STUDIES IN TRADE, INVESTMENT AND INNOVATION NO. 90

FOREIGN DIRECT INVESTMENT AND SUSTAINABLE DEVELOPMENT IN INTERNATIONAL INVESTMENT GOVERNANCE

UNITED NATIONS
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Economic and Social Commission for Asia and the Pacific

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Foreign Direct Investment and Sustainable Development in International Investment Governance

United Nations publication
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Sales no.: E.20.II.F.6
ISBN: 978-92-1-120802-3
eISBN: 978-92-1-004836-1
Print ISSN: 1020-3516
eISSN: 2414-0953
ST/ESCAP/2883

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This publication has been issued without formal editing.

Acknowledgement

This publication on “Foreign Direct Investment and Sustainable Development in International Investment Governance” was prepared under the overall guidance of Mia Mikic, Director, Trade, Investment and Innovation Division (TIID) of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP).

It has been compiled and edited by Marc Proksch, Chief, Investment and Enterprise Development Section (IEDS), TIID, ESCAP and Heather Taylor-Strauss, Economic Affairs Officer, IEDS, TIID, ESCAP. Introduction was written by Heather Taylor-Strauss, with inputs from Manjiao Chi and Viviane Clermont; Chapter 1 was written by Heather Taylor-Strauss; Chapter 2 by Manjiao Chi; and Chapter 3 by Viviane Clermont. Viviane Clermont is also responsible for the analysis in Appendix 2 of Chapter 3. Masato Abe, Macroeconomic Policy and Financing for Development Division, ESCAP, and Soo Hyun Kim, TIID, provided feedback and suggestions for earlier drafts of Chapter 3. Mengchen Suo contributed to the data collection and editing of Chapters 1 and Chapter 2.

Chapter 2 benefitted particularly from the assistance and peer review of Dr. Fan Yang, Ms. Tongxin Du, Ms. Liuxiao Liang, Ms. Xueyu Liao, Ms. Qiya Qiao, Mr. Guanqun Qu and Mr. Yanfeng Zhang, Prof. Huiping Chen, Prof. Xiuli Han, and Prof. Congyan Cai, Law School, Xiamen University; Dr. Peng Wang, Law School, Xi’an Jiaotong University; Dr. Shintaro Hamanaka, Senior Fellow, Institute of Developing Economies of Japan External Trade Organization (IDE-JETRO); and Prof. Julien Chaisse, Law Faculty, the Chinese University of Hong Kong.

Natthika Charoenphon, IEDS, TIID performed final checks and supervised the formatting of the publication. The graphic concept, design and layout were carried out by Clung Wicha Press.

Acronyms

ACIA	ASEAN Comprehensive Investment Agreement
AIA	Framework Agreement on the ASEAN Investment Area
ASEAN	Association of South East Asian Nations
ASEAN IGA	ASEAN Investment Guarantee Agreement
BITs	Bilateral investment treaties
BLEU	Belgium-Luxembourg Economic Union
BOI	Office of the Board of Investments (Thailand)
BRI	Belt and Road Initiative
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
ECT	Energy Charter Treaty
ESCAP	Economic and Social Commission for Asia and the Pacific
EU	European Union
FDI	Foreign direct investment
FTA	Free trade agreement
GATT	General Agreement on Tariffs and Trade
ICFD	International Conference on Financing for Development
ICSID	International Center for Settlement of Investment Disputes
IIAs	International investment agreements
IISD	International Institute for Sustainable Development
ISDS	Investor-State Dispute Settlement
LDCs	Least developed countries
LLDCs	Land-locked developing countries
NGO	Non-governmental organization
RCEP	Regional Cooperation and Economic Partnership
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SDPs	Sustainable development provisions
TIT	Trilateral investment treaty
TTIP	Trans-Atlantic Trade and Investment Partnership
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environmental Program
USA	United States of America
USMCA	United States Mexico Canada Agreement
USTR	United States Trade Representative
WCED	World Commission on Environment and Development
WSSD	World Summit on Sustainable Development

Acronyms of Sustainable Development Provisions

List of Acronyms of Types of SDPs

ATC	Anti-corruption provision
ENV	Environmental provision
GEN	General sustainable development provision
LHR	Labour rights and human rights provision
NES	National security provision
RBP	Responsible business practices provision
TRA	Substantive transparency provision
TRL	Procedural transparency provision

List of Acronyms of Subtypes of SDPs

AOI	Anti-corruption obligations on foreign investors
AOS	Anti-corruption obligations on states
COM	Requirements of communication for law-making and policy-making
CON	Confirmation of sustainable development obligations
DEC	Declaration of the pursuit of sustainable development
ENG	Engagement of stakeholders
EXP	Exceptions that exempt states from the responsibilities
HER	Transparency of arbitral hearings
NDG	Non-derogation of sustainable development standards
PUB	Publication of laws and regulations or arbitral documents
REF	Reference to external sustainable development standards
ROI	Obligations on investors for engaging in responsible business practices
ROS	Obligations on states for ensuring or supervising responsible business practices
TPB	Third party participation in investment dispute settlement proceedings
UTR	Reference to UNCITRAL Transparency Rules

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INTRODUCTION

by Heather Taylor-Strauss

A. Foreign direct investment and sustainable development

Foreign direct investment (FDI) is a principal means of financing the 2030 Agenda for Sustainable Development and the corresponding 17 Sustainable Development Goals (SDGs). In addition, FDI has been recognized as a vital complement to national development efforts in the Addis Ababa Action Agenda and a prominent means of implementation of the 2030 Agenda in SDG 17. By some measurements, developing countries in Asia and the Pacific need an additional investment of $1.5 trillion annually to achieve the SDGs (ESCAP, 2019). Meeting these investment needs will require complementing public sector resources with increased private sector investments, including both domestic investment and FDI as well as public-private partnerships and blended finance.

The 17 Sustainable Development Goals

FDI can contribute to sustainable development in several important ways: through expanding access to markets, bringing in foreign exchange, contributing to skills development/ human capital growth, technology transfer and increasing competition in local markets. It can also support indigenous industry upgrading in host economies and facilitate their enhanced participation in global value chains.

FDI's potential contributions to sustainable development in Asia-Pacific can only be realized if the right conditions and policies are in place and if both the quantity and quality of FDI to, from, and within the region increase. This requires not only identifying and prioritizing FDI projects in key sustainable development sectors - such as renewable energy, education, health, water and sanitation, etc. - but also developing and operationalizing FDI policies and legal and regulatory frameworks at national and international levels that maximize the sustainable development potential of FDI in local economies. With this in mind, this publication sets out to explore the latter point further by focusing on two emerging and important issues related to the international governance: sustainable development-orientation in international investment agreements (IIAs) and the coherence between IIAs and national investment laws in Asia-Pacific.

B. Outline of the volume

This publication comprises of three chapters. Chapter 1 sets the scene for the subsequent chapters by analysing recent FDI trends, both in terms of flows of inward and outward investment as well as FDI policymaking and international investment governance. These trends highlight that the investment landscape in Asia-Pacific is changing and navigating the uncertain dynamics within it depend on swift action from policymakers in the region to, among other things, ensure that the investment they attract delivers sustainable development benefits. Reforming IIAs to make them more sustainable development-oriented and improving the coherence between national and international investment governance are two avenues that policymakers can pursue to more effectively harness FDI for sustainable development.

Chapter 2 begins with the recognition that there has been a growing demand within the investment and development community to make IIAs more sustainable development-oriented. Such moves would ensure that they both protect foreign investors and investments and enable the host country to pursue its legitimate sustainable development objectives. To this end, many countries, especially developed and emerging economies, have started to incorporate sustainable development provisions (SDPs) in their IIAs. While at this stage it would be premature to conclude that making sustainable development-oriented IIAs has become a global trend, Asian-Pacific countries, including least developed countries (LDCs) and landlocked developing countries (LLDCs), have begun to note this emerging trend in IIA-making and build capacity in this area. In light of this, the chapter analyses and compares the number and types of sustainable development provisions in two groups of IIAs, 20 sample IIAs concluded by both developed and developing

countries globally and 340 bilateral investment treaties (BITs) of 18 Asia-Pacific LDCs and LLDCs. The analysis reveals that there is a significant sustainability gap between the two groups of IIAs. Compared with the 20 sample IIAs, BITs of Asia-Pacific LDCs and LLDCs contain significantly fewer number and types of SDPs. This suggests that the BITs of Asia-Pacific LDCs and LLDCs are less sustainable development-oriented than the sample 20 IIAs. Furthermore, in terms of their sustainable development objectives, the analysis also finds that the BITs of Asia-Pacific LDCs and LLDCs prioritize SDPs with environmental dimensions, while very few focus on the social dimensions of sustainable development. This suggests that non-state stakeholders may have narrower access to engage in investment governance in Asia-Pacific. Appendix 2 of chapter 2 provides support for extending these conclusions to the region as a whole through an analysis of the BITs in 10 additional Asian-Pacific countries.

Chapter 2 also explores the political will of Asian-Pacific LDCs and LLDCs to make IIAs more sustainable development-oriented by analysing survey data on their preferences and capacities. The analysis confirms that the region's LDCs and LLDCs have varying types of sustainable development challenges, and different policy preferences for addressing these challenges. Consequently, such differences imply that a one-size-fits-all model of a sustainable development-oriented IIA will not work for all countries of the region. Instead, LDCs and LLDCs need to focus on building their capacity to formulate and/or improve their respective IIA strategies to ensure that the IIAs they conclude meet their national sustainable development priorities and objectives.

Building on these conclusions, chapter 3 addresses the importance of balancing investor protection and countries' right to regulate investment, especially with regards to the protection of the environment, human rights and other public interests. Noting the increasing global network of IIAs, this chapter explores the coherence between IIA regimes and national frameworks for investment. In two country case studies, it explores whether the respective IIA regimes in Thailand and Viet Nam are consistent with their domestic investment laws and regulations, as any inconsistencies may hinder their ability to leverage FDI for sustainable development. The country studies outline the challenges at hand for embedding sustainable development in the IIAs regimes of both countries as well as the challenges arising from the interaction between treaty provisions for the pursuit of sustainable development and the national legal frameworks for investment.

Chapter 3 also examines how the formulation, application and enforcement of sustainable development provisions may influence the coherence of the IIA regime with national frameworks for investment. Recognizing that the role of an arbitral

tribunal in the interpretation and application of treaty provisions may have an impact on the enforcement of those provisions in the national legal order, chapter 4 examines the possibility of creating a new multilateral investment system to address the inconsistency of case law and improve the accuracy of decisions and predictability of investment-related laws. The discussion specifically focuses on whether such a new system could help address the inconsistency of case law, improve the accuracy of decisions and predictability of the law, as well as forge coherence and complementarity of the IIA regime with national investment policies and regulations and thereby enhance the sustainable development orientation of both IIA governance and national investment frameworks.

In conclusion, reforming the IIA regime with a view to make it both more sustainable development-oriented and coherent with national investment laws in the Asia-Pacific region is a formidable challenge that requires significant political will. On the one hand it is a challenge that demands governments of the region to work together to address the reforms needed, while on the other hand it simultaneously requires governments to develop individual strategies based on their own national sustainable development challenges and priorities. The chapters in this publication offer promising signs that the momentum for and political will to reform the IIA regime to make it more sustainable development-oriented and coherent are picking up. However, much work still needs to be done. To this end, ESCAP is committed to supporting its member States in these areas. ESCAP's intergovernmental platform is well placed to bring the region's policymakers and stakeholders together to collectively develop strategies to implement sustainable development reforms of the IIA regime. ESCAP also stands ready to offer its member States the policy advisory and technical capacity building services needed to formulate and improve their respective IIAs and make them more consistent and coherent with their national legal frameworks for investment.

References

United Nations Economic and Social Commission for Asia and the Pacific (2019). Economic and Social Survey of Asia and the Pacific 2019: Ambitions beyond Growth. Bangkok. Available at https://www.unescap.org/publications/economic-and-social-survey-asia-and-pacific-2019-ambitions-beyond-growth.

CHAPTER 1

THE INVESTMENT LANDSCAPE IN ASIA AND THE PACIFIC: TRENDS AND OUTLOOK FOR INVESTMENT FLOWS, POLICIES AND INTERNATIONAL TREATIES

by Heather Taylor-Strauss

A. Introduction

The investment landscape in Asia-Pacific is changing in several important and dynamic ways. Investment flows to the region are increasingly uncertain and inextricably tied to the unfolding of current global and regional political economic risks, such as increased trade tensions and the retreat of multilateralism globally. Despite this uncertainty, Asia-Pacific has simultaneously become the most attractive destination globally for FDI inflows and the largest source of global FDI outflows. Relatedly, intraregional FDI flows have continuously grown over the last decade, reflecting the growing need for more and better inward and outward investment cooperation among the region's economies. Sectorally, while FDI inflows are still predominantly in the manufacturing sector, they are shifting more and more towards the services sector. Such shifts can offer countries in the region more possibilities to harness value-chain linked sustainable FDI flowing into the region. At the policy level, to a large extent most countries in the region have prioritized implementing policies to attract and facilitate FDI and the success of these policies is undeniably evident in the rapid gains the region has made in terms of increasing its share of global FDI inflows over the last two decades. At the international policy level, Asian and Pacific countries have also actively pursued IIAs and the region is responsible for the largest amount of newly signed IIAs in the last two years combined. Asia-Pacific's avid pursuit of IIAs underscores the need for more coherence and coordination in international investment treaty making.

The chapter that follows elaborates on each of these dynamic features within the Asia-Pacific investment landscape. In doing so, it provides an overview of the inward and outward FDI trends and the policy changes, both at a national policy level and IIA level, since 2018.

B. FDI trends in Asia-Pacific[1]

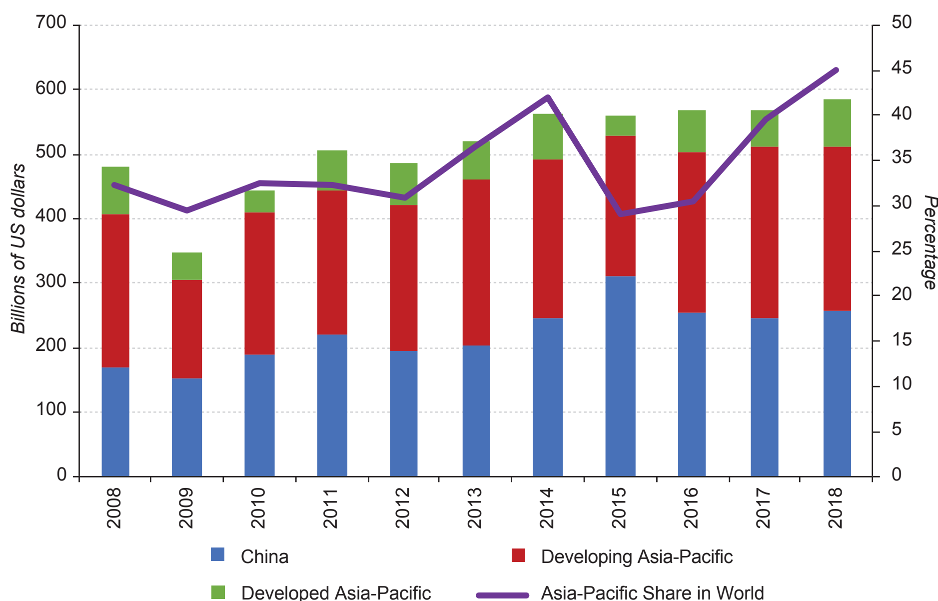
1. Trends in inward and outward FDI

Global FDI flows declined for the third consecutive year in 2018, dropping 13% from 2017 levels to $1.3 trillion (UNCTAD, 2019). Large-scale foreign earning repatriations from multinational enterprises (MNEs) headquartered in the United States along with geopolitical risks, trade tensions and concerns about shifts towards more protectionist policies globally were the largest contributors to the downward trend in global FDI flows. The largest declines were in developed countries and economies in transition, with flows declining by 27% from 2017 levels. In contrast, inward flows to developing economies grew by 2% to reach $706 billion in 2018. The combination of declining flows to developed economies and modestly growing flows to developing economies resulted in a significant change in global FDI patterns in which the share of inward FDI captured by developing economies increased to 54% in 2018 compared to 47% in the previous year.

Among the regions worldwide, Asia-Pacific received the largest share of FDI inflows, attracting 45% of global FDI inflows in 2018 compared with 39% in 2017 (figure 1.1). The region recovered from a 2% contraction in 2017 to a moderate growth of 3% to reach $585 billion in 2018. Developing countries in the region attracted 40% of global FDI inflows and 88% of total Asia-Pacific inflows.

1 This section provides a general overview of the FDI trends in and outlook for the region. For a detailed report and outlook, including a more in-depth analysis of sectoral and subregional trends, please refer to ESCAP, 2019.

Figure 1.1 FDI inflows to Asia-Pacific and their global share, 2008-2018



Source: ESCAP calculations based on UNCTAD (2019).
Note: China includes Hong Kong, China and Macao, China; A-P stands for Asia and the Pacific; Developing A-P excludes China.

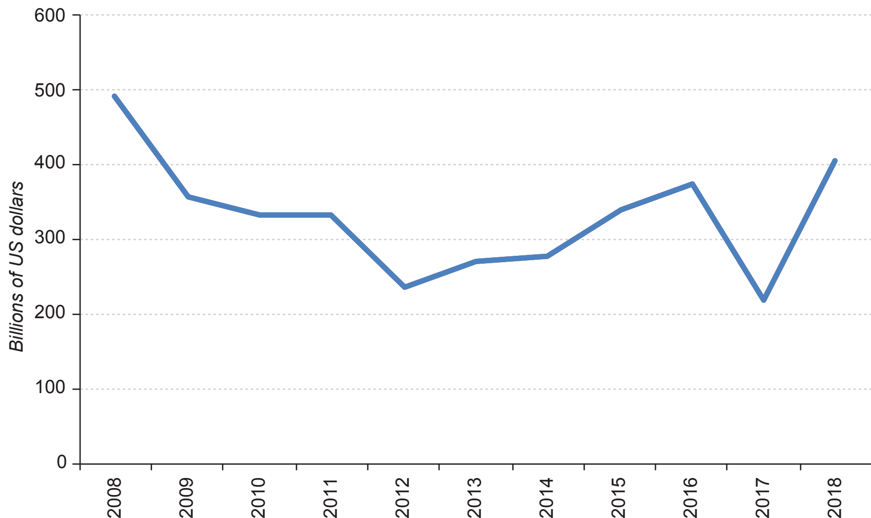
Despite the stable growth in FDI inflows to the Asia-Pacific region, they were not evenly distributed. China and Hong Kong, China remained the largest FDI recipients in 2018, together receiving 44% ($254.7 billion) of total FDI inflows to the region, up 1 percentage point from 2017. Other economies, such as Cambodia, Thailand, Turkey and Viet Nam also attracted comparatively more FDI in 2018.

The value of announced greenfield FDI projects in Asia and the Pacific, which is an indicator of future FDI trends, also recovered and grew by 86% in 2018 (figure 1.2). Strong growth in announced greenfield projects in the region is likely due to low borrowing costs and the strong liquidity position of the region (UNCTAD, 2019) as well as strong economic growth forecasts for developing Asia in 2019.

China was the largest recipient of greenfield FDI inflows in 2018, with the value of announced greenfield projects growing from $51 billion in 2017 to $107 billion in 2018. Following China (in descending order), India, Indonesia, Viet Nam and the Philippines received the largest values of greenfield FDI inflows. In general, the value of greenfield FDI inflows to ASEAN members more than

doubled between 2017 and 2018, jumping from $65 billion to $135 billion. The increase in greenfield investment to ASEAN was related both to more favourable investment policies in several countries in the grouping as well as redeployments of investments related to the ongoing trade tensions between the United States and China (Anukoonwattaka and Lobo, 2019; ESCAP, 2018).

Figure 1.2 Announced greenfield FDI inflows to the Asia-Pacific region, 2008-2018

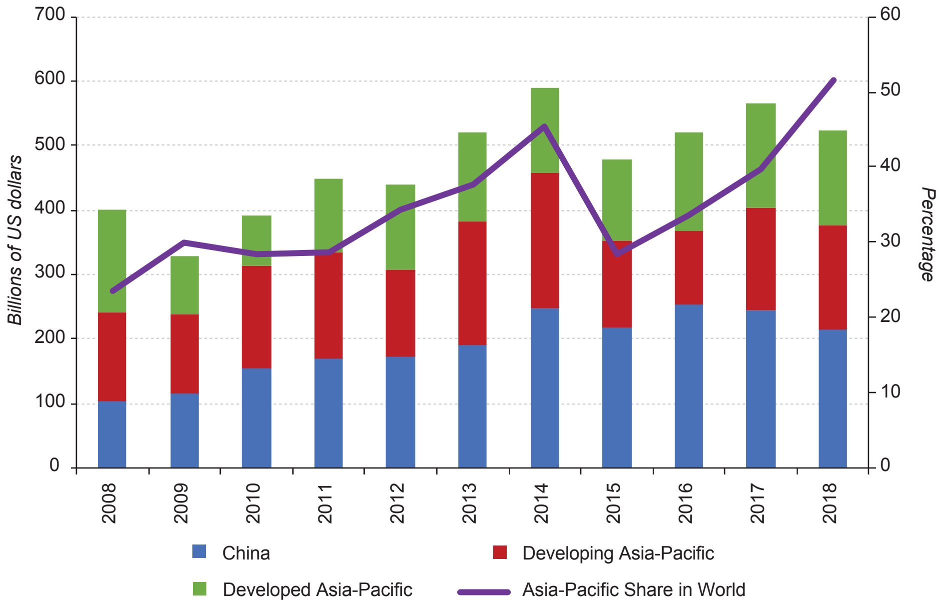


Source: ESCAP calculations based on fDi Intelligence data (accessed October 2019).

Global FDI outflows declined by 29% in 2018 from a peak of $1.42 trillion in 2017. The largest declines were from developed economies, whose outflows dropped 40% from $925 million in 2017 to $558 million in 2018. A combination of investment intentions and the continued effects of large-scale repatriations by multinationals from the United States in 2017 were responsible for this dip in 2018. Outflows from developing economies decreased more moderately by 10%, from $461 million in 2017 to $417 million in 2018.

Overall FDI outflows from the Asia-Pacific region declined by 8% to $522.3 billion in 2018. Nonetheless, the region, including both developed and developing countries, became the largest source of worldwide outward FDI. Illustrating this, the region’s share in global FDI outflows actually increased to 52% in 2018 compared with 40% in 2017 (figure 1.3).

Figure 1.3 Outward FDI flows from Asia-Pacific and their global share, 2008-2017



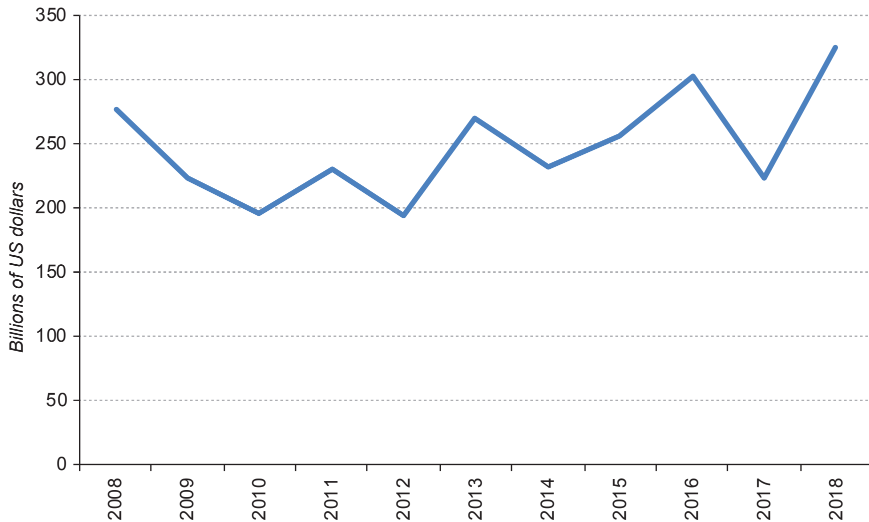
Source: ESCAP calculations based on UNCTAD (2019).
Note: China includes Hong Kong, China and Macao, China; A-P stands for Asia and the Pacific; Developing A-P excludes China.

China was the largest source of outward FDI from Asia -Pacific in 2018; consequently, an 18% drop in outflows from China in 2018 was reflected in the whole region's fall in outward FDI. FDI outflows from both South-East Asia, and North and Central Asia also declined slightly by 2% and 1%, respectively, while outflows from South and South-West Asia and the Pacific grew by 5% and 19%, respectively. Increased outflows from South and South-West Asia were mainly due to a significant expansion in outward investment from Turkey, while increases in outward investment from Australia and New Zealand were responsible for the growth in outward flows from the Pacific.

The value of announced greenfield projects from Asia-Pacific countries recovered globally in 2018, growing 31% from $223 billion in 2017 to $325 billion in 2018 (figure 1.4). The largest source of greenfield projects in the region was, unsurprisingly, China which was responsible for $92 billion of global greenfield outflows, followed by Japan, Hong Kong, China; and Singapore. The largest recipients of Chinese greenfield investments were (in descending order) Indonesia, the Philippines, the United States, Hong Kong, China; and Kazakhstan. Indonesia

received the largest value of investment, topping at $22 billion in 2018, while the Philippines received $9 billion, followed by the United States at $6 billion, Hong Kong, China at $4 billion and Kazakhstan at $4 billion.

Figure 1.4 Announced greenfield FDI outflows in the Asia-Pacific region, 2008-2018



Source: ESCAP calculations based on fDi Intelligence data (accessed October 2019).

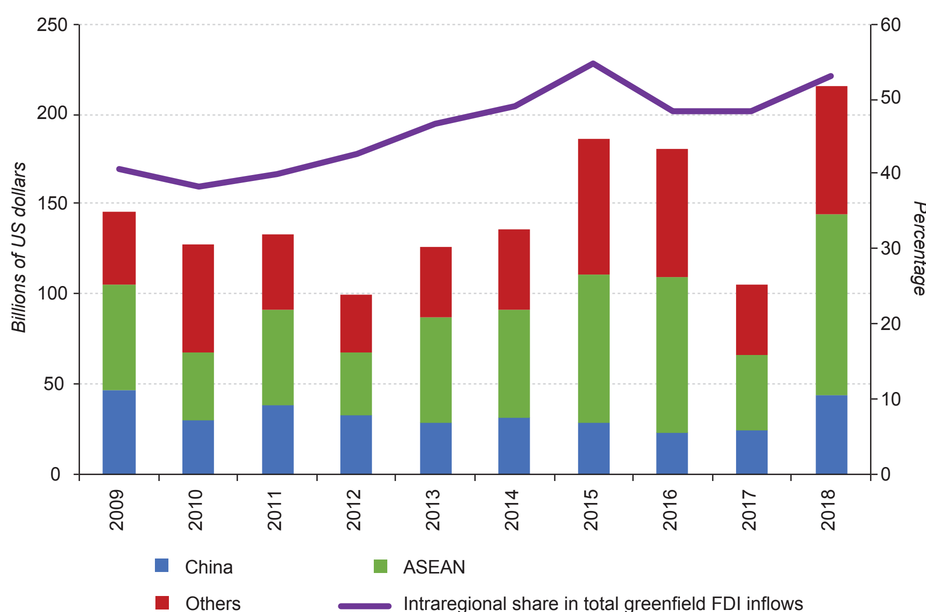
2. Intraregional FDI trends

Since 2009, intraregional greenfield FDI inflows in Asia-Pacific have continuously made up a larger portion of total greenfield FDI inflows to the region. In particular, intraregional greenfield FDI inflows grew from 40% of total greenfield FDI inflows to the region in 2009 to 49% in 2014, before rising to 53% in 2018 (figure 1.5). During 2011-2015 period, intraregional shares averaged 44%, compared with 51% during 2015-2018 period.

ASEAN members continued to attract the largest share of intraregional greenfield investments, receiving $100 billion (47%) of all intraregional greenfield investments. Within ASEAN, Indonesia, Malaysia and Viet Nam attracted the largest flows of intraregional greenfield investments in 2018. The single largest recipient of intraregional flows in the overall Asia-Pacific region, however, was China, which received $37.7 billion (18%) of intraregional investments; investments from Hong Kong, China accounted for $9.6 billion (26%) of these investments. Japan, Singapore, and the Republic of Korea were the largest sources of greenfield investment in

China in 2018 other than Hong Kong, China; with Japan investing $8.3 billion, Singapore $7.6 billion, and the Republic of Korea $6.9 billion. Investments by these economies may further help the proactive efforts of the Government of China to support the upgrading of domestic companies to middle- and high-range manufacturing.

Figure 1.5 Destinations of intraregional greenfield FDI inflows and share of total greenfield FDI inflows to the Asia-Pacific region, 2009-2018



Source: ESCAP calculations based on fDi Intelligence data (accessed October 2019)

The East and North-East Asian subregion continued to be the largest source of intraregional greenfield FDI outflows in 2018. Together, intraregional greenfield FDI outflows from China (including Hong Kong, China and Macao, China), Japan and the Republic of Korea doubled from 2017 to 2018, totalling $142 billion and accounting for 66% of all intraregional greenfield FDI outflows. The expansion in intraregional investments from this subregion is mainly due to a significant jump in intraregional greenfield FDI outflows from China.

Following East and North-East Asia, ASEAN members were the next largest subregional source of intraregional greenfield investments in 2018, contributing

23% of the total. Intraregional greenfield investment from this subregion more than doubled in 2018 to reach $50.3 billion, up from $18.8 billion in 2017. The largest sources of investment from ASEAN were Singapore, Thailand and the Philippines, accounting for 43%, 27% and 15%, respectively, of total intraregional greenfield investment emanating from ASEAN. ASEAN members also continued to be the largest destination of ASEAN outward greenfield investments, with Viet Nam, Malaysia and the Philippines (in descending order) receiving the largest shares of these investments.

