The European Union's Normative Power in Asia: Endogenous and Exogenous Factors of the Nascent Investment Policy

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Introduction

States actively seek to attract foreign investment into their economies because high levels of foreign investment have long been associated with increased economic growth and prosperity.[1] In the international legal sphere, the period since the North America Free Trade Agreement (NAFTA) entered into force has witnessed a literal explosion in the number of international investment agreements (IIAs),[2] in the form of both bilateral investment treaties (BITs) and preferential trade agreements (PTAs) involving all countries which were earlier part of the Soviet Union.[3] It was in the year 2000 that many Asian countries developed and reinforced their network of IIAs thereby making investment a key aspect of their economic pacts with third countries.[4]

[1] Sachs (2005).

[2] If, globally speaking, international investment law and policy have developed in the mid-1990s, it was essentially in North America and Europe. The path-breaking North American Free Trade Agreement (NAFTA) of 1994, whose Chapter 11 (Investment) embedded a full set of investment rules within the ambit of a trade architecture for the very first time.

[3] Investors, however, are free to invest where they choose, and without legal instruments and mechanisms to protect investments abroad, investors may be reluctant to invest their resources in a foreign State. As a consequence of concerns in respect to differences in legal systems and differences in the levels of legal infrastructure, over the past 25 years in particular, states have concluded more than 2,850 BITS to regulate the treatment of foreign investors and investments and to provide a mechanism for the resolution of disputes between foreign investors and host States.

[4] In terms of methodology, it is important to clarify that Asian countries are understood in this paper as being those States geographically located in the Asian region and which are also members

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To put matters into the global context, the United Nations estimates that in 2014 the global inflows of foreign direct investment (FDI) amounted to 1.35 trillion USD ($1,350,000,000,000).[5] That figure represents capital moving from investors based in one State into investments located in another. The European Union (EU) is by far the leading foreign investment power. At the end of 2014, the EU outward stock of FDI in Asia represented EUR574.9 billion, which is equivalent to 14 % of all EU outward stock of FDI and is the amount of FDI affected by the change in FDI competence.[6]

In parallel with the economic significance of foreign investment, the EU is emerging as an international actor in the regulation of foreign investment. The Treaty of Lisbon extended the Common Commercial Policy to FDI in 2009.[7] Albeit subject to unanimity, the EU competence, which will soon be implemented (and affect all third countries), is broad and exclusive,[8] thereby enabling it to conceive what could be the main features of a new model of European investment agreement. The shift from national to supranational level is, in itself, a major legal development. The EU is likely to employ its significant bargaining power when negotiating IIAs to improve, for instance, the standards of investment protection or to develop new forms of all-encompassing agreements.[9] In this regard, current EU investment negotiations with Asian countries are not only relevant for immediate participants but also for third countries.

of the Asian Development Bank. In total, 48 States belong to the Asian regional members category. Apart of North Korea, all states (regardless of their size, population and political regime) are considered in this study and their respective investment treaties are analysed.

[5] UNCTAD (2013), p. 110 http://unctad.org/diae.

[6] Eurostat, European Commission, April 2014. In Asia, the most important destinations for outward stocks of EU-27 FDI were Singapore; Hong Kong, China; and Japan. Together, they accounted for half of the EU-27's positions in Asia in 2010. The relative importance of the PRC as a destination for EU-27 FDI has grown steadily in recent years, and outward FDI stocks in the PRC reached EUR75.1 billion by the end of 2010, which was higher than in the Republic of Korea, India, and Indonesia, which are the next largest partners. Virtually, all these EU FDI in Asia (and FDI currently made) will see their legal protection modified because of current negotiations.

[7] See also Chaisse (2012a), p. 462.

[8] The EU now holds exclusive competence over FDI, which is interpreted to include the classical standards of investment protection. However, the absence of a definition of FDI in the Treaty still leaves scope for disagreement. For further discussion, see Chaisse (2012b), p. 51.

[9] The "negotiation mandate" for EU FTAs with Canada, India, and Singapore was approved by the General Affairs Council on 12 September 2011. This confidential document confirms the trend that the EU will negotiate broad and encompassing FTAs to replace narrow and conventional BITs. Neither the 2008 Economic Partnership Agreement with the Caribbean Forum of African, Caribbean, and Pacific (CARIFORUM) States, nor the 2010 signed agreement with the Republic of Korea addresses the core investment protection issues of minimum standards of treatment, expropriation, and compensation. Nor do they provide recourse to investor–State arbitration procedures. The latter outcome reflects the legal situation prior to December 2009 and the shared competency, or "mixed competence", between Member States and the EU in matters of investment regulation.

As mentioned in the introduction, a major trend of international investment rule-making is the increasing regionalisation of negotiations. If the core of international investment regulations remains based on BITs and bilateral PTAs, it is important to underscore the current negotiations of broader pacts which involve more than two countries and cover a great number of economic areas. For instance, the EU intends to develop broad and encompassing trade and investment agreements which will include areas outside its exclusive competence, such as cultural cooperation[10] or criminal procedures in relation to intellectual property rights (IPR) violations.[11] A good illustration is the 2010 Preferential Trade Agreement (PTA) between the EU and South Korea; this is the first of the new generation of PTAs launched in 2007 as part of the "Global Europe" initiative. This PTA includes a dedicated protocol on cultural cooperation which sets up a framework for engaging in policy dialogue on culture and audiovisual issues.[12] By this, even if the CJEU would adopt a very broad interpretation of the new investment competence in the future, the negotiated trade and investment treaties are most likely to be mixed treaties. In addition to that, even if future EU agreements address only investment protection (*i.e.*, no trade), they will largely be negotiated and signed as mixed agreements for two main reasons: (1) portfolio investment uses various indirect financial mechanisms and falls outside the Article 207 TFEU competence on FDI; and (2) because of Article 345 TFEU which states that the treaties shall in no way prejudice the rules governing Member States' systems of property ownership, some aspects of expropriation will remain within MS competence. For Asian countries, an even more immediate issue is the negotiations of the TPP.[13]

[10] Cultural cooperation elements have to be included in EU trade agreements as a consequence of the UNESCO Convention on Protection and Promotion of the Diversity of Cultural Expressions which the EC and most of its Member States have ratified. The Convention foresees that countries have to promote cultural diversity and this should be also reflected in their international agreements and in the implementation of such international agreements. Without prejudice to the fact that UNESCO guidelines are being elaborated, the EU has drafted a model Protocol on Cultural Cooperation to be included in future trade agreements.

[11] It is not new, because, for instance, Article 61 of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) requires criminal procedures and penalties in cases of "wilful trademark counterfeiting or copyright piracy on a commercial scale". But modern PTAs have developed this kind of TRIPs plus requirements and increase criminalisation of certain violations. See Lindstrom (2010), p. 917 (942–946).

[12] The protocol also seeks to encourage parties to cooperate in facilitating exchanges regarding cultural activities, notably in the area of performing arts, publications, protection of cultural heritage sites and historical monuments, as well as in the audiovisual sector. It also seeks to ensure a facilitated movement for artists and other cultural professionals and practitioners who are not service providers.

[13] The June 2012 leaked draft of the Trans-Pacific Partnership (TPP) investment chapter (which is largely unchanged as of May 2014) resembles in large measure the more recent US IIAs rather than the 1995 text of NAFTA Chapter 11. In a nutshell, the TPP investment chapter does not provide major innovations in treaty drafting. However, the TPP crystallises most recent innovations since 2001 concerning NAFTA-interpreting notes but also NAFTA case law. The normative quality of the TPP however places the agreement among the most detailed and important

The present study of the evolving international regime for investment in Asia comes at a crucial time for the EU. The Asian regime for investment is not static but on the contrary very dynamic. It continues to grow and change, and it will be affected by various factors in the coming months and years which relate to the rise of some new actors such as the EU, the regionalisation of investment rule-making (illustrated by the Transpacific partnership) and the likely increase of litigation in Asia. The analysis first provides a macro-analysis of Asian rule-making. This section helps to understand the key characteristics of the Asian IIAs (second section). Once the relevant IIAs are identified, the paper will explore the details of these specific Asian IIAs. It will also provide a detailed micro-view of the Asian rule-making in investment (third section). That fundamental analysis will be complemented by a study of the mechanisms that organise the interplay of bilateral Asian IIAs with the rest of the world through regionalisation and the application of the most-favored nation (MFN) treatment clause (fourth section). A holistic analysis of the Asian regime for investment will not be complete without a thorough analysis of international investment litigation involving Asian parties (fifth section). Finally, policy lessons are drawn by way of conclusion in the final section.

The Asian Map of the European Investment Policy

Trade and investment dynamics might be boosted further by the recent reforms in the EU. The Treaty of Lisbon came into force on 1 December 2009, amending the former European Union (EU) and European Community (EC) treaties.

Among key improvements, the Treaty of Lisbon abolished the European Community (EC) and replaced it with the EU, endowing the latter with full legal

investment treaties. In this light, it is possible to return to the question raised in the introduction as to whether the TPP will strengthen or fracture current regimes. As this investment treaty is negotiated in the context of an agreement of great economic significance, doted (what does "doted" mean here?) of a broad MFN provision, if the TPP negotiations proceed successfully, then as a broad preferential trade agreement the TPP will presumably supersede NAFTA and other existing IIAs (where there is overlap). Interestingly, the TPP may be read as a strengthening or a *de facto* renegotiation of NAFTA and many other agreements such as the ASEAN-Australia--New Zealand Free Trade Area (2010). The TPP is even more clearly a strengthening of investment disciplines for some developing countries such as Vietnam or Malaysia which have not so far been bound to the USA. Last but not least, the TPP membership is open to new members willing to sign up to its commitments under the sole condition that it is accepted by the current TPP members. The absence of geographic or economic conditions gives the TPP a significant attractiveness. Japan joined TPP negotiations in the summer of 2013. And the list of prospective member States is long, namely, South Korea, Thailand, Taiwan ROC, Philippines, Laos, Colombia, and Costa Rica. Should all these countries join the TPP and ratify, among others, the investment chapter, there is no doubt that we will have an embryo of a long-awaited multilateral agreement on investment. Last but not least, some other investment treaties illustrate the regionalisation of investment regulation in Asia such as the ACIA, the ongoing negotiations for China-Korea-Japan or some Asian treaties with China and India.

personality.[14] The new EU has the ambition to be a more prominent global actor, with the creation of a new European external relations service with EU delegations around the world, and the EU's High Representative, which is assigned greater importance. The Treaty of Lisbon extends the scope of external trade policy to issues of investment.

For the EU itself and its trading partners, the extension of "trade" policy to include investment is an important development and it will impact the international investment regime. The most important change to benefit EU investors might be the shift from post-establishment to pre- and post-establishment rights granted to foreign investors, which represent the two main approaches to the admission of foreign investment that can be recognised in the BITs.[15] "Entry" provisions erode the host State's control over the admission of foreign investment into its territory.[16] They may affect the capacity of the host state to prioritise certain investments over others, and undermine its negotiating power vis-à-vis incoming investors, which in turn is crucial for negotiating terms and conditions that maximise the investment's contribution to sustainable development.

