

**Transitions from Rule-Taker to Rule-Maker?
Asian Investment Regimes in Japan, China and Korea**

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Abstract

East Asia's changing role in the investment regime is at investigation. The key question considered includes: are Asian countries evolving from rule takers to ruler makers? If Asian countries are playing an influential role in redesigning the IIR, then are they pursuing an alternative path to western countries' traditional liberalizing provisions? In the first section, I provide a historical examination of European and Western erecting international law and in extension foreign investment law which illustrates the way the Asian region has been at a disadvantage. In the second section, I look at Japan, China and South Korea individually to understand the changing role of Asia within the investment regime. In the third section, I provide a comparative analysis of Japan, China and South Korea to examine the way they fit into the Western Liberal economic order. I conclude that East Asia as a region collectively and Japan, China and South Korea individually are becoming rule-makers within a liberal economic order, hence western countries status as rule-makers is not threatened. The rise of Asia within international investment regime and in extension in the international community does not equate to a zero-sum game of the western countries losing their historical advantage and status of being rule-makers.

Glossary

Broad Asset Based Definition: States use a broad definition to define investment so that such language can be extended to new forms of investment as they emerge without renegotiation of the agreement.

Expropriation/Nationalization: The taking of foreign property by a host country has constituted, is categorized under several categories including expropriation and nationalization. It may also be termed as “creeping expropriations”, “regulatory takings” and “indirect takings.”

Fair and Equitable Treatment (FET): The fair and equitable standard plays a significant role in IIAs. In addition to filling gaps and providing a context for the interpretation of specific provisions, it seeks to provide a means for resolving problems not only by reference to strict legal rules but based on equity, considering the surrounding circumstances of each individual case.

General Clauses: Specific provisions are included in an agreement that allow parties to act not permitted by the general agreement to cope with unforeseen events arising after adopting an instrument. It involves unilateral action by the country concerned but require notification and approval. It is usually taken during balance **crises or emergency economic situations.**

Most-Favored Nation (MFN): The MFN standard means that a host country must extend to investors from one foreign country the same treatment it accords to investors from any other foreign country in like cases. It potentially applies to all kinds of investment activities, such as the operation, maintenance, use, sale or liquidation of an investment. About the admission and establishment of an investment, international MFN commitments are less frequent, although there is a certain movement towards an extension of the rule in this direction

National Treatment (NT): The National Treatment clauses is a common provision to invoke formal equality of treatment between foreign and domestic enterprises but where degree of development of countries varies, formal equality may disregard import. Differences in actual situation & capabilities of enterprises on each side. There are exceptions to National treatment that may be subject or country specific.

National Negative List: Exceptions and qualifications of industries or industries or types of business activities may be listed where standards may not apply. Specifically, it is when national treatment is accompanied with limitations.

Prohibition of Performance Requirement (PR): Mandatory PRs are linked to the conditions for the entry and operation of the investment which the investor must agree when making its investment or continue to operate. On the other hand, Host states extend non-mandatory PRs, which are linked to access to certain advantages, such as tax exemptions or subsidies by the host country.

UNCITRAL RULES: The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations.

UNCTAD. 2004. *International Investment Agreements: Key Issues*. 1. 1-146.
https://unctad.org/en/Docs/iteiit200410_en.pdf

Section 1: INTRODUCTION

International Investment Agreements (IIAs) are becoming an important legal mechanism to govern the increasing flows of foreign direct investment (FDI). These agreements (or treaties) are part of an ongoing process to liberalize FDI and legalize dispute resolution within the investment regime. IIAs most often come in the form of Bilateral Investment Treaties (BITs), which establish “the terms and conditions for private investment by the individuals and companies of one country in the jurisdiction of another (Tao, 2015, 3). IIAs also come in the form of Free Trade Agreements (FTAs) which provides a framework of cooperation for geographically distant companies between nations by setting up tariff-free trade of goods and services, eliminates other barriers to trade, and often comes with an investment chapter as well. Beyond FTAs and BITs, IIAs is architected through an Economic Partnership Agreement (EPA) which eliminates barriers to the movement of goods, services, and investment, but also makes the movement of people between the member countries easier. EPA is a step between Free Trade Area and a single market toward economic integration which includes provisions for government procurement, international competition and cooperation, customs procedures and international dispute resolution (Small Business, 2018). The growing use of IIAs and its many forms have become a crucial legal instrument to facilitate and govern foreign direct investment (FDI) as a response to the lack of an effective global-level multilateral regime that governs foreign investment in the growing decades. BITs include substantive provisions that balance the interests of private investors and host states. The proliferation of IIAs reflects the changing attitudes of developing countries as more have embraced pro-market economic reforms since the 1980s. This parallels with the increasing liberalization of foreign investment around the world to boost the

economic growth of a host state. Today, there is an increasing competition between countries to attract FDI.

The basic features of international investment law formulated in the twentieth century is entrenched in the investor protection tradition. Such a focus is an extension of state practice and interests historically enforced by Western capital-exporting and investor states which has come at the expense of public interest and economic development of host countries (Miles, 21, 2013). European and North American countries have forged the classic model of IIAs using international investment rules to carve out investment opportunities abroad and protect investment in foreign jurisdiction (Chaisse, 566, 2015).

Nevertheless, there is a geographical shift taking place within the international investment regime in the past years. Asian countries are becoming the economic powerhouse in the Far East and focal points in rule-making process of international investment law. A fundamental shift towards the transpacific is evident by the regions activity: a growing number of partnering countries currently ratifying Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPATPP); the negotiation of the Regional Comprehensive Economic Partnership (RCEP) continues; there is remarkable activity of Asian actors via Association of Southeast Asian Nations (ASEAN) and through international investment agreements (IIAs); Asian engagement with investment arbitrations, as claimants and respondents (Schill, 2016). Today Asia tops the world FDI, making it “the world’s largest investor region (Schill, 2016).”

Since 2000, many East Asian countries, which have traditionally been capital-importers, are actively engaging in international investment agreements within and out of the Asian region. Today Asia tops the world FDI, making “the world’s largest investor region.” Further, many East Asian countries including China, Singapore, Malaysia, Japan and Korea are now an increasing

source of capital, which they export. As such, these capital exporters see IIAs to protect their firms' investments abroad rather than simply protect foreign investors at home. This suggests that they should have an interest in becoming rule-makers rather than rule-takers.

It was during economic reconstruction and political upheaval that many East Asian countries began to embrace neo-liberal norms and open their economies globally. History shows that developing countries, including East Asian countries, have tended to be rule takers, as international law has been selectively applied in favor of capital exporting countries. As a region, Asia is very diverse and under power disparities due to states being at different level of economic development. Hence, Asian states have remained least likely to “form regional institutions, to accede to major treaties, to have a voice proportionate to their size and power, and to engage in international dispute settlements” (Nottage, Chaisse, & Thanitcul, 2018, 6).

East Asian countries are party to 1,194 BITs, representing about one sixth of the world's BITs. Further, of the two hundred Preferential Trade Agreements with investment chapters that have been reported to the World Trade Organization (WTO), Asia-Pacific countries have become involved in sixty-one of them (Chaisse, 2005, 571). 25 Asia-Pacific intraregional PTAs include investment chapters (ibid.). While East Asia is growing its engagement with international investment law through BITs, PTAs, FTAs and EPAs, the international investment regime (IIR) is under debate, especially with respect to rules underpinning the investor protector tradition and investor-state dispute settlement (ISDS) mechanism. The increasing agency of East Asian countries in the IIR have attracted the allegations that China is seeking an alternative global economic agenda to the historical Western built order. Such bold skepticism calls forth an examination of the historical development of IIAs to explore the current IIR reality and leads us to ask the following question: are Asian countries evolving from rule takers to ruler makers? If

Asian countries are playing an influential role in redesigning the IIR, then are they pursuing an alternative path to western countries' traditional liberalizing provisions?

Developing countries in Asia are embracing neo-liberal development ideas that most developed countries had already previously embraced, which is in parallel to the rising liberalization of foreign investment and increasing legalization of BITS: a packaged impetus to boost and facilitate capital inflows. BITS come with a mandatory dispute mechanism, which has prompted many protective Asian countries to give up some of their sovereignty by signing up to the International Centre for Settlement of Investment Disputes (ICSID), a funded dispute mechanism established in 1966 for legal dispute resolution and conciliation between states and international investors. Asian countries have used BITS to signal their commitment to liberalization of foreign investment. Today, many Asian countries, such as China, South Korea and Japan, have become exporting investment countries and, as such, are at the forefront of shaping the investment regime. While European countries tend to be more willing in accommodating the sovereign concerns of capital-importing states and focus on investment protection, the United States has emphasized liberalization. It appears that the larger East Asian countries are now finding their place between the American and European investment model instead of pursuing an alternative, thereby continuing to be part of the international economic order as it is.

To answer the above-mentioned research question, I analyze Chesterman's argument that, considering the ongoing economic and geopolitical shifts, the status-quo of rule-making within and towards Asia is unsustainable, yet a divergent Asian model emerging in respect to the international order and, as an extension, the international investment regime is unlikely (Nottage, Chaisse, & Thanitcul, 2018, 6). The shifts in IIR mirrors broader changes in the security,

economic and political realm. A ‘post-American world’ is expected where US must share its power with other states simultaneously being a dominant power (Zackaria, 2008). Nevertheless, the once commonly used terms such as hegemony and empire no longer defines US dominance. Western states (including US) no longer is able to provide security guarantees (Chesterman, 26, 2017). Asian voice is not represented within Asian and globally. China is unwilling to rely on western political will and institutions by owning the role of being a responsible rule-maker with its initiatives such as the Asia Infrastructure Investment Bank¹ and One Belt, One Road Project.² Still, it is likely that there is a convergence of Western and Asian interests in the international order with Asian states taking a more prominent role as rule-makers. The basic structural foundation of sovereign equality of state is likely to be maintained which means Asia’s prominence is not a catalyst to a zero-sum displacement of the Westphalian system. A closer look at China, Japan and Republic of Korea shows that even as Asian countries contribute to the IIR rule-making process, Western countries can remain rule-makers. The IIR is underpinned by a pro-investor model and rooted in the “Washington Consensus,”³ which despite being challenged by the “Beijing Consensus,”⁴ will likely remain the prominent model (ibid).

¹ The Asian Infrastructure Investment Bank (AIIB) is a multilateral development bank that aims to support the building of infrastructure in the Asia-Pacific region.

² One Belt, One Road is a development strategy adopted by the Chinese government involving infrastructure development and investments across the continent of Europe, Asia and Africa.

³ Washington Consensus is an economic and political ideology led by the U.S. post-world war II. It is based on the idea that minimal government intervention shall promote economic growth and underpins the Bretton Wood institutions such as the International Monetary Fund and World Bank.

⁴ Beijing Consensus is coined by Joshua Cooper Ramo who summarizes Chinese to be underpinned by ideas of innovation, promotion of work through chaotic management and self-determination.

In the paper's first section, I highlight the above-mentioned research question's importance by contextualizing the experience of Asian (in particular East Asia) history as part of the developing and third world. This is followed with a specific country analysis of Japan, China and South Korea to illustrate their evolving legal models of IIAs and showcase their contribution to the evolution of discourse around the international investment regime. Next, I compare Japan, China and South Korea within Asia's current geo-politics and the IIR. Finally, I make conclusory remarks by pinpointing further areas of research to explore the future changes within the Asian region.

Section 2: CONTEXTUALIZING THE IIR IN ASIA

Historically, Western powers in Europe and America have been the driving impulse behind the creation of modern legal bodies and institutions internationally. The basis of the modern system of international law on foreign investment protection is built on the interplay of power and development of legal rules. Legal institutions have been affirmed "with capitalist relations of production through repetitive assertions of power and responses to power" (Benton, *Colonial Cultures*, 11, 2001).

