

## Studies and Comments

### The European Union investment policy in Asia in the light of „Dawn of an Asian century in international investment law”<sup>1</sup>

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#### **Abstract**

*After its gradual establishment, the investment policy of the European Union experienced turbulent times when the EU and the United States commenced negotiations on the Trans-Pacific Trade and Investment Partnership. While the public and political focus concentrated on the transatlantic relations with the United States (TTIP) and Canada (CETA), the EU has steadily progressed at different paces with third countries in Asia where it commenced trade and investment negotiations with Singapore, Vietnam, Myanmar, China, Thailand, the Philippines and Indonesia among others. This paper seeks to evaluate how the Union has been successful in its “Asia strategy” in the field of investment negotiation and promotion of its reform approach to the investment protection regime. It offers an overview of the EU investment negotiations with the individual partners in the Far East and explores these relationships and their potential implications. It concludes that it is not surprising that the EU already persuaded the first countries in this region about its novel approach because of their strong motivation to conclude agreements with the EU that will ‘modernise’ and ‘harmonise’ the existing investment protection. On the other hand, challenges persist as it remains to be seen in which direction Asian actors will push for in the development of global investment governance.*

**Keywords:** European Union; International Investment Law; Asia; Free Trade Agreement; Investment Protection Agreement.

**JEL Classification:** K33

#### **1. Introduction**

After its gradual establishment<sup>3</sup> without much public attention, the EU investment policy experienced turbulent times when the European Union and the United States commenced negotiations on the Trans-Pacific Trade and Investment Partnership (TTIP). The public backlash against investment protection and investor-state dispute settlement, particularly in this agreement, led the European Commission (EC) to open the public consultation on investment protection in the

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<sup>3</sup> European Commission, *Commission Communication: Towards a comprehensive European international investment policy*, COM (2010) 343.

TTIP, and subsequently to radical change in the Union's investment policy.<sup>4</sup> For further TTIP talks with the US, the European Commission developed a new proposal of an investment chapter and particularly a mechanism of settling investment disputes. The traditional investor-state dispute settlement (ISDS) was to be replaced by the novel investment court system (ICS). The investment negotiations in the TTIP advanced marginally and the EU proposal was never seriously discussed before the negotiations on the whole agreement were put on hold following Donald Trump's election in 2016.<sup>5</sup> Nevertheless, the consequences of the public consultation, including the EU's detachment from ISDS, could not be ignored in other bilateral negotiations conducted by the EU. As Trade Commissioner Cecilia Malmström put plainly, "[t]his new system will replace the old ISDS model in all our ongoing and future trade negotiations."<sup>6</sup> The EU's proposal prepared for the TTIP negotiations has thus become de facto the EU model bilateral investment agreement.

While the public and political focus concentrated on the transatlantic relations with the United States (TTIP) and Canada (Comprehensive Economic and Trade Agreement, CETA) afterwards, the EU has steadily progressed at different paces with third countries, particularly in the Asia region. The second investment negotiation started by the EU was with Singapore in March 2010. And many other countries followed soon, particularly in Southeast Asia when talks for a region-to-region FTA with ASEAN<sup>7</sup> launched in 2007 were paused in 2009 to give way to bilateral approaches. After Singapore, the EU has started bilateral talks with Malaysia (2010), Vietnam (2012), Myanmar (2013), Thailand (2013), the Philippines (2015) and Indonesia (2016). In parallel, negotiations also started with the biggest Asian economies: India (2007), Japan (2013) and China (2013). It is also assumed that sooner or later the EU will start investment negotiations with Hong Kong and Taiwan,<sup>8</sup> and possibly with South Korea where the FTA is already in place but without investment protection.<sup>9</sup>

Taking a step back, the EU has negotiated or is currently negotiating investment protection, except the US, Canada, Mexico, Chile and Tunisia, only with the countries in the South, Southeast and East Asia which are together referred

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<sup>4</sup> European Commission, *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, SWD (2015) 3 final (January 13, 2019); European Commission, *Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court* (May 5, 2015).

<sup>5</sup> See also Ondřej Svoboda, "TTIP and ISDS: not irreconcilable acronyms", *Czech Yearbook of Public & Private International Law* 6 (2015): 345.

<sup>6</sup> "Blog Post by Cecilia Malmström. Proposing an Investment Court System", European Commission, last modified September 16, 2015, [https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/proposing-investment-court-system_en).

<sup>7</sup> ASEAN was founded in 1967 by five states in South East Asia, that is, Indonesia, Malaysia, Singapore, Thailand, and the Philippines. Five other states in the same region have joined, namely, Brunei Darussalam (1984), Vietnam (1992), Myanmar (1997), Laos (1997), and Cambodia (1999).

<sup>8</sup> European Commission, *Trade for All: Towards a more responsible trade and investment policy* (2015), 31.