The Evolving Asian Regime for Investment

Understanding the Asian rule-making in international investment requires knowledge of what are the international treaties (in the form of bilateral investment treaties or preferential trade agreements with investment chapters) that involve at

[14] Prior to the entry into force of the Treaty of Lisbon on 1 December 2009, the EU did not have the legal capacity to sign up to international agreements. Articles 216-218 of the Treaty on the Functioning of the European Union (formerly the EC Treaty) amend this, Treaty of Lisbon, [2008] OJ C 115/1. Before that, "European Union" was the official name. To facilitate the reading we use the name even when disputes occurred before 2009.

[15] As stated by the Commission, "a comprehensive common international investment policy needs to better address investor needs from the planning to the profit stage or from the pre- to the post-admission stage. Thus, our trade policy will seek to integrate investment liberalization and investment protection.", European Commission (2010) Communication, Towards a comprehensive European international investment policy, COM(2010)343 final, p. 5.

[16] In its 2010 communication, the Commission points out that the existing European BITs relate to the treatment of investors "post-entry" or "post-admission" only. This is perfectly true and implies that the Member States' BITs provide no specific binding commitments regarding the conditions of entry, neither from third countries regarding outward investment by companies of our Member States, nor *vice versa*. But the European Commission observes that "[g]radually, the European Union has started filling the gap of entry or admission through both multilateral and bilateral agreements at the EU level covering investment market access and investment liberalization", and illustrates this in a footnote because at the multilateral level the General Agreement on Trade in Services (GATS) provides for a framework for undertaking commitments on the supply of services through a commercial presence (defined as mode 3 in GATS Article I). At the bilateral level, the EU has concluded negotiations with the Republic of Korea on an FTA, which includes provisions on market access for investors and establishments.

least one Asian country. If at least one Asian country has signed such an investment pact, the host economy is likely to be affected by foreign investment, and, in any case its domestic investment policy is subject to the international obligations which are expressed in the investment agreement.

A first methodological challenge lies in the fact that there is no international organisation informed by Asian States of their international treaties. Also, not all Asian governments publish the results of their negotiations. Consequently, one of the contributions of the current paper is to provide a mapping of these Asian practices based on a survey on the main IIAs databases complemented by each national government's source of information.

In substance, Asian investment treaty practice (as with all other national treaty practices in this regard) shows that virtually all treaties listed above which regulate foreign investment matters cover the following nine topics[17]: (1) definitions and scope of application; (2) investment promotion and conditions for the entry of foreign investments and investors; (3) general standards for the treatment of foreign investors and investments; (4) issues of monetary transfers; (5) expropriation (direct or indirect); (6) operational and other conditions; (7) losses from armed conflict or internal disorder; (8) treaty exceptions, modifications, and terminations; and (9) dispute settlement. These diverse provisions are important to reassure foreign investors that they will be able to reap the benefits of their investment, and no trend denies such an approach, although evidence on the extent to which investment decisions are influenced by investment treaties is mixed.[18] The following sections detail each of these provisions in light of Asian IIAs.

The current section looks at the investment agreements concluded by the 48 Asian Development Bank (ADB) members. In total, ADB countries have concluded 1,194 BITS and 61 PTAs with an investment chapter since 1959. As approximately 2,850 BITs have been concluded worldwide over the same period, it means that Asian countries have taken part in no less than 40 % of international rule-making.

To ease the analysis of the huge number of treaties, one can distinguish four main groups of Asian countries which reflects their respective role and importance in Asia investment rule-making.

[17] To review the Asian IIAs' key investment provisions, I will address the key provisions (leaving for the last section the important issue of MFN) following the same methodology: what is the specific definition given in the TPP, what is the meaning and what lessons can be drawn from the IIAs' orientations. The negotiators have to opt for either an admission clause or the pre-establishment rights, the definition of national treatment, the minimum standard of treatment, full protection and security and the indirect expropriation methodology. In another paper, these provisions have been analysed in the context of Asian IIAs. See Chaisse (2014a).

[18] The extent to which BITs actually attract increased flows of foreign direct investment is disputed. According to Salacuse & Sullivan, entering a BIT with the United States of America would nearly double a country's FDI inflows. However, entering BITs with other OECD countries had no significant effect on FDI. See Salacuse and Sullivan (2005), p. 67 (105–111). Another important study concludes that there is "little evidence that BITs have stimulated additional investment". Hallward-Driemeier (2003).

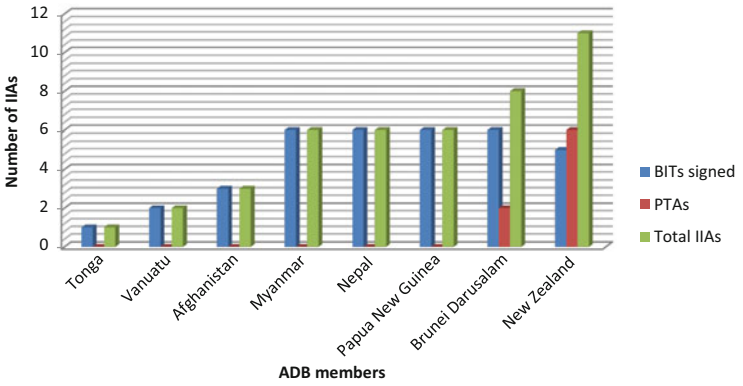

Fig. 1 Asian countries with less than 10 IIAs. *Sources*: Compiled by the author on the basis of United Nations Conference on Trade and Development (*UNCTAD*) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information

Firstly, there is a group of 13 ADB countries which has not concluded a single investment agreement as of April 2013. This means that Bhutan, Cook Islands, Fiji, Kiribati, Maldives, Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Samoa, Solomon Islands, Timor-Leste, and Tuvalu have so far been reluctant to engage in international investment rule-making.

Secondly, a group of eight ADB countries has signed some IIAs, but in a rather limited number. Indeed, Tonga, Vanuatu, Afghanistan, Myanmar, Nepal, Papua New Guinea, Brunei Darusalam, and New Zealand have each signed less than ten IIAs (see Fig. 1).

Thirdly, an intermediate group of 14 ADB members has signed between ten and 40 IIAs. This group of relatively active States is made up of Hong Kong, China, Cambodia, Lao PDR, Turkmenistan, Taipei, China, Japan, Australia, Kyrgyz Republic, Sri Lanka, Bangladesh, Georgia, Tajikistan, Armenia, and the Philippines (see Fig. 2).

Fourthly and finally, a group of ADB countries comprises the frontrunners which are the States that have concluded more than 40 IIAs (see Fig. 3). This group is made of Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, Korea, and China.[19] It is on this group of countries that most of our micro-analysis will be based. Logically, the great number of IIAs which they have concluded reflects a very active investment diplomacy and this also means that there are bound to be a great number of third countries that have granted rights to a great number of foreign investors.

[19] On India, see in particular Chaisse (2014), p. 385.

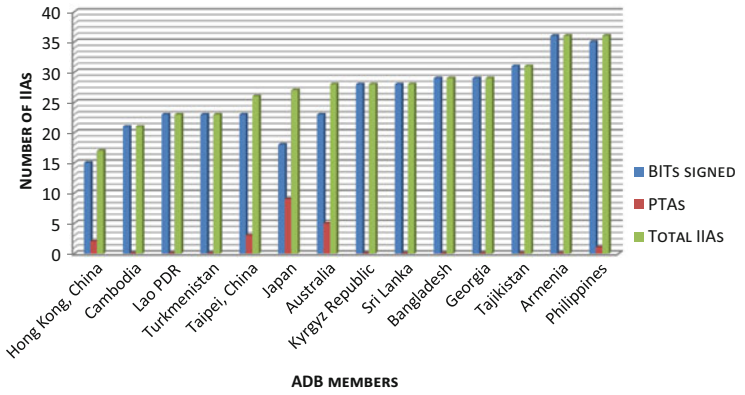

Fig. 2 Asian countries with less than 40 but more than 10 IIAs. *Sources*: Compiled by the author on the basis of United Nations Conference on Trade and Development (*UNCTAD*) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information

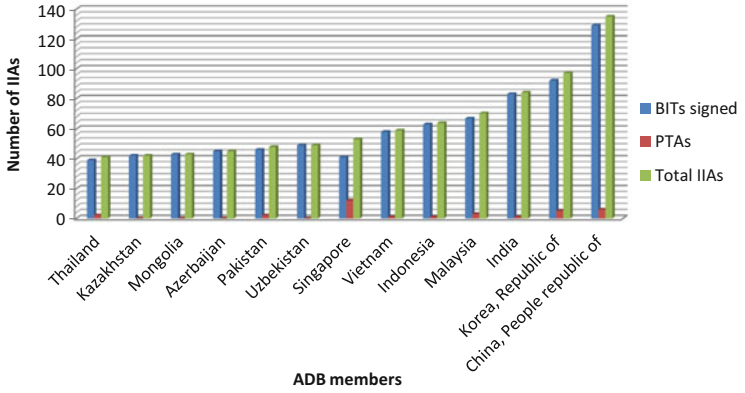

Fig. 3 Asian countries with more than 40 IIAs. *Sources*: Compiled by the author on the basis of United Nations Conference on Trade and Development (*UNCTAD*) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information

The Asian Economies Singled Out by the EU

As part of the triad with North America and East Asia in investment matters,[20] Europe is one of the most relevant sources and destinations for investment. Yet the EU is itself just emerging as a player in investment matters. The EU Member States

[20] See Gugler and Chaisse (2009), p. 1.

have shown a great keenness to retain national control over foreign investment rather than see the same moves into EU competence.[21]

One of the consequences of this is that investment was covered by a plethora of BITs between individual EU Member States and third parties.[22] BITs were considered to be the single most important tool in investment relations between countries.

By proposing in 2006 a "Minimum Platform on Investment" (MPoI) the Commission sent a signal that it wants to acquire all the competences needed to negotiate investment deals.[23] This "MPoI" intended to serve—rather like national Model BITs—as a standardised negotiation proposal for ongoing and future PTA negotiations with third countries.

But the Treaty of Lisbon extends the Common Commercial Policy to the second most important field of international economic relations, namely, foreign direct investment (Articles 206 and 207 TFEU).

As of April 2015, there are eight Asian partners with which the EU was negotiating new trade agreements that will reflect the recent changes in EU FDI competence, namely, India, China, Japan, ASEAN as block but also bilateral discussions with Malaysia, Vietnam, Thailand, and Singapore (see Table 1). Almost all these countries are also involved in other investment negotiations: Malaysia, Singapore, Vietnam and Japan are part of the TPP, while China is leading the Regional Comprehensive Economic Partnership (RCEP) project.

