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# Investment Arbitration in East Asia and the Pacific

## *A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitrations in the Region*

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### Abstract

Many countries in the East Asian and Pacific (EAP) region have strengthened their networks of bilateral investment treaties (BITs) and other international investment agreements (IIAs). This growth in investment protection instruments not only illustrates the region's continued attractiveness to foreign investors, but also reflects a shift of several developing EAP countries from having been predominantly recipients of foreign investment in the past, toward becoming important sources of foreign investment abroad. Reflecting trade and investment patterns, as of December 2014, EAP countries concluded a total of at least 712 BITs and 69 other IIAs. On the heels of this development, the region has seen a rising number of investment arbitrations. As of December 2014, at least 49 investment arbitrations have been brought against EAP countries and/or by EAP investors. Most recently, the number of new cases has picked up pace significantly, making the region a veritable 'hot bed' of investment arbitration.

### Keywords

bilateral investment treaties – other international investment agreements – investor-state arbitration – East Asia and Pacific region – statistical analysis

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## 1 Introduction

The East Asia and Pacific (EAP) region comprises 35 countries, ranging from the world's most populous country and second-largest economy—China—to some of the world's most remote Pacific islands.<sup>1</sup> Despite its challenging environment including several conflict- and disaster-stricken countries, the EAP region has remained the world's economic growth engine and one of its export powerhouses in the last years, accounting for over 40% of the increase in global output.<sup>2</sup> Generally, developing countries in the EAP region navigated the global economic crisis successfully and maintained high growth.<sup>3</sup> However, in the mid-term, ensuring sustainable growth is a major challenge for this region, which will require more and better quality investments in infrastructure and in skills and training of the growing work force. The region's economic, political and cultural diversity as well as its potential for continued economic growth make it a compelling subject for analysis.

Inflows of foreign direct investments (FDI) to EAP countries continue to be significant in volume. While inflows to some major economies in the EAP region, such as China or South Korea, have decreased in recent years, FDI inflows to the Association of Southeast Asian Nations (ASEAN) continue to increase.<sup>4</sup> Moreover, a number of developing EAP countries have become major sources of FDI, as EAP investors have been increasingly pursuing investment opportunities abroad that allow them to diversify and grow their business.<sup>5</sup> Notably, China continues to establish itself as one of the most important outward investors, especially in Africa, the broader Asia and Pacific region and Latin America.<sup>6</sup> As outward FDI from EAP countries turns increasingly towards

<sup>1</sup> For purposes of this article, the EAP region comprises the following 35 countries or territories: Australia, Brunei, Cambodia, China, Cook Islands, East Timor, Fiji, Hong Kong (Special Administrative Region), Indonesia, Japan, Kiribati, Laos, Macao (Special Administrative Region), Malaysia, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, New Zealand, Niue, North Korea, Palau, Papua New Guinea, the Philippines, Samoa, Singapore, Solomon Islands, South Korea, Taiwan, Thailand, Tonga, Tuvalu, Vanuatu, and Vietnam. On country classifications, see Annex, Table A.

<sup>2</sup> See World Bank, 'East Asia and Pacific Overview' (7 October 2014) <<http://www.worldbank.org/en/region/eap/overview>> accessed 13 April 2015.

<sup>3</sup> *ibid.*

<sup>4</sup> UNCTAD, *World Investment Report 2013: East Asia and Pacific* (United Nations 2013) 2 <[http://unctad.org/en/publicationslibrary/wir2013\\_en.pdf](http://unctad.org/en/publicationslibrary/wir2013_en.pdf)> accessed 13 April 2015.

<sup>5</sup> *ibid.* 4. Indeed, Asian countries overall remained the largest source of FDI in the developing world in 2013. *ibid.*

<sup>6</sup> *ibid.* 4–5.

developing countries with less stable legal environments, the risks associated with such investments increase. Thus, many developing EAP countries continue to strengthen their networks of bilateral investment treaties (BITs) and other international investment agreements (IIAs), such as preferential trade agreements, free trade agreements, economic partnership agreements and economic integration agreements with provisions for the promotion and protection of foreign investments through substantive and procedural safeguards,<sup>7</sup> to not only continue to attract FDI to their own soil, but also to ensure appropriate protection of their nationals' investments abroad.

This article will provide an in-depth statistical analysis of BITs and other IIAs concluded by EAP countries (Section 2). Further, this article will examine investment arbitrations brought by EAP investors and/or brought against EAP countries (Section 3). Unless otherwise indicated, this article is current as of December 2014. Tables detailing the data, which forms the basis of this statistical analysis, as well as charts aiding in the analysis and interpretation of this data are available on the Social Science Research Network (SSRN) and will be referred to as Annex materials throughout this analysis.<sup>8</sup>

A review of the data gathered reveals the following main points. Generally reflecting existing trade and investment patterns, EAP countries have concluded a total of at least 712 BITs. Thus, BITs involving at least one EAP party account for nearly a quarter of the global number of BITs, estimated at 2,902 by the end of 2013.<sup>9</sup> BITs were first signed by countries in the region in the early 1960s, and have grown exponentially since. The majority of the region's BITs were concluded in the 1990s, and the rate at which new BITs have been signed since 2000 has slowed considerably.

Furthermore, EAP countries also have concluded at least 69 bilateral or multilateral IIAs other than BITs. The vast majority of these agreements have been signed since the 2000s, just as the conclusion of new BITs in the region started to slow down noticeably. Thus, IIAs other than BITs involving at least one EAP party account for more than one-fifth of the global number of other

<sup>7</sup> Independent of the terminology used by the contracting parties to designate their respective agreements, this analysis will refer to all international economic agreements containing provisions on investment promotion or protection other than BITs as other IIAs.

<sup>8</sup> See Claudia T Salomon and Sandra Friedrich, 'Annex Materials: Investment Arbitration in East Asia & Pacific – A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitrations in the Region' <<http://ssrn.com/abstract=2591186>> accessed 24 April 2015.

<sup>9</sup> See UNCTAD, *World Investment Report 2014: Investing in the SDG's. An Action Plan* (United Nations 2014) 114 <[http://unctad.org/en/publicationslibrary/wir2014\\_en.pdf](http://unctad.org/en/publicationslibrary/wir2014_en.pdf)> accessed 13 April 2015.

IAs, estimated at 334 as of December 2013.<sup>10</sup> As the majority of other IAs in the region also provide for investor-state arbitration as a means of dispute resolution, they appear to protect foreign investors and their investments as effectively as previously concluded BITs.

Moreover, consistent with global trends, the region has seen a rapidly increasing number of investment arbitrations. Since the early 1980s, at least 49 investment arbitrations have been brought by EAP investors or against EAP countries. While the rise in investment arbitrations involving EAP parties had been slightly lagging behind the global rate during the 1990s and 2000s, most recently, that number has been picking up pace significantly, making the region a veritable 'hot bed' of investment arbitration.

## 2 Bilateral Investment Treaties and Other International Investment Agreements Concluded by EAP Countries

After examining the conclusion of BITs in the region by decade and by geographical location of the other contracting party (Section 2.1), and analyzing the conclusion of other bilateral or multilateral IAs by EAP countries (Section 2.2), this section will discuss in detail the BIT and other IIA practices of select EAP countries (Section 2.3).

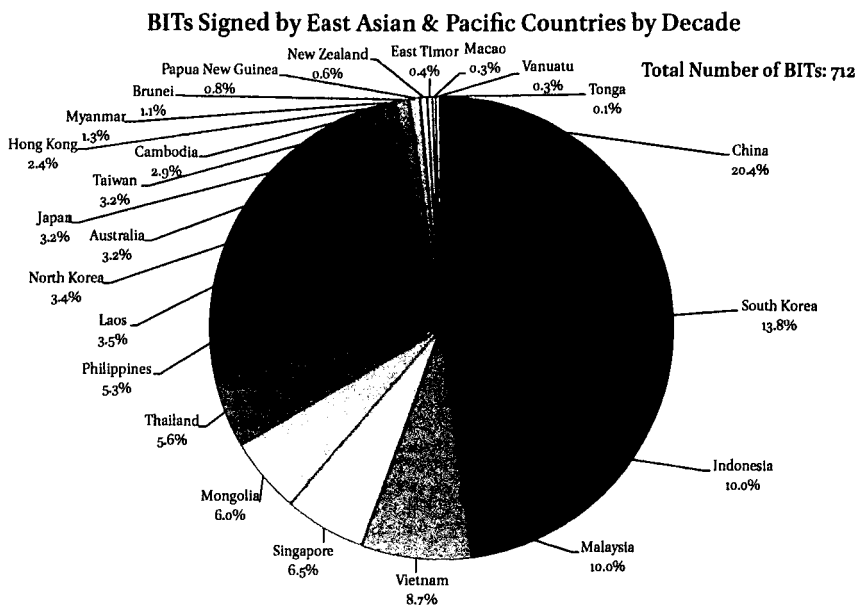
### 1.1 *Overview on Bilateral Investment Treaties in EAP*

With the conclusion of the first BITs in the early 1960s, BIT activity in the EAP region spans more than five decades. Based on the IIA Navigator database of the United Nation's Conference on Trade and Development (UNCTAD),<sup>11</sup> 24 EAP countries concluded a total of 712 BITs.<sup>12</sup> Of those, 541 BITs are in effect. China has concluded by far the most BITs in the region with 145 BITs, followed by South Korea with 98 BITs, Indonesia and Malaysia with 71 BITs, and Vietnam with 62 BITs. On the other hand, nearly one-third of the countries in the region, all of them small Pacific Island nations, have not concluded any BITs.

<sup>10</sup> *ibid* 114.

<sup>11</sup> See UNCTAD, 'IIA Navigator' (2015) <<http://investmentpolicyhub.unctad.org/IIA>> accessed 13 April 2015.

<sup>12</sup> The statistics on BITs concluded by EAP countries are derived from the data gathered in Annex, Table B, which provides a general overview on BITs in the region by decade, by region and sub-region of the other contracting party and by country, as well as in Annex, Tables B.1 through B.7, which provide more detailed overviews.



These eleven East Asian & Pacific countries have not concluded any BITs: Cook Islands, Fiji, Kiribati, Marshall Islands, Micronesia, Nauru, Niue, Palau, Samoa, Solomon Islands, and Tuvalu.

CHART B.16

### 1.1.1 The 1960s–1980s

The early 1960s mark the beginning of BIT activity for the EAP region.<sup>13</sup> Four EAP countries—Indonesia, Malaysia, South Korea, and Thailand—were at the very forefront of foreign investment promotion and protection by concluding seven BITs, exclusively with (Western and Northern) European countries.<sup>14</sup> With four BITs, Indonesia was the only country to conclude more than one BIT at the time.

During the 1970s, three more EAP countries—Japan, the Philippines, and Singapore—started to sign BITs as well.<sup>15</sup> Thus, seven EAP countries concluded a total of 26 BITs, mostly with Western European countries (22 BITs,

<sup>13</sup> Malaysia concluded the first BIT in the region with Germany on 22 December 1960, little more than a year after the conclusion of the first modern BIT, the Germany-Pakistan BIT of 25 November 1959.

<sup>14</sup> Annex, Table B.1. The majority of these BITs have been terminated since and often were replaced by later treaties.

<sup>15</sup> Annex, Table B.2.

84.6%).<sup>16</sup> Singapore (7 BITs, 26.9%), South Korea (6 BITs, 23.1%) and Malaysia (5 BITs, 19.2%) concluded the most BITs during this decade. Notably, the 1970s saw the EAP region's first BITs with North American<sup>17</sup> and North African<sup>18</sup> countries.

During the 1980s, another five EAP countries—Australia, China, Laos, New Zealand, and Papua New Guinea—started to conclude BITs, while Indonesia paused its BIT activity.<sup>19</sup> Thus, 11 EAP countries signed a total of 48 BITs, nearly doubling the number of BITs from the previous decade. Newcomer China (22 BITs) as well as BIT ‘veterans’ Malaysia and South Korea (respectively 10 BITs) concluded the most BITs during this decade. The region's BIT portfolio became increasingly diversified geographically,<sup>20</sup> including the first BITs with countries in Southern Asia,<sup>21</sup> Sub-Saharan Africa,<sup>22</sup> the Middle East,<sup>23</sup> and Eastern Europe.<sup>24</sup> Moreover, EAP countries concluded the first intraregional BITs during this decade.<sup>25</sup> In fact, relative to the total number of BITs concluded by EAP countries in each decade, the 1980s saw the highest percentage of BITs concluded intraregionally and with Southern Asia (respectively 16.7% of BITs concluded in the 1980s).<sup>26</sup>

### 1.1.2 The 1990s

During the 1990s, 21 EAP countries—by far the largest group yet—concluded 369 BITs.<sup>27</sup> Nine EAP countries were newcomers to concluding BITs: Brunei,

<sup>16</sup> Annex, Chart B.4. Indeed, relative to the total number of BITs concluded by EAP countries in each decade, the 1970s saw the highest percentage of BITs concluded by EAP countries with Western European countries. Annex, Chart B.10(a).

<sup>17</sup> Canada-Singapore BIT (adopted and entered into force 30 July 1971).

<sup>18</sup> South Korea-Tunisia BIT (adopted 23 May 1975, entered into force 28 November 1975).

<sup>19</sup> Annex, Table B.3.

<sup>20</sup> Annex, Chart B.5.

<sup>21</sup> Sri Lanka-South Korea BIT (adopted 28 March 1980, entered into force 15 July 1980) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1832>> accessed 8 May 2015.

<sup>22</sup> Senegal-South Korea BIT (adopted 12 July 1984, entered into force 2 September 1985) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1828>> accessed 8 May 2015.

<sup>23</sup> China-Kuwait BIT (adopted 23 November 1985, entered into force 24 December 1986) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/752>> accessed 8 May 2015.

<sup>24</sup> Malaysia-Romania BIT (adopted 26 November 1982, terminated) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/1963>> accessed 8 May 2015.

