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The Shifting Tectonics of International Investment Law—Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region

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THE SHIFTING TECTONICS OF INTERNATIONAL INVESTMENT LAW—STRUCTURE AND DYNAMICS OF RULES AND ARBITRATION ON FOREIGN INVESTMENT IN THE ASIA-PACIFIC REGION

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ABSTRACT

This Article studies the evolving international regime for investment, with a focus on Asia-Pacific experiences and with the aim to provide a macro analysis of the current treaty practices in this quickly developing region of the world. The regulation of international investment in Asia-Pacific region as a field of law has experienced major developments, particularly within the last decade. Currently, a large number of bilateral investment treaties and preferential trade agreements form the core of the Asian "noodle bowl" of investment treaties. The recent rise in multilateral agreements that have a wider regulatory scope are likely to both produce significant economic effects in Asia-Pacific economies and disseminate basic foreign investment protection principles to most Asia-Pacific countries.

I. INTRODUCTION

Foreign investments are one of the key interests of any country's political economy. International investments can aid the host country[1] in developing a sound economic structure, increasing and diversifying manufacturing, offering novel and more developed

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1. This Article refers to "countries" in a broad sense, so as to encompass any geographical entity with international personality and capable of conducting an independent foreign economic policy. The designations employed do not imply the expression of any opinion concerning the legal status of any country or territory such as the Special Administrative Regions of Hong Kong and Macau or the international status of the Republic of China (Taiwan).

services, creating employment, and bringing innovative technology, amongst other benefits.[2] Additionally, countries endeavor to encourage well-established domestic companies to expand their business into other markets because national companies abroad bring long-term capital gains, help build economic and political ties with other nations, and may ensure access to natural resources that the home country lacks.[3] Concluding international agreements with relevant partners is one of the regulatory policy tools that works toward fostering foreign expansion of national companies.[4] The existence of an international investment agreement (IIA) may signal to international investors a favorable investment environment and provide them with guarantees that their investments will benefit from adequate regulatory conditions in their business operation.[5]

The main purpose of the IIAs is to ensure a stable and predictable environment for investment, through providing investor protection (including relative and absolute standards, as discussed below) and giving access to investor and state arbitration in a case of a breach of a treaty obligation.[6] As a result, IIAs interest all

2. *See* Andreas Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 129 (2003); K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. L. 105, 125 (1986); Bertram Boie & Julien Chaisse, *The Regulatory Framework of International Investment: The Challenge of Fragmentation in a Changing World Economy*, *in* THE PROSPECTS OF INTERNATIONAL TRADE REGULATION—FROM FRAGMENTATION TO COHERENCE 417, 418 (Thomas Cottier & Panagiotis Delimatsis eds., 2011).

3. For an overview, see ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 391–414 (2002).

4. *See* Daniel R. Sieck, *Confronting the Obsolescing Bargain: Transacting Around Political Risk in Developing and Transitioning Economies Through Renewable Energy Foreign Direct Investment*, 33 SUFFOLK TRANSNAT'L L. REV. 319, 326 (2010).

5. For further information on the impact of these treaties on foreign direct investment (FDI) flows, see Julien Chaisse & Chistian Bellak, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology*, 3 TRANSNAT'L CORP. REV. 3, 6 (2011), and Julien Chaisse & Chistian Bellak, *Navigating the Expanding Universe of Investment Treaties—Creation and Use of Critical Index*, 18 J. INT'L ECON. L. 1 (2015). *See also* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 70 (2005) (noting investor benefits that may result from international investment agreements (IIAs) in creating an attractive investment environment for foreign investors). The U.S. Trade Representative's office recognized the goals of the U.S. Bilateral Investment Treaties Program to be the protection of U.S. investment abroad; the encouragement and adoption in foreign countries of policies that treat private investment fairly; and the support of the development of international law standards that are consistent with the stated goals. *See* Jeffrey Lang, *Keynote Address*, 31 CORNELL INT'L L.J. 455, 457 (1998).

6. Along with an increase in number of IIAs, the last decade has also witnessed an exponential surge in investment disputes between foreign investors and host country governments. Arbitral panels are charged with the task of applying the rules of IIAs in specific

members of the international community.[7] Capital-exporting countries use these rules to seek investment opportunities abroad and to protect their investments in foreign jurisdictions.[8] Capital-importing economies use these rules to promote inward investment by ensuring foreign investors a stable business environment in line with high international standards.[9] Several developing countries, such as People's Republic of China (PRC), India, and Korea, represent both capital-exporting and capital-importing nations.[10] From their capital-importing perspective, these countries wish to benefit from foreign investment;[11] as vigorous and growing capital-exporting economies, it is also their interest to expand their businesses into other markets.[12]

Germany and Pakistan signed the very first bilateral investment treaty (BIT) in 1959; since then, BITs have been one of the most popular and widespread forms of IIAs.[13] Since IIAs play a signifi-

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cases, an often complex process given the broad and sometimes ambiguous terms of these arrangements. *See generally* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 173–75 (2005) (noting that foreign investors are increasingly resorting to the mechanism of international arbitration for resolving their disputes with the government of a host country). On the emerging issue of sovereign debt restructure by international Tribunals, see Julien Chaisse, *The Impact of International Investment Agreements on the Greek Default*, *in* INTERNATIONAL ECONOMIC LAW AFTER THE GLOBAL CRISIS—A TALE OF FRAGMENTED DISCIPLINE 306, 306–28 (Chin Leng Lim & Bryan Mercurio eds., 2015).

7. *See* Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AMS. 155, 155 (2007); Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections*—General Exceptions Clause as a Forced Perspective, 39 AM. J.L. & MED. 332, 334–35 (2013).

8. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 22 (2008) ("[T]he purpose of investment treaties is to address the typical risks of a long-term investment project, and thereby to provide for stability and predictability in the sense of an investment-friendly climate.").

9. *Id.*

10. *See* Prabhash Ranjan, *India and Bilateral Investment Treaties—A Changing Landscape*, 29 ICSID REV. 419, 429–30 (2014); Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime*, 12 J. INT'L ECON. L. 457, 499 (2009); Julien Chaisse, *International Investment Treaties and China Outbound Investments*, *in* CHINA OUTBOUND INVESTMENTS—LAW AND PRACTICE 213, 213 (Lutz-Christian Wolff ed., 2011); FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA 296 (Vivienne Bath & Luke Nottage eds., 2011).

11. *See* David A. Gantz, *The BRIC States and Outward Foreign Direct Investment*, 20 INT'L TRADE L. REV. 24, 24–26 (2014) (reviewing DAVID COLLINS, THE BRIC STATES AND OUTWARD FOREIGN DIRECT INVESTMENT (2013)).

12. *Id.*

13. Vertrag zwischen def Bundesrepublik Deutschland und Pakistan zur Förderung und zum Schutz von Kapitalanlagen [Treaty Between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments], Ger.-Pak., Nov. 25, 1959, BUNDESGESETZBLATT, Teil II [BGBL. II] at 793 1961 (Ger.); *see* Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27, 28 (2004).

cant role in the economic development of all countries, they have considerably expanded in number and types, creating their own specific and dynamic branch of international economic law.[14] The core of foreign investment is based on BITs[15] and, increasingly, on preferential trade agreements (PTAs).[16] Currently, more than twenty-eight hundred BITs, involving 179 countries, have been signed. The annual growth rate peaked in 2001; in 2014, there were thirty-three new BITs.[17] Further, over three hundred bilateral and regional PTAs have been signed, with fourteen new PTAs signed in the past year.[18] The number of PTAs doubled between the years 2003 and 2014.[19] In total, there are now more than three

14. Since the North American Free Trade Agreement's (NAFTA) entry into force, there has been an explosion in the number of IIAs that involve many countries. The IIAs have existed primarily between developed and developing countries to protect the formers' investors. *See* Salacuse, *supra* note 7, at 155. However, in the last decade, there has been a growing number of the IIAs concluded between developing countries, characterizing the evolution of emerging economies and the ascendancy of sovereign wealth funds. *See generally* Julien Chaisse et al., *Emerging Sovereign Wealth Funds in the Making: Assessing the Economic Feasibility and Regulatory Strategies*, 45 J. World Trade 837 (2010) (investigating the effect of sovereign wealth funds in wake of 2008 economic crash).

15. A bilateral investment treaty (BIT) is a treaty between two states that ensures that investors of a state-party receive certain standards of treatment when investing in the territory of the other state-party. *See* Jose E. Alvarez, *Empire, Contemporary Foreign Investment Law: An "Empire of Law" or the "Law of Empire"?*, 60 Ala. L. Rev. 943, 957–59 (2009). The purpose of the BIT is to encourage the FDI between the two State-Parties, which hopefully leads to economic growth for both state-parties.

16. *Regional Trade Agreements and Preferential Trade Arrangements*, World Trade Org. (WTO), https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (last visited Apr. 15, 2015). In this Article, we use the term BIT in reference to international instruments specifically devoted to the promotion and protection of foreign investment. Preferential trade agreements (PTAs) are meant to denote all bilateral, regional, or plurilateral arrangements that seek the preferential liberalization of investment flows, along with trade in goods and in services. The PTAs also often provide rules on other areas, such as intellectual property, competition, and movement of natural persons. Both BITs and PTAs with investment disciplines are encompassed under the broader terms of IIAs. Not all PTAs deal with the protection of direct investments (as such, and not as services); direct investment matters are often included in a separate chapter of the PTA. NAFTA is a prime example of a PTA. Chapter XI of NAFTA is devoted to the promotion and protection of foreign investments. These separate investment chapters in the PTAs are comparable, on average, to self-standing BITs. They can include rules on both investment liberalization (nondiscrimination safeguards) and investment protection (substantive standards of treatment afforded by the host state to the foreign investor or investment). *See* U.N. Conference on Trade & Dev. (UNCTAD), *Global FDI Rose by 11%; Developed Economies Are Trapped in a Historically Low Share*, Global Investment Trends Monitor, Jan. 28, 2014.

17. *International Investment Agreements Navigator*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA (last visited Apr. 15, 2015).

18. *See infra* Table 1.

19. *See infra* Table 1.

thousand IIAs, which constitute a decentralized and somewhat chaotic global regime for foreign investment.[20]

However, this global picture is inadequate to understand the specific investment regimes of certain regional arenas. Specifically, the economies of Asia-Pacific countries have been growing very fast in the last few years with significant foreign direct investment (FDI) inflows and, more recently, growing FDI outflows.[21] Since 2000, many Asia-Pacific countries have developed and reinforced their network of IIAs, making investment a key aspect of their economic pacts with third countries.[22] This Article strives to explore the extent to which the situation in the Asia-Pacific, specifically, converges with global investment trends. This Article therefore attempts to identify regional trends and highlight specific features of Asia-Pacific investment treaties and policies. For that purpose, the Article is based on a comprehensive review of all IIAs concluded by at least one Asia-Pacific country (1,255 IIAs)[23] and attempts to assess where Asia-Pacific's agreements stand in comparison to the most recent global trends in the evolving rules on foreign investment. This Article will also investigate the reasons why there have only been a limited number of international investment disputes that involve Asia-Pacific states while Latin American and East European countries have experienced significant amounts of investor dispute claims.[24]

In order to do this, Part II provides a macro view of foreign investment international rulemaking in the Asia-Pacific region.[25] This aids in understanding the key characteristics of the Asia-Pacific IIAs and the relationship between currently existing IIAs

20. *See generally* Julien Chaisse & Puneeth Nagaraj, *Changing Lanes—Trade, Investment and Intellectual Property Rights*, 36 HASTINGS INT'L & COMP. L. REV. 223 (2014) (analyzing current regulatory and litigation landscape of IIAs concerning trademarks and other intellectual property).

21. *See* Julien Chaisse, *The Patterns and Dynamics of Asia's Growing Share of FDI*, *in* ASIA EXPANSION OF FOREIGN DIRECT INVESTMENT—STRATEGIC AND POLICY CHALLENGES 1, 2 (Julien Chaisse & Phillipe Gugler eds., 2009) (reviewing the major determinants in the expansion of trade and foreign direct investment into Asian economies).

22. *See id.* at 14.

23. *See infra* Part II for methodology and data.

24. UNCTAD, *Recent Developments in Investor-State Dispute Settlement*, INT'L INVESTMENT AGREEMENTS—ISSUE NOTES, May 2013, *available at* http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

25. The Asia-Pacific refers to the forty-eight developing member economies of the Asian Development Bank (ADB). Apart from the Democratic People's Republic of Korea, all Asian economies are considered in this study, and their respective investment treaties analyzed.

within the region.[26] Part III further extends the analysis by exploring the conditions and regulation of market access in the Asia-Pacific region. Part IV analyzes the regulation of conditions of competition for foreign investors. Part V focuses on the proper protection of foreign investments in the Asia-Pacific. Part VI takes a prospective stance and discusses future trends for arbitration and investment rulemaking in the Asia-Pacific. Part VII concludes.

II. Understanding Asia-Pacific Rulemaking in International Investment: The Macro View

Being a party to an investment pact indicates that a host economy will likely be affected by foreign investment and that its domestic investment policy will be subject to the international obligations expressed in the investment agreement. Understanding the Asia-Pacific region's IIA rulemaking requires identifying international treaties—either BITs or PTAs with investment chapters—that involve at least one Asia-Pacific country. Overall, in the Asia-Pacific region, current investment negotiations often take the form of broader pacts, such as the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement (ACIA), ASEAN+ agreements, Regional Comprehensive Economic Partnership (RCEP), and Trans-Pacific Partnership (TPP), which involve more than two countries and cover a great number of economic areas.[27] This increasing regionalization of negotiations has modified and will continue to modify Asia-Pacific economic regulation.

Currently, over three thousand IIAs have come into effect worldwide.[28] This remains an approximation, as no international organ-

26. This research was conducted understanding that the availability of data on IIAs is limited.

27. The Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, Feb. 26, 2009, *available at* http://agreement.asean.org/media/download/20140119035519.pdf [hereinafter ACIA]; ASEAN+ Agreements (available in searchable database at http://agreement.asean.org/home.html); *ASEAN Framework for Regional Comprehensive Economic Partnership*, Ass'n Southeast Asian Nations, http://www.asean.org/news/item/asean-framework-for-regional-comprehensive-economic-partnership (last visited Apr. 15, 2015); Press Release, Off. of the U.S. Trade Representative, Trans-Pacific Partnership Leaders Statement (Nov. 12, 2011), *available at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2011/november/trans-pacific-partnership-leaders-statement; *see* Julien Chaisse, *The Regulation of Investment in the Transpacific Partnership—Towards a Defining International Agreement for the Asia-Pacific Region*, *in* The Regionalization of Investment Treaty Arrangements—Developments and Implications 312 (N. Jansen Calamita & Mavluda Sattorova eds., 2015) 103–46.

28. *See* J. Zhan et al., United Nations Conference on Trade and Development, World Investment Report 199–202 (2012); *see also* Boie & Chaisse, *supra* note 2, at 417–50.

ization has the role or capacity to track the entry into force of new IIAs.[29] However, looking at the data published by the U.N. Conference on Trade and Development (UNCTAD),[30] it appears that approximately 2,850 IIAs are BITs.[31] Asia-Pacific countries, specifically, have concluded 1,194 BITs. Therefore, nearly one-third of the world's BITs involves at least one Asian-Pacific country.[32] Further, approximately 220 PTAs have been reported to the World Trade Organization (WTO); of these, two hundred or so are PTAs that contain investment chapters.[33] Since 1959, Asia-Pacific countries have becomes involved in sixty-one PTAs with investment chapters.[34]

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29. Christoph Herrman noted as follows:

> In the investment field, transparency is also making progress, albeit—lacking a multilateral forum and body of law—more slowly than in the WTO. As the impact of investment agreements on domestic policy choices is even more apparent and arguably more considerable than that of the WTO legal framework, this has been increasingly criticized, together with other aspects of Investor-State Dispute Settlement (ISDS). The negotiation of bilateral investment treaties does not have to be made public prior to registration with the United Nations Treaty Office.

Christoph Herrmann, *Transleakancy*, *in* Trade Policy Between Law, Diplomacy and Scholarship: Liber Amicorum in Memoriam Horst G. Krenzler, European Yearbook of International Economic Law (manuscript at 3) (Herrmann, Simma, & Streinz eds., 2015); *see also* Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order—A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. Int'l Econ. L. 9, 9–36 (2013).

30. UNCTAD is the principal organ of the U.N. General Assembly dealing with trade, investment, and development issues that has developed over the last twenty years a general expertise on IIAs. UNCTAD, Global Value Chains and Development: Investment and Value Added Trade in the Global Economy: A Preliminary Analysis (2013), *available at* http://unctad.org/en/PublicationsLibrary/diae2013d1_en.pdf.

31. *See generally* Pieter Bekker & Akiko Ogawa, *The Impact of Bilateral Investment Treaty (BIT) Proliferation on Demand for Investment Insurance: Reassessing Political Risk Insurance After the "BIT Bang"*, 28 ICSID Rev. 314, 314–50 (2013) (assessing the proliferation of BITs in the 1990s and its ramifications). For data, see UNCTAD, World Investment Report 2013: Global Value Chains: Investment and Trade for Development 112 (2014), *available at* http://unctad.org/en/publicationslibrary/wir2013_en.pdf.

32. This Section partially draws from Julien Chaisse & Shintaro Hamanaka, *The Investment Version of Asian Noodle Bowl—Proliferation of Agreements* 3 (Asian Dev. Bank, Working Paper No. 128, 2014).

33. *Id.* The WTO receives notifications from WTO members regarding PTAs. Importantly, some PTAs have been established without notification to the WTO. Jo-Ann Crawford & Roberto V. Fiorentino, *The Changing Landscape of Regional Trade Agreements* 1–3 (WTO, Discussion Paper No. 8, 2005), *available at* http://www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf; *see also* WTO, World Trade Report 2011: WTO and Preferential Trade Agreements: From Co-Existence to Coherence 67 (2011), *available at* http://perma.cc/XR44-J22M (providing statistical analysis of PTAs).

34. Chaisse & Hamanaka, *supra* note 32, at 3.

A. *"Noodle Bowl" of International Investment Agreements*

Several of the current Asia-Pacific IIAs have been concluded with leading capital-exporting countries, such as the United States or Western European nations.[35] Moreover, examining Asia-Pacific IIAs shows that a majority of them can be characterized as cross-regional IIAs in which a non-Asian party tends to act as the capital-exporting country. As such, current IIAs within the Asia-Pacific region may reflect the interests and bargaining powers of capital-exporting countries rather than the interests of the capital-importing nations.[36] To avoid reflecting non-Asia-Pacific interests, this Article's analysis is limited to IIAs concluded between Asia-Pacific countries only (i.e., intraregional IIAs). Tailoring the analysis to purely Asia-Pacific IIAs also helps in identifying the Asia-Pacific countries that play a leading role in the current development of investment rules in the Asia-Pacific.