The Endogenous Determinants of the Next Investment Treaties

This section looks at the investment agreements concluded by the 48 ADB developing member economies.[24] To ease the analysis of the huge number of treaties, four main groups of Asian countries are distinguished to reflect their respective role and importance in Asian investment rule-making. This section identifies the Asian

[21] *Inter alia*, this was showcased at the Nice Summit (2000), where EU Member States agreed to amend Article 133 of the Treaty of Rome (which governs the Union's common commercial policy) by extending EU competence to a number of "new" areas. In a few sensitive sectors such as audiovisual services (e.g., "*l'exception culturelle"*) and investment, EU Member States did not agree on handing over "shared" or "mixed" competence to the EC. With the ratification of the Treaty of Nice, investment was one of a few most sensitive issues that remained subject to the rules and procedures of inter-governmentalism, as opposed to the "community approach". See Klamert and Maydell (2008), p. 493 (493–494).

[22] Baert (2003), p. 100 (116).

[23] In November 2006 the Council of the European Union adopted the "Minimum Platform on Investment" for EU PTAs with third countries, Council of the European Union, Minimum Platform on Investment, 15375/06, 27 November 2006 (not public). As explained at that time, the EU was already determined to expand its Common Commercial Policy powers to cover also investment issues. See Maydell (2008), pp. 204–206.

[24] This section partly draws from Chaisse (2014b), p. 75.

Table 1 Current EU negotiations with Asian economies since 2009 to now

Asian country	Negotiating directives	Current status	Next steps
PRC	Announcement made 23 May, 2013	Preparations	Started investment negotiations in January 2014
India	Negotiating authorization and directives of April 2007	Negotiations were launched in June 2007. After 12 full rounds, negotiations reached in 2013 a phase where negotiators met in smaller more targeted clusters (*i.e.*, expert level intersessionals) rather than full rounds, chief negotiator meetings, and meetings at Director General level. Negotiations were suspended in September 2013.	Newly elected Indian government in May 2014 may change the political context of negotiations which are expected to resume by the end of 2014.
Singapore	Based on 2007 ASEAN negotiating directives (see below)	EU Trade Commissioner de Gucht and Singapore's Minister of Trade and Industry Lim, announced the completion of negotiations on 16 December, 2012. The agreement reached is one of the most comprehensive the EU has ever negotiated and it will create new opportunities for companies from Europe and Singapore to do business together. The growing Singaporean market offers export potential for EU, industrial, agricultural and services businesses. An EU–Singapore FTA will be the EU's second ambitious agreement with a key Asian trading partner, after the EU–Republic of Korea FTA, which has been in operation since July 2011.	The FTA draft agreement needs now to be agreed upon by the European Commission and the Council of Ministers, before being ratified by the European Parliament. Investment protection (FTA Chapter 9) is not yet available. Negotiations on investment protection, which are based on a new EU competence under the Lisbon Treaty and started later, are continuing in June 2014.
Malaysia	Based on 2007 ASEAN negotiating directives (see below)	On 10 September, 2010, EU Member States agreed that the commission could start FTA negotiations with Malaysia. The negotiations were officially launched in Brussels on 5 October, 2010. A consultation of stakeholders is completed. The seventh round of	Technical Working Groups discussions.

(continued)

Table 1 (continued)

Asian country	Negotiating directives	Current status	Next steps
		FTA negotiations took place in Brussels in April 2012.	
ASEAN	Negotiating authorization and directives of April 2007	Negotiations with a regional grouping of seven ASEAN member states launched in July 2007. The Joint Committee in March 2009 agreed to take a pause in the regional negotiations.	In December 2009, EU Member States agreed that the Commission will pursue FTA negotiations in a bilateral format with countries of ASEAN. Negotiations with Singapore and Malaysia were launched in 2010, and with Vietnam in June 2012. The Commission continues exploratory informal talks with other individual ASEAN member states with a view to assess the level of ambition at bilateral level.
Vietnam	Based on 2007 ASEAN negotiating directives (see above)	The Foreign Affairs Council (Trade format) on 31 May, 2012 endorsed the launching of negotiations for a FTA with Vietnam. Commissioner De Gucht and Minister Hoang officially launched the FTA negotiations at a ceremony in Brussels on 26 June, 2012. Since then three rounds of negotiations have taken place. The first from 8–12 October in Hanoi, Vietnam, the second round in Brussels from 22–25 January, 2013 and the third in Ho Chi Minh City on 23–26 April, 2013.	Both sides seek a comprehensive agreement covering tariffs, non-tariff barriers as well as commitments on other trade-related aspects, notably procurement, regulatory issues, competition, services, and sustainable development.
Japan	NA	The negotiations with Japan were open in 2012. They will address a number of EU concerns, including non-tariff barriers and the further opening of the public procurement market.	The EU–Japan FTA negotiations have been launched on 25 March, 2013. The first round of negotiations took take place on 15–19 April, 2013 in Brussels. Parties exchanged views and a limited number of texts on all negotiating areas identified during the scoping exercise.

(continued)

Table 1 (continued)

Asian country	Negotiating directives	Current status	Next steps
Thailand	Negotiating directives obtained in April 2009	Negotiations were launched in May 2009 and the content of the CETA (Comprehensive Economic and Trade Agreement) and its general modalities were agreed in June 2009. The first round took place in October 2009. The negotiations are now in their final phase. Commissioner de Gucht and his Canadian counterpart Trade Minister Fast met on 22 November, 2012 and on 6–7 February, 2013 in Ottawa to take stock of the remaining open points. The aim is to conclude the CETA negotiations in the third quarter of 2013.	Negotiation teams are currently meeting twice per month to work out the final deal.

Source: EU, Trade Directorate overview of FTA and other trade negotiations (updated June 10, 2014)

Noodle Bowl of IIA which represents the existing negotiated preferential treatment for investors that the EU will try to neutralise through current negotiations. It then identifies the various roles played by Asian countries and, in particular, by the eight partners already singled out by the EU. Thirdly, the section looks at the quality of some existing Asian IIAs.

Identifying the Asian Noodle Bowl of Investment Treaties

To refine the contribution of ADB countries to international investment rule-making, it is necessary to narrow the analysis to these IIAs which have been concluded between Asian countries only. Indeed, many of the agreements presented above may have been concluded with leading capital exporting countries such as the USA or other Western countries, and this implies that the treaty might rather reflect the interest and bargaining power of the capital exporting countries. Narrowing the analysis to pure Asian IIAs also helps to identify the ADB countries that play a leading role in the development of investment rules in Asia.

The table in Annex represents a wealth of information in Asia's investment treaty practice. In total, 208 IIAs have been concluded between two or more countries which are Asian. This great number of IIAs forms what is the core of the Asian noodle bowl of investment treaties. Out of the 202 IIAs, there are 146 BITs which are currently in force whereas 41 BITs have been signed but have not yet entered into force. To these 187 BITs, one must add 21 PTAs with investment chapters all of which have entered into force.

One can also discern some patterns for each country. For instance, Singapore is a major user of PTAs to regulate investment as it already has seven such instruments. Then come New Zealand and Japan with six PTAs covering investment issues. A majority of Asian countries have so far been reluctant to incorporate investment negotiations in their trade agreements. One can also observe that some countries have had difficulties in ratifying a BIT which was signed earlier. This is the case of Cambodia, Tajikistan, Vietnam and Malaysia, which have six BITs. On the top of this list is Pakistan which has signed eight BITs which are yet to enter into force.

Basically, one key idea is that China has BITs or PTAs with almost all ADB countries except Nepal, and this makes China the Asian leader in investment rule-making. China (30 Asian IIAs) but also India (23 Asian IIAs), Korea (22 Asian IIAs), Vietnam (21 Asian IIAs), Indonesia (20 Asian IIAs) and Malaysia (19 Asian IIAs) are the ADB countries with the greatest number of IIAs in force which are also diverse in their forms (either BITs or PTAs). These are the big players which will be at the core of the substantive analysis in Section 3. These frontrunners' treaty practice is not only important in quantitative and qualitative terms, but it is also crucial in the light of one key IIAs provision, namely, the most-favoured nation treatment. This particular provision plays a role which increases in significance when a country is bound by a great number of investment treaties. The case of China is, in this light, very important as the MFN provision found in China's IIAs may, to some extent, represent an embryo of Asian multilateral agreements on investment.

The Annex which provides an exhaustive view of all IIAs concluded between Asian countries also helps to understand an important feature of Asian investment rule-making which is the rise of PTA to regulate investment matters. In total, 21 Asian PTAs with investment chapters have been concluded since 2001 (see Fig. 4).[25]

Quantitative Ranking

Firstly, there is a group of 13 ADB economies which had not concluded a single investment agreement as of April 2013. Bhutan, Cook Islands, Fiji, Kiribati,

[25] A list of Asian PTAs is as follows: PTA New Zealand-Singapore, 1 January 2001; PTA Japan-Singapore, 30 November 2002; PTA China-Hong Kong, China, 29 June 2003; PTA Singapore-Australia, 28 July 2003; PTA Thailand-Australia, 1 January 2005; PTA India-Singapore, 1 August 2005; PTA Korea, Republic of-Singapore, 2 March, 2006; PTA Trans-Pacific Strategic Economic Partnership, 28 May 2006; PTA Japan-Malaysia, 13 July 2006; PTA Pakistan-China, 1 July 2007; PTA Japan-Thailand, 1 November 2007; PTA Pakistan-Malaysia, 1 January 2008; PTA Brunei Darussalam-Japan, 31 July 2008 ; PTA China-New Zealand, 1 October 2008; PTA Japan-Indonesia, 1 July 2008; PTA Japan-Philippines, 11 December 2008; New Zealand-Malaysia, 1 August 2010; Hong Kong, China-New Zealand, 1 January 2011; Australia-New Zealand (ANZCERTA), 1 January 1989 (investment Protocol 2011); ASEAN Comprehensive Investment Agreement (ACIA), 1 March 2012.