<sup>25</sup> China-Thailand BIT (adopted 12 March 1985, entered into force 13 December 1985) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/786>> accessed 8 May 2015.

<sup>26</sup> Annex, Chart B.12(c); Annex, Chart B.15.

<sup>27</sup> Annex, Table B.4.

Cambodia, Hong Kong, Mongolia, Myanmar, North Korea, Taiwan, Tonga, and Vietnam.<sup>28</sup> Thus, during the 1990s, the number of BITs concluded by EAP countries increased nearly eight-fold from the 1980s. China (67 BITs), Malaysia (48 BITs), Indonesia (45 BITs), and South Korea (44 BITs) concluded the most BITs during this decade.

The 1990s are not only the first (and only) decade, during which EAP countries concluded BITs with countries of all regions and sub-regions worldwide,<sup>29</sup> but EAP countries also concluded the largest number of BITs with each sub-region during this decade, except for the Middle East and Central America, where the number of BITs peaked a decade later. Moreover, for the first time, EAP countries concluded fewer BITs with European countries than with countries outside of Europe. The 1990s also saw the region's first BITs with countries in Western and Central Asia<sup>30</sup> and Central<sup>31</sup> and South America<sup>32</sup> and the Caribbean.<sup>33</sup> Relative to the total number of BITs concluded by EAP countries in each decade, the 1990s saw the highest percentage of BITs concluded by EAP countries with Eastern Europe (18.7% of BITs concluded in the 1990s),<sup>34</sup> which is certainly related to the collapse of the Iron Curtain and the end of the Cold War in 1991, allowing for the reintegration of former Eastern Bloc countries into the world economy.

### 1.1.3 The 2000s

During the 2000s, 21 EAP countries—a similarly large group as in the 1990s—concluded 234 BITs (the second-largest number of BITs after the 1990s).<sup>35</sup> While East Timor, Macao and Vanuatu concluded BITs for the first time, New Zealand, Papua New Guinea, and Tonga did not add any new BITs to their portfolios. Thus, during the 2000s, the number of BITs concluded by EAP countries decreased by more than one-third from the 1990s. Countries that concluded the most BITs in the 2000s were once again China (50 BITs) and South Korea (37 BITs), followed by Vietnam (22 BITs).

<sup>28</sup> In addition, Indonesia, which had not concluded BITs in the 1980s, resumed its BIT practice during the 1990s.

<sup>29</sup> Annex, Chart B.6.

<sup>30</sup> China-Turkey BIT (adopted 13 November 1990, entered into force 20 August 1994) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/789>> accessed 7 May 2015.

<sup>31</sup> Panama-Taiwan BIT (adopted 26 March 1992, entered into force 14 July 1992).

<sup>32</sup> Paraguay-Taiwan BIT (adopted 6 April 1992, entered into force 11 September 1992).

<sup>33</sup> China-Jamaica BIT (adopted 26 October 1994, entered into force 1 April 1996) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/746>> accessed 8 May 2015.

<sup>34</sup> Annex, Chart B.10(c).

<sup>35</sup> Annex, Table B.5.



BITs concluded by EAP countries during the 2000s are the second-most geographically diverse group after the 1990s, representing all regions and sub-regions worldwide, except North America.<sup>36</sup> Moreover, the number of BITs signed by EAP countries with countries in the Middle East and Central America peaked during the 2000s (after the total number of BITs per decade for all other sub-regions had already peaked during the 1990s).<sup>37</sup>

#### 1.1.4 The 2010s

Between 2010 and 2014—a half-decade—12 EAP countries concluded 28 BITs.<sup>38</sup> Twelve other EAP countries, which had concluded BITs in the past, have not (yet) concluded any BITs during the 2010s.<sup>39</sup> Japan (8 BITs), China (6 BITs) and Singapore (5 BITs) have concluded the most BITs so far. Relative to the total number of BITs concluded by EAP countries in each decade, the 2010s saw the highest percentage of BITs with Middle Eastern and Sub-Saharan African countries (respectively 28.6% and 25% of BITs concluded in the 2010s).<sup>40</sup> While Middle Eastern countries have become important foreign investors in several EAP countries, Sub-Saharan Africa has seen a lot of foreign investment inflows from the EAP region. So far, EAP countries have not concluded any new BITs with countries in Northern Europe, Southern Asia, Central America and the Caribbean.

Overall, the number of new BITs concluded during this decade is significantly lower than during the 1990s and 2010s. If this development continues, the region only may see about 60 new BITs by the end of this decade, which would constitute a decline of roughly three-quarters compared to the 2000s.

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This analysis shows that the region's BIT portfolio generally is in line with global trends. After a few EAP countries concluded their first BITs during the 1960s, the 1970s and 1980s saw a slow, but steady growth in the number of BITs until that number grew exponentially and reached its peak in the 1990s.

<sup>36</sup> Annex, Chart B.7.

<sup>37</sup> Annex, Chart B.13(b); Annex, Chart B.12(b).

<sup>38</sup> Annex, Table B.6.

<sup>39</sup> These 12 countries are Australia, Brunei, Cambodia, Macao, Mongolia, New Zealand, North Korea, the Philippines, South Korea, Thailand, Tonga, and Vanuatu. It remains to be seen whether these countries will conclude any new BITs by the end of this decade.

<sup>40</sup> Annex, Chart B.11(b); Annex, Chart B.12(b).

**BITs Signed by East Asian & Pacific Countries  
by Decade**

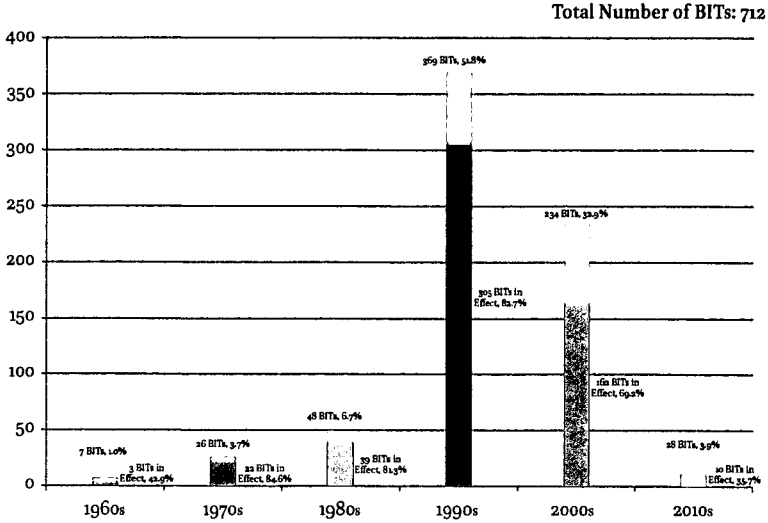


CHART B.1

In fact, more than half the BITs in the region were concluded during that decade. Since then, there has been a significant decline in the number of new BITs signed in the region,<sup>41</sup> which is consistent with a global stagnation in BIT numbers.<sup>42</sup>

Several reasons may account for the declining rate at which new BITs are signed in the region. To some extent, this development can be attributed to a saturation of the market, where most frequent trading and investment partner countries have concluded the BITs necessary to achieve the desired level of investment promotion and protection. Some EAP countries also may have shown reluctance in concluding new BITs after investors brought investment arbitration claims against them, seeking substantial compensation in reliance on the substantive protections and procedural guarantees provided in a BIT. For instance, the Philippines seems to have stopped concluding BITs shortly after the filing of the first investor-state arbitration claim against it in

<sup>41</sup> While the 1990s saw the conclusion on average of nearly 37 BITs per year in the region, the 2000s only saw the conclusion on average of 23 BITs per year, and this rate has fallen further to on average less than six BITs per year in the first half of this decade.

<sup>42</sup> See UNCTAD (n 4) xix-xx, Fig 5.

2002.<sup>43</sup> While the country had concluded 37 BITs by the time the International Centre for Settlement of Investment Disputes (ICSID) registered the claim, it has only signed one BIT with Syria since the case settled in 2008.<sup>44</sup> Furthermore, certain countries or regions elsewhere have become generally more reluctant to foreign investment and the conclusion of BITs,<sup>45</sup> which decreases the number of potentially available contracting parties for new BITs involving EAP countries.

Lastly, the EAP region is following a global trend of concluding IIAs other than BITs, which often address trade and investment under one umbrella, instead of concluding separate agreements.<sup>46</sup> Therefore, some EAP countries may have chosen to conclude other IIAs instead of BITs, thus contributing to the lower number of new BITs in the region.

The regional affiliation of the other contracting party in BITs involving EAP countries is also of interest and, as the statistical analysis shows, has changed over time. While the majority of BITs concluded by EAP countries in the 1960s, 1970s and 1980s were concluded with European countries—100% of the BITs in the 1960, 88% of the BITs in the 1970s and 58% of the BITs in the 1980s<sup>47</sup>—EAP countries increasingly have been concluding BITs with countries in other parts of the world throughout the 1990s, 2000s and 2010s. Indeed, BITs with European countries represent less than one-sixth of BITs concluded during the 2010s, which is likely due not only to a certain saturation of the market, but also to a diversification of investment relations of developing EAP countries, many of which have become capital-exporters to other regions. Conversely, the percentage of BITs concluded with African and other Asian countries outside of the EAP region has increased nearly

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<sup>43</sup> *SGS Société Générale de Surveillance SA v Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004) (subsequently settled and settlement recorded as award under ICSID Arbitration Rule 43(2) on 11 April 2008).

<sup>44</sup> Philippines-Syria BIT (adopted 25 November 2009, entered into force 4 May 2010). Further, the Philippines only concluded one IIA other than a BIT—the Japan-Philippines Economic Partnership Agreement of 9 September 2006—and its investment arbitration provision is subject to further negotiation.

<sup>45</sup> See eg International Institute for Sustainable Development, 'Analysis: Latin America's New Model Bilateral Investment Treaties, Investment' (*Investment Treaty News*, 17 July 2008) <<http://www.iisd.org/itn/2008/07/17/in-depth-latin-america-s-new-model-bilateral-investment-treaties/>> accessed 13 April 2015 (discussing Bolivia's withdrawal from ICSID, Brazil's lack of bilateral investment treaties and Ecuador's plans to denounce some of its existing investment treaties).

<sup>46</sup> See Section 2.2.

<sup>47</sup> Annex, Chart B.10.

uninterruptedly since the first BITs with these regions were concluded in the 1970s and 1980s respectively, representing two-thirds of BITs concluded during the 2010s.<sup>48</sup> This development illustrates not only the growing importance of foreign investors from those regions in EAP, but also the increasingly important role of EAP investors in those regions, in particular Sub-Saharan Africa.

Overall, the region's largest share of BITs still involves European countries (280 BITs, 39.3%), followed by BITs with other Asian countries outside of the EAP region (155 BITs, 21.8%), African countries (100 BITs, 14.0%), intraregional BITs (93 BITs, 13.1%),<sup>49</sup> and Central and South American and Caribbean countries (79 BITs, 11.1%).<sup>50</sup> When looking at the other contracting parties' regional sub-divisions, among European countries, Western European countries lead the pack (120 BITs, 16.0%), closely followed by Eastern European countries (111 BITs, 15.6%). Further, EAP countries have concluded a sizeable number of BITs with countries in the Middle East and Sub-Saharan Africa (respectively 69 BITs, 9.7%), Northern Europe (49 BITs, 6.9%), Western and Central Asia (44 BITs, 6.2%), South America (43 BITs, 6.0%), Southern Asia (42 BITs, 5.9%), as well as North Africa (31 BITs, 4.4%). On the other hand, EAP countries have concluded relatively few BITs with countries in Central America and the Caribbean (respectively 18 BITs, 2.5%), as well as with countries in North America (5 BITs, 0.7%).<sup>51</sup> This regional breakdown of the BIT portfolio held by EAP countries largely reflects the region's trade and investment patterns.<sup>52</sup>

<sup>48</sup> Annex, Chart B.11; Annex, Chart B.12.

<sup>49</sup> Overall, the rate of intraregional BITs has remained relatively high throughout the 1980s, 1990s and 2000s, which is indicative of flourishing intraregional trade and investment relations in the region. Annex, Chart B.15. Indeed, most of them were concluded after the signing of ASEAN's Agreement on Promotion and Protection of Investments in 1987 among a smaller group of EAP countries. China concluded the most intraregional BITs (19 BITs), followed closely by Vietnam (16 BITs), South Korea (14 BITs), Indonesia (13 BITs), Laos (12 BITs), Cambodia and Thailand (11 BITs each), and Malaysia, Mongolia and the Philippines (10 BITs each).

<sup>50</sup> Annex, Chart B.2. However, the trend in the conclusion of BITs with Central and South America and the Caribbean has been less linear. The percentage of BITs concluded with this region remained relatively stable for two decades during the 1990s and 2000s, but has since plummeted abruptly, which likely is due to changing political and economic environments in several South American countries. Annex, Chart B.13.

<sup>51</sup> The small overall number of countries in the North America region contributes to the low percentage of BITs concluded by EAP countries with that region.

<sup>52</sup> See Section 2.3.

