



**Asia-Pacific  
Economic Cooperation**

**Advancing** Free Trade  
for Asia-Pacific **Prosperity**

# **Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2017 by APEC Economies**

**APEC Policy Support Unit**

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## KEY FINDINGS

- The number of RTA/FTAs signed and enforced by APEC economies has grown year after year. As of December 2017, 175 RTA/FTAs had been signed by at least one APEC economy. 164 of them were already in force, out of which 63 had been intra-APEC agreements.
- APEC economies are strengthening their integration within APEC and with the rest of the world through the implementation of RTA/FTAs. From the trade perspective, APEC's share of exports with its RTA/FTA partners surged from 24.2% in 1997 to 49.4% in 2017. Similarly, APEC's share of imports with its RTA/FTA partners increased from 22.6% to 46.0% during the same period.
- By the end of 2017, 101 intra-APEC trade pairings were covered by RTA/FTAs. This signified that 48.1% of the bilateral trade pairings within APEC had been covered by RTA/FTAs. However, some of the most important bilateral pairings in APEC have yet to be covered by any RTA/FTA (e.g. China-United States; China-Japan; and Japan-United States).
- In terms of Competition Policy provisions, all four agreements included clauses on state-owned enterprises. All agreements recognize that anti-competitive practices could be detrimental and do not prevent any party from maintaining or designating state enterprises, which have to act in a non-discriminatory manner. In addition, some agreements highlight the need for state enterprises to make purchases and sales under commercial considerations.
- Regarding the chapters on Temporary Entry of Natural Persons, all agreements facilitate temporary entry for applicants travelling for business purposes that fall under certain categories, such as intra-corporate transferees and business visitors. Some agreements also extend it to other categories. For instance: investors, merchants, independent professionals and contractual service suppliers. Reservations and economic needs test apply for some cases. The initial granted period and extensions for temporary entry differ depending on the trade agreement and the type of business visitor.
- For Customs-related chapters, all agreements include WTO Trade Facilitation Agreement (TFA)-plus provisions. In some cases, RTA/FTAs incorporate the same TFA provisions or the whole TFA *mutatis mutandis* into the bilateral trade agreement. In terms of scope of Customs-related chapters, they differ in certain areas. For example, the implementation of risk assessment principles is only mandatory in certain RTA/FTAs. Also, in terms of advance rulings, while all provide for inquiries concerning tariff classification and origin of a good, not all agreements provide them for customs value criteria or if reimports are subject to preferential treatment.
- Investment chapters are included in three of the RTA/FTAs analyzed in this report (Canada-European Union; Peru-Honduras; and Singapore-Turkey FTAs). About the similarities, all agreements use a negative list approach for investment commitments at

both the pre and post-establishment stages. Similarities are also found regarding expropriation and compensation clauses and include definitions on direct and indirect expropriation. In terms of differences, some agreements offer fair and equitable treatment as well as “full protection and security” based on “international customary laws”, while others list actions/features that could determine a breach of these obligations. Procedures regarding investor-state dispute settlements also differ across RTA/FTAs. Also, some agreements do not prohibit the use of performance requirements on technology transfer as per the Agreement on Trade-Related Aspects of International Property Rights (TRIPS)’s Articles 31 and 39.

- It is possible that more RTA/FTAs in the future include specific clauses reaffirming the rights of the parties to regulate in order to achieve legitimate policy objectives. Therefore, regulations seeks these objectives will not constitute a breach of any obligation in RTA/FTAs. CPTPP already has a clause on the matter concerning tobacco control measures. Following a similar rationale, the Canada-European Union FTA includes a comprehensive clause in the Investment chapter, reaffirming the rights of the parties to regulate in order to achieve legitimate policy objectives such as those related to public health, safety, environment, public morals, social or consumer protection and the promotion and protection of cultural diversity.
- The report also show cases in which RTA/FTAs have been used as a tool to facilitate the implementation of domestic reforms in areas that would not have been able to do so in the absence of an RTA/FTA. Such reforms are mostly possible in cases where trade agreements are signed with very important partners. These reforms are not only conducted to put RTA/FTAs in force, but also to maximize benefits from them. Many of these reforms have been helpful to sustain economic growth rates and close the development gap. Evidence from Latin American economies show that economies that have pursued an outward-looking trade strategy, including through the use of RTA/FTAs, were able to make much more socioeconomic progress than those who have pursued inward-looking policies instead.

## 1 INTRODUCTION

As part of the APEC Information Sharing Mechanism agreed in 2014<sup>1</sup>, this is the fourth annual report produced on recent RTA/FTAs implemented by APEC economies. This report provides an overview of the proliferation of RTA/FTAs in the APEC region and the general structure of the trade agreements – involving at least one APEC economy as a member – put in place in 2017, namely: Canada-European Union; Canada-Ukraine; Peru-Honduras; and the Singapore-Turkey FTAs.

Concerning these trade agreements, common patterns and differences are identified in selected topics. The report also highlights some of the innovative features incorporated within these trade agreements. In addition, it discusses the importance of RTA/FTAs as a tool to trigger structural reforms and promote growth and development.

One of the RTA/FTA chapters analyzed in this report is on Competition Policy. This is in response to the growing number of RTA/FTAs that have included provisions on this matter, particularly those on state-owned enterprises and monopolies.

Another evaluated topic relates to the Temporary Movement of Natural Persons. In recent years, an increasing number of RTA/FTAs have incorporated disciplines on trade in services, with some even including chapters to facilitate the temporary entry to persons travelling for business-related purposes. Governments are interested in attracting investors, as well as highly-qualified professionals to facilitate businesses and in certain cases, find ways to reduce bottlenecks in the labor market.

This report also includes an analysis of the Customs Administration, Procedures and Trade Facilitation chapters. Given that the WTO Trade Facilitation Agreement (TFA) is in force, it is relevant to discuss the type of customs-related provisions governments are negotiating in RTA/FTAs. While so, it is important to note that the TFA includes provisions in many areas that have already been incorporated in RTA/FTAs negotiated before the implementation of the TFA.

Finally, for the fourth consecutive year, this report discusses the content of Investment chapters, as investment-related provisions have increasingly been included within RTA/FTAs. In general, there has been interest among relevant APEC committees and sub-fora to better understand the approaches taken to implement investment commitments (i.e. positive vs. negative list) and the features included in the clauses on investor-state dispute settlement.

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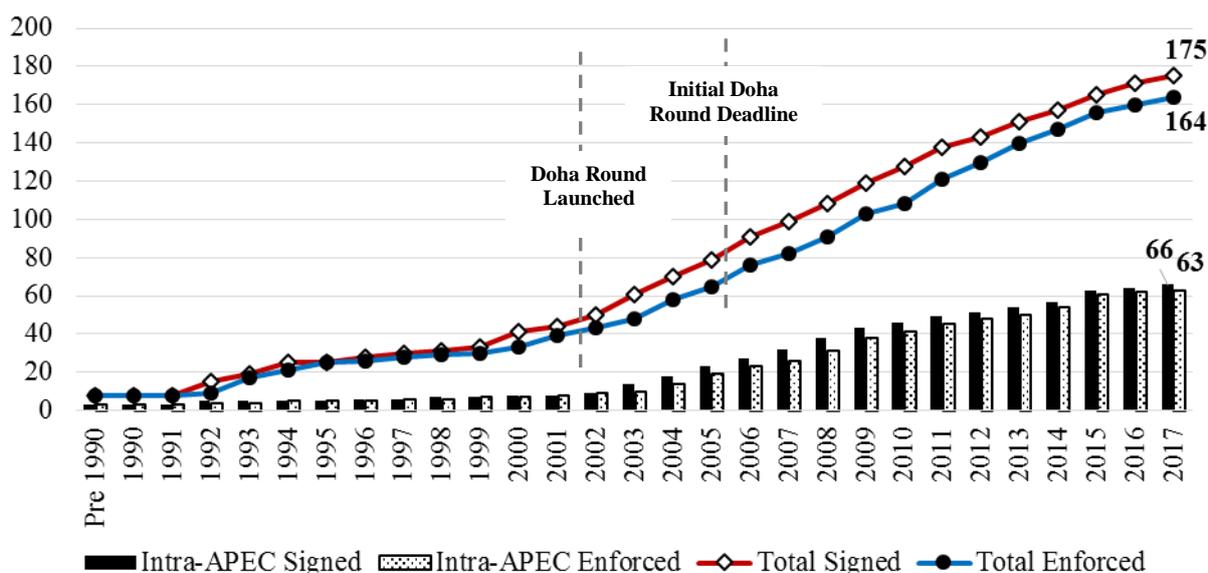
<sup>1</sup> APEC (2014), “Meeting of the APEC Ministers Responsible for Trade – Qingdao Statement”, 17-18 May, [https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Trade/2014\\_trade](https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Trade/2014_trade)

## 2 RTA/FTAS WITHIN THE APEC REGION

### 2.1 PROLIFERATION OF RTA/FTAS

The number of RTA/FTAs signed and enforced by APEC economies increased momentum after 1999 with signed agreements quadrupling between 2000 and 2017. By 2017, 175 agreements had been signed by APEC economies of which 66 agreements were intra-APEC (Figure 2.1). Almost 95% of these signed agreements by APEC economies had been enforced by 2017. Some possible explanations to the rise in number of RTA/FTAs includes the failure in concluding the Doha Round of multilateral trade negotiations at WTO<sup>2</sup>, the increased coverage provided by RTA/FTAs<sup>3</sup>, and the relative ease to successfully conclude trade negotiations at the bilateral level, among others.

**Figure 2.1: Cumulative Number of RTA/FTAs Signed and Enforced by APEC Economies**



Source: APEC Secretariat, Policy Support Unit

### 2.2 FREE TRADE AGREEMENTS AS MAIN CHOICE OF TRADE INTEGRATION

The use of Free Trade Agreements (FTAs) has been the main policy choice to deepen trade integration for APEC economies. Almost all trade integration schemes chosen by APEC economies have been FTAs. One exceptions is the Eurasian Economic Union, a customs union where Russia is a member. Another integration scheme, the Andean Community, which Peru is part of, has implemented policies to facilitate the movement of factors of production, but has yet to attain common market status<sup>4</sup>.

<sup>2</sup> Menon, J. (2008). Dealing with the Proliferation of Bilateral Trade Agreements. *APEC Study Center (Discussion Paper Series)*.

<sup>3</sup> World Trade Organization. (2011). *World Trade Report 2011: The WTO and preferential trade agreements (From co-existence to coherence)*, p. 61-63.

<sup>4</sup> Sistema Económico Latinoamericano y del Caribe (2014), *Evolución de la Comunidad Andina*, SP-Di No. 7-14, p. 38.

Some possible reasons for the preference of free trade areas over customs unions, common markets and monetary unions are as follows<sup>567</sup>:

### **I Greater Control of Domestic Policy**

Free trade areas allow economies involved to maintain barriers to trade with economies outside the free trade area based on their own domestic policies, while removing barriers between signatory parties. Other forms of integration such as customs unions require greater integration through means such as a common external tariff. Furthermore, free trade areas can be limited to particular sectors, whereas other engagement forms are more pervasive. All in all, the greater autonomy an economy has over its trade policy makes the use of free trade areas a popular instrument.

### **II Creating Markets for Higher Cost Inputs**

The frequent use of rules of origin within free trade areas may require economies to purchase inputs from their partner economy despite them being priced higher than those from the rest of the world. This trade diversion allows end products created with these higher priced inputs to be exported to its partner economy duty-free. These measures allow uncompetitive producers that are unable to compete with other lower cost inputs from outside the free trade area to continue to have a market to sell their products.

### **III Influence of Domestic Producers in Trade Policy**

The need for rules of origin to be included within free trade areas motivates domestic producers to seek protection from governments by requesting specific rules or production processes to be met for a product to qualify as originating within the free trade area. While rules of origin may help to protect domestic firms, they tend to increase the complexity of trade transactions and could divert trade.

### **IV Increased Bargaining Power**

By joining a customs union, economies have limited bargaining powers on the acceptable common external tariff levels. However, within free trade areas, economies have more power to negotiate their liberalization schemes with each of their counterparts.

## **2.3 INTENSIFICATION OF TRADE INTEGRATION BY APEC ECONOMIES**

Trade integration within the region has intensified in recent years with the number of Intra-APEC trade pairings with RTA/FTAs having increased by almost 4 times between 1997 and 2017 (Table 2.1). As of 2017, almost half of all possible trade pairings within APEC have been covered by trade agreements and have contributed towards 63.6% of all trade flows (USD 6.1 trillion) within the APEC region.

While intra-APEC trade flows have increased by several billions in recent years, the growth rate of Intra-APEC trade flows that are both covered and not covered by RTA/FTA partners have slowed in the last decade. Specifically, the growth rate of Intra-APEC trade flows grew

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<sup>5</sup> Krueger, A. (1997), Free Trade Agreements versus Customs Unions, *Journal of Development Economics* 54, p. 169-187

<sup>6</sup> Mirus, R., & Rylska, N. (n.d.). Economic Integration: Free Trade Areas VS Customs Unions. Western Centre for Economic Research.

<sup>7</sup> Paul R. Krugman, (1991). "The move toward free trade zones," *Economic Review*, Federal Reserve Bank of Kansas City, issue Nov, p. 5-25.

by 122.7% between 1997 and 2007 but is seen to fall to 46.4% between 2007 and 2017. IMF (2016) identifies weakness in economic activity and reduced investment growth as main factors contributing towards the decline in trade growth since 2012. However, it also highlights other factors that could have contributed to the decline such as a slowdown in trade liberalization and an increase in implementation of protectionist measures<sup>8</sup>.

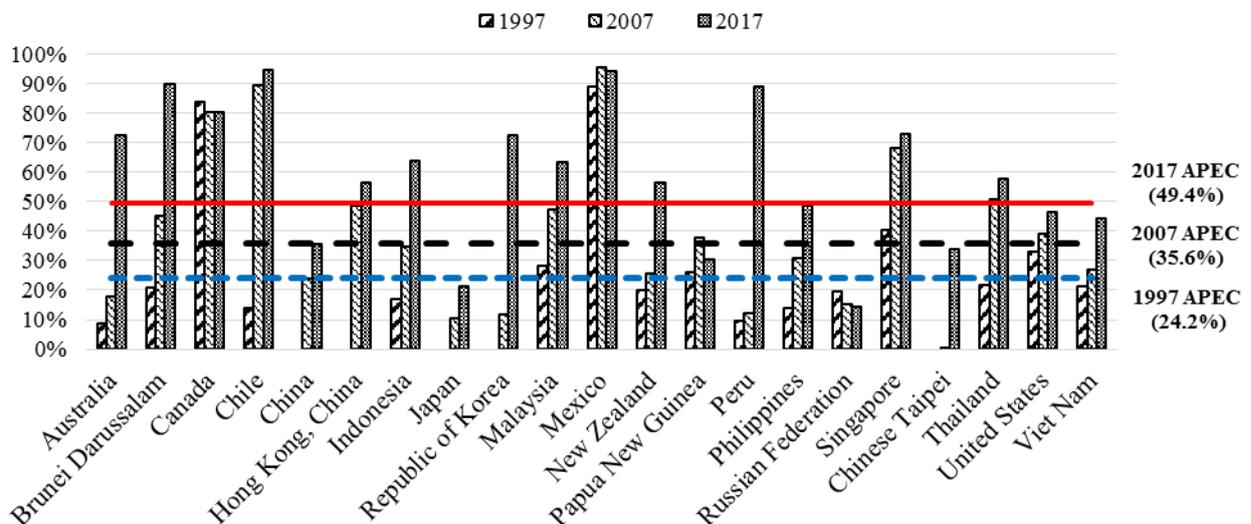
**Table 2.1: Intra-APEC Trade Pairings Covered by RTA/FTAs**

Year	Intra APEC Trade Pairings	Intra-APEC Trade Pairings with RTA/FTAs	% Intra APEC Trade Pairings with RTA/FTA	Intra-APEC Trade Flows (USD Billions)	Intra-APEC Trade Flows by RTA/FTA Partners (USD Billions)	% of Intra-APEC Trade Flows by RTA/FTA Partners
1997	210	28	13.3	1,884.8	603.9	32.0
2007	210	62	29.5	4,197.8	2,052.6	48.9
2017	210	101	48.1	6,144.5	3,907.8	63.6

Source: International Monetary Fund – Direction of Trade Statistics; Chinese Taipei’s Ministry of Finance– Trade Statistics Database; APEC Secretariat, Policy Support Unit Calculations.

