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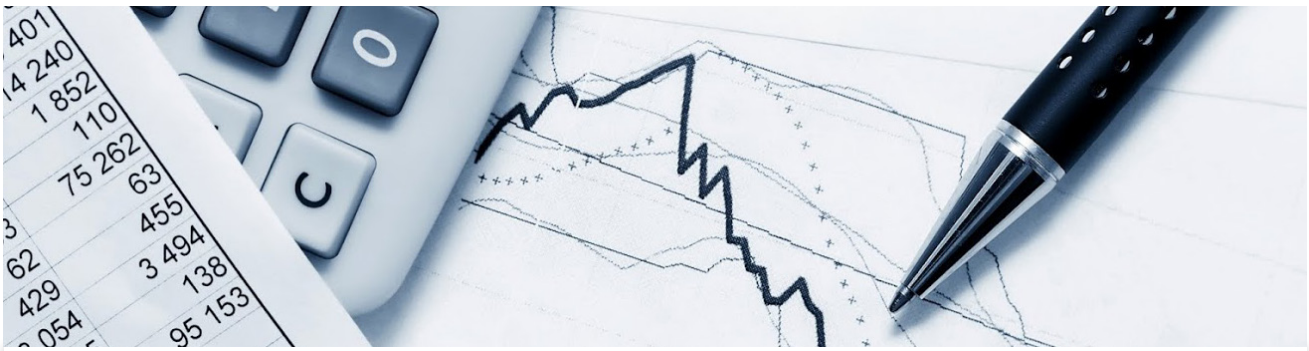

The Role of Pacific Rim FTAs in the Harmonisation of International Investment Law: Towards a Free Trade Area of the Asia-Pacific

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ABSTRACT

The paper observes that the fragmented international investment law regime is moving toward harmonisation. In the near future, five major agreements could govern a very substantial share of global investment: a United States-China bilateral investment treaty (BIT), a European Union-China BIT, and three mega-regional free trade agreements—the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP), and the Regional Comprehensive Economic Partnership (RCEP). There is also increasing convergence in state practice reflected in recent investment treaties.

Against this background, the authors argue that the Pacific Rim region is well placed to serve as the centre of gravity for further harmonisation. First, recent state treaty practice in the Pacific Rim reflects a significant — and increasing — amount of support for investment liberalisation. Second, investment law harmonisation in the region is expected to be achieved through regional free-trade agreements, rather than bilateral investment treaties. In particular, the TPP and the RCEP agreements can serve as pathways to a plurilateral Free Trade Area of the Asia-Pacific (FTAAP) agreement—which potentially would include the United States, China, India, Japan, Korea, Canada, Mexico, Australia, New Zealand, and the 10 ASEAN states.

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ABBREVIATIONS AND ACRONYMS

ABAC	APEC Business Advisory Council
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
CIL	Customary international law
CTI	APEC Committee on Trade and Investment
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and equitable treatment
FTA	Free-trade agreement
FTAAP	Free Trade Area of the Asia-Pacific
FTC	NAFTA Free Trade Commission
GATS	General Agreement on Trade in Services
GVC	Global value chains
ICC	International Chamber of Commerce
IEG	APEC Investment Experts' Group
ICT	Information and communications technology
IFAP	APEC Investment Facilitation Plan
IIA	International investment agreement
IMF	International Monetary Fund
ISDS	Investor-state dispute settlement
MFN	Most-favoured nation
MNEs	Multinational enterprises
MST	Minimum standard of treatment
NAFTA	North American Free-Trade Agreement
NGO	Non-governmental organisation
NT	National treatment
P4	Trans-Pacific Strategic Economic Partnership Agreement
PECC	Pacific Economic Cooperation Council
RCEP	Regional Comprehensive Economic Partnership
RTA	Regional trade agreement
TPP	Trans-Pacific Partnership
TRIMS	Trade-Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
US	United States
USTR	United States Trade Representative
WTO	World Trade Organization

INTRODUCTION

The fragmented international investment law regime — which is composed of thousands of treaties — is harmonising in two fundamental respects. First, in the near future, five agreements could govern a very substantial share of global investment: a United States (US)-China bilateral investment treaty (BIT), a European Union (EU)-China BIT, and three mega-regional free-trade agreements (FTAs)— the Transatlantic Trade and Investment Partnership (TTIP); the Trans-Pacific Partnership (TPP); and the Regional Comprehensive Economic Partnership (RCEP).

Second, in addition to the development of a small number of major agreements, a convergence in state practice across treaties also is contributing to the harmonisation of international investment law. Such convergence is reflected in a number of areas of recent treaty practice. Specifically, recent treaties often include: liberalisation commitments; detailed clarifications of substantive obligations (such as the content of the fair and equitable treatment obligation (FET), which does not establish a blanket obligation to avoid "unfair" treatment in an ordinary sense, and the compensation standard for expropriation, which should be prompt, adequate, and effective); provisions authorising host states to deny treaty benefits to shell companies (to avoid so-called treaty shopping); and regulatory transparency commitments, which obligate parties to make investment-related laws and regulations publicly available.

As the international investment law regime harmonises, the Pacific Rim region, for several reasons, is particularly well placed to serve as the regime's centre of gravity. First, recent state treaty practice in the Pacific Rim reflects a significant — and increasing — amount of support for investment liberalisation. The North American Free-Trade Agreement (NAFTA) states; the Pacific Alliance states; the Association of Southeast Asian Nations (ASEAN) States; and China have included market access protections in recent agreements.

Second, investment law harmonisation in the Pacific Rim largely would be achieved through the negotiation of FTAs, rather than BITs. Achieving investment law harmonisation through FTAs is a timely development, given the ability of FTAs — which include investment chapters alongside other chapters, such as trade in services and trade in goods — to develop complementary trade and investment disciplines that can be applied to increasingly intertwined trade and investment activities. FTAs also provide additional opportunities for investment liberalisation by setting out reserved sectors in a single set of annexes, which apply both to investment and trade in services activities.

Third, as first observed by Asia-Pacific Economic Cooperation (APEC) in 2014, the TPP and the RCEP agreements can serve as pathways toward an even larger regional instrument: a Free Trade Area of the Asia-Pacific (FTAAP) agreement. APEC economies have contemplated such an agreement for many years, and APEC has begun to take concrete steps supporting the development of an FTAAP following the issuance in 2014 of The Beijing Roadmap for APEC's Contribution to the Realization of the FTAAP. APEC recently reaffirmed its commitment to an FTAAP in the 2015 APEC Leaders Declaration, where the heads of state "reiterate[d]" their "belief that the FTAAP should be pursued as a comprehensive free trade agreement by building on ongoing regional undertakings." With respect to the development of an FTAAP investment chapter in particular, the APEC Investment Experts' Group (IEG) — which has worked on investment initiatives since 1994 — could play an important role.

The TPP and RCEP agreements would be very significant "paths" to an FTAAP. The TPP agreement covers 12 APEC member economies,[1] representing almost 40 percent of global GDP and 28 percent of global foreign direct investment (FDI) inflows in 2014.[2] An RCEP agreement would cover the 10 ASEAN members[3] as well as Australia, China, India, Japan, Korea, and New Zealand, representing 30 percent of global FDI inflows in 2014.[4] The resulting FTAAP — depending on the size of the negotiating group — would represent approximately 50 percent of global FDI inflows.

Fourth, with respect to the development of an FTAAP, a US-China BIT could bridge remaining differences between the TPP (which includes the US but not China) and the RCEP (which includes China but not the US).

Taken together, these key elements — the TPP and the RCEP agreements, a US-China BIT, recent ASEAN and Pacific Alliance treaty practice, the development of an FTAAP, and a potential role for APEC in supporting that development — establish the Pacific Rim region as the natural centre of gravity for a rapidly harmonising international investment law regime.

1 Original P4 Agreement signatories, Brunei-Darussalam, Chile, New Zealand, and Singapore (2005); plus the US, Australia, Peru, and Vietnam (joined negotiations in 2008); Malaysia (2010); Canada and Mexico (2012); and Japan (2013). The Trans-Pacific Partnership was signed in Auckland on 4 February, 2016.

