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Investment Claims against Asian States-- a legal analysis of the statistics, trends and prospects

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Abstract: The developments which are now taking place show that Asian states are increasingly negating the IIAs (in the form of BITs or PTAs) which form a dense network of obligations. Although few cases had been brought against Asian states by 2009, the pattern has changed since 2010, with a sharp increase in the initiation of investor-state arbitration proceedings over the last three years. Although some IIAs have generated a few disputes for technical reasons (for example, those concluded by China before 2005 or by Thailand, Indonesia, Thailand and Malaysia, which require the pre-approval of investments), it is rather predictable that Asian states are currently entering an era in which foreign investors are likely to multiply claims. Such a trend requires host states to be prepared to litigate while reassessing the economic and political benefits of current investment treaty commitments.

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Contents

1. Introduction

International investment law and policy have undergone profound transformations since the mid-1990s. The period since NAFTA's[1] coming into force has witnessed a literal explosion in the number of international investment agreements (IIAs), in the form of both BITs and PTAs involving all states which were earlier part of the Soviet Union.[2] Primarily North–South in character at the outset, this phenomenon has also registered an important mutation in the 2000s, with an ever-growing number of South–South and South–North IIAs characterizing the evolution of emerging economies. It has been during the last decade that many Asian states, with China, India, and Korea being the most active, developed and reinforced their network of IIAs, thereby making investment a key aspect of their economic pacts with third states.

While not all countries and stakeholders share similar expectations of investment treaties application,[3] the present article contributes to the study and understanding of the evolving international regime for investment in Asia at a crucial time. The Asian regime for investment is not static but, on the contrary, very dynamic.[4] It continues to grow and change, and it will be affected by various factors in the coming months and years which relate to the rise of some new actors; these include the likely increase of litigation in Asia, the regionalization of investment rule-making (illustrated by the Transpacific partnership (TPP)) and the rise of EU as an FDI negotiator. Firstly, the last decade has witnessed an exponential surge of investment disputes between foreign investors and host country governments.[5] Arbitral panels have been charged with the task of applying the rules of IIAs in specific cases, a task often not straightforward,

[1] The path-breaking North American Free Trade Agreement (NAFTA) of 1994, whose Chapter 11 (Investment) embedded a full set of investment rules within the ambit of a trade architecture for the very first time. See Gilbert Gagné and J. F. Morin, "The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT", *Journal of International Economic Law* 9, no. 2 (2006): 357–382, doi:10.1093/jiel/jgl006. See also S. Jandhyala, W. J. Henisz, and E. D. Mansfield, "Three Waves of BITs: The Global Diffusion of Foreign Investment Policy", *Journal of Conflict Resolution* 55, no. 6 (23 August, 2011): 1047–1073, doi:10.1177/0022002711414373.

[2] Chang-fa Lo, "11 Conditions and Ways of Restoring Investment to the WTO Negotiation Agenda", *Expansion of Trade and FDI in Asia: Strategic and …* (2009): 269–284.

[3] As explained by Ryan, "International investment law developed rapidly over the past thirty years to meet the expectations of a diverse constituency -developed (i.e., capital-exporting) countries, developing (i.e., capital-importing) countries, and private investors. While aligned in their desire to create a stable framework for international investment, each of these groups brings unique expectations and demands to the system." Christopher M. Ryan (2008) Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law, 29(3) U. Pa. J. Int'l L. 725, 726.

[4] J. Chaisse and M. Matsushita, "Maintaining the WTO's Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism", *Journal of International Economic Law* 16, no. 1 (22 January, 2013): 9–36, doi:10.1093/jiel/jgs043.

[5] The cumulative number of treaty-based cases had risen to more than 400 by 2013, with more than 200 brought before the International Centre for Settlement of Investment Disputes (ICSID). Few disputes, however, involve Asian parties. However, as this paper will explain, the picture is likely to change in the near future by reason of the multiplication of Asian IIAs combined with a greater knowledge and practice (in both public and private circles) of investment rules. In any event, many lessons can be drawn for disputes and cases involving non-Asian claimants and countries; that is why the case law will be a major component in the current paper.

given the broad and sometimes ambiguous[6] terms of these arrangements.[7] This new phenomenon of investment litigation has brought about a number of decisions from different arbitral *fora*, contributing to the investment law regime by giving meaning to its provisions. Secondly, the TPP is a twenty-first-century preferential trade agreement (PTA)[8] to change PTAs by "*multilateralising regionalism*".[9] The TPP represents a major PTA which illustrates the regionalization of investment rule-making and probably represents a benchmark for the state of the art of international law of foreign investment. Thirdly, in the EU, in 2009 the *Treaty of Lisbon* extended the Common Commercial Policy to be the second most important field of international economic relations, namely, foreign direct investment. The shift from the national to the supra-national level is in itself a major legal development – such an external dimension is relevant to Asian states because the EU, instead of one or all of the 27 EU members, will become their partner in future negotiations.[10] In this connection, the EU is likely to employ its significant bargaining power when negotiating IIAs to improve, for instance, the standards of investment protection or to develop new forms of all-encompassing agreements. This will affect the whole architecture of the international law of foreign investment.

The current analysis focuses on the litigation scenario involving Asian states[11] as defending parties; this has hitherto not been studied.[12] There is a wealth of information on various national

[6] In this case, the tribunal will turn to the Vienna Convention if a term is ambiguous, or if further interpretation of a treaty provision is required. See, *e.g*., LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October, 2006, paras 89 and 122.

[7] Giorgio Sacerdoti, "Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards", *ICSID Review* (2004): 1–48.

[8] The term PTA encompasses many different kinds of bilateral and regional trade agreements and underscores their common denominator which is to establish preferences for the signatories over others in trade relations. Indeed, many of the so-called FTAs favor certain countries in trade relations and are basically discriminatory rather than "free trade". See Julien Chaisse, "The Three-pronged Strategy of India's Preferential Trade Policy: a Contribution to the Study of Modern Economic Treaties", *Conn. J. Int'l L.* 26, no. 4 (2011): 415–455.

[9] As early as 2006, Richard Baldwin argued that since the "spaghetti bowl's inefficiencies are increasingly magnified by unbundling and the rich/poor asymmetry, the world must find a solution. Since regionalism is here to stay, the solution must work with existing regionalism, not against it. The solution must multilateralise regionalism." See Richard Baldwin (2006), "Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade", 29(11) *The World Economy* 1451–1518.

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

[11] In terms of methodology, it is important to clarify that Asian countries are understood in this paper as being those states which are geographically located in the Asian region and which are members of the Asian Development Bank. In total, 48 states belong to the Asian regional members category. Apart from North Korea, all states (regardless of their size, population and political regime) are considered in this study and their respective investment treaties analyzed. For a detailed list of the 48 countries, see Annex 1.

[12] As pointed out by Gantz, "The large volume of literature and commentary on resolution of investor-state disputes tends to focus primarily on the rights of the foreign investor and the process through which the investor may protect her interest through investor-state arbitration, either at the World Bank's ICSID or in some other forum. Where issues relating to governments-as-respondents have been addressed, the emphasis has often been on nations such as the three NAFTA Parties and other relatively large and affluent nations such as Argentina. Until relatively recently, much less attention has been paid to challenges facing small developing respondents, such as the member nations of CAFTADR, Chile, Colombia or Ecuador." David A Gantz (2012) Resolution of Investor-State Controversies in Developing Countries, The Law and Development Review: Vol. 5: No. 2, Article 5. DOI: 10.1515/1943-3867.1153

Asian practices in treaty-making;[13] there is also a general analysis of the increasing role of international arbitration on investment matters but as yet no broad analysis of the participation of Asian states in investor-state arbitration. Such an analysis is however needed because investment disputes are a reliable indicator of the current compliance in the region with international norms, it simultaneously sheds light on domestic reforms undertaken to liberalize foreign investment. This paper intends to fill this gap by providing a comprehensive analysis of investment litigation against Asian states. The main thesis is that Asian states are currently entering an era in which foreign investors are likely to multiply claims which require host states to be prepared to litigate while assessing the benefits of the current investment treaties.[14]

The current analysis first provides a macro-analysis of Asian rule-making. This section helps to understand what the key characteristics of the Asian IIAs (section 2) are. Once the relevant IIAs are identified, the paper will review the increasing share of investment disputes involving Asian states (Section 3). A holistic analysis of the Asian regime for investment will not be complete without a thorough analysis of international investment litigation involving Asian parties (Section 4). In the concluding section, lessons are drawn and prospects are sketched.