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35. *See* Walid Ben Hamida et al, *International Investments Law and Practice*, 5 INT'L BUS. L.J. 513, 517–18 (2013). Some of Asia-Pacific's IIAs are also concluded with other leading capital-exporting countries such as Japan, Republic of Korea, Singapore, Hong Kong, and, increasingly, the People's Republic of China (PRC). *See* Guiguo Wang, *China's Practice in International Investment Law: From Participation to Leadership in the World Economy*, 34 YALE J. INT'L L. 575, 575 (2009). It is important to understand the parties involved in IIAs because foreign investors may choose to initiate legal proceedings in the domestic courts of the host country or they may choose to initiate international arbitration proceedings instead. Investors may prefer international arbitration as it is easier to understand international law and practice; however, international tribunals are not immune from domestic political pressures. *See* Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, *in* 50 YEARS OF THE NEW YORK CONVENTION: ICAA CONGRESS SERIES NO. 14, at 43 (Albert Jan van den Berg ed., 2009).

36. Andrew T. Guzman noted the following regarding least developed countries (LDCs):

> LDCs face a prisoner's dilemma in which it is optimal for them, as a group, to reject the Hull Rule, but in which each individual LDC is better off "defecting" from the group by signing a BIT that gives it an advantage over other LDCs in the competition to attract foreign investors.

Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: The Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 666–67 (1998).

TABLE 1: CHARACTERISTICS OF ASIA-PACIFIC IIAS[37]

	World Total	Asia-Pacific Total	Cross-Regional	Intra-Regional
Investment Treaties	2,850+	1,201	1,048	146
Investment Chapter Under PTAs	200+	64	40	21
Total IIAs	3,000+	1,265	1,088	167

Globally, BITs are the principal device for regulating international investment.[38] The international investment of the Asia-Pacific region is also principally regulated by BITs as there are 149 intraregional BITs currently in force in the Asia-Pacific region.[39] Additionally, there are twenty-five intraregional PTAs in Asia-Pacific with investment chapters, all of which have entered into force.[40] Thus, in total, there are 188 intraregional IIAs in force.[41]

37. The information in this Table is a personal compilation of Asia-Pacific practices by combining information from various databases. *See Investment Policy Hub: International Investment Agreements*, UNCTAD, http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBIT (last visited Apr. 15, 2015); *Welcome to the Regional Trade Agreements Information System*, WTO, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (last visited Apr. 15, 2015). *See also* public information from the Ministries of Foreign Affairs websites of Bhutan, Cook Islands, Fiji, Kiribati, Maldives, Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Samoa, Solomon Islands, Timor-Leste, Tuvalu, Tonga, Vanuatu, Afghanistan, Myanmar, Nepal, Papua New Guinea, Brunei Darussalam, New Zealand; Hong Kong, Cambodia, Lao People's Democratic Republic (PDR), Turkmenistan, Taipei, Japan, Australia, Kyrgyz Republic, Sri Lanka, Bangladesh, Georgia, Tajikistan, Armenia, the Philippines, Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, the Republic of Korea, and the People's Republic of China.

38. *See* Salacuse, *supra* note 7, at 155.

39. *See supra* Table 1. It is also important to note that there are forty-one intraregional BITs that have been signed but have not yet entered into force.

40. *See infra* Table 2.

41. According to our calculation, the total is 208 if IIAs signed but not yet in effect are included. For details, see Annex 1.

These IIAs form the core of the Asian "noodle bowl"[42] of investment treaties.[43]

TABLE 2: INTRA-ASIA-PACIFIC PTAS WITH AN INVESTMENT CHAPTER[44]

International Investment Agreements	Date in Force
New Zealand-Singapore	January 1, 2001
Japan-Singapore	November 30, 2002
PRC-Hong Kong, China	June 29, 2003
Singapore-Australia	July 28, 2003
Thailand-Australia	January 1, 2005
India-Singapore	August 1, 2005
Republic of Korea-Singapore	March 2, 2006
Trans-Pacific Strategic Economic Partnership	May 28, 2006
Japan-Malaysia	July 13, 2006
Pakistan-PRC	July 1, 2007
Japan-Thailand	November 1, 2007
Pakistan-Malaysia	January 1, 2008
Brunei Darussalam-Japan	July 31, 2008
PRC-New Zealand	October 1, 2008
Japan-Indonesia	July 1, 2008
Brunei Darussalam-Japan	July 31, 2008
Japan-Philippines	December 11, 2008
New Zealand-Malaysia	August 1, 2010
Hong Kong, China-New Zealand	January 1, 2011
Australia-New Zealand (ANZCERTA)	January 1, 1989 (Investment Protocol in 2011)
India-Malaysia	July 1, 2011
India-Japan	August 1, 2011

42. Jagdish Bhagwati coined the term "spaghetti bowl." Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, *in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2–3 (Jagdish Bhagwati & Anne O. Krueger eds., 1995). This term refers to "a mish-mash of overlapping, supporting, and possibly conflicting, obligations." In the Asian context, the Asian Development Bank and other commentators have used the term "noodle bowl" instead. Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 978 (2011); Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism* 5 (Asian Dev. Bank, Working Paper Series on Regional Economic Integration No. 7, 2007), *available at* http://www.adb.org/documents/papers/regional-economic-integration/WP07-Baldwin.pdf; Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends and Challenges* 3 (Asian Dev. Bank, Working Paper No. 144, 2009), *available at* http://www.adbi.org/files/2009.08.04.wp144.asian.fta.trends.challenges.pdf.

43. *See infra* Annex 1.

44. The information in this Table is a personal compilation of Asia-Pacific practices by combining information from various databases. *See* sources cited *supra* note 37.

ACIA	March 1, 2012
Australia-Malaysia	January 1, 2013
New Zealand-Taiwan	November 25, 2013
Singapore-Taiwan	April 22, 2014

In addition to BITs, PTAs have also become popular means of formalizing international rules on investment.[45] While BITs and PTAs are largely similar in that both attempt to liberalize and protect investment through the legalization of economic relations, there are some minor technical differences.[46] First, BITs usually have an expiry time (e.g., ten years) whereas PTAs are perpetual unless the contracting parties decide to terminate the implementation under an agreed termination clause.[47] BITs expiry dates make it easier to predict when overlapped or nested agreements will unwind. Secondly, most-favored nation (MFN)[48] status is usually applicable only within the same category of IIAs.[49] Therefore, favorable MFN provisions in BITs do not apply to PTAs with nonparty countries just as those provisions in PTAs do not apply to BITs with nonparty countries.[50] This means that MFN clauses in BITs lead only to the transfer of MFN provisions to other BITs with third countries.[51] In terms of implementing MFN provisions, BITs

45. See Jeffrey Schott & Julia Muir, *US PTAs: What's Been Done and What It Means for the TPP Negotiations in The Trans-Pacific Partnership (TPP)*, *in* The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement 45, 45–63 (C.L. Lim et al. eds., 2012).

46. Sébastien Miroudot, *Investment*, *in* Preferential Trade Agreement Policies for Development: A Handbook 307 (2011), *available at* http://siteresources.worldbank.org/INTRANETTRADE/Resources/C14.pdf.

47. *See* Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 Mich. J. Int'l L. 537, 568–84 (2012) (discussing limitations of substantive uses of a most favored nation (MFN) treatment clause).

48. The MFN treatment clause has become such a typical clause in treaties that the International Law Commission (ILC) has drawn up Draft Articles on Most-Favoured-Nation clauses (ILC's Draft Articles). For commentaries on the ILC's Draft Articles, see Report of the International Law Commission on the Work of its Thirtieth Session, May 8–July 28, 1978, Official Records of the General Assembly, 33d Sess., Supp. No. 10, U.N. Doc. A/33/10, 2 Yearbook of the International Law Commission (1978).

49. *See, e.g.*, Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, *in* 3 Investment Treaty Law: Current Issues 241 (Andrea Bjorklund et al. eds., 2009) (advocating a jurisdictional extension of consent by means of MFN clauses when they are worded so as to apply to the entire subject matter of the treaty); *see also* Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored Nation Clauses*, 27 Berkeley J. Int'l L. 496, 548–65 (2009); Zachary Douglas, The International Law of Investment Claims 344–62 (2009) (advocating against jurisdictional extension of consent by means of MFN clauses).

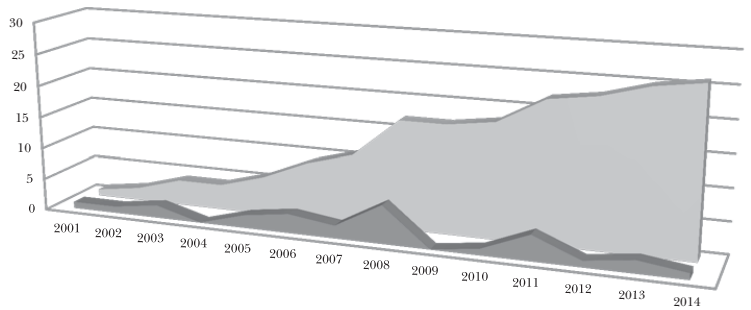
50. *See* sources cited *supra* note 49.

51. Article 8 of ILC's Draft Articles states as follows:

and PTAs, while similar in nature, belong to two different pools of MFN provisions used within the investment agreement.

Thus, modern PTAs with investment chapters allow Asia-Pacific countries to regulate and deregulate intra-Asian economic activities, including both trade and investment, because they expand beyond tariff liberalization.[52] Despite these benefits, some Asia-Pacific countries remain hesitant to include investment chapters within PTAs.[53] Importantly, all twenty-four Asia-Pacific PTAs were concluded after 2001.[54]

FIGURE 1: INCREASE OF ASIA-PACIFIC PTAS WITH INVESTMENT CHAPTERS[55]



	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Number of PTAs entry into force	1	1	2	0	2	3	2	6	0	1	4	1	2	1
Cumulative Number of Asian PTAs with investment chapters	1	2	4	4	6	9	11	17	17	18	22	23	25	26

Note: Constructed by Author

The source and scope of most-favoured-nation treatment:

1. The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause referred to in article 4, or from the clause on most-favoured-nation treatment referred to in article 6, in force between the granting State and the beneficiary State.

2. The most-favoured-nation treatment to which the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, is entitled under a clause referred to in paragraph 1 is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.

REP. OF INT'L L. COMM'N IN ITS THIRTEENTH SESSION, at 31, UN Sales No. E.79.V.6 (Part II) (1975).

52. *See generally* Carsten Fink & Martin Molinuevo, *East Asian Free Trade Agreements in Services: Key Architectural Elements*, 11 J. INT'L ECON. L. 263 (2008).

53. India is an example of one of these countries. *See* Julien Chaisse et al., *The Three-Pronged Strategy of India's Preferential Trade Policy: A Contribution to the Study of Modern Economic Treaties*, 26 CONN. J. INT'L L. 415 (2011); *see also* Julien Chaisse, *Deconstructing Services and Investment Negotiations—A Case Study of India at WTO GATS and Investment Fora*, 14 J. WORLD INVESTMENT & TRADE 44, 44–78 (2013).

54. *See infra* Figure 1.

55. Data compiled from sources cited *supra* note 37.

B. *National Practices in Investment Rulemaking*

Despite growing IIA practice, thirteen of forty-eight Asian Development Bank [ADB] nation members have not concluded a single investment agreement as of May 2015 and remain reluctant to enter into the international investment arena.[56] Further, eight ADB economies have signed only a limited number of IIAs.[57] However, fourteen ADB members have signed between ten and forty IIAs.[58] The remaining thirteen ADB members are the frontrunners of international investment, concluding more than forty IIAs.[59] This Article's analysis will be based on the data compiled from these final thirteen frontrunner countries. The great numbers of IIAs concluded reflects a very active investment diplomacy in the region, also signaling that many third countries (i.e., non-Asia-Pacific countries) have been indirectly granted rights through the MFN treatment.[60]

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56. *See* sources cited *supra* note 37. These include Bhutan, Cook Islands, Fiji, Kiribati, Maldives, Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Samoa, Solomon Islands, Timor-Leste, and Tuvalu.

57. *See* sources cited *supra* note 37. Tonga, Vanuatu, Afghanistan, Myanmar, Nepal, Papua New Guinea, Brunei Darussalam, and New Zealand have entered into less than ten IIAs.

58. *See* sources cited *supra* note 37. This group comprises of Hong Kong, PRC, Cambodia, Lao PDR, Turkmenistan, Taipei, Japan, Australia, Kyrgyz Republic, Sri Lanka, Bangladesh, Georgia, Tajikistan, Armenia, and the Philippines.

59. *See* sources cited *supra* note 37. These frontrunners are Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, the Republic of Korea, and the PRC. The PRC has the greatest amount of IIAs. Following the policy of opening implemented by the PRC more than thirty years ago and the admission of the PRC into the WTO, the PRC is now concluding a different generation of IIAs, the most recent granting full jurisdiction to the International Centre for Settlement of Investment Disputes (ICSID). *See* Julien Chaisse, *The Regulation of Trade-Distorting Restrictions in Foreign Investment Law—An Investigation of China's TRIMs Compliance*, 3 EUR. Y.B. INT'L ECON. L. 159, 160–89 (2012); *see also* J.Y. Willems, *The Settlement of Investor State Disputes and China New Developments on ICSID Jurisdiction*, 8 S.C. J. INT'L L. & BUS. 1, 62 (2011).

60. For further information about the MFN treatment, see *infra* Part V. *See* Julien Chaisse & Debashis Chakraborty, *The Evolving and Multi-Layered Investment Regulatory Framework Between the European Union and India*, 20 EUR. L.J. 385, 386–422 (2014) (looking at the benefits of Indian IIAs for E.U. investors).

TABLE 3: IIAs SIGNED BY ADB MEMBER ECONOMIES[61]

Members	Total IIAs	BITs	PTAs with Investment Chapters
PRC	139	131	8
Republic of Korea	98	92	6
India	84	83	3
Malaysia	72	68	2
Indonesia	64	63	1
Vietnam	59	58	1
Uzbekistan	49	49	0
Pakistan	50	47	3
Azerbaijan	45	45	0
Mongolia	43	43	0
Kazakhstan	43	43	0
Singapore	53	41	12
Thailand	41	39	2
Armenia	36	36	0
Philippines	36	35	1
Tajikistan	31	31	0
Australia	29	23	6
Bangladesh	29	29	0
Georgia	29	29	0
Kyrgyz Republic	28	28	0
Sri Lanka	28	28	0
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	9	7	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

61. The information in this Table is a personal compilation of Asia-Pacific practices by combining information from various databases. *See* sources cited *supra* note 37.

An overall analysis of all Asia-Pacific intraregional IIAs illuminates several important observations. First, a few countries dominate Asia-Pacific investment rulemaking.[62] The PRC (thirty Asia-Pacific IIAs), India (twenty-three Asia-Pacific IIAs), the Republic of Korea (twenty-two Asia-Pacific IIAs), Vietnam (twenty-one Asia-Pacific IIAs), Indonesia (twenty Asia-Pacific IIAs), and Malaysia (nineteen Asia-Pacific IIAs) have the greatest number of IIAs in force that are diverse in their forms.[63] These countries form the core of this Section's substantive analysis. These frontrunners' treaty practice is not only important in quantitative and qualitative terms but crucial in illuminating a key IIA provision—the MFN treatment—which has significant effects on the countries bound by a large number of investment treaties.[64] Of these frontrunners, the PRC is the Asia-Pacific leader in investment rulemaking.[65] It has BITs or PTAs with almost all ADB developing member economies except Nepal.[66] As such, the PRC is at the center of a dense network of agreements. Therefore, an understanding of the PRC's IIA practice is important because the MFN provision used in its agreements can be understood as an embryonic Asia-Pacific multilateral IIA.

Moreover, Asia-Pacific intraregional IIAs also demonstrate that some countries are inclined to regulate investment by entering into PTAs while others simply ignore this technique. There are also some patterns for each country in terms of the distinction between BITs and PTAs. For example, Singapore is a major user of PTAs to regulate investment; it already has seven such instruments.[67] Following Singapore, New Zealand and Japan have both entered into six PTAs that cover investment issues.[68] Despite these examples, a majority of Asia-Pacific countries have remained reluctant to incorporate PTA investment negotiations into their trade agreements. As evidence of this, virtually all the PTAs concluded

62. *See supra* Table 3.

63. *See* sources cited *supra* note 37.

64. *See infra* Part IV.

65. *See supra* Table 3.

66. *See infra* Annexes I and II.

67. *See supra* Table 3.

68. For Japanese treaty practice, see Shotaro Hamamoto, *A Passive Player in International Investment Law: Typically Japanese?*, *in* Foreign Investment and Dispute Resolution Law and Practice in Asia 53 (Vivienne Bath & Luke Nottage eds., 2011) (discussing PTAs existing in 2011 and explaining that Japan is in the process of negotiating additional PTAs). For New Zealand, see *New Zealand, Preferential Trade Agreements*, WTO, http://ptadb.wto.org/SearchByCountry.aspx (search for or click on "New Zealand") (last visited Apr. 17, 2015).

by India and the PRC ignore investment matters. Even with preferred BITs, some countries have had difficulty ratifying BITs they have already signed.[69]

III. Accessing Asia-Pacific Markets

Generally, under international law, territorial sovereignty allows a state to prohibit the admission of foreigners and deny the right to settle within its territory.[70] This principle is reflected in many international instruments.[71] In other words, under a classic BIT, the host country has the exclusive authority to decide whether the investment may be allowed in its territory.[72] However, once the host country does decide to admit foreign investment ventures into its territory, those ventures will be entitled to all the protections afforded by the IIA.[73] Therefore, it is important to consider the degree of liberalization of the rules governing the entry of foreign investment into the host country (i.e., the conditions upon which foreign investments may enter into another country's economy).[74]

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69. Cambodia, Tajikistan, Vietnam, and Malaysia each has at least six BITs that have not yet come into force; Pakistan has signed at least nine BITs that are yet to enter into force. *Investment Policy Hub*, *supra* note 37.

70. Colin Grey noted the following:

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests.

Colin Grey, *The Rights of Migration*, 20 Legal Theory 25, 27 (2014).

71. *See* M. Sornarajah, The International Law on Foreign Investment 34, 345 (2d ed. 2004).

72. *See* UNCTAD, Most-Favored-Nation Treatment 14, 20, 30 (1999), U.N. Doc. UNCTAD/ITE/IIT/10 (Vol. III).

73. *See* Jeswald Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 Int'l L. 875, 884–86 (1999); *see also* The Theoretical Evolution Of International Political Economy 6–7, 55–58 (George T. Crane & Alba Amawi eds., 1997) (explaining that economic principles claim that production of goods and services will be at its peak when the market is fully entrusted in the hands of demand and supply without any regulatory intervention by the government); *see* Roger H. Cummings, *United States Regulation of Foreign Joint Ventures and Investment*, *in* International Joint Ventures: A Practical Approach to Working with Foreign Investors in the U.S. and Abroad 137, 139 (David Goldsweig & Roger H. Cummings eds., 1990) (arguing that this is an absolutist position and in reality, it is doubtful if there is any state that actually has adopted this extreme approach to economic liberalization because the principle of sovereignty, including economic sovereignty, still holds much appeal in international law and relations meaning states have a latitude of powers to regulate, and in fact do regulate, the operation of foreign investments within their territories).

