



**Asia-Pacific
Economic Cooperation**

**Toward Building Resilient
Supply Chains – A Possible
Role of Investment Policy**

APEC Committee on Trade and Investment

December 2021

Contents

Introduction	5
Background	6
Key findings from the APEC workshop speakers	7
Chapter I Comparative stock-take of BITs and investment-related provisions in FTAs/EPAs	10
1. FTAAP: Investment Policy	10
Presented by Juan Navarro, Director and Principal researcher at CMX Partnerships and associate faculty at Royal Roads University, Canada	
Chapter II Good practices of BITs and investment-related provisions in FTAs/EPAs and its challenges	14
1. Japan's Investment Policies	14
Presented by Ueno Yudai, Senior Coordinator, Economic Partnership Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Japan	
2. Challenges in International Investment Agreements from a business perspective and possible solutions	18
Author: Hiroki Yamada, Junior Research Officer, International Economy Division, Overseas Research Department, Japan External Trade Organization (JETRO)	
3. Role of investment chapters in FTAs	29
Presented by Deborah Elms, Founder and Executive Director of the Asian Trade Centre	
Chapter III Analysis on new investment related issues in the post-COVID era	32
1. New issues in the post-COVID era: what role for FDI and investment treaties?	32
Presented by Ana Novik, Head of the Investment Division of the Directorate for Financial and Enterprise Affairs, OECD	
2. The New Generation of Peruvian International Investment Agreements and Covid-19	36
Presented by Ricardo de Urioste, International consultant and Arbitrator	

Chapter IV Analysis of a possible role played by BITs and investment-related provisions in FTAs/EPAs under the COVID crisis toward building resilient supply chain	42
1. COVID-19 Pandemic, Foreign Direct Investment, and Bilateral Investment Treaties	42
Author: Professor Urata Shujiro, Professor Emeritus, Waseda University, Japan	
2. Foreign investment policies of APEC economies under the COVID-19 pandemic: Toward a new balance between protection/promotion of foreign investment and public health	68
Author: Professor Nakagawa Junji, Faculty of Liberal Arts, Chuo Gakuin University; Of Counsel, Anderson, Mori & Tomotsune	
3. Investment Measures for National Security: How Should We Strike a Balance?	75
Author: Professor Kawashima (Professor at Graduate School of Law, Kobe University, Japan	
4. How investment provisions in FTAs/EPAs and BITs can help enhancing supply chain resilience	87
Presented by Sebastien Miroudot, Senior Trade Policy Analyst, Trade in Services Division, OECD	
5. ABAC Presentation on FTAAP	90
Presented by Ho Meng Kit, Chair for Chair for ABAC Regional Economic Integration Working Group	
6. Toward building resilient supply chains – a role for investment policy	91
Presented by Kevin Klowden, Executive Director of the Milken Institute’s Center for Regional Economics	
Annex 1 Agenda for the workshop “Toward building resilient supply chains – a possible role of investment policy	93

Acknowledgement

This project was guided by APEC Division, Economic Affairs Bureau at the Ministry of Foreign Affairs, Japan. It developed under closer collaboration with APEC Business Advisory Council (ABAC), honourable speakers from Australia, Canada, Chile, France, Japan, Peru, Singapore and the United States, and genuinely supportive co-sponsor economies namely Australia, Canada, Chile, Mexico, Peru, Chinese Taipei.

DISCLAIMER: The views expressed and the conclusions reached are those of the author and do not necessarily represent those of the Government of Japan, nor the consensus view of APEC member economies nor of the individual economies addressed.

Introduction

Resilient supply chains have always been important, and this importance has been brought sharply into focus by the COVID-19 pandemic. Now, more than ever, supply chain resilience is essential to ensure the continued supply of essential goods by, and for, the manufacturing sector.

It has been noted that the pandemic may lead some multinational enterprises to rethink the geographic and sectoral spread of their activities. It has also been observed that inward foreign direct investment policies were being tightened due to concerns about the impact of foreign acquisitions on technology, competition, level playing fields, and security.

Pursuing balanced investment policies, and advancing investment liberalisation would actually be the key to attracting longer term investment and increasing the cross-border flow of goods and capital through supply chains, both within APEC economies and between APEC and the rest of the world.



Background

This research report was developed on behalf of the Ministry of Foreign Affairs, Japan for APEC economies and was undertaken by the Global Trade Professionals Alliance (GTPA) with honourable contribution from academic researchers, business community, government and international organisation .

The Ministry of Foreign Affairs, Japan implemented by the Global Trade Professionals Alliance (GTPA) hosted an interactive two-day workshop in May to collaborate and discuss how APEC members can work toward building resilient supply chains and explore the possible role of the investment policy.

This workshop discussed the possible role played by provisions in FTAs/EPAs and BITs to foster cross- border investment and to establish resilient supply chains in the Asia-Pacific region. The evolution of investment policy will be a particularly important area to monitor during and after the COVID-19 crisis, in the aim of continuing to pursue the eventual realisation of a high-quality and comprehensive FTAAP (Free Trade Area of the Asia - Pacific).

The workshop covered the following topics¹:

- Comparative stock-takes of BITs and investment-related provisions in FTAs/EPAs
- Best practices in BITs and investment-related provisions in FTAs/EPAs, and their incumbent challenges.
- Analysis of new issues in the post-COVID era
- Analysis of a possible role played by BITs and investment related provisions in FTAs/EPAs under the COVID-19 crisis

Up to 125 representatives from APEC economies and ABAC participated in the workshop which featured interactive sessions, guest presentations and panel sessions, giving APEC participants the opportunity to delve further into the data and discuss how the private and public sector can work together to ensure that government pandemic support initiatives are appropriate and sufficient to meet the needs of business.

Insights from the workshop have been incorporated into this report.

Key findings from the APEC workshop speakers

I Investment policy and Global Value Chains

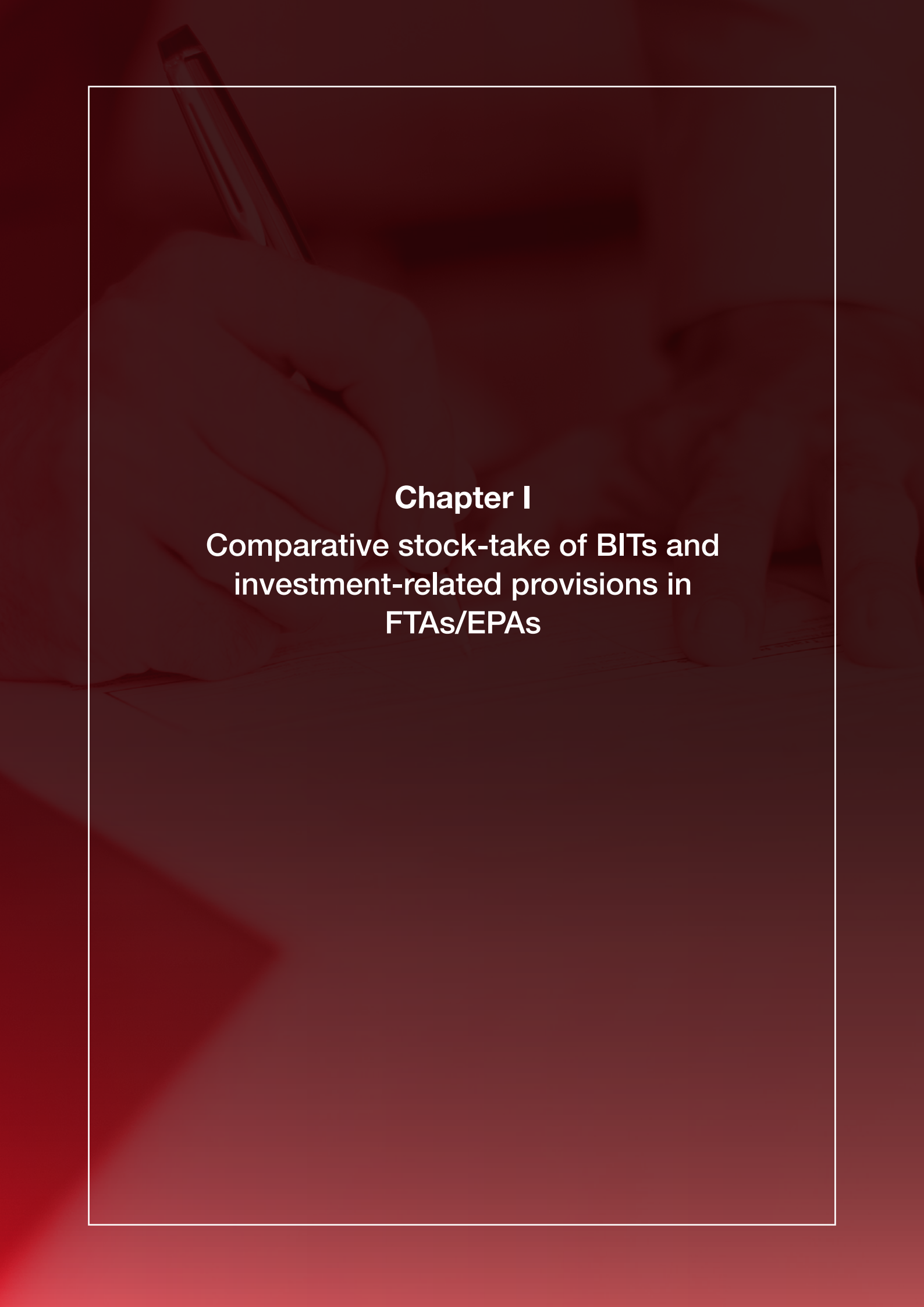
1. Under the current crisis, investment liberalization can play a significant role in the economic recovery from the pandemic, by facilitating regional APEC investment activities which will contribute to enhancing GVCs resilience.
2. APEC economies may want to consider business priorities when negotiating investment agreements, in order to support business confidence and enhance GVCs resilience, and encourage investments of MNEs along supply chains.
3. APEC economies need to ensure that investment rules meet high standards and offer predictable and transparent investment environment, guaranteeing a sufficient level of investment liberalization and protection as well as a effective Dispute Settlement mechanism.
4. Recognition of the FTAAP in the Putrajaya Vision 2040 has proved APEC's firm commitment to advance the liberalization of trade and investment with higher standards to advance regional economic integration. APEC economies can now plan and act together for sustainable economic recovery, re-ignite growth and lasting resilience.
5. APEC economies should develop tailor-made promotion schemes for large-scale firms and SMEs, in order to support trade investment. This should include promoting investment liberalisation, which will enhance GVCs resilience and stimulate economic recovery.

II Capacity building needs

1. APEC economies can support SMEs by investing in capacity-building of both home and host economies, this should include outreach to SMEs to understand chapters within agreements so that companies are more knowledgeable. This will in turn support SMEs better engaged with government's on investment barriers.
2. APEC economies can support stakeholders' knowledge by investing in additional training and knowledge development of a wide range of government officials (not only economy level officials but also regional level officials)/private sector (including SMEs/lawyers etc on the content of such agreements so they are accurately and effectively communicating with global or regional companies. This in turn will ensure that APEC economies can also incorporate better business views in their FDI rulemaking, which will contribute to promoting confidence and improving the business climate.
3. With regard to BITs, BITs can be an effective tool to increase FDI, especially in developing economies, when they are applied conditions where a good business environment, open and fair market, well-functioning infrastructure, as well as the availability of capable human resources are provided. Therefore, it is advisable to include provisions such as an economic cooperation provisions, which would contribute to improving business environment of developing economies.

III Investment measures introduced related to the COVID-19 pandemic

1. Because the COVID-19 pandemic is a very special case (once in a century crisis), government emergency measures should be justified. However, the governments should ensure that they are adopted in a good-faith as well as a non-discriminatory and transparent manner.
2. As for the investment policy measures introduced under the COVID-19 crisis, it is particularly critical to strike the balance between the right of the host economy to take measures for public health and the interests of foreign investors. One way to strike the balance would be to limit the exercise of the right of the host economy to pursue legitimate public policy objectives by requiring that such measures are not applied in an arbitrary or discriminatory manner, or they shall not be disguised restrictions on investors and investments. Another way to strike the balance would be to adopt such measures only temporarily. It should be noted some measures of the APEC economies were temporary measures and will be lifted when the crisis caused by the pandemic is over.
3. APEC economies should continue to learn from best practices in agreements such as CPTPP and RCEP, including perhaps through creating a forum to discuss what measures constitute non-abusive resort of security exceptions as well as exchange best practices of the above conditional approvals.
4. Global challenges and the health crisis triggered new social demands on investment treaties. Notably, the possible impact of climate change, human rights and labour issues on investment treaty deserve special attention.

The background of the page is a dark red color with a faint, semi-transparent image of a hand holding a pen over a document. The text is centered and enclosed in a white rectangular border.

Chapter I
**Comparative stock-take of BITs and
investment-related provisions in
FTAs/EPAs**

Chapter I

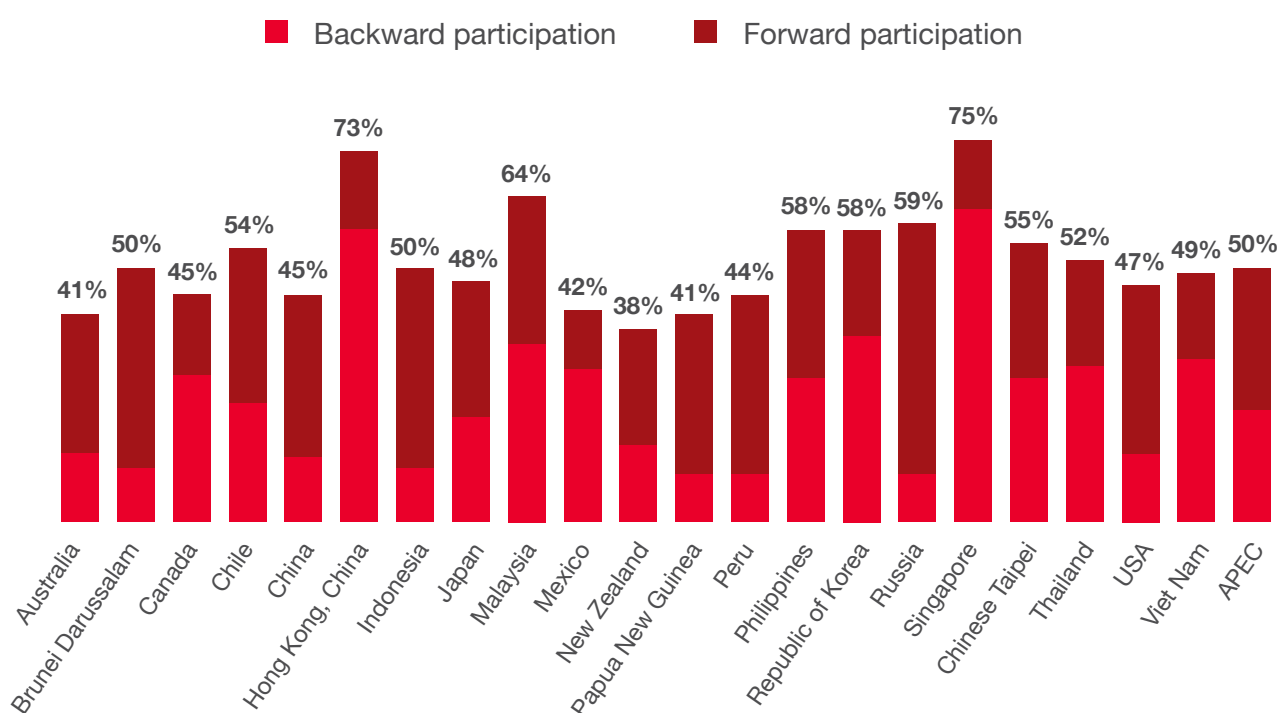
Comparative stock-take of BITs and investment-related provisions in FTAs/EPAs

1. FTAAP: Investment Policy

Presented by Juan Navarro, Director and Principal researcher at CMX Partnerships and associate faculty at Royal Roads University, Canada

The global pandemic has produced economic turmoil worldwide, impacting the livelihoods of millions of people, disrupting business activities, affecting trade and investments and exposing the fragility of Global Value Chains (GVCs). This report proposes prioritizing investment policy as one of the public policy tools to promote economic recovery and build GVCs resilience across the region. The COVID-19 crisis has damaged the global economy by hitting, directly and indirectly, trade, investments, and GVCs at an unprecedented scale. The pandemic hit at a time when international trade was already being challenged, and serious concerns about trade disputes and protectionist measures were on the rise. According to a report issued by the World Bank and the WTO, over two-thirds of global trade happens through GVCs. The strong integration and participation in global supply chains of most APEC economies meant that the consequences derived from the pandemic had a strong negative impact across the region.

GVC Participation index in APEC economies (2018)



Source: Navarro's (author) calculations using the UNCTAD-Eora Global Value Chain Database

Challenges for enhancing GVC resilience from investment viewpoint

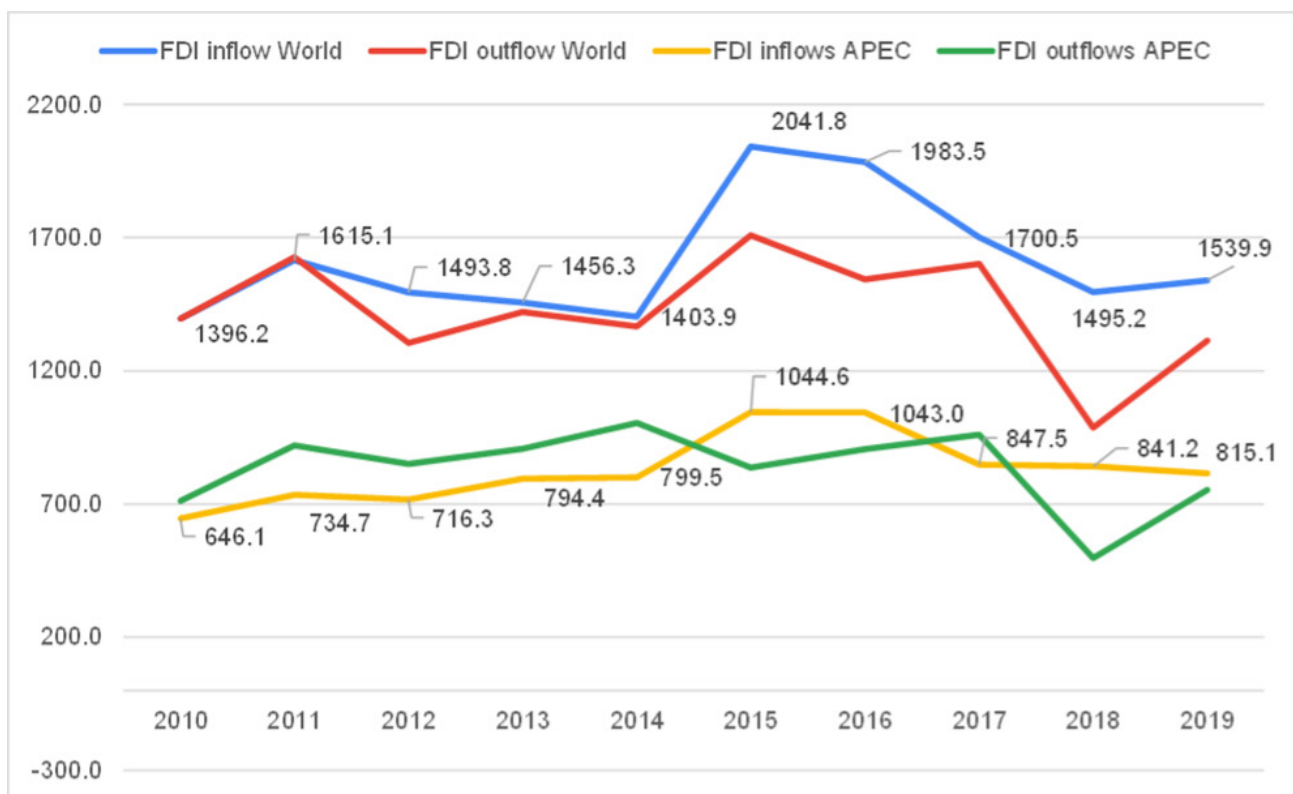
FDI measures may be the gamechanger that revitalizes GVCs and, for this reason, should be considered a strategic action towards economic recovery.

Three main challenges need to be analysed and addressed by APEC economies: increasing number of screening FDI measures, protectionist measures on the rise and make digital technologies accessible for all.

Encouraging FDI by liberalizing and opening investments across the Asia Pacific may help companies to not only keep running operations and doing business until the pandemic is ended, but could also assist to re-establish disrupted supply chains networks and mitigate the negative economic impact. Inward and outward investments in the APEC region have been strategic drivers for the economic growth and development of the region during the current century.

APEC and Global Foreign direct investment, 2010-2019

Inward and outward flows (Billions of dollars)



Comparative analysis on investment chapters of RTAs

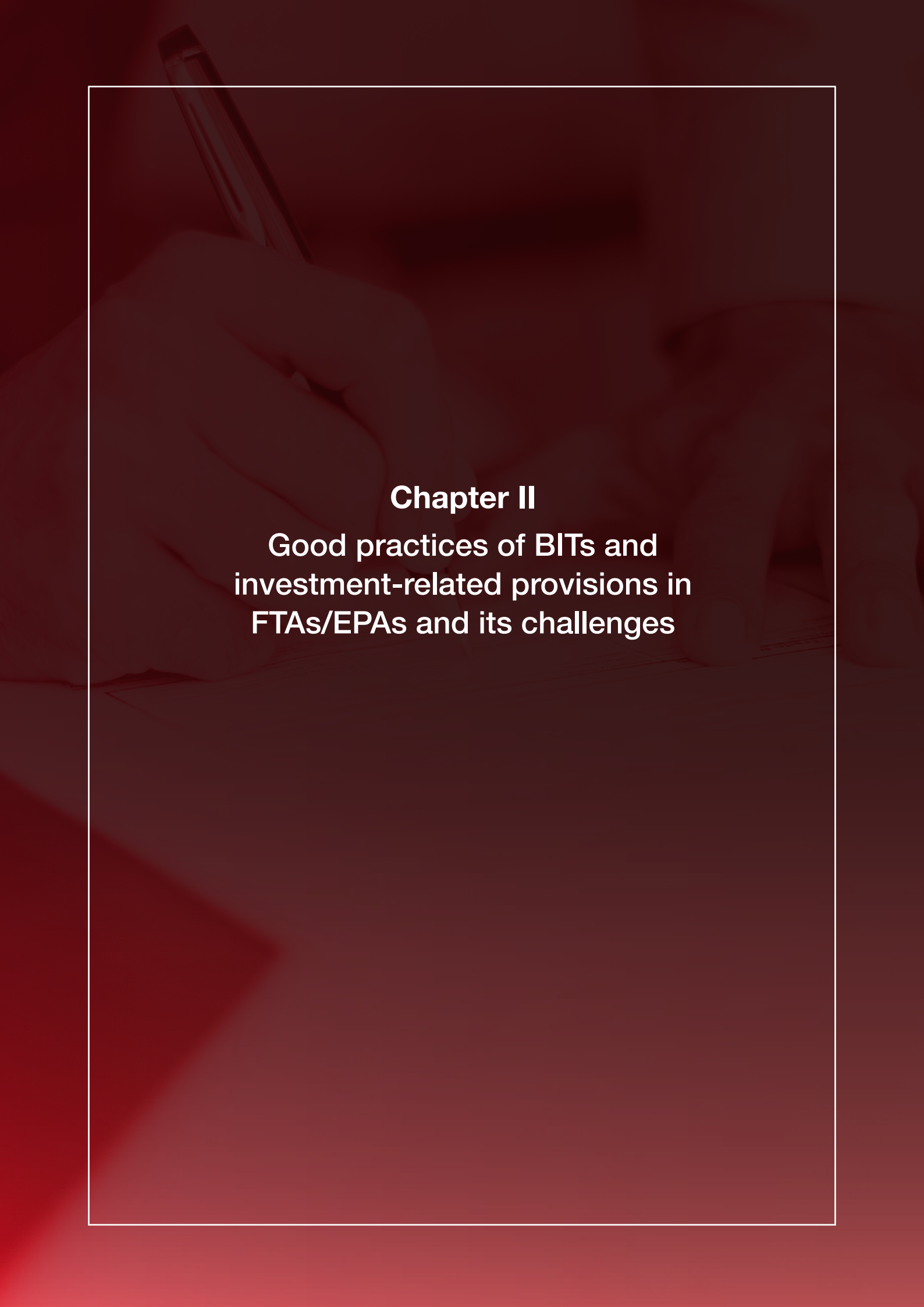
Improving and strengthening the investment environment in APEC economies via enhanced rules on Free Trade Agreements (FTAs) and/or international investment agreements (IIAs) could contribute to promoting resilience in supply chains and sustainable economic recovery. With this improvement in mind, reviewing the contents of leading pathways towards the FTAAP goal namely the CPTPP and RCEP is a useful exercise.

The CPTPP contains the most advanced investment commitments due to their deeper and broader coverage of investment liberalization, protection, and dispute settlement. The CPTPP offers a comprehensive template to encourage FDI and resolve conflicts.

The RCEP has provisions that offer an excellent reference to analyze but it still has considerable room to grow in investment commitments, for instance, by adding an Investment Dispute Settlement mechanism and including subsidies, which are currently exempted as part of the scope of the investment obligations.

Because of the relevance that the CAI (EU-China Comprehensive Agreement on Investment) could represent for supply chain networks in the Asia Pacific and beyond, it is also important to consider it in the comparative analysis on investments provisions. The CAI includes serious commitments on transparency including subsidies, behaviour of covered entities (SOEs), sustainable development; and the establishment of an investment committee. To be noted, CAI does not include an Investment Dispute Settlement .





Chapter II
**Good practices of BITs and
investment-related provisions in
FTAs/EPAs and its challenges**

Chapter II

Good practices of BITs and investment-related provisions in FTAs/EPAs and its challenges

1. Japan's Investment Policies

Presented by Ueno Yudai, Senior Coordinator, Economic Partnership Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Japan

1. Introduction

As we witness the spread of protectionist sentiments amidst the economic downturn caused by the novel coronavirus crisis, the promotion of an open and fair trade and investment system has become more than ever an important factor for the speedy economic recovery of the world. In this regard, developing a better investment environment through initiatives such as the conclusion of bilateral, regional or multilateral investment agreements with well-balanced provision on investment liberalization and protection, are not only effective in protecting investors, but will also contribute to attracting further foreign investments in host economies, thereby contributing to their post-COVID19 economic recoveries and its future development.

2. “Action Plan” on the promotion of investment related agreements and the improvement of investment environments

In 2016, the Government of Japan formulated the “Action Plan towards Promoting the Conclusion of Investment Related Treaties and Development of Investment Environment” or the so-called “Action Plan”, setting out a series of actions to take until the year 2020. Back then in 2016, the number of economies and regions covered by Japan's investment agreements were only 35, covering only 35% of the economy's outward FDI stocks. After 5 years of intensive work, we have managed to double the number of economies and regions covered by investment related agreements, up to 79 economies and regions (including those signed and not in force). Including those that are still under negotiation, the number counts up to 94 economies and regions. This covers approximately 93% of Japan's outward FDI stocks. Moreover, during the years Japan have successfully concluded several multilateral agreements with investment provisions, such as the CPTPP and the RCEP, as well as other high-level treaties such as the Japan-EU Economic Partnership Agreement and the Japan-UK Comprehensive Economic Partnership Agreement.

For the forementioned reasons, Japan believes that the Action Plan has achieved significant results in the improvement of investment environments for the economy. However, the Japanese government believe there is still further work to be done, particularly in the APEC region.

For example, the coverage of BITs with the African economies as well as the Latin American economies still remains relatively low. As mentioned earlier, the conclusion of IIAs contribute not only to investors of the investing economy, but also to the economic development of the hosting economy. In this regard, the importance of having IIAs with the relevant economies is primordial, and Japan is willing to engage in discussions with interested economies to further improve the current investment environment.