Encouragingly, increased integration has also been noted between APEC economies and the rest of the world. This is illustrated in Figure 2.2 and Figure 2.3 which shows the share of trade between APEC and its RTA/FTA partners having increased for most economies between 1997 and 2017. For the case of exports, APEC as a region has seen improvements in its share of trade from 24.2% in 1997 to 49.4% in 2017. Similarly, on the import side, the regions share of trade has increased from 22.6% in 1997 to 46.0% in 2017.

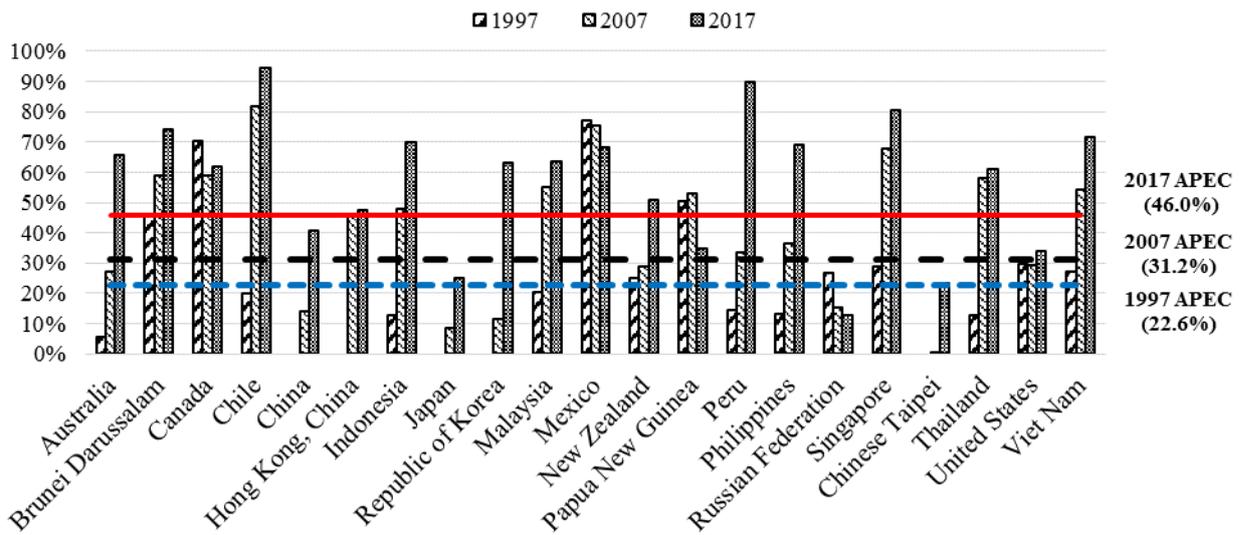
**Figure 2.2: APEC Economies’ Share of Trade with RTA/FTA Partners (Exports)**



Source: International Monetary Fund – Direction of Trade Statistics; Chinese Taipei’s Ministry of Finance – Trade Statistics Database; APEC Secretariat, Policy Support Unit Calculations.

<sup>8</sup> International Monetary Fund. (2016). Global Trade: What’s behind the Slowdown?. Chapter 2, in World Economic Outlook, Washington, October 2016.

**Figure 2.3: APEC Economies' Share of Trade with RTA/FTA Partners (Imports)**



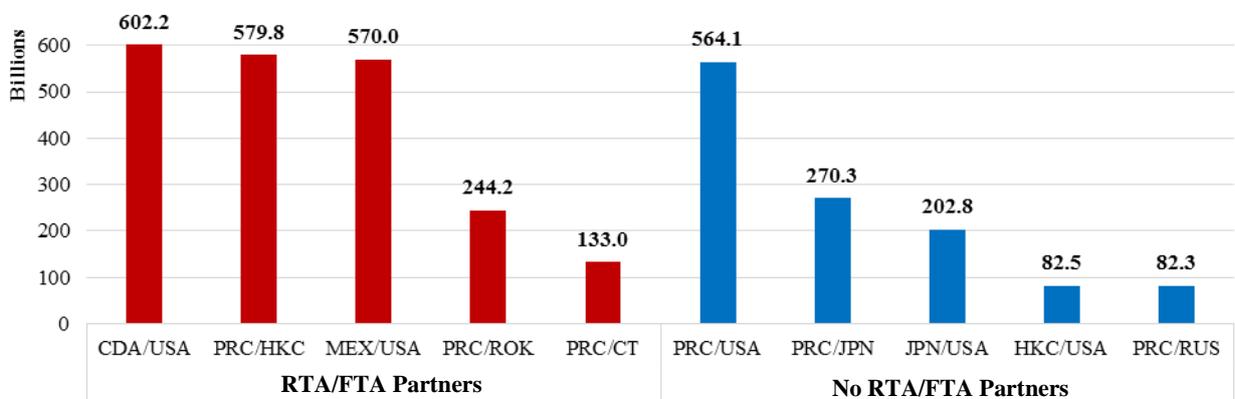
Source: International Monetary Fund – Direction of Trade Statistics; Chinese Taipei’s Ministry of Finance – Trade Statistics Database; APEC Secretariat, Policy Support Unit Calculations.

**2.4 TOP 2017 BILATERAL TRADE FLOWS IN APEC**

Many top bilateral trade flows within the APEC region take place between RTA/FTA partners. These top bilateral trade flows are illustrated in Figure 2.4, with the largest ones being between Canada and the United States (USD 602 billion). Trade flows between China and Hong Kong, China followed closely behind, totaling USD 579 billion.

While 64.0% of intra-APEC trade flows have been covered by RTA/FTA partners (as shown in Table 2.1), several important trade flows continue to be uncovered. For instance, bilateral trade flows between China and the United States accounted for USD 564 billion.

**Figure 2.4: Top 5 Bilateral Trade Flows within APEC in 2017**



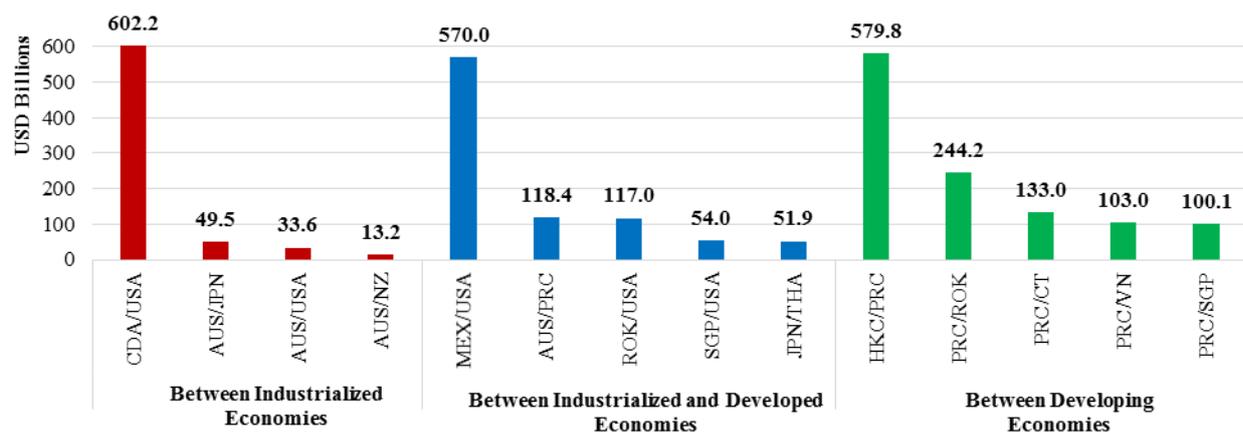
Source: International Monetary Fund – Direction of Trade Statistics; Chinese Taipei’s Ministry of Finance – Trade Statistics Database; APEC Secretariat, Policy Support Unit Calculations.

Figure 2.5 and Figure 2.6 illustrates the top trade flows in the region categorized by the development stage of economies. On evaluation of bilateral trade flows by RTA/FTA partners, total trade involving developing RTA/FTA partners only were higher in comparison to those

involving either industrialized RTA/FTA partners only or one industrialized and one developing economy<sup>9</sup>. While for trade flows not covered by RTA/FTAs, total trade flows between industrialized and developing economies were found to be the highest.

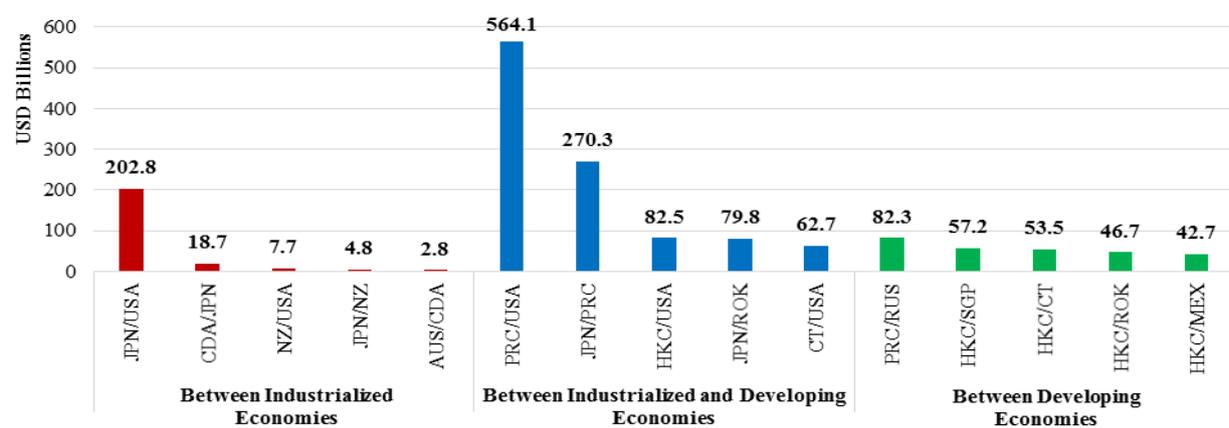
While industrialized economies in APEC account for a large proportion of total trade flows, only four bilateral trade flows among these economies have been covered by RTA/FTA partners thus far, with a significant trade flow between Japan and the United States still uncovered. Likewise, for trade flows between industrialized and developing economies, important trade flows such as those between China and the United States (USD 564 billion) and between Japan and China (USD 270 billion) are not covered by any RTA/FTA yet.

**Figure 2.5: Top 5 Bilateral Trade Flows in APEC between RTA/FTAs Partners in 2017**



Source: International Monetary Fund – Direction of Trade Statistics; Chinese Taipei’s Ministry of Finance – Trade Statistics Database; APEC Secretariat, Policy Support Unit Calculations.

**Figure 2.6: Top 5 Bilateral Trade Flows in APEC between Partners without RTA/FTAs**



Source: International Monetary Fund – Direction of Trade Statistics; Chinese Taipei’s Ministry of Finance – Trade Statistics Database; APEC Secretariat, Policy Support Unit Calculations.

<sup>9</sup> The classification of APEC economies as “industrialized” or “developing” follows a similar criterion used in WTO, in which members announce for themselves whether they consider as “industrialized” or “developing” economies. The APEC-industrialized economies are Australia; Canada; Japan; New Zealand; and United States. The APEC-developing economies are Brunei Darussalam; Chile; China; Hong Kong, China; Indonesia; Korea; Malaysia; Mexico; Papua New Guinea; Peru; Philippines; Russia; Singapore; Chinese Taipei; Thailand; and Viet Nam.

## **2.5 FUTURE DEVELOPMENTS**

While the APEC region has achieved a great degree of trade integration, it is still possible to deepen it through the pursuit of additional high-quality RTA/FTAs. Important bilateral trade flows between developed and developing economies such as those between China and the United States continue to be uncovered by any RTA/FTA. However, it is encouraging that agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership have been signed. Enforcing this agreement will add an additional 19 trade pairings thereby increasing the coverage of intra-APEC pairings subject to RTA/FTAs from 101 to 120 (i.e. from 48.1% to 57.1% of all possible pairings in APEC).

### 3. GENERAL STRUCTURE OF RTA/FTA'S IN FORCE 2017

Table 3.1 below provides an overview of the chapters covered by agreements enforced by APEC economies in 2017. As noted in previous years, apart from traditional chapters on trade in goods, agreements enforced have included disciplines on services and investments as well.

**Table 3.1: Chapter Structure of RTA/FTAs**

Chapters\ RTA/FTAs	Canada-European Union	Canada-Ukraine	Peru-Honduras	Singapore-Turkey
Trade in Goods				
Rules of Origin				
Customs Administration /Trade Facilitation				
Technical Barriers to Trade				
Sanitary and Phytosanitary Measures				
Trade Remedies				
Cross Border Trade in Services				
Financial Services				
Telecommunications				
Maritime Services				
Movement of Business People				
Investment				
Government Procurement				
Intellectual Property Rights				
Competition Policy				
E-Commerce				
Cooperation / Promotion				
Labor				
Environment				
Transparency				
Dispute Settlement				
Regulatory cooperation				
Subsidies				
Mutual Recognition of Professional Qualification				
Domestic Regulation				
State Enterprises, Monopolies and Enterprises granted Special Rights or Privileges				
Trade and Sustainable Development				

Included	
Included in other chapters	

Source: APEC Secretariat, Policy Support Unit. Extracted from the legal texts of each of the agreements.

Traditional chapters in trade agreements such as Trade in Goods; Rules of Origin; Customs Administration/Trade Facilitation; Technical Barriers to Trade; and Sanitary and Phytosanitary Measures are found in all four agreements put into force in 2017. Trade remedies were found to be included in all agreements evaluated as well. On the other hand, subsidies were found to be included as an individual chapter only within Canada-European Union, while clauses on the matter were included in other chapters in the Peru-Honduras and Singapore-Turkey FTAs.

For services, all agreements, except the Canada-Ukraine FTA included a chapter on Cross-Border Trade in Services. Individual chapters for specific services sectors have been included for financial services (in two agreements), telecommunications (in two agreements) and maritime services (in one agreement). Furthermore, the chapter on E-Commerce is found three agreements. The Canada-Ukraine agreement was the only agreement out of the four analyzed to not deal with issues concerning the temporary entry of business people, mutual recognition of professional qualifications and domestic regulation. While temporary entry is addressed as a separate chapter in the Canada-European Union; Peru-Honduras; and Singapore-Turkey FTAs; domestic regulation is only addressed as separate chapter in the Canada-European Union FTA.

Investment has been included in three agreements, only missing in the Canada-Ukraine FTA. Government Procurement, Transparency, Intellectual Property Rights, Dispute Settlement and Competition Policy have also been included as individual chapters in all four agreements. Regarding the issue of state-owned enterprises and monopolies, the Canada-European Union and Canada-Ukraine FTAs have included it as an individual chapter, while the Peru-Honduras and Singapore-Turkey FTAs have included disciplines on the matter within other chapters.

Chapters related to economic development are being included within some agreements as well. Individual chapters on Labor and Environment were included for both agreements put in force by Canada. Similarly, Trade and Sustainable Development has been included as an individual chapter in the Canada-European Union FTA.

Cooperation/promotion has been included as a chapter in three agreements with the exception of the Peru-Honduras FTA. While regulatory cooperation and domestic regulation was only found as an individual chapter within the Canada-European Union agreement.