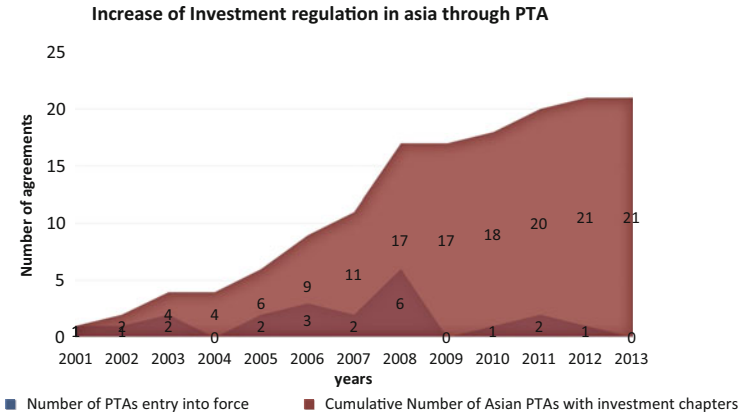

Fig. 4 The rise of Asian PTAs with investment chapters. *Sources*: Compiled by the author on the basis of United Nations Conference on Trade and Development (*UNCTAD*) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information

Maldives, Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Samoa, Solomon Islands, Timor-Leste, and Tuvalu have so far been reluctant to engage in international investment rule-making. Secondly, a group of eight ADB economies has signed a limited number of IIAs. Indeed, Tonga, Vanuatu, Afghanistan, Myanmar, Nepal, Papua New Guinea, Brunei Darussalam, and New Zealand have each signed less than ten IIAs (see Table 2). Thirdly, a group of 14 ADB member economies has signed between ten 0 and 40 IIAs. This group comprises Hong Kong, China; Cambodia; Lao People's Democratic Republic (Lao PDR); Turkmenistan; Taipei, China; Japan; Australia; Kyrgyz Republic; Sri Lanka; Bangladesh; Georgia; Tajikistan; Armenia; and the Philippines.

Finally, there is a group comprising the frontrunners, which are the economies that have concluded more than 40 IIAs: Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, the Republic of Korea, and, at the forefront, the People's Republic of China (PRC).[26] It is within this last group that most of our micro-analysis will be based. Logically, the great number of IIAs they have concluded reflects a very active investment diplomacy, which also means that there are bound to be a great number of third countries and have granted rights to a great number of foreign investors. In this light, the EU has decided to negotiate investment with Asian partners who are already well experienced as China, India, Malaysia, Vietnam,

[26] Following the policy of opening implemented by the PRC more than 30 years ago and the admission of the PRC into the World Trade Organization, the PRC is now concluding different generations of IIAs, the most recent granting full jurisdiction to the International Centre for Settlement of Investment Disputes (ICSID). See Willems (2011).

Table 2 IIAs signed by ADB member economies

	Total IIAs	BITs	PTAs with investment chapters
China (People's Republic)	135	129	6
Korea, Republic of	97	92	5
India	84	83	3
Malaysia	70	67	3
Indonesia	64	63	1
Vietnam	59	58	1
Uzbekistan	49	49	0
Pakistan	48	46	2
Azerbaijan	45	45	0
Mongolia	43	43	0
Kazakhstan	42	42	0
Singapore	53	41	12
Thailand	41	39	2
Armenia	36	36	0
Philippines	36	35	1
Tajikistan	31	31	0
Bangladesh	29	29	0
Georgia	29	29	0
Kyrgyz Republic	28	28	0
Sri Lanka	28	28	0
Australia	28	23	5
Taiwan (Republic of China)	26	23	4
Lao People's Democratic Republic	23	23	0
Turkmenistan	23	23	0
Cambodia	21	21	0
Japan	27	18	9
Hong Kong, China	17	15	2
New Zealand	11	5	7
Brunei Darussalam	8	6	2
Myanmar	6	6	0
Nepal	6	6	0
Papua New Guinea	6	6	0
Afghanistan	3	3	0
Vanuatu	2	2	0
Tonga	1	1	0

Source: UNCTAD Database of Investment Agreements, WTO regional trade agreements database and National Ministries of Foreign Affairs public information

BIT Bilateral Investment Treaty, *FTA* Free Trade Agreement, *IIA* International Investment Agreement

Singapore and Thailand are all in the Asian tier 1. Only Japan, among the Asian partners negotiating with the EU, counts less than 40 IIAs.

If we limit our analysis to intraregional IIAs, some interesting observations can be made. One is that the PRC is the Asian leader in investment rule-making because it has BITs or FTAs with almost all ADB developing member economies except Nepal. The PRC (30 Asian IIAs), India (23 Asian IIAs), the Republic of Korea (22 Asian IIAs), Vietnam (21 Asian IIAs), Indonesia (20 Asian IIAs), and Malaysia (19 Asian IIAs) have the greatest number of IIAs in force, which are also diverse in their forms. These are the big players that will be at the core of the substantive analysis in this section.

These frontrunners' treaty practice is not only important in quantitative and qualitative terms, but is also crucial in the light of one of the key IIAs provisions, which is MFN treatment. This provision plays a significant role when a country is bound by a great number of investment treaties. The case of the PRC is very important because the MFN provision found in the PRC's IIAs may, to some extent, represent an embryonic Asian multilateral agreement on investment.

One can also discern some patterns for each country in the distinction between BITs and FTAs. For instance, Singapore is a major user of FTAs to regulate investment because it already has seven such instruments. Then come New Zealand and Japan with six FTAs covering investment issues.[27] A majority of Asian countries have so far been reluctant to incorporate investment negotiations into their trade agreements. Virtually, all the FTAs concluded by India and the PRC ignore investment matters.

One can also observe that some countries have had difficulties in ratifying a BIT earlier signed. This is the case of Cambodia, Tajikistan, Vietnam, and Malaysia, each with six BITs that have not yet come into force. On the top of this list is Pakistan, which has signed eight BITs that are yet to enter into force.

Qualitative Ranking

All IIAs enshrine a series of obligations on the parties to ensure a stable and favorable business environment for foreign investors. These obligations pertain to the treatment that foreign investors are to be afforded in the host country by the domestic authorities.

Meanwhile, such "treatment" that encompasses many laws, regulations, and practices from public entities also significantly affect foreign investors or their investments. Thus, analysis of the quality of investment treaties is important to

[27] For Japanese treaty practice, Hamamoto (2011), p. 53.

Table 3 Sampling Asian treaties quality (BITSel quality indicator)

	PRC	Rep. of Korea	India	Indonesia	Malaysia
BITsel number of IIAs	84	77	72	61	61
BITsel quality indicator: average	1.58	1.75	1.82	1.57	1.62
Strongest treaty and coefficient	Germany (1.90)	Vietnam (1.90)	Switzerland, Mauritius (1.90)	Germany (1.90)	Saudi Arabia (1.81)
Weakest treaty and coefficient	Bulgaria, Mexico, Colombia, Costa Rica (1.36)	Indonesia (1.36)	India (1.63)	Denmark (1.27)	Lebanon (1.36)
Coefficient of variation	0.31	0.23	0.20	0.30	0.29

Source: Data from BITSel Index, elaboration by the authors
IIA International Investment Agreement, *PRC* People's Republic of China

provide a clearer view of their likely impacts.[28] Not all investment treaties are drafted similarly as many of their provisions may vary significantly in scope of application and likely economic impact.[29]

The Bilateral Investment Treaties Selection Index (BITSel Index)[30] provides extremely detailed support to understand national treaty practices. In light of the great number of BITs in which different provisions and their different wordings would give birth to a broad kaleidoscope of legal obligations and, hence, regulatory effects, the BITSel Index, which is based on the 11 most important elements found in most existing BITs.[31] The BITSel Index has a scale from 1.0 (restrictive) to 2.0 (liberal). The data for the top five Asian frontrunners—Indonesia, Malaysia, India, the Republic of Korea, and the PRC—have been extracted to shed light on the substance and quality of these respective treaties (see Table 3).

[28] "While the treaties continue to govern the same key aspect of investment, they have morphed over the 40 year period to include different types of clauses. We need to take into account the heterogeneity in order to better understand the motivations of states.", Jandhyala et al. (2010), pp. 31–32. "While it should be recognized that a BIT could be an important commitment device, the nature of the commitment can vary enormously depending on the terms of the BIT. Too much attention has been placed on whether or not a BIT exists, than on the strength of the property rights actually being enshrined in these agreements." Hallward-Driemeier (2003), p. 3.

[29] Chaisse and Bellak (2011), p. 3.

[30] Bilateral Investment Treaties Selection Index, BITSel (2013), Version 4.00, available at: http://www.cuhk.edu.hk/law/proj/BITSel.

[31] These include: (1) the definition of investment; (2) admission for foreign investment; (3) national treatment; (4) most-favoured nation; (5) expropriation and indirect expropriation; (6) fair and equitable treatment; (7) transfer of investment-related funds out of the host State provision; (8) non-economic standards; (9) investor-State dispute mechanism (10) umbrella clause; and (11) temporal scope of application.

The results are stunning because the strongest average quality indicator belongs to India (1.82), which is far more significant than those of countries with relatively weaker investment treaties such as Indonesia (1.57) and the PRC (1.58). Less surprisingly, the Republic of Korea ranks second (1.75) while Malaysia is third (1.62).

These average values are based on a relatively high number of treaties and confirm the significant gap between the top five in rule-making: not all Asian investment treaties are similar. India is inclined to grant quite significant rights to foreign investors, although it has signed fewer treaties than the PRC. Conversely, the PRC has signed more treaties, but their average quality is among the lowest of the top five.

Of course, these averages also depend on the partner countries. Treaties are, by definition, the result of negotiations and they reflect the consensus that the two sides reached after exchanging their goals and visions. In view of this, we can take a closer look at the BITsel and see what treaties for each country in the top five stands at the extreme (most robust or weakest protection) of the national practice.

In the case of the PRC, the treaty with the greatest quality was concluded with Germany (1.90). This confirms the fact that the PRC truly entered a new generation of investment treaties, with greater rights and access to investor–State dispute settlement (ISDS), only after 2005, and thus the treaty with Germany represents a milestone. At the other extreme, the PRC concluded a series of relatively weak treaties with Bulgaria, Mexico, Colombia, and Costa Rica. One can further fine-tune the analysis and note that there is a significant difference between the IIAs concluded before and after 2005. In the wake of the PRC–Germany BIT, the PRC further negotiated treaties which were rather more favourable to foreign investors. This generation provides broader and more substantive obligations with regard to the treatment of foreign investment. Post-establishment national treatment—albeit with sectoral reservations in some cases—and no substantial restrictions on the ability of foreign investors to challenge host country measures in international arbitration are standard in this category. The PRC's "new generation" of BITs concluded since the beginning of this century seems to belong in this company. Consequently, these post-2005 IIAs obtain a score of 1.65, while prior to 2005 the score is only 1.55.

In the case of the Republic of Korea, the treaty with Vietnam is one of the strongest (1.90). At the other extreme, there is the agreement between the Republic of Korea and Indonesia (1.36). India concluded more than a dozen treaties of a rather high quality, for example with Switzerland and Mauritius, giving it a score of 1.90. On the other hand, a relatively weak treaty was concluded between India and Mexico (1.63). Indonesia ranks fourth among Asian countries in the number of investment treaties. However, it has a rather low average quality. In this light, it is interesting to note that the Germany–Indonesia treaty provides a very high level of

protection (1.90), much higher than the Indonesian average. However, on the other hand, the Indonesia–Denmark treaty offers an example of a rather weak treaty (1.27). Last but not least, Malaysia, whose economic policy is deeply intertwined with politics, has concluded a rather strong treaty with Saudi Arabia (1.81). However, the treaty between Malaysia and Lebanon scores poorly (1.36).

