

Drafting Investment Law: Patterns of Influence in the Regional Comprehensive Economic Partnership (RCEP)

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ABSTRACT

The investment chapter in the recently signed Regional Comprehensive Economic Partnership (RCEP) has the potential to affect investment decisions in the Asia-Pacific region and beyond. Yet, we know relatively little about the pathways through which countries determine the content of investment law in preferential trade agreements (PTAs). In this article, we use quantitative text analysis to test theoretically informed conjectures about the negotiation process. We focus on which of the signatories' past agreements most influenced RCEP, and whether countries chose to draw more from treaty practice through their previous PTAs or bilateral investment treaties (BITs). Our analyses yield several noteworthy findings. First, we show that no single country dominated the negotiation process, instead RCEP represents an effort to reconcile overlapping agreements around a more common template. Second, contrary to the fears of some observers, we show that larger powers such as China and Japan did not overwhelmingly impact the agreement, instead portions were influenced by Association of Southeast Asian Nations agreements, the Comprehensive and Progressive Trans-Pacific Partnership, and others. Finally, we show that, on average, countries drew more from PTAs than BITs, but that they switch strategically between them to reuse language that they deem important for the development of investment law.

I. INTRODUCTION

The Regional Comprehensive Economic Partnership (RCEP) Agreement was signed in November 2020 and entered into force on 1 January 2022. With 15 signatories¹, RCEP represents the largest preferential trade agreement (PTA) by economic output in the world.² An important feature of the agreement was the negotiation of a stand-alone investment chapter, covering investment protection, facilitation, and liberalization, following a trend in trade agreements to include investment commitments previously found in bilateral investment treaties

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¹ Based on 2019 World Bank data, the combined GDP of the signatories represents approximately 28% of the world total.

² The Agreement covers all areas of modern trade treaties with the exception of a number of trade-related themes usually found in US and EU agreements pertaining to environmental, labor, and governance issues.

(BITs).³ RCEP holds significant potential to impact investment law. Not only are China and Japan two major economies in the world, but many RCEP signatories have followed restrictive policies in regard to foreign direct investments (FDIs) in the past.⁴ Therefore, the RCEP investment chapter has the potential to shift FDI policies for a number of countries, while also influencing the development of investment rules in the future.

Existing scholarship has paid scant attention to the negotiation process that determines the content of investment chapters in PTAs. Thus, little is known about how governments choose which provisions to include and the impact that these choices have across the trade and investment regimes. In this article, we address this gap through a textual analysis of the investment provisions in the recently signed RCEP. Our analysis focuses on uncovering the negotiating parties who most influenced the final content of RCEP's investment chapter and consequently whose preferences it is most likely to reflect. Descriptive accounts suggest that the agreement was primarily driven by the Association of Southeast Asian Nations (ASEAN) member states who hoped to consolidate existing ASEAN agreements,⁵ whereas others have claimed that China had a significant impact on the outcome of the negotiations.⁶ Thus, we aim to resolve empirically competing accounts of who most influenced the agreement's final provisions. A second question this article asks is whether the legal imprint was stronger through signatories' past BITs or past PTAs, and whether these tracks were considered to be complimentary or functioned as substitutes during the negotiations. These questions are of particular importance given the role that RCEP will play defining the legal rules governing trade and investment in the region (and potentially beyond). Moreover, our analysis is noteworthy given the increasing propensity of states to include BIT-like legal provisions in PTAs, which represents a shift in the location and substance underpinning the investment regime.

Using quantitative text analyses, we produce several empirical findings. First, we show that the final content of the RCEP investment chapter was not clearly dominated by a single powerful party during the bargaining process. Rather, RCEP's commitments represent a substantial compromise between the parties, who balanced their desire to reconcile competing rules in the region with the creation of new rules that were preference compatible and could serve as a focal point for future rulemaking. That said, there was significant imprint of a mega-regional agreement negotiated among the parties with outside countries (Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)/Transpacific Partnership Agreement (TPP)) as well as modern PTAs involving Australia. Second, we find that the governments drew also from previous ASEAN BITs with India and Hong Kong as well as from the inner-ASEAN Comprehensive Investment Agreement (ACIA). Finally, we show that countries drew more language from their recent PTAs relative to their BITs. That said, we also find evidence that countries switch back and forth between PTAs and BITs for strategic reasons, suggesting that countries choose language from the agreements that best represent their preferences.

The article is structured as follows. We first discuss the role of investment provisions in PTAs generally and in the Asia Pacific region specifically. We then review leading explanations in the literature that seek to explain 'who writes' treaty language and consider how the choice to use

³ J.A. Crawford and B. Kotschwar, *Investment Provisions in Preferential Trade Agreements: Evolution and Current Trends* (Geneva: Economic and Research and Statistics Division, World Trade Organization, 2018).

⁴ The Philippines, Thailand, Malaysia, New Zealand, Indonesia, and China are among the top 15 countries in terms of how restrictive their FDI policies are; see OECD FDI Restrictiveness Index 2020: <https://data.oecd.org/fdi/fdi-restrictiveness.htm>.

⁵ D. Elms, 'Getting RCEP Across the Line', 20 (3) *World Trade Review* 373 (2021); J. Chaisse, 'The Regional Comprehensive Economic Partnership's Investment Chapter: One Step Forward, Two Steps Back?' *Columbia FDI Perspectives* No 271 (2020); S. Jusoh and I.M. Ramli, 'The COVID-19 Pandemic, Regional Cooperation Economic Partnership (RCEP) and the Rise of Investment Facilitation', 20 (2) *Chinese Journal of International Law* 425 (2021).

⁶ D. Vines, 'The BRI and RCEP: Ensuring Cooperation in the Liberalisation of Trade in Asia', 6 (3) *Economic and Political Studies* 338 (2018); K. Bradsher and A. Swanson, 'China-Led Trade Pact Is Signed, in Challenge to U.S.', *New York Times*, 15 November 2020.

past PTA or BIT language influences treaty content. In the empirical section, we rely on text-as-data methods to assess which past treaties had the most influence on the final text, distinguishing between investment commitments in PTAs and BITs, respectively. The final section contextualizes the findings within the legal and international relations literatures and outlines areas for future research.

II. INVESTMENT PROVISIONS IN PTAS

There is extensive research in economics, political science, and international law on PTAs. Most of these studies focus on the impact of PTAs on trade flows, but there is growing recognition that PTAs contain a variety of trade-related and non-trade issues.⁷ Political scientists, for example, have explored the role of PTAs on issues as varied as human rights,⁸ the environment,⁹ and interstate alliances¹⁰ and have sought to understand the politics that determine which provisions are included.¹¹ However, studies have been relatively slow to recognize the importance of investment provisions in PTAs.

Those studies that have considered the trade and investment nexus focus primarily on the FDI effects of PTAs. For example, several studies find that PTAs have a positive effect on FDI flows between signatories,¹² while others posit that the alleged investment effects of PTAs lead to their proliferation.¹³ However, many of these studies do not control for whether PTAs contain specific investment provisions (and variation in them),¹⁴ and relatively little is known about the process that determines what legal language is included in the final text of a given agreement. Moreover, how countries choose provisions from across their PTA and BIT networks, and how they subsequently reconcile their obligations, is poorly understood. Better understanding these dynamics is of key importance, as it sheds light on how countries bargain and compromise over investment rules within multilateral fora, how they balance their competing interests across regimes, and how the international investment regime keeps evolving on different tracks.

As a foundational step, we undertake a systematic investigation of the growth in investment provisions in PTAs since World War II. This analysis demonstrates that investment provisions in PTAs have steadily increased. Figure 1 plots the number of PTAs with and without investment provisions between 1948 and 2017 using data on approximately 712 PTAs contained in the Design of Trade Agreements (DESTA) database.¹⁵ The bars represent the total number of PTA signed in a given year, the black represent the number that include investment provisions, and the grey those that do not. None of the early post-war PTAs signed between 1948 and 1958 contain investment provisions, and even into the late 1980s and 1990s fewer than half of PTAs signed in most years contained investment provisions.

