



Core Elements of International Investment Agreements in Domestic Investment Frameworks in the APEC Region

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The following symbols have been used in the tables:

Two dots (..) indicate that data are not available or are not separately reported.

Rows in tables have been omitted in those cases where no data are available for any of the elements in the row;

A dash (-) indicates that the item is equal to zero or its value is negligible;

A blank in a table indicates that the item is not applicable;

A slash (/) between dates representing years, e.g. 1994/1995, indicates a financial year;

Use of a hyphen (-) between dates representing years, e.g. 1994-1995, signifies the full period involved, including the beginning and end years.

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Details and percentages in tables do not necessarily add to totals because of rounding.

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ABBREVIATIONS

ADR	alternative dispute resolution
ANZCERTA	Australia/New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BIT	bilateral investment treaty
CAFTA	Central American Free Trade Agreement
CEP	Closer Economic Partnership
CFIUS	Committee on Foreign Investment in the United States
ECT	Energy Charter Treaty
EIA	economic integration agreement
EPA	economic partnership agreement
FATA	Foreign Acquisitions and Takeovers Act (Australia)
FET	fair and equitable treatment
FIA	Foreign Investments Act
FTA	free trade agreement
FTAAP	Free Trade Area of the Asia-Pacific
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
IFAP	investment facilitation action plan
IPA	investment promotion agencies
IPPA	investment promotion and protection agreement
ISDS	investor-State dispute settlement
MFN	most-favored nation
MIDA	Malaysian Industrial Development Authority
NAFTA	North American Free Trade Agreement
PACER	Pacific Agreement on Closer Economic Relations
RTA	regional trading agreement
SACU	Southern African Customs Union
TRIMS	Trade-Related Investment Measures
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

EXECUTIVE SUMMARY

This study reviews the core elements of international investment agreements (IIAs) of APEC member economies, analyzing and describing how they are reflected in these economies' domestic legal frameworks. As these elements are also reflected in APEC non-binding instruments on investment, reference to the relevant APEC principles is also made as part of this analysis.

The domestic legal frameworks of APEC members vary and, where core elements are reflected in these domestic legal frameworks, they are found – depending on each specific issue and individual economy – at a constitutional level and in the regulatory framework (laws, regulations, statutes, administrative guidelines etc.). Some core elements can simply not be contemplated in the domestic legal framework because of their inherently international nature.

The approach taken in this study is to present the main core elements of APEC IIAs, discuss their relationship to non-binding APEC principles, where applicable, and illustrate the way they are reflected in APEC member economies' domestic legal frameworks.

The study finds that the relationship between core elements of IIAs and domestic legal frameworks varies with each element and each economy's individual legal and political system. From the analysis conducted, it appears that the legal framework of most economies is, in general terms, consistent with obligations made in IIAs. Despite the broad and diverse network of more than 6,000 IIAs with differing objectives, the relatively small number of disputes when compared to the number of agreements also seems to indicate that there are no egregious inconsistencies between the international obligations in IIAs and most domestic legal frameworks.

Possible incoherence, if at all, normally arises with regard to specific actions or measures that affect a single or small group of investors in ways that can breach international commitments. Moreover, since some of the standards found in IIAs, such as fair and equitable treatment, are by nature a part of international law, one cannot reference a specific piece of domestic legislation that implements them. It should be added that, when IIAs provide not only for investment protection but also for liberalization, the relationship to an economy's domestic legal framework can be more complex, and new international commitments may require statutory or regulatory modifications more often.

In terms of economic policy, economies should make sure that domestic legal frameworks – which may be considered less stable than international commitments – remain consistent with provisions of IIAs. A further consideration may be to further consolidate international investment law, with the aim to have a single reference against which to assess consistency.

INTRODUCTION

The economies of the Asia-Pacific Economic Cooperation (APEC) recognize the importance of foreign investment in growth and the creation of wealth. National policies and legal frameworks are crucial in generating domestic environments that attract foreign investors, as is the legal certainty of international investment agreements (IIAs). These two components – the domestic and the international – compounded with economic and competitiveness factors – are central in decision-making processes that result in increased levels of investment from abroad, and its benefits to national economies, development and growth.

Besides the domestic legal framework that regulates investment and specific legislation that refers to foreign investment in particular, APEC members are also active participants in the web of IIAs. These agreements generally share a series of core elements that define the scope, coverage and investment protection obligations. APEC economies have also agreed among themselves to a number of non-binding principles relating to their domestic frameworks for investment, in areas that often correspond to core elements of IIAs.

The present study reviews the elements in IIAs identified in the core elements programs¹ as they are reflected in the domestic legal framework of APEC economies, recognizing that each economy has different legal systems. This report builds on the UNCTAD study “Identifying Core Elements in Investment Agreements in the APEC Region”, that used a sample of 28 IIAs involving APEC member economies and draws on information provided by APEC economies on their investment regimes (UNCTAD, 2008).

Core elements in IIAs include the definition of investor and investment, provisions on national treatment, most-favored nation (MFN) treatment, minimum standard of treatment, expropriation, transfers, performance requirements and senior personnel, as well as commitments regarding dispute settlement and investment promotion, cooperation and transparency. As noted above, these elements are also reflected in APEC instruments on investment; the present study discusses the interaction between domestic legal frameworks and IIAs, referring, where applicable, to the relevant APEC principles.

The domestic legal frameworks of APEC members vary considerably and, where core elements are contained in the domestic legal framework, they vary in levels depending on the issue and the economy. Several core elements are reflected at a constitutional level in some economies, while others are at a legal or statutory level, and yet others have an administrative or regulatory rank, while some can simply not be contemplated in the domestic legal framework at all. Areas of IIAs that are necessarily reflected in domestic legal frameworks include sectors reserved to the State or from which foreign investors are excluded or limited, instances that require prior authorizations or investment screening, and specific performance requirements.

Domestic legal frameworks are arguably less stable than commitments acquired under IIAs. This is generally not problematic as long as new legislation remains consistent with the provisions of the international agreement, and generally speaking, evolves towards liberalization and higher levels of protection, rather than the reverse.

While each economy is a different case, the present study presents the main core elements from APEC IIAs, discusses their relationship to APEC principles, where applicable, and illustrates the way they are reflected in APEC member economies' domestic legal frameworks.

Notes

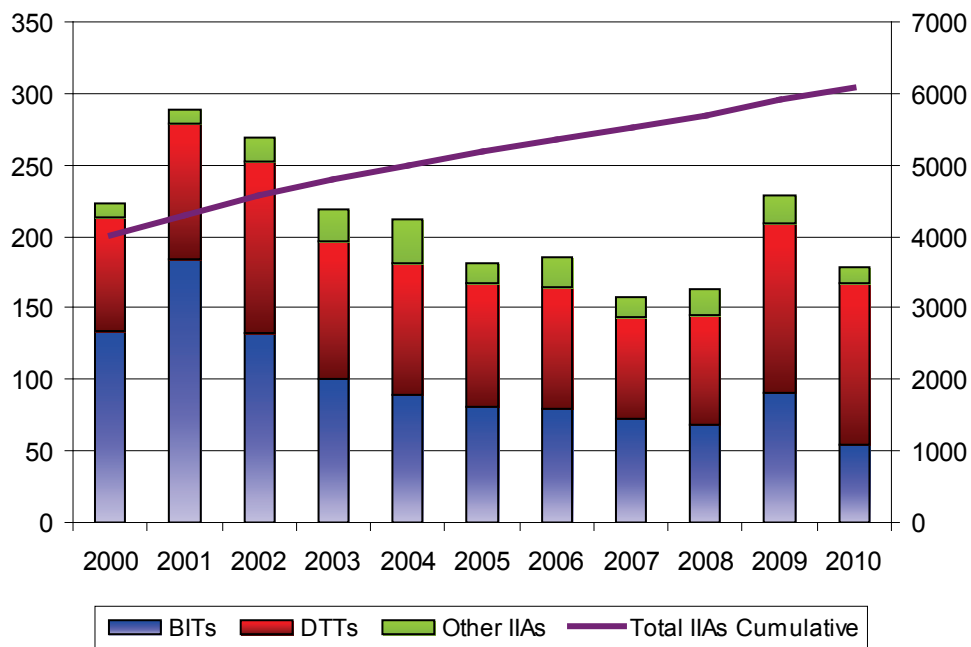
¹ This study does not analyze the relationship with contracts entered into by investors and host countries that may fall under the scope of an IIA through umbrella clauses.

I. INTERNATIONAL INVESTMENT AGREEMENTS AND DOMESTIC LEGAL FRAMEWORKS

The universe of IIAs includes more than 6,000 agreements (UNCTAD, 2011c), with some bilateral investment treaties (BITs) that go back to the late 1950s and early 1960s. These IIAs have diverse objectives and provisions that construct a complex web of international investment rules. BITs and investment chapters of economic integration agreements (EIA) being negotiated today, and their provisions and level of ambition with regard to liberalization, reflect developments in domestic policy and legal frameworks.

Although investment stand-alone agreements such as BITs are more numerous, the 1990s marked the beginning of a surge in the negotiation of EIAs such as free trade and regional agreements with investment and services chapters that simulate the core of BITs obligations and structure (see Figure 1). While originally the objectives of BITs tended to be more focused on the protection of investment, EIAs generally have clear market access and liberalization goals, as do some newer models of BITs.

Figure 1. Trends of BITs, double taxation treaties and other IIAs



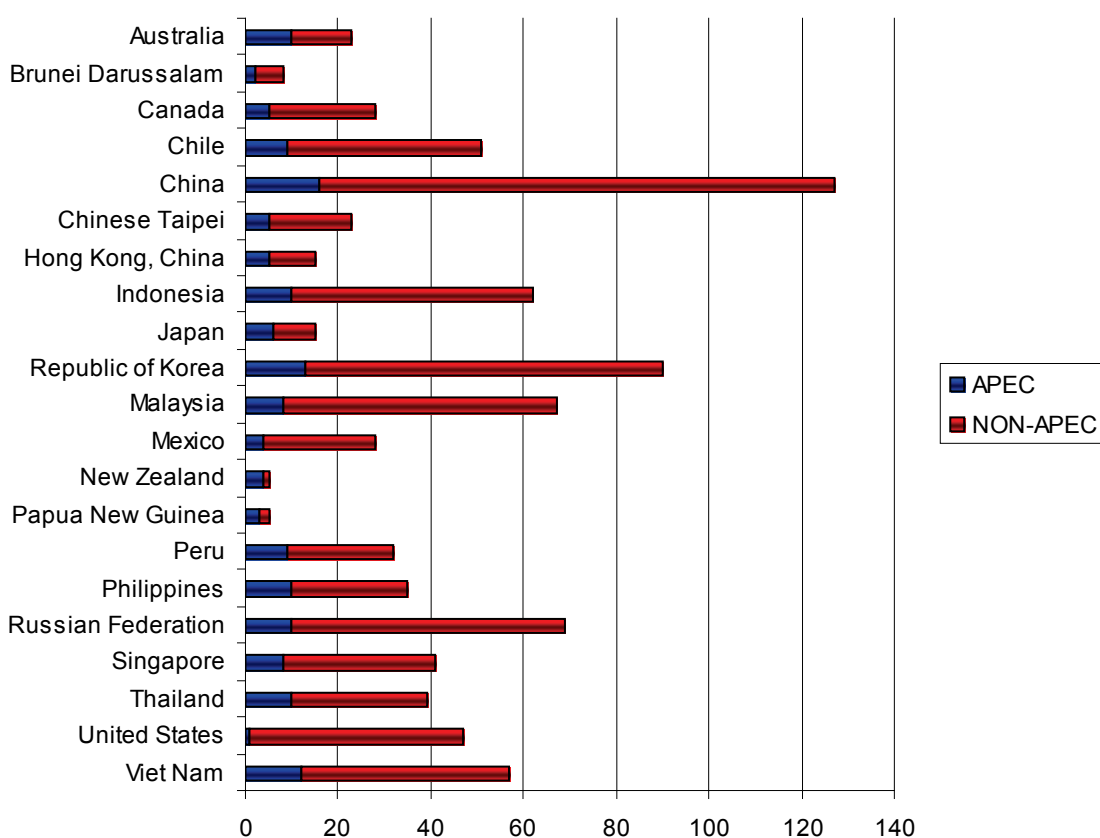
Source: UNCTAD database

This transition is explained in part because, while some economies saw BITs as protection instruments, three key players in international investment negotiations – the United States, Canada and Japan – saw them as tools for liberalization as well as protection. The United States started to use the liberalizing model in the 1980s, Canada after the mid-1990s and Japan started to use this model in the last decade (UNCTAD, 2008). As the number of IIAs negotiated by these three has grown, partner economies have also adopted this model and many use it today.

APEC economies have been active participants in the negotiation of IIAs, especially BITs and EIAs, including Regional Trading Agreements (RTAs) and Free Trade Agreements (FTAs).

As UNCTAD's list of BITs signed as of 1 June 2010¹ by APEC members shows, China and the Republic of Korea are the most active negotiators within APEC and account for 15% and 10% of all agreements signed by APEC economies, respectively. Additionally, while there are close to 150 agreements among APEC economies, the number of agreements between APEC members and non-APEC economies is well over four times that (see Figure 2).

Figure 2. BITs concluded by APEC economies, 1 June 2010 (cumulative)



Source: UNCTAD database

On the other hand, of the over 80 FTAs notified to the World Trade Organization (WTO)² that cover goods and services, 66 involve at least one APEC member economy, while 34 are between APEC economies. According to WTO notifications, the first APEC member economy EIA (coverage of goods and services) to enter into force was the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) in 1989³. Although this agreement did not cover investment, it did provide for liberalization in trade in services, including the right of establishment. The next APEC EIA was the North American Free Trade

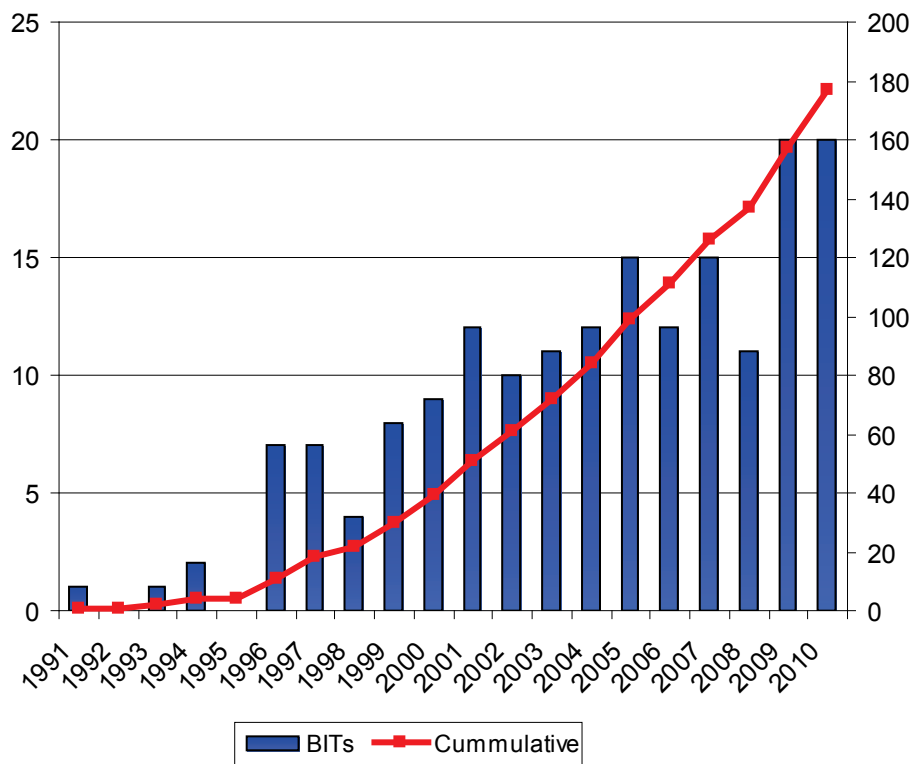
Agreement (NAFTA) in 1994, which had a separate investment chapter covering both access and protection of investments.

The intricate web of IIAs is dynamic and continues to grow. For example, Australia⁴ is currently undertaking FTA negotiations with China, Japan, Malaysia, the Gulf Cooperation Council (GCC),⁵ the Republic of Korea and Indonesia, and participating in the negotiation of the Trans-Pacific Partnership Agreement and the Pacific Agreement on Closer Economic Relations (PACER) Plus.

At the same time, besides the FTA with Australia currently under negotiation mentioned above, China is negotiating agreements⁶ with the GCC, Iceland, Norway and SACU (Southern African Customs Union), and considering agreements with India, the Republic of Korea, Japan and Switzerland.

In addition to the new negotiations, economies are renegotiating older agreements, sometimes replacing them with FTA-like provisions that tend to build and expand on the original BIT provisions (see Figure 3).

Figure 3. Number of renegotiated BITs, annual and cumulative (1998-2008)



Source: UNCTAD database

In addition to internationally binding agreements, APEC economies have created several non-binding goals and instruments that promote more open and stable investment regimes and climates. On November 15, 1994, APEC members adopted the Declaration of Common Resolve, known as the "Bogor" Declaration. This declaration sets the long-term goal of free and

open trade and investment in the Asia-Pacific and sets target dates for 2010 and 2020 for developed and developing economies, respectively. Additionally, APEC adopted the Non-Binding Investment Principles of 1994; and the Menu of Options for Investment Liberalization and Business Facilitation to Strengthen APEC Economies of 1997. Further to this, in 2008 in Lima, APEC leaders agreed to an Investment Facilitation Action Plan (IFAP) to further promote investment in their economies (see Annexes).

As recently as November 13, 2010, APEC leaders reiterated their commitment to free and open trade and investment in a declaration entitled “The Yokohama Vision - Bogor and Beyond”, issued in Yokohama, Japan:

“We will take concrete steps toward realization of a Free Trade Area of the Asia-Pacific (FTAAP), which is a major instrument to further APEC’s regional economic integration agenda. An FTAAP should be pursued as a comprehensive free trade agreement by developing and building on ongoing regional undertakings, such as ASEAN+3, ASEAN+6, and the Trans-Pacific Partnership, among others. To this end, APEC will make an important and meaningful contribution as an incubator of an FTAAP by providing leadership and intellectual input into the process of its development, and by playing a critical role in defining, shaping, and addressing the “next generation” trade and investment issues that FTAAP should contain. APEC should contribute to the pursuit of an FTAAP by continuing and further developing its work on sectoral initiatives in such areas as investment; [...]”

IAs and APEC non-binding instruments co-exist with domestic investment frameworks and regulations, and both have evolved over the years as policies and economic objectives do. While the two frameworks – domestic and international – have different objectives and ends, they must be consistent and compatible.

Domestic legislation on investment sets the rules for activities within the borders of a party, and ideally it should provide a clear framework and rules for investors and investments in a given host economy. The application is clearly limited to the territory of that economy. Objectives in IAs generally seek to promote better investment climates through the definition of a set of stable rules, normally of a more general nature, and to provide investors of the home economy with protection in the host economy.

The present study reviews the core elements of IAs and APEC’s related non-binding principles, and describes, where applicable, how they are reflected and addressed in domestic legal frameworks of APEC economies. IIA core elements can be divided into categories as follows:

- Definitions: definition of investment and of investor
- Liberalization: national treatment and MFN treatment
- Investment protection: minimum standard of treatment, expropriation, transfers, performance requirements, senior personnel and dispute settlement
- Promotion, including cooperation and transparency

Some of these elements are inherently treaty provisions and therefore will not be directly contained or reflected specifically in domestic legal frameworks. MFN treatment, for example, is typically reflected in international agreements because it is derived directly from an international treaty or agreement to provide the same treatment between treaty partners. Therefore disciplines or legislative provisions on its functioning *per se* are generally not present in domestic frameworks.

Two general schemes seem to exist within APEC economies with regard to approaches to regulating foreign investment. While many economies have a general foreign investment law or regime, other economies do not and simply address the issues and elements relevant or specific to foreign investment in the sector or issue specific legislation such as tax codes, privatization laws, and investment incentives.

The United States, for example, does not have a foreign investment statute. Definitions of foreign investment appear in IIAs, but some statutes such as the Exon-Florio have specific definitions of foreign investment for limited statutory purposes (IADB, 1999). Like the United States, several economies that do not have general foreign investment laws but do have sector specific legislation that affects foreign investment that applies to specific sectors, activities or situations.

Other economies have general laws on foreign investment as well as sector specific provisions. The Philippines governs foreign investment in Republic Act (RA) No. 7042, also known as the Foreign Investments Act (FIA) of 1991 (as amended by RA 8179). In addition to the general foreign investment framework, the Philippines also have a series of laws and regulations regarding investment incentives such as the Omnibus Investment Code of 1987 and laws on freeports and ecozones, for example.

At the same time, the standing of core elements in domestic legal frameworks varies from economy to economy and from element to element. Some core elements in domestic legal frameworks have constitutional standing, while others may be statutory or regulatory. In the Philippines, for example, Article 3, Section 1 of the Constitution reads: “No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws”. While this general principle of non-discrimination in protection has constitutional standing, provisions on remittances, expropriation and compensation are found in Executive Order No. 226 which has a different standing within the Philippines legal framework.

IIAs that cover investments only after their establishment in the host economy at the post-establishment stage tend to have a more limited relationship with domestic legal frameworks than those that also cover investments at a pre-establishment stage where investment liberalization is a major component. Liberalization derived directly from the IIA also needs to be reflected in the domestic framework.

Some BITs have market access provisions, and most FTAs provide pre-establishment coverage for investment. Generally, economies have largely made commitments in IIAs that consolidate a level of openness currently in their domestic investment framework, thereby applying the same access to all investors no matter what their origin. That said, the IIAs do

provide protection elements only to IIA signatories, and even when economies do not open new sectors to investment, an IIA can consolidate the existing level of openness and contain requirements that liberalization not be reversed, thereby limiting future domestic action that would backtrack openness.

An IIA can also provide for preferential access only for investors from a given origin. In this case, domestic legal frameworks on investment generally need to specifically provide special access conditions for investments and investors from a certain home economy, reflecting the obligations in the IIA. An example of this is the special conditions provided for United States investors in the United States-Australia FTA (see details in MFN section below) where the IIA provisions were translated into Australia's domestic legislation specifically for investors from the United States.

Both domestic and international rulemaking and frameworks are relevant for investors when making decisions of where to do business, and impact an economy's investment climate. Most economies today, and certainly all APEC economies, recognize the importance of foreign investment for growth, development and job creation. In consequence, some economies not only endeavor to generate investment-friendly legal and economic environments through their national legal framework and IIAs, but also actively support investors through investment promotion agencies.

Notes

¹ Available from the UNCTAD website at: <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1>

² See: <http://rtais.wto.org/UI/PublicAllRTAList.aspx>

³ The goods component of the ANZCERTA came into force in 1983.

⁴ See: http://www.dfat.gov.au/publications/trade/trade_at_a_glance_2010.html#sect15

⁵ Saudi Arabia, Qatar, Bahrain, Oman, Kuwait, United Arab Emirates

⁶ See: http://fta.mofcom.gov.cn/english/fta_qianshu.shtml

II. CORE ELEMENTS IN INTERNATIONAL INVESTMENT AGREEMENTS AND DOMESTIC LEGAL FRAMEWORKS

Economies have different instruments and tools to achieve specific policy objectives. APEC economies have recognized the importance of promoting foreign investment and generating positive investment climates. Several tools are used to meet these goals, including IIAs and domestic legal frameworks (UNCTAD, 2009). While these two legal subsets co-exist, they sometimes overlap or may at times even contradict each other.

The foreign investment objectives of governments in negotiating IIAs can be summarized in three areas: protection, liberalization and promotion. These form the basis for the identification of the core elements of IIAs that will be studied here (see Box 1).

Box 1. Core elements analyzed in this study

- A. Definitions
 - 1. Definition of investment
 - 2. Definition of investor
- B. Liberalization
 - 1. National treatment
 - 2. Most favored nation treatment – MFN
- C. Investment Protection
 - 1. Minimum standard of treatment
 - 2. Expropriation
 - 3. Transfers
 - 4. Performance requirements
 - 5. Senior personnel
 - 6. Dispute settlement
- D. Investment Promotion
 - 1. Facilitation
 - 2. Cooperation
 - 3. Transparency

Provisions in IIAs become binding international commitments for the signatories. While some economies incorporate IIA provisions into law as a whole (e.g. Chile) through congressional or parliamentary approval of the agreement as such, some present implementing legislation to their Congress or Parliament that identifies statutory or administrative changes that may be necessary to implement provisions of the agreement (Box 2), while others do not require congressional approval but executive branch action such as a presidential decree (Peru).

**Box 2. Example of implementing legislation of investment provisions of an IIA in the
United States (excerpt)**

United States

U.S. PUBLIC LAW 108–286—AUG. 3, 2004, To implement the United States-Australia Free Trade Agreement

“SEC. 102. Relationship of the Agreement to the United States and State Law

(a) . Relationship of the Agreement to the United States Law.—

(1) UNITED STATES LAW TO PREVAIL IN CONFLICT.—No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

(2) CONSTRUCTION.—Nothing in this Act shall be construed—

(A) to amend or modify any law of the United States, or

(B) to limit any authority conferred under any law of the United States,

unless specifically provided for in this Act.

[...]

SEC. 103. IMPLEMENTING ACTIONS IN ANTICIPATION OF ENTRY INTO FORCE AND INITIAL REGULATIONS.

(a) IMPLEMENTING ACTIONS.—

(1) PROCLAMATION AUTHORITY.—After the date of the enactment of this Act—

(A) the President may proclaim such actions, and

(B) other appropriate officers of the United States Government may issue such regulations, as may be necessary to ensure that any provision of this Act, or amendment made by this Act, that takes effect on the date the Agreement enters into force is appropriately implemented on such date, but no such proclamation or regulation may have an effective date earlier than the date on which the Agreement enters into force”

United States

June 21, 2004, The United States – Australia Free Trade Agreement Implementation Act – Statement of Administrative Action

“Chapter Ten (Cross-Border Trade in Services)

No statutory or administrative changes will be required to implement Chapter Ten.

Chapter Eleven (Investment)

1. Implementing Bill

No statutory changes will be required to implement Chapter Eleven.

2. Administrative Action

Article 11.16.1 of the Agreement contemplates the possibility that at some point in the future there may be a change in circumstances affecting the settlement of disputes related to investment in the territory of one country by investors of the other country. Where either the United States or Australia believes that such a change in circumstances has occurred, it may request consultations with the other country on whether to amend the Agreement to provide for investor-state arbitration.

Chapter Twelve (Telecommunications)

No statutory or administrative changes will be required to implement Chapter Twelve.

Chapter Thirteen (Financial Services)

No statutory or administrative changes will be required to implement Chapter Thirteen.”

General laws in some economies provide a comprehensive legal framework and general guiding framework for foreign investment, as well as specific sector legislation that covers investment in specific areas, e.g. fisheries, banking and financial services, forestry, mining, petroleum, or telecommunications. The present report draws on the provisions that relate to IIA core elements in general investment laws.

Just as economies and policies evolve, international investment objectives of APEC economies have evolved since the mid 1950s when BIT negotiations began, and therefore IIAs tend to reflect specific domestic policy and legislation at the time of its negotiation or adoption. This has resulted in notable differences in scope and structure of commitments and in diverse combinations in each economy's IIA network and in the IIA global system in general.

The universe of IIAs is made up of approximately 6,000 agreements, including BITs that go back to the 1950s.¹ The growing level of coverage of IIAs requires additional efforts on the part of host economies to ensure coherence between IIA commitments and domestic frameworks. Post-establishment model BITs typically provide for a set of disciplines regarding protection of investments that in many cases are contained in an economy's Constitution or general investment framework or legal system. A typical example is expropriation. At the same time, APEC economies have also agreed on non-binding instruments to aspire to certain standards of practice with respect to individual core elements.

As commitments expand into market access and the right of establishment, the areas of domestic legislation that may be relevant to IIAs increases, especially due to the many sector specific legislation and regulations that may reflect market access commitments contained in IIAs with pre-establishment.

These different elements and principles are reflected in domestic legal frameworks as well. Just as economies set goals for their international investment negotiations, they define objectives for the domestic or national legal framework for foreign investment. Despite the fact that each economy is different and that diverse approaches are used, a review of the objectives set out in some APEC general investment laws is useful (see Box 3).

While not all economies have a general investment statute or law, a review of objectives set out in some investment laws indicates that the goal of promoting investment seems to converge for APEC economies not just in the negotiation of international investment instruments, but also in the national law-making process. These examples seem to reflect the ideals set out in several APEC declarations and pronouncements regarding the importance of improving investment climates and integrating APEC economies, as will be further illustrated below.

Box 3. Objectives set out in foreign investment laws

Japan

Foreign Exchange and Foreign Trade Control Law

“Article 1 (Purpose)

The purpose of this Act is, on the basis of the freedom of foreign exchange, foreign trade and other foreign transactions, to enable proper expansion of foreign transactions and the maintenance of peace and security in Japan and in the international community through the minimum necessary control or coordination of foreign transactions, and thereby to ensure equilibrium of the international balance of trade and stability of currency as well as to contribute to the sound development of the Japanese economy.”

Papua New Guinea**Investment Promotion Act 1992**

“PART I.—PRELIMINARY.

1. Purposes of Act.

The purposes of this Act are—

- (a) to promote and facilitate investment in the country by citizens and foreign investors; and
- (b) to provide for the grant of a certificate to a foreign enterprise; and
- (c) to define the activities open to a foreign investor; and
- (d) to provide for a register of foreign investment opportunities; and
- (e) to promote investments which will materially benefit the country and its people and which—
 - (i) contribute to economic growth; or
 - (ii) create employment; or
 - (iii) utilize domestic resources and, in particular, renewable resources; or
 - (iv) assist in skills acquisition; or
 - (v) increase the volume and value of exports; or
 - (vi) develop remote areas of the country; or
 - (vii) facilitate increased ownership of investment by citizens; or
 - (viii) promote import replacement; or
 - (ix) are likely to effect any combination of the aims specified in Subparagraphs (i) to (viii); and
- (f) to establish the Investment Promotion Authority to assist the State in achieving the purposes specified in this Section.”

Mexico**Foreign Investment Law, Title One - General Provisions, Chapter I – On the purpose of the Law**

“ARTICLE 1. This law is of public policy and for general adherence throughout the Republic. Its purpose is to establish rules to attract foreign investment to the country and promote its contribution to national development.”

The following sections will review each one of the relevant IIA core elements, and identify how these are reflected in domestic legal frameworks.

A. Definitions

The purpose of this section is to review the way different APEC economies define foreign investment and investor in their domestic framework and how these definitions relate to IIAs they are Parties to, and to APEC’s non-binding investment instruments.

The definition of investment and investor determine the scope or coverage of an agreement (UNCTAD, 2011b). The objectives in terms of protection and liberalization of each economy will define the broadness of the definitions, both for its domestic legal frameworks and in the way these definitions are included in IIAs. The definition of investment in domestic legal frameworks has different objectives and consequences than that in IIAs. For example, an economy may choose to consider investments from a national with dual citizenship as foreign investment to promote growth, while excluding these investments from an IIA to exclude a situation where one of its own citizens may trigger international arbitration.

While in general it can be expected that the more liberalizing the agreement seeks to be, the broader the definitions, this is not always the case. Some economies are

willing to include broader definitions and therefore scope when using a post-establishment model precisely because the commitments are limited to established investments.

APEC economies use different approaches in defining investment and investor in IIAs. The UNCTAD review of selected APEC IIAs showed that most include a broad definition of investment, and approximately half explicitly included portfolio investment, while only three explicitly excluded it. Additionally, approximately 50% of the reviewed agreements extended IIA provisions to permanent residents (UNCTAD, 2008).

While some economies do not have general foreign investment laws, those that do generally define investment and investor for domestic purposes. These definitions do not necessarily coincide with the definitions contained in IIAs, precisely because each has different objectives and context.

The definitions agreed to in IIAs will define the coverage of investment and investors in an international agreement, and will provide for protection and possibly conditions of access that may not be generally applicable to investment and investors of all origins or of the host economy. The main question for an IIA is whether the treaty covers an investment or an investor. Many of the arbitral awards in investor-State dispute settlement (ISDS) have centered on the determination of whether an enterprise or asset qualifies as a covered investment or if a claimant falls under the definition of investor.

Although not always, an IIA may result in the need to modify domestic definitions, especially when it provides investors from a certain origin benefits not accrued in domestic legal frameworks or applicable on an MFN basis.

Ultimately, the approach and definitions included in IIAs reflect policy decisions of the Parties, and can be crafted to include or exclude the elements of interest of each economy, and generally will not mirror definitions in domestic legal frameworks. As stated before, this situation is to be expected given the different objectives of domestic legal frameworks and IIAs.

1. Definition of investment

The definition of investment determines coverage in an IIA, and, when an economy has a general foreign investment law, sets conditions and treatment of foreign investment that enters the economy. While investment is generally defined in IIAs, not all foreign investment laws, where they exist, define investment or foreign investment in particular.

APEC non-binding instruments specifically suggest that economies should broaden the definition of investment in existing legislation to allow for a wide range of investment without the need for legislative modifications. This is specified in item number 1.01 of the **Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies of 1997** (see Annex 4):

“Broaden definitions of investment and foreign investment in existing legislation, regulations and administrative procedures to permit the widest variety of forms of investment and allow for newly emerging forms to be covered, without a need for future changes in domestic legislation/regulations.

-- The definition might include – illustratively - not just new ("green field") investments, but also acquisition of shares of domestic enterprises, management contracts, long-term leases, all forms of business organization (e.g. wholly owned, subsidiaries, partnerships, branches, joint ventures, smart partnerships, strategic alliances, venture capital), certain kinds of debt instruments, intellectual property, etc.”