<sup>9</sup> European Commission, *Trade for All*, 31.

to as “the Far East”. Among the negotiating partners in this area are the second (China), third (Japan) and sixth (India) largest economies in the world. Asia is also the largest FDI recipient region and China continues to be the second largest FDI recipient in the world.<sup>10</sup> Countries from the region have also entered into a significant number of BITs and they are now recognised as key players in investment treaty-making. In addition, their investors have become more active users of investment arbitration to resolve their disputes.<sup>11</sup> Accordingly, some authors speak of the “Dawn of an Asian Century in International Investment Law”.<sup>12</sup> The EU progress in negotiations in the Far East is thus of crucial importance for the success of promoting the EU reform approach in investment policy. This is recognised by the EU itself as in its trade strategy “Trade for All” from 2015, where the European Commission claimed that “[t]his Asia strategy will need to be pursued, consolidated and enriched over the next few years.”<sup>13</sup>

This paper seeks to evaluate how the Union has been successful in its “Asia strategy”. First, it offers an overview of the EU investment negotiations with individual partners in the Far East. The paper further explores these relationships and the potential implications. Logically, the focus will be primarily on China, Japan and India. Nonetheless, the ASEAN countries will be an important part of the analysis as it is necessary to take them into account to complete the whole picture. Further, the paper does not overlook the megaregional treaties which create a new dimension of investment relations in contrast to what the EU proposes.

## 2. Early promises: Singapore and Vietnam

The first Asian countries which got familiar with the EU’s nascent treaty practice after adoption of the new approach were Singapore and Vietnam. And as members of ASEAN, they may influence other countries in the region to take the same path.

FTA negotiations with Singapore were launched in 2010 and finalised in 2014. The agreement however still awaits a signature because the EC decided to request the opinion of the Court of Justice of the EU on competence to conclude the agreement. The Court’s decision that the whole agreement does not fall under the Union’s exclusive competence initiated a subsequent development.<sup>14</sup> The EC admitted that “the debate on the best architecture for EU trade agreements and investment protection agreements must be completed.”<sup>15</sup> This aim was achieved in

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<sup>10</sup> UNCTAD, *World Investment Report 2018* (Geneva: United Nations Publications, 2018), 4.

<sup>11</sup> Joongi Kim, “A Pivot to Asia in Investor – State Arbitration: The Coming Emergence of Asian Claimants”, *ICSID Review* 27, no. 2 (2012): 399-415.

<sup>12</sup> Stephan W. Schill, “Special Issue: Dawn of an Asian Century in International Investment Law?,” *Journal of World Investment & Trade* 16, no. 5-6. (2015): 765–771; Stephan W. Schill, “Changing geography: prospects for Asian actors as global rule-makers in international investment law,” *Columbia FDI Perspectives* 177 (2016): 1-3.

<sup>13</sup> European Commission, *Trade for All*, 31.

<sup>14</sup> Opinion 2/15 of 16 May 2017, ECLI:EU:C:2017:376. For further developments see Miriama Kiselyova, EU-Singapore Investment Protection Agreement in the Light of the Opinion 1/17, *Czech Yearbook of Public & Private International Law* 10 (2019): 408.

<sup>15</sup> European Commission, *A balanced and progressive trade policy to harness globalisation*, COM (2017) 492 final, 13.9.2017, p. 6.

May 2018 when the splitting of FTAs was adopted in the Council's conclusions on the negotiation and conclusion of FTAs.<sup>16</sup>

Following the fundamental changes in the EU trade and investment policy, Singapore quickly agreed to incorporate the new elements, including replacing ISDS with ICS,<sup>17</sup> and splitting the agreement into two parts – the new FTA and an investment protection agreement. Both agreements are now finalised, aiming for signing before the end of the current mandate of the European Commission in 2019.<sup>18</sup>

The EU and Vietnam launched trade and investment negotiations in June 2012. These were concluded in December 2015. The results of these negotiations were declared by the European Commission successful regarding investment. Vietnam largely accepted the EU proposals and all important elements of the reform approach were incorporated, including ICS. The adoption of the agreement is nevertheless still delayed as a direct consequence of the Court proceedings in the EU-Singapore FTA case. Following the Court of Justice of the EU Opinion 2/15, and in light of the subsequent wide-ranging EU internal discussions among EU institutions on the architecture of trade and investment agreements, the initially negotiated text was adjusted, following the pattern with Singapore, to create two self-standing agreements: the EU-Vietnam Free Trade Agreement and the EU-Vietnam Investment Protection Agreement (IPA).

After Canada in negotiation of CETA, Singapore and Vietnam proved that investment negotiators are no longer to be “prisoners of precedent”, unwilling to abandon prior models.<sup>19</sup> For the EU, both investment agreements could thus be considered a major success as it was able to persuade the first Asian countries to adopt its model on investment protection despite the Court's Opinion 2/15 which had a negative effect significantly delaying their signature and ratification.<sup>20</sup>

### **3. Pitfalls of mixing politics and investment: Thailand, Myanmar, the Philippines**

Next to Singapore and Vietnam, the EU has started negotiations with relatively similar countries – Thailand, Myanmar and the Philippines. But after

<sup>16</sup> Council of the European Union, *Outcome of the Council Meeting*, 3618th Council meeting, Foreign Affairs, Trade and development issues, 9102/18 (May 22, 2018).