⁷ A. Dür, L. Baccini, and M. Elsig, 'The Design of International Trade Agreements: Introducing a New Dataset', 9 (3) *The Review of International Organizations* 353 (2014).

⁸ E.M. Hafner-Burton, *Forced to Be Good: Why Trade Agreements Boost Human Rights* (Ithaca: Cornell University Press, 2011).

⁹ J.F. Morin, A. Dür, and L. Lechner, 'Mapping the Trade and Environment Nexus: Insights from a New Data Set', 18 (1) *Global Environmental Politics* 122 (2018); M.G. Koo and S.Y. Kim, 'East Asian Way of Linking the Environment to Trade in Free Trade Agreements', 27 (4) *The Journal of Environment & Development* 382 (2018).

¹⁰ E. Mansfield and R. Bronson, 'Alliances, Preferential Trading Arrangements, and International Trade', 91 (1) *American Political Science Review* 94 (1997).

¹¹ L. Lechner, 'The Domestic Battle over the Design of Non-Trade Issues in Preferential Trade Agreements', 23 (5) *Review of International Political Economy* 840 (2016).

¹² T. Büthe and H. Milner, 'The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?' 52 (4) *American Journal of Political Science* 741 (2008).

¹³ L. Baccini and A. Dür, 'Investment Discrimination and the Proliferation of Preferential Trade Agreements', 59 (4) *Journal of Conflict Resolution* 617 (2015).

¹⁴ For a notable exception, see, for instance, R. Desbordes, 'A Granular Approach to the Effects of Bilateral Investment Treaties and Regional Trade Investment Agreements on Foreign Direct Investment' (Asian Development Bank, 2015) https://aric.adb.org/pdf/events/accd2016/paper_rodolphedesbordes.pdf; Asian Development Bank (ADB), *ADB Asian Economic Integration Report 2016* (2016).

¹⁵ Dür, Baccini, and Elsig, above n 7.

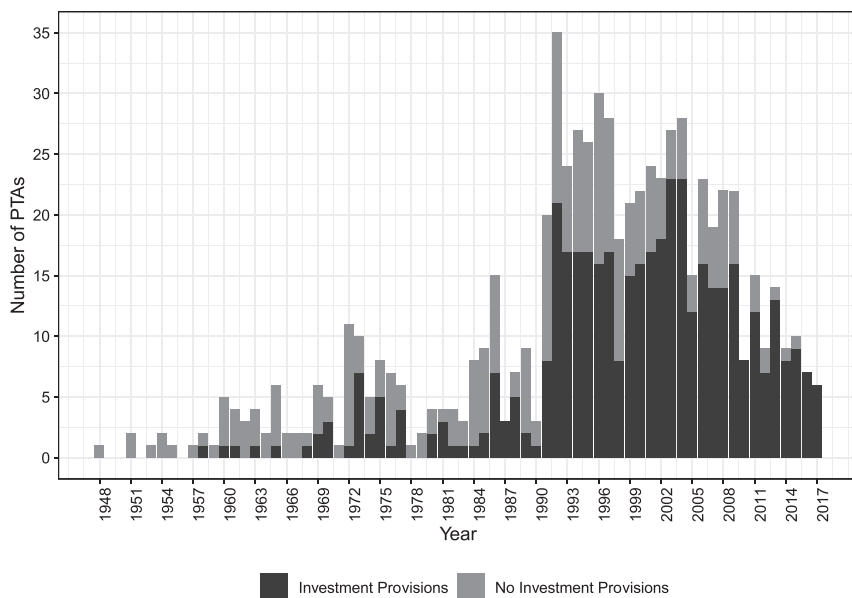


Figure 1. Investment chapter in PTAs, 1948–2017.

Source: Design of Trade Agreements (DESTA) database.¹⁶

For example, in 1991, only 8 of the 20 total PTAs signed contained provisions on investment. However, beginning in the late 1990s, countries begin to include investment provisions more frequently, which also coincided with a general uptick in PTA signing. By 2010, virtually all new PTAs contain investment provisions, often with entire chapters dedicated to investment. Indeed, between 2010 and 2017, 70 of the 78 PTAs signed contained investment provisions. Moreover, as we discuss later, these provisions often contain a comprehensive and coherent set of legal requirements on how signatories are to treat investment.

This profound growth of investment provisions in PTAs is driven by several interrelated developments. First, international trade is increasingly driven by the expansion of global value chains (GVCs), where firms break up their production processes for individual goods across multiple countries.¹⁷ For deep GVCs to develop, governments must liberalize investment, not only in the goods sector, but also in services and services related to manufacturing sectors, as the large firms at the center of GVCs frequently aim to control multiple links in a given GVC. This requires ownership of foreign production facilities and policy certainty so they can seamlessly shift capital across facilities in order to optimize production. This has led to a growing consensus within policymaking circles that investment and trade are interlinked and need to be governed by the same regulatory framework. Thus, the inclusion of investment provisions in PTAs is likely to reflect pressure from multinational corporations and also a desire of governments to deal with these issues concurrently in order to promote regulatory coherence and advance the interests of their companies.¹⁸

Second, there is growing a backlash against the investment provisions included in BITs, which has led countries to terminate existing BITs, seek ways to amending them, and design new

¹⁷ G. Gereffi, J. Humphrey, and T. Sturgeon, 'The Governance of Global Value Chains', 12 (1) *Review of International Political Economy* 78 (2005).

¹⁸ J. Eckhardt and A. Poletti, 'The Politics of Global Value Chains: Import-Dependent Firms and EU–Asia Trade Agreements', 23 (10) *Journal of European Public Policy* 1543 (2016).

templates for the future.¹⁹ In particular, there has been widespread dissatisfaction with provisions related to the investor state dispute settlement (ISDS), which provides foreign investors recourse to sue governments at international tribunals, such as the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).²⁰ This has pushed governments to explore other venues to regulate investment, with PTAs as the obvious alternative international law instrument. Thus, the shift to including investment provisions in PTAs is important because it may impact the investment effects of PTAs and potentially shift the locus of investment law from BITs to PTAs. This latter development in particular is noteworthy as it has important implications for the trade and investment regimes and may have the potential to further increase the impact of investment rules on FDI flows.²¹

This shift from dealing with investments solely through BITs to their inclusion in PTAs is reflected in the evolving manner in which systemically important countries treat investment law. For example, the European Union (EU)—which has one of the most extensive networks of PTAs—has shifted competence to regulate investment to EU institutions through amendments in the Lisbon Treaty.²² In an attempt to consolidate existing BITs concluded by EU member states, and with the development of a new model for dispute settlement, the EU has been an advocate of extending the scope of investment treaty provisions in its PTAs. A new approach was also spearheaded in US treaties which extended the scope of investment safeguard provisions typically found in BITs to PTAs. This provides for a more widespread investment framework, making it applicable to goods, intellectual property, and portfolio investment.²³ In the case of the US, there was a clear shift starting with the original NAFTA to include BIT-like investment provisions in newly negotiated PTAs, which subsequently found their way into most US bilateral and multilateral agreements.²⁴ Moreover, these newer agreements often borrowed heavily both from existing PTAs but also the prevailing US model BIT.²⁵

Since the 1970s and 1980s, the Asia-Pacific region experienced a significant increase in BIT signing, which was consistent with trends in other parts of the world. However, after 2010, the number of new BITs being signed declined. At the same time, some countries terminated their BITs in order to renegotiate existing ones. This was seen as a reaction to investment treaty claims brought against the countries of this region. Alternatively, some countries opted for renegotiations to avoid claims.²⁶ Indonesia, for example, decided to terminate its BIT with Singapore in order to renegotiate its original terms. Similarly, India chose to renegotiate BITs to ensure a narrower model to avoid future claims.²⁷ Other countries such as Australia also followed a similar path. Other Asian countries, such as China and Japan, strong exporters of capital, chose more offensive strategies to support the protection of investment and the consolidation of GVCs.

