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Technical Barriers to Trade and Sanitary and Phytosanitary Measures in Preferential Trade Agreements

The Recent Past and the Near Future

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3.1 INTRODUCTION

The United Nations defines '[n]on-tariff measures (NTMs) [as] policy measures other than tariffs that can potentially have an economic effect on international trade in goods' (UN, 2022).[1] While many NTMs take the form of government regulations, standards, and testing procedures aimed at protecting public health or the environment, they often pose challenges to exporters, importers, and policymakers.

This chapter focuses on two NTMs: technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures. The World Trade Organization's (WTO) TBT Agreement aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not create unnecessary obstacles to trade. The WTO's SPS Agreement seeks to protect human, animal, and plant life or health from pests, and diseases, as well as additives, contaminants, and toxins, and aims to ensure that such measures do not constitute disguised restrictions on international trade. Both Agreements seek to ensure that WTO Members have sufficient policy space to address these important public policy objectives, while at the same time ensuring that NTMs do not result in arbitrary and unjustifiable discrimination and disguised restrictions on international trade.

Since the establishment of the WTO in 1995, the number of TBT and SPS measures notified by WTO Members to the WTO increased gradually by an annual average of around 10 per cent (Figure 3.1). With the steady decline in tariffs since 1947, WTO Members have devoted increasing attention to disciplining the use of NTMs, such as TBT and SPS measures. While fluctuating from year to year, TBT and SPS measures continue to cause WTO Members to raise trade concerns in the relevant WTO committees (Figure 3.2).

[1] The authors express their appreciation to Rodrigo Polanco for his review and comments on the text. All remaining errors are those of the authors.

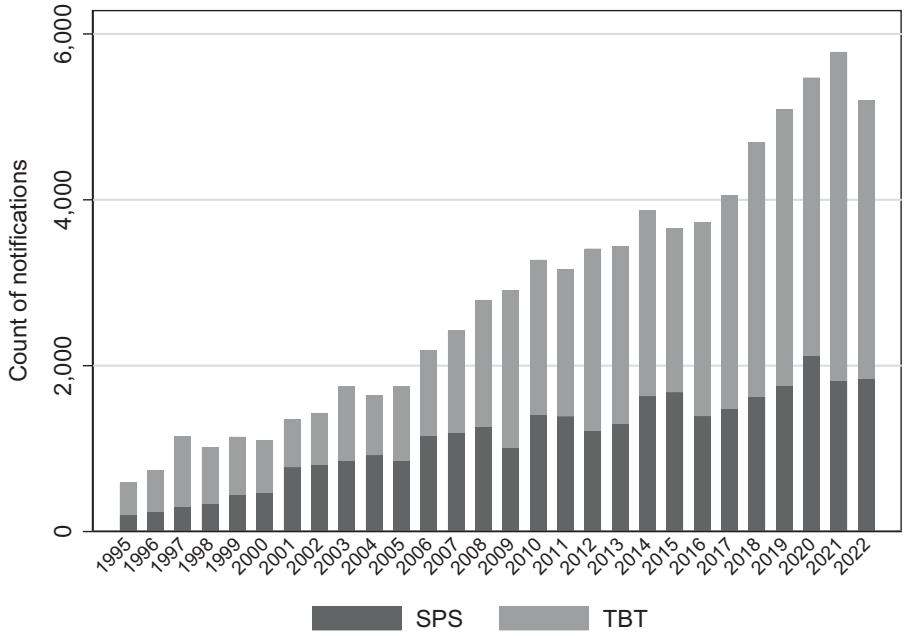

FIGURE 3.1 TBT and SPS notifications to the WTO.
Source: Sebastian Klotz's calculations and illustration based on WTO (2022)

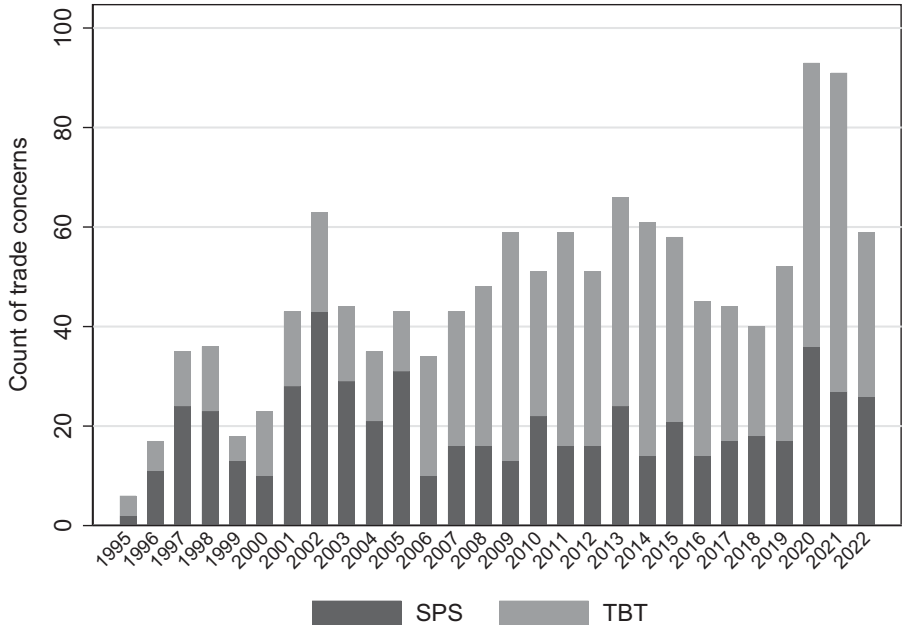

FIGURE 3.2 TBT and SPS trade concerns raised at the WTO.
Source: Sebastian Klotz's calculations and illustration based on WTO (2022)

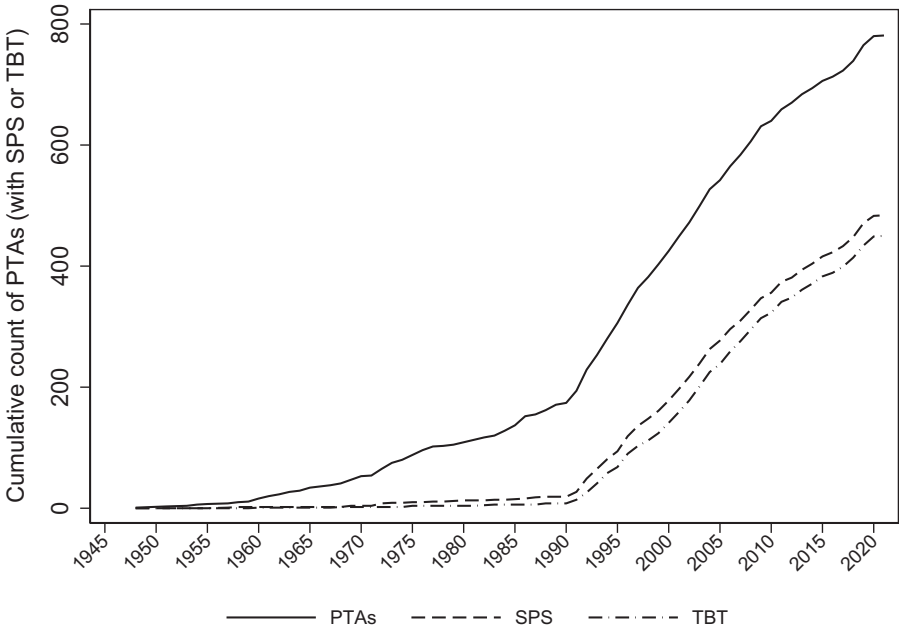

FIGURE 3.3 TBT and SPS chapters in PTAs.
Source: Sebastian Klotz's calculations and illustration based on Dür et al. (2014)

TBT and SPS measures play an important role in the governance of NTMs in the multilateral trade policy regime, but also in preferential trade agreements (PTAs). Indeed, since the entry into force of the WTO TBT and SPS Agreements, on 1 January 1995, an increasing number of PTAs include TBT and SPS chapters and provisions (Figure 3.3).

This chapter is organised as follows. We briefly outline the existing literature on the evolution and design of TBT and SPS chapters in PTAs. We then examine the recent past and assess the extent to which four mega-regional agreements appear to be inspired by previous agreements. Our analysis is focused on the European Union (EU)–Canada Comprehensive Economic and Trade Agreement (CETA), the United States–Mexico–Canada Agreement (USMCA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Regional Comprehensive Economic Partnership (RCEP). We seek to identify existing trends and novel development and provisions that may inform PTA design and which may eventually be multilateralised.

3.2 THE RECENT PAST

3.2.1 *Literature Review*

3.2.1.1 Spillovers between the WTO and PTAs

Preferential trade agreements and multilateral trade agreements, such as the WTO TBT and SPS Agreements, are often closely intertwined and build upon one

another (Cottier et al. 2015). Approximately 85 per cent of PTAs signed since 1995 include a reference to the WTO or replicate sizeable parts of the relevant legal texts (Allee et al. 2017a). Of the PTAs that include a TBT and/or SPS chapter, around three-quarters include a reference to the WTO. On average, around 11 per cent of these TBT and SPS chapters replicate verbatim from the respective WTO agreements (Allee et al. 2017a). In some instances, particularly in the areas of TBT and SPS measures, PTA parties may agree on deeper cooperation (WTO plus, WTO+). In other areas, such as competition and human rights, PTA partners may agree on cooperation that goes well beyond the WTO mandate (WTO extra, WTO-X) (Horn et al. 2010).

3.2.1.2 Spillovers between PTAs

Preferential trade agreement negotiators rely on multilateral trade agreements and also replicate texts from other PTAs. European Union and United States (US) PTA provisions are found in many other PTAs due to replication by third countries (Horn et al. 2010, 2011; WTO 2011a; Lester and Barbee 2013; Baccini et al. 2015; Egan and Pelkmans 2015; Allee and Elsig 2019; Elsig and Klotz 2019). Forty-five per cent of the Trans-Pacific Partnership (TPP) text, the CPTPP predecessor, is drawn directly from US PTAs signed between 1995 and 2015 (Allee and Lugg 2016). Notably, around 35% of the US–Bahrain Free Trade Agreement (FTA) (2004) TBT chapter and 28% of the US–Australia FTA (2005) SPS chapter are replicated in TPP. Although the US withdrew from TPP in 2017, its TBT and SPS chapters appear to have been influential in the 2018 USMCA. The United States–Mexico–Canada Agreement duplicates 37% and 65% of TPP's TBT and SPS provisions (Elsig and Klotz, 2019).

The EU also reuses its template, albeit less consistently than the US. With respect to TBT provisions, 16% of previous Canadian and EU TBT chapters are replicated in CETA. More than 50% of the TBT chapter in the 2009 Canada–Jordan FTA appears in CETA. Similarly, CETA replicates approximately 17% of the SPS chapter of the 2008 Canada–Colombia FTA (Elsig and Klotz 2019).