2. Revisiting the dynamics of investment rule-making in Asia

In terms of substance, Asian investment treaty practice (as are all other national treaty practices in this regard) shows that virtually all treaties listed above regulating foreign investment matters cover classic issues of international investment treaties. In this connection, the current paper does not detail these provisions (which are well known) but it simply refers to available publications. The following nine topics are classic issues of investment law: (1) definitions and scope of application;[15] (2) investment promotion and conditions for the entry of foreign investments and investors;[16] (3) general standards for the treatment of foreign investors and investments;[17] (4) issues of monetary transfers;[18] (5) expropriation (direct or indirect);[19] (6) operational and other

[13] See V. S. Seshadri, "Evolution in India's Regional Trading Arrangements", *Journal of World Trade* 43, no. 5 (2009): 903–926 ; Wenhua Shan, "EU Enlargement and the Legal Framework of EU-China Investment Relations", *Journal of World Investment and Trade* 6, no. 2 (2005): 237–262 ; Australian Government, Australian Productivity Commission, and Investment Disputes, "The Australian Trade Policy Statement on Investor-State Dispute Settlement", 15, no. 22 (2011).; Julien Chaisse and Debashis Chakraborty, "The Evolving and Multilayered EU – India Investment Relations — Regulatory Issues and Policy Conjectures", *European Law Journal* 19, no. 5 (15 May , 2013): n/a–n/a, doi:10.1111/eulj.12037.

[14] On the assessement of economic impact of IIAs on FDI flows, see Julien Chaisse and Chistian Bellak (2011), "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology", 3(4) *Transnational Corporations Review* 3–11.

[15] Jean Ho, "The Meaning of 'Investment' in ICSID Arbitrations", *Arbitration International* 26, no. 4 (2009): 633–647.

[16] Claudia Annacker, "Protection and Admission of Sovereign Investment Under Investment Treaties", *Chinese Journal of International Law* 10, no. August (1 August, 2011): 531–564, doi:10.1093/chinesejil/jmr018.

[17] Julien Chaisse, "Exploring the Confines of International Investment and Domestic Health Protections – is a General Exceptions Clause a Forced Perspective?", *American Journal of Law & Medicine* 39, no. 2–3 (January 2013): 332–60.

[18] Katia Yannaca-Small, *Essential Security Interests Under International Investment Law**, 2007.

[19] Emma Aisbett, Larry Karp, and Carol McAusland, "Compensation for Indirect Expropriation in International Investment Agreements: Implications of National Treatment and Rights to Invest", *Journal of Globalization and Development* 1, no. 2 (27 January, 2010), doi:10.2202/1948–1837.1133.

conditions;[20] (7) losses from armed conflict or internal disorder;[21] (8) treaty exceptions, modifications, and terminations;[22] and (9) dispute settlement.[23] These diverse provisions are important to reassure foreign investors that they will be able to reap the benefits of their investment, and no trend denies such an approach, although evidence on the extent to which investment decisions are influenced by investment treaties is mixed.[24]

To understand the dynamics of Asian rule-making in international investment requires knowledge of which are the international treaties (in the form of BITs or PTAs which have investment chapters) that involve at least one Asian country. If at least one Asian country has signed such an investment pact, the host economy is likely to be affected by foreign investment and, in any case, its domestic investment policy is subject to the international obligations which are expressed in the investment agreement. A first methodological challenge lies in the fact that there is no international organization informed by Asian states of their international treaties. Also, not all Asian governments publish the results of their negotiations. As a result, one the contributions of the current paper is to provide a mapping of these Asian practices based on a survey on the main IIAs databases complemented by national governments' sources of information. Asian investment rule-making can be depicted as a three-tier structure reflecting the various levels of involvement of states in treaty negotiations (2.1), which states also tend to increasingly rely on PTAs to regulate investment instead of pure BITs (2.2).

2.1. The Three-tier Classification of Asian states

The current section looks at the investment agreements concluded by the 48 ADB members. In total, since 1959 Asian states have concluded 1,194 BITs and 61 PTAs which contain an investment chapter. Since approximately 2,850 BITs have been concluded worldwide over the same period of time, it means that Asian states have taken part in no less than 40 percent of international rule-making. In order to facilitate the analysis of the huge number of treaties, one can distinguish four main groups of Asian states which reflect their respective roles and importance in Asian investment rule-making.

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[20] Katia Yannaca-Small, "Interpretation of the Umbrella Clause in Investment Agreements", in *International Investment Law: Understanding Concepts and Tracking Innovations*, 2008, 101–134.

[21] W. J. Moon, "Essential Security Interests in International Investment Agreements", *Journal of International Economic Law* 15, no. 2 (10 May, 2012): 481–502, doi:10.1093/jiel/jgs024.

[22] Chaisse, "Exploring the Confines of International Investment and Domestic Health Protections – is a General Exceptions Clause a Forced Perspective?".

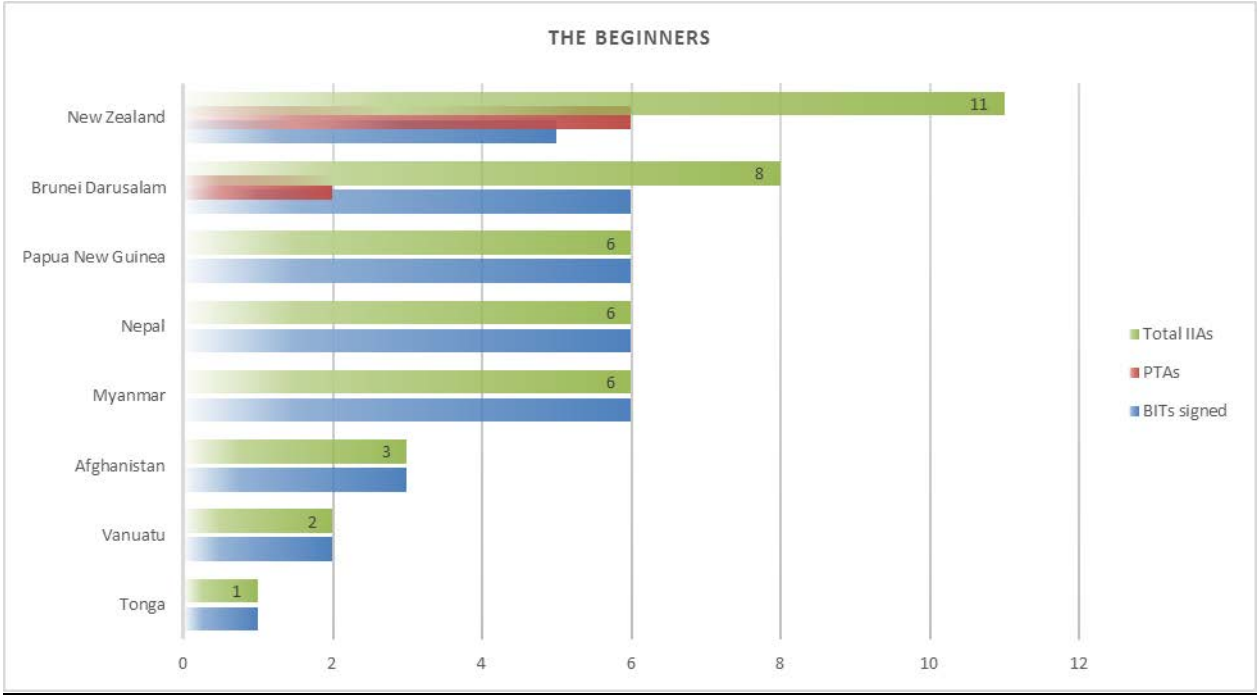
[23] Bryan Mercurio and I Introduction, "The Untapped Potential of Investor-State Dispute Settlement Involving Intellectual Property Rights and Expropriation in Free Trade Agreements", no. December (2010): 1–19.