2 United Nations Conference on Trade and Development, World Investment Report 2015, p. 6

3 ASEAN member states are Brunei-Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

4 United Nations Conference on Trade and Development, World Investment Report 2015, p. 6

HARMONISING A FRAGMENTED INTERNATIONAL INVESTMENT LAW REGIME

An investment regime that is composed of thousands of investment treaties can fairly be characterised as "fragmented."[5] But, a fragmented regime need not be an "incoherent" regime.[6] As observed by Stephan Schill, a fragmented investment treaty regime nevertheless can give rise to "a substantive rather than deliberative multilateralism"; the regime can "multilateraliz[e] on the basis of bilateral treaties" through the development of "increasingly uniform standards of investment protection[.]"[7]

As discussed below, active treaty practice — both bilateral and regional — indeed has brought the international investment regime substantially closer to uniformity. But, such convergence is far from complete, and, in our view, the potential remains for a much greater level of harmonisation, to be achieved through the completion of the major treaty negotiations outlined above: a US-China BIT, and EU-China BIT, and the TTIP, TPP, and RCEP FTAs. Those major agreements, in turn, have been made possible by the active, and converging, bilateral and regional treaty practice of the individual states negotiating them, in particular the NAFTA states, the ASEAN states, the Pacific Alliance states, and China.

One key aspect of a fragmented treaty regime is the "'overlapping, supporting, and possibly conflicting'"[8] obligations that arise when treaty proliferation creates the "spaghetti bowl" effect, which, as recently characterised by APEC, poses "complex new challenges to regional economic integration and to business."[9] The less predictable outcomes associated with the spaghetti bowl effect are particularly significant in the investment arbitration context, where divergent interpretations of substantive obligations and procedural requirements by tribunals have been criticised frequently.[10]

The conclusion of US-China and EU-China BITs, the three mega-regional FTAs (TTIP, TPP, and RCEP), and even an FTAAP, would not eliminate the fragmented nature of the international investment law regime. In some instances, those treaties could further complicate — rather than simplify — the regime by adding another layer of rules to an existing investment law structure.[11] Divergent interpretations of substantive obligations and procedural requirements by tribunals likely would continue, at least to some extent.[12]

Nevertheless, the conclusion of those major agreements would harmonise the international investment law regime to a very significant extent. Based on recent state practice, the agreements likely would reflect significant convergence

5 *See, e.g.,* Karl P. Sauvant and Federico Ortino. (2013) Improving the International Investment Law and Policy Regime: Options for the Future, (Ministry for Foreign Affairs of Finland), p. 28 (characterising the international investment regime as "highly fragmented").

6 *Cf.* UNCTAD IIA Issues Note No. 5, Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-making (July 2013) ("At the international level, policy-making faces multiple challenges . . . [including] how to deal with a fragmented treaty regime characterized by overlaps and incoherence").

7 Stephan W. Schill. (2009) "Multilateralizing Investment Treaties through Most-Favored-Nation Clauses," 27 Berkeley J. Int'l L. 496, 500.

8 Peter K. Yu. (2011) Sinic Trade Agreements, 44 U.C. Davis Law Review 953, 978 (quoting Simon Lester and Bryan Mercurio. (2009) Introduction to Bilateral and Regional Trade Agreements: Case Studies, at 2).

9 Beijing Roadmap for APEC's Contribution to the Realization of the FTAAP, attached as Annex A to the 2014 APEC Leaders' Declaration. The costs and complexity associated with overlapping treaties also has been referred to as the "noodle bowl." *See, e.g., The Economist (2009) The Noodle Bowl* ("The more overlapping deals there are, the more complex the rules and the higher the costs. Those who follow Asia's FTA mania refer to this as the 'noodle bowl'").

10 *See, e.g.,* Anna Joubin-Bret. (2015) "Why we need a global appellate mechanism for international investment law," Columbia FDI Perspectives, No. 146 (referring to "concerns about the inconsistency of awards rendered by investment-treaty arbitration tribunals"). As one example of divergent interpretations by investment arbitration tribunals, in the context of a "legitimate expectations" obligation, *see Glamis Gold Ltd. v. United States*, UNCITRAL, Award (8 June 2009), 799 (a "threshold condition" for a legitimate expectations claim is the "active inducement of a quasi-contractual expectation"); *PSEG Global Inc. v. Republic of Turkey,* ICSID Case No. ARB/02/5, Award (19 Jan. 2007), 241 ("[l]egitimate expectations by definition require a promise of the administration on which the Claimants rely"); *Saluka Investments B.V. v. Czech Republic,* UNCITRAL, Partial Award (17 March 2006), 329 ("the Claimant's reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government," but rather could be based on an expectation that the state would act in "a consistent and even-handed way"); *Joseph C. Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 January 2010), 267 (the "Claimant could expect a regulatory system for the broadcasting industry which was to be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions").

11 *See, e.g.,* Wolfgang Alschner. (2014) "Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?" 17 J. Int'l Econ. L. 271, 275 ("Regional investment agreements typically add an extra treaty layer to the already existing BITs resulting in vertical overlap of investment treaties for the contracting parties").

12 In some instances, even identical treaty language has been interpreted in strikingly different ways by investment arbitration tribunals. For example, in the context of NAFTA Article 1105(1), *compare Glamis, supra* note [10], 22 ("the standard for finding a breach of the customary international law minimum standard of treatment remains as stringent as it was under *Neer"), with Bilcon v. Canada,* UNCITRAL, Award on Jurisdiction and Liability (17 March 2015) (characterising as "particularly apt" the *Waste Management* interpretation of NAFTA Article 1105(1), under which "'arbitrary, grossly unfair, unjust or idiosyncratic'" conduct violates the provision) (quoting *Waste Management Inc. v. Mexico,* ICSID Case No. ARB(AF)00/3 (30 April 2004), 98).

on many key investment law issues. The agreements also would include updated provisions that likely would be viewed favourably by investors, such as market access protections, more developed provisions on performance requirements and state-owned enterprises, and a wider selection of arbitration rules. In addition, similar to the current state of NAFTA Chapter 11, US-CAFTA-DR Chapter 10, and Energy Charter Treaty case law, a substantial body of jurisprudence could develop under each of the major agreements, with the potential for some form of appellate body oversight.

We agree with Professor Schill that a regime composed of "uniform rules on investment protection" would be preferable to a "conglomerate of fragmented and diverging bilateral rules."[13] An investment law regime governed in significant part by five agreements — a US-China BIT, an EU-China BIT, and the TTIP, TPP, and RCEP agreements — almost certainly would reflect substantial movement in the direction of uniformity. The opportunity to then achieve investment law harmonisation on a regional, Pacific Rim level through the development of an FTAAP — which could cover as many as 25 economies representing more than half of global FDI inflows – is both significant and realistic, and thus merits close consideration.

INVESTMENT LAW HARMONISATION THROUGH FTAS: A TIMELY REFLECTION OF TRADE/INVESTMENT CONVERGENCE

The last global financial crisis caused both trade and investment flows to plummet. Although investment flows have been recovering since then, they have been growing more slowly and remain below pre-crisis levels (global FDI inflows were USD 1.397 trillion in 2005-07 (pre-crisis) and USD 1.228 trillion in 2014).[14] This situation can be improved by different factors, such as strengthening national policies to enhance business climates, facilitating investments, and removing obstacles and barriers to FDI.[15] However, such progress is hindered by the fragmentation of FDI regulation at the international level. The fragmentation, and thus greater complexity, of investment regulation raises difficulties not only for businesses, but also for countries administering these rules. Even the G20 has acknowledged that while the active negotiation of regional trade agreements (RTAs) and BITs "has promoted trade and investment liberalisation and facilitation, it also results in 'fragmentation' in global trade and investment governance regimes, to which [the] G20 needs to respond."[16]

On the other hand, the emergence of global and regional value chains (GVCs) in the global marketplace has increased the relevance of having intertwined trade and investment policies to boost economic growth to its full potential. The development of cross-border supply networks, the evolution of multinational enterprises (MNEs) from asset-based corporations to network-based businesses, the inclusion of services into GVCs, the innovations in information and communications technology (ICT), and the increasing fragmentation of production have highlighted the interrelation between FDI and trade. With the current economic slowdown, FDI and global trade have become crucially important for fostering economic growth by expanding the productive capacity of the economy, creating jobs, increasing income, and transferring knowledge.

Against this background, policy-makers face new challenges for developing the necessary tools to reap the benefits of FDI for boosting economic growth. The ICT revolution has internationalised supply chains, which has created a tight supply side linkage between trade and FDI.[17] This increasing complexity is emerging directly from the activities of MNEs and their business strategies that include the expansion of networks of parents and vertically related subsidiaries, through which flow goods — intermediate and final — services, capital, technology, and cross-border data. These developments reaffirm that trade and investment are no longer separate issues, but two sides of the same coin.

