Asia-Pacific
Economic Cooperation

2021/CTI/WKSP3/002

Workshop Presentation Materials

Submitted by: Japan

NEW ZEALAND
APEC 2021
ASIA-PACIFIC ECONOMIC
COOPERATION 2021

Workshop on Toward Building Resilient Supply Chains - A Possible Role of Investment Policy
13-14 May 2021

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

"Toward building resilient supply chains

– a possible role of investment policy"

Day 1: Thursday 13 May 2021
10:00 - 1:00pm (Tokyo time)

Day 2: Friday 14 May 2021
10.00-1.00pm (Tokyo time)

Ms Collins Rex, Director- GTPA

Collins Rex is an independent consultant who has owned and operated her own very successful businesses on two continents. In her professional capacity she assists clients across a range of international marketing, product development and communications areas, helping them get maximum return on their marketing investment.

Collins is passionate about seeing small business do better business and do it on the global stage!

To this end, she's been responsible for the development and delivery of training courses across a range of topics, including export readiness, pitching/presentation & Free Trade Agreements workshops. Her international trade knowledge and skills have been honed over many years, as evidenced by her managing and delivering a number of major trade-related projects.

Ms Ueda Naoko, Director, APEC Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Japan

Ms Ueda is the Director of the APEC Division in the Economic Affairs Bureau of Japan's Ministry of Foreign Affairs (MOFA).

Since first joining MOFA in 1987, Ms Ueda has operated in a variety of influential roles within the ministry and elsewhere.

At MOFA, she has previously acted as both a Senior Negotiator and Principal Deputy Director in the Climate Change Division, and has also worked in the International Cooperation Bureau, North American Division, and Grant Aid Division. Ms Ueda was formerly the Deputy Director of the Organisation for Economic Co-operation and Development (OECD) Secretariat, and in addition spent 3 years serving as the First Secretary of the Embassy of Japan in Zimbabwe.

Ms Ueda received her BA in International Relations and Legal Studies from Sophia University (Japan), her MA in Political Science from the University of Pennsylvania (United States), and another MA in Development Economics through the GRIPS/FASID program (Japan).

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Session:1
Comparative stock-take of BITs and investment-related provisions in FTAs/EPAs

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Professor Juan Navarro, Director and Principal researcher at CMX Partnerships and associate faculty at Royal Roads University

Mr Navarro is a researcher, educator, and entrepreneur with over 20 years of combined experience in business, finance, international trade, regional economics and policy analysis.

As a researcher, his reports on global trade and free trade agreements (FTAs) have been published by leading universities, research centres and global organisations.

He has successfully completed reports for the APEC Business Advisory Council (ABAC) such as “FTAAP: Next Generation Trade and Investments Issues - A Business Perspective” in 2019, and “FTAAP: Competition Policy” in 2020.

FTAAP: Investment Policy

by Prof. Juan Navarro

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

May 2021

The author is the director and principal researcher at CMX Partnerships and associate faculty at Royal Roads University

FTAAP: Investment Policy

- **The global pandemic** has produced **economic turmoil worldwide**, impacting the livelihoods of **millions of people**, disrupting **business activities**, affecting **trade and investments** and exposing the fragility of **Global Value Chains** (GVCs).

- **This report proposes** prioritizing **investment policy** as one of the public policy tools to promote **economic recovery** and build **GVCs resilience** across the region.

I. Covid-19 crisis impact on the disruption of GVC

- **The covid-19 crisis has damaged the global economy** by hitting, directly and indirectly, trade, investments, and **Global Value Chains (GVCs)** at an unprecedented scale.

- **The pandemic hit at a time** when international trade was already being challenged, and **serious concerns** about **trade disputes and protectionist measures** were on the rise.

Policy measures impacting global trade and investments in 2020

Economy	Liberasing	Harmful	Total
World	613	1,863	2,476
APEC	198	706	904
Australia	5	57	62
Brunei Darussalam	1	0	1
Canada	5	91	96
Chile	14	15	29
China	29	39	68
Hong Kong, China	0	1	1
Indonesia	23	49	72
Japan	1	47	48
Republic of Korea	3	38	41
Malaysia	10	19	29
Mexico	8	16	24
New Zealand	15	17	32
Peru	2	14	16
Philippines	6	11	17
Russian Federation	21	66	87
Singapore	2	7	9
Chinese Taipei	4	6	10
Thailand	9	15	24
United States of America	33	188	221
Viet Nam	7	10	17

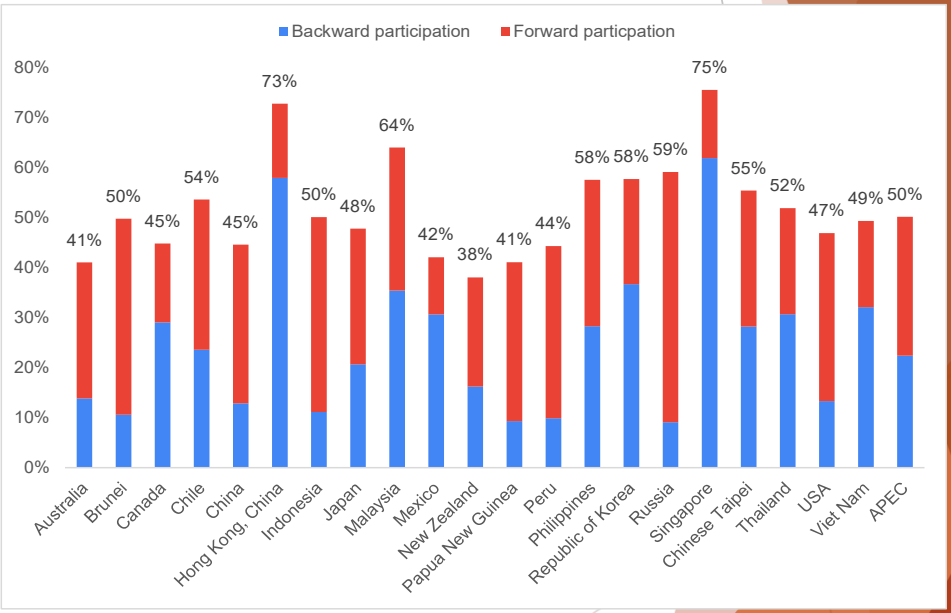
Source: Global Trade Alert Report

II. Global Value Chains resilience

- According to a report issued by the World Bank and the WTO, over **two-thirds of global trade happens through GVCs**.

- **The strong integration** and participation **in global supply chains** of most APEC economies **meant** that the consequences derived from the pandemic had a strong **negative impact across the region**.

GVC Participation index in APEC economies (2018)



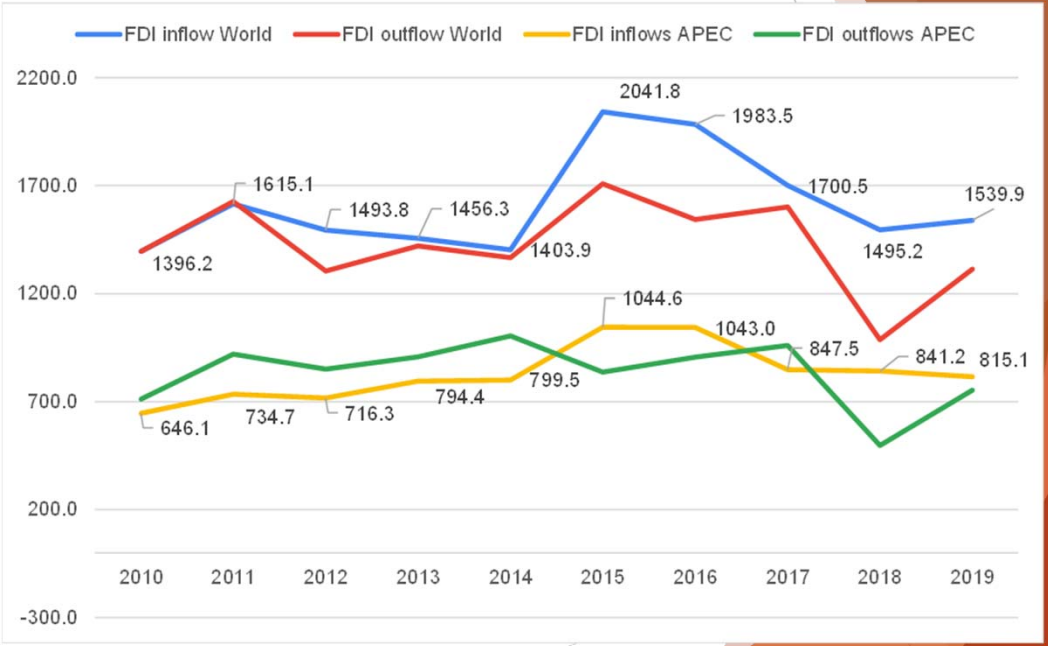
Source: Navarro's (author) calculations using the UNCTAD-Eora Global Value Chain Database
Notes: 1) Backward participation is the foreign value added in gross exports of an economy 2) Forward participation is the domestic value-added exports of an economy which goes into other economies' exports

III. Challenges for enhancing GVC resilience from investment viewpoint

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

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

APEC and Global Foreign direct investment, 2010-2019
Inward and outward flows (Billions of dollars)



Source: Elaborated by Navarro (author) with information from UNCTAD Database

IV. Comparative analysis on investment chapters of RTAs

- **the CPTPP** contains the **most advanced investment commitments** due to their **deeper and broader coverage** of investment liberalization, protection, and dispute settlement. the CPTPP **offers a comprehensive template** to **encourage FDI and resolve conflicts**.
- **The RCEP has provisions that offer an excellent reference to analyze but it still has considerable room to grow in investment commitments**, for instance, by adding an Investment Dispute Settlement (IDS) mechanism and including subsidies, which are currently exempted as part of the scope of the investment obligations.
- **The CAI** includes **serious commitments** on **transparency** including **subsidies**, behaviour of **covered entities (SOEs)**, **sustainable development**; and the establishment of an **investment committee**. To be noted, **CAI does not include an Investment Dispute Settlement (IDS)**.

Comparison of Investment Chapters of the CPTPP and RCEP

Topic	CPTPP (Ch. 9)	RCEP (Ch. 10)
Definition of investment	article 9.1	article 10.1
Definition of investor	article 9.1	article 10.1
National Treatment (NT)	article 9.4	article 10.3
Most-favoured-nation treatment (MFN)	article 9.5	article 10.4
Fair and equitable treatment (FET)	article 9.6	article 10.5
Full protection and security (FPS)	article 9.6	article 10.5
Expropriation	article 9.8	article 10.13
Performance requirements	article 9.10	article 10.6
Investor-State Dispute Settlement	Section B	-
Security exceptions	article 9.24	article 10.15
Scope	article 9.2	article 10.2
Relation to other chapters	article 9.3	-
Treatment in Case of Armed Conflict / compensation for losses	article 9.7	article 10.11
Transfer	article 9.9	article 10.9
Senior Management and Boards of Directors	article 9.11	article 10.7
Non-Conforming Measures	article 9.12	article 10.8
Denial of Benefits	article 9.15	article 10.14
Investment and Environmental, Health and other Regulatory Objectives	article 9.16	-
Corporate Social Responsibility	article 9.17	-
Promotion of investment	-	article 10.16
Facilitation of Investment	-	article 10.17
Work Programme	-	article 10.18
Customary international law	Annex 9-A	-

Source: Elaborated by Navarro (author) using investment chapters from the CPTPP and RCEP

V. Policy recommendation from a business perspective

I. **Under the current crisis, investment liberalization could have a significant impact** on the economic recovery from the pandemic by facilitating regional investment activities to enhance GVCs resilience.

II. **APEC Governments may want to incorporate business priorities in FDI rulemaking** to support business confidence to enhance GVCs resilience and encourage investments of MNEs along supply chains.

III. **Despite unprecedented challenges posed by the pandemic, governments demonstrated their commitment on shared priorities to advance the investment liberalization agenda.** Notable examples are CPTPP, RECEP and CAI that establish commitments all phases of the life of an investment.

IV. **Learning from challenges posed by Covid-19**, including supply chain disruptions and restrictive measures, **should be leveraged to advance dialogue and activities and improve investment rules.**

V. **APEC Governments need to ensure that FDI regulations meet high standards and offer appropriate market access** based on predictable rules that guarantee investment liberalization, protection and a Dispute Settlement (IDS) mechanism.

VI. **Digital technology with facilitated data flow is essential** to building stronger, smarter and more efficient Global Value chains, advancing connectivity and promoting innovation.

VII. **Recognition of the FTAAP in the Putrajaya Vision 2040 has proved APEC's firm commitment** to advance the liberalization of trade and investment with higher standards to advance regional economic integration. **Now is the time to plan and act together** for sustainable economic recovery, re-ignite growth and lasting resilience.

Thank you

FTAAP: Investment Policy by Prof. Juan Navarro

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

May 2021

The author is the director and principal researcher at CMX Partnerships and associate faculty at Royal Roads University

E-mail address: Juan.Navarro@cmxpartnerships.com

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Ms Lisa McAuley, CEO- GTPA

Lisa has worked in international trade for over 15 years, most recently as CEO of the ECA has seen the organisation focus on ground-breaking research and advocacy projects that promote and enhance the global competitiveness of SMEs. Lisa lends her passion for international trade and her respected voice in the industry to various initiatives, from an advisory role on the AmCham Trade Advisory Group, to the board of CargoHound and the Executive Director of the Global Trade Professionals Alliance (GTPA).

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Session 2: Good practices of BITs and investment-related provisions in FTAs/EPAs and its challenges

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

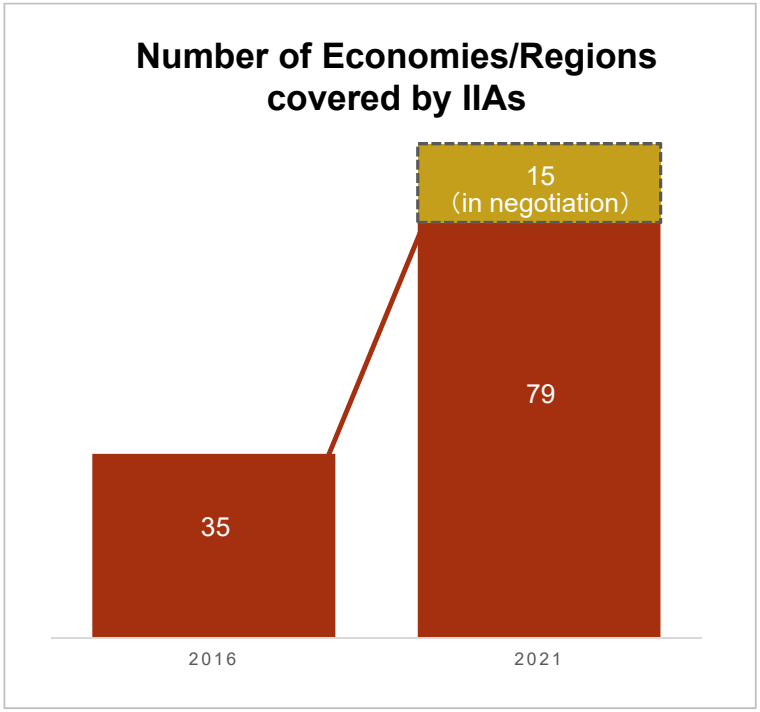
Mr Ueno Yudai, Senior Coordinator, Economic Partnership Division, Economics Affairs Bureau, Ministry of Foreign Affairs, Japan

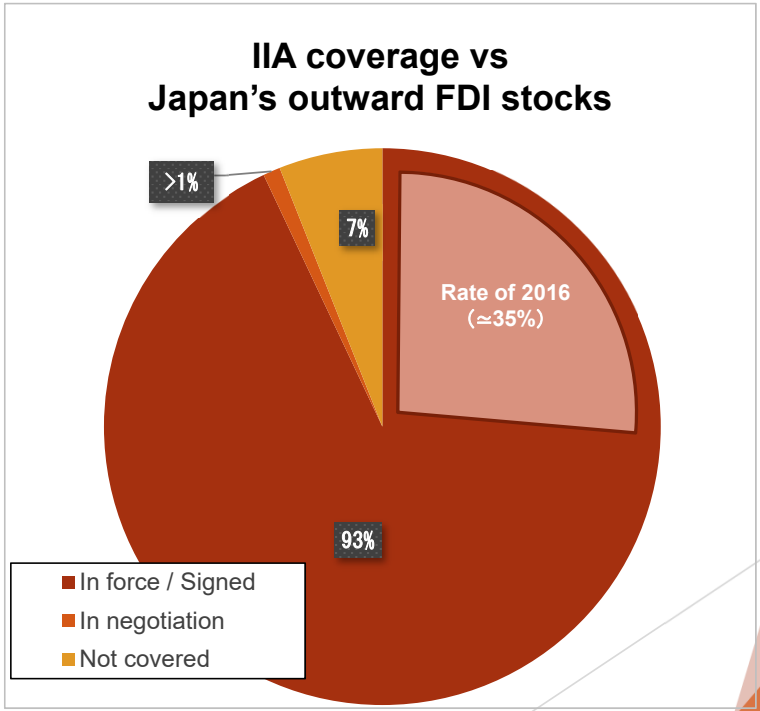
1991 Entered Ministry of Foreign Affairs
2005 First Secretary, Embassy of Japan in the US
2008 First Secretary, Permanent Mission of Japan to the EU
2011 Deputy Director, Status of US Forces Agreement Division
2013 First Secretary, Embassy of Japan in the Philippines
2016 Counsellor, Embassy of Japan in the Republic of Korea
2020 Senior Coordinator, Economic Partnership Division

Introduction to Japan's Investment Policies

UENO Yudai
Senior Coordinator
Economic Partnership Division
MOFA, Japan

1. “Action Plan towards Promoting the Conclusion of Investment Related Treaties and Development of Investment Environment” (2016) and its achievements





2. Understanding the Needs and Demands of Investors

- **Key Features :**
  “Investment liberalization” and “Investment protection”

- **“Policy Proposal on Investment Treaties”**
  (2019, Japan Business Federation (Keidanren))

3. International Discussion on Investment Related Policies

- United Nations Commission on International Trade Law (UNCITRAL) Working Group III
- WTO Negotiations on Investment Facilitation
- Negotiations for Amendment of the Energy Charter Treaty (ECT)
- Other practices introduced in recent treaty negotiations

etc…

Mr Yamada Hiroki, Japan External Trade Organisation (JETRO)

Yamada Hiroki holds a LLM degree in International Economic Law from the University of Edinburgh in the UK. He was a former research intern at the Institute of International Relations in Prague, and also an investment promotion officer at the Danang Investment Promotion Agency in Vietnam.