The inclusion of specific TBT and SPS provisions in PTAs follows a hub-and-spoke approach (Horn et al. 2010, 2011; WTO 2011a). For example, the type of transparency provisions favoured by the US are also commonly included in other North American, East Asian, South-Central American, and Pacific Ocean PTAs, but are less commonly featured in EU and African PTAs (WTO 2011a; Lejárraga 2013, 2014).

3.2.1.3 The Design of SPS Chapters

An early analysis of fifty-one PTAs signed between 1992 and 2009 finds that more than 80 per cent of these PTAs include SPS provisions on harmonisation, equivalence, regionalisation, risk assessment, transparency, and technical cooperation and

joint committees (Fulponi et al. 2011). The authors conclude that approximately one-quarter are WTO+ in the areas of harmonisation, equivalence, regionalisation, and risk assessment. Almost half go beyond WTO rules on transparency. Other early studies with a larger sample size focus on transparency and enforceability (Lejárraga, 2013, 2014). These studies point to a close relationship between multilateral and preferential trade policy regimes, in particular a close relationship between WTO Members' work in the SPS Committee and the design of SPS chapters in PTAs.

3.2.1.4 The Design of TBT Chapters

Early TBT studies (Lesser 2007; Piermartini and Budetta 2009) found that TBT liberalisation is influenced by PTA Members' level of development, the PTA's integration ambition, and EU and US involvement. More recent studies (Molina and Khoroshavina 2015, 2018; Espitia et al. 2020) largely confirm these findings and the importance of the transatlantic divide as a determinant in the design of TBT chapters.

3.2.1.5 Transatlantic Differences in the Design of TBT and SPS Chapters

Transatlantic differences between the EU and the US on TBT- and SPS-related measures have a long history and are well documented (Lesser 2007; Heydon and Woolcock 2009; Piermartini and Budetta 2009; Stoler 2011; Ti-Ting 2012; Molina and Khoroshavina, 2015, 2018; Espitia et al., 2020). The EU favours harmonisation towards EU regulations, standards, and conformity assessment procedures when it signs PTAs with geographically close partner countries, and towards international standards when it signs PTAs with geographically more distant countries. The US emphasises that any international standard developed in line with the 'Six Principles' of transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and a development dimension is an international standard (McDaniels et al., 2018).

The United States Trade Representative's (USTR) National Trade Estimate Report on Foreign Trade Barriers repeatedly raises TBT- and SPS-related concerns. In its 2020 edition, the Report identifies TBT-related concerns, including transparency and notification, European standardisation, and conformity assessment procedures; chemicals; renewable fuels; sustainability criteria; energy efficiency regulations; transport fuel quality; agriculture quality schemes; wine traditional terms; distilled spirits ageing requirements; and the certification of animal welfare. SPS measures-related concerns included hormones and beta agonists, antimicrobials, agricultural biotechnology, pathogen reduction treatments, certification requirements, somatic cell count, animal by-products, live cattle, agricultural chemicals, and pesticide residues. The USTR Report also notes that '*[t]he EU's approach to standards-related measures, including its conformity assessment framework, and its efforts to encourage governments around the world to adopt its approach, including European regional standards, creates a challenging environment for U.S. exporters*' (USTR, 2020, p. 178).

TABLE 3.1 *Text overlaps between the four mega-regionals and previous PTAs*

	Share of used PTAs (%)		Share of duplicated text (%)	
PTAs	TBT	SPS	TBT	SPS
CETA	34	21	20	9
CPTPP	81	51	20	15
USMCA	70	46	20	18
RCEP	80	58	17	14
Average	**66**	**44**	**19**	**14**

3.2.2 *Data Analysis*

Building upon the literature outlined above, we apply a text-as-data analysis to explore the TBT and SPS chapters of the four mega-regional PTAs: CETA, CPTPP, USMCA, and RCEP. Before discussing the details of this analysis, we summarise the first set of results in Table 3.1. We find that, in all four mega-regional PTAs, negotiators rely more on previous PTAs when designing the TBT chapter than the SPS chapter. This can be observed in two ways: first, on average, the negotiators copy-pasted 66% of previous TBT chapters but only 44% of prior SPS chapters. Second, the negotiators duplicated, on average, around 19% of previous TBT chapters but only 14% of prior SPS chapters. In other words, the negotiators did not only consult more PTAs but also replicated relatively more text from those PTAs for TBT than for SPS chapters.

The second set of results is summarised in Table 3.2. Here, we analyse the text overlap only among the four mega-regionals. We find that considerable parts of CPTPP are duplicated in USMCA and, to a lesser extent, in RCEP. In contrast to the first set of results, this analysis indicates that relatively more text is duplicated in the area of SPS than in TBT chapters.

3.2.2.1 Data and Methodology

To generate these results, we analysed all PTAs that have been signed since 2000, notified to the WTO, that are currently in force, and include at least one signatory party that is also party to CETA (signed in 2016), CPTPP (2018), USMCA (2018), or RCEP (2020). This sample includes 160 PTAs. Of these PTAs, 124 PTAs (77%) include a TBT chapter, and 118 PTAs (73%) include an SPS chapter. For these PTAs, we extract all texts from the latest version of the Design of Trade Agreements database (DESTA, Dür, Baccini, and Elsig 2014).[2]

To assess the extent to which CETA, CPTPP, USMCA, and RCEP are influenced by previous PTAs, we rely on text-as-data analysis techniques previously

[2] We thank the DESTA team for access to their collection of texts.

TABLE 3.2 *Text overlaps between the four mega-regionals*

	TBT			
	CETA (%)	CPTPP (%)	USMCA (%)	RCEP (%)
CETA	–			
CPTPP	9	–		
USMCA	9	27	–	
RCEP	11	13	13	–
	SPS			
	CETA (%)	**CPTPP (%)**	**USMCA (%)**	**RCEP (%)**
CETA	–			
CPTPP	5	–		
USMCA	5	56	–	
RCEP	4	28	17	–

employed by Allee and Lugg (2016), Allee et al. (2017a, b), and Elsig and Klotz (2019). More precisely, we use the open-source Windows-based program WCopyfind (version 4.1.5) to compare all PTA texts and assess text overlaps. In line with previous research, we define a minimum of six consecutive identical words as a match. Non-words, letter cases, numbers, and punctuation are ignored. Based on the number of matches, WCopyfind calculates a percentage similarity score.

3.2.2.2 Comprehensive Economic and Trade Agreement (CETA)

To assess CETA, we analyse thirty-five PTAs previously signed by the EU or Canada (Figure 3.4). Twenty-six of these PTAs (74%) include a TBT chapter, and 23 PTAs (65%) include an SPS chapter. Of the PTAs that do include a TBT chapter, nine PTAs (34%) are identified as influential for CETA's TBT chapter, and five PTAs (21%) are influential for CETA's SPS chapter. The average text overlap for the TBT chapter is 20%, and for the SPS chapter, 9%. By far, the most influential TBT chapter is Canada–Jordan (2009) (51% overlap). The most influential SPS chapter is Canada–Colombia (2008) (17% overlap).

3.2.2.3 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

For the analysis of CPTPP, we focus on ninety-nine PTAs signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam (Figure 3.5). Despite the withdrawal of the US from CPTPP, we also include previous US PTAs, as the US participated strongly in the negotiation of TPP (CPTPP's predecessor) (Allee and Lugg 2016). Ninety-one of the ninety-nine PTAs

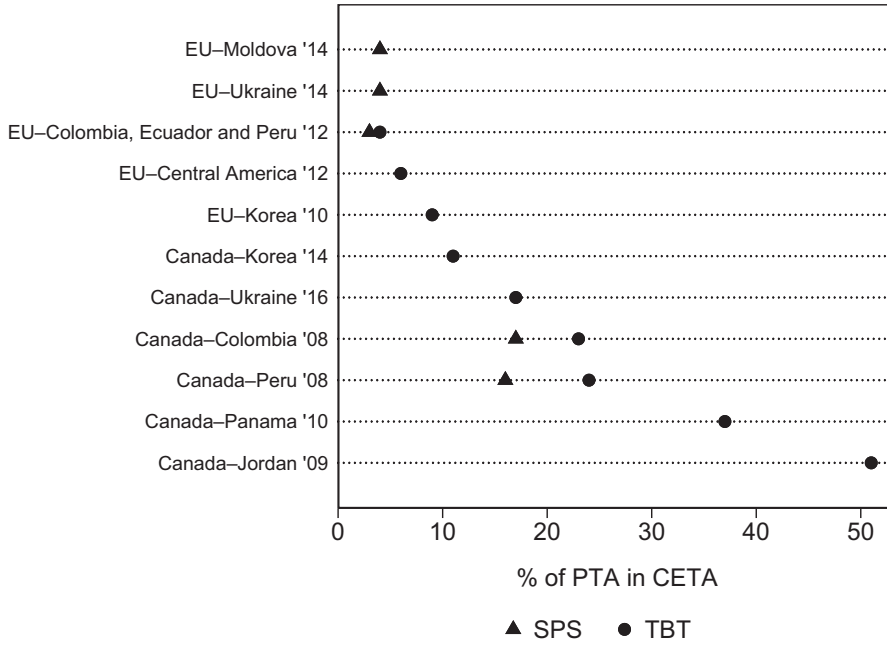

FIGURE 3.4 TBT and SPS chapters in CETA.
Source: Sebastian Klotz's calculations and illustration

(91%) include a TBT chapter, and eighty-eight of the ninety-nine PTAs (88%) include an SPS chapter. Of the PTAs that include a TBT chapter, seventy-four PTAs (81%) are identified as influencing CPTPP. Of the PTAs that include an SPS chapter, fifty-one PTAs (57%) are identified as influential. On average, the text overlap for CPTPP's TBT chapter is 20%, while the average text overlap for the SPS chapter is 15%. The PTA between Peru and Australia (2018) stands out in both areas. The text overlap is 94% for the TBT chapters and 80% for the SPS chapters. USMCA, which was signed in the same year as CPTPP, is also among the most influential PTAs. Thirty-four per cent of its TBT chapter and 45% of its SPS chapter overlap with the respective CPTPP chapters. USMCA is one of the few PTAs where the text overlap is larger for the SPS chapter than for the TBT chapter.

