HANDBOOK ON PROVISIONS AND OPTIONS FOR INCLUSIVE AND SUSTAINABLE DEVELOPMENT IN TRADE AGREEMENTS

UNITED NATIONS

Handbook on Provisions and Options for Inclusive and Sustainable Development in Trade Agreements

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This Handbook is developed as part of the
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in collaboration with:

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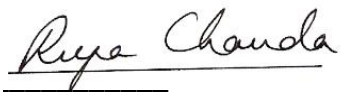
FOREWORD

Trade can significantly contribute to sustainable and inclusive development. This has been increasingly recognized, and trade agreements are expanding in scope to address various aspects of development more directly. As the inclusion of sustainable and inclusive development provisions becomes more systematic, it will be important that the new provisions meet the needs of both developed and developing trade partners and to design them so that they have a real impact on advancing the implementation of the sustainable development goals (SDGs). ESCAP, in cooperation with ECA, ECLAC, ESCWA, UNECE, UNCTAD and other partners, launched the Initiative on Mainstreaming Sustainable Development Provisions in Regional Trade Agreements (IMSDP) to build the capacity to design and negotiate sustainable development provisions tailored to specific situations of different economies. This handbook, prepared in close collaboration with the Centre on Inclusive Trade and Development at Georgetown Law, is a first deliverable under this new initiative.

The Handbook on Provisions and Options for Inclusive and Sustainable Development in Trade Agreements covers key topics in trade and inclusive and sustainable development, including gender, MSMEs, environment, labour rights, and investment. It summarises key issues under each topic and discusses how to address those issues through specific provisions, so that trade agreements can help with environmental protection, raising labour standards, promoting gender equality, supporting MSMEs, and ensuring sustainable investment. For each issue, it provides a range of options drawn from different models in existing trade agreements. Notably, this handbook provides detailed explanations of legal formulations to guide the readers in understanding and weighing different approaches.

We are grateful to all the partners involved in this initiative, including those from the WTO, ILO, individual governments, academia and the private sector, whose expertise and contributions have been invaluable. We hope that this handbook will serve as a useful reference for trade negotiators, policymakers, and other stakeholders involved in the development and implementation of trade agreements, especially in light of the challenges posed by the COVID-19 pandemic and the need to build forward better. We also hope that it will contribute to enhancing regional integration and cooperation among our Member States in trade and inclusive and sustainable development.



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EXECUTIVE SUMMARY

Despite the increasing trend to incorporate sustainable and inclusive development considerations in the international trade realm, there are still gaps in multilateral rules and regional trade agreements (RTAs) with regard to commitments to ensure sustainable and inclusive development. Although a number of developed economies and a growing number of developing economies have included provisions related to sustainable and inclusive development in their RTAs, other economies have expressed concerns about including non-trade issues in RTAs.

In this context, it has become important to understand the scope of international trade rules related to inclusive and sustainable development and to provide negotiators, policymakers, and other stakeholders with design options for inclusive and sustainable development provisions that can be tailored to their needs and priorities. Against this background, the objective of this *Handbook on Provisions and Options for Inclusive and Sustainable Development in Trade Agreements* (Handbook) is to provide options for negotiators, particularly from developing economies, for RTA provisions that could enhance the contribution of trade to inclusive and sustainable development.

Sustainable and inclusive development commitments are generally regarded as trade plus, WTO plus, WTO extra or WTO-x, since these provisions have largely evolved outside the ambit of the WTO, with RTAs as a key driver in law-making. Therefore, unlike other common trade issue areas, there is no baseline at the multilateral level for most sustainable and inclusive development disciplines. RTAs exhibit significant diversity in scope and impact with regard to inclusive and sustainable development provisions, with differences in terms of emphasis and placement, language, specificity, and issue coverage. This Handbook covers key dimensions of inclusive and sustainable development based on a comparative review of existing trade agreements. Since RTAs continue to evolve, it will be a living document that is periodically updated and digitally distributed.

This Handbook covers five key issue areas of sustainable development: (1) micro-, small-, and medium-sized enterprises (MSMEs), (2) gender, (3) environment, (4) labour, and (5) investment, drawing upon different RTA models from around the world. For each issue area, this Handbook presents example options for trade negotiators to incorporate inclusive and sustainable development consideration, accompanied by explanatory notes to guide negotiators in weighing different approaches and trade-offs. Most options are presented ranging from the lowest to the highest level of commitment, with exceptions explained. Where possible, the degree to which these approaches are more common or less common is also noted.

Chapter I examines provisions that relate to MSMEs, including (i) provisions on cooperation; (ii) commitments on government procurement; (iii) provisions related to customs and trade facilitation; (iv) provisions on electronic commerce; (v) transparency provisions; and (vi) mechanisms for dispute settlement. It is not unusual for MSME provisions to appear throughout RTAs, in contrast to some of the other issues covered in the Handbook, and these provisions tend to be both aspirational in some cases and binding in other cases.

Chapter II presents gender provisions, including: (i) non-discrimination provisions; (ii) reaffirmations of Parties' gender related commitments made under other agreements; (iii) commitments to undertake cooperative activities for women; (iv) establishment of gender committees to act as a focal point to facilitate exchange of information and cooperation; and (v) commitments of the parties relating to the resolution of possible disputes. Gender provisions tend to be mainly aspirational and non-binding. However, a deeper review of both textual and contextual approaches is warranted as gender mainstreaming in RTAs becomes more common. This chapter presents options drawn from current models available under international trade rules, and the final section of this chapter discusses emerging models that could also be considered.

Chapter III covers environment, which is central to sustainable development, identifying emerging and more common RTA approaches. This chapter covers: (i) defensive provisions that incorporate exceptions to accommodate environmental issues, tracking with the WTO Baseline, (ii) cooperation, consultation and capacity building provisions; (iii) provisions related to MEAs; (iv) domestic environmental laws and policies; (v) compliance and enforcement; and (vi) emerging issues relating to environmental sustainability, including environmental goods and services. Environmental provisions in RTAs are on the rise and are increasingly binding and subject to deeper implementation, although significant differences exist across countries and regions. The example options for environment commitments in RTAs reflect these widely differing approaches, contexts, and political sensitivities.

Chapter IV focuses on labour issues in RTAs. The chapter covers: (i) provisions on strengthening labour cooperation and capacity-building; (ii) provisions to promote labour standards in parties' territories; (iii) provisions that address labour-related commitments on business & human rights; (iv) provisions that protect essential workers in times of crisis, and (v) mechanisms for ensuring compliance with and enforcement of labour commitments made under RTAs. Contexts and political sensitivities regarding the inclusion of hard commitments on labour in RTAs differ widely across countries and regions. Of all of the sustainable development issues covered by the Handbook, provisions on labour and health have the longest history, and these provisions tend to be both deeper and more binding overall than provisions in other areas.

Chapter V covers investment provisions in the context of sustainable development. It showcases recent changes in RTAs and emerging approaches that address sustainable development, including in relation to issues covered in previous chapters. It covers the following issues: (i) provisions on sustainable and socially responsible investment, (ii) definitions of investor and investment; (iii) investment protection provisions; (iv) host state flexibilities; and (v) dispute settlement provisions. It is worth noting that there is an emerging trend to incorporate sustainable development provisions into international investment agreements (IIAs), including bilateral investment treaties (BITs) and RTAs. On the whole, RTA provisions related to investment appear to be on the rise, while some States are choosing to modify or phase out BITs. Such new developments are covered by this chapter, along with related reform efforts in international investment law.

LIST OF ABBREVIATIONS AND ACRONYMS

ACCTS	Agreement on Climate Change, Trade and Sustainability
ACP	African, Caribbean, and Pacific
AfCFTA	African Continental Free Trade Area
AEO	Authorised Economic Operator
APEC	Asia-Pacific Economic Cooperation
ARTNeT	Asia-Pacific Research and Training Network on Trade
ASEAN	Association of Southeast Asian Nations
ATIGA	ASEAN Trade in Goods Agreement
BITs	Bilateral Investment Treaties
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
CARICOM	Caribbean Community
CARIFORUM	Caribbean Forum
CBAM	Carbon Border Adjustment Mechanism
CBDR-RC	Common but Differentiated Responsibilities and Respective Capabilities
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEPA	Comprehensive and Enhanced Partnership Agreement
CETA	Comprehensive Economic and Trade Agreement
CITD	Center on Inclusive Trade and Development (Georgetown University Law Center)
CLRTAP	Convention on Long-Range Transboundary Air Pollution
CLS	Core Labour Standards
COMESA	Common Market for Eastern and Southern Africa
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSR	Congressional Research Service
CSO	Civil Society Organisations
CSR	Corporate Social Responsibility

CTE	Committee on Trade and Environment
CUTS	Consumer Unity and Trust Society
DEA	Digital Economy Agreement
DEPA	Digital Economy Partnership Agreement
DESTA	Design of Trade Agreements
DHS	Department of Homeland Security
DPA	Defense Production Act
DSM	Dispute Settlement Mechanism
EAC	East African Community
EEA	European Economic Area
ECA	Economic Commission for Africa
ECE	Economic Commission for Europe
ECHR	European Convention for the Protection of Human Rights
ECLAC	Economic Commission for Latin America and the Caribbean
ECOWAS	Economic Community of West African States
ECOWIC	Economic Community of West African States Common Investment Code
ECT	Energy Charter Treaty
EFTA	European Free Trade Area
EPA	Economic Partnership Agreement
ESCAP	Economic and Social Commission for Asia and the Pacific
ESCWA	Economic and Social Commission for Western Asia
ESG	Environmental, Social, and Corporate Governance
EU	European Union
FDI	Foreign Direct Investment
FDSR	Financing for Sustainable Development Report
FET	Fair and Equitable Treatment
FFSR	Foreign Affairs and Trade, Fossil Fuel Subsidy Reform
FIPA	Foreign Investment Promotion and Protection Agreement
FPS	Full Protection and Security

FTA	Free Trade Agreement
G7	Canada, France, Germany, Italy, Japan, the United Kingdom and the United States
G20	Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States, and the European Union.
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCCA+	Global Climate Alliance Plus
GDP	Gross Domestic Product
GHG	Higher Greenhouse Gas
GPA	Government Procurement Agreement
GSP	Generalized System of Preferences
GSTP	Global System of Trade Preferences
GVCs	Global Value Chains
HS	Harmonized System
ICC	International Chamber of Commerce
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICT	Information and Communication Technology
ICSID	International Centre for Settlement of Investment Disputes
IEL	International Economic Law
IIA	International Investment Agreements
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
IMP	Initiative on Model Provisions
IPR	Intellectual Property Rights
ISDS	Investor-State Dispute Settlement
ISMDP	Initiative on Mainstreaming Sustainable Development Provisions in Trade Agreements
ISO	International Organization for Standardization

ITA	Information Technology Agreement
IWG	Informal Working Group
IWP	Informal Work Program
JSI	Joint Statement Initiative
KORUS	United States - Korea Free Trade Agreement
LDCs	Least Developed Countries
LCA	Labour Cooperation Agreement
LP	Labour Provisions
MAST	Multi-Agency Support Team
MEAs	Multilateral Environmental Agreements
MERCOSUR	Southern Common Market Agreement
MFN	Most-Favoured-Nation
MIC	Multilateral Investment Court
MRAs	Mutual Recognition Agreements
MSME	Micro, Small, and Medium-Sized Enterprises
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NAO	National Administrative Office
NGO	Non-Governmental Organization
NT	National Treatment
NTMs	Non-tariff measures
OACP	Organisation of African, Caribbean and Pacific States
OECD	Organisation for Economic Co-operation and Development
PACER Plus	Pacific Agreement on Closer Economic Relationship Plus
PAFTA	Peru-Australia Free Trade Agreement
PAHO	Pan-American Health Organization
RCEP	Regional Comprehensive Economic Partnership Agreement
ROO	Rules of Origin
RRLM	Rapid Response Labour Mechanism

RTA	Regional Trade Agreement
SADC	Southern African Development Community
SADEA	Singapore-Australia Digital Economy Agreement
S&DT	Special and Differential Treatment
SCM	Subsidies and Countervailing Measures
SDGs	Sustainable Development Goals
SDG 1	No Poverty
SDG 2	Zero Hunger
SDG 3	Good Health and Well-Being
SDG 5	Achieve Gender Equality and Empower All Women
SDG 6	Clean Water and Sanitation
SDG 8	Decent Work and Economic Growth
SDG 9	Industry, Infrastructure and Innovation
SDG 10	Rising Inequalities
SDG 12	Responsible Consumption and Production
SDG 13	Climate Action
SDG 14	Life Below Water
SDG 15	Life on Land
SDG 16	Peace, Justice, and Strong Institutions
SDG 17	Partnership for the Goals
SIAM	Southern Common Market Agreement Environmental Information System
SMEs	Small and Medium-Sized Enterprises
SNITIS	National Independent Union of Industry and Service Workers
SPS	Sanitary and Phytosanitary Measures
STEM	Science, Technology, Engineering, and Mathematics
TBT	Technical Barriers to Trade
TCA	Trade and Cooperation Agreement
TESSD	Trade and Environmental Sustainability Structured Discussions
TFA	Trade Facilitation Agreement

TPRM	Trade Policy Review Mechanism
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TSCDC	Technical Sub-Committee on Development Cooperation
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nationals Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UN DESA	United Nations, Department of Economic and Social Affairs
UNDHR	United Nations Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNITE	Union of Needletrades, Industrial and Textile Employees
UN ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UN ESCWA	United National Economic and Social Commission for West Asia
UNFCCC	United Nations Framework Convention on Climate Change
URL	Uniform Resource Locator
US	United States
USMCA	United States-Mexico-Canada Agreement
WEF	World Economic Forum
WCO	World Customs Organizations
WG	Working Group
WTO	World Trade Organization

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INTRODUCTION

Trade treaties are increasingly prioritizing sustainable and inclusive development, in part as a result of the emphasis on trade throughout the United Nation's seventeen Sustainable Development Goals (SDGs), which often approach trade as a tool for advancing broad-based development. The events of the past several years have only underscored the importance of understanding international trade rules in the context of inclusive and sustainable development and changing circumstances, as challenges of climate change and pandemic have been exacerbated by widening systemic inequalities, increasing economic diversity, war, and technological advancement.[1]

Sustainable development is a "broad" concept,[2] with implications for a range of relevant trade provisions and ties to a larger body of international law.[3] The term "sustainable development" was defined in the 1987 Brundtland Commission Report "Our Common Future" as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[4] Sustainable development encompasses three interconnected pillars of economic development, social development, and environmental protection,[5] as well as the inter-connected concepts of inter-generational equity (equity across generations) and intra-generational equity (equity across countries and stakeholders). The principle of "common but differentiated responsibilities and respective capabilities" (CBDR-RC) is central to sustainable development as well,[6] and, much like special and differential treatment (S&DT) in trade rules, recognizes that different countries should have different obligations with different timelines for compliance,[7] which has implications for the design and implementation of trade rules.

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

[2] Louise Malingrey and Yann Duval, "Mainstreaming Sustainable Development in Regional Trade Agreements: Comparative Analysis and Way Forward for RCEP," U.N. ECON. & SOC. COMMISSION ASIA & PACIFIC (UN ESCAP) and ASIA-PACIFIC RESEARCH AND TRAINING NETWORK ON TRADE (ARTNeT), 12 (July 2022) at 4 [hereinafter Malingrey and Duval], available at https://www.unescap.org/kp/2022/mainstreaming-sustainable-development-regional-trade-agreements-comparative-analysis-and

[3] Katrin Kuhlmann, "Inclusive and Sustainable Trade and Development: More Than Words?," in *Next Generation Approaches to Trade and Development: Balancing Economic, Social, and Environmental Sustainability,* Center on Inclusive Trade and Development (Katrin Kuhlmann, ed.), at 5 (2023) [hereinafter Kuhlmann, Inclusive and Sustainable Trade and Development].

[4] Report of the World Commission on Environment and Development, "Our Common Future" 1987, at 51.

[5] Rio Declaration on Environment and Development, 1992, A/CONF.151/26 (vol. I) [Rio Declaration], which built upon the Declaration of the United Nations Conference on the Human Environment (1952), "Stockholm Declaration." Principle 3 of the Rio Declaration reiterates and enhances the definition of sustainable development in the Brundtland Report, stating that the "right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations" (UN Doc. A/CON. 151/26 Vol. I). *See also*, Report of the World Summit on Sustainable Development, para. 11, *Copenhagen Declaration on Social Development,* U.N. DOC. A/Conf. 166/9 (1995), as reiterated in the 2002 Johannesburg Declaration, World Summit on Sustainable Development, 11, *Johannesburg Declaration on Sustainable Development,* U.N. DOC. A/Conf. 199/L. 6/Rev. 2 (2002).

[6] Rio Declaration, Principle 7, *supra* note 5. *See also,* UN Framework Convention on Climate Change and its Kyoto Protocol.

[7] Kuhlmann, Inclusive and Sustainable Trade and Development, *supra* note 3.

Inclusive development is a newer, albeit related concept. UN ESCAP notes that the measure of inclusive trade and investment is whether "all people can contribute to and benefit from international trade and investment," with equality of opportunities as a precondition.[8] In the context of trade rules, inclusive provisions include those focused on MSMEs and gender, as well as trade rules that recognize the rights of marginalized communities, such as indigenous communities.

Trade and Sustainable and Inclusive Development in International Trade Law

Perhaps the most notable example of the link between sustainable development and trade is contained in the Preamble to the World Trade Organization (WTO), which states:

> "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development*, *seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development*." (emphasis added).[9]

Although the WTO Preamble does not create binding obligations, it arguably sets the tone for the WTO covered agreements,[10] and it has influenced some WTO jurisprudence on application of environmental exceptions.[11]

Incorporating inclusive and sustainable development into agreement preambles is also common in Regional Trade Agreements (RTAs) as well, as discussed below. However, unlike WTO law, inclusive and sustainable development provisions in RTAs exhibit significant diversity in scope and impact, with significant differences in terms of placement, language, and issue coverage.

Based on a recent UN ESCAP study, over one-third (38 percent) of RTAs[12] include at least one mention of sustainable development.[13] The trend to include inclusive and sustainable

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[8] UN ESCAP, "Asia-Pacific Trade and Investment Report 2013 – Turning the Tide: Towards Inclusive Trade and Development," at xxii, UN (2013), available at https://www.unescap.org/sites/default/files/publications/APTIR%202013%20Full%20Report.pdf.

[9] Marrakesh Agreement Establishing the World Trade Organization (WTO), pmbl., April 15, 1994, 1867 U.N.T.S. 154 [hereinafter GATT 1994]. Paragraph 6 of the 2021 Doha Ministerial Declaration reaffirms the commitment to the "objective of sustainable development." Doha Ministerial Declaration, WT/MIN (01)/DEC/1.

[10] *See generally,* WTO, "Mainstreaming Trade to Attain the Sustainable Development Goals," 2018, available at https://www.wto.org/english/res_e/booksp_e/sdg_e.pdf [hereinafter WTO 2018].

[11] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AV/R, 1998, at paras. 127–131. *See,* Gabrielle Marceau & Fabio Morosini, "The Status of Sustainable Development in the Law of the WTO*,"* in *Arbitragem e Comercío Internactional* (Umberto Celli Junior et al. eds., 2013).

[12] The term RTAs is used in this Handbook to encompass a range of agreement models between countries, including Free Trade Agreements (FTAs), Free Trade Areas, Customs Unions, Preferential Trade Agreements, Trade and Development Agreements, Economic Partnership Agreements and other related agreement models.

[13] Malingrey and Duval, *supra* note 2, at 3.

development in RTAs is on the rise,[14] and two-thirds of RTAs signed after 2005 incorporate at least one mention of sustainable development.[15] UN ESCAP has categorized several substantive dimensions of sustainable development, all of which are incorporated into this Handbook and the *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic*, namely:[16]

(1) Sustainable development as a concept;
(2) Labour rights and standards;
(3) Environment;
(4) Human Rights;
(5) Small- and Medium-sized Enterprises (herein referred to as MSMEs);
(6) Gender; and
(7) Health.

RTA preamble references to inclusive and sustainable development can take a number of forms. For example, the preamble to the Regional Comprehensive Economic Partnership (RCEP) references the three pillars of sustainable development, noting that they are "interdependent and mutually reinforcing."[17] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) includes reference to sustainable development in both its Preamble and its "Development" chapter, which also includes an article on gender (CPTPP contains chapters on specific issues related to sustainable development as well, such as labour and environment).[18]

As another example, the General Objectives of the African Continental Free Trade Area (AfCFTA) contain the objective to "promote and attain sustainable and inclusive socio-economic development; gender equality and structural transformation of the State Parties."[19] The AfCFTA further references sustainable development in the Preamble to the Protocol on Trade in Services in the context of the right of AfCFTA State Parties' right to pursue national policy objectives, stating:

> "Recognising the right of State Parties to regulate in pursuit of national policy objectives, and to introduce new regulations, on the supply of services, within their

[14] *See also,* Paul Baker, "Handbook on Negotiating Sustainable Development Provisions in Preferential Trade Agreements," UN ESCAP (2021), available at https://repository.unescap.org/bitstream/handle/20.500.12870/4285/ESCAP-2021-MN-Handbook-negotiating-sustainable-development.pdf?sequence=1&isAllowed=y

[15] Id.

[16] Katrin Kuhlmann, *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic*, UN ESCAP (2021), available at https://www.unescap.org/kp/2021/handbook-provisions-and-options-trade-times-crisis-and-pandemic [hereinafter Kuhlmann UNESCAP 2021].

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

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

[19] Agreement Establishing the African Continental Free Trade Area, Article 3 (e), March 21, 2018, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [hereinafter AfCFTA].

> territories, *in order to meet legitimate national policy objectives, including competitiveness, consumer protection and overall sustainable development with respect to the degree of the development of services regulations in different countries, the particular need for State Parties to exercise this right, without compromising consumer protection, environmental protection and overall sustainable development."*[20]

Some RTAs, such as more recent RTAs between the European Union (EU) and its trading partners, include trade and sustainable development (TSD) chapters that incorporate social justice, human rights, and labour and environmental standards. These agreements also contain separate chapters on sustainable development issues, namely labour and environment, placing significant emphasis on these areas. Other RTAs use separate chapters to highlight issues related to sustainable development, including labour, environment, gender, and MSMEs. In addition, some international investment agreements (IIAs), including some RTAs, incorporate sustainable and inclusive development in the context of investment.

Although international trade treaties are the main instrument assessed in this Handbook, trade and sustainable development are also linked through soft law, especially the SDGs. A number of the SDGs relate to trade, particularly SDG 1 (no poverty), SDG 2 (zero hunger), SDG 3 (good health and well-being), SDG 5 (gender equality), SDG 8 (decent work and economic growth), SDG 9 (industry, innovation, and infrastructure), SDG 10 (rising inequalities), SDG 12 (responsible consumption and production), SDG 13 (climate action), SDG 14 (life below water), SDG 15 (life on land), SDG 16 (peace, justice and strong institutions), and SDG 17 (partnership for the goals). Many SDG targets and indicators reference international trade issues or legal instruments (Box 1); some of which will be further examined in the chapters that follow.

Box 1: References to Trade Rules in the SDGs

- SDG 2 End Hunger
  - 2.b Correct and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of agricultural export subsidies and all export measures with equivalent effect, in accordance with the mandate of the Doha Development Round.
- SDG 3 Good Health & Well-Being
  - 3.b Support the research and development of vaccines and medicines for the communicable and non-communicable diseases that primarily affect developing countries, provide access to affordable essential medicines and vaccines, in accordance with the Doha Declaration on the TRIPS Agreement and Public Health, which affirms the right of developing countries to use to the full the provisions in the Agreement on Trade-Related Aspects of Intellectual Property

[20] AfCFTA, Preamble, Protocol on Trade in Services; *See also*, Protocol on Trade in Services, Art. 3 and Art. 7.

Rights regarding flexibilities to protect public health, and, in particular, provide access to medicines for all.

- SDG 8 Decent Work and Economic Growth
  - 8.1 Increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-related Technical Assistance to Least Developed Countries.
- SDG 10 Reduced Inequalities
  - 10.a Implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with World Trade Organization agreements.
- SDG 14 Life Below Water
  - 14.4 By 2020, effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics.
- SDG 17 Peace, Justice, and Strong Institutions
  - 17.10 Promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda.
  - 17.12 Realize timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions, including by ensuring that preferential rules of origin applicable to imports from least developed countries are transparent and simple, and contribute to facilitating market access.

Handbook's Approach

This Handbook presents example options for trade negotiators, with a particular focus on developing economy negotiators, across five different dimensions of sustainable and inclusive development: (1) MSMEs, (2) gender, (3) environment, (4) labour, and (5) investment, drawing upon different RTA models from around the world. All of these dimensions incorporate human rights considerations, and all go beyond the WTO Covered Agreements,[21] broadening the trade agenda by establishing rules on issues that have yet to be addressed by the WTO (these issues are often referred to as "WTO beyond," "WTO extra," or "WTO-x" issues and agreements, as well as, more generally, "trade plus" issues).[22]

[21] *See, e.g.,* Iza Lejárraga, "Deep Provisions in Regional Trade Agreements: How Multilateral Friendly?," ORGANIZATION FOR ECONOMIC AND COOPERATION DEVELOPMENT (OECD) TRADE POLICY PAPER NO 168, 15 (2014), https://www.oecd-ilibrary.org/docserver/5jxvgfn4bjf0-en.pdf?expires=1604451869&id=id&accname=guest&checksum=4B04A3B6F4908DF93CFF9984684F7331.

[22] *See* Kimberly Ann Elliott, "The WTO and Regional/Bilateral Trade Agreements," in HANDBOOK OF INTERNATIONAL TRADE AGREEMENTS: COUNTRY, REGIONAL AND GLOBAL APPROACHES 17, 25 (Robert E. Looney ed., 2018). *See also* Chad P. Bown, "Mega-Regional Trade Agreements and the Future of the WTO," 4 (2016), https://www.globalpolicyjournal.com/articles/world-economy-trade-and-finance/mega-regional-trade-

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

- Approaches that are relatively more or less common, providing a basis for comparison across RTAs.
- The degree to which RTA provisions and chapters create specific, binding, and enforceable commitments, rights, and obligations, or, conversely, the degree to which commitments are more open-ended and ambiguous. For negotiators, it will be important to consider the implications of creating binding rights and obligations, weighing the possibility of using aspirational, non-binding language or more specific, binding language. Whether to subject inclusive and sustainable development provisions to some form of binding dispute settlement is another important consideration. These language choices and agreement design characteristics will impact country commitments and future actions, yet it is also important to keep in mind that more aspirational language can be a starting point for introducing issues of inclusive and sustainable development into trade rules, perhaps leading to progressive commitments over time.
- RTA approaches that align with WTO law, where applicable, consistent with the "Baseline" approach used in the *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic.* While Baseline provisions are less common in this Handbook, they do appear in the context of general exceptions provisions and other aspects related to trade facilitation, transparency, and development.
- Provisions that provide for "flexibility," particularly for developing economy partners. This includes flexibility in implementation and exercise of policy space, ideally while still taking into account the needs of local stakeholders and global trading partners.
- Development priorities of importance to developing countries and their stakeholders, that impact the weight given to different RTA options and the tradeoffs inherent in choosing one approach over another.

Because there is no established baseline for trade and sustainable development provisions, in most cases, the Handbook presents Example Options, accompanied by explanatory notes to guide negotiators in weighing different approaches. Example Options are taken directly from existing RTA provisions, and, where existing provisions do not exist, Sample Options are provided in a limited number of cases. Like the *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic*, this Handbook presents options that attempt to

agreements-and-future-wto , which discusses WTO-plus and WTO-extra provisions; and *generally,* Katrin Kuhlmann, Tara Francis, Indulekha Thomas, Malou Le Graet, Mushfiqur Rahman, Fabiola Madrigal, Maya Cohen, & Ata Nalbantoglu, "Re-conceptualizing Free Trade Agreements Through a Sustainable Development Lens," 22 (July 27, 2020) (A Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), https://www.unescap.org/sites/default/files/145%20Final-Team%20Katrin%20Kuhlmann-USA.pdf, which highlights numerous RTA approaches that have broadened the trade agenda beyond WTO disciplines [hereinafter Kuhlmann et al. Hackathon 2020].

accommodate diverse national interests, maintain fundamental trade principles, and adequately balance the needs of different States and stakeholders.

Thus far, sustainable and inclusive development approaches, including those focused on gender, MSMEs, environment, and labour tend to incorporate common elements, such as the following:

- *Cooperation Provisions* related to engagement between the Parties, which can be a good starting point, but is generally neither fully inclusive nor in the form of concrete obligations.
- *Reaffirmations of Existing Commitments* focused on acknowledgement of other relevant treaties, such as International Labour Organization (ILO) Conventions, human rights treaties (such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)), or Multilateral Environmental Agreements (MEAs).
- *Capacity Building Provisions* that reinforce S&DT and address important capacity gaps, albeit often in an aspirational manner.
- *Reservations or Exceptions* that grant governments policy space to address important issues such as environmental concerns. These do have a baseline in Article XX of the General Agreement on Tariffs and Trade (GATT), although they could perhaps be expanded upon to include issues like gender and disability.[23]
- *Minimum Legal Standards*, which, although less common than other approaches, create actionable rights and obligations in areas like gender and labour, often in line with human rights obligations.

Across these common design elements, most provisions on sustainable and inclusive development tend to be relatively more aspirational than other trade agreement provisions, and they often do not create binding obligations for the parties. This can be helpful in some circumstances, such as when governments seek policy space; however, binding language can also address important aspects of sustainable and inclusive development, such as reinforcing human rights by creating a channel for enforcement through trade mechanisms. In some cases, such as environment and labour, provisions tend to be relatively more binding, and they are sometimes subject to dispute settlement. However, these approaches are neither consistent nor universally accepted, and their incorporation may give rise to important concerns, as noted below.

In order to use RTAs as a tool that can boost trade and advance important human rights, the details matter, and negotiators should be aware of the existence and implications of a range of possible approaches. Tradeoffs between approaches are discussed in all of the Handbook's chapters, providing negotiators with different considerations to take into account in drafting new RTAs. For example, while some provisions create more binding obligations, others may allow for greater, and possibly more desirable, policy space. Countries may decide to address some issues in great detail, for example through a dedicated RTA chapter, and may choose to

[23] In the case of disability, see Amrita Bahri, "Making Trade Agreements Work for People with Disabilities: What's Been Achieved and What Remains Undone?," May 2022, TAF 2+, Cowater, and UK Aid, https://www.genderandtrade.com/_files/ugd/86d8f7_a4ebc789a1ae4c81b51d725cbc31bfa3.pdf [Bahri 2022]

include only broad references to others in single provisions. For example, while some trade agreement models (U.S. and European) include significant focus on issues like environment and labour, these issues are not deeply covered by other RTAs, such as the RCEP. Yet the RCEP incorporates other issues within inclusive and sustainable development, such as MSMEs and indigenous peoples' rights. Other regional models, like intra-African RTAs, have a deeper focus on areas like gender, in some cases even subjecting minimum legal standards to binding dispute settlement, but do not contain many references to environment and labour.

In all cases, it is important to consider the rights and interests of developing countries and third party stakeholders, especially vulnerable stakeholders and communities. For developing economies, some RTA approaches may give rise to concerns of legal imperialism or disguised protectionism.[24] For developing economy stakeholders, rights-based approaches can provide important protections and reinforce both the SDGs and human rights. These interests can be addressed in a balanced way, by providing developing country negotiators with greater agency over how to approach new trade issues while, at the same time, building the needs of interested stakeholders into agreement design and implementation.

It Is also important to consider whether provisions are asymmetrical, with stronger obligations applied to developing economy parties that developed economies, or whether they represent one set of priorities over another. For example, certain labour provisions under the United States-Mexico-Canada Agreement (USMCA), while innovative, apply only to Mexico,[25] even though labour issues exist across the board. In the case of environment, CBDR-RC could be more strongly incorporated into RTAs, particularly since developed economies have been most responsible for carbon emissions. In addition, the focus of RTA provisions should be considered. For example, developing economies may wish to focus on labour mobility in the context of labour provisions; in the environment context, climate mitigation and, more recently, carbon leakage, should be balanced with enhanced focus on climate adaptation and green growth, which are of great significance to developing economies.

While a number of RTAs reference inclusive and sustainable development, there is still a long way to go in integrating sustainable development into trade rules, which do not adequately incorporate all dimensions of sustainable development (economic, social, and environmental) or fully address the needs of all.[26] In particular, the greatest emphasis tends to be placed on the economic pillar and, to a lesser extent, the environmental pillar in trade instruments, with less focus on the social pillar.[27] Provisions related to the social pillar, such as those that reference vulnerable communities, including gender provisions and newer provisions related to indigenous communities, as well as more general provisions on health, education, or employment often do not create actionable rights or address distributional issues.[28] In

[24] *See, e.g.,* Thabo Fiona Khumalo, "Sustainable Development and International Economic Law in Africa," *LAW, DEMOCRACY, AND DEVELOPMENT,* Vol. 24 (Cape Town, 2020) and Carrère, C, M Olarreaga and D Raess (2017), "Labor Clauses in Trade Agreements: Worker Protection or Protectionism," CEPR Discussion Paper Series No. 12251.

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

[26] Kuhlmann, Inclusive and Sustainable Trade and Development, *supra* note 3 at 5.

[27] Ibid.

[28] Ibid.

addition, despite the principles of S&DT and CBDR-RC, provisions to address intra-generational equity remain limited in scope and duration.[29]

One of the ways in which RTAs can address some gaps, and better address stakeholder needs over time, is through examining both "context" and a broad concept of "flexibility." Analysis here is drawn from an ongoing research project by the principal author focused on regulatory diversity, equity, and other factors observed in RTAs and international economic law (IEL) that could be better leveraged to address economic and social development considerations.[30] For the avoidance of doubt, flexibility is referred to in the Handbook as a way to tailor RTA rules to the needs of different stakeholders, particularly within developing economies, and is intended to highlight how rules could be better designed to respond to development challenges, making use of S&DT and CBDR-RC.[31] These flexibilities focus on the specific positive rules and norms that are adaptable to changing circumstances, especially during times of change, thereby enabling global trade to continue flowing with minimal disruption overall.[32] The chapters of this Handbook incorporate provisions that have the potential to allow countries to balance contextual approaches, appropriate flexibility, and fit-for-purpose design while still preserving a collective rules-based approach.[33] With this in mind, over time, the sustainable and inclusive development options presented in this Handbook could include other possibilities that are better tailored to stakeholder needs.[34]

Like the *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic*, this Handbook's overall aim is to equip developing country trade negotiators with the tools for negotiating complex RTAs and to facilitate a return to collective action to solve global problems. The options presented are intended to address social and economic development

[29] Ibid.

[30] *See* Katrin Kuhlmann, "Mapping Inclusive Trade and Development: A Comparative Agenda for Addressing Inequality and Vulnerability Through International and National Law," 2 AF. J. INT'L L. (2021) [hereinafter Kuhlmann 2021] and Katrin Kuhlmann, "Flexibility and Innovation in International Economic Law: Enhancing Rule of Law, Inclusivity, and Resilience in the Time of COVID-19*", Afronomicslaw Blog (African Int'l Econ. L. Network)* (August 27, 2020) [hereinafter, Kuhlmann 2020], https://www.afronomicslaw.org/2020/08/27/flexibility-and-innovation-in-international-economic-law-enhancing-rule-of-law-inclusivity-and-resilience-in-the-time-of-covid-19/. *See also,* Katrin Kuhlmann and Bhramar Dey, "Using Regulatory Flexibility to Address Market Informality in Seed Systems: A Global Study," *Agronomy* 2021, 11, 377.

[31] "Flexibilities" are sometimes viewed as a suspension of or departure from the rules, even though trade rules and CBDR explicitly allow for certain flexibilities and differentiation. *See, e.g.,* Simon J. Evenett & Richard Baldwin, "Revitalizing Multilateral Trade Cooperation: Why? Why Now? And How?," in REVITALISING MULTILATERALISM: PRAGMATIC IDEAS FOR THE NEW WTO DIRECTOR-GENERAL 9 (Simon J. Evenett & Richard Baldwin eds., 2020), https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general [hereinafter Evenett & Baldwin 2020].

[32] *See* Kuhlmann 2021, *supra* note 30.

[33] *See* Kuhlmann et al. Hackathon 2020, *supra* note 22.

[34] *See* Katrin Kuhlmann, "Gender Approaches in Regional Trade Agreements and a Possible Gender Protocol under the African Continental Free Trade Area: A Comparative Assessment," *Trade Policy and Gender Equality,* Cambridge University Press (Amrita Bahri, Dortea López, and Jan Yves Remy, eds.), 2023, available at https://scholarship.law.georgetown.edu/facpub/2484/ [Kuhlmann Cambridge 2023] and Katrin Kuhlmann and Amrita Bahri, "Gender Mainstreaming in Trade Agreements: A Potemkin Façade?," 2023, *Making Trade Work for Women: Key Learnings from World Trade Congress on Gender* (September 2023) [Kuhlmann and Bahri 2023].

considerations,[35] building upon other principles of trade and development, including special and differential treatment. The Handbook's approach recognizes the importance of the UN SDGs in promoting inclusive trade and includes RTA options that could help achieve specific SDGs. While specific examples are contained in the various chapters, the options included throughout the Handbook support SDG 17 (Peace, Justice, and Strong Institutions) and its targets, balancing in particular between a "rules-based, open, non-discriminatory and equitable multilateral trading system" as set out in target 17.10, due to the incorporation of WTO rules into many of the provisions, while preserving countries' "policy space and leadership to establish and implement policies for poverty eradication and sustainable development," in line with target 17.15.[36]

Achieving broader development goals will also require effective implementation, which is an important consideration for all trade agreements and the rules they contain. While this Handbook notes implementation issues to the extent possible, a full assessment of the implementation implications of the options discussed is beyond the scope of this current version of the Handbook and could be the focus of future efforts. Further, trade agreement design is not just a legal exercise, and the economic (and social and environmental) implications of different options presented in this Handbook deserve greater focus. This should also include deeper work on the impact of different design approaches, which would be a significant complement to the analysis contained in this Handbook.

This Handbook is one of the outputs of the Initiative on Mainstreaming Sustainable Development Provisions in Trade Agreements (ISMDP) following the success and achievements of the Initiative on Model Provisions for Trade in Times of Crisis and Pandemic (IMP) launched by UN ESCAP with joint implementation by the United Nations Conference on Trade and Development (UNCTAD) and the five UN Regional Commissions (Economic Commission for Africa (ECA), Economic Commission for Latin America and the Caribbean, ESCAP, Economic and Social Commission for Western Asia (ESCWA), and Economic Commission for Europe (ECE) in cooperation with the WTO, Consumer Unity and Trust Society (CUTS) International, civil society organizations, academia, and the private sector, including a Core Expert Group.[37] It builds upon the *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic* developed under the IMP*,* which was a continuation of the UN ESCAP Policy Hackathon organized in June 2020 that allowed for inputs and ideas to be gathered from a wide range of stakeholders, including, inter alia, government experts, academics, trade negotiators, international organizations, and civil society groups.[38] In

[35] For a more comprehensive discussion of options that address social and economic development, presented in the context of a broader methodology that includes flexibility, equity, inclusiveness, and other factors covered in this Handbook, see Kuhlmann 2021, *supra* note 30.

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

[37] *See generally,* UN ESCAP, "Initiative on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements"*,* (May 13, 2020), https://www.unescap.org/resources/initiative-model-provisions-trade-times-crisis-and-pandemic-regional-and-other-trade# .

[38] An online repository of the contributions to the UN ESCAP Policy Hackathon can be found here: https://www.unescap.org/resources/online-repository-contributions-policy-hackathon-model-provisions-trade-times-crisis-and. Selected works include: Henry Gao, Dhiraj G. Chainani, Chew Siu Farn, Claudia Dalmau Gomez, Dou Han, Guo Ziyong, Jamie Loh, Kueh Jinyan Justin, Tay Yan Chong, Leslie, "COVID-19 and the Little

particular, this Handbook expands upon the issues contained in Chapter IX on 'Building Forward Better' of the *UN Handbook on Trade in Times of Crisis and Pandemic*. It also draws upon the work of Katrin Kuhlmann, Tara Francis, Indulekha Thomas, Malou Le Graet, Mushfiqur Rahman, Fabiola Madrigal, Maya Cohen, and Ata Nalbantoglu on reconceptualizing RTAs to focus on sustainable development,[39] as well as other works by the principle author and other academics, experts, and institutional authors. The Handbook is meant to be a living document, serving as a knowledge repository for trade policymakers and negotiators seeking to incorporate tailored provisions within RTAs to encourage resilience and respond to future challenges of sustainable development.

While the Handbook includes diverse examples of RTA provisions, several WTO-x next-generation RTAs, or "deep" trade agreements are particularly illustrative,[40] such as the USMCA, the CPTPP, EU agreements, the AfCFTA Agreement and its Protocols, and the RCEP. Sectoral RTAs like the Agreement on Climate Change, Trade and Sustainability (ACCTS) between Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland that is currently under negotiation to address issues of climate change and sustainability, are also particularly relevant to trade and sustainable development,[41] as are RTAs from countries that have led on particular issues, like the gender chapters in Africa's, Chile's, and Canada's RTAs. The Digital Economy Partnership Agreement (DEPA) among Chile, New Zealand, and Singapore (which China and the Republic of Korea are preparing to join as well) also incorporates sustainable development considerations, such as digital inclusion.[42]

Red Dot: Important Lessons for Trade in Times of Global Pandemics Based on Singapore's Experience," 25-32 (July 27, 2020) (Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), https://www.unescap.org/sites/default/files/175%20Final-Team%20Henry%20Gao-SMU.pdf [hereinafter Gao et al. Hackathon 2020]; Tracey Epps, Denae Wheeler & Georgia Whelan, "Facilitating a Coordinated International Response in Times of Crisis" (July 27, 2020) (Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), https://www.unescap.org/sites/default/files/103%20Final-Team%20Tracey%20Epps-New%20Zealand.pdf [hereinafter Epps et al. Hackathon 2020]; Kuhlmann et al. Hackathon 2020, *supra* note 22; and Chiedza L. Muchopa, "Improving Africa's Crisis and Pandemic Responses Through Regional Trade Agreement – Does A "Crisis/Pandemic Lens" Matter for Trade in Food?," (July 27, 2020) (Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), https://www.unescap.org/sites/default/files/30%20Final-LC%20Muchopa-South%20Africa.pdf [hereafter Muchopa Hackathon 2020].

[39] Kuhlmann et al. Hackathon 2020, *supra,* note 22.

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

[41] *See,* N.Z. Ministry of Foreign Affairs and Trade, "Agreement on Climate Change, Trade and Sustainability (ACCTS)" Negotiations, https://www.mfat.govt.nz/en/trade/free-trade-agreements/climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/ (last visited March 16, 2020). [hereinafter New Zealand MoFT 2020].

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

Outline of Handbook Chapters

The Handbook consists of the following chapters focused on central aspects of RTAs that have been, or could be, related to trade and sustainable development. Because these chapters largely cover issues that have not yet been integrated into multilateral rules, innovations in RTAs could also help guide developments at the multilateral level, which could become increasingly important as States explore new issues and possible reform. It is also important to note that there are a number of interconnections between issue areas, such as synergies between MSME, gender, and labour provisions and links between investment and environment, labour, and gender, to name a few.

Chapter I examines RTA provisions that relate to MSMEs, which are the most broadly supported inclusion provisions across global RTAs. These include: (i) provisions on cooperation; (ii) commitments on government procurement; (iii) provisions related to customs and trade facilitation; (iv) provisions on electronic commerce; (v) transparency provisions; and (vi) mechanisms for dispute settlement. As with gender provisions, many MSME provisions are largely aspirational and non-binding, although they could set the stage for deeper commitments to come, and deeper textual and contextual analysis is needed.

Chapter II focuses on gender and trade, which is a growing area of focus in inclusive and sustainable trade. Gender provisions in RTAs can take various forms, including: (i) non-discrimination provisions; (ii) reaffirmations of Parties' gender related commitments made under other agreements; (iii) commitments to undertake cooperative activities for women; (iv) establishment of gender committees to act as a focal point to facilitate exchange of information and cooperation; and (v) commitments of the parties relating to the resolution of possible disputes. Unlike labour and environment, gender provisions tend to be mainly aspirational and non-binding. However, a deeper review of both textual and contextual approaches is warranted as gender mainstreaming in RTAs becomes more common.

Chapter III covers environment, which is central to sustainable development and aligned with aspects of multilateral trade and environmental law. This chapter identifies emerging and more common RTA approaches and covers: (i) defensive provisions that incorporate exceptions to accommodate environmental issues in RTAs, tracking with the WTO Baseline, (ii) cooperation, consultation and capacity building provisions; (iii) provisions related to MEAs; (iv) domestic environmental laws and policies; (v) compliance and enforcement; and (vi) emerging issues relating to environmental sustainability, including environmental goods and services. Environmental provisions in RTAs are on the rise, and, like labour provisions, they are increasingly binding on the parties and subject to deeper implementation; however, significant differences exist across countries and regions. The Example Options for environment commitments in RTAs reflect these widely differing approaches, contexts, and political sensitivities. They are generally presented ranging from the lowest level of commitment to the highest level, and, where possible, the degree to which these approaches are more or less common is also noted. Like the labour chapter, Chapter III focuses on existing approaches in environment and trade, with emerging issues discussed in the final section of the chapter.

Chapter IV focuses on labour issues in RTAs, in line with international labour standards and human rights. The chapter covers: (i) provisions on strengthening labour cooperation and capacity-building; (ii) provisions to promote labour standards in parties' territories; (iii) provisions that address labour-related commitments on business & human rights; and (iv) compliance with and enforcement. As in other chapters, contexts and political sensitivities regarding the inclusion of hard commitments on labour in RTAs differ widely across countries and regions. Therefore, this chapter presents a range of Example Options for labour commitments in RTAs, structured from lowest to highest level of commitment, with no baseline identified. Where possible, the degree to which these approaches are more common or less common is also noted. Of all of the sustainable development issues covered by the Handbook, provisions on labour and health[43] have the longest history, and these provisions tend to be both deeper and more binding overall than provisions in other areas.

Chapter V covers investment, both in the context of sustainable development and more broadly. It showcases recent changes in RTAs and emerging approaches that address sustainable development, including in relation to issues covered in previous chapters. Issues covered include (i) provisions on sustainable and socially responsible investment, (ii) definitions of investor and investment; (iii) investment protection provisions; (iv) host state flexibilities; and (v) dispute settlement provisions. Investment is a bit different than the other areas covered in the Handbook, given that there is a significant body of law under international investment agreements (IIAs) that goes beyond sustainable development. However, there is an emerging trend to incorporate sustainable development into IIAs, which includes the other issues covered in the Handbook as well as related issues on sovereign debt restructuring and balance of payments challenges. These developments are covered in Chapter V, along with related reform efforts in international investment law, including those covered under United Nations Commission on International Trade Law (UNCITRAL) Working Group (WG) III.

[43] RTA Options on Health are covered under chapter I, Kuhlmann UNESCAP 2021, *supra* note 16.

CHAPTER I:

MICRO-, SMALL-, AND MEDIUM-SIZED ENTERPRISES

CHAPTER I – MICRO-, SMALL-, AND MEDIUM-SIZED ENTERPRISES

A. Introduction

MSMEs hold a critical place in global trade and development, and they are one of the largest job creators in developing countries and LDCs. Around 95 percent of the companies across the globe are MSMEs, which account for 60 percent of the world's total employment[44] and 50 percent of the world GDP.[45] Women-led MSMEs are also on the rise in many countries and are increasingly active in global trade; however, they tend to face greater barriers to their effective participation in markets, both domestically and internationally.

Not only are MSMEs significant in global and domestic markets, they are also vital to achieving the UN SDGs. MSMEs can contribute to achieving all UN SDGs, including even the high-level Goal 17 (partnerships for the goals – strengthen the means of implementation and revitalize the global partnership for sustainable development),[46] which contains a focus on international trade. MSMEs can also contribute to the SDGs through reduced poverty via expanded employment opportunities for a large section of the world's population (especially the informal sector),[47] a narrowing of the gender gap by employing women and providing financial stability,[48] and contributions to new innovations in digital technologies, which will help MSMEs and actors across industries.

[44] WTO, "Informal Working Group on the MSMEs," *Members of the Group*, (Jan. 14, 2022) [WTO IWG 2022], https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/MSME/2R6.pdf&Open=True.

[45] UN, "Resilience and Rebuilding: MSMEs for Sustainable Development at the Forefront of Building Back Better and Stronger from the Impact of the COVID-19 pandemic, Climate Crisis and Conflicts," (Aug. 1, 2022), https://www.un.org/en/observances/micro-small-medium-businesses-day.

[46] Ms. Raniya Sobir, "Report on MSMEs and the Sustainable Development Goals," UN DESA (Aug. 1, 2022), https://sustainabledevelopment.un.org/content/documents/26073MSMEs_and_SDGs.pdf.

[47] *Goal 1: End poverty in all its forms everywhere*, UN DESA, https://sdgs.un.org/goals/goal1; *Goal 2: End hunger, achieve food security and improved nutrition and promote sustainable development*, UN DESA, https://sdgs.un.org/goals/goal2; and *Goal 8: Promote sustained, inclusive and sustainable economic growth, full and production employment and decent work for all,* UN DESA, https://sdgs.un.org/goals/goal8.

[48] Goal 5: *Achieve gender equality and empower all women and girls,* UN DESA, https://sdgs.un.org/goals/goal5.

One notable point for trade negotiators is that currently there is no globally accepted definition for MSMEs, nor are there standard eligibility criteria or rules for what constitutes an MSME. The OECD defines MSMEs as "non-subsidiary, independent firms which employ a given number of employees."[49] Countries have defined MSMEs in a variety of ways based on the number of employees or, in some cases, based on financial assets.[50] For example, the EU defines MSMEs based on head count and turnover or balance sheet.[51] The Reserve Bank of India defines MSMEs based on their turnover.[52] In China, MSMEs are categorized based on industry category and number of employees.[53] In the United States, MSMEs are firms employing fewer than 500 employees.[54] Although there is no defined meaning of MSMEs, the general notion is that they are companies with fewer than 250 employees,[55] with companies with fewer than ten employees making up the micro-enterprise subset of MSMEs.[56]

MSMEs often face considerable constraints, and they are largely underrepresented in the global market, both in economic terms and their ability to shape trade rules. Although MSMEs comprise two-thirds of total employment in OECD countries, their contribution to global exports is low (20 to 40 percent as of 2020).[57] The degree to which MSMEs participate in global trade also varies by country, region, and sector, among other factors,[58] with low participation of MSMEs from developing countries.[59] MSMEs also face high trade costs and are impacted by changing circumstances; MSMEs had a disproportionate presence in sectors that were affected by the pandemic, for example.[60]

Access to finance and information are also major challenges for MSMEs,[61] as are other constraints in the enabling environment. Financial constraints impact MSMEs' ability to deal

[49] Glossary of Statistical Terms, OECD Statistics Portal, "Small and Medium-Sized Enterprises (SMES) Definition," https://stats.oecd.org/glossary/detail.asp?ID=3123.
[50] Ibid.
[51] European Commission, "Internal Market, Industry, Entrepreneurship and SMEs, SME Definition," https://ec.europa.eu/growth/smes/sme-definition_en.
[52] Frequently Asked Questions, "Micro, Small and Medium Enterprises," *Reserve Bank of India*, (updated as on October 1, 2021), https://m.rbi.org.in/scripts/faqview.aspx?Id=84.
[53] John Dudovskiy, "SMEs in China: Overview," *Business Research Methodology,* https://research-methodology.net/small-and-medium-enterprises-in-china-overview/#:~:text=The%20definition%20of%20a%20small,total%20assets%2C%20and%20this%20criteria.
[54] U.S. Small Business Administration, "Small Business Profile" https://www.sba.gov/sites/default/files/advocacy/United_States.pdf.
[55] WTO, A Joint Initiative within the WTO, Micro, Small and Medium Enterprises, *OMC. Informal Working Group* (Aug. 1, 2022), https://www.wto.org/english/thewto_e/acc_e/ppp_msmes.pdf.
[56] WTO, "Levelling the Trading Field for SMEs: World Trade Report," *WTO Publishing* (2016) [WTO Report 2016].
[57] Lucia Cusmano & Miriam Koreen, "Fostering Greater SME Participation in a Globally Integrated Economy," *SME Policy faced with Development of Financial Technology*, [Cusmano and Koreen] (Aug. 1, 2022), https://www.g20-insights.org/policy_briefs/fostering-greater-sme-participation-in-a-globally-integrated-economy/#:~:text=SMEs%20integrate%20GVCs%20as%20direct,investing)%20(OECD%202018).
[58] WTO Report 2016, *supra* note 56.
[59] Ibid.
[60] OECD, "Fostering Greater SME Participation in a Globally Integrated Economy," SME Ministerial Conference, (2018), https://www.oecd.org/cfe/smes/ministerial/documents/2018-SME-Ministerial-Conference-Plenary-Session-3.pdf; and WTO, "Information Note, Helping MSMEs Navigate the COVID-19 Crisis," (2020) (Aug. 1, 2022), https://www.wto.org/english/tratop_e/covid19_e/msmes_report_e.pdf.
[61] Kuhlmann et al. 2020, *supra* note 22, at 196.

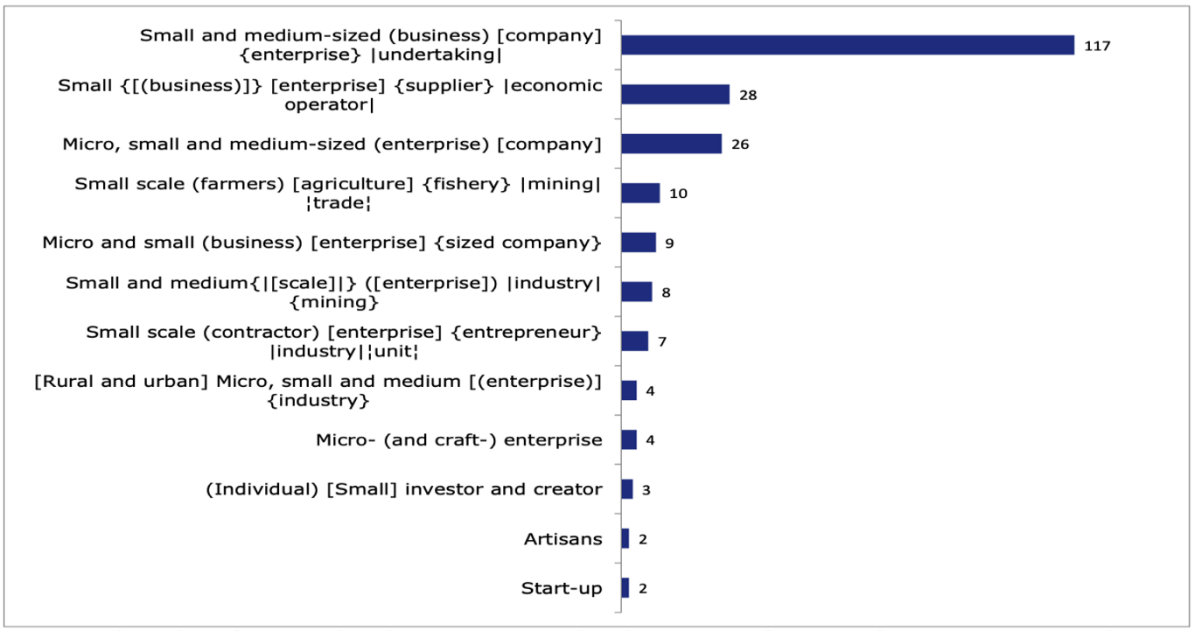
with trade costs fluctuations; they also exacerbate other challenges such as lack of access to technology and R&D, which reduces competitiveness in the market.[62] MSME growth is further hindered by lack of access to information related to consumer markets, standards, laws and regulations, product requirements, and information on target markets. Women-owned MSMEs are disproportionally affected by lack of access to information, difficulty in complying with procedural requirements, employment in sectors less resilient to disruptions, workplace harassment, corruption, and time constraints.[63]

Although MSMEs often engage in international trade indirectly (including as sub-contractors within Global Value Chains (GVCs)),[64] they can be major suppliers to larger firms, which makes them invaluable in the global market.[65] GVCs provide opportunities for MSMEs to enter global markets by providing them with access to finance, technology, skills, knowledge, presence in international markets, and human and management resources.[66] Cooperation between GVCs and MSMEs must be strong in order for MSMEs to reap benefits, which may not be the case for all MSMEs.[67] It is also not practical to expect that all MSMEs will work within a GVC, however, and it is important that MSMEs can engage in international trade in a more direct manner.

MSMEs are referenced in RTAs in a heterogeneous manner (Figure 1), [68] with references ranging from SMEs, MSMEs, start-ups, micro enterprises, small scale enterprises, artisans, etc.[69] For the benefit of this Handbook, MSMEs is used as an all-encompassing term that includes all of the groups set out in Figure 1.

[62] Cusmano and Koreen, *supra* note 57.
[63] Julia V. Sekkel, "Women-Owned SMEs and Trade Barriers," (Aug. 1, 2022), https://www.international.gc.ca/trade-commerce/economist-economiste/analysis-analyse/women_owned_smes_trade-pme_commerce_appartenant_femmes.aspx?lang=eng.
[64] Ibid.
[65] Ibid.
[66] OECD, "Enhancing the Role of SMEs in Global Value Chains," OECD Publishing, Paris, (2018) https://doi.org/10.1787/9789264051034-en.
[67] OECD, "Fostering Greater SME Participation in a Globally Integrated Economy," Discussion Paper Prepared for SME Ministerial Conference Plenary Session 3 held on 22-23 February 2018 in Mexico City," *OECD Publishing*, (2018) https://www.oecd.org/cfe/smes/ministerial/documents/2018-SME-Ministerial-Conference-Plenary-Session-3.pdf.
[68] Jose-Antonio Monteiro, "Provisions on Small and Medium-sized Enterprises in Regional Trade Agreements,"(2016) [Monteiro MSME 2016] *WTO Working Paper ERSD-2016-12*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825775.
[69] WTO, "Working Group Finalises Package of Declarations and Recommendations to Assist Small Business," (2020) [WTO MSME 2020] https://www.wto.org/english/news_e/news20_e/msmes_05nov20_e.htm.

Figure 1: MSME Terminology Used in RTAs[70]

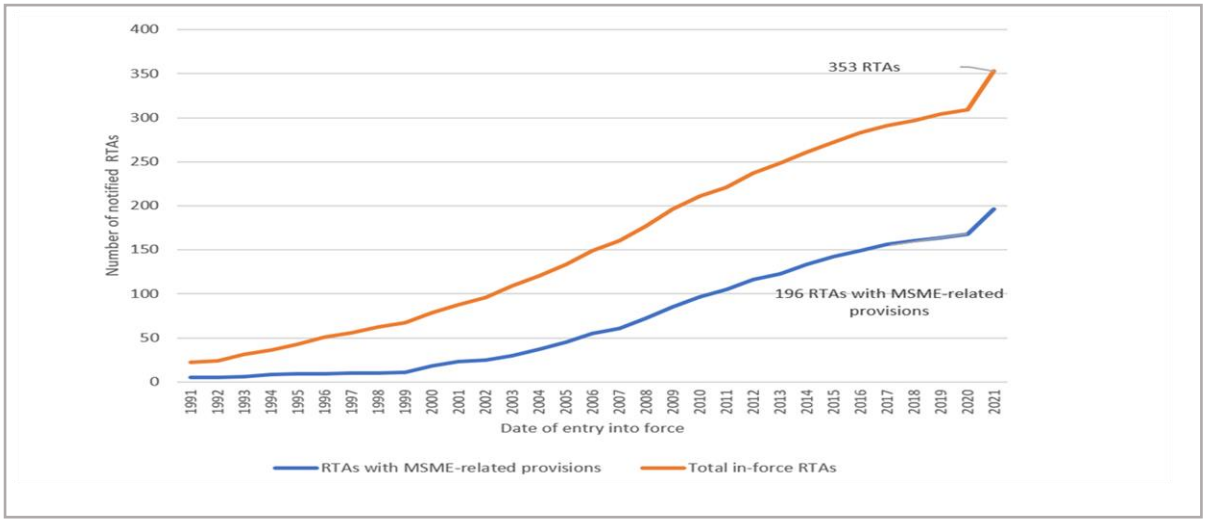


Note: Total number of RTAs with at least one SMEs-related provision referring to the respective terminology.
Source: Computations based on WTO RTA database. WTO. MSMEs, *Working Group Finalises Package of Declarations and Recommendations to Assist Small Business*

The number of RTAs containing MSME provisions has grown over time (Figure 2), and RTAs can help address some of the challenges MSMEs face in international trade. To start with, MSMEs can benefit from preferential market access established under RTAs, which can allow MSMEs to access target markets at reduced costs. RTA implementation can also help address issues in relation to non-tariff barriers and access to information, the latter through establishing points of contact and even MSME committees to help address challenges. Following RTA negotiation, national government also help them better access the preferential market access established under the RTA. For example, the United States-Colombia RTA provided a channel for Colombian companies to establish and expand access to the U.S. market.[71] RTAs can also contribute to the streamlining and simplification of technical and legal procedures at the border, and small businesses are more likely to gain from improved trade facilitation measures due to the exorbitant costs often associated with customs and border procedures.

[70] Ibid.
[71] ConnectAmericas Management, "FTAs offer a golden opportunity for SMEs," *ConnectAmericas,Publications* (Aug. 1, 2022), https://connectamericas.com/content/ftas-offer-golden-opportunity-smes.

Figure 2: Evolution of MSME-related Provisions in RTAs[72]



Source: WTO. Micro, Small and Medium-Sized Enterprises (MSMEs), *Working Group Finalises Package of Declarations and Recommendations to Assist Small Business*, (Aug. 1, 2022).

