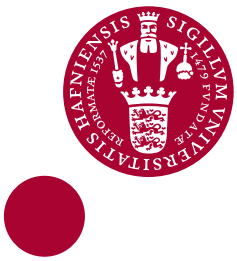

The Growing Tendency of Including Investment Chapters in PTAs

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Chapter X. The Growing Tendency of Including Investment Chapters into PTAs

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Abstract In the context of a rising number of preferential trade agreements (PTAs) that include investment protection provisions traditionally found in bilateral investment treaties (BITs), this chapter has a double purpose. First, based on an empirical analysis of 158 post-North American Free Trade Agreement (NAFTA) PTAs, we conclude that three categories of countries/regional economic integration organisations (REIOs) exist: those that regularly include investment chapters into their PTAs (Japan, the United States, Canada, the Association of Southeast Asian Nations (ASEAN), Australia and the Caribbean Community (CARICOM)), those that are finding their voice in international investment law and increasingly include such chapters (India, China, the European Union and Chile) and those that have an adverse position towards it (Brazil and the Southern Common Market (MERCOSUR)) or defer the inclusion of such provisions to further negotiations (African Plurilaterals, Morocco and South Africa). Second, we look at the drivers behind including/excluding investment protection provisions into/from PTAs. Some drivers will be readily apparent from the data collected for the purpose of answering the first question, while other drivers will need a more detailed discussion. These drivers are: (a) the weaker party accepts/uses templates of more powerful states; (b) states/REIOs wish to pursue more comprehensive and resource-friendly negotiations; (c) states/REIOs want to achieve a more coherent application of international economic law.

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X.1 Introduction

The breakdown of the multilateral World Trade Organization (WTO) talks has led to the proliferation of bilateral and regional preferential trade agreements (PTAs).[1] From the mid-1990s onwards PTAs began to include non-trade related fields, such as labour standards, human rights, intellectual property or environmental protection.[2] Following the coming into force of the North American Free Trade Agreement (NAFTA, 1994), investment protection standards and investor-state dispute settlement (ISDS), traditionally the domain of bilateral investment treaties (BITs), have also come under the ambit of a growing number of PTAs.

[1] See Kotschwar 2009, at 373-375; Miroudot 2011; Lee 2015, at 7-9; Lanyi and Steinbach 2017.
[2] See Horn et al 2010.

More recent mega-regionals, such as the Trans Pacific Partnership (TPP), the proposed Transatlantic Trade and Investment Agreement (TTIP) or the EU-Canada Comprehensive Economic and Trade Agreement (CETA)[3], also include investment chapters.

The practice of including investment chapters has also prompted a growing volume of scholarship on the matter.[4] The purpose of this chapter is to take this scholarship further in a manner that addresses the topics of interest for this year's Volume of the *Netherlands Yearbook of International Law*. The 2017 Volume, among others, aims to explore 'emerging trends' in selected fields of international economic law, such as trade and investment law.[5] In an effort to address the Yearbook's broader topic and to answer the questions posed in this chapter, the traditional doctrinal method was replaced with an interdisciplinary approach.

The first question (section X.2) is whether a growing tendency of including BIT-like chapters into PTAs exists. If so, in which countries or regions is this phenomenon more prevalent? Furthermore, what types of investment protection clauses are preferred: substantive standards, ISDS or both? An empirical analysis of 158 post-NAFTA PTAs from 'all four corners' of the Earth will provide the answers to these questions. The methodology for choosing and examining the PTAs is explained in section X.2.1.

The second question (section X.3) concerns the drivers behind the growing tendency of including BIT-like investment chapters into PTAs and their potential implications. Some drivers will be readily apparent from the data collected in section X.2 (section X.3.1), while other drivers will need a more detailed discussion (section X.3.2). For the latter, the data gathered in section X.2 is not sufficient. Therefore, academic literature from various fields of the social sciences, such as law, political science and negotiation theory shall also be consulted.

Some potential drivers, such as the rise of production networks,[6] will not be discussed since they would require expertise in fields unfamiliar to the authors. Furthermore, the second question is not to be confused with the broader question of why states/regional economic integration organisations (REIOs) choose to conclude PTAs in the first place. The

[3] See Lim et al 2012; Mathis 2012; Venzke 2016; Pantaleo et al 2016.
[4] Kotschwar 2009; Miroudot 2011; Baccini et al 2011, at 18-21; He and Sappideen 2013; Lester et al 2015.
[5] T.M.C. Asser Instituut (2017) Topic description, Netherlands Yearbook of International Law, vol 48 (2017), http://www.asser.nl/media/3314/nyil-2017-topic.pdf, accessed 25 August 2017.
[6] Miroudot 2011, at 307.

considerations for doing so can be numerous, ranging from economic aspects to strengthening political ties with the partner countries or geopolitical aspirations.[7]

X.2 Is There a Growing Tendency of Including Investment Chapters into PTAs?

Section X.2 is meant to answer the question whether a growing tendency of including investment chapters into PTAs exists. If so, in which countries or regions is this phenomenon more prevalent? Furthermore, what types of investment protection clauses are preferred: substantive standards, ISDS or both? This section begins with a description of the methodology used in gathering the data, followed by an examination of various countries and regions of the world.

X.2.1 How is the Data Gathered?

For this study 158 post-NAFTA PTAs were selected from the WTO Regional Trade Agreement Information System (RTA-IS), the United Nations Conference on Trade and Development (UNCTAD)'s International Investment Agreements Navigator[8] and the official websites of governments and REIOs. The starting point is the entry into force of NAFTA (1994), since this was the first agreement to merge under one roof comprehensive trade and investment provisions.[9] Thus, it can be regarded as a 'trendsetter'.[10] The number of PTAs selected represents over half of *all* PTAs (pre- and post-NAFTA) registered in the WTO RTA-IS that have entered into force.[11] Besides the treaty texts, policy documents, model agreements and academic literature were also consulted.[12]

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[7] Wang 2011, at 494-497.

[8] UNCTAD's classification of 'Treaties with Investment Provisions' includes also PTAs that only mention investment promotion in a cursory manner (UNCTAD (2017) International Investment Agreements Navigator, http://investmentpolicyhub.unctad.org/IIA, accessed 25 August 2017).

[9] He and Sappideen 2013, at 215; Kotschwar 2009, at 366. The pre-NAFTA 1989 Canada-US FTA, which was subsequently replaced by NAFTA, dedicated Chapter Sixteen to Investment. The Agreement included two standards of treatment (national treatment and the prohibition of expropriation) but omitted MFN, FET, FPS and ISDS. See also Fontanelli and Bianco 2014, at 219.

[10] See Fontanelli and Bianco 2014; Lévesque 2006. Alschner et al, at 19-20 conclude that many South-South PTAs also included NAFTA language.

[11] Almost 300 regional trade agreements have been notified by WTO members (WTO (2017) RTA Database, https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx, accessed 25 August 2017). 'Due to its growing size and complexity, the PTA universe has become increasingly difficult to navigate.' (See Alschner et al, at 3.)

[12] See the various sources mentioned in section X.2.2-5. Examples include: Fontanelli and Bianco 2014; Ruse-Khan and Ononaiwu 2015; European Commission (2015) Investment in TTIP and Beyond - The Path to Reform, Concept Paper, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF, accessed 25 August 2017;

Some parameters also need to be set. First, the determining factor in the selection of the treaties is not their names but their contents. The agreements must include clear obligations and legal commitments to liberalise trade between the parties and not just hortatory or promissory language, common for so-called framework agreements. [13]

Second, the sample includes both bilateral and plurilateral agreements (the latter being popular among African and Asian countries) for which a final version of the text exists. Treaties that are being negotiated at the moment of writing are excluded from the statistics; however, they are discussed if they carry a high normative force, such as TTIP.

Third, we selected 15 countries and REIOs from around the world, namely: the United States (US), Canada, the European Union (EU), China, India, Japan, the Association of Southeast Asian Nations (ASEAN), Australia, Brazil, Chile, the Southern Common Market (MERCOSUR), the Caribbean Community (CARICOM), Morocco, South Africa and several inter-African regional agreements. When selecting the representative countries/REIOs, various factors were considered, such as the number of PTAs concluded, the ability of a country/REIO to be a rule-maker, its economic might, the need to have a balanced geographical representation, etc. For example, when selecting the US or the EU, one must take into account the normative force exerted by their agreements[14] and their sheer economic might. Similar factors were also taken into consideration when choosing Japan, China and India. For the latter two, recent academic discussions on the goal of China and India to become rule-makers and not rule-takers were also consulted.[15]

It was also necessary to ensure an adequate geographical and ideological balance as well as a balance between countries and REIOs. Thus, for the Latin American region, Chile, a country with an open investment policy, and Brazil, a country known for its aversion towards main-

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2004 Canadian Model Foreign Investment Protection Agreement, https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf, accessed 8 November 2017.

[13] Examples of promissory language include the 1999 US-South Africa Trade and Investment Framework Agreement ('US-South Africa TIFA'), https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file224_7728.pdf, accessed 8 November 2017, Article 1(2): 'The Parties *will seek* to: (2) take appropriate measures to *encourage* and *facilitate* the exchange of goods and services' (emphasis added); 2002 Trade Agreement between the Government of the Republic of India and the Government of the Republic of Mauritius ('India-Mauritius Trade Agreement'), http://commerce.nic.in/trade/Mauritius.pdf, accessed 13 November 2017, Article II: 'The Contracting Parties shall *encourage* and *facilitate* contacts between their natural and juridical persons' (emphasis added). See also Gao 2015, at 80.

[14] See Fontanelli and Bianco 2014.

[15] Wang 2011; Ranjan 2015.

stream investment law and policy, were chosen.[16] Two REIOs, MERCOSUR and CARICOM, were also added to the Latin American Region. In Africa (beyond some difficulties in gathering data, see section X.2.5) the study covered the major inter-African REIOs and considered a representative from sub-Saharan Africa (South Africa) and one from Northern Africa (Morocco). Furthermore, the traditional North-South/capital exporting-capital importing type of agreements has now given way to a more complex scene that also includes agreements between traditionally capital importing or exporting countries.[17]

Fourth, the qualitative side of the analysis focuses on investment protection provisions that traditionally appear in BITs and excludes the services chapters of PTAs; the latter, in essence, do not deal with investment protection standards and ISDS.[18] The study examines the occurrence of the following core standards of investment protection: national treatment (NT), most-favoured nation treatment (MFN), prohibition of expropriation and other standards, such as fair and equitable treatment (FET), full protection and security (FPS), protection from civil strife, etc. Furthermore, it looks at whether ISDS is included, and if so, whether the agreements provide a choice between multiple arbitral rules.

X.2.2 The North-Atlantic

i. *United States* - Following NAFTA, the US concluded 12 FTAs in the period between 2000 and 2007.[19] The statistics also include NAFTA, while the two mega-regionals (TPP and TTIP) were excluded due to their uncertain future for the US.