3.2.2.4 United States–Mexico–Canada Agreement (USMCA)

To assess USMCA, we analyse thirty-two PTAs signed by the US, Mexico, and Canada (Figure 3.6). Almost all of these PTAs include TBT chapters (96%) and SPS chapters (93%). Of these, twenty-two PTAs (70%) are influenced by the USMCA TBT chapter. Fourteen PTAs (46%) influenced the USMCA SPS chapter. On average, the text overlap of the USMCA TBT chapter with previous PTAs is

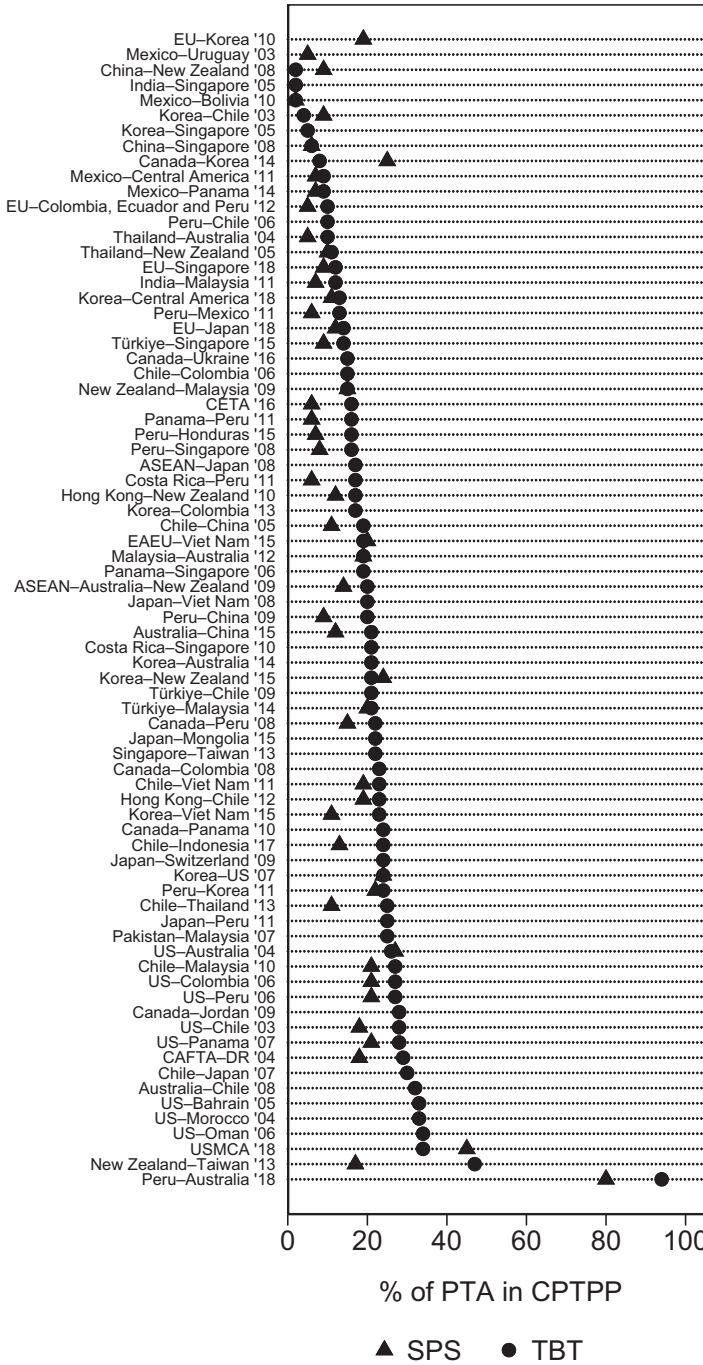

FIGURE 3.5 TBT and SPS chapters in CPTPP.
Source: Sebastian Klotz's calculations and illustration

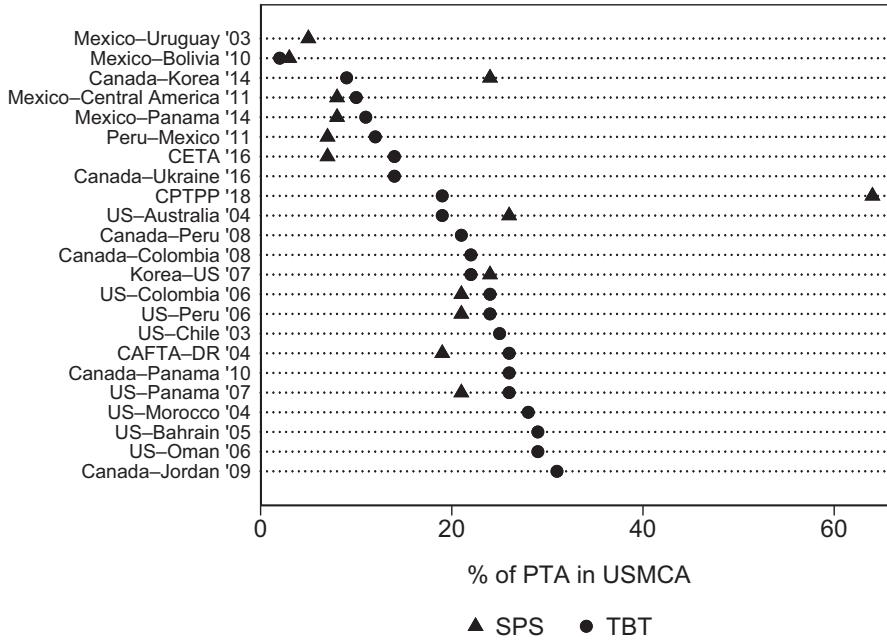

FIGURE 3.6 TBT and SPS chapters in USMCA.
Source: Sebastian Klotz's calculations and illustration

20%; for the USMCA SPS chapter, the average overlap is 18%. For the TBT chapter, Canada–Jordan (2009) is the most influential, with an overlap of 31%. In the area of SPS, CPTPP stands out with an overlap of 64%.

3.2.2.5 Regional Comprehensive Economic Partnership (RCEP)

For the analysis of RCEP, we assess eighty-eight previous PTAs signed by Australia, Brunei, Cambodia, China, Indonesia, Japan, South Korea, Laos, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Thailand, and Viet Nam (Figure 3.7). Seventy-one of these PTAs (80%) include TBT chapters, and sixty-eight PTAs (77%) include SPS chapters. Of the PTAs that include TBT chapters, fifty-seven PTAs (80%) are influential for the RCEP TBT chapter. Of the PTAs that include SPS chapters, forty PTAs (58%) are influential for the RCEP SPS chapter. The average text overlap of the RCEP TBT chapter with previous PTAs is 17%. The average text overlap for the SPS chapter is 14%. ASEAN–Australia–New Zealand (2009) and Indonesia–Australia (2019) are almost equally influential for the RCEP TBT chapter, with respective overlaps of 37% and 38%. Together with ASEAN–Hong Kong (2018), the PTA between ASEAN–Australia–New Zealand (2009) is also the most influential source for the RCEP SPS chapter (overlap 31%).

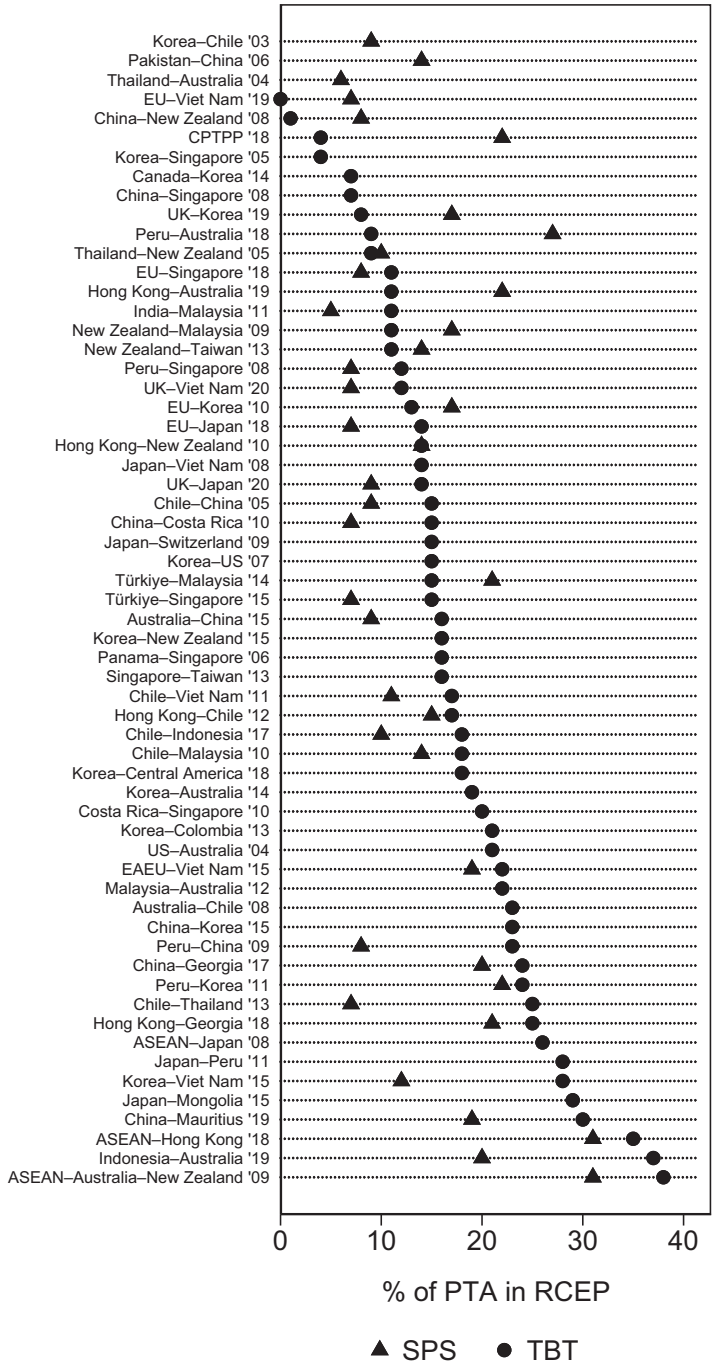

FIGURE 3.7 TBT and SPS chapters in RCEP.
Source: Sebastian Klotz's calculations and illustration

