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### East Asia, Investment, and International Law: Distinctive or Convergent?

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# East Asia, Investment, and International Law: Distinctive or Convergent?

Beth A. Simmons

International investment agreements (IIAs) are the primary legal instruments designed to protect and encourage foreign direct investment world-wide. This article argues that Asian countries have used IIAs just as much as have other regions of the world to attract foreign direct investment, but that their pattern of agreement provisions is somewhat distinctive. States in East and Southeast Asia have tended to enter into agreements that strike a balance somewhat more favorable to host states than to foreign firms, at least when compared to the rest of the world. This may be due to high growth in the region, which tends to strengthen host states' bargaining power, and the availability of a wider range of macroeconomic tools available to many governments in the region to stimulate growth. A better bargaining position leads to less constraining IIAs, which may in turn help to account for the relative dearth of investment disputes involving East and Southeast Asian states, since weaker protections give foreign investors slimmer grounds to dispute their treatment. There is some evidence, however, that the terms of Asian IIAs are beginning to converge with investment agreements elsewhere in the world.

Key Words: international investment, international law, bilateral investment treaties, foreign direct investment

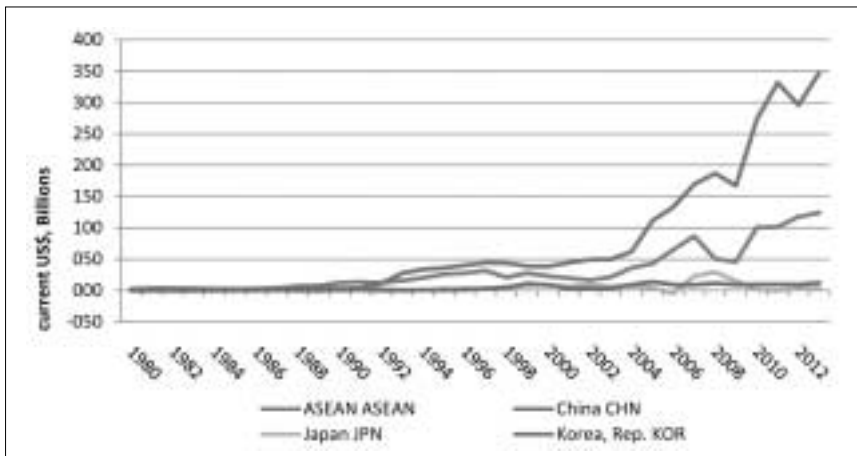
International investment agreements (IIAs) are the primary legal instruments designed to protect and encourage foreign direct investment world-wide. Global flows of foreign direct investment (FDI) - defined as "an investment made by a resident of one economy in another economy...of a long term nature or of 'lasting interest'"(UNCTAD 2009, 35) - are estimated to have reached \$1.6 trillion in 2014 and the world-wide stock of FDI in 2013 is estimated at about \$25.5 trillion. Asia attracts more foreign investment than anywhere else in the world: nearly 30 percent of global FDI inflows, according to UNCTAD's World Investment Report 2014.<sup>1</sup> Total inflows to "developing Asia" (excluding West

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Asia) amounted to \$382 billion in 2013, approximately a quarter of the world's total FDI.<sup>2</sup> Figure 1 illustrates the explosive growth in net FDI inflows for select Asian economies. In particular, it shows the dips and recoveries in FDI flows associated with the Financial Crisis of 1997 and the Great Recession of 2007-2009.

Figure 1. FDI Net Inflows, select Asian countries



Source: World Bank, World Development Indicators

FDI has been critical to the growth and development of Asia as a whole. In the 1990s, some studies suggest foreign investments accounted for as much as 20 percent of GDP growth in five ASEAN states.<sup>3</sup> A recent report by the Asia Development Bank estimates that about half of China's growth in the 2000s was due to exports and FDI.<sup>4</sup> Throughout the region, FDI has been critical to supply chain development, trade intensification, and strong stable growth.

Foreign direct investment flows depend on many factors, but one of the most important appears to be the quality of governing and regulatory institutions in the host country.<sup>5</sup> States world-wide have tried hard to attract foreign capital invest-

<sup>1</sup> See World Bank (2014). Accessed at [http://unctad.org/en/PublicationsLibrary/wir2014\\_overview\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2014_overview_en.pdf) (July 10, 2015).

<sup>2</sup> See IMF (2014, 21). Accessed at <http://www.imf.org/external/pubs/ft/reo/2014/apd/eng/areo0414.pdf> (July 12, 2015).

<sup>3</sup> See Fan and Dickie (2003). Accessed at [http://www.jstor.org/stable/25773639?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/25773639?seq=1#page_scan_tab_contents) (July 12, 2015).

<sup>4</sup> See Xing and Pradhananga (2013). Accessed at <http://www.adb.org/sites/default/files/publication/156282/adbi-wp427.pdf> (July 9, 2015).

ments by reforming institutions, strengthening the rule of law, and improving the transparency of their regulatory systems. One of the most observable moves they can make is to commit to international treaties to encourage and protect foreign investments within their jurisdiction. The growing popularity of IIAs world-wide can be understood as a transparent and credible attempt to assure investors that their investment are safe in the states that sign such agreements. But criticism of these agreements is on the rise. Some people argue states have given away important prerogatives in the interest of protecting investors' profits (Guzman 1998).

This article is about how Asia - East and Southeast Asia in particular - have engaged the legal regime for the protection of foreign investment. The geographic focus is on East and Southeast Asia; it excludes for the most part South Asia as well as Australia and New Zealand, and deals with Pacific Islands only in passing. Substantively, the focus is on agreements designed to protect foreign direct investment, not only by defining investors' rights but also often by allowing private investors to sue their host states via investor-state arbitration (ISA), should a dispute arise. The focus is on public agreements (usually treaties) between states, although private investors also often enter into specific contracts with their hosts and other domestic entities in host countries as well. This legal regime to protect private investors vis-à-vis their state hosts grew out of customary international law in the nineteenth century. Lately, legal protections have accelerated through a series of bilateral treaties championed by (largely western) actors using familiar western forms of law: legally binding treaties, investor-state arbitration, monetary and other damages for losses stemming from contract violation, etc.

Asia's relationship with international investment law has been somewhat ambivalent. On the one hand, the region has grown quite dependent on foreign investment for its growth and prosperity. There appear to be strong pressures for states to compete for international capital by adopting global standards and practices for its establishment and protection. The spread of bilateral investment treaties (BITs) around the world is perhaps the most dramatic example of global policy diffusion in this area (Elkins, Guzman and Simmons 2006). Several Asian states - China, most enthusiastically - have apparently embraced BITs and other IIAs in recent years. On the other hand, volumes have been written about Asian states' distinctive approaches to international law, their reluctance to enter binding international agreements, and their aversion to formalized dispute settlement in particular.<sup>6</sup> The region as a whole still tends to be among the most restrictive

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<sup>5</sup> See IMF (2014), Table 1.4.1. Accessed at <http://www.imf.org/external/pubs/ft/reo/2014/apd/eng/areo0414.pdf> (July 10, 2015).

