

COVID-19 AND FREE TRADE: The Case for Suspending Trade Rules

28 June 2020

Some current FTA negotiations in the region

Country	In CPTPP? ⁱ	In RCEP? ⁱⁱ	EUFTA? ⁱⁱⁱ	EFTA FTA? ^{iv}	Japan-ASEAN services & investment chapters? ^v
Australia	In force	Negotiating	Negotiating	N	NA
Brunei	Signed	Negotiating	Can start via ASEAN ^{vi}	N	Signed
Cambodia	Was considering joining TPP	Negotiating	Can start via ASEAN ^{vi}	N	Signed
China	No	Negotiating	Negotiating BIT	N	NA
India	No	?	Negotiations paused?	Negotiating	NA
Indonesia	Interested in joining	Negotiating	Negotiating	Ratifying	Signed
Japan	In force	Negotiating	In force	N	Ratified
Korea (South)	Interested in joining	Negotiating	In force	In force	NA
Lao	No	Negotiating	Can start via ASEAN ^{vi}	N	Ratified
Malaysia	Signed	Negotiating	Negotiations paused?	Negotiating	Signed
Myanmar	No	Negotiating	Negotiating BIT	N	Ratified
New Zealand	In force	Negotiating	Negotiating	N	NA
Philippines	Interested in joining	Negotiating	Negotiations paused	In force	Signed
Singapore	In force	Negotiating	In force	In force	Ratified
Thailand	Joining?	Negotiating	Negotiations paused	N	Ratified
Vietnam	In force	Negotiating	Awaiting ratification	Negotiating	Signed

USA signed TPP but did not sign or ratify CPTPP

ⁱ <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/Pages/comprehensive-and-progressive-agreement-for-trans-pacific-partnership>

ⁱⁱ <https://www.dfat.gov.au/trade/agreements/negotiations/rcep/Pages/regional-comprehensive-economic-partnership>

ⁱⁱⁱ https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_in-place and <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>

^{iv} <https://www.efta.int/free-trade/ongoing-negotiations-talks> and <https://www.efta.int/Free-Trade/Free-Trade-Agreements-510711>

^v <https://www.phnompenhpost.com/business/asean-japan-trade-deal-updated> and <https://asean.org/storage/2019/11/ASEAN-integration-report-2019.pdf>

^{vi} 'A joint EU ASEAN Working Group for the development of a Framework setting out the parameters of a future ASEAN-EU FTA gathers at a regular basis'

<https://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/>

E.g. Indonesia's FTA status in 2020

Perkembangan Perjanjian Perdagangan Internasional



Some current WTO negotiations

Country	Joined MPA? ⁱ	In plurilateral ecommerce negotiations? ⁱⁱ	In plurilateral services domestic regulations disciplines negotiations? ⁱⁱⁱ	In plurilateral investment facilitation negotiation? ^{iv}
Australia	Y	Y	Y	Y
Brunei	N	Y	N	N
Cambodia	N	N	N	Y
China	Y	Y	Y	Y
India	N	N	N	N
Indonesia	N	?	N	N
Japan	N	Y	Y	Y
Korea (South)	N	Y	Y	Y
Lao	N	Y	N	Y
Malaysia	N	Y	N	N
Myanmar	N	Y	N	Y
New Zealand	Y	Y	Y	Y
Philippines	N	N	N	Y
Singapore	Y	Y	N (withdrew)	Y
Thailand	N	Y	N	N
Vietnam	N	N	N	N

ⁱ JOB/DSB/1/Add.12 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx

ⁱⁱ WT/L/1056 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx (search document symbol for inf/ecom* for documents)

ⁱⁱⁱ WT/L/1059 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx (search document symbol for inf/sdr* for documents)

^{iv} WT/L/1072/Rev.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx (search document symbol for inf/ifd* to see Philippines joining later)