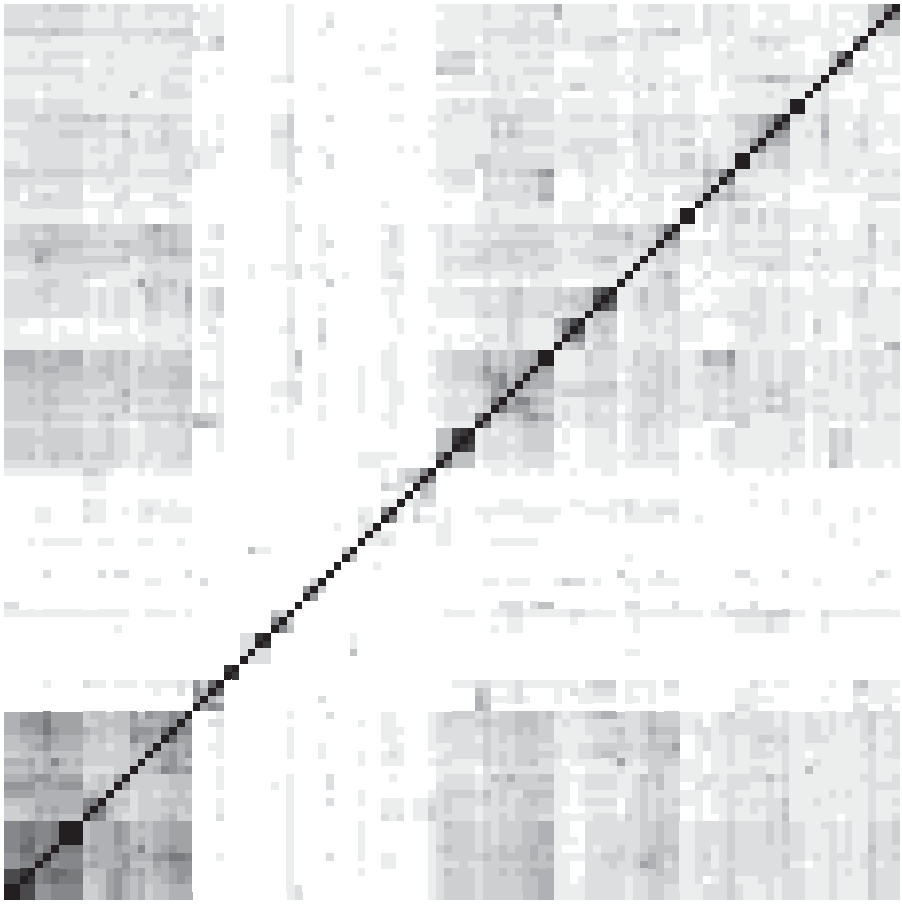

FIGURE 3.8 TBT chapters in CETA, CPTPP, USMCA and RCEP, and previous PTAs.
Source: Sebastian Klotz's calculations and illustration; darker shades indicate greater text overlaps

3.2.2.6 The Full Sample

To conclude this section, we provide a bird's-eye view of all 160 PTAs. Figures 3.8 and 3.9 illustrate the results of the text comparison for the full sample using heatmaps.[3] Essentially, this methodology compares each PTA to one another. The larger the text overlap, the darker the colour. The heatmaps also allow for identifying certain clusters. Two observations stand out. First, the overall shading is darker for TBT than for SPS chapters, indicating again that more text is duplicated between PTAs' TBT chapters than SPS chapters. And indeed, the average overlap for TBT

[3] The X and Y axes are omitted for readability. For more details on the methodology, please see Elsig and Klotz (2021).

FIGURE 3.9 SPS chapters in CETA, CPTPP, USMCA and RCEP, and previous PTAs.
Source: Sebastian Klotz's calculations and illustration; darker shades indicate greater text overlaps

chapters is 16%, whereas the overlap for SPS chapters is slightly lower at 13%. Second, both figures show a dark cluster in the lower left corner. In the area of TBT, these text overlaps are particularly evident among PTAs to which Chile, Singapore, and the US are parties. US–Peru (2006), US–Colombia (2006), US–Bahrain (2005), and US–Oman (2006) have essentially identical TBT chapters. Similar to TBT, the highest overlaps in SPS chapters can be found in PTAs to which the US and Chile, but also Canada, are parties.

3.3 THE NEAR FUTURE

The failure of the Doha Round of Trade negotiations (Doha Development Agenda) to achieve meaningful results has encouraged WTO Members to seek bilateral and plurilateral solutions to various trade issues. This section examines novel or

innovative developments (or lack thereof) in the TBT and SPS provisions of four mega-regional PTAs to ascertain whether certain models are dominating and whether there are areas of contention. It builds upon the first part of this article by adding greater granularity to the analysis – comparing typical and new TBT and SPS provisions across CETA, USMCA, CPTPP, and RCEP.

These four agreements demonstrate varying levels of ambition. This is evident when one compares the treatment of TBT and SPS measures. A comparison reveals that CETA and CPTPP are the most ambitious, followed by USMCA. RCEP is somewhat less ambitious in terms of both TBT and SPS provisions. The difference in the level of ambition in the selected agreements makes the identification of novel or innovative developments a bit easier. As one would expect, the greater the level of ambition, the more likely there will be novel TBT and SPS developments (frequently in the form of ideas and language not repeated in many other agreements). Modest agreements often reflect dominant templates favoured by large trading countries and blocks (demonstrated in the first section of this chapter). Comparing TBT and SPS chapters with high and low levels of ambition may reveal areas of contention.

As most lawyers and diplomats will appreciate, there are many ways to frame similar obligations – an analysis of word patterns found in various agreements scratches the surface – revealing only when drafters subscribe to existing templates. Once a computerised word pattern analysis is complete (see the previous section), it is necessary to undertake a legal analysis of selected provisions to identify novel developments, emerging concepts, and areas of contention. These are likely to be provisions that are not repeated, or infrequently repeated, in existing PTAs.

3.3.1 *TBT Provisions*

The treatment of technical regulations in FTAs is of considerable importance as it can be a major determinant of market access for, primarily, non-agricultural goods. With the decline in tariffs since 1947, and the lack of progress in WTO negotiations, in particular the Doha Development Agenda, it is not surprising that trading countries have taken a bilateral or plurilateral approach towards liberalisation of non-tariff barriers, in particular technical regulations, standards, and conformity assessment procedures. Having said this, the liberalisation of TBT-related NTMs has proven slow, uneven, and not particularly ambitious, as demonstrated by the following analysis.

3.3.1.1 TBT Definitions and General Incorporation of the TBT Agreement

All four of the agreements under review apply the definitions found in the TBT Agreement in their entirety.[4] CETA and RCEP do not go beyond the TBT definitions.

[4] Article 4.2.1 CETA, Article 11.1 USMCA, Article 8.1.1 (TPP), and Article 6.1 RCEP. CPTPP incorporates large portions of TPP. Throughout the chapter, a reference to TPP is therefore a reference to sections of TPP incorporated into CPTPP.

USMCA and TPP, the two agreements that involved the US at the negotiating stage, go beyond the TBT definitions, for example, by adding definitions for a 'mutual recognition agreement' (MRA) and a 'mutual recognition arrangement'.[5] Both agreements provide that MRAs include agreements to implement two Asia Pacific Economic Cooperation (APEC) mutual recognition arrangements.[6]

All four agreements also incorporate certain TBT provisions, but here the analysis becomes more complex. CETA incorporates almost all of the TBT Agreement in its entirety.[7] USMCA and CPTPP include the most important TBT provisions, with the primary exception of the provisions dealing with the equivalence of technical regulations (Article 2.7 TBT), and mutual recognition of conformity assessment procedures (Article 6 TBT). While affirming the obligations of the TBT Agreement,[8] RCEP incorporates a smaller selection of TBT provisions,[9] and specifically excludes the requirement to use international standards as a basis for technical regulations (harmonisation – Article 2.4) and the requirement that WTO Members shall ensure that central government bodies use relevant guides or recommendations issued by international standardising bodies (harmonisation – Article 5.4). RCEP does not strengthen the TBT Agreement's already weak mutual recognition provisions; it only recognises the importance of MRA procedures and encourages cooperation between relevant conformity assessment bodies to accept results.[10]

3.3.1.2 Scope of the Mega-regional Agreements

All four mega-regional agreements follow the TBT Agreement approach with respect to their scope by excluding government procurement and SPS measures

[5] Article 8.1.2 TPP and Article 11.1.2 footnote 1 USMCA. The two agreements are: the APEC Mutual Recognition Arrangement for Conformity Assessment of Telecommunications Equipment of 8 May 1988, and the Electrical Equipment Mutual recognition Arrangement of 7 July 1999.

[6] Article 4.2 CETA incorporates TBT Articles 2, 3, 4, 5, 6, 7, 8, and 9, and Annexes 1 and 3.

[7] Article 11.3 USMCA incorporates in its subparagraphs: (a) Articles 2.1, 2.2, 2.3, 2.4, 2.5, 2.9, 2.10, 2.11, and 2.12; (b) Articles 3.1, 4.1, and 7.1; (c) Articles 5.1, 5.2, 5.3, 5.4, 5.6, 5.7, 5.8, and 5.9; and (d) paras D, E, F, and J of Annex 3.

Article 8.4.1 TPP incorporates in its subparagraphs: (a) Articles 2.1, 2.2, 2.4, 2.5, 2.9, 2.10, 2.11, and 2.12; (b) Articles 5.1, 5.2, 5.3, 5.4, 5.6, 5.7, 5.8, and 5.9; and (c) paras D, E, and F of Annex 3.

[8] Article 6.4.1 RCEP.

[9] Article 6.4.1 RCEP incorporates in its subparagraphs: (a) Article 2, except paras 4, 7, 8, and 12; (b) para 2 of Article 4; (c) Article 5, except para 4; (d) para 3 of Article 6; (e) para 1 of Article 9; and (f) Annex 3, except para A.

[10] Article 6.8.5(a) RCEP recognises the utility of mutual recognition of conformity assessment procedures and Article 6.8.8 encourages cooperation between the parties' conformity assessment bodies to facilitate acceptance of conformity assessment results. Article 6.9.3 endorses cooperation between the parties' conformity assessment bodies.

from their purview.[11] Their scope differs to some degree with respect to how standardisation bodies below the central government level should be treated. Article 1.8.2 CETA makes a party's obligations applicable to all levels of government. At first glance, Article 4.1.5 would seem to limit the scope of Article 1.8 by stating that the 'extent of obligations' provision does not apply to Article 3 TBT (which would have required that parties take 'all necessary measures' to give effect to the Agreement at all levels of government). This is an incorrect conclusion. Instead, Article 4.2.1 CETA incorporates the obligations present in Article 3 TBT with the effect that parties must take 'reasonable measures' to ensure compliance by local governments.

Through its incorporation of Articles 3.1 and 4.1 of the WTO TBT Agreement, Article 11.3.1 USMCA applies a 'reasonable measures' approach to ensure that local government bodies comply with the provisions of the PTA governing technical regulations and standards but is silent with respect to conformity assessment procedures.[12]

The obligation in Article 8.3.2 TPP is weaker. Parties have an obligation to take reasonable measures within their authority 'to encourage observance' by regional and local government bodies with respect to the preparation, adoption, and application of technical regulations, standards, and conformity assessment procedures and extend this obligation to other articles in chapter 8 and its annexes.

Article 6.3.2 RCEP also contains a 'reasonable measures' provision applicable to local government bodies and non-governmental bodies responsible for the preparation, adoption, and application of technical regulations, standards, and conformity assessment procedures.

3.3.1.3 Incorporation of TBT Committee Decisions

Unlike USMCA, CPTPP, and RCEP, CETA does not explicitly incorporate the WTO TBT Committee's 'Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement'.[13] But as CETA incorporates almost all of the TBT Agreement, and as Articles 1.6 (Reference to Other Agreements)[14]

[11] With respect to government procurement see Article 4.1.2(a) CETA, Article 11.2.2(a) USMCA, Article 8.3.4 TPP, and Article 6.3(b) RCEP. With respect to sanitary and phytosanitary measures see Article 4.1.2(b) CETA, Article 11.2.2(b) USMCA, Article 8.3.5 TPP, and Article 6.3(a) RCEP.

