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The Investment Version of Asian Noodle Bowl:

Proliferation of International Investment Agreements (IIAs)

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Abstract

While there is an extensive amount of literature on noodle bowl of agreements in Asia, the majority of them exclusively focus on trade (in goods) and so far little emphasis has been placed on investment. Such a situation is not ideal because the proliferation of international investment treaties (IIAs) is much more significant than that of free trade agreements (FTAs). Not only investment chapters under FTAs but also bilateral and plurilateral investment treaties constitute IIAs. In fact, there are more than 1,000 IIAs in Asia. The noodle bowl of FTAs usually results in more options for traders and even an unexpected way of availing FTA preference by the third parties is likely to be welfare-enhancing – overemphasis on complicated rules of origins and other issues are misleading. However, the story of proliferation of IIAs and investment noodle bowl is totally different – it would lead to inconsistency across IIAs that brings legal interpretation problem (rather than more options and opportunities for business) as well as proliferation of unexpected investor-state dispute (rather than unexpected avail of preferential treatment). This paper aims to provide a detailed reading of recent advances in Asian investment rule making, a finer appreciation of how rules in Asian IIAs have evolved in response to what stimuli. While existing studies mainly deal with interpretation and application of IIA where the rules are given, this study deals in turn with the development of rules (i.e. investment protection). The main objective of the paper is to describe and provide an exhaustive mapping of the recent Asian experience of investment rule-making through regional and bilateral agreements. A detailed analytical account of key dimensions of investment treaties will be provided. This comprehensive study offers insights on the possible make-up of future attempts at embedding comprehensive investment norms into the regional (such as the Transpacific Partnership) and/or WTO architecture.

Keywords: bilateral investment treaty; preferential trade agreement, foreign direct investment

1. Introduction: the significance of international law of foreign investment for Asia

The regulation of international investment is a field of law which has experimented major developments in the recent years. While international trade has been regulated right after World War II (by the GATT but also the European Community treaties at regional level), international investment remained largely untouched by international rules until the late-1960's. However, since then, the international investment regime has become increasingly dependent upon international treaties. Globally speaking, international investment law and policy have developed in the mid-1990's, essentially in the 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. The period since NAFTA's entry into force has witnessed a literal explosion in the number of international investment agreements (IIAs), involving all countries. Primarily concluded between developed and developing countries to protect the former investors, this phenomenon has also registered an important mutation in the last decade, with an ever growing number of IIAs concluded between developing countries characterizing the evolution of emerging economies and the ascendancy of sovereign wealth funds.[1] It is the years 2000, that many Asian countries developed and reinforced their network of IIAs making investment a key aspect of their economic pacts with third countries. As of today, more than 2,850 bilateral agreements have been concluded since the early 1960s, most of them in the 1990s.[2]

The deep changes that have recalibrated the international law of foreign investment takes the form of a "treatification" as analyses by Salacuse.[3] Gradually, customary international law[4], which was the main instrument to regulate foreign capital, has been replaced by international treaties. The shift from non-written rules to codified and detailed principles demonstrate the huge development of international of foreign investment in just about twenty years. Such a "treatification" also means that more foreign investments are protected by international norms while the same norms promote the increase of FDI. The increasing role of international law and policy in the area of international investment is finally illustrated by the fact that new claims are being lodged at an exponential rate before international tribunal.[5] The treatification of international investment also results in a significant legalization of cross-border investment activities which raises many issues of crucial importance for all stakeholders: host countries, investors and international policy makers. As a result, along with the increase in number of IIAs, the last decade has witnessed an exponential surge of investment disputes between foreign investors and host country governments. Arbitral panels have been charged with the task of applying the rules of IIAs in specific cases, a task not often straightforward, given the broad and

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[1] See J Chaisse, D Chakraborty, J Mukherjee (2011) Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies, Journal of World Trade 45 (4), 837-876

[2] JAMES ZHAN, ET AL., UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2012 (2012) Annex table III.1. List of IIAs at 199.

[3] *See* Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 LAW & BUS. REV. AM. 155 (2007).

[4]

[5] Investment treaties provide various dispute resolution mechanisms, "one of the most important of which is international investor-state arbitration which entitles an injured investor to sue the host government for damages because of a violation of treaty standards and rights." Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J., 427, 446 (2010). A supervising body may assist in appointing arbitrators, determining the place of arbitration, determining costs and arbitrator fees, and so forth, and will itself charge a fee for the performance of these functions. The most common supervisory bodies referred to in investment-enabling institutions are the International Centre for the Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce's (ICC) International Court of Arbitration; each body has its own set of arbitration rules. *See id.* at 446-47 n.91. *Ad-hoc* arbitrations most often follow the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). *See id.*

sometimes ambiguous terms of these arrangements. This new phenomenon of investment litigation has brought about a number of decisions from different arbitral *fora*, contributing to investment law regime by giving meaning to its provisions. The cumulative number of treaty-based cases has risen to more than 400 by July 2013, with more than 200 brought before the International Centre for Settlement of Investment Disputes (ICSID). Few disputes however do involve Asian parties. However, there will be more disputes in Asia in future, given that many plurilateral IIAs are being negotiated and knowledge and practice of Asian parties (in both public and private circles) on investment rules are being developed.

However, it is important to note that the network of international investment law is not a "system" *per se*. There is no multilateral investment agreement with a unique tribunal in charge of resolving disputes, but rather a patchwork of agreements and provisions which address the regulation of investment.[6] Accordingly, this paper studies the evolving international regime for investment, with a special reference to Asian experiences. The Asian regime for investment is not static but on the contrary very dynamic. It continues to grow and change and will be affected by various factors in the coming years. This attempts to make contribution to the literature by focusing on the Asian scenario which has not been much studied so far.

This paper is structured as follows. The next section provides a macro mapping of IIAs in Asia. This section helps to understand what the key characteristics of the Asian IIAs are, such as their geographical dispersion and relationship between IIAs (such as overlapped IIAs). The third section considers the problems associated with the so-called noodle bowl syndrome. It argues, the noodle bowl problem caused by intersected, nested and overlapped agreements are very serious in the case of investment, while such a problem is relatively manor in the case of trade (in goods). The fourth section will have a close look at the recent trend of IIAs in Asia and elsewhere, quantitative and qualitatively. The fifth section discusses the rise of plurilateral agreement and the wider scope agreement that include IIAs as its major, covering both recent Asian cases as well as non-Asian experiences. The final section concludes.