In this context, at the Antalya Summit in 2015, the G20 leaders indicated that the trade ministers meeting would be held regularly and a supportive group would be established. In accordance with that guidance, in January 2016, China launched the G20's trade and investment permanent working group, which highlights the importance of FDI and global trade not only in the Pacific Rim, but also globally.[18]

13 Schill, *supra* note [7], at 500.

14 United Nations Conference on Trade and Development, World Investment Report 2015, p. 18

15 According to the G20 declaration for 2015 priorities, one of the main policy goals is "…bringing together the reforms that tangibly improve the investment climate and to unlock private sector investments both for infrastructure and SMEs…"https://g20.org/wp-content/uploads/2014/12/2015-TURKEY-G-20-PRESIDENCY-FINAL.pdf

16 Message from President Xi Jinping on 2016 G20 Summit in China http://www.g20.org/English/China2016/G202016/201512/P020151210392071823168.pdf

17 World Economic Forum, Foreign Direct Investment as a key driver for Trade, Growth and Prosperity: The case for a Multilateral Agreement on Investment

18 Ministry of Commerce, People's Republic of China (http://english.mofcom.gov.cn/article/newsrelease/significantnews/201602/20160201251500.shtml)

The fragmentation caused by the proliferation of BITs and FTAs raises the question of whether the time has finally come to build a single international regime, which would allow countries to apply one set of rules to FDI flows and investment in general. Such harmonisation could be achieved incrementally, relying significantly on regional and plurilateral treaty practice, which recently has been active in the context of so-called mega-regional trade agreements (TPP, TTIP, and RCEP).[19] Achieving investment law harmonisation primarily through FTAs, rather than BITs, would be particularly significant, for two reasons:

a) First, FTAs and RTAs better address the interaction between trade and investment and better acknowledge the new complexities of the global trading system by incorporating new investment disciplines and provisions on trade in goods, trade in services, intellectual property, and the digital economy. FTAs and RTAs combine and balance those different aspects of FDI and global trade. This new reality has been better captured in next-generation FTAs, which link investment disciplines with all other "trade-side" sections of the agreement.[20]

b) Second, achieving harmonisation largely through FTAs creates significant opportunities for investment liberalisation, given that reserved/carved-out sectors typically are negotiated as part of a single set of annexes that apply to both services and investment. Under such a framework, momentum for services liberalisation can have a cascading effect on investment liberalisation. As discussed below, active FTA treaty practice in the Pacific Rim region could contribute significantly to such momentum.

The emergence of GVCs has made evident the necessity of a coherent and multilateral set of rules for governing not only investment, but also interactions with trade disciplines. In this context, RTAs and other plurilateral initiatives can play a key role in the Asia Pacific region in further harmonising investment provisions and reaching the full potential of FDI, given that trade provisions are better aligned with investment in the context of FTAs and RTAs, rather than BITs, which do not include trade-related aspects. The negotiation of mega-regional agreements, such as the TPP and the RCEP reflect an important effort to achieve harmonisation of investment provisions in the Pacific Rim.

THE PACIFIC RIM AS THE CENTRE OF GRAVITY FOR A RAPIDLY HARMONISING INTERNATIONAL INVESTMENT LAW REGIME

The Pacific Rim region is well positioned to serve as the centre of gravity for a rapidly harmonising 21st century international investment law regime. Significant gains in investment liberalisation are being made in the region; recent treaty practice primarily has occurred through FTAs rather than BITs; the TPP and RCEP agreements can serve as pathways to an FTAAP; a US-China BIT can bridge remaining differences between the TPP and the RCEP; and APEC — including the APEC IEG — can play a key role in supporting harmonisation efforts in the region.

SIGNIFICANT MOMENTUM FOR INVESTMENT LIBERALISATION

Over the past decade, international investment agreements (IIAs) have become increasingly controversial, and their legitimacy has been challenged, mainly owing to the protection aspect of those treaties, including investor-state dispute settlement (ISDS). More generally, civil society and

19 One advantage of approaching investment law harmonisation at a regional level is the regional orientation of many production networks. *See,* e.g., Sherry Stephenson. (2016) Trade Governance Frameworks in a World of Global Value Chains: Policy Options, E15 Expert Group on Global Value Chains: Development Challenges and Policy Options – Policy Options Paper. E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, at 6 ("existing evidence tends to show that most production networks are regionally oriented and concentrated around three hubs: North America, Europe, and East Asia").

20 *See,* e.g., Roger Alford. (2013) The Convergence of International Trade and Investment Arbitration, 12 Santa Clara J. Int'l L. 35, 39 (observing that preferential trade agreements with investment chapters "mitigate the risks associated with trade and investment that are critical for successful global chains of supply. The preferential trade component of such agreements makes it comparatively cheaper for multinational corporations to secure supply chain inputs from the host country, while the investment protections protect against the political risks associated with large capital investments").

other stakeholders have voiced broader concerns about the impacts of policies that attract FDI on the liberalisation of domestic regimes through measures such as privatisation and deregulation. However, as the scrutiny of ISDS intensifies, an opportunity arises to highlight the liberalisation aspect of IIAs in a positive manner.

Concurrent with the rapid expansion of "post-establishment model" BITs in the early 1990s (which accorded protections to investments once they were established), two main exceptions, which included pre-establishment/market access rights, appeared: The World Trade Organization (WTO) General Agreement on Trade in Services (GATS) and the NAFTA. Those agreements include market access commitments that cover, respectively, a commercial presence in the territory of the other country for investment in the services sector (mode 3 GATS) and the pre-establishment phase of foreign investments generally, including investments in services (NAFTA).

In general terms, FTAs that have followed or have been based on the NAFTA approach do not treat investment in an isolated manner and have regulated all aspects of it, by including provisions on environment, labour standards, and services. For example, in NAFTA, services that do not entail a permanent commercial presence (and thus do not entail an investment) are regulated in a specific chapter, which disciplines only cross-border trade, while mode 3 — commercial presence — is captured by the investment chapter. The latter has the advantage of establishing one set of rules for investments across all economic activity, including investment in services.[21]

Under the NAFTA approach, countries made their liberalisation commitments through the listing of non-conforming measures for services and investments, including standstill and ratchet provisions. The agreements also provide countries with the opportunity to safeguard policy space in sectors where they want to keep future policy space, regardless of their current non-conforming measures (in practice this has been referred to as "annex II" of the services and investment chapters of the FTA).

NAFTA was the first to set such an approach on a regional basis and, 20 years later, has become the model for many countries beyond its original membership, including several Latin American countries. Hence, the pre-establishment model is now the preferred approach not only for Mexican FTAs, but also for FTAs signed by Chile and Peru, all of which are today TPP signatories. The Pacific Alliance, which is discussed later in this paper as a harmonisation example, incorporates the same structure. Other TPP members, such as Australia and New Zealand, also have a similar approach when negotiating FTAs, and in general many of the countries that have already negotiated an FTA with the US today follow a similar approach.

This is also particularly true in current treaty negotiations in the Pacific Rim, as these regional negotiations do not only include investments as such, but also incorporate, *inter alia*, disciplines on cross-border trade in services, financial services, e-commerce, state-owned enterprises, and labour and environment provisions. This constitutes a healthy attempt to address this complex global trade scenario where those issues are interrelated, acknowledging that FDI does not happen in a vacuum. The potential for the two Pacific Rim mega-regional FTAs — the TPP and the RCEP — to serve as pathways to an even larger FTAAP is discussed below.