## **4 ANALYSIS OF THE STRUCTURE OF SPECIFIC RTA/FTA CHAPTERS**

### **4.1 COMPETITION POLICY**

Competition Policy chapters are found in all four RTA/FTAs analyzed in this report. The content of these chapters are considered WTO-plus, as there are limited rules on this matter within the WTO. While all four agreements contain provisions on state enterprises, only the Canada-Ukraine FTA includes them within the Competition Policy chapter. For the case of the Canada-European Union FTA, this topic is included in a separate chapter titled State Enterprises, Monopolies, and Enterprises Granted Special Rights or Privileges. The Peru-Honduras and Singapore-Turkey FTAs include a provision on the matter in their Market Access chapters instead.

In general, the Competition Policy chapters in these RTA/FTAs contain provisions that incorporate some elements of the APEC Model Measures for RTA/FTAs on Competition Policy in clauses relating to objectives/principles, treatment of anticompetitive business conduct, cooperation, consultations and dispute settlement.

#### **I Objectives and Purpose**

All agreements evaluated have recognized that anti-competitive practices could be detrimental. In the case of the Canada-European Union, Peru-Honduras and Singapore-Turkey FTAs, it is mentioned that these practices could undermine the benefit of trade liberalization, as stressed within APECs Model Measures for RTA/FTAs. The Canada-European Union, Canada-Ukraine and Singapore-Turkey FTAs recognize that these practices could distort the proper functioning of markets.

The Peru-Honduras FTA also includes the promotion of cooperation among the parties to adopt and enforce their competition-related regulations, as one of the objectives of the Competition Policy chapter.

#### **II Application of Competition Laws**

All agreements mention that measures adopted by the parties need to be consistent with the principles of non-discrimination, transparency and procedural fairness, which are also included within the APEC Model Measures for RTA/FTAs<sup>10</sup>. Similarly, the four RTA/FTAs state that these measures have to be applied to the extent required by their own laws.

The Canada-European Union and Canada-Ukraine FTAs contemplate the possibility of excluding the application of competition laws in a transparent manner.

#### **III Definition of Anti-Competitive Practices**

The Canada-European Union and Canada-Ukraine FTA contain the same definition of “anti-competitive business conduct”, which refers to “anti-competitive agreements, concerted practices or arrangements by competitors, anti-competitive practices by an enterprise that is dominant in a market, and mergers with substantial anti-competitive effects”.

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<sup>10</sup> The APEC Model Measures for RTA/FTAs promotes the objectives of the APEC Principles to Enhance Competition and Regulatory Reform, which includes the principles of non-discrimination and transparency, as well as features related to procedural fairness.

The Singapore-Turkey FTA does not contain an explicit definition of anti-competitive practices, but notes that to promote undistorted competition, parties have to address certain areas within their legislation. Some examples of these include horizontal agreements, decisions by associations and concerted practices with the objective of preventing, restricting or distorting competition; abuses of a dominant position; and concentrations which lessens or prevent effective competition (e.g. by strengthening of a dominant position).

#### **IV Transparency**

For the case of the Canada-European Union and Canada-Ukraine FTAs, parties implementing exclusions from the application of competition laws have to provide public information to the other party in relation to those exclusions.

#### **V Monopolies**

Regarding monopolies, the Canada-European Union and Canada-Ukraine FTAs mention that parties have the right of maintaining or designating a monopoly. The Canada-European Union FTA adds that nothing prevents a party from granting an enterprise, including a monopoly, special rights or privileges.

For monopolies to operate, both the Canada-European Union and Canada-Ukraine agreements establish some conditions that monopolies have to meet. Some examples include the need to act in a manner that is consistent with the obligations agreed to by parties in the agreement and according to commercial considerations, as well as providing non-discriminatory treatment to goods and services of the other party. Furthermore, the Canada-Ukraine FTA includes that the aforementioned non-discriminatory treatment is applicable in the relevant market, and that monopolies cannot use their monopoly position to engage in anti-competitive practices in a non-monopolized market in its territory affecting the other party.

Both the Canada-European Union and Canada-Ukraine FTA exclude government procurement to be applied on the clauses referring to monopolies.

#### **VI State Enterprises**

In terms of state enterprises, the Canada-European Union and Canada-Ukraine FTAs explicitly mention that these agreements do not prevent any party from designating or maintaining state enterprises.

The Canada-European Union, Peru-Honduras and Singapore-Turkey FTAs have incorporated GATT's Article XVII on State Trading Enterprises<sup>11</sup>, and the Understanding on the Implementation of Article XVII of the GATT 1994. This means that state enterprises have to act in a non-discriminatory manner and make any purchases and sales based on commercial considerations.

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<sup>11</sup> The Canada-European Union FTA does not incorporate GATT's Article XVII, paragraph 4, which mentions that a party shall provide the other parties with information concerning the products that state enterprises are imported into or exported from their territories. In addition, this paragraph also mentions that parties shall provide information, under request from the other party of: (1) import markups of the product that the party is importing through an import monopoly; and (2) operations of the state enterprise related to the execution of the provisions within GATT, in case the operations are affecting the interest of one of the parties. Finally, this paragraph also exempts parties to disclose confidential information that could prevent law enforcement; or be contrary to public interests; or legitimate commercial interests of particular firms.

The Canada-Ukraine FTA does not incorporate the aforementioned GATT article, but it includes commitments for state enterprises to act in a non-discriminatory manner. This agreement does not make any reference on the need for state enterprises to act in accordance with commercial considerations, but specifies that even in cases where state enterprises are given regulatory, administrative or other authority by a party (e.g. the power to expropriate, grant a license, approve commercial transactions, or impose a quota, fee or other charges) they have to act in a manner that is consistent with obligations in the agreement.

## **VII Cooperation**

The four agreements include clauses related to cooperation. In the case of the Canada-European Union FTA, cooperation goes beyond the APEC Model Measures for RTA/FTAs, as the emphasis resides in the proscription of anti-competitive business conduct. The Canada-Ukraine also acknowledge that cooperation aims to end this type of practice, but adds that cooperation could include the share of information.

Other agreements also include cooperation clauses with elements from the APEC Model Measures for RTA/FTAs. In the case of the Singapore-Turkey FTA, law enforcement is the priority within this area. In this regard, parties have agreed on best endeavors to collaborate in the enforcement of their respective laws. The Peru-Honduras FTA emphasized the need to cooperate in issues relating to competition law and policy by exchanging information, notifying the application of legislation related to competition matter, in case this legislation affects the other party's interests and establishing consultations between both parties.

## **VIII Consultations**

The Peru-Honduras and Singapore-Turkey FTAs indicate that for a party to start consultations upon request of the other party, the party requesting consultations has to specify how the issue in particular is affecting trade between the parties. For the case of the Singapore-Turkey FTA, it is mentioned that this is only applicable when relevant.

In addition, the Singapore-Turkey FTA points out that parties must meet promptly to discuss any matter related to the interpretation or application of the Competition chapter.

## **IX Exchange of Information**

The Peru-Honduras and Singapore-Turkey FTA include clauses encouraging the exchange of information in accordance to the parties own laws and regulations. They also include caveats on the matter. For instance, the Peru-Honduras FTA makes exceptions when the information could affect ongoing investigations. Also, the Singapore-Turkey FTA states that the party that receives information in confidence must maintain the confidentiality of the information as per its own laws and regulations.

## **X Dispute Settlement**

The Peru-Honduras and Singapore-Turkey FTA exclude issues relating to the Competition chapters from the use of procedures established under the Dispute Settlement chapter. The Canada-European Union FTA stipulates the same in the Competition chapter, but the chapter on State Enterprises, Monopolies, and Enterprises Granted Special Rights or Privileges is not excluded from the application of the Dispute Settlement chapter.

## 4.2 TEMPORARY MOVEMENT OF NATURAL PERSONS

Apart from reducing barriers to goods trade, strengthening regional economic integration involves reducing barriers within services trade as well. To facilitate such provision of services, it is important to reduce barriers for the movement of factors of production, such as labor, capital and technology.

In recent years, there has been an increasing number of RTA/FTAs that have introduced commitments in services, particularly those of mode 4 (E.g. movement of natural persons). Most regional integration schemes do not include a full integration of labor markets that allow workers to immigrate and move freely without restrictions. Instead, trade agreements tend to include commitments that are deregulating the movement of natural persons to the extent necessary to achieve a desired degree of services liberalization (METI, 2017)<sup>12</sup>.

Three of the agreements contain chapters on this matter. RTA/FTA chapters on Temporary Entry of Natural/Business Persons are considered WTO-plus, as they include deeper commitments than those within GATS. The Temporary Entry of Natural/Business Persons clauses in these agreements include elements from the APEC Model Measures on RTA/FTAs (e.g. in terms of grant of temporary entry, provision of information and understanding of common categories of business persons).

### I Objectives and Scope

Some similarities exist in terms of objectives of the Temporary Entry of Natural/Business Persons chapters in the Canada-European Union; Peru-Honduras; and Singapore-Turkey FTAs. For instance, all three agreements recognize the objective of facilitating temporary entry of persons for business purposes and mention that the process has to be conducted in a transparent manner.

The three agreements emphasize that the chapter is not applicable to measures concerning citizenship, residence or employment on a permanent basis. These agreements also recognize the right of signatory parties to implement measures to regulate the entry of natural persons or their temporary stay in their territories and clarify that a visa requirement does not nullify or impair benefits under the agreements. Furthermore, they state that the Temporary Entry chapter shall not be interpreted as imposing obligations on immigration measures.

Among the differences, only the Peru-Honduras FTA indicates that the objective of facilitating temporary entry has to be conducted based on reciprocity. Similarly, the Canada-European Union and Peru-Honduras FTAs mention that these temporary entry measures shall be applied to avoid impairing or delaying trade in goods or services.

Another difference appearing in the Canada-European Union FTA resides on the clarification that domestic requirements concerning employment and social security measures will continue to apply on issues such as minimum wages and collective wage agreements. The agreement introduces a caveat, stipulating that the chapter does not apply when the person is interfering or affecting the outcome of a labor/management dispute or negotiation.

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<sup>12</sup> Ministry of Economy, Trade and Industry (2017), “2017 Report on Compliance by Major Trading Partners with Trade Agreements – WTO, EPA/FTA and IIA”, p. 742-744.

## **II Grant of Temporary Entry**

The Canada-European Union, Peru-Honduras and Singapore-Turkey FTAs allow for temporary entry of natural persons qualifying for certain categories listed in each of the FTAs. The categories include definitions, terms and conditions that may differ depending on the agreement and the partner involved.

For example, while these agreements grant temporary entry for intra-corporate transferees who have been working for at least a year in a company that is transferring the person, there are differences in scope. While the Peru-Honduras and Singapore-Turkey FTAs allow the use of this category for executives, managers and specialists, the Canada-European Union FTA allows the same type of personnel, but adds graduate trainees as well.

Regarding business visitors, the approach differs among the three agreements. The Canada-European Union FTA restricts it to managers and specialists setting up an enterprise and lists the activities that short-term business visitors can engage (e.g. business and consultations, research and design, marketing activities, training seminars, trade fairs and exhibitions and sales, among others). The Singapore-Turkey FTA provides a broader range by including those engaging in activities related to trade in goods, establishing or acquiring an enterprise and negotiating the sale of services or entering an agreement to sell services. The Peru-Honduras FTA only lists a number of specific business activities covered under this category (e.g. meetings and consultations, research and design, post-sales services, among others). For natural persons involved in activities related to trade in goods, the Peru-Honduras FTA allows for temporary entry using a different category for merchants.

In the case of investors, both the Canada-European Union and Peru-Honduras FTAs include natural persons who establish, develop or administer the operation of an investment. The Singapore-Turkey FTA includes those establishing or acquiring a firm as business visitors, but do not include any reference for those in charge of administering the operation of an investment.

The Canada-European Union FTA is the only agreement that includes temporary entry for contractual services suppliers and independent professionals. This temporary entry is possible for a period not exceeding 12 months in a number of listed sectors. Similarly, EU members and Canada have a list of reservations in which they reserve the right to grant temporary entry in certain cases. In some cases, temporary entry is subject to an economic needs test or to the natural person having special knowledge relevant to the service provided.

**Table 4.1: Grant of Entry per Categories**

	Canada-EU FTA		Peru-Honduras FTA		Singapore-Turkey FTA	
	Canada	EU	Peru	Honduras	Singapore	Turkey
<b>Intra-Corporate Transferees</b>	<p><u>Specialists and senior personnel</u>: the lesser of 3 years or length of contract. Extension of up to 18 months</p> <p><u>Graduate trainees</u>: the lesser of 1 year or length of contract</p>		1 year period with renewal option	Up to 90 days, maximum period of 120 days with extension/ 5 year resident permit with renewal option	2 years, maximum extension for 3 additional years	1 year, maximum extension for 2 additional years.
<b>Investors</b>	One year with extensions at the discretion of the party granting temporary stay		Up to 183 days when planning to invest / 1 year period for an established investor with renewal option	Up to 90 days, maximum period of 120 days with extension/ 1 year resident permit with renewal option	N.A.	N.A.
<b>Merchants</b>	N.A.	N.A.	Up to 183 days	Up to 90 days, maximum period of 120 days with extension	N.A.	N.A.
<b>Business Visitors</b>	90 days within any 6-month period		Up to 183 days	Up to 90 days, maximum period of 120 days with extension.	Up to 30 days	Up to 90 days within a 180-day period
<b>Independent Professionals</b>	Up to 12 months		N.A.	N.A.	N.A.	N.A.
<b>Contractual Suppliers</b>	Up to 12 months		N.A.	N.A.	N.A.	N.A.

Source: FTA legal texts. Prepared by APEC Secretariat, Policy Support Unit.

In terms of the procedures to obtain grant of temporary entry, both the Canada-European Union and Peru-Honduras FTAs mention that any fees for processing applications have to correspond to costs incurred.

The Peru-Honduras and Singapore-Turkey FTAs have clauses stating that parties upon request have to provide information to the applicant on the status of his/her application. In addition, authorities are required to notify within a reasonable period of time the outcome of an application. The Singapore-Turkey FTA notes that parties have to establish facilities for online application for entry and temporary stay.

### **III Provision of Information**

The three agreements include a standard clause in which parties commit to make available information concerning the requirements for temporary entry no later than 6 months after the date of entry into force of the agreement. While the Canada-European Union and Peru-Honduras FTAs do not specify the type of information to be provided, the Singapore-Turkey FTA includes a list of specific information, such as relevant laws and regulations, categories of permission related to temporary entry, procedures for application and renovation, application fees and processing application time.

The Canada-European Union and Peru-Honduras FTAs also state that in accordance to the corresponding domestic laws and under request, parties could make data available to the other party regarding temporary entry of business persons.

### **IV Contact Points**

Different approaches have been established by the three agreements analyzed in this section. The Singapore-Turkey FTA only mentions that the parties shall notify their contact points upon the date of entry into force of the agreement. On the opposite, the Canada-European Union FTA has already established specific contact points and the requirement to meet to discuss matters relevant to this chapter, such as its implementation and administration, the development of measures to facilitate temporary entry and the issuance of recommendations.

In the case of the Peru-Honduras FTA, a Committee on Temporary Entry of Business Persons has been created to review any matter relevant to this chapter. This agreement also establishes that the Committee has to meet at least once a year every three years in a date mutually agreed by parties.

### **V Dispute Settlement**

Only the Singapore-Turkey FTA has mentioned the chapter on Temporary Entry is excluded from the application of Dispute Settlement chapters/clauses included in the agreement. The Peru-Honduras FTA only allows recourse to dispute settlement in cases of recurrent patterns of practice and when domestic remedies have been exhausted.