[24] The extent to which BITs actually attract increased flows of foreign direct investment is disputed. According to Salacuse and Sullivan, entering a BIT with the United States of America would nearly double a country's FDI inflows. However, entering BITs with other OECD countries had no significant effect on FDI. See Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", 46 *HARVARD. INTERNATIONAL LAW.. JOURNAL*. 67, 105–111 (2005). Another important study concludes that there is "little evidence that BITs have stimulated additional investment". Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a Bit...and They Could Bite* 22 (World Bank Dev. Research Grp, Research Working Paper No. 3121, 2003), *available at* http://elibrary.worldbank.org/content/workingpaper/10.1596/1813–9450-3121.

Firstly, there is a group of 13 Asian states which have not concluded a single investment agreement as of August 2013. This means that Bhutan, Cook Islands, Fiji, Kiribati, Maldives, Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Samoa, Solomon Islands, Timor-Leste, and Tuvalu have so far been reluctant to engage in international investment rule-making.

Secondly, a group of eight Asian states has signed some IIAs but in a rather limited number. Indeed, Tonga, Vanuatu, Afghanistan, Myanmar, Nepal, Papua New Guinea, Brunei Darusalam, and New Zealand have each signed less than eleven IIAs (see **Figure 1**).

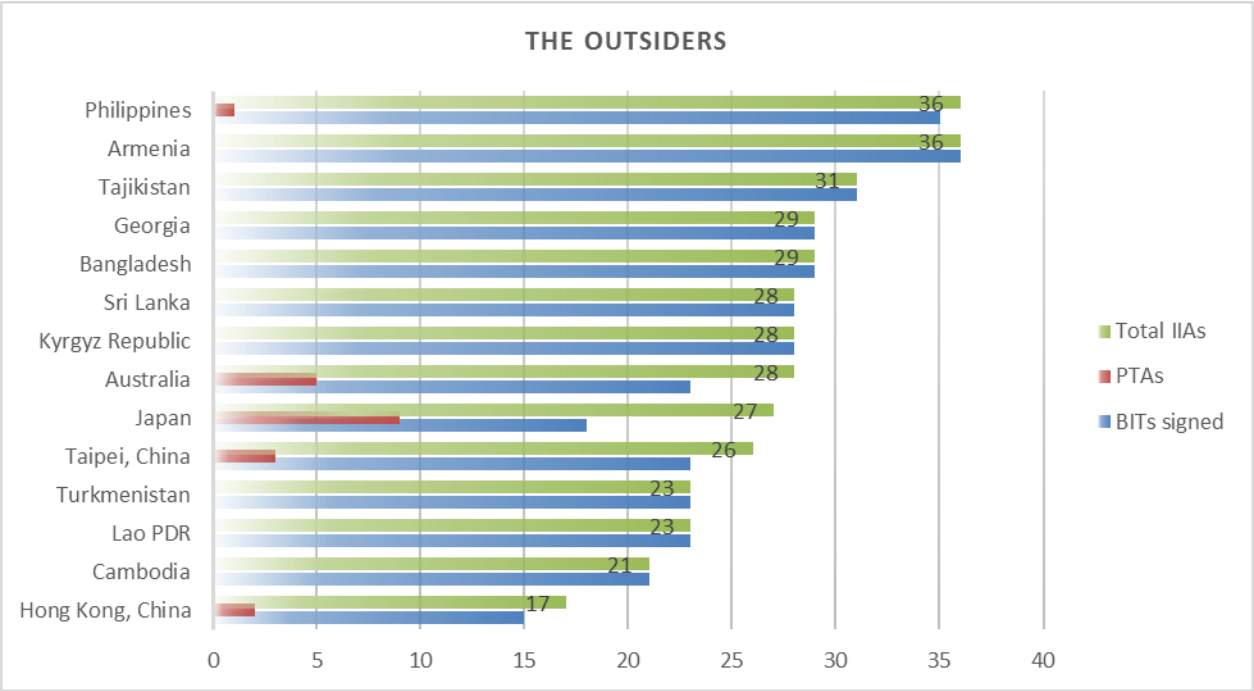
Figure 1. Asian states with less than 11 IIAs



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

A third and intermediate group of 14 ADB members has signed between 12 and 40 IIAs. This group of relatively active states is made up of Hong Kong, China, Cambodia, Lao PDR, Turkmenistan, Taipei, China, Japan, Australia, Kyrgyz Republic, Sri Lanka, Bangladesh, Georgia, Tajikistan, Armenia, and the Philippines (**Figure 2**).

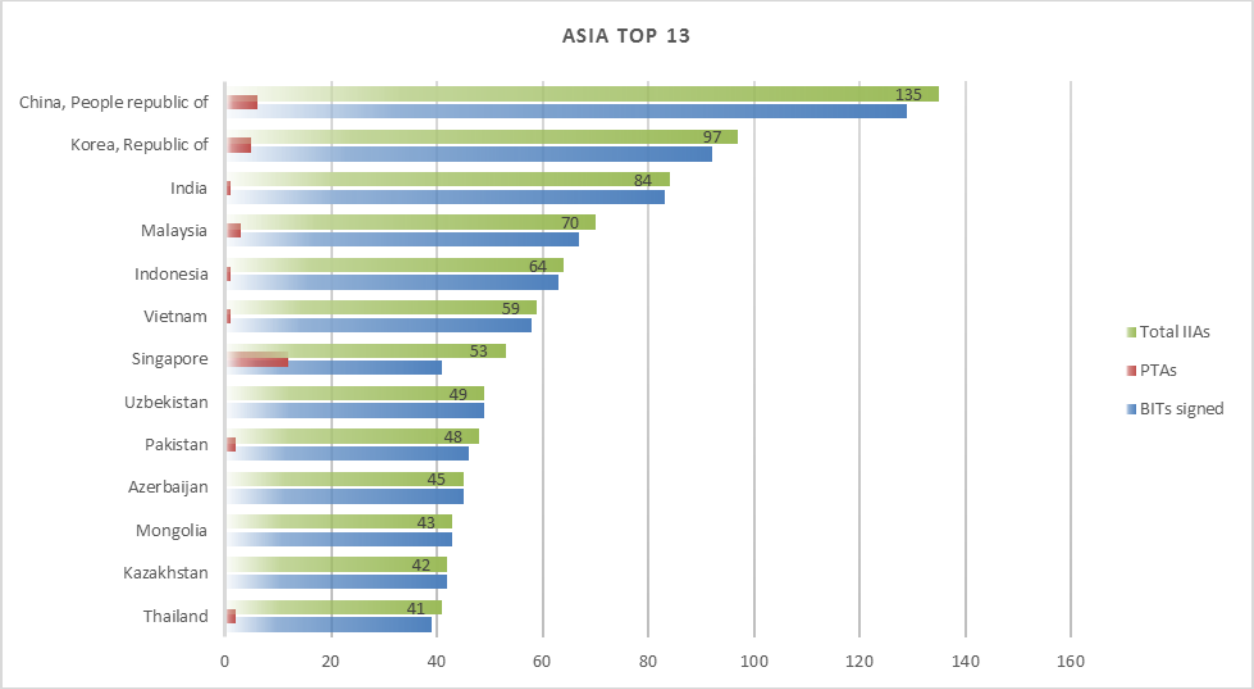
Figure 2. Asian states with less than 40 IIAs (but more than 11)



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

Finally, a fourth group of Asian states comprises the frontrunners; these are the States that have concluded more than 40 IIAs. This group is made of Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, Republic of Korea, Peoples' Republic of China. It is on this group of countries that most of our micro-analysis will be based. Logically, the great number of IIAs they have concluded reflects a very active investment diplomacy, and this also means that there is bound to be a great number of third states that have granted rights to a great number of foreign investors.

Figure 3. Asian States with more than 40 IIAs



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

2.2. The increasing use of preferential trade agreements

Another trend worth mentioning is the increasing role of PTAs in Asian investment rule-making. An exhaustive view of all IIAs concluded among Asian states can also help us to understand an important feature of Asian investment rule-making, namely, the rise of PTA to regulate investment matters. In total, 21 Asian PTAs with investment chapters have been concluded since 2001 and notified to the WTO.