Chapters in CPTPP

Preamble	16. Competition Policy
1. Initial Provisions and General Definitions	17. State-Owned Enterprises and Designated Monopolies
2. National Treatment and Market Access for Goods	18. Intellectual Property
3. Rules of Origin and Origin Procedures	19. Labour
4. Textile and Apparel Goods	20. Environment
5. Customs Administration and Trade Facilitation	21. Cooperation and Capacity Building
6. Trade Remedies	22. Competitiveness and Business Facilitation
7. Sanitary and Phytosanitary Measures	23. Development
8. Technical Barriers to Trade	24. Small and Medium-Sized Enterprises
9. Investment	25. Regulatory Coherence
10. Cross-Border Trade in Services	26. Transparency and Anti-Corruption
11. Financial Services	27. Administrative and Institutional Provisions
12. Temporary Entry for Business Persons	28. Dispute Settlement
13. Telecommunications	29. Exceptions and General Provisions
14. Electronic Commerce	30. Final Provisions
15. Government Procurement	

Chapters in RCEP

Preamble	Telecommunications Services
General definitions	Electronic Commerce
Trade in Goods	Investment
Rules of origin	Economic and Technical Cooperation
Customs Procedures and Trade Facilitation	Intellectual Property
Sanitary and Phytosanitary	Competition
Standards, Technical Regulations and Conformity Assessment Procedures (TBT)	General Provisions and Exceptions
Small and Medium Enterprises	Institutional Provisions
Trade in Services	Dispute Settlement
Government procurement	Final Provisions
Financial Services	

Some of the trade/investment rules that can harm pandemic response

- Intellectual property:
 - WTO (TRIPS) requirements for non LDCs:
 - Patents on masks, medicines, vaccines, ventilators
 - Trade secrets on test kit buffer recipe, ventilator quality assurance protocols, algorithm training process and datasets
 - Industrial designs on ventilator valves
 - Copyright on ventilator software, algorithms and dataset in AI
 - TRIPS+ e.g. EUFTA proposal to Indonesia includes:
 - Patent term extension for medicinal products for delays in marketing approval
 - 11? year data/market exclusivity on medicinal product even when there's no patent
 - Industrial design monopoly extended from 10 years to 25 years
 - <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>
- Infant industry tariff protection to start mask etc industries between pandemics:
 - WTO (e.g. New Zealand-Singapore: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/G/C/W/777.pdf>) and FTA proposals to remove tariffs on imported masks etc permanently
 - All industrialised economies except Hong Kong used infant industry tariff protection to industrialise: <http://www.twn.my/title2/t&d/tnd36.pdf>.

More trade/investment rules that can harm pandemic response

- Lockdowns violate services market access commitments in Mode 3 e.g. in EUFTAs, RCEP, Japan-ASEAN services-investment chapters, CPTPP
- Increased FDI screening e.g. by Australia, India, New Zealand can violate services mode 3 national treatment (NT)/market access commitments and MFN commitments and investment NT commitments

Trade/investment rules that can harm pandemic response continued

- Capital controls to deal with the capital flight due to the pandemic's economic crises can violate:
 - services market access commitments
 - FTA investment chapter & BIT free movement of capital provisions
 - WTO plurilateral investment facilitation proposal? (INF/IFD/W/19 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx says transfers will be negotiated)
 - exceptions for capital controls in the WTO/FTAs may be limited and difficult to use
- Sovereign debt restructuring to deal with debt problems from the pandemic's economic crises can violate various FTA investment chapter & BIT provisions, http://unctad.org/en/Docs/webdiaepcb2011d3_en.pdf