¹⁹ C. Peinhardt and R. Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment', 7 (4) *Global Policy* 571 (2016); J. Chaisse and S. Jusoh, *The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investment* (London: Elgar, 2016).

²⁰ R. Wellhausen, 'Recent Trends in Investor-State Dispute Settlement', 7 (1) *Journal of International Dispute Settlement* 117 (2016).

²¹ Asian Development Bank, above n 14.

²² J. Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?' 15 (1) *Journal of International Economic Law* 51 (2012).

²³ L.S. Poulsen, 'Bilateral Investment Treaties and Preferential Trade Agreements: Is a BIT Really Better than a Lot?' *Investment Treaty News* 1 (2010) <https://www.iisd.org/itn/en/2010/09/23/bilateral-investment-treaties-and-preferential-trade-agreements-is-a-bit-really-better-than-a-lot/>.

²⁴ K. Vandevelde, *US International Investment Agreements* (Oxford: Oxford University Press, 2009).

²⁵ W. Alschner and D. Skougarevskiy, 'The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe', 17 (3) *The Journal of World Investment & Trade* 339 (2016); T. Allee and A. Lugg, 'Who Wrote the Rules for the Trans-Pacific Partnership?' 3 (3) *Research & Politics* 1 (2016).

²⁶ B. Bland and S. Donnan, 'Indonesia to Terminate More Than 60 Bilateral Investment Treaties', *Financial Times*, 26 March 2014.

²⁷ P. Ranjan and P. Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction', 38 (1) *Northwestern Journal of International Law and Business* 16 (2017).

ASEAN has been another pro-active force and venue in Asia-Pacific. Recently, for example, the ASEAN member states negotiated a regional investment agreement in the form of ACIA. Unlike the EU, however, ASEAN does not have the competence to negotiate PTAs and investment agreements on behalf of its member states. This makes negotiating as a group more difficult and leads to hybrid approaches. Most BITs have been negotiated individually by ASEAN members. Only a few BITs have been coordinated through ASEAN and these are mostly regional ones (e.g. with India, Japan, Australia, and China). A similar pattern holds with respect to PTAs, where many ASEAN member states have negotiated individually or as a group. Moreover, the region has been at the forefront of the creation of mega-regional agreements before, such as the CPTPP, which included several ASEAN members, and includes an investment chapter. Due to these factors, the Asian region has developed an overlapping and competing set of trade and investment agreements, which has generated increasing calls for a practical solution to the ‘noodle bowl’ of investment obligations.²⁸

III. EXPLAINING TREATY CONTENT

In the following, we develop a set of expectations regarding the content of investment obligations in RCEP. We group these into two broader questions, namely (i) how have existing country templates influenced the final outcome and (ii) whether past BIT or PTA obligations have left a higher imprint on the final treaty.

A. Who writes the treaty?

Our article contributes to an emerging literature on variation in PTA design, which is one of the most important research frontiers in legal and political science research.²⁹ While research has shown that the content of PTAs can be partially explained by domestic factors, e.g. by interest groups and veto players³⁰ or by endogenous features related to treaty dimensions, e.g. that deeper trade agreements are also more flexible,³¹ the content of model treaties and past treaties also play an important role. This is especially true as countries aim to codify their preferences in successive agreements. Advances in text-as-data methods allow researchers to trace textual overlap with existing treaties, which has provided evidence that countries frequently use copy-pasted and boilerplate language.³² For example, it has been shown that in the case of the original TPP, past US agreements influenced the final outcomes substantially, suggesting that power asymmetries influence observed provisions.³³ In contrast, in treaties where power asymmetry is less obvious, and where there are potentially overlapping preferences, such as in the Comprehensive and Economic Trade Agreement between Canada and the EU, the overall import from past agreements is less substantial, but also more balanced, indicating that both parties influenced the legal text.³⁴ Thus, we know that treaty text diffuses across agreements, but we still do not know the specifics of how these mechanisms work across different partner constellations.

²⁸ J. Chaisse and S. Hamanaka, ‘The “Noodle Bowl Effect” of Investment Treaties in Asia: The Phenomenon, the Problems, the Practical Solutions’, 33 (2) *ICSID Review* 501 (2018).

²⁹ See Dür, Baccini, and Elsig, above n 7; L. Baccini, ‘The Economics and Politics of Preferential Trade Agreements’, 22 *Annual Review of Political Science* 75 (2019).

³⁰ T. Allee and M. Elsig, ‘Veto Players and the Design of Preferential Trade Agreements’, 24 (3) *Review of International Political Economy* 538 (2017).

³¹ L. Baccini, A. Dür, and M. Elsig, ‘The Politics of Trade Agreement Design: Revisiting the Depth–Flexibility Nexus’, 59 (4) *International Studies Quarterly* 765 (2015).

³² T. Allee and M. Elsig, ‘Are the Contents of International Treaties Copied and Pasted? Evidence from Preferential Trade Agreements’, 63 (3) *International Studies Quarterly* 603 (2019); C. Peacock, K. Milewicz, and D. Snidal, ‘Boilerplate in International Trade Agreements’, 63 (4) *International Studies Quarterly* 923 (2019).

³³ See Allee and Lugg, above n 25.

³⁴ T. Allee, M. Elsig, and A. Lugg, ‘Is the European Union Trade Deal with Canada New or Recycled? A Text-as-data Approach’, 8 (2) *Global Policy* 246 (2017).

A lot of attention in the literature has been devoted to US and EU trade agreements, but we know less about Asian countries' approaches towards PTAs. Hicks and Kim provide one of the first systematic accounts.³⁵ Using manual coding of treaty provisions, they argue that Asian governments use PTAs as 'credible commitment' devices. Allee and Elsig show that Asian dispute settlement provisions are surprisingly highly legalized, contrary to conventional expectations.³⁶ Other studies highlight that economic factors play an important role. For example, Manger shows that expected economic gains from tariff reduction and unfolding specialization in production are important drivers for Asian PTAs.³⁷

Considering that Asian and Pacific states have been very active in negotiating PTAs, we assume that past treaties' content to be a good proxy for understanding the initial interests of negotiators. Following studies on the role of templates, we expect that these should serve as a guide for RCEP members trying to influence treaty content. In the following, we briefly sketch three competing expectations as to which parties will most influence treaty language.

First, the RCEP treaty is seen by many as an attempt to consolidate ASEAN agreements and to preserve 'ASEAN Centrality'.³⁸ As the process was largely organized by ASEAN as an organization and most of the negotiations took place in ASEAN premises, ASEAN member states may have had substantial influence on the drafting process and therefore outcome. Given the historical development of the ASEAN processes and the anchoring around the ASEAN platform, we expect in particular that past ASEAN agreements have been a main source of treaty adaptation. This leads to our first expectation.

Conjecture 1: The RCEP investment chapter text is substantially shaped by existing ASEAN treaties.

Second, as powerful states tend to have a proportionally higher influence in treaty negotiation outcomes, a second expectation is that the big 3 economies in Asia (China, Japan, and Korea) are able to convince other actors to support their treaty text propositions based on their past agreements. This may in particular apply to China, which is by far the largest market power in Asia and which aims to create a counter vision of Asian regionalism. While Japan and Korea are close allies with the USA, they both rely heavily on 'Factory Asia' to remain competitive export power houses. They have therefore an interest to see a consolidation of trade and investment obligations that are aligned with their existing commitments.