### **VI Cooperation**

The Peru-Honduras FTA includes an article on cooperation with the aim of improving institutional capabilities of competent authorities, exchange information on regulations and implementation of technology systems on relevant issues such as the use of biometric technology, advance information systems, frequent traveler programs and ensuring documents are secure.

## **4.3 CUSTOMS ADMINISTRATION, PROCEDURES AND TRADE FACILITATION**

The four agreements included in this report contain chapters related to customs and trade facilitation matters. While all agreements seek to establish clear rules to make trade easier, the approach taken shows some differences. For example, while the Singapore-Turkey FTA is the first agreement enforced by an APEC economy that explicitly incorporates the WTO Trade Facilitation Agreement (TFA), the Canada-European Union; Canada-Ukraine; and Peru-Honduras FTAs include provisions in several areas, including some WTO-plus elements.

The Customs chapters analyzed in this report include provisions in most disciplines appearing in the APEC Model Measures for RTA/FTAs on Customs Administration and Trade Facilitation. In general, the agreements' provisions are similar to those in the Model Measures. However, in some specific cases, the level of ambition in the agreements is lower than those of the Model Measures (e.g. in the case of express shipments, no agreement exempts low-value consignments from customs duties). In other cases, the level of ambition is higher (e.g. advance rulings can be issued regarding the tariff classification of a good, as per the APEC Model Measures for RTA/FTAs, but also in relation to other areas).

## **I General Principles, Objectives and Scope**

The agreements enforced by Canada with the European Union and Ukraine include similar clauses on this matter. Both agreements aim to cooperate on exchanging information on best practices, promoting compliance and effective enforcement, as well as implementing procedures that are no more administrative burdensome or restrictive than necessary to achieve a legitimate objective.

## **II Transparency**

All agreements evaluated include provisions for parties to publish and make available online their legislation, regulations and procedures related to customs issues, as highlighted in the APEC Model Measures for RTA/FTAs. The Singapore-Turkey FTA is the only agreement that mentions that the information will be made available in English to the extent possible. In addition, all agreements state that the parties, to the extent possible, will publish customs-related laws and regulations that they are planning to adopt.

Also, all four agreements state that contact points will be designated by the parties in order to address any inquiries by interested persons in customs-related matters. The Canada-European Union; Canada-Ukraine; and Peru-Honduras FTAs mention that the steps to make an inquiry will be made available on the internet. However, the Singapore-Turkey FTA only mentions that those inquiries have to be addressed in English.

## **III Customs Valuation**

All of the agreements stipulate that the WTO Customs Valuation Agreement applies to determine the methods or criteria for customs valuation. The Peru-Honduras FTA also mention that advance rulings can be requested on the appropriate criteria or methods for customs valuation for a particular good, which goes beyond what the TFA establish, by encouraging parties to provide advance rulings on the matter.

## **IV Automation**

The Canada-European Union and Canada-Ukraine FTAs include a reference on using information technology to simplify and expedite the procedures for the release of goods. This is mandatory, in accordance to domestic laws for the submission of customs forms in electronic format.

The Singapore-Turkey FTA makes a reference for parties to develop or maintain single windows to facilitate the electronic submission of documents required by customs and other entities in relation to goods trade.

The Peru-Honduras FTA only mentions best endeavors to use information technology for the same purpose. In addition, Peru and Honduras agreed to work together in developing the interoperability of their single windows to the extent possible.

The Canada-European Union; Canada-Ukraine; and Peru-Honduras FTAs also endeavor to work on the development of electronic systems, as well as a set of data elements and processes, to facilitate the submission of information.

## **V Authorized Economic Operators (AEOs)**

While the TFA encourages all its parties to develop authorized operator schemes on the basis of international standards, when available and appropriate, only the Peru-Honduras FTA includes a provision on AEOs to promote their implementation in accordance to the World Customs Organization's SAFE Framework of Standards.

## **VI Risk Management**

In the case of the Canada-European Union and Canada-Ukraine FTAs, the agreements establish that parties have to implement risk assessment principles to examine, release and conduct post-entry verification of merchandise. For the Peru-Honduras and Singapore-Turkey FTAs, parties only have to apply risk management systems to the extent possible, as indicated by the TFA.

All trade agreements evaluated establish that the implementation of risk management systems implies the expedited release of low-risk consignments and focus inspections on high-risk consignments.

## **VII Release of Goods**

The four agreements in this report include clauses on the release of goods<sup>13</sup>, establishing the adoption of simplified customs procedures for the release of goods. Only the Peru-Honduras FTA includes a time limit for the release of goods, by noting it has to be done within 48 hours of arrival to the extent possible. The Canada-European Union and Canada-Ukraine FTAs include a clause stating an expeditious release of goods should be done, when possible, in emergency cases.

The release of goods has to be done at the first point of arrival in the case of the Canada-European Union; Canada-Ukraine; and Peru-Honduras FTAs. However, these agreements include some caveats. In the Canada-European Union and Canada-Ukraine FTAs, this is done to the extent possible in the case of controlled or regulated goods. In the Peru-Honduras FTA, the goods can be transferred to warehouses or other facilities should customs authorities need to implement additional controls, or when the infrastructure at the first arrival point does not allow proper release.

The Canada-European Union and Canada-Ukraine FTAs explicitly refer to the obligation of imported goods to be released prior to the final determination of customs duties, taxes and fees, as long as the importer presents a guarantee in the form of a surety, deposit or other appropriate instrument. This is also stated in the TFA, which has been explicitly incorporated in the Singapore-Turkey FTA. For the case of the Peru-Honduras FTA, no clause on the matter is

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<sup>13</sup> In the case of the Singapore-Turkey FTA, this is done through the application of the TFA's Article 7 on the Release and Clearance of Goods.

included, as Honduras has notified this TFA commitment as category C to the WTO, with the implementation deadline by 1 March 2026.

### **VIII Temporary Admission of Goods**

Only the Singapore-Turkey FTA includes a clause on the matter, which indicates that the parties have to continue facilitating temporary admission of goods as per the Customs Convention on the ATA Carnet for the Temporary Admission of Goods and the TFA.

### **IX Express Shipments**

All agreements include provisions on the matter. In the case of the Singapore-Turkey FTA, this is done through the incorporation of clauses on Expedited Shipments of the TFA. However, all agreements have different features in this topic. For example, the Canada-Ukraine and Peru-Honduras FTAs stress that parties need to adopt or maintain separate customs procedures for express shipments.

In addition, the Canada-European Union and Peru-Honduras FTAs state that the submission of documentation has to be prior to the physical arrival of goods and in electronic format. They also mention that certain goods can be released with minimum documentation (i.e. low-risk and low-value goods under the Peru-Honduras FTA). Regarding the Canada-Ukraine FTA, the electronic submission of documentation and the clearance of certain goods with minimum documentation only occurs to the extent possible.

Among other features, the Canada-Ukraine FTA mentions that express shipments shall not be limited by a maximum weight. In terms of time, the Peru-Honduras FTA states that express consignments shall be done in six hours after the arrival of documentation, so long as the cargo has arrived.

For the case of the Singapore-Turkey FTA, the TFA clauses list a series of requirements that applicants may need to meet in order to benefit from express shipments, including the anticipated submission of information necessary for expedited shipment; assuming liability for payment of duties, taxes and fees; maintaining high degree of control over expedited shipments through the use of internal security, logistics and tracking technology; and have good record of compliance with customs; among others.

As opposed to the APEC Model Measures on RTA/FTAs, none of the agreements evaluated included a *de minimis* value to exempt the application of customs duties to low-value shipments. The closest clause found on this matter appears in the Peru-Honduras FTA, which only exempts customs duties for express consignments related to mail, documents, newspapers and periodical publications.

### **X Advance Rulings**

All agreements include clauses on the issuance of advance rulings. In the case of the Singapore-Turkey FTA, it is through the application of Article 3 of the TFA. In general, all of them can issue written decisions on requests regarding the tariff classification and the origin of a good<sup>14</sup>.

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<sup>14</sup> In the case of the Canada-European Union and Canada-Ukraine FTAs, the procedures related to the issuance of advance rulings regarding the origin of a good are included in the protocols or chapters on rules of origin.

For the case of the Peru-Honduras FTA, authorities have to issue advance rulings on requests concerning the application of the criteria/methods to calculate the customs value and whether a reimported merchandise to the territory of one of the parties is still eligible for duty free treatment after being exported to the territory of the other party for repair or alteration. In the TFA, it is only encouraged to issue advance rulings in these two cases.

In terms of the procedures to request an advance rulings, only the Canada-Ukraine and Peru-Honduras FTAs establish that advance rulings have to be requested by the importer in its territory, or an exporter or producer within the territory of the other party. As for the days to issue the advance rulings, the Peru-Honduras FTA establishes a time period of 150 days after the presentation of the request, as long as all the necessary information has been submitted. While the same time period applies for the advance rulings related to origin in the Canada-Ukraine FTA, the Canada-European Union FTA implements a shorter time period, 120 days, for the issuance of advance rulings related to origin.

No agreement includes any clause specifying a time period for the validity of the advance rulings. Only the Peru-Honduras FTA mentions that the party issuing an advance ruling can modify or revoke it if the circumstances that led to the issuance of the initial ruling have changed.

## **XI Cooperation**

The four agreements include clauses on customs-related cooperation, but the degree of cooperation varies. For example, the Canada-European Union FTA focuses on the need of parties to continue their cooperation in multilateral fora, such as the World Customs Organization, as well as collaborating on enforcement matters, in particular on matters relating to a suspected breach of a party's customs legislation.

The Canada-Ukraine FTA also includes similar clauses on cooperation, but on enforcement matters, it adds more details on the steps to follow if there are reasonable grounds for a party to suspect an offence related to fraudulent claims for preferential tariff treatment. In addition, the Canada-Ukraine FTA includes other cooperation activities, such as the exchange of trade statistics, the harmonization of trade documents and the standardization of data elements, among others.

The Peru-Honduras FTA emphasizes cooperation on the implementation and administration of the Customs chapter. In addition, it lists a number of areas for mutual cooperation such as customs procedures, customs valuation, tariff regimes and tariff nomenclature, among others. The Peru-Honduras FTA also includes a chapter on Cooperation and Mutual Assistance on Customs Matters establishing the terms for providing technical and administrative assistance. It include clauses on exchange of information, verification of information, technical assistance, steps to make requests and time to implement the request.

The Singapore-Turkey FTA aims to strengthen cooperation among parties in international organizations. This agreement also includes other cooperation activities such as exchanging information related to their customs legislation in several areas; developing joint initiatives relating to import, export or other customs procedures; and working together on customs-related matters related to international trade supply chains.

## **XII Confidentiality**

While the Singapore-Turkey FTA incorporates the clauses on protection and confidentiality in the TFA, the Canada-European Union; Canada-Ukraine; and Peru-Honduras FTA include provisions on the matter, with some differences<sup>15</sup>. For instance, the TFA mentions that all information given to the requesting party has to be held in confidence and given the same level of protection and confidentiality as per the laws of the requested party. In the Canada-European Union; Canada-Ukraine; and Peru-Honduras FTAs, the information is confidential if it is by nature confidential or it has been provided on a confidential basis in accordance to their laws. Those two agreements signed by Canada also aim to protect information from disclosure that could prejudice the competitive position of the party/person providing the information.

The Canada-European Union and Canada-Ukraine FTA mention that if the party receiving information is required by law to disclose the information, this party only needs to notify the requested party on the matter. Similarly, this information could be allowed in administrative and judicial proceedings related to the failure to comply with customs-related laws implementing the Customs chapter, as long as the required party is notified in advance on such use.

In the case of the TFA and Peru-Honduras FTA, the information cannot be disclosed unless there is a written permission by the requested party. In the same way, the information could only be used for other purposes if the requested party agrees in writing. The TFA also mentions that the requested party could refuse a request of information if its domestic law prevents the release of the information.

The Peru-Honduras FTA's Customs chapter includes a clause on confidentiality regarding the publication of advance rulings. This agreement mentions that advance rulings can be published subject to confidentiality requirements as per domestic laws of the parties.

## **XIII Review and Appeal**

In terms of customs-related decisions, all agreements analyzed in this report gives the right to any affected party of requesting: 1) an administrative review, independent of the institution or official that issued the original decision; and 2) a judicial appeal or review. In the case of the Singapore-Turkey FTA, this is incorporated through the TFA's Article 4 on Procedures for Appeal or Review.

The Canada-European Union and Canada-Ukraine FTAs mentions that before the case is submitted to a judicial level, parties need to provide an administrative level of review or appeal or review.

## **XIV Penalties**

Parties in the four agreements can apply penalties for a breach in customs laws and regulations. In the case of the Canada-European Union and Canada-Ukraine FTA, penalties have to be applied in a non-discriminatory manner and proportional to the severity of the breach. These two agreements also state that the application of those penalties cannot result in unwarranted delays.

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<sup>15</sup> In the case of the Peru-Honduras FTA, the clauses on confidentiality are included in the chapter on Cooperation and Mutual Assistance on Customs Matters.

The Peru-Honduras FTA mentions that penalties could be administrative or criminal. The Singapore-Turkey FTA incorporates TFA's Article 6.3, which mentions that the penalty shall be imposed only to those responsible for the breach and proportionate with the degree and severity of the breach.

## **XV Committee on Customs Matters**

Two of the agreements in this report have created a committee with regards to customs-related issues. However, their scope of work have some differences. In the case of the Canada-European Union FTA, there is a Joint Customs Cooperation Committee, which is in charge of the proper implementation and functioning of the Customs and Trade Facilitation chapter, as well as the Protocol of Rules of Origin and Origin Procedures, Intellectual Property affairs regarding border measures, and Market Access issues concerning the temporary suspension of preferential tariff treatment.

The Peru-Honduras FTA has created a Committee on Trade Facilitation and Customs Procedures, in charge of monitoring the implementation and administration of the Customs chapter and the Cooperation and Mutual Assistance on Customs Matters chapter. Besides this role, the Committee is in charge of fostering cooperation in specific customs issues such as customs valuation and tariff regimes, among others.

In the case of Canada-Ukraine FTA, any issues on customs matters have to be submitted for consideration to the Joint Committee in charge of the implementation and proper functioning of the entire agreement.

The Singapore-Turkey FTA does not include the formation of a committee on customs issues but includes a provision in which the parties have to nominate contact points to resolve any operational matters related to the Customs and Trade Facilitation chapter

## **4.4 INVESTMENT**

Three of the RTA/FTAs specifically Canada-European Union, Peru-Honduras and Singapore-Turkey FTAs examined in this report include a chapter on investment. The Canada-Ukraine FTA does not incorporate any investment chapter, but a review clause in the chapter of Final Provisions explicitly states that the parties can do it in the future.

The following analysis includes WTO-plus clauses, which refer to disciplines that go beyond what it is included in the WTO Agreement on Trade-Related Investment Matters (TRIMS). In addition, this report does not include any comparative analysis with APEC Model Measures for RTA/FTAs, as this initiative endorsed in 2008 did not include any model measure relating to investment issues.

### **I Definition of Investment**

The Canada-European Union, Peru-Honduras and Singapore-Turkey FTAs contain many similarities in the definition of an investment. They include a comprehensive definition, as any asset that is owned or controlled by an investor and has at least one of the characteristics of an investment, namely: 1) the commitment of capital or other resources; 2) the expectation of gain or profit; or 3) the assumption of risk.

Among the differences, the Canada-European Union and Peru-Honduras FTA specifies that the investment could be direct (e.g. investor acquiring an asset) or indirect (e.g. a holding buying an asset on the investor's behalf). In terms of the characteristics of the investment, while the Canada-European Union FTA indicates that for an asset to qualify as an investment, it must include a certain duration and at least one of the three characteristics listed in the previous paragraph; the Singapore-Turkey FTA does not stipulate that an asset needs to have a duration to qualify as an investment, but mentions that besides the three characteristics described above, duration is one of the features that an asset could meet to be considered as an investment.

