



**Asia-Pacific
Economic Cooperation**

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

Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2018 by APEC Economies

APEC Policy Support Unit
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The views expressed in this paper are those of the authors and do not necessarily represent those of APEC Member Economies. The authors would like to thank members of the APEC Committee on Trade and Investment for their comments. The terms “national”, “nation” and “state” used in the text are for purposes of this report and do not imply the “political status” of any APEC member economy.

TABLE OF CONTENTS

1	INTRODUCTION.....	1
2	RTA/FTAS WITHIN THE APEC REGION	2
	2.1 Proliferation of RTA/FTAs.....	2
	2.2 Intensification of Trade Integration in APEC through RTA/FTAs	3
	2.3 Top Bilateral Trade Flows in APEC in 2018.....	7
	2.4 Future Outlook for Intra-APEC Trade Agreements.....	9
3	GENERAL STRUCTURE OF RTA/FTA’S IN FORCE 2018.....	11
4	ANALYSIS OF THE STRUCTURE OF SPECIFIC RTA/FTA CHAPTERS	13
	4.1 Intellectual Property.....	13
	4.2 Investment.....	19
	4.3 Rules of Origin.....	33
5	FINAL REMARKS.....	40
6	REFERENCES.....	42

LIST OF FIGURES

Figure 2.1: Cumulative Number of RTA/FTAs Signed and Enforced by APEC economies....	2
Figure 2.2: RTA/FTAs in-force in APEC with Services Commitments	3
Figure 2.3: APEC Economies’ Share of Trade with RTA/FTA Partners (Exports).....	6
Figure 2.4: APEC Economies’ Share of Trade with RTA/FTA Partners (Imports).....	6
Figure 2.5: Top 5 Bilateral Flows between APEC in 2018 by RTA/FTA status	7
Figure 2.6: Top 5 Bilateral Trade Flows between APEC Developed economies in 2018 by RTA/FTA status.....	7
Figure 2.7: Top 5 Bilateral Trade Flows between APEC Developing economies in 2018 by RTA/FTA status.....	8
Figure 2.8: Top 5 Bilateral Trade Flows between APEC Developed and Developing economies in 2018 by RTA/FTA status.....	9
Figure 4.1: ISDS Cases Initiated Each Year (APEC Economies as Respondents and Rest of the World).....	25
Figure 4.2: Distribution of Concluded ISDS Cases by Outcome (by end of July 2019).....	25

Figure 4.3: Outcome of ISDS Cases in USD Billions–World	27
Figure 4.4: Amount Awarded by ISDS Tribunals–World (%)	27
Figure 4.5: Distribution of ISDS Cases by Sector	28
Figure 4.6: Sectoral Distribution of ISDS Cases Won by Investors by Number of Cases	29
Figure 4.7: Sectoral Distribution of ISDS Cases Won by Investors by Amounts Awarded ...	29
Figure 4.8: Breakdown of Amounts Awarded to Primary Subsectors for APEC ISDS Cases	30
Figure 4.9: Breakdown of Amounts Awarded to Secondary Subsectors for APEC ISDS Cases	31
Figure 4.10: Breakdown of Amounts Awarded to Tertiary Subsectors for APEC ISDS Cases	31

LIST OF TABLES

Table 2.1: Intra-APEC Trade Pairings covered by RTA/FTAs	3
Table 2.2: Intra-APEC Trade Pairings covered by RTA/FTAs by Developmental Level in 2018	4
Table 3.1: Structure of RTA/FTAs	11
Table 4.1: Average Proportion of Amount Claimed that was Awarded	26
Table 4.2: Amounts Awarded to Investors as Percentage of Amounts Claimed	26
Table 4.3: Amounts Awarded to Investors by Range (USD)	27
Table 4.4: Number of Cases per Sector by Range of Amounts Awarded to Investors	30
Table 4.5: Average Amount Awarded by Subsector	32

LIST OF BOXES

Box 4.1: Has ISDS Been Onerous for APEC Economies?	24
Box 4.2: Statistics on ISDS Cases by Industry Cluster	28

1 INTRODUCTION

This is the fifth annual report produced by the APEC Policy Support Unit on recent RTA/FTAs put in force by APEC economies. As agreed by APEC in 2014, this report is part of the APEC Information Sharing Mechanism. The purpose of this report is to provide an overview of the evolution of the RTA/FTA network in the APEC region; and to study the similarities and differences in the structure and content of the agreements. In addition, this report identifies current trends and new features in the RTA/FTAs implemented in 2018.

The current report includes an analysis of the chapters on intellectual property, investment and rules of origin in the four trade agreements that were put in force by at least one APEC economy in 2018, namely:

1. The China – Georgia FTA;
2. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP);
3. The Hong Kong, China – Macao, China FTA; and
4. The Philippines – EFTA FTA.

An analysis of intellectual property (IP) chapters is included in this report because of the rising importance of IP to APEC economies. There is a growing interest among APEC economies to use trade agreements to establish frameworks to protect and incentivize innovations and creations, while also taking into account the balance in making such innovations and creations accessible. As such, more economies are incorporating clauses on IP issues into their new RTA/FTAs. At the same time, signatory parties are getting more comfortable with including more IP-related disciplines into their agreements.

Due to the ongoing interest among APEC committees and sub-fora about investment disciplines, this year's report also analyzes investment provisions in recent RTA/FTAs and compares these provisions with those in RTA/FTAs included in last year's report. Moreover, the section on investment examines the results of all recorded investor-state dispute settlement cases filed against an APEC member. The results show that most of the cases have favored APEC governments. On the other hand, in cases that favored investors, the amounts awarded to such investors were not too onerous.

Finally, the report examines the chapters on rules of origin in these new agreements. The four agreements have different characteristics, which influenced the approach these agreements have taken to discuss issues on rules of origin. The CPTPP has eleven signatory economies with varying sizes and development levels, and as such, its provisions account for multilateral arrangements. The Philippines – EFTA FTA, an agreement signed between one economy and one economic bloc, leaves space for particular arrangements among the signatory parties. Meanwhile, the other two agreements are bilateral: the China – Georgia FTA is between two parties that are seeking to open their markets, while the Hong Kong, China – Macao, China FTA is between two parties that are duty-free ports. The China – Georgia FTA contains specific clauses on preferential rules of origin, while the Hong Kong, China – Macao, China FTA reiterates both parties' commitment to non-preferential rules of origin.

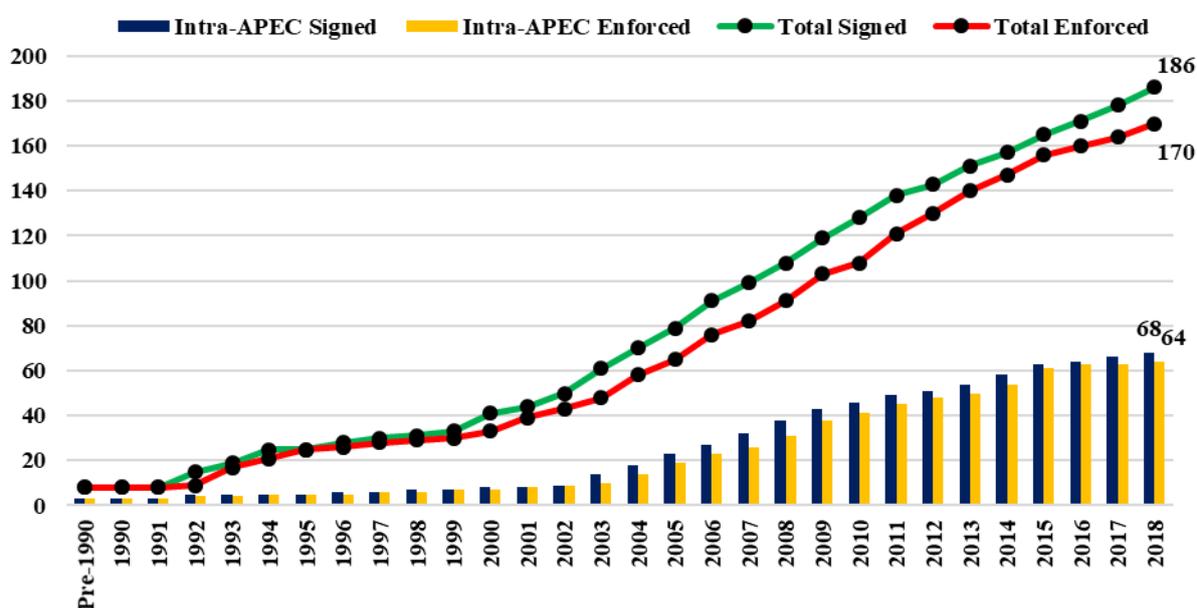
2 RTA/FTAS WITHIN THE APEC REGION

2.1 PROLIFERATION OF RTA/FTAS

Over the last 30 years, APEC economies have increasingly participated in RTA/FTA agreements. From having just 8 signed trade agreements in 1989, APEC had a total of 186 signed agreements with APEC and non-APEC economies as of 2018, among which 170 had been enforced. The number of intra-APEC agreements has similarly risen. As of 2018, 64 of the 68 signed intra-APEC agreements had been in force (Figure 2.1).

While the number of signed trade agreements has seen an annual increase since the 1990s, this trend accelerated after 2001. Since then, economies have signed an additional 142 agreements. Some possible reasons for this acceleration include the failure of the WTO Doha Round negotiations, the possibility of including greater coverage (such as WTO-plus chapters) in RTA/FTAs¹, and the efforts of economies to extend their economic and political interests through better market access using trade agreements².

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



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

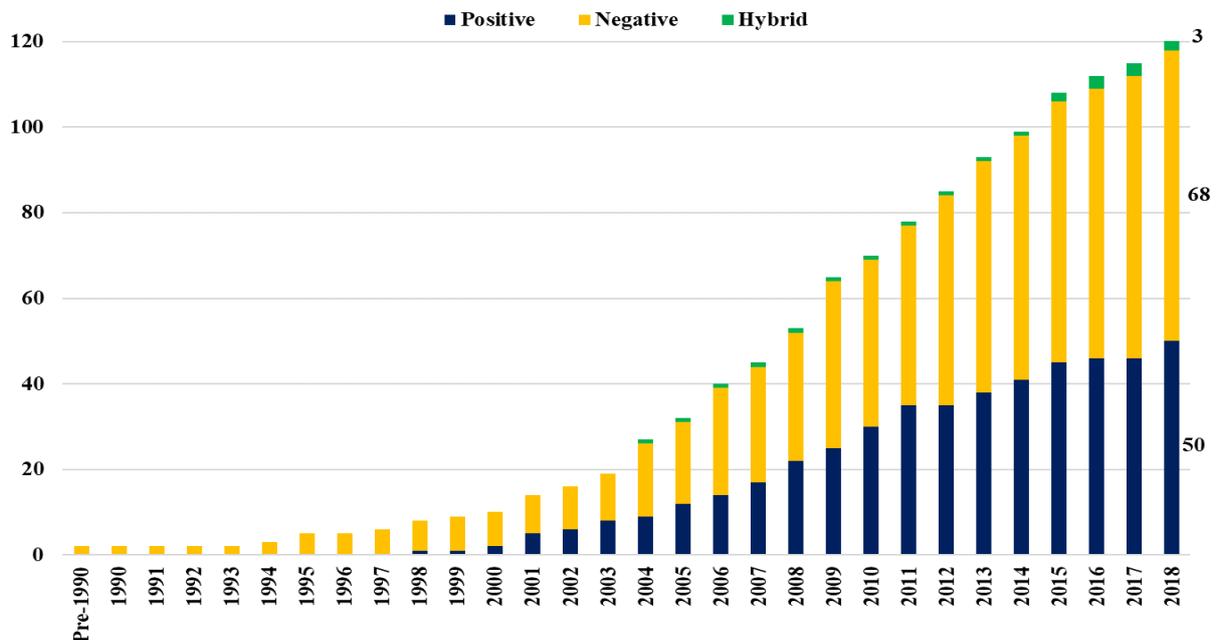
Several of the trade agreements signed by APEC have gone beyond traditional agreements (which tend to focus trade in goods) by incorporating trade in services into its provisions. By 2018, APEC economies had enforced 121 agreements with service commitments, which accounted for 71% of all agreements enforced (Figure 2.2). Furthermore, these RTA/FTAs are

¹ World Trade Organization. (2011). World Trade Report 2011: The WTO and preferential trade agreements (From co-existence to coherence).

² Menon, J. (2008). Dealing with the Proliferation of Bilateral Free Trade Agreements. ERD Working Paper Series, 123rd ser., p. 10-12.

increasingly taking a negative list approach instead of a positive list approach (68 vs. 50), suggesting that APEC economies have been willing to cover deeper services commitments.³

Figure 2.2: RTA/FTAs in-force in APEC with Services Commitments



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

2.2 INTENSIFICATION OF TRADE INTEGRATION IN APEC THROUGH RTA/FTAS

As illustrated in Table 2.1, the percentage of bilateral trade pairings in APEC covered by RTA/FTA agreements increased from 13.3% in 1998 to 51.9% in 2018. This increase has had significant impact on intra-APEC trade flows, which rose by almost four times between 1998 and 2018. The combined effect of an increase in the number of RTA/FTA agreements and growing trade flows also raised the proportion of intra-APEC trade flows subject to a trade agreement from 34.9% in 1998 to 64.3% in 2018.

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

Year	Intra-APEC Trade Pairings	Intra-APEC Trade Pairings with RTA/FTA	% 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
1998	210	28	13.3%	1,751.75	612.06	34.9%
2008	210	67	31.9%	4,609.05	2,326.93	50.5%
2018	210	109	51.9%	6,707.50	4,311.62	64.3%

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

³ A negative list approach means that only the sectors that are listed in the agreement are excluded from the commitments agreed in the RTA/FTA. Conversely, a positive list approach means that only the sectors listed in the agreement are covered by the commitments agreed in the RTA/FTA.

Looking at trade pairings by level of development, 80% of all possible trade pairings between APEC's developed economies⁴ were covered by trade agreements in 2018 (Table 2.2). The coverage is much lower for those between developing economies: only 46.7% of bilateral trade pairings were subject to trade agreements. Meanwhile, 56.3% of trade pairings between developed and developing economies were covered by RTA/FTAs, which is higher than those between developing economies but lower than those between developed ones.

Nonetheless, in terms of trade flows, the share of intra-APEC trade covered by RTA/FTAs within economies of the same development status was relatively similar. In fact, 77.5% of the trade flows between APEC developed economies and 77.9% of the trade flows between APEC developing economies were between RTA/FTA partners. One of the main reasons for this is that developing economies tend to establish trade agreements with their most important trade partners, many of which have self-declared as developing members of the WTO and have been some of the largest exporters and importers in APEC, such as China, Korea and Singapore.

Although trade flows between developed and developing economies within APEC is significant, only 47.4% of the intra-APEC trade flows between developed and developing economies took place between RTA/FTA partners. One explanation of this relatively low share is the fact that there is no trade agreement between China and the two largest developed economies in APEC (i.e. United States and Japan). In addition, only 5 out of 16 APEC developing economies have an existing trade agreement with the United States, which is typically one of the largest trade partners of APEC developing economies.