<sup>17</sup> For detailed analyses see Elsa Sardinha, “The New EU-Led Approach to Investor-State Arbitration: The Investment Tribunal System in the Comprehensive Economic Trade Agreement (CETA) and the EU–Vietnam Free Trade Agreement,” *ICSID Review* 32, no. 3 (2017): 625-672.

<sup>18</sup> European Commission, *European Commission proposes signature and conclusion of Japan and Singapore agreements*, 18 April 2018. Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1826> (accessed 2.10.2019).

<sup>19</sup> John Christopher Thomas, “Introductory comments “The Pacific Rim and International Economic Law: Opportunities and Risks of the Pacific Century”,” *Transnational Dispute Management* 12, no. 1 (2015): 3.

<sup>20</sup> It must be nonetheless kept in mind that the investment court system in case of an agreement with Vietnam will be for the most part financed by the EU because of a division of expenses on the system taking into account their respective levels of development. See Art. 12(15) EU-Vietnam Free Trade Agreement.

several years since the beginning of these negotiations, it is difficult to estimate the date of their finalisation.

The negotiations for an EU-Thailand FTA, including investment issues, were launched in March 2013. So far, only two rounds of negotiations have taken place. The last one was held in September 2013 and during the round, negotiation teams discussed a wide range of issues which include investment as well.<sup>21</sup> Since the military takeover in Thailand in May 2014, political contact at all levels between the EU and Thailand was suspended and no further FTA rounds have been scheduled. During recent years the EU repeatedly called for the restoration of full democracy in Thailand. At present, it seems the EU has now agreed to restore contacts after the country made democratic progress this year by adopting a new constitution and committing to hold a general election in November 2018. If the election proceeds without intervention of the military government, they will likely be prepared to restart FTA talks after four years on hold.

The EU launched negotiations for an investment protection agreement (IPA) with Myanmar in 2014 “in order to help transform the country into an attractive trade and investment partner.”<sup>22</sup> Since the start of the negotiations five rounds have taken place. In contrast to other negotiations, the European Commission has not published any draft of the IPA.<sup>23</sup> It has only published short reports of the last two rounds of negotiations. During the fourth round in December 2016 the new elements of the EU approach such as the right to regulate, the investment court system and provisions on transparency were introduced while “overall, good progress could be made.”<sup>24</sup> The last official report is from April 2017 and indicates an almost finalised text, including incorporation of the EU’s reformed approach.<sup>25</sup> The European Parliament’s (EP) International Trade Committee decided to postpone its visit to Myanmar following the EP’s adopted resolution, due to the current political and human rights situation in the country.<sup>26</sup> It is a generally accepted position that the signing of the IPA cannot be done under the political conditions and human rights situation in Myanmar and its signing is put off until an unknown date.

The Philippines are another important prospective partner for the EU.<sup>27</sup> In a bid to further strengthen bilateral trade and investment relations, the Philippines and the EU initiated negotiations on FTA in December 2015. Since the launching

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<sup>21</sup> European Commission, *EU and Thailand conclude second round of negotiations for a Comprehensive Free Trade Agreement*, (September 20, 2013).

<sup>22</sup> Council of the EU, *Council conclusions on EU strategy with Myanmar/Burma*, 10482/16 (June 20, 2016), 9.

<sup>23</sup> Another exception is investment negotiations with China.

<sup>24</sup> European Commission, *Report of the fourth round of negotiations for the EU-Myanmar Investment Protection Agreement* (December 22, 2016).

<sup>25</sup> European Commission, *Report of the fifth round of negotiations for the EU-Myanmar Investment Protection Agreement* (April 28, 2017).

<sup>26</sup> European Parliament, *Resolution of 14 September 2017 on Myanmar, in particular the situation of Rohingyas* (2017/2838 (RSP)).

<sup>27</sup> In 2016 the largest investor in the country and mutual trade grew by 17 % during the first half of 2017.

of the negotiations, due to the political situation, only two rounds have taken place – the last one in February 2017. The EU used these occasions to present “its approach based on the recent practice (including EU-Vietnam FTA and the proposal for TTIP), highlighting the importance of preserving a coherent approach in bilateral FTAs with ASEAN Member States, while also taking into account some of the new policy developments.”<sup>28</sup> Subsequently, commonalities and divergences in the respective approaches were identified.<sup>29</sup>

However, further progress was stopped as the EU has postponed further talks with the Philippines because of President Duterte’s campaign against illegal drugs: “The significant increase in the number of drug-related killings since the election of President Duterte, in particular during law-enforcement operations; the apparent lack of due process and restraint during these operations; and the fact that these deaths are not investigated in a transparent, impartial and effective manner thus allowing to bring perpetrators to justice raises serious concerns regarding the right to life. Together with statements by the President that can be seen as incitement to killings and fostering a culture of impunity, the conduct of the ‘war on drugs’ raises serious questions about the Government’s commitment to human rights.”<sup>30</sup> The European Parliament also expressed its concerns and in its resolution of 19 April 2018 on the Philippines called on the EC to initiate the procedural steps which could result in the temporary withdrawal of the GSP+ preferences, if the situation regarding the protection of human rights does not improve.<sup>31</sup>

These three examples show the risks of value-based trade and investment policy.<sup>32</sup> Considering political and human rights issues, the European Union is distracted in pursuing its ambitious reform policy vis-à-vis partners with whom there is a considerable chance to expand its model.