THE TPP AND RCEP AGREEMENTS AS PATHWAYS TO AN FTAAP

In 2014 and 2015, the APEC economic leaders "reaffirmed" their commitment to an FTAAP and supported "The Beijing Roadmap for APEC's Contribution to the Realization of the FTAAP," which called for pursuing an FTAAP "by building on current and developing regional architectures" and identified the TPP and RCEP as "possible pathways to the FTAAP." The Beijing Roadmap observed that the "proliferation of regional RTAs/FTAs has created favorable liberalising momentum," but, at the same time, has "resulted in a 'spaghetti bowl' effect," which poses "complex new challenges to regional economic integration and to business."[22] The APEC economic leaders agreed to "[l]aunch a collective strategic study on issues related to the realisation of the FTAAP by building on and updating existing studies and past work[.]"[23]

Notably, APEC economies have contemplated regional integration generally, and an FTAAP in particular, for many years. More than 20 years ago, in 1994, APEC economic leaders announced their commitment to achieve "free and open trade and investment in the Asia-Pacific no later than the year 2020." Earlier efforts on investment included several iterations of APEC's Investment Facilitation Plan (IFAP),[24] the negotiation of the "APEC Model Measures for Investment Agreements" at the end of the last decade (as a set of non-binding recommendations for the content of investment agreements within the APEC region) and a 2011 update of the "APEC Non-Binding Investment Principles" endorsed by all APEC economies.[25] Advancement and capacity-building on investment disciplines and standards at APEC is led by the APEC IEG, which, since 1994, has met two to three times each year.[26]

21 The exception to this rule is financial services, since investment in financial institutions is governed by a specific chapter covering both financial sector investments and cross-border trade in financial services.

22 Beijing Roadmap for APEC's Contribution to the Realization of the FTAAP, attached as Annex A to the 2014 APEC Leaders' Declaration.

23 *Ibid.*

24 http://publications.apec.org/publication-detail.php?pub_id=1413

25 Attached as Annex 2

26 http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Investment-Experts-Group.aspx

Over the past 20 years, the IEG, which comprises experts on investment and officials responsible for investment policies in all APEC member economies, has worked on initiatives to promote a favourable investment climate, including ensuring more transparent dispute resolution mechanisms and simplified business regulations. More recently, the IEG has expanded to stimulate investment on social and environmental sustainability, and continues to assist APEC's Committee on Trade and Investment (CTI) to encourage and facilitate free and open investment in the region. If formal FTAAP negotiations are further advanced, the IEG's efforts could also play a significant role in advancing the investment dimension of the FTAAP.

The Pacific Economic Cooperation Council (PECC)—a "non-profit, policy-oriented, regional organization dedicated to the promotion of a stable and prosperous Asia-Pacific" and "one of the three official observers of the APEC process"[27] — recently analysed alternative roles that the RCEP and TPP agreements could play as pathways to an FTAAP. According to the PECC, the "simplest paths" to an FTAAP "would involve the conclusion of the RCEP, the coming into force of TPP and the enlargement of one or the other to cover the region."[28] Another potential path, however, "would be to create a new 'umbrella agreement' to complement RCEP and the TPP."[29]

For any path to an FTAAP, an "early, difficult choice" would concern "the definition of an FTAAP negotiating group."[30] "RCEP membership is based on ASEAN's FTA partners, while the TPP represents self-selected APEC economies."[31] Four non-members of APEC are participating in the RCEP negotiations,[32] while four APEC members are not participating in either the TPP or RCEP processes.[33]

As outlined by the PECC, three potential approaches to defining FTAAP membership would be as follows: (i) limit membership to the 21 APEC member economies, "since the FTAAP concept arose in APEC," (ii) as a "more inclusive option," include both the 21 APEC member economies and the four non-members of APEC that are participating in the RCEP negotiations, and (iii) limit membership to the 17 economies that are both APEC members and participating in the TPP and/or RCEP negotiations: "this group has demonstrated the greatest commitment to regional trade and has accumulated the most experience with regional and sub-regional institutions."[34] Under the first approach, the FTAAP member countries' combined FDI inflows would be USD 652 billion (53 percent of world FDI inflows), based on 2014 figures; under the second approach, combined FDI inflows would be USD 690 billion (56 percent of world FDI inflows); under the third approach, combined FDI inflows would be USD 525 billion (43 percent).[35]

One factor weighing in favour of limiting FTAAP membership to APEC member economies would be APEC's central role over the past 20 years in supporting the development of an FTAAP. Reinforcing that central role by limiting FTAAP membership to APEC member economies could heighten prospects for appropriate APEC groups (in particular, the CTI and IEG) to play an active role in supporting further development of an FTAAP.

Also with respect to the potential participation of non-APEC members in the development of an FTAAP, India merits close attention. An RCEP negotiating state that is not a member of APEC — but which recently expressed interest in the possibility of joining[36] — India recently issued a model investment treaty that reflects very significant departures from recent investment treaty practice.[37] Another RCEP negotiating state that recently has adopted a distinctive approach to investment issues, Australia, also must be considered. Australia's case-by-case approach to ISDS most recently was reflected in the China-Australia Free Trade Agreement, in which the parties agreed to ISDS with respect to a limited set of obligations while, at the same time, agreeing to "conduct a review of the investment legal framework between them" and to subsequently "commence negotiations on a comprehensive investment chapter."[38]

With the notable exceptions of India and Australia,[39] recent treaty practice by many TPP parties and RCEP negotiating states reflects substantial investment law convergence in the Pacific Rim region, and thus improves prospects for the TPP and RCEP to serve as key building blocks for an FTAAP

27 PECC, State of the Region 2014-2015, Introduction

28 PECC, State of the Region 2014-2015, p. 31

29 *Ibid.*

30 PECC, State of the Region 2014-2015, p. 36

31 PECC, State of the Region 2014-2015, pp. 36-37

32 Cambodia, India, Laos, and Myanmar. PECC, State of the Region 2014-2015, p. 36

33 Papua New Guinea, Hong Kong, Russia, and Chinese Taipei. PECC, State of the Region 2014-2015, p. 36

34 PECC, State of the Region 2014-2015, pp. 36-37.

35 *See* Annex 1

36 *See* Kevin Rudd and Sunil Kant Munjal. (2013) "Why APEC Needs India," The Straits Times. (Referring to India's "newly expressed interest in APEC").

37 *See, e.g.,* Grant Hanessian and Kabir Duggal. (2015) The 2015 Indian Model BIT: is this change the world wishes to see? ICSID Review.

38 China-Australia Free Trade Agreement Article 9.9

39 Like India and Australia, the European Commission recently supported a significant departure from recent investment treaty practice by recommending the establishment of a "permanent investment court with tenured judges." Concept Paper, Investment in TTIP and beyond—the path for reform, p. 11, *available at* http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF. Such a departure from existing investment treaty practice likely will raise challenges for TTIP investment chapter negotiators. More generally, by adopting such a distinctive approach to investment, the EU, like India and Australia, has rendered the achievement of investment law harmonisation in the near term more challenging.

agreement. Regarding investment liberalisation, recent state practice increasingly adopts a negative list approach and includes market access commitments (including recent practice by China — in the Shanghai Free Trade Zone and in a joint US-China statement on their BIT negotiations — as well as recent practice by Chile, Korea, Peru, and Singapore). Substantive obligations also show trends of convergence; for example, with respect to FET, current practice reflects consistent efforts to clarify the scope of the standard, including language confirming that the obligation (i) is not violated by the mere breach of separate provisions found in other agreements, and/or (ii) does not include protections beyond the scope of customary international law. On transparency, Pacific Rim states have included regulatory transparency provisions in many recent agreements and, increasingly, have included additional provisions on transparency in their dispute settlement procedures. A historic overview, and particular examples of recent treaty practice by TPP parties and RCEP negotiating states, and examples from the TPP final text, are discussed below.

RECENT TREATY PRACTICE BY TPP PARTIES

For the negotiation of this FTA, TPP members have followed the NAFTA approach for the inclusion of investment disciplines.[40]

For some of the TPP members, this negative list approach does not constitute a departure from their past investment policy, given that Australia, Canada, Chile, Mexico, Peru, and Singapore already have negotiated investment chapters with the US following this structure of negotiations. Also, Japan and New Zealand have experience negotiating with the same approach. However, a major shift in investment treaty practice happened for countries, such as Brunei Darussalam,[41] Malaysia, and Vietnam. For these countries, the TPP was the first time they followed a negative list approach and included pre-establishment commitments based on non-discriminatory treatment — national treatment (NT) and most-favoured nation (MFN) treatment — for foreign investors and their investments.

THE GENESIS OF THE TRANS-PACIFIC PARTNERSHIP

The Trans-Pacific Strategic Economic Partnership (P4) Agreement, which came into force in January 2006 and was negotiated between Brunei-Darussalam, Chile, New Zealand, and Singapore, is the first multiparty FTA linking Asia, the Pacific, and the Americas.[42] These negotiations were launched by Chile, New Zealand, and Singapore on the sidelines of the APEC Leaders' Summit in 2002 in Los Cabos, Mexico. Subsequently, Brunei Darussalam joined as a member in 2005 after attending a number of rounds as an observer of the negotiation process.