The three agreements include a list of examples that may be considered an investment. They all recognize the following forms of investment: an enterprise; shares, stocks and other forms of equity participation; turnkey, construction, production or revenue-sharing contracts; intellectual property rights; and movable and immovable property. However, some differences emerge regarding some types of investment. For example, for a loan to be considered an investment, the Canada-European Union FTA specifies that it has to be to an enterprise; while the Singapore-Turkey FTA narrows the scope by indicating that the loan has to be related to a business activity associated with an investment. The Peru-Honduras FTA further narrows the definition by stating that the loan has to be directed to a subsidiary of the investor and the loan maturity is required to be at least three years. Furthermore, it excludes public debt operations and loans to state-owned enterprises.

## **II National Treatment**

The three agreements provide for national treatment at both pre and post-establishment phases. All of them specify that such treatment is given to investments in "like circumstances" (i.e. similar situations) and offered it through a negative list approach, including a list of sectors in which national treatment cannot be offered due to existing non-conforming measures. The agreements also include a list of sectors in which the parties reserve the right to implement future measures not complying with the national treatment clause.

The Canada-European Union FTA is the first agreement where the European Union has accepted negotiations on a negative list for services and investment. In the case of the subnational governments in Canada, the treatment by these governments have to be no less favorable than the most favored treatment given to investors of Canada in the territory of these governments. For the European Union, the treatment given by a European Union member to an investor of the other party has to be no less favorable than the most favored treatment given to investors of the European Union in the territory of that European Union member.

In addition, the Canada-European Union FTA includes a clause allowing non-compliance with national treatment with respect to intellectual property rights should it be allowed by the TRIPS Agreement and any of its amendments and waivers.

## **III Most Favored Nation Treatment (MFN)**

All agreements include a MFN clause stating that investors of the other parties are to be given treatment no less favorable than those given to investors of third parties in similar circumstances. In general, this clause applies for both pre and post-establishment. All of them also explicitly do not apply this clause to international dispute settlement procedures.

The Singapore-Turkey FTA includes an exception to the application of the MFN clause to pre-establishment phase in the case of the supply of services in the territory of a party by covered

investments, as the MFN clause only applies to the management, conduct, operation and sale phases (i.e. post-establishment).

Another exception to this MFN clause appears in the Canada-European Union FTA with respect of intellectual property rights only should it be allowed by the TRIPS Agreement and any of its amendments and waivers.

#### **IV General Treatment**

“Fair and equitable treatment” and “full protection and security” are offered in the Canada-European Union, Peru-Honduras, and Singapore-Turkey FTAs.

For the case of “fair and equitable treatment”, both the Peru-Honduras and Singapore-Turkey FTAs offer this treatment in accordance to customary international law. The Canada-European Union FTA does not include a reference on the matter, but includes an exhaustive list of features that determine whether a measure has breached the obligation of fair and equitable treatment, such as denial of justice, breach in due process, including transparency, manifest arbitrariness, and targeted discrimination on wrongful grounds, among others. This content can be reviewed by the parties.

Regarding “full protection and security”, the Peru-Honduras and Singapore-Turkey FTAs states that parties must provide the level of police protection as per customary international law. The Canada-European Union FTA provides a standard clause where parties have to guarantee the physical security of investors and covered investments.

The Canada-European Union FTA has included new elements in RTA/FTAs regarding the treatment of investments, such as a clause on “investment and regulatory measures”, which reaffirms the rights of parties to regulate in order to achieve legitimate policy objectives, such as those related to public health, safety, environment, public morals, social or consumer protection and the promotion and protection of cultural diversity. This agreement states that when a government regulates and affects an investment, or investors’ expectations of profits, this is not considered a breach of an obligation in the FTA.

#### **V Performance Requirements & Senior Management and Board of Directors**

In terms of performance requirements, all the agreements analyzed in this report explicitly prohibit their use and include a list of prohibited performance requirements against investors, such as the quotas of exporting a given level or a percentage of goods or services, achieving a given level of domestic content, purchasing or giving preferences to goods produced in the territory of the party and relating the volume or value of imports to those of exports among others.

Among the differences in the list of prohibited requirements, the Canada-European Union FTA forbids requiring investors to use or give preferences to services that are provided in the territory of a party. All three agreements include a prohibition to require investors to do technology transfers, but the Peru-Honduras and Singapore-Turkey FTAs mention that it is possible the no application of this prohibition in accordance with Articles 31 and 39 of the TRIPS Agreement<sup>16</sup>.

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<sup>16</sup> For more information regarding the TRIPS Agreement, please see [https://www.wto.org/English/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/English/tratop_e/trips_e/intel2_e.htm)

All three agreements include clauses regarding senior management stating that signatory parties cannot impose on covered investments any nationality requirements for senior management positions. For the case of the board of directors, the Canada-European Union FTA states no nationality requirements for positions in the board of directors of a covered investment. However, the Peru-Honduras and Singapore-Turkey FTAs allow parties to establish a nationality or resident requirement to board members as long as this does not impair the ability of the investor to control its investment.

## **VI Expropriation and Compensation**

Articles on expropriation and compensation are included in all three agreements, which mention that expropriation can only take place due to public purpose, according to the due process, in a non-discriminatory manner and on the payment of a compensation. All agreements acknowledge that expropriation could be direct (i.e. formal transfer or confiscation of an investment) or indirect (i.e. measures that have the equivalent effect of direct expropriation without a formal transfer or confiscation). They mention that the compensation has to be done without delay and at a fair market value. In the case of the Canada-European Union and Singapore-Turkey FTAs, the fair market value is equivalent to the value of the investment at the time immediately before the expropriation became public. The Peru-Honduras FTA establishes that this value is determined immediately after expropriation takes place.

Regarding the currency to be used for compensations, the Singapore-Turkey FTA establishes that this has to be done in a freely convertible currency, while the Canada-European Union FTA adds that it has to be in a freely convertible currency accepted by the investor or the currency used in the economy the investor is from. The Peru-Honduras FTA considers the possibility that a compensation is denominated in a not freely convertible currency and establishes how the compensation should be calculated.

All evaluated agreements have included a clause excluding the application of this article to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance to the TRIPS Agreement.

## **VII Transfers**

The three agreements include a standard clause on transfers in which the parties shall allow the free transfer of capital, without delays and in a freely convertible currency. All these agreements mention that transfers may be prevented in cases of bankruptcy, insolvency, issuing, trading or dealing with securities, criminal offenses, financial reporting to assist law enforcement and compliance with orders/rulings from judicial proceedings. All these cases to delay or prevent a transfer have to be done in an equitable and non-discriminatory manner.

The Peru-Honduras and Singapore-Turkey FTAs also allow parties to prevent or delay transfers in cases involving social security, including compulsory health services schemes, public retirement or compulsory savings schemes.

All agreements include a clause to temporarily restrict the free transfer of capital in cases of balance-of-payments difficulties. While the Singapore-Turkey FTA includes this clause in its Investment chapter, the Canada-European Union and the Peru-Honduras FTAs include them in their Exceptions chapters.

### **VIII Treatment in Case of Armed Conflict or Civil Strife**

The Canada-European Union and Singapore-Turkey FTAs include a clause to provide compensation to investors that suffered losses due to armed conflict, civil strife and emergencies in a non-discriminatory manner with regards to local and foreign investments from other parties. In the case of the Canada-European Union FTA, this is also extended to cases of losses due to natural disasters.

The Peru-Honduras FTA does not make any specific reference about restitution or compensation. It only mentions that any measure adopted by the parties in relation to investors' losses due to armed conflict or civil strife should be non-discriminatory.

The Canada-European Union and Peru-Honduras FTAs mention that measures adopted by the parties in relation to losses suffered by investors do not apply to subsidies or grants that could be inconsistent with the article on national treatment, except for those listed in the provision on non-conforming measures.

### **IX Environmental Measures**

The Canada-European Union and Peru-Honduras FTAs include clauses recognizing that it is inappropriate to derogate or waive environmental regulations for the sake of attracting investments. In these agreements, the signatory parties ensure that environmental regulations will not be relaxed to attract more investments.

The Canada-European Union, Peru-Honduras and Singapore-Turkey FTAs allow parties to adopt the right to regulate by implementing necessary measures to protect life or health and ensure that investments are going to address environmental concerns.

### **X Settlement of Disputes between a Party and an Investor of the Other Party**

The three analyzed agreements include clauses on Investor-State Dispute Settlement (ISDS), which establishes that a party and an investor from the other party can resolve a dispute through consultations, or by going to arbitration, in case the dispute could not be resolved during consultations. However, the agreements have different characteristics with regards to their ISDS clauses.

For example, while all agreements include a clause on consultations, the time required for parties to submit the case to a tribunal should parties be unable to resolve the dispute through consultations, differs among agreements. The Canada-European Union FTA establishes a 60 day-period from the submission of the request for consultations, unless parties agree on longer period. While, the Peru-Honduras and Singapore-Turkey FTAs establish a 6-month period from the date of the written request for consultations.

RTA/FTAs usually establish a maximum period since the alleged breach is made known to invoke the use of ISDS provisions to seek a resolution of a dispute. For the case of the Peru-Honduras and Singapore-Turkey FTA, disputes cannot be submitted to arbitration three years after the alleged breach was known. The Canada-European Union FTA mentions that the request for consultations cannot take place in these situations: 1) three years after the date when the alleged breach was known, or 2) two years after an investor ceases to pursue claims in court under the law of the party or when those proceedings ended, and no later than 10 years after the investor knows of the alleged breach.

In terms of the rules to resolve the dispute, all agreements include standard clauses, by allowing the use of the rules of the ICSID Convention and Rules of Procedures for Arbitration Proceedings, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other additional rules agreed by the parties. The Canada-European Union FTA is the only agreement that establishes a time period of 30 days for parties to agree on rules other than those of ICSID or UNCITRAL rules or proceedings.

One of the main differences among the agreements is concerning the constitution of the tribunal. While all agreements establish a period of 90 days to constitute the tribunal, in the case of the Peru-Honduras and Singapore-Turkey FTAs, each arbitration tribunal is established for a specific dispute, it has to be constituted by three arbitrators, one arbitrator appointed by each party plus one more arbitrator agreed by both sides. However, the Canada-European Union FTA agreed to constitute a Joint Committee in charge of appointing 15 members to a tribunal, five members have to be nationals of Canada, five members have to be nationals of a member of the European Union and five others from third parties. The members have to serve for a period of five years. Any hearing involves three members of the tribunal, one each for Canada and the European Union, and the other member from a third party, who will chair the case. Parties could also agree on a single tribunal member from a third party to hear the dispute.

Another new feature included in the Canada-European Union FTA is the establishment of an appellate tribunal to review awards decided by the ISDS tribunal, which may uphold, modify or reverse the award in certain situations. Parties have 90 days to appeal the initial awards. In the case of the Peru-Honduras FTA, there is no reference to an appellate tribunal, but it is possible for parties to request the review or repeal of an award. The Singapore-Turkey FTA mentions that any arbitral award shall be final and binding upon the disputing parties.

Regarding the awards, the three agreements mention that tribunals can only award pecuniary compensation and any applicable interest, as well as the restitution of property, in which the respondent should pay monetary damages instead with any applicable interest. All three agreements allowed for the cost and attorney's fees to be awarded in all these agreements as well. The Canada-European Union FTA also makes some specifications in the case of the pay of monetary damages in lieu of restitution of property, as it has to represent the fair market value of the property before the expropriation or the intention of expropriation becomes known.

Also, some differences appear with regards to not awarding punitive damages, where only the Canada-European Union and Peru-Honduras FTAs make this specification.

In terms of the execution of the award, the Canada-European Union and Peru-Honduras FTAs allow for 120 days if the dispute followed the rules of the ICSID Convention and 90 days, when the dispute was heard under the ICSID Additional Facilities Rules and UNCITRAL Arbitration Rules. The Singapore-Turkey FTA does not establish any timeframe, but mentions that the enforcement of the award has to be executed in accordance to the laws and regulations of the relevant party.

## **XI Transparency in ISDS Proceedings**

Both the Canada-European Union and Peru-Honduras FTAs requires that hearings are open to the public, but necessary arrangements have to be made in order to ensure that confidential information are protected. Moreover, both agreements mention that documents such as the notice of dispute, notice of intent, decisions of the tribunal among others, have to be made

available to the public. In this case, the tribunal needs to make necessary arrangements to avoid the release of any protected or confidential information.

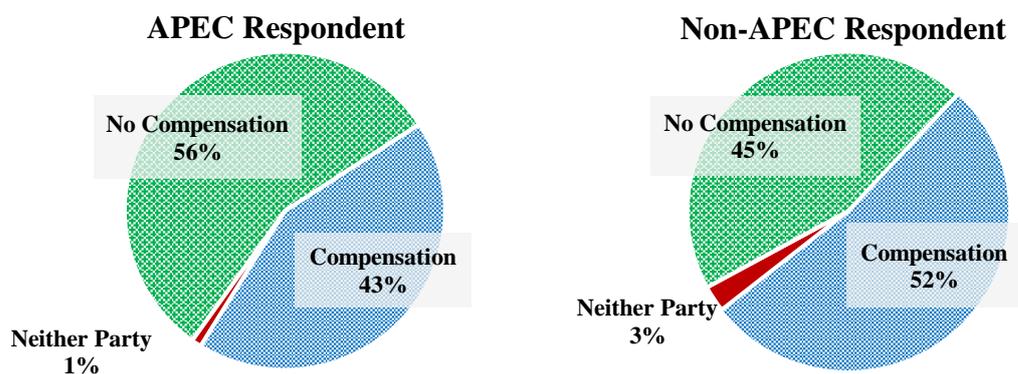
**Box 4.1: Has ISDS Been Onerous for APEC Economies?**

ISDS provisions in FTAs help facilitate foreign direct investment (Peterson Institute for International Economics, 2015), as they provide an avenue for foreign investors to resolve disputes objectively with the signatory governments. Additionally, ISDS provisions are also useful in assisting host economies with weak domestic legal institutions.

However, there has been criticism that ISDS have been unfair to governments. Governments spend large amounts of money to defend themselves against ISDS claims brought by investors – maintaining the status quo when they win, and paying large sums of money to investors when they lose. The ISDS cases in the APEC region that were ruled in favour of the investor from 1987 to 2016 showed that the total amount claimed by investors from such cases was equivalent to USD 117 billion, while the total amount awarded by ISDS panels was USD 50.4 billion (UNCTAD, 2017).

Despite the seemingly high costs associated with these cases, 56% of the ISDS cases involving an APEC economy as respondent, ended with no compensation being paid by governments (i.e. cases ruled in favour of governments and discontinued), while 43% of them ended with APEC economies with the need to provide compensation (i.e. cases in favour of investors and settled). For the rest of the world, the results were less favourable as 45% of the concluded cases had no compensation and 52% of cases required paying a compensation.

**Figure 4.1: Percentage of ISDS Cases subject to Compensation**



Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

On evaluation of the proportion of amount claimed that was awarded in favour of the investor, the actual costs associated with ISDS cases becomes less daunting. Within the APEC region, on average, the awarded amount comprised 42.9% on average of the amount claimed.

**Table 4.2: Average Proportion of Amount Claimed that was Awarded**

Average Proportion of Amount Claimed that was awarded	APEC Respondent (%)	Non APEC Respondent (%)
Tribunal awarded	42.9	29.7

Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

A closer look, however, showed that more than half of the cases in the APEC region got tribunal awards equivalent to less than 25% of the amount claimed. In fact, only one case within APEC was awarded more than 75% of the total claim.