74. *See, e.g.*, Bruce Kogut & Harbir Singh, *The Effect of National Culture on the Choice of Entry Mode*, 19 J. Int'l Bus. Stud. 411, 413–15 (1988) (examining the effect of culture on the mode of entry for foreign investment). For other studies concerning companies' choice of entry mode in foreign markets, see Magnus Blomstrom & Mario Zejan, *Why Do*

The negotiation of IIAs has evolved resulting in two relevant models. On the one hand, there is the "admission clause" model, which makes the admission and establishment of foreign investment subject to the domestic laws of the host country.[75] On the other hand, the "right of establishment" model (also called the "pre-establishment right" model)[76] is a broader model in that it automatically provides foreign investors with National Treatment (NT) and MFN treatment both during the establishment of the investment and once the investment begins operating in the host country.[77] Opting for one or the other model has significant legal and economic ramifications. This Part investigates the Asia-Pacific region's preferred practices and analyzes the extent to which Asia-Pacific IIAs can be a driver (or consolidator) of opening up market

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Multinationals Seek Out Joint Ventures?, 3 J. INT'L DEV. 53 (1991) (studying characteristics of Swedish firms that have sought joint ventures and those that have not).

75. The host state is entitled the right to grant admittance of investment into its territory. This results in model BIT phrasing such as "shall . . . admit" and "in accordance with its legislation." *See* Kenneth Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 523 n.30 (1998). This right allows the host country to operate a screening mechanism for foreign investment or to utilize any admission laws already in place to determine the conditions upon which foreign investment will be allowed to enter the country. *See id.* at 523; *see also* Agreement Between the Government of Hong Kong and the Government of the Republic of Austria for the Promotion and Protection of Investments, H.K.-Austria, art. 2:1, Oct. 11, 1996, BUNDESGESETZBLATT III [BGBL III] No. 198/1997 ("Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its area, and, subject to its laws and regulations, shall admit such investments.").

76. Uche Ewelukwa Ofodile, *Trade and Investment in Africa: Harmony and Disharmony with the International Community*, 105 AM. SOC'Y INT'L L. PROC. 521, 523 (2011) (observing that most PRC-Africa BITs use the admission clause model and do not confer any pre-establishment rights on investors).

77. However, the right of establishment is never absolute as the right is often subject to a series of exceptions and reservations. *See* Martin Molinuevo, *Foreign Investment in Services and the DSU*, *in* GATS AND THE REGULATION OF INTERNATIONAL TRADE IN SERVICES 296, 297–98 (Marion Panizzon, Nicole Pohl & Pierre Sauve eds., 2008). Investors of one party will receive treatment no less favorable than domestic investors (national treatment or NT) and investors of any other third country (MFN). For example, the Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments include the following language:

> 1. Each Party shall maintain favorable conditions for investment in its territory by nationals and companies of the other Party. Each Party shall permit and treat such investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable . . . .

Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, Oct. 27, 1982, S. TREATY DOC. NO. 99-14 [hereinafter U.S.-Pan.].

and promoting competitive regulatory reforms in investment regimes.

A. *General Preference of the Admission Clause Model*

Overall, Asia-Pacific's IIAs, like the majority of global IIAs,[78] do not provide territorial entry rights to foreign investors. [79] Rather, most Asia-Pacific IIAs provide only a best-endeavor provision regarding the admission of the foreign investments; the best-endeavor provision mirrors the admission clause model. [80] As explained above, the admission clause model allows the host country to apply any admission and screening mechanism for a foreign investment, therefore determining the conditions on which foreign investment will be allowed to enter the country.[81]

TABLE 4. ADMISSION CLAUSE IN ASIA-PACIFIC IIAS

Treaty & Relevant Provision	Text
India-PRC BIT (2007) Article 3	1. Each Contracting Party shall encourage and create favorable conditions for investors of the other Contracting Party to make investments in its territory, and admit such investments in accordance with its laws and policy.
Indonesia-Thailand BIT (1998) Article 2	1. This Agreement shall apply to investments . . . to investments by investors of the Republic of Indonesia in the territory of the Kingdom of Thailand which have been specifically approved in writing by competent authorities of Thailand in accordance with the applicable laws and regulations of the Kingdom of Thailand and any laws amending or replacing them.
Taiwan-Thailand (1996) Article 4	1. Each Contracting Party shall seek and obtain approval from the authorities of its relevant place to the effect that investments by investors of the other relevant place and the returns therefrom shall receive treatment which is fair and equitable and not less favorable than that accorded to investments by investors of any third party.

78. *See* 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. 51–84 (2012).

79. *See* Salacuse, *supra* note 7, at 160 (implying that territorial entry rights to foreign investors are not a given).

80. *See infra* Table 4; *see also* Agreement Concerning the Encouragement and Reciprocal Protection of Investments, China-Viet., Dec. 2, 1992; Agreement for the Promotion and Protection of Investment, H.K.-Japan, May 15, 1997; Agreement for Promotion and Protection of Investments, India-China, Nov. 21, 2006.

81. *See* Kenneth Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 523 (1998).

B. *Increasing Use of Pre-Establishment Clause in Asia-Pacific Investment Treaties*

As discussed above, the right of establishment approach consists of providing foreign investors with NT and MFN treatment both during the establishment of the investment and once the investment begins operating in the host country.[82] The treaties that use the right of establishment rather than an admission clause model aim at liberalizing investment flows.[83] Liberalization, in the context of FDI, involves the diminution of restrictions on the entry of foreign companies into host countries.[84] Liberalization also involves various contracting approaches,[85] which can be used to negotiate agreement outcomes. Of course, such IIAs should be

82. See U.S.-Pan., *supra* note 77.

83. Despite this liberalization, BITs may still contain country-specific reservations because, in practice, no state will grant unlimited access to the FDI. In this way, parties retain some degree of flexibility to control the admission of foreign investment. Restrictions on the right of establishment may take the form of a list of industries, activities, laws, and/or regulations to which the obligations to grant NT and MFN treatment in the pre-establishment phase do not apply.

84. *See* Julien Topal, *The Evolving International Investment Regime—Expectations, Realities, Options (Book Review)*, 23 EUR. J. INT'L L. 300, 302 (2012).

85. Examples of varying contracting approaches are IIAs that allow for the parties to exclude certain economic activities from the IIAs' core obligations or to that include country-specific reservations. It is important to note, however, that the use of these of these restrictions, thus far, has mostly been observed in IIAs promoted by Canada and the United States; BITs concluded by other countries do not generally allow for country-specific exceptions and all obligations of the agreements in principle apply to all economic activities. Nonetheless, country-specific exceptions entail the identification of two elements: (1) the economic activity to be excluded, and (2) the nature of the nonconforming measures that apply to that activity. These elements can be recorded on a positive basis—identifying what is covered or allowed—or on a negative basis—identifying what is not covered or not allowed. Hybrid approaches are also possible and very common. The selection of the scheduling approach triggers different negotiating dynamics but does not alter the structure and substantive content of the IIA. For example, the Singapore-India Comprehensive Economic Cooperation Agreement features both types of schedules with Singapore's reservations listed on a negative list basis, while India's commitments are inscribed on a hybrid schedule. *See generally* Comprehensive Economic Cooperation Agreement art. 6.16:2, India-Sing., Aug. 1, 2005. Further, IIAs usually employ one of three pre-establishment approaches: a top-down approach, a bottom-up approach, and a middle-ground approach. The top-down approach applies the nondiscrimination provisions to all sectors of the economy except for those expressly excluded. The bottom-up approach is the reverse of that (i.e., it applies the nondiscriminatory provisions to specifically identified sectors). The middle-ground approach applies the bottom-up principle to pre-establishment and the top-down principle to post-establishment. These approaches are discussed more fully in Stefan D. Amarasinha & Juliane Kokott, *Multilateral Investment Rules Revisited*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 119, 143–44 (Peter Muchlinski et al. eds., 2008); *see also* Julien Chaisse et al., *India's Multilayered Regulation of Foreign Direct Investment—Between Reluctance to Multilateral Negotiations and Unilateral Proactivism*, *in* ASIA EXPANSION OF FOREIGN DIRECT INVESTMENT—STRATEGIC AND POLICY CHALLENGES 240, 257 (Julien Chaisse et al. eds., 2011).

complemented with schedules of commitments, which clarify the effort of liberalization.[86] Historically, the use of the pre-establishment model was traditionally limited to U.S. BITs and later to Canadian ones (post-North American Free Trade Agreement (NAFTA)).[87] However, during the last few years other important capital-exporting countries have started to utilize pre-establishment models for their IIAs.[88] Presumably, admission is likely to have a limited impact on the FDI flows, as any investor decision to invest is subject to an administrative approval by the host state.

In sharp contrast to the dominant admission clause model that is largely followed by most Asia-Pacific countries, the text of much Japanese and Singaporean MFN treatment and NT provisions within their IIAs encompasses pre-establishment rights.[89] Interestingly, the Japan-Thailand 2007 PTA presents a hybrid form of

86. An IIA's schedule of investment commitments lists each country's obligations. The sector-specific commitments are set out in a standard format. The left-hand column of the schedule denotes the sector, subsector, or service in which the country has made the commitment. The right-hand column lists any limitation that applies to the country's market access or NT commitment in relation to that service. *See generally* Axel Berger et al., *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box* (Kiel Working Papers, Paper No. 1647, 2010) (demonstrating the format for the schedule of investment commitments).

87. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) [hereinafter NAFTA]. In the drafting of NAFTA, the disparities in economic strength between Mexico, the United States, and Canada was cause for concern. For example, the U.S. 1992 election campaign featured the famous "Great Sucking Sound" comment from Ross Perot, which captured the fear that the lower Mexican labor standards and wages would "suck" U.S. jobs down to Mexico. This concern was shared by the U.S. labor unions, leading President Bill Clinton to negotiate the NAFTA "side agreement on labor," which on paper compelled Mexico to enforce what turned out to be substantively protective labor norms that the government simply ignored. *See* William F. Pascoe, *Deja Vu All Over Again? Collective Bargaining and NAFTA: Can Mexican and United States National Unions Foster Growth Under the NAALC?*, 19 Ariz. J. Int'l & Comp. L. 741 (2002). From the Mexican standpoint, the concerns about NAFTA centered on opening up its borders for Northern employers to take advantage of cheaper labor and repatriate profit and know-how at home without leaving behind tools of meaningful development needed by the Mexican economy. *See* Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter 11*, 28 U. Miami Inter-Am. L. Rev. 303, 304 (1997); *see also* Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis*, 17 Geo. Int'l Envtl. L. Rev. 51 (2004).

88. As a result, a growing number of developing countries actually apply two different BIT models depending on who their treaty partners are: the "admission clause" model (mostly in BITs with European countries) and the "right of establishment" model (mainly in treaties concluded by the United States, Japan, and Canada). *See* Gus Van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 Trade L. & Dev. 19, 27, 43–44, 52 (2010).

89. *See infra* Table 5; David Collins, *National Treatment in Emerging Market Investment Treaties* (Jan. 21, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=2204351.

investment establishment.[90] The PTA's hybrid forms consist of some investment sectors being identified in Annex 6 as open to foreign investors and therefore follow a pre-establishment rights approach.[91] However, sectors not listed in the Annex remain subject to an admission clause's restrictions, placing them within the admission clause model.[92] The 2015 draft chapter of the ambitious TPP,[93] currently under negotiations,[94] is a hybrid-model IIA as well.[95]

TABLE 5. PRE-ESTABLISHMENT RIGHTS IN ASIA-PACIFIC IIAS

Treaty & Relevant Provision	Text
Japan-Indonesia PTA (2007) Article 59	1. Each Party shall accord to investors of the other Party and to their investment's treatment no less favorable than that it accords in like circumstances to its own investors and to their investments with respect to investment activities. Art. 58 (g) the term "investment activities" means establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments.
	Art. 93. 1. In the sectors inscribed in Part 1 of Annex 6, and subject to any conditions and qualifications set out therein, each Party shall accord to investors of the other Party and to their investment's treatment no less favorable than that it accords, in like circumstances, to its own investors and to their investments with respect to the establishment, acquisition and expansion of investments in its Area. 2. Each Party shall, subject to its laws and regulations existing on the date of entry into force of this Agreement, accord to investors of the other Party and to their investment's treatment no less favorable than that it accords, in like circumstances, to its own investors and to their investments with respect to the management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its Area. 3. Paragraph 2 above shall not apply to any measures specified by a Party in Part 2 of Annex 6.

90. *See infra* Table 5.

91. *See infra* Table 5.

92. *See infra* Table 5.

93. The TPP Investment Chapter was published on January 20, 2015, by WikiLeaks. *See Secret Trans-Pacific Partnership Agreement (TPP)—Investment Chapter*, WIKILEAKS, https://wikileaks.org/tpp-investment (last visited May 20, 2015).

94. See the TPP official webpage on the Office of the U.S. Trade Representative (USTR) website at https://ustr.gov/tpp (last visited May 20, 2015).

95. *See* Julien Chaisse, *TPP Agreements: Towards Innovations in Investment Rule-Making*, *in* THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT, *supra* note 45, at 147, 147–55; Bryan Mercurio, *The Trans-Pacific Partnership: Suddenly a 'Game Changer'*, 37 WORLD ECON. 1483, 1558–74 (2014).

Japan-Thailand PTA (2007) Articles 93 and 96	Art. 96. 1. If, after this Agreement enters into force, a party enters into any agreement on investment with a non-Party, it shall consider a request by the other Party for the incorporation in this Agreement of treatment no less favorable than that provided under the former agreement with respect to the establishment, acquisition and expansion of investments. 2. Each Party shall accord to investors of the other Party and to their investment's treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party and to their investments with respect to the management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its Area. 3. Paragraph 2 above shall not be construed to oblige a party to extend to the investors of the other Party the benefit of any treatment, preference or privilege which may be extended by the former Party by virtue of any customs union, free trade area, a monetary union, similar international agreements leading to such unions or free trade areas, or other forms of regional economic cooperation to which either party is or may become a party. 4. Paragraph 2 above shall not apply to any measures specified by a Party in Part 3 of Annex 6.
TPP Draft (January 2015) Article 12	4. 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

The increasing use of pre-establishment clauses in the Asia-Pacific region can also be observed in certain PTAs, such as Singapore-USA (2003), Australia-USA (2004), Singapore-Panama PTA (2006), Japan-Mexico Economic Partnership Agreement (EPA) (2007), Japan-Chile EPA (2007), Taiwan-El Salvador-Honduras PTA (2007), and Japan-Switzerland PTA (2009). These demonstrate an increasing tendency in the Asia-Pacific region to liberalize the FDI flow through negotiating PTAs rather than BITs. Further, the amount of PTAs with investment chapters in Asian investment rulemaking shows an increased role of this type of instruments in Asia as compared to more global trends of lesser use of PTAs. In the long run, this increasing preference for PTAs in the Asia-Pacific region could substantially affect the overall global architecture of foreign investment.

C. *Requirement of a Mooted "Certificate of Investment"*

The Asia-Pacific BIT practice in some states—most notably Thailand, Malaysia, and Indonesia—ties the substantive investment treaty protections it offers foreign investors with tailored compli-

ance to an element of domestic law that regulates the entry of foreign investment. Thailand tends to be the most conservative of these countries in that it often obliges foreign investors to demonstrate that they have been granted specific approval in writing by a competent authority.[96] This parallels the notion of a mooted "certificate of investment."[97]

Under this "certificate of investment" practice, the BIT will not protect foreign investment unless there is clear proof of the investor's compliance with the host nation's requirements and registration process.[98] In practical terms, the requirement of an investment certificate means that in practice there must be an affirmative act of approval in writing by the host state; such an affirmative act is a necessary and sufficient condition of conferring treaty protection.[99] In effect, requiring affirmative approval allows a state to regulate its investment treaty exposure by basing its approval of foreign investment on domestic law procedures. [100] Furthermore, strong public policy grounds may underlie states' domestic registration requirements in their IIAs because registration is often used by states to regulate and administer the benefits that initially attract foreign investment.[101] Registration may also allow the host state to monitor the efficacy of specific conditions imposed on foreign investors to maximize the developmental divi-

96. *See supra* Table 4, Taiwan-Thailand and Indonesia-Thailand.

97. Typically, foreign investors must have an investment project before being granted an investment certificate. The investment certificate serves as the business registration certificate. Generally, the investment certificate shall be issued as part of the investment registration and/or evaluation processes, which consider (1) the type of project, (2) the scale of invested capital, and (3) whether such project falls within a conditional investment sector. See, for instance, the case of Chinese outbound investments: Lutz-Christian Wolff, *Chinese Outbound Investments in the Food Sector: Hungry For Much More!*, 69 Food & Drug L.J. 399, 410 (2014) (explaining that an Enterprise Overseas Investment Certificate that is issued by the Government upon verification is valid for a period of two years and enables the Chinese outbound investor to handle foreign exchange, bank, customs, foreign affairs, and other formalities).

98. *See generally* Pamela. B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 Stan. J. Int'l L. 373 (1985) (providing examples of BITs requiring compliance with formalities by the foreign investors).

99. *See* Michael R. Reading, *The Bilateral Investment Treaty in ASEAN: A Comparative Analysis*, 42 Duke L.J. 679, 681, 686 (1992).

100. This approval tends to take the form of registration or any other formal requirement. For instance, in Brazil, all foreign investments in the Brazilian economy are subject to registration and verification by the Central Bank of Brazil. *See* Antonio de Moura Borges et al., *The BRIC Context in a Globalized World and Foreign Direct Investment in Brazil*, 18 L. & Bus. Rev. Am. 329, 362–63 (2012).

101. *See* Tim Ambler, Morgan Witzel, and Chao Xi, Doing Business in China 32, 34, 44, 115 (3d ed. 2008).

dends to host states.[102] Increasing dividends to host states may be accomplished with performance requirements such as local content requirements.[103]

Moreover, certificate of investment practices may aid states that wish to limit their risk of investment treaty liability. A significant proportion of the small number of BIT claims brought against Asia-Pacific states have been denied review by arbitrators based on a lack of tribunal over the matter.[104] This jurisdictional problem stems from a lack of clear or uniform guidelines by national governments as to the precise procedure involved in securing "approved project" status.[105] Without obtaining this status, an investor may not bring a claim to arbitration because the tribunal has no jurisdiction over nonapproved projects.[106] The current "approved project" standard appears to be arbitrary to an extent.[107]

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102. *See* Daniella Tavares, *Using Brazil's Regulatory System as a Thoughtful Experience*, *in* BANKING AND FINANCE CLIENT STRATEGIES IN CENTRAL AND SOUTH AMERICA: LEADING LAWYERS ON INTERPRETING INTERNATIONAL BANKING LAWS, ADVISING CLIENTS ON ENTERING LATIN AMERICAN CAPITAL MARKETS, AND PREDICTING FINANCIAL MARKET DEVELOPMENT AND STABILITY 5 (2009).