In addition to the goal of boosting trade and investment among P4 countries, the FTA was negotiated with the intention of becoming an important vessel for economic integration in the Asia-Pacific region beyond its original member countries, and hence adopted a framework that would welcome new membership after the entry into force of the agreement. In this context, the P4 was conceived as an "open agreement," providing the possibility of accession of third parties with the objective of promoting the creation of a major strategic alliance for the liberalisation of trade and investment in the Asia-Pacific region. Specifically, article 20.6 of the P4 establishes that other APEC economies or other states can join the agreement on the terms agreed by the parties.

On this basis, in 2008, the Office of the US Trade Representative (USTR) announced that the US would participate in the subsequent negotiations of the P4, specifically in those related to the pending chapters on investment and financial services negotiations, which were not included in the original P4. Later that year, the P4 countries and the US announced the launch of negotiations for the US to join,[43] which started the formal process that in time became the TPP negotiations.

At the time, USTR Susan Schwab stated, "(…)while the United States is the first additional country to seek to join the four original members of the Trans-Pacific Strategic Economic Partnership, we are confident that other countries in the region will ultimately embrace the benefits of participation. This high-standard regional agreement will enhance the competitiveness of the countries that are part of it and help promote and facilitate trade and investment among them, increasing their economic growth and development."[44] At that moment, the focus of the US accession to the P4 shifted from an investment and financial services chapters-only approach, to a participation in the full FTA, which soon brought the opening and renegotiation of all P4 chapters into a new landmark agreement known as the TPP.

40 https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.fvfjglhzo

41 Brunei as an original member of the P4 FTA had already negotiated a Services Chapter with a negative list approach, which includes liberalisation commitments on mode 3 (commercial presence) for investments in the services sector. In practice, this proved to be a difficult exercise at the time, which portrays the high complexity that negotiating a full agreement with this approach (such as the TPP) brings for countries like Brunei, Malaysia, and Vietnam. This would also be an important hurdle for an FTAAP, considering other countries that still lack negative-list/pre-establishment framework negotiating experience.

42 http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/2-P4.php

43 https://ustr.gov/schwab-statement-launch-us-negotiations-join-trans-pacific-strategic-economic-partnership-agreement

44 https://ustr.gov/schwab-statement-launch-us-negotiations-join-trans-pacific-strategic-economic-partnership-agreement

During the APEC summit of 2008, Australia, Peru, and Vietnam formally expressed their interest to join the negotiations of the initial P4, and one year later the US President announced, during his first trip to Asia, "…the United States' intention to engage with the Trans-Pacific Partnership countries to shape a regional agreement, with broad-based membership and with the highest standards of an agreement of the 21st Century."[45]

Structure of the TPP's investment chapter

For the investment section, TPP countries followed the NAFTA negative list approach for scheduling their services and investments commitments regarding NT, MFN, performance requirements, senior management and board of directors, and market access for commercial presence for the services sector. The scope of the Investment Chapter includes investments in all sectors of the economy, excluding only investments in the financial sector, which are dealt with in a specific and separate chapter for the cross-border supply of financial services and investment in financial institutions.

The Investment Chapter encompasses investments in the pre-establishment and post-establishment phase, granting rights not only to foreign investors that are already established, but also to foreign investors seeking to invest in the territory of the other country. Pre-establishment commitments are those that grant foreign investors non-discriminatory — NT and MFN — treatment with respect to the establishment and acquisition of their investments.

TPP parties consolidated their commitments by listing their current non-conforming measures in the different sectors of their economies (annex I reservations) and locking in those sectors in which no reservations have been taken (stand-still effect). The TPP parties also commit to automatically capture in the agreement future liberalisation of measures (ratchet effect). Policy space on sensitive sectors is still preserved by reservations on future measures, as set out in annex II of non-conforming future measures.

In addition, market access commitments for investments in services on a negative-list approach provide for the right of entry for foreign investors in the services sector, aligning market access commitments and lists of nonconforming measures for investment and services involving commercial presence. Countries that have followed this approach for the first time face many challenges in order to be able to list their nonconforming measures and to determine the scope of their future reservations for specific sectors in which, whether a current nonconforming measure is in force or not, there is a need for further policy space to regulate activity within such sectors in the future.

It is important to stress that TPP investment liberalisation builds on previous commitments made by the other TPP members who have been following this approach in past FTA and RTA practice. Coexistence of agreements means that TPP commitments will not supersede prior commitments, and bilateral FTAs will not be terminated. Instead, TPP commitments will cohabit with liberalisation made in past agreements. However, in practice, those later commitments reflect the current level of market openness of those countries and, by definition, need to be equal to or broader than past commitments included in previous FTAs.

TPP investment commitments provide a major opportunity to foster harmonisation of investment liberalisation in the Asia Pacific region, especially since the agreement builds on previous FTAs among TPP partners and consolidates a deeper integration process among them, creating the most important free-trade zone in the region, not only for investments, but also for trade in general.

Standards of protection

The TPP investment chapter also achieved major progress in advancing harmonisation on standards of protection of investments in Pacific Rim treaty practice. Several provisions adopted in the TPP confirm that a significant number of Asia Pacific countries have a common understanding on key elements of investment protection. In this respect, obligations on free transfers of capital (including specific exemptions added in the TPP), the prohibition on imposing specific mandatory performance requirements, the inclusion of specific standards for the treatment of foreigners in cases of civil strife, and the concept of denial of benefits provide examples of the improvements in harmonisation of Asia-Pacific investment treaty practice made by the TPP.

As to the relationship between FET and the minimum standard of treatment (MST) obligation, the TPP expands the applicability of the widely adopted NAFTA approach to FET, which views FET as falling within the MST obligation, which itself is tied to customary international law (CIL). That approach had been confirmed by the NAFTA parties in 2001, in a NAFTA Free Trade Commission (FTC) interpretation, which clarified the relationship between FET, MST, and CIL under NAFTA.[46] Prior to the conclusion of the TPP, most, but not all, of the TPP negotiating parties had adopted the NAFTA approach to FET, either in FTA negotiations with the US or in other IIA negotiations.[47] With the conclusion of the TPP, three additional Pacific Rim countries – Brunei-Darussalam, Malaysia, and Vietnam — now follow the NAFTA approach to FET, which further harmonises treaty practice on a fundamental international investment law issue.

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45 http://www.sice.oas.org/whatsnew_pending/TTP_Congress_e.pdf

46 *See* Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions, July 31, 2001, http://www.state.gov/documents/organization/38790.pdf.

47 Canada, Mexico, Australia, Chile, Peru and Singapore adopted the NAFTA approach to FET in FTA negotiations with the United States; Japan and New Zealand adopted the approach in FTA negotiations with countries that followed the NAFTA approach.

With respect to the expropriation obligation, the TPP has reaffirmed the commonly accepted features of direct expropriation, ensuring that, in case of an expropriation, TPP parties will have acted with a public purpose, in accordance with due process of law, and subject to prompt, adequate, and fully realisable and transferable compensation. Furthermore, improvements have been made in establishing guidance for arbitral tribunals in order to determine situations that may constitute indirect expropriation, which could further support investment law harmonisation in the Pacific Rim. First, the guidance provided by the TPP on measures that could have effects equivalent to a direct expropriation is an important addition, which is complemented by having a shared view among TPP parties concerning measures that can constitute an indirect expropriation.

The TPP also underscores that countries can regulate in the public interest, including on health, safety, financial stability, and environmental protection, although not with the same level of specificity that other regional proposals are bringing forward, such as the EU TTIP proposal. On this particular point, one controversial aspect was the TPP's inclusion of a dispute settlement carve-out for measures related to tobacco control in order to protect public health, prompted by recent ISDS cases, which led to heavy public criticism in some TPP countries. It will be interesting to see whether such a provision will be replicated in future Asia-Pacific treaty practice and in other regional agreements.

The TPP investment chapter also includes enhancements with respect to ISDS. These include consolidation provisions and specific safeguards for discouraging abusive and frivolous claims, including the potential award of costs and attorneys' fees to the respondent government. Consolidating the trend of including transparency provisions as the general practice for investment arbitration proceedings, the TPP investment chapter mandates that arbitration hearings and documents are open and available to the public and that interested non-parties, such as trade unions and non-governmental organisations (NGOs), are eligible to participate in the proceedings by submitting *amicus curiae* briefs. The chapter also includes the possibility that an investor's home government and other TPP parties present submissions to the arbitral tribunal on issues of TPP treaty interpretation, in accordance with the non-disputing party submissions provision.