#### 4. Japan: objector without cause?

Opening negotiations on FTA with Japan in 2013 was regarded as an important step in fulfilling the EU trade strategy given the significance of the Japanese economy in the international trade system.<sup>33</sup> Regarding Japanese engagement with investment protection regime, the situation is more complex and deserves brief introduction.

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<sup>28</sup> European Commission, *Report from the 1st round of negotiations for a Free Trade Agreement between the European Union and the Philippines* (June 3, 2016).

<sup>29</sup> European Commission, *Report from the 2nd round of negotiations for a Free Trade Agreement between the European Union and the Philippines* (March 17, 2017).

<sup>30</sup> European Commission and High Representative of the Union for Foreign Affairs and Security Policy, *Joint Staff Working Document on The EU Special Incentive Arrangement for Sustainable Development and Good Governance (‘GSP+’) assessment of the Philippines covering the period 2016-2017*, SWD (2018) 32 (January 19, 2018), 11-12.

<sup>31</sup> European Parliament, *Resolution of 19 April 2018 on the Philippines*, 2018/2662(RSP).

<sup>32</sup> See Article 21 of the Treaty on European Union.

<sup>33</sup> European Commission, *Speech – Why we should open free trade negotiations with Japan* (July 18, 2012).

Japan's investment treaty program, described in literature as "peculiar",<sup>34</sup> has been relatively limited as only nine BITs were signed between 1977 and 2001. Since 2002 Japan began to adopt a new generation of BITs that provided more protection for investors.<sup>35</sup> Almost all of Japan's BITs and FTAs containing Investment chapters contain the ISDS mechanism,<sup>36</sup> which thus constitutes a part of a de facto Model BIT.<sup>37</sup> Decision to join the TPP brought opportunities to incorporate innovative provisions especially regarding ISDS based on NAFTA experience. The decision was nonetheless controversial. The Diet (Japan's parliament) engaged in anti-ISDS discourse in regard to the TPP negotiations. The Japanese government faced a hard-fought battle and invested much political capital to persuade the public and lawmakers to accept ISDS in the TPP. It is interesting that none of the anti-ISDS arguments were used in the context of the ongoing negotiation with the European Union.<sup>38</sup>

In these circumstances and in the negotiation of a comprehensive FTA, the EU negotiators brought a proposal to set up a reformed mechanism of ICS for resolving disputes similar to the one in the EU-Canada trade agreement and claimed that "[f]or the EU ISDS is dead,"<sup>39</sup> or to put it more diplomatically "there can be no return to the old-style Investor to State Dispute Settlement System (ISDS)."<sup>40</sup> The EU proposal for ICS was discussed with Japan for the first time during the 14th round in February/March 2016. Japan was cautious regarding the proposal and asked for clarifications.<sup>41</sup> Despite good progress made in subsequent rounds on substantive investment protection rules, where compromises on a number of key issues enabled consolidation of the text, on investment dispute resolution the last reports admitted that "a substantial convergence of approaches remains to be achieved."<sup>42</sup> The negotiations thus progressed in all areas except an investment chapter, and in December 2017, it was confirmed that negotiations of a trade agreement, the EU-Japan Economic Partnership Agreement (EJPEA), was finalised. The investment part was separated due to irreconcilable differences

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<sup>34</sup> Elodie Dulac, "Investment Treaties and Investment Arbitration in Asia: Coming of Age," *Transnational Dispute Management* 8, no. 5 (2011): 9.

<sup>35</sup> *Ibid.*, 10.

<sup>36</sup> Exceptions are FTAs with Philippines (2006) and Australia (2015).

<sup>37</sup> Shotaro Hamamoto, Luke Nottage, "Foreign Investment In and Out of Japan: Economic Backdrop, Domestic Law, and International Treaty-based Investor-State Dispute Resolution" *Transnational Dispute Management* 5 (2011): 42.

<sup>38</sup> Shotaro Hamamoto, "Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-Up But Glaring Hypocrisy," *Journal of World Investment & Trade* 16, no. 5-6. (2015): 950.

<sup>39</sup> European Commission, *A new EU trade agreement with Japan* (July 1, 2017).

<sup>40</sup> European Commission, *Key elements of the EU-Japan Economic Partnership Agreement – Memo* (July 6, 2017). Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1687> (accessed 4.10.2019).

<sup>41</sup> European Commission, *Report of the 15th EU-Japan FTA/EPA negotiating round* (March 16, 2016).