[12] Many such measures might nevertheless fall within the purview of Article 7 TBT as the underlying technical regulations and standards are likely to be the same.

[13] WTO Document G/TBT1 with numerous revisions.

[14] Article 1.6 CETA provides: 'When this Agreement refers to or incorporates by reference other agreements or legal instruments in whole or in part, those references include: (a) related annexes, protocols, footnotes, interpretative notes and explanatory notes; and (b) successor

and 4.1.4 CETA[15] contemplate updating CETA based on changes to other agreements (which would include the TBT Agreement), the ambitious nature of CETA is evident. Not only does CETA implicitly incorporate the Decision, and related annexes, protocols, footnotes, interpretative notes, and explanatory notes, it also incorporates successor agreements that bind the parties. Due to its unique language and broad scope, CETA stands in contrast to the narrower scope of the other megaregionals. Automatic updating of CETA based on WTO developments is a novel approach worthy of recognition.

Article 11.4.2 USMCA requires each party to adopt the Committee Decision on International Standards (as revised) to determine whether there is an international standard, guide, or recommendation within the meaning of Articles 2 and 5 and Annex 3 of the TBT Agreement,[16] and for notification purposes 'to consider, among other things, the relevant guidance in the Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995 (G/TBT/1/Rev.13), as may be revised'. The TPP uses the same language in Article 8.5.2 with respect to the application of the TBT Committee Decision on International Standards. RCEP uses similar language but contains a weaker obligation. Article 6.5.2 only requires that 'each Party take into account the principles set out in the Decision of the Committee … and subsequent relevant decisions and recommendations … adopted by the WTO Committee …'.

3.3.1.4 Strengthened Use of International Standards

The US, Canada, and the EU apply different approaches to the formulation of standards with the result that one can expect to see somewhat divergent language. The US and Canada take a more private sector approach, while the EU favours standardisation at the regional (governmental) level. Differences in approaches colour provisions related to standardisation. Article 4.3 CETA calls for the parties to strengthen cooperation, including in the area of international standards. Articles 4.6.2 and 4.7.1(d) also encourage the parties to promote cooperation between their standardisation bodies. Article 4.6.2 further encourages the parties to exchange information and harmonise standards based on mutual interest and reciprocity. Article 11.9.5 USMCA encourages cooperation between the parties' respective

agreements to which the Parties are party or amendments that are binding on the Parties, except where the reference affirms existing rights.'

[15] Article 4.1.4 CETA provides: 'References in this Chapter to technical regulations, standards, and conformity assessment procedures include amendments thereto, and additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.'

[16] Defined in Article 11.1 USMCA as Annex 2 to Part 1 (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement) in the Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995 (G/TBT/1/Rev.13), as may be revised, issued by the WTO Committee on Technical Barriers to Trade.

standardisation organisations. Article 11.4.3 USMCA makes it clear that only the TBT Committee Decision on International Standards can be relied upon to recognise what is an international standardisation organisation. The result is that the EU's regional standardisation bodies do not qualify. A similar approach is taken in Article 8.5.3 TPP, which supports cooperation, and Article 8.5.2 TPP, which reinforces the application by the parties of the TBT Agreement and the Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade. RCEP Article 6.4.1(f) incorporates the TBT Code of Good Practice (Annex A), and Article 6.6.4 encourages cooperation between standardising bodies, supporting information exchanges regarding procedures and supporting cooperation in international standardising activities in areas of mutual interest. In summary, the distinctive North American approach to standardisation will continue to lead PTA negotiations in divergent directions. This is an area of contention that will be difficult to resolve.

3.3.1.5 Mutual Recognition

By incorporating TBT Article 6.3, CETA encourages the negotiation of MRAs related to the parties' conformity assessment procedures. Likewise, the inclusion of: (i) the Protocol on the mutual acceptance of the results of conformity assessment[17] and (ii) the Protocol on the mutual recognition of the compliance and enforcement programme regarding good manufacturing practices for pharmaceutical products also moves CETA in the direction of mutual recognition.[18] Article 11.1.2 USMCA defines both an MRA and a mutual recognition arrangement.[19] Article 11.9.4 USMCA, which is a novel provision, requires parties to explain reasons for a decision declining to recognise the results from a conformity assessment body that is a signatory to an MRA, and a decision not to continue MRA negotiations. Article 11.6.7 encourages parties to facilitate and encourage mutual recognition arrangements to recognise conformity assessment bodies, and again novelly, 'consider approving or recognizing accredited conformity assessment bodies for its technical regulations or standards, by an accreditation body that is a signatory to a mutual or multilateral recognition arrangement, for example, the International Laboratory Accreditation Cooperation (ILAC) and the International Accreditation Forum (IAF)'. Article 11.9.1 requires parties to consider sector-specific cooperation proposals for mutual recognition of the results of conformity assessment bodies, recognising existing mutual recognition arrangements between or among accreditation bodies of conformity assessment bodies. Likewise, Article 8.1

[17] Council of the European Union (2016a).
[18] Council of the European Union (2016b).
[19] Article 11.1.2 distinguishes between the two – an MRA is an intergovernmental agreement that specifies conditions for the recognition of the results of conformity assessment procedures, while a mutual recognition arrangement is an international or regional arrangement among accreditation bodies in which these bodies accept each other's results.

TPP defines an MRA (with the definition specifically including certain APEC Agreements) and a mutual recognition arrangement. Like USMCA, Article 8.6.8 TPP encourages parties 'adopting measures to approve conformity assessment bodies that have accreditation for the technical regulations or standards of the importing Party, by an accreditation body that is a signatory to an international or regional mutual recognition arrangement'. Again, like USMCA, Article 8.6.12 TPP requires parties to explain decisions to decline the use of a mutual recognition arrangement and to explain reasons for not entering into MRA negotiations. Finally, Article 8.9.1 TPP acknowledges that MRAs are one mechanism that may facilitate the acceptance of conformity assessment proceedings. Section C (Regional Cooperation Activities on Telecommunications Equipment) of TPP Annex 8-B also encourages parties to implement the APEC Mutual Recognition Arrangement for Conformity Assessment of Telecommunications Equipment of 8 May 1998 (MRA-TEL) and the APEC Mutual Recognition Arrangement for Equivalence of Technical Requirements of 31 October 2010 (MRA-ETR).

Article 6.8.5(a) RCEP recognises that MRAs are one of a broad range of mechanisms to facilitate the acceptance of the results of conformity assessment procedures. Article 6.9.3(c) RCEP recognises that enhancing participation in the frameworks for mutual recognition developed by regional and international bodies may be an avenue for cooperation.

3.3.1.6 Equivalence

Although none of the mega-regionals under review mandate equivalence, CETA incorporates the TBT Agreement's provision on equivalence (Article 2.7), and Article 4.4 establishes a cooperative procedure for requesting recognition that a technical regulation is equivalent. The other three agreements take a less ambitious approach. Neither USMCA nor TPP incorporate Article 2.7 TBT; nevertheless, Article 11.9.2(c) USMCA and Article 8.9.2(d) of TPP use almost identical language and recognise that promotion of the acceptance of technical regulations as equivalent is one of a broad range of measures that supports greater regulatory alignment. RCEP Article 6.7.3 simply repeats the language of TBT Article 2.7, thus requiring a party to give positive consideration that technical regulations that differ from their own are equivalent if they 'adequately fulfil the objectives of its own regulations'. The lack of novelty with respect to equivalence in the TBT chapters of the mega-regionals stands in contrast to the more aggressive and somewhat more novel approach taken in the SPS chapters (discussed below).

3.3.1.7 Supplier's Declaration of Conformity

Reference to the use of a Supplier's Declaration of Conformity (SDOC) is notably absent from CETA's TBT chapter. This is in contrast to Article 11.9.1(f) USMCA,

Article 8.9(f) TPP, and Article 6.8.5(f) RCEP, which recognise that a broad range of mechanisms exist to facilitate the acceptance of conformity assessment procedures and note the acceptance of an SDOC is one means to facilitate the acceptance of conformity assessment results. The mention of SDOC is a step forward, and this is a path that could be followed in future PTAs.

3.3.1.8 Strengthened Transparency

All four of the mega-regionals emphasise strengthened transparency. These provisions are detailed, and there is some commonality in their approach. While national treatment provisions feature in each, permitting various degrees of participation in the development of technical regulations and conformity assessment procedures by the central government, these provisions nevertheless differ in subtle ways.

For CETA, the Article 4.6 transparency procedure is limited to technical regulations and conformity assessment procedures and applies to interested persons of the parties. Where a consultation process is open to the public, persons of the other party may participate on terms no less favourable than its own persons (national treatment). Comments from parties must be replied to in writing before the technical regulation or conformity assessment procedure is adopted. Responses or summaries of responses to significant comments must be made public. Except in urgent cases, parties must endeavour to allow sixty days following WTO notification for comments and must give positive consideration to requests to extend the comment period. Each party must give the importer, without undue delay, the reason for the detention of goods that do not meet a technical regulation. Bodies below the central government level are subject to the 'reasonable measures' provisions incorporated from the TBT Agreement.

Article 11.7 of the USMCA national treatment obligation extends to the participation of parties in the development of technical regulations, standards, and conformity assessment procedures by central government bodies. Each party must allow persons from another party to submit written comments during a public consultation on terms no less favourable than it provides its own persons and to make these written comments publicly available. If practicable, a party is to accept written requests from another party to discuss written comments. Each party has an obligation to publish how it has addressed substantive issues raised in these comments. Standardising bodies (which are often private sector bodies in the US and Canada) are encouraged to apply the national treatment provisions set forth in Article 11.7.1. There is no provision dealing with detained goods. Provisions below the central government level are subject to the 'reasonable measures' provisions incorporated from the TBT Agreement. There is an additional obligation to take reasonable measures to ensure that proposed and final technical regulations and conformity assessment procedures of regional governments are published.

In the case of TPP, the Article 8.7.1 national treatment obligation extends to the participation of parties in the development of technical regulations, standards, and conformity assessment procedures by central government bodies. If appropriate, parties are expected to encourage non-governmental bodies to allow for parties' participation. With respect to regional government bodies and local government bodies on the level directly below the central level of government, parties are required to ensure that all new final technical regulations and conformity assessment procedures and amendments to these procedures are accessible through official websites or journals. Except in urgent circumstances, each party should normally allow sixty days from WTO notification of a draft regulation for comment. On or before the date of publication of the technical regulation or conformity assessment procedure, a party is required to make publicly available its response to significant or substantive issues presented in comments received on proposals for technical regulations and conformity assessment procedures. Lastly, a party must provide within sixty days of receipt of a request from another party a description of significant revisions it made to a proposal for a technical regulation or a conformity assessment procedure, including those made in response to comments.

