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Multilateralising Regionalism: The Case of E-Commerce

Lior Herman



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MULTILATERALISING REGIONALISM: THE CASE OF E-COMMERCE

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ABSTRACT

This study analyses the extent to which e-commerce provisions in existing RTAs can be multilateralised. E-commerce has been recognised as an important engine for growth and development, yet WTO negotiations in this area have yielded very little progress so far. Against the backdrop of WTO stalemate, an increasing number of RTAs adopted specific provisions and rules for e-commerce. While these provisions increase the tradability of e-commerce, they also risk the creation of an e-commerce spaghetti bowl that will undermine the prospects for future WTO consensus in this area. This study considers two broad approaches for multilateralisation of RTA provisions. First, it suggests bottom-up multilateralisation extending RTAs e-commerce undertakings and provisions to a larger number of trading partners. Second, it proposes top-down multilateralisation which can advance e-commerce provisions, commitments and common learning at the WTO level. Both approaches to multilateralisation emphasise the importance of common definitions, rule-making and extension of bilateral liberalisation undertakings. The study highlights that despite the proliferation of e-commerce provisions in RTAs, many commonalities exist thus increasing the possibility of multilateral convergence.

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MULTILATERALISING REGIONALISM: THE CASE OF E-COMMERCE[1]

Executive Summary

Electronic commerce (e-commerce) is an important engine of economic growth. E-commerce has been rapidly growing for twenty years and is expected to continue so in the future, with the expansion of information technologies.

Despite wide recognition of the economic and societal role that e-commerce play, WTO negotiations in this area have been slow and yielded very little progress so far. A key area of discussion, among the many issues being negotiated, is the question whether digital products, specifically those products such as software, music, films, etc, which can be either downloaded or traded in physical form, are goods, services, a combination of both or possibly constitute a new category. An answer to that question can determine which existing trade rules, GATT or GATS, should be appropriately applicable.

Against this backdrop, e-commerce provisions have increasingly become part and parcel of many RTAs, particularly in the last decade. A growing number of RTAs now include reference and specific chapters covering e-commerce and address many of the non-resolved issues discussed at the WTO. Membership of these RTAs is diverse and includes OECD and non-OECD members. In many cases, countries that have adopted e-commerce undertakings in their RTAs have not undertaken similar commitments at the WTO.

RTAs have addressed and innovated on e-commerce issues related to definitions, application of WTO rules, non-discrimination, transparency, moratorium on customs duties on e-commerce transactions, as well as dealt with domestic regulation issues such as regulatory barriers, electronic authentication, consumer protection and more.

RTAs are a second-best option for multilateral liberalisation. Nevertheless, they can be harnessed and utilised to become building blocks for the multilateral trading system. The analysis of e-commerce provisions in RTAs reveal that in many areas a *de-facto* convergence is emerging through *de-jure* rule-making in RTAs. The analysis shows that in many instances WTO members reach similar, albeit not identical, provisions in their respective RTAs.

Multilateralisation of e-commerce provisions and commitments can follow two paths. First, bottom-up multilateralisation extends RTAs e-commerce undertakings and provisions to a larger number of trade partners. Second, top-down multilateralisation advances e-commerce provisions, commitments and common learning at the WTO level.

Bottom-up multilateralisation possibilities include the extension of existing RTAs and their provisions to new members. This approach has already been experimented in several e-commerce RTAs for both trade rules and regulatory aspects. Convergence of a number of RTAs into a region-wide free trade area with a single set of rules is another possibility for multilateralisation. Other areas where bottom-up

[1] This report was prepared by Lior Herman, an external consultant.

multilateral extension can take place are the inclusion of MFN provisions in existing RTAs which on the one hand do not erode the preferences of current parties to RTAs from future RTAs, and on the other hand extend benefits to non-members of RTAs.

Top-down multilateralisation includes the adoption of new provisions on e-commerce at the WTO, building on definitions developed in RTAs to resolve open issues, as well as adoption of a flexible WTO understanding on e-commerce between willing members. Members can also take greater multilateral commitments in service sectors closely associated with e-commerce or generally in modes 1 and 2, based on their respective undertakings in RTAs. Further adherence of new members to the ITA will also facilitate trade in information technology products, which are significant for e-commerce. Finally, an increased transparency at the WTO of existing e-commerce regimes can facilitate greater convergence on e-commerce among WTO members. This process can be pursued through formal and informal mechanisms.

The multilateralisation of e-commerce provisions can minimise the costs of trade diversion created by RTAs, reduce, simplify and create coherence within the regulatory complexity created by RTAs and advance WTO rules through a learning process and extension of different regional and bilateral approaches.

I. Introduction

1. Negotiations on e-commerce at the WTO have taken a slow pace since their beginning in 1998. Despite some convergence on several issues, member states differ on a multitude of issues, thus preventing an agreement on the applicability of trade rules to e-commerce. Nevertheless, in recent years e-commerce provisions have become part and parcel of many RTAs concluded by OECD and non-OECD members. The emergence of preferential rule-making in the area of e-commerce can have various negative effects on the ability to achieve multilateral governance in this area. However, despite the second-best nature of preferential agreements, RTAs can serve as experimental laboratories, particularly in new areas such as e-commerce. Hence, e-commerce provisions in RTAs can provide guidance and direction for the ways through which rule-making and liberalisation commitments can take place multilaterally.

2. It is in this vein that this paper seeks to address the development and nature of e-commerce provisions in RTAs and how they can be multilateralised. The paper begins with an analysis of the current state of play of e-commerce at the WTO, particularly addressing the issues of definitions and open questions. It then proceeds into an examination of e-commerce treatment in 24 RTAs,[2] which provides the basis for an analysis of several scenarios through which preferential e-commerce commitments and rules can be multilateralised in several respects. The paper finds that the scope for multilateralisation is high and can take both bottom-up and top-down approaches.

II. E-commerce and the WTO

3. E-commerce is considered among the main drivers of economic and social change, having significant domestic and international impact on supply and demand. The growing role of e-commerce in the last two decades is linked directly to the expansion of globalisation and the spread of information technologies. Although the expansion of e-commerce is by now not a recent phenomenon, its rapid growth is expected to continue in the long run. The high growth of e-commerce is evident even in economic activities which were traditionally non-tradable such as healthcare services (Herman 2009).[3] Data presented in table 1 on international trade in computer services, a sector closely associated with e-commerce, provides evidence on its increasingly important role. Accordingly, OECD and accession countries (Israel, Russia) as well as enhanced engagement economies (India, Brazil) are among the world's top 15 exporters and importers of computer services, with exceptionally high growth rates.