Conjecture 2: The RCEP investment chapter text is substantially shaped by treaties of the big 3.

Third, given that on average Asian countries have fewer agreements than the USA and the EU, and given the existence of US and EU agreements with Asian countries, a third expectation is that there is strong outside or external influence on treaty texts. Given that TPP was largely US-dominated and led to CPTPP, and that the EU has been actively negotiating trade deals with the majority of RCEP states, we expect these agreements also to matter. In other words, the USA and the EU indirectly shape the RCEP treaty as they continue to be rule-makers through PTAs. Moreover, many RCEP countries rely on exports to the large US and EU markets and are actively seeking investments. Thus, we expect that these countries may aim to align their treaty texts.

Conjecture 3: The RCEP investment chapter is substantially shaped by outside economic powers, such as the USA and the EU.

³⁵ R. Hicks and S.Y. Kim, 'Reciprocal Trade Agreements in Asia: Credible Commitment to Trade Liberalization or Paper Tigers?' 12 (1) *Journal of East Asian Studies* 1 (2012).

³⁶ T. Allee and M. Elsig, 'Why Do Some International Institutions Contain Strong Dispute Settlement Provisions? New Evidence from Preferential Trade Agreements', 11 (1) *The Review of International Organizations* 89 (2016).

³⁷ M. Manger, 'The Economic Logic of Asian Preferential Trade Agreements: The Role of Intra-Industry Trade', 14 (2) *Journal of East Asian Studies* 151 (2014).

³⁸ S. Jusoh, *Economic Diplomacy for the Developing Asia* (Bangi: UKM Press, 2021).

B. PTAs vs BITs

Besides the question of ‘who writes the investment chapter’, we are also interested in how RCEP’s investment provisions were influenced by countries’ choice to draw language primarily from their past PTAs or BITs. Our assumption is that the track or venue matters. The question of whether investment chapters are pivoting towards existing BITs or PTAs is important because it may be indicative of a larger shift in the locus of lawmaking. In addition, we focus on how these provisions may act as complements or substitutes. Below, we develop three expectations related to the proportional imprint through the BIT networks as compared to the PTAs.

First, we assume that given the nature of trade negotiations, trade experts will be more interested in importing legal language from PTAs as opposed to BITs. The provisions of PTAs are more familiar to negotiators and they are also less keen to introduce legal terms and interpretations that developed in other fields of international economic law. Due to the institutional set-up of trade negotiations which are usually anchored in trade ministries, experts on investment law will take a backseat in the negotiations as they proceed. This leads to our next expectation.

Conjecture 4: The RCEP investment chapter is more shaped by past trade than investment treaties.

In contrast to conjecture 4, we theorize that some countries may have incentives to push past BIT commitments as a means to influence RCEP. For example, some countries may have a more extensive BIT network, with more well-developed, and hence preference compatible, legal provisions. This in particular applies to members such as China who have invested more diplomatic resources into the creation of BIT templates, but who have struggled to conclude PTAs. In some instances, this interest may override the bureaucratic incentives of trade negotiators to allow mostly domain-related legal language. This leads to the following competing conjecture.

Conjecture 5: The RCEP investment chapter is more shaped by past investment than trade treaties.

Finally, we are interested in the type of language that is copy-pasted and whether BITs and PTAs are tracks that supply language that is clearly focusing on different concerns. In this respect, we expect that language is largely complementary and therefore BIT and PTA text are not acting as competing templates. Rather, there is a clear division of legal purposes and this can be observed in the final text. This motivates our last conjecture below.

Conjecture 6: The language copy-pasted in the RCEP investment chapter will be drawn from different (subject or topic) provisions in BITs and PTAs, suggesting that they are mostly complementary.

IV. EMPIRICS

A. Methodology

In order to assess our conjectures, we rely on quantitative text analysis of legal texts, which has become an important tool in recent legal and political science research.³⁹ While this type of research is extremely valuable, it requires that the researcher selects a technique that is sensitive to the type of text under investigation and the questions being asked.⁴⁰ Here, we are interested in the strategic copy-pasting of precise legal language from past treaty practice to the recently negotiated RCEP agreement. We contend that this type of copy-pasting is informative because

³⁹ W. Alschner, J. Pauwelyn, and S. Puig, ‘The Data-Driven Future of International Economic Law’, 20 (2) *Journal of International Economic Law* 217 (2017); J. Wilkerson and A. Casas, ‘Large-Scale Computerized Text Analysis in Political Science: Opportunities and Challenges’, 20 *Annual Review of Political Science* 529 (2017).

⁴⁰ J. Grimmer and B. Stewart, ‘Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts’, 21 (3) *Political Analysis* 267 (2013).

it allows us to isolate instances where signatories deliberately borrowed language from past treaty practice, which can help the researcher understand which state parties exercised influence over a given text and from what sources they borrowed most deliberately from.⁴¹

Our relevant universe of texts is the 38 PTAs and 146 BITs signed by RCEP signatories since 2005, which we obtain and convert to a machine-readable format utilizing the DESTA and EDIT databases. We then compare the percentage overlap of the text of a prior agreement—either a PTA or BIT—with the final text of the RCEP agreement. To do so we use *wcopyfind*, which is an intuitive open-source text comparison tool that performs like a commercial plagiarism detection program.⁴² That is, it counts words as overlapping any time there is an exact matching sequences of words beyond a threshold set by the user, which we set at a minimum of six words. This allows us to assess the percentage of words in RCEP that are taken verbatim from the signatories' previous agreements by dividing the number of copied words by the total number of words in a document. These percentage overlap numbers are useful because they indicate how much of RCEP was taken from a given previous agreement rather than simply the similarity between two documents.

This technique has been used in comparable applications⁴³ and produces similar measures of overlap to other techniques, such as the computation of Jaccard distances.⁴⁴ Importantly, this technique requires that the words be in the exact order they are written, as opposed to other text similarity measures that disaggregate documents into a bag of words and require preprocessing such as stemming, the removal of stop words, and other manipulations that can potentially affect interpretation.⁴⁵ Overall, we focus on instances of copy-pasting in order to preserve the precise legal meaning of the texts and to uncover instances where the signatories have deliberately incorporated past treaty language. We believe that his approach best addresses the underlying text generation process. However, in the [Supplementary Appendix](#), we demonstrate that our results are robust to alternative text similarity methods, including cosine and Jaccard similarity measures.⁴⁶

B. Who wrote RCEP: the PTA side

In order to assess conjectures one through three, we engage in several comparisons. First, [Table 1](#) presents the 20 PTA investment chapters concluded by RCEP signatories that most influenced the investment chapter. A total of 38 PTA chapters were analyzed, which represents the universe of PTAs with investment provisions signed by RCEP signatories since 2005. Column one lists the agreement, column two shows the total number of words copied in RCEP, and column three the percentage of the total words in the RCEP chapter from the corresponding PTA. For example, row one shows that 42% (or approximately 2549 words out of 6069) of RCEP was copied directly from the CPTPP.⁴⁷

The results for PTAs show that there was extensive copy-pasting in the final RCEP agreement. In terms of our conjectures, we find support for several. First, the results at the agreement

⁴¹ See Allee and Lugg, above n 25; Alschner and Skougarevskiy, above n 25; Peacock et al., above n 32.

⁴² L. Bloomfield, 'Wcopyfind 4.1.5', 2017, <https://plagiarism.bloomfieldmedia.com/software/wcopyfind/>.

⁴³ Allee and Elsig, above n 32.

⁴⁴ Alschner and Skougarevskiy, above n 25. The primary difference between these two measures is that with *wcopyfind* the user can decide the relevant direction of the comparison. That is, we choose to assess how much of the final text of RCEP—the agreement we are interested in—is copied from other agreements, whereas other techniques often report a single similarity measure.