Trade/investment rules that can harm pandemic response

continued

- State-to-state dispute settlement is usually available for the above
- ISDS is usually available for BITs/FTA investment chapter (IIA) provisions:
 - Law firms are already advising investors re how to sue via ISDS for pandemic measures, e.g. see <https://longreads.tni.org/cashing-in-on-the-pandemic>, https://longreads.tni.org/pandemic-profiteers/?fbclid=IwAR2tILPnr8TcmPtzZVe_vTgC8kOHI0eDr_3iwEamwSotxruBXNQOO74cD6M, <https://www.iisd.org/library/investor-state-claims-amidst-covid-19>
 - Peru has already been threatened with an ISDS (in a contract) case for its suspension of tolls during the pandemic: <https://www.iareporter.com/articles/highway-concessionaire-initiates-contract-based-icsid-arbitration-against-peru/> and <https://globalarbitrationreview.com/article/1227546/peru-threatened-over-coronavirus-emergency-measure>
 - Existing IIAs: <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy#iialInnerMenu> including those not yet in force
 - Canada is negotiating a BIT with India: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>
 - Known ISDS cases: <https://investmentpolicy.unctad.org/investment-dispute-settlement>

Exceptions in trade/investment treaties

- Health exception:
 - WTO's general exception (including health) worked 1/44 times from 1995-2015:
https://www.citizen.org/sites/default/files/general-exception_4.pdf and does not apply to IP
 - in FTAs is usually copied from WTO's & in CPTPP don't apply to IP and investment chapters
- Security exception:
 - In WTO: panel would decide if pandemic measures are for an essential security in a time of emergency in international relations
 - USFTA security exceptions (e.g. CPTPP) it doesn't have to be a time of emergency in international relations

Some further information

- WTO proposals re pandemic: https://www.wto.org/english/tratop_e/covid19_e/proposals_e.htm
- CPTPP text: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources>
- Japan-ASEAN services & investment chapter text: <https://cil.nus.edu.sg/wp-content/uploads/2019/06/2019-First-Protocol-to-Amend-the-ASEAN-Japan-Comprehensive-Economic-Partnership-Agreement.pdf>
- Australia now screens all foreign investment: <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/changes-foreign-investment-framework> but under the CPTPP it would only screen investments more than A\$252million: <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Annexes/Annex-I.-Australia.pdf>.
- Due to the pandemic the New Zealand government is in the process of increasing its FDI screening: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_97805/tab/submissionsandadvice in ways not fully covered by its non-conforming measures schedules in its FTAs so will presumably have to rely on the security/public order exception, e.g. see https://www.parliament.nz/resource/en-NZ/52SCFE_EVI_97805_FE26056/62ecb79bdb42be4ecb1d545cde6b5cca441f5e84
- India now restricts FDI from China: <https://dipp.gov.in/whats-new/press-note-3-2020>.
- Some analyses of proposed ecommerce rules relevant to the pandemic:
 - Tariffs on electronic transmissions: http://unctad.org/en/PublicationsLibrary/gdsecidc2017d3_en.pdf, https://unctad.org/en/PublicationsLibrary/ser-rp-2019d1_en.pdf, <https://journals.scholarpublishing.org/index.php/ASSRJ/article/view/6966/4434>, https://unctad.org/en/PublicationsLibrary/ser-rp-2020d6_en.pdf
 - Some implications of cross-border data flows: Briefing 3 at https://www.twn.my/briefings_MC11.htm
- Services domestic regulation disciplines analysis: Briefing 2 at https://www.twn.my/briefings_MC11.htm
- 400 CSOs say stop trade & investment treaty negotiations during the pandemic: <https://www.citizen.org/news/open-letter-stop-all-trade-and-investment-treaty-negotiations-during-the-covid-19-outbreak/>
- South African Ambassador to the WTO: 'It is therefore not the time for rule-making and negotiations should be kept in abeyance to enable Members to respond to the (Covid-19) crises. . . the Covid-19 has underscored the need for the following responses: Peace clause for all the Government measures implemented in the context of COVID-19.' <https://www.twn.my/title2/wto.info/2020/ti200602.htm>
- 630 CSOs say no ISDS for pandemic measures etc: <http://s2bnetwork.org/sign-the-pen-letter-to-governments-on-isds-and-covid-19/>

Thank you

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