Table 1. The list of Asian PTAs with investment chapters

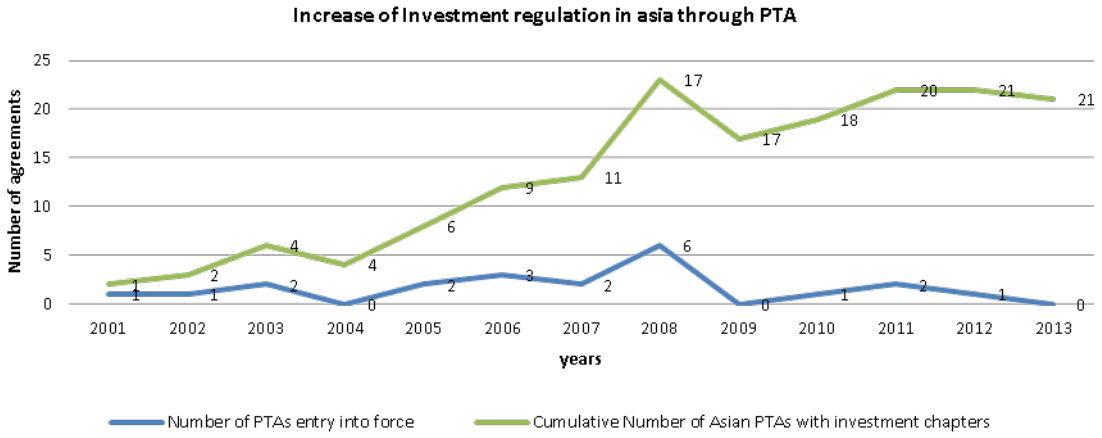
PTA New Zealand - Singapore 1 Jan 2001	PTA Japan - Singapore 30 Nov 2002	PTA China - Hong Kong, China 29 June 2003	PTA Singapore - Australia 28 Jul 2003	PTA Thailand - Australia 1 Jan 2005
PTA India - Singapore 1 Aug 2005	PTA Korea, Republic of - Singapore 2 Mar 2006	PTA Trans-Pacific Strategic Economic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

Sources: Compiled by the author on the basis of the WTO regional trade agreements database and national Ministries of Foreign Affairs public information.

It is a relatively significant list of PTAs which promotes FDI liberalization and ensures FDI protection throughout key economies such as Singapore, Japan, Malaysia, and Hong Kong. One observes that PTAs seem to be the favorite legal instruments of Asian capital-exporting states to regulate FDI, as opposed to classic BITs. Among these PTAs, the ASEAN Comprehensive Investment Agreement has a specific position since it regulates FDI in ten states which aim at creating a common market by 2015.[25] Another important feature is put in evidence by **Figure 5** which shows the increasing rise of PTAs over time to regulate FDI in the region.

[25] P. L. Hsieh, "The Roadmap for a Prospective US-ASEAN FTA: Legal and Geopolitical Considerations", *Journal of World Trade* 46, no. 2 (2012).

Figure 5. The rise of Asian PTAs with investment chapters



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

Of course, the number of PTAs covering investment matters remains limited compared to Asian BITs. However, the trend tells us that a growing number of Asian states are willing to negotiate trade and investment in the same document. Such broad treaties may of course be more difficult and longer to negotiate than classical BITs. However, they are also likely to produce greater economic impacts and benefits since both trade and investment are liberalized at the same time.

While the current paper focuses on existing data, it is important to underscore the important number of PTAs currently under negotiation which regulate FDI. The TPP but also RCEP or the Triangular China, Korea, Japan treaties offer good examples and probably validate the idea that the future regulation of investment will take the form of widely encompassing PTAs rather than narrow BITs.

3. Mapping the share of investment claims against Asian states

The last decade has witnessed an exponential surge of investment disputes between foreign investors and host country governments, and this illustrates the popularity of investment litigation at international level (3.1). Arbitral panels have been charged with the task of applying the rules of IIAs in specific cases, a task not often straightforward given the broad and sometimes ambiguous terms of these arrangements. This new phenomenon of investment litigation has brought about a number of decisions from different arbitral *fora*, contributing to investment law regimes by giving meaning to their provisions.[26] The cumulative number of

[26] Prosper Weil, "The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage Ą Trois", *ICSID Review* (2000): 401–416.

treaty-based cases had risen to more than 400 by 2013, with more than 200 brought before the International Centre for Settlement of Investment Disputes (ICSID), and this paper will detail the statistics for Asian states (3.2).

3.1. Investor-state dispute settlement options

In principle, foreign investors may choose to initiate legal proceedings in the domestic courts of the host country, *i.e.*, a right they never lose. Alternatively, they may initiate international arbitration proceedings that can be more favorable to them: this is because it is easier to know international law and practice and because international tribunals are not subject to domestic political pressure.[27] Should investors face discrimination in a state with a weak legal order, it is possible to initiate international arbitration proceedings as a priority. International arbitration is the process by which neutral arbitrators settle disputes concerning bilateral IIAs between sovereign states and foreign investors.[28] In order to ensure a proper respect and conformity with investment rules regarding protected foreign investments, investment treaties provide various dispute resolution mechanisms, "one of the most important of which is international investor-state arbitration which entitles an injured investor to sue the host government for damages because of a violation of treaty standards and rights".[29]

On the basis of these provisions, disputes between an investor and a host state are settled by international arbitration rather than by the domestic courts of the host state (as would otherwise be the case). The host government's consent to the jurisdiction of an international arbitration tribunal is granted *ex ante* in the form of an open offer either in the investment treaty or in its national law.[30] During the past few years investment disputes brought before international arbitrators have multiplied and have raised attention by reason of the significant compensations which host states have in some instances had to pay.[31]

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[27] Roberto Echandi, "Investor-State Dispute Prevention : A Conceptual Framework Designing a Conflict Management System for Investor-State Relations" (2011).

[28] In order to avoid multiple proceedings on the same matter, however, IIAs often establish that once a dispute has been brought to one forum – or, in some cases, a decision has been reached – the dispute may not be pursued in another venue. M.C.I. v. Ecuador holds that the "fork-in-the-road" rule is different from the *lis pendens* rule because the former rule refers to an option, expressed as a right to choose irrevocably between different jurisdictional systems; once the choice has been made there is no possibility of resorting to any other option. The right to choose once is the essence of the "fork-in-the-road" rule. M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, 31 July, 2007, para. 181.

[29] Jeswald W. Salacuse, "The Emerging Global Regime for Investment", 51 *Harvard International Law Journal*, 427–472 (2010) at 446.

[30] The Wintershall v. Argentina tribunal, in discussing one trend in the case law (relating to the effect, if any, of an MFN clause on dispute settlement), commented that this closely follows the principle of general international law which states that international courts and tribunals can exercise jurisdiction over a state only with consent – this trend does not regard as sufficient a consent of the host state to international arbitration which would merely be a presumed consent. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December, 2008, para. 179.

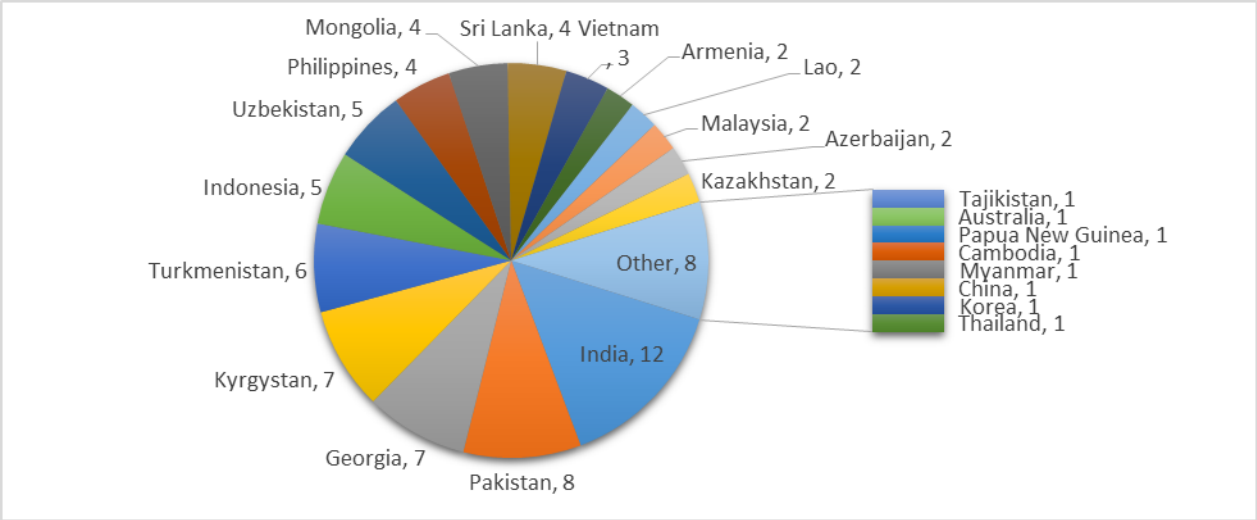
[31] One notable example is the case of CME Czech Republic B.V. v. The Czech Republic, an UNCITRAL arbitration under the Netherlands–Czech Republic BIT, which resulted in an award and payment of $355 million to an injured investor, one of the largest awards ever made in an arbitration proceeding. See UNCITRAL, *CME Czech Republic B.V. v. The Czech Republic* Final award (2003).