⁴⁵ A. Spirling, 'US Treaty Making with American Indians: Institutional Change and Relative Power, 1784–1911', 56 (1) *American Journal of Political Science* 84 (2012).

⁴⁶ For example, we show that the correlation between our preferred copy-paste measure and cosine similarity and Jaccard index based measures is typically above 0.70.

⁴⁷ These overlap percentages show how much of RCEP was copied from a specific agreement; thus, they do not sum to 100%. Rather, a signatory may borrow similar segments of language from multiple prior agreements, a point we address in more detail below.

Table 1. Top twenty PTAs that most influenced the RCEP investment chapter

Agreement	Words copied	% RCEP copied	Year of agreement
CPTPP	2549	42%	2018
Australia Indonesia	2491	41%	2019
TPP	2503	41%	2016
Australia Singapore	2439	40%	2016
Australia Peru	2288	38%	2018
AANZFTA	2255	37%	2009
Singapore Turkey	2193	36%	2015
Korea New Zealand	2042	34%	2015
Central America Korea	2070	34%	2018
Australia Korea	2011	33%	2014
Costa Rica Singapore	1921	32%	2010
New Zealand Taiwan	1945	32%	2013
Korea Peru	1912	32%	2011
Korea Vietnam	1936	32%	2015
Colombia Korea	1964	32%	2013
Singapore Taiwan	1889	31%	2013
Singapore Sri Lanka	1718	28%	2018
Canada Korea	1685	28%	2014
Australia Malaysia	1650	27%	2012

Note: All agreements from the Design of Trade Agreements (DESTA) database.⁴⁸

level provide initial support for conjecture one, which suggested that the agreement was influenced heavily by ASEAN member states' preferences. Not only is the ASEAN Australia New Zealand FTA (AANZFTA) one of the most copied agreements, with approximately 37% of RCEP's text taken from the agreement, but we see that agreements by ASEAN individual members are well represented among the most copied agreements. For example, the CPTPP and TPP each contained four ASEAN member states and were the 1st and 3rd most copied agreements respectively. Similarly, the Australia–Indonesia agreement, the Australia Singapore PTA, and the Singapore Turkey PTA are second, fourth, and seventh most copied, respectively, each contributing over 35% of the final language of the RCEP investment chapter.

Turning to conjecture two, the results are mixed in the PTA context. In the case of Japan, they are a leading member of the CPTPP, which is the most copied agreement. But previous analysis did not find that they were a driving force behind the initial negotiations for the investment chapter, which most resembled past US agreements.⁴⁹ Moreover, none of Japan's bilateral agreements are among the top 20. Turning to China, the results do not show a single PTA among the top 20. In fact, Chinese PTAs do not turn up until the 24th and 25th most copied agreements, and both are with RCEP signatories—Korea and Australia—who seem to have had more overall influence on the agreement.⁵⁰ Thus, there is little solid evidence that either China or Japan had a major role through the copy-pasting of their past PTA language. In contrast, South Korea seems to have had more influence through bilateral PTAs than either Japan or China, with sizable chunks of RCEP being copied from Korea's agreements with New Zealand (34%), Central America (34%), Australia (33%), Peru (32%), Vietnam (32%), Colombia (32%), and Canada (28%). Moreover, the Korean case is buoyed by the fact that the agreements represent both a mix of RCEP and non-RCEP partners.

⁴⁹ See Allee and Lugg, above n 25.

⁵⁰ The China Korea 2015 agreement has 16% overlap, and the Australia China 2015 agreement has 13%.

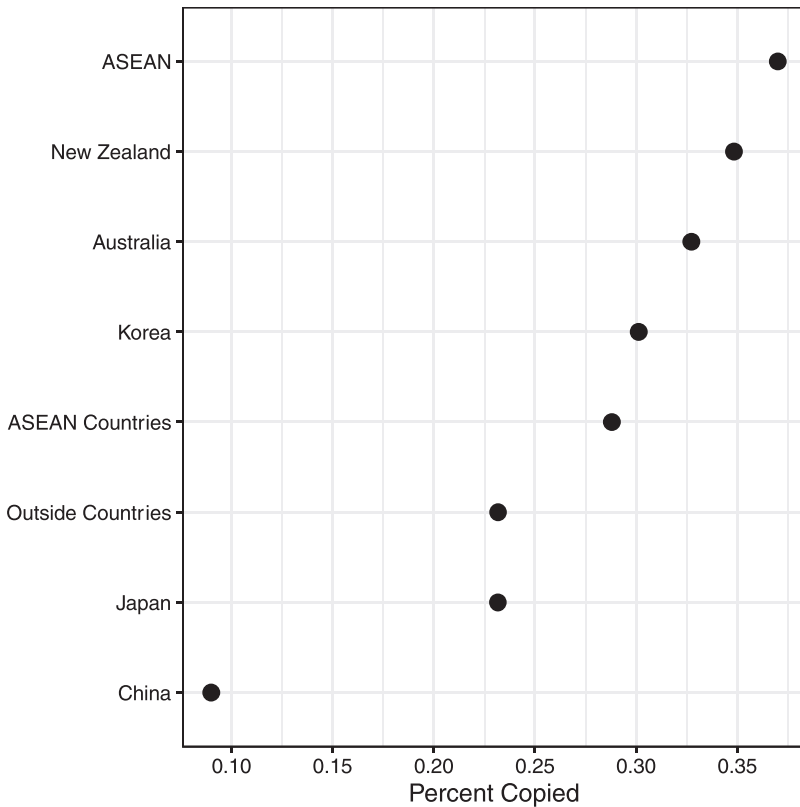


Figure 2. Country PTA average amount copied.

Turning to conjecture three, we see that there does appear to be outside influence on the agreement, mostly via US influence on CPTPP and TPP. Moreover, as noted above, previous analysis suggests that the investment chapter of the TPP was largely drawn from previous US PTAs. Analysis of the original TPP suggested that the investment chapter matched past US agreements often at 80% or above, with approximately 88% of the US-Oman Agreement incorporated directly into the TPP text. Thus, the fact that the TPP and revised CPTPP are only copied at 42 and 41%, respectively, suggests that while outside influence is considerable in some provisions, and hence determined some of the final content of RCEP, it would be wrong to view the agreement as wholly composed of provisions initially crafted by outside parties. In addition, there is little evidence that recent EU agreements with RCEP signatories had much influence on the investment chapter. The two highest EU agreements are those with Japan and Singapore, which only overlap by 12 and 11%, respectively, which are lower than other agreements by both of those parties. Finally, there also does not appear to be extensive influence from India—who dropped out the negotiations part way through—as Indian PTAs with Malaysia and Japan are 21st and 28th most copied, respectively.

Figure 2 views the data in a slightly different manner by aggregating the average amount copied for all PTAs across signatories. This is important as it helps us assess the extent to which certain countries systematically copied language into RCEP through multiple past agreements. Even though there is only one ASEAN PTA with a relevant investment chapter, the amount copied is higher than any other country or country grouping, with 37% of RCEP copied. New

Zealand, Australia, and Korea are next, with 35, 33, and 30% copied, respectively. If we aggregate ASEAN member states individually across all PTAs, the average is approximately 29%, and Japan's average is at approximately 23%. Importantly, China is clearly in last position with 9%. This suggests again strong support for conjecture one, with both an ASEAN agreement and ASEAN member states clearly having an important imprint on the agreement. As before, the evidence for conjecture 2 is more mixed. There is clear imprint from Korea, but Japan has less influence, and China's is nearly nonexistent. Finally, for conjecture 3, we see that on average outside countries have less influence than several of the core RCEP members, but, as noted above, the CPTPP and original TPP agreements show that there is some important influence on key provisions.