<sup>6</sup> See the discussion in Kahler (2000).

when it comes to FDI entry (Pekkanen 2012). And even though many states in the region have negotiated the legal tools to do so, Asian states and firms seem less interested in settling investment disputes through the “time-honored” practice of litigation, which has become so common elsewhere in the world.

This article argues that there is something distinctive about the Asian experience with the international legal regime to protect investments. But it is not a story of distinctive Asian culture or the incompatibility with Asian values, legal systems or institutions. Rather, I locate Asia’s experience with the international investment regime in more proximate constraints and opportunities presented by the political economy. Most countries in the developing world negotiated IIAs from a position of economic weakness; Asia’s high growth has placed most states in the region in a much better bargaining position than states in emerging Europe, Latin America or Africa have been. Along with the power of China to demand important protections for state prerogatives in IIAs, this helps to explain why investment agreements involving Asian states are somewhat less favorable to private actors vis-à-vis public ones, compared to the rest of the world. This may also shed light on the relative dearth of formally disputed cases: weaker agreements give foreign investors slimmer grounds to dispute their treatment. Many states in the region have been able to drive harder bargains with foreign investors, which has reduced private litigation pressure and avoided backlash such as has been experienced in many parts of the world. While I do not claim that this is the only explanation for distinctive IIA patterns in Asia, it contributes to an understanding of how and why the regime operates a bit differently in this part of the world than elsewhere.

The rest of this article is organized as follows. The first section provides some background on the international investment regime, characterizing it as a bargain between states with interests to attract capital on the one hand, but to preserve their sovereign prerogatives vis-à-vis capitalists on the other. World-wide, I argue, states in a weak bargaining position have had to compete fiercely with others to attract capital, and have tended to make significant concessions to investors over the past few decades along the way. The second section discusses the ways in which the Asian experience may have been different from this global narrative. States in the region have embraced IIAs, but in general these have not been as lavishly favorable to investors as has been the case elsewhere. One reason may be that in contrast to the rest of the world, Asian states enter into IIAs during periods of much higher growth than have other areas of the developing world. The third section demonstrates that while Asian states and firms have participated in formal investor-state dispute settlement, they have done so much less than one would expect compared to the rest of the world. The fourth section considers

alternative explanations for this distinctive Asian experience. Many factors are undoubtedly at play, but I conclude that culture is not the only, or even the most convincing, possibility. Bargaining strength related to economic growth and a greater range of policy alternatives plays an important role as well.

## BACKGROUND: THE INTERNATIONAL INVESTMENT REGIME

The “international investment regime” refers to a welter of rules whose general purpose is to promote and protect direct investments by nationals of one state within the jurisdiction of another.<sup>7</sup> These rules are quite decentralized, even sometimes incoherent. They grew out of customary international law developed in the nineteenth century by the major capital-exporting countries, and reflect the principle that no government is entitled to expropriate private property without prompt, adequate, and effective compensation.<sup>8</sup> For decades, these rules remained in the form of customary law, but by the late 1950s risks of expropriation encouraged some capital-exporting states to develop explicit treaties with host states to protect their nationals’ investment abroad. Initially, such agreements were bilateral and focused explicitly on investment protection. A few bilateral investment treaties (BITs) were negotiated in the 1960s and 1970s, but these agreements began to diffuse dramatically in the 1980s and especially the 1990s.

Investment protection provisions began to pop up in trade and regional agreements from the 1990s. In recent years about a third of FTAs reported to the WTO have some kind of investment provision (Alschner 2014). Once almost completely bilateral, recently there has been a proliferation of regional investment agreements. For example, the Lisbon Treaty gives the European Union competence over foreign direct investment issues with foreign entities, and now it enters “bilateral” negotiations as a single unit. ASEAN is now said to have achieved a “comprehensive” approach to investment promotion and protection along the lines of “best practices” in international law, although it is not completely clear

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<sup>7</sup> For an explicit application of the regimes concept to international investment law, see Salacuse(2010).

<sup>8</sup> The basic premise was reflected in customary international law of the time; no government was entitled to expropriate private property, for whatever purpose, without providing prompt, adequate, and effective payment. See then U.S. Secretary of State Cordell Hull’s note to the Mexican Minister of Foreign Affairs during the 1938 dispute over land expropriations, reprinted in Green H. Hackworth’s *Digest of International Law*, vol. 3, sec. 228 (1942). The rule itself predates Hull’s statement, and it was restated in various decisions from the early part of the twentieth century. See *Concerning the Factory at Chorzow* (Ger. v. Pol.), 1926?29 P.C.I.L. (ser. A), Nos. 7, 9, 17, 19; *Norwegian Shipowners Claims Arbitration* (U.S. v. Nor.) 1 Rep. Int’l Arb. Awards 307 (1922).

how this “Comprehensive Investment Agreement” accords with existing BIT obligations.<sup>9</sup> Similarly, the WTO now recognizes a long list of regional and preferential trade agreements. However, many agreements, including Asian FTAs, are not yet even reported to the WTO.<sup>10</sup>

The international rules governing FDI are much more decentralized overall than those for international trade. There is no WTO for investment. Historically, capital exporting states have not been able to agree on multilateral treaty provisions among themselves, and certainly not with developing countries. Twice in modern history (in discussions of the International Trade Organization in 1947 and the Multilateral Agreement on Investment in 1995-98), notable efforts were made to multilateralize the international investment regime, and both failed. Even the GATT’s Uruguay Round (1986-94), noted for its sweeping accomplishments codified in fifty major new agreements, touched on investment only in a relatively minor way.<sup>11</sup> By the end of the Uruguay Round, attention to FDI amounted to little more than a patchwork of international rules (Kurtz 2003, 723). A decade later, global agreement on investment had been virtually removed from the agenda of WTO negotiations, largely because of the gulf between developed and major developing countries on multinational firms’ liability for harms done within the host state (Sornarajah 2010, 26). Global agreement remains elusive.

Despite the lack of a focal international institution or treaty,<sup>12</sup> investors’ rights are well protected in international law. IIAs and especially BITs are all about protecting investors; they are generally not designed to protect state prerogatives or to foster development generally. Indeed, today’s IIAs offer a wider array of substantive protections than did the previous customary rules that prevailed through the first half of the twentieth century. For example, BITs typically require national treatment and most-favored-nation (MFN) treatment of foreign investments in the host country.<sup>13</sup> They usually protect contractual rights,<sup>14</sup> guarantee the

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<sup>9</sup> ASEAN Comprehensive Investment Agreement, negotiated 26 February 2009, entered into force 29 March 2012.

<sup>10</sup> See the list of unreported Asian FTAs at <http://aric.adb.org/fta-all>.

