FTAAP: Competition Policy

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Introduction

The vision to promote economic growth and prosperity across the Asia-Pacific region through the eventual realization of the Free Trade Area of the Asia-Pacific (FTAAP) remains a powerful goal to improve regional and economic integration. The FTAAP has the potential to create a level playing field for all economies involved, as long as it reflects the constant evolution of the business landscape and it provides high-quality solutions to Next Generation Trade and Investments Issues (NGeTI), [1] including those related to Competition Policy. The current challenges faced by the multilateral trading system, along with increasing questions about the efficacy of international trade and Free Trade Agreements (FTAs) as tools to create equal opportunities for development for all, however, make it challenging for the FTAAP to occur unless decisive actions are taken to ensure a level and inclusive playing field. For over 30 years, APEC economies have shown a deep commitment to building a dynamic region by championing free, open trade and investments. In this context, it is more important than ever that these economies continue working together to create a more sustainable and fair business climate.

What can APEC economies do to promote economic development and sustainable growth by promoting fair competition and equal footing in their markets? What could they do to move closer to making the FTAAP a reality with a high-standard framework? There are no simple answers to these complex questions. Multiple actions will need to be implemented to achieve these goals. Nonetheless, a fundamental step to create a level playing field in the region, which benefits all sizes of companies and move towards an eventual FTAAP, is reviewing competition policy laws and adding the highest level of commitments in this area to FTAs negotiations. In this respect, this report analyzes Competition Policy as a strategic tool to boost business activities and create equal opportunities by implementing advanced solutions to this field in FTAs and towards the FTAAP. To achieve this, state-of-the-art provisions about competition policy proposed by FTAs in the Asia Pacific, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the United States-Mexico-Canada Agreement (USMCA) and other new generation agreements should be considered as strategic contributors towards the realization of a comprehensive FTAAP.

Why should competition policy be considered as a strategic component in the Asia-Pacific agenda? Private and public enterprises of all sizes and sectors would benefit from an improved competition environment, allowing businesses equal opportunities to participate in, contribute to and reap the benefits of trade and investments locally and globally. Improved competition policy in FTAs would help create a better business environment that companies demand to grow and reach their full potential and, in this way, increase their productivity, creating more jobs and

[1] NGeTI are issues that have been affecting trade and investments historically, and also issues that have arisen in recent years as part of the changes to the global trading environment, especially with the emergence of technological progress that are having a real impact on the ability of companies to do business.

paying better salaries for their employees. The potentially huge and positive impact that competition policy might have will only occur if implemented properly. According to Godfrey (2008), competition is fundamental to the development of markets and it boosts productivity, innovation, and growth, "all of which create wealth and reduce poverty".[2] In the context of global trade conflicts, formal adoption of a clear and comprehensive competition policy as a shared strategy in the Asia Pacific would send a clear signal in favour of an improved rule-based trading system and against trade protectionism and unilateralism.

Professor Michael Porter (2004), one of the most influential thinkers on competitiveness, pointed out that competitiveness is everywhere, and he recognized that improving competitiveness is an important challenge for governments due to the complexity that it involves. For this reason, Porter (2004) added competition should be addressed "within countries and across countries."[3] In this respect, Free Trade Agreements, either bilateral or regional, can be extraordinary links to improve solutions for competition-policy issues inside and beyond the borders of one economy, articulating efforts among trading parties, building capacity with each other, facilitating the use of FTAs by businesses, and creating increased economic benefits for all. Collaboration and enforcement of cross-border competition policy through high-standard provisions in FTAs might offer significant positive spillovers for businesses of trading partners.

In Sokol's view (2009), the inclusion of competition policy provisions within trade agreements is justified due to the positive signal that it sends about a pro-investment and market-oriented economy to potential foreign investors and that it "may create domestic legitimacy and assist antitrust agencies to pursue their competition-enhancing mission."[4] In this respect, competition policy provisions in FTAs can play an important role at both the domestic and regional level, supporting institutions and authorities related to competition policy to meet their ultimate mandates. Thus, discussing issues and agreeing to high-level commitments on competition policy should be considered a priority item during FTAs negotiations. High-standard provisions on related competition policy chapters in FTAs would mean guarantying a level playing field for businesses, making border compliance more efficient, decreasing transaction costs for companies, integrating small and medium enterprises (SMEs) into Global Value Chains (GVCs), and offering more stability and certainty for local and foreign investors. Most importantly, it would mean moving negotiations and policies towards realizing an eventual comprehensive FTAAP.

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[2] Godfrey, Nick. Why is Competition Important for Growth and Development? A Contribution to the OECD Global Forum on Investment, 2008

[3] Porter, Michael E. "Building the Microeconomic Foundations of Prosperity: Findings from the Business Competitiveness Index." In The Global Competitiveness Report 2003-2004, edited by Michael E. Porter, Klaus Schwab, and Xavier Sala-i-Martin, 29–56. Oxford University Press, 2004.

[4] Sokol, Daniel. 2008. "Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements." Chicago-Kent Law Review, 231.

Report structure

Recognizing that competition policy is an essential element to achieve a comprehensive FTAAP that involves a broad number of disciplines, this report focuses on three main areas that are closely related to competition policy. The main areas covered by this study are 1) Competition law 2) Investment, and 3) Small and Medium Enterprises (SMEs). This report presents a comparative analysis of competition policy provisions and chapters in Free Trade Agreements (FTAs) in which Asia-Pacific economies actively participate and that are considered next generation agreements due to the high standard provisions that were incorporated within their texts.

We reviewed two FTAs throughout this report, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[5] and the agreement among the United States, Mexico and Canada Agreement (USMCA)[6], due to their comprehensive treatment of trade and investment issues including competition policy, and their potential contribution to the realization of FTAAP. It is worth noting that in our previous study[7], we pointed out that CPTPP deserves recognition as one of the most important trade agreements over the last two decades, and it is currently the leading pathway of the eventual FTAAP due to the depth and extensive treatment of NGeTI that go beyond WTO rules. We also advised keeping possibilities open to add new pathways towards the FTAAP, and we suggested considering the new text of the USMCA as a modern template for FTAs and the international trading system. Thus, we considered it useful to make a deep analysis of the competition policy provisions of these two state-of-the-art FTAs.

To enrich this report, we selected a third agreement for each discipline of competition policy contained in this study. Due to the high-standard of their provisions, we chose the following agreements: the European Union-Singapore Free Trade Agreement (EUSFTA) and the European Union-Viet Nam FTA (EVFTA) for comparison of competition, the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) for comparison of investment, and the agreement between the European Union and Japan FTA for an Economic Partnership (EPA) for comparison of SMEs discipline.

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[5] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is a free trade agreement composed of eleven economies in the Asia-Pacific region, namely Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. Once fully implemented, the CPTPP will represent a market of 495 million consumers. The CPTPP has currently entered into force in seven economies: Canada, Australia, Japan, Mexico, New Zealand, Singapore, and Vietnam.

[6] The USMCA was originally signed on November 30, 2018 but a protocol of amendment was signed on December 10, 2019. Mexico is currently the only economy that has ratified the agreement, but it is expected that Canada and the US will ratify the USMCA in the next few weeks. It is anticipated that the USMCA will enter into force in the first part of 2020.

[7] Our previous study was titled FTAAP: Next Generation Trade and Investments Issues - A Business Perspective: https://www2.abaconline.org/assets/2019/Research/Next_Generation_Trade_and_Investment_Issues_NGeTi_Business_Perspective_paper_final2.pdf

It is not coincidental that four of the six agreements of this report are between Asia-Pacific economies and the European Union because they are considered new generation agreements due to the high level of commitments assumed by the participating parties. The European Union and APEC economies represent economies with a serious commitment to global trade and multilateralism. The EU has an extensive expertise in the treatment of NGeTI, including competition policy, and that makes them a reliable partner to APEC economies. There exists a real and shared interest between APEC economies and the EU to strengthen economic, trade and investment ties through agreements with deeper level of commitments, more transparency, and with more predictable and mutually-advantageous provisions on contentious issues. Interestingly, different scholars have already realized the different approaches that EU and Asia Pacific economies have dealing with FTAs and competition policy provisions. For instance, regarding these two different approaches, Laprévote, Frisch, and Can (2015) pointed out that NAFTA and NAFTA-inspired agreements are usually "markedly different from those found in European type FTAs."[8] Therefore, it is useful to see how the interaction between these two approaches can work together and complement each other to build stronger provisions in FTAs regarding competition policy provisions.

This report has been prepared from a business perspective aiming to contribute to the understanding of key provisions in FTAs that might have a meaningful impact on business success by providing innovative and comprehensive solutions to key issues that need to be addressed in order to create a level playing field and guarantee fair competition. These key issues include: discerning how competition rules should be designed in order to create equal opportunities for businesses with different ownership, including private and public enterprises; guarantee an appropriate business environment that benefits both local and foreign investors; foster a level playing field where both multinational companies and SMEs can succeed internationally; and finally, how competition rules should be defined in order to integrate SMEs and underserved groups that have been excluded for a long time and have not yet reaped the benefits of international trade and FTAs.

For the above-mentioned reasons, this report aims to identify both similarities and discrepancies between the selected FTAs in competition policy, comparing their provisions, and providing recommendations on how to improve competition policy rules through FTAs and the eventual FTAAP. The report consists of four main sections: 1) challenges and obstacles in competition policy are identified and examined from a business perspective, 2) a quantitative review and analysis of trends and variables related to competition policy in the Asia Pacific, 3) a comparison and analysis of competition policy chapters in FTAs covered by this report, and 4) recommendations.

[8] Laprévote, François-Charles, Sven Frisch, and Burcu Can. Competition Policy within the Context of Free Trade Agreements. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015.

Summary of the agreements and chapters analyzed in this report are shown in table 1.

Table 1: FTAs and chapters analyzed

Agreement	Competition	Investment	SMEs
The Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP)	Ch. 16. Competion Policy and Ch. 17 State-Owned Enterprises and Designated Monopolies	Ch. 9 Investment	Ch. 24 Small and Medium-Sized Enterprises and Ch. 22 Competitiveness and Business Facilitation
The United States-Mexico-Canada Agreement (USMCA)	Ch. 21 Competition Policy and Ch. 22 Owned Enterprises and Designated Monopolies	Ch. 14 Investment	Ch. 25 Small and Medium-Sized Enterprises and Ch. Competitiveness 26
The European Union-Singapore Free Trade Agreement (EUSFTA)	Ch. 11 Competition and Related Matters	-	-
The EU- Canada FTA (the Comprehensive Economic and Trade Agreement - CETA)	-	Ch. 8 Investment	-
The European Union-Japan FTA (the Economic Partnership Agreement - EPA)	-	-	Ch. 20 Small and Medium-Sized Enterprises
the European Union-Vietnam FTA (EVFTA)	Ch. 11 State-Owned Enterprises, Enterprises Granted Special Rights or Privileges, and Designated Monopolies	-	-

Section I. Challenges and obstacles on competition policy

Identifying the challenges and obstacles on competition policy are essential in order to reflect the dynamic evolution of businesses, to catch up with the fast developments in the digital economy, to create adequate rules that promote equal opportunity and a level playing field for all companies and move APEC economies in the right direction towards the FTAAP. In this respect, we identified five challenges and obstacles on competition policy.

A. Status on competition policy at the multilateral level

In 2004, members of the World Trade Organization (WTO) decided that competition policy would no longer be part of negotiations in the context of the Doha Round and therefore, it was not possible to continue negotiations and reach an agreement on this discipline at the multilateral level.[9] The lack of a comprehensive framework on this discipline at the WTO level represents a serious challenge for businesses because there are no binding commitments by economies to take competition to its next level, promoting competition law, cooperation and enforcement.

[9] The WTO Working Group on the Interaction between Trade and Competition Policy was active from 1997 to 2003

Companies doing business every day face major obstacles without a multilateral framework that fully protects them against anti-competitive business conducts. In fairness, some WTO agreements have competition policy-related provisions and these can be found in the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMs), the Agreement on Trade-Related Intellectual Property Rights (TRIPS) and the Agreement on Subsidies and Countervailing Measures (ASCM). These WTO agreements, however, are not enough to cover the broad range of issues that competition policy should regulate, including next generation trade and investment issues generated by the global economy and technological progress in society.

Some of the issues about why WTO agreements are considered insufficient to cover the current challenges faced on competency policy include, for instance, the fact that the ASMC only applies to subsidies on products, but it does not apply to subsidies for services. Furthermore, the ASCM is only applicable in situations in which public bodies or governments provide a subsidy, but it does not apply when governments subsidize enterprises through an entity other than public bodies. In this same vein, analyses have shown that there are major areas of the WTO in which competition policy rules have been delegated or absent. Perez (2016) pointed out that the anti-dumping agreement, even though it includes measures to act against predatory price discrimination, these measures are "much softer rules than most domestic competition laws applied to enforce anticompetitive predatory pricing." [10] Koul (2018) affirmed that state-sanctioned export cartels, a discriminatory pricing system, state subsidies and the conduct of state monopolies should be subjected to the examination of international rules at the WTO level.[11]

On the other hand, International institutions such as the Organisation for Economic Co-operation and Development (OECD), the International Competition Network (ICN) and the United Nations Conference on Trade and Development (UNCTAD) have been doing important work and promoting valuable initiatives to encourage competition policies worldwide. Since 1990, the OECD has been collaborating with competition authorities and governments by providing them support on competition topics such as abuse of dominance, mergers, public procurement, and reduction of unnecessary restrictions on competition in law. The OECD has also provided extraordinary tools in this area, such as the Competition Assessment Toolkit,[12] and added valuable knowledge to the discussion with the "competitive neutrality" concept.[13] The ICN has been proposing procedural and substantive convergence on competition policy and encouraging

[10] Eduardo Perez Motta. Competition Policy and the Trade System: Challenges and Opportunities. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2016.
[11] Koul A.K. (2018) WTO and Competition Policy. In: Guide to the WTO and GATT. Springer, Singapore
[12] The Competition Assessment Tool shows the principles and benefits of competition, provides technical guidance and offers a step-by step process for performing competition assessment.
[13] According to the OECD, competitive neutrality occurs where no entity operating in an economic market is subject to undue competitive advantages or disadvantages. (OECD, 2012, Competitive Neutrality, Maintaining a Level Playing Field Between Public and Private Business, Paris)

international cooperation and the inclusion of high standard rules in this discipline worldwide. One of the most important initiatives of the ICN in the last few months is *the international Framework on Competition Agency Procedures* (CAP) [14] that promotes basic principles on procedural fairness. With regard to UNCTAD, this organization has contributed by undertaking research, policy analysis, and providing technical assistance to developing economies on competition policy matters that has strengthened markets through improved competition and consumer protection. Two important contributions by UNCTAD are *the United Nations Set of Principles and rules on Competition* (The UN Set) and *the Model Law on Competition*.

Nonetheless, despite all these valuable efforts by international organizations, the lack of an agreement on competition policy at the multilateral level is still a task that needs to be accomplished. Developing and developed economies need to have a general agreement on competition policy in the framework of the international trading system that includes a set of principles, rules, schedules of commitments, and procedures for settling disputes; but, unfortunately, it does not exist yet and it seems it will take a long time to gain agreement. Thus, a viable route to advance this agenda is dealing with competition policy issues from bilateral, regional and plurilateral agreements that incorporate advanced solutions in this discipline.

B. Competition Policy is a broad issue

Competition policy involves several areas that makes it challenging for authorities and governments to manage and legislate. As mentioned in the introduction, competition is ubiquitous, with a horizontal scope that hits several trade and investment issues. Scholars have identified a broad range of issues addressed in competition provisions and chapters; the issues addressed range from promoting competition, maintaining competition laws, avoiding abuse of dominant market position, and regulating state aids to identifying competition-specific exemptions, encouraging transparency, defining competition enforcement principles, eliminating trade defenses, and setting forth cooperation and dispute settlement mechanisms. Thus, the question is how to address such a broad issue? How can economies, willing to implement rules about competition policy, manage and promote such a complex issue? The answers are by cooperation and by taking advantage of the experience of current and future trading partners.

This report aims to progress the competition discussion on FTAAP by recognizing that establishing and operating SOE is a rational policy instrument. Although it is a fact that public companies are at the center of challenges of competitive market environment, however, there exists a situation where private entities become anti-competitive players as well. Also, while highly commending the significant contributions of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) which progressed the clarification and its discipline of when regulatory authority enters into commercial competition, in this report, the

[14] The CAP is an "opt-in" framework, open to all competition agencies, as an implementation tool to advance basic fairness principles among all competition authorities.

following wording would be more appropriate for the purpose of addressing the substance of the competition rule as:

"*Preferential Regulatory Treatment*" including subsidies and non-commercial assistance, used for domestic policies that may create anti-competitive impacts to the marketplace, and "*Anti-Competitive behaviour*" used for actions that have a detrimental effect on the competitive market environment.

Market distortion caused by private companies needs to be considered as well, however, the public entity is set up for policy purposes in many strategic areas within the economy, and given the significant influence it has on the competitiveness within the market economy, it is important to have a perspective that provides transparency to ensure that level playing field is not compromised. Public enterprises holds substantial position of the world's leading companies with growing influence on the market, so it is required to elucidate the current situation to promote further fair market competition through advanced FTAs as such influence will provide significant meaning to discussion of the FTAAP next generation trade and investment issues.

Even though competition policy is a broad topic, considerable knowledge have been accumulated worldwide, including from the APEC region, that might help any economy implement improvements in this discipline, despite the complexity of the issues involved. Anderson, Kovacic, Müller and Sporysheva (2018) pointed out that, in 1997, there were approximately 50 countries worldwide with national competition laws, whereas, in 2018, there were approximately 135 countries with these laws, including a large number of developing economies.[15] All these global experiences in competition policy should be put on the table at FTA negotiations and be shared with trading partners as a means to build capacity together and stronger relations.

Competition policy has an inherent presence in such areas as investments, intellectual property rights, SMEs, anti-competitive behaviour, innovation and technology transfer. Its scope and impact are even more extensive due to the effects of globalization and the digital economy, making competition policy development and trade negotiation even more complex. Strategic and comprehensive competition policies need to be developed to meet the new global challenges for policymakers, competition authorities, economic negotiators, and businesses.

C. Risk of an increased uneven playing field

Private and public enterprises across the region could face an increased uneven playing field due to anti-competitive business practices or abuse of market power. Likewise, the existence of discretionary financial and other support granted to specific enterprises can provide them with

[15] Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, Competition Policy, Trade and the Global Economy: Existing WTO Elements, RTA Commitments, Current Challenges and Issues for Reflection, WTO Working Paper, ERSD-2018-12

hidden advantages over others, substantially affecting market efficiency by hurting the performance of efficient competitors, and frustrating the goal of liberalizing trade and investments. Economic markets, either local and international, perform well when both private and public companies compete without undue competitive advantages or disadvantages, providing equal opportunities that benefit both companies and consumers. Any level of governments that intervene in the market by providing aids and subsidies to public or private enterprises, without justified reasons and transparent disclosures, create negative economic distortions and damage productivity along regional supply chains.

Asia Pacific economies have to consider many critical elements to promote a level playing field. All companies, whether public or private, have the same rights, but also the same obligations when engaged in commercial activities. To promote equal footing, SMEs and companies from underserved groups participating in the market has to be included in every analysis due to their current and potential presence in a broad variety of competitive sectors worldwide. Improved regulations on preferential regulatory treatment are hurdles that have to be addressed by competition policy, giving special attention to corporate governance from enterprises, avoiding any suspicions in their management and ensuring transparent separation between ownership and their operations. Estimations made by the OECD (2016) indicated that 22 percent of the largest companies in the world are under the control of states, representing "the highest percentage in decades."[16] Similarly, the World Bank highlighted the strategic role and importance of these enterprises, as they account for 5 percent of jobs, 20 percent of investments in some economies.[17]

Competition policy is not meant to focus on a particular enterprise, but is used in defense of all companies by ensuring competition neutrality. The issue is that regulations and enforcement of competition policy have to warrant fair competition and articulate a set of rules that stimulate the development of competencies of efficiency and innovation among private and public enterprises. Unfair competition creates higher costs for all companies, and severely impacted companies, especially SMEs, end up shutting down operations, with all the negatives effects that closing a business means. Thus, discretionary funding, tax breaks and non-transparent financial aids to a particular enterprise or a limited group of companies, without supported reasons, must be avoided because these are inflicting serious damage to competing businesses.

D. SMEs participation in international trade

One of the most important challenges of a comprehensive competition policy is incorporating SMEs successfully in global value chains, electronic commerce and overall in international trade. Global value chains (GVCs) represent 80 percent of international trade, according to UNCTAD (2013).[18] Though GVCs are a crucial vehicle to support SMEs to connect with international

[16] OECD (2016), State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?, Paris.
[17] World Bank Group (2014), Corporate Governance of State-Owned Enterprises: A Toolkit, Washington.
[18] United Nations Conference on Trade and Development (UNCTAD) (2013), World Investment Report 2013: Global Value Chains, Investment and Trade for Development, New York and Geneva: UN.

opportunities, SMEs have not been included properly. Furthermore, even with technological advances, SMEs have not been fully integrated, nor made use of these advances. Lanz, Lundquist, Mansio, Maurer, and Teh (2018) pointed out the opportunity to insert SMEs in global trade by investing in information and communication technology (ICT) infrastructure, training SMEs how to use ICT effectively and designing adequate regulations and provisions.[19] Lanz et al. (2018) found evidence that SMEs in developing economies participate more actively in global value chains (GVC) in economies where stronger ICT connectivity exists and that manufacturing SMEs with website presence usually had more foreign trade operations (via exports and imports) and stronger participation in GVC than those SMEs not connected digitally.

Despite the reports showing that participation of SMEs in international markets can result in higher growth and employment due to improved efficiency, economies of scale and assimilation of innovation processes, the actual number of SMEs using FTAs and exporting is still very small in both developing and developed economies. For instance, according to the World Trade Report (2016),[20] trade participation of SMEs in developing economies represented 7.6 percent of manufacturing sales, whereas for large companies, trade participation represented 14.1 percent. Likewise, it is imperative to recognize that SMEs face different challenges compared to multinational companies when using FTAs and participating in international markets. SMEs challenges include an incomplete understanding of FTAs provisions, no or less data available on target markets, regulatory uncertainty, limited amount of financial and human resources to invest in international endeavors, difficulties defining logistics of shipping goods or delivering services, and barriers at the border and behind the border when they decide to move forward. The small percentage of SMEs participating in international trade should underscore the necessity of supporting them to overcome the obstacles they face by bolstering commitments in FTAs on competition policy issues affecting SMEs performance.

E. Inclusion of high quality, comprehensive provisions in FTAs

The good news is that competition policy provisions have been widely adopted in FTAs by both developed and developing economies. It seems there is an awareness of the relevance of this type of policy, and an important number of trade agreements included competition clauses in their texts over the last few years. Laprévote et al (2015) reported that of the 216 FTAs included in the WTO Regional Trade Agreements (RTA) database that they reviewed, "a substantial majority (88 percent) addresses competition related issues in one form or another." The same report, however, pointed out that there were substantial variations in the language and scope of competition provisions across all these agreements. These differences in the level of commitment assumed by economies on competition provisions represent challenges and obstacles for businesses, authorities and economies. Lack of harmonization on competition rules between

[19] Lanz, R., Lundquist, K., Mansio, G., Maurer, A., and Teh R. (2018), "E-commerce and developing country-SME participation in global value chains", working paper.

[20] World Trade Report 2016 retrieved from https://www.wto.org/english/res_e/booksp_e/world_trade_report16_e.pdf

trading parties, including in the Asia Pacific, disrupts collective efforts to support SMEs, strengthen their role in GVCs and promote economic integration and a level playing field in the region.