Most Asian IIAs further allow the foreign investors to choose the venue for the arbitration. *Ad-hoc* arbitration allows the parties to agree on the procedural rules to the dispute, although states commonly rely on the established UNCITRAL arbitration rules. The parties may also resort to organizations that provide a venue and have developed their own arbitral procedures. The ICSID, established in 1967 under the umbrella of the World Bank, and which specializes in investor-state disputes, has received the most attention,[32] totalling well over half the investor-state claims brought today.[33] For the most part, IIAs feature more than one option for international arbitration. Most IIAs allow resorting to ICSID, and to *ad-hoc* arbitration under UNCITRAL rules. Some agreements additionally allow the claim to be brought in other institutions, such as the Stockholm Chamber of Commerce or the International Chamber of Commerce.

3.2. Investor-(Asian) state arbitration

As a first effort, the current paper collected all the cases brought against Asian states. The results are significant since for the period from 1987 to the present, at least 83 investment disputes have involved 24 Asian states as defending parties. It is a relatively significant number of disputes, and they amount to almost 20% of all international investment litigation. Further scrutiny reveals that a great variety of states have faced such claims (**Figure 6**).

Figure 6. Ranking of Asian states per number of investor claims



Sources: Compiled by the author on the basis of United Nations Conference on Trade and Development (UNCTAD) Database of Treaty-Based Investor-State Dispute Settlement Cases, International Centre for Settlement of Investment Disputes Database of registered cases and national Ministries of Foreign Affairs public information.

[32] Sacerdoti, "Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards". See also Omar E. Garcia-Bolivar, "Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach", 2 *Trade Law & Development* 145 (2010) and Leon E. Trakman (2013) The ICSID Under Siege, 45 Cornell Int'l L.J. 603.

[33] Peter Malanczuk, "State-state and Investor-state Dispute Settlement in the OECD Draft Multilateral Investment Agreement", *Journal of International Economic Law* 83 (2000): 417–439.

India has had to face 12 claims, whereas Pakistan (8), Georgia (7), Turkmenistan (6), Indonesia (5), Uzbekistan (5) follow with an already substantive experience of investment litigation. In order to complement this initial picture, a further look is needed at the possible relation between the negotiation of treaties and the number of investment disputes. It is especially necessary to understand why India has had to face so many claims, whereas China, which has more IIAs, has only once been challenged.

4. Investigating the Asian trends in Investor-state Arbitration

In order to understand the trends and hence to give meaning to the current developments, this section looks at four key parameters. Firstly, the evolution over time of the investment claims made against Asian states (4.1). Secondly, the analysis of the quality of national investment treaties is important because it provides a clearer view of the likely impact of the investment treaties.[34] In an earlier publication, it was explained that not all investment treaties are drafted in the same manner; this is because many of their provisions may vary in a significant manner regarding their scope of application and likely economic impact (4.2).[35] Thirdly, the other specific parameters that explain why Indonesia and Thailand have so far encountered a relatively low number of claims are reviewed (4.3). Eventually, the case of China is further analyzed (4.4).

4.1. The recent acceleration of investment litigation against Asian States

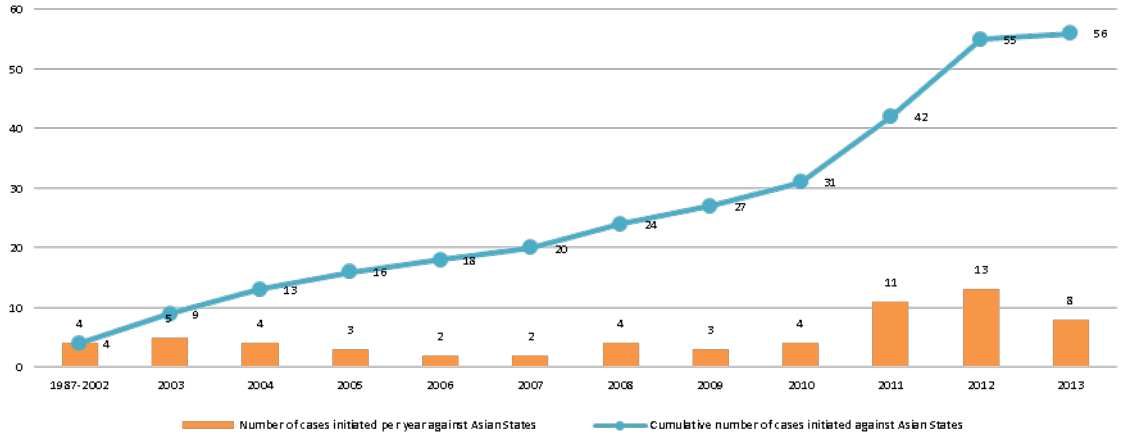
In order to provide a finer analysis of the litigation involving Asian states, the current section looks at the evolution over time since the very first claim made against Sri Lanka in 1987 to the present claims made against Kazakhstan. The results of the survey covering 83 claims against 24 states[36] appear in **Figure 7**.

[34] *"While the treaties continue to govern the same key aspect of investment, they have morphed over the 40 year period to include different types of clauses. We need to take into account the heterogeneity in order to better understand the motivations of states."* Srividya Jandhyala, Henisz, J. Witold, and Edward D. Mansfield, (2010) Pooling is a BIT Inappropriate: A Two Stage Model for Bilateral Investment Treaty Signing, 27 January, mimeo. See also *"While it should be recognized that a BIT could be an important commitment device,* ***the nature of the commitment can vary enormously depending on the terms of the BIT****. Too much attention has been placed on whether or not a BIT exists, than on the strength of the property rights actually being enshrined in these agreements"*, in Mary Hallward-Driemeier, (2003), "Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit … And They Could Bite", World Bank Policy Research Working Paper, No. 3121, 1–37.

[35] Chaisse Julien and Bellak Christian (2011), "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology" 3(4) *Transnational Corporations Review* 3–11.

[36] India' Pakistan' Georgia, Kyrgystan, Turkmenistan, Indonesia, Uzbekistan, Philippines, Mongolia, Sri Lanka, Vietnam, Armenia, Lao, Malaysia, Azerbaijan, Kazakhstan, Tajikistan, Australia, Papua New Guinea, Cambodia, Myanmar, China, Korea, and Thailand. See **Figure 6**.

Figure 7. Investment claims against Asian states (1987–2013)



Sources: Compiled by the author on the basis of United Nations Conference on Trade and Development (UNCTAD) Database of Treaty-Based Investor-State Dispute Settlement Cases, International Centre for Settlement of Investment Disputes Database of registered cases and national Ministries of Foreign Affairs public information.

The first-ever case brought against an Asian state was the one involving a Hong Kong claimant against Sri Lanka in 1987. Since then, a certain number of Asian states have, however, been immune to investment litigation. No claim has ever been made (so far) against New Zealand, Brunei Darussalam, Nepal, Afghanistan, Vanuatu, Tonga, Hong Kong China, Japan, Taiwan, or Singapore.

However, since 1987 a growing number of states (24 in total) have been challenged by international arbitration. More importantly, if only an average of four claims a year was initiated from the early 2000s to 2010, there was a sharp increase in 2011. In 2011 and 2012 more than ten disputes were initiated. It is expected that 2013 will be another rich year, with eight disputes already as of August, 2013. It is of course risky to predict the future but one can understand that litigation requires instruments, the knowledge of these instruments and a significant volume of FDI. These three parameters are now satisfied in most Asian states.