<sup>11</sup> Trade Related Investment Measures (TRIMs), whose express purpose it was to facilitate international investment but which were clearly limited to “investment measures related to goods only;” TRIMs, article 1 and the General Agreement on Trade in Services (GATS), which introduced the idea of “commercial presence” - via investment - to the WTO; and Trade Related Intellectual Property (TRIPs), which protected intellectual property and technology transfers (Dattu 2000).

<sup>12</sup> The primary agreement is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - International Centre for Settlement Of Investment Disputes, Washington 1965, which offers dispute settlement facilities and obligates states parties to enforce arbitral awards, but does not set out a series of substantive rules for the treatment of FDI.

right to transfer profits in hard currency, and prohibit or restrict the use of performance requirements.<sup>15</sup> Perhaps most importantly, most BITs and FTA investment clauses provide for international arbitration of disputes between the investor and the host country (investor-state arbitration, or ISA).<sup>16</sup> In contrast to most trade agreements, which are generally enforced by *official state actions* through public mechanisms such as sanctions, most BITs and FTA investment provisions are enforced by *firms exercising a private right of action*, typically granted in the treaties themselves, which may result in monetary compensation for damages.<sup>17</sup>

This list of concessions to investors may seem extensive, but most states calculate they are worth it. The main reason host states have for entering into such agreements is the hope to attract higher foreign investment flows. And yet the evidence that investment agreements have improved access to foreign capital is not overwhelming. A spate of studies have found marginal to no ability of signed BITs to attract foreign investments, although some studies support to some extent a rosier conclusion.<sup>18</sup> Büthe and Milner (2014) find in a recent study that BITs have no effect on FDI flows, but that such flows are influenced by FTAs that include more stringent investment agreements. They also find, however, that some 2/3 of FTAs have no investment provisions at all and only about 20 percent have “BIT-like” provisions, so FTAs are hardly perfect substitutes for IIAs. If international legal agreements encourage FDI flows, it is probably not only because of the rights investors have unilaterally to launch cases in arbitral settings, as many states and firms seem to have assumed.

One explanation for the diffusion of BITs is the competitive scramble for capital such agreements tend to set off. This was especially the case in the 1990s and 2000s, when developing countries tended to negotiate highly asymmetrical

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<sup>13</sup> E.g., the 1994 U.S. Prototype Bilateral Investment Treaty, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce; Article 2(1), 2(2)(a).

<sup>14</sup> E.g., 1994 U.S. Prototype BIT, Article I(d)(ii).

<sup>15</sup> E.g., 1994 U.S. Prototype BIT, Article V(1-2).

<sup>16</sup> E.g., 1994 U.S. Prototype BIT, Article IX. Regional FTAs with ISA that give investors rights to sue states include the Energy Charter Treaty (ECT), the North American Free Trade Agreement (NAFTA), the Central American Free Trade Agreement (CAFTA), and the ASEAN Comprehensive Investment Agreement (ASEAN CIA), which entered into force in 2012.

<sup>17</sup> Historically, by contrast, customary international legal protection for investors was generally mediated by state-to-state relationships (Schill 2010, 36). Furthermore, friendship, commerce, and navigation agreements negotiated by many governments to protect investments prior to the rise of BITs typically did not explicitly contain such a right. See Sykes (2005, 4).

<sup>18</sup> Several studies have differing findings and approaches (Banga 2003, Neumayer and Spess 2004, Egger and Merlo 2007, Büthe and Milner 2009, Tobin and Rose-Ackerman 2011, Rosendorff and Shin 2012, Kerner and Lawrence 2014). See also the essays in Sauvants and Sachs (2009).



investment agreements in response to their closest competitors (Elkins, Guzman and Simmons 2006). Moreover, a series of studies have found that BITs were more likely to be signed in this period when the less powerful state faced economic downturns - evidence that states were willing to make more and more asymmetrical agreements under relatively stressful economic conditions (Allee and Peinhardt 2014). A damper was put on the enthusiasm for competitive treaty negotiation, however, when the consequences of legal liability became apparent. The more BITs a state signed through the 2000s, the more likely they were to be sued in an ISA forum such as the International Centre for Settlement of Investment Disputes (ICSID)(Simmons 2014).

Bilateralism and a right of standing for private corporate actors imbues the international investment regime with a peculiar character that stimulates competition for capital, weakens the bargaining position of states when they are in a vulnerable economic position, and potentially exposes them to legal liabilities that they may not have anticipated when they “tied their hands” under these agreements in the first place. Over the past three decades, the number of cases registered with the International Center for Settlement of Investment Disputes (ICSID) has grown much more rapidly than the number of cases registered with the WTO. True, there are many more firms than there are sovereign states, so we should expect a gap between total disputes in the two cases. But the *rate of change* in disputation is what is especially startling: new disputes registered with the GATT/WTO grew 96 percent from the 1980s to the 1990s but fell about 16 percent from the 1990s to the 2000s. New investor-state arbitration (ISA) cases registered with the ICSID grew 153 percent and a whopping 449 percent, respectively, over the same decades.<sup>19</sup> Some researchers have argued that governments in some developing countries scarcely understood the consequences of the concessions they were making to foreign investors until they themselves were dragged into arbitration (Poulsen and Aisbett 2013).

As a result, the legal regime to protect foreign investment has stirred up a good deal of controversy. In some states - from Australia to Norway to Ecuador, and even the United States - there is growing pushback from public actors who increasingly view the investment regime as currently constituted as not in their interest. As one legal scholar puts it, investor-state arbitration has become “one of the most dynamic and controversial areas of international law today” (Yackee 2012).

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<sup>19</sup> Author’s calculations, based on WTO data.

## IS THE ASIAN EXPERIENCE WITH ISAS 'DIFFERENT'?

East and Southeast Asian states have, with varying degrees of enthusiasm, participated in the international investment regime. They have negotiated BITs intra- and extra-regionally, signed FTAs with investment provisions, and have edged toward the prevailing ISA model in their regional agreements as well. They have strengthened investor protections along the lines described above, despite the controversies, and despite a “tradition” of standing aloof from binding international legal agreements (Kahler 2000). But there are at least three ways in which the zeal to contract to protect investment has been a little different from the rest of the world: in its *timing*, *content*, and *litigation experience*.

### TIMING OF ASIA'S IIAS

Common wisdom has it that Asian states are reluctant to commit themselves to formal legal arrangements of a binding nature because of their potential to infringe on state sovereignty. While this may be true of other issue areas, it is hardly the case with respect to agreements designed to facilitate international economic transactions. An Asian (albeit, South Asian) state was the first ever to sign a BIT (Pakistan with Germany, in 1959). East and Southeast Asian states have accounted for about 20 per cent of the world's BITs since the early 1980s. Figure 2 illustrates the growing interest internationally in BITs, distinguishing Asian state participation from the rest of the world. Naturally, most BITs do not involve an Asian state as a party at all (the green area), but the East and Southeast Asian share is approximately constant over time. The largest share of these agreements is with states outside of the region (the blue area in Figure 2). A small but growing slice of BITs (red area) represents agreements between states that are both from this region. Importantly, the slope of the curve during the 1990s BITs frenzy is just about the same for Asia as for the rest of the world.

