Preferential Trade and Investment Agreements: From Recalibration to Reintegration

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To assert the dynamic nature of international investment law may have become almost a commonplace. Case law is the obvious motor of development: during the last two decades in particular, awards by arbitral tribunals have redrawn the map of investment law and at times pushed its boundaries, at times prompting criticism of 'arbitral activism'. However, arbitral practice interpreting and applying the existing law is not the only source of dynamism. Equally dynamic are processes of law-making, and notably the complex manner in which States define and redefine the law governing investments abroad. One notable development in this context is the increasingly frequent conclusion of Preferential Trade and Investment Agreements (PTIAs) that complement traditional bilateral investment treaties (BITs) and combine investment and trade rules. It is this source of dynamism that the contributions to the present book evaluate.

For a long time, investment and trade were addressed in separate legal regimes. While the regulation of international trade was organized multilaterally (first in the General Agreement on Tariffs and Trade, then in the World Trade Organization (WTO)), substantive rules on investment protection were typically enshrined in bilateral treaties. For a considerable period of time, investment treaties followed the model of the 'mother of all BITs', the *Draft Convention on Investments Abroad* presented by Herman Joseph Abs, then Chairman of Deutsche Bank, and Lord Hartley Shawcross, a former British Attorney-General and then Director of Shell Petroleum Company.[1] From the first-ever BIT concluded between Germany and Pakistan in 1959, fairly succinct provisions would limit the right of States to take foreign property and enshrine a number of general standards of protection. From the late 1960s onwards, these substantive provisions would be complemented by procedures for direct recourse to international arbi-

1 Initially published in (1960) 9 Journal of Public Law 116-118, available in Christian J Tams and Christian Tietje (eds), *Documents in International Economic Law. Trade – Investment – Finance* (OUP 2012) 358-360. The Abs-Shawcross Draft heavily influenced the 1967 OECD Draft Convention on the Protection of Foreign Property, (1963) 2 ILM 241-267, which in turn influenced the model treaties of most OECD countries. For background and references see Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 35-40.

tration.[2] The model was appealing in its brevity and sufficiently open (with the benefit of hindsight, some might say: perhaps too open) to be flexibly applied.

Over the course of the last few years, however, the texts of international investment agreements (IIAs) have become more diverse. Traditional BITs are still being concluded, but many are becoming more detailed and nuanced. What is more, investment rules are no longer exclusively to be found in narrow, single-issue BITs but increasingly often embedded in PTIAs that regulate trade and investment and their interaction with common concerns, such as environmental protection or labor standards. This development is part of a general trend towards an "increasing complexity of international investment law."[3] It requires investment lawyers to move beyond traditional certainties and to ask anew what central elements hold their increasingly complex field of law together, whether it may be time to move beyond traditional forms of governance, and whether the gap between investment and trade can be bridged. The present book is an attempt to explore these new uncertainties. The analysis proceeds from the formal sources of law, but moves beyond them to look at actors and processes that influence the development of international investment law and its interaction with other areas of global governance. On that basis, the increasing complexity of investment law can be confronted analytically, and the crucial questions it raises addressed.

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The rise of PTIAs and their way of combining investment and trade rules is closely connected to the ongoing debates about the backlash against investment law and arbitration[4] and the 'recalibration' of investment treaties. 'Recalibration' is a convenient umbrella concept that can be used to describe a range of modifications of the traditional sources of international investment law in response to criticism of the system based on its (real or perceived) preference for investment over non-investment concerns.[5] Beginning with the 2004 US Model Treaty,[6]

2 For a clear summary of the historic development see Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009) 41-57.

3 cf Stephan W Schill and Marc Jacob, 'Trends in International Investment Agreements, 2010-2011: The Increasing Complexity of International Investment Law' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2011/2012* (OUP 2013) 141.

4 Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds), *The Backlash Against Investment Arbitration* (Kluwer Law International 2010).