In addition, although Japan understands the importance of ensuring the capacity of each state to regulate with a view to addressing its concerns, notably those related to homeland security, from the investors' point of view, it is also important that these agreements retain a sufficient level of investment protection.

3. Understanding the needs and demands of the investors

In order to properly attract foreign investment in an economy, understanding the investors' needs and their demands is quite essential.

In Japan, the government frequently hold dialogues between businesses and policymakers. This is quite useful since it allows the Government to become more aware of these needs and demands. Through these dialogues, it is all the more evident that it is crucial for the economies to practice a balanced approach between investment liberalisation or facilitation and investment protection.

In fact, from the investors' point of view, as much as investment facilitation, such as simplifying the administrative procedures necessary to make investments, it is also important that the risks of investing in a foreign economy, where legal systems as well as practices are very much different, is sufficiently mitigated. For example, a typical concern that a Japanese company may have when investing in a foreign economy is the possibility of the hosting government or any relevant body unilaterally breaching agreements or concessions that they had once agreed upon with the investor. These kinds of risks will only complicate the legal predictability for investors when investing in a foreign economy. Investment treaties can effectively relieve these concerns.

From a more practical point of view, few companies in Japan recognises the existence of bilateral investment agreements with the host economy as an important factor when deciding its investment. In fact, some even confess that it becomes much more difficult to obtain approval for a project, if there is no BIT with the relevant economy. The main reason of this kind of hesitation is probably the lack of transparency. Without a BIT, the company will genuinely have less predictability and foreseeability in its investments, which constitutes a significant risk for investors.

A more specific request from the investor side can be found, for example, in the "Policy Proposal on Investment Treaties" published in 2019 by the Japan Business Federation. This Federation is in fact one of the largest economic organisations in Japan, constituted of more than 1,500 companies and organizations. According to the report, elements such as ensuring a wide range of coverage of investment assets, securing "National Treatment", Most-Favoured-Nations Treatment as well as Fair and Equitable Treatment, Prohibition of performance requirements, Freedom of Remittance, and ensuring an effective Investor-State Dispute Settlement mechanism are indicated as some of the important issues to be addressed in IIAs.

4. International discussion on investment related policies

Although investment treaty related practices have significantly developed over the past 30 or more years, this does not mean that the current investment treaty practice is the most effective approach in promoting investment liberalisation.

Especially, taking adequate balance between the protection of investors' rights on the one hand, and securing policy space for regulatory measures on the other hand, has been the main challenge from the outset. In fact, more and more concerns are being raised, for example, in the environmental sphere. Economies are experiencing significant risks to be awarded by the

tribunals under ISDS clause to pay the costs of investors' damage, as a result of their regulation and policies changes which were taken to address environmental challenges. Given this situation, Japan believes it is all the more important to strike an adequate balance between the states' authority to regulate, and the protection of investors. This is not an easy task to handle, but recently we have been seeing some interesting initiatives develop in different international forums.

For example, in UNCITRAL, or the United Nations Commission on International Trade Law, Working Group III has been mandated since 2017 to develop discussions on the Reform of investor-state dispute settlement. Its 40th session was recently held, where Japan has been actively engaging in the discussion since its start.

Number of concerns have been pointed out with regards to the current mechanism of ISDS: for example, there have been rising concerns regarding the independency and impartiality of arbitrators. Issues of double hatting, where an arbitrator for a certain case serves on the other hand as an attorney for an investor of the former one in another case, may lead to serious conflict of interests. Some have also pointed out that easy access to third party funding as well as the lack of case-filtering mechanisms may lead to increasing frivolous claims, eventually leading to increased burdens of host economies. This may have negative effects on the proper implementation on the current mechanism of ISDS.

Although participating governments and stakeholders have shared the common goal to upgrade the current mechanism, the views of participating economies are still diverse on how these issues can be addressed properly, and thus discussions are still underway. Further evaluation on a fact-and-statistics basis will be required for economies to determine which path will be the most efficient approach in addressing the existing concerns. Japan is determined to keep contributing to the discussion, with a view to achieving an appropriate approach that can strike correct balances between the interests of states and ones of investors and business.

In addition, discussions on creating a multilateral instrument for investment facilitation under the framework of the WTO is also underway. This initiative finds its origin in the Joint Initiative on Investment facilitation, which was established in 2017 at the 11th WTO Ministerial Conference (MC11). The negotiation aims to improve transparency and simplicity of relevant laws, regulations and administrative procedures on foreign investment, through the development of common rules in investment facilitation. For example, when an investor decides to invest in a certain economy, if the government requires the investor to produce complex documents and go through lengthy processes prior to approval of investing, this can discourage investors from investing. Also, in order to increase foreign investment in an economy, reasonable, objective and impartial administration of rules and procedures throughout the lifecycle of investment is the key.

Japan is actively engaging in these negotiations with a view to contribute to the rule-making procedure, fully utilising the experiences it has accumulated in its past treaty negotiations. From the perspective of the economy which promotes foreign investment, we also believe that it is important to keep in mind that when developing rules, these rules should be implemented in a universal manner, regardless of the levels of development.

In addition, the negotiation for amendment of the Energy Charter Treaty, which includes investment related provisions and ISDS, has started in 2019. The ECT opened up for signature in December 1994 and entered into force in 1998, which Japan concluded in 2002. Several rounds of negotiations has already taken place since its kick-off in 2020, and the issues of negotiations widely range from investment protection (such as FET, expropriation and exemption clauses etc.), ISDS, to sustainable development and corporate social responsibilities.

The idea behind the negotiation is, on one hand, to address the concerns and interests of the Contracting Parties that the Treaty should be modernized in a way that it effectively keeps up with the demand to create a more sustainable energy environment towards a carbon neutral society, and on the other hand, to update provisions for investment protection in a way that it correctly reflects the recent trend of investment agreements. Japan believes that in these negotiations a balanced approach is also the key: it is important that negotiations are developed in a way that both parties' interests, that is, of the states as well as investors, are equally taken account of.

In addition, initiatives can also be seen in individual treaty negotiations to accommodate recent concerns and trends in economic activities. For example, Labour and Environments have become more and more an issue of concern for many economies, given the rise of interest by the civil society. Responding to these concerns, in the CPTPP, contracting states have successfully agreed to include Labour and Environment Chapters in the Agreement.

In the Labour Chapter of the CPTPP, Member States affirmed their obligations as a member of the ILO, and committed themselves to maintain in their statutes and regulations to adopt or maintain labour rights including forced labour, within their territories. Similarly, the Environment Chapter aims to promote mutually supportive trade and environmental policies and promote high levels of environmental protection and effective enforcement of environmental laws. The inclusion of these provisions in the CPTPP agreement was in fact quite innovative, and has successfully set out a new standard in economic treaties' negotiations.



2. Challenges in International Investment Agreements from a business perspective and possible solutions

Author: Hiroki Yamada, Junior Research Officer, International Economy Division, Overseas Research Department, Japan External Trade Organization (JETRO)

I. Introduction

Businesses are facing a high level of uncertainty against the backdrop of trade frictions and the COVID-19 pandemic. A recent JETRO's survey showed that about 70% of 2,722 Japanese firms reviewed their overseas business strategies in response to the increasing global risks². Such an uncertainty particularly overshadows foreign investment. UNCTAD reports that global FDI is disproportionately hit by the COVID-19 pandemic in comparison to international trade, with global FDI flows falling by 35% in 2020 and reaching the lowest level since 2005³. Although UNCTAD predicts that the FDI flows will show a recovery in 2021, this prospect is modest as it is subject to 'lingering uncertainty about access to vaccines, the emergence of virus mutation and delays in the reopening of economic sectors'⁴.

While the recovery of FDI greatly depends on the duration of the ongoing pandemic, FDI remains an important source of economic growth in the post-pandemic era. As such, it is ever more necessary for host states to provide certain and predictable environments for foreign investment so that investors can have confidence in successfully implementing their project. In this context, International Investment Agreements (thereinafter 'IIAs') play a crucial role in creating such environments. IIAs oblige host states to guarantee foreign investment protection based on substantive standards. Those standards generally include non-discrimination principles (most-favoured-nation treatment and national treatment), fair and equitable treatment and prohibition against illegal expropriation.

Investment protection under IIAs benefits investors both before and after the investment is made. That is, investors at a pre-establishment stage could take into account the availability of IIAs to assess its long-term business risks in each candidate state. Moreover, at a post-establishment stage, investors could maintain the balanced relationship with host states – investors may restore their leverage against host states by relying on treaty protection once they have initiated capital flow within the jurisdiction of host states⁵.

All APEC economies have developed their IIA network in the region at both bilateral and plurilateral levels. Thus, most investors in the region are given opportunities to reap the benefit from IIAs, insofar as such treaties are in force between home and host economies. Nevertheless, it is not sufficiently known to what extent businesses benefit from the treaty protection in practice. In this regard, JETRO revealed in its survey that more than half of Japanese investors did not recognise the existence of IIAs. Moreover, the survey showed that almost no investor relied on IIAs to seek settlement of operational troubles with host states, even when the disputes could be within the scope of the treaty protection. This result strongly suggests that investment protection promised under IIAs are not fully enjoyed by investors in need. Based on these findings and their implications, this paper recommends that 1) home economies in the APEC region undertake tailor-made promotion activities of IIAs for multinational firms and SMEs respectively, and that 2) both

home and host economies in the region strengthen their internal capacity to facilitate the use of IIAs by investors.

This paper consists of six parts. In Section II, it briefly describes some features of the JETRO's Survey on IIAs. In Section III, the paper highlights findings of the survey and considers their implications. In Section IV, it introduces three key phases for investors to enjoy investment protection under IIAs, and goes on to introduce some policy recommendations for APEC economies in Section V. Section IV concludes.

II. About survey on IIAs

First, it is useful to provide an overview of the survey on IIAs. The survey was conducted as a part of JETRO's annual survey on the international operations of Japanese firms. This annual survey targets Japanese firms that have used JETRO's services to gauge their interest in overseas business. The survey generally asks target firms about the status quo of their trade and investment activities as well as its prospects and challenges. In 2020 FY, JETRO implemented the survey between 30th October and 6th December 2020, and received 2,722 valid responses⁶.

Among those respondents, JETRO particularly focused on 966 Japanese firms with foreign bases (thereinafter 'Japanese investors'), and asked about IIAs in relation to investment activities at a *post-establishment* stage. Importantly, 94.0% of the respondents have at least one establishment in a state/regional organisation covered by Japan's effective IIAs. In terms of scale of firm, 67.9% of them are Small and Medium-sized Enterprises (thereinafter 'SMEs') while the rest is multinational firms⁷. The respondents operating in manufacturing and non-manufacturing sectors account for 53.9% and 46.1% respectively⁸. As for their experience in foreign investment, about 60% answered that they have been maintaining their foreign bases for more than 10 years.

To empirically understand how Japanese investors benefit from the treaty protection, the survey mainly asked three questions: 1) to what extent are you familiar with IIAs, 2) whether you have faced any operational problems arising from measures or treatments by host states, and if so 3) how have you overcome such problems. The next Section describes the results in detail and considers its implications.

III. Survey results

i. Familiarity with IIAs

The first question concerns the degree of awareness of IIAs among Japanese investors (See **Figure 1**). The survey revealed that 51.2% of the respondents were not at all familiar with IIAs. When looking at this figure by scale of firm, the ratio of SMEs is 58.7%, which is 23.2% higher than multinational firms. The remaining respondents chose 'know the overview' (34.6%) and 'have considered in the context of overseas businesses' (10.2%).

Despite the apparent gap between SMEs and multinational firms in term of familiarity with IIAs, the result does not necessarily mean that multinational firms better comprehend the significance of IIAs for their investment than SMEs. That is, both SMEs and multinational firms, in answering that they have considered IIAs in the context of overseas businesses, showed almost the same response ratio, namely about 10%. This would be rather counterintuitive as multinational firms are usually placed in a better position to take advantage of legal instruments such as IIAs⁹. Although multinational firms may have alternative methods to manage non-commercial risks other than IIAs (e.g. investment insurance, stronger leverage against and channels with host states), a majority of them are highly likely to lack sufficient

Figure 1: Familiarity with IIAs

Total (n=966)



Large-scale firms (n=310)



SMEs (n=656)



- Have no idea
- Know the overview
- Have considered IIAs in the context of overseas business
- Others (incl. no answer)

Source: JETRO, FY 2020 Survey on the International Operations of Japanese Firms

Note: Others include 'have relied on IIAs to seek solutions in the face of operational problems' and no response

ii. Operational problems in host states

Second, the survey asked whether investors had faced any operational problems due to measures or treatments by host states (i.e. central, regional or local governments). 18.3% of the respondents, namely 177 firms, answered that they had faced such issues in host states. **Figure 2** shows the breakdown of the responses. While careful analyses of facts in each case is of paramount importance, all of the problems correspond to typical provisions of IIAs¹⁰ and thus are likely to be within the scope of the treaty protection.

Figure 2: Operational problems encountered by investors

(multiple choices allowed, %)

Untransparent legal system/sudden regulatory changes

41.8%

Rejection of renewal of license/delay of procedures without reasonable grounds

24.3%

Restriction on transfer of revenues

17.5%

Order to hire local employees/appoint local employees as executives

16.4%

Interference with transfer of technology/royalty rate

14.1%

Discriminatory treatment in license application compared to 3rd countries

5.1%

Investment incentives (eg. subsidies, tax exemptions) abandoned

4.5%

Expropriation (incl. indirect expropriation) without adequate compensation

4.5%

Others

9.0%

n=177

Source: JETRO, FY 2020 Survey on the International Operations of Japanese Firms

Note: Multiple choices allowed. 'Others' represent 16 investors who provided additional comments on investment-related measures of host states other than listed choices. All of those measures could be covered by IIA provisions.

The most frequently chosen problem is 'untransparent legal system/sudden regulatory changes', marking 41.8% of the total. According to comments provided by the respondents, problems concerning untransparent legal system include 'inconsistent interpretations of foreign investment regulation between different bureaus' (multinational firm, utility), 'sudden accusations of non-compliance by host state despite the lack of clarity in local laws' (SME, trade and wholesale), and 'additional taxation by local investment promotion agency due to insufficient [voluntary] payment for their services' (SME, trade and wholesale). Likewise, the respondents commented that sudden regulatory changes by host state resulted in 'a temporary cancellation of investment activity' (SME, plastics) and 'a receipt of a sudden non-compliance notification from the government' (SME, metal product). Respondents also faced unreasonable rejection or delay of licence-related procedures (24.3%), restriction on transfer of revenues (17.5%) and order from host states to employ local staff or appoint local executives (16.4%).

iii. Approach to problem-solving

Lastly, the survey asked how the Japanese investors in trouble had tried to settle the problems caused by measures or treatments by host states (See Figure 3). A majority of the respondents (61.6%) answered that they gained assistance of local consultants. This is followed by dialogues with host government via external channels such as Japan's Chamber of Commerce (35.6%) and consultation with governmental organisations including JETRO (25.4%).

Figure 3: Approach taken to solve operational problems

(multiple choices allowed, %)

Consultation with local consultants

61.6%

Dialogues with local gov. via external channels (eg. Japan's Chamber of Commerce)

35.6%

Consultation with gov. organisations including JETRO

25.4%

Overseas investment insurance

0.6%

Exploring solutions under IIAs

0.6%

Others

10.7%

n=177

Source: JETRO, FY 2020 Survey on the International Operations of Japanese Firms

Note: Multiple choices allowed. 'Others' represent 22 investors who provided additional comments other than listed choices.

Importantly, only 0.6%, namely, 1 respondent referred to IIAs to seek solutions. To be clear, it is beyond observation whether individual problem faced by respondents is actually within the scope of the treaty protection. Nevertheless, this result strongly suggests that investment protection promised by IIAs is not effectively enjoyed by investors in need.

The implication of the survey results is twofold. First, despite an expanding network of IIAs, a large number of foreign investors, inter alia SMEs, seems unaware of IIAs in the first place. The survey revealed that more than half of Japanese investors did not recognise the existence of IIAs. Although further empirical evidence is required, this tendency could be more or less applicable to investors in other APEC economies¹¹. Given that such a low awareness poses a great obstacle to maximising the benefits of IIAs, it is desirable that investors become more familiar with IIAs enough to be able to consider it in relation to its own investment.

Second, the survey result implies that businesses do not consider IIAs as a problem-solving tool. A primary explanation for this is that investors do not have sufficient knowledge to associate day-to-day operational problems with relevant IIA provisions. Furthermore, investors

may consider that IIAs do not provide realistic solutions because they perceive that recourse to investment arbitration, which requires special legal expertise as well as time-consuming and costly procedures, is the only way out under IIAs. In particular, SMEs are more likely to bear such burden due to their limited capacities and resources. In fact, a relevant study suggests that SMEs constituted about 15 % of the claimants in all investor-state dispute settlement cases between 2008 and 2013¹². Contrary to this seemingly dominant perception, this paper explains in the next Section that IIAs indeed provide multiple solutions depending on circumstances of respective investors. Thus, investors are encouraged to understand those options and identify the most suitable solution under IIAs. This eventually enables investors have wider options in managing or preparing for non-commercial risks in during the period of their project.

IV. Key phrases to protect investment under IIAs

Before making policy recommendations in the next Section, it is helpful to start with illustrating three key phases for investors to protect their existing investments under IIAs.

The first and foremost step is to understand the basic functions of IIAs. Specifically, investors should know what operational problems/risks could be covered under IIAs. For practitioners, it is obvious that IIAs protect investors from host states' mistreatments or measures contrary to IIAs obligations. However, a majority of investors do not necessarily possess this basic knowledge as indicated in the survey above. Therefore, investors should have an elementary understanding as to the categories of typical problems/disputes that are within the scope of IIAs (See Figure 4). Simply acquiring such basic knowledge, combined with external assistance by home states and business associations, could increase the chance that the damaged investors get effective protection under IIAs.

Figure 4: Operational problems and corresponding IIA provisions

Problem	Example of relevant IIA provision
Untransparent legal system/ sudden regulatory changes	Transparency
Rejection of renewal of license/delay of procedures without reasonable grounds	Fair and equitable treatment
Restriction on transfer of revenues	Free transfer of capital
Order to hire local employees/appoint local employees as executives	Prohibition of performance requirements
Interference with transfer of technology/royalty rate	Prohibition of performance requirements
Discriminatory treatment in license application compared to 3rd countries	Most-favoured-nation treatment
Investment incentives (e.g. subsidies, tax exemptions) abandoned	Umbrella clause
Expropriation (incl. indirect expropriation) without adequate compensation	Expropriation and compensation

Note: Relevant IIA provisions are illustrative.

In the second phase, investors should confirm whether IIAs provide legal protection for their investment at issue. This step requires consideration or application of IIAs in relation to an actual or potential dispute. Such considerations include 1) whether a project or deal at issue is a qualified ‘investment’ under IIA, 2) whether the investor is a qualified ‘investor’ and 3) whether the measure at issue is within the scope of specific provisions of IIAs. In case host states reserve application of certain provisions to designated sectors or legislations in its schedule (so-called negative list), investors need to check whether or not the sector of the investment or the measure in question is exempted from the treaty protection. Moreover, as the IIA network becomes more multi-layered, investors are encouraged to compare available IIAs and choose the most suitable one. For example, there are three concluded IIAs between Japan and People’s Republic of China, each of which has different structure and provisions (See Figure 5). Given such parallel treaty channels, investors from both economies should carefully compare the relevant provisions and identify the most favourable IIA depending on their circumstances.

Figure 5: Comparison of IIAs between Japan and China

Provision	Japan-China BIT	China - Japan - Korea, Republic of Trilateral Investment Agreement	Regional Comprehensive Economic Partnership
Transparency			
Fair and equitable treatment	✓*	✓	✓
Free transfer of capital			✓
Umbrella clause		✓	
Prohibition of performance requirements			
export requirement	✓*	✓*	✓
domestic sale restriction requirement			✓
senior management and boards of directors			✓
technology transfer requirement	✓*	✓*	✓
intervention with royalty rate			✓
Expropriation and compensation	✓*	✓	✓
ISDS clause	✓*	✓	*2

Source: Compiled by author

Note: For reference purposes only. i) Provisions with asterisk (*) are applied with limited scope or certain conditions. ii) Contracting Parties of RCEP will enter into discussions on an ISDS clause no later than two years after the date of entry into force of the agreement.

As long as the damaged investor believes that the host government acts in breach of its IIA obligations, it could consider, as a final step, how such disputes could be settled by taking advantage of IIAs. Figure 6 categorises four possible approaches enabled by IIAs by focusing on both their procedures (formal v. informal) and forms (collective v. individual). The investor could choose the most suitable approach by carefully examining multiple elements such as resources (e.g. litigation fees, human resources), strategies (e.g. cost-benefit analysis, relationship with the host state) and stages of an investment dispute.

Figure 6: Approaches taken by relying on IIAs

Procedure / Form	Individual	Collective
Formal	Investor-state arbitration	Inter-governmental forum
Informal	Informal consultation e.g. renegotiation of the contract	Dialogues

Within the framework of IIAs, recourse to investor-state arbitration based on an ISDS (Investor-State Dispute Settlement) clause would be an effective solution as it offers a formal and legally binding procedures. Indeed, damaged investors have actively used international arbitration to pursue monetary compensation. According to the UNCTAD, the number of publicly known ISDS cases, as of 31st December 2020, is 1,104. This number by far outweighs that of WTO cases as of the same date (598). However, given the burden and potential tension between disputing parties incurred by the proceedings, some investors including SMEs may think that international arbitration is a last resort to claim financial compensation by the host state, and instead prefer more amicable and cost/time efficient solutions¹³.

In this regard, inter-governmental forums constituted under IIAs would be an alternative. For example, Art.14.18 of Japan-Australia EPA stipulates that contracting states establish a Sub-Committee on Investment in order to review and monitor the implementation and operation of the investment chapter. Although the Sub-Committee is primarily composed of and co-chaired by government representatives, it may invite by consensus parties interested in the issue to be discussed. Therefore, businesses are given a direct channel to host states to collectively convey their concerns about the implementation of the treaty. Despite non-binding nature of the framework, investors can still take advantage of such forums and pursue early resolution or prevention of investment disputes.

Some investors may wish to have an informal consultation with the local government at an early stage of the dispute. Under this circumstance, investors could indicate potential breaches of IIA obligation by the host government to gain more negotiating leverage, and exchange views to seek an amicable and mutually satisfactory settlement.

Another informal approach is to collectively express those concerns on the basis of IIA provisions via external entities such as business associations and governmental organisations of home states. For example, according to a hearing by JETRO, a group of Japanese manufacturing investors were told by local government to shut down and relocate the factories due to the implementation of an urban development plan. However, the investors were concerned that the compensation was not sufficient as the suggested term was not clear. Under this circumstance, the investors reached a satisfactory term with the local government after claiming, via Japan's Consulate, an adequate amount of compensation based on the expropriation provision under a relevant BIT. Those investors told JETRO that, in addition to maintaining a friendly relationship with the local government on a daily basis, the collective negotiation based on the IIA term was a crucial element for the successful negotiation.

There is no one-fit-for-all solution to international investment dispute because of its highly sensitive nature and different circumstances of each dispute. Nevertheless, it is crucial for

investors to be able to flexibly consider multiple solutions under IIAs and choose the most suitable one. By doing so, investors could widen its discretion in settling disputes with host states.

V. Policy Recommendation

Given the findings and implications from the survey, this paper recommends two policies that APEC economies could take. First, it suggests that host economies undertake tailor-made promotion activities of IIA for multinational firms and SMEs respectively. Second, it also suggests that both host and home economies build up internal capacity to facilitate investors to get effective protection under IIAs. In the following, these recommendations are elaborated by referring to the three-phase framework explained in the previous section.

i) Tailor-made promotion for multinational firms and SMEs

Public sectors could take strong initiatives to carry out a variety of promotion activities such as holding seminars, making relevant information more accessible, and importantly, translate ‘treaty languages’ into more practical terms. In doing so, it is essential to take into account gaps between SMEs and multinational firms in terms of capacity and resources. Therefore, it is desirable that such promotion activities take tailor-made approaches to two different targets respectively.

The three-phase framework helps identify which phases SMEs and multinational firms should understand as the essential knowledge. For SMEs, the first phase, namely, to understand what problems could be covered under IIAs, is the most important. This is because it is the investors who encounter specific problems in their daily operation. Once SMEs voluntarily recognised that they appear to face such problems covered by IIAs, the home government could assist them in taking the next two phases to consider practical solutions under IIAs. This in turn necessitates the capacity-building of home economies as explained below.

On the other hand, multinational firms need to understand the entire phases to take advantage of IIAs given their relatively richer resources. As such, the promotion activities should be more comprehensive than those for SMEs. Such programmes could for example include how to read treaty texts and how to identify the best solution under IIAs.

ii) Capacity building of host and home governments

The second key recommendation is capacity-building within public sector (See Figure 7). First of all, host economies must ensure that they comply with treaty obligations at central, regional and local levels as IIAs generally bind actions of all government entities. Capacity-building of non-central governments is especially significant because they are in many cases daily contact points for foreign investors. In the above-mentioned JETRO’s hearing, the Japanese investors told that the local officer did not know the existence of an IIA in the first place, and after letting the staff know the expropriation provision, they could reach a satisfactory solution as to the amount of compensation. This case is a great example in which capacity building of local government matters in practice.

In this regard, it would be useful for host economies to refer to ‘Handbook on Obligations in International Investment Treaties’ prepared by APEC Secretariats. Although the Handbook does not provide any specialised legal advice, it nonetheless provides an overview of IIA obligations and some checklists for forming and implementing relevant domestic regulations. (See Figure 7)

Figure 7: Checklist for decision makers in government entities

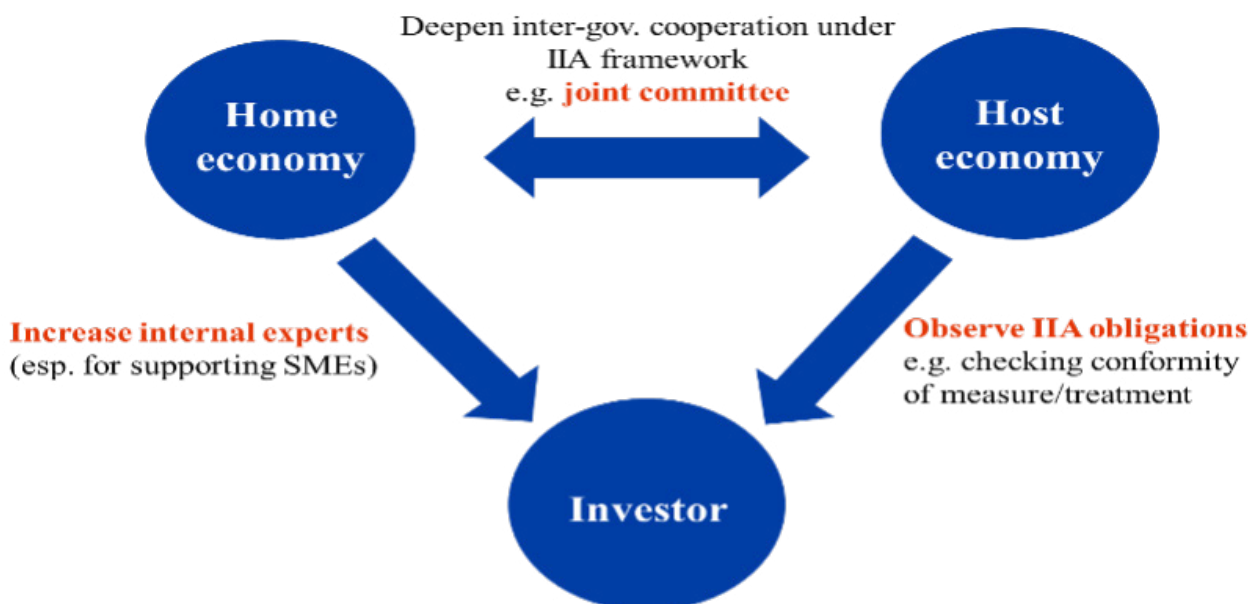
No.	Checklist for decision-making
1.	Do I have the legal authority for the action I am planning to take? Am I acting within the authority granted by the law?
2.	Am I exercising my legal authority for the purpose for which it was given?
3.	In exercising my legal authority, have I taken into account all relevant information and excluded irrelevant considerations?
4.	Can I show that I have correct reasons for my decision or action?
5.	Have I heard and considered the point of view of those likely to be affected by the decision? Have they been given a fair opportunity to make representations?
6.	Have I made up my mind in advance of my decision or give the impression that I have? If I am following a general policy, have I considered whether any exceptions are permitted or warranted?
7.	Do I or anyone involved in making the decision have any conflicting interest which might lead someone to suppose that there is bias?
8.	Have I caused anyone to believe that I will be acting in a different way from the way in which I now intend to act?
9.	Am I acting in a way that might be regarded as "arbitrary" or "disproportionate"?
10.	Does my decision result in less favorable treatment between persons or entities in similar circumstances?
11.	Is there a contract between the investor and the government? Does my decision have an effect on that contract or what the investor is able to do under it?