### BITs Signed by East Asian & Pacific Countries by Other Contracting Party (Sub-Region)

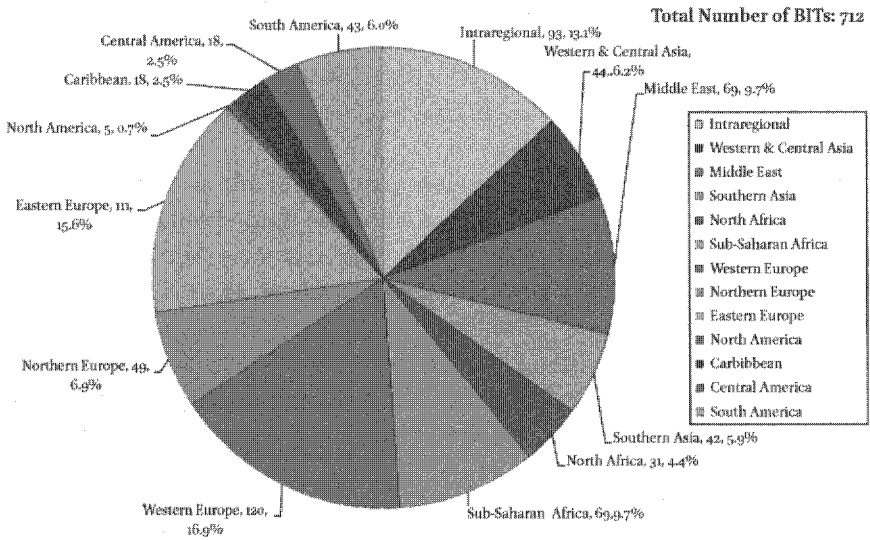


CHART B.3

#### 1.2 Overview on International Investment Agreements Other Than BITs in EAP

While BITs provide foreign investors with assurances against uncompensated expropriation and other substantive and procedural protections of their investments abroad, IIAs other than BITs often also contain market access provisions, which may make it easier and cheaper for foreign investors to make imports to and exports from a host country related to their investments.<sup>53</sup> Generally, at least in a North-South context, BITs often lay the basis for the contracting parties to subsequently negotiate other international economic agreements, including IIAs other than BITs, with deeper obligations regarding trade and market access that extend beyond foreign investment.<sup>54</sup> Thus, historically, BITs have outnumbered these agreements by about ten to one globally.<sup>55</sup>

Since the early 1980s, ASEAN and 18 individual EAP countries have concluded at least 69 IIAs,<sup>56</sup> and all of them—except Fiji (and ASEAN)—also have

<sup>53</sup> See Jennifer L Tobin and Marc L Busch, 'A BIT is Better Than a Lot – Bilateral Investment Treaties and Preferential Trade Agreements' (2010) 62(1) World Politics 2.

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*

<sup>56</sup> The statistics on IIAs other than BITs concluded by EAP countries are derived from the data gathered in Annex, Table C, which provides a detailed overview. See also Annex, Chart C.

signed BITs.<sup>57</sup> Japan holds the largest portfolio of IIAs other than BITs (14 IIAs, 20.3%), followed by Australia, China and Singapore (12 IIAs, 17.4% each), South Korea (11 IIAs, 15.9%), New Zealand (8 IIAs, 11.6%), and Malaysia (7 IIAs, 10.1%). Contrary to the region's BITs, which were predominantly concluded during the 1990s, the vast majority of the region's other IIAs were concluded during the 2000s (43 IIAs, 62.3%) and 2010s (21 IIAs, 30.4%),<sup>58</sup> as the conclusion of BITs started to slow down in the region.

In addition, several EAP countries have proposed or are currently negotiating new IIAs other than BITs.<sup>59</sup> For instance the Trans-Pacific Partnership (TPP) involves 12 countries bordering the Pacific, namely Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.<sup>60</sup> It has drawn widespread attention and criticism from the public, advocacy groups and elected officials regarding its scope,<sup>61</sup> intellectual property provisions,<sup>62</sup> secrecy of the negotiations,<sup>63</sup> as well as criticism of the possibility of investor-state arbitration.<sup>64</sup>

<sup>57</sup> Thus, 17 EAP countries have not signed any IIAs other than BITs. Of those, seven countries have signed BITs, but no other IIAs—Cambodia, East Timor, Laos, Myanmar, North Korea, Tonga, and Vanuatu—while the remaining ten countries—all of them small Pacific Island nations—have not signed any BITs or other IIAs.

<sup>58</sup> Conversely, the 1980s and 1990s saw relatively few IIAs other than BITs (respectively 2 IIAs, 2.9% and 3 IIAs, 4.3%). Notably, the region's first other IIA was the Organisation of the Islamic Conference (OIC) Investment Agreement of 5 June 1981, involving EAP countries Brunei, Indonesia and Malaysia.

<sup>59</sup> See ADB Asia Regional Integration Center's database on Free Trade Agreements <<http://aric.adb.org/fta-country>> accessed 13 April 2015.

<sup>60</sup> See Office of the US Trade Representative, 'Overview of the Trans-Pacific Partnership' <<https://ustr.gov/tpp/overview-of-the-TPP>> accessed 13 April 2015; see also Office of the US Trade Representative, 'Outlines of TPP' (12 November 2011) <<https://ustr.gov/tpp/outlines-of-TPP>> accessed 13 April 2015.

<sup>61</sup> See eg Citizens Trade Campaign, 'Bigger-than-NAFTA Leesburg Trade Summit Attracts Controversy, Protest' (5 September 2012) <<http://www.citizenstrade.org/ctc/wp-content/uploads/2012/09/TPPLEesburgReportersMemo.pdf>> accessed 13 April 2015.

<sup>62</sup> See eg Richard Chirgwin, 'US Trans-Pacific Partnership Proposal Leaked' (*The Register*, 11 March 2011) <[http://www.theregister.co.uk/2011/03/11/us\\_tpp\\_proposal\\_leaked/](http://www.theregister.co.uk/2011/03/11/us_tpp_proposal_leaked/)> accessed 13 April 2015.

<sup>63</sup> See eg 'Groups Urge President to Reject "Unprecedented Level of Secrecy" in Trade Negotiation' (*Open the Government Org*, 6 March 2012) <<http://www.openthegovernment.org/node/3757>> accessed 13 April 2015.

<sup>64</sup> See eg Lori Wallach, 'Brewing Storm over ISDR Clouds: Trans-Pacific Partnership Talks – Part 1' (*Kluwer Arbitration Blog*, 7 January 2013) <<http://kluwerarbitrationblog.com/blog/2013/01/07/brewing-storm-over-isdr-clouds-trans-pacific-partnership-talks-part-i>> accessed 13 April 2015.

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About half the countries in the region have concluded IIAs other than BITs, including more than two-thirds of those EAP countries with existing BITs. This shows that most EAP countries do not conclude BITs *or* other IIAs, but both. However, for all but two EAP countries—Fiji and New Zealand—the number of BITs in their portfolios largely surpasses the number of other IIAs,<sup>65</sup> which likely is due to the fact that the BIT practice of EAP countries has a longer history and is more established. Additionally, developed countries in particular may be willing to conclude a large number of BITs, which impose little political cost.<sup>66</sup> Other IIAs, however, often involve deeper, reciprocal obligations regarding market access and trade and thus come at a higher political price, as their negotiation may mobilize antitrade constituents.<sup>67</sup> Thus, while there is a growing global trend to provide for the promotion and protection of trade and investment under one umbrella agreement instead of several separate agreements,<sup>68</sup> countries may be more selective in their choice of contracting party when it comes to such agreements, explaining their overall lower numbers.

Indeed, it appears that EAP countries frequently choose to conclude either a BIT or an IIA other than a BIT with a specific contracting party, instead of following a sequential approach (ie BIT first, then possibly other IIA). EAP countries concluded other IIAs after already having concluded a BIT with the same contracting party in only 25 instances,<sup>69</sup> of which nine involved China. In all but four cases, the previously concluded BIT remains in effect and was not replaced by the later IIA. Thus, depending on the treaties' exact wording, eligible investors may be in a position to claim protection under the BIT and the other IIA's investment chapter. Conversely, this also shows that EAP countries mostly conclude IIAs other than BITs without previously having concluded a

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<sup>65</sup> New Zealand has concluded twice as many other IIAs (8) than BITs (4), while Fiji has not concluded any BITs, but one other IIA.

<sup>66</sup> See Tobin and Busch (n 53) 5.

<sup>67</sup> *ibid.*

<sup>68</sup> See on this global trend Stephan W Schill and Marc Jacob, 'Trends in International Investment Agreements 2010–2011: The Increasing Complexity of International Investment Law' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2011–2012* (OUP 2013) 141, 144–54.

<sup>69</sup> Not taking into account possible overlap through membership of EAP countries or their contracting parties in international organizations, such as ASEAN, OIC, the European Free Trade Association (EFTA) or the Gulf Cooperation Council (GCC), or the industry-specific Energy Charter Treaty (ECT).

BIT to 'pave the way.' Once an IIA other than a BIT is in place, the conclusion of a BIT likely becomes obsolete.

Thus, the rise of such umbrella agreements in the EAP region likely contributed to the lower number of new BITs signed by EAP countries since the early 2000s. Indeed, the vast majority of other IIAs in the region contain substantive and procedural protections similar to BITs, including provisions on investor-state arbitration under the ICSID Convention or other arbitral rules (49 IIAs). Therefore, these other IIAs appear to protect foreign investors and their investments in the region as well as EAP investors abroad in a similar manner as previously concluded BITs.

Besides two truly global other IIAs with 50 or more contracting states—the Organisation of the Islamic Conference's (OIC) Investment Agreement and the Energy Charter Treaty (ECT)—EAP countries have concluded IIAs other than BITs with every region in the world, except Africa. Yet, in the past five years, EAP countries have concluded nearly one-third of the region's BITs with African counter-parties. This might indicate that the treaty practice of EAP countries is akin to that of capital-exporting states in a North-South context, when it involves African countries, meaning in this context BITs indeed are used as an initial means to 'pave the way' for later IIAs other than BITs that involve deeper, reciprocal obligations regarding market access and trade. EAP countries concluded by far the most other IIAs intraregionally (38 IIAs, 55.1%), followed by other IIAs with countries in Central and South America and the Caribbean (16 IIAs, 23.2%) and other Asian countries (12 IIAs, 17.4%). Very few IIAs other than BITs were concluded with countries in North America and Europe (respectively 5 IIAs, 7.2%, and 4 IIAs, 5.8%), but several are currently under negotiation. As the region's other IIA portfolio is much smaller than its BIT portfolio—less than one-tenth—contracting parties are fewer in numbers and less geographical diverse. For instance, all nine IIAs other than BITs with South Asian countries involve one of two countries—India or Pakistan, while all nine other IIAs with South American countries involve one of three countries—Chile, Colombia, or Peru, which indicates strong economic relationships of the EAP region with those countries.

### 1.3 *Detailed Discussion of Bilateral Investment Treaties and Other International Investment Agreements Concluded by Select EAP Countries*

Having discussed the region's overall BIT and other IIA practice, this section will provide a more detailed analysis of the BIT and other IIA activity of the following seven EAP countries: Australia, China, Indonesia, Japan, Malaysia, South Korea, and Vietnam. This diverse group of countries includes developed and developing economies, capital-importing and capital-exporting countries,



ASEAN member states and non-ASEAN members, territorial behemoths and smaller states, populous giants and sparsely populated nations. Notably, the group is composed of EAP countries with the three largest BIT and other IIA portfolios,<sup>70</sup> in addition to EAP's top developed and developing home economies of foreign investors—Japan and China, as well as its top developed and developing host economies of foreign investments—Australia and China.<sup>71</sup> Overall, this country-by-country analysis shows that BIT and other IIA portfolios of EAP countries generally correlate with existing economic realities in the areas of trade and investment.

### 1.3.1 Australia

With inflows of USD 50 billion in 2013,<sup>72</sup> Australia—the world's twelfth-largest economy—<sup>73</sup> is the world's eighth-largest host economy of FDI, the second-largest among developed countries, and the largest among developed countries within EAP.<sup>74</sup>

Australia has concluded 23 BITs, of which all but two are in effect (91.3%).<sup>75</sup> Australia concluded its first BIT in the late 1980s,<sup>76</sup> but the vast majority date from the 1990s (17 BITs, 73.9%).<sup>77</sup> Since the early 1980s, Australia also concluded at least 12 other IIAs, nearly two-thirds of them dating from the 2000s or later.<sup>78</sup> All of Australia's BITs and several of its other IIAs contain investment arbitration provisions.

In April 2011, Australia attracted international attention with a controversial statement by its then Prime Minister Julia Gillard that it would no longer include investor-state dispute resolution procedures in future BITs and other IIAs due to the significant legal risk of compulsory arbitration.<sup>79</sup> The down-under nation

<sup>70</sup> See ss 2.1 and 2.2.

<sup>71</sup> See UNCTAD (n 4) xv, Fig 2 and Fig 3.

<sup>72</sup> See UNCTAD (n 9) xv, Fig 2 (marking a notable decline of USD 6 billion from 2013 levels).

<sup>73</sup> See World Bank, 'GDP (current US\$) per Country' (2014) <<http://data.worldbank.org/indicator/NY.GDP.MKTP.CD>> accessed 13 April 2015.

<sup>74</sup> See UNCTAD (n 9) xv, Fig 2.

<sup>75</sup> Annex, Table B; Annex, Table B.7.

<sup>76</sup> Australia-China BIT (adopted and entered into force 11 July 1988) <<http://investment-policyhub.unctad.org/Download/TreatyFile/148>> accessed 8 May 2015.

<sup>77</sup> Australia's most recent BIT is the Australia-Mexico BIT (adopted 23 August 2005, entered into force 21 July 2007).

<sup>78</sup> Annex, Table C.