For economies with a general foreign investment law, the definition of investment – when it does exist – can vary widely from economy to economy. In part, this is due to the different concepts and elements that economies consider as foreign investment, but also relates to the broadness, specificity and coverage of the law. Additionally, many economies have sector-specific laws that define investment solely for the narrow purposes of that sector or that law.

For example, New Zealand defines portfolio investment under Part Y of the Income Tax Act of 2007. However, the application of the definition is limited to the context of taxation, and may not be directly relevant to New Zealand’s general investment policy towards portfolio investment.

Box 4 contains several examples of the definition of foreign investment in the domestic framework of a selection of APEC economies.

As can be seen, economies refer to varying and diverse elements in defining foreign investment in their domestic frameworks, including the nationality of the investor as a determining factor. Some definitions specifically refer to elements such as portfolio investments, loans as investments, registration with national authority, or activities going to income generating activities.

Box 4. Definition of investment in foreign investment laws

Philippines

Foreign Investment Act of 1991

“SEC. 3. Definitions [...]

c. The term “*foreign investment*” shall mean an equity investment made by non-Philippine national in the form of foreign exchange and/or other assets actually transferred to the Philippines and duly registered with the Central Bank which shall assess and appraise the value of such assets other than foreign exchange; [...]

SEC. 4. *Scope.* – This Act shall not apply to banking and other financial institutions which are governed and regulated by the **General Banking Act** and other laws under the supervision of the Central Bank.”

(emphasis added)

Peru**Legislative Decree N° 662**

“Article 1.- The State promotes and guarantees the foreign investments now or hereafter made in the country in all economic activities and in any corporate or contractual organizations permitted under national laws.

For these purposes, foreign investments will be considered to be any investments coming from abroad made in any income-generating activities under any of the following modalities:

- a. Property contributions by foreign individuals or corporations, handled through the national financial system, to the capital of a new or existing company under any of the forms of incorporation stipulated in the General Corporate Law, in freely convertible currency or in physical or tangible goods, such as industrial plants, new and reconditioned machinery, new and reconditioned equipment, spare parts, parts, pieces, raw materials and intermediate goods;
- b. Investments in national currency from resources authorized to be remitted abroad;
- c. The conversion of foreign private obligations into shares;
- d. Reinvestments made in conformity with the current laws;
- e. Investments in goods physically located inside the territory of the Republic;
- f. Intangible technological contributions, such as trademarks, industrial models, technical assistance and know-how, whether patented or not, in the form of physical goods, technical documents and instructions;
- g. Investments assigned to the purchase of securities, financial documents and papers listed on the stock market or bank deposit certificates in national or foreign currency;
- h. Resources assigned to joint venture contracts for similar contracts, whereby foreign investors are allowed to participate in the productive capacity of a company, if they do not imply a capital contribution and correspond to contractual commercial operations whereby foreign investors supply goods or services to the recipient company in exchange for a share in the physical production, overall sales or net profits of said recipient company;
The investments included in this item are subject to the respective tax laws; and,
- i. Any other foreign investment modality contributing to the country’s development.”

Indonesia**Investment Law 25 of 2007, Chapter I, General Provisions, Article 1**

“In this Law, the meaning of:

1. Investment shall be any kinds of investing activity by both domestic and foreign investors for running business within the territory of the Republic of Indonesia.
2. Domestic Investment shall be any investing activity for running business within the territory of the Republic of Indonesia, made by any domestic investor using domestic capital.
3. Foreign Investment shall be any investing activity for running business within the territory of the Republic of Indonesia, made by any foreign investor using either foreign capital entirely or joint capital with domestic capital.”

Papua New Guinea**Investment Promotion Act 1992**

“‘foreign investment’ means investment by a non-citizen;

[...]

‘investment’ means every kind of asset subject to the laws of Papua New Guinea and includes—

- (a) moveable and immovable property and other property rights including charges, mortgages, liens and pledges; and
- (b) shares, stocks and debentures of corporations or interests in the property of such corporations; and
- (c) a chose in action, a claim to money or a claim to any performance having a financial value; and
- (d) intellectual and industrial property rights and goodwill; and
- (e) business and analogous concessions conferred by law, including concessions to search for, cultivate, extract or exploit natural resources;”

Japan

Foreign Exchange and Foreign Trade Control Law²

- “(2) The term "inward direct investment, etc." shall mean an act that falls under any of the following items.
- (i) Acquisition of the shares or equity of a corporation (excluding acquisition through transfer from those listed in the items of the preceding paragraph and acquisition of the shares of a corporation which issues shares listed in a securities exchange prescribed in Article 2, paragraph 16 of the Securities and Exchange Act or shares specified by Cabinet Order as those equivalent thereto (referred to as "Listed Corporations, etc." in items 2 and 3)
 - (ii) Transfer of the shares or equity of a corporation other than Listed Corporations, etc., which have been held by a person prior to his/her becoming a non-resident (limited to transfer from an individual who is a non-resident to any of those listed in the items of the preceding paragraph)
 - (iii) Acquisition of the shares of a Listed Corporation, etc. (limited to cases where the ratio of the number of shares of the Listed Corporation, etc. pertaining to the acquisition in the total number of issued shares of the Listed Corporation, etc., or the ratio of the sum of the number of shares of the Listed Corporation, etc. which will be held by a person who conducts the acquisition after the acquisition and the number of shares of the Listed Corporation, etc. held by non-resident individuals, corporations or other organizations (limited to those which fall under those listed in items 2 to 4 inclusive of the preceding paragraph), which are specified by Cabinet Order as being in a permanent economic relationship, kinship or other special relationship equivalent thereto with a person who conducted the acquisition in the total number of issued shares of the Listed Corporation, etc. is not less than the ratio specified by Cabinet Order which is not less than 10%)
 - (iv) Consent given in regard to the substantial change of the business purpose of a corporation (for a business corporation, limited to consent given by those holding one-third or more of the voting rights of all shareholders of the business corporation)
 - (v) Establishment of the Branch Offices, etc. in Japan or substantial change of the kind or business purpose of the Branch Offices, etc. in Japan (limited to establishment or change specified by Cabinet Order, which is conducted by those listed in item 1 or 2 of the preceding paragraph)
 - (vi) Loan of money exceeding the amount specified by Cabinet Order to a juridical person having its principal office in Japan (excluding loan provided by a person who operates banking business or other financial institution specified by Cabinet Order on a regular basis and loan in Japanese currency provided by those listed in item 3 or 4 of the preceding paragraph), for which the period exceeds one year
 - (vii) Act specified by Cabinet Order as equivalent to any of the acts set forth in the preceding items”

Republic of Korea

Foreign Investment Promotion Act

“Article 2 (Definitions)

(1) The definitions of the terms used in this Act are as follows:

[...]

4. The term "foreign investment" shall refer to any of the following;

- (a) Where a foreigner purchases, under the conditions prescribed by the Presidential Decree, stocks or holdings (hereinafter referred to as "stocks") of a Korean corporation (including a Korean corporation in the process of being established) or a company run by a national of the Republic of Korea, for the purpose of establishing a continuous relationship with and participating in the management of said Korean corporation or company;
- (b) Where a loan with the maturity of not less than five years is extended to a foreign-capital invested company by its overseas holding company or by a company in a relationship with said holding company of the capital investment prescribed by the Presidential Decree;”

In defining investment in IIAs, economies have chosen two main approaches: the asset based definition or enterprise-based definition. In either case, economies may choose to specifically exclude certain types of investments or limit the definition in other manners.

The broad asset-based definition is most common in IIAs (UNCTAD, 2011b), including those reviewed in APEC. This definition includes “all assets” and then generally sets out a list of examples including property rights, shares, intellectual property rights, claims to money, etc. and may set out a list of elements *not* considered investment.

Table 1. Examples of broad asset-based definitions in IIAs

Australia - United States FTA (2005)	China – Germany IPPA (2005)
<p>Article 11.17 : Definitions “[...]” Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:</p> <ul style="list-style-type: none"> (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans;^{11-[13]} (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorisations, permits, and similar rights conferred pursuant to the applicable domestic law; [...] and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges; <p>----- ^{11-[13]} Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.”</p>	<p>“Article 1 - Definitions For the purpose of this Agreement Investment means every kind of asset invested directly or indirectly by investors of one Contracting Party in the territory of the other Contracting Party, and in particular, though not exclusively, includes:</p> <ul style="list-style-type: none"> (a) movable and immovable property and other property rights such as mortgages and pledges; (b) shares, debentures, stock and any other kind of interest in companies; (c) claims to money or to any other performance having an economic value associated with an investment; (d) intellectual property rights, in particular copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, knowhow and goodwill; (e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources; <p>any change in the form in which assets are invested does not affect their character as investments. [...].”</p>

The enterprise-based definition identifies the investments to assets but only as they relate to the enterprise. This approach was first used by the Canada-United States FTA in 1988, and can also differ in its broadness, as its sister definition in NAFTA shows in Table 2. While NAFTA’s definition maintained the enterprise approach, it specifically referenced what is not included in the definition. This practice is used especially in agreements concluded by NAFTA economies.

Table 2. Examples of enterprise-based definitions in IIAs

United States – Canada FTA (1988)	NAFTA (1994)
<p>“Article 1611: Definitions Investment means: a) the establishment of a new business enterprise, or b) the acquisition of a business enterprise; and includes: c) as carried on, the new business enterprise so established or the business enterprise so acquired, and controlled by the investor who has made the investment; and d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor.”</p>	<p>“Article 1139: Definitions [...] investment means: (a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; [...]” (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;”</p>

These definitions determine what investments are covered by the IIA, and may differ from definitions in an economy's domestic framework because the scope and objectives of the two are different. IIAs may not imply modification of domestic definitions of investment, except where necessary to implement a commitment contained in the IIA.

Table 3 compares the definition of investment contained in Mexico's Foreign Investment Law with that contained in recent IIAs – one asset-based and the other enterprise-based. As can be seen, despite the evolution in treaty drafting practice, the domestic definition of investment is unchanged, and while relevant in the negotiating process, not a direct reference when identifying a covered investment.

Table 3. Definition of investment in the foreign investment law of Mexico and selected Mexican IIAs

<p>Foreign Investment Law of Mexico, Article 2 (unofficial translation): “Foreign Investment means: a) the participation of foreign investors in any percentage, in the capital stock of Mexican companies; b) Investments made by Mexican companies in which foreign capital has majority interest; and c) The participation of foreign investors in activities and acts in this law.”</p>	
<p>Agreement between Australia and the United Mexican States on the Promotion and reciprocal Protection of Investments (signed 2005)</p>	<p>Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (2005)</p>
<p>“Article 1 - Definitions 1. For the purposes of this Agreement: (a) the term “investment” means every kind of asset, owned or controlled, directly or indirectly, by Investors of one Contracting Party admitted in accordance with the laws, regulations and policies of the Contracting Party in whose territory the investment is made such as: (i) an enterprise; (ii) shares, stocks and any other form of equity participation in an enterprise; (iii) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise or to share in the assets of that enterprise on dissolution; (iv) debt securities of an enterprise; (v) a loan or other claim to money made, acquired or used for economic or other business purposes; (vi) tangible or intangible property, acquired or used for economic purposes, as well as any other property rights such as mortgages, liens and other pledges and similar rights; (vii) intellectual property rights, including rights with respect to copyright, patents, trademarks, trade names, industrial designs, trade secrets, know-how and goodwill; and (viii) interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under: (i) contracts involving the presence of an Investor's property in the territory of the Contracting Party, including turnkey or construction contracts; (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; or (iii) concessions and any other rights required to conduct economic activity and having economic value conferred by law or under a contract.”</p>	<p>Section 3 – Definitions, Article 96 – Definitions “(i) the term “investment” means: (AA) an enterprise; (BB) an equity security of an enterprise; (CC) a debt security of an enterprise: (aa) where the enterprise is an affiliate of the investor, or (bb) where the original maturity of the debt security is at least 3 years, but does not include a debt security, regardless of original maturity, of a Party or a state enterprise; (DD) a loan to an enterprise: (aa) where the enterprise is an affiliate of the investor, or (bb) where the original maturity of the loan is at least 3 years, but does not include a loan, regardless of original maturity, to a Party or a state enterprise; (EE) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (FF) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (CC) or (DD) above; (GG) real estate or other property, tangible or intangible, and any related property rights such as lease, liens and pledges, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (HH) interests arising from the commitment of capital or other resources in the Area of a Party to economic activity in such Area, such as under: (aa) contracts involving the presence of an investor's property in the Area of the Party, including turnkey or construction contracts, or concessions, or (bb) contracts where remuneration depends substantially on the production, revenues</p>

	or profits of an enterprise;”
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One approach to expressly link treaty language to domestic legal frameworks is the requirement that a covered investment has been made in compliance with the host economy’s domestic legislation, thereby providing IIA protection and benefits only to those investments that are admitted in accordance with domestic laws. Some agreements, including the Agreement for the Promotion and Reciprocal Protection of Investments between Mexico and Australia, explicitly include this requirement:

“the term “investment” means every kind of asset, owned or controlled, directly or indirectly, by Investors of one Contracting Party admitted in accordance with the laws, regulations and policies of the Contracting Party in whose territory the investment is made” (see full definition in Table 3).

Yet, even when the provision is not explicitly included, tribunals have interpreted the condition to comply with host-economy domestic legislation as implicit in an IIA (UNCTAD, 2011b). Examples of such rulings are included in Box 5.

Box 5. Examples of arbitral rulings on protection of foreign investments made in accordance with the laws of the host economy (excerpts)

Plama Consortium Limited v. Bulgaria, ICSID Case No. Arb/03/24, Award, 27 August 2008

“138. Unlike a number of Bilateral Investment Treaties,¹³ the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided by the ECT cover all kinds of investments, including those contrary to domestic or international law. As noted by the Chairman’s statement at the adoption session of the ECT on 17 December 1994:

*[...] the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969. [...] The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.*¹⁴

139. In accordance with the introductory note to the ECT “[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [...]”.¹⁵ Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protection of the ECT cannot apply to investments made contrary to law.”

¹³ For example the Germany-Philippines BIT, Lithuania-Ukraine BIT, and Italy-Morocco BIT

¹⁴ Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, Chairman’s Statement at Adoption Session on 17 December 1994, p. 158.

¹⁵ Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, An Introduction to the Energy Charter Treaty, p. 14.

Phoenix Action Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009

“101. In the Tribunal’s view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal’s view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT. This position of the Tribunal

has also been adopted in the case of Plama, [...]

102. The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. [...]"

2. Definition of investor

As was discussed above, the definitions of investment and investor are very important because they can ultimately define coverage or lead to a tribunal rejecting a claim if the investor is not considered to conform to the IIA definition of investor in the IIA. As is the case with investment, not all general investment laws – where they exist – actually define the term. Box 6 presents examples of the definition of investor in some foreign investment laws from APEC economies.

Box 6. Definition of investor in foreign investment laws

Japan

Foreign Exchange and Foreign Trade Control Law

Chapter V Direct Domestic Investments, etc.

“Article 26 (Notice, etc., of direct domestic investments, etc.)

A "foreign investor" shall mean any one of those mentioned below, which performs any one of the direct domestic investments, etc., mentioned in each Item of the next Paragraph:

- (1) A natural person who is a non-resident;
- (2) A juridical person or other organization established under foreign legislation, or a juridical person or other organization having its main office in a foreign country;
- (3) A company of which the number of stock or the amount of capital subscription directly owned by one or more of those mentioned in Item (1) and/or the preceding Item, and/or the number of stock or the amount of capital subscription designated by a Cabinet Order as being indirectly owned by the above-mentioned through another company or other companies, equal(s) or exceed(s) in the aggregate one-half (1/2) of that company's total stock issue or total subscribed capital; or
- (4) Other than those mentioned in the preceding two Items, a juridical person or other organization, where parties listed in Item (i) constitute either the majority of the board members (meaning directors and other similar posts. Hereinafter in this Item, the same) or of the parties who have the right of representation by board directors.”

Indonesia

Investment Law 25 of 2007

[Chapter I, General Provisions, Article 1]

“[...]

4. Investor shall be any individual or corporation that makes investment in form of either domestic or foreign investors.
5. Domestic Investor shall be any individual of Indonesian citizen, Indonesian corporation, the state of the Republic of Indonesia, or any region making investment within the territory of the Republic of Indonesia.
6. Foreign Investor shall be any individual foreign citizen, foreign corporation, or foreign state making investment within the territory of the Republic of Indonesia.
7. Capital shall be any asset in form of money or any forms other than money possessing economic value owned by any investor.
8. Foreign Capital shall be any capital owned by any foreign country, individual foreign citizen, foreign corporation, foreign legal entity, and/or Indonesian legal entity, whose capital is owned partially or entirely by foreign party.
9. Domestic Capital shall be any owned by the state of the Republic of Indonesia, individual Indonesian

citizen, or corporation or non-corporation.”

Papua New Guinea

Investment Promotion Act 1992

“‘foreign investor’ means any person, corporation, body or association of persons that is not a citizen which makes or proposes to make an investment in the country;”

Peru (*NOTE: definition applies only for purposes of Supreme Decree No. 162-92; Not for general investment law*)

Supreme Decree N° 162-92-EF Approving the Regulations for Private Investment Guarantee Systems

“a) Investors: individuals or companies, local or foreign, holders of any type of investments in the country including the following forms:

- a.1. Capital contributions in any of the forms referred to in sections a to f and i of Article 1° of Legislative Decree N° 662;
- a.2. Portfolio, that is, such financial resources channelled through the National Financial System, aimed at the acquisition of financial titles, documents, and papers traded at stock exchanges, or bank deposit certificates in local or foreign currency; and
- a.3. Resources aimed at joint ventures, which are investments carried out by investors regarding assets or services supplied to companies which do not represent capital contributions but commercial transactions of a contractual nature through which the investor is granted a share in the volume of the physical production, lump sales amount or net profits of the company [...]”

Investors can be either natural persons or legal persons (juridical entities). The definition for domestic legislation may differ from that used in IIAs due to the specific objectives of the IIA.

Issues that arise in the definition of investor in an IIA context are however similar to those in domestic legal frameworks, and include the coverage of residents of that home economy or exclusion of dual nationals from the definition of investor. In determining the definition of a legal person investor in an IIA framework, the definition may vary and exclude certain types of juridical entities based on their legal form, purpose or ownership (UNCTAD, 2011b). The same situation arises in domestic legal frameworks, especially for specific areas such as incentives or tax purposes.

a. Natural Person

When defining a covered investor who is a natural person, IIAs generally refer to those persons of the nationality of the home economy in accordance with the law of that home economy. Therefore, a direct link is made between a covered investment and the determination of nationality as set out in the domestic legal framework of the economy of origin of the investor.

There are situations that could be interpreted as contradictory with domestic legislation when determining a covered investor. Such a case arises with dual nationality investors. In an IIA some economies explicitly exclude individual investors who are of both nationalities – home and host economies – or limit the covered investor to his/her dominant or effective nationality. Therefore, if a natural person is a national of both economies, and the definition of investor has excluded dual nationals, the IIA would not

cover said investor despite the fact that he is a national or a citizen under the home economy domestic legislation. In the second case, despite the fact that the investor holds the nationalities of the home and host economies, he would only be considered an investor of the economy where he has dominant and effective nationality or primary residence. Table 4 sets out examples of IIA definitions described in this paragraph.

Most economies do not address this issue in defining a natural person investor for domestic purposes. For example, Section 4 of the Thailand Foreign Business Act of 1999 defines a natural person “foreigner” as “*Natural person not of Thai nationality.*”

The Republic of Korea’s Foreign Investment Promotion Act does specifically refer to the case of residency:

■ *Article 2 (Definitions)*

(1) *The definitions of the terms used in this Act are as follows:*

[...]

(2) *With respect to an individual who is of Korean nationality but holds permanent residenceship of a foreign country, the provisions of this Act concerning foreigners shall apply in addition to other provisions of this Act.*

Some IIA definitions of investor include permanent residents. Since the definitions of investor in domestic legal frameworks and under IIAs have different objectives and scope, they do not necessarily mirror each other. Nevertheless, the common use of “national” or “citizen” to define a natural person foreign investor makes domestic legislation on this issue a reference point when defining if an investor is covered by IIA protection and benefits.

Table 4. Examples of definitions of natural person investors in IIAs - dual nationality and residency

Canada’s model BIT (2004)	United States–Uruguay BIT (2006)	Article 27 (3) of the New Zealand–Singapore CEP agreement (2001)
<p>“Article 1 Definitions investor of a party means: in the case of Canada:</p> <p>(i) Canada or a state enterprise of Canada, or</p> <p>(ii) a national or an enterprise of Canada,</p> <p>that seeks to make, is making or has made an investment; in the case of _____:</p> <p>_____;</p> <p>that seeks to make, is making or has made an investment and that does not possess the citizenship of Canada.”</p>	<p>“Article 1 Definitions [...] ‘investor of a Party’ means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship.”</p>	<p>“‘Investor’ means:</p> <p>a. a natural person who resides in the territory of the other Party or elsewhere and who under the law of that other Party:</p> <p>i. is a national of that other Party; or</p> <p>ii. has the right of permanent residence in that other Party, in the case of a Party which accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting investments, provided</p>

		that that Party is not obligated to accord to such permanent residents more favourable treatment than would be accorded by the other Party to such permanent residents; [...]"
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To further illustrate these difference and implications, Table 5 compares the definition of foreign investor contained in Mexico’s Foreign Investment Law with those of three IIAs signed by Mexico. Despite the evolution in treaty drafting and each text meeting a different set of objectives and needs, the definitions are largely compatible. While the first determined the investors subject to its foreign investment law, the others determine what is considered an investor from the point of view of the IIA. As was seen above, the determination of an investor under the IIA may depend on the compliance of the investor with domestic law, and therefore linked with IIA protection.

Table 5. Definition of foreign investor in the foreign investment law of Mexico and selected Mexican IIAs

<p>Foreign Investment Law of Mexico, Article 2 and Article 3 (unofficial translation): “Foreign investor is an individual or entity of any nationality other than Mexican, and foreign entities with no legal standing [...]” For the purposes hereof, investments made in this country by foreigners with the status of permanent residents shall be considered Mexican investment, except those made in activities contemplated in Titles One and Two hereof.”</p>		
Mexico-Australia IPPA (signed 2005)	Agreement between Japan and Mexico for the strengthening of the economic partnership (2005)	NAFTA Chapter Eleven: Investment (1994)
<p>“Article 1 - Definitions (c) the term “Investor of a Contracting Party” means: (i) a natural person who is a national or citizen of a Contracting Party in accordance with its applicable law; or (ii) an enterprise of a Contracting Party that has substantive business operations in the territory of the Contracting Party under whose laws it is constituted or organized;”</p>	<p>“Section 3 – Definitions, Article 96 - Definitions (k) the term “investor of a Party” means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;”</p>	<p>“Section C - Definitions, Article 1139: Definitions investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;”</p>

While not all economies have specific legislation on foreign investment, and those that have do not always define investor or foreign investor, the most important point is to ensure consistency between domestic legal frameworks and IIA commitments

and drafting. This becomes especially relevant given recent panel interpretations that foreign investment must be undertaken in accordance with domestic legislation for it to be covered by IIA protection and provisions.

b. Juridical person or legal entity

There are numerous elements that economies may or may not include in the definition of investor – a legal entity in an IIA context. In comparing definitions, it is clear that issues such as the coverage of branches, non-profit organizations, government owned entities, entities without legal personality, and issues of control, headquarter location and others have been discussed. Some definitions require the legal entity to have “real economic activity” within the territory of the host economy, or that the investor be headquartered in the home economy. These same issues arise in defining investor for domestic purposes.

The examples in Table 6 illustrate different approaches taken by Thailand in its IIAs with different APEC economies, as well as Thailand’s own domestic definition of foreign investor. As in other areas, the definitions in domestic frameworks and in IIAs have differing objectives and therefore do not mirror each other.

As can be seen in this example, economies may wish to vary definitions in different agreements in order to make the coverage broader or narrower, and will normally decide on broader or narrower approach depending on the scope of commitments in the agreement itself. This generally does not affect the definition of investor used for domestic purposes, unless changes are identified to ensure compliance with the new obligations of the IIA. This analysis is case-specific and depends on each economy’s system, legal framework, and commitments contained in the IIA. Australia had to define an investor from the United States specifically in the domestic legal framework in order to differentiate this investor from others, and thereby provide the advantages that only United States investors enjoy derived from the FTA.

Table 6. Definition of investor in the Thailand Foreign Business Act of 1999 and selected IIAs of Thailand

Thailand Foreign Business Act of 1999
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“Section 4. In this Act:

‘Foreigner’ means

- (1) Natural person not of Thai nationality.
- (2) Juristic person not registered in Thailand.
- (3) Juristic person registered in Thailand having the following characteristics:
 - (a) Having half or more of the juristic person's capital shares held by persons under (1) or (2) or a juristic person having the persons under (1) or (2) investing with a value of half or more of the total capital of the juristic person.
 - (b) Limited partnership or registered ordinary partner-ship having the person under (1) as the managing partner or manager
- (4) Juristic person registered in Thailand having half or more of its capital shares held by the person under (1), (2) or (3) or a juristic person having the persons under (1), (2) or (3) investing with the value of half or more of its total capital.

For the purpose of the definitions, the shares of a limited company represented by share certificates that are issued to bearers shall be deemed as the shares of aliens unless otherwise provided by ministerial regulations.”

Hong Kong, China – Thailand IPPA (2006)	Thailand – Russia IPPA (signed 2002)	Australia–Thailand Free Trade Agreement (2005)
<p>“(4) ‘investors’ means:</p> <p>(a) in respect of the Kingdom of Thailand:</p> <ol style="list-style-type: none"> (i) physical persons who possess the nationality of the Kingdom of Thailand in accordance with its laws; (ii) juridical persons incorporated or constituted under the law in force in its area, whether or not with limited liability and whether or not for pecuniary profit, hereinafter referred to as “companies”; <p>(b) in respect of the Hong Kong Special Administrative Region:</p> <ol style="list-style-type: none"> (i) physical persons who have the right of abode in its area; (ii) corporations, partnerships and associations incorporated or constituted under the law in force in its area, hereinafter referred to as ‘companies’;” 	<p>“a) the term ‘investor’ shall mean with regard to either Contracting Party:</p> <ol style="list-style-type: none"> (i) natural persons who, according to the laws of that Contracting Party, are considered to be its nationals; (ii) legal persons, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;” 	<p>“(m) ‘investor of a Party’ means:</p> <ol style="list-style-type: none"> (i) a juridical person of a Party; or (ii) a natural person who is a national or a permanent resident of a Party, that has made, is in the process of making, or is seeking to make an investment in the territory of the other Party; <p>(n) ‘juridical person’ means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately owned or governmentally owned, including any corporation, association, trust, partnership, joint venture or sole proprietorship;</p> <p>(o) a juridical person is:</p> <ol style="list-style-type: none"> (i) ‘owned’ by persons of a Party if more than 50 percent of the equity interest in it is beneficially owned by persons of that Party; (ii) ‘controlled’ by persons of a Party if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;”

B. Liberalization

The BITs that began in the late 1950s and early 1960s were designed for protection rather than market access or liberalization. While members of the General Agreement on Tariffs and Trade (GATT) were discussing market access in goods since 1947, the discussions on services at the WTO did not come to a conclusion until the end of the Uruguay Round and the creation of the WTO in 1995. Around the same time, NAFTA (1994) was negotiated and became the first FTA to incorporate BIT-like provisions covering both protection and liberalization (OECD, 2008).

In the field of goods, liberalization typically refers to the reduction of trade barriers such as technical barriers to trade or quotas and elimination or reduction of tariffs. In the area of investment, including investment in services, the goal generally is to secure the right of establishment on non-discriminatory terms.

In IIA terms, the right of establishment materializes generally through the granting of national treatment or MFN treatment to investment and investors (UNCTAD, 2002). Investment negotiations have evolved from protection-focused BITs to protection and market-opening agreements. Two basic modalities have emerged for scheduling commitments with respect to the establishment phase of investments: positive list and negative list approaches.

The positive list provides a closed list of sectors or measures to which a certain IIA obligation applies, such as national treatment and MFN. The negative list, by contrast, requires the listing of those sectors to be excluded or exempt from application of a given IIA obligation.

Negative-list agreements can require a complete map of all measures that may be incompatible with IIA provisions, and therefore an exhaustive review of domestic legislation in all sectors. While many economies have a general foreign investment law, almost all have sector-specific laws that may regulate foreign investment participation in one way or another. Review of several laws may therefore be necessary to ensure consistency between the commitments in an IIA and the provisions of domestic law.

While national treatment and MFN obligations can be used in IIAs to achieve liberalization outcomes, they are fundamentally “protection” obligations; that is, they protect investors against discriminatory treatment, a protection that has been included in IIAs since their very beginning.

1. National treatment

National treatment can be defined as “a principle whereby a host country extends to foreign investors treatment that is at least as favorable as the treatment that it accords to national investors in like circumstances” (UNCTAD, 1999, page 1).

National treatment is a core element in IIAs³ and exceptions to it are the basis for discrimination with regard to foreign investors. Distinctions between treatment of national investors and foreign investors can go from simple registration requirements that apply only to foreign investors, to screening or to outright exclusions or limitations to foreign investors in sectors or subsectors.

The issue of national treatment is also covered in the **APEC Non-Binding Investment Principles, specified in Jakarta in November 1994 (see Annex 3)⁴**:

“With exceptions as provided for in domestic laws, regulations and policies, member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favourable than that accorded in like situations to domestic investors.”

Many economies provide for national treatment of foreign investors in either their constitutions or other legislation, but generally include caveats or exceptions, especially with regard to investment. Box 7 presents national treatment provisions contained in the domestic legal frameworks of a set of APEC member economies.

Box 7. Examples of national treatment provisions in domestic legal frameworks

Indonesia

Investment Law 25 of 2007, Chapter III, Basic Policy of Investment, Article 4

“[...]”

(2) In making the basic policy set forth in paragraph (1) above, the Government is:

- a. to provide the same treatment to any domestic and foreign investors, by continuously considering the national interest;
- b. to warrant legal certainty, business certainty, and business security to any investors since the licensing process up to the end of investment activity pursuant to the rules of law; [...]

Republic of Korea

Foreign Investment Promotion Act

“Article 3 (Protection of Foreign Investment)

[...]”

- (2) Except as otherwise prescribed by any relevant Act of the Republic of Korea, foreign investors and foreign-capital invested companies shall be treated the same way as nationals of the Republic of Korea and Korean corporations are treated in business operation.”

Peru

Political Constitution of Peru

“Article 63

National and foreign investments are subject to the same conditions. Goods and services production and foreign exchange are free. If another country or other countries adopt protectionist or discriminatory measures, which are detrimental to the national interest, the State may, in defense of it, adopt similar measures. [...]

Article 71

Regarding to property, aliens, whether they be natural or juridical persons, are in the same conditions as Peruvians. Therefore, in any case, they may in no instance invoke exception or diplomatic protection. [...]

While a general principle of national treatment may exist as seen in Box 7, all economies have provisions that limit this treatment. Given the broad range of sectors in an economy, not all economies have limitations to foreign investors in a single piece of legislation. While Constitutions may provide for sectors where foreign investment is simply prohibited, other legislation and regulation may identify sectors or circumstances where national treatment does not apply. Besides sector specific limitations, some economies have introduced broader limitations based on national security.

In liberalization negotiations, economies may have sectors that are restricted to any private investment and others that are restricted to foreign investors specifically. Some economies have screening processes for foreign investors in all or certain sectors. The first category may include sectors related to defense or security or state monopolies, among others, while the second category may reflect policy decisions to limit international participation. In general, with regard to the right of establishment, foreign investors seek the same rights given by an economy to its own nationals, and APEC instruments call for policies that eliminate or reduce prior authorizations and extend national treatment (Options for Investment Liberalization and Business Facilitation to Strengthen the APEC economies, 1997, Items number 1.04, 3.03, 3.04, 3.05, 3.06, 3.07, 3.08).

Some APEC economies screen foreign investments to varying degrees and levels. Examples include:

- **Australia:** The Foreign Acquisitions and Takeovers Act 1975 (FATA) provides the legislative framework for Australia's screening regime. The Government, through the Foreign Investment Review Board, reviews investment proposals on a case-by-case basis, although the Treasurer makes the final decision. Applications may be accepted, rejected or conditions may be imposed based on considerations including national security and economic development.
- **Canada:** Certain investments are subject to review under the Investment Canada Act in order to ensure benefit to Canada. The Investment Canada Act specifies the factors that must be taken into account in assessing the "net benefit", including the investment's effect on economic activity, employment, resource processing, exports, the use of Canadian products, productivity, efficiency, technological development, product innovation and variety, and competition, and, as of 2009, on the basis of national security.
- **China:** Project examination and approval is the first step when investing in China. Important or restricted projects in China require verification as laid out in the Decision on Reforming the Investment System and the Catalogue of Investment Projects Requiring Government Verification (issued by the National Development and Reform Commission)⁵
- **New Zealand:** Some investments (sensitive land, significant business assets and fishing quota) are screened by the Overseas Investment Office to ensure that they align with the economic development objectives of New Zealand.
- **United States:** The Committee on Foreign Investment in the United States (CFIUS) is authorized to review mergers, acquisitions and takeovers (not greenfield

investments) by foreign investors to identify and mitigate any risk to United States national security interests. Only the President may prohibit a transaction.

Other economies such as **Japan** require prior notification for investments, but do not implement a screening process as such, while many require registration either before or after the investment is made.

In many IIAs, drafting of the national treatment provision defines whether an agreement is protection-based or also has a liberalization component. Including the word “establishment” or equivalent in the national treatment clause guarantees investors the same treatment as nationals *in the process of making* an investment. Table 7 illustrates this using the Japan-Viet Nam Agreement that provides an example of liberalization language, and the Thailand-Russia investment promotion and protection agreement (IPPA) with language for national treatment at a post-establishment phase.