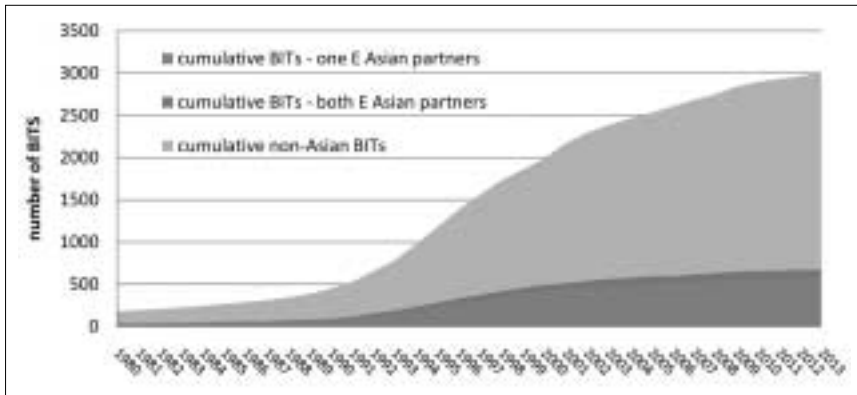
China got a slightly late start on negotiating BITs, but then topped out at about 30 percent of all agreements involving an East or Southeast Asian partner by 1993. Since then, China has been involved in about a quarter of all BITs with an East/Southeast Asian member. Overall, Asian states, but especially China, had been just about as (or more) eager as those of Eastern Europe, Latin America and Africa to sign BITs during the negotiation boom of the 1990s.<sup>20</sup>

Timing is critical, especially with respect to each contracting state's business cycle. The business cycle can be thought of as a rough measure of bargaining

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<sup>20</sup> Bilateral free trade agreements (FTAs) are on the rise as well in Asia, and many of these have investment provisions, but they lag behind the sheer number of bilateral investment agreements.

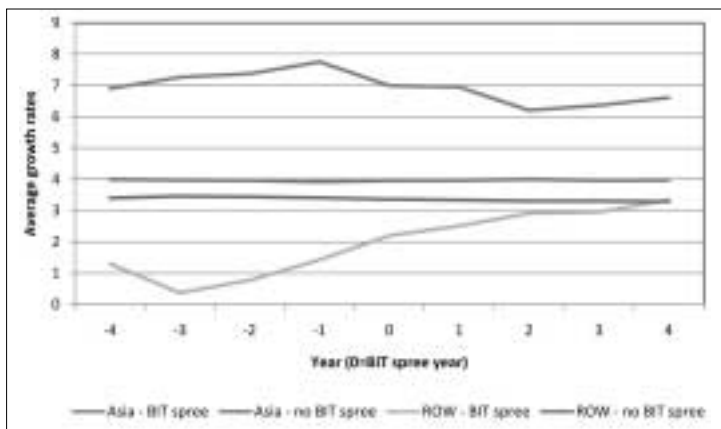
Figure 2. Asian bilateral investment treaties in global context



Source: UNCTAD

strength, along with other measures that make an investment destination attractive. One key difference between Asia and the rest of the world has been that BITs were negotiated in Asia during a period of robust growth. The same cannot be said of the rest of the world (Simmons 2014). Figure 3 illustrates the average growth rates states faced in the years surrounding “BIT sprees” - years in which more than four BITs were signed.

Figure 3. Average Growth Rates Preceding BIT Sprees (>4 BITs/year)



Year 0 represents any year in which four or more BITs were signed. Growth rates relate to the rate of growth in the *less developed* of the two-state pair as measured by GDP per capita. For most of the developing world, signing a large number of BITs was preceded by a slump in growth (the green line), which suggests that many governments in developing countries around the world may have been motivated to negotiate BITs to stimulate the economy. In fact, three years before a BIT spree, the rest of the world (outside of East and Southeast Asia and the Pacific) hovered between none and only 1 percent growth on average. The corresponding rate of growth for a state in East Asia and the Pacific region was over 7 percent (blue line). Meanwhile, there was no particular pattern to growth for those years in which states signed relatively few BITs, although it is clear that growth in Asia has been on average more robust than that elsewhere in the world (4 percent compared to a little over 3 percent). Table 1 presents the same relationship from a different perspective. Here, the likelihood of entering into a BIT spree is regressed on growth in the three prior years. While *negative* growth makes a BIT signing spree more likely in the rest of the world, *positive* growth makes it more likely for a state in the East Asia/Pacific region. A similar relationship holds when the signing of *any* BIT is substituted for a bit spree.

**Table 1: Effect of economic growth on the likelihood of a “BIT Spree” (more than 4 BITs signed in a year)**

VARIABLES	(1) East Asia and Pacific	(2) Rest of the World
GPD growth (t-1)	0.0062*** (0.0021)	-.0014* (.0007)
GPD growth (t-2)	0.0033 (0.0022)	-.0017** (.0007)
GPD growth (t-3)	0.0038** (0.0019)	-.003*** (.000)
Constant	0.00245 (0.0134)	.0854*** (.005)
Observations	635	3783
R-squared	0.047	.016

Standard errors in parentheses

\*\*\* p<0.01, \*\* p<0.05, \* p<0.1

Note: results are similar substituting “any new BIT” for a “BIT spree,” and using either OLS or a probit model

## AGREEMENT CONTENT

Asian governments seem to have participated in the BITs frenzy of the 1990s and 2000s as much as other countries from around the world have done, but on aver-

age they have negotiated from a position of economic strength; i.e., much stronger growth rates. Strong growth rates have the dual effects of both making a given jurisdiction a more attractive place in which to invest, while also reducing domestic political pressures on governments to adopt policies simply for purposes of stimulating the economy in the short term. BITs are bargains that are subject to the same kinds of negotiating pressures that characterize a broad range of international agreements. When growth is strong, governments have incentives to hold out for investment protection terms they find most attractive. Under such conditions, they are likely to be less willing to strike a bargain that reduces their sovereign prerogatives over incoming FDI.

To view BITs as bargains implies that strong growth should have implications for the contents of Asian BITs, compared to similar agreements elsewhere in the world. Governments in strong negotiating positions should be able to preserve many more sovereign prerogatives in their investment agreements compared to those in weaker economic positions. Once thought of as largely homogeneous, new data on investment treaty provisions suggest there may in fact be some important differences across BITs. Of particular concern here are the differences that provide especially strong protections for investors and limit the rights of governments to interfere with the operation and income stream of foreign investors.