Source: APEC Committee on Trade and Investment, Handbook on Obligations in International Investment Treaties

Capacity building is also necessary for home state as well. As illustrated earlier, SMEs usually do not have sufficient resources and capacities to take advantage of treaty protection independently. Thus, home states have a crucial role in facilitating investors to get treaty protections. This is especially true of the second and third phases where legal expertise is much required. In case of JETRO, we are gradually starting to hold internal seminars on IIAs so that we could consider treaty protection when Japanese firms are facing trouble in the economy of their overseas operation.

Last but not least, both home and host states should take advantage of communication tools under IIA framework such as joint committees. They could discuss and review whether measures at issue are in conformity with treaty obligation. By doing so, they could share common understanding as to the background why the measure has been taken or how they could improve the situation with the aim to create further economic cooperation between contracting states.

Figure 8: Capacity building in public sector



VI. Conclusion

Given the unprecedented uncertainty surrounding businesses, investors could benefit from investment protection under IIAs to secure more certain and transparent environment.

However, the reality is that most investors do not recognise or enjoy such protections. To maximise the benefit of treaty protections given to investors, this paper suggests that public sectors in APEC economies undertake promotion activities suitable for multinational firms and SMEs respectively, and that both home and host economies strengthen their capacity to facilitate investors to get effective protection under IIAs.



3. Role of investment chapters in FTAs

Presented by Deborah Elms, Founder and Executive Director of the Asian Trade Centre

Investment chapters in free trade agreements (FTAs) have at least three key objectives:

1. Rules governing investment practices;
2. Market access and national treatment conditions;
3. Investment protection to ensure governments do not expropriate without fair and adequate compensation.

All three elements are very important for companies and commitments only matter to the extent that they either alter planned activities of government or encourage companies to invest.

Most of the focus has been on the final function which is investment protection. Investment protection does matter to firms, but more as signaling device about what governments might/might not do. Using any FTA (or BIT) investment protection mechanism can be viewed as “nuclear option” for firm—company will never work in the market again.

There is a limited focus on the rule-making aspects of investment chapters, including national treatment and MFN clauses as well as other components. But these can be extremely useful for companies.

APEC economies can focus on more clearly articulating the rules that govern investment, including such elements as allowable performance requirements, movement of capital in and out, allowable government activities on expropriation, management and boards of directors’ requirements, and non-conforming measures or restrictions.

The importance of market access commitments

Market access commitments are important. Key queries for business include:

- Which sectors are opened for foreign investment?
- Which have limitations imposed?
- What are these limitations?
- How might the market access conditions change over time?

Investment chapters are part of a larger FTA, and they need to build on and supports efforts across the entire agreement, not just for investment.

Investment chapters, like other aspects of an FTA, can be renegotiated, added, expanded or adjusted in the future as part of ongoing process of updates/upgrades.

Why knowledge sharing across APEC economies is important?

APEC economies would benefit from knowledge sharing, for example on BIT Chapters. Even brilliant agreements that sit forever in a drawer are not helpful.

It is critically important for APEC economies to work with local firms to explain conditions granted by new commitments within FTAs on Investment. APEC economies should support materials and sessions geared to both large and small firms in business-friendly language.

APEC economies can play a critical selling role and APEC economies can share.

Knowledge exchange on how better to improve investment promotion agencies working overseas can support initiatives that attract inbound investment. This can be achieved by

APEC economies sharing knowledge from a wide range of government officials on the content of such agreements can also benefit the way in which investment policy are accurately and effectively communicating with global or regional companies.



A hand holding a pen over a document, with a red overlay.

Chapter III

**Analysis on new investment related
issues in the post-COVID era**

Chapter III

Analysis on new investment related issues in the post-COVID era

1. New issues in the post-COVID era: what role for FDI and investment treaties?

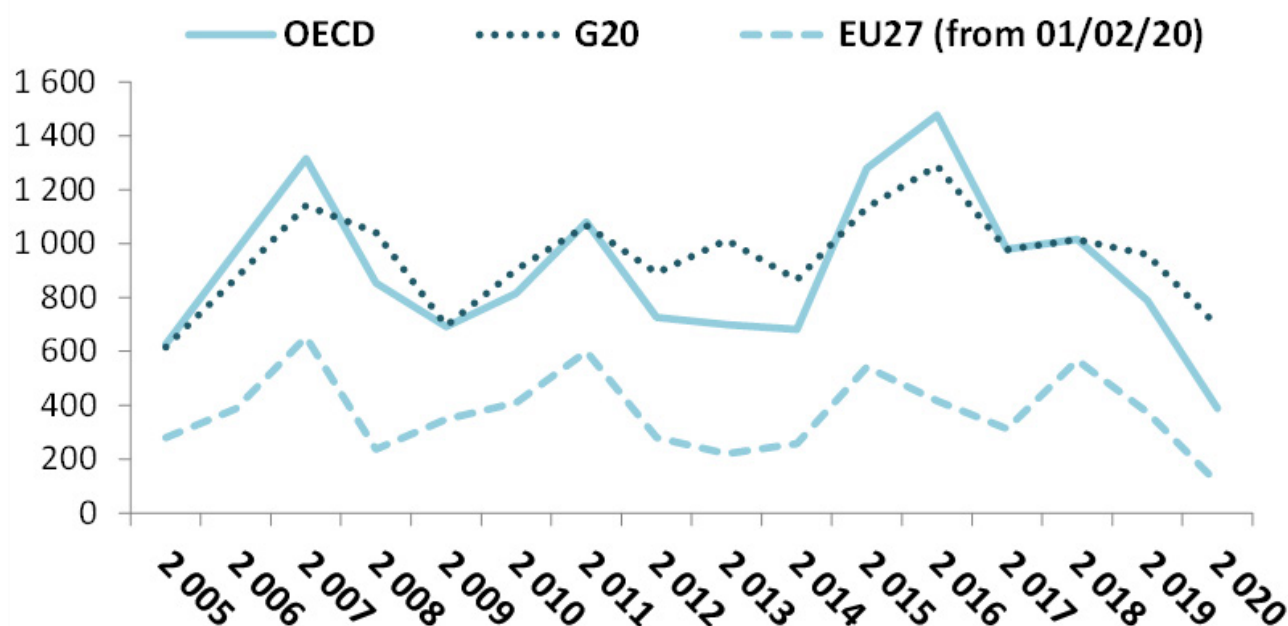
Presented by Ana Novik, Head of the Investment Division of the Directorate for Financial and Enterprise Affairs, OECD

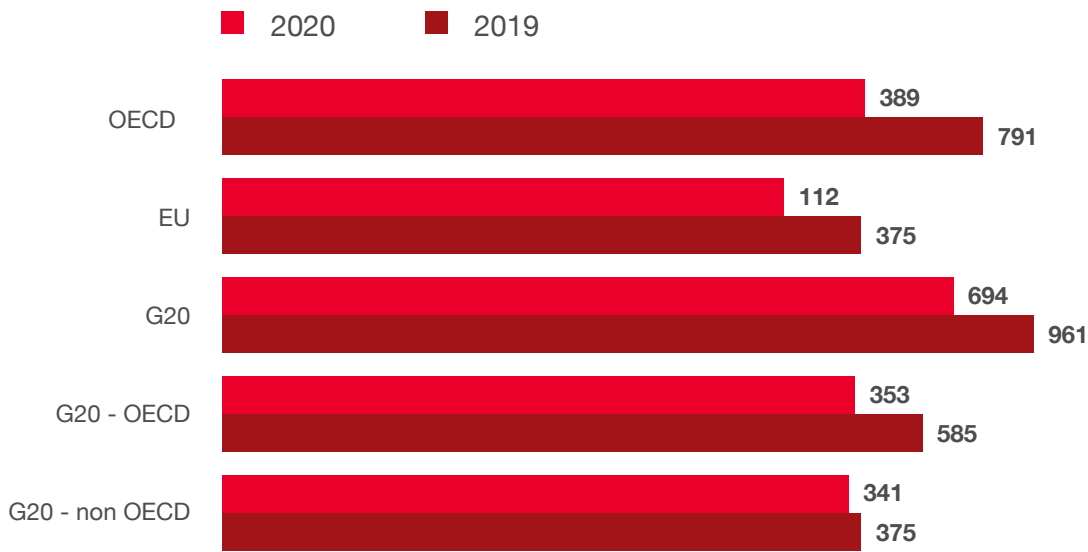
COVID-19 disruptions send global FDI plunging 38%, accentuating FDI's steady decline over the past 6 years.

FDI inflows declined continuously in all quarters of 2020 except in the third quarter where they increased by 11%, before dropping again by 42% in the fourth quarter.

FDI inflow decreases were widespread across all non-OECD G20 economies, except in China and India where FDI inflows increased by 14% and 27% respectively due to surges in the second half of the year.

FDI inflows for selected areas, 2005-2020 (USD billion)





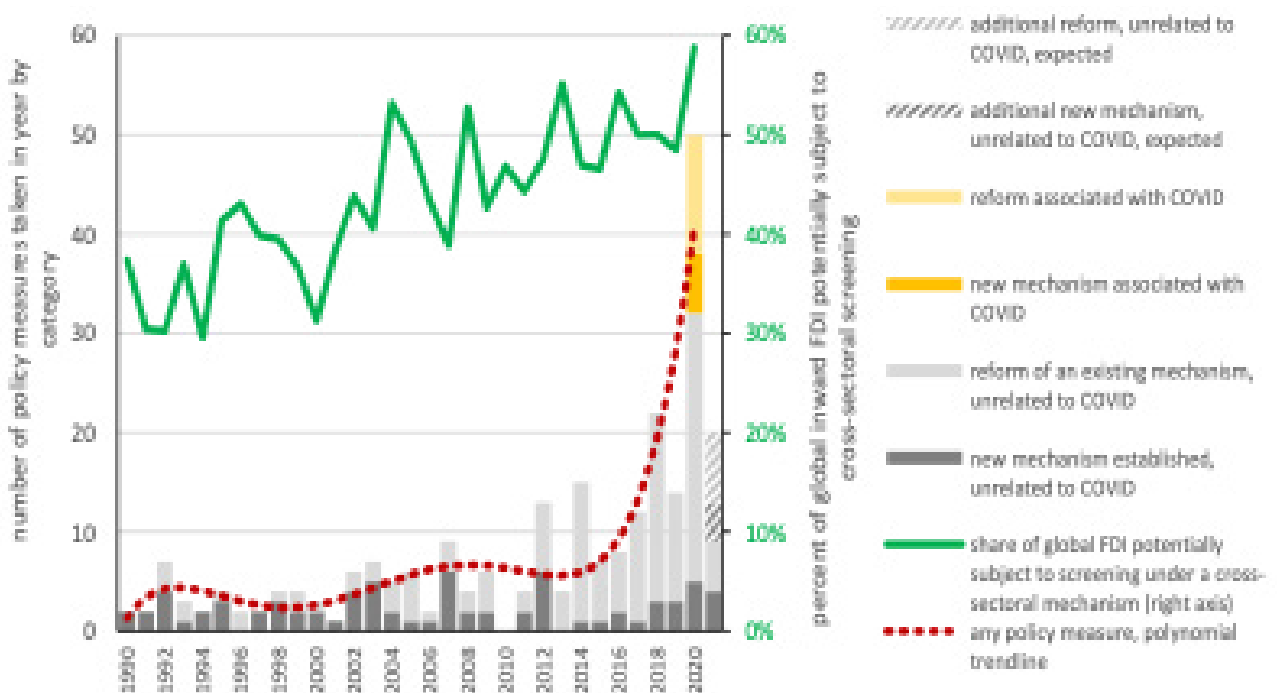
Investment policy measures

Many economies are facilitating and liberalizing foreign investment, but policy making for investment screening continues an upward dynamic.

The result has been that the share of global FDI inflows potentially subject to screening continues to grow.

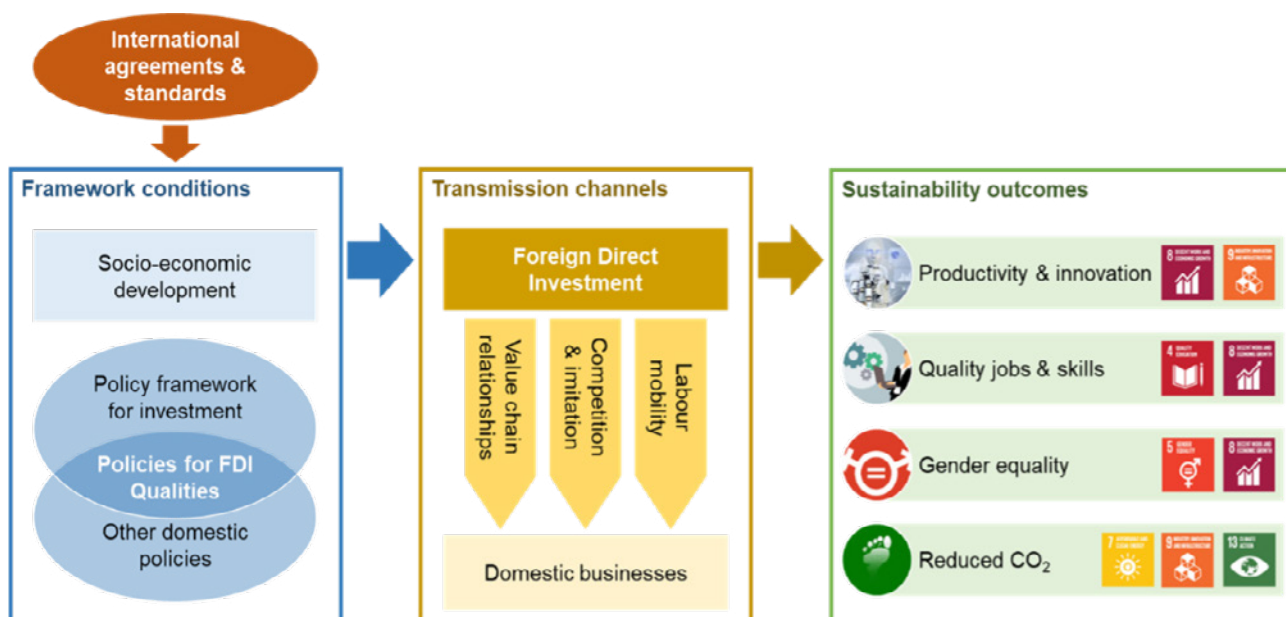
Private investment, and in particular international investment, should be part of a sustainable recovery beyond 2021.

Introduction and reform of acquisition- and ownership-related policies to safeguard essential security interests (1990 to early May 2021)



Data cover the 62 economies that participate in the OECD-hosted Freedom of Investment Roundtable and reflect information as of 2 May 2021. A new mechanism or reform is “associated with COVID-19” if the government has explicitly justified its introduction, at least in part, with the pandemic or its fallout. Projections by the OECD Secretariat are based on public government statements. FDI flow data for 2020 are preliminary. Source: OECD.

Investment for sustainable development: The FDI Qualities Policy Toolkit



Investment treaty policy

In March 2021, the OECD launched a new structured multilateral discussion among 62 economies (a “two-track approach”):

Track 1: What is the future of investment treaties in this new environment?

- Global challenges and COVID including new social demands on investment treaties
- Scope for potential areas to address in treaties has broadened
- Protection, liberalization, facilitation, right to regulate, sustainable development, etc ...
- Investment treaties are one of the main frameworks that regulate international investment

Issues to consider:

- Contributing to sustainable development and responsible business conduct, including advancing respect for human rights;
- Liberalization of investment, market access and investment facilitation;
- Fair competition issues in areas such as government support and digital transformation;

- Investment protection and transition policies; and
- Implementation and enforcement beyond investor-state dispute settlement.

Two broader issues that deserve special attention:

- investment treaty policy and policies on climate change; and
- investment treaty policy and FDI qualities.

Track II: What to do with existing agreements?

- The evolution of BITs and how many economies are reviewing treaty designs in light of experiences (disputes)
- New designs including greater precision and clarity and limited multilateral coordinated effort
- Some specific provisions are more relevant than others
- Need to address perceived shortcomings in treaties concluded in the past



2. The New Generation of Peruvian International Investment Agreements and Covid-19

Presented by Ricardo de Urioste, International consultant and Arbitrator

In general terms, the following presentation wishes to relate Peruvian public policy destined to combat the current Covid-19 pandemic with options regarding the reform or modernization of Peruvian international investment agreements.

More specifically, this work will basically identify the key potential risks illustrated by recent Peruvian investment arbitration case law and will set these against the Peruvian response package to the Covid-19 crisis in order to identify a set of issues that would require the attention of policymakers in order to strengthen Peru's defensive position in ISDS claims. The pertinent case law will be limited to those cases lost by Peru as a proxy of the issues which have proven to be more problematic from the defensive standpoint.

The presentation will then turn to analyze how does the Peruvian model of international investment agreements stand as well-prepared in order to meet the identified new challenges.

A set of general conclusions will close the presentation.

As referred by UNCTAD's 2020 World Investment Report the upshot of the Covid-19 pandemic is expected to be both the confirmation and strengthening of a trend identifiable since 2010 of a deceleration in the growth of the international flow of capital and the ensuing drop in the delocalization of production.

This trend sets the scene for an expected enhanced role for public policy as economies realise that more is needed from their part in order to attract shrinking flows of international investment very much in demand. This is where the link with international investment agreements kicks in, as much as these agreements are perceived by policymakers as part of the tool set of a economy's foreign investment attraction scheme.

The next step will identify Peru's perceived contingency risks vis-a-vis potential ISDS claims by investors. This assessment will be made by overlapping the issues which have stood prominent in ISDS cases lost by Peru with the key aspects which make up the bulk of the Peruvian Government's response policy to Covid-19.

An assessment based on the cold score would conclude that Peru has done relatively well in its defense of ISDS claims. From a total of 19 ISDS public awards issued up to date Peru has lost in only three of them². Two of those three cases (Duke v. Peru and Tza Yap Shum v. Peru) hinged upon tax matters, while the third one stemmed from a mining sector case (Bear Creek v. Peru) involving an allegedly illegal investment unduly invoking the protection afforded by the Investment Chapter of the Peru-Canada Free Trade Agreement (FTA).

Following a chronological order, the first case was Duke v Peru (2008). This case concerned the end of a promotional income tax scheme for mergers put in place by Peru in 1994 and whether such promotional regime had been included under the protective umbrella of the tax stability agreement (contract) entered into beforehand by Bear Creek and the Peruvian Government. Peruvian tax stability agreements had been put in place in 1992 in order to attract foreign investment by, inter alia, freezing key aspects of the applicable income tax regime.

The Duke case had an essentially contractual nature as there was no applicable investment treaty. However, the fact that the decision weighed heavily on Peru's reading that the merger scheme was not covered by the tax stability agreement related the case to the ever-present discussion regarding legitimate expectations as part of the Fair & Equitable Treatment (FET) protection standard. It is foreseeable that the open-ended character and vague construction of the FET standard will play an enhanced role in future ISDS claims given the fact that the pandemic has expanded the need and nature of governmental action as a result of major intervention in the economy as a response to the Covid-19 crisis.

Tza Yap Shum v. Peru (2011), the second case at hand, shares the fiscal nature of the Duke case. This second case involved a Chinese citizen's claim of an indirect expropriation suffered in the hands of the Peruvian tax authority who had over-zealously frozen the bank accounts of the fishmeal company run by Mr. Tza Yap Shum in Peru. The timely lessons to be drawn from this case include the realization that aggressive moves by the tax authority in order to collect could be deemed expropriatory by an arbitration tribunal. Arguably, such risk heightens in times of increased pressure on fiscal resources such as the present pandemic context as there would be a bigger incentive for tax authorities to act in a more forceful way in order to ensure effective tax collection. The *Tza Yap Shum* case warns that these efforts should be balanced against possible contingencies arising from situations resembling those that determined its outcome.

The third and most recent case lost by Peru has been the Bear Creek case (2017). Here, a Canadian mining company had obtained the required exemption from the Constitutional provision banning foreign real estate property or possession within 50 km from the Peruvian national border. Such an exemption was required as a condition for the adjudication and exploitation of the Santa Ana project by Bear Creek in the border zone between Peru and Bolivia.

However, approximately three and a half years after issuing the Supreme Decree embodying the required exemption the Peruvian Government issued a laconic second Supreme Decree revoking the first Supreme Decree and effectively withdrawing the required permit. The foreign investor therefore alleged being subject to an indirect expropriation.

Needless to highlight that besides the expropriation issue this case leans heavily on the same legitimate expectations and FET relationship which is also part of the legacy of the Duke case. The legitimate expectations prong will surely gain even more prominence as States growingly display contradictions in governmental action between different State entities and levels of government as a result of measures intended to thwart the effects of the Covid-19 crisis. The Covid-19 pandemic has shown how even traditionally well-organised States and Governments have revealed these disparities and contradictions between their different internal instances. Surely this problem will be replicated at a higher level and rate by the weak institutions that characterize developing economies.

The Bear Creek case also sheds light on two other controversial issues which will surely gain even more protagonism in the current context of increased governmental action: the legality requirement for treaty coverage of investments and the tension between international business and human rights.

In the Bear Creek case the Peruvian government alleged that the Canadian investment did not qualify as a legal investment under Peruvian laws and therefore was not entitled to protection under the Investment Chapter of the Peru-Canada FTA. This issue has already proven to be an extremely sensitive one by the recent corruption cases that have plagued the Peruvian political headlines flowing from the Odebrecht affair.

Bear Creek also brings forward the currently hotly-debated question of the contradictions between the modern and growing trend of holding international business accountable for breaches of human rights and the traditional guarantees for international investment that result from the established international regime protecting foreign investment. This debate will undoubtedly gain even more momentum against the backdrop of the current efforts regarding the implementation of the UN Sustainable Development Goals and the UN Guidelines on Business and Human Rights.

Regarding the Peruvian economy's Covid-19 rescue package it can be divided in two major components: (i) a soft loan program for companies implemented through the private banking system and made possible by credit lines extended by the Central Bank and guaranteed by the Executive and (ii) a series of fiscal policy measures destined to provide economic support to families, individuals and small and micro enterprises, through tax relief measures, subsidies for educational infrastructure, household income, investment in public services and public projects' infrastructure, public and private investment promotion measures (including a tourism reactivation scheme, cutting red tape across all economic sectors and the promotion of public procurement targeting purchases from small and micro enterprises).

A matching assessment of the matters that have played an eminent role in cases that have complicated Peru's defense efforts in ISDS cases together with the issues that seem likely to be targets for ISDS claims arising from the implementation of Peru's Covid-19 response should lead analysts and policy makers to watch out for the following items: tax issues, FET and legitimate expectations, indirect expropriation, legality of investments and the encompassing issue of investors' obligations and the tension between business and human rights.

Is Peru's investment agreement scheme well-suited to face these challenges? What steps has Peru taken in order to enhance its defensive interests in the design and letter of its international investment agreements (IIAs)?

Peru does not have an official IIA model as other economies do³. However, the de facto standard replicated in Peru's current IIA negotiations corresponds to the CPTPP (originally the TPP) standard.

The CPTPP package does include a series of defensive features that were not present in the legacy bilateral investment treaties (BITs) negotiated in the 1990s or in previous FTAs and some of these features do address both the indirect expropriation issue and the question of the FET and legitimate expectations relation.

CPTPP does not address the legality requirement for investments. Regarding the business and human rights debate the CPTPP standard includes an indirect reference.

In respect of the FET standard, the CPTPP model does incorporate the cap in protection set by the customary international law minimum standard of treatment. Following what currently constitutes widespread treaty practice the CPTPP model has included as treaty language the understanding heralded by the 2001 NAFTA Article 1105 Interpretative Notes.

The CPTPP model however, goes beyond the Peru-US FTA standard (and the 2004 US BIT Model) and does address although rather conservatively the legitimate expectations issue. This approach consists of a clarification in the sense that the mere fact of an inconsistency with an investor's expectations does not constitute a breach of the FET standard (CPTPP art. 9.6.4).

Concerning indirect expropriation, the CPTPP text replicates the formula of the 2004 US Model BIT of an annex providing guidelines to arbitrators in order to assess the existence of such an

expropriation. CPTPP Annex 9-B points to the analysis of three variables, while recognizing that the following list does not exclude other possibly pertinent factors: economic impact of the governmental measure, reasonable investment-backed expectations and the character of the government action. Peru has regularly repeated this formula in its latest FTAs.

Furthermore, the CPTPP model presents the novelty of a comprehensive taxation measures exception designed to safeguard the legitimate prerogatives of tax administrations. This exception addresses, among other issues, the potential disruptive effects of ISDS expropriation claims on tax collection by a provision that attempts to balance a State's right to tax with the expropriation article of the Investment Chapter of the FTA. In order to reach that goal CPTPP article 29.4.8 introduces a State-State procedural filter mechanism in order to determine if a taxation measure constitutes an expropriation.

In regard to the legality requirement in order for an investment to be considered a covered investment by an IIA, this is a feature which is absent in the CPTPP (and TPP). This has not been consistent treaty practice by Peru as, for example, such legality requirement has not been included in other treaties but rather provide flexibility for provisions on special formalities and information requirements such as the Peru-Canada FTA (art. 816 (1) and (2)). The Peru-Brazil Treaty which is not yet in force contains an interesting declaration regarding efforts towards the fight against corruption and illegality (art. 2.14). Under the light of current political events in Peru it would seem a natural move to invariably include a legality requirement following the example of recent investment agreements such as the Canada-EU CETA (2016), the Japan-Jordan BIT (2018) and the United Arab Emirates-Uruguay BIT (2018).

Finally, connected with the legality requirement is the upwardly trend of considering the need for establishing obligations for investors in investment agreements. The dissenting opinion by Philippe Sands in the Bear Creek case made the point that by failing to obtain the social license for its mining project the investor had contributed to the social unrest that motivated the Government's decision to withdraw the exemption to the Constitutional prohibition of foreign concessions in the area.

This argument stands in the same line of reasoning behind the current global efforts to reach the United Nations Sustainable Development Goals and also backing the ongoing efforts at the UN to prevent, address and remedy human rights abuses committed in business operations such as the UN Guiding Principles on Business and Human Rights and the establishment of the UN Working Group on business and human rights.

This upwardly going trend will surely make it more difficult for arbitral tribunals to embark in a fragmented, self-contained approach of international investment law which ignores the human rights dimension of foreign investment.

Peru has already displayed some efforts in this direction. For example, the CPTPP (article 9.17) and some other FTAs (for instance, article 810 of the Peru-Canada FTA) include a Corporate Social Responsibility clause which work as soft law by reaffirming the importance of State parties encouraging enterprises operating within their territories or subject to their jurisdiction to voluntarily incorporate internationally recognised standards, guidelines and principles of corporate social responsibility.