An important caveat to be mentioned here in conducting this research is the availability of data on IIAs. There is no international organization informed by Asian states of their international treaties. Also, not all Asian governments do publish the results of their negotiations. The UNCTAD Database of Investment Agreement is mainly used, but this should be complimented by national governments source. In terms of FTAs, RTA database constructed by WTO that includes all notified FTAs, but not FTAs without notification, is used. As a result, one of major contributions of the current paper is to provide a mapping of these Asian practices based on a survey on the various database. Asia in this paper refers to the geographical area covered by regional member of Asian Development Bank (for the list of the 48 countries, see **Annex 1**).[7]

2. Proliferation of IIAs in Asia: Salient Characteristics

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

[6] On the attempts at crafting multilateral disciplines on investment, see, Pierre Sauvé, 'Multilateral Rules on Investment: Is Forward Movement Possible?', 9(2) Journal of International Economic Law 325-355 (2006). See also, David Collins, 'A new role for the WTO in international investment law: public interest in the post-neoliberal period', 25 Connecticut Journal of International Law 1-35 (2009).

[7] Apart of North Korea, all states are considered in this study and their respective investment treaties analyzed.

investment and, in any case, its domestic investment policy is subject to the international obligations which are expressed in the investment agreement.

There are several angles to categorize IIAs in Asia and elsewhere. An important distinction is that between investment treaty and FTAs that have investment chapter. In addition to investment treaties, free trade agreements (FTAs) have also become popular means of formalizing international rules on investment, in particular for a country like the US.[8] While two are essentially the same because both type of agreements attempt to liberalize and protect investment by the legalization of economic relation, there are some technical differences.

First, BITs usually have an expiry (say ten years), while FTA usually continues to exist unless contracting parties decide to terminate its implementation (FTA usually has "the termination clause). This means that consolidation of BITs is easier than FTAs because the situation of overlapped or nested agreements will disappear sooner or later when one of them expires (for the details of overlapped or nested agreements, see Section 2.2). Second, MFN is usually applicable within the same category of IIAs only. This means that MFN clause in BIT (FTAs) leads to the importation of more favorable provisions in a third country's BIT (FTAs) only, not FTAs (BITs). However, this means that two belongs to the different families in terms of MFN application, rather than that the two are different in nature.

Another important distinction is the one between intraregional and cross-regional. Intra-regional IIA means it include only Asian parties (all parties are Asian). Cross-regional IIA means it includes both Asian and non-Asian. The concept of Asian agreements or agreements in Asia refers to both intra-Asian agreements and cross-regional agreements.

Table 1: Characteristics of Asian IIAs

	World Total	Asia Total	Cross-regional	Intraregional
Investment Treaties	2,850+	1,194	1,048	146
Investment Chapter under FTAs	200+	61	40	21
Total IIAs	3,000+	1,255	1,088	167

As of now, more than 3,000 IIAs are in effect. There are approximately, 2,850 BITs have concluded worldwide. Asian countries have concluded 1,194 BITs. Thus, nearly the one-third of BITs in the world involves at least one Asian entity. Likewise, there are around 220 FTAs in the world that (notification basis) and there are some FTAs without notification. It is deemed that the majority of them has investment chapters (thus in the world there are 200 or so FTAs with investment chapters). In Asia, there are, 61 FTAs that have investment chapter since 1959. Thus, there are, in fact, a huge number of IIAs in Asia.

However, there are many Asian IIAs concluded with leading capital exporting countries such as the US or Western countries. The majority of IIAs in Asia falls under this category, namely cross-regional IIAs where non-Asian party is the capital exporting country (but there are cases where Asian party is capital exporter, such as Japan). This implies that the treaty might rather reflect the interest and bargaining power of the capital exporting countries. In order to refine the contribution of Asian countries to international investment rule-making, it is necessary to narrow

[8] See Jeffrey J. Schott and Julia Muir (2012) US PTAs: what's been done and what it means for the TPP negotiations, in: Chin Leng Lim, Deborah Elms, Patrick Low (eds) The Trans-Pacific Partnership (TPP) – A Quest for Twenty-first Century Trade Agreement, (London: Cambridge University Press, 2012) 45-63.

the analysis to these IIAs which have been concluded among Asian countries only, which can be classified as intra-regional IIAs in the above category. Narrowing the analysis to pure Asian IIAs also help to identify Asian countries that play a leading role in the development of investment rules in Asia.

There are currently 146 intraregional BITs which are currently in force, while there are also 41 intraregional BITs have been signed but haven't yet entered into force. In addition, there are 21 intraregional FTAs in Asia that have investment chapters which all entered into force. Thus, in total, there are 187 intraregional IIAs in force (208 intraregional IIAs if "signed but not yet effect" IIAs are included). This great number of IIAs forms what is the core of the Asian noodle bowl of investment treaties. The data in **Annex 2** represents a wealth of information, in terms of Asia investment treaty practice.

It is safe to consider that BIT is the principal devise to regulate international investment at the global level. As aforementioned, in the world there are around 2,850 BITs, but the number of FTAs with investment chapters are at most 200 plus. Even if we limit out analysis on Asian IIA practices, the picture does not change that much. As discussed above, there are 1194 BITs and 61 FTA with investment chapters in Asia.

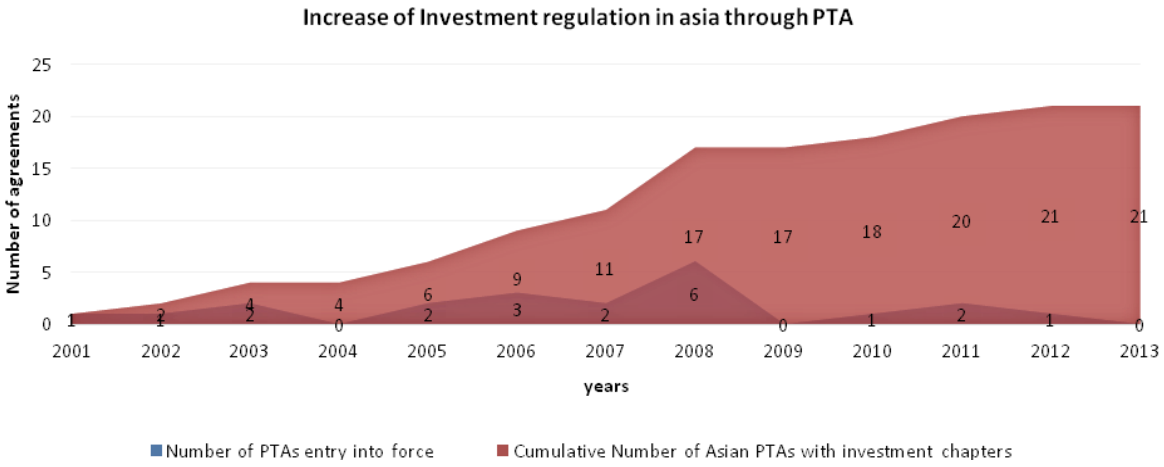
However, if we limit our analysis on intra-regional IIAs, some interesting observation can be made. While there are 146 intraregional investment treaties, there are also 21 are intra-Asian FTAs with investment chapters (see Table 2).