As others have noted,[20] NAFTA had a tremendous influence on the design of subsequent FTAs with investment chapters either directly or by influencing the 2004/2012 US Model BITs, which in turn affected the design of investment chapters in subsequent FTAs. Most of the agreements analysed (11, 84.6%) include detailed standards of investment protection (NT, MFN, the prohibition of expropriation and minimum standards of treatment, such as FET and

[16] See section X.2.4(i).
[17] Francis 2010, at 35-36; Alschner et al, at 25.
[18] For similar approaches see Kotschwar 2009, at 370; Miroudot 2011; Mathis and Laurenza 2012; De Brabandere 2013, at 40-41; Fontanelli and Bianco 2014, at 213.
[19] Office of the United States Trade Representative (2017) Free Trade Agreements, https://ustr.gov/trade-agreements/free-trade-agreements/, accessed 25 August 2017. In alphabetical order, the FTAs with Australia (2004), Bahrain (2004), CAFTA-DR (2004), Chile (2003), Colombia (2006), Jordan (2000), Korea (2007), Morocco (2004), Oman (2006), Panama (2007), Peru (2006) and Singapore (2003).
[20] Gantz 2004, at 680 and 711 on the influence of NAFTA case-law on subsequent agreements. See also Fontanelli and Bianco 2014, at 218.

FPS). Some agreements also include an extra clause on protection during civil strife and armed conflict.[21] In the case of the FTAs with Colombia,[22] the Dominican Republic-Central America (CAFTA-DR), Morocco, Panama and Peru, even the number of the articles on NT, MFN and the minimum standards of treatment match between these agreements. Ten agreements (76.9%) include ISDS under a wide choice of arbitral rules (International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility (AF), United Nations Commission on International Trade Law (UNCITRAL) and often under other rules agreed by the parties).

The agreements with Jordan and Bahrain do not include an investment chapter, since the US had previously concluded BITs with these countries.[23] The US-Australia BIT is the outlier, since it includes standards of investment protection but does not provide for ISDS (Article 11.6).[24]

ii. *Canada* - The recent Canadian FTAs in many ways mirror their US counterparts. The Government of Canada lists 11 post-NAFTA FTAs that are in force,[25] three that have been recently concluded but have yet to enter into force, [26] and an increasing number of agreements under negotiations for which final texts are not available. [27] The surge of international economic agreements occurred after 2008, resulting in many FTAs and a string of Foreign Investment Promotion and Protection Agreements (FIPAs) with African countries.[28]

Nine out of 14 eligible FTAs (64.3%) include the four core standards of investment protection and ISDS. Similar to US FTAs, ISDS clauses mention four variants of arbitral rules.

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[21] 2006 United States-Peru Trade Promotion Agreement ('US-Peru TPA'), https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text, accessed 8 November 2017, Article 10.6; 2007 United States-Panama Trade Promotion Agreement ('US-Panama TPA'), https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text, accessed 8 November 2017, Article 10.6.

[22] See Watson 2015.

[23] 1999 United States-Bahrain Bilateral Investment Treaty, Treaty Doc 106-25 ('US-Bahrain BIT'); 1997 United States-Jordan Bilateral Investment Treaty, Treaty Doc 106-30 ('US-Jordan BIT').

[24] For an explanation of Australia's policy towards ISDS, see section X.2.3(v).

[25] Government of Canada (2017) Canada's Free Trade Agreements, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng, accessed 25 August 2017. These are the FTAs with Korea (2014), Honduras (2013), Panama (2010), Jordan (2009), Colombia (2008), Peru (2008), EFTA (2008), Costa Rica (2001), Chile (1996) and Israel (1996).

[26] The FTAs with the EU (CETA, 2016), the Ukraine (2016) and TPP (2016).

[27] There are also several older Trade and Investment Cooperation (TICA) Agreements and Trade and Economic Cooperation Arrangements (TECA) that functioned more as initiators for further collaboration or set a framework for cooperation. These agreements have not been included in the study since they do not provide clear trade liberalisation commitments.

[28] See R Willard, S Morreau (2015) The Canadian Model BIT – A Step on the Right Direction for Canadian Investment in Africa? Kluwer Arbitration Blog, 18 July 2015, http://kluwerarbitrationblog.com/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa/, accessed 25 August 2017.

However, several agreements do not accord the parties the right to agree on arbitral rules.[29] Like their US counterparts, the investment chapters of these agreements follow the templates set up by a model agreement, in this case the 2004 Canadian Model FIPA. The latter in turn had been influenced by Chapter 11 NAFTA and investment cases brought under it.[30]

The remaining five FTAs (35.7%) do not mention the standards of protection or ISDS. Nonetheless, in three cases (Jordan, Costa Rica and Ukraine) Canada has existing investment agreements with these countries.[31] Article 12 of the FTA with the European Free Trade Association (EFTA) countries encourages the parties to review and further consider the adoption of measures regarding the liberalisation of investment. The FTA with Israel (1999) does not include any investment chapters and no investment agreement exists between the two countries.

iii. *EU* - The situation in the European Union is more complex and warrants several observations. First, the analysis does not include EU PTAs signed prior to 1 December 2009, because the EU had only acquired the competence to conclude international agreements that cover foreign direct investment (FDI) after the entry into force of the Lisbon Treaty.[32]

Second, while EU Member States could conclude BITs prior to 2009[33] and under certain conditions can do so after Lisbon as well,[34] they could not solely conclude PTAs, since this field was/is covered by the EU's Common Commercial Policy (CCP).

Third, the EU can conclude agreements with trade components under multiple policy areas, such as the EU's CCP, the EU's Neighbourhood Policy (ENP), etc.[35] Therefore, some of these agreements are named free trade agreements, while others association agreements (AAs) that include deep and comprehensive trade agreements (DCFTAs), partnership and cooperation

[29] See 2010 Free Trade Agreement between the government of Canada and the government of Panama ('Canada-Panama FTA'), http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/panama/fta-ale/index.aspx?lang=eng, accessed 8 November 2017, Article 9.23; 1996 Free Trade Agreement between the Government of Canada and the Government of Chile ('Canada-Chile FTA'), http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/index.aspx?lang=eng, accessed 8 November 2017, Article G-023(2).
[30] Lévesque 2006, at 250-251 and 254.
[31] The FIPAs with Jordan (2009), Costa Rica (1998) and Ukraine (1994).
[32] 2007 Treaty on the Functioning of the European Union, OJ C 326/47 ('TFEU'), Article 207; see Basedow 2016.
[33] See Pantaleo 2014; Fontanelli and Bianco 2014, at 215-218.
[34] See Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351/40, Articles 7-11.
[35] See Brown and Record 2015, at 42; Van Vooren and Wessel 2014, Chapter 15.

agreements (PCAs), economic partnership agreements (EPAs) or stabilisation and association agreements (SAAs).

Fourth, in May 2017 the Court of Justice of the European Union (CJEU) delivered its much-awaited Opinion 2/15 on the competence to conclude the EU-Singapore FTA. Whilst the CJEU held that the agreement in its current form has to be concluded as a 'mixed' agreement together with the Member States mainly due to non-direct foreign investment falling under shared competences, the CJEU has also greatly expanded the EU's exclusive competences over all forms of services, public procurement, intellectual property, sustainable development and competition law.[36] It follows that, after Opinion 2/15, the EU can conclude a far-reaching trade agreement *without* investment protection by *itself*. The recent Opinion, together with the contestation of ISDS by civil society and Wallonia,[37] might be the reason why the European Commission's President has recently declared that the EU should conclude its future trade agreements with Australia and New Zeeland without investment chapters.[38] In other words, post-Lisbon and prior to Opinion 2/15, the EU's new competences over FDI were one of the reasons why the EU chose to negotiate FTAs with investment chapters. However, post-Opinion 2/15 the clarification of the EU's exclusive competences over free trade and investment agreements (FTIAs) might be the main reason why the EU will consider decoupling investment from trade agreements.

Regarding the numbers, 19 post-Lisbon agreements were examined.[39] Out of them, only three agreements[40] (15.8%) have a traditional investment chapter and ISDS. Interestingly,

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[36] CJEU, Opinion 2/15 of the Court (Full Court), EU:C:2017:376, 16 May 2017.

[37] On the insistence of Wallonia, Belgium has officially requested a CJEU Opinion on the compatibility of the investment court system (ICS) under CETA with EU law. See Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation (2017) Minister Reynders Submits Request for Opinion on CETA, 6 September 2017, https://diplomatie.belgium.be /en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta, accessed 8 November 2017.

[38] S Gáspár-Szilágyi (2017) A Follow-up to the EU Commission's Decision to 'Split' Trade and Investment Protection, International Economic Law and Policy Blog, 21 February 2017, http://worldtradelaw.typepad.com/ielpblog /2017/09/guest-post-a-follow-up-to-the-eu-commissions-decision-to-split-trade-and-investment-protection.html, accessed 8 November 2017.

[39] These are: FTAs and FTIAs with Korea (2009), Singapore (not signed), Canada (CETA, 2016), Vietnam (not signed); Colombia and Peru (2013, from 2016 also Ecuador); AAs that include DCFTAs with Georgia (2014), Moldova (2014), Ukraine (2014); Central America (2012); SAA with Kosovo (2015); PCA with Iraq (2012); Enhanced PCAs with Kazakhstan (2015); Interim Partnership Agreements with Papua New Guinea and Fiji (2009); EPAs with ECOWAS (not signed), EAC (not signed) and SADC (2016); interim EPA with Cameroon (2009), Ghana (2016) and Madagascar (2009). See European Union External Action (2017) Treaties Office Database, http://ec.europa.eu/world/agreements/default.home.do, accessed 25 August 2017.

[40] 2016 CETA, EU-Vietnam and EU-Singapore.

EU-Singapore does not include an MFN clause (this has been characterised as a REIO exception clause[41]). The rest of the agreements (16, 84.2%) are PCAs, EPAs, SAAs or AAs with DCFTAs; they follow similar design patterns that do not include investment chapters. Nevertheless, they all include 'review' or '*rendez-vous*' clauses under which the contracting parties undertake to carry out further negotiations or cooperation on investment protection.[42]

One may suggest several reasons why most of the agreements do not include investment chapters. Some of them, such as EU-Korea (2009), were negotiated prior to the entry into force of the Lisbon Treaty. For other agreements, several explanations might exist. First, some of the EPAs and PCAs require further endeavours to be reached by the non-EU party. These agreements only set a framework for further cooperation in the field of investment protection instead of including highly detailed clauses. Second, the EU's external agreements cover various policy fields are thus concluded under different legal bases. For example, whilst EU-Singapore[43] or CETA belongs to the CCP, SAAs and AAs belong to the EU's neighbourhood policy and have a different legal basis for their conclusion.[44] Third, as explained, in the future the EU might decouple investment chapters from far-reaching trade agreements due to its post-Opinion 2/15 powers to conclude the latter by itself, without the Member States. This would greatly simplify the ratification process.

[41] Miroudot 2011, at 316. During the 27 February 2017 Stakeholder Meeting on ISDS, Trade Commissioner Cecilia Malmström stated that investment chapters with ISDS shall be included in all future EU FTAs.