<sup>42</sup> European Commission, *Report of the 16th EU-Japan FTA/EPA negotiating round* (May 10, 2016); European Commission, *Report of the 17th EU-Japan FTA/EPA negotiating round* (October 26, 2016).

between the two sides on an investment dispute mechanism, which could delay the approval of FTA.

The difficult approach of Japan is likely the result of a combination of several causes. Japan has never faced an investment claim and with regard to the level of the rule of law in the Member States of the EU, there is no strong motivation for Japanese companies to push investment protection in the negotiations. ICS' institution consists of 15 judges in the first instance and 6 appellate judges and this set-up will require substantial funds. Also, broader implications of such system for the efficiency of proceedings are generally hard to predict and estimates vary. Accordingly, establishment of a bilateral two-tiered semi-permanent investment tribunal may seem a needless financial burden. Furthermore, as the Japanese government put much effort into the defence of ISDS in the context of TPP debates, it would be difficult to imagine now that it will turn its policy by accepting ICS with its anti-ISDS critique.

Regardless of the fact that subsequent technical discussions "acknowledging a large degree of convergence on investment protection standards" continue "in order to bridge differences in the positions between the two sides, in particular with regard to the mechanism for resolving investment protection disputes,"<sup>43</sup> Japan has officially become the first negotiating partner, and until now the only one, which the EU was not able to persuade to accept its new approach during mutual negotiations. For EU-Japan investment relations this does not have to be a serious concern as Japan does not have any BIT with EU Member States.<sup>44</sup> What is worse, it has an impact on the long-term EU strategy to promote ICS and a multilateral investment court. The EU has built momentum with the Singapore and Vietnam agreements, but Japanese resistance presents the most serious setback for the EU investment policy so far.

### 5. Crucial partnership for future: China

China is a key partner for the EU in Asia, not only because of a need of strengthening the international legal regime for both European and Chinese investment under the current incomplete, unsystematic and uncoordinated legal system.<sup>45</sup> With 129 BITs, of which 109 are in effect,<sup>46</sup> China has concluded by far the most BITs in the region.

China's approach to international investment rule-making has developed in four distinctive stages. The current practice, as well as the substantive and procedural protections granted, has focused on ensuring adequate protection of its

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<sup>43</sup> "EU-Japan investment negotiations," European Commission, last modified July 1, 2018, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1888>.

<sup>44</sup> But in the energy sector, investment protection is provided in the Energy Charter Treaty, which Japan, the EU and all EU Member States except Italy signed and ratified.

<sup>45</sup> Wenhua Shan, *The Legal Framework of EU-China Investment Relations A Critical Appraisal* (Oxford: Hart Publishing, 2005) 267-268.

<sup>46</sup> "International Investment Agreements Navigator – China," UNCTAD, last modified April 15, 2020, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42>.

nationals' growing investments abroad.<sup>47</sup> The last decade of the Chinese treaty-making is also referred as a 'partial NAFTA-lization' of Chinese BITs which contain a number of NAFTA-like provisions.<sup>48</sup> As China has become a prime source of foreign investment worldwide pushing for higher investment protection, and has projected the Silk Road Economic Belt and the 21st Century Maritime Silk Road (the Belt and Road), it has emerged as a newly hegemonic actor in international investment.<sup>49</sup> Accordingly, it has recently created innovative mechanisms to deal with investor-state claims based on existing arbitral institutions to provide a broader range of ISDS services, especially in the context of the Belt and Road Initiative. This could be beneficial to China to further amplify its voice in the international discourse on international investment agreements.<sup>50</sup>

In November 2013, the launch of negotiations of a bilateral investment agreement was announced at the 16th EU-China Summit. Regardless of the new EU approach, the investment negotiations have been considered a daunting task,<sup>51</sup> but for the EU they are the top priority in developing their relationship with China.<sup>52</sup> The Council Conclusions on the EU Strategy on China of 18 July 2016 state that an investment agreement "is the EU's main priority towards deepening and rebalancing its economic relationship with China. The Council believes that more ambitious reforms in China towards liberalising its economy, reducing the role of the state-owned sector, and creating a level-playing field for business would open new market opportunities."<sup>53</sup> Regarding multilateral agenda, Trade Commissioner Malmström called on China to support an investment court at the multilateral level and highlighted the bilateral investment agreement under negotiation as an opportunity for wider reform by China of its investment regime.<sup>54</sup> In another speech, the Commissioner spoke of an agreement improving "the balance between investment protection, sustainable development and the capacity of states to regulate in the public interest" and hoped that "these negotiations are seen by China as an inspiration for its wider efforts at reforming its investment

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<sup>47</sup> Axel Berger, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making," *Journal of World Investment & Trade* 16, no. 5–6. (2015): 820-822.

<sup>48</sup> *Ibid.*, 846

<sup>49</sup> Muthucumaraswamy Sornarajah, "The Unworkability of "Balanced Treaties" and the Importance of Diversity of Approach Among the BRICS," *AJIL Unbound*. 112 (2018): 223. See on a rather potential Chinese role to the architecture governing global investment Fan He, Bijun Wang, "Chinese interests in the global investment regime," *China Economic Journal* 7, no. 1 (2014): 4–20.