Data collected by Chaisse and Bellak(2015) are useful for exploring the depth and breadth of investor protections in East Asian/Pacific BITs compared to those negotiated by the rest of the world. Chaisse and Bellak coded ten aspects of IIAs (both BITs and FTAs) that affect the quality of a treaty commitment to protect investors: whether the *definition of investment* is broad and open-ended or restricted by lists or exclusions; whether the agreement contains a *right of establishment*, which gives investors greater certainty regarding the conditions under which they can invest; whether *national treatment* clauses guarantee rights for foreign investors that are as favorable as those provided to domestic firms (narrow), or at least as favorable (broad); *most favored nation* clauses that are essentially unrestricted (broad) versus those that carry restrictions (narrow); whether or not the treaty contains a *fair and equitable treatment* provision, the presence of which gestures toward greater investor protection; whether *expropriation* clauses cover not only direct but indirect expropriation as well, which widens investor protections to a broader range of government takings; whether the treaty guarantees broadly the outward *transfer of funds*, or whether transfer is restricted in some circumstances; whether or not it contains any *non-economic obligations*, such as respect for human rights; whether the agreement has an *investor-state dispute settlement* clause; whether the agreement contains an *umbrella clause* that effectively extends the reach of the agreement; and the existence of

broad *temporal scope* provisions, which may extend protections to investment made before the treaty entered into force.<sup>21</sup>

Are Asian BITs systematically different from others around the world in terms of the quality of protections extended to investors? Bargaining theory would suggest that governments presiding over high-growth economies (which are more desirable to investors) would face few pressures to make strong concessions to attract capital. Table 2 examines whether there are significant differences in investor protections in Asian BITs compared to the rest of the world. “Liberalization” combines the individual indicators for right of establishment, free transfer of funds, and (lack of) non-economic obligations. The results suggest that BITs involving an Asian state tend on average to be noticeably less liberal than others by these criteria. Moreover, agreements involving two states in the region are about twice as likely to be “less liberal” than agreements involving only states outside the region. The results were similar with respect to agreement “breadth” (based on the breadth of investment definition, temporal scope and the presence of an umbrella clause). In this case the results are not quite significant for one partner, but intra-Asian BITs are not as likely on average to have as broad coverage as are BITs negotiated elsewhere in the world.

**Table 2: Strength of East and Southeast Asian BITs compared to the Rest of the World**

VARIABLES	(1) BIT liberaliza- tion	(2) BIT breadth	(3) BIT regulatory constraint	(4) BIT dispute settlement	(5) BIT strength (total)	(6) BIT strength (year/region interaction)
<i>Both partners Asian</i>	-0.395*** (0.101)	-0.273* (0.155)	-0.0318 (0.0478)	-0.0963 (0.0681)	-0.939*** (0.262)	-156.1*** (33.19)
<i>One partner Asian</i>	-0.184** (0.0708)	-0.150 (0.100)	-2.19e-05 (0.0201)	-0.101 (0.0734)	-0.519** (0.235)	-0.520** (0.235)
Date of signature	0.00458 (0.00325)	0.00988* (0.00517)	0.00785*** (0.00139)	0.00681* (0.00350)	0.0332*** (0.00691)	0.0314*** (0.00702)
Date of Signature <i>*both partners Asian</i>						0.0778*** (0.0166)
Constant	-4.384 (6.491)	-14.33 (10.35)	-11.72*** (2.786)	-11.83* (6.986)	-48.95*** (13.79)	-45.32*** (14.02)
Observations	1,444	1,444	1,444	1,444	1,444	1,444
R-squared	0.050	0.026	0.058	0.026	0.070	0.074

Robust standard errors in parentheses  
 \*\*\* p<0.01, \*\* p<0.05, \* p<0.1

<sup>21</sup> For a detailed discussion of their methodology, see Chaisse and Bellak(2011).

Two measures of investor protection in Asian BITs - regulatory constraint and dispute settlement - also tend to be *somewhat* less favorable to investors and more protective of state sovereignty in BITs involving Asian states compared to those negotiated between other states. “Regulatory constraints” include Chaisse and Bellak’s measures of indirect expropriation and also whether or not there is an explicit statement of fair and equitable investor treatment. “Dispute settlement,” as discussed above, simply indicates whether the agreement contains an investor-state arbitration (ISA) clause. Asian BITs are slightly, but not statistically much less likely to have these provisions than are BITs concluded by states outside of the region. Overall, Table 2 suggests that Asian BITs tend to be less favorable to investors and more protective of state prerogatives than are those negotiated by states outside the region.

Since dispute settlement is so central to the investor protection regime, it is worth taking an even closer look at such clauses. Allee and Peinhardt have coded a global sample of dispute settlement mechanisms found in BITs. Earlier research using this data has revealed that some BIT provisions are on average quite sensitive to the business cycle. Consistent with a bargaining hypothesis, the “tilt” in dispute settlement clauses was found to favor international arbitration over local remedies when negotiated during weak GDP growth in a potential host country (Simmons 2014). The results of this earlier research were quite striking: in almost every case, the stronger the economic growth in the less developed BIT partner, the stronger the domestic provisions and the weaker the international provisions contained in the dispute settlement section of a BIT. (The lone exception was a provision to use the ICSID for dispute settlement, which was found to have no consistent relationship with the developing country’s business cycle; Simmons 2014).

Interestingly, however, *these results do not hold for East Asian and Pacific states*. There is no strong evidence that business cycle conditions have contributed to specific kinds of dispute clauses in the sample of BITs that Allee and Peinhardt collected and coded. This is not very surprising, since as we have found above Asian BITs are much more likely to be negotiated from a position of economic strength; in effect, the key variance in the regional sample is truncated. But this does suggest that Asian BITs might differ systematically from those negotiated by developing states elsewhere in the world. Table 3 looks only at agreements between East Asian and Pacific states with the rest of the world, and distinguishes different kinds of dispute settlement clauses. Both ICSID and United Nations Commission on International Trade Law (UNCITRAL) clauses are classic third party arbitration, though using ICSID generally implies a more transparent process. According to Allee and Peinhardt’s data, which codes different kinds of dispute settlement clauses, ICSID and UNCITRAL provisions trend up strongly

with time, and a failure to mention either becomes less likely. There are increasing references to the use of local bodies, such as domestic courts, for dispute resolution, but a clear trend away from treaties that demand the exhaustion of local remedies.

Because of the inclusion of an interaction term between year and China, the above finding is conditional: it applies when China is *not* one of the treaty partners. Chinese treaty behavior is quite distinct. China overall is much less likely to agree to an ICSID provision than are other Asian states, and is also much less likely overall to agree to the exhaustion of local remedies. China’s agreements are trending in the same way as the rest of the region with respect to ICSID clauses; the interaction term suggests that they almost certainly have been more likely to agree to an ICSID clause with each passing year. However, China is moving against the regional trend with respect to clauses requiring the exhaustion of local remedies. With each passing year, other states are likely to reduce use of such clauses, while China is increasingly likely to include them. As with ICSID clauses, this could be because they “start” with a very low baseline probability of their inclusion.