Clearly, APEC economies should take advantage of the momentum that competition policy is experiencing regionally and beyond borders to develop and commit to high-level competition standards. High standard provisions would guarantee equal opportunity and non-discrimination for all business participants, including SMEs, women, start-ups, foreign capitals, considering the diversity of APEC regional business. Anti-competitive business conduct would not be allowed to interfere with the advantages of trade liberalization. Effective competition policy regulations are essential to provide a predictable and supportive environment for business and investment prosperity. In this sense, FTAs provide an extraordinary framework to dialogue together and build economic agreements that reflect and meet the challenges and obstacles in the current and complex business environment. In these times of uncertainty and rapid change, high standards on competition policy can work as a stabilizing, balancing influence in regional markets, applying rules to make sure businesses compete fairly with each other. Recognizing that some economies might not be able to assume the same level of commitment to neutral competitive policies, the route towards high standard provisions will need to be a gradual, ongoing process in order to reap the benefits of this policy.

Therefore, after analyzing some of the most recent and progressive FTAs of APEC economies, the results of this comparative study of advanced competition provisions will provide a framework for strategic dialogue, providing information and best practices for achieving agreements that respond to current business needs, and also contributing to the growing knowledge base for establishing a comprehensive trade policy that includes crucial, competition provisions for an eventual FTAAP.

Section II. Quantitative review and analysis of variables related to competition

For the quantitative review and analysis of competition-related variables in this section, data was analyzed from two international reports, namely the *Doing Business Report 2020* and *The Global Competitiveness Report*. Additionally, indicators were reviewed related to investments, micro, small and medium enterprises (MSMEs) and preferentially-treated entities (PTEs) that are important players to consider in order promoting a level playing field across the Asia-Pacific. This review provides an opportunity to visualize ways to improve doing business by using competition rules through the development of high standard provisions in FTAs and the eventual FTAAP.

A. Doing Business Report 2020

To start the quantitative review of variables related to competition, some indicators have been chosen from the *Doing Business Report 2020*[21] to offer an overview of the business climate in APEC economies. It must be highlighted that the Doing Business aims to capture the regulatory reforms implemented by economies, including competition policy reforms that have an impact in the business environment and make it easier to do business. The last edition of this report identifies 294 regulatory reforms implemented worldwide during the last year (May 2018-May 2019) and it points out that these reforms made it possible for 115 economies to now offer a better business environment[22]. Likewise, the report states that some of the most common reform characteristics include competition-related topics such as strengthening minority investor protections, enhancing online platforms to comply with regulatory requirements, and automating international trade logistics. In this respect, the *Doing Business Report* found, for instance, that China during the last few months strengthened minority investors' protection by "*imposing liability on controlling shareholders for unfair related-party transactions and clarifying ownership and control structures. This reform applies to both Beijing and Shanghai*". Economies that want to improve their business environment and their performance in the Doing Business Report should consider promoting and implementing effective competition rules. Thus, it would be in the best interest of any economy to carefully analyze such reports as Doing Business, implementing competition reforms and promoting collaboration and capacity building in competition areas with other like-minded economies.

The Doing Business Report offers two aggregate measures, "*the ease of doing business score"* and "*the ease of doing business rankings."* These two measures comprise of 41 indicators for 10 doing business topics.[23] The most recent version of this report ranks 190 economies, and sends mixed signals regarding the business environment in the Asia-Pacific economies. These results deserve careful attention with a view to make "best practice" decisions on competition-related policy regulations. On the hand one, eight APEC economies are in the top twenty of the *Ease of Doing Business Rank* including four in the top five: New Zealand (1), Singapore (2), Hong Kong, China (3) and the Republic of Korea (5). However, if the goal was that all APEC economies were within the first 50 positions, eight of them did not achieve it. APEC economies beyond the fiftieth position are: Chile (59), Mexico (60), Brunei Darussalam (66), Viet Nam (70), Indonesia (73), Peru (76), Philippines (95), and Papua New Guinea (120). If the analysis of the doing business ranking was broken down into the ten business topics that compose this

[21] The Doing Business Report is the World Bank Group flagship publication: https://www.doingbusiness.org/

[22] Since 2005, more than 3,800 business regulatory reforms have been implemented across the 190 economies measured by the Doing Business report.

[23] A high ease of doing business ranking means the regulatory environment is more conducive to the starting and operation of a local firm. The rankings are determined by sorting the aggregate scores on 10 topics, each consisting of several indicators, giving equal weight to each topic. The 10 topics are: Starting a business, Dealing with construction permits, Getting electricity, Registering property, Getting credit, Protecting minority investors, Paying taxes, Trading across borders, Enforcing contracts, and Resolving insolvency.

ranking, most of the APEC economies, except for Singapore, have at least one topic ranked beyond the fiftieth position (see Table 2).

For two relevant topics for competition policy, on the one hand with *starting a business topic*[24] there are five APEC economies in the top twenty: New Zealand (1), Canada (3), Singapore (4), Hong Kong, China (5), and Australia (7), and there are ten economies below the fiftieth position, including eight beyond the one hundredth position: Japan (106), Mexico (107), Viet Nam (115), Malaysia (126), Peru (133), Indonesia (140), Papua New Guinea (142) and the Philippines (171). On the other hand, analyzing the trading across borders topic[25], it is surprising to realize that none of the APEC economies are in the top 20 of this key area for international trade. The Asia-Pacific economy with the best position in this area is Hong Kong, China (29), followed by the Republic of Korea (36), the United States (39) Singapore (47) and Malaysia (49). There are 16 economies below the fiftieth place, including seven beyond the one hundredth position: Peru (102), Viet Nam (104), Australia (106), Philippines (113), Indonesia (116), Papua New Guinea (125), and Brunei Darussalam (149).

Table 2: The Doing Business Report
Ranking APEC economies 2019

Economy	Ease of Doing Business (Global rank)	Starting a Business	Dealing with Construction Permits	Getting Electricity	Registering Property	Getting Credit	Protecting Minority Investors	Paying Taxes	Trading across Borders	Enforcing Contracts	Resolving Insolvency
New Zealand	1	1	7	48	2	1	3	9	63	23	36
Singapore	2	4	5	19	21	37	3	7	47	1	27
Hong Kong, China	3	5	1	3	51	37	7	2	29	31	45
Korea, Rep.	5	33	12	2	40	67	25	21	36	2	11
United States	6	55	24	64	39	4	36	25	39	17	2
Malaysia	12	126	2	4	33	37	2	80	49	35	40
Australia	14	7	11	62	42	4	57	28	106	6	20
Chinese Taipei	15	21	6	9	20	104	21	39	61	11	23
Thailand	21	47	34	6	67	48	3	68	62	37	24
Canada	23	3	64	124	36	15	7	19	51	100	13
Russian Federation	28	40	26	7	12	25	72	58	99	21	57
Japan	29	106	18	14	43	94	57	51	57	50	3
China	31	27	33	12	28	80	28	105	56	5	51
Chile	59	57	41	39	63	94	51	86	73	54	53
Mexico	60	107	93	106	105	11	61	120	69	43	33
Brunei Darussalam	66	16	54	31	144	1	128	90	149	66	59
Viet Nam	70	115	25	27	64	25	97	109	104	68	122
Indonesia	73	140	110	33	106	48	37	81	116	139	38
Peru	76	133	65	88	55	37	45	121	102	83	90
Philippines	95	171	85	32	120	132	72	95	113	152	65
Papua New Guinea	120	142	122	118	127	48	72	118	125	173	144

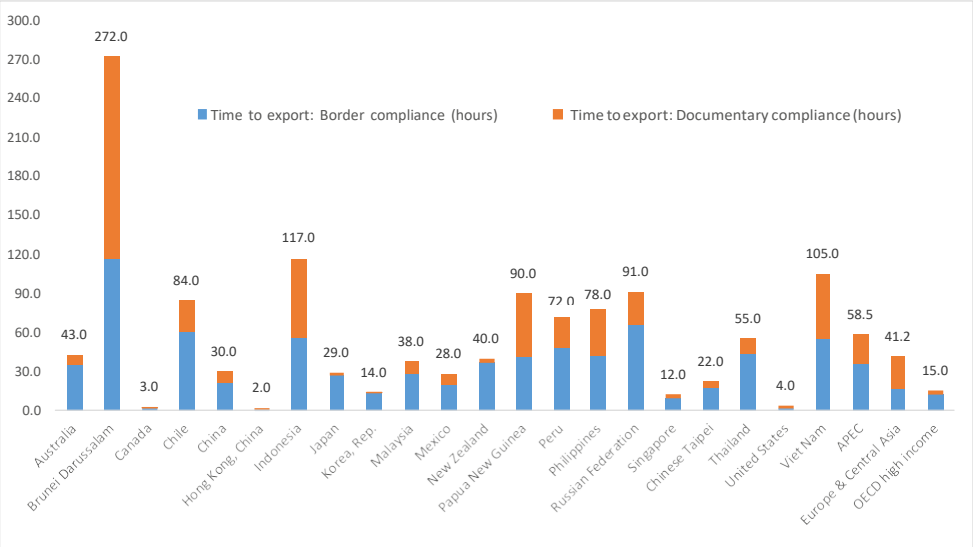
Source: Doing Business Report 2020, the World Bank

A deeper analysis of the information provided by the doing business report regarding four indicators composing trading across border part, the total time to export and import can be estimated, and the total cost to export and import in each of the APEC economies can be compared with the APEC average. In this respect, the three APEC economies with the lowest total time to export are Hong Kong China, Canada and the United States with two, three and four

[24] Starting a business measures the time, the number of procedures, the cost and minimum capital to open a business.
[25] Trading across borders measures the time and cost to export and import. It gives an idea about the logistical and administrative procedures of exporting and importing in one economy as compared with others.

hours respectively. Conversely, the economies with the highest time to export measured by hours are Brunei (272), Indonesia (117) and Viet Nam (105). To be noted, there are eight economies above the APEC average time, which is 58.5 hours. Compared to other groups, the APEC average time to export is higher than the average time in Europe and Central Asia (41.2 hours) and also higher than *OECD high income economies* (15 hours) (see Figure 1).

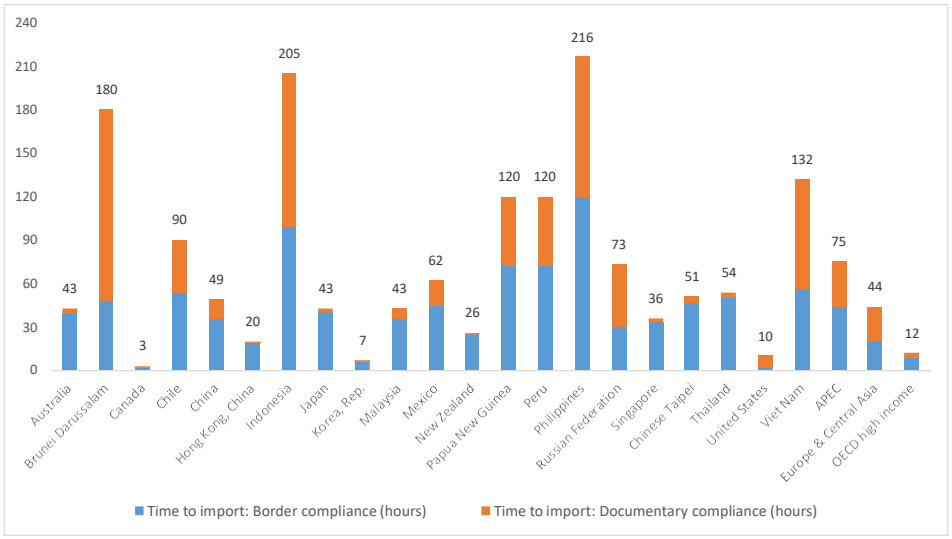
Figure 1: Total time to export
Border compliance + Documentary compliance (hours)



Source: Doing Business Report 2020, the World Bank

With regard to the total time to import (Figure 2), the APEC economies with the fastest time to import (considering border and documentary compliance) are Canada, Republic of Korea and the United States with three, seven and ten hours respectively. The economies with the highest time to import in the region, assessed by hours, are Philippines (216), Indonesia (205) and Brunei (180). There are seven economies above the APEC average of seventy-five hours. The APEC average time to import is higher than the average in Europe and Central Asia (44) and OECD high-income economies (12).

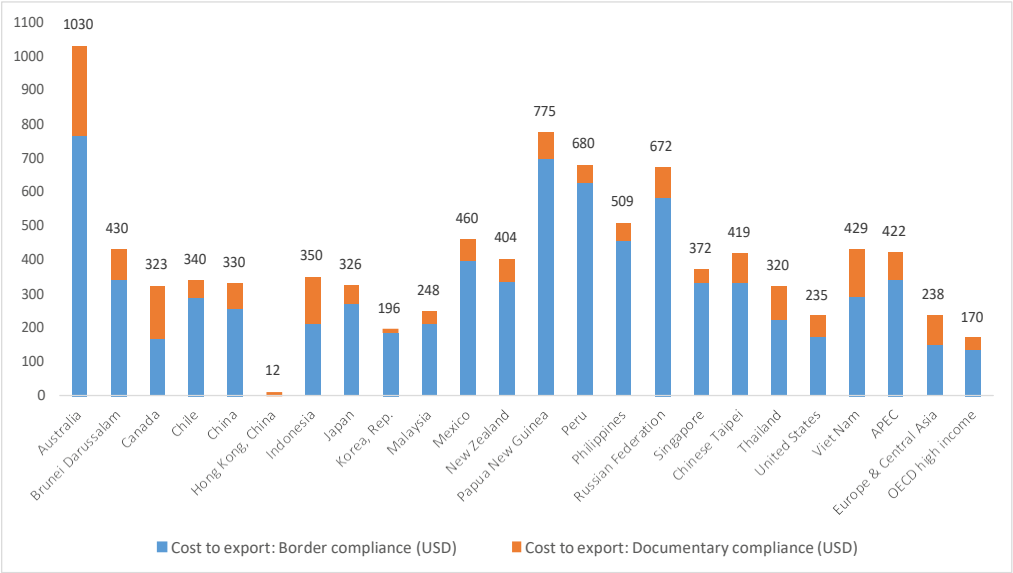
Figure 2: Total time to import
Border compliance + Documentary compliance (hours)



Source: Doing Business report 2020, the World Bank

The total cost to export (Figure 3) calculated by adding the costs of border and documentary compliance and measured in American dollars shows that the three APEC economies with the lowest total cost to export are Hong Kong, China ($12), Republic of Korea ($196) and the United States ($235). The economies with the highest total estimated cost to export are Australia ($1,030), Papua New Guinea ($775) and Peru ($680). There are eight economies above the APEC average of 422 USD, whereas the average costs to export in economies of Europe and Central Asia ($238) and OECD high income ($170) are more affordable than the APEC average.

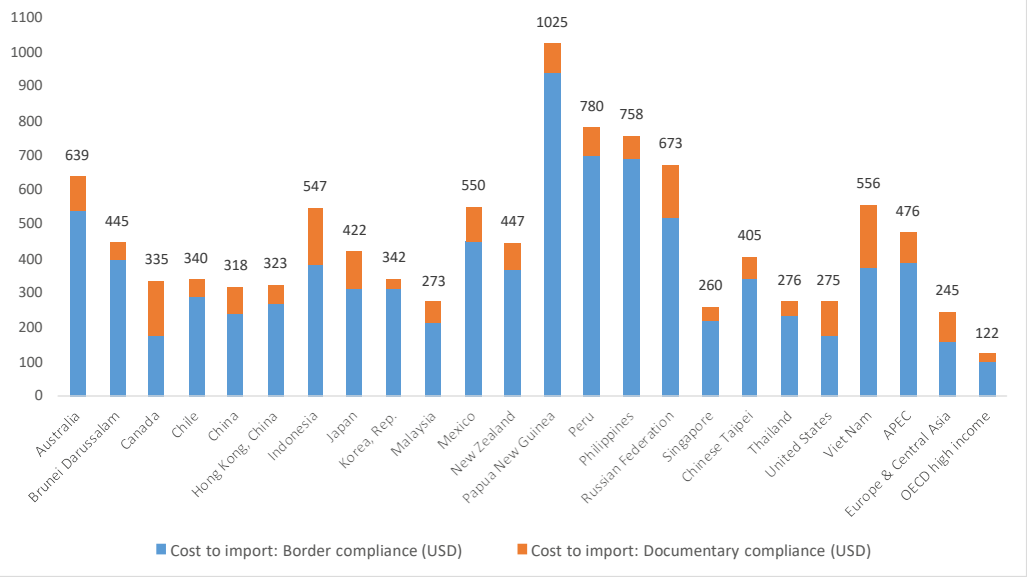
Figure 3: Total cost to export (USD)
Border compliance + Documentary compliance



Source: Doing Business report 2020, the World Bank

In terms of total cost to import (Figure 4), the APEC economies with the lowest cost, measured in American dollars, are Singapore ($260), Malaysia ($273), the United States ($275), and Thailand ($276); whereas the economies with the highest cost are Papua New Guinea ($1,025), Peru ($780) and Philippines ($758). There are eight APEC economies above the average cost to import in the region ($476). The APEC average cost to import is more expensive than the average in Europe and Central Asia ($245) and OECD high-income economies ($122)

Figure 4: Total cost to import (USD)
Border compliance + Documentary compliance



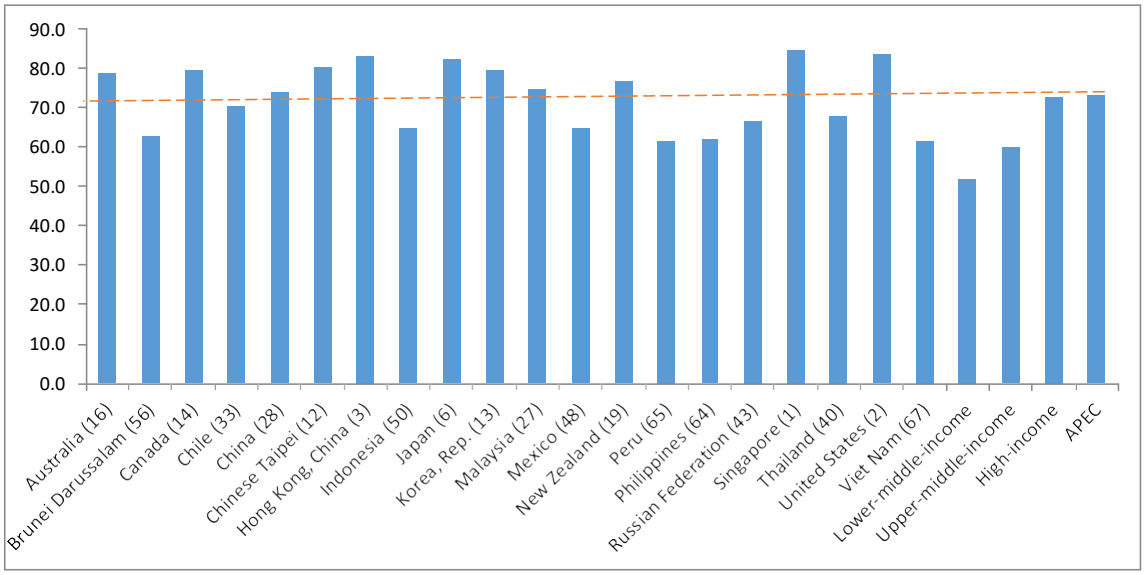
Source: Doing Business report 2020, The World Bank

The analysis of the Doing Business Report shows that, even though there are some APEC economies with outstanding ranking, most of the APEC economies have many opportunities for improvement. Likewise, the developed and developing economies in the region still have to develop high-standard, comprehensive trade regulations, enhance procedures along regional supply chains, create better conditions for businesses to participate in international trade, and promote efficiencies in the marketplace. In this respect, a comprehensive competition policy is an ally for APEC economies to improve their performance in strategic indicators of international rankings such as The Ease of Doing Business ranking.

B. Global Competitiveness

The Global Competitiveness Report[26] measures national competitiveness, defined as a set of policies, institutions and factors that define the degree of productivity in any economy. The last edition of this publication shows that three APEC economies are assessed at the top three of the list: 1) Singapore, 2) the United States and 3) Hong Kong, China. Nine APEC economies are in the top 20 ranking and the rest of APEC economies are between the 27th and 67th positions (Figure 5). The APEC average for this indicator equals 73, which compared to the index of high-income economies, is very similar. Despite this good ranking level as a region, there are nine APEC economies below that average: Chile, Thailand, Russia, Mexico, Indonesia, Brunei Darussalam, the Philippines, Peru and Viet Nam (Figure 5).

Figure 5: The Global Competitiveness Report 2019
Ranking and Index: APEC economies



Source: The Global Competitiveness Report 2019 / Note: Score 0-100 (best)

Analyzing the twelve pillars that make up the Global Competitiveness rank, the following observations can be made. First, overall, APEC economies perform well in pillars such as macroeconomic stability, market size and business dynamism. Most of the APEC economies are located below the fifty positions of these pillars. Conversely, there are seven strategic pillars to promote competitiveness in which at least seven APEC economies are above the fiftieth position; these pillars are institutions, innovation capability, skills, infrastructure, product market, labor market and health. (Table 3).

[26] The Global Competitiveness Report 2019 measures competitiveness of 141 economies, providing valuable analysis into the drivers of economic growth under twelve pillars. (Papua New Guinea is not part of the list).

Table 3: The Global Competitiveness Report
Twelve Pillars of the Global Rank

Economy	1st pillar: Institutions	2nd pillar: Inf rastructure	3rd pillar: ICT adoption	4th pillar: Macroeconomic stability	5th pillar: Health	6th pillar: Skills	7th pillar: Product market	8th pillar: Labour market	9th pillar: Financial system	10th pillar: Market size	11th pillar: Business dynamism	12th pillar: Innovation capability
Australia	17	29	29	1	17	13	5	23	13	25	16	18
Brunei Darussalam	50	58	26	87	62	59	37	30	98	116	62	51
Canada	13	26	35	1	14	12	24	8	9	16	12	16
Chile	32	42	56	1	37	47	10	53	21	46	47	53
China	58	36	18	39	40	64	54	72	29	1	36	24
Hong Kong, China	5	3	3	1	1	20	1	7	1	28	15	26
Indonesia	51	72	72	54	96	65	49	85	58	7	29	74
Japan	19	5	6	42	1	28	6	16	12	4	17	7
Korea, Rep.	26	6	1	1	8	27	59	51	18	14	25	6
Mexico	98	54	74	41	60	89	53	96	64	11	41	52
Malaysia	25	35	33	35	66	30	20	20	15	24	18	30
New Zealand	3	46	21	1	34	10	3	5	28	66	13	27
Peru	94	88	98	1	19	81	56	77	67	49	97	90
Philippines	87	96	88	55	102	67	52	39	43	31	44	72
Russian Federation	74	50	22	43	97	54	87	62	95	6	53	32
Singapore	2	1	5	38	1	19	2	1	2	27	14	13
Thailand	67	71	62	43	38	73	84	46	16	18	21	50
Chinese Taipei	24	16	11	1	24	23	14	15	6	19	20	4
United States	20	13	27	37	55	9	8	4	3	2	1	2
Viet Nam	89	77	41	64	71	93	79	83	60	26	89	76

Source: The Global Competitiveness Report 2019

Last but not least, if a comparison between the rankings of 2019 and 2018 is made, there are some interesting findings to consider. Eleven of the twenty APEC economies measured in this report fell in their position from 2018 to 2019; the United States, Japan and New Zealand went down one place; Canada; Australia; Malaysia, Thailand, Mexico and Peru went down two places; Indonesia fell five places and the Philippines went down eight positions. On the other hand, Viet Nam, Brunei and Hong Kong, China moved up ten, six and four places respectively. Furthermore, the Republic of Korea, Singapore and Chinese Taipei advanced one position, while China, Chile and Russia kept themselves in the same position (table 4).