3. Sectoral FDI Trends

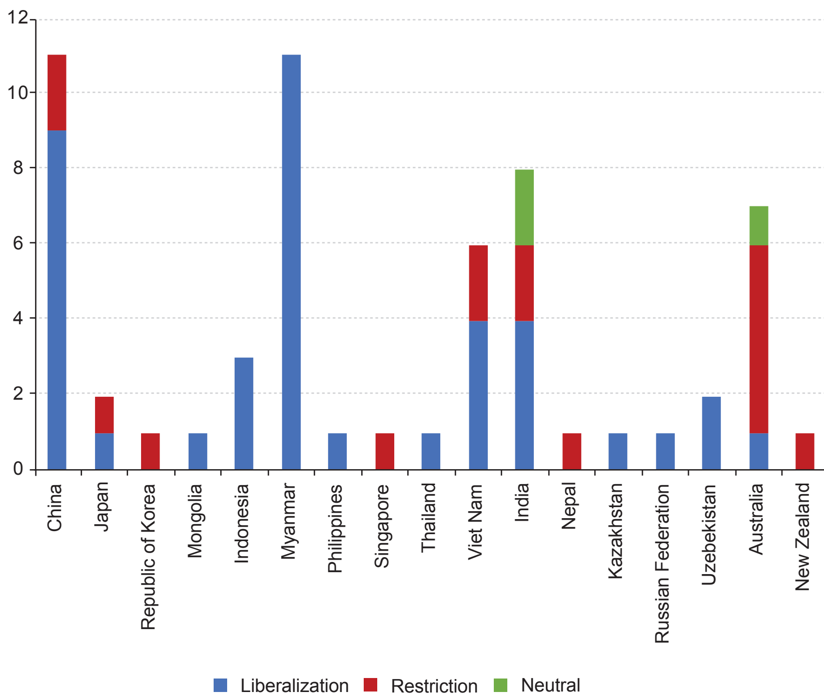
The general trend in sector composition during the past decade in the Asia-Pacific region has been a declining share of greenfield inward FDI in the primary sector, a stable amount directed towards the manufacturing sector, and a growing share in the services sector. In 2018, 16% of announced greenfield investments were directed towards the primary sector, and 42% towards both the manufacturing and services sectors. The primary sector's share in the overall composition of announced greenfield investments rose by 5% from 2017 to 2018, while the manufacturing sector's share increased by 1%. These gains were offset by a 6% decrease in the share of announced greenfield investments in the services sector. However, FDI inflows to all three sectors, i.e. the primary, manufacturing and services sectors, significantly grew in 2018 compared with 2017. In particular, investment values grew more than twofold in the primary sector, from $18.5 billion to $50.5 billion. Investment in the manufacturing and services sectors expanded even more, with investment more than doubling in the manufacturing sector from $68.5 billion to $133.3 billion and growing by 65% in the services sector from $81.9 billion to $134.9 billion. A couple of points can be observed from these figures. One is that the relative growth of flows into the primary sector does not improve the relatively low value and declining share of that sector in total greenfield investments. Second, and similarly, the 2018 decline in the services share of inward FDI does not change the recent trend of services being the most attractive sector in the region for greenfield investors, followed closely by the manufacturing sector.

C. Trends in FDI policy making in Asia-Pacific

Countries of the region continued to pursue national policies to develop a more attractive environment for FDI. Between January 2018 and October 2019, there were 138 investment policy measures implemented globally and 59 of them were adopted by 17 countries in Asia-Pacific. Among the measures implemented

by Asian-Pacific countries, 40 were launched to liberalize, promote, or facilitate investment, while 16 measures restricted or regulated investment, and 3 were neutral (figure 1.6). Compared with 74 policy measures taken in Asia-Pacific during the previous observed period (January 2017 to June 2018) (ESCAP, 2018), 16 fewer policy measures were implemented in the most recent period. While the number of new restrictive measures remained the same over both observed periods (16), there were 7 fewer measures to liberalize, promote or facilitate investment and 8 fewer measures considered as neutral. The sections that follow provide a snapshot of some of the more notable measures taken in Asian-Pacific countries by subregion between 2018 and 2019.

Figure 1.6 Number and type of investment policy changes in Asia-Pacific countries



Source: ESCAP calculations based on the UNCTAD Investment Policy Hub (accessed November 2019).

1. Investment liberalization measures

Many countries in the region have furthered liberalized foreign ownership since January 2018 in order to attract more foreign investors. Within the East and North-East Asian subregion, China was the only country to enact liberalization measures in both 2018 and 2019. These measures included the 2018 and 2019 editions of the Special Administrative Measures (Negative List) for Foreign Investment Access; and the 2018 and 2019 editions of the Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones. These measures were issued jointly by the National Development and Reform Committee and Ministry of Commerce and aimed at further enlarging market access and continuing the gradual process of a more liberalized, negative list approach to investment. For instance, the 2018 edition of these measures reduced the number of items on the foreign investment negative list from 63 to 45, while the number of items on the free trade zone negative list were reduced from 95 to 45. The 2019 edition of negative list on lifted several restrictions on foreign investment in mining, infrastructure, as well as in fisheries and printing, while the 2019 free trade zone negative list further reduced the number of items on the negative list to 40.

In South-East Asia, Myanmar was the most active in terms of implementing FDI liberalization measures. At least 6 new liberalization measures were introduced in 2018, and 1 in 2019. These measures entailed allowing foreign investors to invest up to 80% in the agricultural and private education sectors; 100% foreign ownership in the wholesale and retail sectors; partial opening of the mining sector to foreign investment; and enabling foreign investors to purchase stocks on the Yangon Stock Exchange. Liberalization measures were also enacted in 2018 in Indonesia, the Philippines and Viet Nam. In Indonesia, the minimum equity requirement for foreign investors to register and use the online single submission portal was reduced from IDR 10 billion to IDR 2.5 billion. In the Philippines, foreign ownership caps in the construction and public works sector were increased from 25% to 40%, while in Viet Nam the foreign investor cap on the commodity exchange was increased to 49%.

In South and South-West Asia, most new liberalization measures introduced in the 2018-19 period were in India. In 2018, a number of amendments were made to the FDI policy including inter alia the following: 100% FDI under automatic route for single brand retail trading with Government approval no longer required; the cap for foreign investment in the airlines sector was increased to 49% under the automatic approval route; and real-estate broker services became eligible for 100% FDI under the automatic route. In 2019, investment in the following sectors

were also further liberalized: defence, telecommunications and broadcasting and private security services. Bhutan also introduced investment liberalization measures in 2019 which opened small scale sectors up to foreign investment. In 2019, Sri Lanka introduced new accounts to liberalize FDI flows and give the domestic banking units of licensed commercial banks in Sri Lanka authority controls that had previously been held with the Central Bank of Sri Lanka.

Both the Russian Federation and Kazakhstan implemented FDI liberalization measures in the last two years in North and Central Asia. In 2018, the Russian Federation adopted a new law defining foreign investors while review procedures and restrictions for foreign investors were relaxed. In 2019, Kazakhstan liberalized its investment arbitration framework to harmonize it with international conventions and standards, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Pacific subregion was the only ESCAP subregion that did not implement any new FDI liberalization measures. As will be discussed further below, the subregion has primarily enacted new FDI restrictions over the last two years, a worrisome trend for investment promotion efforts in this subregion.

2. Investment facilitation and promotion measures

Many countries across the region continued their efforts to facilitate and promote FDI by simplifying processes and using information and communications technology to cut red tape.

In East and North East Asia, the Government of China carried out a series of reforms to promote the high-quality development of foreign investment, including the delegation of authority to provincial governments to examine and approve foreign investments of less than $1 billion and promoting the single window recording and registering of new foreign enterprises. In 2019, the Ministry of Commerce proposed 20 new policies and measures to stabilize and strengthen the promotion of investment, deepen investment facilitation reforms, and strengthen the protection of the legitimate rights and interests of foreign investors. Beyond this, the Government issued the Catalogue of Encouraged Industries for Foreign Investment, which increased the number of encouraged items by more than 10%, enabled more foreign enterprises access to preferential tariffs on imported equipment for their own use, and further optimized the industrial structure and regional distribution of foreign investment.

The only other country in the subregion to implement an investment facilitation measure in 2019 was Mongolia. In February 2019, the Government launched a one-stop service centre for foreign investors to encourage and support inward FDI.

In South-East Asia, several investment facilitation promotion measures were adopted in 2018 and 2019. In 2018, Indonesia implemented a new tax holiday regulation and issued new regulations to establish and promote the online single submission portal for business registration. Thailand passed the Eastern Economic Corridor Act to promote and further develop this geographic area as a special economic zone by providing tax incentives and establishing rules to expeditated pre-establishment approval processes. Viet Nam issued a decree to provide preferential mechanisms and investment incentives, such as preferential treatment on corporate income tax and import duty incentives, for the Da Nang Hi-Tech Park. In 2019, several countries in the subregion enacted investment promotion measures aimed at attracting potential investment redeployments and diversions related to heightened trade tensions between the United States and China. For example, in 2019 Thailand announced a package of incentives, including a 50% corporate tax break, for companies relocating production from China to Thailand (Chan, 2019). Indonesia has announced plans to streamline its FDI regulations and improve the business and investment climate to specifically increase its ability to capitalize on divestments from China (Gorbiano and Fachriansyah, 2019).

In South and South-West Asia, the most notable investment promotion measure was implemented by India in 2018 when the Model Concession Agreement on public-private partnerships was revised to make port projects more investor-friendly. Among other things, the new Agreement provides an easier exit route for developers, enabling them to divest up to 100% of their equity two years after completion and commencement of the commercial operation date. It also lowers standard rents for land to reduce the costs involved in any expansion of port facilities. Since 2018, Bhutan has also been working to set up and institutionalize a single window service system for business registrations and investment approvals.

In North and Central Asia, three new notable investment facilitation measures were taken in 2019. In April of 2019, Uzbekistan privatized 64 state-owned enterprises in the financial, construction, oil and gas, food and alcohol production, chemical and power sectors. In addition to the privatization of these enterprises, the Government also released a list of 15 public-private partnership projects to be developed in 2019. In June 2019, the Government of Armenia adopted a law on public-private partnerships which will come into force on 1 January 2020. The law is relevant for both foreign and domestic investors as it defines the legal framework for regulation of public-private partnerships, including the rules

and procedures related to the development and implementation of such projects, the institutional framework for governance, applicable criteria and other issues related to them.
In the Pacific, in 2018 Australia issued a revised guideline on the foreign purchases of agricultural land to make these types of sales more transparent and flexible.

3. Investment regulatory or restrictive measures

While most of the FDI policy changes in the Asia-Pacific region have been aimed at liberalizing or promoting investment, there have been several new regulations introduced in three of the ESCAP subregions aimed at restricting FDI.

In East and North-East Asia, both China and Japan introduced measures to restrict FDI in 2018 and 2019 respectively. In 2018, China issued the National Development and Reform Commission's Measures for the Administration of Outbound Investment by Enterprises, which largely regulated outward investment, but also contained some provisions on inbound investment. In particular, the regulation prohibited outward FDI to countries or regions which do not have diplomatic ties with China, are at war or under civil disturbance, or are subject to investment restrictions by international treaties or agreements in which China participates; strengthened the supervision of outward FDI projects and required any above a certain level to be reported to the authorities; and forbid inward FDI in sensitive sectors. Capital restrictions on outbound investments were largely introduced to mitigate any consequences of large-scale capital outflows and address risks within China's financial system from rapid outward investment. In 2019, Japan's Ministry of Economy, Trade and Industry implemented a measure to expand the scope of industries requiring FDI pre-approval to include those industries important to national security, public order, public safety and relevant to the smooth management of the Japanese economy. The implementation of this measure was motivated by concerns over cyber security and the potential leaks of emerging technologies.

In South and South-West Asia, Nepal introduced a measure to raise the minimum foreign investment threshold from Rs. 5 million to Rs. 50 million in 2019. No new restrictive measures were introduced over the period observed in North and Central Asia and in South-East Asia.

The Pacific subregion led the pack in terms of the number of restrictive FDI measures introduced in the observed period. In 2018, Australia introduced 5 new measures aimed at restricting or regulating FDI in the observed period. Of these, most relevant were 2 restrictions implemented to tighten foreign investment rules on the purchase of electricity assets and agricultural land. Additionally, in

2018 the Security of Critical Infrastructure Act was passed, which empowers the Minister of Home Affairs with the ability to direct domestic and foreign investors and operators of critical infrastructure assets to abide by specific measures. Other than Australia, the only other noteworthy restrictive investment measure introduced in the Pacific subregion was implemented by New Zealand in 2018 to regulate foreign property investments.

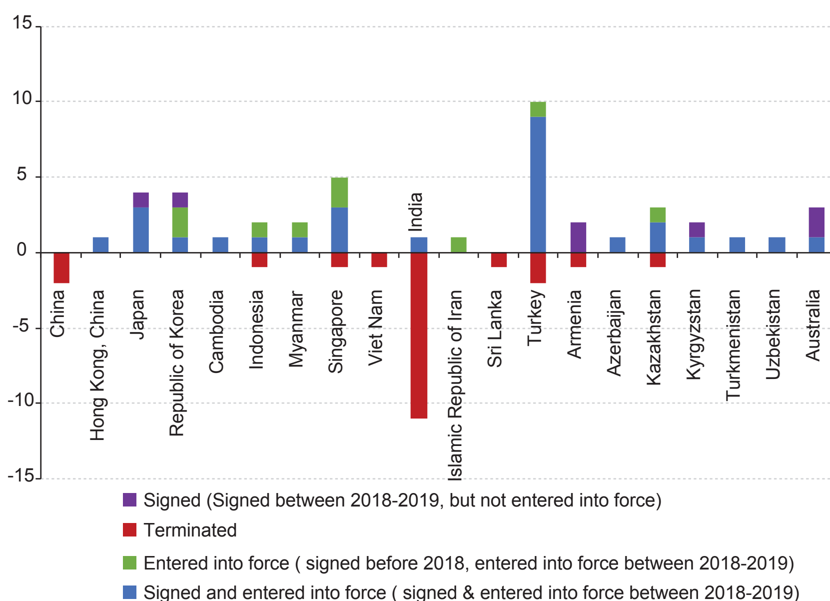
D. Trends in IIAs

1. Bilateral investment treaties

IIA making has been slowing down since 2017 (ESCAP, 2018). Between January 2018 and October 2019, 50 new BITs were signed, 17 treaties with investment provisions (TIPs) were either signed and/or entered into force globally, and 52 IIAs were terminated, bringing the total number of IIAs to 3,287. Such a low level of total IIAs has not been occurred since 1983. Moreover, the number of terminated IIAs has continuously outpaced the number of newly signed IIAs over the last three years, highlighting the continued need for review and revision of the IIA regime to more effectively rebalance investor and host country rights and obligations.

Asian and Pacific countries both signed and terminated the largest number of IIAs during the January 2018-October 2019 period. During this period, 44 BITs were either signed and/or entered into force by countries of the region (figure 1.7). Notably, Turkey, Japan, and Singapore were the three most active countries in making BITs. Meanwhile, 21 BITs were terminated by one or multiple countries in the Asia and the Pacific region. India was the most active terminator of agreements in the region, with 11 BITs terminated during January 2018 to October 2019 period. A snapshot of the new BITs concluded by Asian and Pacific countries by subregion is provided below.

Figure 1.7 New and terminated BITs by Asian-Pacific countries, 2018-2019



Source: UNCTAD International Investment Agreements Navigator (accessed November 2019).

In the East and North-East Asian subregion, Japan and the Republic of Korea were the most active countries concluding or enforcing new BITs in the 2018-2019 period. In 2018, Japan concluded 4 new BITs with Argentina, Jordan, the United Arab Emirates and Armenia respectively. In the Republic of Korea, 1 new BIT was signed with Uzbekistan in 2019, while 3 previously signed BITs with Armenia, Myanmar and Cameroon came into force. Beyond the conclusion of new BIT in the subregion, another related noteworthy development was the approval of a new BIT model by the Government of Mongolia in 2019. Since its adoption, the Mongolian Ministry of Foreign Affairs and National Development agency have been working on an action plan to help revise existing BITs according to this framework.

South-East Asian countries were very active in concluding and enforcing new BITs in the last two years, and with the exception of 2, all were intraregional BITs. For instance, Cambodia signed a new BIT with Turkey, while Indonesia, Islamic Republic of Iran, Kazakhstan and Myanmar signed BITs with Singapore.

In South and South-West Asia, Turkey was the most active country with regard to BITs, signing 8 new BITs in 2018 alone. Aside from the previously mentioned BIT with Cambodia, the remaining BITs were with Palestine, Lithuania, Zambia, Mali, Mauritania and Belarus respectively.

Nearly all countries in the North and Central Asian subregion signed or enforced new BITs in the time period observed, and most were intraregional BITs. For instance, and previously mentioned above, Armenia concluded BITs with both Japan and the Republic of Korea in 2018 and enforced them in 2019; Kazakhstan with Singapore; Azerbaijan with Turkmenistan; and Uzbekistan with the Republic of Korea.

The only recorded new BIT in the observed period in the Pacific subregion was signed by Australia and Uruguay in 2019, however, it has yet to enter into force.

2. Treaties with investment provisions

In the Asia and Pacific region, 12 new TIPs were either signed or entered into force during the January 2018 to October 2019 period (table 1.1). Countries of the region continued their efforts to conclude several large-scale TIPs. Most notable among them are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). The CPTPP entered into force on 30 December 2018. Seven of the eleven signatories to the CPTPP are from the Asia-Pacific region, i.e. Australia, Brunei Darussalam, Japan, Malaysia, New Zealand, Singapore, and Viet Nam. The CPTPP represents a significant step towards forging closer trade and investment ties, and therefore also higher levels of both trade and investment among participatory countries. While the CPTPP extends beyond the Asia-Pacific region, RCEP is a proposed economic partnership agreement involving a free trade agreement among several of the region's economies, including all 10 ASEAN member states as well as Australia, China, Japan, New Zealand and the Republic of Korea. Despite India backing out of RCEP in 2019, negotiations to conclude the FTA have continued and the agreement is expected to be signed in early 2020.

While recent investment provisions under the RCEP agreement have not been made publicly available yet, some of the more notable investment provisions under the CPTPP include a specification of the mechanisms to protect foreign investment in CPTPP countries (Chapter 9) and on dispute resolution between foreign investors and participating countries (Chapter 9), including entitlements for Investor-State Dispute Settlement (ISDS). Regarding the latter, for instance if invested properties are expropriated or nationalized, the CPTPP requires the relevant national authority to compensate the foreign investor with an amount equivalent to the fair market value immediately before the expropriation took place. If, however, the foreign investor is not satisfied with the level of compensation and/or if they believe that the respective CPTPP country's regulation or action was directly responsible for the investment loss, they may initiate a lawsuit under the ISDS clause in the CPTPP.

Table 1.1 New TIPs by Asian-Pacific countries, 2018-2019

Treaties with investment Provisions (short title)	Signatories from Asia and the Pacific	Signatories from non-Asia and the Pacific	Date of signature	Date of entry into force
Armenia-Singapore Agreement on Trade in Services and Investment (2019)	Armenia, Singapore		10/01/2019	
EU-Viet Nam Investment Protection Agreement (2019)	Viet Nam	European Union	30/06/2019	
Australia - Hong Kong Investment Agreement (2019)	Australia; Hong Kong, China		26/03/2019	
Australia-Indonesia Comprehensive Economic Partnership Agreement (CEPA) (2019)	Australia, Indonesia		03/04/2019	
EFTA States - Indonesia Economic Partnership Agreement (EPA) (2018)	Indonesia	EFTA (European Free Trade Association)	16/12/2018	
EU - Singapore Investment Protection Agreement (2018)	Singapore	European Union	15/10/2018	
EU - Japan Economic Partnership Agreement (2018)	Japan	European Union	17/07/2018	02/01/2019
Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018)	Australia, Brunei Darussalam, Japan, Malaysia, New Zealand, Singapore, Viet Nam	Canada, Chile, Mexico, Peru	08/03/2018	30/12/2018
Central America - Republic of Korea Free Trade Agreement (FTA) (2018)	Republic of Korea	El Salvador, Costa Rica, Honduras, Nicaragua, Panama	21/02/2018	
Australia - Peru FTA (2018)	Australia	Peru	02/12/2018	
Singapore - Sri Lanka FTA (2018)	Singapore, Sri Lanka		23/01/2018	01/05/2018
ASEAN - Hong Kong, China SAR Investment Agreement (2017)	ASEAN, Hong Kong, China		11/12/2017	17/06/2019
Regional Comprehensive Economic Partnership (RCEP)	ASEAN member States, Australia, China, Japan, Republic of Korea, New Zealand		Expected to be signed in 2020	

Source: UNCTAD International Investment Agreement Navigator database (accessed on November 2019).

Beyond these 2 large-scale TIPs, there were several other TIPs that were signed or entered into force across the region. For instance, 2 notable TIPs were signed by countries in the East and North- East Asian subregion. The first was a TIP between the EU and Japan, the second was an FTA between five countries in Central America and the Republic of Korea. In South-East Asia, outside of the CPTPP, 6 new TIPs were signed or entered into force in the 2018-2019 period. Among them, these included TIPs between the following countries: Indonesia and Australia; the European Free Trade Association States and Indonesia; Armenia and Singapore, the EU and Singapore; Singapore and Sri Lanka: and the EU and Viet Nam. The TIP between Singapore and Sri Lanka was also the only TIP involving a country from South and South-West Asia in the 2018-2019 period. The TIP between Armenia and Singapore was the only TIP signed in the observed period that involved a country from the North and Central Asian subregion. In the Pacific subregion, Australia and New Zealand were the only countries that signed and/or enforced TIPs between 2018-2019. Both countries signed and enforced the CPTPP, while Australia also, and as previously mentioned, signed TIPs with Indonesia, Hong Kong, China, and Peru in the observed period.

E. Outlook and recommendations

The Asia-Pacific region is expected to remain a significant destination and source of FDI in 2019. However, sluggish growth in greenfield investment may hamper the ability of the region to attract the same levels of investment in 2019 as it did in 2018. Likewise, a decline in FDI inflows is expected for 2020 in the absence of a resolution to the trade wars and persistence of other global and regional uncertainties, and thereby increasing the chance of a global recession. In particular, initial data on announced greenfield project values from the first eight months of 2019 for the region as a whole suggest that a decline in this type of investments can be expected in 2019 and will most likely continue into 2020. This is significant, as announced greenfield investments are an indicator of future FDI trends. Project values of announced greenfield investments in the region between January and August 2019 totalled $158 billion, while intraregional announced greenfield investments during the same period reached $64 billion. Both of these figures are much less than the $406 billion in total greenfield investments and $215 billion in intraregional investments recorded in 2018.

Unless several mega investment projects occur in the last couple of months in 2019, it is unlikely that greenfield investments will reach the same levels as in 2018. Moreover, the deceleration of growth in all major and emerging economies

and darkening outlook for trade growth in 2019[2] are likely to stymie businesses from making productivity-enhancing investments globally and well into 2020 (WTO, 2019). Therefore, investment prospects for the region remain subdued and tied to unfolding risks of ongoing global political and economic disturbances, such as Brexit, the United States-China trade war, growing protectionist sentiments and a retreat from multilateralism across the world.

The Asia-Pacific region will continue to be a significant source of outward FDI, with outward flows remaining high in 2019 and 2020. Outward investment from the subregions of East and North-East Asia and South-East Asia are expected to remain stable and make up the largest share of outward investment from the region in 2019 and 2020. Continued efforts to expand bilateral cooperation under the Belt and Road Initiative (BRI) are likely to result in increased levels of outward FDI from China in 2019 and 2020, especially so if sustainability concerns expressed by some countries involved in the BRI are adequately addressed. Finally, it is expected that a large percentage of these outflows will be intraregional, following the general trend of increased intraregional investment since 2009.

Countries of the region have continued to implement policies to attract and facilitate FDI that is strategically important to their economies. The majority of the policies adopted between January 2018 and October 2019 were aimed at easing regulations for FDI and strengthening investment facilitation. In descending order, Myanmar, China, Viet Nam and India were the most active regarding the implementation of investment liberalization and facilitation measures. A particularly worrisome trend during the observed period was the number of restrictive measures adopted in the Pacific.

A further slowdown in international investment treaty making has also been observed since 2018 and the number of terminated IIAs has continued to outpace the number of newly signed IIAs. Globally, however, Asia-Pacific remains the most active IIA making region, with 44 BITs and 12 new TIPs either signed or entering into force since 2018.

Navigating the changing and challenging dynamics of the investment landscape in Asia and the Pacific highlighted in this chapter calls for action in a few key areas to ensure FDI can work for sustainable development in the region:

2 Illustrating this, in October 2019 the WTO sharply cut its forecasts for global trade growth in 2019 from 2.6% to 1.2%. Trade tensions and slowing global growth are the main factors responsible for the downgrade. (WTO, 2019).

First, countries across the region must ensure that the investments they promote and attract deliver sustainable development benefits. Doing so critically depends on the ability of governments in the region to assess and evaluate the sustainability characteristics of FDI. To support this, ESCAP is developing country-specific FDI sustainability indicators to support countries in prioritizing, identifying and channelling FDI into key SDG sectors. Securing such investments, however, will also require countries to take the appropriate steps to ensure that mechanisms to lower the risks for investments in priority projects are in place.

Second, achieving a broader and more intricate sustainable development policy agenda in Asia-Pacific must include building and maintaining a favourable investment climate through sustained investment facilitation and other measures that improve the ease of doing business. This includes ensuring both openness and clarity of rules regarding foreign investment as well as establishing a conducive business climate for investment in sustainability-related sectors. To this end, the development and implementation of investment policies and regulatory frameworks that are coherent, transparent and appropriately designed to mobilize investments that provide the greatest benefits in terms of sustainable development are critical. Such policies and frameworks must strike a delicate balance between incentivizing foreign investors and achieving host country sustainable development policy objectives. For example, rather than providing across the board tax deductions for FDI, tax and other incentives can target investments in environmentally sustainable sectors or in sectors that generate more jobs or other tangible development benefits. Policymakers should also leverage digital technologies, where possible, to further reduce red tape. ESCAP's Handbook on Policies, Promotion and Facilitation of Foreign Direct Investment for Sustainable Development in Asia and the Pacific (2017) and the forthcoming second edition can serve as a guide to policymakers in the region on how to harness FDI flows that generate the maximum sustainable development benefits for their countries.

Third, reforming IIAs to make them more sustainable development-oriented could make a major contribution to helping countries achieve the SDGs. While many IIAs currently include provisions on investment promotion and cooperation as well as requirements to harmonize investment rules and regulations, they must improve the extent to which they are oriented towards sustainable development by reflecting all three dimensions of such development (i.e. economic, environmental and social). This topic is addressed further in chapter 2 of this publication.

Finally, governments need to work together to improve the coherence of international investment governance and make it work for sustainable development. While this must entail consolidating or rationalizing existing BITs and other IIAs, it must also

include improving the coherence between the IIAs they conclude and national investment frameworks. As is discussed further in chapter 3, while sustainability provisions may provide an avenue for doing this, it is important to recognize that any reform of the IIA system will require strong political will among the parties involved.

References

Anukoonwattaka, W. and R. S. Lobo (2019). Trade wars: Risks and opportunities for Asia-Pacific economies from US tariffs, United Nations ESCAP Trade, Investment and Innovation Working Paper Series, (01) 2019. Available at https://www.unescap.org/sites/default/files/publications/TIID%20WP_012019_Trade%20Wars.pdf.

Chan, D. M. (2019). Thailand offers 50% tax break to firms fleeing China, *Asia Times*, 14 September 2019. Available at https://www.asiatimes.com/2019/09/article/thailand-offers-50-tax-break-to-firms-fleeing-china/.

Gorbiano, M. I. and R. Fachriansyah (2019). Jokowi ready with bold reform agenda to lure foreign investment, *The Jakarta Post*, 16 September 2019. Available at https://www.thejakartapost.com/news/2019/09/16/jokowi-ready-with-bold-reform-agenda-to-lure-foreign-investment.html.

United Nations Economic and Social Commission for Asia and the Pacific (2017). Handbook on Policies, Promotion and Facilitation of Foreign Direct Investment for Sustainable Development in Asia and the Pacific. Bangkok. Available at https://www.unescap.org/sites/default/files/FDI%20Handbook-low.pdf.

_______(2018). Asia-Pacific Trade and Investment Report 2018: Recent Trends and Developments. United Nations Economic and Social Commission for Asia and the Pacific, Bangkok. Available at https://www.unescap.org/publications/asia-pacific-trade-and-investment-report-2018.

_______(2019). Foreign Direct Investment Trends and Outlook for Asia and the Pacific. Asia-Pacific Trade and Investment Trends. United Nations Economic and Social Commission for Asia and the Pacific, Bangkok. https://www.unescap.org/resources/APTITrends2020

United Nations Conference on Trade and Development. International Investment Agreements Navigator database. Geneva. Available at: http://investmentpolicyhub.unctad.org/IIA.

_______Investment Policy Hub. Geneva. Available at: https://investmentpolicy.unctad.org/country-navigator

_______(2019). World Investment Report 2019: Special Economic Zones. Geneva. Available at https://unctad.org/en/PublicationsLibrary/wir2019_overview_en.pdf.

World Trade Organization (2019). WTO lowers trade forecast as tensions unsettle global economy. Geneva. Available at https://www.wto.org/english/news_e/pres19_e/pr840_e.htm.

CHAPTER 2

PROMOTING AND FACILITATING FOREIGN DIRECT INVESTMENT FOR SUSTAINABLE DEVELOPMENT: ANALYSING THE SUSTAINABLE DEVELOPMENT ORIENTATION OF ASIAN-PACIFIC LDCS AND LLDCS IIAS[1]

by Manjiao Chi

A. Introduction

Foreign investment, especially FDI plays an important role in economic development at national and international levels (Alfaro et.al., 2006). As illustrated in chapter 1 of this volume, Asian-Pacific countries have become a major destination and source of global FDI (ESCAP, 2019). While FDI helps promote the economic development of the recipient countries, FDI associated activities may also give rise to sustainable development challenges (Hindelang and Krajewski, 2016).[2] Such challenges could be particularly profound in those developing countries that do not have a sound legal system, strong law enforcement and high level of investment governance. To many countries, how to reconcile and harmonize

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1 An earlier version of this chapter was published as an ESCAP ARTNeT working paper in 2018. Chi, M. (2018) Sustainable development provisions in investment treaties. ARTNeT. United Nations Economic and Social Commission for Asia and the Pacific, Bangkok. Available at: https://www.unescap.org/sites/default/files/Sustainable%20Development%20Provisions%20in%20Investment%20Treaties.pdf.

2 Such as environmental challenges, labour and human rights challenges, public health and safety challenges, state regulatory rights challenges, national security challenges, and irresponsible investor conduct.

the two seemingly conflicting goals in investment governance, i.e. promoting FDI and pursuing sustainable development, has quickly become a pressing concern.

IIAs are widely deemed to be a major source of legal norm for the existing global investment governance regime. IIAs are composed of various types of international agreements or treaties, mainly including BITs, investment chapters or free trade agreements (FTAs) and regional or international investment treaties, such as the Energy Charter Treaty (ECT), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Broadly construed, IIAs also include investment contracts concluded between foreign investors and the host states or state entities, which are often kept confidential.

It is widely agreed that IIAs are not primarily designed to facilitate and promote sustainable development (Vanduzer, 2016). Yet, given the cornerstone role of IIAs in global investment governance and the profound sustainable development challenges faced by the international community, a growing call for sustainable development to be integrated into investment policymaking and IIA-making has emerged. The making of sustainable development-oriented IIAs has become a recent trend in global IIA-making. Confirming this, IIAs concluded in 2017 showed a clear sustainable development orientation, with the majority including a larger number of provisions explicitly referring to sustainable development issues (UNCTAD, 2018a).

The Asia-Pacific region is home to a large number of countries with varying developmental levels. While some Asian-Pacific countries are considered developed countries, such as Australia, Japan and New Zealand, most are developing, including a number of LDCs[3] and LLDCs. Many Asian-Pacific LDCs and LLDCs rely on inward FDI to boost economic development, but they also face growing sustainable development challenges associated with such inward FDI activities. One helpful way to confront such challenges is for these countries to make the IIAs they conclude more sustainable development-oriented.