[42] Council of the European Union, Economic partnership agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the European Union and its Member States, of the other part, 2014/0265(NLE), 3 December 2014 ('EU-ECOWAS EPA'), Article 106(2)e; European Commission (2015) Economic Partnership Agreement between the East African Community Partner States, of the one part, and the European Union and its Member States, of the other part ('EU-EAC EPA'), http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.compressed.pdf, accessed 8 November 2017, Article 3(b)ii; 2014 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261/4 ('EU-Georgia AA'), Article 80(2); 2014 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260/4 ('EU-Moldova AA'), Article 206(2); 2014 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161/3 ('EU-Ukraine AA'), Article 89(2); 2012 Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJ L 346/3 ('EU-Central America AA'), Article 168; 2012/2016 Trade Agreement between Colombia, Peru and Ecuador and the European Union and its Member States, OJ L 354/3, Article 166, OJ L 356/1.

[43] See CJEU, Opinion 2/15 of the Court (Full Court), 2017.

[44] See TFEU, Article 217; Van Vooren and Wessel 2014, Chapter 5.

In conclusion, the overwhelming majority of post-NAFTA US PTAs and the majority of post-NAFTA Canadian PTAs include detailed standards of investment protection and multiple rules for initiating investor-state arbitration. Nonetheless, in most cases, the rules are similar or the same, following the templates provided in NAFTA, the 2004/2012 US Model BITs or the 2004 Canadian Model FIPA.[45] Contrary to this, illustrated in Table X.1, not even a fifth of post-Lisbon EU PTAs include standards of investment protection and ISDS. Nevertheless, these new provisions are very complex and follow the EU Commission's policy of reforming investment law.[46]

Table X.1 Post-NAFTA North-Atlantic PTAs

States/ REIOs	PTA	Standards of investment protection								ISDS					
		NT		MFN		Exprop.		Extra		Just ICSID		ICSID +		No ISDS	
		No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
USA	13**	11	84.6	11	84.6	11	84.6	11	84.6	0	-	10	76.9	3	23.1
Canada	14**	9	64.3	9	64.3	9	64.3	9	64.3	0	-	9	64.3	5	35.7
EU*	19**	3	15.8	2	10.5	3	15.8	3	15.8	0	-	3	15.8	16	84.2

* Post-Lisbon (1 Dec 2009) for EU

** NAFTA is included for both Canada and the US. TPP is only included for Canada. CETA is included for both Canada and the EU. TTIP is excluded from the analysis.

X.2.3 Asia-Pacific

The countries/REIOs of interest in this region include India, China, Japan, Australia and the ASEAN bloc. The latter has specific agreements with all the other countries, which were considered together with other ASEAN treaties to avoid double counting.

i. *India* - For this analysis 19 PTAs were selected,[47] most of which (78.9%) are trade agreements (TAs) granting national[48] or MFN treatment[49] to goods and/or services, and which

[45] Even though in 2012 the US drafted a new model BIT, the agreements which entered into force in 2012 (US-Colombia, US-Korea, US-Panama) had been negotiated prior to the 2012 US Model BIT. No FTAs have yet to enter into force after 2012.

[46] See European Commission (2015) Investment in TTIP and Beyond - The Path to Reform, Concept Paper. The goal of reforming ISDS is not restricted to Europe or North America. See for example the South American initiative to create a regional investment dispute settlement institution (Gómez and Titi 2016, at 518-522).

[47] Department of Commerce, Government of India (2017) Trade Agreements, updated 8 November 2017, http://commerce.gov.in/InnerContent.aspx?Type=InternationalTrademenu&Id=32, accessed 8 November 2017. Two trade agreements, two framework agreements and four short bilateral trade agreements with African countries were excluded from the analysis due to an absence of substantive legal commitments to liberalise trade.

[48] India-Sri Lanka (1998); Chile-India (2006).

lack investment protection provisions. The rest (21.1%) are Comprehensive Economic Cooperation/Partnership Agreements (CECA/CEPAs) that contain investment provisions. In addition, 12 preferential trade/investment agreements (PT(I)As) are being negotiated,[50] the EU-India Broad-based Bilateral Trade and Investment Agreement (India-EU BTIA) probably being the most widely discussed one.[51]

The practice of including investment protection standards into bilateral PTAs is a more recent phenomenon that began with the India-Singapore CECA (2005), followed by the agreements with South Korea (2009), Malaysia (2010) and Japan (2011). A similar situation has been unfolding in the multilateral context. The South Asian Free Trade Area Agreement (SAFTA, 2004) contains no provisions on investment, while more recently a separate Agreement on Investment (2014) has been added to the ASEAN-India CECA Framework Agreement (FA) (2003). Out of the total number of selected PTAs, NT and expropriation provisions were provided in four treaties (21.1%) and MFN in three treaties (15.8%).

ISDS provisions began expanding over time as well. Currently, four treaties (21.1%) include some form of ISDS. While the earlier India-Singapore CECA (2005) provides the narrower choice between domestic courts, ICSID and UNCITRAL arbitration,[52] subsequent treaties added the ICSID Additional Facility Rules (AFR) and arbitration under any agreed rules.[53] Furthermore, the investment chapters of more recent Indian PTAs depart from the 2003

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[49] India-South Africa (1994); India-Mongolia (1996); Bangladesh-India (2006).

[50] Ministry of Commerce & Industry, Government of India (2016) Impact of FTAs, 16 November 2016, http://pib.nic.in/newsite/PrintRelease.aspx?relid=153695, accessed 25 August 2017.

[51] R Howse (2017) India Should Hold Firm against the European Efforts to Undermine Its New Model Bilateral Investment Treaty, International Economic Law and Policy Blog, 21 February 2017, http://worldtradelaw.typepad.com/ielpblog/2017/02/india-should-hold-firm-against-the-european-efforts-to-undermine-its-new-model-bilateral-investment-.html, accessed 25 August 2017.

[52] 2005 Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore ('India-Singapore CECA'), http://investmentpolicyhub.unctad.org/Download/TreatyFile/2707, accessed 8 November 2017, Article 6.21.

[53] 2010 Comprehensive Economic Cooperation Agreement between the Government of Malaysia and the Government of the Republic of India ('India-Malaysia CECA'), http://fta.miti.gov.my/miti-fta/resources/Malaysia-India/MICECA.pdf, accessed 8 November 2017, Article 10.14; 2011 Comprehensive Economic Partnership Agreement between the Republic of India and Japan ('India-Japan CEPA'), http://commerce.nic.in/trade/IJCEPA_Basic_Agreement.pdf, accessed 8 November 2017, Article 96(4); 2014 Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore ('ASEAN–India CECA'), http://investmentpolicyhub.unctad.org/Download/TreatyFile/2707, accessed 8 November 2017, Article 20(7).

Model BIT and are considered more balanced, since they include broader substantive coverage and reserve more regulatory space for the state.[54]

ii. *China* - In the observed period, China concluded 13 PTAs. From 2006 onwards, when the China-Pakistan FTA was signed, Chinese PTAs have included investment provisions. Out of the selected agreements, NT and MFN provisions were included in five treaties (38.5%), while protections against expropriation in four (30.8%). The treaty practice is not uniform: two agreements include links to the relevant existing BITs between the same parties,[55] one FTA was designed in co-existence with an active BIT,[56] while another bilateral FTA has reserved place for the investment chapter upon the negotiation of a regional FTA.[57] Moreover, the scope of provisions expanded over time, as China was calibrating its position in the multilateral trade system.[58] Treaties concluded after the China-Pakistan FTA (four, 30.8%) expand the choice for ISDS by including besides ICSID arbitration the ICSID AFR, UNCITRAL arbitration and any other arbitration agreed by the parties.[59]

Chinese PT(I)As are said to have several distinctive features.[60] First, while only 20% of Chinese BITs are said to provide NT,[61] this obligation is present in all Chinese PTAs with

[54] Ranjan 2015, at 928–929.

[55] 2010 Free Trade Agreement between the Government of the People's Republic of China and the Government of Costa Rica ('China-Costa Rica FTA'), http://fta.mofcom.gov.cn/topic/encosta.shtml, accessed 8 November 2017, Article 89, linking to 2007 China-Costa Rica BIT; 2013 Free Trade Agreement between the Government of Iceland and the Government of the People's Republic of China ('China-Iceland FTA'), https://www.mfa.is/media/fta-kina/Iceland-China.pdf, accessed 8 November 2017, Article 92, linking to 1994 China-Iceland BIT.

[56] 2015 Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China ('China-Australia FTA'), http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-agreement-text.pdf, accessed 8 November 2017, Article 9.9(2).

[57] 2008 Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore ('China-Singapore FTA'), http://fta.mofcom.gov.cn/singapore/doc/cs_xieyi_en.pdf, accessed 8 November 2017, Article 84, referring to the ongoing negotiations of the ASEAN-China Investment Agreement.

[58] Wang 2011, at 497.

[59] See 2009 Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Peru ('China-Peru FTA'), http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf, accessed 8 November 2017, Article 139; 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the Republic of China and the Association of Southeast Asian Nations ('ASEAN-China Agreement on Investment'), http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf, accessed 8 November 2017, Article 14; China-Australia FTA, Article 9.12(4).

[60] Wang 2011, at 502–503.

[61] Ibid.

investment chapters. This is supported by the recent treaty practice.[62] Second, the ISDS provisions in Chinese PTIAs prioritise friendly and non-litigious dispute settlement, which may be the result of longstanding national traditions of conflict avoidance or distrust of ISDS due to a lack of experience with it.[63] It has also been argued that Chinese FTAs are carefully tailored to the different needs and levels of development of their trading partners.[64]

iii. *ASEAN* - The investment regime of ASEAN can be divided into an internal (within the ASEAN bloc) and an external (with third countries) one. The internal framework is now governed by the ASEAN Comprehensive Investment Agreement (ACIA, 2009) that consolidates the two earlier internal investment agreements.[65] It contains an extensive list of substantive investment guarantees[66] and expands the choice of available fora with regional dispute settlement institutions.[67] Agreements with third countries follow a distinct pattern; in most cases FAs precede separate investment agreements, such as the FAs with China (2002), Japan (2003), India (2004) and Korea (2005). Interestingly, even though the FA with Japan was later supplemented with the ASEAN-Japan FTA (2008), the latter did not contain provisions on investment, deferring them to future negotiations.[68]

From a statistical perspective, out of six selected agreements, five (83.3%) contain NT, FET and FPS obligations together with provisions on expropriation and broad ISDS. Only three

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[62] ASEAN-China Agreement on Investment, Article 4; China-Australia FTA, Article 9.3; 2015 Free Trade Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea ('China-Korea FTA'), http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf, accessed 8 November 2017, Article 12.3.

[63] Wang 2011, at 503.

[64] Ibid., at 498–499. On the evolution of Chinese investment agreements, see Fontanelli and Bianco 2014, at 238-239.

[65] ASEAN Agreement for the Promotion and Protection of Investments (1987) and the Framework Agreement on the ASEAN Investment Area (1998). See also P Malanczuk (2011) Association of Southeast Asian Nations (ASEAN), Max Planck Encyclopedia of Public International Law, updated May 2011, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e898?rskey=Gk2eXt&result=2&prd=EPIL, accessed 25 August 2017, paras 24-29; Tevini 2013.