In the case of RCEP Article 6.11, the transparency obligations are weaker. Parties are required to 'take into account relevant decisions and recommendations in the Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995 (G/TBT/1/Rev.13) as may be revised . . .'. Each party 'should normally allow 60 days' from the date of WTO notification for comments from other Parties, should take into account those comments, and 'endeavour to provide responses . . .'. Parties must allow other parties to participate in consultation procedures 'that are available to the general public for the development of technical regulations, national standards and conformity assessment procedures . . .', 'subject to its laws and regulations on terms no less favourable than those accorded its own persons'. Like CETA, there is also an obligation to notify an importer as soon as possible, or its representative, when goods are detained at the point of entry for non-compliance with a technical regulation or a conformity assessment procedure and provide the reasons for detention. The foregoing analysis demonstrates widespread agreement that increased transparency is an advantageous direction for future PTAs.

3.3.1.9 Dispute Settlement

CETA offers an important dispute settlement feature. Article 4.7.1(b) designates the CETA Committee on Trade in Goods to address issues that the Parties raise concerning the development, adoption, or application of standards, technical regulations, or conformity assessment procedures. If the parties are unable to resolve a matter arising under the TBT chapter, Article 4.7.2 CETA allows a party to request that the CETA Joint Committee establish an *ad hoc* technical working group to

identify solutions to facilitate trade. This consultative approach is novel to the extent that it invokes a technical working group as opposed to trade negotiators. Recourse to a technical working group does not prevent a Party from seeking redress under CETA Article 29 (Dispute Settlement) for violations at the national level of the WTO TBT Agreement or CETA's TBT Chapter.

Moreover, Article 4.2.3 CETA allows recourse to the treaty's dispute settlement mechanism for matters involving standards, technical regulations, and conformity assessment procedures of local government bodies, as well as conformity assessment procedures by non-governmental bodies and international and regional systems if one party has not achieved satisfactory results under these articles and its trade interests are significantly affected.

Article 29.3.3 CETA governs the choice of forum and clarifies that recourse to the CETA dispute settlement mechanism is without prejudice to the WTO dispute settlement system. Article 29.3.4 offers a fork-in-the-road provision whereby parties may choose to resolve equivalent obligations in either the WTO or CETA, but not both.

Dispute settlement under the USMCA follows a similar fork-in-the-road approach. Article 11.3.2 eliminates recourse to Chapter 31 of USMCA (Dispute Settlement) for: (i) claims made under the provisions of the TBT Agreement incorporated into Chapter 11 of the USMCA, or (ii) if a matter was referred, or is subsequently referred by a party to a WTO dispute settlement panel, or is taken to comply with a WTO dispute settlement decision.

Likewise, Article 28.4 TPP contains a fork-in-the-road provision that gives exclusive jurisdiction to the first forum chosen (TPP or WTO dispute settlement). However, Article 8.5 TPP prohibits recourse to that treaty's dispute settlement (Chapter 28) for disputes alleging a violation of TBT provisions incorporated into chapter 8 TPP. Otherwise, Article 28.3.1(c) brings matters arising under Chapter 8 (Technical Barriers to Trade) within the ambit of TPP dispute settlement.

RCEP rejects jurisdiction over TBT disputes that *exclusively* allege a violation of TBT provisions incorporated into RCEP through Article 6.4.1. Somewhat surprisingly, and again possibly emblematic of RCEP's lower level of ambition, Article 6.14 provides that Chapter 19 (Dispute Settlement) is not applicable to disputes arising under the TBT chapter for the first two years after entry into force of RCEP, and only then will the non-application clause be reviewed, with review to be completed within three years. In short, it is unclear from Article 6.14 when the RCEP dispute settlement provisions will apply to RCEP TBT disputes. Also surprisingly, Article 6.4.2 RCEP elevates the provisions of RCEP's TBT chapter above incorporated WTO TBT provisions in the event of inconsistency.

Fork-in-the-road approaches are achieving a consensus, at least in the mega-regionals. Of course, they still lead to uncertainty as it is unclear how a WTO panel would react if charged with resolving a dispute already before a PTA dispute settlement body.

3.3.1.10 Annexes and Protocols

One novel feature of two of the four mega-regional agreements under review, which may pave the way for future TBT alignment, is the creation of topic-specific annexes and protocols dealing with technical regulations and conformity assessment procedures. For example, Annex 4-A CETA mandates cooperation in the field of motor vehicle regulations. Of particular importance, and again demonstrating the ambitious nature of CETA, Article 4.5 CETA mandates observation of two CETA protocols: 1) the Protocol on the mutual acceptance of the results of conformity assessment,[20] and 2) the Protocol on the mutual recognition of the compliance and enforcement programme regarding good manufacturing practices for pharmaceutical products.[21]

TPP also demonstrates a significant level of ambition that suggests the importance of gradual sectoral expansion of the scope of the TBT chapter. Article 8.3.2 TPP requires each party to take reasonable measures to encourage observation of regional and local governmental bodies of the annexes to Chapter 8 (which binds central government bodies). And Article 8.3.3 TPP leaves room for the creation of amendments and additions to technical regulations, standards, and conformity assessment procedures.

Article 8.13(1) TPP provides that the *scope* of the Annexes on Pharmaceuticals, Cosmetics, Medical Devices and Proprietary Formulas for Prepackaged Food products and Food Additives is set out in the respective annexes. The *scope* of other annexes is set out in Article 8.3 (Scope), including: Annex 8-A: Wine and Distilled Spirits, Annex 8-B: Information and Communications Technology Products, Annex 8-C: Pharmaceuticals, Annex 8-D: Cosmetics, Annex 8-E: Medical Devices, Annex 8-F: Proprietary Formulas for Prepackaged Foods and Food Additives, and Annex 8-G: Organic Products.

3.3.1.11 TBT Conclusions

There are not many novel TBT developments in the mega-regionals. Three that stand out are CETA's incorporation of future WTO TBT decisions, the possibility under CETA to create a technical working group to address disagreements before the invocation of CETA dispute settlement, and the use of subject-specific and sector-specific annexes and protocols in CETA and TPP.

Except for the private sector approach that the US and Canada apply with respect to standardisation, and RCEP's postponement of TBT dispute settlement, there are not many differences of note in the agreements reviewed above. Divergences that do exist, such as recognition and implementation of the broad range of mechanisms

[20] Council of the European Union (2016a).
[21] Council of the European Union (2016b).

available to facilitate trade, have more to do with the level of ambition, rather than points of contention. Instead, what is discernible is acceptance of logical solutions that are eventually becoming dominant, such as fork-in-the-road provisions for dispute settlement, and widespread agreement on the gradual expansion of TBT disciplines, such as improved transparency – which is indicative of greater cooperation.

3.3.2 *SPS Provisions*

The treatment of SPS regulations in regional trade agreements is a major determinant of market access for agricultural goods, including processed food and beverages destined for human and animal consumption. With the decline in tariffs since 1947, weaknesses in the WTO Agreement on Agriculture, and the lack of progress in the Doha Development Agenda negotiations, trading countries are increasingly taking a regional approach towards the treatment of non-tariff barriers affecting agricultural trade. Nevertheless, defining the ideal SPS framework and disciplining liberalisation of SPS-related NTMs have proven slow, uneven, and not particularly ambitious, as demonstrated by the following analysis.

As with the TBT discussion, this section examines novel or innovative developments (or lack thereof) in the SPS provisions of the same four mega-regional trade agreements to ascertain whether certain models are dominating and whether there are areas of contention. It builds upon the first part of this chapter by adding greater granularity to the analysis – comparing typical and new SPS provisions across the four selected mega-regional trade agreements.

3.3.2.1 SPS Definitions and General Incorporation of the SPS Agreement

All four of the agreements under review apply the definitions found in Annex A of the SPS Agreement in their entirety,[22] and expressly affirm the parties' obligations under the WTO SPS Agreement.[23] CETA also incorporates definitions adopted by Codex Alimentarius (Codex), the World Organisation for Animal Health (OIE), the International Plant Protection Convention (IPPC), and the EU definition of a 'protected zone for a specified regulated harmful organism'. Annex 5-A CETA defines 'competent authorities' and allocates responsibilities to various EU, Member State, and Canadian competent authorities. In the event of a conflict, the definitions of the WTO SPS Agreement prevail. USMCA and TPP add several additional definitions which take precedence over the WTO definitions. There is considerable overlap in terms of these additional definitions (not surprising as the US participated in both negotiations). As in CETA, in TPP and USMCA a

[22] Article 5.1.1 CETA, Article 11.1 USMCA, Article 7.1.1 TPP, and Article 5.1 RCEP.
[23] Article 5.4 CETA, Article 9.4.1 USMCA, Article 7.4.1 TPP, and Article 5.4 RCEP.

competent authority is defined in terms of government bodies of each party.[24] Finally, in addition to adopting the SPS Agreement definitions, RCEP also defines 'competent authorities' and states that relevant definitions of Codex, OIE, and IPPC shall be taken into account.[25]

3.3.2.2 Scope and Objectives

All four mega-regionals use almost identical language with respect to the scope of their SPS chapters. They apply to SPS measures that may, directly or indirectly, affect trade between the parties.[26] TPP also makes clear that the SPS chapter shall not prevent parties from adopting or maintaining halal food requirements.[27] A similar provision appears in footnote 2 to Article 5.8 of RCEP. While halal labelling would normally fall under the TBT Agreement, this novel development encouraged support for TPP and RCEP from Muslim communities among the parties.

All four agreements list the objectives of their SPS chapters. The CETA objectives simply repeat the objective of the SPS Agreement and seek to further its implementation.[28] The objectives of USMCA, TPP, and RCEP are broader, emphasising transparency, strengthened communication, cooperation, and consultation.[29] The objectives of USMCA also emphasise the development and adoption of science-based international standards, and decision-making, a concept further underscored in Article 9.6 USMCA.

3.3.2.3 Adaptation to Regional Conditions

All four agreements contain provisions dealing with adaptation to regional conditions. The level of ambition varies. CETA, USMCA, and TPP contain novel provisions that one can expect to see in future agreements. Article 5.5.1 CETA recognises the concept of zoning for animals, animal products, and animal by-products, lists the diseases in Annex 5-B covered by zoning, and leaves room in Annex 5-C for the development of principles and guidelines to recognise regional conditions. For plant and plant products, Article 5.5.2 requires that a party imposing an SPS measure take into account the pest status of an area, including pest-free areas, pest-free places of production, pest-free production sites, areas of low pest prevalence, and a protected zone that the exporting party has established.

[24] Article 7.1 TPP and Article 9.1.2 USMCA.
[25] Article 5.1 RCEP.
[26] Article 5.3 CETA, Article 9.2 USMCA, Article 7.3.1 TPP, and Article 5.3 RCEP.
[27] Article 7.3.2 TPP.
[28] Article 5.2(b) CETA.
[29] Article 9.3 USMCA, Article 7.2 TPP, and Article 5.2 RCEP.