3 In Asia-Pacific, the following countries are considered LDCs: Afghanistan, Bangladesh, Bhutan, Cambodia, Lao People's Democratic Republic, Kiribati, Timor-Leste, Myanmar, Nepal, Solomon Islands, Tuvalu, and Vanuatu; while the following are categorized as LLDCs: Afghanistan, Kazakhstan, Kyrgyzstan, the Lao People's Democratic Republic, Mongolia, Nepal, Tajikistan, Turkmenistan, and Uzbekistan (https://www.unescap.org/our-work/macroeconomic-policy-financing-development/countries-special-needs/about). There are four countries which fall into both categories, namely Afghanistan, Bhutan, Lao People's Democratic Republic, and Nepal.

Against such a background, this chapter adopts comparative and empirical research methods to find out whether and to what extent the BITs of Asian-Pacific LDCs and LLDCs are sustainable development-oriented, and how these countries could make sustainable development-oriented IIAs in the future. Admittedly, there is no uniformly agreed and fixed standard to determine the level of sustainable development-orientation of IIAs at national and international levels. Therefore, this chapter adopts a three-pronged investigation method. First, the chapter examines the number (availability) of sustainable development provisions (SDPs) incorporated in the IIAs studied, as the availability of SDPs is the most obvious representation of whether the IIA is capable of addressing sustainable development concerns. Second, the chapter examines the types of the SDPs that are present in the IIAs, as the types of the SDPs signify what kind(s) of sustainable development concerns the IIA can address. Third, the chapter examines the subtypes of SDPs, as these subtypes to a large extent determine the practical effectiveness of the IIA in addressing sustainable development concerns.

This remainder of the chapter is structured in six sections. Section B provides a discussion of the relevance of IIAs for sustainable development. Section C examines the SDPs contained in the 20 selected sample IIAs, aiming to set a "benchmark" and "reference" of sustainable development-oriented IIAs. Section D studies the SDPs contained in the 340 BITs concluded by Asian-Pacific LDCs and LLDCs, while section E explores the sustainability gap between the sample IIAs and BITs of Asian-Pacific LDCs and LLDCs. Section F goes the extent to which Asian-Pacific countries have the capacity to make IIAs more sustainable development-oriented. Finally, section G concludes with several recommendations to help Asian-Pacific LDCs and LLDCs make sustainable development-oriented IIAs in the future.

B. The 2030 Agenda for Sustainable Development and its relevance for IIAs

As discussed in the introduction, FDI represents a key means of financing the 2030 Agenda and it is an indispensable component of economic development in many countries. The legal framework for the governance of FDI-associated activities is partly based on a large number of IIAs, which furnish the major part of binding norms at the international law level. To ensure that FDI activities are governed in both a way that is consistent with and conductive to sustainable development, IIAs need to be made sustainable development-oriented. Such IIAs would play a facilitative and promoting role in ensuring that FDI does not harm the environment and social development of the recipient countries, while contributing

to the economic growth of these countries. The following subsections explore this issue further, highlighting the necessity of making sustainable development-oriented IIAs and identifying the major types and subtypes of SDPs in IIAs.

1. The need to make sustainable development-oriented IIAs

Despite the overall positive role of FDI in promoting economic development, not all foreign investment leads to sustainable development in host states (see e.g. De Schutter et. al. 2013; Schill et. al., 2015). There are countless examples across the world in which FDI has caused serious damage to their host states' environment and local communities and has even given rise to international disputes and conflicts. This has particularly been the case in countries with a vulnerable political, economic and social environment and weak governance.

Since IIAs are the main basis for legal norms for FDI, reforming the existing global investment governance regime to be more sustainable development-oriented requires reforming the IIA system, which is a challenging task. As IIAs are designed primarily for protecting foreign investors and investments from discriminatory and arbitrary conducts of host states (Mann et.al., 2005)[4], it is doubtful whether they are an appropriate mechanism to address sustainable development concerns. Furthermore, the fragmentation of international law makes it more difficult for IIAs to be more responsive to sustainable development needs. For instance, it has been argued that sustainable development concerns should be addressed through specialized treaties, such as international environmental treaties (IETs) and international human rights treaties, instead of IIAs (see e.g. Schneiderman, 2011).

Global rules and institutions relating to international investment, including IIAs, have generally not been designed and conceived through a sustainable development lens (IISD, 2019). For instance, International Centre for Settlement of Investment Disputes (ICSID) case law implies that under the ICSID Convention, protected foreign investments are supposed to play a positive role in promoting the development of the host state (see e.g. Italaw, 2015a).[5] However, when understanding this role, the drafters of the ICSID Convention seemed to have only considered economic development, but not the other two dimensions of sustainable development (see e.g. Chi, 2017).

4 See for example the 2005 IISD Model BIT, as elaborated in Mann et.al., 2005.
5 For case examples please refer Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco as elaborated in Italaw, 2015a.

The lack of a sustainable development perspective in IIA-making could make it more difficult to make sustainable development-oriented IIAs. Despite such difficulty, there is a growing call to make IIAs more conducive to achieving sustainable development. In other words, the need to reduce the "sustainability deficit" of IIAs has become increasingly pressing. First, as many countries face mounting sustainability challenges in global investment governance, there is a compelling need for these countries to ensure that foreign investment does not impede their legitimate rights to pursue sustainable development objectives. Second, since many IIAs allow investor-state arbitration (ISA), foreign investors frequently challenge the host states' regulatory measures in international arbitration. Some high-profile ISA cases, such as Vattenfall et al. v. Germany (UNCTAD, 2012a)[6], and Philip Morris v. Australia (UNCTAD, 2011)[7], clearly show how the "regulatory chill" effects of ISA could impede countries' efforts to pursue sustainable development. Third, many specialized treaties, such as international human rights treaties and IETs, and their implementation regimes, often appear insufficient and ineffective in addressing sustainable development concerns associated with transnational investment activities (Chi, 2017).

In light of this situation, making sustainable development-oriented IIAs is necessary. This essentially implies that IIAs should be allowed to "deviate" from their traditional purpose of investment protection to also address sustainable development concerns, such as environmental and social concerns.

In recent years, many countries, especially developed countries, have begun to put more stress on sustainable development in IIA-making. This can be witnessed from the model BITs these countries have adopted, such as the United States Model BIT of 2012 and the Dutch Model BIT of 2018. Prominent international organizations have also formulated model IIAs addressing sustainable development needs. For example, in 2004, the International Institute for Sustainable Development (IISD) put forward a Model International Investment Agreement for the Promotion of Sustainable Development, to serve as a template for IIA-making (Moltke, 2004). UNCTAD also issued the Investment Policy Framework for Sustainable Development in 2012 (UNCTAD, 2012b), which was updated in 2015, in light of the emergence of a "new generation of investment policies" (UNCTAD, 2015a). The Policy Framework proposes strategic guidelines and concrete suggestions for making IIAs and policies more compatible with sustainable development at international, regional and national levels.

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6 For a case example please refer to Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12), as elaborated in UNCTAD, 2012a.

7 For a case example please refer to Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12), as elaborated in UNCTAD, 2011.

Such developments show that there is a growing global consensus on the need to make national investment policies and IIAs more sustainable development-oriented. Against such a background, Asian-Pacific LDCs and LLDCs should not stay isolated from this emerging trend. Instead, they must find appropriate ways to make sustainable development-oriented IIAs on the basis of their national development priorities and needs.

2. Major types of SDPs

IIAs can both address investment protection and sustainable development needs by incorporating SDPs. To identify SDPs, this study used the "subject matter" test, which deems a provision in an IIA as a sustainable development one if its subject matter reflects or embodies one or more elements of sustainable development. As sustainable development is a comprehensive concept with a broad coverage touching upon a wide range of elements, including natural resources, environmental protection, poverty elimination, gender equality, climate change, public interest, labour and human rights, and the rule of law and good governance, to list a few, SDPs are also divided into various types. These types indicate the corresponding kind of sustainable development concerns the SDPs are to address. Following this method, this study identifies the following eight major types of SDPs in IIAs (table 2.1).

The first type is "general sustainable development provisions" (GENs), and they often appear in the preambles of IIAs. They can also appear in the form of a standalone IIA provision entitled "sustainable development". GENs aim at addressing sustainable development concerns in a general manner, instead of focusing on a specific sustainable development element, such as environmental protection.

The second type consists of anti-corruption provisions (ATCs). Such provisions are widely deemed to be an important part of public policy and a core element of good governance at both international and national levels. ATCs are helpful in preventing and combating corruption associated with transnational investment activities and could play a helpful role in providing access to justice for all and build effective, accountable and inclusive institutions, as elaborated in the SDGs.

The third type, environmental provisions (ENVs), are the traditional and probably the most frequently seen type of SDPs in modern IIAs. They have also been subject to intense study in recent years. In the present study, the term "environment" should be understood broadly to cover not only the natural environment and resources, but also human, animal and plant life, public health and safety. ENVs aim at addressing concerns over the protection of the environment in a broad

sense. They clearly reflect the environmental dimension and certain elements of the social dimension of sustainable development.

The fourth type, labour rights and human rights provisions (LHRs)[8] mainly aim at addressing concerns over the protection of labour rights and human rights associated with transnational investment activities. The scope of labour rights or human rights could be broad or narrow, depending on the specific IIA. Generally speaking, LHRs not only cover basic labour rights, such as the core labour rights recognized by the International Labour Organization (ILO), but also encompass a broader range of social rights relating to human rights, such as gender equality, poverty eradication, education and employment. LHRs clearly reflect the various elements of the social dimension of sustainable development.

The fifth type, substantive transparency provisions (TRLs) mainly deal with the transparent publication of investment-related laws, regulations, policies and practices at local, national and international levels. They may also deal with the way such laws and policies are contemplated and made. As transparency of law is an essential element of good governance, it reflects an important element of the social dimension of sustainable development.

The sixth type, procedural transparency provisions (TRAs) refer to provisions dealing with the transparency of investment dispute settlement proceedings, particularly ISA. Depending on the IIA, TRAs may deal with a wide range of procedural issues, such as publishing arbitration documents, e.g. arbitral awards and written submissions, providing public access to arbitration proceedings, especially hearings, and allowing third parties to participate in the arbitration proceedings in an appropriate manner, especially through submitting written briefs in the capacity of *amicus curiae*. Nowadays, as the public law nature of ISA has become widely accepted, TRAs have increasingly been used in IIA-making for good governance purposes.

The seventh type, national security provisions (NES) aim to protect the essential security interests of host states, especially in exceptional circumstances. Given that national security is widely deemed to be in the public interest of any country

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8 Strictly speaking, labour rights and human rights are different, each has a different regulatory focus and approach. Human rights are rights inherent to all human beings that are universal and inalienable, while labour rights refer to entitlements that relate specifically to the role of being a worker. Some labour rights are recognized in human rights conventions and can be protected as human rights. For the purpose of the present study, the two terms are used interchangeably (see e.g. Khalfan, 2011)

or the international community, and that such security is highly relevant for the well-being of the people in a country, it plays an important role in ensuring sustainable development. For such reasons, NESs can be considered as a specific type of SDP in IIAs.

The eighth type, responsible business practices (RBPs) or corporate social responsibility provisions (CSRs) broadly address the pressing and sensitive issue of foreign investor sustainability obligations in IIAs. MNEs, as the largest source of FDI globally, could provoke profound sustainable development concerns, but they could also contribute to sustainable development in host states, especially in certain economic sectors (UNCTAD, 2014). While it is true that the conduct of investors remains primarily regulated by the domestic laws of host (and home) states, it also makes sense for IIAs to impose certain obligations on investors. RBPs are important for sustainable development because they not only can help host states better address sustainable development concerns, but they also directly reflect the elements of the environmental and social dimensions of sustainable development.

Finally, a few extra points should be mentioned. First, although the above types of SDPs are typical in IIAs, they do not constitute an exhaustive list of all SDPs in modern IIAs. Second, the various types of SDPs have different subject matters, which also decides the nature and function of the SDPs to some extent. Some types of SDPs, such as ENVs, GENs and NES, are made to address certain “traditional” types of sustainable development concerns, such as the protection of the environment and national security; other types of SDPs have a focus on various social aspects of sustainable development, such as labour rights and human rights protection and the rule of law in global investment governance. These SDPs can be categorically deemed as “social SDPs”, mainly covering ATCs, LHRs, TRAs, TRLs and RBPs. Third, given that the concept of sustainable development is continuously evolving, it is likely that future IIAs may incorporate certain “novel” types of SDPs. For instance, human society is experiencing rapid technological advancements and data security has recently become a growingly important and outstanding issue for governments and individuals. Though the exact impacts of such technological advancement on global investment governance remains insufficiently clear at the moment, it should not be surprising if future IIAs may incorporate provisions to deal with this issue.

3. Major subtypes of SDPs

Whether and to what extent an IIA is sustainable development-oriented depends both on the availability and types of SDPs contained in the IIA, and also relies

on the practical effectiveness of the SDPs (table 2.1). The practical effectiveness of the SDPs is assessed mainly through their subtypes. In this chapter, every SDP is classified into one or more specific subtypes, determined mainly by the nature of the obligations imposed by the SDPs. The subtypes of SDPs are explained in the following subsection.

Table 2.1 Summary of types of SDPs

	Type of SDPs	Subtype of SDPs
1.	General sustainable development provision (GEN)	1. Declaration of the pursuit of sustainable development (DEC)
2.	Anti-corruption provision (ATC)	1. Declaration of the pursuit of sustainable development (DEC) 2. Anti-corruption obligations on states (AOS) 3. Anti-corruption obligations on foreign investors (AOI)
3.	Environmental provision (ENV)	1. Non-derogation of sustainable development standards (NDG) 2. Confirmation of sustainable development obligations (CON) 3. Exceptions that exempt states from the responsibilities (EXP)
4.	Labour rights and human rights provision (LHR)	1. Reference to external sustainable development standards (REF) 2. Non-derogation of sustainable development standards (NDG) 3. Confirmation of sustainable development obligations (CON) 4. Exceptions that exempt states from responsibilities (EXP)
5.	Substantive transparency provision (TRL)	1. Publication of laws and regulations or arbitral documents (PUB) 2. Transparency of arbitral hearings (HER) 3. Third party participation in investment dispute settlement proceedings (TPB)
6.	Procedural transparency provision (TRA)	1. Publication of laws and regulations or arbitral documents (PUB) 2. Transparency of arbitral hearings (HER) 3. Third party participation in investment dispute settlement proceedings (TPB) 4. Reference to UNCITRAL Transparency Rules (UTR)
7.	National security provision (NES)	1. Exceptions that exempt states from the responsibilities (EXP)
8.	Responsible business practices (RBPs)	1. Reference to external sustainable development standards (REF) 2. Obligations on states for ensuring or supervising responsible business practices (ROS) 3. Obligations on investors for engaging in responsible business practices (ROI)

GENs are often declaratory in nature (DEC) and appear in the preambles of IIAs. Under the 1969 Vienna Convention on the Law of Treaties (VCLT), treaty preambles can play an assistive role in interpreting treaty clauses as "context" under article 31, and in ascertaining the objects and purpose of the treaty under article 18 and article 60 (Villiger, 2008). Such assistive functions have been confirmed by arbitration practice in a number of ISA cases, such as *Siemens v. Argentine* (Italaw, 2015b)[9], and Vivendi v. Argentine (Italaw, 2015c)[10]. Despite their assistive role, treaty preambles in general do not confer contractual rights or obligations on the contracting parties, though they may reflect rules of customary law and form an integral part of a treaty (see e.g. Fitzmaurice,1957). In this sense, GENs only have limited practical effectiveness as they cannot oblige the contracting states or foreign investors to take measures for sustainable development purpose.

ATCs can be further classified into three subtypes. The first subtype is declaratory (DEC), mainly calling on the contracting states and investors not to engage in corruptive conduct. The second type imposes an obligation on the contracting states (AOS), either to take anti-corruption measures or to refrain from engaging in corruptive conducts. The third type relates directly to foreign investors (AOI), either obliging the investors not to engage in corruptive conduct or providing for punishment of investors for corruptive conduct.

ENVs are the major type of SDPs in modern IIAs, which can be further classified into three subtypes. The first subtype stands for non-derogation obligation on the contracting states (NDG), essentially requiring countries not to lower their environmental laws or standards in investment governance in order to avoid a "race to the bottom" in environmental protection. The second subtype mainly aims at confirming or recognizing that the contracting states shall bear obligations to take necessary measures for protecting the environment, human, animal or plant life and public safety and health under national or international laws (CON). The third subtype is exceptive in nature (EXP), exempting the contracting states of their state responsibility for taking environmental measures that are otherwise inconsistent with their IIA obligations.

9 For a case example please refer to Siemens A.G. v. The Argentine Republic (ICSID Case No. ARB/02/8), as elaborated in Italaw, 2015b.

10 For a case example please refer to Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), as elaborated in Italaw 2015c.

LHRs have become increasingly popular in IIAs and can be further classified into four subtypes. The first subtype is a reference to external human rights or labour rights standards (REF), such as the ILO core labour standards or standards in other international human rights instruments. Such reference does not necessarily incorporate the external standards as a binding part of the IIA. The second subtype is non-derogation obligation (NDG), requiring the contracting states not to lower their human rights or labour rights standards in investment governance. The third subtype aims at confirming or recognizing that the contracting states shall bear primary obligations for protecting human rights or labour rights (CON). The fourth subtype is exceptive (EXP), exempting the contracting states of their state responsibility for taking human rights or labour rights measures that are otherwise inconsistent with their IIA obligations.

TRLs have increasingly become prominent in trade and investment treaties in recent years, which is largely related to the fact that the transparency of laws and associated government conduct is widely deemed to be a key factor of the rule of law and good governance. TRLs in IIAs can be classified into three subtypes. The first subtype imposes an obligation on the contracting states to publish investment-related laws and regulations (PUB), which is also the traditional and typical subtype of TRLs. Such TRLs are often explicitly titled as “transparency” in some IIAs. The second subtype requires the contracting states to communicate in an appropriate manner with regard to their investment-related laws, regulations, policies and practices, especially when the partner states have relevant inquiries or concerns (COM). The main purpose of such TRLs is to enhance the contracting states’ understanding of each other’s investment regulatory systems for better investment governance. The third subtype essentially requires the contracting states to allow stakeholders to engage in the making of an investment-related law or policy in an appropriate way (ENG). Typically, such TRLs allow the public to make comments during the law-making or policy-making process.

TRAs have also gained in popularity in recent years as the need for ISDS transparency has become a highly contentious issue and an important aspect of the ongoing ISDS reform. An increasing number of IIAs incorporate TRAs. TRAs in IIAs can be further classified into four subtypes. The first subtype deals with the publication of various sorts of arbitration documents, such as the pleadings of the disputants and arbitral awards (PUB). The second subtype deals with public access to arbitration hearings, essentially allowing the public to observe the arbitration proceedings in an appropriate manner (HER). The third subtype deals with the contentious issue of non-disputing third party participation in the arbitration proceedings (TPB), often in the form of the third party submitting written briefs as *amicus curiae*. The fourth subtype is a reference to the UNCITRAL Transparency

Rules (UTR). As these rules were only adopted in 2014, they have not been widely referred to in IIAs and countries have different views on these rules.

NES forms a critical component of many trade and investment treaties. The protection of national security relies primarily on the state. Almost all NES are exceptive in nature, aiming at exempting the states of their state responsibility for taking regulatory measures for the protection of essential national security or international peace and security that are otherwise inconsistent with their IIA obligations (EXP).

RBPs seem to be a comparatively “novel” type of SDPs. The international community has come to realize that investor conduct may give rise to profound sustainable development concerns, and RBPs have gradually penetrated into IIAs to help address such situations, though they remain infrequently used in IIAs in general. Existing RBPs are typically contained in some recent IIAs of developed countries. RBPs can be further classified into three subtypes. The first subtype is a reference to an external code of conduct (REF), such as the OECD Guideline for Multinational Enterprises. Such references do not necessarily create a binding obligation on the investors. The second subtype is for an IIA to impose certain obligations on the contracting states to encourage or supervise investors to engage in responsible conduct (ROS). The third subtype is that an IIA imposes certain obligations on the investors directly to require them to engage in responsible investment activities (ROI).

4. The nature of the obligations imposed by SDPs

The level of sustainable development-orientation of an IIA can be determined by the number, types and subtypes of SDPs contained in the IIA. Roughly speaking, the number of SDPs contained in an IIA shows whether the IIA contains any (or sufficient) treaty norms that can be used in addressing sustainable development concerns. The types of SDPs demonstrate what kind(s) of sustainable development concerns the respective IIA addresses. The subtypes of SDPs further illustrate the extent of practical effectiveness to which that IIA can address sustainable development concerns. As table 2.2 shows, regardless of the multiple types and subtypes of SDPs, the obligations imposed by the SDPs can be declaratory, obligatory or exceptive in nature.

Table 2.2 The nature of obligations imposed by SDPs

	GEN	ATC			ENV			LHR				TRL			TRA				NES	RBP		
	DEC	DEC	AOS	AOI	NDG	CON	EXP	REF	NDG	CON	EXP	PUB	COM	ENG	PUB	HER	TPB	UTR	EXP	REF	ROS	ROI
Declaratory	♦	♦				♦		♦		♦										♦		
Obligatory			♦	♦	♦							♦	♦	♦	♦	♦	♦	♦			♦	♦
Exceptive							♦				♦								♦			

Declaratory SDPs are in essence a statement or a mere confirmation that the contracting states shall promote or take measures for sustainable development under their domestic law or other international law rules. A typical type of declaratory SDP is a statement of achieving sustainable development in the preamble of an IIA. Such SDPs do not impose obligations on the states, though they may reflect the objective of the IIA. In this sense, the practical effectiveness of such SDPs is weak. Typical such subtypes of SDPs include DEC (of GENs and ATCs), CON (of ENVs and LHRs), and REF (of LHRs and RBPs).

Obligatory SDPs impose obligations on the contracting states to take affirmative measures or restrain them from certain conduct in the name of sustainable development. The majority of SDPs are obligatory in nature. Such SDPs typically require the contracting states of an IIA to take measures for various sustainable development purposes. Typical SDPs of this nature include NDG (of ENVs and LHRs), AOS (of ATCs and RBPs), PUB, COM, ENG, TPB, HER and UTR (of TRLs and TRAs). Recently, a growing number of IIAs have also begun to incorporate provisions that directly impose obligations on foreign investors, especially with regards to CSR. Typical such subtypes of SDPs include AOI (of ATCs) and ROI (of RBPs).

Exceptive SDPs in general aim at preserving the regulatory right of the contracting states by exempting the states of their responsibility to take regulatory measures that are otherwise inconsistent with their IIA obligations related to sustainable development in particular. Exceptive SDPs have the strongest practical effectiveness, at least in theory. Typically, such SDPs are EXP (of ENVs, LHRs and NES).

C. Sustainable development provisions in the sample IIAs

This section provides a panoramic study of the SDPs contained in 20 selected sample IIAs, 17 of which are still in force, 1 of which has been terminated, and 2 have yet to be ratified (table 2.3). These sample IIAs were selected for several reasons. First, the contracting states of these IIAs cover the major geographical regions of the world, including Asian, American and European countries. Second, the contracting states of these IIAs are at different developmental levels, including

developed countries, developing countries and LDCs. Third, all but one sample IIA (NAFTA investment chapter)[11] were concluded in the new millennium, thus they are widely deemed to reflect the latest trend of IIA-making at the global level. Fourth, the sample IIAs are influential not only at bilateral and multilateral levels. The "mega-regional FTAs", such as TPP and TTIP[12] (investment chapters) are deemed to furnish "golden standards" for global trade and investment governance (see e.g. Alschner and Skougarevskiy, 2016; Stoll and Holterhus, 2017; Alvarez, 2016). Given the representativeness of the sample IIAs, the SDPs incorporated in the IIAs not only sets up a benchmark for assessing the SDPs contained in the IIAs of Asian-Pacific LDCs and LLDCs, but also offers a helpful example and reference for these countries in their future IIA-making.

Table 2.3 List of IIAs under analysis in this chapter

1994 NAFTA investment chapter (terminated)	2012 U.S. Model BIT
2004 Canada Model BIT	2014 CETA investment chapter
2005 IISD Model BIT	2015 Brazil Model BIT
2008 Colombia Model BIT	2015 India Model BIT
2008 German Model BIT	2015 Norway Model BIT
2008 Ghana Model BIT	2015 TTIP investment chapter (leaked EU version)
2009 China-ASEAN Investment Agreement	2016 TPP investment chapter (withdrawn and changed to CPTPP, entered into force 2018)
2012 China-Japan-Korea TIT	2018 Dutch Model BIT
2012 KORUS (Korea-U.S.) FTA Investment Chapter	2018 EU-Singapore BIT
2012 SADC Model BIT	2018 RCEP investment chapter (leaked China version) (not yet entered into force)

11 NAFTA was replaced by the United States-Mexico-Canada Agreement (USMCA) with minor amendments not affecting investment. USMCS is still awaiting ratification in the United States Congress. Only Mexico has ratified the Agreement so far. While there are a number of differences between the NAFTA and the USMCA, including in the investment chapter, there a no profound changes relating to the sustainable development provisions, and hence orientation, of the USMCA vs. NAFTA.

12 Please note that the TPP and TTIP are both defunct trade agreements that were halted by the United States. After the United States' withdrawal on 23 January 2017, the TPP has been recast as the CPTPP, which then was concluded on 8 March 2018, pending ratification. In the case of TTIP, the United States had vowed in January 2017 to withdraw from the deal but talks resumed in July 2018 before TTIP was finally abandoned on 9 April 2019 (Council of the European Union, 6052/19). Both the TTIP and the CPTPP have the potential to set an example for future agreements. For the purpose of this paper, TPP has been used rather than the CPTPP given that the provisions of the TPP are incorporated by reference into and made part of the CPTPP. While there are a number of differences between the TPP and the CPTPP, including in the investment chapter, there a no profound changes relating to the sustainable development provisions, and hence orientation, of the CPTPP vs. TPP.

1. The distribution of SDPs

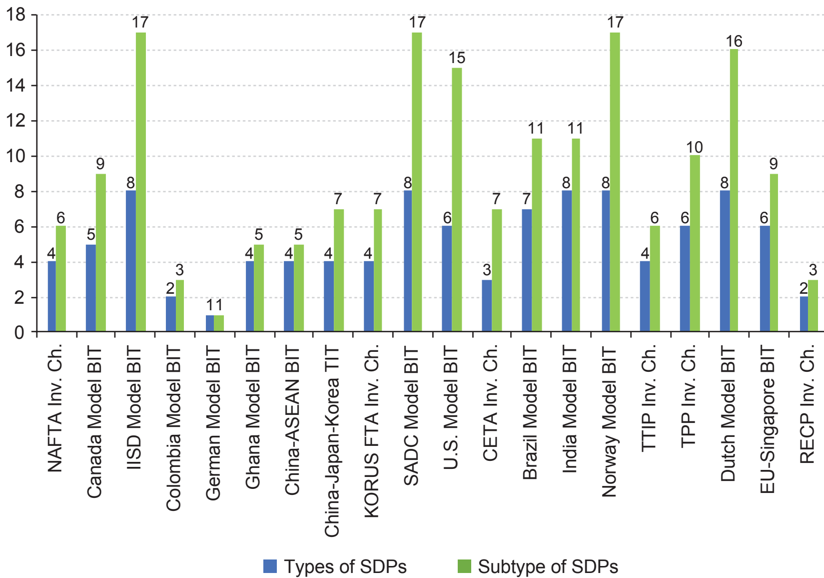
Table 2.4 provides detailed information on the number and types of SDPs as well as their distribution among the sample IIAs. As can be seen in the table all but one of the IIAs considered contains multiple SDPs. Therefore, at a superficial level of analysis it would appear that all of these IIAs are sustainable development-oriented. Yet, it is important to realize that the distribution of the different types of SDPs among the sample IIAs is quite uneven, and therefore some can be considered more sustainable development-oriented than others.

Table 2.4 SDPs in sample IIAs

Sample IIAs	Year	GEN	ATC			ENV			LHR				TRL			TRA				NES	RBP		
			DEC	AOS	AOI	NDG	CON	EXP	REF	NDG	CON	EXP	PUB	COM	ENG	PUB	HER	TPB	UTR		REF	ROS	ROI
NAFTA investment chapter	1994	X				X		X								X		X		X			
Canada Model BIT	2004	X				X		X					X	X		X	X	X		X			
IISD Model BIT	2005	X		X	X	X	X	X	X	X	X		X			X	X	X		X	X	X	X
Colombia Model BIT	2008						X	X												X			
German Model BIT	2008																			X			
Ghana Model BIT	2008	X					X	X												X			X
China-ASEAN Investment Agreement	2009	X						X					X	X						X			
China-Japan-Korea TIT	2012	X					X	X					X	X	X					X			
KORUS FTA investment chapter *	2012	X				X		X								X	X	X		X			
SADC Model BIT	2012	X		X	X	X	X	X	X	X	X		X			X	X	X		X	X	X	X
United States Model BIT	2012	X				X	X	X	X	X	X	X	X	X	X	X	X	X		X			
CETA investment chapter *	2014				X		X	X								X	X	X	X				
Brazil Model BIT	2015	X		X		X	X	X		X	X		X	X						X			X
India Model BIT	2015	X			X			X			X		X	X		X	X	X		X			X
Norway Model BIT	2015	X	X	X		X	X	X	X	X	X		X	X		X	X	X		X	X	X	
TTIP investment chapter (leaked) *	2015				X		X	X										X	X	X			
TPP investment chapter. *	2016	X					X	X					X	X		X	X	X		X		X	
Dutch Model BIT	2018	X		X	X	X	X	X	X	X	X	X	X					X	X	X	X	X	
EU-Singapore BIT	2018	X					X	X	X				X			X	X	X		X			
RCEP investment chapter (leaked) *	2018							X								X			X -				
Sub Total		**15**	**1**	**5**	**6**	**10**	**13**	**19**	**6**	**6**	**7**	**2**	**12**	**8**	**2**	**12**	**10**	**13**	**4**	**18**	**4**	**5**	**5**
Total & Subtype	**182**	**15**	**12**			**42**			**21**				**22**			**39**				**18**	**14**		

Figure 2.1 below illustrates the types and subtypes (numbers) of SDPs contained in the sample IIAs. From the perspective of types of SDPs, the German Model BIT only contains 1 type of SDP (NES), while the IISD, SADC, Indian, Norway and Dutch Model BITs each contain all 8 types of SDPs. In general, the latter IIAs could be deemed to represent an "example" of sustainable development-oriented IIA at the international level. In contrast, the German Model BIT seems to be the least sustainable development-oriented, as it only contains one SDP.