Conclusions

The identified trends in the international flow of capital reveal a loss of dynamism which puts the accent on governmental policy in order to make the most of a growing competition for the attraction of not readily available foreign investment. This enhanced role for government policy will be strengthened even more by the current efforts to address the Covid-19 pandemic.

Insofar as States rely on international investment agreements (IIAs) as part of their foreign investment policies the enhanced role for said policies will also determine an increased attention to IIAs, including modernisation and reform options and their alignment with sustainable development objectives.

A comparison between Peruvian ISDS case law and the core elements of the Peruvian policy response to COVID-19 shows the following common denominators as potential ISDS risk factors: fiscal measures, FET and legitimate expectations, indirect expropriation, the legality requirement of the investment for treaty protection and the tension between business and human rights.

Peru's effective IIA model (CPTPP standard) shows a mild move towards paying attention to the legitimate expectation component of FET, although it limits itself to a somewhat abstract reference. This situation shows that there is definitely more room here for policymakers to explore the need for further developments in order to reinforce defensive interests.

The CPTPP standard repeats an important set of guidelines for arbitrators dealing with indirect expropriation. Regarding the overlap between indirect expropriation and taxation issues the CPTPP model includes the novelty of a tax exception clause which does address to a certain level of detail the link between them.

The CPTPP model does not address the legality requirement for IIA protection. However, Peru has included the requirement in other agreements and the immediate political context regarding high-profile corruption cases will surely determine their inclusion as a standard feature in Peruvian IIA negotiations and possible renegotiations of older generation treaties.

That same inclusion is to be expected for the Corporate Social Responsibility clause contained in the CPTPP model and which has been replicated in many Peruvian FTAs. However, recent case law dealing with the mining sector which is of capital importance for the Peruvian economy added to the international multilateral pressure for addressing the tension between business and human rights will surely determine further developments in Peru's IIA scheme.



Chapter IV

**Analysis of a possible role played
by BITs and investment-related
provisions in FTAs/EPAs under
the COVID crisis toward building
resilient supply chain**

Chapter IV

Analysis of a possible role played by BITs and investment-related provisions in FTAs/EPAs under the COVID crisis toward building resilient supply chain

1. COVID-19 Pandemic, Foreign Direct Investment, and Bilateral Investment Treaties

Author: Professor Urata Shujiro, Professor Emeritus, Waseda University, Japan

I. Introduction

The COVID-19 pandemic has had significantly negative impacts on foreign direct investment (FDI). In 2020 global FDI is projected to decline by 42 percent from the previous year (Figure 1).¹⁴ Developed economies are hit harder as the rate of decline in their FDI inflows is projected to be as large as 69 percent, while the corresponding rate for developing economies is much lower at 12 percent. Huge decline is mainly due to substantial decline in economic activities, which resulted from lockdowns and other emergency measures that prevented people's physical mobility. Although the negative impact in terms of FDI inflows is relatively less serious for developing economies compared to developed economies, negative impacts of the decline in FDI inflows on economic growth are very serious for developing economies, because the contribution of FDI inflows to economic development/growth is substantial for developing economies. According to UNCTAD (2021a), the prospects of FDI flows in 2021 are rather weak, particularly weak in developing economies, where fiscal space needed for a recovery is very limited.

Recognizing the need of FDI inflows for the developing economies for their economic growth and rather pessimistic future prospect of attracting FDI inflows, an increased attention has been given to the role of international investment agreements (IIAs) such as bilateral investment treaties (BITs) in increasing FDI inflows to developing economies. Many developing economies have signed and enacted IIAs/BITs, as their governments considered that the benefits of hosting FDI such as technology transfer outweigh the "costs" of "tying their hands" in their policy formulation to the agreements and commitments made under IIAs/BITs. In contrast to high expectation for a possible facilitating role in promoting FDI inflows, there has been a growing concern on the part of the host governments about unfavorable impacts of IIAs/BITs, as the cost, both financial and non-financial costs, incurred to deal with the investor-state dispute settlement (ISDS) cases have been very high. Indeed, slowing down of the new cases of IIAs/BITs in recent years appears to reflect this increasing concern (Figure 2). It should be added that one important factor behind this slowdown in the rate of increase in IIAs/BITs is that the number of IIAs/BITs has reached a very high level, making it difficult to increase the number of IIAs/BITs further.

The emergence of the COVID-19 pandemic has intensified the debate about the importance of IIAs/BITs for developing economies, as many governments had to deal with the pandemic

by adopting emergency measures, which may violate the provisions under IIAs/BITs, in order to protect their peoples' security and safety. To make matters more difficult, many economies revised their investment policies, in order to deal with emerging new situations including those on environment, digital transformation, domestic security, and others.

With these observations in mind, I would like to discuss the following issues in this paper. First, I review new developments in investment policies with a focus on APEC economies since the outbreak of the COVID pandemic in section II. Then I briefly examine the disputed cases concerning investment that have been taken to the International Centre for Settlement of Investment Disputes (ICSID) in section III. In section IV I review academic empirical studies of the impacts of BITs on FDI. In section V I present some concluding remarks.

Recent changes in investment policies in APEC economies

Investment policies can play an important role for the economies facing challenges brought out by the COVID-19 pandemic¹⁵. Promotion and facilitation of FDI inflows would contribute to overcome the negative impacts such as a drop in production/sales caused by the pandemic. The government can also use investment policies to protect people's health and safety by allocating resources to medical and health sectors. However, such government intervention possibly affects foreign firms' performance, resulting in a dispute. In this section, we review investment policies adopted by APEC economies during the pandemic period.

According to UNCTAD (2021b), fifty-two economies and the European Union (EU) implemented 96 investment policy measures in the May 2020 – December 2020 period. Of total measures, 55 percent were geared towards more favorable FDI conditions, while 45 percent of the measures were new regulations or restrictions on investment. Investment liberalization, promotion, and facilitation measures were adopted in various sectors including pharmaceutical and digital sectors. Almost all new investment regulations or restrictions address domestic security concerns as more and more economies become worried that domestic core assets and technologies may be acquired by hostile foreign takeovers in the wake of pandemic. There are quite a few cases where the same economy applies both restrictive and liberal measures toward FDI. Although these contrasting measures are applied to different sectors, simultaneous application of these measures reflects ambivalent situation or dilemma faced by many economies. On the one hand, they are eager to attract FDI to promote/develop industries, but on the other hand they are concerned with loss of technology or threat to domestic security.

Let us see the recent changes in investment policy measures for APEC economies. Table 1 lists the number of measures adopted by APEC economies between May 2020 and December 2020. The measures are classified into four types, entry and establishment, treatment of established investment, promotion and facilitation, and general business climate. For each category, except promotion and facilitation, both restrictive and liberal measures have been adopted¹⁶.

II.1 Entry and establishments

Most measures are either reinforced existing FDI screening mechanisms or newly introduced regulatory or restrictive investment policies.

Restriction

Canada extended the initial review period under the National Security Review of Investments Regulations for any investments notified between 31 July 2020 and 31 December 2020. It also extended the time given to the Minister to take an action for investments that are subject to the Investment Canada Act but do not require a filing (31 July 2020).

China adopted the Regulation on the Unreliable Entity List to establish a framework for restrictions or penalties on foreign entities considered to endanger the sovereignty, security, or development interests of China (19 September 2020).

China authorized the “Foreign Investment Security Review Working Mechanism” to review certain foreign investments in various “covered sectors”. For example, the measures apply to foreign investments in the “military, military support and other sectors related to national defense and security,” as well as investments in proximity to military facilities and military industrial facilities (19 December 2020).

Indonesia introduced new regulations for the e-commerce sector. The regulation requires parties to satisfy certain prerequisites before engaging in the relevant e-commerce activities (19 May 2020).

Japan lowered the threshold for prior notification to 1 percent from the previous 10 percent for foreign investment in listed Japanese companies relevant for homeland security (8 May 2020).

Japan announced that starting on 15 July 2020, “manufacturing industries related to **pharmaceuticals**¹⁷” and “manufacturing [industries] related to highly-controlled **medical devices**” would also be listed as companies subject to specific notification requirements (15 June 2020).

Korea tightened the FDI review mechanism for foreign investment where there is high possibility of leakage of core national technologies (5 August 2020).

New Zealand introduced a temporary emergency notification requirement in its FDI screening mechanism to be able to review all new controlling foreign investments. (28 May 2020) The New Zealand Government decided to prolong the Emergency Notification Regime in the Overseas Investment Act 2005 for another 90 days to ensure that New Zealand’s national interest remains protected. In June 2020, the Government introduced the regime in response to the **COVID-19** pandemic (1 September 2020).

The Russian Federation amended the Federal Law on “Procedures for Foreign Investment in the Business Entities of Strategic Importance for Russian National Defense and State Security” to seek to clarify certain provisions of the Law in order to prevent circumvention of the screening mechanism (11 August 2020).

United States modified the criteria for mandatory declarations for certain foreign investment transactions involving a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more “critical technologies” came into effect (15 October 2020).

United States (outward FDI) banned Americans from investing in Chinese firms that are owned or controlled by the Chinese military (13 November 2020).

Liberalization

China reduced the number of sectors in the Negative List for Foreign Investment Access and the Free Trade Zone (FTZ) Negative List; in particular, the new lists lift restrictions in sectors such as financial services, manufacturing, agriculture, radioactive mineral smelting, and in the **pharmaceutical sector** (23 July 2020).

China's National Development and Reform Commission and the Ministry of Commerce unveiled the Market Access Negative List, with immediate effect. Compared with the 2019 version, the new list has been shortened to 123 items from 131 last year – relaxing requirements in sectors, such as oil and gas, resource management, and trading and financial services (16 December 2020).

Indonesia enacted the job creation law to attract investment, create new jobs, and stimulate the economy by, among other things, simplifying the licensing process and harmonizing various laws and regulations, and making policy decisions faster for the central government to respond to global or other changes or challenges (2 November 2020).

Philippines allows for 100% foreign ownership in large-scale geothermal exploration, development, and utilization projects with some conditions (30 October 2020).

Mixed

Australia reinstated monetary thresholds for some acquisitions that fall under Australia's Foreign Acquisitions and Takeovers rules to those applicable before they had been reduced to 0 AUD on 29 March 2020 in the context of the **COVID** pandemic (4 September 2020).¹⁸

II.2 Treatment

Liberalization

China announced 15 policies aiming to protect foreign trade entities and to keep supply chains stable against the economic fallout of the unabated **COVID-19 pandemic**. Specific examples include (1) Key foreign investment projects over 100 million U.S. dollars will be treated in the same way as a domestic investment project and the Chinese government will increase its support for foreign investment projects in terms of the sea use, land use, utility usage and environment protection issues. (2) Encouraging foreign investors to invest in high-tech industries as well as **healthcare enterprises** by facilitating the application process for high-tech enterprise certification and lowering the threshold for foreign R&D centers to be eligible for preferential policies, such as preferential import tax treatment (12 August 2020).

China broadened the scope of possible complaints of Foreign Invested Enterprises. A National Centre for Complaints of Foreign Invested Enterprises is specifically in charge of complaints that may have a significant national or international impact (October 1, 2020).

Mexico's National Center for the Control of Energy issued a Resolution to guarantee the Efficiency, Quality, Reliability, Continuity and Security of the National Electric System ("CENACE Resolution") (29 April 2020).

Restriction

United States requires companies publicly listed on stock exchanges in the United States to declare that they are not owned or controlled by any foreign government, and it allows delisting foreign companies from domestic stock exchanges if the audits of those companies remain shielded from the Public Company Accounting Oversight Board (PCAOB) (18 December 2020).

Viet Nam regulates investment activities and private investment attraction in some important and essential infrastructure areas under the PPP model. The law focuses on five essential activities: transportation; power grid and plants; irrigation, clean water supply, water drainage, and wastewater and waste treatment; healthcare and education – training; and information technology infrastructure (18 June 2020).

Promotion and facilitation

China published a list of reforms for Shenzhen that include steps for financial markets, intellectual property protection, economic legislation, and talent attraction. Specific measures include lifting of restrictions on foreign ownership in telecommunications (October 18, 2020).

China's Shanghai Regulations on Foreign Investment entered into force that apply to all foreign investment projects (existing or potential) located within Shanghai, including the China (Shanghai) Pilot Free Trade Zone and the New Lingang Area. Specific measures include that Foreign-invested R&D centres will gain greater access to services provided by the local authorities to facilitate their participation in government-funded R&D programmes (November 1, 2020).

China's Shanghai's Municipal Government released the Regulations on Encouraging the Establishment and Development of Foreign-funded Research and Development Centers (24 November 2020).

China's National Development and Reform Commission and the Ministry of Commerce issued the Catalogue of Encouraged Industries for Foreign Investment (2020 Version) to be implemented from 27 January 2021, replacing its 2019 version. The newly released catalogue contains a total of 1,235 items, increased by 10 percent from 1,108 items in the previous version (27 December 2020).

Singapore's Intellectual Property Office launched the SG Patent Fast Track Program, which aims to expedite the application-to-grant process of patents in all technology fields to six months, compared to the typical duration of two years (4 May 2020).

Viet Nam expands the list of business lines eligible for investment incentives to support businesses, particularly SMEs, affected by **COVID-19** (15 May 2020).

Viet Nam provides additional fiscal investment incentives for investment for the preservation of drugs, **manufacture of medical equipment**, renewable energy, products with 30% or more added value, energy-saving products, waste collection and treatment (17 June 2020).

General Business Climate

Restriction and liberalization (mixed)

China's Ministry of Commerce and Ministry of Science and Technology announced the amendment of the "Catalogue of Technologies Prohibited and Restricted from Exporting in China". These rules, which had been in effect unchanged since 2008, add 23 categories of technologies to the list of technologies restricted from exportation, remove some categories from the lists of technologies restricted or prohibited, and modifies control parameters for several technologies (28 August 2020).

Restriction

The Standing Committee of China's National People's Congress passed the Export Control Law of the People's Republic of China (the ECL), which took effect on 1 December 2020. The ECL establishes China's first comprehensive framework for restricting exports of military and dual-use products and technology for domestic security and public policy reasons (17 October 2020).

Viet Nam tightened the requirements for legal representatives of intellectual property applicants/owners to sign documents on their behalf (23 November 2020).

Liberalization

Viet Nam passed the amended Law on Enterprises and simplified the business registration process, redefines state-owned enterprises, and protects minority shareholders (17 June 2020).

Viet Nam adopted a reduction of the corporate income tax rate from previously 20 per cent to 14 per cent for most businesses to help them deal with the **COVID -19** impacts (19 June 2020).

The findings above show that China was very active in introducing or changing investment policy measures during the period.

Among the investment policy measures adopted by APEC economies, several investment policy measures are directly related to COVID-19. They may be divided into two groups, one for promoting FDI and the other restricting FDI. The former group can be further divided into two groups. One is to promote FDI inflows in medical and pharmaceutical sector, and the other to promote economic activities to deal with the negative economic impact caused by the COVID-19 pandemic. The first group includes the cases in China (23 July 12 August, 2020) and Viet Nam (17 July 2020). The second group includes Viet Nam (15 May and 19 June 2020). In contrast to FDI promotion policies, Japan introduced restriction on FDI in medical devices probably to avoid acquisition of technologies by foreign entities. Australia and New Zealand tightened restriction on FDI in response to COVID-19.

Disputed Cases

Many governments have taken urgent and extraordinary measures to combat the spread of the Coronavirus and to address the public health and economic crises that the virus has caused¹⁹. Some such measures include closures of non-essential facilities during lockdown periods, confinement of employees, export restrictions, and border closures in many economies. In the United States, the Governors of both California and New York authorized the requisition of equipment and facilities to treat patients. In Peru, toll fees on the road network were suspended

during the state of emergency. Inevitably, some of these measures will affect foreign investors and their investments in host economies, possibly triggering investor-state disputes.

These emergency measures adopted by the government may be challenged by foreign investors on the following ground; a breach of an investor's right to fair and equitable treatment, a breach of protection and security, a breach of national treatment and most-favored-nation (MFN) treatment, and direct and indirect expropriation by the government.

BITs require the government to ensure that an investor receives fair and equitable treatment. Export restrictions imposed by many governments to secure supply of some personal protective equipment such as respirators may be challenged for the breaches of fair and equitable treatment. Foreign investors may challenge the government for breaching its obligation to provide full commercial protection and security to the investors if inappropriate policies in response to the COVID-19 pandemic caused financial loss of the investors. BITs guarantee a level-playing field vis-à-vis comparable domestic investors and investors from third economies. The government may be challenged if this condition is violated. A possible case may be that only certain domestic companies are given special treatment such as subsidy to deal with difficult financial situation due to the COVID-19 pandemic. Expropriation by a government occurs when a government implements measures that have the effect of controlling or interfering with the use of an investment. Possible examples include requisitioning of hotels and medical equipment, and temporary closures of commercial activities.

Since the outbreak of COVID-19 in December 2019, nine cases involving APEC economies have been registered at the International Centre for Settlement of Investment Disputes (ICSID), Freeport-McRoRan Inc. (US) vs Peru, Espirtu Santo Holdings LP (Canada) vs Mexico, Macro Trading Co., Ltd (Japan) vs China, Fengzhen Min (China) vs Korea, Goh Chin Soon (Singapore) vs China, Lupaka Gold Corp. (Canada) vs Peru, Worth Capital Holdings 27 LLC (US) vs Peru, Koch Industries, Inc. and Koch Supply & Trading, LP (US) vs Canada, and First Majestic Silver Corp. (Canada) vs Mexico.²⁰ All of these cases, whose contents are not known due to the unavailability of necessary information, are pending. Assuming that not all the cases are caused by the pandemic because there are other possible factors such as those related to international relations, the fact that so far nine cases have been registered at ICSID gives an impression that the pandemic has not given rise to many claims by the investors. However, there is a high probability that the number of claims may increase with the passage of time.

VII. Impacts of Bilateral Investment Treaties on Foreign Direct Investment: A Brief Survey of Literature

The issue of the importance of bilateral investment treaties (BITs)/international investment agreements (IIAs) in increasing foreign direct investment has attracted a lot of attention from policy makers and researchers. A large number of empirical studies have been conducted since the 1990s. Several useful survey articles have been published including Jacobs (2017) and Pohl (2018). The results of empirical studies are mixed in that some studies found positive impacts while some studies did not find significantly positive impacts. Although the results are mixed, many studies found that BITs are effective in increasing FDI if certain conditions such as high institutional quality of the host economies and/or strong dispute settlement provisions in BITs are satisfied. Let us briefly summarize important findings from some selected studies.

One of the first rigorous empirical studies on the impacts of BITs on inward FDI is Hallward-Driemeier (2003). Analyzing bilateral FDI outflows from 20 OECD economies to 31 developing

economies for 1980-2000 period, the author did not find positive impact of BITs on FDI flows. One interesting finding is positive impacts of interaction term between BITs and institutional quality measured by various indicators such as the rule of law and corruption, suggesting that BITs are more effective in inducing FDI in settings of higher institutional quality and where institutions are already being strengthened. The author argues that this finding undermines a central rationale for some of the less developed economies that enter into these agreements hoping to bypass the need to strengthen property rights and institutions more generally.

Ineffectiveness of BITs in increasing FDI is also found in Tobin and Rose-Ackerman (2005). They conducted two types of analyses. One study examines the impacts of BITs on overall FDI inflows to 64 developing economies for the 1985-2000 period, and the other on bilateral FDI flows from the United States to 53 economies for the 1980-2000 period. The authors consider that the latter analysis would reveal direct impacts of BITs compared to the former analysis, which captures indirect effects as well. Tobin and Rose-Ackerman do not find FDI inducing effect of BITs in either analysis. However, they find that BITs are effective in attracting FDI in developing economies that achieved certain level of political stability. This finding is consistent with the findings of Hallward-Driemeier in that BITs cannot substitute unfavorable business environment resulting from political instability.

Recent studies have considered the quality of BITs with a particular attention to the provisions on dispute settlement. Strong dispute settlement provisions are hypothesized to promote FDI because they provide stronger protection. Frankel and Walter (2018) investigate the impact of strength of international dispute settlement provisions in BITs on inward FDI by developing an index measuring the strength of international dispute settlement provision of BITs. They apply this index to the question whether BITs positively affect bilateral and total FDI inflows and inward FDI stocks. Specifically, they conduct a panel data analysis using a panel data covering 2,571 BITs involving 186 host economies between 1970 and 2016. They find that the presence of BITs is associated with greater inward FDI and that stronger international dispute settlement provisions in BITs are associated with greater inward FDI. These relationships are found not only for inward FDI from BIT partner economies but also that from other economies, indicating the presence of signaling effect of BITs. Furthermore, they find that the impacts are larger for inward FDI to developing economies.

Aisbett, Busse, and Nunnenkamp (2018) examine the impact on FDI of compensation claims against developing host economies brought to dispute settlement by investors for alleged violation of BIT obligations. Their analysis is conducted on bilateral FDI flows for a panel of 83 developing host economies and 39 source economies, covering the period 1980–2010. They find that BITs do have a causal positive impact on FDI flows to developing economies, but only for those hosts who have not had a BIT claim brought to arbitration. They label such effect as the “BITs as deterrents” hypothesis and draw an important policy implication for developing economies, namely that the potential costs of dispute settlement provisions should no longer be ignored when engaging in BIT negotiations. In particular, small and poor host economies may need considerable technical support by international organizations such as UNCTAD to strengthen their expertise and improve their bargaining position vis-à-vis highly developed source economies when it comes to designing increasingly complex and binding investment provisions in BITs.

Dixon and Haslam (2016) analyze the impact of BITs on FDI by considering quality of BITs. In their study quality of BITs is measured by considering 13 aspects of an investment agreement from the perspective of flexibility given to the host government²¹. An agreement with limited flexibility is regarded as “high quality” to investors. Their data set covers eighteen Latin American

economies, and seven of the largest North American, European, and Asian investors in the region and signers of BITs: Canada, the United States, France, Germany, Spain, the United Kingdom, and Korea. Their analysis finds that ratified treaties that offer significant investment protection have some effect, while signed treaties do not. It suggests that credible commitment is an important causal mechanism for FDI. The treaties that reflect credible commitment are characterized by an expansive definition of investment, provisions on property rights, ‘fair and equitable treatment’ and expropriation. Moreover, these treaties are restrictive on governmental policy autonomy, curtailing the use of performance requirements, disallowing restrictions on capital, profit and remittance transfers, and allowing for access to binding international arbitration.

Many empirical studies examined the issue at aggregated sector level without considering the sectoral differences. This approach masks important differences in the degrees of risks associated with investment in different sectors. For example, the risk of expropriation of investment with high sunk costs is high, because it is relatively easy for a government to take over an investment that cannot easily be withdrawn. Colen, Persyn, and Guariso (2016) examine the heterogeneous impacts of BITs on FDI in different sectors. They argue that an empirical investigation of heterogeneous effects is important because the impacts of FDI on the host economies differ among different sectors. They argue that the results from the investigation may give important information for the host economy governments in formulating their policies toward FDI. Their sample consists of FDI data for seven different sectors (agriculture, mining, manufacturing, banking, utilities, private services, and real estate) in 13 economies in Central and Eastern Europe and the Former Soviet Union over the period 1994–2009. They find that BITs are effective for attracting FDI in the sectors of utilities and real estate. For foreign investments in manufacturing and services, BITs seem not to play a major role in investment decisions. They also find that different effects across samples can at least partially be explained by the different degree of sunkness, which is proxied by capital-intensity, of investments in these sectors.

As was noted above, very few studies examined the issue at disaggregated sector levels. There are even fewer studies that analyzed at company level largely because of difficulty in obtaining company level data. Egger and Merlo (2012) examine the impacts of BITs on investment activities of 5,616 German multinational companies in 86 host economies using the company level data covering the period 1996–2005. They find that signing and ratifying BITs increase the number of firms entering the host economy as well as the number of plants per firm. More specifically, they find that signing and ratifying BITs raises the number of firms in the average host economy and year in their sample by 26 units. On average, treated firms will open only a single plant. FDI generated by signing and ratifying a BIT amounts to about 5 million euros per firm and, hence, 130 million euros per host economy, on average.

A huge interest in the impacts of BITs on FDI has resulted in a great number of empirical studies with mixed results. In the light of the situation, Brada, Drabeck, and Iwasaki (2021) undertook a very interesting and important study, “summarizing” the results of these empirical studies. Specifically, they conducted a meta-analysis of 74 studies, yielding 2107 estimates, of the effects of international investment treaties (IIAs) on FDI. They find that all types of international treaties, bilateral investment treaties, multilateral investment treaties, bilateral trade agreements, and multilateral trade agreements have effects on FDI that is so small as to be considered as negligible or zero. They give two possible reasons for the results. One is that the protection provided to investors by IIAs is in fact insufficient to alter their investment decisions. Another possible reason is the proliferation of IIAs. Early IIAs were signed between investor and host economies with attractiveness, but as the number of IIAs increased, IIAs involving the host economies with less attractiveness became to be signed, reducing the effectiveness of IIAs in promoting FDI. The

authors point out several important issues concerning the empirical studies on the impact of IIAs on FDI. First, a lack of theoretical model explaining the relationship between IIAs and FDI causes various problems related to the specification of estimated equations including the selection of dependent and explanatory variables. Another problem is the differences in the impacts depending on the investors and host economies, indicating the need for detailed analysis by considering these differences.

A survey of literature brings out several important findings and policy implications. First, the impacts of BITs on the FDI are mixed in that in some cases BITs are found to increase FDI and in some cases such effects are not found. However, even when the positive impacts are found, the impacts are found to be very small. Second, BITs tend to be effective in promoting FDI when certain conditions are satisfied. Specifically, BITs with strong dispute settlement provisions are shown to promote FDI. Furthermore, BITs with developing economies with high institutional quality and political stability are likely to successfully attract FDI. These observations indicate that BITs cannot substitute unfavorable business environment reflected in a lack of reliability of the host government and unstable political environment. Developing economies keen on attracting FDI need to improve the quality of the government and business environment before signing BITs. The government needs to comply with the commitments agreed in BITs, in order to continue attracting FDI. Because the effective BITs tie the hands of the government in formulating and implementing policies, the government has to make serious effort in formulating strategies toward the discussion and negotiation of the BITs.

Before closing this section, it should be emphasized that many empirical studies found fundamental conditions such as stable political situation, good business environment reflected in open, free, and fair market conditions, well-developed and well-functioning hard and soft infrastructure, and availability of capable human resources play very important roles in attracting FDI.

Concluding Remarks

Not only the COVID-19 pandemic has had negative impacts on FDI flows but also has brought difficult challenges for both states and investors. The states have adopted various measures including drastic measures such as lockdowns and requisitioning of hotels and hospitals, in order to protect people's lives and health. Although these measures prevent the spread of the virus, investors may be exposed to serious damages economically. In order to avoid such damage, foreign investors may rely on "Fair and Equitable Treatment", "Protection and Security" and "Expropriation" provisions in BITs and may request compensation. The states, on the other hand, may argue that these measures should be considered exceptions in BITs for the protection of public health.

In order to minimize the risk of ISDS cases related to COVID-19 pandemic policy measures, the states should ensure that such measures are adopted in a non-discriminatory manner and in good faith and clarify their precise intention as well as their time frames. It is advised for the states to strengthen existing "early warning systems" for potential disputes with investors and operationalize existing alternative dispute resolution mechanisms.

In the light of these discussions, it is important that both states and foreign investors consider and analyze the potential interaction between COVID-19 measures and the rights and obligations contained in the BITs. When the investor takes the case to arbitration for breach of an investment agreement, an investment arbitration tribunal should look at the specific factual circumstances

to determine whether the respondent state should be held liable or not for the relevant measure applied in response to COVID-19 pandemic.