The next step is to calculate the coefficient of variation, which is a better measure of heterogeneity. The number itself expresses the relation of the standard deviation (a measure for the dispersion of the data) to their mean. If the coefficient of variation is lower than 0.5, the mean value is a good representation for all data. For Malaysia, it is 0.29. What does it tell us? Returning to our example, the 0.29 average for Malaysia means that the variation in the provisions is 29 %.

Because all the coefficients of variation are well below 0.5 for each BIT, the mean is a good representation for all the single BIT provisions. What does the coefficient of variation say in comparison to other countries? The one for the PRC is 0.31, so the heterogeneity of BITs is slightly larger for Chinese BITs than for Malaysian BITs. While the mean value of each country tells us how investor-friendly its BIT provisions are, the coefficient of variation tells us how heterogeneous they are. The key advantage of the coefficient of variation is that it is directly comparable across countries. If we have a coefficient of variation of country A at 30 % and country B at 60 %, we can say that the heterogeneity of country B is twice as large as that of country A.

At this stage, it is important to mention two lessons. Firstly, there is a significant discrepancy between Asian treaty practices and also between individual treaty practices for a particular country. Secondly, although this paper focuses on the broad analysis of Asian investment treaties, it also underlines the need to look more carefully at the key provisions found in each investment treaty, and this will be addressed in a second paper.

The Exogenous Parameters of the Current Negotiations

The current negotiations on investment between the EU and Asian countries will also be affected by some exogenous parameters. As the future treaties will be subject to existing MFN provisions the meaning and implications of this legal provision must be reviewed. Secondly, the broader context of Asian investment integration through huge treaty negotiations (such as the TPP, RCEP and Triangular treaty) will be discussed. These ambitious pacts oblige the EU to negotiate at least comparable standards to maintain the competitive advantage of EU investors.

The Most-Favoured Nation Treatment Principles in Motion

The principle of national treatment prohibits discrimination on the grounds of nationality[32] and, more generally, any discrimination between investors and investments produced domestically and those from other countries.[33] Together with the most-favoured nation (MFN) obligation, it forms the fundamental principle of non-discrimination in investment law.[34]

In regard to investments, the principle of the MFN treatment seeks to establish equal conditions of competition for all foreign investors, independently of their country of origin.[35] This principle allows investors covered by one IIA to claim equal benefits to those granted to investors from other countries, irrespective of whether those benefits are established in other IIAs, or in the actual regulatory practice of the host country.

While traditionally regarded as a standard clause without major implications, the MFN principle has, to say the least, recently gained attention in the ambit of international investment rule-making in the light of the application of this provision recently made by some arbitral panels.[36] The Impregilo v. Argentina tribunal majority diplomatically noted that the issues remain controversial and that the "predominating jurisprudence which has developed is in no way universally accepted."[37]

Article 12.5 of the June 2012 leaked draft of the Trans-Pacific Partnership (TPP) investment chapter defined the MFN as follows:

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[32] ICSID, ARB/02/9, *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, Award, 27 October 2006, paras. 128 and 156.

[33] LCIA, UN3467, *Occidental Exploration and Production Company v. Republic of Ecuador*, Final Award, 1 July, 2004 stated that the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which the particular activity is undertaken, para. 173.

[34] The scope and practical relevance of NT is to a large extent dependent on the reading of the term "like circumstances". Its definition essentially sets the benchmark for national regulatory freedom to treat certain imported products differently from domestically produced ones. Indeed, "[o]ften the definition of national treatment is qualified by the inclusion of the provision that it only applies in "like circumstances" or "similar circumstances". As the situations of foreign and domestic investors are often not identical, this language obviously leaves room open for interpretation.", see Chaisse (2013), p. 332.

[35] Chaisse (2014c), p. 101.

[36] *Tza Yap Sum v. Peru* recognises the need to analyse the specific wording of each provision of a treaty in accordance with the established rules of international law; an *a priori* decision is not appropriate, i.e., it is not possible to decide in general whether MFN clauses are efficacious in some sorts of situation while they are not in others; each MFN clause is a world in itself, which demands an individualised interpretation to determine its scope of application, see ICSID, ARB/07/6, *Tza Yap Shum v. Republic of Peru*, Decision on Jurisdiction and Competence, 19 June 2009, paras. 196–198.

[37] See ICSID, ARB/07/17, *Impregilo S.p.A. v. Argentine Republic*, Award, 21 June 2011, para. 107.

> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms such as those included in Section B.

The scope of the most Asian IIAs MFN obligation, like any other substantial provision of the treaty, is limited not only by the overall coverage of the IIA, but also by the wording introduced in an IIA clause itself. Several aspects are relevant in this regard, as follows. Usually, whether the obligation applies to investments already established in the country, or whether it also applies to the ability of the investor to claim access to the host country (so-called pre-establishment rights). TPP MFN expressly extends the coverage of the MFN obligation to pre-establishment rights.[38] Usually, the language which allows the comparison between the treatment of investors from different countries may add specific conditions. The TPP MFN refers to the "in like circumstances" which is a typical wording of US treaties and very well known in NAFTA case law.[39] Finally, whether issues pertaining to investor–State dispute settlement procedures are covered by the MFN principle.[40] The TPP MFN clearly excludes in its third paragraph the ISDS clause.

Consequently, the scope of the TPP MFN commitment is rather broad in order not to dilute advances made in negotiations partners would conduct with third countries.[41] One can imagine that TPP may apply to several third-party treaties with the possibility that the claimant may import substantive rights. For instance,

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[38] See Chaisse (2014d)

[39] *Parkerings v. Lithuania* finds that for investors to be in like circumstances, three conditions must be met: the investor must be a foreign investor; they must be in the same economic or business sector; and the two investors must be treated differently, see ICSID, ARB/05/8, *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, 11 September 2007, para. 371.

[40] Following to the arbitral decision in the *Maffezini* case, much attention has been drawn to the debate of whether provisions relating to the disputes settlement procedures enshrined in one IIA can be "imported" into another IIA by virtue of the MFN clause. The question posed by the *Maffezini* decision ultimately addresses the general scope of the MFN principle and how the provision is crafted in each individual agreement. This leads us to last section of this chapter dealing with the TPP investor–State dispute mechanism.

[41] One can first observe that the MFN provisions already existing in older IIAs will bring to them the benefits of TPP new chapter. Indeed, the commitments by TPP countries may have to be extended MFN, for instance, to Thailand (except dispute settlement), and China (except dispute settlement and obligations specific to existing FTA partners).

the Tribunal MTD v. Chile applied an MFN provision to accord an investment the fair and equitable treatment protections of other BITs.[42] The Impregilo v. Argentina Award recorded the claimant's contention that the requirement of "full protection and security" in the Argentina–USA BIT was applicable through the MFN clause in the Argentina–Italy BIT.[43] Also, the White v. India Final Award holds that the BIT's MFN clause, a substantive provision, reaches an "effective means of asserting claims" provision contained in another of the respondent's BITs.[44] Finally, the EDF v. Argentina Award found that the applicable treaty's MFN clause permits recourse to the "umbrella clauses" of third-country treaties.[45]

This should not be surprising. The principle of most-favoured-nation treatment in the TPP is of paramount importance to the international investment regime. Non-existent in customary international law,[46] it constitutes the very foundation of treaty-based international investment regulation. With the national treatment, MFN is constitutive of the system of complex multi-layered governance for investment. Equally important in future litigation, the more IIAs that a country has, the more MFN might play an important future role. Malaysia, Chile and Vietnam are in this regard, the TPP countries that should pay great attention to the TPP MFN as these three have already granted rights to a great number of their party investors and investments.

The increase of Asian FTAs with investment chapters also raises an important issue of connections with existing IIAs. Indeed, the MFN treatment provisions in existing treaties may give rise to the so-called free-rider issue that arises when benefits from customs unions, FTAs, or economic integration organisation agreements are extended to non-members. To avoid this outcome, many IIAs exclude the benefits received by a Contracting State Party to a regional economic integration

[42] ICSID, ARB/01/7, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award, 25 May 2004, paras. 104 and 197. This was later confirmed by the *Bayindir v. Pakistan* Award which applies an MFN clause to import the fair and equitable treatment standard from another treaty entered into after the treaty in question, ICSID, ARB/03/29, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, 27 August 2009, paras. 153-160; and *ATA v. Jordan* applies an MFN clause to import a fair and equitable treatment and treatment no less favourable than that required by international law clause, ICSID, ARB/08/2, *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, Award, 18 May 2010, note 16.

[43] However, the tribunal considers that having found a breach of the FET standard, it was unnecessary to examine whether there had also been a failure to ensure full protection and security, ICSID, ARB/07/17, *Impregilo S.p.A. v. Argentine Republic*, Award, 21 June 2011, para. 334.

[44] UNCITRAL (2011) *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, para. 11.2.

[45] In doing so, the tribunal notes that it takes no position on the debate over the interaction of MFN clauses with jurisdictional and procedural requirements, ICSID, ARB/03/23, *EDF International S. A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, Award, 11 June 2012, paras. 930-936.

[46] In *Asian Agricultural Products v. Sri Lanka*, Dissenting Opinion of Samuel K.B. Asante, citing various publicists, noted that most-favoured-nation treatment does not derive from customary law, see ICSID, ARB/87/3, *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, Dissenting Opinion of Samuel K.B. Asante, 27 June 1990, para. 40.

Table 4 Non-applicability of the MFN principle to FTAs

France 2006 Model BIT Art. 4	India 2003 Model BIT Art. 4	ASEAN Comprehensive Investment Agreement 2012 Art. 6
This treatment shall not include the privileges granted by one Contracting Party to nationals or companies of a third party State by virtue of its participation or association in a free trade zone, customs union, common market or any other form of regional economic organization.	(3) The provisions of paragraphs (l) and (2) above shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from: (a) any existing or future customs unions or similar international agreement to which it is or may become a party, or (b) any matter pertaining wholly or mainly to taxation.	3. Paragraphs 1 and 2 shall not be construed so as to oblige a Member State to extend to investors or investments of other Member States the benefit of any treatment, preference or privilege resulting from: (a) any sub-regional arrangements between and among Member States; or (b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement.

Source: Model BITs from national government websites
ASEAN Association of Southeast Asian Nations, *BIT* Bilateral Investment Treaty, *FTA* Free Trade Agreement, *MFN* Most-Favored Nation

organisation (REIO) from the scope of MFN treatment obligations through a REIO exception. Virtually all IIAs include a carve-out from the MFN principle (see Table 4).