C. Who wrote RCEP: The BIT side

Next, we address the authorship of the RCEP investment chapter through an analysis of the imprint of the negotiating parties' previous BITs on the final provisions. Results of the quantitative comparisons are presented in [Table 2](#), which presents the 20 agreements with the most imprint on the final RCEP agreement. Several trends stand out. First, it is notable that the four closest matching agreements are all agreements with ASEAN as a party. The ASEAN-Hong Kong agreement is the most copied (41%), followed by the ASEAN-India Investment Agreement (37%), ACIA (35%), and the ASEAN-South Korea Agreement (31%). This provides confirmatory evidence in support of conjecture 1, which emphasized the role of ASEAN in steering the content of the RCEP agreement.

Turning to conjecture 2, several important findings stand out. First, unlike when we analyzed the parties' past PTAs, we see that several Chinese investment agreements had language

Table 2. Top 20 investment agreements that most influenced the RCEP investment chapter

Agreement	Words copied	% RCEP copied	Year
ASEAN-Hong Kong, China SAR Investment Agreement	2487	41%	2017
ASEAN-India Investment Agreement	2236	37%	2014
ASEAN Comprehensive Investment Agreement	2109	35%	2009
ASEAN-South Korea Investment Agreement	1898	31%	2009
Australia-Hong Kong, China SAR BIT	1675	28%	2019
Japan-Uruguay BIT	1522	25%	2015
ASEAN-China Investment Agreement	1448	24%	2009
China-Hong Kong CEPA Investment Agreement	1445	24%	2017
Japan-Peru BIT	1460	24%	2008
Armenia-Japan BIT	1317	22%	2018
Colombia-Japan BIT	1363	22%	2011
Taiwan-Viet Nam BIT	1309	21%	2019
Israel—Japan BIT	1306	21%	2017
Argentina-Japan BIT	1239	20%	2018
EU-China Comprehensive Agreement on Investment	1152	19%	2021
Myanmar-Singapore BIT	1102	18%	2019
Japan-United Arab Emirates BIT	1099	18%	2018
Japan-Mozambique BIT	1089	18%	2013
Japan-Myanmar BIT	1123	18%	2013
Japan-Lao People's Democratic Republic BIT	1048	17%	2008

Note: Agreement texts identified and taken from the Electronic Database of Investment Treaties (EDIT).⁵¹

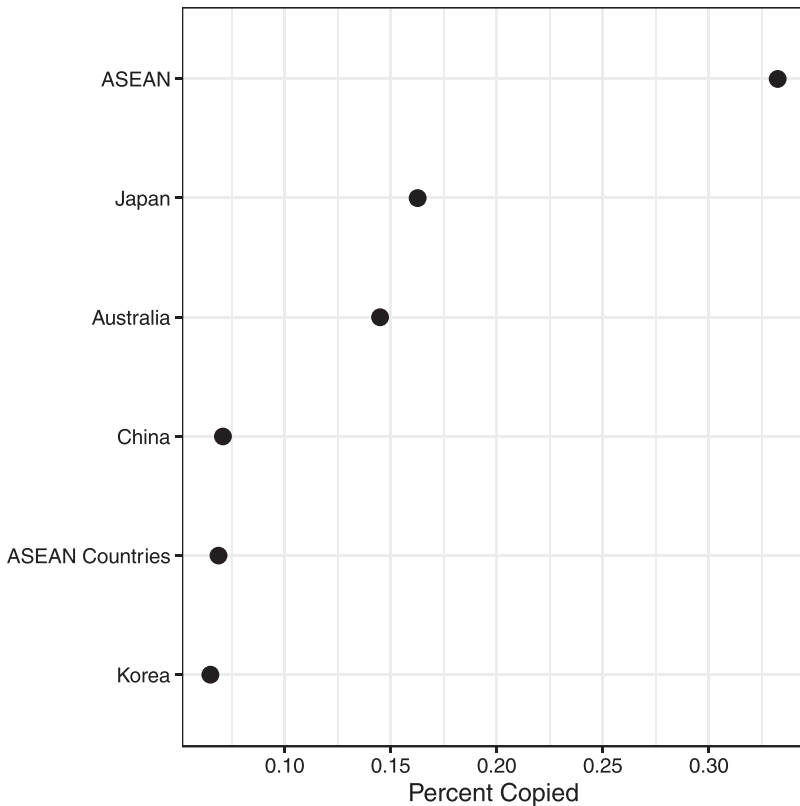


Figure 3. Country and grouping averages for investment agreements.

which was replicated in the final chapter. The ASEAN-Hong Kong Agreement, the Australia-Hong Kong Agreement, the China-Hong Kong CEPA and the recent China-EU Agreement all show evidence of influencing the final language. Thus, Hong Kong and China clearly played a role via investment agreements that is not clear when we consider PTAs alone. Interestingly, we also see evidence of Japanese influence via 10 BITs in the top 20 agreements, which range from contributing between 25% and 17% of the final text of the RCEP investment chapter. Finally, although there are not many South Korean agreements among the top 20, the agreement between ASEAN and South Korea negotiated in 2009 has the fourth most content copied in the RCEP agreement.

In terms of conjecture 3, the evidence here is minimal. The recently negotiated EU-China agreement contains some replicated content, but at 19% of the total, this amount is not nearly the amount of copied from the CPTPP and the TPP. Thus, the evidence in support of conjecture 3 is mixed at best.

Figure 3 presents averages across all investment agreements from 2005 to the present for relevant groupings of the parties. The dot labeled ASEAN represents only agreements where ASEAN negotiated collectively, whereas the dot for ASEAN member states includes those that ASEAN member states negotiated bilaterally with other countries. New Zealand is not included as they had no relevant investment agreements during the time period. Nor is there a dot for outside parties, as the only relevant outside agreement is the recently negotiated EU-China agreement that was discussed above. The figure yields several important takeaways. First, it

again provides compelling evidence for the influence of ASEAN in the negotiations. The average amount replicated across all ASEAN led agreements is 33%, which is approximately double that of the next highest party, Japan. Interestingly, this is in stark contrast to agreements with ASEAN member states individually, which contain only about 7% of the language replicated in RCEP on average.

Overall, this suggests that the RCEP agreement indeed represents an effort to write new rules for the region around a more common ASEAN template, rather than that of any of the individual ASEAN. Clearly, other parties also had a major imprint, as we see large segments of text from past agreements involving Japan and Australia. Importantly, however, the gap between ASEAN agreements and other countries for investment treaties is quite large, suggesting that ASEAN influence was particularly consequential via this track. The results also show that if we consider the whole collection of Chinese agreements, their imprint is relatively small. This again paints the picture that there was minimal adoption of China's preferred provisions from their past agreements. Instead, to the extent that language from China made its way into the agreement it was on provisions that had already been agreed to in earlier negotiations with ASEAN member states.

D. BITs versus PTAs?

In this section, we consider our next set of conjectures (4–6), which specify whether the negotiating parties to RCEP chose to recycle language from previous PTAs or BITs. We outlined two competing logics, one favoring PTAs as a focal point, whereas the other favored BITs.

