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THE RISE OF REGIONALISM IN INTERNATIONAL INVESTMENT POLICYMAKING: CONSOLIDATION OR COMPLEXITY?

1) Introduction

Regional and inter-regional investment treaty-making involving more than two parties can take different forms – notably, negotiations within a regional grouping, negotiations between a regional bloc and a third country, or negotiations between like-minded countries. Some of the regional investment policy developments are described below.

2) Current regional negotiations

Asia

On 22 November 2012, ASEAN officially launched negotiations with Australia, China, India, Japan, New Zealand and the Republic of Korea on a Regional Comprehensive Economic Partnership Agreement (RCEP). The RCEP seeks to create a liberal, facilitative and competitive investment environment in the region. Negotiations on investment under the RCEP will cover the four pillars of promotion, protection, facilitation and liberalization, based on its Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership.² The RCEP agreement will

Highlights

- Today, at least 110 countries are involved in 22 regional negotiations.¹ This follows the conclusion of eight regional IIAs during 2012, involving 49 countries from Asia, Europe, North and South America.
- Regionalism can bring challenges and opportunities.
- The current approach to regionalism leads to a multiplication of treaty layers, making the network of international obligations even more complex and prone to overlap and inconsistency.
- However, regionalism can also provide an opportunity for rationalization of the IIA regime. If parties to nine current regional negotiations (i.e. those where BITs-type provisions are on the agenda) opted to replace their respective BITs with an investment chapter in the regional agreement, this would consolidate today's global BIT network by more than 270 BITs, or close to ten per cent.

¹ This includes the 27 EU Member States counted individually.



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be open for accession by any ASEAN FTA partner that did not participate in the RCEP negotiations and any other partner country after the conclusion of the RCEP negotiations.

On 20 December 2012, ASEAN and India concluded negotiations on trade in services and on investment. The ASEAN–India Trade in Services and Investment Agreements were negotiated as two stand-alone treaties pursuant to the 2003 Framework Agreement on Comprehensive Economic Cooperation between ASEAN and India. The agreements are expected to complement the already signed FTA in goods.³

Latin America

In 2012, Chile, Colombia, Mexico and Peru signed a framework agreement that established the Pacific Alliance as a deep integration area – an initiative launched in 2011.⁴ In line with the mandate established therein, negotiations continue for the free movement of goods, services, capital and people and the promotion of investment on the basis of the existing trade and investment frameworks between the parties. The investment negotiations emphasize objectives to attract sustainable investment and address novel elements such as responsible investment and CSR.

Africa

Negotiations towards the creation of a free trade area between the Southern African Development Community, the East African Community and the Common Market for Eastern and Southern Africa (COMESA) picked up momentum in 2012 with the establishment of the Tripartite Trade Negotiation Forum, the body responsible for technical negotiations and guided by the road map adopted for the negotiations. Investment talks are scheduled as part of the second phase of negotiations, envisaged to commence in the latter half of 2014.⁵

Europe

In Europe, regional treaty-making activity is dominated by the European Union (EU), which negotiates as a bloc with individual countries or other regions.⁶ Most of the recently launched negotiations encompass investment protection and liberalization. This is in line with the shift of competence over FDI from Member States to the EU after the entry into force in December 2009 of the Lisbon Treaty (*WIR10*, *WIR11*). Since new EU-wide investment treaties will eventually replace BITs between the EU Member States and third parties, these negotiations will contribute to a consolidation of the IIA regime.

(i) Recently launched negotiations⁷

On 1 March 2013, the EU and Morocco launched negotiations for a Deep and Comprehensive Free Trade Agreement (DCFTA). Morocco is the first Mediterranean

² The Guiding Principles were adopted by the economic ministers in Siem Reap, Cambodia in August 2012 and endorsed by the ASEAN leaders at the 21st ASEAN Summit, <http://www.asean.org/news/asean-secretariat-news/item/asean-and-fta-partners-launch-the-world-s-biggest-regional-free-trade-deal>.

³ Vision Statement, ASEAN–India Summit, New Delhi, India, 20 December 2012, <http://www.asean.org/news/asean-statement-communiques/item/vision-statement-asean-india-commemorative-summit>. Because the two agreements were awaiting signature at the end of 2012, they are not reported as IIAs concluded in 2012.

⁴ “Mandatarios suscriben Acuerdo Marco de la Alianza del Pacífico”, Presidency of the Republic of Peru Antofagasta, 6 June 2012, <http://www.presidencia.gob.pe/mandatarios-suscriben-acuerdo-marco-de-la-alianza-del-pacifico>.