Table 2: 21 Intra-Asian FTAs with investment chapter

IIAs	In force
New Zealand - Singapore	1 Jan 2001
Japan - Singapore	30 Nov 2002
China - Hong Kong, China	29 June 2003
Singapore - Australia	28 Jul 2003
Thailand - Australia	1 Jan 2005
India - Singapore	1 Aug 2005
Korea, Republic of - Singapore	2 Mar 2006
Trans-Pacific Strategic Economic Partnership	28 May 2006
Japan - Malaysia	13 Jul 2006
Pakistan - China	1 Jul 2007
Japan - Thailand	1 Nov 2007
Pakistan - Malaysia	1 Jan 2008
Brunei Darussalam - Japan	31 Jul 2008
China - New Zealand	1 Oct 2008
Japan - Indonesia	1 Jul 2008
Brunei Darussalam - Japan	31 Jul 2008
Japan - Philippines	11 Dec 2008
New Zealand - Malaysia	1 Aug 2010
Hong Kong, China - New Zealand	1 Jan 2011
Australia - New Zealand (ANZCERTA)	1 Jan 1989 (investment Protocol in 2011)
ASEAN Comprehensive Investment Agreement (ACIA)	1 March 2012

Note that all of 21 FTAs are concluded after 2001 (see **Figure 1**). Thus, we can say that investment chapters in FTAs play a, increasingly relatively important role in the investment rule-making in the Asian region. This is perhaps because Asian countries attempt to regulate and deregulate intra-Asian economic actives that include both trade and investment activities, using so-called modern FTAs, that go beyond tariff liberalization. At the same time we should also realize that some Asian countries are reluctant, so far, to include investment chapters in FTAs.

Figure 1: The rise of Asian FTAs with investment chapters

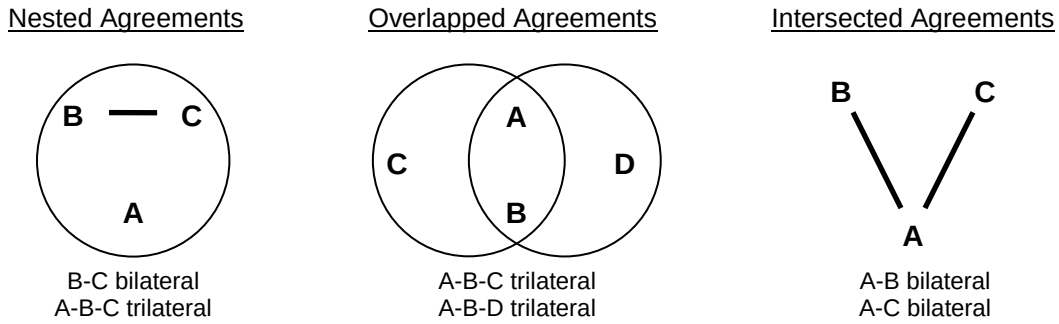


Sources: Compiled by the author on the basis of United Nations Conference on Trade and Development (UNCTAD) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information

3. Asian Noodle Bowl of IIAs

In considering the noodle bowl of IIAs, it is interesting to note there are many common-member agreements in Asia. There are three types of common-member agreements: “overlapped”, “nested” and “intersected” agreements (see **Figure 2**).

Figure 2: Three Types of Common-Member Agreements



Note: X, Y, Z, and W represent countries. Bilateral agreements are represented as a line; plurilateral agreements are represented as a circle.
Source: Author’s illustration.

3.1. Overlapped and Nested IIAs: The inconsistency problem

There are many overlapped and nested IIAs in Asia. This is especially true for the relationship between plurilateral IIAs (especially plurilateral FTA with investment chapter) and bilateral agreement. While the there are some concerns with regard to nested and overlapped agreements in the case of trade, little attention has been paid to this problem with regard to investment (for the details on the rise of plurilateral IIAs in Asia, see Section 3).

In the case of trade, however, the negative impact of nested and overlapped agreement seems to be marginal, especially for problems associated with rules of origin (ROOs). While the concerns are sometimes exaggerated, nested or overlapped agreement usually gives traders more options: traders can have preferential access if their goods satisfy ROOs set by either of nested/overlapped agreements. Trader can choose the most beneficial agreements to maximize their benefit. In addition, it is important to note that the use of FTAs is not compulsory for traders. Moreover, the majority of Asian trade is already conducted under zero-MFN tariff, there is no need to use FTA in many circumstances.

However, in the case of investment, nested or overlapped agreements may cause some uncertainties. This is especially true for procedural issues of investor-state disputes. While overlapped or nested IIAs may sometimes give investors more options regarding dispute settlements, investors may get confused about the necessary procedures when each of overlapped or nested IIAs stipulate the procedures in an inconsistent way. On the one hand, if the IIAs stipulate the domestic court/international arbitration *can* be used, this would lead to more options; on the other hand, if they stipulate the domestic court/international arbitration *shall* be used, there is a clear conflict between the two.

Suppose a situation wherein a plurilateral IIA requests investor to first use domestic court to settle the issues, while a nested or overlapped bilateral IIA would allow to directly submit the issue to international arbitration. A concrete scenario of this kind is emerging with the Transpacific partnership which involves, so far, four ASEAN countries (namely Vietnam, Singapore, Malaysia, Brunei). Investors from one of these countries may lodge a claim against another under TPP ISDS rules but also under ASEAN CIA which incorporates different rules of procedure. One can add another layer to this scenario since Malaysia and Vietnam concluded a bilateral investment treaty in 1992 which offers a third instrument to Vietnamese and Malaysian investors to bring a claim against the host state. When thinking of the key objective of IIAs which is to promote and protect investment, one might wonder what this complex multilayered regulation of FDI between two countries can add. Some may argue that the choice is good and investors are given choice among, at least, three forum. Some may rather look at the risks taken by the host State which, through an inconsistent treaty practice over time, may have to face various claims under different rules.

There are also other possibilities that nested or overlapped IIAs have conflict with each other. Possible inconsistency between overlapped/nested IIA relating to the substance of rules (not procedures). Here again, the investor is likely to simply opt for the most favourable treatment but at an earlier state the host country administration may have some difficulties to determine what are the substantive requirements in its treatment of the foreign investors. One can however assume that the host country always does its best in the way it treats the foreign investors.

3.2. Intersected IIAs: The treaty shopping problem

Since a large number of agreements signed in the world and Asia, intersected agreements are too common phenomena. If one country signs an agreement with two different partners separately, the situation of intersected agreements is created. And it is too unrealistic to assume that those agreements are perfectly the same in terms of legal stipulation. Thus, the issue of intersected agreements is that indefinite number of agreements is involved. If one country signs ten agreements with ten different partners, all of ten agreements constitute intersected agreement problem. In the case of overlapped or nested agreements, the number of the concerned agreements is relatively limited.