In the context of investment liberalizing negotiations, economies may agree to open formerly closed sectors to investors from the other Party in some sectors, to acquire an international commitment to maintain access for foreign investment at the existing level in all sectors, or even to provide access to sectors formerly closed to non-nationals of that Party (see Figure 4). In the last case, the agreement can have a direct impact on domestic legal frameworks. Because there are few multilateral investment instruments, IIAs are often the primary source of international commitments in the areas of investment protection and liberalization.

Table 7. Examples of national treatment articles in selected IIAs

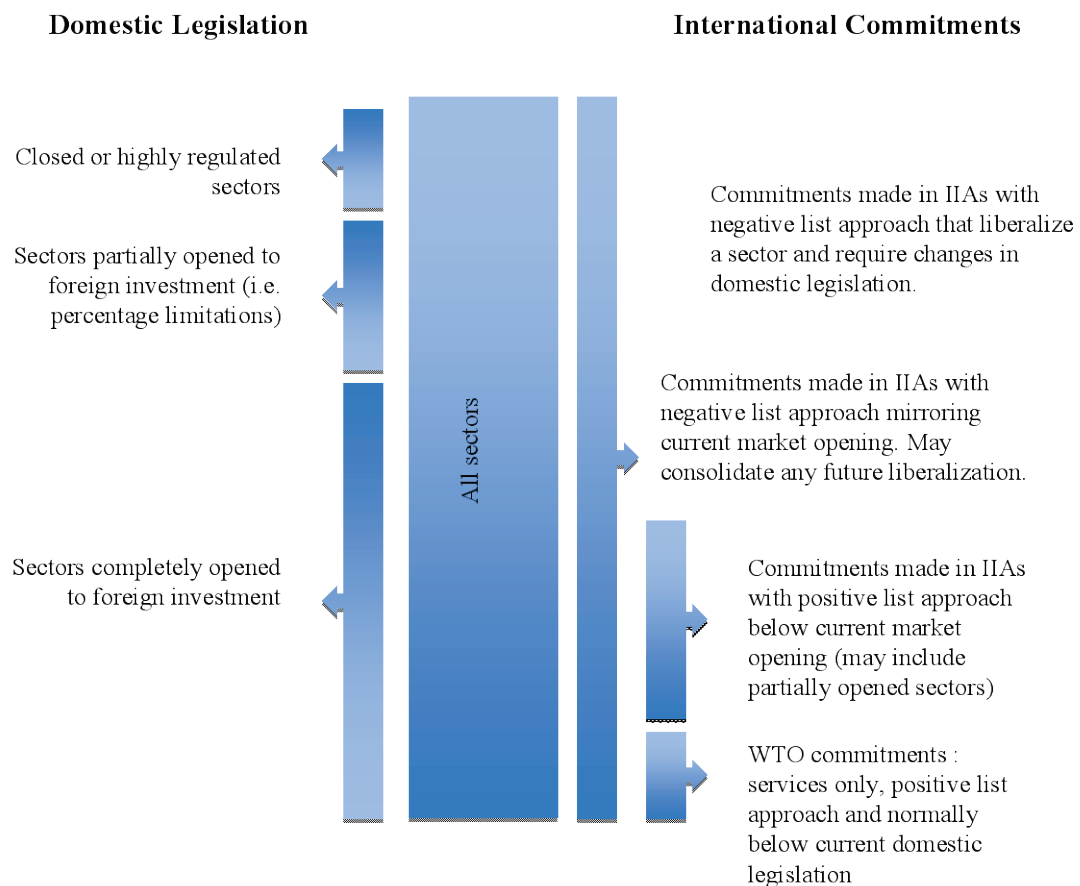
Japan-Viet Nam investment promotion and liberalizing agreement (2004)	Thailand-Russia IPPA (signed 2002)
<p>“Article 2 1. Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favorable than the treatment it accords in like circumstances to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments (hereinafter referred to as “investment activities”). [...]” (emphasis added)</p>	<p>“Article 3: Treatment of Investments 1. Each Contracting Party shall accord in its territory to investments made in accordance with its laws by investors of the other Contracting Party treatment no less favourable than that it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable. 2. Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable. [...]”</p>

The large number of IIAs and the varying commitments and coverage of the different agreements make a complex web of international investment obligations. Nevertheless, commitments made under IIAs generally tend to reflect domestic legal

frameworks, which are applied on an MFN basis, and therefore in general each IIA does not require changes in domestic legal frameworks. Nevertheless, this can limit an economy's future legislation on foreign investment by making current market opening an international commitment.

Economies use different legal instruments when defining the sectors where foreign investment is restricted or prohibited. In some cases restrictions to foreign investment in certain sectors are contained in the Constitution, while in other cases they are contained in laws or in policies. Table 8 presents an example of a Constitutional provision and how it is contained in an IIA.

Figure 4. Domestic legal frameworks vs. international commitments



Besides the Constitutional provision, a measure may also be reflected in several pieces of sector or discipline laws and regulations within the domestic legal framework. In the case of the example in Table 8, these include Mexico's Regulatory Law of the Constitutional Article 27 on Oil Matters (*Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo*), the Mexican Petroleum (PEMEX) and its Subsidiary Bodies Organizational Law (*Ley Orgánica de Petróleos Mexicanos y Organismos Subsidiarios*), and the Foreign Investment Law (*Ley de Inversión Extranjera*), all of which are referenced in Mexico's schedules in its FTAs.

Domestic legal frameworks can be directly affected when, within an IIA negotiation, an economy agrees to open a sector that was previously restricted. In this case, domestic legal frameworks may have to be modified to reflect the new international commitment taken in the IIA. As was said above, the new access to a given sector is generally provided on an MFN basis to all investors. Exceptions to this rule will be discussed in the section on MFN treatment below.

Table 8. Example of national treatment exceptions in IIAs and domestic legal frameworks

Political Constitution of Mexico ⁶	Japan-Mexico EPA (2005)
<p>“Article 25 [...] The public sector shall be in charge, in an exclusive manner, of those strategic areas established in Article 28, paragraph fourth of the Constitution, and the Federal Government shall at all times maintain ownership and control over the entities which may be established, as appropriate. [...]</p> <p>Article 27 [Ownership] [...] In the case of petroleum and solid, liquid or gaseous hydrocarbons, or of radioactive minerals, neither concessions nor contracts shall be granted, nor shall the ones previously granted, if any, survive, and the Nation shall carry out the exploitation of such products under the terms set out forth in the respective Law. [...]</p> <p>Article 28 [...] The functions performed in an exclusive manner by the State in the following strategic areas shall not constitute monopolies: postal service, telegraphs and radiotelegraphy; petroleum and any other hydrocarbons; basic petrochemical; [...]</p>	<p>“Annex 8 referred to in Chapter 7 Activities Reserved to the State Schedule of Mexico Section 1 Activities Reserved to the Mexican State: Mexico reserves the right to perform exclusively, and to refuse to permit the establishment of investments in, the following activities: 1. Petroleum, Other Hydrocarbons and Basic Petrochemicals (a) Description of activities: (i) exploration and exploitation of crude oil and natural gas; refining or processing of crude oil and natural gas; and production of artificial gas, basic petrochemicals and their feedstocks and pipelines; (ii) transportation, storage and distribution up to and including first hand sales of the following goods: crude oil; artificial gas; energy goods and basic petrochemicals obtained from the refining or processing of crude oil; and basic petrochemicals; and (iii) foreign trade up to and including first hand sales of the following goods: crude oil; artificial gas; energy goods and basic petrochemicals obtained from the refining or processing of crude oil. [...]</p>

2. MFN treatment

MFN treatment requires a host economy to treat investors and investments from other economies in the most favorable way it treats any investor or investment from another home economy. MFN treatment typically derives from international agreements, where economies reciprocally provide to investors from the Contracting Party the best treatment given to investors from any other economy. As with national treatment in the previous section, economies can make exceptions to this general commitment (UNCTAD 2010b).

MFN treatment is also addressed in the **APEC Non-Binding Investment Principles, specified in Jakarta in November 1994 (see Annex 3):**

“Non-discrimination between Source Economies

- *Member economies will extend to investors from any economy treatment in relation to the establishment, expansion and operation of their investments that is no less favourable than that accorded to investors from any other economy in like situations, without prejudice to relevant international obligations and principles.”*

Similarly, the options relevant to MFN are covered in items 3.01 and 3.02 of the **Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies of 1997 (see Annex 4)⁷:**

“3.01 Commit to MFN treatment economy-wide, except in a few limited cases as may be specified by individual member economies, immediately or over a publicly announced period of time.

4.02 For economies that have already committed to MFN treatment, review where MFN exceptions to it taken in the past can be eliminated or reduced (in other words, review whether the ‘few limited cases’ of exceptions to MFN can be narrowed even further).”

Most economies do not have domestic requirements for MFN, precisely because it is normally provided on a reciprocal basis through IIAs. Nevertheless, Box 8 shows some examples of references to MFN in domestic legal frameworks.

By definition, core investment protection elements such as access to international arbitration for dispute settlement are discriminatory in favor of investors from economies that have IIAs with a host economy vs. those that do not. Market access concessions in investment may however be implemented on an MFN basis, or provide special or more favorable conditions for investors from one home economy.

Box 8. Examples of references to MFN in domestic legal frameworks

Indonesia

Investment Law 25 of 2007, Chapter V, Treatment to Investment, Article 6

- “(1) The Government shall provide the same treatment to any investors originating from any countries making investment in Indonesia pursuant to the rules of law.
(2) Treatment set forth in paragraph (1) shall not apply to investor of certain countries that have received privilege by virtue of an agreement with Indonesia.”

Peru

Political Constitution of Peru, Article 63

“National and foreign investments are subject to the same conditions. Goods and services production and foreign exchange are free. If another country or other countries adopt protectionist or discriminatory measures which are detrimental to the national interest, the State may, in defense of it, adopt similar measures. [...]”

Most IIAs tend to have MFN clauses that provide investors with treatment at least as favorable as the best granted to investors from any other economy, whether the agreement follows a pre- or post-establishment model. When commitments mirror or fall short of current openness to foreign investment in domestic legal frameworks and are applied to all foreign investors, IIAs generally do not require any modification to domestic legal frameworks.

Although it may vary depending on the domestic legal system, when economies take on liberalizing commitments in an IIA, they generally modify their domestic legal frameworks to reflect these new commitments (unless approval of an IIA automatically incorporates such commitment into domestic legislation and no other action is required).

For example, to implement NAFTA, Canada adopted the NAFTA Implementation Act. The Statement of Implementation of NAFTA explains:

“Section 178 of the NAFTA Implementation Act sets out the amendments to the Investment Canada Act. It revises the formula for indexing the review threshold for direct acquisitions, extends to all NAFTA investors both the higher threshold for direct acquisitions and the non-reviewability of indirect acquisitions, and also defines related terms. In addition, the amendments empower the government to acquire a cultural business in the case of forced divestiture by a NAFTA investor, as agreed under the FTA, and extended to all Parties in the NAFTA.”

Sector-specific laws or general investment laws may require modifications when opening new sectors or improving conditions of access as a result of an IIA. When these changes become of general application, the liberalizing effect of the IIA is actually extended to all investors, not just to investors from the Contracting Party to the IIA. Because market-access commitments can require modification in domestic legal frameworks and regulatory measures, their implementation date may be agreed to happen some time after signing or entry into force of an IIA.

In the Central American Free Trade Agreement (CAFTA), for example, Costa Rica undertook a commitment to end the state-run Costa Rican Institute of Electricity's (ICE) monopoly in the telecommunications sector. To do so, Costa Rica had to modify its General Telecommunications Law and issue a relevant regulation to allow competition.

This specific commitment was set out in annex 13 of the telecommunications chapter of CAFTA (see Box 9), and the new market opening was applied generally and on an MFN basis

Full implementation of CAFTA in Costa Rica, including in areas outside of investment, required the approval of three international agreements, eleven new laws (including market opening legislation in telecommunications, insurance and intellectual property, and reforms to the criminal code) and close to thirty executive decrees, besides the creation of two new institutions. (Inter-American Development Bank, 2009). Of course, as a multi-party FTA, commitments in this agreement are much broader than those typically found in BITs.

Box 9. CAFTA: Telecommunications Chapter Annex 13 - Specific Commitments of Costa Rica on Telecommunications Services (excerpt)

“Annex 13

Specific Commitments of Costa Rica on Telecommunications Services

I. Preamble

The Government of the Republic of Costa Rica:

acknowledging the unique nature of the Costa Rican social policy on telecommunications, and reaffirming its decision to ensure that the process of opening its telecommunications services sector must be based on its Constitution;

emphasizing that such process shall be to the benefit of the user and shall be based on the principles of graduality, selectivity, and regulation, and in strict conformity with the social objectives of universality and solidarity in the supply of telecommunications services; and

recognizing its commitment to strengthen and modernize the *Instituto Costarricense de Electricidad (ICE)* as a market participant in a competitive telecommunications marketplace while ensuring that the use of its infrastructure shall be remunerated and to develop a regulatory body to oversee market development; undertakes through this Annex the following specific commitments on telecommunications services.

II. Modernization of ICE

Costa Rica shall enact a new legal framework to strengthen ICE, through its appropriate modernization, no later than December 31, 2004.

III. Selective and Gradual Market Opening Commitments

1. Market Access Standstill

Costa Rica shall allow service providers of another Party to supply telecommunications services on terms and conditions that are no less favorable than those established by or granted pursuant to its legislation in force on January 27, 2003.

2. Gradual and Selective Opening of Certain Telecommunications Services

(a) As provided in Annex I, Costa Rica shall allow telecommunications services providers of another Party, on a non-discriminatory basis, to effectively compete to supply directly to the customer, through the technology of their choice, the following telecommunications services in its territory: [...]

(i) private network services, [...] no later than January 1, 2006;

(ii) Internet services, [...] no later than January 1, 2006; and

(iii) mobile wireless services, [...] no later than January 1, 2007.

(b) Subparagraph (a) shall also apply to any other telecommunications service that Costa Rica may decide

to allow in the future. [...]

A different approach is to liberalize or facilitate investment only for investors of the IIA partner. Such an approach was taken in the United States-Australia FTA by Australia, and is reflected in the changes to its domestic legislation where specific conditions are set out only for United States investors⁸. The WTO Trade Policy Review Mechanism identified the preferential treatment agreed to for United States investors in the United States-Australia FTA (Table 9) vis-à-vis all other foreign investors.

Australia implemented these and other modifications resulting from the FTA with the United States in the 2004 United States Free Trade Agreement Implementation Act 2004 No. 120, 2004. The Act's Schedule 5 sets out the amendments to the Foreign Acquisitions and Takeovers Act of 1975 required to implement the Australia-United States FTA, as well as amendments in nine other areas (customs, agriculture and veterinary chemicals, geographic indications for wine, life insurance, Commonwealth authorities and companies, therapeutic goods, patents, copyright and broadcasting).

**Table 9. Preferential treatment for United States Investors
in Australia (WTO, 2007)**

For all foreign investors	For United States investors
Prior approval/notification requirement for all activities	
<p>“Acquisitions of substantial interests in existing Australian businesses with total assets over \$A 50 million, or where the proposal values the business at over \$A 50 million; takeovers of offshore companies whose Australian subsidiaries or assets are valued at over \$A 50 million”</p>	<p>“Acquisitions of substantial interests in existing Australian businesses with total assets over \$A 800 million in 2005 (annually adjusted and increased to \$A 831 million in 2006) (except for businesses within prescribed sensitive sectors) Acquisitions of substantial interests in existing Australian businesses within the following prescribed sensitive sectors: media, telecommunications, transportation, supply of goods and services to the Australian Defence Force or other defence forces, goods or technology that has military applications, encryption and security technologies, the extraction of uranium or plutonium, and the operation of nuclear facilities with total assets of more than \$A 50 million in 2005 (increased to \$A 52 million in 2006) Acquisitions of substantial interests in existing Australian financial institutions subject to screening under the Financial Sector (Shareholdings) Act 1998 (FSSA) are exempt from screening under the FATA”</p>
<p>“New businesses involving a total investment of \$A 10 million or more”</p>	<p>“New business proposals by U.S. investors, except an entity controlled by the U.S. Government, do not require notification, but remain subject to other relevant policy requirements”</p>
<p>“Acquisitions of interests in urban land (including interests that arise via leases, financing and profit-</p>	<p>“Same as for all foreign investors, except that a threshold of \$A 800 million in 2005 (annually</p>

For all foreign investors	For United States investors
Prior approval/notification requirement for all activities	
sharing arrangements, and the acquisition of interests in urban land corporations and trusts) that involve: developed non-residential commercial real estate, where the property is subject to heritage listing, valued at \$A 5 million or more; developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at \$A 50 million or more; accommodation facilities irrespective of value; vacant real estate irrespective of value; residential real estate irrespective of value”	adjusted to \$A 831 million in 2006) applies to U.S. acquisitions of developed non-residential commercial real estate (other than acquisitions by entities controlled by the U.S. Government)”

In addition to specific bilateral negotiating outcomes in IIAs, it is worth pointing out that some sectors such as aviation, fisheries and maritime transport are examples where economies have traditionally undertaken bilateral negotiations and typically include MFN exemptions in IIAs to protect bilateral sector specific agreements.

Table 10. Preferential treatment for United States Investors in the Australian banking sector (WTO, 2007)

For all foreign investors	For U.S. investors
Sector-specific foreign investment restrictions - Banking	
“Foreign investment to be consistent with the Banking Act 1959, the Financial Sector (Shareholdings) Act 1998 (FSSA), and banking policy, including prudential requirements. Foreign takeover or acquisition of Australian banks considered on a case-by-case basis”	“U.S. investments in authorized deposit-taking institutions (as well as authorized insurers and their respective holding companies) are exempt from FATA screening where they are screened under the FSSA Banking policy, including prudential requirements, continues to apply ”

C. Investment protection

Protection of investments was the objective of the first wave of bilateral investment treaties that started in the late 1950s. These agreements provided for basic treatment of foreign investors and investments in host economies such as fair and equitable treatment (FET), non-discrimination (national and MFN treatment), compensation for losses in cases of strife or similar situations and the free transfer of investment-related funds. These agreements normally also provided investors with access to international arbitration for the settlement of investment disputes (as an alternative to the host economy’s domestic judicial system or domestic arbitration).

This objective has been maintained in the over half century of IIA negotiations, and remains central to the IIAs being negotiated today, even as more modern IIAs have added new investment liberalization objectives.

1. FET and minimum standard of treatment

The concept of treatment is understood as “the legal regime that applies to investments once they have been admitted by the host State” (Dolzer and Stevens, 1995, page 58). Although there is some discussion, the minimum standard of treatment is generally accepted to include FET and full protection and security. This provision is invoked in many ISDS cases, and has therefore been the subject of ample arbitral analysis.

The concept of FET provides a basic standard that is not related to the domestic law of the host economy⁹, but does commit a State to refrain from, for example, acts that constitute denial of justice. The concept of full protection and security is generally understood as an obligation of due diligence on the side of the government with regard to the foreign investor.

While the concept as such of FET is generally not found in domestic legal frameworks, most economies do have provisions regarding due process and protection. Box 10 sets out some examples.

Box 10. Examples of elements of the concept of FET in domestic legal frameworks

Indonesia

Investment Law 25 of 2007, Chapter IX, The rights, obligation and liability of investor, Article 14

“Every investor shall be entitled to obtain:

- a. right certainty, legal certainty and protection certainty;
- b. open information about business fields it is running;
- c. service; and
- d. various forms of facility according to the rules of law.”

Hong Kong, China

Basic Law of the HKSAR (Hong Kong Special Administrative Region)

“Article 6

The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.

Article 105

The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law.”

Peru

Political Constitution of Peru, Article 139

“Principles and rights of the jurisdictional function are the following:

[...]

3. the observance of due proceedings and jurisdictional protection.

No person shall be diverted from the jurisdiction predetermined by the law, nor shall anyone be subjected to proceedings other than those previously established or tried by exceptional jurisdictional bodies or special commissions created for that purpose, whatever the denomination. [...]

8. the principle of not failing to administrate justice, despite of legal gap or deficiency.

In such case, the general principles of law and customary law must be applied.”

[...]

New Zealand

New Zealand Bill of Rights Act 1990¹⁰, Section 27

“27. Right to justice

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
- (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
- (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.”

In IIAs there are many variations in drafting of this provision, and arbitrators, scholars and negotiators have not been uniform in its interpretation. Appropriate interpretation of the minimum standard of treatment will depend on drafting of the commitment, the context or the intent of the parties. The different interpretations of this concept are not the focus area of the current analysis, but it is worth pointing out that in light of differing interpretations given by panels, the NAFTA Parties issued the following interpretive note to clarify what these two concepts meant in the NAFTA:

“B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”

Several IIAs include similar language, such as in Japan’s EPAs with Brunei Darussalam, Chile, Mexico and the Philippines, which included a similar interpretative note within the agreements themselves. Japan’s agreement with Singapore, on the other hand, does not refer to minimum standard of treatment, and only refers to FET and full protection and security under the provisions on expropriation and compensation (article 77).

While it is beyond the scope of this article to delve into the discussion of the relationship between FET, minimum standard of treatment and full protection and security, it seems that a violation is generally rooted in an act of government, and sometimes in domestic legislation. So while domestic legislation usually does not describe or address these concepts specifically, the international obligation of the government to provide this minimum standard does require that a government refrains from implementing legislation or regulations that violates the standard.

2. Expropriation

Expropriation, be it direct or indirect, is one of the central elements in international investment law, and one of the oldest issues in IIAs. The legitimacy of taking of property is generally recognized as long as certain conditions are met.

Both expropriation and compensation are included in the **APEC Non-Binding Investment Principles, specified in Jakarta in November 1994 (see Annex 3):**

“Expropriation and Compensation

- *Member economies will not expropriate foreign investments or take measures that have a similar effect, except for a public purpose and on a non-discriminatory basis, in accordance with the laws of each economy and principles of international law and against the prompt payment of adequate and effective compensation.”*

Many economies have provisions in their constitutions that allow for expropriation, prior payment of compensation, as well as laws or regulations that define the details of valuation and procedure. In common law economies, jurisprudence can be another pillar of the legal framework. In the United States, for example, there is a long body of legal decisions on expropriations (“takings”) that, while not written into law, is part of the legal framework. The grounds for expropriation vary from economy to economy, and include concepts such as social purpose, public utility, social interest, national interest, public interest and national security, among others. Box 11 presents examples of general provisions regarding expropriation in constitutions or investment laws of a selection of APEC economies.

Box 11. Examples of provisions on expropriation in constitutions or investment laws

Indonesia

Investment Law 25 of 2007, Chapter V, Treatment to Investment, Article 7

- “(1) The government shall neither nationalise nor take over the ownership right of any investors, except through the law.
- (2) In the event that Government either nationalises or takes over the ownership right of any investors set forth in paragraph (1) above, the Government is required to pay compensation whose amount is stipulated based on market price.
- (3) If any of the parties fails to reach agreement on the compensation or indemnity, set forth in paragraph (2) above, it shall be settled through arbitration.”

China**The Real Right Law of the People's Republic of China**

“Article 42

In order to meet the demand of public interests, it is allowed to requisition lands owned collectively, premises owned by entities and individuals or other realities according to the statutory power limit and procedures. [...]

When requisitioning the premises owned by entities and individuals or other realities, it is required to compensate for demolition and relocation in accordance with law and protect the lawful rights and interests of the owners of the requisitioned realities; [...]

The compensation fees for requisitioning and other fees may not be embezzled, misappropriated, privately shared, detained or delayed in the payment of by any entity or individual.

[...]

Article 121

Where the usufructuary right is terminated or its exercise is affected for reasons of expropriation or requisitioning, the usufructuary right holder has the right to obtain corresponding compensation in accordance with Articles 42 and 44 of the present Law.

[...]

Article 132

In case a contracted land is expropriated, the holder of the right to the contracted management of such land has the right to obtain corresponding compensation in accordance with Paragraph 2 of Article 42 in the present Law. ”

Republic of Korea**Constitution**

“Article 23 [Property, Public Welfare, Expropriation]

- (1) The right to property of all citizens is guaranteed. Its contents and limitations are determined by law.
- (2) The exercise of property rights shall conform to the public welfare.
- (3) Expropriation, use, or restriction of private property from public necessity and compensation therefore are governed by law. However, in such a case, just compensation must be paid.”

Peru**Political Constitution of Peru, Article 70**

“The right of property is inviolable. The State guarantees it. It is exercised in harmony with the common good and within the limits of the law. No one shall be deprived of his property, save, exclusively, on grounds of national security or public need determined by law and upon cash payment of the appraised value, which must include compensation for potential damages. Proceedings have been instituted before the judiciary to challenge the property value established by the State in the expropriatory procedure.”

Philippines**Constitution of the Republic of the Philippines**

“ARTICLE III

BILL OF RIGHTS

Section 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws. [...]

Section 9. Private property shall not be taken for public use without just compensation. [...]

Executive Order No. 226, The Omnibus Investments Code of 1987

“TITLE II

BASIC RIGHTS AND GUARANTEES

ARTICLE 38. Protection of Investments. - All investors and registered enterprises are entitled to the basic rights and guarantees provided in the Constitution. Among other rights recognized by the Government of the Philippines are the following:

[...]

- (d) Freedom from Expropriation. - There shall be no expropriation by the government of the property represented by investments or of the property of the enterprise except for public use or in the interest of national welfare or defense and upon payment of just compensation. In such cases, foreign investors or enterprises shall have the right to remit sums received as compensation for the expropriated property in the currency in which the investment was originally made and at the exchange rate at the time of remittance, subject to the provisions of Section 74 of Republic Act No. 265 as amended; [...]

Mexico**Political Constitution of Mexico**

Article 27

“Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.

Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity. [...]

Expropriation Law

“Article 1

The present law is of public interest and its objective is to establish the causes of public good and regulate the procedures, modalities and execution of expropriations. [...]

Besides the general constitutional provisions, many economies have very detailed laws on expropriation that set out specific guidelines and definitions for expropriation. Box 12 presents examples of the issues addressed in expropriation laws of certain APEC economies.

Box 12. List of issues in expropriation laws of APEC economies (non exhaustive)**Mexico****Expropriation Law**

- What are considered causes of public interest
- Guidelines for declaring public interest
- Publication and notification requirements and guidelines
- Possibility of objections with regard to compensation sums and damages
- Procedures of the expropriation process
- Definition of value of the expropriated asset as equivalent to commercial value, currency and scheduling of payment

Canada**Expropriation Act (R.S.C., 1985, c. E-21)**

- Procedural guidelines
- Definitions, including expropriated interest, notice of confirmation, notice of intent, owner, etc.
- Notices, registration, statement of claim, statement of defence and other documents
- Authority to expropriate and exceptions
- Notice of intention to expropriate, which should set out description of land, nature of interest, indication of public work and “a statement that it is intended that the interest be expropriated by the Crown”
- Indication of public purpose
- Objections
- Right to compensation, rules determining value and factors not to be taken into account, market value defined, offer of compensation to be based on written appraisal, time as of which value to be determined, moving and relocation expenses of owner of leasehold interest, interest payable where offer is accepted, additional interest where delay in offer
- Land subject to security interest
- Determination respecting the title
- Right of the Crown to physical possession and where the possession is urgently required
- Intention to abandon expropriation, election to accept abandonment, effect of confirmation of abandonment, compensation payable where intention to expropriate is abandoned

At an international level, APEC economies are specifically presented with recommendations on expropriation in item numbers 4.01, 4.02 and 4.03 of the **APEC’s Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies** (Annex 4):

“4.01 Consistent with international law standards/principles, limit permissible expropriation to cases involving a public purpose where expropriation is undertaken in a non-discriminatory manner, under due process of law, and accompanied by payment of prompt, adequate and effective compensation.

-- Take steps to amend expropriation laws and regulations based on the above-mentioned standards/principles of international law with respect to expropriation.

4.02 Included in bilateral, regional or multilateral investment treaties, agreements, and/or arrangements a commitment on compensation in cases of expropriation.

4.03 To improve transparency, define, publish and disseminate to investors the relevant investment treaties and arrangements.”

Most IIAs require that expropriations be carried out in a non-discriminatory manner, for a public purpose, in accordance with due process and with prior payment of compensation that should be freely transferable, among others. Most domestic legal frameworks however do not refer to the issue of indirect expropriation, while some IIAs do. Table 11 sets out examples of expropriation clauses in IIAs.

Table 11. Examples of expropriation clauses in IIAs

Chile-Republic of Korea FTA (2004)	NAFTA (1994)
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Chile-Republic of Korea FTA (2004)	NAFTA (1994)
<p>“Article 10.13: Expropriation and Compensation 1. Neither Party may, directly or indirectly, nationalize or expropriate an investment of an investor of the other Party in its territory, except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 10.5(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6. [...]”</p>	<p>“Article 1110: Expropriation and Compensation 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (‘expropriation’), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6. [...]” (emphasis added)</p>

In general, conditions for direct expropriation are set out and are by and large verifiable. The issue of indirect expropriation is less clear and not contained in domestic expropriation laws given that inherently it is not presented as an expropriation but hidden in a series of measures. According to UNCTAD, “‘indirect’ expropriation/nationalization involves acts that effectuate the loss of management, use or control, or a significant depreciation in the value, of assets” (UNCTAD, 2004, page 68). The acts mentioned in this definition can be one or several acts of government, including laws or regulations. In this manner, an investor may challenge a piece of domestic legislation as the root of an indirect expropriation.

APEC economies seem to be adopting more detailed treaty texts in order to clarify the scope of the expropriation provision and what is meant by indirect expropriation (UNCTAD, 2008).

Once an expropriation has been identified, several issues of importance remain: compensation, payment without delay, determination of fair market value, determination of currency and interest, and the free transfer of compensation payments. As was mentioned, economies have laws with varying degrees of specificity and detail with regard to these issues. Nonetheless, economies are obliged to implement their domestic legislation in a way that is consistent with the commitments contained in the IIAs they have entered into.

3. Transfers

The right to transfer investment-related funds is of vital importance to investors, and limitations to the free flow of investment funds can have severe negative effects on profitability and even the viability of an investment (UNCTAD, 2000). Therefore, the right to freely transfer investment capital and payments related to the investment is a core element of an IIA. On the other hand, some economies retain the possibility of exchange controls in IIAs for balance of payment reasons or as a general economic policy instrument.

The issue of transfer of funds is addressed in the **APEC Non-Binding Investment Principles, specified in Jakarta in November 1994** (see Annex 3):

“Repatriation and Convertibility

- *Member economies will further liberalise towards the goal of the free and prompt transfer of funds related to foreign investment, such as profits, dividends, royalties, loan payments and liquidations, in freely convertible currency.”*

While some economies with investment laws include provisions on transfers in the laws themselves, many economies have these provisions in laws and regulations that refer to other issues such as central banking. Box 13 presents examples of provisions on transfers in APEC economies, and includes both provisions relating to free flow of capital as well as those specifying limitations to it.

Box 13. Transfer provisions in domestic legislation

Japan

Foreign Exchange and Foreign Trade Control Law

“Article 9 (Suspension of Transactions, etc. in Case of Emergency)

- (1) Where a drastic change has taken place in international economic conditions, the competent minister may, when he/she finds it urgently necessary, order, pursuant to the provisions of Cabinet Order, the suspension of transactions, acts or payment, etc. governed by this Act within the period specified by Cabinet Order.
- (2) Suspension ordered pursuant to the provision of the preceding paragraph shall not make payment that has been authorized by this Act up to the suspension impossible, and the delay of the payment due to the suspension shall be limited to the period specified by Cabinet Order.

[...]

Article 16-2 (Restrictions on Payment, etc.)

Where the competent minister has imposed the obligation to obtain permission pursuant to the provision of paragraph 1 of the preceding article, when he/she finds a risk that a person who has made payment, etc., for which the obligation to obtain the permission is imposed, without obtaining the permission will make payment, for which the obligation to obtain permission is imposed pursuant to the provision of the said paragraph, again without obtaining the permission, he/she may, for a period of not more than one year, prohibit the person from making, in whole or in part, payment from Japan to a foreign state (excluding payment through exchange transactions conducted by banks (meaning banks prescribed in Article 2, paragraph 1 of the Banking Act (Act No. 59 of 1981); the same shall apply hereinafter) or other financial institutions specified by Cabinet Order (hereinafter referred to as the "Banks, etc.") and payment, etc. made between a resident and a non-resident (excluding payment, etc. resulting from exchange transactions conducted by the Banks, etc. or other payment, etc. specified by Cabinet Order), or may impose, pursuant to the provisions of Cabinet Order, on the person, the obligation to obtain permission for such payment and payment, etc.”

Chile

Law 18,840 Basic Constitutional Act of the Central Bank of Chile¹¹

“Section 49. The Bank shall have the authority to set the following limits to foreign exchange transactions conducted, or those that should be conducted, in the Formal Exchange Market, in accordance with the procedure prescribed in Section 50 hereof:

1. Establish the obligation of repatriation into the country, in foreign currency, of the corresponding payment value obtained from the transactions specified in subparagraphs 1, 2 and 5 of Section 42 and the obligation to convert into Chilean currency the foreign currency arising from such transactions (3)
2. In the event of conversion of foreign currency arising from investments, capital contributions or credits

from abroad, the Bank shall authorize access to the Formal Exchange Market for compliance with obligations arising therefrom, under terms and conditions generally in effect at the time of such conversion;

3. Determine that the credits, deposits or investments in foreign currency originating or to be sent abroad be subject to a reserve requirement. Such requirement shall apply only to transactions in respect of which remittances are made after the adoption thereof.
4. Such reserve, which in no event shall exceed 40 per cent of the respective transaction, may be imposed either in Chilean or foreign currency and shall be set up with the Bank or, if so determined by the Bank, with banking entities or financial institutions.