[2] RTAs are broadly defined and include different types of preferential trade agreements.

[3] E-health includes various e-commerce activities such as teleradiology, telepsychiatry, telesurgery and more.

Table 1. Major exporters and importers of computer services, 2006 (Million dollars, percentage)

Rank	Exporters	Value	Share in 15 economies	Annual percentage change	Rank	Importers	Value	Share in 15 economies	Annual percentage change
1	EU-27	60 398	59.5	14	1	EU-27	32 439	61.7	14
	Extra EU-27 exports	22 225	21.9	27		Extra EU-27 imports	11 081	21.1	14
2	India	21 061	20.7	...	2	United States	10 522	20.0	24
3	United States	6 208	6.1	8	3	India	1 979	3.8	61
4	Israel	5 289	5.2	17	4	Brazil	1 947	3.7	18
5	Canada	3 583	3.5	3	5	Canada	1 401	2.7	11
6	Norway	1 376	1.4	53	6	Norway	1 268	2.4	26
7	Australia	1 040	1.0	19	7	Australia	915	1.7	16
8	Russian Federation	576	0.6	54	8	Malaysia	518	1.0	37
9	Malaysia	572	0.6	31	9	Russian Federation	476	0.9	26
10	Costa Rica	371	0.4	46	10	Korea	311	0.6	...
11	Argentina	342	0.3	48	11	Hong Kong, China	310	0.6	-16
12	Hong Kong, China	301	0.3	45	12	Argentina	206	0.4	13
13	Korea	182	0.2	...	13	Colombia	132	0.3	20
14	Uruguay	122	0.1	47	14	Syria	95	0.2	-5
15	Sri Lanka	98	0.1	19	15	Philippines	67	0.1	8
	Above 15	101 520	100.0	-		Above 15	52 585	100.0	-

Note: Based on countries reporting computer and information services trade.
Source: WTO

4. E-commerce has been defined in numerous ways. Although these definitions often differ conceptually from each other, they are at times overlapping. The range of definitions is the outcome of the multitude of stakeholders involved in e-commerce trade, rule-making, data collection and regulation. Policy-makers, statisticians, business and industry as well as consumers have different projections and interests guiding the way in which they interpret and define e-commerce. Table 2 groups the definitional ambit into four broad streams of classification, which highlight different aspects of e-commerce. E-commerce is treated in three main dimensions according to its unique features of physical traits (goods, services), methods of delivery[4] and spatial location (OECD. 1999; Perez-Esteve and Schuknecht 1999;

[4] Wunsch-Vincent (2006) provides a comprehensive discussion of the definition of e-commerce from a delivery mode perspective. Accordingly, e-commerce is delivered either via physical carrier medium (e.g.

Wunsch-Vincent 2004; Wunsch-Vincent 2006). Countries often apply a mix of these definitions when domestically regulating e-commerce and collecting statistics. According to the OECD's definition of e-commerce, the latter "*refers to commercial transactions occurring over open networks, such as the Internet. Both business-to-business and business-to-consumer transactions are included"* (OECD. 1999). This classification treats e-commerce as more of an infrastructure or an electronic platform for commercial transactions, rather than a unique type of an economic operation.

Table 2. Taxonomy of e-commerce

Classification	Scope of definitions	Examples
Location	Focus on open networks (e.g. Internet) as the location or infrastructure where retail transactions take place with consumers	Internet purchase from Amazon but excludes sales over the phone
Channel	Broad definition that views e-commerce as a mode of trade which includes all electronically transferred commercial and financial transactions	money transfers, data transfers
Market entity	E-commerce is regarded as a type of service and/ or a tangible or intangible good	Digital products (software), telecommunication services
Transaction	These definitions view the elements of the e-commerce transaction, including information-seeking and advertisement, purchase and paying, as well as the final delivery	A bundle or combination of an electronic transaction that includes advertisement of online gaming, payment and delivery (playing)

5. While e-commerce rapidly captured a central role within domestic and international trade, rule-making and regulation governing e-commerce trade have taken a slower pace. The lack of governance and regulation negatively affects international trade in e-commerce. It is largely the result of the absence of an agreement at the World Trade Organisation (WTO) on what constitutes e-commerce. The lack of consensus on e-commerce by no means reflects the fact that WTO members have been discussing e-commerce since 1998. These deliberations have been guided by the WTO Work Programme on Electronic Commerce which defines e-commerce as "*the production, distribution, marketing, sale or delivery of goods and services by electronic means*" (World Trade Organisation 1998). The breadth of the WTO e-commerce work programme highlights the importance of e-commerce within a spectrum of areas of the WTO system.[5] From a definitional point of view, the WTO treatment of e-commerce is broader than the

CD) or through electronic delivery. E-commerce is then distributed either on demand (point to point) (e.g. physical purchase or downloading) or on supply (e.g. cinema or radio broadcasting).

5 According to the work programme, e-commerce is discussed under the direction of the General Council in the Council for Trade in Goods (GATT Council), the Council for Trade in Services (GATS Council), the Council for Trade-Related aspects of Intellectual Property (TRIPS Council) and the Committee on Trade and Development (CTD).

OECD's as it encompasses elements from across the four classifications outlined in the taxonomy developed in table 2, including also production, distribution and marketing.

6. Inability to reach consensus on the extent of coverage of e-commerce by existing agreements within the WTO, the international forum for trade negotiations and rule-making, is a major stumbling block for the development of new trade rules, if needed, and determination of the applicability of existing ones for the governance of e-commerce. However, one central issue may have been resolved by the Antigua-US dispute settlement case covering on-line gambling. The ruling clearly treated Internet supply as a means of delivery within the ambit of cross-border supply of services (World Trade Organisation 2007).[6]

7. Aside from the many issues on which agreement was emerging,[7] WTO members were unable to reach a common understanding on whether digital products, specifically those products such as software, music, films, etc, which can be either downloaded or traded in physical form, are goods or services, hence covered by GATT or GATS. The classification problem extends beyond the technical need for a working definition. Broadly speaking the US and Japan view e-commerce as encompassing all digitally delivered products and prefer applying GATT-like rules to these downloadable products. The EU on the other hand, has argued that the content of digital products are services, and hence, when no longer provided in physical format are covered by GATS. One of the sensitive considerations in these discussions has been the categorization of audio-visual downloads, which have been subject to less liberalisation in the GATS by members such as the EU and Australia. It has not gone without notice that treating digital products under GATT rules would provide for automatic extension of national treatment, which, in the GATS, is a negotiated commitment.