<sup>50</sup> Huiping Chen, "China's Innovative ISDS Mechanisms and Their Implications," *AJIL Unbound* 112 (2018): 207-211.

<sup>51</sup> For an overview of foreseen controversial aspects see Marc Bungenberg, Catharine Titi, "The Evolution of EU Investment Law and the Future of EU-China Investment Relations" in: *China and International Investment Law: Twenty Years of ICSID Membership*, ed. Wenhua Shan, Jinyuan Su. (Leiden: Brill/Nijhoff), 357-370.

<sup>52</sup> European Commission, *Trade for All: Towards a more responsible trade and investment policy* (2015) 31.

<sup>53</sup> Council of the European Union, *Council conclusions on EU strategy on China*, (July 18, 2016), 7.

<sup>54</sup> "Speech: Building bridges: strengthening EU-China trade and investment relations," European Commission, last modified February 6, 2017, [http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc\\_155277.pdf](http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155277.pdf).

regime.”<sup>55</sup> Most recently, at the 20th EU-China Summit in July 2018, the EU and China exchanged market access offers, expecting to move the negotiations into “a new phase, in which work can be accelerated on the offers and other key aspects of the negotiations.”<sup>56</sup> Apart from these rather general proclamations, what else do we know about the negotiations?

The first round of negotiations took place in January 2014 and the last 18th round in July 2018. Still, both parties have been negotiating for more than four years and yet there is no tangible progress. Brief reports from the last six rounds of negotiations do not indicate breakthroughs in any important issues and, for instance, ICS is not even mentioned. It can be easily assumed that there are conflicting issues between the EU proposal and the Chinese practice inspired by the NAFTA. It is also safe to assume that China has reservations towards the ICS with regard to only two investment claims it has faced so far.

On the other hand, China has proven to be a committed supporter of multilateralism in international trade and investment. Long before Chinese president Xi Jinping became “the new Davos man”, China had been actively pursuing multilateral solutions at the G20 and the WTO. Regarding investment, China tailors variations in its approach to negotiations of BITs to its relationships with different partners, being flexible as the case justifies. Pragmatism could be an explanation behind this negotiation strategy as the design of Chinese BITs is largely influenced by its partner countries’ models.

Would China seek to modify EU’s proposal in favour of a limited appellate mechanism, a roster of arbitrators or any other design? Such scenarios would require compromises and flexibility from both sides. This could be perhaps feasible given both the Chinese and the EU’s perspectives. China will not likely be willing to accept the “full-scale version” of ICS in the end. The most probable scenario is an agreement on a permanent appellate mechanism and fixed roster of arbitrators at the first instance. This will likely be complemented by a strong commitment of both parties to a future multilateral reform eventually replacing the existing system.<sup>57</sup> Given the importance of China and the EU, it is almost certain that their BIT will have profound impact on international investment regime at a global level.

## 6. Radical challengers: India and Indonesia

In contrast to the Chinese approach, which as an emerging capital exporting country appears to favour a more conventional approach to investor protection and ISDS, a couple of Asian countries are rethinking their position towards the system, particularly in the light of a recent rise in investment arbitrations.<sup>58</sup>

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<sup>55</sup> European Commission, *Speech: China EU – A Partnership for Reform* (January 28, 2016).

<sup>56</sup> European Commission, *EU-China Summit: deepening the strategic global partnership* (July 16, 2018).

<sup>57</sup> Berger, “Hesitant Embrace,” 866, 868.

<sup>58</sup> Grant Hanessian, Kabir Duggal, “*The 2015 Indian Model BIT: Is This Change the World Wishes to See?*,” *ICSID Review* 30, no. 3 (2015): 740.

The negotiations on the Broad-based Trade and Investment Agreement (BTIA) between the EU and India have been the longest for the EU<sup>59</sup> and still there is no realistic chance to conclude the agreement soon. Compared to other negotiations, the situation with India is probably the most complicated for the EU. India commenced its BIT program relatively late, signing its first BIT with the United Kingdom in 1994, and it became the Asian country most active in entering into BITs over the past few years. Indian disillusionment came soon too. The Indian government's efforts to promote its new model bilateral investment treaty in negotiations with the individual EU Members States resulted in termination of existing Member States' BITs in 2016 and left an undesirable gap in investment protection for European investors in India. In spite of sunset clauses which will last for another 10–15 years, the main concern now is that new investments are not covered by any protection, as EU's Ambassador to India admitted recently.<sup>60</sup>

The EU offered a separation of the fast-tracking negotiation of investments from the other areas discussed for BTIA in order to achieve a compromise as soon as possible. And the EU and Indian approaches are not entirely irreconcilable. In substantive terms, both sides have recently addressed the issue of balance, or recalibration in the framework of investment policy reform. As for India, the government appears open to some proposals, for instance for an appellate body or similar mechanism, which is one of the key aspects of the EU proposal.<sup>61</sup> Constructive and open exchange of views thus may contribute to today rather unforeseen rapprochement.<sup>62</sup>