Table 2.2: Intra-APEC Trade Pairings covered by RTA/FTAs by Developmental Level in 2018

Bilateral trade flow:	Intra-Group Trade Pairings	Intra-Group Trade Pairings with RTA/FTA	% Intra-Group Trade Pairings with RTA/FTA	Intra-Group Trade Flows (USD Billions)	Intra-Group Trade Flows by RTA/FTA Partners (USD Billions)	% of Intra-Group flows by RTA/FTA Partners
Developed – Developed	10	8	80.0%	995.29	771.77	77.5%
Developing – Developing	120	56	46.7%	2,727.82	2124.70	77.9%
Developed – Developing	80	45	56.3%	2,984.39	1415.15	47.4%

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

As illustrated in Figure 2.3, APEC's regional trade with RTA/FTA partners registered an increasing share for both imports and exports. For instance, the region's share of exports with RTA/FTA partners rose from 25.7% in 1998 to 50.3% in 2018. Similarly, in terms of imports, the share of trade with RTA/FTA partners in the APEC region rose from 24.9% in 1998 to 46.9% in 2018. Although APEC as a whole increased its trade with RTA/FTA partners worldwide, some economies have experienced a falling share. One case in point is Russia, whose export and import shares with RTA/FTA partners have fallen in the last ten years. This

⁴ The term 'developed economies' in this report refers to Australia, Canada, Japan, New Zealand and United States. All other APEC economies are referred to as 'developing economies'. The use of the terms 'developed economies' and 'developing economies' is provided without prejudice to Member Economies' views as to which economies are considered developing.

decline is likely a product of the limited number of trade agreements it has in effect and a possible change in its trade patterns.

In the same vein, between 1998 and 2018, Mexico and Papua New Guinea experienced falling import shares with their RTA/FTA partners. However, given their active participation in trade agreements, their decline is more likely due to other causes such as changing import patterns. Across the period, the imports for both economies moved away from larger developed economies (e.g. United States, Japan etc.) and towards growing manufacturing hubs such as China and Korea with whom they do not have trade agreements with⁵. For instance, while Papua New Guinea does not have any trade agreement with China, its share of imports from China increased from 1.6% in 1998 to 16.5% of its total imports in 2018. Mexico exhibits similar trends: its imports from Korea increased from 1.6% in 1998 to 3.6% of its total imports in 2018, while its imports from China rose from 1.5% to 18.0% across the same period. In contrast, its import from the United States, its largest trade partner fell from 74.5% to 46.5%.

The changing trade patterns are likely induced by two phenomena that have fragmented global manufacturing: the rise of global value chains and the offshoring of industrial tasks⁶. The literature notes that the prevalence of these two trends disruptive trends have great repercussions on global trade: some have argued that economies today no longer require a comparative advantage in producing a final good to participate actively in global trade. Instead, they only require a comparative advantage in a specific phase of the production chain. Consequently, developing economies, specifically those in East and Southeast Asia, have largely benefitted, leading to regional clustering of supply chains^{7,8}. As such, it is unsurprising that those economies in question have seen a fall in their import share from actual RTA/FTA members, as they do not have many trade agreements in place with APEC economies in East and Southeast Asia.

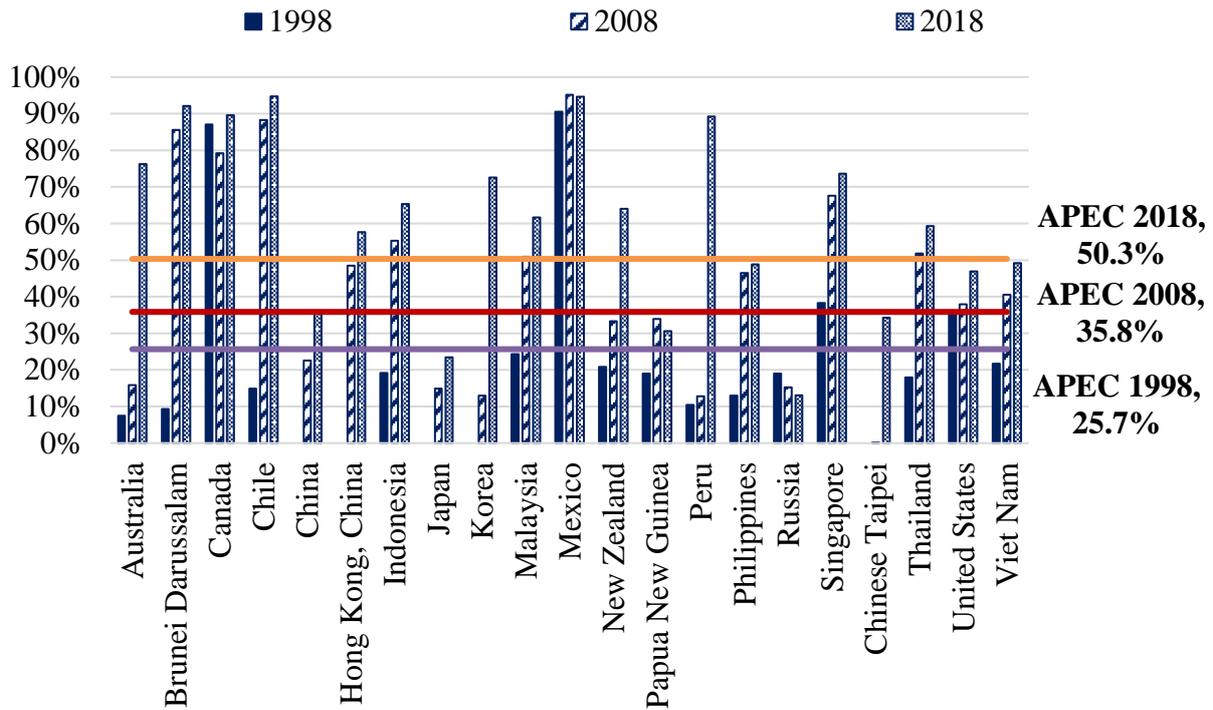
⁵ Except the case between Canada and Korea, who have a bilateral FTA in effect since January 2015.

⁶ WTO. (2011). Trade patterns and global value chains in East Asia: From trade in goods to trade in tasks. Retrieved from https://www.wto.org/english/res_e/booksp_e/stat_tradepat_globvalchains_e.pdf

⁷ Brookings. (2017). Global value chains provide new opportunities to developing countries. Retrieved from <https://www.brookings.edu/blog/order-from-chaos/2017/07/19/global-value-chains-provide-new-opportunities-to-developing-countries/>.

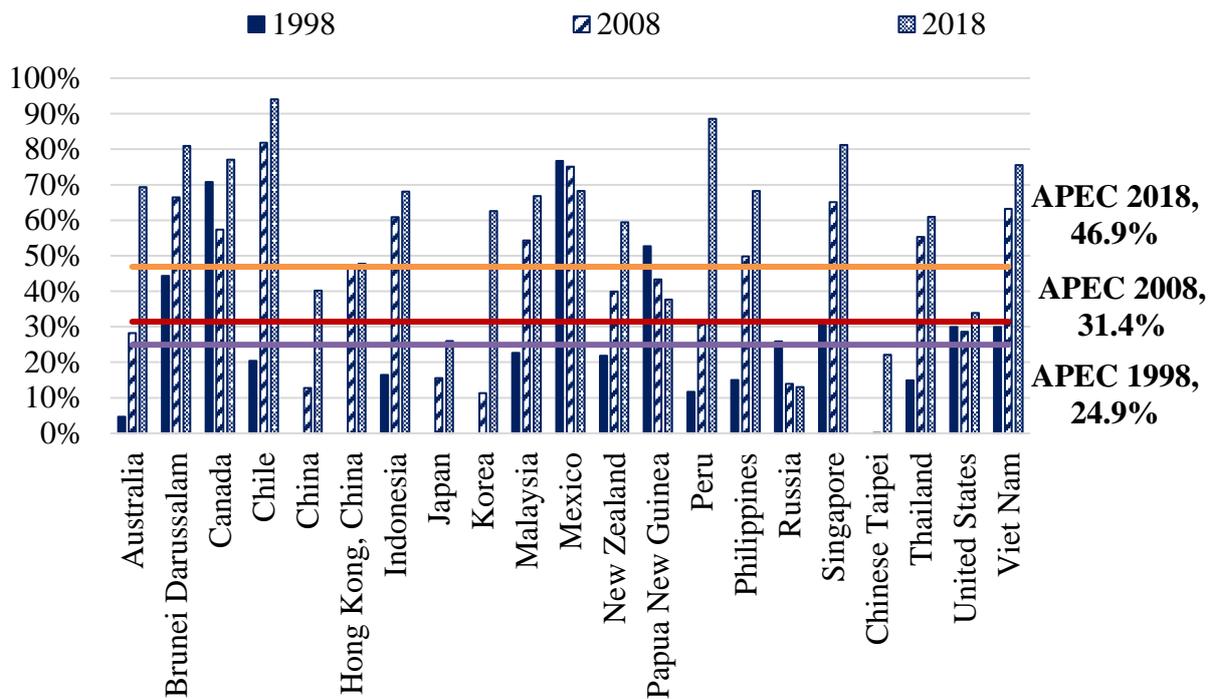
⁸ WTO. (2011). Trade patterns and global value chains in East Asia: From trade in goods to trade in tasks. Retrieved from https://www.wto.org/english/res_e/booksp_e/stat_tradepat_globvalchains_e.pdf

Figure 2.3: 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

Figure 2.4: APEC Economies' Share of Trade with RTA/FTA Partners (Imports)

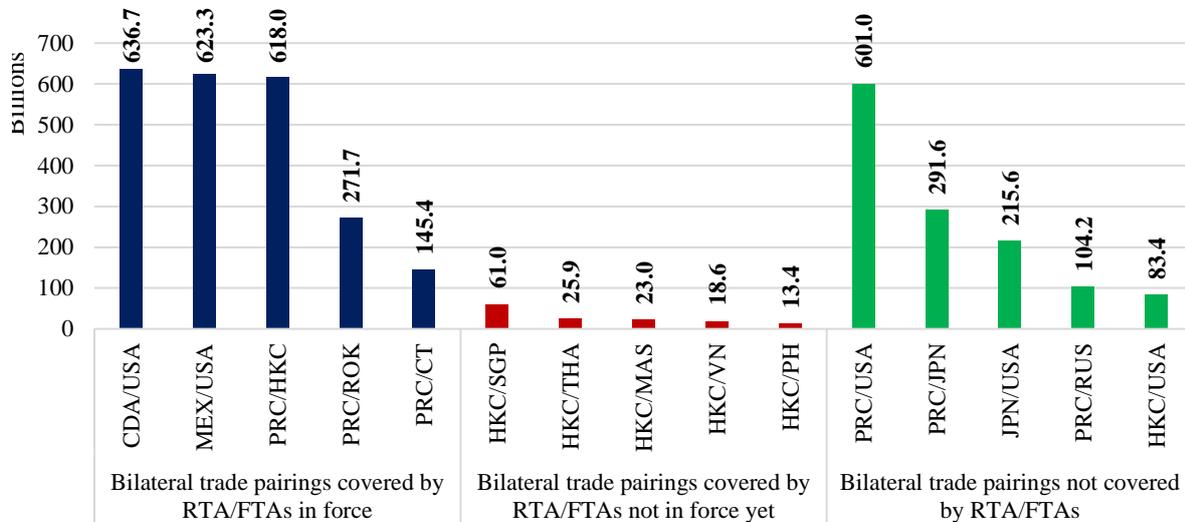


Source: International Monetary Fund – Direction of Trade Statistics; Chinese Taipei’s Ministry of Finance – Trade Statistics Database; APEC Secretariat, Policy Support Unit Calculations

2.3 TOP BILATERAL TRADE FLOWS IN APEC IN 2018

While most of the largest bilateral trade flows in the region (e.g. Canada – United States; Mexico – United States etc.) are covered by trade agreements, other important trade flows such as those between China and the United States are still uncovered.

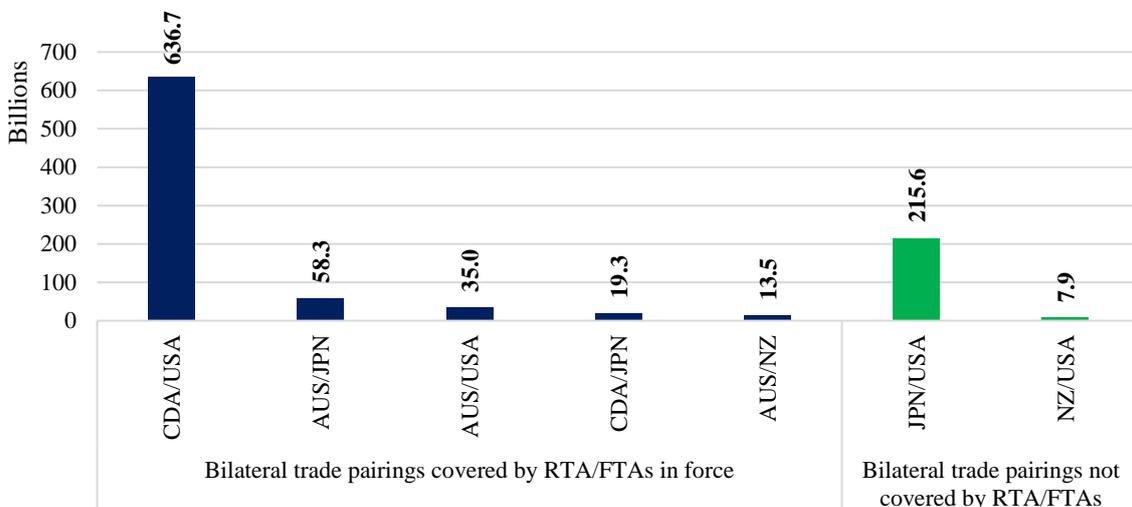
Figure 2.5: Top 5 Bilateral Flows between APEC in 2018 by RTA/FTA status



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

As seen in Figure 2.5, the largest bilateral trade flow within APEC in 2018 occurred between Canada and the United States, which amounted to USD 636.7 billion. While most trade between the region’s developed economies have been covered by RTA/FTAs, those between Japan and the United States as well as New Zealand and the United States continue to be uncovered (Figure 2.6).