5 José Alvarez, 'Why are We "Re-calibrating" our Investment Treaties?' (2010) 4 World Arbitration & Mediation Review 143.

contemporary BITs have sought to rebalance rights and obligations of foreign investors through changes in treaty language, omission of certain standards of protection, and restrictions on investor-State dispute settlement.[7]

Beyond treaty-drafting, States, arbitrators, NGOs, and scholars of international investment law have reconsidered the balance to be struck between investment protection and competing (non-investment) concerns and between private rights and public interests – including those enshrined in general international law[8] and other international legal regimes.[9] These debates have typically emphasized the embeddedness of investment law in the broader international legal framework and highlighted the concept of systemic integration, which could help balance investment and non-investment concerns.[10] In addition, important debates have exposed international investment law to (partly destructive, partly constructive) public law approaches that stress the critical potential of analogies between international investment law and arbitration, on the one hand, and (domestic and international) public law adjudication, on the other.[11]

Taken together, the different strands of the recalibration debate have confronted investment lawyers with concepts and approaches developed in general international law, other specialised international legal disciplines, and domestic public law. As befits confrontations with 'the other', these exchanges have exposed frictions and differences, but also opened up perspectives for fruitful

6 Reprinted in Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration* (OUP 2007) 393.

7 Peter Muchlinski, 'Trends in International Investment Agreements: Balancing Investor Rights and the Right to Regulate the Issue of National Security' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2008/2009* (OUP 2009) 35, 36-50. See also Peter Muchlinski, 'Trends in International Investment Agreements, 2008/2009: Review of the Model Bilateral Investment Treaties of Norway, South Africa and the United States' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2009/2010* (OUP 2010) 41, 55-85 (focusing on the development of new model investment treaties); Edward G Kehoe and Paul B Maslo, 'Trends in International Investment Agreements, 2009/2010: Recent Steps in the Evolution of Bilateral Investment Treaties and the UNCITRAL Arbitration Rules' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2010/2011* (OUP 2011) 37 (focusing on the renegotiation of existing investment treaties).

8 See eg the contributions to Rainer Hofmann and Christian J Tams (eds), *Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos 2011).

9 For a recent conspectus see Rainer Hofmann and Christian J Tams (eds), *International Investment Law and Its Others* (Nomos 2012).

10 See also Campbell McLachlan, 'Investment Treaties and General International Law' (2008) 57 Int'l & Comp L Quart 361-401.

11 See Stephan W Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 EJIL 875, 894 et seq (for a review of the relevant literature).

cross-fertilization. The inclusion of investment rules in PTIAs is no exception to this development.

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While the process of recalibration in the sense just outlined continues, it is increasingly flanked by related developments. Among them the move towards PTIAs – which forms the subject of the subsequent analysis – would seem to be of particular relevance. UNCTAD's *World Investment Report 2012*[12] brings out clearly that the BIT (whether traditional or recalibrated, succinct or detailed) is losing its status as the exclusive instrument of international investment law. International investment protection is no longer achieved through self-standing investment protection treaties only, but increasingly based on (in UNCTAD's terminology) "other IIAs". Many of these "other IIAs" combine provisions on investment protection and investment liberalization with rules on the trade in goods and services, often in the context of systems of regional integration that function as IIAs among members, but that also become actors in investment treaty making themselves. The *World Investment Report 2012* describes the trend in the following terms:

> By the end of 2011, the overall IIA universe consisted of 3,164 agreements, which included 2,833 BITs and 331 "other IIAs". In quantitative terms, bilateral agreements still dominate international investment policymaking; however, in terms of economic significance, there has been a gradual shift towards regionalism.[13]

The proliferation of PTIAs is a relatively recent phenomenon. While some older treaties exist, the number of PTIAs has surged since the 1990s, following the adoption of the North-American Free Trade Agreement (NAFTA)[14] (see table on the next page). Crucially (and complicating the analysis) PTIAs, while characteristically combining trade and investment rules in a single agreement, are not based on one single treaty model but come in different variations, Again, the point is made clearly in the *World Investment Report 2012*:

> "Other IIAs", which include agreements such as free trade agreements or economic partnership agreements, continue to fall into one of three categories: IIAs including obligations commonly found in BITs (9); agreements with limited investment-related provisions