Challenges in International Investment Agreements

-from a business perspective and possible solution-

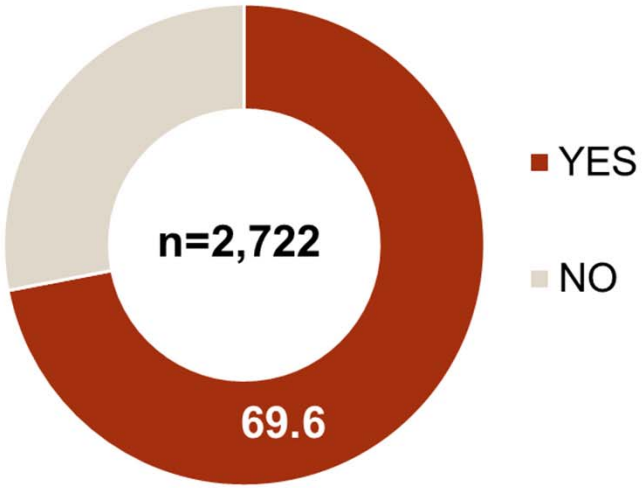
(Mr.)Yamada Hiroki

Japan External Trade Organization

Uncertainty overshadows overseas businesses

- Companies need to deal with operational risks arising from unprecedented uncertainty e.g. reconstruction of supply chain

Q. Have you reconsidered (or will you consider) your overseas operation?



Source: JETRO's overseas business survey (30th Oct. ~ 6th Dec. 2020)

IIAs as a tool to safeguard foreign investment

- International Investment Agreements (IIAs) help investors reduce uncertainties by affording investment protection.

Function / Stage	Investment protection	Liberalisation
Pre-establishment	Help risk assessment in *planning* investment	Improve market access at *establishment* & *acquisition* stages
Post-establishment	**Protect *operation* of investment**	Facilitate *expansion* of investment

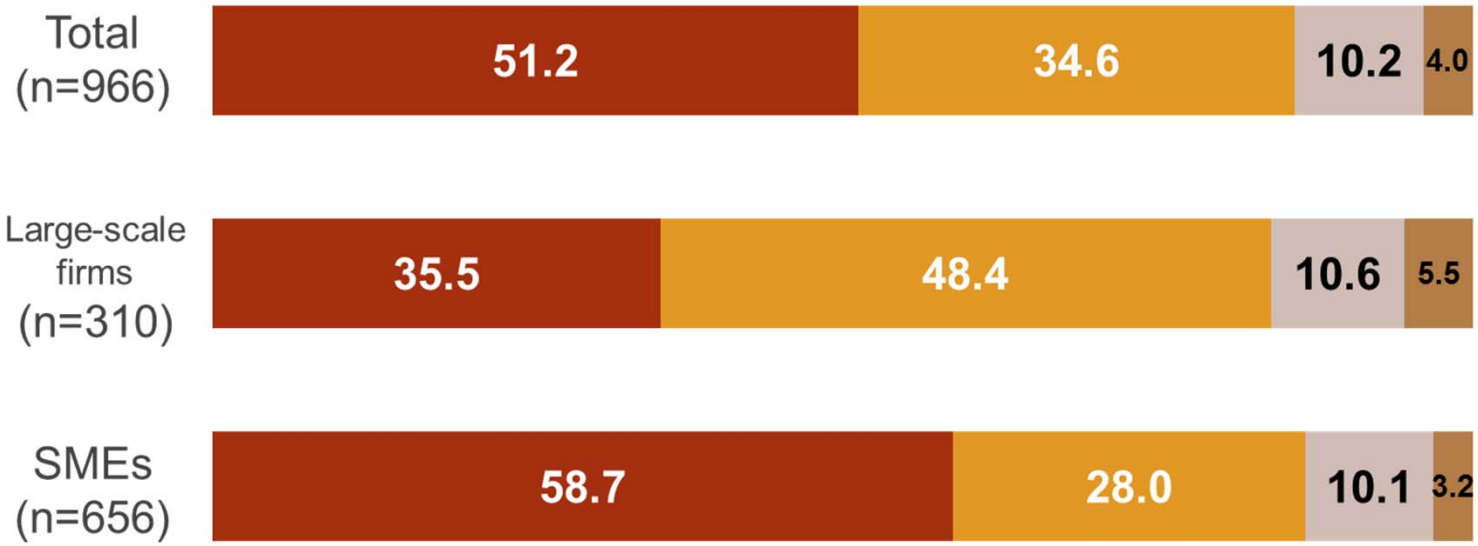
About survey on IIAs

- Target: 966 Japanese firms with overseas bases
- Characters of target company
  - Large-scale firms : **SMEs** = 32.1 : **67.9**
  - 61.2 % operating foreign investment for more than 10 years

Questions:

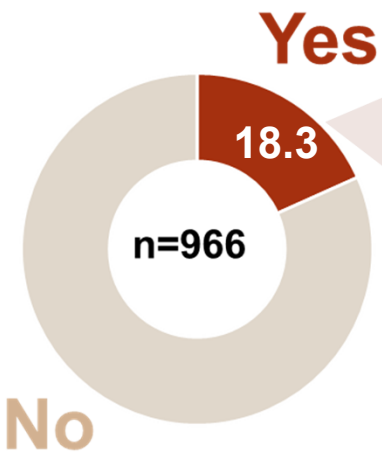
1. To what extent do you know about IIAs?
2. Whether you have faced any operational problems due to measures or treatments by local government; and if so,
3. How have you solved such problems?

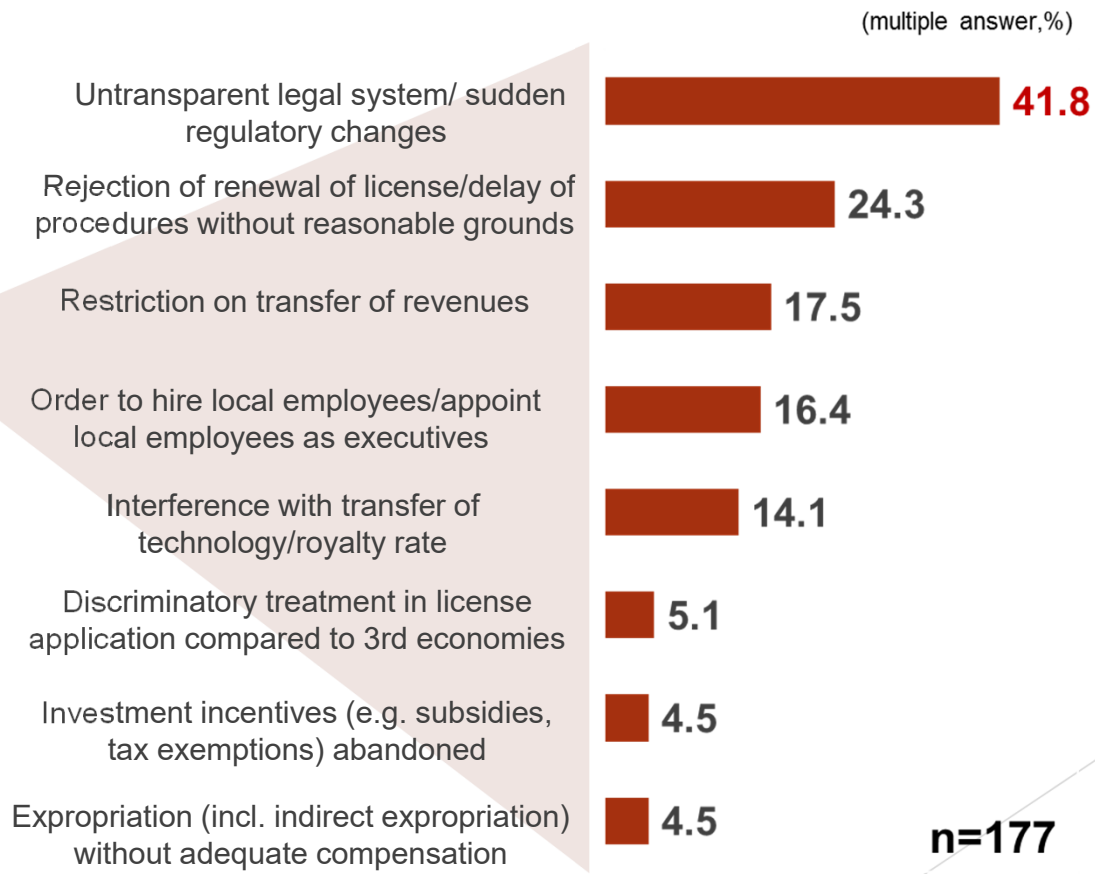
Q1. To what extent do you know about IIAs?



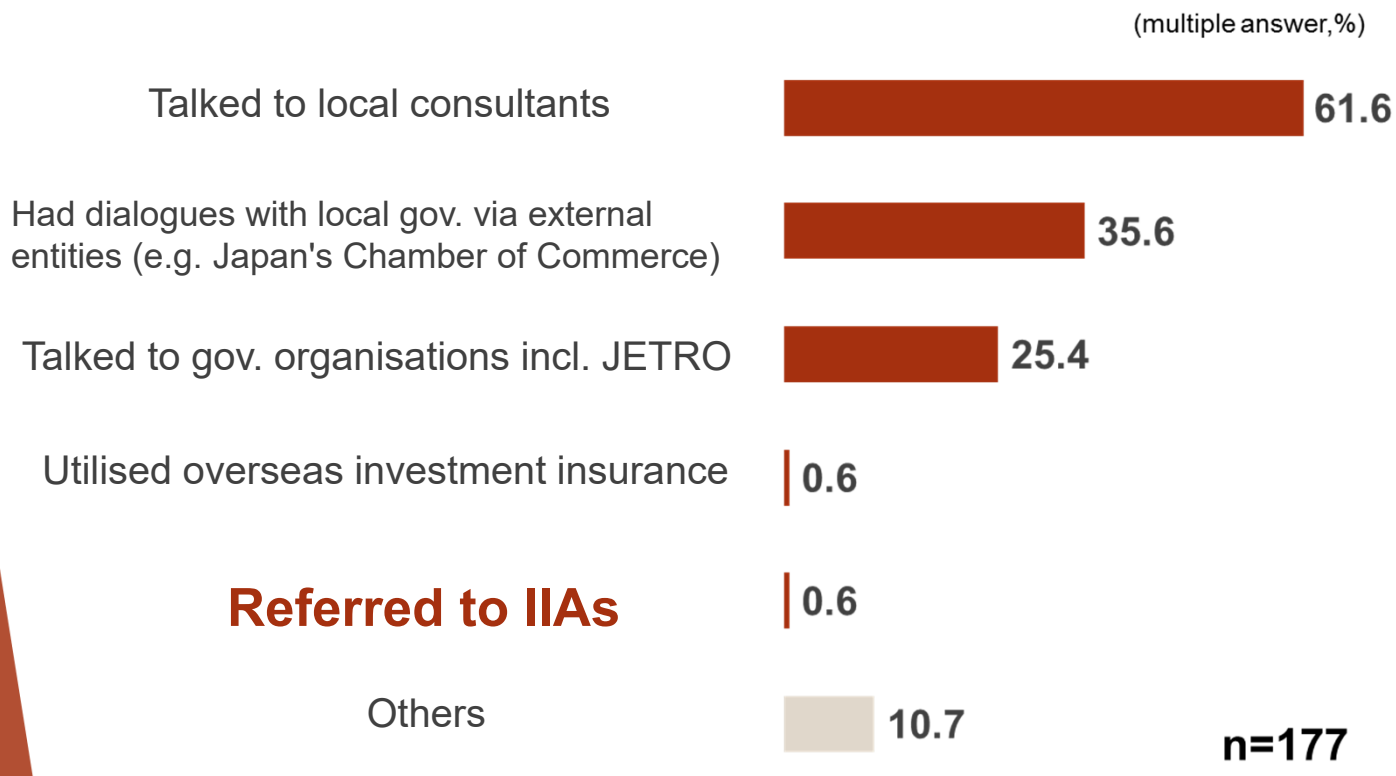
- Have no idea
- Know the overview
- Have considered in the context of overseas businesses
- Others (incl. no answer)

Q2. Any operational problems related to local gov. measures/treatments?





Q3. How have you solved such problems?



Challenges and possible approaches

- Benefits of IIAs (investment protection) are curtailed by

  - Low awareness of IIAs
  - Limited knowledge of IIAs as a problem-solving tool

- Two key elements to tackling the challenges:

  1. **Tailor-made promotion for large-scale firms and SMEs**
  2. Capacity-building of both home and host economies

Tailor-made promotion for large-scale firms and SMEs

e.g. Utilising IIAs (investment protection) at post-establishment stage

- Informal consultation with local gov.
- Inter-governmental meeting
- ISDS proceedings

- **What to know (at minimum.)**

To summarise…

- IIAs create more predictable and transparent environments for investors through **investment protection**.
- **Limited knowledge of IIAs** is a challenge
- **Two key elements** to tackling the challenges:
  1. Tailor-made promotion for large-scale firms and SMEs
  2. Capacity-building of both home and host economies

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

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

Dr Deborah Elms, Founder and Executive Director of the Asian Trade Centre. The Asian Trade Centre works with governments and companies to design better trade policies for the region. Dr. Elms is President of the Asia Business Trade Association (ABTA). She served on the Trade and Investment Council of the World Economic Forum from 2017-2019, on the International Technical Advisory Committee of the Global Trade Professionals Alliance and was Chair of the Working Group on Trade Policy and Law. She was also a senior fellow in the Singapore Ministry of Trade and Industry's Trade Academy. Previously, Dr Elms was head of the Temasek Foundation Centre for Trade & Negotiations (TFCTN) and Senior Fellow of International Political Economy at the S. Rajaratnam School of International Studies at Nanyang Technological University, Singapore.

Role of Investment Chapters in FTAs

- Investment chapters in free trade agreements (FTAs) have at least three key objectives:
  - Rules governing investment practices
  - Market access and national treatment conditions
  - Investment protection to ensure governments do not expropriate without fair and adequate compensation
- All three elements very important for companies
- Commitments only matter to the extent that they either
  - Alter planned activities of government or
  - Encourage companies to invest

Focus Has Been Too Narrow

- Most focus has been on final function: investment protection
  - Why? Activities of lawyers and academics key
  - Investment protection does matter to firms, but more as signaling device about what governments might/might not do
  - Using any FTA (or BIT) investment protection mechanism can be viewed as "nuclear option" for firm—company will never work in the market again
  - Mechanisms best viewed as "insurance policy"
- Limited focus on the rule-making aspects of investment chapters
  - National treatment and MFN clauses as well as other components
- But these can be extremely useful for companies
  - More clearly articulate rules that govern investment, including such elements as allowable performance requirements, movement of capital in and out, allowable government activities on expropriation, management and boards of directors requirements, and non-conforming measures or restrictions

Market Access Commitments Important

- Market access commitments also important
  - Which sectors are opened for foreign investment?
  - Which have limitations imposed?
  - What are these limitations?
  - How might the market access conditions change over time? (Particularly relevant as newer agreements are negotiated in the future)
- Investment chapters are part of larger FTA
  - Builds on and supports efforts across entire agreement, not just for investment
- Review clauses and institutional mechanisms
  - Investment chapters, like other aspects of an FTA, can be renegotiated, added, expanded or adjusted in the future as part of ongoing process of updates/upgrades

Knowledge Needs to be Shared

- Chapters (like BITs) only work if companies know about them
  - Even brilliant agreements that sit forever in a drawer are not helpful
- Critically important to work with local firms to explain conditions granted by new commitments
  - Materials and sessions geared to both large and small firms in business-friendly language
- Should be part of "selling point" of investment promotion agencies working overseas to attract inbound investment
  - Requires knowledge by wide range of government officials on the content of such agreements so they are accurately and effectively communicating with global or regional companies

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Session 3: Analysis of new issues in the post-COVID era

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

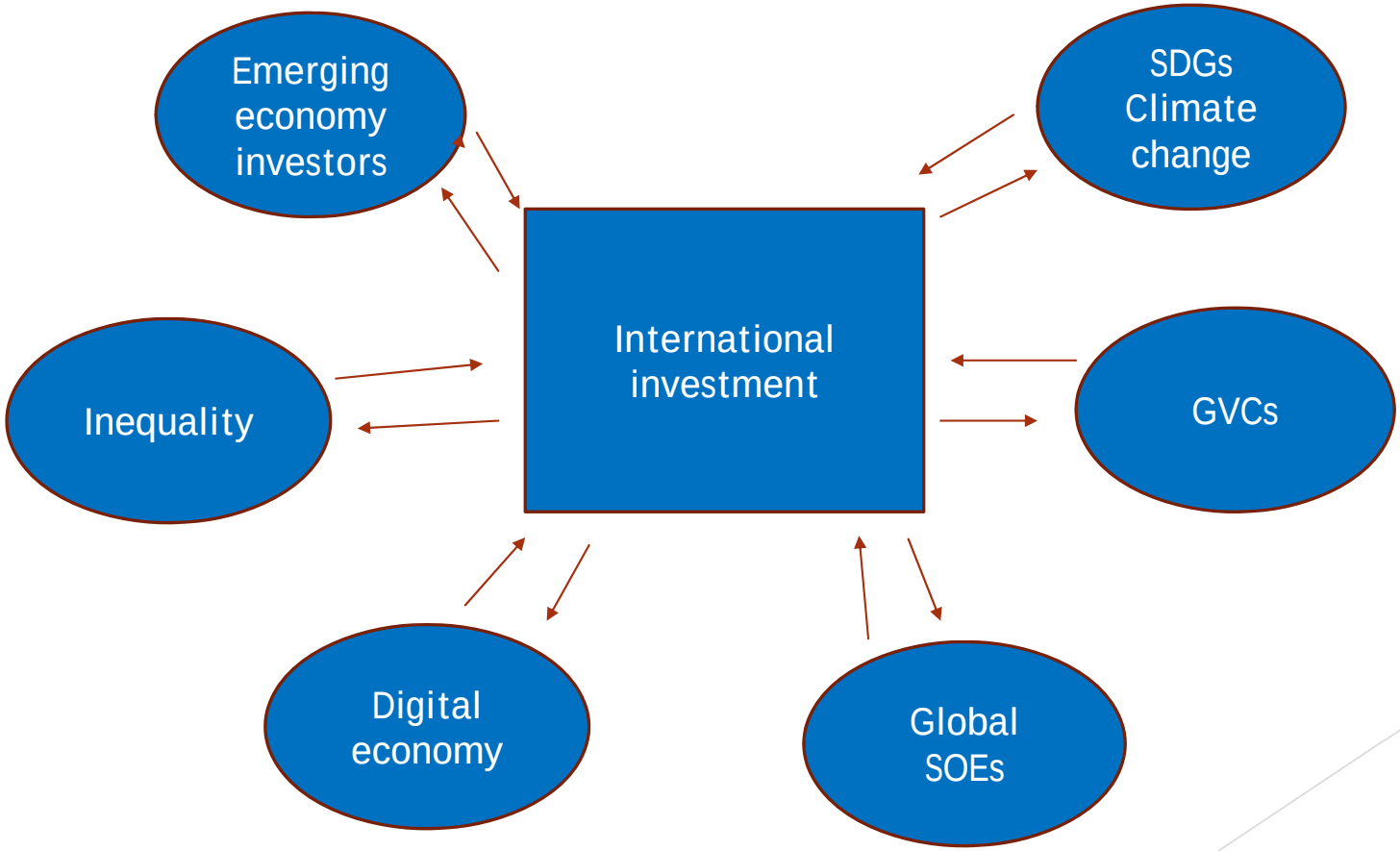
Ana Novik as Head of the Investment Division of the Directorate for Financial and Enterprise Affairs, supports the Director in DAF's contribution to the strategic orientations of the Secretary General, with a focus on improving the international investment climate, promoting good domestic policies to support investment and Responsible Business Conduct. She establishes strategies for the OECD to secure a leadership role in the international investment debate and to advance a more structured economic analysis of investment flows and impact. She also contributes to OECD-wide initiatives, including horizontal work streams on competitive neutrality, global value chains and OECD contributions to the G20. Prior to joining the OECD, Ms. Novik was the Ambassador Director of Multilateral Economic Affairs in the Economics Directorate of Chile's Ministry of Foreign Affairs and Trade from 2011 to 2014.