<sup>79</sup> See Australian Government, Department of Foreign Affairs and Trade, 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' (April 2011) 14

considered that the economic and non-economic costs of investor-state arbitration outweighed its potential benefits due to a number of factors: Australia's desire to protect its public policy, the absence of a strong business lobby to support investor-state arbitration, growing foreign investments in traditionally Australian-owned sectors, such as agriculture, banking, air transport, telecommunications and shipping, threatened investment claims by several mining companies in relation to a proposed super profits mining tax, and the then impending treaty-based arbitration by a Philip Morris Hong Kong subsidiary challenging the country's Plain Packaging Act of 2011 for cigarettes.<sup>80</sup>

Australia did not attempt to revisit any of its existing BITs or other IIAs, which provide for investor-state arbitration. However, the recent Australia-Malaysia Free Trade Agreement of 22 May 2012 was the first Australian IIA to implement this reluctant stance on investment arbitration by omitting a provision on investor-state arbitration and thus withholding from investors direct recourse against the host state other than in the local courts or through diplomatic protection.<sup>81</sup> Nevertheless, Australian and Malaysian investors are still able to resolve investment disputes through the previously concluded ASEAN-Australia-New Zealand Free Trade Agreement of 27 February 2009.<sup>82</sup> Therefore, the main impact of Australia's reluctance to including investor-state arbitration provisions in its BITs and other IIAs will be felt by non-ASEAN countries. For instance, the Australia-Japan Economic Partnership Agreement of 8 July 2014 does not provide for investor-state arbitration.<sup>83</sup> However, the recently concluded Australia-South Korea Free Trade Agreement (KAFTA) of 8 April 2014 contains detailed investor-state arbitration provisions with 'appropriate carve-outs and safeguards in important areas such as public welfare, health

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<<http://pdf.aigroup.asn.au/trade/Gillard%20Trade%20Policy%20Statement.pdf>> accessed 13 April 2015; see generally Luke R Nottage, 'The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement"' *Sidney Law School Legal Studies Research Paper No 11/32* (10 June 2011) <<http://ssrn.com/abstract=1860505>> accessed 13 April 2015.

<sup>80</sup> See Michael Hwang and Nicholas Thio, 'Investment Treaty Arbitration in Asia: Contemporary Issues and Challenge' (2012) 9 *Transnatl Disp Mgmt* 24–25; Parliament of Australia, 'Australia's Foreign Investment Policy' <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/Briefing\\_Book44p/AustForeignInvest](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/Briefing_Book44p/AustForeignInvest)> accessed 13 April 2015.

<sup>81</sup> See Hwang and Thio (n 80) 27.

<sup>82</sup> *ibid* 29.

<sup>83</sup> However, Article 14.19(2) provides that if Australia enters into any multilateral or bilateral agreement providing for a mechanism for the settlement of investor-state disputes, an equivalent mechanism might be established under this agreement in the future.

and the environment.<sup>84</sup> These recent additions to Australia's other IIA portfolio illustrate that the current Australian government under prime minister Tony Abbott has reverted back to a case-by-case assessment regarding the inclusion of appropriate investor-state arbitration provisions in the country's BITs and other IIAs, which allowed the KAFTA negotiations to finally conclude successfully.<sup>85</sup>

Major sectors for foreign investment in Australia are mining, services, manufacturing, and finance,<sup>86</sup> and the largest sources of foreign investment in Australia are the United States, the United Kingdom, Japan, Singapore and Hong Kong, while China and India are also significant.<sup>87</sup> Conversely, the largest destinations for Australian investments are the United States, the United Kingdom, and New Zealand.<sup>88</sup> As for trade, Australia's most important trade partners are China, Japan, Singapore, South Korea, and Thailand—all fellow EAP countries.<sup>89</sup> Notably, Australia's trade and investment relations with all these major economic partners, except China, Hong Kong and the United Kingdom, are governed by individual IIAs other than BITs between Australia and those countries, and as for ASEAN members Singapore and Thailand also by other IIAs between Australia and ASEAN. Further the down-under nation concluded nearly a third of its BITs (7 BITs, 30.4%) intraregionally with other EAP countries, including China and Hong Kong.

In addition, Australia concluded several BITs with countries in Eastern Europe (5 BITs, 21.7%), South America (4 BITs, 17.4%), and Southern Asia (3 BITs, 13%), including India, which is also one of its important trade and

<sup>84</sup> See Australian Government Fact Sheet, 'Australia and Korea FTA (KAFTA) - Key Outcomes' <[https://www.pm.gov.au/sites/default/files/media/13-12-05\\_kafta\\_fact\\_sheet\\_docx.pdf](https://www.pm.gov.au/sites/default/files/media/13-12-05_kafta_fact_sheet_docx.pdf)> accessed 13 April 2015; Australia-South Korea Free Trade Agreement (adopted 8 April 2014, not yet in force) ch 11 ('Investment') arts 11.15–11.21 <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2971>> accessed 8 May 2015

<sup>85</sup> See Rowan Callick, 'Korea Ready to Talk Turkey After FTA Hurdle Removed' (*The Australian*, 1 November 2013) <<http://www.theaustralian.com.au/business/economics/korea-ready-to-talk-turkey-after-fta-hurdle-removed/story-e6frg926-1226750841630#>> accessed 13 April 2015.

<sup>86</sup> See Parliament of Australia (n 80).

<sup>87</sup> See Australian Government, Department of Foreign Affairs and Trade, *International Investment Australia 2013* (December 2014) 2 <<http://www.dfat.gov.au/about-us/publications/Documents/international-investment-australia.pdf>> accessed 13 April 2015.

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*; US Central Intelligence Agency, 'The World Factbook: Australia, Economy' (2015) <<https://www.cia.gov/library/publications/the-world-factbook/geos/as.html>> accessed 13 April 2015.

investment partners.<sup>90</sup> However, Australia has not concluded any BITs with countries in the Middle East, Sub-Saharan Africa,<sup>91</sup> Western Europe or North America.<sup>92</sup>

Overall, Australia's BIT and other IIA practice focus on its main economic partners, many of which are located within the broader Asia and Pacific region. Through a carefully crafted network of less than three dozen BITs and other IIAs,<sup>93</sup> Australia seeks to promote the continued inflow of foreign investment, while protecting the growing investment activities of its nationals abroad. Recently, Australia seems to favor other IIAs with a broader scope of trade and investment over BITs. As the country has faced (or been threatened with) its first investment claims in the areas of natural resources and public health, its willingness to provide foreign investors with readily accessible investment arbitration mechanisms has decreased somewhat, as Australia now conducts a case-by-case assessment as to whether investment arbitration provisions should be included in new BITs and other IIAs.

### 1.3.2 China

China is the world's second largest economy after the United States.<sup>94</sup> In 2013, China was also the world's second largest host economy of FDI after the United States with USD 124 billion invested in a wide range of industries and countries,<sup>95</sup> and also ranked as the world's third-largest investor economy after the United States and Japan with record levels of USD 101 billion,<sup>96</sup> making it the largest host and home economy for FDI among developing countries worldwide. In fact, for 2014 to 2016, transnational corporations considered China the top prospective destination for FDI (thus predicting the country's

<sup>90</sup> See *ibid.*

<sup>91</sup> While no BIT between Australia and a Sub-Saharan African country has been reported to UNCTAD, it appears that two ICSID cases recently were filed based on an Australia-Gambia BIT. Annex, Table D.2.

<sup>92</sup> However, Australia has concluded an IIA with the United States, its major North American trade and investment partner. Australia-United States Free Trade Agreement (adopted 18 May 2004, entered into force 1 January 2005) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2689>> accessed 8 May 2015.

<sup>93</sup> Australia is also one of the region's few signatories to the Energy Charter Treaty of 17 December 1994—besides Japan and Mongolia—but Australia's ratification is still pending.

<sup>94</sup> See World Bank (n 73).

<sup>95</sup> See UNCTAD (n 9) xv, Fig 2 (marking a USD 3 billion increase compared to 2013).

<sup>96</sup> *ibid* xv, Fig 3; xiv (marking a USD 13 billion increase compared to 2013, stemming from several megadeals in developed countries).

FDI inflows will surpass the United States'),<sup>97</sup> while international investment agencies also considered it the most promising source of FDI (surpassing the United States and Japan).<sup>98</sup>

With 145 BITs, of which 106 (73.1%) are in effect, China has concluded by far the most BITs in the region.<sup>99</sup> While China concluded its first BITs in the early 1980s,<sup>100</sup> the majority of its BITs date from the 1990s (67 BITs, 46.2%) and 2000s (50 BITs, 34.5%), coinciding with the announcement of China's outward investment-friendly 'Going Global' strategy.<sup>101</sup> China continues to conclude new BITs, with its latest BIT having been concluded with Tanzania in 2013.<sup>102</sup> Many recent Chinese BITs are in fact renegotiated treaties, aimed at broadening the scope of investor-state dispute resolution provisions to accommodate Chinese nationals' increasing role as foreign investors abroad.<sup>103</sup> Since the late 1980s, China increasingly has focused on signing BITs with developing, capital-importing rather than with developed, capital-exporting countries.<sup>104</sup> Notably, half of its BITs concluded since 2010 involve contracting parties in (Sub-Saharan) Africa, where China recently joined the ranks of the top investing countries with FDI flows totaling USD 16 billion across many industry sectors.<sup>105</sup>

Chinese BITs can be divided into three phases.<sup>106</sup> Nearly half of China's BITs (66 BITs, 45.5%) are 'first generation' BITs, concluded up to the late 1990s, with

<sup>97</sup> *ibid* 28, Fig I.28.

<sup>98</sup> *ibid* 28, Fig I.27.

<sup>99</sup> Annex, Table B; Annex, Table B.7.

<sup>100</sup> China-Germany BIT (adopted 7 October 1983, terminated).

<sup>101</sup> Elodie Dulac, 'Investment Treaties and Investment Arbitration in Asia: Coming of Age' (2011) 8 *Transnatl Disp Mgmt* 1, 6; Lars Markert, 'Arbitration Under China's Investment Treaties – Does It Really Work?' (2012) 5 *Contemp Asia Arb J* 205, 207 (noting the rapid growth of inward foreign direct investment at the same time); Wei Shen, 'Is This a Great Leap Forward? A Comparative Review of the Investor-State Arbitration Clause in the ASEAN-China Investment Treaty: From BIT Jurisprudential and Practical Perspectives' (2010) 27 *J Intl Arb* 379, 382.

<sup>102</sup> China-Tanzania BIT (adopted 24 March 2013, entered into force 17 April 2014).

<sup>103</sup> Dulac (n 101) 6.

<sup>104</sup> See Shen (n 101) 384 (showing changing pattern in Fig 2).

<sup>105</sup> UNCTAD (n 4) 5, Box I.1, 40. Indeed, China is the third-largest developing-country investor in Africa after Malaysia and South Africa, *ibid* xvi, 40. South Africa is the leading recipient of Chinese FDI on the African continent, followed by Sudan, Nigeria, Zambia, and Algeria, *ibid* 5, Box I.1. In 2012, China also became one of top investing countries in some least developed countries, such as Sudan and Zambia, *ibid*.

<sup>106</sup> See Hwang and Thio (n 80) 10. See also Stephan W Schill, 'Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China' (2007) 15 *Cardozo JICL* 73.

narrow arbitration clauses limited to disputes over the amount of compensation for an established expropriation.<sup>107</sup> As these narrow provisions proved disadvantageous to growing Chinese investments abroad, China started to conclude 'second generation' BITs in the late 1990s, which allow for arbitration of disputes relating to the alleged breach of any treaty provision.<sup>108</sup> Since the late 2000s, in its 'third generation' BITs, which are broadly similar to the 2004 United States Model BIT, China is pushing for even stronger protections of investors and their investments abroad, as it has become a prime source of foreign investment worldwide.<sup>109</sup> China also has concluded at least 12 IIAs other than BITs—all dating from the 2000s or later, and about half of them contain investment arbitration provisions as well.<sup>110</sup>

China is the only country in the region to have concluded BITs with countries of every region and sub-region in the world. Reflecting the country's rapidly growing number of investments in that part of the world,<sup>111</sup> one-fifth of China's BITs were concluded with countries in Sub-Saharan Africa (30 BITs, 20.7%). China also concluded a sizable number of BITs with other EAP countries (19 BITs, 13.1%),<sup>112</sup> where it is an important investor<sup>113</sup> and from where it receives significant investment inflows.<sup>114</sup> In fact, China holds the region's largest intraregional BIT portfolio, which includes its major regional economic partners Australia, Indonesia, Japan, Malaysia, the Philippines,

<sup>107</sup> *ibid.* In addition, less than a handful of Chinese BITs do not provide for investment arbitration at all.

<sup>108</sup> Dulac (n 101) 7.

<sup>109</sup> *ibid.*; Hwang and Thio (n 80) 10. However, China often incorporates restrictive language as to the scope of application of the agreement, such as by narrowly defining 'investor,' requiring that the investor company not only to be incorporated or organized in the territory of a contracting party, but also that it carry out substantive business operations there and/or be controlled by nationals of that state, *ibid.*

<sup>110</sup> Annex, Table C.

<sup>111</sup> See Wei Shen, 'Confusion or Clarity in Perspective: Jurisprudential Review of the Investor-State Arbitration Clause in the ASEAN-China Investment Treaty and the Award on Jurisdiction in the First China-Related ICSID Case' (2010) 4(1) *World Arb & Med Rev* 27, 32–34.

<sup>112</sup> In fact, China and Thailand were the region's first countries to sign an intraregional BIT on 12 March 1985.

<sup>113</sup> UNCTAD (n 4) 45, 48. For instance, in total, Chinese companies invested an estimated USD 7 billion in infrastructure projects in Indonesia and another USD 7 billion in transport projects in Laos. *ibid.* 48. In the 1990s, China also added both countries—Indonesia and Laos—to its BIT portfolio, presumably to protect such investments of its nationals there.

<sup>114</sup> See Ken Davies, 'China Investment Policy: An Update' *OECD Working Papers on International Investment* 2013/01 (2013) 12, Table 1 <[http://www.oecd.org/china/WP-2013\\_1.pdf](http://www.oecd.org/china/WP-2013_1.pdf)> accessed 13 April 2015.

