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## International Investment Policy of Small States: The Case of Brunei

### Abstract

Brunei Darussalam is a small open economy gifted with important oil resources which make it the second richest Southeast Asian economy after Singapore. Like all resource-rich countries, its main challenge is to diversify its activities to prepare for a post-oil sustainable economy. Attracting foreign direct investment in new sectors will be an important element of success in this endeavour. The legal framework governing investment will therefore be critical to foreign investors. Although the experience of Brunei in international investment treaties negotiations is rather limited from a quantitative point of view, the country has signed several treaties with partners such as China, Korea, Japan, and the other ASEAN countries. This chapter reviews the existing treaties with the object of assessing Brunei’s contribution to international investment policy in Asia and explaining Brunei’s trajectory in terms of investment rule-making, FDI trends and potential disputes.

### Keywords

Brunei Darussalam – Foreign Direct Investment – Investor-State Arbitration – Investment Treaties – Investment law

### 1 Introduction

Brunei Darussalam (Brunei) is headed by the Sultan of Brunei who also serves as Prime Minister, Minister of Defence and Minister of Finance. He is advised by, and presides over, four policy councils: The Council of Cabinet Ministers, the Legislative Council, the Privy Council, and the Religious Council. The Sultan appoints the members of each of these Councils<sup>2</sup>. Brunei became independent in 1984 after having been under British protection and suzerainty since 1888. That same year, it became a member of the United Nations (UN), the British Commonwealth, the Organisation of Islamic Cooperation, and most importantly of the Association of Southeast Asian Nations (ASEAN). Brunei joined the Asia Pacific Economic Cooperation (APEC) forum in 1989 and became a founding member of the World Trade Organisation (WTO) in 1995. Brunei has a parallel legal system of courts which apply respectively the sharia law and the common law. The sharia law applies mostly to Muslims for family and religious affairs while the common law applies to civil and economic affairs. The common law is based principally on the English law as in India, Malaysia, and Singapore.

Since its independence, Brunei has achieved high living standards with a gross national income per capita of USD 77,355 in 2015, slightly higher than in Singapore (USD 76,459)<sup>3</sup> when the difference of cost of living is taken into account. The top two richest Southeast Asian

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<sup>2</sup> The Commonwealth, ‘Brunei Darussalam: Constitution and Politics’ <<http://thecommonwealth.org/our-member-countries/brunei-darussalam/constitution-politics>> accessed 14 June 2017.

<sup>3</sup> Based on the Purchasing Power Parity (PPP) in constant international dollars of 2011, which accounts for the difference of price levels: World Bank, ‘World Development Indicators’ <<http://data.worldbank.org/data-catalog/world-development-indicators>> accessed on 12 June 2017

countries have close relations, with extensive cooperation in monetary and defence areas<sup>4</sup>, and Brunei looks carefully at Singapore for law reform initiatives (e.g. in consumer law). According to the UN Development Programme, the Human Development Index in 2014 was 0.865 (compared to 0.925 in Singapore, with the maximum being 1), which ranked Brunei in the top 30 among 188 countries. The life expectancy is of 79 years (compared to 83 years in Singapore).

Perceived corruption is quite low. According to Transparency International, Brunei was ranked 41 out of 176 countries in its 2016 Corruption PeRCEption Index<sup>5</sup>. The country is also considered a good place to do business. In the 2017 Doing Business Report published by the World Bank<sup>6</sup>, Brunei achieved the status of most improved country in the world and ranks 4th in ASEAN (after Singapore, Malaysia and Thailand) and 13th out of 29 countries in Asia Pacific. On a scale of -2.5 to +2.5, Brunei's scores in 2015 were 1.05 for government effectiveness, 0.84 for regulatory quality and 0.44 for rule of law according to the Worldwide Governance Indicators also published by the World Bank (while in Singapore, the respective scores were respectively 2.3, 2.3 and 1.9)<sup>7</sup>. This shows that Brunei's scores are moderately positive and must improve to reach the benchmark established by Singapore in the region.

## 2 Current Patterns of Foreign Investment in Brunei

With a share of around 50% of Gross Domestic Product<sup>8</sup>, the economy of Brunei is very dependent on oil and gas, and very vulnerable to fluctuations of its prices on global market. With the recent fall of oil prices from a peak of \$115 per barrel in June 2014 to under \$35 at the end of February 2016, and its gradual recovery to around \$50 per barrel which is expected to last, Brunei has had to adjust its economic policy to new realities.

After four years of recession, budget spending was cut and efforts to diversify the economy were revived. Economic diversification is enshrined in the *Wawasan Brunei 2035* economic development plan<sup>9</sup>. It defines five investment priority clusters: the Halal industry, business services, tourism, innovative technology and creative industry, and downstream oil and gas industry. Measures were adopted to bolster the private sector, which accounts for around a quarter of economic activity.