The TPP also includes innovative procedural features, such as language reaffirming the binding nature of joint interpretations issued by the TPP Free Trade Commission, and obligations to address discriminatory measures that provide advantages to foreign state-owned enterprises, including clarifications that TPP investment disciplines apply to state-owned enterprises and other persons exercising delegated governmental authority.[48]

Unlike the TPP, the text of an RCEP agreement is not currently available; however, consideration of recent treaty practice of RCEP negotiating parties can inform analysis of the extent to which the TPP and RCEP agreements can serve as pathways toward an FTAAP.

Recent treaty practice by RCEP negotiating parties

Given that the RCEP is an "ASEAN-led trade agreement,"[49] recent ASEAN treaty practice can offer important insights into the kinds of provisions that likely would be included in a final RCEP text. The recent investment treaty practice of another RCEP negotiating state, China, reflects positions that are largely consistent with ASEAN practice.

The political factors seem also to be coming closer to alignment. Recently, Chinese Foreign Minister Wang Yi said that the two major Asian regional trade agreements should eventually merge into a broader free-trade area to avoid fragmentation of the Asian market. Minister Yi argued that it will take some time, but the goal should be an eventual merging of the TPP and the RCEP into a Free Trade Area of the Asia Pacific. "In our view that is the right choice," she stated at a Center for Strategic and International Studies event on Chinese foreign policy and US-China relations in Washington, DC.[50]

Categories of recurring provisions in ASEAN and Chinese treaty practice that reflect, and contribute to, an increasing level of harmonisation in international investment law are discussed below.

ADVANCING INVESTMENT LIBERALISATION

Provisions supporting investment liberalisation appear consistently in recent ASEAN treaty practice, both when setting out the goals of a particular treaty and in substantive obligations. National treatment and MFN obligations in those agreements normally extend protections to the "admission," "establishment," and "acquisition" of investments.[51] The ASEAN-China Investment Agreement includes pre-establishment protections under MFN treatment, but not the NT obligation.[52] More recently, however, China has agreed to include pre-establishment protections within the scope

48 United States Trade Representative, the Trans-Pacific Partnership. https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.rayh31t8k

49 Murray Hiebert and Liam Hanlon. (2012) *ASEAN and Partners Launch Regional Comprehensive Economic Partnership,* Center for Strategic and International Studies.

50 Washington Trade Daily. (2016) "Merging TPP, RCEP." Volume 25, number 41.

51 *See,* e.g., ASEAN Investment Agreement art. 5 and art. 6; ASEAN-Korea art. 3 and art. 4; ASEAN-Australia-New Zealand FTA, chapter 11, art. 4

52 *Compare* ASEAN-China art. 5 (including the "admission," "establishment," and "acquisition" of investment in the MFN obligation) *with* ASEAN-China art. 4 (not including the "admission," "establishment," or "acquisition" of investment in the NT obligation).

of the NT obligation under a US-China BIT,[53] which provides additional momentum for the harmonisation of market access protections in investment treaties.

Standards of protection

Recent ASEAN investment treaties consistently place limitations on the scope of the FET obligation, as many of these treaties include language clarifying that a breach of another provision of the treaty, or of another agreement, does not establish a breach of the FET obligation.[54] The ASEAN-Australia-New Zealand and ASEAN-Korea agreements include the additional clarification that the scope of the FET obligation is limited to protections available under the CIL minimum standard of treatment.[55] China also has consistently placed limitations on the FET obligation in its recent investment treaties.[56]

Recent ASEAN investment agreements also consistently provide for prompt, adequate, and effective compensation for expropriation. For example, the original ASEAN Investment Agreement provides that compensation for expropriation must be "paid without delay," "be equivalent to the fair market value of the expropriated investment," and "be fully realizable and freely transferable [.]"[57] ASEAN's agreements with China,[58] Korea,[59] and Australia and New Zealand[60] include similar provisions.

Provisions on regulatory transparency also have been consistently included in recent ASEAN investment agreements. For example, under the ASEAN-China Investment Agreement, the parties commit to "make available through publication all relevant laws, regulations, policies, and administrative guidelines that pertain to, or affect investments in its territory."[61] ASEAN's agreements with Australia and New Zealand,[62] and with Korea,[63] include similar transparency commitments. ASEAN has also included provisions on transparency in arbitral proceedings in the ASEAN Investment Agreement, as well as the ASEAN-Australia-New Zealand agreement.[64]

With respect to China and opportunities for the harmonisation of investment rules, the transparency of investment dispute settlement proceedings remains an issue to watch. In the China-Canada BIT, for example, the parties agreed that "[a]ny Tribunal award" under the dispute settlement section "shall be publicly available."[65] With respect to "all other documents" submitted to, or issued by, a tribunal, such documents will be made publicly available if a "disputing Contracting Party" — the respondent in an investor-state case — "determines that it is in the public interest to do so and notifies the Tribunal of that determination."[66] More recently, in the China-Australia FTA, the parties agreed in a side letter to enter into consultations, within one year of the entry into force of the agreement, on the applicability of the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules to disputes submitted to arbitration under the China-Australia investment chapter.[67] Thus, under both the China-Canada BIT and the China-Australia FTA, a wide range of outcomes is possible with respect to the level of transparency of dispute settlement proceedings brought by investors against China.

Responses to "treaty shopping"

China, like the ASEAN states, recently has been including in its investment agreements denial of benefits provisions, which authorise host states to deny treaty benefits to shell companies.[68] Such provisions have been developed in response to concerns over 'treaty shopping," i.e., the practice of establishing a corporate presence in a jurisdiction solely to gain access to certain treaty protections.

A US-China BIT as a bridge between the TPP and RCEP agreements

When evaluating prospects for achieving harmonisation of the international investment law regime in the Pacific Rim region, the ongoing US-China BIT negotiations must be considered at the centre of the exercise. The negotiations bring together the world's two largest economies, one of which (the US) is a signatory of the TPP, while the other (China) is participating in the RCEP negotiations.

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53 *See* Joint US-China Economic Track Fact Sheet of the Fifth Meeting of the US-China Strategic and Economic Dialogue (July 12, 2013) ("The [US-China] BIT will provide national treatment at all phases of investment, including market access ('pre-establishment')").

54 *See* ASEAN Investment Agreement art. 11(3), ASEAN-China art. 7(3), ASEAN-Korea art. 5(3), ASEAN-Aus-NZ art. 6(3)

55 ASEAN-Aus-NZ art. 6(2), ASEAN-Korea art. 5(2)(c)

56 *See,* e.g., China-Mexico BIT art. 5, China-Canada BIT art. 4, China-Korea-Japan Investment Agreement art. 5

57 ASEAN Investment Agreement art. 14

58 ASEAN-China art. 8

59 ASEAN-Korea art. 12

60 ASEAN-Australia-New Zealand art. 9

61 ASEAN-China art. 19

62 ASEAN-Australia-New Zealand chap. 11 art. 13

63 ASEAN-Korea art. 8

64 *See* ASEAN Investment Agreement art. 39, ASEAN-Australia-New Zealand art. 26

65 Canada-China BIT art. 28

66 *Ibid.*

67 *See* Letter from Andrew Robb, Minister for Trade and Investment, to Gao Hucheng, Minister of Commerce (17 June 2015), available at http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-side-letter-on-transparency-rules-applicable-to-investor-state-dispute-settlement.pdf

68 *See,* e.g. China-ASEAN Investment Agreement art. 15, China-Korea-Japan Investment Agreement art. 22, China-Australia FTA art. 9.6

As noted above, with respect to investment liberalisation, the US and China have announced that the NT obligation under a US-China BIT will include market access protections and that the agreement will be negotiated on a negative list basis. With agreement already reached on market access coverage for NT, three issues to watch for in the US-China BIT negotiations will be performance requirements, free transfer obligations, and the transparency of dispute settlement proceedings. On those issues, China's recent BIT with Canada — another NAFTA party whose model investment treaty resembles the US model BIT in many respects — provides noteworthy approaches. For performance requirements, the Canada-China BIT limits protections to those set out in Article 2 and the Annex of the WTO Agreement on Trade-Related Investment Measures (TRIMS).[69] Regarding free transfer obligations, the Canada-China BIT allows a contracting party to adopt or maintain "measures that restrict transfers when the contracting party experiences serious balance of payment difficulties," subject to certain limitations,[70] which is consistent with most recent recommendations of the International Monetary Fund (IMF).[71] Regarding the transparency of arbitral proceedings, as noted above, under the China-Canada BIT, tribunal awards must be made publicly available, but public access to any other documents will require a determination by the respondent in each investor-state dispute that making a certain set of documents publicly available "is in the public interest[.]"[72]

Given the size of the two economies and their respective roles in the TPP and the RCEP, a BIT between the US and China will provide significant insights into whether, and how, harmonisation of international investment law in the Pacific Rim region can be achieved. The TPP, plus the finalisation of RCEP and a US-China BIT — involving many of the world's largest economies and covering very substantial investment flows — could serve as fundamental stepping stones not only towards an FTAAP in the Pacific Rim region, but also, on a broader scale, towards global harmonisation of the investment system. An EU-China BIT and TTIP agreement also would play key roles in that process.