The origins of international investment law are rooted in the "imposition of power [and] jurisdictional primacy" (Miles, 2013, 23). Rules of foreign investment protection have been asserted as international law with the use of military force to grant traditional capital-exporting states a mechanism that secures the investors, which historically have been non-Asian (Anghie, *Imperialism*, 32–3.). The modern network of bilateral investment treaties can be traced back to the signing of the first treaty in 1959 between Germany and Pakistan, and is popularly cited as the starting point of modern international investment law. Reaching back beyond the 1959

marker reveals a more complex picture that stretch into European trade and investment activity from the seventeenth to early twentieth centuries (Miles, 2013, 19). European strategies included “the securing of friendship, commerce and navigation treaties, the acquiring of concessions, diplomatic pressure, capitulation treaties, extraterritorial jurisdiction, military intervention, and colonial annexation of territory” (Benton, *Colonial Cultures*, 10–11). Capital-exporting states, traditionally European and American, legitimized these strategies within international law and principles pertaining to foreign investment with the advantage of sharing a political economic base in liberalism (Miles, 2013, 23). This understanding reflected powerful Western states’ interests and stressed the obligations of nations to facilitate trade and investment. Such international legal processes contributed to cultural implications of spreading Western notions of property, endorsed the European view of international law within other territories, and promoted an international legal doctrine to secure Western political and commercial hegemony in the nineteenth and twentieth centuries (Miles, 2013, 24).

International law based on European conceptions of property became the dominant organizing framework for inter-nation legal regimes, trading and investment exchanges. The use of international law is an ongoing extension of a power struggle tied to the methods of European and North American commercial expansion. The international legal system established by European nations fostered rules on foreign investment protection during the era of colonialism as an instrument to safeguard the interests of capital exporting states and their nationals. The link between imperialism, the pursuit of trade, investment, and the development of international law shows that European trading nations have had a profound impact on shaping the character of investment law (Miles, 2013, 21). Unequal treaties was an important tool of dominant Western commercial powers to force hesitant non-European territories to open up their economies.

China's defeat in the First Opium War (1839-1842) shattered the Chinese world order; the Treaty of Nanking (1842) ceded Hong Kong to Britain and opened five ports for trade (Chesterman, 2016, 8). The Second Opium War (1856-1860) was fought to continue opening up the Chinese market, and was successful after burning down of the Summer Palace and opening permanent diplomatic representation in the Chinese capital under the Treaty of Tientsin (Chesterman, 2016, 8).

Under imperial rule unequal treaties showcase the intricacies of law, with various legal regimes co-existing applying to different within the same territory (Benton, Search for Sovereignty, 2–8, 2010). This type of governance created “quasi-colonies of Western power and companies,” exhibiting political dominance that enhanced social and political hierarchies enabling foreign trade and investment (Miles, 2013, 26). Unequal treaties addressed issues including “travel prerogatives of foreign traders, the securing of extensive trading and investment rights, non-discriminatory commercial access to the host state, the granting of concessions to foreign companies, the protection of Christian missionaries, the leasing or ceding of territory to foreign states, and governance powers” (Miles, 2013, 27). The European powers, led by the British military, enforced the legal rights of their nationals, ultimately slowing down China's and other Asian colonies' ability to embrace public international law in the early twentieth century.

Categories such as “civilized” and “uncivilized nations” led to concepts such as “sovereignty, statehood, territory acquisition, and treaty-making” to obtain new meanings as Europeans pursued their expansionist goals when engaging with non-European nations (Miles, 2013, 31). The division of categories between uncivilized and civilized continues to enlighten the modern conceptualization of sovereignty doctrine and implicates the development of

international investment law. Legal principles were architected and employed to justify repressive action in pursuit of Western commercial gains and guarding property. The universal rules of international law on foreign investment protection were translated from European trading and investment practices that approved and encouraged exploitation, imperialism and manipulation of legal doctrine (Miles, 2013, 31). The colonies of the host state were excluded territories from the protective principles of international investment law, In the empire, legal “inconsistencies were accommodated, violence justified, parallel jurisdiction co-existed, control unevenly experienced, and variegated layers of law created” (Miles, 2013, 33). The process “was not a smooth, bloodless, or wholly intact emergence of an international legal order, [but] it was in that era, with the ideas, conceptualizations, practices, rules and principles developed within it, that formed the basis of modern international investment law” (ibid). The standard of civilization excluded the rest of the world from the sovereignty available to European counterparts. The Westphalian system implied the continuous exclusion of most Asian states in the negotiation of most of the agreements that defined the modern international order.

In the 20th century, rule-making continued to be dominated by Western powers through American leadership after World-War II. Decolonization, nationalization and new independence movement brought traditional capital-importing states into a collective voice as the “Global South,” which challenged the one-sided making of international investment law and the so-called “liberal international economic order”. However, the resistance became an impetus for Western-led powers to create new instruments and bodies to secure rights for European and American investors.

Postcolonial states, assuming formal sovereignty, sought out an alternative legal order. Developing countries’ resistance brought forward a legitimacy crisis to the IIR. The Global

South attempted to conceptualize investment regulation by contesting the unbalanced foundation that overprotected foreign investors at the expense of the home state's regulatory space and public interest. In this way, Global South nations fostered a claim to an alternative economic order (Morosini & Badin, 2017, 2). Postcolonial states' formal independence did not alleviate the inequities of the global trading and investment system. A sense of injustice and desire to participate in the reshaping of international law led to the proposal for a New International Economic Order (NIEO) at the United Nations (Sornarajah, 2014, 35).

As the Third World gained independence, developing countries strove to advocate for more sensitivity toward state sovereignty regarding FDI and BITs to ensure foreign investment under states' control (Tao, 2015, 4). At the time, IIR was in its infancy, with the United States externalizing the protection of their nationals' foreign investment in Latin America. The United States sought to create an international minimum standard since Latin America was governed by dictatorship and its domestic law could be partially biased to protect local interests. The U.S. wanted disputes between foreign investors and host state be settled by "neutral" tribunal overseas (Sornarajah, 2015, 34). Latin American countries protested in favor of national treatment and equal treatment between foreign and national investors, which became known as the Calvo Doctrine (Sornarajah, 2015, 33). The doctrine affirmed that the jurisdiction of international investment disputes lay with the host country and local remedies must be exhausted by foreign investors before resorting to the protection and intervention of the home state (Tao, 2015, 4). A rising United States asserted customary international law regarding the standards of dispute and payment of full compensation upon expropriation, which became known as the Hull Rule. The rule was advocated widely by developed European and North American countries, which demanded that the host state to provide "prompt, adequate and effective payment" in case of

nationalization and expropriation (Guzman, 1998, 641). The end of the imperial system brought forward new state actors, which backed the Calvo Doctrine. The United Nations (UN) system allowed developing states to form the Group of 77 to collectively emphasize their shared experience of imperialism and seek reform of international economic law (Miles, 2017, 44). The NIEO campaign was a movement to shift international investment law to make accommodation for postcolonial states.⁵ In this way, postcolonial states attempted to neutralize the “otherness” of international investment law and participate in its development; however, familiar antagonism was met by capital-exporting states, which denied the legitimacy of the NIEO’s international legal status at the UN as an impetus of any rule-creating potential.

Western states’ response to the period of changes stemming from decolonization involved a systematic approach to investor protection with the creation of treaty regimes. After failed attempts to establish a multilateral framework for foreign investment protection such as the International Chamber of Commerce (ICC), owing to differing viewpoints of capital-exporting and host states on the standard for investor protection, attention was put on bilateral investment treaties and engaging in one-on-one negotiations. This led to the first treaty between Germany and Pakistan in 1959. This was the onset of capital-exporting states increasing their entries into BITs with developing states. Furthermore, a noteworthy development in the international architecture governing foreign investment is the incorporation of the International Centre for Settlement of Investment Disputes (ICSID), which is “a permanent legal institution for solving disputes between host states and private investors” (Allee and Peinhardt, 2011, 12). While the rationale for the regime was framed as the “depoliticization of investment disputes,”

⁵ The NIEO campaign used various instruments including the 1962 General Assembly Resolution 1803 on the principle of permanent sovereignty over natural resources, the 1974 Charter of Economic Rights and Duties of States (CERDS), and the 1974 Declaration of the Establishment of a New International Economic Order (Miles, 2017, 44).

the justification mimicked the 19th century position that only international arbitration could guarantee a foreign investor a fair hearing in a dispute with a host state (Sornarajah, 2014, 37).

The system of international investment arbitration and the substantive rules of international investment law remained extremely entrenched in a political framework that is rooted in a Western conceptualization of neutrality and objectivity. The system advantaged foreign investors as it rejected the use of domestic law and preservation of postcolonial sovereignty (Sornarajah, 2015, 37). ICSID's establishment was a response to postcolonial states challenging the prevailing investor-protection rules, which sought to limit a host state's ability to implement social and economic policies that negatively affected foreign investors' interests. Moreover, BITs were employed to reject "capital-importing state's multilateral approach, postcolonial nationalizations and the assertion of the NIEO" (Miles, 2014, 89). Western states attempted to frame the treaties as a reciprocal arrangement but it was really an instrument to protect the interests of their investors.

While not many investment treaties were concluded through the 1960s and 1970s, BITs surged in the late 1980s and 1990s, and more actively in the 2000s in the Asia-Pacific region. Today, Asian countries are becoming a collective force that is expected to bring about globally a more contested set of rules as their economic and political influence grow. Specifically, China, Japan and Republic of Korea are increasingly exhibiting proactive behaviors within the international investment regime as rule-makers via IIAs.

Section 3: A CLOSE UP OF JAPANESE, CHINESE AND REPUBLIC OF KOREA INTERNATIONAL INVESTMENT REGIMES

This section's focus is to provide an evolutionary context of specific Asian states (Japan, China and South Korea) to showcase the accelerated legalization and liberalization of their international investment agreements. I look at the shifting trends in investment law and drafting

of IIAs to highlight the maturation of the region's international investment regime. This is followed by evaluating the use of specific substantive provisions and diversity in style of agreements to elaborate on Asia's transition from its role as rule taker to ruler maker in the twenty-first century.

Japan's entrance in the international investment regime was relatively late but it shows initiative, maturation and capacity to be innovative. At the core of China's participation in the IIR is a commitment to liberalization, pragmatism and pursuit of "high-standard" IIAs. South Korea has a long-standing history of BITs and now has agreed to a number of FTAs that contain investment chapters. It has showed capacity to be innovative with a focus on transparency provisions and general exception clauses that protect the public interest over the investor.

JAPAN

Japan was a late player to pursue a bilateral investment agreement strategy, owing to its heavy approach toward multilateralism. Japan concluded its first bilateral investment treaty with Egypt in 1977 but was not an active player in IIA negotiations for the following two decades (UNCTAD, 2018). During this time, Japan focused its attention on multilateral negotiations. However, major multilateral efforts were disappointing, with the weak Agreement on Trade-Related Investment Measures (TRIMS) at the World Trade Organization (WTO) and the failed negotiation of the Multilateral Agreement on Investment at the Organization for Economic Cooperation and Development (OECD) (Stoel, Ishikawa and Jacobson, 2015, 4). Fierce opposition toward a multilateral investment treaty became a strong impetus for Japan's policy shift toward BITs in the 2000s. As a result, Japan lagged behind other countries, especially its OECD peers.

Alongside the failure of multilateral efforts in 1990s, Japan's declining return on capital and the economic downturn sparked by the 1997 Asian Financial crisis were equally important in providing impetus for investment liberalization (Hunt and Treehearne, 2015, 2). Hence, Japan began its modern approach to IIAs with the negotiation of the Japan-South Korea BIT in 1998 (Hamamoto, 2011, 53). Subsequently, Japan announced a new strategy to negotiate bilateral free trade agreements with comprehensive investment chapters (Stoel, Ishikawa, and Jacobson, 2015, 5). The policy identified criteria to select countries including "economic, geographical, political and diplomatic criteria alongside feasibility and timing" (Stoel, Ishikawa, and Jacobson, 2015, 3). Japan also emphasized that the new strategy was inspired by the US and the EU, which were already pursuing large-scale regional trade frameworks (Cooper, 2014, 1).