[66] NT (Article 5), MFN (Article 6), FET and FPS (Article 11), protections against expropriation (Article 16) and others.

[67] 2009 ASEAN Comprehensive Investment Agreement ('ACIA'), http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf, accessed 8 November 2017, Article 33(1). The Kuala Lumpur Regional Centre for Arbitration also appears in 2005 Agreement between the Government of Malaysia and the Government of Japan for an Economic Partnership ('Malaysia-Japan EPA'), http://fta.miti.gov.my/miti-fta/resources/auto%20download%20images/55894af110378.pdf, accessed 8 November 2017, Article 85.

[68] 2008 Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations ('ASEAN-Japan CEPA'), http://www.mofa.go.jp/policy/economy/fta/asean/agreement.pdf, accessed 8 November 2017, Article 51.

treaties include the MFN obligation (50%). FAs lacking substantive legal commitments were excluded from the statistics.[69]

iv. *Japan* - The Japanese experience is similar to the US and Canadian ones. First, the conclusion of EPAs with investment chapters is a more recent phenomenon, starting in the early 2000s, following the break-down of the multilateral WTO initiatives.[70] Second, a very high percentage (80%) of the 15 Japanese EPAs selected[71] include NT and the prohibition of expropriation, while 73.3% include an MFN clause in their investment chapters. In a fashion similar to the EU-Singapore FTA, the Japan-Singapore EPA lacks an MFN provision. Nonetheless, unlike US and Canadian FTAs, which include FET and FPS, Japanese EPAs include provisions on 'access to courts of justice', 'general treatment' or 'minimum standards of treatment'. In most cases they also include protection from civil strife, even with very stable countries such as Switzerland.[72]

A third of Japanese EPAs do not include ISDS. In the case of the Philippines, the government of this country had specifically asked Japan not to include ISDS,[73] while the EPA with Australia was concluded after 2011 when the then Australian government was reluctant to include ISDS in its international economic agreements.[74] The EPAs with Vietnam and Peru do not include investment chapters, since they are preceded by the 2003 and 2009 BITs, while Article 51 of the EPA with ASEAN only refers to further negotiations regarding investment protection. Nonetheless, BITs or bilateral EPAs with investment provisions exist with most ASEAN members.

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[69] The Framework Agreement on the ASEAN Investment Area (1998) was excluded from the first group, while the framework agreements with China (2002), Japan (2003), India (2004), Korea (2005) and the US (2006) were excluded from the second.

[70] Ministry of Foreign Affairs of Japan (2002) Japan's FTA Strategy, October 2002, http://www.mofa.go.jp/policy/economy/fta/strategy0210.html, accessed 25 August 2017.

[71] These are the EPAs with Mexico (2005), Malaysia (2006), Chile (2007), Thailand (2007), Indonesia (2007), Brunei (2008), Singapore (2006), ASEAN (2007), Philippines (2006), Switzerland (2009), Vietnam (2009), India (2011), Peru (2011), Australia (2014) and Mongolia (2015). Japan is also negotiating EPAs with Canada, Colombia, the Golf Cooperation Council, the EU and South Korea. See Ministry of Foreign Affairs of Japan (2017) Economic Policy, Free Trade Agreement (FTA) and Economic Partnership Agreement (EPA), 12 October 2017, http://www.mofa.go.jp/policy/economy/fta/, accessed 25 August 2017.

[72] 2009 Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation ('Japan-Switzerland EPA'), http://www.mofa.go.jp/region/europe/switzerland/epa0902/agreement.pdf, accessed 8 November 2017, Article 92.

[73] Kurtz and Nottage 2015, at 466.

[74] See Nottage 2013, at 255-258; He and Sappideen 2013, at 232.

v. *Australia* – Australia also began to include investment chapters into PTAs in the early 2000s. All the 10 post-NAFTA FTAs[75] selected and the Protocol on Investment to the Australia-New Zealand FTA of 1983 (entered into force in 2013) include standards of investment protection. NT appears in all the agreements (100%), while MFN treatment (81.8%) is missing in the FTAs with Singapore and ASEAN. The prohibition of expropriation and minimum standards of treatment appear in all the agreements, with the exception of the FTA with China, which in Article 9.9 provides for further negotiations.

Over a third of the agreements (36.6%) do not include ISDS. Two explanations exist. First, the apparent reason for the US-Australia FTA not including ISDS[76] was the 'robust' legal systems of the two countries for resolving disputes.[77] Second, in 2011 the Gillard Government vowed to exclude ISDS from future trade agreements.[78] This is why the FTAs with Japan (2014), Malaysia (2012) and the Protocol to the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA, 2013), negotiated and concluded in this period, do not include ISDS.[79] Nevertheless, this policy towards ISDS changed following the instatement of a new government in late 2013.[80] The FTAs that include ISDS mostly provide for the ICSID Arbitration Rules (AR), the ICSID AFR and the UNCITRAL AR. The FTA with Thailand is the exception, since in Article 917 it provides for only two options for ISDS: domestic judicial/administrative avenues or UNCITRAL arbitration.

In conclusion, the Asia-Pacific region portrays a diverse picture. China and India are concluding an increasing number of PTAs with investment protection provisions while simultaneously trying to become rule-makers. Japan follows a similar approach to Canada and the US, while Australia's stance on ISDS depends on the government in power.

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[75] These are the FTAs with Singapore (2003), Thailand (2003), US (2004), Chile (2008), ASEAN/AANZFTA (2009), Malaysia (2012), Korea (2014), Japan (2014) and China (2015) and the TPP (2016). The ones with the US, China, Japan and ASEAN appear in those sections as well. See Australian Government Department of Foreign Affairs and Trade (2017) Free Trade Agreements, http://dfat.gov.au/trade/agreements/pages/trade-agreements.aspx, accessed 25 August 2017.

[76] Still, Article 11.6 does envisage the possibility of the future setting up of an ISDS.

[77] K Tienhaara, P Ranald (2011) Australia's Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors, Investment Treaty News, 12 July 2011, http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/, accessed 25 August 2017; Kurtz and Nottage 2015, at 469.

[78] See Nottage 2013, at 255-258; He and Sappideen 2013, at 232.

[79] Australia does not have pre-existing BITs with these countries. See UNCTAD (2013) Australian BITs, http://investmentpolicyhub.unctad.org/IIA/CountryBits/11, accessed 25 August 2017.

[80] Kurtz and Nottage 2015, at 468.

Table X.2 Post-NAFTA Asia-Pacific PTAs

States/ REIOs	PTA	Standards of investment protection								ISDS					
		NT		MFN		Exprop.		Extra		Just ICSID		ICSID +		No ISDS	
		No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
India*	19	4	21.1	3	15.8	4	21.1	3	15.8	0	-	4	21.1	15	78.9
China*	13	5	38.5	5	38.5	4	30.8	4	30.8	1	7.7	4	30.8	8	61.5
ASEAN	6	5	83.3	3	50	5	83.3	5	83.3	0	-	5	83.3	1	16.7
Japan	15	12	80	11	73.3	12	80	12	80	0	-	10	66.7	5	33.3
Aust.**	11	11	100	9	81.8	10	90.9	10	90.9	0	-	6	55.5	4	36.6

* ASEAN-India and ASEAN-China were counted with ASEAN agreements only to avoid double-counting.
** The FTA with Thailand includes ISDS but does not refer to the ICSID AR.

X.2.4 Latin America

Some Latin American countries have been traditionally cautious about ISDS,[81] and their treaty practice remains largely diversified. In order to provide a balance between countries and REIOs and account for ideological differences regarding ISDS, two countries (Brazil and Chile) and two regional blocs (MERCOSUR and CARICOM) have been chosen.

i. *Brazil* – Brazil is known for not ratifying its BITs and refraining from undertaking international investment commitments that emulate widely used standards.[82] For example, none of the three bilateral PTAs with Guyana (2001), Mexico (2002) and Suriname (2005) contain investment provisions. Nevertheless, lately Brazil has been concluding cooperation and facilitation investment agreements (CFIAs) and has even come up with a new Model BIT, all of which diverge significantly from the mainline of international investment agreement (IIA) drafting.[83] However, neither the CFIAs nor the Model BIT include preferential trade arrangements, and are thus beyond the objective scope of this chapter. Furthermore, they still refrain from including investor-state arbitration.

[81] Barreiro and Lemos Daniela 2013, at 6.
[82] Ibid., at 13 et seq.
[83] Gómez and Titi 2016, at 522–524; J de Paiva Muniz, L Peretti (2015) Brazil Signs New Bilateral Investment Treaties with Mozambique and Angola: New Approach to BITs or 'Toothless Lions'? Global Arbitration News, 7 April 2015, https://globalarbitrationnews.com/20150407-brazil-signs-new-bilateral-investment-treaties/, accessed 25 August 2017.

ii. *Chile* – Unlike Brazil, Chile has been actively concluding PTAs. Several of them are presented in other geographical blocs and will not be counted here.[84] For the remaining 14 agreements, one may observe the following distinctive traits. First, five agreements (35.7%) contain traditional investment chapters, with the core standards of protection and ISDS consistently preserved from the late 1990s.[85] Second, a couple of Chilean PTAs, such as the plurilateral FTA with Central American states (1999)[86] and the bilateral FTA with Panama (2006)[87], refer to existing BITs instead of including investment chapters. Third, the most recent Chilean bilateral PTAs show a tendency of putting investment chapters aside during the original negotiations, while leaving an anchor for further consultations.[88] This approach might shorten the time needed to negotiate FTAs, while Chile's strong domestic protection of foreign investment can provide adequate protection to foreign investors until subsequent BITs are concluded.[89]

iv. *MERCOSUR* - In the observed period, MERCOSUR has concluded a significant number of PTAs (12), none of which contain investment chapters. In a few cases (four, 33.3%) the agreements mention the need to promote and encourage investments or conclude BITs in the future, without further elaboration.[90]

v. *CARICOM* - On the contrary, the treaty practice of CARICOM progressively leans towards hard investment commitments. Of the five PTAs concluded by CARICOM, four were

[84] The treaty with MERCOSUR (1996) will be presented below together with other regional treaties, while PTAs with Canada (1996), India and US (both 2003), China (2005), Japan (2007) and Australia (2008) are reviewed together with these countries respectively. The Chile-EU Association Agreement that includes a comprehensive FTA (2003) was concluded before the Lisbon Agreement and therefore excluded from the analysis (see section X.2.2 above).

[85] See FTAs between Chile and Mexico (1998), Korea (2003), Peru (2006) and Colombia (2006). The latest plurilateral agreement of Chile, Colombia, Mexico and Peru, the Pacific Alliance FTA (2014), also contains a broad investment chapter.

[86] 1999 Free Trade Agreement between Central America and Chile ('Chile - Central America FTA'), http://www.sice.oas.org/Trade/chicam/Text.pdf, accessed 8 November 2017, Articles 10.01-10.02.