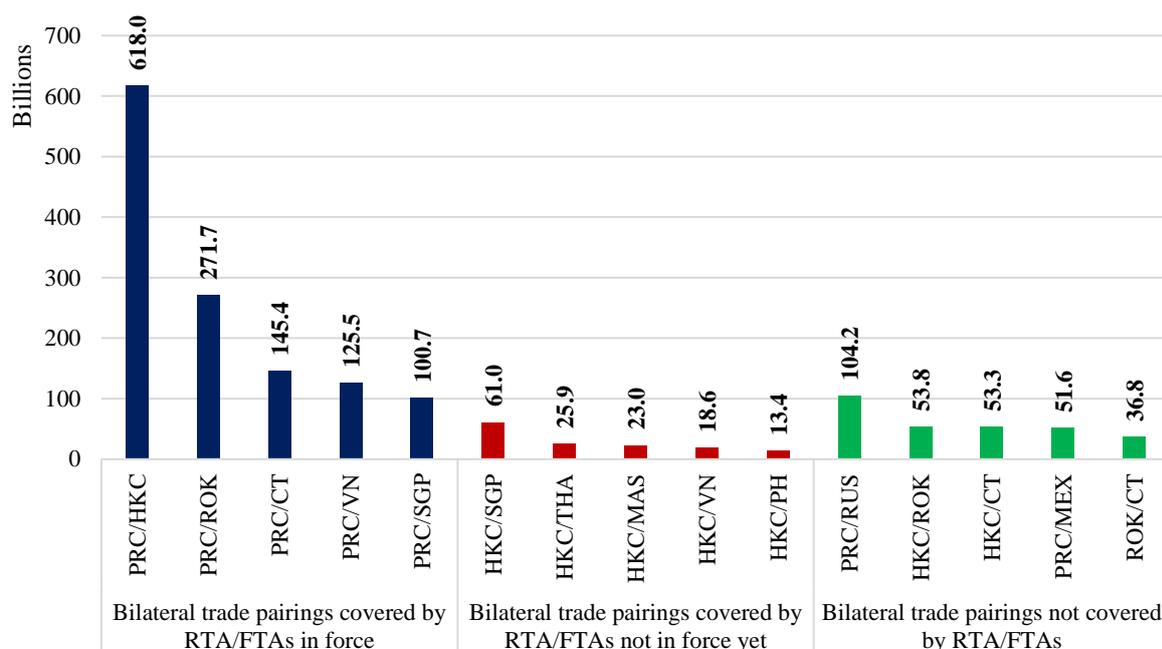
Figure 2.6: Top 5 Bilateral Trade Flows between APEC Developed economies in 2018 by RTA/FTA status



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

Among APEC's developing economies, the largest trade flow among RTA/FTA partners is between China and Hong Kong, China (Figure 2.7). As mentioned earlier, most of the trade flows between APEC developing economies occur between RTA/FTA partners. However, many bilateral trade flows such as those between China and Russia; Hong Kong, China and Korea; and Hong Kong, China and Chinese Taipei are not covered by any trade agreement. These economies can incentivize greater trade flows between themselves by negotiating bilateral trade agreements. In recent years, APEC developing economies are making progress in this aspect by finalizing some trade negotiations such as those between Hong Kong, China and ASEAN economies. These new trade agreements are likely to further increase trade between these economies.

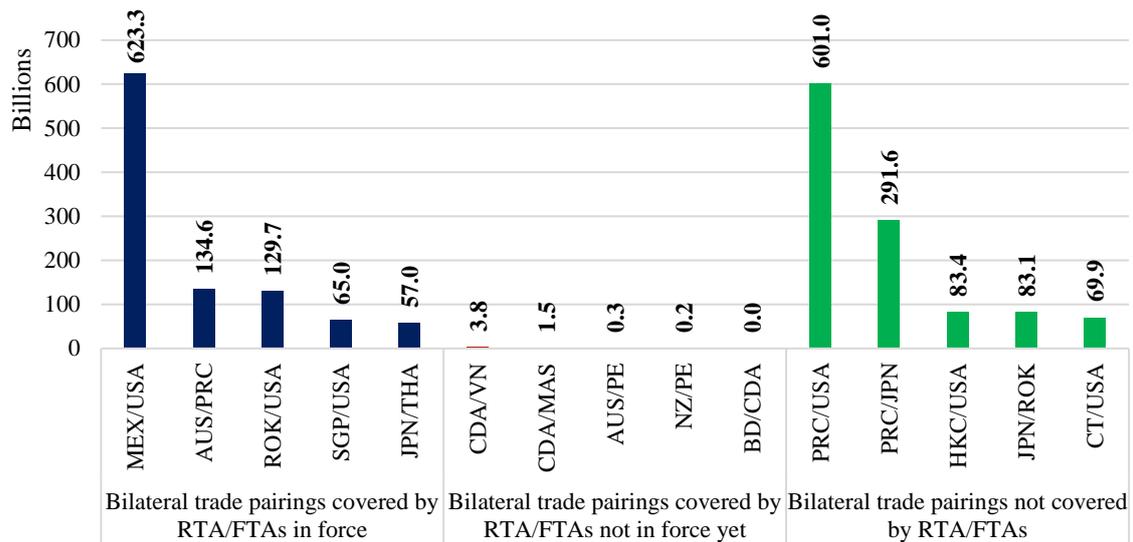
Figure 2.7: Top 5 Bilateral Trade Flows between APEC Developing economies in 2018 by RTA/FTA status



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

With regards to the bilateral trade flows between an APEC developed economy and an APEC developing economy, the largest trade flow is between two RTA/FTA partners, Mexico and the United States (Figure 2.8). However, other important trade flows in APEC continue to be uncovered by any trade agreement, as is the case of those between China and the United States (USD 601.0 billion) and between China and Japan (USD 291.6 billion). Many of the currently uncovered bilateral flows by RTA/FTA will be covered when the remaining CPTPP members are able to put this agreement in force in the future. As of 31 December 2018, only 6 out of 11 CPTPP parties had implemented the agreement: Australia, Canada, Japan, Mexico, New Zealand and Singapore.

Figure 2.8: Top 5 Bilateral Trade Flows between APEC Developed and Developing economies in 2018 by RTA/FTA status



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 FUTURE OUTLOOK FOR INTRA-APEC TRADE AGREEMENTS

While intra-APEC trade flows have increased over the years, there is still significant room for improvement: several trade flows within the region still do not enjoy preferential trade benefits. In fact, 101 intra-APEC trade pairings did not have an enforced trade agreement in place as of 31 December 2018.

Economies have continued their efforts to increase coverage within the region. As a matter of fact, within the APEC region, many RTA/FTAs have already been signed, but economies are awaiting the finalization of domestic procedures to be duly implemented. This is the case of the RTA/FTAs between Australia and Peru; Chile and Indonesia; Hong Kong, China and ASEAN; and the remaining five economies that had not implemented CPTPP by 31 December 2018. Should these agreements be ratified and enforced, APEC would increase the number of trade pairings covered by a RTA/FTA by 19, which amounted to approximately USD 159.0 billion of trade or 2.4% of intra-APEC trade flows in 2018.

Other initiatives include the participation of APEC economies in ongoing negotiations to create large intra-APEC regional trade agreements. For example, some APEC economies are taking part in the negotiations for the Regional Comprehensive Economic Partnership (RCEP), which includes ASEAN economies and their trading partners⁹. Along with the CPTPP, the RCEP is expected to serve as a pathway for an eventual Free Trade Area of the Asia-Pacific (FTAAP).¹⁰

⁹ RCEP negotiations include the following APEC members: Australia; Brunei Darussalam; China; Indonesia; Japan; Korea; Malaysia; New Zealand; the Philippines; Singapore; Thailand; and Viet Nam. Non-APEC members include Cambodia; Lao PDR; Myanmar; and India.

¹⁰ Ministry of Trade and Industry, Singapore. (2014). Factsheet on RCEP: What you need to know about Regional Comprehensive Economic Partnership (RCEP). Retrieved from <https://www.mti.gov.sg/-/media/MTI/Legislation/Public-Consultations/2014/FACTSHEET-WHAT-YOU-NEED-TO-KNOW-ABOUT/factsheet-on-rcep-june-2014.pdf>.

The RCEP is projected to cover almost half the world's population and account for approximately 30% of global trade.¹¹ More importantly, the RCEP has significant potential to increase intra-APEC trade flows by providing preferential treatment to more bilateral trade flows between APEC economies, such as those between China and Japan; and Japan and Korea, amongst others.

¹¹ ASEAN. (n.d.). Regional Comprehensive Economic Partnership. Retrieved from [https://www.asean.org/storage/images/2015/October/outreach-document/Edited RCEP.pdf](https://www.asean.org/storage/images/2015/October/outreach-document/Edited_RCEP.pdf).

3 GENERAL STRUCTURE OF RTA/FTA'S IN FORCE 2018

Table 3.1 provides an overview of the chapters covered by the trade agreements put in force by an APEC member economy in 2018. The structure of those agreements differ in various aspects, specifically on the chapters incorporated into the agreements.

Table 3.1: Structure of RTA/FTAs

Chapters\ RTA/FTAs	Comprehensive and Progressive Agreement for Trans-Pacific Partnership	Philippines-EFTA	China-Georgia	Hong Kong, China - Macao
Competition Policy	Included	Included	Included	Included
Competitiveness and Business Facilitation	Included			
Cooperation / Promotion	Included	Included	Included	Included
Cross Border Trade in Services	Included	Included	Included	Included
Customs Administration/Trade Facilitation	Included	Included	Included	Included
Dispute Settlement	Included	Included	Included	
E-Commerce	Included			
Energy		Included		
Environment	Included	Included	Included	
Financial Services	Included	Included	Included	
General Provisions and Exceptions	Included	Included	Included	Included
Government Procurement	Included			
Intellectual Property Rights	Included		Included	Included
Investment	Included	Included		Included
Labor	Included			
Maritime Transport		Included	Included	
Movement of Business People	Included	Included	Included	
Regulatory Coherence	Included			
Rules of Origin	Included	Included	Included	
Sanitary and Phytosanitary Measures	Included	Included	Included	Included
SMEs	Included			
State Enterprises, Monopolies and Enterprises granted Special Rights or Privileges	Included	Included		
Technical Barriers to Trade	Included	Included	Included	Included
Telecommunications	Included	Included		
Textiles and Apparel	Included			
Trade and Sustainable Development	Included	Included		
Trade in Goods (Market Access)	Included	Included	Included	Included
Trade Remedies	Included	Included	Included	Included
Transparency	Included	Included	Included	
Included	Included			
Included in Other Chapters or Annexes		Included		

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

Among the newly enforced agreements, the CPTPP covers the broadest array of topics. In terms of trade in goods and other traditional areas, the CPTPP includes chapters on market access, rules of origin, technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), trade remedies, customs procedures/trade facilitation and dispute settlement, among others. One such chapter not present in the other three agreements is a chapter on textiles and apparel.

Under this chapter, the CPTPP introduces particular provisions on rules of origin and safeguards that are only applicable to the sector.

Similar to other recent RTA/FTAs, the CPTPP also includes chapters related to trade in services and investments, namely on cross-border trade in services and the movement of business people. Moreover, the CPTPP has sectoral chapters on e-commerce, financial services and telecommunications. The CPTPP also follows recent trade agreements in tackling emerging disciplines by incorporating provisions in areas such as competition policy, state-owned enterprises, intellectual property and government procurement. Chapters on labour and environment are also present. Finally, the CPTPP includes clauses on areas that are not yet very common but may be increasing their presence in other RTA/FTAs, such as provisions on SMEs, regulatory coherence and sustainable development.

The structure of the Philippines – EFTA FTA is patterned after other RTA/FTAs signed by the EFTA. Most of EFTA's RTA/FTAs include traditional topics, though provisions on such topics are not usually included in the main text of the agreement. Instead, these provisions are attached as annexes to the agreement. This is what usually happens to clauses on rules of origin; intellectual property; and services sectors such as financial, telecommunications, movement of natural persons supplying services, maritime transport and energy. While many of the chapter topics in CPTPP are also included in the Philippines – EFTA FTA, several of these topics do likewise do not appear in the main text, and are instead attached annexes to the agreement. Moreover, some new topics like e-commerce are not included in the agreement.

The China – Georgia FTA contains chapters on traditional disciplines related to trade in goods related to market access, rules of origin, customs procedures, SPS, and TBT, among others. However, unlike the CPTPP and the Philippines – EFTA FTA, it does not include chapters or annexes on investment, government procurement, and sectoral services except for the financial and transportation sector.

Finally, the Hong Kong, China – Macao, China FTA is an agreement with very general provisions in terms of disciplines on trade in goods. This is not surprising as both economies are duty-free ports for goods. Nevertheless, this agreement is noteworthy as it consolidated binding commitments in rules at the bilateral level and liberalized trade in services on a bilateral basis, based on the agreed schedule of services commitments.

4 ANALYSIS OF THE STRUCTURE OF SPECIFIC RTA/FTA CHAPTERS

4.1 INTELLECTUAL PROPERTY

The inclusion of chapters on intellectual property (IP) in RTA/FTAs is becoming more common. A WTO Working Paper by Valdes and McCann (2014) had already found an increasing number of RTA/FTAs with IP provisions since the 2000s¹². Indeed, the four RTA/FTAs analyzed in this report each contain a chapter on IP.

In general, RTA/FTAs with an IP chapter set out to establish frameworks to protect and incentivize innovations and creations. However, to ensure that the IP rules do not overprotect certain stakeholders, economies are increasingly incorporating into RTA/FTAs clauses that facilitate the transfer of technology across borders. In doing so, economies encourage companies to invest in research and development in order to create new products and content. At the same time, they also level the playing field by making it easier for consumers and firms to access such technologies.

Finding a balance between protecting innovation and promoting technology transfers between industrialized and developing economies is not easy. RTA/FTAs are one of the tools that APEC economies could utilize to address the interests of both developed and developing economies in IP matters.

I Reaffirmation of Intellectual Property Agreements

All analyzed RTA/FTAs (i.e. China – Georgia; CPTPP; Hong Kong, China – Macao, China; and the Philippines – EFTA) reaffirm the parties' commitments to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The China – Georgia and Hong Kong, China – Macao, China FTAs also mention that the signatories reassert their commitments to the other international agreements on IP that they have signed.

The CPTPP and the Philippines – EFTA FTA explicitly mention which other multilateral IP agreements the signatory parties have acceded to, affirmed, or ratified, or will be required to ratify or accede to by the date of entry into force of the agreement. The list of IP agreements included in these two RTA/FTAs differs, as it depends on what other RTA/FTAs their signatories are bound to and the IP topics included in the texts. Some of the agreements mentioned by both RTA/FTAs are as follows:

- Patent Cooperation Treaty
- Paris Convention for the Protection of Intellectual Property
- Berne Convention for the Protection of Literary and Artistic Works
- Madrid Agreement Concerning the International Classification of Goods for the Purpose of Registration of Marks
- WIPO Performances and Phonogram Treaty

¹² McCann, Maegan (2014). Intellectual property provisions in regional trade agreements: Revision and update, WTO Staff Working Paper, No. ERSD-2014-14, p.9 World Trade Organization (WTO), Geneva, <http://dx.doi.org/10.30875/6e577b22-en>

II National Treatment

The CPTPP and the Philippines – EFTA FTAs include provisions that requires the parties to accord to the nationals of the other party treatment no less favorable than that accorded to their own nationals. These RTA/FTAs include exceptions in accordance to the TRIPS Agreement¹³.

The China – Georgia FTA also provides national treatment by referring to the TRIPS Agreement’s Article 3.1 on National Treatment.