Amid this challenging environment, foreign direct investment (FDI) is more important than ever. Indeed, Figure 1 shows that FDI has peaked in 2012 at almost 860 million us\$ but has plummeted since then.

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<sup>4</sup> Brunei and Singapore have signed a Currency Interchangeability Agreement which makes one Bruneian dollar equals to one Singaporean dollar and de facto legal tender in either country.

<sup>5</sup> Transparency International, 'Corruption PeRCEptions Index 2016' <[https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016#table](https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table)> accessed 12 June 2017.

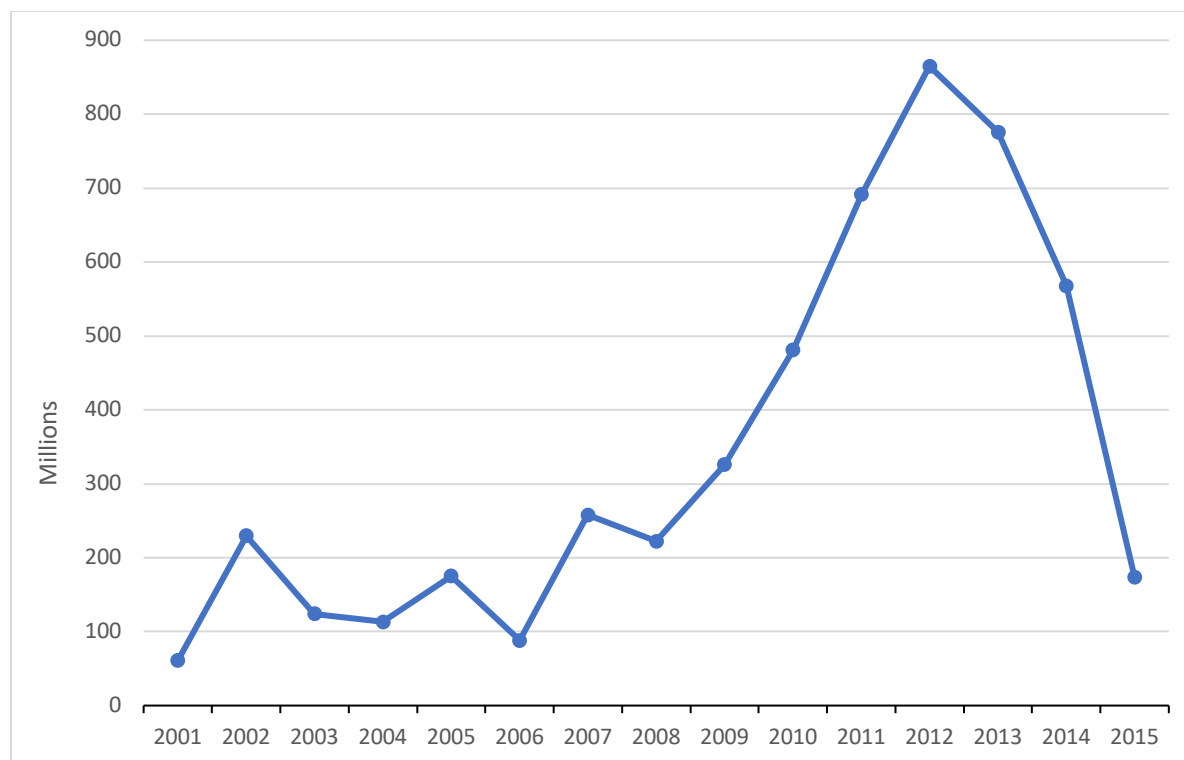
<sup>6</sup> 'Economy Profile 2017: Brunei Darussalam' in World Bank, *Doing Business 2017: Equal Opportunity for All* (World Bank 2017), available at <<http://documents.worldbank.org/curated/en/821781478159613430/pdf/109730-WP-DB17-PUBLIC-Brunei-Darussalam.pdf>> accessed 14 June 2017.

<sup>7</sup> World Bank, 'World Governance Indicators' <<http://info.worldbank.org/governance/wgi/index.aspx#reports>> accessed 12 June 2017.

<sup>8</sup> Services account for 35.6%, manufacturing for 13.8% and agriculture for 1%. Average share of GDP over the period of 1989–2015. Authors' calculations based on World Bank (n 2).

<sup>9</sup> Council for the Long-Term Development Plan, *Wawasan Brunei 2035: Outline of Strategies and Policies for Development 2007–2017, National Development Plan 2007–2012* (2007).