⁵ The first phase of the negotiations, scheduled to conclude in June 2014, will focus on merchandise trade liberalization, infrastructure development and industrial development.

⁶ This section highlights negotiations involving the EU that were launched in 2013, as well as negotiations that were started earlier and that cover investment protection and liberalization based on the new EU mandate. Negotiations that were started earlier and that do not directly address investment protection (e.g. such as those carried out in the EPA context) are not included in the review.

country to negotiate a DCFTA with the EU that includes investment. Negotiations with Egypt, Jordan and Tunisia are expected to follow.⁸

On 6 March 2013, FTA negotiations between the EU and Thailand were officially launched. In addition to investment liberalization, negotiations will also cover tariff reduction, non-tariff barriers and other issues, such as services, procurement, intellectual property, regulatory issues, competition and sustainable development.⁹

On 12 March 2013, the European Commission requested Member States' approval to start negotiations towards a Transatlantic Trade and Investment Partnership (TTIP) with the United States.¹⁰ Besides investment, the TTIP is expected to include reciprocal market opening in goods and services and to foster the compatibility of regulatory regimes. With respect to investment, the EU–United States High-Level Working Group on Jobs and Growth has recommended that the future treaty include investment liberalization and protection provisions based on the highest levels of liberalization and protection standards that both sides have negotiated to date.¹¹ It also recommended “that the two sides explore opportunities to address these important issues, taking into account work done in the Sustainable Development Chapter of EU trade agreements and the Environment and Labor Chapters of U.S. trade agreements”.¹²

On 25 March 2013, the EU and Japan officially launched negotiations for an FTA.¹³ Both sides aim to conclude an agreement covering the progressive and reciprocal liberalization of trade in goods, services and investment, as well as rules on trade-related issues.¹⁴

(ii) Ongoing negotiations¹⁵

The EU is negotiating a Comprehensive Economic and Trade Agreement (CETA) with Canada. The CETA will likely be the first EU agreement to include a substantive investment protection chapter (adopting the post-Lisbon approach).¹⁶

Following the conclusion of free trade negotiations between the EU and Singapore in December 2012, the two sides are pursuing talks on a stand-alone investment agreement – again, based on the new EU competence under the Lisbon Treaty.¹⁷ The FTA between the EU and India, under negotiation since 2007, is expected to include a substantive investment protection chapter (also following the post-Lisbon approach).¹⁸

EU negotiations with Armenia, Georgia and the Republic of Moldova are under way and address establishment-related issues, among other elements. In addition, negotiations to strengthen investment-related provisions in existing partnership and cooperation agreements are under way with Azerbaijan, Kazakhstan and China.¹⁹

⁷ This section covers negotiations that began in 2013. For a comprehensive overview of EU FTAs and other negotiations, see http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

⁸ These negotiations are taking place after the European Commission, in December 2012, received a mandate to upgrade association agreements with its Mediterranean partner countries to include investment protection. See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=888>.

⁹ <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/thailand>.

¹⁰ <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/united-states>.

¹¹ “Final Report of the High Level Working Group on Jobs and Growth”, 11 February 2013, http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

¹² This follows the April 2012 “Statement on Shared Principles for International Investment,” which set out a number of principles for investment policymaking, including the need for sustainable-development-friendly elements, (see http://europa.eu/rapid/press-release_IP-12-356_en.htm and WIR 2012, chapter III.B) .

¹³ <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/japan>.

¹⁴ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=881>.

¹⁵ This section refers to the latest developments in negotiations that were launched before 2013.

¹⁶ <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/canada>.

¹⁷ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=855>.

¹⁸ <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/india>.

Interregional negotiations

In terms of interregional negotiations – i.e. those conducted between numbers of individual countries from two or more geographical regions – discussions on the Trans-Pacific Partnership Agreement (TPP) continued, with the 17th negotiation round concluded in May 2013.²⁰ As of May 2013, 11 countries were participating in the negotiations – namely Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Viet Nam. Japan officially declared its intention to join the TPP negotiations on 13 March 2013, and Thailand has also expressed its interest in joining. The agreement is expected to include a fully fledged investment chapter containing typical standards of investment liberalization and protection.