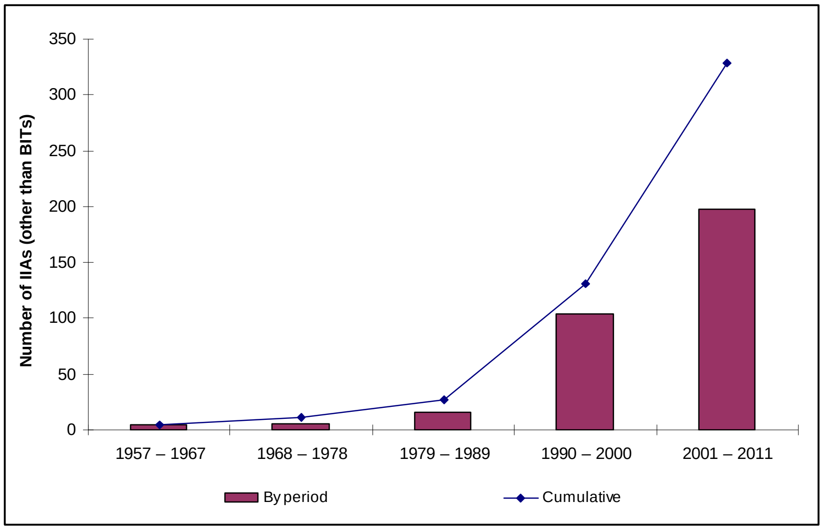
12 UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012) <http://www.unctad-docs.org/UNCTAD-WIR2012-Full-en.pdf> accessed 5 February 2013.

13 Ibid 84.

14 North American Free Trade Agreement, United States-Canada-Mexico, signed 17 December 1992 (1993) 32 ILM 289.

(2); and IIAs focusing on investment cooperation and/or providing for a future negotiating mandate on investment (3).[15]

Development of International Investment Agreements (other than BITs)



Source: UNCTAD, Division on Investment and Enterprise.

Just as earlier debates about recalibration, so the emergence of PTIAs on the investment law scene can be perceived as a threat as well as a chance. A positive gloss would stress that, by combining trade and investment rules in a single agreement, PTIAs could help bridge an artificial gap in the legal regulation of cross-border economic activities. And indeed, trade and investment are often linked and seem closely related.[16] This is particularly the case with global supply chains and production networks where components for end-products are produced in different countries and subsequently marketed worldwide.[17] More gen-

15 UNCTAD (n 12) 84.

16 See Tomer Broude, 'Investment and Trade: The "Lottie and Lisa" of International Economic Law?' (Hebrew University of Jerusalem Legal Studies Research Paper No. 10-11) <http://ssrn.com/abstract=1957686> accessed 31 January 2013.

17 The point is explored in the contributions of Johnston/Trebilcock and Bungenberg, in this volume; see also Kazunobu Hayakawa and Nobuaki Yamashita, 'The Role of Preferential Trade Agreements (PTAs) in Facilitating Global Production Networks' (2011) 45 Journal of World Trade 1181; UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (2011) 124 <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf> accessed 31 January 2013.

erally, from a microeconomic perspective, market-seeking investment can substitute inward trade in overcoming trade barriers. For export-oriented foreign investment, in turn, outward trade is a necessary complement to investment. Similarly, in macroeconomic terms, both investment and trade are key factors in stimulating the competitiveness of domestic economies and economic growth and therefore help create the economic basis for development. All this suggests that in pursuing different regulatory strategies, international economic law may have artificially separated out economic activities that often are closely connected. What is more, while post-1945 international regulation addressed trade and investment separately, previous regimes had not perceived them to be distinct. In fact, from a historical perspective, the move towards PTIAs may be less a novelty than a return to the basics: older FCN treaties addressed both, just as the International Trade Organization of 1946 would have dealt with investment alongside trade.[18] More recently, various attempts have been made in the context of the WTO to reintegrate trade and investment governance.[19] And equally tellingly, within the European Union (EU), the Lisbon Treaty has rounded off the Union's existing, trade-related competences by adding the field of "foreign direct investment," which is considered to be the "new frontier for the [EU's] common commercial policy."[20] All this suggests that legal rules can bridge the trade-investment gap.