Given the number of agreement involved in the intersected status, the problem of treat shopping becomes very serious in the case of intersected agreements. While the problem of nested and overlapped agreements is limited to the inconsistency between/among a limited number of agreements that include the same parties (trilateral A-B-C agreement versus bilateral B-C agreement), there are so many options of "shopping list" in the case of intersected agreements.

However, treaty shopping does not seem to be that serious in the field of trade (in goods). Again, the fundamental reason is that this leads to more option for traders to avail tariff preference. While it is natural if an export from Country B to Country A uses A-B agreement to secure preferential access, A-C agreement could be used for such a trade, depending of the rules of origin stipulated in A-C agreement. Moreover, firms in a certain country (say, Country X) that does have agreement with Country A may use the agreement between A and B/C to have preferential access to the Country A markets. Such an expected use of agreement leads to uncertainty from a policy perspective, but this essentially increases business opportunity. Moreover, an agreement's "leaky" rules of origin that leads to an unexpected way of using such agreement simply reduce the discriminatory effect of agreement. Furthermore, uncertainty that would lead to an unexpected way of using FTA to avail preference has not been emphasized even from a policy angle; that has been discussed is non-use of FTA, not an unexpected use of FTA.[9]

In the case of investment, having more options may lead to a serious problem, mainly because IIAs usually involves investor-state dispute: a state would be sued by an investor in an unexpected way. The uncertainly with regard to the origin determination (of firms) may lead to an unexpected investor-state dispute. Because of the globalization of multinational firms, they may file a claim against a certain state that did not expect such as case at all. Interestingly, a firm in the third country that does not have IIA with the concerned country may file a claim against it.

In short, the problems caused by common-member agreements differ from goods to investment. First, the status of nested and overlapped agreement brings more option of availing tariff preference to traders, which is a good thing, though this may lead to the inconsistency of regulation in the case of international investment. Second, in the case of intersected agreements, unexpected way of using FTAs basically reduces the negative aspect of FTAs, such as exclusiveness. In the case of investment, intersected IIAs would lead to unexpected investor-state dispute.

[9] Moreover, non-use of FTAs is not a serious prlblem from a policy perspectives as well as far as Asian is concerened. This is because FTAs are not used bcase the majority of trade in Asia is conducted on zero MFN tariff already. See Hamanaka (2013).

4. Cross-Country Analysis: The Asian Scenario

The current section looks at the investment agreements concluded by the forty-eight ADB members. In order 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.

4.1. Quantitative Ranking

First, there is a group of thirteen ADB countries which have not concluded a single investment agreement as of April 2013. This means that Bhutan, Cook Islands, Fiji, Kiribati, Maldives, Marshall Islands, Micronesia, Federated States of, Nauru, Palau, Samoa, Solomon Islands, Timor-Leste and Tuvalu have so far been reluctant to engage into 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 Darussalam, and New Zealand have each signed less than ten IIAs (see figure 3-1).

A third and intermediate group of fourteen ADB members have signed between ten and fourty IIAs. These groups of relatively active States is made of Hong Kong, China, Cambodia, Lao PDR, Turkmenistan, Taipei, China, Japan, Australia, Kyrgyz Republic, Sri Lanka, Bangladesh, Georgia, Tajikistan, Armenia and the Philippines (Figure 3-2).

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

Figure 3-1: ADB Countries with less than 10 IIAs

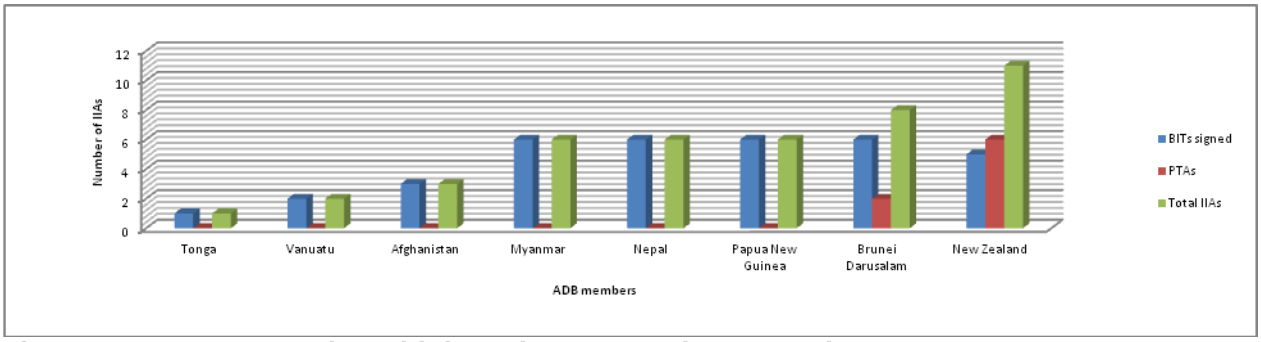


Figure 3-2: ADB Countries with less than 40 IIAs but more than 10

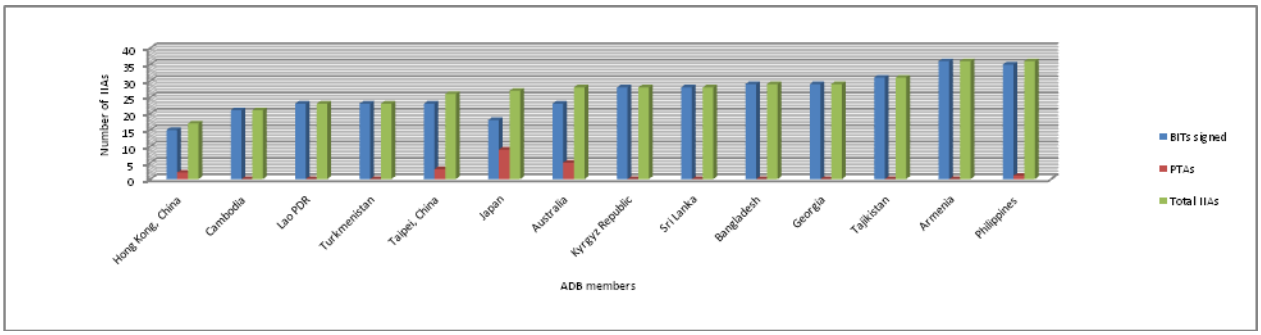
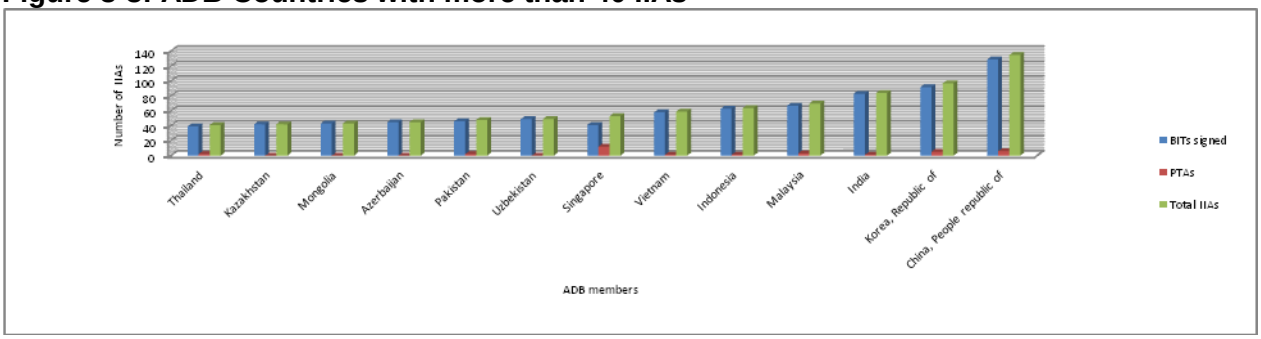