III Technical Cooperation

Each RTA/FTA analyzed in this report has a different approach to cooperation. For instance, the Hong Kong, China – Macao, China FTA commits to the establishment of a Work Program on Economic and Technical Cooperation that will cover IP issues.

In the case of the CPTPP, the agreement provides that parties may appoint contact points for cooperation matters. The scope of cooperation matters includes the following:

1. Developments in domestic and international intellectual property policy;
2. Intellectual property administration and registration systems;
3. Education and awareness relating to intellectual property;
4. Policies involving the use of intellectual property for research, innovation and economic growth;
5. Implementation of multilateral IP agreements;
6. Patent cooperation and work sharing;
7. Cooperation in the area of traditional knowledge.

The Philippines – EFTA FTA is very general in describing the areas that cooperation may include. Among the areas enumerated are the exchange of information and experts related to IP; the promotion of public awareness on IP; the provision capacity-building and technical assistance; and the strengthening of IP rights protection and enforcement systems.

Regarding the China – Georgia FTA, the exchange of information is under request and is currently limited to the following: policies on IP; changes to and developments in the implementation of IP systems; and the administration and enforcement of IP rights. This FTA also mentions some areas where parties could cooperate. These areas include, but are not limited to, assessing patents; enforcing IP rights; raising awareness on IP issues; and reducing the complexity and cost of obtaining a patent grant.

IV Enforcement Provisions

The China – Georgia; the CPTPP and the Philippines – EFTA FTAs include provisions on the enforcement of IP rights. All these agreements require the parties to establish civil and/or administrative procedures. In the case of the China – Georgia FTA, this is implicit through the reaffirmation of the commitments in the TRIPS Agreement; while in the cases of the CPTPP

¹³ For example, an exception to TRIPS is on judicial and administrative procedures, in terms of requiring a person or a firm from the other party to designate an address for services of process in its territory, or to appoint an agent in its territory as long as it is to secure compliance with laws or regulations not inconsistent with the agreement, and it is not applied as a disguised manner to restrict trade.

and the Philippines-EFTA FTAs, explicit provisions on civil/administrative procedures are included.

These three agreements also include obligations on criminal enforcement, building on Article 61 of the TRIPS Agreement. These provisions require parties to impose criminal penalties in cases of deliberate trademark counterfeiting and copyright (or related rights) piracy on a commercial scale. However, the CPTPP is the only agreement that clarifies that such provisions also apply to cases where the acts in question occur for the purpose of commercial advantage or financial gain; or have a substantial prejudicial impact on the copyright holder in relation to the market place.

The CPTPP also mentions additional areas where criminal procedures and penalties will apply. These include situations such as the deliberate importation and domestic use of labels or packaging used without authorization; the unauthorized copying of a cinematographic work from a performance in a movie theater; and the aiding and abetting in the perpetration of acts where criminal procedures and penalties apply.

V Border Measures

While the TRIPS Agreement requires the parties to suspend the release of suspected counterfeit or pirated copyright goods in the cases where a right holder lodges an application with competent authorities; the CPTPP and the Philippines – EFTA FTAs require the parties to suspend the release of goods *ex-officio*. This means that authorities in these economies have the right to suspend the release of a good even if they have not received any application to suspend the release of goods, so long as they have valid grounds to suspect an infringement of intellectual property rights. For the CPTPP, this is applicable to goods that are imported, exported or in transit¹⁴; while for the Philippines – EFTA, this only applies to goods that are exported or imported.

The CPTPP also allows parties to provide that their competent authorities to have the authority to inform the IP owners of information regarding the goods, such as the names and addresses of the consignor, exporter, consignee or importer of the goods; the general description of the goods; the quantity of the goods; and the place of origin of the goods.

VI Trade Secrets

The CPTPP requires that parties provide criminal procedures and penalties for the unauthorized and willful: 1) access to a trade secret held in a computer system; 2) misappropriation of a trade secret, including by means of a computer systems; or 3) disclosure, or fraudulent disclosure, of a trade secret, including by means of a computer system.

VII Trademarks

The China – Georgia; CPTTP and the Philippines – EFTA FTAs include binding provisions on trademarks. While the China – Georgia FTA only includes binding provisions regarding well-

¹⁴ The CPTPP provides an alternative to *ex-officio* authority with regards to goods in transit, in which parties may share information to allow the identification of suspect goods upon arrival in a party's territory.

known trademarks; the CPTPP and the Philippines – EFTA FTAs include more comprehensive provisions in this area.

One of the main differences among these RTA/FTAs concerns the types of signs that could be a trademark. While all of them require that trademarks could be visual signs (such as words, letters, numerals, shapes of goods and combination of colours, among others), the China-Georgia and the CPTPP agreements acknowledge that a sound could be registered as a trademark. The CPTPP also goes further and acknowledges that parties make best efforts to register scent marks, and provide that trademarks include collective marks and certification marks. In the case of the Philippines-EFTA FTA, trademarks are mostly visual signs, as the parties may require signs filed for a trademark application to be visually perceptible.

In the case of well-known trademarks, these three agreements include provisions on the matter. While the clauses in the China – Georgia and the Philippines – EFTA FTAs reaffirm their commitments on the matter in accordance to the TRIPS Agreement; the CPTPP goes beyond the TRIPS Agreement. The CPTPP provides that no party shall require as a condition for determining that a trademark is well-known that a trademark has been registered in the party or another jurisdiction, included on a list of well-known trademarks, or given prior recognition as well-known trademarks.

The CPTPP also includes provisions on the registration of trademarks, such as requiring appropriate measures to refuse the application or cancel the registration and prohibit the use of a trademark that is identical or similar to a well-known trademark. In addition, it establishes that the term of protection for trademarks be no less than 10 years, greater than the period of no less than 7 years under the TRIPS Agreement.

VIII Copyright and Related Rights

The degree of protection of copyrights varies among trade agreements. The China – Georgia FTA only promotes the establishment of appropriate bodies for the collective management of copyrights. Meanwhile, the Philippines – EFTA FTA includes a similar clause and also points out that the protection of copyrights is without prejudice to obligations in international agreements and is in accordance with domestic laws, rules and regulations.

The CPTPP provides a comprehensive section on copyrights and related rights. It includes an article that requires each party to endeavor to achieve an appropriate balance in its copyright and related rights systems, among other things by means of limitations or exceptions in certain special cases that do not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder. Under the CPTPP, parties must endeavor to give due consideration to legitimate purposes such as, but not limited to: criticism, comment, news reporting, teaching, scholarship, research and other similar purposes, and facilitating access to published works for persons who are blind, visually impaired, or otherwise print disabled¹⁵.

¹⁵ Australia Department of Foreign Affairs and Trade. (2015). Trans-Pacific Partnership Agreement – Chapter Summary: Intellectual Property, p.4. Retrieved from <https://dfat.gov.au/trade/agreements/in-force/cptpp/summaries/Documents/intellectual-property.PDF>

Regarding the term of protection for copyright and related rights, CPTPP parties have decided to suspend the application of the TPP provision to extend the terms of protection for copyrights and related rights to the life of the author plus 70 years¹⁶.

However, none of the analyzed agreements includes provisions to protect against the circumvention of effective technological measures used to restrict copyrighted works. Under the CPTPP, parties agreed to suspend TPP provisions on technological protection measures (TPMs) and rights management information (RMI). However, the CPTPP requires parties to ratify or accede to the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonogram Treaty, which contain provisions in these areas.

IX Geographical Indications

The China – Georgia; the CPTPP and the Philippines – EFTA FTAs define geographical indications in the same manner, as “an indication that identifies a good as originating in the territory of a party, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin”¹⁷.

In the case of the China – Georgia FTA and the CPTPP, the recognition of geographical indications is possible in different ways, including through a trademark, a sui generis system or other legal means. In turn, the Philippines – EFTA FTA mentions that parties have to include in their domestic laws and regulations proper means to protect geographical indications.

The CPTPP requires parties to provide transparent procedures for the protection or recognition of a geographical indication. In addition, the CPTPP requires parties to provide grounds for the opposition and cancellation of a geographical indication under certain grounds; for instance, those parties must provide procedures that allow interested persons to object to the protection or recognition of a geographical indication on the ground that the geographical indication is likely to cause confusion with a pre-existing trademark or pending trademark application; or that the geographical indication is a term with a common name.

Certain CPTPP signatory parties have exchanged side letters recognizing their understandings in previous bilateral agreements. For example, Japan and Peru used these letters to recognize their geographical indications for wines and spirits, as previously agreed in their bilateral trade agreement.

X Industrial Designs

Only the CPTPP and the Philippines – EFTA agreements contain a specific clause on the protection of industrial designs. The CPTPP requires adequate and effective protection of industrial designs and protections for designs embodied in a part of an article, or alternatively, having a particular regard, where appropriate, to a part of an article in the context of an article as a whole. The duration of the period of protection is subject to the TRIPS Agreement, which establishes a period of at least 10 years. In contrast, the Philippines – EFTA FTA mentions that

¹⁶ The CPTPP keeps the term of protection specified in the Berne Convention for the Protection of Literary and Artistic Works, which is equal to the life of the author plus 50 years.

¹⁷ See article 11.13, paragraph 2 of the China-Georgia FTA; article 18.1 of the CPTPP, and annex XVIII, article 5, paragraph 2 of the Philippines-EFTA FTA.

the period of protection should be at least 15 years, but it notes that the parties could provide for a shorter period of protection for designs of component parts used to repair products.

XI Patents

The China – Georgia; the CPTPP and the Philippines – EFTA FTAs include provisions on patents. All these agreements mention that the “patentable subject matter” (i.e. what can be patented) has to meet all three requirements: 1) it is new; 2) it involves an inventive step; and 3) it is capable of industrial application. However, only the CPTPP includes minimum standards to determine if the subject matter involves an inventive step. For example, a claimed invention would not be patented if an “inventive step” has been obvious to a person skilled or having ordinary skill in the art, having regard to the prior art¹⁸.

These agreements also outlines three cases of exclusion from patentability: 1) due to the need to prevent the commercial exploitation of an invention in order to protect public order or morality – including to protect human, animal or plant life or health– or to avoid serious prejudice to the nature or the environment; 2) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; and 3) plants and animals others than microorganisms, and essentially biological processes for the production of plants or animals, other than non-biological and microbiological processes.

The CPTPP also includes an article to protect undisclosed test or other data in relation to agricultural chemical products. Moreover, the CPTPP mentions that no third parties can use this information to market a product for 10 years since the date that the new agricultural chemical product obtained marketing approval in the territory of the party.

XII Plant Variety Protection

Different approaches are taking place regarding the protection of new plant varieties. For example, the China – Georgia FTA includes a non-binding clause encouraging parties to improve the harmonization of the plant breeders’ rights administrative systems, and reduce unnecessary duplications on the plant breeders’ rights examination systems.

The CPTPP requires that the parties ratify or accede to the 1991 Act of the International Convention for the Protection of the New Varieties of Plants (UPOV 1991). New Zealand, which has not acceded to UPOV 1991, has to comply with it within three years of enforcing the CPTPP.

As for the Philippines – EFTA FTA, the protection could take place through the implementation of the UPOV 1991 or through the provisions stated in the agreement, which are mostly similar to the clauses in UPOV in terms of the scope, exemptions and exhaustion of the breeder’s right. However, the Philippines-EFTA FTA extends beyond the requirements of the UPOV 1991 by including a clause stating that the breeder’s rights cannot extend to the traditional right of small farmers to save, use, exchange, share or sell their farm produce of a protected variety, except when the sale is for reproduction purposes under a commercial marketing agreement.

¹⁸ Australia Department of Foreign Affairs and Trade, Op. Cit., p.4.

XIII Genetic Resources and Traditional Knowledge

The importance of genetic resources and traditional knowledge is recognized in the China – Georgia; the CPTPP and the Philippines – EFTA FTAs. However, the depth of the provisions differs among these agreements. For instance, the CPTPP mentions that its members should endeavor to cooperate to enhance the understanding of issues connected with traditional knowledge associated with genetic resources. The CPTPP also requires that parties endeavor to pursue quality patent examination in relation to traditional knowledge associated with genetic resources.

In the case of the China – Georgia FTA, the clauses in these areas are not binding as well. The agreement mentions that besides international obligations, it is optional for the parties to establish measures to protect genetic resources and traditional knowledge.

On the opposite, the Philippines – EFTA FTA provides binding obligations on the protection of genetic resources and traditional knowledge. In particular, it mentions that applications for patent protection have to disclose the origin or source of the genetic resources if the invention is directly based on genetic resources. Furthermore, to protect the rights of indigenous and local communities, the parties may require that such disclosures include a statement in which the patent applicant affirmed that it has obtained permission from such communities to access the genetic resources.

XIV Public Health

The China – Georgia; the CPTPP and the Philippines – EFTA FTAs explicitly recognize the Doha Declaration on the TRIPS Agreement and Public Health, which recognizes that intellectual property protection is important for the development of new medicines, while affirming that the TRIPS Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.

4.2 INVESTMENT

Three of the trade agreements put in force in 2018 include a chapter on investment. However, only the CPTPP covers this topic comprehensively by incorporating binding provisions in several disciplines, including investor-state dispute settlement (ISDS).

The other two agreements do not have binding clauses. In the Philippines-EFTA FTA, the chapter on investment only includes best endeavours in terms of establishment, transparency, environmental matters and investment promotion. However, it does include a clause to review in five years' time the possibility of negotiating terms for investment commitments. Meanwhile, the chapter on investment in the Hong Kong, China – Macao, China FTA only mentions that the two parties are starting the negotiations for an investment agreement between them.

I Definition of Investment

The definition of investment in the CPTPP contains many similarities to those used in past RTA/FTAs put in force by APEC economies. Moreover, the CPTPP's definition of investment is comprehensive: it covers any asset that an investor owns or controls and has the characteristics of an investment. Like the Canada-European Union FTA implemented in 2017,

the CPTPP specifies that the investment could be direct (e.g. investor acquiring an asset) or indirect (e.g. a holding acquiring an asset on the investor's behalf). Additionally, the CPTPP states that for an asset to be considered as an investment, the asset needs to possess at least one of the following three characteristics: 1) the commitment of capital or other resources; 2) the expectation of gain or profit; and 3) the assumption of risk.

The CPTPP includes a list of examples that can be considered as investment. These encompass enterprises, shares, stocks, bonds, futures, options, intellectual property rights, among others. The CPTPP also considers loans as investment so long as such loans are not between governments. As per past agreements, the CPTPP also clarifies that some forms of debt, such as claims to payments resulting from the sale of goods and services, are less likely to have the characteristics of an investment.

II National Treatment and Most Favored Nation (MFN) Treatment

The CPTPP accords both national treatment and MFN treatment to investors and covered investments from other signatory parties. While both treatments only apply in "like circumstances" (i.e. similar situations), they apply at the pre- and post-establishment levels.

In the case of national treatment, the CPTPP also emphasises that such treatment extends to the regional level of governments. In other words, regional governments have to confer to investors and covered investments a treatment no less favourable than the treatment given to investors and covered investments from the economy within the CPTPP party where the region is located.

In the case of the MFN treatment, as in many other trade agreements, the CPTPP specifies that the MFN treatment does not apply to international dispute resolution procedures.