103. Of course, this strategy would need to be carefully considered given the constraints in the law of the WTO. For instance, Indonesia's use of local content conditions in the automotive sector was ruled to be contrary to the Agreement on Trade-Related Investment Measures (TRIMS) by a WTO Panel in 1998. *See* Panel Report, *Indonesia—Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998). Also, Viviane De Beaufort and Edouard Devilder noted the following:

> Local content requirements have been intensifying since the early eighties. These requirements oblige companies to use locally-produced components rather than imported products in their production cycles. Local content is frequently requested and can pose problems for bidders. In the high tech sector, it is sometimes difficult to meet local content requirements in the poorest countries: the economies of buying countries are not always sufficiently developed to absorb high tech manufacturing.

Viviane De Beaufort & Edouard Devilder, *Competitiveness of European Companies and International Economic Countertrade Practices*, INT'L BUS. L.J. 2014, at 1, 16.

104. *See* Gruslin v. The State of Malaysia, Case No. ARB/99/3, Award, at 22 (ICSID Nov. 27, 2000); Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, Case No. ARB/03/25, Award at 508 (ICSID Aug. 16, 2007).

105. *See* Dato' Cecil Abraham, *Arbitration of Investment Disputes: A Malaysian Perspective*, 75 ARB. 206, 208 (2009) ("Increasingly, however, the term 'approved project' is being removed from the BITs that the Government of Malaysia is negotiating with foreign states. This notion of 'approved project' status is however not relevant to Malaysia alone.").

106. On investment, treaties, and investment treaty arbitration, see generally CAMPBELL MCLACHLAN, LAURENCE SHORE, AND MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION—SUBSTANTIVE PRINCIPLES (2007) (describing an approved investment).

107. That said, some of these awards raise the sort of claimed problems posted by earlier responses. In *Gruslin v. Malaysia*, for instance, the single arbitrator declined to exercise jurisdiction over a loss incurred on a portfolio investment by a Belgian national as a result of Malaysian capital controls imposed as a response to the 1998 East Asian Financial

IV. Regulating the Conditions of Competition

The NT and MFN treatment doctrines form the nondiscrimination principles concerning competition for and among foreign investors.[108]

A. *Who Is the Most Favored Nation?*

The principle of MFN treatment is a cornerstone of international trade agreements, dating back to the first Friendship, Commerce and Navigation treaties.[109] The MFN aims to prevent discrimination amongst trading parties by setting a level playing field for all foreign parties.[110] With investment specifically, MFN seeks to establish equal conditions of competition for all foreign investors, regardless of their country of origin.[111] The MFN standard ensures that investors who are covered by one IIA can claim equal benefits to those granted to investors from other countries, irrespective of whether those benefits are established in other IIAs or are in the actual regulatory practice of the host country.[112]

Crisis. The arbitrator found there was no jurisdiction because the general approval by the Malaysian stock exchange for the listing of shares held by the Belgian national did not meet the required standard of an "approved project" under the BIT in question.

108. *See* Champion Trading Co. & Ameritrade Int'l, Inc. v. Egypt, Case No. ARB/02/9, Award, ¶¶ 128, 156 (ICSID Oct. 27, 2006); Occidental Exploration & Prod. Co. v. Ecuador, Administered Case No. UN3467, Final Award, ¶ 173 (London Ct. of Int'l Arb. July 1, 2004) (stating that the purpose of NT 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).

109. *See* Won-Mog Choi, *The Present and Future of Investor State Dispute Paradigm*, 10 J. Int'l Econ. L. 725, 731 (2007).

110. Yannick Radi stated the following:

> The most-favoured-nation clause (MFN clause) has been included in international agreements since the twelfth century. Originally it was used mainly with the aim of preventing discrimination in international trade. It was then extended to the area of international investments, first of all through the friendship, commerce and navigation treaties, and later, with their successors, the bilateral investment treaties (hereinafter BIT), which aim at the promotion and protection of investments.

See Yannick Radi, *The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse"*, 18 Eur. J. Int'l L. 757, 758 (2007).

111. *See* Agreement for the Promotion and Reciprocal Protection of Investments, Arg.-Spain, art. 4, Oct. 3, 1991 ("In all matters subject to this Agreement, this treatment shall be no less favourable than that extended by each Party to the investments made in its territory by investors of a third country.").

112. *See* Domenico Di Pietro, *The Use of Precedents in ICSID Arbitration. Regularity or Certainty?* 10 Int'l Arb. L. Rev. 92, 98–99 (2007); *see also* Stephan W. Schill, The Multilateralization of International Investment Law 124 (2009) ("MFN clauses affect the structure of the international economic order and impact the system of international investment protection by supporting the emergence of a uniform international investment regime.").

While traditionally regarded as a standard one-meaning clause within most IIAs, the MFN principle has recently gained attention in international investment rulemaking in light of recent arbitral rulings that each MFN clause could be analyzed on an IIA-by-IIA basis.[113]

The scope of most Asia-Pacific IIAs' MFN obligations is limited not only by the coverage of the IIA but also by the wording in an IIA clause itself.[114] The wording of the clause may determine whether the MFN obligation applies to investments already established in the country (admission clause model) or whether it also applies to the ability of the investor to claim future access to the host country (i.e., pre-establishment rights model).[115] This Article's research has found that only a minority of Asia-Pacific IIAs expressly extend the coverage of the MFN obligation to pre-establishments rights. In reality, a majority of Asia-Pacific IIAs follows the admission clause model meaning that Asia-Pacific IIAs include an MFN obligation that applies only to investments already established in the country.

Further, countries may add their own specific conditions to the MFN clauses that allow for a comparison between the treatment of investors from different countries, such as the "in like circumstances" phrase found in many U.S. treaties.[116] Nevertheless, this Article's research has found that most Asia-Pacific IIAs do not refer

113. For example, *Tza Yap Sum v. Peru* recognizes the need to analyze the specific wording of each provision of a treaty in accordance with established rules of international law. Therefore, an *a priori* decision is not appropriate. The arbitral panel found it is not possible to generally decide whether MFN clauses are efficacious in some sorts of situations and not in others. Each MFN treatment clause is a world in itself, which demands an individualized interpretation to determine its scope of application. *See* Tza Yap Shum v. Republic of Peru, Case No. ARB/07/6, Decision on Jurisdiction and Competence, ¶¶ 196–98 (ICSID June 19, 2009); Impregilo S.p.A. v. Argentine Republic, Case No. ARB/07/17, Award, ¶ 107 (ICSID June 21, 2011) (finding "predominating jurisprudence [on MFN clauses], which has developed is in no way universally accepted"). For an analysis of inconsistent interpretations of MFN clauses, see Julie A. Maupin, *MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?*, 14 J. Int'l Econ. L. 157 (2011).

114. *See* Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 193–96 (2009).

115. The right of establishment ensures that a foreign investor, "whether a natural or legal person, has the right to enter the host country and set up an office, agency, branch or subsidiary (as the case may be), possibly subject to limitations justified on grounds of national security, public health and safety or other public policy grounds." UNCTAD, Admission and Establishment 12 (1999), U.N. Doc. UNCTAD/ITE/IIT/10 (Vol. II), U.N. Sales No. E.99.II.D.10.

116. For investors to be "in like circumstances," three conditions must be met: the investor must be a foreign investor, the investor must be in the same economic or business sector, and the two investors must be treated differently. *See* Parkerings-Compagniet AS v.

to the "in like circumstances" phrase. Further, the MFN clause wording may also determine whether the MFN standard also applies to investor-state dispute settlement (ISDS) procedures.[117] This Article observes that, currently, most Asia-Pacific IIAs do not exclude the MFN doctrine from the ISDS clauses of their IIAs.

The increase of Asia-Pacific PTAs with investment chapters also raises an important issue with regard to existing IIAs. There exists a free-rider issue, which occurs when, under MFN, some states who sign more favorable IIAs must extend those IIAs' advantages to all other states with which they are bound through other existing IIAs, even if the latter states do not reciprocate those advantages.[118] Therefore, the MFN treatment provisions in already-existing treaties may give rise to a free-rider issue in which benefits included in customs unions, PTAs, or economic integration organization agreements are extended to nonmembers of those treaties.[119] To avoid this, many IIAs exclude the benefits received by a Con-

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Republic of Lithuania, Case No. ARB/05/8, Award, ¶ 371 (ICSID Sept. 11, 2007); *see also* Article II(3) of the Canada-Thailand BIT, stating the following:

> Each Contracting Party shall, in accordance with its applicable measures in existence on the date of entry into force of this agreement, permit establishment of a new business enterprise or acquisition of an existing enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party on a basis no less favorable than that which in like circumstances, it permits such acquisition or establishment by: (a) its own investors or prospective investors; or (b) investors or prospective investors of any third state.

Agreement for the Promotion and Protection of Investment, Can.-Thai., art. II(3), Jan. 17, 1997, B.E. 2537, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_thailand.pdf [hereinafter Can.-Thai. BIT]; *see also* U.S. DEP'T OF STATE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, art. 4 (2012), *available at* http://www.state.gov/documents/organization/188371.pdf [hereinafter U.S. MODEL BIT] (outlining the specifics of the U.S. Model BIT's MFN treatment clause).

117. Following to the arbitral decision in Emilio Agustin Maffezini v. Spain, 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. *See, e.g.*, Emmanuel Gaillard, *Establishing Jurisdiction Through a Most-Favored-Nation Clause*, N.Y. L.J., June 2, 2005, *available at* http://www.shearman.com/~/media/Files/NewsInsights/Publications/2005/06/Establishing-Jurisdiction-Through-a-MostFavoredN__/Files/Download-PDF-Establishing-Jurisdiction-Through-a__/FileAttachment/IA_060205.pdf (discussing the application of the MFN clause to jurisdiction). The question posed by the *Maffezini* decision ultimately addresses the general scope of the MFN treatment principle and how the provision is crafted in each individual agreement. *See generally* Emilio Agustin Maffezini v. Spain, Case No. ARB/97/7, Award (ICSID Nov. 2000).

118. To the extent that non-reciprocating countries benefit from improved market access to liberalizing countries (the so-called MFN externality), two related incentive problems emerge: countries may avoid participating in negotiations in hopes of free riding on the liberalization of others, and countries that do enter negotiations may reach inefficient agreements, as they do not fully internalize the benefits of their liberalization.

119. *See* Susan E. Stenger, Note, *Most-Favored-Nation Clauses and Monopsonistic Power: An Unhealthy Mix?*, 15 AM. J.L. & MED. 111, 119 (1989).

tracting State Party from being applied to a regional economic integration organization (REIO) from the scope of the MFN treatment obligations.[120] This is done through drafting an REIO exception into the IIA.[121] As a result, virtually all IIAs include a carve-out from the MFN principle being applied to newly entered-into PTAs.[122]

TABLE 6. NONAPPLICABILITY OF THE MFN PRINCIPLE TO PTAS[123]

Treaty & Relevant Provision	Text
France 2006 Model BIT Article 4	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.
India 2003 Model BIT Article 4	(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.
ACIA 2012 Article 6	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.

Despite the consistent use of an REIO exception, the drafting of the exception varies, which impacts and modifies the scope of the exception.[124] In this regard, some countries extend the REIO exception to apply to similar agreements, such as any other agreement that regulates foreign investment. For instance, the Indian model BIT's carve-out refers to "any existing or future customs unions or similar international agreement to which it is or may

120. *See* Anca Radu, *Foreign Investors in the EU—Which "Best Treatment"? Interaction Between Bilateral Investment Treaties and EU Law*, 14 EUR. L.J. 237, 247 (2008).

121. *See* Jan Kleinheisterkamp, *Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty*, 15 J. INT'L ECON. L. 85, 87, 89–95 (2012).

122. *See infra* Table 6.

123. The information in this Table is a personal compilation of model BITs from national government websites for the countries referenced. *See* sources cited *supra* note 37.

124. *See supra* Table 6.

become a party."[125] The French model agreement's MFN carve-out refers to a "free trade zone, customs union, common market, or any other form of regional economic organization."[126] These MFN provisions would allow France or India to enter into new PTAs with investment chapters without the obligation to extend the new PTA's benefits to countries with which they were already bound through a BIT. This gives rise to the assumption that some countries may be tempted to negotiate IIAs as a PTA in order to isolate the newly negotiated treaty from other BITs. [127] In comparison, the 2012 ACIA's MFN exception is more limited in scope. ACIA Article 6 applies only to "any sub-regional arrangements between and among Member States; alternatively, (b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement."[128] One can interpret that this provision maintains basic MFN benefits for only ASEAN members. Granted, given the regional integration scheme of ACIA, members have an interest to be granted better treatment than one of them would grant to a third country through an IIA in the form of a PTA or a BIT.

B. *National Treatment*

The NT doctrine prohibits discrimination based on nationality[129] and, more generally, prohibits any discrimination between investors and investments produced domestically and abroad.[130] Together with the MFN obligation, it forms the fundamental principle of nondiscrimination in investment law.[131] Nonetheless, the scope and practical relevance of NT largely depends upon the reading of the term "like circumstances." The definition of "like

125. *See supra* Table 6; *see also* Debashis Chakraborty, Julien Chaisse, & Jaydeep Mukherjee, *Deconstructing Service and Investment Negotiating Stance: A Case Study of India at WTO GATS and Investment Fora*, 14 J. World Inv. & Trade 44 (2013).

126. *See supra* Table 6.

127. The Author observes that, Pakistan, for instance, seems to favor investment negotiations within PTAs in order not to be subject to full MFN applicability under other BITs. *See Investment Policy Hub*, *supra* note 37; *Welcome to the Regional Trade Agreements Information System*, *supra* note 37.

128. *See supra* Table 6.

129. Champion Trading Co. & Ameritrade Int'l, Inc. v. Egypt, Case No. ARB/02/9, Award, ¶¶ 128, 156 (ICSID Oct. 27, 2006).

130. The purpose of NT is to protect foreign investors as compared to local producers; solely addressing the sector in which the particular activity is undertaken cannot do this. Occidental Exploration & Prod. Co. v. Ecuador, Administered Case No. UN3467, Final Award, ¶ 173 (London Ct. of Int'l Arb. July 1, 2004).

131. *See* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 Am. J. Int'l L. 48, 48 (2008).

circumstances" creates the benchmark for national regulatory policies as to its treatment of certain imported products as opposed to 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."[132]

The NT provisions enshrined in Japanese IIAs and the TPP are substantially equivalent to the NAFTA Article 1102 which reads, "no less favorable than that it accords, in like circumstances, to its own investors [and investments] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[133] As a result, some IIAs require that the NT violations be based on some form of discrimination in which foreign investors are discriminated against because of their nationality.[134] Moreover, NT has a different regime in trade and investment contexts.[135] Within the trade and investment context, arbitral tribunals repeatedly highlighted the different purposes of NT as well as the difference between the terms "in like situations" in BITs and "like products" in the WTO.[136]

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132. Jun Xiao, *Chinese BITs in the Twenty-First Century: Protecting Chinese Investment*, *in* EXPANSION OF TRADE AND FDI IN ASIA: STRATEGIC AND POLICY CHALLENGES 127 (Julien Chaisse & Philippe Gugler eds., 2009).

133. *See* NAFTA, *supra* note 87, art. 1102; *supra* Table 7.

134. *See* Jurgen Kurtz, *National Treatment, Foreign Investment and Regulation Autonomy: The Search for Protectionism or Something More?*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 311 (Philippe Kahn & Thomas Wälde eds., 2007).

135. Todd J. Weiler describes as follows:

> [T]he goods manufacturer likely has other markets it can access if relations sour in one country. In contrast, the foreign investor will always 'playing all in' every time he establishes an investment . . . . [The investment standard of no less favorable treatment] provides a putative foreign investor with what he prizes most of all: the assurance of equality, not just non-discrimination, but de facto, competitive equality as between himself and his commercial competitor. Given the stakes involved, a promise not to pass laws that discriminate on the basis of nationality is just not good enough for him to risk so much on a foreign investment.

Todd J. Weiler, *Treatment No Less Favorable Provisions Within the Context of International Investment Law: "Kindly Please Check Your International Trade Law Conceptions at the Door*", 12 SANTA CLARA J. INT'L L. 77, 86 (2014).

136. *See* Occidental Exploration & Prod. Co. v. Ecuador, Administered Case No. UN3467, Final Award, ¶¶ 175–76 (London Ct. of Int'l Arb. July 1, 2004). Later, in 2009, *Bayindir v. Pakistan Award* determined that the NT clause must be interpreted in an autonomous manner, independent from trade law considerations. *See* Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, Case No. ARB/03/29, Award, ¶¶ 389, 402 (ICSID Aug. 27, 2009). For commentaries on these important Awards, see Todd J. Grierson-Weiler & Ian A. Laird, *Standards of Treatment, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 259, 290–96 (Peter Muchlinski et al. eds., 2008).

TABLE 7. NATIONAL TREATMENT IN ASIA-PACIFIC IIAS

Treaty & Relevant Provision	Text
Malaysia-Korea BIT (1989) Article 3	(1) Investments of nationals or companies of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall receive treatment which is fair and equitable and not less favorable than that accorded in respect of the investments and returns of the nationals and companies of the latter Contracting Party or of any third State. However, with respect to investments and returns in banking and insurance sectors, such treatment shall be accorded in compliance with the relevant laws and regulations of each Contracting Party. (2) Each Contracting Party shall in its territory accord to nationals or companies of the other Contracting Party as regards the management, use, enjoyment or disposal of their investments, treatment which is fair and equitable and not less favorable than that which it accords to its own nationals and companies or to the nationals and companies of any third State.
PRC-Korea BIT (2007) Article 2	3. Nationals of either State who wish to enter the territory of the other State and to remain therein for the purpose of making investment and carrying on business activities in connection therewith, shall be given sympathetic consideration to their applications for the entry, sojourn and residence in that State as well as to the applications for licenses and permits to conduct business activities, in accordance with the applicable legislation of that State.
TPP Draft (January 2015) Article 12.5	1. Each Party shall accord to investors of another Party treatment no less favorable 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 favorable 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. 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.
Japan-India PTA (2011) Article 85	1. Each Party shall accord to investors of the other Party and to their investments treatment no less favorable than that it accords in like circumstances to its own investors and to their investments with respect to investment activities in its Area.
Japan-Brunei PTA (2007) Article 57	1. Each Party shall accord to investors of the other Party and to their investments, treatment no less favorable than that it accords, in like circumstances, to its own investors and to their investments with respect to investment activities.

Korea-Brunei (2003) Article 3	1. Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party, treatment no less favorable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favorable to investors of the other Contracting Party. 2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party as regards operation, management, maintenance, use, enjoyment or disposal of their investments, treatment no less favorable than that which it accords to its own investors or to investors of any third State, whichever is more favorable to investors of the other Contracting Party.