A considerable number of existing IIAs cover, at least, specific types of regional integration that are expressly mentioned in the agreement. But some countries extend the scope of the REIO exception to similar arrangements. For instance, the India model agreement[47] refers to "any existing or future customs unions or similar international agreement to which it is or may become a party" (Article 4). The French model agreement refers to a "free trade zone, customs union, common market, or any other form of regional economic organization" (Article 4). Such provisions allow France or India to enter into new FTAs with investment chapters without the obligation to extend the benefits to countries with which they were bound through a BIT. In this regard, one might also assume that some countries may be tempted to negotiate investment agreements in the context of an FTA to isolate the newly negotiated treaty from other BITs. Pakistan, for instance, seems to favour negotiations of investment within FTAs in order not to be subject to full MFN applicability under other BITs.

In this light, the 2012 ASEAN Comprehensive Investment Agreement (ACIA) MFN exception is, logically, more limited. ACIA Article 6 applies only to "any sub-regional arrangements between and among Member States; or (b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement." The effect of such a provision is to maintain the applicability

[47] See Chaisse et al. (2013), p. 44.

of the basic MFN for the benefits of the members. Of course, in the context of a regional integration scheme, such as ACIA, members have an interest to be granted better treatment than one of them would grant of a third country through an IIA in the form of an FTA or a BIT.

The Current Asian Negotiations on Investment: RCEP, Trilateral and TPP

The rise of plurilateral agreements with wider scope is likely to produce greater economic effects while certainly spreading the basic principles of foreign investment protection to most Asian economies. While the rise of plurilateral IIAs may alleviate the problems associated with the noodle bowl of IIAs, it may also intensify the problems by creating more common-member agreements.

In this connection, three determinants are assessed to play a major role in Asian rule-making. Firstly, there are three Asian plurilateral agreements, either recently concluded or currently under negotiations, that deal with investment matters and illustrate the regionalisation of investment law: ACIA; Regional Comprehensive Economic Partnership; and the PRC–Japan–Republic of Korea Trilateral Investment Treaty. Secondly, the current TPP negotiations may soon result in one of the most ambitious investment treaties ever negotiated, which may have the potential to absorb all Asian investment treaties. Thirdly, an exogenous parameter is the EU decision to expand into investment negotiations and replace the negotiating role of EU Members States. Virtually all Asian countries already bound with many of the 28 EU Member States are going to be affected.

There has long been a debate between the PRC and Japan on the "appropriate" membership of Asian economic cooperation bodies. The PRC prefers the ASEAN +3 framework (EAFTA), while Japan insists upon the inclusion of Australia, New Zealand, and India (CEPEA). To avoid being involved in the political rivalry between the two powers, in 2011 ASEAN proposed RCEP, under which the modality of economic interaction in East Asia could be discussed by going beyond membership problems. All partners that have FTAs or EPAs with ASEAN members—which include the PRC, Japan, and the Republic of Korea, as well as Australia, New Zealand, and India—are involved in RCEP.

Officially, the RCEP will aim at creating a liberal, facilitative, and competitive investment environment in the region. Negotiations will cover the four pillars of promotion, protection, facilitation, and liberalisation. In this connection, the RCEP Working Groups in Goods, Services, and Investment were established by the ASEAN Leaders during the 19th ASEAN Summit to consider the scope of the RCEP and the ASEAN Economic Ministers have accepted their recommendations as detailed in the Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (RCEP). However, no progress had been made as of July 2013.

The ASEAN–PRC FTA came into force in 2005, while its investment chapter became effective in 2010. However, this is not an ambitious agreement, covering

only the protection of investment. Meanwhile Japan's EPAs with individual ASEAN members include relatively sophisticated investment chapters that cover both the protection and liberalisation of investment. However, the Japan–ASEAN EPA was signed in 2008, but its investment chapter is still under negotiation. If Japan–ASEAN EPA's investment chapter simply consolidates Japan's EPA with individual ASEAN countries, it would become a relatively comprehensive one. However, there is a possibility that ASEAN as a bloc will exercise its bargaining power to lower the level of ambition. In any event, the modality of the future investment chapter for the Japan–ASEAN EPA would be likely to affect the investment chapter of RCEP.

Another important development that seems to have important implications for the investment chapter of RCEP is the PRC—Japan–Republic of Korea trilateral investment treaty recently signed after 9 years of negotiations. The trilateral investment treaty is not especially ambitious because it covers the protection of investment only (liberalisation is not covered) and its list of prohibited performance requirement measures is limited. The dominant argument in Japan is that if the trilateral FTA between the PRC, Japan, and the Republic of Korea is to be pursued, its investment chapters should be more ambitious.

Thus, it is difficult to foresee at this stage the modality of the investment chapter of RCEP, mainly because of the disagreement between Japan and the PRC with regard to the level of ambition. Perhaps, from the Chinese perspective, the trilateral investment treaty is a done deal, upon which the investment chapter of a trilateral FTA should be based. From the Japanese perspective, however, upgrading the investment discipline is a necessary component of the trilateral FTA.

The TPP is a twenty-first century FTA designed to change FTAs and the problems associated with them by making them more useful in spreading liberalisation globally by "multilateralizing regionalism."[48] The TPP's potential for successfully achieving such a goal is partly because of the nature of the partners, given their diversity and geographical spread linking both sides of the Pacific,[49] and partly because of the intended nature of the deal in achieving an all-new type of FTA design. In the view of leading authors, the definition of a "high-quality, twenty-first century" FTA means that such an agreement should combine three key features.[50] Firstly, a "high-quality, twenty-first century" agreement should have a comprehensive scope. Secondly, it should have a substantial depth that includes cooperation and integration components between members. Thirdly, it must contain a set of shared values, ideology, or norms between participants.[51]

[48] As early as 2006, Richard Baldwin argued that because the "spaghetti bowl's inefficiencies are increasingly magnified by unbundling and the rich/poor asymmetry, the world must find a solution. Since regionalism is here to stay, the solution must work with existing regionalism, not against it. The solution must multilateralize regionalism.", see Baldwin (2006), p. 1451.

[49] The TPP countries currently are Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Malaysia, Peru, Singapore, United States of America, and Vietnam.

[50] See Lim et al. (2012), p. 3.

[51] See Lim et al. (2012), p. 3.

The TPP is important for the future of trade and investment regulation because it may represent the first concrete effort to sort out some of the negative effects (*i.e.*, stumbling blocks) created by overlapping FTAs. Therefore, the evolution of the TPP could either strengthen or fracture current trading regimes. The specific architecture of the agreement,[52] including the elements of various negotiating chapters, is critical to realising high-quality outcomes. In the short period of negotiations under review (March 2010–July 2013), three key features of TPP regulation on foreign investment have emerged. Firstly, the dynamic characters of the negotiations have progressed quite regularly while incorporating new countries. Secondly, the level of US leadership is obvious in both the form and substance of the TPP. While exerting this leadership in a group of 11 countries, half of which are emerging economies, the USA also has isolated the largest emerging economies: the PRC, India, and Brazil. Thirdly, in the light of the previous points, the TPP represents a major FTA that illustrates the regionalisation of investment rule-making and probably represents a benchmark for state-of-the-art international law for foreign investment.

If the TPP reflects US investment rule-making practice, the EU seems to be willing to negotiate new investment treaties largely inspired by this US practice. To these current developments, one should add the start of the Trans-Atlantic Trade and Investment Partnership (TATP) announced by President Obama in his 2012 State of the Union address. These new negotiations may well confirm the global adoption of a NAFTA-like mode of investment regulation. The current paper focuses on Asian rule-making in international investment but it will also point at the relevant time to possible interaction with developments elsewhere in the world that may affect various Asian economies.

In fact, the June 2012 leaked draft of the TPP investment chapter, which was largely unchanged as of April 2013, resembled in large measure the more recent USA IIAs rather than the 1995 text of NAFTA Chapter 11. In a nutshell, the TPP investment chapter does not provide major innovations in treaty drafting. However, the TPP crystallises the innovations since 2001 concerning NAFTA interpreting notes and NAFTA case law. The normative quality of the TPP, however, places the agreement among the most detailed and important investment treaties. In this light, it is possible to return to the question raised in the Introduction of whether the TPP will strengthen or fracture current regimes.

As these investment treaties were negotiated in the context of an agreement of great economic significance, including a broad MFN provision, if the TPP negotiations proceed successfully, then, as a broad FTA, the TPP will presumably supersede NAFTA and other existing IIAs where there is overlap. Interestingly, the TPP may be read as a strengthening, or a *de facto* renegotiation, of NAFTA and many other agreements such as the ASEAN–Australia–New Zealand FTA (2010). The TPP is even more clearly a strengthening of investment disciplines for some developing countries such as Vietnam and Malaysia, which have not previously been bound to the USA.

[52] For example, how will the TPP relate to existing FTAs between TPP negotiating parties, such as the USA-Australia, USA-Singapore, or Singapore-Australia FTAs?

Last but not least, TPP membership is open to new members willing to sign up to its commitments under the sole condition that it is accepted by the current TPP members. The absence of geographic or economic conditions gives the TPP a significant attractiveness. Japan made an official announcement in joining TPP negotiations on 15 March, 2013. And the list of prospective members is long, including the Republic of Korea; Thailand; Taipei, China[53]; the Philippines; Lao PDR; Colombia; and Costa Rica. Should all of these countries join the TPP and ratify, among other provisions, the investment chapter, this would no doubt signify an embryonic version of a long-awaited multilateral agreement on investment.

Conclusion

This paper provides a framework of analysis for understanding investment rule-making in Asia and challenges which lie ahead for the EU investment policy. Several important issues can be summarised.

Firstly, as in the rest of the world, the regulation of international investment is a field of law, which has experienced major developments in Asia, especially during the last decade. Against such a fast-evolving canvass, the EU negotiations will both benefit from sound practice in investment rule-making from partners but also encounter difficulties in adopting state-of-the-art provisions.

Secondly, there are currently 146 intraregional BITs in force, and there are 41 intraregional BITs that have been signed but have not yet entered into force. In addition, there are 21 intraregional FTAs in Asia that have investment chapters, which have all entered into force. Thus, in total, there are 187 intraregional IIAs in force (208 intraregional IIAs if "signed but not yet in effect" IIAs are included). This large number of IIAs forms the core of the Asian noodle bowl of investment treaties.

Thirdly, out of the 48 ADB developing member economies, 13 comprise a group of frontrunners that have concluded more than 40 IIAs. This group consists of Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, the Republic of Korea, and the PRC. Last but not least, although investment rule-making has undergone profound changes in recent years (e.g., treatification, legalisation, and proliferation) it is very likely to continue to evolve just as quickly. In this regard, a major trend of international investment rule-making is the increasing regionalisation of negotiations, which will have an impact on Asian regulations. If the core of international investment regulations remains based on BITs and bilateral FTAs, it is important to underscore the importance of ongoing negotiations of broader pacts, which involve more than two countries and cover a number of economic areas. The rise of plurilateral agreements with a wider scope—such as ACIA, "ASEAN plus" agreements, RCEP, and TPP—is likely to

[53] Taipei, China, President Ma Ying-jeou said his government will work hard to create the conditions for Taipei, China, to participate in the USA-led TPP at an appropriate time, see Shu-hua and Low (2013).

produce greater economic effects while spreading the basic principles of foreign investment protection to most Asian economies. It also suggests that research and policy efforts should increasingly focus on these new instruments.