**Table 3. Dispute Settlement Clauses Contained in Asian BITs**  
 (“Asia”: one or more parties to the BIT is from the East Asia/Pacific region)

	<b>Model 1 ICSID provision</b>	<b>Model 2 UNCITRAL provision</b>	<b>Model 3 Neither ICSID nor UNCITRAL</b>	<b>Model 4 Local Body Provision</b>	<b>Model 5 Exhaust Local remedies</b>
Difference in Developmental level	.162 (p=.106)	.149 (p=.207)	-.222* (p=.054)	-.293** (p=.017)	-.051 (p=.782)
Joint Democracy	.034 (p=.844)	-.026 (p=.856)	.042** (p=.033)	.150 (p=.535)	1.13*** (p=.013)
China	-184.217** (p=.049)	18.03 (p=.832)	157.44 (p=.122)	40.75 (p=.712)	-280.39** (p=.013)
Year	.061*** (p=.000)	.098*** (p=.000)	-.087*** (p=.000)	.043* (p=.055)	-.015*** (p=.004)
China *year	.091* (p=.051)	-.009 (p=.828)	-.078 (p=.127)	40.75 (p=.712)	.141*** (p=.012)
constant	-120.58*** (p=.000)	-195.08*** (p=.000)	171.22*** (p=.000)	-84.45* (p=.058)	83.29*** (p=.006)
Observations	345	345	345	340	340
Pseudo R <sup>2</sup>	.29	.15	.39	.15	.22

Results of a Probit model.  
 Probabilities of the Null hypothesis of no relationship in parentheses  
 \*\*\* p<0.01, \*\* p<0.05, \* p<0.1  
 Data source: Allee and Peinhardt.



In the interest of exploring other observable implications of the BITs as bargains framework, Table 3 also includes other forms of power and asymmetry between partners. Larger power differentials between BIT partners tend to strengthen third party arbitration provisions - a nearly statistically significant relationship in the case of ICSID and UNCITRAL provisions, and a strong negative relationship for the absence of such a provision. This implies that the more equal states are - as measured here by their World Bank development category - the less likely they are to include one or both of these dispute mechanisms in their agreement. Large power differentials are also associated with a reduced tendency to include provisions for resolution in local courts. There is some evidence that asymmetries in parties' developmental level makes third party dispute settlement options more attractive. Regime asymmetry also seems to play a role. Among BITs involving Asian states, when "joint democracy" matters, it tends to reduce third party provisions (mentioning neither ICSID nor UNCITRAL is more likely), and to increase the use of provisions for the exhaustion of local remedies before turning to third party arbitration. China's BITs are distinguishable among Asian agreements in their reluctance to name ICSID as a preferred forum for dispute settlement, but this is changing over time, as seems to have been the case with other Asian states.

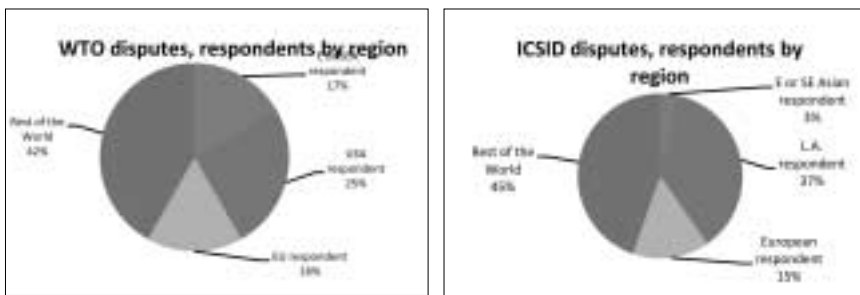
Overall, Asian BITs are on average distinguishable from those concluded elsewhere. Returning to the more general examination of provisions in Table 2, Model 5 combines all of the sub-indicators of investor protection into one aggregated measure of "BIT strength." Here the pattern is clear: *BITs with one Asian signatory are significantly less protective of investors than those without any Asian partners.* When both partners are from the region, the effect is even stronger, both substantively and statistically. Note that all of the models reported in Table 2 control for the year the agreement was signed, so that the regional effects cannot be attributed to global changes in BIT contents over time. The positive coefficient on date of signature indicates that there has been a strong tendency over time for investor protections generally to strengthen. The final model (column 6) includes an interaction term for region and year. The negative coefficients for BITs involving Asian states is still negative - BITs in which Asian states are involved better preserve state prerogatives relative to other BITs - but the positive coefficient on the interaction term suggests that BITs involving Asian states have moved toward favoring investors over time. Asian BITs are still distinctive, but they show evidence of moving toward the ways of the rest of the world. This is to be expected as states from the region acquire interests common to net capital exporters elsewhere.

## LITIGATION EXPERIENCE

Finally, Asian governments (and firms for that matter) behave distinctly with respect to their dispute settlement practices. World-wide, one of the main consequences of signing BITs has been an increase in litigation: more BITs have on average been associated with an increase in investor-state arbitration to settle disputes that arise out of obligations contained in these treaties (Simmons 2014). With Asian states, however, there are very few cases of investor-state arbitration in formal settings despite the fact that, as we have seen, Asian states have participated in about the same number of international investment agreements.

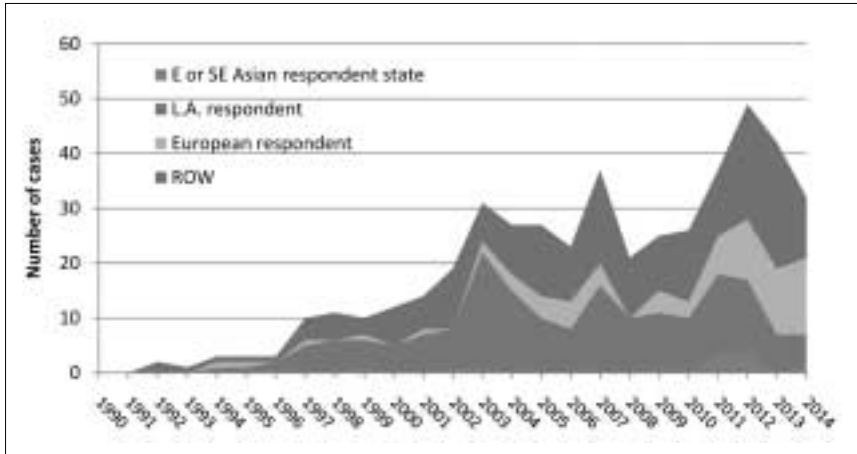
Asia appears to be an exception to the proposition that BITs lead ineluctably to states being sued. Asian states and firms simply have not participated in investor-state arbitration (ISA) to anything like the same degree as Latin American or Eastern European states. In fact, while East Asian states have been respondents in the WTO dispute settlement mechanism reasonably frequently (about 17% of respondents are from this region), they are respondents in investor-state arbitrations only rarely (for example, in only about 3% of ICSID cases; which is of course only a subset of such arbitrations; Figure 4). Within the major Asian regional forums, there have effectively been no formal trade or investment disputes that have been concluded between state parties to regional agreements. Asian states have been respondents in ICSID cases only a handful of times. These cases have been concentrated, with a slight lag, around major financial and economic crises of 1997 and 2009 (Figure 5). While the numbers are much smaller than elsewhere, this fits the general pattern globally over the past couple of decades: investors are much more likely to dispute their treatment after an economic shock than at any other time.