Considering a finding from the previous literature that BITs are effective in increasing FDI when BITs are applied to developing economies, where fundamental conditions such as stable political situation, good business environment reflected in open, free, and fair market conditions, well-developed and well-functioning hard and soft infrastructure, and availability of capable human resources are provided, it is advisable to include an economic cooperation chapter, which would contribute to improve business environment of developing economies, in BITs involving developed and developing economies.

References

- Aisbett, E., M. Busse, and P. Nunnenkamp (2018) “Bilateral investment treaties as deterrents of host economy discretion: the impact of investor-state disputes on foreign direct investment in developing countries” *Review of World Economics*, 154: 119-155 <https://doi.org/10.1007/s10290-017-0285-1>
- Brada, J.C., Z.Drabek, and I.Iwasaki (2021) “Does Investor Protection Increase Foreign Direct Investment? A Meta-analysis”, *Journal of Economic Surveys* Vol. 35, No. 1, pp. 34–70
- Colen, L., D. Persyn, and A. Guariso (2016) “Bilateral Investment Treaties and FDI: Does the Sector Matter?” *World Development*, Vol. 83, pp. 193–206 <http://dx.doi.org/10.1016/j.worlddev.2016.01.020>
- Dixon, J. and P.A.Haslam (2016) “Does the Quality of Investment Protection Affect FDI Flows to Developing Countries? Evidence from Latin America,” *World Economy*, vol. 39, issue 8, pp. 1080-1108
- Egger, P. and V. Merlo (2012) “BITs Bite: An Anatomy of the Impact of Bilateral Investment Treaties on Multinational Firms” *Scandinavian Journal of Economics* 114(4), 1240–1266
- Frenkel M, Walter B. (2019) “Do bilateral investment treaties attract foreign direct investment? The role of international dispute settlement provisions”. *World Economy*; 42:1316–1342. <https://doi.org/10.1111/twec.12743>
- Hallward-Driemeier, M. (2003). Do bilateral investment treaties attract FDI? (World Bank Research Working Paper 3121. Retrieved from World Bank website: <http://documents.worldbank.org/curated/en/113541468761706209/>
- Jacobs, M.N. (2017) “Do bilateral investment treaties attract foreign direct investment to developing countries? A review of the empirical literature.” *International Relations and Diplomacy* Vol. 5, No. 10, 583-593
- Norton Rose Fulbright (2020) “Investor-State Claims in the Era of the COVID-19 Pandemic” June <https://www.nortonrosefulbright.com/en/knowledge/publications/e8979151/investorstate-claims-in-the-era-of-the-covid19-pandemic>
- Pohl, J. (2018) “Societal benefits and costs of international investment agreements: A critical review of aspects and available empirical evidence.” OECD Working Paper on International Investment No. 2018/01. OECD: Paris

- Tobin, J., & Rose-Ackerman, S. (2005). Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties (Yale Law School Research Paper No. 293). Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121
- UNCTAD (2020) “Investment Policy Responses to the COVID-19 Pandemic”, *Investment Policy Monitor*, Special Issue No. 4 May 2020 https://unctad.org/system/files/official-document/diaepcbinf2020d3_en.pdf
- UNCTAD (2021a) *Global Investment Trend Monitor*, No. 38 January <https://unctad.org/webflyer/global-investment-trend-monitor-no-38>
- UNCTAD (2021b) *Investment Policy Monitor*, No. 24, February https://unctad.org/system/files/official-document/diaepcbinf2021d2_en.pdf



Table 1 The Number of Investment Policy Measures Adopted by APEC Economies During March – December 2020

	Entry and establishment	Treatment	Promotion and facilitation	General business climate
Australia	1			
Canada	1			
China (*)	4	3	5	4
Indonesia (*)	2	2	1	1
Japan	3			
Korea, Republic of	1			
Mexico		1		
New Zealand	2			
Philippines	1			
The Russian Federation	1			
Singapore			1	
United States of America	3	1		
Viet Nam (*)	1	2	2	3
Total	20	9	9	8

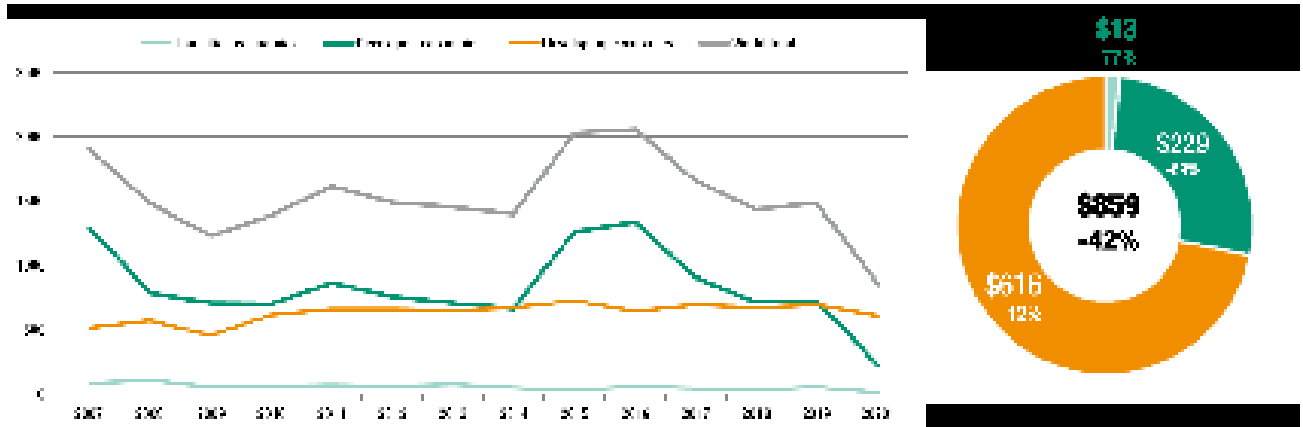
* Measures are double counted because they re related to more than one type

Source: UNCTAD, Investment Policy Monitor, Issue 24, February 2021

https://unctad.org/system/files/official-document/diaepcbinf2021d2_en.pdf

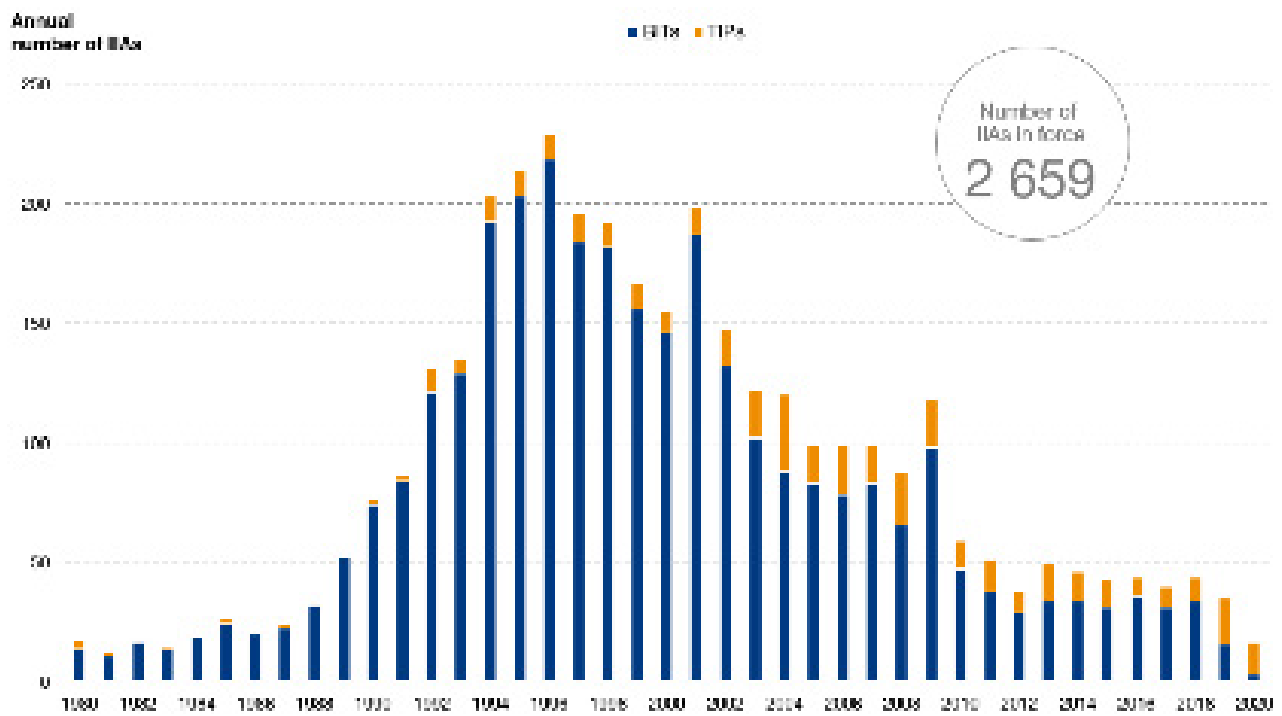
accessed on 1 April, 2021

Figure 1 Investment Inflows: Global and Group of Economies 2007-2020 (\$billion)



Source: Reproduced from UNCTAD Global Investment Trend Monitor, No. 38 January 2021

Figure 2. Trends in IIAs signed, 1980–2020



Reproduced from UNCTAD, Investor Policy Monitor, Issue 24, 21 February 2021

Appendix Table

Description of measure		Date	Source
Australia	Entry	On 4 September 2020, the Foreign Acquisitions and Takeovers Amendment (Commercial Land Lease Threshold Test) Regulations 2020 entered into force. The Regulations, which apply in all states of Australia, reinstate monetary thresholds for some acquisitions that fall under Australia's Foreign Acquisitions and Takeovers rules to those applicable before they had been reduced to 0 AUD on 29 March 2020 in the context of the COVID pandemic. The Regulations reinstate the previously applicable threshold for the renewal or material variation of existing non-sensitive leasehold interests in developed commercial land, where the same acquirer held a substantially similar interest under a lease on 29 March 2020.	4-Sep-20 Federal Register of Legislation, "Foreign Acquisitions and Takeovers Amendment (Commercial Land Lease Threshold Test) Regulations 2020", 3 September 2020
Canada	Entry	On 31 July 2020, the Order Respecting Time Limits and Other Periods Established By or Under Certain Acts and Regulations for Which the Minister of Industry is Responsible (COVID-19) was issued. Among others, it extends the initial review period under the National Security Review of Investments Regulations for any investments notified between 31 July 2020 and 31 December 2020. The Order also extends the time given to the Minister to take an action for investments that are subject to the Investment Canada Act but do not require a filing.	31-Jul-20 Government of Canada, "Temporary Extension of Certain Timelines in the National Security Review Process Due to COVID-19", 31 July 2020
China	Entry	On 23 June 2020, the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) jointly released Order No.32 of 2020, Special Administrative Measures (Negative List) for Foreign Investment Access (2020 edition) ("Negative List for Foreign Investment Access") and Order No.33 of 2020, Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2020 Edition) ("FTZ Negative List"). Both lists replace the respective earlier versions of 2019 and entered into force on 23 July 2020. Compared with the 2019 editions, the Negative List for Foreign Investment Access and the FTZ Negative List contain fewer items; in particular, the new lists lift restrictions in sectors such as financial services, manufacturing, agriculture, radioactive mineral smelting, and in the pharmaceutical sector.	23-Jul-20 Lexology, "China announced the 2020 Negative Lists for Foreign Investment Access", 13 July 2020

Description of measure		Date	Source
Treatment/ Promotion and facilitation	<p>On 12 August 2020, the State Council of the People's Republic of China ("State Council") released the Circular on Further Stabilizing Foreign Trade and Foreign Investment (the "Circular"), in which the Chinese government announced 15 policies aiming to protect foreign trade entities and to keep supply chains stable against the economic fallout of the unabated COVID-19 pandemic. Key points of the Circular include, inter alia: - In order to facilitate foreign trade flows and business travel to China, China will continue to work with foreign economies to establish "fast pass" to facilitate the international travel of foreign businessmen, logistics personnel, production personnel and technicians to China. - The China Export & Credit Insurance Corporation will provide insurance coverage against the risks of canceled orders before shipments. - Extended financial support to major foreign-funded companies, which are now eligible for the People's Bank of China's 1.5 trillion-yuan low-cost re-lending loan program and rediscount quota. - Key foreign investment projects over 100 million U.S. dollars will be treated in the same way as a domestic investment project and the Chinese government will increase its support for foreign investment projects in terms of the sea use, land use, utility usage and environment protection issues. - Encouraging foreign investors to invest in high-tech industries as well as healthcare enterprises by facilitating the application process for high-tech enterprise certification and lowering the threshold for foreign R&D centers to be eligible for preferential policies, such as preferential import tax treatment.</p>	12-Aug-20	The State Council, "Work urged to further stabilize foreign trade, investment", 12 August 2020
General business climate	<p>On 28 August 2020, China's Ministry of Commerce and Ministry of Science and Technology announced the amendment of the "Catalogue of Technologies Prohibited and Restricted from Exporting in China", which came into effect on the same day. These rules, which had been in effect unchanged since 2008, add 23 categories of technologies to the list of technologies restricted from exportation, remove some categories from the lists of technologies restricted or prohibited, and modifies control parameters for several technologies.</p>	28-Aug-20	Ministry of Commerce, "China adjusts catalogue of technologies subject to export bans, restrictions", 3 September 2020
Entry/ Treatment	<p>On 19 September 2020, the Regulation on the Unreliable Entity List entered into force, following an announcement by the Ministry of Commerce in May 2019. The Regulation establishes a framework for restrictions or penalties on foreign entities that are considered to endanger the national sovereignty, security, or development interests of China or that seriously harm the legitimate rights and interests of Chinese enterprises, organizations, or individuals. Among others, restrictions and penalties may include prohibitions to trade with Chinese entities or to invest in China.</p>	19-Sep-20	South China Morning Post, "China's ambiguous Unreliable Entity List gives Beijing 'leeway' to take punitive actions against foreign firms", 22 September 2020

Description of measure		Date	Source
Treatment	On 1 October 2020, the Rules on Handling Complaints of Foreign-Invested Enterprises entered into force. The rules were released on 25 August 2020 and are based on Article 26 of the recently adopted Foreign Investment Law and its implementing regulations. They replace rules on complaints of foreign-invested enterprises that the Ministry of Commerce had issued on 1 September 2006. Among others, the rules broaden the scope of possible complaints. A National Centre for Complaints of Foreign Invested Enterprises is specifically in charge of complaints that may have a significant national or international impact.	1-Oct-20	Ministry of Commerce, "MOFCOM Order No. 3 of 2020 on Rules on Handling Complaints of ForeignInvested Enterprises", 31 August 2020
General business climate	On 17 October 2020, the Standing Committee of China's National People's Congress passed the Export Control Law of the People's Republic of China (the ECL), which took effect on 1 December 2020. The ECL establishes China's first comprehensive framework for restricting exports of military and dual use products and technology for domestic security and public policy reasons.	17-Oct-20	Reuters, "China passes exportcontrol law following U.S. moves", 18 October 2020
Promotion and facilitation / General business climate	On 18 October 2020, the National Development and Reform Commission published a list of reforms for Shenzhen that include steps for financial markets, intellectual property protection, economic legislation and talent attraction. Key points include, inter alia: - Restrictions on foreign ownership in telecommunications will be lifted. - Shenzhen will streamline visa rules to attract talent. - The city will be allowed to issue offshore, yuan denominated local government bonds. - Shenzhen will build a new intellectual property rights protection system that ensures digital IP protection and punishes infringements.	18-Oct-20	Reuters, "China gives Shenzhen more autonomy for market reform, integration", 18 October 2020
Promotion and facilitation	On 1 November 2020, the Shanghai Regulations on Foreign Investment entered into force that apply to all foreign investment projects (existing or potential) located within Shanghai, including the China (Shanghai) Pilot Free Trade Zone and the New Lingang Area. Inter alia, foreign-invested R&D centres will gain greater access to services provided by the local authorities to facilitate their participation in government-funded R&D programmes, the marketing of the fruits of R&D, prosecution (both in China and worldwide) of patents, and the import of equipment and appliances for the purposes of R&D.	1-Nov-20	Shanghai Daily, "Regulations to enhance confidence of foreign investors", 27 September 2020
General business climate	On 11 November 2020, the Standing Committee of the National People's Congress passed the latest revision to the Copyright Law. The new amendment will take effect on 1 June 2021. The new Copyright Law provides a list of activities that are deemed to be copyright infringements and states that persons who have committed the said acts shall bear civil liability to cease the infringement, eliminate the negative effects of the act, make an apology, or pay compensation for damages.	11-Nov-20	China Briefing, "China's Copyright Law Amended: Key Changes", 4 January 2021

Description of measure	Date	Source
<p>Promotion and facilitation</p> <p>On 24 November 2020, Shanghai's Municipal Government released the Regulations on Encouraging the Establishment and Development of Foreign funded Research and Development Centers. The Regulations are in effect from 1 December 2020 until 30 November 2025. During this period, eligible foreign-funded R&D centers can benefit from a dozen policy support measures, including customs clearance facilitation for cross-border R&D, cross border financial services facilitation, talent acquisition and development, funding support, tax cuts, participation in government projects, facilitation of environmental assessment and hazardous waste management, facilitation on land use for R&D purposes, and protection of intelligent property rights, etc.</p>	24-Nov-20	China Briefing, "Shanghai Encourages Foreign R&D Centers, Introduces a Dozen Support Policies", 24 December 2020
<p>Entry</p> <p>On 16 December 2020, the National Development and Reform Commission and the Ministry of Commerce unveiled the Market Access Negative List (2020), with immediate effect. Compared with the 2019 version, the new list has been shortened to 123 items from 131 last year – relaxing requirements in sectors, such as oil and gas, resource management, and trading and financial services. Distinct from the Negative List for Foreign Investment Access, the Market Access Negative List standardizes market entry rules for all players (domestic or foreign), including state-owned firms, private companies, joint-ownership firms, and foreign firms. The Market Access Negative List includes two categories: prohibited and restricted markets. For the prohibited market list, market players are forbidden from engaging in these industries, fields, and businesses – whether it be in the form of investments, partnerships, or takeovers. Market players wishing to enter "restricted" categories must do so by filing an application for access to the relevant administrative organs as per the laws and regulations. Finally, for sectors outside of the list, market players can access them on an equal footing in accordance with the law.</p>	16-Dec-20	China Briefing, "China Releases 2020 Negative List for Market Access", 23 December 2020

Description of measure		Date	Source
Entry	<p>On 19 December 2020, China's National Development and Reform Commission and Ministry of Commerce jointly issued the Measures on Security Review of Foreign Investment. The Measures took effect on 18 January 2021. The Measures mandate pre-closing filings, and authorize the "Foreign Investment Security Review Working Mechanism" to review certain foreign investments in various "covered sectors". The Measures apply to foreign investments in the "military, military support and other sectors related to national defense and security," as well as investments in proximity to military facilities and military industrial facilities; and to – investments in the sectors below that would result in foreign investors obtaining "actual control" over the domestic enterprises they invest in: important agricultural products; important energy and resources; major equipment manufacturing; important infrastructures; important transportation services; important cultural products and services; important information technology and Internet/online products and services; important financial services, critical technologies; and other important sectors/areas.</p>	19-Dec-20	Lexology, "China Issues Measures on National Security Review of Foreign Investment", 22 December 2020
Promotion and facilitation	<p>On 27 December 2020, the National Development and Reform Commission and the Ministry of Commerce issued the Catalogue of Encouraged Industries for Foreign Investment (2020 Version) to be implemented from 27 January 2021, replacing its 2019 version. The newly released catalogue contains a total of 1,235 items, increased by 10 percent from 1,108 items in the previous version.</p>	27-Dec-20	China Briefing, "China Expands Encouraged Catalogue, Improves Foreign Investor Access", 5 January 2021
Indonesia	<p>On 19 May 2020, the Indonesian Ministry of Trade ("MOT") has issued a new regulation, MOT Regulation No. 50 of 2020 regarding Provisions on Business Licensing, Advertising, Guidance and Supervision of Businesses Trade through Electronic Systems. This regulation took effect on 19 November 2020. The regulation divides e-commerce business actors into the following categories: (1) E-Commerce Organizers; (2) Merchants; and (3) Intermediary Services Organizers. Parties in each category must satisfy certain prerequisites before engaging in the relevant e-commerce activities.</p>	19-May-20	Lexology, "Indonesia Introduces New Requirements for E-Commerce Companies", 18 June 2020

Description of measure		Date	Source
Entry/ Treatment/ Promotion and facilitation	<p>On 2 November 2020, Indonesia's President enacted the job creation law – commonly known as the “Omnibus Law”. It aims to attract investment, create new jobs, and stimulate the economy by, among other things, simplifying the licensing process and harmonizing various laws and regulations, and making policy decisions faster for the central government to respond to global or other changes or challenges. The Omnibus Law has amended more than 75 current laws and requires the central government to issue more than 30 government regulations and other implementing regulations within 3 months. The key points include among others: - It focuses on increasing the ease of doing business in Indonesia (e.g., simplifying licensing processes, simplifying land acquisition processes, formalizing economic zones, providing more incentives to free trade zones, creating a land bank supervisory authority). – It provides that capital investment (including foreign investment) is permitted except for investment in business lines that are closed or those that can only be carried out by the central government. – It introduces key amendments in several sectors, notably mining, power, forestry, public housing, healthcare (particularly requirements on medical facilities) and postal services.- It introduces key amendments to the Labor Law, particularly on definite period employment, outsourcing, overtime, minimum wage, termination of employment and manpower social security.</p> <p>- It also simplifies environmental assessment requirements and licensing procedures, amends several tax provisions and introduced several changes to the Immigration Law including a Visit Visa and Limited Stay Visa.</p>	2-Nov-20	Baker McKenzie, “Indonesia: The House of Representatives Approves Omnibus Law”, 9 October 2020
Japan	<p>On 7 May 2020, the Ministry of Finance released a list of 518 companies in the 12 sectors deemed important to Japan's domestic security (14 per cent of publicly traded companies) – including Toyota, Sony, Mitsubishi Heavy Industries, Hitachi, Tokyo Electric, Central Japan Railway and SofBank. Any foreign investor is required to submit a prior notification of stock purchases to the government via the Bank of Japan when planning to acquire a stake of 1 per cent or higher in these listed companies. The total of Japan's 3,800 listed companies is divided into three categories: those requiring prior notification, those not requiring prior notification, and those with exemptions in some cases.</p>	7-May-20	Nikkei Asian Review, “Japan names 518 companies subject to tighter foreign ownership rules”, 9 May 2020

Description of measure		Date	Source
Entry	<p>On 8 May 2020, amendments to Japan's Foreign Exchange and Foreign Trade Act (FEFTA) came into effect. Among others, the amendment lowers the trigger threshold for acquisitions in certain companies to 1%, down from 10% previously, and introduces notification requirements for some acquisitions. In the meantime, the exemption scheme for prior notification requirement for stock purchases has been introduced. Investors who comply with certain conditions are exempted from the requirement of prior-notification. The lower threshold and notification requirements apply to assets operating in certain sectors, as clarified in a media release of 24 April and 8 May 2020 and complemented by a list of 3800 listed Japanese companies with individual classifications for the purpose of the rules as of the time of release on the same day.</p>	8-May-20	Regulation Asia, "Japan's New Foreign Investment Rules Take Effect", 10 May 2020
Entry	<p>On 15 June 2020, the Japanese authorities publicly announced that starting on 15 July 2020, "manufacturing industries related to pharmaceuticals" and "manufacturing [industries] related to highly-controlled medical devices" would also be listed as companies subject to specific notification requirements.</p>	15-Jul-20	Ministry of Economy, Trade and Industry, "Addition of Pharmaceutical and Special Medical Device Manufacturing businesses, to Core Designated Business Sectors Subject to Inward Direct Investment Screening", 15 June 2020
Korea	<p>On 5 August 2020, amendments to the Enforcement Decree of the Foreign Investment Promotion Act entered into force. One of the changes has made it possible for the competent Minister or the heads of the relevant agencies to request a review to the Foreign Investment Committee of a foreign investment where there is a "high" possibility of leakage of core national technologies, as defined by the Act on the Prevention of Divulgence and Protection of Industrial Technology, and where a foreigner's acquisition of de facto control over the management of an existing domestic company by acquiring its stocks, etc. may threaten domestic security.</p>	5-Aug-20	National Law Information Center, "Enforcement Decree of the Foreign Investment Promotion Act as Amended by the Presidential Decree No. 30918", 5 August 2020

Description of measure		Date	Source
Mexico	<p>Treatment</p> <p>On 29 April 2020, in response to the COVID-19 pandemic, Mexico's National Center for the Control of Energy (Centro Nacional de Control de Energía, or "CENACE") issued a Resolution to guarantee the Efficiency, Quality, Reliability, Continuity and Security of the National Electric System ("CENACE Resolution"). In addition, on May 15, 2020, Mexico's Minister for Energy (Secretaría de Energía, or "SENER") published a Resolution establishing the "Policy of Reliability Security Continuity and Quality of the National Electric System" ("SENER Resolution").</p> <p>The operative part of the CENACE Resolution declares that, as of 3 May 2020: (i) all pre-operative testing is suspended for intermittent electricity generation facilities (that is, solar and wind farms), and (ii) preferential access to the grid will be granted to nonintermittent (conventional) electricity generation facilities. The effect of these measures is that:</p> <ul style="list-style-type: none"> - wind and solar farms which have not yet completed their pre-operative testing will not be able to sell the electricity they generate through the National Electric System (Sistema Eléctrico Nacional, or "SEN"); and – CENACE has discretion to limit the extent to which any electricity generation facility can send its electricity to the SEN if, according to CENACE, it could put the stability of the SEN at risk. 	3-May-20	DLA Piper, "Mexican renewable energy projects affected by new measures", 19 May 2020
New Zealand	<p>Entry</p> <p>On 28 May 2020, the Overseas Investment (Urgent Measures) Amendment Act 2020 (Urgent Measures Act) was passed. Key changes include, among others: - A 'national interest' test, to allow the Government to decline consent for certain transactions ordinarily screened if they are considered contrary to New Zealand's national interest. – A temporary emergency notification requirement, that will apply to transactions not ordinarily screened. The Government will be able to review all new controlling investments in New Zealand businesses and assets and impose conditions, including prohibitions or a requirement to dispose of those investments if contrary to New Zealand's national interest.</p> <ul style="list-style-type: none"> - A call-in power, to take effect once the temporary emergency notification requirement is removed, to enable the Government to review investments in 'strategically important businesses' that are not ordinarily screened. - The Urgent Measures Act also relaxes some aspects of the regime – for example, the investor test has been simplified to significantly narrow the scope of considerations that can be taken into account when assessing an investor's suitability to invest. 	28-May-20	Land Information New Zealand, "Changes to the Overseas Investment Act", 16 June 2020

Description of measure		Date	Source
Entry	On 1 September 2020, the New Zealand Government decided to prolong the Emergency Notification Regime in the Overseas Investment Act 2005 for another 90 days to ensure that New Zealand's national interest remains protected. In June 2020, the Government had introduced the regime in response to the COVID-19 pandemic.	1-Sep-20	The Treasury, "Ministers retain temporary overseas investment screening rules", 1 September 2020
Philippines	On 30 October 2020, the Department of Energy issued a circular on the guidelines for the third Open and Competitive Selection Process (OCSP3) in the awarding of renewable energy service contracts. The circular allows for 100% foreign ownership in largescale geothermal exploration, development, and utilization projects. However, there are some conditions that foreign investors should meet if they wish to participate such as (1) the investment should be large-scale, with a minimum investment cost of about US\$50 million, and (2) it should be implemented under the Financial and Technical Assistance Agreement (FTAA) as provided under the Constitution.	30-Oct-20	Department of Energy, "DOE Statement on Allowing Foreign Investors 100% Ownership of Large-scale Geothermal Projects", 30 October 2020
The Russian Federation	On 11 August 2020, the Federal Law No. 255-FZ of 31 July 2020 on "Amendments to the Federal Law on "Procedures for Foreign Investment in the Business Entities of Strategic Importance for Russian National Defence and State Security", entered into force. The amendments seek to clarify certain provisions of the Law in order to prevent circumvention of the screening mechanism.	11-Aug-20	President of Russia, "Amendments to Federal Law on procedures for foreign investment in business entities of strategic importance for national defence and state security", 31 July 2020
Singapore	On 4 May 2020, the Intellectual Property Office of Singapore (IPOS) launched the SG Patent Fast Track Program, which aims to expedite the application-to-grant process of patents in all technology fields to six months, compared to the typical duration of two years. This is a two-year program, which began on 4 May 2020, and is expected to end on 29 April 2022.	4-May-20	ASEAN Briefing, "Singapore Launches Fast Track Patent Program", 4 May 2020