III General Treatment

The CPTPP guarantees that each party shall accord to covered investments treatment in line with applicable customary international law principles, such as "fair and equitable treatment" and "full protection and security." The CPTPP states that the parties are not required to provide any additional treatment beyond what is required to keep those standards. "Fair and equitable treatment" obligates both parties not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. "Full protection and security" requires each party to provide the level of police protection required under customary international law.

Consistent with previous RTA/FTAs put in force (e.g. Canada-European Union FTA), the CPTPP also specifies some limitations to the minimum standard of treatment. It clarifies that any action undertaken or not undertaken by a party that may be inconsistent with an investor's expectations is not a breach of the article on minimum standard of treatment. In the same way, not issuing, renewing, or maintaining a subsidy is not a breach of this article even if there is loss or damage to the covered investment as a result.

IV Performance Requirements

Similar to other RTA/FTAs with binding investment clauses, the CPTPP prohibits both parties from imposing specific requirements as a condition to any investment activity. Parties should not set up conditions (such as exporting a percentage of goods or services; achieving a

minimum level of domestic content; and transferring a particular technology, a production process or other proprietary knowledge to a person in its territory, among others) as a prerequisite to investment activity. The CPTPP also mentions that the prohibition does not apply for technology transfers in accordance with Articles 31 and 39 of the TRIPS Agreement.

One major difference between CPTPP and other RTA/FTAs is the broader scope in prohibiting CPTPP members of implementing performance requirements in regard of purchasing, use or accord a preference to a technology of the host CPTPP member. Similarly, CPTPP members also forbids the use of performance requirements that prevent purchasing, using or giving preference to a particular technology.

V Senior Management and Board of Directors

The CPTPP includes a standard clause on senior management, which prevents signatories from setting up nationality quotas for senior management positions.

In terms of requirements to the board of directors, the CPTPP mentions that parties can establish citizenship or residence requirements for board members, as long as these requirements are not materially impairing the ability of the investor to exercise control over its investment. This approach is similar to that adopted by recent trade agreements put in force, such as the Peru-Honduras and Singapore-Turkey FTAs.

VI Treatment in Case of Armed Conflict or Civil Strife

The CPTPP establishes that non-discriminatory treatment is guaranteed with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife. The same article also provides that in cases where an investor of a party suffers a loss in the territory of another party resulting from either the requisition or destruction of its covered investment by the latter's forces or authorities, the latter party is obliged to provide the investor restitution, compensation, or both.

Like other FTAs that came into force in 2017, such as the Canada-European Union and Peru-Honduras FTA, the CPTPP does not apply this treatment to any subsidies or grants that could be inconsistent with the article on national treatment, except for those listed under the article on non-conforming measures.

VII Expropriation and Compensation

The CPTPP prohibits the direct or indirect expropriation or nationalization of a covered investment, except for situations in which this is done for a public purpose; in a non-discriminatory manner; on payment of compensation without delay and equivalent to the fair market value of the investment before the expropriation took place; and in accordance with due process of law.

In terms of the currency used for compensations, the CPTPP is more flexible than other trade agreements as it considers that the fair market value of the compensation could be denominated in a not freely usable currency. In that case, the CPTPP has provisions for how the compensation has to be calculated.

In line with other RTA/FTAs with an investment chapter, the CPTPP also includes a clause that excludes the application of the provisions on expropriation and compensation to the

issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS.¹⁹

The CPTPP also introduces a new element in RTA/FTAs by providing further clarity to what is not an expropriation. In this way, it specifies that not issuing, renewing, or maintaining a subsidy or a grant does not constitute an expropriation.

VIII Transfers

The CPTPP includes a standard clause on transfers stating that the parties have to allow free transfers of money, without any delay, into and out of their territories. The clause includes an indicative list with several examples of transfers such as contributions to capital; profits; dividends; interest; capital gains; royalty payments; management fees; technical assistance fees and other fees; and payments made under a contract; among others.

In addition, the CPTPP also describes the situations where parties can prevent or delay transfers in good faith of the party's laws, in an equitable and non-discriminatory manner. Such situations include the following: bankruptcy, insolvency or the protection of the rights of creditors; issuing, trading or dealing in securities, futures, options and derivatives; criminal offences; financial reporting or record keeping or ensuring compliance with orders or judgements in judicial or administrative proceedings. Similarly, it includes a clause in the exemptions chapter that restricts temporarily the free transfer of capital in the case of balance-of-payments difficulties, as well as when capital movements cause or threaten to cause serious difficulties for macroeconomic management.

IX Environmental Measures

The CPTPP and the Philippines-EFTA FTA include clauses on environmental issues related to investment. The investment chapter in the CPTPP recognizes the right of the parties to implement and enforce measures to ensure that investment activities are undertaken in ways that are sensitive to the environment, health and other regulatory objectives. The Philippines-EFTA FTA includes a clause recognizing that it is inappropriate to encourage investment by lowering health, safety, or environmental standards.

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

The CPTPP's investment chapter includes a section on Investor-State Dispute Settlement (ISDS), which establishes that parties can resolve their disputes through consultations. If these consultations fail, the parties can go through an arbitration process. In the case of CPTPP, a claim can be submitted to arbitration after six months from the day of written request for consultations. This is similar to the period stated in other RTA/FTAs implemented in recent years, such as the Peru-Honduras and Singapore-Turkey FTAs.

In addition, the CPTPP includes a time limit that the affected side can submit a claim for arbitration under the ISDS section. Claims cannot be submitted after three years and six months the alleged breach was known. This is slightly longer than the three years period established under the Peru-Honduras and Singapore-Turkey FTAs.

¹⁹ Many of these compulsory licenses have applied to cases in which governments issue these licenses to companies without a patent to produce pharmaceutical products in specific situations. For example, due to a public health emergency.

For claims against Chile; Mexico; Peru or Viet Nam, the investors cannot start an arbitration process under the CPTPP's ISDS mechanism if they have already started proceedings alleging a breach of CPTPP investment obligations in a domestic court or administrative tribunal. In those cases, the election to submit a claim regarding those treaty obligations to the domestic court or administrative tribunal is considered definitive and exclusive.

The CPTPP allows the claims to be submitted under the rules of the ICSID Convention and Rules of Procedures for Arbitration Proceedings; the ICSID Additional Facility; the UNCITRAL Arbitration Rules; or any other arbitral institution or arbitration rules. However, unlike the Canada-European Union FTA, there is no maximum time period for the parties to agree on rules other than those of the ICSID and UNCITRAL.

In terms of the constitution of the tribunal, unlike the Canada-European Union FTA where the tribunal resembles more an international investment court,²⁰ the CPTPP establishes a more traditional procedure in selecting three arbitrators (unless agreed by the parties otherwise): one arbitrator is appointed by each party individually, and one arbitrator is appointed by agreement of both parties. Under the CPTPP, the parties have 75 days to constitute a tribunal, which is shorter than the 90 days established under the Peru-Honduras and Singapore-Turkey FTAs. If there is no agreement after 75 days, the ICSID Secretary General can appoint the third arbitrator, who cannot be from any of the parties involved, unless agreed otherwise by the parties.

Contrary to the Canada-European Union FTA, the CPTPP's ISDS section does not include the establishment of an appellate tribunal. However, the CPTPP mentions that if an appellate mechanism is developed under other institutional arrangements, the CPTPP parties will decide whether the award decisions should be subject to the appellate mechanism or not. Clauses with similar nature are also included in agreements such as the Peru-Honduras and Korea-United States FTAs. Markert and Ishido (2019) suggested that these clauses have probably been introduced with "a nod to reform efforts regarding the ISDS system currently undertaken within the UNCITRAL Working Group III."²¹

In terms of the final award, the CPTPP mentions that the tribunal can only award pecuniary compensation and any applicable interest, as well as restitution of property. In the latter, the CPTPP mentions that it is possible to award a monetary compensation and applicable interests in lieu of the restitution. In addition, it is possible for the tribunal to award cost and attorney's fees. These characteristics are similar to those in recent agreements, such as the Canada-European Union; Peru-Honduras; and Singapore-Turkey FTA.

Furthermore, the CPTPP explicitly prohibits awarding punitive damages, in line with the Canada-European Union and Peru-Honduras FTAs.

²⁰ Sardinha, E. (2017). The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement. Retrieved from <https://cil.nus.edu.sg/wp-content/uploads/2018/01/6.-Sardinha-The-New-EU-Led-Approach-to-Investor-State-Arbitration.pdf>

²¹ Markert, L., & Ishido, S. (2019). The Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Retrieved from https://thelawreviews.co.uk/digital_assets/ad736abb-8284-411f-abaa-6f09f3d45dab/Investment-Treaty-Arbitration-Review---Edition-4.pdf

As for the implementation of the award, the CPTPP establishes a timeframe of 120 days if the process followed the rules of the ICSID Convention, and 90 days if the arbitration took place under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other applicable rules.²² This period is similar to those established in recent RTA/FTAs, such as the Canada-European Union and Peru-Honduras FTA.

XI Transparency in ISDS Proceedings

Under the CPTPP, ISDS hearings are open to the public and the tribunal has to determine the appropriate logistical arrangements, in consultation with the disputing parties. In the event that one of the parties is going to use protected information, they have to make necessary arrangements to protect such information from disclosure. For example, making hearings private during the discussion of this information. A similar arrangement applies in the Canada-European Union FTA as well.

XII Application of the ISDS Provisions

The application of the section on ISDS in the CPTPP investment chapter is restricted for some of the CPTPP signatory parties. A case in point is New Zealand, which has varying degrees of commitments to other signatories. New Zealand has signed side letters with Australia and Peru agreeing that their investors cannot invoke the ISDS mechanism under CPTPP against the government of the other party. Additionally, New Zealand has signed side letters with Brunei Darussalam; Malaysia; and Viet Nam, mentioning that the ISDS mechanism can only be used if consultations have not resolved the dispute and the government hosting the investor consents to the application of the ISDS mechanism.

The CPTPP also includes a provision in the chapter on Exceptions and General Provisions that a party may elect to deny the benefits of the ISDS mechanism in the agreement with respect to claims challenging a tobacco control measure of the party.

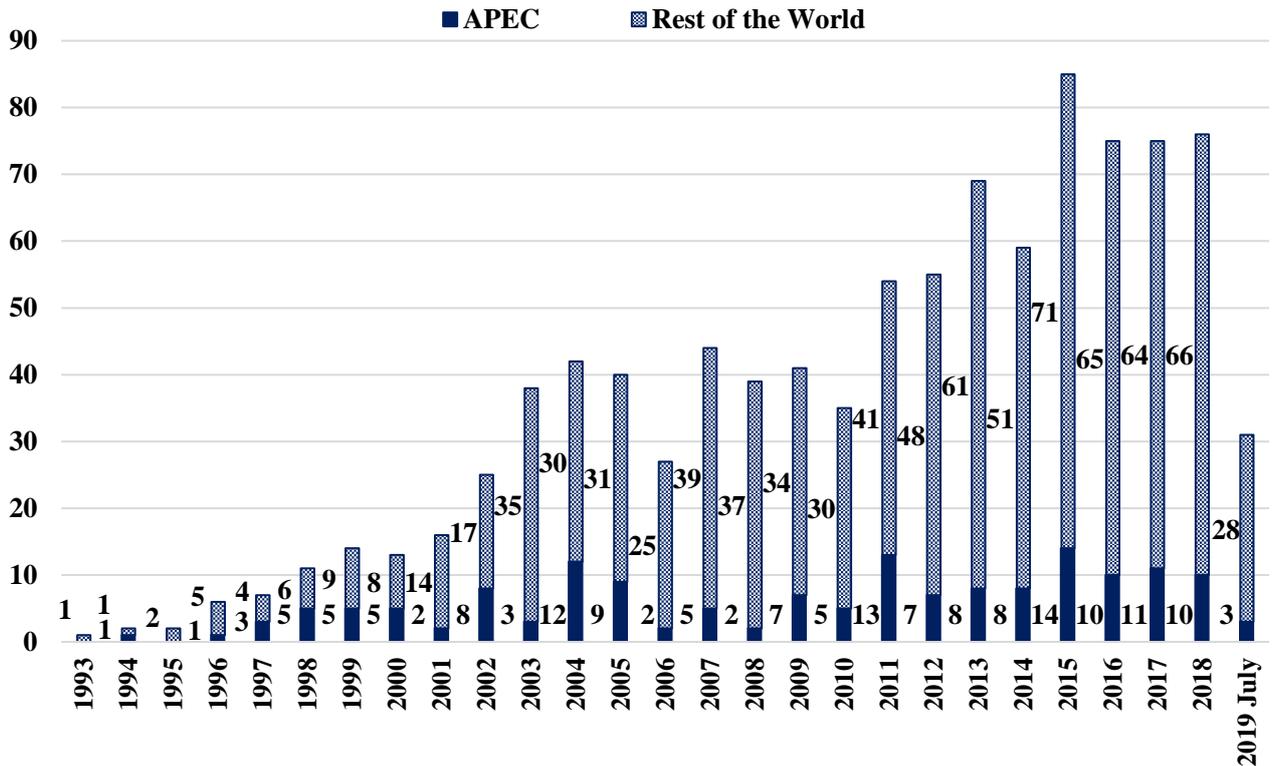
Box 4.1: Has ISDS Been Onerous for APEC Economies?

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 parties. Additionally, ISDS provisions are also useful in assisting host economies with weak domestic judiciary institutions.

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 awarded to investors when they lose. From 1987 to July 2019, the number of ISDS cases initiated has grown steadily over the years in the world and also in the APEC region. During the period, 983 ISDS cases were initiated in the world, 647 of which had been concluded by July 2019. Investors have brought 159 ISDS cases against APEC economies for the same period, with 115 cases concluded by July 2019.

²² These timeframes are valid as long as no disputing party has requested revision or annulment of the award.

Figure 4.1: ISDS Cases Initiated Each Year (APEC Economies as Respondents and Rest of the World)



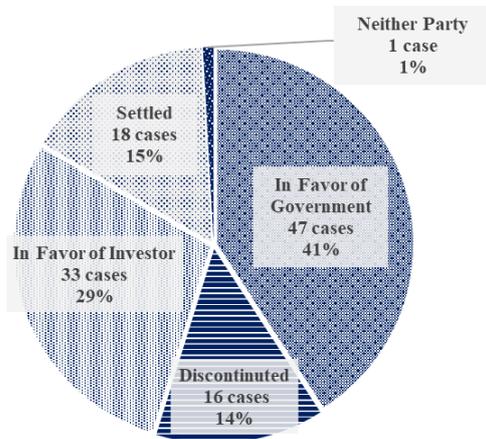
Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

Note: Only one case was filed before 1993 (in 1987) and was excluded from the graph.