In North Africa and the Middle East, Arab countries are expected to continue discussions and negotiations on a revised Unified Agreement for the Investment of Arab Capital in the Arab States. A draft text was adopted early in 2013, ensuring free movement of capital and providing national treatment and most-favoured-nation (MFN) status to investments.

Progress in 2013 is also expected in the interregional negotiations between the EU and MERCOSUR (the Mercado Común del Sur), which were first launched in 2000. Those negotiations had stalled for several years, but were relaunched in May 2010 at the EU-LAC Summit in Madrid.²¹

3) Systemic issues arising from regionalism

The current IIA regime is known for its complexity and incoherence, gaps and overlaps. Rising regionalism in international investment policymaking presents a rare opportunity to rationalize the regime and create a more coherent, manageable and development-oriented set of investment policies. In reality, however, regionalism is moving in the opposite direction, effectively leading to a multiplication of treaty layers, making the network of international investment obligations even more complex and prone to overlap and inconsistency.

An analysis of 11 regional IIAs signed between 2006 and 2012 reveals that most treaties do not provide for the phasing out of older BITs. Instead, most treaty provisions governing the relationship between regional agreements and other (investment) treaties allow for the continuing existence of the BITs in parallel with the regional treaty (table 1).

Regional IIAs use different language to regulate the relationship between prior BITs and the new treaty. Some expressly confirm parties' rights and obligations under BITs, which effectively means that the pre-existing BITs remain in force. This is done, for example, by referring to an annexed list of BITs (e.g. the Consolidated European Free Trade Agreement, or CEFTA) or to all BITs that exist between any parties that are signatories to the regional agreement (e.g. China–Japan–Republic of Korea investment agreement). Some IIAs include a more general provision reaffirming obligations under any agreements to which “a Party” is party (e.g. the

Although regionalism provides an opportunity to rationalize the IIA regime, the current approach risks adding a layer of complexity.

¹⁹ At the EU–China Summit on 14 February 2012, the leaders agreed that “a rich in substance EU–China investment agreement would promote and facilitate investment in both directions” and that “[n]egotiations towards this agreement would include all issues of interest to either side, without prejudice to the final outcome”. See http://europa.eu/rapid/press-release_MEMO-12-103_en.htm.

²⁰ Press release, United States Trade Representative, 13 March 2013, <http://www.ustr.gov/about-us/press-office/press-releases/2013/march/tpp-negotiations-higher-gear>.

²¹ During a joint EU-MERCOSUR Ministerial Meeting (26 January 2013), the parties stressed the importance of ensuring progress in the next stage of the negotiation and agreed to start their respective internal preparatory work for the exchange of offers, http://trade.ec.europa.eu/doclib/docs/2013/january/tradoc_150458.pdf. Note that these negotiations currently focus on establishment and do not cover BITs-type protection issues. See http://eeas.europa.eu/mercosur/index_en.htm.

ASEAN Common Investment Area, as well as agreements between ASEAN and China, and ASEAN and the Republic of Korea).

Table 1. Relationship between regional and bilateral IIAs (illustrative)

Regional Agreement	Affected bilateral treaties	Relationship	Relevant article
ASEAN Comprehensive Investment Agreement (2009)	26	Parallel	Article 44
COMESA Common Investment Area (CCIA) (2007)	24	Parallel ^a	Article 32
SADC Protocol on Finance and Investment (2006)	16	Silent	N.A.
Consolidated Central European Free Trade Agreement (CEFTA) (2006)	11	Parallel	Article 30
ASEAN–China Investment Agreement (2009)	10	Parallel	Article 23
Eurasian Economic Community investment agreement (2008)	9	Silent	N.A.
ASEAN–Republic of Korea Investment Agreement (2009)	8	Parallel	Article 1.4
Dominican Republic–Central America–United States FTA (CAFTA) (2004)	4	Parallel ^a	Article 1.3
Central America–Mexico FTA (2011)	4	Replace	Article 21.7
China–Japan–Republic of Korea investment agreement (2012)	3	Parallel	Article 25
ASEAN–Australia–New Zealand FTA (2009)	2	Parallel ^a	Article 2 (of chapter 18)

Source: UNCTAD.

Note: All except CEFTA include substantive and procedural investment protection provisions as commonly found in BITs. (CEFTA contains some BIT-like substantive obligations but no ISDS mechanism.)

^a The language of the relevant provision leaves room for doubt as to whether it results in the parallel application of prior BITs and the regional IIA.