The election of Junichiro Koizumi as prime minister in 2001 put Japan at the forefront of a new era in IIAs. A key element of the Koizumi Administration was to support structural economic reforms evident by the proposal of the "Initiative of Japan-ASEAN Comprehensive Economic Partnership" and signing the Japan-Singapore EPA, thereby underpinning Japan's new emphasis of bilateralism and regionalism (Stoel, Ishikawa, and Jacobson, 2015, 4). In the first decade of the 2000s, Japan negotiated many IIAs with ASEAN countries. It also concluded IIAs with countries in South America, the Middle East and Africa as well larger economies such as India, the US, the EU and Canada (Stoel, Ishikawa, and Jacobson, 2015, 8). From 2002 onward, Japan showed an aggressive momentum to building its own network of international investment regime (Stoel, Ishikawa, and Jacobson, 2015, 8).

By 2002, Japan began to pursue a dual track approach by negotiating both BITs and comprehensive EPAs with full and substantial investment chapter. In total, Japan signed twenty EPAs with investment chapters and twenty BITs (Ishikawa, 2018, 516). A key advantage of

Japan's dual track approach is that it allowed the pursuit of investment objectives concurrently with the negotiation of other major international economic concerns/sectors, including market access, intellectual property, and agriculture (Stoel, Ishikawa, and Jacobson, 2015, 8). Japan's IIAs included strong substantive protections: Fair and Equitable Treatment; National Treatment; Most-Favored Nation; Expropriation/Nationalization; Free Transfer of Capital; Umbrella Clauses (Hamamoto and Nottage, 2013, 347-391). Japan's dual-track mirrors the inclusion of investment chapters in trade agreements by Canada and the US since NAFTA. It was not a strategy historically widely used by other capital-exporting countries, including EU (Stoel, Ishikawa, and Jacobson, 2015, 8).

Japan used the first decade of the twenty-first century to fully articulate its investment goals. It was not until 2006 that Japan formed an outbound and inbound foreign investment strategy to employ EPAs to facilitate international investment (Hamamoto, 2011, 54). In June 2013, Japan further clarified its investment policy with the announcement of Japan's "Revitalization Strategy" under the Abe administration. The strategy addressed areas of international investment and economic agreement policy by adding that the Japanese government will:

take initiatives to develop a business environment to facilitate international deployment through the expansion of economic partnership agreements as well as the conclusion of investment agreements and tax treaties, removal of institutional obstacles which extend over the domestic and international markets, and promotion of full-fledged globalization within Japan through the improving environment for foreign investment and fostering global human resources. (Ministry of Foreign Affairs of Japan, 2013, 128)

The updated 2016 strategy specified "early entry into TPP [now known as the CPTPP] and expand its member countries/regions, and strategically and expeditiously promote negotiations on other economic partnerships, including the Japan-EU EPA, Regional Comprehensive

Economic Partnership (RCEP), and Japan-China Republic of Korea FTA” (Ministry of Foreign Affairs of Japan, 2016, 28). Japan’s strategy of negotiating IIAs is now part of its larger economic goals including tax policy, labor policy, corporate investment, corporate governance, infrastructure, agriculture, energy and innovation (Mochuizuki, 2014).

Japan is assertively riding the wave of free trade agreements. Concerning the Japan-EU EPA, after 18 rounds of negotiations between April 2013 and April 2017, in June 2018 the biggest trade agreement by EU which create an open trade zone covering 600 million people is signed (Ishikawa, 2018, 517). Though the Japan-EU EPA does not include an investment chapter. On July 11, 2018, the chief negotiators of both partner acknowledged a large convergence on investment protection standards but position around ISDS need to be reconciled (European Commission). The pace of negotiation of the China-Japan-Korea FTA is progressing more slowly, with fourteen rounds of negotiation between March 2013 and May 2018 (Ishikawa, 2018, 517). The Regional Comprehensive Economic Partnership (RCEP) is trade agreement currently under negotiation that comprises the 10 member states of the ASEAN, Japan, China, South Korea, India, Australia and New Zealand (Ishikawa, 2018, 517). RCEP negotiations began in May 2013 and held its twenty-third round of negotiations in July 2018. It focuses on market access in goods and services as well as investment (*The Sun Daily*, 2017). CPTPP, which began in May 2010 has been ratified in mid- 2018 and will enter into force at the end of 2018. It covers not only market access, services, and investment but also labor, environment and cross-cutting “horizontal issues” to sustain a competitive business environment (ICTSD, 2018).

A major characteristic of Japanese IIAs is the diversity in treaties and agreements. This makes it difficult to identify common patterns. Moreover, Japan has not made any Model BIT⁷ public, unlike other major economies. This suggests that Japan frequently accommodates its partners' specific demands and tends to be flexible during negotiations. Specifically, Japanese treaty provisions shows variations, validating an eagerness on Japans part to actively experiment in finding its own unique model within the investment regime. Firstly, Japan has sought investment liberalisation, allowing certain flexibility with its negotiations partners. For instance, since 2002, Japan in its pre-establishment phase in the scope of certain obligations such as national treatment (NT), most-favoured nation treatment (MFN) and prohibition of performance requirement do not always include binding commitment and offer a best endeavour option or certain "effort" obligation about investment liberalisation (Ishikawa, 2018, 519).⁸ This is evident by pre-establishment national treatment clauses in BITs with Papua New Guinea, China, Korea, Ukraine, Iraq, Kazakhstan, Oman, Iran and Kenya (Ibid).

Applying such positive standards of treatment are tools via IIAs to eliminate discrimination and restrictions against foreign enterprises to promote the operations of markets for partnering countries. Japan shows interest in liberalizing investment entry in its economy at a gradual pace with the mentioned member states. Japan embraces common IIAs standard which shows a general liberals attitude as a host state. Japan is testing out and applying the available provisions through BITs to liberalize its economy.

⁷ Model Bilateral Investment Treaty (BIT) is a sum of legal provisions balancing member countries specific economic development and political goals when drawing agreements for the reciprocal promotion and protection of investments in each other's territories by individuals and companies situated in either State.

⁸ See Glossary for definition of National Treatment, Most Favoured Nation and Performance Requirement.

Secondly, as Japan IIAs adopt a broad asset-based definition of investment after 2010, the treatment of public debt differs between them. For example, Japan's recent IIAs with Columbia, Ukraine and Uruguay dismiss the debt of a contracting party or a national enterprise from the definition of investment (Ishikawa, 2018, 519). However, CPTPP does not exclude public debts from the scope of investment, but it includes a limitation on any disputing and arbitration claim emerging from public debt. Remarkably, the Japan-Saudi Arabia IIA specifies in the definition of investment "securities issued by the government of a Contracting Party" (Ishikawa, 2018, 520). These examples show variation in the degree of Japan's open-endedness and sensitivity to the negotiating parties' ability to facilitate economic recovery during a possible debt restructuring.

Thirdly, the general standard of treatment in Japanese IIAs varies a lot and is to some extent incoherent. Japan's use of Fair and Equitable (FET) standard⁹ has evolved since its first appeared in a BIT. Some of the early BITs do not include any FET provisions (Ishikawa, 2018,

⁹ See Glossary for the definition of Fair and Equitable Standard (FET).

521).¹⁰ Some of post-2010 Japanese IIAs employ use of FET without adding a note/comment as exemplified by the Japan-Cambodia BIT (Hamamoto, 2011, 56). Another category of FET clauses includes notes that clarify the application of the obligation; however, the notes are not similar across IIAs. The variety of FET provisions reveals the Japanese government's extreme flexible attitude, and reflects its compromise-oriented position. Japan's involvement with increasing BITs/FTAs shows experimentation of various propositions to nurture and cultivate its own clear policy about FET. It would be safe to say that the Japanese government's open-ended use and application of FET shows its pro-investor stance, as it is willing to be agreeable with the negotiating partners. Substantive provisions within Japan's treaties through its diversity, variation and flexibility exhibit enthusiasm to experiment and take on a dynamic role post-2002 within Asia's international investment regimes.

Despite Japan concluding the highest number of IIAs between 2016 and 2017 in Asia, a lack of experience in arbitrating ISDS case hinders its roles in the investment regime at the expense of its own investors. Given the importance of the Japanese economy, Japan has never been a respondent and neither brought an arbitral case, unlike many similar developed countries. A wider debate has attributed the cause to Japan's legal culture, where one school of thought emphasizes cultural factors and the competing school of thought stresses the institutional setting. The former alleges the lack of confrontational methods of resolving disagreement to Japanese culture's emphasis on the need for harmony in social relations (Ozaki, 2014, 54). The latter reasons that low litigation stems from "capacity limitations arising, from the small number of Japanese judges, limited remedies available to courts, cost-effectiveness and the length of even a simple trial" (Ozaki, 2014, 51). An extension of the institutional argument is that Japan's policy

¹⁰ Japan-Egypt BIT (1977); Japan-Sri Lanka BIT (1982); Japan-China BIT (1988); Japan-Turkey BIT (1992); Japan-Bangladesh BIT (1998); Japan-Pakistan BIT (1998); and Japan-Mongolia BIT (2001).

elites prefer using mediation methods rather than adjudicative methods, substituting in-court with out-of-court procedures instead (Takahashi, 2014, 98). However, Nippon Keidanren, the Japan Business Foundation, composed of major Japanese business corporations, has repeatedly issued policy proposals strongly pressing the government for more protection of their international investments by increasing BITS/EPAs equipped with an ISDS procedure (Dominguez, 2016, 14). The Japanese Business foundation went as far as proposing a Model BIT with ISDS procedure (Ibid). This shows that the Japanese business organization maybe pushing for more protection and use of ISDS but individual “companies attitude toward Investor-State dispute resolution range from caution to total rejection” (Dominguez, 2016, p.11). The Japanese are concerned about their relationship with host state and is governed by administration guidance, conciliation and settlement.

Given the smaller number of IIAs signed by Japan, Japanese investors are vulnerable. For instance, the approval for an offshore oil and gas project in Sakhalin Island Russia, being operated by Sakhalin Energy Investment Company Ltd. (Sakhalin Energy/ SEIC), and involved Mitsui & Co. and Mitsubishi Corporation. The approval was rescinded due to inadequate environmental safeguards; however, the negotiations also led another Russian energy monopoly to acquire share of Sakhalin Energy Investment Company Ltd. (Sakhalin Energy/ SEIC) for below the market while neither Mitsui nor Mitsubishi took advantage of institute arbitration under the Japan-Russia BIT with ISDS procedure (Hamamoto, 2011, 56). Another arbitration case under the UNCITRAL Arbitration Rules¹¹ demonstrates why Japanese should embrace international arbitration over the concern of weakening their relationship with host states. In *Saluka Investments v. the Czech Republic* in 2001, which at first glance looked like it was under

¹¹ See Glossary for the definition of UNICITRAL Rules.

the Netherlands-Czech Republic BIT but Saluka was the Dutch-incorporated subsidiary of the Japanese Nomura Group (Pekkanen, 2009, 23). The Nomura Group had gained much experience in advising the Czech government on the privatizing of Czech breweries and banking services. Nomura had been negotiating the purchase of the Czech state's shares in IPB, which was one of the four banks whose privatization had been initiated by the Czech government to move away from a Communist model. When IPB with other privatized banks had "non-performing loans, faced inadequate legal provisions for debt repayments, and faced a tough new regulatory framework" the Czech government put it under forced administration in June 2001 (Ibid) but it was coupled with sale to a strategic investor protected by a state aid (ibid). The arbitration panel admitted Saluka's claim of expropriation but asserted it as a regulatory action by Czech government considering the then economic conditions (Pekkanen, 2009, 24). Saluka confronted the Czech government, claiming that it violated Fair and Equitable Treatment (FET) under the Netherlands-Czech BIT, leading Saluka, and thus Nomura, to walk away with partial victory of sizable pecuniary outcome (Pekkanen, p.24). Although Japan is not directly involved in this case, the arbitration approach Saluka and in extension the Japanese Nomura Group may shed some light for Japanese investors. It shows that as Japan grows cross-border transactions, advantage can be taken of the expanding network of Japan's investment-related agreements and indicates a momentum toward Japan's potential to participate in rule-making process of investment regime as the case of Saluka shows their strategic corporate structure is beneficial in case of arbitration. The case shows Japanese companies have in its arsenal the attitude and institutional capacity to offensively launch a legal claim. The case questions both school of thought that popularly reasons Japan's passive arbitration behavior. The case highlights Japan's capacity to take on a foreign government head on to protect their investment and as result dictate interpretation of

laws in their favor when required. Indirectly, Japanese firms were able to help themselves across the globe via agreements not undertaken by their home government. Japan's capacity of legal aggressiveness with respect to investment rule-making and litigation should not be doubted. As in the case with SEIC, one can be a soft target for government action and expropriation within a large group of investments, especially when host states are aware that certain investors are unwilling to use ISDS to protect their interests. Japanese firms must grow their awareness of ISDS as an available tool to protect their investment, even if solely to use ISDS as a bargain chip to settle a dispute. Most major economies like the US have a high number of claimants, who have been traditionally rule-maker of the international investment regime, where even other smaller Asian economies have not shied away from arbitration, and points to the idea that Japan is curtailing its own evolution of stepping into its role as a rule-maker of the Asian investment regime. Major economies in the West have relied on ISDS to foster the conditions of predictability and certainty in protecting own investors abroad by investing in legal resources to maintain those conditions when a dispute arises. By Japan not willing to launch ISDS cases when a need arises, it misses a chance to dictate favorable interpretation to protect own investors. Japan also loses a feedback loop to innovate own treaty model and language governing dispute resolution to better address future engagement via IIAs and arbitration conventions.