In practice, arbitral tribunals analyze NT by determining whether the parties involved were in similar situations and, if so, then by comparing the treatment received by foreign investments with the treatment received by local investors.[137] In 2001, the Pope & Talbot NAFTA Tribunal articulated a lucent and compelling analysis of the application of NT,[138] which has been implicitly observed by every investment tribunal to date.[139] Through case law, three basic elements have formed that constitute the "nondiscrimination test" for NT disputes.[140] To bring a dispute, the inves-

137. For instance, the *Bayindir Award* held that the tribunal must first assess whether the investor was in a "similar situation" to that of other investors. If yes, then the tribunal must further inquire whether the investor was granted less favorable treatment than other investors. *See Bayindir*, ¶ 390. The *BG v. Argentina Award* also stated that a measure that breaches NT or MFN treatment standards would be unavoidably "discriminatory" for the purposes of the BIT standard. *See* BG Group Plc v. Argentina, Final Award, ¶¶ 355–56 (UNCITRAL Dec. 24, 2007).

138. Pope & Talbot, Inc. v. Canada, Award, Merits, ¶¶ 31–81, 78 (Arbitral Tribunal 2001).

139. See for instance, the BIT case Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶¶ 177–179. See under the CAFTA, Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶¶ 153–155. See also the NAFTA cases Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 Dec. 2002, ¶ 210; Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award, 21 Nov. 2007, ¶¶ 212–213, 304; Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 Sept. 2009, ¶¶ 219–223. As for the latest, see the recent William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 Mar. 2015, ¶¶ 696–716, 725, 742.

140. The respondent state must first be shown to have granted the foreign investor or its investment "treatment . . . with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition" of the relevant investments. Then, it must be shown that the foreign investor or investments were "in like circumstances" to an investor or investment of the respondent state ("the comparator"). United Parcel Serv. of Am. Inc. v. Canada, Award on the Merits, ¶ 83 (UNCITRAL May 24, 2007) (outlining three distinct elements which an investor must establish in order to prove

tor must make out a *prima facie* claim that it has received less favorable treatment than any of its domestic competitors by (1) identifying appropriate comparator investors or investments followed and (2) highlighting the result of the difference in treatment being received. In response, the respondent must then (3) justify such treatment as reasonable and justifiable in the circumstances.[141]

1. Likeness of the Comparators

Generally, the likeness of the comparators to which the complaining party attempts to compare itself is the basis for any NT claim.[142] For example, in cases where the disputed treatment is within a certain industry, the source of comparison naturally lends itself to investors operating within that industry, as opposed to all investors in the territory.[143] According to the Pope & Talbot NAFTA Tribunal, "[t]he treatment accorded to a foreign-owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector."[144] Applying these principles, the *ADF Group Incorporated v. U.S. Award* determined that the point of comparison in this case under Article 1102(2) was between steel products held by the investor (a steel fabricator) and steel products held by domestic investors, with respect to their potential use in a highway project.[145]

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that a state party has acted in a manner inconsistent with its obligations under Article 1102); *see also* Corn Prods. Int'l Inc. v. United Mexican States, Case No. ARB(AF)/04/1, Decision on Responsibility, ¶ 117 (ICSID Jan. 15, 2008) (requiring the same three elements be present). For further analysis, see Todd Weiler, *The Treatment of SPS Measures Under NAFTA Chapter 11: Preliminary Answers to an Open-Ended Question*, 26 B.C. INT'L & COMP. L. REV. 229 (2003).

141. The tribunal in *ADM v. Mexico* found that it would: (1) identify the relevant subjects for comparison; (2) consider the treatment each comparator receives; and (3) consider any factors that may justify any differential treatment. *See* Archer Daniels Midland Co. v. United Mexican States, Case No. ARB(AF)/04/5, Award, ¶ 196 (ICSID Nov. 21, 2007).

142. *See* Jurgen Kurtz, *National Treatment, Foreign Investment and Regulation Autonomy: The Search for Protectionism or Something More? in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 311–51 (P. Kahn & T. Walde eds., 2007).

143. For example, the tribunal in *GAMI v. Mexico* found that the holding company in which the claimant invested was not in "like circumstance" because the comparators offered were not in the same condition of financial distress. GAMI Investments, Inc. v. United Mexican States, Final Award, ¶ 114 (UNCITRAL Nov. 15, 2004).

144. *Pope & Talbot, Inc.*, ¶ 78.

145. ADF Grp. Inc. v. United States, Procedural Order No. 2, Case No. ARB(AF)/00/1, Award, ¶ 155 (ICSID Jan. 9, 2003). Shirley Contracting Corporation (Shirley), a U.S. corporation, was the successful bidder in a road project federally funded by the Department of Transport for the Commonwealth of Virginia (VDOT). *Id.* ¶ 46. Following a further bidding round, Shirley entered into a subcontract with ADF Group Inc. (ADF) to provide

The *ADF* Tribunal's comparison therefore utilized firms operating in the steel fabrication business as its "universe" of comparable investors under Article 1102(1).[146] Importantly, the 2012 *CAFTA Railroad Development v. Guatemala Award* adopted the reasoning of the 2001 *ADF* and shared the conclusion that the minimum standard of treatment is "constantly in a process of development." [147]

2. Test of "Treatment No Less Favorable"

Investors and their investments are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances. The 2010 *Total v. Argentina Award* noted that the treatment obligation does not preclude all differential treatment but is aimed at protecting foreign investors from de jure or de facto discrimination based on nationality. Therefore, a claimant complaining of a breach by the host state of the BIT's treatment clause:

> (i) has to identify the local subject for comparison;
> (ii) has to prove that the claimant-investor is in like circumstances with the identified preferred national comparator(s); and

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structural steel components for nine bridges in connection with the project. *Id.* ¶ 47. Federal regulations incorporated by reference in the project contract and subcontract required—with certain exceptions—the use of materials, "produced in the United States." *Id.* ADF proposed to perform its contractual obligations by processing U.S. steel at its plant in Canada in order to make it suitable for use in the bridges. *Id.* ¶ 49. VDOT insisted that ADF must conduct all processing in the United States in order to comply with federal, state, and contractual "Buy America" requirements and refused to grant a waiver to ADF. *Id.* ¶¶ 50–51, 54. As a result, ADF was forced, at increased expense, to subcontract out the vast majority of the work it had contracted to perform to U.S. steel processing. *Id.* ¶ 55. ADF performed the operations in the United States on time but sought to recover additional amounts on the grounds that the local manufacture condition violated Articles 1102(1) and 1102(2), 1103, 1105(1), and 1106(1)(c) of NAFTA. *Id.* ¶¶ 55, 61–88. ADF also claimed that it had subsequently suffered further losses from the local manufacture condition in relation to other projects. *Id.* ¶¶ 89–90.

146. *Id.* ¶ 63.

147. R.R. Dev. Corp. v. Guatemala, Case No. ARB/07/23, Award, ¶ 218 (ICSID June 29, 2012). This constant development of a minimum treatment standard applies to *Neer*'s formulation, an earlier formulation on the fair and equitable treatment standard made by the *Neer* arbitral tribunal in 1925. L.F.H. Neer v. United Mexican States (U.S. v. Mexico), 4 R.I.A.A. 60 (Oct. 15, 1926). The *Neer* case involved a claim brought against Mexico for the death of a U.S. citizen in Mexico. *Id.* at 60. The arbitral tribunal concluded that actions of governments would be in violation of the minimum standard of treatment if they "amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." *Id.* at 61–62. This created a very high threshold. *See* Charles Brower et al., *Fair and Equitable Treatment Under NAFTA's Investment Chapter*, 96 Am. Soc'y Int'l L. Proc. 9, 19–20 (2002).

> (iii) must demonstrate that it received less treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators.[148]

These comparisons analyze both whether the treatment being received is substantially similar to other investments and the actual result of the treatment being received on the complaining investor.[149] The Myers Tribunal noted as follows:

> Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favor nationals over non-nationals would not give rise to a breach of [Article 1102] if the measures in question were to produce no adverse effect on the non-national complainant. The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is a violation of Chapter 11.[150]

Therefore, the "treatment no less favorable" test focuses on the particular experience of the claimant, not a global comparison of general treatment received by groups of domestic or foreign investors or investments.[151] The comparison remains between the treatment being received by the claimant and the best treatment being received by a domestic investor operating in like circumstances.[152]

3. "Like Circumstances Exception"

Once the claimant proves a *prima facie* breach of NT, the analysis turns to whether the difference in treatment was justifiable under

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148. *See* Total S.A. v. Argentina, Case No. ARB/04/01, Decision on Liability, ¶ 212 (ICSID Dec. 27, 2010). The *Levy de Levi v. Peru* tribunal noted the need to identify appropriate comparators, (i.e., discrimination may be found between groups or categories of persons who are in a similar situation), and to assess the relevant circumstances, on a case-by-case basis. Levy de Levi v. Peru, Case No. ARB/10/17, Award, ¶ 396 (ICSID Feb. 26, 2014).

149. *See Total*, ¶¶ 211–12.

150. S.D. Myers v. Canada, Partial Award, ¶ 254 (NAFTA/UNICTRAL Trib. Nov. 13, 2000).

151. *See id.*

152. It is also unnecessary to prove that the reason for any difference in treatment received by an investor or its investment was due to its nationality (i.e., not being domestic), as in the following:

> [I]t is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or "by reason of nationality" . . . . However, it is not self-evident, as the Respondent argues, that any departure from national treatment must be explicitly shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances.

See Feldman v. Mexico, Case No. ARB(AF)/99/1, Award, ¶ 181 (ICSID Dec. 16, 2002).

the circumstances.[153] In NAFTA cases (the only investment awards that review this issue) concerning NT, the tribunal has looked to the respondent to justify its actions that caused the difference in treatment—regardless of whether the difference was discriminatory on its face[154] or discriminatory in result or application.[155] Furthermore, NAFTA practice demonstrates that to safeguard the liberalizing objectives of a treaty, the "like circumstances exception" must be construed narrowly.[156] Other tribunals, however, have extended the "like circumstances exception" to other types of clauses.[157]

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153. This third element applies to *prima facie* claims of MFN treatment disputes as well. *See* Weiler, *supra* note 135, at 106–07.

154. *See* In the Matter of Cross-Border Trucking Services, Case No. USA-MEX-98-2008-01, Final Report of the Panel, ¶¶ 258–60 (NAFTA Arbitral Panel Feb. 6, 2001).

155. *See Feldman*, ¶¶ 171–72; *S.D. Myers*, ¶ 251; Pope & Talbot, Inc. v. Canada, Award, Merits, ¶¶ 41–42 (Arbitral Tribunal 2001).

156. This is further explained as follows:

> It would be impossible for an investor, in making out its prima facie case, to address the universe of reasons as to why the differential treatment accorded to it was unreasonable and/or disproportionate in the circumstances. Past tribunals have accordingly looked to the respondent to provide such justification. While the legal burden will obviously remain with the claimant, once a prima facie case has been made out it will behoove the respondent to supply an explanation as to why the differential treatment was reasonable and proportionate in relation to the objectives it claimed for the measure at the time it was imposed. The rationale for this step was explained in the Pope & Talbot Award, and in the separate opinion in UPS v. Canada, as follows: Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.

Weiler, *supra* note 135, at 106–07.

157. This is further explained as follows:

> Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, Article IV of the Treaty does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context.

Parkerings-Compagniet AS v. Lithuania, Case No. ARB/05/8, Award on Jurisdiction & Merits, ¶ 368 (ICSID Aug. 2007) (construing a fair and equitable treatment (FET) clause as if it were an NT clause).

V. Protecting Foreign Investments in Asia-Pacific

Countries conclude IIAs primarily to protect and, secondarily, to promote foreign investment.[158] Increasingly, countries also enter into IIAs to liberalize such investments.[159] Companies and individuals enter into IIAs because they offer increased security and certainty under international law when they invest or set up a business in foreign countries party to the agreement.[160] The IIAs' fair and equitable treatment (FET) commitments[161] and regulation of expropriation[162] serve to encourage foreign companies and individuals to invest in the host country that concluded the IIA.

A. *Minimum Standard of Treatment*

Globally, the FET standard is expressed in different ways. Some treaties contain a bare reference to FET with no other explanation while others link the FET standard to international law or customary international law.[163] Some treaties also include the FET standard in a clause that contains prohibitions against arbitrary and discriminatory acts and/or a "nonimpairment" obligation. These different formulations may lead to different interpretative outcomes.

Defining FET within the context of Asia-Pacific IIAs may prove challenging given their own varying formulations. For example, some Asia-Pacific countries' IIAs take into account the full range of international law sources on the issue, giving FET an extended scope of application.[164] In contrast, certain Asia-Pacific IIAs make no mention of FET or of any minimum standard of treatment, a

158. *See* Gudgeon, *supra* note 2, at 125.

159. Liberalizing investments means that the financial structure of a country or region has been opened to market forces without the control of government or other any other types of control. *See* Todd J. Friedbacher & David P. Roney, *Regulation of Foreign Investment: Challenges to International Harmonization*, 13 World Trade Rev. 591, 591–98 (2013).

160. International dispute settlement processes have been responding to provide greater security and certainty for cross-border investment flows. *See* Charles N. Brower, *Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?*, 80 Arb. 179, 179–95 (2014).

161. *See infra* Part V.A.

162. *See infra* Part V.B.

163. *See* Org. for Econ. Co-operation & Dev. (OECD), *Fair and Equitable Treatment Standard in International Investment Law* (OECD Working Papers on Int'l Investment, Paper No. 2004/03, 2004) (citing tribunal decisions); Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 ASIL Proc. 27 (2004).

164. Examples include the Japan-Thailand PTA or the Draft Investment chapter of the TPP. These international law sources include general principles, modern treaties, and other conventional obligations. *See* Agreement for an Economic Partnership, Japan-Thai., Apr. 3, 2007; Trans-Pacific Partnership art. 12, July 18, 2005.

standard customary in international law.[165] In between these extremes, some other Asia-Pacific countries' IIAs approach FET as a mere minimum standard of treatment.[166]

TABLE 8. FET IN ASIA-PACIFIC IIAS

Treaty & Relevant Provision	Text
Hong Kong-Japan (1997) Article 2	3. Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the area of the other Contracting Party.
Japan-Thailand PTA (2007) Article 95	This article titled, minimum standard of treatment reads: Each Party shall accord to investments of investors of the other Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. Note: This Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens, and do not create additional substantive rights. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

165. *See* Agreement on the Encouragement and Reciprocal Protection of Investments Between the Government of the Republic of Korea and the Government of the People's Republic of China, China-S. Kor., Sept. 30, 1992, 1739 U.N.T.S. 314. Under customary law, foreign investors are entitled to a certain level of treatment. Any treatment that falls short of this level gives rise to the state's responsibility to remedy this. FET has been identified by some as one of the elements of the minimum standard of treatment of foreigners and of their property required by international law. *See* Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BRIT. Y.B. INT'L L. 99, 104 (1999); *see also* Stephen Fietta, *Expropriation and the 'Fair and Equitable' Standard: The Developing Role of Investors' 'Expectations' in International Investment Arbitration*, 23 J. INT'L ARB. 375, 398 (2006) (stating that FET should not be treated merely as a minimum standard, but a standard that is continuously re-evaluated in light of the international community's perceptions of level of treatment required to be given to foreign investors by host states). *But see* Glamis Gold, Ltd. v. United States, Final Award, ¶ 609 (UNCITRAL June 8, 2009) (finding that BIT jurisprudence being seen as "converg[ing] with customary international law in this area [FET]" is an overstatement).

166. *See, e.g.*, Agreement for the Promotion and Protection of Investment, H.K.-Japan, May 15, 1997, 36 I.L.M. 1423; Agreement Concerning the Promotion and Protection of Investments, Indon.-Uzb., Aug. 27, 1996, *available at* http://www.aseanbriefing.com/userfiles/resources-pdfs/Indonesia/BIT/Indonesia_Uzbekistan_BIT.pdf.

TPP Draft (January 2015) Article 12.6	1. Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the [applicable rules of] customary international law [minimum] standard of treatment of aliens as the [minimum] [general] standard of treatment to be afforded to covered investments. The concept of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and . . . 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
India-Korea (1996) Article 3	2. Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
Indonesia-Uzbekistan (1997) Article 2	2. Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.
Malaysia-Kazakhstan (signed 1996, not yet in force) Article 2	2. Investments of investors of each Contracting Party shall at all times be accorded equitable treatment and shall enjoy full and adequate protection and security in the territory of the other Contracting Party.

Overall, our research shows that most Asia-Pacific IIAs do provide FET protection yet fail to provide any definition. As Table 8 demonstrates, only the Thailand-Japan PTA and the TPP 2015 draft seek to clarify the meaning and scope of the FET obligation. The TPP wording parallels typical U.S. treaty practice[167] when it clarifies that the FET standard is part of customary public international law.[168] The TPP further elucidates that concepts of FET and full protection and security "do not require treatment in addition

167. U.S. treaty practice links the FET standard with customary law but clarifies that the former (FET) is a component of the latter. *See* Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.- Uru., Nov. 4, 2005, S. Treaty Doc. No. 109-9 ("Each Party shall accord to covered investments treatment in accordance with customary international law, including [FET] and full protection and security.").

168. "Each Party shall accord to covered investments treatment in accordance with customary international law, including [FET] and full protection and security." Trans-Pacific Partnership, *supra* note 164.

to or beyond that which is required by that standard [minimum standard treatment], and do not create additional substantive rights."[169]

Although there has been considerable academic debate concerning FET provision drafting,[170] tribunals have avoided utilizing overarching theories concerning the meaning of the FET standard.[171] Some academics, such as Ioana Tudor, approve of this refusal to define FET, finding that "FET has only one content, which is operating at different thresholds, depending on the context."[172] However, these varying obligations and standards under FET may lead to different interpretative outcomes.[173] Generally, tribunals tend to limit any theoretical discussion of FET to listing examples of behaviors that violate the standard rather than actually providing a concrete standard.[174] The NAFTA award in *Waste Management v. Mexico* illustrates this when it held that conduct that violates FET is defined as follows:

> Grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[175]

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169. *Id.* art. 12.6.

170. *See* Total S.A. v. Argentina, Case No. ARB/04/01, Decision on Liability, ¶ 106 (ICSID Dec. 27, 2010) (finding that while providing FET to investors of the other party is a standard feature in BITs, the exact language of such undertakings is not uniform, and the generality of the FET standard distinguishes it from other specific obligations undertaken by the parties to a BIT).

171. Spyridon Roussalis v. Romania, Case No. ARB/06/1, Award, ¶ 318 (ICSID Dec. 1, 2011) (finding that the scope of FET is not precisely defined beyond general principles such as transparency and good faith).

172. *See* IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 154 (2008).