Whenever exercising the authority provided under this subparagraph, the Bank shall have the power to issue different rules, taking into account the several types of transactions.

The Bank shall also have the authority to pay interest or to authorize the payment of interest, on funds subject to reserve requirements, which shall in no event exceed normal market rates;

[...]"

Indonesia

Investment Law 25 of 2007, Chapter V, Treatment to Investment, Article 8

"(1) Any investors may transfer their assets to another party they choose in accordance with the rules of law.

(2) Any assets other than those set forth in paragraph (1) above shall constitute assets owned by the state as stipulated by the law.

(3) Any investors shall have the right to make transfer or repatriation in foreign currency to, among others:

- a. capital;
- b. profit, bank interest, dividend, and any other revenue;
- c. funds required for:
 1. purchasing raw materials and support materials, intermediate products, or final product;
 2. reimbursement of capital goods in order to secure the investment;
- d. additional fund required for financing investment;
- e. fund for loan repayment;
- f. payable royalty or interest;
- g. income of any foreign individuals working in any investment company;
- h. the proceeds of any sale or liquidation of investment;
- i. compensation for any loss;
- j. compensation for any takeover;
- k. payment made for technical aid, payable costs for technical service and management, payment made under project contract, and payment for intellectual property right; and
- l. proceeds of asset sale set forth in paragraph (1) above;

(4) The right to make transfer and repatriation set forth in paragraph (3) above shall be conducted in accordance with the rules of law.

(5) Provisions set forth in paragraph (1) above shall not prejudice to:

- a. Government authority to apply the rules of law requiring the reporting of any fund transfer;
- b. Government's right to collect tax and/or royalty and/or any other government's revenues from investment pursuant to the rules of law;
- c. the implementation of the law that protects creditor's rights;
- d. the implementation of the law that prevents the state from any loss."

Republic of Korea

Foreign Investment Promotion Act

"Article 3 (Protection of Foreign Investment)

(1) With respect to the proceeds that come from the stocks, acquired by a foreign investor, proceeds from the sale of stocks, the principal, interest and service charges paid in accordance with the contract for such a loan as prescribed by the provisions of Article 2 (1) 4 (b), and the compensation paid in accordance with a contract for the introduction of technology, their remittance to foreign countries shall be guaranteed in accordance with the contents of the permission or report of the contract for foreign investment or for the introduction of technology, as of the time for the said remittance. [...]"

Peru**Legislative Decree N° 662 – Approving the juridical stability system for foreign investment**

“Article 7.- The right of foreign investors to transfer abroad in freely convertible foreign currency without previous authorization from any authority from the Central Government or decentralized public entities, and from the Regional or Municipal Government, prior payment of legal taxes, is hereby guaranteed. Foreign investors may transfer the following:

- a) The total amount of their capital derived from investments included in Article 1° hereof and registered before the Competent National Organization, including the sale of shares, interest shares or rights, and capital reduction or partial or total liquidation of the company; and,
- b) The total amount of dividends or proven net profits derived from their investments, as well as considerations for the use or enjoyment of assets physically located in the country registered before the Competent National Organization, and royalties and considerations for the use and transfer of technology including any other constitutive element of industrial property authorized by the competent National Organization.”

Philippines**Executive Order No. 226, The Omnibus Investments Code of 1987**

“TITLE II

BASIC RIGHTS AND GUARANTEES

ARTICLE 38. Protection of Investments. - All investors and registered enterprises are entitled to the basic rights and guarantees provided in the Constitution. Among other rights recognized by the Government of the Philippines are the following:

- (a) Repatriation of Investments. - In the case of foreign investments, the right to repatriate the entire proceeds of the liquidation of the investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of repatriation, subject to the provisions of Section 74 of Republic Act No. 265 as amended;
For investments made pursuant to Executive Order No. 32 and its implementing rules and regulations, remittability shall be as provided therein.
- (b) Remittance of Earnings. - In the case of foreign investments, the right to remit earnings from the investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance, subject to the provisions of Section 74 of Republic Act No. 265 as amended;
- (c) Foreign Loans and Contracts. - The right to remit at the exchange rate prevailing at the time of remittance such sums as may be necessary to meet the payments of interest and principal on foreign loans and foreign obligations arising from technological assistance contracts, subject to the provisions of Section 74 of Republic Act No. 265 as amended; [...].”

On transfers of capital related to investment, APEC recommends to member economies that they should guarantee the right to transfer capital related to an investment at market exchange rates, without delay and with only limited exceptions, as well as remove or reduce restrictions on investment-related transfers of funds and make binding commitments in international agreements to reduce or eliminate restrictions. This is specified in item numbers 6.01, 6.02 and 6.03 of the **Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies of 1997** (see Annex 4):

“6.01 Remove or reduce restrictions on the transfer of funds related to foreign investment, such as profits, dividends, royalties, loan payments, interest, infusions of additional financial resources after the initial investment has been made, and proceeds from liquidations - all in a freely convertible or a freely usable currency.”

-- Eliminate or phase out restrictions that impede recovery of profit, such as ceilings on royalties, technical assistance fees or special taxes, restrictions on access to foreign exchange, and control over the allocation of foreign currencies.

6.02 Make a binding commitment, in treaties, agreements or arrangements, to eliminate or progressively reduce restrictions on the transfers of funds related to foreign investment, such as profits, dividends, royalties, loan payments, interest, infusions of additional financial resources after the initial investment has been made, and proceeds from liquidation - all in freely convertible or freely usable currencies.

6.03 Guarantee the right to transfer capital related to an investment in and out of an economy, without delay and at market rates of exchange, with only limited exceptions.”

The spectrum of transfer provisions in IIAs is broad and varied. In some cases transfer provisions in IIAs refer only to the freedom to repatriate investment related flows, and in others provide exceptions or limitations to capital movements in certain circumstances. Some examples are presented in Table 12. While some models limit the obligation to the laws or regulations of the host economy, others do not. Additionally, the exceptions to the freedom of transfers in cases of bankruptcy, securities, criminal offenses and to ensure compliance with judgments normally are not found in domestic legal frameworks with regard to transfers as such, but are sometimes included in IIAs to avoid uncertainty.

While the free transfer of investment funds is the general rule, many economies have provisions in their domestic legal frameworks or policies that provide for limitations on transfers in certain cases, including balance of payment difficulties. These limitations are reflected in IIAs through articles such as that in the Japan-Republic of Korea IPPA (2003) (Box 14). These exceptions differ from the ones contained in article 12.3 of the Japan-Republic of Korea IPPA (2003) (Table 12) that are illustrative of provisions of some IIAs. While the exceptions in article 12.3 of the Japan-Republic of Korea IPPA refer to specific case-by-case limitations, the exceptions in Box 14 are of general application. Measures of the kind mentioned in Box 14 are taken in extreme circumstances and would have to be implemented through specific domestic legislative or regulatory action.

Table 12. Examples of transfer clauses in IIAs

Japan-Republic of Korea IPPA (2003)	Malaysia-Viet Nam (1992)
<p>“Article 12 1. Each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor of the other Contracting Party may be freely transferred into and out of its territory without</p>	<p>“Article 6 Repatriation of Investment (1) Each Contracting Party shall, subject to its laws, regulations and administrative practices allow without unreasonable delay the transfer in any freely usable currency:</p>

Japan-Republic of Korea IPPA (2003)	Malaysia-Viet Nam (1992)
<p>delay. Such transfer shall include, in particular, though not exclusively:</p> <ul style="list-style-type: none"> (a) the initial capital and additional amounts to maintain or increase an investment; (b) profits, interest, dividends, capital gains, royalties or fees; (c) payments made under a contract including a loan agreement; (d) proceeds of the total or partial sale or liquidation of investments; (e) payments made in accordance with Articles 10 and 11; [FET, expropriation and protection from strife] (f) payments arising out of the settlement of a dispute under Article 15; and (g) earnings and remuneration of personnel engaged from the other Contracting Party in connection with an investment. <p>2. Neither Contracting Party shall prevent transfers from being made without delay in freely convertible currencies at the market rate of exchange existing on the date of the transfer.</p> <p>3. Notwithstanding paragraphs 1 and 2 above, a Contracting Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:</p> <ul style="list-style-type: none"> (a) bankruptcy, insolvency or the protection of the rights of creditors; (b) issuing, trading or dealing in securities; (c) criminal or penal offenses; or (d) ensuring compliance with orders or judgements in adjudicatory proceedings.” 	<ul style="list-style-type: none"> (a) the net profits, dividends, royalties, technical assistance and technical fees, interest and other current income, accruing from any investment of the investors of the other Contracting Party; (b) the proceeds from the total or partial liquidation of any investment made by investors of the other Contracting Party; (c) funds in repayment of loans related to an investment; and (d) the earnings of citizens and permanent residents of the other Contracting Party who are employed and allowed to work in connection with an investment in the territory of the other Contracting Party. <p>(2) The exchange rates applicable to such transfer in paragraph (1) of this Article shall be the rate of exchange prevailing at the time of remittance.</p> <p>(3) The Contracting Parties undertake to accord to the transfers referred to in paragraph (1) of this Article a treatment as favourable as that accorded to transfers originating from investments made by investors of a third State.”</p>

Box 14. Limitations to the free transfer clause

Japan-Republic of Korea IPPA (2003)

“[...]Article 17

1. A Contracting Party may adopt or maintain measures not conforming with its obligations under paragraph 1 of Article 2 relating to cross-border capital transactions and Article 12 of this Agreement:
 - (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or
 - (b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.
2. Measures referred to in paragraph 1 of this Article:
 - (a) shall be consistent with the Articles of Agreement of the International Monetary Fund so long as

- the Contracting Party taking the measures is a party to the said Articles of Agreement;
- (b) shall not exceed those necessary to deal with the circumstances set out in paragraph 1 of this Article;
- (c) shall be temporary and shall be eliminated as soon as conditions permit; and
- (d) shall be promptly notified to the other Contracting Party.
3. Nothing in this Agreement shall be regarded as altering the rights enjoyed and obligations undertaken by a Contracting Party as a party to the Articles of Agreement of the International Monetary Fund.”

4. Performance requirements

Performance requirements refer to measures such as local content, export performance, domestic equity, joint ventures, technology transfer and employment of nationals. These measures can be mandatory (condition for entry or access to a sector) or voluntary (condition for benefiting from an incentive) (UNCTAD, 2004).

The WTO Trade-Related Investment Measures (TRIMS) agreement specifically prohibits certain types of performance requirements. All WTO members made notifications of the policies and measures that were considered inconsistent with these provisions, referencing specific pieces of domestic legislation for each measure. Notifications on inconsistent measures and on those that have been eliminated can be consulted from the WTO.¹²

Similarly, APEC addresses the issue of performance requirements in the **APEC Non-Binding Investment Principles, specified in Jakarta in November 1994** (see Annex 3):

“Performance Requirements

- *Member economies will minimize the use of performance requirements that distort or limit expansion of trade and investment.”*

Because performance requirements are either mandatory or required to receive a benefit, each measure is generally reflected in an economy’s domestic legal framework. Nevertheless, while the specific measures are reflected in domestic legal frameworks, economies do not generally have national laws that prohibit or eliminate these policy instruments. Economies’ specific measures, regulations or legislation that contravene specific IIA performance requirement provisions are often spelled out in the economy’s respective exception Annex to an IIA.

APEC recommendations to member economies suggest that they eliminate WTO-inconsistent performance requirements unilaterally or through IIA negotiations, and eliminate or phase out other performance requirements, such as local hiring or training requirements, local manufacturing or local sales measures, technology transfer or local research and development provisions, or export requirements. This is clarified in item numbers 7.01, 7.02 and 7.03 of the **Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies of 1997** (see Annex 4):

“7.01 Publish and implement a phase-out plan for WTO TRIMs-inconsistent programs identified on TRIMs illustrative list.

7.02 Reach consistency with WTO TRIMs’ illustrative list by 2000. Take steps to accelerate implementation of phase-out plans where possible.

7.03 Eliminate, phase out, or relax unilaterally and/or through government-to-government agreements and treaties, on an economy-wide or sectoral basis, requirements such as:

- local hiring requirements,*
- local training requirements,*
- requirements to manufacture locally,*
- local sales requirements,*
- required technology transfer,*
- required local research and development,*
- export requirements (e.g. those expressed as requirements to generate foreign exchange or achieve a particular export target).”*

Not all APEC IIAs deal with performance requirements, and those that do reiterate (e.g. the Japan-Malaysia EPA of 2006) or expand in the IIA on measures banned by the WTO TRIMS Agreement.

Usually, not all performance requirements will be ruled out under an IIA, and some IIAs include language to this respect, including Article 10.7 of the Chile-Republic of Korea FTA (2004) that clarifies:

[...]4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, in compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory. In the event of any inconsistency between this paragraph and the TRIMS Agreement, the latter shall prevail to the extent of the inconsistency. [...]”

Unlike other elements of IIAs where disciplines are reflected in general legislation (i.e. expropriation), this is clearly not the case in performance requirements. Economies do not ban these measures generally in their domestic legal frameworks. On the other hand, because performance requirements are measures that generate a consequence, they are generally codified in domestic legislation or regulations, and commitments to limit or eliminate them in IIAs could affect that legislation.

IIA architecture can allow economies not only to grandfather existing performance requirements, but also to maintain policy space in certain sectors set out in annexes to the agreements. In the Peru-Singapore FTA (signed 2003), each economy

made reservations with regard to existing measures and future measures as set out in Table 13.

Table 13. Reservations to the performance requirement provision in the Peru-Singapore FTA (signed 2003)

	Grandfathered measures	Future measures
Peru	Annex 11B - AudioVisual Services - RadioBroadcasting Services	Annex 11D - Indigenous Communities, Peasant, Native, and Minority Affairs - Fishing and Services Related to Fishing - Handicraft Industries - AudioVisual Industry - Jewelry Design, Theater Arts, Visual Arts, Music, Publishing - Social Services
Singapore	Annex 11C - Manufacturing and Services incidental to Manufacturing	Annex 11E (excerpt) - - divestment of the administrator and operator of airports - health services by government-owned or controlled healthcare institutions - supply of social services, social security, public training, public law enforcement, ambulance services, correctional services and fire fighting services - Arms and Explosives - Broadcasting Services - Educational Services, Primary Education Services, Secondary Education Services - Sewage and Refuse Disposal, Sanitation and Other Environmental Protection Services - Courier Services - Supply of Potable Water for Human Consumption - Air Transport Services - Transport Services - Internal Waterways Transport Services - Wholesale trade services and retail trade services of alcoholic beverages and tobacco

5. Entry and sojourn of foreign nationals and senior personnel

An investor in a host economy in general prefers to hire the personnel of his or her choice, without limitations regarding citizenship. Nevertheless, economies have work permit requirements and immigration provisions that must be met, and can also have citizenship requirements for certain sectors and executive positions that affect investors' capacity to freely hire personnel. While entry and sojourn provisions relate to immigration laws, nationality requirements on senior personnel apply even once foreign personnel are legally in the host economy.

Entry and sojourn of personnel forms part of the **APEC Non-Binding Investment Principles, specified in Jakarta in November 1994** (see Annex 3):

“Entry and Sojourn of Personnel

- *Member economies will permit the temporary entry and sojourn of key foreign technical and managerial personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations”*

Some economies with general investment laws, such as Indonesia, have references to both entry and sojourn of personnel, as well as issues regarding nationality of personnel. Box 15 presents the relevant provisions in Indonesia’s investment law with regard to hiring and use of domestic and foreign workers by foreign investors.

APEC suggests that economies allow temporary entry and stay of personnel needed for investments, offer visas to visitors to facilitate investors’ ability to enter and re-enter a host economy, take steps to facilitate hiring of foreign or domestic managerial talent and permit sponsors to hire top technical or advisory talent of the investors’ choice. This is shown in item numbers 8.01, 8.02, 8.03 and 8.04 of the **Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies of 1997** (see Annex 4):

“8.01 Consistent with an economy’s visa laws regarding the entry and stay of personnel, allow the temporary entry and stay of personnel needed to establish, develop, administer or advise on the operation of an investment of theirs (i.e. investor and key managerial or technical personnel and advisers).

8.02 Offer visas for investors that facilitate entry and reentry (or identify other ways, consistent with domestic laws and policy, to facilitate investors’ ability to enter and reenter for investment purposes).

8.03 Take steps to permit investors/project sponsors to hire the top managerial advisory talent of their choice, regardless of nationality.

8.04 Take steps to permit investors/project sponsors to hire the top technical and/or advisory talent of their choice, regardless of nationality.”

Box 15. Select provisions of Indonesia’s Foreign Investment Law with regard to workers and licensing

Indonesia

Investment Law 25 of 2007, Chapter VI, Manpower, Article 10

- “(1) Any investment companies shall prioritise in recruiting workers those of Indonesian citizen.
 (2) Any investment companies shall be entitled to use experts of foreign citizen on certain position and expertise in accordance with the rules of law.
 (3) Any investment companies are required to improve the competence of workers of Indonesian citizen through work trainings pursuant to the rules of law.
 (4) Any investment companies employing foreign experts are required to provide trainings and transfer of technology to workers of Indonesian citizen pursuant to the rules of law.”

Investment Law 25 of 2007, Chapter X, Investment Facility, Article 23

- “(1) Service and/or licensing convenience for immigration facility set forth at point b of Article 21 may be granted for:
 a. any investment requiring foreign workers for realising the investment;
 b. any investment requiring foreign workers whose nature is temporary for repairing machinery, other production supports, and post-sale service;
 c. any prospective investors making inquiry in investment.
 (2) Service and/or licensing convenience for immigration facility set forth at point a and b of paragraph (1) above shall be granted after such investor has been recommended by the Investment Coordinating Board.
 (3) Facilities granted for foreign investment are:
 a. limited residential permit for two (2) years for foreign investors.
 b. change of status from limited residential permit into permanent residential permit for foreign investors after living in Indonesia for two (2) consecutive years;
 c. one-year re-entry permit will be granted for several trips to any holders of limited residential permit that will apply for twelve (12) months starting from the day such limited residential permit is granted;
 d. two-year re-entry permit will be granted for several trips to any holders of limited residential permit that will apply for twenty-four (24) months starting from the date such limited residential permit is granted; and
 e. re-entry permit will be granted for several trips to any holders of permanent residential permit that will apply for twenty-four (24) months starting from the date such permanent residential permit is granted.
 (4) The granting of limited residential permit to foreign workers set forth at point a and b of paragraph (3) above will be done by the Directorate General of Immigration based on recommendation of the Investment Coordinating Board.”

Although not all IIAs contain provisions on entry and sojourn of foreign nationals and senior personnel, some have important commitments and may even require amendments to domestic legislation or regulation. The United States-Chile FTA was one of the last set of IIAs negotiated by the United States with provisions on temporary entry of business persons, and required certain adjustments to the application of the Immigration and Nationality Act (INA). The United States-Chile FTA Implementation Act Statement of Administrative Action sets out these modifications as follows:

“In order to provide for the admission of business visitors and intra-company transferees, no changes in U.S. statutes are required. Limited technical changes are needed to provide for the admission of traders and investors and professionals. Legislation is also required to implement Article 14.3(2) of the Agreement regarding labor disputes.”

Annex 8 includes the portion of the Statement of Administrative Action relevant to Chapter 14 (Temporary Entry for Business Persons) of the United States-Chile FTA.

Although some IIAs require host economies to give favorable consideration to investors' applications for licenses, sojourn of personnel, entry of employees, working permits etc., while some IIAs exclude the issue altogether, others may include a best endeavour clause, and some even include a hard commitment with annexes for certain measures and sectors. Table 14 presents examples of different soft approaches.

Table 14. Examples of senior personnel clauses in APEC IIAs

Australia-Mexico IPPA (signed 2005)	Japan-Viet Nam IPPA (2004)
<p>“Article 5 Entry and stay of personnel Each Contracting Party shall, within the framework of its laws, regulations and policies, give a sympathetic consideration to applications for the permits necessary for the engagement of key managerial and technical personnel in connection with investments in its territory of the Investor’s choice from abroad.”</p>	<p>“Article 8 Each Contracting Party shall, in accordance with its applicable laws and regulations, give sympathetic consideration to applications for the entry, sojourn and residence of a natural person having the nationality of the other Contracting Party who wish to enter the territory of the former Contracting Party and remain therein for the purpose of investment activities.”</p>

The examples above frame the commitment to “give sympathetic consideration” to applications for permits in the host economy within its laws and regulations. Therefore, this type of softer commitment would, in principle, not require any modification to the domestic legal frameworks in force when the IIAs were signed or came into force.

In the case of more specific commitments such as those set out in the Canada-Chile FTA (1997) below, economies may require modification in the applicable domestic legal framework (the Australia-United States FTA of 2005 has very similar senior management provisions):

“Article G-07: Senior Management and Boards of Directors

- 1. Neither Party may require that an enterprise of that Party that is an investment of an investor of the other Party appoint to senior management positions individuals of any particular nationality.*
- 2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is an investment of an investor of the other Party, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.”*

Additionally, this agreement also has an annex on temporary entry for business persons:

“Annex K-03: Temporary Entry for Business Persons

Section I: Business Visitors

- 1. Each Party shall grant temporary entry to a business person seeking to engage in a business activity set out in Appendix K-03.I.1, without requiring that person to obtain an employment authorization, provided that the business person otherwise*

complies with existing immigration measures applicable to temporary entry, on presentation of:

- (a) proof of citizenship of a Party;*
- (b) documentation demonstrating that the business person will be so engaged and describing the purpose of entry; and*
- (c) evidence demonstrating that the proposed business activity is international in scope and the business person is not seeking to enter the local labour market.*

[...]

Section II: Traders and Investors

1. Each Party shall grant temporary entry and provide confirming documentation to a business person seeking to:

- (a) carry on substantial trade in goods or services principally between the territory of the Party of which the business person is a citizen and the territory of the other Party into which entry is sought, or*
- (b) establish, develop, administer or provide advice or key technical services to the operation of an investment to which the business person or the business person's enterprise has committed, or is in the process of committing, a substantial amount of capital,*

in a capacity that is supervisory, executive or involves essential skills, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry.

2. Neither Party may:

- (a) as a condition for temporary entry under paragraph 1, require labour certification tests or other procedures of similar effect; or*
- (b) impose or maintain any numerical restriction relating to temporary entry under paragraph 1.*

3. Notwithstanding paragraph 2, a Party may require a business person seeking temporary entry under this Section to obtain a visa or its equivalent prior to entry.”

Economies may choose to take reservations with regard to these commitments in annexes. Canada, for example, made the following reservation (Table 15) in its agreement with Chile based on existing legislation or the need for space for future policy and safeguard provisions in existing legislation, such as the Canada Business Corporations Act, R.S.C. 1985, c. C-44, the Canada Business Corporations Act Regulations, SOR/79-316 and the Canada Corporations Act, R.S.C. 1970, c. C-32, in this specific case.

Sometimes Parties agree to additional commitments outside an IIA to balance the interest of both sides not achieved solely within the IIA. The United States stopped negotiating FTAs with chapters on movement of natural persons after the agreements with Chile and Singapore due to internal political hesitation to include this issue in trade agreements. Instead, in parallel to the FTA, the United States and Australia negotiated a visa scheme, which would facilitate temporary employment of Australian nationals in the United States (Bondiotti, 2008).

Table 15. Canada Business Corporations Act

“Sector:	All Sectors
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Type of Reservation:	Senior Management and Boards of Directors (Article G-07)
Level of Government:	Federal
Description:	<p><i>Canada Business Corporations Act</i>, R.S.C. 1985, c. C-44 <i>Canada Business Corporations Act Regulations</i>, SOR/79-316 <i>Canada Corporations Act</i>, R.S.C. 1970, c. C-32 Special Acts of Parliament incorporating specific companies</p> <p><u>Investment</u></p> <p>The <i>Canada Business Corporations Act</i> requires that a simple majority of the board of directors, or of a committee thereof, of a federally-incorporated corporation be resident Canadians. For purposes of the Act, "resident Canadian" means an individual who is a Canadian citizen ordinarily resident in Canada, a citizen who is a member of a class set out in the <i>Canada Business Corporations Act Regulations</i>, or a permanent resident as defined in the <i>Immigration Act</i> other than one who has been ordinarily resident in Canada for more than one year after he became eligible to apply for Canadian citizenship.</p> <p>In the case of a holding corporation, not more than one-third of the directors need be resident Canadians if the earnings in Canada of the holding corporation and its subsidiaries are less than five percent of the gross earnings of the holding corporation and its subsidiaries.</p> <p>Under the <i>Canada Corporations Act</i>, a simple majority of the elected directors of a Special Act corporation must be resident in Canada and citizens of a Commonwealth country. This requirement applies to every joint stock company incorporated subsequent to June 22, 1869 by any Special Act of Parliament.</p>
Phase-Out:	None"

In any case, the impact of IIAs on domestic legal frameworks and regulation with regard to entry and sojourn and senior personnel related to investments depends on the scope of the commitments undertaken and the individual domestic legal framework and system. Generally, commitments undertaken under mode 4 in the General Agreement on Trade in Services (GATS) and in chapters on movement of natural persons in EIAs tend to require specific implementation at the level of domestic legal frameworks and regulations.

Depending on each individual system and the nature of the commitments, IIA implementation may require modifications in law, regulations or administrative guidelines. Yet, in other cases, IIA implementation may not require statutory or regulatory modifications.

6. Dispute settlement

Generally, IIAs contain provisions for the settlement of disputes between the Parties that negotiated the agreement, and also provide investors with access to international arbitration to resolve investment disputes. While State-State dispute settlement in IIAs is rarely used, ISDS use has increased considerably in the last two decades.

The access to international arbitration is an important element in IIAs and generally continues to be included in them. The ability of economies to take part in international arbitration is generally derived from a law, or the economy's participation in

an international convention such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the New York Convention).

The settlement of disputes is addressed in the **APEC Non-Binding Investment Principles, specified in Jakarta in November 1994** (see Annex 3):

“Settlement of Disputes

- *Member economies accept that disputes arising in connection with a foreign investment will be settled promptly through consultations and negotiations between the parties to the dispute or, failing this, through procedures for arbitration in accordance with members' international commitments or through other arbitration procedures acceptable to both parties”*

More concrete options on the settlement of disputes are provided in are item numbers 9.01 and 9.02 of the **Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies of 1997** (see Annex 4):

“9.01 Develop effective mechanisms for resolving disputes and mechanisms for enforcing the solutions found to those disputes.

9.02 Take steps to become a member of the International Convention on the Settlement of Investment Disputes (ICSID) and/or other widely recognized international arbitration bodies.”

a. ISDS

Economies in general provide foreign investors with non-discriminatory access to their judicial system, as well as to negotiation, arbitration, mediation and litigation, and therefore guarantee the same forum for the settlement of disputes as is available to nationals. The option of seeking to resolve disputes within the national courts or through domestic alternative dispute resolution (ADR) mechanisms keeps the investor within a domestic legal framework and judicial system.

Each economy regulates international arbitration with investors differently, and in some cases economies have specific reference to dispute settlement with investors in their general investment law or even in their Constitutions. Box 16 presents two examples of specific references to ISDS in domestic legal frameworks.

Box 16. Examples of reference to ISDS in domestic legal frameworks

Indonesia

Investment Law 25 of 2007, Chapter XV, Dispute Settlement, Article 32

“(1) In the event of dispute in investment sector between Government and any investors, the two parties shall devote their entire effort to settle it with deliberation.

(2) In the event that such settlement set forth in paragraph (1) above fails, such dispute shall be settled

through arbitration or alternative settlement or court of justice in accordance with the rules of law.

- (3) In the event of dispute in investment sector between Government and any domestic investors, the two parties may settle it through arbitration based on agreement between them, and if such settlement through arbitration fails, such dispute shall be settled by court of justice.
- (4) In the event of dispute in investment sector between Government and any foreign investors, the two parties may settle it through international arbitration based on agreement between them.”

Peru

Political Constitution of Peru, Article 63

“ [...]

In all contracts of the State and public corporations with resident aliens, these shall subject to the national laws and courts of competent jurisdiction and surrender to any diplomatic claim. Contracts of a financial nature may be excepted from national jurisdiction.

The State and other public corporations may submit their controversies arising from their contractual relation to courts specially established by virtue of treaties in effect. They can also submit them to national or international arbitration in the manner provided by law.”

Many economies have domestic arbitration laws to give effect to their obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958, the ICSID Convention or other issues relevant to international arbitration. Domestic legislation is important for international arbitration, and Table 16 sets out examples of objectives of two domestic arbitration laws.

Because considerable disparities exist among different domestic arbitration laws, and at time there is an absence of specific legislation governing arbitration, UNCITRAL defined a model arbitration law (last updated in 2006). Some of the limitations the model law set out to address are:

- provisions that equate the arbitral process to court litigation;
- laws drafted with domestic arbitration primarily in mind, leading to situations where local concepts influence international cases;
- imposition of mandatory provisions of applicable domestic law that affect the ability to select arbitrators freely or prevent procedures from following agreed arbitration rules;
- disparity in national laws can make it difficult or even impossible to obtain a full and precise account of the laws applicable to arbitration (UNCITRAL 2008).

Hong Kong, China recently (November 2010) updated its arbitration statute based on this revised UNCITRAL model law. The resulting law unifies the domestic and international regime and covers issues of great importance to international investment arbitration such as recognition and enforcement of arbitral awards.

Table 16. Examples of objectives in domestic arbitration laws

Australia International Arbitration Act 1974¹³	Hong Kong Arbitration Ordinance (Ord. No. 17 of 2010)¹⁴
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<p>“2D Objects of this Act The objects of this Act are:</p> <ul style="list-style-type: none"> (a) to facilitate international trade and commerce by encouraging the use of arbitration as a method of resolving disputes; and (b) to facilitate the use of arbitration agreements made in relation to international trade and commerce; and (c) to facilitate the recognition and enforcement of arbitral awards made in relation to international trade and commerce; and (d) to give effect to Australia’s obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twentyfourth meeting; and (e) to give effect to the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended by the United Nations Commission on International Trade Law on 7 July 2006; and (f) to give effect to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed by Australia on 24 March 1975.” 	<p>“3. Object and principles of this Ordinance</p> <ul style="list-style-type: none"> (1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. (2) This Ordinance is based on the principles— <ul style="list-style-type: none"> (a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and (b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance. <p>[...]</p> <p>4. UNCITRAL Model Law to have force of law in Hong Kong</p> <p>[...]</p> <p>The provisions of the UNCITRAL Model Law that are expressly stated in this Ordinance as having effect have the force of law in Hong Kong subject to the modifications and supplements as expressly provided for in this Ordinance.”</p>
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In addition to the general dispute settlement legislation in domestic frameworks, economies may need to make adjustments to their domestic arbitration framework following conclusion of an IIA. For example, the Canadian Statement of Implementation of NAFTA specified the following:

“The *Commercial Arbitration Act* enacts the UNCITRAL Arbitration Code and governs commercial arbitration, including judicial review and enforcement of an arbitration decision, where one of the parties is the Crown in right of Canada. Section 50 of the *NAFTA Act* amends section 5 of the *Commercial Arbitration Act* to ensure that it will apply to arbitrations conducted under NAFTA.”¹⁵

Likewise, the United States implemented its obligation in the United States-Peru FTA through the 2007 United States Public Law 110-138¹⁶ - An Act To implement the United States-Peru Trade Promotion Agreement:

“*SEC. 106. ARBITRATION OF CLAIMS.*
The United States is authorized to resolve any claim against the United States covered by article 10.16.1(a)(i)(C) or article 10.16.1(b)(i)(C) of the Agreement, pursuant to the Investor-State Dispute Settlement procedures set forth in section B of chapter 10 of the Agreement.”

There are economies that specifically provide the investor with access to international arbitration when they enter into contracts with a State, and resulting cases may lead to a tribunal reviewing alleged breaches of the contract itself and the IIA as well. The same situation can appear when umbrella clauses that cover agreements between the Contracting Party and investors under the IIA are included in an IIA.

Domestic legislation becomes especially relevant in these cases, which are often triggered by measures at different levels of government. In the end, arbitration proceedings may lead to compensation for the investor but cannot impose a repeal of a measure or law, unlike the WTO State-State system. Despite this, direct negotiations between an investor and a State may result in agreements that lead to statutory or regulatory modifications, avoiding international arbitration and promoting long-term investor-State relationships.

Regarding domestic legislation in dispute settlement, as was noted in section A.1 above, some tribunals have considered that the obligation to comply with host economy domestic legislation is an implicit requirement for an investment to benefit from IIA protection. This interpretation, or the explicit reference in the definition of investment to compliance with domestic legislation, can be seen as creating a strong link between local laws and regulations and the eligibility for coverage, including recourse to ISDS of an investment under the IIA.

One of the main characteristics of IIAs has traditionally been the consent of the host economy, expressed in the IIA itself, to international arbitration in cases of disputes, and many IIAs list specific arbitration rules for the investor to choose from. While this is the general rule, some APEC IIAs provide the host economy with the option of denying consent in individual disputes (e.g. Japan-Philippines EPA, signed 2006, see Table 17), while others simply omit an ISDS provision altogether (e.g. United States-Australia FTA, 2005).

Finally, although ADR in the area of international investment disputes is still in its early stages and not widely known to be used in these instances, efforts by economies to resolve differences before arbitration is triggered may lead to agreements that save time and resources for both sides. Nevertheless, for ADR methods to work, economies may have to implement new legislation that empowers government negotiators to broker agreements, and secure the necessary backing and legal and political leverage to carry through creative solutions (UNCTAD 2011a, 2010a).