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

Ana Novik

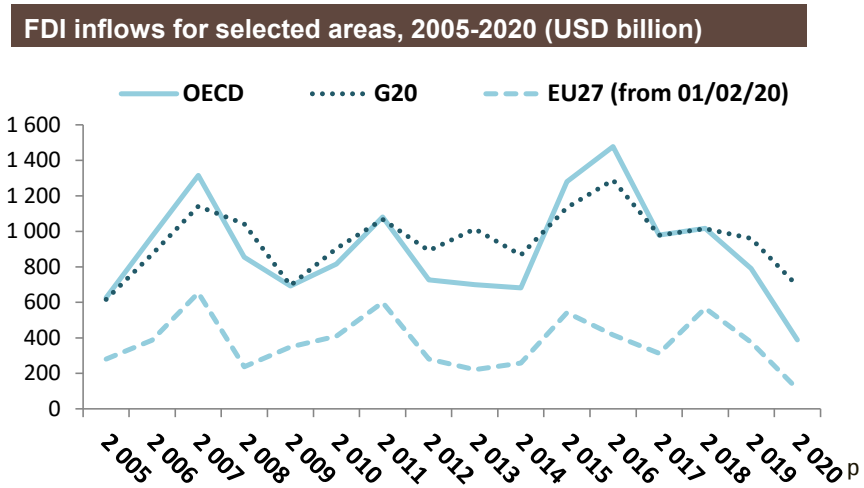
OECD

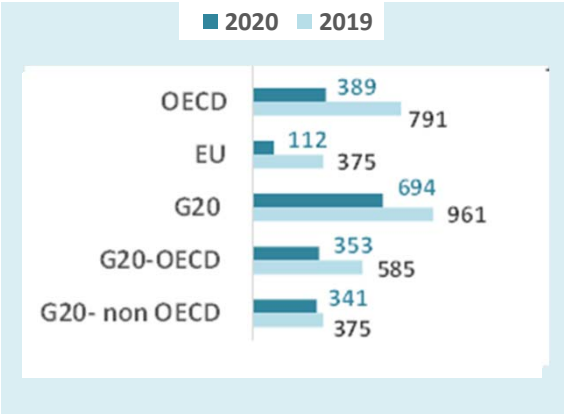
Global Challenges pre COVID-19



OECD
BETTER POLICIES FOR BETTER LIVES

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





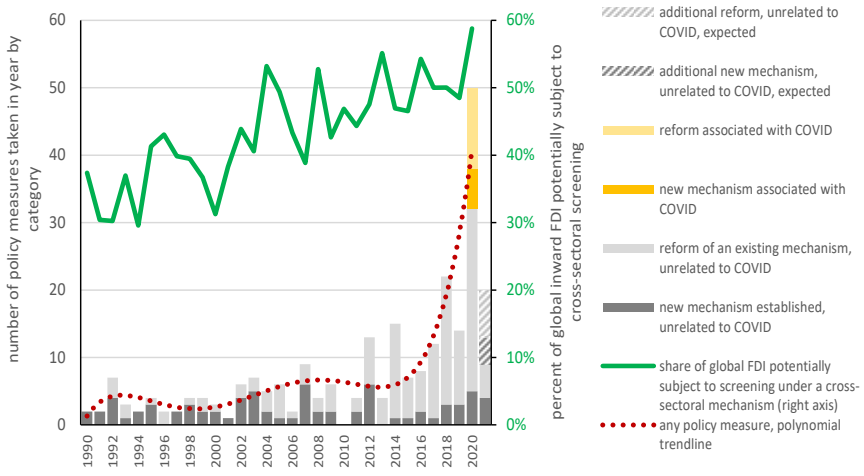
FDI inflows declined continuously in all quarters of 2020 except in the third quarter where they increased by 11%, before dropping again by 42% in the fourth quarter.

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

OECD
BETTER POLICIES FOR BETTER LIVES

Investment policy measures

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

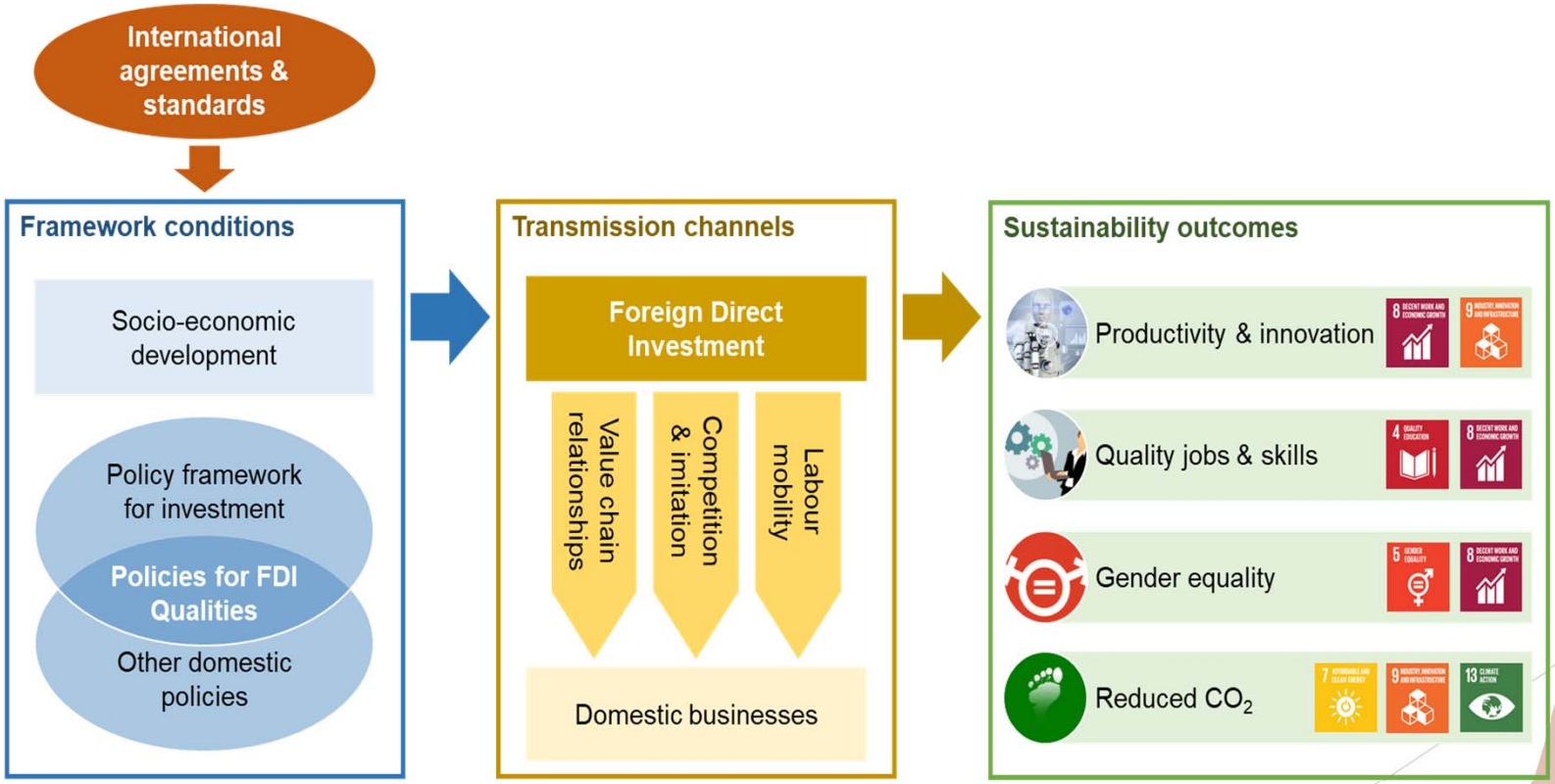


Note: Data cover the 62 economies that participate in the OECD-hosted Freedom of Investment Roundtable and reflect information as of 2 May 2021. A new mechanism or reform is "associated with COVID-19" if the government has explicitly justified its introduction, at least in part, with the pandemic or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

- Many economies are facilitating and liberalizing foreign investment, but policy making for investment screening continues an upward dynamic. Result: The share of global FDI inflows potentially subject to screening continues to grow
- Private investment, and in particular international investment, should be part of a sustainable recovery beyond 2021

OECD
BETTER POLICIES FOR BETTER LIVES

Investment for sustainable development: The FDI Qualities Policy Toolkit



OECD
BETTER POLICIES FOR BETTER LIVES

Investment treaty policy

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

- **What is the future of investment treaties in this new environment? (Track I)**
  - ⇒ Global challenges and COVID => new social demands on investment treaties
  - ⇒ Scope for potential areas to address in treaties has broadened
    - ⇒ Protection, liberalization, facilitation, right to regulate, sustainable development, etc …
  - ⇒ Investment treaties are one of the main frameworks that regulate international investment

- **What to do with existing agreements? (Track II)**
  - ⇒ Evolution of BITs => many economies are reviewing treaty designs in light of experiences (disputes)
  - ⇒ New designs => greater precision and clarity => limited multilateral coordinated effort
  - ⇒ Some specific provisions are more relevant than others
  - ⇒ Need to address perceived shortcomings in treaties concluded in the past

OECD
BETTER POLICIES FOR BETTER LIVES

Track I: What is the future of investment treaties?

….. Some issues to consider

⇒ Contributing to sustainable development and responsible business conduct, including advancing respect for human rights;

⇒ Liberalization of investment, market access and investment facilitation;

⇒ Fair competition issues in areas such as government support and digital transformation;

⇒ Investment protection and transition policies; and

⇒ Implementation and enforcement beyond investor-state dispute settlement.

Two broader issues that deserve special attention:

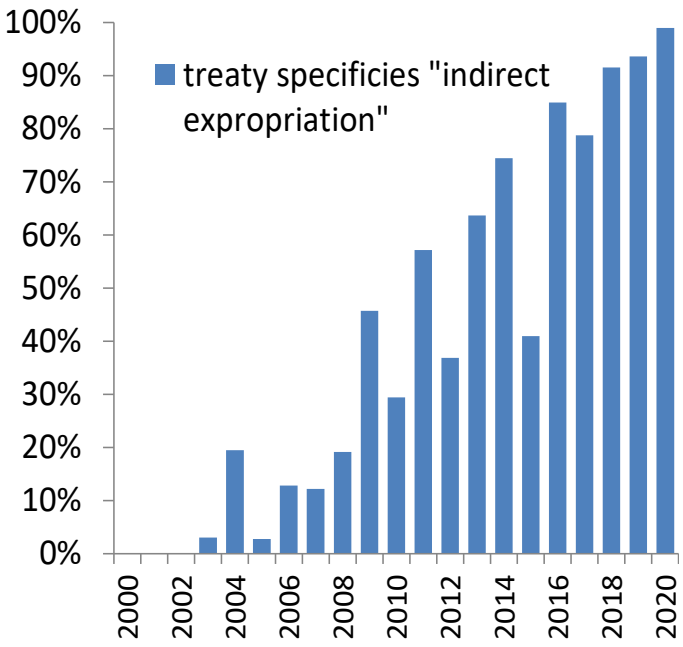
i) investment treaty policy and policies on climate change; and

ii) investment treaty policy and FDI qualities.

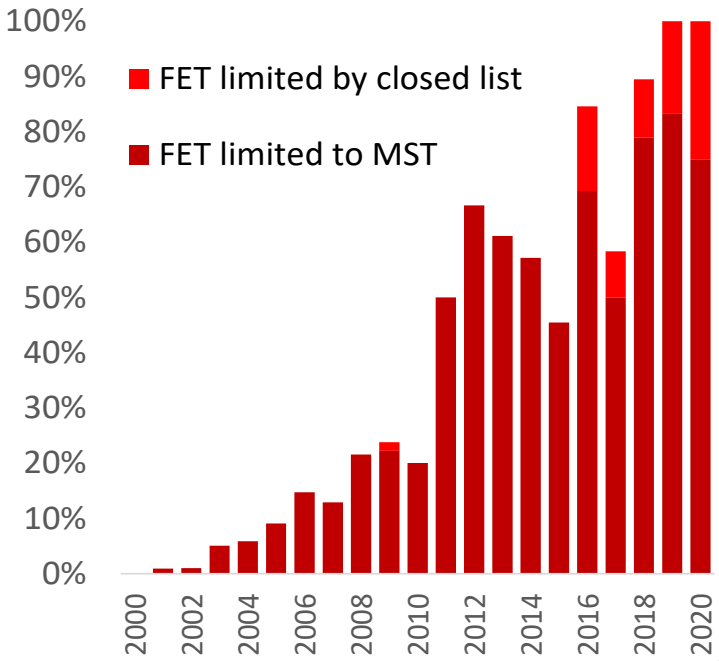
OECD
BETTER POLICIES FOR BETTER LIVES

Track II: What to do with existing agreements?

Emergence and rise of new designs 2000 – 2020



indirect expropriation

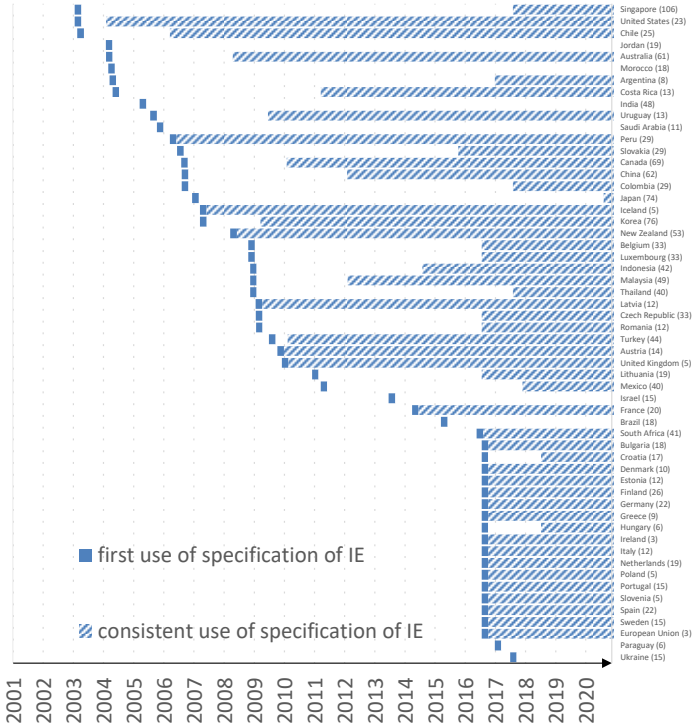


fair and equitable treatment

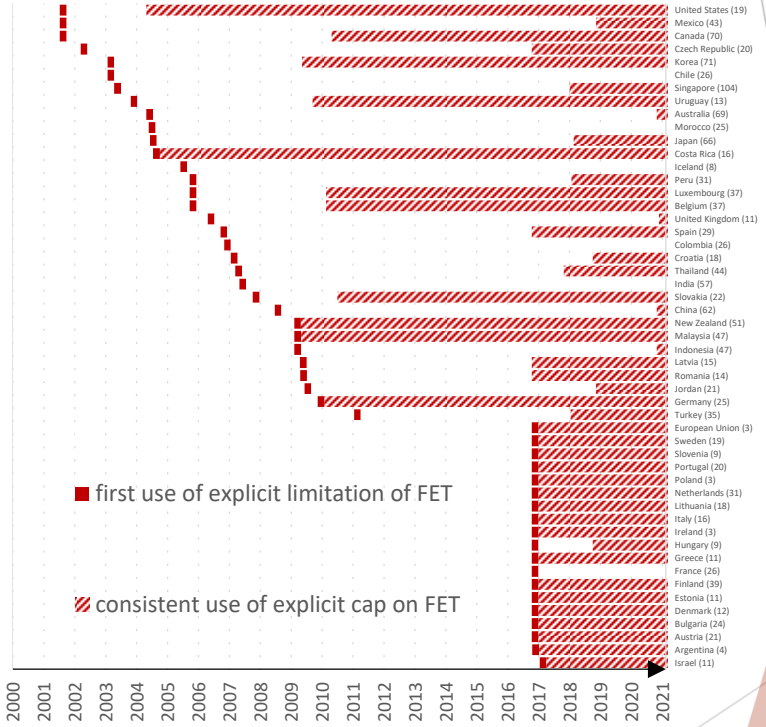
OECD
BETTER POLICIES FOR BETTER LIVES

Track II: What to do with existing agreements?