Description of measure		Date	Source
United States of America	Entry	On 27 August 2020, a Final Rule issued by the U.S. Department of Treasury clarifying revisions to the definition of “principal place of business” in the regulations of the Committee for Foreign Investment in the United States (CFIUS) became effective. The definition of “principal place of business” was introduced earlier through Interim Rules published on 17 January 2020 and on which the public provided comments. The Final Rule introduces clarifications that were the subject of public comments addressed to the U.S. Treasury in January 2020 after the publication of two interim rules defining the term. The Final Rule also adopts definitively an Interim Rule published by the U.S. Treasury on 29 April 2020 establishing fees for parties filing a formal written notice with CFIUS of a real estate transaction.	27-Aug-20 Federal Register, “Final Rule, Definition of “Principal Place of Business”; Filing Fees for Notices of Certain Investment in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Rea”, 28 July 2020
	Entry	On 15 October 2020, a Final Rule issued by the U.S. Department of the Treasury modifying the criteria for mandatory declarations for certain foreign investment transactions involving a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more “critical technologies” came into effect. This Final Rule made revisions to the proposed rule published on 21 May 2020 and on which the public provided comments. This Final Rule removes the previous analysis and nexus to the North American Industry Classification System (NAICS) codes and replaces it with an analysis of export control authorization requirements. Additionally, this Final Rule makes amendments to the definition of the term “substantial interest” and a related provision, and makes one technical revision.	15-Oct-20 Federal Register, “Final Rule, Provisions Pertaining to Certain Investments in the United States by Foreign Persons”, 15 September 2020
	Entry	On 13 November 2020, President Donald Trump signed an executive order banning Americans from investing in Chinese firms that the administration says are owned or controlled by the Chinese military. The order applies to 31 Chinese companies. Investors will have until November 2021 to divest from the companies. The executive order was set to take effect on 11 January 2021.	13-Nov-20 CNN, “Trump bans Americans from investing in Chinese firms he claims have ties to the military”, 13 November 2020
	Treatment	On 18 December 2020, the President of the United States signed into law Senate Bill 945, the “Holding Foreign Companies Accountable Act”. The Act requires companies publicly listed on stock exchanges in the United States to declare that they are not owned or controlled by any foreign government, and it allows delisting foreign companies from domestic stock exchanges if the audits of those companies remain shielded from the Public Company Accounting Oversight Board (PCAOB).	18-Dec-20 United States Congress, “S.945 – Holding Foreign Companies Accountable Act”, 18 December 2020

Description of measure		Date	Source
Viet Nam	Promotion and facilitation	15-May-20	Viet Nam Briefing, "Viet Nam Issues Investment Incentives for SMEs", 29 April 2020
	<p>Viet Nam introduced Decree No. 37/2020/ND-CP (Decree 37) on 30 March 2020 to update the list of sectors and industries access to investment incentives under Decree 118/2015/ND-CP. The move underlines the government's efforts to support businesses and particularly small and medium-sized enterprises (SMEs) affected by COVID-19. Decree 37 took effect on 15 May 2020. The regulation expands the list of business lines eligible for investment incentives and includes four types of SME business lines.</p>		
	<p>On 17 June 2020, the National Assembly passed the amended Law on Investment which took effect on 1 January 2021. Key points include, among others: - A business organization is deemed as a "foreign investor" if such investors hold 50% or more of the charter capital (the current law stipulates 51%). In case the business organization is a partnership, the majority of the general partners/ members must be foreigners. - Before foreign investors can establish a business organization, they must have identified an investment project and obtain an Investment Registration Certificate, unless it is an SME.</p> <p>- Market access conditions for foreign investors are the same as for domestic investors, except for industries and business that do not allow for such market access reciprocally or those that come with conditions on foreign investors.</p> <p>- Foreign investors can reap the benefits of various business guarantees, including a guarantee on investment in case of change in laws, guarantee of property ownership, guarantee on investment activities and guarantee on the right to transfer assets abroad.</p> <p>- Disputes between foreign investors and the State can be taken to international arbitration, provided that the contract between the parties includes such clause or international treaties to which Viet Nam is a signatory.</p> <p>- Additional fiscal investment incentives are offered. -</p> <p>Some more business lines are eligible for investment incentives, including, inter alia, the preservation of drugs, manufacture of medical equipment, renewable energy, products with 30% or more added value, energy-saving products, waste collection and treatment.</p>	17-Jun-20	Lexology, "Viet Nam – new law on investment proves the government's effort to attract foreign direct investment", 25 August 2020
	<p>Entry / Treatment / Promotion and facilitation</p>		

Description of measure		Date	Source
General business climate	On 17 June 2020, the National Assembly passed the amended Law on Enterprises, which took effect on 1 January 2021. The amended law, inter alia, simplifies the business registration process, redefines state-owned enterprises, and protects minority shareholders.	17 June, 2020	Viet Nam Briefing, "Viet Nam Adopts Amended Law on Enterprises and Law on Investment", 7 July 2020
Treatment	On 18 June 2020, the Law on Public-Private Partnership Investment was passed. It regulates investment activities and private investment attraction in some important and essential infrastructure areas under the PPP model. The law focuses on five essential activities: transportation; power grid and plants; irrigation, clean water supply, water drainage, and wastewater and waste treatment; healthcare and education – training; and information technology infrastructure.	18-Jun-20	Online Newspaper of the Government of the Socialist Republic of Viet Nam, "National Assembly adopts law on public-private partnership investment", 19 June 2020
General business climate	On 19 June 2020, the National Assembly adopted a reduction of the corporate income tax rate from previously 20 per cent to 14 per cent for most businesses to help them deal with the COVID -19 impacts. Businesses with annual revenues of VND200 billion (\$8.6 million) or less this year and fewer than 200 employees are eligible for the tax break.	19-Jun-20	TienPhong News, "National Assembly green-lights tax cut for businesses", 19 June 2020
General business climate	On 23 November 2020, the Intellectual Property Office of Viet Nam issued Notice No. 13822/TB-SHTT ("Notice 13822"), which tightens the requirements for legal representatives of intellectual property applicants/owners to sign documents on their behalf.	23-Nov-20	ASEAN Briefing, Nam Intellectual Property Office Issues New Regulation on Document Signing", 30 November 2020

Source: UNCTAD (2021b)

2. Foreign investment policies of APEC economies under the COVID-19 pandemic: Toward a new balance between protection/promotion of foreign investment and public health

Author: Professor Nakagawa Junji, Faculty of Liberal Arts, Chuo Gakuin University; Of Counsel, Anderson, Mori & Tomotsune

Abstract

Global spread of the COVID-19 is strongly affecting foreign investment policies of APEC economies. Some economies adopted restrictive measures on inward foreign direct investment. This paper analyses possible claims against these restrictive measures based on the provisions of international investment agreements (IIAs), and also analyses possible recommendations for host economies to justify those measures under the provisions of IIAs. It argues that the challenge is to strike a balance between securing the power of the host state to adopt legitimate public policy measures and safeguarding the legitimate interests of foreign investors. From foreign investors' standpoint, it argues, renegotiation of the terms and conditions of their investment should be a preferred solution, rather than a monetary settlement through investor-state dispute settlement (ISDS). ISDS should, therefore, be sought as a second-best solution.

Keywords

international investment agreements (IIAs), ISDS, fair and equitable treatment (FET), indirect expropriation, COVID-19

I. Introduction

Global spread of the COVID-19 is strongly affecting foreign investment policies of APEC economies. While some APEC economies promoted or facilitated foreign investment in healthcare and medical equipment sectors, some APEC economies tightened screening of foreign investments in these sectors to maintain domestic manufacturing bases of medicines and medical devices. Such measures entail challenges for BITs and FTA investment chapters (hereinafter "IIAs") of APEC economies, as these treaties are aimed at protecting and promoting foreign investment and may not provide a clear legal basis to justify such measures. This paper will explore the ways to locate these measures adequately under IIAs of APEC economies.

Section II will make a brief survey of recent measures of some APEC economies (a) to promote or facilitate foreign investment in healthcare and medical equipment sectors, and (b) to tighten screening of foreign investments in healthcare and medical equipment sectors or tighten screening foreign investments generally. Section III will discuss the legal status of such measures under IIAs of APEC economies, and explore ways to locate them adequately under IIAs. Section IV will conclude by discussing the ways to strike a balance between securing the power of the host state to adopt legitimate public policy measures and safeguarding the legitimate interests of foreign investors.

II. Foreign investment policies of APEC economies in response to the COVID-19 pandemic

APEC economies undertook investment policy measures to tackle the negative impact of COVID-19. Some APEC economies took measures to support foreign investors, while others took restrictive measures to protect critical domestic industries.

(i) Support measures

Some APEC economies took measures to support foreign investors that were adversely affected by COVID-19. For instance, on 3 March 2020, Thailand declared that it will accommodate visa extension requests from foreign nationals whose travel plans have been disrupted by COVID-19.²² Another example was China. On 9 March 2020, it published “Notice on Further Deepening Reform for Improving Works on Foreign Investment Projects in Response to the Epidemic Situation”, that provides for FDI-specific measures including simplifying approval procedures for FDI projects for tax exemption process for imported equipment.²³ On 26 March 2020, it obliged national economic development zones to take swift actions to make sure Chinese and foreign companies can get equal access to the government’s preferential policies.²⁴

(ii) Restrictive measures

On the other hand, some APEC economies tightened screening of foreign investments in healthcare and medical equipment sectors. Some adopted measures focused on these sectors, and others adopted general measures to tighten screening of foreign investments. These measures are justified either as means to protect these sectors against hostile foreign takeovers, or as means to safeguard domestic production capacities so as to protect life and health of nationals. An example of the former, sector-specific measure was Canada. In April 2020, it introduced enhanced scrutiny of foreign investments that are related to public health or are involved in the supply of critical goods and services to the nationals.²⁵ This was introduced as a temporary measure.²⁶ Another example was Japan. In July 2020, it expanded the pre-screening procedure to foreign investments in manufacturing (i) medicines for infectious diseases and (ii) advanced medical devices such as artificial heart and lung, artificial respirator, heart pacer, etc.²⁷ The government of Japan explained that the purpose of the measure was to maintain domestic manufacturing base of these products to protect public health and essential security,²⁸ but it did not set any temporary limit to the measure.

An example of the latter, general measure is Australia. In March 2020, it announced a change to its foreign investment review framework. According to the change, the monetary threshold for foreign investment review procedure by the Foreign Investment Review Board (FIRB) was lowered to zero.²⁹ The government explained that the objective of the change was to secure economic security and viability of critical sectors of the economy.³⁰ The change was a temporary measure that will remain in place for the duration of the COVID-19 crisis,³¹ and the threshold was restored in September 2020.³²

III. Status of foreign investment policies of APEC economies for the COVID-19 pandemic under IIAs

IIAs can influence the policy responses of APEC economies to address the COVID-19 pandemic because these measures affect the operations of foreign investors. IIAs provide legal stability and predictability to foreign investors, and they set legal limits on the regulatory power of host states to pursue public policies including those relating to public health.³³ Relevant provisions of IIAs are (i) standard of national treatment, (ii) fair and equitable treatment, (iii) expropriation, (iv) emergency action or *force majeure*, and (v) general exceptions.

(i) Standard of national treatment

State measures to tighten screening of foreign investment in healthcare and medical equipment sectors could violate the standard of national treatment if an IIA provide for the standard at the pre-establishment stage, because the measure accords foreign investors less favorable treatment than nationals of the host state.

States may wish to maintain a degree of flexibility with regard to the standard of national treatment. One way to maintain such flexibility is to exempt specific policy areas/measures from the scope of the obligation in order to meet public policy needs. For instance, footnote 17 of the RCEP Chapter 10.3 on National Treatment states that the determination of “like circumstances” depends on the totality of circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives. A similar statement is made in the CPTPP.³⁴ Discriminatory treatment of foreign investors may be justified based on the legitimate public policy needs to secure domestic production base for healthcare and medical equipment sectors.

(ii) Fair and equitable treatment (FET)

Broad and unqualified provisions of fair and equitable treatment (FET) in earlier IIAs can potentially create tensions with measures related to COVID-19. For example, breaches of FET could be invoked for imposing export restrictions on foreign investors with respect to healthcare products or medical equipment, because it may harm legitimate interest of foreign investors. States may wish to clarify that the FET standard does not preclude States from adopting regulatory measures that pursue legitimate public policy objectives, including public health. One way to achieve this objective is to link the FET standard to the minimum standard of treatment under customary international law. For instance, Article 10.5.1 of the RCEP states that each Party shall accord to covered investments fair and equitable treatment and full protection and security in accordance with the customary international law minimum standard of treatment of aliens. It further stipulates that “fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings”, that “full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment”, and that fair and equitable treatment and full protection and security do not require treatment to be accorded to covered investments in addition to or beyond that which is required under the customary international law minimum standard of treatment of aliens, and do not create additional substantive rights”.³⁵ By limiting the scope of the FET standard to the customary international law minimum standard of treatment of aliens, regulation of foreign investment according to the policy requirement of public health may be positioned beyond the narrow scope of the FET standard.

Another way of avoiding states' measures to pursue public policy measures related to the COVID-19 pandemic from the breach of the FET standard is to stipulate that the clause does not preclude the host state from adopting regulatory measures that pursue legitimate policy objectives including public health. Though this may be achieved by inserting the stipulation into the FET standard, this may also be achieved by inserting in the IIA a general exceptions clause that affirms the host state's right to adopt measures necessary for public policy objectives listed in the clause. See *infra* (v) of this section.

(iii) Expropriation

Measures implemented to tackle COVID-19 may include requisitioning hotels or medical equipment, or temporary closures of commercial activities (restaurants, shops, etc.). When foreign investments are included in the target of such measures, they could potentially be challenged as violations of expropriation provisions of IIAs, as they cover not only direct expropriation but also indirect or regulatory expropriation.

To avoid such challenges, States may wish to set out criteria for State acts that should not be considered as an expropriation, e.g. legitimate regulatory measures taken for the public interest. For instance, Annex 9-B, Section 3(b) of the CPTPP provides that non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health,³⁶ safety and the environment, do not constitute indirect expropriations, except in rare circumstances. Similar provision is found in Annex 10B, section 4 of the RCEP.³⁷

(iv) Emergency action or *force majeure*

IIAs often contain a provision on compensation for losses incurred under specific circumstances, such as civil strife or state of emergency. For instance, Article 10.11 of the RCEP provides that each Party shall accord to investors/investments of another Party national treatment and MFN treatment with respect to measures it adopts or maintains relating to losses suffered by investments owing to armed conflict, civil strife or state of emergency. Some IIAs expand the coverage of such provision by including compensation in case of natural disasters or *force majeure* situations.

Such a broad approach could increase a risk for a host state to face financial liabilities for events outside the control of the state, including pandemics. States may wish to limit their financial liability for events outside of their control, such as those relating to COVID-19 by explicitly referring to the exemption of financial liability in *force majeure* situations. In general, *force majeure* is a contractual defense that allows a party of a contract to suspend or discontinue performance of its contractual obligations, as long as the *force majeure* event continues. By the analogy of this reasoning, a host state may be exempt from financial liability arising from COVID-19, but a clear provision to that effect may be needed to justify this under its IIA.

(v) General exceptions

Recent IIAs increasingly reaffirm the right of host states to regulate in the public interest by introducing general exceptions, including measures that are necessary to protect human life and public health. Such provisions are often modelled on Article XX of GATT 1994. For instance, Article 17.12 of the RCEP provides that Article XX of GATT 1994 is incorporated into Chapter 10

on Investment, *mutatis mutandis*.³⁸ This type of public policy exceptions could serve to justify measures adopted in response to the COVID-19 pandemic. A more general statement is made in Principle VI of the G20 Guiding Principles for Global Investment Policymaking, which states that (g)overnments reaffirm the right to regulate investment for legitimate public policy purposes.³⁹

The so-called security exception clauses have an effect essentially similar to the general exceptions clauses. They exempt from the scope of the treaty's obligations measures of host states necessary for maintaining essential security, public order, health and morality.⁴⁰ Here again, Article 10.15 of the RCEP provides that nothing in the Agreement shall be construed to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests.

The table below is the summary of the provisions of IIAs that may be applied to evaluate restrictive measures of host states, and the recommended measures to justify such measures under the provisions.

Provisions of IIAs	Explanation	Recommendation
National treatment (NT) and Most-favored-nation treatment (MFN)	State measures to mitigate the economic impact of COVID-19 that seem to favor certain investors could potentially violate NT/MFN.	Exempt certain sectors and measures from the NT/MFN in order to satisfy public policy objectives.
Fair and equitable treatment (FET)	Breach of FET could be invoked for restrictions on the activities of foreign investors.	Clarify that the FET clause does not preclude host states from adopting good-faith measures to pursue legitimate public policy objectives.
Expropriation	Measures may involve the requisitioning of facilities and medical equipment, which could be regarded as indirect expropriation.	Set out criteria for state acts that should not be regarded as indirect expropriation, e.g., legitimate regulation adopted for public policy objectives.
<i>Force majeure</i>	Some IIAs provide for compensation for losses incurred under force majeure situation. This could be employed for measures adopted in response to COVID-19.	Limit host state's financial liability for events outside of state's control, such as those relating to COVID-19.
General or public policy exception	Recent IIAs increasingly reaffirm host state's right to regulate by introducing general exceptions for public policy, including public health.	A general exception clause. Conditions should be set out for the application of the clause, e.g., non-discrimination, prohibition of arbitrary application.
Security exception	Some IIAs include a (national) security exception to allow host states to deviate from treaty obligations.	A security exception clause, which explicitly stipulates that public health crisis falls under its scope.

IV. Conclusion – Striking a balance between securing the power of the host state to adopt legitimate public policy measures and safeguarding the legitimate interests of foreign investors

IAs, notably earlier IAs, may not provide sufficient legal basis for host states to adopt measures to restrict foreign investments to tackle the COVID-19 pandemic. Some measures of APEC economies may be challenged by foreign investors through ISDS as violation of the standard of national treatment, fair and equitable treatment or indirect expropriation.⁴¹ States may wish to include provisos or general exceptions into IAs to justify measures that are taken to pursue public policy objectives including public health, so that they may avoid being incurred financial liabilities/damages arising from such measures through ISDS.

As this may harm the interests of foreign investors, it is necessary for IAs to strike a balance between the right of a host state to pursue legitimate public policy objectives and the protection of the interests of foreign investors. One way to strike the balance would be to limit the exercise of the right of the host state to pursue legitimate public policy objectives by requiring that such measures are not applied in an arbitrary or discriminatory manner, or they shall not be disguised restrictions on investors and investments. For instance, Article 17.12.1 of the RCEP provides that Article XX of GATT 1994 (General exceptions), including its chapeau, is incorporated into and made part of the Agreement, *mutatis mutandis*. Accordingly, the Article provides for the requirements of non-arbitrariness, non-discrimination and prohibition against disguised restriction on investors and investments, as provided under the chapeau of GATT Article XX. Foreign investors will be able to challenge measures of host states taken in the course of the COVID-19 pandemic relying on the general exceptions provisions of IAs through ISDS, but the success rate of the challenge will be fairly low, in light of the case record of the WTO on Article XX.⁴²

It should be noted, however, that the ISDS is the means of last resort in settling disputes between host states and foreign investors, where foreign investors give up the idea of continuing their investment activities in host states and they try to recover their investment by asking for pecuniary damages. With over 2,600 IAs in force and only a total of over 1,000 known ISDS cases,⁴³ it is safe to say that the majority of these agreements have operated without a single ISDS case. We may say that investment disputes are, from an investor's standpoint, expensive to file, time-consuming, and difficult to win.⁴⁴ There are many ways to handle the dispute before going to the ISDS, from renegotiating the terms of investment to divestiture with payment of partial losses to foreign investors, among others.

From an investor's standpoint, there are alternatives to ISDS in settling the disputes arising from host state's measures to tackle COVID-19. First is to renegotiate the terms of investment, and to continue its investment under the renegotiated terms. The theme of renegotiation may include (i) the change in the amounts of investment, (ii) the change in the terms of investment, (iii) the change in the forms of investment, (iv) the host state's payment of the losses incurred by the foreign investor as a result of the renegotiation.⁴⁵ Second is the divestment of foreign investor with the host state's payment of the losses incurred by the foreign investor. ISDS may be the last resort for foreign investors to recover their investment if, and only if, these means of settling the disputes are not successful. Foreign investors are, therefore, advised to try to settle the disputes arising from host state's measures to tackle COVID-19 by first renegotiating their terms of investment. If they succeed in the renegotiation of the terms of investment, they will be able to continue their investment activities under the renegotiated terms and conditions. As foreign direct investment is economic activities with decades of duration, it is always better to continue the going concern than to divesting with the payment of losses incurred.

Another way to strike the balance would be for host states to adopt such measures only temporarily. It should be noted some measures of the APEC economies referred to in section II were temporary measures and will be lifted when the crisis situation caused by the pandemic is over. The temporariness of the measure may make it more transparent and predictable, so that foreign investors who are affected by the measure may change their business plan accordingly. It may also lessen the risk of the host states being sued against under the ISDS.

The COVID-19 is an ongoing phenomenon, and the whole picture of governmental measures to tackle COVID-19 is yet to be seen. So are the reactions of foreign investors against governmental measures of host states. Some speculates on the surge of ISDS cases arising from governmental measures to tackle COVID-19,⁴⁶ and some host states have warned of potential ISDS cases over COVID-19 measures.⁴⁷

This paper summarizes some of the governmental measures adopted by some APEC economies to tackle COVID-19, and analyzes the possibility that the measures may be challenged under the provisions of IIAs. The paper also analyzes possible defenses that may be adopted by host states under those provisions of IIAs. So as to strike a balance between securing the power of the host state to adopt legitimate public policy measures and safeguarding the legitimate interests of foreign investors, a balanced interpretation of the provisions of IIAs will be needed in ISDS cases. At the same time, it should be noted that ISDS is the last resort.

Alternative means of settling disputes should be sought, including renegotiation of the terms of investment and divestiture with the payment of (at least partial) loss of foreign investors. From foreign investors' standpoint, continuation of investment activities should always be a preferred settlement of disputes arising from governmental measures to tackle COVID-19, because foreign direct investment is an economic activity with substantive amount of capital that lasts decades of years. Once the initial emergency situation is eased, host governments should be flexible enough to negotiate such solution with foreign investors. Wise host states should have adopted their measures as temporary, so that they may be lifted once the situation is improved. Even though the measures were not temporary, host states will be able to negotiate the terms and conditions of lifting them with foreign investors that were negatively affected by them. If the negotiation is successful, foreign investors will be able to continue their investment activities under the new, negotiated terms and conditions. It is only if host states and foreign investors cannot reach mutually satisfactory outcomes that settlement of the disputes should be brought to ISDS, which is, at best, a second best solution for foreign investors.

3. Investment Measures for Security Interests: How Should We Strike a Balance?

Author: Professor Kawashima (Professor at Graduate School of Law, Kobe University, Japan)

1. Background: Proliferation of Investment Measures for Security Interests

This century is witnessing a proliferation of trade and investment measures imposed for the purpose of protecting security interests.⁴⁸ In trade area, such measures include not only traditional export control but also more controversial measures like the United States' recent tariff measures on steel and aluminum products based on Sec. 232 of the Trade Expansion Act of 1962. In addition, the former traditional export control is now expanding its scope of application by also covering "emerging and foundational technologies" and products and technologies to be used for serious violations of human rights.⁴⁹ Also in investment area, they may cover not only more long-standing security review of inward foreign investment⁵⁰ but also security-related restriction of outbound direct or portfolio investment.⁵¹

One of the most important root causes for such phenomenon can be identified in the deteriorating relationship and rivalry between the U.S and China under the name of "strategic competition."⁵² As it is not likely for this strategic competition to end very shortly, the above phenomenon may also continue for a long time, and more and more trade and investment activities may thus suffer from it. Against such background, it is very urgently needed to tackle the following question: How can we mitigate the impact of security-related restrictions of trade and investment while ensuring each economy's sovereignty to define its security interests and to design measures necessary to protect them?

Many literatures tackle this question mainly by exploring how to screen out abusive use of security exceptions in trade and investment agreements.⁵³ As abusive use of security-related trade measures have relatively more frequently been tackled,⁵⁴ especially after Panel Report in *Russian Federation – Measures Concerning Traffic in Transit* (DS512), this paper focuses more particularly on security-related investment measures (hereinafter 'SRIMs').

Section 2 will very briefly introduce basic legal disciplines by bilateral investment treaties (hereinafter 'BITs') which are relevant to SRIMs and Section 3 will do stocktaking of the existing security exceptions in BITs including Investment Chapters of free trade agreements (hereinafter 'FTAs') or economic partnership agreements (hereinafter 'EPAs'). Based on the findings in the previous sections, Section 4 will try to offer some policy recommendations, which may be suitable to forums like the Asia-Pacific Economic Cooperation (hereinafter 'APEC').

2. Basic Legal Disciplines by Bilateral Investment Treaties

Modern types of BITs generally provide for legal principles like most-favored nation treatment, national treatment, fair and equitable treatment, adequate compensation for expropriations. They also provide for investor-state dispute settlement mechanism (hereinafter 'ISDS') through which damaged investors can directly initiate arbitration procedures against governments who damaged them by violating BITs, in addition to state-state dispute settlement procedures (hereinafter 'SSDS').

Among the legal principles mentioned above, national treatment would be very relevant to SRIMs. National treatment can be divided into two categories: Firstly, post-establishment national treatment and secondly, pre-establishment national treatment. The former is an obligation to ensure non-discriminatory treatment between domestic investors and foreign investors who have already invested into host economies while the latter is one to ensure non-discriminatory treatment between domestic and foreign investors even before the foreign investors have invested into host economies. In the latter case, foreign investors can invest in the same market as domestic ones can while in the former case, foreign investors may be prohibited to invest in that market.

Many BITs provide only for post-establishment national treatment⁵⁵ while a limited number provide for both pre- and post-establishment national treatment.⁵⁶ This difference in the national treatment is very important in the context of security review of inward foreign investment. If the BIT between Host Economy Y which introduces such security review and Home Economy X whose Investor Z is subject to such review provides only for the pre-establishment national treatment, not the post-establishment national treatment, then X and Z have no right to initiate SSSDs or ISDS. Therefore, it is noteworthy not all BITs offer the protection against security review of inward foreign investment.

In case of security-related restriction of outbound direct or portfolio investment, there is almost no legal discipline. For example, the concept ‘covered investment’ in BITs is usually defined as follows:

“covered investment means, with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement for those Parties or established, acquired, or expanded thereafter;”⁵⁷

Therefore, no protection is provided for to investment of domestic investors, regardless of whether the restriction is imposed on outbound direct investment from the economy who introduces it or portfolio investment by domestic investors to foreign companies listed within the economy.