Fourthly, the paper also identified the TPP as one of the key investment agreements in Asia which is likely to oblige the EU to negotiate high-level standards for foreign investment—they should at least be of comparable standard with those of Asian countries. The TPP reflects a US investment rule-making practice while the EU seems to be willing to negotiate new investment treaties largely inspired by the US practice.[54] These new negotiations may well confirm the global adoption of a NAFTA-like mode of investment regulation which will provide a benchmark for all future EU negotiations with Asian countries.

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Annex: The Asian "Noodle Bowl" of Investment Treaties

	Armenia	Australia	Azerbaijan	Bangladesh	Brunei Darussalam
Armenia					
Australia					
Azerbaijan					
Bangladesh					
Brunei Darussalam					
Cambodia					ACIA 1 Mar 2012
China, People's Republic of	BIT 18 Mar 1995	BIT 11 July 1988	BIT 1 Apr 1995	BIT 25 Mar 1997	BIT not yet into force
Georgia	BIT 18 Feb 1997		BIT 10 July 1996		

(continued)

[54] To these current developments, one should add the start of the transatlantic trade and investment partnership (TATP) announced by President Obama in his 2012 speech on the State of the Union.

	Armenia	Australia	Azerbaijan	Bangladesh	Brunei Darussalam
Hong Kong, China		BIT 15 Oct 1993			
India	BIT 30 May 2006	BIT 4 May 2000		BIT 7 Jul 2011	BIT 18 Jan 2009
Indonesia		BIT 29 July 1993		BIT 22 Apr 1999	ACIA 1 Mar 2012
Japan				BIT 25 Aug 1999	FTA Brunei Darussalam—Japan 31 Jul 2008
Kazakhstan			BIT not yet into force		
Korea, Republic of			BIT 25 Jan 2008	BIT 6 Oct 1988	
Kyrgyz Republic	BIT 27 Oct 1995		BIT 28 Aug 1997		
Lao PDR		BIT 8 Apr 1995			ACIA 1 Mar 2012
Malaysia				BIT 20 Aug 1996	
Mongolia					
Myanmar					
Nepal					
New Zealand		BIT not yet into force and Australia–New Zealand (ANZCERTA) 1 Jan 1989			FTA Trans-Pacific Strategic Economic Partnership 28 May 2006
Pakistan		BIT 14 Aug 1998		BIT not yet into force	
Papua New Guinea		BIT 20 Oct 1991			
Philippines		BIT 8 Dec 1995		BIT 1 Aug 1998	
Singapore		FTA Singapore–-Australia 28 Jul 2003		BIT 19 Nov 2004	FTA Trans-Pacific Strategic Economic Partnership 28 May 2006
Sri Lanka		BIT not yet into force			
Taipei, China					

(continued)

	Armenia	Australia	Azerbaijan	Bangladesh	Brunei Darussalam
Tajikistan	BIT not yet into force		BIT 26 Feb 2008		
Thailand		FTA Thailand–Australia 1 Jan 2005		BIT 12 Jan 2003	
Turkmenistan	BIT not yet into force				
Uzbekistan			BIT 2 Nov 1996	BIT 24 Jan 2001	
Vanuatu					
Viet Nam	BIT 28 Apr 1993	BIT 11 Sep 1991		BIT not yet into force	

	Cambodia	China, People Republic of	Georgia	Hong Kong, China	India
Armenia		BIT 18 Mar 1995	BIT 18 Feb 1997		BIT 30 May 2006
Australia		BIT 11 July 1988		BIT 15 Oct 1993	BIT 4 May 2000
Azerbaijan		BIT 1 Apr 1995	BIT 10 July 1996		
Bangladesh		BIT 25 Mar 1997			BIT 7 July 2011
Brunei Darussalam	ACIA 1 Mar 2012	BIT not yet into force			BIT 18 Jan 2009
Cambodia		BIT 1 Feb 2000			
China, People's Republic of	BIT 1 Feb 2000		BIT 1 Mar 1995	FTA China–Hong Kong, China 29 June 2003	BIT 1 Aug 2007
Georgia		BIT 1 Mar 1995			
Hong Kong, China		FTA China–Hong Kong, China 29 June 2003			
India		BIT 1 Aug 2007			
Indonesia	BIT not yet into force and ACIA 1 Mar 2012	BIT 1 Apr 1995			BIT 22 Jan 2004

(continued)

	Cambodia	China, People Republic of	Georgia	Hong Kong, China	India
Japan	BIT 31 Jul 2008	BIT 14 May 1989		BIT 18 June 1997	
Kazakhstan		BIT 13 Aug 1994	BIT 24 Aug 2008		BIT 26 Jul 2001
Korea, Republic of	BIT 12 Mar 1997	BIT 1 Dec 2007		BIT 30 July 1997	BIT 7 May 1996
Kyrgyz Republic		BIT 8 Sep 1995	BIT 28 Oct 1997		BIT 10 Apr 1998
Lao PDR	BIT not yet into force and ACIA 1 Mar 2012	BIT 1 June 1993			BIT 5 Jan 2003
Malaysia	BIT not yet into force	BIT 31 Mar 1990			BIT 12 Apr 1997
Mongolia		BIT 1 Nov 1993			BIT 29 Apr 2002
Myanmar		BIT 21 May 2002			BIT 8 Feb 2009
Nepal					BIT not yet into force
New Zealand		BIT 25 Mar 1989 and FTA China–New Zealand 1 Oct 2008		BIT 5 Aug 1995 and Hong Kong, China–New Zealand 1 Jan 2011	
Pakistan	BIT not yet into force	BIT 30 Sep 1990 and FTA Pakistan–China 1 Jul 2007			
Papua New Guinea		BIT 12 Feb 1993			
Philippines	BIT not yet into force	BIT 8 Sep. 1995			BIT 29 Jan 2001
Singapore	BIT 24 Feb 2000	BIT 7 Feb 1986			FTA India–Singapore 1 Aug 2005

(continued)

	Cambodia	China, People Republic of	Georgia	Hong Kong, China	India
Sri Lanka		BIT 25 Mar 1987			BIT 13 Feb 1998
Taipei, China					BIT 28 Nov 2002
Tajikistan		BIT 20 Jan 1994			BIT 14 Nov 2003
Thailand	BIT 16 Apr 1997	BIT 13 Dec 1985		BIT 18 Apr 2006	BIT 13 July 2001
Turkmenistan		BIT 4 June 1994	BIT 21 Nov 1996		BIT 27 Feb 2006
Uzbekistan		BIT 1 Sep 2011	BIT 24 May 1999		BIT 28 Jul 2000
Vanuatu		BIT not yet into force			
Viet Nam	BIT not yet into force	BIT 1 Sep 1993			BIT 1 Dec 1999

	Indonesia	Japan	Kazakhstan	Korea, Republic of	Kyrgyz Republic
Armenia					BIT 27 Oct 1995
Australia	BIT 29 July 1993				
Azerbaijan			BIT not yet into force	BIT 25 Jan 2008	BIT 28 Aug 1997
Bangladesh	BIT 22 Apr 1999	BIT 25 Aug 1999		BIT not yet into force	
Brunei Darussalam	ACIA 1 Mar 2012	FTA Brunei Darussalam–Japan 31 Jul 2008		BIT 30 Oct 2003	
Cambodia	BIT not yet into force and ACIA 1 Mar 2012	BIT 31 Jan 2008		BIT 12 Mar 1997	
China, People's Republic of	BIT 1 Apr 1995	BIT 14 May 1989	BIT 13 Aug 1994	BIT 1 Dec 2007	BIT 8 Sep 1995

(continued)

	Indonesia	Japan	Kazakhstan	Korea, Republic of	Kyrgyz Republic
Georgia			BIT 24 Aug 2008		BIT 28 Oct 1997
Hong Kong, China		BIT 18 June 1997		BIT 30 July 1997	
India	BIT 22 Jan 2004		BIT 26 Jul 2001	BIT 7 May 1996	BIT 10 Apr 1998
Indonesia		FTA Japan–Indonesia 1 Jul 2008		BIT 10 Mar 1994	BIT 23 Apr 1997
Japan	FTA Japan–Indonesia 1 Jul 2008			BIT 1 Jan 2003	
Kazakhstan				BIT 26 Dec 1996	BIT not yet into force
Korea, Republic of	BIT 10 Mar 1994	BIT 1 Jan 2003	BIT 26 Dec 1996		BIT 8 June 2008
Kyrgyz Republic	BIT 23 Apr 1997		BIT not yet into force	BIT 8 June 2008	
Lao PDR	BIT 14 Oct 1995 and ACIA 1 Mar 2012	BIT 3 Aug 2009		BIT 14 June 1996	
Malaysia	BIT 27 Oct 1999	FTA Japan–Malaysia 13 Jul 2006	BIT not yet into force	BIT 31 Mar 1989	BIT not yet into force
Mongolia	BIT 13 Oct 1999	BIT 24 Mar 2002	BIT 3 Mar 1995	BIT 30 Apr 1991	BIT not yet into force
Myanmar					
Nepal					
New Zealand					
Pakistan	BIT 3 Dec 1996	BIT 29 May 2002	BIT not yet into force	BIT 15 Apr 1990	BIT not yet into force
Papua New Guinea		BIT not yet into force			
Philippines	BIT not yet into force	FTA Japan–Philippines 11 Dec 2008		BIT 25 Apr 1996	
Singapore	BIT 21 June 2006	FTA Japan–Singapore 30 Nov 2002		BIT 26 Mar 1998 and FTA Korea, Republic of–Singapore 2 Mar 2006	

(continued)

	Indonesia	Japan	Kazakhstan	Korea, Republic of	Kyrgyz Republic
Sri Lanka	BIT 21 Jul 1997	BIT 7 Aug 1982		BIT 15 Jul 1980	
Taipei, China					
Tajikistan	BIT not yet into force			BIT 13 Aug 1995	BIT not yet into force
Thailand	BIT 5 Nov 1998	FTA Japan–-Thailand 1 Nov 2007		BIT 30 Sep 1989	
Turkmenistan	BIT not yet into force				
Uzbekistan	BIT 27 Apr 1997	BIT 29 Sep 2009	BIT 8 Sep 1997	BIT 20 Nov 1992	BIT 6 Feb 1997
Vanuatu					
Viet Nam	BIT 3 Apr 1994	BIT 19 Dec 2004	BIT not yet into force	BIT 5 Jun 2004	