PACIFIC ALLIANCE: INVESTMENT LAW HARMONISATION IN THE PACIFIC RIM GAINS ADDITIONAL MOMENTUM

The harmonisation of international investment law in the Pacific Rim region has gained additional momentum with the emergence of the Pacific Alliance, a regional economic integration process involving four Pacific Rim states: Chile, Colombia, Mexico, and Peru. The Pacific Alliance promotes the exchange of trade, investment, innovation and technology around the world, with special emphasis on the Asia-Pacific region. The Pacific Alliance agreement was finalised quickly and is seen as a global example of how like-minded countries can swiftly agree on a comprehensive, 21st century FTA. Significantly, the agreement includes 32 official observer countries, including many Pacific Rim states: Australia, Canada, China, India, Japan, New Zealand, Singapore, South Korea, and the US. New Zealand recently announced its desire to either become a member of, or negotiate an FTA with, the Pacific Alliance.

Investment liberalisation under the Pacific Alliance agreement, while not ground-breaking, is significant, because it builds on the bilateral FTAs of its member countries, using them as a starting point for further liberalisation of investments and taking into account their current commitments. By embarking on this exercise, the Pacific Alliance states also strive to update the standards of protection and liberalisation to the most forward-thinking trends. Notably, the Pacific Alliance has incorporated into their market access, NT and MFN commitments the latest liberalisation efforts made by each one of its members, locking in that liberalisation through the listing of non-conforming measures on a negative list basis.

Just like the P4 at the beginning of the century, the Pacific Alliance is an initiative that is open for new membership, providing an opportunity to foster further harmonisation

69 Canada-China BIT art. 9

70 Canada-China BIT art. 12

71 Jonathan D. Ostry *et al. (2010)* Capital Inflows: The Role of Controls, IMF Staff Position Note SPN/10/04, http://www.imf.org/external/pubs/ft/spn/2010/spn1004.pdf

72 Canada-China BIT art. 28

in the region. The Agreement has followed the NAFTA approach, by including a services chapter that deals with cross-border supply of services, an investment chapter that includes all types of investments in all sectors (including mode 3) for pre-establishment and post-establishment protection, and a specific chapter for financial services (cross-border supply of financial services and investments in financial institutions).

Finally, Pacific Alliance member countries have restated their approach in the context of standards of protection, by reaffirming their shared understanding of key provisions, such as the MST obligation (which, following the NAFTA approach, is tied to CIL) and indirect expropriation (identifying common criteria for situations that might constitute an indirect expropriation).

Like the TPP, the RCEP, and the US-China BIT, the Pacific Alliance can advance the development of investment law harmonisation in the Pacific Rim region by reaffirming the shared understanding of a group of Pacific Rim states on fundamental investment law issues.

CONCLUSION

As discussed above, recent treaty practice by states negotiating the TPP, the RCEP, and the US-China BIT, as well as the recent Pacific Alliance agreement, creates a significant opportunity for the harmonisation of the international investment law regime at a regional, Pacific Rim level. It is recognised, however, that there would still be a significant gap between such regional harmonisation and any potential multilateral agreement on investment. Negotiations to be watched in that respect are, in particular, the TTIP and the China-EU BIT. In addition, the other BRICS countries could pose a significant challenge to multilateralisation, since they have investment treaty models that depart significantly from the convergence in treaty practice discussed in this paper.[73]

Within the Pacific Rim region, however, there is significant momentum for investment law harmonisation, which ultimately could be expressed in a plurilateral FTAAP agreement. The 2004 US Model BIT provides one example of how an individual instrument can have a very substantial impact on the entire investment law regime. Many of the innovations introduced in that model — including clarifications of the FET and expropriation obligations, as well as provisions addressing public access to documents — have been included in a wide range of recent treaties. Even greater contributions to the international investment law regime could be made by an FTAAP, which potentially would include, among other states, the US, China, India, Japan, Korea, Canada, Mexico, Australia, New Zealand, and the 10 ASEAN states.

POLICY OPTIONS

For policy-makers interested in the harmonisation of the international investment law regime, the building blocks for such a project already exist in the Pacific Rim region. The TPP and Pacific Alliance agreements, as well as the ongoing RCEP and US-China BIT negotiations, provide key opportunities for a large number of Pacific Rim states to reach agreement on investment law obligations and ISDS provisions. One important first step toward harmonisation of the regime would be to consider the extent to which the TPP and RCEP texts reflect a convergence of state views on investment law issues.

A US-China BIT can help bridge textual differences between the TPP (which includes the US but not China) and the RCEP (which includes China but not the US). In that respect, challenges to concluding a US-China BIT can serve as reliable indicators of challenges to bridging the TPP and RCEP investment chapter texts. For a US-China BIT, provisions on performance requirements, free transfers, state-owned enterprises, and transparency of documents and hearings could be particularly challenging to negotiate, given recent treaty practice of the two states.

In response to such challenges to harmonisation, Pacific Rim states could consider several potential strategies. The China-Australia FTA provides one approach, where the parties agreed to an investment chapter with ISDS, while also agreeing to hold further negotiations on additional, unresolved investment issues. A second option would be to follow the "opt-in" approach reflected in UNCITRAL's Mauritius Convention on Transparency, where particularly contentious issues — such as, for example, transparency in dispute settlement — can be addressed in stand-alone instruments that states can elect to apply to existing treaties on an opt-in basis. A third option would be for APEC to take an active role in attempting to facilitate resolution of remaining differences between the TPP and RCEP agreements, with the APEC IEG focusing on the development of an FTAAP investment chapter.

Regarding APEC involvement in the development of an FTAAP, two complicating factors would need to be considered: (i) potential participation by the four RCEP negotiating states that are not members of APEC (Cambodia, India, Laos, and Myanmar), and (ii) potential participation by the four APEC members that are not participating in either the TPP or RCEP negotiations (Hong Kong, China; Chinese Taipei; Russia; and Papua New Guinea). One reason to limit FTAAP membership

73 Although these models include innovative approaches on disciplines and dispute settlement, instruments that depart significantly from recent investment treaty practice — and more generally, potential strategies for bridging the gap between an FTAAP or other Pacific Rim plurilateral agreement and a multilateral investment agreement — are beyond the scope of this paper.

to APEC member economies would be to reinforce and reconfirm APEC's central role in the development of an FTAAP. Reinforcing that central role could, in turn, heighten prospects for appropriate APEC groups (in particular, the APEC CTI and APEC IEG) to actively support further development of an FTAAP.

The boost China has given to the G20 process on the issues of FDI and global trade — by launching the G20's first-ever trade and investment working group in 2016, closely followed by a similar effort from the B20 side — is also noteworthy and could play an important role in supporting the further advancement of investment law harmonisation. Private sector drive (and demand) is also a key element to advance harmonisation, and in this respect, the APEC Business Advisory Council (ABAC) could bring to APEC an input similar to what the B20 will bring to the G20, delivering specific recommendations on investment. Business associations and public-private cooperation institutions that work on investment policy, such as the International Chamber of Commerce (ICC) and the World Economic Forum, could also be instrumental in supporting these regional processes.