Consistent use of new designs spreads steadily



indirect expropriation

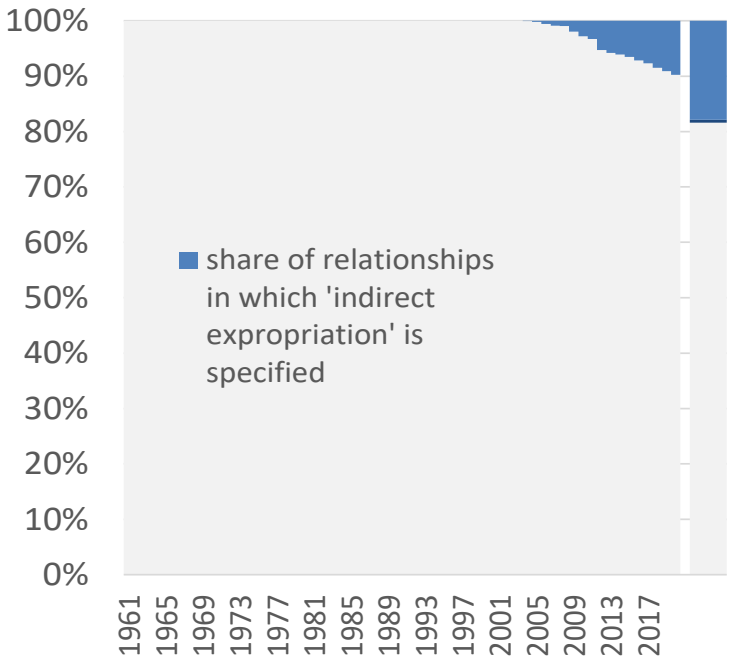


fair and equitable treatment

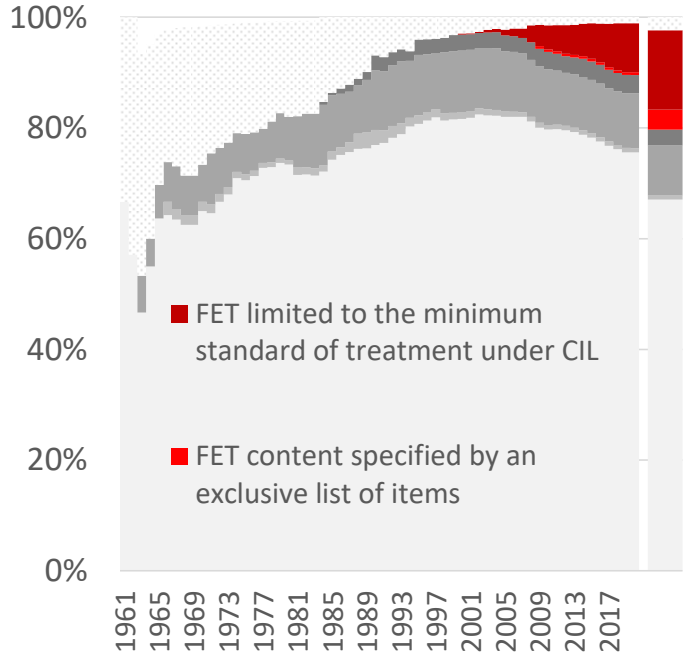
OECD
BETTER POLICIES FOR BETTER LIVES

Track II: What to do with existing agreements?

Despite this, the stock of old designs remains large



indirect expropriation



fair and equitable treatment

OECD
BETTER POLICIES FOR BETTER LIVES

Join OECD work and platforms

- Investment treaty policy: https://oe.cd/IIApolicy
- FDI Qualities Initiative: https://www.oecd.org/investment/business-investment-sdgs.htm
- Acquisition- and ownership-related policies to safeguard essential security interests (2020): https://oe.cd/natsec2020. Further material on investment policies related to national security is available at: https://oe.cd/natsec

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

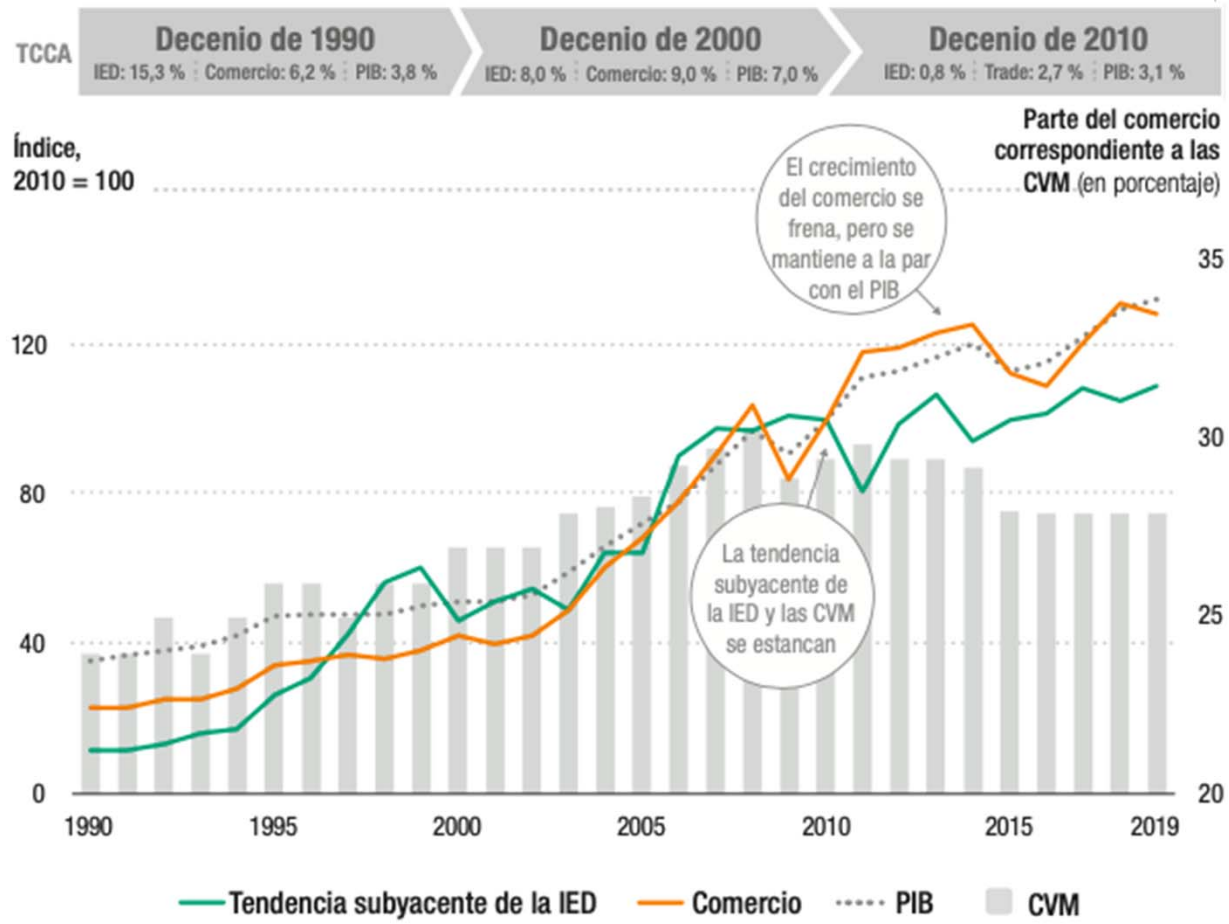
Mr Ricardo De Urioste, International consultant and Arbitrator, Ministry of Foreign Trade, Peru

International counsel, consultant and arbitrator. Diplôme International d'Administration Publique (International Relations) ENA-France, MSc International Political Economy London School of Economics, LLM University of Chicago. Member of the Peruvian Delegation to UNCITRAL Working Group III (ISDS Reform). Former Head of the Secretariat of the Special Commission Representing Peru in International Investment Disputes. Former Lead Negotiator for Peru of the TPP Investment Chapter. Former Member of the Ministry of Foreign Affairs' Advisory Office in the Peru-Chile Maritime Delimitation Case before the International Court of Justice. Former Deputy Consul of Peru in Santiago de Chile.

PERU, COVID-19 AND NEW TRENDS IN IIAS

Ricardo De Urioste

TRENDS FDI, TRADE AND GDP, 1990-2019



Fuente: UNCTAD.

CONCLUDED CASES

CASO		Nº CASO CIADI	NACIONALIDAD ALEGADA	MATERIA	BASE JURÍDICA	CONTINGENCIA (monto solicitado por el inversionista)	MONTO OTORGADO A FAVOR DEL INVERSIONISTA	MONTO OTORGADO A FAVOR DEL ESTADO
1	LIDERCON S.L	ARB/17/9	España	Exclusividad en la inspección técnica de vehículos en Lima	Convenio	$98'924'249,00	$0.00	$4'006,516.64
2	DPWORLD CALLAO SRL, P&O DOVER (HOLDING) LIMITED, AND THE PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY	ARB/11/21	Reino Unido	Exclusión de grupo DP World para la licitación de la concesión del Muelle Norte	Contrato/Convenio	$112,500,000.00	$0.00	$0.00
3	EXETECO INTERNATIONAL COMPANY SL	Reglas CNUDMI	España	Concesión de un establecimiento peninteciario en la Región Lima	Convenio	$1,447,571.00	$0.00	$0.00
4	APM TERMINALS CALLAO S.A	ARB/16/33	Holanda	Recepción de obras en el puerto	Contrato	No especificado	$0.00	$0.00
5	BEAR CREEK MINING CORPORATION	ARB/14/21	Canadá	Proyecto minero	Convenio	$522,200,000.00	$24,223,775.00	$0.00
6	PERU c. CARAVELI COTARUSE	ARB/13/24	España	Pago de penalidades	Contrato	$0.00	$0.00	$36,750,000.00
7	PLUSPETROL PERU CORPORATION PERUPETRO S.A	ARB/12/28	Varias	Cálculo de regalías por exportación de gas natural	Convenio	No especificado	$0.00	$64,893,603.00
8	ISOLUX CORSAN CONCESIONES S.A.	ARB/12/5	España	Proyecto de línea de transmisión	Convenio	$11,100,000.00	$0.00	$487,705.14
9	RENEE ROSE LEVY Y GREMCITEL	ARB/11/17	Francia	Declaración de tierras como zona histórica protegida	Convenio	$41,000,000,000,00	$0.00	$1,571,858.72

CONCLUDED CASES

10	CARAVELI COTARUSE	ARB/11/9	España	Proyecto de línea de transmisión	Contrato	$26,389,851.00	$0.00	$3,097,691.82
11	THE RENCO GROUP INC	UNCT/13/1	EE.UU	Complejo metalúrgico	Contrato/ Convenio	$800,000,000.00	$0.00	$0.00
12	RENEE ROSE LEVY	ARB/10/17	Francia	Entidad bancaria	Convenio	$6,989,000,000.00	$0.00	$150,000.00
13	CONVIAL CALLAO	ARB/10/2	Argentina	Declaración de caducidad del contrato de concesión	Contrato	$105,438,504.00	$0.00	$2,117,489.27
14	TZA YAP SHUM	ARB/07/6	Bermuda	Recaudación de impuestos	Contrato	$26,480,555.00	$786,306.00	$0.00
	ANULACIÓN		China		Convenio	$0.00	$0.00	$0.00
15	AGUAYTIA ENERGY	ARB/06/13	EE.UU	Incumplimiento de convenio de estabilidad	Contrato	$140,600,000.00	$0.00	$0.00
16	DUKE ENERGY	ARB/03/28	Chile	Acotaciones fiscales	Convenio	$37,500,000.00	$18,440,745.00	$0.00
17	LUCCHETTI	ARB/03/4	Chile	Licencia de funcionamiento de fábrica	Convenio	$150,000,000.00	$0.00	$0.00
18	COMPAGNIE MINIERE INTERNATIONALE OR SA	ARB/98/6	Francia	Proyecto de explotación de oro	Contrato	No especificado	$0.00	$0.00

TZA YAP SHUM v. PERU (2011)

INDIRECT EXPROPRIATION

DUKE v. PERU (2008)

ATTRIBUTION OF RESPONSIBILITY IN CONFLICTING ACTIONS BY DIFFERENT STATE ORGANS/INSTITUTIONS

LEGITIMATE EXPECTATIONS (FET)

BEAR CREEK v. PERU (2017)

LEGALITY OF THE INVESTMENT

CONTRIBUTIVE FAULT BY INVESTOR AND HUMAN RIGHTS

INVESTMENT IN SDGs

- The UNCTAD 2014 World Investment Report signalled that developing economies face an annual deficit of US$ 2,5 billion dollars.
- The existing investment promotion instruments applicable to SDGs are limited in number and follow a poorly systematic approach.

THE PERUVIAN ECONOMY'S COVID-19 MEASURES

- **Economic Support Measures** (Subsidies for Educational Infrastructure, Household Income and Investment in Public Services and Public Projects' Infrastructure)
- **Tax Relief Measures** (suspension/reduction of payments; deferral and rescheduling of tax debts; extension of the Special Early Recovery Regime of the VAT)
- **Public Investment Promotion Measures** (cutting red tape and resuming public works)
- **Private Investment Promotion Measures** (tourism reactivation scheme; cutting red tape;promotion of public procurement from small and micro enterprises)
- **Family Support Measures**

New Substantive Features in Peruvian IIAs

DEFINITION OF INVESTMENT

- Exclusion of specific types of assets - art. 9.1 fn 2, fn3, fn 9, fn 10 CPTPP (public debt, claims to money arising from commercial contracts for the sale of goods and services) art. 10.28 fn 16 and art. 17 FTA PERU-USA
- Requirements of specific characteristics (Salini test) – not in CPTPP
- Legality requirement – not in CPTPP, but there is a declaration regarding the fight against corruption and ilegality in the Brazil-Peru Agreement (art. 2.14)

New Substantive Features in Peruvian IIAs

DEFINITION OF INVESTOR

- Substantial business activities requirement – definition of investor art. 9.1 CPTPP, art. 10.28 FTA PERU-USA
- Denial of Benefits – art. 9.15.1, 9.15.2 CPTPP (both excluding "shell corporations" and circumvention of diplomatic restrictions or embargos) art. 10.12.1 y 10.12.2 FTA PERU-USA
- Denial of Benefits clause used by Peru normally does not include the express reference to the possibility of applying it retrospectively

New Substantive Features in Peruvian IIAs

- **Cap of Customary International Law to Fair & Equitable Treatment** –art. 9.6.2 CPTPP, art. 10.5.2 FTA PERU-USA
- **FET and Legitimate Expectations** – CPTPP art. 9.6.4 (the mere fact of an inconsistency with an investor's expectations does not constitute a breach of FET)
- **Public Policy Considerations for Determining "Like Circumstances" in Non-Discrimination (MFN and NT) –** art.9.4 fn.14 (MFN and NT) CPTPP
- **NT Reservations (government procurement; subsidies; measures that derogate from the NT obligation in conformity with the TRIPs Agreement) –** art. 9.12.6(a) (government procurement) y art. 9.12.6(b) (subsidies) CPTPP; arts. 10.13.5(a) and 10.13.5(b) FTA PERU-USA

New Substantive Features in Peruvian IIAs

- **Expropriation Annex –** Annex 9-B CPTPP (criteria include economic impact; reasonable investment-backed expectations; character of the government action), Annex 10-B FTA PERU-USA
- **Clarifications regarding indirect expropriation** - Annex 9-B CPTPP (non-discriminatory regulatory actions by a Party that are designed and aplied to achieve legitimate public welfare objectives) y Annex 10-B FTA PERU-USA; art. 9.8.5 CPTPP (Exception for the issuance of compulsory licenses in accordance with the TRIPs Agreement) and art.10.7.5 FTA PERU-USA

New Substantive Features in Peruvian IIAs

- **Limitations on standing for reflective loss (control) –** art.9.19.1(b) CPTPP y 10.16.1(b) FTAL PERU-USA
- **Safeguard Transfers –** art. 29.3 CPTPP
- **Tax Exception -** art. 29.4 CPTPP, art. 22.3 FTA PERU-USA
- **Declaration on Corporate Social Responsibility** (art. 2.13 Brazil-Peru Agreement; art. 8.17 of Peru-Australia Agreement, CPTPP art. 9.17)
- **Possibility of Interpretative Notes –** CPTPP art. 27.2.2 (f), FTA PERU-USA **art.**20.1.3(c)
- **Non-Disputing Party Submissions on Treaty Interpretation –** art. 9.23.2 CPTPP; art.10.20.2 FTA PERU-USA

New Procedural Features

- **Dismissal of Frivolous Claims** – CPTPP art. 9.23.4; FTA PERU-USA art.10.20.4
- **Expedited consideration of preliminary objections** – CPTPP 9.23.5; FTA PERU-USA art.10.20.5
- **Limitation periods for bringing claims pursuant to treaty** – CPTPP art. 9.21.1; FTA PERU-USA art.10.18.1
- **Limitations on Treaty Shopping (Denial of Benefits)** – CPTPP art. 9.15; FTA PERU-USA art.10.12

New Procedural Features

- **Waiver Provisions** (waiver of claims by parent/subsidiary under a different treaty once claims are submitted- art. 9.21 CPTPP; waiver of ability to continue pending claims or initiate new claims once claims are submitted to arbitration i.e. "no U-turn" – CPTPP art. 9.21.2(b)); FTAL PERU-USA art.10.18.1 and art.10.18.2(b)
- **Ethical Codes for Arbitrators** (Peru-Australia FTA art. 8.23.5)
- **Other third-party submissions** – CPTPP art. 9.23.3 (*amicus curiae);* FTA PERU-USA art.10.20.3
- **Transparency** – CPTPP art. 9.24, FTA PERU-USA art.10.21

Ms Collins Rex, Director- GTPA

Collins Rex is an independent consultant who has owned and operated her own very successful businesses on two continents. In her professional capacity she assists clients across a range of international marketing, product development and communications areas, helping them get maximum return on their marketing investment.