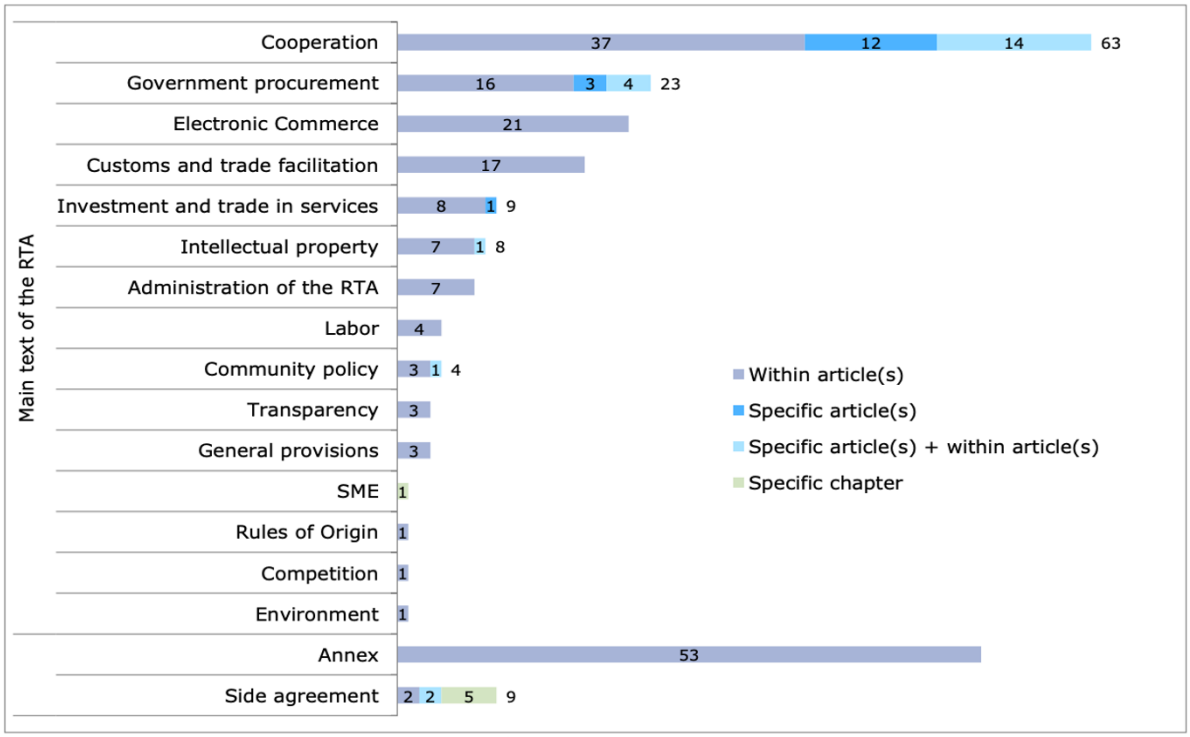
B. Legal Aspects of MSMEs

Legal instruments related to MSMEs include WTO covered agreements and commitments under RTAs, some of which integrate specific provisions and disciplines on MSMEs.[73] The WTO Agreement on Trade Facilitation (TFA), the provisions of which are often incorporated into RTAs in whole or in part, is considered to be particularly relevant for SMEs, as it streamlines customs and border procedures and results in reduced trade costs. Other WTO rules are relevant to MSMEs as well, including disciplines on non-tariff measures (NTMs) like sanitary and phytosanitary standards (SPS) and technical barriers to trade (TBT). The 2017 Buenos Aires Declaration on the Establishment of a WTO Informal Work Program (IWP) on Micro-Small- and Medium-Sized Enterprises (MSME Declaration) contains a number of relevant proposals that will likely inform international trade law going forward.[74]

References to MSMEs appear in trade agreements in a scattered manner (Figure 3; note that the figure was last updated in 2016, so additional variations can be found in next-generation agreements such as the USMCA, RCEP, the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and others). New generation RTAs sometimes dedicate an entire chapter to the participation of SMEs/MSMEs in international trade. These include recently negotiated FTAs like the CPTPP,[75] USMCA,[76] EU-Japan EPA,[77] and the Modernized Canada-Israel FTA.[78]

[72] WTO MSME 2020, *supra* note 68.
[73] WTO, "MSME Provisions in Regional Trade Agreements," *Trade Topics: Small Business and Trade*, https://www.wto.org/english/tratop_e/msmesandtra_e/rtaprovisions_e.htm.
[74] WTO, "New Initiatives on Electronic Commerce, Investment Facilitation and MSMEs," https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm.
[75] CPTPP, *supra* note 18, Chapter 24.
[76] USMCA, *supra* note 25, at Chapter 25.
[77] Agreement between the European Union and Japan for an Economic Partnership, (February 2019) [EU-Japan EPA], Chapter 20.
[78] FTA Between the Government of Canada and The Government of The State of Israel, Canada-Israel FTA (September 2019) [CIFTA], Chapter 14.

Figure 3: Location of Provision Referring to SMEs in RTAs (as of 2016)[79]

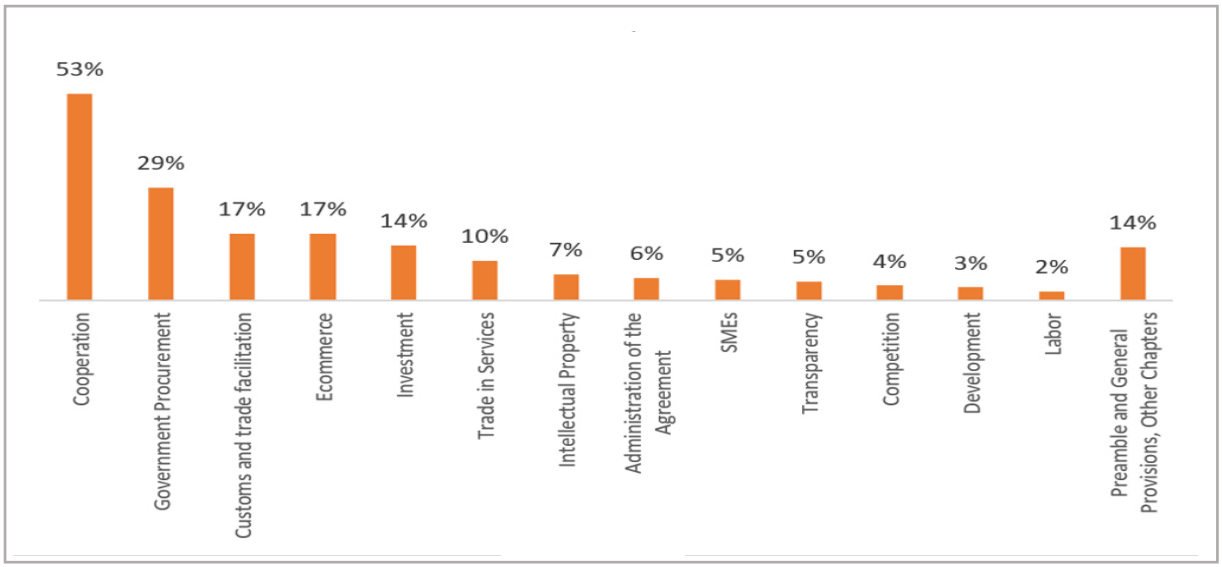


Source: WTO. Micro, Small and Medium-Sized Enterprises (MSMEs), *Working Group Finalises Package of Declarations and Recommendations to Assist Small Business*

MSME-related provisions tend to be contained in RTA chapters setting out commitments in broader areas like cooperation, customs and trade facilitation, investment, and trade in services, but over the years the integration of MSME-related provisions in RTAs has become more prominent, with some RTAs integrating stand-alone MSME chapters. Figure 4 shows the percentage of MSME-related provisions per chapter across total RTAs with MSME-related provisions. There are important cross-references here with other chapters of this Handbook (and the earlier *Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic*). In particular, for purposes of this Handbook, MSME provisions relate to gender (Chapter 2), labour (Chapter 4) and Investment (Chapter 5).

[79] WTO MSME 2020, *supra* note 68.

Figure 4: MSME-Related Provisions Across RTAs[80]



Note: MSME-related provisions per chapter over total RTAs with MSME-related provisions
Source: WTO. Micro, Small and Medium-Sized Enterprises (MSMEs), *Working Group Finalises Package of Declarations and Recommendations to Assist Small Business*, (Aug. 1, 2022).

Provisions on cooperation are the most common among MSME-related provisions in trade agreements.[81] These provisions often provide for cooperation among parties to support MSMEs through specific measures like sharing of best practices, working together to remove barriers to the use of e-commerce, creating networking opportunities, providing training in ICT; improving entrepreneurial and managerial skills for export engagements, encouraging investments, sensitizing MSMEs about partner markets, and facilitating cooperation to better understand state parties' procurement systems.[82] RTAs have also established committees to promote cooperative activities between MSMEs of RTA partners states.

After cooperation provisions, MSME-related provisions are most significantly integrated in government procurement commitments under RTAs. These provisions can be grouped into four categories. They are most commonly found under provisions that exempt the application of stringent government procurement procedures for MSMEs and provide preferences or set asides for MSMEs. They are also found under cooperation provisions where Parties have agreed to cooperate on certain matters including facilitating participation of MSMEs in government procurement, exchange of information, building capacity and enhancing access to procurement opportunities. Other provisions include affirmations by RTA Parties and setting up institutional arrangements including a committee on government procurement that would oversee and facilitate MSME participation in government procurement.

Government procurement is covered under both multilateral and regional instruments. The WTO plurilateral Government Procurement Agreement (GPA) explicitly refers to MSMEs in

[80] WTO MSME 2020, *supra* note 68.
[81] Id.
[82] Anjali Tandon, "SME Related Provisions in Free Trade Agreements – An Analysis of India's Strategic Focus," *ISID Working Paper 237*, https://isid.org.in/pdf/WP237.pdf.

Article XXII (Final Provisions).[83] It states that under future negotiations, the Committee on Government Procurement shall work to facilitate implementation of the GPA through adoption of work programmes on various items including the "treatment of small and medium-sized enterprise."[84] Further, on 30 March 2021, Parties to the GPA adopted a work program for MSMEs focused on adopting various measures and tools in relation to how MSMEs are treated in the process of government procurement, including avoidance of discriminatory measures that favour domestic MSMEs, adoption of a transparency program including an MSME survey that allows the Committees to survey Parties through questionnaires, guidance on assessment of the results of the survey and implementation of the outcomes, and review of the participation of MSMEs in government procurement.[85] It is important to note, however, that the GPA does require non-discriminatory, open, fair, and transparent conditions on government procurement, which include national treatment and non-discrimination among the suppliers of trading partners. This means that MSME set-asides are generally bound to national treatment, unless they have been otherwise specifically negotiated and scheduled.

Trade facilitation provisions in RTAs, which essentially operate to improve market access by modernizing, simplifying, and harmonizing border procedures, [86] are also particularly important to MSMEs. Although it is very common that trade agreements incorporate trade facilitation measures, usually in line with the WTO TFA, they rarely incorporate unique challenges faced by MSMEs. However, negotiators are beginning to take this dimension into account, and recent trade facilitation provisions increasingly incorporate provisions that address some of the needs of MSME exporters.

MSME-related provisions can also be found in e-commerce commitments under RTAs. These provisions are mostly cooperative in nature to address matters related to MSME access to data, addressing the digital divide between MSMEs and multinationals, and specific cooperative activities on e-commerce. Multilaterally, e-commerce remains subject to ongoing negotiations under the plurilateral Joint Statement on Electronic Commerce. [87] The WTO also has a Work Programme on issues related to international trade and e-commerce, although it has been criticized for catering more to multinational companies than MSMEs.

RTAs have also incorporated transparency provisions specifically for MSMEs. These include obligations for Parties to provide a predictable regulatory environment for MSMEs, obligations to maintain transparency online, and provisions that obligate Parties to maintain transparency in relation to other issues areas, including trade facilitation, government procurement, trade in services, intellectual property, and e-commerce. More general

[83] Agreement on Government Procurement (GPA), (2012), https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm
[84] Ibid.
[85] WTO, "Decision on the Committee on Government Procurement on a Work Programme on SMEs," (March 2012), https://www.wto.org/english/tratop_e/gproc_e/annexc_e.pdf
[86] Minako Morita-Jaeger & Ingo Borchert, "The Representation of SME Interests in Free Trade Agreements: Recommendations for Best Practice, " *UK Trade Policy Observatory,* https://blogs.sussex.ac.uk/uktpo/files/2020/01/FSB-Trade-TPO-Report.pdf
[87] WTO, News Item, "New Initiatives on Electronic Commerce, Investment Facilitation and MSMEs," Ministerial Conferences, https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm

transparency provisions are addressed in Chapter VII of the "Handbook on Provisions and Options for Trade in Times of Crisis," which also apply to MSMEs.

As is true in other areas related to sustainable development, most RTAs do not contain enforceable MSME provisions, and MSME provisions are excluded from dispute settlement mechanisms. However, more limited approaches, such as obligating Parties to establish appeals processes for administrative decisions taken by customs authorities in relation to matters concerning MSMEs, appear in a few RTAs.

The WTO Informal Working Group (IWG) is also relevant, as it focuses on identifying measures that could help MSMEs expand their potential through non-discriminatory trade rules and encourages sharing of best practices and recommendations to support MSME trade.[88] Since the group is informal, it primarily works through recommendations and guidelines towards tangible solutions to achieve its desired outcomes.[89] It is notable, however, that although there are 91 members in the IWG, some major developing countries such as India, South Africa and Indonesia are not a part of the group, and the United States only recently joined as of December 2022.[90]

Pursuant to its creation in December 2017, the IWG has worked on links between MSMEs and relevant trade principles and instruments, such as RTAs, the trade policy review mechanism (TPRM), trade facilitation, trade information, and other areas. In 2019, a database of MSME provisions in regional trade agreements was launched, providing an overview of the MSME provisions in RTAs notified to the WTO.

Subsequently, in 2020, the IWG endorsed a package of six recommendations and declarations with an objective to address challenges faced by the MSMEs:[91]

A. MSME-related Information in WTO Trade Policy Reviews: The group recommended that members should voluntarily provide information on policies related to MSMEs during the TPRM process to engage good practices and enhance exchange of information.
B. Access to Information: The IWG requested that members support the Global Trade Helpdesk, which could help the MSMEs access market intelligence and information, including information on tariffs and regulations.
C. Trade Facilitation for MSMEs: Since MSMEs do not have extensive resources, it becomes increasingly difficult for them to comply with customs procedures and other requirements. The group called upon members to fully implement the TFA to employ good practices to help MSMEs so that, instead of acting as barriers, trade facilitation procedures should promote MSMEs.

[88] WTO, "Informal Working Group on Micro, Small and Medium-sized Enterprises (MSMEs)," https://www.wto.org/english/thewto_e/minist_e/mc12_e/briefing_notes_e/bfmsmes_e.htm
[89] Ibid.
[90] WTO IWG 2022, *supra* note 44.
https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/MSME/2R10.pdf&Open=True
[91] WTO MSME 2020, *supra* note 68

D. Promoting MSME Inclusion in Regulatory Development: Members were also encouraged to focus on the impact of new trade regulations on MSMEs. New regulations should not make the market less favourable for MSMEs.
E. Supporting Implementation of the 2019 Decision on the WTO Integrated Database: The Integrated Database is the WTO's official data source, and the group calls upon members to provide timely and up-to-date updates so as to enable MSMEs to receive reliable information on tariffs and other market access data.
F. Access to Finance and Cross-border Payments: MSMEs face difficult challenges with respect to finance and cross-border payments, and members are requested to share best practices with the intent to identifying potential material developments.

The WTO Secretariat also took note of the impact of COVID-19 on MSMEs and published an information note on 24 September 2020, which reiterated that MSMEs are the backbone of many economies and are particularly exposed to the pandemic because of limited financial resources, disproportionate presence, transport disruptions, and trade restrictions on agricultural products.[92] Moreover, MSMEs, which are highly integrated into GVCs, faced a crisis due to shortages and supply chain disruptions resulting from the pandemic.[93] The information note emphasized the importance of supporting MSMEs through better regulatory and market information and affordable trade finance, along with digital trade and tools and various structures and procedures that could be better leveraged to support MSMEs, such as the transparency mechanism in WTO committees and bodies; the IWG on MSMEs; exchange of good practices, implementation of the TFA; enhanced market access for MSMEs; transparent, open and fair procurement; support for digitization efforts; and development of e-commerce rules.[94]

In 2021, the IWG, in partnership with the ITC and the International Chamber of Commerce (ICC), launched the "Digital Champions for Small Business" initiative to help small businesses go digital in order to increase participation in international trade. The group requested proposals on awareness-raising campaigns, competitions, capacity building, training and mentoring programs; however, it excluded WTO negotiations or proposed changes to WTO rules.[95]

In addition, the IWG has also launched a database of MSME references in the TPRM and is currently working on the development of Trade4MSMEs web platform. This platform will contain trade guides for MSMEs, designed to help MSMEs access information on customs procedures, including export procedures, as well as guides for policymaker focused on good practices and new topics such as digital and rural issues.

[92] WTO, "Helping MSMEs Navigate the COVID-19 Crisis," *Information Note* (24 September 2020), https://www.wto.org/english/tratop_e/covid19_e/msmes_report_e.pdf
[93] Id.
[94] Id.
[95] WTO, "Digital Champions for Small Business," https://www.wto.org/english/news_e/news21_e/msmes_faq_25jun21_e.pdf

C. RTA Options and Provisions

RTA Options set out in the following sub-sections addresses priority areas for MSMEs that are commonly found in RTAs: (i) definition of MSMEs; (ii) cooperation; (iii) government procurement; (iv) customs and trade facilitation; (v) electronic commerce; (vi) transparency; and (vii) dispute settlement. A final section discusses emerging issues that could be considered by negotiators going forward.

a. Definition of MSMEs

RTAs do not generally define MSMEs, but the India-United Arab Emirates (UAE) CEPA is an exception. Although the agreement does not delve into the specifics of what constitutes an MSME, the Parties defer the authority to define an MSME to the domestic legal, regulatory, and policy instruments of the specific Party, as set out in the Example Option below. This option both provides some clarity for the scope of coverage but also provides the Parties with policy space.

Example Option: *Definition of MSME*

For the purposes of this Chapter, "SME" means small and medium-sized enterprises, including micro enterprises, and may be further defined, where applicable, according to the respective laws, regulations, or national policies of each Party.

Source: Article 13.1, India-UAE Comprehensive Economic Partnership Agreement

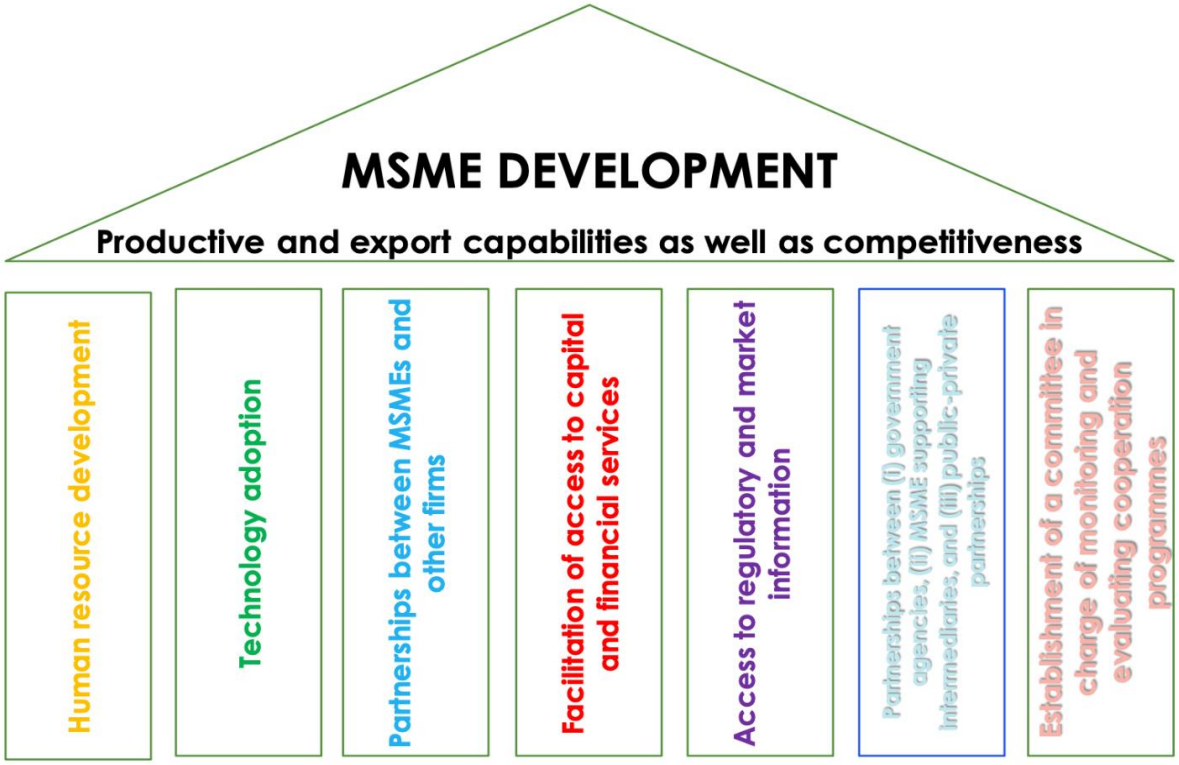
A common definition of what constitutes an MSME could help provide clarity on the entities to which MSME provisions would apply. This would allow relevant actors to understand their rights and obligations under specific RTAs. If the Parties are reluctant to adopt specific definitions, they could defer this function to the domestic level, as seen in CEPA, or adopt definitions proposed by international organizations such as the OECD.

b. Cooperation Provisions

As of 2022, 53 percent of RTAs that reference MSMEs incorporated provisions on cooperation.[96] Cooperation provisions in RTA related to MSMEs include development of MSME capabilities, implementation of trade rules, regional integration, improved market access for MSMEs, promotion of innovation and use of digital technologies amongst MSMEs, sharing of good regulatory practices, work on gender-related issues (Chapter II), and access to credit, among others. These can be done through partnership between institutions, financial support from government and financial institutions, links between MSMEs, exchange of information to improve competitive of MSMEs, training and workshops for MSME personnel, and use of information and communication technology. According to the WTO, there are seven pillars of MSME Cooperation and Development under RTAs (Figure 5).

[96] WTO 2022, "MSME-Related Language in Regional Trade Agreements," Informal Working Group on MSMEs, INF/MSME/W/6/Rev.2, (Aug. 1, 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/MSME/W6R2.pdf&Open=True.

Figure 5: Seven Pillars of MSME Cooperation and Development in RTAs[97]



Source: WTO. Kathryn Lundquist, *MSME-Related Provisions in RTAs*

For trade negotiators, a range of cooperation provisions are possible. Example provisions are included below based on their degree of commitment (i.e., binding or non-binding) and the specificity of the provisions in terms of incorporating targeted activities to be undertaken for MSMEs.

Example Option A, from the ASEAN-Korea FTA, recognizes the role of MSMEs and provides for cooperation among parties' MSMEs and relevant government departments by establishing networking opportunities for MSMEs in order to share knowledge on best practices in areas like technology transfer, product quality improvement, development of management skills, access to financing; technical assistance, and supply chain linkages.[98] Parties to the RTA further commit to cooperate to facilitate investment flows to MSMEs in their respective countries as well as to share information and knowledge on the creation of policies and programs related to SMEs.[99] Example Option B is a variation of Example Option A, whereby additional activities are added to the list of matters included for cooperation.

Example Option C, taken from the Canada-Colombia RTA, recognizes cooperation on MSMEs among the parties as essential and provides for collaboration with a view to promoting

[97] Kathryn Lundquist, "MSME-Related Provisions in RTAs," WTO, (2021), p. 9, https://www.wto.org/english/tratop_e/msmes_e/rta_240621.pdf

[98] Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, ASEAN – Korea, (August 2006), [ASEAN-Korea FTA] art. 3(2)(a), https://wits.worldbank.org/GPTAD/PDF/archive/ASEAN-Korea.pdf.

[99] ASEAN-Korea FTA, Art. 3(2)(b)&(c).

sustainable economic development.[100] This RTA takes cooperation a step further by establishing a joint committee to facilitate "trade related cooperation"[101] between its parties, including collaboration on matters affecting MSMEs.

Example Option D, taken from the USMCA, provides specific detailed activities for cooperation among the Parties, including collaboration to promote MSMEs owned by marginalized communities. Many RTAs have also established provisions for cooperation through MSME committees, which usually have the mandate of identifying opportunities, promoting engagement in discussions, and reviewing MSME-related work done by the Parties. An example of such a provision can be found in the CPTPP, as set out as Example Option E below.

Finally, Example Option F, taken from the RCEP, places additional monitoring obligations for any matters arising under Chapter 14 (Small and Medium Enterprise) on the Committee on Sustainable Growth, which is one of the subsidiary bodies established under the RCEP.[102] This Committee has two specific functions in this regard: (a) monitoring the implementation of Chapter 14 and (b) discussing ways to facilitate cooperation on small and medium enterprises among the Parties. This puts an additional check on matters concerning the relevant chapter under the agreement.

Example Options for MSME-Related Cooperation

Example Option A: Recognizing Roles of MSMEs plus Establishing Limited List of Cooperation Activities

The Parties, on the basis of mutual benefits, shall explore and undertake cooperation projects in the following areas: (c)small and medium enterprises.

The Parties recognizing the fundamental role of small and medium enterprises in maintaining the dynamism of their respective national economies, shall cooperate in promoting close cooperation among SMEs as well as the relevant agencies of the Parties. Such cooperation shall include: (a) establishing networking opportunities for SMEs of the Parties to facilitate collaboration and/or sharing of best practices, such as in the field of management skill development, technology transfers, product quality improvements, supply-chain linkages, information technology, access to financing as well as technical assistance; (b) facilitating the investment flows by Korean SMEs in the ASEAN Member Countries, and vice versa; and (c) encouraging their relevant agencies to discuss, cooperate and share information and experiences in the development of SMEs policy and programmes.

Source: ASEAN-Korea FTA, Article 3 (2)(a)

[100] FTA between Canada and the Republic of Columbia, Canada-Columbia, (August 2011) [Canada-Columbia FTA] Art. 1801(d) , https://wits.worldbank.org/GPTAD/PDF/archive/canada-columbia.pdf.
[101] Canada-Columbia FTA, Art. 1802.
[102] Malingrey and Duval, *supra* note 2, at. 12.

Example Option B: Overarching Areas of Cooperation

The Parties shall strengthen their cooperation under this Chapter, which may include:
(a) encouraging efficient and effective implementation of facilitative and transparent trade rules and regulations;
(b) improving small and medium enterprises' access to markets and participation in global value chains, including by promoting and facilitating partnerships among businesses;
(c) promoting the use of electronic commerce by small and medium enterprises;
(d) exploring opportunities for exchanges of experiences among Parties' entrepreneurial programmes;
(e) encouraging innovation and use of technology;
(f) promoting awareness, understanding, and effective use of the intellectual property system among small and medium enterprises;
(g) promoting good regulatory practices and building capacity in formulating regulations, policies, and programmes that contribute to small and medium enterprise development; and
(h) sharing best practices on enhancing the capability and competitiveness of small and medium enterprises.

Source: RCEP, Article 14.3, SME Chapter

Example Option C: Promotion of Sustainable Economic Development

Recognizing that trade-related cooperation is a catalyst for the reforms and investments necessary to foster trade-driven economic growth and adjustment to liberalized trade, the Parties agree to promote trade-related cooperation pursuant to the following objectives: […] (d) to promote sustainable economic development, with an emphasis on small and medium sized enterprises, in order to contribute to the reduction of poverty through trade.

Source: Canada-Columbia RTA, Article 1801

Example Option D: Cooperate to Increase Trade and Investment Opportunities for SMEs

With a view to more robust cooperation between the Parties to enhance commercial opportunities for SMEs, and among other efforts, in the context of **Memoranda of Understanding that exist between Parties on SME cooperation**, each Party **shall seek to** increase trade and investment opportunities, and **in particular shall**:

(a) **promote cooperation between the Parties' small business support infrastructure**, including **dedicated SME centers, incubators and accelerators, export assistance centers, and other centers as appropriate, to create an international network for sharing best practices, exchanging market research, and promoting SME participation in international trade**, as well as business growth in local markets;
(b) strengthen its collaboration with the other Parties on activities to promote **SMEs owned by under-represented groups, including women, indigenous peoples, youth and minorities, as well as start-ups, agricultural and rural SMEs, and promote partnership among these SMEs and their participation in international trade**;

(c) enhance its cooperation with the other Parties to **exchange information and best practices in areas including improving SME access to capital and credit, SME participation in covered government procurement opportunities, and helping SMEs adapt to changing market conditions**; and
(d) **encourage participation in platforms, such as web-based, for business entrepreneurs and counselors to share information and best practices to help SMEs link with international suppliers, buyers**, and other potential business partners.

Source: USMCA, Article 25.2, SME Chapter

Example Option E: Committee on MSMEs

The Parties **hereby establish a Committee on SMEs** (Committee), composed of government representatives of each Party. The Committee shall:
(a) identify ways to assist SMEs of the Parties to take advantage of the commercial opportunities under this Agreement;
(b) exchange and discuss each Party's experiences and best practices in supporting and assisting SME exporters with respect to, among other things, training programmes, trade education, trade finance, identifying commercial partners in other Parties and establishing good business credentials; [. . .]
(d) explore opportunities for capacity building to assist the Parties in developing and enhancing SME export counselling, assistance and training programmes;
(e) recommend additional information that a Party may include on the website referred to in Article 24.1 (Information Sharing);
(f) review and coordinate the Committee's work programme with those of other committees
[. . .];
(g) facilitate the development of programmes to assist SMEs to participate and integrate effectively into the global supply chain;
(h) exchange information to assist in monitoring the implementation of this Agreement as it relates to SMEs;
(i) submit a report of its activities on a regular basis and make appropriate recommendations to the Commission; and
(j) consider any other matter pertaining to SMEs as the Committee may decide, including any issues raised by SMEs regarding their ability to benefit from this Agreement.

Source: CPTPP, Article 24.2

Example Option F: Committee on Sustainable Growth
[…]
12. The functions of the Committee on Sustainable Growth, established pursuant to subparagraph 1(c) of Article 18.6 (Subsidiary Bodies of the RCEP Joint Committee), shall include considering any matter arising under or relating to the implementation or operation of:
(a) Chapter 14 (Small and Medium Enterprises); […]

13. With respect to Chapter 14 (Small and Medium Enterprises), the functions of the Committee on Sustainable Growth shall include:
(a) monitoring the implementation of Chapter 14 (Small and Medium Enterprises); and
(b) discussing ways to facilitate cooperation on small and medium enterprises among the Parties.

Source: RCEP, Chapter 18, Annex 18A: Functions of the Subsidiary Bodies of the RCEP Joint Committee

As noted, one of the main issues faced by MSMEs is lack of access to credit. RTAs do not typically include provisions on access to credit, especially in relation to MSMEs; however, as per the WTO MSME database,[103] nine RTAs have incorporated provisions on access to credit for MSMEs, mostly in relation to cooperative activities established under the RTAs. For example, under the EU-Central America RTA, the Parties agreed to promote employment and social protection through programs that create jobs and entrepreneurship opportunities for MSMEs and facilitate their access to credit, as set out in Example Option A below.

Example Option B below is taken from the EU-Cameroon EPA, whereby the Parties have agreed to fund MSME activities thorough an EPA fund. In the EU-Mexico RTA, under a set of cooperative activities, the Parties agreed to eliminate laws that hinder women's access to finance, as highlighted in Example Option C below.

Example Options for Cooperative Activities Relating to Access to Credit

Example Option A: Cooperation to Employment for MSMEs

The Parties agree to cooperate in order to promote employment and social protection through actions and programmes, which aim in particular to: (k) stimulate job creation and entrepreneurship by strengthening the institutional framework necessary to the creation of small and medium sized enterprises and facilitating access to credit and micro-finance.

Source: EU-Central America RTA, Article 42

Example Option B: Creation of an EPA Fund to Finance MSMEs

The Parties agree on the creation of an EPA regional fund, set up by and for the Central African region, to coordinate support which will help to finance effectively the priority measures intended to build productive capacity in the Central African States. […] Its key areas of action include, among others, (3) Industry, diversification and competitiveness of economies in conjunction with regional development, through (3.9) Support for small and medium-sized enterprises.

Types of measures to be taken:

[103] WTO, "MSME Provisions in Regional Trade Agreements," https://www.wto.org/english/tratop_e/msmesandtra_e/rtaprovisions_e.htm

(a) Expertise services — provision of a range of services to help SMEs with marketing, accounting, legal analysis, business plan preparation, access to finance.
(b) Vocational training
(c) Facilitating access to credit and improving conditions for SMEs to access credit. Useful to create mechanisms which are more likely to provide funds for SMEs in the region, for example by means of loan guarantee funds. […] Expertise services will be able to help SMEs to prepare their loan documentation.
(d) Provision of credit information at regional level.
(e) More flexible lending conditions.
(f) Strengthening the capacity of financial intermediaries in Central Africa […]
(i) Promoting the transition from the informal to the formal economy, in conjunction with the public authorities, for example by means of incentives.

Source: EU-Cameroon RTA, Annex I

Example Option C: Enhancing Opportunities for Women to Access Credit

Having recognised the importance of women as a vital economic link between agriculture, industry and trade, the Partner States undertake to: (a) increase the participation of women in business at the policy formulation and implementation levels; (b) promote special programmes for women in small, medium and large scale enterprises; (c) eliminate all laws, regulations and practises that hinder women's access to financial assistance including credit; […]

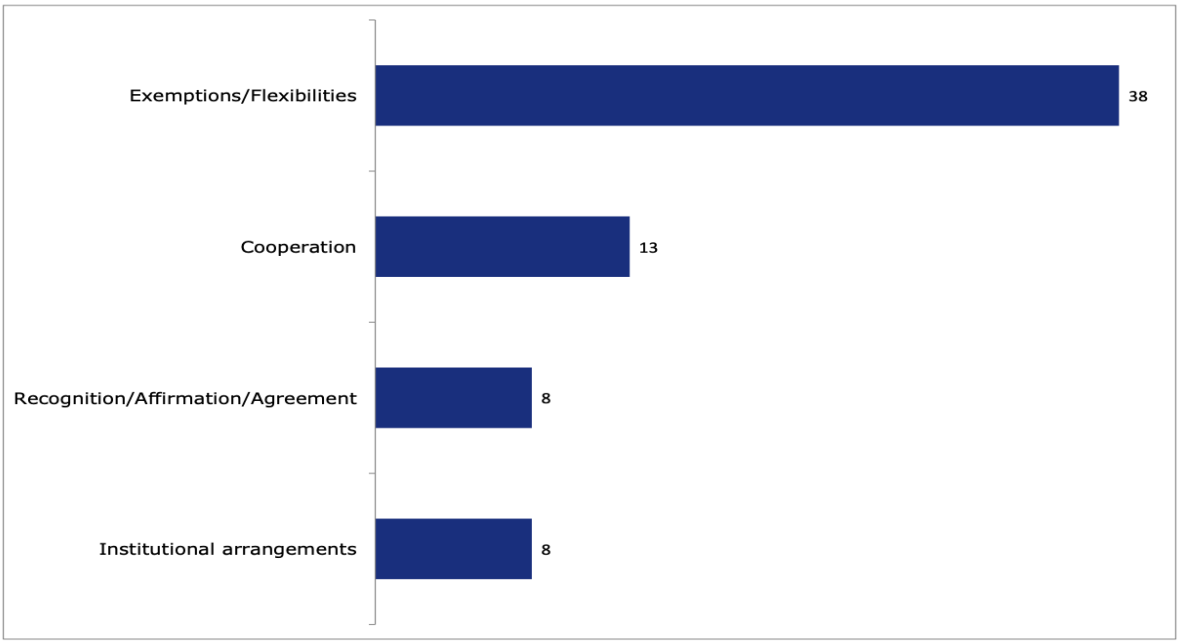
Source: EU-Mexico RTA

c. MSME-related Government Procurement Provisions

After cooperation provisions, MSME-related provisions are most common with respect to government procurement. According to the WTO,[104] there are four primary types of MSME provisions on government procurement: (i) exemption provisions; (ii) cooperation provisions; (iii) affirmations; and (iv) institutional arrangements (Figure 6).

[104] Jose-Antonio Monteiro, "Provisions on Small and Medium-sized Enterprises in Regional Trade Agreements," *WTO Working Paper ERSD-2016-12*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825775.

Figure 6: Types of MSMEs-related Provisions on Government Procurement[105]



Note: Total number of RTAs with at least one SMEs-related provision belonging to the respective category.
Source: Computations based on WTO RTA database. Jose-Antonio Monteiro, "Provisions on Small and Medium-sized Enterprises in Regional Trade Agreements", *WTO Working Paper ERSD-2016-12*

Government procurement provisions related to MSMEs typically provide exemptions or flexibilities related to the government procurement chapter including "set asides" or preferences applicable to MSMEs. Example Option A below, taken from the Canada-Chile FTA, highlights such an approach. The Canada-Colombia FTA, Example Option B, applies a set-aside for procurements under a certain threshold to ensure that small businesses can benefit.

Example Options on Government Procurement Set-Asides for MSMEs

Example Option A: Non-application of Government Procurement Chapter in Relation to Set-aside for MSMEs

This Chapter (Government procurement) does not cover procurements in respect of (d) set-asides for small and minority businesses.

Source: Canada-Chile FTA, Schedule of Canada

Example Option B: Non-application of Government Procurement Chapter in Relation to Set-aside for MSMEs for Procurement Below a Certain Threshold Amount

This Chapter does not apply to: (2) set-asides of procurements below US$125,000 on behalf of Micro, Small and Medium-sized Companies. The set-asides include any form of

[105] Monteiro MSME 2016, *supra* note 68.

preference, such as the exclusive right to provide a good or a service and measures conducive to facilitate the transfer of technology and sub-contracting;

Source: Canada Colombia FTA, Schedule of Colombia

Many RTAs also combine cooperative provisions with government procurement measures. For example, the CPTPP requires parties to cooperate in matters related to the facilitation of MSME participation in government procurement,[106] as set out in Example Option A below. Matters for cooperation include participation of MSMEs in government procurement, exchange of information, use of electronic means to facilitate trade, and capacity building, among others. Example Option B, also taken from the CPTPP, establishes a committee on government procurement charged with addressing matters related to the facilitation of MSME participation in covered procurements.[107] The committee on government procurement is an example of an institutional arrangement for government procurement designed to give more weight to the cooperation provision.

Example Options for Cooperation in Government Procurement

Example Option A: Cooperation on Government Procurement Matters

1. The Parties recognise their shared interest in cooperating to promote international liberalisation of government procurement markets with a view to achieving enhanced understanding of their respective government procurement systems and to improving access to their respective markets.

2. The Parties shall endeavour to cooperate in matters such as: (a) facilitating participation by suppliers in government procurement, in particular, with respect to SMEs; (b) exchanging experiences and information, such as regulatory frameworks, best practices and statistics; (c) developing and expanding the use of electronic means in government procurement systems; (d) building capability of government officials in best government procurement practices; (e) institutional strengthening for the fulfilment of the provisions of this Chapter; and (f) enhancing the ability to provide multilingual access to procurement opportunities.

Source: CPTPP, Article 15.22

Example Option B: Committee on Government Procurement

The Parties hereby establish a Committee on Government Procurement (Committee), composed of government representatives of each Party.

On request of a Party, the Committee shall meet to address matters related to the implementation and operation of this Chapter, such as: (a) cooperation between the Parties, as provided for in Article 15.22 (Cooperation); facilitation of participation by SMEs

[106] CPTPP, *supra* note 18, Art. 15.22(2)(a).
[107] CPTPP, *supra* note 18, Art. 15.23(b).

in covered procurement, as provided for in Article 15.21 (Facilitation of Participation by SMEs); (c) use of transitional measures; and (d) consideration of further negotiations as provided for in Article 15.24 (Further Negotiations).

Source: CPTPP, Article 15.23

d. MSME-related Customs and Trade Facilitation Provisions

This section sets out legal options and provisions on key MSME-related trade facilitation issues that have been incorporated into RTAs. These includes provisions related to express shipments, MSME participation, and advance rulings. Other RTA provisions on trade facilitation include provisions on cooperation and transparency, as noted above. Trade facilitation is comprehensively covered in Chapter III of the "Handbook on Provisions and Options for Trade in Times of Crisis"; however, this section focuses on trade facilitation provisions that relate specifically to MSMEs.

i. Expedited Shipments

MSMEs are often not equipped to deal with the bureaucratic and procedural hurdles associated with cross-border shipments. With the opportunities that digital trade provides, MSMEs are in the position to export lower-value shipments to international markets; however, they often face issues due to stringent customs requirements. The Global Express Association[108] notes that issues often stem from the lack of any substantial difference between the customs procedures applied to large shipments versus low-value shipments, and the OECD has recommended that countries adopt processes to streamline the import/export processes for low value shipments.[109] A number of countries have separate procedures in place for lower-value shipments, which are often referred to as de-minimis rules and procedures.

In June 2018, the World Customs Organization (WCO) released "Guidelines for the Immediate Release of Consignments By Customs" (Immediate Release Guidelines).[110] The Immediate Release Guidelines provide a methodology for expediting the release of consignments by customs authorities, irrespective of the weight, size or cost of the consignment. The Guidelines aim to achieve the following three goals:[111] (i) facilitate the pre-arrival processing and risk management of the consignments based on advance electronic information; (ii) streamline and expedite the handling of the consignments upon arrival; and (iii) assist customs administrations in determining data requirements and the exact procedure to be applied.

[108] Global Express Association, "Policies to Promote International MSME Trade: Tapping the Full Potential of Global E-commerce," https://global-express.org/assets/files/Whats%20new%20section/GEA-MSME-(F).pdf
[109] Id.
[110] World Customs Organization, "Immediate Release Guidelines," (June 2018), http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/immediate-release-guidelines/immediate-release-guidelines.pdf?db=web
[111] Id.

Given the rise of e-commerce and the demand for expedited deliveries, the WTO TFA recommends that expedited shipments should extend beyond the traditional forms of letter, documents, and small packages.[112] Chapter III of the "Handbook on Provisions and Options for Trade in Times of Crisis" covers express shipments measures in detail, including risk management, single window systems, self-filing of documents, and authorized economic operators. The WTO Informal Work Programme calls for full implementation of the WTO TFA to address trade issues faced by MSMEs at customs.

Further, some RTAs call for simplified customs procedures for MSMEs. Example Option A below, drawn from the EU-UK RTA, obligates Parties to work towards simplification of customs procedures in order to reduce time and costs for MSMEs. The specific emphasis on simplifying procedures for MSMEs here is important, as it pushes Parties towards considering the impact of customs procedures on MSMEs.
Example Option B is taken from the CPTPP and sets out a more binding provision, which places an obligation on each party not to assess customs duties on express shipments valued at or below a fixed amount and requires each party to periodically review the impact of the fixed amount on MSMEs.[113]

Example Options for Simplified Customs Procedures for MSMEs

Example Option A: Simplified Customs Procedures for MSMEs

Simplified customs procedures: 1. Each Party shall work towards simplification of its requirements and formalities for customs procedures in order to reduce the time and costs thereof for traders or operators, including small and medium-sized enterprises.

Source: EU-UK RTA, Article 106

Example Option B: Express Shipments

Each Party shall adopt or maintain expedited customs procedures for express shipments while maintaining appropriate customs control and selection. These procedures shall: (f) provide that, under normal circumstances, no customs duties will be assessed on express shipments valued at or below a fixed amount set under the Party's law.

Each Party shall review the amount periodically taking into account factors that it may consider relevant, such as rates of inflation, effect on trade facilitation, impact on risk management, administrative cost of collecting duties compared to the amount of duties, cost of cross-border trade transactions, impact on SMEs or other factors related to the collection of customs duties.

Source: CPTPP, Article 5.7

[112] Id.
[113] CPTPP, *supra* note 18, Ch. 5, art. 5.7 (1) (f).

ii. Authorised Economic Operators

Authorised Economic Operators (AEO) support the import-export processes, which is an aspect of trade facilitation that is particularly important for MSMEs. The WCO SAFE Framework of Standards recommendations do not directly address issues faced by MSMEs; however, they advocate for a simpler system of AEO accreditation. RTAs have incorporated AEO provisions of significance for MSMEs, most of which emphasize that qualification requirements should not bar the participation of MSMEs as AEOs.

Example Option A, drawn from the UK-Turkey RTA, notes that any specified criteria for participation or qualification as an AEO should not preclude the qualification of an MSME as an AEO. This could be considered a minimum for negotiators who want to make sure that MSMEs are not disqualified from acting as AEOs. Alternatively, Example Option B, taken from the UK-Turkey RTA, includes a similar provision but it is more comprehensive and sets out specificities for AEOs in addition to stating that requirements should not restrict the participation of MSMEs as AEOs. These include customs compliance, records management systems, financial solvency, and supply chain security.

Example Options for MSMEs as Authorized Economic Operators

Example Option A: Qualification for Participation of a MSME as an AEO

The specified criteria to qualify as an AEO shall not be designed or applied so as to afford or create arbitrary or unjustifiable discrimination between operators where the same conditions prevail. The specified criteria shall be designed or applied so as to allow the participation of small and medium-sized enterprises.

Source: UK-Turkey RTA, Article 3.11

Example Option B: Provisions Allowing the Participation of MSMEs as AEOs

Each Member shall provide additional trade facilitation measures related to import, export, or transit formalities and procedures, pursuant to paragraph 7.3, to operators who meet specified criteria, hereinafter called authorized operators. Alternatively, a Member may offer such trade facilitation measures through customs procedures generally available to all operators and is not required to establish a separate scheme.

The specified criteria to qualify as an authorized operator shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member's laws, regulations or procedures. (a) Such criteria, which shall be published, may include: (i) an appropriate record of compliance with customs and other related laws and regulations; (ii) a system of managing records to allow for necessary internal controls; (iii) financial solvency, including, where appropriate, provision of a sufficient security or guarantee; and (iv) supply chain security. b) Such criteria shall not: (ii) to the extent possible, restrict the participation of small and medium sized enterprises.

Source: Turkey-Singapore RTA

iii. Consultation with Business Community on Trade Facilitation Measures

RTAs also contain provisions that require States to consult with the business community on development and implementation of trade facilitation measures, especially as they relate to MSMEs. Thus, MSMEs would be represented when trade facilitation measures are being developed domestically. Incorporating such a provision in an RTA puts pressure on States to meet this standard both nationally and at a regional level. These provisions can be seen in a few RTAs, including the Iceland-China RTA, Switzerland-China RTA, and UK-Iceland, Liechtenstein and Norway RTA. The Example Option below is taken from the Iceland-China RTA and requires that the Parties consult the business community in trade facilitation issues, with special attention provided to MSMEs in order to ensure their participation.

Example Option: Consulting the Business Community on Trade Facilitation Measures

The Parties shall consult their respective business communities on their needs with regard to the development and implementation of trade facilitation measures, noting that particular attention should be given to the interests of small and medium-sized enterprises.

Source: Iceland-China RTA

iv. Advance Rulings

Advance rulings help MSMEs transport their goods across the border with greater certainty that a product qualifies for importation. An RTA may expressly provide that MSMEs should have access to advance rulings. For example, the Turkey-Singapore RTA incorporates a provision that states that particular consideration shall be given to MSMEs in terms of access to advance rulings, as shown in the Example Option below.

Example Option on Advance Rulings for MSMEs

An advance ruling is a written decision provided by a Member to the applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to: (i) the good's tariff classification; and (ii) the origin of the good. A Member may require that the applicant have legal representation or registration in its territory. To the extent possible, such requirements shall not restrict the categories of persons eligible to apply for advance rulings, with particular consideration for the specific needs of small and medium-sized enterprises. These requirements shall be clear and transparent and not constitute a means of arbitrary or unjustifiable discrimination.

Source: Turkey-Singapore RTA

e. MSME-related Electronic Commerce Provisions

E-commerce has become an integral part of economic growth of companies and economies over the last several decades. Due to various factors, including the digital divide, [114] lack of capital, and regulatory barriers, access to e-commerce opportunities is uneven, with a disparate impact on MSMEs. MSMEs face a number of challenges when offering goods and services on e-commerce platforms. MSMEs in LDCs and developing countries often lack broadband connection and the relevant hardware to support e-commerce, which creates a prima-facie barrier to entry.[115] Further, MSMEs often find it difficult to access to data needed to participate efficiently in e-commerce.

As seen in Chapter VI of the "Handbook on Provisions and Options for Trade in Times of Crisis," RTAs have addressed various aspects of e-commerce, most of which are also applicable to MSMEs. However, few RTAs have incorporated e-commerce provisions designed specifically for MSMEs, such as provisions addressing the digital divide, cooperation, access to data, data protection (and compliance assistance for MSMEs), and digital inclusion.

i. Digital Divide

The digital divide is significant with respect to MSMEs, and it is more pronounced in least developed and developing countries.[116] Two particular aspects of the digital divide related to MSMEs are the lack of access to broadband and the lack of necessary equipment. While both are primarily domestic issues, certain measures under RTAs could potentially offer a solution or expedite the process of reducing the divide. For example, reduction of customs duties on a wider group of information and communication technologies (ICT) could benefit MSMEs and help make primary equipment more affordable. This was the purpose of the WTO Information Technology Agreement (ITA), [117] signed in 1996, which required Parties to eliminate custom duties for high technology products set out under the agreement.

Example Option A, taken from the Partnership Agreement between the EU and Organisation of African, Caribbean and Pacific States (OACP), addresses the digital divide by incorporating and promoting a number of aspects that are significant to MSMEs. In particular, it obligates the Parties to cooperate on matters that support access to ICT, promote and support digital entrepreneurship (especially for women), and cooperate on developing and managing private and data protection policies.

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[114] UNCTAD, "Information Economy Report 2017 on Digitalization, Trade and Development," https://unctad.org/system/files/official-document/ier2017_en.pdf.

[115] Ibid.

[116] Ibid.

[117] The Information Technology Agreement (ITA) is a plurilateral agreement that was signed by a number of WTO Member States. It eliminates customs duties on certain technology products, such as computers, telecommunications equipment, semiconductors, and software. At present, around 81 WTO Member States have signed onto the ITA. (*See* "Information Technology Agreement – An Explanation," WTO, https://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm)

Example Option: Addressing Digital Divide for MSMEs

1. The Parties shall cooperate to reduce the digital divide by promoting cooperation with regard to the development of the digital society to benefit citizens and businesses through accessibility to digital technologies, including ICT adapted to local circumstances. The Parties shall support measures that enable easy access to ICT through, among others, the use of affordable and renewable energy sources and the development and redeployment of low-cost wireless networks. They shall also work towards greater complementarity and harmonisation of communication systems and their adaptation to new technologies.

2. The Parties agree on the central role of the digital economy as an amplifier and accelerator for change that can drive significant economic diversification, create jobs and enable leapfrog growth. They agree to advance digitalisation with a view to reducing transaction costs and lessening information asymmetries, with the overarching aims of improving productivity and sustainability.

3. The Parties shall promote and support digital entrepreneurship, particularly by women and youth, and the digital transformation of MSMEs. They shall encourage the development of e-commerce to revamp supply chains and expand markets, and encourage the expansion of e-banking, including to reduce costs of remittances, and the deployment of e-governance solutions.

4. The Parties shall cooperate on developing and managing privacy and data protection policies, promote measures to facilitate data flows, and support the regulatory framework to promote the production, sale and delivery of digital products and services.

Source: Negotiated Agreement Text for the Partnership Agreement between the European Union/The European Union and its Member States, of the One Part, and Members of the Organisation of African, Caribbean and Pacific States, of the Other Part, Article 48[118]

ii. Cooperative Activities on E-Commerce

Cooperation is also important in the area of e-commerce. The Example Option below is taken from the United Kingdom-Japan FTA and states that the Parties should share information and maintain a dialogue on best practices in relation to e-commerce.

Example Option: Cooperation on E-commerce

The Parties agree to maintain a dialogue on regulatory matters relating to electronic commerce with a view to sharing information and experience, as appropriate, including on related laws, regulations and their implementation, and best practices with respect to

[118] *See* Negotiated Agreement Text for the Partnership Agreement between the European Union/The European Union and its Member States, of the One Part, and Members of the Organisation of African, Caribbean and Pacific States, of the Other Part (April 15, 2021) https://ec.europa.eu/international-partnerships/system/files/negotiated-agreement-text-initialled-by- eu-oacps-chief-negotiators-20210415_en.pdf.

electronic commerce, in relation to, inter alia: challenges for small and medium-sized enterprises in the use of electronic commerce.

Source: United Kingdom-Japan FTA, Article 8.83

iii. Access to Data

MSMEs often struggle to participate efficiently and competitively in e-commerce due to a lack of relevant data. States have tried to address this through facilitating access to government data that has been made available to the public. The following Example Option, taken from the FTA between the United Kingdom, Iceland, Liechtenstein and Norway, is one such example.

Example Option: Cooperation on Access to Data

The Parties shall endeavour to cooperate to identify ways in which each Party can expand access to and use of government data that the Party has made available to the public, with a view to enhancing and generating business opportunities, especially for MSMEs.

Source: United Kingdom-Iceland, Liechtenstein and Norway FTA

f. MSME-related Transparency Provisions

MSME-related provisions can also be found in the context of transparency between trading partners. General transparency provisions, addressed in Chapter VII of the "Handbook on Provisions and Options for Trade in Times of Crisis," apply to MSMEs as well.

Some, albeit few, RTAs incorporate provisions on transparency specifically for MSMEs. To date, provisions that do so can be divided into three categories: (i) provisions that obligate Parties to provide for a predictable regulatory environment for MSMEs; (ii) provisions that obligate Parties to maintain transparency through an online platform that sets out necessary information relevant to MSMEs; and (iii) provisions that obligate Parties to maintain transparency in relation to other issues areas as they relate to MSMEs, including customs and trade facilitation, government procurement, trade in services, intellectual property, and e-commerce. Regulatory coherence is also related to transparency in trade regulation.[119] In the MSME context, it could be helpful to identify regulatory common ground in order to ensure cohesive MSME treatment across Parties.

Example Option A below, taken from the preamble to the EU-Japan EPA, calls for a transparent regulatory environment for MSMEs. Although the obligation is overarching and not specific, the emphasis on MSMEs enhances focus among the RTA Parties to provide for

[119] "The Trans-Pacific Partnership-A Quest For a Twenty-first Century Agreement, Regulatory Coherence in the TPP Talks," *Cambridge University Press*, 2012, p. 171, https://books.google.com/books?hl=en&lr=&id=I7MgAwAAQBAJ&oi=fnd&pg=PA171&dq=regulatory+coherence+trade+law&ots=Ffhnf46AmS&sig=yvDidWrFMQhbWY3CV_jSZlw3iVY#v=onepage&q=regulatory%20coherence%20trade%20law&f=false.

an efficient and transparent regulatory environment for MSMEs. Such provisions are common in RTAs that have incorporated transparency provisions on MSMEs,[120] and it is an example of an important non-binding provision that sets the stage for the Parties to enhance focus on MSMEs.

Example Option B, taken from the EU-Ukraine Association Agreement (and also found in the UK-Japan RTA and EU-Japan RTA) goes a step further and calls for the RTA Parties to not only "maintain an effective and predictable regulatory environment for MSMEs" but also to take into account principles of legal certainty and proportionality. This provision has significant implications for both policy space and greater certainty for MSMEs.

Relevant RTA clauses also focus on impact assessment to enable regulators to observe the benefits or shortcomings of a specific system and make any relevant changes as needed. Such clauses are found in the CPTPP and Peru-Australia FTA (PAFTA), as shown below in Example Option C, which obligates the Parties to encourage regulatory agencies at the national level to conduct impact assessments when designing regulatory measures that exceed a certain threshold of economic or regulatory impact, taking into consideration the impact on MSMEs.

Example Options on Maintaining Predictable Regulatory Environment for MSMEs

Example Option A: Obligation to Provide a Transparent Regulatory Environment

Recognising the impact which its regulatory environment may have on trade and investment between the Parties, each Party shall provide for a transparent regulatory environment, which is effective and predictable for persons including economic operators, especially small and medium-sized enterprises.

Source: EU-Japan RTA, Preamble

Example Option B: Obligation to Provide a Predictable Regulatory Environment for MSMEs Taking Into Account Requirements of Legal Certainty and Proportionality

Cognisant of the impact which their respective regulatory environment may have on trade between them, the Parties shall establish and maintain an effective and predictable regulatory environment for economic operators doing business in their territory, especially small ones, due account being taken of the requirements of legal certainty and proportionality.

Source: EU-Ukraine RTA, Article 282

Example Option C: Implementation of Core Good Regulatory Practices

To assist in designing a measure to best achieve the Party's objective, each Party should generally encourage relevant regulatory agencies, consistent with its laws and regulations,

[120] WTO, "MSME Provisions in Regional Trade Agreements, Small Business and Trade," https://www.wto.org/english/tratop_e/msmesandtra_e/rtaprovisions_e.htm.

to conduct regulatory impact assessments when developing proposed covered regulatory measures that exceed a threshold of economic impact, or other regulatory impact, where appropriate, as established by the Party. Regulatory impact assessments may encompass a range of procedures to determine possible impacts. […]
When conducting regulatory impact assessments, a Party must take into consideration the potential impact of the proposed regulation on SMEs.

Source: PAFTA, Article 24.5

The Hong Kong, China-Australia RTA also obligates Parties to maintain transparency in online platforms for MSMEs, with obligations for the Parties to describe provisions most relevant to MSMEs and add other information as useful, including on relevant government agencies. This is set out as the Example Option below.

Example Option on Maintaining Transparency in relation to Information Relevant to MSMEs

1. Each Party shall establish or maintain its own publicly accessible website containing information regarding this Agreement, including: […]

(d) information designed for SMEs that contains: (i) a description of the provisions in this Agreement that the Party considers to be most relevant to SMEs; and (ii) any additional information that the Party considers would be useful for SMEs interested in benefitting from the opportunities provided by this Agreement.

2. Each Party shall also include in its website referred to in paragraph 1 links to: (a) the equivalent website of the other Party; and (b) the websites of its government agencies and other appropriate entities that provide information that the Party considers would be useful to any person interested in trading, investing or doing business in the Area of that Party.

3. Subject to each Party's laws and regulations, the information described in paragraph 2(b) may include: (a) customs regulations and procedures; (b) regulations and procedures concerning intellectual property rights; (c) technical regulations, standards and sanitary and phytosanitary measures relating to importation and exportation; (d) foreign investment regulations; (e) business registration procedures; (f) employment regulations; and (g) taxation information.

4. Each Party shall regularly review the information and links on the website referred to in paragraph 1 and paragraph 2 to ensure that such information and links are up-to-date and accurate.

5. Neither Party shall have recourse to dispute settlement under Chapter 18 (Consultations and Dispute Settlement) for any matter arising under this Article.

Source: Hong Kong, China-Australia RTA, Article 16.6

Additional options for transparency provisions can be found across issue areas such as digital trade, intellectual property, government procurement, and trade in services. They also be found in relation to anti-corruption provisions in the CPTPP.

g. MSME-related Dispute Settlement Provisions

Dispute settlement mechanisms (DSMs) in RTAs are designed to ensure that there is a process to enforce the commitments undertaken by the Parties. If the provisions are unenforceable, then there may be little follow through, which could affect trade between the Parties.[121] In spite of this, there are very few enforceable provisions in RTAs with respect to commitments relating to MSMEs. In fact, most RTAs that have incorporated provisions on MSMEs have excluded such provisions from the purview of DSMs.

RTAs such as the Canada-Israel RTA, the CPTPP, EU-Japan RTA, and the USMCA, among others, take such an approach. Example Option A, taken from the Canada-Israel RTA, exempts MSME provisions from the DSM. The Hong Kong-China-Australia RTA, highlighted as Example Option B, adopts a different approach, whereby transparency provisions applicable to MSMEs are excluded from recourse to DSM. Such an approach could be found in RTAs that do not have a standalone MSME chapter. Although these examples highlight provisions that are not enforceable, even aspirational provisions have value and can be an important way for countries to prioritize MSMEs without significant additional resources.

Example Options on Dispute Settlement for MSMEs

Example Option A: Exempting MSME Chapter from DSM

A Party shall not have recourse to dispute settlement under this Agreement for any matter arising under the Chapter on SMEs.

Source: Canada – Israel RTA, Article 14.5

Example Option B: Exempting Specific Issues from DSM

Neither Party shall have recourse to dispute settlement under Chapter 18 (Consultations and Dispute Settlement) for any matter arising under this Article.

Source: Hong Kong-China-Australia RTA, Article 16.6

Notwithstanding the above, there are a few RTAs that allow some recourse to MSMEs for administrative decision taken against them. Such provisions are mostly found under customs and trade facilitation chapters/provisions. The United Kingdom-Cote d'Ivoire RTA (set out in the Example Option below) allows MSMEs the right to appeal any "administrative actions, rules and decisions by customs authorities affecting imports, export and goods in transit."

[121] Claude Chase, Alan Yanovich, Jo-Ann Crawford and Pamels Ugaz, "Mapping Dispute Settlement Mechanism in Regional Trade Agreement – Innovative Variations on a Theme?," WTO, 2013, https://www.wto.org/english/res_e/reser_e/ersd201307_e.pdf.

This obligates Parties to make sure that such procedures are easily accessible and costs are reasonable, and it would allow MSMEs to challenges decisions taken against them.

Example Option: Requirement for Appeal/Review/Rulings Shall be Accessible to MSMEs

In order to improve working methods and ensure respect for the principles of non-discrimination, transparency, efficiency, integrity and accountability, the Parties shall: (c) provide efficient, prompt and non-discriminatory procedures enabling the right of appeal against administrative actions, rulings and decisions by the customs authorities affecting imports, exports or goods in transit. These procedures shall be easily accessible to the applicants, including small and medium-sized enterprises, and the related costs shall be reasonable and proportionate to the costs incurred by lodging the appeal;

Source: United Kingdom-Cote d'Ivoire RTA

D. Emerging Trends, Possible Additions, and Innovations

MSME provisions in RTAs are mainly aspirational in nature. They are integrated under cooperative commitments and/or as flexibilities or exemptions. A few RTAs, like the CPTPP, have taken a step forward in integrating more comprehensive MSMEs provisions; however, there is still a substantial gap in addressing MSME issues at the RTA level. Below are some emerging trends, recommendations, and possible innovative approaches that could be built upon to address challenges faced by MSMEs.

a. Dedicated MSME Chapters

While MSMEs can benefit from general RTA provisions, whether specific to MSMEs or not, in practice, MSMEs often find it difficult or impossible to meet the demands of international trade rules given their structure, size, and financial status. Dedicated MSME chapters essentially address issues similar to those addressed through MSME-related provisions in traditional RTAs, with some form of innovation in areas like information sharing. Dedicated RTA chapters also mandate parties to create and maintain public websites where useful information for MSMEs must be published. Such chapters could be used to specifically address future challenges faced by MSMEs.

b. Exemption from Certain Obligations (e.g., Additional Duties)

MSME-related provisions can also be found in the form of exceptions from certain obligations under RTAs. This is not a common occurrence, but it does appear in two RTAs with India as a party. This is an important point of discussion, as integrating such provisions allows MSMEs to trade under more flexible rules. For example, under the India-Nepal RTA, as shown in the Example Option below, products manufactured by MSMEs in Nepal are exempt from additional duties on par with the relief extended to products manufactured by MSMEs in India.

Example Option on Exception from Certain Obligations for MSMEs

Notwithstanding the provisions of Article III and subject to such exceptions as may be made after consultation with His Majesty's Government of Nepal, the Government of India agree to promote the industrial development of Nepal through the grant on the basis of non-reciprocity of specially favorable treatment to imports into India of industrial products manufactured in Nepal in respect of customs duty and quantitative restrictions normally applicable to them.

On the basis of a Certificate issued, **for each consignment of articles manufactured in the small-scale units in Nepal,** by His Majesty's Government of Nepal, **that the relevant conditions applicable to the articles manufactured in similar Small Scale Industrial units in India for relief in the levy of applicable Excise Duty rates are fulfilled for such a parity, Government of India will extend parity in the levy of Additional Duty on such Nepalese articles equal to the treatment provided in the levy of effective Excise Duty on similar Indian articles under the Indian Customs and Central Excise Tariff […]**

Source: India-Nepal RTA and Protocol to the Treaty of Trade, Article V

c. Binding Dispute Resolution for MSME Commitments, Including Use of Alternative Dispute Resolution

As seen above, most MSMEs provisions do not fall within the purview of DSM procedures. This makes the commitments relating to MSMEs unenforceable, which lowers the onus on RTA Parties to implement these commitments. Incorporating enforceable provisions could help enhance the role of MSMEs, and, like the discussion in Chapter II on gender, would strengthen incorporation of these provisions in RTAs.

Taking examples from other issue areas covered in this Handbook, as well as under RTAs more generally, MSMEs provisions under RTAs could be made more enforceable in several ways. MSMEs provisions could be brought under the purview of existing DSMs under an RTA. This could be done generally or for specific issues as seen under the UK-Cote d'Ivoire RTA, where the Parties have agreed to establish a right to appeal any decisions made by a customs authority with a special focus on MSMEs. Subjecting MSME provisions to the general DSM process under an RTA would be an alternative, and more ideal, option.