Yet, the combination of trade and investment in PTIAs may also be seen as a clash between two systems based on fundamentally different ordering paradigms. From the perspective of world trade law, bilateral and regional integration through preferential trade agreements, free trade areas, etc., is often seen as a threat to the multilateral trading regime – a "spaghetti bowl" to use Jagdish Bhagwati's famous metaphor to describe the universe of preferential trade agreements (PTAs) and the disorder they may create in world trade law.[21] By

18 See the contribution by Andreas Ziegler, in this volume; and further Jürgen Kurtz, 'A General Investment Agreement in the WTO?' (2002) 23 U Penn J Int'l Econ L 713, 718.

19 See Schill (n 1) 50-53.

20 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European international investment policy (COM(2010)343 final) <http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf> accessed 5 February 2013.

21 See the discussion in Peter Sutherlund et al, 'The Future of the WTO – Addressing Institutional Challenges in the New Millennium' (2004) 19-27 <http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf> accessed 31 January 2013. For a more recent analysis of PTAs see World Trade Organization, *World Trade Report 2011 - The WTO and Preferential Trade Agreements From Co-existence to Coherence* (2011) 40 et seq <http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf> accessed 31 January 2013; see also the contributions in Kyle W Bagwell and Petros C

contrast, bilateralism has been a defining feature of substantive investment law. In a system dominated by BITs, the multilateral features of international investment law have had to be (re-)constructed by drawing on similar treaty clauses, common principles and leveling factors such as the most-favoured nations principle and an overarching framework of arbitral jurisprudence.[22] Put differently, in the field of investment law (unlike in trade law), the increasing reliance on PTIAs marks a shift towards more broadly-based (if still regional) investment rules integrated in a broader governance framework. Against that background, the two constituencies (trade lawyers and investment lawyers) are likely to view the emergence of PTIAs rather differently.

Moving beyond the normative dimension, combining trade and investment also implies increasing contact between different epistemic communities, that is, international trade lawyers, on the one hand, and international investment lawyers, on the other. To be sure, such contacts did exist before: investment arbitration and some of the investment law literature notably drew on trade law as a source of inspiration for the interpretation of investment treaties – as investment law's 'older brother in faith', as it were.[23] Yet, while that was never a mainstream strand of analysis, it might become one as the move towards PTIAs forces two hitherto largely separate communities to engage with each other. Some investment lawyers may perceive this development as a threat of 'colonization' and resist any perceived take-over by trade law(yers). At the same time, there is considerable potential for cross-fertilization. Just as much as it may seem threatening, the influx of trade lawyers and their ideas could enrich investment law discourses, not least because the debates about global governance and its legitimacy in world trade as well as the "trade and…"-debates are often more advanced than in the investment context. As in many processes of integration, the

Mavroidis (eds), *Preferential Trade Agreements – A Law and Economics Analysis* (CUP 2011).

22 See generally on the multilateral structures underlying the network of BITs Schill (n 1) 15 et seq.

23 See on the nascent literature in this context, for example, Nicholas DiMascio and Joost Pauwelyn, 'Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 AJIL 48; Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration' (2009) 20 EJIL 749; Jürgen Kurtz, 'The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 243; Freya Baetens, 'Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law' in Schill (n 23) 279; Broude (n 16); Mary E Footer, 'International Investment Law and Trade: The Relationship that Never Went Away' in Freya Baetens (ed), *Investment Law Within International Law: An Integrationist Perspective* (CUP 2013) (forthcoming); see also the contributions to Todd Weiler (ed), 'TDM Special: Intersections: Dissemblance or Convergence between International Trade and Investment Law' (2001) 8(3) TDM.

challenge is to channel the discourse in a constructive manner and to avoid turf wars between competing factions.