Indonesia attracted wide attention in 2014 when the Indonesian government decided to review its stock of BITs and let the old ones lapse in order to negotiate better ones,<sup>63</sup> in the light of "recent developments".<sup>64</sup> The first unilaterally denounced BIT was with the Netherlands and according to various sources, Indonesia continues in treaty terminations with already 19 BITs denounced. At the same time, Indonesia remains a contracting party to the ASEAN's Comprehensive Investment Agreement and ASEAN free trade agreements with Australia, New Zealand, China, Japan, Korea, and India. Although Indonesia has not yet published its new Model BIT, it has not left the investment protection regime completely.<sup>65</sup> A declared intention to negotiate more "modern" investment treaties should be taken seriously.

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<sup>59</sup> The mandate for the European Commission was updated in 2011 to negotiate on investment in the framework of BTIA.

<sup>60</sup> Nayanima Basu, "India updating positions on FTA: Kozlowski." *The Hindu*, January 31, 2018.

<sup>61</sup> Congyan Cai, "Balanced Investment Treaties and the BRICS," *AJIL Unbound* 112 (2018): 220.

<sup>62</sup> Ondřej Svoboda, "EU-India Investment Negotiations and their Prospects in Era of Backlash and Reform," *Transnational Dispute Management* 15, no. 2 (2018): 12-13.

<sup>63</sup> Junianto James Losari, Michael Ewing-Chow, "Reflective or Reactionary? Indonesia's Approaches to International Investment Agreements and Recommendations for the Future," *Transnational Dispute Management* 12, no. 1 (2015): 2.

<sup>64</sup> "Boediono Meets with Netherlands PM," *Jakarta Post*, March 24, 2014.

<sup>65</sup> David Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?," *Asian Journal of International Law* 7, no. 1 (2017): 147-148.

While Indonesia is maybe at a cross-roads with regard to its investment policy, negotiations for an EU-Indonesia FTA were launched in 2016. Negotiators have met for five rounds until now. Similarly, to other EU negotiations, investment issues are subject to discussions as well. According to the latest reports, there is continued engagement by both sides while “good progress was made in further consolidating the text in key areas such as establishment, non-discrimination, as well as fair and equitable treatment.”<sup>66</sup> This indicates that Indonesia might well agree to the inclusion of principles and provisions in the EU proposal which provide a more equitable balance between the objectives of foreign investors and the host state. However, discussions on investment dispute settlement remained limited due to still ongoing Indonesian internal consultations on the Investment Court System.<sup>67</sup>

It is important to underline that both India’s and Indonesia’s actions do not have to be necessarily taken as an indication that these countries are turning their back on the international investment system. India has developed its new Model BIT and Indonesia continues in developing its own approach while they actively participate in other regional investment agreements negotiations.<sup>68</sup> Moreover, the EU could gain an advantage with its new approach reacting to alleged shortcoming of ISDS and strengthening the position of the Host State.

### 7. Regionalisation of investment law in Asia

The EU approach in Asia does not only have to deal with investment policies of individual states. Although the phenomenon of the legalisation of investment regionalism is relatively new and still emerging,<sup>69</sup> particularly in the form of megaregional agreements, it is an important element in investment treaties’ landscape in Asia. Currently, the main platforms for regional investment cooperation are the ASEAN Comprehensive Investment Agreement (ACIA),<sup>70</sup> the China – Korea - Japan Investment Agreement,<sup>71</sup> the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as a successor of the

<sup>66</sup> European Commission, *Report of the 4th round of negotiations for a Free Trade Agreement between the European Union and Indonesia*, 26 February 2018; European Commission, *Report of the 5th round of negotiations for a Free Trade Agreement between the European Union and Indonesia* (July 24, 2018).

<sup>67</sup> European Commission, *Report of the 5th round*.

<sup>68</sup> See Sam Luttrell, “ISDS in the Asia-Pacific: A Regional Snap-Shot,” *International Trade and Business Law Review* 19 (2016): 36.

<sup>69</sup> Saadia Pekkanen, “*Investment regionalism in Asia: new directions in law and policy?*,” *World Trade Review* 11, no. 1 (2012): 122.

<sup>70</sup> ASEAN Comprehensive Investment Agreement, signed on 26 February 2009 and entered into force on 29 March 2012.

<sup>71</sup> Agreement Among the Government of Japan, the Government of the Republic of Korea, and the Government of the People’s Republic of China for the Promotion, Facilitation, and Protection of Investment, signed on 13 May 2012 and entered into force on 17 May 2014. See for detailed analysis Derek Zhaoke Zhu, “International Investment Agreements among China, Japan and Korea: From ‘Bilateral’ to ‘Trilateral’ – the Way toward a Better Protection for Foreign Investors,” *Manchester Journal of International Economic Law* 12, no. 1 (2015): 80-107.

Trans-Pacific Partnership (TPP) and, nearing finalisation, the Regional Comprehensive Economic Partnership (RCEP). For the purposes of this contribution, only the two most recent initiatives are briefly introduced.