As another option, RTA Parties could resort to alternate dispute resolution mechanism including consultations, establishment of panels, cooperative dialogue, and other mechanisms incorporated. For example, the Rapid Response Labour Mechanism under the USMCA could be used as a model to resolve issues relating to MSMEs as well. The CPTPP also provides for alternate mechanisms for dispute resolution including setting out procedures for labour consultations, labour cooperative dialogue between the Parties, and ultimately DSM. Further, the investment provisions under CETA are very specific and deliberate in making it less expensive for MSMEs to seek redress where disputes arise.

d. Focus on Specific Issues (Trade in Services and Investment)

A few RTAs also contain provisions on services, investment, and IPR that address MSMEs specifically, signalling that this may be an area for further focus. With respect to services, many RTAs go beyond the WTO General Agreement on Trade in Services;[122] however, most of these provisions are limited to cooperation and exemption clauses. Some agreements, however, such as the EU-CARIFORM EPA and Canada-Korea FTA have introduced innovative provisions that could be further explored going forward. For example, in the EU-CARIFORUM EPA, parties have made sector-specific provisions for MSME services traders by enjoining the parties to facilitate the participation of MSMEs in tourism and cooperate in the creation of an online marketing strategy for MSMEs in the tourism sector.[123] Further, with respect to cross-border investment, the EFTA-Egypt FTA included a non-binding provision focused on cooperation in the creation of mechanisms for joint investment with MSMEs.[124]

e. Whole of Agreement Approach

As recommended in the discussion in Chapter II on gender, a whole of agreement approach could apply to MSMEs as well. As seen in the sections above, some RTAs have started to focus on MSMEs as an integral part of trade, and, as a result, there are now dedicated MSME chapters in some trade agreements. However, the commitments relating to MSMEs are still quite narrow in these RTAs, and they are mostly non-binding. To integrate a more comprehensive approach into RTAs, negotiators could focus on issues that have an impact on MSMEs, including in areas like trade facilitation, investment, intellectual property, dispute settlement, e-commerce and digital trade, and others. As noted in Chapter II on gender, this would require working in tandem with MSMEs while negotiating trade agreement as well as in the implementation phase.

[122] Monteiro MSME 2016, *supra* note 68.
[123] EU-CARIFORUM EPA, art. 119(3) (c).
[124] FTA between the Arab Republic of Egypt and the EFTA States (August 2007), https://www.efta.int/media/documents/legal-texts/free-trade-relations/egypt/EFTA-Egypt%20Free%20Trade%20Agreement.pdf. *See Article 25(1)(d).*

CHAPTER II:

GENDER

CHAPTER II – GENDER

International trade was once viewed as 'gender neutral', conferring equal benefits on all of society. However, over the past decade, there has been an increasing realization that trade has significant consequences at the distributional and implementation levels, leading to different effects on different stakeholders, including women.[125] These differences are even more palpable in certain industries and countries.[126] Gender disparities condition the way in which women can participate economically, which ultimately translates into substantial gaps in terms of earnings.[127] To date, only 55 percent of adult women are part of the labour market, compared with 78 percent of men.[128] These differences are exacerbated during time of change and crisis, as evidenced by the COVID-19 pandemic, which resulted in health vulnerabilities and an increase in gender-based violence.[129] Overall, it is estimated that the global gender gap will not close for another 100 years,[130] calling for approaches to address gender disparities in the shorter term.

In 2017, WTO Member States and observer countries signed the Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires (Gender Declaration).[131] In the Gender Declaration, WTO Member States agreed, among other things, to make trade and development more gender responsive though a series of collaborative best efforts.[132] In December 2022, the WTO held the first World Trade Congress on Gender.

[125] *See, e.g.,* Kuhlmann and Bahri 2023, *supra* note 34.
[126] OECD, "Trade and Gender," Trade Policy Brief (May 27, 2021), available at https://issuu.com/oecd.publishing/docs/trade_and_gender.
[127] World Bank Group, "Unrealized Potential: The High Cost of Gender Inequality in Earnings," (2018) [hereinafter World Bank Group Gender 2018], https://openknowledge.worldbank.org/handle/10986/29865 (last visited Jun. 27, 2022), at 1.
[128] Id., at 5.
[129] *See, e.g.,* UN WOMEN, "Measuring the Shadow Pandemic: Violence Against Women During Covid-19 Pandemic," (November 2021), https://data.unwomen.org/sites/default/files/documents/Publications/Measuring-shadow-pandemic.pdf (last visited August 12, 2022).
[130] World Bank Group "Gender 2018," *supra* note 179, at 127.
[131] WTO, "Buenos Aires Declaration on Women and Trade Outlines Actions to Empower Women" (2017), https://www.wto.org/english/news_e/news17_e/mc11_12dec17_e.htm (last visited Jul. 24, 2022).
[132] WTO, "Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires," (Dec. 2017), https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf.

Overall, considerable work will be needed to make commitments on gender more tangible. As one example, in 2021, a group of countries agreed to the Joint Statement Initiative on Domestic Services Regulation,[133] covering licensing and qualification requirements and procedures and technical standards. The Joint Statement Initiative on Domestic Services Regulation also contained a provision on non-discrimination between men and women in measures related to the authorization for the supply of a service, marking the first time ever that a WTO negotiated text contains a provision on gender-based discrimination. RTAs, which also contain gender-related commitments, can also be better leveraged to integrate more specific commitments on gender and trade. Overall, efforts to address gender considerations throughout the text of RTAs, fall within the purview of "gender mainstreaming."[134]

The SDGs provide an important benchmark for designing a more fair and equitable trading system, which can be used to rethink and reshape the current system in order to shape rules that allow women to increase their participation in the trade sphere and benefit from trade; gender equality is considered to be integral to each of the seventeen SDGs.[135] In September 2021, UN Women released a report on the progress made towards achieving the SDGs with regard to women.[136] The report revealed that out of the eighteen indicators under SDG 5 (gender equality), only one of them was "close to target," i.e., Target 5.5 to "ensure women's full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life."[137] Gaps exist with respect to other SDGs as well. For example, SDG 17 (partnerships for the goals) points out that global partnerships and cooperation in the trade sector are essential for development and emphasizes the need for timely and reliable data, including gender data, in order to achieve this goal. Yet, sex-disaggregated data remains insufficient,[138] even though bridging this gap is one of the goals of the Gender Declaration.

It is also important to understand the changes in the structure and composition of international trade and investment that will continue to shape women's work and livelihoods. First, there has been a significant rise in trade in services. In 2021, trade in services reached $1.6 trillion, a figure above pre-pandemic levels.[139] Furthermore, according to the World Bank,

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[133] WTO, "Declaration on the Conclusion of Negotiations on Services Domestic Regulation," (Dec. 2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1129.pdf&Open=True.

[134] International Trade Centre (ITC), "Mainstreaming Free Trade Agreements" (2020) [ITC 2020], https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf. (last visited Jun. 27, 2022); *see also* Maya Sophie Cohen, "The Pink Trojan Horse: Inserting Gender Issues into Free Trade Agreements", [Cohen 2021] *International and Public Affairs*, Vol. 5, No. 2, 2021, p. 78.

[135] UN, "Women and the Sustainable Development Goals," UN Women Blog, https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs (last visited Jul. 23, 2022).

[136] *See* UN, "Progress on Sustainable Development Goals: the Gender Snapshot 2021," UN Women https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2021/Progress-on-the-Sustainable-Development-Goals-The-gender-snapshot-2021-en.pdf (last visited Jul. 23, 2022).

[137] Id at 23.

[138] Id at 3 and 10.

[139] UNCTAD, "Global Trade Hits Record High of $28.5 Trillion in 2021, but Likely Subdued in 2022" (Feb. 17, 2022) [UNCTAD 2022], https://unctad.org/news/global-trade-hits-record-high-285-trillion-2021-likely-be-subdued-2022 (last visited Jul. 24, 2022).

services employ a higher share of women than agriculture or manufacturing.[140] As the range of services expands, so do opportunities for women. Second, the rise in GVCs discussed in the MSME chapter represents another important work opportunity for women, particularly in the electronics and apparel sectors.[141] Additionally, GVCs also offer a higher paycheck to women, which, in turn, helps in poverty reduction.[142] Third, digital technologies can also aid women in a myriad of ways. For instance, if women businesses invest in new technologies, they can increase productivity. [143] Moreover, technology provides women with education opportunities and facilitates their access to finance.[144] While services and digital technologies are on the rise, to date, women make up 43 percent of the global agricultural labour force.[145] Hence, thinking outside the box is crucial to enhance opportunities for women in areas like non-traditional agricultural exports, such as cut flowers and fruits and vegetables, which can provide new trade opportunities for women.[146] Further, although there are various options available, barriers remain, and tailored policies and regulations need to be in place in order for women to reap the benefits of trade.

RTAs have yet to demonstrate how they can really help address women's needs. Existing RTA provisions have failed to address issues facing women, in part because gender commitments in RTAs are not specific to women's work and needs,[147] and because "almost no FTA so far contemplates how gender-related commitments could be implemented, financed, or enforced."[148] It is therefore crucial that future RTAs establish procedures and objectives, along with corresponding institutions in charge of carrying these out, to ensure that the provisions on paper actually translate into executable actions by governments. Moreover, funding needs to be allocated, and a clear timeline needs to be established to guarantee the fulfilment of these provisions. Deeper, whole-of-agreement approaches should also be considered. This chapter assesses the existing landscape of gender provisions in RTAs, while also noting other reform options that could be considered as new provisions on gender are negotiated.

A. Legal Aspects of Gender Provisions in RTAs

Commitments on gender equality are often included in RTAs at a more superficial level, for example in an agreement preamble or in non-specific articles on gender. Although gender approaches date back to the Treaty of Rome and a number of African RTAs, gender chapters

[140] Erik Churchill et al., "Women and Trade: The Role of Trade in Promoting Gender Equality," *The World Bank And the WTO 2020*, at 80 [Churchill].
[141] UNCTAD 2022, *supra* note 139.
[142] World Bank, "Trading for Development in the Age of Global Value Chains" (2020) at 79, https://openknowledge.worldbank.org/handle/10986/32437.
[143] Churchill, *supra* note 140 at 55.
[144] Id. at 81.
[145] FAO, "Women in Agriculture," https://www.fao.org/reduce-rural-poverty/our-work/women-in-agriculture/en/ (last accessed Aug. 15, 2022).
[146] *See* Kuhlmann Cambridge 2023, supra note 34, at 22.
[147] Id.
[148] Amrita Bahri, "Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Agreements Help?," 23 J. Int. Econ. Law 563, 563-82 (2020) (discussing the unique pressures faced by women at the frontline of COVID pandemic response).

became more common recently, beginning with the 2016 Chile-Uruguay FTA.[149] Other examples of RTAs with separate gender chapters include the Agreement between the United Kingdom of Great Britain and North Ireland and Japan for a Comprehensive Economic Partnership (UK-Japan EPA),[150] the Chile-Argentina FTA, the Canada-Chile FTA, the Canada-Israel FTA, and the UK-New Zealand Free Trade Agreement (awaiting ratification). Gender provisions in RTAs can take various forms, including: (i) non-discrimination provisions; (ii) reaffirmation of Parties' gender related commitments made under other agreements; (iii) commitments to undertake cooperative activities for women; (iv) establishment of gender committees to act as a focal point to facilitate exchange of information and cooperation; and (v) commitments of the parties relating to the resolution of possible disputes.[151] The WTO has created a database of existing gender provisions in RTAs.[152] Before turning to the substantive content of gender approaches, it is important to consider the location and language of gender-related provisions. Future gender approaches should also consider the context of gender-related provisions.[153]

a. Location and Formulation of Gender-Related Provisions

The location and formulation of gender-related provisions varies depending upon the agreement. Some parties, such as Chile and the EU, have created an almost formulaic structure and approach to including gender-related provisions in RTAs, whereas other agreements vary depending upon the nature of the agreement and the relevant stakeholders. As seen in Table 3 below, as of 2021, the majority of gender-related provisions can be found in the main text of an RTA, followed by post-RTA agreements/decisions on gender and side document(s) to the RTA. Examples of each of these are provided in Sections I and II. For the purposes of this section, only the structure and positioning of the gender-related provision relative to the rest of the agreement will be assessed, with the content of the gender-related provisions addressed in Section II (RTA Options).

Understanding the positioning of gender-related provisions is useful, because it highlights common approaches for negotiators, which is one of the comparative dimensions assessed in this Handbook. Understanding the range of options in integrating gender provisions in an RTA also has a bearing on the degree to which language is binding or, at least, sets the tone for an agreement or chapter.

[149] While stand-alone gender chapters are considered a recent development, in Africa, gender chapters have existed in African Regional Economic Communities, such as the COMESA Treaty and EAC Treaty since the 1990s. *See* Clair Gammage and Mariam Momodu, "The Economic Empower of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies," *African Journal of International Economic Law,* [Gammage and Momodu] Vol. 1 (2020), https://www.afronomicslaw.org/journal-file/economic-empowerment-women-africa-regional-approaches-gender-sensitive-trade-policies .

[150] The chapter is entitled "Trade and Women's Economic Empowerment," in contrast to most of the other treaties, which include a gender chapter titled "Trade and Gender." The title of the chapter in and of itself can also signal the importance parties give to this particular issue.

[151] Kuhlmann et al. 2020, *supra* note 22, at 57.

[152] José-Antonio Monteiro, "The Evolution of Gender-Related Provisions in Regional Trade Agreements," WTO, ERSD Working Paper No. 2021-8, 1-51, (2021) [Monteiro 2021].

[153] Kuhlmann and Bahri 2023, *supra* note 34.

Table 1: Structure of Gender-Related Provisions[154]

Structure of gender-related provisions	Number of RTAs
1. Main text of the RTA:	**76**
- Preamble	12
- Non-specific article(s) on gender	64
- Specific article on gender	10
- Specific chapter on gender	9
- Annex(es)	17
2. Side document(s) to the RTA:	**12**
- Side letters	1
- Joint statement(s)	1
- Protocol(s)	2
- Labour cooperation agreement	8
3. Post-RTA agreements/decisions on gender:	**13**
- Declaration(s)/recommendation(s)	4
- Decision(s)/resolution(s)/directive(s)	6
- Agreement(s)/Protocol(s)	3

Source: José-Antonio Monteiro, *The Evolution of Gender-Related Provisions in Regional Trade Agreements* (World Trade Org., ERSD Working Paper No. 2021-8, 2021)

i. Provisions in the Main Agreement Text

Preamble

As shown in Table 1 above, the inclusion of gender in an RTA preamble is a relatively common method of incorporating gender provisions in the main text of the RTA. Incorporating gender into the preamble, "establishes the intentions of the negotiators and provides, for purposes of interpretation, the parties' objectives."[155] Table 2 below provides several examples of gender-related provisions in preambles of RTAs.

There are two different methods for including gender in a preamble, either through a gender-specific sentence or as part of another sentence. For example, the Chile-Argentina FTA and Chile-Uruguay FTA both include gender-specific provisions to "PROMOTE gender mainstreaming in trade…." The Agreement establishing the AfCFTA, on the other hand, includes gender in the preamble as part of a larger provision, whereby it also recognizes "the importance of international security, democracy, human rights, gender equality, and the rule of law, for the development of international trade and economic cooperation."[156] The choice of whether to include gender as part of a larger provision can signal that gender is part of a broader vision, which may be helpful as whole-of-agreement approaches gain ground, or, alternatively, it can signal that is not a priority of the parties but rather is just one of many issues to be addressed.

Finally, some preambles also indirectly include gender-related provisions through reference to human rights agreements such as the United Nations Universal Declaration of Human

[154] Monteiro 2021, *supra* note at 152.
[155] Kuhlmann et al. 2020, *supra* note 22, at 54.
[156] AfCFTA, *supra* note 20.

Rights ("UNDHR") or the European Convention for the Protection of Human Rights ("ECHR"), both of which refer to gender equality or equality between men and women. This lack of explicit reference, however, has been criticized as indicative of a lack of interest among parties.[157] Altogether, explicitly including gender in the preamble arguably sets a tone on the importance of gender in the RTA and in the relationship between the parties.

While the location of gender-related provisions in an agreement's preamble does not impact legal interpretation, it can signal interest among the parties. For example, the Chile-Argentina FTA and Chile-Uruguay FTAs both include a gender-related provision close to the front of the agreement, signalling some degree of priority. Table 2 below contains a number of examples of gender-related provisions in RTA preambles.

Table 2: Gender-Related Provisions in Preambles to RTAs

RTA	Gender-Related Provision
AfCFTA (2018)	Recognising the importance of international security, democracy, human rights, **gender equality**, and the rule of law, for the development of international trade and economic cooperation.[158] (emphasis added)
Chile-Argentina FTA (2017)	The Government of the Argentine Republic ("Argentina") and the Government of the Republic of Chile ("Chile"), hereinafter referred to as the "Parties," decided to: … **PROMOTE** gender mainstreaming in international trade, encouraging equal rights, treatment and opportunities between men and women in business, industry and the world of work, propelling inclusive economic growth for societies in both countries;[159]
Chile-Uruguay FTA (2016)	The government of the Republic of Chile and the Eastern Republic of Uruguay, having decided to: … PROMOTE gender mainstreaming in international trade by encouraging equal rights, treatment and opportunities for men and women.[160]
CPTPP (2018)	REAFFIRM the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, indigenous rights, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest.[161]
Agreement on the European	NOTING the importance of the development of the social dimension, including equal treatment of men and women, in the European Economic Area and wishing to ensure economic and social progress and to promote

[157] Elise Steiner, "European Union's Gender-Explicit Provisions in Free-Trade Agreements and Gender Equality – An Intersectional Feminist Approach to International Law," ISRN-number: LIU-TEMA G/GSIC1-A—21/012-SE, https://www.diva-portal.org/smash/get/diva2:1573023/FULLTEXT01.pdf. at 21 [Steiner]

[158] AfCFTA, *supra* note 20, Preamble at 1.

[159] Original Spanish text reads: El Gobierno de la República Argentina ("Argentina") y el Gobierno de la República de Chile ("Chile"), en adelante las "Partes", decididos a: … PROMOVER la incorporación de la perspectiva de género en el comercio internacional, alentando la igualdad de derechos, trato y oportunidades entre hombres y mujeres en los negocios, la industria y el mundo del trabajo, propendiendo al crecimiento económico inclusivo para las sociedades de ambos países.

[160] Chile-Uruguay FTA Preamble, CL-UY, Dec. 13, 2018, ACE No 73.

[161] CPTPP, *supra* note 18, Preamble, Mar. 8, 2018.

Economic Area (EEA) (2016)	conditions for full employment, an improved standard of living and improved working conditions within the European Economic Area.[162]

Non-Specific Article(s) on Gender

The most common way in which gender-related provisions are incorporated into RTAs is through non-specific articles on gender. Non-specific articles are "any article referring to an issue or a broad range of issues that mentions gender as a particular case."[163] The majority of non-specific articles on gender are found in chapters on labour, cooperation, and development.[164] The location in the text of the non-specific articles is important, as it signals the context in which gender is considered in the RTA. For example, the AfCFTA includes a non-specific gender article under the "General Objectives" of the RTA, making clear the importance of "promot[ing] and attain[ing] sustainable and inclusive… gender equality," to the parties.[165] The importance of gender is emphasized by the fact that AfCFTA's non-specific article is coupled with the inclusion of gender in the preamble.

On the other hand, the EU-Korea FTA includes a non-specific article on gender in a broader chapter on "Trade and Sustainable Development." This inclusion of a non-specific article on gender in the Trade and Sustainable Development chapter is an approach that the EU has incorporated numerous times.[166] As a result, the location of the non-specific gender provision in the EU-Korea FTA, as compared with the AfCFTA, arguably creates the impression that the application of the gender provision is more limited in scope. When considering where to include gender provisions, whether specific or not, parties should, therefore, look not only at the content of the provision but also at the provision in relation to the RTA, ideally in comparison with other RTAs.

Table 3: Non-Specific Articles on Gender

RTA	Gender-Related Provision	Location in Text
AfCFTA (2018)	ARTICLE 3: The general objectives of the AfCFTA are to: … (e) promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties[167]	Part II: Establishment, Objectives, Principles and Scope Article 3: General Objectives
EU-Korea FTA (2011)	ARTICLE 13.4: Multilateral labour standards and agreements… 2. The Parties reaffirm the commitment, under the 2006 Ministerial Declaration of the UN Economic and	Chapter 13: Trade and Sustainable Development

[162] Agreement on the European Economic Area, Preamble, Jan. 1, 1994.
[163] Monteiro 2021, *supra* note at 14.
[164] Id.
[165] AfCFTA, *supra* note 20, Art. 3(e).
[166] *See* Association Agreement between the European Union and the European Atomic Energy Community and third Member States of the one part, and Georgia, of the other part; *see also* European Union-Armenia Comprehensive and Enhanced Partnership Agreement.
[167] AfCFTA, *supra* note 20, Art. 3(e).

	Social Council on Full Employment and Decent Work, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people.	

Specific Articles on Gender

Specific articles on gender refer explicitly to gender equality for women.[168] The inclusion of specific articles on gender is a relatively recent phenomenon and is still not as common as non-specific gender articles. An exception to the rule is the Treaty of the Economic Community of West African States ("ECOWAS"), which, as shown below, was signed in 1993.

Aside from their content, specific articles on gender provide the parties with a larger landscape to establish the impact of gender on the relevant agreement. As with the other categories of gender-related provisions, the location of the specific article on gender is noteworthy. As seen in Table 3, the EEA and ECOWAS include specific gender articles in chapters on Social Policy; and Human Resources, Information, and Social and Cultural Affairs respectively. In the USMCA on the other hand, gender-specific articles are located within the agreement's Labour Chapter. By including the gender provision in the Labour Chapter in the USMCA, it could appear that the intent of the drafters was to limit the impact of these provisions to labour issues only. The recent EU-New Zealand FTA includes a gender article in the Trade and Sustainable Development Chapter, highlighting another drafting possibility that could have broader application.

Table 4: Specific Articles on Gender[169]

RTA	Gender-Related Provision	Location in Text
Agreement on the European Economic Area (EEA) (2016)	ARTICLE 69: 1. Each Contracting Party shall ensure and maintain the application of the principle that men and women should receive equal pay for equal work....	Part V on Horizontal Provisions Relevant to the Four Freedoms, Chapter I on Social Policy
ECOWAS Treaty (1993)	ARTICLE 63: WOMEN AND DEVELOPMENT 1. Member States undertake to formulate, harmonies, co-ordinate and establish appropriate policies and mechanisms, for enhancement of the economic, social and cultural conditions of women....	Chapter XI on Co-operation in Human Resources, Information,

[168] Steiner, *supra* note 157 at 5.

[169] Note: Table 4 contains excerpts from relevant articles.

		Social and Cultural Affairs
USMCA (2020)	ARTICLE 23.9: Parties recognize the goal of eliminating discrimination in employment and occupation and support the goal of promoting equality of women in the workplace….	Chapter 23: Labour
EU-New Zealand Free Trade Agreement (2022)	ARTICLE 19.4: 1. The Parties recognise the need to advance gender equality and women's economic empowerment and promote a gender perspective in the Parties' trade and investment relationship. Moreover, they acknowledge the important current and future contribution by women to economic growth through their participation in economic activity, including international trade. Accordingly, the Parties underline their intention to implement the provisions of this Agreement in a manner that promotes and enhances gender equality…	Chapter 19 on Trade and Sustainable Development

Specific Chapter on Gender

Specific chapters on gender refer to chapters within an RTA that predominantly deal with gender equality and/or women.[170] As with specific articles on gender, gender chapters are also considered to be a recent development in RTAs. However, this is a misconception, since gender chapters have existed in African RTAs like the COMESA Treaty and EAC Treaties since the 1990s.[171] More recently, since 2016, Chile has taken the lead on including gender chapters in its RTAs, such as in the Uruguay-Chile FTA (2016), the Argentina-Chile FTA (2017), the Brazil-Chile FTA (2018), the Ecuador-Chile FTA (2020), the Chile-Paraguay FTA (2021),[172] with gender also included in provisions in the Digital Economy Partnership Agreement ("DEPA") between Singapore, Chile, and New Zealand (2020).[173] Further, Chile is in the process of negotiating an FTA with the EU, which commentators predict may contain one of the most comprehensive gender chapters to date,[174] even though the EU's practice thus far has been to include gender in broader Sustainable Development chapters.

[170] Steiner, *supra* note 157 at 5.
[171] Gammage and Momodu, *supra* note 149, at 33.
[172] Marcela Otero, Head of Inclusive Trade Department, Chilean Ministry of Foreign Affairs, "Chilean Experience with Gender Chapters in FTAs," https://www.wto.org/english/tratop_e/womenandtrade_e/pres_chl_26feb21_e.pdf
[173] Digital Economy Partnership Agreement (DEPA), Singapore Ministry of Trade and Industry, https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement (last visited Jun. 29, 2022).
[174] Amrita Bahri, BKP Economic Advisors, "Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples," WTO Chairs, https://wtochairs.org/sites/default/files/7.%20Gender%20mainstreaming%20in%20FTAs_final%20%286%29.pdf

As discussed above, the location of a gender chapter is relevant when it comes to the overall goals of the parties and what an agreement communicates vis-à-vis the rest of the RTA. As shown in Table 4, gender chapters all tend to be included towards the middle to the end of an RTA, with the Canada-Chile FTA gender chapter outside of the main text in an appendix. Overall, while the content of the gender chapter is the most important when setting the standards and obligations of the parties, the location of the gender chapter can also signal the intention of the Parties.

Table 5: Specific Chapters on Gender[175]

RTA	Gender-Related Chapter	Location in Text
Canada-Israel FTA (2018)	TRADE AND GENDER ARTICLE 13.1: GENERAL PROVISIONS 1. The Parties acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth and the key role that gender-responsive policies can play in achieving sustainable economic development […]	Chapter 13
Canada-Chile FTA (2019)	TRADE AND GENDER ARTICLE N BIS-01: GENERAL PROVISIONS 1. The Parties acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth, and the key role that gender-responsive policies can play in achieving sustainable socioeconomic development […]	Appendix II – Chapter N bis
Chile-Ecuador Economic Complementation Agreement (2020)	TRADE AND GENDER ARTICLE 18.1. GENERAL PROVISIONS 1, The Parties recognize the importance of gender mainstreaming in promoting inclusive economic growth, and the fundamental role that gender policies can play in achieving sustainable economic development, which aims, inter alia, to distribute the benefits among the entire population by providing equal opportunities for men and women in the labour market, business, trade and industry.[176] […]	Chapter 18
United Kingdom-Japan Comprehensive Economic Partnership (2020)	TRADE AND WOMEN'S ECONOMIC EMPOWERMENT ARTICLE 21.1 WOMEN AND THE ECONOMY	Chapter 21

[175] Note: Table 5 contains excerpts from relevant articles.
[176] Economic Complementation Agreement No. 75 between the Republic of Chile and the Republic of Ecuador Art. 18.1(1).

	1. The Parties recognise the importance of enhancing opportunities for women within their territories, including workers and business owners, to participate equitably in the domestic and global economy.[177] […]	
COMESA Treaty (1993)	WOMEN IN DEVELOPMENT AND BUSINESS ARTICLE 154 Role of Women in Development The Member States agree that women make significant contribution towards the process of socio-economic transformation and sustainable growth and that it is impossible to implement effective programmes for rural transformation and improvements in the informal sector without the full participation of women […].[178]	Chapter 24
EAC Treaty (1999)	ENHANCING THE ROLE OF WOMEN IN SOCIO-ECONOMIC DEVELOPMENT ARTICLE 121 The Role of Women in Socio-economic Development The Partner States recognise that women make a significant contribution towards the process of socio-economic transformation and sustainable growth and that it is impossible to implement effective programmes for the economic and social development of the Partner States without the full participation of women.	Chapter 22

Annex(es) and Side Agreements

Some parties opt to include gender-related provisions in the annexes to an RTA. An example of this, as shown in Table 6, is the 2014 Agreement on Labour and Cooperation Between Canada and Honduras, in which the gender provision is not only in an annex but it is also part of a side agreement to the RTA.

[177] Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership Art. 21.1(1), Oct. 23, 2020.
[178] Treaty Establishing the Common Market for Eastern and Southern Africa Art. 154, Oct. 31, 2000.

Table 6: Gender Provisions in RTA Annexes

RTA	Gender-Related Provision	Location in Text
Agreement on Labour Cooperation Between Canada And Honduras (2014)	COOPERATIVE ACTIVITIES 1. The Parties have established the following list of areas for cooperative activities that they may develop pursuant to Article 9 (Cooperative Activities): … (i) gender: gender issues, including the elimination of discrimination in respect of employment and occupation.[179]	Annex 1

As this example highlights, parties may also include gender provisions in side agreements to an RTA. For example, Canada has incorporated gender in RTA side agreements on labour cooperation with Jordan and Costa Rica. As demonstrated previously, approaching gender in the context of labour is fairly common in the current landscape of gender-related provisions.

The benefits of including gender-related provisions in side agreements include giving the parties an opportunity to address gender at a later point outside of the negotiation of the main agreement, providing the parties with an additional possibility of raising gender in an environment in which there are fewer competing priorities. That being said, as previously addressed, where gender-related provisions are included further down in an agreement, including in a separate side agreement, it arguably creates an impression that gender is not at the forefront of the parties' priorities.

Table 7: Gender Provisions in RTA Side Agreements

RTA	Gender-Related Provision	Location in Text
Protocol 38C on the EEA Financial Mechanism (2016) Side Agreement to the EEA	ARTICLE 10 The following shall apply to the implementation of the EEA Financial Mechanism: 1. The highest degree of transparency, accountability and cost efficiency shall be applied in all implementation phases, as well as principles of good governance, partnership and multi-level governance, sustainable development, and equality between men and women and non-discrimination.[180]	End of protocol
Canada-Jordan Agreement on Labour	COOPERATIVE ACTIVITIES The Parties have established the following indicative list of areas for cooperative activities that they may develop pursuant to Article 8:	Annex I

[179] Agreement on Labour Cooperation between Canada and the Republic of Honduras Annex 1(i), Oct. 1, 2014.
[180] Protocol 38C of the EEA Enlargement Agreement, Jan. 8, 2016, EEA Protocol 38C.

Cooperation (2012) Side agreement to the Canada-Jordan FTA	… (k) gender: gender issues, including the elimination of discrimination in respect of employment and occupation;	
Canada-Costa Rica Agreement on Labour Cooperation (2001) Side Agreement to Canada-Costa Rica FTA	Annex 1 - Fundamental Principles and Rights at Work The Parties are committed to respecting and promoting the principles and rights recognized in the ILO Declaration on Fundamental Principles and Rights at Work. The Parties shall reflect these in their laws, regulations, procedures and practices: … equal pay for women and men.	Annex 1

ii. Post-RTA Agreements/Decisions on Gender

Finally, gender-related provisions may be included in post-RTA agreements. An example of this is the Global Trade and Gender Arrangement ("GTGA") (2020) between Canada, Chile, and New Zealand. Post-RTA agreements can help build upon and supplement existing gender-related provisions in RTAs.[181] This provides parties with another opportunity to add to previously negotiated RTAs with an exclusive focus on gender.

Table 8: Gender Provisions in Post-RTA Agreement/Decisions on Gender

RTA	Gender-Related Provision	Location in Text
Global Trade and Gender Arrangement (Canada, Chile, New Zealand) (2020)	1. General Understandings a) In concluding this Arrangement on Trade and Gender, the Participants: i. acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth, and the key role that gender-responsive policies can play in achieving sustainable development [. . .]	Entire agreement

B. RTA Options for Gender

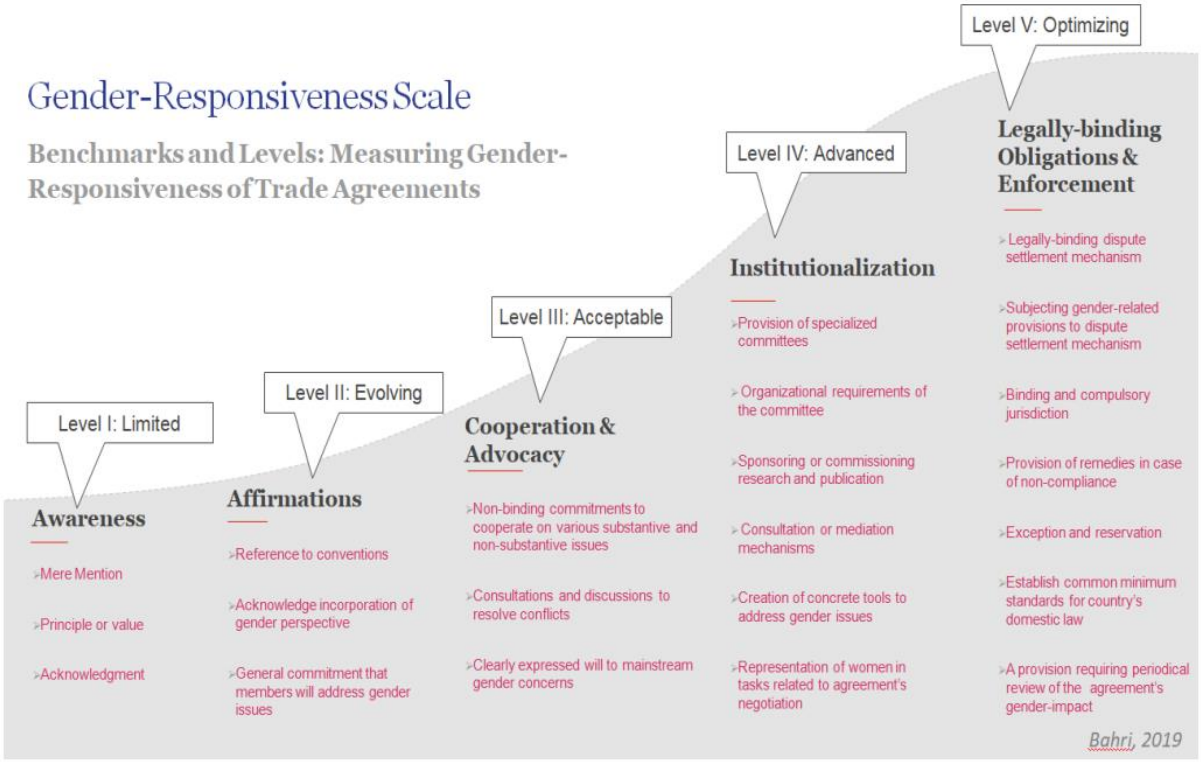
The current landscape of options for gender provisions in RTAs can range from base-level limited acknowledgments to, at least on a surface level, legally binding obligations with enforcement. For the purposes of this chapter, five legal categories will be assessed: (i) Acknowledgements of a link between gender and trade; (ii) Reaffirmations of the Parties' gender related commitments made under other agreements; (iii) Commitment to undertake cooperative activities for women; (iv) Establishment of a Gender Committee to act as a focal point to facilitate exchange of information and cooperation; and (v) Commitments of the parties relating to the resolution of possible disputes and implementing of gender-related provisions into domestic legislation. The goal in this section is to present to negotiators with

[181] Monteiro 2021, *supra* note at 2.

options drawn from current models available in the international trade arena, and the final section of this chapter discusses emerging models that could also be considered.

A methodology for textually assessing RTAs with respect to gender responsiveness has been developed by Dr. Amrita Bahri (the Gender-Responsiveness Scale in Figure 7 below). Under this scale, gender-responsiveness ranges from Level I, which includes RTAs with limited acknowledgements of gender, to Level V, which includes legally-binding obligations and enforcement. This tool has been adopted by the International Trade Centre, a joint WTO-UN initiative and is useful for assessing existing gender provisions in RTAs, as it also speaks to the binding nature of gender-related provisions in an RTA.

Figure 7: Gender-Responsiveness Scale (Bahri)[182]



Source: Amrita Bahri, *Measuring the Gender Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework*, 14 J. GLOB. TRADE & CUST

Going forward, as RTAs go beyond the substantive areas noted below, additional considerations should also be considered, with respect to context of gender provisions (see Katrin Kuhlmann's contextual Inclusive Trade Approach) and impact of whole-of-agreement approaches.[183]

[182] *See* Amrita Bahri, "Measuring the Gender Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework," [Bahri 2019] 14 J. GLOB. TRADE & CUST. 517, 517-527 (2019) at 9.
[183] Kuhlmann 2021, *supra* note 30.

a. Acknowledgement Provisions

Acknowledgement provisions are the most common gender-responsive legal provisions in the current RTA landscape, and they also provide the lowest level of gender responsiveness (Level I in the Gender Responsiveness Scale, including "a mere mention of the term women/female/girl/gender (or a related term) in the text, or an acknowledgment of the role of women in trade and development").[184] Even RTAs that include more advanced gender-related provisions often include a provision in the preamble to convey the intentions of the parties.[185]

While they do not create any legally binding effect, acknowledgement provisions can be useful in signalling the importance of gender equality in trade. The legal options below also highlight a range of specificity in these provisions. On one hand, making a broad statement recognizing the important of gender equality in international trade can signal the parties' intention to include gender considerations in the interpretation of an entire RTA. However, providing no specificity arguably makes the parameters of the provision unclear and may result in having little to no impact on the RTA's implementation and the parties' trade relations.

When considering acknowledgement provisions, there are a range of options. For example, parties could state their intention to recognize the importance of gender equality more broadly, as is the case with Example Option A below. Example Option B recognizes gender-equality in achieving socio-economic development, providing a brief description of the parameters of this recognition "equitable opportunities for the participation of women and men in business, industry, and the labour market." This is relatively broad but still more specific than recognizing gender-equality in a more general context. Acknowledgement provisions can also be crafted in the context of a specific sector (e.g., services or in agriculture). Example Option C below specifies the parties' agreement to recognize gender equality in promoting digital trade.

Example Options on Non-Discrimination

Example Option A: Recognizing the Importance of Gender Equality for Development of International Trade

Recognising the importance of international security, democracy, human rights, gender equality, and the rule of law, for the development of international trade and economic cooperation.[186]

Source: AfCFTA Preamble

Example Option B: Acknowledging the Role of Gender Responsive Policies in Achieving Socio-economic Development

[184] *See* Bahri, *supra* note 182 at 10.
[185] *See* AfCFTA *supra* note 20 (emphasis added).
[186] AfCFTA, *supra* note 20, Preamble, May 30, 2019 (emphasis added).

1. The Parties acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth, and the key role that gender-responsive policies can play in achieving sustainable socioeconomic development. Inclusive economic growth aims to distribute benefits among the entire population by providing equitable opportunities for the participation of women and men in business, industry and the labour market.

Source: Article N BIS-01, Canada-Chile FTA (2019)

Example Option C: Recognizing the Importance of Gender Equality in Promoting Digital Trade

1. The Parties have a shared vision to promote secure digital trade to achieve global prosperity and recognise that cybersecurity underpins the digital economy.

2. The Parties recognise the importance of: […]

(c) workforce development in the area of cybersecurity, including possible initiatives relating to mutual recognition of qualifications, diversity and equality.[187]

Source: Article 34, Australia-Singapore Digital Economy Agreement (Cybersecurity)

b. Reaffirmations of the Parties' Gender Related Commitments

Reaffirmations of parties' prior commitments are also a common formulation in gender provisions, similar to some of the examples discussed in the environment and labour chapters. Reaffirmations are used to reiterate the importance of gender-responsive objectives such as "achieving women's empowerment, reduction of gender gaps and gender-based discrimination, and reduction of barriers that women face in trade and commerce." [188] As with Acknowledgement Provisions, reaffirmations are criticized for not creating any new binding legal commitments. Instead, reaffirmations are usually "best-endeavour promises," that do not provide for a mechanism to ensure the implementation of such promises.[189]

As seen below in Example Options A and B, reaffirmations can restate the parties' commitments to international instruments, such as the SDGs (Example Option A below) or the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), as shown in Example Option B below. Example Option C below, which is the standard approach of the EU, reaffirms commitment to upholding the ILO Conventions, including the protections on non-discrimination.[190]

[187] Australia-Singapore Digital Economy Agreement Art. 34, Dec. 8, 2020 (emphasis added).
[188] *See* Bahri 2022, *supra* note 23 at 16.
[189] Ibid.
[190] Zamfir Ionel, *"*Labour Rights in EU Trade Agreements: Towards Stronger Enforcement*"* (2022) 1-12 (European Parliamentary Research Service, Briefing Paper PE 698.800); EU Vietnam FTA.

Negotiators could also consider provisions that combine multiple affirmations. Although reaffirmations do not create new obligations, they do reaffirm prior commitments and signal areas of common ground on trade and gender.

Examples Options on Reaffirmations of the Parties' Gender-related Commitments

Example Option A: Link to SDGs

2. Parties recall Goal 5 of the Sustainable Development Goals of the United Nations 2030 Agenda (UNSDG 2030) for Sustainable Development, to achieve gender equality and empower all women and girls.

Source: Article N BIS-01 Canada-Chile FTA

Example Option B: Link to Gender-Specific International Commitments/Agreement

1. Parties **reaffirm** their commitment to effectively implement the obligations under the **CEDAW**.

2. Parties **reaffirm** their commitments to implementing **other international agreements** addressing gender equality or women's rights to which they are parties. Article N bis-03.

Source: Article N BIS-02 Canada-Chile FTA

Example Option C: Reference to ILO Conventions

The Parties, in accordance with their obligations as members of the ILO, reaffirm their commitments to respect, promote, and realise in good faith and in accordance with the ILO Constitution, the principles concerning the fundamental rights which are the subject of the fundamental ILO Conventions, namely:

(a) the freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.[191]

Source: Article 286, Agreement establishing an Association between the European Union and its Member States, on the one hand and Central America on the other.

[191] Agreement Establishing an Association between the European Union and its Member States, on the One Hand and Central America on the Other Art. 286, Dec. 15, 2012; *see* FTA Between the European Union and the Republic of Singapore (Trade and Sustainable Development – Labour Aspects), Nov. 14, 2019.

c. Commitments to Undertake Cooperative Activities

Cooperation provisions, or commitments to undertake cooperative activities, are also quite common among gender provisions, as is also true with environment, labour, and MSME provisions. The majority of EU provisions on gender, for example, focus on cooperation activities.[192] These provisions represent a middle ground under the Gender-Responsiveness Scale.

Cooperation provisions are generally couched in non-binding language, with the parties cooperating and coordinating through a set of activities including dialogue, seminars, and conferences. Regional differences exist as well, and cooperation provisions are sometimes context-specific. The EU tends to focus its cooperation activities on education and training, while the United States and Canada often opt for cooperation activities such as seminars and dialogue to eliminate gender discrimination.[193] Overall, the content of cooperation provisions in RTAs vary based on scope, set of specific activities, reference to international standards/agreements, economic development, and capacity building, amongst other.

When considering cooperation provisions, parties could choose between relatively loose language or more specific language. Example Option A, taken from the AfCFTA, contains a broad and loosely defined cooperation provision that only requires the parties to cooperate and exchange best practices and does not specifically apply such activities to gender. Example Option B below is also not gender-specific, but it extends the cooperation provision to political dialogue. This sort of cross-cutting cooperation provision can, on one hand, create a less focused response, but, on the other hand, it provides the parties with the opportunity, if used strategically, to push issues like gender to all aspects of the RTA.

While there are benefits to including broad cross-cutting cooperation provisions, more specific and tailored provisions exist as well. For example, Example Option C below, creates a committee that meets annually and examines the progress of the implementation of the gender chapter.[194] The EU has even gone a step further under the EU-Central American FTA, as shown in Legal Option D, and has provided regional funds to assist and promote entrepreneurship among women.[195] Finally, cooperation provisions can reference work underway at the multilateral level (e.g., WTO and OECD), as shown in Example Option E.

Examples Options for Cooperation on Gender

Example Option A: Cross-Sectional Non-Gender Specific Cooperation Activities

1. The Secretariat, working with State Parties, RECs and partners, shall coordinate and provide technical assistance and capacity building in trade and trade related issues for the implementation of this Protocol.
2. State Parties agree to enhance cooperation for the implementation of this Protocol.

[192] Steiner, *supra* note 157 at 21.
[193] Rohini Acharya, "Looking to Regional Trade Agreements for Lessons on Gender Equality," CIGI BLOG (Apr. 4, 2018), *available at* https://www.cigionline.org/articles/looking-regional-trade-agreements-lessons-gender-equality/
[194] Canada-Chile FTA Art. N bis-04, May 5, 2017.
[195] Steiner, *supra* note 157 at 25; *see also* EU – Central American FTA, Art. 24(3).

3. The Secretariat shall explore avenues to secure resources required for these programmes.[196]

Source: Article 29 AfCFTA, (Technical Assistance, Capacity Building and Cooperation)

Example Option B: Cross-Sectional Non-Gender Specific Cooperation Activities

1. The Parties agree that political dialogue shall cover all aspects of mutual interest either at the regional or international levels.

2. The political dialogue between the Parties shall prepare the way for new initiatives for pursuing common goals and for establishing common ground in areas such as: regional integration; the rule of law; good governance; democracy; human rights; promotion and protection of the rights and fundamental freedoms of indigenous peoples and individuals, as recognised by the United Nations Declaration on the Rights of Indigenous Peoples; equal opportunities and gender equality; the structure and orientation of international cooperation; migration; poverty reduction and social cohesion; core labour standards; the protection of the environment and the sustainable management of natural resources; regional security and stability, including the fight against citizens' insecurity; corruption; drugs; transnational organised crime; the trafficking of small arms and light weapons as well as their ammunition; the fight against terrorism; the prevention and peaceful resolution of conflicts.

3. Dialogue under Part II shall also cover the international conventions on human rights, good governance, core labour standards and the environment, in accordance with the Parties' international commitments and raise, in particular, the issue of their effective implementation.

4. The Parties may agree at any time to add any other topic as an area for political dialogue.[197]

Source: Art. 13, EU-Central American Association Agreement (Areas).

Example Option C: Gender-focused Cooperation Activities with Specific Goals and Parameters

1. The Parties acknowledge the benefit of sharing their respective experiences in designing, **implementing, monitoring and strengthening policies and programs to encourage women's participation in national and international economies**. Accordingly, and subject to the availability of resources, the Parties shall develop programs of cooperative activities based on their mutual interests.

2. The aim of the cooperation activities will be to improve the **capacity and conditions for women, including workers, businesswomen and entrepreneurs, to access and fully benefit from the opportunities created by this Agreement. These activities shall be carried out with inclusive participation of women.**

[196] AfCFTA, *supra* note 20, Art. 29.

[197] *See also* EU-Central American Association Agreement Art. 13.

3. The Parties shall encourage the involvement of their respective government institutions, businesses, labour unions, education and research organizations, other non-governmental organizations, and their representatives, as appropriate, in the cooperation activities decided upon by the Parties.

4. Areas of cooperation may include:

(a) encouraging capacity-building and skills enhancement of women at work and in business;

(b) promoting financial inclusion for women, including financial training, access to finance, and financial assistance;

(c) advancing women's leadership and developing women's networks in business and trade;

(d) developing better practices to promote gender equality within enterprises;

(e) fostering women's representation in decision making and positions of authority in the public and private sectors, including on corporate boards;

(f) promoting female entrepreneurship and women's participation in international trade, including by improving women's access to, and participation and leadership in, science, technology and innovation;

(g) conducting gender-based analysis;

(h) sharing methods and procedures for the collection of sex-disaggregated data, the use of indicators, and the analysis of gender-focused statistics related to trade; and

(i) other issues as decided by the Parties.

5. The Parties may carry out activities in the cooperation areas set out in paragraph 4 through various means as they may decide, including workshops, internships, collaborative research, specific exchanges of specialised technical knowledge and other activities as decided by the Parties.

6. The Trade and Gender Committee established by Article 13.4 may refer any proposed cooperation activities related to labour or labour market development to the Labour Ministerial Council established by Article 12.7 (Labour Ministerial Council) for its consideration.[198]

Source: Article 3.3 Canada-Israel FTA (2018)

Example Option D: Gender-focused Cooperation Activities with Attached Financial Mechanisms

3. The Parties shall pursue policies and measures with a view to attaining the objectives referred to above. These measures may include innovative financial mechanisms with the objective of contributing to the achievement of the Millennium Development Goals and other internationally agreed development objectives, in conformity with the commitments of the Monterrey Consensus and subsequent fora.

[198] FTA between The Government of Canada and The Government of The State of Israel Art. 13.6(1), Jan. 1, 1997.

Source: Art. 24(3), EU-Central American Association Agreement (Areas).

Example Option E: Gender-focused Cooperation at a Multilateral Level

9. Acknowledging the importance of the work on trade and gender being carried out at the multilateral level, the Parties shall cooperate in international and multilateral fora, including at the WTO and OECD, to advance trade and gender issues and understanding, including, as appropriate, through voluntary reporting as part of their National Reports during the WTO trade policy review mechanism.

Source: Art. 19.4.9, EU-New Zealand FTA

d. Establishment of Institutions Including Gender Committees

Some parties have gone beyond cooperation activities to establish institutional structures in the form of gender committees to act as a focal point to facilitate the exchange of information and cooperation. This is also an approach that appears throughout this Handbook.

Based on the Gender Responsiveness Scale, an effective gender committee provision would need to include (i) establishment of gender committees overseeing gender focused actions; (ii) requirements and functions of the committee; (iii) engagement in gender and trade research; (iv) identification of processes to conduct ex-ante or ex-post gender-focused impact assessments; (v) creation of tools addressing gender issues; and (vi) establishment of consultation or mediation mechanisms to resolve conflicts arising from gender-related concerns.[199] None of the current RTAs satisfy all these requirements, although the example options below provide for gender committees that satisfy some of these criteria.

The level of commitment of institutionalization varies across RTAs. For example, Example Option A, establishes a Trade and Gender Committee with the mandate to meet annually review implementation of gender-related aspects of the RTA. Under Example Option B, it is left up to the parties to develop reporting mechanisms.

Another factor to consider for institutional provisions is who will be appointed to the gender committee. Instead of designating government representatives responsible for trade, Example Option C establishes a committee to be composed of "relevant representatives of each party" and additionally provides for appointment of a Coordinator.

[199] Bahri 2019, *supra* note 182 at 14.

Example Options on Institutionalization Through Gender Committees

Example Option A: Establishment of the Trade and Gender Committee with Annual Review

1. Establishes a Trade and Gender Committee composed of representatives from each Party's government institutions responsible for trade and gender.

2. Committee shall determine, organize and facilitate the cooperation activities under Article N bis-03, facilitate the exchange of information between the Party's experiences, discuss joint proposals, invite international donor institutions, private sector entities, NGOs to assist with development and implementation of cooperation activities, at request of a Party consider and discuss any matter arising relating to the interpretation and application of this Chapter.

3. Committee shall meet annually to consider any matter arising under this Chapter. […]

8. Within two years of the first meeting of the Committee, the Committee shall review and implementation of this Chapter and shall report to the Commission

9. Parties to develop mechanisms to report publicly on the activities developed under this Chapter.

Source: Canada-Chile FTA, Article N BIS-04 (2019)

Example Option B: Establishment of the Trade and Gender Committee with Discretion on Reporting

4. Establishes a Gender Committee to be composed of governmental representatives of each Party responsible for relevant gender and trade matters. Tasks include facilitating the exchange of information between Parties regarding the formulation and implementation of national policies aimed at creating gender equality.

5. Parties to make all possible efforts through dialogue, consultations and cooperation to resolve matters relating to the interpretation and application of the Chapter.

Source: Chile-Uruguay FTA, Article 14 (2016)

Example Option C: Designation of Coordinator as Government Point of Contact

1. The Parties hereby establish a Trade and Gender Committee composed of relevant representatives from each Party.

2. The Committee shall normally convene once a year or as decided by the Parties, in person or by any other technological means available, to consider any matter arising under this Chapter. The Committee shall:

(a) determine, organise and facilitate the cooperation activities and exchange of information under Article 13.3;

(b) report, and make recommendations as appropriate, to the Commission for its consideration on any matter related to this Chapter;

(c) discuss any matter of common interest, including joint proposals to support policies and other initiatives on trade and gender;

(d) consider matters related to the implementation and operation of this Chapter; and

(e) carry out other duties as determined by the Parties.

3. In the performance of its duties, the Committee may work with and encourage other committees, subcommittees, working groups and other bodies established under this Agreement to integrate gender-related commitments, considerations and activities into their work.

4. The Committee may request that the Commission refer work to be conducted under this Article to any other committees, subcommittees, working groups or other bodies established under this Agreement.

5. The Committee may seek the advice of a non-governmental person or group, including by inviting an expert to participate in meetings.

6. The Committee shall consider undertaking a review of the implementation of this Chapter, with a view to improving its operation and effectiveness, within five years of the entry into force of this Agreement, and periodically thereafter as the Parties decide.

7. Each Party may report publicly on the activities developed under this Chapter.

8. To facilitate communication between the Parties regarding the implementation of this Chapter, each Party designates the Coordinator appointed pursuant to Article 18.2 (Coordinators) as its point of contact for the purposes of this Chapter.

Source: Canada-Israel FTA, Article 13.4 (Trade and Gender Committee) (2018)

e. Dispute Resolution and Domestic Implementation

The most advanced gender-related options in existing RTAs, based on the Gender Responsiveness Scale, are those that create legally binding obligations and include enforcement mechanisms.[200] Such commitments can be achieved via two different means: (i) through impacting domestic law and policy; and (ii) through creating binding enforcement mechanisms. Very few of the RTAs in the current international sphere meet this benchmark, and only a few have made significant steps towards creating legally binding obligations and enforcement. Examples in this regard include the COMESA Treaty and the SADC Protocol on Gender and Development.[201]

[200] Id.

[201] Treaty Establishing the Common Market for Eastern and Southern Africa (Nov. 5, 1993), Articles 154 and 155 and SADC Protocol on Gender and Development, Aug. 17, 2008 Articles 6, 18, 20, and 22.

i. Impacting Domestic Law and Policy and Minimum Legal Standards

One way in which parties can achieve a more binding legal approach is through creating gender-related provisions that impact domestic law. Existing RTAs show steps towards that benchmark either through the incorporation of minimum legal standards or international conventions that include gender-related provisions into domestic law or through the direct incorporation of gender-related activities into domestic law. Example Options A and B below, the most binding of the options, are examples of minimum legal standards taken from the COMESA Treaty and SADC Protocol on Gender and Development, respectively. Example Option A calls for greater representation of women in decision-making, along with elimination of discriminatory rules and customs. Example Option B also calls for minimum legal standards, including on gender-based violence. Notably, the COMESA Treaty and SADC Protocol on Gender and Development contain further minimum legal standards, including "the elimination of laws and regulations that hinder women's access to credit" (COMESA Treaty, Art. 155) and "review of all policies and laws that determine access to, control of, and benefit from, productive resources by women in order to . . . ensure that women have equal access and rights to credit, capital, mortgages, security and training as men . . . " (SADC Protocol on Gender and Development, Art. 18). Both the COMESA Treaty and SADC Protocol on Gender and Development also contain binding enforcement mechanisms.

Example Option C is an example of incorporating international conventions, whereby the parties agree to reflect the rights contained in the ILO Declaration on Fundamental Principles and Rights at Work in their "laws, regulations, procedures and practices," which includes equal pay for men and women. In the case of Example Option B, the parties have already signed the relevant ILO Declaration but are now reinforcing that obligation through the RTA.

Example Options D and E provide for the incorporation of gender-equality related provisions into domestic law. For example, Example Option D provides for the "bolstering and developing Egyptian family planning and mother and child protection programs,"[202] and Example Option E provides for the "promotion of the role of women in social and economic development, particularly through education and the media, in line with Jordanian policy in this area.[203] While the wording of both provisions is arguably more aspirational than enforceable, it does show how RTAs could create more actionable commitments by directly impacting domestic law and policy.

Examples Options on Binding Legal Approaches for Impacting Domestic Law and Policy

Example Option A: Minimum Legal Standards and Women's Participation

[. . .] Member States shall through appropriate legislative and other measures (emphasis added):

(a) promote the effective integration and participation of women at all levels of development especially at the decision-making levels;

[202] EU-Egypt Association Agreement Art. 65, Sept. 30, 2004.
[203] EU-Jordan Association Agreement Art. 82.

(b) eliminate regulations and customs that are discriminatory against women and specifically regulations and customs which prevent women from owning land and other assets; [. . .]

COMESA Treaty, Article 154

Example Option B: Minimum Legal Standards

1. State Parties shall review, amend and or repeal all laws that discriminate on the basis of sex by 2015.

2. State Parties shall enact and enforce legislative and other measures to:

(a) ensure equal access to justice and protection before the law;
(b) abolish the minority status of women by 2015;
(c) eliminate practices which are detrimental to the achievement of the rights of women by prohibiting such practices and attaching deterrent sanctions thereto; and
(d) eliminate gender-based violence.

SADC Protocol on Gender and Development, Article 6

Example Option C: Implementing an ILO Declaration into Domestic Law

The Parties are committed to respecting and promoting the principles and rights recognized in the ILO *Declaration on Fundamental Principles and Rights at Work*. The Parties shall reflect these in their laws, regulations, procedures and practices: […] equal pay for women and men.[204]

Source: Agreement on Labour Cooperation Between the Government of Canada and the Government of the Republic of Costa Rica, Annex I (Fundamental Principles and Rights at Work)

Example Option D: Bolstering Programs Affecting Women Under Domestic Law

With a view to consolidating co-operation between the Parties in the social field, projects and programmes shall be carried out in any area of interest to them. […]

(b) promoting the role of women in economic and social development;

(c) bolstering and developing Egyptian family planning and mother and child protection programmes.[205]

Source: EU-Egypt Association Agreement, Article 65 (2001)

[204] Agreement on Labour Cooperation Between the Government of Canada and the Government of the Republic of Costa Rica Annex I, Nov. 2002 [hereafter Canada-Costa Rica Free Trade Agreement].
[205] Euro-Mediterranean Agreement establishing an Association Between the European Communities and their Member States, of the one part, and The Arab Republic of Egypt, of the other part Art. 65, Jun. 25, 2001.

Example Option E: Promotion of the Role of Women in Social and Economic Development Through Domestic Law and Policy

2. To consolidate social cooperation between the Parties, actions and programmes shall be undertaken on any issue of interest to them. […]

(c) promotion of the role of women in social and economic development, particularly through education and the media, in line with Jordanian policy in this area.[206]

Source: EU-Mediterranean Agreement (Jordan), Article 82 (2002)

ii. Enforcement (Dispute Resolution)

Many gender provisions explicitly remove gender from the purview of dispute resolution clauses, falling short of creating fully binding obligations, as seen in the Canada-Chile FTA.[207] However, this is a more recent trend, and older RTAs often do not contain such carveouts. As noted above, the COMESA Treaty and SADC Protocol on Gender and Development, the latter of which is included below as Example Option A below (referral to SADC Tribunal following attempt to amicably resolve dispute), are also notable exceptions.

The Canada-Chile FTA exempts matters arising under the Trade and Gender Chapter from dispute resolution and is set out as Example Option B below. On the other hand, under Example Option C, the Canada-Israel FTA provides that gender-related disputes under the purview of the RTA may be subject to dispute resolution with the consent of the Parties. Therefore, at least on the surface level, it is arguably a large step towards creating enforceable legal options. However, it is significant that both parties must consent to the dispute resolution mechanism's jurisdiction.[208] As such, there is hardly any incentive for the offending party to consent to dispute settlement, thus making it "a cosmetic attempt" to provide real enforcement.[209]

Examples Options on Dispute Resolution

Example Option A: Binding Dispute Resolution Following Attempt at Amicable Resolution

1. State Parties shall strive to resolve any dispute regarding application, interpretation or implementation of the provisions of this Protocol amicably.

2. Any dispute arising from application, interpretation or implementation of the provisions of this Protocol which cannot be settled amicably, shall be referred to the SADC Tribunal, in accordance with Article 16 of the Treaty.

Source: SADC Protocol on Gender and Development, Article 36

[206] Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part Art. 82, May 15, 2002.
[207] Canada-Israel FTA, Article N *bis-06.*
[208] Bahri 2019, *supra* note 182 at 18.
[209] Id.

Example Option B: Trade and Gender Exempted from Dispute Settlement

A Party shall not avail itself of the dispute resolution mechanism provided for in Chapter N (Institutional Arrangements and Dispute Settlement Procedures) with respect to any matter arising under this Chapter.

Source: Canada-Chile FTA, Article N *bis-06*

Example Option C: Dispute Resolution Subject to Consent of the Parties

2. If the Parties cannot resolve the matter in accordance with paragraph 1, they may consent to submit the matter to dispute settlement in accordance with Chapter Nineteen (Dispute Settlement).