Table 17. Examples of dispute settlement clauses in IIAs

Thailand-Hong Kong, China IPPA (2006)	Japan-Philippines EPA (signed 2006)
“ARTICLE 8	“Article 107

Thailand-Hong Kong, China IPPA (2006)	Japan-Philippines EPA (signed 2006)
<p>Settlement of Investment Disputes</p> <p>A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the area of the latter which has not been settled amicably, shall, after a period of six months from written notification of the claim, be submitted to such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within that six month period, the parties to the dispute shall agree to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties may agree in writing to modify those Rules.”</p>	<p>Further Negotiation</p> <p>1. The Parties shall enter into negotiations after the date of entry into force of this Agreement to establish a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party.</p> <p>2. In the absence of the mechanism for the settlement of an investment dispute between a Party and an investor of the other Party, the resort to international conciliation or arbitration tribunal is subject to mutual consent of the parties to the dispute. This means that the disputing Party may, at its option or discretion, grant or deny its consent in respect of each particular investment dispute and that, in the absence of the express written consent of the disputing Party, an international conciliation or arbitration tribunal shall have no jurisdiction over the investment dispute involved.” (emphasis added)</p>

D. Investment promotion

APEC economies recognize the contributions of investment to growth and development. APEC members are especially committed to promoting foreign investment, both as a group and individually. They have issued several declarations and non-binding instruments, and have undertaken an important amount of technical work to help members improve their investment climate and move forward toward further integration.

APEC has made important practical efforts towards facilitating and promoting investment in the Asia-Pacific region, including the adoption of the following texts:

- Bogor Goals¹⁷: APEC Leaders committed to achieve free and open trade and investment by 2010 for industrialized economies and by 2020 for developing economies (1994). The Osaka Action Agenda¹⁸ provides a roadmap to meet these goals, through general principles including transparency and cooperation;
- APEC Non-Binding Investment Principles (1994) (Annex 3): These principles recognize the importance of investment to development and of promoting domestic environments that attract investment. The principles include transparency and the importance of investor behaviour.
- Options for Investment Liberalization and Business Facilitation to Strengthen APEC Economies (1997) (Annex 4). This non-exhaustive “menu of options” identifies policies that are conducive to free and open investment, including transparency;

- APEC Transparency Standards: In 2002, Leaders agreed to a set of General Transparency Standards. In 2003 and 2004, these general standards were matched with specific trade policy areas, resulting in nine sets of Area-Specific Transparency Standards, including services and investment (Annex 6).
- Investment Facilitation Action Plan (IFAP) (2007): The plan states that it is “aimed at further promotion of investment in APEC member economies”(Annex 7).
- Guide to the Investment Regimes of APEC Member Economies (7th edition, 2010).

There is no single practice when it comes to the issue of investment promotion in IIAs signed by APEC economies. A review of these agreements shows that while some agreements limit the reference to promotion to the preamble, others refer to promotion in the articles of the agreement or even in a separate chapter. Some refer specifically to investment cooperation, and others also include specific provisions on transparency. The degree to which domestic legal frameworks address each one of these issues varies by economy, and may be impacted by the level of development.

1. Investment promotion and facilitation

Most developed and developing economies, and all APEC economies, recognize the importance of investment to economic growth and development.

Many IIAs include the promotion of investment at least in the preamble of the agreement, and most BITs are titled “for the promotion and protection of investment”. While it is generally accepted that IIAs help generate a better investment climate and therefore may contribute to more investment, the protection and more recently liberalization objectives of IIAs are dominant in these negotiations.

Investment promotion is a direct objective in only approximately one third of IIAs in APEC member economies (UNCTAD, 2008). Some APEC IIAs have specific language on investment promotion, but stop short of specific measures or commitments in this area (see Table 18).

Many economies recognize the importance of foreign investment in their national laws, and have made great efforts to improve their business climate and facilitate investments. Therefore, most economies are already undertaking active investment promotion activities, even if they are not foreseen in an IIA. Many APEC members either have specific offices that facilitate foreign investment or foreign investment promotion agencies (IPAs). Examples are listed in Box 17.

Table 18. Examples of investment promotion provisions in IIAs

Malaysia-Viet Nam IPPA (1992)	Thailand-Russia (2002)	Australia-Mexico (signed 2005)
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<p>“ARTICLE 2 Promotion and Protection of Investments (1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest in its territory and subject to its rights to exercise powers conferred by its laws, regulations and administrative practices, shall admit such investments. [...]”</p>	<p>“Article 2: Admission and Protection of Investments and Application of Agreement 1. Each Contracting Party shall aspire to create favourable conditions to investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws.”</p>	<p>“ARTICLE 3 Promotion and Admission of Investments 1. Each Contracting Party shall encourage and, to the extent possible, promote investments in its territory by Investors of the other Contracting Party. 2. Each Contracting Party shall, in accordance with its laws, regulations and investment policies applicable from time to time, admit the entry of investments and new investments.”</p>
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The Constitutions and internal legislations of most economies assign responsibilities to undertake activities that promote development to the central government, and in some cases, this specifically includes promotion of foreign investment. Further legislation may delegate authority to a specific agency or institution, which then undertakes the promotion activities, including those that may be foreseen in specific IIAs.

Some of these powers are mandated by law, such as is the case of the Malaysian Industrial Development Authority (MIDA), created in 1965 by the Federal Industrial Development Authority Act.¹⁹ The Minister of International Trade and Industry appoints the Director General of MIDA. The Act defines MIDA’s function as follows: “It shall be the functions of the Authority to promote investment in the industrial sector and its related services in Malaysia and to advise the Minister on the formulation of policies in respect thereof [...]”.

Box 17. Examples of IPAs/authorities in APEC economies

Australian Trade Commission - Austrade²⁰ - is **Australia**’s trade and investment development agency.

The Ministry of Industry and Primary Resources, which was established in 1989, is the main Government agency that promotes and facilitates investment, business and trade activities in **Brunei Darussalam**.

Canada created the Invest in Canada bureau to promote, attract and retain FDI in Canada.

One of the objectives of **Chile**’s Foreign Investment Committee is “to develop all types of initiatives to communicate, promote, coordinate and implement measures to foster the entry of foreign investment”.²¹

Invest in China is the investment promotion agency of the Ministry of Commerce (MOFCOM) of the People’s Republic of **China**.

The Department of Investment Services under the Ministry of Economic Affairs serves as an investment promotion agency in **Chinese Taipei**.

Hong Kong, China established InvestHK as the government department responsible for FDI, supporting other economies' businesses to set up and expand in Hong Kong, China. Its mission is to confirm and strengthen Hong Kong, China as Asia's leading international business centre and to attract economically and strategically important investment.

The objective of the Investment Coordinating Board of the Republic of **Indonesia** (BKPM) is to boost domestic investment and FDI by creating a conducive investment climate. It is the primary interface between business and government.²²

Japan External Trade Organization (JETRO) is a government-related organization to promote mutual trade and investment between **Japan** and the rest of the world. JETRO established the Invest Japan Business Support Center, which is a one-stop centre for a foreign investor in Japan.

Invest Korea, established in 2003, is the government organization officially charged with attracting FDI to the **Republic of Korea**. Invest Korea provides a comprehensive suite of one-stop services for foreign investors, as well as practical support related to living in the Republic of Korea and post-investment support.

Additionally, the Office of the Investment Ombudsman was established within Invest Korea to resolve practical and administrative difficulties. The Ombudsman is appointed by the President of the Republic of Korea and can recommend changes to the government's foreign investment policy or to its procedures.

The Malaysian Industrial Development Authority (MIDA) is in charge of attracting foreign investment to **Malaysia** including through promotional activities, follow-up and monitoring on existing investment projects. It also conducts evaluation of the current investment regime.

ProMéxico is the Mexican Government institution in charge of coordinating actions to attract FDI to **Mexico**.

New Zealand facilitates investment through its economic development agency, New Zealand Trade and Enterprise, where a team of dedicated investment specialists provide support and incentives to investment in New Zealand.

The Investment Promotion Authority in **Papua New Guinea** was set up in 1992 to promote and facilitate investment.

In **Peru**, ProInversión is in charge of promoting both local and foreign private investment, in order to foster competitiveness and sustainable development in Peru.

In the **Philippines**, the Philippine Board of Investments conducts investment promotion and facilitation activities.

The Department of Commerce's Invest in America program, established in 2007, performs functions such as facilitating foreign investment inquiries and educating international investors about investment in the **United States**. On June 15th, 2011, the White House issued an Executive Order establishing the SelectUSA initiative. The order states that the initiative is “a Government-wide initiative to attract and retain investment in the American economy. The Initiative is to be housed in the Department of Commerce. The mission of this Initiative shall be to facilitate business investment in the United States in order to create jobs, spur economic growth, and promote American competitiveness. The Initiative will provide enhanced coordination of Federal activities in order to increase the impact of Federal resources that support both domestic and foreign investment in the United States. In providing assistance, the Initiative shall work to maximize impact on business investment, job creation, and economic growth.”

Another example is the case of Mexico where ProMéxico was specifically created through a decree, building on Article 25 of the Constitution.²³ It establishes the following:

Article 25

The Federal State shall lead the national development which will be integral and sustainable. [...]

The Federal State shall plan, conduct, coordinate and guide the nation's economic activity and shall – within the constitutional framework – regulate and promote the activities demanded by the public interest. [...]

Further, the Organic Law of the Federal Public Administration and the Foreign Trade Law provide that the Ministry of Finance is in charge of formulating and conducting general foreign trade policies. Based on these provisions, ProMéxico was created as a public trust fund in the sector of the Ministry of Finance.

Although each APEC economy has different and distinctive legal and institutional set-ups to promote investment, they all recognize the importance of investment and assign the task of its promotion to one or several authorities or agencies, which then implement investment promotion strategies and policies including those in IIAs when they apply.

2. Cooperation on investment

Other agreements go further in the promotion of trade and investment, and create institutional arrangements to strengthen bilateral investment ties. For example, the Agreement between Japan and The Republic of Chile for a Strategic Economic Partnership (2007) states the intention to improve the business climate and creates a Committee for this purpose (Box 18).

This Committee has met several times, and has been a useful forum to discuss bilateral investment issues and promote economic ties. The second meeting of the Commission took place in Santiago, Chile on 15 April 2009, and the Ministry of Foreign Affairs of Japan reported²⁴ that it “was attended by not only government officials, but representatives of the private sector, including director generals of the Japan-Chile Business Cooperation Committee of the both economies. They had a frank and active exchange of views and opinions on a broad range of issues for the purpose of the improvement of business environment in both economies, including the holding of a seminar for promoting investment, electronic certificate of origin and procedures for obtaining driver's license”.

Although institutional arrangements such as committees and working groups may require administrative action or domestic regulation to establish membership or assign tasks and responsibilities in national agencies, they can be useful mechanisms to address issues and improve bilateral investment relationships. Recent reports²⁵ indicate

that other economies, such as Mexico, are considering the initiation of similar institutional arrangements with strategic partners.

Box 18. Consultations and Committee on Improvement of Business Environment in the Japan-Chile EPA (2007)

“Article 172 Consultations for the Improvement of Business Environment

The Parties, confirming their interest in creating a more favorable business environment with a view to promoting trade and investment activities by their private enterprises, shall from time to time have consultations in order to address issues concerning the improvement of business environment in the Parties.

Article 173 Committee on Improvement of Business Environment

1. For the purposes of the effective implementation and operation of this Chapter, the Parties hereby establish a Committee on Improvement of Business Environment (hereinafter referred to in this Article as “Committee”).

2. The functions of the Committee shall be:

- (a) discussing ways and means to improve business environment in the Parties;
 - (b) making, as needed, recommendations to the Parties on appropriate measures to be taken by the Parties;
 - (c) receiving information on the implementation of such recommendations from the relevant authorities of the Governments of the Parties;
 - (d) making public, as needed, such recommendations in an appropriate manner;
 - (e) reporting the findings of the Committee to the Commission; and
- [...]

3. The Committee shall be composed of government officials of the Parties.

4. The Committee may, by consensus, invite representatives of relevant entities other than the governmental agencies of the Parties with the necessary expertise related to the issues to be discussed.

5. The Committee shall meet at such venues and times as may be agreed by the Parties.

[...]

3. Transparency

While there is no universally agreed definition of transparency, most agree that ensuring timely access to information is an essential part of it. The availability and easy access to investment-related legislation, regulation and information on opportunities is also an instrument to promote investment. According to UNCTAD, “a key aspect of the concept of “transparency” as commonly understood in connection with international economic agreements involves the publication of domestic laws, regulations and administrative practices that are relevant to the subject matter of the agreement in question” (UNCTAD, 2004, page 177).

Undoubtedly, recognition of the importance of transparency to good governance and even development has increased. The World Bank paper “*Transparenting Transparency. Initial empirics and policy implications*” concludes that “transparency is associated with better economic and human development indicators, even after controlling for differences in income. Thus, for the same level of income per capita, economies ranking higher in the overall transparency index are also more competitive in international markets, and their population has a higher life expectancy at birth and higher rates of female literacy and child immunization” (World Bank, 2005, page 43).

For investors, having access to timely information with regard to issues that affect and regulate investment is very important in order to make informed decisions and understand and comply with the host economy's framework. The technological progress of the last decades has made this objective even more important, and has also enhanced economies' ability to share information in a timely and complete matter, and receive input and public participation.

APEC members have included transparency in many of their instruments. Annex 1 provides a snapshot of the evolution of transparency elements contained in APEC instruments since 1994. As can be seen, elements of transparency have broadened, and gone from making existing rules and regulations available to include much broader areas. Transparency recommendations in APEC instruments include suggestions to:

- Publish or make available
 - all laws, regulations, procedures, judicial decisions and administrative rulings, administrative guidelines and policies pertaining to investment;
 - updates of changes to investment regimes;
 - information on investment code, laws, regulations and procurement procedures, to ensure transparency at federal/central, provincial/state and local authority levels;
 - rules and information on investment promotion programs;
- Publish in advance proposed regulations and laws or investment measures, and provide reasonable opportunity for public comment;
- Establish a single window or enquiry point for enquiries on investment policies and applications to invest;
- Establish an IPA and make its existence widely known;
- Conduct briefings on investment policies and future direction;
- Publish and make available guidelines for evaluation and scoring of projects in investment screening procedures;
- Where prior authorizations of investments are required, ensure simple and transparent procedures;
- Provide, upon request from a person or another economy:
 - information or responses to relevant questions regarding any investment measure;
 - a contact point related to the subject matter;
- Ensure that domestic procedures are in place for prompt review and correction of final administrative actions regarding investment and:
 - Provide for tribunals and panels that are impartial and independent and have no substantial interest in the outcome of the investment matter;
 - Provide parties with reasonable opportunity to present their positions;
 - Provide parties with decisions based on evidence and submissions of record;
 - Ensure proper implementations of decisions;
- Maintain clear procedures regarding application, registration and government licensing of investments by publishing or making available clear and simple instructions and explanations of the process, and criteria for assessment of proposals.

A review of APEC economy IIAs shows a broad range of approaches with regard to transparency provisions and commitments, which go from no mention at all (e.g. Malaysia-VietNam IPPA, 1992), to full chapters (e.g. NAFTA, 1994, Chapter 18: Publication, Notification and Administration of Laws). In general, EIAs and FTAs tend to have more detailed provisions than BITs, possibly because of the more limited scope of a BIT compared to an FTA. Table 19 presents examples of transparency provisions in APEC IIAs.

Table 19. Examples of transparency provisions in APEC IIAs

Australia-China BIT (signed 1988)	<p>“Article VI: Transparency of laws Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect investments in its territory of nationals of the other Contracting Party:</p> <ul style="list-style-type: none"> (a) make such laws and policies public and readily accessible; (b) if requested, provide copies of specified laws and policies to the other Contracting Party; and (c) if requested, consult with the other Contracting Party with a view to explaining specified laws and policies.”
United States-Russia BIT (1992)	<p>“7. Each Party shall make public in the customary form all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.”</p>
<p>NAFTA (1994), (Chapter Eighteen: Publication, Notification and Administration of Laws)</p> <p>Canada-Chile FTA (1997), (Chapter L: Publication, Notification and Administration of Laws)</p> <p>Peru-Chile FTA (signed 2006), (Chapter 14: Transparency)</p>	<p>Summary of provisions:</p> <ul style="list-style-type: none"> - Contact Points: the establishment of contact points to facilitate communication among the Parties; - Publication: publication of laws, regulations, procedures and administrative rulings of general application and to the extent possible, advance publication and opportunity for interested persons or Parties to comment on proposed measures; - Notification and provision of information: to the maximum extent possible, notify the other Party of proposed or actual measures that may materially affect the operation of the agreement, and provide information and answer questions of the other Party upon request regarding such measures; - Administrative proceedings: wherever possible, persons of the other Party directly affected by administrative proceedings are provided reasonable notice of proceedings, including the nature and legal authority under which the proceeding is initiated and a general description of issues in controversy, as well as an opportunity to present facts and arguments to support their positions, and that these procedures are in accordance with domestic law. - Review and appeal: Parties shall establish or maintain judicial, quasi-judicial or administrative tribunals or procedures for prompt review and, where warranted, correction of final administrative actions regarding investment-related matters. The tribunals shall be impartial and independent and not have any substantial interest in the outcome of the matter. The parties to the proceeding should be provided with a reasonable opportunity to support or defend their positions, and the decision should be based on the evidence and submissions of record.

New Zealand-Singapore CEP (2001)	<p>“Article 69 Transparency</p> <p>1. Each Party shall promptly make public all laws, rules, regulations, judicial decisions and administrative rulings of general application pertaining to trade in goods, services, and investment; shall promptly make available administrative guidelines which significantly affect trade in services covered by its commitments; and shall endeavour to make available promptly administrative guidelines which significantly affect trade in goods and investment.</p> <p>2. Each Party shall endeavour to provide opportunity for comment by the other Party on its proposed laws, rules, regulations and procedures affecting trade in goods and services and investments if it is of the view that any such proposed laws, rules, regulations and procedures are likely to affect the rights and obligations of either Party under this Agreement.</p> <p>3. Each Party shall respond promptly to all requests by the other Party for specific information on any of its measures of general application. Each Party shall establish one or more enquiry points to provide specific information upon request on all such measures.</p> <p>4. In view of the importance of transparency of domestic legislation and procedures affecting trade in goods and the supply of services and in investment to the operation of this Agreement, the Parties shall discuss any concerns which may arise in this area at the reviews referred to in Article 68, in order to address means of overcoming such concerns.”</p>
Singapore-Australia (2003) FTA	<p>Chapter 08: Investment</p> <p>“Article 4: Each Party shall promptly make public its laws, regulations and investment policies, and any amendments thereto, of general application that pertain to or affect investments in its territory by investors of the other Party.”</p>

Clearly, transparency provisions have broadened in scope. While some agreements foresee an endeavor to provide opportunity for the *other Party* as home economy to comment on proposed laws, rules, regulations and procedures if they affect rights and obligations in the agreement, and require responses to requests for information on specific measures from the other Party, other agreements open this requirement to private parties or individual investors. Additionally, while earlier provisions referred to laws and policies, the menu of instruments to which transparency provisions apply has broadened, as transparency obligations may apply to not only laws and policies, but also to regulations, (administrative) procedures, administrative rulings, measures, rules and judicial decisions, among others.

Many agreements with this type of transparency provisions include some kind of limitation on the general requirements for specific situations. Table 20 sets out examples contained in the Canada-Chile FTA (1997) and the New Zealand-Singapore CEP (2001).

Additionally, some APEC IIAs have included provisions to clarify that the IIA’s obligations do not prevent an economy from requesting information from an investor. Canada and Chile included the following text in their 1997 FTA:

“Article G-11: Special Formalities and Information Requirements [...]
2. [...] a Party may require an investor of the other Party, or its investment in its territory, to provide routine information concerning that investment

solely for informational or statistical purposes. The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.”

Table 20. Examples of limitations on disclosure of information in IIAs

Canada-Chile FTA (1997)	New Zealand-Singapore CEP (2001)
<p>Chapter O: Exceptions “Article O-05: Disclosure of Information Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.”</p>	<p>“Article 77 Disclosure of Information Nothing in this Agreement shall be construed to require either Party to furnish or allow access to information the disclosure of which it considers: a) would be contrary to its essential security interests; b) is contrary to the public interest as determined by its laws; c) is contrary to any of its laws, including but not limited to those protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions; d) would impede law enforcement; or e) would prejudice legitimate commercial interests of particular enterprises, public or private.”</p>

While it is not an area of domestic legislation, it is worth noting that another area where transparency provisions have increased is in ISDS, where many agreements now provide for public access to hearings and submissions by non-disputing parties (*amicus curiae* submissions), among others.

Domestically, many economies have provisions that require public access to legislation, regulation and administrative processes. Additionally, some economies have requirements for government officials and agencies to provide, when asked, information that is considered of public interest (national security or similar limitations apply). Therefore, transparency provisions in IIAs can sometimes be less a commitment that requires domestic action on the side of a Party, and more a commitment in an international agreement that mirrors domestic requirements. Nevertheless, IIAs tend to recognize that transparency obligations can be burdensome, and have qualifiers such as “to the extent possible” or “wherever possible” for some of the requirements, in recognition of the fact that, despite ongoing efforts, economies may not have the necessary resources and institutional set-ups to meet increasingly ambitious transparency requirements in all respects. An example of this increasing ambition is the shift from commitments to provide the other Party of an agreement with information, to provisions that require answers to individual investors on specific investment measures.

Most economies have transparency-related provisions in their Constitutions or legislation, and undertake standard publication of laws and regulations on a regular basis, facilitated greatly by modern technology and the internet. Some examples of how

economies reflect different elements of transparency in their domestic legal frameworks include:

Australia has adopted the Best Practice Regulation Handbook²⁶, which states that “in general, any policy development process, including proposed new regulation or changes to regulation, will involve consultation with relevant stakeholders, including the main parties affected by the proposal: business, the not-for-profit sector, the community, regulators and other government agencies. Consultation helps to ensure that the full range of impacts is taken into account when assessing how best to solve a problem and the transparency it fosters helps to build trust in the policy process. It is important that consultation be conducted with the attitude that the stakeholders’ views will be listened to and taken seriously, rather than conducted as a ‘box-ticking’ exercise after the policy decision has effectively been made.” Additionally, Australia created the Office of Best Practice Regulation (OBPR) to promote the Government’s objective of improving the effectiveness and efficiency of regulation. The OBPR is a division within the Department of Finance and Deregulation and occupies a “central role in assisting Australian Government departments and agencies to meet the Australian Government’s requirements for best practice regulatory impact analysis and in monitoring and reporting on their performance.”

In **Canada**, all formal public notices, including proposed regulation, regulations and public acts of Parliament and government departments and agencies, are published in the Canada Gazette. Each proposed regulation in the Gazette has a contact name from the department proposing the regulation and a closing date for comments. Canada states the criteria used to evaluate the “net benefit of foreign investments” under review in Section 20 of the Investment Canada Act, and publishes all information on investment promotion programs at a national and provincial level.

China adopted the Legislation Law of the People’s Republic of China in 2000, which requires publication of all laws in the Bulletin of the Standing Committee of National People's Congress and nationally circulated newspapers in a timely manner; of all administrative regulation in the State Council Bulletin and nationally circulated newspapers in a timely manner; and of local, autonomous or special decrees in the Bulletin of the Standing Committee of the People's Congress of the region and the newspapers circulated within such jurisdiction in a timely manner. Additionally, Regulations on Procedures for the Formulation of Administrative Regulations (Decree No. 321 of the State Council of the People's Republic of China, effective as of January 1, 2002) requires that administrative regulations be “detailed but not verbose, logically tight and operable with their articles clear and concrete, and their wording accurate and concise” (article 5). The Decree additionally provides that, “in drafting administrative regulations, in-depth investigations and researches shall be conducted, practical experience shall be summed up and the opinions of the relevant organs, organizations and citizens shall be extensively solicited. Solicitation of opinions may take forms such as forums, appraisal meetings and hearings, etc.” (article 12). The decree further states that, “where a draft for examination directly involves the immediate interests of citizens, legal persons or other organizations, the legislative affairs department of the State Council may

hold hearings to solicit comments from the relevant departments, organizations and citizens” (article 22). These administrative regulations should be published in the State Council Gazette and in newspapers of nation-wide distribution, and take effect 30 days after promulgation.

Japan requires publication of its laws and regulations. Article 7 of Japan’s Constitution states that “the Emperor shall, with the advice and approval of the Cabinet, perform the following acts in matters of state on behalf of the people: (1) Promulgation of amendments of the constitution, laws, cabinet orders and treaties. [...]”.

Article 1 of Japan’s Administrative Procedure Act – Act No. 88 of 1993 states that, “the purpose of this Act is, by providing for common rules concerning procedures for dispositions, administrative guidance and notifications, and procedure for establishing ‘Administrative Orders, etc’, to seek to advance a guarantee of fairness and progress towards transparency (here meaning, that there be clarity in the public understanding of the contents and processes of administrative determinations [...]) [...]”. The Act requires administrative agencies to define criteria (“review standards”) for granting permissions, and requires that they be as concrete as possible and that they be posted at the administrative office that receives the application. Additionally, agencies are requested to respond to requests regarding future applications, and to requests from applicants on progress and expected conclusion of review, and shall provide reasons for denying an application when it is not successful. The Act also provides for advance notification and public comment procedures for "Administrative Orders, etc."

Mexico’s Constitution provides for publication of all laws and decrees, and provides that the right to information will be guaranteed by the State. The Federal Administrative Procedures Law requires publication of all administrative act in the Official Diary of the Federation, and provides that a party in an administrative procedure has the right to request the state of the process (exceptions include information on defense, national security, etc.). The Federal Commission for Regulatory Improvement (COFEMER) was created in 2000 as an administrative body within the Mexican Federal Ministry of Economy to promote transparency in the development and implementation of regulations.

New Zealand’s Acts and Regulations Publication Act of 1989 requires publication of all acts and regulations. Additionally, court decisions are publicly available. The Cabinet Manual on the Development and Approval of Bills provides guidance on the consultation process for proposed legislation and regulation, and states that “effective and appropriate consultation is a key factor in good decision making, good policy, and good legislation” (paragraph 7.24). In some cases, legislation itself imposes specific consultation requirements when drafting and issuing regulations pursuant to that law.

Peru has references both in its Constitution and in Supreme Decree N° 001-2009-JUS that establishes the general obligation of publication, publication of proposed laws and regulations, and obligation to make all legal norms publicly available. Public

entities must allow comments regarding proposed laws and regulations. Article 51 of Peru's Constitution states that "publication is essential to enforce any legal rule of the State".

In addition to the examples of general access to information provided above, many economies have additional freedom of information legislation that provides citizens with a channel to require information from government. Examples include Australia's 1982 Freedom of Information Act, Mexico's 2002 Federal Law on Transparency and Access to Public Governmental Information²⁷, the United States' 1967 Freedom of Information Act (FOIA) and 1996 Electronic Freedom of Information Act Amendments (E-FOIA), and Hong Kong, China's Code on Access to Information that was introduced in March 1995.

Notes

¹ These agreements also include double taxation treaties (DTTs) which are not discussed any further in this study.

² See: <http://www.japanlaw.info/forex/law/mc.htm>

³ Core elements in IIAs have been identified in previous APEC and UNCTAD joint projects (UNCTAD, 2008; APEC 2009).

⁴ See also items numbers 3.03 to 3.11 of the Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies of 1997.

⁵ China WTO Trade Policy Review, WT/TPR/S/199, page 40

⁶ See: <http://www.scjn.gob.mx/RecJur/BibliotecaDigitalSCJN/IndiceBibliotecaDigital/IndiceObrasSCJN/Libros/Paginas/PoliticalConstitutionoftheUnitedMexicanStates.aspx>

⁷ See also items numbers 3.03 to 3.11 of the Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies of 1997 for further relevant options.

⁸ US Free Trade Agreement Implementation Act 2004, No. 120, 2004, An Act to implement the Australia United States Free Trade Agreement, and for other purposes

⁹ Investment Treaties in the Western Hemisphere: A Compendium; see: http://www.ftaa-alca.org/Wgroups/WGIN/English/bit_inte.asp#26

¹⁰ See: http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html?search=ts_regulation_securities+Act_resel

¹¹ See: <http://www.bcentral.cl/eng/about/basic-constitutional-act/law03.htm>

¹² See: http://www.wto.org/english/tratop_e/invest_e/invest_e.htm#trims

¹³ See: http://www.austlii.edu.au/au/legis/cth/consol_act/iaa1974276.txt

¹⁴ See: http://www.hkiac.org/show_content.php?sec=1

¹⁵ Canada Gazette Part 1, January 1, 1994, page 159

¹⁶ See: <http://www.thomas.gov/cgi-bin/bdquery/z?d110:H.R.3688>:

¹⁷ See: <http://www.apec.org/en/About-Us/About-APEC/Achievements-and-Benefits/2010-Bogor-Goals.aspx>

¹⁸ See: <http://www.apec.org/Home/About-Us/How-APEC-Operates/Action-Plans>

¹⁹ See: <http://www.agc.gov.my/Akta/Vol.%208/Act%20397.pdf>

²⁰ See: www.austrade.gov.au

²¹ See: http://www.foreigninvestment.cl/index.php?option=com_content&view=article&id=58&Itemid=109

²² See: <http://www2.bkpm.go.id/contents/general/2/about-us>

²³ See: <http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf>

²⁴ See: http://www.mofa.go.jp/announce/announce/2009/4/1190607_1132.html

²⁵ See: “Implementaría SE comités de mejora de ambiente de negocios en tratados”, <http://mx.finance.yahoo.com/news/Implementar%C3%ADa-SE-comit%C3%A9s-notilt-3148610747.html?x=0>

²⁶ See: <http://www.finance.gov.au/obpr/proposal/handbook/3-preparing-a-regulation-impact-statement.html>

²⁷ See: <http://www.diputados.gob.mx/LeyesBiblio/pdf/244.pdf>

CONCLUSIONS

The relationship between core elements of IIAs and domestic legal frameworks varies with each element and each economy's individual legal and political system. Nevertheless, in general it can be stated that while protection provisions are disciplines and standards that may be reflected at a Constitutional level and are of general application, liberalization commitments are reflected in specific measures that at times affect an individual investor and not the economy as a whole.

Given the thousands of IIAs with protection provisions, it is likely that the legal framework of most economies is consistent with IIA obligations in general terms. Problems normally arise with regard to specific actions or measures that affect a single or group of investors in ways that can breach IIA commitments. Since some of the standards such as FET are by nature a part of international law, one cannot reference a specific piece of domestic legislation that implements them.

As IIAs transition from purely protection instruments to protection and liberalization agreements, the impact on a economy's domestic legal framework is likely to be more complex, and commitments may require statutory or regulatory modifications more often. The discussion becomes especially relevant in a dispute settlement environment, where domestic measures at different levels of government are often at the root of arbitration.

The broad and diverse network of more than 6,000 IIAs with differing levels of ambition in protection and liberalization and the relatively small number of investor-State disputes when compared to the number of agreements, as well as the absence of State-State disputes, seems to indicate that there are no egregious inconsistencies between the international obligations in IIAs and most domestic legal frameworks. While improvements can always be found, from the policy perspective, economies might be interested in consolidating international investment law to have a single reference against which to judge consistency.