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Whether seen as a risk or a chance, it seems beyond doubt that the combination of trade and investment in PTIAs raises salient questions of fundamental relevance for the system of investment law. Do PTIAs introduce a new ordering paradigm for international investment law? Do they break with the content and rationales of BITs, or do they constitute their logical continuation? How do PTIAs relate to the debate about bilateralism and multilateralism in international investment law? Are they threatening the unity of international investment law, just as they are seen by some as "termites in the [global] trading system"?[24] What are the repercussions of combining matters related to trade and investment in a single instrument? How do PTIAs relate to the phenomenon of regionalism in international economic law? Will they lead to a more harmonious universe of international economic law or will they increase fragmentation and conflict? These are some of the crucial questions raised by the emergence of PTIAs as a new instrument ordering international investment relations, which are taken up in the subsequent contributions.

As is clear from the foregoing, while the trade law perspective is not ignored in the present volume, the primary focus here is on the so far little discussed question of whether and how PTIAs affect the traditional regime of international investment law.[25] The inquiry proceeds in a prologue and four main parts that address the impact of PTIAs on international investment law, the integration of investment rules into a broader framework of (economic) governance, the contribution of PTIAs to bilateralism and multilateralism, and the interaction of PTIAs and regionalism.

Raúl Emilio Vinuesa's keynote paper provides the prologue to the subsequent contributions. Adopting a practitioner's perspective, he surveys the manifold modifications – some substantial, some less so – that PTIAs bring to the world of investment arbitration. A particular focus is on the breadth and depth of rules that often provide firmer guidance for counsel and arbitrators and "restrict their

24 Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (OUP 2008).

25 For some of the rare earlier discussions of the topic see UNCTAD, 'Investment Provisions in Economic Integration Agreements' (2006) <http://unctad.org/en/Docs/iteiit 200510_en.pdf> accessed 17 May 2013; Barbara Kotschwar, 'Mapping Investment Provisions in Regional Trade Agreements: Towards an International Investment Regime?' in Antoni Estevadeordal, Kati Suominen and Robert Teh (eds), *Regional Rules in the Global Trading System* (CUP 2009) 365.

interpretative ‘room for manoeuver’, to which they may have grown accustomed in interpreting BITs.”[26]

Taking up themes raised in the keynote paper, the first main part of the book – comprising contributions by *Eric de Brabandere*, *Christina Binder*, and *Marc Jacob* – assesses the interrelationship between BITs and PTIAs. They inquire whether PTIAs conflict with BITs or whether they follow the same rationale and essentially replicate the standards of investment protection found in traditional BITs. Put differently, the three contributions take a look at PTIAs from inside the investment treaty system.

Given the many variations in both PTIAs and BITs, *Eric de Brabandere* warns against generalizations, but carves out common characteristics of both types of investment agreements. These concern, above all, the protection of foreign investment in the post-establishment phase where “investment chapters of PTIAs and BITs generally offer the same protection to foreign investors.”[27] Many PTIAs, however, also contain rules regarding pre-establishment and thus go beyond traditional BIT protection. All in all, the potential for conflict between PTIAs and BITs seems minimal: *Eric de Brabandere* sees both types of agreements as “complementary instruments rather than conflicting.”[28]

Christina Binder and *Marc Jacob* strike a somewhat different tone: they both warn against an all too harmonious view. *Christina Binder* argues that conflicts between PTIAs and BITs are real, even if not common, both as regards differences in substantive obligations and dispute settlement procedures. While general international law offers techniques of de-fragmentation and harmonious interpretation, she proposes the inclusion of clearer conflicts rules in PTIAs. *Marc Jacob*, in turn, suggests that even though treaty obligations are often formulated similarly, they need not be construed in an identical manner; after all, he points out, dispute settlement bodies may interpret PTIAs and BITs quite differently. Hence, only time will tell whether PTIAs and BITs will be dealt with as part of one universe of international investment law or whether they will fragment the field.