Figure 2.1 The distribution of SDPs in the examined IIAs



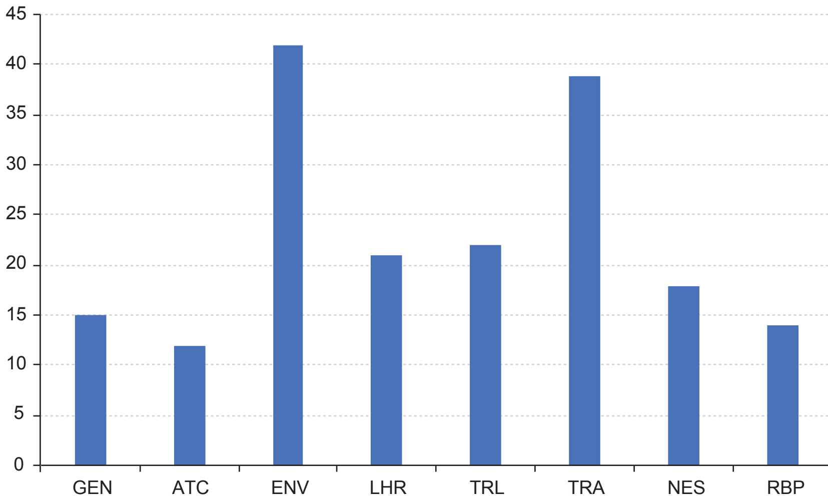
Almost all IIAs with a strong sustainable development-orientation are model BITs. Although model BITs are not binding, as they serve as the template or reference in IIA-making, they send out a clear signal that IIAs should and could be made more sustainable development-oriented in the future. Compared with these model BITs, some sample FTA investment chapters, including the TTIP and TPP investment chapters, contain smaller numbers and fewer types of SDPs. However, this does not necessarily mean that these FTA investment chapters are less sustainable development-oriented. A reasonable explanation seems to be that these FTAs also incorporate various SDPs in other chapters, thus there is little need to repeat the SDPs in the investment chapters. For instance, in addition to the preamble, TPP contains several standalone chapters addressing a wide range of sustainable development topics, such as labour rights, the environment,

development, transparency and anti-corruption (UNCTAD, 2016a). These chapters are parallel to the investment chapter, which could help address sustainable development concerns that may otherwise be addressed by the SDPs in the TPP investment chapter. Similarly, TTIP also deals with a number of sustainable development-related issues in other chapters, such as the environment, transparency, labour rights, anti-corruption and competition (USTR, 2016).

2. The types and subtypes of SDPs

The types and subtypes of SDPs are important indicators of the sustainable development challenges an IIA could address and the level of practical effectiveness of the IIA. As shown in table 2.4 above, the 20 sample IIAs incorporate a total number of 182 SDPs, covering all 8 types and 22 subtypes of SDPs. Figure 2.2 shows the distribution of the types of SDPs in the sample IIAs. On the one hand, the fact that these IIAs cover all 8 types of SDPs suggests that IIAs can potentially address a wide range of sustainable development concerns associated with FDI. On the other hand, the distribution of the 8 types of SDPs in the sample IIAs appears unbalanced. An ENV is contained in 42 IIAs; an NES in 18; a GEN in 15; a TRA in 39; a TRL in 22; an LHR in 21; an RBP in 14; and an ATC in 12. Such a distribution suggests that the SDPs in the sample IIAs have a clear focus on certain traditional sustainable development concerns, such as environmental protection and national security protection. Though the sample IIAs concluded in recent years have a tendency to incorporate a growing number of social SDPs, such as ATCs, LHRs, TRAs and RBPs, the appearance of social SDPs in the sample IIAs is nonetheless a recent phenomenon.

Figure 2.2 Types of SDPs in the examined IIAs



The remainder of this section provides a further analysis of the subtypes of SDPs, as the subtypes of SDPs dictate the practical effectiveness of the SDPs to a large extent. The first conclusion that can be drawn from such an analysis is that it seems that the incorporation of a GEN in IIAs has become almost a standard IIA-making practice for many countries. In total, a GEN was incorporated in 15 sample IIAs. While most of the GENs in the sample IIAs are a simple declaratory statement, one of the most recent sample IIAs - the EU-Singapore BIT - clearly recognizes the three dimensions of sustainable development. The preamble of this BIT states that that the contracting parties are determined “to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development in its economic, social and environmental dimensions” (UNCTAD, 2018b). This confirms the above finding that the sample IIAs concluded after 2012 incorporate more social SDPs than earlier ones. It also seems to show that the international community is paying growing attention to the social dimension of sustainable development.

Second, the incorporation of ATCs in IIAs also seems to be a recent IIA-making practice. With the exception of the IISD Model BIT, all sample IIAs that include an ATC were concluded after 2012. ATCs in the sample IIAs can be both declaratory and obligatory. Most sample IIAs concluded after 2012 incorporate an ATC in one subtype or another. A DEC is contained in 1 sample IIA, i.e. the Norway Model BIT, which states that the contracting states are “determined to prevent and combat corruption, including bribery, in international trade and investment” (UNCTAD,

2015b). No other sample IIA contains a DEC. An AOS is contained in 5 of the sampled IIAs (IISD, SADC, Brazil, Norway and Dutch Model BITs), imposing an obligation on the contracting states to combat corruption. In these BITs, the AOS was either general or specific. A general AOS requires the contacting states to "adopt measures and make efforts to prevent and fight corruption" (UNCTAD, 2015c); while a specific AOS requires, for instance, that the contracting states' abusive treatment of investors, such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct, should be deemed a "violation of fair and equitable treatment of the investors" (Government of the Netherlands, 2018). An AOI is contained in 6 sample IIAs (IISD, SADC, Indian, Dutch Model BITs, CETA and TTIP investment chapters). In these IIAs, the AOIs were either affirmative or punitive. A typical affirmative AOI requires that "investors and their investments shall not be complicit in any corruptive act" and a breach of such obligation shall be deemed "to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment" (SADC, 2012a). A typical punitive AOI provides that "claims involving corruptive investment activities will not be allowed to be submitted to international arbitration" (UNCTAD, 2016a, 2016b; Government of the Netherlands, 2018). A few sample IIAs concurrently incorporate both an AOS and an AOI, such as the IISD, SADC and Dutch Model BITs. This practice is necessary since corruptive conduct is often committed confidentially between state entities or officials and foreign investors.

Third, ENVs are the most represented SDP in IIAs, and are contained in 19 of the 20 sample IIAs. Among these IIAs, an NDG is contained in 10; a CON in 13 and an EXP in 19. Nearly all of the IIAs examined choose to incorporate an EXP to help preserve state regulatory rights for environmental protection purpose.

Fourth, LHRs have only recently started to be incorporated in IIAs and were only found in 8 of the sample IIAs, all of which were concluded after 2012. The subtypes of the LHRs in these IIAs vary dramatically. A REF is contained in 6 IIAs, referring to various kinds of standards, mostly the ILO core labour standards. An NDG is contained in 6 IIAs, a CON in 7, and an EXP is only in 2. The United States and Dutch Model BITs each contain all 4 subtypes of LHRs, and therefore they seem to be the most-friendly towards labour rights and human rights protection.

Fifth, as TRLs are frequently present in most trade and investment treaties, it is unsurprising that they were present in 12 of the IIAs sampled. A PUB is contained in all 12 IIAs; a COM in 8; and an ENG in 2. This seems to suggest that TRLs in the sample IIAs remain largely state-oriented, i.e. aiming at imposing certain obligations on the contracting states to improve regulatory transparency. In

contrast, the lack of an ENGs in the examined IIAs shows that FDI stakeholders other than states have no or little access to the standard setting in IIA-making.

Sixth, an increasing number of IIAs have begun to incorporate TRAs, and 14 are present in the examined IIAs. A PUB is present in 12; an HER in 10; a TPB in 13; and a REF in 4. All REFs make clear reference to the UNCITRAL Transparency Rules, even though these rules were only recently adopted. This seems to suggest that the IIAs examined were generally friendly towards third party participation in ISDS, which conforms to the recent ISDS transparency trend. However, a reference to the UNCITRAL Transparency Rules could be both positive and negative. A positive reference can be found in the Dutch Model BIT, providing that the “UNCITRAL Transparency Rules shall apply to disputes under this Section” (Government of the Netherlands, 2018). A negative reference excludes the application of the Rules instead. For instance, the RCEP investment chapter provides that the UNCITRAL Transparency Rules shall not be applied unless the disputing parties agree otherwise (UNCTAD, 2018c). In this regard, all sample IIAs concluded after 2012, excluding the RCEP investment chapter, boast a high standard of procedural transparency of ISDS.

Seventh, NES are widely present in the sample of IIAs, and they are mostly exceptive in nature. Except for the CETA and RECP investment chapters, an NES is present in all remaining 18 sample IIAs.

Eighth, RBPs have only been recently incorporated into IIAs, similar to ATCs and LHRs. In total, RBPs are present in 8 sample IIAs. A REF is included in 4 sample IIAs, mostly referring to the OECD Guidelines for Multinational Enterprises. It should be noted that such a reference does not necessarily impose an obligation on investors. A ROS was found in 5 of the examined IIAs. A ROS obligation is often “best-effort” in nature. A typical example is the Norway Model BIT, which provides that the contracting states shall “encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact” (UNCTAD, 2015b). An ROI is present in 5 sample IIAs. An ROI obligation is also best-effort in nature. For instance, the Indian Model BIT provides that “investors and their enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies” (Government of India, 2015). The SADC Model BIT is probably an exception as the ROI obligation imposed in it is affirmative in nature. Article 13 provides that “investors or their investments shall comply with environmental and social assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required

by the laws of the Host State for such an investment" (SADC, 2012a). However, as admitted by the drafters of this BIT, this obligation is not self-contained as it depends largely on the rules of the national law of the contracting states.

3. Major observations from the examination of the 20 IIAs

Several conclusions can be drawn from the data described in the previous section. First, there seems to be a positive relationship between the time the sample IIAs were concluded and their level of sustainable development-orientation, with more recent IIAs, i.e. those concluded after 2012, containing a larger number and more types of SDPs than earlier IIAs. This trend is not surprising given that the discourse on sustainable development within the international community has only become mainstreamed within the last decade. Such a pro-sustainable development trend is likely to be maintained in the future, and it therefore stands to reason that future IIAs can and will be made more sustainable development-oriented.

Second, it seems that the formulation of sustainable development-oriented IIAs has become a shared aspiration of countries regardless of their development level and geographic location. While developed countries remain the major drivers of sustainable development-oriented IIAs, some developing countries and LDCs have also become supporters. The SADC, Indian and Brazilian BITs provide evidence to support this trend. Composed of 15 mostly developing countries from Southern Africa, Such an IIA-making paradigm shift could help erode the traditional North-South division in IIA- making.

Third, a close reading of the types and subtypes of the SDPs in the sample IIAs reveal that there appears to be a recent trend towards "socialization" of SDPs in IIAs. IIAs concluded after 2012 contain a larger and more diverse number of SDPs, and in particular more social SDPs, such as LHRs, ATCs, suggesting that many countries are placing more emphasis on the social dimension of sustainable development in IIA -making. Such a shift enriches the diversity of SDPs in IIAs and could help foster a new trend in IIA-making which places equal emphasis on addressing all three dimensions of sustainable development.

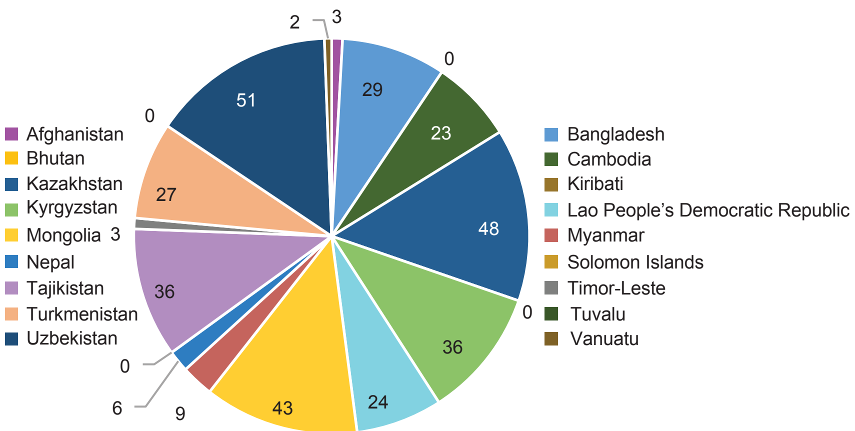
D. Sustainable development provisions in the BITs of Asian-Pacific LDCs and LLDCs

Utilizing a similar research method as that in the previous section, the following subsections examine the SDPs contained in the BITs of the 18 Asian-Pacific LDCs and LLDCs.

1. Landscape of BITs and SDPs in BITs in Asia and the Pacific[13]

Asian-Pacific countries have concluded around 1,500 IIAs in total, including around 1,200 BITs and around 300 FTAs, roughly occupying 40% of the world's total IIAs (UNCTAD, 2019). As discussed in the first chapter of this publication, Asian-Pacific countries have become the most active IIA treaty makers globally recently. IIAs therefore have an important role in the investment policy-making and foreign investment governance in Asian-Pacific countries. The 18 Asian-Pacific LDCs and LLDCs host 459 IIAs (excluding terminated IIAs), of which 364 are in force. Among these IIAs, 340 are BITs, with 266 in force, however the distribution of the 340 BITs among the among these countries is uneven (figure 2.3). In general, Northern and Central Asian countries host more BITs, while the Pacific island countries host much less. Specifically, Uzbekistan hosts the largest number of BITs, with 51 in total to date. In contrast, four countries, namely Bhutan, Kiribati, Solomon Islands and Tuvalu, have concluded only a few FTAs and no BITs. The remaining 12 Asian-Pacific LDCs and LLDCs have concluded varying numbers of BITs.

Figure 2.3 Number of BITs in Asian-Pacific countries



13 Appendix 2 in this chapter also contains an analysis of the BITs and their SDPs for an additional ten Asian-Pacific countries.

While many LDCs and LLDCs in the region seek to attract FDI to boost their development levels, they have different policy preferences in IIA-making related to their different national social and economic situations. Table 2.5 provides detailed information on the number and type of SDPs contained in the BITs of Asian-Pacific LDCs and LLDCs.

A few observations from table 2.5 can be made. First, despite the large number of BITs these countries host, 79% do not contain any SDPs (figure 2.4). Furthermore, while a small percentage of these BITs contain SDPs (21%), only a very small fraction of them host multiple SDPs. Out of the 71 BITs with SDPs, 38 BITs contain only 1 SDP, 8 BITs contain 2 SDPs, 15 BITs contain 3 SDPs, and only 10 BITs contain 4 or more SDPs.

Figure 2.4 Distribution of SDPs in BITs of Asian-Pacific LDCs and LLDCs

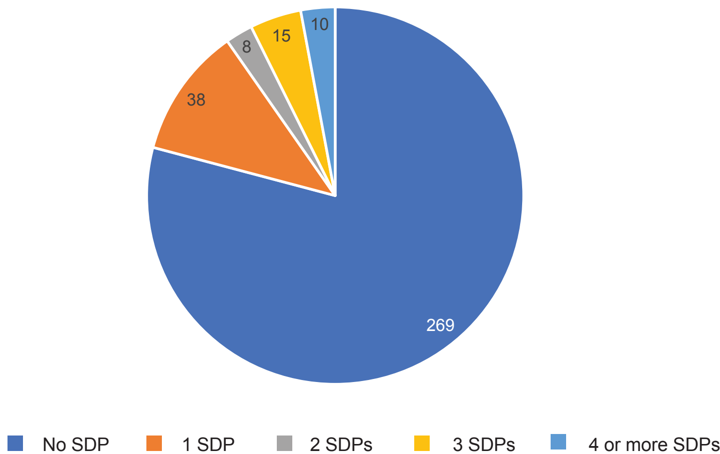


Table 2.5 SDPs in BITs of Asian Pacific LDCs and LLDCs

Country	No. of BIT	No. of SDPs	GEN	ATC			ENV			LHR				TRL			TRA				NES	RBP		
				DEC	AOS	AOI	NDG	CON	EXP	REF	NDG	CON	EXP	PUB	COM	ENG	PUB	HER	TPB	UTR		REF	ROS	ROI
Afghanistan	3	1							1															
Bangladesh	29	22	1				2	3	3					3	2					8				
Bhutan	0	0																						
Cambodia	23	9		1			1	1	1				1	2							2			
Kazakhstan	48	41	2		1		3	10	4		1	2		7					1		10			
Kiribati	0	0																						
Kyrgyzstan	36	17	2	1			2	1	1		1	1		4						1	3			
Lao People's Democratic Republic	24	10	1		1		1		2					2							3			
Mongolia	43	20	2				2		2					3	1		1	1			7		1	
Myanmar	9	14			1		1	1	4					2				5						
Nepal	6	5	2				1							1				1						
Solomon Island	0	0																						
Tajikistan	36	12	1				2	2	1	1	1			1						2	1			
Timor-Leste	3	0																						
Turkmenistan	27	2												2										
Tuvalu	0	0																						
Uzbekistan	51	27	7				3	1			2			2	8					3		1		
Vanuatu	2	0																						
Subtotal	**340**	**180**	**18**	**2**	**3**	**0**	**18**	**19**	**19**	**1**	**5**	**3**	**1**	**29**	**11**	**0**	**1**	**1**	**1**	**1**	**44**	**1**	**2**	**0**
Total & Subtype			**18**	**5**			**56**			**10**				**40**			**4**				**44**	**3**		

Admittedly, the reasons for the lack of SDPs in the BITs of Asian-Pacific LDCs and LLDCs are various and complicated. However, given that BITs are made on a bilateral basis, it is of interest to explore what role the BIT counterpart countries play in making sustainable development-oriented BITs with these countries. Table 2.6 shows the counterpart countries with which Asian-Pacific LDCs and LLDCs maintain BITs that contain one or more SDPs. Of the 36 counterpart countries, BITs concluded with developed countries contained the largest among of SDPs while those with other developing and emerging countries contained the fewest.[14]

[14] Since the time of writing the India-Lao BIT and India-Nepal BIT have been terminated. Nonetheless, they were still used for analysis in this paper.

This finding is not a coincidence. As developed countries in general have higher sustainable development standards, they tend to have a larger number and more types of SDPs in BITs. In recent years, some developed countries have made sustainable development an objective in their trade treaty-making. This could further suggest that, to some extent, Asian-Pacific LDCs and LLDCs may have not yet formed a coherent strategy for making sustainable development-oriented IIAs, and the incorporation of SDPs in their BITs depends on the demand of their counterpart countries and are determined on a case-by-case basis.

Second, although the distribution of the SDPs in the 180 BITs containing them is unevenly distributed across LDCs and LLDCs, whether a country is classified as an LDC or an LLDC does not seem to make significant impact on the appearance of SDPs in their BITs. Third, the types of SDPs contained in BITs of Asian-Pacific LDCs and LLDCs are quite diverse. The major SDPs in their BITs are, in descending order, ENVs, NES, TRLs and GENs, (figure 2.5) all of which are also the major types of SDPs in the sample IIAs examined in the previous section.

Figure 2.5 Distribution of SDPs in BITs of Asian-Pacific LDCs and LLDCs

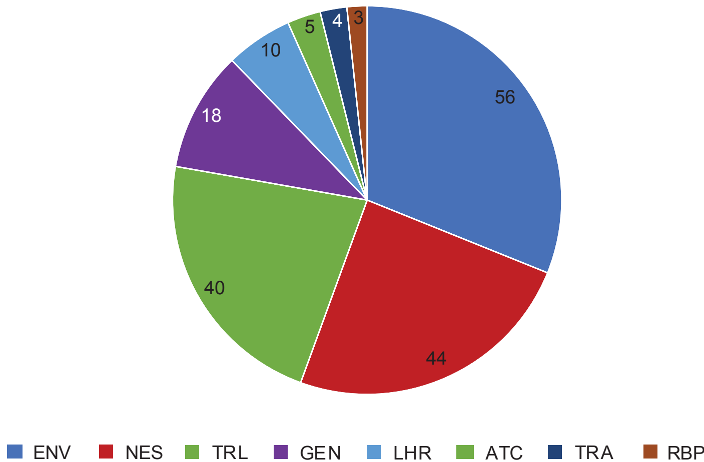


Table 2.6 Counterpart countries of Asian-Pacific LDCs and LLDCs BITs with SDPs

Country	AFG	BAN	CAM	KAZ	KGZ	LAO	MGL	MYA	NEP	TJK	TKM	UZB	Total
Austria		X		X	X					X		X	**5**
Australia						X							**1**
Azerbaijan				X									**1**
BLEU										X			**1**
Canada							X						**1**
China				X								X	**2**
Croatia			X										**1**
Estonia				X									**1**
Finland				X	X		X		X				**4**
France			X										**1**
Germany	X												**1**
Greece												X	**1**
India						X			X				**2**
Indonesia					X	X	X					X	**4**
Israel												X	**1**
Japan			X	X		X		X				X	**5**
Jordan				X									**1**
Kazakhstan												X	**1**
Republic of Korea								X				X	**2**
Lao People's Democratic Republic								X					**1**
Latvia				X									**1**
Philippines								X					**1**
Portugal												X	**1**
Qatar							X						**1**
Macedonia				X									**1**
Netherlands		X										X	**2**
Romania				X									**1**
Russian Federation				X		X					X	X	**4**
Singapore		X				X	X					X	**5**
Spain												X	**1**
Switzerland		X										X	**2**
Thailand						X							**1**
Turkey		X		X						X			**3**
United Arab Emirates					X		X				X		**3**
United Kingdom		X							X				**2**
United States		X		X	X		X					X	**5**
TOTAL	**1**	**7**	**3**	**13**	**5**	**7**	**7**	**4**	**3**	**3**	**2**	**15**	

2. Key observations from the examination of SDPs in Asian-Pacific LDC and LLDC BITs

The data in the previous subsection illustrated that the SDPs in the BITs of Asian-Pacific LDCs and LLDCs have some distinct features, especially when compared with those contained in the sample IIAs. These features not only help define BITs of Asian-Pacific LDCs and LLDCs with regard to their sustainable development-orientation, but also reveal the profound sustainability gap between the IIAs examined in section C and the BITs of Asian-Pacific LDCs and LLDCs examined in this section. Several further conclusions can be drawn from the analysis of Asian-Pacific LDC and LLDC BITs.

First, while Asian-Pacific LDCs and LLDCs increasingly realize the importance of sustainable development in BIT treaty-making, their perceptions of sustainable development remain largely focused on the environmental dimension of sustainable development, while very little focus is placed on the social dimension of it. In particular, the BITs of Asia-Pacific's LDCs and LLDCs insufficiently address various types of social concerns associated with FDI as they contain hardly any social SDPs and related subtypes are also missing (e.g. AOI (of ATCs), EXP (of LHRs), ENG (of TRLs) and ROI (of RBPs)). This implies that none of the SDPs in these BITs directly imposes obligations on foreign investors. Consequently, the investors' activities are mainly subject to the national laws of the host countries.

Second, the BITs of Asian-Pacific LDCs and LLDCs seem to have a strong focus on balancing the state-investor relationship. The major types of SDPs in these BITs, including GENs, EVNs, TRLs and NES, mainly serve the purpose of striking a proper balance between two seemingly conflicting goals in global investment governance, i.e. the protection of foreign investments and the preservation of host state regulatory rights. Reflected in IIA-making, the SDPs in the BITs of Asian-Pacific LDCs and LLDCs either confirm that the contracting states bear obligations to take necessary measures for sustainable development purpose or exempt the states' responsibility for taking measures that are otherwise inconsistent with BIT obligations. Indeed, such IIA-making practice largely conforms to the call for reforming the existing IIA system through balancing the state-investor relationship enshrined in IIAs. However, as SDPs in BITs of Asian-Pacific LDCs and LLDCs seldom take into consideration the role that non-state parties could play in global investment governance, such as foreign investors, it is unclear how well these SDPs could address sustainable development challenges in the era of global governance.

Third, the incorporation of SDPs in the BITs of Asian-Pacific LDCs and LLDCs also seems to be conditional on counterpart countries to some extent. For instance, almost all existing social SDPs, though small in number, are contained in BITs with developed countries. Such conditionality of SDPs seems to suggest that Asian-Pacific LDCs and LLDCs do not have adequate incentives or capacity for negotiating and concluding sustainable development-oriented IIAs that balance all three dimensions of sustainable development, and the main driving force for making such IIAs probably comes from the demand of their IIA counterpart countries.

E. Sustainability gaps in Asian-Pacific BITs and their implications

The following subsections explore and analyse the major differences between the SDPs in the sample IIAs and those in BITs of Asian-Pacific LDCs and LLDCs in order to identify the "sustainability gap" between the two groups of IIAs examined in this chapter. Appendix 2 at the end of this chapter extends the analysis done in this chapter to include a broader sample of Asian-Pacific countries. As a result, the conclusions on the sustainability gaps summarized in the following subsections regarding Asia-Pacific LDC and LLDCs can be extended more broadly to the Asia-Pacific region.

1. Gaps in availability and practical effectiveness of SDPs

Compared with the sample IIAs examined in section C, the BITs of Asian-Pacific LDCs and LLDCs in general seem much less sustainable development-oriented. This is not only evidenced by the difference in the total number of SDPs in the two groups of IIAs, but also by the difference in the practical effectiveness of the SDPs as reflected by their types and subtypes.

The number of SDPs contained in an IIA determines the availability of treaty norms in addressing sustainability concerns associated with FDI under the IIA. BITs of Asian-Pacific LDCs and LLDCs contain, on average, a much smaller number of SDPs than the sample IIAs. While the 20 sample IIAs studied in section C contained 182 SDPs, the 340 BITs of Asian-Pacific LDCs and LLDCs contained only 180 SDPs. This difference is striking. It suggests that the BITs of Asian-Pacific LDCs and LLDCs insufficiently provide the necessary treaty norms for global investment governance for sustainable development. Furthermore, while 95% of the sample IIAs contained multiple SDPs, only 10% of the Asian-Pacific BITs had multiple SDPs, while 79% had none at all.

Even the BITs of Asian-Pacific LDCs and LLDCs with SDPs contain less types and subtypes of SDPs. In this case, the most prominent difference is in the amount of lower amount TRAs and social SDPs and related subtypes in Asian-Pacific LDC and LLDC BITs versus the sample IIAs. This implies that that there not only a gap in the appearance of social SDPs in the BITs of Asian-Pacific LDCs and LLDCs but that the BITs of these countries address a narrower scope of sustainability concerns, which consequently constrains the practical effectiveness of these BITs.

Admittedly, to many countries, including Asian-Pacific LDCs and LLDCs, incorporating social SDPs in IIAs is a contentious issue because there are disagreements within these countries on whether IIAs are a proper mechanism to address social concerns. Considering that Asian-Pacific LDCs and LLDCs sometimes rely on the BIT templates of their counterpart countries in IIA-making, SDPs contained in the model BITs of developed countries could play a key role in BIT-making of Asian-Pacific LDCs and LLDCs. As social SDPs are becoming increasingly incorporated in model BITs, it is highly likely that Asian-Pacific LDCs and LLDCs could face increasing pressure to incorporate social SDPs in their future IIAs.

Considering that the SDPs in the BITs of Asian-Pacific LDCs and LLDCs are limited in number and lack practical effectiveness, further IIA-making efforts towards incorporating SDPs should be made by Asian-Pacific LDCs and LLDCs in the future. This may require further consensus building among these countries for making sustainable development-oriented IIAs. Although many Asian-Pacific LDCs and LLDCs clearly realize the importance of sustainable development in trade and investment policymaking, such awareness needs to be further strengthened and should be translated into IIA -making practice. To this end, Asian-Pacific LDCs and LLDCs must prioritize the identification of their country-specific sustainable development challenges and subsequently develop the best IIA-making strategies and practices to address these challenges while ensuring that their IIAs are coherent and consistent with sustainable development.

2. Gaps in governance-orientation of SDPs

The gap between SDPs in the sample IIAs and those in BITs of Asian-Pacific LDCs and LLDCs may also be observed from their different levels of governance-orientation. The globalization of governance has had profound impacts on global investment governance, including IIA-making and enforcement. At a normative level, such impacts are evident in four main subtypes of SDPs in IIAs. For instance, an increasing number of IIAs now grant access for non-disputant third parties to

participate in arbitration proceedings, through opening hearings to the public or allowing third parties to submit briefs in the capacity of *amicus curiae*. This is further reflected by the appearance of HERs and TPBs (of TRAs) in IIAs. Broadly speaking, these SDPs also reflect the growing tendency of enhancing the rule of law in global investment governance. Some IIAs include provisions that impose obligations on foreign investors directly, such as ROIs (of RBPs) and AOIs (of ATCs). This has often been done to correct the structural imbalance of IIAs so that they can strike a better balance between the preservation of state regulatory rights and the protection of foreign investment. Some IIAs clearly make reference to non-binding external standards, such as the ILO core labour standards and the OECD Guidelines for Multinational Enterprises, such as REFs (of LHRs and RBPs). This has helped provide the opportunity for many soft law rules to be considered and applied for the purpose of global investment governance. Some IIAs also provide opportunities for the general public to take part in the making of standards that are relevant to public interest as evidenced by the incorporation of ENGs (of TRLs) in IIAs. In general, the above subtypes of SDPs provide opportunities for non-state actors to play a role in global investment governance.

However, there is still room to improve the governance orientation of IIAs, and some of the sample IIAs examined in section C provide a good example of how this can be done. For instance, article 10 of the SADC Model BIT provides for "Common Obligation against Corruption". This article not only prohibits foreign investors from engaging in corruptive conduct, but also requires the state to prosecute any individuals for such conducts on the ground of breaching the domestic law of the state. Similarly, the Dutch Model BIT also contains enforceable provisions for anti-corruption purpose. This BIT not only provides that investors' claims involving corruptive conducts are not admissible to international arbitration, but also stipulates that the contracting states' abusive treatment of investors, including corruption shall be deemed a violation of the FET provision, constituting a breach of the BIT or international law. Furthermore, the Dutch Model BIT also includes a standalone clause titled "Rule of Law" (Government of the Netherlands, 2018), which lays down certain general requirements for the administrative conduct of the contracting states. It is obvious that these provisions go beyond the traditional purpose of investment protection and liberalization. They echo and reflect a shift towards sustainable development and clearly demonstrate the growing governance-orientation within IIAs.

Governance wise, the SDPs contained in BITs of Asian-Pacific LDCs and LLDCs and those in the sample IIAs bear substantial differences. The sample IIAs contain all of the above types of governance-oriented SDPs, i.e. AOIs, HERs, TPBs,

ROIs, REFs and ENGs, while these SDPs are largely absent in BITs of Asian-Pacific LDCs and LLDCs. BITs of Asian-Pacific LDCs and LLDCs only contain 2 REFs (each of LHR and of RBP) and 1 HER (of TRA). The lack of governance-oriented SDPs in BITs seems to suggest that Asian-Pacific LDCs and LLDCs in general have not adopted a governance perspective in IIA-making. This not only potentially restricts the ability and reach of these countries to enhance the rule of law in national and global investment governance, but potentially hinders them from confronting their domestic sustainable development challenges in the long run.

F. Survey of Asian-Pacific countries capacity for sustainable development-oreinted IIA making

There is no one-size-for-all model sustainable development-oriented IIA available for Asia-Pacific countries. The extent to which the IIAs of a country should be made sustainable development-oriented depends on the specific national situation and needs of the country. Using data obtained from a survey of several Asian-Pacific countries, this section analyses the national situation and needs of these countries when making sustainable development-oriented IIAs. The questionnaire for the survey is attached in appendix 1.