Figure 1. Foreign direct investment, net inflows (bop, current us\$). Source: World Bank (n 2).



Foreign investment in Brunei is important for its economy but accounts for a very small share of ASEAN's FDI, less than 1% even for the best years. As may be expected, most of the FDI is concentrated in the oil and gas sector, which explains the sharp fluctuations. At the peak of 2012, two thirds of FDI were concentrated in oil and gas, 9% in manufacturing, 4.4% in construction, 4.7% in wholesale and retail trade, 14% in Financial and insurance services and 2.3% in other activities.

Table 1 shows the country of origin of FDI by sector of activity over the recent period. European FDI dominates in oil and gas (mining and quarrying), followed by ASEAN investors. In each case, the number of countries involved is very limited. The Netherlands and the United Kingdom make the most of European FDI, while Malaysia and Singapore are the top ASEAN investors. Table 1 reveals a movement of divestment in manufacturing, trade and financial and insurance activities that runs contrary to the objective of diversification of the economy. The largest foreign investment accomplished to this day is a methanol distillery, partially financed by Mitsubishi Gas Chemical Company (from Japan). A series of new downstream energy projects such as a refinery, financed by Chinese investors, is set to come on-line by 2019 and should help revamp the economy. China appears as a new important investor.

Outward FDI is also important relative to the size of the Bruneian economy, although it is difficult to estimate its exact size. Outflows registered by the World Bank indicate an average of around USD 141.5 million per year over the period 2001–2015<sup>10</sup>. This does not include the

<sup>10</sup> Authors' calculations based on World Bank (n 2).

outward investments realised by Bruneian sovereign wealth funds, whose capital was estimated at around USD 39.2 billion in 2012<sup>11</sup> and which buy financial assets and real estate.

Table 1: *Foreign Direct Investment by Economic Activity and Country, 2015*

<b>Foreign Direct Investment by Economic Activity and Country 2015</b>							
<i>Economic Activity, BND million</i>	ASEAN	European Union	Hong Kong	Japan	USA	Others	<i>Total</i>
<i>Mining and Quarrying</i>	96.8	157.6	0.0	0.0	-10.2	0.0	244.2
<i>Manufacturing</i>	1.5	-20.4	-3.0	-52.2	0.0	7.5	-66.6
<i>Construction</i>	8.8	3.1	0.0	0.4	0.0	0.0	12.3
<i>Wholesale and Retail Trade</i>	-0.3	-10.9	-0.2	0.0	0.3	-22.3	-33.4
<i>Financial and Insurance Activities</i>	1.9	-18.1	3.8	0.7	0.0	16.8	5.1
<i>Other Activities</i>	13.3	4.1	0.7	0.9	0.2	57.4	76.7
<b><i>Total</i></b>	<b>122.1</b>	<b>115.4</b>	<b>1.3</b>	<b>-50.2</b>	<b>-9.7</b>	<b>59.3</b>	<b>238.2</b>

Source: DEPARTMENT of Economic Planning and Development, Prime Minister's Office of Brunei Darussalam.

According to Price Waterhouse Cooper, in 2015, Brunei sovereign funds ranked 26 among the top 73, the first being the Norwegian sovereign fund with a capital of USD 818 billion<sup>12</sup>. The funds are managed since 1983 by the Brunei Investment Agency (BIA) under the Ministry of Finance. The BIA 'holds and manages the General Reserve Fund of the Government and all external assets of the Government'<sup>13</sup>. A policy of strict secrecy is observed about the detail of the investment, but it is believed that financial assets consist mainly of fixed-income bonds such as international bonds from the USA and Western Europe and no corporate bonds. The BIA also invests in currency hedging positions, in collateralised debt obligations, credit default swaps and other fixed-income derivatives<sup>14</sup>. A new initiative was taken in March 2015, when the BIA and Oman's State General Reserve Fund, created a new venture, the Oman Brunei Aviation Leasing Co (OBALC), which will invest in and manage the purchase and lease of commercial aircraft operated by airlines in the Middle East and globally<sup>15</sup>. Real estate investments include the Dorchester Collection, a group of 10 high-end hotels created in 1996, which contains among others, the Dorchester in London, the Plaza Athénée in Paris and the Beverly Hills in Los Angeles. Two more hotels operate under the Grand Hyatt brand in Singapore and Kuala Lumpur<sup>16</sup>. The BIA also invests in equity, primarily in large well-

<sup>11</sup> The Investment Management Institute quoted in Oxford Business Group, *The Report: Brunei Darussalam 2014* (Oxford Business Group 2014), available at <<https://www.oxfordbusinessgroup.com/brunei-darussalam-2014/trade-investment>> accessed 14 June 2017.