Japan's engagement with sustainable development norms contributes to the broader discourse of IIAs reforms, which indicates positive signs of maturation as a participant in the investment regime. Firstly, Japan frequently employs the use of general exception, which are known to help address public interest and sustainable development concerns. Inclusion of general exception clauses, modelled after GATT Article XX and GATT Article XIV, are often found in Japanese IIAs since the Japan-Singapore EPA was signed and entered force in 2002

(Ishikawa, 2018, 524). GATT-style general exceptions cover various types of public purposes: e.g., the protection of public morals, human, animal or plant life or health and human rights. The incorporation of GATT-style general exceptions into IIAs exempts the host state from liability and preserves state regulatory power for public purpose. Japan has shown leadership on sustainable development norms by having “almost all” of its IIAs cover the phase of pre-establishment of investment to provide exceptions and limitations due to public interest consideration (Ishikawa, 2018, 524). The use of general exceptions in IIAs is not common but Japan is leading an emerging consensus to use GATT-style clause of general exceptions, which are thought to improve the existing IIA system in a sensible manner. General clauses are crafted to provide legal certainty by prioritizing public interest via limited regulatory flexibility and guaranteeing accountability. General clauses provide an exhaustive list of permissible policies, required link between a state measure and a permissible objective, and prohibition of arbitrary application. The General clause uses these elements to relieve the host state” from treaty liability for good faith measures taken to pursue public welfare objectives” and at the same time “enable foreign investors to price in the risk of adverse state action in the covered policy areas when calculating investment costs prior to making the investment” (IISD). Japan has been bold in its commitment to using these general clauses in IIAs as a supplier of sustainable development norms. Japan went as far as having substantive provisions, such as indirect expropriation clause to be subject to public policy consideration as it applies to protecting legitimate public welfare objects, including the environment (Ishikawa, 2018, 525). The first Japanese IIA with such use a proviso was the Japan-Peru BIT, which entered force in 2009 (Ishikawa, 2018, 525).

Not only does Japan follow the Hull formula, which requires a “prompt, adequate and effective compensation,” it prioritizes the environment as a public concern within the

expropriation clause. At the core of the expropriation clause is “taking of the property”; the United Nations General Assembly (UNGA) 1803 Resolution confirms that “public utility, security or the national interest [...] are recognized as overriding purely individual or private interests” and entitled to “appropriate compensation” (Chi, 2017, 103). Within the discourse of reforming international investment regime, the right to regulate and public governance are core principles of investment for sustainable development at a time when more effective global governance is needed. Japan’s use of expropriation clause being subjected to public welfare objectives including environment is found in treaties with Columbia, India, and Uruguay, among others. This makes its IIAs more compatible with sustainable development goals (Ishikawa, 2018, 228). Japan’s willingness to adopt indirect expropriation as a balancing provision is a positive sign of prioritizing sustainable development obligation, even though it currently only aims at preserving state regulatory powers and does not further impose sustainable development standards. Nevertheless, Japan is not consistent in its use of sustainable development norm via balancing provisions in its post-2010 era as evident by the Japan-Mexican EPA (soon to be replaced by the CPTPP). The agreement incorporates Article XX of GATT 1994 and Article XIV of GATS, which allow “members to adopt and maintain measures that promote or protect other societal values and interests” but the general clause does not apply to the investment chapter (Ishikawa, 2018, 528). In the investment chapter, the expression in article 57 (4) “(n)othing in this Chapter shall impose any obligation on either Party regarding measures pursuant to immigration laws and regulations” falls short of being an exception provision (UNCTAD, 2018).

Lastly, Japan’s adamant participation in CPTPP has been an important impetus to embracing more liberal procedural provisions relating to sustainable development and adherence

to principle of good governance. CPTPP introduces Japan to element founded in IIAs outside Japan but is novel to existing Japanese IIAs such as provisions on transparency in arbitral proceedings and references to *amicus curiae* submissions, defined as the unsolicited submission from third parties to a dispute (including by NGOs or other firms) (UNCTAD, 2018). While several Japanese IIAs subject the public disclosure of certain documents to certain confidentiality measures, CPTPP Article 9.24 requires the conduct of hearings being open to the public (UNCTAD, 2018, 112). CPTPP provisions on transparency and public participation in investor-state arbitration bring Japan to adhere to growing legitimacy standards (Ishikawa, 2018, 528). Raising standards of accessing information and justice via third party (*amicus curiae*) participation and an arbitral appeal system are closely associated with sustainable development norms.

Japan was a latecomer to BITs. It is now slowly transitioning from its role of a rule-taker to rule-maker within the investment regime. Firstly, Japanese use of legal provisions within the treaty-making process shows diversity and willingness to be flexible to accommodate its partners' specific demands, validating an eagerness on Japan's part to be more actively involved within the investment regime. Further, Japan's lack of ISDS claim as a respondent under its BITs maybe hindering its participation and crafting of investment strategy in the long-run. However, Japan's involvement in CPTPP has contributed to spread sustainable development norms as it encourages the use of general exceptions to protect public interest in its own legal future treaties. Despite Japan being a latecomer to the investment regime, Japan has demonstrated a capacity to be the rule-maker by showing initiative, maturation and willingness to be creative with crafting legal provisions.

CHINA

China development strategy of active participation in world markets transformed its international investment practices with the adoption of its “open door” policy in 1978 and the launch of “going global” strategy initiated in 1999 (Chaisse, 2018, 555). The underlying policy for China’s participation in the international investment regime is to assist “the readjustment of China’s economy, to coordinate its modernisation programs and to improve its quality of life” (Ibid). The policy is in step with China’s effort to join multilateral investment-related legal instruments and conclude international investment agreements. Due to its bitter history of unequal treaties, China selectively concluded BITs with developed countries, signing with Sweden the first BIT in 1982 (Ibid). Despite China being a latecomer to the international investment regime, China has accelerated its participation through three stages of BITs. China’s participation in the investment regime has contributed to its status as a major developing country and a strong proponent of the Global South (Bath, 2011, 47). Nevertheless, China is finding its balance between a rule-maker and rule-taker evident by the three generations of BITs. China is characterized by its liberalization, pragmatism and aspiration to seek high standard IIAs with more market access for incoming foreign investors. China shows potential to be a leading country to practice sustainable norms and greener rule-making process. China’s expected strong influence on the shaping of the international economic order is a source of debate (i.e. whether China threatens the liberal order); however, its investment policies do not demonstrate a major dissatisfaction with the current investment regime.

Today, China is an extremely active BITs member, but its hyperactive role is rooted in humble beginnings. Traditionally, China has been able to find a place within the post-war global economic governance architecture through its ‘Open Door’ policy, which encouraged foreign companies to invest in China, and its ‘Going Global’ strategy, which “bid farewell to the Mao-

era mindset of self-reliance urging Chinese firms to take advantage of booming world trade to invest in global market” (Bath , 2017, 49) China’s accession to the WTO in 2001 accelerated its integration in the global economy. China’s participation in the rules-based multilateral trading system is complemented by its bilateral and regional preferential trade agreements. China’s growing partnership to treaties is paralleled with its growing role as a recipient of outward and inward investment flows. With a dense network of 127 BITs and 22 FTAs with investment chapters, China was in 2017 the second largest recipient of FDI in the world, behind the US, and third largest source of outward FDI flows in the world, behind the US and Japan (HKTDC, 2018). China is a vocal proponent of a regional economic integration in the Asia-Pacific, leading the RCEP negotiations and pursuing the “One Belt, One Road” (OBOR) project (Ke, 2018).

China’s international investment participation has evolved with greater breadth and depth of investment rules to becoming a responsible rule-maker. The evolution of its BITs exemplifies the path of its integration with the liberal international order and opening to the world economy. Chinese IIAs are popularly characterized by three generation of BITs as the country evolved to adopt to economic globalization, deepening domestic reform to improve market access and investment protection of Chinese investors, building the new open economy system while balancing China’s regulatory space. The first generation of BITs began in early 1980 as China signed relatively restrictive IIAs with Western European capital exporters to encourage FDI and reactivate the Chinese economy after decades of isolation (Berger, 2015, 848). The content of its early BITs was very limited, adopting treaty templates taken from European counterparts, but asserted a number of restrictions. There were restrictions on the scope of the ISDS clause, which went as far as dispute claim accounting for compensation in the case of expropriation (Ibid).

China also did not include national treatment clauses and subjected the transfer of investment-related funds to national law (Ibid).

Facing isolation from Western countries in response to the violence in Tiananmen Square in 1989, China focused on signing treaties with developing countries from Asia, Africa and Latin America (Ibid). These treaties followed China's restrictive approach even if the Chinese government wished to promote friendly relations by using the idea of mutually beneficial South-South cooperation. These second generation BITs (from 1990 to 1999) remained limited in scope. They were carefully articulated to preserve the autonomy of the host state (Hamanka, 2016, 122). The content of these early BITs contained limitations on most-favoured-nation provision, fair and equitable treatment, expropriation, compensation for damages, transfer, subrogation, clauses on preservation of rights, and ISDS (Bath, 2011, 50).

China became a member to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) in 1993, subject to a reservation of disputes being limited to compensation for expropriation (Ibid). The first Chinese IIAs that included comprehensive ISDS clauses were introduced with developing countries, when China was becoming a FDI-exporting country, thereby attempting to increase the legal protection of its own foreign investments (Berger, 2015, 849). This was followed by renegotiations of older BITs with Netherlands, Finland and German (Ibid).

China's WTO membership triggered third-generation BITs. In these cases, China has adopted comprehensive arbitration clauses but the drafting of national treatment continues to vary: with capital-exporting countries being a party to comprehensive national treatment with the exclusion of only non-conforming measures; with developing countries being party to less stringent national treatment as subjected to the domestic law of the host states (Chaisse, 2018,

560). China's BITs have evolved to include asset-based definition of investment, unqualified provisions on fair and equitable treatment, full protection and security and non-discrimination.

With a growing presence globally, China's transition toward being a rule-maker in the international investment regime is driven by its commitment to putting liberalization at the core of its IIAs. Chinese investment policy post-2008 is shifting towards NAFTAisation: evolving protection and liberalization to mirror the 2012 US Model BIT (Trakman, 2017, 69). China has embraced liberal treaty provisions such as pre-establishment MFN, prohibition of performance requirements, fair and equitable treatment not subjected to customary law, and similar language of indirect expropriation. China's unprecedented degree of liberalization is supported by legalized rules and substantive provisions. This shows China's willingness to participate in the IIR based on cross-border market forces over restricted norms of state sovereignty. China has become less reluctant to grant investors free market access by letting go of its liberty to regulate the entry of foreign investors, and concern for state-owned companies in the form of allowing a pre-establishment MFN legal provisions (Berger, 2015, 853).¹³ Restrictions on the usage of performance requirements such as local content or technology transfer were frequently used pre-2008 within China's investment treaties; however, post-2008, the provisions were commonly no longer included (Berger, 2015, 854). As a result, discriminatory measures were relaxed, which opened China to new state members for inbound investment and enhanced a wide participation via IIAs.