However, some types of SRIMs can be caught in the scope of legal disciplines of BITs, especially post-establishment most-favored or national treatment and fair and equitable treatment. For example, in May 2019, the U.S introduced security measures which exclude Huawei and other equipment from telecommunication network in the U.S.⁵⁸ and some of the European economies like Sweden and the United Kingdom followed the U.S, if not totally (hereinafter ‘Huawei-type exclusion’). In response, Huawei sent, for example, to the Swedish government the notification of dispute which mentioned the BIT between China and Sweden as amended in 2004 by adding the ISDS clause. Depending on the investment already done by Huawei and details of the measures taken by economies, they may fall under the scope of relevant BITs protection and violate one or several obligation thereof.⁵⁹

The brief introduction in this section highlights that, depending on their contents of BITs and the nature of SRIMs, BITs may or may not offer protection to investors in respect of SRIMs. In many cases except for Huawei-type exclusions and security review of inward foreign investment when making commitment on pre-establishment national treatment, the economy who applies SRIMs doesn’t have to be afraid of risk of ISDS or SSSDs, and even doesn’t have to defend its position by resorting to security exceptions in BITs. This is in a clear contrast with the legal disciplines in trade in goods, where most of security-related trade measures violate one or several obligations such as general elimination of quantitative restriction of importation and exportation, tariff binding and national treatment.

3. Security Exceptions in BITs

This section categorizes security exceptions of BITs including those in FTAs/EPAs Chapters on Investment, into some of the categories and compares between them.

3.1 Self-judging and open-ended security exceptions

Some of BITs adopt very self-judging and open-ended security exceptions, like “it considers necessary for: ... (ii) the protection of its own essential security interests.” For example, Chapter 10 on Investment of the Regional Comprehensive Economic Partnership Agreement (hereinafter ‘RCEP’)⁶⁰ has the following security exceptions, in addition to the more general ones in Article 17.13⁶¹:

Art. 10.15: Security Exceptions

Notwithstanding Article 17.13 (Security Exceptions), nothing in this Chapter shall be construed to:

- (a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
- (b) preclude a Party from applying measures that it **considers necessary for**:
 - (i) the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security; or
 - (ii) **the protection of its own essential security interests** (emphasis added) .

Just as Article 17.13(b) of the RCEP, Article 10.15(b) adopts the similar wording “measures that it considers necessary ... for the protection of its own essential security interests,” which can be interpreted as a “self-judging” clause. However, as Article 17.13(b) lists four concrete items, for example, (iii) taken so as to protect critical public infrastructures (footnote omitted) including communications, power, and water infrastructures; and (iv) taken in time of national emergency or war or other emergency in international relations, it should be interpreted as an exhaustive list which limits the scope of its application. On the contrary, Article 10.15(b) doesn’t mention such concrete items and will be likely to be interpreted as an open-ended exception.

Article 29.2 of CPTPP as well as security exceptions of many BITs signed by the U.S. adopt a similar approach under the influence of Article 18 of 2012 U.S. Model BIT.⁶²

A little different but almost same approach can be found in the ASEAN Comprehensive Investment Agreement (hereinafter ‘ACIA’)⁶³, of which Article 18 says:

Article 18: Security Exceptions

Nothing in this Agreement shall be construed:

- (a) to require any Member State to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any Member State from taking **any action which it considers necessary** for the protection of its essential security interests, **including but not limited to**:

- (i) action relating to fissionable and fusionable materials or the materials from which they derived;
- (ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- (iii) action taken in time of war or other emergency in domestic or international relations;
- (iv) action taken so as to protect critical public infrastructure, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure; or
- (c) to prevent any Member State from taking any action pursuant to its obligations under the United Nations Charter for the maintenance of international peace and security.

(emphasis added)

Not like Article 10.15(b) but like Article 17.13 (b) of the RCEP, Article 18 (b) of the ACIA above lists four concrete items. By adding “including but not limited to” in its chapeau, however, it clarifies it is not an exhaustive but indicative list. Combined with “any action which it considers necessary” in the same chapeau, Article 18(b) constitutes a self-judging and open-ended exception, just like Article 17.13(b) of the RCEP.

Similar wordings are adopted in Article 33.1 on Security Exceptions in the 2016 Model Text for the Indian Bilateral Investment Treaty (hereinafter ‘2016 India Model BIT) which are exactly followed by, for example, Article 33.1 of India-Kyrgyzstan BIT.⁶⁴ However, it is noteworthy that Annex 1 of the 2016 India Model BIT as well as the concrete BITs under its influence, clarifies their security exceptions are non-justiciable and not open to any arbitral tribunal:

Annex I: Security Exceptions

The Parties confirm the following understanding with respect to interpretation and/or implementation of Article 33 of this Treaty.

(i) (omitted)

(ii) Where the Party asserts as a defense that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by Article 33, any decision of such Party taken on such security considerations and its decision to invoke Article 33 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. It **shall not be open to any arbitral tribunal** constituted under Chapter IV or Chapter V of this Treaty to review any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or and adjudication of any other issues referred to the Tribunal. (emphasis added)

Thus, Annex I above strengthens an absolutely self-judging nature of Article 33 as a whole.

3.2 Self-judging but exhaustive lists with anti-abuse clauses

On the other hand, Japan-Korea-China Investment Agreement (JKCIA)⁶⁵ adopts an exhaustive list and anti-abuse clause as follows:

Article 18: Security Exceptions

1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 12, each Contracting Party may take any measure:
 - (a) **which it considers necessary** for the protection of its essential security interests;
 - (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or
 - (ii) **relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;**
 - (b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 12, that **Contracting Party shall not use such measure as a means of avoiding its obligations.** (emphasis added)

Though Article 18(a) of JCKIA is drafted as self-judging by having a wording “which it considers necessary,” it only lists two items, one of which is usually found also in other BITs: (i) measures taken in time of war etc. Though it doesn’t mention fissionable materials and traffic in arms which are also usually found in other BITs, (ii) measures “relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons“ are sufficiently broad to cover those relating to both fissionable materials and traffic in arms. In contrast with RCEP/CPTPP and ACIA/India Model BITs, however, it doesn’t have a wording “including but not limited to” and thus, it is not an indicative but exhaustive list. As a result, some measures would be out of the scope of Article 18(1)(a), for example, “action taken so as to protect critical public infrastructure” in Article 18(b)(iv) of the ACIA This difference would be critical in case where some parties such as Japan and Korea have taken Huawei-like exclusions and they constitute violation of BIT obligations like national treatment. In this situation, the Parties may be in difficulty to defend their position by resorting to Article 18(1)(a) of JCKIA.

Another important feature of JCKIA is Article 18(2) which incorporates an anti-abuse clause: Contracting Party shall not use such measure as a means of avoiding its obligations. Security exceptions usually don’t incorporate such an anti-abusive clause like the chapeau of Article XX of the General Agreement on Tariffs and Trade (hereinafter ‘GATT’). In sum, by both limiting the scope of application and adding an anti-abuse clause, JCKIA has taken more cautious approach in drafting security exceptions compared with other BITs introduced in Subsection 3.2 above.

3.3 Almost copy of Article XXI of GATT

In this context, it's very interesting that the recently agreed China-EU Comprehensive Agreement on Investment⁶⁶ adopts security exceptions which almost copy Article XXI of the GATT.⁶⁷

Article 10: Security Exceptions

Nothing in this Agreement shall be construed:

- (a) to require a Party to furnish or allow access to any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent a Party from taking an action **which it considers necessary** for the protection of its essential security interests:
 - (i) **connected to the production of or traffic in arms, ammunition and implements of war and to such production, traffic and transactions in other goods and materials, services and technology, and to economic activities, carried out directly or indirectly for the purpose of supplying a military establishment;**
 - (ii) relating to fissionable and fusionable materials or the materials from which they are derived; or
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. (emphasis added)

Difference from Article XXI of the GATT is in bold above. The wording of the GATT is slightly revised by also referring to Article XIV bis of the General Agreement on Trade in Services (hereinafter 'GATS')⁶⁸, because in case of BITs, measures can be related not only traffic in goods but also their production and traffic in services and technologies.

As it is an almost copy, interpretative issues raised in the WTO disputes concerning Article XXI of the GATT, Article XIV bis of the GATS, and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Properties (hereinafter 'TRIPS'), which will be discussed in details in Subsection 3.6 below, would be commonly relevant to Article 10 of the EU-China CAI.

3.4 Security exceptions which are not clearly self-judging

Some of BITs have security exceptions which are not clearly self-judging. For example, Article 14 of China-India BIT says as follows:

Article 14 Exceptions

Nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.

As shown above, the wording of “which it considers necessary” can’t be found here. Therefore, it is possible for arbitral tribunals to assess necessity expressed in “for the protection of its essential security interests” in more details than in case of clearly self-judging security exceptions.

It is also noteworthy it has a wording of “in accordance with its laws normally and reasonably applied on a non-discriminatory basis,” which can function as an anti-abuse clause like the chapeau of Article XX of the GATT: “Subject to the requirement that such measures are not applied in a manner which would constitute a *means of arbitrary or unjustifiable discrimination* between countries where the same conditions prevail.”

3.5 BITs with no security exceptions

Some of BITs have no security exceptions like those listed in Subsections 3.1 to 3.4 above. For example, China-Sweden BIT upon which Huawei relied in its Notification of Dispute above has no security exceptions. Potential interpretative issues may include whether arbitral tribunals can find, and apply, *implied* security exceptions in spite of their apparent non-existence in the BITs.

3.6 Analysis

The very brief overview above suggests that economies adopt a variety of approaches in respect of security exceptions in their BITs including the followings:⁶⁹

- 1) Self-judging and open-ended
 - a) Those under influence of Article 18 of 2012 US Model BIT: TPP/CPTPP; RCEP
 - b) An expanded indicative list: ACIA
 - c) An expanded indicative list but non-justifiable clause: 2016 India Model BIT
- 2) Self-judging but an exhaustive list with anti-abuse clauses: JKCIA
- 3) Almost copy of Article XXI of the GATT: China-EU CAI
- 4) Not clearly self-judging: China-India BIT
- 5) No security exception: China-Sweden BIT

Though Cases 4 and 5 are not so rare in case of relatively old BITs, let me focus on BITs with some security exceptions. When examining potential interpretative issues thereof, it would be helpful to referring to the recent WTO dispute settlement Panel Reports in *Russia – Traffic in Transit and Saudi Arabia – Protection of IPRs*.⁷⁰ They highlight possibility for Panels, or arbitral tribunals in case of ISDS, to objectively assess whether measures at issue fall under the scope of security exceptions drafted like Article XXI of the GATT (Type 3 above) or at least those with not an indicative but exhaustive list (Type 2 above).

For example, in tackling the interpretative issue whether Article XXI(b)(iii) of the GATT⁷¹ which has the clause “which it considers necessary”, is totally self-judging which “carves out from a panel’s jurisdiction *ratione materiae* actions that a Member considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations” (para. 7.57), Panel Report in *Russia – Traffic in Transit* states in paras.7.70, 7.77, 7.101-103:

- 7.70. The phrase “taken in time of” in subparagraph (iii) describes the connection between the action and the events of war or other emergency in international relations in that subparagraph. The Panel understands this phrase to require that the action be taken during the war or other emergency in international relations. **This chronological concurrence is also an objective fact, amenable to objective determination.**
- 7.77. Therefore, as the existence of an emergency in international relations is an **objective state of affairs, the determination** of whether the action was “taken in time of” an “emergency in international relations” under subparagraph (iii) of Article XXI(b) **is that of an objective fact, subject to objective determination.**
- 7.101. The Panel concludes that the adjectival clause “which it considers” in the chapeau of Article XXI(b) does not extend to the determination of the circumstances in each subparagraph. Rather, for action to fall within the scope of Article XXI(b), **it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.**
- 7.102. It follows from the Panel’s interpretation of Article XXI(b), **as vesting in panels the power to review whether the requirements of the enumerated subparagraphs are met**, rather than leaving it to the unfettered discretion of the invoking Member, that Article XXI(b)(iii) of the GATT 1994 **is not totally “self-judging”** in the manner asserted by Russia.
- 7.103. Consequently, Russia’s argument that the Panel lacks jurisdiction to review Russia’s invocation of Article XXI(b)(iii) must fail. (emphasis added, footnotes omitted)

Thus, by emphasizing the objective nature of determination of some requirements for applying the security exceptions, Panel rejected Russian argument that Article XXI(b)(iii) of the GATT 1994 is totally “self-judging” and thus confirmed its own jurisdiction to review invocation of Article XXI(b)(iii) and also vested in itself the power to review whether the requirements of the enumerated subparagraphs are met.

Taking into account the interpretation above by Panel in *Russia – Traffic in Transit*, whether or not security exceptions in BITs are drafted like Article XXI of the GATT or at least drafted as not an indicative but exhaustive list with objective requirements, would be practically very important when predicting whether and to what extent arbitral tribunals would interfere into discretion of respondent economy who introduces SRIMs and violates some obligations of BITs.

In addition, in interpreting the chapeau of Article XXI(b) of the GATT, i.e., “any action which it considers necessary for the protection of its essential security interests,” Panel in *Russia – Traffic in Transit* also states in paras.7.131-134, 7.138-139:

- 7.131. The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, **it is left, in general, to every Member to define what it considers to be its essential security interests.**

- 7.132 However, this does not mean that a Member is free to elevate any concern to that of an “essential security interest”. Rather, the discretion of a Member to designate particular concerns as “essential security interests” is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) (“[a] treaty shall be interpreted in good faith ...”) and Article 26 (“[e]very treaty ... must be performed [by the parties] in good faith”) of the Vienna Convention.
- 7.133. The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994. A glaring example of this would be where a Member sought to release itself from the structure of “reciprocal and mutually advantageous arrangements” that constitutes the multilateral trading system simply by re-labelling trade interests that it had agreed to protect and promote within the system, as “essential security interests”, falling outside the reach of that system.
- 7.134. It is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.
- 7.138. The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, applies not only to the Member’s definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.
- 7.139. The Panel must therefore review whether the measures are so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency. (emphasis added, footnotes omitted)

Though the Panel accepted each economy’s sovereignty and discretion to define what it considers to be its essential security interests (para.7.131), by referring to the obligation of good faith as a general principle of law and a principle of general international law (para.7.132), it also limited the discretion by imposing the two obligations on the invoking economy: Firstly, an obligation to articulate the essential security interests sufficiently enough to demonstrate their veracity (para.7.134) ; Secondly, an obligation to demonstrate the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests (para.7.138).

The interpretation above can be regarded as an effort to add anti-abuse clauses to the provision which looks like very self-judging on the text and lacks the explicit anti-abuse clauses like the chapeau of Article XX of the GATT.⁷² Though the second obligation is not so demanding as the

necessity test in Article XX(a) or (b) which requires to show there is no less restrictive alternative, it would clearly make the resort to national essential exceptions more difficult than what it looks like on its face, and Panel in Saudi Arabia – Protection of IPRs which adopted the exactly same interpretation as Panel in *Russia – Traffic in Transit* actually found one of the measures concerned didn't meet this second obligation and therefore couldn't be justified by Article 73(b)(iii) of the TRIPS, is the same clause as Article XXI(b)(iii) of the GATT.

The WTO Panels' attitude to try to put constraint on abusive resort to security exceptions by both limiting the scope of requirement in self-judging nature and interpreting implied anti-abuse clauses even where there is no explicit clause, would be understandable to some extent when taking into account the increasing trend of security-related trade and investment measures as well as the need to mitigate their impact mentioned in Section 1 above. In addition, Panel in *Russia – Traffic in Transit* successfully introduced not too intrusive nor too permissive standard, which tries to strike a delicate balance between needs to prevent abusive use of security exceptions and to ensure each economy's sovereignty to define its essential security interests and to design measures necessary to protect them.⁷⁴

Criticisms can be raised, however, from both camps which emphasize the need to sovereignty and discretion, on one hand, and put more weight on the need to prevent abusive use of security exceptions on the other hand. From the first perspective, Panel's heavy reliance on the text of Article XXI of the GATT which is an exhaustive list would easily raise serious concerns whether Article XXI which was drafted more than seventy years ago, has sufficiently listed necessary scenarios, particularly when taking into account the rapidly changing concept of security interests in the 21st century.⁷⁵ In case of BITs, similar concerns are applicable to both Types 2: Self-judging but an exhaustive list in JKCIA and Type 3: Almost copy of Article XXI of the GATT in China-EU CAI. Similar concerns may have already incentivized more and more use of Type 1: Self-judging and open-ended security exceptions like 2012 U.S. Model BIT/RCEP/CPTPP.

In addition, the result of the Panel's assessment on whether the invoking economy meets the two obligations to articulate the essential security interests sufficiently and to demonstrate the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, would always be subject to critical criticisms it is too intrusive, too permissive or too subjective, from both the first and second perspectives.

Given the variety of approaches in security exceptions in BITs, the analysis would be more complicated. *Firstly*, in case of Type 1b: An expanded indicative list like in ACIA, if the arbitral tribunal finds the measure concerned in violation of a BIT obligation doesn't fall under the scope of one of the items listed, then should they deliver an award in favor of the investors, or should they further assess whether it can meet the general requirement of "measures which it considers necessary for protection of essential security interests"? Maybe the latter approach should be adopted by the tribunal, but, in that case, is a heavier burden of proof applied to the respondent economy who resorts to the abstract security exceptions?

Secondly, it can be argued by the investor that, even if there is no anti-abuse clause in security exceptions, implied anti-abuse clause based on the principle of good faith should be applied just as in the WTO Panel reports. On the other hand, it can also be argued by the respondent economy that, as some BITs adopt ones without anti-abuse clauses while others specifically select to add anti-abuse clauses, it can be persuasively argued that BITs Parties' choice not to add anti-abuse clause in Type 3 should be much more respected than in case of the WTO.

Thirdly, in case of Type 4: Security exceptions which are not clearly self-judging like China-India BIT, potential interpretative issues may include whether arbitral tribunals can respect sovereignty

and discretion to define what constitutes essential security interests and to design measures to protect them in the same way as in case of Type 1⁷⁶. *Fourthly*, in case of Type 5: BITs with no security exceptions like China-Sweden, it is also a potential interpretative issue whether tribunals can find, and apply, implied security exceptions, in spite of the apparent lack thereof in the BITs.

An important question can be raised: When confronted with disputes involving SRIMs and security exceptions, can arbitral tribunals assess whether, and finally find that, the respondent economy abused security exceptions just like the WTO Panels? Given the variety and complexity above in BITs, the answer may be: It depends. However, because of the sensitivity of the issues, there may be cases where arbitrators are hesitant to intrude into sovereign discretion in respect of essential security interests in spite of the text and wording of security exceptions, and show the highest degree of self-restraint. That may happen in case of Types 4 and 5.

4. How Should We Strike a Balance?

Throughout this article, the main issue is: How should we strike a delicate balance between the needs to ensure each economy's sovereignty to define its essential security interest and to design measures to protect them on one hand and to prevent the abuse of SRIMs and security exceptions.

Section 3 analyzes how security exceptions are crafted in BITs and predicts how they would be interpreted also referring to the WTO Panels' recent interpretation of Article XXI of the GATT. More particularly, Subsection 3.6 suggests the possibility for arbitrators to respect sovereign discretion in disputes concerning SRIMs in spite of the text and wording of security exceptions.

Based on the analysis in Section 3, the policy recommendations for the drafters for the Free Trade Area for Asia-Pacific is that drafting security exceptions as totally self-judging is undesirable and, if possible, an exhaustive list is more desirable for prevention of their abuse, though drafting such lists which can cover all possible scenarios is almost impossible. Combined with the possibility of a heavier burden of proof imposed on the economy who applies SRIMs beyond the scope of indicative list as discussed in Subsection 3.6 above, drafting an expanded indicative list like in the ACIA would be recommended.

Even if drafting as self-judging and open-ended provisions, it's better to add anti-abuse clause like JKCIA and to also impose notification obligation like Article XIV bis (2) of the GATS and Article 33.2 of 2016 India Model BIT which follow the GATS, in order to ensure the transparency of SRIMs to some extent.⁷⁷

It should be reminded again, however, that the analysis in Section 3 is relevant only when SRIMs can constitute violation of BITs. As discussed in Section 2, in many cases except for Huawei-type exclusions and security review of inward foreign investment when the reviewing economy makes a commitment of pre-establishment national treatment, the economy who applies SRIMs doesn't have to be afraid of risk of ISDS or SSDS, and even doesn't have to defend its position by resorting to security exceptions in BITs.

Therefore, even if security exceptions can be adequately designed and based on them, arbitral tribunals can really function in striking a delicate balance between needs to prevent abusive use of security exceptions and to ensure each economy's sovereignty to decide its security interests and to design measures necessary to protect them, such contribution may be limited to very narrow scope of SRIMs.

Given such weak or narrow legal disciplines of BITs in respect of SRIMs, the policy

recommendations for those economies who apply SRIMs is that even with narrow scope of protection committed in their BITs and self-judging security exceptions thereof, it is critically needed for such economies themselves to voluntarily develop a mechanism of self-disciplines. For that purpose, the risk of abusing SRIMs should be widely recognized by domestic stakeholders including the legislature, the administration, the court and the business. Such risk would be expanded particularly because the relevant fact is not sufficiently disclosed due to the sensitive nature of the security-related issues and information. Based on such recognition, it is better to voluntarily take advantage of disciplines based on domestic administrative law, which can review whether SRIMs have been abused through administrative and/or court procedures. More concretely, it is helpful to voluntarily develop and apply, for example, the less restrictive alternative (LRA) test in designing and implementing SRIMs. Under such test, it is strongly advised to apply not outright prohibition, but approval with conditions, with which compliance is monitored by external auditors. Conditional approval is very common practice in competition law review of mergers and acquisitions but also adopted in the Security Review of foreign inward direct investment in some economies.⁷⁸

Finally, the policy recommendation for the APEC is that it should create a forum to discuss what measures may constitute non-abusive resort to security exceptions as well as to exchange best practices of the above-mentioned conditional approvals. It is commonly understood that, in the context of SRIMs and security exceptions, non-litigation and non-confrontational approach is desirable.



4. How investment provisions in FTAs/EPAs and BITs can help enhancing supply chain resilience

Presented by Sebastien Miroudot, Senior Trade Policy Analyst, Trade in Services Division, OECD

What are we trying to solve?

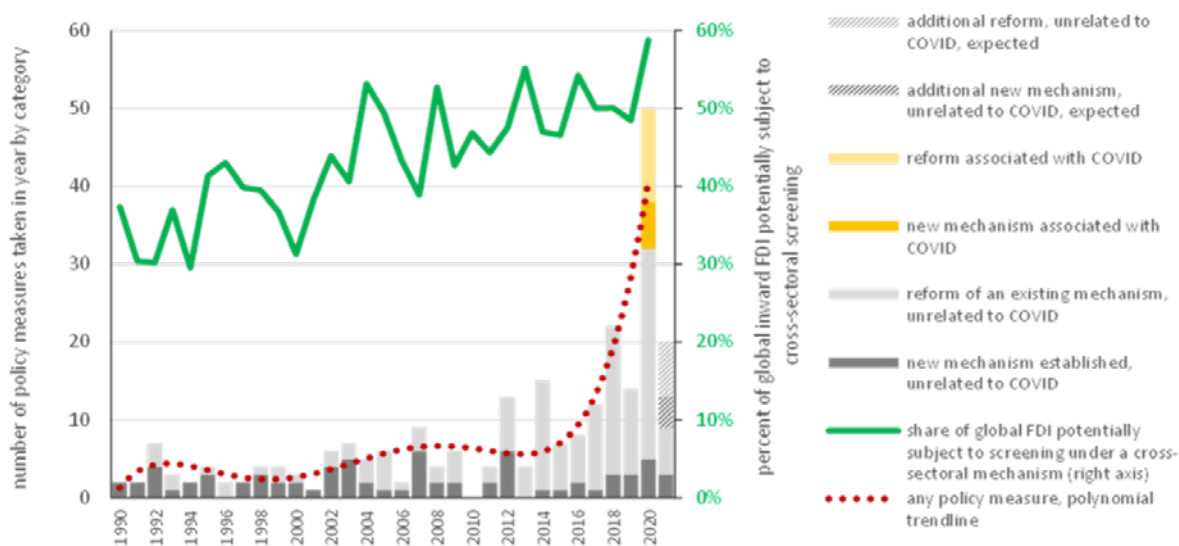
Let us first understand the issue of resilience of supply chains. COVID-19 and the 'Great Lockdown' have disrupted both domestic supply and international supply. Supply chains are mostly domestic, foreign value-added is on average about 20%. When discussing operations of foreign affiliates, resilience is first in the host economy.

GVCs have been rather resilient, including for the supply of essential goods. The main challenge of COVID-19 has been a shift in demand with consumers at home, for example the need for essential goods and the limited disruptions in food supply chains and pharmaceuticals. Whilst there were a major shortage for key medical supplies due to an unanticipated surge in demand – shortages have been addressed through GVCs (face masks, test kits, etc.). The vaccine challenge is first about creating additional capacity.

The industries most affected by COVID-19 are service industries that do not operate in long and complex supply chains.

Additionally, tensions on international freight and border controls have created additional disruptions for companies operating in GVCs.

Some of the issues discussed as part of the 'resilience' debate are not related to COVID-19, for example rising economic nationalism and geopolitical tensions has had a high impact on investment and most investment measures before and during COVID-19 are related to homeland security interests.



Note: Data covers the 62 economies that participate in the OECD-hosted Freedom of Investment Roundtable. A new mechanism or reform is “associated with COVID-19” if the government has explicitly justified its introduction, at least in part, with the pandemic or its fallout. Projections by the OECD Secretariat are based on public government statements. Data as of 3 May 2021. Source: OECD (2020) – <https://oe.cd/INVINV2021>.

Improving the resilience of supply chains

- There is a need for diversification of suppliers, ‘just-in-case’ production and reshoring. Risk is not prevented by producing in one place or another.
- Redundancy is costly, for example several suppliers of high buffer stocks and this and redundancy is also a source of risk, for example quality issues with inputs from multiple suppliers that are not exactly the same.
- Whilst there can be a focus on policy risk, there are other risks. Firms manage risks and become resilient through the development of capabilities.
- There is a requirement to look at solutions that provide end-to-end visibility in the value chain.
- Business needs agility and flexibility so that they can prevent and quickly react when there are disruptions.
- APEC economics can facilitate collaboration and information sharing

Resilient GVCs – the role of governments and investment agreements

1. First, do no harm:

- One of the main risks faced by firms is uncertainty related to policy change. Creating a predictable regulatory and investment policy environment;
- One of the main objectives of investment agreements: predictability and transparency;
- Some provisions that directly address the policy risk (e.g. protection of investors, standard of treatment, expropriation, subrogation, investor-state dispute settlement, etc.);

- Economic nationalism and restrictive investment measures can exacerbate shortages or disruptions during a crisis;
- Despite general and security exceptions, investment agreements can limit the discretion of governments (e.g. prohibition of performance requirements).

2. Facilitating investment during a crisis and in the recovery phase:

- Role of Investment Promotion Agencies
- More international co-operation needed and more international disciplines
- Exploring new types of provisions in FTAs/EPAs and BITs

3. Supporting businesses to improve their risk management strategies:

- Development of capabilities at the firm-level
- Investment agreements can promote trust and transparency between domestic and foreign firms across economies and within economies (including directly through their provisions; e.g. free transfer of funds)
- Provisions on data flows and data privacy
- Private-public co-operation and platforms
- Associating investment policymakers and foreign firms to public-private dialogue



5. ABAC Presentation on FTAAP

Presented by Ho Meng Kit, Chair for Chair for ABAC Regional Economic Integration Working Group

FTAAP and Investment Policy

APEC has an important leadership role to play in investment facilitation by developing common non-binding principles for investment. ABAC had called for the Implementation Plan of the Putrajaya Vision to enable ABAC's aspiration for a "seamless" APEC economy, which includes:

1. Prioritizing for early progress the areas where APEC has fallen short of achieving the Bogor Goals including investment, and other areas such as agriculture, NTBs, services;
2. Incorporating next generation trade and investment issues, such as digital trade and integration of SMEs in GVCs, to address the continuously evolving business environment; and
3. Continuing to progress the FTAAP negotiating pathways to deliver convergence to regionally coherent rules and standards.