Another group of regional IIAs includes clauses reaffirming obligations under agreements to which “the Parties” are party (e.g. the ASEAN–Australia–New Zealand FTA, CAFTA, and COMESA). This ambiguous language leaves open the question of whether prior BITs remain in force and will co-exist with the regional IIAs.²²

A regional agreement can also provide for the replacement of a number of prior IIAs, as is the case with the Central America–Mexico FTA,²³ or they can simply remain silent on this issue. In the latter scenario, the rules of the Vienna Convention on the Law of Treaties²⁴ on successive treaties that relate to the same subject matter could help to resolve the issue.

The parallel existence of such prior BITs and the more recent regional agreements with investment provisions has systemic implications and poses a number of legal and policy questions. For example, parallelism raises questions about how to deal with possible inconsistencies between the treaties. While some IIAs include specific “conflict rules”, stating which treaty prevails in the case of an inconsistency,²⁵ others do not. In the absence of such a conflict rule, the general rules of international law enshrined in the Vienna Convention on the Law of Treaties (notably, the “lex posterior” rule) apply. Next, parallelism may pose a challenge in the context of ISDS. Parallel IIAs may create situations in which a single government measure could be challenged by the same foreign investor twice, under two formally different legal instruments.

²² This lack of clarity arises from the fact that the treaty’s reference to “the Parties” could be understood as covering either all or any of the parties to the regional agreement. The latter interpretation would also include BITs, hence resulting in parallel application; the former interpretation would only include agreements which all of the regional treaty parties have signed, hence excluding bilateral agreements between some – but not all – of the regional agreement’s contracting parties.

²³ The Central America–Mexico FTA (2011) replaces the FTAs between Mexico and Costa Rica (1994), Mexico and El Salvador, Guatemala and Honduras (2000), and Mexico and Nicaragua (1997).

²⁴ Vienna Convention on the Law of Treaties (1969), http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

²⁵ The COMESA investment agreement, for example, states in Article 32.3: “In the event of inconsistency between this Agreement and such other agreements between Member States mentioned in paragraph 2 of this Article, this agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.” Article 2.3 of the ASEAN–Australia–New Zealand FTA enshrines a “soft” approach to inconsistent obligations whereby “In the event of any inconsistency between this Agreement and any other agreement to which two or more Parties are party, such Parties shall immediately consult with a view to finding a mutually satisfactory solution.”

Current regional negotiations present an opportunity to consolidate the IIA regime.

Parallelism is also at the heart of systemic problems of overlap, inconsistency and the concomitant lack of transparency and predictability arising from a multi-faceted, multi-layered IIA regime. It adds yet another layer of obligations and further complicates countries' ability to navigate the complex spaghetti bowl of treaties and pursue a coherent, focused IIA strategy.

Although parallelism appears to be the prevalent approach, current regional IIA negotiations nevertheless present a window of opportunity to consolidate the existing network of BITs. Nine current regional negotiations that have BIT-type provisions on the agenda may potentially overlap with close to 270 BITs, which constitute nearly 10 per cent of the global BIT network (table 2). The extent to which parties opt to replace several existing BITs with an investment chapter in one regional agreement could help consolidate the IIA network.

Table 2. Regional initiatives under negotiation and existing BITs between the negotiating parties (illustrative)

Regional initiative	Existing BITs between negotiating parties
Inter-Arab investment draft agreement	96
Regional Comprehensive Economic Partnership Agreement (RCEP) between ASEAN and Australia, China, India, Japan, New Zealand and the Republic of Korea	68
Comprehensive Economic and Trade Agreement (CETA)	23
Trans-Pacific Partnership Agreement (TPP)	21
EU-India FTA	20
EU-Morocco Deep and Comprehensive Free Trade Area (DCFTA)	12
EU-Singapore FTA	12
EU-Thailand FTA	8
EU-United States Transatlantic Trade and Investment Partnership (TTIP)	8

Source: UNCTAD.

Note: These nine regional negotiations cover investment protection issues as currently addressed in BITs.

Such an approach is already envisaged in the EU context, where Regulation 1219/2012, adopted in December 2012, sets out a transitional arrangement for BITs between EU Member States and third countries. Article 3 of the Regulation stipulates that “without prejudice to other obligations of the Member States under Union law, bilateral investment agreements notified pursuant to article 2 of this Regulation may be maintained in force, or enter into force, in accordance with the [Treaty on the Functioning of the European Union] and this Regulation, until a bilateral investment agreement between the Union and the same third country enters into force.”

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