Fair and equitable treatment has been a key source of prominent ISDS cases coming from NAFTA, which narrowly defines the standard using a "Note" that specifically denies going beyond customary international law (Berger, 2015, 857). Only after 2008, did China's FET

¹³ Although the open access to investors is being challenged currently due to Trump's tariff war with China.

standard evolve to converge with NAFTA's legal language. China originally dismissed it as a Western concept, which historically disregarded the interest of developing countries (Ibid). The shift of legal language demonstrates China's capacity to let go of old grievances in order to be part of a common legal regime with the rest of the international community adhering to international law. By adopting provisions core to liberalization as embraced by the US, which has traditionally dictated the rule-making process in the IIR, China has showed serious commitment to opening its doors wider and going global (Berger, 2015, 853). China's transformational use of substantive provisions post-2008 demonstrates further liberalization. This shows an ambition to transition into a rule-maker of the international investment regime.

Despite its accelerated liberalization, China's pragmatic approach with partnering members shows its advantageous capability of being a diplomatic rule-maker. China's BIT liberalization is incremental but does not apply to all its activity. China has adopted more extensive protection of foreign investment in treaties whose primary purpose is to expand outbound investors. It is likely to limit protection in treaties that primarily regulate FDI flows into China. China's differentiated approach is explained by the North-South paradigm (Bath, 2011, 71). A Chinese BIT with a developing African country, in which China is focused on cultivating a diplomatic alliance and acquiring raw materials, will have state exemptions and investor protections different from a BIT that China concludes with Canada, Australia and Singapore. The national treatments are weaker in South-South treaties compared with North-South treaties in pre-2008 treaties. This is China's way of incrementally handling liberalization to pursue the free flow of FDI and protecting its national interests from inbound foreign investors (Berger, 2015, 73). China is carefully trotting its role of being the leader of the developing countries while engaging with them to keep expanding its market of outward investment.

As China applied varying degrees of NAFTA-like provisions post-2008, the north-south frame can no longer be applied (Chaisse, 2018, 506). For instance, liberalized provisions, such as pre-establishment MFN, now appear in treaties with both developed and developing countries. Nevertheless, China is willing to be adaptive to its partners' approach as a departure point in negotiations, which shows a keen diplomatic awareness and getting 'deal done' mindset. In other words, China is pro-active and ready to negotiate its legal provisions with all members of the international community.

China has looked to make a shift in its crafting of IIAs with respect to the pre-establishment national treatment by using a national negative list approach.¹⁴ China is supporting a new open economic system with the aim of improving market access via an upcoming negative list nationwide and pilot free trade zone (with number of off-limit items estimated to be reduced to 48 from 63) (Global Times, 2018). An elevated level of openness is expected with government retreating from hands-on regulation by liberalizing inbound investment through the unification of domestic and foreign investment regulations while encouraging and facilitating outbound investment (Global Times, 2018). An aspiration of reform of this magnitude shows China pressing toward a more open, flexible and efficient management of foreign investment, and taking on the role of a responsible rule-maker. China seeks an open economic system and international community via its architecture of the evolving investment regime.

Despite cautious approach to international arbitration, China has the capacity to assume a leading role in the development of dispute settlement mechanisms within the IIR. China's evolution through three generations of ISDS clauses shows maturation of being an interested party to becoming a tangible party of a responsible rule-based legal order founded on

¹⁴ The National Negative lists industries in which the rule of nondiscrimination does not apply. See Glossary for full definition.

international standards. China's inclusion of dispute settlement clauses in its BITs has been an incremental advance from no provision for recourse to investor-state arbitration to permitting a claim of compensation amount of expropriation to a more comprehensive investor state dispute resolution provision (Chaisse, 2018, 558). The third generation of dispute settlement clause was introduced within the context of the "Going Global" period, which proactively encouraged outbound FDI. During this period more than 40 bilateral investment treaties signed by China contains a detailed dispute mechanism provision (Trakman, 2011, 75). There are several notable features of China's more expansive dispute-settlement clauses. Definitions of a dispute are broad in scope, the waiting period is six months from either formal notification or commencement of negotiations, and the prevailing forum is ICSID, closely followed by ad hoc arbitration under UNICITRAL rules (Chaisse, 2018, 560). Other notable features of this new generation of BITs can also be identified: a provision for the consolidation of claims; a time limitation period in which to file an arbitration claim; a State party's right to object that a claim is manifestly without merit; specific exclusions for public health, safety, and environmental measures; a State party's right to publish tribunal documents; restrictions on punitive damages; limitations as to a tribunal's binding forces; and the exclusion of the 'Maffezini' interpretive approach to the importation of dispute resolution provisions through MFN clauses (Wilhem, 2013, 32). China's modern provisions restrict the discretion allotted to arbitrators, emphasizing the public interest and provide specificity to the scope of private rights (Ibid).

China has emerged as a capital-exporter. As a result, it transitioned its priorities from being merely concerned about sovereignty being threatened by investor protection to making available a comprehensive dispute mechanism for all contracting members. The adoption of a comprehensive investor-state arbitration shows China overcoming its traditional concerns

embodied in the “five principles of mutual coexistence”: e.g., mutual respect for sovereignty, non-interference in each other’s internal affairs, equality and mutual benefit (The Diplomat, 2015). China’s evolving approach to investor-state arbitration (ISA) shows its capacity to go beyond tried practices and ideological conformity embodying a sense of maturity in its participation of international investment law to be responsible rule-maker of international standards.

Even though the embrace of ISDS as a legal instrument does not reflect Chinese engagement of arbitration, its historical repulsion to investor-state arbitration in practice is slowly turning into approval. A lack of arbitration activity can be explained with many first generation BITs remaining in force with no provision of dispute-settlement mechanism. While China is the signatory to 127 BITs and 22 FTAs, there have been only 8 reported investor-state dispute cases under a Chinese BIT, of which five were by Chinese investors against foreign states and three by a foreign investor against China (UNCTAD, 2018). Among them, a notable case is Ping An Life Insurance Company v. Government of Belgium, which invoked the 2009 China-BLEU BIT with a comprehensive ISA clause (McLaughlin, 2018, 92). Ping An, China’s second largest insurer, lost approximately US\$3 billion when the failed Belgo-Dutch bank, Fortis, was nationalized and sold during the 2008 financial crisis (Trakman, 2017, 82). The collapse of the price of Fortis Bank and its sale diminished Ping An’s interest in the Bank. Although Ping An was unsuccessful in its claim on preliminary jurisdictional grounds, the case was significant since it was the first mainland Chinese company to file a claim in the ICSID and first claim by a Chinese national against the government of a developed economy (Ibid). The case demonstrates a greater willingness on the part of Chinese foreign investors to summon claims against host states but considering the low number of cases, sweeping conclusions are

difficult to make. Nevertheless, the Ping An case may illustrate a turning point of readiness of large Chinese companies to pursue substantial claims under China's BITs. Chinese investors' willingness to petition through dispute-settlement mechanisms shows erosion of cultural repulsion to formal proceedings and a capacity to undertake the pragmatic cost-benefit analysis when value of the expropriated investment is many times greater. China is acknowledging the deficiencies in investor-state arbitration by incrementally reforming its BITs.

Despite a lack of coherence, Chinese participation in investment law shows sensitivity toward construing a relationship between investment and sustainable development. Since 2010, China's IIAs are becoming environmentally friendly. An enhanced awareness of non-investment issues, including environmental protection is addressed through environmental provisions (EPs) within China's BIT models (Chi, 2018, 524). EPs come in many forms, including substantive provisions such as Fair and Equitable treatment and (indirect) expropriation, which are present in six Chinese BITs with five of the former kind and one of the latter kind (Chi, 2015, 525).

Overall, there are 10 Chinese BITs with EPs where total number of EPs in all is 18. Further, the 18 EPs in Chinese BITs are not evenly distributed: the China-Canada BIT has four EPs, the most EPs in any single Chinese BIT; the China-Japan-Korea BIT and the China-Tanzania BIT each has three; the China-Uzbekistan BIT has two. All these four BITs are recent 3G BITs. Other six BITs each has one. (Chi, 2015, 528)

Although there is an overall lack of EPs and a low concentration level of the EPs in Chinese BITs, there is a clear indication of Chinese practices becoming greener, especially in the recent BITs that include many EPs (Chi, 2015, 527). The increasing quality and quantity of Chinese BITs conforms to the global initiative of IIA-making that stresses "inclusive growth, responsible investment and sustainable development" when developing investment policies (UNCTAD, 2018). China BIT practice illustrates an increasing awareness of environmental protection that

has been prioritised by Chinese leaders in recent years. Considering the terrible environmental challenges experienced by the international community and China domestically, it is likely that China is to maintain such a practice in future BIT-making. China's willingness to address current concerns around sustainability and environment through IIAs shows its capacity to embrace responsible rule-making practices of more green BITs mirroring other progressive member of the international community such as U.S. and Canada.

Furthermore, China's increasing inclusion of EPs parallels efforts by China's Presidency of the G20 to lay groundwork for higher flows of sustainable FDI within a multilateral/plurilateral framework. Overtime, national interests of developed and developing countries has changed profoundly which has paved a consensus and harmonization of substantive and procedural aspect of international investment law. China's evolving approach to IIAs reflects this changing pattern. While discussion in G20 has been underway since 2016, China advanced a dialogue through the G20's Trade and Investment Working Group concluding with nine non-binding "Guiding Principles for Global Investment Policymaking" (Sauvant, 2016, 2). They guiding principles include the following elements for investment policy-making:

avoidance of FDI protectionism; openness, non-discrimination, transparency, and predictability; investment protection, including dispute settlement; transparency in investment rule-making, involving all stakeholders; coherence in investment rule-making, consistent with sustainable development; the right to regulate; investment promotion and facilitation; responsible business conduct; and international cooperation on investment matters (Sauvant, 2016, 10).

China deployed diplomatic skills to muster a willingness of compromise among all members, aided by Canada as Co-chair of the Investment group. It was a "desirable step" toward architecting a comprehensive framework on international investment. It is important to note that China made the governance of international investment a top priority of its G20 presidency to promote inclusive growth via multilateral diplomacy (Sauvant, 2016, p.10). The principles are a

crucial accomplishment despite being general since it is adopted by a diverse group of countries and explicitly shares the facilitation of higher sustainable FDI flows. China emphasized a convergence between investment, growth and development specifically with infrastructure investment and inclusive finance (Chin, 2016, p.161). China found a way to reconcile its recent initiative of the new China-backed multilateral infrastructure financing, the new Sustainable Development Goals (SDGs), and the G20 process. China presidency of G20 complemented its investment law practices, and initiative of supporting green finance via green bonds, and the urgency of creating a green financial market (Chin, 2016, p.162). Considering green economy is a national priority, China is likely to play an active role in improving the international investment law in respect to sustainability and becoming a member of more “green” rule-making process.

China is an emerging leader of the international economic order with its IIAs, showing a lack of interest in seeking an alternative to the existing economic order founded upon liberal norms. China’s “Open Door” and “Going Global” strategy has accelerated Chinese participation in the international investment regime. China has evolved through three stages of BITs with fast-paced liberalisation contributing to its status as a major developing country and a strong proponent of the Global South (Bath, 2011, 47). As China continues to find balance between its role of being rule-maker and rule-taker, Chinese investment treaty practice continues to be characterized by liberalization, pragmatism and an aspiration to seek high standards with more market access for foreign investors. China confirms its potential to practice sustainable norms and greener rule-making process.

REPUBLIC OF SOUTH KOREA

The Republic of Korea (ROK) is one of the first Asian states to sign a BIT to transform its economy post Korean War in the 1950s. Overall, historically South Korea has not played an active role in rule-making process. The focus on transparency provisions and general exception clause may indicate some inclination of ROK taking a unique approach to the crafting of IIAs. Although South Korea's investment policy is generally passive, it may be moving toward a more active role of being a rule-maker in some ways.