- Indeed, as earlier explained, most Asian states have entered into investment treaties over the last few years and are expanding their network of IIAs. All these new agreements are the instruments which, soon, will lead to more litigation.
- Equally importantly are the knowledge of the treaties which relate to the private practice and the legal education on investment matters. There is no wide study and measure of such knowledge but it seems to be a trend in many Asian-based law firms to develop an "arbitration" department and for many universities to establish programs on investment regulation. These developments can only nurture the capacity of investors to rely on expert legal advice to bring claims before arbitration against Asian states.
- The regular increase of foreign investment into Asian economies is also important. By definition, there were fewer disputes in the early 2000s in Asia because the volume of

FDI was lower. It is because FDI is increasing that the likelihood of having to face claims is becoming more significant.

These three parameters have to be combined to understand the prospects for litigation against Asian states. They actually reveal a great potential which hitherto has been ignored or marginalized. However, the current paper shows that investor-state arbitration is developing fast in Asia, and it predicts an intense practice in the coming years.

4.2. The variations over the quality of ISDS provisions

The following table (**Table 2)** provides detailed data extracted from the BITsel Index. It does so on a selected number of Asian states as: the Top 10 which are most frequently sued by arbitration (India, Pakistan, Georgia, Turkmenistan, Kyrgyz Republic, Indonesia, Philippines, Mongolia, Sri Lanka, and Vietnam); as well as some key Asian IIAs negotiators, *e.g.*, Malaysia, Thailand, and China.

Table 2. Quality of selected Asian IIAs and ISDS provisions

	Total IIAs	Total claims	BITsel quality indicator	Average of coefficient of variation	BITsel ISDS quality indicator
	Number	*Number*	*Average across 11 provisions for all BITs in force*	*Standard deviation over mean * 100 (in percent)*	*Average across ISDS provisions for all BITs in force*
India	84	12	1.82	0.21	2.00
Pakistan	48	8	1.66	0.28	1.63
Georgia	29	7	1.77	0.23	2.00
Turkmenistan	23	6	1.82	0.20	2.00
Kyrgyz Republic	28	5	1.77	0.23	1.71
Indonesia	64	5	1.57	0.31	1.75
Malaysia	70	2	1.62	0.29	1.78
China	135	1	1.58	0.31	1.30
Thailand	41	1	1.72	0.24	1.61

Source: Compiled by the author on the basis of the BITsel Index v.4.00.

The *BITsel Index*[37] provides an extremely detailed support for understanding national treaty practices.[38] The data for the Top 6 Asian litigators have been extracted to shed some light on the substance and quality of these respective treaties. The results are stunning because the strongest average quality indicator goes to India and Turkmenistan (1.82), which are far more significant than those of states with relatively weaker investment treaties, such as Indonesia (1.57) and China (1.58). These average values are based on a relatively high number of treaties and confirm the significant gap among the Top 6 in terms of rule-making: not all Asian investment treaties are similar. India is inclined to grant significant rights to foreign investors, although it has signed fewer treaties than China has. Conversely, China has signed a large number of treaties but its average quality is among the poorest of the Top 6.

Of course, these averages also depend on the partner states. Treaties are by definition the result of negotiations and reflect the consensus that the two sides reached after exchanging their goals and ambitions. In this connection, this paper will take a closer look at the *BITsel* and see which treaties for each country of the Top 6 are at the extreme of national practice.

In the case of China, the treaty with the highest quality was concluded with Germany (1.90). This confirms the fact that China truly entered a new generation of investment treaties (with greater rights and access to ISDS) only after 2005, and the treaty with Germany represents a milestone. At the other extreme, China concluded a series of relatively weak treaties with Bulgaria, Mexico, Colombia, and Costa Rica. One can further fine-tune the analysis and note that there is a significant difference between its IIAs concluded before and after 2005. In the wake of the China–Germany BIT, China further negotiated treaties which were rather more favorable to foreign investors. This generation provides broader and more substantive obligations in regard to the treatment of foreign investment. After the establishment of national treatment – albeit with sectoral reservations in some cases – no substantial restrictions on the ability of foreign investors to challenge the host country's measures in international arbitration are now standard in this category. China's "new-generation" BITs concluded since the beginning of this century seem to be in this category. As a result, these post-2005 IIAs obtain a score of 1.65 whereas before that turning point it was only 1.55. India, on the contrary, concluded more than a dozen treaties with rather high quality (for instance with Switzerland and Mauritius) after it reached the value of 1.90. But it also signed a relatively weak-quality treaty with Mexico (1.63). As for Indonesia, it ranks fourth among the Asian states in terms of the number of investment treaties. However, it has a rather low average quality. In this light, it is interesting to note that the Germany–Indonesia treaty provides a very high level of protection (1.90), much higher than the Indonesian average. However, on the other hand, the Indonesia–Denmark treaty offers the example of a rather weak treaty (1.27). Last but not least, Malaysia, whose economic policy is deeply intertwined with

[37] BITs enshrine a series of obligations on the parties to ensure a stable and favorable business environment for foreign investors. These obligations pertain to the treatment that foreign investors are to be afforded in the host country by the domestic authorities. But, meanwhile, such "treatment" that encompasses many sorts of laws, regulations and practices from public entities also affects foreign investors or their investments to a significant extent. In light of the great number of BITs in which different provisions and their different wordings would give birth to a broad kaleidoscope of legal obligations and hence regulatory effects, the "BIT Selection" (BITSel) Index, which is based on the 11 most important elements is found in most of the existing BITs.

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

politics, has concluded a rather strong treaty with Saudi Arabia (1.81). However, the treaty of Malaysia–Lebanon scores poorly (1.36).

The next step is to calculate the "coefficient of variation",[39] which is a better measure of the heterogeneity. The number itself expresses the relation of the standard deviation (a measure for the dispersion of the data) to their mean. If the coefficient of variation is lower than 0.5, the mean value is a good representation for all data. For example, Malaysia's is 0.29. What does it tell us? As it is 0.29 on average for Malaysia, it means that its variation in the provisions is 29%. As all the coefficients of variation are well below 0.5 for each BIT of Malaysia, the mean is a good representation for all the single BIT provisions. What does the coefficient of variation say in comparison to other states? The one for China is 0.31, so the heterogeneity of BITs is slightly larger for Chinese BITs than for Malaysian BITs. While the mean value of each country tells us how investor-friendly their BITs provisions are, the coefficient of variation tells us how heterogeneous they are.

Finally, the *BITsel* ISDS Quality Indicator represents the *Average across ISDS provisions for all BITs in force.* An investor-state dispute mechanism is an incentive to invest because it provides as an ultimate resort access to international (neutral) jurisdiction. In the *BITsel Index*, if such a mechanism is included in the BIT, it can be expected to have a positive effect on FDI flows, but if it is subject to conditions, the effect is expected to be less. The ISDS procedures can however be subject to conditions. Possible condition: Foreign investors must refer the dispute to an administrative review procedure in accordance with domestic law in the first place, and if the dispute still exists three months after the investor has brought the issue to the review procedure, he or she can submit the dispute to international arbitration.[40]

At this stage, it is important to mention two lessons. Firstly, there is a significant discrepancy not only between Asian treaty practices but also between individual treaty practices. Secondly, it also underlines the need to look more carefully at the key provisions found in each investment treaty, such as ISDS. Clearly, India has granted a relatively easier access to ISA than China has: the former obtains a coefficient of 2.00 whereas China has the lowest of all Asian states with 1.30.

[39] The key advantage of the coefficient of variation is that it is directly comparable between countries. If we have a coefficient of variation of country A, say 30%, and of country B, say 60%, we can say that the heterogeneity of country B is twice as large as that of country A.

[40] Possible Condition: If the issue has been brought to a Chinese court, investors must be able to withdraw the case according to domestic law. Otherwise, they cannot submit the dispute to international arbitration. This rule of so-called "fork in the road" requires the investor to make a choice between submission to a domestic court or to international arbitration, and where the choice once made becomes final and irreversible. J. R. Weeramantry, "Investor-State Dispute Settlement Provisions in China's Investment Treaties", *ICSID Review* 27, no. 1 (24 September, 2012): 192–206, doi:10.1093/icsidreview/sis012.