Table 4: The Global Competitiveness Report
Ranking APEC economies 2019 vs 2018

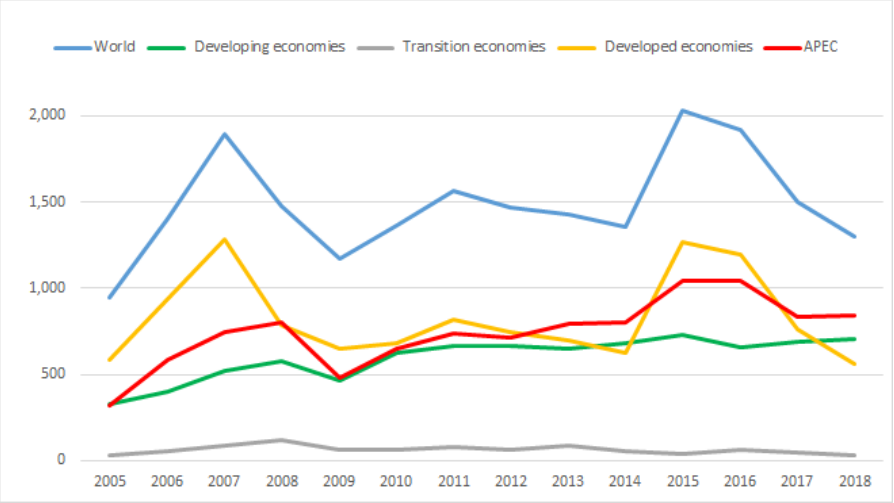
Economy	Rank 2019	Rank 2018	Change
Australia	16	14	-2.00
Brunei Darussalam	56	62	6.00
Canada	14	12	-2.00
Chile	33	33	0.00
China	28	28	0.00
Hong Kong, China	3	7	4.00
Indonesia	50	45	-5.00
Japan	6	5	-1.00
Korea, Rep.	13	15	2.00
Malaysia	27	25	-2.00
Mexico	48	46	-2.00
New Zealand	19	18	-1.00
Peru	65	63	-2.00
Philippines	64	56	-8.00
Russian Federation	43	43	0.00
Singapore	1	2	1.00
Chinese Taipei	12	13	1.00
Thailand	40	38	-2.00
United States	2	1	-1.00
Viet Nam	67	77	10.00

Source: The Global Competitiveness Report 2019 and 2018

C. Investments

Global foreign direct investment (FDI) flows grew worldwide from 949 billion in 2005 to 1,297 billion in 2018, an increase of 37 percent; in the APEC region, this same indicator had extraordinary growth, going from 320 billion to 839 billion, representing a growth of 162 percent (Figure 6). Developing and transition economies grew their FDI by 113 percent and 12 percent respectively. In contrast, developed economies decreased their FDI by 5 percent. It must be noted that during this period, APEC as a region increased its share of global FDI inflows, moving from 33.8 percent of global flows in 2005 to 64.6 percent in 2018. The APEC region currently has a higher share of global FDI inflows compared to developed and developing economies (Figure 7).

Figure 6: FDI in-flows
Global, APEC and by group of economies, 2005–2018



Source: UNCTAD Data Center

Figure 7: Percentage share in global FDI in-flows
APEC region versus developed and developing economies, 2005–2018

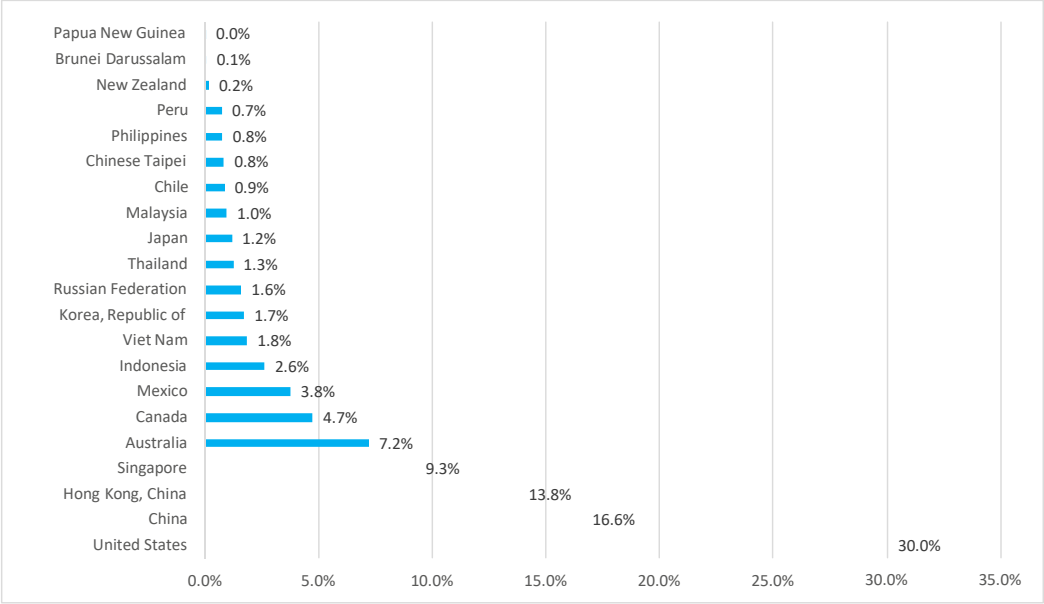
Source: UNCTAD Data Center

Despite the positive numbers in the APEC region from 2005 to 2018, there are three challenges that need to be addressed. First, 85 percent of the foreign direct investments in the Asia Pacific are concentrated in seven economies: namely, the United States of America 30.0 percent, China 16.6 percent, Hong Kong, China 13.8 percent, Singapore 9.3 percent, Australia 7.2 percent, Canada 4.7 percent, and Mexico 3.8 percent (Figure 8). Second, in recent years, FDI's dynamism worldwide has begun to stagnate. For instance, the change of global FDI measured on an annual basis fell during two consecutive years, by 22 percent in 2017 and by 13 percent in 2018. For APEC's economies, FDI declined by 20 percent in 2017 and only grew 1 percent in 2018. According to the World Investment Report 2018, the decrease in FDI globally is produced in part by the decline in the amount of cross-border mergers and acquisitions, opposite to the performance of other macroeconomic variables, such as trade and gross domestic product that had "substantial improvement."

Third, it is imperative to realize that the investment environment has not reach its full potential. Improving investment policies in the APEC region would send a clear message to foreign investors that their investments would be protected under high standard regulations. To demonstrate the potential to grow investments in the region, we can compare the foreign direct investments inflows and outflows as a percentage of Gross Domestic Product (GDP) of each APEC economy, known as "*investment openness"* versus the total of exports and imports as a share of GDP known as *"trade openness"* (Figure 9). Comparing these investment and trade indicators shows, for instance, that the trade openness indicator for Viet Nam equals 209 percent, while its investment openness is only 6.6 percent. Likewise, the value for trade openness for Malaysia is 131 percent, whereas its investment openness is 3.8 percent. Hong Kong, China has the highest value for both indicators: 376 percent for trade openness and 55 for investment openness. Makin and Chai (2018) analyzed these two indicators in APEC economies with data from 1990 to 2014, and concluded that trade openness has increased for most APEC members, but, in contrast, investment openness has remained flat over this period for more than twenty years.[27]

Thus, APEC economies would benefit by collaborating and promoting investment rules through FTAs that encourage competition, strengthen regional value chains, and facilitate new companies participation, adding value to local and regional markets. It is time to recognize that solving investment issues has been delayed and it is time to reverse this trend.

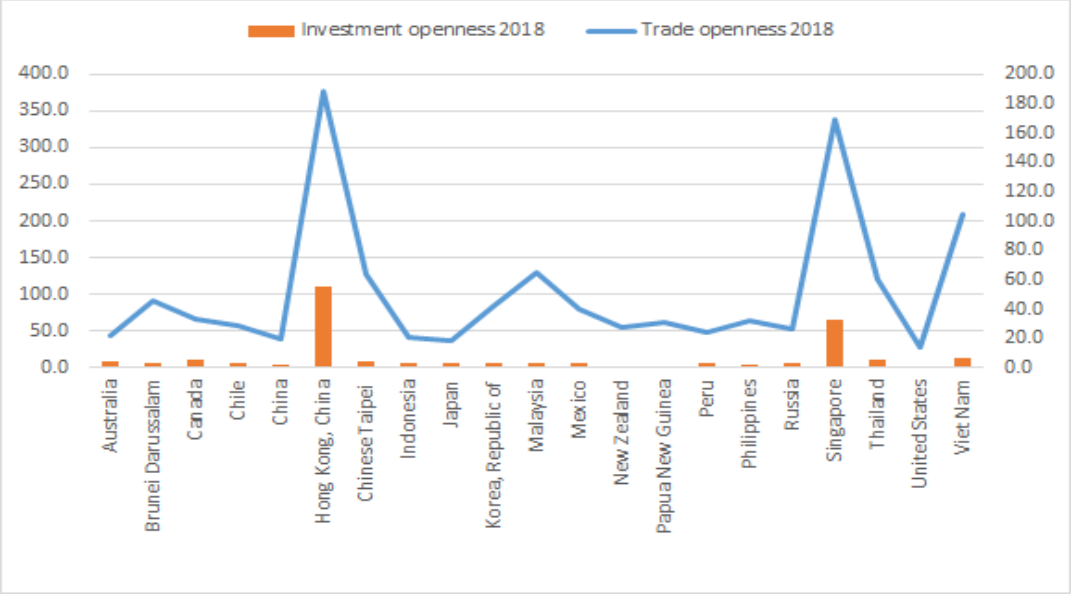
Figure 8: Percentage share in APEC FDI in-flows
APEC economies, 2018



Source: UNCTAD Data Center

[27] Makin, Anthony & Chai, Andreas. (2018). Prioritizing Foreign Investment in APEC. Global Economy Journal.

Figure 9: Investment Openness versus Trade Openness
APEC economies, 2018



Source: UNCTAD Data Center

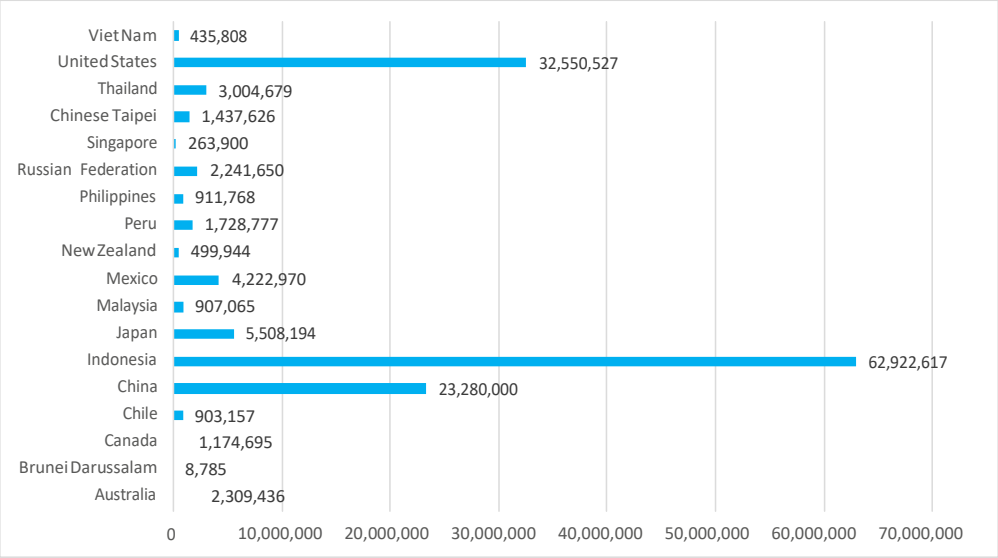
D. Small and Medium Enterprises

The relevance of SMEs globally and in the APEC region is beyond question. A recent report co-published by the WTO and the World Bank (2019) indicated that SMEs account for between 60 and 70 percent of employment and between 80 and 99 percent of businesses in the world. The same report added that contribution to GDP by SMEs ranged from approximately 22 percent to 70 percent depending on the region.[28] Following the same pattern in Asia Pacific, SMEs represent a driving force whose contribution adds more than half the jobs, over 97 percent of the total of companies, and between 20 percent and 50 percent to the GDP depending on the economy.[29] According to the SME Finance Forum, the number of formally registered micro, small, and medium enterprises (MSMEs) in the region is above 144 million; the economies with the highest number of MSMEs are Indonesia, the United States and China with 62.9, 32.6 and 23.3 million respectively (Figure 10).

Figure 10: Number of MSMEs

[28] Technological innovation, supply chain trade, and workers in a globalized world (2019)
[29] APEC website, working group of Small and Medium Enterprises

APEC Economies and Number of Enterprises



Note: no information available for Hong Kong China, Rep. of Korea and Papua Guinea
Source: the SME Finance Forum. MSME Economic Indicators Database 2019

Even with the extraordinary presence of SMEs worldwide, these enterprises are not participating in global trade according to their potential, which has prevented them from reaping the benefits of regional supply chains by exploiting economies of scale, accessing foreign distribution networks and increasing their competitiveness. The APEC region is the same as the rest of the world, with SMEs suffering from lack of integration, and the consequences are their low participation in international trade and FTAs. For example, SMEs' direct participation in exports in APEC economies has been limited to 35 percent or less of the total. Another way to analyze MSMEs' performance is estimating the number of formal MSMEs per 1,000 people. A higher number in this variable means adequate institutional frameworks, a good level of competition, a satisfactory business environment and overall, increased shared prosperity. Based on information from the SME Finance Forum,[30] the APEC economy with the highest number of MSMEs per 1,000 inhabitants is Indonesia (238), followed by New Zealand (104), the United States (100) and Australia (94) (Figure 11). Conversely, eleven of the eighteen APEC economies with information available for this variable are below 50 MSMEs per 1,000 people. MSMEs clearly need better support in the APEC region.

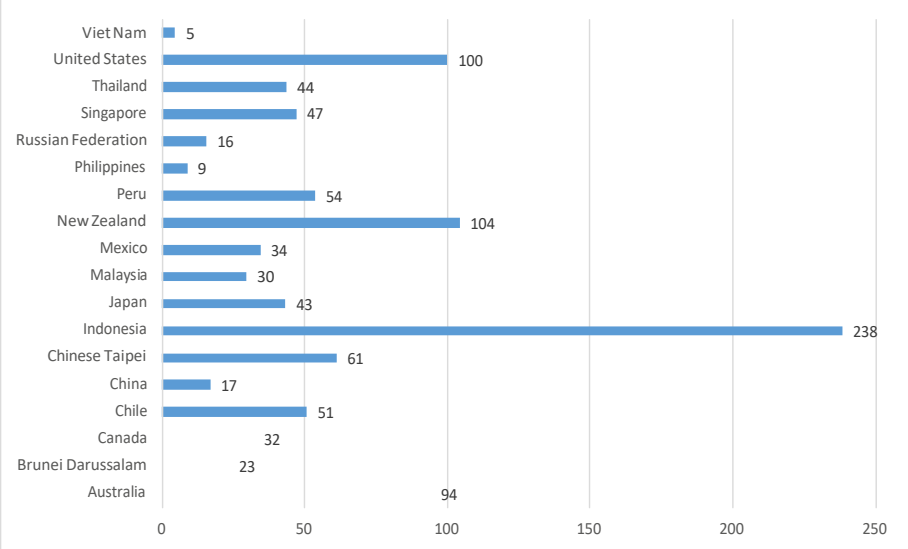
In order to support MSMEs performance, regulations need improving, recognizing that these enterprises find it harder to cover their costs to meet with trade regulations, while also investing in human and material resources in these endeavors. A report from the International Trade Centre (ITC) indicated that a 10 percent rise in the frequency of trade requirements might doubly affect SMEs compared to large enterprises. ITC estimated this issue could decrease the export value of SMEs by 3.2 percent, whereas large companies would reduce exports by only 1.6

[30] The SME Finance Forum. MSME Economic Indicators Database 2019

percent.[31] Thus, it is imperative to revise regulations, making them as simple and efficient as possible. In order to do this, a basic first step would be to agree to a shared definition of how a micro, small and medium enterprise will be determined. The APEC region, however, does not have a common definition for MSMEs accepted by all. Instead, there is a vast variety of MSMEs definitions, making it difficult to harmonize and standardize regulations. For instance, the definition of a small company based on the number of employees in Australia is between 5 and 19 workers, and in Canada, between 5 and up to 99 employees. In China, the definition of a small company depends on the economic sector. The same issues arise when we are trying to categorize a medium enterprise: for Indonesia, between 20 to 99 employees; in Japan, between 50 and 300 employees; in the Philippines, between 100 and 199 workers. In Korea, it varies depending on the industry (Table 5).

Improving and adding high-standard provisions in FTAs could provide innovative solutions to some of the issues facing SMEs. Strengthening their performance, will support economic integration necessary for an FTAAP.

Figure 11: MSMEs per 1,000 people: APEC Economies



Note: no information available for Hong Kong China, Rep. of Korea and Papua Guinea
Source: the SME Finance Forum. MSME Economic Indicators Database 2019

[31] SME Competitiveness Outlook 2016. Meeting the Standard for Trade

Table 5: SME Definitions
APEC Economies

Economy	SME Definitions (number of employees)	
	Small	Medium
Australia	5-19	20-199
Brunei Darussalam	6-50	51-100
Canada	5-99	100-499
China	5-20 Wholesale; 10-50 Retail; 20-100 Warehouse; 10-100 Accomodation, Restaurant, Software, Tenancy, Information, Other; 20-300 Heavy Industry, Transportation, Postal; 100-300 Property management	20-200 Wholesale; 50-300 Retail; 100-200 Warehouse; 100-300 Accomodation, Restaurant, Software, Tenancy, Other; 100-2000 Information; 300-1000 Heavy Industry, Transportation, Postal, Property management
Hong Kong, China	<100 Manufacturing; <50 Non-manufacturing firms	<100 Manufacturing; <50 Non-manufacturing firms
Indonesia	5-19	20-99
Japan	10-49	50-300
Korea, Rep.	<50 in Manufacturing, Mining, Construction, Transportation ; < 10 in other	< 300 Manufacturing., Mining, Construction, Transportation; <200 Agriculture; <100 Others; <50 Real State
Malaysia	5-75 Manufacturing; 5-30 Services and others	76-200 Manufacturing; 31-75 Services and others
Mexico	11-50	51-250
New Zealand	6-9	9-20
Papua New Guinea		<500
Peru	10-100	>100
Philippines	10-99	100-199
Russia	16-100	101-250
Singapore		<200
Chinese Taipei		<200 Manufacturing, Construction, Mining; <100 Other
Thailand	≤50 Manufacturing, Services; ≤25 Wholesale; ≤15 Retail	51-200 Manufacturing, Services; 26-50 Wholesale; 16-30 Retail
United States	20-99	100-499
Viet Nam	10-200 Agriculture, Industry, Construction; 10-50 Commerce, Services	201-300 Agriculture, Industry, Construction; 50-100 Commerce, Services

Note: no information available for Papua New Guinea
Source: the SME Finance Forum. MSME Economic Indicators Database 2019

E. Preferentially-Treated Entities (PTEs)

Preferentially-treated entities play a major role in local and regional economies by providing strategic services and products, and by interacting and doing business with other private and public enterprises, including their clients, suppliers, partners or competitors. The influence of these enterprises comes from participating actively in strategic and competitive sectors such as

energy, gas, electricity, manufacturing, telecommunications, finance, transportation, specialized services, among others. For instance, a study by Price Waterhouse Coopers (PWC) reported that the proportion of state-owned enterprises among the Fortune Global 500 grew from 9 percent in 2005 to 23 percent in 2014.[32]

In many APEC economies, PTEs contribute significantly to the local economies and to the GDP by creating jobs, investing in capital projects, and participating in stock markets. Some examples of the solid presence of PTEs in the APEC region include: first, contribution to GDP which was 15 percent in Singapore, 25 percent in Thailand, 30 percent in China and 38 percent in Viet Nam; second, presence in stock exchanges measured by market capitalization reached approximately 20 percent in Singapore, 25 percent in Thailand, 33 percent in Indonesia, about 50 percent in Malaysia and close to 60 percent in China.[33] Likewise, estimations made by the OECD showed that the presence of these entities in nine APEC economies represented 51,557 enterprises with a market value of over 29 USD trillion, translating into more than 21 million jobs (Table 6).

Thus, measuring efficiency and the transparency of these kinds of entities are key to advancing the competition agenda. This report analyzed one indicator, the *Public Ownership* of *the Product Market Regulation (PMR) database,* issued by the OECD. This indicator summarizes the scope of public undertakings, government involvement in network sectors, direct control over enterprises, and governance of these entities in every measured economy. This indicator offers information from OECD economies, including seven APEC economies (Australia, Canada, Chile, Japan, Korea, Mexico, and New Zealand) and some non-OECD economies. The index scale is zero to six, with zero meaning the least restrictive regulatory barriers to competition. From the seven APEC economies on the list, analyzing this indicator shows that the economy with the least restrictive environment to competition on state enterprises is Chile, followed by Australia, and Japan. Although these three APEC economies are below the OECD average, all of them are below other economies such as United Kingdom, Spain and the Netherlands. The rest of the APEC economies in this database (Canada, Korea, Mexico and New Zealand) are above the OECD average (Figure 12).

Due to the scope of preferentially-treated entities (PTEs) and their presence and impact in the APEC region and beyond borders, it is paramount to revise their rules by increasing their transparency, guaranteeing a professional management supported by appropriate board of directors, and promoting a level playing field for the benefit of all. APEC economies would find it beneficial to discuss and establish harmonized rules in the region through the use of FTAs.