To progress on investment facilitation, APEC economies should ensure that for any COVID-19-related trade and investment restrictive measures to be targeted, proportionate, transparent and temporary. ABAC opposes inward-looking supply chains and support the strengthening of supply chain resilience through diversification. ABAC also supports the steady progress in the negotiations for an investment facilitation agreement at the WTO.

APEC economies should implement the following policy recommendations:

- Promote investment liberalisation to enhance GVCs resilience and stimulate economic recovery.
- Incorporate business views in FDI rulemaking to promote confidence and improve the business climate.
- Continue to learn from best practices in agreements such as CPTPP and RCEP.
- Commit to avoiding protectionism and supply chain disruptions.
- Base FDI regulations on transparent and predictable rules, enhance market access, and incorporate dispute settlement mechanisms.
- Prioritise the adoption of digital technologies and facilitate cross-border data flows.
- Realise FTAAP through Putrajaya Vision 2040, with early harvest of concrete milestones.

6. Toward building resilient supply chains – a role for investment policy

Presented by Kevin Klowden, Executive Director of the Milken Institute's Center for Regional Economics

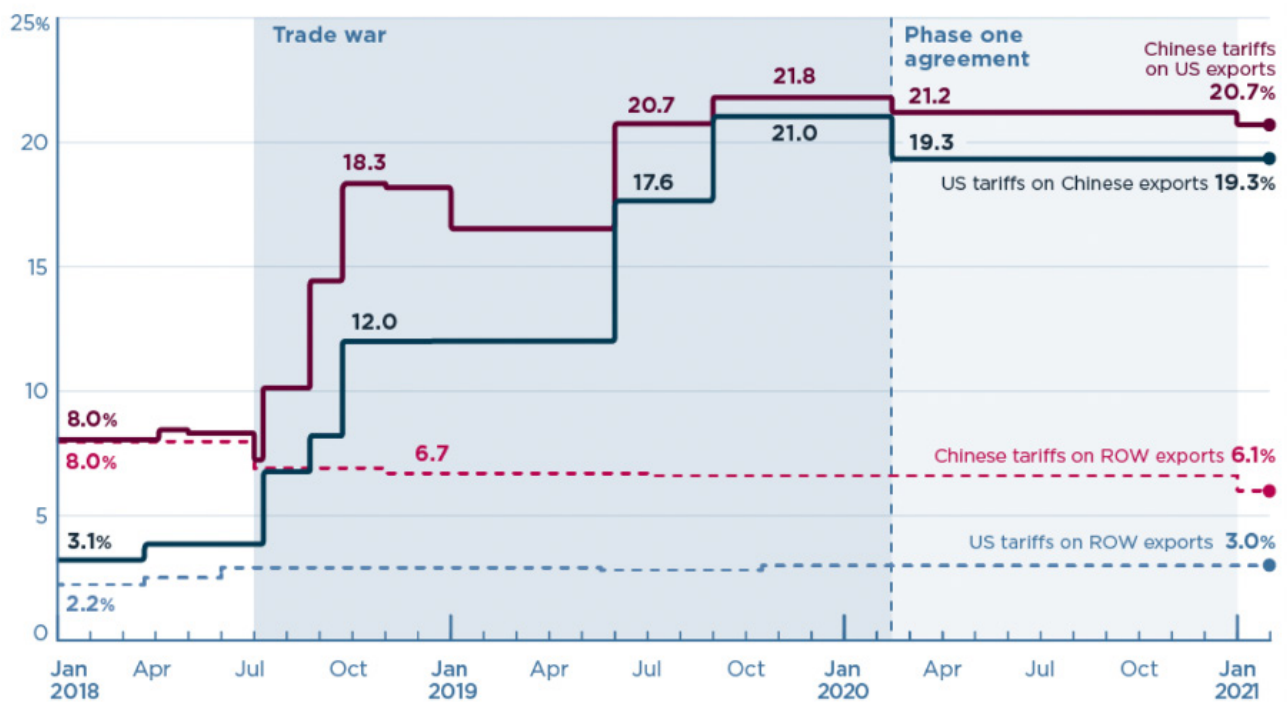
Key Dimensions of Supply Chains

It is businesses that choose location of production and sourcing. This is often based on access to specific resources, favorable regulations, or the importance of access to local markets.

Governments can influence via tariffs and trade agreements, harmonization of standards, and domestic production requirements. However, business seek stability, and this has a strong influence on investment decisions. Unpredictable public policy can make it difficult for businesses to adjust in the short term or drive them away in the long term.

The US-China Tariff War is a clear example:

a. US-China tariff rates toward each other and rest of world (ROW)



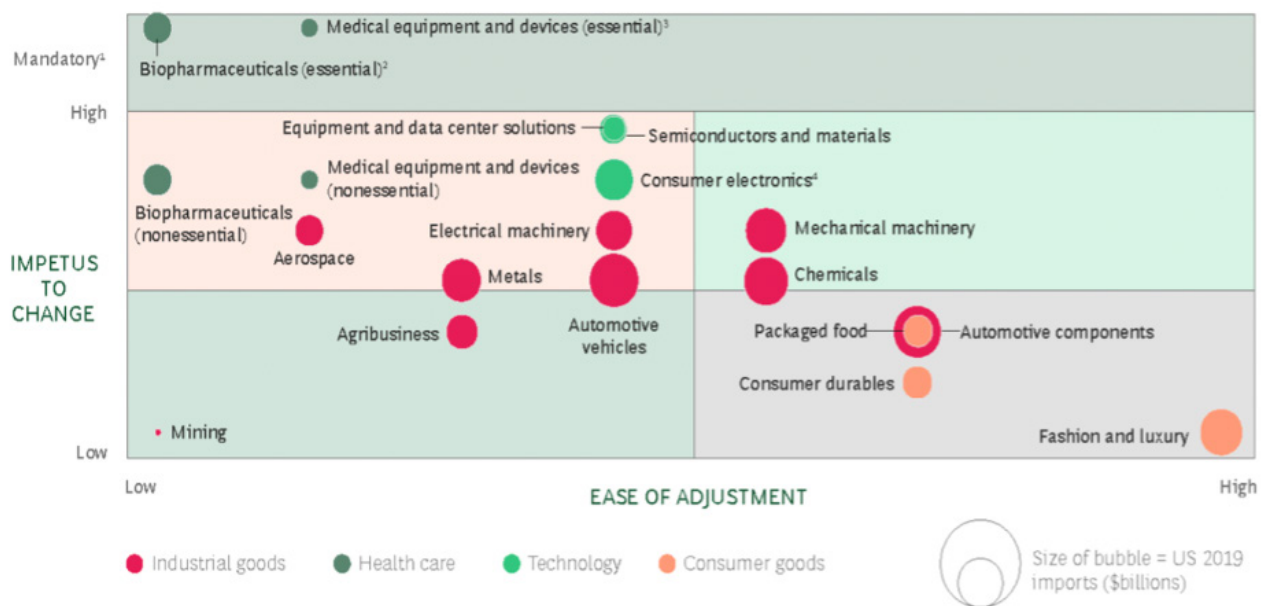
Source: Chad Bown, "US-China Trade War Tariffs: An Up-to-Date Chart," Peterson Institute for International Economics, 16 March 2021.

Key Aspects of Resilience

- Data-driven control of product movement: this includes public-private collaboration to reduce trade barriers;
- Detection of and response to market changes: this includes planning for demand spikes and supply disruptions;
- Redundancies: emergency stockpiles and diverse sourcing; this includes the ability to access surge capacity during crises;
- Evolution: maintaining agility and learning from setbacks: this includes careful investigation of problems.

Adaptation Requires Investment and different Sectors Face Unique Pressures

ILLUSTRATION: COMPARING IMPETUS FOR CHANGE AND EASE OF ADJUSTMENT FOR US GOODS SECTORS



Source: Ben Aylor, Bitan Datta, Megan DeFauw, Marc Gilbert, Claudio Knizek, and Michael McAdoo, "Designing Resilience into Global Supply Chains," BCG, 3 August 2020.

The role of Bilateral Investment Treaties (BITs) key recommendations

1. The key role of BITs is to provide a stable and flexible environment for supply chains to adjust to market and political pressures;
2. Ensure non-discrimination against foreign investors with limits on expropriation and entitlement to seek compensation, provide right to transfer funds into and out of host economy and restricts trade-distorting practices (local content or export quotas).

Annex 1 Agenda for the workshop “Toward building resilient supply chains – a possible role of investment policy”

Up-dated AGENDA (as of 10th of May)

In Singapore time (UTC+08:00), on

Day 1: Thursday, 13 May 2021 9:00-12:00

Day 2: Friday, 14 May 2021 9:00-12:00

Toward building resilient supply chains – a possible role of investment policy

Day 1 (9:00-12:00)

9.00am-9.05am	Welcome from GTPA facilitator Ms Collins Rex, Director, GTPA
9.05am-9.15am	Opening Remarks Ms Ueda Naoko, Director, APEC Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Japan (10 mins)
9.15am-10.00am	Session 1: Comparative stock-take of BITs and investment-related provisions in FTAs/EPAs <ul style="list-style-type: none"> • Professor Juan Navarro, Director and Principal researcher at CMX Partnerships and associate faculty at Royal Roads University (20 mins) • Discussant : Ms Lisa McAuley, Director, GTPA (10 mins) • Q & A session (15 mins)
10.00am-10.15am	Coffee break
10.15am-11.00am	Session 2: Good practices of BITs and investment-related provisions in FTAs/EPAs and its challenges <ul style="list-style-type: none"> • Mr Ueno Yudai, Senior Coordinator, Economic Partnership Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Japan (10 mins) • Mr Yamada Hiroki, Japan External Trade Organisation (JETRO) (10 mins) • Dr Deborah Elms, Founder and Executive Director of the Asian Trade Centre (10 mins) • Q & A session (15 mins)

11.00am-11.45am	<p>Session 3: Analysis of new issues in the post-COVID era</p> <ul style="list-style-type: none"> • Ms Ana Novik, Head of the Investment Division of the Directorate for Financial and Enterprise Affairs, OECD (10 mins) • Mr Ricardo de Urioste, International consultant and Arbitrator, Ministry of Foreign Trade, Peru (10 mins) • Q & A session (15 mins)
11.45am-12.00pm	<p>Final Q & A with attendees and concluding remarks Ms Collins Rex, Director, GTPA</p>
Day 2 (9:00-12:00)	
9.00am-9.05am	<p>Welcome from GTPA facilitator Ms Collins Rex, Director, GTPA</p>
9.05am-10.15am	<p>Session 4: Analysis of a possible role played by BITs and investment-related provisions in FTAs/EPAs under the COVID crisis toward building resilient supply chain.</p> <p>Academic perspective panel:</p> <ul style="list-style-type: none"> • Professor Urata Shujiro, Professor Emeritus, Waseda University, Japan (10 mins) • Professor Nakagawa Junji, Professor at the Faculty of Liberal Arts at Chuo Gakuin University, Japan (10 mins) • Professor Kawashima Fujio, Professor of Law, Kobe University, Japan (10 mins) • Mr Sebastian Miroudot, Senior Trade Policy Analyst, Trade in Services Division, OECD (10 mins) • Panel discussion (20 mins) • Q & A session (10 mins)
10.15am-10.30am	Coffee break
10.30am-11.40am	<p>Session 4: Analysis of a possible role played by BITs and investment-related provisions in FTAs/EPAs under the COVID crisis toward building resilient supply chain.</p> <p>Business perspective panel:</p> <ul style="list-style-type: none"> • Mr Ho Meng Kit, ABAC Singapore, Chair for ABAC Regional Economic Integration Working Group (10 mins) • Mr Ziyaad Ebrahim Research and Teaching Assistant, The University of Adelaide (10 mins) • Mr Kevin Klowden, Executive Director of the Milken Institute's Center for Regional Economics (10 mins) • Panel discussion (20 mins) • Q & A session (10 mins)
11.40-11.50am	<p>Wrap-Up and Closing Ms Ueda Naoko, Director, APEC Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Japan</p>
11.50am-12.00pm	<p>Final Q & A with attendees and concluding remarks Ms Collins Rex, Director, GTPA</p>

References

- 1 The agenda is attached at the annexe.
- 2 JETRO, FY 2020 Survey on the International Operations of Japanese Firms, Retrieved from <https://www.jetro.go.jp/en/news/releases/2021/601d3a6485e0a414.html> (Visited on 29th June 2021)
- 3 UNCTAD, *The World Investment Report 2021: Investing in Sustainable Recovery* (New York, United Nations Publications, 2021), at 2-4.
- 4 *Ibid.* at 16-18.
- 5 Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* 2nd edition (Oxford, Oxford University Press, 2012), at 21-22.
- 6 JETRO, above n 2.
- 7 The definition of SMEs is based on Japan's Small and Medium-sized Enterprise Basic Act.
- 8 The top 5 subsectors, except "Other manufacturing" (7.0%) and "Other non-manufacturing" (6.2%), are "Trade and wholesale" (20.6%), "Iron & steel/non-ferrous metals/metal products" (6.9%), "Food & beverages" (6.6%), "Cars/car parts/other transportation machinery" (5.2%) and "General machinery" (4.8%).
- 9 For example, another JETRO's recent survey revealed that 63.2 % of large-scale firms took advantage of preferential tariffs under FTA when exporting to Japan's FTA partners, surpassing SMEs by about 20%.
- 10 See Figure 4 for details.
- 11 The similar conclusion is reached in the same kind of surveys in other APEC economies. See for example, Jason Webb Yackee, 'How Much do U.S. Corporations Know (Care) about Bilateral Investment Treaties? Some Hints from New Survey Evidence', *Columbia FDI Perspectives* No.31, at 2. [The survey dealt with the familiarity with BITs of General Counsels of 75 large US corporations. The result showed that on a five point scale ranging from 1 ('not at all familiar') to 5 ('very familiar'), the median response was only 2. Only 21 % of the target companies indicated high familiarity (4 or 5).]
- 12 Joachim Karl, 'The Treatment of Small and Medium-Sized Enterprises in International Investment Law', In *Small and Medium-Sized Enterprises in International Economic Law*, edited by Thilo Rensmann. (Oxford: Oxford University Press, 2017.), at 261.
- 13 Importantly, recent IIAs offer alternative means of dispute resolution (ADR) such as conciliation and mediation.
- 14 UNCTAD (2021a)
- 15 See UNCTAD (2020) for useful discussions on this point.
- 16 More detailed description of the investment policy measures undertaken by APEC economies are shown in Appendix Table.
- 17 Investment-related measures that appear to be directly related to COVID-19 are indicated in boldface letters.
- 18 New regulation effected on 4 September 2020 indicates more liberal attitude to FDI, but it only went back to the situation before 29 March 2020, mainly because of limited capacity in screening all FDI due to 0 AUD threshold introduced on 29 March 2020. FDI policy was becoming more restrictive since a few years ago and became even tighter on 29 March 2020 but it became less restrictive on 4 September 2020. Because of these developments, Australian case is classified under "mixed."

- 19 See Norton Rose Fulbright (2020) and UNCTAD (2020)
- 20 International Centre for Settlement of Investment Disputes (ICSID)
<https://icsid.worldbank.org/cases/case-database>
- 21 They are overall objectives (preamble); scope of application (definition of investment); right of establishment; treatment standard (national treatment and most-favoured nation); expropriation standard; compensation standard; freedom of transfer; use of operational measures and advantages (performance requirements); promotional measures; dispute settlement type; precision and force of agreement; exceptions; and temporal phasing.
- 22 “Immigration Update: Thailand Visa Extension For Foreign Nationals Impacted By COVID-19”, Public, 3 March 2020. Available at <http://www.publicnow.com/view/14B94CA9D64DEADE01D1BE5D3CAC37150CE4A1A5> .
- 23 UNCTAD, Investment Policy Monitor, Issue 23, April 2020, p.2.
- 24 UNCTAD, Investment Policy Monitor, Special Issue No.4, May 2020, p.3.
- 25 Government of Canada, Policy Statement on Foreign Investment Review and COVID-9, 18 April 2020. Available at <https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/lk81224.html>.
- 26 According to the policy, the enhanced scrutiny of foreign investments will apply until the economy recovers from the effects of the COVID-19 pandemic. See *ibid.*, para.6.
- 27 Japan, Ministry of Economy, Trade and Industry, News release, “Announcement to add manufacturing medicines for infectious diseases and highly controlled medical devices to the core sectors under the Foreign Exchange and Foreign Trade Act”. 15 June 2020. Available at <https://www.meti.go.jp/press/2020/06/20200615001/20200615001.html>. (In Japanese)
- 28 *Id.*
- 29 Australian Government, Foreign Investment Review Board, Media release, “Changes to foreign investment framework”. 29 March 2020. Available at <https://firb.gov.au/about-firb/news/changes-foreign-investment-framework-0>.
- 30 *Id.*
- 31 Australian Government, Foreign Investment Review Board, Q&A – Temporary changes to foreign investment framework, 29 March 2020. Available at <https://firb.gov.au/qa-temporary-changes-foreign-investment-framework>.
- 32 See Clayton UTZ, “Australia restores no-review threshold for foreign acquirers of leasehold interests in certain commercial land”, 4 September 2020. Available at <https://www.claytonutz.com/knowledge/2020/september/australia-restores-no-review-threshold-for-foreign-acquirers-of-leasehold-interests-in-certain-commercial-land>.
- 33 See, for instance, Tai-Heng Cheng, “Power, Authority and International Investment Law”, *American University International Law Review*, Vol.20, Issue 3, (2005), pp.465-520, p.482. (Argues that power and authority of the executive branch of a host state is diminished by international investment law, which demands that the host state respect the legitimate expectation of investors.)
- 34 See footnote 14 of Article 9.4 (National Treatment).
- 35 RCEP, Article 10.5.2(a), (b) and (c).

- 36 Footnote 37 clarifies that “(f)or greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products”.
- 37 See Annex 10B, section 4, which says that non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, public morals, the environment, and real estate price stabilization, do not constitute expropriation.
- 38 In contrast, Article 29.1 of the TPP, which incorporates Article XX of GATT 1994 into its chapters dealing with trade in goods and services, does not refer to Chapter 9 on Investment. Likewise, Article 32.1 of the US-Mexico-Canada Agreement (USMCA) does not refer to Chapter 14 on Investment in its incorporation of Article XX of GATT 1994.
- 39 G20 Guiding Principles for Global Investment Policymaking, 10 July 2016. Available at <https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>.
- 40 See UNCTAD, UNCTAD Series on Issues in International Investment Agreements II, Fair and Equitable Treatment, UNCTAD, 2012, p.113.
- 41 Kevin O’Gorman, Paul Stothard and Martin Valasek, “Investor-state claims in the era of the COVID-19 pandemic”, in Norton Rose Fulbright, International Arbitration Report, Issue 14, June 2020, pp.17-19.
- 42 See WTO, WTO Analytical Index, GATT 1994, Article XX (Jurisprudence). <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art20_jur.pdf >
- 43 See UNCTAD, World Investment Report 2020, pp.106 and 110. (Reporting that there are 2,654 IIAs in force and 1,023 known ISDS cases.)
- 44 Scott Miller, “Investor-state dispute settlement: Who uses it?”, Hinrich Foundation, 15 March 2018. <<https://www.hinrichfoundation.com/research/tradevistas/sustainable/investor-state-dispute-settlement/> >
- 45 See Junji Nakagawa, Nationalization, Natural Resources and International Investment Law, Routledge, 2019, Chapter 6. (It argued that the majority of nationalization disputes in natural resource development sector were settled not by the payment of compensation but by the renegotiation of contracts between host states and foreign investors.)
- 46 See, for instance, Oliver Hailes, “Epidemic Sovereignty? Contesting investment treaty claims arising from coronavirus measures”, EJIL: TALK!, 27 March 2020. <<https://www.ejiltalk.org/epidemic-sovereignty-contesting-investment-treaty-claims-arising-from-coronavirus-measures/>>
- 47 “Peru warned of potential ICSID claims over covid-19 measures”, Bilaterals.org., 15 April 2020. <<https://www.bilaterals.org/?peru-warned-of-potential-icsid&lang=en> >
- 48 See e.g., J. Benton Heath, The New National Security Challenge to the Economic Order, Yale Law Journal, 129:1020, 2020, pp.1022-1023. See also OECD, Acquisition- and ownership-related policies to safeguard essential security interests, Current and emerging trends, observed designs, and policy practice in 62 economies, Research note by the OECD Secretariat May 2020.

- 49 As an example of the former, see Sec. 1758 of Export Control Reform Act of 2018 (also covering “emerging and foundational technologies”). As an example of the latter, see Art. 5, Regulation (EU) No. 2021/821, OJ L206, 11. 6. 2021, p. 1 (also covering “cyber-surveillance items”).
- 50 For example, the security reviews led by the Committee on Foreign Investment in the United States (“CFIUS”).
- 51 Executive Order 14032 of June 3, 2021, Addressing the Threat from Securities Investments that Finance Certain Companies of the People’s Republic of China, 83 Fed. Reg. 30145 (published June 7, 2021).
- 52
- 53 See Summary of 2018 National Defense Strategy of the United States of America, November 2018 (redefining China as a strategic competitor to the United States which seeks the global displacement of the U.S. in the future) and Interim National Security Strategic Guidance, March 2021 (recognizing “China...is the only competitor potentially capable of combining its economic, diplomatic, military, and technological power to mount a sustained challenge to a stable and open international system” and emphasizing a need to prevail in strategic competition with China). See also S.1169 - Strategic Competition Act of 2021, 117th Congress (2021-2022) (finding “(t)he People’s Republic of China (PRC) is leveraging its political, diplomatic, economic, military, technological, and ideological power to become a strategic, near-peer, global competitor of the United States.”* Heath, *supra* note 48, at 1024.
- 54 Viktoriia Lapa, “The WTO Panel Report in Russia – Traffic in Transit: Cutting the Gordian Knot of the GATT Security Exception?” May 12, 2020, available at Questions of International Law, <http://www.qil-qdi.org/the-wto-panel-report-in-russia-traffic-in-transit-cutting-the-gordian-knot-of-the-gatt-security-exception/>.
- 55 One of the examples is Articles 1(5) and 3(1) of Investment promotion and protection agreement between Japan, Republic of Korea and China (hereinafter ‘JKCIA’) signed May 13, 2012 and entered into force May 17, 2014.
- 56 Such limited cases include Articles I(1)(a), (e) and II(1) of Treaty between the United States of America and the Republic of Kazakhstan concerning the Encouragement and Reciprocal Protection of Investment signed May 19, 1992 and entered into force January 12, 1994 and Article 9.4.1 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership signed March 8, 2018 and entered into force December 30, 2018 (hereinafter ‘CPTPP’).
- 57 Article 9.1 of the CPTPP.
- 58 Executive Order 13873 of May 15, 2019, Securing the Information and Communication Technology and Services Supply Chain, 84 Fed. Reg. 22689 (published May 17, 2019). For the implementation of this executive order, see Congressional Research Service, *Huawei and U.S. Law*, R46693, February 23, 2021, pp.14-17.
- 59 Huawei Technologies, Written Notification of Dispute Pursuant to Article 6 bis of the Agreement on the Mutual Protection of Investment entered into between the Kingdom of Sweden and the People’s Republic of China on 29 March 1982, as amended on 27 September 2004, December 31, 2020. It clearly claimed Swedish actions violated fair and equitable treatment, most-favored nation treatment and prohibition of expropriation. For relevant discussion, Ioannis Glinavos, *Huawei and ISDS: 5G Infrastructure and Investment Claims*, Kluwer Arbitration

Blog, June 20, 2020, available at <http://arbitrationblog.kluwerarbitration.com/2020/06/11/huawei-and-isd-5g-infrastructure-and-investment-claims/>.

60 Signed November 15, 2020 and to be entered into force January 1, 2022.

61 Article 17.13: Security Exceptions (“Nothing in this Agreement shall be construed:

(a) to require any Party to furnish any information the disclosure of which it considers contrary to its essential security interests;

(b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to fissionable and fusible materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials, or relating to the supply of services, as carried on directly or indirectly for the purpose of supplying or provisioning a military establishment;

(iii) taken so as to protect critical public infrastructures (footnote omitted) including communications, power, and water infrastructures;

(iv) taken in time of national emergency or war or other emergency in international relations; or

(c) to prevent any Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”).

62 As to the U.S. interpretation of national security exceptions in its Model and

actual BITs as self-judging, see Catherine H. Gibson, “Beyond Self-Judgment: Exceptions Clauses in US Bits,” *Fordham International Law Journal*, 38(1), 2015, p.26.

63 Signed February 26, 2009 and to be entered into force February 24, 2009.

64 Signed June 14, 2019 and not yet entered into force.

65 Supra note 55.

66 Agreed in Principle December 30, 2020, not yet formally signed or entered into force.

67 Article XXI: Security Exceptions

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

68 Art. XIV bis: Security Exceptions

1. Nothing in this Agreement shall be construed:

(a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:

(i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;

(ii) relating to fissionable and fusionable materials or the materials from which they are derived;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security

2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

69 As an earlier finding of a variety of approaches in respect of national security exceptions, PART I, Chapter 5 Essential Security Interests under International Investment Law, in OECD, *International Investment Perspectives: Freedom of Investment in a Changing World 2007 Edition*, 2007, pp.94-99 and UNCTAD, *The Protection of national security in IIAs*, UNCTAD Series on International Investment Policies for Development, 2009.

70 Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, adopted 26 April 2019 and Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R, 15 June 2020 (on appeal).

71 *Supra* note 67.

72 Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

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

73 Paras.7.289-293.

74 See Lapa, *supra* note 54 (evaluating the Panel skillfully dealt with the interpretation of the security exception of the GATT and managed to design a flexible framework which will accommodate the need for deference of WTO Members on the one hand, and will prevent the abuse of the security exception on the other hand.). See also Caroline Glöckle, “The second chapter on a national security exception in WTO law: the panel report in *Saudi Arabia – Protection of IPR*,” *EJIL: Talk!*, July 22, 2020, available at <https://www.ejiltalk.org/the-second-chapter-on-a-national-security-exception-in-wto-law-the-panel-report-in-saudi-arabia-protection-of-ipr/>.

75 Heath, *supra* note 48, at 1024. See also Lapa, *supra* note 54.

76 See *CC/DEVAS Ltd v. India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, July 25, 2016, paras. 243-245 (in interpreting BIT security exceptions like Type 4, while stating “the Respondent... still has to establish that the measure related to its essential security interests, also stating “the Tribunal has also no difficulty in recognizing the “wide measure of deference” mentioned by the Respondent. An arbitral tribunal may not sit in judgment on national security matters as on any other factual dispute arising between an investor and a State. National security issues relate to the existential core of a State. An investor who wishes

to challenge a State decision in that respect faces a heavy burden of proof, such as bad faith, absence of authority or application to measures that do not relate to essential security interests.”).

77 See Transparency, APEC Non-Binding Investment Principles (2011 Update) (“Member economies will make all laws, regulations, administrative guidelines and policies pertaining to investment in their economies publicly available in a prompt, transparent and readily accessible manner.”).

78 * See OECD, *supra* note 48, paras.59-60.



APEC Project: CTI 08 2020T

Produced by:
APEC Division, Economic Affairs Bureau
Ministry of Foreign Affairs, Japan
<https://www.mofa.go.jp/>

Global Trade Professionals Alliance (GTPA)
www.gtpalliance.com
info@gtpalliance.com

For
Asia-Pacific Economic Cooperation Secretariat
35 Heng Mui Keng Terrace Singapore 119616
Tel: (65) 68919 600
Fax: (65) 68919 690
Email: info@apec.org
Website: www.apec.org

© 2021 APEC Secretariat

APEC#221-CT-01.18