The Republic of Korea has a long history of international investment agreements (IIAs), with an extensive BIT network. The ROK signed its first BIT in 1964 with Germany and its first FTA with Chile in 2004 (Kim, 2018, 487). For Korea's trade and investment policy, today FTAs have replaced BITs as the fundamental means to establish IIAs. South Korea's evolving participation within the investment regime is paralleled by its transformation from an agriculture-based economy in the 1960s to the 11th largest economy in terms of GDP in 2016 (Global Tenders, 2018). Nevertheless, South Korea early on complied with the requests of developed countries in negotiating BITs, including joining the ICSID Convention with other states in 1966 to attract much-needed foreign investment (Ernisse and Kim, 2017). After the Korean War (1950-1953), Korea's BITs were used as a reconstruction and economic development tool to create a favourable investment climate for foreign investors from major capital-exporting countries (St. Louis, 2018). By the 1990's, Korea emerged as one of the world's largest major trading partners with overseas investment that matched FDI inflows. Korea's accession to the OECD Convention in 1996 further contributed to the momentum (OECD, 2018). Today, Korean overseas investment exceeds incoming FDI by a substantial margin, making Korea a net capital exporter (St. Louis Fed, 2018).

Korea's investment policy is characteristic of a capital-importing and capital-exporting country, which accommodates both inflow and outflow of capital. With its post-2000 BITs and FTAs, Korea has positioned itself as a capital-exporting country, seeking more investment opportunities and increasing protection overseas (Kim, 2018, 487). It has begun to conclude more BITs and FTAs with developing countries (St. Louis Fed, 2018). However, Korea tends to behave as a capital-importing country in its relations with countries such as Japan, the US, and the EU, which are major sources of FDI into Korea (Ibid). Korea's IIAs span the entire globe, with 94 BITs and 20 FTAs (UNCTAD, 2018). Korea's modern IIAs all contain ISDS provisions, despite facing several substantial cases brought against the government.

Although South Korea has a general passive rule-taker approach, a unique trend has emerged in IIAs regarding transparency. Admittedly, Korea has adopted a general characteristic of other Asian countries. None of the 19 countries that embraced the UN convention on transparency in treaty-based investor-state arbitration (Mauritius Convention) is from Asia, including Korea (Kim, 2018, 487). However, in recent times Korea's IIA posture toward transparency, especially in its FTAs, has become more active. Korea's first transparency-related provisions are found in its FTA with Chile (Kim, 2018, 490). A basic level of transparency is granted with the disclosure of the arbitral award either by the investor or host state and concedes to the home state participation in the proceedings and access submissions (Kim, 2018, 494). Although it did not influence the IIAs that followed, Korea did incorporate an extensive transparency provision in its FTA with the US. This was the first time a Korean FTA included "notice of intent, pleadings, memorials, and briefs submitted to the tribunal and submissions by third parties, minutes or transcripts of the hearings and tribunal orders and decisions, among other things" (Kim, 2018, 495). This was a major departure for Korean policy. Similar

provisions were not pursued afterwards with countries where Korea had more bargaining power and greater incentives to protect the interests of its investors. Nevertheless, Korea's FTAs with Australia, Canada and New Zealand show an emerging transparency policy that is a testimony to Korea's push to be a rule-maker (Kim, 2018, 496). While each of these countries have transparent oriented models, the IIAs with Korea is one of the most transparent even from the other country's perspectives which highlight Korea's active posturing.

In the Australian case, the disclosure of submissions, public hearings, access by the home state or amicus curiae submissions is most transparent for both parties (Kim, 2018, 496-500). The New Zealand case mandates a disclosure of minutes and transcripts of the hearing, on top of the items listed above. Even though Canada is far more progressive in comparison to Korea's FTAs with Australia and New Zealand when it comes to the dispute-settlement process, Korea still took an active posture (Ibid). While wide disclosures of documents are mandated, Korea pushed to give disputing parties the opportunity to have the option to prevent public disclosure in the public interest if necessary. Via Canada, New Zealand and Australia, Republic of Korea has been able to gain momentum toward transparency with more advanced economies, which shows its capacity to be a strong negotiator (Ibid). It is true that the countries are generally considered relatively strong advocate of transparency, yet Korea has advanced provisions beyond what these would normally includes in their IIAs. To some degree, then Korea also exhibits capacity to be an innovator since it pursued transparency with countries that have traditionally played the role of rule-maker within the investment regime.

South Korea has showed some progress in terms of playing a rule-making role through FTAs; however, it has not adopted similar provisions in its IIAs. As a result, Korea shows mixed activity as a rule-maker, yet indicates a willingness to experiment with newer provisions within

the dispute settlement mechanism that supports regional economic integration. This leads to the anticipation that in the future South Korea maybe the first Asian state to sign the Mauritius Convention. The emerging trend of transparent provisions in its FTAs shows initiative and a positive step toward filling the gap between investment and sustainability within the rule-making process of the investment regime.

South Korea's use of general exceptions within IIAs shows legislative experimentation to reconcile public interest with investor-protection provisions. General exceptions are often employed to provide the host state with regulatory flexibility to reserve policy space for the public interest. As such, they are commonly associated with sustainability provisions. Korea utilizes general exceptions in various degrees and forms, illustrating the way Korea is establishing social or environmental cooperation to complement its traditional process of liberalization and economic goals. Firstly, in Korea's early treaty-making process in the 2000s, basic self-judging provisions have been employed as a symbolic gesture of concern for the public interest (Kim, 2018, 506). A self-judging provision is a gentle gesture of public interest measures to be consistent with the investment chapter. Although many perceive the provision to lack clarity, others see it as a good-faith standard of being appropriate. Korea adopted the measure with Peru, US, Canada and Colombia via FTAs but limiting the provision to environmental concerns (Kim, 2018, 507). Korea prevailed with the US and Canada by including the use of a self-judging provision that emphasized environment over health and safety. Korea has showed bargaining vigor over its more developed and tradition western counterparts, which are the primary architects of the international investment regime.

Secondly, Korea draws on GATT articles when incorporating comprehensive general exception provisions. Korea's FTAs with EFTA (European Free Trade Association) countries

(2006), ASEAN (2009), India (2010) and China (2015) include implicit comprehensive general exception provisions modeled after Article XIV of the GATS and Article XX of the GATT, while FTAs with Singapore (2006), Peru (2011), New Zealand (2015), Vietnam (2015) and Colombia (2016) are explicitly embracing GATT general exception articles (Kim, 2018, 504). The most common general exception includes measures to protect human, animal or plant life or health; to protect the environment; to secure compliance with laws and regulations (WTO, 2018). The GATT exceptions are broad ranged provisions that grant bigger policy space for environmental regulations. Korea's use of these exception varies: instead of adding a provision on environment, it adds a provision on public morals, protecting national works and supporting creative national value, and conserving natural resources. This shows Korea is actively negotiating and exploring public interest-oriented general exceptions around health, safety and the environment. Korea is willing to use GATT articles as a foundation and experiment further to adapt various partner members' legal styles while maintaining its own narrow interests. Korea's experimentation shows initiative to contribute as a rule-maker within investment law internationally.

Thirdly, Korea has utilized non-lowering standard provisions in FTAs investment chapters and selected IIAs, showing a thoughtful concern for public interests. Korea's older FTAs with Chile (2004), India (2010) and Peru (2011) and the one with Canada (2015) employ a general non-lowering standard provision in the investment chapters for exceptions (Kim, 2018, 505). In its FTAs, Korea embraces health, safety and environmental measures as a host state to withstand pressure from investors who seek a lowering of such standards but has a more limited use of non-lowering standard provision in IIAs that exclude healthy and safety measures. The idea of non-lowering standard provision is to "discourages the Contracting States from attracting

investment through the relaxation of their environmental, labour and/or health and safety standards” (Footer, 2009, 43). Korea’s transformation of policy reform is supported by non-lowering provisions that sustain its business environment as much as policies incentivizing investment in innovation. Korea shows flexibility in its use but continues to be an advocate of non-lowering provision, showing experimentation of legal provision to support economic goals.

Fourthly, Korea goes further to utilize public-interest-oriented exceptions constituting indirect expropriation. Korea uses a more narrowly applicable public-interest exception, which is designed to protect “legitimate public welfare objectives” such as public health, safety and the environment (Kim, 2018, 506). Although there is no defined meaning, the clause is elaborated by examples such as “real estate price stabilisation.” The idea is to allow indirect expropriation on the ground of legitimate public welfare objective where real estate price stabilisation is necessary to protect public interest. The list is not exhaustive although Korea continues to insist on this provision by adding that it must not constitute a certain type of “rare circumstance” such as when a measure has an “extremely severe or disproportionate effect in light of its purpose” (Kim, 2018, 507). Korea negotiated these terms with Colombia and US even though it did not fit its traditional model.

Fifthly, Korea takes on an uncommon practice of employing exceptions in performance requirement. Exceptions within performance requirement tend to provide space for specific policy objectives such as the technology used to meet standards that protect the public interest. In Korea’s case of performance requirements, several FTAs include public-interest exceptions based on GATT article XX and GATS article IV (Kim, 2018, 510-511). Korea’s FTAs with Chile, Singapore, Peru, US, Turkey, Australia and Colombia have performance requirements exceptions regarding measures “necessary to protect human, animal or plant life or health,

necessary to secure compliance with laws and regulation and necessary for or related to the conservation of living and non-living exhaustible natural resources” (Ibid). These exceptions are, however, not used in its recent FTAs with Canada, New Zealand, China and Vietnam, as well as in all its recent BITs (Ibid). In the original use within the GATT, the GATS and the US Model BIT, these performance requirement measures are not to be applied in an arbitrary/unjustifiable manner or act as a disguised restriction on international trade or investment; only one of the conditions needs to be met for the exception not to apply. However, Korea’s FTAs require that, where these three public interest exceptions are not stated, both conditions must be satisfied. This makes it difficult to apply the exceptions (Kim, 2018, 510-511). Korea’s approach is liberal as it adopts GATT and GATS provisions but at the same time contributes to the rule-making process by adding its own unique conditionality within FTA. Korea’s use of general exception within performance requirement shows its capacity to hone its craft of drafting legal provisions and its eagerness to be creative to protect public interest with variations.

Korea’s outlier-like tendencies is an asset to transitioning into a more dominant a rule-making role in the investment regime. Korea’s promotion of transparency-related provisions shows legal experimentation in crafting its IIAs. Korea adheres to comprehensive public-interest general exceptions such as the non-lowering standard provision, self-judging provision, performance requirement or indirect expropriation. Its vast array of general exceptions shows willingness, boldness, bargaining power and creativity, which are assets to attain a more prominent role in rule-making in the international investment regime.

Section 4: A COMPARATIVE LENS

This section evaluates the role of China, Japan and Korea in a comparative manner to understand collectively their influence in driving Asia’s transition from a rule-taker to a rule-maker within

the IIR. A comparative analysis is used to decipher each country's posture of liberalization in respect to each other. The area of investment regime, where each of the countries' law making and legal attitude diverge and converge in the rule-making process, is examined.

Historically, South Korea was the first country to participate in the investment regime by signing its first BIT in 1964 with Germany and went into force in 1967 (Investment Policy Hub-UNCTAD, 2018). In comparison, China signed its first BIT with Sweden in 1982 during its first phase which lasted until 1998 and signed around 70 BITS (Investment Policy Hub-UNCTAD, 2018). Japan signed its first BIT in 1977 with Egypt and a few more by the late 1990s; at the beginning of the 2000s, Japan had only signed nine BITs (Investment Policy Hub-UNCTAD, 2018). By then, both South Korea and China had become full-fledged participants in Asia's investment noodle and the wider IIR. Today, ROK has 94 BITs and 20 FTAs/EPAs with investment chapters; China has 127 BITs and 22 FTA/EPAs; and Japan has 28 BITs and 20 FTA/EPAs. ROK's impetus in entering the investment regime was the reconstruction of its economy post-Korean war. China's participation in IIAs accelerated as a result of its "Open Door" policy and "Going Global" program when it was making the transition from planned economic system to "a socialist system with Chinese characteristic." Japan hastened its IIA efforts post-2001 as part of Abenomics, which aimed to help the Japanese economy to recover from a long recession. Today, these three countries are exporters as well as importers of FDI, although they are net capital exporters.