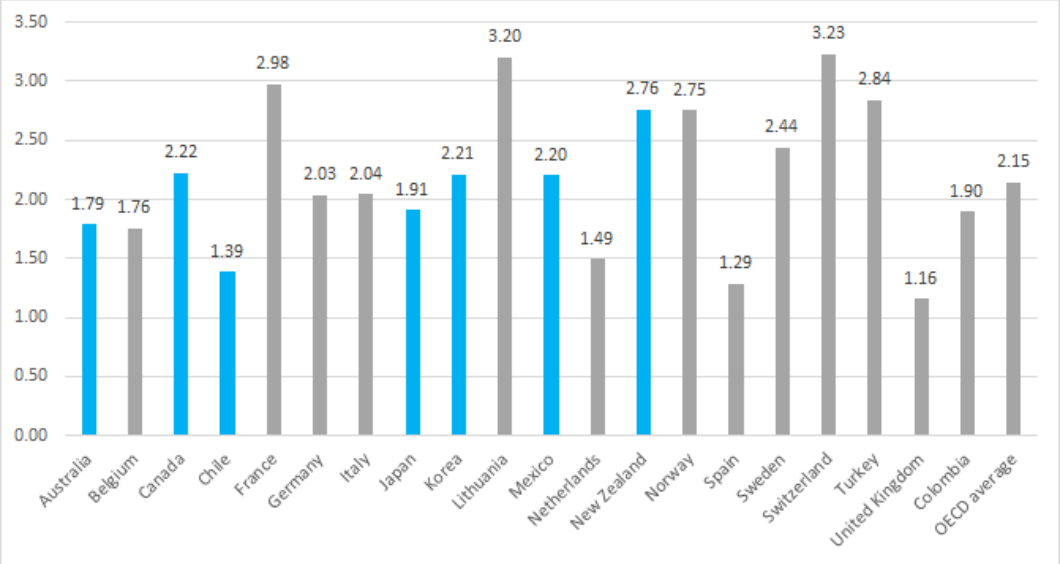
32 Price Waterhouse Coopers (2015) State-Owned Enterprises: Catalysts for public value creation?
33 OECD, 2010, Policy Brief on Corporate Governance of State-Owned Enterprises in Asia: Recommendations for Reform

Table 6 Presence of Public Undertakings in eight APEC economies
N° of enterprises, N° of employees and value in USD million

		Total	Primary sectors	Manufacturing	Finance	Telecoms	Electricity and gas	Transportation	Other utilities	Real estate	Other activities
Australia	N° of enterprises	8		1		2	1	2	1		1
	N° of employees	42,607		2,500		5,000	650	1,100	32,732		625
	Value of enterprises	13,602		210		6,558	1,561	2,735	1,437		1,101
Canada	N° of enterprises	44	4	1	7			13	5	2	12
	N° of employees	83,462	3,760	1,200	6,930			4,749	64,346	945	1,532
	Value of enterprises	30,316	-4,921	216	32,247			1,422	-828	376	1,805
Chile	N° of enterprises	25	3		1	1		12	2		6
	N° of employees	50,361	24,118		13,826	1,076		5,219	5,294		828
	Value of enterprises	20,811	13,637		2,284	514		3,639	427		311
China	N° of enterprises	51,341	3,267	10,463	313	712	4,308	3,865	1,197	3,847	23,369
	N° of employees	20,248,999	5,935,389	3,696,749	2,218,240	1,191,224	1,569,958	2,370,720	169,814	180,344	2,916,561
	Value of enterprises	29,201,079	2,708,542	1,662,164	16,897,344	922,915	1,820,906	1,929,509	94,406	610,909	2,554,383
Japan	N° of enterprises	8						7	1		
	N° of employees	256,265						37,953	218,312		
	Value of enterprises	82,365						26,526	55,839		
Mexico	N° of enterprises	78	1	3	20	5	2	22	1		24
	N° of employees	73,686	1,136	1,024	15,281	9,499	1,201	10,352	19,671		15,522
	Value of enterprises	21,232	213	266	15,748	400	46	3,612	92		856
New Zealand	N° of enterprises	37	3		3	4	5	6	1	2	13
	N° of employees	36,214	2,297		365	770	3,828	15,018	8,504	312	5,120
	Value of enterprises	29,053	1,015		121	263	9,097	4,842	814	12,301	600
United States	N° of enterprises	16		1	10		1	2	1		1
	N° of employees	535,981		12,278	1,673		10,000	20,130	491,863		37
	Value of enterprises	-21,629		309	-3,815		23,796	8,155	-50,391		317
Total	N° of enterprises	51,557	3,278	10,469	354	724	4,317	3,929	1,209	3,851	23,426
	N° of employees	21,327,575	5,966,700	3,713,751	2,256,315	1,207,569	1,585,637	2,465,241	1,010,536	181,601	2,940,225
	Value of enterprises	29,376,830	2,718,485	1,663,165	16,943,929	930,650	1,855,406	1,980,440	101,796	623,586	2,559,372

Source: OECD (2017), The Size and Sectoral Distribution of State-Owned Enterprises, OECD Publishing, Paris.

Figure 12: Indicator of Product Market Regulation
Public Ownership



Source: OECD 2018 PMR database Note: The US and Estonia have not completed OECD data collection

After completion of this section, it is important to acknowledge that the availability of data on competition policy issues from the APEC economies is still limited, even though there are some extraordinary global reports and databases issued by international organizations, such as the World Economic Forum, the World Bank Group, OECD, International Trade Centre, among others. Nonetheless, APEC economies should work together and create partnerships with international organizations in order to improve methodologies and measures on competition policy topics, to offer timeliness of data, complete economy coverage of APEC economies and consistent definitions and standards. Some indicators that might be developed under these initiatives could include metrics on SMEs, investments, competition law, and preferential regulatory treatment. It would be in the best interest of all APEC economies to support the development and collection of data intelligence that would allow better understanding of the status of competition issues and, based on this better understanding, develop efficient rules that benefit all.

Next, the comparative analysis of competition policy provisions that was completed for the selected free trade agreements is presented.

Section III. Comparison and analysis of Competition Policy provisions

The business landscape is constantly evolving, so it is imperative to keep regulations of FTAs and the eventual FTAAP updated with the highest level of commitments in order to respond effectively to the challenges and opportunities produced by the new dynamics of global value chains, the flow of investments, cross border transactions and the fact that rules at the international trading system have not kept pace with transitions in the global economy. Thus, emphasizing a requirement on high-quality provisions that boost a level playing field should be ensured in FTAAP in order to create conditions to equal footing to all companies, regardless of their size or ownership.

In this section, results from the analysis of the selected trade agreements texts for each of the competition policy areas are presented in the following order: A) Competition law B) Investment and C) Small and medium enterprises. The agreements covered throughout this section are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA), for each of the three topics. With regard to the competition law section, since the CPTPP and the USMCA stipulate independent chapters of Competition and Preferential Regulatory Treatment (PRT), the analysis of this discipline includes both chapters. Thus, the European Union (EU)-Singapore Free Trade Agreement (EUSFTA) was used for the comparison of competition chapters; whereas the EU-Viet Nam FTA (EVFTA) was used for comparison of PRT provisions. The Canada-EU Comprehensive Economic and Trade Agreement (CETA) for comparison of the investment chapters, and the agreement between the EU and Japan for an Economic Partnership (EPA) for the comparison of the SMEs chapters.

A. Competition law

Competition law is a core component of the overall competition policy, making its inclusion as a dedicated chapter in FTAAP imperative. A consensus exists among most of the economies of the relevance and need to encourage and enforce competition rules in the marketplace. However, the challenge at the multilateral level has been to agree on a shared definition of competition, to pursue common goals and to use a collaborative approach to improve this discipline. Despite challenges in the multilateral trading system, there have been important advances in competition discipline at the regional level through the growing trend to incorporate competition provisions in FTAs. Coverage of competition-related provisions in FTAs with dedicated chapters include topics such as the competition promotion, legislation, institutional requirements, anti-competitive practices, abuse of dominant market position, cooperation, adoption of competition rules, transparency, and preferential regulatory treatment.

The CPTPP and USMCA are two excellent examples of agreements that are contributing to solving the above-mentioned competition matters. Likewise, the EU-Singapore Free Trade Agreement (EUSFTA) and the EU-Viet Nam Free Trade Agreement (EVFTA) are exemplary FTAs with advanced provisions in competition and Preferential Regulatory Treatment chapters respectively. To complete a comparative analysis in this section, this report considers the highlighted points identified as desirable and optional elements on competition chapters during the *Capacity Building Workshop on Competition Chapter in FTAs* held in Papua New Guinea in August 2018. According to the experts who participated in the Capacity Building Workshop, an initiative coordinated by the APEC Committee on Trade and Investment (CTI), the desirable topics that a competition chapter should cover include: 1) Objectives, 2) Principles such as Anti-Competitive Activities, Non-Discrimination and Transparency 3) Procedural Fairness and 4) Technical Cooperation. The topics that were identified as optional are: 1) Private Rights of Action, 2) Notification, 3) Cooperation in Enforcement Activities, 4) Coordination of Enforcement Activities, 5) Confidentiality of Information, 6) Consultation, 7) Dispute

Settlement, 8) State Aids and Subsidies, 9) State-Owned Enterprises 10) Consumer Protection and 11) Review Mechanism.

APEC economies, regardless of their level of economic development, have demonstrated a firm commitment to competition discipline, with significant effort moving the competition agenda forward by including dedicated competition chapters in some of their FTAs. APEC economies that have included dedicated chapters on competition include the USA, Japan, Canada, Chile, Chinese Taipei, Hong Kong China, Indonesia, Australia, New Zealand, Malaysia, Mexico, the Philippines, Peru, the Republic of Korea, Viet Nam, and China, which has negotiated competition chapters with Switzerland (Chapter 10) Iceland (Chapter 5), and with the Eurasian Economic Union (Chapter 8). However, making the Asia Pacific region more competitive demands continuously improving competition chapters, and, in this respect FTAs, offer a unique opportunity to build a consistent application of competition law that reduces compliance burden and transaction costs for companies along the global supply chain and offers greater certainty for investors.

A competition chapter should promote both competitive and open markets by addressing issues affecting both local and foreign businesses at the border and behind the-border, guaranteeing the adequate flow of trade and investments, improving economic efficiency, and encouraging consumer welfare. In order to achieve this, it is essential that all economies involved in FTAs negotiations keep themselves willing to adopt new regulations into their national competition laws that address anti-competitive practices; but also that all economies continue strengthening their competition authorities and empowering them to enforce competition law under a transparent and procedural fairness framework in which final decisions are published and available to the public.

Next, it is presented introductory reflections from business perspective that will be expected a competition chapter covers. After that, we offer preliminary information about the competition chapters of the agreements analyzed in this section, followed by an analysis of five relevant areas that represent a priority agenda in competition chapters: 1) objectives, 2) principles, 3) anti-competitive activities, 4) non-discrimination, transparency and procedural fairness, and 5) Preferential Regulatory Treatment (PRT). High standard provisions on these five disciplines in FTAs would boost the competition policy to optimal levels for an eventual FTAAP. A comparative table of the elements mentioned *in the APEC Capacity Building Workshop* is presented at the end.

Business Perspective

From a business perspective, there are a range of concerns about actions that might tip competition in an unfair manner, creating inefficiencies, affecting prices and the entire supply chain. In this regard are presented two examples. First, One concern, for instance, is export subsidies granted by economies because they discourage sales in the domestic market and work as a form of protectionism. For example, assume *Economy A* grants an export subsidy to

manufacturers of electronics industry through a tax relief for exporters. Manufacturers from *Economy A* export their products, such as mobile devices, televisions, and circuit boards, to *Economy B*, which also has its manufacturers producing electronics locally. In this situation, local businesses from *Economy B* are being hurt due to anti-competitive practices from Economy A. The potential damage to the local businesses in *Economy B* and the regional supply chain due to this anti-competitive behaviour would mean job losses and the closure of companies related to the electronics sector, including SMEs. Thus, new generation Free Trade Agreements and the eventual FTAAP would be expected to provide high-standard solutions that avoid and stop these competition-distorting practices by eliminating the tax relief advantage that manufacturers in *Economy A* have over manufacturers in *Economy B* due to the export subsidy from their government.

A second example might be related to preferentially-treated entities (PTEs), which have an important presence across different economic sectors, including the financial intermediation one. From a business perspective, one overall concern is that the presence of PTEs might affect competition and produce an uneven playing field, with state-owned commercial banks as an example. For instance, we can assume that *Economy C* has a solid automotive industry that includes local companies manufacturing car components and assembling cars. *Economy C* detected that its car assembling companies were increasing the imports of car components such as batteries, air filters, radiators, and disk brakes from *Economy D*. After an investigation, *Economy C* found that a state-owned commercial bank from *Economy D* was offering preferential loans to exporters from its car industry. The interest rates of these loans were well below the rates offered by the bank industry worldwide, thus, constituting subsidies to their exporting activity. The potential for economic distortions in this example could be quite large due to the negative impacts that might occur for local and regional businesses along the supply chain in *Economy C* produced by the unfair support granted by *Economy D*. Exporters from *Economy D* are benefiting from unfair trading advantages granted to them by governments via PTEs participating in the financial industry. Given the variety of approaches to regulate these activities across the Asia Pacific, high-level commitments on preferential regulatory treatment chapters would help to promote fair competition and move all the economies closer to the FTAAP.

CPTPP

Chapter sixteen, the competition chapter of the CPTPP, includes nine articles to promote a transparent, predictable and competitive business environment among the negotiating parties that benefits all sizes of businesses and consumers. According to Anderson at al. (2018), the CPTPP is part of the small percentage of FTAs (only 2%) with a dedicated competition chapter that include content on private rights of action, and they added that CPTPP is “the most novel approach to the protection of procedural fairness in competition law enforcement from a stakeholder perspective.” Additionally, the CPTPP includes relevant provisions on cooperation, consultation and technical assistance.

USMCA

The Competition Chapter of USMCA, chapter twenty-one, and updates through seven articles of the legendary NAFTA, set higher measures to safeguard the interests of member parties, encouraging fair competition and creating a more transparent business environment in the application of competition laws. USMCA expands and adds new provisions compared to NAFTA; these new competition measures include clauses about consumer protection, transparency and the Non-Application of Dispute Settlement under Chapter 14 (Investment) and Chapter 31 (Dispute Settlement).

EUSFTA

EUSFTA was the first FTA concluded between the EU and an ASEAN economy. Signed in October 2018, EUSFTA obtained the consent of the European Parliament in February 2019, and the agreement is currently in the ratification process. EUSFTA has a separate competition chapter, Chapter 11, that contains fourteen articles, and similar to other trade agreements in the EU, it is divided into four sections based on the different topics being discussed, which offers a clear understanding for the users of the agreement. The sections of the EUSFTA competition chapter are: A) Anti-competitive Conduct and Mergers, B) Public Undertakings, Undertakings Entrusted with Special or Exclusive Rights and State Monopolies, C) Subsidies and D) General Matters. EUSFTA presents all the desirable elements of competition chapters and several of the optional ones, but it is missing clauses on right of action, technical assistance and consumer protection. EUSFTA stands out for the inclusion of specific articles on Preferential Regulatory Treatment (PTR) and subsidies that make this agreement a good reference to review for economies that are not ready to include a separate chapter on these areas in their FTAs. To be noted, EUSFTA is the only agreement of the three that contains a review mechanism; however, this is only available for the subsidies section.[34]

Objectives

Laprévote et al. (2015) found in their analysis of 216 FTAs that there were a broad list of objectives for including competition-related provisions in FTAs, ranging from preserving trade gains, pursuing broader economic objectives such as economic efficiency, consumer welfare, and economic and social development, to protecting the competitive process rather than competitors, improving and securing an investment friendly climate, reducing the risk of discriminatory antitrust enforcement and abolishing trade defenses. In this respect, the three agreements frame their objectives within the broad set found by Laprévote et al. (2015). The competition chapters of CPTPP and USMCA set similar objectives; both agreements state that each Party shall maintain or adopt national competition laws with the objective of promoting economic efficiency and consumer welfare. EUSFTA establishes that their respective authorities shall strive to

[34] Article 10 of EUSFTA competition chapter states that The Parties shall keep under constant review the matters to which reference is made in Section C (subsidies). Each Party may refer such matters to the Trade Committee. The Parties agree to review progress in implementing this Section every two years after the entry into force of this Agreement, unless both Parties agree otherwise.

harmonize and collaborate in the enforcement of their respective laws to reach the objective of this trade pact of free and undistorted competition in their trade relations.

Principles

Some of the most important principles of the competition chapter for the business community are the provisions related to anti-competitive activities, non-discrimination, transparency and procedural fairness. Whereas CPTPP and EUSFTA refer to these four principles in the competition chapter, USCMA only refers to three of them and it does not make any specific mention of the non-discrimination principle. To be noted, EUSFTA is the only agreement that has an article (11.1) titled *principles* that recognizes the relevance of free and undistorted competition in the trade relations among the parties; and the CPTPP is the only agreement establishing that competition laws should be taken into consideration in the APEC Principles to Enhance Competition and Regulatory Reform, issued at Auckland in 1999.

Anti-competitive activities

Regarding anti-competitive activities, CPTPP and USMCA have similar statements in articles 16.1 and 21.1 respectively, both establishing that each party shall have national competition laws that proscribe anti-competitive business conduct and shall take appropriate action with respect to that conduct. While EUSFTA also includes the concept of anti-competitive business conduct, the wording is different, pointing out that anti-competitive business conduct and anti-competitive transactions have the potential to distort the correct functioning of the market and weaken the benefits of trade liberalisation. EUSFTA applies not only the concept of anti-competitive business conduct, but also adds the concept of anti-competitive transactions in its article, which offers a broader approach regarding this provision.

Non-discrimination, transparency and procedural fairness

CPTPP addresses these three principles in different articles. Article 16.1 refers to non-discrimination that states that each Party shall ensure that it has an enforcement policy for national competition authorities to act in accordance with the competition chapter's objectives and not to discriminate on the basis of nationality. With regard to transparency, CPTPP dedicates its article 16.7 to describe how this principle should be applied in the competition discipline; it highlights the value of making competition enforcement policies as transparent as possible, for acknowledging the value of the APEC Competition Law and Policy Database, and for making available information concerning competition law enforcement on the request of another Party. Regarding procedural fairness, CPTPP has taken this to the next level, with competition chapter introducing higher standards that ensure a transparent, predictable and fair process during competition enforcement proceedings.

Despite article 21.1 in the USMCA stating that competition enforcement policies of its national competition authorities shall include treating persons of another Party no less favorably than persons of the Party in like circumstances, the USMCA is missing the non-discrimination principle within its competition chapter. With respect to transparency, USMCA has article 21.5, in which they commit to making advocacy and enforcement of competition policies as

transparent as possible, and also refers to transparency in articles 21.1 and 21.2. The depth of the treatment of transparency in the competition chapter in the USMCA is less than what CPTPP enshrined. The USMCA addresses Procedural Fairness in a broad number of issues, including the definition of "enforcement proceeding" and a framework to serve as a guide for their national competition authorities, to management and use of confidential information, and how to proceed under pending or ongoing investigations, among others.

With respect to EUSFTA, Article 11.2 includes the three principles of non-discrimination, transparency and procedural fairness; and states that parties shall apply their respective legislation in a transparent and non-discriminatory manner, respecting the principles of procedural fairness and the rights of defense of the parties concerned. Additionally, EUSFTA has a dedicated article focused on transparency that only applies to subsidies in products and services (Art. 11.9).

Preferential Regulatory Treatment

EUSFTA is a good template for economies that are still not ready to include a dedicated chapter on preferentially-treated entities (PTEs). EUSFTA dedicates six articles, from 11.5 to 11.10, to provide a framework about subsidies. Some contents that deserve attention can be found in article 11.5 that defines a subsidy as a measure that fulfils the conditions set out in Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), *mutatis mutandis*, irrespective of whether the subsidy is granted in relation to the production of goods or services. Article 11.9 established that each EUSFTA member provide a report every two years to the partners *on the legal basis, the form, and to the extent possible, the amount or budget, and the recipients of subsidies granted by its government or any public body*. This same article states that each Party shall warrant transparency in subsidies related to trade in services and products. Article 11.10 establishes the review mechanism for the subsidies section, stating that EUSFTA partners shall keep under ongoing review the content to which reference is made in the subsidies articles.

Article 11.3 from EUSFTA states that nothing in this chapter will prevent a party from establishing public undertakings, or entrusting undertakings with special or exclusive rights according to its respective law. However, the article establishes some boundaries, such as:
each Party shall ensure that undertakings entrusted with special or exclusive rights do not use those special or exclusive rights to engage either directly or indirectly…in anti-competitive practices in another market in respect of which such undertakings have no special or exclusive rights, that adversely affect investments, trade in goods or services of the other Party (Art. 11.3.3)

Furthermore, EUSFTA specifies in article 11.4 that while nothing in its chapter shall be construed to prevent a Party from maintaining state monopolies, each Party shall adjust its state monopolies of a commercial character to ensure no discrimination is exercised by such enterprises.

Because the CPTPP and USMCA have dedicated chapters for preferential regulatory treatment that include rules on subsidies, an analysis of the SOE chapter of the CPTPP, USMCA and the EU-Viet Nam Free Trade Agreement (EVFTA) has been included as an annex to this report. EVFTA has been included for comparison of Preferential Regulatory Treatment (PRT) provisions due to its ambitious and comprehensive chapter in this discipline, which is a good example of how a developing economy such as Viet Nam that has a strong presence of PTEs in its economic structure, can negotiate and establish binding commitments with developed economies, as the EU represents. CPTPP, USMCA and EVFTA have included high quality rules in their respective FTAs, achieving a balance of fair competition, promoting a level playing field for all and preserving the right of states to define SOEs presence as a part of their public policies. Under these three agreements, public services are fully safeguarded and nothing in their chapters affect the ability of Parties to continue providing these services for their population as a part of their governmental functions.[35] The annex enclosed to this report includes observations of the most important provisions in the context of these three FTAs.

Provisions that address preferential regulatory treatment separately should be encouraged within the text of FTAs and the eventual FTAAP due to its multiplier effects in competition. Preferentially-treated entities (PTEs) have a solid presence in the marketplace, a situation that needs to be addressed and taken into consideration for the benefit of all the economies through appropriate competition rules, which would contribute to creating a more level playing field for all companies, competitiveness, and market efficiency. It is important to highlight that the existence of PTEs is justified and needed because they often fill a strategic function in both developing and developed economies by supplying strategic services and products, by addressing market failures, and by serving as key instruments of public policy. Sectors where these entities have an important presence are featured by their network effects and natural monopoly, including transportation, telecommunications, water and power. They are also present in competitive sectors such as manufacturing and services. The strategic relevance of them is not in doubt, especially when they operate with meaningful transparency and meet social purposes, promoting local industries, and managing and creating jobs.

Kawase (2014) pointed out that preferentially-treated entities (PTEs) are viable enterprises but their distorting measures create issues. For instance, when governments support these enterprises through anti-competitive and non-transparent practices, such as cheap loans, excessive capital investments, preferential treatment, subsidies or absence of a well implemented corporate governance that allows scrutiny by stakeholders, these actions promote dumping and disrupt the order of fair international competition.[37] It must be noted that PTEs are significant economic players worldwide. For instance, The World Bank estimates they generate 5 percent of employment globally, 20 percent of investments, and account for up to 40 percent of production

[35] Public services are defined as services which governments are concerned with providing at prices and/or locations that are accessible to all citizens.

in some economies. Likewise, there are studies that pointed out the solid presence of them in strategic sectors owning "roughly 70% of oil and gas production assets and about 60% of coal mines and coal power plants globally."[36] The Asia Pacific is not an exception, with PTEs as major players in several economies. For instance, the OECD has estimated that they represent 38 percent of GDP from Viet Nam, and 30 percent of GDP from China.[37] Due to their pervasive presence in local and foreign markets and also for their strategic role in a variety of sectors, their participation needs to align with the principles of fair competition and transparency, avoiding negative effects and distortions in the marketplace. Thus, economies at all levels should work together, not to impede their participation, but to enhance their performance and governance through rules that guide their presence in the market in a transparent, fair and efficient manner.

The anti-competitive behaviour of PTEs can distort both domestic and international markets including global value chains; unless there exists proper regulations and laws, it could limit competition, distort prices, harm consumers, create inefficiencies and build trade barriers either for local or foreign companies. Regulations should aim for avoiding preferential treatment to a particular enterprise when it engages in commercial activities, while also avoiding the creation of monopolies and neutralizing government intervention in the marketplace. Instead, rules should encourage fair competition, trade liberalization, and a level playing field where all companies can receive the benefits of an open and fair market with an attractive business environment for local and foreign investors. Private-sector Small, Medium and Large Enterprises often compete at a disadvantage against PTEs because local governments actively support them through different mechanisms. Unfortunately, these anti-competitive behaviours equally affect both international and domestic enterprises. PTEs have a legitimate interest in participating in the marketplace, yet they should compete fairly and should not have an advantage over their competitors.