Singapore, South Korea, and Thailand.<sup>115</sup> China also concluded other IIAs with major regional economic partners Hong Kong, Japan, Macao, Singapore, South Korea, and Taiwan, as well as ASEAN.<sup>116</sup>

In addition, China concluded a sizable number of BITs with countries in Eastern, Western and Northern Europe (20 BITs, 13.8%; 18 BITs, 12.4%; and 9 BITs, 6.2% respectively), the Middle East (13 BITs, 9.0%) and Western and Central Asia (10 BITs, 6.9%). In fact, China signed the region's very first BITs with Middle Eastern,<sup>117</sup> Central and Western Asian<sup>118</sup> and Caribbean countries.<sup>119</sup>

Moreover, China and the United States recently resumed BIT talks after previous rounds of negotiations had come to a halt nearly 20 years ago,<sup>120</sup> and both countries intend to reach agreement on key treaty features in 2015.<sup>121</sup> While it may be a long path ahead until a China-United States BIT comes into effect,<sup>122</sup> such a treaty could dramatically expand investment opportunities for both sides, by opening up important Chinese industries to US investment, and by providing Chinese companies easier access to the United States.<sup>123</sup>

China's extremely active BIT practice—second only to Germany's extensive BIT portfolio—tells the tale of a country's changing economics—from mostly being a recipient of foreign investment early on to then also becoming a major source of foreign investment abroad, especially in developing and transition economies. While China's earlier BITs were mostly concluded with European

<sup>115</sup> See US Central Intelligence Agency, 'The World Factbook: China, Economy' (2015) <<https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>> accessed 8 May 2015.

<sup>116</sup> *ibid.*

<sup>117</sup> China-Kuwait BIT (n 23).

<sup>118</sup> China-Turkey BIT (n 30).

<sup>119</sup> Barbados-China BIT (adopted 20 July 1998, entered into force 1 October 1999).

<sup>120</sup> John Pappas, 'The Future US-China BIT: Its Likely Look and Effect' (2011) 41 *Hong Kong LJ* 857, 857–58; Ministry of Commerce of the People's Republic of China, '9th Round of China-US Investment Treaty Negotiations Launched in Qingdao' (4 June 2013) <<http://english.mofcom.gov.cn/article/newsrelease/significantnews/201306/20130600157517.shtml>> accessed 13 April 2015.

<sup>121</sup> US Department of the Treasury, 'Treasury Notes: U.S. and China Breakthrough Announcement on the Bilateral Investment Treaty Negotiations' (15 July 2013) <<http://www.treasury.gov/connect/blog/Pages/U.S.-and-China-Breakthrough-Announcement.aspx>> accessed 13 April 2015; The White House, Office of the Press Secretary, 'Fact Sheet: US-China Economic Relations' (12 November 2014) <<https://www.whitehouse.gov/the-press-office/2014/11/12/fact-sheet-us-china-economic-relations>> accessed 13 April 2015.

<sup>122</sup> Ian Talley and William Mauldin, 'US, China to Pursue Investment Treaty' (*Wall Street Journal*, 11 July 2013) <<http://online.wsj.com/article/SB10001424127887324425204578599913527965812.html>> accessed 13 April 2015.

<sup>123</sup> *ibid.*

countries—which still represent the largest share of China's BIT portfolio (47 BITs, 32.4%)—China increasingly concluded BITs with capital-importing countries in the broader Asia and Pacific region (46 BITs, 31.7%) and Africa (36 BITs, 24.8%), where it has become a major source of foreign investment. Accordingly, China's BIT practice, as well as the substantive and procedural protections granted, have changed to ensure adequate protection of its nationals' growing investments abroad. While China's portfolio of BITs and other IIAs certainly includes the vast majority—though not yet all—of its major economic partners, the extremely large number of BITs indicates that China also is using BITs as a means of showing its willingness for broader economic cooperation in the future, even in the absence of major current foreign investment flows between the contracting parties.

### 1.3.3 Indonesia

Starting in the late 1960s, Indonesia's government under General Suharto encouraged foreign investment, which fueled three decades of economic growth. Indonesia—an ASEAN member and the world's sixteenth-largest economy<sup>124</sup>—is now among the world's top 20 host economies for FDI (and fifth-largest in the EAP region) with increasing inflows of FDI totaling USD 18 billion in 2013.<sup>125</sup> Moreover, transnational corporations rank Indonesia among the top three prospective destinations for FDI in 2014 to 2016 (and second only to China in the EAP region).<sup>126</sup>

With 71 BITs, of which only two-thirds are in effect (47 BITs, 66.2%), Indonesia has the third-largest BIT portfolio in the region (together with Malaysia).<sup>127</sup> While Indonesia was one of the region's few countries to conclude BITs as early as the 1960s and 1970s (4 BITs in each decade),<sup>128</sup> the majority of its BITs date from the 1990s (45 BITs) and 2000s (17 BITs).<sup>129</sup> Indonesia signed its latest BIT with Serbia in 2011—its only one so far in this decade.<sup>130</sup> Indonesia also has concluded at least two individual IIAs other than BITs (outside of its collective commitments under ASEAN's IIAs), which provide for investor-state arbitration.<sup>131</sup>

<sup>124</sup> See World Bank (n 73).

<sup>125</sup> See UNCTAD (n 9) xv, Fig 2 (showing Indonesia as the fourth-largest host economy for FDI among EAP developing countries, ie not including Australia).

<sup>126</sup> *ibid* 28, Fig I.27.

<sup>127</sup> Annex, Table B; Annex, Table B.7.

<sup>128</sup> Indonesia's first BIT is the Denmark-Indonesia BIT (adopted 30 January 1968, entered into force 2 July 1968).

<sup>129</sup> Indonesia did not conclude any BITs during the 1980s.

<sup>130</sup> Indonesia-Serbia BIT (adopted 6 September 2011, not yet in force).

<sup>131</sup> Annex, Table C.



Having one of the most geographically diverse BIT portfolios, Indonesia concluded BITs with nearly every region and sub-region in the world, except North and Central America. The largest share of its BITs are intraregional (13 BITs, 18.3%)—the region's fourth-largest intraregional BIT portfolio after China, Vietnam and South Korea—closely followed by BITs concluded with Western and Eastern European countries (11 BITs, 15.5% and 10 BITs, 14.1% respectively), and with countries in Northern Europe, the Middle East and North Africa (6 BITs, 8.5% each). Indonesia's portfolio of BITs and other IIAs includes most of its major trading and investment partners, including China, India, Japan, Malaysia, the Netherlands, Singapore, South Korea, Thailand, and the United Kingdom.<sup>132</sup> Moreover, as an ASEAN member, Indonesia's trade and investment relations with fellow ASEAN members and major economic partners Malaysia, Singapore and Thailand also are governed by the relevant ASEAN agreements.<sup>133</sup> Furthermore, Indonesia's trade and investment relations with major economic partners China, India, Japan, and South Korea are governed by IIAs other than BITs between those countries and ASEAN.<sup>134</sup>

However, the Indonesian government recently announced that it would let lapse its BIT with the Netherlands on 1 July 2015, which is when the treaty is set to expire, and that it intends to do the same for some of its other BITs.<sup>135</sup> Indonesia's ambassador to Belgium noted that Indonesia is not 'terminating' its BITs, but merely intends 'to update, modernize and balance' them, as many of them were signed decades ago at a time when 'Indonesia [was] considered a place to play, not a player' in the global economy.<sup>136</sup> As Indonesia holds one of the largest BIT portfolios in the region that includes the vast majority of its major economic partners, to merely improve the outcome of future treaty negotiations would not have much effect on its investment relations with those major economic partners, as they would continue to be governed by older BITs already in place. Even if Indonesia terminated its BITs, existing investors would

<sup>132</sup> See US Central Intelligence Agency, 'The World Factbook: Indonesia, Economy' (2015) <<https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>> accessed 8 May 2015; Santander Trade, 'Indonesia: Foreign Investment' (2015) <<https://en.santander-trade.com/establish-overseas/indonesia/foreign-investment>> accessed 13 April 2015.

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

<sup>135</sup> Embassy of the Kingdom of the Netherlands in Jakarta, Indonesia, 'Termination Bilateral Investment Treaty' <<http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html>> accessed 13 April 2015.

<sup>136</sup> Arif Havas Oegroseno, 'Revamping Bilateral Treaties' (*Jakarta Post*, 7 July 2014) <<http://www.thejakartapost.com/news/2014/07/07/revamping-bilateral-treaties.html>> accessed 13 April 2015.

continue to receive protections under the treaties' survival clauses, and Indonesia's obligations under the ASEAN agreements would remain unchanged.

Overall, Indonesia's large BIT portfolio includes a broad range of developed, developing and transitional economies and thus reflects not only its status as an important host economy of foreign investment, but also the growing significance of its nationals' investments abroad. Moreover, as an ASEAN member, Indonesia's BIT portfolio also reflects its strong economic ties within the region. As Indonesian nationals increasingly are becoming 'players' in the global economy, the country is seeking out new BITs with capital-importing countries and may also look to renegotiate some of its older treaties to better fit its needs.<sup>137</sup>

#### 1.3.4 Japan

Japan—the world's third-largest economy<sup>138</sup>—is also the world's second-largest investor economy after the United States with a record level of USD 136 billion in 2013, making it the largest home economy for FDI in the EAP region.<sup>139</sup> Investment promotion agencies also rank Japan among the top three most promising sources of FDI in 2014 to 2016, while transnational corporations see it among the top 15 prospective host economies for FDI, which most likely is due to ongoing reconstruction efforts after the 2011 tsunami.<sup>140</sup>

Yet, Japan has signed only 23 BITs, of which 19 are in effect (82.6%).<sup>141</sup> One of the few countries to start concluding BITs in the 1970s (1 BIT),<sup>142</sup> Japan has continued to conclude BITs on a regular basis, with more than half of its BITs dating from the past ten years. Indeed, in the 2010s, Japan has concluded the most BITs in the region, with its latest BIT—the most recent in the entire region—having been signed with Kazakhstan in October 2014.<sup>143</sup> Japan also concluded at least 14 IIAs other than BITs—all but one dating from the 2000s or later.<sup>144</sup>

<sup>137</sup> Possibly, with at least six investment claims brought against it in the past ten years, Indonesia may also seek to renegotiate investor-state dispute resolution provisions. See Annex, Table D.1.

<sup>138</sup> See World Bank (n 73).

<sup>139</sup> See UNCTAD (n 9) xv, Fig 3 (marking a USD 13 billion increase compared to 2013).

<sup>140</sup> *ibid* 28, Fig I.27 and Fig I.28.

<sup>141</sup> Annex, Table B; Annex, Table B.7.

<sup>142</sup> Japan's first BIT is the Egypt-Japan BIT (adopted 28 January 1977, entered into force 14 January 1978).

<sup>143</sup> Japan-Kazakhstan BIT (adopted 23 October 2014, not yet in force).

<sup>144</sup> Annex, Table C.

The largest share of Japan's BITs are intraregional (9 BITs, 39.1%), followed by BITs concluded with other Asian countries outside of the EAP region—in Southern Asia, the Middle East, and Western and Central Asia (3 BITs, 13.0% each)—all of which are prime destinations for Japanese foreign investment.<sup>145</sup> Notably, Japan concluded BITs or other IIAs with most of its major economic partners, including Australia, China, South Korea, Hong Kong, Saudi Arabia, and Thailand.<sup>146</sup> However, overall, the island nation's portfolio of BITs and other IIAs primarily targets emerging markets, in line with its status as the world's second-largest investor country. Japan has not concluded any BITs with other capital-exporting countries in Western and Northern Europe,<sup>147</sup> or with countries in North and Central America or the Caribbean.<sup>148</sup>

Even though it is the second-largest investor country for FDI globally, Japan has entered into much fewer BITs than other capital-exporting countries, like France, Germany, the United Kingdom, or the United States. Japan's BITs and other IIAs narrowly focus on countries with an existing stock of Japanese foreign investment or a potential for future investment growth, producer countries of natural resources like oil, natural gas and rare metals, and countries, which may serve as gateway for investments in regions such as South America and Africa.<sup>149</sup> As Japan's significant foreign investment outflows may result in investment disputes with host countries in those emerging markets, the protection of Japanese investors abroad is a primary concern. Thus, all of Japan's BITs and other IIAs provide for investor-state dispute settlement, except the recently concluded Australia-Japan Economic Partnership Agreement.<sup>150</sup>

<sup>145</sup> Dulac (n 101) 9.

<sup>146</sup> See US Central Intelligence Agency, 'The World Factbook: Japan, Economy' (2015) <<https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html>> accessed 8 May 2015. Australia's economic relations with Thailand are also governed by the ASEAN-Japan Economic Partnership Agreement of 14 April 2008.

<sup>147</sup> Japan's only BIT with a European country is the Japan-Russia BIT (adopted 13 November 1998, entered into force 27 May 2000).

<sup>148</sup> However, Japan has concluded an IIA other than a BIT with Switzerland—the Japan-Switzerland Economic Partnership Agreement of 19 February 2009. Japan also is currently negotiating the TPP, which includes the United States, its major North American economic partner. See Section 2.2.

<sup>149</sup> See Japan Ministry of Economy, Trade and Industry (METI), 'Japan's Policies and Strategies on Bilateral Investment Treaties' <[http://www.rieti.go.jp/jp/events/08072501/pdf/3-1\\_E\\_Mita\\_t.pdf](http://www.rieti.go.jp/jp/events/08072501/pdf/3-1_E_Mita_t.pdf)> accessed 13 April 2015.

<sup>150</sup> See Section 2.3.1.

### 1.3.5 Malaysia

From a plantation economy at the time of its independence in 1957, with rubber and tin representing half of its gross domestic product (GDP), Malaysia has developed into a diversified, open economy and is now ASEAN's second richest economy after Singapore.<sup>151</sup> While Malaysia was the fifth-largest home and host economy for FDI among the region's developing countries in 2012,<sup>152</sup> it no longer ranks among the top 20 countries in either category in 2013, due to decreased FDI flows.<sup>153</sup> As Malaysia continues to promote foreign investment at home and abroad, especially in high value added activities and niche areas,<sup>154</sup> transnational corporations believe the country will see increasing FDI inflows in the near future, ranking it among the top 15 prospective host economies for 2014 to 2016 (and sixth in the EAP region).<sup>155</sup>

With 71 BITs, of which 50 are in effect (70.4%), Malaysia has the third-largest BIT portfolio in the region (together with Indonesia) after China and South Korea.<sup>156</sup> Having concluded the region's very first BIT with Germany in 1960, Malaysia has continued to sign BITs in each decade, with its latest BIT having been concluded with San Marino in 2012.<sup>157</sup> Like most EAP countries, Malaysia concluded the majority of its BITs during the 1990s (48 BITs, 67.6%). Malaysia also has concluded at least seven individual IIAs other than BITs (outside of its collective commitments under ASEAN's IIAs), all but one dating from the 2000s or later.<sup>158</sup>

Like Indonesia, Malaysia's BIT portfolio is very diverse geographically, North and Central America being the only regions not represented.<sup>159</sup> Malaysia concluded a significant share of its BITs within the region (10 BITs, 14.1%), including BITs with major trade and investment partners China, Indonesia and South Korea.<sup>160</sup> As a member of ASEAN, Malaysia's trade and investment

<sup>151</sup> See OECD, 'Investment Policy Reviews: Malaysia' (2013) 24 <<http://www.oecd.org/daf/inv/investment-policy/IPRMalaysia2013Summary.pdf>> accessed 13 April 2015.