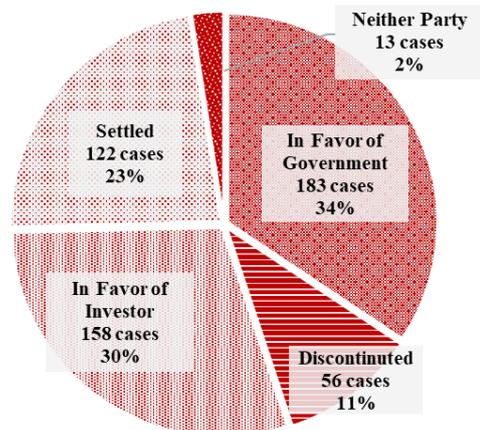
55% of the ISDS cases involving an APEC economy as respondent ended with no compensation being paid by governments (i.e. cases ruled in favour of governments and discontinued), while 44% of them ended with APEC economies with the need to provide compensation (i.e. cases in favour of investors and settled). For the rest of the world, the results were less favourable as 45% of the concluded cases had no compensation and 53% of cases required paying a compensation.

Figure 4.2: Distribution of Concluded ISDS Cases by Outcome (by end of July 2019)

APEC Respondent (115 Concluded Cases)



Non-APEC Respondent (532 Concluded Cases)



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

33 ISDS cases in the APEC region that were ruled in favour of the investor from 1987 to July 2019 showed that the total amount claimed by investors from such cases was equivalent to USD 120.4 billion, while the total amount awarded by ISDS panels was USD 51.8 billion. This total amount awarded in favor of investor within the APEC region is significantly higher in comparison to the USD 32.9 billion awarded in 149 cases against governments from the rest of the world.²³ Moreover, this number does not include settlement payments, whose terms and conditions are usually confidential.

Furthermore, though cases with compensation take up a smaller share for APEC economies, a higher proportion of amount claimed that was awarded by the tribunal in favour of the investor was observed in the APEC region than the rest of the world. Within the APEC region, on average, the awarded amount comprised 43.1% of the amount claimed, while for non-APEC respondents, the proportion was 31.1%.

Table 4.1: Average Proportion of Amount Claimed that was Awarded

Average Proportion of Amount Claimed that was awarded	APEC respondent (%)	Non APEC Respondent (%)
Tribunal awarded	43.1%	31.1%

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 33 APEC respondent cases, 1 case had the amount claimed missing. Of the 158 non-APEC respondent cases, there were 16 cases with amount claimed missing, 5 cases with award amount missing, and 4 cases with both claim amount and award missing. The cases with missing data were excluded from the 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 three cases within APEC was awarded more than 75% of the total claim.

Table 4.2: 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 (%)
Below 25	18	56.3%	55	41.4%
Between 25 – 49.9	6	18.8%	36	27.1%
Between 50 – 74.9	5	15.6%	20	15.0%
Between 75 - 100	2	6.3%	19	14.3%
> 100	1	3.1%	3	2.3%
Total	32	100.0%	133	100.0%

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, as explained in the note of Table 4.1.

Table 4.3 shows further that the strikingly high amount of total awards by tribunal is largely attributed to four outlier cases within the APEC region. Cases awarded more than USD 1 billion take up a larger share (12.1%) in the region than the rest of the world (4.0%). These four cases (USD 1.8 billion, USD 8.2 billion, USD 40 billion and USD 1.1 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, excluding the outlier cases, the amount of ISDS awards within the APEC region decreased significantly to USD 675 million, which only represented 11.8% of the amount that was initially claimed.**

²³ For non-APEC respondent cases, awards information was missing for 9 out of 158 cases ruled in favor of investors.

Table 4.3: 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 (%)
Below 10 mil	12	36.4%	46	30.9%
Between 10 mil and 19.9 mil	7	21.2%	18	12.1%
Between 20 mil and 49.9 mil	6	18.2%	26	17.4%
Between 50 mil and 99.9 mil	3	9.1%	15	10.1%
Between 100 mil and 999.9 mil	1	3.0%	38	25.5%
1 bn and above	4	12.1%	6	4.0%
Total	33	100.0%	149	100.0%

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

Note: The total number of cases differs from Table 4.2 as this table uses only award data for calculations. The number of cases with award data tallies with the statistics given under the note of Table 4.1 and Table 4.2.

Aside from the outliers, Table 4.3 above shows that more than half of the ISDS cases in favour of investors were awarded amounts below USD 20 million in the APEC region, while the share was 43% for non-APEC respondents. In general, as the amount awarded to the investor increases, the share of cases decreases within the APEC region.

As seen in Figure 4.3, the impact of the outliers on the statistical figures was significant. A further analysis also revealed that the awards in 3 out of 4 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 62.3% of the world’s total amount awarded, the actual costs after follow-on proceedings shrank to 5.4% of that total, as shown in the Figure 4.4. **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 4.3: Outcome of ISDS Cases in USD Billions–World

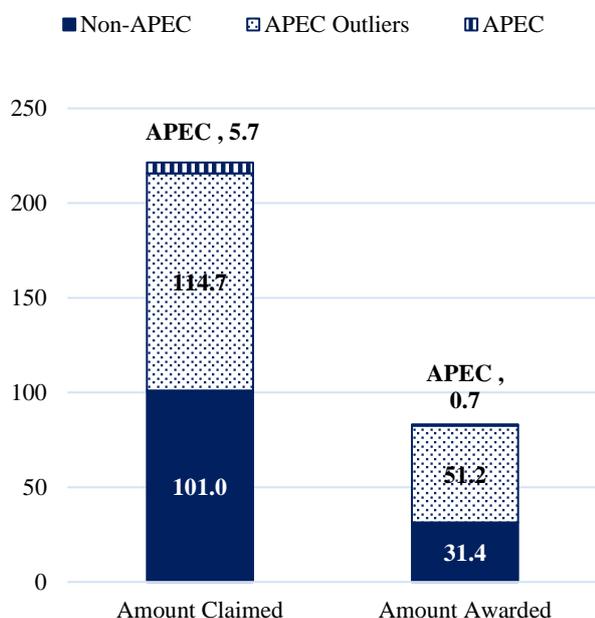
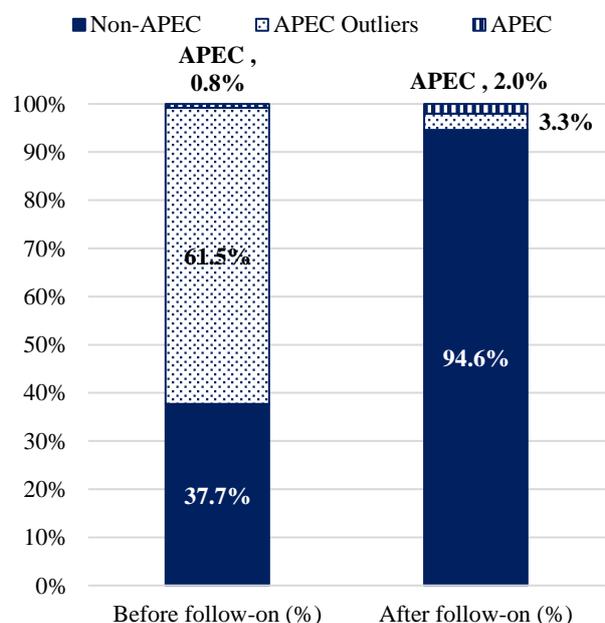


Figure 4.4: Amount Awarded by ISDS Tribunals–World (%)



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

Sources:

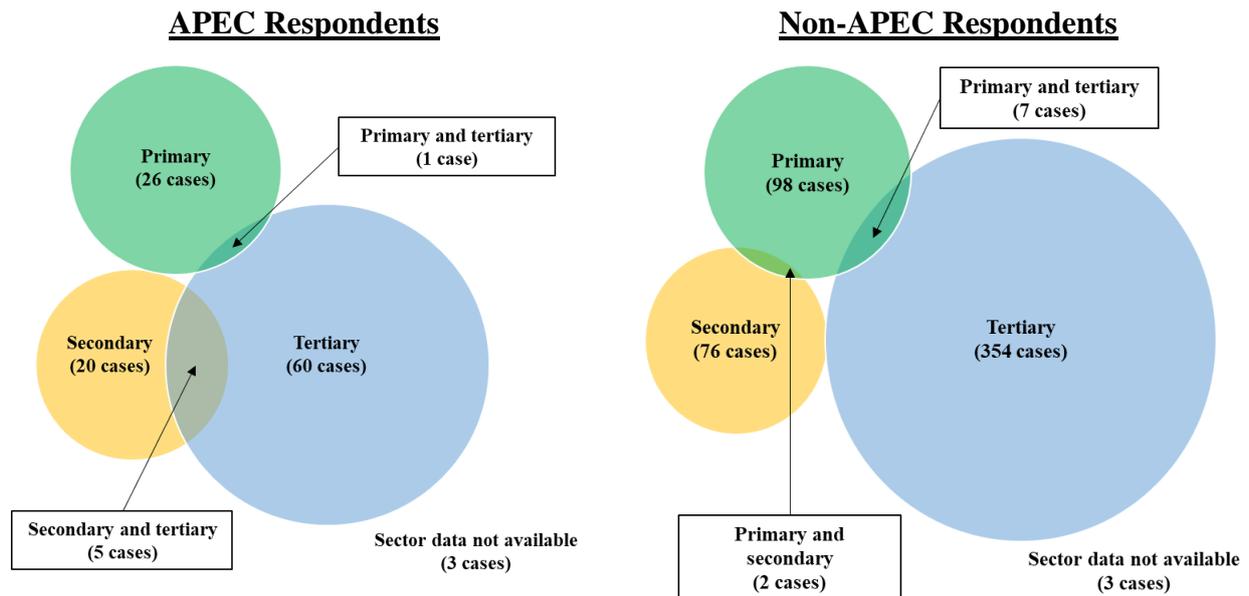
- Peterson Institute for International Economics. (2015). What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI? Retrieved from <https://www.piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state>
- United Nations - UNCTAD. (2019). Investment Dispute Settlement Navigator. Retrieved 1 October 2019 from <https://investmentpolicy.unctad.org/investment-dispute-settlement>

Box 4.2: Statistics on ISDS Cases by Industry Cluster

Since the founding of APEC in 1989, 115 cases filed against a member economy have been concluded. Most cases pertained to the tertiary sector (i.e. services), with 60 cases in the sector. This is followed by 26 cases pertaining to the primary sector (e.g. agriculture, forestry and mining) and 20 cases pertaining to the secondary sector (i.e. manufacturing). A further six cases straddled multiple sectors, with 1 case covering both primary and tertiary sectors; and 5 cases pertaining to the secondary and tertiary sectors. An additional 3 other cases were recorded, but sectoral affiliation for these cases was not available on the UNCTAD database.

Cases filed against economies from the rest of the world follow roughly the same distribution: cases related to the tertiary sector numbered the most, at 354. This is followed by cases in the primary sector, at 98, and by those in the secondary sector, at 76. The rest of the world also encountered ISDS cases spanning multiple sectors: 7 cases were linked to the primary and tertiary sectors, followed by 2 cases linked to both the primary and secondary sector. Three other cases were recorded, but sector data is unavailable.

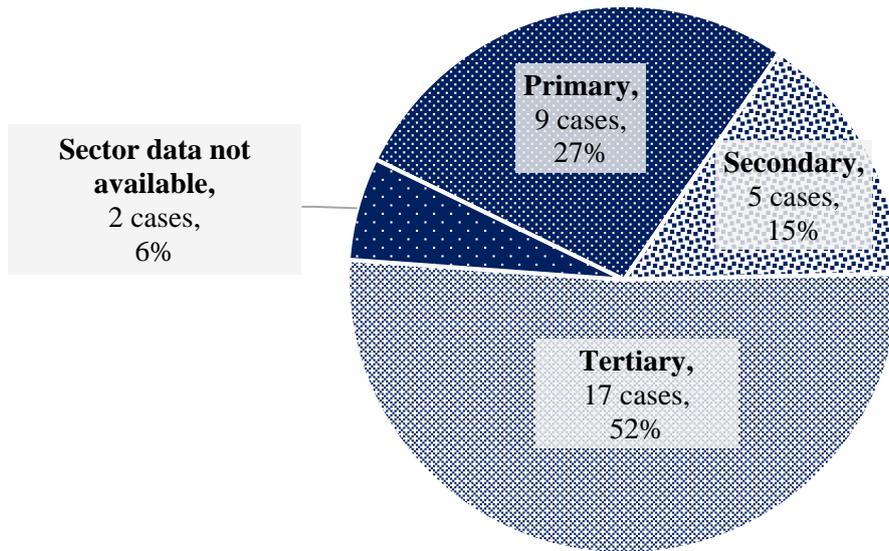
Figure 4.5: Distribution of ISDS Cases by Sector



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

Among APEC’s 115 completed cases, the court has ruled in favour of investors in 33 instances (29% of the cases). The number of cases won by investors mirrored the distribution of ISDS cases recorded: 17 cases (55%) were in the tertiary sector, followed by 9 cases (29%) in the primary sector, then by 5 cases (16%) in the secondary sector. No cases straddling multiple sectors won, while 2 won cases (6%) had no sectoral data available.

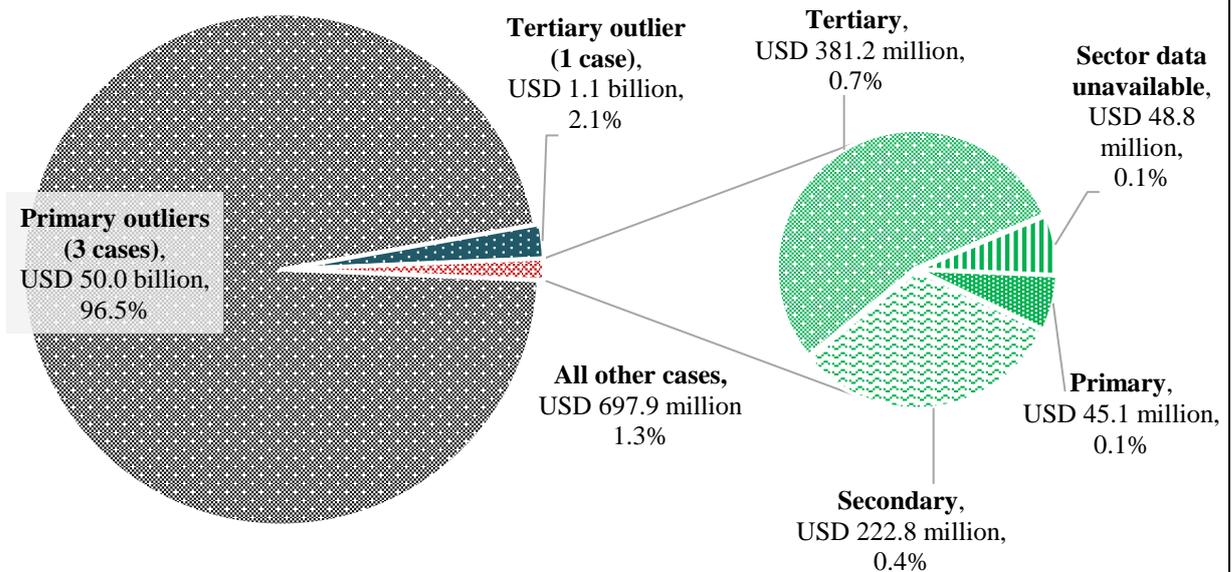
Figure 4.6: Sectoral Distribution of ISDS Cases Won by Investors by Number of Cases



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

Within APEC, arbitral panels have ruled that a total of USD 51.9 billion should be awarded to investors. However, the distribution of awards is heavily skewed towards the primary sector. In fact, the primary sector alone would account for 96.6% of the total awards, at USD 50 billion. The tertiary sector is entitled to USD 1.5 billion, 2.9% of the total awards; while the secondary sector only make up 0.4% of the awards, at USD 222.8 million.