The questionnaire was sent to all Asian-Pacific countries. Replies were received from the following nine countries: Armenia, Bangladesh, Bhutan, Cambodia, Islamic Republic of Iran, Mongolia, Myanmar, Nepal, and Turkey. A response to the questionnaire was also received from one territory, New Caledonia.[15] While the ten countries/territories are not entirely identical to Asian-Pacific LDCs and LLDCs whose BITs were investigated in this study, it is nonetheless useful to still consider the data obtained from these countries/territories in order to better assess and draw conclusions about IIA treaty making in LDCs and LLDCs.

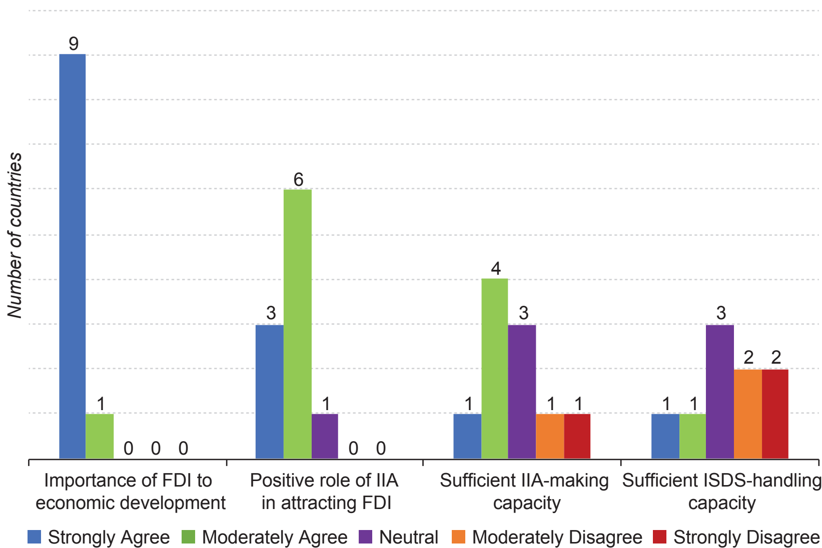
1. IIAs and sustainable development in Asia and the Pacific

The first area that can be assessed from the data obtained in the survey is the extent to which the surveyed countries/territories understand the relevance of IIAs for FDI and economic development. There was a general consensus that FDI is

[15] New Caledonia is a special territory of France.

an important factor in promoting economic development (figure 2.6). Nine countries strongly agree that FDI plays a supportive role in economic development, with only one country moderately agreeing. Three countries strongly agreed that IIAs play a supportive role in attracting FDI, while six countries moderately agreed. Figure 2.6 also highlights the IIA-making and ISDS-handling capabilities of the surveyed countries/territories. It is noteworthy that only five countries/territories strongly or moderately agreed that they have sufficient IIA-making capacity and only a mere two countries/territories strongly or moderately agreed that they have sufficient ISDS-handling capacity.[16] Thus, while all ten countries/territories agree that FDI may promote economic development and that IIAs are important in attracting FDI, not all of them have sufficient IIA-making and ISDS-handling capacities. Such a finding suggests that there is an urgent need for Asian-Pacific countries to enhance their capacities with regard to IIA-making and ISDS-handling.

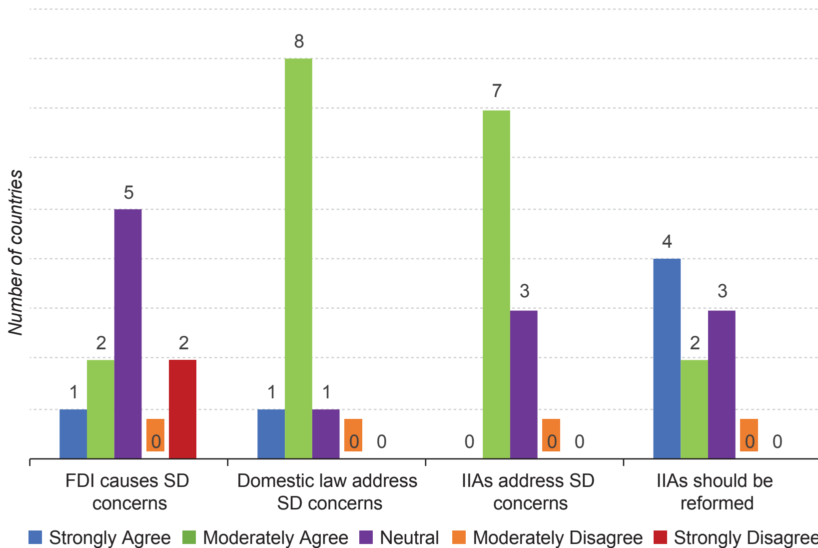
Figure 2.6 Relevance of IIAs to the economic development in surveyed countries/territories



16 To this end, it should be noted that to date only relatively few Asian-Pacific countries have been involved in ISDS cases.

The second area that can be assessed from the survey data is the extent to which the surveyed countries/territories perceive FDI and IIAs relevant for sustainable development. Countries/territories seemed to have split opinions on this matter (figure 2.7). Nonetheless, there was a general consensus among countries/territories that sustainable development should be integrated in national law-making and IIA-making. Illustrating this, nine countries/territories indicated that their domestic law- and policymaking places emphasis on sustainable development, while seven indicated that they address sustainable development concerns when making IIAs. The surveyed countries/territories also generally agreed that IIAs could be a suitable tool for addressing sustainable development concerns associated with FDI. These finding indicate the practical importance of sustainable development to several Asian-Pacific countries as they conclude new IIAs and update their existing ones.

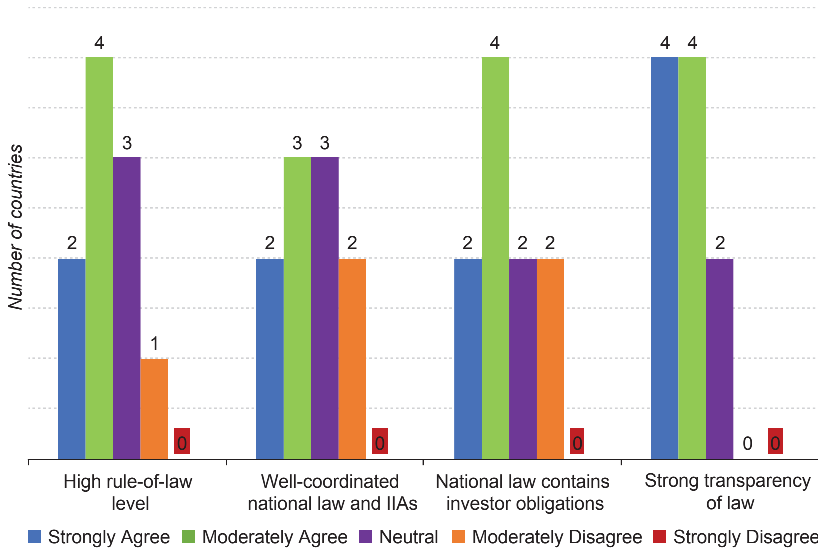
Figure 2.7 IIAs and sustainable development in surveyed countries/territories



The third assessment that can be ascertained from the survey data is that the countries/territories surveyed generally displayed a high level of confidence in the rule of law governing FDI in their countries/territories. To this end, six countries/territories strongly or moderately agreed that the rule of law situation, especially the law enforcement situation in their countries/territories is excellent; five countries/territories strongly or moderately agreed that their national laws and policies were well-coordinated with IIAs; six countries/territories stated that their domestic laws contain rules with regard to investor obligations; and eight countries/territories

strongly or moderately agreed that the transparency of their investment-related laws and policies was strong (figure 2.8). Negative replies were rarely received in any of these categories by respondents.

Figure 2.8 Rule of law in surveyed countries/territories



Asian-Pacific countries face varying levels and different types of sustainable development challenges. This is evidence by the priorities placed on various sustainable development concern areas (table 2.7). Among the various types of challenges, it seems that environmental issues have the highest priority, as four countries/territories rank this concern high or moderate. Public health and safety concerns and state regulatory rights concerns are only ranked as important by a few of the respondent countries/territories. Perhaps most worrisome is that none of the respondents ranked labour rights or human rights, irresponsible investor conduct and national security concerns as major types of sustainable development concerns.

Table 2.7 Sustainable development concerns of Asian-Pacific countries/ territories

Types of SD Challenge	High	Moderate	Low	No	No Comments
Environmental	1	3	2	0	1
Labour/human rights	1	1	4	0	1
Public health and safety	1	2	2	1	1
State regulatory rights	1	2	2	1	1
National security	1	1	4	0	1
Irresponsible investor conducts	0	2	3	1	1

These findings help provide some background context to the IIA-making priorities and practices of Asian-Pacific countries. It is not surprising that ENVs are the major type of SDPs in BITs of Asian-Pacific LDCs and LLDCs and the survey data confirm that this is the area in which countries seem to place the largest priority. Although NES was a major type of SDPs identified in their BITs, Asian-Pacific countries do not seem to place a high emphasis on national security as a major type of sustainable development concern. A reasonable explanation for this could be that the NES clauses in the BITs of these countries are probably incorporated upon the demand of the counterpart countries.

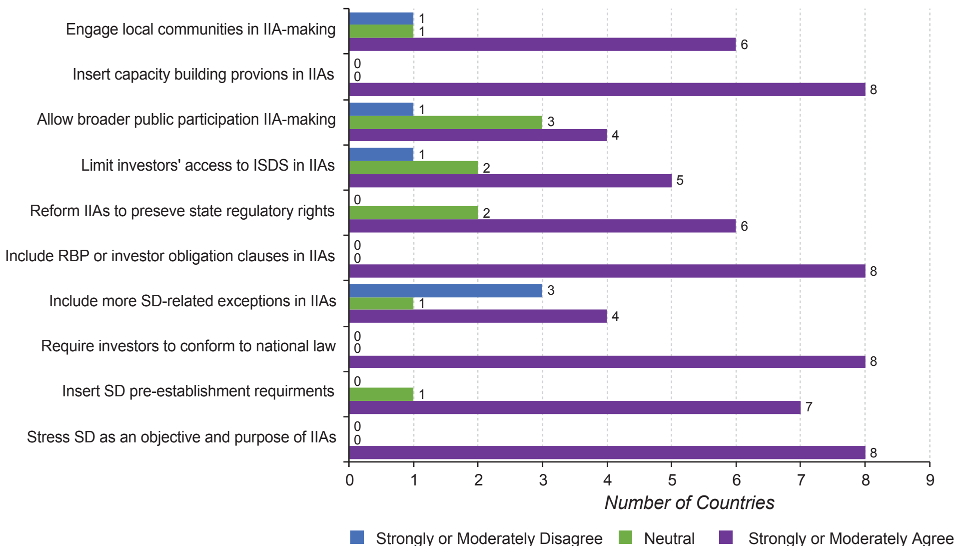
At a sectoral level, the survey data reveal that Asian-Pacific countries/territories have diverse sustainable development concerns related to the different economic sectors in which their economies place priority (table 3.8). Overall, it seems that Asian-Pacific countries face a moderate or low level of sustainable development challenges in almost all economic sectors except agricultural and food industry and the mining and mineral processing industry, which both seem to generate a higher level of challenges than other industries.

Table 2.8 Sectorial sustainable development challenges of Asian-Pacific countries/territories

Types of SD Challenge	High	Moderate	Low	No	No Comments
Mining and mineral processing	2	2	1	0	2
Natural resource processing	1	2	2	0	2
Agriculture and food processing	0	4	2	0	1
High-technology industry	1	1	2	1	2
Chemical processing	0	3	2	1	1
Services	1	3	1	1	1
Textile and clothing industry	1	1	3	1	1
Light industry	0	2	3	1	1
Heavy machinery industry	0	3	3	0	1

The survey also revealed the atractiveness of various options to reform IIAs (figure 2.9). The options proposed in the survey were mainly drawn from UNCTAD recommendations for IIA reform. The list is not exhaustive but rather provides a snapshot of possible options. The most preferred options for Asian-Pacific countries/territories indicated in the surveys were: (a) incorporating capacity-building clauses in IIAs; (b) including RBP or investor obligation clauses in IIAs; (c) requiring foreign investors to conform to national law; and (d) stressing sustainable development goals as an objective and purpose of IIAs. Additionally, several countries cited that sustainable development-related pre-establishment requirements should be included in IIAs. The options that were less welcome by the surveyed countries/territories were: (a) including sustainable development-related exceptive clauses in IIAs; (b) limiting investors' access to ISDS in IIAs; (c) allowing broader public participation in IIA-making; and (d) engaging local communities in IIA-making. Several countries/territories strongly disagreed with the option of IIAs incorporating sustainable development-related exceptive clauses, however, they did not provide an explanation as to why. The reform options and preferences of these countries, and Asian-Pacific countries more broadly, are based on their respective national economic, political and developmental situations.

Figure 2.9 IIA reform preferences in surveyed countries/territories



Note: SD means sustainable development.

2. Key takeaways from the survey results

The survey explored whether surveyed Asian-Pacific countries/territories face sustainable development challenges in global investment governance and how they could make IIAs sustainable development-oriented to help confront such challenges. At a broad level, the results provide a general confirmation that Asian-Pacific countries agree that FDI plays an important role in national economic development and that IIAs can play a positive role in attracting FDI. Importantly, the surveyed countries/territories principally agreed that IIAs could be a helpful tool in addressing sustainable development concerns associated with FDI. They also showed a strong preference for a number of IIA-reform options. Such findings seem to suggest that Asian-Pacific countries share a consensus of making IIAs more sustainable development-oriented.

The survey also demonstrated that Asian-Pacific countries have different types and levels of sustainable development challenges and varying levels of IIA-making capacity and ISDS-handling capacity. Such differences provide an explanation for why Asian-Pacific countries may have different priorities and expectations when negotiating and concluding IIAs. This suggests that Asian-Pacific countries should design and align their strategies to make sustainable development-oriented IIAs that address country-specific situations and needs.

The survey also revealed that countries, obviously, have different preferences on how to make IIAs more sustainable development-oriented. A general consensus seemed to emerge around incorporating investor obligation clauses in IIAs, such as RBPs or provisions that require foreign investors to comply with national laws of the host states. This seems to imply that Asian-Pacific countries may enhance the presence of certain social SDPs in IIAs, such as RBPs and ATCs. However, Asian-Pacific countries seem to be reluctant to grant broader opportunities for non-state actors, such as foreign investors and local communities, to play a more constructive and active role in global investment governance, such as participation in ISDS and IIA-making. This implies that Asian-Pacific countries tend to favour a formal and state-centralist approach in global investment governance. This approach is not wrong, but it is incongruent with the emerging trend in other regions aimed at making IIAs more governance-oriented.

G. Recommendations

There is a growing consensus in the Asia-Pacific region that the negotiation and conclusion of sustainable development-oriented IIAs is a necessary and effective way to address the multifaceted and varying sustainable development challenges associated with FDI. The following recommendations can be drawn from the empirical study of SDPs in both sections C and D as well as the survey results in section F:

- There is no one-size-for-all model of sustainable development-oriented IIA. Asian-Pacific LDCs and LLDCs should carefully assess their specific national situation, priorities and needs in IIA-making.
- Sustainable development-oriented IIAs should strike a proper balance among economic growth, environmental protection and social development/inclusion. It is necessary for Asian-Pacific LDCs and LLDCs to adopt a broad and updated understanding of sustainable development and conduct a country-specific benefit-cost analysis to decide whether and how social SDPs should be incorporated in IIAs.
- IIAs are becoming increasingly governance-oriented. Asian-Pacific LDCs and LLDCs need to consider this emerging trend in IIA-making. They especially need to consider the role of non-state stakeholders and soft law rules in the existing IIA system.
- The practical effectiveness of SDPs in IIAs not only relies on the SDPs themselves, but also depends on the national law standards and the rule-of-law situation of a country. Thus, SDPs in IIAs could be better and more effectively harnessed if Asian-Pacific LDCs and LLDCs also improve sustainable development standards at national and regional levels.

- Capacity building, interstate cooperation and stakeholder engagement are increasingly important in making sustainable development-oriented IIAs. Asian-Pacific LDCs and LLDCs should carefully consider these factors in light of their specific national situation and needs.

In addition, it is also suggested that Asian-Pacific LDCs and LLDCs consider the following further recommendations in future IIA-making:

- As FTAs also address sustainable development concerns, Asian-Pacific LDCs and LLDCs need to properly deal with the interrelations between BITs and FTAs in IIA-making, especially with regard to the application of FTA chapters on investment issues.
- Despite the fact that many ISDS cases provoke sustainable development concerns, SDPs in IIAs are seldom applied in practice. Asian-Pacific LDCs and LLDCs should continue to monitor this development, especially with regard to the interpretation and application of SDPs in IIAs.

References

Alfaro, L., Chanda, A., Kalemli-Ozcan, S. and S. Sayek (2006). How Does Foreign Direct Investment Promote Economic Growth? Exploring the Effects of Financial Markets on Linkages, HBS Working Paper, vol. 07, No. 013. Available at http://www.hbs.edu/research/pdf/07-013.pdf

Alschner, W. and D. Skougarevskiy (2016). The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe, *Journal of World Investment and Trade*, vol. 17, No. 3.

Alvarez, J. E. (2016). Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?. IILJ Working Paper. Available at https://wp.nyu.edu/megareg/wp-content/uploads/sites/ 3134/2016/03/Alvarez_IILJ-MegaReg_2016-3.pdf.

Benvenisti, E. (2013). The Law of Global Governance, *Recueil des cours*, vol. 368.

Brazil Model BIT (2015). Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download.

Chi, M. (2017). *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, Systematic Integration and Governance Implications*. London & New York: Routledge.

Comprehensive Trade and Economic Agreement between Canada and the European Union, signed on 30 October 2016, parts are provisionally applicable.

De Schutter, O., J. Swinnen and J. Wouters, eds. (2013). *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements*, Oxon: Routledge.

ESCAP (2017). *Handbook on Policies, Promoting and Facilitation of Foreign Direct Investment for Sustainable Development in Asia and the Pacific*. United Nations Economic and Social Commission for Asia and the Pacific, Bangkok: United Nations publication. Available at https://www.unescap.org/resources/ handbook-policies-promotion-and-facilitation-foreign-direct-investment-sustainable-0.

_______(2019). *Foreign Direct Investment Trends and Outlook in Asia and the Pacific. Asia-Pacific Trade and Investment Outlook*. United Nations Economic and Social Commission for Asia and the Pacific, Bangkok, United Nations publication.

EU-Singapore Investment Protection Agreement, signed on 19 October 2018, ratified on 21 November 2019.

Fitzmaurice, G. (1957). The Law and Procedural of the International Court of Justice 1951-1954, *British Yearbook of International Law*, vol. 33.

Hindelang, S. and M. Krajewski, eds. (2016). *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*. Oxford: Oxford University Press.

ICSID, Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, Case No. ARB/97/3, Award on resubmission proceeding, 20 August 2007, Award on second annulment proceeding, 10 August 2010. Available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/97/3.

_______, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocc*o, Case No. ARB/00/4, Award, 4 February 2014, settled. Available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/00/4.

_______, *Siemens A.G. v. The Argentine Republic, Case No. ARB/02/8, Decision of The ad hoc Committee on the Request for supplementation and rectification of its Decision Concerning Annulment of the Award*, 28 May 2003. Available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C159/DC554_En.pdf.

_______, *Vattenfall AB and others v. Federal Republic of Germany*, Case No. ARB/12/12, pending. Available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/12.

IISD (2019). *Without Investment, Sustainable Development is Impossible*. Geneva: International Institute for Sustainable Development. Available at https://www.iisd.org/ topic/investment.

India (2015). Indian Model Bilateral Investment Treaty. Ministry of Finance. Available at https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

Khalfan, A. (2011). International Investment Law and Human Rights, In *Sustainable Development in World Investment Law*, M.-C. Cordonier Segger, M. W. Gehring and A. Newcombe, eds. Alphen aan den Rijn: Kluwer Law International.

Mann, H., Von Moltke, K., Peterson, L. E. and A. Cosbey (2005). *IISD Model International Agreement on Investment for Sustainable Development.* Winnipeg: International Institute for Sustainable Development. Available at https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf.

Norway Model BIT (draft) (2015). Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3350/download.

Office of the United States Trade Representative (2016), T-TIP Round Information, The USTR-Archives, 3-7 October. Available at https://ustr.gov/ttip/ttip-round-information.

PCA, *Philip Morris Asia Limited v. The Commonwealth of Australia*, Case No. 2012-12, Award on jurisdiction and admissibility, 17 December 2015, Final award regarding costs, 8 March 2017. Geneva: United Nations Conference on Trade and Development. Available at https://pca-cpa.org/en/cases/5/.

Regional Comprehensive Economic Partnership, proposed.

Schill, S. W., C. Tams and R. Hofmann (2015). International investment law and development: Friends or foes?. *In International Investment Law and Development: Bridging the Gap*, S. W. Schill, C. Tams and R. Hofmann, eds. Cheltenham: Edward Elgar Publishing.

Schneiderman, D. (2011). Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint, *Journal of International Dispute Settlement*, vol. 2, No. 2.

Southern African Development Community (2012a). *SADC Model Bilateral Investment Treaty Template with Commentary.* Gaborone. Available at https://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf.

_______(2012b). SADC *Overview*. Gaborone. Available at https://www.sadc.int/about-sadc/overview/.

Stoll, P. T. and T. P. Holterhus (2017). The ‘Generalization’ of International Investment Law in Constitutional Perspective. In *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, S. Hindelang and M. Krajewski, eds. Oxford: Oxford University Press.

The Netherlands (2018). New Model Text Investment Agreements. Ministry of Foreign Affairs. Available at: https://www.internetconsultatie.nl/investeringsakkoorden.

Trans-Pacific Partnership, signed on 4 February 2016.

United Nations Conference on Trade and Development (2012). *Investment Policy Framework for Sustainable Development*. Geneva: United Nations publication. Available at http:// unctad. org/en/PublicationsLibrary/diaepcb2012d5_en.pdf.

_______(2014). *World Investment Report*. Geneva: United Nations Publication. Available at http://unctad.org/en/PublicationsLibrary/wir2014 _en.pdf.

_______(2015). *Investment Policy Framework for Sustainable Development*. Prepared by a team led by J. Zhan. UNCTAD/DIAE/PCB/2015/5, Geneva: United Nations Publication. Available at https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

_______(2018). Recent Developments in the International Investment Regime, UNCTAD IIA Issues Note, Issue 1 (May). Available at http://unctad.org/en/PublicationsLibrary/ diaepcbinf2018d1_en.pdf.

_______(2019). International Investment Agreement Navigator. Investment Policy Hub. Available at https://investmentpolicy.unctad.org/international-investment-agreements.

UN-OHRLLS (2019). *Country Profiles*. Available at http://unohrlls.org/about-lldcs/country-profiles/.

VanDuzer, J. A. (2016), Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?. In *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, S. Hindelang and M. Krajewski, eds. Oxford: Oxford University Press.

Villiger, M. E. (2008). *Commentary on the 1969 Convention on the Law of Treaties*, The Hague: Martinus Nijhoff.

Von Moltke, K. (2004). A Model International Investment Agreement for the Promotion of Sustainable Development. Winnipeg: International Institute for Sustainable Development. Available at https://www.iisd.org/library/model-international-investment-agreement-promotion-sustainable-development.

Appendix 1: Questionnaire

Section I: Profile of Survey-taker

Name:

Country:

Job title & Organization:

Questions	Strongly Agree	Moderately Agree	Neutral	Moderately Disagree	Strongly Disagree
1. FDI generally plays a supportive role in national economic development in my country					
2. FDI causes concerns over the SD in my country *					
3. IIAs' plays a supportive role in attracting FDI inflow					
4. My country faces profound SD challenges nowadays					
5. My country addresses SD goals in national FDI and related law/policymaking					
6. My country addresses SD goals in IIA-making					
7. My national laws contain sufficient provisions on RBP/investor obligations					
8. My country has sufficient capacity of IIA-making					
9. My country has sufficient capacity in handling ISDS (and potential) cases					
10. IIA-making and FDI and related law/policymaking in my country are well-coordinated					
11. The transparency of FDI and related law and policy of my country is strong					
12. The rule of law level in my country, especially law enforcement, is excellent					
13. My country prefers ISDS to national courts or other ADR in settling investment disputes					
14. My country senses that IIAs should be reformed to address SD concerns *					
15. My country senses it necessary to reform the existing ISDS mechanism *					

Section II: Country-specific SD challenges

1. If your answer to Question No.2 is positive (strongly or moderately agree), please specify the type and level of the SD challenges in FDI governance:

Tyles/Levels	High	Moderate	Low	No	No comment
1. FDI causes environmental concerns					
2. FDI causes labour/human rights concerns					
3. FDI causes public health and safety concerns					
4. ISDS threats the state regulatory power					
5. FDI causes national security concerns					
6. FDI brings about irresponsible investor conducts in my country					
7. Other type of challenges (please specify)					

2. If your answer to Question No.2 is positive (strongly or moderately agree), please specify the economic sectors of your country that face SD challenges:

Sectors/Levels	High	Moderate	Low	No	No comment
1. Mining and mineral processing					
2. Natural resource processing (e.g. water, lumber)					
3. Agriculture and food processing industry					
4. High-technology industry (e.g. IT, telecom)					
5. Chemical processing (e.g. pharmaceutical)					
6. Services industry (e.g. tourism, transportation, education, finance)					
7. Textile and clothing industry					
8. Light industry (e.g. daily utensil production)					
9. Heavy machinery industry					
10. Other sectors (please specify)					

3. If your answer to Question No.14 is positive (strongly or moderately agree), please specify how IIAs can be made helpful in addressing SD concerns from the perspective of your country:

Types/Levels	Strongly Agree	Moderately Agree	Neutral	Moderately Disagree	Strongly Disagree
1. Stress SDGs (or SD related goals) as an object and purpose of IIAs					
2. Introduce more SD related pre-establishment requirements (e.g. environmental assessment) in IIAs					
3. Requiring investors to conform to national laws in IIAs					
4. Include more SD-related exceptions (e.g. environmental, labor rights, general exceptions) in IIAs					
5. Include RBP or investor obligation clauses in IIAs					
6. Reform investment protection clauses to preserve state regulatory power (e.g. expropriation, FET)					
7. Limit investors' access to ISDS in IIAs					
8. Allow broader public participation in ISDS in IIAs					
9. Insert capacity building provisions in IIAs					
10. Engage local/indigenous communities in IIA-making					
11. Others (please specify)					

Section III: Country-specific SD challenges to ISDS

4. If your answer to Question 15 is positive (strongly or moderately agree), please briefly answer the following questions before answering questions.

1. Which government organ(s) in your country is in charge of IIA-making (Ministry)? (____).
2. Has your country experienced any ISA cases (please use "X")?
   ( ) Yes / ( ) No
3. To my knowledge, my country has be sued in (__________) ISDS cases (as Respondent) / I do not know (_____).
4. To my knowledge, there are (__________) ISDS cases initiated relying on my countries IIAs / I do not know (_____).

5. In my country, the major reasons to allow ISDS in settling disputes are:

Types/Levels	Strongly Agree	Moderately Agree	Neutral	Moderately Disagree	Strongly Disagree
1. The cost of ISDS is too high					
2. Arbitrators may lack independence and impartiality					
3. ISDS procedures are too complicated and time-consuming					
4. The public has negative views on ISDS					
5. ISDS endangers state regulatory right and state sovereignty					
6. ISDS may negatively influence business environment in my country					
7. ISDS awards lack consistency					
8. ISDS lacks transparency and public participation					
9. ISDS seems inconsistent with the legal culture of my country					
10. Others (please specify)					

Types/Levels	Strongly Agree	Moderately Agree	Neutral	Moderately Disagree	Strongly Disagree
1. ISDS is an effective way for investment dispute settlement					
2. Arbitrators are more capable than national judges					
3. ISDS is more neutral than national courts					
4. Foreign partner states prefer ISDS in IIA-making					
5. Acceptance of ISDS helps my country attract FDI					
6. Acceptance of ISDS helps the outward investors of my country					
7. Others (please specify)					

6. In my country, the major reasons to allow ISDS in settling disputes are:

7. From the perspective of my country, possible ISDS reform should include:

Types/Levels	Strongly Agree	Moderately Agree	Neutral	Moderately Disagree	Strongly Disagree
1. Controlling the cost of ISDS for host states					
2. Setting high ethical requirements for arbitrators					
3. Improving the efficiency of ISDS process					
4. Limiting investors' access to ISDS					
5. Screening sensitive cases from being submitted to ISDS					
6. Introducing pre-arbitration requirements (e.g. negotiation)					
7. Allowing states to intervene in ISDS (e.g. treaty interpretation)					
8. Allowing broader public participation in ISDS					
9. Introducing an appeals facility					
10. Creating a standing international investment court					
11. Replacing ISDS by inter-state arbitration					
12. Replacing ISDS by national courts (local remedies in host state)					
13. Providing necessary legal and financial aid to host states					
14. Others (please specify)					

Section V: Further comments on making IIAs SD-supportive from your country's perspective (if any):

Appendix. 2 Supporting analysis of BITS in ten additional Asian-Pacific countries

To obtain a broader picture of the level of sustainable development-orientation of IIAs in the Asia-Pacific region and enable the development of more generalizable conclusions, in November 2019 an analysis of current BITs in force in ten additional Asian-Pacific countries that were not LDCs or LLDCs was undertaken. The analysis included a mix of low, middle and upper-income level countries, namely: Brunei Darussalam, India, Indonesia, Malaysia, the Philippines, the Republic of Korea, Singapore, Sri Lanka, Thailand, and Viet Nam.

As of November 2019, 440 BITs were concluded[1] in the countries analysed (table 2.9). Of these 440, texts were available for only 375, and of those 375 only 140 included SDPs. In descending order, the Republic of Korea, Malaysia, and Viet Nam have the largest amounts of BITs (97, 66, and 61 respectively), and also the largest amount for which text was available for the analysis (92, 51, and 44 respectively). In terms of BITs containing SDP provisions, Singapore, the Republic of Korea and India take the lead, with 36, 34, and 29 BITs including SDP provisions respectively. Among ASEAN countries, Viet Nam has the second largest number of SDP provisions behind Singapore in BITs, with 14 in total, followed by Thailand with 9. This data seems to confirm that the upper-income countries tend to have more SDP provisions in their BITs (for example Singapore and the Republic of Korea), while the middle- and low-income countries, even if they have a significant number of BITs, still have a considerably low level of SDP provisions in their BITs. Of course, India and Viet Nam appear to both be outlier in the case given their number of BITs and number of SDP provisions.