<sup>152</sup> See UNCTAD (n 4) 44, Fig A.

<sup>153</sup> See UNCTAD (n 9) xv, Fig 2 and Fig 3. However, in 2012, Malaysia had seen increasing outflows of FDI, totaling USD 17 billion in 2012, which marked a twelve percent increase. See UNCTAD (n 4) 46.

<sup>154</sup> See OECD (n 151) 11.

<sup>155</sup> See UNCTAD (n 9) 28, Fig I.28.

<sup>156</sup> Annex, Table B; Annex, Table B.7.

<sup>157</sup> Malaysia-San Marino BIT (adopted 27 September 2012, not yet in force).

<sup>158</sup> Annex, Table C.

<sup>159</sup> However, Malaysia currently is negotiating the TPP, which includes the United States, its major North American economic partner, and Mexico, as well as the Malaysia-United States Free Trade Agreement.

<sup>160</sup> See US Central Intelligence Agency, 'The World Factbook: Malaysia, Economy' (2015) <<https://www.cia.gov/library/publications/the-world-factbook/geos/my.html>>

relations with its major economic partners Indonesia, Singapore and Thailand are governed by the ASEAN agreements. Moreover, its trade and investment relations with important economic partners Australia, Japan and India are not only governed by individual IIAs other than BITs with these countries, but also by other IIAs between those countries and ASEAN.<sup>161</sup>

Malaysia also concluded a sizeable number of BITs with countries in Sub-Saharan Africa (10 BITs, 14.1%), reflecting its increasing role as capital-exporting country in that part of the world.<sup>162</sup> In fact, Malaysia is now the largest developing-country investor in Africa, followed by South Africa, China, and India.<sup>163</sup> Further, Malaysia also signed a number of BITs with countries in Western and Eastern Europe (10 BITs, 14.1% each)—including major investor countries, such as the Netherlands and Switzerland<sup>164</sup>—the Middle East (9 BITs, 12.7%) and Western and Central Asia (5 BITs, 7.0%). The vast majority of Malaysia's BITs and other IIAs provide for investor-state dispute resolution—one notable exception being the Australia-Malaysia Free Trade Agreement.<sup>165</sup>

Overall, Malaysia's large portfolio of BITs and other IIAs goes beyond the country's major trade and investment partners, which is consistent with Malaysia being one of the countries that is most integrated into the global economy.<sup>166</sup> Typical for an important host economy of foreign investment, Malaysia's portfolio includes a number of BITs with capital-exporting European countries. Moreover, it reflects the country's important economic ties to the region, within ASEAN and beyond. Particularly noteworthy is the country's growing BIT portfolio involving Sub-Saharan African countries, which serves to protect significant Malaysian investments there.

### 1.3.6 South Korea

South Korea's economy—the world's fifteenth-largest<sup>167</sup>—relies heavily on exports, which represent half the country's GDP.<sup>168</sup> South Korea also is among

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accessed 8 May 2015; Santander Trade, 'Malaysia: Foreign Investment' (2015) <<https://en.santandertrade.com/establish-overseas/malaysia/foreign-investment>> accessed 13 April 2015.

<sup>161</sup> *ibid.*

<sup>162</sup> See UNCTAD (n 4) xvii, 4.

<sup>163</sup> *ibid* xvi, 5.

<sup>164</sup> See Santander Trade (n 160).

<sup>165</sup> See Section 2.3.1.

<sup>166</sup> See OECD (n 151).

<sup>167</sup> See World Bank (n 73).

<sup>168</sup> See US Central Intelligence Agency, 'The World Factbook: South Korea, Economy' (2015) <<https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html>> accessed 8 May 2015.

the world's top twelve home economies of investors (the third-largest among EAP developing countries), with FDI outflows totaling USD 29 billion in 2013.<sup>169</sup> Furthermore, investment promotion agencies rank South Korea in the top ten prospective home economies for FDI for 2014 to 2016, seeing it as a major source of FDI among developing economies.<sup>170</sup>

With 98 BITs, of which 83 are in effect (84.7%), South Korea holds the region's second-largest BIT portfolio after China.<sup>171</sup> One of only a few countries in the region to conclude BITs as early as the 1960s,<sup>172</sup> South Korea has continued to conclude BITs throughout the 1970s (6 BITs, 6.1%) and the 1980s (10 BITs, 10.2%), with most of its BITs having been signed during the 1990s (44 BITs, 44.9%) and the 2000s (37 BITs, 37.8%).<sup>173</sup> South Korea also concluded at least 11 other IIAs—all dating from the 2000s or later.<sup>174</sup>

South Korea's BIT portfolio is remarkably diverse, including BITs with every region and sub-region in the world, except North America. However, South Korea has concluded other IIAs with Canada<sup>175</sup> and the United States, its major trade and investment partner.<sup>176</sup> Indeed, the South Korea-United States Free Trade Agreement of 30 June 2007, is said to be 'the United States' most commercially significant free-trade agreement of in almost two decades,' and contains provisions intended to increase the free trade in goods and services between the two countries as well as a comprehensive chapter on investment, which provides for investor-state arbitration.<sup>177</sup>

South Korea's earlier BITs primarily targeted capital-exporting Europe—indeed European BITs still represent the second-largest share of South Korea's BIT portfolio (31 BITs, 31.6%)—and include major investor countries, such as France, Germany, the Netherlands, and the United Kingdom.<sup>178</sup> Since the 1990s,

<sup>169</sup> See UNCTAD (n 9) xv, Fig 3.

<sup>170</sup> *ibid* 28, Fig I.27.

<sup>171</sup> Annex, Table B; Annex, Table B.7.

<sup>172</sup> Germany-South Korea BIT (adopted 4 February 1964, entered into force 16 January 1967).

<sup>173</sup> South Korea's most recent BIT is the South Korea-Uruguay BIT (adopted 1 October 2009, entered into force 8 December 2011).

<sup>174</sup> Annex, Table C.

<sup>175</sup> The Canada-South Korea Free Trade Agreement of 22 September 2014 is the most recent other IIA in the entire region.

<sup>176</sup> See Santander Trade, 'South Korea: Foreign Investment' (2015) <<https://en.santandertrade.com/establish-overseas/south-korea/foreign-investment>> accessed 25 August 2015.

<sup>177</sup> Office of the US Trade Representative, 'New Opportunities for US Exporters Under the US-Korea Trade Agreement' <<http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta>> accessed 13 April 2015.

<sup>178</sup> See Santander Trade (n 176).

the country's BIT focus has shifted to capital-importing emerging markets in the broader Asia and Pacific region and beyond, resulting in EAP's third-largest intraregional BIT portfolio (14 BITs, 14.3%) after China and Vietnam, as well as a significant number of BITs with Central and South America and the Caribbean (18 BITs, 18.4%) and Africa (15 BITs, 15.3%), which reflect South Korean nationals' significant role as investors in those regions.<sup>179</sup> Notably, South Korea was a fore-runner in the conclusion of BITs with emerging markets, concluding the first BITs with countries in Africa and Asia (outside of EAP) in the 1970s and 1980s.<sup>180</sup> Overall, South Korea's investment relations with major intraregional trade and investment partners China, Hong Kong and Japan are governed by BITs,<sup>181</sup> while other IIAs govern its trade and investment relations with major economic partners Australia, China, Japan, and Singapore (through individual other IIAs and the ASEAN-South Korea Investment Agreement of 24 August 2006).<sup>182</sup>

South Korea's large portfolio of BITs and other IIAs not only includes the majority of its important economic partners, but also most major economies responsible for foreign investment outflows and inflows worldwide. Similar to China, South Korea's status has changed over time from mostly being a recipient of foreign investment early on to then also becoming an important source of foreign investment abroad, especially in developing and transition economies. South Korean investments abroad enjoy vital protection, as the vast majority of South Korea's BITs and other IIAs provide for investor-state dispute resolution, notable exceptions being its older BITs with France and Germany.<sup>183</sup>

### 1.3.7 Vietnam

Vietnam—another ASEAN member—has undergone an impressive transformation from an isolated, poor and collectivized economy based on agriculture

<sup>179</sup> Dulac (n 101) 11; see also UNCTAD (n 4) 74 (stating that South Korean investors have made significant investments in least-developed countries over the past decade). For instance, South Korean investors are in the process of establishing industry-specific industrial zones in India, which may fall under the India-South Korea BIT of 26 February 1996 or the India-South Korea Comprehensive Economic Partnership Agreement of 7 August 2009. See UNCTAD (n 4) 50–51, Box II.1.

<sup>180</sup> South Korea-Tunisia BIT (n 18); South Korea-Sri Lanka BIT (n 21); Senegal-South Korea BIT (n 22).

<sup>181</sup> See US Central Intelligence Agency (n 168); Santander Trade (n 176).

<sup>182</sup> *ibid.*

<sup>183</sup> France-South Korea BIT (adopted 28 December 1977, entered into force 1 February 1979); Germany-South Korea BIT (n 172). Moreover, a few of South Korea's BITs provide for investor-state dispute resolution for certain types of disputes only, an example being the Hungary-South Korea BIT of 28 December 1988.

into a booming country with a dynamic and diversified private sector, which is fully integrated into the world economy.<sup>184</sup> As a low-income country, Vietnam has been an attractive FDI location for labor-intensive manufacturing for exports.<sup>185</sup> Therefore, transnational corporations rank it among the top nine prospective host economies for FDI in 2014 to 2016.<sup>186</sup> Over the past decade, Vietnamese nationals have also emerged as sustained investors in least-developed countries.<sup>187</sup>

With 62 BITs, of which 46 are in effect (74.2%), Vietnam holds the region's fourth-largest BIT portfolio.<sup>188</sup> Vietnam did not start to conclude BITs until the 1990s (38 BITs), when economic and political reforms from the late 1980s had allowed its integration into the global economy.<sup>189</sup> Vietnam has continued to conclude a significant number of BITs during the 2000s (22 BITs), and its latest BIT was signed with Morocco in 2012.<sup>190</sup> Vietnam also concluded at least one individual IIA other than a BIT (outside of its collective commitments under ASEAN's IIAs)—the United States-Vietnam Bilateral Trade Agreement of 13 July 2000.<sup>191</sup>

Similar to fellow ASEAN members Indonesia and Malaysia, Vietnam's BIT portfolio is one of the most diverse in the region, North and Central America being the only regions not represented. However, Vietnam has concluded an IIA other than a BIT with the United States, its major North American trade and investment partner.<sup>192</sup> With more than a quarter of its BITs being concluded within the EAP region, Vietnam also holds EAP's second-largest intra-regional BIT portfolio (16 BITs, 25.8%) after China, which is consistent with Vietnam receiving a large share of foreign investments from within the EAP region.<sup>193</sup> Indeed, many of Vietnam's major trade and investment partners are part of the EAP region—namely China, Japan, Malaysia, Singapore, South

<sup>184</sup> See UNCTAD, *Investment Policy Review: Vietnam* (United Nations 2008) 1 <[http://unctad.org/en/Docs/iteiprc200710\\_en.pdf](http://unctad.org/en/Docs/iteiprc200710_en.pdf)> accessed 13 April 2015.

<sup>185</sup> See UNCTAD (n 4) xvii, 45–46.

<sup>186</sup> See UNCTAD (n 9) 28, Fig I.28.

<sup>187</sup> See UNCTAD (n 4) 74, 76.

<sup>188</sup> Annex, Table B; Annex, Table B.7.

<sup>189</sup> See eg Hoang Anh Tuan, 'Doi Moi and the Remaking of Vietnam' (2012) 4 *Global Asia* 37 <<http://www.globalasia.org/l.php?c=e215>> accessed 13 April 2015.

<sup>190</sup> Morocco-Vietnam BIT (adopted 15 June 2012, not yet in force).

<sup>191</sup> Annex, Table C.

<sup>192</sup> See UNCTAD (n 184) 15, Table I.5.

<sup>193</sup> *ibid.*



Korea, Taiwan, and Thailand<sup>194</sup>—and Vietnam concluded BITs with all of them. Furthermore, as a member of ASEAN, Vietnam's trade and investment relations with fellow ASEAN members and major trading partners Malaysia, Singapore and Thailand are also covered by the ASEAN agreements, while its trade and investment relations with major economic partners China, Japan and South Korea also are governed by other IIAs between those countries and ASEAN.<sup>195</sup>

In addition, a sizeable number of Vietnam's BITs involve European countries (26 BITs, 41.9%), and other Asian countries outside of the EAP region (10 BITs, 16.1%), where a significant share of its foreign investment originates.<sup>196</sup> While Vietnam is not (yet) a major source of foreign investment abroad, a small, but growing share of Vietnam's BIT portfolio involves other capital-importing emerging markets in Africa and Central and South American and the Caribbean (5 BITs, 8.1% each), as Vietnamese foreign investments continue to grow there.