Figure 3-3: ADB Countries with more than 40 IIAs



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

If we limit our analysis on intra-regional IIAs, some interesting observations can be made. Basically one key idea is that China has BITs or PTAs with almost all ADB countries except Nepal what 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 inn section 3. These frontrunners treaty practice is not only important in quantitative and qualitative terms, but crucial in light of one the key IIAs provision which the most favored nation treatment. That 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 agreement on investment.

On can also discern some patterns for each country in terms of the distinction between BIT and FTAs. For instance, Singapore is major user of PTAs to regulate investment as it already has 7 such instruments. Then come New Zealand and Japan with 6 PTAs covering investment issues. A majority of Asian countries have so far been reluctant to incorporate investment negotiations in their trade agreements. Virtually, all the FTAs concluded by India or China 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 with 6 BITs. On the top of this list is Pakistan which has signed 8 BITs which are yet to enter into force.

4.2. Qualitative ranking

Analysis the quality of national investment treaties is important as it provides a clearer of view of the likely impact of the investment treaties.[10] In an earlier publication, it has been explained that not all investment treaties are drafted in the same manner as many of their provisions may vary in significant manner as for their scope of application and likely economic impact.[11]

The BITsel Index[12] provides an extremely detailed support to understand national treaty practices.[13] The data for the 5 top Asian frontrunners (i.e. Indonesia, Malaysia, India, Korea, Republic of, China, People republic of) have been extracted to shed some light on the substance and quality of these respective treaties (**Figure 4**).

Figure 4. BITsel Quality Indicator

	China	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	China-Germany 1.90	Korea-Vietnam 1.90	e.g. Switzerland, Mauritius 1.90	Germany-Indonesia 1.90	Malaysia-Saudi Arabia 1.81
Weakest treaty and coefficient	Bulgaria, Mexico, Colombia, Costa Rica	Korea-Indonesia 1.36	India-Mexico 1.63	Indonesia-Denmark 1.27	Malaysia-Lebanon 1.36

[10] *"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, Srividya; Henisz, Witold J.; Mansfield, Edward D. (2010) Pooling is a BIT Inappropriate: A Two Stage Model for Bilateral Investment Treaty Signing, 27th January, mimeo. See also *"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", in* Hallward-Driemeier, Mary (2003) "Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit … And They Could Bite", World Bank Policy Research Working Paper, No. 3121, 1-37.

[11] Chaisse Julien and Bellak Christian (2011) 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology' 3(4) Transnational Corporations Review 3-11

[12] BITs enshrine a series of obligations on the parties to ensure a stable and favourable 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. But, meanwhile, such "treatment" that encompasses many sorts of laws, regulations and practices from public entities also affect foreign investors or their investments to a significant extent. 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 "BIT Selection" (BITSel) Index, which is based on the 11 most important elements found in most of the existing BITs.

[13] BITSel (2013) Bilateral Investment Treaties Selection Index, Version 4.00, www.cuhk.edu.hk/proj/BITsel [August, 10, 2013]. the BITsel classifies each provision as to its "investment friendliness" as either conducive (=2) or limiting (= 1)" (or whatever terms you prefer).

	1.36				
Coefficient of variation	0.31	0.23	0.20	0.30	0.29

Source: Data from BITsel Index, elaboration by the author

Results are stunning as the strongest average quality indicator goes to India (1.82) which far more significant than those of countries with relatively weaker investment treaties such as Indonesia (1.57) and China (1.58). Less surprisingly, 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 among the top 5 in terms of rule-making: not all Asian investment treaties are similar. India is inclined to grant quite significant rights to the foreign investors, although it has signed less treaties than China. Conversely, China has signed a great number of treaties but their average quality is among the poorest of the top 5.

Of course, these averages also depend on the partner countries. Treaties are by definition the result of negotiations and reflect the consensus that the two sides reached after exchanging their goals and ambitions. In this connection, we can take a closer look at the BITsel and see what treaties for each country of the Top 5 are at the extreme of the national practice.

In the case of China, the treaty with the greatest quality was concluded with Germany (1.90). This confirms the fact that China truly entered a new generation of investment treaties (with greater rights and access to ISDS) only after 2005 and the treaty with Germany represents a milestone. At the other extreme, China concluded a series of relatively weakest treaties with Bulgaria, Mexico, Colombia and Costa Rica. One can fine tune further the analysis and note that there is a significant difference between the IIAs concluded before or after 2005. In the wake of the China-Germany BIT, China further negotiated treaties which were rather more favourable to foreign investors. This generation provides broader and more substantive obligations in 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. China's 'new generation' BITs concluded since the beginning of this century seem to enrol in this company. As a result, these post-2005 IIAs obtain a score of 1.65 while before that turning point it only was 1.55.

In the case of Korea, of the treaty with Vietnam is one of the strongest (1.90). At the other extreme, the one between Korea-Indonesia (1.36)

India concluded more than a dozen of treaties with a rather high quality (for instance with Switzerland, Mauritius,…) since it reached the value of 1.90. On the other hand, a relatively weak treaty was concluded with India-Mexico (1.63).

Indonesia ranks fourth among the Asian countries in terms of 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 the example of a rather weak treaty (1.27).

Last but not the least, Malaysia, whose economic policy is deeply intertwined with politics, has concluded a rather strong treaty with Saudi Arabia (1.81). However, the treaty Malaysia-Lebanon scores poorly (1.36).