Important efforts have been carried out in the multilateral level with the goal to create preferential regulatory treatment rules. Some of the main regulations in the multilateral trading system can be found in articles XVII of the General Agreement on Tariffs and Trade (GATT) and VIII of The General Agreement on Trade in Services (GATS). In article XVII, GATT introduced the first multilateral rules on this discipline in 1947 when member countries introduced the concept and rules for "State Trading Enterprises" (STEs). The scope of this article was improved during the Uruguay Round of multilateral trade negotiations when the Understanding on the Interpretation of this Article was included. One of the main features of the

[36] Prag, A., D. Röttgers and I. Scherrer (2018), "State-Owned Enterprises and the Low-Carbon Transition", OECD Environment Working Papers, No. 129, OECD Publishing, Paris

[37] World Bank Group, Corporate Governance of State-Owned Enterprises: A Toolkit (Washington, 2014)

[37] Kawase, T. (2014). Trans-Pacific Partnership negotiations and rulemaking to regulate state-owned enterprises. VoxEU. org, 29.

Understanding is the "working definition of State Trading Enterprise"[38] that narrowed the STEs definition and clarified which entities, specifically the principles of non-discrimination and acting in accordance with commercial considerations, applied. Although GATS does not specifically address state trading enterprises or PTEs, it contains related concepts. For instance, under Article XVIII, GATS parties must ensure that any monopoly supplier of a service or any exclusive service suppliers in its territory act in a way consistent with that member's specific commitment, as well with the Most-Favoured-Nation (MFN) treatment obligation.

Moreover, there are analysts who believe the Agreement on Subsidies and Countervailing Measures (SCM Agreement) should be considered part of PTEs regulations at the multilateral level. However, there are other analysts who believe the SCM agreement is not clear enough to be considered directly applicable based on its definition that states that a subsidy is "a financial contribution by a government or any public body within the territory of a Member." These analysts question if SOEs should be qualified as a "public body." Willemyns (2016) answered this question by stating that, based on decisions taken by the WTO appellate body on this matter, "SOEs might fall within the definition of 'public body', but this will always have to be determined on a case-by-case basis, evaluating the core features of the entity concerned."[39] Furthermore, for many years, international organizations such as the Organisation for Economic Co-operation and Development (OECD) have been making contributions on this discipline through deep analysis and reports, creating awareness of the economic relevance and its impacts, and also advising a path to follow, such as establishing guidelines in order to align them to the principles of competitive neutrality. The competitive neutrality concept introduced by the OECD means that all businesses compete on a level playing field. It does not aim to limit participation of any enterprise in the marketplace, but to limit the advantages that some enterprises might receive unjustified and with no transparency.

Despite the important efforts and existing rules at the multilateral level with the goal to create PTEs regulations, these initiatives have to be supported and improved with comprehensive, high standard provisions in FTAs that address current challenges in this discipline, fill in the existing gaps in multilateral regulations and update provisions according to current needs of our globalized world. Preferential Regulatory Treatment (PRT) provisions in FTAs should aim at eliminating anti-competitive practices, ensuring a level playing field for all enterprise, and overall, promoting efficient competition. In this respect, Laprevote et al. (2015) noted that PRT discipline appeared only in "a very limited number" of trade agreements to which economies

[38] The working definition establishes that State trading enterprise are "governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports"

[39] Ines Willemyns, Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?, Journal of International Economic Law, Volume 19, Issue 3, September 2016, Pages 657–680

with a significant PTEs presence were party.[40] Thus, there is considerable room to add high standard provisions on this discipline within FTA texts. Preferential regulatory treatment chapters in FTAs should ensure that private and public enterprises with commercial activities, regardless of their ownership, compete fairly on the basis of commercial variables, namely quality, price and/or customer service, not under the basis of preferential support provided by their governments or discriminatory regulation. In addition, those regulations should focus not only on dealing with anti-competitive practices after these have taken place, but also on preventing these practices from occurring.

Final comments on competition chapters

While CPTPP and USMCA have a similar approach and language in the content of their competition chapters, CPTPP has a higher level of detail and coverage in its clauses. CPTPP has provisions that consider all the listed elements of the APEC capacity-building workshop, with the exception of lacking a review mechanism provision. EUSFTA and USMCA have a good number of high-standard competition clauses, but EUSFTA does not include provisions on technical cooperation and USMCA does not have clauses that refer to the non-discrimination principle, private rights of action, notification and review mechanism. Below is a comparative table of the provisions analyzed in the competition chapters of the three agreements (see Table 7).

Table 7: Comparison of Competition Chapters: CPTPP, USMCA and EUSFTA

[40] Laprévote, François-Charles, Sven Frisch, and Burcu Can. *Competition Policy within the Context of Free Trade Agreements*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015.

Topic	CPTPP (Ch. 16)	USMCA (Ch. 21)	EUSFTA (Ch. 11)
Objectives	Art. 16.1	Art. 21.1	Art. 11.1
Principles	Art. 16.1	-	Art. 11.1
Anti-competitive Activities	Art- 16.1	Art. 21.1	Art. 11.1
Non-discrimination	Art. 16.1	-	Art. 11.2
Transparency	Art. 16.1 & Art. 16.6	Art. 21.1, 21.2 & 21.5	Art. 11.2
Procedural Fairness	Art. 16.3	Art. 21.2	Art. 11.2
Technical Cooperation	Art. 16.5	Art. 21.3	-
Private Rights of Action	Art. 16.3	-	-
Notification	Art. 16.4	-	Art. 21.3
Cooperation in Enforcement Activities	Art. 16.4	Art. 21.3	Art. 11.11
Coordination of Enforcement Activities	Art. 16.4	Art. 21.3	Art. 11.11
Confidentiality of Information	Art. 16.2 & Art. 16.7		Art. 11.12
Consultation between Competition Authority	Art. 16.8	Art. 21.6	Art. 11.13
Dispute Settlement	Article 16.9 Non-Application of Dispute Settlement	Art. 21.7 Non-Application of Dispute Settlement	Art. 11.14 Non-application of Dispute Settlement except for Article 11.7 (Prohibited Subsidies)
State Owned Enterprises (SOEs)	separated chapter	separated chapter	Art. 11.4
State Aids & Subsidies	Included in SOEs chapter	Included in SOEs chapter	Art. 11.5, 11.6, 11.7, 11.8, 11.9 and 11.10
Consumer Protection	Art. 16.6	Art. 21.4	-
Review Mechanism	-	-	Art. 11.10

B. Investment

The Global Investment Competitiveness Report (2018) highlighted three important findings that deserve attention when trade agreements and investment regulations are discussed and put in place. These findings are: 1) three-quarters of investors have declared being affected by political issues in their operations and these issues have caused about a quarter of investors to cancel their investments 2) more than one third of investors reinvest all of their earnings into the host economy and 3) over 90% of investors rate various types of legal protections as important or critically important for retaining and expanding foreign investments.[41] These findings emphasize the importance of protecting both local and foreign investments, and the critical relevance of guaranteeing an adequate business climate for investors, offering equal opportunity for all and avoiding laws that cause them a prohibitive cost that could be fatal for businesses including MSMEs.

Setting out higher standards on Investment provisions in FTAs might significantly increase cross border investments within APEC members, and between APEC and the rest of the world, and it also might play a greater role in creating jobs, promoting economic development for all and reaching the optimal goal for FTAAP. Thus, continuing advancing liberalization of investments should be viewed as a win-win relationship between the source and the recipient of the investment, where capital moves easily across borders to be allocated where it will be used productively. Reports have shown that regulatory obstacles to foreign investment have been the

[41] The Global Investment Competitiveness Survey includes interviews with 754 executives of multinational corporations with investments in developing economies.

main cause why trade inflows are bigger than trade outflows. On the other hand, national treatment has been one of the most important provisions considered when Investment Protection is discussed in FTAs. Although this concept is simple to understand, in practical terms it has been very difficult to apply because the interpretation and different scenarios that can occur, and also because it touches on economically sensitive issues. Thus, continuing to discuss and agree on best practices and an ideal framework for this particular topic is crucial for improved investments.

For a long time, the close relationship between competition and investment has been recognized by international organizations. The WTO has included a valuable set of provisions on these disciplines through The Agreement on Trade-Related Investment Measures (TRIMs) and The General Agreement on Trade in Services (GATS). Regarding the investment provisions, TRIMs prevents trade-related investment measures, and GATS addresses foreign investment in services as one of four modes of delivery of services. Facilitation for investments has had a renewed effort in the WTO level in the last few years. For instance, at the end of 2017, seventy WTO members, representing approximately 66 percent of inward foreign direct investment (FDI), announced their commitment "to pursue structured discussions" on this discipline with the goal of creating a multilateral framework that put together the close relationship between investment, trade and development.[42] According to WTO Director-General Roberto Azevêdo, investment is a catalyst for trade, and for that reason, a coherent approach to design policies on this discipline is vital.

Despite this awareness of the relationship of investment as a part of the competition policy, there is still a need to enhance awareness about this and explain why it is important to include high standards on investments protection in FTAs. Facilitating and improving the environment for investments in FTAs will promote not only a healthy competition in the marketplace, but will also promote economic growth and development. For this reason, investment provisions within FTAs demands a special attention that has to be translated into particular regulations that can be integrated in separate chapters of existing rules for trade in services and goods. Having dedicated chapters containing only investment clauses should be considered a best practice to be included in either current or future trade agreement negotiations.

Investment chapters should aim to set out transparent, predictable and stable rules governing investment and to guarantee that governments of host economies treat foreign investors fairly. Likewise, investment chapters should include provisions to secure market access to foreign investors, and make it easier to protect their investments by setting out measures to open up investments among trade parties. Investment provisions should ensure, as well, non-discrimination and a level playing field to compete with local investors; and process in a

[42] https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm

transparent and effective manner any investment dispute when needed. Without these kinds of regulations, foreign investors could be treated less favourably than others.

To analyze the investment chapters in modern FTAs, this report analyzes the CPTPP, USMCA and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). These three agreements include a set of provisions for removing barriers and protecting foreign investments that are subject to country-specific exceptions. The three agreements have a similar approach in relevant areas of the investment discipline, but also some differences. For instance, regarding national treatment, all three agreements obligate parties to not discriminate against investors of each other in favour of their domestic investors. As well, with respect to the most-favoured nation treatment, the three FTAs set out the obligation among trading partners regarding no discrimination against investors and their investments of each other in favour of others of a third country. Furthermore, the three agreements establish a similar minimum standard of treatment that provides fair and equitable treatment to covered investments based on customary international law. As well, the three FTAs offer predictable and transparent clauses with respect to Expropriation and Compensation, to freely permit all transfers related to covered investment in and out of the host economy, and to not impose Performance Requirements. Likewise, the three agreements do not require companies to appoint Senior Managers of a particular nationality; however, they establish that governments can require that a majority of boards of directors conform to residency or nationality requirements.

Regarding the differences among the three agreements, the main one is the manner in which they address the resolution of investment disputes where they offer different solutions to foreign investors. Furthermore, CPTPP and USMCA are the only two agreements to encourage, in articles 9.17 and 14.17 respectively, the importance of each party encouraging businesses operating within their borders to adhere to internationally recognized standards of Corporate Social Responsibility (CSR) that have been endorsed by the parties, whereas CETA does not include any article related to CSR in the investment chapter. USMCA added in Article 14.17 the mention of the OECD Guidelines for Multinational Enterprises and it included a list of CSR areas from labour, environment, and gender equality to human rights, indigenous and aboriginal peoples' rights, and corruption, but the CPTPP did not. On the other hand, CETA is the only agreement that has a separate set of clauses to address market access (Article. 8.4) related to investments.

The next section includes an example from a business perspective on the relevance of high-standard provisions on investment chapters, followed by introductory comments about the three agreements and an analysis in five areas of the Investment chapters 1) definitions, 2) scope, 3) national treatment, 4) non-conforming measures, and 5) resolution of investment disputes. At the end of this section, three comparative tables are shown that summarize our review of the investment chapters (articles and sections, general provisions and resolution of investment disputes).

Business perspective

Post-establishment obligations in FTAs allow host economies to preserve autonomy over the kind and share of foreign capital they want to authorize. From a business perspective, companies find these obligations unfair and difficult to accept because they do not offer a level-playing field. For this reason, it is very important for businesses that, in any FTA and towards the eventual FTAAP, an investment chapter includes provisions that cover all phases of an investment's lifecycle, including the pre-establishment stage. For example, a food company from *Economy A* that recently signed a trade agreement with *Economy B* is very interested in establishing local subsidiaries in *Economy B* due to the large size of the market and the estimated potential demand of food products. Thus, the food company has invested funds in market research, has started its strategic plan to penetrate the new market and has started to analyze the best city and location to establish its first subsidiary in *Economy B*. However, after some weeks advancing the development of these pre-establishment activities, the corporate law director informs the Managing Director of the food company that, because the FTA signed between the two economies applies only to post-establishment investments, they have to submit an approval request to open a subsidiary to the government of *Economy B*. The corporate law director adds that this is a process only applicable to foreign investors, but it does not apply to local companies, which can establish a food business wherever they want in *Economy B*, only meeting the procedures to get an operating license.

In the above example, to avoid this unfair and unequal treatment between local and foreign investors, the best solution would have been that the FTA included the "pre-establishment national treatment" obligation. This obligation means that foreign investors and their investments would be given treatment no less favourable than those granted to domestic investors and their investments at the pre-establishment stage of the investment. If *Economies A and B* signed an investment chapter that applied to all phases of an investment's lifecycle, plus the inclusion of the dispute settlement procedure, an approval request to establish the subsidiary in *Economy B* would have been a violation. In this scenario in which an obligation for "pre-establishment national treatment" is in place, the food company would have had the right to bring a claim under the dispute settlement procedure between them and *Economy B*, which should be carried out in a transparent, fair and impartial manner. It is important to highlight that, even though an economy negotiated the pre-establishment national treatment obligation in the investment chapter, all economies have the right to protect specific products, services or industries through clear and transparent limitations in investment chapters through a "negative list" approach. Under the negative list approach, investors can easily identify whether or not their product, service or sector has any restriction to invest. If this is not listed, no restrictions exist and it is subject to openly receive investments.

CPTPP

Chapter nine of the CPTPP covers the investment discipline through 30 articles and 12 annexes that provide a framework to promote and protect foreign investments among parties. This chapter aims at offering a set of protections to investors of CPTPP economies, and, at the same time,

recognizing the right of governments to regulate in the public interest. CPTPP provisions address important issues such as non-discrimination against investors and their investments, minimum standard of treatment, national treatment, most-favoured nation treatment, expropriation, and transfers. In addition, the investment chapter of CPTPP offers the Investor-State Dispute Settlement (ISDS) mechanism for resolving disputes between trading parties and investors.

USMCA

Chapter fourteen of USMCA comprises the provisions on investment through 17 articles and 5 annexes. According to a report by the United States International Trade Commission, the investment chapter of the USMCA compared to NAFTA offers a clearer framework about what constitutes an investment. The USMCA, similar to the CPTPP, covers an extensive number of issues of relevance for investments, including definitions, scope, national treatment, minimum standards of treatment and most-favored-nation treatment, expropriation, transfers, performance requirements and board of directors. It must be noted that one of the most significant changes in the USMCA investment chapter compared to NAFTA refers to the dispute settlement process (ISDS). The ISDS will be phased out between Canada and the US after three years. After that date, ISDS will be conducted by local courts. For Mexico and the US, the ISDS mechanism will remain under specific circumstances.

CETA

Chapter eight of CETA stands out for setting out measures to facilitate and promote investments between Canada and the EU, ensuring both Parties treat investors and their investments fairly, while also ratifying the right of Parties to regulate within their borders to achieve "legitimate policy objectives." The Investment chapter of CETA aims to offer a comprehensive set of provisions to investors that offer them transparency, certainty and protection for their investments. The CETA Investment chapter broke new ground by establishing a permanent and institutionalized dispute-settlement tribunal. The Investment Chapter in CETA is presented through 45 articles divided into six sections: 1) definitions and scope, 2) establishment of investments, 3) non-discriminatory treatment, 4) Investment protection, 5) reservations and exceptions, and 6) resolution of investment disputes between investors and states. This CETA chapter includes six annexes.

Definitions

The CPTPP in Article 9.1 and the USCMA in Article 14.1 define, in an identical manner, investment as an asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Likewise, both trade agreements consider an investment as the same kind of assets such as an enterprise, shares, stock and other forms of equity participation in an enterprise, bonds, debentures, loan, futures, and options. CPTPP and USCMA also consider the forms that an investment may take: turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; intellectual property rights; licenses, authorizations, permits, and similar rights conferred

pursuant to a Party's law; and other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases.

CETA offers a very similar definition for investment compared to the CPTPP and USMCA. The only difference is that CETA includes, as one additional characteristic, the duration of the investment. With regard to the forms that an investment may take, CETA considers the same forms that the USMCA and CPTPP outline, but, in addition, CETA includes any other kind of interest in an enterprise and claims to money or claims to performance under a contract.

Scope

Articles 9.2, 14.2 and 8.2 from the CPTPP, USMCA and CETA provide the scope regarding the application of the investment chapter. The three agreements state that this chapter applies to measures maintained by a Party relating to investors of another Party, covered investments, and with respect to the article related to Performance Requirements, any investments in its territory. CPTPP and USMCA add that this Chapter shall apply to measures adopted by a Party relating to the Article that covers Investment and Environmental, Health and other Regulatory Objectives, all investments in the territory of that Party. As a part of the scope, CPTPP and USMCA define a Party's obligations under this chapter that apply to measures maintained by authorities and governments at the local, regional and central levels, as well to a person, including a state enterprise or another body, when it exercises any governmental authority delegated to it.

In contrast, CETA sets some limits in the scope of this chapter. For instance with respect to the establishment or acquisition of a covered investment, Section B (Establishment of investments) and Section C (Non-discriminatory treatment) do not apply to a measure relating to activities carried out in the exercise of governmental authority, and to air services, or related services in support of air services and other services supplied by means of air transport.[43] Additionally, the scope of the investment chapter in CETA points out that for the EU Party, Sections B and C do not apply to a measure with respect to audio-visual services; and for Canada, these same sections do not apply to a measure with respect to cultural industries.

National Treatment

The National Treatment discipline in the CPTPP, USMCA and CETA is covered in the Investment chapters in Articles 9.4, 14.4 and 8.6 respectively. The three agreements in these articles provide a similar approach in which the CPTPP and USMCA practically use the same language and structure. The three agreements state that each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it

[43] The investment chapter in CETA does apply to aircraft repair and maintenance services; airport operation services; computer reservation system (CRS) services; ground handling services; and the selling and marketing of air transport services. Likewise, this chapter does not affect the rights and obligations of the Parties under the Agreement on Air Transport between Canada and the European Community and its Member States, done at Brussels on 17 December 2009 and Ottawa on 18 December 2009.

accords, in like situations to its own investors, and to the investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or disposal of their investments in its territory. CETA establishes three additional circumstances in which each Party shall accord to investors of another Party treatment no less favourable with respect to maintenance, use, and enjoyment of investments. It must be highlighted that the three agreements apply protections to all stages of the lifecycle of an investment, including the possibility for an investor to bring a claim in relation to the "pre-establishment" stage of an investment. *The pre-establishment national treatment* is a very important feature in an investment chapter because it ensures foreign investors and their investments cannot be treated less favorably than domestic investors and their investments in respect to market access.

For greater certainty, the treatment to be accorded by a Party under CPTPP means, with respect to a regional level of government and for USMCA other than the central level, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by those government to investors, and to investments of investors, of the Party of which it forms a part. On the other hand, the treatment accorded to a party under CETA refers, with respect to a government in Canada other than at the federal level, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of Canada in its territory and to investments of such investors; whereas with respect to a government of or in a Member State of the European Union, the treatment accorded by a Party implies treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of the EU in its territory and to investments of such investors.

Non-conforming measures

Being clear about non-conforming measures is very important because the CPTPP, USMCA and CETA use a negative list approach, which means that trading partners should list the sectors and/or activities that are not covered by the commitments of their agreements. If a Party does not specify any restrictions for a particular economic activity or sector, this would mean that the Party is committed to not applying any measures that would be inconsistent with investment provisions. CPTPP, USMCA and CETA maintain exceptions applicable to their investment chapters in Articles 9.12, 14.12 and 8.15 respectively. The three agreements set out that the articles of the Investment Chapter related to National Treatment, Most-Favoured-Nation Treatment, Performance Requirements and Senior Management and Boards of Directors shall not apply to any existing non-conforming measure or the continuation to any of these measures that are maintained by a Party at the central, regional and local levels of government, as set out by that Party in their Schedule to Annex I. Likewise, the three FTAs define that the same articles do not apply to any measure that a Party maintains with respect to a sector, subsector or activity as set out in their Schedules to Annex II. In addition, CETA adds that Article 8.4 related to Market Access does not apply to the country-specific list of exceptions.

The three FTAs include their lists of exceptions in their Annexes I and II. Annex I includes the current level of openness given in an economy and cannot be made more restrictive, whereas

Annex II details reservations for economic activities and/or sectors where a Party reserves the right to keep existing discriminatory measures and/or implement new ones. CPTPP named these two annexes Cross-Border Trade in Services and Investment Non-Conforming Measures, and the USMCA titled these Investment and Services Non-Conforming Measures. CETA has no title for these two Annexes but, the same as the USCMA and CPTPP, it includes the reservations applicable for Canada and the European Union.

Resolution of investment disputes

An independent, impartial and transparent process for resolution of investment disputes ensures that investors and their investments receive fair treatment. The CPTPP, USMCA and CETA offer a good set of ISDS provisions, but with differences among them. On one hand, CPTPP offers a mechanism that allows CPTPP foreign investors to pursue remedies directly against another Party in relation to non-compliance of CPTPP's investment clauses. USMCA follows a similar approach; however, it includes a bilateral investor-state dispute settlement mechanism for Mexico and the USA instead of the current trilateral one of the original NAFTA. The USA and Canadian investors will not be able to launch an ISDS claim against each other; the only recourse will be State-to-State dispute settlement. USMCA partners agreed to a transitional period of three years, during which ISDS clauses under the original agreement would continue to apply only for investments made prior to the entry into force of USMCA. To be noted, any successful claim in disputes between Canada and the USA would not result in the award of any damages. Finally, CETA seems to be the agreement with the deepest level of commitments regarding ISDS provisions due to the innovative approach, covering in detail, a good number of issues related to the investor-state dispute resolution. Specific comments on dispute resolution in each of the three agreements is presented in the following section.

CPTPP

According to Chen, L., Urata, S., Nakagawa, J., & Ambashi, M., the resolution of investment disputes in the CPTPP, referred to as ISDS, is largely based on the 2012 US Model Bilateral Investment Treaty (BIT), and contains several ASEAN Comprehensive Investment Agreement (ACIA) and elements such as provisions for securing transparency in ISDS procedures (2019).[44] Some of the features of ISDS provisions in the CPTPP include the establishment that ISDS tribunals must be constituted with sufficient expertise to resolve claims in a proper manner (Article 9.22), and the transparency requirement as a part of the ISDS process through the provision for hearings and ISDS decisions to be available to the public (Article 9.24). Nonetheless, the ISDS clauses of CPTPP are an excellent framework to promote certainty and transparency to foreign investors. The application of some ISDS provisions for some economies is reduced by a series of side letters between CPTPP Parties that lessen the effectiveness and the full potential that could be reached with the ISDS provisions.

[44] Chen, L., Urata, S., Nakagawa, J., & Ambashi, M. (Eds.). (2019). Emerging global trade governance : Mega free trade agreements and implications for asean (Routledge-eria studies in development economics, 13). Abingdon, Oxon: Routledge. (2019).