Source: Canada-Israel FTA, Article 13.6

C. Emerging Trends, Possible Additions, and Innovations

As seen in the previous sections, RTAs are increasingly incorporating gender-related provisions. However, much more could be done to incorporate tailored provisions aimed at gender inclusion. New RTA negotiations (or renegotiations of existing agreements) represent an opportunity to reassess existing provisions and evaluate how they could be adjusted to better address women's needs. This section examines some of the emerging trends and possible ways forward, yet all of these options warrant further analysis.

a. Exceptions and Reservations

Future RTAs could incorporate a general exception like the one found in GATT Article XX that protects public morals, animal life, human health, and the environment.[210] In the same way, a new exception for gender would provide governments with the policy space for gender-responsive rules and policies, including supporting women in industries that are currently male dominated (i.e., engineering, computer science, and other STEM roles).[211] Such an exception could also allow parties to create favourable conditions for investment and growth in sectors that are particularly relevant for women (such as agriculture, tourism, hospitality, and education services), provided that other trade rules are followed in both cases. An example of a gender exception in an FTA could be crafted as follows:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade;[212] nothing in this agreement shall be construed to prevent the

[210] GATT 1994, *supra* note 9.
[211] World Economic Forum (WEF), "The Industry Gender Gap: Women and Work in the Fourth Industrial Revolution" (Jan. 2016), https://www3.weforum.org/docs/WEF_FOJ_Executive_Summary_GenderGap.pdf (last accessed Jul. 24, 2022) at 6.
[212] GATT 1994, *supra* note 9.

adoption or enforcement by any contracting party of a measure necessary to promote women's economic empowerment or achieve gender equality."[213]

[213] ITC 2020, *supra* note 134, at 17.

b. Appointing a Gender Officer to Lead the Gender Committees

As discussed previously, none of the institutionalization options in current RTAs carry sufficient weight. One option would be to enhance the effectiveness of gender committees through the creation of a 'Gender Officer' role,[214] which would ideally work with trade negotiators during the drafting of new RTAs and continue to work with the gender committee afterwards to ensure that the goals of the gender provisions are being met.

c. Binding Dispute Resolution Provisions

As mentioned in the previous section, many existing agreements, except for the Canada-Israel FTA and African RTAs, remove gender from the purview of dispute resolution clauses; even that agreement falls short in terms of binding provisions, since parties must provide consent.[215] In the future, negotiators might want to consider different formulations for dispute resolution provisions to make them both legally binding and effective. One useful example that may be relevant is the labour chapter of the USMCA, which includes enforceable obligations, including a special Rapid Response Mechanism for certain labour issues.[216]

d. Minimum Standards of Treatment

The incorporation of gender minimum legal standards would seek to create more actionable rights and standards,[217] consistent with approaches under environment and labour as covered in Chapters 1 and 2 of this Handbook. RTAs could build upon the examples in the COMESA and SADC instruments and seek to ensure that the Parties comply with a set of minimum standards in their domestic laws such as equal pay, implementation of antidiscrimination and antiharassment laws, and protection of reproductive rights, amongst others.[218] Incorporating such commitments would help ensure that RTAs are more equitable and flexible in response to women's needs.[219]

Minimum standards could also include a reaffirmation to other existing commitments and international rules, such as CEDAW and the ILO conventions.[220] Similarly, agreements could incorporate gender-responsive standards in line with UNECE Declaration for Gender Responsive Standards and Standards Development.[221] An example of a provision containing a minimum legal standards can be found in Art. 15.2 of the Chile-Argentina FTA, which contains an explicit reference to both CEDAW and the ILO, although it is important to reiterate

[214] Kuhlmann et al. 2020, *supra* note 22, at 57.
[215] Cohen 2021, *supra* note 134, at 87.
[216] Kuhlmann et al. 2020, *supra* note 22, at 12. It is important to note, however, that the USMCA RRM does not apply to all labour issues and is somewhat one-sided, applying only to issues with regard to freedom of association and collective bargaining in Mexico.
[217] ITC 2020, *supra* note 134 at 8.
[218] Kuhlmann et al. 2020, *supra* note 22, at 55.
[219] Kuhlmann Cambridge 2023, *supra* note 34, at 10. *See also,* Kuhlmann 2021, *supra* note 30.
[220] International Trade Centre, "From Europe to the World: Understanding Challenges for European Businesswomen" (2019) at 8.
[221] Kuhlmann Cambridge 2023, *supra* note 34, at 18.

that this provision is not fully binding. Negotiators should also consider the impact of permissive language when drafting this type of provision.[222]

e. Commitments to Include Gender Chapters/Provisions in Future RTAs

Another option to ensure gender responsiveness would be for governments to adopt a policy of including a gender chapter or, at a minimum, gender-explicit provisions, in all future agreements. For example, in March 2018, the European Parliament passed a resolution indicating that European Union trade agreements must contain binding and enforceable provisions that ensure gender equality.[223] This is emphasized in the text by indicating that the Commission should "promote, in trade agreements, the commitment to adopt, maintain and implement gender equality laws, regulations and policies effectively."[224]

f. Whole of Agreement Approach

A whole of agreement approach could help enshrine gender commitments through the body of an RTA, operationalizing gender equality more fully. This could be done by mainstreaming gender across an entire Agreement and its annexes/appendices, as opposed to a specific section or chapter. Examples would include commitments on goods, services, non-tariff measures, government procurement, subsidies, and other areas, all of which could be tailored to the needs of women across sectors, which would enhance equity, flexibility, and inclusiveness in RTAs.[225] However, such an approach requires that multiple stakeholders work together as an RTA is negotiated in order to address the different substantive sectors and areas.[226] Hence, this approach aims not at a specific intervention, but rather at a set of integrated actions.

g. Including Gender in Investment Provisions

Another emerging trend has been to incorporate gender considerations in investment provisions (see Chapter V), including under bilateral investment treaties ("BITs") and RTA investment chapters (see Chapter V), which has implications for future RTAs[227] For example, in March 2019, the Netherlands published its new model BIT, weaving in rules on sustainable development[228] and gender. [229] This was the first time a BIT made explicit reference to the

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[222] Kuhlmann et al. 2020, *supra* note 22, at 56.

[223] EU Monitor, "The Parliament's Fight for Gender Equality in the EU" (Jun. 16, 2022), available at https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vl0s95y2lyzz?ctx=vh94ercwm6u9 (last visited Jul. 24, 2022).

[224] European Parliament Resolution of 13 March 2018 on Gender Equality in EU Trade Agreements (2017/2015(INI)), Mar. 13, 2018.

[225] Kuhlmann Cambridge 2023, *supra* note 146, at 8-11.

[226] *See* Nadira Bayat, "A Whole Agreement Approach – Towards Gender Mainstreaming in the AfCFTA" (Mar. 22, 2022).

[227] *See, e.g.,* Lolita Laperle-Forget, "Eight Types of Provisions to Make the AfCFTA Investment Protocol Gender Responsive" (December 2021) TRALAC, https://www.tralac.org/documents/publications/working-papers/2021/4449-s21tr072021-laperle-forget-eight-types-of-provisions-to-make-the-afcfta-investment-protocol-gender-responsive-31122021/file.html

[228] *See, e.g.,* the BIT between the Kingdom of Morocco and the Federal Republic of Nigeria for ideas on how to incorporate language on sustainable development into a Treaty.

[229] Kabir Duggal & Laurens H. van de Ven, "With Rights Come Responsibilities: Sustainable Development and Gender Empowerment under the 2019 Netherlands Model BIT," KLUWER ARB. BLOG (Jun. 15, 2019), *available at*

importance of women's equality,[230] stating, among other things that the Contracting Parties must "commit to promote equal opportunities and participation for women and men in the economy."[231] Under the model BIT, gender discrimination is considered to constitute a breach of the fair and equitable treatment standard.[232]

The Zero Draft of the AfCFTA Protocol on Investment also includes a reference to gender, as well as a reference to MSMEs, linking with another focus issues of this Handbook, in its language "reaffirming the importance of encouraging investment activities that benefit underrepresented groups, including women, youth and small and medium enterprises."[233] Other IIAs, such as the Morocco-Nigeria BIT, which has a strong emphasis on sustainable development, could have implications for women's economic empowerment and gender equality as well.

http://arbitrationblog.kluwerarbitration.com/2019/06/15/with-rights-come-responsibilities-sustainable-development-and-gender-empowerment-under-the-2019-netherlands-model-bit/

[230] It is worth noting that, as of publication, the Netherlands had not signed a BIT using their new model.

[231] Netherlands Model Investment Agreement Art. 6(3) (2019).

[232] Netherlands Model Investment Agreement Art. 9(2).

[233] Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area, Zero Draft, Preamble, November 2021, https://www.tralac.org/documents/resources/cfta/4613-protocol-on-investment-to-the-agreement-establishing-the-afcfta-zero-draft-november-2021/file.html.

CHAPTER III:

ENVIRONMENT

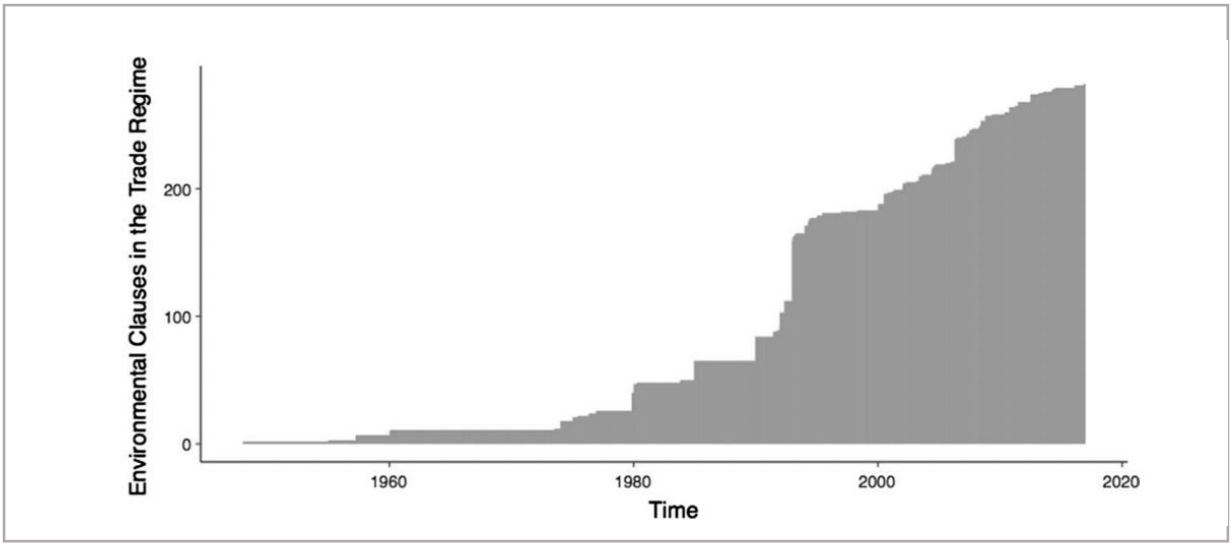
CHAPTER III – ENVIRONMENT

With environment as one of the pillars of sustainable development, trade rules must increasingly respond to environmental and climate change issues, which present a looming crisis. Trade has been a contributing factor in environmental pollution and resource depletion,[234] and globalization has led to increased production and energy consumption, exacerbating the challenge.[235] Over the last half century, trade liberalization and environmental protection issues have often been addressed within different forums. Yet, efforts to tackle environmental issues and climate change are now increasingly taking place on the international trade front, giving rise to an opportunity for negotiators to build forward better.

This chapter explores the inclusion of environmental provisions in RTAs and how this reflects the interconnected nature of environmental protection and economic development.[236] Mechanisms to address environmental protection have, to an extent, been part and parcel of international trade agreements since the signing of the GATT in 1947. Figure 8 below demonstrates the proliferation of environmental clauses in trade agreement over time. The GATT introduced the first two environmental clauses in the form of defensive provisions, or general exceptions, related to the protection of human, animal, or plant life or health and the conservation of exhaustible natural resources. The inclusion of environmental provisions in RTAs, which is often more affirmative in nature, has the potential to contribute to environmental sustainability by reinforcing international environmental commitments and promoting adherence to domestic environmental legislation.

[234] Neumayer, E., "Trade and the Environment: A Critical Assessment and Some Suggestions for Reconciliation," *The Journal of Environment & Development*, 138 (2000).
[235] Dean JM, "Does Trade Liberalization Harm the Environment? A New Test," 35 *Canadian Journal of Economics* 819-842 (2002).
[236] Clive George & Shunta Yamaguchi, "Assessing Implementation of Environmental Provisions in Regional Trade Agreements," *OECD Trade and Environment Working Papers* (January 2018).

Figure 8: Environmental Clauses in the Trade Regime Over Time.

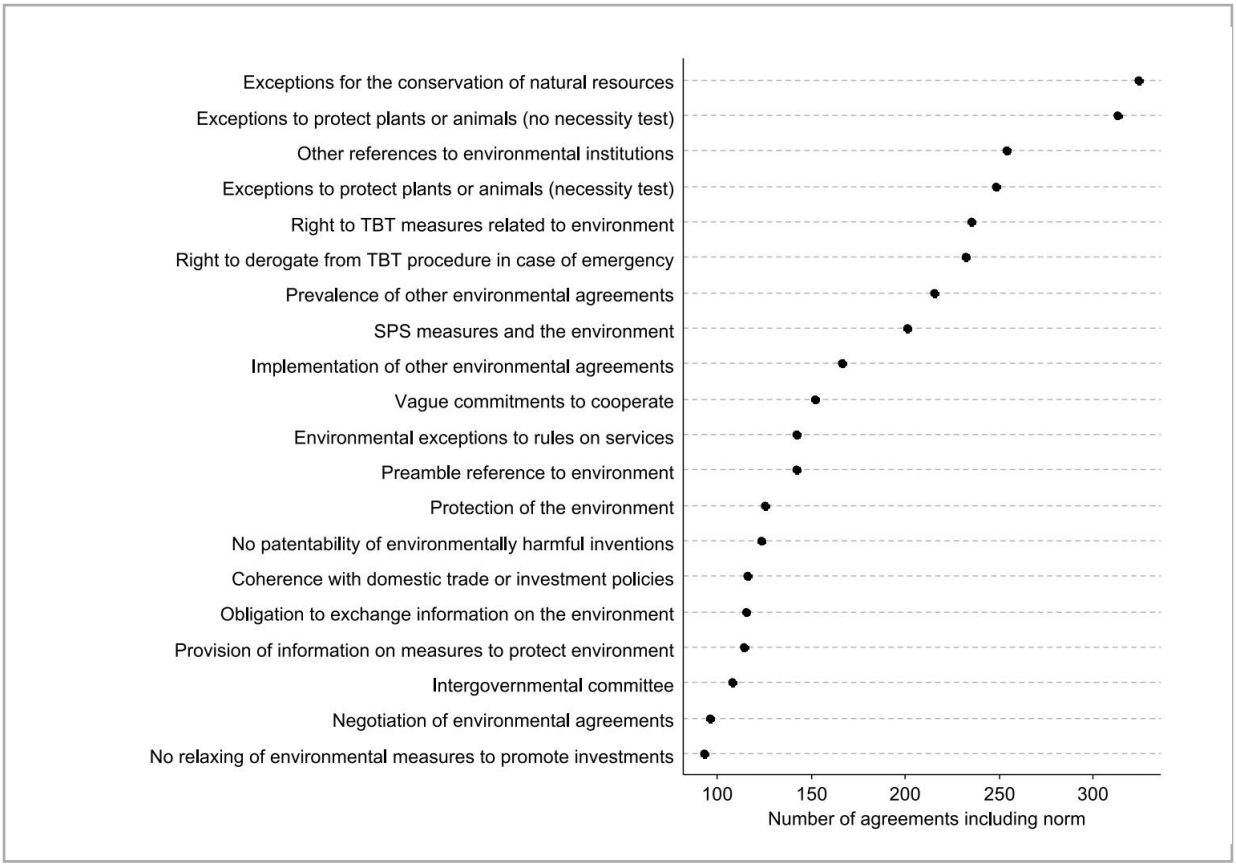


Source: TREND

There is also a growing body of environmental law that extends well beyond provisions in RTAs. Institutions have been set up to guide specific areas and provide spheres of interaction where actors can communicate and decide on norms, including: the UN Framework Convention on Climate Change (UNFCCC) and its accompanying Kyoto Protocol and Paris Agreement, the Vienna Convention on the Protection of the Ozone Layer and its Montreal Protocol, and the Convention on Long-Range Transboundary Air Pollution (CLRTAP) and its various accompanying protocols. These instruments, referred to collectively as Multilateral Environmental Agreements (MEAs), are often linked to international trade law through their incorporation into RTAs.

The extent to which a trade agreement can positively influence environmental sustainability will be dependent upon the nature of RTA environmental provisions. Figure 9 below shows that the most frequent environmental provisions are exceptions to trade commitments for domestic measures related to the conservation of natural resources. The least common provisions are those emphasizing non-derogation of environmental measures to promote investment.

Figure 9: The Most Widely Used Environmental Norms in Trade Agreements[237]



As is true with other issues covered in this Handbook, RTAs can offer a better forum for environmental negotiations than multilateral fora, since they are often among contiguous countries with shared ecosystems and shared concerns. RTAs are now a vehicle for positive harmonization through environmental policies pushing for greater social benefits; however, not all RTAs include environmental provisions, and most RTAs with environmental provisions are North-South Agreements. In this context, some countries have expressed concerns with the nature and intent of environmental provisions in RTAs, and the range of options for including environmental measures in RTAs will likely continue to evolve.

A. Legal Aspects of Environmental Sustainability

Despite the early recognition of sustainable development as an objective of the global trading system in the Preamble to the WTO,[238] which recognizes that trade should be conducted in a way that allows for "the optimal use of the world's resources in accordance with the objective of sustainable development," [239] environmental issues are not extensively affirmatively covered under multilateral trade rules, with the exception of the recently-concluded WTO Agreement on Fisheries Subsidies. Instead, provisions accommodating environmental objectives tend to appear as exceptions to the general rules, most notably in the General

[237] Morin, J., Dür, A., & Lechner, L. (2018). "Mapping the Trade and Environment Nexus: Insights from a New Data Set." *Global Environmental Politics* 18(1), 122-139. https://www.muse.jhu.edu/article/687112
[238] GATT 1994, Preamble, *supra* note 9.
[239] Ibid.

Exceptions clause in Article XX of the GATT[240] subparagraphs (b) ("necessary to protect human, animal or plant life or health")[241] and (g) ("relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption").[242] General exception clauses are also common in RTAs, which often incorporate Article XX directly.

Despite the lack of affirmative provisions at the multilateral level, environmental issues have received increasing focus at the WTO. In 1995, the WTO Committee on Trade and Environment (CTE) was established, and an increasing number of proposals from WTO Member States called for Ministerial Statements on a range of environmental issues. The Doha Round of negotiations also included specific environmental topics for the first time, and, while the round was not concluded, the landmark WTO Agreement on Fisheries Subsidies was concluded in June 2022.

WTO negotiations on fisheries subsidies, which had been ongoing since the 2001 Doha Ministerial Conference, concluded with the WTO Agreement on Fisheries Subsidies, adopted at MC12 in June 2022, that prohibited fisheries subsidies that contribute to illegal, unreported, and unregulated fishing.[243] Upon deposit of "instruments of acceptance" by 2/3 of WTO Member States, the agreement will become operational and amend the WTO Agreement, for the second time since its creation. It is also historic in that it fulfils SDG 14.6,[244] the first agreement to fulfil an SDG and the first WTO agreement on the environment.[245] The Agreement contains special provisions for LDC Members and a provision on technical assistance and capacity building, as well as provisions on notification and transparency.

Fisheries subsidies and related issues are also addressed in a number of RTAs, including the CPTPP and USMCA. The EU-Singapore FTA includes obligations for the Parties to undertake measures related to ensuring the conservation and management of fish stocks. The CETA also sets out the Parties' commitment to help develop a global, multilateral resolution to fisheries subsidies, as well as to undertake measures for responsible management of fisheries and aquaculture in a manner consistent with their international obligations.

In addition, over forty WTO Member States sought the conclusion of an Environmental Goods Agreement (dormant since 2016), and work has been initiated on trade and environmental sustainability (Trade and Environmental Sustainability Structured Discussions (TESSD)) and plastics pollution (Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade). Other WTO Member States had also been advocating for a Ministerial

[240] GATT 1994, *supra* note 9.
[241] GATT, Article XX(b), *supra* note 9.
[242] GATT, Article XX(g), *supra* note 9.
[243] WTO, "Negotiations on Fisheries Subsidies", https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm (last visited February 5, 2022).
[244] Target 14.6 "by 2020, prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU fishing, and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the WTO fisheries subsidies negotiation." (Indicators and a Monitoring Framework, https://indicators.report/targets/14-6/)
[245] Agreement on Fisheries Subsidies, Ministerial Decision of 17 June 2022, WTO/MIN (22)/33/WT/L/1144, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm.

Statement on Fossil Fuel Subsidy Reform. These three initiatives target tangible outcomes in a number of areas flagged for consideration at the Thirteenth WTO Ministerial Conference in early 2024.

Many RTAs also increasingly impose affirmative obligations on their parties to address environmental issues, most notably through incorporating and building upon the existing frameworks established by MEAs, as shown in Table 9 below. Given the large number of MEAs with varying signatories, MEA-related provisions in RTAs are thus among the most heterogeneous, with more than 190 different provisions in 126 RTAs.[246] In addition, some recently concluded RTAs have gone a step further to address a wider range of environmental issues, such as those relating to fisheries subsidies[247] and fossil fuel subsidies.[248]

Table 9: List of Most Frequently Cited MEAs in RTAs

Multilateral Environmental Agreement (MEA)	Number of RTAs
Convention on International Trade in Endangered Species of Wild Fauna and Flora[249]	36
Montreal Protocol on Substances that Deplete the Ozone Layer[250]	34
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal[251]	29
Convention on Biological Diversity[252]	22
Kyoto Protocol to the United Nations Framework Convention on Climate Change[253]	20

Environmental provisions tend to appear most often in RTA preambles or objectives. Environmental issues have also been addressed in side agreements to RTAs, such as NAFTA, and in stand-alone environmental chapters. The growing trend favours inclusion of environmental provisions within the main text of a trade agreement, including in a specific chapter addressing trade and environment. More recently, an RTA focused on environment and climate change, the Agreement on Climate Change, Trade, and Sustainability (ACCTS Agreement), is under negotiation among Costa Rica, Fiji, Iceland, New Zealand, and Switzerland, signalling a possible new era of RTAs that are more focused on trade, environment, and climate issues.

[246] José-Antonio Monteiro, "Typology of Environment-Related Provisions in Regional Trade Agreements," WTO, WTO Working Paper ERSD-2016-13 (2016), https://www.wto.org/english/res_e/reser_e/ersd201613_e.pdf [hereinafter Monteiro 2016].
[247] *See, e.g.* EU-Singapore FTA.
[248] *See, e.g.* the ACCTS that is currently under negotiation by New Zealand, Costa Rica, Fiji, Iceland, Norway and Switzerland.
[249] Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3rd, 1973, 993 U.N.T.S. 243 [hereinafter CITES].
[250] Montreal Protocol on Substances that Deplete the Ozone Layer, 1522 UNTS 3, 26 ILM 1541, 1550 (1987) [hereinafter Montreal Protocol].
[251] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1673 UNTS 5, 28 ILM 657 (1989) [hereinafter Basel Convention].
[252] Convention on Biological Diversity, 1760 UNTS 79, 31 ILM 818 (1992).
[253] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 148, 37 ILM 22 (1998), [2008] ATS 2 [hereinafter Kyoto Protocol].

B. RTA Options for Environmental Sustainability

The RTA options below, broadly grouped into defensive and affirmative provisions, set out important RTA options for addressing environmental sustainability and tackling ongoing and pressing environmental issues, including climate change. In addition to the defensive options that incorporate exceptions to accommodate environmental issues in RTAs, tracking with the WTO Baseline, affirmative options are presented in the following areas: (i) cooperation, consultation and capacity building provisions; (ii) provisions related to MEAs; (iii) provisions on domestic environmental laws and policies; (iv) compliance and enforcement measures; (v) environmental goods and services; and (vi) emerging issues relating to environmental sustainability.

With the exception of defensive measures (exceptions), where there is a baseline established under the GATT/WTO rules, the sections below will present Example Options for environment commitments in RTAs that reflect the widely differing approaches, contexts, and political sensitivities across countries and regions. These options will be presented ranging from the lowest level of commitment to the highest level, and, where possible, the degree to which these approaches are more or less common will also be noted. Flexibility aspects, including policy space in both a defensive and affirmative context, will also be referenced.

a. Exceptions: Preserving Policy Space to Regulate the Environment

GATT Article XX contains general exceptions that provide "defensive" means to preserve policy space to regulate the environment. In order for Art. XX to apply, first, a measure taken by a Member State has to be inconsistent with other GATT provisions and principles, such as those related to National Treatment or Most-Favoured Nation (MFN). A respondent can trigger GATT Art. XX in defence of these measures when the measure (1) falls under the specific exceptions listed in paragraphs (a) to (j) of GATT XX and (2) satisfies the Article XX "chapeau," which relates to the manner in which the measure is applied.[254]

Jurisprudence on Article XX has also explored issues of territoriality, that is, whether a measure taken with respect to any human, animal or plant (subparagraph (b)) or natural resources (subparagraph (g)) must be within the territory of the WTO Member State undertaking the measure. Despite instances of measures allowed to be taken in respect of natural resources that extended beyond the geographical boundaries of the WTO Member State undertaking the measure,[255] these measures remain limited and subject to contention. The term "natural resources" under Article XX(g) has also been interpreted to include living resources (such as turtles)[256] and non-living resources (such as clean air).[257]

[254] The GATT XX "chapeau" provides as follows: "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or disguised restriction on international trade."
[255] Appellate Body Report and Panel Reports, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/49/Rev.1, (January 17, 2019) ("Tuna-Dolphin").
[256] Appellate Body Report and Panel Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/23 (November 26 2021) ("Shrimp-Turtle").
[257] Appellate Body Report and Panel Reports, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/10 (26 August 1997).

In RTAs, General Exceptions clauses are common and are usually based on Art. XX, often by simply incorporating GATT Art. XX in its entirety. Other agreements, such as CPTPP or USMCA, clarify the meaning of exceptions, particularly environmental measures.

Baseline Option A below incorporates GATT Art. XX in its entirety and can be found in RTAs such as the EU-SADC EPA(Note: this approach is most commonly observed). In Baseline Option B, GATT Art XX is incorporated, but the article itself is not copied. Parties confirm that GATT Art. XX and its interpretive note constitutes a part of the agreement, mutatis mutandis. Such a provision is found in a majority of RTAs, such as the China-Korea FTA, the EFTA-Bosnia and Herzegovina FTA, and the Hong Kong-Georgia FTA, as set out below. Baseline Option C below, taken from the Southern Common Market Agreement (MERCOSUR)-Egypt FTA, the parties recognize the right to impose measures that are consistent with GATT Art. XX. It should be noted that the meaning of "consistent with GATT Art. XX" has not been clarified, however.

Finally, in the Baseline Plus Option (less frequently observed), taken from the CPTPP and USMCA, GATT Art. XX has been incorporated with additional clarifications. GATT Art. XX and its interpretative notes are incorporated as a part of the RTAs, mutatis mutandis. Further, parties confirm that the measures referred to in Article XX(b) of GATT 1994 include environmental measures necessary to protect human, animal or plant life or health and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources. It further clarifies the meaning of the measure "consistent with GATT Art. XX" by articulating precise examples.

Example Options for General Exceptions (Defensive Provisions)

Baseline Option A: Incorporation of GATT Art. XX

General Exception Clause

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by either Party of measures: […]

(b) necessary to protect human, animal or plant life or health; […]

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

Source: EU- SADC EPA Article 97; Stepping Stone EPA between Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part Article 68

Baseline Option B: Incorporation of GATT Art. XX (Mutatis Mutandis)

1. Article XX of GATT 1994 and its interpretive notes are incorporated into and made part of this Agreement, mutatis mutandis.

2. Article XIV of GATS (including its footnotes) is incorporated into and made part of this Agreement, mutatis mutandis.

Source: China-Korea FTA Article 21.1, EFTA - Bosnia and Herzegovina FTA Article 24 & 32, Hong Kong-Georgia FTA Chapter 17 Article 2

Baseline Option C: Recognition of Party's Right to Adopt Measures Consistent with GATT XX

Nothing in this Agreement shall prevent any Party or Signatory Party from taking actions and adopting measures consistent with Articles XX and XXI of the GATT 1994.

Source: Southern Common Market (MERCOSUR) – Egypt FTA Article 22

Baseline Plus Option: Incorporation of GATT XX with Clarifications

General Exceptions

1. Article XX of GATT 1994 and its interpretative notes are incorporated into and made part of this Agreement, mutatis mutandis.

2. The Parties understand that the measures referred to in Article XX(b) of GATT 1994 include environmental measures necessary to protect human, animal or plant life or health, and that Article XX(g) of GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

3. Paragraphs (a), (b) and (c) of Article XIV of GATS are incorporated into and made part of this Agreement, mutatis mutandis. The Parties understand that the measures referred to in Article XIV(b) of GATS include environmental measures necessary to protect human, animal or plant life or health.

4. Nothing in this Agreement shall be construed to prevent a Party from taking action, including maintaining or increasing a customs duty, that is authorised by the Dispute Settlement Body of the WTO or is taken as a result of a decision by a dispute settlement panel under a free trade agreement to which the Party taking action and the Party against which the action is taken are party.

Source: CPTPP Article 29.1, USMCA Article 32.1, Chile - Indonesia Comprehensive Economic Partnership Agreement Article 13.1, FTA Between Chile and Thailand Article 15.1, A-HK FTA Article 19.3

b. Cooperation, Consultation and Capacity Building Provisions

Cooperation provisions related to the environment are common in RTAs, and the most specific cooperation provisions often push for the implementation of environmental provisions within RTAs, such as building institutional capacity and maintaining high levels of environmental protection. Some RTAs even provide opportunities for private sector and civil society to participate in the implementation of environmental cooperation activities.

Cooperation can relate to a number of different aspects, including enforcement, scientific cooperation, information exchange, harmonization, assistance, and joint institutions. Overall, there has been an increase in the number of RTA provisions related to environmental cooperation. The most common are clauses on the exchange of information, followed by less specific clauses on environmental issues and scientific cooperation.

i. Cooperation Provisions

Cooperation among parties on environmental measures is a common approach across RTAs. Strengthening environmental protection through RTAs is dependent upon mutual environmental interests and the political will of the parties to an RTA. It is important to keep in mind, however, that even though cooperation provisions can appear to be relatively neutral, parties' notions of cooperation may differ and face capacity challenges in some cases.

Cooperation often focuses on adherence to environmental standards and regulations, and it can either be mandatory or voluntary, depending upon whether the measures were established by a public authority or a private entity. Within environmental policy, cooperation tends to take into consideration governmental and non-governmental interests. Internal policy coherence is important as well.

Cooperation provisions in RTAs can take many forms, including provisions on the implementation of research and development programmes, training programmes for capacity building, and climate technology transfer, among others. Provisions related to the exchange of information make up 26 percent of cooperation provisions of all trade agreements (since 1947). Trends in cooperation preferences differ across regions, with the US favouring provisions focused on regulatory harmonization and the EU favouring the creation of joint organizations for environmental cooperation.

The Example Option below, taken from the EU-Japan Economic Partnership Agreement (EPA), includes a more general, and more common, cooperation provision focused on information exchange.

Example Options Cooperation on Exchange of Information

Recognising the importance of cooperation on trade-related and investment-related aspects of environmental and labour policies in order to achieve the objectives of this Agreement, the Parties may [...] (c) cooperate to facilitate and promote trade and investment in environmental goods and services, in a manner consistent with this Agreement, including through the exchange of information.

Source: EU-Japan EPA Article 16.12 (c)

Often, cooperation is more feasible on a regional level, where countries share common priorities. One example is the Regional Coordinating Unit of the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment for the West and Central Africa Region (Abidjan Convention), a treaty coordinated by the United Nations Environment Programme (UNEP) for the prevention of marine pollution in the West and Central Africa Region, which focuses on inter-governmental cooperation and encompasses several MEAs that address shipping pollution. This is shown below in Example Option A, taken

from the Abidjan Convention Protocol Concerning Co-operation in Combating Pollution in Cases of Emergency, the UNEP Regional Seas Programme, which calls for development of a regional action plan and cooperation in implementing an agreed-upon environmental work programme. Example Option C, below, also drawn from the Abidjan Convention, calls for harmonization of national law and policy related to relevant environmental matters.

Overall, the Abidjan Convention contains general provisions that do not provide a clear pathway for parties to adhere to its obligations. However, the Protocol Concerning Cooperation in Combating Pollution in Cases of Emergency is notable in terms of environmental protection in times of crisis,[258] as it contains more specific obligations and gives the parties the option to cooperate on various aspects of environmental management, such as: coastal erosion, environmental impact assessments, and specially protected areas. The Protocol goes even further to incorporate specific articles on scientific and technological cooperation. UNEP acts as the Secretariat to the Abidjan Convention, and, among its duties, coordinates the implementation of cooperative activities agreed upon by the Contracting Parties.[259] Notably, with such coordination, it is also important to ensure that trade issues do receive sole focus at the expense of researchers, civil society, intergovernmental organizations, and government bodies focused on environmental matters.

In some cases, regional cooperation will depend upon legal changes at the national level. The Protocol to the Abidjan Convention,[260] referenced in Example Option B below, includes language calling for Parties to cooperate in harmonizing national legislation and policies for the effective discharge of obligations under the Protocol.

Example Option for Regional Cooperation

Example Option A: Cooperation via a Regional Action Plan

4. Two elements are fundamental to UNEP's Regional Seas Programme:

Cooperation among Governments of the regions. Since any specific regional programme is aimed at benefitting the States of that region, Governments are invited to participate from the very beginning in the formulation, acceptance, and policy development of the programme. The programme is based on a regional action plan formally adopted by the Governments of the region and is carried out primarily by the national institutions of those Governments. Periodic intergovernmental meetings are used to review the progress made in

[258] The Abidjan Convention Protocol Concerning Cooperation in Combating Pollution in Cases of Emergency, https://abidjanconvention.org/themes/critai/documents/meetings/partnersmeeting2019/Working%20Documents/Anglais/LBSA%20Protocol%20English%2022%20June%202012.pdf

[259] Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, Institutional Arrangements, Article 16 (1)(v), *United National Environment Programme*, (1981), https://wedocs.unep.org/bitstream/handle/20.500.11822/36241/AC.pdf?sequence=3&isAllowed=y

[260] Additional Protocol to the Abidjan Convention Concerning Cooperation in the Protection and Development of Marine and Coastal Environment from Land-Based Sources and Activities in the Western, Central, and Southern African Region (22 June 2012), https://abidjanconvention.org/themes/critai/documents/meetings/plenipotentiaries/working_documents/en/LBSA%20Protocol%20English%2022%20June%202012.pdf

implementing the agreed work-plan of the programme and to introduce appropriate adjustments in order to meet the wishes of the Governments […]

Source: Abidjan Convention, Protocol Concerning Co-operation in Combating Pollution in Cases of Emergency

Example Option B: Regional Cooperation to Harmonize National Legislation and Policies

2. The Contracting Parties shall **cooperate in harmonizing national legislation and policies** for the effective discharge of their obligations under this Protocol.

3. Each Contracting Party shall take appropriate measures in accordance with international law to enhance compliance with the provisions of this Protocol and cooperate by offering assistance, advice or information to other Contracting Parties to enhance compliance with and ensure enforcement of the Protocol.

Source: Second Draft Protocol Additional to the Abidjan Convention Concerning Land-based Sources and Activities in the Western, Central and Southern African Region—Introduction to the Abidjan Convention and Its Related Protocol

Environmental protection and management tend to require institutional flexibility to allow for adaptation to rapidly changing environmental concerns, an aspect that is particular tied to flexibility in the context of changing circumstances. Some RTAs encourage mutual recognition of Members' environmental standards through general and/or specific provisions recognizing other Parties' conformity assessments. CETA contains a Protocol on Mutual Acceptance of Conformity Results for specific products, including products required to comply with energy-efficiency requirements; this is noted as Example Option A below.

In some cases, RTAs can impose legal liability by explicitly containing provisions calling for environmental protection performance requirements. Example Option B below, taken from the Nicaragua-Republic of China FTA, promotes cooperation by stipulating that Parties develop performance measures to ensure that environmental protection goals are met.

Example Options for Conformity Assessment and Environmental Performance Requirements

Example Option A: Cooperation on Conformity Assessment Procedures

1. The Parties recognise that differences may exist between their respective standards, technical regulations and conformity assessment procedures. When such differences exist, the recognising Party may seek to satisfy itself that the nominated accreditation body is competent to accredit conformity assessment bodies as competent to assess conformity with the relevant technical regulations of the recognising Party. The recognising Party may satisfy itself based on the following:

(a) an arrangement establishing cooperation between the European and Canadian accreditation systems; […]

Source: CETA, Protocol on Mutual Acceptance of Conformity Results, Article 12.3

Example Option B: Evaluation of Cooperation Based on Environmental Performance Requirements

In developing cooperative programs, projects and activities, the Parties shall develop benchmarks or other types of performance measures to assist the contact points in their ability to examine and evaluate the progress of specific cooperative programs, projects and activities in meeting their intended goals.

Source: Nicaragua-Republic of China FTA, Annex 19.08, Environmental Cooperation Mechanism (Program of Work and Priority Cooperation Areas)

RTAs can also focus on sector-specific cooperation. Under such an approach, special provisions, chapters, and annexes can be used to address a specific environmental problem. Sector-specific annexes are also used to enhance regulatory cooperation in particular products or sectors. These annexes often contain general commitments to exchange information, improve understanding, or cooperate towards a particular objective. They aim to enhance regulatory compatibility by giving parties a chance to harmonize their environmental standards and promote mutual recognition. The Example Option below, drawn from the USMCA, exemplifies this approach in a more general manner. Notably, it includes specific reference to medical devices and pharmaceuticals, making it an example of a provision with cross-cutting relevance in the context of crisis and pandemic.

Example Option on Sector-Specific Cooperation

In addition to other applicable provisions of this Agreement, this Chapter contains provisions with respect to chemical substances, cosmetic products, information and communication technology, energy performance standards, medical devices, and pharmaceuticals, as defined therein.

Source: USMCA, Sectoral Annex on Energy Performance Standards, Article 12.1

Parties to an RTA may also agree to cooperate to harmonize procedures to respond to environmental emergencies. The Additional Protocol on Cooperation and Assistance in Environmental Emergencies to the Framework Agreement on the Environment of MERCOSUR[261] emphasizes regional cooperation in environmental emergencies, as does the Abidjan Convention, referenced above. In the Example Option below, taken from MERCOSUR,

[261] Additional Protocol to The Framework Agreement on the Environment of the South American Economic Organization (MERCOSUR) Regarding Cooperation and Assistance in Environmental Emergencies, www.sice.oas.org/mrcsrs/decisions/dec1404s.asp

an additional protocol calls upon State Parties to harmonize procedures in the event of an environmental emergency and articulates implementation, notification procedures, assistance procedures, and assistance financing.

Example Option on Harmonizing Procedures in Case of Environmental Emergency

The State Parties shall develop actions tending to harmonize compatible procedures to act in case of environmental emergencies. To this end, cooperation in this area will be implemented through:

(a) The exchange of prior information on situations that require common prevention measures and those that may lead to an environmental emergency;

(b) The exchange of information and experiences in prevention, mitigation, warning, response, reconstruction and recovery;

(c) Exchange of information on applicable technologies;

(d) Joint planning for risk reduction;

(e) The preparation of contingency plans, programs and projects for joint action;

(f) The incorporation of statistics on environmental emergency situations that have occurred in the region to the MERCOSUR Environmental Information System (SIAM);

(g) The creation of a bank of experts in environmental emergencies for inclusion in SIAM;

(h) The use of personnel and means of a state party at the request of another;

(i) The provision of technical and logistical support to respond to environmental emergencies at the request of the state parties;

(j) The training of human resources.

Source: Article 3, The Additional Protocol on Cooperation and Assistance in Environmental Emergencies to the Framework Agreement on the Environment of MERCOSUR

ii. Consultation Provisions

Consultation provisions are also common and are used to accommodate and incorporate different perspectives on environmental protection and address sustainability concerns and environmental regulatory approaches in other jurisdictions. Notably, they can enhance inclusion through stakeholder engagement, which can be particularly important in times of crisis. Consultation provisions can also be used to initiate dispute resolution between parties.

Example Option A below, drawn from the EU-Singapore FTA, calls for expedited consultations where there is a risk to human, animal or plant life or health. Example Option B, taken from the Korea-Australia FTA, provides for consultations when environmental matters arise involving either of the parties to the FTA, with establishment of an ad hoc committee if consultations cannot resolve relevant issues.

Example Options for Consultation Provisions

Example Option A: General Consultations

2. Where a Party has serious concerns regarding a risk to human, animal or plant life or health, affecting commodities to which trade takes place, **consultations regarding the situation shall take place as soon as possible.** In such case, each Party shall endeavor to provide all necessary information in due time to avoid disruption in trade.

Source: EU-Singapore FTA, Article 5.12.2

Example Option B: Consultations to Mitigate Environmental Issues

1. A Party may request consultations with the other Party regarding any matter arising under this Chapter [Environment] by delivering a written request to the contact point of the other Party. Consultations shall commence promptly after a Party delivers a request for consultations to the contact point of the other Party. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter.

2. If consultations . . .] fail to resolve the matter, and a Party deems that the matter needs further discussion, that Party may request the establishment of an *ad hoc* Committee [. . .] to consider the matter. Where the establishment of such an *ad hoc* Committee is requested under this paragraph, that *ad hoc* Committee shall be established without undue delay and shall endeavour to agree on a resolution of the matter.

Source: Korea-Australia FTA, Article 18.7

Some RTAs go further and specify the designation of contact points to facilitate consultations on environmental matters. The USMCA, in Example Option A below, specifies that each party is to designate a national contact point to facilitate communication between the parties. Additional RTA provisions can be relevant in the context of environmental engagement, such as provisions regarding stakeholder engagement in the regulatory process, as reflected in Example Option B below, also drawn from the USMCA.

These provisions can call for publication of an annual list of regulations a country plans to adopt, along with other processes to ensure stakeholder engagement during the development of regulations. These provisions can also call for the creation of expert bodies that include NGOs, businesses, consumer bodies, and others in the development or implementation of regulations.

Example Options for Consultation with Contact Points or Expert Advice

Example Option A: Designation of Contact Points

1. Each Party shall **designate and notify a contact point** from its relevant authorities within 90 days of the date of entry into force of this Agreement, in order to **facilitate communication**

between the Parties in the implementation of this Chapter. Each Party shall promptly notify, in writing, the other Parties in the event of any change of its contact point.

Source: USMCA, Article 24.26

Example Option D: Advice and Consultation

1. The Parties recognize that their respective regulatory authorities may seek expert advice and recommendations with respect to the preparation or implementation of regulations from groups or bodies that include non-governmental persons. The Parties also recognize that obtaining those advice and recommendations should be a complement to, rather than a substitute for, the procedures for seeking public comment pursuant to Article 28.9.3 (Transparent Development of Regulations).

Source: USMCA, Article 28.10

iii. Capacity Building Provisions

Many countries involved in the negotiation of environmental provisions lack the capacity to negotiate on environmental issues. This can be a result of power asymmetries in negotiations, capacity within negotiating teams, lack of finance, or national regulatory and enforcement capacity. Low-income countries in particular have a hard time negotiating environmental chapters in RTAs when their own national environmental regulation standards are at their infancy. Environmental measures also require significant preparation, coordination, and financial means. The weight of environmental issues within specific countries and geographic regions also differs greatly. In addition, relevant institutions often do not exist to carry out environmental activities during the implementation phase of an RTA, making capacity building critical to successful environmental approaches.

In 2019, the SADC Secretariat and EU launched a capacity building programme, the Intra-African, Caribbean and Pacific (ACP) Global Climate Alliance Plus (GCCA+) Programme, to strengthen the capacity of SADC Member States to undertake climate adaptation and mitigation interventions.[262] This builds upon SADC framework policies such as the SADC Climate Change Strategy and Action Plan of 2015 and the SADC Regional Green Growth Strategy and Action Plan of 2015. Example Option A below, taken from the EU-SADC EPA, recognizes the importance of development finance to these efforts. Because it does not call upon the parties to establish new institutions and instead focuses on leveraging prior commitments under the Cotonou Agreement, it is highlighted as the option that requires the lowest level of additional commitment.

Example Option B, also from the EU-SADC EPA, encourages the parties to establish new institutional structures ("shall aim at supporting") but does not require their creation, which

[262] SADC and EU launch a programme to strengthen capacity of SADC Member States to undertake Climate Change Adaptation and Mitigation actions, https://www.sadc.int/news-events/news/sadc-and-eu-launch-programme-strengthen-capacity-sadc-member-states-undertake-climate-change-adaptation-and-mitigation-actions/

reduces the level of commitment. It also encourages the delivery of coordinated activities to adjust to SADC Member States' specific financing needs.

Example Option C, taken from a joint statement issued by the U.S. and Jordanian governments, provides for technical assistance on the environmental review. It also establishes a Joint Forum on Environmental Technical Cooperation to meet regularly to develop technical cooperation initiatives. Because establishment of a new forum may be more difficult for developing country partners, this option calls for a higher level of commitment than Example Option B.

Example Options on Capacity Building

Example Option A: Development Finance Cooperation

2. The Parties recognize that development cooperation is a crucial element of their Partnership and an essential factor for the achievement of the objectives of this Agreement as laid down in Article 1. **Development finance cooperation for regional economic cooperation and integration**, as provided for in the Cotonou Agreement, shall be carried out to support and promote the efforts of the SADC EPA States to achieve the objectives and to maximize the expected benefits of this Agreement.

Source: EU-SADC EPA, Article 12.1

Example Option B: Institutional Capacity Building

8. Cooperation for EPA institutional capacity building shall aim at supporting institutional structures for EPA implementation management, capacity building for trade negotiations and for trade policy in cooperation with the relevant institutional mechanisms established under the SADC Treaty and SACU Agreement or in the respective SADC EPA States.

Source: EU-SADC EPA, Article 13.8

Example Option C: Joint Forum on Environmental Technical Cooperation

The following programs reflect both ongoing and future U.S. support for enhancing environmental protection in Jordan. These programs focus on building human and constitutional capacity in environmental management, compliance assurance and enforcement, and conservation of living and non-living natural resources. It is intended that the **work of these programs will inform the development agenda of the Joint Forum on Environmental Technical Cooperation**.

Source: US-Jordan Joint Statement on Environmental Technical Cooperation

Other RTAs, like the CAFTA-DR FTA, contain a range of environmental cooperation activities, such as strengthening environmental management systems. Here, the U.S. Environmental Protection Agency and its cooperative agreement partner, Battelle Memorial Institute, in collaboration with the Pan-American Health Organization (PAHO), designed and implemented

the Air Quality Management program.[263] Such an option may require greater capability and capacity among the parties, however, making it a more involved option than those noted above. It is included as the Example Option below.

Example Option on Fostering Partnerships to Address Conservation and Management

3. As set forth in Article V of the ECA, the Parties have identified the following priorities for environmental cooperation activities:
….
(c) Fostering partnerships to address current or emerging conservation and management issues, ***including personnel training and capacity building*** (emphasis added);

Source: Chapter 17, Annex 17.9, CAFTA-DR Agreement

c. Multilateral Environmental Agreements

MEAs permeate the landscape of environment-related agreements and are integral to global efforts in tackling environmental challenges, not least of which is the crisis of climate change. Including MEA-related provisions in RTAs serves to reinforce and strengthen the existing commitments that parties have undertaken under these other instruments. This also presents an opportunity to clarify and scope the interactions between RTAs and MEAs, particularly where both agreements provide for overlapping areas of commitments, and, in turn, contribute to the development of a cohesive body of international rules on trade and environmental sustainability for effective implementation and enforcement of environmental objectives.

i. Strengthening MEA-related Commitments

At the minimum, MEA-related provisions reaffirm the importance of MEAs and the parties' obligations thereunder. Some RTAs go further by calling upon parties to adopt measures required to comply with MEA obligations, although only a minority require parties to ratify specific MEAs. Instead, when they appear in RTAs, MEAs tend to be identified as an area of cooperation between parties, which allows for more flexibility in implementation while still committing the parties to prioritizing environmental sustainability and protection in their dialogues. RTAs also differ in their approach towards MEAs. While some RTAs refer to MEAs in general, others restrict the RTA's application to unspecified MEAs to which one or more of the parties adhere, while others prescribe a specific list of MEAs to which the RTA applies.

[263] Phase I of the program focused on emission inventories, standards and regulations, quality control and data analysis and equipment. Phase II focused on development and deployment of air quality webinars to address priorities in CAFTA-DR countries through dissemination of expert knowledge and best practices. Phase III provided targeted support for the development of emissions inventories and support M&E capacities of CAFTA-DR countries. An Emissions Inventory Planning guide was formulated. Phase IV plans to develop training modules with case studies to help CAFTA-DR countries and Panama use EPA's Motor Vehicle Emission Simulator, a modeling system that estimates emissions for mobile sources at the national, country and project level for air pollution, GHG and air toxics. (*See* Capacity-Building Programs Under the CAFTA-DR FTA, *United States EPA*, https://www.epa.gov/international-cooperation/capacity-building-programs-under-dominican-republic-central-america).

While MEAs serve as useful reference points, RTA commitments may also go beyond MEA commitments or include MEA-related commitments without obligations that bind a non-party to the MEA. In the former, RTAs provide a platform for States to explore an expanded scope of commitments to strengthen the achievement of environmental goals under the respective MEAs. In the latter, including MEA-related commitments in RTAs, without obligations that bind a non-signatory to the MEA, achieves the effect of diffusing and strengthening MEA-related commitments.[264]

Example Option A below, taken from the CPTPP, is an example of a general provision that reaffirms countries' existing commitments under MEAs. Such provisions often do not create additional binding obligations, but they are useful as a signal of the parties' commitments to environmental sustainability and protection. Example Option A also calls upon the parties to engage in dialogue with respect to the negotiation and implementation of relevant MEAs and trade agreements; however, this clause is softer than the language in Example Option B.

Example Option B below, taken from the USMCA, highlights the parties' commitment to consult and cooperate with respect to "environmental issues of mutual interest, in particular trade-related issues, pertaining to relevant multilateral environmental agreements." While this option imposes obligations beyond the general language in Example Option A, it still offers significant flexibility and policy space for States to explore and engage in conversations on the MEAs and environmental issues that are of mutual interest to them.

Other RTA options establish commitments for the parties to cooperate with respect to particular issues or MEAs. Example Option C below, taken from the USMCA, creates binding obligations for RTA parties to fulfil their obligations under a specified list of MEAs where the parties have already undertaken obligations. This option complements the flexible approach in Example Option B by drawing attention to the MEAs and environmental issues that have already been agreed upon by the parties to be most critical to their environmental agendas.

Example Option D below, taken from the Agreement Establishing a Common Market for Eastern and Southern Africa (COMESA), sets out the parties' agreement to accede to specific MEAs in the main text of the RTA. While this option sends the strongest signal of a State's commitment to the specified MEAs and their respective environmental issues, creating an obligation to sign onto new MEAs ultimately requires ratification subject to the State's legislative process. Nonetheless, this option has the potential to increase participation in certain MEAs, allowing these MEAs to gain greater visibility, legitimacy and effectiveness.[265] Example Option E below, taken from the US-Peru Trade Promotion Agreement, illustrates commitments on biological diversity. While framed in aspirational terms, it places biological diversity on the environmental agenda of the parties, pulling in countries that are non-signatories to the relevant MEA, the Convention on Biological Diversity (namely the US).

[264] For example, the U.S. has not ratified the Convention on Biological Diversity, but has entered into RTAs such as the US-Peru Trade Promotion Agreement that contain provisions on biological diversity. Noémie Laurens & Jean-Frédéric Morin, "Negotiating Environmental Protection in Trade Agreements: A Regime Shift or A Tactical Linkage?," *International Environmental Agreements: Policitcs, Law and Economics,* (2019), https://doi.org/10.1007/s10784-019-09451-w

[265] Id.

Example Options on Strengthening MEA-related Commitments

Example Option A: General Affirmation of MEA Commitments

1. The Parties recognize that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.

2. The Parties emphasize the need to enhance the mutual supportiveness between trade and environmental law and policies, through dialogue between the Parties on trade and environmental issues of mutual interest, particularly with respect to the negotiation and implementation of relevant multilateral environmental agreements and trade agreements.

Source: CPTPP, Article 20.4

Example Option B: Obligation to Consult and Cooperate on Environmental Issues Covered Under MEAs

The Parties commit to consult and cooperate as appropriate with respect to environmental issues of mutual interest, in particular trade-related issues, pertaining to relevant multilateral environmental agreements. This includes exchanging information on the implementation of multilateral environmental agreements to which a Party is party; ongoing negotiations of new multilateral environmental agreements; and, each Party's respective views on becoming a party to additional multilateral environmental agreements.

Source: USMCA, Article 24.8.3

Example Option C: Obligation to Adopt Measures to Comply with Specific MEAs

Each Party shall adopt, maintain, and implement laws, regulations, and all other measures necessary to fulfil its respective obligations under the following multilateral environmental agreements ("covered agreements"):

(a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended;

(b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended;

(c) the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended;

(d) the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended;

(e) the Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980;

(f) the International Convention for the Regulation of Whaling, done at Washington, December 2, 1946; and

(g) the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949.

Source: USMCA, Article 24.8.4 (footnotes omitted)

Example Option D: Obligation to Accede to Specific MEAs

The Member States undertake to accede to international environmental Conventions that are designed to improve the environmental policies and management. To this end, the Member States agree to accede to the Montreal Protocol on the Environment.

Source: COMESA, Article 125.3

Example Option E: Commitments on Biological Diversity

1. The Parties recognize the importance of the conservation and sustainable use of biological diversity and their role in achieving sustainable development.

2. Accordingly, the Parties remain committed to promoting and encouraging the conservation and sustainable use of biological diversity and all its components and levels, including plants, animals, and habitat, and reiterate their commitments in Article 18.1.

3. The Parties recognize the importance of respecting and preserving traditional knowledge and practices of indigenous and other communities that contribute to the conservation and sustainable use of biological diversity.

4. The Parties also recognize the importance of public participation and consultations, as provided by domestic law, on matters concerning the conservation and sustainable use of biological diversity. The Parties may make information publicly available about programs and activities, including cooperative programs, it undertakes related to the conservation and sustainable use of biological diversity.

5. To this end, the Parties will enhance their cooperative efforts on these matters, including through the ECA.

Source: US-Peru Trade Promotion Agreement Article 18.11

ii. Clarifying Inconsistencies Between RTAs and MEAs

The incorporation of environmental provisions in RTAs and the proliferation of MEAs have raised concerns on the legal compatibility of overlapping commitments under RTAs and MEAs. Yet, only 29 RTAs address situations of inconsistency between RTA and MEA

obligations.[266] Provisions that clarify the relationship between an RTA and relevant MEAs are usually drafted to favour MEA obligations.

The NAFTA was the first RTA to address inconsistency between an RTA and MEA,[267] and the relevant language, shown in Example Option A below, has been replicated in the Canada-Chile RTA and Chile's RTAs with Honduras, Guatemala, El Salvador, Costa Rica and Nicaragua. This is a more common approach that places a less stringent burden upon the parties to an RTA.

In contrast, Example Option B below, taken from the US-Peru FTA, adopts a stricter wording that references the multilateral principle of "a disguised restriction on trade." This approach is further expanded in Example Option C below, taken from the Canada-Jordan RTA, which also incorporates the principle of "arbitrary or unjustifiable discrimination."

Example Options on Clarifying Inconsistencies Between RTAs and MEAs

Example Option A: Parties to Choose the Least Inconsistent Means

In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

(a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979;

(b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990; or

(c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989.

Such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

Source: Canada-Chile FTA, Article A-04; Chile-Costa Rica FTA, Article 1.04.2 (taken from NAFTA)

Example Option B: Measure Must Not Impose a Disguised Restriction on Trade

In the event of any inconsistency between a Party's obligations under this Agreement and a covered agreement, the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.

[266] Id.

[267] North American Free Trade Agreement, (December 17, 1992), Article 104(1), http://www.sice.oas.org/trade/nafta/naftatce.asp

Source: US-Peru FTA, Article 18.3(4); KORUS FTA, Article 20.10.3 (footnote 6 omitted)

Example Option C: Measure Must Not Constitute Arbitrary or Unjustifiable Discrimination or a Disguised Restriction on International Trade

In the event of any inconsistency between this Agreement and a Party's obligation in one of the MEAs listed in Annex 1-5, such obligation shall prevail to the extent of the inconsistency, provided that the measure taken is necessary to comply with that obligation, and is not applied in a manner that would constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Source: Canada-Jordan FTA, Article 1-5

d. Domestic Environmental Laws and Policies

Alongside MEA-related commitments, domestic environmental laws and policies are an essential component of the framework within which global environmental efforts are pursued. RTAs frequently contain provisions regarding domestic environmental laws and policies that commit the parties to support, or at least not undermine, global environmental efforts. Increasingly, RTAs, such as the CPTPP and Canadian RTAs, also set out provisions that call for greater transparency in the domestic environmental rule-making process.

This section presents options on the domestic environmental commitments that are most prevalent and/or gaining momentum in RTAs, including: (i) high level of environmental protections; (ii) upholding domestic environmental laws; (iii) ensuring transparency in the domestic environmental rule-making process; and (iv) enforcement of domestic environmental laws.

i. High Level of Environmental Protection

Most RTAs contain provisions that commit the parties to maintain a high level of environmental protection and continue to improve the level of environmental protection. These provisions range from aspirational language ("strive," "seek" or "endeavour") to stronger, more binding language ("shall ensure"). Generally, these provisions tend to afford States the space to regulate and set their level of environmental protection; however, some turn to international standards to fill the void in the absence of relevant environmental standards in national or regional legislation.

Example Option A is adapted from the CPTPP and EU-Japan EPA. This option, framed in aspirational language, is least restrictive and accords the parties the greatest policy space to establish their own levels of domestic environmental protection. This option also commits the parties to "continue to improve [their] respective levels of environmental protection," in a nod to the iterative process of environmental efforts.

Example Option B, taken from the EU-CARIFORUM EPA, commits the parties to adopt "relevant international standards, guidelines or recommendations, where practical and

appropriate," covering maximum ground in their environmental protections through a blend of national, regional and international standards.

Example Options on High Level of Domestic Environmental Protection

Example Option A: Aspirational Language on Upholding of High Levels of Domestic Environmental Protection

1. The Parties recognize the sovereign right of each Party to establish its own levels of domestic environmental protection and its own environmental priorities, and to establish, adopt or modify its environmental laws and policies accordingly.

2. Each Party **shall strive** to ensure that its environmental laws and policies provide for, and encourage, high levels of environmental protection and to continue to improve its respective levels of environmental protection. (emphasis added)

Source: CPTPP, Articles 20.3.2 & 20.3.3

Example Option B: Incorporating International Environmental Standards in Environmental Protections

In light of the environmental challenges facing their respective regions, and in order to promote the development of international trade in such a way as to ensure sustainable and sound management of the environment, the Parties recognise the importance of establishing effective strategies and measures at the regional level. The Parties agree that in the absence of relevant environmental standards in national or regional legislation, they shall seek to adopt and implement the relevant international standards, guidelines or recommendations, where practical and appropriate.

Source: EU-CARIFORUM Economic Partnership Agreement, Article 185

ii. Upholding Domestic Environmental Laws

Many RTAs contain provisions that reference the importance of upholding domestic environmental laws and some prohibit the parties from lowering their levels of environmental protection to further trade or investment.[268] These provisions tend to adopt language that "recognizes" or "agrees" that it is inappropriate to encourage trade and/or investment by a weakening or reduction in the protections afforded by domestic environmental laws. While strong enforcement commitments in this context can address concerns regarding a 'race to the bottom', some RTAs temper these obligations by retaining the parties' right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters, and to make decisions regarding the resources allocated to enforcement.

Example Option A, taken from the Japan-Philippines EPA, contains non-binding language ("*should not*") with respect to derogation from domestic environmental laws. Due to its

[268] Monteiro 2016, *supra* note 143.

design, this provision requires less commitment and affords the greatest degree of policy space, although flexibility in this case could favour certain priorities over others.

The newer mega-RTAs, such as the CPTPP and USMCA, stipulate a more specific and binding prohibition on parties against waiving or otherwise derogating from their environmental laws in order to encourage trade or investment within their territory. Example Option B, taken from the CPTPP, contains binding language that creates an obligation that the parties shall not fail to effectively enforce their environmental laws in a manner affecting trade or investment. However, it is notable that this firmer commitment also encompasses policy space. This is shown in Example Option B, which provides that a party has not failed to effectively enforce its environmental laws if a course of action or inaction reflects a reasonable exercise of discretion or results from a *bona fide* decision to allocate resources to enforcement of other environmental matters determined to be of a higher priority.

Example Options on Non-Derogation from Domestic Environmental Laws

Example Option A: Non-Binding Language on Non-Derogation from Domestic Environmental Laws

Each Party recognizes that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures. To this effect each Party **should not** waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion in its Area of investments by investors of the other Party.

Source: Japan-Philippines EPA, Article 102

Example Option B: Binding Language on Non-Derogation from Domestic Environmental Laws

4. No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement for that Party.

5. The Parties recognize that each Party **retains the right to exercise discretion** and to make decisions regarding: (a) investigatory, prosecutorial, regulatory and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 4 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a *bona fide* decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws.

6. Without prejudice to paragraph 2, The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party **shall not** waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner

that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.

Source: CPTPP, Articles 20.3.4, 20.3.5, and 20.3.6

iii. Ensuring Transparency in the Domestic Environmental Rule-Making Process

While most RTAs recognize the right of States to set domestic environmental laws and policies, an increasing number of RTAs set out the requirements by which domestic regulations are made and adopted, such as the requirement for governments to consult the public prior to adopting environmental regulations. The requirement for public participation and consultation may appear in a general standalone provision or in provisions on specific environmental regulations. A handful of RTAs also require States to commit to monitor the state of the environment and provide periodic public reports. Such provisions remain rare in RTAs, as they pose administrative challenges for States with respect to domestic rule-making discretion, with high costs of compliance and enforcement, particularly for developing and LDC States that may not have the relevant resources and capacity.

Example Option A, taken from the Preamble to the Canada-Colombia Agreement on the Environment, stresses the importance of transparency and public participation in the domestic environmental rule- and policy-making process. It is the least restrictive of the options, as it merely acknowledges the importance of transparency and public participation in environmental governance but does not create any obligations for the parties. Example Option B, taken from the CPTPP, calls upon the parties to "seek to accommodate requests for information," creating a somewhat deeper focus but still using best endeavour language ("seek to accommodate"). In contrast, Example Option C, taken from the USMCA, creates a binding obligation on the parties to promote public awareness of environmental laws and policies and consider questions or comments received through a more comprehensive public consultation process. Both options B and C also obligate the parties to "make use of existing, or establish new, consultative mechanisms" to seek views from the public. Example Option D, also taken from the CPTPP, sets out a binding obligation related to a specific environmental issue (ozone layer protection).

Example Options on Domestic Environmental Rule-Making Process

Example Option A: Preambular Reference to Transparency and Public Participation in the Development of Environmental Laws and Policies and Environmental Governance

Acknowledging the importance of transparency and public participation in the development of environmental laws and policies and with respect to environmental governance. (emphasis added)

Source: Canada-Colombia Agreement on the Environment, Preamble

Example Option B: Best Endeavour Provision on Public Participation

1. Each Party **shall seek to accommodate requests for information** regarding the Party's implementation of this Chapter.

2. Each Party shall make use of existing, or establish new, consultative mechanisms, for example national advisory committees, to seek views on matters related to the implementation of this Chapter. These mechanisms may include persons with relevant experience, as appropriate, including experience in business, natural resource conservation and management, or other environmental matters.

Source: CPTPP, Article 20.8

Example Option C: Binding Provision on Public Participation

1. Each Party **shall promote public awareness** of its environmental laws and policies, including enforcement and compliance procedures, by ensuring that relevant information is available to the public.

2. Each Party **shall provide for the receipt and consideration of written questions or comments from persons of that Party** regarding its implementation of this Chapter. Each Party shall respond in a timely manner to these questions or comments in writing and in accordance with domestic procedures, and make the questions or comments and the responses available to the public, for example by posting on an appropriate public website.

3. Each Party shall make use of existing, or establish new, consultative mechanisms, for example national advisory committees, to seek views on matters related to the implementation of this Chapter. These mechanisms may include persons with relevant experience, as appropriate, including experience in business, natural resource conservation and management, or other environmental matters. (emphasis added)

Source: USMCA, Article 24.5

Example Option D: Public Information and Public Participation in Relation to Specific Environmental Commitments

The Parties **recognize the importance of public participation and consultation**, in accordance with their respective law or policy, in the development and implementation of measures concerning the protection of the ozone layer. Each Party **shall make publicly available appropriate information** about its programs and activities, including cooperative programs that are related to ozone layer protection. (emphasis added)

Source: CPTPP, Article 20.5.2 (with respect to specific obligations relating to the protection of the ozone layer)

Environmental impact assessment is also sometimes included, which may be defined as "analytical processes of identifying, forecasting and estimating the possible (positive and negative) environmental impacts of the implementation of particular projects, programs and policies."[269] Since the NAFTA, which introduced a provision requiring parties to conduct environmental impact assessments in their territories, similar provisions have been incorporated in environmental cooperation agreements associated with RTAs, which require parties to ensure they maintain appropriate procedures for assessing the environmental impacts of proposed projects which may cause significant adverse effects on the environment, with a view to avoiding or minimizing such adverse effects. These provisions also tend to follow a commitment of States to disclose to the public information arising from the proposed projects and allowing the public to participate in these environmental assessment procedures.

Example Option A, taken from the Canada-Colombia Agreement on the Environment, sets out in binding terms the obligation on the parties to ensure that appropriate procedures for environmental impact assessments are maintained. Example Option B, taken from the USMCA, explicitly limits the parties' obligation to projects that are "subject to an action by that Party's central level of government."