173. *See* Sempra Energy Int'l v. Argentina, Case No. ARB/02/16, Award, ¶¶ 296–97 (ICSID Sept. 28, 2007) (noting that FET is not a clear and precise standard and that it has evolved through case-by-case determinations); *see also* El Paso Energy Int'l Co. v. Argentina, Case No. ARB/03/15, Award, ¶ 338 (ICSID Oct. 31, 2011) (agreeing that variation exists in the practice of arbitral tribunals in analyzing FET).

174. *See* Mondev Int'l Ltd. v. United States, Case No. ARB(AF)/99/2, Award, ¶ 95 (ICSID Oct. 11, 2002) (observing that the minimum standard of treatment applies to a wide range of factual situations, whether in peace or in civil strife, and may be conducted by a wide range of state organs and agencies).

175. Waste Mgmt., Inc. v. Mexico, Case No. ARB(AF)/00/3, Award, ¶ 98 (ICSID Apr. 30, 2004).

B. *Indirect Expropriation*

Expropriation can take different forms. Direct expropriation occurs when an investment is nationalized or directly seized through the dispossession of the investor's title over its investment.[176] Indirect expropriation occurs through measures that, although not formally denying the investor of its title, have an impact on the investor's property sufficient to effectively deprive the investor of benefits over its investments, inhibit its management, use or control, or substantially depreciate its value.[177] A subset of indirect expropriation is known as regulatory expropriation, a situation in which a measure has been taken for regulatory purposes but has an impact equivalent to expropriation.[178] Significant discrepancies exist in Asia-Pacific countries' expropriation practices because while some IIAs cover both direct and indirect expropriation, others address only direct expropriation.[179] Further,

176. Expropriation, one of the most protected substantive principles of investment law, means the taking of property either directly or indirectly. *See* Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV.—FOREIGN INV. L.J. 7–8 (2005).

177. For example, host states can erase or decrease the value of an investment by taking measures that alter the legal and economic equilibrium of the contract. This can be done through tactics such as the imposition of new taxes, an increase in the rate of taxes already applicable, or even the imposition of limitations on the transferability or convertibility of currency. *See* Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 70–72 (2002). *See also* Metalclad Corp. v. Mexico, Case No. ARB(AF)/97/1, Award (ICSID Aug. 30, 2000), 5 ICSID Rep. 209. In *Metalclad Corp*, a U.S. investor had acquired land in Mexico for use as a landfill and had obtained assurances from the Mexican federal government that all necessary permits had been issued. *Id.* The local authority, however, refused to grant permission to begin construction. *Id.* The ICSID Tribunal concluded that the host government's actions had deprived Metalclad of the ability to use its property for its intended purpose, which had caused sufficient harm to constitute expropriation. *Id.* The Tribunal also recognized the principle that:

> [E]xpropriation . . . includes not only open, deliberate and acknowledged takings of property . . . but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

Id. at ¶ 103.

178. Indirect expropriation may also be equivalent to creeping expropriation, where it is not one an individual act but rather a series of measures that brings about the expropriatory effect. *See* Generation Ukraine v. Ukraine, Case No. ARB/00/9, Award, ¶¶ 20.22, 20.26 (ICSID Sept. 16, 2004) (finding "creeping expropriation" to occur when an investment is eroded by a series of acts attributable to the state, to the extent that the erosion violates the relevant international standard of protection against expropriation).

179. Controversy exists in how to distinguish between indirect expropriation (regulatory and creeping) and state measures taken for legitimate regulatory purposes. *See* Lauder v. Czech Republic, Award (Final), ¶ 200 (ICSID Sept. 3, 2001), 9 ICSID Rep. 130 (finding "measures . . . taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the

indirect expropriation's inclusion in an IIA is not consistent; the same country will sometimes include indirect expropriation in one IIA and not another.[180] Inclusion of indirect expropriation in an IIA is significant because it offers protection to foreign investors who may be faced with serious alterations of the investment climate that they could not have reasonably anticipated.[181]

Similar to FET, there is no clear definition of indirect expropriation.[182] Despite a number of decisions by international tribunals attempting to navigate the line between the concept of indirect expropriation that requires compensation versus governmental regulatory measures that do not require compensation, no standard has been clearly articulated; cases instead turn upon the specific facts and circumstances of the complaint at hand.[183] In recent years, a new generation of U.S. and Canadian IIAs, including the investment chapters of PTAs, has introduced specific language[184] and established criteria to assist in determining whether an indirect expropriation requiring compensation has occurred.[185] This

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respective rights" and measures that "[do] not involve an overt taking, but that effectively neutralize[ ] the enjoyment of the property" would constitute indirect expropriation); *see also Metalclad Corp.*, ¶ 103 (finding that NAFTA's prohibition on measures "tantamount to expropriation" included not only open, deliberate, and acknowledged takings of property but also covert or incidental interference with the use of property, which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state); Técnicas Medioambientales Tecmed, S.A. v. Mexico, Case No. ARB (AF)/00/2, Award, ¶ 114 (ICSID May 29, 2003), 10 ICSID Reps. 130 (2006).

180. New Zealand, Singapore, and the PRC do not always cover indirect expropriation in their IIAs. *See* Agreement on a Closer Economic Partnership, N.Z.-Sing., Nov. 14, 2000, 2203 U.N.T.S. 129 (no indirect expropriation protection); Free Trade Agreement, N.Z.-China, art. 145, Apr. 7, 2008, 2590 U.N.T.S. 101 (limitations on expropriation present).

181. *See* Simon Baughen, *Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven*, 18 J. Envtl. L. 207, 209 (2006); Steven Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 Am. J. Int'l L. 475, 478 (2008); Lowenfeld, *supra* note 3, at 397–403.

182. *See* Middle East Cement Shipping & Handling Co. v. Egypt, Case No. ARB/99/6, Award (ICSID April 12, 2002), 7 ICSID Rep. 173, 175–76 (2005); *Lauder*, ¶ 200 (2006); *Metalclad Corp.*, ¶ 103; *see also Técnicas Medioambientales Tecmed*, ¶ 114.

183. *See* Anne Van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. Int'l Econ. L., 507, 510–12 (2009).

184. For further discussion, see Rachel D. Edsall, *Indirect Expropriation Under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public*, 86 B.U. L. Rev. 931, 953–61 (2006).

185. While investment agreements do not completely disallow expropriatory measures (as these are included within a state's sovereign rights), they can require states to fulfill certain conditions before an expropriation is considered lawful under international law. Such conditions include expropriations being for public interest, on a nondiscriminatory basis, with the payment of compensation, and through due legal process. *See* Letter from U.S. Secretary of State to Mexican Ambassador (Aug. 22, 1938), *reprinted in* Andreas F. Lowenfield, International Economic Law 478 (2d ed. 2008) ("Under every rule of law

Article's comprehensive review of all Asia-Pacific IIAs shows that limits to the indirect expropriation definition can also be found in U.S. PTAs with Singapore, Chile, Australia, and Peru.

TABLE 9. INDIRECT EXPROPRIATION IN ASIA-PACIFIC IIAS

Treaty & Relevant Provision	Text
PRC-Myanmar BIT (2009) Article 4	1. Neither Contracting Party shall expropriate, nationalize or take other similar measures (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met: (a) for the public interests; (b) under domestic legal procedure; (c) without discrimination; (d) against compensation. 2. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the value of the expropriated investments immediately before the expropriation is taken or the impending expropriation becomes public knowledge, which is earlier. The value shall be determined in accordance with generally recognized principles of valuation. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The compensation shall also be made without delay, be effectively realizable and freely transferable.
Malaysia-Indonesia (April 2012) Article 4	Each Contracting Party shall not take any measures of expropriation, nationalization or any other dispossession, having effect equivalent to nationalization or expropriation against the investments of an investor of the other Contracting Party except under the following conditions: (a) the measures are taken for a lawful purposes or public purpose and under due process of law; (b) the measures are non discriminatory; (c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value immediately before the measure of dispossession became public knowledge. Such market value shall be determined in accordance with internationally acknowledged practices and methods or, where such fair market value cannot be determined, it shall be such reasonable amount as may be mutually agreed between the Contracting Parties hereto, and it shall be freely transferable in freely usable currencies from Contracting Party. Any unreasonable delay in payment of compensation shall carry an interest at prevailing commercial rate as agreed upon by both parties unless such rate is prescribed by law.

and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefor."). This statement, also known as the "Hull formula," suggested that the foreign investor was entitled to dispute resolution before an overseas tribunal if the remedies provided by the host state proved inadequate. *Id.*

TPP Draft (January 2015) Article 12.12	1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation") except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and (d) in accordance with due process" [subsequent paragraphs specifying valuation of expropriations and form and procedure of payment].
Japan-Thailand PTA (2007) Article 102	1. Neither Party shall expropriate or nationalize investments in its Area of investors of the other Party or take any measure equivalent to expropriation or nationalization (hereinafter referred to in this Chapter as "expropriation") except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law; and (d) upon payment of prompt, adequate and effective compensation. 2. Compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier. The fair market value shall not reflect any change in market value occurring because the expropriation had become publicly known earlier.
Japan-Hong Kong (1997) Article 5	1. Investments and returns of investors of either Contracting Party shall not be subjected to deprivation or any measure having effect tantamount to such deprivation (hereinafter referred to as "deprivation") in the area of the other Contracting Party except under due process of law, for a public purpose, on a non-discriminatory basis, and against compensation. Such compensation shall amount to the real value of the investments and returns at the time of the deprivation or when the impending deprivation became public knowledge, whichever is the earlier, disregarding any reduction in the value which might have been caused by the prospect of the deprivation, shall be paid without undue delay, shall carry an appropriate interest taking into account the length of time until the time of payment, and shall be effectively realizable, freely convertible and freely transferable.
Australia-PRC (1988) Article VIII	1. A Contracting Party shall not take measures of expropriation or nationalization or other measures having a similar effect relating to any investment unless the measures are in the public interest, non-discriminatory, in accordance with the law of the Contracting Party which has admitted the investment and against reasonable compensation. 2. The compensation referred to in paragraph 1 of this Article shall be computed on the basis of the market value of the investment immediately before the measures became public knowledge. Where the market value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognized principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value and other relevant factors. The

	compensation shall include interest at a reasonable rate from the date the measures were taken to the date of payment, shall be paid without undue delay, shall be freely convertible and shall be freely transferable between the territories of the Contracting Parties at the average of the daily exchange rates, determined on each of those days in accordance with the law of the Contracting Party which has admitted the investment, over the six months immediately prior to the taking of the measures.

Within the last decade, indirect expropriations have come to be defined as those which fall short of the actual physical taking of property but which result in the effective loss of management, use, or control of, or a significant depreciation of the value of the assets of a foreign investor.[186] Regulatory takings, a smaller subset of indirect expropriations, are defined as "those takings of property that fall within the police powers of a State, or otherwise arise from State measures like those pertaining to the regulation of the environment, health, morals, culture, or economy of a host country."[187] The issue of regulatory takings is of particular concern in sensitive areas of public policy, such as tobacco control.[188] Similar to the lack of clarity with defining indirect expropriations generally, there has also not been a clear articulation of the line between the concept of indirect expropriation and legitimate governmental regulatory measures not requiring compensation.[189] The determination of indirect expropriation depends on the specific facts and circumstances of each case.[190] There are, however, three main criteria

186. *See* Gemplus, S.A. v. Mexico, Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, ¶ 23 (ICSID June 16, 2010) ("[A]n indirect expropriation occurs if the state deliberately deprives the investor of the ability to use its investment in any meaningful way.").

187. UNCTAD, Taking of Property 12 (2000), U.N. Doc. UNCTAD/ITE/IIT/15 [hereinafter UNCTAD].

188. *See generally* Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections—Is a General Exceptions Clause a Forced Perspective?*, 39 Am. J.L. & Med. 332 (2013) (discussing takings in the context of tobacco control); Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements*, 15 J. Int'l Econ. L. 871 (2012) (discussing takings and intellectual property rights); Bryan Mercurio, *Public Health Law—Case Study: Plain Packaging*, *in* Routledge Handbook on Global Public Health in South/East Asia (Sian Griffiths ed., 2014) (relating plain packaging regulations to takings).

189. *See* Catherine Yannaca-Small, *OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, *in* International Investment Law: A Changing Landscape 43, 54 (2005), *available at* http://browse.oecdbookshop.org/oecd/pdfs/product/2005141e.pdf; see also Van Aaken, *supra* note 183, at 510–12.

190. *See* Yannaca-Small, *supra* note 189, at 54. Despite variation in the ways in which tribunals distinguish between "legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation," generally all look at the three elements of: "(i) the degree of interference with the

that arbitrators are likely to consider in evaluating a regulatory measure.[191] To find the existence of an indirect expropriation, the following three elements must be demonstrated: (1) there has been a substantial deprivation of the value of the whole investment;[192] (2) it was a permanent measure;[193] and (3)[194] the measure is not justified under the police power doctrine.[195]

VI. Exploring Future Prospects for Investment Regulation in Asia-Pacific

To understand the future prospects for investment in the Asia-Pacific, it is important to consider international arbitration that has been sought against Asia-Pacific parties thus far and the current trends in the regionalization of investment pacts.

A. *Moving Toward an Increase of Claims Against Asia-Pacific States?*

Under IIAs, investors from one state party can seek financial compensation from another state party to the agreement for failure to comply with treaty obligations through binding arbitration.[196] A collection of all the cases brought against Asia-Pacific states has already been published.[197] The results of these disputes are significant because from 1987 to the present at least seventy investment disputes have involved twenty-five Asia-Pacific states as defending parties.[198] As shown by Figure 2 below, a great variety of states had faced investment arbitration claims. India (fourteen claims), Pakistan (eight), Georgia (seven), Kyrgyzstan (seven), Turkmenistan (six), Uzbekistan (six), and Indonesia (five) hold the greatest substantive experience with international investment

property right; (ii) the character of governmental measures, *i.e.*, the purpose and the context of the governmental measure; and (iii) the interference of the measure with reasonable and investment-backed expectations." *Id.*; *see also* Van Aaken, *supra* note 183, at 512 (explaining that there is a "fine line between legitimate regulatory non-compensable measures of the host state and compensable regulatory expropriations").

191. *See* Burlington Resources Inc. v. Ecuador, Case No. ARB/08/5, Decision on Liability, ¶ 471 (ICSID Dec. 14, 2012).

192. This element analyzes the degree of interference with the property right, which includes interference with the investor's reasonable investment-backed expectations.

193. This element focuses on the duration of the measure.

194. This requires determining the legitimacy of the measure's purpose.

195. *See Burlington Resources Inc.*, ¶ 471.

196. *See* Christoph Schreuer et al., The ICSID Convention: A Commentary, at ix, 1227 (2d ed. 2009); Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79 Brit. Y.B. Int'l L. 264, 297, 328–29 (2008).

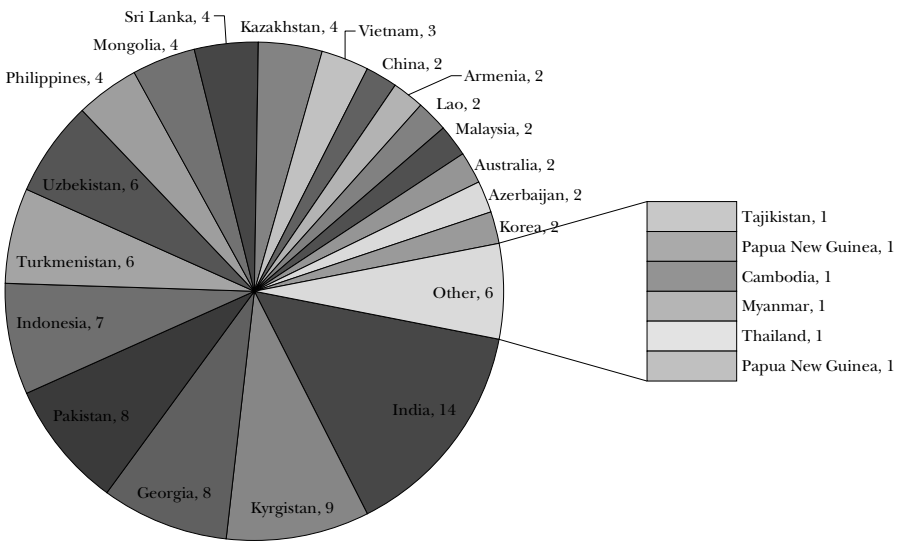
197. *See* Julien Chaisse, *Assessing the Exposure of Asian States to Investment Claims*, 6 Contemp. Asia Arb. J. 187 (2013).

198. *See id.* at 203.

arbitration.[199] To enhance this initial picture, a deeper look into the possible relation between the amount of negotiated treaties and the number of investment disputes is needed.[200]

This Section will analyze four parameters through which to explain this relatively significant number of disputes, amounting to almost twenty percent of all international investment disputes. First, this Section reviews the evolution of the investment claims made against Asia-Pacific states. Second, this Section focuses on three other specific parameters that help to explain how most Asia-Pacific states have now been drawn into international investment arbitration. These three parameters include (1) the increased conclusion of investment instruments (i.e., IIAs), (2) the growing legal understanding of these instruments (i.e., guiding legal principles), and (3) the significant volume of FDI in a State (i.e. an increase in the amount of foreign investment).

FIGURE 2: RANKING OF ASIA-PACIFIC STATES PER NUMBER OF INVESTOR CLAIMS[201]



199. *See infra* Figure 2.

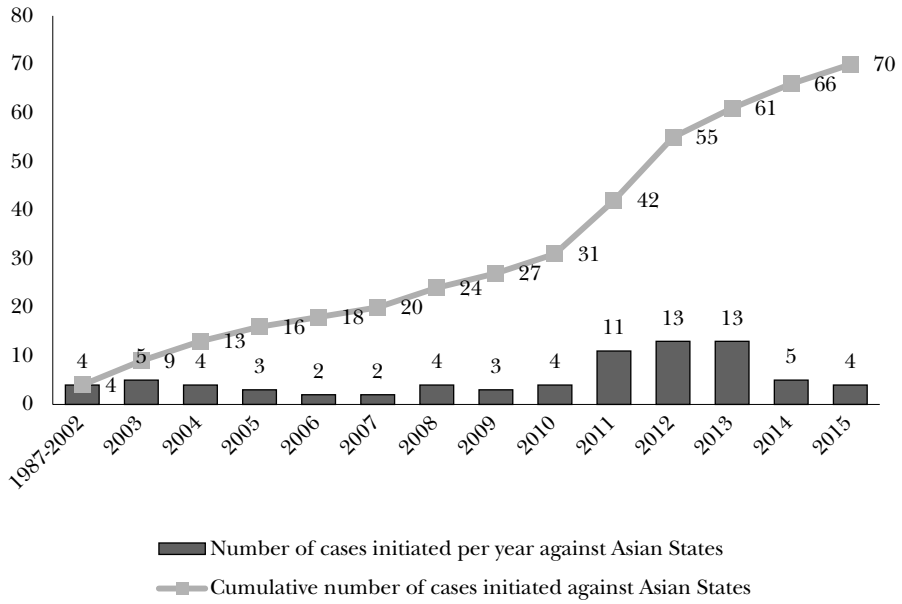
200. This is especially poignant considering India has faced many claims, whereas the PRC, which has concluded a greater amount of IIAs, has been challenged once. *See infra* Figure 2.