Figure 4.7: Sectoral Distribution of ISDS Cases Won by Investors by Amounts Awarded



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

This heavily skewed distribution is best explained by four outlier cases, 3 of which are from the primary sector and 1 from the tertiary sector. These four cases alone account for over 98% of the total awards in APEC. The 3 primary sector cases, all related to the extraction of crude petroleum and natural gas, account for over 96.6% of the total awards, at USD 50.0 billion; while the lone

tertiary sector case, related to financial services, account for USD 1.5 billion, or 2.1%. The final 1.3% (USD 698 million) is split across the various sectors, with the tertiary sector taking the bulk at USD 381 million, follow by the secondary sector at USD 223 million, and lastly by the primary sector at USD 45 million. Another USD 49 million awarded by courts cannot be associated to any sector due to lack of information.

Table 4.4 provides a detailed breakdown of the amounts awarded to each sector by amount range. The primary sector is polarized, with firms awarded with either an amount less than \$10 million or above \$1 billion. Awards to the secondary and tertiary sector are more balanced, with award amounts more diffused across various ranges.

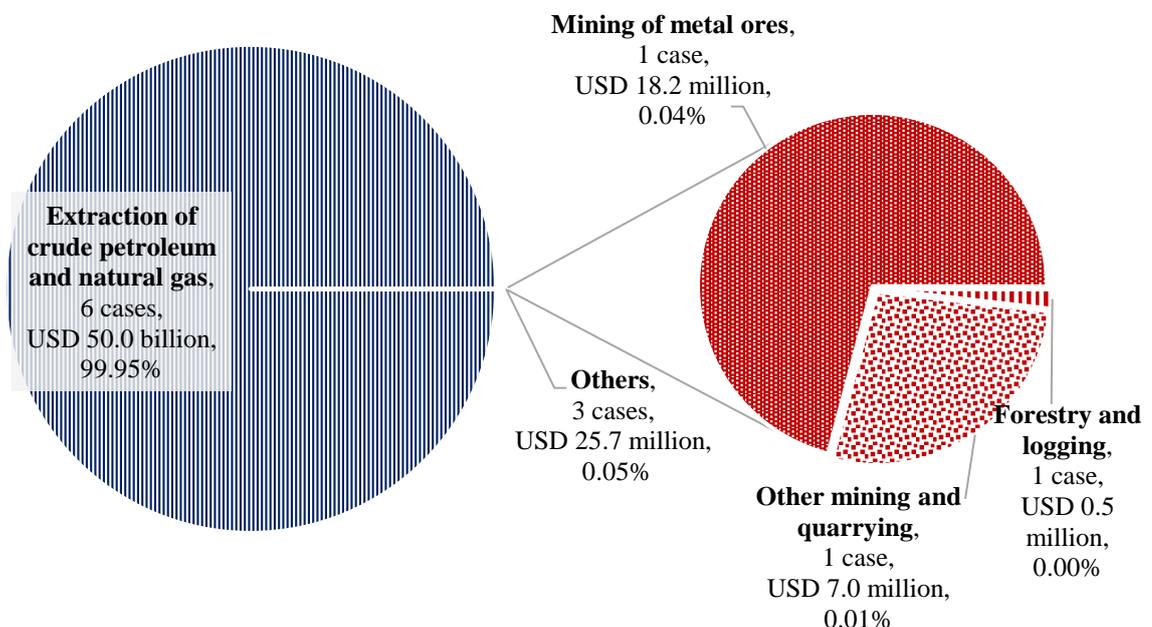
Table 4.4: Number of Cases per Sector by Range of Amounts Awarded to Investors

Amounts awarded in Favour of Investor	Number of cases			Share of cases		
	Primary Sector	Secondary Sector	Tertiary Sector	No sector data	Overall	Share
Less than \$1 million	4	1	7	0	12	36.4%
\$1 - 9.9 million	2	1	4	1	8	24.2%
\$10 - 99.9 million	0	1	4	1	6	18.2%
\$100 - 499.9 million	0	2	0	0	2	6.1%
\$500 - 999.9 million	0	0	1	0	1	3.0%
\$1 billion and above	3	0	1	0	4	12.1%
All cases	9	5	17	2	33	100%

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

Within the primary sector, 3 businesses linked to the extraction of crude petroleum and natural received almost all of the awards, at 99.95% (USD 50.0 billion). The rest of the awards were linked to the subsectors involved in mining of metal ores at 0.04% (USD 18.2 million), other mining and quarrying at 0.01% (USD 7.0 million), and forestry and logging, which receives an infinitesimal amount compared to other subsectors (USD 0.5 million).

Figure 4.8: Breakdown of Amounts Awarded to Primary Subsectors for APEC ISDS Cases

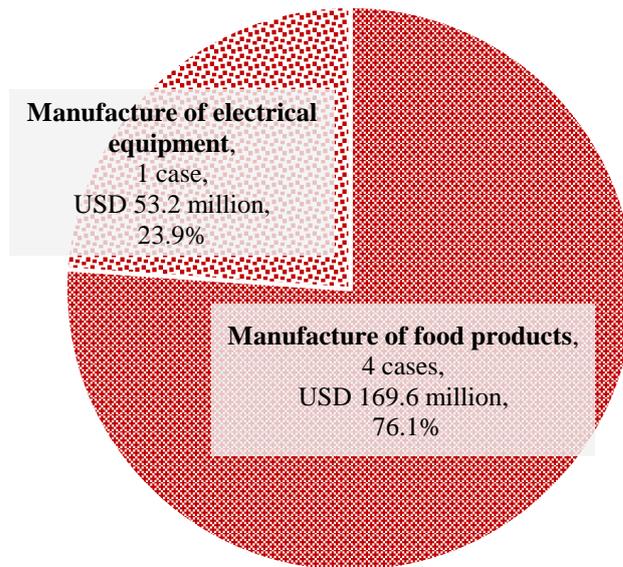


Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit Calculations

For the secondary sector, awards to investors involved in the manufacture of food products took the majority of awards to the sector, at USD 169.6 million, or 76.1% of the amount awarded to cases in

the sector. The rest of the amount, USD 53.2 million or 23.9% of the amount, went to the manufacture of electrical equipment.

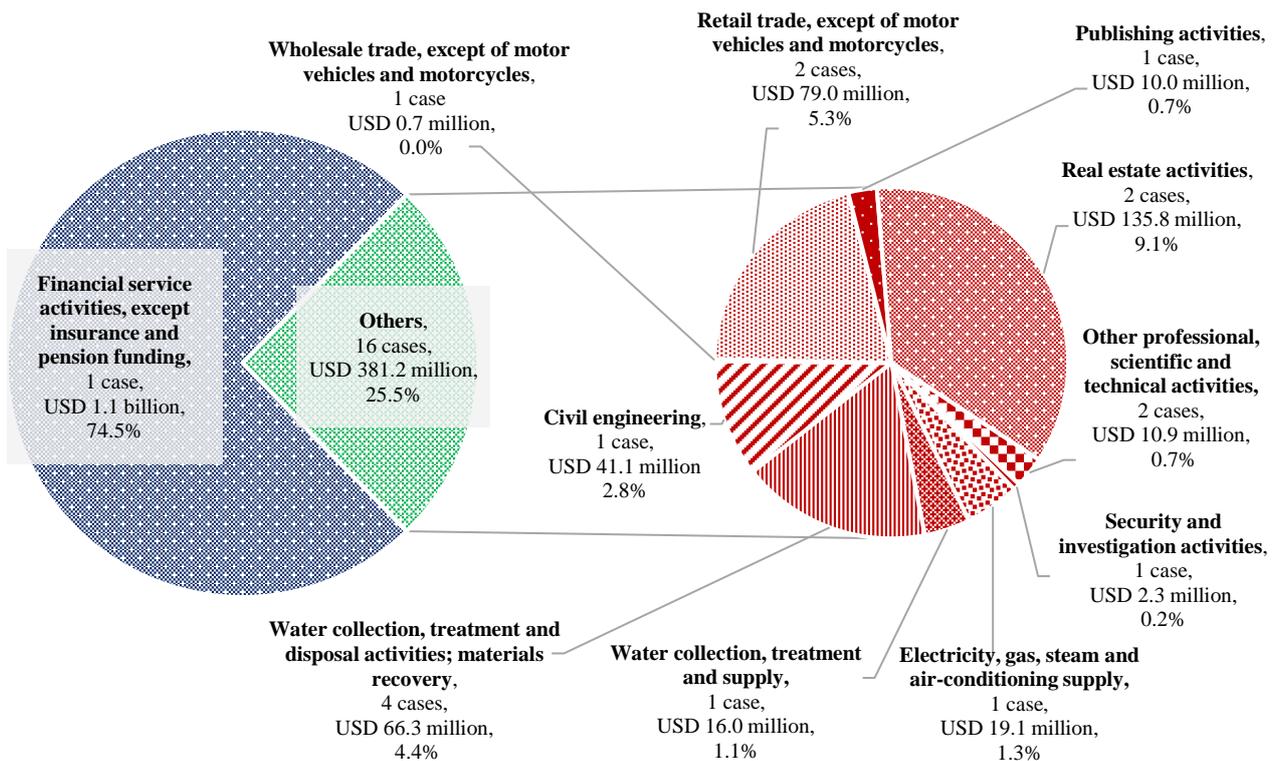
Figure 4.9: Breakdown of Amounts Awarded to Secondary Subsectors for APEC ISDS Cases



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

Lastly, in the tertiary subsector, most of the awards went to investors in financial services activities (excluding insurance and pension funding) (74.5%; USD 1.1 billion), followed by real estate (9.1%; USD 135.8 million), and retail trade (excluding motor vehicles) (5.3%; USD 79.0 million). The distribution of awards to other subsectors is detailed in Figure 4.10.

Figure 4.10: Breakdown of Amounts Awarded to Tertiary Subsectors for APEC ISDS Cases



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

Table 4.5 shows the average awards by subsectors before follow-on proceedings. Crude oil and natural gas extraction stand out, with an average award of USD 8.3 billion per case before follow-on proceedings. This is trailed by financial services activities at USD 1.1 billion per case. Real estate activities and manufacture of electrical equipment follow at USD 67.9 million and USD 53.2 million respectively.

Table 4.5: Average Amount Awarded by Subsector

Sector	Subsector	Total Amount Awarded to Subsector (USD millions)	Number of Cases	Average Award per Case (USD millions)
Primary	Forestry and logging	0.5	1	0.5
	Extraction of crude petroleum and natural gas	50,068.4	6	8,344.7
	Other mining and quarrying	7.0	1	7.0
	Mining of metal ores	18.2	1	18.2
Secondary	Manufacture of food products	169.6	4	42.4
	Manufacture of electrical equipment	53.2	1	53.2
Tertiary	Electricity, gas, steam and air-conditioning supply	19.1	1	19.1
	Water collection, treatment and supply; Remediation activities and other waste management services	16.0	1	16.0
	Water collection, treatment and disposal activities; materials recovery	66.3	4	16.6
	Civil engineering	41.1	1	41.1
	Wholesale trade, except of motor vehicles and motorcycles	0.7	1	0.7
	Retail trade, except of motor vehicles and motorcycles	79.0	2	39.5
	Publishing activities	10.0	1	10.0
	Financial service activities, except insurance and pension funding	1,111.3	1	1,111.3
	Real estate activities	135.8	2	67.9
	Other professional, scientific and technical activities	10.9	2	5.5
	Security and investigation activities	2.3	1	2.3
No sector data	No subsector data	48.8	2	24.4

Sources: United Nations - UNCTAD. (2019). Investment Dispute Settlement Navigator. Retrieved 1 October 2019 from <https://investmentpolicy.unctad.org/investment-dispute-settlement>

4.3 RULES OF ORIGIN

Rules of origin seek to prevent third parties from benefiting from preferential market access through an RTA/FTA that they are not part of. In particular, such rules preclude third parties from using one of the RTA/FTA trade partners as a point of entry to access – with preferential duties or duty-free status – the market of the other RTA/FTA member. However, strict rules of origin and divergence across various RTA/FTAs increase trade transaction costs, affecting both consumers and firms. Simplifying and harmonizing rules of origin across trade agreements could facilitate and expand trade²⁴.

All RTA/FTAs include chapters or clauses on rules of origin. To be accorded preferential market access, the products need to be wholly obtained or produced within the territory of the signatory parties, or meet product specific rules regarding the production process, origin or value of the inputs used obtain the final good. For example, suppose that economies A and B have an FTA in place that states that for leather shoes to have preferential market access, “the upper of the shoes has to be made of leather originating from economy A and B.” This means that any shoes made in economy A with uppers made of leather from economy C will not qualify for preferential entry when exported from economy A to B.

This section analyzes the main characteristics of the chapters on rules of origin in the RTA/FTAs implemented by APEC economies in 2018. With the exception of the Hong Kong, China – Macao, China FTA, the other agreements analyzed in this report apply product-specific rules of origin. As Hong Kong, China and Macao, China are both duty-free economies, non-preferential rules of origin determine the origin of imports: in essence, their FTA considers that the general rules applicable in one of the parties are applicable to products imported by the other party from the former. While Macao, China does not apply rules of origin on imports²⁵, Hong Kong, China’s general rules of origin say that products are originating from Hong Kong, China if:

- They are natural products of Hong Kong, China.
- They have undergone manufacturing processes in Hong Kong, China, which have changed permanently and substantially the shape, nature, form or utility of the basic materials used in manufacture. Processes such as simple diluting, packing, bottling, drying, simple assembling, sorting or decorating, among others, are not regarded as genuine manufacturing processes²⁶.

I Product-Specific Rules

The China – Georgia, CPTPP, and the Philippines – EFTA FTAs recognize that a product meets the origin criteria if it: 1) is wholly obtained or produced in the territory of the parties; 2) is produced in the territory of the parties from originating materials; or 3) meets a specific requirement.

²⁴ APEC Policy Support Unit (2016), “Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2015 by APEC Economies”, APEC#216-SE-01.9, p. 12.

²⁵ WTO (2013), “Trade Policy Review - Report by the Secretariat: Macao, China”, WT/TPR/S/281, p. 33.

²⁶ See https://www.tid.gov.hk/english/import_export/cert/cert_rules.html

The specific requirements are also known as product-specific rules. Some of the most frequent examples are the following²⁷:

1. Change of tariff classification – changing the tariff classification of a product because it has undergone transformation from its inputs or component parts
2. Qualifying value content – setting a minimum percentage of value that needs to be present in the product
3. Specific transformation – requiring products to meet specific production processes
4. A combination of the above or one criteria among two or three listed.