With respect to prospects for international investment law harmonisation, the recent EU proposal to establish an Investment Court System in ongoing, and future investment treaty negotiations, with a view toward establishing a permanent, multilateral international investment court, must also be considered. In September 2015, the European Commission released an Investment Court System proposal,[74] a final version of which subsequently was presented to the US as part of the ongoing TTIP negotiations.[75]

Unlike the convergence in treaty practice occurring in the Pacific Rim region, the EU Investment Court System proposal would reshape the ISDS regime in fundamental ways, most notably by eliminating the appointment of arbitrators by disputing parties. One clear advantage offered by the Pacific Rim model for harmonisation is the momentum that has been building through more than a decade of active, converging treaty practice by many Pacific Rim states, including the NAFTA states, the Pacific Alliance states, the ASEAN states, Korea, Japan, and China. That momentum establishes the Pacific Rim region as the natural centre of gravity for a rapidly harmonising international investment law regime. Establishing investment law harmonisation on a regional, Pacific Rim level could then serve as a platform, potentially, for multilateral harmonisation, which could be achieved either by treaty propagation[76] (as recently illustrated by the impact of the NAFTA FTC 2001 Interpretation and the 2004 US Model BIT on the investment law regime) or by the development of a multilateral instrument.

74 *See* European Commission. (2015), Press Release, Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations. http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

75 *See* European Commission. (2015). Trade, EU finalises proposal for investment protection and Court System for TTIP. http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396

76 *See*, e.g., J. Christopher Thomas. (2015). QC, Introductory Comments, The Pacific Rim and International Economic Law: Opportunities and Risks of the Pacific Century, Transnational Dispute Management. http://www.transnational-dispute-management.com/article.asp?key=2168 (observing that the points set out in the NAFTA FTC's 2001 Interpretation "have found their way into many subsequent treaties throughout the Pacific Rim [, which] is a good example of the phenomenon of 'treaty propagation' whereby an expression of a substantive obligation in one bilateral treaty finds its way into other treaties not necessarily being negotiated by the states who agreed the original text").

ANNEX 1: RELEVANT REGIONAL AGREEMENTS' MEMBERSHIP, POSSIBLE FTAAP MEMBERSHIP AND WORLD FDI INFLOWS (2014)

Source: World Investment Report 2015, United Nations Conference on Trade and Development, pp. 6, A3-A6.

Note: These are FDI inflows from the world to countries in the various regional groups and, hence, do not reflect the value of investment actually covered by the investment agreement.

No.	APEC (21) [FTAAP I]	TPP (12)	RCEP (16)	FTAAP II (25)	FTAAP III (17)
1.	United States	United States		United States	United States
2.	Australia	Australia	Australia	Australia	Australia
3.	Brunei Darussalam	Brunei Darussalam	Brunei Darussalam	Brunei Darussalam	Brunei Darussalam
4.	Canada	Canada		Canada	Canada
5.	Chile	Chile		Chile	Chile
6.	China		China	China	China
7.	Hong Kong, China			Hong Kong, China	
8.	Indonesia		Indonesia	Indonesia	Indonesia
9.	Japan	Japan	Japan	Japan	Japan
10.	Malaysia	Malaysia	Malaysia	Malaysia	Malaysia
11.	Mexico	Mexico		Mexico	Mexico
12.	New Zealand	New Zealand	New Zealand	New Zealand	New Zealand
13.	Papua New Guinea			Papua New Guinea	
14.	Peru	Peru		Peru	Peru
15.	The Philippines		The Philippines	The Philippines	The Philippines
16.	Russia			Russia	
17.	Singapore	Singapore	Singapore	Singapore	Singapore
18.	Republic of Korea		Republic of Korea	Republic of Korea	Republic of Korea
19.	Chinese Taipei			Chinese Taipei	
20.	Thailand		Thailand	Thailand	Thailand
21.	Vietnam	Vietnam	Vietnam	Vietnam	Vietnam
22.			Myanmar	Myanmar	
23.			Cambodia	Cambodia	
24.			Laos	Laos	
25.			India	India	
FDI Inflow (2014) (in billions of USD; % share in world) :					
	652; 53%	345; 28%	363; 30%	690; 56%	525; 43%
	p. 6	p. 6	p. 6	pp. 6, A3-A6	pp. 6, A3-A6

Calculations:

FTAAP II (APEC + Myanmar, Cambodia, Laos and India):		
Entity	FDI Inflow (billions of dollars)	Share in World (%)
APEC	652	
Myanmar	0.946	
Cambodia	1.73	
Laos	0.721	
India	34.417	
FTAAP II	689.814	56.16
FTAAP III (APEC – HKC, Papua New Guinea, Russia and Taiwan):		
Entity	FDI Inflow (billions of dollars)	Share in World (%)
APEC	652	
Hong Kong, China	103.254	
Papua New Guinea	-0.03	
Russia	20.958	
Chinese Taipei	2.839	
FTAAP III	524.979	42.74

ANNEX 2: APEC INVESTMENT PRINCIPLES (UPDATED 2011)

APEC NON-BINDING INVESTMENT PRINCIPLES
Jakarta, November 1994
Honolulu, November 2011

In the spirit of APEC's underlying approach of open regionalism,

Recognising the importance of investment to economic development, the stimulation of growth, the creation of jobs and the flow of technology in the Asia-Pacific region,

Emphasising the importance of promoting domestic environments that are conducive to attracting foreign investment, such as stable growth with low inflation, adequate infrastructure, adequately developed human resources, and protection of intellectual property rights,

Reflecting that most APEC economies are both sources and recipients of foreign investment,

Aiming to increase investment including investment in small and medium enterprises, and to develop supporting industries,

Acknowledging the diversity in the level and pace of development of member economies as may be reflected in their investment regimes, and committed to ongoing efforts towards the improvement and further liberalisation of their investment regimes,

Without prejudice to applicable bilateral and multilateral treaties and other international instruments,

Recognising the importance of adherence to the WTO Agreement on Trade-Related Investment Measures,

APEC members aspire to the following non-binding principles:

Transparency

-- Member economies will make all laws, regulations, administrative guidelines and policies pertaining to investment in their economies publicly available in a prompt, transparent and readily accessible manner.

Consistency of Interpretation and Implementation

-- Member economies will seek to ensure consistent interpretation of laws, regulations, administrative procedures and policies governing foreign investment, as well as prompt, transparent, and predictable licensing and approval processes, coordinated across all levels of government.

Non-discrimination

-- Member economies will extend to investors from any economy treatment in relation to the establishment, expansion and operation of their investments that is no less favourable than that accorded to investors from any other economy in like circumstances, without prejudice to relevant international obligations and principles.

National Treatment

-- With exceptions as clearly provided for in domestic laws, regulations and policies, member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favourable than that accorded in like circumstances to domestic investors.

Regulatory Protections

-- Member economies will not relax health, safety, labour, and environmental regulations as an encouragement to foreign investment.

Investment Incentives

-- With limited and specified exceptions, member economies will avoid the use of investment incentives which distort fair competition within or between their economies, or which are inconsistent with these principles.

Performance Requirements

-- Member economies will minimise the use of performance requirements that distort or limit expansion of trade and investment.

Expropriation and Compensation

-- Member economies will not expropriate foreign investments or take measures that have a similar effect, except for a public purpose and on a non-discriminatory basis, in accordance with the laws of each economy and principles of international law and against the prompt payment of adequate and effective compensation.

Transfers and Convertibility

-- Member economies will maintain their goal of the free and prompt transfer of funds related to foreign investment, such

as capital contributions, profits, dividends, royalties, loan payments and liquidations, in freely convertible currency.

Settlement of Disputes

-- Member economies accept that disputes arising in connection with a foreign investment will be settled promptly through consultations and negotiations between the parties to the dispute or, failing this, through procedures for arbitration in accordance with members' international commitments or through other arbitration procedures acceptable to both parties.

Protection and Enforcement of Rights

-- Member economies will ensure non-discriminatory access to dispute resolution mechanisms, including tribunals, courts, and appeal processes, and, with due regard to judicial independence, will seek to ensure the availability of resources to enable timely delivery and enforcement of judgments and arbitration awards.

Entry and Sojourn of Personnel

-- Member economies will permit, in a timely manner, the temporary entry and sojourn of key foreign technical and managerial personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations.

Avoidance of Double Taxation

-- Member economies will endeavour to avoid double taxation related to foreign investment.

Investor Behaviour

-- Acceptance of foreign investment is facilitated when foreign investors abide by the host economy's laws, regulations, administrative guidelines and policies, just as domestic investors should, and when investors take into account guidelines related to CSR that have been developed by multilateral bodies, as appropriate.

Removal of Barriers to Capital Exports

-- Member economies accept that regulatory and institutional barriers to the outflow of investment will be minimised.

Implemented jointly by ICTSD and the World Economic Forum, the E15Initiative convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.

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