201. *Database of Treaty-Based Investor-State Dispute Settlement*, UNCTAD, http://unctad.org/en/Pages/DIAE/ISDS.aspx (last visited Apr. 17, 2015) (compiled by Author from ICSID Database of registered cases and national Ministries of Foreign Affairs public information).

1. The Evolution of Arbitration Claims Against Asia-Pacific States

To provide a finer analysis of the international disputes involving Asia-Pacific states, this Section looks at the evolution of arbitration claims over time, from the first claim made against Sri Lanka in 1987 to the present claims made against Kazakhstan.[202] The survey covers seventy claims against twenty-five Asia-Pacific states.[203]

FIGURE 3: INVESTMENT CLAIMS AGAINST ASIA-PACIFIC STATES (1987–MAY 2015)[204]



There are a number of Asia-Pacific states that have never had an arbitration claim brought against them, and these include: New Zealand, Brunei Darussalam, Nepal, Afghanistan, Vanuatu, Tonga, Hong Kong PRC, Japan, Taiwan, and Singapore.[205] Despite the immunity of these countries, arbitration claims have been brought against twenty-four other Asia-Pacific countries.[206] The first case

202. *See infra* Figure 3.

203. These include India, Pakistan, Georgia, Kyrgyzstan, Turkmenistan, Indonesia, Uzbekistan, Philippines, Mongolia, Sri Lanka, Vietnam, Armenia, Lao, Malaysia, Azerbaijan, Kazakhstan, Tajikistan, Australia, Papua New Guinea, Cambodia, Myanmar, PRC, the Republic of Korea, and Thailand. *See infra* Figure 3.

204. Compiled by Author on the basis of sources cited *supra* note 37.

205. *See* Chaisse, *supra* note 197, at 205.

206. *Id.*; *see also* sources cited *supra* note 37.

brought against an Asia-Pacific state was the one involving a Hong Kong claimant against Sri Lanka in 1987.[207] Since 1987, research shows that a growing number of Asia-Pacific states, twenty-five in total, have faced international arbitration challenges. Between the early 2000s and 2010, an average of only five claims a year were initiated.[208] However, a sharp increase in these challenges began in 2011, where more than ten disputes were initiated.[209] Exactly thirteen claims were registered in 2012[210] and, again, in 2013.[211] In 2014, five investment claims were registered, including an important one against China.[212] Although the year 2015 is not yet over at the time of writing, there were already four investment claims filed against Asian states.[213]

2. Parameters of International Investment Arbitration

This Article provides an explanation for a smaller amount of arbitration disputes in the Asia-Pacific region thus far and the likelihood of greater disputes in the future, through looking at three parameters: (1) the conclusion of investment instruments, (2) the

207. *See* Asian Agric. Prods. Ltd. (AAPL) v. Sri Lanka, Case No. ARB/87/3, Final Award (ICSID 27 June 1990).

208. *See supra* Figure 3.

209. *See supra* Figure 3.

210. *See supra* Figure 3.

211. For 2013, this Article identified thirteen investment claims: Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan, Case No. ARB/13/1 (ICSID Feb. 8, 2013); Omar Faruk Bozbey v. Turkmenistan (UNCITRAL Apr. 2013); Consol. Exploration Holdings Ltd. v. Kyrgyz, Case No. ARB(AF)/13/1 (ICSID Apr. 23, 2013); Vladislav Kim v. Uzbekistan, Case No. ARB/13/6 (ICSID Apr. 24, 2013); Democratic Republic of East Timor (Timor-Leste) v. Australia (Ad-hoc 2002 Timor Sea Treaty), Notice Arbitration (May 3, 2013); Federal Elektrik Yatirim ve Ticaret A.S. v. Uzbekistan, Case No. ARB/13/9 (ICSID May 24, 2013); Caratube Int'l Oil Co. v. Kazakhstan, Case No. ARB/13/13 (ICSID June 28, 2013); Günes Tekstil Konfeksiyon Sanayi ve Ticaret Limited Sirketi v. Uzbekistan, Case No. ARB/13/19 (ICSID Aug. 29, 2013); Deutsche Telekom v. India, Notice of Arbitration (ICSID Sept. 2, 2013); Khaitan Holdings Mauritius Ltd. v. India, Notice of Arbitration (UNCITRAL Sept. 30, 2013); Spentex Netherlands, B.V. v. Uzbekistan, Case No. ARB/13/26 (ICSID Sept. 27, 2013); Naumchenko, Poulouektov & Tenoch Holdings v. India (ByCell dispute) (UNCITRAL Oct. 29, 2013); PNG Sustainable Dev. Program Ltd. v. Indep. State of Papua New Guinea, Case No. ARB/13/33 (ICSID Dec. 20, 2013).

212. Ansung Housing Co. v. China, Case No. ARB/14/25 (ICSID Nov. 4, 2014); Beck v. Kyrgyz Republic (Moscow Arb. Ct. June 24, 2014); OKKV (OKKB) v. Kyrgyz Republic (Moscow Arb. Ct. June 23, 2014); Churchill Mining PLC v. Indonesia, Case No. ARB/12/14 (ICSID May 12, 2014); Nusa Tenggara P'ship B.V. v. Indonesia, Case No. ARB/14/15 (ICSID June 30, 2014).

213. Hanocal Holding B.V. and IPIC International B.V. v. Republic of Korea, ARB/15/17; Devincci Salah Hourani and Issam Salah Houran v. Republic of Kazakhstan, ARB/15/13; Aktau Petrol Ticaret A.S. and Som Petrol Ticaret A.S. v. Republic of Kazakhstan, ARB/15/8; Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste, ARB/15/2.

legal understanding of these instruments, and (3) a significant volume of FDI. These three parameters are now satisfied in most Asia-Pacific states and it is the satisfaction of these parameters that draws states fully into the international investment arena, therefore making Asian states susceptible to arbitration disputes. This also explains why some Asia-Pacific countries have remained relatively arbitration-free thus far.

Indeed, most Asia-Pacific states have entered into investment treaties over the last few years and are expanding their network of IIAs.[214] These new agreements are the instruments that form the foundation on which future investment arbitration claims may arise. A greater participation in international investment arbitration is also fostered through a growing legal understanding of these treaties. This understanding grows and forms through private practice and legal education on investment matters. While no general study has yet been conducted to measure such investment knowledge, there has been a trend in many Asia-Pacific-based law firms to develop an "arbitration" department and many universities to establish programs on investment regulation.[215] A growing legal understanding of IIAs will likely encourage investors to rely on expert legal advice to bring claims before arbitration against Asia-Pacific states. Finally, the sheer increase in the volume of the FDI in the Asia-Pacific region points to an explanation for the increase in arbitration disputes and a predicted future increase in disputes.[216]

Combining these three parameters aids in understanding the future prospects for investment claims against Asia-Pacific states. Together, they reveal a great arbitration potential, which hitherto has been ignored or marginalized. Nonetheless, this Article demonstrates that investor-state arbitration is currently developing fast in Asia-Pacific, signaling a likely intensification of international investment arbitration practice in the Asia-Pacific region in the coming years.[217]

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214. *See supra* Tables 1, 2, and 3.

215. *See, e.g.*, Kanishk Verghese, *Arbitration in Asia: The Next Generation?*, ASIAN LEGAL BUS., July 1, 2014, *available at* http://www.legalbusinessonline.com/reports/arbitration-asia-next-generation; *see also* Tara Shah, *Asia Pacific—Investment Arbitration in Asia: The Way Forward for Asia on the Rise*, CONVENTUS L., Oct. 10, 2014, *available at* http://www.conventus-law.com/43547; Chaisse, *supra* note 197, at 206.

216. *See* Xiao, *supra* note 132, at 1–3 (reviewing the major determinants in the expansion of trade and the FDI into Asian economies).

217. *See also generally* Chaisse, *supra* note 197.

B. *Current Asia-Pacific Negotiations on Investment*

Further, a major current trend in international investment rulemaking is the increasing regionalization of negotiations. With the core of international investment regulations being based on BITs and bilateral PTAs, this Section underscores the importance that current negotiations of broader multicountry pacts hold over a great number of economic areas.[218]

The current rise of plurilateral agreements with wider scope[219] is likely to produce greater economic effects while also disseminating the basic principles of foreign investment protection to most Asia-Pacific economies.[220] Nevertheless, while the rise of plurilateral IIAs may be beneficial in certain respects to existing Asia-Pacific IIAs, it may also intensify certain problems because it creates more common-member agreements.[221] These would multiply the already-complex regulatory layers over foreign investment in the region.[222]

This Article observes that three determinants will likely play a major role in Asia-Pacific's future investment rulemaking. First, there are currently three Asia-Pacific plurilateral agreements, either recently concluded or currently under negotiation, that deal with investment matters and illustrate the regionalization of investment law. These are ACIA,[223] RCEP, and the PRC-Japan-Republic

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218. While this Article focuses its analysis on Asia-Pacific rulemaking in international investment specifically, it is important to consider the effects the interaction with developments elsewhere in the world may have on Asia-Pacific economies.

219. Countries have also actively negotiated plurilateral agreements, such as the recently-adopted Anti-Counterfeiting Trade Agreement (ACTA) and the still-incomplete TPP. For discussions of ACTA's impact on access to medicines, see generally Brook K. Baker, *ACTA—Risks of Third-Party Enforcement for Access to Medicines*, 26 AM. U. INT'L L. REV. 579 (2011).

220. *See* Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L.J. 275 (2000) (discussing the failed multilateral agreement on investment negotiations and their effects on modern plurilateral agreements).

221. Rashmi Rangnath, *ACTA the Sequel: The Transpacific Partnership Agreement*, PUB. KNOWLEDGE (Jan. 4, 2011, 2:51 PM), http://www.publicknowledge.org/blog/acta-sequel-transpacific-partnership-agreemen; *see also* Judy Dempsey, *Judy Asks: Is TTIP Really a Strategic Issue?*, CARNEGIE EUR. (Oct. 8, 2014), http://carnegieeurope.eu/strategiceurope/?fa=56869.

222. *See* Rangnath, *supra* note 221; *see also* Dempsey, *supra* note 221.

223. ACIA, *supra* note 27, art. 42. For a review, see Julien Chaisse, *The Association of Southeast Asian Nations in a New Era: Unveiling the Promises*, *in* COMPETITIVENESS OF ASEAN ECONOMIES—CORPORATE AND REGULATORY DRIVERS 2 (Philippe Gugler & Julien Chaisse eds., 2010).

of Korea Trilateral Investment Treaty.[224] Second, the current TPP negotiations may soon result in one of the most ambitious investment treaties ever negotiated, which has the potential to absorb all Asia-Pacific investment treaties.[225] Finally, a relevant exogenous factor is the European Union's decision to expand its influence into investment negotiations and therefore replace the negotiating role of E.U. Members States.[226] One can assume that virtually all Asia-Pacific countries that are already bound with many of the twenty-seven E.U. Member States are going to be affected.

1. RCEP and Its Interaction with Other IIAs

A deep opposition between the PRC and Japan in the Asia region largely affects the architecture of foreign investment regulation.[227] In a nutshell, there has long been a debate between the PRC and Japan on the "appropriate" membership of Asia-Pacific economic cooperation fora and institutions.[228] The PRC prefers the ASEAN+3 framework,[229] while Japan insists upon the inclusion of Australia, New Zealand, and India.[230] To avoid being involved in the political rivalry between the two powers, in 2011, ASEAN

224. *See* Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths Toward Deeper Asian Economic Integration*, 8 Asian J. World Trade Orgs. & Int'l Health L. & Pol'y 359, 361–63 (2013).

225. The Trans-Pacific Partnership: A Quest For A Twenty-First Century Trade Agreement, *supra* note 45; *see also* Lewis, *supra* note 224, at 403–04.

226. *See* Chaisse, *supra* note 78, at 51.

227. Saadia Pekkanen, *Investment Regionalism in Asia: New Directions in Law and Policy?*, 11 World Trade Rev. 119, 124 (2012) ("[T]rends are being shaped mostly by two powers to date: Japan (mostly on the outflow side) and now also China (mostly on the inflow side, though changes on the outflow side, largely to Hong Kong, are also rapidly emerging)."). The structures that have emerged as a result of this opposition are explained as follows:

> In terms of East Asian financial regionalism, there has also been considerable movement, which arose out of the turmoil of the broader Asia financial crisis in 1997 . . . . Several venues have emerged that serve as the locus for East Asian financial cooperation, namely the Association of Southeast Asian Nations (ASEAN), ASEAN Plus Three (APT, or ASEAN+3), and the East Asia Summit (EAS). Through these venues, regional actors have at least come up with concrete goals in terms of cooperation. These include, for example: ASEAN's focus on strengthening surveillance mechanisms and developing domestic financial systems; ASEAN+3's focus on regional economic surveillance, reserve pooling, and bond market development; and EAS's interest in complementing such efforts at the regional level with a view to serving as an Asian voice at the global level.

Id. at 119, 121.

228. *See* Lewis, *supra* note 224, at 362.

229. ASEAN+3 refers to the ten ASEAN countries complemented by the PRC, Japan, and Republic of Korea. *Id.* at 119, 138.

230. *See* The Trans-Pacific Partnership: A Quest For A Twenty-First Century Trade Agreement, *supra* note 45; *China Military-Diplomatic Split over US Ships*, Radio Austr. (Mar. 22, 2012), http://origin.m.radioaustralia.net.au/international/radio/onairhighlights/china-militarydiplomatic-split-over-us-ships.

proposed RCEP, under which the modality of economic interaction in East Asia could be discussed by going beyond membership problems.[231] The membership problems are combated because all countries that have PTAs with ASEAN members—which include the PRC, Japan, the Republic of Korea, Australia, New Zealand, and India—are involved in RCEP.[232] Officially, RCEP will aim to create a liberal, facilitative, and competitive investment environment in the region.[233] The negotiations will cover the four pillars of promotion, protection, facilitation, and liberalization.[234] The ASEAN Leaders established RCEP's Working Groups in goods, services, and investment during the nineteenth ASEAN Summit to consider the scope of RCEP; the ASEAN Economic Ministers have accepted their recommendations, as detailed in the Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership.[235] However, not much progress has been made in the negotiations as of May 2015.[236]

The RCEP will likely interact with all current and developing IIAs in the Asia-Pacific region, made up of both simple and sophisticated PTAs. An example of a simple PTA is the ASEAN-PRC PTA whose investment chapter became effective in 2010 and covers only the protection of investment.[237] In contrast, Japan's EPAs with individual ASEAN members include relatively sophisticated invest-

231. *See* Lewis, *supra* note 224, at 368–69.

232. *See id.* at 363–64.

233. *Id.*

234. Press Release, ASEAN Secretariat, ASEAN and FTA Partners Launch the World's Biggest Regional Free Trade Deal (Nov. 20, 2012), *available at* http:// www.asean.org/news/asean-secretariat-news/item/asean-and-fta-partners-launch-the-world-s-biggest-regional-free-trade-deal.

235. In turn, the momentum of the TPP appears to have spurred the PRC to push more actively for its own multiparty grouping, the ASEAN+6, currently known as the Regional Comprehensive Economic Partnership (RCEP). *See* Lewis, *supra* note 224. Kolsky Lewis analyzes the similarities and differences between these two potential paths toward Asian integration and he identifies factors that may influence each agreement's prospects of expanding further. *Id.* Other relevant coalitions and agreements to consider are: ASEAN, Trans-Pacific Strategic Economic Partnership Agreement, P4 Agreement, RCEP, Free Trade Agreement of the Asia-Pacific (FTAAP), Asia-Pacific Economic Cooperation, and TPP. *Id.*

236. For a detailed account and news of these negotiations, see the excellent work done by The Diplomat at *Regional Comprehensive Economic Partnership*, DIPLOMAT, http://thediplomat.com/tag/regional-comprehensive-economic-partnership (last visited, May 20, 2015).

237. Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the People's Republic of China (ASEAN-China FTA), *entered into force* July 1, 2007, *available at* http://www.asean.org/news/item/twelfthasean-summit-cebu-philippines-9-15-january-2007.

ment chapters that cover both the protection and liberalization of investment.[238] Yet, despite this deeper investment attempt, the Japan-ASEAN PTA, though signed in 2008, is still under negotiation for its investment chapter.[239] If the Japan-ASEAN PTA's investment chapter results in simply consolidating all of Japan's PTAs with individual ASEAN countries, it will become a relatively comprehensive agreement as it may supersede ten existing treaties. However, there still remains the possibility that ASEAN as a bloc can be assumed to exercise its bargaining power to lower the level of ambition for this PTA. Regardless, the modality of the future investment chapter for the Japan-ASEAN PTA would be likely to affect the investment chapter of RCEP.

Another important development that may also have important implications for the future investment chapter of RCEP is the PRC-Japan-Republic of Korea trilateral investment treaty recently signed after nine years of negotiations.[240] The trilateral investment treaty is not especially ambitious as it covers only the protection of investment, not liberalization, and its list of prohibited performance requirement measures is limited.[241] Debating this, Japan insists that if a trilateral PTA between the PRC, Japan, and the Republic of Korea is to be pursued, its investment chapters should be more ambitious.[242]

Thus, it is currently difficult to foresee how the investment chapter of RCEP will end up, mainly due to the disagreement between Japan and the PRC as to the depth of these types of agreements.

2. TPP

The TPP is a twenty-first century PTA designed to change PTAs and the problems associated with them by making agreements more useful in spreading liberalization globally by "multilateralizing regionalism."[243] The TPP's potential for successfully achieving

238. On Japanese BITs and investment liberalization provisions, see *Japan National Reporter: Shotaro Hamamoto*, *in* The Legal Protection of Foreign Investment 445, 457–58 (Wenhua Shan ed., 2012)

239. Agreement on Comprehensive Economic Partnership Among Japan and Member States of the Association of Southeast Asian Nations, art. 51, Apr. 2008, *available at* http://www.mofa.go.jp/policy/economy/fta/asean/agreement.pdf (stipulating that Chapter 7 on investment agreements is still under discussion by the parties).

240. *See* Pekkanen, *supra* note 227, at 122, 137.