**Table 4.3: Amounts Awarded to Investors as Percentage of Amounts Claimed**

Proportion of Amount Claimed that was Awarded (%)	APEC Respondent		Non-APEC Respondent	
	No. of Cases	Share (%)	No. of Cases	Share (%)
<b>Below 25</b>	15	60.0	46	43.5
<b>Between 25 - 50</b>	7	28.0	29	26.9
<b>Between 50 - 75</b>	2	8.0	16	14.8
<b>Between 75 - 100</b>	1	4.0	13	12.0
<b>More than 100</b>	0	0.0	3	2.8
<b>Total</b>	25	100	108	100

Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

Note: This table only includes the cases with information available on both total amounts claimed by investors and awarded by the tribunal. Of the 26 APEC respondent cases, 1 case had the amount claimed missing. Of the 127 non-APEC respondent cases, there were 12 cases with amount claimed missing, 5 cases with award amount missing, and 2 cases with both claim amount and award missing. The cases with missing data were excluded from the calculations.

The total amount awarded in favour of investor within the APEC region is a reasonable cause for concern. The USD 50.4 billion awarded by tribunals from 1994 to 2017 is significantly higher in comparison to the USD 16.3 billion awarded in cases against governments from the rest of the world. Furthermore, this number does not include settlement payments, whose terms and conditions are usually confidential.

A deeper analysis showed that a large proportion of this amount is attributed to three outlier cases within the APEC region. These three cases (USD 1.8 billion, USD 8.2 billion and USD 40 billion) had awards significantly higher than all other cases and accounted for 99% of the total amount awarded in the APEC region to investors. Hence, aside from these outliers, the cost of paying ISDS awards for governments in the APEC region is relatively low.

**Table 4.4: Amounts Awarded to Investors by Range (USD)**

Amount Awarded in Favor of Investor	APEC Respondent		Non-APEC Respondent	
	No. of Cases	Share (%)	No. of Cases	Share (%)
<b>Between 0 mil and 10 mil</b>	11	42.3	39	32.5
<b>Between 10 mil and 20 mil</b>	7	26.9	17	14.2
<b>Between 20 mil and 50 mil</b>	3	11.5	19	15.8
<b>Between 50 mil and 100 mil</b>	2	7.7	11	9.2
<b>Between 100 mil and 1 bn</b>	0	0.0	31	25.8
<b>More than 1 bn</b>	3	11.5	3	2.5
<b>Total</b>	26	100	120	100

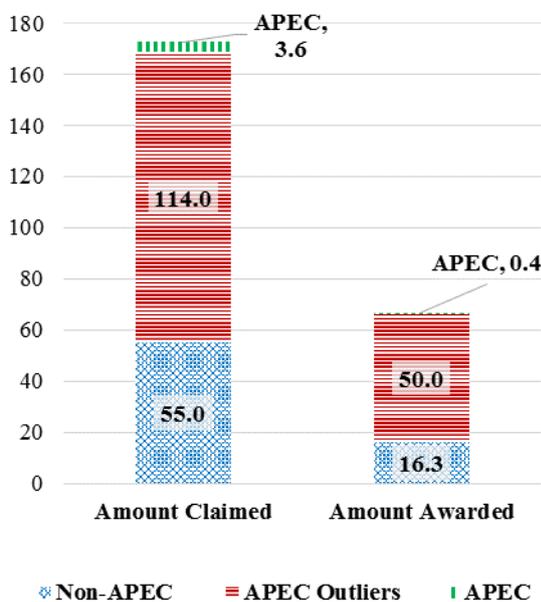
Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

Note: The total number of cases differs from Table 4.3 as this table uses only award data for calculations. The number of cases with award data tallies with the statistics given under the Table 4.3 note.

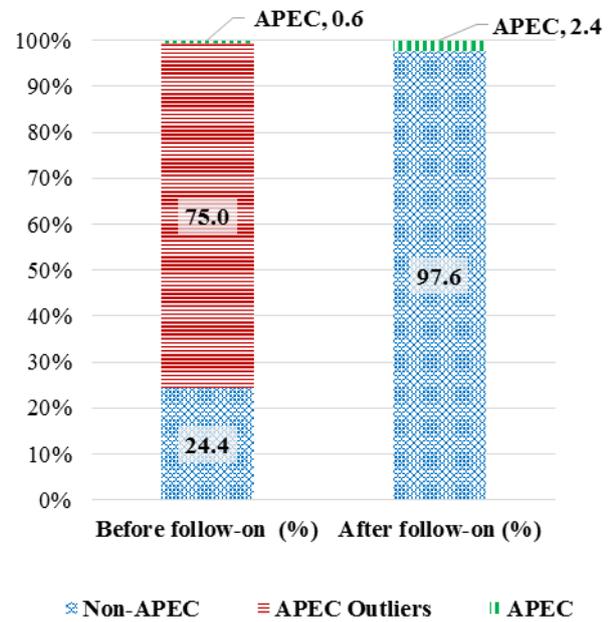
Table 4.4 above shows that 42.3% of the ISDS cases in favour of investors were awarded amounts below USD 10 million. In general, as the amount awarded to the investor increases, the share of cases decreases. While no case in the APEC region was awarded with amounts ranging between USD 100 million and USD 1 billion, 24 cases in the rest of the world (25.8% of total world cases awarded to investors) had been awarded with amounts within that range. Excluding the outlier cases, the total amount awarded to investors for cases involving APEC economies decreased significantly to USD 391 million.

As seen in Figure 4.2, the impact of the outliers on the statistical figures was significant. A further analysis also revealed that the awards in these outlier cases were set aside in their entirety after follow-on proceedings in the district courts where the arbitration took place. While the initial awards of ISDS cases against APEC economies constituted 75.6% of the world’s total amount awarded, the actual costs after follow-on proceedings shrank to 2.4% of that total, as shown in the Figure 4.3. ISDS cases may have appeared costly at the onset for the APEC region. However, after examining carefully the ISDS awards data, this indicates that they have been as a whole not too onerous for APEC economies.

**Figure 4.2: Outcomes of ISDS Cases in USD Billions – World**



**Figure 4.3: Amount Awarded by ISDS Tribunals - World (%)**



Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

**Sources:**

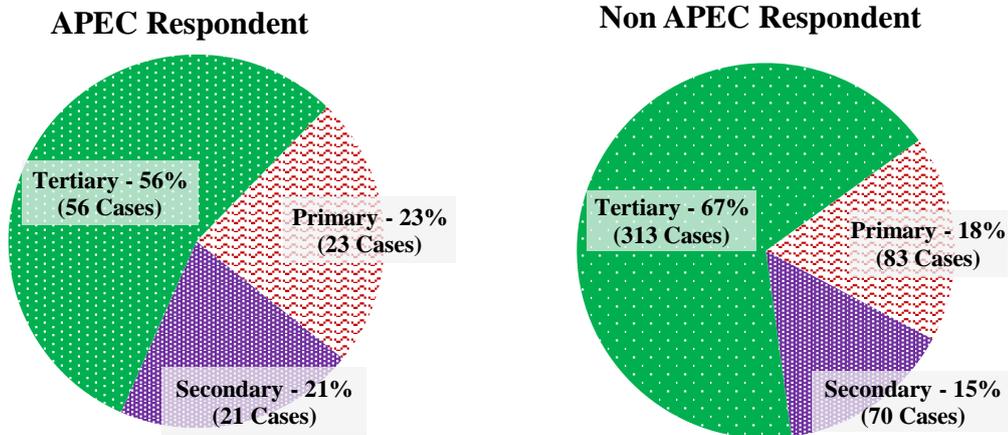
Peterson Institute for International Economics. (2015). What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI? Retrieved from <https://piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state>

United Nations - UNCTAD. (2017). Investment Dispute Settlement Navigator. Retrieved from <http://investmentpolicyhub.unctad.org/ISDS>

**Box 4.2: Most Onerous Sectors for APEC Economies: ISDS Cases Awarded in Favour of the Investors**

Among the ISDS cases resolved from 1987 to 2017 concerning an APEC economy as respondent, 25% of them were related to primary sector (e.g. commodity exploration/mining), 21% related to the secondary sector (i.e. manufacturing), and 56% were related to the tertiary industry (i.e. services). Similarly, for the rest of the world, the bulk of cases (68.5%) were related to the tertiary sector.

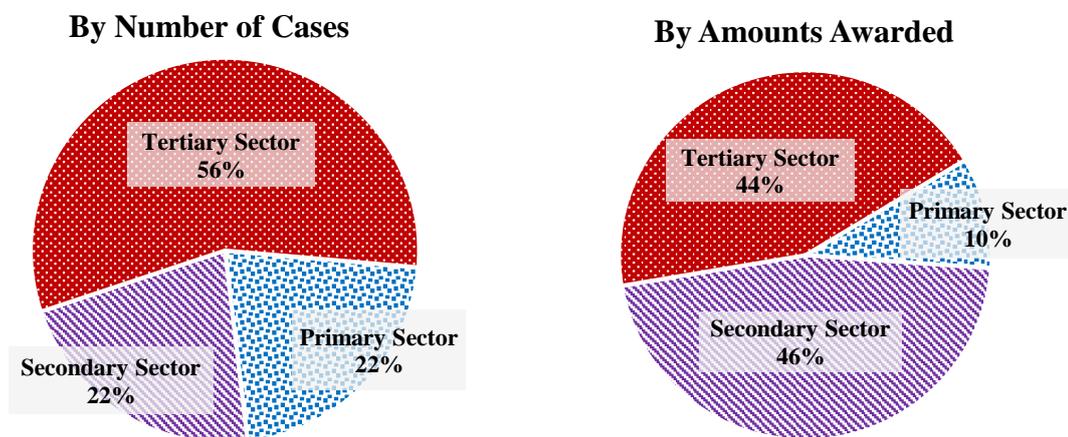
**Figure 4.4: Distribution of ISDS Cases by Sector<sup>17</sup>**



Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

Cases where investors had won against APEC respondents also showed a similar sectoral distribution. Of the 23 cases identified, the tertiary sector comprised 56% of such cases. The share of primary and secondary sector cases also remained similar at 22% each.

**Figure 4.5: Distribution of Cases Won by Investors<sup>18</sup>**



Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

However, the analysis on the amount awarded presents a different picture in terms of the sectors’ burdens. The tertiary sector is no longer the most onerous, accounting for only 44%

<sup>17</sup> Total percentages exceed 100% as some cases have multiple sectors.

<sup>18</sup> Calculations have excluded 3 outliers corresponding to the primary subsector of ‘extraction of crude petroleum and natural gas’ This subsector would take up over 99% of the amount awarded to investors within the APEC Region

of the total amount awarded (USD 391.18 billion), in contrast to the 56% share of the number of cases. Similarly, the primary sectors accounted for only 10% of the awarded amounts even though it constituted 22% of the number of cases. In contrast, the secondary sector consisting only 22% of the number of cases, accounted for 46% of the total amount awarded. This suggests that ISDS cases with APEC respondents involving the secondary sectors are of higher value than those of other sectors.

This is indeed the case, whereby cases in the secondary sector for ISDS cases with APEC respondents have 2 cases (40%) that were awarded between USD 20-50 million, while there were none of such cases in the other sectors.

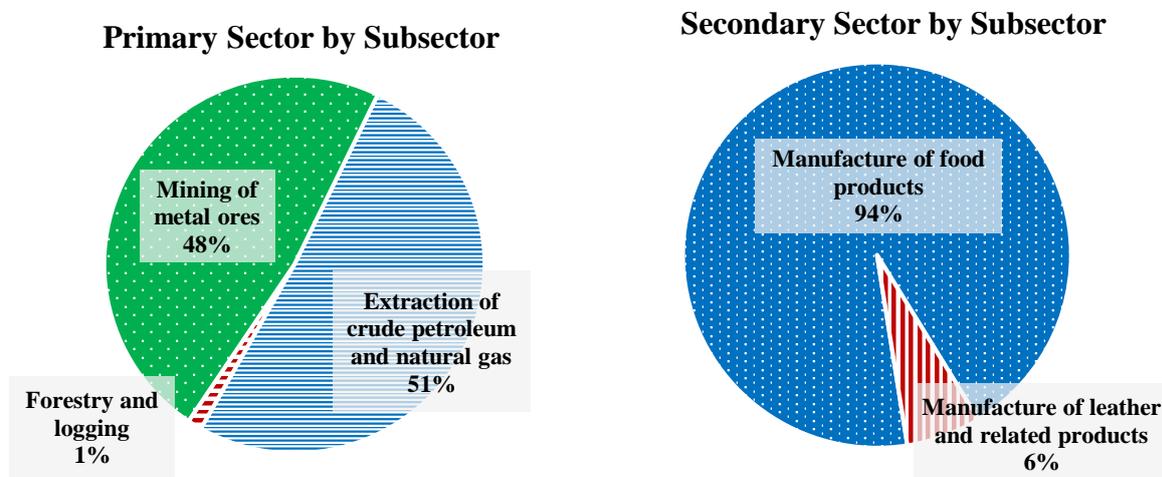
**Table 4.5: Amounts Awarded to Investors as Percentage of Amounts Claimed by Sector**

Amount Awarded in Favour of Investor	Primary Sector		Secondary Sector		Tertiary Sector	
	No. of Cases	Share	No. of Cases	Share	No. of Cases	Share
Between 0 mil and 10 mil	3	60%	1	20%	7	54%
Between 10 mil and 20 mil	2	40%	1	20%	4	31%
Between 20 mil and 50 mil	0	0%	1	20%	2	15%
Between 50 mil and 100 mil	0	0%	2	40%	0	0%
Between 100 mil and 1 bn	0	0%	0	0%	0	0%
More than 1 bn	0	0%	0	0%	0	0%
<b>Total</b>	<b>5</b>	<b>100%</b>	<b>5</b>	<b>100%</b>	<b>13</b>	<b>100%</b>

Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

A closer look at the breakdown of the amount awarded to the sectors by subsector, showed that for APEC respondents, both primary and secondary sectors are dominated by one or two subsectors. Mining of metal ores and extraction of petroleum and natural gas constitute 99% of primary sector awards. In the secondary sector, the manufacturing of food products subsector amount to 96% of the amount awarded for that sector.