8. Another source of tension in the WTO is the debate on the issue of "technological neutrality" in relation to e-commerce and classification questions going beyond that of downloadable products. In regard to technological neutrality with respect to services, although the principle is generally accepted, some Members, such as China, question whether existing commitments made when e-commerce was considered infeasible could be presumed to encompass on-line supply. In the US-Gambling case, the panel concluded that the GATS does not limit the various technologically possible means of delivery under mode 1, which is reflected in the principle of technological neutrality (World Trade Organisation 2004; Wunsch-Vincent 2006). Technological neutrality was also upheld by the panel in the case of China – Measures Affecting Trading Rights and Distribution for Certain Publication and Audiovisual Entertainment Products (World Trade Organisation 2009).

9. The discussion of the classification of digital products is, in part, related to determining the scope and coverage of the WTO moratorium on customs duties on electronic transmissions. Members have been debating whether customs duties should be permanently prohibited and whether such duties are feasible in the first place. While both the EU and the US regard the customs duties moratorium as desirable, the EU is willing to make it permanent on the condition that digital products are treated as services.

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6 Cross-border trade takes place when the consumer and supplier remain in their respective territories and only the service moves across the border. Consumption abroad involves the movement of the consumer to the territory of the supplier, where consumption takes place. The notion of cyberspace challenges these distinctions as it is not clear where the consumer, the producer (and the service) are located in the case of services provided over computer networks.

7 For a broad overview of the many issues debated under the WTO work programme on e-commerce, see Wunsch-Vincent (2004).

10. Classification issues cut across WTO members regardless of their level of development. E-commerce was acknowledged as a potential source for greater and enhanced participation of developing countries in the multilateral trading system and that this goal could be facilitated through capacity-building (World Trade Organisation 2000) Indeed, electronic supply of services has been addressed within the ambit of the Doha Development Agenda by means of a negotiating request on cross-border supply tabled by a group of developing countries, lead by India. It seeks to ensure that improved commitments are made to cover the off-shoring of a wide variety of services commonly supplied remotely by electronic means. Even in this context, classification issues have arisen, whereby it is unclear where some services, such as back-office support, fall within existing classification schemes used to draft schedules. In addition, nearly every sectoral negotiating proposal made in the Doha negotiations, including those in which developing countries are *demandeurs,* urges Members to improve commitments on cross-border supply.

11. Little progress has taken place since the Hong Kong Ministerial Declaration which noted that the examination of e-commerce is not yet complete (World Trade Organisation 2005). Overall, WTO discussions on e-commerce have been rather in hiatus for an extended period of time and have, as yet, been, unable to confirm the applicability of WTO rules and country-specific commitments to e-commerce. Although a comprehensive trade round deal may bring solutions to many of the issues raised by e-commerce, prospects for agreement in the near term remain uncertain. Although e-commerce was flagged as a specific area for possible decisions to be taken in the December 2009 Geneva Ministerial conference (World Trade Organisation 2009; World Trade Organisation 2009), the conference resulted only in the extension of the customs duties moratorium until at least 2011. In the absence of final conclusion of the work programme, however, negotiations on services supplied by electronic means are nevertheless taking place, under the assumption that they are covered by WTO agreements.

III. E-commerce in Regional Trade Agreements

12. The last twenty years has seen a dramatic surge in the proliferation of regional trading arrangements (RTAs). It is expected that by the end of 2010 close to 400 RTAs may be implemented (World Trade Organisation 2009).[8] Numerous economic, political and security reasons explain the motivation behind this proliferation, with the deadlock in the current Doha Development Trade Round also being an important reason (Fiorentino, Verdeja et al. 2006).[9]

13. The proliferation of RTAs have also led to a growing number of RTAs with deep integration or "WTO plus" provisions, which either extend beyond existing WTO rules into new trade areas or deepen and expand rules and commitments in areas already covered by WTO agreements (Heydon and Woolcock 2009; Sauve, Poulsen et al. 2009).

14. Deep integration, particularly in recent RTAs has extended also into the area of e-commerce. A growing number of RTAs now include reference and specific chapters covering e-commerce and address many of the non-resolved issues discussed above. It is roughly estimated that some 30 to 40 RTAs include provisions on e-commerce. Deep integration in e-commerce can be found in many RTAs in which the OECD and accession countries are parties, as well as in RTAs of developing countries. Many members to these RTAs are developing countries whose RTAs with other developing economies also cover e-commerce. In many cases, countries that have adopted e-commerce undertakings in the RTAs have not been willing to do so at WTO level.

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8 This number includes RTAs in force, RTAs in force but not notified to the WTO, RTAs awaiting ratification and RTAs currently under negotiation.

9 For a thorough analysis of the motivation behind the creation of RTA see: Low, P.and R.E. Baldwin, (2009). *Multilateralizing Regionalism: Challenges for the Global Trading System*, Cambridge: Cambridge University Press.

15. Liberalisation of trade through RTAs is a second best solution. Trade creation effects will be the largest and trade diversion effects will sum to zero, if liberalisation takes place on a global multilateral basis.[10] Indeed, the lack of consensus regarding e-commerce at the WTO could be a reflection of broader negotiation strategies aimed at achieving gains in other trade areas. Yet, in the absence of rule-making at the WTO multilateral level, this proliferation trend is creating a greater density and stickiness within the ever-growing spaghetti bowl of preferential trade rules. In the absence of coherence between RTAs there is a growing potential for trade costs, inefficiencies and negative effects on competition. A major risk is that RTAs will become what Bhagwati terms as termites in the trading system, whose complexity and spread undermine the possibility of successfully achieving agreements in the WTO (Bhagwati and Panagariya 1996; Bhagwati 2008; Baldwin and Low 2009).

16. Enlarging the gains from trade on a multilateral basis, necessitates close scrutiny of the ways in which RTAs have evolved beyond existing WTO frameworks. The continuation of this section focuses on the development of e-commerce provisions in RTAs, followed in the next section by an examination of how these developments could possibly have multilateral benefits.