Example Options on Environmental Impact Assessments

Example Option A: General Requirement for Environmental Impact Assessments

Each Party **shall ensure that it maintains appropriate procedures for assessing the environmental impacts** in accordance with national law and policy of proposed plans and projects, which may cause adverse effects on the environment, **with a view to avoiding or minimizing such adverse effects**. (emphasis added)

Source: Canada-Colombia Agreement on the Environment, Article 2.5

Example Option B: Limited Requirement for Environmental Impact Assessments Only in Projects by a Party's Central Level of Government

1. Each Party shall maintain appropriate procedures for assessing the environmental impacts of **proposed projects that are subject to an action by that Party's central level of government** that may cause significant effects on the environment with a view to avoiding, minimizing, or mitigating adverse effects. (emphasis added)

Source: USMCA, Article 24.7

[269] Jean-Frédéric Morin & Rosalie Gauthier Nadeau, "Environmental Gems in Trade Agreements: Little-known Clauses for Progressive Trade Agreements," CIGI PAPERS NO. 148 (October 2017).

iv. Enforcement of Domestic Environmental Laws

Several RTAs commit the parties to ensuring that judicial, quasi-judicial, or administrative proceedings can be used to sanction or remedy violations of domestic environmental laws. Some RTAs, mainly those negotiated by the United States and Canada, require each party to ensure that its citizens have appropriate access to these proceedings, including the right to request that competent authorities investigate alleged violations of domestic environmental laws. A large number of these RTAs also commit parties to providing appropriate and effective sanctions or remedies for these violations, such as penalties, fines, imprisonment, injunctions, suspension of activities, or compliance agreements.

Example Option A, taken from the CPTPP, details a comprehensive set of procedural and rule of law requirements, such as the right to fair hearing and access to justice, as well as sanctions and remedies that commensurate with the nature and gravity of the violation of domestic environmental laws.

Example Option B, taken from the USMCA, stipulates further procedural requirements, including an explicit recognition by the parties that "proceedings should not be unnecessarily complicated nor entail unreasonable fees or time limits," requirements relating to the final decision on merits of cases decided in these proceedings, and the right for parties to these proceedings to seek review, correction or redetermination of final decisions. Both provisions are binding upon the parties (as signalled by use of "shall ensure" and "shall provide"), although Example Option B contains additional procedural options, as noted, creating a more substantial obligation.

Example Options on Enforcement of Domestic Environmental Laws

Example Option A: Enforcement Mechanisms

1. Each Party shall promote public awareness of its environmental laws and policies, including enforcement and compliance procedures, by ensuring that relevant information is available to the public.

2. Each Party shall ensure that an interested person residing or established in its territory may request that the Party's competent authorities investigate alleged violations of its environmental laws, and that the competent authorities give those requests due consideration, in accordance with the Party's law.

3. Each Party shall ensure that judicial, quasi-judicial or administrative proceedings for the enforcement of its environmental laws are available under its law and that those proceedings are fair, equitable, transparent and comply with due process of law. Any hearings in these proceedings shall be open to the public, except when the administration of justice otherwise requires, and in accordance with its applicable laws.

4. Each Party shall ensure that persons with a recognized interest under its law in a particular matter have appropriate access to proceedings referred to in paragraph 3.

5. Each Party shall provide appropriate sanctions or remedies for violations of its environmental laws for the effective enforcement of those laws. Those sanctions or remedies may include a right to bring an action directly against the violator to seek damages or injunctive relief, or a right to seek governmental action.

6. Each Party shall ensure that it takes appropriate account of relevant factors in the establishment of the sanctions or remedies referred to in paragraph 5. Those factors may include the nature and gravity of the violation, damage to the environment and any economic benefit the violator derived from the violation.

Source: CPTPP, Article 20.7

Example Option B: Proceedings for Enforcement of Domestic Environmental Laws

1. Each Party shall ensure that administrative, quasi-judicial, or judicial proceedings for the enforcement of the Party's environmental laws are available under its law and that those proceedings are fair, equitable, transparent, and comply with due process of law, including the opportunity for parties to the proceedings to support or defend their respective positions. The Parties recognize that these proceedings should not be unnecessarily complicated nor entail unreasonable fees or time limits.

2. Each Party shall provide that final decisions on the merits of the case in these proceedings are:
(a) in writing and if appropriate state the reasons on which the decisions are based;
(b) made available without undue delay to the parties to the proceedings and, in accordance with its law, to the public; and
(c) based on information or evidence presented by the parties or other sources, in accordance with its law.

3. Each Party shall also provide, as appropriate, that parties to these proceedings have the right, in accordance with its law, to seek review and, if warranted, correction or redetermination, of final decisions in such proceedings.

Source: USMCA, Article 24.6

v. Compliance and Enforcement of RTA Provisions

The effectiveness of environmental provision in RTAs is often measured by their enforcement mechanisms. Some parties rely on soft mechanisms for enforcement, such as the EU, which uses the mechanism known as the Civil Society Dialogue. Within this mechanism, governments and civil society actors from both the EU and its trading partners meet regularly to work together on implementation. Other parties rely upon more binding enforcement mechanisms, as presented below.

A good example of a soft enforcement mechanism is the EU-Japan Joint Dialogue with Civil Society under the EU-Japan EPA, shown as the Example Option below. The EU-Japan EPA sets

up a committee on trade and sustainable development to review and monitor the implementation of the chapter on trade and sustainable development.

Example Option on Committee Tasked with Compliance with Environmental Sustainability Provisions

1. The Committee on Trade and Sustainable Development established pursuant to Article 22.3 (hereinafter referred to in this Chapter as "the Committee") shall be responsible for the effective implementation and operation of this Chapter.

Source: EU-Japan EPA, Chapter 16 on Trade and Sustainable Development

The Example Option below, also drawn from the EU-Japan EPA, establishes a Joint Dialogue with civil society organisations in the member state territories. The main function of the Joint Dialogue is to receive information from member states on the implementation of the chapter, including environmental interests. However, it is important to note that the success of civil society engagement will be dependent upon organizational capacity and the willingness of government to actually hold these meetings and adhere to the Agreement.

Example Option on Joint Dialogue with Civil Society

2. The Parties shall promote in the Joint Dialogue a balanced representation of relevant stakeholders, including independent organizations which are representative of economic, environmental and social interests as well as other relevant organizations as appropriate. […]

3. The Parties will provide the Joint Dialogue with information on the implementation of this Chapter. The views and opinions of the Joint Dialogue may be submitted to the Committee and may be made publicly available.

Source: EU-Japan Economic Partnership Agreement, Article 16.16

Further, the Example Option below shows how some RTAs, such as the CPTPP, allow parties to have flexible, voluntary mechanisms contributing to the maintenance of high levels of environmental protection. Voluntary mechanisms may include: private-public partnerships, voluntary guidelines for environmental performance, and market-based incentives, such as public recognition of superior environmental performance, among others.

Example Option on Voluntary Mechanisms to Enhance Environmental Performance

1. The Parties recognise that flexible, voluntary mechanism, for example, voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships, can contribute to the achievement of high levels of environmental protection and complement domestic regulatory measures. The Parties also recognise that those mechanisms should be designed in a manner that maximises their environmental benefits and avoids the creation of unnecessary barriers to trade.

Source: CPTPP, Article 20.11

On the other hand, countries like the United States use a more binding approach, which is often viewed as a more "coercive" model based on the threat of sanctions and fines. Under such provisions, a party reserves the right to conduct periodic reviews of environmental policies of its trade partners so as to monitor implementation and compliance with agreement provisions. If levied, sanctions can involve the elimination of trade privileges and fines and are designed to hold parties accountable to commitments on environmental policy. The Example Option below, drawn from the USMCA, highlights the threshold of environmental regulatory compliance under the USMCA. Under the USMCA, the parties also reserve discretion regarding compliance matters.

The USMCA also has side agreements aimed at promoting compliance with environmental provisions within the agreement. For example, the United States and Mexico negotiated a separate Environment Cooperation and Customs Verification Agreement that will help bolster efforts to combat trade in illegally taken wildlife, fish and timber.[270]

Example Option on Compliance Threshold Provisions

1. No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement.

2. The Parties recognize that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory, and compliance matters" […] Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 1 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws.

Source: USMCA, Article 24.4.2

Other RTAs have taken more comprehensive approaches to compliance and enforcement rather than independently focus on mitigation measures. These may center around collaboration, such as the approach taken by COMESA, the East African Community (EAC), and SADC under the five-year Programme on Climate Change Adaptation and Mitigation in the COMESA-EAC-SADC region. This initiative was built off of the COMESA Climate Change Initiative and worked to complement other climate change mitigation projects in the region; it also included a dedicated Monitoring & Evaluation department within the COMESA Climate Change Unit that reports on progress and submits annual reports.

However, in the event of compliance failure, related agreements provide for a number of measures. Example Option A below, taken from the EAC Treaty, illustrates a sanctions-based approach when Partner States fail to meet their obligations under the Treaty. Example Option B below, from the SADC Protocol on Environmental Management for Sustainable

[270] USTR, "USMCA Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement" https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/modernizing (last visited February 5, 2022).

Development, aims to criminally charge offenders and even provides for extradition in an effort to prosecute trans-national environmental offences. Example Option C, from the COMESA Treaty, echoes the polluter pays principle, which is a commonly-accepted practice to require that those who pollute to bear the costs of management to prevent damage to human health or the environment.

Example Options on Comprehensive Approaches to Compliance and Enforcement

Example Option A: Sanctions-based Compliance Approach

A Partner State which defaults in meeting its financial and other obligations under this Treaty shall be subject to such action as the Summit may on the recommendation of the Council, determine.

Source: The Treaty Establishing the EAC, Article 143

Example Option B: Law Enforcement

2. State Parties shall agree upon activities detrimental to the environment, to be deemed as offences.

3. State Parties shall co-operate in the harmonisation and use of monitoring and surveillance systems with a view to minimise the cost of environment law enforcement.

4. State Parties may conclude arrangements, bilateral or otherwise to co-operate in the provision of personnel and the use of vessels, aircraft, communications, databases and information, or other assets for the purposes of environmental management surveillance and law enforcement.

5. State Parties shall designate competent institutions and persons to act as environmental management enforcement officers. […]

7.State Parties shall establish appropriate arrangement to co-operate in dealing with suspected environmental criminals who cross from one Member State to another.

8. State Parties shall enact laws, conclude arrangements and establish procedures for the extradition to each other of persons charged with or convicted of offences of contravening the environmental laws of the State Party seeking the extradition of such persons.

9. State Parties shall take measures to strengthen the capacity of their judicial systems to effectively prosecute perpetrators of environmental crimes or offences.

10. Should some State Parties wish to provide that a penalty imposed by each one of them under their environmental management laws be enforced by another State Party or Parties, they may agree on procedures for that purpose consistent with their national laws.

11. State Parties shall establish region-wide comparable levels of penalties to be imposed for activities that constitute offences against the environment.

Source: SADC Protocol on Environmental Management for Sustainable Development, Article 1

Example Option C: Polluter Pays

6. Action by the Common Market relating to the environment shall be based on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay….

Source: Treaty Establishing the Common Market for Eastern and Southern Africa, Chapter 16 on Co-operation in the Development of Natural Resources, Environment, and Wildlife.

vi. Emerging Issues

A number of other issues related to trade and environment are evolving internationally. Among these are: (i) Environmental Goods and Services, (ii) Carbon Border Adjustment Mechanism (CBAM), (iii) Fossil Fuel Subsidies, (iv) Business & Human Rights, and (v) Circular Economy, all of which are referred to as "emerging issues" below.

Progress on these issues is evident at the multilateral and regional levels. For example, WTO Member States recently concluded the WTO Agreement on Fisheries Subsidies, after many years of negotiations, and the OECD recently released the Global Plastics Outlook,[271] which highlights exponential increases in global plastic waste generation in the context of developing an internationally legally binding instrument on plastic pollution. The EU also presented its Strategy for Sustainable Circular Textiles as a step in combating the sector's negative environmental impact. Circular economy provisions are also appearing in RTAs to incorporate approaches to tackle plastic pollution.

vii. Environmental Goods and Services

Another area at the nexus of trade and environment, which has been a focus of negotiations at both the multilateral and regional levels, is preferential treatment, cooperation, and preferential trade terms for those goods and services most important for environmental sustainability. At present, there is no agreed-upon definition on "environmental goods" or "environmental services"; however, the OECD and APEC aim to identify them by HS codes (goods) or CPC codes (services).[272] At the WTO, the 2001 Doha Ministerial Declaration instructs members to negotiate the reduction of or, as appropriate, elimination of tariff and non-tariff barriers on environmental goods and services. Multilateral negotiations on the topic have not advanced since 2011. From 2014 on, a sub-set of WTO Member States launched plurilateral efforts on the reduction of tariffs on environment-related products (as identified by HS codes) under the Environmental Goods Agreement negotiations. The last round of negotiations took place in December 2016. Since November 2020, WTO Member States co-sponsoring the TESSD have been discussing environmental goods and services but

[271] OECD, "Countries Pledge to Step Up on Climate and Environment at OECD Environment Ministerial," 31 Mar. 2022, https://www.oecd.org/environment/countries-pledge-to-step-up-action-on-climate-and-environment-at-oecd-environment-ministerialhtm.htm

[272] Ronald Steenblik, "Environmental Goods: A Comparison of the APEC and OECD Lists," OECD Trade and Environment Working Paper No. 2005-04.

have yet to determine how environmental goods and services will be defined and treated within the context of the environmental initiative.

The Ministerial Statement on Trade and Environmental Sustainability, the Baseline Option below, does provide a basic approach to the promotion and facilitation of environmental goods and services; however, it focuses on more general cooperation and does not define environmental goods and services. It is fairly aspirational and calls upon the parties to "explore opportunities and possible approaches."

At the RTA level, some regional trade agreements also recognise the importance of working together on trade-related aspects of environmental policies. These provisions tend to appear in the general rules of an environmental chapter. In Example Option A below, drawn from the EU-Singapore trade and investment agreements and New Zealand-Korea FTA, the parties agree to promote trade and investment in environmental goods and services under "Trade and Investment Promoting Sustainable Development" clauses. Example Option B, taken from CPTPP and USMCA, highlights a more substantial approach dedicated to recognizing the importance of trade and investment in environmental goods and services as a means to progress on various environmental issues, confirming an obligation to make a sincere effort for promotion and facilitation of trade and investment in environmental goods and services. Also, parties obligate the Environment Committee to identify potential non-tariff barriers to trade in environmental goods and services.

Example Options on Environmental Goods and Services

Baseline Option: Ministerial Statement on Trade and Environmental Sustainability

1. Explore opportunities and possible approaches for promoting and facilitating trade in environmental goods and services to meet environmental and climate goals, including through addressing supply chain, technical and regulatory elements.

Source: World Trade Organization, Ministerial Statement on Trade and Environmental Sustainability, WTO Doc. WT/MIN(21)/6/Rev.2 (2021)

Example Option A: Provision Promoting Trade and Investment in Environmental Goods and Services

Article 12.10: Cooperation on Environmental Aspects in the Context of Trade and Sustainable Development

The Parties recognise the importance of working together on trade-related aspects of environmental policies in order to achieve the objectives of this Agreement. The Parties may initiate cooperative activities of mutual benefit in areas including, but not limited to: […]

(j) the exchange of views on the liberalisation of environmental goods and services; […]

Article 12.11: Trade and Investment Promoting Sustainable Development

1. The Parties resolve to make continuing special efforts to facilitate and promote trade and investment in environmental goods and services, including through addressing related non-tariff barriers. The Parties also recognise the usefulness of efforts to promote trade in goods that are the subject of voluntary or private sustainable development assurance schemes, such as eco-labelling, or fair and ethical trade.

2. The Parties shall pay special attention to facilitating the removal of obstacles to trade or investment concerning climate-friendly goods and services, such as sustainable renewable energy goods and related services and energy efficient products and services, including through the adoption of policy frameworks conducive to the deployment of best available technologies and through the promotion of standards that respond to environmental and economic needs and minimise technical obstacles to trade.

Source: EU-Singapore trade and investment agreements Articles 12.10 and 12.11; Korea- NZ FTA Articles 16.1 and 16.4

Example Option B: Entire Article on Environmental Goods and Services

1. The Parties recognize the importance of trade and investment in environmental goods and services, including clean technologies, as a means of improving environmental and economic performance, contributing to green growth and jobs, and encouraging sustainable development, while addressing global environmental challenges.

2. Accordingly, the Parties shall strive to facilitate and promote trade and investment in environmental goods and services.

3. The Environment Committee shall consider issues identified by a Party related to trade in environmental goods and services, including issues identified as potential non-tariff barriers to that trade. The Parties shall endeavor to address any potential barriers to trade in environmental goods and services that may be identified by a Party, including by working through the Environment Committee and in conjunction with other relevant committees established under this Agreement, as appropriate.

4. The Parties shall cooperate in international fora on ways to further facilitate and liberalize global trade in environmental goods and services, and may develop cooperative projects on environmental goods and services to address current and future global environmental challenges.

Source: USMCA Article 24.24; CPTPP Article 20.18

viii. Carbon Border Adjustment Mechanism (CBAM)

As an example of a measure to cope with climate change, which has become increasingly severe in recent years, countries are now considering CBAMs in order to meet Paris Agreement commitments, a move that has been spearheaded by the EU in order to address "carbon leakage" when companies transfer their production to countries with less restrictive environmental standards, resulting in higher greenhouse gas (GHG) emissions in total. The COP26 climate negotiations led to the conclusion of rules to operationalize Article 6 of the

Paris Agreement, which promotes the objective of the United Nations Framework Convention on Climate Change (UNFCCC) by embracing cooperative approaches to national carbon reduction and removal targets.[273]

The EU's CBAM is based on EU policy,[274] and it is set to apply to imported products from all countries (with the exception of a few countries that are linked to EU-ETS) in certain sectors (steel, aluminium, cement, electricity etc., as defined by HS codes), based on carbon footprint per product.[275] Although the Paris Agreement stipulates "common but differentiated responsibilities," akin to special and differential treatment, developing countries and LDCs will likely face challenges meeting CBAM requirements. It is also unclear how introduction of CBAMs will affect legal provisions under RTAs. However, negotiators may want to note that the CBAM arose in the context of reconciliation of existing international trade rules, transparency on carbon footprint calculation regulations, and technical assistance and capacity building, especially for LDCs.

ix. Fossil Fuel Subsidies

Fossil-fuel subsidies are one of the biggest factors hindering the global transition to renewable energy sources. Decreases in the global carbon budget, the amount of GHG that can be produced before global warming goes above the 2ºC threshold, necessitate the need to actively limit fossil fuel production. Between 2015 and 2020, 53 countries implemented fossil fuel subsidy reform and fuel taxation.

Sectoral agreements have previously been used to address subsidies in fossil fuel intensive industries, such as the plurilateral agreement on Trade in Civil Aircraft,[276] although these agreements have not gone so far as to address fossil fuel subsidies. The EU-Singapore FTA takes a soft approach in addressing the transition to low carbon fuels and the need for parties to gradually reduce fossil fuel subsidies, with a focus on promoting investment in renewable energy solutions.[277] While the CPTPP does not contain provisions specifically targeting fossil fuel subsidies, its predecessor, the TPP,[278] sets out a progressive adoption by the parties of migration and adaptation actions to increase energy efficiency and develop low-carbon technologies and renewable energy sources. Notably, negotiations are ongoing under the ACCTS Agreement to include disciplines that aim to eliminate both production and

[273] Charles e. Di Leva, "The Paris Agreement's New Article 6 Rules: The Promise and Challenge of Carbon Market and Non-Market Approaches," *IISD*, 13 December 2021, https://www.iisd.org/articles/paris-agreement-article-6-rules

[274] European Commission President Ursula von der Leyen has set the "European Green Deal" as one of the six priorities in her policy agenda. The European Climate Act aims to make carbon neutral by 2050, and raise the 2030 GHG reduction target to at least 55 percent of the 1990 level.

[275] Importers must purchase a "CBAM Certificate," paying the equivalent price of EU-ETSs, based on the following formula: Amount of duty = CBAM Certificate price(P/CO2-ton) x Carbon footprint per product (CO2-ton/Q) x Import Amount (Q)

[276] ATCA Preamble; *See* Richard O. Cunningham, "Subsidies to Large Civil Aircraft Production: New WTO Subsidy Rules and Dispute Settlement Mechanism After Dynamics of U.S.-EU Dispute," *Air & Space Law* 1208.

[277] The EU-Singapore Trade and Investment Agreements, https://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151766.pdf

[278] Trans-Pacific Partnership Agreement Text, https://wikileaks.org/tpp-enviro/#trade_and_climate

consumption of fossil fuel subsidies which build upon work at the WTO on fossil fuel subsidy reform.[279]

x. Transition to a Circular Economy

With the world's population projected to reach approximately 11 billion by 2100,[280] a circular economy model is needed to negate the depletion of natural resources caused by the increase in consumption levels. Preambular language in some RTAs recognizes the relationship between trade and sustainable development, including on matters relating to the circular economy. The CPTPP contains an Annex on Organic Labelling which is designed to facilitate transparency and compatibility among voluntary labelling schemes relevant to the circular economy. The ongoing ACCTS negotiations also envisage developing guidelines that inform the development and implementation of voluntary eco-labelling programmes and associated mechanisms to encourage their promotion and application.[281] In addition, sectoral cooperation provisions, such as the provision on autos in the CETA Annex on Motor Vehicle Regulation, can further promote the circular economy.[282] States are also leveraging RTAs to advance the harmonization of energy efficiency standards by encouraging parties to base their technical regulations on an international standard of energy efficiency, with the EU-Japan EPA and EU-Singapore FTA affording parties the flexibility to adopt international standard most aligned with their policy objectives.

In the international arena, negotiations on an internationally binding instrument to end plastic pollution were recently launched at the 5th UN Environment General Assembly (UNEA-5) in Nairobi. The instrument will reflect diverse alternatives to addressing the lifecycle of plastics, the design of reusable and recyclable products and materials, and the need for enhanced collaboration to facilitate access to technology, capacity building and scientific and technical cooperation.[283] At the WTO level, the TESSD and DPP initiatives cover issues related to trade and circular economy/circularity.

[279] New Zealand Ministry of Foreign Affairs and Trade, Fossil Fuel Subsidy Reform (FFSR), https://www.mfat.govt.nz/mi/environment/fossil-fuel-subsidy-reform-ffsr/

[280] Anthony Cilluffo and Neil Ruiz "World's Population is Expected to Nearly Stop Growing by the End of the Century," June 17, 2019, PEW RESEARCH, https://www.pewresearch.org/fact-tank/2019/06/17/worlds-population-is-projected-to-nearly-stop-growing-by-the-end-of-the-century/

[281] New Zealand MoFT 2020, *supra* note 41

[282] Christophe Bellmann, "The Circular Economy and International Trade: Options for the WTO," *International Chamber of Commerce*, (November 2021), https://icc.se/wp-content/uploads/2021/12/20211214_Circular-Economy.pdf

[283] UNEP, "Historic Day in the Campaign to Beat Plastic Pollution: Nations Commit to Develop a Legally Binding Instrument," (March 2, 2022), https://www.unep.org/news-and-stories/press-release/historic-day-campaign-beat-plastic-pollution-nations-commit-develop

CHAPTER IV:

TRADE AND LABOUR

CHAPTER IV – TRADE AND LABOUR

Changing global circumstances, ranging from environmental crises to pandemic, place significant pressure on the global workforce. Workers are vulnerable to crisis and can face particular challenges when countries or corporations undermine labour protections, such as minimum wages or workplace safety.[284] Climate-related events will also significantly affect labour and capital reallocation across regions, sectors, and firms.[285] Commitments in RTAs can help strengthen workers' rights and increase their protections in times of crisis, as well as provide sustainable guidelines for recovery.

Recently, the COVID-19 pandemic placed unprecedented pressure on labourers in all sectors of the global economy. Frontline workers faced increased health and safety risks in their workplace; remote workers faced challenges with isolation, transitioning to virtual work and balancing childcare responsibilities; and many other workers faced unemployment.[286] Global labour income was US$3.7 trillion (8.3 percent) lower in 2020 than it would have been had the pandemic not happened.[287] Global employment in 2020 declined more for women, youth, and medium- and low-skilled workers than for other groups, and 90 percent of women who lost their jobs exited the labour force entirely.[288] The pandemic exacerbated previous disparities between labourers in different regions, and workers in countries with the ability to enact emergency measures to provide social protections fared much better in terms of their jobs and incomes.[289] Overall, compared to 2019, approximately 108 million more workers are now extremely or moderately poor, meaning that they and their family members live on less than US$3.20 per day (in purchasing power parity terms).[290]

[284] "Covid-19 Impact Brief: Decent Work", U.N. GLOBAL COMPACT, https://unglobalcompact.org/take-action/20th-anniversary-campaign/uniting-business-to-tackle-covid-19/decentwork (last visited Mar. 1, 2022) [hereinafter UN Global Compact COVID-19 Brief].

[285] Christoph Albert et al., "Effects of Climate Change on Labour and Capital Reallocation," National Bureau of Economic Research (Working Paper No. 28995, 2021), https://www.nber.org/papers/w28995

[286] ILO, "Policy Brief: A Policy Framework for Tackling the Economic and Social Impact of the COVID-19 Crisis," 10 (2020), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_745337.pdf

[287] Labour income does not include government benefits or transfers. *See* ILO, "World Employment and Social Outlook: Trends 2021," 12 (2021), [hereinafter ILO 2021] https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_795453.pdf

[288] Ibid.

[289] *See supra*, note 2, at 42.

[290] *See* ILO 2021, *supra* note 287.

Labour standards are currently not covered under WTO rules and disciplines. There is a reference to prison labour in GATT Article XX (General Exceptions), which is a defensive provision and not an affirmative obligation. Language in the 1996 Singapore Ministerial Declaration identifies the ILO as the responsible institution for promoting labour standards.[291] Nevertheless, the number of RTAs that contain provisions governing labour has grown exponentially over the last 25 years.[292] In 2005, only 21 RTAs notified to the WTO contained labour provisions. According to the ILO's latest recount in 2021, this number has increased over fivefold, with around 113 RTAs, or one-third of RTAs in force, now containing labour provisions.[293] Labour provisions are not only found in North-South RTAs, but they also appear in North-North (*e.g.,* CETA, entered into force in 2017) and South-South RTAs (*e.g.,* Chile-Turkey RTA, entered into force in 2011).[294] In some agreements, labour is mentioned in the preamble or objectives of the agreement, while in others, like the CPTPP entered into force in 2019, USMCA entered into force in 2020, U.S.-Singapore FTA entered into force in 2004, Chile-Colombia Trade Agreement entered into force in 2009, and Peru-Republic of Korea Trade Agreement entered into force in 2011, there are dedicated chapters on labour, further reflecting countries' increased prioritisation of labour issues as they relate to trade.[295] In more recent EU RTAs, labour provisions are included in Trade and Sustainable Development chapters, along with environmental provisions.[296]

Labour issues are directly tied to the SDGs. Numerous trade agreements contain provisions that focused on decent work and a safe work environment, in furtherance of SDG 8, Decent Work and Economic Growth. RTA provisions can advance SDG Target 8.5: "achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value" and SDG Target 8.8: "[p]rotect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment." Notably, many trade agreements incorporate ILO standards, including the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which includes enabling rights that support other rights, such as freedom of association and collective bargaining.

Drawing a link between labour and gender, the 1998 Declaration also commits parties to "eliminate discrimination in respect of employment." These provisions directly support SDG 5, Gender Equality, including SDG Target 5.1: "[e]nd all forms of discrimination against all women and girls everywhere" and SDG 10, Reduced Inequality. Incorporation of fundamental labour rights also underpins Indicator 8.8.2, which calls for assessment of national compliance

[291] The one exception is Article XX(e) of the GATT (providing an exception to GATT obligations for measures "relating to the products of prison labour"). Technically speaking this is not an exception to the statement "the WTO references labour standards to a very minimal extent," as XX(e) is a defensive provision and does not incorporate any labour standards and is only related to prison labour.

[292] ILO, "Labour Provisions in G7 Trade Agreements: A Comparative Perspective," International Labour Organization, Geneva, 2019, 17 (figure 2.1), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_719226.pdf

[293] ILO, "Labour Provisions in Trade Agreements Hub," [ILO Hub], https://www.ilo.org/LPhub/.

[294] Id., 17-18 (figure 2.2).

[295] CPTPP, Chapter 19, *supra* note 18; USMCA, Chapter 23, *supra* note 25.

[296] This practice started with the EU-South Korea Free Trade Agreement provisionally applied starting on 1 July 2011 (entered into force 13 December 2015).

based on ILO textual sources and national legislation, disaggregated by sex and migrant status.

The ILO Fundamental Principles also commit parties to "eliminat[e] of all forms of forced or compulsory labour," in support of SDG Target 8.7: "[t]ake immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour…." Finally, provisions that strengthen commitments to occupational health and safety are key for attaining SDG 3, Good Health and Well-being.

This chapter addresses several key areas for incorporating labour provisions (LPs) [297] in trade agreements, including (i) Strengthening labour cooperation and capacity-building; (ii) Promoting labour standards in parties' territories; (iii) Addressing labour-related commitments on business & human rights; (iv) Protecting essential workers in times of crisis, and (v) Ensuring compliance and enforcement of labour commitments made under RTAs.

A. Legal Aspects of Trade and Labour

The inclusion of LPs in trade agreements to facilitate the improvement of social conditions can be traced back to several instruments. One is the 1948 Havana Charter, or the "Final Act of the United Nations Conference on Trade and Employment," which was meant to establish the International Trade Organisation and included provisions on labour and employment but failed to move forward due to opposition within the U.S. Congress. Second was the 1996 Singapore Ministerial Declaration, in which WTO Member States affirmed that the ILO is the competent body for setting and dealing with labour standards.[298] The Singapore Ministerial Declaration also emphasized that "[WTO Members] renew our commitment to the observance of internationally recognized core labour standards" and that the WTO will support and collaborate with the ILO, partly in response to efforts led by the US and various trade union organisations to integrate LPs into the multilateral legal framework.[299] It is also important to note that a number of developing countries have historically opposed "the linkage of international trade to basic labour rights," arguing that it is "protectionist" and tantamount to "discriminatory treatment."[300]

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[297] Labour provisions (LPs) can be defined as "any principle or standard or rule (including references to international labour standards), which addresses labour relations, minimum working conditions, terms of employment, and/or other labour issues" *See* ILO Labour Provisions in Trade Agreements Hub, https://www.ilo.org/LPhub/#home; *See also* Rafeal Peels & Marialaura Fino, "Pushed out the Door, Back in through the Window: The Role of the ILO in EU and US Trade Agreements in Facilitating the Decent Work Agenda," 6 *Global Labour Journal* 189, https://mulpress.mcmaster.ca/globallabour/article/download/2401/2427

[298] Aaditya Mattoo et al., *Handbook of Deep Trade Agreements,* World Bank 58 (2020) [hereinafter Handbook of Deep Trade Agreements 2020], available at https://openknowledge.worldbank.org/handle/10986/34055

[299] Anne Posthuma & F. C. Ebert, "Labour Provisions in Trade Arrangements: Current Trends and Perspectives," International Institute for Labour Studies 1 (Discussion Paper 205, 2011), https://www.researchgate.net/publication/263734653_Labour_provisions_in_trade_arrangements_current_trends_and_perspectives

[300] Mattoo et al., *supra* note 298.

A third relevant shift was the inclusion of labour in RTAs. This essentially began with the North American Free Trade Agreement (NAFTA), which entered into force in 1994 between the United States, Mexico, and Canada and addressed labour issues through a side agreement, and, on the U.S. side, can most recently been seen with the USMCA. The USMCA, which was enacted in 2018, significantly expanded upon NAFTA's precedent with strong and far-reaching labour provisions due to the inclusion of: (i) labour obligations in its core agreement, making it fully enforceable, whereas LPs in NAFTA were contained in a side agreement with limited enforceability, (ii) LPs that strengthen worker's rights generally, and (iii) a new enforcement mechanism, the Rapid Response Labour Mechanism, that could expedite resolution of freedom of association and collective bargaining issues at the individual factory level.[301] This approach can also be found in a number of other trade agreements as well, including those involving the EU, Chile, New Zealand, EFTA, Peru, and Japan.

ILO standards and conventions are central to trade and labour and are often incorporated directly into RTAs. Fundamental Principles and Rights at Work are embodied in the ILO Declaration of 1998 ("1998 Declaration"). These are "international instruments defining a range of human rights at work that provide a guide to a civilised, dignified and sustainable workplace," are standards that are inalienable and fundamental to a worker's abilities to engage in workplace actions to ensure attainment of core labour standards.[302] Further, additional instruments may be referenced in RTAs, like the ILO's 2008 Declaration on Social Justice for Fair Globalisation, which includes the pillars of decent work and states "that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as legitimate comparative advantage and that labour standards should not be used for trade purposes."[303] The incorporation of ILO Fundamental Principles and Rights at Work in RTAs has the potential to promote labour standards in countries that have ratified but not fully implemented the Core Conventions, as well as those that have not ratified the Core Conventions, including those that are not ILO members. In addition, the ILO 1998 Declaration creates an obligation under its "Fundamental Conventions" for all members to "respect, to promote, and to realize, in good faith and in accordance with The Constitution, the principles concerning the fundamental rights."[304] The principles concerning the fundamental rights which are the subject of those Conventions apply regardless of whether the member state

[301] U.S. Department of Labour, "Labour Rights and the USMCA," Bureau of International Labour Affairs, https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca; M. Angeles Villarreal & Cathleen D. Cimino-Isaacs, "USMCA: Labour Provisions," Congressional Research Service (Jan. 20, 2022), https://crsreports.congress.gov/product/pdf/IF/IF11308

[302] James Howard & Winston Gereluk, "Core Labour Standards and Human Rights in the Workplace," Intl. Inst. For Env. and Dev. 1 (2001), < https://www.jstor.org/stable/pdf/resrep17949.pdf?refreqid=excelsior%3A9dc694e94b80cb8dcc9f4466763a49fe&ab_segments=&origin=

[303] Christine Kaufmann, "Declaration on Social Justice for a Fair Globalization," ILO, 4 (2008), https://www.ivr.uzh.ch/institutsmitglieder/kaufmann/archives/fs13/iel/text46.pdf [Kaufmann]

[304] *Id.* ILO, *"Conventions and Recommendations,"* https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (last visited March 2, 2022). The ILO Fundamental Conventions include which include freedom of association, the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

has ratified the eleven separate Fundamental Conventions treaties.[305] See Table 10 below (Relevant International Instruments) for a list of relevant international instruments in the field of labour rights and international trade, including Core Conventions.

Table 10: Relevant International Instruments Trade and Labour

ILO 1998 Declaration on Fundamental Principles and Rights at Work (subject to a follow-up procedure)[306]
Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
Forced Labour and Human Trafficking for Labour Exploitation Convention, 1930 (No. 29 and 105) (and its 2014 Protocol)
Minimum Age Convention, 1973 (No. 138)
Worst Forms of Child Labour Convention, 1999 (No. 182)
Equal Remuneration Convention, 1951 (No. 100)
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)
Occupational Safety and Health Convention, 1981 (No. 155)
Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration), 1977
Universal Declaration of Human Rights, 1948
International Covenant on Economic, Social, and Cultural Rights
Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, 2006 (included in 32 RTAs)
UN Global Compact, 2000 [provisions referencing this agreement do not specifically reference labour but discuss business and human rights more broadly; see, e.g., European Free Trade Association (EFTA)–Turkey (preamble), EFTA-Indonesia (preamble)., sometimes

[305] ILO Convention No. 87, *Freedom of Association and Protection of the Right to Organise Convention* (1948); ILO Convention No. 98, *Right to Organise and Collective Bargaining Convention* (1949); ILO Convention No. 29, *Forced Labour Convention* (1930); ILO Convention No. 105, *Abolition of Forced Labour Convention* (1957); ILO Convention No. 138, *Minimum Age Convention* (1973); ILO Convention No. 182, *Worst Forms of Child Labour Convention* (1999); ILO Convention No. 100, *Equal Remuneration Convention* (1951); ILO Convention No. 111, *Discrimination (Employment and Occupation) Convention* (1958). In the case of freedom of association and collective bargaining, the Committee on Freedom of Association examines violations of these rights irrespective of ratification of the related ILO Conventions.

[306] According to the ILO Declaration on Fundamental Principles and Rights at Work [ILO 1998 Declaration], ILO members that have not ratified the ten ILO Core Conventions are subject to a follow-up procedure, where the member country must report on the status of the above-listed labour rights within their country and the progress of the member's efforts to ratify the Conventions. The ILO Fundamental Conventions provide a more detailed set of commitments on the issues covered by the 1998 Declaration, and the language from these Conventions may be incorporated into labour provisions.

referenced in conjunction with Tripartite Declaration; see UK-EU agreement.]
UN Guiding Principles on Business and Human Rights, 2011 [only referenced in two UK agreements, UK–EU and UK–Iceland, Lichtenstein, and Norway]
United Nations Conference on the Human Environment, 1972 (referenced in 7 RTAs between EFTA and other nations)
UN Conference on Sustainable Development, "The Future We Want," 2012 (referenced in 14 RTAs, largely between the UE, EFTA, UK and other nations)
UN Summit on Sustainable Development, "Transforming Our World: the 2030 Agenda for Sustainable Development," 2015 (referenced in 12 RTAs, largely between the UE, EFTA, UK, Canada and other nations)

A number of labour rights protected by ILO conventions as incorporated in RTA provisions are also covered by multilateral human rights instruments, although several ILO Conventions predated these instruments. The Universal Declaration of Human Rights (UDHR) recognizes the rights to equal pay for equal work, without discrimination, and the right to form and join trade unions.[307] These rights were later included in the ILO Declaration on Fundamental Principles and Rights at Work, which recognizes, among other rights, freedom of association and collective bargaining and the elimination of discrimination in employment.[308] This language has been incorporated into numerous RTAs, as illustrated in the options below.

Similarly, the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work was adapted to the ILO Decent Work Agenda, and references to both can be found in RTAs. The Better Work Programme, part of the ILO's Decent Work Agenda established in 1999, was launched to assist enterprises to "improve practices based on core ILO labour standards and national labour law."[309] Better Work focuses on improving the conditions and rights of vulnerable workers in labour intensive industries in developing countries and has been one initiative to address and apply labour standards more practically.

Perhaps one of the most challenging aspects of labour provisions in RTAs is their enforceability. RTAs can differ in their approach to incorporating ILO instruments,[310] and they also often take different approaches to resolving labour disputes between the parties. While RTAs sometimes apply a combination of approaches, two broad approaches can be characterized as the "cooperative" approach and the "sanction-based" approach. Under EU RTAs, for example, LPs are generally not subject to binding dispute settlement. Instead, labour disputes can be brought before a panel of labour experts that formulates non-binding recommendations. In contrast, some RTAs, such as U.S. RTAs, submit LPs to standard binding dispute settlement mechanisms, although older U.S. RTAs allowed this only for certain labour provisions with others subject to consultation (e.g., CAFTA-DR entered into force in 2009,

[307] G.A. Res. 217 (III), Art. 23, *Universal Declaration of Human Rights* (Dec. 10, 1948).

[308] *ILO 1998 Declaration*, Art. 2, *supra* note 306.

[309] ILO, 6.10 Global Supply Chains, https://www.ilo.org/global/topics/wages/minimum-wages/enforcement/WCMS_439059/lang--en/index.htm

[310] ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* 37 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_564702.pdf

U.S.-Chile FTA entered into force in 2004, U.S.-Singapore FTA entered into force in 2004, U.S.-Bahrain FTA entered into force in 2006, and U.S.-Oman FTA entered into force in 2009). Under a dispute settlement approach, sanctions can be imposed for non-compliance with the decisions.

A global survey of the enforcement practices in the rest of the world shows a mixed picture, with a predominant focus on cooperative enforcement (engagement and consultation instead of sanctions) over binding dispute settlement. Australia, for instance, usually excludes its LPs from any form of legal action or arbitration. Switzerland's revised trade and sustainable development chapter template follows the EU model by drawing on a panel of experts to draft, implement, and monitor recommendations. Canada follows the binding dispute settlement model. Chile generally favours a cooperative approach with mechanisms to settle disputes differing across agreements. Chilean RTAs usually do not include sanctions, except for the agreements with the US and Canada.

The experience with (quasi-) judicial enforcement of LPs until now has been limited. There appears to be a reluctance to refer labour disputes to legal action under RTAs. Two notable cases have fully gone through dispute settlement under RTAs: the US brought and lost a case against Guatemala under CAFTA-DR,[311] and the EU referred a dispute against Korea to a panel of experts under the EU-Korea FTA entered into force in 2009.[312] The Guatemala case illustrates some of the difficulties in subjecting labour disputes to non-labour-specific dispute mechanisms under RTAs, as discussed in greater detail in the options section that follows.[313] In the EU-Korea case, the Panel partially found in favour of the EU and recommended that Korea adjust its labour laws to comply with the principle of freedom of association.

In addition to labour-related complaints made under NAFTA and other U.S. and Canadian RTAs, several labour complaints have so far been made under the USMCA: six by the United States against Mexican facilities under the Rapid Response Labour Mechanism (*see* section 5.e), and one by a large number of trade unions and civil society organization, including those representing migrant worker women, against the United States alleging failure to enforce domestic labour law and gender discrimination on temporary labour migration programs.[314] While the case against the United States, which was filed in 2021, has long remained in the consultation stage, five of the disputes filed under the Rapid Response Mechanism had been

[311] Kevin Banks et al., "In the Matter of Guatemala – Issues Related to the Obligations under Article 16.2.1(a) of the CAFTA-DR," Final Report (June 14, 2017), https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf

[312] Report of the Panel of Experts (proceeding constituted under Article 13.15 of the EU-Korea Free Trade Agreement), Tradoc nr. 159358 (Jan. 20, 2021).

[313] Kathleen Claussen, "Reimagining Trade-Plus Compliance: The Labour Story," 23 *Journal of International Economic Law,* 25 (March 2020).

[314] Centro De Los Derechos Del Migrante, Inc., "Amended Petition on Labor Law Matters Arising in the United States Regarding the Failure of the US Government to Effectively Enforce its Domestic Labor Laws and Promote the Elimination of Employment Discrimination in the H-2 Program in Violation of Chapter 23 USMCA" (March 23 2021), https://cdmigrante.org/wp-content/uploads/2021/03/USMCA-Amended-Peition-and-Appendices_March-23-2021_reduced.pdf.

resolved as of the start of 2023, with a new dispute filed in January 2023 focused on a facility that was the focus of a prior complaint.[315]

At least on paper, the binding dispute settlement model has more legal teeth. The mere threat of trade sanctions may be a sufficient incentive for trading partners to uphold their labour commitments under RTAs. However, in general, resort to dispute settlement under RTAs remains rare.[316] Consequently, no sanctions for non-compliance with LPs have ever been imposed to date.

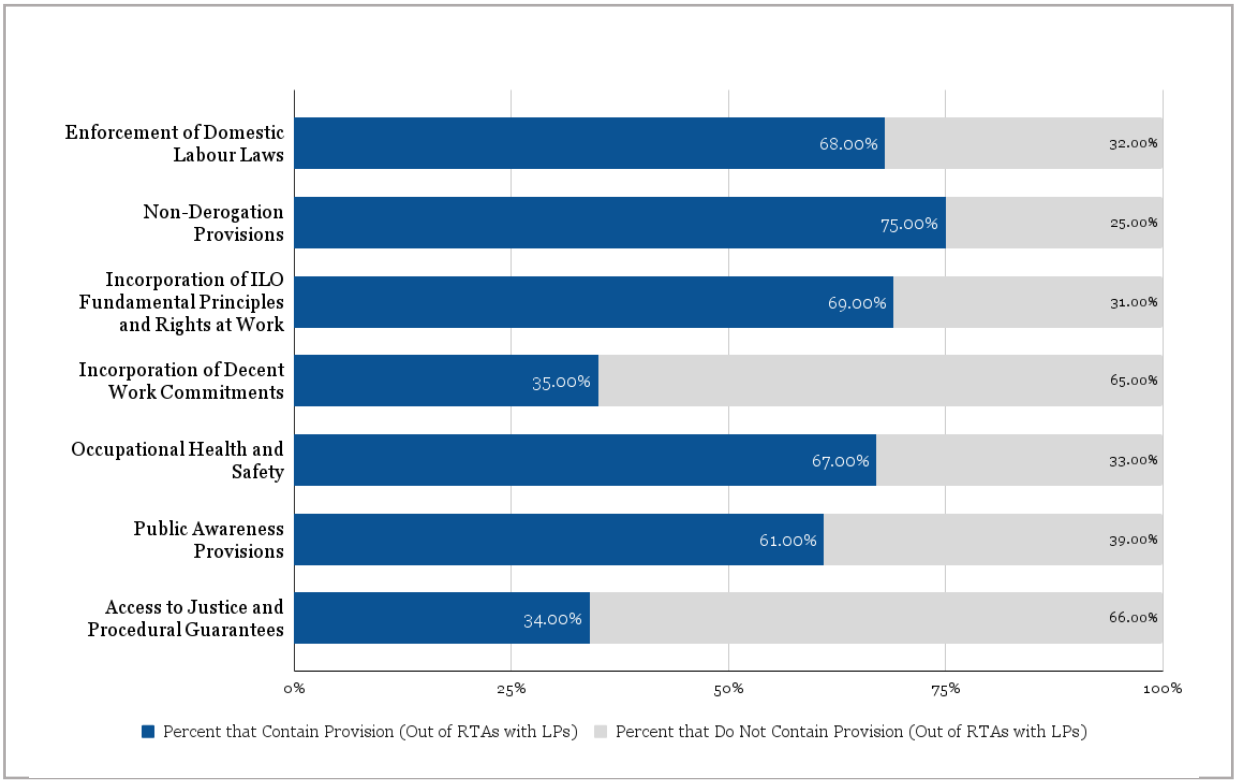
B. Labour Options in RTAs

The RTA Options below address action areas for labour in trade agreements: (i) Strengthening labour cooperation and capacity building; (ii) Promoting labour standards in parties' territories; (iii) Addressing labour-related commitments on business & human rights; and (iv) Compliance with and enforcement. As stated above, the WTO Covered Agreements do not establish a baseline set of 'trade and labour' obligations. Furthermore, contexts and political sensitivities towards the inclusion of hard commitments on labour in RTAs differ widely across countries. Therefore, the sections below present a range of Example Options for labour commitments in RTAs, consistently structured from lowest to highest level of commitment, with no baseline identified. Where possible, the degree to which these approaches are more common or less common is also noted. See Figure 10 for an overview of the relative frequency of the labour provision options presented below, based on ILO data collected in May 2022.

[315] Congressional Research Service, "USMCA: Labor Provisions," *In Focus*, January 12, 2023 (hereinafter CRS, 2023), available at https://crsreports.congress.gov/product/pdf/IF/IF11308

[316] *See* Geraldo Vidigal, "Why is there so Little Litigation under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement," 20(4) *Journal of International Economic Law*, 927 (December 2019).

Figure 10: Frequency of Select Labour Provision Options[317]



Throughout the sections below, emphasis is placed on the need for tailoring labour provisions to special circumstances, including commitments on workers' rights (including occupational health and safety), special protective and informational needs of groups most vulnerable to crisis, and the inclusion of non-state actors in the formation and enforcement of labour policies. As the incorporation of labour provisions in RTAs is gaining momentum globally, the needs and vulnerabilities of workers should be kept in mind when drafting, interpreting, and implementing RTA labour provisions.

a. Strengthening Labour Cooperation and Capacity Building

Cooperation remains the most common approach in trade agreements featuring labour provisions,[318] as is also true in the context of the environment. Not only does this highlight a trend in trade agreements, but it could also be seen as a shift in the global trading system away from asymmetric power dynamics towards global cooperation.[319] Cooperation provisions often take various forms, including cooperation between state parties, cooperation with international organisations, and cooperation with Civil Society Organisations (CSOs), which may be defined differently under different RTAs. SDG targets

[317] ILO Hub, *supra* note 293. *See also* "Incorporation of Decent Work Agreements includes RTAs that reference either the ILO Decent Work Agenda," the Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, or both.

[318] *See, e.g.,* D. Raess & D. Sari, "Labour Market Regulations," in Handbook of Deep Trade Agreement, *supra* note 298.

[319] UNESCAP, "There is No Substitute for Cooperation in Sustainable Development" (2020), https://www.unescap.org/blog/there-no-substitute-cooperation-sustainable-development.

17.6[320] and 17.9[321] call for enhanced North-South, South-South, and triangular regional and international cooperation, innovation, knowledge sharing on mutually agreed terms, and capacity building to implement the SDGs.

i. Cooperation between Parties

Cooperation provisions are a common starting point between parties with respect to labour. Cooperation between parties can occur along two dimensions: pre-ratification cooperation and/or post-ratification cooperation activities. Cooperation is an integral element of most South-South RTA approaches to labour, which include fewer substantive commitments on labour. Negotiators may consider provisions on cooperation, as they may create flexibility in times of crisis, providing opportunities for the parties to adapt and reach contextually favourable decisions. Cooperation activities often range from harmonised labour laws, industrial relations, social security, rights of migrant workers, labour administration and inspection, exchange of information, training, and capacity building.

Cooperation may involve institutional mechanisms such as the creation of ad-hoc and/or standing committees; establishment of contact points within countries; and advisory group reports and meetings. Generally, provisions that require human and financial resources for fulfilling cooperation involve more commitment on the part of the parties. In general, trade negotiators may question such as the following as they structure their agreements:

a. Should cooperation activities be focused on a particular timeframe, or should they be ongoing?
b. What would constitute evidence of the cooperative activities listed in the agreement?
c. Would the parties create an institutional mechanism to follow through on cooperative activities (e.g., a committee)? Would the creation of an institutional mechanism lead to a binding commitment? What capacity challenges might be involved?

Example Option A and Example B below, taken from the Korea-Australia FTA entered into force in 2014, highlights one of the most common provisions found in RTAs focused on cooperation and consultation. It spells out the subject matter for cooperation, alongside a non-exhaustive list of activities that should be undertaken, bearing in mind each party's available resources. This is the most commonly found type of cooperation provision in RTAs, and it takes the form of a soft commitment. Further, Example Option B, from the US-Peru FTA entered into force in 2009, goes further by providing an institutional mechanism to carry out the listed cooperative activities. This approach identifies contact points made up of high-level representatives from each party responsible for labour, with the parties agreeing to the creation of an ad-hoc committee, including labour parties to engage in cooperative activities.

[320] Target 17.6 Enhance North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation and enhance knowledge sharing on mutually agreed terms, including through improved coordination among existing mechanisms, at the United Nations level, and through a global technology facilitation mechanism.

[321] Target 17.9 Enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation.

Example Options on Labour Cooperation, Consultation and Institutional Mechanisms

Example Option A: Cooperation

1. Recognising the importance of cooperating on trade-related aspects of labour policies in order to achieve the objectives of this Agreement, the Parties commit to enhancing close cooperation through cooperative activities in areas of mutual interest as set out in paragraphs 2 and 3.

2. Areas of cooperation may include, but should not be limited to, labour-management relations, working conditions, occupational safety and health, vocational training and human resources development, and labour statistics.

3. Cooperative activities may include, but should not be limited to, exchanges of people and information, cooperation in relevant regional and international fora, conferences and seminars, development of joint research or collaborative projects, and funding of technical cooperation within the ILO with the aim of raising labour standards in the Asia-Pacific region, taking into account each Party's available resources.

Source: Korea-Australia RTA (KAFTA), Article 17.5

Example Option B: Cooperation with Institutional Mechanisms

1. The Parties hereby establish a Labour Affairs Council (Council) comprising cabinet-level or equivalent representatives of the Parties, who may be represented on the Council by their deputies or high-level designees.
2. The Council shall meet within the first year after the date of entry into force of this Agreement and thereafter as often as it considers necessary. The Council shall:
(a) oversee the implementation of and review progress under this Chapter, including the activities of the Labour Cooperation and Capacity Building Mechanism established under Article 17.6 […];

3. All decisions of the Council shall be taken by consensus, and shall be made public unless the Council otherwise decides.

4. Unless the Council otherwise decides, each of its meetings shall include a session at which members of the Council have an opportunity to meet with the public to discuss matters relating to the implementation of this Chapter.

5. Each Party shall designate an office within its labour ministry or equivalent entity that shall serve as a contact point with the other Parties and with the public. The contact points of each Party shall meet as often as they consider necessary or at the request of the Council. Each Party's contact point shall:
(a) assist the Council in carrying out its work, including coordination of the Labour Cooperation and Capacity Building Mechanism;
(b) cooperate with the other Parties' contact points and with relevant government organizations and agencies to:

(i) establish priorities […] regarding cooperative activities on labour matters,
(ii) develop specific cooperative and capacity-building activities according to such priorities,
(iii) exchange information on the labour laws and practices of each Party, including best practices and ways to improve them, and
(iv) seek support, as appropriate, from international organizations such as the ILO, the Inter-American Development Bank, the World Bank, and the Organization of American States, to advance common commitments regarding labour matters;
(c) provide for the submission, receipt, and consideration of communications from persons of a Party on matters related to this Chapter and make such communications available to the other Party and, as appropriate, to the public; and
(d) provide for the receipt of cooperative consultation requests referred to in Article 17.7.1 and 17.7.4. […]

7. Each Party may convene a new, or consult an existing, national labour advisory or consultative committee comprising representatives of its labour and business organizations and other members of its public to provide views on any issues related to this Chapter.

Source: United States-Peru FTA, Article 17.5

RTAs may feature capacity building provisions, which can take many forms,[322] providing for capacity building mechanisms alongside cooperative activities. The Dominican Republic-Central America Free Trade Agreement (CAFTA-DR FTA)) entered into force in 2009 sets an important precedent in this regard. LPs that contribute to capacity building encourage cooperation and technical assistance to share best practices on complying with the provisions on labour standards and build technical capacity for work and other priorities; this is an example of a provision that developing countries are likely to be more supportive of given capacity priorities.

Example Option A below, drawn from EU-Vietnam RTA entered into force in 2020, promotes development cooperation in the areas listed. Although it is a soft commitment, it reinforces ratification of ILO Conventions and other important labour reforms. Example Option B, taken from UK-CARIFORUM States Economic Partnership Agreement (UK-CARIFORM EPA) entered into force in 2021, establishes a Trade and Development Committee to carry out capacity development. It also establishes Technical Sub-Committee on Development Cooperation to advance development assistance, which is a firmer commitment.

Example Options on Development Cooperation and Capacity Building

Example Option A: Cooperation and Capacity Building

[322] Trade capacity building focuses on the physical, legal, human, and institutional capacity to participate in global trade. Congressional Research Service, "Trade Capacity Building: Foreign Assistance for Trade and Development" (2008), https://www.everycrsreport.com/reports/RL33628.html#:~:text=Trade%20and%20Development-,Introduction,to%20participate%20in%20global%20trade

1. The Parties affirm the importance of cooperation and capacity building for the efficient implementation of this Agreement, which supports the continued expansion of and creates new opportunities for trade and investment between them.

2. The Parties commit to deepen cooperation in areas of mutual interest taking into consideration the different levels of development between the Union and Viet Nam. That cooperation shall foster sustainable development in all its dimensions, including sustainable growth and the reduction of poverty.

3. This Chapter applies to all provisions on cooperation of this Agreement.

Source: EU-Vietnam FTA, Article 16.1

Example Option B: Development Cooperation Priorities and Committees

1. Development cooperation as provided for in Article 7 shall be primarily focused on the following areas as further articulated in the individual Chapters of this Agreement:

(i) The provision of technical assistance to build human, legal and institutional capacity in the CARIFORUM States so as to facilitate their ability to comply with the commitments set out in this Agreement; […]

(iii) The provision of support measures aimed at promoting private sector and enterprise development, in particular small economic operators, and enhancing the international competitiveness of CARIFORUM firms and diversification of the CARIFORUM economies;

(iv) The diversification of CARIFORUM exports of goods and services through new investment and the development of new sectors;

(v) Enhancing the technological and research capabilities of the CARIFORUM States so as to facilitate development of, and compliance with, internationally recognised sanitary and phytosanitary ('SPS') measures and technical standards and internationally recognised labour and environmental standards;

(vi) The development of CARIFORUM innovation systems, including the development of technological capacity;

(vii) Support for the development of infrastructure in CARIFORUM States necessary for the conduct of trade. […]

Article 8a

3. Given the specific provisions of this Agreement on development cooperation, and based on the relevant work streams of the CARIFORUM-UK Trade and Development Committee, the CARIFORUM-UK Technical Sub-Committee on Development Cooperation (TSCDC) functions in assisting the work of the CARIFORUM-UK Trade and Development Committee are to: […]

(e) monitor and update the CARIFORUM-UK Trade and Development Committee on: […]

(vi) the status of CARIFORUM States' capacity to facilitate compliance with internationally recognised SPS measures and technical standards ***and internationally recognised labour and environmental standards*** (emphasis added), and other enabling capacities benefitting from this Agreement. […]

Source: UK-CARIFORM EPA , Article 8, 8a

ii. Cooperation with International Organisations

International organizations, most notably the ILO, play a prominent role in setting and monitoring multilateral labour standards, which may be implicitly or explicitly referenced in RTA provisions. Despite RTAs' coverage of labour issues, they usually do not include concrete guidance on how parties should implement their labour commitments, and international organizations do work within their mandates to play a vital role in this regard.

RTA parties, particularly developing countries, may consider this a viable option, as it can involve technical assistance and capacity building, provision of advisory assistance in dispute settlement, or stipulation of reliance on the independent verification of compliance or implementation by individuals or entities chosen by the parties. As highlighted in Example Option A below, the USMCA entered into force in 2020 empowers parties to establish cooperative arrangements with the ILO or other international organizations to draw upon their expertise and resources.[323] This is a more common provision involving international organizations which carries a softer commitment, giving the parties the freedom to make a judgment call on the nature of their partnership with the international organization. Example Option B, from the Peru-Chile RTA entered into force in 2009, requires mutual agreement of the parties and goes a step further by widening the scope of consultations of international organizations beyond the ILO to organizations, such as the International Organization for Migration, the Inter-American Development Bank, and others.

Example Options on Cooperation with International Organisations

Example Option A: Cooperation with International Organisations

6. The Parties may establish cooperative arrangements with the ILO or other international and regional organizations to draw on their expertise and resources to further the purposes of this Chapter.

Source: USMCA, Article 23.12

Example Option B: Cooperation with International Organisations

5. The Parties, by mutual agreement, **may seek** the support, as appropriate, of international organizations, such as the International Labour Organization, the International Organization for Migration, the Inter-American Development Bank, the Organization of American States, in order to advance with the cooperation activities to be developed in the different areas.

[323] USMCA, *supra* note 25, Art. 23.12 (6).

Source: Peru-Chile RTA, Article

iii. Cooperation with Civil Society

Including civil society in the negotiation, implementation, and enforcement of LPs can build inclusion and positively impact labour outcomes. During the negotiation phase, impact assessments that include civil society can help countries anticipate issues and implementation concerns. During the implementation stage, technical assistance and capacity-building programs can also have more impact when targeted to workers, civil society, and government agencies. With respect to enforcement, public complaint mechanisms encourage civil society to file complaints on violations of labour commitments. Public complaint mechanisms are discussed in greater detail in the compliance section.

In some recent RTAs, the formal participation of civil society has received more attention. Example Option A below, taken from the Peru-Chile FTA that entered into force in 2009, envisions the possibility of inviting trade union representatives to participate in the identification of cooperation activities. Example Option B, drawn from the SADC Treaty amended in in 2009, goes further to include an obligation that the parties shall seek to fully involve a broader category of people and organizations listed to participate in decisions.

Example Option C has the most binding commitment and is less commonly seen. It is taken from EU-Central America RTA enacted in 2013 and obliges parties to promote meetings with representatives from the academic community, social and economic partners, and others, as well as call for regular meetings to gather suggestions and share information on of the implementation of the agreement. It also mandates parties to organize a bi-regional Civil Society Dialogue Forum for open dialogue among stakeholders to promote trade aligned with sustainable development. However, it is important to note that, in practice, mandating the creation of additional institutions and procedures can take time and capacity to implement, and issues of adequate and sufficiently broad representation also need to be considered.

Example Options on Cooperation with Civil Society and Other Stakeholders

Example Option A: Cooperation with Civil Society

3. Each Party **may invite** trade unions and employers' organizations to participate, as well as non-governmental sectors and other organizations, to identify areas and cooperation activities.

Source: Peru-Chile FTA, Article 5

Example Option B: Cooperation with Stakeholders

1. In pursuance of the objectives of this Treaty, SADC shall seek to involve fully, the people of the Region and key stakeholders in the process of regional integration.

2. SADC shall co-operate with and support the initiatives of the peoples of the Region and key stakeholders, contributing to the objectives of this Treaty in the areas of co-operation in order to foster closer relations among the communities, associations and people of the Region.

3. for the purposes of this article, key stakeholders include:
(a) private sector;
(b) civil society;
(c) non-governmental organisations; and
(d) workers and employers' organisations

Source: Southern African Development Community Treaty, Article 23

Example Option C: Cooperation with Broad Range of Stakeholders

1. The Parties shall **promote meetings of representatives** of the European Union's and of Central America's civil societies, including the academic community, social and economic partners, and non-governmental organisations.

2. The Parties **shall call for regular meeting**s with these representatives in order to inform them about the implementation of this Agreement and to gather their suggestions in this respect. […]

1. The Parties agree to organise and facilitate a bi-regional Civil Society Dialogue Forum for open dialogue, with a balanced representation of environmental, economic and social stakeholders. The Civil Society Dialogue Forum shall conduct dialogue encompassing sustainable development aspects of trade relations between the Parties, as well as how cooperation may contribute to achieve the objectives of this Title. The Civil Society Dialogue Forum will meet once a year, unless otherwise agreed by the Parties.

2. Unless the Parties agree otherwise, each meeting of the Board will include a session in which its members shall report on the implementation of this Title to the Civil Society Dialogue Forum. In turn, the Civil Society Dialogue Forum may express its views and opinions in order to promote dialogue on how to better achieve the objectives of this Title.

Source: EU-Central America RTA, Articles 11, 295

b. Promotion of Labour Standards in Parties' Territory

Besides cooperation and capacity building provisions, RTAs can, and often do, commit Parties to the promotion and enforcement of labour standards in their territories. To balance policy space and different interests, parties can include provisions affirming their 'right to regulate' on labour as within the public interest, and they can also incorporate provisions that contain flexibility for addressing local needs and inclusion of parties, including workers and civil society. RTAs can also create obligations to promote labour standards with varying degrees of commitment. Generally, provisions committing parties to uphold and enforce their existing domestic labour laws are common, although most countries have already undertaken international commitments by virtue of their ILO membership.

i. Provisions Affirming Parties' Right to Regulate on Labour

Most RTAs include provisions preserving parties' right to regulate in areas of public interest. The right to regulate is usually combined with a non-derogation provision to ensure that Parties do not lower their labour standards to boost competitiveness (see below). The right to regulate can be part of the preamble of an agreement and couched in general terms or incorporated as a labour-specific provision in a labour or trade and sustainable development chapter.[324]

The example provisions below include both approaches to 'right to regulate' provisions. Example Option A, adapted from the China-Georgia FTA entered into force in 2018,[325] contains a preambular reference to the right to regulate phrased in general terms. Such general references are a common feature of RTAs, found in the preamble or body of most trade agreements. It is important to note that a general right to regulate can be applied to many issues covered in this Handbook, and these general references could easily be applied to the labour context and have the advantage of not requiring further negotiations. However, the advantages of general language should be balanced with the lack of labour-specific commitments.