**Figure 4. Asia as a Respondent in Trade versus Investment Disputes**



Source: WTO

Figure 5. ICSID Respondents by Region, 1990-2014



Source: ICSID

As Figure 5 shows, Asian states (not to mention firms) have been involved in a few ISA cases, and there may be more to come - a natural consequence, perhaps, of the growth in the number of BITs governing investments in and by regional actors and their tendency to converge toward global norms. China has now been sued twice using ICSID, first by Ekran Berhad, a Malaysian company, in May 2011 over a land lease in China's Hainan province<sup>22</sup> and in November of 2014 by Ansung, a Korean property development company over losses related to golf course and condominium construction in Sheyang-Xian, Jiangsu province.<sup>23</sup> Little can be concluded from these cases, however, since the first was discontinued and the second has just begun. A Chinese firm has only lodged one case with ICSID, resulting in a small award compensating for the Peruvian government's unjustified taxation.<sup>24</sup> While more ISAs involving Chinese investors are known to have occurred in confidential proceedings,<sup>25</sup> it may be that publicly scrutinized disputes are perceived as contrary to China's (and Chinese firms') interests. The Republic of Korea displays a similar preference. Sued only twice in ICSID, one

<sup>22</sup> EkranBerhad v. PRC (ICSID Case No.ARB/11/15).

<sup>23</sup> Ansung Housing Co., Ltd. V. PRC (ICSID Case No.ARB/14/25).

<sup>24</sup> Tza Yap Shum v. Republic of Peru (ICSID Case No.ARB/07/6).

<sup>25</sup> For example, the Permanent Court of Arbitration is administering a case arising out of the cancellation of licenses held by PRC investors in the Tumurtei iron ore mine in 2012 (China Heilongjiang International Economic & Technical Cooperative Corp. v. Mongolia).

case was discontinued<sup>26</sup> and the other has remained confidential.<sup>27</sup> No ISAs involving Japan could be located.

A little more is known about the experience of the ASEAN states with ISA and it has not always been happy. The Philippines has been sued by foreign investors three times, the most monumental of which dates from a 1990 agreement with a German consulting firm for the expansion of the Manila airport and involves hundreds of millions of dollars, but after an award rejecting jurisdiction, annulment of that decision and the launch of a new claim, the case is still pending.<sup>28</sup> As of this writing, Indonesia is a respondent in three cases pending at ICSID, and recently discontinued a fourth (terms unknown). Malaysia has been a respondent at ICSID three times, but not in almost a decade. Cambodia recently prevailed in a \$300 million claim involving electrical utilities, but the ICSID award is not publicly available.<sup>29</sup>

Meanwhile, regional forums for handling investment disputes have barely gotten off the ground. Presumably in an effort to keep disputes amicable (and private) the ASEAN states have moved in recent years to develop regional mechanisms to resolve investor disputes. The ASEAN Agreement for the Promotion and Protection of Investment (AAPPI, 1987) and the ASEAN Investment Area (AIA; endorsed in principle by the ASEAN summit in 1995) purport to promote investment, but have fatal flaws, according to critics, because disputes are essentially handled politically rather than through neutral third party arbitration (Vergano 2009, Jarvis 2012, 230). Sympathetic observers believe that these mechanisms have been refined over time (Echandi 2009).

## WHY IS ASIA DIFFERENT? BARGAINING POWER IN INTERSTATE RELATIONS

Why has the Asian experience with IIAs and investor-state arbitration been different from that of states elsewhere in the rest of the world? Most Asian states have concluded highly legalized agreements to encourage investment, but both

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<sup>26</sup> *Colt Industries Operating Corporation v. Republic of Korea* (ICSID Case No. ARB/84/2).

<sup>27</sup> *LSF-KEB [Lone Star] Holdings SCA and others v. Republic of Korea* (ICSID Case No. ARB/12/37).

<sup>28</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25).

<sup>29</sup> See <http://cambodianlawstudies-siengpikol.blogspot.jp/2013/05/government-wins-plant-row.html>. The award is not posted on the ICSID website.

the less liberal content and the distinctive distance from investor-state arbitration calls for an explanation. While no one factor is likely to explain all aspects, I argue we should look beyond easy cultural arguments and consider the role that bargaining and interests have played in this area.

“Culture” is a weak explanation for the nature of Asian states’ engagement with the international investment regime for a number of reasons. For one thing, the differences documented in Tables 1-3 are statistically significant, but are not plausibly linked to major differences in cultural orientations across regions. There is certainly no wholesale rejection of the international investment regime that bears any resemblance to broader cultural orientations. Second, whether there are any cultural orientations that can coherently explain attitudes toward international law in general is highly doubtful (Chimni 2011). Differences in “mentalities” of patience and conflict avoidance (Hamamoto 2011) hardly mark relations among states in the region generally. Many scholars and observers have noted that Asian states are far too heterogeneous, both domestically and certainly across the region as a whole to account for an “Asian approach” to international law or legalization (Kahler 2000, 560). Kahler is right when he asserts that Asian states, like all states, are strategic in their engagement with formal legal institutions, engaging them where useful and eschewing them when they do not achieve a well-defined interest. The contrast between involvement in the WTO’s dispute settlement mechanism and investor-state dispute settlement does not support broad claims about avoiding legalistic conflicts. Nor does Japan’s important role in fostering regional standards and institutions for commercial arbitration.

Domestic governments and legal institutions are often suggested to play a role in Asian states’ participation in the international investment regime. Perhaps the historical role of the state in development explains why Asian states are less likely to sacrifice sovereign prerogatives to attract foreign capital. The literature on the development state, popular in the 1980s for explaining growth in the region, might plausibly suggest a resistance to international legal rights for foreign investors that could hamper the ability of states to intervene where and when necessary to guide development and shape other social outcomes. The collusive relationships between strong states and domestic business interests, especially prevalent before the Asian financial crisis, might also constitute a strong coalition against making concessions to foreign capital.