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ANNEXES

Annex 1. Examples of transparency elements contained in APEC instruments

APEC non-binding investment principles (1994)	Menu of Options for Investment Liberalization and Business Facilitation (1997)	Leaders' Statement to Implement APEC Transparency Standards, 21 October 2003, Bangkok, Thailand	IFAP to further promote investment in APEC economies (2007)
<p><u>“Transparency</u> 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.”</p>	<p>“2.01- Make available to investors timely updates of changes to investment regimes, including via the APEC Secretariat (who will use it for the APEC investment guidebook). 2.02- Publish and/or make widely available through other means, on a timely basis, information on an economy’s investment code, investment laws and regulations, and procurement procedures, with an eye to ensuring transparency in the administration of investment laws, regulations and procedures at federal/central, provincial/state and local authority levels. 2.03- If screening is used, publish and/or make widely available through other means the guidelines for evaluating and scoring projects for their approval. 2.04- Conduct briefings (in appropriate fora) on the</p>	<p><u>“Transparency Standards on Investment</u> 1. Each Economy will, in the manner provided for in paragraph 1 of the Leaders’ Statement, ensure that its investment laws, regulations, and progressively procedures and administrative rulings of general application ("investment measures") are promptly published or otherwise made available in such a manner as to enable interested persons and other economies to become acquainted with them. 2. In accordance with paragraph 2 of the Leaders’ Statement, each Economy will, to the extent possible, publish in advance any investment measures proposed for adoption and provide a reasonable opportunity for public comment. 3. In accordance with paragraph 3 of the Leaders’ Statement, upon request from an interested person or another Economy, each Economy will: (a) endeavor to promptly provide information and respond to questions pertaining to any actual or proposed investment measures referred to in paragraph 1 above; and (b) provide contact points for the office or official responsible for the subject matter of the questions and assist, as necessary, in facilitating communications with the requesting economy. 4. Where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding investment matters covered by these standards, that: (a) provide for tribunals or panels that are impartial and</p>	<p>“Promote accessibility and transparency in the formulation and administration of investment-related policies</p> <ul style="list-style-type: none"> ▪ Publish laws, regulations, judicial decisions and administrative rulings of general application, including revisions and up-dates. ▪ Adopt centralised registry of laws and regulations and make this available electronically. ▪ Establish a single window or special enquiry point for all enquiries concerning investment policies and applications to invest ▪ Make available all investment-related regulations in clear simple language, preferably in languages commonly used by business ▪ Establish an Investment Promotion Agency (IPA), or similar body, and make its existence widely known ▪ Make available to investors all rules and other information relating to investment

	<p>current investment policies and future directions to be undertaken by the government.</p> <p>2.05- Give advance notice of proposed regulations and laws, and provide an opportunity for public comment.</p> <p>2.06- Clarify procedures and practices regarding application, registration, government licensing and procurement by:</p> <ul style="list-style-type: none"> -- Publishing (and widely disseminating) clear and simple instructions, and an explanation of the process (the steps) involved in applying/bidding/registering; -- Publishing (and widely disseminating) definitions of criteria for assessment of investment proposals; -- Publishing (and widely disseminating) contact points for inquiries on standards, technical regulations, and conformity requirements; -- Conduct periodic reviews of prior authorization requirement procedures to ensure they are simplified and transparent; -- Make available to investors all rules and information relating to investment promotion schemes.” 	<p>independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the investment matter;</p> <p>(b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;</p> <p>(c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and</p> <p>(d) ensure subject to appeal or further review under domestic law, that such decisions will be implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.</p> <p>5. If screening of investments is used based on guidelines for evaluating projects for approval and for scoring such projects if scoring is used, in accordance with paragraph 1 of the Leaders’ Statement each Economy will publish and/or make publicly available through other means those guidelines.</p> <p>6. Each Economy will maintain clear procedures regarding application, registration, and government licensing of investments by:</p> <p>(a) publishing and/or making available clear and simple instructions, and an explanation of the process (the steps) involved in applying/government licensing/registering; and</p> <p>(b) publishing and/or making available definitions of criteria for assessment of investment proposals.</p> <p>7. Where prior authorization requirement procedures exist, each Economy will conduct reviews at the appropriate time to ensure that such procedures are simple and transparent.</p> <p>8. Each Economy will make available to investors all rules and other appropriate information relating to investment promotion programs.</p> <p>9. When negotiating regional trade agreements and free trade agreements that contain provisions with an investor/state dispute settlement mechanism, each Economy should consider whether or not to include transparency provisions.</p> <p>10. Each Economy will participate fully in APEC-wide efforts to update the APEC Investment Guidebook.”</p>	<p>promotion and incentive schemes</p> <ul style="list-style-type: none"> ▪ Allow investors to choose their form of establishment within legislative and legal frameworks. ▪ Ensure transparency and clarity in investment-related laws ▪ Establish an APEC-wide website or e-portal to replace the hard copy publication the APEC Investment Guidebook (IEG) ▪ Encourage on-line enquiries and on-line information on all foreign investment issues ▪ Publish and/or make widely available screening guidelines for assessing investment proposals ▪ Maintain a mechanism to provide timely and relevant advice of changes in procedures, applicable standards, technical regulations and conformance requirements ▪ To the extent possible, provide advance notice of proposed changes to laws and regulations and provide an opportunity for public comment ▪ Explore the possibility of using the international benchmarks on a voluntary basis as a reference point for peer dialogue and measuring progress”
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Annex 2. APEC Declaration of Common Resolve - the "Bogor" Declaration (1994)

1994 Leaders' Declaration

Bogor Declaration - APEC Economic Leaders' Declaration of Common Resolve

1. We, the economic leaders of APEC, came together at Bogor, Indonesia today to chart the future course of our economic cooperation which will enhance the prospects of an accelerated, balanced and equitable economic growth not only in the Asia-Pacific region, but throughout the world as well.

2. A year ago on Blake Island in Seattle, USA, we recognized that our diverse economies are becoming more interdependent and are moving toward a community of Asia-Pacific economies. We have issued a vision statement in which we pledged:

- * to find cooperative solutions to the challenges of our rapidly changing regional and global economy;
- * to support an expanding world economy and an open multilateral trading system;
- * to continue to reduce barriers to trade and investment to enable goods, services and capital to flow freely among our economies;
- * to ensure that our people share the benefits of economic growth, improve education and training, link our economies through advances in telecommunications and transportation, and use our resources sustainably.

3. We set our vision for the community of Asia-Pacific economies based on a recognition of the growing interdependence of our economically diverse region, which comprises developed, newly industrializing and developing economies. The Asia-Pacific industrialized economies will provide opportunities for developing economies to increase further their economic growth and their level of development. At the same time developing economies will strive to maintain high growth rates with the aim of attaining the level of prosperity now enjoyed by the newly industrializing economies. The approach will be coherent and comprehensive, embracing the three pillars of sustainable growth, equitable development and national stability. The narrowing gap in the stages of development among the Asia-Pacific economies will benefit all members and promote the attainment of Asia-Pacific economic progress as a whole.

4. As we approach the twenty-first century, APEC needs to reinforce economic cooperation in the Asia-Pacific region on the basis of equal partnership, shared responsibility, mutual respect, common interest, and common benefit, with the objective of APEC leading the way in:

- * strengthening the open multilateral trading system;
- * enhancing trade and investment liberalization in the Asia-Pacific; and
- * intensifying Asia-Pacific development cooperation.

5. As the foundation of our market-driven economic growth has been the open multilateral trading system, it is fitting that APEC builds on the momentum generated by the outcome of the Uruguay Round of Multilateral Trade Negotiations and takes the lead in strengthening the open multilateral trading system.

We are pleased to note the significant contribution APEC made in bringing about a successful conclusion of the Uruguay Round. We agree to carry out our Uruguay Round commitments fully and without delay and call on all participants in the Uruguay Round to do the same.

To strengthen the open multilateral trading system we decide to accelerate the implementation of our Uruguay Round commitments and to undertake work aimed at deepening and broadening the outcome of the Uruguay Round. We also commit ourselves to our continuing process of unilateral trade and investment liberalization. As evidence of our commitment to the open multilateral trading system we further agree to a standstill under which we will endeavor to refrain from using measures which would have the effect of increasing levels of protection.

We call for the successful launching of the World Trade Organization (WTO). Full and active participation in and support of the WTO by all APEC economies is key to our ability to lead the way in strengthening the multilateral trading system. We call on all non-APEC members of the WTO to work together with APEC economies toward further multilateral liberalization.

6. With respect to our objective of enhancing trade and investment in the Asia-Pacific, we agree to adopt the long-term goal of free and open trade and investment in the Asia-Pacific. This goal will be pursued promptly by further reducing barriers to trade and investment and by promoting the free flow of goods, services and capital among our economies. We will achieve this goal in a GATT-consistent manner and believe our actions will be a powerful impetus for further liberalization at the multilateral level to which we remain fully committed.

We further agree to announce our commitment to complete the achievement of our goal of free and open trade and investment in the Asia-Pacific no later than the year 2020. The pace of implementation will take into account differing levels of economic development among APEC economies, with the industrialized economies achieving the goal of free and open trade and investment no later than the year 2010 and developing economies no later than the year 2020.

We wish to emphasize our strong opposition to the creation of an inward-looking trading bloc that would pert from the pursuit of global free trade. We are determined to pursue free and open trade and investment in the Asia-Pacific in a manner that will encourage and strengthen trade and investment liberalization in the world as a whole. Thus, the outcome of trade and investment liberalization in the Asia-Pacific will not only be the actual reduction of barriers among APEC economies but also between APEC economies and non-APEC economies. In this respect we will give particular attention to our trade with non-APEC developing countries to ensure that they will also benefit from our trade and investment liberalization, in conformity with GATT/WTO provisions.

7. To complement and support this substantial process of liberalization, we decide to expand and accelerate APEC'S trade and investment facilitation programs. This will promote further the flow of goods, services, and capital among APEC economies by eliminating administrative and other impediments to trade and investment.

We emphasize the importance of trade facilitation because trade liberalization efforts alone are insufficient to generate trade expansion. Efforts at facilitating trade are important if the benefits of trade are to be truly enjoyed by both business and consumers. Trade facilitation has also a pertinent role in furthering our goal of achieving the fullest liberalization within the global context.

In particular we ask our ministers and officials to submit proposals on APEC arrangements on customs, standards, investment principles and administrative barriers to market access.

To facilitate regional investment flows and to strengthen APEC's dialogue on economic policy issues, we agree to continue the valuable consultations on economic growth strategies, regional capital flows and other macro-economic issues.

8. Our objective to intensify development cooperation among the community of Asia-Pacific economies will enable us to develop more effectively the human and natural resources of the Asia-Pacific region so as to attain sustainable growth and equitable development of APEC economies, while reducing economic disparities among them, and improving the economic and social well-being of our people. Such efforts will also facilitate the growth of trade and investment in the Asia-Pacific region.

Cooperative programs in this area cover expanded human resource development (such as education and training and especially improving management and technical skills), the development of APEC study centers, cooperation in science and technology (including technology transfer), measures aimed at promoting small and medium scale enterprises and steps to improve economic infrastructure, such as energy, transportation, information, telecommunications and tourism, with the aim of contributing to sustainable development.

Economic growth and development of the Asia-Pacific region has mainly been market-driven, based on the growing interlinkages between our business sectors in the region to support Asia-Pacific economic cooperation. Recognizing the role of the business sector in economic development, we agree to integrate the business sector in our programs and to create an ongoing mechanism for that purpose.

9. In order to facilitate and accelerate our cooperation, we agree that APEC economies that are ready to initiate and implement a cooperative arrangement may proceed to do so while those that are not yet ready to participate may join at a later date.

Trade and other economic disputes among APEC economies have negative implications for the implementation of agreed cooperative arrangements as well as for the spirit of

cooperating. To assist in resolving such disputes and in avoiding its recurrent, we agree to examine the possibility of a voluntary consultative dispute mediation service, to supplement the WTO dispute settlement mechanism, which should continue to be the primary channel for resolving disputes.

10. Our goal is an ambitious one. But we are determined to demonstrate APEC's leadership in fostering further global trade and investment liberalization. Our goal entails a multiple year effort. We will start our concerted liberalization process from the very date of this statement.

We direct our ministers and officials to immediately begin preparing detailed proposals for implementing our present decisions. The proposals are to be submitted soon to the APEC economic leaders for their consideration and subsequent decisions. Such proposals should also address all impediments to achieving our goal. We ask ministers and officials to give serious consideration in their deliberations to the important recommendations contained in the reports of the Eminent Persons Group and the Pacific Business Forum.

11. We express our appreciation for the important and thoughtful recommendations contained in the reports of the Eminent Persons Groups and the Pacific Business Forum. The reports will be used as valuable points of reference in formulating policies in the cooperative framework of the community of Asia-Pacific economies. We agree to ask the two groups to continue with their activities to provide the APEC economic leaders with assessments of the progress of APEC and further recommendations for stepping up our cooperation.

We also ask the Eminent Persons Group and the Pacific Business Forum to review the interrelationships between APEC and the existing sub-regional arrangements (AFTA, ANZERTA and NAFTA) and to examine possible options to prevent obstacles to each other and to promote consistency in their relations.

Annex 3: APEC Non-Binding Investment Principles (1994)

APEC NON-BINDING INVESTMENT PRINCIPLES

Jakarta, November 1994

In the spirit of APEC's underlying approach of open regionalism,

Recognizing the importance of investment to economic development, the stimulation of growth, the creation of jobs and the flow of technology in the Asia-Pacific region,

Emphasizing the importance of promoting domestic environments that are conducive to attracting foreign investment, such as stable growth with low inflation, adequate infrastructure, adequately developed human resources, and protection of intellectual property rights,

Reflecting that most APEC economies are both sources and recipients of foreign investment,

Aiming to increase investment including investment in small and medium enterprises, and to develop supporting industries,

Acknowledging the diversity in the level and pace of development of member economies as may be reflected in their investment regimes, and committed to ongoing efforts towards the improvement and further liberalization of their investment regimes,

Without prejudice to applicable bilateral and multilateral treaties and other international instruments,

Recognizing the importance of fully implementing the Uruguay Round TRIMs Agreement,

APEC members aspire to the following non-binding principles:

Transparency

- 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.

Non-discrimination between Source Economies

- Member economies will extend to investors from any economy treatment in relation to the establishment, expansion and operation of their investments that is no less favourable than that accorded to investors from any other economy in like situations, without prejudice to relevant international obligations and principles.

National Treatment

- With exceptions as provided for in domestic laws, regulations and policies, member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favourable than that accorded in like situations to domestic investors.

Investment Incentives

- Member economies will not relax health, safety, and environmental regulations as an incentive to encourage foreign investment.

Performance Requirements

- Member economies will minimize the use of performance requirements that distort or limit expansion of trade and investment.

Expropriation and Compensation

- Member economies will not expropriate foreign investments or take measures that have a similar effect, except for a public purpose and on a non-discriminatory basis, in accordance with the laws of each economy and principles of international law and against the prompt payment of adequate and effective compensation.

Repatriation and Convertibility

- Member economies will further liberalise towards the goal of the free and prompt transfer of funds related to foreign investment, such as profits, dividends, royalties, loan payments and liquidations, in freely convertible currency.

Settlement of Disputes

- Member economies accept that disputes arising in connection with a foreign investment will be settled promptly through consultations and negotiations between the parties to the dispute or, failing this, through procedures for arbitration in accordance with members' international commitments or through other arbitration procedures acceptable to both parties.

Entry and Sojourn of Personnel

- Member economies will permit the temporary entry and sojourn of key foreign technical and managerial personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations.

Avoidance of Double Taxation

- Member economies will endeavour to avoid double taxation related to foreign investment.

Investor Behavior

- Acceptance of foreign investment is facilitated when foreign investors abide by the host economy's laws, regulations, administrative guidelines and policies, just as domestic investors should.

Removal of Barriers to Capital Exports

- Member economies accept that regulatory and institutional barriers to the outflow of investment will be minimized.

Annex 4. Menu of Options for Investment Liberalization and Business Facilitation to Strengthen APEC Economies (1997) for Voluntary Inclusion in Individual Action Plans

APEC leaders and ministers at Bogor, Osaka, Subic, and Vancouver have committed their economies to create free and open investment by 2010 and 2020. They endorse Individual Action Plans (IAPs) as a core instrument in this process. They have called for transparency in, and the annual improvement of IAPs. ABAC has also called on APEC economies to make progress in the investment area.

In response to both government and business, the Investment Experts Group, at St. Johns, Canada, undertook to compile a "menu of options" for helping economies to identify policy measures that member economies may include unilaterally in their IAPs for implementation of this objective. There was a consensus that the project should focus on concrete measures, rather than on continued philosophical debate. APEC ministers endorsed the "menu" initiative at Vancouver.

With these instructions in mind, the following document is a non-exhaustive "master menu" of investment-liberalizing and business-facilitating measures from which economies may voluntarily select any of a number of options to make progress toward creating a free and open investment regime. It is intended as a reference tool that economies may refer to when updating their IAPs.

The APEC approach to liberalization and facilitation of trade and investment, as reiterated by APEC Leaders at Vancouver, recognizes the diversity that exists among APEC economies. This "menu of options" is consistent with this recognition of diversity, providing members with a broad range of choices suitable for different circumstances. The items are not prescriptive and, where chosen, may be modified to suit particular circumstances. The menu is not designed to set out the steps in the liberalization process and will evolve over time.

The IEG intends to update this menu on a regular basis, starting in 1999, so as to capture the benefit of APEC economies' increasing experience and changing views.

Item No.	Description
GENERAL	
1.01	<p>Broaden definitions of investment and foreign investment in existing legislation, regulations and administrative procedures to permit the widest variety of forms of investment and allow for newly emerging forms to be covered, without a need for future changes in domestic legislation/regulations.</p> <p>-- The definition might include – illustratively - not just new ("green field") investments, but also acquisition of shares of domestic enterprises, management contracts, long-term leases, all forms of business organization</p>

	(e.g. wholly owned, subsidiaries, partnerships, branches, joint ventures, smart partnerships, strategic alliances, venture capital), certain kinds of debt instruments, intellectual property, etc.
1.02	Permit and promote all forms of investment through means other than, or additional to, broadening the definitions of investment and foreign investment in existing legislation, regulations and administrative procedures.
1.03	Commit to locking in current treatment for investors in specific sectors (i.e. standstill on restrictions).
On prior authorization requirements:	
1.04	Eliminate or phase out prior authorization requirements. If appropriate, replace them with post-establishment notification.
1.05	Make approval within any existing prior-authorization mechanism automatic except in limited specified situations.
1.06	Raise the threshold (value of an investment) above which prior authorization is required. If appropriate, announce progressive raising of the threshold, according to a schedule with a certain date to eliminate most or all prior authorization requirements.
1.07	Limit the requirement for prior authorization to selected sectors. If appropriate, replace it with post-establishment notification.
Involving other economies:	
1.08	Sign or establish (or, as appropriate, sign or establish additional) bilateral, regional, and/or multilateral agreements or arrangements for the protection of investment that provide commitments to the current level of protection and openness for investors/ investment.
1.09	Sign or establish (or, as appropriate, sign or establish additional) bilateral, regional and/or multilateral agreements or arrangements for the protection of investment with enhanced protection and openness for investors/ investments (e.g. fewer restricted sectors of an economy, fewer restrictions within sectors, stronger mechanisms for resolving disputes).
TRANSPARENCY	
2.01	Make available to investors timely updates of changes to investment regimes, including via the APEC Secretariat (who will use it for the APEC investment guidebook).
2.02	Publish and/or make widely available through other means, on a timely basis, information on an economy's investment code, investment laws and regulations, and procurement procedures, with an eye to ensuring transparency in the administration of investment laws, regulations and procedures at federal/central, provincial/state and local authority levels.
2.03	If screening is used, publish and/or make widely available through other means the guidelines for evaluating and scoring projects for their approval.
2.04	Conduct briefings (in appropriate fora) on the current investment policies and future directions to be undertaken by the government.
2.05	Give advance notice of proposed regulations and laws, and provide an opportunity for public comment.

2.06	<p>Clarify procedures and practices regarding application, registration, government licensing and procurement by:</p> <ul style="list-style-type: none"> -- Publishing (and widely disseminating) clear and simple instructions, and an explanation of the process (the steps) involved in applying/bidding/registering; -- Publishing (and widely disseminating) definitions of criteria for assessment of investment proposals; -- Publishing (and widely disseminating) contact points for inquiries on standards, technical regulations, and conformity requirements; -- Conduct periodic reviews of prior authorization requirement procedures to ensure they are simplified and transparent; -- Make available to investors all rules and information relating to investment promotion schemes.
<p>NON-DISCRIMINATION <u>Related to MFN</u></p>	
3.01	<p>Commit to MFN treatment economy-wide, except in a few limited cases as may be specified by individual member economies, immediately or over a publicly announced period of time.</p>
3.02	<p>For economies that have already committed to MFN treatment, review where MFN exceptions to it taken in the past can be eliminated or reduced (in other words, review whether the "few limited cases" of exceptions to MFN can be narrowed even further).</p>
<p><u>Related to National Treatment or both MFN and National Treatment</u> <u>Sectors</u></p>	
3.03	<p>Extend national treatment now (or starting on a particular date) in one or more sectors.</p>
3.04	<p>Extend national treatment economy-wide except in a few limited cases now, or starting on a certain date; or</p>
3.05	<p>Progressively extend national treatment to one more sectors.</p>
3.06	<p>Open additional sectors to participation by foreign investors, or permit foreign investment economy-wide with only limited exceptions. In other words, reduce the size of the list of sectors that are closed or partially restricted to foreign investment.</p>
3.07	<p>Eliminate or phase out sectoral restrictions on a foreign investment.</p>
3.08	<p>Review existing agreements, treaties, and laws to see if any exceptions to national treatment can be eliminated.</p>
<p><u>Ownership</u></p>	
3.09	<p>Allow all investors to choose their form of establishment within legislative and legal frameworks.</p>
3.10	<p>Update regulations to eliminate joint venture requirements for establishment.</p>
3.11	<p>Permit greater foreign equity ownership in sectors partially opened to foreign investment, or permit greater foreign equity ownership economy-wide. -- Prepare a schedule now for future increases in foreign equity ownership. -- Accelerate implementation of dates for liberalizing sectors where possible.</p>
3.12	<p>Eliminate or phase out conditions for foreign ownership in relation with export ratios or domestic sales.</p>

3.13	Reduce areas with joint-venture criteria under investment promotion schemes to allow greater foreign participation.
3.14	Implement (and announce) a policy of not requiring the divestiture or dilution of the ownership of investments on the basis of nationality. Eliminate or phase out requirements to transfer ownership to local firms over a period of time.
3.15	Eliminate or phase out restrictions for foreign investors on the establishment of local branches.
3.16	Eliminate or phase out restrictions for foreign investors to diversity operations.
3.17	Eliminate or phase out restrictions on foreigners with respect to operational permits and licenses.
3.18	Where a time period for foreign investors to find local partners is specified, extend the period of time.
<i>Finance and Capitalization</i>	
3.19	Update regulations to reduce or eliminate restrictions on foreign borrowing by corporations.
3.20	Liberalize foreigners' access to domestic financial instruments (e.g. money market instruments, corporate bond markets).
3.21	With respect to the entry of foreign investment, eliminate or phase out requirements to deposit certain guarantees for foreign investors.
3.22	Reduce, reduce progressively, or eliminate minimum capitalization requirements in sectors where such capitalization requirements are not needed for prudential reasons.
3.23	Eliminate or phase out subsequent additional investment or reinvestment requirements for foreign investors.
3.24	Open existing investment incentive programs to participation by foreign investors, so they are equally available to domestic as well as foreign investors.
<i>Other Measures</i>	
3.25	Eliminate or ease discriminatory restrictions on imports needed to support foreign investment.
3.26	Change policies, guidance, regulations, or laws to eliminate pricing by state-designated monopolies that is discriminatory on the basis of nationality.
3.27	Change policies, guidance, regulations or laws to eliminate discriminatory access to local raw materials and inputs.
EXPROPRIATION AND COMPENSATION	
4.01	Consistent with international law standards/principles, limit permissible expropriation to cases involving a public purpose where expropriation is undertaken in a non-discriminatory manner, under due process of law, and accompanied by payment of prompt, adequate and effective compensation. -- Take steps to amend expropriation laws and regulations based on the above-mentioned standards/principles of international law with respect to expropriation.
4.02	Included in bilateral, regional or multilateral investment treaties, agreements,

	and/or arrangements a commitment on compensation in cases of expropriation.
4.03	To improve transparency, define, publish and disseminate to investors the relevant investment treaties and arrangements.
PROTECTION FROM STRIFE AND SIMILAR EVENTS	
5.01	Decide - and, as possible, commit in investment agreements/arrangements between governments and private investors and in bilateral/multilateral government-to-government treaties, agreements, and/or arrangements - that the government will accord treatment that is non-discriminatory on the basis of nationality to investments with respect to losses that investments may suffer in the government's territory that are due to war, other armed conflict, revolution, national emergency, insurrection, civil disturbance, or other similar events.
TRANSFERS OF CAPITAL RELATED TO INVESTMENTS	
6.01	Remove or reduce restrictions on the transfer of funds related to foreign investment, such as profits, dividends, royalties, loan payments, interest, infusions of additional financial resources after the initial investment has been made, and proceeds from liquidations - all in a freely convertible or a freely usable currency. -- Eliminate or phase out restrictions that impede recovery of profit, such as ceilings on royalties, technical assistance fees or special taxes, restrictions on access to foreign exchange, and control over the allocation of foreign currencies.
6.02	Make a binding commitment, in treaties, agreements or arrangements, to eliminate or progressively reduce restrictions on the transfers of funds related to foreign investment, such as profits, dividends, royalties, loan payments, interest, infusions of additional financial resources after the initial investment has been made, and proceeds from liquidation - all in freely convertible or freely usable currencies.
6.03	Guarantee the right to transfer capital related to an investment in and out of an economy, without delay and at market rates of exchange, with only limited exceptions.
PERFORMANCE REQUIREMENTS	
7.01	Publish and implement a phase-out plan for WTO TRIMs-inconsistent programs identified on TRIMs illustrative list.
7.02	Reach consistency with WTO TRIMs' illustrative list by 2000. Take steps to accelerate implementation of phase-out plans where possible.
7.03	Eliminate, phase out, or relax unilaterally and/or through government-to-government agreements and treaties, on an economy-wide or sectoral basis, requirements such as: -- local hiring requirements, -- local training requirements, -- requirements to manufacture locally, -- local sales requirements,

	<ul style="list-style-type: none"> -- required technology transfer, -- required local research and development, -- export requirements (e.g. those expressed as requirements to generate foreign exchange or achieve a particular export target).
ENTRY AND STAY OF PERSONNEL	
8.01	Consistent with an economy's visa laws regarding the entry and stay of personnel, allow the temporary entry and stay of personnel needed to establish, develop, administer or advise on the operation of an investment of theirs (i.e. investor and key managerial or technical personnel and advisers).
8.02	Offer visas for investors that facilitate entry and reentry (or identify other ways, consistent with domestic laws and policy, to facilitate investors' ability to enter and reenter for investment purposes).
8.03	Take steps to permit investors/project sponsors to hire the top managerial advisory talent of their choice, regardless of nationality.
8.04	Take steps to permit investors/project sponsors to hire the top technical. and/or advisory talent of their choice, regardless of nationality.
SETTLEMENT OF DISPUTES	
9.01	Develop effective mechanisms for resolving disputes and mechanisms for enforcing the solutions found to those disputes.
9.02	Take steps to become a member of the International Convention on the Settlement of Investment Disputes (ICSID) and/or other widely recognized international arbitration bodies.
	<i>Note: We defer to the APEC Dispute Mediation Experts Group for specific menu options for IAPs related to improvements in dispute mediation.</i>
INTELLECTUAL PROPERTY	
10.01	Develop adequate protection for intellectual property.
10.02	Provide protection for intellectual property that at least meets the standards established in the WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS).
10.03	<p>Provide adequate and effective enforcement measures, including as appropriate, administrative, civil, and criminal, against infringement of intellectual property rights.</p> <ul style="list-style-type: none"> -- Increase cooperation among agencies responsible for the administration and enforcement of intellectual property matters and between IPR agencies and those responsible for regulatory issues. -- Provide and streamline, as appropriate, judicial and administrative procedures to ensure timely processing of enforcement actions. -- Increase public education about the importance of intellectual property and its role in the economy as well as the need for effective and efficient enforcement of intellectual property rights. -- Enhance cooperative relationship between different law enforcement agencies. -- Ensure close and efficient cooperation between enforcement agencies

	and the right holders.
10.04	Develop and implement programs that require official agencies in member economies to respect intellectual rights in their operations, such as by using only legitimate software in an authorized manner. -- To the extent possible, provide an adequate budget for purchase of legitimate software.
10.05	Develop/further improve intellectual property regimes: -- Where possible, give effect to international norms for intellectual property protections. -- To the extent possible, cooperate with other nations in international for a.
<i>Note: We defer to the APEC Intellectual Property Rights(IPR) Group for specific menu options for IAPs related to IPR improvements.</i>	
AVOIDANCE OF DOUBLE TAXATION	
11.01	Sign, where appropriate, bilateral avoidance of double taxation agreements that are in conformity with international norms. Expand coverage of such agreements as appropriate.
COMPETITION POLICY AND REGULATORY REFORM	
12.01	Ensure consistency between investment policies and competition and regulatory reform policy.
<i>Note: We defer to the APEC Competition Policy Group for specific menu options for IAPs related to improving competition.</i>	
BUSINESS FACILITATING MEASURES TO IMPROVE THE DOMESTIC BUSINESS ENVIRONMENT	
13.01	Reduce discriminatory use of bureaucratic discretion, by means such as: -- preparing and distributing written in-house guidelines for administrative practices related to the handling of applications, registrations, licensing, etc. -- establishing in-house decision appeal mechanisms, as well as appeal mechanisms available to the public. 13.02 Streamline application, registration, government licensing and government procurement procedures by: -- simplifying forms; -- simplifying the submission (e.g. permitting electronic submission, or centralizing approval offices in a "one-stop shop"); -- shortening processing time of such applications/registrations, and -- reducing unnecessary steps.
13.03	Take positive steps to assist investors by measures such as: -- establishing an office to serve as a clearinghouse (one-stop agency/unit) for interested investors to learn market opportunities and potential investment partners; -- providing a network of all the government agencies that the investors or businesspersons have contact with in doing investments; -- establishing/designating one government agency to handle investors' complaints (e.g. investment ombudsman).
13.04	Examine the role and effects of investment incentives at all levels of government: federal/central, state/provincial and local.
13.05	Offer incentives which are voluntary, non-discriminatory, and limited in

	<p>duration, such as:</p> <ul style="list-style-type: none"> -- tax breaks, -- loans guarantees, -- grants, subsidies and industrial development bonds, -- employment training programs, -- programs aimed at helping companies achieve greater efficiency, -- WTO-consistent export promotion programs, -- small business development, -- high technology development programs, -- measures to support development of new industries, -- industrial linkage programs, -- mobilization of domestic resources.
13.06	<p>Introduce measures to assist companies seeking to achieve greater efficiency such as:</p> <ul style="list-style-type: none"> -- zero inventory -- just in time program -- other related programs
13.07	<p>Establish legal and taxation systems in areas such as stock exchanges, corporate division and mergers and acquisitions to enable flexible corporate reorganization.</p>
13.08	<p>Introduce accounting and financial reporting systems that follow internationally accepted accounting standards.</p>
13.09	<p>Develop and streamline bankruptcy law systems that facilitate corporate reorganization.</p>
13.10	<p>Establish a financial system that enables a variety of financing and capital raising methods.</p>
13.11	<p>Strengthen and promote improved standards of corporate governance.</p>
13.12	<p>Develop a labor market that facilitates domestic labor mobility, taking into account national labor market conditions and policies.</p>
13.13	<p>Improve standards of professional services, such as legal and accounting services.</p>
TECHNOLOGY TRANSFER	
14.01	<p>Improve the transparency of related laws and regulations.</p>
14.02	<p>Reduce the restrictions on the transfer of technology consistent with the protection of essential security interests (for example by modifying as appropriate existing laws and regulations) to facilitate the flow of technology for the economic development of member economies.</p>
14.03	<p>Develop legislation, regulations and measures for the adequate and effective protection of technology and related interests arising from technology transfer.</p>
VENTURE CAPITAL AND START-UP COMPANIES	
15.01	<p>Introduce measures to assist businesses in different stages including start-up companies seeking equity funding, such as:</p> <ul style="list-style-type: none"> -- establishment of a legal and taxation system to assist the development of the venture capital industry and investment banking; and -- establishment of sound and transparent initial public offering (IPO)

	markets for small and medium enterprises (SMEs).
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Annex 5. APEC Investment Facilitation Action Plan (IFAP)

APEC Investment Facilitation Action Plan (IFAP)
2008/MRT/R/004, Agenda Item: 4

Introduction – the benefits of investment

There is strong international consensus on the benefits of investment, across the spectrum of its activities: from tangible assets to intellectual property. Such investment drives economic productivity, builds jobs, raises incomes, strengthens trade flows and spreads international best technologies and practices. Investment bolsters economic growth for developed and developing economies alike.

APEC's member economies recognise the significant economic benefits of investment and are active in promoting investment and facilitating cross-border investment flows. Facilitating investment requires work: a concerted national and international effort to create and sustain the most conducive climate for investment

APEC has been instrumental in this effort in the Asia-Pacific region beginning with its adoption in 1994 of the non-binding investment principles. These are designed to improve and further liberalise investment regimes and they include measures on facilitation. To reinforce APEC's work in this area, in 2007 in Sydney APEC Leaders agreed to the development of an Investment Facilitation Action Plan (IFAP) aimed at further promotion of investment in APEC member economies. Effective investment facilitation can make a significant contribution to the sort of broader investment climate reform efforts widely practiced by APEC member economies.

What is investment facilitation?

To harness the advantages of foreign investment, it is critical that governments have investment procedures in place that do not unnecessarily increase the costs or risk of doing business, or constrain business competition (which individually or collectively lower productivity and growth). Investment facilitation refers to actions taken by governments designed to attract foreign investment and maximise the effectiveness and efficiency of its administration through all stages of the investment cycle.

Investment facilitation covers a wide range of areas, all with the ultimate focus on allowing investment to flow efficiently and for the greatest benefit. Transparency, simplicity and predictability are among its most important principles. The costs of opacity far outweigh the costs of enhancing transparency. Investors look for an investment environment that is stable, and that offers international best practice standards of protection, including the swift and equitable resolution of investment disputes.

A sound investment facilitation strategy ensures that all investment applications are dealt with expeditiously, fairly and equitably. Investment facilitation also requires creating and

maintaining transparent and sound administrative procedures that apply for the lifetime of the investment, including effective deterrents to corrupt practices. Finally, investment facilitation is enhanced by the availability of quality physical infrastructure, high-standard business services, talented and flexible labour forces, and the sound protection of property rights.

Multilateral Investment Facilitation

Several multilateral organisations have active programs in support of strengthening facilitation practices as part of broader investment promotion policies. The World Bank is at the forefront of these efforts, providing information services and diversified technical assistance to help governments and relevant intermediaries involved in promoting investment enhance their ability to respond effectively to investor needs.

UNCTAD analyses trends in FDI and their impact on development, compiles data on FDI, provides advisory services and training on international investment issues, helps developing countries improve policies and institutions that deal with FDI, and assists these countries to participate in international negotiations on investment. The OECD has developed investment policy instruments, such as the Framework for Investment Policy Transparency and the Policy Framework for Investment, to assist governments in developing frameworks for investment facilitation.

APEC's IFAP is designed constructively to complement these existing international efforts. It is a consensus plan on investment facilitation that reflects the specificities and priorities of APEC members. While it is non-binding, the IFAP reinforces APEC's commitment to significantly enhanced regional economic integration.

APEC and investment facilitation

Since its inception in 1989, APEC has emphasised the importance of investment facilitation through practical activities in its work program. In 1995, APEC Leaders adopted the Bogor Goals of free and open trade and investment in the Asia-Pacific region by 2020. At the same time they committed to accelerate APEC's trade and investment facilitation programs. Investment facilitation accordingly is one of the aims of the 1995 Osaka Action Agenda (OAA).