4.3. The Tribunal lacks jurisdiction: explaining the "trompe l'oeil"

In general terms, Asian investments agreements, like the majority of BITs, do not provide entry rights to foreign investors into their territory (**Table 2**). Only a very limited number of IIAs, such as the Japan–Thailand PTA and the Indonesia–Japan PTAs, provide establishment rights. Most Asian BITs provide only a best-endeavour provision in regard to the admission of foreign investments (see the India–China BIT). Such IIAs follow the well-known admission clause model which allows the host country to apply any admission and screening mechanism for foreign investment which it may have in place and therefore determine the conditions on which foreign investment will be allowed to enter the country. In this case, in order to receive the protection of a bilateral investment treaty, the disputed investments have to be in conformity with the host state's laws and regulations, but usually investments in the host state will only be excluded from the protection of the treaty if they have been made in breach of the fundamental legal principles of the host country.[41] Furthermore, in *White v. India*, having regard to the views of commentators, it was noted that "encourage and promote" provisions are generally not seen to give rise to substantive rights (and they hold in any event that the specific obligations contended for by the claimant are not supported by the provision's general wording).[42]

[41] See, *e.g.*, Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July, 2008, para. 319.

[42] White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award, 30 November, 2011, paras 9.2.5 to 9.2.13.

Table 3. Variations on establishment in Asian IIAs

Treaty name	Regulation of entry of foreign investment	Type of regulation
India–China BIT (2007) Article 3.1	"Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and ***admit such investments in accordance with its laws and policy***."	Admission clause
Taiwan–Thailand (1996) Article 4.1	"Each Contracting Party ***shall seek and obtain approval from the authorities*** of its relevant place to the effect that investments by investors of the other relevant place and the returns therefore shall receive treatment which is fair and equitable and not less favorable than that accorded to investments by investors of any third party."	Treaties that require pre-approval of investments
Indonesia–Thailand BIT (1998) Article 2.1	"This Agreement shall apply to investments [...] to investments by investors of the Republic of Indonesia in the territory of the Kingdom of Thailand which have been ***specifically approved in writing by competent authorities of Thailand*** in accordance with the applicable laws and regulations of the Kingdom of Thailand and any laws amending or replacing them."	Treaties that require pre-approval of investments with a triple condition: approval, in writing by relevant authorities
Japan–Thailand PTA (2007) Article 93	"[…] each Party shall accord to investors of the other Party and to their investments treatment no less favourable than that it accords, in like circumstances, to its own investors and to their investments with respect to the ***establishment, acquisition and expansion of investments in its Area***. 2. Each Party shall, subject to its laws and regulations existing on the date of entry into force of this Agreement, accord to investors of the other Party and to their investments treatment no less favourable than that it accords, in like circumstances, to its own investors and to their investments with respect to the ***management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its Area***"	Pre-establishment right
Japan–Indonesia PTA (June 2007) Article 59 1.	"Each Party shall accord to investors of the other Party and to their investments treatment no less favourable than that it accords in like circumstances to its own investors and to their investments with respect to ***investment activities***." Art. 58 (g) "the ***term "investment activities" means establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments***".	Pre-establishment right
TPP Draft (June 2012) Articles 12.4 and 12.5	"1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with ***respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory***. 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors ***with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory***."	Pre-establishment right

Source: Elaborated by the author.

Among the Asian IIAs adopting the admission clause, some of them deserve a special mention in the way that they define the investment covered by the treaty because it has a significant impact on litigation. Indeed, a significant proportion of the small number of investment claims advanced against Asian states to date has failed on the question of jurisdiction involving a precondition of this sort. For instance, in *Yaung Chi Oo Trading v. Myanmar* it was noted that the 1987 ASEAN Agreement requires that the investment must be "specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement", and also it was found that if a state unequivocally and without reservation approves in writing a foreign investment proposal under its internal law, that investment must be taken to be registered and approved also for the purposes of the Agreement.[43] Further illustrations are given by, for instance, *Gruslin v. Malaysia*[44] and *Fraport v. Philippines*.[45] Such claims are taken into account in this paper's data, but they resulted only in an award on jurisdiction and not on the merits. These cases represent a specific kind of investment litigation which could be seen as a "forced perspective" on case law involving Asian states as they cannot result in any violation.

As it can be seen from **Table 3** above, when it comes to Asian IIAs practice (*e.g*., the Indonesia –Thailand BIT and the Taiwan–Thailand BIT), some states – Thailand, Malaysia, and Indonesia – delineate the operation of substantive investment treaty protections by reference to compliance with an element of domestic law regulating the entry of foreign investment. Thailand, for instance, often obliges foreign investors to show that they have been granted specific approval (see Thailand–Indonesia) which can, in extreme cases, explicitly require an approval in writing by a competent authority (see Thailand–Taiwan); this considerably reduces the chances that an investment will be protected by the BIT and hence increase the generation of litigation.

Without clear proof of compliance with this one discrete element across a possible spectrum of entry conditions, foreign investment will not be protected by the BIT. An affirmative act of approval in writing is thus a necessary and sufficient condition for conferring treaty protection. This mechanism allows a state to calibrate its investment treaty exposure to the approval (which will often take the form of registration) of foreign investment under domestic law. It also explains why states such as Indonesia, Thailand, and Malaysia, which have concluded a high number of IIAs, have not been subject to a high number of claims (see **Table 2** above). As a matter of fact, although Malaysia has concluded more IIAs than India or Pakistan, it has not faced much litigation, partly because of the requirement of a written approval.

[43] Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award, 31 March, 2003, paras 53 and 59.

[44] In Gruslin v. Malaysia for instance, the single arbitrator declined to exercise jurisdiction over portfolio investment by a Belgian national that had incurred loss as a result of Malaysian capital controls imposed in response to the 1998 East Asian Financial Crisis. The arbitrator ruled that general approval by the Malaysian stock exchange for the listing of shares held by the Belgian national did not meet the required standard of an "approved project" under the BIT in question. Philippe Gruslin v. The State of Malaysia (ICSID Case No. ARB/99/3) 27 November, 2000.

[45] Fraport v. Philippines considers, for jurisdictional purposes, that the "in compliance with" requirement is a jurisdictional limitation *ratione materiae* which relates the initiation of the investment and not the way it was subsequently conducted (although that may be relevant to a defence on the merits). Fraport AG Frankfurt Airport Services Worldwide, ICSID Case No. ARB/03/25, 16 August, 2007, paras 334, 339–340, and 344–345.

4.4. Deconstructing China's paradox

Very often, commentators on China's investment policy focus on the number of Chinese investment agreements. It is true that China has concluded a great number of such instruments. However China has faced only one claim to date. It has been said that foreign Awards would be difficult to be enforced in China which, however, a statement made on old Chinese Supreme Court interpretation, largely irrelevant today. As explained by China International Economic and Trade Arbitration Commission (CIETAC) Director in Boston, "an award made by an ICSID tribunal should be enforced without impediments and the enforcement of a foreign BIT award may also be realized."[46] Also frequently heard, the cultural argument is invoked to explain that China would be averse to litigation. It may probably play a role, or there are other possible ways for foreigners to deal with Chinese authorities. However, there are technical explanations for the Chinese paradox in having a great number of treaties but only one dispute to date. The *BITsel* quality indicator reveals that China has a very low coefficient of 1.58. This relatively weak protection granted to foreign investors means that the Chinese IIAs do not provide strong protection. If the protection is not strong, it also means that the host state responsibility is rather limited, thereby offering few opportunities for a claim. On top of this, China's *BITsel* ISDS Quality Indicator is also extremely low (1.30) compared with all other Asian states. It means that Chinese ISDS clauses are full of restrictions which do not easily allow investors to bring claims before arbitration. A careful reading of the *BITsel* quality indicator and the *BITsel* ISDS Quality Indicator can only result in the conclusion that most Chinese IIAs are not likely to generate litigation. The reasons are legal and technical.