In contrast, Example Option B includes a (less common) labour-specific 'right to regulate' provision, as found in CETA, which entered into force in 2017. It recognises Parties' right to set their labour priorities and level of protection, as well as to modify labour laws and policies. The CETA provision does limit Parties' right to regulate to "in a manner consistent with international obligations" and requires parties to seek to ensure they uphold high, improving levels of labour protections.

Example Options on the Right to Regulate (General and Labour-Specific)

Example Option A: Preambular References to the Right to Regulate in General Terms

Upholding the rights of their governments to regulate in order to meet national policy objectives, and to safeguard public welfare.

Source: China-Georgia FTA, Preamble, paragraph 4

Example Option B: Labour-Specific Right to Regulate

Recognising the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies accordingly in a manner consistent with its international labour commitments, including those in this Chapter, each Party shall seek to ensure those laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection.

[324] All recent EU FTAs include a domestic right to regulate in labour and social matters, *see, e.g.,* Comprehensive Economic Trade Agreement (CETA), November 2016, Article 23.2, https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

[325] China-Georgia FTA, May 15, 2017, http://fta.mofcom.gov.cn/georgia/annex/xdzw_en.pdf.

Source: CETA, Article 23.2

ii. Commitments on Upholding and Enforcing Existing Domestic Labour Laws

Commitments on domestic labour laws have the potential to function both as stepping stones for Parties to start including LPs in their RTAs and as a complement to RTA commitments on international labour standards. This subsection discusses the two most prevalent commitments on domestic labour action in RTAs: (i) provisions committing Parties to enforce their domestic labour laws and (ii) provisions prohibiting parties from rolling back their existing labour protections (non-derogation) provisions.

iii. Enforcement of Domestic Labour Laws

Many RTAs (77 out of 113 with LPs) contain an obligation for the parties to effectively enforce their domestic labour laws and promote private compliance with labour laws through government action.[326] Such action can include conducting labour inspections, collecting fines, and requiring large businesses to file compliance plans, among other actions.

RTA labour provisions can go beyond emphasising enforcement of domestic labour laws to contain commitments to international labour standards.[327] Nevertheless, "enforcement of domestic labour law" provisions remain helpful complements, especially in times of crisis and vulnerability. Indeed, these provisions often oblige parties to put domestic labour monitoring institutions and systems in place. As is true of other RTA provisions and international treaties in general, these provisions can also be viewed as exercising regulatory sovereignty on resource allocation while specifying that resource decisions do not automatically excuse a failure to enforce domestic laws effectively. An option for future RTAs could be to create more precise obligations on parties to enforce both domestic and international labour laws.

Below are example provisions on the enforcement of domestic labour laws. Example Option A is adapted from the USMCA, which entered into force in 2020, and contains a negative obligation not to fail to effectively enforce labour laws along with a positive obligation to promote private parties' compliance with labour laws through appropriate government action. The provision further stipulates that resource decisions shall not excuse failures to comply with enforcement obligations.

Example Option B is taken from CETA, which entered into force in 2017, and, is similar to the USMCA example. It sets out obligations to effectively enforce and promote compliance with domestic labour laws, but it goes somewhat further and limits policy space by requiring parties to set up and maintain an effective system of labour inspections and provide access to judicial and administrative proceedings (in contrast to the USMCA's "*appropriate*

[326] ILO Hub, *supra* note 293.

[327] *See Conventions and Recommendations,"* https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm

government action" language). While limiting Parties' regulatory space, the CETA example has the advantage of creating more specific, easier to monitor obligations.

The Sample Model Option below proposes new language, which can be customized, broadening labour law enforcement provisions by requiring parties to enforce their commitments under international labour instruments as well as domestic labour laws. The Sample Model Option has the advantage of taking a more holistic approach to parties' enforcement of labour standards, both domestic and international.

Example Options on the Enforcement of Domestic Labour Laws

Example Option A: Enforcement and Promotion of Compliance with Domestic Labour Laws

1. **No Party shall fail to effectively enforce its labour laws** through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement.

2. Each Party **shall promote compliance** with its labour laws through appropriate government action, such as by: (a) appointing and training inspectors; (b) monitoring compliance and investigating suspected violations, including through unannounced on-site inspections, and giving due consideration to requests to investigate an alleged violation of its labour laws; (c) seeking assurances of voluntary compliance; (d) requiring record keeping and reporting; (e) encouraging the establishment of labour-management committees to address labour regulation of the workplace; (f) providing or encouraging mediation, conciliation, and arbitration services; (g) initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labour laws; and (h) implementing remedies and sanctions imposed for noncompliance with its labour laws, including timely collection of fines and reinstatement of workers.

3. If a Party fails to comply with an obligation under this Chapter, **a decision made by that Party on the provision of enforcement resources shall not excuse that failure**. Each Party retains the right to exercise reasonable enforcement discretion and to make bona fide decisions with regard to the allocation of enforcement resources between labour enforcement activities among the fundamental labour rights and acceptable conditions of work enumerated in Article 23.3.1 and Article 23.3.2 (Labour Rights), provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter.

4. Nothing in this Chapter shall be construed to empower a Party's authorities to undertake labour law enforcement activities in the territory of another Party.

Source: USMCA, Article 23.5

Example Option B: Enforcement and Promotion of Compliance with Domestic Labour Laws

Pursuant to Article 23.4, each Party **shall promote compliance with and shall effectively enforce its labour law**, including by: (a) maintaining **a system of labour inspection** in accordance with its international commitments aimed at securing the enforcement of legal provisions relating to working conditions and the protection of workers which are enforceable

by labour inspectors; and (b) **ensuring that administrative and judicial proceedings are available to persons** with a legally recognised interest in a particular matter who maintain that a right is infringed under its law, in order to permit effective action against infringements of its labour law, including appropriate remedies for violations of such law.

Source: CETA, Article 23.5 (1)

Sample Model Option: Enforcement and Promotion of Compliance with Domestic and International Labour Laws

Each Party shall promote compliance with and shall effectively enforce its domestic labour laws as well as its labour commitments under international instruments, standards, conventions, and trade agreements, including by [...].

iv. Non-Derogation Provisions

The majority of RTAs with LPs (82 out of 109) prohibit Parties from lowering their labour protections to boost trade or investment.[328] These non-derogation provisions can be phrased in aspirational terms (*"strive to ensure")*[329] or through binding obligations (*"no party shall waive or otherwise derogate from").*[330] Non-derogation provisions are often accompanied by qualifying language limiting the commitment to prohibiting the lowering of standards in favour of trade or investment. These provisions are also common in the context of environmental standards.

Parties could consider including broad, non-regression provisions in future RTAs that place workers and employers and their needs for stable, predictable labour protections at the centre. One way in which this can be accomplished is through omitting "in favour of trade and investment" qualifying language from the non-derogation provision. Omitting the qualifier has the benefit of creating a broader commitment to uphold labour protections and makes it easier for a party to prove a violation of the provision. The EU-UK Trade and Cooperation Agreement (TCA)), which entered into force in 2021, is an example and contains a broader prohibition of regression on labour protections, combined with specific enforcement procedures.[331] Future provisions could either prohibit derogations from labour protection generally, such as in the EU-UK TCA, or be designed more specifically to prohibit regression on those protections most at risk during crisis, such as occupational health and safety and freedom of assembly.

Example Option A below comes from the Japan-Philippines EPA, which entered into force in 2008. It provides aspirational language on non-derogation from labour standards in favour of trade and investment and is an example of a more common, weaker ("shall stive to ensure"),

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[328] ILO, "Assessment of Labour Provisions in Trade and Investment Agreements," ILO (2016), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_498944.pdf; ILO Hub, *supra* note 293.

[329] Japan-Philippines Economic Partnership Agreement, Article 103 (1) (Sept. 9, 2006), https://www.mofa.go.jp/region/asia-paci/philippine/epa0609/index.html.

[330] CPTPP, Article 19.4, *supra* note 18.

[331] European Union-United Kingdom Trade and Cooperation Agreement, Article 387 (Dec. 30, 2020), http://data.europa.eu/eli/agree_internation/2021/689(1)/oj, [hereinafter EU-UK TCA].

and more aspirational provision on non-derogation, use of the verb "shall" does imply at least a partially binding construction when combined with "strive to ensure," the latter of which is not specific. Example Option B is adapted from the CPTPP, enacted in 2018. This provision creates a stronger commitment through a binding obligation not to derogate from labour standards in favour of trade and investment.

Example Option C is found in the EU-UK TCA, which entered into force in 2021. It creates a broad, binding non-regression obligation on labour protections, omitting the 'in favour of trade and investment' qualifier.

The Sample Model Option below presents aspirational language to recognise the importance of labour protections, including in times of domestic or global crisis, and puts in place a best endeavour obligation to uphold protections to the highest reasonable degree, particularly those that relate to areas that may be compromised in times of crisis, such as occupational health and safety and freedom of association. Such language, while perhaps not easy to enforce legally, can establish priority among the parties not to use crisis as a reason to reduce labour protections.

Example Options Prohibiting Derogation from Existing Labour Protections

Example Option A: Aspirational Language on Non-Derogation from Labour Standards in Favour of Trade and Investment

The Parties **recognise that it is inappropriate to encourage** investment by weakening or reducing the protections afforded in domestic labour laws. Accordingly, each Party **shall strive to ensure** that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognised labour rights referred to in paragraph 2 below as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its Area. If a Party considers that the other Party has offered such encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.

Source: Japan-Philippines EPA, Article 103 (1)

Example Option B: Binding Language on Non-derogation from Labour Standards in Favour of Trade and Investment

The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labour laws. Accordingly, **no Party shall waive or otherwise derogate from**, or offer to waive or otherwise derogate from, its statutes or regulations: (a) implementing Article 19.3.1 (Labour Rights), if the waiver or derogation would be inconsistent with a right set out in that paragraph; or (b) implementing Article 19.3.1 (Labour Rights) or Article 19.3.2 , if the waiver or derogation would weaken or reduce adherence to a right set out in Article 19.3.1, or to a condition of work referred to in Article 19.3.2, in a special trade or customs area, such as an export processing zone or foreign trade zone, in the Party's territory, in a manner affecting trade or investment between the Parties.

Source: CPTPP, Article 19.4

Example Option C: Broader Non-regression from Labour and Social Levels of Protection

2. A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards.

Source: EU- UK TCA, Article 387

Sample Model Option: Non-regression from Commitments in Times of Crisis

In addition to Parties' obligation not to derogate from their statutes and regulations establishing labour protections in favour of trade or investment, Parties recognise the importance of labour protections, in particular but not limited to occupational health and safety and freedom of assembly in times of domestic or global crisis and shall strive to ensure that such protections are upheld to the highest reasonable degree.

v. Commitments to International Labour Standards and Conventions

International Labour standards and other relevant instruments (Conventions, Recommendations, and Protocols) can be incorporated into RTAs in a way that helps prevent the deterioration of labour and employment conditions, including during and after a crisis.[332] Standards serve an important function, providing guidance and promoting inclusive, sustainable policies.[333] In particular, the ILO identified "protecting workers in the workplace" as a key pillar of their COVID-19 response plan.[334] There are two main sources of multilateral labour standards that are particularly relevant to protecting workers in the context of sustainable development, with implications for RTAs: (1) 1998 ILO Declaration on Fundamental Principles and Rights at Work and the Fundamental Conventions (2) ILO Decent Work Agenda and 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work and 2008 Declaration on Social Justice for a Fair Globalization, which consolidates and further institutionalizes the ILO's Decent Work Agenda.

Recognizing the complex nature of labour standards in some countries, labour provisions often leave broad policy space for countries and range from binding to "best efforts" commitments. The provisions outlined below are applicable to bolster minimum labour standards and prevent regulatory competition between trading partners. In times of crisis, these provisions can help to prevent a deterioration of labour standards when workers are highly vulnerable.

[332] ILO, ILO Standards and COVID-19: FAQ 6 (2021), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_780445.pdf
[333] Id. at 5.
[334] UN Global Compact, *supra* note 33, at 8, 10–13.

vi. Incorporation of ILO Declarations and Conventions

For RTAs between ILO members, LPs may contain reference to the 1998 ILO Declaration on Fundamental Principles and Rights at Work ("1998 Declaration"). Currently, 69 percent of trade agreements with LPs reference the 1998 Declaration.[335] Expanding its incorporation in RTAs would reinforce parties' commitments to maintaining basic rights for workers and increasing commitments to workers' rights to ensure that workers are better protected when circumstances change.

Some agreements, including the CPTPP and USMCA, create binding obligations to ensure that labour laws and practices are in accord with the 1998 Declaration's rights and fundamental principles. Other RTAs, such as the EU-South Korea FTA that entered into force in 2011, include language that reaffirms the party's obligations as ILO members under the 1998 Declaration. Because the approach to incorporating the 1998 Declaration in trade agreements varies, different options are presented below.

Example Option A, adapted from the Chile–Indonesia EPA that entered into force in 2019, commits the parties to "strive" to ensure that labour laws and practices are in line with the 1998 Declaration. This option creates the most policy space for the parties by reiterating commitment to the Fundamental Rights while also emphasising each member's sovereignty in determining the best approach for compliance. Among the options presented, it is the least strict due to its language and construction.

Example Option B, adapted from the EU-Korea FTA that entered into force in 2011, requires the parties to "respect[ ], promot[e], and realis[e]" the principles concerning the four fundamental rights and reaffirms the parties' commitment to fulfilling their obligations under the 1998 Declaration. While this language does not create new obligations, it highlights each party's commitment to labour protections and the Fundamental Rights, reinforcing their application.

Example Option C, adapted from CETA that entered into force in 2017, requires parties to bring their domestic laws and practice into compliance with ILO commitments. Including these provisions in trade agreements creates a stronger commitment to conform domestic laws than is owed under the 1998 Declaration. This option creates greater protection for labour in the areas listed in the 1998 Declaration.

Example Options on Incorporation of ILO Fundamental Principles and Rights at Work

Example Option A: Striving to Comply with Fundamental Principles

Article 9.6: Cooperation on Labour Issues

The Parties reaffirm their obligations as members of ILO, especially their commitment to the principles of the ILO Declaration on Fundamental Principles and Rights at Work and its

[335] 75 out of 109 agreements with LPs reference the 1998 Declaration. *See* ILO Hub, *supra* note 293.

follow-up and shall strive to ensure that its labour laws, regulations, policies and practices are in harmony with their international labour commitments.

Each Party shall respect the sovereign right of the other Party to set, administer and enforce their own labour laws and regulations, policies and national priorities and ensure that its labour laws, regulations, and policies shall not be used for trade protectionist purposes.

Source: Chile–Indonesia EPA, Article 9.6(2)-(3)

Example Option B: Reaffirming Commitment to Fundamental Principles

Article 13.4: Multilateral Labour Standards and Agreements

1. The Parties recognise the value of international coop-eration and agreements on employment and labour affairs as a response of the international community to economic, employment and social challenges and opportunities resulting from globalisation. They commit to consulting and cooperating as appropriate on trade-related labour and employment issues of mutual interest.

2. The Parties reaffirm the commitment, under the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people.

3. The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
(a) freedom of association and the effective recognition of the
right to collective bargaining.
(b) the elimination of all forms of forced or compulsory labour;
(c)the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

The Parties reaffirm the commitment to effectively imple-menting the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO.

Source: EU-South Korea FTA, Article 13.4(3)

Example Option C: Obligation to Comply with Fundamental Principles

Article 23.3: Multilateral Labour Standards and Agreements

Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work which are listed below. The Parties affirm their commitment to respect, promote and realize those principles and rights in accordance with the obligations of the members of the International Labour Organization (the 'ILO') and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 adopted by the International Labour Conference at its 86th Session:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

Source: CETA, Article 23.3(1)

The ILO defines "decent work" as productive work for women and men in conditions of freedom, equity, security, and human dignity[336] The 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work announced a goal of "creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development."[337] The 2008 Declaration on Social Justice for a Fair Globalization consolidated and further institutionalized the ILO's Decent Work Agenda to address the UN's goal of full and productive employment and decent work, the ILO's Decent Work Agenda provides four key pillars to attaining this goal, including: employment creation, social protection, rights at work, and social dialogue.[338] In 2017, the ILO issued its Employment and Decent Work for Peace and Resilience Recommendation, which highlights the importance of human rights and rule of law in any crisis response. The 2017 recommendation, which outlines an approach to crisis response that builds stability and resilience, is particularly relevant to crises.

Currently only 35 percent of trade agreements with LPs refer to the UN or ILO decent work agreements. [339] The pandemic exposed significant remaining deficits in decent work

[336] Decent work involves opportunities for work that is "productive and delivers a fair income; provides security in the workplace and social protection for workers and their families; offers prospects for personal development and encourages social integration; gives people the freedom to express their concerns, to organise and to participate in decisions that affect their lives; and guarantees equal opportunities and equal treatment for all." ILO, "Toolkit for Mainstreaming Employment and Decent Work: Country Level Application" VI (2008), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_172612.pdf

[337] 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, preamble.

[338] *See* ILO, ILO Declaration on Social Justice for a Fair Globalization, (2008). https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/genericdocument/wcms_371208.pdf.

[339] The ILO reports that 38 out of 109 agreements with LPs reference decent work objectives. *See* ILO Hub, *supra* note 293.

objectives;[340] however, marking this as an area that deserves greater focus. Including commitments to promote decent work in RTAs would increase labour's resiliency and help prevent compromise of workers' equity, security, and dignity.

RTAs that include commitments on decent work (or the instruments, declarations, etc. that elaborate on the concept of decent work, which is an important distinction with implications for commitments) vary widely in their language. Most refer to the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, while some directly reference the ILO Decent Work Agenda and others discuss goals of decent work without any direct reference to international instruments. While many ILO members have adopted the Employment and Decent Work for Peace and Resilience Recommendation, it has yet to be incorporated in an RTA. The options below represent a range of approaches for decent work provisions across varying levels of commitment.

In Example Option A, drawn from the EU-Vietnam Agreement enacted in 2019, the parties recognize the importance of decent work and reaffirm their commitment to policies that further that goal. This option commits the parties to cooperating and consulting, "as appropriate," on trade-related labour issues but does not create any additional binding commitments and thus affords countries the greatest degree of policy space. This is an example of softer, more aspirational language that is less binding on the parties. This agreement also references the 2008 Declaration, which includes its four strategic objectives.

Example Option B, taken from the EU-Japan FTA that entered into force in 2019, "recognizes" the goals of decent work and commits the parties to consult and cooperate on decent work objectives via a Committee on Sustainable Trade and Development.[341] This option prioritises decent work without binding the parties to change domestic law, granting broad flexibility to parties to determine how and when to incorporate decent work into domestic policies and laws. Its obligation to cooperate on "trade-related labour issues" is general rather than specific to the Decent Work Agenda; however, the reference to decent work in the provision would argue for its inclusion in cooperative activities.

Example Option C, from the SADC Parallel Agreement, as amended in 2009, is similar to Example Option B in that it binds the parties to consultation with the ILO on planning and execution of the Decent Work Agenda. This provision is only seen in the SADC instrument but presents an interesting approach for including the ILO in the process while retaining policy space around implementation. It also incorporates occupational safety and health, gender, and other important labour-related issues.

Example Option D is adapted from CETA, which entered into force in 2017 and creates a binding obligation that the parties "shall ensure" that their labour laws and practices will promote the ILO Decent Work Agenda and lists specific objectives from the Decent Work

[340] ILO, "COVID-19 and the Sustainable Development Goals: Reversing Progress Towards Decent Work for All", (2022), https://ilostat.ilo.org/covid-19-and-the-sustainable-development-goals-reversing-progress-towards-decent-work-for-all/

[341] Part II, § 2 of this Chapter explores using cooperative provisions for workers' rights generally.

Agenda, with an emphasis on occupational health and safety. This creates the strongest commitment to decent work objectives.
The Sample Model Provision below is adapted from the ILO's Employment and Decent Work for Peace and Resilience Recommendation and recognizes the importance of decent work for building peace and recovering from crises. The Sample Model Provision does not commit the parties to any affirmative obligations but emphasises the parties' commitment to decent work, especially in times of crisis.

Example Options on the Incorporation of the ILO Decent Work Agenda

Example Option A: Recognition of Decent Work Agenda

The Parties recognise the importance of full and productive employment and decent work for all, in particular as a response to globalisation. The Parties reaffirm their commitment to promote the development of their bilateral trade in a way that is conducive to full and productive employment and decent work for all, including for women and young people. In this context, the Parties shall consult and cooperate, as appropriate, on trade-related labour issues of mutual interest.

Source: EU–Vietnam FTA, Article 13.4(1)

Example Option B: Cooperation on Trade-Related Labour Issues (with Reference to Decent Work)

The Parties recognise full and productive employment and decent work for all as key elements to respond to economic, labour and social challenges. The Parties further recognise the importance of promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all. In that context, the Parties shall exchange views and information on trade-related labour issues of mutual interest in the meetings of the Committee on Trade and Sustainable Development.

Source: EU-Japan FTA, Article 16.3(1)

Example Option C: Consultation with ILO on Implementing Decent Work Agenda

The ILO and SADC, in order to facilitate attaining the objective of the two Organizations, shall consult each other in respect of planning and execution of programmes for promoting decent work (rights at work, employment, training and income generation, social protection and social dialogue as a tool for socio-economic development) in relation but not limited to the following matters:

(a) the role of employers' and workers' organizations;
(b) tripartite consultation at regional and national levels;
(c) employment, with an emphasis on youth and women;
(d) eradication of child labour, with particular emphasis on the worst form of child labour;
(e) *occupational safety and health* (emphasis added);

(f) *conditions of work and employment* (emphasis added);
(g) social protection, including extension of social security;
(h) HIV/AIDS in the workplace;
(i) harmonization of labour and social security legislation;
(j) gender policy mainstreaming;
(k) labour migration;
(l) measure to combat forced labour and trafficking in persons;
(m) sectoral approaches to social and labour issues;
(n) labour market information systems, including statistical capacity-building;
(o) entrepreneurship and corporate social responsibility; and
(p) productivity programmes.

Source: SADC Parallel Agreement, Article 1

Example Option D: Obligation to Comply with Decent Work Agenda

Article 23.3: Multilateral Labour Standards and Agreements

Each Party shall ensure that its labour law and practices promote the following objectives included in the ILO Decent Work Agenda, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008 adopted by the International Labour Conference at its 97th Session, and other international commitments:
(a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness;
(b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and,
(c) non-discrimination.

Source: CETA, Article 23.3(2)

Sample Model Option: Decent Work as a Tool for Peace and Resilience in Crises

The parties recognise the importance of employment and decent work for promoting peace, preventing crisis situations arising from conflicts and disasters, enabling recovery, and building resilience, and emphasise the need to ensure respect for all human rights and the rule of law, including respect for fundamental principles and rights at work and for international labour standards, in particular those rights and principles relevant to employment and decent work.

Source: ILO Employment and Decent Work for Peace and Resilience Recommendation, preamble

vii. Occupational Health and Safety

Health and safety for workers are central during crises, including climate crises like natural disasters, and other circumstances in which workers are more vulnerable. Increasing countries' commitment to these goals via LPs will encourage them to increase protections in

the broader context of sustainable development. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) recognizes a right to "safe and healthy working conditions,"[342] and the ILO reiterates the language in the ILO Convention on Occupational Safety and Health (No. 155) as well as the ILO Promotional Framework for Occupational Safety and Health Convention (No. 187). However, currently only about two-thirds (67 percent) of trade agreements with LPs reference occupational health and safety.[343]

RTAs vary in how they address issues of occupational health and safety. Occupational health and safety can be incorporated under decent work provisions, as illustrated above, or covered independently. Recent agreements like CPTPP that entered into force in 2018, CETA that entered into force in 2017, and USMCA that entered into force in in 2020 create obligations to adopt laws that promote occupational health and safety. CETA offers the strongest protections; the agreement commits the parties to enacting preventative safety measures and policies "aimed at developing a preventative safety and health culture where the principle of prevention is accorded the highest priority." Additionally, the agreement obliges the parties to consider existing scientific and technical standards in formulating policies, but, where there is a potential hazard, "a Party shall not use the lack of full scientific certainty as a reason to postpone cost effective protective measures." Alternatively, CPTPP and USMCA bind the parties to regulate issues of workplace safety but leave the type and degree of regulation up to the individual parties and in this way retain policy space for the respective members.

Several bilateral agreements, including the Chile-Indonesia Comprehensive EPA that entered into force in 2019, references occupational health and safety under the 'cooperation' section rather than in the general obligations.[344] This option allows for more flexibility in implementation but does not contain a fully binding commitment on workplace safety. Other bilateral agreements, like the Korea-Turkey FTA that entered into force in 2013, address workplace safety in the non-derogation commitments. These provisions are included in the preamble or objectives of the agreements and forbid parties from compromising workplace safety to attract foreign investment. This language does not create any agreement for further protections but does prevent the parties from lowering the protections that are currently in place.

Each of these approaches is represented in the options below. Example Option A, taken from the Chile-Indonesia EPA that entered into force in 2019, commits the parties to cooperating on issues of workplace safety. Under Example Option B, drawn from the EU-Cameroon EPA that entered into force in 2014, the parties agree not to lower standards of workplace safety to attract foreign investment. Example Option C, based on the provisions in the CPTPP and USMCA, obliges parties to adopt laws that promote workplace safety. Example Option D is adapted from CETA and creates obligations for the parties to adopt laws that promote

[342] International Covenant on Economic, Social and Cultural Rights, art. 7, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* 3 Jan. 1976, *acceded to by Zambia 10 Apr. 1984* (emphasis added) [hereinafter ICESCR].

[343] The ILO reports that 73 out of 109 agreements reference decent work objectives. *See* ILO Hub, *supra* note 293.

[344] Part II, § 2 of this Chapter explores using cooperative provisions for workers' rights generally.

workplace safety, implement policies that create a safety-first environment, and respond to reasonably foreseeable potential hazards as they arise.

Example Options on Occupational Health and Safety

Example Option A: Cooperative Approach to Occupational Health & Safety

Taking into account their national priorities and available resources, the Parties shall explore and jointly decide areas of cooperation of mutual interest and benefit. These areas may include but are not limited to… [*inter alia*] occupational safety and health.

Source: Chile–Indonesia EPA, Article 9.6(5)

Example Option B: Non-Derogation Commitment to Occupational Health & Safety[345]

The Parties shall not encourage foreign direct investment by lowering or reducing labour or occupational health and safety standards in the application and enforcement of labour laws of the Parties.

Source: EU–Cameroon EPA, Preamble

Example Option C: Obligation to Regulate Occupational Health & Safety[346]

Each Party shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Source: CPTPP, Article 19.3 (2), Labour Rights

Example Option D: Obligation to Regulation and Implement Preventative Measures

Article 23.3: Multilateral labour standards and agreements

Each Party shall ensure that its labour law and practices embody and provide protection for working conditions that respect the health and safety of workers, including by formulating policies that promote basic principles aimed at preventing accidents and injuries that preventative safety and health culture where the principle of prevention is accorded the highest priority.

When preparing and implementing measures aimed at health protection and safety at work, each Party shall take into account existing relevant scientific and technical information and related international standards, guidelines or recommendations, if the measures may affect trade or investment between the Parties. The Parties acknowledge that in case of existing or potential hazards or conditions that could reasonably be expected to cause injury or illness to a natural

[345] *See also* Korea–Turkey FTA, Art 1.2.

[346] *See also* USMCA, *supra* note 25, Art. 23.3(2).

person, a Party shall not use the lack of full scientific certainty as a reason to postpone cost effective protective measures.

Source: CETA, Article 23.3(3)

c. Addressing Labour-related Commitments on Business & Human Rights

Globalisation has enhanced the influential role of companies in promoting and enforcing human rights, and the growing business and human rights movement reflects this dynamic, underscoring the connection between businesses and human and workers' rights, which is even more pronounced during a crisis. The UN Working Group on Business and Human Rights strongly encourages all States to develop, enact, and update periodically a National Action Plan on business and human rights, as well as disseminate and implement the Guiding Principles on Business and Human Rights. Commitments in this area are evolving under RTAs, and business and human rights may be integrated through reference to corporate social responsibility (CSR) or responsible business conduct in the management of the supply chains, with other options possible in the future.

i. Corporate Social Responsibility

References to CSR are the least common among what the World Bank Deep Trade Agreement database refers to as substantive LPs found in RTAs.[347] It is, however, important to note that CSR provisions, while relatively uncommon, are of relevance to different issues covered in this Handbook, including environment, labour, and investment.

Agreements that include CSR provisions often require the parties to agree to the promotion of CSR. The Parties sometimes refer to the relevant internationally recognised principles and guidelines, such as the OECD Guidelines for Multinational Enterprises, the United Nations Global Compact, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy as standards to be upheld for companies respecting business and human rights.

Example Option A below, from the Canada-Israel RTA amended in 2018, was the first agreement to include CSR, and it contains a soft commitment whereby the parties simply recognize and affirm the need for CSR through dialogue and cooperation. Although the provision is expressly excluded from enforcement, it sets the tone for subsequent engagement. Example Option B, drawn from the Japan-UK EPA that entered into force in 2021, underscores the importance of labour policies in achieving the objectives of the agreement and includes exchange of information and best practices needed in the context of CSR, with CSR noted among areas for possible cooperation. This provision is an example of the type of softer construction commonly found across RTAs.

[347] These are almost never subject to state-to-state dispute resolution. D. Raess & D. Sari, "Labour Market Regulations," in *Handbook of Deep Trade Agreement*, *supra* note 298. James Harrison, "The Labour Rights Agenda in Free Trade Agreements," p. 583-606 (2019)

Example Option C, drawn from the EU-Vietnam FTA that entered into force in 2020, goes further to affirm the commitment of the parties to promote CSR through enumerated measures, provided they do not consist of arbitrary or unjustifiable discrimination between parties or measures restrictive to trade, consistent with language contained in General Exceptions clauses. Example Option D, taken from UK-Ukraine Political, Free Trade and Strategic Partnership Agreement, which entered into force in 2021 has partially binding language ("strive to facilitate") on CSR and fair trade and is the least common example.

Example Options on Corporate Social Responsibility

Example Option A: Corporate Social Responsibility Through Dialogue and Cooperation

1. The Parties affirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their business practices and internal policies those guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, including the OECD Guidelines on Multinational Enterprises. These guidelines and principles address issues such as labour, environment, gender equality, community relations and anti-corruption.

2. The Parties shall make all possible efforts, through dialogue, consultations and cooperation to resolve any matter that may arise relating to this Article.

3. A Party shall not have recourse to dispute settlement under this Agreement for any matter arising under this Article.

Source: Canada-Israel FTA, Article 16.4

Example Option B: Corporate Social Responsibility (Exchange of Information and Best Practices)

Recognizing the importance of cooperation on trade-related and investment-related aspects of environmental and labour policies in order to achieve the objectives of this Agreement, the Parties may, inter alia: [. . .]

(e) cooperate to promote corporate social responsibility, notably through the exchange of information and best practices, including on adherence, implementation, follow-up, and dissemination of internationally agreed guidelines and principles.

Source: Japan-United Kingdom EPA, Article 16:12 (e)(f)

Example Option C: Corporate Social Responsibility (Agreement to Promote CSR)

1. Each Party affirms its commitment to enhance the contribution of trade and investment to the goal of sustainable development in its economic, social and environmental dimensions.

2. To that end, the Parties: [. . .]

(e) in accordance with their domestic laws or policies agree to promote corporate social responsibility, provided that measures related thereto are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade; measures for the promotion of corporate social responsibility include, among others, exchange of information and best practices, education and training activities and technical advice; in this regard, each Party takes into account relevant internationally agreed instruments that have been endorsed or are supported by that Party, such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, the United Nations Global Compact and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

Source: EU-Vietnam FTA Article 13:10 (e)

Example Option D: Corporate Social Responsibility (Fair and Ethical Trade and CSR)

The Parties shall strive to facilitate trade in products that contribute to sustainable development, including products that are the subject of schemes such as fair and ethical trade schemes, as well as those respecting corporate social responsibility and accountability principles

Source: UK-Ukraine Political, Free Trade, and Strategic Partnership Agreement, Article 279.3

ii. Monitoring and Management of Supply Chains

Although RTAs contain commitments at the national level, given the increased focus on monitoring supply chains in the business and human rights and environmental, social, and governance (ESG) space, provisions on supply chains may well become a future trend.[348] This dimension has multiple implications for labour and trade, and the worst workers' rights violations are often seen in factories operating at the bottom of supply chains, where monitoring is weak. Efforts to improve supply chains are vulnerable during times of crisis, as evidenced by the suspension of the ILO's Better Work Initiative, which monitors factories in the global apparel supply chain, during the COVID-19 pandemic, even though many factories were still operating.[349] Such efforts will require unprecedented cooperation from the private sector.

Example Option A below, taken from the UK-Iceland, Lichtenstein, and Norway FTA that entered into force in 2021, urges the parties to disseminate information on supply chain management and establish appropriate policy frameworks, in line with international

[348] Gertz, G., (2020) "The Coronavirus Will Reveal Hidden Vulnerabilities in Complex Global Supply Chains," Brookings, March 5. https://www.brookings.edu/blog/future-development/2020/03/05/the-coronavirus-will-reveal-hidden-vulnerabilities-in-complex-global-supply-chains/; Javorcik, B., (2020), "Global Supply Chains Will Not be the Same in the post-COVID-19 World," in R. Baldwin & S. J. Evenett (Eds), *COVID-19 and Trade Policy: Why Turning Inward Won't Work*, at 111–116. London: CEPR Press.

[349] Better Work classified its monitoring activities during the pandemic based on three phases. Phase 1: Factory production is suspended; on-site factory visits by ILO staff are suspended. Phase 2: Factory production is partially or fully resumed; on-site factory visits by ILO staff are suspended due to COVID restrictions. Phase 3: Factory production is partially or fully resumed; all or partial on-site factory visits by ILO staff are possible. https://betterwork.org/1-better-work-response-to-covid19/

instruments. Example Option B below, from the EU-UK TCA that entered into force in 2021, references a supportive policy framework for managing supply chains and goes further to stress the importance of sector-specific guidelines on supply chains. This is an uncommon provision but is helpful and specifically highlights a vulnerability. Notably, both provisions reference the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights

Example Options on Responsible Supply Chain Management

Example Option A: Responsible Business Conduct

The Parties commit to promote responsible business conduct, including by encouraging relevant practices such as responsible management of supply chains by businesses, as well as providing supportive policy frameworks to encourage the uptake of relevant practices by businesses. In this regard, the Parties acknowledge the importance of dissemination, adherence, implementation and follow-up of internationally recognized principles and guidelines, such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact and the UN Guiding Principles on Business and Human Rights.

Source: United Kingdom-Iceland, Liechtenstein, and Norway FTA, Article 13.11

Example Option B: Responsible Management of Supply Chains

1. The Parties recognize the importance of responsible management of supply chains through responsible business conduct and corporate social responsibility practices and the role of trade in pursuing this objective.

2. In light of paragraph 1, each Party shall:
(a) encourage corporate social responsibility and responsible business conduct, including by providing supportive policy frameworks that encourage the uptake of relevant practices by businesses; and
(b) support the adherence, implementation, follow-up, and dissemination of relevant international instruments, such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite
Declaration of Principles Concerning Multinational Enterprises and Social Policy, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights.

3. The Parties recognise the utility of international sector-specific guidelines in the area of corporate social responsibility and responsible business conduct and shall encourage joint work in this regard. In respect of the OECD Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas and its supplements, the Parties shall also implement measures to promote the uptake of that Guidance.

4. The Parties shall work together to strengthen their cooperation on trade-related aspects of issues covered by this Article, including in multilateral fora, as appropriate, inter alia through the exchange of information, best practices, and outreach initiatives.

Source: EU-United Kingdom TCA, Article 8.10

d. Compliance and Enforcement

Even though the number of RTAs containing LPs continues to rise, States remain divided on how compliance with such provisions should be ensured. As discussed in the legal aspects section above, there is controversy surrounding whether and to what extent violations of RTA LPs should be subjected to (binding) dispute settlement. In addition, certain enforcement measures focus heavily on compliance with domestic labour laws. Consequently, RTAs differ significantly in the mechanisms they provide to ensure compliance with labour commitments.

Emerging approaches worth closer attention are the relatively new innovation of a facility-level enforcement mechanism, such as the USMCA Rapid Response Mechanism, and domestic improvements in access to labour courts. Ensuring compliance with LPs can take many forms and does not necessarily require the inclusion of formal binding dispute settlement or sanctions. Sanctions can have important repercussions, however, and parties tend to place focus on dialogue and remedial actions such as action plans in the context of dispute resolution.

The section below provides options for RTAs to ensure labour compliance and enforcement (a) through 'access to justice and procedural guarantees' provisions; (b) through public complaint mechanisms; (c) through formalised consultations; and (d) through different forms of state-to-state legal arbitration. Additionally, this section discusses the USMCA's rapid response mechanism for remediation of freedom of association and collective bargaining violations at the facility level.

i. Commitments to Adequate Domestic Enforcement through "Access to Justice, Procedural Guarantees, and Public Awareness" Provisions

Domestic courts and administrative tribunals are essential for the enforcement of labour rights. Workers, unions, employers, and other interested third parties turn to these domestic institutions first to have their labour rights enforced and violations remedied, underscoring a basic principle in dispute resolution. Most legal systems do not allow private parties to rely directly on RTA labour commitments for enforcement before national courts. However, RTAs can enhance access to domestic remedies through provisions on access to justice and procedural guarantees. Such provisions typically oblige Parties to provide those with a legal interest with fair, equitable, and transparent access to independent judicial or administrative tribunals, as well as access to and enforcement of appropriate remedies. 'Access to Justice' Provisions can be found in 31 percent of RTAs with LPs.[350]

[350] ILO Hub, *supra* note 293.

Furthermore, RTAs can contain provisions to enhance public awareness of domestic labour laws, international labour commitments, and the availability of legal remedies. Currently, 61 percent of RTAs with LPs contain such 'public awareness' commitments and the number is on the rise.[351] The language of these provisions is usually relatively vague and largely aspirational, for example, "*shall promote public awareness*" through "ensuring *availability of public information*" and "*encouraging education.*"[352]

"Public awareness" provisions can be particularly important as circumstances change. As the pandemic highlighted, vulnerable groups risk not being adequately informed of their rights and remedies. Therefore, the language of these provisions could be enhanced by explicitly recognising the informational hurdles vulnerable groups, such as informal and migrant workers, face. Further, such provisions could commit Parties to mitigate the lack of information amongst such groups, such as through mandatory workplace training on labour laws and national campaigns.

The example options below focus on public awareness, access to justice, and procedural guarantees. Example Options A and B create obligations regarding public information and awareness. Example Option A is found in the Peru-Australia FTA that entered into force in 2020. It commits Parties to promote public awareness of labour laws, including by ensuring the availability of public information and encouraging education. Example Option B is adapted from CETA that entered into force in 2017 and obliges Parties to promote public awareness by ensuring that information is available and taking steps to further knowledge and understanding by workers, employees, and representatives. CETA also requires Parties to encourage public debate.

Alongside or instead of 'public awareness' provisions, parties could opt to go further and include 'access to justice' provisions. Example Option C is, again, adapted from CETA. The provision commits Parties to ensuring access to justice and providing procedural guarantees. CETA requires Parties to ensure that proceedings are not unnecessarily complicated, prohibitively costly, do not entail unreasonable time limits, and are conducted without unwarranted delays. To that end, parties are required to provide reasonable notice, opportunities to be heard, impartial adjudicators, and motivated decisions.

The Sample Model Option below introduces language that makes explicit reference to the need to recognize the special informational needs amongst vulnerable groups and commits Parties to take appropriate government action to ensure that those groups have access to information.

Example Options on Access to Justice, Procedural Guarantees, and Public Awareness

Example Option A: Public Information and Awareness

[351] Id.

[352] *See, e.g.*, Taiwan, China-Nicaragua FTA, Art. 18.03 (June 23, 2006), http://www.sice.oas.org/trade/nic_twn/nic_twn_e/TWN_NIC_full_text_06_16_09.pdf; Peru-Australia FTA, Art. 18.5 (Feb. 12, 2018), https://www.dfat.gov.au/trade/agreements/in-force/pafta/full-text/Pages/fta-text-and-associated-documents; CPTPP, Article 19.8, *supra* note 18.

[…] 4. Each Party shall promote public awareness of its labour laws, including by: (1) ensuring the availability of public information related to its labour laws and enforcement and compliance procedures; and (2) encouraging education of the public regarding its labour laws.

Source: Peru-Australia FTA, Article 18.5

Example Option B: Public Information and Awareness

1. In addition to its obligations under Article 27.1 (Publication), each Party shall encourage public debate with and among non-state actors as regards the development and definition of policies that may lead to the adoption of labour law and standards by its public authorities.

2. Each Party shall promote public awareness of its labour law and standards, as well as enforcement and compliance procedures, including by ensuring the availability of information and by taking steps to further the knowledge and understanding of workers, employers and their representatives.

Source: CETA, Article 23.6

Example Option C: Access to Justice and Procedural Guarantees

Article 23.5: Enforcement Procedures, Administrative Proceedings

1. Pursuant to Article 23.4, each Party shall promote compliance with and shall effectively enforce its labour law, including by: [...]

(b) ensuring that administrative and judicial proceedings are available to persons with a legally recognised interest in a particular matter who maintains that a right is infringed under its law, in order to permit effective action against infringements of its labour law, including appropriate remedies for violations of such law.

2. Each Party shall, in accordance with its law, ensure that the proceedings referred to in subparagraph 1(b) are **not unnecessarily complicated** or **prohibitively costly**, do **not entail unreasonable time limits or unwarranted delays**, provide injunctive relief, if appropriate, and are **fair and equitable**, **including by**:

(a) providing defendants with **reasonable notice** when a procedure is initiated, including a description of the nature of the proceeding and the basis of the claim;

(b) providing the parties to the proceedings with a **reasonable opportunity to support or defend their respective positions**, including by presenting information or evidence, prior to a final decision;

(c) providing that **final decisions are made in writing and give reasons as appropriate to the case** and based on information or evidence in respect of which the parties to the proceeding were offered the opportunity to be heard; and

(d) allowing the parties to administrative proceedings an **opportunity for review** and, if warranted, correction of final administrative decisions within a reasonable period of time by a tribunal established by law, with appropriate guarantees of tribunal **independence and impartiality**.

Source: CETA, Article 23.6

Sample Model Option on Raising Labour Right Awareness Amongst Vulnerable Groups

Parties recognize the enhanced informational needs of vulnerable groups, such as migrant and informal workers, particularly in times of domestic or global crisis. To that end, Parties commit to take appropriate government action to ensure that vulnerable groups are informed of labour rights, protections, and available remedies, such as by (i) providing informational and educational materials to workers in their place of employment; (ii) by engaging in regular, substantial public debate with those workers and their representatives and by (iii) requiring employers to inform their employees of their labour rights, including through the provision of workshops.

ii. Public Communication Mechanisms

Public communication mechanisms are a fundamental element of some approaches to trade and labour enforcement across the globe, including, but not limited to, the U.S. and Canadian approaches. In essence, public communication mechanisms allow various stakeholders, such as workers, unions, and broader civil society to raise their concerns with the implementation of labour commitments under RTAs to tailored institutions set up under the RTA (national contact points, committees, etc.). These institutions review claims and take appropriate steps, such as establishing an action plan or initiating dispute settlement proceedings. When well-implemented, public communications can be an effective enforcement tool, as workers' unions and other stakeholders are often best placed to discover compliance issues.

The Canada-Colombia Agreement on Labour Cooperation that entered into force in 2011 (hereinafter LCA)[353] provides a good example of how a well-designed public communication mechanism can be effective. The LCA public communication mechanism is broad in coverage ("*any matters related to this agreement*") and scope (NGOs, businesses, and nationals). Further, the Canadian implementation of public communication mechanisms offers clear, detailed guidance on citizens' submissions, including clear time limits, acceptance criteria, and transparency requirements. This approach has proven successful in its implementation. In 2016, the Canadian Labour Congress and five Colombian labour organisations filed a public communication with the Canadian National Administrative Office (NAO) under the LCA regarding Colombia's failure to meet several obligations under the agreement, including on freedom of association. This communication led the NAO to adopt a report that, while not legally binding, resulted in change on the ground, because both parties were committed to finding a solution.

[353] The LCA is a parallel accord to the Canada-Colombia FTA (Nov 21, 2008, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/index.aspx?lang=eng.

The Example Options below focus on public communication mechanisms. Example Option A**,** taken from the CPTPP that entered into force in 2018, creates a public communication mechanism at the RTA level by obliging the (RTA Labour) Council to provide a means for receiving and considering the views of interested persons. The advantage of this provision is that the public communications can be addressed to a body consisting of representatives of all parties, which could be a benefit in cases of less well-equipped national institutions. Example Option B is adapted from the LCA discussed above. It provides for a public communication mechanism at the domestic level. The provision benefits from a broad scope allowing all stakeholders, individuals, and organisations to file complaints regarding any matter related to the agreement. While more tailored in its approach, this option could also be more difficult and costly to implement and requires strong national institutions.

Example Options on Public Communication Mechanisms

Example Option A: Public Communication Mechanism at the RTA Level

1. In conducting its activities, including meetings, the Council shall provide a means for receiving and considering the views of interested persons on matters related to this Chapter.

Source, CPTPP, Article 19.14 (1).

Example Option B: Public Communication Mechanism at the Domestic Level

1. Each Party shall provide for the submission, acceptance, and review of public communications on labour law matters that: (a) are raised by **a national or by an enterprise or organisation** established in the territory of the Party; (b) arise in the territory of the other Party; and (c) pertain to **any matters related to this Agreement.**
2. Each Party shall make such communications publicly available upon acceptance for review and shall accept and review such matters in accordance with domestic procedures as provided for in Annex 2.

Source: Canada-Colombia LCA, Article 10

iii. Consultations between the Parties to Resolve Labour Disputes

Most RTAs provide for a consultation process between the Parties. Under some RTA, consultations are the only recourse in case of disagreement over the implementation of LPs. In other RTAs, consultations are a required first step, to be exhausted before recourse to the dispute settlement process is an option. Such is, for instance, the case in U.S., Canadian, and Chilean RTAs. The goal of consultations is to achieve a mutually agreed solution. Some RTAs foresee the possibility of seeking advice from experts, interested third parties, and international organisations.

The Example Options below focus on consultations between the parties to resolve labour disputes. Example Option A, adapted from the Korea-Australia FTA that entered into force in 2014, does not provide for legal arbitration or binding dispute settlement to resolve labour disputes. Therefore, consultations function as a stand-alone dispute settlement mechanism,

and parties are required to make every attempt to reach a mutually satisfactory solution. If consultations fail, the matter can be referred to an *Ad Hoc Committee* of Parties' representatives. Example Option B, taken from the CPTPP that entered into force in 2018, obligates Parties to take consultations are a mandatory first step before requesting the establishment of a panel. The CPTPP allows Parties to seek the advice of independent experts during the consultative process. This option functions alongside a more elaborate dispute settlement system, making it a more binding example.

Example Options on Consultations between the Parties to Resolve Labour Disputes

Example Option A: Consultations as Stand-alone Labour Dispute Settlement Mechanism

1**.** A Party may request consultations with the other Party regarding **any matter arising under this Chapter** by delivering a written request to the contact point of the other Party. Consultations shall commence promptly after a Party delivers a request for consultations to the contact point of the other Party. The Parties shall **make every attempt to arrive at a mutually satisfactory resolution of the matter.**

2. If consultations under paragraph 1 **fail to resolve** the matter, and a Party deems that the matter needs further discussion, that Party may request the establishment of an **ad hoc Committee** under Article 17.3.2 to consider the matter. Where the establishment of such an ad hoc Committee is requested under this paragraph, that ad hoc Committee shall be established **without undue delay** and shall endeavour to agree on a resolution of the matter.

Source: Korea-Australia FTA, Article 17.4

Example Option B: Consultations as Mandatory Preliminary Step in a Dispute Settlement Process

8. The consulting Parties **shall make every attempt to arrive at a mutually satisfactory resolution** of the matter through labour consultations under this Article, taking into account opportunities for cooperation related to the matter. The consulting Parties may request **advice from an independent expert or experts** chosen by the consulting Parties to assist them. The consulting Parties may have recourse to such procedures as good offices, conciliation, or mediation. [. . .]

10. **If the consulting Parties are unable to resolve the matter,** any consulting Party **may request that the Council representatives of the consulting Parties convene** to consider the matter by delivering a written request to the other consulting Party through its contact point. The Party making that request shall inform the other Parties through their contact points. The Council representatives of the consulting Parties shall convene **no later than 30 days** after the date of receipt of the request, unless the consulting Parties agree otherwise, and shall seek to resolve the matter, including, if appropriate, by consulting independent experts and having recourse to such procedures as good offices, conciliation or mediation. [. . .]

12. If the consulting Parties **have failed to resolve** the matter **no later than 60 day**s after the date of receipt of a request under paragraph 2, the requesting Party may request the

establishment of a panel under Article 28.7 (Establishment of a Panel) and, as provided in Chapter 28 (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter.

13. **No Party shall have recourse** to dispute settlement under Chapter 28 (Dispute Settlement) for a matter arising under this Chapter **without first seeking to resolve the matter in accordance with this Article.**

Source: CPTPP, Article 19.15

iv. State-to-State Labour Dispute Settlement

State-to-state dispute settlement is probably the most visible form of labour enforcement under RTAs. Yet, it is also the most controversial, with developing countries often arguing that dispute settlement and sanctions are protectionist and harm the interests of the workers the agreements are supposed to protect. However, dispute settlement can take different forms appropriate to the context of an RTA and can be a very efficient tool to ensure labour compliance.[354] This section contains options for: (1) the scope of labour failures that can be referred to dispute settlement and (2) the forms of labour dispute settlement under RTAs.

v. Scope of Labour Issues Referred to Dispute Settlement

RTAs sometimes limit the scope of RTA labour violations that are subject to dispute settlement. Binding dispute settlement under US RTAs tends to only be available for labour failures "*in a manner affecting trade*" between the parties. This test proved challenging to meet in the US-Guatemala dispute under the CAFTA-DR FTA, contributing to the US loss.[355] Consequently, "for greater certainty," explanatory footnotes were added to the USMCA to accompany the provisions on labour rights, enforcement of labour laws, and non-derogation from labour laws,[356] which further define "in a manner affecting trade or investment" and create an evidentiary presumption for dispute settlement purposes that a violation indeed affects trade or investment. As labour disputes proceed under the USMCA, further light will be shed on these clarifications and how the test is applied in practice.

The Example Options below are ordered from narrow to more broad scope of potential labour disputes that can be subject to dispute settlement. Example Option A is adapted from the CAFTA-DR FTA. It limits violations of the RTA's "Enforcement of Labour Laws" obligation to those failures that are "*in a manner affecting trade*." Example Option B is taken from the USMCA. Similar to the CAFTA-DR FTA, only violations "in a manner affecting trade or investment" can be brought to dispute settlement. However, the USMCA differs in its inclusion of a "*for greater certainty*" explanatory note of "in a manner affecting trade" in

[354] Celine Carrere, Marcelo Olarreaga and Damian Raess, "Labour Clauses in Trade Agreements: Hidden Protetionanism?," *The Review of International Organizationation*, (2022), https://link.springer.com/content/pdf/10.1007/s11558-021-09423-3.pdf?pdf=button%20sticky.

[355] Dominican Republic-Central America FTA (CAFTA-DR), August 5, 2004, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

[356] USMCA, *supra* note 25, Article 23.3, Footnotes 4 and 5; USMCA, Article 23.4, Footnotes 8 and 9 and USMCA, Article 23.5, Footnotes 11 and 12.

footnote 11 and an evidentiary presumption for dispute settlement purposes in footnote 12. This presumption makes it significantly easier for a party to prove a labour violation under the RTA.

Example Option C is adapted from the EU-Korea FTA that entered into force in 2011. Under the EU-Korea FTA any matter of mutual interest arising under the chapter can be referred to consultations and, subsequently, a panel of experts. The substantive labour obligations under this FTA also do not contain the "in a manner affecting trade or investment" qualifier. The scope of dispute settlement under this agreement is, thus, broader. However, this broad scope under the EU-Korea FTA is associated with non-binding labour dispute settlement, which acts as another limiting factor.

Example Options on the Scope of RTA Labour Violations Subjected to Dispute Settlement

Example Option A: Limitation to Failures "in a manner affecting trade" (without presumption)

1. (a) A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, **in a manner affecting trade between the Parties**, after the date of entry into force of this Agreement.

Source: CAFTA-DR FTA, Article 16.2 (1) (a)

Example Option B: Limitation to Failures "in a manner affecting trade or investment" (with explanation and presumption in footnote)

1. No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction **in a manner affecting trade or investment** between the Parties [...].

Footnote 4 - "**For greater certainty**, a "course of action or inaction" is "in a manner affecting trade or investment between the Parties" if the course involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.

Footnote 5 - **For purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties**, unless the responding Party demonstrates otherwise.

Source: USMCA, Article 23.5 (1) [357]

Example Option C: No Limitation on Matters Referable to (non-binding) Dispute Settlement

[357] *See also,* identical language in USMCA, *supra* note 25, Article 23.3, Footnotes 4 and 5 (Labour Rights) and USMCA, Article 23.4 (Non-Derogation), Footnotes 8 and 9 and *supra* note 25.

1. A Party may request consultations with the other Party regarding **any matter of mutual interest arising under this Chapter**, including the communications of the Domestic Advisory Group(s) referred to in Article 13.12, [...].

Article 13.15 (1) Panel of Experts

1. Unless the Parties otherwise agree, a Party may, 90 days after the delivery of a request for consultations under Article 13.14.1, request that a Panel of Experts be convened to examine **the matter that has not been satisfactorily addressed through government consultations**. [...]

Source: EU-Korea FTA, Article 13.14 (1) and Article 13.15 (1)

vi. Form of Labour Dispute Settlement Mechanism

As noted, the two current main models of labour dispute settlement under RTAs are (a) subjecting LPs to binding dispute settlement under the RTA's standard dispute settlement procedures and (b) the "panel of experts" model, under which labour disputes can be brought before a panel of experts, which formulate non-binding recommendations. The binding dispute settlement model differs from the "panel of experts" model on the availability of trade sanctions for non-compliance with the outcome of the dispute settlement process. Consequently, findings of labour commitment violations may authorise the suspension of concessions or authorise monetary assessment. In contrast, under the panel of expert's model, panel reports merely create "best endeavour" compliance obligations.

Regardless of whether parties choose binding dispute settlement or non-binding panel recommendations, three procedural elements should be given adequate attention when designing a labour dispute settlement mechanism:

1. Whether to appoint trade or labour experts, or a combination of both as panellists. A combination of trade and labour experts has the advantage of creating panels that are well-equipped to handle the many aspects, dimensions, and complexities of an RTA labour dispute.
2. Whether to impose shorter labour-specific timelines. Non-compliance with labour commitments directly affects workers' rights. Especially in a context of crisis, swift enforcement to restore the rights of those affected is required.
3. Which evidentiary standards to employ. As the experience in the US-Guatemala case highlighted, evidence of labour violations might be challenging, and workers may not be willing to provide testimony out of fear of losing their jobs.

The Example Options below focus on the two dominant State-to-State Dispute Settlement Models. Example Option A is adapted from the EU-Vietnam FTA that entered into force in 2020 and is an illustration of the "panel of experts" model[358] Noteworthy are: (i) the creation

[358] EU-Vietnam Free Trade Agreement, 2015, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements_en

of mere non-binding recommendations; (ii) specific time limits for selection of experts, issuance of reports, and implementation; (iii) the involvement of the ILO and civil society groups; (iv) the expertise requirement for panellists; and (v) the cooperative implementation process. This option is less binding overall, although it could be customised to particular priorities.

Example Option B is adapted from the USMCA that entered into force in 2020 and illustrates the model of subjecting labour disputes to the regular dispute settlement mechanisms under the RTA. Similar to the EU-Vietnam FTA, the USMCA requires panellists in labour disputes to have expertise on labour issues.

Example Options on State-to-State Labour Dispute Settlement Models

Example Option A: "Panel of Experts" Model

1. If the matter has **not been satisfactorily resolved by the Committee on Trade and Sustainable Development** within **120 days, or a longer period agreed by both Parties**, after the delivery of a request for consultations under Article 13.16 (Government Consultations), a Party may request, by delivering a written request to the contact point of the other Party, that a Panel of Experts be convened to examine that matter.[. . .]

4. The list referred to in paragraph 3 shall comprise individuals with **specialised knowledge of, or expertise in, labour or environmental law, issues addressed in this Chapter, or the resolution of disputes arising under international agreements.** [. . .]

7. In matters relating to the respect of the multilateral agreements as set out in Article 13.4 (Multilateral Labour Standards and Agreements) and Article 13.5 (Multilateral Environmental Agreements), **the Panel should seek information and advice from the ILO or bodies of the relevant multilateral environmental agreement**. [. . .]

9. The Parties **shall discuss appropriate actions or measures to be implemented taking into account the final report of the Panel of Experts and the recommendations therein**. The Party concerned **shall inform its domestic advisory group or groups** and the other Party of its decisions on any actions or measures to be implemented no later than 90 days, or a longer period of time mutually agreed by the Parties, after the final report has been submitted to the Parties. The **follow-up to the implementation** of such actions or measures shall be monitored by the Committee on Trade and Sustainable Development. The domestic advisory group or groups and the joint forum may submit observations to the Committee on Trade and Sustainable Development in this regard.

Source: EU-Vietnam FTA, Article 13.17

Example Option B: "Binding Dispute Settlement Under Regular RTA Mechanism" Model

Article 23.17 (12): Labour Consultations

No Party shall have recourse to dispute settlement under Chapter 31 (Dispute Settlement) for a matter arising under this Chapter without first seeking to resolve the matter in accordance with this Article.

Article 31.8 (3): Roster and Qualification of Panelists

For a dispute arising under Chapter 23 (labour) and Chapter 24 (Environment), each disputing Party shall select a panelist in accordance with the following requirements, in addition to those set out in paragraph 1: (a) in a dispute arising under Chapter 23 (labour), panelists other than the chair shall have **expertise or experience in labour law or practice**; […].

Source: adapted from USMCA, Article 23.17 (2) and Article 31.8 (3)

vii. Facility-Level Dispute Settlement

State-to-state dispute settlement has faced significant critique for being too slow and bureaucratic to address imminent labour concerns. Aside from the sometimes-lengthy dispute settlement process itself, implementing decisions that require changes to legislation or domestic enforcement requires significant time and resources. To remedy these issues, the USMCA introduced a new model in the form of the Rapid Response Labour Mechanism (RRLM) contained in Annex 31-A and B of the agreement. The RRLM is an innovative enforcement tool aimed at addressing time-sensitive "freedom of association and collective bargaining" violations at the firm level. The RRLM includes the possibility of on-site verification with specialised panels. It is ostensibly a state-to-state mechanism, but it directly affects private parties' interests. Mechanisms such as the RRLM have the potential to enforce labour standards through targeted site-specific remedies, which may result in concrete improvements for workers. Furthermore, Parties could employ facility-level mechanisms to address labour rights violations in vertically integrated supply chains.

The United States has filed several cases under the RRLM against Mexico, which have largely resulted in prompt settlements with collaborative action plans, without having to resort to a

panel or remedies,[359] leading to some positive impact for workers.[360] The speed at which remediation agreements have been reached under this mechanism contrasts sharply with the pace of resolution for complaints filed outside of the RRLM; while five RRLM complaints have been resolved (the newest filed in January 2023 remained underway at time of writing), the complaint by Mexican migrant workers, which was the first complaint filed, was still in the consultation stage as of January 2023.[361]

Although the RRLM is innovative, several considerations should guide its inclusion in future RTAs. First, experience under the mechanism to date is still limited. Second, the mechanism comes with a set of downsides and obstacles. These include due process concerns, costs of specialised panellists and on-site visits, and high bureaucratic burdens to deal with potentially numerous complaints. The mechanism might not be appropriate in less regionally integrated markets. It is also notable that the RRLM is limited under the USMCA and applies only to certain labour rights violations concerning Mexico (collective bargaining and freedom of association); it does not apply to all USMCA Parties.

The Example Provisions below are adapted from USMCA, Annex 31-A establishing the US-Mexico RRLM. The provisions establishing the Canada-Mexico RRLM under USMCA, Annex 31-B are *mutatis mutandis* the same. Noteworthy aspects include: (i) the scope and purpose of the RRLM. The mechanism serves to ensure remediation of a denial of rights, i.e., denial of the right of free association and collective bargaining, in a "Covered Facility"; (ii) the possibility of on-site verifications with the respondents' consent; (iii) the facility-specific remedies, including denial of entry of products from persistently violating facilities; and (iv) the obligation on Parties to cooperate with and facilitate compliance by their facilities.

Example Option for Facility-Level Labour Dispute Settlement

Article 31-A.1: Scope and Purpose

[359] On May 10, 2021, AFL-CIO, Public Citizen, and the National Independent Union of Industry and Service Workers (SNITIS) in Mexico, brought the first case under the RRLM, filing allegations against Tridonex. USTR initiated the second case under the RRLM two days later, on May 12, 2021, against General Motors Silao. USTR, "Press Release: United States Reaches Agreement with Mexican Auto Parts Company to Protect Workers' Rights," 10 August 2021, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/august/united-states-reaches-agreement-mexican-auto-parts-company-protect-workers-rights; Bureau of International Labor Affairs, US, "News Release: US, Mexico Announce Enforcement of Worker Protection Agreement," 9 July 2021, https://www.dol.gov/newsroom/releases/ilab/ilab20210709?_ga=2.35181154.2137891952.1634056431-862597107.1634056431. On May 18, 2022, USTR filed a third complaint under the RRLM requesting Mexico to review alleged freedom of association and collective bargaining violations at the Panasonic Automotive Systems facility in Reyona, Mexico. USTR, "Press Release: United States Seeks Mexico's Review of Alleged Freedom of Association and Collective Bargaining Violations at Panasonic Facility," 18 May 2022, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/may/united-states-seeks-mexicos-review-alleged-freedom-association-and-collective-bargaining-violations.

[360] Tridonex, for instance, committed to pay severance and backpay, and to protect workers from harassment in elections. Additionally, the Mexican government agreed to, among other things, facilitate workers' right training and monitor union elections.

[361] CRS 2023, *supra* note 315.

[...]. 2. The purpose of the Facility-Specific, Rapid Response Labour Mechanism (the "Mechanism"), including the ability to impose remedies, is **to ensure remediation of a Denial of Rights**, as defined in Article 31-A.2, for workers at a Covered Facility, not to restrict trade. Furthermore, the Parties have designed this Mechanism to ensure that remedies are lifted immediately once a Denial of Rights is remediated. [...].

Article 31-A.2: Denial of Rights

The Mechanism shall apply whenever a Party (the "complainant Party") has a good faith basis belief that **workers at a Covered Facility are being denied the right of free association and collective bargaining** under laws necessary to fulfil the obligations of the other Party (the "respondent Party") under this Agreement (a "Denial of Rights").

Article 31-A.7: Verification

[. . .] 6. The respondent Party shall reply within seven business days whether it consents to the verification request. [. . .]

7. If the respondent Party agrees to the verification, the panel shall conduct the verification within 30 days after receipt of the request by the respondent Party. Observers from both Parties may accompany the panel in any on-site verification if both Parties so request. [. . .]