APEC member economies are continuing efforts to enhance transparency of investment regimes, improve investment climates and encourage and facilitate free and open investment in the region. The 2007 report on Strengthening Regional Economic Integration emphasises the need to improve further the investment climate in APEC member economies and refocuses APEC's investment liberalisation and facilitation agenda on concrete initiatives that accelerate regional economic integration and reduce behind-the-border barriers.

Among APEC's achievements that have included investment facilitation so far are:

- APEC Non-Binding Investment Principles (1994);
- Options for Investment Liberalisation and Business Facilitation to Strengthen APEC Economies (1997);
- Guide to the Investment Regimes of APEC Member Economies (6th edition, 2007); and
- Study on Enhancing Investment Liberalisation and Facilitation in Economic Development in the Asia-Pacific Region, which examined ways to reduce ‘behind-the-border’ barriers to domestic investment.

These initiatives were undertaken in recognition of the diversity that exists among APEC member economies, and they provide members with a broad range of policy choices suitable for different economic circumstances.

Aims of APEC’s IFAP

The main aims of the IFAP are to:

- ~ strengthen regional economic integration;
- ~ strengthen the competitiveness and sustainability of economic growth of APEC’s member economies;
- ~ expand prosperity and employment opportunities in the APEC region; and
- ~ make further progress toward achievement of the Bogor Goals.

APEC’s investment facilitation principles

The following principles are not exhaustive. They provide a guide to the kind of provisions that would constitute better practice in investment facilitation. They will not prejudice the positions of APEC members in any of their current or future unilateral actions or negotiations with investment provisions.

A working framework

Principles Government role Business impact

- Promote accessibility and transparency in the formulation and administration of investment-related policies
- Provide full, clear and up-to-date picture of investment regime, including advance notice of proposed changes
- Ensure readily available information, including through “one-stop” or special enquiry points and on-line services where appropriate
- Promote legislative simplification including plain language drafting
- Publicise outcomes of periodic reviews of investment regime
- Encourages business interest and enables business decisions

- Allows business to include prospective changes in its planning decisions
- Gives business confidence that laws, regulations and policies are consistent across different areas and levels of government
- Promotes a perception in business that the government aims to maintain a good investment climate
- Enhance stability of investment environments, security of property and protection of investments
 - Provide an environment which is politically and economically stable.
 - Provide secure property rights covering tangible and intangible assets including land use rights.
 - Provide well-performing court systems.
 - Facilitate effective contract enforcement.
- Limit and review the use of regulatory expropriation and guarantee prompt adequate and effective compensation.
- Encourage development of effective, reasonable cost mechanisms for resolving disputes including private arbitration services.
 - Consider membership of recognised international arbitration bodies.
 - Provide a mechanism for the enforcement of arbitral awards.
 - Reduces non-commercial risk associated with investment
 - Links more appropriately effort and reward increasing incentive to invest.
 - Increases business confidence in the domestic legal system
 - Increases ability to raise finance especially for SMEs
 - Provides investor guarantee of compensation for regulatory takings.
 - Gives recourse to impartial channels of dispute settlement
 - Gives an additional layer of protection in cases of disputes
- Enhance predictability and consistency in investment-related policies
 - Systematise and institutionalise common application of investment regulations.
 - Give equal treatment in the operation and application of domestic laws and regulations on investment.
 - Avoid discriminatory use of bureaucratic discretion
 - Establish clear criteria and transparent procedures for administrative decisions including with respect to investment approval mechanisms.▪ Ensures certainty to encourage business decisions
 - Simplifies business transactions and builds business confidence
 - Reassures investors that they are being given equal treatment
 - Reduces cost of doing business and adds to competitiveness
 - Reduces scope for corruption
 - Improve the efficiency and effectiveness of investment procedures
 - Simplify, streamline and quicken investment regime and processes .
 - Provide timely, relevant and prompt advice.
 - Encourage and foster institutional cooperation and coordination
 - Where appropriate, establish “one-stop” approval authority – eg an active investment promotion agency with adequate funding
 - Clarify policy roles and accountabilities between different levels of government.
 - Keep the costs to the investor of the investment approval process to a minimum. ▪ More attractive investment environment

- Speeds up investment processes
- Avoids duplication and double-handling at different levels of government
- Lowers the cost of doing business, especially for small and medium sized enterprises with higher barriers to entry

- Build constructive stakeholder relationships
- Maintain mechanisms for regular consultation and dialogue with interested parties including investors.
- Provide framework to identify and address problems encountered by investors.
- Promote improved standards of corporate governance.
- Promote responsible business conduct. ▪ Enables business to help shape productive investment environment
- Ensures problems can be dealt with expeditiously
- Strengthens private-public sector partnerships
- Enables business to operate in a more socially responsible manner
- Utilise new technology to improve investment environments ▪ Apply new technology to improve information, application and approval processes.
- Promote the adoption of new technology, including through training of officials at all levels of government in their use.
- Provide adequate and effective protection of technology and related intellectual property rights.
- Develop strategies to meet the intellectual property needs of SMEs. ▪ Increased accessibility and reduced business costs
- Enhanced security through measures such as passwords and e-signatures
- Encourages business to invest in research and development and to train personnel in the use of new technologies
- Encourages business to invest in continuous improvement for new technologies and processes
- Establish monitoring and review mechanisms for investment policies
- Maintain mechanism for regular evaluation of investment regime.
- Benchmark and measure performance of institutions involved in facilitating investment. ▪ Maximises effectiveness of investment regime, including in line with current international best practice
- Encourages business to be innovative and forthcoming with new ideas
- Enhance international cooperation ▪ Consider joining international instruments promoting international investment.
- Encourage investment facilitation through bilateral agreements, including free-trade agreements.
- Make use of international and regional initiatives aimed at building investment expertise, including information sharing. ▪ Promotes international competitiveness of the economy
- Increases predictability of the investment environment through binding treaty action
- Especially relevant to companies with investments in more than one economy

APEC's broader business facilitation agenda

APEC's investment facilitation work cannot be considered in isolation from APEC's broader business facilitation activities. APEC continues to be the regional leader in promoting trade and investment liberalisation and facilitation, which remains a cornerstone for strengthening regional economic growth and integration. APEC's agenda is also increasingly focused on structural economic reform, so-called 'behind the border' initiatives to bolster trade and investment in the region. This includes areas such as domestic regulatory reform, corporate and public governance, critical infrastructure and capacity building. Ongoing reform in these areas is integral to underpinning productivity growth, increasing economic growth and stability and boosting trade and investment flows. APEC also has a growing human security agenda in support of stronger trade and investment environments, such as countering the threat of terrorism, food security and emergency management.

IFAP is intended to complement and reinforce existing APEC work on investment facilitation (outlined at Attachment A). In the same way, it is intended to work hand in glove with business and industry stakeholders. An important partner in this work is the APEC Business Advisory Council (ABAC). Ongoing consultation with these stakeholders is a feature of the IFAP.

Capacity Building

An important feature of IFAP is provision for capacity building and technical cooperation to assist lesser developed APEC member economies with implementation. Such capacity building may include activities such as

- APEC activities aimed at improving capacity in developing economies; and
- participation in activities — including training and where appropriate use of other capacity building initiatives such as toolboxes — offered bilaterally or organised by multilateral or regional organisations such as the World Bank, UNCTAD and OECD.

In the course of developing Key Performance Indicators (KPIs) for IFAP actions, sub-fora may consider to identify a minimum of one capacity building need and mechanism to address this. Such mechanisms may include assistance from individual APEC member economies, cooperative activities in APEC, and, on occasion, assistance from international and regional institutions.

Measurement and Reporting

CTI has agreed to develop a work program on implementation of the actions in the IFAP including related to methodologies for reporting progress.

Critical Dates

2008

MRT:

- CTI/SOM to finalise IFAP drafting for Ministers' endorsement

Ministers to consider endorsement of the IFAP

~ SOM III:

CTI to consider recommendations on KPIs and reporting methodologies for endorsement

CTI to consider capacity building proposals for endorsement

~ Leaders: Report progress to Leaders

2009

~ SOM I:

CTI to consider report by sub-fora and fora on implementation of IFAP

~ SOM III:

CTI to consider report by sub-fora and fora on implementation of IFAP

~ Leaders: Report progress to Leaders

Investment facilitation – menu of actions and measures

Specific actions Timetable

Promote accessibility and transparency in the formulation and administration of investment-related policies

- Publish laws, regulations, judicial decisions and administrative rulings of general application, including revisions and up-dates. Continuing
- Adopt centralised registry of laws and regulations and make this available electronically. By 2010
- Establish a single window or special enquiry point for all enquiries concerning investment policies and applications to invest 2008
- Make available all investment-related regulations in clear simple language, preferably in languages commonly used by business
- Establish an Investment Promotion Agency (IPA), or similar body, and make its existence widely known 2009 and beyond
- Make available to investors all rules and other information relating to investment promotion and incentive schemes
- Allow investors to choose their form of establishment within legislative and legal frameworks.
- Ensure transparency and clarity in investment-related laws
- Establish an APEC-wide website or e-portal to replace the hard copy publication the APEC Investment Guidebook (IEG) By end 2009
- Encourage on-line enquiries and on-line information on all foreign investment issues Continuing
- Publish and/or make widely available screening guidelines for assessing investment proposals
- Maintain a mechanism to provide timely and relevant advice of changes in procedures, applicable standards, technical regulations and conformance requirements

- To the extent possible, provide advance notice of proposed changes to laws and regulations and provide an opportunity for public comment Continuing
 - Explore the possibility of using the international benchmarks on a voluntary basis as a reference point for peer dialogue and measuring progress 2009
- Enhance stability of investment environments, security of property and protection of investments
- Establish timely, secure and effective systems of ownership registration and / or property use rights for land and other forms of property. Continuing
 - Create and maintain an effective register of public or state owned property. 2010
 - Ensure costs associated with land transactions are kept to a minimum including by fostering competition. Continuing
 - Explore the possibility of using the World Bank Doing Business indicator “Registering Property” as the basis for peer dialogue and benchmarking and measuring progress across APEC 2010
 - Foster the dissemination of accurate market reputation information including creditworthiness and reliability Continuing
 - Explore the possibility of using the World Bank Doing Business indicator “Enforcing Contracts” as the basis for peer dialogue and benchmarking and measuring progress across APEC 2009
 - Encourage or establish effective formal mechanisms for resolving disputes between investors and host authorities and for enforcing solutions, such as judicial, arbitral or administrative tribunals or procedures Continuing
 - Encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties Continuing
 - Facilitate commercial dispute resolution for foreign investors by providing reasonable cost complaint-handling facilities, such as complaint service centres, and effective problem-solving mechanisms
 - Encourage the adoption of a dispute settlement framework that reflects the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) 2008 and beyond
 - Take steps to accede to an arbitral convention
 - Explore the possibility of using the World Bank Doing Business indicator “Protecting Investors” as the basis for peer dialogue and benchmarking and measuring progress across APEC 2009
- Enhance predictability and consistency in investment-related policies
- Increase use of legislative simplification and restatement of laws to enhance clarity and identify and eliminate inconsistency.
 - Provide equal treatment for all investors in the operation and application of domestic laws and principles on investment.
 - Reduce the scope for discriminatory bureaucratic discretion in interpreting investment-related regulations Beginning in 2008
 - Maintain clear demarcation of agency responsibilities where an economy has more than one agency screening or authorising investment proposals or where an agency has regulatory and commercial functions

- Establish and disseminate widely clear definitions of criteria for the assessment of investment proposals
- Establish accessible and effective administrative decision appeal mechanisms including where appropriate impartial “fast-track” review procedures 2009
- Explore the possibility of using the World Bank Doing Business indicator “Dealing with Licenses” as the basis for peer dialogue and benchmarking and measuring progress across APEC 2009

Specific actions Timetable

Improve the efficiency and effectiveness of investment procedures

- Simplify and streamline application and, registration, licensing and taxation procedures and establish a one-stop authority, where appropriate, for the lodgement of papers
- Simplify and reduce the number of forms relating to foreign investment and encourage electronic lodgement
- Shorten the processing time and procedures for investment applications.
- Promote use of “silence is consent” rules or no objections within defined time limits to speed up processing times, where appropriate
- Ensure the issuing of licences, permits and concessions is done at least cost to the investor
- Simplify the process for connecting to essential services infrastructure Continuing
- Explore the possibility of using the World Bank Doing Business indicator “Starting a Business” as the basis for peer dialogue and benchmarking progress across APEC 2010
- Establish and disseminate widely clear and simple instructions and explanations concerning the application and registration process
- Implement strategies to improve administrative performance at lower levels of government.
- Facilitate availability of high standard business services supporting investment

Build constructive stakeholder relationships

- To the extent possible, establish a mechanism to provide interested parties (including business community) with opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation. 2008
- Continue to share APEC member economies’ experiences of successful stakeholder consultative mechanisms 2009
- Promote the role of policy advocacy within IPAs as a means of addressing the specific investment problems raised by investors including those faced by SMEs Continuing
- Continue to share APEC member economies’ experiences of successful public private dialogue to take advantage of the information on successes and problems encountered by established investors Continuing
- Promote backward investment linkages between businesses, especially between foreign affiliates and local enterprises including through the promotion of industry clusters

- Encourage high standards of corporate governance through cooperation aimed at promoting international concepts and principles for business conduct, such as APEC's programs on corporate governance and anti-corruption.

- Examine and share APEC member economies' experience with responsible business conduct instruments. Continuing

Utilise new technology to improve investment environments

- Promote the introduction and use of new technologies aimed at making the investment process simpler and faster

- Maintain adequate and effective protection of technology and related intellectual property rights

- Where possible, give effect to international norms for property protection

Establish monitoring and review mechanisms for investment policies

- Conduct periodic reviews of investment procedures ensuring they are simple, transparent and at lowest possible cost. 2008 and 2009

- Establish indicators for monitoring the performance of the special inquiry points or Investment Promotion Agencies such as those set down by the Multilateral Investment Guarantee Agency 2010

Enhance international cooperation

- To the best extent possible, accede to, or observe, multilateral and/or regional investment promotion and facilitation conventions

- Make use, where appropriate, of international and regional initiatives aimed at building investment facilitation and promotion expertise, such as those offered by the World Bank, UNCTAD and OECD

- Ensure measures exist to ensure effective compliance with commitments under international investment agreements

- Review existing international agreements and treaties to ensure their provisions continue to create a more attractive environment for investment. Continuing

Attachment A

Investment facilitation actions already under way

Principle Action under way

Accessibility and transparency • Tourism Destinations using Planning Processes to Facilitate Investment (TWG)

- Capacity Building on Tourism Satellite Account as basis for Promoting Liberalization and Facilitation on Tourism Services (TWG 01/2008T)

- Reducing Trade, Regulatory, and Financing Barriers to Accelerate the Uptake of Clean Coal Technologies by Developing Economies in the Asia Pacific Region (EWG 01/2008T)

- ABAC: Business Statements on the importance of Transparency to Facilitate Investment

Stability, security and protection

Predictability and consistency

- Seminar on Good Governance on Investment Promotion (CTI 10/2008T)

- Cross-border Mergers and Acquisitions on Exports, FDI and Competition Policy (EC)
- ABAC: Business Statements on the importance of Harmonisation of Rules to Facilitate Investment

Efficiency and effectiveness

- APEC-UNCTAD Joint Capacity Building Project for Addressing Knowledge Gaps in the Use of Foreign Direct Investment (Stage 1) (CTI 03/2008A)
- APEC-UNCTAD Joint Capacity Building Project for Addressing Knowledge Gaps in the Use of Foreign Direct Investment (Stage 2) (CTI 04-2008A)
 - Doing Business - Investment at the Sub-National Level to Promote Economic Integration (Phase 1) (CTI 35/2008T)
 - Measures Affecting Cross Border Exchange and Investment in Higher Education in the APEC Region (HRD 02/2008T)
- Study on Measures of Ease of Doing Business in APEC (EC)
- ABAC: Business Statements on the importance of Simplification of Approvals Processes to Facilitate Investment

Constructive stakeholder relationships

- Workshop on SMEs' Financing in Asia-Pacific Region (SMEWG 02/2008A)
- Capacity Building for Investment Liberalisation and Facilitation (HRDWG project for 2007-2008) (HRD 01/2007T)
- Capacity Building for Sharing Success Factors of Improvement of Investment Environment (CTI 32/2008T)
- ABAC: Matrix of Successful Investment Facilitation Measures

Use of new technology

Monitoring and review

Enhance international cooperation • Seminar on Recent Trends on Investment Liberalization and Facilitation in Transport and Telecommunications Infrastructure (CTI 09/2008T)

- APEC Energy Trade and Investment Study and Roundtable (EWG)
- Capacity Building for International Investment Agreements (CTI 02/2008T)
- Core Elements in International Investment Agreements Project (Phase II) (CTI 34-2008T)
- APEC Seminar for Sharing Experience in APEC Economies on Relations between Competition Authorities and Regulator Bodies (CTI 13/2008T)

**Annex 6. Leaders' Statement to Implement APEC Transparency Standards, 21
October 2003, Bangkok, Thailand (excerpts)**

Bangkok, Thailand, 21 Oct 2003

Leaders' Statement to Implement APEC Transparency Standards

The Leaders' Statement to Implement APEC Transparency Standards was endorsed by Leaders on 27 October 2002 in Mexico and the statement below is an updated version endorsed by Leaders on 21 October 2003 in Thailand

Los Cabos, Mexico
27 October 2002

Bangkok, Thailand
21 October 2003

We, the Economic Leaders of APEC, reaffirm the commitment made in the Shanghai Accord to pursue implementation of APEC's transparency principles. In so doing, we observe that transparency:

- is an important element in promoting economic growth and financial stability at the domestic and international levels;
- is conducive to fairer and more effective governance and improves public confidence in government;
- is a General Principle in the Osaka Action Agenda which requires its application to the entire APEC liberalization and facilitation process;
- is a basic principle underlying trade liberalization and facilitation, where the removal of barriers to trade is in large part only meaningful to the extent that the members of the public know what laws, regulations, procedures and administrative rulings affect their interests, can participate in their development, can participate in administrative proceedings applying them and can request review of their application under domestic law;
- in monetary, financial and fiscal policies, and in the dissemination of macroeconomic policy data ensures the accountability and integrity of central banks and financial agencies, and provides the public with needed economic, financial and capital markets data; and
- will be enhanced through well-targeted, demand-driven capacity building to assist developing economies make progress toward greater openness.

Accordingly, we are committed to implementing the following transparency standards, taking into account the General Principles in the Osaka Action Agenda. We recognize that implementation of these standards will be an important APEC-led contribution to achieving a successful outcome for the WTO Doha Development Agenda.

Transparency in Trade and Investment Liberalization and Facilitation

General Principles

1. (a) Each Economy will ensure that its laws, regulations, and progressively, procedures and administrative rulings of general application respecting matters in Section C of Part One of the Osaka Action Agenda are promptly published or otherwise made available, for example via the Internet, in such a manner as to enable interested persons and other Economies to become acquainted with them.
(b) Each Economy will have or designate an official journal or journals and publish any measures referred to in paragraph 1 in such journals. Each Economy will publish such journals on a regular basis and make copies of them readily available to the public.
(c) An Economy may comply with subparagraph (b) by publication on the Internet.
(d) Each Economy will promote observance of the provisions of this paragraph by the regional and local governments and authorities within its customs territory.
2. When possible, each Economy will:
 - (a) publish in advance any measure referred to in paragraph 1 that it proposes to adopt; and
 - (b) provide where applicable interested persons a reasonable opportunity to comment on such proposed measures.
3. Upon request from an interested person or another Economy, an Economy will endeavor to promptly provide information and respond to questions pertaining to any actual or proposed measure referred to in paragraph 1.
4. Each Economy will ensure in its administrative proceedings applying any measure referred to in paragraph 1 that:
 - (a) wherever possible, persons of another Economy that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated and a general description of any issues in controversy;
 - (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding and the public interest permit; and
 - (c) its procedures are in accordance with domestic law.
5. Where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding matters covered by these Standards, that:
 - (a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the matter;
 - (b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;
 - (c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and

(d) ensure, subject to appeal or further review under domestic law, that such decisions are implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.

6. For purposes of these Standards, administrative ruling of general application means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include: (a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular person, good or service of another Economy in a specific case; or (b) a ruling that adjudicates with respect to a particular act or practice.

Specific Principles

1. Consistent with the above Standards, Economies will follow the transparency provisions contained in the following documents:
- (a) APEC Group on Services Menu of Options for Voluntary Liberalization, Facilitation and Promotion of Economic and Technical Cooperation in Services Trade and Investment;
 - (b) APEC Investment Experts Group Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies-For Voluntary Inclusion in Individual Action Plans;
 - (c) APEC Principles to Enhance Competition and Regulatory Reform;
 - (d) APEC Sub-Committee on Standard and Conformance objective to ensure transparency according to the WTO Agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures, and the SCSC 1994 Declaration of an APEC Standards and Conformance Framework and 1998 Terms of Reference; and
 - (e) APEC Principles on Trade Facilitation.
2. (a) APEC sub-fora that have elaborated the above transparency provisions should review these regularly and, where appropriate, improve, revise or expand them further.
- (b) APEC sub-fora that have not developed specific transparency provisions should do so.
 - (c) APEC sub-fora that develop such new or revised transparency provisions should present them to Leaders upon completion for incorporation into this Statement.

[...]

Confidential Information

The provisions of this Statement will not require any Economy to disclose confidential information where such disclosure would impede law enforcement, the enactment of laws, or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular persons or enterprises.

Area-Specific Transparency Standards

- 1.(a) Economies are committed to implementing the area-Specific Transparency Standards contained in Sections A-H below in a manner consistent with the Standards in paragraphs 1-6 and 11 above. 1
- (b) Economies agree to review periodically the Area-Specific Transparency Standards contained in Sections A-H below and, where appropriate, improve, revise or expand them further.

A. Services

Introduction

Economies agree to implement, in respect of services, the General Principles contained in paragraphs 1-6 and paragraph 11 of the Leaders' Statement to Implement APEC Transparency Standards ("Leaders' Statement").

Economies believe that, in the services context, it is particularly important to emphasize Leaders' observation that transparency contributes to: good governance; improving public confidence in, and legitimacy of, regulatory regimes; better understanding of regulatory objectives; more efficient markets; and a more attractive investment climate in both small and large economies.

Economies take note of Leaders' recognition that implementation of these standards will be an important APEC-led contribution to achieving success in the WTO Doha Development Agenda (DDA) GATS negotiations.

Transparency Standards on Services

- 1.(a) Each economy will, in the manner provided for in paragraph 1 of the General Principles in the Leaders' Statement, ensure that its laws, regulations, and administrative procedures related to applications for licenses or authorizations (including, inter alia, licensing procedures and requirements/criteria, qualification procedures and requirements, and technical standards) and their renewal or extension are promptly published or otherwise made available in such a manner as to enable interested persons and other Economies to become acquainted with them.
- (b) Economies will use the Internet as much as possible, and specifically, official government web sites, to fulfill this obligation.
2. Economies will publicize and maintain at least one enquiry point that will endeavor to promptly provide information and respond to questions from an interested person or another Economy pertaining to any actual or proposed measure. Economies will also make the names, official addresses, and other contact information (including website, telephone, facsimile) of its enquiry point(s) publicly available.
3. Economies will diligently complete and provide annual updates to their electronic Individual Action Plans (E- IAPs) for services sectors.
4. Regarding authorizations and licensing procedures, when possible:
 - (a) the competent authorities of an Economy will, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. The

competent authorities will establish deadlines for processing of completed applications under normal circumstances.

(b) at the request of the applicant, the competent authorities of the Economy will provide, without undue delay, information concerning the status of the application, including any reason for denial. Applicants will also be given the opportunity to resubmit or amend their application for further review, or file an appeal if an application is denied or found in violation of public regulations.

(c) Economies will publish the time schedule for and costs of examinations required as part of the application process for a license or authorization in accordance with paragraph 1 of the Leaders' Statement.

5. These Standards should be administered in a reasonable, objective and impartial manner.

B. Investment

Introduction

On 27 October 2002, in Los Cabos, Mexico, APEC Leaders adopted the Statement to Implement APEC Transparency Standards ("Leaders' Statement"), and directed that these standards be implemented as soon as possible, and in no case later than January 2005.

In paragraph 8 of the Leaders' Statement, APEC Leaders instructed APEC sub-fora that have elaborated transparency provisions to review these regularly, and, where appropriate, improve, revise or expand them further. Economies were further instructed that such revised transparency provisions should be presented to Leaders upon completion for incorporation into the Leaders' Statement. Accordingly, the following set of transparency standards on investment were developed for incorporation into the Leaders' Statement. These principles flow from the General Principles on Transparency agreed to by APEC Leaders at Los Cabos and also build on the Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies - For Voluntary Inclusion in Individual Action Plans. Economies agree to implement, in respect of investment, the General Principles contained in paragraphs 1 through 6 and paragraph 11 of the Leaders' Statement.

These principles provide specific guidance for implementation within an investment context.

Transparency Standards on Investment

1. Each Economy will, in the manner provided for in paragraph 1 of the Leaders' Statement, ensure that its investment laws, regulations, and progressively procedures and administrative rulings of general application ("investment measures") are promptly published or otherwise made available in such a manner as to enable interested persons and other economies to become acquainted with them.
2. In accordance with paragraph 2 of the Leaders' Statement, each Economy will, to the extent possible, publish in advance any investment measures proposed for adoption and provide a reasonable opportunity for public comment.

3. In accordance with paragraph 3 of the Leaders' Statement, upon request from an interested person or another Economy, each Economy will:
 - (a) endeavor to promptly provide information and respond to questions pertaining to any actual or proposed investment measures referred to in paragraph 1 above; and
 - (b) provide contact points for the office or official responsible for the subject matter of the questions and assist, as necessary, in facilitating communications with the requesting economy.
4. Where warranted, each Economy will ensure that appropriate domestic procedures are in place to enable prompt review and correction of final administrative actions, other than those taken for sensitive prudential reasons, regarding investment matters covered by these standards, that:
 - (a) provide for tribunals or panels that are impartial and independent of any office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the investment matter;
 - (b) provide parties to any proceeding with a reasonable opportunity to present their respective positions;
 - (c) provide parties to any proceeding with a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority; and
 - (d) ensure subject to appeal or further review under domestic law, that such decisions will be implemented by, and govern the practice of, the offices or authorities regarding the administrative action at issue.
5. If screening of investments is used based on guidelines for evaluating projects for approval and for scoring such projects if scoring is used, in accordance with paragraph 1 of the Leaders' Statement each Economy will publish and/or make publicly available through other means those guidelines.
6. Each Economy will maintain clear procedures regarding application, registration, and government licensing of investments by:
 - (a) publishing and/or making available clear and simple instructions, and an explanation of the process (the steps) involved in applying/government licensing/registering; and
 - (b) publishing and/or making available definitions of criteria for assessment of investment proposals.
7. Where prior authorization requirement procedures exist, each Economy will conduct reviews at the appropriate time to ensure that such procedures are simple and transparent.
8. Each Economy will make available to investors all rules and other appropriate information relating to investment promotion programs.
9. When negotiating regional trade agreements and free trade agreements that contain provisions with an investor/state dispute settlement mechanism, each Economy should consider whether or not to include transparency provisions.
10. Each Economy will participate fully in APEC-wide efforts to update the APEC Investment Guidebook.

[...]

Annex 7. Investment Facilitation Action Plan (IFAP) to further promote investment in APEC economies (2007)

APEC Investment Facilitation Action Plan (IFAP)

Introduction – the benefits of investment

There is strong international consensus on the benefits of investment, across the spectrum of its activities: from tangible assets to intellectual property. Such investment drives economic productivity, builds jobs, raises incomes, strengthens trade flows and spreads international best technologies and practices. Investment bolsters economic growth for developed and developing economies alike.

APEC's member economies recognize the significant economic benefits of investment and are active in promoting investment and facilitating cross-border investment flows. Facilitating investment requires work: a concerted national and international effort to create and sustain the most conducive climate for investment

APEC has been instrumental in this effort in the Asia-Pacific region beginning with its adoption in 1994 of the non-binding investment principles. These are designed to improve and further liberalize investment regimes and they include measures on facilitation. To reinforce APEC's work in this area, in 2007 in Sydney APEC Leaders agreed to the development of an Investment Facilitation Action Plan (IFAP) aimed at further promotion of investment in APEC member economies. Effective investment facilitation can make a significant contribution to the sort of broader investment climate reform efforts widely practiced by APEC member economies.

What is investment facilitation?

To harness the advantages of foreign investment, it is critical that governments have investment procedures in place that do not unnecessarily increase the costs or risk of doing business, or constrain business competition (which individually or collectively lower productivity and growth). Investment facilitation refers to actions taken by governments designed to attract foreign investment and maximise the effectiveness and efficiency of its administration through all stages of the investment cycle.

Investment facilitation covers a wide range of areas, all with the ultimate focus on allowing investment to flow efficiently and for the greatest benefit. Transparency, simplicity and predictability are among its most important principles. The costs of opacity far outweigh the costs of enhancing transparency. Investors look for an investment environment that is stable, and that offers international best practice standards of protection, including the swift and equitable resolution of investment disputes.

A sound investment facilitation strategy ensures that all investment applications are dealt with expeditiously, fairly and equitably. Investment facilitation also requires creating and maintaining transparent and sound administrative procedures that apply for the lifetime of the investment, including effective deterrents to corrupt practices. Finally, investment facilitation is enhanced by the availability of quality physical infrastructure, high-standard business services, talented and flexible labour forces, and the sound protection of property rights.

Multilateral Investment Facilitation

Several multilateral organisations have active programs in support of strengthening facilitation practices as part of broader investment promotion policies. The World Bank is at the forefront of these efforts, providing information services and diversified technical assistance to help governments and relevant intermediaries involved in promoting investment enhance their ability to respond effectively to investor needs.

UNCTAD analyses trends in FDI and their impact on development, compiles data on FDI, provides advisory services and training on international investment issues, helps developing countries improve policies and institutions that deal with FDI, and assists these countries to participate in international negotiations on investment. The OECD has developed investment policy instruments, such as the *Framework for Investment Policy Transparency* and the *Policy Framework for Investment*, to assist governments in developing frameworks for investment facilitation.

APEC's IFAP is designed constructively to complement these existing international efforts. It is a consensus plan on investment facilitation that reflects the specificities and priorities of APEC members. While it is non-binding, the IFAP reinforces APEC's commitment to significantly enhanced regional economic integration.

APEC and investment facilitation

Since its inception in 1989, APEC has emphasized the importance of investment facilitation through practical activities in its work program. In 1995, APEC Leaders adopted the Bogor Goals of free and open trade and investment in the Asia-Pacific region by 2020. At the same time they committed to accelerate APEC's trade and investment facilitation programs. Investment facilitation accordingly is one of the aims of the 1995 Osaka Action Agenda (OAA).

APEC member economies are continuing efforts to enhance transparency of investment regimes, improve investment climates and encourage and facilitate free and open investment in the region. The 2007 report on *Strengthening Regional Economic Integration* emphasizes the need to improve further the investment climate in APEC member economies and refocuses APEC's investment liberalization and facilitation agenda on concrete initiatives that accelerate regional economic integration and reduce behind-the-border barriers.

Among APEC's achievements that have included investment facilitation so far are:

- APEC Non-Binding Investment Principles (1994);
- Options for Investment Liberalisation and Business Facilitation to Strengthen APEC Economies (1997);
- Guide to the Investment Regimes of APEC Member Economies (6th edition, 2007); and
- Study on *Enhancing Investment Liberalisation and Facilitation in Economic Development in the Asia-Pacific Region*, which examined ways to reduce 'behind-the-border' barriers to domestic investment.

These initiatives were undertaken in recognition of the diversity that exists among APEC member economies, and they provide members with a broad range of policy choices suitable for different economic circumstances.

Aims of APEC's IFAP

The main aims of the IFAP are to:

- strengthen regional economic integration;
- strengthen the competitiveness and sustainability of economic growth of APEC's member economies;
- expand prosperity and employment opportunities in the APEC region; and
- make further progress toward achievement of the Bogor Goals.

APEC's investment facilitation principles

The following principles are not exhaustive. They provide a guide to the kind of provisions that would constitute better practice in investment facilitation. They will not prejudice the positions of APEC members in any of their current or future unilateral actions or negotiations with investment provisions.