The next step is to calculate the "coefficient of variation", which is a better measure of the 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? Back to our example, as it is 0.29 on average for Malaysia, it means that the variation in the provisions is 29%. As 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 China is 0.31 (see the sheet China, marked in blue), 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 are the BITs provisions, the coefficient of variation tells us how heterogeneous they are. The key advantage of the coefficient of variation is that it is directly comparable between countries. If we have a coefficient of variation of country A, say 30% and country B, say, 60 %, we can say that the heterogeneity of country B is twice as large as for country A.

At this stage, two lessons are important to mention. First, there is a significant discrepancy among Asian treaty practices but also among individual treaty practices. Second, although this paper focuses on the broad analysis of Asian investment treaties, it also underlines the need to more carefully look at the key provisions found in each investment treaty what will be addressed in a second paper.[14]

5. The Rise of Plurilateral Agreements with Wider Scope

As mentioned in the introduction, a major trend of international investment rule making is the increasing regionalization 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 involved more than two countries and cover great number of economic areas. 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. In this connection, three determinants are appealed to play a major role in Asian rule making. First, there are three Asian plurilateral agreements recently concluded or currently under negotiations which deal with investment matters and illustrate the regionalization of investment law (3.1.). Second, an exogenous parameter with the EU decision to engage into investment negotiations and replace EU members States. Virtually, all Asian countries already bound with many of the 27 EU countries are going to be affected (3.2). Third, the current negotiations of the TPP seem to result soon in one the most ambitious investment treaty ever negotiated which may have the potential to absorb all Asian investment treaties (3.3.)

5.1. Intra-Asian Plurilateral IIAs

The most important intra-Asian plurilateral IIA is the ASEAN Comprehensive Agreement which is a milestone for the ASEAN integration (4.1.1.). However, beyond ACIA, which is already in force, some other regional initiatives have been taken (4.1.2.)

[14] Ref later

5.1.1. The ACIA

ACIA was signed by the ASEAN Economic Ministers (AEM) on 26 February 2009 and consolidated existing agreements: the ASEAN Investment Area (AIA) of 1998 and the ASEAN Agreement on the Promotion and Protection of Investments of 1987, also known as ASEAN Investment Guarantee Agreement (IGA). Beyond, the mere consolidation of earlier regional pacts, ACIA is an enhanced agreement that encompasses four pillars: liberalisation, facilitation, protection, and promotion. It also contains new features to further promote and encourage foreign direct investment inflows into ASEAN.

In terms, of liberalization, ACIA enshrines Provisions which accommodate expansion of scope of this Agreement to cover other sectors in the future such as the Article 3(3) (f) "services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying; [Reaffirm our vision stated in AIA] (g) any other sectors, as may be agreed upon by all Member States"

ACIA has an expanded scope as it covers both FDI and Portfolio investment (compared with AIA [FDI only]). Also, the benefits of ACIA are extended to (a) ASEAN Investor (b) Foreign-owned ASEAN-based investor. Interestingly, ACIA remains flexible as it has a more comprehensive „Modification of Commitments" [Art.10] which includes clear procedures on modification of commitments, inclusion of provision for compensatory adjustment to ensure balance of benefits

In terms of protection, ACIA has a more comprehensive and clearer provisions – ensure better protection. ACIA Annex 1 details the "Approval in writing" while Annex 2 clarifies the key concepts of Expropriation and compensation - Fair and equitable treatment [Art. 11.2 – inclusion of „For greater certainty provision"]. Also, Art. 14.5: clarifies that the issuance of compulsory licenses must be in accordance with the TRIPS Agreement and is excluded from expropriation provision. As a result, the ACIA accommodates the balancing of protection of legitimate regulation vs. investors' interests.

ACIA was signed in response to the competitive global environment for foreign direct investment with the aim of creating a freer and more open investment regime based on international best practices. In this light, it is worth noting that ACIA provides a more comprehensive dispute settlement. The ACIA ISDS provisions are many and answered many concerns parties had. First, in order to ensure genuine claim (and avoid treaty shopping) the scope of coverage has been clarified [Art. 29]. The incurred loss or damage is regulated [Art.29.1]. No claim against own-State can be made under ACIA [Art.29.2]. Second, the promotion of Alternative dispute settlement: conciliation [Art.30], consultations and negotiation [Art.31]. Third, greater transparency and detailed procedures of investor-state dispute settlement [Art.32-Art.41]. Fourth, Mechanism of State-to-State dispute settlement [Art.27] - The ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed in 2004

5.1.2. The other regional initiatives

There has been a long debate on the "appropriate" membership of Asian economic cooperation between China and Japan. China prefers the ASEAN+3 framework (EAFTA), which Japan insisted 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 where the modality of economic interaction framework in East Asia can be discussed, going beyond

membership problem. All partners that have FTA/EPA with ASEAN (China, Korea, Japan, 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 liberalization. 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 has been made as of July 2013.

ASEAN-China 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 EPA with individual ASEAN members include relatively high-level of investment chapter that cover both protection and liberalization of investment. However, note that Japan-ASEAN EPA, which include ASEAN as a bloc, was signed in 2008, but investment chapter is still under negotiation. If JAPAN-ASEAN EPA's investment chapter simply consolidates Japan's EPA with individual ASEAN country, it would become a relatively comprehensive one, while there is a possibility that ASEAN as a bloc would exercise a bargaining power to lower the level of ambition. In any event, the modality of the future investment chapter for Japan-ASEAN EPA would likely to affect the investment chapter of RCEP.

Another important development that seems to have an important implication to the investment chapter of RCEP is China-Japan-Korea trilateral investment treaty recently signed, after 9 year negotiations. The CJK trilateral investment treaty is not that ambitious because it covers the protection of investment only (liberalization is not covered) and it list up limited prohibited measures with regard to performance requirement. The dominant argument in Japan is that if trilateral FTA among China, Japan and Korea would be pursued, its investment chapters should be more ambitious.

Thus, it is difficult to foresee at this stage the modality of investment chapter of RECP mainly because of the disagreement between Japan and China with regard to the level of ambition.

5.2. Cross-regional plurilateral IIA: the TPP

The transpacific partnership (TPP) is a 21st Century preferential trade agreement (PTA) to change PTAs and the problems associated with them by making them more useful in spreading liberalization globally, i.e. by "multilateralising regionalism".[15] The TPP's potential for successfully achieving such a goal is partly due to the nature of the partners (i.e. their diversity and geographical spread linking both sides of the Pacific),[16] and partly to the intended nature of the deal in achieving an all-new type of RTA design. In the view of leading authors, the definition

[15] As early as 2006, Richard Baldwin argued that since 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 multilateralise regionalism." See Richard Baldwin (2006) Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade, 29(11) The World Economy 1451-1518.