17. RTAs provide bilateral and regional solutions and innovations to some of the many open e-commerce questions in the WTO. The extent of solutions and commitment level of the parties in these agreements vary considerably. Furthermore, variation exists in the depth of commitments even within different agreements signed by the same party. Table 3 provides a brief summary of e-commerce provisions in 24 agreements[11] signed by OECD members, accession countries, as well as enhanced engagement countries. The table shows that RTAs extend into a wide range of topics such as definitions, the applicability of multilateral and bilateral rules, imposition of customs duties, transparency, non-discrimination and regulatory issues, electronic authentication, consumer protection and cooperation. Overall, Australia and the US address a wider range of e-commerce issues within their RTAs. The remainder of this section reviews e-commerce provisions in RTAs distinguishing between those provisions which are common to most RTAs and those which vary considerably across the sample studied. While this distinction is somewhat arbitrary as variation always takes place, it is useful for later consideration of e-commerce elements that could possibly be multilateralised.

[10] It can be noted that some RTAs do not restrict e-commerce-related provisions to the Parties, with the result (e.g on customs duties) being a kind of *de facto* (although not *de jure*) MFN and hence no diversion.

[11] This is a non-exhaustive list of agreements containing e-commerce provisions.

Table 3. E-commerce provisions in RTAs

	Australia-Chile	**Australia-New Zealand-ASEAN**	**Australia-Singapore**	**Australia-Thailand**	**Canada-Columbia**	**EFTA-Singapore**	**EU-Chile**	**EU-Israel ***	**EU-Korea**	**EU-Mexico**	**Japan-Singapore**
Definitions of e-commerce and related issues	X	X			X						
Trade Rules											
Applicability of WTO rules to e-commerce			X	X	X				X		
Applicability of trade rules in the RTA to e-commerce	X				X						
Customs duties moratorium	X		X	X	X				X		
Transparency		X	X		X						
Non-discrimination and MFN											
Domestic Regulation											
Avoidance of unnecessary regulatory barriers	X			X	X				X		
Electronic authentication and digital signatures	X	X	X	X							
Consumer protection	X	X	X	X	X						
Data protection	X	X	X	X	X				X		
Other Provisions											
Paperless Trade	X	X	X	X	X	X					X
Cooperation on e-commerce and related areas	X	X		X	X		X	X	X	X	X
Reference to e-commerce and intellectual property rights											
Applicability of dispute settlement provisions		NO	NO	NO. Except Moratorium							

	Korea-Singapore	**New Zealand-Thailand**	**US-Australia**	**US-Bahrain**	**US-CAFTA-DR**	**US-Chile**	**US-Jordan**	**US-Morocco**	**US-Oman**	**US-Peru**	**US-Singapore**	**India-Singapore**	**Singapore Jordan**
Definitions of e-commerce and related issues	X		X	X	X	X		X	X	X	X	X	
Trade Rules													
Applicability of WTO rules to e-commerce	X	X	X	X	X		X	X	X	X	X	X	
Applicability of trade rules in the RTA to e-commerce	X		X	X	X	X		X	X	X	X	X	X
Customs duties moratorium	X		X	X	X	X	X	x	X	X	X	X	X
Transparency					X		X			X		X	X
Non-discrimination and MFN	X		X	X	X	X		X	X	X	X	X	
Domestic Regulation													
Avoidance of unnecessary regulatory barriers	X	X	X	X	X	X	X	X	X	X	X	X	X
Electronic authentication and digital signatures			X				X			X			
Consumer protection		X	X				X		X	X			
Data protection							X						
Other Provisions													
Paperless Trade		X	X				X			X		X	
Cooperation on e-commerce and related areas					X		X						
Reference to e-commerce and intellectual property rights							X						
Applicability of dispute settlement provisions		NO. Except moratorium											

* Israel-EU Joint Action Plan of the European Neighbourhood Policy (ENP).

Source: Compiled from the legal texts of the agreements

Common provisions

18. Given the disagreement on many open issues at the WTO, it is surprising that many provisions are common to a large number of RTAs. Common provisions address issues of trade rules, domestic regulation and other areas. Many of those provisions although similar, are not identical. An attempt is made by the main protagonists of e-commerce RTAs (Australia, Singapore, US) to create identical provisions through their respective agreements. Albeit identical at large, it seems that a certain flexibility takes place to allow accommodation of the interests and capacity of other negotiating partners. A distinction can also be made between e-commerce provisions which are 'hard', i.e. enforceable or binding from those which are 'soft', that is general policy or co-operation provisions.

19. Most of the agreements go beyond the WTO and provide *definitions of e-commerce related issues*. These definitions include digital products, carrier media, electronic transmissions as well as electronic authentication and digital certificates. The definitions provide for a workable taxonomy on which RTAs then establish and apply e-commerce rules. Surprisingly, given the lack of consensus at the WTO, there is a high degree of convergence in the way these concepts are defined. The concept of e-commerce itself is only defined once (US-Morocco) and is identical to the WTO definition. Electronic signatures which are key to electronic authentication are not defined in the RTAs or are left for each party to define according to its domestic laws (Australia-New Zealand-ASEAN).

20. While the definitional challenge at the WTO is dealt with in the majority of RTAs, some agreements specifically address this issue with a statement that the definition of digital products does not necessarily reflect their WTO position whether trade in digital products through electronic transmission should be categorised as trade in services or trade in goods (US-Australia, US-Chile).

Table 4. E-commerce related definitions in RTAs

Definition RTA	Digital Products	Carrier Medium	Electronic Transmission	Electronic Authentication	Electronic Signatures	Digital Certificates
Australia-Chile			X	X		X
Canada-Columbia			X	X		
ASEAN-Australia-New Zealand				X	X	X
India-Singapore	X	X	X			
Singapore-Korea	X	X	X			
US-Australia	X	X	X	X		X
US-Bahrain	X	X	X			
US-CAFTA-DR	X	X	X			
US-Chile	X		X			
US-Morocco	X	X	X			
US-Oman	X	X	X			
US-Peru	X	X	X	X		
US-Singapore	X	X	X			

Source: Compiled from the legal texts of the agreements

21. Many RTAs, particularly those with comprehensive e-commerce chapters, recognise the a*pplicability of WTO rules to e-commerce*. Nevertheless, Chile's RTAs with Australia, EU and the US do not include such recognition.