9. If the respondent Party refuses the request for a verification or does not respond within the period provided for in paragraph 6, the complainant Party may request that the panel make a determination as to whether there is a Denial of Rights. [. . .].

Article 31-A.10: Remedies

1. Once the conditions precedent to the imposition of remedies have been met, the complainant Party may impose remedies that are the most appropriate to remedy the Denial of Rights. The complainant Party shall select a remedy pursuant to paragraph 2 that is **proportional** to the severity of the Denial of Rights and shall take the panel's views on the severity of the Denial of Rights into account when selecting such remedies.

2. Remedies may include **suspension of preferential tariff treatment for goods manufactured at the Covered Facility or the imposition of penalties on goods manufactured at or services provided by the Covered Facility.**

3. In cases where a Covered Facility or a Covered Facility owned or controlled by the same person producing the same or related goods or providing the same or related services has received a prior Denial of Rights determination, remedies may include suspension of preferential tariff treatment for such goods; or the imposition of penalties on such goods or services.

4. In cases where a Covered Facility or a Covered Facility owned or controlled by the same person producing the same or related goods or providing the same or related services has received a **prior Denial of Rights determination on at least two occasions**, remedies may

include suspension of preferential tariff treatment for such goods; the imposition of penalties on such goods or services; or the denial of entry of such goods.

5. After the imposition of remedies, the Parties shall continue to consult on an ongoing basis in order to ensure the prompt remediation of the Denial of Rights and the removal of remedies.

6. If, as a result of those ongoing consultations, the Parties reach agreement that the Denial of Rights has been remediated, the complainant Party shall remove all remedies immediately. [...]

Source: Adapted from USMCA, Annex 31-A (US-Mexico Rapid Response Mechanism)

CHAPTER V:

TRADE AND INVESTMENT

CHAPTER V – TRADE AND INVESTMENT

Trade and investment, once seen as largely distinct, are now recognized as crucial interdependent drivers of economic growth and development. GVCs, in particular, have been an engine for enhanced interdependence as companies combine trade and investment to conduct their business activities, including accessing new markets and sourcing inputs.[362] These dynamics create particular opportunities for linking trade, investment, and sustainable development, as more and more countries consider comprehensive and coordinated trade and investment policies. Although investment has historically been governed by IIAs mainly in the form of BITs that operate largely outside of the system of global trade rules, investment provisions are increasingly appearing in RTAs. The international investment landscape is also becoming increasingly multi-dimensional, with an enhanced focus on balancing investor protection with the need for investment that can contribute to sustainable development, with a clear link to the UN SDGs. IIAs, including RTAs, increasingly, approach investment in connection with development issues, such as environment, health, labour, and CSR.

UNCTAD has projected that global crises are impacting the rate of international investment projects that address climate change mitigation and adaptation, with a decrease of 7-12 percent in new projects announced between January and September of 2022,[363] in comparison with such projects in 2021.[364] Foreign Direct Investment (FDI) also decreased by 31 percent from the quarterly average in 2021, reflecting a shift in investor sentiment due to the food, fuel, and financial crises, as well as the Russian war in Ukraine, rising inflation and interest rates, and fears of a coming recession.[365] Climate change has had a significant effect on investment approaches, as have the effects of public health crises like COVID-19.[366]

[362] OECD, International Trade and Investment: Two Sides of the Same Coin?" (May 2018), https://www.oecd.org/industry/ind/international-trade-investment-policy-note.pdf

[363] Projects fell by 7 percent in climate mitigation and 12 in climate adaptation sectors.

[364] UNCTAD, "Global Investment Trends Monitor, No. 43 – Climate Change Investment Affected by the Energy Crisis – Risk of a Temporary Slowdown," UNCTAD/DIAE/IA/INF/2022/5 (October 27, 2022), https://unctad.org/webflyer/global-investment-trends-monitor-no-43

[365] Ibid.

[366] The pandemic created a global economic standstill for millions and negatively impacted development, which may require a decade for recovery. UN, "A Year Into COVID-19 - How do We Invest to Recover Better," (last visited November 26, 2022), https://www.un.org/en/desa/year-covid-19-%E2%80%93-how-do-we-invest-recover-better-0

Against the backdrop of such global and domestic challenges, international investment rules have been receiving increased scrutiny. One set of issues revolves around application of Investor-State Dispute Settlement (ISDS) to resolve disputes. Another issue concerns the rebalancing of States' interests in protecting investors with discretion in promulgating new rules and regulations to address social issues, referred to as the "right to regulate." Although States remain focused on attracting FDI, recent RTAs reflect changes in these areas, ranging from modified ISDS provisions to expanded host state's right to regulate provisions. Similar changes are appearing in other IIAs as well.

An approach is emerging that balances the needs of governments and investors with environmental, social, and corporate governance (ESG) implications of foreign investments, [367] linking trade and investment rules with sustainable development considerations. The SDGs play a central role, and some of the SDG Targets are of particular importance[368] Target 17.5 calls for the adoption of investment promotion regimes for LDCs. Other targets put forward foreign investment as a tool to achieve food security and improved nutrition, ensure access to sustainable energy and agriculture, end poverty and hunger, and reduce inequality within and among countries.[369] In general, the SDG targets largely approach FDI as a means for positive contribution to development, yet there are aspects of FDI that require balance in the context of sustainable development as well.

States' changing attitudes towards the legal requirements and desired development outcomes of trade and investment have been informed and supported by reform proposals introduced by the UNCTAD and other organizations. In 2015, UNCTAD launched its 'Investment Policy Framework for Sustainable Development,' consisting of an overarching set of Core Principles for Investment Policymaking that could serve as guidelines for national investment policies and IIAs, as well as an action menu for promoting investment in SDG sectors.[370] In addition, UNCTAD has published an Investment Advisory Series with case studies and best practices for developing countries to attract and benefit from FDI in line with national development strategies. UNCTAD tracks implementation of its recommendation through country-specific Investment Policy Reviews and a live implementation matrix, aimed at fostering investment reforms for sustainable development.[371] Efforts like the UN Financing for Sustainable Development Report (FDSR), which advises the international community on how to scale up financing to achieve UN SDGs, is also a step in this direction of using investment for sustainable development.[372]

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[367] Dinesh C. Sharma, "A Risky Environment for Investment, A478 Environmental Health Perspectives", A478 (2006), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1552026/

[368] Beverelli, C., Kurtz, J., & Raess, D. Introduction. In C. Beverelli, J. Kurtz, & D. Raess (Eds.), "International Trade, Investment, and the SDG: World Trade Forum," Cambridge University Press, 2020, at 1. doi:10.1017/9781108881364.002

[369] SDG Targets 1(a), 1(b), 2(a), 7(a), 7(b), 10(b), 17(3).

[370] UNCTAD, Investment Policy Framework for Sustainable Development, 2015, https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf

[371] UNCTAD, "Live Implementation Matrix: Fostering Investment Reforms for Sustainable Development," 2021, https://unctad.org/webflyer/live-implementation-matrix-fostering-investment-reforms-sustainable-development

[372] UN, "Financing for Sustainable Development Report 2021," 2021, https://developmentfinance.un.org/fsdr2021

Globally, countries are taking other steps to prioritize environmental and sustainable development goals and balance these with investment protection. A number of European governments recently announced their intention to step away from the Energy Charter Treaty (ECT), a multilateral investment treaty developed in the 1990s to enable multilateral cooperation in the energy sector ECT and provide ISDS for fossil fuel investment,[373] in order to better address climate change.[374] Under the ECT, fossil fuel investors attained record-breaking arbitration awards from their ISDS claims, amounting to five times typical awards in non-fossil fuel sectors, which account for 20 percent of ISDS cases.[375] Despite pulling back from the ECT in the name of climate change, however, legal hurdles remain, as the ECT contains a sunset clause that protects the interests of investors for 20 years following a government's withdrawal. ECT reform efforts propose to modify the definitions of investment and investor to exclude fossil fuel investment from legal protection in the interest of governments' public policy space.[376]

This chapter explores recent developments, trends, and open issues in trade and investment, assessing central investment provisions in RTAs, namely: (i) Provisions on Sustainable and Socially Responsible Investment; (ii) Provisions Defining Covered Investors and Investments; (ii) Investment Protection Provisions; (iv) Host State Flexibilities; and (iv) Dispute Settlement Provisions.

A. Legal Aspects of Trade and Investment

There is no multilateral framework for international investment law, as is the case in international trade. Investment law developed in the aftermath of the World War II, with IIAs governing relations between governments and investors. There are currently over 2500 IIAs in force,[377] primarily in the form of BITs, with some investment chapters in RTAs.[378] Investment provisions first appeared in RTAs in the early 1990s with the inclusion of an investment chapter in the North American Free Trade Agreement (NAFTA), which would provide a template for expanding the scope of investment protections, liberalization, and regulation in RTAs.[379] Lately, there has been an increasing shift towards the inclusion of

[373] The ECT is now viewed as an outdated 'obstacle to a low-carbon economy.' IISD, "What is the Energy Charter Treaty and What Does it Mean for Sustainable Development?" April 22, 2022 [IISD 2022], https://www.iisd.org/articles/explainer/energy-charter-treaty

[374] Leila Choukroune, "Energy Charter Treaty Exodus Show Global Power Shift," *Climate Home News*, November 24, 2022, https://www.climatechangenews.com/2022/11/24/energy-charter-treaty-exodus-shows-a-global-power-shift/

[375] IISD 2022, *supra* note 373; Lea Di Salvaore, "Investor State Disputes in the Fossil Fuel Industry," IISD December 31, 2021, https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry.

[376] Martin Dietrich Brauch, "Should the European Union Fix, Leave or Kill the Energy Charter Treaty, Columbia," Center on Sustainable Investment (Feb. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3823596

[377] *See* UNCTAD, "International Investment Agreement," www.unctad.org/iia

[378] According to the 2021 UNCTAD World Investment Report, there were 2,943 bilateral investment treaties and 417 investment chapters in free trade agreements in place. UNCTAD, "World Investment Report 2021: Investing in Sustainable Recovery," Geneva: United Nations Conference on Trade and Development, (2021).

[379] Handbook of Deep Trade Agreement, *supra* note 298.

investment provisions in RTAs, with 142 investment provisions in RTAs as of November 2022.[380]

There are some important differences between trade and investment law, one of which is the nature of disputes and the manner in which disputes are resolved. Trade disputes are state-to-state disputes governed by RTAs and WTO law, while investment law focuses on the relationship between investors and host states, with disputes historically governed by arbitral provisions in investment chapters.[381] Arbitration has long been the preferred dispute resolution method to solve disputes between foreign investors and host states; however, recently criticism has intensified against the ISDS system and international arbitration.

An ongoing reform process is underway within UNCITRAL Working Group (WG) III – which has been tasked with coordinating global work on modernizing the ISDS system at the global level[382] although there has been little progress from these negotiations to date.[383] UNCITRAL WG III is currently working to elaborate a comprehensive and convergent reform of the ISDS regime by considering all shortcomings identified by both states and investors, as well as other stakeholders such as NGOs, local communities, the academia, and other international and regional economic organizations.[384] Some RTAs also reflect a shift towards national courts and exhaustion of national remedies, like in the USMCA, while others, like the EU, incorporate a Multilateral Investment Court (MIC) model.

Overall, the UNCITRAL and International Centre for Settlement of Investment Disputes (ICSID) arbitration rules are still heavily relied upon to resolve investment disputes. UNCITRAL plays a central role in international investment law, including through the UNCITRAL Arbitration Rules, which provide a set of comprehensive rules on arbitration proceedings enforceable based on the New York Convention on Recognition and Enforcement of Foreign International Awards. ICSID, an institution of the World Bank Group and one of the most important arbitral institutions in investment disputes, was established under the 1969 International Convention for the Settlement of Investment Disputes (ICSID Convention)[385] and is the primary

[380] OECD, "The Future of Investment Treaties," (last visited Nov. 17, 2022), https://www.oecd.org/investment/investment-policy/investment-treaties.htm#:~:text=Investment%20treaties%20are%20an%20important,investment%20provisions%20of%20trade%20agreements; WTO OMC, "Regional Trade Agreements Database" (last visited Nov. 17, 2022), https://rtais.wto.org/UI/PublicSearchByCrResult.aspx

[381] Ralph Ossa et al, "Disputes in International Investment and Trade," *NBER Working Paper No. 27012 (April 2020)*, https://www.nber.org/system/files/working_papers/w27012/w27012.pdf. Concerning the nature of a remedy, RTAs disputes will often result in a judgement to cease and desist from the violation or authorize trade sanctions, whereas, in contrast, monetary awards are common and routinely available to private investors in IIA disputes.

[382] IISD, "UNICITRAL Working Group III - Investor-State Dispute Settlement Reform - Enters Crucial Phase," *Investment Treaty News*, Oct. 7, 2022, https://www.iisd.org/itn/en/2022/10/07/uncitral-working-group-iii-investor-state-dispute-settlement-reform-enters-crucial-phase/

[383] Axel Berger and Wan-Hsin Liu, "Reforming the International Investment Regime," *IAP UNIDO*, Sept. 2022, https://iap.unido.org/articles/reforming-international-investment-regime#fn-1821-1. A 2022 study suggests that negotiations on subsets of international investment regime such as investment facilitation among a subgroup of non-G20 WTO members may be more effective at international investment reform leading to a new set of international investment rules.

[384] UNCITRAL, "Working Group III: Investor-State Dispute Settlement Reform" (last visited Nov. 22, 2022), https://uncitral.un.org/en/working_groups/3/investor-state

[385] Also known as the Washington Convention.

institutional framework for settling investment-related disputes. Parties must recognize ICSID arbitration rules and ICSID as an institution to resolve investment disputes. The distinction between ICSID and the UNCITRAL rules is that an award under ICSID arbitration rules does not need to pass through the same recognition and enforcement procedures as that of UNCITRAL, but its arbitral awards would be considered equivalent to a judgement issued by the court of last resort in the respective state. Also, ICSID Arbitration Rules are used exclusively in disputes before ICSID, whereas the UNCITRAL rules can be used in both investment and commercial disputes.

The WTO as an institution does not play a significant role in the legal aspects of investment agreements. The WTO Covered Agreements do include the Agreement on Trade-Related Investment Measures (TRIMS Agreement), but the TRIMS Agreement is quite limited in its scope and only applies to investment measures that discriminate against foreign products or result in quantitative restrictions.[386] Services commitments, primarily related to commercial presence (Mode 3) also cover investment.

A multilateral Joint Statement Initiative on Investment Facilitation for Development is also under negotiation, launched by a group of developing and LDC countries,[387] with participation from a number of other WTO Member States including Australia, Canada, the EU, Japan, and New Zealand. Investment Facilitation has also been an integral part of UNCTAD's Investment Policy Framework for Sustainable Development,[388] which, along with UNCTAD's Action Menu, focuses on policy approaches and actions to further development through investment facilitation.[389] A number of RTAs, such as RCEP and the Zero Draft of the AfCFTA Protocol on Investment contain specific provisions on investment facilitation, with AfCFTA linking investment facilitation directly to sustainable development.[390] Other instruments such as the ASEAN Investment Facilitation Framework also make references to investment facilitation.[391]

Trade negotiators have begun to incorporate a broad set of investment provisions into RTAs to liberalize, protect, and regulate investments, resulting in the combination of investment protection elements, like those found in BITs, with the trade liberalization elements found in RTAs. Social and regulatory provisions related to labour, environment, or sustainable development also have an impact on investment.

The most common features of investment chapters or investment provisions within a trade agreement include, but are not limited to, investor and investment definitions, Most

[386] Paul Civello, "The TRIMs Agreement: A Failed Attempt at Investment Liberalization," 97 Minnesota J. Intl. Law 97-98 (1999), https://core.ac.uk/download/pdf/217210607.pdf
[387] WTO, "Investment Facilitation for Development", https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm
[388] UNCTAD, "Investment Facilitation: Progress on the Ground," *Investment Policy Monitor* (2022), https://unctad.org/system/files/official-document/diaepcbinf2022d1_en.pdf
[389] UNCTAD, "Global Action Menu for Investment Facilitation," (2016), https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%2001-12-2016%20EN%20light%20version.pdf
[390] AfCFTA Protocol on Investment Zero Draft, *supra* note 437, Article 7.1
[391] UNESCAP, "Investment Facilitation for Sustainable Development Within the Content of the RCEP, the ASEAN Investment Facilitation Framework and WTO Draft Investment Facilitation Framework for Development" (2022), https://www.unescap.org/kp/2022/investment-facilitation-sustainable-development-within-context-regional-comprehensive

Favoured Nation (MFN), National Treatment (NT), Fair and Equitable Treatment (FET), Full protection and security (FPS), flexibilities for the host state such as the right to regulate, provisions on expropriation, dispute settlement provisions, and provisions on sustainability and socially responsible investment. These are discussed briefly below and expanded upon in the options sections that follow.

First, IIAs must specify their subject-matter coverage through the definition of the terms "**investment**," which determines the economic interests to which governments extend substantive protections, and "**investor**," which specifies the range of individuals and legal entities that benefit from the trade agreement or treaty. The scope of investment protections under investment definitions has developed over time as countries have adapted to evolving investment definitions in dispute settlement cases, under trade agreements, and due to changing circumstances. The definition of "investment" transitioned to a broad "asset-based" definition, dominant in the vast majority of investment chapters, explicitly covering "every kind of asset," including FDI and portfolio investments.[392] This broad definition of "investment" carries complications, however, as its broad coverage may conflict with the definition of foreign investment under a particular party's domestic laws.[393] The ICSID Convention does not explicitly define "investment" or "investor; however, generally, IIAs include these definitions, which are binding according to ICSID Article 25(1).[394] ICSID has limited jurisdiction, under Article 25(1) to adjudicate only claims "*arising directly out of an investment."*[395]

The general definition of "investment" will often include an illustrative list of categories of investment to be protected, includes, but is not limited to:

- An enterprise;
- Shares, stock, and other forms of equity participation in an enterprise;
- Business concessions conferred by law or under contract;
- Intellectual property rights; and
- Movable or immovable property and any other property rights such as leases, mortgages, liens, and pledges.[396]

Some IIAs have used closed-list definitions of investment instead of open-ended definitions, employing objective criteria to determine when an asset can qualify as an investment.[397]

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[392] UNCTAD, "Scope and Definition: UNCTAD Series on Issues in International Investment Agreements II," 21 2011, [UNCTAD 2011] https://unctad.org/system/files/official-document/diaeia20102_en.pdf

[393] Phoenix Action Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101-105 (tribunal emphasized that the relevant analysis - especially relating to the broad definition of investment - "has to be performed taking into account the laws in force at the moment of the establishment of the investment" rather than later modifications in legislation.)

[394] Article 25(1) states that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally." ICSID Convention, art. 25(1).

[395] UNCTAD 2011, *supra* note 392.

[396] Id.

[397] Id.

Another trend has been to limit the geographical and temporal scope of trade-related measures in IIAs. Geographically, IIAs or RTAs will typically apply only to the territories of their signatories. Temporal scope is determined based on the date of entry into force of the agreement, and the treaty's implications for temporal scope involve whether IIAs continue to apply after the termination of an agreement.

Tribunals have attempted to further define the scope of coverage under IIAs by on a case-by-case basis. The "Salini test" emerged from a well-known case,[398] guiding arbitral tribunals to apply a four-prong test based on objective criteria to determine whether or not an investment took place within the territory of the host state under Article 25 (1) of the ICSID Convention. To be considered an "investment" under the Salini test, which provides guidance but is not mandatory, a transaction must (1) involve a financial contribution, (2) of a certain duration, (3) bearing a certain risk for the investor and (4) which had a contribution to the economic development of the host state.

The newer generation of RTAs includes investment chapters modelled after IIAs with investment protection provisions like MFN, NT, FET, FPS, and protection from unlawful expropriation, among others. Non-discriminatory treatment in IIAs is linked with broader MFN, with legal roots going back as early as the twelfth century, and non-discrimination becoming the norm in commerce treaties during the eighteenth and nineteenth centuries.[399] The concept of unconditional MFN became prominent when codified in the GATT in 1947, drawing from the Havana Charter.[400] MFN provisions in RTAs vary across international instruments.[401] For instance, MFN clauses may differ in operative wording,[402] appear in different parts of a treaty,[403] or be accompanied by varying exceptions covering, for instance, taxation measures.[404] MFN clauses may be used as a relative treatment obligation (vis-à-vis other investors) or be framed in reference to a comparator treaty.[405] MFN clauses that protect against a comparator treaty may encompass dispute settlement mechanisms and protections in IIAs; however this has not been broadly accepted by investment arbitration tribunals, since some have determined that MFN clauses do not apply to dispute settlement provisions unless explicitly indicated by the party.[406] Negotiators may add express language

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[398] *Salini Construttori S.p.A. v. Kingdom of Marocco,* ICSID Case No. Arb/00/4, *Decision on jurisdiction 23 July 2001*

[399] UNCTAD, "Most-Favoured Nation Treatment: UNCTAD Series on Issues in International Investment Agreements II", 2010, 9 [UNCTAD 2010], https://unctad.org/system/files/official-document/diaeia20101_en.pdf

[400] Id., at 11.

[401] *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, para. 289.

[402] *ICS Inspection and Control Services Limited v. The Argentine Republic (I)*, PCA Case No. 2010-09, Award on Jurisdiction, 10 February 2012, para. 299.

[403] Most Favoured Nation Treatment (MFN), Jus Mundi, Wiki Notes [Jus Mundi MFN], 19 September 2022, para. 4.

[404] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Oriental Republic of Uruguay for the Promotion and Protection of Investments, adopted on 21 October 1991, Article 7; Agreement between the Republic of Turkey and the Republic of Uzbekistan Concerning the Reciprocal Promotion and Protection of Investments, adopted on 28 April 1992, ARTICLE II(4).

[405] Jus Mundi, *supra* note 403, para. 8.

[406] Caron, D.D., and Shirlow, E., "Most-Favored-Nation Treatment: Substantive Protection," in Kinnear, M., Fischer, G.R., Almeida, J.M., Torres, L.F., Bidegain, M.U., "Building International Investment Law: The First 50 Years of ICSID," 2015, p. 399.

in an RTA to this effect, however, either to clearly exclude dispute settlement from comparator treaty MFN[407] or to qualify that MFN treatment is applicable in these scenarios.[408] In a similar vein, the scope of an MFN clause may also incorporate upholding substantive provisions, like FET.[409]

Interestingly, NT, included in the majority of IIAs to date,[410] was not codified to the same extent in international instruments due to the protectionist policies of many countries. The purpose of NT is to prohibit discrimination of foreign investors and their investments versus domestic investors and their investments.[411] NT analysis focuses on whether treatment by the host State has had an adverse discriminatory effect on the party alleging an NT violation based on its rights, as enshrined in an applicable IIA.[412] Traditionally, the language of NT clauses has afforded protections to investors and investments after they have established their operations in the host state (commonly referred as post-establishment), whereby only the management, maintenance, use and enjoyment, sale, and disposition of the investment is covered.[413] More recently, treaties have built upon this to encompass the period before establishing operations, meaning the establishment, acquisition, or expansion of the investment (referred to as pre-establishment).[414]

FET is another common element of investment provisions, providing a standard of protection to foreign investors under customary international law. Like MFN clauses, FET clauses are not uniform in language, resulting in different interpretations by investment tribunals, with varying implications and impacts on investment protections.[415] While different approaches exist,[416] FET is sometimes approached as an objective standard that should not be interpreted subjectively,[417] yet the scope of FET has recently come under question. FET standards usually apply across a broad range of circumstances, and investment case law has underscored that FET includes: (i) denial of due process or justice;[418] (ii) frustration of investor's legitimate

[407] FTA between the Government of Australia and the Government of the People's Republic of China, adopted on 17 June 2015, Art. 9.4(2).
[408] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 167.
[409] *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award, 15 December 2014, para. 555.
[410] UNCTAD 2010, *supra* note 399.
[411] *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, para. 309.
[412] *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, para. 209 (emphasis added).
[413] National Treatment (NT), Jus Mundi, Wiki Notes, 21 October 2022, para. 3 [Jus Mundi NT].
[414] Id.; Of 2571 investment agreements listed by UNCTAD, 2018 cover only post-establishment period. 165 mapped investment agreements cover pre- and post-establishment period.
[415] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 197.
[416] Some tribunals have ruled that, even were FET an autonomous standard, its substance is comparable to a minimum standard of treatment under customary international law; however, this approach is not consistent. *See* Fair and Equitable Treatment (FET), Jus Mundi, Wiki Notes, 7 November 2022, para. 6. 7 (Jus Mundi FET).
[417] *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020, para. 488.
[418] *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria*, Final Award, 26 March 2021, para. 130.

expectations;[419] (iii) coercion and harassment by host state;[420] (iv) failure to offer predictable legal framework;[421] (v) unjust enrichment;[422] (vi) absence of transparency in government processes related to investors' interests; [423] and (vii) arbitrary and discriminatory treatment.[424] Among the several substantive obligations guaranteed in RTAs and IIAs, FET has been most regularly invoked by claimants in ISDS proceedings with considerable success against host states. For illustrative purposes, some FET violations have included: (i) when a host state unexpectedly changes its legislation in a manner detrimental to an investor; (ii) when a host state coerces its investor to enter into an unfavourable settlement agreement; (iii) when a host state fails to ensure that an agreement it has entered into with an investor is compatible with local laws; or (iv) when a host state fails to process applications of necessary licenses and permits in line with a foreign investor's legitimate and fair expectations involving predictability in legal processes.[425]

In the context of sustainable development, it is to be expected that a host state may have to change its legislation, which raises implications for the application of FET clauses. Investment treaty tribunals that have applied FET provisions have already faced challenges in striking the right balance between protecting foreign investors from adverse regulatory changes and protecting host states' policy space,[426] giving rise to larger questions of a host States' right to regulate.[427] As a result, newer generations of IIAs that incorporate the FET protection sometimes provide exhaustive lists of actions that constitute FET violations.[428] For example, CETA enshrines a more precise FET standard, expressly clarifying that a modification to laws that negatively affects an investment or interferes with an investor's expectations does not breach its investment protections.[429]

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[419] *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 798.
[420] *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, para. 638.
[421] *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, para. 292.
[422] *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 450.
[423] *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 418.
[424] Id.
[425] *Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, Paragraph 74.
[426] *Occidental v Ecuador I,* LCIA Case No UN3467, Award, 1, para. 181, (July 2004). (tribunal took harder approach and relied on statement found in the preamble of the underlying treaty (the 1993 Ecuador-United States BIT) that the FET clause "is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources."); *Saluka v Czech Republic,* UNCITRAL, Partial Award, 17 (March 2006). (tribunal adopted softer, more deferential interpretation of regulatory stability on FET clause focusing on the fairness/reasonableness of the regulation under review as the investor's expectations "must rise to the level of legitimacy and reasonableness in light of the circumstances" and a determination of a breach of the FET clause "requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.").
[427] Federico Ortino, "The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?", 21 J. Intl. Econ. L. 845 (2018), https://academic.oup.com/jiel/article-abstract/21/4/845/5134093?redirectedFrom=fulltext
[428] Jus Mundi FET, *supra* note 416.
[429] *See* EU-Canada CETA, art. 8.9, para 2, *supra* note 324.

RTAs also often include FPS clauses, which impose on the host states an obligation (i) to guarantee foreign investors that it will protect them against any negative conduct private parties or the State itself might take and (ii) not to harm foreign investors or their investments, by actions or inactions, of state organs or actions that are attributable to the host state. This standard of protection was included among those offered to foreign investors since the first BIT was signed between Germany and Pakistan in 1959.[430] Historically, this protection has extended to physical protection for the investment and the investor[431] yet some international instruments have included language that explicitly extends the protection to commercial and legal protection as well. [432] When the scope of protection is not detailed, differing determinations have ensued. Now, there is a growing tendency to explicitly limit FPS provisions to physical protection and security.[433]

Arbitral decisions interpreting FPS evolved from a simple due diligence obligation of the host State,[434] which was recognized under customary international law as a codified standard of protection, to include both State actions and omissions to protect the investor and the investment. Most of the time, arbitral tribunals have concluded that the host State breached its FPS obligation by not taking any action or taking insufficient action against third parties' actions such as mobs, revolutionists, insurgents etc, but in some cases given the general language of most FPS clauses, arbitral tribunals have also included instances when the host State did not take the necessary steps to prevent an illegal seizure of an investment by disgruntled employees.[435] FPS clauses impose an obligation on the host State to "make every reasonable effort to ensure the physical protection and security of foreign investments," but they do not require going beyond what it is reasonable.[436]

Additionally, IIAs typically include investment protection provisions related to expropriation. [437] Expropriation, which encompasses the terms "deprivation" or "nationalization"[438]when the relevant action is widespread and covers an entire industry or geographic region,[439] refers to a State taking of private property belonging to a private entity. In this context, the affected investments belonging to a foreign investor.[440] Foreign investors tend to be concerned with political risk, seeking to avoid circumstances in which the host

[430] BIT Germany-Pakistan (1959)
[431] *Saluka Investments .B.V. V. The Czech Republic,* UNCITRAL, ad-hoc arbitration
[432] *See Consutel Group S.P.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award, 3 February 2020, para. 413; *Biwater Gauff Ltd v. Tanzania,* ICSID Case No. ARB/05/22; *Siemes v. Argentina,* ICSID Case No. ARB/02/8.
[433] Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part, adopted on 30 June 2019, Art. 2.5(5).
[434] Asian Agricultural Products Ltd v Sri Lanka, ICSID Case No ARB/87/3 (Final Award) (27 June 1990) at 170.
[435] *American Manufacturing and Trading, Inc v Zaire*, ICSID Case No ARB/93/1 (Award) (21 February 1997); *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4 (Award on Merits) (8 December 2000).
[436] *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28 (Award) (10 March 2014).
[437] Expropriation, Jus Mundi, Wiki Notes, 9 September 2022, para. 3 [Jus Mundi Expropriation].
[438] *Enkev Beheer B.V. v. The Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, para. 330.
[439] *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, para. 695.
[440] *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, para. 443.

state may act in such a way that is tantamount to seizing their assets,[441] either directly or indirectly. During the twentieth century, expropriations of foreign investment occurred in Latin America, the Soviet Union, the Middle East, and Eastern Europe.[442] In response, countries pressed for a standard of protection against expropriation in the international arena.[443] In investment disputes, if tribunals find that either direct[444] or indirect expropriation[445] has taken place, they analyse the surrounding facts in detail to ascertain whether the actions of the host State that amounted to expropriation were lawful.[446] If an expropriation is deemed unlawful, the investor may demand just compensation (sometimes referred to as "full reparation"), which can include compensatory losses plus profit losses.[447]

Another once common feature of investment protection provisions is the "*umbrella clause"* or "*observance clause*" which is a legal provision that expands the protection offered by the treaty to investor-State contracts.[448] The umbrella clause mandates the host States to respect all of its obligations deriving from either a contract with the investor or a treaty signed with the investor's home State. Language varies depending on the treaty,[449] but the expansive

[441] Jeswald W. Salacuse, *The Law of International Treaties* (3rd ed. 2021), p. 380.
[442] Ibid.
[443] Ibid.
[444] The open, deliberate, and clear intent form the state via enactment of a law, emission of a decree or physical act, that deprives the owner, i.e., a foreign investor protected under an RTA, of its property rights through the transfer of a title of the property back to the State or via an unequivocal seizure of the property. *See* UNCTAD, Expropriation, "UNCTAD Series on Issues in International Investment Agreements II", UN, New York and Geneva, 2012, at 7.
[445] When the property in question is destroyed or its owner is otherwise deprived of its ability to use, control or manage it in a meaningful way, without legal title of the land being unaffected. *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 699 (case on the ability to use); *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, para. 394; (case on the ability to control); *Robert Aleksandrowicz and Tomasz Częścik v. Cyprus*, SCC Case No. V 2014/169, Award, 11 February 2017, para. 213 (case on the ability to manage it in a meaningful way); Schreuer, C., *The Concept of Expropriation under the ECT and Other Investment Protection Treaties*, Transnational Dispute Management, 2005, pp. 28-29; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 699.
(case on being without legal title of the land being unaffected).
[446] Based on *OOO Manolium Processing v. The Republic of Belarus*, PCA Case No. 2018-06, Final Award, 22 June 2021, Para. 414, lawfulness depends on the following elements: (i) whether the action in question by the State was made for a legitimate public purpose, (ii) under due process of law, (iii) in a non-discriminatory manner, and (iv) in terms of compensation. More recently tribunals are using the Hull Standard, which evaluates whether the investor received prompt, adequate and effective compensation. *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 700.
[447] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 700; Jus Mundi, para. 26. 27, *supra* note 437.
[448] Jus Mundi, *Umbrella Clause,* https://jusmundi.com/en/document/publication/en-umbrella-clause?su=%2Fen%2Fsearch%3Fquery%3Dumbrella%2520clause%26page%3D1%26lang%3Den&contents[0]=en , last accessed on 31 October 2022; Sinclair A.C., *The Origins of the Umbrella Clause in the International Law of Investment Protection*, Arbitration International, Vol. 20, 2004, pp. 411-434; Ad-hoc arbitration, *Eureko B.V. v. Republic of Poland,* para. 251
[449] Under an umbrella clause, an investor can elevate a non-treaty commitment (e.g., the contractual obligations assumed by the host State) to a treaty-level commitment. In other words, if the investor has a claim derived from a contract, he or she can use the umbrella clause to elevate it to the level of a treaty claim, i.e., if the RTA includes an umbrella clause, the investor can rely on the RTA to engage the State's responsibility for breach of contract. This would not be otherwise possible under international law. *See* Thomson Reuters

scope of these clauses is a common theme.[450] Recent treaty practice proves that umbrella clauses are not used as often as they were in the past;[451] however, and the new generation of IIAs do not incorporate umbrella clauses, especially to reduce the host State's exposure to ISDS claims. Countries have started to eliminate umbrella clauses from their Model BITs.[452] CETA does not include an umbrella clause, nor does the ECT, USMCA, or ASEAN-Australia-New Zealand agreement. The IISD Model International Agreement on Investment for Sustainable Development (IISD Model Agreement)[453] does not include an *"umbrella clause"* provision. The IISD Model Agreement defines the obligations of the host State precisely, and the authors explain that including such a clause creates legal unfairness by expanding treaty protection, under a public international law instrument concluded between the home and host State to private agreements with foreign investors.

There is an increasing trend to incorporate a host state's "Right to Regulate" in newer RTAs, even though there is no one-size-fits-all formula. Sometimes the Right to Regulate is included in an RTA preamble,[454] but it can also be referenced elsewhere in the text, sometimes without explanation or guidelines as to what constitutes the right to regulate.[455] A second approach involves limiting state investment protection responsibilities in previous international instruments or excepting specific industries deemed of public interest from investment protection standards.[456] For example, CETA directly narrows the scope of the protections that investors may enjoy.[457] A third approach focuses on adding expansive language and tangible guidelines regarding the regulatory space available for the parties of an RTA or FTA.[458] CETA also provides guidelines on how the right to regulate is distinguished from indirect expropriation.[459]

Practical Law, *Umbrella clause, https://uk.practicallaw.thomsonreuters.com/8-519-0939?transitionType=Default&contextData=(sc.Default)&firstPage=true, last accessed on 31 October 2022*

[450] An umbrella clause applies exclusively to the undertakings of the host State. *See Roussalis v. Romania,* ICSID ARB 06/01, Award 7, para. 875 (December 2011). The umbrella clause typically provides that States "shall observe obligations" they assumed concerning the investments.

[451] Yannaca-Small K., "Interpretation of the Umbrella Clause in Investment Agreements," *OECD Working Papers on International Investment*, 2006/03, OECD Publishing, 2006, pg. 5.

[452] The United State eliminated the umbrella clause in its Draft Model BIT, and Norway did the same in its 2015 Model BIT. *See also,* 45 France 2006 Model BIT, http://www.italaw.com/documents/ModelTreatyFrance2006.pdf, last accessed November 11, 2022; Canada 2004 Model BIT, http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf, last accessed November 11, 2022; Colombia 2007 Model BIT, http://www.italaw.com/documents/inv_model_bit_colombia.pdf, last accessed November 11, 2022.

[453] Howard Mann, Konrad von Moltke, Luke Eric Peterson, and Aaron Cosbey, "Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook (Second Edition) (April 2006) [hereinafter IISD Model Agreement], Article 19 Commentary, p. 33.

[454] FTA between India and Malaysia, adopted on 18 February 2011, Preamble; See also AfCFTA Zero Draft, *surpa* note 437, Preamble,

[455] Partnership and Cooperation Agreement between the EU and Iraq, adopted on 11 May 2012, Art. 23(5).

[456] Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam of the other part, adopted on 30 June 2019, ARTICLE 2.2 .; EU-Canada CETA, *supra* note 324, Articles 8.10(2), 8.10(4).

[457] EU-Canada CETA, *supra* note 324, Articles 8.10(2), 8.10(4).

[458] Id., Annex 8-A(2-3).

[459] Id., Annex 8-A(3) .

Dispute settlement clauses are a common feature of IIAs. As previously discussed, the predominant dispute settlement mechanism (DSM), ISDS, is being reconsidered in light of ongoing reform negotiations (i.e., UNCITRAL Working Group III and other negotiations). Many RTAs with investment chapters incorporate DSM provisions with a combination of the following elements: (i) the cooling-off period; (ii) non-binding ADR mechanisms, such as mediation and/or conciliation; (iii) national courts option; (iv) arbitration clause; (v) multilateral investment court option; (vi) enforceability provisions; and (vi) sunset clauses. Enforceability is an important feature, and, typically, most IIAs stipulate that the respective arbitral award is final and binding upon the parties of the proceedings. The IISD Model Agreement links the enforceability of the awards to domestic rules which each Contract Party 'shall adopt' as a guarantee for the utility of the arbitration proceedings.[460] The IISD Model Agreement also includes provisions referring to the governing law of the disputes.[461]

The cooling-off period has features in common with consultation proceedings,[462] but, in the case of investment, the host state negotiates directly with the investor. Some arbitral tribunals have considered the cooling-off period as an obligation of means,[463] while others considered it a precondition to moving forward.[464] Another DSM provision of note is mediation, which is more informal and flexible;[465] ICSID, for example, has investor-state mediation rules.[466] Conciliation is more formal and follows rules set by ICSID[467] or UNCITRAL,[468] and it results in an agreement representing a "just compromise to a dispute."[469] However, these compromises are not binding, and parties can still proceed to arbitration or national litigation, depending upon the provisions of the IIA.

In recent years alongside the ISDS reform process at the UNCITRAL level, a new proposal emerged: the creation of a MIC, which has been championed by the EU.[470] The EU's proposal is still on the table for discussion in UNCITRAL WG III, although some countries, such as the United States, Japan and Russia, have argued against the multilateral system in favour of a bilateral system that addresses the problems of the current system.[471] Some RTAs, namely CETA, the EU-Vietnam Investment Protection Agreement, the EU-Singapore Investment

[460] IISD Model Agreement*, supra* note 454, Article 47.
[461] Id, Article 48.
[462] The cooling off period starts when the investor notifies the host state about a dispute in a letter or formal notice of dispute.
[463] *Hasanoc v. Georgia,* ICSID Case No. ARB/20/44, Decision on Respondent's Inter-State Negotiation Objection, at 89.
[464] *Abaclat and others v. Argentina,* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, at 564.
[465] UNCTAD, "Investor-state dispute settlement.", *UNCTAD series on issues in International Investment Agreements II,* United Nations, New York and Geneva, 2014, p.60 [UNCTAD 2014]
[466] World Bank, ICSID Mediation Rules and regulations, July 2022
[467] World Bank, ICSID Conciliation Rules, July 2022
[468] United Nations, UNCITRAL Conciliation Rules (1980), adopted during the UN General Assembly 35th session at the 81st plenary meeting on December 4, 1980
[469] UNCTAD 2014, *supra* note 465, at 60.
[470] The EU's executive branch proposed to create a court composed of a first instance and an appeal body modelled on the WTO DSB. European Commission, "Multilateral Investment Court project, https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en, last accessed in November 11, 2022
[471] A. Roberts, T.St. John, "UNCITRAL and ISDS Reforms: the Divided West and the Battle for the Rest," April 30, 2019, https://www.ejiltalk.org/uncitral-and-isds-reforms-the-divided-west-and-the-battle-by-and-for-the-rest/, last accessed on November 11, 2022

Protection Agreement, the EU-Chile Association Agreement, and the EU-Mexico Agreement in Principle, incorporate an investment court approach, noting that disputes will be solved by establishing a multilateral investment tribunal and a multilateral appellate mechanism.

Most IIAs also have a sunset clause (also called the "surviving" or "grandfathering" clause). The scope of this clause is to provide an additional guarantee to the foreign investor in case one of the contracting states decides to terminate the treaty after the investment has been made in the host state. This clause protects the foreign investors' expectations that the protections they had when the investment was made would continue for a determined period after the termination of the investment treaty. The period usually varies from five years to twenty years.

Recently, sustainability has become an important feature of States' trade and investment agendas, especially following the Paris Agreement. IIAs increasingly incorporate sustainability provisions in their preambles, public policy exception clauses, and other clauses in their texts, yet these provisions remain largely aspirational. Shifting from aspirational to binding provisions would help foster responsible investor behaviour and achieve sustainable development outcomes. Recent, more enforceable sustainability provisions in RTAs and BITs are an important step in the direction of creating more binding provisions. Industrial policy is an increasingly active issue in investment jurisprudence, as more than 80 percent of investment policy measurers recorded since 2010 are directed at the industrial system.[472]

The 2016 Morocco-Nigeria BIT, which is not yet in force, deserves special mention in this regard, as it is a remarkable attempt by two developing economies to reshape investment agreements to seek a better equilibrium between investor protection and the promotion of sustainable development through trade and investment. The overarching developmental goal of the BIT is clearly articulated in the sustainable development provisions in the preamble. The Morocco-Nigeria BIT is also the first IIA to build sustainable development into the definition of an investment (Art. 1.3). This is significant, as it creates hard-law obligations under the treaty requiring arbitral tribunals to review the concept of sustainable development and its status in international law. Further, under Art. 24(1) the BIT states that investors "should strive to make the maximum feasible contributions to the sustainable development of the host State and local community." Institutionally, the BIT establishes a Joint Committee composed of representatives of both parties, which has the responsibility to facilitate the exchange of information and when appropriate set corporate governance standards. The BIT further includes provisions on investment and environment; investment, labour, and human rights protection; right to regulate; social and environmental impact assessment; anti-corruption; and corporate social responsibility. Several of these areas provide important cross-references with other aspects of this Handbook, namely environment and labour provisions.

A similarly notable international instrument to deeply embed sustainable development throughout its text is the Zero Draft of the AfCFTA Protocol on Investment,[473] which includes

[472] UNCTAD, "World Investment Report 2018: Chapter 4 – Investment and New Industrial Policies", 2018, https://worldinvestmentreport.unctad.org/world-investment-report-2018/chapter-4-investment-and-new-industrial-policies/.
[473] AfCFTA Protocol on Investment Zero Draft, *supra* note 231.

provisions on right to regulate (notably covered in Chapter 3 on Development-related Issues); investment facilitation; minimum standards on the environment, labour, and consumer protection; pursuit of development goals; human resources development; transfer of technology; business ethics, human rights, and labour standards; environmental protection; indigenous peoples and local communities; anti-corruption; CSR; corporate governance; and capacity building. Several of these areas are notable not only because of the inter-linkages with other areas of this Handbook but also because they cover subjects that are otherwise not included under the AfCFTA's substantive provisions, such as labour and environment.

B. Investment Options in RTAs

The RTA Options below address several key aspects of investment in RTAs: (i) Provisions on Sustainable and Socially Responsible Investment; (ii) Definitions of Investor and Investment; (iii) Investment Protection Provisions; (iv) Host State Flexibilities; and (v) Dispute Settlement Provisions. Approaches and political sensitivities regarding the inclusion of hard commitments on investment in RTAs differ widely across countries. Therefore, the sections below present a range of Example Options for investment commitments in RTAs, ranging from lowest to highest level of commitment, with no baseline identified. Where possible, the degree to which these approaches are more common or less common and more binding and less binding are also noted.

a. Provisions on Sustainable and Socially Responsible Investment

The promotion of sustainable development through trade and investment is a clearly identifiable emerging trend. An increasing number of IIAs contain provisions aimed at promoting sustainable development and the SDGs, with a trend to include more dimensions of sustainable development – from merely including environmental considerations to incorporating more social considerations.[474] Such sustainable development provisions in IIAs broadly fall into two categories: (i) soft, general commitments on the promotion of sustainable development and environmental goals, and (ii) stricter developmental obligations on the parties and on investors.

Soft commitments for sustainable development, often phrased in aspirational terms, can be found either in the preamble or in the body of an IIA. Some IIAs, such as the Morocco-Nigeria BIT and Zero Draft of the AfCFTA Protocol on Investment, include sustainable development in multiple contexts, including in their preamble and under the definition of investment itself.[475] The IISD Model Agreement is a comprehensive model agreement covering many of the aspects included in current RTAs (and this chapter) from a sustainable development perspective.[476] The IISD Model Agreement highlights how an investment chapter could be designed in its entirety from a sustainable development perspective and can serve as a guide to negotiators for future RTAs. The IISD Model Agreement is referred to throughout the

[474] ESCAP, 2019, Foreign direct investment and sustainable development in international investment governance. United Nations, p. 46. https://repository.unescap.org/bitstream/handle/20.500.12870/3074/ESCAP-2019-RP-Foreign-direct-investment-sustainable-development-international-investment-governance.pdf?sequence=1&isAllowed=y

[475] *See, e.g.*, AfCFTA Investment Protocol Zero Draft, *supra* note, Preamble, Art. 1.

[476] IISD Model Agreement, *supra* note 454.

sections below, and where particularly relevant, language from the agreement is included among the example options. An example instrument that embodies a progressive and inclusive approach to integrating sustainable development is the Zero Draft of the AfCFTA Protocol on Investment, which is referred to throughout the section below where relevant.

According to the UNCITRAL mapping project, at present, in their preamble, 77 IIAs refer to sustainable development; 226 refer to social investment aspects, including human rights, labour, health, CSR and poverty reduction; and 147 refer to environmental aspects, such as plant or animal life or health, biodiversity, or climate change. As explained below, Example Option A, adapted from the Zero Draft of the AfCFTA Protocol on Investment, provides an expansive example of preambular language committing Parties to the promotion of sustainable development in their investment regime. Even though such preambular references do not create enforceable obligations on the parties, they are important to frame the investment agreement and establish a balance between investor protection and developmental goals. Preambular language can also be critically important in interpreting the IIA, including in dispute settlement.

In line with the IISD Model Agreement, Parties may also consider including a general 'objective' provision in the body of the agreement. Such a provision provides a single statement of purpose for the agreement, as well as helps with interpretation. The provision could read as follows: 'The objective of this agreement is to promote foreign investment that supports sustainable development, in particular in developing and least-developed countries.' (Art. 1 IISD Model Agreement).[477]
In the body of IIAs, further soft developmental commitments can be found that relate to health, environment, and labour standards.[478] Such soft commitments can be phrased in a multitude of ways using language such as 'Parties recognise the importance of standards on labour/environment/CSR/anti-corruption to economic efficiency' or 'Parties shall strive to facilitate investment in [environmental goods/SDG sectors/goods that contribute to enhanced social or environmental conditions' (e.g., Art. 223 Georgia-UK Partnership and Cooperation Agreement).

Some IIAs go a step further and create binding obligations on either the parties to the agreement or investors to uphold development principles and rights when attracting or conducting investment. As further explained below, under Example Option C, the ECOWAS Common Investment Code (ECOWIC,) for instance, imposes binding obligations on investors to adhere to certain environmental obligations when carrying out business activities in the ECOWAS territory.[479] The Morocco-Nigeria BIT offers a number of interesting provisions in this regard, such as a provision requiring investors to conduct social and environmental impact assessments prior to investing (Article 14), a provision prohibiting investors from engaging in corruption (Article 17), a provision requiring investors to put in place and adhere to internationally recognised standards of corporate governance (Article 19), and a provision requiring investors to uphold human rights, labour, and environmental obligations post-establishment (Article 18). Interestingly, the Morocco-Nigeria BIT also has a provision

[477] *See also*, AfCFTA Protocol on Investment Zero Draft, *supra* note 231, Art. 2
[478] According to the UNCITRAL Mapping Project, 323 IIAs refer to health or environment, 115 to labour standards, 41 to corporate social responsibility and 45 to corruption.
[479] *See also* AfCFTA Protocol on Investment Zero Draft, *supra* note 231, Art. 30.

imposing home-state civil liability on investors if their investments cause significant damage, personal injury or loss of life in the host state (Article 20, see below Example Option D). The IISD Model Agreement offers extensive guidance on treaty language to impose obligations and duties on both investors (Part 3) and Host States (Part 4). For instance, on anti-corruption, the model agreement includes a provision prohibiting investors from engaging in any form of bribery (Art. 13). The obligation takes its terms from the 2003 United Nations Convention Against Corruption and the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business. This obligation is further enforced by a provision committing host parties to criminalize and prosecute corruption within their territory (Art. 22).

IIAs can also deal with other issues related to sustainable development, such as government debt and balance of payments issues. For example, some IIAs exempt government debt restructuring from the definition of investment (see below), while others, such as the French Model BIT,[480] 2002 Japan-Korea BIT,[481] 2016 Mexico-UAE BIT,[482] and 2015 Mexico-Brazil BIT[483] provide flexibility in dealing with balance of payments challenges. This dimension is also covered in the IISD Model Agreement.[484]

Example Option A is adapted from the AfCFTA Zero Draft of the Protocol on Investment and offers preambular language containing commitments to sustainable development. The preamble refers to the SDGs, the UNCTAD Investment Policy Framework for Sustainable Development and other relevant instruments, It further affirms commitments to transparency, accountability, good governance, responsible business conduct and the promotion of an overall attractive investment climate conductive to development. Notably, the Zero Draft of the AfCFTA Protocol on Investment pursues sustainable development in a multifaceted fashion, by, among other aspects, (i) promoting the highest possible levels of socially responsible corporate practices (Art.34); (ii) mandating stakeholder coordination to provide technical assistance, improve capacity building to promote and facilitate investments (Art. 41); (iii) promoting domestic development and local content (Art. 23); promoting human resource development (Art. 25), facilitating the international transfer of technology (Art. 26); ensuring domestic laws reflect high levels of environmental, labour and consumer protection standards (Art. 22); and facilitating investments that contribute to gender equality and empowerment of women (Art. 7).[485]

[480] French Model BIT, Art. 6, available at https://edit.wti.org/document/show/4dd30824-38f3-4e5e-9d05-79a9d1bfb422

[481] Agreement Between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment, Art. 12, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1727/download

[482] Agreement Between the Government of the United Arab Emirates and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Art. 7 (3), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1727/download

[483] Acuerdo de Cooperación Y de Facilitatiación de las Inversiones Entre la República Federative del Brasil y los Estados Unidos Mexicanos, Art. 9 (3), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4718/download

[484] IISD Model Agreement Art. 51, *supra* note 454.

[485] AfCFTA Protocol on Investment Zero Draft, *supra* note 231, Art. 41

Example Option B is taken from the Georgia-UK Partnership and Cooperation Agreement. It sets out a soft commitment to the promotion of sustainable development in the body of the treaty. As such, Parties recognize, amongst other things, the beneficial role of labour standards and decent work on economic efficiency, the promotion of commitments to trade and investment in environmental goods and services and goods that contribute to enhanced social conditions and environmentally sound practices.

Example Option C is taken from the ECOWIC and sets out stricter commitments in the form substantive sustainable development obligations on investors to protect the environment. The provision obliges investors to, amongst other things, carry out their business activities in strict adherence to domestic and multilateral environmental laws, to conduct pre-investment environmental and social impact assessments and make them accessible to local communities; to pay compensation for damages; and to put in place hazardous waste procedures no less stringent than those employed in their home state.

Example Option D is taken from the Morocco-Nigeria BIT and imposes civil liability on investors in their home state for acts or decisions causing significant damage, personal injury or loss of life in the host state.

Example Options on Sustainable Development and Investment

Example Option A: Preambular Commitments to Sustainable Development

[…] RECALLING Agenda 2030 for Sustainable Development, as contained in Resolution A/RES/70/1 of the United Nations General Assembly, and in particular the 17 Sustainable Development Goals;

TAKING INTO ACCOUNT the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD) and other relevant UNCTAD instruments that support new generation investment policies for inclusive growth and sustainable development;

[…] RECOGNISING the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development while understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept;

DESIRING to promote within State Parties an **overall attractive investment climate conducive to the development** of a more vibrant and dynamic private sector that encourages mutual beneficial partnerships, facilitates job creation, promotes technology transfer, supports long-term economic growth and contributes effectively to social development and the fight against poverty;

AFFIRMING the desire to **promote transparency, accountability, good governance and responsible business conduct** in the investment environment;

SEEKING to achieve an **overall balance of the rights and obligations** between State Parties and investors under this Protocol;[…]

Source: AfCFTA – Zero Draft of the Protocol on Investment (Preamble)

Example Option B: Soft Commitments on Sustainable Development

The Parties reconfirm their commitment to enhance the contribution of trade to the goal of sustainable development in its economic, social and environmental dimensions. Accordingly:

(a) the Parties recognise the **beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity**, and they shall seek greater policy coherence between trade policies, on the one hand, and labour policies on the other;

(b) the Parties shall strive to f**acilitate and promote trade and investment in environmental goods and services,** including through addressing related non-tariff barriers;

(c) the Parties shall strive to f**acilitate the removal of obstacles to trade or investment concerning goods and services of particular relevance to climate change mitigation,** such as sustainable renewable energy and energy efficient products and services. This may include the adoption of appropriate technologies and the promotion of standards that respond to environmental and economic needs and minimise technical obstacles to trade;

(d) the Parties agree to promote **trade in goods that contribute to enhanced social conditions and environmentally sound practices**, including goods that are the subject of voluntary sustainability assurance schemes such as fair and ethical trade schemes and eco-labels;

(e) the Parties agree to **promote corporate social responsibility**, including through exchange of information and best practices. In this regard, the Parties refer to the relevant internationally recognised principles and guidelines, especially the OECD Guidelines for Multinational Enterprises.

Source: Georgia-UK Partnership and Cooperation Agreement (2019), Article 223

Example Option C: Substantive Obligations Promoting Sustainable Development

1. Investors doing business in the ECOWAS territory **shall comply** with the following environmental obligations under this Code to:

(a) **carry out their business activities in strict conformity with the applicable national environmental laws, regulations, and administrative practices of the Member States and other multilateral agreements** applicable to their investments;

(b) undertake **pre-investment environmental and social impact assessments** of their proposed business activities and investments with respect to the natural environment and the local population in the relevant jurisdiction;

(c) apply the **precautionary principle** to their environmental and social impact assessments and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to such investment;

(d) make the investor environmental and social impact assessments available to the general public and **accessible to the affected local communities** and to any other affected interests in the Member State of the proposed investment;

(e) perform the **restoration, using appropriate technologies, for any damage** caused to the natural environment and to pay adequate compensation to all affected interested persons;

(f) **provide** to the competent national environmental authorities, in respect of the products, processes, and services of the investor's enterprises, **all relevant environmental information**, together with measures and costs necessary to avoid and mitigate against any potentially harmful effects; and

(g) implement in the Member States **standards of operation with regard to hazardous waste generation and disposal that are equivalent to, or no less stringent than, those in their home country of origin** for investments carried out by investors of other Member States, or investors of non-Member States.

2. To ensure compliance with the obligations set out in paragraph 1, each **Member State shall encourage investors** operating within its national territory, without prejudice to Article 34 (Responsible Business Conduct) of this Code, **to adopt as part of their responsible business conduct policies, internationally-recognised environmental standards and guidelines** that have been endorsed or are supported by that Member State.

Source: ECOWAS Investment Code, Article 27

Example Option D: Provisions imposing civil liability on investors for damage caused by investments

Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

Source: Morocco-Nigeria BIT, Article 20

As noted, investment facilitation can be used as a pathway to promote sustainable development. Generally, however, investment facilitation commitments in RTAs fall short of directly linking investment facilitation to sustainable development. Such an approach can be seen, for example, in the RCEP (Example Option A below), although it is important to note that the RCEP does reference sustainable development otherwise. More recently, the Zero Draft of the AfCFTA Protocol on Investment includes a provision that directly links investment facilitation to sustainable development by binding the Parties to "facilitate investments that contribute to sustainable development." This is shown as Example Option B below.

Example Options on Sustainable Development Through Investment Facilitation

Example Option A: Investment Facilitation without Reference to Sustainable Development

1. Subject to its laws and regulations, each Party shall endeavour to facilitate investments among the Parties, including through:

(a) creating the necessary environment for all forms of investment;
(b) simplifying its procedures for investment applications and approvals;
(c) promoting the dissemination of investment information, including investment rules, laws, regulations, policies, and procedures; and
(d) establishing or maintaining contact points, one-stop investment centres, focal points, or other entities in the respective Party to provide assistance and advisory services to investors, including the facilitation of operating licences and permits.

2. Subject to its laws and regulations, a Party's activities under subparagraph 1(d) may include, to the extent possible, assisting investors of any other Party and covered investments to amicably resolve complaints or grievances with government bodies which have arisen during their investment activities by:

(a) receiving and, where appropriate, considering referring or giving due consideration to complaints raised by investors relating to government activities impacting their covered investment; and
(b) providing assistance, to the extent possible, in resolving difficulties experienced by the investors in relation to their covered investments.

3. Subject to its laws and regulations, each Party may, to the extent possible, consider establishing mechanisms to make recommendations to its relevant government bodies addressing recurrent issues affecting investors of another Party.

4. The Parties shall endeavour to facilitate meetings between their respective competent authorities aimed at exchanging knowledge and approaches to better facilitate investment.

5. Nothing in this Article shall be subject to, or otherwise affect, any dispute resolution proceedings under this Agreement.

Source: RCEP, Article 10.17

Example Option B: Investment Facilitation with Reference to Sustainable Development

1. Each State Party shall, subject to its respective laws and regulations, facilitate investments that contribute to sustainable development.

2. State Parties shall, subject to their respective laws and regulations, facilitate the granting of visas and permits to foreign workers, employees and consultants as designated by the investor.
3. State Parties shall establish a framework for cooperation and coordination between relevant and competent national regulatory authorities with a view to facilitating investment flows.

4. States Parties commit to promote investments that contribute to gender equality and the empowerment of women.

Source: Zero Draft of the AfCFTA Protocol on Investment, Article 7

b. Provisions Defining Investment and Investor

Since there are no universally agreed-upon definitions of "investor" and "investment," RTA parties must determine how to define these terms. Trade negotiators should consider how definitions would reflect their country's preferences and FDI policies.

i. Definition of "Investment"

The definition of an "investment" determines which assets will receive protection and shapes investors' access to other markets. It also has a link to sustainable development, even if not yet a common approach, as referenced above. In addition, definitions of investment may relate to other issues important to development, such as sovereign debt restructuring.

Many definitions of investment still follow more common, traditional models. Some investment chapters in RTAs have opted for an enterprise-based definition of "investment" like that in the Canada-United States FTA (1988), which defined investment as including the establishment or acquisition of a business enterprise or a share in a business giving the investor control over the enterprise. Enterprise was further broadened under NAFTA to include an "enterprise" owned or controlled by an investor and activities linked to enterprises, such as equity or debt security as investments.

Example Option A below, taken from the Morocco-Nigeria BIT, includes sustainable development in the definition of investment.[486] The Morocco-Nigeria BIT provides a list of assets which are protected investments, and a list of assets which do not fall within the protected investments category. To benefit from the protections of this BIT, an investment

[486] *See also* AfCFTA Protocol on Investment Zero Draft, *supra* note 231, Article 1.

has to fulfil some conditions apart from being part of the protected asset class. One of these conditions is to "contribute to the sustainable development" of the host State. The concept of "sustainable development" is not defined in the definitions of the BIT. However, it is mentioned in several instances in Preamble of the BIT. The Preamble provides what the two States understate by sustainable development as it "(...) requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept." Sustainable development is mentioned later in the treaty as a prerequisite of "high levels of corporate social responsibility."

Example Option A also excludes government-issued debt securities from the definition of investment, thereby preventing mass bondholder claims. Example Option B, taken from the CAFTA-DR includes an explicit exclusion for public debt restructuring.

Example Option D, taken from the USMCA,[487] distinguishes assets that are not included under investment, such as orders or judgements in a judicial or administrative action or assets for commercial contracts for the sale of goods by natural persons or enterprises. Example Option D narrows the scope of investment protection coverage beyond what is included in Example Option E, thus providing more limited investment protection and more expansive policy space for governments. USMCA also includes provisions on public debt restructuring, similar to Example Option B, including the provision that "No claim that a restructuring of debt issued by a Party, standing alone, breaches an obligation in this Chapter shall be submitted to arbitration under Article 14.D.3.1 (Submission of a Claim to Arbitration), provided that the restructuring is effected as provided for under the debt instrument's terms, including the debt instrument's governing law."[488]

Example Option E below, from the Central America-Republic of Korea FTA, is one of the most common approaches focused on an asset-based definition of "investment." It elaborates on what constitutes an asset that qualifies as an "investment" but is not exhaustive. This is the most common type of definition of "investment" in trade agreements and it is a soft commitment.

Example Option F, taken from the IISD Model Agreement provides for an exhaustive list of asset-based investments which shall comply with some *ex-ante* conditions in order to be considered protected investments under this treaty.

Example Options on Mixed Enterprise and Asset-Based Definitions of Investment

Example Option A: Sustainable Development Included in Definition

Investment means an enterprise ' within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the asset of the enterprise which ***contribute sustainable development of that Party*** and has the characteristics of an investment involving a commitment of capital or other similar

[487] USMCA, *supra* note 25, Art. 14.1

[488] USMCA, *supra* note 25, Chapter 14, Appendix 2.

resources, pending profit, risk-taking and certain duration. An enterprise will possess the following assets:

(a) Shares, stocks, debentures and other instruments of the enterprise or another enterprise;
(b) A debt security of another enterprise;
(c) Loans to an enterprise;
(d) Movable or immovable property and other property rights such as mortgages, liens or pledges;
(e) Claims to money or to any performance under contract having a financial value;
(f) Copyrights and intellectual property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State;
(g) Rights conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources;
For greater certainty, Investment does not include:
(a) Debt securities issued by a government or loans to a government
(b) Portfolio investments
(c) Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of another party, or the extension of credit in connection with a commercial transaction, or any claims to money that do not involve interest set out in sub-paragraphs (a) and (g) above
(d) Letters of bank credit; and
(e) Claims to money with maturities less than three years

Source: Morocco-Nigeria BIT, Article 1

Example Option B: Carveout of Government Debt Securities from Definition of Investment

Investment means […]

(III) a debt security of an enterprise

1. (i) where the enterprise is an affiliate of the investor, or
2. (ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise […] For greater certainty: [. . .]

(iii) a loan to, or debt security is sued by, a Party or a state enterprise thereof is not an investment

Source: 2004 Canadian Model FIPA[489]

Example Option C: Exclusion for Public Debt Restructuring

[489] 2004 Canadian Model FIPA, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download

The rescheduling of the debts of a Central American Party or the Dominican Republic, or of such Party's institutions owned or controlled through ownership interests by such Party, owed to the United States and the rescheduling of any of such Party's debts owed to creditors in general are not subject to any provision of Section A [investment] other than Articles 10.3 and 10.4.