241. *Id.*

242. *Id.*

243. *See* Richard Baldwin, *Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade*, 29 World Econ. 1451, 1508 (2006) ("Since regionalism is here

such a goal is due both to the nature of the partners,[244] given their diversity and geographical spread linking both sides of the Pacific,[245] and to the intended nature of the deal in achieving an all-new type of PTA design.[246] According to leading scholars in the field, the definition of a "high-quality, 21st century" PTA means that such an agreement should combine three key features.[247] During the negotiations, three key features of TPP regulation on foreign investment have emerged. These include: (1) the continued progression in the dynamic character of the negotiations while incorporating new countries into the TPP; (2) the level of U.S. leadership;[248] and (3) the TPP's representation as a major PTA that illustrates the regionalization of investment rulemaking and as a benchmark for state-of-the-art international law for foreign investment.[249]

Further, if the TPP reflects U.S. investment rulemaking practice, the European Union seems to be willing to negotiate new investment treaties largely inspired by this U.S. practice.[250] While considering these current developments, it would also be important to consider the Trans-Atlantic Trade and Investment Partnership (TTIP). These new negotiations, such as the TTP, may be evidence of a global adoption of a NAFTA-like mode of investment regulation.[251]

In fact, the January 2015 leaked draft of the TPP investment chapter resembled in a large measure the more recent U.S. IIAs

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to stay, the solution must work with existing regionalism, not against it. The solution must multilateralize regionalism.").

244. *See* Chaisse & Hamananka, *supra* note 32, at 20 ("Perhaps, from the PRC 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.").

245. *Id.* The TPP countries currently are Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Malaysia, Peru, Singapore, United States, and Vietnam.

246. *See* C.L. Lim, Deborah K. Elms, & Patrick Low, *What Is "High-Quality, Twenty-First Century" Anyway?*, *in* THE TRANS-PACIFIC PARTNERSHIP 3, 3–17 (2012).

247. *Id.*

248. This U.S. leadership is apparent in both the form and the substance of the TPP. While exerting this leadership in a group of eleven countries, half of which are emerging economies, the United States also has isolated the largest emerging economies: the PRC, India, and Brazil. *See* Chaisse, *supra* note 27, at 104–05, 145–46.

249. *See id.*

250. Filippo Fontanelli & Giuseppe Bianco, *Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States*, 50 STAN. J. INT'L L. 211 (2014).

251. *See id.*; *see also* Charles H. Brower II, *NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights*, 36 VAND. J. TRANSNAT'L L. 1533 (2003).

rather than the 1995 text of NAFTA Chapter 11.[252] Overall, the TPP investment chapter does not provide major innovations in treaty drafting.[253] Nonetheless, the TPP does crystallize some of NAFTA's principles by interpreting notes and NAFTA case law.[254] Despite this crystallization, the TPP is characterized as an agreement that falls in between the most detailed and important investment treaties.[255] This naturally produces the question as to whether the TPP will strengthen or fracture current regimes. Because existing BITs and PTAs involving Asia-Pacific countries were negotiated in the context of an agreement of great economic significance[256] and include a broad MFN treatment provision, if the TPP negotiations are successful, then as a broad PTA, the TPP (which involves the three NAFTA members) will logically supersede NAFTA and other existing IIAs where there is overlap. In this regard, one would argue that 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 PTA (2010).

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252. Art. 12.6 of the January 2015 leaked draft of the TPP investment chapter defined the FET as follows:

> 1. Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the applicable rules of customary international law minimum standard of treatment of aliens as the minimum general standard of treatment to be afforded to covered investments. The concept of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and . . . 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

This phrasing echoes typical U.S. treaty practice, as illustrated by the USA-Uruguay BIT, which links the FET standard with customary law but makes clear that the former is a component of the latter. To avoid any misinterpretation, the USA-Uruguay BIT continues by clarifying that the foregoing provision "prescribes the customary international law minimum standard of treatment of aliens . . . . The concepts of 'FET' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights." Treaty Between the Government of the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 5.1-2, Nov. 4, 2005, S. TREATY DOC. NO. 109-9, 44 I.L.M. 268, 278 [hereinafter US/Uruguay BIT, 2005]. This is a similar approach to that found in the TPP Art. 12.6 quoted above.

253. *See* discussion *supra* note 252.

254. *See* NAFTA, *supra* note 87, art. 1131, ¶ 2 ("An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.").

255. *See* Chaisse, *supra* note 27.

256. *See infra* Annex 2.

Moreover, even more clearly seen is that the TPP strengthens investment disciplines for some developing countries such as Vietnam and Malaysia, which have not previously been bound to the United States.[257]

Finally, the TPP membership is open to any new members willing to sign onto its commitments under the sole condition that the current TPP members accept the new member state. The TPP remains significantly attractive to new members due to the absence of geographic or economic conditions on its terms.[258] Japan is among new members interested in joining the TPP, as shown when it made an official announcement to join the TPP negotiations on March 15, 2013. [259] Other prospective members include the Republic of Korea,[260] Thailand,[261] Taiwan,[262] the Philippines,[263] Lao People's Democratic Republic (PDR),[264] Colombia,[265] and Costa Rica.[266] If 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.

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257. *See* Deborah K. Elms & C.L. Lim, *An Overview and Snapshot of the TPP Negotiations*, *in* THE TRANS-PACIFIC PARTNERSHIP (TPP)—A QUEST FOR TWENTY-FIRST CENTURY TRADE AGREEMENT, *supra* note 45, at 21, 29–31; Joel Trachtman, *Incorporating Development Among Diverse Members*, *in* THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT, *supra* note 45, at 82, 99; Chaisse, *supra* note 95, at 147–52; THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT, *supra* note 45, at 321–24.

258. *See* Chaisse, *supra* note 95, at 147–52.

259. *Id.*

260. Statement by U.S. Trade Representative Michael Froman on Korea's Announcement Regarding the Trans-Pacific Partnership (Nov. 2013), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2013/November/Froman-statement-TPP-Korea.

261. *Thailand Expresses Interest in Joining Trans-Pacific Trade Talks, as TPP Leaders Set New Deadline*, BRIDGES (Nov. 21, 2012), http://www.ictsd.org/bridges-news/bridges/news/thailand-expresses-interest-in-joining-trans-pacific-trade-talks-as-tpp.

262. Taiwan's President Ma Ying-jeou said his government will work hard to create the conditions for Taiwan to participate in the U.S. led TPP at an appropriate time. Lee Shu-hua & Y.F. Low, *President Pledges to Create Conditions for TPP Access*, FOCUS TAIWAN NEWS CHANNEL (Mar. 21, 2013), http://www.bilaterals.org/spip.php?page=print&id_article=22882.

263. *Philippines—Next to Join the TPP?*, CNBC (Apr. 28, 2014), http://www.cnbc.com/id/101621908.

264. *Trans-Pacific Partnership Trade Pact Risks Splitting ASEAN, Manila Warns*, S. CHINA MORNING POST (Apr. 11, 2014), http://www.scmp.com/news/asia/article/1476989/trans-pacific-partnership-trade-pact-risks-splitting-asean-manila-warns.

265. Julien Chaisse, *Tendencias Globales en la Construcción de Normas y Arbitraje de Inversión*, PUENTES (Oct. 16, 2014), http://www.ictsd.org/bridges-news/puentes/news/tendencias-globales-en-la-construcci%C3%B3n-de-normas-y-arbitraje-de-inversi%C3%B3n.

266. *Id.*

VII. Conclusion

This Article provides a quantitative and qualitative framework to understand investment rulemaking in the Asia-Pacific region. From a quantitative perspective, there are currently 151 intraregional BITs that are in force, while there are also forty-one intraregional BITs, which have been signed but have not yet entered into force. In addition, there are twenty-five intraregional PTAs in Asia-Pacific that have investment chapters, which have all entered into force. Thus, in total, there are 193 intraregional IIAs in force in the Asia-Pacific region. This great number of IIAs form what is the core of the Asian noodle bowl of investment treaties. These IIAs offer a rich canvass against which research may further expand.

As in the rest of the world, the regulation of international investment in the Asia-Pacific is a field of law, which in the last decade has experienced major developments. Generally, Asia-Pacific investments agreements, like the majority of global BITs, do not provide entry rights to foreign investors into their territories. Rather, most Asia-Pacific BITs provide only a best-endeavor provision regarding the admission of the foreign investments.

An important and specific feature of Asia-Pacific IIAs is that some states—Thailand, Malaysia, and Indonesia—base the operation of substantive investment treaty protections on compliance with an element of domestic law that regulates the entry of foreign investment. Such an approach may aid in explaining the relatively low number of disputes brought against Asia-Pacific states because it is hard for an arbitration tribunal to find jurisdiction with this standard. A major question to be answered in future studies is whether such requirements could be circumvented by foreign investors through an MFN treatment argument. Pursuing the answer to this could open new grounds in arbitration and investment practice while further clarifying the conceptual scope of the MFN treatment doctrine.

Furthermore, this Article notes two stipulations that distinguish a few Asia-Pacific treaties. First, many Pacific-Asia IIAs exclude the benefits received by a Contracting State Party to a REIO from the scope of MFN treatment obligations through an REIO exception. Second, virtually all Asia-Pacific IIAs include a carve-out from the MFN treatment principle. Such provisions allow countries to enter into new PTAs with investment chapters without the obligation to extend the new PTA's benefits to countries with which they were already bound through a BIT. In this regard, it seems that a few Asia-Pacific countries have made the choice to negotiate invest-

ment in the context of PTAs rather than BITs in order to isolate the newly negotiated treaty from prior-existing BITs. These observations aid in explaining the rise of the PTAs in investment rulemaking in Asia-Pacific.

While investment arbitration has developed considerably over the last two decades, few Asia-Pacific states have faced foreign investors' claims before an international tribunal. This is a rather surprising phenomenon in light of economic reforms and inflows of the FDI into countries like PRC, India, Thailand, Indonesia, Malaysia, and Vietnam. This disconnect may be explained through an analysis of three parameters, and Asia-Pacific's only recent acquiring of all three elements. Overall, arbitration requires instruments (e.g., the IIAs), the legal knowledge of these instruments (i.e., the lawyers capable to use them), and a significant volume of the FDI invested in the host countries. These three parameters currently exist in most Asian states. Moreover, these three parameters must be combined to understand the prospects for investment claims against Asian states. In light of recent reforms, increased FDI stocks, and the multiplication of investment negotiations in recent years, there exists a great potential for future arbitration within the Asia-Pacific region, which hitherto has been marginalized.

Finally, an emerging trend of Asia-Pacific international investment rulemaking is the increasing regionalization of negotiations, which will likely modify the current Asia-Pacific investment regulation. The current negotiation of broader multicountry pacts that involve a large number of economic areas will have an effect on the core BITs and bilateral PTAs currently making up the international investment of the Asia-Pacific region. The recent rise in plurilateral agreements, such as ACIA, "ASEAN+" agreements, RCEP, and the TPP, is likely to produce greater economic effects while also spreading the basic principles of foreign investment protection to most Asia-Pacific economies. This means that future research effort's work should be more focused on these new plurilateral instruments, which remain largely ambiguous in their anatomy, life, and future economic and legal effects.

Annex 1. The Asia-Pacific IIAs "Noodle Bowl"

	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		
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	PTA 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 People's Democratic Republic (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			PTA 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 Dec1995		BIT 1 Aug 1998	
Singapore		PTA Singapore - Australia 28 Jul 2003		BIT 19 Nov 2004	PTA Trans-Pacific Strategic Economic Partnership 28 May 2006
Sri Lanka		BIT not yet into force			
Taiwan, China					
Tajikistan	BIT not yet into force		BIT 26 Feb 2008		
Thailand		PTA 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					
Vietnam	BIT 28 Apr 1993	BIT 11 Sep 1991		BIT not yet into force	

	Cambodia	China, People's 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	PTA China - Hong Kong, China 29 June 2003	BIT 1 Aug 2007
Georgia		BIT 1 Mar 1995			
Hong Kong, China		PTA 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
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 PTA 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 PTA 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			PTA India - Singapore 1 Aug 2005
Sri Lanka		BIT 25 Mar 1987			BIT 13 Feb 1998
Taiwan, 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			
Vietnam	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	PTA 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
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		PTA Japan - Indonesia 1 Jul 2008		BIT 10 Mar 1994	BIT 23 Apr 1997
Japan	PTA 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	PTA 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	PTA Japan - Philippines 11 Dec 2008		BIT 25 Apr 1996		
Singapore	BIT 21 June 2006	PTA Japan - Singapore 30 Nov 2002		BIT 26 Mar 1998 and PTA Korea, Republic of - Singapore 2 Mar 2006		
Sri Lanka	BIT 21 Jul 1997	BIT 7 Aug 1982		BIT 15 Jul 1980		
Taiwan, China						
Tajikistan	BIT not yet into force			BIT 13 Aug 1995	BIT not yet into force	
Thailand	BIT 5 Nov 1998	PTA 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						
Vietnam	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	PTA Japan - Malaysia 13 Jul 2006	BIT 24 Mar 2002		
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 PTA 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				
Taiwan, China		BIT 18 March 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						
Vietnam	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 Dec1995
Azerbaijan				
Bangladesh		BIT not yet into force		BIT 1 Aug 1998
Brunei Darussalam	PTA 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 PTA Pakistan - China 1 Jul 2007	BIT 12 Feb 1993	BIT 8 Sep. 1995
Georgia				
Hong Kong, China	BIT 5 Aug 1995 and PTA 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	PTA 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 PTA Pakistan - Malaysia 1 Jan 2008	BIT not yet into force	
Mongolia				BIT 1 Nov 2001
Myanmar				BIT 11 Sep 1998
Nepal				
New Zealand				
Pakistan				BIT not yet into force
Papua New Guinea				
Philippines		BIT not yet into force		
Singapore	PTA 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		
Taiwan, 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				
Vietnam				BIT 29 Jan 1993

	Singapore	Sri Lanka	Taiwan, China	Tajikistan
Armenia				BIT not yet into force
Australia	PTA Singapore - Australia 28 Jul 2003	BIT not yet into force		
Azerbaijan				BIT 26 Feb 2008
Bangladesh	BIT 19 Nov 1994			
Brunei Darussalam	PTA Trans-Pacific Strategic Economic Partnership 28 May 2006			
Cambodia	BIT 26 Feb 2000 and ACIA 1 Mar 2012			
China, People's Republic of	BIT 7 Feb 1986	BIT 25 Mar 1987		BIT 20 Jan 1994
Georgia				
Hong Kong, China				
India	PTA 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	PTA Japan - Singapore 30 Nov 2002	BIT 7 Aug 1982		
Kazakhstan				
Korea, Republic of	BIT 26 Mar 1998 and PTA 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	PTA 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	
Sri Lanka	BIT 30 Sep 1980			
Taiwan, 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				
Vietnam	BIT 25 Dec 1992	BIT BIT not yet into force	BIT 23 Apr 1993	BIT not yet into force

	Thailand	Turkmenistan	Uzbekistan	Vanuatu	Vietnam
Armenia		BIT not yet into force			BIT 28 Apr 1993
Australia	PTA 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 Novt 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	PTA Japan - Thailand 1 Nov 2007		BIT 29 Sep 2009		BIT 19 Dec 2004
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
Taiwan, 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					
Vietnam	BIT 7 Feb 1992		BIT 6 Mar 1998		

Annex 2. Overlapping Trans-Pacific Partnership Countries IIAs

	Australia	Brunei	Canada	Chile	Japan	Malaysia	Mexico	New Zealand	Peru	Singapore	USA	Vietnam
Australia		AANZFTA (2010)		Australia-Chile BIT (1999) Australia-Chile FTA Chapter 10 (2009)		AANZFTA (2010)	Australia-Mexico BIT 2007	Australia-New Zealand Protocol on Investment (signed Feb 2010, not in force) AANZFTA (2010)	Australia-Peru BIT (1997)	AANZFTA (2010) SAFTA Chapter 8 (2011)	AusFTA (2005)	Australia-Vietnam BIT 1991 AANZFTA (2010)
Brunei	AANZFTA (2010)				Brunei Darussalam-Japan FTA (2008)	ACIA (2012) AANZFTA (2010)		AANZFTA (2010)		AANZFTA (2010) ACIA (2012)		AANZFTA (2010) ACIA (2012)
Canada							NAFTA (1995)		Canada-Peru BIT 2007	Canada-Singapore BIT 1971	NAFTA (1995)	
Chile	Australia-Chile BIT (1999) Australia-Chile FTA Chapter 10 (2009)				Chile-Japan FTA (2007)	Chile-Malaysia BIT (1995)		Chile-New Zealand (signed 1999)	Chile-Peru BIT (2001) Chile Peru FTA Chapter 11 (2009)		Chile-US FTA chapter 10 (2004)	Chile-Vietnam BIT (signed 1999)
Japan		Brunei Darussalam-Japan FTA (2008)		Chile-Japan FTA (2007)		Japan-Malaysia FTA (2006)	Japan-Mexico FTA (2005)		Japan-Peru BIT (2009)	Japan-Singapore FTA (2002)		Japan-Vietnam BIT (2004)

Malaysia	AANZFTA (2010)	AANZFTA (2010) ACIA (2012)		Chile-Malaysia BIT (1995)	Japan-Malaysia FTA (2006)			AANZFTA (2010) MNZFTA signed 2009	Malaysia-Peru BIT (1995)	AANZFTA (2010) ACIA (2012)		AANZFTA (2010) Malaysia-Vietnam BIT (1992) ACIA (2012)
Mexico	Australia-Mexico BIT (2007)		NAFTA (1995)		Japan-Mexico FTA (2005)					Mexico-Singapore BIT (2011)	NAFTA (1995)	
New Zealand	Australia-New Zealand Protocol on Investment (signed Feb 2010, not in force) AANZFTA (2010)	AANZFTA (2010)		Chile-New Zealand (signed 1999)	ÿMNZFTA	MNZFTA signed 2009 AANZFTA (2010)				AANZFTA (2010)		AANZFTA (2010)
Peru				Chile-Peru BIT 2001 Chile-Peru FTA Chapter 11 (2009)	Japan-Peru BIT (2009)					Singapore-Peru BIT (signed 2003) Peru-Singapore FTA (2009)	US-Peru FTA Chapter 10 (2009)	
Singapore	AANZFTA (2010) SAFTA Chapter 8 (2011)	AANZFTA (2010)	Singapore-Canada BIT (1971)		Japan-Singapore FTA (2002)	AANZFTA (2010)	Singapore-Mexico BIT (2011)	AANZFTA (2010)	Singapore-Peru BIT (signed 2003) Peru-Singapore FTA (2009)		USSFTA Chapter 10 (2004)	Singapore-Vietnam BIT (1992) AANZFTA (2010)
USA	AusFTA (2005)		NAFTA (1995)	Chile-US FTA chapter 10 (2004)			NAFTA (1995)		US-PeruFTA Chapter 10 (2009)	USSFTA Chapter 10 (2004)		

Vietnam	Australia-Vietnam BIT (1991) AANZFTA (2010)	AANZFTA (2010) ACIA (2012)		Chile-Vietnam BIT (signed 1999)	Japan - Vietnam BIT (2004)	Malaysia-Vietnam BIT (1992) AANZFTA (2010) ACIA (2012)		AANZFTA (2010)		Singapore-Vietnam BIT (1992) AANZFTA (2010) ACIA (2012)		