**Figure 4.6: Breakdown of Amount Awarded by Subsector for ISDS Cases with APEC Respondents**

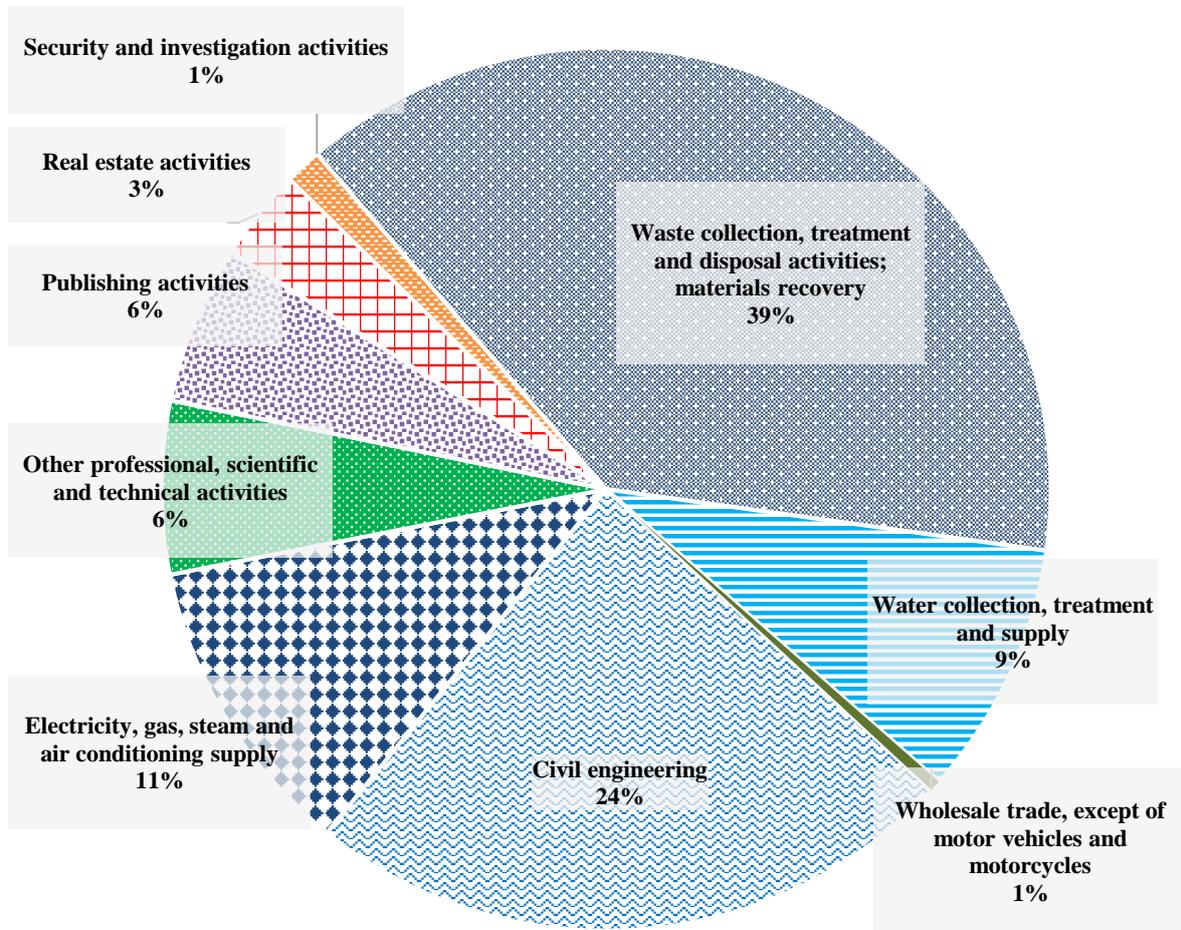


Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

The primary and secondary sectors stand in contrast to the tertiary sector. While there is no one single subsector that dominates, the 3 largest subsectors constitute a collective 74% of the amount awarded within the tertiary sector. The largest of these belonged to the waste

collection subsector (39%), while water sanitation and the electricity subsector amounted to 21% and 11% respectively.

**Figure 4.7: Breakdown of Amount Awarded by Subsector for ISDS Cases with APEC Respondents (Tertiary Sector)**



Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

To see which of the subsectors were the most onerous on APEC respondents, Table 4.6 compares all primary, secondary and tertiary subsectors. At first glance, manufacturing of food products (USD 169.6 million) would seem the most onerous, followed by waste collection and civil engineering at USD 66.3 million and USD 41.1 million respectively.

When we measure the average awarded amount on a per case basis (by subsector), we find that manufacturing of food products still takes top spot at USD 42.4 million, it is actually followed very closely by civil engineering at USD 41.1 million. The average awards for the waste collection subsector accounts to USD 16.6 million per case, which is comparable to the electricity (USD 19.1 million), extraction of crude oil (USD 19.4 million), mining of metal ores (USD 18.2 million), and water collection (USD 16.6 million) subsectors.

**Table 4.6: Awarded Amounts by Subsector**

Subsector	Sector	Amount Awarded (USD millions)	No. of Cases	Average Amount per Subsector (USD millions)
Mining of metal ores	Primary	18.2	1	18.2
Extraction of crude petroleum and natural gas		19.4	3	6.5
Forestry and logging		0.5	1	0.5
Manufacture of food products	Secondary	169.6	4	42.4
Manufacture of leather and related products		11.3	1	11.3
Civil engineering	Tertiary	41.1	1	41.1
Electricity, gas, steam and air conditioning supply		19.1	1	19.1
Other professional, scientific and technical activities		10.9	2	5.5
Publishing activities		10	1	10.0
Real estate activities		5.8	1	5.8
Security and investigation activities		2.3	1	2.3
Waste collection, treatment and disposal activities; materials recovery		66.3	4	16.6
Water collection, treatment and supply		16	1	16.00
Wholesale trade, except of motor vehicles and motorcycles		0.74	1	0.74

Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

**Sources:**

Peterson Institute for International Economics. (2015). What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI? Retrieved from <https://piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state>

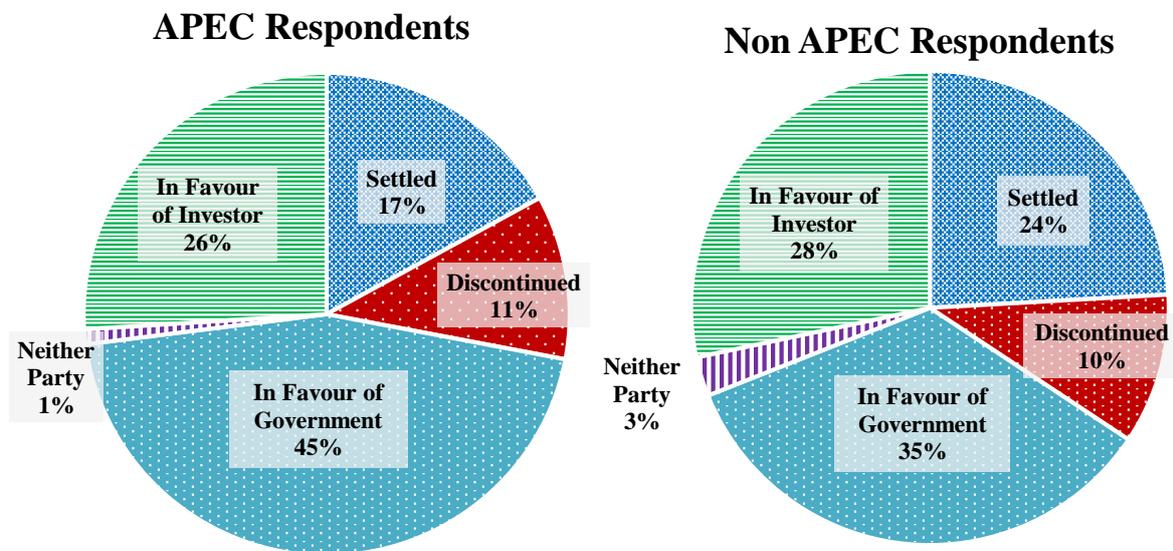
United Nations - UNCTAD. (2017). Investment Dispute Settlement Navigator. Retrieved from <http://investmentpolicyhub.unctad.org/ISDS>

**Box 4.3: Why ISDS Cases are Mostly Resolved in Favour of Governments in the APEC Region?**

As the global stock of FDI has risen from US\$60 billion in 1960 to more than US\$26 trillion in 2016 (UNCTAD, 2017), the number of ISDS cases have also increased significantly (CSIS, 2014), from about 100 claims during the whole period of 1987 – 2002, to 855 as of the end of 2017 (UNCTAD, 2017).

The data of the concluded ISDS cases (Figure 4.8) show that the percentage of cases resolved in favour of governments is higher than that in favour of investors, in particular within the APEC region. 45% of such ISDS cases involving APEC governments as respondent were decided in favour of the government, while only 26% of them were decided in the favour of investors. Among non-APEC Respondents, about 35% of the cases were decided in the government’s favour and 28% in favour of the investors.

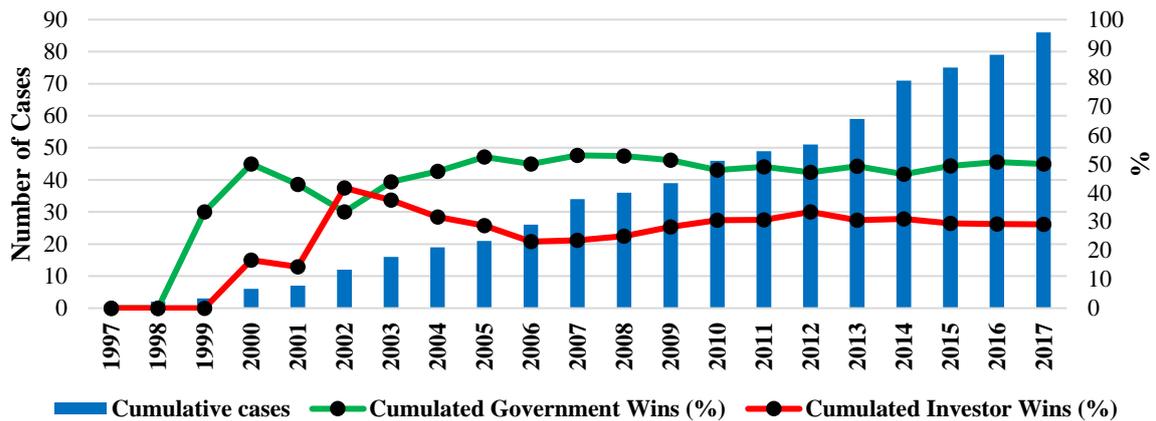
**Figure 4.8: Distribution of Concluded ISDS Cases by Outcome**



Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

A more in depth analysis reveals that for ISDS cases with APEC respondents, the gap between the proportions of the number of cases ruled in favour of governments and the number of cases ruled in favour of investors have been consistent for the past 15 years (Figure 4.9).

**Figure 4.9: ISDS Cases in the APEC Region – Results in Favour of Governments and Investors**



Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

The conventional methodology used by UNCTAD records an ISDS case in favour of the governments when the tribunal determines that it does not have the jurisdiction to hear the case or when the tribunal examines the legal merit of the cases and issues a ruling in favour of the government. It is possible that APEC economies obtain many rulings to their favour due to the higher probability to make policy decisions based on the rule of law and following due process. While the UNCTAD database does not offer statistics on the reasons these cases were ruled in favour of the government, several reports issued by the arbitrators showed that many of the rulings were issued in that regard due to their legal merits.

In fact, Krzysztof (2017) argues that cases of lower legal merit are more consistently being brought to the further stages of litigation, thus influencing governments’ success in dealing with ISDS cases. Cases with high legal merit would mean that the investor would have a high probability of winning the case. It would then be in the governments’ interest to settle such cases early, as prolonging it would mean spending unnecessary money on more litigation. However, governments prefer not to settle cases that have lower legal merit, as they would be more likely to win such cases through litigation and recover their legal costs.

In some cases, these cases with lower legal merit are taken by investors due to “regulatory chill”, which aims to deter governments from implementing any regulation that could affect their businesses. Firms have an incentive to drag out litigation as much as possible, and not settle early, in order to delay or even prevent the enactment of such laws. For example, this has been seen in cases of tobacco companies suing governments for enacting regulations regarding plain packaging on cigarettes.

Another reason is that the ISDS process could serve as the “last resort” for investors (CSIS, 2014), who in some instances, undertake large expenses and poor odds of winning, because the alternative scenarios like bankruptcy or abandoning expropriated assets could lead to greater losses.

Finally, it is possible that cases in which companies that may have a good chance of winning are not taken to the final stages of the ISDS process, as the cost of engaging in the ISDS process can be expensive. OECD (2012) has estimated that the ISDS process averages about

USD 8 million per case. As such, companies may not be able to afford the best legal recourse available in order to put the case through to the final stages of the ISDS.

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## 5 RTA/FTAS: TOOLS FOR REFORMS, GROWTH AND DEVELOPMENT

Much has been said about the importance of open trade and investment systems to improve economic growth and living conditions. However, it has also become increasingly common to hear the general public expressing their disappointment on the impact – or lack thereof – open trade and investment has had on their lives. This is particularly so in economies where benefits have been distributed unequally, unemployment levels are high and people have difficulties making ends meet. However, is open trade and investment the real culprit as identified by some or has there been a missing element obstructing more inclusive growth and development?

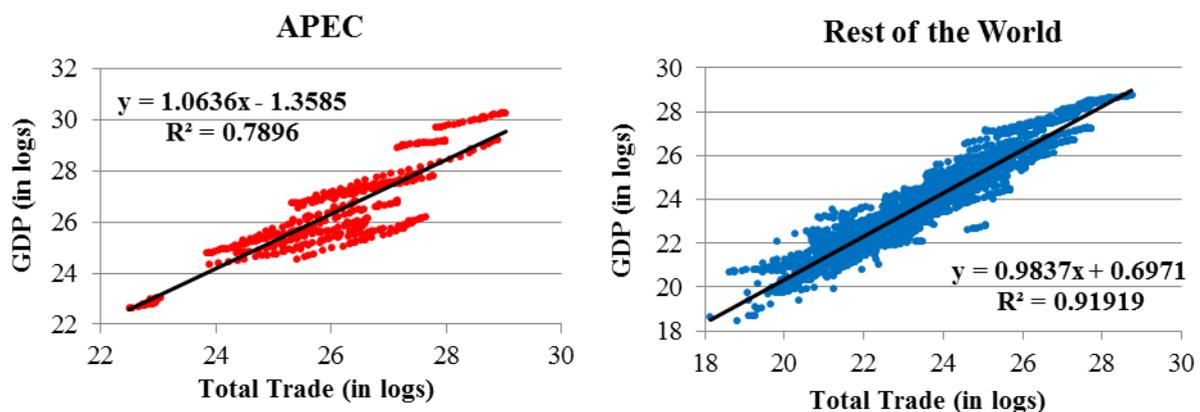
While open trade and investment systems are necessary towards achieving sustainable growth and equitable development, they are insufficient. Free and open trade and investment cannot be assumed to be the “magic wand” it is commonly perceived to be. Instead, growth and development strategies need to be complemented with a clear domestic agenda and sound policies on a wide range of areas, such as transport infrastructure, education, health, anticorruption, telecommunications and competition policy, among others.

A combination of sound policies on the domestic and external fronts will create the best opportunities to improve living standards. Whilst implementing domestic reforms is not an easy task, it is – on occasions – possible to use RTA/FTAs as a tool to facilitate and even fast track such reforms.

### 5.1 AN OUTWARD-LOOKING STRATEGY TO BRIDGE DEVELOPMENT GAPS

The existence of a positive relationship between trade and economic growth is evident in both the APEC region and the rest of the world. This relationship is further supported by estimations carried out by the APEC Policy Support Unit which showed that since 1989, an increase of 1% in APEC’s trade increases the region’s GDP by 0.56%<sup>19</sup>. All other factors held constant, this indicates that an additional 1% growth in APEC’s trade would represent an expansion of APEC’s GDP by USD 242.5 billion.

**Figure 5.1: Correlation between Trade and Economic Growth**

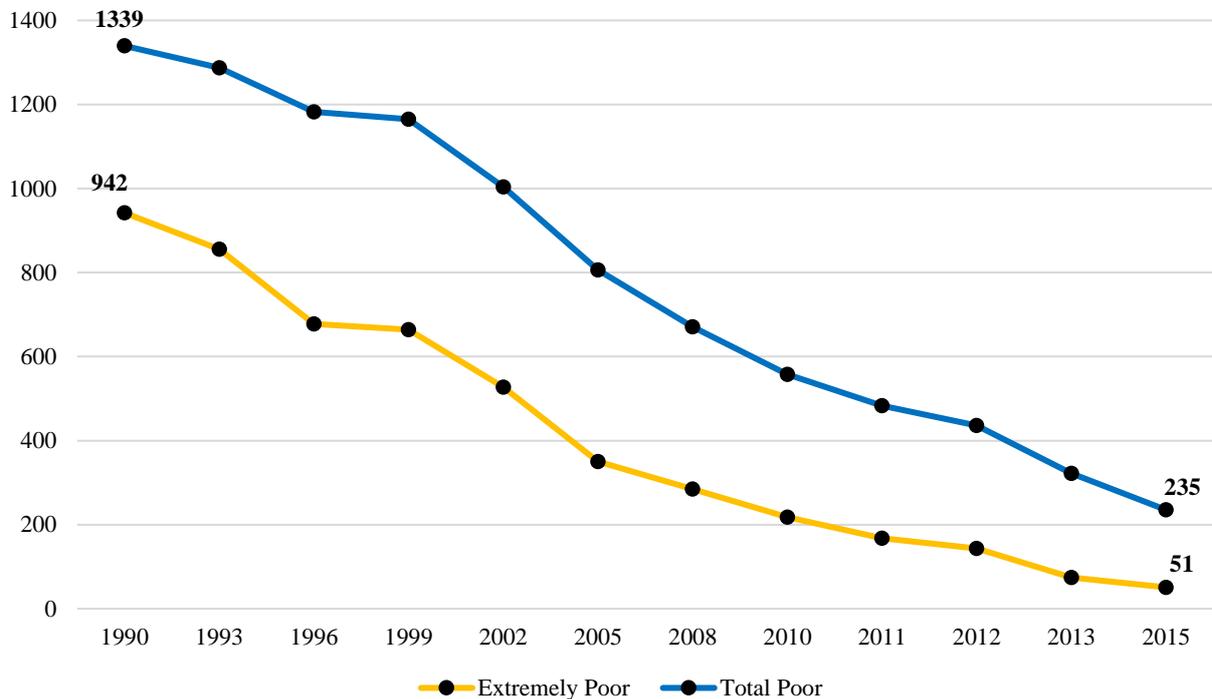


Source: APEC Secretariat, Policy Support Unit estimates.