Source: CAFTA-DR, Annex 10-A

Example Option D: Exceptions of Mixed Enterprise and Asset-Based Definitions of Investment

[…] but investment does not mean:

(i) an order or judgment entered in a judicial or administrative action;
(j) claims to money that arise solely from:

(i) commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
(ii) the extension of credit in connection with a commercial contract referred to in subparagraph (j)(i);

Source: USMCA, Article 14.1

Example Option E: Broad, Mixed Enterprise and Asset-Based Definitions of Investment

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;
(b) shares, stock, and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments, and loans;
(d) futures, options, and other derivatives;
(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
(f) intellectual property rights;
(g) licenses, authorizations, permits, and similar rights conferred pursuant to the law of the Party; and
(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

Source: Central America-Republic of Korea FTA (2018),[490] Article 9.29

[490] Parties to the FTA include the following: Costa Rica, El Salvador, Honduras, Korea, Republic of, Nicaragua, Panama.

Example Option F: Exhaustive List of Asset-based Investments Complying with Ex-ante Conditions

[...] "investment" means:
(i) a company;
(ii) shares, stock and other forms of equity participation in a company, and bonds, debentures and other forms of debt interests in a company;
(iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions or other similar contracts;
(iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, hypothecs, liens and pledges on real property;
(v) rights conferred pursuant to law, such as licences and permits
provided that
(a) such investments are not in the nature of portfolio investments which shall not be covered by this Agreement;
(b) there is a significant physical presence of the investment in the host state;
(c) the investment in the host state is made in accordance with the laws of that host state;
(d) the investment is part or all of a business or commercial operation; and
(e) the investment is made by an investor as defined herein.

Source: IISD Model Agreement, Article 2

In some cases, trade agreements have modified and narrowed the definition of "investment" with exceptions, conditions, or specific language detailing the types of investments covered under their agreements. For example, the Costa Rica-Mexico FTA included additional provisions on acceptance of foreign investments which do "not include capital movements that are mere financial transactions for speculative purposes, commercial contracts for the sale of goods or services, credits granted to a State, or loans that are not directly related to an investment…"[491]

Several narrowing approaches are possible, such as:

- Excluding specific types of assets such as portfolio investments, certain commercial contracts, certain loans, and debt securities, etc;
- Using a "closed list" definition with a wide asset-based list of examples which are exhaustive rather than illustrative;
- Limiting investments to those made "in accordance with host country law";
- Supplementing definitions of "investment" by express references to investment risk and other factors commonly associated with investment, thereby introducing objective criteria to the analysis of the term;
- Restricting covered investments depending on the time of establishment;
- Limiting covered investments to certain industry sectors; and
- Restricting the range of covered IPRs.

[491] *See* WT/WGTI/W/60 (Communication from Costa Rica to the WTO's Working Group on the Relationship between Trade and Investment, dated 28 October 1998).

Example Option A, taken from the Australia-Indonesia CEPA (IA-CEPA),[492] highlights the most common approach for narrowing the definition of investment. It contains an option focused on an asset-based definition of "investment" and details the scope of the RTA by identifying that it will protect the "covered investments" previously identified. Narrowing the scope of the agreement to a closed list definition is a common, if not the most common, approach. The provision goes further to apply to measures taken by the party's government, local authorities, and state-owned enterprise, amongst other, which is a more binding provision.

Example Option B, taken from the China-Mauritius FTA,[493] involves another closed-list, scope-narrowing provision that takes a broader approach than the IA-CEPA noting that "covered investments" must accord with the host country's laws instead of all obligations in the investment chapter or agreement. Example Option C narrows the scope of investment protection coverage by making it contingent upon prior approval by governmental authorities. This option also expressly references insurance in the context of protection against investment risks, which is intended to signal that investment tribunals should use objective criteria in assessing "protected investments," potentially triggering the "Salini Test" under ICSID Art. 25.[494]

Example Options for Narrowing the Scope of the Term "Investment"

Example Option A: Limited to Closed List Definitions with Emphasis on Binding Agreement to Each Parties' Respective Courts

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
   (a) investors of the other Party;
   (b) covered investments; and
   (c) for Article 14.6, all investments in the territory of that Party.

2. A Party's obligations under this Chapter shall apply to measures adopted or maintained by:
   (a) central, regional or local governments and authorities; and
   (b) any person, including a state-owned enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party.[…]

3. This Chapter shall not apply to:
   (a) government procurement; or
   (b) subsidies or grants provided by a Party, including government supported loans, guarantees and insurance.

[492] Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA), https://www.dfat.gov.au/trade/agreements/in-force/iacepa/iacepa-text/Pages/default

[493] The FTA between the Government of the People's Republic of China and the Government of the Republic of Mauritius, http://fta.mofcom.gov.cn/mauritius/annex/mlqs_xdzw_en.pdf

[494] UNCTAD 2011, *supra* note 392, at 41.

4. For greater certainty, this Chapter shall not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement.

Source: Australia-Indonesia CEPA (2019), Article 14.2

Example Option B: Limited to Permitted Investment Under Host Country Laws and Time of Establishing an Investment

covered investment means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter, in accordance with the laws and regulations of that Party;

Source: China-Mauritius FTA (2019), Article 8.1[495]

Example Option C: Conditional Protection Contingent Upon Host Country Approval and Protection Against Investment Risk

The conclusion of insurance contracts shall be subject to the condition that the investor shall have obtained the prior approval of the competent official authority in the host country for the making of the investment and for its insurance with the Corporation against the risks to be covered[.]

Source: Inter-Arab Investment Guarantee Corporation, Article 15.6

ii. Definition of "Investor"

IIAs typically apply to investments by investors who qualify for coverage under the framework. Thus, the definition of "investor" is as significant as the definition of "investment." The definition of "investor" includes natural persons and legal entities. Arbitral tribunals have interpreted the definition of "investor" and the concept of "nationality" in different ways, which has implications for investment coverage under RTAs. Two interpretations of "investor" have been particularly important: (1) nationality of natural or legal entities to determine jurisdiction and (2) minority shareholders rights in investor state dispute settlement provisions in trade agreements.

(a) Natural Persons

The main issues that arise with the taxonomy of natural persons is determining the link between the investor and their home country. Typically, to establish this 'link,' the natural person must hold the nationality of a State party or be linked to the State in another way, such as permanent residence, domicile, etc. In some instances, the nationality at the date of consent to submission to a dispute takes precedence over general nationality under Article

[495] RCEP, *supra* note 17, has identical language in Article 10.1(a)

25(2) of the ICSID Convention.[496] Another important consideration is dual citizenship and its effect on the natural person claiming to be an investor in both states simultaneously. For instance, under the USMCA, a Mexican investor cannot attain coverage in Mexico, but the investor can attain coverage in Canada and the United States. The scenario begs the question of whether a Mexican-American investor could attain broader protection.

(b) Legal Entities

Legal entities, in contrast to natural persons, can include or exclude members of different types of entities, which means, for example, that a "legal entity" may be excluded based on their legal form of ownership. Some investment chapters include only those entities with a legal personality, while others may also include entities without a legal personality.

The example options provided below illustrate which types of persons and entities could be considered as lawful investors. Example Option A and Example Option C contain language used to define which persons are to be considered as investors. Example Option A takes a more general approach, because it includes both natural and legal persons. Example Option C provides for more specific language, including which types of legal entities could be considered investors. It provides information about the capital structure and the type of legal entity, whether public or private. Example Option B, like Example option A, is a more general provision that makes a distinction between the contracting parties' investors and the non-contracting parties' investors. The rationale of having this type of distinction is to determine how an investor will be classified for the purposes of the treaty in order to obtain protection. The first part of the provision includes all natural and legal persons who made an investment in the territory of the host state.

Example Options on Definition of "Investor"

Example Option A: Natural Persons

[…] (d) investor of a non-Party means, with respect to a Party, an investor that seeks to make, is making or has made an investment in the territory of that Party, that is not an investor of a Party;
(e) investor of a Party means a natural person of a Party or a juridical person of a Party that seeks to make, is making, or has made an investment in the territory of another Party;

Footnote: For greater certainty, the Parties understand that an investor "seeks to make" an investment when that investor has taken concrete action or actions to make an investment. Where a notification or approval process is required for making an investment,

[496] "National of another Contracting State" means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute." (Emphasis added.) ICSID Convention, art. 25(2).

an investor that "seeks to make" an investment refers to an investor that has initiated such notification or approval process.

Source: RCEP (2020), Article 10.1

Example Option B: Investor of Party and Non-Party

investor of a Party means a Party, or a natural person of a Party or an enterprise of a Party, that seeks to make, is making, or has made an investment in the territory of the other Party; and

investor of a non-Party means, with respect to a Party, an investor that seeks to make, is making, or has made an investment in the territory of that Party, that is not an investor of the other Party;

Source: IA-CEPA (2019), Article 14.1

Example Option C: Legal Entities

[…] (f) juridical person means any entity constituted or organised under applicable law, whether or not for profit, and whether private or governmental, including any corporation, trust, partnership, joint venture, sole proprietorship, association or similar organisation, and a branch of a juridical person; […]

(g) juridical person of a Party means a juridical person constituted or organised under the law of that Party, and a branch located in the territory of that Party and carrying out business activities there.

Source: RCEP (2020), Article 10.1

c. Investment Protection Provisions

Investment protection standards typically include (i) most favoured nation (MFN) clauses, (ii) national treatment (NT) clauses, (iii) fair and equitable treatment (FET), (iv) full protection and security (FPS), and (v) protection against unlawful expropriation. These standards are discussed below with example RTA clauses.

The main purpose of MFN clauses, which are included in a majority of investment treaties and investment chapters in RTAs,[497] is to ensure non-discriminatory treatment to protected investors versus other foreign investors in the relevant State.[498] At their core, MFN clauses enshrine commitments whereby the parties to the relevant RTA commit not to subject foreign

[497] UNCTAD 2010, *supra* note 399, at 12; Jus Mundi MFN, *supra* note 403 , para. 1.
[498] *UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, para. 162; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 387.

investors and/or their investments to treatment that would be less favourable than that offered to other States' investors and/or investments.[499]

National treatment provisions, on the other hand, ensures that foreign investors and their investments will be treated in a way no less favourable than domestic investors and their investments.[500] This standard is usually enshrined in investment chapters of RTAs [501] and it is generally not considered part of customary international law.[502] Developing countries and LDCs in particular often recognize the unequal financial and technological resources that foreign enterprises have over domestic enterprises, and, therefore, they may seek to limit the scope of NT protection to avoid giving foreign investors equal footing with their more vulnerable national industries.[503]

i. MFN Clauses

As a relative treatment obligation, an MFN clause may be invoked as a substantive protection standard by a qualified investor to prevent a host State from discriminating against the investor in a less favourable manner vis-à-vis foreign investors of other countries.[504] Here, the first investor would allege, via comparative analysis, that it has received less favourable treatment vis-à-vis a comparable second foreign investor to establish that a breach of an MFN clause has taken place.[505] This determination, however, has seldomly been obtained by those who seek it.[506] Alternatively, in the context of a comparator treaty, MFN is invoked via a comparison of the relevant IIA to another agreement (comparator treaty), commonly between the host state and a third state, whereby the second agreement provides more favourable protections than the relevant IIA.[507]

Example provisions on MFN are included below. Example Option A, taken from the USMCA, is a common binding MFN clause. It has a broad scope of protection for qualified investors and investments, covering instances from the initial stages of the investment through its long-term maintenance. This example provision also shows how negotiators can add language to

[499] Agreement Between The Republic Of Guatemala And The Czech Republic For The Promotion And Reciprocal Protection Of Investments, adopted on 8 July 2003, Article 3; Agreement between the Argentine Republic and the Kingdom of Spain on the reciprocal promotion and protection of investments, adopted on 3 October 1991, Article IV(2). (emphasis added)

[500] Jus Mundi NT, *supra* note 413, para. 1.

[501] UNCTAD International Investment Agreements Navigator Mapping Project listed 2183 of 2571 mapped agreements containing national treatment clauses.

[502] *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, para. 25

[503] Jeswald W. Salacuse, *The Law of International Treaties* (3rd ed. 2021), p. 177.

[504] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II)*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 12.3.2.

[505] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 389, 390.

[506] Caron, D.D., and Shirlow, E., "Most-Favored-Nation Treatment: Substantive Protection," in Kinnear, M., Fischer, G.R., Almeida, J.M., Torres, L.F., Bidegain, M.U., "Building International Investment Law: The First 50 Years of ICSID", 2015, p. 399.

[507] Jus Mundi MFN, *supra* note 403, para. 11.

elaborate on specific terms, like "treatment" and "like circumstances," to mitigate the risk of disputes that revolve around their interpretation.[508]

Example Option B, from the Australia-China FTA, also provides a binding MFN commitment with broad scope of application. However, this example provision illustrates how negotiators can include reservations, whereby signatories agree to be able to provide more favourable treatment in certain instances to other non-parties. Importantly, and in line with growing trends in this area, it also excludes dispute settlement mechanisms from its scope, and in doing so, a qualified investor would be prevented from alleging that their MFN protection is violated in this context.

Example Option C, drawn from the ECOWIC, reflects a binding MFN clause, albeit with a narrower scope than the previous example provisions. Here, the language does not afford MFN protection to investments at their establishment/acquisition phase (early stages of the investment), carving out instances and industries where MFN treatment cannot be invoked. A narrower MFN protection may be of interest to countries that seek to exclude exposure to MFN liability at the early stages of foreign investments, applying MFN protection to a certain level of maturity; for example, a stage the State considers to be directly conducive to sustainable development and at which local benefits are more tangible. For risk mitigation purposes, this example also defines what amounts to "treatment," and in doing so, provides some exclusions, like dispute settlement mechanisms, that do not qualify for MFN treatment. This is in line with current trends in the investment arena.

Example Option D, from the IISD Model Agreement, is an MFN clause that provides details surrounding its coverage and interpretation. Here, the scope of protection is relatively wide but is limited to future agreements. In doing so, it sets a more progressive balance of rights and obligations vis-à-vis older IIAs that would otherwise prevail. The inclusion of the word 'substantive' in subsection (A), and its accompanying footnote, ensure that only substantive provisions of any future agreement apply, excluding the application of procedural and dispute settlement provisions. Lastly, under subsection (F), this provision also cross-references language incorporated by reference from another Article, here NT, which is something that the negotiator may find desirable.

Example Options for MFN Clauses

Example Option A: Most-Favoured Nation Provision with Defined Terms

1. Each Party shall accord to investors of another Party treatment no less favourable than the treatment it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party

[508] For an even more descriptive approach to defining "like circumstances," including a list of bottom-up factors to consider, See also AfCFTA Protocol on Investment Zero Draft, *surpa* note 231, Art. 13(2).

or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a government other than at the central level, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that government to investors in its territory, and to investments of those investors, of any other Party or of any non-Party.

4. For greater certainty, whether treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Source: USMCA, Article 14.5

Example Option B: Most-Favoured Nation Provision with Dispute Settlement Exclusions

1. Each Party shall accord to investors of the other Party, and covered investments, in relation to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory, treatment no less favourable than that it accords, in like circumstances, to investors and investments in its territory of investors of any non-Party.

2. For greater certainty, the treatment referred to in this Article does not encompass ISDS procedures or mechanisms.

3. Notwithstanding paragraph 1, each Party reserves the right to adopt or maintain any measure that accords more favourable treatment to investors of non-parties in accordance with any bilateral or multilateral international agreement in force prior to the date of entry into force of this Agreement.

4. Notwithstanding paragraph 1, each Party reserves the right to adopt or maintain any measure that accords more favourable treatment to investors of non-parties in accordance with any bilateral or multilateral international agreement in force on, or signed after, the date of entry into force of this Agreement involving:

(a) aviation;
(b) fisheries; or
(c) maritime matters, including salvage

Source: Australia-China FTA, Article 9.4

Example Option C: Most-Favoured Nation Provision with Narrower Scope, Defined Terms, and Named Exclusions/Carve-Outs

1. Each Member State shall accord to investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investors of any other Member

State with respect to the management, conduct, operation, expansion, sale or other disposition of investment.

2. Each Member State shall accord to investments made by investors of another Member State treatment no less favourable than that it accords, in like circumstances, to investments made by investors of any other Member State with respect to the management, conduct, operation, expansion, sale or other disposition of investments.

3. Paragraphs (1) to (2) above do not oblige a Member State to extend to the investors of a third country the benefit of any treatment, preference or privilege contained in:

(a) The existing or future customs union, free trade area, common market agreements, or any international agreement to which the investor's home State is not a Party, or

(b) Any international agreement or domestic legislation relating wholly or mainly to taxation.

4. For greater certainty, the "treatment" referred to in Paragraphs 1 to 3, does not include dispute settlement procedures provided for in other treaties. Substantive obligations in other treaties do not in themselves constitute "treatment," and thus cannot give rise to a breach of this Article.

Source: ECOWIC, Article 8

Example Option D: Most-Favoured Nation Provision with Defined Scope, Defined Terms, Cross References to National Treatment, and Named Exclusions

(A) This Article applies to:

a) all measures of a Party covered by the Agreement, and b) to the substantive provisions[8] of other international agreements relating to investment that enter into force after this Agreement has entered into force.

(B) Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the management, conduct, operation, expansion, sale or other disposition of investments. Where a foreign investor of a Party or non-Party may, under domestic law, establish an investment, this provision shall apply to the extent it is not inconsistent with such domestic law relating to the establishment or acquisition of investments.

(C) Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the management, conduct, operation, expansion, sale or other disposition of investments.

(D) Each Party shall accord to investors of another Party, and to investments of investors of another Party, the better of the treatment required by this Article and the national treatment obligation in Article 5.

(E) Paragraphs (B)–(D) do not oblige one Party to extend to the investors of another Party the benefit of any treatment, preference or privilege contained in

i) any existing or future customs union, free trade area, common market, any international environmental agreement to which the investor's home state is not a Party, or ii) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

(F) Paragraphs (C)–(E) of Article 5 apply, *mutatis mutandis*, to the present Article.

This Article does not apply to procedural, institutional or dispute settlement provisions of other international agreements relating to investment that enter into force after this Agreement.

Source: IISD Model Agreement, Article 6

ii. **National Treatment Clauses**

Equal treatment under a NT clause differs on a fact-specific, case-by-case basis, depending upon the language of the clause and surrounding facts at hand.[509] The practice of arbitration tribunals is illustrative, with focus on two main factors: (i) the relevant comparator (whether the parties involved who received the relevant treatment were in like situations), and (ii) a comparative analysis between the treatment received by the foreign investor vis-à-vis a domestic comparator.[510]

Example Option A, drawn from the China-Mauritius FTA, reflects a binding commitment and provides a more limited scope of NT protection covering post-establishment. This is relatively a common NT approach for investment, where the qualified investment has already achieved a certain level of maturity. Also, this example shows how a modification can be added (here by footnote) to the relevant protection, stressing that NT may be exempt whenever legitimate public welfare objectives warrant it, such as instances in line with sustainable development goals.

Example Option B, drawn from CETA, embodies a binding NT commitment that provides a more expansive scope of protection, covering both pre-establishment and post-establishment stages. Importantly, an expansive scope for NT protection may reduce the policy space available for the host state. Also, this provision goes a step further to define "treatment," taking into account that Canada has a dual legal system and the European Union has various Member States.

Example Option C, drawn from the Morocco-Nigeria BIT, embodies a binding NT commitment that provides a list of factors for guidance on how to determine the term "like circumstances." In doing so, it mitigates disputes as in terms of interpretation and scope. In addition, and

[509] *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, para. 240.
[510] *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 1170; See also *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006, para. 128.

importantly, this example provision limits the NT protection to exclude State measures that are in line with national policy goals, like national security. This limitation embodies notions of a State's right to regulate, increasingly present in newer generation IIAs.

Example Options for National Treatment

Example Option A: National Treatment Only Covering Post-Establishment Protection

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the management, conduct, operation, and sale or other disposition of investments.[511]

Source: China-Mauritius FTA, Article 8.3

Example Option B: National Treatment Covering Pre-Establishment Protections and Post-Establishment Protections

1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

2. The treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member State of the European Union, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of that Party in its territory and to investments of such investors.

Source: CETA, Article 8.3

Example Option C: National Treatment with Defined Terms and Limitations[512]

[511] Footnote 10: For greater certainty, whether treatment is accorded in "like circumstances" under Article 8.3 (National Treatment) or Article 8.4 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

[512] For a similar catch-all expropriation provision, See IISD Model Agreement Art. 5, *supra* note 454. Importantly, it also provides language ensuring NT coverage to both qualified investors and investments and also addresses sustainable development concerns, like environmental concerns, in its footnote; See also AfCFTA Protocol on Investment Zero Draft, *supra* note 231, Art. 11(2).

1. Each Party shall allow investors of the other Party to invest and contract business in conditions no less favourable than that accorded, in like circumstances, to investments of its own investors in accordance with its laws and regulations.

2. For greater certainty, references to "like circumstances" in paragraph 2 requires an overall examination on a case-by-case basis of all the circumstances of an investment including, but not limited to:

(a) its effects on third person and the local community; (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment; (c) the sector in which the investor is in; (d) the aim of the measure concerned; (e) the regulatory process generally applied in relation to the measure concerned;

The examination referred to in this paragraph shall not be limited to or be biased toward anyone factor. […]

3. The treatment granted under 1,2,3 and 4 of this article shall not be construed as to preclude national security, public security or public order nor oblige one Party to extend to the investors of the other Party and their investment the benefit of any treatment, preference or privilege […]

Source: Morocco-Nigeria BIT, Article 6

iii. Fair and Equitable Treatment

FET is common in RTA investment provisions,[513] even though the current trend is to limit FET more substantially. It is considered a "minimum standard of protection" along with the full security and protection standard, which is an integrated part of customary international law.[514] Similar to MFN, FET clauses are not uniform in language, which results in different interpretation and implications.[515] Particular FET obligations of a host state must be determined by interpreting the relevant treaty language. Again, arbitral cases, while not dispositive, are illustrative, although arbitral tribunals have also had difficulties balancing the interests of foreign investors with the interests of host states.[516]

Example Option A below, taken from the Korea-Central America FTA, illustrates an FET provision with binding language, whereby the Parties commit to upholding an FET standard. In terms of its language, it offers an ambiguous scope of protection, which has been historically common but currently is being replaced by more descriptive, precise language. This example provision also provides some guidance regarding scope by including scenarios

[513] Jus Mundi FET, para. 1. 2. 3, *supra* note 416.
[514] *Free Trade Agreement between the Republic of Korea and the the Republics of Central America,* Article 9.5.
[515] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 197.
[516] *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, para. 293; *Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum, 14 September 2022, para. 198

for protection under the FET standard. Since this example provision is ambiguous, it may leave States uncertain about the degree of policy space available to act without violating the FET protection.

Example Option B, taken from the CETA, reflects a growing and increasingly more common approach to addressing FET. Aligned with historical practice, the language amounts to a binding commitment by the parties to upholding FET protection, yet, in line with more recent approaches, the scope of this protection is limited by an exhaustive list of FET violations, guided by key operative qualifiers like "manifest" and "fundamental." Since this approach provides more guidance on a possible breach, it provides host States with more clarity on the level of policy space available.

Example Options on Fair and Equitable Treatment

Example Option A: FET Limited by the Minimum Standard of Treatment under Customary International Law

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment, and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings, in accordance with the principle of due process embodied in the principal legal systems of the world; […]

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Source: FTA between the Republic of Korea and the Republics of Central America, Art. 9.5.

Example Option B: *Designing FET Protection Guided by Qualifiers.*

1. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

(a) denial of justice in criminal, civil or administrative proceedings;
(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) manifest arbitrariness;
(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
(e) abusive treatment of investors, such as coercion, duress and harassment; or
(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article. […]

2. When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

Source: CETA, Articles 8.10(2), 8.10(4)

iv. Full Protection and Security

FPS is a general standard of protection that is included in most investment treaties and RTA investment chapters.[517] The wording of these provisions should be adapted according to the legal traditions of each jurisdiction. The assessment to determine if the FPS standard has been violated is fact-specific but generally applies if the host state failed to act without due diligence, meaning that it did not take all reasonable measures under the circumstances and taking into account its capacity.[518]

Example Option A below, taken from the USMCA, provides an example of an FPS clause included in the minimum standard of treatment that the host state should afford the foreign investor. By including the FPS as part of customary international law, the host state acknowledges that the FPS standard is a minimum standard of treatment.

Example Option B, taken from the Zero Draft of the AfCFTA Protocol on Investment, provides an example of an FPS clause limited to physical protection and security. Example Option B resembles Example Option A in the sense that the FPS is included in the minimum standard of treatment. The difference between the two options is in the language used.

In Example Option C, extracted from RCEP, full protection and security includes the physical protection of the investment. By including this distinction, the treaty drafters made a clear separation from between the content of FPS and FET as standard of protections.

[517] Full Protection and Security (FPS), Jus Mundi, Wiki Notes, 9 September 2022, para. 2 [Jus Mundi FPS].
[518] Id., para. 7; See also *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 686-687. The geopolitical stability of the Host State is an important consideration. As the arbitral tribunal mentioned in *Pantechniki v Albania "*if an investor decides to invest in an endemic civil strife and poor governance, he cannot have the same expectation of physical security as one investing in London, New York or Tokyo.*"* O. Moussly, "Same concept, different interpretation: the Full Protection and Security Standard in Practice", http://arbitrationblog.kluwerarbitration.com/2019/10/27/same-concept-different-interpretation-the-full-protection-and-security-standard-in-practice/, last visited Nov. 11, 2022.

In Example-Option D, from the IISD Model Agreement, FPS is incorporated as a customary international law obligation, which is included in the host State obligations. FPS is a minimum international standard of protection, but having it included in the customary international obligations of a State implies the evolution of the standard.

Example Options on Full Security and Protection

Example Option A: Minimum Standard of Treatment

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: […]

"full protection and security" requires each Party to provide the level of police protection required under customary international law.
Source: USMCA, Article 14.6.2 (b)

Example Option B: Physical Security and Protection

A State Party shall, subject to its capabilities, accord investors and their investments physical protection and security no less favourable than that which it accords to investments of its own natural and legal persons or to investments of investors of any other State Party or third party as defined in the Agreement.

2. Investors of one State Party whose investments in the territory of the other State Party suffer losses as a result of a breach of paragraph 1, in particular owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall, as regards restitution, indemnification, compensation or other settlement, be accorded by the Host State treatment no less favourable than that which the Host State accords to investments of its own natural and legal persons or to investments of investors of any other State Party or third party as defined in the Agreement

Source: AfCFTA, Zero Draft Protocol on Investment, Article 16

Example Option C: FET with Qualification

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of aliens.

2. For greater certainty: […]

(b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment.

Source: RCEP, Article 10.5

Example Option D: Minimum International Standards

(A) Each Party shall accord to investors or their investment treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. This obligation shall be understood to be consistent with the obligation of host states [...]
(B) Paragraph (A) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments. The concepts of "fair and equitable treatment" and "full protection and security" are included within this standard, and do not create additional substantive rights.

Source: IISD Model Agreement, Article 7

v. Expropriation

Expropriation refers to the taking of private property belonging to a private entity by the State. In the context of RTA provisions, it is useful to define the concept of "expropriation" in order to clarify the rights and obligations that states and investors might encounter if a state's conduct is later qualified as an act that amounts to expropriation. In this context, it is valuable to bear in mind that when protections are afforded under an RTA, a potentially aggrieved investor may seek redress via dispute settlement mechanisms. Regarding expropriation, if the concept is not defined in the treaty, adjudicators have the flexibility to interpret the term "expropriation."

The following sub-sections expand on the concept of "expropriation," which can be subdivided into (i) direct expropriation and (ii) indirect expropriation. This section also provides example RTA provisions that encapsulate these concepts.

(a) Direct Expropriation

Direct expropriation refers to when a State mandates a legal transfer of the foreign investor's private property title or physically seizes private property for the benefit of the State or a State-mandated third party.[519] Direct expropriation is very distinct, as it embodies an (i) open, (ii) deliberate, and (iii) clear intent from the State via enactment of a law, emission of a decree, or physical act, that deprives the owner, i.e., a foreign investor protected under an RTA, of its

[519] UNCTAD, Expropriation, UNCTAD Series on Issues in International Investment Agreements II, United Nation, New York and Geneva, 2012, p. 6 [UNCTAD 2012]. See, for example, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 699; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 667.

property rights, generally through the transfer of title of the property back to the State or via an unequivocal seizure of the property.[520]

In practice, direct expropriations or nationalizations are now rare.[521] States have commonly justified these unilateral moves by alleging that such action is imperative or urgent to preserve specific sectors of national importance.[522]

Example Option A below, taken from the Energy Charter Treaty, exemplifies a more traditional approach through a general commitment of protection against expropriation, without setting clear boundaries on what constitutes expropriation. It also adds criteria to identify instances that would be covered by the commitment. The provision does afford the right to have prompt review of a potential expropriation and sets guidelines on how to proceed with the valuation of the relevant investment for compensation purposes. In doing so, this provision offers language that opens the door for redress for aggrieved qualified investors.

Example Option B, taken from the USMCA, provides clarity regarding the meaning of direct expropriation. The provision affords protection for direct and indirect expropriation, excluding certain instances, with greater detail provided in an annex to the RTA.

Example Options on Direct Expropriation

Example Option A: Catch-All Expropriation Provision[523]

1. Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

(a) for a purpose which is in the public interest;
(b) not discriminatory;
(c) carried out under due process of law; and
(d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").

[520] UNCTAD 2012, p. 7, *supra* note 519.
[521] UNCTAD 2012, p. 7, *supra* note 519. *See also Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13; September 2006, para. 69.; Dolzer, R., Shreuer, C., "Principles of International Investment Law," *Oxford University Press*, 2012.
[522] UNCTAD 2012, p. 7, *supra* note 519.
[523] For a similar catch-all expropriation provision, see IISD Model Agreement, Article 8, *supra* note 454. Importantly, it also provides language that ensures that prompt and effective compensation is given to the investor.

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

2. The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

3. For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

Source: Energy Charter Treaty, Article 13

Example Option B: Direct Expropriation Explicitly Addressed

1. No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:

(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and
(d) in accordance with due process of law. […]

(2) Article 14.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

Source: USMCA, Article 14.8(1) and Annex 14-B(2)

(b) Indirect Expropriation

In contrast to direct expropriation, indirect expropriation happens when the property in question is destroyed or its owner is otherwise deprived of its ability to use,[524] control[525] or manage it in a meaningful way,[526] without legal title of the land being unaffected.[527] A State action may amount to indirect expropriation if it flows from a measure or action that

[524] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 699.
[525] *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, para. 394.
[526] *Robert Aleksandrowicz and Tomasz Częścik v. Cyprus*, SCC Case No. V 2014/169, Award, 11 February 2017, para. 213.
[527] Schreuer, C., "The Concept of Expropriation under the ECT and Other Investment Protection Treaties", *Transnational Dispute Management*, 2005, pp. 28-29 [Schreuer]; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 699.

substantially interferes with a foreign investor's ability to use or derive the economic benefits from an investment in the host State.[528]

The time it takes for a host state's actions to amount to indirect expropriation in this context varies. If the indirect expropriation occurs as a result of gradual actions taken by the host State, whereby each action does not rise to a level of taking, but, when analyzed as a whole, has the effect of destroying (or nearly destroying) the value of the underlying investment, then this may be considered "*creeping expropriation*." [529] Conversely, if the indirect expropriation occurs abruptly through a specific action by the host State, it is considered a "*de facto expropriation*."[530]

Example Option A, taken from the USMCA, shows a binding commitment with clarity regarding the interpretation of the meaning of indirect expropriation as defined in a relevant annex. The provision excludes certain instances, which could be helpful to mitigate the possibility of disputes.

Example Option B, taken from the COMESA Treaty, reflects a binding commitment with some context. The provision also distinguishes itself by going a step further in defining expropriation, including a detailed definition of creeping expropriation.

Example Options on Indirect Expropriation

Example Option A: Indirect Expropriation Explicitly Addressed

1. No Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:

(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2, 3, and 4; and
(d) in accordance with due process of law. […]

USMCA, Annex 14-B(3)

2. The second situation addressed by Article 14.8.1 (Expropriation and Compensation) is *indirect expropriation*, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

[528] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 699; See also *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021.
[529] UNCTAD 2012, p. 11, *supra* note 519.; See examples *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 63.; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 188.
[530] Schreuer, *supra* note 527, at 36; See example *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 188.

1. (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, *constitutes an indirect expropriation*, requires a case-by-case, fact- based inquiry that considers, among other factors:

   (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred,
   (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations, and
   (iii) the character of the government action, including its object, context, and intent.

2. (b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.

Source: USMCA, Article 14.8(1) and Annex 14-B(3)

Example Option B: Creeping Expropriation Explicitly Addressed

3. The Member States agree that part of the conducive climate to investment are measures aimed at protecting and guaranteeing such investment. To this end, the Member States shall:

   (a) subject to the accepted principle of public interest, refrain from nationalising or expropriating private investment; and

   (b) in the event private investment is nationalised or expropriated, pay adequate compensation.

4. For the purposes of paragraph 3 of this Article, expropriation shall include any measures attributable to the government of a Member State which have the effect of depriving an investor of his ownership or control of, or a substantial benefit from his investment and shall be interpreted to include all forms of expropriation such as nationalisation and attachment as well as *creeping expropriation in the form of imposition of excessive and discriminatory taxes, restrictions in the procurement of raw materials, administrative action or omission where there is a legal obligation to act or measures that frustrate the exercise of the investors rights to dividends, profits and proceeds of the right to dispose of the investment*.

Source: COMESA Treaty, Article 159(3)-(4)

d. Host State Flexibilities

States have a legitimate right to regulate investments in their territories, which is now referred to as a "Right to Regulate." There is a growing interest to regulate to protect sustainable development considerations, which includes the environment, health, and

human rights.[531] The right to regulate allows a state to take actions that may affect investments in the name of the public interest.[532] A determination of whether a relevant action falls within a valid right to regulate or compensable expropriation is generally done on a case-by-case, fact-sensitive basis,[533] which may depend upon international obligations and RTA language. This section will delve into more details and sub-considerations in this context.

i. The Right to Regulate

The right to regulate refers to the host State's power to regulate activities that fall within the state's public interest, like protecting the environment or cultural diversity.[534] Due to the dynamic and evolving nature of a host State's public interest, striking a balance between the right to regulate with protections of investors and their investments may be challenging.[535] Newer generations IIAs have evidenced an increasing tendency to strengthen this right,[536] whereby, for example, protections covering FET and indirect expropriations are narrower and more clearly defined,[537] or valid exceptions to substantive investment protections, like NT and MFN treatment, are added if applied to protect an umbrella of legitimate public policy objectives.[538] Currently, public interests that are often highlighted involve the protection of the environment, social or consumer protection, protection of cultural diversity, historical heritage, and financial stability.[539]

Example Option A below, taken from the India-Malaysia FTA, highlights how negotiators may briefly acknowledge the right to regulate in an agreement's preamble, without this right becoming binding on the parties.[540] This approach, by itself, may be less common, as countries are tending to bolster their right to regulate in the context of sustainable development. However, this approach may be desirable for negotiators who do not wish to include clear and precise language to define the scope of their right to regulate. However, without additional detail, this option may leave member States in a weak position to uphold their right to regulate versus other standards of protection. Also, this approach could be included in combination with a specific article devoted to the right to regulate later in the same RTA, which would further a State's position to invoke its right to regulate.

Example Option B, taken from the EU-Viet Nam Investment Protection Agreement, showcases how an entire article can be devoted to the right to regulate with more expansive detail regarding its scope and interaction with other standards of protection, such as expropriation.

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[531] Ibid.

[532] Rajput, A., "Regulatory Freedom and Indirect Expropriation in Investment Arbitration," *Kluwer Law International*, 2018, p. 103.

[533] Right to Regulate in the Context of Expropriation, Jus Mundi, Wiki Notes, 9 June 2022.

[534] Right to Regulate in the Public Interest: Treaty Practice, Jus Mundi, Wiki Notes, 8 June 2022, para. 17.

[535] Id.

[536] Id, para. 10.

[537] UNCTAD Issue Note, "The Changing IIA Landscape: New Treaties and Recent Policy Developments," at 6.

[538] *See* AfCFTA Protocol on Investment Zero Draft, *supra* note 231, Arts. 12(1), 14(1), 18(2), 20(2).

[539] EU-Canada CETA, *supra* note 324, Art. 8.9(1); See also Right to Regulate in the Public Interest: Treaty Practice, Jus Mundi, Wiki Notes, 8 June 2022, para. 17.; See ,e.g., AfCFTA Protocol on Investment Zero Draft, *surpa* note 231, Arts. 12(1), 14(1), 18(2), 20(2).

[540] For similar preamble language, *See also* AfCFTA Protocol on Investment Zero Draft, *supra* note 231, Preamble.

This option exemplifies a growing trend in the investment arena, where the right to regulate is being expanded by countries to ensure that qualified investments are in line with sustainable development to protect, for instance, public health and cultural diversity. Negotiators may wish to opt for this type of provision if it is within their priorities to clearly delineate, bolster, and provide certainty as to what falls within their right to regulate. This help avoid potential investment disputes that revolve around the interpretation of the host State's right to regulate.

Example Option C, taken from the FTA between Nicaragua and Taipei, is a modern and progressive provision that indirectly bolsters the right to regulate from a host State whenever it wishes to act in the protection of environmental concerns, which follows policy developments surrounding sustainable development. The language used in this provision establishes a binding commitment to allow the host State to act in such a manner vis-a-vis qualified investors and/or qualified investments, if needed.

Example Option D, taken from the Morocco-Nigeria BIT and mirrored in the Zero Draft of the AfCFTA Investment Protocol, embodies a strong, binding approach linking the right to regulate with sustainable development. These instruments are notable since they integrate the right to regulate at different points in the relevant instrument, with the right to regulate strongly embedded throughout the agreement with a clearly defined scope. This brings certainty and clarity to the right and should mitigate risks of future disputes as to its interpretation. Option D also helps to pre-emptively shape the expectations a foreign investor, explicitly noting that this right (i) will not breach any other commitment by the host State to qualified investors; (ii) will be balanced with the investor's rights; and will be (iii) guided by the host State's priorities to protect the environment, their economy, and society.[541]

Example Options on the Right to Regulate

Example Option A: Right to Regulate in Agreement Preamble

REAFFIRMING their right to pursue economic philosophies suited to their respective development goals and their right to regulate activities to realise their national policy objectives

Source: FTA between India and Malaysia, Preamble

Example Option B: Direct Approach to the Right to Regulate[542]

1. The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection, or promotion and protection of cultural diversity.

[541] For a similar example provision, see IISD Model Agreement, Articles 8(I), 25, *supra* note 454.

2. For greater certainty, this Chapter shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor's expectations of profits.

3. For greater certainty and subject to paragraph 4, a Party's decision not to issue, renew or maintain a subsidy or a grant shall not constitute a breach of this Chapter in the following circumstances:

(a) in the absence of any specific commitment to an investor of the other Party or to a covered investment under law or contract to issue, renew, or maintain that subsidy or grant; or
(b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy or grant.

4. For greater certainty, nothing in this Chapter shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex 1 (Competent Authorities).

Source: EU-Vietnam Investment Protection Agreement, Article 2.2

Example Option C: Indirect Approach to Right to Regulate in the Context of Environmental Concerns

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintain, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Source: FTA between Nicaragua and Taipei, Article 10.11

Example Option D: Right to Regulate Expressly Linked to Sustainable Development

The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities.

[…] 1. In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.

2. Except where the rights of Host State are expressly stated as an exception to the obligation of this Agreement, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in the Agreement.

3. For greater certainly, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.

Source: Reciprocal Investment Promotion and Protection Agreement between Morocco and Nigeria, Articles 13(2), 23

e. Dispute Settlement Provisions

Dispute settlement clauses have traditionally been designed to allow foreign investors to bring a claim if the host state breaches a substantive provision of treaty. DSM in investment treaties have traditionally focused on ISDS; however, newer RTAs incorporate other forms of DSMs, shaped by changes at the global level and the ongoing reform of the ISDS system through UNCITRAL Working Group III.

i. Elements of a Dispute Resolution Clause

Different elements can be considered in the context of DSMs: (i) the cooling-off period; (ii) non-binding ADR mechanisms such as mediation and/or conciliation; (iii) national courts option (iv) arbitration clauses; (v) a multilateral investment court option; (vi) enforceability provisions; and (vii) sunset clauses.

Before proceeding to the analysis of the elements of a dispute resolution clause in a treaty, it is worth mentioning that the IISD Model Agreement included a "transparency clause" as a mandatory element of such a dispute resolution clause. Such a clause obliges the parties to full transparency of notice of arbitration, submissions coming from the disputing parties and *amicus curiae*, as well as public access to oral hearings. Usually, the transparency rules as included in the arbitration rules chosen by the parties govern the dispute's proceedings. The public interest can be better safeguarded if the proceedings are made public and transparency rules are enhanced.

(a) Cooling-off Periods

The cool-off period ("waiting period") is a characteristic of BITs and RTAs with investment chapters. It refers to the situation in which an investor shall abstain from starting contentious proceedings against the state for a determined period of time. This is generally a period of six months, during which the investor and the state shall try to solve the dispute amicably. More extended periods also appear in some IIAs, such as 24 months, as do much shorter periods, such as 60 days.

Example Option A below, taken from the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore, provides for consultation and negotiation prior to initiating a dispute. Example Option B, taken from the India-Malaysia FTA, offers another example of a cooling-off period clause, which describes the means and process the parties can use to solve the disputes in an amicable manner. Example Option C, extracted from the IISD Model Agreement, includes a cooling-off period as part of the dispute

prevention and mediation, and it prescribes a minimum period for this period, allowing trade negotiators to determine whether a longer period would be advisable.[543]

Example Options for Cooling-Off Periods

Example Option A: Investment Disputes

The parties to the dispute shall, as far as possible, resolve the dispute through consultations and negotiations.

Where the dispute cannot be resolved as provided for under paragraph 2 within 6 months from the date of a request for consultations and negotiations, then unless the disputing investor and the disputing Party agree otherwise or the investor concerned has already submitted the dispute to the courts or administrative tribunals of the disputing Party (excluding proceedings for interim measures of protection referred to in paragraph 5), the investor may submit the dispute t[o:]

Source: Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (2005), Article 6.21

Example Option B: The Settlement of Investment Disputes between a Party and an Investor of the Other Party

1. Any dispute between a Party ("disputing Party") and an investor of the other Party ("disputing investor") that has incurred loss or damage arising out of an alleged breach of any rights conferred by this Agreement with respect to the investment of the disputing investor shall, as far as possible, be settled by the parties to the dispute in an amicable way. […]

5. In the event of an investment dispute referred to in paragraph 1, the disputing parties shall as far as possible resolve the dispute through consultation and negotiation, with a view towards reaching an amicable settlement. Such consultations and negotiations, which may include the use of non-binding, third party procedures, shall be initiated by a written request for consultations and negotiations by the disputing investor to the disputing Party.
6. With the objective of resolving an investment dispute through consultations and negotiations, a disputing investor shall provide the disputing Party, prior to the commencement of consultations and negotiations, with information regarding the legal and factual basis for the dispute.

Source: India-Malaysia FTA, Article 10.14

Example Option C: Prevention of Disputes and Mediations

(...) (B) For the purposes of this Agreement, there shall be a minimum six-month cooling-off period between the date of a notice of intention to initiate a dispute settlement process

[543] *See also* AfCFTA Protocol on Investment Zero Draft, *su*pra note 231, Annex 1 Art. 5(2).

under this Agreement, and the date a Party, investment or investor, as the case may be, may formally initiate a dispute.

Source: IISD Model Agreement, Article 42

(b) Mediation and Conciliation

Another method for solving disputes is using ADR mechanisms such as conciliation or mediation. These ADRs are not binding and involve a third party (mediator or conciliator) to help resolve the dispute. Including ADRs in a dispute resolution clause is not yet a standard procedure. However, it is an option that States can consider.

The following example provisions provide three models of how a mediation clause could be drafted in an investment chapter. Example Option A, taken from the Canada-Korea FTA, refers to the use of a non-contentious dispute settlement mechanisms as a precondition for the investor to have access to binding proceedings. The use of "shall" demonstrates that negotiations/consultations are mandatory.

Example Option B, taken from the Korea-Republic of Vietnam FTA, includes the requirement for mediation within 30 days after the investor files a notice of intent to submit a claim to arbitration. This option also gives the parties the discretion to agree on an alternative approach.

Example Option C, taken from the IISD Model Agreement, includes mediation, conciliations, good offices, and other ADRs as mandatory means to solve a dispute arising either between the Contracting Parties of the treaty or the investor and host State. The proponents use "shall," which is an indicator that these ADRs are obligatory in submitting the notice for arbitration.

Example Options for Mediation and Conciliation

Example Option A: Consultation and Negotiation

[…] In the event of an investment dispute, the disputing investor and the disputing Party shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding third-party procedures.

Source: Canada-Korea FTA(2014), Article 8.15

Example Option B: Consultation and Negotiation

In the event of an investment dispute, the disputing investor and the disputing Party shall initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding third-party procedures. Consultations shall be held within 30 days of the submission of the notice of intent to submit a claim to arbitration, unless the disputing parties agree otherwise.

Source: Korea-Republic of Vietnam FTA (2015), Article 9.16

Example Option C: Prevention of Disputes and Mediation

[...](C) The Parties shall seek to resolve potential disputes through amicable means, both prior to and during the cooling-off period. Investors and investments shall similarly seek to resolve potential disputes with host states, and host states with their investors and investments, in an amicable manner, prior to and during the cooling-off period. The use of good offices, conciliation, mediation or any other agreed dispute resolution process may be applied.

(D) Where no alternative means of dispute settlement are agreed upon, Parties, investors or investments, as the case requires, shall seek the assistance of a mediator to resolve disputes during the cooling-off period required under this Agreement between notification of a potential dispute and the initiation of dispute settlement proceedings. [...]

Source: IISD Model Agreement, Article 42

ii. Arbitration Clauses

Treaty drafters should pay particular attention to arbitration clauses. Consent is essential, although most tribunals have ruled that if the contracting parties to the treaty agreed to solve the dispute by using arbitration, there is consent.

Enforceability is also a significant issue. Depending upon the type of arbitration, i.e., ad-hoc or institutional (ICSID or another arbitral institution), the enforcement rules will be different. In this regard, if the arbitration clause provides for ad-hoc arbitration under the UNCITRAL Rules or for arbitration under the rules of any other institution but ICSID, then the enforcement proceedings will be governed by the New York Convention.[544] This means that the winning party can enforce the award in any jurisdiction that is a Contracting Party of the New York Convention and in which the other party has assets. However, enforcement will require the intervention of the national courts of the respective country where enforcement is sought. If the award is recognized and enforced in one jurisdiction, it does not automatically make it enforceable in another jurisdiction. The winning party will have to follow the recognition and enforcement proceedings in each jurisdiction.

On the other hand, if the treaty drafters decide to opt for arbitration under the ICSID rules, enforcement functions a bit differently. Under the ICSID Rules, an award rendered by an ICSID tribunal has the same judicial force as a final judgment of the highest jurisdiction in the respective country. Therefore, if the winning party seeks to enforce the award, it will not have to pass through the same procedure as with the New York Convention. Treaty drafters should be mindful of which option to choose, because an ICSID award is almost automatically enforceable in every state signatory of the ICSID Convention.

The following examples include different arbitral clauses using either ICSID and/or UNCITRAL. The third example provides for an innovative system with a bespoke rule of arbitration

[544] UNCITRAL, "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards", 1958.

created by the Council of DSM under the respective treaty. Example Option A, taken from the Korea-Turkey FTA, is an example of a typical arbitration clause containing a choice of forum. When a dispute arises, the investor may start non-contentious proceedings before seeking recourse with the national courts of the host state. Arbitration is provided as a last resort option. The clause uses "may" and not "shall," which demonstrate that the procedures before the national courts of the host state are not a pre-condition for the eligibility under arbitral proceedings. The investor can choose whether it wants an arbitral institution or ad-hoc arbitration and under which rules of procedure. It is also important to consider that once the investor opts to go before the national courts, this option is final, and parallel proceedings cannot be initiated. Example Option B, taken from the Japan-Mongolia Agreement, provides for arbitration either under the ICSID rules and before the ICSID Centre or under the UNCITRAL rules. Compared with Option A, the language in Option B is more straightforward and does not offer a choice between the national courts and arbitration.

Example Option C, taken from the IISD Model Agreement provides that trade negotiators can design their own arbitration rules and incorporate them into the RTA, or they can use the ICSID Arbitration Rules regardless of whether the Contracting Parties of the treaty were party to the ICSID Convention or not.

Example Options for Arbitration Clause

Example Option A: Arbitration Clause with Choice of Forum

[…] 5. Any such dispute which has not been resolved within a period of six months from the date of written request for consultations may be submitted to any competent courts or administrative tribunals of the disputing Party provided that such courts or tribunals have jurisdictions over such claims or to arbitration. In the latter event, the investor has the choice among any of the following:

(a) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the disputing Party and the non-disputing Party are parties to the ICSID Convention;

(b) the ICSID Additional Facility Rules, provided that either the disputing Party or the non-disputing Party, but not both, is a party to the ICSID Convention;

(c) the UNCITRAL Arbitration Rules; or

(d) any other arbitration institution or any other arbitration rules, if the disputing parties so agree.

6. Once the investor has submitted the dispute to either the courts or administrative tribunals of the disputing Party or any of the arbitration mechanisms provided for in paragraph 5, the choice of forum shall be final.

7. Each Party hereby consents to the submission of a dispute to international arbitration under paragraph 5 in accordance with this Article, conditional upon:

(a) the submission of the dispute to such arbitration taking place within three years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Agreement and of the loss or damage incurred by the disputing investor in relation to its covered investment or by the covered investment;

(b) the disputing investor providing written notice, which shall be delivered at least 90 days before the claim to arbitration is submitted, to the disputing Party of its intent to submit the dispute to such arbitration and which:

(i) states the name and address of the disputing investor and the covered investment;

(ii) selects one of the fora in paragraph 5 as the forum for dispute settlement;

(iii) waives its right to initiate any proceedings, excluding proceedings for interim injunctive relief referred to in paragraph 8, before any of the other dispute settlement for a referred to in paragraph 5 in relation to the matter under dispute; and

(iv) briefly summarizes the alleged breach of the disputing Party under this Agreement (including the articles alleged to have been breached) and the loss or damage allegedly caused to the investor in relation to its covered investment or caused to the covered investment; and

(c) In deciding whether an investment dispute is within the jurisdiction of ICSID and competence of the tribunal, the arbitral tribunal established under paragraph 5(a) or 5(b) shall comply with the notification submitted by the Republic of Turkey on March 3, 1989 to ICSID in accordance with Article 25 (4) of ICSID Convention, concerning classes of disputes considered suitable or unsuitable for submission to the jurisdiction of ICSID, as an integral part of this Agreement.

Source: Korea-Turkey Agreement on Investment under the Framework Agreement Establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey, Section C, Article 1.17

Example Option B: Choice of ICSID or UNCITRAL

[…] the disputing investor may, subject to paragraph 6, submit the investment dispute to one of the following international arbitrations:

(a) Arbitration in accordance with the ICSID Convention, so long as the ICSID Convention is in force between the parties

(b) Arbitration under the ICSID Additional Facility Rules, provided that either Party, but not both is a party to the ICSID Convention;

(c) Arbitration under the Arbitration Rules of United Nations Commission on International Trade Law; and

(d) If agreed with the disputing Party, any arbitration in accordance with other arbitration rules.

Source: Agreement between Japan and Mongolia for an Economic Partnership (2015), Article 10.13

Example Option C: Choice of Bespoke Arbitration Rules or ICSID

The Council of the Dispute Settlement Body shall establish Rules of Arbitration consistent with the provisions of this Agreement. Until the adoption of such Rules, the Rules of Arbitration of the Centre in effect on the date the claim or claims were submitted to arbitration under this Agreement, shall govern the arbitration except to the extent modified by this Agreement, irrespective of whether the host and home states are parties to the ICSID Convention.

Source: IISD Model Agreement, Annex A, Article 3

iii. Multilateral Investment Court Clauses

Some RTAs also call for establishment of a Multilateral Investment Court or Tribunal, as shown in the Example Options below. The language in all three options that follow is quite similar, considering that these clauses come from FTAs between the EU and different trade partners. All three options refer to the same dispute mechanism: the creation of a multilateral court with a two-tier jurisdiction – a first instance and an appellate jurisdiction, modelled on the WTO system. In all cases, the multilateral court will resolve disputes involving only the investment chapter of the RTA, and a Joint Committee will be established to adopt the rules of procedure.

Example Options for Multilateral Investment Courts

Example Option A: Establishment of a Multilateral Investment Tribunal and Appellate Mechanism

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.

Source: CETA, Article 8.29

Example Option B: Multilateral Dispute Settlement Mechanism

The Parties shall enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement. The Parties may consequently agree

on the non-application of relevant parts of this Section. The Committee may adopt a decision specifying any necessary transitional arrangements.

Source: EU-Vietnam Investment Protection Agreement, Article 3.41

Example Option C: Multilateral Dispute Settlement Mechanism

1. The Parties should cooperate to establish a multilateral mechanism for the resolution of investment disputes.

2. Upon the entry into force between the Parties of an international agreement providing for such a multilateral mechanism applicable to disputes under this Agreement, the relevant parts of this Section shall be suspended and the Joint Council may adopt a decision specifying any transitional arrangements.

Source: EU-Mexico Agreement in Principle, Article 14

(a) Exhaustion of Local Remedies

Currently, states are also exploring exhaustion of local remedies in the host state as a DSM option before investor-state arbitration claims can be brought. The objective of this local remedy is to protect host state sovereignty under international law.[545] Proponents of this approach contend that requiring the exhaustion of local remedies in the context of investor-state disputes helps to strengthen and integrate the domestic and international systems for investor protection.[546] In this regard, arbitral tribunals could benefit from a domestic court's characterization of the relevant domestic law, where an investor has already referred the dispute to the court.[547] Requiring the exhaustion of local remedies is also thought to help clarify the relationship between domestic and international dispute settlement procedures.[548]

The examples below provide two different approaches with regard to the exhaustion of local or national remedies. Example Option A, taken from the USMCA, obliges investors to start proceedings before the national courts of the host state and exhaust all national remedies before going to arbitration. Whereas in Example Options B and C, the investor has an option to choose between the national courts and arbitration, without a requirement to exhaust local remedies. In Example Option D, taken from the IISD Model Agreement, the provisions mandate an obligatory exhaustion of national legal remedies before proceeding to arbitration before an international panel. Only if national remedies are either not available or the judicial

[545] Porterfield, Matthew C., *Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?,* 41 YALE J. INT'L L. 5. Fall 2015. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735036 (citing Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW 22 (2d ed. 2004) ("The requirement that local remedies should be resorted to seems to have been recognized in the early history of Europe before the modern national state had been born . . . .")).
[546] Porterfield, *supra* note 545, at 5.
[547] Id.
[548] Id. at 17.

system in the respective country is known for a lack of independence, can the investor proceed directly to arbitration. This is different than language on exhaustion of national remedies in the USMCA and other IIAs that gives the investor the possibility of choosing between national remedies and arbitration.

Example Options for Exhaustion of Local Remedies

Example Option A: Settlement of Disputes

[…] No claim shall be submitted to arbitration under this Annex unless:

(a) the claimant (for claims brought under Article 14.D.3.1(a) (Submission of a Claim to Arbitration)) and the claimant or the enterprise (for claims brought under Article 14.D.3.1

(b) first initiated a proceeding before a competent court or administrative tribunal of the respondent with respect to the measures alleged to constitute a breach referred to in Article 14.D.3; (b) the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding in subparagraph (a) was initiated;

Source: USMCA, Article 14.D.5

Example Option B: Settlement of Disputes between an Investor of one Party and the Other Party

[…] 3. If a dispute cannot be settled amicably by means of negotiations during a period of six months starting from the date of receipt by the Party who is a party to the dispute of the written request of the investor of the other Party to this Chapter, it shall be submitted at the choice of the investor for consideration to: a) a competent court of the Party to this Chapter in which territory the investments were made, or (…).

Source: Colombia-Republic of Korea FTA (2013), Article 8.38

Example Option C: Choice of Forum

[…] 7. Where the dispute cannot be resolved as provided for under paragraph 5 of this Article within one hundred eighty (180) days from the date of written request for consultations 29 and negotiations, unless the disputing parties agree otherwise, it may be submitted at the choice of the disputing investor to:

(a) the courts or administrative tribunals of the disputing Party

Source: Agreement on investment under the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the Republic of India (2014), Article 20.7

Example Option D: Investor/Investment-State Disputes

(A) In the event of a dispute between an investor or investment and a host State Party as to the application or interpretation of this Agreement, and such dispute has not been resolved pursuant to good faith efforts in accordance with Article 42, the investment or investor may initiate an arbitration in accordance with the rules in this Agreement, including in Annex A, applying them mutatis mutandis to the context of an investor/investment-state dispute.
(B) A dispute between an investor or investment and a host state may not be commenced until domestic remedies are exhausted in relation to the underlying issues pleaded in relation to a breach of the Agreement.
(C) Where such remedies are unavailable due to the subject of the dispute or a demonstrable lack of independence or timeliness of the judicial or administrative processes21 implicated in the matter in the host state, an investor may plead this in an application before a panel as a preliminary matter. The decision of a panel on this issue shall be final. [...]

Source: IISD Model Agreement, Article 45

(b) State-to-State Dispute Mechanism

With the number of investment disputes rising exponentially, states have revisited the possibility of going back to state-to-state dispute settlement, as is the norm in trade disputes. While this mechanism has not gained much traction in BITs, some RTAs do encompass state-to-state dispute settlement.[549]

The Example Options below illustrate how state-to-state dispute clauses could be drafted. Example Options A and B provides for a dispute mechanism which is characteristic of a multilateral instrument and it is more oriented towards consultations and negotiations. Example Option C, taken from the Zero Draft of the AfCFTA Protocol on Investment, includes a more generic clause, which provides that for the possibility to state-to-state proceedings under the same rules of procedure as ISDS. Example Option D, taken from the IISD Model Agreement, provides for both ADRs and arbitration mechanisms to be used in case a dispute between the Contracting States arises.

Example Options for State-State Dispute Settlement Mechanism

Example Option A: State-to-State Dispute Settlement

Disputes which arise between the States Parties concerning the interpretation, application or non-fulfilment of the provisions of the Treaty of Asuncion and the agreements concluded within its framework or of Decisions of the Council of the Common Market, Resolutions of the Common
Market Group and Directives of the Mercosur Trade Commission shall be subject to the settlement procedures laid down in the Brasilia Protocol of 17 December 1991.

Sole paragraph. The Directives of the Mercosur Trade Commission are also incorporated in Articles 19 and 25 of the Brasilia Protocol.

[549] International Institute for Sustainable Development, "State-State Dispute Settlement in Investment Treaties", October 2014, p. 1. *See also,* Australia–Malaysia FTA (2012), the Japan–Philippines EPA (2006), and the Australia–United States FTA (2004).

Source: MERCOSUR Agreement – Protocol of Ouro Preto, Article 43

Example Option B: State-to-State Dispute Settlement

1. When a controversy cannot be resolved through the application of the procedures referred to in Chapters II and III, any of the State Parties to the controversy can communicate to the Administrative Secretariat its intention to resort to the arbitral procedure which is established in the present Protocol.

2. The Administrative Secretariat will immediately notify the other State Party or Parties involved in the controversy and the Common Market Group of this communication and will be entrusted with the means required for the development of the procedures.

Article 8

The State Parties declare that they recognize as obligatory, ipso facto and without need of a special agreement, the jurisdiction of the Arbitral Tribunal which in each case is established in order to hear and resolve all controversies which are referred to in the present Protocol.

Source: Brasilia Protocol of 17 December 1991, Articles 7 and 8

Example Option C: State-to-State Dispute Settlement

The relevant provisions of the Protocol on the Rules and Procedures on the Settlement of Disputes shall apply to consultations and the settlement of disputes between State Parties under this Protocol.

Source: AfCFTA Zero Draft Protocol on Investment, Annex 1 - Article 1

Example Option D: State-to-State Disputes

(A) In the event of a dispute between two or more Parties as to the application or interpretation of this Agreement, and such dispute has not been resolved pursuant to good faith efforts in accordance with Article 42, a Party may initiate an arbitration in accordance with the rules in this Agreement, including Annex A of this Agreement, applying them mutatis mutandis to the context of a state-state dispute.
(B) Such a dispute shall, unless otherwise resolved, proceed to a panel, and may, at the discretion of a disputing Party, subsequently be taken to the appellate division.

Source: IISD Model Agreement, Article 43

(c) Sunset Clauses

In case of unilateral termination of a treaty, i.e., one of the contracting parties abrogates the treaty, a sunset clause allows the investor to bring claims against the host state for a period

of time.[550] Only if the parties to the treaty decide to terminate the sunset clause will an investor not be able to lawfully bring a claim against the host state. The termination of the sunset clause equates to the ultimate withdrawal of consent to arbitration. In the EU, due to investment policy reform, in May 2020, 23 Member States adopted the so-called EU Termination Treaty,[551] through which these Member States mutually agreed to terminate the intra-EU BITs and their sunset clauses.

RTA drafters have the option of including or not including a sunset clause. A number of RTAs include such clauses in their investment chapters, such as the India-Korea Comprehensive Economic Partnership Agreement (2009), while other treaties do not provide for a survival clause and merely mention the possibility of states withdrawing from the agreement after notification, such as the Canada-Chile FTA (2008).

The Example Options provided below offer some examples of how a sunset clause could be formulated. All three options have some common features: (i) the clause is activated when one of the parties withdraws from the treaty, (ii) it provides protection if the investment is made before the withdrawal, and (iii) it applies for a determined period of time after the treaty ceases to be in effect. The duration of the survival clause varies, and there is no fit-for-all duration. Sometimes Parties opt for a short period of time, such as three years (Example Option B), or a longer period of ten years (Example Option A) or fifteen years (Example Option C).

Example Options for Sunset Clause Provisions

Example Option A: Survival/Sunset Clause

This Agreement shall terminate when either of the remaining Contracting Parties as are stipulated in paragraph 5 withdraws in accordance with that paragraph. In respect of investments acquired prior to the date of termination of this Agreement, the provisions of this Agreement shall continue to be effective for those remaining Contracting Parties for a period of ten years from the date of termination of this Agreement.

Source: Agreement among The Government of Japan, the Government of the Republic of Korea and the Government of The People's Republic of China for the promotion, facilitation and protection of investment, Article 27

Example Option B: Survival Clause

[…]

2. Notwithstanding paragraph 1, a claim may be submitted under an agreement listed in Annex 30-A in accordance with the rules and procedures established in the agreement if: […] (b) no more than three years have elapsed since the date of termination of the agreement

Source: Comprehensive Economic and Trade Agreement between Canada and the European Union, Article 30.8

[550] *See Gavazzi v. Romania,* ICSID Case No. ARB 12/25, Decision on Jurisdiction, Admissibility and Liability, p. 1, 5

[551] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L169, 29.05.2020, p. 1-41

Example Option C: Entry into Force, Duration, and Termination

In the event that this Agreement is terminated, the provisions of this Chapter, the provisions in Chapter 15, and other provisions in the Agreement necessary for or consequential to the application of this Chapter, except paragraph 1 of Article 6.3 and Article 6.16, shall continue in effect with respect to investments made or acquired before the date of termination of this Agreement for a further period of fifteen years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

Source: Comprehensive economic cooperation agreement between the Republic of India and the Republic of Singapore, Article 6.24

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