USMCA

Even though there are important updates in the investment discipline in USMCA compared to the original agreement, there is, as well, an important setback from a business perspective. This setback is related to the provisions for dispute resolution among the three trade partners, which were considerably reduced. With NAFTA as one of the first FTAs to incorporate investor protections and embed investment protection in Global Value Chains, it was expected that it would advance to the next level of investment dispute resolution, but, unfortunately, it did not. USMCA will establish a bilateral ISDS mechanism and will replace the current trilateral one, in place since the original NAFTA. The ISDS mechanism from the original agreement will remain available to investors with respect to their existing investments for a period of three years after the termination of NAFTA. Regarding the new bilateral resolution of investment disputes, Canada and the US agreed to eliminate ISDS protections between them and only include state-to-state remedies.

With regard to Mexico and the US, the ISDS provisions will remain active, but these will only apply to certain sectors: oil and natural gas, power generation, transportation, telecommunications, infrastructure and other listed sectors that have a contract with the government. In this respect, a report of the Heritage Foundation pointed out that the language in ISDS provisions between Mexico and the USA should be improved in the USCMA because it seemed midstream and downstream operators, which were doing business in the five sectors and did not hold contracts explicitly with the government, would not be provided with ISDS protections. From a business perspective, while the retention of ISDS clauses with regard to some investments between the US and Mexico is positive, resolution of investment disputes should be included for all investments and sectors among the three countries. USMCA will leave many sectors and companies that are currently protected by NAFTA with no possibility to take any longer advantage from ISDS provisions in the USMCA.

CETA

One of the most important contributions of CETA in the Investment Chapter is the introduction of a new Investment Court System (ICS) that strengthens the dispute resolution mechanism and allows investors to resolve disputes with governments in a transparent and fair manner.

Table 8: Comparison of the contents of Investment Chapters of the CPTPP, USMCA and CETA- Total number of Articles and Sections

Section	CPTPP (Ch. 9)	USMCA (Ch. 14)	CETA (Ch. 8)
Total number of Articles	30	17	45
Section A	No title (definitions of terms, scope and substantive obligations) (Art. 9.1 to 9.17)	-	Definitions and scope (Art. 8.1 to 8.3)
SECTION B	Investor-State Dispute Settlement (Art. 9.18 to 9.30)	-	Establishment of investments (Art. 8.4 to 8.5)
SECTION C	-	-	Non-discriminatory treatment (Art. 8.6 to 8-8)
SECTION D	-	-	Investment protection (Art. 8.9 to 8.14)
SECTION E	-	-	Reservations and exceptions (Art. 8.15 to 8.17)
SECTION F	-	-	Resolution of investment disputes between investors and states (Art. 8.18 to 8.45)
Annexes	12 annexes (Annex 9-A to 9-L)	5 annexes (Annex 14-A to 14-E)	6 annexes (Annex 8-A to 8-F)

Table 9: Comparison of the contents of Investment Chapters of the CPTPP, USMCA and CETA- General Provisions

Topic	CPTPP (Ch. 9)	USMCA (Ch. 14)	CETA (Ch. 8)
Definitions	Art. 9.1	Art. 14.1	Art. 8.1
Scope	Art. 9.2	Art. 14.2	Art. 8.2
Relation to other chapters	Art. 9.3	Art. 14.3	Art. 8.3
National treatment	Art. 9.4	Art. 14.4	Art. 8.6
Most-Favored-Nation (MFN) Treatment	Art. 9.5	Art. 14.5	Art. 8.7
Market access	-	-	Art. 8.4
Minimum Standard of treatment	Art. 9.6	Art. 14.6	Art. 8.10
Treatment in case of armed conflict or civil strife	Art. 9.7	Art. 14.7	Art. 8.11
Expropriation and Compensation	Art. 9.8	Art. 14.8	Art. 8.12
Transfers	Art. 9.9	Art. 14.9	Art. 8.13
Performance requirements	Art. 9.10	Art. 14.10	Art. 8.5
Senior management and boards of directors	Art. 9.11	Art. 14.11	Art. 8.8
Non-conforming measures (Reservations and exceptions)	Art. 9.12	Art. 14.12	Art. 8.15
Subrogation	Art. 9.13	Art. 14.15	Art. 8.14
Special Formalities and Information Requirements	Art. 9.14	Art. 14.13	Art. 8.17
Denial of benefits	Art. 9.15	Art. 14.14	Art. 8.16
Investment, environmental, health and other regulatory objectives	Art. 9.16	Art. 14.16	Art. 8.9
Corporate social responsibility	Art. 9.17	Art. 14.17	-

Table 10: Comparison of the contents of Investment Chapters of the CPTPP, USMCA and CETA- Resolution of investment disputes

Topic	CPTPP (Ch. 9)	USMCA (Ch. 14)	CETA (Ch. 8)
Scope	-	-	Art. 8.18
Consultation	Art. 9.18	Art. 14.D.2	Art. 8.19
negotiation or mediation	Art. 9.18	Art. 14.D.2	Art. 8.20
Determination of the respondent for disputes	-	-	Art. 8.21
Submission of a Claim to Arbitration (Submission of a claim to the Tribunal)	Art. 9.19	Art. 14.D.3	Art. 8.22 & Art. 8.23
Consent to Arbitration	Art. 9.20	Art. 14.D.4	Art. 8.25
Conditions and Limitations on Consent of Each Party	Art. 9.21	Art. 14.D.5	-
Selection of Arbitrators (Constitution of the Tribunal)	Art. 9.22	Art. 14.D.6	Art. 8.27
Conduct of the Arbitration	Art. 9.23	14.D.7	-
Indemnification or other compensation	Art. 9.23	14.D.7	Art. 8.40
Apellate mechanism	Art. 9.23	-	Art. 8.28
Claims manifestly without legal merit	Art. 9.23	14.D.7	Art. 8.32
Claims unfounded as a matter of law	Art. 9.23	14.D.7	Art. 8.33
Interim measures of protection	Art. 9.23	14.D.7	Art. 8.34
Proceedings under another international agreement	-	-	Art. 8.24
Transparency of Proceedings	Art. 9.24	14.D.8	Art. 8.36
Information sharing	Art. 9.24	14.D.8	Art. 8.37
Non-disputing Party	Art. 9.24	14.D.8	Art. 8.38
Governing Law	Art. 9.25	14.D.9	Art. 8.31
Interpretation of Annexes	Art. 9.26	14.D.10	-
Expert Reports	Art. 9.27	14.D.11	-
Consolidation	Art. 9.28	14.D.12	Art. 8.43
Final award	Art. 9.29	14.D.13	Art. 8.39
Enforcement of awards	Art. 9.29	14.D.13	Art. 8.41
Service of Documents	Art. 9.30	14.D.14	Art. 8.23
Establishment of a multilateral investment tribunal and appellate mechanism	-	-	Art. 8.29
Ethics	-	-	Art. 8.30
Discontinuance	-	14.D.7	Art. 8.35
Third party funding	-	-	Art. 8.26
Committee on Services and Investment	-	-	Art. 8.44
Exclusion	-	-	Art. 8.45

Note: USMCA provisions listed in this table only apply for Mexico-United States Investment Disputes

C. Small and Medium-Sized Enterprises (SMEs)

Small and Medium Enterprises (SMEs) are important players in global value chains (GVCs) and local and international markets due to their contribution of jobs and the high number representing the total companies across the Asia Pacific, which is over 97 percent. Nonetheless, not all SMEs have reaped the benefits of international trade and have been included in GVCs. Thus, it is imperative to consider SMEs in the design and negotiations of FTAs, improving their capacity to engage in global markets, and developing provisions that guarantee their inclusion, a level playing field to compete and solutions to the most pressing challenges that SMEs face today. Thus, incorporating SMEs' perspective through high quality provisions in FTAs should be considered as part of a shared strategy across the Asia Pacific.

There are reports that pointed out that many different regulations among trading partners multiply the costs of doing business for SMEs. Thus, harmonizing SMEs provisions by FTAs could be a meaningful support for SMEs that struggle everyday with complex regulatory processes, complicated trade paperwork, burdensome customs regulations, lack of transparency

in border procedures and formalities, restrictions on data flows across borders, weak logistics services, and lack of understanding of FTAs provisions. SMEs provisions, and ideally separate chapters, should aim at addressing the barriers SMEs are facing and support them to succeed in the complex and e-connected marketplace. Incorporation of specific SMEs provisions and chapters must consider the important differences between multinational companies and SMEs, including capital, infrastructure, human and material resources. Clauses should be created that make it simpler for SMEs to participate in GVCs and make use of trade pacts. SMEs regulations, if implemented effectively, could enhance SMEs performance by reducing their costs, increasing their competitiveness, and making it easier and faster for them to participate in GVCs and international markets.

There have been important efforts at the multilateral level with the intention of putting SMEs as a top priority in the international agenda. For instance, in December of 2017 during the WTO's 11th Ministerial Conference in Buenos Aires, 87 WTO like-minded economies composed of developed, developing and least-developed economies, which represent around 78 percent of exports globally, issued a joint statement declaring their mutual goal to establish "an Informal Working Group" on micro, small and medium sized enterprises (MSMEs). This informal working group has been open to all WTO members and has been promoting the discussion on obstacles related to foreign trade operations for MSMEs, namely shipping, logistics, financing, trade facilitation, procedures and requirements related to origin, among other issues affecting SMEs. Likewise, in 2017, the WTO and the International Chamber of Commerce (ICC) launched the Small Business Champions' initiative to facilitate MSMEs participation in global markets; this initiative offers a platform for companies and private sector institutions from all over the world to propose innovative ideas designed to promote MSMEs to do business across borders and participate in GVCs. It should be noted that there are several WTO agreements in which SMEs issues have been addressed, namely the Anti-dumping Agreement, the Agreement on Subsidies and Countervailing Measures (SCM), and the Agreement on Trade Facilitation (ATF).[45] Nonetheless, there is not yet a formal work programme for SMEs at the WTO level.

If effective SMEs regulations are put in place at the multilateral, regional and local levels, these might not only open new business opportunities for SMEs by giving them the opportunity to participate in GVC and international markets, but also, and more importantly, it might lead to equal opportunity for SMEs and increase wellbeing for these vulnerable companies. A study in 2012 found that African-American owned businesses in the USA that went to international markets through exports paid about 80 percent higher than those that did not export; and they also hired four times more than non-exporters. Thus, solutions to problems faced by SMEs can mean not only survival for them, but would also create better conditions for their employees,

[45] Articles 6.13 and 12.11 from the Anti-dumping Agreement and the Agreement on Subsidies and Countervailing Measures respectively, establish that "the authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable."

more jobs and better salaries in local economies. Specific SMEs provisions and separate chapters could be part of these efforts to boost SMEs to international markets improving their capacity and position to benefit from international trade. To succeed in this endeavor, all actors involved in SMEs' success from both private and public sectors must be invited to participate in this process.

The opportunity to fill the gap in provisions that offer solution to SMEs challenges is real. Monteiro (2016) analyzed 270 regional trade agreements (RTAs) and found that 136 of these incorporated at least one provision explicitly mentioning SMEs. Monteiro added that a limited but growing number of trade pacts in recent years were starting to cover specific provisions in separate articles or even chapters on SMEs, but noted that SMEs-related provisions are highly heterogeneous and vary in terms of language, scope, commitments and location in the text of the agreement.[46]Thus, the opportunity to define specific provisions that offer solutions to the most pressing challenges of SMEs remains available for Parties interested in supporting these enterprises. It is not a solution for SMEs to include only footnotes in chapters covering broader issues or providing vague solutions within articles covering various issues. SMEs issues deserve special attention and treatment with specific articles and ideally under separate chapters, and these should be strengthened with additional provisions throughout SMEs-related chapters, such as cooperation, services, investment, government procurement, electronic commerce, trade facilitation, intellectual property, transparency, among others.

Next, the provisions from the SMEs Chapters of the CPTPP, USMCA and the agreement between the European Union and Japan for an Economic Partnership (EPA) are analyzed. The EPA has been chosen as the third agreement to include in this section because this is a new generation agreement between two of the world's biggest economies, both of them with extensive expertise in the design and negotiations of trade pacts, including experience in incorporation of SMEs provisions in FTAs.[47] The EPA was signed on July 17, 2018 and it entered into force on February 1, 2019. The EPA has gone beyond the discussion of traditional trade issues and has created a platform to cooperate in order to prevent obstacles to investments and trade where both economies have a particular interest in supporting SMEs to participate in global trade. The EPA has created one of the largest open free trade zones in the world with about 30 percent of the world GDP, 40 percent of global trade, and a market with over 600

[46] Monteiro, José-Antonio, Provisions on Small and Medium-Sized Enterprises in Regional Trade Agreements (June 13, 2016). WTO Working. This study analyzed 270 RTAs in force and notified to the WTO as of April 2016

[47] Monteiro (2016) pointed out the trade agreements to which Japan is a party with Malaysia, the Philippines, Viet Nam and Singapore incorporate a relatively high number of provisions on SMEs; Monteiro added that the Japan-Thailand economic partnership agreement was the agreement with the highest number of SMEs-related provisions in force and notified. Montero pointed out that the agreements negotiated by the EU with South Africa and Cameroon contain also several SMEs-related provisions, mainly on cooperation; and the European Union-Central America association agreement incorporates several provisions on SMEs, including a specific article on cooperation.

million people. There are estimates that predict the annual trade between Japan and the EU might grow by nearly €36 billion once the agreement is fully implemented.

In the following paragraphs, an initial reflection about the relevance of SMEs chapter from a business perspective are shown, followed by introductory comments on the SMEs chapter of each agreement and related-SMEs provisions and an analysis of five key areas of SMEs chapters: 1) general principles or objective 2) information sharing 3) SME committee 4) cooperation and 5) competitiveness, business facilitation and other obligations that benefit SMEs. At the end of this section, a table is presented that summarizes the presence of some of the most important provisions on SMEs chapters in CPTPP, USMCA and EPA and a final reflection.

Business perspective

The presence of regional value chains and digitalization are rapidly changing the way in which Small and Medium Enterprises (SMEs) are doing business and integrating in international trade. From a business perspective, SMEs represents the backbone of the business economy, but their participation in global trade needs to be strengthened in order to promote sustainable growth in which all companies receive the benefits of implementing free trade agreements. To achieve better participation of SMEs in current and future FTAs and the eventual FTAAP, it is essential to increase their competitiveness and understand their main challenges. According to the International Trade Centre (ITC), three crucial areas to improve SMEs competitiveness in these times of rapid technological change are access to finance, access to logistics and access to information, this latter known as "the currency of the digital world." Focusing on the information challenge for SMEs, for example, it is true that all companies require information to compete, but SMEs are more vulnerable to this situation due to their size, limited human and financial resources and less experience compared to multinational companies. Information is an important asset for any company, but particularly for SMEs because they need information to support their decision-making in international endeavors and to add value to their supply chain.

A business case from an ITC report [48] showed that SMEs in a developing economy were struggling due to the lack of access to higher-quality market information. A survey given to 200 businesses in this economy showed that the size of business and the integration into international value chains were two of the most important variables that affected the extent of information access. The results of this survey verified that micro and small companies do not have good access to market data. Based on these results, the government of this economy, together with the support of the ICT, developed some specific actions to improve SMEs access to data. For instance, they enhanced SMEs' digital access to information by making a website available to them that included market intelligence data, consumer habits and preferences, and the profitability and size of market segments. The website also included trade guides, customs and excise documents, standards and quality recognition catalogues, and market analyses.

[48] International Trade Centre (2018). SME Competitiveness Outlook 2018: Business Ecosystems for the Digital Age. ITC, Geneva.

Furthermore, the government of this economy organized *the digital Literacy Boot Camp* with the support of the World Bank Group and other international organizations in which entrepreneurs, civil servants, and stakeholders learned how to obtain, use, interpret and present data to fit their business objectives.

For the above reasons, it is essential to recognize that one of the most important challenges for SMEs is the lack of access to information. Trade agreements and the eventual FTAAP have to include solid commitments by Parties to support SMEs engagement in international markets, both as exporters and active players in supply chains, by providing them with high quality information that allows them to better research their proposed new markets.

CPTPP

The small- and medium-sized Enterprise chapter of the CPTPP has made history and broken new ground with its content responding in innovative ways to challenges facing SMEs and taking the discussion to the next level. CPTPP has set out high standards in SMEs remedies, and it has made a goal of including a stand-alone chapter on SMEs in FTAs as part of the new generation trade and investment agreements. Chapter 24 of the CPTPP addresses issues such as creating a website for specific use of SMEs, putting available information of particular interest for SMEs, and establishing a SMEs committee to exchange best practices and experiences in training, financing, and supporting SMEs. CPTPP created a specific set of rules that strengthen SMEs position in order to use the agreement, take advantage of opportunities, and ensure that they are able to engage with their governments to provide feedback about the development of CPTPP and raise concerns about its implementation when needed.

USMCA

The USMCA took as a template the SMEs chapter of the CPTPP and created Chapter 25 that included a high quality set of provisions that went further in the solution of issues affecting SMEs compared with the CPTPP. In this respect, the USMCA includes some similar articles as CPTPP related to information sharing and SMEs committee. The USMCA made some additions and improvements to some CPTPP provisions, such as that on the Committee on SMEs in which USMCA establishes that Parties agreed to facilitate the exchange of information on entrepreneurship education programs for under-represented groups and young people. In addition, USMCA was innovative proposing specific articles that define general principles, cooperation as a way to boost SMEs opportunities, and the "SME Dialogue." This latter provision aims to receive feedback from SMEs owners and stakeholders on technical, scientific, and any other issues of the agreement affecting SMEs, and will occur on an annual basis.

EPA

The EPA recognizes in the Preamble of the agreement the relevance of strengthening the economic, trade and investment relations among Parties, and to be mindful of the challenges faced by their businesses including their small and medium-sized enterprises. The EPA also recognizes that establishing a secured trade and investment framework will enhance the competitiveness of their economies, will make their markets more efficient and will ensure

predictability in benefit of the business environment. Chapter 20 of the EPA is the stand-alone chapter on SMEs and it sets outs the same obligation as the CPTPP and USMCA did to the Parties to provide information on access to each other's market. Chapter 20 of the EPA includes four articles that set the objective, encourage cooperation between parties, promote information sharing for the benefit of SMEs, and encourage SMEs participation in the agreement. In brief, the SMEs chapter of the EPA aims to enable SMEs to maximise benefits from the agreement. Chapter 20 of the EPA follows a similar approach compared with the CPTPP and USMCA with slight differences, such as the inclusion of a chapter objective (article 20.1) that CPTPP does not include and that the USMCA titled General Principles.

General Principles / Objective

USMCA and EPA set the framework for their SMEs chapters in Article 25.1 (general principles) and 20.1 (objective) respectively. In these articles, both agreements recognize the relevance of provisions addressing issues of small and medium sized enterprises. On the one hand, the USMCA Parties recognize SMEs as key contributors to improve competitiveness and maintain dynamism in the regional economy, and they identify the private sector as an important player to succeed in cooperation initiatives to benefit SMEs. On the other hand, the EPA highlights the relevance of this chapter and SMEs related provisions that aim to promote mutual effort among the Parties on matters of interest for SMEs. While the CPTPP did a great job creating a first framework for separate SMEs chapters, it is missing an introductory article that sets out the general principles or objectives to pursue in this chapter.

Information sharing

Article 24.1 titled "information sharing" of the SMEs chapter of the CPTPP includes provisions obliging parties to create a website with tailored information for the use of SMEs that would allow them to fully participate and take advantage of the agreement. CPTPP requires the Parties to include in their SMEs websites information such as an explanation of the main provisions of the agreement, the equivalent websites of their trading partners, the websites of its government agencies that offer information to SMEs that other Parties might consider useful and any additional information that SMEs might find interesting. In the same way, the USMCA in article 25.3 requires the Parties to make information available for specific use of SMEs through a free and publicly accessible website that contains relevant information about this agreement.

On the other hand, article 20.2 of the EPA requires the Parties to establish its own publicly accessible website that includes information regarding the agreement and any other information that might be useful for SMEs interested in participating for the benefits produced by the EPA. The EPA obligates the Parties to provide additional information that CPTPP and USMCA do not request, such as a link to a database that is electronically searchable by tariff nomenclature code and if applicable, any relevant information with respect to accessing their own markets, such as rates of customs duty, the most-favoured-nation applied rates of customs duty, rules of origin and any other tariff measure. It must be noted that the three agreements require the Parties, as part of the information sharing, to include in their websites links to the websites of their government

agencies and other appropriate entities that might provide useful information to any person interested in doing business with them. In this respect, the information that the three agreements suggest to be included in this section is shown in the next table.

Table 11: Comparison of the content in the websites of government agencies and other appropriate entities as part of the information-sharing article: CPTPP, USMCA and EPA

Information on the dedicated website for SMEs	CPTPP (Ch. 24)	USMCA (Ch. 25)	Japan-EU EPA (Ch. 20)
customs regulations and procedures	✓	✓	✓
enquiry points	-	✓	✓
regulations and procedures concerning IPRs	✓	✓	✓
technical regulations and standards	✓	✓	✓
conformity assessment procedures	-	✓	✓
sanitary or phytosanitary measures relating to importation or exportation;	✓	✓	✓
foreign investment regulations	✓	✓	
business registration procedures	✓	✓	✓
employment regulations	✓	✓	
taxation information	✓	✓	✓
When possible, information available in English	✓	✓	
trade promotion programs	-	✓	
competitiveness programs	-	✓	
SME financing programs	-	✓	
information related to the temporary entry of business persons	-	✓	✓
government procurement opportunities	-	✓	✓
other information which the Party considers to be useful for SMEs.	-	-	✓

Establishment of a SMEs Committee

There are reports that pointed out that the establishment of a SMEs committee has several benefits, from offering transparency and guidance to SMEs, to setting accountability, coordination and facilitation functions among Parties. In this respect, Article 24.2 of the CPTPP requires the Parties to establish a Committee on SMEs to assist small and medium enterprises to take full advantage of the agreement. Government representatives from each of the Parties comprise the committee and it should meet within one year of the date of entry into force. Some of the tasks of this committee in the CPTPP are promoting workshops and seminars to inform SMEs of the benefits of the CPTPP; exchanging best practices among the Parties in supporting SMEs; and exploring capacity building initiatives to support the Parties in enhancing SME export guidance and training programs. While the CPTPP made a great contribution proposing the establishment of this committee to benefit SMEs, the USMCA also made a great contribution by going further in the treatment of SMEs issues and writing out a more robust article. For example, the USMCA added, as part of the tasks of this committee, identifying ways to assist SMEs to strengthen their competitiveness; facilitating the design of programs to support SMEs to

integrate successfully into the global supply chains; and exchanging best practices in assisting SMEs on topics such as trade facilitation, trade missions and digital trade. In addition, USMCA sets out clearly that this committee should encourage SMEs participation in digital trade and it should assess the implementation of SME-related provisions, report findings and make suggestions.

On the other hand, the EPA does not include a committee on SMEs in the content of the chapter, but it proposes a very similar mechanism in Article 20.3 titled SME contact points. In this article, the EPA requires that Parties define a contact point with the goal to ensure that the needs of small and medium enterprises are listened to throughout the implementation of the agreement. Part of the duties of the SME Contact points in the EPA is encouraging cooperation on relevant issues to SMEs, monitoring the execution of the information-sharing article, ensuring that the information provided by each Party is relevant and up-to-date for SMEs, submitting a report on their activities and making appropriate recommendations to the Joint Committee.