Article 9.8.1 USMCA recognises the concepts of regionalisation, zoning, and compartmentalisation as a means to facilitate trade, and calls for the parties to endeavour to cooperate on the recognition of pest- or disease-free areas, and areas of low pest or disease prevalence with the objective of acquiring confidence in the procedures followed by each party. Likewise, Article 7.7.1 TPP also recognises the concepts of regionalisation, zoning, and compartmentalisation to facilitate trade and Article 7.7.3 contains similar confidence-building language.

In comparison, Article 5.6 RCEP is a weaker provision. It only recognises pest-and disease-free areas and areas of low pest or disease prevalence.

3.3.2.4 Equivalence

Equivalence is treated in all four mega-regionals. Article 5.6 CETA contains the shortest equivalence provision, shifting much of the work to annexes, several of which remain to be negotiated. Although Article 5.6.1 CETA repeats the first sentence of Article 4.1 of the WTO SPS Agreement, Article 5.6.2 allows for possible innovation by saving room in Annex 5-D for the eventual negotiation of principles and guidelines to determine, recognise, and maintain equivalence. Annex 5-C CETA, which is also still to be negotiated, sets the stage for developing a process for the recognition of regional conditions concerning animal diseases and plant pests.

Most of Annex 5-E CETA is complete. As noted in Article 5.6, Annex 5-E 'sets out' '(a) the area for which the importing Party recognises that an SPS measure of the exporting Party is equivalent to its own' and '(b) the area for which the importing Party recognises that fulfilment of the specified special conditions, combined with the exporting Party's SPS measure, achieves the importing Party's appropriate level of SPS protection'. While not entirely complete (Appendix B on phytosanitary measures remains to be negotiated), Annex 5-E is an important step towards the advancement of equivalence and provides a possible direction that other countries may wish to apply in equivalence negotiations.

Another example where equivalence can play a role in PTA negotiations is demonstrated by Article 5.9 CETA and Annex 5-I. When an official health certificate is required for the import of live animals and animal products and the importer has accepted the exporter's SPS measures as equivalent to its own, Article 5.9 CETA requires the use of the model health attestation prescribed in Annex 5-I. Document recognition can play an important role in facilitating trade.

Several of the equivalence provisions in Article 9.9 USMCA and Article 7.8 TPP are similar – again, no surprise, as the US participated in each negotiation. Both articles: (i) recognise that a positive determination of equivalence is a means to facilitate trade, (ii) seek to apply equivalence to the extent feasible and appropriate, (iii) call for the parties to take into account the guidance of the WTO SPS Committee and relevant international standards, guidelines, and recommendations,

(iv) require importing parties, upon request of the exporting party, to explain the objectives and rationale behind SPS measures and identify the risk the measure is intended to address, (v) require, upon request, that equivalence assessments begin without undue delay, (vi) require the importing party to explain its process for making an equivalence assessment and if equivalence is found its plan for enabling trade, (vii) call for recognition of equivalence if the exporting party objectively demonstrates that its SPS measure achieves the same level of protection, (viii) provide for enhanced communications between the parties, and (ix) require that the importing party explain the rationale for a determination that two measures are not equivalent. The USMCA goes further in two respects: it establishes a process for streamlining an equivalence assessment, and it establishes a procedure, including a notification and communications procedure, if a party adopts, modifies, or repeals a recognition of equivalence.

Lastly, Article 5.5 RCEP sets forth an equivalence procedure based on strengthened cooperation, taking into account the principles of the WTO SPS Agreement, the decisions of the SPS Committee and international standards, guidelines, and recommendations. Like USMCA and TPP, RCEP calls for recognition of equivalence if a party can objectively demonstrate that an SPS measure achieves the same level of protection. Unlike the other three mega-regional agreements, when making an equivalence assessment RCEP specifically permits parties to take into account 'available knowledge, information, and experience, as well as the regulatory competence, of the exporting Party'. RCEP calls for parties to enter into consultations aimed at achieving 'bilateral recognition arrangements' and sets forth a procedure, somewhat similar to that of USMCA and TPP, for conducting the equivalence recognition consultations and communicating the results.

3.3.2.5 Science and Risk Analysis

Neither CETA nor RCEP deals specifically with science-based risk assessments in their SPS chapters. However, Article 5.7 RCEP aims to improve cooperation in risk analysis and risk management. Both CETA and RCEP deal generally with risk management in their Customs and Trade Facilitation chapters.[30]

Article 9.6 USMCA and Article 7.9 TPP contain extensive and somewhat similar provisions on science-based risk assessments in their SPS chapters – no doubt due to the presence of the US at the negotiation stage. Where not identical to provisions in the WTO SPS Agreement, they complement SPS provisions. With respect to identical provisions, both Articles note the right to apply SPS measures, emphasise the requirement to base SPS measures on scientific principles, note that parties can determine the level of protection deemed appropriate, require that risk assessments be appropriate to the circumstances, and provide measures to ensure transparency in

[30] Article 6.7 CETA and Article 4.14 RCEP.

the risk assessment process. USMCA goes further in its elaboration of precaution, risk assessment, and risk management, though none of the provisions are particularly novel or contestable, and all seem to be consistent with the spirit of the WTO SPS Agreement.

3.3.2.6 Compliance Measures: Audits, Import Checks, and Certifications

Annex C of the SPS Agreement provides for control, inspection, and approval procedures, but these procedures are not fully elaborated in the annex. All four mega-regional agreements deal with similar subjects: audits, import checks, and certifications, and exceed the scope of the SPS Agreement. They can therefore be viewed as novel developments.

Article 5.8.1 CETA allows for an audit or verification to maintain confidence that the provisions of the SPS chapter are being implemented. Article 5.8.2 provides for a placeholder in Annex 5-H if the parties decide to develop principles and guidelines to conduct an audit or verification. Article 5.10 CETA governs import checks (inspections), with the frequency of import checks governed by the table present in Annex 5-J (with fees to be agreed upon later). Import checks are to be based on an assessment of the risk involved and not be more trade-restrictive than necessary. Specifying frequency is a novelty among the four agreements examined.

The audit provisions in Article 9.10 USMCA and Article 7.10 TPP are almost identical. Audits may include an assessment of control programmes, including reviews of inspection and audit programmes and on-site inspection of facilities. Both require system-based audits to check the effectiveness of regulatory controls. Both require the parties to discuss the rationale of the audit and its objectives and scope, and criteria against which the exporting party will be assessed, and base decisions on objective evidence and data. Both require the opportunity to comment, protection of confidential information, and that costs incurred be borne by the auditing party.[31]

Article 9.11 USMCA and Article 7.11 TPP govern import checks to assess compliance with SPS measures and to obtain information to assess risks associated with importation. Again, there are major similarities between the two articles. Both require: (i) parties to make available information on import processes so that the nature and frequency of import checks can be assessed, (ii) the importing party to make available information on the analytical methods, quality controls sampling procedures, and facilities used to test the goods, (iii) that testing be conducted using appropriate and validated methods in a facility operating under a quality assurance programme consistent with international standards, and (iv) that the importing party retain documentation. Final decisions in response to a finding of non-conformity must be limited to what is reasonable and necessary. If prohibitions or restrictions on

[31] Article 9.10.11 USMCA allows the parties to decide otherwise on costs.

importation are imposed, notifications must be provided to the importer, exporter, or manufacturer. Notifications must include the reason for the restriction, the legal basis or authorisation, and information on the status of the affected goods. Article 9.11.9 (a)(iii) USMCA goes further, requiring, if applicable, laboratory methodology and results, pest identification, and information on the disposition of goods. Both agreements require that the importing party imposing restrictions must provide an opportunity for review within a reasonable period of time.

Article 9.12 USMCA and Article 7.12 TPP deal with certification. With one exception, the provisions are almost identical. Both agreements recognise that certificates are not the only way to assure respect for SPS requirements. Both require that certifications be applied only to the extent necessary to achieve the appropriate level of protection, and that the importing party take into account relevant guidance from the SPS Committee and relevant international standards, guidelines, and recommendations. Attestations and information required must be limited to essential SPS information, and the rationale for such requirements must be transmitted to the other party upon request. The parties may work together to develop model certificates to accompany specific goods in trade and shall promote the implementation of electronic certification and other technologies to facilitate trade. The only point of difference is that USMCA requires that certification requirements be based on relevant international standards or that the certification requirement is appropriate to the circumstances, with respect to risks to human, animal, or plant life or health at issue.[32]

RCEP's audit provisions in Article 5.8 are minimal, and those that exist strongly resemble Articles 7.10.2–7.10.5 of TPP. RCEP provisions on import checks, set forth in Article 5.10, are also not novel. They require parties to take into account the relevant decisions of the SPS Committee and international standards, guidelines, and recommendations. Import checks shall be based on SPS risks associated with importation, and final decisions shall be appropriate to the SPS risk. In the event of non-compliance, there shall be notification of non-compliance, and significant and recurring non-compliance shall be subject to discussion between the parties. RCEP treats certification in Article 5.9. But for a requirement in Article 5.9.2 that certification is in English unless otherwise agreed, there is little novel in this RCEP provision. It largely parallels Articles 7.12.1–7.12.3 TPP.

3.3.2.7 Strengthened Transparency

All four of the mega-regionals strengthen transparency. Article 5.11 CETA sets forth additional 'Notification and Information Exchange' requirements. Likewise, Article 9.13 USMCA and Article 7.13 TPP establish very similar 'Transparency' requirements, in particular a sixty-day period for offering comments on most proposed

[32] Article 9.12.2 USMCA.

measures, which are to appear on a publicly available website or in an official journal, with written comments or a summary of written comments. If a proposed measure does not conform to a relevant international standard, the party is to provide upon request to another party the relevant documentation considered when developing the proposed measure. If a final SPS measure is substantially altered from the proposed measure, a party shall include in the notice of the final SPS measure the objective and rationale of the measure, how the measure advances that objective and rationale, and any substantive revisions that it made. The transparency obligations also contain novel provisions requiring the exporting party to notify the importing party in a timely and appropriate manner of any significant SPS risks of which it is aware, and any new scientific findings of importance which affect the regulatory response. In addition, there is a novel provision that obligates parties, upon request, to make available all SPS measures related to the importation of a good into that party's territory.

RCEP also sets forth transparency requirements. While weaker than those of USMCA and TPP, Article 5.12 RCEP does include a sixty-day comment period, a thirty-day period for providing parties with documents or a summary describing in English the requirements of draft SPS measures notified to the WTO and following notification the requirements of adopted SPS measures, and upon reasonable request relevant information regarding SPS requirements that apply to specific products. The same provision also obliges parties to provide timely and appropriate information on significant and recurring SPS non-compliance and provisional SPS measures. Lastly, like USMCA and TPP, exporting parties are, to the extent possible, obligated to provide information to importing parties if an export consignment poses a significant SPS risk.