1 This figure includes BITs that were signed and in force as well as those that have been signed and are not in force.

Table 2.9 Sustainable development provisions in bilateral investment treaties of Selected Countries

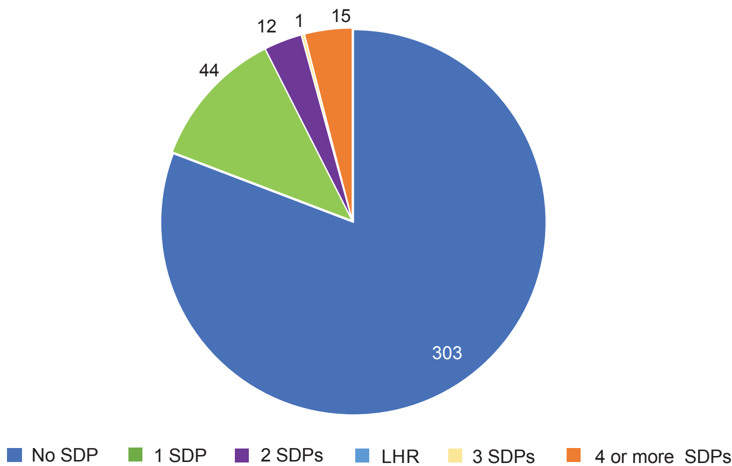
Country	No. of BITs	No. of BITs for which texts are available	No. of SDPs	GEN	ATC			ENV			LHR				TRL			TRA				NES	RBP			No. of BITs containing one or more SDPs
					DEC	AOS	AOI	NDG	CON	EXP	REF	NDG	CON	EXP	PUB	COM	ENG	PUB	HER	TPB	UTR		REF	ROS	ROI	
Brunei Darussalam	8	5	1																			1				1
India	17	17	29						6	3					2	1					2	15				17
Indonesia	42	30	2												1							1				2
Korea, Republic of	97	92	34	6				2	5						8	6		1			1	5				12
Malaysia	66	51	2	1																	1					2
Philippines	37	31	5						1	1					1	1						1				2
Singapore	47	43	36	3				1	16	6					2	1						6	1			19
Sri Lanka	26	24	8	1					1	1					1	1						3				4
Thailand	39	38	9							1			1		1	4					2					6
Viet Nam	61	44	14	3				1	1	1					4	2						2				7
Subtotal	440	375	140	14	0	0	0	4	30	13	0	0	1	0	20	16	0	1	0	0	6	34	1	0	0	72
Total				**14**	**0**			**47**			**1**				**36**			**7**				**34**	**1**			

Regarding the types and subtypes of SDP provisions, as in LDC and LLDC countries, the BITs analysed of the 10 additional countries show a higher preference for the environmental dimension of SDPs, with 34% of all SDPs being ENVs. The 10 countries also prioritized governance and national security related provisions, with TRLs accounting for 26% and NES 24% of all SDPs in the BITs analysed. Among the countries, Singapore incorporated the largest number of ENV provisions (23), while the Republic of Korea incorporated the highest number of TRL provisions (14) and India the most NES provisions (15). Regarding the subtypes of SDP provisions, of the ENV provisions, 64% were confirmations of obligation (CON) while 28% were set out exemptions of responsibilities (EXP); 56% can be categorized as publications of laws or arbitral documents (PUB), while 24% can be categorized as CON.

The additional BITs from the ten countries analysed also showed a similar pattern as those analysed in LDC and LLDC countries of the region with regard to the incorporation of social SDPs. Based on the data analysed, there appeared to be a general aversion to social SDPs. Illustrating this, of the 140 SPDs identified there was only one labour and human rights provision (Thailand), one responsible business provision (Singapore), and no anti-corruption provisions.

In terms of the distribution of SDPs in BITs similar to LDC and LLDC countries, the majority of BITs (81%) concluded in the selected countries do not contain any SDPs (figure 2.10). Only 12% contain 1 SDP provision, while only 4% contain 4 or more SDPs, and 3% contain 2.

Figure 2.10 Number of SDPs in BITs of the ten additional Asian-Pacific countries



Note: This figure only refers to BITs for which text was available.

In conclusion, the analysis of the BITs and SDPs in the BITs concluded by the ten additional countries studied supports the conclusions drawn regarding the sustainable development-orientation of BITs in LDC and LLDC countries. To this end, four broader conclusions can be drawn from both the data presented in the main study and the data in this annex. First, the number of BITs that Asia-Pacific countries have concluded do not correlate with the number of SDPs found in those BITs. Secondly, a country's level of development impacts the relative number of SDPs contained in their existing BITs. Thirdly, Asian-Pacific countries with SDP provisions place the highest priority on those related to the environmental dimension of sustainable development, and relatively little to none on those related to the social dimension. Fourthly, the number of SDPs contained in the BITs of Asian-Pacific countries is uneven. The majority contain no SDP provisions, several contain 1 provision, and only a very limited amount contains more than 1. This suggests that there is a relatively low level of sustainable development-orientation within the BITs of the Asia-Pacific region.

CHAPTER 3

STRENGTHENING COHERENCE AND SYNERGIES OF INTERNATIONAL INVESTMENT AGREEMENTS WITH NATIONAL LEGAL INVESTMENT FRAMEWORKS FOR SUSTAINABLE DEVELOPMENT: CASE STUDIES OF THAILAND AND VIET NAM[1]

by Viviane Clermont

A. Introduction

As laid out in the introduction of this volume, FDI is a key source of capital, technology and access to markets for recipient countries, and it has therefore become an invaluable mechanism for boosting developing countries' economic growth and development. With the mainstreaming of the sustainable development agenda globally recipient countries have started to prioritize increasing both the quantity and quality of FDI they attract. As was discussed in chapter 2, sustainable development-oriented IIAs can be an effective tool for helping countries achieve this; but much progress still needs to be made in terms of concluding and reforming the IIA regime in Asia-Pacific to make it more sustainable-development oriented. Aside from increasing the number and extent of sustainable development provisions in their IIAs, as suggested by the analysis in chapter 2, another avenue countries in the region could pursue to ensure that IIAs are broadly consistent with their individual sustainable development objectives and priorities would be to focus on improving FDI governance frameworks. To this end, this chapter suggests that it

1 The contents of this chapter are not intended to provide legal advice about any matter pertaining to the domestic law of Thailand or Viet Nam. It is intended for information purposes only and is not a substitute for professional legal advice.

is of paramount importance that efforts in this vein especially focus on improving the coherence, consistency and interaction between domestic and international investment governance frameworks. This refers to both domestic investment laws and regulations as well as IIAs, including BITs and TIPs.

Coherence and consistency issues have arisen because of the nature of the international investment treaty regime. In particular, there has been increased pressure on host countries to comply with and incorporate good governance standards in their domestic legal order. Incoherencies between the domestic and international investment frameworks may hinder reforms to make the IIA regime more sustainable development-oriented. To analyze the issue of coherence, as a first step this chapter identifies to what extent a body of public international law incorporating sustainable development provisions has been developed, and as a second step analyzes how this body has impacted national governance and legal framework for investment.

The ISDS system is at the heart of issues related to consistency in the IIA regime. As the number of IIAs has proliferated over the last two decades, there has also been a commensurate increase in the number of investment arbitration cases. Proposals for a global investment governance regime have been perceived as prioritizing corporate rights over the right of governments to regulate and ensure the protection of the environment, human rights, or other public interests. As result, the ISDS system has been confronted with rising criticism on its consistency, efficiency, and transparency (UNCTAD, 2017a). One of the most prominent consistency issues that has arisen is related to increasing number of discrepancies between IIA arbitral decisions versus those decisions made on the same issues at the domestic legal level. To address the ISDS system consistency related issues this chapter analyzes how the system can be reformed to ensure consistency between the arbitral decisions that are made at both the domestic and international investment governance level.

Through addressing these issues of coherence and consistency this chapter demonstrates the importance of continuing IIA reform efforts and identifies modalities to increase policy coherence and synergies between the IIA regime and domestic legal framework for investment in developing countries, with a focus on Thailand and Viet Nam. Both countries are Association of Southeast Asian Nation member countries and top investment destinations in Asia.

As BITs form the core of the international investment regime and are the source of most investment arbitration claims (Ferreira, 2017), the chapter only focuses on BITs in each country. Reviews and comparisons in this chapter are limited to sustainable development issues related to FDI within the field of international investment law. Given that the objectives of this chapter require the examination of public policy and the operation of law in diverse jurisdictions, it combines a literature review with an international comparative analysis. In the literature review, the chapter will document emerging patterns and themes related to the concepts which are an inherent part of the topic under investigation. In the comparative analysis, the chapter will compare the coherence of the two selected countries' BITs with national investment policy and regulatory frameworks. UNCTAD's policy tools for sustainable development-oriented IIA reform lay the theoretical basis for the analysis in this chapter (UNCTAD, 2017b). The information provided in this paper is not expected to be an exhaustive analysis of foreign policies and laws nor a substitute for legal advice.

The remainder of this paper is structured as follows: the next section briefly discusses the need for greater coherence of sustainable development provisions within the international investment regime; section C provides the background context of the investment and legal regimes in ASEAN, Thailand and Viet Nam; section D comparatively analyzes the coherence of sustainable development provisions of IIAs and national investment frameworks in Thailand and Viet Nam, and provides a forward-looking discussion of the results of the analysis; and finally section E provides a summary of the key takeaways from the chapter and outline for future research in these areas.

B. Coherence and synergies of IIAs for sustainable development

A system is coherent when, showing no trace of contradiction, its elements are logically related to each other (Schreuer, 2013). Coherence can be systemic or relational. The coherence of a system can take root in its logic, accuracy or fairness (Cambridge Dictionary, 2019a). However, relational coherence amounts to more than logical consistency amongst propositions. When depicted as the combined power of a group of things working together which performance is greater than the sum of the separate individual parts, such interaction is rather described as a synergy (Cambridge Dictionary, 2019b). Coherence and synergy are concepts that have special relevance in the realm of law.

Coherence of a legal system can be viewed as a unity of principle or the realization of some sort of common values (MacCormick, 1984). In comparison, policy coherence refers to mutually supportive policies, i.e. policies that complement each other rather than a matter of uniform legal language.

Prior to discussing reform of the IIA regime, there is a need to understand the nature of coherence and synergies addressed along three dimensions: within a country's IIA network, between IIAs and the national legal framework for domestic and foreign investment, and between IIAs and other bodies of international law affecting investment (UNCTAD, 2017b).

1. Coherence of a country's IIA network

The coherence of a country's IIA network may be affected by gaps and discrepancies in treaty content. The main divergences in terms of content relate to the scope of the treaty, the types and breadth of investment protections, the clarifications of key treaty obligations, approach to regulating investor responsibilities, and the way in which investment disputes are to be settled. Differences may arise among various types of IIAs depending on their area of focus, such as investment protection, investment liberalization, investment facilitation, or investment cooperation.

Academic research has revealed that a higher GDP per capita may contribute to a higher level of coherence within countries' IIA networks (Alschner and Skougarevskiy, 2016). It also revealed that the status of development of economies may determine the capacity of such economies to design IIA policy and develop a model treaty in accordance with their national preferences that reflects their investment policy priorities and objectives. The reliance on other countries' model treaties would increase the potential of undesired incoherence in terms of content, scope, and approach to investment commitments if the different model treaties are not coherent with each other in the first place (UNCTAD, 2017b).

A lack of coherence of a country's IIA network may give rise to a few policy challenges. Countries may face an increased exposure to ISDS-related risks caused by treaty shopping practices such as nationality planning, which is a practice used by investors who seek to structure their investments to ascertain the most favourable investment treaty protection. Initiating parallel dispute settlement proceedings on the same issue to take advantage of the most favourable dispute settlement provisions available in different agreements is another practice used by investors (Butler and Subedi, 2017). Countries may face difficulties in managing their IIA networks, especially smaller countries with resource limitations that have to ensure compliance with a patchy regime of different treaties and more often

than not have to agree to undesirable clauses during negotiations. In particular, uncertainty with regard to the meaning of certain IIA provisions may cause countries to face reduced predictability of ISDS outcomes (Butler and Subedi, 2017).

2. Coherence and synergy between IIAs and national legal frameworks for investment

Countries' investment policy regimes typically have both a national and an international dimension. When an IIA enters into force in a country, such instrument of international law generally becomes part of the country's domestic law. In order to comply with its obligations towards the international community, the state must develop and implement the substance of each legal obligation in its domestic legislation. However, since the level of legal obligations under IIAs often differs from those contained in national investment-related laws and regulations, gaps and possible inconsistencies between the two must be addressed to ensure coherence of the national legal investment regime, of which IIAs become an integrated part. In order to reduce those gaps and inconsistencies, cooperation between national and international investment policymakers would be required (Sevilla Albornoz, 2017).

It is important to recognize key structural and contextual differences between national and international policy dimensions in order to achieve coherence (UNCTAD, 2017b). While IIAs are the primary international instruments governing investment relations between two or more countries, national legal frameworks consist of broad systems of investment-related laws, regulations and policies, and may or may not include a national investment law. The purpose and scope of the two regimes may differ in terms of protections offered to foreign investors. For instance, while national legal frameworks may cover foreign investors from any country and even cover domestic investors, IIAs may entail additional legal obligations, depending on the countries involved, that go beyond those prevailing in the domestic legal regime. While the IIA is a result of negotiations based on bargaining power, national investment laws are formulated on the basis of internal political and legislative processes. The extent of SDG-orientation in IIAs is subject to global debate and reform approaches based on UNCTAD's frameworks, but at the national level, sustainable development considerations are not normally integrated into investment laws (UNCTAD, 2017b).

There are various challenges arising from the interaction between IIAs and the national legal framework for investment are of three kinds. For instance, working in silos may create outcomes that are not mutually supportive. Furthermore, incoherence between IIAs and national investment laws may lead to legal

confusion on the part of investors which can be exploited in a court of law. In particular, such incoherence may create ISDS-related risks and parallel proceedings (UNCTAD, 2017b).

3. Interaction between IIAs and other bodies of international law affecting investment

The legal regime for investment interacts with other areas of economic law as well as with non-economic areas of law. Areas of international law differ from each other in terms of type of regime, type of dispute settlement, and type of protection and content. While trade agreements and double taxation treaties often take the shape of bilateral agreements, human rights and environment generally take the shape of multilateral agreements. IIAs can either be based on bilateral or multilateral agreements. Some areas of law are governed by enforceable legal instruments while others adopt soft law norms. The IIA and trade regime contain litigation-type dispute settlement mechanisms while multilateral environmental agreements and double taxation treaties contain dispute prevention mechanisms. Both IIAs and some international human rights conventions allow private parties, as opposed to states, to submit direct claims to international arbitral tribunals. While some regimes govern the relationships between states and private parties, others seek to regulate policies with a view of achieving certain global objectives (UNCTAD 2017b).

Challenges resulting from the interaction between IIAs and other bodies of international law affecting investment include the reduction of regulatory space, administrative complexity, and the uncertainty about dispute settlement. Joint-interpretation treaty provisions by state parties or their joint committee may help achieve consistency across arbitral decisions, but the nature of the obligations they create remains obscure (International Bar Association, 2018). Actually, policymakers in the pursuit of important public policy objectives expose their government to ISDS-related risks. The constraint that IIAs put on policymaking may have a chilling effect on future non-investment related law-making. There are administrative difficulties for both states and investors. For states, the difficulty lies in the management of distinct but overlapping policy areas and international obligations, while for investors, it lies in the investment decisions they have to make in light of a fragmented web of national and international laws. Dispute settlement poses risks of isolated treaty interpretation, litigation of the same facts, claims or arguments before multiple fora, and uncertainty about the interpretation of non-investment related laws by ISDS tribunals (International Bar Association, 2018).

Effectively, arbitral tribunals established on an ad hoc basis do not have to make use of precedent, and therefore are likely to reach conflicting results. Given the incoherence of the international investment regime, investors can exploit differences among various IIAs or between IIAs and domestic legal provisions and launch parallel proceedings. The diversity of outcome of arbitral tribunals has not been an issue so far as it was related to commercial arbitration between private parties, i.e. not involving the state (Butler and Subedi, 2017). However, as many ISDS proceedings are conducted confidentially, the non-published awards and discrepancies in the interpretation and application of the laws when investment arbitral tribunals address matters of public policy, have attracted the attention of a greater audience (International Bar Association, 2018; Butler and Subedi, 2017).

Criticisms levelled at investment treaty arbitration concern its lack of consistency, efficiency, and transparency, which overall affects its legitimacy. Whether an ad hoc tribunal is the most appropriate mechanism to assess the validity of states' actions has often been questioned. Some aspects of investment arbitration, such as the reliance on broad legal concepts designed to be applied to a broad situation (e.g. fair and equitable treatment, full protection and security, transparency, and arbitrary and discriminatory treatment), the decentralized nature of dispute settlement mechanisms, and the newness of certain areas of international investment law tend to act as catalysts for inconsistency. Some other aspects tend to enhance inconsistency, such as when dealing with state policies and matters of public interest different arbitration tribunals address the same facts regardless of precedents and different interpretations. Catalysts or magnifiers, those aspects of investment arbitration are even more noticeable now that some arbitral decisions have been made publicly available (International Bar Association, 2018).

Several solutions have been proposed to reform the ISDS system. One solution would be to make arbitral tribunals on investment adhere to precedent, which is difficult because the roots of ISDS can be found in commercial arbitration between two private parties but ISDS is applied between an investor and a host state (Butler and Subedi, 2017). Ad hoc tribunals (similar in a number of respects to civil law courts) are not set to follow precedent as do courts in the common law tradition. The adoption of the doctrine of precedent or stare decisis could ensure that like cases be treated alike (Sureda, 2009), but would require that arbitrators follow prior cases under the same treaty and cases that are similar though under different treaties. However, such a solution could only be effective in bringing systemic consistency in countries where this notion of precedent is known, e.g. in countries sharing a common law-like legal tradition. Therefore, when it is not placed in the context of a hierarchical legal system where appeal courts can correct lower courts which is found in common law-like jurisdictions and reflecting

the common law conception, the application of the doctrine of precedent can be questioned (International Bar Association, 2018).

The inclusion of an appeals procedure is an option that would require the amendment of the ICSID Convention, which is unlikely to happen given that the ICSID Convention prescribes that “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention” (ICSID Convention, 1965). In a nutshell, the ISDS is a system that is not based on legal correctness as it provides no power to correct for error of law, short of some other errors that does give rise to annulment (ICSID Convention, 1965).

Another approach would be the establishment of a stand-alone international appellate body staffed with permanent or semi-permanent members which could consider awards rendered under the existing system, and therefore enable the development of a body of jurisprudence. Such approach would require decisions on how the new body could be made an integral part of the current ISDS regime (International Bar Association, 2018).

The introduction of preliminary rulings under investment treaties could be a sensible alternative to an appeals procedure as preliminary rulings are an interim procedure that addresses issues of inconsistency through preventive action while the original proceedings are still pending. However, the decentralized nature of ad hoc tribunals may bring its share of difficulties to the establishment of an impartial and authoritative advisory facility for preliminary rulings. (Kaufmann-Kohler, 2004)

An institutionalized solution would be the creation, through the conclusion of a widely accepted multilateral treaty, of a centralized permanent or semi-permanent international investment court (Kaufmann-Kohler, 2004). Several attempts to negotiate such a multilateral treaty have been unsuccessful, because the demand of industrialized countries for a multilateral agreement on investment to be negotiated under the auspices of either the OECD or the WTO met with resistance on the part of developing countries (Nunnenkamp and Pant, 2003). Such a solution, however, could be perceived as a loss of confidence in the current party appointment mechanism provided by the current ISDS system and raises the question of how to establish a politically acceptable alternative to balance business liberalization and legitimate social regulation by public institutions (Kaufmann-Kohler, 2004).

4. IIA reforms at different levels

Reforms of IIAs should concurrently be performed at the national, bilateral, regional, and multilateral levels given that these levels are all interdependent.

National IIA reform is crucial to harness the potential of IIAs to contribute to the sustainable development of a country but must be accompanied by domestic reform efforts geared toward improving the regulatory framework for investment. A national-level IIA reform should include a review of the country's network of IIAs, and the development of a national IIA action plan to help identify the scope and areas of reform and the policy options best suited for doing so. From there, countries will face several outcomes to decide upon, such as designing new IIA models, terminating or abandoning treaties, or addressing bottlenecks for domestic IIA implementation and IIA reform in order to reflect the strategic choices made based on the adopted national IIA action plan (UNCTAD, 2017b).

Bilateral reforms build on national-level actions to create change in the legal instruments covering the bilateral relationship as contained in BITs. A joint BIT review that assesses the impact and risks of the relationship, and identifies the reforms needed to update the BIT and make it more development-oriented, will help in the development of a plan for a joint course of action. Countries will face options such as joint interpretative statements for clarifying existing treaties, amendments to or renegotiation of existing treaties, and consensual termination of treaties upon treaty expiration or when superseded by a regional initiative involving both parties (UNCTAD, 2017b).

Regional reform builds on both national-level and bilateral-level reforms, with additional layers of complexity and greater potential for change. Regional IIA reform is an opportunity, often facilitated by regional integration organizations, to harmonize and consolidate existing investment rules in a specific region. A regional IIA reform requires a review of the IIA network (intraregional IIAs and IIAs with third parties) and content, to assess the impact and risks of the regional relationship, and identify, through the consultation with relevant stakeholders, the reforms needed. It involves the development of a plan for a joint course of action addressing the diverse alternatives such as the negotiation of new IIAs, the modernization or consolidation of existing ones, and the management of the relationship of co-existing, overlapping IIAs. It may require regulatory adjustments at the national level and the creation of new regional facilities to provide coordination and technical cooperation to ensure coherence and create synergies (UNCTAD, 2017b).

Multilateral reform builds on national-level, bilateral-level and regional-level actions, and therefore is an effort that calls for common responses from all parties involved. Multilateral IIA reform mirrors previous levels of reform with increasing intensity. It may involve multilateral guidance for the interpretation of IIA provisions, multilateral mechanisms for improving the transparency, predictability and stability of international investment law and clarifying the substance of key provisions, and multilaterally agreed guidelines for investment policymaking. Although it is far-fetched that a multilateral investment system based on a multilateral agreement would emerge at some point in the near future, this raises the issues about the institution which should oversee such a multilateral reform (UNCTAD, 2017b).

The current state of fragmentation in the governance of FDI may contribute to the confusing landscape faced by investors and governments. In that context, concerted efforts at the multilateral level could be, theoretically, an effective avenue for reforming pre-existing IIAs (UNCTAD, 2018). Making the concept of nationality largely irrelevant, a multilateral investment treaty could be an opportunity to achieve coherence and consistency through the replacement of the multitude of diverse BITs and regional treaties. In practice however, a universal or near universal agreement on investment is unlikely to happen, especially in the current global context as multilateralism is under challenge while a few countries are withdrawing from multilateral treaties. As the various paths identified are not mutually exclusive, cross-fertilization between different reform paths is what is most likely to occur with regard to the IIA regime (Schreuer, 2013).

5. Policy options to avoid conflict and maximize synergies between IIAs and national frameworks for investment

Obviously, with the achievement of the SDGs in mind, strengthening the coherence of IIA networks and maximizing synergies between national and international policies on investment in a regime composed of 3,300 investment treaties is a significant challenge for all countries, and even more for developing countries. Strengthening the coherence of IIA networks starts with the implementation of actions at the national and bilateral levels.

All these actions should be based on factual stocktaking of policy incoherence to identify priority areas for reform and specific IIA clauses in need of modernization. Reforms of investment treaties at the regional and multilateral levels may help promote the harmonization of investment rules beyond the territories covered by BITs (UNCTAD, 2017b).

Maximizing sustainable development benefits requires the strengthening of cooperation between national and international policymakers to avoid the failure of implementation of instruments that may have been formulated without establishing a common ground. It also requires the improvement of the complementarities between national and international legal investment regimes through the establishment of clear principles for inter-operationality of different elements of these regimes, and to condition investment protection on investor compliance with domestic law to minimize challenges arising from diverging or conflicting clauses. It is important to ensure that the lessons learned in one realm of policymaking benefit the other. Careful attention must be paid to the possibility of cross-fertilization between domestic investment rules and IIAs, given the key structural and contextual divide between the two regimes, to avoid making sustainable development-oriented IIA reform more challenging (UNCTAD, 2017b).

Furthermore, when addressing the interaction between IIAs and other bodies of international law in IIA reform, it is important to manage the conflict of norms emanating from such interaction through clearer drafting in IIAs of clauses that clarify how to interpret such interaction. The use of different methods such as exceptions or carve-out clauses for other policy areas, cross-referencing to indicate when exceptional measures should apply, and guiding interpretation of key treaty terms can be useful tools to improve sustainable development-oriented policy coherence (UNCTAD, 2017b).

C. Promoting coherence and synergies in the BITs of Thailand and Viet Nam

Putting assets at risk to achieve their project objectives, investors have to strategically choose their investment destinations to manage and reduce their country-risk exposure. Developing countries are increasingly entering into investment agreements and adopting measures to affect businesses' decisions in their favour to attract more FDI into their territories. As discussed in chapter 1, it is critical that countries focus on increasing both the quantity and quality of FDI they attract. To achieve this, host countries must develop coherent and effective strategies based on their specific country contexts, which will better enable them to attract and channel quality FDI into their priority sustainable development sectors.

The following section outlines the background context for understanding the investment context in the two case study countries of this chapter. Such background context is important because BITs are not concluded in a vacuum, but rather in a specific context that responds to the existing needs and challenges of countries concluding them. Since both Thailand and Viet Nam are members of ASEAN, the following subsection first provides an overview of the ASEAN investment context before turning to each of the country's respective investment context at the country level.

1. ASEAN investment and legal context

ASEAN is a regional intergovernmental organization consisting of 10 member countries, including Thailand and Viet Nam. Chiefly aiming at promoting economic growth and regional stability among its members, this economically, politically and culturally diverse organization fosters intergovernmental cooperation and facilitates economic, political, military, educational and cultural integration amongst its members and with other Asian countries.

ASEAN has become an increasingly attractive destination for FDI. Illustrating this, in 2018, it received nearly 12% of total global FDI inflows (table 3.1). Intraregional FDI forms an important component of much of the investment flows to and from ASEAN. As pointed out in chapter 1, in 2018 ASEAN was the largest recipient and second largest subregional source of intraregional investment in the Asia-Pacific region.

Table 3.1 FDI Inflows to ASEAN, 1990 versus 2019 ($ millions)

Economy	1990	2018
World	204,886	1,297,153
ASEAN	12,821	148,647
Brunei Darussalam	7	504
Cambodia	Not available	3,103
Indonesia	1,092	21,980
Lao PDR	6	1,320
Malaysia	2,611	8,091
Myanmar	225	3,554
Philippines	550	6,456
Singapore	5,575	77,646
Thailand	2,575	10,493
Viet Nam	180	15,500

Source: ESCAP calculations based on UNCTAD 2019a.

Committed to building a climate conducive for business and investment, the ASEAN member States adopted the *ASEAN Comprehensive Investment Agreement* ("ACIA") in 2009 to provide a clearer interaction between provisions pertaining to investment liberalization and protection under one single investment agreement. ACIA entered into force in 2012 and has since become the primary regional investment framework in ASEAN. Legally binding for ASEAN member States only, ACIA prescribes commitments to intensify economic cooperation between and among its members, and further enhances regional integration in order to realize a free and open investment regime where non-discriminatory treatment is extended to ASEAN and ASEAN-based investors.

ASEAN, as a distinct entity, has concluded a total of 13 IIAs (all of them being TIPs given that ASEAN has not yet entered into any BITs)[2] from which only 12 are currently in force (table 3.2). However, ASEAN member States have collectively concluded a total of 567 IIAs (359 BITs and 208 TIPs) from which only 464 (283 BITs and 181 TIPs) are currently in force. Overall, ASEAN member States have 12.39% of the signed BITs worldwide and 12.1% of the BITs in force worldwide.

Table 3.2 Total number of IIAs per ASEAN member country

Economy	BITs		TIPs		Total IIAs	
	Signed	In force	Signed	In force	Signed	In force
World	2,898	2,339	389	314	3,287	2,653
ASEAN	0	0	13	12	13	12
Brunei Darussalam	8	6	20	18	28	24
Cambodia	26	14	15	14	41	28
Indonesia	42	26	19	15	61	41
Lao PDR	23	20	16	14	39	34
Malaysia	66	54	25	22	91	76
Myanmar	10	8	15	13	25	21
Philippines	37	32	16	14	53	46
Singapore	47	39	35	31	82	70
Thailand	39	36	23	21	62	57
Viet Nam	61	48	24	19	85	67

Source: ESCAP calculations based on UNCTAD Investment Policy Hub.

2 Agreements such as the ASEAN-China Investment Agreement are part of wider frameworks, in this case the Framework Agreement on Comprehensive Economic Cooperation between China and ASEAN.

2. The investment and legal context in Thailand

Despite political uncertainty marked by frequent coups, Thailand's financial markets have remained resilient (Chomchuen and Hookway, 2014), and as a result the country has maintained a low level of economic risk and moderate levels of political and financial system risk (A.M. Best Company, Inc, 2019a). In 2018, Thailand ranked 21 (of 180) in the World Bank's Ease of Doing Business rankings, highlighting that the country is perceived as an attractive destination for foreign investors (World Bank, 2019). Despite several political and economic crises over the last two decades, inward FDI to Thailand grew from $2.575 billion in 1990 to $10.493 billion in 2018.

As a consequence of the prominent role played by French advisors, Thailand's code law was developed to model the French civil system, maintaining much of the customs and usages of the country, and including features from the British and European systems with minor borrowings from India, Japan, China, and the United States. Further to its civil law tradition, Thailand's legal system is mostly based on written law passed by its legislature. Its primary sources of law include the Constitution of the Kingdom of Thailand (which is the supreme law of the country), codified laws, acts, treaties and administration laws (Leeds, 2008). As the role of precedent is not rigid, cases are judged on their own merits. Courts can uphold their own precedents but are not bound to do so. Although judicial decisions of higher courts are not binding in principle, in practice they do exert some sort of influence on inferior courts within the same judicial hierarchy, the Dika Court being the most persuasive. As a result, Thailand may have a predominantly civil law legal system, but its source of law has strong common law influences (Darling, 1970).

As of 21 November 2019, Thailand had 62 reported IIAs worldwide (39 BITs and 23 TIPs) from which only 57 IIAs (36 BITs and 21 TIPs) are currently in force (table 3.3). Although Thailand has no specific law on investment, FDI is actively promoted in the country. The Office of the Board of Investment (BOI) is the principal government agency under the Office of the Prime Minister responsible for promoting inward and outward investment in order to enhance Thailand's competitiveness and achieve sustainable growth. The BOI also regulates the working privileges for foreign experts and skilled workers. The Foreign Business Act, which regulates foreign ownership of certain Thai industries and foreign companies, reserves specific activities for Thai nationals and limits foreigners in their ability to engage in these activities (Government of Thailand, 1999). Investment incentives are set forth in the Investment Promotion Act (Government of Thailand, 1977) The Industrial Estate Authority of Thailand (IEAT) (Government of Thailand, 1977) is the authority in charge of matters related to the acquisition of land, conclusion of long-term leases, the establishment of factories, the acquisition of the relevant permits and licenses,

and the realization of incentives in industrial estates. Thailand has been a member of WTO since 1 January 1995, and a member of the General Agreement on Tariffs and Trade ("GATT") since 20 November 1982.