In the case of the CPTPP, the most utilized criteria to determine whether the products meet origin requirements are change of tariff classification and qualifying value content. In some sectors, for products to meet origin requirements, they need to undergo a specific production process. For example, apparel needs to meet a “yarn-forward” rule, which specifies that fabric used to produce garments must be made of yarn originating in one of the CPTPP parties. On the other hand, chemical products are considered to have originated from a CPTPP party if they meet specific production process rules. For instance, chemicals that are subject to purification could be eligible to meet origin requirements if the purification takes place in the territory of one or more of the CPTPP parties and results in the elimination of not less than 80 per cent of the content of existing impurities²⁸.

The Philippines – EFTA FTA has rules of origin that requires many of the agricultural products and some manufactured products to be wholly obtained or produced with only wholly obtained materials from a signatory to meet origin requirements. For most other manufactured goods, change of tariff classification or qualifying value content are used to determine origin. In some cases, rules are very flexible to make it easier for goods to meet origin criteria. For instance, this FTA has a clause that gives apparels preferential market access if they are made of any non-originating materials, unlike the CPTPP that has the “yarn forward” rule which requires apparels to be made of originating materials to qualify for preferential treatment.

In the China – Georgia FTA, product-specific rules apply to most agricultural products. Most agricultural goods and natural rubber meet rules of origin if they fall under a different tariff classification from their component materials. For the rest of non-agricultural products, they meet origin criteria if the qualifying value content is no less than 40%.

II Qualifying value content

Only the China – Georgia FTA and the CPTPP specify methodologies to calculate the qualifying (or regional) value content. In the case of the China – Georgia FTA, the qualifying value content (QVC) is determined by the equation:

$$QVC = \frac{\text{Ex-works Price} - \text{VNM}}{\text{Ex-works Price}} * 100\%$$

where “Ex-works Price” refers to the factory price of the goods (i.e. excludes transportation costs) and VNM refers to the value of non-originating materials.

²⁷ APEC Policy Support Unit (2016), Op. Cit., p.13.

²⁸ See CPTPP’s Annex 3-D, Section Note 2: Purification Rule, p. 47.

In contrast, the CPTPP provides four methodologies to calculate the QVC:

1. Focused value method, which takes into account the value of non-originating materials specified in the applicable product-specific rule and used in the production of the good (FVNM)

$$QVC = \frac{\text{Value of the Good} - FVNM}{\text{Value of the Good}} * 100\%$$

2. Build-down method, which uses the value of non-originating materials used in the production of the good (VNM)

$$QVC = \frac{\text{Value of the Good} - VNM}{\text{Value of the Good}} * 100\%$$

3. Build-up method, which is based on the value of the originating materials used in the production of the good in the territory of CPTPP parties (VOM)

$$QVC = \frac{VOM}{\text{Value of the Good}} * 100\%$$

4. Net cost method, which is used for automotive goods only and is based on the total cost of the good minus sales promotion, marketing, after-sales service, shipping and packing costs and non-allowable interest costs (NC)

$$QVC = \frac{NC - VNM}{NC} * 100\%$$

III De Minimis

The three agreements with product-specific rules of origin include a *de minimis* article, which allows products to be considered as originating from a signatory party even if they do not meet the product-specific rule on change of tariff classification. They establish that as long as the value of non-originating materials does not exceed a certain threshold, those products can meet the origin criteria. The threshold is quite flexible in the Philippines – EFTA FTA (i.e. 20% of the ex-works price), while it is more restrictive in the China-Georgia FTA and the CPTPP, which require 10% of the ex-works price and 10% of the value of the good respectively.

In the CPTPP, the abovementioned threshold is not applicable to textiles and apparel. For textile products, a *de minimis* provision based on the weight of the non-originating materials apply. The CPTPP establishes that the weight of the non-originating materials have to be no more than 10% of the total weight of the good for the good to be considered as originating. For apparel products, the yarn and fibers of the components used to determine the tariff classification of the apparels are taken into account: the weight of non-originating yarns and fibers cannot be more than 10% of the total weight of that component to be considered as originating.

The CPTPP also makes some exclusions to the *de minimis* rule. The rule does not apply to non-originating materials for dairy products; citrus fruit and juices; and some vegetable oils; as well as non-originating peaches, pears or apricots (including those used to produce fruit juices). For textiles and apparel, this rule does not apply to elastomeric yarn.

IV Accumulation

Trade agreements usually include clauses on accumulation, which facilitates the ability of producers to meet the origin criteria. The intention of the accumulation clause for any RTA/FTA party is to consider as originating materials those that are originating from other signatory parties.

The accumulation clause of the China – Georgia FTA is straightforward. Since the agreement is bilateral, if a material originating from one of the signatories is used in the production of a good within the other party, the material will be considered as originating in the latter party.

The accumulation clause is similar in CPTPP, with the difference that it involves 11 parties: any originating materials from any of the CPTPP parties count as originating in the production of a good that is produced in the territory of one or more CPTPP parties by one or more producers. This makes it easier for CPTPP members to obtain preferential market access as they could use inputs from any CPTPP members to meet the origin criteria. In addition, the CPTPP acknowledges that the production of a non-originating material in the territory of one or more CPTPP parties could count to confer origin to a good that uses this non-originating material.

The Philippines-EFTA FTA also allows parties to use originating materials from the signatory parties to facilitate the ability of producers to meet the origin criteria. This agreement also clarifies that if a good is made from materials that have originated from two or more signatory parties and that have not undergone any working or processing beyond minimal operations, then the material with the highest customs value determines the origin of the goods.

V Declaration and Certification of Origin

Imported goods need to enclose a declaration or certificate of origin to obtain preferential treatment. However, the process of issuing a valid certificate of origin depends on the RTA/FTA involved. For example, the China – Georgia FTA stipulates that only specific public entities can issue these certificates, and that the exporter or producer must file a prior application for the certificate. On the other hand, the Philippines – EFTA FTA and CPTPP adopt a self-certification process. Importers in both RTA/FTA zones are expected to present certificates of origins for their goods. However, a key difference between these two agreements is who can fill in the self-certification. In the Philippines – EFTA FTA, only the exporter can complete the certificate. On the other hand, in the CPTPP, the exporter, producer or importer can complete the certificate. The CPTPP also includes a waiver for the implementation of the self-certification system. Additionally, for Brunei Darussalam, Malaysia, Mexico, Peru and Viet Nam, there is a waiver with respect to the self-certification of origin by the importer for five years after their respective dates of entry into force of the CPTPP.

Regarding the characteristics of the certificates of origin, the China – Georgia FTA states that these certificates need to follow a specific format and that the entities in charge of the issuance of these certificates need to fill them out in English. Similarly, the Philippines – EFTA FTA mentions that exporters must issue the certificates of origin in English and that these certificates must follow a standard format. On the contrary, under the CPTPP, the certificates of origin do not need to follow a prescribed format. The only stipulations for such certificates are that they contain a set of minimum data requirements and that they are completed in English. However,

the CPTPP also notes that the importing party reserves the right to ask the importer for a translation of the certificate in the language of the importing party.

VI Validity of the Declaration/Certificates of Origin

Both the China – Georgia and the Philippines – EFTA FTAs establish that the certificates of origin are valid for one year since the date of issuance. For the CPTPP, the validity is either one year or a longer period specified by the laws and regulations of the importing party.

VII Waiver of Declaration/Certificate of Origin

Only the China – Georgia FTA and the CPTPP waive the requirements for a certificate of origin for low value importations. Under the China – Georgia FTA, imports with originating goods below USD 600 are exempted from the presentation of the certificate of origin. Likewise, under the CPTPP, imports whose value does not exceed USD 1,000 are exempted from this requirement.

In addition, the CPTPP parties can determine other situations wherein the requirement for a certification of origin is waived. Parties can exempt importers from submitting the certification for certain cases.

The Philippines – EFTA FTA also includes the possibility of waiving a certification of origin, but it does not establish a maximum value for imports to receive this benefit. It only mentions that the waivers could take place in accordance with the parties' domestic laws, rules and regulations.

Such waivers are also subject to certain restrictions to prevent abuse. For example, under the China – Georgia FTA and the CPTPP, the authorities reserve the right not to apply a waiver if the imports are suspected to be part of a series of importations conducted to bypass the requirement to submit certificates of origin.

VIII Verification of Origin

Trade agreements also include clauses that specify the procedures to verify origin during or after the importation accorded with preferential treatment takes or has taken place. While all RTA/FTAs have the same objective in terms of the verification of origin (i.e. determining whether the imported good complied with the rules of origin), each agreement has outlined a different procedure.

The China – Georgia FTA mentions that the authorities of the importing party can initiate the verification procedure randomly; or when there is a reasonable doubt to suspect on the authenticity of the certificate or the originating status of the goods. On the other hand, the Philippines-EFTA FTA establishes that the authorities of the exporting party will do the verifications only if they get a request of the importing party. In the case of the CPTPP, the verification process falls under the responsibility of the importing party, which could start this process, among other means, by sending a written request to the importer, exporter or producer.

In terms of the information and visits to conduct the verification, the China – Georgia FTA establishes that the customs authority from the importing party can request information from the importer and administrative assistance from the customs authority of the exporting party. In addition, the customs authorities could request for verification visits to the exporting party.

The importing party has to specify the reasons for the request, while the exporting party has to respond within six months of the date of the request.

Likewise, the Philippines – EFTA FTA establishes that the importing party has to identify the reasons of the request to the exporting party, but this verification request can only take place within 36 months of the issuance of the declaration of origin. The customs authority of the exporting party is the entity that can request information and inspection visits to the exporter or producer, but there is no deadline on when they should receive a response to their request.

The CPTPP specifies that the importing party must accept information directly from importers, exporters or producers when undergoing a verification process. In addition, it establishes that requests for information or verification visits to exporters or importers have to state the reasons for the request and have to be addressed in English or the official language of the party from whom the request is made. The importing party needs to ask for a written consent from the exporter or producer where the verification visit is intended to take place. Within 30 days of receipt, the recipients have to respond to the written request for additional information and provide consent to or refuse verification visits. In all cases, the importing party can also request access to records and facilities relevant to the verification during the visit.

Only the CPTPP and the Philippines – EFTA FTA establish obligations to disclose the results of the verification. The CPTPP mentions that before issuing a written determination, the importing party has to inform the results of the verification to the importer and to any exporter or producer that have provided information to the importing party. If the result can lead to the denial of preferential treatment for a good, then the affected parties have 30 days to submit additional information about the origin of the good. As for the Philippines – EFTA FTA, the exporting party who conducted the verification has six months from the date of the verification request to inform the importing party of the results. If the importing party has not received information within this timeframe, then it can deny preferential treatment to the import transaction related to the verification process.

IX Records and Confidentiality

In order to facilitate post-verification checks, RTA/FTAs usually establish a minimum period for the importers, exporters and producers to maintain records. The China – Georgia FTA requires importers, exporters, producers and authorities issuing certificates of origin to keep their records for at least 3 years. The Philippines – EFTA FTA includes a similar period, but it only applies to the importer. The CPTPP includes a longer period of 5 years applicable to importers, exporters and producers.

Only the CPTPP and the Philippines – EFTA FTA include a clause on confidentiality. The approach taken at the CPTPP is that the parties have to respect and protect the confidentiality of information that could affect the competitive position of the person or entity providing the information. In the case of the Philippines – EFTA FTA, the information that is confidential or provided on a confidential basis cannot be disclosed without explicit permission of the person or authority providing the information.

X Review and Appeal

None of the RTA/FTAs analyzed in this report include explicit clauses on the review and appeal process concerning the determination of the origin of a product.

XI Sanctions

Both the CPTPP and the Philippines – EFTA FTA include a provision that states that parties could establish or maintain appropriate penalties for the violation of laws and regulations related to the chapter on rules of origin.

5 FINAL REMARKS

Despite the resurgence of trade-restrictive measures worldwide²⁹, APEC members have continued to negotiate and implement new RTA/FTAs. Through such initiatives, APEC members have advanced the improvement of market access conditions, the liberalization of trade in goods and services, and the promotion of investment within the region. In addition, APEC members have utilized these RTA/FTAs to improve rules in traditional trade areas and initiate discussions on new disciplines that are becoming more relevant for trade and investment.

RTA/FTAs are becoming more crucial for the APEC region. Back in 1998, only approximately a quarter of the region's trade occurred among RTA/FTA partners. In 2018, nearly half of APEC's trade happened among RTA/FTA partners worldwide. Economies are aware of the importance of trade agreements. In general, they have become more proactive in negotiating new agreements. In 1998, APEC economies only had 29 RTA/FTAs in force. Just 20 years later, in 2018, the number of agreements signed by an APEC economy shot up to 170, with 64 of them being intra-APEC RTA/FTAs. Consequently, the share of intra-APEC trade with RTA/FTA partners increased from 34.9% in 1998 to 64.3% in 2018.

It is becoming more common for new RTA/FTAs to include chapters on trade in services. Currently, over 70% of agreements signed by APEC economies contain services commitments. Furthermore, most of these new RTA/FTAs outlined their services commitments via a negative list approach. This indicates that APEC economies are increasingly willing to incorporate more comprehensive services commitments.

Economies are also more receptive to the incorporation of non-traditional trade-related topics into new RTA/FTAs. All four agreements analyzed in this report have chapters on intellectual property (IP). There seems to be an impetus among economies to find a balance between protecting and promoting innovations and making new technologies and products accessible across borders. Likewise, the agreements explored in this report all include clauses that allow the parties to apply criminal penalties for IP infringements in certain circumstances. While the depth of the IP chapters differs among the agreements, it is possible to find some common trends, such as the inclusion of IP disciplines regarding patents, copyrights, trademarks, geographical indications and plant variety protection.

Three of the agreements analyzed in this report include a chapter on investment, but only the CPTPP goes far to include binding provisions. The scope of the investment chapter at the CPTPP is comprehensive: it seeks a balance between establishing favorable treatment for investors from participating parties and protecting the right of governments to implement measures to meet their environmental, health and other regulatory objectives. The CPTPP also includes a detailed ISDS mechanism with the caveat that it is not possible for investors to invoke it to challenge any government decision related to tobacco control measures.

Finally, the agreements discussed in this report also have a chapter on rules of origin. Three of the agreements use product-specific rules to determine if a good meets origin criteria. However,

²⁹ WTO. (2018). Overview of Developments in the International Trading System – Annual Report by the Director-General, p.4. Retrieved from https://www.wto-ilibrary.org/trade-monitoring/overview-of-developments-in-the-international-trading-environment-annual-report-by-the-director-general-2018_2273d63c-en

these rules differ due to the varied interests and sensitivities of the parties involved. Change of tariff classification and qualifying value content are used to determine origin in most cases. Nonetheless, some agreements apply strict production process requirements to determine if a manufactured product satisfies the origin criteria. However, some agreements also include flexible provisions, such as a higher *de-minimis* value for non-originating materials or flexible product-specific rules that allow the use of many non-originating parts and components, to make it easier for parties to meet the origin criteria.

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