3.3.2.8 Emergency SPS Measures

All four mega-regional agreements contain provisions dealing with the imposition of emergency SPS measures. Article 5.13 CETA requires notification of emergency measures within twenty-four hours of a Party's decision to implement the measure and, upon request, requires technical consultations within ten days. Article 9.14 USMCA and Article 7.14 TPP require prompt notification and eventual review of the emergency measure. Article 5.11 RCEP requires immediate notification of emergency measures to relevant exporting parties and, upon request, discussion with exporting parties as soon as is practicable. A review of emergency measures is also required within a reasonable period of time or upon request of the exporting party.

3.3.2.9 Cooperation and Cooperative Technical Consultations

All four mega-regional agreements provide for enhanced cooperation and technical consultations. Article 5.14 CETA establishes a Joint Management Committee,

which, among many things, is responsible for information exchange and greater bilateral engagement. Furthermore, Article 5.12 CETA allows a party to request technical consultations with the other party. Article 9.16 USMCA calls for the parties to explore opportunities for cooperation and sets forth a list of areas where cooperation is encouraged. Cooperation is also possible through the USMCA's Committee on Sanitary and Phytosanitary Measures (Article 9.17), its Technical Working Groups (Article 9.18), and Technical Consultations (Article 9.19). TPP takes a similar approach requiring the parties to explore opportunities for cooperation, collaboration, and information exchange in Article 7.15, establishing a procedure for information exchange in Article 7.16, and a procedure for cooperative technical consultations in Article 7.17. Article 5.13 RCEP also calls upon the parties to explore further cooperation, and Article 5.14 establishes procedures for technical consultations.

3.3.2.10 Dispute Settlement

Unlike its TBT chapter, CETA's SPS chapter is silent with respect to dispute settlement. As a result, the SPS chapter falls under Chapter 29. As already noted, Article 29.3.1 CETA governs the choice of forum and clarifies that recourse to the CETA dispute settlement mechanism is without prejudice to the WTO dispute settlement system. However, Article 29.3.4 offers a fork-in-the-road provision whereby parties may choose to resolve equivalent obligations in either the WTO or CETA, but not both.

Article 9.19.6 USMCA requires that parties first seek to resolve SPS disputes through technical consultations before having recourse to Chapter 31 (Dispute Settlement). Article 9.20 (Dispute Settlement) provides that if a dispute involves scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the Parties. Otherwise, Article 31.3 follows a fork-in-the-road approach. The complaining party may select the forum for disputes arising under both the WTO Agreement and the SPS chapter of USMCA. Once the forum is selected, the other forum is excluded.

Likewise, Article 28.4 TPP contains a fork-in-the-road provision that gives exclusive jurisdiction to the first forum chosen (TPP or WTO dispute settlement). However, Article 7.17.8 prohibits recourse to dispute settlement under Article 28 for SPS disputes without first seeking to resolve the matter through cooperative technical consultations. The TPP also prohibits recourse to Chapter 28 for matters arising under Article 7.9.2, which deals with whether an SPS measure conforms to an international standard or is based on documented and objective scientific evidence that is rationally related to the measure.[33] Finally, like USMCA, Article 7.18.2 TPP encourages panels to seek advice from technical expert groups for matters involving scientific or technical issues.

[33] This exclusion is contained in footnote 3 to Article 7.9.2.

Pursuant to Article 5.17 RCEP, Chapter 19 (Dispute Settlement) shall not apply at the entry into force of the agreement (1 January 2022). Non-application is to be reviewed two years after the entry into force of the agreement, with the review to be completed within three years. Parties will then have a choice as to whether they are ready to apply Chapter 19.

3.3.2.11 Annexes

CETA has several SPS annexes, not all of which are complete. Some serve as placeholders for the results of future negotiations. Their existence sets the course for further negotiations and may provide insight into how other countries may treat the negotiation of SPS provisions in PTAs:

- ANNEX 5-A *COMPETENT AUTHORITIES*
- ANNEX 5-B *REGIONAL CONDITIONS* Lists diseases for which regionalisation decisions may be taken.
- ANNEX 5-C *PROCESS OF RECOGNITION OF REGIONAL CONDITIONS* To be agreed at a later stage.
- ANNEX 5-D *GUIDELINES TO DETERMINE, RECOGNISE AND MAINTAIN EQUIVALENCE Determination and Recognition of Equivalence* To be agreed at a later stage. *Maintenance of Equivalence* (already agreed)
- ANNEX 5-E *RECOGNITION OF SANITARY AND PHYTOSANITARY MEASURES* Annex 5-E sets out: (a) the area for which the importing party recognises that an SPS measure of the exporting party is equivalent to its own; and (b) the area for which the importing party recognises that the fulfilment of the specified special condition, combined with the exporting party's SPS measure, achieves the importing party's appropriate level of SPS protection.
- ANNEX 5-F *APPROVAL OF ESTABLISHMENTS OR FACILITIES*
- ANNEX 5-G *PROCEDURE RELATED TO SPECIFIC IMPORT REQUIREMENTS FOR PLANT HEALTH*
- ANNEX 5-H *PRINCIPLES AND GUIDELINES TO CONDUCT AN AUDIT OR VERIFICATION* To be agreed at a later stage.
- ANNEX 5-I *EXPORT CERTIFICATION*
- ANNEX 5-J *IMPORT CHECKS AND FEES (Fees:* To be agreed at a later stage.)

3.3.2.12 SPS Conclusions

There are several novel SPS developments in the mega-regionals. Those that stand out include the recognition of regionalisation, zoning, and compartmentalisation to

facilitate trade in both USMCA and TPP, and calls to cooperate more on the recognition of pest- or disease-free areas, and areas of low pest or disease prevalence with the objective of acquiring confidence in the procedures followed by each party. CETA also recognises zoning for animals, animal products, and animal by-products, and lists diseases covered by zoning. CETA also leaves room to negotiate principles and guidelines to recognise regional conditions.

Equivalence also appears to be an emerging area receiving greater emphasis in mega-regional negotiations. For example, CETA sets out the area for which the importing party recognises that an SPS measure of the exporting party is equivalent to its own and the area for which the importing party recognises that fulfilment of the specified special conditions, combined with the exporting party's SPS measure, achieves the importing party's appropriate level of SPS protection. USMCA and TPP, the two mega-regionals spearheaded by the US, take a less ambitious approach to equivalence, but leave the door open for recognition of equivalent SPS measures. USMCA goes further in two respects: it establishes a process for streamlining an equivalence assessment, and it establishes a procedure, including a notification and communications procedure, if a party adopts, modifies, or repeals a recognition of equivalence.

CETA's use of annexes is also a novel approach. CETA's annexes establish a roadmap for negotiation. Parties can decide to fill in the gaps when practicable.

As with the aforementioned TBT chapters, there are a few major areas of contention. What differences do exist seem to be related to the level of ambition of the parties to various agreements. This is apparent with respect to SPS dispute settlement, where RCEP Members postponed the implementation of RCEP's dispute settlement provisions.

Again, what is discernible is the acceptance of logical solutions that are eventually becoming dominant, such as greater transparency, enhanced cooperation, fork-in-the-road provisions for dispute settlement, and some degree of alignment in USMCA, TPP, and CETA with respect to compliance measures – audit, import checks, and certification procedures.

3.4 CONCLUSIONS ON FUTURE DESIGN

Looking at existing practice, we only found a few novel TBT developments. Three CETA developments stand out: (i) incorporation of future WTO TBT decisions, (ii) requirement that technical working groups address disagreements before the invocation of CETA dispute settlement, and (iii) the use of subject-specific and sector-specific annexes and protocols in CETA (and TPP). Likewise, we found that there are few points of contention. Instead, what is discernible is acceptance of logical solutions that are eventually becoming dominant, such as fork-in-the-road provisions for dispute settlement, and widespread agreement on the gradual expansion of TBT disciplines, such as improved transparency and greater cooperation.

The future design of PTA TBT provisions is likely to be influenced by the soft law provisions in existing PTAs. For example, Article 11.9 USMCA and Article 8.9 TPP acknowledge that a broad range of mechanisms exist to facilitate acceptance of conformity assessment results. Among those mechanisms that might eventually shape the future design of TBT provisions are: greater mutual recognition of technical regulations and the results of conformity assessment procedures by government bodies, mutual recognition arrangements between or among accreditation bodies, accreditation to qualify conformity assessment bodies, unilateral recognition of conformity assessment procedures, and acceptance of supplier's declarations of conformity. In addition, an emphasis on greater cooperation, information sharing, transparency, and trade facilitation discussions between and among PTA parties is likely to be a feature of all future PTAs.

As with the TBT chapters, there are a few major areas of contention in the SPS chapters. What is discernible is the acceptance of logical solutions that are eventually becoming dominant, such as greater transparency, enhanced cooperation, fork-in-the-road provisions for dispute settlement, and some degree of alignment in USMCA, TPP, and CETA with respect to compliance measures – audit, import checks, and certification procedures.

The design of SPS provisions in future PTAs is also indicated by certain features in existing PTAs. Negotiators relied less on provisions from previous SPS chapters when designing the mega-regionals, which suggests they contain several novel developments, for example: (i) recognition of regionalisation, zoning, and compartmentalisation to facilitate trade in both USMCA and TPP, and (ii) general calls to cooperate more on the recognition of pest- or disease-free areas, and areas of low pest or disease prevalence. Equivalence is also receiving greater emphasis, as can be seen in the SPS chapters of the mega-regional agreements. One can expect that equivalence, cooperation, transparency, and trade facilitation will feature prominently in future PTAs. Likewise, CETA's use of annexes is a novel approach that establishes a roadmap for negotiations and is another mechanism that is likely to feature in future PTAs. In summary, any mechanism that can encourage dialogue, information exchange, technical advice and assistance, cooperation including scientific cooperation, and the use of good regulatory practices, is likely to play a prominent role in the development of future SPS chapters.

One problematic area that remains is dispute settlement. Fork-in-the-road provisions that lead to WTO dispute settlement will stymie resolution of many TBT and SPS disputes until the re-emergence of the Appellate Body in some form.[34] One idea suggested in Article 4.7.2 CETA that merits further study is the possibility of resolving disputes in *ad hoc* technical working groups that would identify solutions

[34] With the absence of a functioning Appellate Body, the practice by the losing party in WTO disputes of 'appeals into the void' prevents resolution of many trade disputes.

to facilitate trade. This idea is particularly interesting for disputes of a highly technical nature that require scientific input.

Beyond the analysis conducted for this chapter, we believe there are a number of other trends in TBT and SPS chapters that may become more pronounced, both within and outside PTAs. In the TBT area, there is at least one instance in which governments appear to move beyond PTAs. The Trade and Technology Council, recently established between the EU and the US, provides a platform to develop common standards and potentially overcome some of the TBT-related challenges that contributed to the 2019 failure of the Transatlantic Trade and Investment Partnership (TTIP).

Technology will also play an increasingly important role in SPS chapters. Distributed ledger technology, and blockchain more specifically, is already used by companies around the world to track food supply chains and manage food safety measures. The governance of these technologies may eventually be featured in future SPS chapters that seek to regulate international food trade.

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