Asian countries' shift from being FDI importers to FDI exporters corresponds to changes in the international investment agreement in the region. As sources of capital and outward FDI destination diversify, China, Japan and Korea are at the forefront of understanding the way Asia as a region is being designed. The new generation of regional trade agreements contains

investment chapters. The new dynamics of investment flows has also resulted in an increasing number of investor-state dispute settlement cases against Asian countries, including China and South Korea. While Asian legal tradition pursues harmony and previously lacked institutional capacity, Asian countries' growing outward FDI is challenging their past passivity towards investor-state arbitration and activity under ICSID.

By looking at the IIAs between China, Japan and Korea, the latter's role as rule-makers collectively is scrutinized. The China-Japan-ROK trilateral investment agreement (CJROK TIA) is revolutionary as it lays a "solid foundation for the establishment of a free trade area among the three nations to ensure a stable investment environment for investors" (Hamanaka, 128). The TIA could not have been possible without its precedent BIT agreements: China-Japan (1989), Japan-Korea (2003), and China-Korea (2007). In a comparative lens, the legal substantive provisions between China, Japan and Korea signify the cultivation of an evolving legal common ground and consensus as a foundation for East Asian investment regime and as a result influencing the global economy. Collectively, within the CJROK TIA, the three countries found a liberalized and progressive common ground, which is a positive pivot towards the evolution of the investment regime within the Asian region. Firstly, the TIA takes a modern approach by combining Fair and Equitable Treatment with Protection and Security Treatment (PST) into a single provision. Usually FET is drafted using related standards such as the international minimum standard; however, the TIA's FET provision follows the approach of referring to the "generally accepted rules of international law" (Zhu, 2015, 97). The provision goes further by adding that the FET/PST treatment could not apply to violate other provision of TIA to avoid competitiveness (Ibid). China's BIT Model separates the FET and PST provisions, although in practice some BITs adopt the TIA's approach. Nonetheless, most Chinese BITs' FET clause is

not subjected to the customary international law (Ibid). In term of the PST provision, it can be found in older Japanese BITs. For Japan, its old generation BITs do not contain the FET clause or similar language (Ibid). In Japan's newer BITs, a 'Note' acts similarly as the TIA by dismissing the application of the treatment "in addition to or beyond" the customary international law minimum standard" and another "Note" that excludes application when it violates other provision or competes with other "separate international agreement" (Ibid). The Korean Model BIT puts the FET and PST provisions within the Promotion and Protection of Investment category and generally doesn't refer to the minimum standard of international law. The TIA's use of FET and PST is progressive since it has broader application and lacks precedence for all three countries. Agreement on such a basic provision shows a strong willingness by Japan, China and ROK to seek international law as a common ground for future regional economic integration.

Secondly, the TIA includes the expropriation and compensation clauses together; they are found in Article 11 covering broadly direct and indirect expropriation. The expropriation clause includes universal exception such as "public interest,' 'on a discriminatory basis,' 'in accordance with its laws and international standard of due process of law,' and 'upon compensation'" (Zhu, 2015, 98). TIA adds a Protocol, which is a mechanism to add flexibility and adds another layer of understanding regarding indirect expropriation for tribunal when accounting for discriminatory factors in the case of expropriation (Ibid). TIA has embraced a broad application of the amount of compensation by referring to "fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriated occurred" (Ibid). The expropriation clause is identical in China's evolving BIT Model whereas the compensation clause varies, citing "under appropriate legal procedure" and

“under domestic legal procedure” (Ibid). The TIA oversteps the Chinese Model BIT by applying “in accordance with its laws and international standard of due process of law” since China follows the public interest standard (Zhu, 2015, 99). In the case of the compensation provision, often “corresponding compensation” under domestic law or “in accordance with generally recognized principles of valuation” under the Chinese Model BIT is applied (Zhu, 2015, 98). In contrast, the TIA uses the Hull formula of the “prompt, adequate and effective compensation” for expropriation. In Japan’s case, the use of “normal market value” is found in older BITs but the new generation has pursued the trend of “market value” to regulate the amount of compensation in expropriation. The Korean Model BIT encompasses better protection than the Chinese model but not better than the TIA and further limits the expropriation clause where indirect expropriation is same as “nationalization and expropriation.” The Korea Model BIT encompasses the same idea as TIA’s ‘fair market value’ but TIA adds that the value of expropriation investment for compensation must be determined at time “immediately before expropriation was taken” and “before impending expropriation became public knowledge” (Zhu, 2015, p.100). In Japan-Korea BIT (2002), China-Korea BIT (2007), and TIA (2014) the expropriation provision is architected in a way that rightfully allows the compensating member to make a just claim regarding the investment value. The Japan-Korea BIT is similar to the TIA expropriation clause which “includes the amount of compensation based on fair market value” and is limited to the indirect expropriation (Ibid). The TIA follows a global trend by using ‘fair market value,’ which is another liberal and progressive common ground for Korea, Japan and ROK (Hamanaka, 2017, 129). The TIA’s compensation clause has wider application than the Chinese Model BITs and previous Korean BITs and adds to the consensus made previously in their previous BIT agreement with each other. Although China continues to be reluctant to use

the more popular and Western-advocated Hull formula of compensation, the unique legal language of the expropriation provision shows momentum of the three parties embracing a more progressive consensus parties as they plays a part integrating the region.

Thirdly, within TIA, regulatory provision is a self-judging clause, which is a groundbreaking addition since it is not commonly used in IIAs by Asian countries. The self-judging clause is adopted to prevent a member from taking any action that impacts the host country's essential security interests or international peace and security or grants necessary actions for the protection of their essential security. In TIA Article 18, contract parties are granted to take measures to protect security interests under the United Nations' Charter invoking broad application of deference. Such a clause is not found in the Chinese Model BITs or ROK Model BITs, neither in the China-Japan BIT and the China-Korea BIT. Other than in the TIA, it is found in the ASEAN-China Cooperation Agreement. It has also been seen in ROK's FTAs with Canada and US, which shows some legal crafting innovation. The clause comes from Japan's BIT practice, where provisions are drafted (as mentioned earlier) in accordance with Article XIV and XIV of GATS and Article XX and XXI of GATT. The only time a similar exception is included is in the Japan-Korea BIT in the form of the public order exceptions in the case of serious threat to society, because both countries are OECD members, which include such exceptions (Zhu, 2018, 101-102). The TIA provides a modern approach by embracing the self-judging clause and can be traced back to Japan's own international legal practice. By including the self-judging provision, the TIA is stronger than China's and Korea's BIT programs. This is another area where the three countries have embraced a liberal and progressive take.

Nevertheless, National Treatment continues to be controversial as it pertains to economically- and politically-sensitive issues. National treatment is not granted when it comes to

the establishment of an investment, which, as mentioned earlier, China is continuing to aspire to but no final national negative or positive list has been granted. There has been some common ground where in the TIA National Treatment is granted once admitted and included the “in like circumstances” to its own investors with an exception for “non-conforming” measures (Zhu, 2015, 91). For China, around half of its BITs don’t have a NT provision. Because China has different forms of enterprises, it makes it difficult to provide a similar treatment to national investor (Ibid). The Korean Model does not contain the “in like circumstances” and excludes pre-establishment but the Korea-China BIT has similar exception to TIA (Zhu, 2015, 92). Japan has included a NT provision in its old generation BIT but it is found in new generation BIT with a negative list (Zhu, 2015, 92). As a matter of fact, a liberalized NT is applied to pre-establishment mirroring American practice in the Japan-Korea BIT with “respect of the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investment” (Zhu, 2015, 91). The TIA here fails to be as liberal and encompass a broad scope and uses “non-conforming” measures in an ambiguous manner (Zhu, 2015, 93). The Japan-Korea BIT provides better protection than the TIA in term of NT, which is something the three parties can work toward in their next treaty-making process.

By repeatedly using commonly-used provisions that mirror the global trend of rule-making, such as fair and equitable treatment, expropriation and compensation, and self-judging provision, the three leading Asian countries demonstrate interest in shaping the Asian region in a way that models after international laws erected dominantly and historically by their Western counterparts. Asian countries like China, Korea, and Japan are keen to pursue liberalization and are leaning toward an open economy. Overall, the CJROK TIA is extremely Americanized, which signals a unprecedented level of liberalization and openness via IIAs to influence Asia’s

integration in particular and the global economy in general. Asian countries are strategically using a legal liberal approach to economically enhance their position across the world because collectively and individually it is in their advantage.

CJROK are leaning toward becoming rule-makers by a liberalized approach through CJROK TIA which is a positive pivot towards the evolution of the investment regime within the Asian region. Even though CJROK have embraced an open global economic system that the US once constructed, they are not rule-takers. The Asian countries continue to embrace a liberal consensus regionally when American and European countries are going inward nullifying the allegations that Asian countries are architecting an alternative international order. The fact that the Asian countries consensus is liberal shows that the economic integration of Asia is likely to be based on progressive norms which is a positive symbol for world's economy overall. In this way, CJROK is proactively translating national will into a region with an agency of open and integrated investment relations. CJROK evolved overall from barely engaging within the investment regime to having Western countries dictate norms in the early years of engagement to strategically using BITs to drive their economies out of historical and political upheaval. In this way, Asian countries may have embraced overall liberal norms with each other but the current variation in their degree of embracing these norms individually shows them of cultivating independence as much as being a responsible rule-maker instead of being arbitrarily coerced into becoming a rule-taker within the investment regime.

Section 5: Conclusion

Asia has become an active participant of IIAs by strategically leveraging legal norms while simultaneously pursuing a liberal approach within the investment regime. The popular skepticism towards a rising Asia and China has brought forward the idea that an alternative

international order is being sought to the historical western built liberal global order. Such allegations have been the motivating factor to investigate the research question at the core of this paper: are Asian countries evolving from rule takers to ruler makers? If Asian countries are playing an influential role in redesigning the IIR, then are they pursuing an alternative path to western countries' traditional liberalizing provisions? Asian countries are currently transitioning from rule-taker to rule-maker which does not mean Western countries cannot remain rule-makers within the investment region. Asian countries changing status is not a zero-sum game. They are late comers as participants to the investment regime, driven by a necessity to rise above their own national political upheavals, and are leveraging western crafted liberal economic rule-making process to develop and strengthen economic ties across the globe.

A historical examination illustrates the idea that the origins of international investment law are rooted in the "imposition of power and jurisdictional primary" most advantageous to the capital exporting states and traditionally those have been the western states. A crucial reason Asia engaged late with the investment regime is due to the unequal treaties imposed on China and the region, followed by the resistance towards the NIEO movement and the Calvo Doctrine being denied legitimacy. After the establishment of ICSID, following western countries, IIAs became a popular instrument for Asia to promote FDI and protect investors abroad. Asia is utilizing all foreign policy and diplomatic tools available, including various forms of IIAs strategically to exercise sovereign agency to be part of the liberal economic order. A closer look at Japan, Republic of Korea and China illustrates Asia's own ambition to be at the table of liberal rule-making process instead of creating their own unorthodox vision of global economic order. In this way, Asia's evolving from being a late comer to pursuing engagement within the

investment regime instead of being coerced into treaties as experienced in history, highlighting its positive and proactive role in the rule-making process.

Still, Asia is a force that will bring about a globally more contested set of rules as actors play their role in proportion to their political and economic influence and more Asian countries become focal points in rule-making in international investment law. Asia countries have become capital-exporters and involved in investment arbitration as claimants and respondents which is of great consequence internationally. It is unlikely that a major powerhouse country of the region such as China will drive a shift in rule-making even though a commitment to liberalization is at its core and is approval of ICSID due to its pragmatic approach with treaty partners. China dictates rule-making less with its treaty partners and adapts to their economic and legal BIT models. By signing up to ICSID and balancing liberalization, China is embracing Western legal thoughts and innovating legal provision that is most hospitable to Asia's unique history. Japan's recent approval of the Trans-Pacific Partnership Agreement (TPPA) is an impetus to new discussions around investor-state arbitration which has brought forward greater awareness of IIAs in Japanese society. Overall, Japan is a relative latecomer as a player within the investment regime showing continuous initiative and maturation of its participation. Nevertheless, Japan is in its early phase of transitioning to being an active rule-maker. Republic of South Korea may be in a better place to embrace innovative provisions to influence international investment law via its transparency provisions and use of general exceptions.