22. The majority of RTAs confirm the *applicability of trade rules in the RTA to e-commerce*, particularly with regard to services, financial services and investment. The specific application of e-commerce to trade in goods is made using the categorisation of digital products and carrier mediums. Nevertheless, the Canada-Columbia agreement does not use these two categories and explicitly applies e-commerce trade rules also to national treatment and market access for goods (India and Singapore also apply trade in goods). Application is made in the Canada-Columbia agreement also to government procurement and telecommunications. In the EU-Chile agreement, e-commerce is part of the section on trade in services, though a qualification is made that this inclusion is made without prejudice to Chile's position in the WTO regarding whether e-commerce should be viewed as the supply of services.[12]

23. All RTAs that apply WTO rules to e-commerce, adopt a *customs duties moratorium* (New Zealand-Thailand agreement is an exception). The moratorium on imposing customs duties on importation or exportation of digital products is expressed differently across agreements, but presumably has the same effect.

24. RTAs recognise the importance of *avoiding unnecessary regulatory barriers* to e-commerce trade. In the Canada-Columbia agreement the undertaking specifically addresses measures which unduly hinder trade conducted by electronic means or that have the effect of treating trade conducted by electronic means more restrictively than trade conducted by other means. RTAs commit to not discriminate on the basis of technology, to minimise regulatory burden and to guarantee that regulation supports the development of industry-led e-commerce trade. Several agreements make specific reference to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce as the basis for domestic regulation of e-commerce (e.g. Singapore-Australia, New Zealand-Thailand, Australia-Thailand).

25. Provisions on *cooperation in e-commerce and related areas* range from minimal to extensive commitments for cooperation.[13] Areas of cooperation in RTAs include: market access and regulatory issues; tackling obstacles encountered by micro, small and medium enterprises in the use of e-commerce; consumer protection and confidence, protection of privacy and personal data; provision of financial services by electronic means; cyber-security; intellectual property rights; development of private sector self-regulation;[14] electronic government and development of paperless trade, authentication and electronic signatures issues, dialogue on various issues related to the information society; as well as research and training activities.

26. In many of the RTAs, it is not clear how cooperation will take place. Some RTAs, however, provide institutional mechanisms for such cooperation that include the possibility of establishing experts working group and joint meetings and consultations. The EU-Korea RTA establishes a specialised

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12 This qualification is not repeated in the US-Chile agreement and according to which e-commerce is applicable for both trade in services and financial services. The issue of consistency is repeated in other agreements, such as those of Australia and Singapore that apply trade rules to e-commerce in their RTAs but not in their joint agreement.

13 Paragraphs 29 to 33 further elaborate on some of the co-operation provisions.

14 Such as codes of conduct, model contracts, guidelines, and other private sector enforcement mechanisms.

committee[15] for cooperation, implementation and supervision of the provisions related to e-commerce in the agreement.

Infrequent provisions

27. *Non-discrimination and MFN* provisions for digital products appear in several RTAs, excluding those of Australia[16] and the EU. *National treatment* obligations for digital products are formulated as the commitment not to accord less favourable treatment to some digital products than the party to the agreement accords to other like digital products. National treatment is granted on the basis that these products are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms or that the author, performer, producer, developer, or distributor of such digital products is a person of the other Party and in some RTAs of a non-party.[17] *MFN treatment* is formulated in the agreements in almost a similar way and is accorded to parties and non-parties to the agreement. Nevertheless, it should be noted that many RTAs restrict national treatment for audio-visual and broadcasting services and in some cases allow for new restrictive measures in these sectors in future.

28. Rule-making and reference to *transparency* in e-commerce appear occasionally in an explicit manner in the RTAs, albeit not always expressed in the same manner. The parties most often commit to publish and make publicly available all measures which affect their commitments with regard to e-commerce, as well as to respond to all information requests on e-commerce commitments from the other party to the agreement. One agreement recognises transparency, clarity and predictability in domestic regulation as an important vehicle for social and economic development (Canada-Columbia).

29. Some RTAs extend e-commerce rules to the area of *electronic authentication* and call on the parties to the agreement to ensure that their domestic regulation allows the parties to electronic transactions to freely choose and determine authentication technologies and implementation models, as well as not to limit the recognition of these models unless a domestic or international legal obligation requires them to do so. Electronic authentication provisions also permit the parties to an electronic transaction to have the opportunity to prove in court that their electronic transaction complies with any legal requirements. In several RTAs the parties commit to work towards achieving *mutual recognition of electronic signatures* (e.g. EU-Israel, Australia-Singapore) and encourage interoperability of digital certificates (e.g. Australia-Chile).

30. *Consumer protection* provisions require protection of e-commerce consumers which is at least equivalent to that afforded to consumers of other forms of trade. Several RTAs emphasise the importance to protect consumers from fraudulent and deceptive commercial behaviour. Some RTAs also call business engaged in e-commerce to pay due regard to the interests of consumers and to act in accordance with fair business, advertisement and marketing practices. Particular reference is made to the information provided by business, as well as to the avoidance of ambiguity with regard to consumers' intention to make a transaction.

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15 The Committee on Trade in Services, Establishment and Electronic Commerce.

16 Other than Australia-US RTA.

17 India's RTAs with Singapore follows a different wording: "Each Party shall accord to the digital products of the other Party treatment no less favourable than it accords to its own like digital products in respect of all measures affecting the contracting for, commissioning, creation, publication, production, storage, distribution, marketing, sale, purchase, delivery or use of such digital products". Measures which have effect on national treatment are any measure whether in the form of a law, regulation, rule, procedure, decision, administrative action, requirement or any other form.

31. The sensitivity of *data protection* is dealt with either unilaterally or through cooperation. Some RTAs require the parties to afford data protection to e-commerce users in the ways they see fit. To encourage consistency between the parties' data protection systems, the parties to the agreements are to take account of international standards and the criteria of international organisations.[18] In other RTAs the parties to the agreements agree to cooperate in order to strengthen their level of data protection.

32. *Paperless trade* rules aim to facilitate e-commerce by, on the one hand making electronically available all trade administration documents, and, on the other hand accepting as legally equivalent all electronically submitted trade administration documents.