Cooperation

Cooperation is the main area that FTAs have covered in SMEs-related provisions. According to Monteiro (2016), 92 of 270 RTAs analyzed in his study included at least one provision on cooperation mentioning SMEs. Monteiro (2016) concluded that SMEs-related provisions on cooperation are the most common form of provisions addressing SMEs, but also the most heterogeneous ones due to their varied scope. The common cooperation activity shared in the three agreements consists of exchanging information, experiences and best practices to benefit SMEs. However, the three agreements follow different approaches to promote cooperation. The CPTPP in its Article 24.22 on Committee on SMEs identify different areas to promote cooperation among the Parties and establishes different activities to work together. The CPTPP Parties agreed to cooperate through the committee on SMEs to share best practices and experiences related to financing, training and identifying commercial partners to benefit SME exporters. The CPTPP sets outs a broad range of cooperative activities that include exploring opportunities for capacity building, identifying ways to help out SMEs to take full advantage of the agreement, providing recommendations about improvements in their websites for SMEs, and identifying areas to enhance the ability of SMEs to engage in investment and trade opportunities offered by this agreement, among others.

The USMCA goes further in the promotion of SMEs related-provisions on cooperation by setting a specific article dealing with this area. Article 25.2 titled “cooperation to increase trade and investment opportunities for SMEs” states that Parties should work together in supporting SMEs participation in international trade and in enhancing its cooperation to exchange information in key areas for SMEs’ success: namely, SMEs’ penetration to new markets, SMEs access to credit and capital, and SMEs participation in government procurement. Furthermore, cooperation activities in the USMCA include collaborating on promoting SMEs owned by under-represented groups such as indigenous people, youth, women and minorities; encouraging partnerships, and

fostering cooperation among the parties by sharing best practices implemented in their dedicated SME centers, incubators and accelerators.

With regard to the EPA, this agreement recognizes in the first article of the chapter (objective) the relevance of cooperation as a tool to benefit SMEs. In addition, Article 20.3 referred to as the SME Contact Points highlights that Parties should collaborate with each other for improving SMEs possibilities of doing business in international markets and improving cooperation on issues of relevance to SMEs. As well, the SMEs chapter of the EPA establishes that trading parties should share information for supporting SMEs to reap the benefits of this agreement.

Competitiveness, business facilitation and other obligations

Even though the CPTPP does not offer a provision that points out a list of other obligations in the agreement that also benefit SMEs in their text, this report has identified SMEs obligations in other chapters such as Customs Administration and Trade Facilitation (Ch. 5), Trade Remedies (Ch. 6), Technical Barriers to Trade (Ch. 8), Financial Services (Ch. 11), Electronic Commerce (Ch. 14), Intellectual Property (Ch. 18), Transparency and Anti-Corruption (Ch. 26), Competitiveness and Business Facilitation (Ch. 22), among others. Regarding Chapter 22, the CPTPP developed a high quality framework for strengthening regional supply chains in benefit of SMEs that includes a supply chain definition (art. 22.1)[49] and the establishment of one Committee on Competitiveness and Business Facilitation (art. 22.2) composed of government representatives from each Party. This committee will have as its goals to improve SMEs participation in regional supply chains and it will work to find opportunities to take full advantage of the CPTPP and identify best practices for the development and consolidation of a cross-border network of enterprises. Additionally, this committee will have, as a part of their duties, to create mechanisms and engage directly with interested business stakeholders to receive feedback on issues of interest to enhancing competitiveness and business facilitation.

Chapter 25 of the USMCA was improved by adding an interesting article (art. 25.6) where Parties recognized specific obligations located in other chapters that benefit SMEs in addition to the provisions listed in the SME Chapter (Table 12).

Table 12: Article 25.6 of USMCA: Obligations in the Agreement that Benefit SMEs

[49] Supply chain means a cross-border network of enterprises operating together as an integrated system to design, develop, produce, market, distribute, transport, and deliver products and services to customers.

Chapter	Article
Chapter 5 Origin Procedures	Article 5.18 on Committee on Rules of Origin and Origin Procedures
Chapter 13: Government Procurement	Article 13.17 on Ensuring Integrity in Procurement Practices
	Article 13.20 on Facilitation of Participation by SMEs
	Article 13.21 on Committee on Government Procurement
Chapter 15 Cross-Border Trade in Services	Article 15.10 on Small and Medium-Sized Enterprises;
Chapter 19: Digital Trade	Article 19.17 on Interactive Computer Services
	Article 19.18 on Open Government Data
Chapter 20: Intellectual Property	Article 20.14 on Committee on Intellectual Property Rights
Chapter 23: Labor	Article 23.12 on Cooperation
Chapter 24: Environment	Article 24.17 on Marine Wild Capture Fisheries
Chapter 26: Competitiveness	Article 26.1 on North American Competitiveness Committee
Chapter 27: Anticorruption	Article 27.5 on Participation of Private Sector and Society
Chapter 28: Good Regulatory Practices	Article 28.4 on Internal Consultation, Coordination, and Review
	Article 28.11 on Regulatory Impact Assessment
	Article 28.13 on Retrospective Review.

Regarding Chapter 26 on Competitiveness, the USMCA follows the same approach as the CPTPP did with regard to highlighting the importance of improving regional competitiveness through the establishment of a Committee on Competitiveness (Article 26.1); however, the USMCA did not include specific statements on supply chains and business facilitation. The Committee on Competitiveness in the USMCA will work on the development of cooperative initiatives to facilitate regional trade and investment, and stimulate North America production. In Chapter 26, the USMCA Parties recognize their commercial and economic ties and affirm their shared goal in strengthening regional economic growth and prosperity. It should be noted that the USMCA is the first FTA signed by the US that includes a chapter on competitiveness.

With regard to the EPA, the agreement does not offer a provision identifying other obligations in the agreement that benefit SMEs as the USMCA did. This analysis found other related SMEs provisions in chapter 4 on customs matters and trade facilitation (art. 4.6 simplification of customs procedures), in chapter 8 on trade in services, investment liberalisation and electronic commerce (art. 8.80 Cooperation on electronic commerce), chapter 14 on intellectual property (art.14.52 cooperation), chapter 17 on transparency (art. 17.2 transparent regulatory environment), and chapter 18 on good regulatory practices and regulatory practices and regulatory cooperation (art. 18.8 impact assessment).

Summary of provisions on SMEs chapters

Next, a table is presented that summarizes the presence of some of the most important provisions on SMEs chapters in the CPTPP, USMCA and EPA. It must be noted that the three agreements (CPTPP, USMCA and EPA) included, at the end of their SMEs chapters, an article that clarifies that all the provisions under these chapters shall not be subject to their corresponding dispute settlement chapters. Likewise, an opportunity area for the three agreements in their SMEs chapter might be agreeing on and including a definition of what a Small and Medium Enterprise is and the criteria for being considered one of these. This definition could be useful to create stronger statistics about these enterprises and improve the understanding of SMEs contribution to

global trade. In this respect, a recent report co-published by the WTO and the World Bank[50] emphasized the need for setting a standard definition for SMEs that make SMEs comparisons among economies less challenging and allows better analyses about these enterprises. If this definition were incorporated in FTAs and other SMEs-related regulations, it would be possible to measure SMEs' contribution to GDP, trade and investments and other relevant variables in a more effective and standardized way.

Table 13: Comparison of the SMEs Provisions in the CPTPP, USMCA and EPA

Provisions	CPTPP (Ch. 24)	USMCA (Ch. 25)	Japan-EU EPA (Ch. 20)
General Principles / Objective	-	Art. 25.1	Art. 20.1
Information sharing	Art. 24.1	Art. 25.3	Art. 20.2
maintain its own free, publicly accessible website	Art. 24.1	Art. 25.3	Art. 20.2
the text of this Agreement	Art. 24.1	Art. 25.3	Art. 20.2
a summary of the Agreement	Art. 24.1	Art. 25.3	Art. 20.2
information designed for SMEs	Art. 24.1	Art. 25.3	Art. 20.2
links to the equivalent websites of the other Parties	Art. 24.1	Art. 25.3	Art. 20.2
links to the websites of its own government agencies	Art. 24.1	Art. 25.3	Art. 20.2
Committee on SMEs / SME Contact Points	Art. 24.2	Art. 25.4	Art. 20.3
SME Dialogue	-	Art. 25.5	-
Obligations in the Agreement that Benefit SMEs	-	Art. 25.6	-
Cooperation to Increase Trade and Investment Opportunities for SMEs	Art. 24.2	Art. 25.2	Art. 20.3
Non-Application of Dispute Settlement	Art. 24.3	Art. 25.7	Art. 20.4

Section IV. Concluding recommendations

An exhaustive FTAAP that offers deep and broad solutions to trade and investment issues represents a cornerstone in the foundation for deeper economic integration in the Asia Pacific with the possibility towards sustainable growth and well-being for all. These high standard provisions should be considered both a framework for the eventual FTAAP, and, at the same time, a valuable reference to consider in FTAs negotiations happening currently and in the near future. After completing this report, five recommendations are suggested in order to outline high-standard provisions on related competition policy disciplines that could contribute to the eventual realization of a comprehensive FTAAP and optimize business potential towards a future of shared prosperity for all companies regardless their ownership and size.

[50] World Bank; World Trade Organization. 2019. Global Value Chain Development Report 2019 : Technological Innovation, Supply Chain Trade, and Workers in a Globalized World (English). Washington, D.C. : World Bank Group.

A. Competition discipline must provide that all the Parties have high standards on their national competition laws and ensure these are fully enforceable with no discrimination.

Competition rules of the eventual FTAAP should reflect the importance that APEC economies have attached to offering and maintaining a level playing field that guarantees equal opportunities for all. Provisions on competition discipline should ensure that all Parties have in place high standards on competition laws that protect their markets against anti-competitive business behaviours, and also these should guarantee full enforcement of these laws to all commercial activities under basic fairness principles and without discrimination against any person. Competition chapters should ensure that competition authorities of all Parties work collaboratively, coordinate strategies, create synergies and cooperate as concerns to enforcement activities of competition law, including exchanges of information, consultations, notifications and joint investigations when required, in order to guarantee fair competition across the region. Competition rules should ensure that Parties keep their markets open and offer treatment no less favourable to foreign products, services, investments, and enterprises than those granted to domestic ones. Competition provisions should ensure that a person of another Party is treated no less favorably than a person of the Party in like circumstances, and should include rules on procedural fairness and private rights of action. Fair, impartial and effective procedures would be highly recommended, including transparency clauses through which the Parties can exchange information about their own competition laws and clarify any exceptions to it.

Competition rules in the eventual FTAAP should promote convergence and harmonization of competition laws through cooperation and capacity building, where economies with less experience in this discipline feel fully supported by trading Parties to advance together in the same direction. An important step towards a comprehensive FTAAP would be the inclusion of provisions that address subsidies and state aids, recognizing not only their distortive effects in the market and overall economy, but also establishing clear measures to constrain these. Another high-standard provision on competition discipline would be considering the application of the dispute settlement mechanism in the competition chapter, guaranteeing that every Party may have recourse to dispute resolution for any matter that threatens fair competition and undermines the purpose of competition provisions. Two final features that a competition chapter of the eventual FTAAP might include are: first, the inclusion of a review mechanism that allows the Parties to keep competition matters under an ongoing review, assessing progress and updating competition rules based on current and prospective challenges faced by businesses; and second, provisions on consumer protection matters that prohibit fraudulent commercial activities, guarantee competitive markets and increase consumer rights.

B. Provisions on preferential regulatory treatment must ensure that companies regardless of their ownership, compete fairly based on market considerations such as price and quality

During the last few years, an increasing number of FTAs have been dealing with issues on preferentially-treated entities (PTEs) in stand-alone chapters due to their economic relevance and

influence. Recognizing that no rules on PTEs can have a negative impact in the marketplace, producing adverse effects on innovation, economic efficiency, competitiveness and economic growth is an excellent starting point to building a broad coverage on this competition area. Preferential Regulatory Treatment including subsidies and non-commercial assistance is employed for the legitimate purpose but needs the discipline not to cause the market distortion and hurt the equal opportunity for all market participants. Thus, adding high standard regulations on PTEs should be considered essential for offering an even playing field and eliminating the disadvantages that other companies can face when competing against an entity with monopoly features, producing market distortions. On one hand, preferential regulatory treatment (PRT) should be preserved for its public policy for each economy to define and maintain PTEs on public interest grounds, but on the other hand, preferential regulatory treatment should prevent an uneven playing field that hurts businesses and negatively affects consumers by, for instance, increasing prices and decreasing availability of products or services. PRT provisions should aim at preventing anti-regulatory behavior by preferentially-treated entity, when engaging in commercial activities, competing based on market criteria and not under the privilege of its special status. For the above reasons, preferential regulatory treatment clauses should aim to ordain regulatory authority over preferential regulatory treatments and to define a broad set of obligations to follow, such as not operating in a manner that creates barriers for businesses, nor discriminates against competing enterprises of other Parties in making commercial sales or purchases.

High standard provisions on preferential regulatory treatment should provide solutions to the fact that businesses often cannot compete against PTEs on an equal basis because they obtain support from their regulatory body via subsidies, state aids, regulatory advantages, relaxed competition law enforcement and favouritism. The provisions on this discipline should be framed under the principles of transparency, no discrimination and procedural fairness, creating certainty and predictability for both local and foreign companies. In this regard, a good practice to promote transparency would be that market participants share with their counterparts a list of their PTEs and the activities that these carry out, and also provide information about the non-commercial assistance that they are provided. Other relevant clauses would be requesting the Parties that operations of PTEs is under internationally recognised standards and principles of corporate governance. Finally, the rules should include obligations related to subsidies and coverage. For example, including rules on subsidies to services exports would be highly recommended and adding improved methods of reporting obligations on subsidies. With regard to the coverage of preferential treatment, provisions should cover all entities, regardless of ownership operating within an economy. Its rules should also apply to cross-border activities including their participation as investors in foreign markets.

C. Investment provisions must ensure that the playing field is not tilted in favour of local investors and against foreign ones through enforcement of national treatment and most favoured nation clauses

Investment provisions should provide a level playing field to local and foreign investors for all the Parties. Providing Parties with enhanced conditions when doing business in the territory of any of the member economies should be an ultimate goal, facilitating, for example, the creation of commercial partnerships between companies of different Parties, or making it easier to establish an in-market presence for exporters of products or services. Investment provisions should guarantee fair competition between local and foreign investors by adding clauses related to national treatment, most favoured nation and minimum standard of treatment. Provisions on these areas should ensure that trading Parties do not discriminate against each other's investors to benefit either their own investors or investors from another economy. In other words, these rules should guarantee that foreign investors not be treated less favourably than others in like circumstances. Provisions establishing a minimum standard of treatment should be in accordance with principles of customary international law including due process, fair and equitable treatment, and full protection and security. Moreover, investment provisions should prohibit the establishment of restrictions over foreign investments such as technology transfer or export requirements. Likewise, investment provisions should prevent foreign investors from being restricted to appoint senior executives to run their businesses in the territory of other Parties, regardless of their nationality. Conversely, these provisions should require foreign investors to transfer their funds without delay, for example, by transferring dividends and profits, interest payments and royalties.

Investment rules should be supported by an effective Investor-State Dispute Settlement (ISDS) mechanism that guarantees transparency, predictability and fairness for investors and their investments. This ISDS should operate in an independent, transparent and timely manner for resolution of disputes and ensure that investors receive fair treatment when they feel that a specific rule of the agreement has been breached. Some of the features of this ISDS could include hearings open to the public and reporting on publicly available dispute decisions. An important feature of investment provisions should be negotiating the investment chapter under a negative list approach. Actually, this should be considered as a strategic step in order to send a clear message to foreign investors about the commitment of the Parties to promote and keep their market open for investments unless they list restrictions for a particular industry or sector. Negotiation under a negative list approach offers a proactive framework to host investments due to the willingness of the Parties to open all their economic sectors to the negotiation process with the exception of those listed in the non-confirming measures and corresponding annexes. A final recommendation to consider for the eventual FTAAP would be applying investment obligations to all phases of the lifecycle of an investment, considering that all investment provisions are applicable from the pre-establishment of an investment, which is a very important stage where investors are planning and making important decisions before the investment is actually made. This feature would offer more certainty to foreign investors and would create equal conditions regardless of the origin of the investment from the conception of the investment.

D. Results show that it is imperative to incorporate high standard provisions on SMEs and under-served groups in the eventual FTAAP, improving their capacity to engage in global markets and guaranteeing they can compete against large and multinational companies

Considering that SMEs make up the vast majority of APEC businesses, accounting for over 97 percent of total companies and more than half the jobs, a separate chapter that address challenges and issues faced by SMEs is not only justified, but imperative. SMEs provisions in the eventual FTAAP should reflect the strong conviction from APEC economies to significantly grow participation of small and medium enterprises in international markets either as exporters or as active players in regional and global supply chains. SMEs provisions should contribute to reduce the abysmal difference between SMEs and Multinational Corporations (MNCs) in regards to international trade participation and use of trade agreements. State of the art provisions on SMEs should include measures to assist them to take full advantage of the opportunities that digitalization offers, and help them overcome at the border and behind the border barriers that currently preclude their participation in international markets. High-quality provisions on this discipline should include helping SMEs to develop and sustain competitiveness via creation of trade competencies and capacities that allow them to penetrate new markets. Provisions on SMEs should include dedicated websites for exclusive use of SMEs, putting available information of particular interest for SMEs, establishing a committee that focuses only on finding solutions to SMEs challenges, setting cooperation as a key element to boost SMEs opportunities across the region, and creating the space to carry out open and direct dialogue between authorities and SMEs.

SMEs rules should ensure that they have access to useful information from trading Parties, so SMEs can make their best decisions to compete against large and multinational companies that surpass them in human and financial resources. Likewise, incorporating business facilitation provisions would be highly recommended in order to support and facilitate the participation of SMEs and also of other underserved groups that have been excluded historically from global trade, namely women, indigenous groups and young entrepreneurs. These rules should aim to simplify regulatory processes, burdensome customs regulations, and border procedures and formalities for SMEs and underserved groups in order to make possible their participation and avoid increased operational costs and complicated logistics. It would be valuable to the eventual FTAAP to include a shared definition on SMEs across the region and develop metrics that support the measurement of the degree of progress and integration of SMEs in regional trade and then adjust strategies as needed. In brief, it is imperative to consider SMEs and underserved groups in competition policy provisions, improving their competitiveness and capacity to engage in global markets, and ensuring their inclusion in global trade and supply chains.

E. Competition Policy should not be seen as simply a domestic matter, but as a regional matter that needs to be addressed in collaboration with like-minded economies

The eventual FTAAP is a powerful goal that requires all APEC economies to continue working together with resilience and determination. Advancing towards the FTAAP requires that APEC

economies improve coordinating efforts and capacity building to achieve mutual competition policy goals. The good news is that there is a majority support to include competition policy matters in FTAs. The challenge, however, is that competition policy provisions have to be set out with high standards in order to meet their purpose of ensuring a level playing field and contributing to a comprehensive FTAAP. Having high quality rules on competition policy to be eventually employed in the FTAAP is the proper approach that should be encouraged across the region. Defining high-quality provisions on competition policy matters have to be considered an essential element to build a solid foundation towards the eventual FTAAP. Business entity of any ownership either in public or private, of all sizes including SMEs, and of all nationalities would benefit from an improved competition environment. However, the potentially positive impact that competition policy might have in the region will only occur if implemented properly locally and regionally

The six agreements covered in this report are good examples of the progress on competition policy provisions that have been made in FTAs. The content of related chapters, namely competition, investments, small and medium enterprises, preferential regulatory treatment, competitiveness and business facilitation are good references to consider for negotiations and should be considered part of the FTAs matrix for APEC economies to advance towards a cross cutting FTAAP. High-standard provisions on related competition policy chapters in FTAs need to converge to eventual comprehensive FTAAP which guarantees a level-playing-field for all the business in the region. Nonetheless, every future negotiation of FTAs occurring in the Asia Pacific should be considered a unique opportunity to improve solutions on competition policy matters. The function of competition policy in promoting fair competition, preventing and combating monopolies and eliminating any restrictions on investments and trade should be considered an ongoing task. Thus, it is essential that APEC economies continue to stand together and be open to negotiating new generation agreements that include high-standards on competition provisions to promote inclusive growth and advance in the right direction towards sustainable economic integration. The FTAAP, the powerful instrument to advance the economic integration, needs a Competition governance to achieve a level-playing-field for all market participants, incorporating constant evolution of business model and ever changing international business environment as one of the high-quality solutions to Next Generation Trade and Investment Issues.

Annex: Comparison of Preferential Regulatory Treatment chapters: CPTPP, USMCA and EVFTA

CPTPP

For several analysts, CPTPP has been considered as a ground-breaking agreement with a "revolutionary approach" to rule-making in defining the rules of commercial engagement for Preferential Regulatory Treatment (PRT) and related disciplines. In this regard, chapter 17, titled *State-Owned Enterprises and designated monopolies*, can be considered an extension of competition chapter setting the rules for eleven diverse economies and putting in practice the solution of issues generated in a real environment. Chapter 17 of the CPTPP has added high standard provisions in its text which has taken this agenda to a higher level of discussion, including guaranteeing that purchases and sales are made on a commercial criteria, prohibiting discriminatory behavior toward other buyers and suppliers, addressing support policies and programs from governments to preferentially-treated entities (PTEs), adding transparency, and including the chapter on the CPTPP's dispute settlement resolution mechanism.

For the broad coverage of PRT issues by CPTPP Parties, this chapter of the CPTPP has been recognized as one of the most important contributions of this agreement to build a comprehensive and progressive template for FTAAP. This report agrees with scholars who conclude that chapter 17 of the CPTPP appears as a tipping point in the approach to this discipline. According to Francis (2019), the CPTPP has made a serious effort to take this agenda to a new stage in the internationalization process of this discipline and "*its central contribution is the articulation – in a plurilateral project involving parties with significant SOEs sectors, and subject to a dispute settlement process- of a set of basic norms that have found expression in other instruments but have yet to achieve genuine international salience or wide acceptance in practice*". This chapter of the CPTPP has contributed to taking the discussion on PTEs to a new level by setting high standards on rule-making and management for those enterprises participating in commercial activities.

USMCA

Since it went into effect, the NAFTA agreement was considered a high quality template, and it served as an excellent framework for other FTAs negotiations for several years. In this respect, PRT provisions in NAFTA, included in Chapter Fifteen (*Competition Policy, Monopolies and State Enterprises*), encouraged different economies to recognize in their agreements the relevance of PTEs to avoid operating in a manner that created obstacles to trade and investment. Under USMCA negotiations, PRT provisions had to be revised and the output was a separate chapter titled the same as in the CPTPP and with similar provisions in it (Chapter 22). Nonetheless, it is worth noting that USMCA has actually gone further in some clauses compared to the CPTPP, which is a good sign for the ongoing process of global market improvement.

Compared with the CPTPP, the USMCA offers a broader definition of SOEs as an enterprise that is principally engaged in commercial activities, and in which a Party directly or indirectly owns more than 50 percent of the share capital, whereas the definition in the CPTPP only considers enterprises in which a Party has direct ownership.[51] In addition, USMCA considers in its SOEs definition the circumstance in which a Party might hold the power to control the enterprise through any other ownership interest, including indirect or minority ownership. In brief, the chapter of USMCA took as a template the chapter of CPTPP, and then it went further in some of the provisions. This sends a good message about the possibilities of improvement within the CPTPP and for other FTAs, and this was one of the main conclusions included in our previous report for the APEC Business Advisory Council (ABAC). Without a doubt, USMCA is an excellent model to follow for ensuring better competitive neutrality between preferentially-treated entities engaged in commercial activities and their competitors.