Collins is passionate about seeing small business do better business and do it on the global stage!

To this end, she's been responsible for the development and delivery of training courses across a range of topics, including export readiness, pitching/presentation & Free Trade Agreements workshops. Her international trade knowledge and skills have been honed over many years, as evidenced by her managing and delivering a number of major trade-related projects.

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Session 4: Analysis of a possible role played by BITs and investment-related provisions in FTAs/EPAs under the COVID crisis toward building resilient supply chain.

Professor Urata Shujiro, Professor Emeritus, Waseda University, Japan

Senior Research Advisor to the President of ERIA.

Shujiro Urata received his PhD in Economics from Standford University in 1978.

Before joining ERIA as a senior research advisor, he was affiliated with Waseda University wherein he served as professor since 1988.

His focus of research is in international and development economics.

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

COVID-19 Pandemic, Foreign Direct Investment, and Bilateral Investment Treaties (BITs)

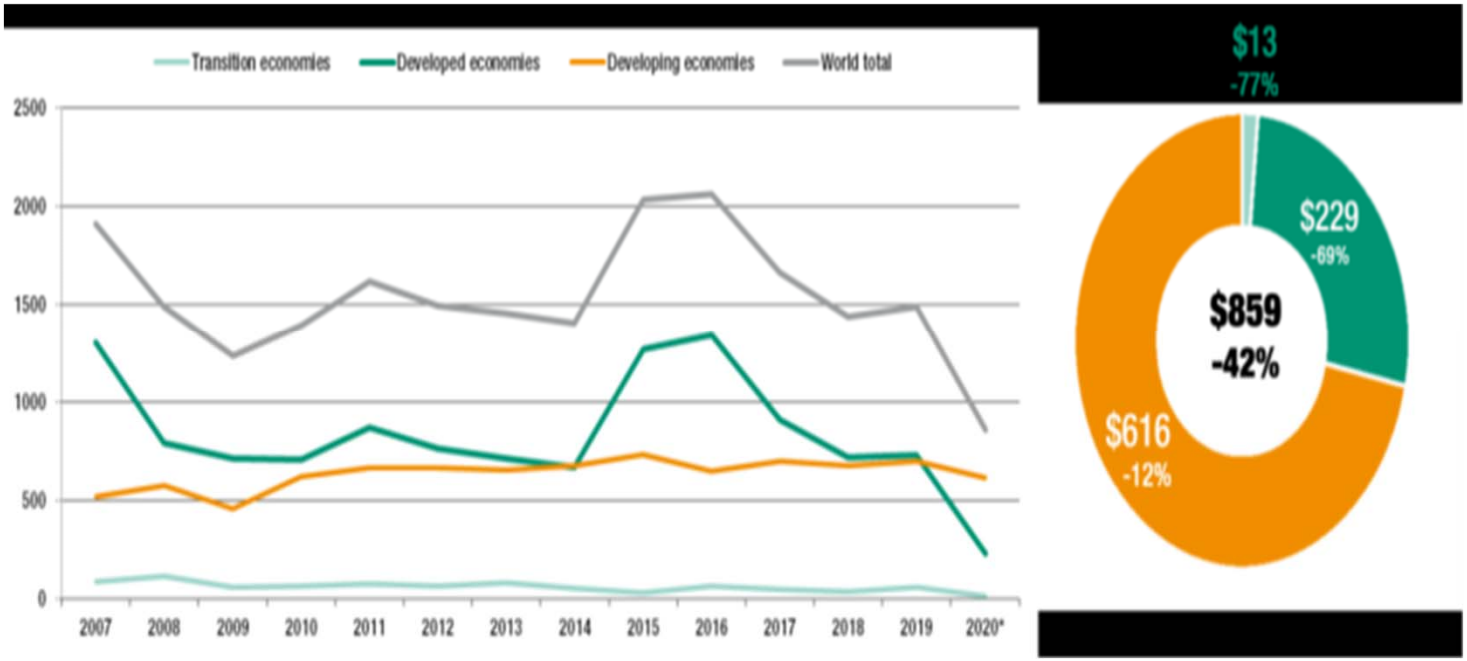
14 May 2021

Shujiro URATA
Waseda University

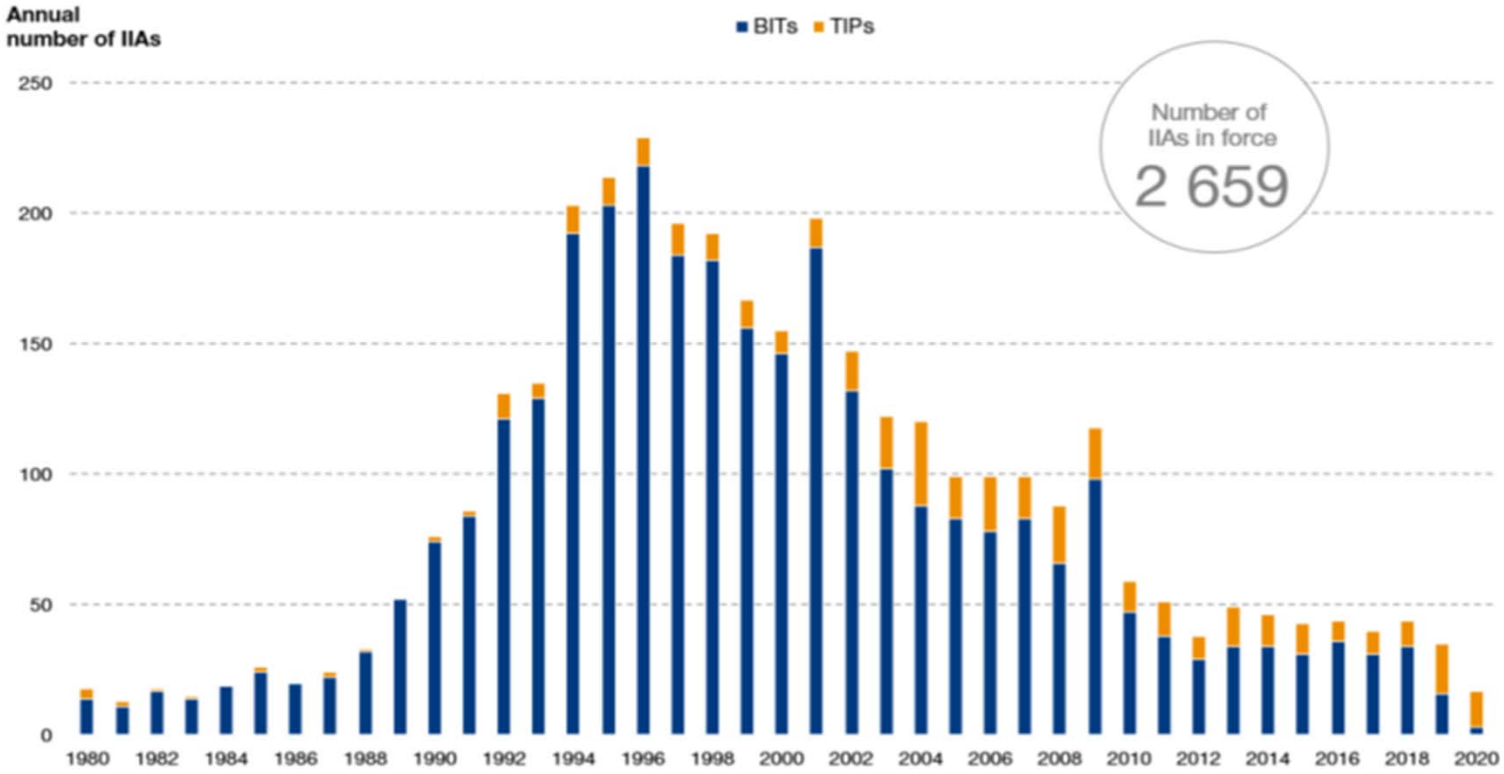
1. Background

- COVID-19 Pandemic has led to a decline in foreign direct investment (FDI)
- Developing economies are eager to attract FDI
- Bilateral investment treaties (BITs) and free trade agreements (FTAs) are expected to contribute to attracting FDI
- Interest in BITs has been declining because the cost of commitment in BITs in terms of restricting policy space as well as dispute settlement has risen
- Outbreak of COVID-19 pandemic is likely to increase arbitration cases because many governments have adopted emergency measures, which may result in the breach of agreements

FDI inflows: global and by groups of economies (Billions of US dollars)



Trends in IIAs: BITs and TIPs (treaties with investment provisions)



2. The Objectives of my paper

- Examine the changes in investment policy of APEC economies after the outbreak of the COVID-19 pandemic
- Examine the arbitration cases during the COVID-19 pandemic
- Survey the literature on the impact of BITs on FDI inflows

3. Major findings

- Both FDI promotion/facilitation and restriction policies have been implemented
- Limited number of arbitration cases so far: 9 cases involving APEC economies have been registered at the International Centre for Settlement of Investment Disputes (ICSID), possibility of increasing the cases
- Mixed results on the impacts of BITs on FDI inflows
- BITs by themselves may not increase FDI inflows
- BITs increase FDI inflows when BITs are implemented in an economy which provides FDI friendly environment/fundamental requirements for achieving economic growth such as well-functioning infrastructure, good governance, political/social/economic stability, etc

The Number of Investment Policy Measures Adopted by APEC Economies During March - December 2020

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

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

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

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

4. Literature Survey

- Findings
- (1) The impacts of BITs on FDI inflows are mixed. BITs are found to increase FDI inflows in some cases but such effects are not found in some cases.
- (2) Even in the cases where the positive impacts are found, the impacts are found to be very small.
- (3) BITs tend to be effective in increasing FDI inflows when certain conditions are satisfied. BITs with strong dispute settlement provisions are shown to promote FDI. BITs with developing economies with high institutional quality and political stability are likely to successfully attract FDI.

Implications

- BITs cannot substitute unfavorable business environment reflected in a lack of reliability of the host government and unstable political environment.

Policy implications

- (1) Developing economies keen on attracting FDI need to improve the quality of the government and business environment before signing BITs.
- (2) The government needs to comply with the commitments agreed in BITs, in order to continue attracting FDI.
- (3) Because the effective BITs tie the hands of the government in formulating and implementing policies, the government has to make serious effort in formulating strategies toward the discussion and negotiation of the BITs.

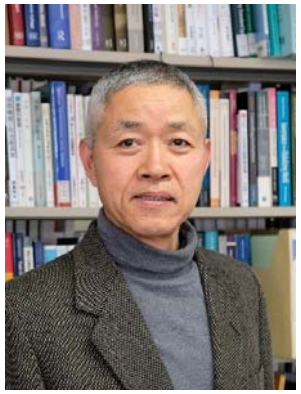
5. Concluding remarks

- COVID-19 has given rise to difficult challenges for both governments and investors, whose interests are in conflict. Governments are eager to protect people's health and lives, while investors are keen on protecting their assets.
- Because the COVID-19 pandemic is a very special case (once in a century crisis), government emergency measures should be justified.

5. Concluding remarks

- However, governments should ensure that emergency measures are adopted in a non-discriminatory manner and in good faith and clarify their precise intention as well as their time frames.
- On BITs, considering that BITs are effective in increasing FDI when BITs are applied to developing economies, where fundamental conditions such as good business environment reflected in open and fair market, well-functioning infrastructure, and availability of capable human resources are provided, it is advisable to include an economic cooperation chapter, which would contribute to improve business environment of developing economies, in BITs.

Professor Nakagawa Junji, Professor at the Faculty of Liberal Arts at Chuo Gakuin University, Japan



Junji Nakagawa is a Professor at the Faculty of Liberal Arts at Chuo Gakuin University. He is Of Counsel at Anderson, Mori & Tomotsune. He received his B.A., M.A. and Ph.D. from the University of Tokyo. Before assuming the current position, he was a professor of international economic law at the Institute of Social Science at the University of Tokyo. He is a Chairperson of the Asian WTO Research Network and the Asia International Economic Law Network. His research covers a wide range of public international law regulating transnational economic transactions. His publications include: A Post-WTO International Legal Order, Springer, 2020, TPP Commentary, Japan Tariff Association, 2019, International Economic Law, 3rd edition, Yuhikaku, 2019, Asian Perspectives on International Investment Law, Routledge, 2019, and Nationalization, Natural Resource and International Investment Law, Routledge, 2017.

Investment policy responses to COVID-19

- Global spread of COVID-19 has impacted investment policies of APEC economies.
- Some APEC economies promoted/facilitated foreign investment in healthcare and medical equipment sectors.
- Some APEC economies tightened screening foreign investment in these sectors to maintain domestic manufacturing bases of medicines and medical equipment.
- What are their implications to the international investment agreements (IIAs)?

Some promoted/facilitated foreign investment

- **Thailand (March 2020)**

Accommodation of visa extension requests from foreign citizens whose travel plans have been disrupted by COVID-19.

- **China (March 2020)**

It obligated domestic economic development zones to take swift actions to make sure Chinese and foreign companies can get equal access to the government's preferential policies.

Some tightened screening of foreign investments

- **Canada (April 2020)**

It introduced enhanced scrutiny of foreign investment that are related to public health, or are involved in the supply of critical goods/services to Canadian citizens.

- **Japan （July 2020）**

It applied pre-screening procedure to foreign investments in manufacturing
(i) medicines for infectious diseases, and

(ii) advanced medical device such as artificial respirator, heart pacer, etc.

Some took general restrictive measures

- **Australia (March 2020)**

It lowered the general monetary threshold of investment review procedure to zero so as to secure the economic viability of critical sectors.

- While some measures were temporary (e.g., Australia and Canada), others were not.

Restrictive measures may infringe on the provisions of IIAs

Provision	Explanation	Recommendation
National treatment and MFN	State measures to mitigate the economic impact of COVID-19 that seem to favor certain investors could potentially violate NT/MFN	Exemption of certain sectors/measures from the NT/MFN in order to meet public policy needs.
Fair and equitable treatment	Breach of FET could be invoked for restrictions on the activities of foreign investors.	Clarify that the FET clause does not preclude states from adopting good-faith measures to pursue legitimate public policy objectives.
Expropriation	Measures may involve the requisitioning of facilities and medical equipment, which could be regarded as indirect expropriation.	Set out criteria for state acts that should not be regarded as indirect expropriation, e.g., legitimate regulation adopted for the public interest.

Provision	Explanation	Recommendation
Force majeure	Some IIAs provide for compensation for losses incurred under *force majeure* situation. This could be employed for measures taken in response to COVID-19.	Limit host state's financial liability for events outside of state's control, such as those relating to COVID-19.
Public policy exception	Recent IIAs increasingly reaffirm states' right to regulate by introducing general exceptions for public policy, including public health.	A general exception clause. Conditions should be set out for the application the clause, e.g., non-discrimination, prohibition of arbitrary application.
Security exception	Some IIAs include a security exception to allow states to deviate from treaty obligation.	A security exception clause, which explicitly stipulates that public health crisis falls under its scope.

How can we strike a balance between public health and interests of foreign investors?

- IIAs, notably early IIAs, may not provide sufficient legal basis for host states (economies) to take restrictive measures to tackle COVID-19. Some of them could be challenged by foreign investors through ISDS as violation of the substantive rules of IIAs, such as NT/MFN or FET.
- Economies may wish to justify them by either (i) exempting them from the application of the substantive rules, or (ii) setting out general exceptions/national security exception.
- The challenge is to strike a balance between economies' right to take measures for public health and interests of foreign investors.

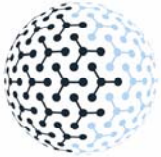
- One way to strike the balance would be to limit the exercise of the right of the host state (economy) to pursue legitimate public policy objectives by requiring that such measures are not applied in an arbitrary or discriminatory manner, or they shall not be disguised restrictions on investors and investments.
- Another way to strike the balance would be to adopt such measures only temporarily. It should be noted some measures of the APEC economies were temporary measures and will be lifted when the crisis situation caused by the pandemic is over.

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Professor Kawashima Fujio, Professor of Law, Kobe University, Japan

Professor Kawashima has been teaching competition law and international economic law at several universities, researching the WTO dispute settlement mechanism, development of competition laws in Asian economies, especially Antimonopoly Law of China, as well as trade and competition policy. During the time, he has also contributed to the capacity building of competition law enforcing agencies and trade-related ministries of many developing economies as lecturers of the Japan International Cooperation Agency (JICA), providing training courses on competition law enforcement and implementation of the WTO agreements. He was a Visiting Scholar at Georgetown Law Center (2000) and KoGuan Law School, Shanghai Jiao Tong University (2016-2017). He is Member of the E15 Expert Group on Competition Policy and the Trade System organized by the World Economic Forum and ICTSD; Former Member of the Study Group on Governmental Regulations and Competition Policy organized by Japan Fair Trade Commission; and Former member of the Study Group on the GATT/WTO Dispute Settlement Reports organized by Japan's METI.



GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Post COVID-19 Issues of Investment Policy: Focusing on Security Exceptions & Facilitation of Relocation

Fujio Kawashima

Professor of Law, Kobe University, Japan

Introduction

(1) "**Resilient supply chains**" as a key word under the COVID-19 pandemic: Not only for the supply of essential goods such as masks, medicines & medical devices, but also for that of parts & components of important final products such as automobiles and computers.

(2) Though activated well before the current pandemic, also observed increase of **security-related measures,** *e.g.*, **restricting inward foreign direct investment.** See OECD (May 2020)

Introduction

(3) On “resilient supply chain”, focusing on **the need for relocation of manufacturing facilities, more particularly on their withdrawal or divestment from the recipient economies**. To review the existing provisions in BITs/Investment Chapters of FTAs/EPAs & suggest policy recommendations to both recipient economies & investors.

(4) On security-related restrictions, **comparing the text of security exceptions in BITs/Investment Chapters with each other** and suggesting how to draft security exceptions in FTAAP investment chapter & policy recommendations to actors including APEC.