Table 3.3 BITs concluded between Thailand and partner countries

No.	Partner	Status	Date of signature	Date of entry into force
1	Argentina	In force	18/02/2000	07/03/2002
2	Bahrain	In force	21/05/2002	17/07/2002
3	Bangladesh	In force	09/06/2002	12/01/2003
4	BLEU (Belgium-Luxembourg Economic Union)	In force	12/06/2002	19/09/2004
5	Bulgaria	In force	11/09/2003	12/08/2004
6	Cambodia	In force	29/03/1995	16/04/1997
7	Canada	In force	17/01/1997	24/09/1998
8	China	In force	12/03/1985	13/12/1985
9	Croatia	In force	18/02/2000	10/08/2005
10	Czech Republic	In force	12/02/1994	04/05/1995
11	Egypt	In force	18/02/2000	27/02/2002
12	Finland	In force	18/03/1994	18/05/1996
13	Germany	In force	24/06/2002	20/10/2004
14	Hong Kong, China SAR	In force	19/11/2005	18/04/2006
15	Hungary	In force	18/10/1991	18/10/1991
16	Indonesia	In force	17/02/1998	05/11/1998
17	Israel	In force	18/02/2000	28/08/2003
18	Jordan	In force	15/12/2005	08/06/2012
19	Korea, Democratic People's Republic of	In force	01/03/2002	24/05/2002
20	Korea, Republic of	In force	24/03/1989	30/09/1989
21	Lao PDR	In force	22/08/1990	07/12/1990
22	Myanmar	In force	14/03/2008	08/06/2012
23	Netherlands	In force	06/06/1972	03/03/1973
24	Peru	In force	15/11/1991	15/11/1991
25	Philippines	In force	30/09/1995	06/09/1996
26	Poland	In force	18/12/1992	10/08/1993
27	Romania	In force	30/04/1993	20/08/1994
28	Russian Federation	Signed (not in force)	17/10/2002	
29	Slovenia	In force	18/02/2000	20/10/2002
30	Sri Lanka	In force	03/01/1996	14/05/1996
31	Sweden	In force	18/02/2000	23/11/2000
32	Switzerland	In force	17/11/1997	21/07/1999
33	Taiwan Province of China	In force	30/04/1996	30/04/1996
34	Tajikistan	Signed (not in force)	09/08/2005	
35	Turkey	In force	24/06/2005	21/07/2010
36	United Arab Emirates	In force	23/02/2015	16/12/2016
37	United Kingdom	In force	28/11/1978	11/08/1979
38	Viet Nam	In force	30/10/1991	07/02/1992
39	Zimbabwe	Signed (not in force)	18/02/2000	

Source: ESCAP based on UNCTAD Investment Policy Hub.

3. The investment and legal context in Viet Nam

Over the last two decades and since shifting to a market economy with socialist orientation, Viet Nam has increasingly liberalized investment and become an attractive destination for FDI. Illustrating this, inward FDI jumped from a mere $180 million in 1990 to $15.5 billion in 2018. Ever since the entry into force of key laws on enterprise and investment in 2015, i.e. *Law on Investment*, Viet Nam's legal landscape for doing business has changed significantly. Nonetheless, continued improvements in the business and investment environment are still needed. In 2019 the country dropped 1 ranking in the World Bank's Ease of Doing Business Rankings to 70 (of 180) (World Bank, 2019). In particular, the country still needs to make improvements on issues related to insolvency for the private sector.

Viet Nam's legal system has been influenced by the Chinese legal system, the French civil law system and the Soviet communist legal ideology (Tri Uc, 2003). Viet Nam's process to accept legal concepts, legal norms and institutions is also influenced by the regulations of international organizations such as the WTO. Modern Viet Nam is a unitary republic with a strong central government. Its political system vests exclusive power in the Communist Party of Viet Nam (Government of Viet Nam, 2013).

The Vietnamese Constitution created the foundation and framework of Viet Nam's current legal system. Given the absence of separation of powers, there exists no line boundary between legislative and executive powers, and therefore the law cannot conflict with the Party's policy (Phan Thi 2014). The concept of source of law in Viet Nam, as defined in The Law on Promulgation of Normative Documents, finds its foundation in legal normative documents (issued by competent agencies as prescribed by laws), which have different hierarchical legal validity (Government of Viet Nam, 2015). According to the list of legal normative documents, legislation is the most important source of law in Viet Nam. The Vietnamese Constitution, being the supreme law, has the highest legal validit (Phan Thi, 2014). Judicial decisions are not defined as normative documents, and therefore are not source of law in Viet Nam. However, serving as guidelines, the circulars issued by the Chief Justice of the Supreme People's Court have a binding effect on lower courts and government authorities (Government of Viet Nam, 2015). Customary regulations are not source of law in Viet Nam as they are not defined as such. In practice, customary regulations may become source of law when the law says so (Phan Thi, 2014). If not contrary to the Constitution of Viet Nam, international treaties also require formal consent to in order for them to become source of law in Viet Nam (Phan Thi, 2014).

As of 21 November 2019, Viet Nam had 85 reported IIAs worldwide (61 BITs and 24 TIPs) from which only 67 IIAs (48 BITs and 19 TIPs) are currently in force (table 3.4). Party to 85 IIAs, Viet Nam offers investment protection to investors coming from a higher number of home countries than Thailand does.

Table 3.4 BITs between Viet Nam and partner countries

No.	Partner	Status	Date of signature	Date of entry into force
1	Algeria	Signed (not in force)	21/10/1996	
2	Argentina	In force	03/06/1996	01/06/1997
3	Armenia	Signed (not in force)	01/02/1993	
4	Austria	In force	27/03/1995	01/10/1996
5	Bangladesh	Signed (not in force)	01/05/2005	
6	Belarus	In force	08/07/1992	24/11/1994
7	BLEU (Belgium-Luxembourg Economic Union)	In force	24/01/1991	11/06/1999
8	Bulgaria	In force	19/09/1996	15/05/1998
9	Cambodia	In force	01/09/2001	24/10/2005
10	Chile	Signed (not in force)	16/09/1999	
11	China	In force	02/12/1992	01/09/1993
12	Cuba	In force	12/10/1995	01/10/1996
13	Czech Republic	In force	25/11/1997	09/07/1998
14	Denmark	In force	23/07/1993	07/08/1994
15	Egypt	In force	06/09/1997	04/03/2002
16	Estonia	In force	24/09/2009	11/02/2012
17	Finland	In force	21/02/2008	04/06/2009
18	France	In force	26/05/1992	10/08/1994
19	Germany	In force	03/04/1993	19/09/1998
20	Greece	In force	13/10/2008	08/12/2011
21	Hungary	In force	26/08/1994	16/06/1995
22	Iceland	In force	20/09/2002	10/07/2003
23	Iran, Islamic Republic of	In force	23/03/2009	19/03/2011
24	Italy	In force	18/05/1990	06/05/1994
25	Japan	In force	14/11/2003	19/12/2004
26	Kazakhstan	In force	15/09/2009	07/04/2014
27	Korea, Democratic People's Republic of	Signed (not in force)	02/05/2002	
28	Korea, Republic of	In force	15/09/2003	05/06/2004
29	Kuwait	In force	23/05/2007	16/03/2011
30	Lao PDR	In force	14/01/1996	23/06/1996
31	Latvia	In force	06/11/1995	20/02/1996
32	Lithuania	In force	27/09/1995	24/04/2003
33	Malaysia	In force	21/01/1992	09/10/1992
34	Mongolia	In force	17/04/2000	13/12/2001
35	Morocco	Signed (not in force)	15/06/2012	
36	Mozambique	In force	16/01/2007	29/05/2007
37	Myanmar	Signed (not in force)	15/02/2000	
38	Namibia	Signed (not in force)	30/05/2003	01/02/1995
39	Netherlands	In force	10/03/1994	11/01/2016
40	North Macedonia	In force	15/10/2014	
41	Oman	Signed (not in force)	10/01/2011	
42	Philippines	In force	27/02/1992	29/01/1993
43	Poland	In force	31/08/1994	24/11/1994
44	Romania	In force	15/09/1994	16/08/1995
45	Russian Federation	In force	16/06/1994	03/07/1996

Table 3.4 *(continued)*

No.	Partner	Status	Date of signature	Date of entry into force
46	Singapore	In force	29/10/1992	25/12/1992
47	Slovakia	In force	17/12/2009	18/08/2011
48	Spain	In force	20/02/2006	29/07/2011
49	Sri Lanka	Signed (not in force)	22/10/2009	
50	Sweden	In force	08/09/1993	02/08/1994
51	Switzerland	In force	03/07/1992	03/12/1992
52	Taiwan Province of China	In force	21/04/1993	23/04/1993
53	Tajikistan	Signed (not in force)	19/01/1999	
54	Thailand	In force	30/10/1991	07/02/1992
55	Turkey	Signed (not in force)	15/01/2014	
56	Ukraine	In force	08/06/1994	08/12/1994
57	United Arab Emirates	Signed (not in force)	16/02/2009	
58	United Kingdom	In force	01/08/2002	01/08/2002
59	Uruguay	In force	12/05/2009	09/09/2012
60	Uzbekistan	In force	28/03/1996	06/03/1998
61	Venezuela, Bolivarian Republic of	In force	20/11/2008	17/06/2009

Source: ESCAP based on UNCTAD Investment Policy Hub.

D. Overview of the IIA networks and their sustainability orientation in Thailand and Viet Nam in the ASEAN context

This section highlights the level of sustainable development provisions in BITs of Thailand and Viet Nam in the context of ASEAN. ASEAN, as a distinct entity, has not yet entered into any BITs, and therefore has not yet any direct or indirect references to sustainable development to be accounted for at the bilateral level. Therefore, only the BITs that have been concluded individually by ASEAN member countries are referred to below in order to draw comparisons on their level of sustainable development orientation.

Table 3.5 shows that among all BITs concluded globally, direct references in preambles to the right to regulate (e.g. regulatory autonomy, policy space, flexibility to introduce new regulations), to sustainable development (e.g. concept of sustainable development), to social investment aspects (e.g. human rights, labour, health, CSR and poverty reduction) and environmental aspects (e.g. plant or animal life, biodiversity and climate change) have been reported in 30, 55, 195 and 123 signed BITs, respectively, out of which only 16, 39, 158, and 96 respectively are currently in force. In comparison, direct references in preambles of TIPs to the right to regulate, to sustainable development, to social investment aspects and environmental aspects have been reported worldwide in 14, 23, 18 and 18 signed TIPs, respectively, from which only 9, 16, 11 and 14 respectively are currently in force.

Table 3.5 BITS of ASEAN member countries with direct references to sustainable development in preamble provisions

Economy	Right to regulate		Sustainable development		Social investment aspects		Environmental aspects		Score - BITs containing direct references to sustainable development*	
	Signed	In force	Signed	In force	Signed	In force	Signed	In force	Signed	In force
World	30	16	55	39	195	158	123	96	403	309
Brunei Darussalam	0	0	0	0	0	0	0	0	0	0
Cambodia	0	0	0	0	2	1	2	1	4	2
Indonesia	0	0	0	0	0	0	0	0	0	0
Lao PDR	0	0	0	0	1	1	1	1	2	2
Malaysia	0	0	0	0	1	1	0	0	1	1
Myanmar	0	0	0	0	2	2	2	2	4	4
Philippines	0	0	0	0	0	0	0	0	0	0
Singapore	0	0	1	0	1	1	0	0	1	1
Thailand	0	0	0	0	0	0	0	0	0	0
Viet Nam	0	0	0	0	3	3	2	2	5	5

Source: ESCAP calculations based on UNCTAD's Investment Policy Hub.
*Includes double counted BITs.

Table 3.5 also shows that most of the BITs of the ASEAN member States present little or no direct references to dimensions of sustainable development in their preamble. Among ASEAN member States' BITs, there is no reference to the right to regulate. Singapore is the only ASEAN member State that has one BIT (with Nigeria) that explicitly refers to sustainable development, but this BIT has not yet entered into force. With 11 BITs in force (including the three BITs that Viet Nam is party to with Estonia, Finland and Japan) presenting direct references to social investment aspects in their preamble, social investment aspects seem to be a little more frequent in ASEAN member States' BITs than the other types of direct references. Direct references to environmental aspects are only present in six ASEAN member States' BITs in force. One common denominator, Japan is the main partner country to ASEAN member States whose BITs present direct references to social investment aspects (4) or environmental aspects (4), including Viet Nam for both social investment and environmental aspects. Finland is the partner country to the second BIT in force concluded by Viet Nam. For the time being, Brunei Darussalam, Indonesia, Philippines and Thailand are the only ASEAN member States that have no direct reference to any of the dimensions of sustainable development.

With regard to the six aspects of sustainable development found in BITs' operative provisions assessed in table 3.6, ASEAN member States' BITs seem to make little or no reference to labour standards, the right to regulate, CSR, and "not lowering of standards". As of 21 November 2019, Singapore was the only ASEAN member State party to BITs that had at least one reference to all the aspects of sustainable development assessed, its highest numbers of references being for the right to regulate (13), and health and environment aspects (12). Thailand is party to one BIT with Bahrain which contains a reference to the right to regulate. Only Myanmar (with Japan) and Thailand (with Canada) are party to BITs in force with reference to labour standards. References to CSR are not yet a trend in the region as only the Singapore-Nigeria BIT, which is not yet in force, contains such reference. With three, Viet Nam is party to BITs presenting the most references to aspects of transparency. Thailand is a little behind with two BITs with such references. The only three member States presenting no BITs with references to aspects of transparency are Brunei Darussalam, Indonesia and Malaysia. Viet Nam is party to one BIT in force (with Japan) bearing a reference to "not lowering of standards", but Thailand currently presents no such reference.

Table 3.6 BITs of ASEAN member countries with indirect references to sustainable development in operative provisions

Economy	Transparency directed at States		Health and environment		Labour standards		Right to regulate		Corporate social responsibility		Not lowering of standards		Score -BITs containing indirect references to sustainable development*	
	Signed	In force	Signed	In force	Signed	In force	Signed	In force	Signed	In force	Signed	In force	Signed	In force
World	311	273	255	186	89	61	104	76	27	15	92	64	878	675
Brunei Darussalam	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Cambodia	2	2	3	2	0	0	1	1	0	0	1	1	7	6
Indonesia	0	0	1	1	0	0	0	0	0	0	0	0	1	1
Lao PDR	2	2	2	2	0	0	0	0	0	0	1	1	5	5
Malaysia	0	0	1	1	0	0	0	0	0	0	0	0	1	1
Myanmar	2	2	3	3	1	1	0	0	0	0	1	1	7	7
Philippines	2	2	1	1	0	0	1	1	0	0	0	0	4	4
Singapore	2	1	14	12	1	0	13	13	1	0	1	0	24	18
Thailand	2	2	2	2	1	1	1	1	0	0	0	0	6	6
Viet Nam	3	3	2	1	0	0	0	0	0	0	1	1	6	5

Source: ESCAP calculations based on UNCTAD's Investment Policy Hub.
*Includes double-counted BITs.

Safeguards can be included in IIAs to balance the interests of investors and governments. Table 3.7 displays the total number of BITs presenting indirect references to four types of exceptions to sustainable development dimensions as set forth in operative provisions. With a score of 39 signed BITs and 32 BITs in force, Singapore is the ASEAN member State that is party to the most BITs containing references to exceptions to sustainable development dimensions (mainly 15 BITs containing a reference to an essential security exception, and 17 to public policy exceptions related to health and environment). Both with four BITs presenting such references to an essential security exception, Malaysia and Myanmar are parties to one BIT more than Cambodia, Lao PDR and Viet Nam are. Among the three BITs with references to an essential security exception Viet Nam has concluded and implemented, one of them is with Japan. Thailand has no such reference. Its BIT in force containing a reference to public policy exception related to health and environment and a reference to other public policy exceptions was concluded with Canada.

Table 3.7 BITs of ASEAN member countries with references to exceptions to dimensions of sustainable development in operative provisions

Economy	Essential security exception included		Essential security exception defined		Public policy exception – health and environment		Other public policy exceptions		Score – BITs containing indirect references to exceptions of sustainable development*	
	Signed	In force	Signed	In force	Signed	In force	Signed	In force	Signed	In force
World	287	237	117	91	187	141	192	159	783	628
Brunei Darussalam	1	1	0	0	0	0	0	0	1	1
Cambodia	3	2	2	1	3	2	0	0	8	5
Indonesia	1	1	0	0	1	1	0	0	2	2
Lao PDR	3	2	2	1	2	2	2	1	9	6
Malaysia	1	1	0	0	1	1	1	1	3	3
Myanmar	4	4	2	2	2	2	2	2	10	10
Philippines	4	4	1	1	1	1	2	2	8	8
Singapore	15	13	3	2	17	15	4	2	39	32
Thailand	0	0	0	0	1	1	2	1	3	2
Viet Nam	3	3	2	2	2	2	2	2	9	9

Source: ESCAP calculations based on UNCTAD's Investment Policy Hub.
*Includes double-counted BITs.

With regard to the five ISDS features assessed in table 3.8, references to aspects of transparency in arbitral proceedings such as the documents to be made publicly available, hearings to be open to the public and *amicus curiae* submissions to arbitral tribunal by third parties were absent from current provisions in BITs that ASEAN member States are a party to. In descending order, Malaysia, Viet Nam, Singapore and Thailand have the largest number of BITs in force referring to ISDS (36, 34, 33 and 30 respectively), which may increase these countries' ISDS-related risks. The BITs in force that Viet Nam is party to contain the most references to UNCITRAL as an ISDS forum option in their operative provisions (30). Thailand is second with 16 BITs, followed by Malaysia with 15 and Singapore with 14.

Table 3.8 BITs of ASEAN member countries with references to elements related to ISDS in operative provisions

Economy	ISDS		UNCITRAL		Transparency requires documents to be made publicly available		Transparency requires hearings to be open to the public		Transparency regulates *amicus curiae* submissions by third parties		Overall occurrence of indirect references to elements related to ISDS*	
	Signed	In force	Signed	In force	Signed	In force	Signed	In force	Signed	In force	Signed	In force
World	2,180	1,873	1,452	1,216	37	32	29	23	28	24	3,726	3,168
Brunei Darussalam	5	3	2	2	0	0	0	0	0	0	7	5
Cambodia	18	14	14	10	0	0	0	0	0	0	32	24
Indonesia	27	20	9	7	0	0	0	0	0	0	36	27
Lao PDR	17	16	10	9	0	0	0	0	0	0	27	25
Malaysia	38	36	15	15	0	0	0	0	0	0	53	51
Myanmar	7	7	6	6	0	0	0	0	0	0	13	13
Philippines	29	26	12	10	0	0	0	0	0	0	41	36
Singapore	35	33	16	14	0	0	0	0	0	0	51	47
Thailand	32	30	18	16	0	0	0	0	0	0	50	46
Viet Nam	39	34	34	30	0	0	0	0	0	0	73	64

Source: ESCAP calculations based on UNCTAD Investment Policy Hub.
*Includes double-counted BITs

Table 3.9 below shows that the inclusion of ISDS provisions in BITs has opened the door to the filing of 983 reported ISDS[3] cases worldwide since the inception of the ISDS system. Of these 983 ISDS reported cases, 953 have been filed during the past 20 years, including 655 in the past ten years alone.

Table 3.9 Total annual arbitration proceedings initiated, arbitral decisions issued, and follow-on decisions issued from 1987 to 2019

Date	Arbitrations initiated*	Arbitral decisions issued	Follow-on decisions issued
2019	31	52	12
2018	76	68	22
2017	75	78	15
2016	75	66	23
2015	85	65	13
2014	59	67	17
2013	69	59	17
2012	55	59	14
2011	54	31	13
2010	35	53	17
2009	41	45	6
2008	39	40	5
2007	44	40	10
2006	27	39	6
2005	40	23	6
2004	42	22	1
2003	38	18	3
2002	25	17	6
2001	16	15	1
2000	13	16	1
1999	14	6	N/A
1998	11	5	N/A
1997	7	3	N/A
1996	6	1	N/A
1995	2	1	N/A
1994	2	1	N/A
1993	1	0	N/A
1992	0	0	N/A
1991	0	0	N/A
1990	0	1	N/A
1989	0	N/A	N/A
1988	0	N/A	N/A
1987	1	N/A	N/A

Source: ESCAP calculations based on UNCTAD's Investment Policy Hub.
*This number does not take into account fully confidential investment arbitration cases.

3 This number of ISDS cases does not take into account fully confidential investment arbitration cases.

Of the 983 reported ISDS cases, table 3.10 below displays the 30 cases where ASEAN member countries are recorded as the respondent States (which represent 3.05% of the overall ISDS cases). As of 31 July 2019, Viet Nam, Indonesia and the Philippines (the three countries often considered as the most promising growth spot in ASEAN) took the lead in terms of the number of ISDS cases recorded as the respondent State with eight, seven and five cases respectively. The home states of the investors involved in the eight cases in which Viet Nam is the respondent state are France (two cases), Netherlands (two cases), the Republic of Korea (one case), the United Kingdom (one case), and the United States (two cases). Brunei Darussalam, Cambodia and Singapore are the only ASEAN member States that have not yet been reported as having been tried before an arbitral tribunal as a respondent state. Among the ASEAN countries that have the lowest rate of ISDS cases filed are Myanmar and Thailand with only one and two cases respectively. Thailand is the respondent state in one case involving Australia and another one involving Germany as home states of the investors making the claims before arbitral tribunals.

Table 3.10 Cumulative number of ISDS cases filed involving ASEAN member countries

Economy	Total ISDS cases*	Pending	Decided	Settled	Discontinued	Unknown
World	983	332	435	139	73	4
Brunei Darussalam	No cases available					
Cambodia	No cases available					
Indonesia	7	0	4	1	2	0
Lao PDR	4	3	0	1	0	0
Malaysia	3	0	2	1	0	0
Myanmar	1	0	1	0	0	0
Philippines	5	1	3	1	0	0
Singapore	0	0	0	0	0	0
Thailand	2	1	1	0	0	0
Viet Nam	8	2	4	1	1	0

Source: ESCAP based on UNCTAD Investment Policy Hub.
*This number does not take into account fully confidential investment arbitration cases.

1. Validity of IIAs in Thailand and Viet Nam

Before examining mechanisms that can enhance IIA networks coherence and maximize their synergies with national frameworks, it is important to know whether a country's IIA provisions for the pursuit of sustainable development are normatively valid and whether they have entered or not into their national framework for investment.

Treaties may enter into domestic law only when valid and enforceable. Table 3.11 below presents a list of the current BITs that Thailand and Viet Nam have signed but are not yet in force in either country. Building off of table 3.2 above, table 3.11 reveals that Thailand is party to BITs that have been signed with Zimbabwe, the Russian Federation and Tajikistan in 2000, 2002 and 2005 respectively that are not yet in force; and that Viet Nam is party to 13 BITs that have been signed from 1993 to 2014 but are not yet in force. These numbers indicate that most signed BITs of both Thailand and Viet Nam that are not yet in force have been considerably delayed in their ratification process and may therefore not become part of their domestic law.

Table 3.11 BITs concluded by Thailand and Viet Nam not yet in force

No.	Economy	Partner	Date of signature
1	Thailand	Tajikistan	09/08/2005
2	Thailand	Russian Federation	17/10/2002
3	Thailand	Zimbabwe	18/02/2000
4	Viet Nam	Turkey	15/01/2014
5	Viet Nam	Morocco	15/06/2012
6	Viet Nam	Oman	10/01/2011
7	Viet Nam	Sri Lanka	22/10/2009
8	Viet Nam	United Arab Emirates	16/02/2009
9	Viet Nam	Bangladesh	01/05/2005
10	Viet Nam	Namibia	30/05/2003
11	Viet Nam	Korea, Democratic People's Republic	02/05/2002
12	Viet Nam	Myanmar	15/02/2000
13	Viet Nam	Chile	16/09/1999
14	Viet Nam	Tajikistan	19/01/1999
15	Viet Nam	Algeria	21/10/1996
16	Viet Nam	Armenia	01/02/1993

Source: ESCAP based on UNCTAD Investment Policy Hub.

2. Applicability of Thailand and Viet Nam's IIAs[4]

This subsection first showcases a non-exhaustive compilation of provisions regarding the legal basis of IIAs made and entered into by the two countries and then examines to what extent treaty provisions are embedded in their national laws. More specifically, it explores whether valid treaty norms enter automatically into the respective domestic laws of Thailand and Viet Nam through a general device provided by a constitutional provision or require the adoption of a special legislative device explaining the mechanism for their implementation. This comparative analysis serves then as a basis for comparing the coherence between the BIT network in Thailand and Viet Nam with their respective national framework on investment from a sustainable development perspective.

The Thai constitution (section 178) provides that the King has the royal prerogative to conclude treaties with other countries or international organizations, including treaties on matters of foreign investment (Government of Thailand, 2017). As stipulated under section 178, treaties that have wide scale effects on investment of the country must obtain approval by Thailand's National Assembly during a joint sitting called for that purpose. However, in the event that Thailand's National Assembly does not complete its consideration of the treaty for approval within the timeframe provided by law, there is a legal presumption that Thailand's National Assembly has given approval. Pursuant to the Thai constitution (section 5), treaties shall not be contrary to the constitution, which is the supreme law of the State of Thailand. (Government of Thailand, 2017).

In virtue of the Vietnamese constitution, the President is authorized to decide on the negotiation and conclusion of treaties in the name of the State. The Government of Viet Nam has, among other powers, the competence to negotiate and conclude treaties in the name of the State as authorized by the President and in the name of the Government where the law provides for it. (Government of Thailand, 2017)

4 It should be noted that there is no guarantee that provisions set out in this compilation accurately reproduce an officially adopted text, or that this compilation is comprehensive, complete or up to date. The reader is advised in all cases to consult the official source of the full text as originally adopted in their official language. Furthermore, the content of this subsection does not provide legal advice about any matter pertaining to the domestic law of Thailand and Viet Nam. It is intended for information purposes only and is not a substitute for professional legal advice.

The Prime Minister of Viet Nam may decide on and direct the negotiation, conclusion, ratification, and implementation of treaties within the ambit and powers of the Government. The National Assembly of Viet Nam has the power to decide on and ratify treaties in specific situations. (Government of Thailand, 2017)

The Vietnamese constitution also stipulates that Viet Nam abides by its commitments with regard to the international community, including the Charter of the United Nations, to which it was admitted as a member on 15 November 1977, and is bound to obligations to which it has agreed in treaties with other nations. Pursuant to the Vietnamese constitution, the National Assembly of Viet Nam promulgated the Law on Treaties, which contains provisions with regard to the conclusion of treaties on matters related to socio-economic development, financial and monetary issues. Treaties in relation to socio-economic development, financial and monetary issues must be ratified. In order to be enforceable, treaties shall not be contrary to the Vietnamese constitution. (Government of Viet Nam, 1969)

Pursuant to the Vietnamese constitution, the deputies of the National Assembly are entitled to make laws regarding the implementation of treaties, and requirements for socio-economic development and assurance of human rights (Government of Viet Nam, 1969).

For both Thailand and Viet Nam, some constitutional and legislative provisions may not have been adopted in the English language. Where an English translation has been published by a legislative, judicial or governmental body in the country concerned, that translation was provided.

When determining foreign law, domestic courts may consider any relevant material or source of law. While domestic courts must give respectful consideration to a foreign government's interpretation of their own law, they are not bound to defer to that position. One reason is that the way foreign law is enforced by domestic courts entirely depends on the constitution and law of each country. Both Thailand and Viet Nam follow a civil law legal tradition. Given that the source of law of civil law legal systems is principally from the law, general principles of international law can serve as guidance for tribunals but will not have a direct effect on Thai law and Vietnamese law, nor prevail in case of inconsistent legislation.

The Vietnamese constitution stipulates that Viet Nam abides to the United Nations Charter and international treaties for which it is a contracting party (Government of Viet Nam, 1969). It also prescribes that the National Assembly of Viet Nam is authorized by law to make laws implementing the requirements contained in international treaties (Government of Viet Nam, 2016). In the case of both Thailand

and Viet Nam, there is no specific legal provision that mandates that international law has to be regarded as part of national law. A commitment of these two countries to be bound to other countries through international treaties does not seem to directly alter their respective domestic law. In the case of Viet Nam, its constitution does not consider that treaties create rights or obligations under national law unless they have been given effect by Parliament (Government of Viet Nam, 1969). The Vietnamese constitution does not specify the type of device required for attributing normative applicability of international treaties to matters related to socio-economic development. In the case of Thailand, the compilation is not exhaustive enough to provide information about the need or not of a device to attribute normative applicability to international treaties on matters related to trade or investment by its Assembly during consideration for approval (Government of Viet Nam, 1969). In the event that no other constitutional documents provide clarification on this matter, treaty law on investment when strictly normatively valid just exists notwithstanding any domestic laws on that matter and creates a binding effect upon states only. Treaty provisions inconsistent with the Thai or Vietnamese constitution are nevertheless unenforceable in domestic law.

Treaties that provide for matters related to trade or investment must be approved by Thailand's National Assembly. However, in the event that Thailand's National Assembly does not complete its consideration of the treaty for approval within the timeframe provided by law, there is a legal presumption that Thailand's National Assembly has given approval. This situation may give normative validity to treaty provisions without making them applicable in the national legal order.

With regard to transparency provisions, why they are not embedded in Thailand and Viet Nam's IIAs is not in connection with their normative applicability. The data regarding the number of BITs that are not yet in force in the two countries and the other ASEAN member States altogether are unveiling why references to the transparency element of ISDS have not yet been integrated in most of their new BITs. While Thailand' three BITs not yet in force are old treaties concluded before 2010, Viet Nam's 13 BITs include 10 old treaties and only three treaties considered as new ones. But all of Viet Nam's new BITs have been signed prior to the adoption of the Mauritius Convention on Transparency, which aims to facilitate the application of the 2014 UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. Both Thailand and Viet Nam may have the option to incorporate such transparency feature in the design of their future IIAs. Once treaty provisions are applicable in the domestic legal order, it is necessary to look at their hierarchy in the domestic order and the rules to resolve the conflict they can have with other norms emanating from the domestic laws. This is where sustainable development may face issues before arbitral tribunals.

3. Overview of the IIA networks and their mechanisms to enhance coherence and maximize synergies with national frameworks for investment in Thailand and Viet Nam

This subsection presents various mechanisms to enhance the coherence of IIAs and other mechanisms to maximize the synergies with national framework for investment.

Table 3.12 displays a low number of BITs referring to mechanisms for the consolidation of claims, for provisional or interim measures, or for treaty interpretation. More particularly, the mechanism for treaty interpretation by renvoi, which provides for the referral of certain questions to the contracting parties or their joint body for interpretation, is not yet a trend among ASEAN member States. Viet Nam (BIT with the Republic of Korea) as well as Philippines', Singapore's and Indonesia's BITs show a light preference for treaty interpretation by joint committee which may issue joint interpretations binding on the arbitral tribunal. The only two BITs in force presenting a mechanism for the consolidation of claims arising out of the same events or circumstances are the Singapore-Mexico and Viet Nam-Republic of Korea ones.

Table 3.12 BITs with references to other specific ISDS features in their operative provisions

Economy	Consolidation of claims		Provisional or interim measures		Treaty interpretation by joint committee		Treaty interpretation by renvoi		Score - BITs containing references to other specific ISDS features*	
	Signed	In force	Signed	In force	Signed	In force	Signed	In force	Signed	In force
World	57	49	73	67	104	93	31	29	265	238
Brunei Darussalam	0	0	0	0	0	0	0	0	0	0
Cambodia	0	0	1	1	0	0	0	0	1	1
Indonesia	0	0	0	0	1	1	0	0	1	1
Lao PDR	0	0	1	1	0	0	0	0	1	1
Malaysia	0	0	0	0	0	0	0	0	0	0
Myanmar	0	0	1	1	0	0	0	0	1	1
Philippines	0	0	1	1	2	2	0	0	3	3
Singapore	3	1	2	1	2	2	0	0	7	4
Thailand	0	0	0	0	0	0	0	0	0	0
Viet Nam	1	1	0	0	1	1	0	0	2	2

Source: ESCAP calculations based on UNCTAD Investment Policy Hub.
* Includes double-counted BITs.