Traditionally, China has restricted unilateral consent to arbitration to disputes on the amount of compensation to be granted in cases of expropriation.[47] Controversies on other matters, such as the existence of expropriation itself, or breaches of treatment obligations, were to be settled in domestic courts, or could be submitted to arbitration by mutual consent of the investors and national authorities (*e.g.*, China–Korea BIT, Art. 9.3).[48] A number of IIAs require the foreign investor to fulfill certain procedural requirements prior to filing the arbitration claim. The most usual procedural restrictions pertain to waiting periods[49] and the exhaustion of local remedies.[50]

[46] Jie Wang (2009) Investor-State Arbitration: Where Does China Stand? 32 Suffolk Transnat'l L. Rev. 496, 501. Wang also explains that "both the accession of China to the New York Convention and the above judicial interpretation by the Supreme People's Court took place long before China entered into the ICSID Convention. Article 236 of the Civil Procedure Law 2007 provides that if an international treaty concluded or acceded to by China contains provisions different from those of this Law, the provisions of the international treaty shall apply."

[47] *Ibid*.

[48] Iberdrola v. Guatemala Award finds that Guatemala's consent to arbitration does not cover all types of disputes relating to investments made within its territory, but, rather, that it is limited to disputes involving "matters regulated by" the treaty. Iberdrola Energia S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award, 17 August, 2012, paras 306 and 309.

[49] For intance, Bayindir v. Pakistan considered the claimant's failure to abide by a six-month waiting period, and it concluded that waiting periods are procedural, not jurisdictional. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November, 2005, para. 102.

[50] Kilic v. Turkmenistan Award finds that the requirement to submit the dispute to local courts is a condition precedent, compliance with which constitutes a jurisdictional requirement, and is not a question of admissibility. Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, 2 July, 2013, para. 6.2.9.

These types of requirements are commonly found in Sino–foreign BITs.[51] Prior to the launch of arbitration, foreign investors must hold negotiations with China's authorities with a view to reaching an amicable settlement. Should these negotiations fail to bring the parties to a commonly agreed solution within a six-month period, the investor may bring the claim to international arbitration. While the majority of Sino–foreign BITs require a six-month waiting period, a few agreements require somewhat shorter periods – three months: BITs with the Netherlands (2001), Germany (2003), and Finland (2004) – or, exceptionally, no waiting period at all in the case of Ghana (1989). The exhaustion of local remedies requires foreign investors to seek relief to their claim through domestic procedures before bringing the international dispute. Commonly, the investors would be required to file the claim before the competent domestic court. Should the domestic court fail to settle the dispute, or fail to reach a decision within a given period of time, the investor could be entitled to launch the international proceedings.[52]

New-generation Sino–foreign IIAs are instead free of the substantial restriction, granting unilateral consent to disputes concerning all disciplines of the agreement.[53] Only these new and recent IIAs are likely to generate litigation before IS on their own or through the application of most-favored-nation treatment (MFN) clauses in the wake of the Maffezini jurisprudence. Indeed, several Tribunals have applied MFN clauses to relieve claimants of having to comply with a "prior recourse" obligation.[54] However, some other Tribunals and arbitrators which have rejected attempts to apply MFN clauses to relieve claimants of having to comply with a "prior recourse" obligation[55] have created a schism across awards which may well become an issue when further exploring China's IIAs.

[51] However, not all waiting periods are requirements. Pan American Energy v. Argentina suggests, without deciding, that the text of the applicable BIT (since it uses the word "should") indicates that the consultation and negotiation phase is not mandatory. Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July, 2006, para. 41.

[52] The Argentina–Korea BIT of 1994 (Art. 8.3), provides in this regard that the dispute may be submitted to international arbitration " if one of the parties so requests, where, after a period of eighteen (18) months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision, or where the final decision has been made but the parties are still in dispute".

[53] China's BIT with Mozambique of 2001 (Art. 7.3.), for instance, provides that: "Any dispute, if unable to settled within six months after resort to [amicable] negotiations […] shall be submitted at the request of either Party to: International Center for Settlement of Investment Disputes (ICSID) [..]; or an ad hoc arbitral tribunal."

[54] Maffezini v. Spain applies the BIT's MFN clause to relieve the claimant of its non-compliance with the BIT's requirement of prior to the respondent's local courts before bringing an ICSID claim. Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January, 2000, paras 54–56. Later, HOCHTIEF v. Argentine Republic Decision on Jurisdiction, by a majority, holds that the BIT's MFN clause applies to dispute settlement and relieves the claimant of having to comply with the prior recourse provision of the treaty. HOCHTIEF Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October, 2011, para. 75.

[55] Wintershall v. Argentina holds that it is one thing to stipulate that the investor is to have the benefit of MFN treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the settlement resolution clause of the very same BIT when the Parties have not chosen language in the MFN clause which shows an intention to do this. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, 8 December, 2008, paras 167–168. Also, HOCHTIEF v. Argentine Republic Separate and Dissenting Opinion of J. Christopher Thomas, Q.C. holds that the MFN clause in the particular BIT before the tribunal does no apply to access to international jurisdiction under the arbitration provision. HOCHTIEF Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Separate and Dissenting Opinion of J. Christopher Thomas, Q.C., 24 October, 2011, paras 74 and 80–83.

5. Conclusion

First of all, a comment must be made on investment arbitration provisions as for the current investment treaties negotiated. In the TPP context, Australia has also rejected investor-state dispute settlement in the TPP and the question which arises here is how far that view will influence the other TPP parties. Australia is trying to persuade some TPP members to do away with ISDS in the investment chapter. The reason for doing so, according to Australia, is that ISDS is not an important factor to secure FDI into TPP states and they confirm this through an independent study. This is an interesting issue for the developing member of the TPP to seriously consider and they probably need to do a study to confirm or to rebut what Australia is saying.[56] It is too early to say that Australia's change in policy has immediately affected other states.[57]

The analysis conducted in this paper has been aimed at providing a primary analysis of investment litigation against Asian states. All investment agreements concluded by at least one Asian country have been reviewed and contributed to various aspects of the analysis. The developments which are taking place show that Asian states are increasingly negating IIAs (in the form of BITs or PTAs) which form a dense network of obligations. Although, few cases were brought against Asian states by 2009, the pattern has changed since 2010, with a sharp increase over the last three years.

Although some IIAs (for instance, those concluded by China before 2005 or by Thailand, Indonesia, and Malaysia which require the pre-approval of investments) have generated few disputes for technical reasons, it is rather predictable that Asian states are currently entering an era in which foreign investors are likely to multiply claims. Such a trend requires host states to be prepared to litigate while assessing the benefits of current investment treaties negotiations with, for instance, the EU, the US and Canada.

In this connection, the principle of MFN treatment is of paramount importance to the Asian investment regime as it may create opportunities for investors against these states that have developed rather restrictive provisions. Equally important in terms of future litigation, the more a country has IIAs, the more MFN might play an important role in the future. Malaysia, China and Vietnam are, in this regard, the Asian states that should pay the greatestattention to MFN since the three have already granted rights to a great number of their party investors and investments.

[56] Much of the debate regarding the ISDS provisions of the KORUS FTA is viewed as more an outgrowth of political posturing prior to the parliamentary and presidential elections that are looming next year rather than of legal or economic argument. But the developments in Korea have potentially lasting effects throughout our (Asia-Pacific) region and beyond (especially in the context of Japan joining TPP negotiations).

[57] In any case, one wonders what the alternative to ISDS should be. ISDS aimed to take these cases out of the (arbitrary) political realm of diplomatic protection on the one hand, and out of (non-neutral) domestic courts on the other. Everyone would agree that the ISDS process has deficiencies, and that the substantive rules it applies need refinement, but one would prefer to improve it rather than to abandon it.

Annex 1. The 48 Asian states (Asian Development Bank membership as of August, 2013)

Regional Members

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

TURKMENISTAN	2000
TUVALU	1993
UZBEKISTAN	1995
VANUATU	1981
VIETNAM	1966

NON-REGIONAL MEMBERS	
AUSTRIA	1966
BELGIUM	1966
CANADA	1966
DENMARK	1966
FINLAND	1966
FRANCE	1970
GERMANY	1966
IRELAND	2006
ITALY	1966
LUXEMBOURG	2003
THE NETHERLANDS	1966
NORWAY	1966
PORTUGAL	2002
SPAIN	1986
SWEDEN	1966
SWITZERLAND	1967
TURKEY	1991
UNITED KINGDOM	1966
UNITED STATES OF AMERICA	1966

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