Table of Contents

1. Relocation-related provisions in BITs & Investment Chapters of FTAs/EPAs

1.1 Existing Provisions

Possibility of smooth relocation including sales or liquidation of investment as an important factor for decision to invest into the target economy. As such, BITs provide for at least the following two obligations concerning relocation:

1) National Treatment

2) Transfers of Funds

1. Relocation-related provisions in BITs & Investment Chapters of FTAs/EPAs

1.1 Existing Provisions (cont.)

1) National Treatment

Art. 10.3 National Treatment, RCEP (2020)

"1. Each Party shall accord to investors of another Party, and to covered investments, treatment no less favourable than that it accords, in like circumstances, to its own investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and **sale or other disposition of investments** in its territory."

Similar: Art. 9.5, CPTPP (2018); Art. 5, ASEAN CIA (2009)

1. Relocation-related provisions in BITs & Investment Chapters of FTAs/EPAs

1.1 Existing Provisions 2) Transfers (cont.)

Art. 10.9 Transfers, RCEP (2020)

"1. Each Party shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) (b) omitted

(c) **proceeds from the sale or liquidation** of all or any part of the covered investment;"

Proceeds from liquidation covered since the first generation BIT btw. Germany-Pakistan (1959)

Similar: Art. 9.9, CPTPP (2018); Art. 13, ASEAN CIA (2009)

1. Relocation-related provisions in BITs & Investment Chapters of FTAs/EPAs

1.1 Existing Provisions 2) Transfers (cont.)

Art. 10.9 Transfers, RCEP (2020)

"3. Notwithstanding paragraphs 1 and 2, a Party may prevent or delay a transfer **through the equitable, non-discriminatory, and good faith application** of its laws and regulations relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors **including employees**;

(b) to (e) omitted

(f) **taxation**;

(g) omitted

(h) **severance entitlement of employees**;

Similar: Art. 14.9, AUS-INA FTA (2019); Art. 13.3, ASEAN CIA (2009) but not mentioning employees in (a). Cf. Art. 6.3, India Model BIT (2015)

Cf. Not mentioning taxation and severance entitlement of employees in Art. 9.9, CPTPP (2018) and Art. 7.4, U.S. Model BIT (2012)

1. Relocation-related provisions in BITs & Investment Chapters of FTAs/EPAs

1.2 Analysis and Suggestions 1) Analysis

- NT constantly covering "**sale or other disposition of investments**" and Transfers also constantly covering "**proceeds from the sale or liquidation**" while different approaches in the Exceptions for Transfers: **covering or not covering taxation and rights of employees**
- **An analysis of drafting history as well as phylogenetic tree of BITs** suggests the approach covering taxation and rights of employees was **proposed by developing economies such as ASEAN and India**, which indicates they are **very concerned about outflow of investment, and loss of tax base and unemployment as a result.**

1. Relocation-related provisions in BITs & Investment Chapters of FTAs/EPAs

1.2 Analysis and Suggestions 1) Analysis (cont.)

- Protections of tax base and employees are **very legitimate policy objectives**, particularly for developing economies and it is reasonably expected, **in future drafting of Investment Chapter for FTAAP, an RCEP approach would strongly be proposed**.

Cf. Preamble, APEC Non-binding Investment Principle "Acknowledging the diversity in the level and pace of development of member economies"

- However, it should be also noted **exception clauses for Transfers clearly provide** "a Party may prevent or delay a transfer **through the equitable, non-discriminatory, and good faith application** of its laws and regulations." Furthermore, **the national treatment clause also applies** to laws and regulations relating to: bankruptcy and protection of laborers. Therefore, **discriminatory application of those laws and regulations is prohibited also at the time of sale or liquidation of FDI.**
  Cf. taxation exceptions

1. Relocation-related provisions in BITs & Investment Chapters of FTAs/EPAs

1.2 Analysis and Suggestions 2) Suggestions (cont.)

- So far, transfer clause rarely disputed except for in cases concerning Argentina Financial Crisis. However, surging needs for relocation on the side of investors may cause increase of disputes concerning transfer clauses.
- **Suggestions for recipient economies**: **Education about risk of BITs violation** for not only domestic level officials but also sub-domestic level officials and **excessive interference into outflow of investments in this decade may disincentivize inflow of investments in the next decades**.
- Suggestions for investors: Note **BITs can be used also at the time of withdrawal** of investments and **communication necessary btw. Investment & divestment lawyers and investment** *arbitration* **lawyers** if too much specialized.

2. Security Exceptions in BITs & Investment Chapters of FTAs/EPAs

2.1 Existing Provisions

Art. 10.15: Security Exceptions, RCEP (2020)

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

(a) require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

(b) preclude a Party from applying measures that **it considers necessary for**:

(i) the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security; or

(ii) **the protection of its own essential security interests**."

Similar: Art. 29.2, CPTPP (2018); Art. 18, U.S. Model BIT (2012)

2. Security Exceptions in BITs & Investment Chapters of FTAs/EPAs

2.1 Existing Provisions (cont.)

Art. 18: Security Exceptions, ASEAN Comprehensive Investment Agrmnt (2009)

"Nothing in this Agreement shall be construed:

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

(b) to prevent any Member State from taking any action which it considers necessary for the protection of its essential security interests, **including but not limited to**:

(i) action relating to fissionable and fusionable materials or the materials from which they derived;

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

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

(iv) action taken so as to protect critical public infrastructure, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructure; or

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

Similar **Art. 33: Security Exceptions, India Model BIT (2015)** followed by India-Kyrgyzstan (2019) but **non-justiciable and not open to any arbitral tribunal**. *See* Annex 1.

2. Security Exceptions in BITs & Investment Chapters of FTAs/EPAs

2.1 Existing Provisions (cont.)

Art. 18: Security Exceptions, Japan-Korea-China Investment Agrmt (2012)

"1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 12, each Contracting Party may take any measure:

(a) which it considers necessary for the protection of its essential security interests;

(i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or

(ii) **relating to the implementation of domestic policies or international agreements respecting the non-proliferation of weapons**;

(b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 12, that **Contracting Party shall not use such measure as a means of avoiding its obligations**."

2. Security Exceptions in BITs & Investment Chapters of FTAs/EPAs

2.1 Existing Provisions (cont.)

Art. 10: Security Exceptions, China-EU CAI (2020)

"Nothing in this Agreement shall be construed:

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

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

(i) connected to the production of or traffic in arms, ammunition and implements of war and to such production, traffic and transactions in other goods and materials, **services and technology, and to economic activities**, carried out directly or indirectly for the purpose of supplying a military establishment;

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

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

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

2. Security Exceptions in BITs & Investment Chapters of FTAs/EPAs

2.1 Existing Provisions (cont.)

Art. XXI: Security Exceptions, GATT (1947, 1994)

"Nothing in this Agreement shall be construed

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

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

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

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

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

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

Same: Art. 73, TRIPS (1994, as amended 2017)

2. Security Exceptions in BITs & Investment Chapters of FTAs/EPAs

2.1 Existing Provisions (cont.)

Art. XIV *bis*: Security Exceptions, GATS (1994)

"1. Nothing in this Agreement shall be construed:

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

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

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

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

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

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

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

2. Security Exceptions in BITs & Investment Chapters of FTAs/EPAs

2.2 Analysis and Suggestions 2) Suggestions (cont.)

- At issue is **how to strike a delicate balance** btw. **ensuring each economy's sovereignty to determine security policy** and **avoiding the abuse of security exceptions**.
- Suggestions for drafters: **Drafting like self-judging provisions undesirable** and **exhaustive list desirable for avoidance of abuse** while **drafting lists which can cover all possible scenarios almost impossible.** Even if drafting like self-judging and open-ended provisions, **better to add anti-abuse clause** like JKCIA and **impose notification obligation** like GATS and India Model BIT.

Cf. Transparency, APEC Non-binding Investment Principles

2. Security Exceptions in BITs & Investment Chapters of FTAs/EPAs

2.2 Analysis and Suggestions 2) Suggestions (cont.)

- Suggestions for economies restricting investments: Even under self-judging security exceptions, better to **voluntarily apply less restrictive alternative (LRA) measures**. *E.g.*, Not outright prohibition but approval with conditions, with which compliance is monitored by external auditors. *See* paras. 36-37, OECD (May 2020)
- Suggestions for APEC: **Creating a forum to discuss what measures constitute non-abusive resort** of security exceptions as well as **exchange best practices of the above conditional approvals. Non-litigation & non-confrontational approach desirable.**

Mr Sebastian Miroudot, Senior Trade Policy Analyst, Trade in Services Division, OECD

Sébastien Miroudot is senior trade policy analyst in the Trade in Services Division of the OECD Trade and Agriculture Directorate. He has spent 20 years working on trade and investment issues, including the creation of trade statistics in value-added terms (TiVA), the construction of a services trade restrictiveness index (STRI) and the analysis of the policy implications of global value chains. His research interests include global value chains, multinational production and the role of multinational enterprises in international trade. Before joining the OECD, Mr. Miroudot was researcher at SciencesPo Paris in Groupe d'Economie Mondiale and taught international economics. In 2016-2017, he was visiting professor at the Graduate School of International Studies (GSIS) of Seoul National University. He holds a PhD in international economics from SciencesPo Paris.

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

Sébastien Miroudot

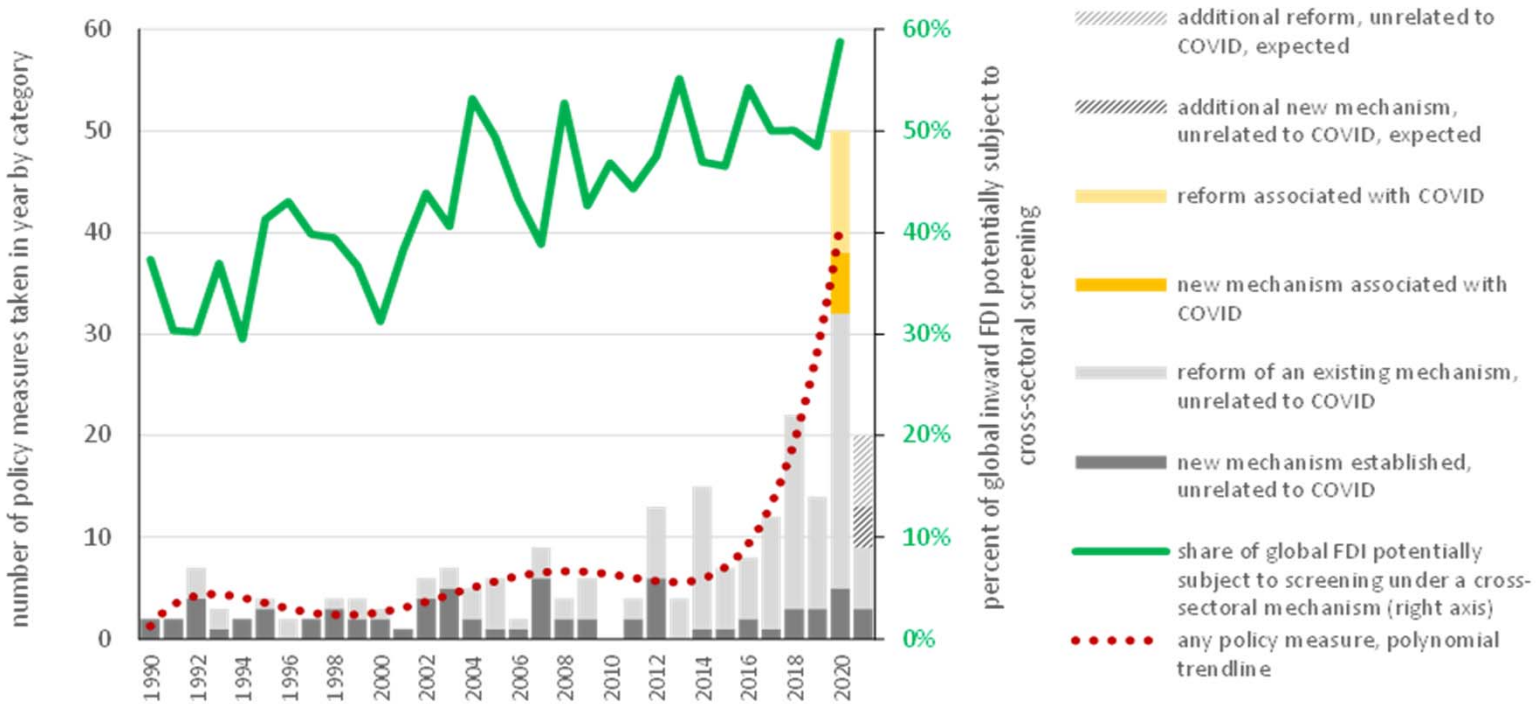
OECD

What are we trying to solve? Let's first understand the issue of resilience of supply chains

- **COVID-19 and the 'Great Lockdown' have disrupted both domestic supply and international supply**
  - Supply chains are mostly domestic (foreign value-added is on average about 20%)
  - When discussing operations of foreign affiliates, resilience is first in the host economy
- **GVCs have been rather resilient, including for the supply of essential goods**
  - Main challenge of COVID-19 has been a shift in demand with consumers at home
  - Essential goods: limited disruptions in food supply chains and pharmaceuticals
    - A major shortage for key medical supplies but due to an unanticipated surge in demand – shortages have been addressed through GVCs (face masks, test kits, etc.)
    - The vaccine challenge is first about creating additional capacity
  - Industries the most affected by COVID-19 are service industries that do not operate in long and complex supply chains
- **Tensions on international freight and border controls have created additional disruptions for companies operating in GVCs**
  - 64% of global trade is operated by MNEs (34% by foreign affiliates)
  - Trade measures impact investment (importance of vertical and complex FDI)
- **Some of the issues discussed as part of the 'resilience' debate are not related to COVID-19**
  - Rising economic nationalism and geopolitical tensions – High impact on investment
  - Most of investment measures before and during COVID-19 are related to national security interests

More OECD analysis on the resilience of GVCs during COVID-19: https://oe.cd/3Ew

Screening of FDI



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

OECD
BETTER POLICIES FOR BETTER LIVES

Improving the resilience of supply chains

- **Diversification of suppliers, 'just-in-case' production and reshoring**
  - A 'naïve' approach not in line with the business literature
    - Risk is not prevented by producing in one place or another (just different types of risks)
    - Redundancy is costly (e.g. several suppliers, high buffer stocks, etc.) and also a source of risk (e.g. quality issues with inputs from multiple suppliers that are not exactly the same)
  - Focus on policy risk… but there are other risks
- **Firms manage risks and become resilient through the development of capabilities**
  - End-to-end visibility in the value chain
  - Agility and flexibility (preventing and quickly reacting when there are disruptions)
  - Collaboration and information sharing (importance of trust and long-term relationships with suppliers)
- **Still a role for governments**
  - … and investment policy, including through FTAs/EPAs and BITs

OECD report to the G7 on building economic resilience: https://oe.cd/3Ex

OECD
BETTER POLICIES FOR BETTER LIVES

Resilient GVCs – role of governments and investment agreements

- **First, do no harm**
  - One of the main risk faced by firms is uncertainty related to policy change. Creating a predictable regulatory and investment policy environment
    - One of the main objective of investment agreements: predictability and transparency
    - Some provisions directly address the policy risk (e.g. protection of investors, standard of treatment, expropriation, subrogation, investor-state dispute settlement, etc.)
  - Economic nationalism and restrictive investment measures can exacerbate shortages or disruptions during a crisis
    - Despite general and national security exceptions, investment agreements can limit the discretion of governments (e.g. prohibition of performance requirements)
- **Facilitating investment during a crisis and in the recovery phase**
  - Role of Investment Promotion Agencies
  - More international co-operation needed and more international disciplines
    - Exploring new types of provisions in FTAs/EPAs and BITs
- **Supporting businesses to improve their risk management strategies**
  - Development of capabilities at the firm-level
    - Investment agreements can promote trust and transparency between domestic and foreign firms across economies and within economies (including directly through their provisions; e.g. free transfer of funds)
    - Provisions on data flows and data privacy
  - Private-public co-operation and platforms
    - Associating investment policymakers and foreign firms to public-private dialogue

The impact of FTAs/EPAs with investment provisions on multinational production

- Signing an agreement including investment provisions is associated with increased output of foreign affiliates up to 36 per cent in the manufacturing sector and 52 per cent in the services sector
- Investment provisions facilitate operations of MNEs in foreign markets, especially activities that require the proximity of producers and consumers (services) and activities with a high fragmentation of production in GVCs (manufacturing)

	Industry-specific MP			
PTA	0.00352	-0.0134	0.0157	0.00617
	(0.0478)	(0.0489)	(0.0527)	(0.0523)
Invest prov	0.293***	-0.0588	-0.282***	-0.526***
	(0.0454)	(0.0715)	(0.104)	(0.124)
Invest prov x GVC		1.498***		0.955***
		(0.245)		(0.256)
Invest prov x Proximity			0.208***	0.214***
			(0.0361)	(0.0355)
Observations	373,752	373,752	320,754	320,754
Host-ind-year FE	YES	YES	YES	YES
Partner-ind-year FE	YES	YES	YES	YES
Host-partner-ind	YES	YES	YES	YES

Source: Miroudot and Rigo (2021, forthcoming)

OECD analytical work on multinational production: http://oe.cd/gvc-mne

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Session 4: Analysis of a possible role played by BITs and investment-related provisions in FTAs/EPAs under the COVID crisis toward building resilient supply chain.

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Mr Ho Meng Kit, ABAC Singapore, Chair for ABAC Regional Economic Integration Working Group

Mr Ho retired as the Chief Executive Officer of SBF in end 2020, after leading SBF for 10 years. The SBF is the Apex Business Chamber of Singapore with membership from more than 27,200 top companies.

SBF serves as the voice of the Singapore business community both locally and internationally. It runs many programmes to connect its member companies to overseas business opportunities. Mr Ho represents Singapore as a member of APEC Business Advisory Council (ABAC). He chairs the ABAC
Working Group on Regional Economic Integration.

Prior to joining SBF in 2011, Mr Ho held a variety of senior policy and executive positions in Singapore Government including four years as Principal Private Secretary to then Senior Minister Lee Kuan Yew; as Deputy Secretary in the Ministry of Trade and Industry and the Ministry of Foreign Affairs. He was also Chief Executive of the Singapore Broadcasting Authority, Land Transport Authority and Managing Director of the Economic Development Board.