33. Many agreements discuss the *applicability of intellectual property rights* in the context of electronic transmissions and information and communication technologies. However, no progress beyond the WTO framework has been made to include new rule-making on intellectual property rights and e-commerce. Several agreements refer to intellectual property rights when dealing with the area of cooperation on e-commerce, such as the RTAs of Japan-Singapore, US-Chile, Canada-Columbia, Australia-New Zealand-ASEAN.

34. E-commerce provisions are in many cases not subject to *dispute settlement provisions* provided in RTAs. Nevertheless, some RTAs, such as Australia-US and US-Korea subject their entire e-commerce chapters to dispute settlement, while a more limited application can be found in Australia's and New Zealand's respective agreements with Thailand, where dispute settlement provisions apply only to the customs duties moratorium.

IV. Multilateralising e-commerce provisions

35. The idea of multilaterising regionalism addresses three main issues. First, it seeks to minimise the costs of trade diversion created by RTAs, and to maximise trade creation gains through expansion of regional or bilateral preferences on a multilateral basis. Second, multilateralising regionalism implies an effort to reduce, simplify and create coherence within the regulatory complexity created by RTAs (the spaghetti bowl effect). Finally, as many RTAs go beyond the WTO framework into deeper integration, multilateralisation is an effort to advance WTO rules through a learning process and extension of different regional and bilateral approaches. All in all, multilateralisation is the attempt to eliminate the "stumbling block" dimension of RTAs, while emphasising their "building block" elements as a model for multilateral liberalisation (Baldwin 2006; Menon 2009).

36. The rest of this section considers multilateralisation of e-commerce progress in RTAs from bottom-up and top-down perspectives. *Bottom-up multilateralisation* - refers to policy options which include the extension of RTAs' e-commerce undertakings and provisions to a larger number of trading partners. *Top-down multilateralisation* - advances e-commerce provisions, commitments and common learning at WTO level.

Bottom-up multilateralisation:

37. *Extension of existing RTAs and provisions to new members* - According to this scenario, new parties join existing agreements, thus minimising the creation of further RTAs with new sets of rules. Liberalisation commitments of the parties are extended to the new members. The attractiveness of this approach is that it minimises trade diversion among the members of the RTA and decreases the number of overlapping disciplines. Furthermore, since negotiations of RTAs require many organisational resources,

[18] The US-Jordan Joint Statement on E-Commerce refers to the OECD Privacy Guidelines as an appropriate basis for policy development

extension of existing RTAs to new members is less resource-intensive. Economising on negotiating resources allows for greater inclusion of smaller economies within RTAs of major trading countries, who need not invest a large amount of resources where individual country benefits are not particularly high. While the extension approach allows for greater incorporation of smaller economies, it also reduces their ability to effectively negotiate and safeguard their trade interests. Nevertheless, some OECD member states have indicated that while using e-commerce templates in negotiating their RTAs, they attempt to allow a degree of flexibility to accommodate the interests and capacities of their respective partners.

38. From an e-commerce perspective, this approach has already been partly adopted by the US in many of its RTAs. Rather than incorporating new parties to existing RTAs, the US has effectively extended its e-commerce chapter template to several countries, including commitments for the applicability of WTO rules to e-commerce, application of trade rules to e-commerce, the customs duties moratorium, non-discrimination and MFN and the avoidance of unnecessary regulatory barriers. An important element facilitating this approach has been the fact that negotiations on e-commerce chapters first took place with Chile and Singapore. Concluding extensive e-commerce provisions with these two countries made expansion of the e-commerce chapter easier in future agreements (Wunsch-Vincent 2006). This approach has also been effective in the US-Australia RTA, which took on the US e-commerce template despite the fact that Australia and the US differ considerably in their positions on e-commerce at the WTO. The US-Australia RTA highlights the fact that such an approach also has costs. While Australia agreed to apply trade rules and non-discrimination to e-commerce, it nevertheless was able to take non-conforming measures (e.g. broadcast quotas); it has also maintained subsidies in the services sector. Finally, it should be noted that expansion of e-commerce provisions has also been successful in domestic regulation.[19] Australia's RTAs are a case in point where template provisions on electronic authentication, data protection and consumer protection have been replicated in its respective RTAs.

39. *Regional convergence* – Convergence of a number of RTAs into a regional free trade area provides a single umbrella and a single set of trade provisions, where previously overlap existed. Promotion of regional convergence differs from mere extension of existing RTAs on a regional basis since regional consolidation requires negotiation between already established RTAs. Regional convergence can be difficult since it necessitates re-negotiation of domestic preferences locked-in in existing RTAs. From a multilateral point of view this approach can on the one hand, decrease the amount of overlapping and competing provisions, but on the other hand can create competing regional trading blocs.

40. From a narrow e-commerce perspective, multilateralisation through this approach could be successful since the number of e-commerce provisions in existing RTAs is relatively small. Thus, political economy variables, such as entrenched interests may play a lesser role. Although it seems unlikely that regional convergence will only take place in specific areas, it is possible to create special and specific regional provisions for e-commerce. A point in case is the EU and its Mediterranean partners. Despite the fact that the 2010 goal of consolidating all the FTAs in the region into one regional FTA is far from reality, the EU has been able to promote a Euro-Mediterranean protocol on the liberalisation of trade in services. This is notable since the protocol that sets the terms for future integration, was achieved prior to the establishment of any RTA in services in the region. The innovation introduced by the EU was done using a chain and ratchet principle of 'Regional Most Favoured Nation'. Each party engaged in bilateral liberalisation must extend no less favourable treatment to other parties with whom they bilaterally engaged with. Thus, multilateralisation is created from linking bilateral agreements with each other and providing a ratchet mechanism, whereby deeper liberalisation with new parties is automatically extended to partners of

[19] Issues such as electronic authentication, data protection and consumer protection relate to domestic regulation, though are not necessarily in full overlap with the WTO's work programme on domestic regulation.

existing agreements. In the context of the Euro-Mediterranean protocol, this framework can have an effect on both north–south integration and south–south integration (Herman 2006).