In order to address this quantitatively, [Figure 4](#) presents the average amount of language taken from the top five through the top 35 investment agreements and compares that to the amount taken from PTAs. The grey dots represent investment agreements, with dark dots represent PTAs. This comparison illustrates quite clearly that, on average, the countries chose to draw more from their past PTAs relative to investment agreements. In every comparison, the average amount adopted from PTAs exceeds that taken from investment agreements. For example, the average amount of text taken from the top 10 PTAs is approximately 38%, whereas the amount of

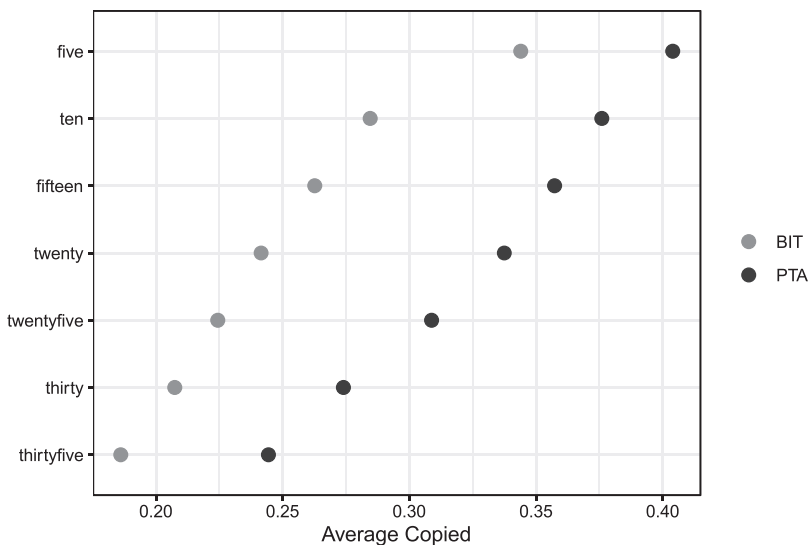


Figure 4. Average amount of language in RCEP taken from investment agreements versus PTAs.

Table 3. Comparison of language recycled across PTAs, and BITs, by grouping

Actor	Top PTA	Top BIT	Top 5 PTAs	Top 5 BITs
ASEAN	37%	41%	19%	33%
China	16%	41%	9%	27%
Japan	42%	25%	26%	26%
S. Korea	34%	31%	33%	16%
Australia	42%	28%	40%	15%
ASEAN member states	42%	21%	40%	18%

language taken from the top ten BITs is around 28%, a 10-percentage point difference. As such, this indicates that on the whole we find support for conjecture 4, which suggests that countries are more likely to recycle language from past PTAs.

A comparison of the raw averages, however, hides important dynamics at the country grouping level. Thus, to gain further insight, Table 3 compares the amount of text contained in RCEP by country grouping, focusing on only the most influential agreements. Several important findings stand out. First, we see that not all actors uniformly preferred to draw text from their PTAs versus BITs. The most notable difference is that ASEAN drew much more from its top 5 investment agreements, an average of 33.25% of RCEP came from these sources, whereas they pulled comparatively less from their body of PTAs. A similar story emerges for China. They pulled much more language from their top BITs relative to their PTAs, with their top five BITs contributing an average of 27.5% of RCEP's content, whereas they averaged a paltry 9% across their PTAs.

We observe different patterns when we focus on the behavior of Japan, Australia, Korea, and individual ASEAN member state. In these cases, the actors preferred to borrow language from PTAs, sometimes by a larger margin. For example, we see that in the case of ASEAN member states' individual PTAs, these were much more influential than their individually negotiated BITs. This again suggests that different countries may be rule-makers in some negotiating contexts, but rule-takers in others. Moreover, some countries seem to have drawn relatively evenly across agreements. For example, Japan drew evenly from their top PTAs and top BITs, suggesting that their treaty practice is more consolidated across the regimes.

These differences can be chalked up to several dynamics. First, countries likely have a generalized preference for PTA language when negotiating new PTAs. However, each country's past experience in the trade and investment regimes are likely to be different. They may be more active in one regime versus the other and they may be more influential in one versus the other. This seems to be particularly important in the case of ASEAN whose primary influence on the agreement was through their stand-alone investment agreements. Not only were these agreements more recent, but because they were negotiated collectively, ASEAN member states had more leverage over the final content, whereas individual ASEAN member states were frequently rule-takers in BITs with larger negotiating partners from outside the region. For example, the Protocol to amend the ASEAN-Japan FTA 2019 provides for the written consent for ICSID arbitration, whereas the ASEAN-Hong Kong Investment Agreement does not have any ISDS provision. Thus, we find more support for conjecture 4 than conjecture 5, but note that that where countries choose to draw language from is conditional upon (i) the availability of recent agreements and (ii) their past success across different contexts.

Our final conjecture suggests that countries adopt complimentary language from their different treaties. In order to assess this conjecture, we looked for differences in the language borrowed across the different actor groupings. To analyze this conjecture, we qualitatively compare where textual overlap is occurring from across different agreements with common country pairs. First, we compare the impact of two ASEAN agreements with other RCEP signatories: the

Table 4. Comparison of language recycling across PTAs and BITS at the article level

Article	Title	ASEAN-AUS-NZ PTA	ASEAN-HK IIA	CPTPP	Japan-Uruguay BIT
10.1	Definitions	0.39	0.25	0.31	0.19
10.2	Scope	0.23	0.42	0.22	0.09
10.3	National Treatment	0.41	0.45	0.77	0.25
10.4	Most-Favoured-Nation	*	0.36	0.44	0.07
10.5	Treatment of Investment	0.79	0.77	0.54	0.56
10.6	Prohibition of Performance Requirements	0.04	*	0.69	0.35
10.7	Senior Management and Board of Directors	*	*	0.87	0.66
10.8	Reservations and Non-Conforming Measures	0.31	0.29	0.48	0.21
10.9	Transfers	0.64	0.62	0.39	0.19
10.1	Special Formalities and Disclosure of Information	0.81	0.83	0.77	0.43
10.11	Compensation for Losses	0.93	0.32	*	*
10.12	Subrogation	0.52	0.62	0.28	0.16
10.13	Expropriation	0.46	0.48	0.34	0.23
10.14	Denial of Benefits	0.44	0.58	0.25	0.15
10.15	Security Exceptions	*	0.47	*	0.23
10.16	Promotion of Investment	*	0.8	*	*
10.17	Facilitation of Investment	*	0.27	*	*
10.18	Work Programme	0.36	0.53	*	*

Note: Asterisks denote instances where there was no stand-alone chapter in the relevant agreement.

AANZFTA and the ASEAN Hong-Kong Investment agreement. Next, we compare the impact of two Japanese agreements: the CPTPP and the Japan-Uruguay BIT.

Table 4 summarizes these results for each article of the RCEP investment chapter where there were analogous chapters from other agreements.⁵² Each article is categorized as having high overlap, medium overlap, or low overlap. Reading across each row provides evidence as to whether countries were copying and pasting language from different places across the agreements. Several observations are noteworthy. First, it is quite common for there to be relatively extensive, but medium levels of copy-pasting across certain articles, such as definitions, scope, and denial of benefits. In this instance, it seems that countries are likely copying important provisions that occur in many treaties in the overall universe but tailoring larger portions to their specific needs. Second, and importantly, we see that there is some variation across the common pairs. For example, in the case of ASEAN, we see that in articles coming towards the end of the agreement, which are more likely to be idiosyncratic or newly favored provisions, we see more differences in the amount of copy-pasting. For example, more is drawn for the ASEAN

⁵² The absence of a number in the table means that there was no stand-alone chapter on that topic; there still could be replicated text from other articles. Moreover, in the case of several agreements, there are chapters that were not found in RCEP, including investment disputes and certain types of safeguard measures to name a few.

HK agreement in the areas of ‘denial of benefits’, ‘promotion of investments’, and ‘facilitation of investment’ than from the older AANZFTA.

In the case of Japan’s agreements, we see a similar pattern. On some issues, there is a common amount of copying and pasting across agreements, but for others, we see that Japan clearly copied more from one agreement rather than the other. For example, more was copied from the ‘National Treatment’, ‘Most-Favoured-Nation’, ‘Prohibition of Performance Requirements’, and ‘Special Formalities and Disclosure of Information’ articles of the CPTPP than from one of Japan’s most recent BITs with Uruguay.