[87] 2006 Free Trade Agreement between Chile and Panama ('Chile-Panama FTA'), http://www.sice.oas.org/Trade/CHL_PAN_FTA/TLC-Chile-Panama.pdf, accessed 8 November 2017, Articles 9.2.

[88] See FTAs between Chile and Turkey (2009), Malaysia (2010), Vietnam (2011), Hong Kong, China (2012) and Thailand (2013).

[89] Gómez and Titi 2016, at 530; Tavassi 2013, at 366.

[90] 1996 Free Trade Agreement between Chile and MERCOSUR ('Chile-MERCOSUR FTA'), ACE No. 35, Article 41; 1996 Economic Complementation Agreement between Bolivia and MERCOSUR ('Bolivia-MERCOSUR ECA'), ACE No. 36, Articles 35-36; 2005 Free Trade Agreement between MERCOSUR and Peru ('MERCOSUR-Peru FTA'), ACE No. 58, Articles 29-30; 2010 Free Trade Agreement between MERCOSUR and the Arab Republic of Egypt ('Egypt-MERCOSUR FTA'), http://www.jmcti.org/kaigai/Latin/2010/2010_09/2010_09_Ms01.pdf, accessed 8 November 2017, Articles 23.

included in the statistics; the PTA with the EU was counted as an EU agreement.[91] Several other agreements (CARICOM-Central American Integration System and PTIAs with MERCOSUR and US) are under negotiation without draft texts being available. The PTA with Canada was not included since negotiations broke down between the parties. The draft text, however, includes both investment protection provisions and broad access to ISDS.

Of the remaining four agreements, the first agreement is a rather early and traditional PTA with Colombia (1994), which mentions only encouragement of investments.[92] The FTAs with the Dominican Republic (1998) and Cuba (2000)[93] have investment chapters included as integral annexes. Nonetheless, the FTA with the Dominican Republic lacks ISDS provisions and includes only domestic dispute settlement procedures.[94] The FTA with Cuba contains a rather unique reference to an 'international arbitrator' or UNCITRAL arbitration.[95] The inclusion of Washington-based ICSID would have probably turned problematic given the past tensions between the US and Cuba. The subsequent FTA with Costa Rica (2004) contains an investment chapter with a full set of observed guarantees and broad access to ISDS.

From a statistical standpoint, three of the four observed agreements (75%) include the core protection standards, while access to ISDS is lacking in two agreements (50%).

In conclusion, the data shows that Chile and CARICOM are open to the inclusion of investment chapters into their PTAs. Nevertheless, recent Chilean PTAs defer investment protection to further negotiations. On the other hand, Brazil and MERCOSUR, to which Brazil is a party, prefer not to include any investment provisions, especially ISDS, in their PTAs.

Table X.3 Post-NAFTA Latin American PTAs

States/ REIOs	**PTA**	**Standards of investment protection**								**ISDS**					
		NT		**MFN**		**Exprop.**		**Extra**		**Just ICSID**		**ICSID +**		**No ISDS**	
		No.	**%**	No.	**%**	No.	**%**	No.	**%**	No.	**%**	No.	**%**	No.	**%**

[91] See Ruse-Khan and Ononaiwu 2015, at 146-149.

[92] 1994 Agreement on Trade, Economic and Technical Cooperation between CARICOM and Colombia ('CARICOM–Colombia ATEC'), AAP.A25TM No. 31, Articles 1 and 18.

[93] 1998 Free Trade Agreement between CARICOM and the Dominican Republic ('CARICOM-Dominican Republic FTA'), Annex III, http://www.sice.oas.org/Trade/Ccdr/English/Annexes/Annx_III_e.pdf, accessed 8 November 2017; 2000 Trade and Economic Co-operation Agreement between the Caribbean Community (CARICOM) and the Government of the Republic of Cuba ('CARICOM-Cuba TECA'), http://mfaft.gov.jm/wp/wp-content/uploads/2017/06/CARICOM-Cuba.pdf, accessed 13 November 2017, Annex A.

[94] CARICOM-Dominican Republic FTA, Annex III, Article VIII.

[95] CARICOM-CUBA TECA, Annex A, Article XII.

Brazil*	3	0	-	0	-	0	-	0	-	0	-	0	-	3	100
Chile	14	5	35.7	5	35.7	5	35.	5	35.7	0	-	5	35.7	9	64.3
MERC.	12	0	-	0	-	0	-	0	-	0	-	0	-	12	100
**CARI. ** **	4	3	75	3	75	3	75	3	75	0	-	1	25	2	50

* Agreements concluded within MERCOSUR were coded in that field.
** The CARICOM FTA with Cuba contains ISDS provisions without ICSID.

X.2.5 Africa

Researching African PTAs posed some methodological challenges. First, the PTAs between African and non-African countries often follow the model agreements of a more economically powerful partner. Thus, such agreements cannot be counted as truly 'African'. Second, compared to other regions the number of PTAs analysed is quite low (17 PTAs), often due to difficulties obtaining the treaty texts. Most notably, the analysis excludes 27 Kenyan PTAs[96], the texts of which could not be found.[97] Third, several post-NAFTA intra-regional and inter-regional PTAs deserve special attention, as they cover a significant number of African countries. Considering these limitations, the conclusions for the African region are rather tentative.

Due to the scarcity of data, the analysis takes a geographical turn and investigates the PTAs concluded by representatives of sub-Saharan Africa (South Africa) and Northern Africa (Morocco) as well as the major inter-African REIOs.

i. *South Africa* - South Africa has concluded six bi- and plurilateral trade agreements, either as a sole entity or as a member of regional organisations, such as the South African Customs Union (SACU) or the South African Development Community (SADC).[98] None of the

[96] Export Promotion Council of Kenya (2017) Trade Agreements, http://epckenya.org/index.php?option=com_content&task=view&id=50&Itemid=70, accessed 25 August 2017.
[97] The Government of Kenya's website only includes the names of the agreements, not their texts. The WTO RTA Database does not include RTAs with Kenya. The UNCTAD database under 'Treaties with Investment Provisions' (TIPs) only includes agreements to which Kenya is a party via its membership to REIOs, such as COMESA.
[98] Department of Trade and Industry, Republic of South Africa (2017) Trade Agreements, https://www.thedti.gov.za/trade_investment/ited_trade_agreement.jsp, accessed 25 August 2017. These are 1996 Zimbabwe-South Africa, 1999 Trade and Development Cooperation Agreement with the EU, 2002 South African Customs Union Agreement (SACU), 2006 EFTA-SACU (2006), 2008 SACU-MERCOSUR and 2016 EU-SADC. The TIFA and TIDCA between South Africa and the US were not included due to their hortatory and exploratory character. Neither were two non-reciprocal trade agreements included.

agreements include any standards of investment protection or ISDS. However, the South Africa-European Community (EC) Trade, Development and Cooperation Agreement (Article 52), the subsequent EPA with the EU (Article 74) and the EFTA-SACU FTA (Article 28) provide for further cooperation of the contracting parties regarding investment protection.

ii. *Morocco* - In the 1990s and early 2000s, Morocco concluded six trade agreements with countries and REIOs from the North-Atlantic Area or North Africa/the Middle East.[99] Only the FTA with the US includes all core standards of protection and ISDS. The FTAs with Turkey (Article 14), EFTA (Article 14) and the European Community (Article 50) all recognise the importance of investment and aim for further cooperation between the contracting parties.

iii. *Plurilateral Regionals* - The present study includes seven plurilateral agreements: the SADC Agreement (1996), the East African Community Agreement (EAC, 1999), the SACU Agreement (2002), the Agreement on the West African Economic and Monetary Union (WAEMU, 1994), the Tripartite Agreement (2015) between EAC, Common Market for Eastern and Southern Africa (COMESA) and SADC, the Revised Cotonou Agreement (2010) with the EU and the Economic Community of West African States (ECOWAS) Protocol on Energy concluded in 2003 but not yet in force.[100] The main ECOWAS Agreement (1993) and the COMESA Agreement (1993) were not included in the statistics because they were concluded before NAFTA. The main ECOWAS Agreement does not include provisions on investment protection and ISDS. However, the COMESA Agreement does include FET and the prohibition of expropriation in Chapter 26 on 'Investment Promotion and Protection'.[101] Furthermore, in Article 162 COMESA Agreement, the parties undertake to accede to multilateral investment agreements, such as ICSID.

Except for the Revised Cotonou Agreement, all the other agreements are truly African trade agreements between African countries. None of them include ISDS, NT or MFN treatment, apart from the ECOWAS Energy Protocol. The latter includes the core standards of investment protection[102] and three methods of ISDS: domestic courts, previously agreed dispute settlement procedures or international arbitration under the ICSID AR/AFR, the UNCITRAL AR, the

[99] These are the FTAs with the EU/EC (1996), the Pan-Arab Free Trade Area (1997), the US (2004), the Agadir Agreement (2004), EFTA (1997) and Turkey (2004).
[100] 2003 ECOWAS Energy Protocol, A/P4/1/03.
[101] 1993 Treaty establishing the Common Market for Eastern and Southern Africa, 33 ILM 1067 (1994) ('COMESA Treaty'), Articles 159(1)(a) and 159(3).
[102] Ibid., Chapter III.

Stockholm Chamber of Commerce or the Organisation for the Harmonization of Trade Laws in Africa.[103] The Tripartite Agreement in Article 45, the EAC in Articles 79-80 and the Revised Cotonou Agreement in Articles 21 and 78 also provide that the contracting parties shall seek further cooperation on investment protection.

One may conclude that the African PTAs analysed paint a different picture from their US, Canadian or Japanese counterparts, since most of them do not include the traditional standards of investment protection or ISDS. Regarding PTAs with non-African states, a possible explanation might be the abundance of existing BITs between these parties. When it comes to the regional trade agreements, there are two explanations. First, most countries that share membership in at least one regional organisation have concluded separate BITs between each other. [104] Second, regional organisations such as COMESA, ECOWAS or SADC have signed either a regional protocol or some regional regulations related to investment or are developing model regional investment agreements.[105]

Table X.4 Post-NAFTA African PTAs

States/ REIOs	PTA	Standards of investment protection								ISDS					
		NT		MFN		Exprop.		Extra		Just ICSID		ICSID +		No ISDS	
		No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
S. Africa*	6	0	-	0	-	0	-	0	-	0	-	0	-	6	100
Moroc.**	6	1	16.7	1	16.7	1	16.7	1	16.7	0	-	1	16.7	5	83.3
Regionals*	7	1	14.3	1	14.3	1	14.3	1	14.3	0	-	1	14.3	6	86.7

* SACU and SADC are included for both South Africa and the Regionals.
** The US-Morocco FTA (2006) is included for both Morocco and the US in section X.2.1.