Mr Ho currently serves on the Board of Accounting and Corporate Regulatory Authority, SBF Foundation, Governing Board Member of East Asian Institute and several public sector advisory bodies. Mr Ho is also a Fellow of the Singapore Institute of Directors

ABAC Presentation on FTAAP

Ho Meng Kit

Chair for ABAC Regional Economic Integration Working Group

14 May 2021

Agenda

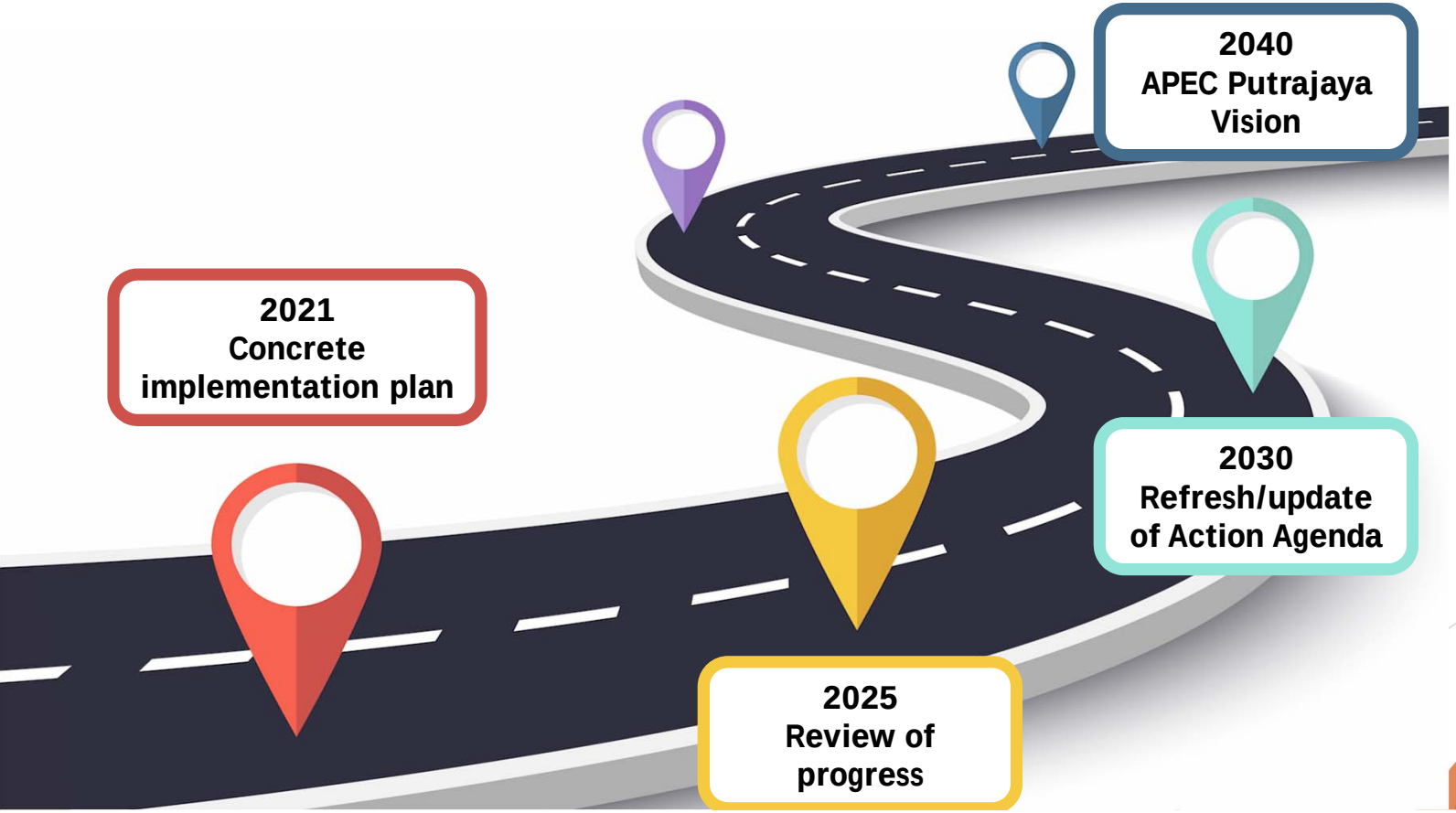
1. ABAC's Priorities on the Implementation Plan for the APEC Putrajaya Vision 2040
2. FTAAP Investment Policy Report Policy Recommendations
3. FTAAP-related Policy Recommendations in the Report to APEC MRT

APEC Putrajaya Vision 2040

Our vision is an open, dynamic, resilient and peaceful Asia-Pacific community by 2040, for the prosperity of all our people and future generations.

"We will further advance the Bogor Goals and economic integration in the region in a manner that is market-driven, including through the work on the Free Trade Area of the Asia-Pacific (FTAAP) agenda which contributes to high standard and comprehensive regional undertakings."

FTAAP as both a journey and destination

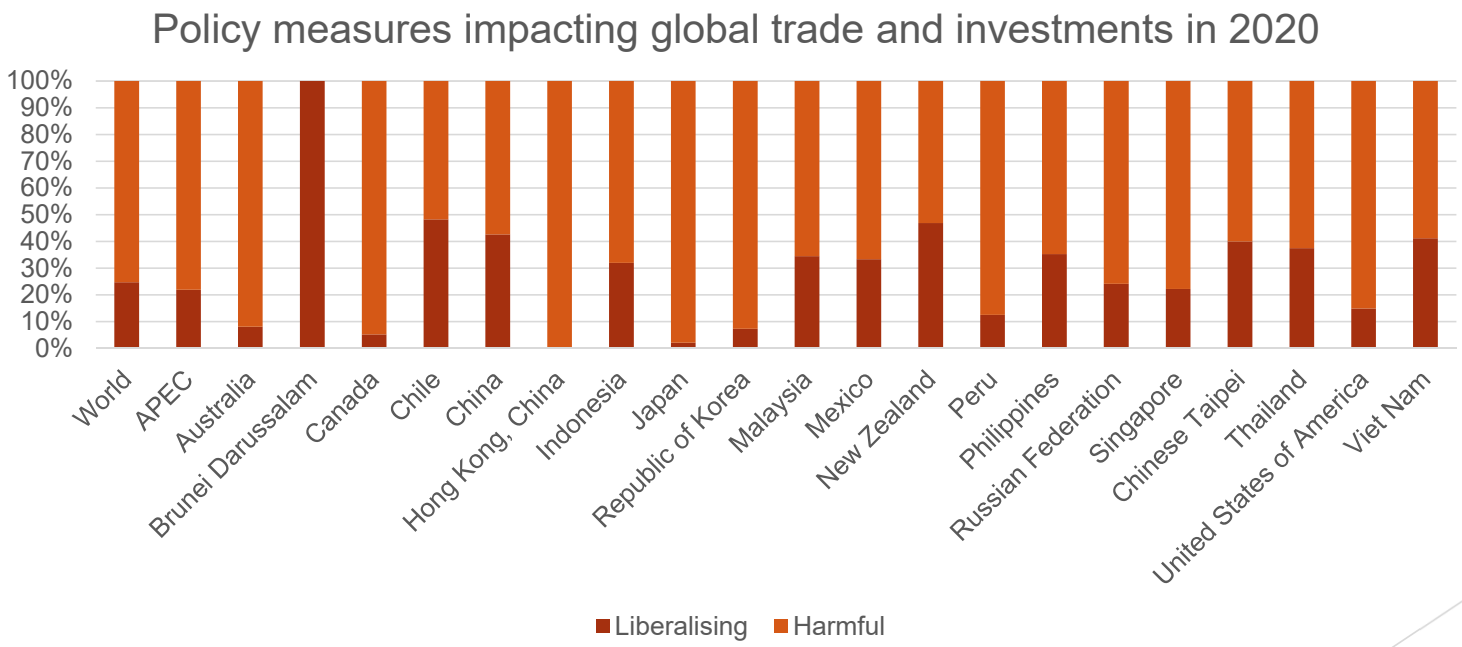


FTAAP Investment Policy Report

- The Covid-19 pandemic has impacted millions of lives globally, disrupted business activities, and exposed the fragility of global supply chains (GVCs).

- The strong integration and participation in GVCs of most APEC economies meant that the pandemic had a particularly strong negative impact on the region.

Policy measures impacting global trade and investment



Progressing investment facilitation moving forward

Any Covid-related restrictions to be targeted, proportionate, transparent and temporary

Progress in the negotiations for an investment facilitation agreement at WTO

Policy recommendations

APEC Economies should:

1. Promote **investment liberalisation** to enhance GVCs resilience and stimulate economic recovery.
2. Incorporate **business views** in FDI rulemaking to promote confidence and improve the business climate.
3. Continue to **learn from best practices** in agreements such as CPTPP and RCEP.
4. Commit to **avoiding protectionism** and supply chain disruptions.

Policy recommendations

5. Base FDI regulations on **transparent and predictable rules,** enhance market access, and incorporate **dispute settlement mechanisms**.

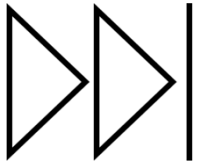
6. Prioritise the adoption of digital technologies and facilitate **cross-border data flows**.

7. Realise **FTAAP through Putrajaya Vision 2040**, with early harvest of concrete milestones.

ABAC Report to APEC MRT

FTAAP-related Policy Recommendations

1. Areas where APEC has fallen short of Bogor Goals, e.g. agriculture, NTBs, services, investment



2. Next generation trade and investment issues to address the continuously evolving business environment

3. FTAAP negotiating pathways for convergence on regionally coherent rules and standards

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Mr Ziyaad Ebrahim, Research and Teaching Assistant at the Institute for International Trade, The University of Adelaide

Ziyaad has over fifteen years of experience in international trade and development. He is currently pursuing a PhD at the University of Adelaide, his research is concentrated on the effects of trade in services on economic development. He was previously employed by the World Trade Organization (WTO). Prior to that, he served 12 years in various positions within the Government of Seychelles, where he comes from.

During his time in the Government of Seychelles, he was directly involved in trade, investment and general economic policy formulation and implementation. He also has experience on WTO accession and was involved in FTA negotiations between the European Union and the Eastern and Southern African (ESA) region and the African Continental Free Trade Area (ACFTA). He has also worked with international organisations such as the IMF, World Bank and the African Development Bank on Structural Adjustment Programmes, private sector and MSME development initiatives including gender empowerment projects.

In his role at the WTO, he coordinated the work of the WTO LDC Group in the ongoing trade negotiations. He also monitored and assisted LDC participation in specific areas of the negotiations which include Special and Differential Treatment (S&DT), fisheries subsidies, trade facilitation and LDC accession negotiations. He completed in Bachelors' Degree (Honours) in Development Studies in 2004 from the University of Manchester (United Kingdom) and completed his Masters' in International Trade and Development from the University of Adelaide in 2013.

▶BRIEF OUTLINE

1. Comparative analysis on various examples of recent investment provisions in FTAs/EPAs and BITs.

2. A stock-take of good practices of liberal investment policy to promote an adequate business climate for all investors.

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

1. Comparative analysis on various examples of recent investment provisions in FTAs/EPAs and BITs

- In the last sixty years, there have been in excess of a hundred investment treaties which have been concluded either bilaterally or regionally.
- In addition, PTAs have embedded investment provisions.
- Investment protection provisions add credibility to the commitments by locking them in for the duration of the Agreement.

A. Definition of Investment and Investor

- Definition of investments were very broad in early BITs – e.g. Germany-Malaysia Bilateral Investment Treaty (BIT) (1960) defines them as “every kind of asset”.
- With rise of investor-state disputes BITs adopt more precise and narrowed down coverage.
- Azerbaijan-Finland BIT (2003), Botswana-Ghana BIT (2003) and China-Pakistan FTA (2006) examples of broad-based coverage of investments but precise definitions.
- Article I of the United Kingdom–Mexico BIT (2006) goes further and stipulates that “A change in the form in which assets are invested does not affect their character as investments as long as they are covered by this definition.”

A. Definition of Investment and Investor

- Narrowed down definition:
- Mexico-Costa Rica FTA (1995), the coverage of investments excludes "..capital movements that are mere financial transactions for speculative purposes, commercial contracts for the sale of goods or services, credits granted to a State, or loans that are not directly related to an investment.."
- European Free Trade Association (EFTA)-Mexico FTA (2000) - exclude portfolio investments unless they lead to substantial control of domestic firms.
- Canada's model BIT (2004) also excludes certain commercial contracts, loans and debt securities from the scope of investment.

A. Definition of Investment and Investor

- BITs and investment chapters in the FTAs/EPAs also specify the definition of investors.
- They tend to exclude the coverage of dual citizens from the protection under provisions of the Agreements and their access to the dispute settlement mechanism.
- They also exclude investors from third party economies, who do not have diplomatic relations and prevent them from circumventing controls.
- A number of BITs exclude third parties from benefiting from the provisions of the Agreement to prevent incidence of “treaty shopping”.

B. Investment Liberalisation and Protection Clauses

- Provisions related to the “pre-establishment phase” of investments are increasingly being incorporated in BITs, more precisely application of National Treatment (NT) principle.
- Most developed economies and number of Asian and Latin American economies have taken pre-establishment commitments such as Chile, Costa Rica, the Republic of Korea, Peru and Singapore.
- The China-Japan-Korea Trilateral Investment Treaty (CJK TIT) does not have any “pre-establishment” protection clause but it prohibits the use of any performance measure.
- To attain deeper integration and complement the FTAs, some BITs have specific investment liberalisation provisions - the Caribbean Community (CARICOM) Revised Treaty (2001) and the Framework on the Association of South East Asian Nations (ASEAN) Investment Area (1998).
- Pre-establishment clauses - foreign investors to enter a host economy without any restrictions that are more excessive than what are applied for citizens.

C. Investment Protection and Fair and Equitable Treatment (FET)

- BITs have a number of provisions which protect investments post-establishment.
- NT and Most-Favoured Nation (MFN) principles to foreign investment; e.g. guarantee of compensation upon expropriation.
- The ASEAN Agreement only provides for MFN treatment after entry, however the following FTAs Colombia-Venezuela-Mexico (1995), Mexico- Nicaragua (1998), Central America-Dominican Republic (2004) and Mexico-Costa Rica (2005), have NT provisions.

C. Investment Protection and Fair and Equitable Treatment (FET)

- The principle of fair and equitable treatment (FET) is imbedded in most BITs.
- The FET provisions usually cover the actions of governments and actions which fall out of the scope of other provision of the agreements.
- In its review of current BIT provisions, Indonesia has replaced the FET provision in its model text to “Standard Treatment” which shifts the focus away from investor rights to denial of justice.

The quality of the investment climate is determined by a host of interacting factors such as:

- Macroeconomic policy framework;
- Trade policy, taxation;
- Foreign exchange;
- Land and labour;
- Political risk and governance;
- Government administration and management of the regulatory process related to commercial activities;
- Legal and judicial frameworks and their ability to protect property, settle disputes, and enforce contracts; and;
- Quality of both the physical and institutional infrastructure.

A. Inception of the Investment Code

- The investment codes are derived from government policies which are set out in different strategic sectoral initiatives.
- Investment policy should be integrated into an over-arching development strategy and investment attraction also depends on other aspects of policies such as labour or tax policies.
- Geo-political considerations, they are also influenced by global challenges such as financial crises, food security and climate change.
- Investment codes should answer three pertinent questions; Who can invest? Where can they invest? Under which conditions can the investments be made?

B. Investment Promotion & Facilitation

- Foreign Direct Investment (FDI) is associated with increased productivity and income in host economies which cannot necessarily be triggered by domestic investments.
- Investors generally seek a favourable business climate which is predictable and allows them to gain an acceptable rate of return, they also seek to avoid three obstacles; cost, delay and risks.

C. Safeguarding Investors' rights

- Investors expect the minimum standard of protection of their rights in the course of their operation, which are as follows:

- Provision of equal treatment between domestic and foreign investors;
  - Investors seek guarantees against expropriation of their property and other interest without due process;
  - Convertibility and repatriation of their earnings;
  - Some foreign investors opt for alternative dispute settlement mechanism (investor-state dispute settlement (ISDS)); and;
  - There is an expectation that the host-economy would facilitate the employment of foreign labour to compensate for the skills gap that exists in the domestic labour market.

- The two economic effects of COVID-19 pandemic are similar to the Global Financial Crisis (2008-2010) – sharp exogenous shock and companies have experienced reduced liquidity.

- FDI flows have been declining during the past five years, in 2021 they expected to remain below pre-crisis levels if the public health and economic support measures are ineffective.

- Research indicates that developing and transition economies have borne the brunt of falling FDI flows because they largely concentrated in the primary and manufacturing sectors.

es

- The COVID-19 pandemic, accelerated the transition towards the use of digital tools and platforms by Governments, to ensure provision of services.

- Government subsidy schemes to develop medical devices, treatment and biotechnology - Czech Republic, South Korea and the European Union.

- Government incentives have been provided to expand or convert the supply chain to provide medical equipment - India, Italy and the US.

- MNCs may want to shorten or otherwise reconfigure their supply chains and seek to geographically diversify these in order to avoid extensive exposure to location-specific disruptions thereby increasing their resilience.

COVID-19 accelerated moves by economies to impose more stringent measures to screen FDI:

- European Commission (EC) investment guidelines 25 March 2020.
- Expansion of the jurisdiction of the Committee on Foreign Investments in the United States (CFIUS).
- Australia lowered its trigger threshold to 0%;
- France lowered its approval threshold from 25% to 10%;
- Hungary instated lower trigger thresholds and expanded its sectoral coverage;
- Italy imposed more exigent rules on EU and European Economic Area investors;
- New Zealand imposed a temporary review of transactions.

- The COVID-19 pandemic has accelerated the use of digitalization and the use of new technologies.
- Digital be-spoke manufacturing techniques will enable manufacturing agility and quality management systems to deliver high value manufacturing.
- Improvements in infrastructure to support the manufacturing sector will be supported through government stimulus packages, prior to the pandemic, public and private investment in infrastructure.
- Re-building of health systems to support the recovery.
- Transition towards a low-carbon economy which supports private and public investments in renewable sources of energy, circular production lines, supporting technology and infrastructure.