One important final note based on these comparisons is that we clearly see that there are differences across the two ASEAN and Japanese agreements. Namely, Japan’s impact is more obvious on offensive provisions, i.e. provisions that directly serve the interests of Japanese investors such as the articles related to ‘prohibition of performance requirements’ and ‘Senior Management and Board of Directors’ than ASEAN agreements. In contrast, recent ASEAN agreements have more impact across defensive provisions, i.e. provisions designed to protect the rights of the host states such as ‘subrogation’, ‘Denial of Benefits’, ‘Security Exceptions’, and ‘Promotion of Investment’. This suggests, importantly, that the negotiating parties sought to protect their interests and drew from past treaties where they felt their preferences were well represented. Ultimately, support for conjecture 6 is mixed. In some instances, the negotiating parties clearly have an interest in replicating similar (or even the same) language across both their PTAs and BITs, but other times they strategically pick and choose language from different portions of treaties.

V. DISCUSSION AND OUTLOOK

In this article, we evaluated a series of theoretically informed conjectures concerning which parties influenced the recently negotiated RCEP agreement, and whether this influence was most evident through past PTAs or BITs. Support for our six main conjectures is summarized in Table 5. First, we find strong support for the conjecture that ASEAN played a central role influencing the final text of the agreement. This seemed to be especially the case with respect to recent investment agreements crafted by ASEAN in the region. Thus, there is evidence that by pooling their collective resources and acting through an important regional organization with strong negotiating capacity, ASEAN member states were able to exercise power as rule-makers in the region. This is an important finding, as it corroborates existing qualitative accounts of the negotiations,⁵³ but in doing so, also shows in more detail which provisions were selected, and how ASEAN strategically adopted language from contexts where it had been more successful in the past.

Second, we find mixed support for our second conjecture about the centrality of China, Japan, and Korea in the outcome. There was clear evidence that Japan influenced the agreement through CPTPP and recent BITs, and there was some influence of Korea through recent bilateral PTAs, but, on the whole, this influence was not as large as one might expect given their size and importance in the region. Most surprising, however, was the relatively minimal influence of China on the final negotiated text. Given the growing economic and political importance of China, and evidence of Beijing’s desire to shift the locus of global governance, we find this result puzzling. Future studies should probe in more depth whether this is an instance of China failing to influence an important regional agreement, or if the final text is in fact preference compatible but just not evident when looking at textual imprint from past treaty practice. As in the case of other agreements, the fact that we found no evidence of highly replicated texts in the final agreement (the highest overlap percentage were typically no more than 40% at the most), means

⁵³ see Elms, above n 5; Chaisse, above n 5; Jusoh and Ramli, above n 5.

Table 5. Support for conjectures

Conjecture number	Description	Support
1	ASEAN influence	Strong, especially through BITs.
2	Big 3 influence	Mixed. Japanese influence through CPTPP and BITs. Korean influence through bilateral PTAs. Chinese influence minimal, except for ASEAN investment agreements that are very recent.
3	Outside influence	Limited. Clear influence from CPTPP, but seemingly little EU influence. No clear outside influence through BITs.
4	PTAs influence	Strong, countries appear to favor PTAs on average, but very large portions of language taken from recent ASEAN IIAs.
5	BIT Influence	Conditional. Countries appear to favor PTAs on average, but this depends on availability of past agreements and past negotiating success. Again, recent ASEAN IIA appear important.
6	Complementary Influence	Mixed. There appears to be instances where similar language is taken from both PTAs and BITs by common treaty pairs, but there are also instances where more is taken from one treaty relative to another.

that RCEP did contain language that is unique to this landmark agreement, including language promising to consider the negotiation of a new ISDS mechanism in the future, but we caution that our method cannot provide an exact measure of how much of RCEP is novel.⁵⁴ Thus, future studies should seek to uncover how bargaining dynamics played out in these areas. Moreover, the fact that the parties decided to deal with some issues in the future—such as dispute settlement provisions—may indicate that China strategically deferred to ASEAN during the initial negotiations but may be more forceful in the future.

Third, we find limited support for our third conjecture on the influence of outside parties. Aside from potential US influence through TPP and left-over language in the CPTPP, we find limited evidence of influence from other major parties' agreements such as the EU and India. We find this moderately surprising, as it could be argued that RCEP signatories have a strong incentive to try to replicate the legal language of their largest export markets and areas where there are large inward and outward investment flows.

Taken together, the results from these three conjectures provide compelling evidence that ASEAN played a central role facilitating and leading the negotiations. This fits well with information from the negotiation process, where ASEAN, when negotiating as a group would normally work towards finding a common position through an ASEAN caucus. Also, the strong influence of the ACIA provides evidence that an ASEAN-centered approach has been notable. Thus, we take this as indication that the signatories were strongly motivated by a desire to reconcile the noodle-bowl of existing agreements under a common framework. This suggests that the signatories were motivated to shift the locus of lawmaking away from agreements that involved major external powers such as the USA and towards a more Asian centered forum that reflected the preferences of the parties and the deeply integrated GVCs in the region. Observers should pay close attention to whether RCEP treaty provisions become the dominant legal standards for

⁵⁴ See Allee, Elsig, and Lugg, above n 34.

the signatories, and whether this affects treaty practice more broadly both in the region and the beyond.

We also sought to assess whether and how countries chose to draw language from their past PTAs versus BITs. With respect to conjectures 4 and 5, we found that on average countries choose to draw more from past PTAs than BITs. We theorized that this was due to the incentives of the negotiators to draw from PTAs rather than BITs. Moreover, we also theorized that this could be part of the larger backlash against BITs, which means that negotiators will try to stray away from BIT-like language in an effort to reduce their exposure to ISDS and/or avoid domestic backlash. Future research should probe this result in more depth to better understand which logic is most influential, and how this affects the incentives facing the negotiating parties.

Finally, we found mixed evidence that states adopt complementary language from their PTAs versus their BITs. This result, especially when considered with the fact that influence through BITs and PTAs varies across countries and country-pairings, suggests that negotiators are strategic with respect to the language they choose. When countries have been more successful in one regime than another and have more recent agreements to draw from, they will likely choose those. However, they may go back and forth between the regimes regularly in search of language that satisfies the negotiating parties and domestic interests. More broadly, this indicates that future research should do more to untangle—both with text-as-data techniques and with qualitative analyses of the negotiations—the strategic incentives facing negotiators, and the factors that determine which countries are more successful. Importantly, we suggest that countries likely draw from whichever regime(s) they were most able to influence in the past, which should depend on the negotiating context. This corroborates theoretical accounts such as work on regime complexity, which suggests that parties have incentives to search for forums where their interests are best represented.⁵⁵

Overall, our account here shows that fruitful insights about PTA design can be gleaned from quantitative text analysis of investment provisions in PTAs, which have typically not been considered on their own in the literature. This can help researchers better understand the process through which important new legal language is created, consolidated, and diffused. As one of the most important PTAs signed in recent years, it is imperative that we understand better who among the parties most influenced the treaty language on investment and how this is likely to impact treaty practice in the region, and globally, in the future. Our account suggests that ASEAN played a central role, both as part of an effort to write new rules for the region and also in order to consolidate exiting treaty language across the BIT and PTAs networks of the signatories. Whether RCEP becomes the dominant forum for dealing with investment within the region, and how other actors such as the USA, EU, and India react, will be an important development to monitor in the coming years.

SUPPLEMENTARY DATA

Supplementary data are available at *Journal of International Economic Law* Online.

⁵⁵ S. Meunier and K. Alter, 'The Politics of International Regime Complexity', 7 (1) *Perspectives on Politics* 13 (2009); K. Alter and K. Raustiala, 'The Rise of International Regime Complexity', 14 *Annual Review of Law and Social Science* 329 (2018).