X.2.6 Interim Conclusions

The answer to the first question raised by this chapter is that there is a growing tendency of including BIT-like chapters into PTAs. However, this practice is not uniform between the regions, countries and REIOs analysed. The selected countries/REIOs can be split into three groups. The *first group* includes the US, Canada, Japan, Australia, ASEAN and CARICOM. According to the country-specific data in Tables X.1 and X.2, most PTAs (65-100%)

[103] Ibid., Chapter V, Article 26.
[104] Páez 2017, at 389.
[105] Ibid., at 394-398.

concluded by these countries/REIOs include investment chapters with investment protection standards and ISDS. In these countries (apart from Australia), the way in which trade agreements have been concluded has been static in the last 15 years or so. Countries and REIOs belonging to the *second group* (EU, India, China and Chile), as illustrated by the country-specific data in Tables X.1, X.2 and X.3, have a higher number of PTAs (65-85%) that *do not* include investment chapters. Nevertheless, their trade and investment policies are evolving and an increasing number of recent PTAs include investment chapters. The *third group* includes countries/REIOs in which almost all PTAs lack investment chapters. Countries, such as Brazil, and REIOs influenced by these countries, such as MERCOSUR, often have an adverse position towards investment protection/ISDS, which is reflected in the lack of such provisions in PTAs. The African Regionals, as well as Moroccan and South African PTAs, often defer the inclusion of investment protection to further negotiations.

X.3 Potential Drivers behind the Inclusion/Exclusion of Investment Chapters into/from PTAs and Their Implications.

This section looks at potential drivers behind the inclusion or exclusion of investment chapters into/from PTAs and their implications. The data gathered in section X.2 will help to pin-point some readily apparent drivers (section X.3.2). However, it will be insufficient when discussing three other potential drivers (section X.3.3): (a) low-capacity governments accepting/using the templates of more powerful states; (b) the pursuit of more comprehensive and resource friendly negotiations; (c) achieving a more coherent application of international economic law. Therefore, academic literature from various fields of social sciences, such as law, political science and negotiation theory, shall also be consulted.

X.3.1 Readily Apparent Drivers

States/REIOs can choose to include investment chapters into their PTAs in order to *replace or reform an existing investment agreement* between them. For example, the China-New Zealand FTA (2008) included investment protection provisions that were meant to replace the outdated standards of the China-New Zealand Investment Protection and Promotion Agreement of

1998.[106] The opposite is also true. Contracting parties will often *not include* an investment chapter into a PTA if a *prior BIT exists* between them. Such is the case with the US PTAs with Bahrain and Jordan,[107] the Canadian PTAs with Jordan, Costa Rica and Peru[108] as well as the Japanese EPAs with Vietnam and Peru.[109]

One could also argue that some states/REIOs will aim to conclude complex PTAs, which go beyond traditional trade related areas, in order to *change* or *influence* existing international rules or domestic *rules* in the other contracting party. For example, newcomers to the investment field, such as the EU,[110] or rising economic powers, such as China, also want to leave their 'normative mark' on international investment law.[111] Others have argued that US PTAs often have the objective to produce changes in the partner country's domestic regulatory framework with the aim of bringing about a more favourable regulatory environment to their investors.[112]

There are further considerations for *not* combining trade and investment in one agreement. It might *not be the opportune moment* for the contracting parties to tackle too many issues in one agreement. Instead of an 'all-in' agreement, a cautious step-by-step approach can be favoured by contracting parties that are at the beginning of their economic cooperation after a period of cold political ties. For example, following decades of tense political relationship, China and Taiwan pursued economic cooperation with cautious steps. First, they concluded the Economic Cooperation Framework Agreement (ECFA) that does not include an investment chapter. [113] They decided only later, in 2012, to conclude the Cross-Straits Bilateral Investment Protection and Promotion Agreement (BIPPA).

It can also happen that there are *domestic impediments* for not including investment chapters into PTAs. These can be of a *constitutional/legal nature*, such as in the case of the EU. As mentioned, prior to the Lisbon Treaty, the EU could not conclude international agreements

[106] Gao 2015, at 89.
[107] Section X.2.2(i) United States.
[108] Section X.2.2(ii) Canada.
[109] Section X.2.3(iv) Japan.
[110] European Commission (2015) Investment in TTIP and Beyond - The Path to Reform, Concept Paper.
[111] Wang 2011, at 509-511.
[112] Lee 2015, at 9; Horn 2010, at 1587.
[113] Wang 2011, at 511-513.

covering FDI[114]; or some of the post-Lisbon agreements that have trade components, such as the AAs with Georgia, Moldova or Ukraine, are concluded under a different legal basis than FTAs.[115] Furthermore, following Opinion 2/15 the EU might seek to decouple investment chapters from far-reaching trade agreements in order to avoid possible conflict between the investment court system (ICS) and the EU legal order and to speed up the agreements' conclusion and ratification.

There might also be domestic impediments of a *political nature*, such as in the case of Brazil's reluctance to embrace the international investment law system.[116] Brazil's reluctance might have also influenced the type of agreements that MERCOSUR, to which Brazil is a party, has concluded.[117] ISDS has also been expressly excluded from Australian PTAs under the former Gillard Government or in the case of the Japan-Philippines EPA. [118]

X.3.2 Drivers that Require a More Thorough Discussion

The following subsections deal with three potential drivers and their implications, for which the data gathered in section X.2 is not sufficient. Therefore, a thorough discussion is undertaken with the help of academic works and studies from several disciplines.

X.3.2.1 Low-Capacity Governments Accepting/Using Existing Templates

In investment law it is not a secret that some states, such as the US, use model BITs as a basis to conclude subsequent investment agreements.[119] The European Commission, on the other

[114] In the United States this problem does not occur since the power over external affairs is vested exclusively in the Federal Government (mainly the President and in some instances the US Congress. See US Constitution, Articles I Section 8, II Section 2 Clause 2). See *United States v Belmont*, US Supreme Court, Judgement, 301 U.S. 324, 3 May 1937, at 328-332. Furthermore, US Constitution, Article 1 Section 10 Clause 1 prohibits State governments to enter into any treaties, alliances or confederations.

[115] TFEU, Article 207 for FTAs that also cover FDIs; TFEU, Article 217 for Association Agreements.

[116] Gómez and Titi 2016, at 523.

[117] The 1993 Colonia Protocol on Promotion and Protection of Investments Coming from Non-MERCOSUR States and the 1994 Buenos Aires Protocol on the Promotion and Protection of intra-MERCUSOR investments have included the traditional investment protection standards and ISDS but never came into force (see Fry and Stampalija 2012). In 2015 Brazil proposed the negotiation of an intra-MERCOSUR investment agreement based on its CFIAs that excludes ISDS.

[118] Kurtz and Nottage 2015, at 466; D Vis-Dunbar (2009) NGOs claim the Philippine-Japan free trade agreement is unconstitutional, Investment Treaty News, 8 June 2009, https://www.iisd.org/itn/2009/06/05/ngos-claim-the-philippine-japan-free-trade-agreement-is-unconstitutional/, accessed 25 August 2017.

[119] See Kantor 2012.

hand, has expressly renounced the idea of a 'one-size-fits-all' model for IIAs,[120] even though an 'invisible' EU BIT might actually exist.[121] For example, the 2015 Proposal on ISDS in TTIP has already found its way in a slightly altered manner into CETA and EU-Vietnam. Furthermore, the ISDS chapter under EU-Singapore will most likely be renegotiated in order to include the new Investment Court model..[122]

With regard to PTAs, a recent study has revealed that most PTAs copy verbatim a sizeable majority of their contents from existing agreements.[123] In some cases, such as the US FTAs with Colombia and Peru, there is a 99% overlap between the agreements, while the Canada-Peru FTA had copied the FTA with Colombia to such an extent that not even the names of the countries were changed in one of the schedules.[124] The authors of the study have also found 177 PTAs that covered investment, in the case of which the median overlap was 65% (!).[125] The study finds that such type of 'copy-pasting is most prevalent in two distinct scenarios: low-capacity governments that turn to an existing template to help devise their agreements, and powerful states that desire to spread their preferred set of rules globally'.[126] In other words, most probably one of the drivers for including investment chapters into PTAs is the usage/acceptance by low capacity governments of the PTA templates of more powerful states that also include investment chapters.

As observed in section X.2, some developed-developing country PTAs follow the template of existing agreements, often *verbatim*. In the case of the US FTAs with Colombia, CAFTA-DR, Morocco, Panama and Peru, even the numbering of the various articles dealing with investment protection matched.[127] The investment chapters of Canadian FTAs followed the 2004 Canadian Model FIPA, while Japanese EPAs mostly included similar investment

[120] See European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy, COM(2010)343 final, 7 July 2010, at 6.
[121] See Bungenberg and Reinisch 2014, at 377-378.
[122] H von der Burchard (2017) EU Makes Big Step toward Setting Investor Court as Global Norm, Politico, 2 February 2017, http://www.politico.eu/pro/trump-effect-pushes-singapore-toward-investment-court-reform/, accessed 25 August 2017.
[123] Allee and Elsig 2016. Alschner et al argue that powerful states adapt their PTAs strategically to their negotiation partner, rather than following a 'one-size-fits-all' approach used for BITs. Nonetheless, more recent PTAs of the US feature much higher similarity (Alschner et al 2017, at 12-13).
[124] Allee and Elsig 2016, at 2 and 24.
[125] Ibid., at 18.
[126] Ibid., at 3.
[127] See section X.2.2(i).

chapters.[128] However, this practice makes it more difficult to negotiate tailor-made solutions that adequately represent the wills of both contracting parties. Adding investment chapters to PTAs will simply continue this practice with a high risk that countries with more low-capacity governments will agree to trade liberalisation agreements that might contain unjustifiably broad or untailored ISDS provisions, which may in turn increase their exposure to investment claims.

There are, however, notable exceptions. A growing number of states refuse to be rule-takers. India chose not to follow its old BITs (which evidence earlier rule-taking) when shaping the investment chapters of its PTAs.[129] China made a similar move with the aim of creating more robust investment chapters in its recent PTIAs,[130] while Brazil has created a new CFIA model.[131]

A curious case is the Japan-Philippines EPA, in the case of which the economically stronger Japan agreed to omit ISDS on the request of the Philippines, even though its previous FTAs and BITs with other ASEAN countries included ISDS.[132] There might be two explanations for this. First, the Philippines at that point in time was the respondent in a high-profile investment arbitration case[133] that would have made the ratification of a PTA with an ISDS clause extremely difficult or impossible. The Philippines could then use the hostile domestic climate as a bargaining advantage over Japan, arguing that the whole agreement could fail because of the inclusion of ISDS.[134] Second, the rest of the agreement was probably more important to Japan than ISDS, since it was willing to exclude it. Japan might have chosen to do so because evidence shows that Japanese investors will almost never appear as claimants in investor-state disputes.[135]

[128] See section X.2.2(ii) and X.2.3(iv).
[129] Ranjan 2015, at 928.
[130] Wang 2011.
[131] Kurtz and Nottage 2015, at 468.
[132] Ibid., at 466.
[133] D Vis-Dunbar D (2009) NGOs claim the Philippine-Japan free trade agreement is unconstitutional.
[134] See Putnam 1988, 439-440. Adding a non-negotiable issue to the agenda can also cause the collapse of the entire negotiations (see Davis 2004, at 156).
[135] See Wells and Tsuchiya 2011.