EVFTA

The European Union-Viet Nam Free Trade Agreement (EVFTA) was signed on June 30 of 2019 and it is an ambitious pact aligned with the shared goals by the Parties to promote sustainable development, trade and investment. Within the preamble of EVFTA, part of their priorities is promoting the competitiveness of their companies by providing them with a predictable legal framework. EVFTA plans to fully dismantle nearly all tariffs with only a few exceptions: custom duties will be removed over a transitional period of ten years maximum for EU products and seven years for Vietnamese ones. According to Ms. Cecilia Malmström, the EU Commissioner for Trade, the EVFTA is the most ambitious and comprehensive FTA that the EU has ever concluded with a middle-income economy. As such, it sets "a new benchmark for Europe's engagement with emerging economies" [52] and this statement speaks to the relevance of the agreement and potential impact in the trade and investment agenda.

Chapter eleven of the EVFTA is a separate chapter that defines the rules on Preferential Regulatory Treatment and related disciplines, and it is titled "*State-Owned Enterprises, Enterprises Granted Special Rights or Privileges, and Designated Monopolies*." The outcome of chapter eleven is an excellent example of how developing economies with a strong presence of Public undertakings, such as Viet Nam, can agree and move forward in the discussion of critical issues of the agenda to benefit their businesses and domestic economy, but also for the benefit of the overall business environment, competition and putting all enterprises on an equal footing when engaged in commercial transactions. EVFTA lays a positive precedent due to participation and weight of state-owned companies in the economic structure of Viet Nam, which is about 40 percent of its Gross Domestic Product (GDP). In this respect, EVFTA has included a high

[51] According to USMCA text, for the purposes of SOEs definition, the term "indirectly" refers to situations in which a Party holds an ownership interest in an enterprise through one or more state enterprises of that Party. At each level of the ownership chain, the state enterprise – either alone or in combination with other state enterprises – must own, or control through ownership interests, another enterprise.

[52] Taken from the Guide to the EU-Viet Nam Free Trade Agreement

standard set of rules in order to ensure that the agreed liberalization of trade is not weakened by anti-competitive and unfair business actions of those enterprises.

EVFTA contains that same provisions as the CPTPP and USMCA that apply to all state-owned enterprises and public and private designated monopolies engaged in commercial activities, but EVFTA goes further by incorporating the concept of "enterprises granted special rights or privileges." Some of the key provisions in EVFTA refer to non-discrimination, commercial considerations, transparency, and corporate governance. This difference in the scope between EVFTA and the two other agreements adds value to the discussion and solution of issues, and the increased scope should be considered in future negotiations on this discipline in the Asia Pacific.

Definitions

Definitions of related concepts to preferential regulatory treatment are included in the first article of each of the chapters of the three agreements. The CPTPP offers fifteen definitions, the USMCA includes sixteen and EVFTA seven. All three FTAs have definitions for the same five concepts: commercial activities, commercial considerations, Designate, Designated Monopoly, and State-Owned Enterprise. CPTPP is the only agreement that includes a definition for two concepts: *Sovereign Wealth Fund* and *by virtue of that state-owned enterprise's government ownership or control*. USMCA is the only agreement that includes three definitions for *financial services suppliers, certain enterprises* and *limited to certain enterprises*. EVFTA is the only agreement to include two definitions on *Special rights or privileges* and *Enterprise granted special rights or privileges* (see Table 14).

The three agreements (CPTPP, USMCA and EVFTA) define SOEs as entities of which a party owns a majority of the share capital, controls a majority of the voting rights, or appoints the majority of the board members or any other similar management body. In other words, the three agreements coincide in the definition of SOEs on the basis of government ownership and government control. However, USMCA and EVFTA go further on the definition by including two additional situations to be considered. USMCA adds the situation in which a party can control through minority ownership, and EVFTA considers the situation in which a Party can exercise control over the strategic decisions of the enterprise.

CPTPP and USMCA share the same definition of designated monopoly as a privately owned monopoly that is designated after the date of entry into force of their agreements and any government monopoly that a party designates or has already designated. The EVFTA provides a broader definition on designated monopoly stating that this is an entity, a group of entities or a government agency, and any subsidiary thereof, that in a relevant market in the territory of a Party is designated as the sole purchaser or supplier or of a service or product. EVFTA text clarifies that the designated monopoly definition does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant.

Table 14: Definitions included on SOEs Chapters of the CPTPP, USMCA and EVFTA

Definitions	CPTPP (Ch. 17)	USMCA (Ch. 22)	EVFTA (Ch. 11)
Arrangement	✓	✓	-
Commercial activities	✓	✓	✓
Commercial considerations	✓	✓	✓
Designate	✓	✓	✓
Designated monopoly	✓	✓	✓
Government monopoly	✓	✓	-
Independent pension fund	✓	✓	-
Market	✓	✓	-
Monopoly	✓	✓	-
non-commercial assistance	✓	✓	-
assistance	✓	✓	-
by virtue of that SOE's government ownership or control	✓	-	-
certain enterprises	-	✓	-
limited to certain enterprises	-	✓	-
Public service mandate	✓	✓	-
Sovereign wealth fund	✓	-	-
State-owned enterprise	✓	✓	✓
Financial services supplier, financial institution, and financial services	-	✓	-
Enterprise granted special rights or privileges	-	-	✓
Special rights or privileges	-	-	✓

Scope

The SOEs chapters of the three agreements analyzed in this section (CPTPP, USMCA and EVFTA) contain articles that define the scope of their chapters, provide a proper framework and set detailed provisions about what they aim to cover and what they do not. The CPTPP and USMCA follow a similar approach in Articles 17.2 and 22.2 respectively, which state that their chapters shall apply to the activities of *state-owned enterprises and designated monopolies* of a Party that affect trade or investment between Parties within the free trade area, including the activities that cause adverse effects in the market of a non-Party. As part of the scope, both agreements list several areas that shall not be considered within the scope of their chapters. In this respect, the CPTPP and USMCA clarify that nothing in their chapters should prevent a party in adopting regulatory or supervisory measures, or monetary and related credit policy and exchange rate policy from a central bank or a monetary authority; to implement regulatory or supervisory measures over financial services suppliers from a financial regulatory body including a non-governmental body; and to apply measures for the purpose of a failing or failed financial institution or any other failing or failed enterprise principally engaged in the supply of financial services. In addition, the CPTPP and USMCA set out that those chapters do not apply to a Party's independent pension fund or an enterprise owned or controlled by an independent pension fund of a Party under certain exceptions, and neither applies to government procurement. Finally, the CPTPP and USMCA make clear that nothing in their Chapters shall be construed to limit trading parties from maintaining preferentially-treated entities. To be noted, Article 17.9 from the CPTPP and 22.9 from USMCA both left the possibility open for member

parties to include non-conforming activities in their schedule to Annex IV, to which these chapters shall not apply.

EVFTA offers a different approach in the manner that it defines its scope in Article 11.2, though it is effective and provides a clear framework about what the chapter covers. The opening paragraph of the scope article establishes the rights and obligations from the Parties under paragraphs 1 to 3 of Article XVII of GATT 1994, the Understanding on the Interpretation of Article XVII of the General Agreement On Tariffs And Trade 1994 as well as under paragraphs 1, 2 and 5 of Article VIII of GATS which are hereby incorporated into and made part of this Agreement, *mutatis mutandis*. The scope of this chapter of EVFTA applies not only to all state enterprises engaged in commercial activities, but also to enterprises granted special rights or privileges, which are defined as public or private undertakings, including subsidiaries, that have been granted, in law or in fact, special rights or privileges by a Party. Moreover, the EVFTA text prevents the scenario in which an enterprise might have both commercial and non-commercial activities, and it clarifies that only the commercial ones will be covered by this chapter. Regarding the "no application" of this chapter, EVFTA states that this chapter does not apply to covered procurement by a Party or its procuring entities. Additionally, this chapter does not apply to any service supplied by state enterprises in the exercise of governmental authority.[53]

Non-discriminatory Treatment and Commercial Considerations

The requirements to act pursuant to commercial considerations and to offer a non-discriminatory treatment in the CPTPP, USMCA and EVFTA are set out in articles 17.4, 22.4 and 11.4 respectively. The obligation to ensure preferentially-treated enterprises (PTEs) act based on commercial considerations, a key principle of competitive neutrality, follow a similar approach in the three agreements, aiming to guarantee that the decisions are based on commercial criteria. The wording of the three agreements is very similar, establishing that trading parties shall ensure that each of their state enterprises, when engaging in commercial activities, act based on commercial factors either for their sales or purchases of services or products, including when applied to an investment. Important values behind the commercial considerations provisions are the intention to promote fair competition in which PTEs participate without undue support from their governments.

With regard to the non-discrimination provisions, the three agreements include National Treatment and Most Favoured Nation obligations as a part of the content in their articles. These obligations on commercial considerations and non-discriminatory treatment prevent restrictive and discriminatory practices that limit an adequate business environment in benefit of both private and public enterprises.

[53] The term "a service supplied in the exercise of governmental authority" has the same meaning as defined in subparagraph 3(c) of Article I of GATS which states "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Non-commercial assistance

Anderson et al (2018) found that only about 30 percent of FTAs specifically include provisions on subsidies or state aids within the chapters dedicated to competition policy.[54] Thus, there is an opportunity and need to include this topic in FTAs. Fleury & Marcoux (2016)[55] noted that non-commercial assistance provisions surged as a complement to non-discriminatory treatment provisions and in response to "*address more adequately specific forms of support from states to SOEs.*" In this respect, the CPTPP defines in Article 17.1 non-commercial assistance as assistance to PTEs by virtue of the privilege of its special status in which assistance might be granted through the following ways: direct transfers such as grants, debt forgiveness, loans, loan guarantees, equity investment, and goods or services on conditions more favourable than those commercially available. CPTPP provides detailed information about how this principle shall operate among the parties in Articles 17.6 in which it states that Parties shall not produce "adverse effects" to the interests of another Party through the use of non-commercial assistance either "directly or indirectly" to any of its SOEs. CPTPP also emphasizes that every member shall warrant that its preferentially-treated enterprises does not cause adverse effects to the interests of another Party, nor cause injury to a domestic industry of another member economy. Anderson et al (2018) pointed out that the CPTPP was the first regional trade agreement that establishes disciplines on subsidies for services delivered cross-border.

In the case of USMCA, a non-commercial assistance principle is covered, but its content has some differences compared to the CPTPP. For instance, USMCA defines the non-commercial assistance in Article 22.1 as "*assistance that is limited to certain enterprises*." Despite that difference, USMCA defines "assistance" in a very similar way. In addition, Article 22.6 of USMCA provides, in a similar manner, the framework about adverse effects.[56] In this same article, USMCA states the ways that non-commercial assistance are prohibited if given to an enterprise primarily engaged in the production or sale of goods other than electricity. This is an important contribution from the USMCA content on preferential regulatory treatment chapters and something the CPTPP does not have in its content. In this respect, this report found that the USMCA took the CPTPP as a template in many provisions; however, the USMCA improved the chapter, building even broader and stronger provisions. It must be highlighted that both the CPTPP and USMCA have included provisions on non-commercial assistance related to services that represents an advance on the agenda to avoid the presence of undue subsidies in the growing services sector. With regard to EVFTA, the agreement does not include any content related to this principle, and this provision might be considered in a future version of the agreement.

Transparency

[54] Anderson et al. analyzed 280 RTAs notified to the WTO and available in the WTO's Regional Trade Agreements Information System.

[55] Julien Sylvestre Fleury, Jean-Michel Marcoux, The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership, Journal of International Economic Law, Volume 19, Issue 2, June 2016.

[56] The adverse effect term is defined broadly in articles 17.7 and 22.7 of the CPTPP and USMCA respectively, both articles list the circumstances when adverse effects might arise due to the effect of the non-commercial assistance.

Scholars have identified two main approaches to encourage transparency of PTEs into the text of Free Trade Agreements. A "proactive approach" consists of requesting Parties to proactively supply information about their existing PTEs once they have reached an agreement, and update this information when any change occurs. The second approach is to establish a "request mechanism" through which Parties can request explicit information about PTEs to other Parties. In this respect, CPTPP incorporated these two approaches within article 17.10, and also added some innovative content. Article 17.10 requires each Party to provide its trading parties, or otherwise make publicly available on an official website, a list of its state undertakings. Additionally, this provision states that Parties agree to "promptly provide" additional information on a written request of another Party regarding the structure and operations of a specific enterprise.[57] Some of the information that should be provided by the Parties under written request include percentage of shares and votes, a description of any special shares, special voting or other rights, government titles of officials serving in the entity, annual revenue, total assets, any exemptions and immunities, and any other publicly available information such as financial reports and third-party audits. Additionally, the request mechanism included in this chapter of CPTPP offers the possibility to obtain additional information with respect to non-commercial assistance offered by a government to its enterprises, part of the innovative content added by CPTPP.

With regard to transparency in the USMCA, the trading partners set out the provisions in article 22.10 that follows the same approach that the CPPTP applied; the USMCA practically used the same language that CPTPP did, with just a few adjustments. For instance, in Article 22.10.4 related to the written request of one Party to receive information regarding any policy or program that the other Party has adopted, the USMCA used the same content that the CPTPP did with respect to promptly provide in writing information that provides for non-commercial assistance, but USCMA also added that information should be included related to any equity capital (regardless of whether the equity infusion also constitutes non-commercial assistance) to its enterprises. Moreover, USMCA, in Article 22.10.9, refers to the situation when a Party responds to a request for information under the Transparency Article with the same content and language that the CPTPP did, but the USMCA went further by adding that when a Party responds to a request for information, to the maximum extent possible under its law, the Party should not consider the amount of the financial contribution associated with the non-commercial assistance or equity capital to be confidential.

Transparency provisions in EVFTA follow the "request mechanism" approach in Article 11.6, in which EVFTA notes that Parties that have a valid reason to believe their interests under this chapter have been affected by the commercial activities of a preferentially-treated entity of another party may request the other Party in writing to receive information about the functioning of an specific entity. The written request of EVFTA obligates the parties to include the following

[57] The written request should include an explanation of how the activities of the entity in question may be affecting trade or investment between the trading partners.

information in their request: the enterprise, the goods or services and markets concerned, and include indications that the enterprise or entity is engaging in practices that affect trade or investment between the trading Parties.

Promoting a level playing field

Promoting a level playing field between domestic and foreign enterprises regardless of their ownership and size represents the ultimate goal of PRT provisions. Both the CPTPP and USMCA include a technical cooperation clause, stating that Parties might develop cooperation initiatives such as "sharing best practices on policy approaches to ensure a level playing field between all enterprises, including policies related to competitive neutrality. In addition, USMCA also uses the playing field concept in the Annex 22-E in which it points out that Mexico shall ensure that Special Purpose Vehicles "*pursue the performance of commercial activities on equal circumstances and conditions available to competitors on a level playing field, with no intention of displacing or impeding competitors from the relevant market.*"

Dispute Settlement

With the influence and presence of preferentially treated entities in local and international markets, especially in global supply chains, a dispute settlement mechanism is a crucial process that can ensure an impartial, transparent and reliable judgement when conflicts and differences arise. However, despite the need of this mechanism, the possibility of adjudication has been absent in the text of most of the FTAs covering these issues until the CPTPP included this topic. Before the CPTPP, most of the FTAs had included one of two options: first, no reference to dispute settlement applied to SOEs, or second, articles indicating that Parties do not have recourse to dispute settlement under their FTAs for any matters related to anti-competitive business conduct, cooperation, or consultations.[58]

The CPTPP improved their agreement with the inclusion of Article 17.5 titled "Courts and Administrative Bodies" that allows for settlement of disagreements with regard to this chapter before domestic courts. This article states that each Party "shall provide its courts with jurisdiction over civil claims against an enterprise owned or controlled through ownership interests by a foreign government based on a commercial activity carried on in its territory." Nonetheless, this article clarifies that a trading Party is not obligated "to provide jurisdiction over such claims if it does not provide jurisdiction over similar claims against enterprises that are not owned or controlled through ownership interests by a foreign government." Willemyns (2016) pointed out that the dispute settlement article of CPTPP does not contain an exclusive jurisdiction clause, which means that Parties can bring a dispute on preferential regulatory treatment matters before investor–state dispute settlement (ISDS) or the dispute settlement

[58] Fleury and Marcoux (2016) included as examples the following FTAs: USA–Singapore FTA (Article 12.7) USA–Chile FTA (Article 16.8) USA–Peru FTA (Article 13.10) USA–Colombia FTA (Article 13.10) and USA–South Korea (Article 16.8)

mechanism that is provided in chapter 28 and thus, Willemyns concluded that adequate enforceability is ensured under the agreement. It must be noted that in the CPTPP other provisions are included related to the dispute settlement process, such as Article 17.8 that explains several factors that should be considered in order to determine whether or not there is a presence of injury;[59] and Article 17.15 contains the process for developing information to be considered in disagreements under Chapter 28 (Dispute Settlement) regarding a Party's commitment related to non-discriminatory treatment, commercial considerations or non-commercial assistance. The USMCA follows the same approach and actually uses the same language as the CPTPP applies to elaborate its dispute settlement mechanism in Article 22.5 and related clauses. With respect to EVFTA, it does not contain any reference to dispute settlement with regard to this discipline.

Nonetheless, the contribution of a dispute settlement mechanism proposed by the CPTPP, which the USMCA did in the same way, is critical to settling international disputes. This report agrees with the proposal of some analysts who propose a neutral international dispute settlement court instead of domestic courts. An international mechanism could address "sensitivities" and guarantee efficiency, transparency and reliability in its decisions.

Corporate governance

Taking actions to improve the corporate governance of preferentially-treated entities (PTEs) is vital in order to increase not only their efficiency, competitiveness and productivity, but to also strengthen the overall competition environment in both developing and developed economies. Good corporate governance is associated with a number of benefits and positive outcomes, such as improved strategic decision making, better operational performance, lower costs of capital, better access to external funding, reduced risks, and better relationships with stakeholders. Andres, Guasch, and Lopez Azumendi (2011) who analyzed 44 state-owned enterprises in Latin America and the Caribbean found that there is a positive correlation between six dimensions of corporate governance and the performance of these kind of entities in the water and electricity sectors; and among the highest contributors to well-performing these entities found by this study are performance orientation and professional management.[60]

With corporate governance as a key step in moving forward the agenda, the CPTPP and USMCA have both introduced a corporate governance concept in their provisions, articulated in the technical assistance articles in which they encourage the Parties, where appropriate and subject to available resources, exchange experiences and information related to improvement of the

[59] "injury" shall be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.

[60] Andrés L., Guasch J. and López Azumendi S. (2011). Governance in state-owned enterprises revisited: The cases of water and electricity in Latin America and the Caribbean. Washington, DC. World Bank, Latin American and the Caribbean Region, Sustainable Development Unit. The six dimensions of corporate governance analyzed in this study included board, chief executive officer, performance orientation, management, legal framework, and transparency/ disclosure.

corporate governance and operations of their public undertakings. On the other hand, EVFTA goes further in the introduction of the corporate governance principle in Article 11.5, which is about the regulatory framework, establishing that trading partners have to ensure that their state enterprises follow internationally recognised standards of corporate governance.

Exceptions

CPTPP and USMCA follow the same approach and basically use the same language and content to list their exceptions that are included in Articles 17.13 and 22.13 respectively. The Chapters of both agreements should not apply the obligations imposed on Parties related to commercial considerations, non-discriminatory treatment, and non-commercial assistance when the Parties have to adopt or enforce temporary measures in response to national or global economic emergencies. Furthermore, CPTPP and USMCA established that non-discriminatory treatment and commercial consideration provisions do not apply to the supply of financial services by an entity pursuant to a government mandate. In addition, within the exceptions, both agreements excluded provisions related to non-discriminatory treatment, commercial considerations, non-commercial assistance, transparency, and the activities of the Committee to state enterprises under the threshold as defined by Article 17.13(5) and Annex 17-A. In this respect, CPTPP only considers entities covered by this chapter to be those with annual revenue derived from the commercial activities of the enterprise above the established threshold of 200 million Special Drawing Rights (SDRs); whereas in the USMCA, the threshold shall be 175 million SDRs. In addition to the exceptions articles, CPTPP and USMCA include Party´s schedules and Annex 17-D and 22-D respectively, where Parties list companies and non-conforming activities of these to which this chapter will not apply.

The EVFTA does not include a specific Article with exceptions; however, these have been included in the scope provision. In this respect, EVFTA sets out the same provisions as the CPTPP and USMCA that the SOEs chapter does not apply to state enterprises, for which a Party has taken actions on a temporary basis in response to a national or global economic emergency. EVFTA has also included into the exceptions, the same as the CPTPP, that those SOEs in any one of the three previous consecutive years with an annual revenue derived from the commercial activities of that enterprise was less than 200 million special drawing rights. Likewise, EVFTA text points out that this chapter does not apply to activities or measures listed in Annex 11-A (Specific Rules for Viet Nam on State-Owned Enterprises).

Further negotiations

An important clause that was included in the CPTPP and USMCA is the commitment of the parties to conduct further negotiations on extending the application of this discipline. The language is practically the same in Articles 17.14 and 22.14 of the CPTPP and USMCA respectively; however, there is a significant difference in the time to begin further conversations among the Parties. The CPTPP states that Parties should initiate further negotiations within five years of the date of entry into force of the agreements, whereas the USMCA establishes this

criterion after six months. The EVFTA does not include any article that sets out a commitment to continue discussing this discipline after a certain period of time after the initiation of the agreement.

Table 15: Comparison of the contents of Chapters on Preferential Regulatory Treatment of the CPTPP, USMCA and EVFTA

Topic	CPTPP (Ch. 17)	USMCA (Ch. 22)	EVFTA (Ch. 11)
Definition	Art. 17.1	Art. 22.1	Art. 11.1
Scope	Art. 17.2	Art. 22.2	Art. 11.2
Delegated Authority	Art. 17.3	Art. 22.3	
Non-discriminatory Treatment and Commercial Considerations	Art. 17.4	Art. 22.4	Art. 11.4
Non-discriminatory treatment	Art. 17.4 (1)	Art. 22.4 (1)	Art. 11.4 (1)
Prohibition of anticompetitive practices by designated monopolies	Art. 17.4 (2)	Art. 22.4 (2)	Art. 11.4 (1)
SOEs purchases and sales based on commercial considerations	Art. 17.4 (1)	Art. 22.4 (1)	Art. 11.4 (1)
Non-commercial assistance	Art. 17.6 & 17.7	Art. 22.6 & 22.7	-
Courts and Administrative Bodies	Art. 17.5	Art. 22.5	Art. 11.5
foreign-owned enterprises subject to jurisdiction same than locals	Art. 17.5 (1)	Art. 22.5 (1)	-
exercise of regulatory discretion by administrative regulators of SOEs	Art. 17.5 (2)	Art. 17.5 (2)	Art. 11.5 (2)
Transparency	Art. 17.10	Art. 22.10	Art. 11.6
Technical Cooperation	Art. 17.11	Art. 22.11	Art. 11.7
Committee on State-Owned Enterprises and Designated Monopolies	Art. 17.12	Art. 22.12	-
Exceptions	Art. 17.13	Art. 22.13	Annex 11-A
Further Negotiations	Art. 17.14	Art. 22.14	-
Dispute settlement process	Art. 17.15 and Annex 17-B	Art. 22.15 and Annex 22-B	-
Corporate Governance mention	Art. 17.11	Art. 22.11	Art. 11.5
Playing field mention	Art. 17.12	Art. 22.12	-