The evidence presented above suggests that there may be important macro-economic differences in the conditions under which bargains for investment protection are struck in the first place, so this may be one place to look for explanations for Asia’s distinctive regime engagement to date. Asian states have tended to negotiate BITs from a position of economic strength, strike bargains that leave

somewhat wider discretion for states and a slightly narrower set of protections for foreign investors, and end up in arbitration much less than is the case in other regions of the world. What underlying conditions might contribute to this outcome?

High growth rates for the region generally are likely part of the explanation. It is common-place to argue that East and Southeast Asia have been and will continue to be for some time among the most dynamic economies in the world and are therefore among the most attractive in which to invest (Rajan 2013). During the decades of the most intense BIT negotiations, the 1990s and 2000s, the region experienced the strongest growth rates in the world. According to the World Bank, between 1985 and 2005 East Asia and the Pacific region grew an average of 4.2%, while Latin America grew about 2.8%, North Africa and the Middle East grew 3.8%, and Africa grew about 2.8%.<sup>30</sup> High growth regions naturally attract capital, and by this criterion East Asia is a prime site for foreign direct investment.

Even when economic growth does slow, the research in this paper suggests that states in the East Asia and Pacific region have been able to avoid negotiating BITs, possibly in favor of other policy tools. In East Asia, BITs do not appear to be the policy tool of choice in difficult economic conditions, at least compared to elsewhere in the developing and emerging world. This is not a claim of course that the East Asian region has not experienced recession, but rather that states in the region may have a broader range of macroeconomic tools available to combat growth slumps. In particular, East Asian states seem to be able and willing to conduct fiscal policy counter-cyclically. By contrast, in many developing areas of the world, from Latin America to Africa, governments appear to conduct fiscal policy pro-cyclically rather than counter-cyclically (Gavin and Perotti 1997). Whether this is due to a credit squeeze (Kaminsky, Reinhart and Végh 2005), aid reductions (Yackovlev, Lledo and Gadenne 2009) or to agency problems based on a basic mistrust in government's ability to commit to responsibly reduce spending during expansions (Alesina et. al. 2008), one of the basic tools of economic stimulation appear to be unavailable to governments in many regions of the world. Interestingly, Asia is an exception, at least in contrast to Latin America and Africa (Alesina, Campante and Tabellini 2008; Woo 2009, 854-55).<sup>31</sup> This could imply that many Asian states have other policy tools for managing economic downturns without making quite as many concessions to foreign investors as has been the

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<sup>30</sup> World Development Indicators online.

<sup>31</sup> The published version of Alesina et. al. does not make this distinction, but the SSRN version on which it is based calculates average pro- versus counter-cyclicality by region. Asia resembles the OECD in its fiscal policy more closely than it does Africa or especially Latin America.

case in the rest of the world. This is an argument about the *availability of policy instruments in downturns*; it comports with the finding above that Asian states on average have avoided making treaty commitments during downturns. On average, they may have better access to countercyclical policies than do most governments outside of the OECD. If so, then this could have systematic effect on bargaining positions, treaty contents, and eventually the course and settlement of disputes between investors and states.

## CONCLUSION

International law governing FDI has been explicitly adopted by a significant number of states around the world, largely in the form of bilateral agreements with investor-state dispute resolution clauses. These treaties have given foreign investors significant rights vis-à-vis the governments in jurisdictions in which these investments are made. The results globally have been mixed: such treaties may have contributed to attracting capital, but they also have exposed states, especially in Latin America but elsewhere as well, to significant risks of litigation.

The BIT regime has been explained as a result of competition to attract capital (Elkins, Guzman and Simmons 2006). In particular, research on a global scale has shown that on average states have been in a weak place in their growth cycles when they have signed such treaties, which at least partially explains the prevalence of significant concessions to foreign investors. This article offers evidence that Asia does not fit the broad global patterns reported elsewhere (Simmons 2014). As a region, East Asian states have negotiated BITs during periods of relatively robust growth, and as a result Asian governments have retained more flexibility in these agreements than elsewhere in the world. As a whole, Asian BITs are not as 'strong' in their investor protections as are BITs around the world, although this research also reveals there is some noticeable convergence, in that BITs negotiated by East Asian states are generally becoming more favorable to investors over time.<sup>32</sup> I argue that robust growth and weaker investor protections - rather than cultural preferences - at least partially explain the lack of litigation involving states and firms in this region. East Asian states responded to the 1997 crisis largely by further liberalizing and to some extent harmonizing their nation-

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<sup>32</sup> Recent research suggests that investor protections offered in Asian *trade* agreements are just as if not stronger than elsewhere in the world (Allee and Elsig 2014). Regional changes are likely driven to a significant degree by changes in China's preferences for better investment protections, including national treatment (Shan, Gallagher and Zhang 2012).

al rules (Athukorala 2003; Poulsen and Hufbauer 2011). As East Asian states become ever more important exporters of FDI, their interests in BITs and other IIAs will continue to grow.

Future research should concentrate on other regional aspects of the political economy of investment that would also contribute to an understanding of the pattern of treaties and their contents in Asia. One avenue for exploration would be how the dense linkages between trade, investment and services differ in Asia compared to other parts of the world (Baldwin 2011), creating incentives to negotiate legal protections but also to settle disputes quickly and quietly. A related approach would be to compare investments by sector to shed light on how specific kinds of investments affect time horizons and, in turn, influence how nascent disputes are settled. For example, Japanese observers attribute a business's reluctance to initiate investor-state arbitration at the ICSID to the "mentality," said to be prevalent among Japanese business, to stay in the host long-term, and therefore to work out investment conflicts amicably (Hamamoto 2011). It might prove more enlightening to recast such arguments in terms of time-to-profitability for certain kinds of investments, which in turn affects time horizons and could encourage states and investors to make concessions privately (Hafner-Burton, Steinert-Threlkeld and Victor 2014).

One thing does seem certain: formal legal agreements are becoming increasingly important to the regulation of FDI among and involving East Asian states. In addition to the growing number of BITs analyzed here, waves of FTAs with investment agreements are in various stages of conceptualization, discussion, provisional acceptance and in force. One source calculates that a high proportion - perhaps almost a quarter - of bilateral investment relationships is governed by more than one investment treaty (Alschner 2014). Sometimes these treaties are acknowledged to operate in parallel,<sup>33</sup> but in some cases their relationships are less clear. The Transpacific Partnership Agreement (TPPA, under discussion) will be the world's second largest trade and investment area after the EU, but there is disagreement between the existing BITs of its members and the TPPA on the possibility of investor-state arbitration at all (Trakman 2014). Asian states have hardly exempted themselves from negotiated a welter of agreements to enhance trade and investment. The challenge is to understand regional differences in such agreements in terms that also clarify trends worldwide.

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<sup>33</sup> The China-Japan-South Korea Trilateral Investment Agreement (2012) Article 25 explicitly says for example that it does not affect BIT obligations. The 2012 ASEAN CIA refers more generally to international law. See (Alschner 2014, 22).



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