	Lao PDR	Malaysia	Mongolia	Myanmar	Nepal
Armenia					
Australia	BIT 8 Apr 1995				
Azerbaijan					
Bangladesh		BIT 20 Aug 1996			
Brunei Darussalam	ACIA 1 Mar 2012	ACIA 1 Mar 2012		ACIA 1 Mar 2012	
Cambodia	BIT not yet into force and ACIA 1 Mar 2012	BIT not yet into force and ACIA 1 Mar 2012		ACIA 1 Mar 2012	
China, People's Republic of	BIT 1 June 1993	BIT 31 Mar 1990	BIT 1 Nov 1993	BIT 21 May 2002	
Georgia					
Hong Kong, China					
India	BIT 5 Jan 2003	BIT 12 Apr 1997	BIT 29 Apr 2002	BIT 8 Feb 2009	BIT not yet into force
Indonesia	BIT 14 Oct 1995 and ACIA 1 Mar 2012	BIT 27 Oct 1999 and ACIA 1 Mar 2012	BIT 13 Oct 1999	ACIA 1 Mar 2012	
Japan	BIT 3 Aug 2009	FTA Japan-Malaysia 13 Jul 2006	BIT 24 Mar 2002		

(continued)

	Lao PDR	Malaysia	Mongolia	Myanmar	Nepal
Kazakhstan		BIT not yet into force	BIT 3 Mar 1995		
Korea, Republic of	BIT 14 June 1996	BIT 31 Mar 1989	BIT 30 Apr 1991		
Kyrgyz Republic		BIT not yet into force	BIT not yet into force		
Lao PDR		BIT not yet into force and ACIA 1 Mar 2012	BIT 29 Dec 1994	BIT not yet into force and ACIA 1 Mar 2012	
Malaysia	BIT not yet into force		BIT 14 Jan 1996		
Mongolia	BIT 29 Dec 1994	BIT 14 Jan 1996			
Myanmar	BIT not yet into force				
Nepal					
New Zealand		New Zealand–Malaysia 1 Aug 2010			
Pakistan	BIT not yet into force	BIT 30 Nov 1995 and FTA Pakistan–Malaysia 1 Jan 2008			
Papua New Guinea		BIT not yet into force			
Philippines			BIT 1 Nov 2001	BIT 11 Sep 1998	
Singapore	BIT 26 Mar 1998		BIT 7 Jan 1996		
Sri Lanka		BIT 31 Oct 1995			
Taipei, China		BIT 18 Match 1993			
Tajikistan			BIT 16 Sep 1999		
Thailand	BIT 7 Dec 1990			BIT not yet into force	
Turkmenistan		BIT not yet into force			
Uzbekistan		BIT 20 Jan 2000			
Vanuatu					
Viet Nam	BIT 23 Jun 1996	BIT 9 Oct 1992	BIT 13 Dec 2001	BIT not yet into force	

	New Zealand	Pakistan	Papua New Guinea	Philippines
Armenia				
Australia	BIT not yet into force and Australia-New Zealand (ANZCERTA) 1 Jan 1989	BIT 14 Aug 1998	BIT 20 Oct 1991	BIT 8 Dec 1995
Azerbaijan				
Bangladesh		BIT not yet into force		BIT 1 Aug 1998
Brunei Darussalam	FTA Trans-Pacific Strategic Economic Partnership 28 May 2006			ACIA 1 Mar 2012
Cambodia		BIT not yet into force		BIT not yet into force and ACIA 1 Mar 2012
China, People's Republic of	BIT 25 Mar 1989 and China-New Zealand 1 Oct 2008	BIT 30 Sep 1990 and FTA Pakistan-China 1 Jul 2007	BIT 12 Feb 1993	BIT 8 Sep. 1995
Georgia				
Hong Kong, China	BIT 5 Aug 1995 and FTA Hong Kong, China-New Zealand 1 Jan 2011			
India				BIT 29 Jan 2001
Indonesia		BIT 3 Dec 1996		BIT not yet into force and ACIA 1 Mar 2012
Japan		BIT 29 May 2002	BIT not yet into force	FTA Japan-Philippines 11 Dec 2008
Kazakhstan		BIT not yet into force		
Korea, Republic of		BIT 15 Apr 1990		BIT 25 Apr 1996
Kyrgyz Republic		BIT not yet into force		
Lao PDR		BIT not yet into force		ACIA 1 Mar 2012
Malaysia	New Zealand-Malaysia 1 Aug 2010	BIT 30 Nov 1995 and FTA Pakistan-Malaysia 1 Jan 2008	BIT not yet into force	
Mongolia				BIT 1 Nov 2001

(continued)

	New Zealand	Pakistan	Papua New Guinea	Philippines
Myanmar				BIT 11 Sep 1998
Nepal				
New Zealand				
Pakistan				BIT not yet into force
Papua New Guinea				
Philippines		BIT not yet into force		
Singapore	FTA New Zealand-Singapore 1 Jan 2001 and Trans-Pacific Strategic Economic Partnership 28 May 2006	BIT 4 May 1995		
Sri Lanka		BIT 5 Jan 2000		
Taipei, China				BIT 28 Apr 1992
Tajikistan		BIT not yet into force		
Thailand				BIT 6 Sep 1996
Turkmenistan		BIT not yet into force		
Uzbekistan		BIT 15 Feb 2006		
Vanuatu				
Viet Nam				BIT 29 Jan 1993

	Singapore	Sri Lanka	Taipei, China	Tajikistan
Armenia				BIT not yet into force
Australia	FTA Singapore-Australia 28 Jul 2003	BIT not yet into force		
Azerbaijan				BIT 26 Feb 2008
Bangladesh	BIT 19 Nov 1994			
Brunei Darussalam	FTA Trans-Pacific Strategic Economic Partnership 28 May 2006			
Cambodia	BIT 26 Feb 2000 and ACIA 1 Mar 2012			

(continued)

	Singapore	Sri Lanka	Taipei, China	Tajikistan
China, People's Republic of	BIT 7 Feb 1986	BIT 25 Mar 1987		BIT 20 Jan 1994
Georgia				
Hong Kong, China				
India	FTA India-Singapore 1 Aug 2005	BIT 13 Feb 1998	BIT 28 Nov 2002	BIT 14 Nov 2003
Indonesia	BIT 21 June 2006	BIT 21 Jul 1997		BIT not yet into force
Japan	FTA Japan–Singapore 30 Nov 2002	BIT 7 Aug 1982		
Kazakhstan				
Korea, Republic of	BIT 26 Mar 1998 and FTA Korea, Republic of–Singapore 2 Mar 2006	BIT 15 Jul 1980		BIT 13 Aug 1995
Kyrgyz Republic				BIT not yet into force
Lao PDR	BIT 26 Mar 1998 and ACIA 1 Mar 2012			
Malaysia		BIT 31 Oct 1995	BIT 18 Match 1993	
Mongolia	BIT 7 Jan 1996			BIT 16 Sep 1999
Myanmar				
Nepal				
New Zealand	FTA New Zealand–Singapore 1 Jan 2001 and Trans-Pacific Strategic Economic Partnership 28 May 2006			
Pakistan	BIT 4 May 1995	BIT 5 Jan 2000		BIT not yet into force
Papua New Guinea				
Philippines			BIT 28 Apr 1992	
Singapore		BIT 30 Sep 1980	BIT 9 Apr 1990	

(continued)

	Singapore	Sri Lanka	Taipei, China	Tajikistan
Sri Lanka	BIT 30 Sep 1980			
Taipei, China	BIT 9 Apr 1990			
Tajikistan				
Thailand		BIT 14 May 1996	BIT 30 Apr 1996	BIT not yet into force
Turkmenistan				
Uzbekistan	BIT 23 Nov 2003			
Vanuatu				
Viet Nam	BIT 25 Dec 1992	BIT not yet into force	BIT 23 Apr 1993	BIT not yet into force

	Thailand	Turkmenistan	Uzbekistan	Vanuatu	Viet Nam
Armenia		BIT not yet into force			BIT 28 Apr 1993
Australia	FTA Thailand-Australia 1 Jan 2005				BIT 11 Sep 1991
Azerbaijan			BIT 2 Nov 1996		
Bangladesh	BIT 12 Jan 2003		BIT 24 Jan 2001		BIT not yet into force
Brunei Darussalam	ACIA 1 Mar 2012				ACIA 1 Mar 2012
Cambodia	BIT 16 Apr 1997				BIT not yet into force and ACIA 1 Mar 2012
China, People's Republic of	BIT 13 Dec 1985	BIT 4 June 1994	BIT 1 Sep 2011	BIT not yet into force	BIT 1 Sep 1993
Georgia		BIT 21 Nov 1996	BIT 24 May 1999		
Hong Kong, China	BIT 18 Apr 2006				
India	BIT 13 July 2001	BIT 27 Feb 2006	BIT 28 Jul 2000		BIT 1 Dec 1999
Indonesia	BIT 5 Nov 1998	BIT not yet into force	BIT 27 Apr 1997		BIT 3 Apr 1994 and ACIA 1 Mar 2012
Japan	FTA Japan-Thailand 1 Nov 2007		BIT 29 Sep 2009		BIT 19 Dec 2004

(continued)

	Thailand	Turkmenistan	Uzbekistan	Vanuatu	Viet Nam
Kazakhstan			BIT 8 Sep 1997		BIT not yet into force
Korea, Republic of	BIT 30 Sep 1989		BIT 20 Nov 1992		BIT 5 Jun 2004
Kyrgyz Republic			BIT 6 Feb 1997		
Lao PDR	BIT 7 Dec 1990 and ACIA 1 Mar 2012				BIT 23 Jun 1996 and ACIA 1 Mar 2012
Malaysia		BIT not yet into force	BIT 20 Jan 2000		BIT 9 Oct 1992 and ACIA 1 Mar 2012
Mongolia					BIT 13 Dec 2001
Myanmar	BIT not yet into force				BIT not yet into force ACIA 1 Mar 2012
Nepal					
New Zealand					
Pakistan		BIT not yet into force	BIT 15 Feb 2006		
Papua New Guinea					
Philippines	BIT 6 Sep 1996				BIT 29 Jan 1993 and ACIA 1 Mar 2012
Singapore			BIT 23 Nov 2003		BIT 25 Dec 1992 and ACIA 1 Mar 2012
Sri Lanka	BIT 14 May 1996				BIT not yet into force
Taipei, China	BIT 30 Apr 1996				BIT 23 Apr 1993
Tajikistan	BIT not yet into force				BIT not yet into force
Thailand					BIT 7 Feb 1992 and ACIA 1 Mar 2012
Turkmenistan			BIT 2 Aug 1996		
Uzbekistan		BIT 2 Aug 1996			BIT 6 Mar 1998
Vanuatu					
Viet Nam	BIT 7 Feb 1992		BIT 6 Mar 1998		

BIT bilateral investment treaty, *IIA* international investment agreement

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