X.3.2.2 Pursuing More Comprehensive and Resource-Friendly Negotiations

International negotiations take time and resources and ultimately affect the overall relationship and trust between the contracting parties.[136] Therefore, it is plausible that to save time and resources and to show high levels of mutual commitments, states might prefer to hold one set of comprehensive negotiations on both trade and investment, instead of holding separate negotiations for a PTA and a BIT.

Traditionally states favoured a 'compartmentalised' approach to international relations, dealing with different issues in different fora and through different international agreements.[137] However, as mentioned, more recent PTAs cover a multitude of non-trade fields. The presence of trade and investment in the same agreement might also lead to 'issue linkage' during the negotiations, which in turn can 'facilitate the completion of a greater number of mutually beneficial agreements'[138] and can motivate the contracting parties to stay committed to the agreement. Nevertheless, creating more comprehensive negotiations with the goal of using fewer resources might have certain *drawbacks* if one of the issues on the agenda is highly contentious domestically.

States and REIOs do not represent one single 'domestic' position on a particular issue. A country entering into international negotiations takes part in a two-level game because it needs to simultaneously satisfy the international partner and domestic constituencies.[139] For example, when negotiating the EPAs with Singapore and Mexico, Japan had to satisfy domestic constituencies that favoured the EPAs (the business federations) and those that opposed them (the agricultural sector).[140] If a certain issue, such as ISDS, is highly contentious domestically, then the negotiations might become more time and resource consuming or could end up in a deadlock. Several situations can be envisaged with various consequences.[141] The underlying premise is that state A and B are negotiating a PTA that includes ISDS.

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[136] One can for example think of the more recent Wallonian 'rebellion' against ISDS in CETA and the upset it caused with the Canadian side. See H von der Burchard, C Oliver (2016) Walloon revolt against Canada deal torpedoes EU trade policy, Politico, 17 August 2017, http://www.politico.eu/article/belgian-regional-government-set-to-block-eu-canada-trade-deal/, accessed 25 August 2017.

[137] See Wallace 1976, at 169-170.

[138] Tollison and Willet 1979, at 426. Nonetheless, just because two policy areas appear in one agreement does not necessarily mean there is issue linkage. See Maggi 2016, at 517.

[139] Putnam 1988, at 434. For an overview of subsequent literature that built on Putnam's model, see Enia 2009, at 368-369.

[140] Enia 2009, at 360-368.

[141] Due to constraints of space we have slightly simplified the scenarios.

In the first scenario, ISDS is not a contentious domestic issue in either of the states. Thus, it is highly likely that the contracting parties will agree to include ISDS in the PTA and conclude the agreement in a timely and resource-efficient fashion. For example, the China-New Zealand FTA (includes ISDS) was negotiated in only three years[142] or the US-Korea FTA (includes ISDS) took only 14 months to negotiate.[143] The ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) took four years to negotiate, but it has 12 contracting parties.[144] In none of these cases did ISDS represent a serious domestic concern.

In the second scenario, ISDS in not a contentious issue in State A, but it is in State B. In such a case the domestic 'win-set' of the parties will overlap to a lesser extent, and the inclusion or not of ISDS in the agreement will depend on multiple factors. For example, in the case of the EU, one can talk about a 'multi-level' game, in which the EU negotiator must satisfy multiple actors: the other contracting party(ies), domestic constituencies as well as EU-level Member State and regional institutions. As the recent Wallonian stance against CETA illustrates,[145] even a regional parliament of an EU Member State can disrupt the conclusion of a major PTIA if the domestic opposition against ISDS is strong enough. In the EU the public outcry against ISDS during the negotiations of TTIP and CETA[146] has led to extended negotiations. For CETA it took almost seven years to agree on the final text (2009-2016),[147] while in the case of EU-Singapore the addition of ISDS had lengthened the negotiations by over a year and the EU might seek to renegotiate EU-Singapore to include the new Investment

[142] Gao 2015, at 80.
[143] Lee 2015, at 1. In the case of this agreement there have been other domestic concerns in Korea.
[144] Lewis 2015, at 118.
[145] S Marks, C Oliver (2016) Belgium's Wallons cave on EU-Canada Trade Deal, Politico, 27 October 2016, http://www.politico.eu/article/belgiums-walloons-cave-on-eu-canada-trade-deal/, accessed 25 August 2017.
[146] European Commission, Commission Staff Working Document: Report: Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP), SWD(2015) 3 final, 13 January 2015.
[147] Council of the European Union, Recommendation from the Commission to the Council in order to authorize the Commission to open negotiations for an Economic Integration Agreement with Canada, 9036/09, 24 April 2009. Following the Lisbon changes, investment was also added to the CETA Negotiating Directive. See Council of the European Union, Recommendation from the Commission to the Council on the modification of the negotiating directives for an Economic Integration Agreement with Canada in order to authorise the Commission to negotiate, on behalf of the Union, on investment, 12838/11, 14 July 2011. Even though the initial text was concluded in 2014, the EU decided to add changes to the ISDS mechanism in late 2015, and the final text was thus agreed in February 2016.

Court System.[148] The end of the TTIP negotiations, which started in 2013, is also not yet in sight. On the other hand, the EU-Korea FTA could not include ISDS and took only two years to negotiate.[149] Some authors have even argued that ISDS should not be included in EU FTIAs because they might block the negotiation or conclusion of the agreements.[150]

The negotiation outcomes in the second scenario will vary according to how the perception of the contentious issue in State B changes over time and according to whether State A conditions the existence of the agreement on the inclusion of the contentious issue. For example, the EU in the end managed to include a 'refined' version of ISDS in CETA that was meant to please the civil society.[151] Still, this does not guarantee that problems will not surface during the ratification phase. Furthermore, it cannot be said that the negotiations were swift and resource-friendly.

In the case of the Japan-Philippines EPA, the Philippines had a clear stance against ISDS, and in the end Japan agreed to the non-inclusion of ISDS. As Putnam notes, if one of the contracting parties finds it difficult to ratify the international agreement due to domestic policy constraints, then it can use these domestic constraints to bargain for an international deal that does not include the contested 'issue'.[152] Nevertheless, a contracting party's strong bargaining position on ISDS does not guarantee that concessions in other areas will not be made.

If the inclusion of an investment chapter or ISDS risks compromising the conclusion of the trade agreement or can lead to protracted and costly negotiations, states could choose to have a sequential approach to their economic relationship, as observed in late Chilean FTAs. The parties can include 'anchor' clauses on future talks or consultations on investment

[148] European Commission (2017) DG Trade, Singapore, Documents archive, updated 8 November 2017, http://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=709, accessed 8 November 2017. See H von der Burchard (2017) EU Makes Big Step toward Setting Investor Court as Global Norm.

[149] Brown and Record 2015, at 41.

[150] J Pauwelyn (2016) If Wallonia Blocks CETA Because of Investor-State Dispute Settlement (ISDS) Why not Take ISDS out of CETA? International Economic Law and Policy Blog, 26 October 2016, http://worldtradelaw.typepad.com/ielpblog/2016/10/if-wallonia-blocks-ceta-because-of-investor-state-dispute-settlement-isds-why-not-take-isds-out-of-ceta.html, accessed 25 August 2017.

[151] Under the new approach the revised CETA text includes a clear recognition of the right to regulate of the contracting parties in the investment chapter, a two-tier dispute settlement system with an Appellate Tribunal, the objective to create a multilateral Investment Court and safeguards concerning domestic law. See European Commission (2016) CETA: EU and Canada agree on new approach on investment in trade agreement, 29 February 2016, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468, accessed 25 August 2017.

[152] Putnam 1988, at 439-440. Adding a non-negotiable issue to the agenda can also cause the collapse of the entire negotiations. See Davis 2004, at 156.

protection.[153] Once the trade relations are normalised and the initial trade agreement comes into force, the parties can then go on to negotiate the investment agreement. This way the PTA can be concluded in a short period of time without the contentious investment chapter compromising its conclusion. Furthermore, domestic attitudes towards ISDS might change over time, thus facilitating the conclusion of a subsequent BIT.

When negotiating a PTIA states must also ensure that trade and investment are adequately represented by professionals from both fields. Other authors have argued that the fields of trade and investment are served by two, largely divided, epistemic communities; lawyers and policy advisers will mostly be experts in either trade or investment.[154] Therefore, if during the negotiations one of the fields is not adequately represented, a state might enter into commitments it does not fully understand.

In the case of developing countries, the risk exists that a certain government department might not have sufficient expertise in both fields. However, this is an issue that states/REIOs with developed administrative structures can also face. For example, prior to Lisbon the EU did not have expertise in the negotiation of investment agreements. Therefore, post-Lisbon the European Parliament called on the European Commission 'to invest in terms of its personnel and its material resources' in the negotiation and conclusion of investment agreements.[155] In the US issues arose not because of a lack of personnel, but because the primary authority over investment agreements was transferred from the State Department to the Office of the US Trade Representative in the 1980 reorganisation of the Executive Branch.[156] Furthermore, the 'PTIA drafters need more negotiating expertise due to the likelihood of interaction and cross-chapter application of rules in such treaties'.[157]

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[153] 2009 Free Trade Agreement between the Republic of Chile and the Republic of Turkey ('Chile-Turkey FTA'), http://www.sice.oas.org/Trade/CHL_TUR_Final/Text_FTA_e.pdf, accessed 10 November 2017, Article 61; 2010 Malaysia-Chile Free Trade Agreement ('Chile-Malaysia FTA'), http://www.sice.oas.org/Trade/CHL_MYS/CHL_MYS_FTA_e/Full_text.pdf, accessed 10 November 2017, Article 14.5.

[154] Hoffmann et al 2013, at 15.

[155] European Parliament, Resolution of 6 April 2011 on the Future European International Investment Policy, P7 TA(2011)0141, 6 April 2011, point 16. Currently, Unit B2 under DG Trade is tasked with investment matters (see European Commission (2009) Trade organisation chart, http://trade.ec.europa.eu/doclib/docs/2009/december/tradoc_145610.pdf, accessed 16 March 2017.

[156] Vandevelde 1992, at 30.

[157] Baetens 2013, at 101.

X.3.2.3 A More Coherent Application of International Economic Law?

In the post-WWII period trade and investment agreements took divergent paths; trade took the path of multilateralism and state-to-state arbitration, while investment protection became regulated mainly bilaterally, and investor-state arbitration became the preferred mode of dispute settlement. Nevertheless, trade and investment are closely related and one often conditions the existence of the other. The push to create more overarching PTAs, which increasingly include investment protection, could reflect the wish of states to create more coherence in the application of trade and investment provisions.[158]

One could argue that including trade and investment in the same agreement might result in more coherence and possible normative convergence between trade and investment law. However, it would be difficult to measure whether convergence occurs. Furthermore, much would depend on how the PT(I)As are applied and interpreted by the various treaty institutions set up for this purpose. Regarding the latter, the selected agreements create two types of international institutions/bodies: treaty bodies and dispute settlement bodies.