The second part of the book analyzes PTIAs from the perspective of international economic governance. Will PTIAs bring about a more unified regime of international economic law that bridges the trade/investment divide; or are the two areas simply too different to be combined? *Freya Baetens* discusses the various criticisms levelled against a unified regime and generally finds them unpersuasive. In her view, there is considerable potential for cross-fertilization between trade and investment. While PTIAs are part of “a more complex govern-

26 See Raúl Vinuesa, in this volume, 33.

27 Eric De Brabandere, in this volume, 69.

28 Ibid.

ance system that may be difficult to manage,"[29] they address some of the simmering tensions expressly, such as investment v. environment or investment v. labor standards. Also they could broaden the scope of investment law to include the pre-investment phase, "thereby allowing for coordination between trade and investment rules which regulate and enhance the liberalization of the services market."[30]

Tillmann Rudolf Braun agrees with this latter assessment. Yet his contribution, which focuses on European PTIAs, emphasizes that any attempt at reintegration ought to be based on a careful analysis of the different institutional contexts within which separate regimes have emerged. A unified regime would therefore have to preserve the "unique characteristics" of the investment treaties, notably the "remarkable effectiveness" of the system of investment arbitration.[31]

Jorge Albites-Bedoya's contribution outlines options for improving convergence between trade and investment regimes. He highlights the existence of express treaty provisions addressing conflicts between substantive obligations and argues that (as per Article 25 DSU) "arbitration, [as] the most common mechanism to settle investment disputes, is not alien to international trade disputes."[32] In his view, such provisions could be drawn upon "to alleviate tensions between trade and investment chapters of PTIAs."[33]

Finally, *Michele Potestà* assesses the interaction between PTIAs and environmental protection. Drawing on United States practice, he indicates how PTIAs embed investment protection in a broader governance framework that encompasses multiple social relationships and that is designed to promote foreign investment as well as environmental protection. In that sense, as he suggests, PTIAs may effectively serve, despite their concern for investment protection, "as a vehicle to reinforce environmental obligations."[34]

The third part of the book situates PTIAs within the broader debate about bilateralism and multilateralism in international economic law. The contributions by *Andreas Ziegler, Peter Muchlinski* and *Irmgard Marboe* trace the emergence of contemporary investment law as a body of law lacking a comprehensive multilateral structure. *Andreas Ziegler* highlights that early instruments used to cover trade *and* investment, but that this approach was not pursued after the failure of the International Trade Organization. He recalls the series of (unsuccessful) attempts, within the United Nations and elsewhere, to establish a multilateral re-

29 Freya Baetens, in this volume, 128.
30 Ibid 127.
31 Tillmann Rudolf Braun, in this volume, 153.
32 Jorge Albites-Bedoya, in this volume, 164.
33 Ibid 166.
34 Michele Potestà, in this volume, 184.

gime of substantive investment protection. In his view, attempts to come up with a comprehensive multilateral framework are unlikely to succeed. Instead, indirect forms of ensuring consistency – e.g. with tribunals or possibly an appellate institution "clarify[ing] … the proper interpretation of similar or identical rules,"[35] or the increased use of model treaties, including "model PTIAs" – to him seem more likely to produce results.

It is this latter aspect that *Irmgard Marboe* focuses on in her contribution. She agrees that model PTIAs could be "building blocks" of a multilateral regime. However, in her view (which echoes that of *Eric de Brabandere)*, the existing practice of PTIA treaty-making remains characterized by its diversity: the "one specific 'model [PTIA]' would be difficult to develop."[36] For the time being, she opines, the multilateralization of the PTIA regime is most likely to be achieved through well-known techniques developed in traditional investment law, notably by recourse to leveling principles such as MFN or international standards formulated by the OECD or within the WTO context.

Peter Muchlinski's focus, in turn, is broader: he emphasizes the accidental way by which the traditional system of investment law has emerged: in his view, it "is best seen … as a series of often unforeseen developments."[37] Among these unforeseen developments, he counts the rise to prominence (or even dominance) of investment arbitration. Rather than focusing on dispute settlement and on relying on arbitrators as agents of legal harmonization, *Peter Muchlinski* suggests that new forms of investment regulation ought to re-focus on economic development and long term collaboration, with arbitration being one aspect among many. Against that background, PTIAs to him "represent an opportunity to go beyond the narrow 'economism' of first generation IIAs."[38]