[16] The TPP countries currently are Australia, Brunei, Canada, Chile, Mexico, New Zealand, Malaysia, Peru, Singapore, United States, and Vietnam

of a "high-quality, 21st century"[17] means that such an agreement should combine three ley features. Firstly, a "high-quality, 21st century" agreement should have a comprehensive scope; secondly, it should have a substantial depth that includes cooperation and integration components among members. Thirdly, a "high-quality, 21st century" must contain a set of shared values, ideology or norms among participants.[18]

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 PTAs. Having said that, the evolution of the TPP could strengthen or fracture current trading regimes. The specific architecture of the agreement,[19] including the elements of various negotiating chapters, are critical elements to realizing 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 character of the negotiations which have progressed quite regularly while including new countries. Secondly, the US leadership which is obvious in the form but also the substance of the TPP. While exerting this leadership in a group of eleven countries (half being emerging economies), the US also has isolated the main emerging countries that are China, India and Brazil. Thirdly, in light of the previous points, the TPP represents a major PTA which illustrates the regionalization of investment rule-making and probably represents a benchmark for the state of the art of international law of foreign investment.

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. 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. These new negotiations may well confirm the global adoption of a NAFTA-like mode of investment regulation. The current paper hence focuses on the Asian rule-making in international investment but will also point out at relevant time to the possible interaction with the developments in the recent of the world which may well affect various Asian economies.

In fact, the June 2012 Leaked draft of the Trans-Pacific Partnership (TPP) investment chapter (which is largely unchanged as of April 2013) 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 with major innovations in terms of treaty drafting. However, the TPP crystalizes most recent innovations since 2001 in terms of NAFTA interpreting notes but also 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 whether the TPP will strengthen or fracture current regimes.

As these investment treaty is negotiated in the context of an agreement of great economic significance, doted of a broad MFN provision, if the TPP negotiations proceed successfully, then

[17] See C.L. Lim, Deborah K. Elms and Patrick Low (2012) What is "high-quality, twenty-first century" anyway?, in: Chin Leng Lim, Deborah Elms, Patrick Low (eds) The Trans-Pacific Partnership (TPP) – A Quest for Twenty-first Century Trade Agreement, (London: Cambridge University Press, 2012) 3-18. See also See, Meredith Kolsky Lewis (2011) The Trans-Pacific Partnership: New Paradigm Or Wolf In Sheep's Clothing?, 34 B.C. Int'l & Comp. L. Rev. 27-52. See also, Exploring the Confines of International Investment and Domestic Health Protections--Is a General Exceptions Clause a Forced Perspective? J Chaisse Am. JL and Med. 39, 332-442.

[18] See Deborah K. Elms and C.L. Lim (2012) An overview and snapshot of the TPP negotiations, in: Chin Leng Lim, Deborah Elms, Patrick Low (eds) The Trans-Pacific Partnership (TPP) – A Quest for Twenty-first Century Trade Agreement, (London: Cambridge University Press, 2012) 21-44.

[19] For example, how will the TPP relate to existing PTAs between TPP negotiating parties, such as the US-Australia, US-Singapore or Singapore-Australia PTAs?

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 AANZFTA (2010). The TPP is even more clearly a strengthening of investment disciplines for some developing countries such as Vietnam or Malaysia which were not bound to the US so far.

Last but not the least, the TPP membership is open to new members willing to sign up to its commitments under the sole condition it is accepted by the current TPP members. The absence of geographic or economic conditions give the TPP a significant attractiveness. Japan made an official announcement to join TPP negotiations 15 March 2013. And the list of prospective member states is long South Korea, Thailand, Taiwan ROC[20], Philippines, Laos, Colombia, and Costa Rica. Should all these countries join the TPP and ratify, among others, the investment chapter, no doubt that we would have an embryo of a long awaited multilateral agreement on investment.

5.3. Exogenous parameter: the European Union shift

In the EU, the Treaty of Lisbon extended in 2009 the Common Commercial Policy to foreign direct investment (Articles 206 and 207 TFEU)[21]. Albeit subject to unanimity, the EU competence, which will soon be implemented (and affect all third countries) is broad and exclusive[22], thereby enabling it to conceive what could be the main features of a new model of European investment agreement.

The EU is, by far, the first foreign investment power. At the end of 2010, EU outward stocks of FDI in Asia represented Eur 574,9 billion which is equivalent to 14% of EU outward stocks of FDI which is the amount of FDI affected by the change in FDI competence (Eurostat, European Commission, July 2013).[23]

The shift from national to supra-national 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.[24] Neither the 2008 Economic Partnership Agreement with the CARIFORUM

[20] Tawina President Ma Ying-jeou said his government will work hard to create the conditions for Taiwan to participate in the U.S.-led Trans-Pacific Partnership at an appropriate time. Lee Shu-hua and Y.F. Low (2013) President pledges to create conditions for Taiwan's TPP access, 2013/03/21.

[21] Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?*, 15 J. INT'L ECON. L. 51, 66 (2012).

[22] 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 Julien (2012) 'Promises and Pitfalls of the European Union Policy on Foreign Investment - How Will the New EU Competence on FDI Affect the Emerging Global Regime?', 15(1) *Journal of International Economic Law* 15-35.

[23] In Asia, the most important destinations for outward stocks of EU-27 FDI were Singapore, Hong Kong and Japan, together accounting for half of the EU-27's positions in Asia in 2010. The relative importance of China as a destination for EU-27 FDI has grown steadily over recent years, and outward FDI stocks reached EUR 75.1 billion by the end of 2010, which was higher than in South Korea, India and Indonesia (the next largest partners). Virtually all these EU FDI in Asia (and FDi currently made) are going to see their legal protection modified as a result of current negotiations.

[24] The "negotiation mandate" for EU-Canada/India/Singapore PTAs was approved by the General Affairs Council on September 12, 2011. This confidential document confirms the trend that the EU will negotiate broad encompassing PTAs to replace narrow and conventional BITs. See Chaisse Julien (2012) 'Promises and Pitfalls of the European Union Policy on Foreign Investment - How Will the New EU Competence on FDI Affect the Emerging Global Regime?', 15(1) *Journal of International Economic Law* 15-35.

states[25] nor the 2010 signed agreement with South Korea address the core investment protection issues of minimum standards of treatment, expropriation and compensation, nor does it provide recourse to investor-state arbitration procedures. The latter outcome reflects the legal situation *before December 2009* and the shared competency (or "mixed competence")[26] between Member States and the EU in matters of investment regulation.

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 liberalisation and investment protection."[27] The most important change which will 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 recognized in the BITs. "Entry" provisions erode the host state's control over the admission of foreign investment into its territory.[28] They may affect the capacity of the host state to prioritize 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. As of 5 July 2013, there are eight Asian partners with which the EU is negotiating new trade agreements which will reflect the recent changes in EU FDI competence. **Annex 3** summarizes the current EU negotiations with Asian countries.