Treaty bodies are generally charged with the power to interpret[159] or supervise the implementation of international agreements.[160] Most of the selected PTAs set up a central organ, such as a Joint or Trade Commission/Committee,[161] as well as specialised sub-

[158] Other authors have already noted that international economic agreements are increasingly used as tools to achieve more coherence in a state's foreign economic policy (see Chilton 2015). The European Commission's 2006 Global Europe Communication speaks of the need to build a 'comprehensive, integrated and forward-looking external trade policy' of the EU with the help of FTAs that 'must be comprehensive in scope' (European Commission (2006) Global Europe Competing in the World: A Contribution to the EU's Growth and Jobs Strategy, http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf, accessed 25 August 2017, at 9-10).

[159] See Schlütter 2012.

[160] See Ulfstein 2012, at 429-430. For a classification of treaty bodies (commissions or committees), see Schermers and Blokker 2011, paras 421-431, who classify them into functional, consultative, *ad hoc* advisory, procedural and regional commissions. See also Gáspár-Szilágyi 2016.

[161] 2016 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member Stats, of the other part, OJ L 11/23 ('CETA'), Article 26.1; 2014 Free Trade Agreement between Canada and the Republic of Korea ('Canada-Korea FTA'), http://investmentpolicyhub.unctad.org/Download/TreatyFile/3076, accessed 10 November 2017, Article 20.1; 2013 Free Trade Agreement between Canada and the Republic of Honduras ('Canada-Honduras FTA'), http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/honduras/fta-ale/index.aspx?lang=eng, accessed 10 November 2017, Article 21.1; Canada-Panama FTA, Article 21.01; 2006 United States-Colombia Trade Promotion Agreement ('US-Colombia PTA') https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text, accessed 13 November 2017, Article 20.1; 2006 United States-Oman Free Trade Agreement ('US-Oman FTA'), https://ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text , accessed 13 November 2017, Article 19.2; 2005 Dominican Republic–Central America–United States Free-Trade Agreement ('CAFTA-DR'),

committees[162] handling various policy areas covered by the agreements, such as trade in goods and customs[163] or services and investment.[164] Some PTAs also create secretariats to provide administrative assistance.[165] An argument could be made that this type of institutional set-up is conducive for some level of coherence or convergence between a PTA's trade and investment provisions. Even though various sub-committees oversee the interpretation and implementation of the different policy fields, the chances of conflict or overlap are lowered because one central committee ensures their overall supervision. Nonetheless, the power of such committees to interpret the agreements might create tensions with the interpretive powers of dispute settlement bodies (DSBs).[166]

When it comes to *DSBs*[167], the situation is markedly different. Unlike central treaty committees that can supervise the work of trade and investment sub-committees, no central body exists that supervises the work of trade and investment DSBs. Traditionally, PTAs only provided for state-to-state dispute settlement. However, the data gathered in section X.2 shows that most PTAs with investment chapters also include investor-state arbitration. In other words, the old difference between trade and investment law's dispute settlement methods is kept in the selected PT(I)As.

One could argue that the inclusion of various policy areas in one agreement may lead to a more holistic reading and interpretation of the treaty in dispute settlement proceedings.

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https://wits.worldbank.org/GPTAD/PDF/archive/UnitedStates-DominicanRepublic(CAFTA).pdf, accessed 1 November 2017, Article 19.1; 2004 Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership ('Japan-Mexico EPA'), http://www.mofa.go.jp/region/latin/mexico/agreement/pdfs/epa1203.pdf, accessed 13 November 2013, Article 165; 2005 Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership ('Japan-Malaysia EPA'), http://www.mofa.go.jp/region/asia-paci/malaysia/epa/content.pdf, accessed 13 November 2017, Article 13. For a further discussion, see Gáspár-Szilágyi 2016.

[162] Canada-Korea FTA, Annex 20-A; Canada-Honduras FTA, Article 21.1.7; Canada-Panama FTA, Annex 21.01; US-Colombia TPA, Article 20.1.3; CAFTA-DR, Article 19.1.3; Japan-Mexico EPA, Articles 19, 37, 103 and 117; Japan-Malaysia EPA, Articles 14, 25, 49, 58, 65, 70, 93, 110, 129, 134 and 143. See also Ulfstein 2012, at 430.

[163] CETA, Article 26.2; European Commission (2015) EU-Singapore Free Trade Agreement: Authentic text as of May 2015, 29 June 2015 ('EU-Singapore FTA'), http://trade.ec.europa.eu/doclib/press/index.cfm?id=961, accessed 10 November 2017, Article 17.2.1; European Commission (2016) EU-Vietnam Free Trade Agreement: Agreed text as of January 2016, 1 February 2016 ('EU-Vietnam FTA'), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437, accessed 10 November 2017, Chapter XX, Article X.2.1.

[164] CETA, Article 26.2(b) 'Committee on Services and Investment', Article 17.2.1(d) 'Committee on Trade in Services, Investment and Government Procurement'; EU-Vietnam FTA, Chapter XX, Article X.2.1(b) 'Committee on Services, Investment and Government Procurement'.

[165] Canada-Honduras FTA, Article 21.3.

[166] See Brower 2006; Kaufmann-Kohler 2011.

[167] Not to be confused with the WTO Dispute Settlement Body.

International trade law has been traditionally perceived as an authoritative source for the interpretation of investment treaties,[168] especially in the context of NT/MFN provisions.[169] However, to what extent shall other parts of a PTA be relevant for arbitral tribunals established under the PTA's ISDS provisions?

It has been suggested that the interpretation of the investment chapters may be influenced by the 'surrounding treaty context', leading to a somewhat different application of investment protection standards in PTIAs from standalone BITs.[170] These have been characterised as 'conceivable theoretical problems' since 'there is virtually no case law addressing this issue'.[171] However, questions of mutual interference between different chapters have actually appeared in jurisdictional decisions of early NAFTA tribunals, showing the lack of any consistent approach to trade and investment matters within a single agreement.[172]

It may nevertheless be suggested that the broader context of PT(I)As can have an influence on the reasoning of investment tribunals. Instead of confining themselves to investment provisions, tribunals can take into consideration the overall purpose of PT(I)As (trade liberalisation, promotion of investment, regulatory space, protection of non-economic interests and general exceptions) when interpreting investment protection provisions. This could create a more balanced approach towards the goal of trade and investment liberalisation than just having a short BIT. At the same time, some tribunals might still only focus on those provisions that concern their respective areas of jurisdiction, neglecting the rest of the agreement. For example, NAFTA arbitral practice 'contains mixed conclusions as to whether the inclusion of an investment chapter in a PTIA would indeed substantially change the scope and character of both its trade and investment provisions'.[173]

The wish of contracting parties to create more coherence and convergence in the application of trade and investment law might also be hampered by the different epistemic communities involved in the enforcement process. The differences between the trade and investment adjudicative mechanisms requires specialised decision-makers, which conditions low levels of cross-disciplinary participation and expertise, anecdotally coined by Joost Pauwelyn as

[168] For a comprehensive review of literature, see Hoffmann et al 2013, at 15, footnote 23.
[169] Dolzer and Schreuer 2012, at 204-206; Muchlinski 2013, at 220-221.
[170] Baetens 2013, at 96.
[171] Ibid.; De Brabandere 2013, at 65-66.
[172] For an overview of cases, see Lévesque 2015, at 376-386.
[173] Braun 2013, at 138-141.

'investment arbitrators are from Mars, trade adjudicators are from Venus'.[174] From a legal perspective, these striking differences of two epistemic communities of decision-makers can explain the impeded convergence between WTO and ISDS case law and the lack of cross-fertilisation between the two fields.[175] It shall be noted that the recent EU FTIAs also follow this tradition and separate the decision-making communities into arbitrators of government-to-government dispute settlement panels and 'judges' of the Investment Court System, with different qualification requirements.[176]

In conclusion, while states and REIOs might use the need to provide coherence in the application of trade and investment rules as a reason to include investment chapters into PTAs, such coherence might only be ensured by treaty committees. Trade and investment DSBs might continue their divergent paths due to their different scope, set-up and different epistemic communities.

X.4 Conclusions

This chapter posed two questions: first, whether there is a growing tendency of including BIT-like investment chapters into PTAs; second, if such a tendency exists, what are the drivers behind it and what potential implications might they have? Due to the nature of the questions, which were meant to be in line with this Volume of the *Netherlands Yearbook of International Law*, a traditional, doctrinal approach was replaced with an empirical study of 158 post-NAFTA PTAs, followed by a critical assessment of several potential drivers in the light of trade law, investment law, negotiation theory and political science literature.

The answer to the first question is a nuanced one. A growing tendency of including investment chapters into PTAs can be observed. Nonetheless, this is not global and differs among the 15 countries and REIOs that were analysed. Most of the PTAs concluded by the US, Canada, Japan, ASEAN and CARICOM include comprehensive investment chapters, which in turn contain detailed investment protection standards and ISDS. Most of the PTAs concluded

[174] Pauwelyn 2015.
[175] Ibid., at 800.
[176] For trade DSB see European Commission (2015) Textual Proposal: Dispute Settlement, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf, accessed 25 August 2017, Article 22.2; CETA, Article 29.8; EU-Vietnam FTA, Chapter [...] Dispute Settlement, Articles 23.2. For ISDS, see European Commission (2015) Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce, http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf, accessed 25 August 2017, Article 9.4; CETA, Article 8.27; EU-Vietnam FTA, Chapter II, Article 12.

by China, India, the EU and Chile do not include investment chapters. Nevertheless, their trade and investment policies are changing and an increasing number of recent PTAs include investment chapters. PTAs concluded by Brazil and MERCOSUR do not include investment chapters, while most of the African Regionals, as well as Moroccan and South African PTAs, often defer the inclusion of investment protection to further negotiations.

There are several potential drivers behind the tendency of including investment chapters into PTAs. Some drivers, as well as inhibitors, are easily discernible from the data gathered in section X.2. For example, states/REIOs can choose to include investment chapters into PTAs with the aim of replacing/reforming existing investment agreements between them or in order to change/influence existing international rules or domestic rules in the other contracting party. States can also choose *not* to combine trade and investment in one agreement for the following reasons: if a BIT already exists between them; if it is not the opportune political moment; or if there are domestic impediments of a legal/constitutional/political nature .

For three further drivers the data collected in section X.2 was not sufficient. Therefore, various academic writings and studies from several fields of social sciences were consulted.

First, low-capacity governments might accept/use existing PTA templates of more powerful states that include investment chapters. However, this practice implies the lack of tailor-made solutions and increases the risk for weaker states of accepting onerous investment commitments. Furthermore, several states are turning against such practice by devising their own treaty models or by refusing to accept investment chapters or ISDS in PTAs.

Second, states/REIOS might choose to include investment chapters in PTAs to pursue more comprehensive and resource-friendly negotiations. At the same time, negotiation delays and even deadlocks can occur if certain highly contested issues, such as ISDS, are included in the overall negotiations. In addition, negotiating over a broader agenda requires sufficient expertise from the negotiators, which may not always be available.

Third, a more coherent application of international economic law might be pursued through the inclusion of trade and investment provisions into one agreement. Nonetheless, coherence and possible convergence might be hindered by the application and interpretation of the PTAs by various treaty and dispute settlement bodies that are served by distinct epistemic communities.

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