Unlike *Andreas Ziegler*, *Peter Muchlinski* and *Irmgard Marboe*, the contribution by *Adrian M. Johnston* and *Michael J. Trebilcock* addresses the proliferation of PTIAs from a trade law perspective. While acknowledging the risks of further fragmentation of the multilateral trading system, they view PTIAs as instruments of deeper integration, which can offer something the WTO at present is unable to provide, namely the "transnational governance needed to support and expand international production networks."[39] Whether PTIAs will undermine the multilateral trading system, as feared by many trade lawyers, will depend on their design and application. In this respect (similarly to *Irmgard Marboe*), *Johnston* and *Trebilcock* point to the role of informal coordination techniques tested in tradi-

35 Andreas Ziegler, in this volume, 209.
36 Irmgard Marboe, in this volume, 240.
37 Peter Muchlinksi, in this volume, 211.
38 Ibid 226.
39 Adrian M Johnston and Michael J Trebilcock, in this volume, 266.

tional investment law, which in their view should guide PTIA drafters and tribunals applying them.

The impact of PTIAs on the bilateralism/multilateralism divide is also a central concern in the contributions of *Marc Bungenberg*, *Anna Joubin-Bret*, *Axel Berger* and *Anna Tevini* who, in the fourth part of the book, offer regional perspectives on PTIAs. Focusing on NAFTA and the EU, *Marc Bungenberg* assesses PTIAs as a phenomenon of regional economic integration. As the case of NAFTA shows, the inclusion of investment and trade rules in a PTIA is often closely related to regional cooperation. Furthermore, regional organizations themselves may become actors that conclude PTIAs with third States, as the case of the EU shows, which – post-*Lisbon* – has begun to negotiate international agreements covering foreign direct investment.

Anna Joubin-Bret, in turn, stresses that the trend towards regional approaches is not restricted to Europe and North America, but encompasses Africa, Central and South America, the Middle East, and South and South-East Asia. Consequently, in her view, the NAFTA approach has now been "successful[ly] sprea[d] … across regions."[40] As both *Marc Bungenberg* and *Anna Joubin-Bret* suggest, agreements concluded by the major regional blocks or players could eventually simplify the existing treaty relations, as major regional agreements would cover a larger number of investments. In the words of *Marc Bungenberg,* "[t]he spaghetti bowl of bilateral investment treaties could then be replaced by a Lasagna plate."[41]

Marc Bungenberg and *Anna Joubin-Bret* take for granted that, apart from the EU and the United States/NAFTA, a meaningful coordination between regional actors will require the participation of China and the Association of Southeast Asian Nations (ASEAN). Accordingly, two separate contributions, by *Axel Berger* and *Anna Tevini*, trace the evolution of Chinese and ASEAN approaches. Quite strikingly, as *Axel Berger* shows, China's treaty practice, while following pragmatic rather than principled rationales, increasingly reflects approaches commonly found in the practice of NAFTA countries – a trend he pointedly describes as one of "partial 'NAFTA-ization'."[42] As regards ASEAN, *Anna Tevini* highlights the potential impact of the ASEAN Comprehensive Investment Agreement (ACIA), which – while not immune from criticism –is "closer to international best practices."[43] Notwithstanding remaining regional variety, both contributions suggest a 'creeping convergence' of investment rules not only in Europe and North-America, but also in the Far East.

40 Anna Joubin-Bret, in this volume, 293.
41 Marc Bungenberg, in this volume, 287.
42 See the title of the contribution by Axel Berger, in this volume.
43 Anna Tevini, in this volume, 353.

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As is clear from this brief summary, the various contributions approach PTIAs from a range of perspectives; they reflect the risks as well as chances of this new trend in treaty-making. Differences notwithstanding, they would seem to substantiate the working hypothesis of the present book – namely that the move towards PTIAs has the potential of changing the normative landscape of international investment law profoundly. This change need not be felt immediately in the practice of investment arbitration (as the most visible instantiation of the law), which is likely to continue on the basis of traditional BITs. However, by modifying patterns of treaty-making, the emergence of PTIAs is likely to reform investment law incrementally. In three respects, this incremental change is likely to broaden the scope of the discipline.