6. Conclusion

This paper provides with a framework analysis to understand investment rule-making in Asia. Several important issues can be summarized. First, as in the rest of the world, the regulation of international investment is a field of law which has experimented major developments in Asia, especially in the last decade. Second, there are currently 146 intraregional BITs which are currently in force, while there are also 41 intraregional BITs have been signed but haven't yet entered into force. In addition, there are 21 intraregional FTAs in Asia that have investment chapters which all entered into force. Thus, in total, there are 187 intraregional IIAs in force (208 intraregional IIAs if "signed but not yet effect" IIAs are included). This great number of IIAs forms what is the core of the Asian noodle bowl of investment treaties.

Third, Out of the 48 ADB countries, a group of 13 economies comprises the frontrunners which are the States that have concluded more than forty IIAs. This group is made of Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia,

[25] See : http://www2.parl.gc.ca/Content/LOP/ResearchPublications/2010-56-e.htm - fn5

[26] On the concept and implications of « mixed competence », see Nikos Lavranos, 'New Developments in the Interaction between International Investment Law and EU Law' (2010) 9 The Law & Practice of International Courts and Tribunals 409–441

[27] EU, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, COM(2010)343 final, Brussels, July 7 2010, p. 5.

[28] 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. It is perfectly true. This implies that 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 "Gradually, the European Union has started filling the gap of 'entry' or 'admission' through both multilateral and bilateral agreements at EU level covering investment market access and investment liberalization" and illustrates this in a footnote, because, at the multilateral level, GATS provides for a framework for undertaking commitments on the supply of services through a commercial presence (defined as "mode 3" by GATS Article I). At the bilateral level, the EU has concluded negotiations with South Korea on a PTA, which includes provisions on market access for investors and establishments.

Malaysia, India, Korea, Republic of, China, People republic of. Last but not the least, although investment rule-making has undergone a profound mutation over the last years (treatification, legalization, proliferation), it is very likely to continue to evolve very quickly. In this regard a major trend of international investment rule making is the increasing regionalization of negotiations which will modify Asian regulation. 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 involved more than two countries and cover great number of economic areas.

The rise of plurilateral agreements such as ACIA, ASEAN+ agreements, RCEP, TPP with wider scope is likely to produce greater economic effects while certainly spreading the basic principles of foreign investment protection to most Asian economies. It also means that research efforts and officials work should be more focused on these new instruments which as any new species remain quite unknown in their anatomy, life and future effects.

Annex 1 – The List of Asian countries (ADB Regional Members)

MEMBERS	YEAR OF MEMBERSHIP
AFGHANISTAN	1966
ARMENIA	2005
AUSTRALIA	1966
AZERBAIJAN	1999
BANGLADESH	1973
BHUTAN	1982
BRUNEI DARUSSALAM	2006
CAMBODIA	1966
CHINA, PEOPLE'S REPUBLIC OF	1986
COOK ISLANDS	1976
FIJI	1970
GEORGIA	2007
HONG KONG, CHINA	1969
INDIA	1966
INDONESIA	1966
JAPAN	1966
KAZAKHSTAN	1994
KIRIBATI	1974
KOREA, REPUBLIC OF	1966
KYRGYZ REPUBLIC	1994
LAO PDR	1966
MALAYSIA	1966
MALDIVES	1978
MARSHALL ISLANDS	1990
MICRONESIA, FEDERATED STATES OF	1990
MONGOLIA	1991
MYANMAR	1973
NAURU	1991
NEPAL	1966
NEW ZEALAND	1966
PAKISTAN	1966
PALAU	2003
PAPUA NEW GUINEA	1971
PHILIPPINES	1966
SAMOA	1966
SINGAPORE	1966
SOLOMON ISLANDS	1973
SRI LANKA	1966
TAIPEI,CHINA	1966
TAJIKISTAN	1998
THAILAND	1966
TIMOR-LESTE	2002
TONGA	1972
TURKMENISTAN	2000
TUVALU	1993
UZBEKISTAN	1995
VANUATU	1981
VIET NAM	1966

Annex 2. The Asian IIAs noodle bowl

(Excel file near here)

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

Annex 3: Current EU negotiations with Asian countries post-2009 scenario

Asian Country	Negotiating Directives	Current Status	Next Steps
China	Announcement made May 23, 2013	Preparations	Starting investment negotiations
India	Negotiating authorization and directives of April 2007	Negotiations were launched in June 2007; after 11 full rounds negotiations are now in a phase where negotiators meet in smaller more targeted clusters rather than full rounds, i.e. expert level inter-sessionals, chief negotiator meetings and meetings at Director General level. Negotiations are ongoing, on market access for goods (improve coverage of both sides' offers), the overall ambition of the services package and achieving a meaningful chapter on government procurement	Both sides are aiming to find solutions which are mutually acceptable, so as to achieve an ambitious outcome which would give an important boost to trade between the EU and India.
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 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 EUKorea FTA, which is in operation since July 2011.	The draft agreement will now be reviewed by legal teams from both sides, which aim to initial the draft text in summer 2013. Negotiations on investment protection, which are based on a new EU competence under the Lisbon Treaty and started later, will continue in 2013.
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 FTA negotiations took place in Brussels in April 2012.	Technical Working Groups in a number of negotiating areas met in Kuala Lumpur September 2012.
ASEAN	Negotiating authorisation and directives of April 2007.	Negotiations with a regional grouping of 7 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 assessing the level of ambition at

			bilateral level.
Viet Nam	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 from 23-26 April 2013.	Both sides seek for 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. The fourth round of negotiations took place in Brussels from 2 to 5 July.
Japan	NA	At the EU-Japan Summit of May 2011, the EU and Japan decided to start preparations for both an FTA and a political framework agreement. The EU and Japan stated that on the basis of a successful scoping exercise, the European Commission would seek the necessary authorisation from the Council for negotiations. After one year of intensive discussions, in May 2012, the Commission agreed with Japan on a very ambitious agenda for the future negotiations (covering all EU market access priorities). In the context of the negotiations, the Commission also agreed with Japan on specific 'roadmaps' for the removal of non-tariff barriers as well as on the opening up of public procurement for Japan's railways and urban transport market. In July 2012 the European Commission decided to ask the Member States for their agreement on opening FTA negotiation with Japan. On the 29 November 2012 the Council decided to give the Commission 'the green light' to start trade negotiations with Japan. On 29 November 2012 the Council decided to give the Commission 'the green light' to start trade negotiations with Japan. The negotiations with Japan 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. The second round is scheduled for 24-28 June in Tokyo
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 and 7 February in Ottawa to take stock of the remaining open points. The aim is to conclude the CETA negotiations in the 3 Rd 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 5 July 2013