Overall, Vietnam's BIT portfolio reflects its status as a primarily capital-importing country with an emerging need to protect its nationals' investments in other developing markets abroad. Moreover, Vietnam's BIT portfolio reflects its status as an ASEAN member with strong economic ties within the broader Asia and Pacific region (26 BITs). In Vietnam's emerging economy, BITs and other IIAs provide a useful starting point for foreign investors who seek to understand the legal, tax and dispute resolution mechanisms available to protect their investments. Notably, most Vietnamese BITs provide for investor-state dispute resolution,<sup>197</sup> although some, such as the China-Vietnam BIT of 2 December 1992, limit its availability to expropriation disputes.

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This overview on the BIT and other IIA practices of select EAP countries shows that generally BIT and other IIA developments in the region are in line with global trends. Not surprisingly, the largest BIT portfolios are also the most diverse geographically, although generally the Americas are underrepresented. Moreover,

<sup>194</sup> See US Central Intelligence Agency, 'The World Factbook: Vietnam, Economy' (2015) <<https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html>> accessed 8 May 2015.

<sup>195</sup> *ibid.*

<sup>196</sup> See UNCTAD (n 184) 14–15, Table I.5.

<sup>197</sup> As Vietnam is not (yet) a contracting state to the ICSID Convention, ICSID arbitration is not currently available.

the BIT and other IIA practices of EAP countries largely serve to further and expand their existing trade and investment patterns. Commonly, trade and investment go hand in hand. While they can be substitutes, as high trade barriers may be circumvented through liberalized investment, they most often are complementary, as market access through trade can also lead to foreign investment, which may lead to more trade.<sup>198</sup> Thus, trading partners with substantial economic interactions oftentimes also enter into BITs and other IIAs.<sup>199</sup> This holds true in the EAP region as well. The BIT and other IIA portfolios of EAP countries commonly correlate with existing economic realities and usually contain treaties with the vast majority of each country's main trading partners—and where a BIT is absent, a different type of IIA generally exists to serve a similar purpose. Notably, ASEAN member states often hold individual BITs or other IIAs with their major economic partners—including other ASEAN members—in addition to IIAs concluded between those same countries and ASEAN (or in addition to ASEAN agreements among member states). Therefore, intra-ASEAN investors may find themselves in a position to pick the best protections for their investments among the host country's individual BITs or other IIAs, or similar agreements concluded by ASEAN. Instances, where an EAP country has not concluded any BIT or other IIA with a major economic partner (and is not currently negotiating one) are very rare.

Naturally, there are exceptions to these premises. Not all BITs in the EAP region appear to have been concluded solely for economic reasons. Non-economic reasons, such as the furtherance of political affiliations and alliances, appear to play, albeit a limited, role as well. One notable example is North Korea, which concluded its 24 BITs mostly intraregionally or with Eastern European countries for obvious political reasons. However, those BITs are unlikely to see much use, as foreign investment in the country is highly restricted.<sup>200</sup> Moreover, especially countries with exceptionally large BIT portfolios, such as China, South Korea, Indonesia, and Malaysia, do not necessarily limit them to only their major trade and investment partners, but may use the conclusion of BITs to show their willingness for broader economic cooperation in the future, even in the absence of major current foreign investment flows between the contracting parties.

<sup>198</sup> See Petros C Mavroidis, 'All Clear on the Investment Front: A Plea for a Restatement' in José E Alvarez and Karl P Sauvart (eds), *The Evolving International Investment Regime: Expectations, Realities, Options* (OUP 2011) 95, 96.

<sup>199</sup> *ibid.*

<sup>200</sup> See The Heritage Foundation and Wall Street Journal, '2015 Index of Economic Freedom: North Korea' (September 2014) <<http://www.heritage.org/index/pdf/2015/countries/northkorea.pdf>> accessed 8 May 2015.

Furthermore, a country's status under international law may limit its options of potential contracting parties for BITs or other IIAs and thus impact its international investment regime. For instance, Taiwan's disputed statehood status has led to a BIT portfolio, which is dominated by treaties with countries in Central and South American and the Caribbean—a region where more countries than anywhere else in the world have recognized Taiwan's statehood.<sup>201</sup>

In addition, a country's domestic situation may reflect on its international investment policy as well. For instance, a change in Australia's government brought with it a (again) more open-minded approach to investor-state arbitration provisions in the country's BITs and other IIAs. Similarly, Indonesia's government currently seeks to recalibrate (or possibly disengage from) its involvement with BITs, as it perceives the country's current BIT portfolio to no longer reflect economic realities.

Conversely, a country's engagement with the international investment regime may be brought on by internal political changes. For instance, Vietnam—a communist state—concluded its first BITs in the 1990s after completing economic and political reforms in the late 1980s, which marked the country's transition from a rigid centrally-planned economy and allowed for the country's integration into the global economy.<sup>202</sup>

Overall, the statistics show that over the past decades a number of developing EAP countries went from predominantly concluding BITs with European contracting parties to increasingly concluding BITs with contracting parties intraregionally (especially since the conclusion of ASEAN's Agreement on Promotion and Protection of Investments among a smaller group of EAP countries), in the broader Asia and Pacific region, Africa and Central and South America and the Caribbean. This development indicates that several developing EAP countries, which were predominantly recipients of foreign investment during the 1960s, 1970s and 1980s, are evolving towards also establishing themselves as important

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<sup>201</sup> See Johanna Mendelson Forman and Susana Moreira, 'Taiwan-China Balancing Act in Latin America' in Carola McGiffert (ed), *Chinese Soft Power and Its Implications for the United States* (Center for Strategic & Int'l Studies 2009) 97 <[http://csis.org/files/media/CSIS/pubs/090310\\_chinesesoftpower\\_chap8.pdf](http://csis.org/files/media/CSIS/pubs/090310_chinesesoftpower_chap8.pdf)> accessed 13 April 2015. Not surprisingly in light of its disputed political status, Taiwan has not concluded any BITs with countries in North America, as well as Western and Northern Europe.

<sup>202</sup> Similarly, Laos, a one-party communist state, signed its first BIT (with France) in 1989 after the country's economic decentralization and encouragement of private enterprise in 1986. See US Central Intelligence Agency, 'The World Factbook: Laos, Economy' (2015) <<https://www.cia.gov/library/publications/the-world-factbook/geos/la.html>> accessed 8 May 2015.

capital-exporting countries, which not only seek to attract foreign investments to their own soil, but also look to protect their nationals' investments abroad. Indeed, in 2013, not only a quarter of the top 20 host countries of FDI globally, but also more than a quarter of the top 20 investor economies were located in EAP.<sup>203</sup> Moreover, transnational corporations consider EAP countries a prime location for FDI, with eight out of 17 of the top prospective host countries for FDI in 2014 to 2016 located in EAP.<sup>204</sup> In light of the well-established network of BITs and other IIAs in the region, these inbound and outbound investments are likely to receive substantive and procedural protections on an international level.

### 3 Investment Arbitrations Involving EAP Countries or Investors

In light of the region's thriving inbound and outbound foreign investments, most of which fall under a growing number of BITs and other IIAs, it is also of interest to see how often disputes arise out of these foreign investments, leading to investor-state arbitration. The EAP region has seen an increasing number of investment arbitrations<sup>205</sup>—at least 49 cases from the early 1980s to the end of 2014—that were either brought by foreign investors against an EAP country, or brought by an EAP investor<sup>206</sup> against a host state. While a large number of these disputes arose under BITs and other IIAs—resulting in so-called treaty-based arbitrations—some disputes arose under contracts between the foreign investor and the host state or a host state's domestic investment law. Overall, given the large number of BITs and other IIAs concluded by countries in the region and the significant inflow and outflow of foreign investments, the number of investment arbitrations brought against EAP countries or by EAP investors, though on the rise, remains relatively low.<sup>207</sup>

<sup>203</sup> See UNCTAD (n 9) xv, Fig 2 and Fig 3.

<sup>204</sup> *ibid* 28, Fig 1.28.

<sup>205</sup> For purposes of this analysis, a case is considered an investment arbitration provided (i) one party is a state entity, (ii) the other party is a private investor, and (iii) the tribunal applied international law to resolve the dispute.

<sup>206</sup> For purposes of this analysis, individual investors with the nationality of an EAP country or residents of Hong Kong, Macao or Taiwan, as well as corporate entities registered or incorporated in an EAP country, are considered EAP investors. Investment arbitrations seated in the EAP region, which do not involve an EAP party, are beyond the scope of this article.

<sup>207</sup> See *eg* Dulac (n 101) 15; Shen (n 111) 36; Shen (n 101) 381.

**Investment Arbitrations Involving East Asian & Pacific Countries and/ or Investors by Year**

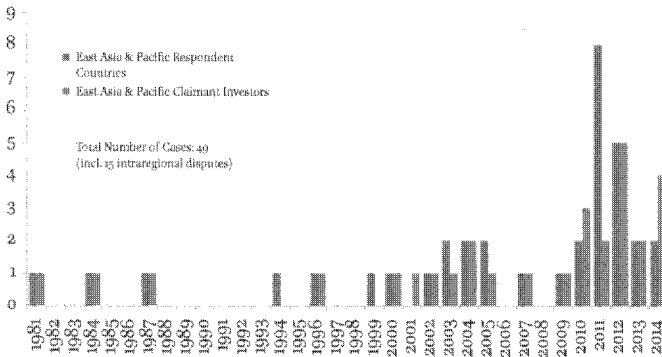


CHART D<sup>208</sup>

After discussing investment arbitrations brought against EAP countries (Section 3.1.), this section will analyze investment arbitrations brought by EAP investors (Section 3.2.).

**3.1 Investment Arbitrations Against EAP Countries**

There have been 35 investment arbitrations against EAP countries, including 22 arbitrations under the ICSID Convention (62.9%), one arbitration under the ICSID Additional Facility Rules (2.9%), and 12 non-ICSID arbitrations (34.3%), mostly under the UNCITRAL Arbitration Rules.<sup>209</sup> Notably, the vast majority of investment arbitrations against EAP countries were treaty-based (30 cases, 85.7%). While most of these cases were based on the region's BITs, six treaty-based arbitrations were based on other IIAs, namely the ASEAN Agreement, the Organisation of Islamic States (OIC) Investment Agreement of 5 June 1981, the Energy Charter Treaty (ECT) and the United States-Vietnam Bilateral Trade Agreement.

Even though EAP countries concluded BITs as early as the 1960s, the first investment arbitrations against EAP countries were not launched until the early 1980s. This is consistent with the low number of investment arbitrations filed globally during the 1970s and 1980s.<sup>210</sup> Indeed, *Amco Asia Corp v*

<sup>208</sup> Chart D depicts the 15 intraregional investment arbitrations twice, (1) as brought against an EAP respondent country, and (2) as brought by an EAP claimant investor.

<sup>209</sup> The statistics on investment arbitrations brought against EAP countries are derived from the data gathered in Annex, Table D.1, which provides a detailed overview.

<sup>210</sup> For the number of ICSID arbitrations, see ICSID, 'The ICSID Caseload – Statistics' (2015–1) 7 <[https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20%28English%29%20%282%29\\_Redacted.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20%28English%29%20%282%29_Redacted.pdf)> accessed 8 May 2015.

*Indonesia*<sup>211</sup>—a dispute concerning the construction and operation of a hotel in Jakarta, Indonesia—was not only the first-ever investment arbitration (albeit not treaty-based) involving an EAP country, it was also only the tenth ICSID arbitration ever filed.<sup>212</sup> With only three new investment arbitrations filed against EAP countries during the 1990s, including the first treaty-based arbitration *Philippe Gruslin v Malaysia*,<sup>213</sup> the number of investment arbitrations in the region remained low. However, this number more than doubled during the 2000s, and has been increasing exponentially with 19 new cases filed since 2010.

With seven investment arbitrations brought against it—one-fifth of cases brought against countries in the region—Indonesia is the most-sued EAP country,<sup>214</sup> followed by Mongolia, the Philippines and Vietnam with four arbitrations filed against each of them, Malaysia with three, and China, Laos, Papua New Guinea and South Korea with two each. Further, the following five EAP countries have been named as respondent in at least one investment arbitration: Australia, Cambodia, Myanmar, New Zealand, and Thailand. Conversely, 21 EAP countries—more than half of which signed BITs or other IIAs—have never been named as respondents in an investment arbitration.<sup>215</sup>

More than half of the investment arbitrations involving EAP respondent countries were brought by Western European investors (19 cases, 54.3%), including investors from major capital-exporting countries and long-time BIT veterans France, Germany, the Netherlands, Switzerland, and the United Kingdom.<sup>216</sup> North American investors, mostly from the United States, have been fairly active in pursuing investment arbitrations against EAP respondents as well (5 cases, 14.3%). This relatively high number of investment arbitrations brought by Western European and North American investors against EAP

<sup>211</sup> *Amco Asia Corp et al v Indonesia*, ICSID Case No ARB/81/1, Award (20 November 1984), Decision on Annulment (16 May 1986), Award on Re-submitted Claim (5 June 1990).

<sup>212</sup> ICSID, 'List of Concluded Cases' <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>> accessed 13 April 2015.

<sup>213</sup> *Philippe Gruslin v Malaysia*, ICSID Case No ARB/94/1 (settled and discontinued under ICSID Arbitration Rule 43(1) on 24 April 1996).

<sup>214</sup> Indonesia's province of East Kalimantan was also the first state-entity to ever bring an ICSID arbitration against a foreign investor, see *Gov't of the Province of East Kalimantan v PT Kaltim Prima Coal*, ICSID Case No ARB/07/3, Award (28 December 2009).

<sup>215</sup> These 21 countries are: Brunei, Cook Islands, East Timor, Fiji, Hong Kong, Japan, Kiribati, Macao, Marshall Islands, Micronesia, Nauru, Niue, North Korea, Palau, Samoa, Singapore, Solomon Islands, Taiwan, Tonga, Tuvalu, and Vanuatu.