CJROK are evolving to become rule-makers, by finding a balance between unique social and political characteristic of their own national economy and embracing the Western architected economic order. A more complete picture of the extent Asian countries is becoming legal and economic leaders via their engagement with investment and trade rule can be constructed by a

further comparative, regional and global scrutinized lens. It shall be interesting to see how United States under Trump administration impact Asia's influence, and heckle the Asian voice as China leads the ambitious vision of the "One Belt One Road," the AIIB, pursue a free trade Asia region, continue to engage with the investment regime and the international economic order.

Bibliography

1. Anghie, A. (2005). *Imperialism, Sovereignty and the Making of International Law* (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511614262
2. Allee, T., & Peinhardt, C. (2011). Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment. *International Organization*, 65(3), 401-432. Retrieved from <http://www.jstor.org/stable/23016160>
3. Benton, K. (2009). *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900*. Cambridge: Cambridge University Press. doi:10.1017/CBO9780511988905
4. Benton, K. (2001). *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Studies in Comparative World History). Cambridge: Cambridge University. Retrieved from <https://www.cambridge.org/core/books/law-and-colonial-cultures/5DE1BB3C38E1F258F57ACC6A437BACF2Press>.
5. Bath, V. (2017). The South and Alternative Models of Trade and Investment Regulation. In F. Morosini & M. Sanchez Badin (Eds.), *Reconceptualizing International Investment Law from the Global South* (47-94). Cambridge: Cambridge University Press. <https://doi-org.proxy.bib.uottawa.ca/10.1017/9781316996812.003>
6. Berger, A. (2015). Hesitant Embrace: China's Recent Approach to International Investment Rule-Making. *The Journal of World Investment & Trade*. 16 (5-6). 843-868. Retrieved from [10.1163/22119000-01606003](https://doi.org/10.1163/22119000-01606003)
7. Chaisse, J. (2018). China's International Investment Agreements: Formation, Evolution, and Transformation. In J. Chaisse & L. Nottage (Ed.), *International Investment Treaties and Arbitration Across Asia* (544- 578). Retrieved from <http://booksandjournals.brillonline.com/content/books/9789004360105>
8. Chaisse, J. (2015). The Shifting Tectonic of International Investment Law- Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia Pacific. *George Washington International Law Review*. 47 (No.3). 563- 638. Retrieve from https://www.gwilr.org/?page_id=1760
9. Chesterman, S. (2016). Asia's Ambivalence about International Law and Institutions: Past, Present and Future. *European Journal of International Law*. *European Journal of International Law*. 27 (4). 945-978. Retrieved from <https://academic.oup.com/ejil/article/27/4/945/2962207>.
10. Chi, M. (2015). The Greenization of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making. *Journal of International Economic Law*. 18. 511-542. Retrieved from <https://academic.oup.com/jiel/article/18/3/511/830082>

11. Chin, G. & Dobson, H. (2015). China's Presidency of the G20 Hangzhou: On Global Leadership and Strategy. *Global Summitry*. 1 (2).151–170. Retrieved from <https://doi.org/10.1093/global/guw002>
12. Cooper, W.H. (2014). *Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy*. Washington, DC: Congressional Research Service. Retrieved from https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2252&context=key_workplace
13. Dominguez, M.D.G. (2016), Does Japan's Quiet Approach to International Investment Law Work in a World of Recurrent Conflict? *The University of Chicago Law School International Immersion Program Papers*. (No.4). 1-17. Retrieved from https://chicagounbound.uchicago.edu/international_immersion_program_papers/22/
14. Gallagher, N. (2014). China's BIT's and Arbitration Practice: Progress and Problems. In Shan, W. & Su, J (Ed.), *China and International Investment Law Twenty Years of ICSID Membership*. (180-214). Retrieved from <http://booksandjournals.brillonline.com.proxy.bib.uottawa.ca/content/books/9789004279636>
15. Global Tenders. (2018). Economy of South Korea and Business Opportunity. Retrieved from <https://www.globaltenders.com/economy-of-south-korea.php/>
16. Global Times. (July 2, 2018). *China's Reforms will Further Boost Globalization*. Retrieved from, <http://www.globaltimes.cn/content/1109222.shtml>
17. Guzman, A.T. (1998). Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties. *Virginia Journal of International Law*. 38. 640-687. Retrieved from <https://ssrn.com/abstract=2176003>
18. Hamamoto, S. (2011). A Passive Player in International Investment Law: Typically Japanese? In V. Bath & L. Nottage (Ed.), *Foreign Investment and Dispute Resolution Law and Practice in Asia*. (55-67). Retrieved from <https://www-taylorfrancis-com.proxy.bib.uottawa.ca/books/e/9781136581069>
19. Hamanaka, S. (2017). China-Japan-Korea Trilateral Investment Treaty: Implications for Future Investment Negotiations in Asia. In Julien, C. & Tomoka, I. & Sufian, J (Ed.), *Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration*. P.121-139. Retrieved from <https://www.springer.com/gp/book/9789811058813>.

20. HKTDC. (2018). *Economic and Trade Information on China*. Retrieved from <http://china-trade-research.hktdc.com/business-news/article/Facts-and-Figures/Economic-and-Trade-Information-on-China/ff/en/1/1X000000/1X09PHBA.htm>
21. IISD. (2015). *The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice*. Investment Treaty News. Retrieved from <https://www.iisd.org/itn/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/>
22. Investment Policy Hub. (2018). International Investment Agreements Navigator. United Nation Conference on Trade and Development. Retrieved from <http://investmentpolicyhub.unctad.org/IIA>
23. Ishikawa, T. A. (2018). A Japanese Perspective on International Investment Agreements: Recent Development. In J. Chaisse & L. Nottage (Ed.), *International Investment Treaties and Arbitration Across Asia* (513-543). Retrieved from <http://booksandjournals.brillonline.com/content/books/9789004360105>
24. Ke, Wang. (June 11, 2018). *China to Roll Out New Policies for Easier Access of Foreign Investment*. Retrieved from, <http://en.people.cn/n3/2018/0611/c90000-9469909.html>
25. Kim, J. (2018). Korea's International Investment Agreements: Policy at the Contours. In J. Chaisse & L. Nottage (Ed.), *International Investment Treaties and Arbitration Across Asia* (486-512). Retrieved from <http://booksandjournals.brillonline.com/content/books/9789004360105>
26. Kim, Y. (2016). *Investor-State Arbitration in South Korean International Trade Policies: An Uncertain Future, Trapped by the Past*. (Investor State Arbitration Series, Paper No. 16). Waterloo, Ontario: Centre for International Governance Innovation.
27. Morosini, F. & Badin, M. S. (2017). Reconceptualizing International Investment Law from the Global South: An Introduction. In F. Morosini & M. Sanchez Badin (Eds.), *Reconceptualizing International Investment Law from the Global South* (1-46). Cambridge: Cambridge University Press. <https://doi-org.proxy.bib.uottawa.ca/10.1017/9781316996812.003>
28. McLaughlin, M. (2018). Global Reform of Investor-State Arbitration: A Tentative Roadmap of China's Emergent Equilibrium. *The Chinese Journal of Comparative Law*. 6 (1). 73-102. Retrieved from <https://academic.oup.com/cjcl/article/6/1/73/5001583>
29. Ozaki, Ichiro. (2014). Law, Culture and Society in Modernizing Japan. In D. Vanoverbeke, J. Maesschalck, D. Nelken, & S. Parmentier. (50-59). <https://www-elgaronline-com.proxy.bib.uottawa.ca/view/9781783475643.00012.xml>

30. Pekkanen, S; Gao, H. & Ahn, D. (1-2 August 2009) From Rule Takers, Shakers to Movers: How Japan, China and Korea Shaped New Norms in International Economic Law. Second Biennial General Conference of the Asian Society of International Law, Tokyo. 1-2 August, 2009.
31. Sauvant, K. (2018). China Moves the G20 Toward an International Investment Framework and Investment Facilitation. In Julien Chaisse, ed., *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*. Retrieved from <https://ssrn.com/abstract=2901156>
32. Sauvant, K. (2016). China, the G20 and the International Investment Regime. *China and World Economy*. 24 (2). 73-92. Retrieved from <https://doi.org/10.1111/cwe.12168>.
33. Schill, S. W. (2016). Changing Geography: Prospects for Asian Actors as Global Rule-Makers in International Investment Law. (Columbia FDI Perspectives; No. 177). New York: Vale Columbia Center on Sustainable International Investment. Retrieved from <http://ccsi.columbia.edu/files/2013/10/No-177-Schill-FINAL.pdf>
34. Stoel, J.T; Ishikawa T; Jacobson, G.M; (2015). Japan's Ambitious International Investment Agreement Policy - Laying the Groundwork for Future Disputes? *Transnational Dispute Management*, 12 (1), 1-27. Retrieved from www.transnational-dispute-management.com/article.asp?key=2183.
- Sun Daily. (September 2, 2018). *RCEP Adheres to Mutually Beneficial and Fair Trade Deal*. Retrieved from, **Error! Hyperlink reference not valid.**
35. St. Louis Fed. (March 20, 2018). How Did South Korea's Economy Develop So Quickly? Retrieved from <https://www.stlouisfed.org/on-the-economy/2018/march/how-south-korea-economy-develop-quickly>
36. Sornarajah, M. (2015). *Resistance and Change in the International Law on Foreign Investment*. Cambridge: Cambridge University Press. doi:10.1017/CBO9781316156339
37. Tao, J. (2015). China's Integration into the Liberal International Economic Order and Its Changing Policies on Legalized Bilateral Investment Treaties. New York, New York: The Law and Development Colloquium, School of Law, New York University. Retrieved from http://www.law.nyu.edu/sites/default/files/upload_documents/Tao%20-%20China%E2%80%99s%20Integration%20into%20the%20Liberal%20International%20Economic%20Order%20and%20Its%20Changing%20Policies%20on%20Legalized%20Bilateral%20Investment%20Treaties.pdf
38. Takahashi, Hiroshi. (2014). Towards an Understanding of the Japanese Way of Dispute Resolution: How is it Different from the West? In Vanoverbeke, Maesschalck, Nelken & Parmentier (Ed.), *The Changing Role of Law In Japan*. 98. Retrieved from <https://www.e-elgar.com/shop/the-changing-role-of-law-in-japan>

39. Trakman, L.E. (2017). China's Regulation of Foreign Direct Investment. In Julien, C. & Tomoka, I. & Sufian, J (Ed.), *Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration*. P.121-139. Retrieved from <https://www.springer.com/gp/book/9789811058813>.
40. United Nations Conference on Trade and Development. *International Investment Agreements: Key Issues, Volume II. (2004)*. New York & Geneva: United Nations.
41. Xiao, J. (2015). How Can a Prospective China-EU BIT Contribute to Sustainable Investment: in light of the UNCTAD Investment Policy Framework for Sustainable Development. *Journal of World Energy Law and Business*.18 (3). 521-542. Retrieved from <https://academic.oup.com/jwelb/article/8/6/521/2578657>
42. Zhu, D.Z. (2015). International Investment Agreements among China, Japan and Korea: From Bilateral to Trilateral – The Way toward a Better Protection for Foreign Investors. *Manchester Journal of International Economic Law*. 12 (1): 80-107. Retrieved from <https://search-ebshost-com.proxy.bib.uottawa.ca/login.aspx?direct=true&db=lgs&AN=103142133&site=ehost-live>
43. Zhang, S. (2017). China's Approach in Drafting the Investor-State Arbitration Clause: A Review from the Belt and Road Regions Perspective. *The Chinese Journal of Comparative Law*. 5 (1). 79-109. Retrieved from <https://academic.oup.com/cjcl/article/5/1/79/3970839>