41. *Inclusion of (de jure) MFN provisions and third party MFN clauses* – MFN provisions reduce the discrimination of third parties and can also ensure that preferred benefits for parties in existing RTAs are not eroded in future RTAs. Many RTAs, particularly those of the US, already include MFN and third-party MFN provisions. The inclusion of these provisions limits the need to negotiate complicated rules of origin, which would be difficult to consolidate later in the multilateral level. To a large extent, the use of the MFN provisions, rather than being an attempt to multilateralise current commitments in e-commerce, is the outcome of either the potential complexity of negotiating rules of origin or the lack of feasibility of negotiating these rules in the first place (Wunsch-Vincent, 2004). Despite their relative weaker bargaining capacity, smaller nations may prefer joining agreements with third-party MFN provisions due to expected dynamic gains. Hence, their preferences might be guided by an incentive for expected realisation of benefits achieved from future negotiations between their trading partners with other big countries , thereby obtaining more concessions (Baldwin, Evenett et al. 2009).

42. It should be noted that the MFN provisions are an insufficient condition for multilateralisation. The application of non-conforming measures for goods and services with regard to e-commerce (as described above) can erode MFN. Nevertheless, even under these conditions, inclusion of MFN provisions can be useful for multilateralisation. It seems plausible that future negotiations to remove sector-specific exemptions will be easier than attempting to reach an all-encompassing MFN provision.

43. Finally, e-commerce provisions carry varying importance with regard to multilateralisation, either through extension of exiting RTAs and their provisions, regional convergence or inclusion of third-party MFN clauses. E-commerce provisions range from those which are obligatory for signatories to best efforts provisions and capacity building. From this perspective, multilateralisation of existing RTAs is undoubtedly more important for those provisions which are obligatory, but to a lesser extent also for other provisions. Such pragmatism may facilitate greater regional convergence or facilitate the joining of more countries in existing RTAs. This point is of particular importance for developing countries, who may find it harder to accept deep e-commerce provisions. Furthermore, a distinction between obligatory and best effort provisions is also useful for encouraging wider application of dispute-settlement mechanisms to e-commerce provisions.

Top-down multilateralisation

44. *Adoption of deeper RTA provisions at the WTO* – the process of multilateral liberalisation is a long one. Slow liberalisation was the case even during the days of the GATT when the scope of the agenda was narrower and the number of member states was significantly lower. However, the WTO has so far proved to be the most effective platform to achieve multilateral liberalisation and is the only forum in the world where trade rules are created and enforced on a global scale.

45. The deadlock in the current trade round negotiations has pushed many members into RTAs, where negotiations are quicker and benefits are often more visible. Bilateralism and regionalism approaches were taken even by countries who traditionally refrained from doing so, such as Japan. One way in which RTAs can support multilateralised liberalisation is by serving as a laboratory for new ideas, innovation in trade rules and liberalisation initiatives. In that regard, there is scope for consideration at the WTO of provisions related to e-commerce based on the accumulated experience of e-commerce treatment in RTAs.

46. There are several possible ways in which the WTO can incorporate RTAs provisions. First, is the adoption of new rules on e-commerce. Indeed, many RTAs include special chapters and sections on e-

commerce. Yet, some of the key rules adopted in RTAs, such as non-discrimination, MFN, applicability of WTO and trade rules and more, come at the price of complexity and carve-outs through exceptions and non-conforming measures. It is not clear that multilateralising e-commerce provisions will be achieved by the creation of a separate chapter on e-commerce or a new set of specialised e-commerce trade rules. Furthermore, this may not be in the interest of WTO Members who are currently urging that existing schedules be improved with respect to cross border supply, presumably to cover electronic transmission.

47. Since a key obstacle to multilateralisation is the issue of defining the status of downloadable products that are also traded in physical form, the second possibility is to engage in study and negotiations on this particular point. The two panel reports concerning on-line supply indicate that in the absence of a negotiated agreement by the member states, this vacuum may be filled, at least partially, by panel jurisprudence (World Trade Organisation 2004 -- US Gambling case; World Trade Organisation 2009 - Chinese audiovisual products case).

48. RTAs have significantly contributed to this debate by defining concepts such as digital products, carrier medium and electronic transmissions. These definitions mitigate some of the controversy related to the distinction between goods and services, because they develop a method which overrides the definitional problem. This method advances liberalisation of e-commerce by subjecting it to national treatment and MFN obligations without pre-determination whether the product is a service, a good or something else. Almost all RTAs with e-commerce chapters define *electronic transmissions* as the transfer of digital products using any electromagnetic or photonic means. *Digital products* are defined as computer programmes, text, video, images, sound recordings and other products that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically. Almost all e-commerce RTAs provide a clarification that digital products do not include digitalised representations of financial instruments. *Carrier medium* is any physical object[20] capable of storing a digital product by any method now known or later developed, and from which a digital product can be perceived, reproduced, or communicated, directly or indirectly, and includes, but is not limited to, an optical medium, a floppy disk, or a magnetic tape. A WTO consensus on the matter of coverage of downloadable products by GATT and/or GATS may promote forward movement and allow the generally understood consensus that existing agreements cover e-commerce. Once this is possible, it may reduce or eliminate the need for specific trade rules in the WTO, since it will be possible to conclude that WTO agreements are already applicable. Minimising potential duplication and overlapping of rules will contribute to effective and more transparent multilateralisation.

49. Third, the status of downloadable products that are also traded in physical form can potentially be resolved by negotiating selective carve-outs by some Members. Hence, WTO members may solve the definition problem by deciding that downloadable products will be subject to GATT rules, but at the same time introduce a carve-out that will exempt members from applying GATT disciplines on specified sensitive products, activities that some members currently treat according to rules for trade in services. Doing so can potentially help countries like Australia and EU Member States to converge towards an agreement with other WTO members, while carving-out sensitive digital products relating to audio-visual services from the automatic national treatment obligation of the GATT.