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

Mr Kevin Klowden, Executive Director, Milken Institute

Kevin Klowden is the executive director of the Milken Institute's Center for Regional Economics and California Center. He specializes in the study of key factors that underlie the development of competitive regional economies (clusters of innovation, patterns of trade and investment, and concentration of skilled labor), and how these are influenced by public policy and in turn affect regional economies. On a domestic level, he is heavily involved in issues of capital access for small business, including serving as chair of the U.S. Department of Commerce's Trade Finance Advisory Council. He also helps to coordinate the Partnership for Lending in Underserved Markets initiative with the U.S. Small Business Administration, which focuses on funding for African-American and Latino small businesses. His areas of expertise include technology-based development, capital access, infrastructure, the global economy, media, and entertainment.

Toward Building Resilient Supply Chains

A Role for Investment Policy

Kevin Klowden

Executive Director

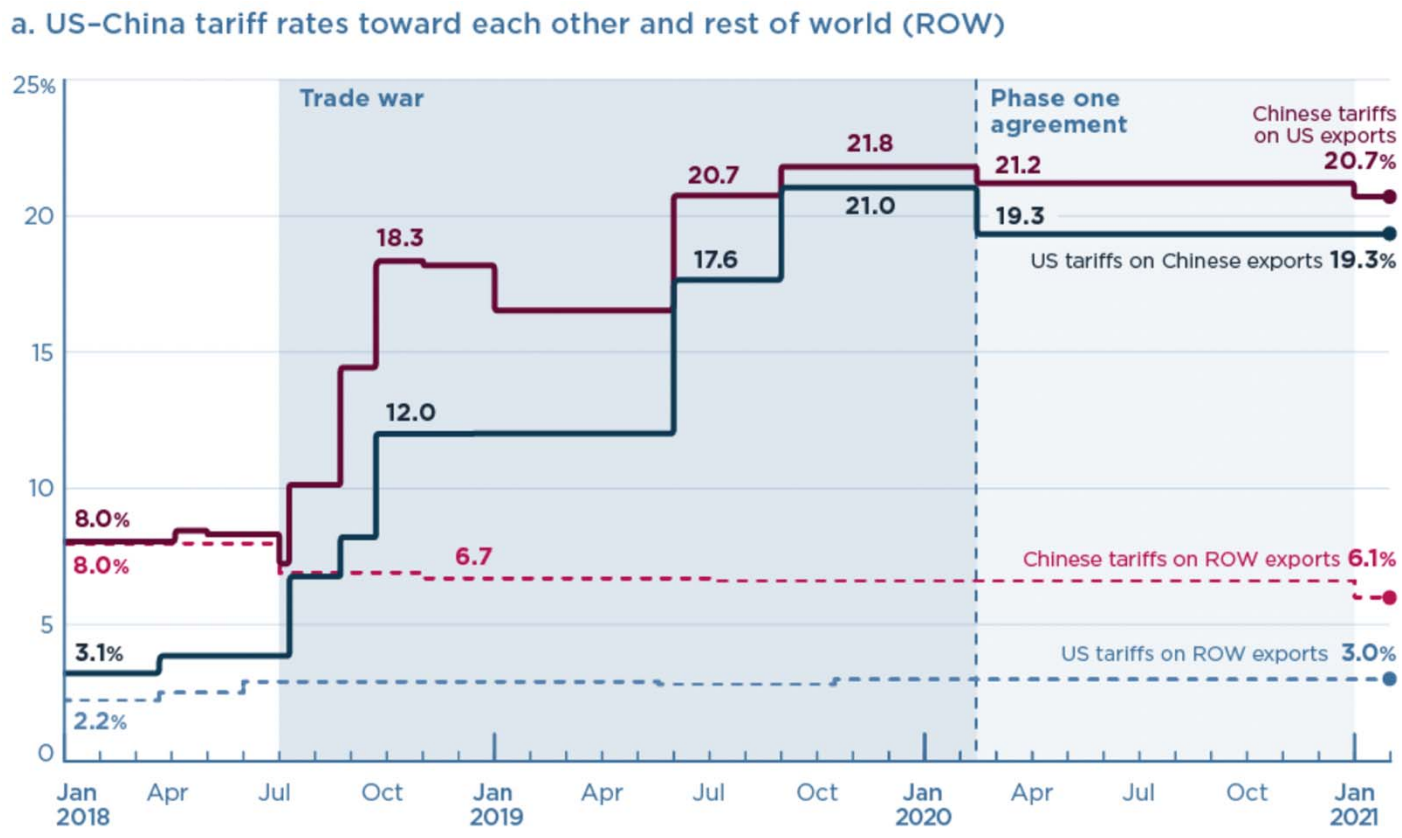
Milken Institute Center for Regional Economics

kklowden@milkeninstitute.org

Key Dimensions of Supply Chains

- Companies choose location of production and sourcing
  - Often based on access to specific resources, favorable regulations, or importance of access to local markets
  - Governments can influence via tariffs and trade agreements, harmonization of standards, and domestic production requirements
- Stability has a strong influence on investment decisions
  - Unpredictable public policy can make it difficult for businesses to adjust in the short term or drive them away in the long term
  - Example: US-China Tariff War
  - Example: US-Mexico-Canada Trade Agreement (USMCA)
  - Example: Trade Agreements in Asia-Pacific

US-China Tariff War



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

US-Mexico-Canada Trade Agreement

- Challenge: More stringent certification of steel and aluminum sourcing required to qualify for duty-free trade
  - NAFTA: 62.5 percent of raw material
  - USMCA: requirement up to 75 percent, Labor Value Content (made by workers earning at least 16 USD per hour)
- Opportunity: Higher *de minimis* values provide US SME exporters with easier access to Canadian and Mexican markets
  - Canada: *de minimis* up from 20 CAD to 40 CAD; duty-free shipments up to 150 CAD
  - Mexico: *de minimis* remains at 50 USD; duty-free shipments up to 117 USD

Source: US Trade Representative, "United States-Mexico-Canada Trade Fact Sheet: Modernizing NAFTA into a 21st Century Trade Agreement," accessed May 2021.

Trade Agreements in Asia-Pacific

- Comprehensive & Progressive Agreement for Trans-Pacific Partnership (CPTPP)
  - Rigorous trade agreement; negotiated with goal of greater benefits than existing FTAs for integrating parts and components into final products
- Regional Comprehensive Economic Partnership (RCEP)
  - Unifies rules of origin throughout member states; allows inputs from anywhere in the region to be counted as local
  - Could it help accelerate other negotiations (e.g., China-Japan-South Korea FTA or China-European Union BIT)?

Source: Deborah Elms, "The Comprehensive and Progressive Trans-Pacific Partnership: Policy Innovations and Impacts," *Bertelsmann Siftung*, 2018; Pramila Crivelli and Stefano Inama, "Making RCEP successful through business-friendly rules of origin," *ADB*, 12 February 2021.

Key Aspects of Resilience

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

Source: Eleftherios Iakovou and Chelsea C. White III, “How to build more secure, resilient, next-gen U.S. supply chains,” Brookings Institution, 3 December 2020.

Adaptation Requires Investment

- Buyers invest in obtaining access from new suppliers
  - Example: Vietnam
    - 16 percent year-on-year increase in demand to Q1 2021 (up for three consecutive quarters)
    - 43 percent of US respondents to survey cited Vietnam among top three buying locations (double the number in 2019)
- Suppliers invest in adapting production for new buyers
  - Example: Semiconductor production
    - Pandemic slump in car sales; auto producers cut parts supply orders
    - Spike in consumer electronics sales (laptops, smartphones, consoles)
    - Manufacturers switched from car parts to chips for electronics

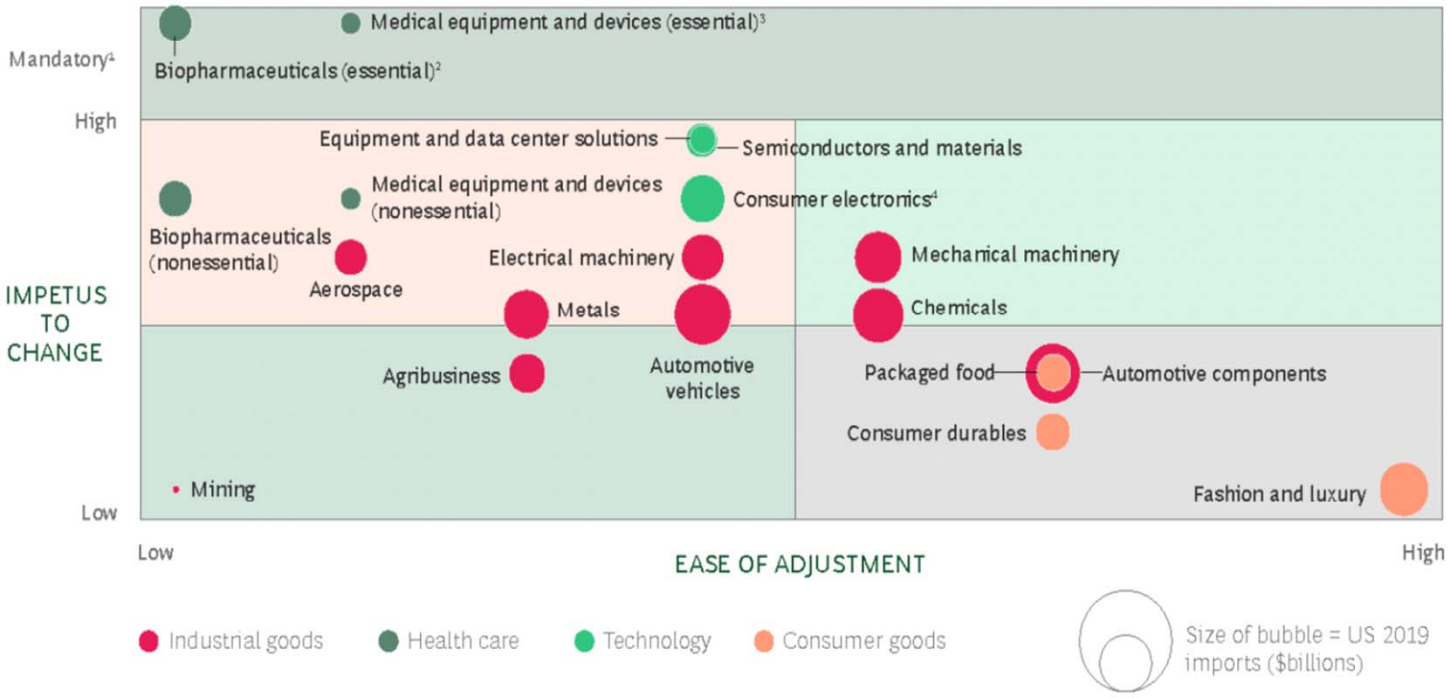
Adaptation Requires Agility and Learning

- California built up medical supply stockpile in 2006
  - Three mobile hospitals; 50 million N95 respirators; 2,400 portable ventilators; kits for 20,000 additional patient beds
- However, fiscal deficit led to elimination in 2011
  - Mobile hospitals defunded; medical equipment redistributed to local hospitals but without funding to maintain
- US built up N95 mask stockpile in response to pandemic
  - Stockpile now 25X higher, but reserved for emergency requests
- However, market costs of PPE continue to rise
  - N95 from $0.04 per mask to $3-7 per mask for small orders

Source: Lance Williams, Will Evans, and Will Carless, "California once had mobile hospitals and a ventilator stockpile. But it dismantled them," *Los Angeles Times*, 27 March 2020; Austin Landis, "A Year Into the Pandemic, the PPE Shortage Becomes a Disconnect," NY1, 2 April 2021.

Different Sectors Face Unique Pressures

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



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

Role of Bilateral Investment Treaties

- Provide stable and flexible environment for supply chains to adjust to market and political pressures
- Ensure non-discrimination against foreign investors
  - Limits on expropriation and entitlement to seek compensation
  - Provide right to transfer funds into and out of host economy
  - Restricts trade-distorting practices (local content or export quotas)
- But significant disparity between US/China in Asia
  - US only has a limited number of treaties (all with smaller economies)
  - China has numerous treaties (including with Australia, Japan, Malaysia, New Zealand, Russia, South Korea, Viet Nam; also with Mexico and Canada)

Source: UNCTAD, “International Investment Agreements Navigator,” Investment Policy Hub, accessed May 2021.

Asia-Pacific Economic Cooperation

GTPA
GLOBAL TRADE PROFESSIONALS ALLIANCE

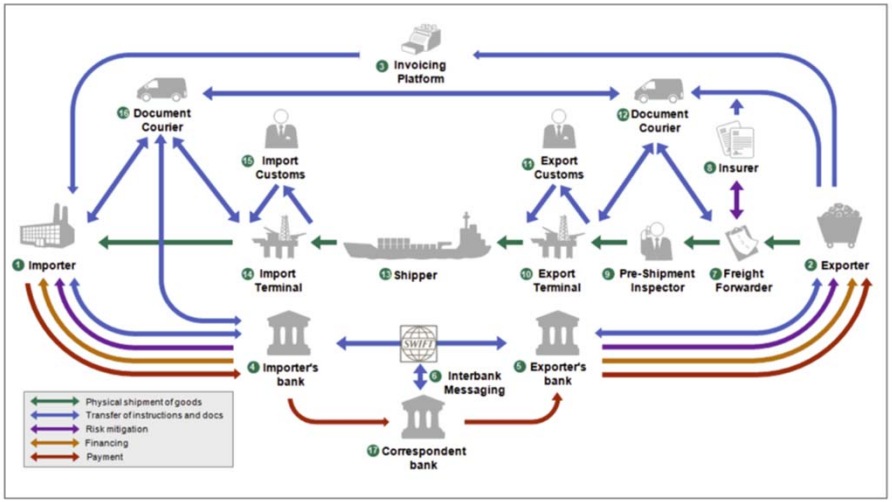
Mr Alexander Malaket, President, OPUS Advisory Services International

Alexander R. Malaket, CITP, CTFP, GTP-E, is President of Canadian consultancy OPUS Advisory Services International Inc., Co-Founder of London-based ESG Validation Ltd., and Founding Partner, Prism Global Partners, LLP based in London.

Alexander has undertaken a range of advisory and consultancy engagements around the world, and contributes to top-level advocacy through the UN, WTO, B20 and the International Chamber of Commerce, among others. He has researched and authored thought leadership reports, program assessments and reviews, public and international policy reports and has participated in or chaired numerous international initiatives for industry bodies and other institutions.

Lessons from Trade

1. Shift: Bilateral to Ecosystem View



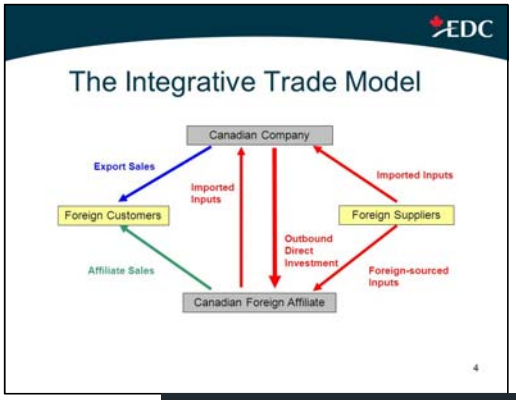
https://www.tradefinanceglobal.com/posts/video-digital-ecosystems-within-trade-finance-boston-consulting-group-seeing-beyond-the-technology/

- This far more comprehensive view of trade has direct implications for the Enterprise Partnerships Team – both the potential scope of your mission and the size of the opportunity in play
- Multiple touch points
- Multiple technologies
- Varying interests, objectives and measures of success among parties
- More pain points, greater opportunity for collaboration
- Wider range of propositions and revenue opportunities

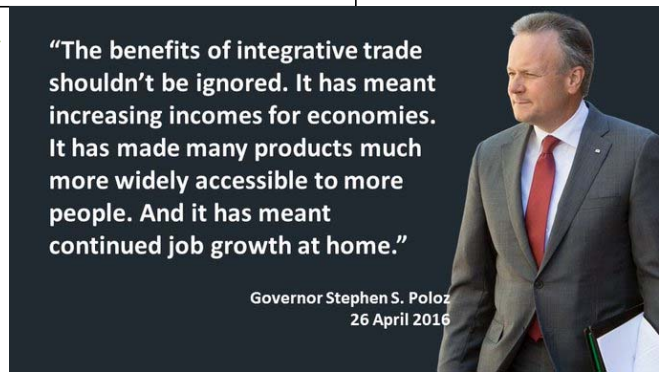
Think Global Supply Chains: Large Buyer, Hundreds, or Thousands of suppliers + service providers – commercial/policy implication?

Lessons from Trade

2. Shift: Integrative Trade [Trade + FDI]



www.edc.ca



HISTORICALLY:

- Trade and Investment/FDI: Which comes first?
- Trade as a bilateral commercial relationship: buyer/seller, importer/exporter

TODAY:

- More holistic, sophisticated view
- FDI and trade are complementary and seen as part of a larger whole
- Trade is looked at increasingly from a supply chain or a value chain perspective

Lessons from Trade

3. Finance: The Oil in the Engine of Trade

- 80% + of merchandise trade depends on trade financing
- Big questions:
  - Trade Finance Gap
  - Bankability/Financial Literacy
  - Non-Traditional Sources of Financing
  - Tech and Digitisation
  - Sustainable Finance
  - Efficacy (or not?) of Trade Promotion

"Investment" Financing? Bankability of Infrastructure Projects?
Post-Covid recovery through Investment + Trade?

Lessons from Trade

4. ESG & Sustainability: Linking Trade & “Values”

- ESG and Sustainability increasingly Board-level priority
- Commercial, Policy AND Financial
- Connected Questions:
  - “Progressive” Trade Agreements
  - Capital Markets and procurement standards/expectations emerging in trade linked to ESG

What are the parallel questions in Investment?

Lessons from Trade

5. Net New Capacity: Developing an Asset Class

- Banks cannot meet demand for trade finance
- Attract new capital by making this activity more “investable”
- Similar efforts with Infrastructure Finance, including through B20/G20 Working Groups
- Both need to consider commercial and investment realities

Enabling policy is necessary but not sufficient to add global capacity

Policy considerations:

1. Bridge the Trade and Investment Gap in Developing Policy
2. Assess and learn from the way “the other side” develops best practices and devises effective policy
3. Consider the Commercial Context and Realities