Table 3.13 demonstrates that BITs that ASEAN member countries are party to contain more references to mechanisms for consultations between state parties than the other types of mechanisms aiming at dealing with institutional issues such as institutional framework committee mechanisms and technical cooperation and capacity building mechanisms for the implementation of agreements. In descending order, Philippines, Indonesia, Thailand and Viet Nam with 17, 14, 11, 10 respectively are the ASEAN member States party to the most BITs presenting such references. With two BITs, Viet Nam is the ASEAN member State which is party to the greatest number of BITs containing such reference to technical cooperation and capacity building. Given that the BIT with Mongolia is not yet in force, Viet Nam's current partner country to the BIT in force is Switzerland. Thailand's BITs as well as the BITs of Brunei Darussalam, Cambodia, Indonesia, Lao PDR and Myanmar do not yet present such references.

Table 3.13 BITs of ASEAN member countries with references to mechanisms that deal with institutional issues in their operative provisions

Economy	Mechanism for consultations between State parties		Institutional framework committee		Technical cooperation / capacity building		Score - BITs containing references to mechanisms to deal with institutional issues*	
	Signed	In force	Signed	In force	Signed	In force	Signed	In force
World	776	668	177	165	64	93	1,017	926
Brunei Darussalam	1	0	0	0	0	0	1	0
Cambodia	6	4	1	1	0	0	7	5
Indonesia	20	14	0	0	0	0	20	14
Lao PDR	6	5	2	2	0	0	8	7
Malaysia	3	3	1	1	1	1	5	5
Myanmar	5	5	2	2	0	0	7	7
Philippines	18	17	0	0	1	1	19	18
Singapore	4	3	2	2	1	1	7	6
Thailand	11	11	1	1	0	0	12	12
Viet Nam	13	10	2	2	2	2	17	14

Source: ESCAP calculations based on UNCTAD Investment Policy Hub.
*Includes double-counted BITs.

4. Comparative analysis of the coherence of sustainable development provisions in IIAs and national framework for investment in Thailand and Viet Nam

Both Thailand and Viet Nam use IIAs as their primary international instrument to govern foreign investment. While Viet Nam's national legal framework for investment includes a national investment law, Thailand's national legal framework for investment relies on a multitude of investment-related laws rather than on a single national investment law. For the purpose of this analysis, the Thailand's investment-related laws considered are the *Foreign Business Act* and *Investment Promotion Act*. Given that Viet Nam's national legal framework for investment includes a national investment law, its *Law on Investment* is the one that is considered in this analysis.

Although both Thailand and Viet Nam may have sustainable development goals of their own, the BITs they are party to do not present much sustainable development provisions with direct reference to dimensions of sustainable development. In fact, the BITs that Thailand is party to have no such reference. Viet Nam only has three BITs with references to social investment aspects and two BITs with references to environmental aspects. Viet Nam's *Law on investment* does not make any references to dimensions of sustainable development, and therefore, though possibly inconsistent in their formulation, no contradictions can be noted. Thailand's *Foreign Business Act* is silent regarding post-establishment investment protection. It is to be noted that Thailand's *Foreign Business Act* (Government of Thailand, 1999) contains one provision making sustainable development an objective to be observed in granting permission to foreigners for the operation of a business:

> **Section 5.** In granting permission to foreigners for the operation of business under this Act, regard shall be had to advantageous and disadvantageous effects on national safety and security, economic and social development of the country, public order or good morals, national values in arts, culture, traditions and customs, natural resources conservation, energy, environmental preservation, consumer protection, sizes of undertakings, employment, technology transfer and research and development.

The *Investment Promotion* Act also provides (in section 16) for making sustainable development an investment pre-establishment condition of eligibility to be attained in order for investment promotion to be granted to an applicant to a promotion certificate under this act:

> **Section 16.** Business undertakings eligible for investment promotion granted by the Board shall be those which are important and beneficial to the economy, social, and security of the country; involve production for export; have high content of capital, labour or services; or utilize agricultural produces or natural resources as raw materials, and where the Board deems that those business undertakings are non-existent, or inadequate in the Kingdom or using out-of-date production processes.

The *Investment Promotion Act* (Government of Thailand, 1977) further provides (in section 19) for the selection of investment projects that can prevent harmful effects on the environmental quality and the livelihood of the public:

> **Section 19.** Investment projects, to which the Board may grant the promotion, shall be those which incorporate appropriate measures to prevent and control harmful effects on environmental quality, for the benefits of livelihood of the public and sustenance of human-being and nature.

Thailand's BITs present references to aspects related to transparency directed at state, aspects of health and environment, aspects related to labour standards and the right to regulate in its operative provisions. Both *Thailand's Foreign Business Act* and *Investment Promotion Act* are silent on these matters. Viet Nam's BITs present references to aspects related to transparency directed at state, aspects of health and environment, and "not lowering standards" clause. However, Viet Nam's *Law on investment* is silent about these aspects, and therefore an inconsistency can be noted for both Thailand and Viet Nam.[5]

Thailand's BITs contain references to public policy exception with regard to health and environment, but no essential security exception, and therefore another inconsistency can be noted for Thailand. However, *the Investment Promotion Act* (Government of Thailand, 1977) stipulates in sections 46 and 47 exceptional measures that can be taken in case of necessity for the economy, social (purposes) and security of the country.

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5 However, it should be noted that the absence of such does not necessarily mean they are inconsistent but, rather, complementary in the sense that there are no contradictions.

> **Section 46.** The State shall not impose price controls on products or commodities of the promoted business undertakings, except in case of necessity for the economy, social and security of the country. In no case shall the controlled prices be lower than those which deemed appropriate by the Board.
>
> **Section 47.** The promoted person shall be granted permission to export at all times products or commodities of the promoted business undertakings, except in case of necessity for the economy, social and security of the country.

Balancing the rights of a promoted person with the rights of the Board to regulate, Thailand's *Investment Promotion Act* (Government of Thailand, 1977) stipulates the consequences of violation or non-compliance with the conditions of the Board:

> **Section 54.** Where a promoted person violates or fails to comply with the conditions stipulated by the Board, the Board shall have the power to withdraw the rights and benefits, in whole or in part, granted to that promoted person and may also prescribe length of time thereof.
>
> If the Board deems that such violation or failure to comply with the conditions by the promoted person is unintentional, the Board may instruct the Office to send a written warning to the promoted person to make corrections or comply with the conditions within a specified period first. If, after the expiration of such period, the promoted person fails to make corrections or comply with conditions without reasonable justification, the Board shall take actions as specified in paragraph one.

Viet Nam's BITs contain a few references to exceptions to sustainable development, but its *Law on Investment* is silent on exceptions to essential security, public policy exception related to health and environment, and other public policy exception referred to in its BIT network. However as for Thailand, Viet Nam's *Law on Investment* provides in article 73 for actions that can be taken against any entity or person that violates the Law, including persons acting on behalf of the state:

> **Article 73. Actions against violations**
>
> 1. Any entity that violates this Law shall face disciplinary actions, administrative penalties, or criminal prosecution depending on nature and severity of the violations and pay compensation for any damage caused.

2. Any person that misuse his/her power to obstruct investment activities, harass investors, or fails to perform their duties as prescribed by law shall face disciplinary actions or criminal prosecution depending on nature and severity of the violations.

Both Thailand's and Viet Nam's BITs contain references to ISDS. However, both Thailand's and Viet Nam' laws assessed in this analysis do not make any such references, and therefore present possible inconsistencies.[6]

Both Thailand's and Viet Nam's BITs contain references to the applicable norm when the domestic legal order provides for more favourable norms. However, only Viet Nam's *Law on Investment* stipulates in its article 4 about the hierarchy between the norms emanating from the treaty and the ones from the *Law on Investment*:

> Article 4. Application of the *Law on Investment*, relevant laws and international agreements
>
> 1. Investments made within Vietnam's territory must comply with this Law and relevant laws.
>
> 2. Where regulations on banned business lines, conditional business lines, or investment procedures in this Law and other laws are inconsistent, regulations of this Law shall apply, except for investment procedures prescribed in the Law on Securities, the Law of credit institution, the Law on Insurance, and the Law on Petroleum.
>
> 3. Where regulations of this Law and those of an international agreement to which the Socialist Republic of Vietnam is a signatory are inconsistent, the latter shall apply.
>
> 4. With regard to any contract to which at least a party is a foreign investor or a business organization defined in Clause 1 Article 23 of this Law, the parties to which may reach an agreement on whether to apply foreign laws or international practice if such agreement does not contravene Vietnam's laws.

6 Again, the absence of such does not necessarily mean they are inconsistent but, rather, complementary in the sense that there are no contradictions.

Viet Nam's *Law on Investment* provides an exception to the obligation for compliance to it in the case where international agreements that Viet Nam is party to provide for something that is inconsistent with the *Law on Investment*. In such a situation, if not contrary to the constitution of Viet Nam, the international agreements norms must prevail. This is coherent with the IIA provisions on that matter.

As a result, the conclusion of the 39 and 61 BITs to which Thailand and Viet Nam are respectively party to, evidences their strong interest for economic growth through the attraction of FDI. Both Thailand and Viet Nam seem to use their BITs and national legal framework for investment for the main purpose of investment protection and promotion. This means that for the time being, they do not use their BITs and national legal framework for investment as principal instruments to pursue sustainable development goals.

Both countries present inconsistencies between their IIAs and their national legal framework for investment, but such inconsistencies do not necessarily make their investment system incompatible with their IIA network. The inconsistencies may be used as a strategy to attract more investment However, given that both countries' IIA network present not many exceptions for measures for the protection of public interest, but do contains ISDS provisions, the two countries may increase their exposure to ISDS-related risk related to social or environmental regulations that may be challenged by investors.

5. Summary and discussion of the comparative analysis

The automatic incorporation of ratified treaties by constitutional provision is the general device used for domestic implementation without legislative action beyond ratification. Ratification requires special legislation to give domestic effect to treaties. Most IIAs stipulate that their provisions only become legally binding when given effect by Parliament. But for both Thailand and Viet Nam, through a reading of the compilation of constitutional and legislative provisions discussed in the previous subsection, it is unclear whether the normative effects of treaties they are engaged in are direct after ratification or require special legislation after ratification.

In order to ensure that treaty norms do not undermine legitimate sustainable development objectives of countries, it has become more common to include references to sustainable development in the preamble of IIAs. The explicit reference to features of sustainable development in preambles of BITs ASEAN member States are party to is a very recent trend. Such features have mainly focused on social investment aspects and, in a few cases, on environmental aspects, such as in the case of Viet Nam but not Thailand. This indeed stands

in stark contrast to the results of chapter 2's analysis which found environmental provisions to be more widespread than social provisions in the BITs of Asia-Pacific LDCs and LLDCs.

Indirect references to aspects of sustainable development in operative provisions of Thailand and Viet Nam's BITs are just a little more frequent than direct references in their BITs' preamble, but do not concern transparency in ISDS provisions in any possible way. Viet Nam's BITs' provisions contain just a few more indirect references than those of Thailand in relation to exceptions to aspects of the dimensions of sustainable development.

In order to pursue legal coherence, both Thailand and Viet Nam need to review all the IIAs they are party to as they both have a number of old BITs remaining in force and coexisting with new-generation BITs concluded since 2010. Those old-generation BITs in force concluded prior to 2010 present a high potential of exposure for Thailand and Viet Nam to ISDS-related risks. Actually, they perpetuate inconsistencies as their continued existence creates overlaps and fragmentation in treaty relationships and interaction challenges. Negotiating new improved treaties and modernizing the existing ones may help both Thailand and Viet Nam to reflect their evolving policy preferences, in particular with regard to sustainable development. However, both Thailand and Viet Nam may not use their IIA network and national legal framework for investment as an instrument to declare their sustainable development goals given that their national legal framework for investment is even less explicit than their IIAs on that matter.

Having no obligatory force, concluded BITs that remain unratified are unlikely to enter into force when facing domestic political opposition (Rogoff and Gauditz, 1987). Both Thailand and Viet Nam could abandon their unratified BITs to replace them with new-generation BITs if they wanted to formally declare their decision not to be bound by them. Keeping them may have an impact on foreign investors' decisions to invest in Thailand or Viet Nam based on the option to challenge policies on the basis of clauses contained in the unratified BITs. Therefore, provided that Thailand and Viet Nam comply with the procedural provisions of their agreements, abandoning or keeping unratified BITs is a political decision to be made at their sole discretion. However, unratified BITs may create legitimate expectations on the part of prospective foreign investors that a country will not take any actions inconsistent with its signed treaties before their entry into force or their abandonment.

It is still too early to assess the effectiveness of the innovative language introduced in the new-generation BITs of Thailand and Viet Nam. However, the non-reference

to various aspects related to sustainable development in the preamble and operative provisions of their BITs may expose them in the future to ISDS-related risks as their respective needs in investment develop. As a result, the risks may be a little higher for Viet Nam, whose economy is at an earlier stage of development than the one of Thailand.

The adoption of appropriate implementation measures at the national level allows for the transformation, through primary or secondary legislation, of international investment law into domestic law if accordingly provided for by constitutional provisions or special legislation. The analysis presented in this chapter has found that how treaty norms enter into the national legal order may influence the rank of treaty norms with national norms related to sustainable development and create incoherence intentionally or not. Both Thailand and Viet Nam should investigate how substantive standards and dispute settlement mechanisms set forth in their BITs may impact on the development and implementation of their domestic investment, social and environmental laws.

Thailand and Viet Nam have domestic laws with regard to the protection of their respective public good. Somehow, having joined ACIA and other IIAs may have had an impact on the enforcement of some ASEAN member States' domestic rights. Both Thailand and Viet Nam should investigate whether there are discrepancies between ASEAN member States' domestic rights and policies adopted to achieve their sustainable development goals on one hand and their legal obligations under IIAs on the other hand. As a body of jurisprudence may form about investment disputes under ACIA, this event could raise the question of whether customary regional investment law is a source of law in ASEAN, and if so whether it is compatible with ASEAN member States' national laws and sustainable development policies.

Finally, turning to ISDS issues, while references to aspects of sustainable development are minimal in IIAs, their appearance in ISDS cases is expected to continue to increase for human rights. Presenting little to no exceptions for security or public policy, Thailand and Viet Nam's BITs containing ISDS provisions may increase these two countries' exposure to ISDS-related risks related to social or environmental regulation that may be challenged by investors. The higher the exposure to ISDS-related risks, the more the risks may have a chilling effect on these two countries environmental regulation.

IIAs are prone to inconsistent arbitration jurisprudence because of the multiple dispute settlement mechanisms and the variety of adjudicative bodies they provide for. The question of whether the current types of dispute settlement institutions

are appropriate is not new. Already reported as a source of major concerns in 2012, the lack of legitimacy, transparency, and consistency, erroneous decisions, and the system for arbitrator appointment and financial stakes remain very current concerns regarding ISDS arbitration (UNCTAD, 2013). The new language introduced in IIAs has yet to be tested in ISDS proceedings to see how arbitrators may interpret them (UNCTAD, 2019c). A country's legal tradition may influence how arbitrators interpret BITs' sustainable development provisions or absence of sustainable provisions in ISDS proceedings. Given that both Thailand and Viet Nam's cultivate a civil law legal tradition, arbitral tribunals deciding on cases involving Thailand or Viet Nam may even less consider themselves bound to uphold their own precedents or the ones from other arbitral tribunals.

E. Conclusions

The extent to which investment delivers sustainable development benefits matters. In support of this assumption, the SDGs explicitly call for quality investment to support sustainable development. In this regard, attracting investments to a specific region requires the establishment of an investment climate that incentivizes predictability, stability and transparency of investment relations. Appropriate policies can create the enabling environment for the promotion and facilitation of sustainable development-oriented investment. The absence of a well-designed investment regime has the potential to create systemic incoherence that may limit the impact of the investment, but may also increase the exposure of government to ISDS-related risks and parallel proceedings, and therefore reduces the capacity of sovereign states to regulate in the public interest. The reconceptualization of investment treaties as instruments to promote sustainable development-oriented investment will be possible only if sustainable development objectives enter into the normative framework of IIAs.

The intent of this chapter was to explore the internal coherence of IIA networks for the pursuit of sustainable development objectives of two developing countries in South-East Asia, as well as the coherence and synergies between their IIAs and respective national regulatory framework for domestic and foreign investment. To this end, the chapter compared the international investment regimes of Thailand and Viet Nam with regard to their internal coherence with their respective IIA networks. The central question addressed in the chapter was whether the IIA networks of Thailand and Viet Nam are coherent with their respective national laws on investment for the purpose of achieving sustainable development. The comparative analysis demonstrated that there are inconsistencies between the IIA network in both countries and their national laws on investment, but their

international investment regime is not necessarily incompatible with their national legal order at the present moment.
The evolution of the IIA regime has opened the door for investors to directly file claims against host governments for alleged violation of the investment treaty between their home and host country. Worldwide, as indicated before, claims against host states involving environmental or human rights issues are on the rise. With increasing growth, both Thailand and Viet Nam need to approach this matter ahead of time. Given that ensuring more inclusive and environmentally sustainable growth presents a key challenge for the ASEAN region, both Thailand and Viet Nam may have to make strategic choices when reviewing their treaty networks and design their future IIA regimes. They may also have to adopt appropriate implementation measures at the national level to allow for an efficient transformation of international investment law into domestic law.

An additional issue explored in this chapter was whether a new multilateral investment system in the form of a multilateral investment agreement institutionalizing investment protection at the international level could be a useful mechanism to strengthen coherence and consistencies among individual IIAs and could help forge coherence and complementarities of the international investment regime with national investment policies and regulations to attract sustainable development-oriented investment and reduce the number of investments that have adverse effects on the local environment and communities. To this end, a multilateral investment agreement would be relevant to reform the current IIA regime to increase its coherence and consistency, but the formulation of such an agreement would face considerable challenges.

This chapter revealed that the reconceptualization of IIAs as instruments to promote sustainable development-oriented investment requires the entry of sustainable development provisions into the normative framework of investment treaties. In the quest of promoting and facilitating investment, treaty design must provide for an appropriate balance between the interests of foreign investors and the right of governments to regulate in the public interest. On top of that, in order to make IIAs contribute to achieving sustainable development goals, it is important to put in place policies that are tailored to the specific needs of each country.

The mere fact of the efficacy of the conception and formulation of IIAs does not guarantee market outcome or positive development impacts of the investment (UNCTAD, 2015a). IIAs cannot substitute for sound domestic policies and regulatory and institutional frameworks seeking to maximize positive development impacts and minimize associated risks of investment by safeguarding public interests in politically sensitive sectors (UNCTAD, 2015b). The design, formulation, and

functionality of treaty provisions may nevertheless have various implications for the nature of the obligations they create, and the nature of the investment they help to attract and facilitate in a specific territory. Therefore, countries should diligently assess their respective national situations and identify their sustainable development challenges prior to designing their new investment treaties or redesigning their existing stock of IIAs. Such assessment could help ensure coherence of IIAs with their respective areas of public interest and align their overall investment regime with their sustainable development agenda. The integration of provisions referring directly or indirectly to the diverse aspects of sustainable development may help a shift towards the rebalancing of rights and responsibilities of states and investors in the interest of sustainable development.

Policy clarity, predictability and stability are necessary to provide adequate protection to established foreign investors and their investments. They also play an important role in the reduction of institutional gaps that allow investors to challenge core domestic policy decisions, and the reduction of unanticipated interpretations by arbitral tribunals. Among the different solutions to reform the ISDS system, it was proposed to, concurrently or separately, make arbitral tribunals on investment adhere to precedent, to include an appeals procedure, to establish a stand-alone international appellate body staffed with permanent or semi-permanent members, to introduce preliminary rulings as an alternative to an appeals procedure, or to create, through the conclusion of a widely accepted multilateral treaty, a centralized permanent or semi-permanent international investment court. Although a single integrated multilateral investment regime seems the most potentially effective remedy for reforming pre-existing IIAs, it also appears, at least for the time being, unattainable in the current global context.

As the various paths identified for reforming the IIA regime are not mutually exclusive, countries should formulate policy action plans involving cross-fertilization between different reform paths to increase their potential outcome. The IIA reform is important to make them contribute to, or at least not hinder, the achievement of the country’s sustainable development goals by balancing the rights and obligations of states and investors. It is also important to increase awareness among nation states (in their role as respondents) and tribunals (in their role as interpreters and adjudicators) about the sustainable development dimensions of FDI and the challenges they bring about. In a nutshell, coherence in the investment regime must be in formulation, in approach, and in enforcement.

Competition among developing countries for FDI from developed countries may have driven the regionalization of investment arrangements in South-East Asia. The entry into force of the ACIA in March 2012 is relatively recent. Time will

tell whether ACIA is the adequate instrument to attract and facilitate investments of ASEAN and ASEAN-based investors in order to realize a free and open investment regime among and between ASEAN member States.

The analysis conducted in this chapter contributes to the current understanding of the coherence between the IIA networks of Thailand and Viet Nam with their national frameworks on investment. Should discrepancies be found between ASEAN member States' practice and ASEAN sustainable development treaty provisions, this situation could exacerbate complexities in the international investment regime and have an impact on the prospect of coherence and convergence towards multilateralism. Therefore, future research should look at the extent to which the IIA networks of the other ASEAN member States together with the ones of Thailand and Viet Nam have produced a coherent body of public regional law, and if that is the case, whether it can contribute to the achievement of greater sustainable development in the region and improve national governance. Given the central pillar of South-East Asian regionalism, i.e. its principle of non-interference in domestic matters of neighbouring states, further research on the legal basis for the contribution of national jurisprudence to the development of regional law could be required.

References

Alschner, W. and D. Skougarevskiy (2016). Mapping the Universe of International Investment Agreements. *Journal of International Economic Law*, pp. 561–588.

Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between the People's Republic of China and the Association of Southeast Asian Nations (also known as "ASEAN-China Investment Agreement), signed in Bangkok on 15 August 2009.

A.M. Best Company, Inc. (2019). Best's Country Risk Report: Thailand CRT-3. 22 August. Available at http://www3.ambest.com/ratings/cr/reports/thailand.pdf.

ASEAN Comprehensive Investment Agreement, signed in Cha-am on 26 February 2009, entered into force on 29 March 2012.

Association of Southeast Asian Nations. *ASEAN Investment Area (AIA) Council*. Available at https://asean.org/asean-economic-community/asean-investment-area-aia-council/#.

Butler, N. and S. Subedi (2017). The Future of International Investment Regulation: Towards a World Investment Organisation?. *Netherlands International Law Review*, vol. 64, No. 1, pp. 43–72.

Cambridge Dictionary (2019a). Consistency. Cambridge University Press. Available at https://dictionary.cambridge.org/dictionary/english/consistency.

_______(2019b). Synergy. Cambridge University Press. Available at https://dictionary.cambridge.org/dictionary/english/synergy.

Chomchuen, W. and J. Hookway (2014). Thailand Military Declares a Coup: Army Detains Ministers and Faction Leaders, Imposes Curfew, Orders Protests to Disband. *The Wall Street Journal*, 22 May. Available at https://www.wsj.com/articles/thailand-prepares-for-a-second-day-of-political-talks-1400733692.

Dao, T. U. (2003). Vietnam: Basic Information for Legal Research - A Case Study of Vietnam. In *Doing Legal Research in Asian Countries China, India, Malaysia, Philippines, Thailand, Vietnam. Institute of Developing Economies - Japan External Trade Organization, vol. 23,* pp. 195–228.

Darling, F. C. (1970). The Evolution of Law in Thailand. *The Review of Politics*, vol. 32, No. 2 (April), pp. 197–218.

Ferreira, A. (2017). How and Why Does Sustainable Development Influence International Investment Law in the Current Globalization Era. Compatibility or Irreconcilability?. *Doctoral thesis*, Barcelona: Universitat Ramon Llull. Available at https://www.tdx.cat/handle/10803/456675.

Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic of China, signed in Phnom Penh on 4 November 2002.

General Agreement on Tariffs and Trade, signed in Geneva on 30 October 1947, entered into force on 1 January 1948.

ICSID Convention, adopted on 18 March 1965, entered into force on 14 October 1966.

International Bar Association (2018). Consistency, Efficiency and Transparency in Investment Treaty Arbitration. *IBA Arbitration Subcommittee on Investment Treaty Arbitration*, November.

International Monetary Fund (2019). IMF Executive Board Concluded 2019 Article IV Consultation with Thailand. *Press release no. 19/364*, 7 October. Available at https://www.imf.org/en/News/Articles/2019/10/07/pr19364-thailand-imf-executive-board-concludes-2019-article-iv-consultation-with-thailand.

Kaufmann-Kohler, G. (2004). Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?. In *Annulment of ICSID Awards: A New Investment Protection Regime in Treaty Arbitration*, E. Gaillard and Y. Banifatemi, eds. Huntington: Juris Publishing.

_______(2005). In search of transparency and consistency: ICSID Reform Proposal, *TDM*, vol. 2, No. 5.

Leeds, J. (2008). Introduction to the Legal System and Legal Research of the Kingdom of Thailand. *GlobaLex*, published by the Hauser Global Law School Program at NYU School of Law, November/December) Available at https://www.nyulawglobal.org/globalex/Thailand.html.

MacCormick, N. (1984). "Coherence in Legal Justification", In *Theory of Legal Science*. A. Peczenik, L. Lindahl and B. Van Roermund, eds. Dordrecht: D. Reidel Publishing, pp. 235–251.

Muchlinski, P. T. (2000). The Rise and Fall of the Multilateral Agreement on Investment: Where Now?. *The International Lawyer*, vo. 34, No. 3 (Fall). Foreign Law Year in Review. pp. 1033–1053.

Nunnenkamp, P. and M. Pant (2003). Why the Case for a Multilateral Agreement on Investment Is Weak. Kiel Institute for the World Economy. Kiel Discussion Paper, No. 400.

Phan Thi, L. H. *Overview of the Vietnamese Legal System*. Available at https://www.academia.edu/7325321/OVERVIEW_OF_THE_VIETNAMESE_LEGAL_SYSTEM.

_______(2014). The Role of Vietnamese Government in Legislation – In Comparison with Japan. Nagoya University Center for Asian Legal Exchange, CALE Discussion Paper, No. 11 (September).

Rigo Sureda, A. (2009). Precedent in Investment Treaty Arbitration. In *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. C. Binder, U. Kriebaum, A. Reinisch and S. Wittich, eds. Oxford: Oxford University Press.

Schreuer, C. (2013). Coherence and consistency in International Investment Law. In *From and Uneven International Investment Regime Towards a Coherent International Investment System: the Way Forward*. R. Echandi and P. Sauvé, eds. New York: Cambridge University Press, pp. 391–402.

Sevilla Albornoz, C. A. (2017). Can Foreign Investors Be Held Liable for Human Rights Violations? International Human Rights Law and Beyond. *Investment Treaty News*, 26 September. Available at https://www.iisd.org/itn/2017/09/26/can-foreign-investors-be-held-liable-for-human-rights-violations-international-human-rights-law-and-beyond-carlos-andres-sevilla-albornoz/.

Thailand, Constitution of the Kingdom of Thailand, B.E. 2560, enacted on 6 April 2017 (Unofficial translation)

_______, Foreign Business Act, B.E. 2542 (1999), adopted on 24 November 1999, published in *Government Gazette* on 4 December 1999, vol. 116, Part 123a (Unofficial translation).

_______, Industrial Estate Authority of Thailand Act, B.E. 2522 (1979), adopted on 19 March 1979, as last amended by Industrial Estate Authority of Thailand Act (No. 4), B.E. 2550 (2007).

_______, Investment Promotion Act, B.E. 2520 (1977), adopted on 29 April 1977, published in the *Government Gazette* on 04 May 1977, vol. 94, Part 3, Special Issue, p. 1 (Unofficial translation pending review and approval).

Thailand Board of Investment. What We Do. BOI. Available at https://www.boi.go.th/index.php?page=what_we_do2.

UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, adopted on 16 December 2013, entered into force on 1 April 2014.

United Nations Conference on Trade and Development (2013), *World Investment Report 2013 - Global Value Chains: Investment and Trade for Development*, (27 June). New York and Geneva: United Nations publication.

_______(2015a). *Investment Policy Framework for Sustainable Development*. Prepared by a team led by J. Zhan. UNCTAD/DIAE/PCB/2015/5, Geneva: United Nations Publication. Available at https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

_______(2015b). *World Investment Report 2015 – Reforming International Investment Governance*. Geneva: United Nations Publication.

_______(2017a). Improving Investment Dispute Settlement: UNCTAD Policy Tools. *UNCTAD IIA Issues Note*, Issue 4 (November). Available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d8_en.pdf.

_______(2017b). *UNCTAD's Reform Package for the International Investment Regime*. 2018 Edition (November), New York and Geneva: United Nations Publication. Available at https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-.

_______(2018). UN Upgrades International Investment Rules Reform Package. 25 October. Available at https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1899.

_______(2019a). Foreign Direct Investment: Inward and Outward flows and Stock, Annual. UNCTADstat, 16 August. Available at https://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=96740.

_______(2019b). IIAs by Economy. *Investment Policy Hub*, 21 November. Available at https://investmentpolicy.unctad.org/international-investment-agreements/by-economy.

_______(2019c). Investment Dispute Settlement Navigator. *Investment Policy Hub*, 31 August. Available at https://investmentpolicy.unctad.org/investment-dispute-settlement.

_______(2019d) Mapping of IIA Content. *Investment Policy Hub*, 21 November. Available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping#section-1.

_______(2019e). Taking Stock of IIA Reform: Recent Developments. *IIA Issues Note*, Issue 3 (June). Available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf.

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (also known as the "Mauritius Convention on Transparency"), adopted in New York on 10 December 2014, entered into force on 18 October 2017.

United Nations ESCAP (2018). *Asia-Pacific Trade and Investment Report 2018 – Recent Trends and Developments*. Bangkok: United Nations publication.

Viet Nam, Law on Investment, Law No. 67/2014/QH13, adopted on 26 November 2014, entered into effect on 1 July 2015.

_______, Law on Promulgation of Normative Documents, No. 80/2015/QH13, adopted on 22 June 2015, entered into force on 1 July 2016 (Unofficial translation).

_______, Law on Treaties, No. 108/2016/QH13, adopted on 9 April 2016 by the XIIIth National Assembly of the Socialist Republic of Vietnam at its 11th session, entered into force on 1 July 2016 (Unofficial translation).

_______, The Constitution of the Socialist Republic of Vietnam (2013), adopted on 28 November 2013, promulgated on 8 December 2013, Order No. 18/2013/L-CTN.

World Bank (2019). Doing Business 2019: *Training for Reform*. 16th Edition. Washington, D.C.: International Bank for Reconstruction and Development / The World Bank.

World Bank Group (2019). *Key Features of Common Law or Civil Law Systems*. 9 September. Available at https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law.

ISBN: 978-92-1-120802-3