A working framework

<i>Principles</i>	<i>Government role</i>	<i>Business impact</i>
<ul style="list-style-type: none"> ▪ <i>Promote accessibility and transparency in the formulation and</i> 	<ul style="list-style-type: none"> ▪ Provide full, clear and up-to-date picture of investment regime, including advance notice of proposed changes ▪ Ensure readily available 	<ul style="list-style-type: none"> ▪ Encourages business interest and enables business decisions ▪ Allows business to include prospective changes in its planning decisions ▪ Gives business confidence that

<i>Principles</i>	<i>Government role</i>	<i>Business impact</i>
<i>administration of investment-related policies</i>	<p>information, including through “one-stop” or special enquiry points and on-line services where appropriate</p> <ul style="list-style-type: none"> ▪ Promote legislative simplification including plain language drafting ▪ Publicise outcomes of periodic reviews of investment regime 	<p>laws, regulations and policies are consistent across different areas and levels of government</p> <ul style="list-style-type: none"> ▪ Promotes a perception in business that the government aims to maintain a good investment climate
<ul style="list-style-type: none"> ▪ <i>Enhance stability of investment environments, security of property and protection of investments</i> 	<ul style="list-style-type: none"> ▪ Provide an environment which is politically and economically stable. ▪ Provide secure property rights covering tangible and intangible assets including land use rights. ▪ Provide well-performing court systems. ▪ Facilitate effective contract enforcement. ▪ Limit and review the use of regulatory expropriation and guarantee prompt adequate and effective compensation. ▪ Encourage development of effective, reasonable cost mechanisms for resolving disputes including private arbitration services. ▪ Consider membership of recognised international arbitration bodies. ▪ Provide a mechanism for the enforcement of arbitral awards. 	<ul style="list-style-type: none"> ▪ Reduces non-commercial risk associated with investment ▪ Links more appropriately effort and reward increasing incentive to invest. ▪ Increases business confidence in the domestic legal system ▪ Increases ability to raise finance especially for SMEs ▪ Provides investor guarantee of compensation for regulatory takings. ▪ Gives recourse to impartial channels of dispute settlement ▪ Gives an additional layer of protection in cases of disputes
<ul style="list-style-type: none"> ▪ <i>Enhance predictability and consistency in investment-related policies</i> 	<ul style="list-style-type: none"> ▪ Systematise and institutionalise common application of investment regulations. ▪ Give equal treatment in the operation and application 	<ul style="list-style-type: none"> ▪ Ensures certainty to encourage business decisions ▪ Simplifies business transactions and builds business confidence ▪ Reassures investors that they are being given equal treatment

<i>Principles</i>	<i>Government role</i>	<i>Business impact</i>
	<p>of domestic laws and regulations on investment.</p> <ul style="list-style-type: none"> ▪ Avoid discriminatory use of bureaucratic discretion ▪ Establish clear criteria and transparent procedures for administrative decisions including with respect to investment approval mechanisms. 	<ul style="list-style-type: none"> ▪ Reduces cost of doing business and adds to competitiveness ▪ Reduces scope for corruption
<ul style="list-style-type: none"> ▪ <i>Improve the efficiency and effectiveness of investment procedures</i> 	<ul style="list-style-type: none"> ▪ Simplify, streamline and quicken investment regime and processes . ▪ Provide timely, relevant and prompt advice. ▪ Encourage and foster institutional cooperation and coordination ▪ Where appropriate, establish “one-stop” approval authority – eg an active investment promotion agency with adequate funding ▪ Clarify policy roles and accountabilities between different levels of government. ▪ Keep the costs to the investor of the investment approval process to a minimum. 	<ul style="list-style-type: none"> ▪ More attractive investment environment ▪ Speeds up investment processes ▪ Avoids duplication and double-handling at different levels of government ▪ Lowers the cost of doing business, especially for small and medium sized enterprises with higher barriers to entry
<ul style="list-style-type: none"> ▪ <i>Build constructive stakeholder relationships</i> 	<ul style="list-style-type: none"> ▪ Maintain mechanisms for regular consultation and dialogue with interested parties including investors. ▪ Provide framework to identify and address problems encountered by investors. ▪ Promote improved standards of corporate governance. ▪ Promote responsible 	<ul style="list-style-type: none"> ▪ Enables business to help shape productive investment environment ▪ Ensures problems can be dealt with expeditiously ▪ Strengthens private-public sector partnerships ▪ Enables business to operate in a more socially responsible manner

<i>Principles</i>	<i>Government role</i>	<i>Business impact</i>
	business conduct.	
<ul style="list-style-type: none"> ▪ <i>Utilise new technology to improve investment environments</i> 	<ul style="list-style-type: none"> ▪ Apply new technology to improve information, application and approval processes. ▪ Promote the adoption of new technology, including through training of officials at all levels of government in their use. ▪ Provide adequate and effective protection of technology and related intellectual property rights. ▪ Develop strategies to meet the intellectual property needs of SMEs. 	<ul style="list-style-type: none"> ▪ Increased accessibility and reduced business costs ▪ Enhanced security through measures such as passwords and e-signatures ▪ Encourages business to invest in research and development and to train personnel in the use of new technologies ▪ Encourages business to invest in continuous improvement for new technologies and processes
<ul style="list-style-type: none"> ▪ <i>Establish monitoring and review mechanisms for investment policies</i> 	<ul style="list-style-type: none"> ▪ Maintain mechanism for regular evaluation of investment regime. ▪ Benchmark and measure performance of institutions involved in facilitating investment. 	<ul style="list-style-type: none"> ▪ Maximises effectiveness of investment regime, including in line with current international best practice ▪ Encourages business to be innovative and forthcoming with new ideas
<ul style="list-style-type: none"> ▪ <i>Enhance international cooperation</i> 	<ul style="list-style-type: none"> ▪ Consider joining international instruments promoting international investment. ▪ Encourage investment facilitation through bilateral agreements, including free-trade agreements. ▪ Make use of international and regional initiatives aimed at building investment expertise, including information sharing. 	<ul style="list-style-type: none"> ▪ Promotes international competitiveness of the economy ▪ Increases predictability of the investment environment through binding treaty action ▪ Especially relevant to companies with investments in more than one economy

APEC's broader business facilitation agenda

APEC's investment facilitation work cannot be considered in isolation from APEC's broader business facilitation activities. APEC continues to be the regional leader in

promoting trade and investment liberalisation and facilitation, which remains a cornerstone for strengthening regional economic growth and integration. APEC's agenda is also increasingly focused on structural economic reform, so-called 'behind the border' initiatives to bolster trade and investment in the region. This includes areas such as domestic regulatory reform, corporate and public governance, critical infrastructure and capacity building. Ongoing reform in these areas is integral to underpinning productivity growth, increasing economic growth and stability and boosting trade and investment flows. APEC also has a growing human security agenda in support of stronger trade and investment environments, such as countering the threat of terrorism, food security and emergency management.

IFAP is intended to complement and reinforce existing APEC work on investment facilitation (outlined at Attachment A). In the same way, it is intended to work hand in glove with business and industry stakeholders. An important partner in this work is the APEC Business Advisory Council (ABAC). Ongoing consultation with these stakeholders is a feature of the IFAP.

Capacity Building

An important feature of IFAP is provision for capacity building and technical cooperation to assist lesser developed APEC member economies with implementation. Such capacity building may include activities such as

- APEC activities aimed at improving capacity in developing economies; and
- participation in activities — including training and where appropriate use of other capacity building initiatives such as toolboxes — offered bilaterally or organised by multilateral or regional organisations such as the World Bank, UNCTAD and OECD.

In the course of developing Key Performance Indicators (KPIs) for IFAP actions, sub-fora may consider to identify a minimum of one capacity building need and mechanism to address this. Such mechanisms may include assistance from individual APEC member economies, cooperative activities in APEC, and, on occasion, assistance from international and regional institutions.

Measurement and Reporting

CTI has agreed to develop a work program on implementation of the actions in the IFAP including related to methodologies for reporting progress.

Critical Dates

2008

- MRT:
 - CTI/SOM to finalise IFAP drafting for Ministers' endorsement
 - Ministers to consider endorsement of the IFAP

- SOM III:
 - CTI to consider recommendations on KPIs and reporting methodologies for endorsement
 - CTI to consider capacity building proposals for endorsement
- Leaders: Report progress to Leaders

2009

- SOM I:
 - CTI to consider report by sub-fora and fora on implementation of IFAP
- SOM III:
 - CTI to consider report by sub-fora and fora on implementation of IFAP
- Leaders: Report progress to Leaders

Investment facilitation – menu of actions and measures

<i>Specific actions</i>	<i>Timetable</i>
<i>Promote accessibility and transparency in the formulation and administration of investment-related policies</i>	
▪ Publish laws, regulations, judicial decisions and administrative rulings of general application, including revisions and up-dates.	Continuing
▪ Adopt centralised registry of laws and regulations and make this available electronically.	By 2010
▪ Establish a single window or special enquiry point for all enquiries concerning investment policies and applications to invest	2008
▪ Make available all investment-related regulations in clear simple language, preferably in languages commonly used by business	
▪ Establish an Investment Promotion Agency (IPA), or similar body, and make its existence widely known	2009 and beyond
▪ Make available to investors all rules and other information relating to investment promotion and incentive schemes	
▪ Allow investors to choose their form of establishment within legislative and legal frameworks.	
▪ Ensure transparency and clarity in investment-related laws	
▪ Establish an APEC-wide website or e-portal to replace the hard copy publication the APEC Investment Guidebook (IEG)	By end 2009
▪ Encourage on-line enquiries and on-line information on all foreign investment issues	Continuing
▪ Publish and/or make widely available screening guidelines for assessing investment proposals	

<i>Specific actions</i>	<i>Timetable</i>
<ul style="list-style-type: none"> ▪ Maintain a mechanism to provide timely and relevant advice of changes in procedures, applicable standards, technical regulations and conformance requirements 	
<ul style="list-style-type: none"> ▪ To the extent possible, provide advance notice of proposed changes to laws and regulations and provide an opportunity for public comment 	Continuing
<ul style="list-style-type: none"> ▪ Explore the possibility of using the international benchmarks on a voluntary basis as a reference point for peer dialogue and measuring progress 	2009
<i>Enhance stability of investment environments, security of property and protection of investments</i>	
<ul style="list-style-type: none"> ▪ Establish timely, secure and effective systems of ownership registration and / or property use rights for land and other forms of property. 	Continuing
<ul style="list-style-type: none"> ▪ Create and maintain an effective register of public or state owned property. 	2010
<ul style="list-style-type: none"> ▪ Ensure costs associated with land transactions are kept to a minimum including by fostering competition. 	Continuing
<ul style="list-style-type: none"> ▪ Explore the possibility of using the World Bank <i>Doing Business</i> indicator “Registering Property” as the basis for peer dialogue and benchmarking and measuring progress across APEC 	2010
<ul style="list-style-type: none"> ▪ Foster the dissemination of accurate market reputation information including creditworthiness and reliability 	Continuing
<ul style="list-style-type: none"> ▪ Explore the possibility of using the World Bank <i>Doing Business</i> indicator “Enforcing Contracts” as the basis for peer dialogue and benchmarking and measuring progress across APEC 	2009
<ul style="list-style-type: none"> ▪ Encourage or establish effective formal mechanisms for resolving disputes between investors and host authorities and for enforcing solutions, such as judicial, arbitral or administrative tribunals or procedures 	Continuing
<ul style="list-style-type: none"> ▪ Encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties 	Continuing
<ul style="list-style-type: none"> ▪ Facilitate commercial dispute resolution for foreign investors by providing reasonable cost complaint-handling facilities, such as complaint service centres, and effective problem-solving mechanisms 	
<ul style="list-style-type: none"> ▪ Encourage the adoption of a dispute settlement framework that reflects the <i>International Convention on the Settlement of Investment Disputes between States and Nationals of Other States</i> (ICSID) 	2008 and beyond
<ul style="list-style-type: none"> ▪ Take steps to accede to an arbitral convention 	

<i>Specific actions</i>	<i>Timetable</i>
<ul style="list-style-type: none"> ▪ Explore the possibility of using the World Bank <i>Doing Business</i> indicator “Protecting Investors” as the basis for peer dialogue and benchmarking and measuring progress across APEC 	2009
<i>Enhance predictability and consistency in investment-related policies</i>	
<ul style="list-style-type: none"> ▪ Increase use of legislative simplification and restatement of laws to enhance clarity and identify and eliminate inconsistency. 	
<ul style="list-style-type: none"> ▪ Provide equal treatment for all investors in the operation and application of domestic laws and principles on investment. 	
<ul style="list-style-type: none"> ▪ Reduce the scope for discriminatory bureaucratic discretion in interpreting investment-related regulations 	Beginning in 2008
<ul style="list-style-type: none"> ▪ Maintain clear demarcation of agency responsibilities where an economy has more than one agency screening or authorising investment proposals or where an agency has regulatory and commercial functions 	
<ul style="list-style-type: none"> ▪ Establish and disseminate widely clear definitions of criteria for the assessment of investment proposals 	
<ul style="list-style-type: none"> ▪ Establish accessible and effective administrative decision appeal mechanisms including where appropriate impartial “fast-track” review procedures 	2009
<ul style="list-style-type: none"> ▪ Explore the possibility of using the World Bank <i>Doing Business</i> indicator “Dealing with Licenses” as the basis for peer dialogue and benchmarking and measuring progress across APEC 	2009

<i>Specific actions</i>	<i>Timetable</i>
<i>Improve the efficiency and effectiveness of investment procedures</i>	
<ul style="list-style-type: none"> ▪ Simplify and streamline application and, registration, licensing and taxation procedures and establish a one-stop authority, where appropriate, for the lodgement of papers 	
<ul style="list-style-type: none"> ▪ Simplify and reduce the number of forms relating to foreign investment and encourage electronic lodgement 	
<ul style="list-style-type: none"> ▪ Shorten the processing time and procedures for investment applications. 	
<ul style="list-style-type: none"> ▪ Promote use of “silence is consent” rules or no objections within defined time limits to speed up processing times, where appropriate 	
<ul style="list-style-type: none"> ▪ Ensure the issuing of licences, permits and concessions is done at least cost to the investor 	
<ul style="list-style-type: none"> ▪ Simplify the process for connecting to essential services 	Continuing

<i>Specific actions</i>	<i>Timetable</i>
infrastructure	
<ul style="list-style-type: none"> ▪ Explore the possibility of using the World Bank <i>Doing Business</i> indicator “Starting a Business” as the basis for peer dialogue and benchmarking progress across APEC 	2010
<ul style="list-style-type: none"> ▪ Establish and disseminate widely clear and simple instructions and explanations concerning the application and registration process 	
<ul style="list-style-type: none"> ▪ Implement strategies to improve administrative performance at lower levels of government. 	
<ul style="list-style-type: none"> ▪ Facilitate availability of high standard business services supporting investment 	
<i>Build constructive stakeholder relationships</i>	
<ul style="list-style-type: none"> ▪ To the extent possible, establish a mechanism to provide interested parties (including business community) with opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation. 	2008
<ul style="list-style-type: none"> ▪ Continue to share APEC member economies’ experiences of successful stakeholder consultative mechanisms 	2009
<ul style="list-style-type: none"> ▪ Promote the role of policy advocacy within IPAs as a means of addressing the specific investment problems raised by investors including those faced by SMEs 	Continuing
<ul style="list-style-type: none"> ▪ Continue to share APEC member economies’ experiences of successful public private dialogue to take advantage of the information on successes and problems encountered by established investors 	Continuing
<ul style="list-style-type: none"> ▪ Promote backward investment linkages between businesses, especially between foreign affiliates and local enterprises including through the promotion of industry clusters 	
<ul style="list-style-type: none"> ▪ Encourage high standards of corporate governance through cooperation aimed at promoting international concepts and principles for business conduct, such as APEC’s programs on corporate governance and anti-corruption. 	
<ul style="list-style-type: none"> ▪ Examine and share APEC member economies’ experience with responsible business conduct instruments. 	Continuing
<i>Utilise new technology to improve investment environments</i>	
<ul style="list-style-type: none"> ▪ Promote the introduction and use of new technologies aimed at making the investment process simpler and faster 	
<ul style="list-style-type: none"> ▪ Maintain adequate and effective protection of 	

<i>Specific actions</i>	<i>Timetable</i>
technology and related intellectual property rights	
<ul style="list-style-type: none"> ▪ Where possible, give effect to international norms for property protection 	
<i>Establish monitoring and review mechanisms for investment policies</i>	
<ul style="list-style-type: none"> ▪ Conduct periodic reviews of investment procedures ensuring they are simple, transparent and at lowest possible cost. 	2008 and 2009
<ul style="list-style-type: none"> ▪ Establish indicators for monitoring the performance of the special inquiry points or Investment Promotion Agencies such as those set down by the Multilateral Investment Guarantee Agency 	2010
<i>Enhance international cooperation</i>	
<ul style="list-style-type: none"> ▪ To the best extent possible, accede to, or observe, multilateral and/or regional investment promotion and facilitation conventions 	
<ul style="list-style-type: none"> ▪ Make use, where appropriate, of international and regional initiatives aimed at building investment facilitation and promotion expertise, such as those offered by the World Bank, UNCTAD and OECD 	
<ul style="list-style-type: none"> ▪ Ensure measures exist to ensure effective compliance with commitments under international investment agreements 	
<ul style="list-style-type: none"> ▪ Review existing international agreements and treaties to ensure their provisions continue to create a more attractive environment for investment. 	Continuing

Attachment A

Investment facilitation actions already under way

<i>Principle</i>	<i>Action under way</i>
<i>Accessibility and transparency</i>	<ul style="list-style-type: none"> ▪ Tourism Destinations using Planning Processes to Facilitate Investment (TWG) ▪ Capacity Building on Tourism Satellite Account as basis for Promoting Liberalization and Facilitation on Tourism Services (TWG 01/2008T) ▪ Reducing Trade, Regulatory, and Financing Barriers to Accelerate the Uptake of Clean Coal Technologies by Developing Economies in the Asia Pacific Region (EWG 01/2008T) ▪ ABAC: Business Statements on the importance of Transparency to Facilitate Investment
<i>Stability, security and protection</i>	

<i>Principle</i>	<i>Action under way</i>
<i>Predictability and consistency</i>	<ul style="list-style-type: none"> ▪ Seminar on Good Governance on Investment Promotion (CTI 10/2008T) ▪ Cross-border Mergers and Acquisitions on Exports, FDI and Competition Policy (EC) ▪ ABAC: Business Statements on the importance of Harmonisation of Rules to Facilitate Investment
<i>Efficiency and effectiveness</i>	<ul style="list-style-type: none"> ▪ APEC-UNCTAD Joint Capacity Building Project for Addressing Knowledge Gaps in the Use of Foreign Direct Investment (Stage 1) (CTI 03/2008A) ▪ APEC-UNCTAD Joint Capacity Building Project for Addressing Knowledge Gaps in the Use of Foreign Direct Investment (Stage 2) (CTI 04-2008A) ▪ Doing Business - Investment at the Sub-National Level to Promote Economic Integration (Phase 1) (CTI 35/2008T) ▪ Measures Affecting Cross Border Exchange and Investment in Higher Education in the APEC Region (HRD 02/2008T) ▪ Study on Measures of Ease of Doing Business in APEC (EC) ▪ ABAC: Business Statements on the importance of Simplification of Approvals Processes to Facilitate Investment
<i>Constructive stakeholder relationships</i>	<ul style="list-style-type: none"> ▪ Workshop on SMEs' Financing in Asia-Pacific Region (SMEWG 02/2008A) ▪ Capacity Building for Investment Liberalisation and Facilitation (HRDWG project for 2007-2008) (HRD 01/2007T) ▪ Capacity Building for Sharing Success Factors of Improvement of Investment Environment (CTI 32/2008T) ▪ ABAC: Matrix of Successful Investment Facilitation Measures
<i>Use of new technology</i>	
<i>Monitoring and review</i>	
<i>Enhance international cooperation</i>	<ul style="list-style-type: none"> ▪ Seminar on Recent Trends on Investment Liberalization and Facilitation in Transport and Telecommunications Infrastructure (CTI 09/2008T) ▪ APEC Energy Trade and Investment Study and Roundtable (EWG) ▪ Capacity Building for International Investment Agreements (CTI 02/2008T) ▪ Core Elements in International Investment Agreements Project (Phase II) (CTI 34-2008T)

<i>Principle</i>	<i>Action under way</i>
	<ul style="list-style-type: none"><li data-bbox="565 254 1388 354">▪ APEC Seminar for Sharing Experience in APEC Economies on Relations between Competition Authorities and Regulator Bodies (CTI 13/2008T)

**Annex 8. The U.S. – Chile Free Trade Agreement Implementation Act Statement of
Administrative Action (excerpts)**THE UNITED STATES-CHILE FREE TRADE AGREEMENT
IMPLEMENTATION ACT

STATEMENT OF ADMINISTRATIVE ACTION

This Statement of Administrative Action is submitted to the Congress in compliance with section 2105(a)(1)(C)(ii) of the Bipartisan Trade Promotion Authority Act of 2002 (ATPA Act@) and accompanies the implementing bill for the United States-Chile Free Trade Agreement (AAgreement@). The bill approves and makes statutory changes necessary or appropriate to implement the Agreement, which the United States Trade Representative signed on June 6, 2003.

[...]

Chapter Fourteen (Temporary Entry of Business Persons)1. Implementing Bill

Title IV of the bill implements U.S. commitments under Chapter 14 of the Agreement, which governs the temporary entry of business persons. In general, Chapter 14 is consistent with existing provisions of the Immigration and Nationality Act (AINA@). The four categories of persons eligible for admission under the Agreement's expedited procedures correspond to existing INA nonimmigrant and related classifications.

In order to provide for the admission of business visitors and intra-company transferees, no changes in U.S. statutes are required. Limited technical changes are needed to provide for the admission of traders and investors and professionals. Legislation is also required to implement Article 14.3(2) of the Agreement regarding labor disputes.

a. Traders and Investors

Under Section B of Annex 14.3 of the Agreement, citizens of Chile are eligible for temporary entry as traders and investors. This category provides for admission under requirements identical to those governing admission under INA section 101(a)(15)(E) (8 U.S.C. 1101(a)(15)(E)), which permits entry for persons to carry on substantial trade in goods or services or to develop and direct investment operations.

Section 101(a)(15)(E) currently conditions admission into the United States upon authorization pursuant to a treaty of commerce and navigation. Since the Agreement

is not a treaty of commerce and navigation, and no such treaty exists between the United States and Chile, legislation is necessary to accord treaty trader and investor status to Chilean citizens qualifying for entry under Section B.

Section 401 of the bill does not amend section 101(a)(15)(E). Instead, it uses a mechanism similar to that provided in section 341(a) of the North American Free Trade Agreement Implementation Act, which in turn was based upon the Act of June 18, 1954 (68 Stat. 264, 8 U.S.C. 1184a). The Act of June 18, 1954 conferred treaty trader and investor status upon nationals of the Philippines on a basis of reciprocity secured by an agreement entered into by the President of the United States and the President of the Philippines.

b. Professionals

Section 402(a) of the bill amends section 101(a)(15)(H)(i) of the INA (8 U.S.C. 1101(a)(15)(H)(i)), which defines certain categories of persons entitled to enter the United States as nonimmigrant professionals. Section 402(a) of the bill inserts new subclause (b1) into INA section 101(a)(15)(H)(i). Subclause (b1) establishes a new category of aliens entitled to enter the United States temporarily as nonimmigrants. These aliens are citizens of countries with which the United States has entered into free trade agreements listed in INA section 214(g)(8)(A), as amended by the bill, and who seek to come to the United States temporarily to engage in business activities at the professional level. To qualify as a professional for purposes of subclause (b1), a person must be engaged in a specialty occupation requiring (1) theoretical and practical application of a body of specialized knowledge, and (2) attainment of a bachelor's degree or higher degree in the specific specialty (or the equivalent of such a degree) as a minimum for entry into the occupation in the United States. It is intended that the definition of Aspecialty occupation in the amendment to the INA made by section 402(a)(1) of the implementing bill will be interpreted in a manner similar to the interpretation of the definition of Aspecialty occupation under section 214(i) of the INA.

Entry into the United States under section 101(a)(15)(H)(i)(b1) would be subject to annual numerical limits established by the Secretary of Homeland Security as provided for in the applicable agreement, and as set forth in INA section 214(g)(8)(B), as added by the bill. The Department of Labor will also issue regulations governing temporary entry of professionals under this new provision of law. These amendments to the INA implement Section D of Annex 14.3 of the Agreement.

Annual numerical limits under the H-1B program, set forth in INA section 214(g)(1)(A), will be reduced by the annual numerical limits set forth in new INA section 214(g)(8)(B). However, if at the end of a fiscal year the limits under section 214(g)(8)(B) have not been exhausted, the H-1B limit for that fiscal year may be adjusted by the amounts remaining under section 214(g)(8)(B). Visas may be issued under the H-1B program pursuant to such adjustment to persons who applied for H-1B visas in the year for which the adjustment was made. These visas may be issued only during the first 45 days of the next fiscal year.

A person's status under section 101(a)(15)(H)(i)(b1) will be valid for one year at a time, renewable in one-year increments (subject to conditions discussed below concerning the labor attestation made by the alien's employer). Continuation of such status will not count against the applicable numerical limit in INA section 214(g)(8)(B). However, after the fifth extension of an alien's status under section 101(a)(15)(H)(i)(b1), subsequent extensions will count against the H-1B numerical limit set forth in INA section 214(g)(1)(A).

Existing INA section 101(a)(15)(H) also provides for the entry of spouses and children accompanying or following to join business persons entering under new subclause (b1). The purpose of this provision is to grant express authorization for the admission of such persons, but not allow them to be employed in the United States unless they independently meet all applicable INA requirements.

Persons seeking temporary entry into the United States under section 101(a)(15)(H)(i)(b1) will be:

- considered to be seeking nonimmigrant status;
- subject to general requirements relating to admission of nonimmigrants, including those pertaining to the issuance of entry documents and the presumption set out in INA section 214(b) (8 U.S.C. 1184(b)); and
- accorded nonimmigrant status on admission.

This treatment also codifies current practice.

It should be noted that while there are many similarities between the way professionals would be treated under section 101(a)(15)(H)(i)(b1) of the INA, as added by the bill, and the way H-1B professionals are treated, a determination of admissibility under subclause (b1) will neither foreclose nor establish eligibility for entry as an H-1B professional. Further, section 101(a)(15)(H)(i)(b1) does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed.

Certain provisions of the H-1B program are due to expire at the end of fiscal year 2003. In future legislation, Congress may extend or modify those provisions. It is recognized that, should Congress extend or modify provisions of the H-1B program, it may make corresponding modifications to the amendments to the INA made by the implementing bill, to the extent consistent with the obligations of the United States under the Agreement. In particular, section 402(d) of the bill amends section 214(c) of the INA to establish that any fee charged for issuance of a visa pursuant to the H-1B program will also be charged for issuance of a visa pursuant to INA section 101(a)(15)(H)(i)(b1). Such fees will be used for worker training, scholarships, and other purposes for which H-1B fees are used, as described in INA section 286(s).

c. Numerical Limitations

Paragraph six of Section D of Annex 14.3 of the Agreement permits the United States to establish an annual numerical limit on temporary entries under the Agreement of Chilean professionals. Under new paragraph (8)(B) of INA section 214(g) added by section 402(a) of the bill, the Secretary of Homeland Security will issue regulations establishing an annual limit of up to 1,400 new temporary entry applications from Chilean professionals, as provided in Appendix 14.3(D)(6) of the Agreement.

As discussed above, the annual numerical limits applicable under the H-1B program will be adjusted in light of the numerical limits established under INA section 214(g)(8)(B).

d. Labor Attestations

Under section (D)(5) of Annex 14.3 of the Agreement, the United States may require that an attestation of compliance with labor and immigration laws be made a condition for the temporary entry of Chilean professionals. This provision allows U.S. labor and immigration officials to ensure that U.S. employers are not hiring Chilean professionals as a way to put pressure on U.S. employees to accept lower wages or less favorable terms and conditions of employment.

Section 402(b) of the bill implements the attestation requirement under the Agreement. Section 402(b) of the bill amends section 212 of the INA (8 U.S.C. 1182) by adding a new subsection (t) to the end of that section.

INA section 212(t)(1), as added by section 402(b) of the bill, requires a U.S. employer seeking a temporary entry visa for a Chilean professional to file an attestation with the Secretary of Labor. The attestation will consist of four core elements similar to those required for attestations under the H-1B visa program. See 8 U.S.C. 1182(n)(1)(A)-(C). Thus, an employer must attest that:

- It will pay the employee the higher of (a) the actual wage paid to all other individuals with similar experience and qualifications for the specific employment in question, or (b) the prevailing wage level for the occupational classification in the area of employment.
- It will provide working conditions for the employee that will not adversely affect the working conditions of workers similarly employed.
- There is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment.
- The employer has provided notice of its attestation to its employees' bargaining representative in the occupational classification in the area for which the employee is sought or, absent such a representative, has otherwise notified its employees.

An attestation is required in connection with a professional's initial admission into the United States pursuant to INA section 101(a)(15)(H)(i)(b1). A professional's nonimmigrant status under section 101(a)(15)(H)(i)(b1) is valid for one year at a time,

renewable in one year increments. Pursuant to INA section 214(g)(8)(C), as added by the bill, for a professional whose status under section 101(a)(15)(H)(i)(b1) is extended, a new attestation must be filed every three years for the duration of the professional's continuation of nonimmigrant status under section 101(a)(15)(H)(i)(b1).

The remainder of new INA section 212(t) contains provisions for enforcing the labor attestation requirement. Like the contents of the attestation itself, the enforcement requirements are based on requirements under the H-1B visa program.

INA section 212(t)(2)(A) requires an employer to make copies of labor attestations (and such accompanying documents as are necessary) available for public examination at the employer's principal place of business or worksite.

INA section 212(t)(2)(B) requires the Secretary of Labor to compile a list of all labor attestations filed including, with respect to each attestation, the wage rate, number of alien professionals sought for employment, period of intended employment, and date of need. These lists will be available for public examination at the Department of Labor in Washington, D.C.

INA section 212(t)(2)(C) provides that the Secretary of Labor shall accept a labor attestation within seven days of filing and issue the certification necessary for an alien to enter the United States as a nonimmigrant under INA section 101(a)(15)(H)(i)(b1), unless the attestation is incomplete or obviously inaccurate.

INA section 212(t)(3)(A) requires the Secretary of Labor to establish a process for the receipt, investigation, and disposition of complaints respecting an employer's failure to meet a condition specified in a labor attestation or an employer's misrepresentation of material facts in such an attestation. Section 212(t)(3) also sets forth penalties that may be imposed for violation of the labor attestation requirements, including monetary fines and denial of applications for visas under INA section 101(a)(15)(H)(i)(b1) for specified periods.

INA section 212(t)(4) defines certain terms used in INA section 212(t).

e. Labor Disputes

Article 14.3(2) of the Agreement establishes an important safeguard for the domestic labor force in the United States and Chile, respectively. It permits either government to refuse to issue an immigration document authorizing employment where the temporary entry of a business person might affect adversely the settlement of a labor dispute or the employment of a person involved in such dispute. Article 14.3(2) thus allows the United States to deny temporary entry to a Chilean business person whose activities in the United States require employment authorization if admission might interfere with an ongoing labor dispute. If the United States invokes Article 14.3(2), it must inform the business person in writing of the reasons for its action and notify Chile.

Section 403 of the bill implements Article 14.3(2) of the Agreement by amending INA section 214(j) (8 U.S.C. 1184(j)), designating current subsection (j) as paragraph (1) and inserting a new paragraph (2).

New paragraph (2) of INA section 214(j) provides authority to refuse nonimmigrant classification under specified circumstances to a Chilean business person seeking to enter the United States under and pursuant to the Agreement. In particular, nonimmigrant classification may be refused if there is a labor dispute affecting the relevant occupational classification at the Chilean business person's place of employment or intended place of employment in the United States, unless that person establishes, pursuant to regulations issued by the Secretary of Homeland Security after consultations with the Secretary of Labor, that the business person's entry will not adversely affect the settlement of the labor dispute or the employment of any person involved in the labor dispute.

New paragraph (2) of INA section 214(j) also requires the provision of notice to the affected Chilean business persons and to Chile of a determination to deny nonimmigrant classification, as required under Article 14.3(3) of the Agreement.

As discussed above, an employer seeking to hire a Chilean professional under new section 101(a)(15)(H)(i)(b1) of the INA must submit an attestation in compliance with all of the conditions set forth in new section 212(t)(1) of the INA. If the employer is unable to make the necessary attestation, due to a strike or lockout in the professional's occupational classification, then the Chilean professional will not be admitted to enter the United States under section 101(a)(15)(H)(i)(b1), notwithstanding new INA section 214(j)(2).

INA section 214(j)(2) as inserted by the bill applies only to requests for temporary entry by traders and investors, intra-company transferees, and professionals---i.e., the categories of nonimmigrants that require employment authorization under U.S. law (corresponding to Sections B, C, and D of Annex 14.3 of the Agreement). Employment in the U.S. labor market is not permitted for business visitors, as defined in INA section 101(a)(15)(B) (8 U.S.C. 1101(a)(15)(B)) (corresponding to Section A of Annex 14.3 of the Agreement); violations of status under that provision that involve labor disputes are fully redressable under existing law.

Section 214(j)(2) is similar to existing INA provisions that prohibit admission in certain circumstances where interference with a labor dispute may result. For example, under INA section 212(n)(1)(B) (8 U.S.C. 1182(n)(1)(B)), the U.S. employer sponsoring an alien for admission must certify that there is no strike or lockout in the occupational classification at the place of employment. Additionally, section 214(j)(2) will supplement INA section 237(a)(1)(C) (8 U.S.C. 1227(a)(1)(C)) and related INA provisions that now authorize deportation of an alien admitted under a particular nonimmigrant category if the alien ceases to perform the type of work permitted under that category or misrepresented the nature of the work at the time of admission. The Department of Labor will provide strike certifications to the Department of Homeland Security, as it has provided to the

Immigration and Naturalization Service under existing provisions, pursuant to 8 C.F.R. 214.2(h)(17).

2. Administrative Action

Chile will be added to the list of countries, maintained by the Department of State, whose citizens are eligible for treaty trader and treaty investor status under INA section 101(a)(15)(E).

With respect to professionals provided for under Section D of Annex 14.3 of the Agreement, in all cases where a state license is required to engage in a particular activity in the United States, such professionals will be required to obtain the appropriate state license.

Pursuant to INA section 214(g)(8)(B) as added by section 402(a) of the bill, the Secretary of Homeland Security will issue regulations implementing the numerical limits set forth in Appendix 14.3(D)(6) of the Agreement. The Secretary of Labor will issue regulations implementing the labor attestation provisions in new subsection (t) of INA section 212. The administrative agencies responsible for administering the other amendments to the INA described above will promulgate regulations to implement those amendments.