<sup>19</sup> Kuriyama, Carlos and Emmanuel San Andres (2014), “Trade and Economic Growth: 25 Years of a Stronger Relationship within APEC”. APEC Policy Support Unit, Policy Brief No.11, 20 October. This Policy Brief also found that an increase of 1% in the rest of the world (RoW)’s trade would increase RoW’s GDP in 0.39%.

In general, APEC economies have simultaneously pursued broader economic openness which has contributed to the decline in poverty levels within the APEC region. During the period of 1990 and 2015, 1.1 billion people were lifted out of poverty in the APEC region and 891 million people were taken out of extreme poverty (Figure 5.2).

**Figure 5.2: People Living under Poverty and Extreme Poverty Conditions (million)**



Source: World Bank, Povcal. APEC Secretariat, Policy Support Unit calculations

Note: Extreme poverty refers to living with less than USD 1.9 per day. Poverty refers to living with less than USD 3.1 per day.

Indeed, evidence within developing economies shows that those who have implemented outward-looking policies have performed much better than those who had carried out inward-looking strategies. An interesting region to examine this phenomenon is in Latin America. While, a number of economies – specifically all Latin American APEC members – have embraced economic liberalization, other economies have preferred to take on a more protectionist stance towards trade and investment.

The above mentioned phenomenon can be further investigated by comparing Peru (Outward looking economy) and Brazil (Inward looking economy) through a range of indicators. Table 5.1 shows the evolution of two types of indicators for Peru and Brazil in recent years: 1) policy indicators regarding trade-related matters (i.e. average tariffs, number of RTA/FTAs in force and number of trade remedies) and public expenditure (i.e. social assistance transfers to the population); and 2) economic performance indicators in terms of real GDP growth, job creation, income improvement for the 10% poorest and extreme poverty headcount as percentage of the total population.

**Table 5.1: Economic Openness vs Protectionism - The Cases of Peru and Brazil**

<b>Policy Indicators</b>	<b>Peru</b>	<b>Brazil</b>
MFN average tariffs	10.2% in 2007 2.4% in 2017	12.2% in 2007 13.4% in 2017
RTA/FTAs in force	17 RTA/FTAs with 52 economies	6 RTA/FTAs with 8 economies
Trade remedies implemented (2007-2017)	11	184
Public expenditure on social assistance transfers to population (2006-2016)	0.2% of public expenditure	2.5% of public expenditure
<b>Economic Performance Indicators</b>	<b>Peru</b>	<b>Brazil</b>
Real GDP Growth (2007-2017)	4.9%	1.5%
Job creation as percentage of Economically Active Population (2007-2017)	17%	5%
Income Improvement for the 10% poorest population (2006-2016, Peru; 2006-2015, Brazil)	94%	49%
Extreme poverty headcount (% of total population)	13.5% in 2006 3.5% in 2016	7.2% in 2006 3.4% in 2015
Reduction of population living in extreme poverty (annual average rate since 2006)	-11.6% per year	-7.2% per year

Source: International Monetary Fund, World Bank, World Trade Organization, Organization of American States, APEC Secretariat, Policy Support Unit calculations.

From the results, it is seen that Peru has experienced a better economic performance than Brazil. This is noted in the real GDP, job creation and income improvement for the poorest population which is seen to have grown much faster in Peru as compared to Brazil. In addition, extreme poverty has declined faster as well. These outcomes have occurred in a context of economic openness where unilateral measures were implemented to reduce average MFN tariffs extensively; RTA/FTAs were negotiated and implemented with its most important partners; and the frequency of the use of trade remedies was diminished.

Peru's experience has been similar to those of other Latin American economies that have embraced economic openness such as Chile; Colombia; Costa Rica; and Mexico. Other Latin American economies, for example: Brazil; Argentina; and Venezuela, have implemented more inward-looking policies, which have led to them being unable to generate jobs and sustainable growth rates at the same pace.

Economic openness increases competition and could initiate critical structural reforms in several areas, which are necessary to sustain higher growth rates and take advantage of RTA/FTAs. The case of Peru shows that poverty alleviation has been better served by policies promoting economic openness than protectionist policies, as even without depending on direct government transfers, living standards have improved. In other words, economic openness has been a better pro-poor policy than protectionism.

## **5.2 RTA/FTAS AS TRIGGER FOR GROWTH AND DEVELOPMENT**

The use of trade agreement to promote growth and development goes beyond its traditional role of improving market access for goods and services, attracting investors and promoting interests to explore new business opportunities. RTA/FTAs have also been used as a trigger for domestic reforms, particularly in situations where authorities face difficulties in implementing them. Furthermore, RTA/FTAs could fast track reforms, especially if the agreements are signed

with very important partners. In fact, many governments have used RTA/FTAs as a policy anchor. Baccini and Urpelainen (2014) mentioned that RTA/FTAs codify legally binding rules and make it hard for governments to go backwards in the application of the RTA/FTAs and reforms related to it<sup>20</sup>.

Furthermore, RTA/FTAs strengthen institutional framework and assist signatories in gaining credibility within the international community. Should an economy fail to comply with its commitments in signed trade agreements, it could damage its reputation. Tornell and Esquivel (1997) found evidence that the administration of President Carlos Salinas de Gortari in Mexico used NAFTA as a policy anchor to commit to trade liberalization reforms, especially by eliminating protection in agriculture and services sectors for the next 15 years, and promoting the market access benefits that Mexico was going to enjoy in the American and Canadian markets<sup>21</sup>. In the same way, RTA/FTAs could motivate reforms so as to accede to international treaties. For example, Biadgleng and Maur (2011) noted that FTAs signed by developing economies with the European Union and the United States promoted the adherence to multilateral treaties in intellectual property<sup>22</sup>.

Many of the reforms undertaken by RTA/FTA signatories take place to: 1) allow the implementation of the RTA/FTAs by creating, modifying or abolishing laws in order to comply with the obligations agreed in the RTA/FTAs; 2) make domestic policy changes in order to take maximum advantage of it (e.g. policies to improve general competitiveness regardless of the existence of any trade agreement).

In this regard, Garcia (2010) explained that Peru had to pass 99 Legislative Decrees with reforms in order to put in force the Peru-United States FTA. 12 of these Decrees were related to the implementation of the agreement, while 84 of them involved changes to improve Peru's competitiveness. Three of the Decrees had a mixed nature with elements relating to the implementation of the FTA and the need to improve competitiveness<sup>23</sup>. Similarly, Gonzalez (2009) described the difficulties Costa Rica faced to liberalize and reform the telecommunications and insurance sectors in the past, and how the FTA between Central America-Dominican Republic and the United States facilitated the introduction of reforms in these sectors in order to implement this agreement<sup>24</sup>. Opening the telecommunication and insurance markets to competition in the provision of services is considered to be the most important public policy reform in Costa Rica in many years<sup>25</sup>. Tomic and Novoa (2011) also

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<sup>20</sup> Baccini, Leonardo and Johannes Urpelainen (2014), "International Institutions and Domestic Politics: Can Preferential Trading Agreements Help Leaders Promote Economic Reform?", *The Journal of Politics*, Vol. 76, No. 1, pp. 195-214.

<sup>21</sup> Tornell, Aaron and Gerardo Esquivel (1997), "The Political Economy of Mexico's Entry into NAFTA", in *NBER Chapters, Regionalism versus Multilateral Trade Agreements*, Takatoshi Ito and Anne O. Krueger (eds.), University of Chicago Press, p. 25-56.

<sup>22</sup> Biadgleng, Ermias Tekeste and Jean-Christophe Maur (2011), "The Influence of Preferential Trade Agreements on the Implementation of Intellectual Property Rights in Developing Countries: A First Look", United Nations, International Centre for Trade and Sustainable Development, Issue Paper No. 33, p. 11-13.

<sup>23</sup> García, Luis Alonso (2010), "Implementación de Acuerdos Comerciales Preferenciales en América Latina: La Experiencia Peruana en su TLC con Estados Unidos" (*Implementation of Preferential Trade Agreements in Latin America: The Peruvian Experience in its FTA with the United States*), Inter-American Development Bank, Documento de Políticas IDB-PB-108, p. 25, 85-88.

<sup>24</sup> González, Anabel (2009), "La Implementación de Acuerdos Comerciales Preferenciales en América Latina. La Experiencia de Implementación del CAFTA-RD en Costa Rica" (*Implementation of Preferential Trade Agreements in Latin America: The Implementation Experience of the CAFTA-RD in Costa Rica*), Inter-American Development Bank, Documento de Políticas BID-DP-104, p. 23-24.

<sup>25</sup> *Ibid*, p. 87

highlighted domestic reforms regarding customs procedures implemented in Chile due to commitments in the Chile-United States and Chile-European Union FTAs, such as the implementation of the trade single window<sup>26</sup>.

Without these trade agreements, it would have been more difficult or even impossible for the governments involved to have implemented critical reforms to sustain trade and economic growth rates, as well as improve welfare and living standards. Trade agreements, particularly those signed in the last two decades, tend to be comprehensive in nature and RTA/FTA-related reforms usually encompass several areas. Many reports released by the Inter-American Development Bank have listed an extensive list of reforms that have been implemented - motivated by RTA/FTAs- in areas such as customs procedures, investment, transportation, energy, finance, telecommunications, transparency, labor, environment, SMEs, intellectual property, competition policy, agriculture, education and forestry, among others<sup>27</sup>.

Finally, the process of negotiating, implementing and enforcing RTA/FTAs involves the need for policy coordination within government agencies and between the public and private sectors. RTA/FTAs have motivated governments to take a more “whole-of-government” approach to facilitate the articulation of strategies and policies. Issues are complex and cross-sectorial in the whole process and require that agencies coordinate on a frequent basis to determine the feasibility of policy proposals. Economies that have successfully negotiated and put in force RTA/FTAs with their most important partners usually strengthen the public sector’s institutional capability, which later on becomes a very useful asset in the formulation of any public policies.

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<sup>26</sup> Tomic, Esteban and Rodrigo Novoa (2011), “Reformas Legales e Institucionales en la Implementación de Acuerdos Comerciales: La Experiencia Chilena” (*Legal and Institutional Reforms in the Implementation of Trade Agreements: The Chilean Experience*), Inter-American Development Bank, Documento de Políticas IDB-PB-124, p. 9-10.

<sup>27</sup> For more information, see García, Luis Alonso (2010), *op.cit.* p. 85-99; Tomic, Esteban and Rodrigo Novoa (2011), *op.cit.* p. 24-34; González, Anabel (2009), *op.cit.* p. 69-74; Furche, Carlos (2011), “Experiencia de Chile en la Implementación y Administración de Acuerdos Comerciales” (*Chile’s Experience in the Implementation and Administration of Trade Agreements*), Inter-American Development Bank, Resumen de Políticas BID-PB-131, p. 22-30.

## 6 CONCLUDING REMARKS

This report shows that APEC member economies have continued their efforts to negotiate trade agreements. Through the realization of RTA/FTAs, APEC economies have not only looked into improving market access conditions, but also into establishing clear rules to facilitate trade and investment among partners. In addition, RTA/FTAs signed with important counterparts have been used on occasions as tools to push for the implementation of domestic reforms, particularly in areas where conducting reforms in the absence of these RTA/FTAs have been difficult for authorities.

The importance of RTA/FTAs is also reflected by figures within the APEC region. By the end of 2017, there had already been 164 RTA/FTAs enforced by at least one APEC economy, 63 of which were intra-APEC RTA/FTAs. Likewise, the share of trade for APEC economies with RTA/FTA partners has increased substantially in recent decades. Between 1997 and 2017, the share of exports with APEC RTA/FTA signatory parties increased from 24.2% to 49.4% of APEC's total exports, and the share of imports improved from 22.6% to 46.0% of APEC's total imports.

The analysis of the structure of recent RTA/FTAs put in force in 2017 corroborates the fact that new RTA/FTAs are increasingly including chapters that relate to services and investment, as well as other non-traditional areas such as government procurement, intellectual property rights, electronic commerce and competition policy –including state-owned enterprises– among others.

In terms of competition policy issues, the findings show that the analyzed RTA/FTAs do not prevent parties from maintaining or designating state enterprises or monopolies. The key issue here is that any RTA/FTA has to act in a non-discriminatory manner and that state enterprises and monopolies have to make purchases and sales based on commercial considerations. In many RTA/FTAs, chapters on competition policy are usually excluded from the application of dispute settlement chapters. However, the Canada-European Union FTA makes an exception, as the chapter on state enterprises and monopolies is not excluded from the dispute settlement chapter.

Chapters on temporary entry of persons for business purposes only facilitate the entrance of persons for business purposes. The analyzed chapters on this topic include provisions granting temporary entry to intra-corporate transferees and business visitors. Granting temporary entry to investors is also common in some of the chapters. The Canada-European Union FTA has included clauses providing temporary entry to independent professionals and contractual service suppliers as well. These two categories are usually not included in most RTA/FTAs. Similarly, the Peru-Honduras FTA includes clauses on temporary entry for merchants, which are not commonly found in other RTA/FTAs.

As for customs-related matters, the report shows that chapters include many WTO TFA-plus elements. Agreements promote transparency, especially with the use of information technology. In addition, these new systems are used to improve risk assessments. An interesting finding is that partners may decide to incorporate the WTO-TFA *mutatis mutandis* into trade agreements, as in the case of the Singapore-Turkey FTA.

With regards to investment, all agreements analyzed utilize a negative list approach in which national treatment and most-favored nation treatments are offered at both pre and post-

establishment investment stages. However, some differences remain in other clauses. For example, in terms of the obligations concerning “fair and equitable treatment” as well as “full protection and security”, two options were to provide these conditions as per international customary law or to include a list of features determining a breach of any of those obligations.

Likewise, differences in the features concerning investor-state dispute settlement (ISDS) are common. The Canada-European Union FTA includes new features such as the conformation of the arbitral tribunal, chosen from a Joint Committee of 15 members from both sides and third parties. This agreement also include other clauses not commonly seen in other agreements such as the conformation of an appellate tribunal to review awards and the access to hearings and the release of documents to the public (with arrangements to avoid releasing public information).

It is possible that more RTA/FTAs in the future include specific clauses reaffirming the rights of the parties to regulate in order to achieve legitimate policy objectives. As precedent, the CPTPP included a clause in which any claims against tobacco control measures could be denied from the application of the ISDS. In this sense, the Canada-European Union FTA is including a comprehensive clause in the Investment chapter, reaffirming the rights of the parties to regulate in order to achieve legitimate policy objectives such as those related to public health, safety, environment, public morals, social or consumer protection and the promotion and protection of cultural diversity. This means regulatory action in these areas, seeking legitimate policy objectives, do not constitute a breach of any obligation in this agreement.

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