<sup>216</sup> Cases brought by co-claimants with different nationalities were counted towards each claimant's nationality for purposes of this analysis.

countries is indicative of their long-standing investment activity in the region and their familiarity with the international investment regime. However, 15 investment disputes—nearly half of all investment arbitrations against EAP respondent countries (42.9%)—were brought by foreign investors from other EAP countries, including Singapore, Australia, and Malaysia, and are thus intraregional disputes, stemming from the region's large share of intraregional investments governed by its intraregional BITs and other IIAs.

Overall, EAP countries with larger BIT and other IIA portfolios and significant foreign investment inflows have been sued more frequently by foreign investors. This is not surprising as the potential for disputes increases with the number of foreign investment inflows a country receives, and such disputes are more likely to be resolved through investment arbitration, where BITs and other IIAs with dispute resolution provisions are in place. Moreover, the region's developing countries have been sued more often than the region's developed nations, even though Australia, a developed country, is the region's third-largest recipient of FDI. Likely, the domestic administrative authorities of the region's developed countries are more experienced in dealing with foreign investors and their investments within the bounds of international (and domestic) law, which may prevent many a dispute from arising in the first place or at least may lead to settlement of the contested issues before they grow into a full-blown legal dispute. Further, once a dispute related to foreign investment arises, the domestic legal systems of the region's developed countries likely are more adept at handling such complex international disputes in a timely and experienced manner than the domestic legal systems of many of the region's developing nations, thus preventing investment disputes down the road based on inadequacies and severe delays in the domestic legal system, rising to the level of a breach of international law.

### 3.2 *Investment Arbitrations Brought by EAP Investors*

There have been 29 investment arbitrations brought by EAP investors, including 22 arbitrations under the ICSID Convention (75.9%) and seven non-ICSID arbitrations (24.1%), mostly under the UNCITRAL Arbitration Rules.<sup>217</sup> Notably, 19 investment arbitrations brought by EAP investors were treaty-based (65.5%), with 17 arbitrations based on the region's BITs and two arbitrations based on the ASEAN Agreement. Conversely, the nine non-treaty-based investment arbitrations were based on a private contract between the foreign

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<sup>217</sup> The statistics on investment arbitrations brought by EAP investors are derived from the data gathered in Annex, Table D.2, which provides a detailed overview.

investor and the host state (7 cases, 24.1%) or on the host state's domestic investment law (2 cases, 6.9%).

Overall, the 1980s saw three investment arbitrations brought by EAP investors. In fact, the first investment arbitration filed against an EAP country in 1981—*Amco Asia Corp v Indonesia*—was an intraregional dispute based on a contract, as one of the claimants—P.T. Amco—was a locally incorporated Indonesian company. Shortly thereafter followed the first investment arbitration filed by an EAP investor based on the host state's domestic investment law, *Southern Pacific Properties (Middle East) Ltd v Egypt*<sup>218</sup>—a dispute concerning a tourism development project in Egypt brought by a Hong Kong investor.

After only one investment arbitration was brought by EAP investors in the 1990s, there were nine new cases during the 2000s—a number that nearly has doubled this decade, which already counts 16 cases so far. The 2000s also finally saw the first treaty-based investment arbitration by an EAP investor—*Yaung Chi Oo Trading Pte Ltd v Myanmar*,<sup>219</sup> based on the ASEAN Agreement.

With Australian investors having brought nine arbitrations—nearly a third of cases brought by EAP investors (31.0%)—they have been the region's most active in pursuing investment claims, followed by investors from Hong Kong and Malaysia with four arbitrations filed (13.8% each), and from China and Singapore with three arbitrations filed (10.3% each). Further, investors from Cambodia, Indonesia, Macao, New Zealand, South Korea and Vietnam have been claimants in at least one investment arbitration.

As discussed above, 15 investment disputes—more than half of all disputes brought by EAP investors (51.7%)—have been intraregional disputes,<sup>220</sup> while another three investment disputes have been brought against other Asian countries outside of the EAP region (South Asian India and Pakistan and Middle Eastern Yemen).<sup>221</sup> Thus, nearly two-thirds of investment disputes brought by EAP investors target respondent countries in the broader Asia and Pacific region (62.1%), which is indicative of established and flourishing intra-Asian and Pacific investments.

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<sup>218</sup> *Southern Pacific Properties (Middle East) Ltd v Egypt*, ICSID Case No ARB/84/3, Award (20 May 1992) (annulment proceedings settled and discontinued under ICSID Arbitration Rule 43(1) on 9 March 1993).

<sup>219</sup> *Yaung Chi Oo Trading Pte Ltd v Myanmar*, ASEAN ID Case No ARB/01/1, Award (31 March 2003).

<sup>220</sup> Notably, nearly one-third of the region's 49 investment disputes, brought by EAP investors or against EAP countries, are intraregional (30.6%).

<sup>221</sup> See Section 3.1.



Moreover, eight investment disputes—more than a quarter of all disputes brought by EAP investors (27.6%)—were filed against African countries (Egypt, the Democratic Republic of Congo, Gambia, Ghana, Tanzania<sup>222</sup> and Uganda). Notably, all claims against Sub-Saharan African countries were filed after 2000. This recent development stems from EAP investors' increased economic activity in this region. Indeed, EAP outbound investments no longer are largely limited to the broader Asia region. Rapidly growing EAP economies have emerged as important trade and investment partners for Sub-Saharan developing countries, and competent users of the international investment regime.

Further, EAP investors have brought investment arbitrations against two South American countries (Chile and Peru) (6.9%), as well as one Western European country (Belgium) (3.4%). Conversely, investors from 24 EAP countries—the majority of which signed BITs or other IIAs—have not yet brought any investment arbitrations.<sup>223</sup> Notably, despite Japan's significant portfolio of BITs and other IIAs, which regularly provide advanced consent to investor-state arbitration, and its leading and long-standing role as a major source of foreign investment within the region and globally, Japanese investors have not submitted any investment claims to arbitration, which to some extent could be explained by a cultural preference for amicable dispute settlement, such as through negotiation or mediation.<sup>224</sup>

Even though EAP investors have been pursuing investment claims in arbitration for more than three decades, in the early days of investment arbitration in the region they mostly were involved as locally-incorporated subsidiaries of Western European and North American parent companies.<sup>225</sup> However, EAP

<sup>222</sup> The respondent party was not the state of Tanzania, but a parastatal organization wholly owned by the Tanzanian government.

<sup>223</sup> These 24 countries are: Brunei, Cook Islands, East Timor, Fiji, Japan, Kiribati, Laos, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, Niue, North Korea, Palau, Papua New Guinea, the Philippines, Samoa, Solomon Islands, Taiwan, Thailand, Tonga, Tuvalu, and Vanuatu.

<sup>224</sup> Notably, in *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award (17 May 2006) (subsequently settled), the Dutch subsidiary of major Japanese merchant banking and financial services group Nomura, brought a treaty-based UNCITRAL arbitration against Czech Republic in connection with the reorganization and privatization of the Czech banking sector.

<sup>225</sup> Two out of the three investment arbitrations brought by EAP investors in the 1980s involved a locally-incorporated subsidiary of a Western European or North American parent company, who was also a co-claimant. See *Amco Asia Corp et al v Indonesia* (n 21) (claimant PT Amco was a locally-incorporated Indonesian company, while co-claimants

investors quickly brought investment claims without the involvement (at least on the record) of any non-EAP parent entity. While investors from one of the region's few developed countries, Australia, have been the most active in pursuing their investment claims in arbitration, nearly two-thirds of the region's investment claims were brought by EAP investors from developing countries (19 cases, 65.5%). Thus, EAP investors from the region's developing and developed countries have become proficient users of the international investment regime and have proven their willingness and ability to enforce their rights against host states in arbitration, be it under private contracts with the host state, the host state's domestic investment laws or under their home countries' BITs and other IIAs.<sup>226</sup>

While investment arbitrations involving EAP parties date back to the early 1980s, the overall case numbers are relatively low and the growth in the number of investment arbitrations involving EAP parties has been lagging behind slightly when compared to global trends.<sup>227</sup> For instance, looking at investment arbitrations under the ICSID Convention and ICSID Additional Facility Rules only, which account for the majority of investment arbitrations in the EAP region, cases involving EAP parties account for less than one-tenth of cases filed globally.<sup>228</sup> A contributing factor may have been the late inclusion of broader investor-state arbitration provisions in the BITs of the EAP region's largest home economy of investors and host economy of foreign investment, and the region's largest BIT portfolio—China.<sup>229</sup>

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Amco Asia Corp and Pan American Development Limited had US and British nationality respectively); *Mobil Oil Corp et al v New Zealand*, ICSID Case No ARB/87/2 (settled and discontinued under ICSID Arbitration Rule 43(1) on 26 November 1990) (claimant Mobil Oil New Zealand was a locally-incorporated New Zealand company, while co-claimants Mobil Oil Corp and Mobil Petroleum Inc had US nationality).

<sup>226</sup> EAP investors have only brought claims under the region's BITs and the ASEAN Agreement; no other IIAs have been invoked by EAP investors so far.

<sup>227</sup> The global number of investment arbitration started to significantly increase in the mid-1990s following the ground-breaking award in *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) paras 18ff (recognizing as valid a host state's advanced consent to investor-state arbitration given in a BIT).

<sup>228</sup> Out of 497 investment arbitrations registered under the ICSID Convention or the ICSID Additional Facility Rules as of December 2014, only 35 cases (7.0%) involved an EAP party. See ICSID (n 210); ICSID case database <<https://icsid.worldbank.org/ICSID>> accessed 13 April 2015; Annex, Table D.1; Annex, Table D.2.

<sup>229</sup> See Section 2.3.2; see also Nottage (n 79) 1, 2; Shen (n 111) 36 (noting the discrepancy between BITs concluded and treaty-based arbitrations filed as relating to China).

However, while the number of ICSID arbitrations in the region was relatively low and slow to increase early on—rising only three-fold from the 1990s to the 2000s, while global case numbers increased more than five-fold during the same period<sup>230</sup>—the 2010s have seen a significant uptick in ICSID arbitrations, with 19 out of 192 ICSID cases globally involving an EAP party (9.9%). Thus, from the 2000s to the 2010s, the number of ICSID arbitrations involving EAP parties has grown at a rate that is more than twice as significant than the rise in ICSID arbitrations on a global level,<sup>231</sup> making the region a veritable ‘hot bed’ of investment arbitration.

#### 4 Conclusion

The EAP region is not only a major destination for foreign investment, but also has become an important source of foreign investment worldwide, which provides EAP companies with important means for diversification and growth. As outward investment from the EAP region has turned increasingly towards emerging markets in Africa, Asia and Latin America, EAP countries continue to strengthen their networks of BITs and other IIAs, reflecting those evolving trade and investment patterns. In particular, a number of developing countries in the EAP region, which traditionally had been predominantly recipients of foreign investment, recently have been shifting towards becoming capital-exporting countries, driving a concurrent rise in the number of BITs and other IIAs concluded with recipient countries of such capital exports, mostly within the EAP region, in Africa as well as in Central and South America and the Caribbean. Thus, EAP countries now focus not only on attracting foreign investment to their soil, but also on ensuring appropriate protections of their nationals’ investments in emerging markets abroad.

While some developing countries in the region may not always have been party to meaningful and substantive negotiations for their earlier BITs—possibly similar to another country in the broader Asia and Pacific region with a

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<sup>230</sup> ICSID arbitrations involving an EAP party increased from three cases in the 1990s to nine cases in the 2000s, while ICSID arbitrations globally increased from 43 cases in the 1990s to 236 cases in the 2000s. See ICSID (n 210); ICSID case database (n 228); Annex, Table D.1; Annex, Table D.2.

<sup>231</sup> ICSID arbitrations involving an EAP party increased more than four-fold from nine cases in the 2000s to 19 cases in the first half of this decade, while ICSID arbitrations globally increased less than two-fold from 236 cases in the 2000s to 192 cases in the first half of this decade. See ICSID (n 210); ICSID case database (n 228); Annex, Table D.1; Annex, Table D.2.

long-standing BIT history: Pakistan<sup>232</sup>—they now appear to take a more active role in negotiating these instruments. As they conclude a growing number of BITs (and other IIAs) with other emerging markets and likely recipients of their nationals' foreign investments, EAP countries pursue an increasingly dual agenda: the promotion and protection of foreign investment at home, as well as the protection of EAP investors and their investments abroad. Indeed, several developing countries in the EAP region—including Cambodia, China, Indonesia, Malaysia, Mongolia, and Thailand—have developed their own BIT programs and use their own model BITs, mostly dating from the late 1990s and early 2000s, in the negotiation of new treaties. Many EAP countries (and surely the ones that already have been sued by foreign investors under an international investment instrument) are acutely aware of their substantive and procedural obligations under BITs and other IIAs and seek to improve the outcome of future treaty negotiations. Further, as the example of Indonesia shows, some may not consider it sufficient to have future treaties reflect their emerging dual status with regards to investment flows, but may consider letting existing BITs lapse to negotiate better ones that they perceive as more balanced. Thus, many EAP countries, which formerly often were solely rule-takers in the area of foreign investment, are increasingly seeking to become rule-makers themselves.

With an increasing awareness of investment protection instruments and the rights and obligations they provide, the number of investment arbitrations involving an EAP party has been picking up pace significantly, making the region a veritable 'hot bed' of investment arbitration. These developments are fairly recent, and EAP investors as well as investors in EAP countries can be expected to continue to become increasingly familiar with and utilize these broad networks of BITs and other IIAs in the region.

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<sup>232</sup> Lauge Skovgaard Poulsen and Damon Vis-Dunbar, 'Reflections on Pakistan's Investment-Treaty Program after 50 Years: An Interview with the Former Attorney General of Pakistan, Makhdoom Ali Khan' (16 March 2009) <<http://www.iisd.org/itn/2009/03/16/pakistans-standstill-in-investment-treaty-making-an-interview-with-the-former-attorney-general-of-pakistan-makhdoom-ali-khan/>> accessed 13 April 2015 (stating that Pakistani officials perceived BITs as 'a piece of paper,' the signing of which would make for 'a good photo opportunity,' without having any meaningful involvement in the negotiations).