50. Fourth, reaching a wider consensus on e-commerce could potentially be achieved through a plurilateral understanding or agreement. Such an instrument can draw on provisions adopted in RTAs and can serve as a benchmark for future multilateralised liberalisation. A plurilateral understanding could include two sets of provisions. The first set of provisions could be binding commitments, and could for example draw on the definitions of electronic transmissions, digital products and carrier mediums as a

[20] The India-Singapore FTA refers to "any physical object" as any physical object, listed under the WTO Information Technology Agreement (ITA-1) Attachment A.

basis for a WTO liberalisation framework for e-commerce. By avoiding the classification conundrum, such a framework could include a permanent customs duty moratorium extended on MFN and national treatment basis, adherence to the ITA, as well as transparency disciplines. These provisions could also be subject to the WTO dispute settlement mechanism. The second set of provisions would be constructed from best endeavour practices and could include for example provisions on domestic regulation, encouragement of mutual recognition agreements (MRAs) for electronic authentication and digital signatures, as well as provisions on e-commerce cooperation and consumer protection. While it is suggested that the first set of provisions would be legally binding, the second set of provisions might be of a best endeavours nature to enable as many countries to undertake multilateral commitments in e-commerce, allowing flexibility by not taking a decision on specific harmonisation of domestic regulation or standards. The Decision and Guidelines on Disciplines on Domestic Regulation in the Accountancy Sector are examples of one possibility. The introduction of the second set of provisions (the best endeavour provisions) is also a necessary avenue for the WTO to engage in regional integration (e.g. MRAs) by enhancing its own role and relevancy as a rule-making and standard-setting forum. It will also enable the WTO to contribute to future work in this area in a non-discriminatory manner. A plurilateral understanding could also be conditional. Thus, it might be possible to condition the entry into force of such an understanding to an adherence of a critical mass of members (e.g. number of users and suppliers of e-commerce or share of countries in total world e-commerce trade). This conditionality can have a positive effect on negotiation incentives.

51. Finally, while a separate chapter or new trade rules on e-commerce will not necessarily optimise multilateralisation, there is scope for gains from considering the achievements of RTAs in the area of domestic regulation. Members can engage in greater consultations with regard to rule-making and standard-making in electronic authentication, use and recognition of digital signatures and protection of data and consumers. Negotiations in this area may be long, but they are less dependent on the issues of definition and classification of e-commerce. Many RTAs already provide definitions and rules. RTAs define *Electronic authentication* as the process or act of establishing [testing] the identity of a party [levels of confidence in the identity] to an electronic communication or transaction or ensuring the integrity of an electronic communication [establish a level of confidence in the statement's or claim's reliability]. *Digital certificates* are defined as electronic documents or files that are issued or otherwise linked to a party to an electronic communication or transaction for the purpose of establishing the party's identity, authority, or other attribute. Furthermore, international experience in organisations, such as the International Standards Organisation (ISO) shows that negotiations on complicated standards can be fruitful (Baldwin 2006).

52. *Multilateralisation of existing commitments* – Another possible avenue for multilateralisation is for members of RTAs to unilaterally accept WTO bindings based on deeper commitments made in their RTAs.

53. In the context of e-commerce, there are at least three possible ways in which countries can multilateralise their preferential undertakings. First, members can schedule GATS commitments in sectors related to e-commerce, such as audio-visual services, telecommunication services, computer services, and a variety of outsourced business services. Certain of these sectors can be potentially difficult for some members,[21] but even a restrictive scheduling of a commitment is a supporting building block for multilateralisation. Another GATS scheduling opportunity to facilitate e-commerce is for members to commit for modes 1 and 2 in as many services as possible. Commitments might be easier to make for members of RTAs which have adopted a negative listing approach for liberalisation, whereby everything is

[21] As earlier noted, Australia and the EU are two examples of WTO members with an interest in facilitating greater trade in e-commerce, without necessarily liberalising audio-visual services. In the case of the EU, audio-visual services are not within the trade negotiating mandate of the Commission, thus leaving lesser scope for negotiations.

liberalised except what is specifically singled out.[22] The US and Australia apply negative listing in their RTAs (Wunsch-Vincent 2006; Heydon and Woolcock 2009). Finally, members of present and future RTAs who are not parties to the ITA can facilitate multilateralisation by adhering to the ITA, thus facilitating trade in information technology products. Chile, Columbia and Peru are three examples of members to RTAs with e-commerce provisions, who are not yet members of the ITA.

54. *Increase transparency on applied regimes* – multilateralisation of e-commerce can be encouraged through greater transparency and information sharing WTO members' e-commerce regimes. Focusing on applied regimes, rather than international legal bindings, will shed light on the ways in which members address various e-commerce issues. An increase of information regarding individual countries applied e-commerce policies will particularly be useful to identify areas where convergence (or divergence) among the members takes place. Increased transparency can focus WTO work on e-commerce by shifting discussions from conceptual issues to the practical ways in which trade rules can and are applied. The EU, for example, can provide information on the ways in which the EU and member states address issues such as cross-border electronic provision, electronic privacy and data protection, digital consumerism and other areas of cooperation in regulation of e-commerce. Increased transparency can be facilitated through specialised seminars, dedicated sessions and information sharing. Targeted technical assistance to developing countries is another instrument that can be applied to facilitate greater knowledge on e-commerce regulation. Technical assistance can also support creation of infrastructure and training. Nevertheless, the provision of technical assistance need not be tied to progress of the WTO work programme on e-commerce. Such a linkage can create an artificial conditionality whereby technical assistance precedes negotiations on e-commerce.

V. Conclusions

55. While the growing role of e-commerce in international trade has not yet been paralleled with an agreement on the appropriate WTO framework for this trade, numerous RTAs have addressed e-commerce in substantive ways. RTAs' provisions on e-commerce address issues of definitions, the applicability of WTO and trade rules, and also deal with domestic regulation and other areas.

56. These developments shed light onto areas where *de-facto* convergence is emerging through *de-jure* rule-making in RTAs. The analysis shows that in many instances WTO members reach similar, albeit not identical, provisions in their respective RTAs. Several ways are suggested to minimise the multilateral costs of preferential trade agreements, which include on the one hand, bottom-up multilateralisation through extension of existing RTAs to new members, convergence on regional basis, and inclusion of MFN provisions. On the other hand and without being mutually exclusive, multilateralisation can take a top-down approach through the adoption of deeper and new provisions at the WTO, as well as the multilateral extension of preferential commitments and informal and formal ways for increased transparency.

[22] In contrast to the negative approach, the positive listing approach commits only to those sectors which have specifically been listed. Non-scheduled sectors are left out of the scope of liberalisation. The GATS schedules follow a positive list approach. In some recent RTAs a hybrid approach is applied where some broad sectors are liberalised through negative listing, while others use positive listing. Although the literature usually upholds the negative listing approach as more liberalising at least from a theoretical point of view, empirical findings are inconclusive. For further readings see: Sauvé, P. Poulsen, L.S. and L. Herman, (2009). *Preferential Services and Investment Liberalisation in Asia: Implications for Switzerland*, Mimeo, Berne: SECO; and Heydon, K. And S. Woolcock., (2009). *The Rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements*, Tokio: United Nations University Press;

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