First, in terms of the law, PTIAs typically adopt a broader approach to investment protection. They reflect, and affirm, the trend away from investment rules exclusively focusing on a particular phase of investment (post-establishment) and a particular form of scenario (dispute resolution by means of arbitration). These core aspects no doubt remain important: in fact, while PTIAs integrate international investment protection into broader frameworks of governance, this does not seem to have watered down significantly the scope of investment protection in the post-establishment phase. Instead, post-establishment standards are increasingly complemented by provisions addressing the pre-establishment phase; just as preventive mechanisms for dispute avoidance supplement arbitration. Moreover, the combination of trade and investment rules may make the investment rules in question stronger and more durable, as termination or renegotiation of PTIAs may be more costly or difficult to achieve than termination or renegotiation of a single-issue BIT.

Second, the new investment regime based on PTIAs sees new actors enter the scene. Regional international organizations are the obvious example: in the European context, the EU is a new protagonist in treaty making; other regional organizations may follow suit. Other newcomers are less visible, but equally important: in many States, as well as in the EU, parliaments seem to play a greater role in practice, either because PTIAs require new forms of parliamentary approval or because parliaments are more willing than before to make use of their competences. Within governments, the negotiation of PTIAs, because of their broader subject-matter, may require input from separate departments of government and thus shake up existing competence structures. And lastly, PTIAs regularly create their own institutions: treaty parties increasingly entrust the administration of investment treaties to specific treaty bodies of different shapes and sizes, competent and required to administer the application of the treaty; or they envisage regular meetings of parties.

Third, and relatedly, the investment law discourse is likely to become more diversified. To the extent that PTIAs cover non-investment concerns in more detail, they will facilitate, and provide a clearer basis for, debates about public interest concerns in investment law. The reintegration of trade and investment rules is likely to lead to increasing interaction between trade lawyers and investment lawyers, and an influx of trade law concepts in investment law. Existing epistemic communities are likely to be broken up; debates about 'trade and development', 'trade and labour', etc. may be expected to spill over into investment law scholarship. Drawing on the (broadened) context and *telos* of PTIAs, arguments developed in the WTO context may affect the interpretation of investment provisions. In other words, the emerging investment regime based on PTIAs is likely to have a broader sociological and thematic base than the old BIT regime.

All this suggests that the new regulatory framework of investment law will be more diverse, and more 'messy', than the traditional world of BITs. The trends described above add variety to a field of law that traditionally had relied on succinct bilateral treaties enshrining a handful of general provisions. That this new variety can be perceived as a threat is understandable. Yet, it is a development that is not imposed upon investment law from the outside, by *octroi*, but based on deliberate changes in treaty making. Together with recalibrated BITs, PTIAs reflect the current thinking of States and regional organizations about the balance to be struck between investment protection and non-investment values, between private rights and public interests, about the temporal scope of investment protection, and about the respective roles of treaty parties and dispute settlers in the administration of the investment regime.

While the current thinking results in greater complexity, looked at from a comparative perspective, it might equally be said that it takes investment law 'out of the ordinary'. In a number of respects, the approach pursued in PTIAs is much more in line with strategies adopted in other fields of international regulation. PTIAs reflect a move from narrowly-formulated agreements to framework treaties, from dispute settlement to treaty management, from treaties to regimes. And none of this is particular in investment law: with some degree of variation, similar trends can be observed in fields as diverse as international environmental law, human rights law, disarmament and arms control, or the law of the sea. As they become more complex, investment agreements begin to resemble treaties in other areas of international law.

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Looked at from a broader perspective, perhaps the developments summarized in the foregoing (and analyzed in the following contributions) should best be taken to reflect the 'maturing', or 'ripening', of investment law. Maturing involves readjustment and adaptation to changing circumstances, learning from others as much as the occasional smoothing of edges. Typically, it is a gradual process, not accomplished suddenly; and it may take time for its results to be discerned. The rise of PTIAs reflects all of these features. It is unlikely to revolutionize investment law, but forms part of a reform process that accommodates demands for change. This change unsettles some of the old certainties, but could result in a more rounded and balanced legal regime. The emerging investment regime comprising PTIAs alongside traditional and recalibrated BITs is indeed more complex and in many ways new. But this complexity is the hallmark of a more mature body of international investment law. The subsequent contributions are an invitation to engage with it.