The TPP negotiations were concluded in October 2015, when twelve countries found an accord on the text.<sup>72</sup> The agreement was subsequently signed in February 2016. Its investment chapter has many similarities to the Model US BIT 2012. There are also provisions that reflect parts of the NAFTA and other US treaties. Following the United States' withdrawal from the TPP in January 2017, the remaining 11 TPP parties agreed to carry on with the agreement which was signed in March 2018 in the form of the CPTPP. As the initial TPP provisions were maintained, the contracting parties decided to suspend the investment rules in part.

The second regional treaty nearing conclusion is the RCEP, involving ten ASEAN members and six other countries in the region.<sup>73</sup> The aim of the negotiators is to bring the negotiations to a conclusion this year. The text has not yet been published, but it is supposed to include an ambitious investment chapter that should cover investment protection, liberalisation, promotion and facilitation.<sup>74</sup>

Both megaregions pose a challenge for the EU as they are built on a traditional approach with several improvements. The UNCTAD correctly highlights the question of policy coherence in the current diverging system, related not only to substantive standards such as FET definition but to a mechanism of settling of investment disputes as well. In order to limit a threat of parallel proceedings arising from a multi-layered network of states or discrepancy in interpretation of international obligations, states usually tend to harmonise their treaty network.<sup>75</sup> The CPTPP and the RCEP maintain traditional ISDS mechanism built in many ways on imported improvements from the NAFTA. This makes it more difficult for the EU to promote its own model.

## 8. Conclusion

Asia is a diverse region, and particularly challenging from the European negotiators' perspective. EU's partners in the Far East have different legal, economic and political systems and above all are in different stages of economic development – from Japan, one of the largest and most developed economies, to Myanmar which is among the least developed countries. China, Japan and India are Far Eastern economic powerhouses with their own influential investment policies. Since “Asian actors are setting the trends” in investment rule-making,<sup>76</sup> Asia seems the crucial region for the EU investment policy driven by the reform efforts to

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<sup>72</sup> Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Several other countries, including Indonesia, Korea and the Philippines, have reportedly expressed interest in joining.

<sup>73</sup> Australia, China, India, Japan, South Korea, and New Zealand.

<sup>74</sup> UNCTAD, *World Investment Report 2018*, 91.

<sup>75</sup> On the other hand, the EU negotiations, where investment chapters in the EU agreements that are expected to replace all Member States' BITs, should lead to a significant consolidation of BITs' network.

<sup>76</sup> Pekkanen, “Investment regionalism in Asia, 134.

which it has committed. This is also an explanation of EU's busy treaty-making, either in the form of IPAs or investment chapters in comprehensive free trade agreements.

Overall as Asian countries have become more developed, they have tended to pursue more modern BITs and FTAs<sup>77</sup> and their provisions are changing the Asian legal landscape. In particular, megaregional agreements are reshaping the investment treaty regime and not necessarily in favour of EU preferences. Some countries seek to reform investment regime, openly challenging its legitimacy, and to terminate existing investment treaties. The EU approach can certainly offer something in terms of the balance they are looking for. In this context, for some Asian countries, there is strong motivation to conclude an agreement with the EU as it will 'modernise' and 'harmonise' the existing investment regulation established in BITs previously signed with the EU Member States because these BITs will be replaced by the EU agreement.

It is therefore not surprising that the EU already persuaded the first countries in the Far East about its novel approach. The EU committed Singapore and Vietnam to its reform approach and a multilateral initiative for an investment court. Perhaps progress could be even better if internal political circumstances did not delay negotiations. The EU-China investment relationship and current negotiations are critical for the EU to retain the role of global leading rule-maker in the field. The EU's ultimate goal – a multilateral investment court replacing the ISDS system (short of its support and engagement) – will be difficult to achieve. The coming years will likely indicate in which direction Asian actors will head in the development of global investment governance.

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<sup>77</sup> See e.g. Manjiao Chi, "The 'Greenization' of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making," *Journal of International Economic Law* 18, no. 3 (2015): 511-542.

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## Annex

## An overview of EU investment negotiations in Asia

Country	Authorisation for negotiation	State of negotiations	Type of agreement	Number of MS' BITs
Singapore	9/2011	Signed on 19 October 2018	IPA separated from FTA	12
India	9/2011	On hold due to level of ambitions	Investment chapter under FTA	23
Japan	12/2012	EU proposal rejected, technical consultations continue	Investment chapter separated from FTA	0
Malaysia	10/2013	On hold due to level of ambitions	Investment chapter under FTA	15
Thailand	10/2013	On hold due to political situation	Investment chapter under FTA	12
Vietnam	10/2013	Finalising text for signature	IPA separated from FTA	20
China	10/2013	24 negotiating rounds completed	IPA	25
Myanmar	3/2014	On hold due to political situation	IPA	0
Philippines	11/2015	On hold due to political situation	Investment chapter under FTA	14
Indonesia	7/2016	9 negotiating rounds completed	Investment chapter under FTA	8