<sup>12</sup> PwC, 'Sovereign Wealth and Investment Funds 2015 League Table' <<https://www.pwc.com/gx/en/deals/sovereign-wealth-investment-funds/assets/sovereign-wealth-investment-funds-league-table.pdf>> accessed 6 August 2017.

<sup>13</sup> Brunei Investment Agency (Chapter 137), available at <<http://www.commonlii.org/bn/legis/BIA137307/>> accessed 6 August 2017

<sup>14</sup> Sovereign Wealth Center, Brunei Investment Agency, 'Investments: Fixed Income' <<http://www.sovereignwealthcenter.com/fund/5/Brunei-Investment-Agency.html#.WYaZJK3pORs>> accessed 6 August 2017.

<sup>15</sup> 'Oman, Brunei Sovereign Funds Partner in Aircraft Leasing' (*Reuters*, 9 March 2015) <<http://www.reuters.com/article/oman-brunei-aircraft-idUSL5N0WB0EB20150309>> accessed 6 August 2017.

<sup>16</sup> Oxford Business Group, *The Report: Brunei Darussalam 2014* (Oxford Business Group 2014).

established companies, usually no more than 5 per cent and follows a passive strategy and does not exercise voting rights. The expectation is to make long-term profits with these blue-chip companies and not to play an active role in their strategy.

In summary, Brunei is primarily interested in investment agreements that induce foreigners to invest in the Sultanate. But, due to the importance of outward investments for the future of the country, in particular of its sovereign funds, Brunei is also eager to protect its investment abroad.

### 3 Brunei's International Investment Law and Policy

Compared to other Southeast Asian countries, Brunei has only signed a few investment treaties, although Brunei appears quite open and not choosy about its counterparties. There are 13 investment treaties currently in force: 7 bilateral investment treaties (BITs), and 4 regional investment treaties and two investment chapters in Free Trade Agreements (FTAs), with BITs demonstrating a high degree of consistency<sup>17</sup>. The 7 BITs in force are with South Korea (signed in 2003), Germany (2004), Oman (2006), Ukraine (2006), India (2009), Bahrain (2009) and Kuwait (2011). A treaty with China has been signed in 2000 but is still not in force (as listed in Appendix 1).

Regional investment treaties (Appendix 2) signed by Brunei are the ASEAN Comprehensive Investment Agreement, the ASEAN-China Investment Agreement, the ASEAN-Korea Investment Agreement and the ASEAN-India Investment Agreement<sup>18</sup>. On top of that, there are 4 investment chapters in FTAs in which Brunei is involved. These comprise Chapter 10 in the ASEAN Australia-New Zealand FTA, Chapter 5 in the Brunei–Japan Economic Partnership Agreement, and Chapter 9 in the Trans-Pacific Partnership (signed in 2016 but not yet in force). It is interesting that Brunei has only concluded one FTA, and that being with Japan – the latter may be explicable by the ASEAN-Japan FTA lacking an investment chapter, to promote and protect the cross-border investment. Brunei has also been negotiating the Regional Comprehensive Economic Partnership (RCEP or ASEAN+6 FTA) with Japan and 14 other economies<sup>19</sup>. Brunei is also a party to the ICSID Convention, which was signed in 2002 and came into force the same year<sup>20</sup>.

The Ministry of Finance is responsible for BITS and the Ministry of Foreign Affairs and Trade is responsible for multilateral investment treaties. But in both cases, a steering committee chaired by the Ministry of Finance, the Ministry of Energy, the Ministry of Foreign Affairs and Trade, the Ministry of Tourism and the Prime Minister's Office will analyse and take decision at a later stage. There is no overt difference of approaches between bilateral or multilateral investment agreements. Brunei does not give preference to trade agreements relative to investment agreements, nor does it make an investment agreement a precondition

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<sup>17</sup> Albeit with an even smaller sample size, Brunei's bit network coherence rank is 17 out of 133 states, according to Wolfgang Alschner and Dmitriy Skougarevskiy, *Mapping BITS* <<http://mappinginvestmenttreaties.com/country?iso=BRN>> accessed 28 July 2017.

<sup>18</sup> On these trade agreements that also cover investment, see Julien Chaisse 'The Shifting Tectonics of International Investment Law – Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region' (2015) 47(3) *George Washington Int'l L Rev* 563–638.

<sup>19</sup> On RCEP, see generally the introductory chapter of this volume. See also Amokura Kawharu and Luke Nottage, 'Models for Investment Treaties in the Asian Region: An Underview' (2017) *Arizona J Int'l & Comp L* (forthcoming).

<sup>20</sup> International Centre for Settlement of Investment Disputes (ICSID), 'List of Contracting States and other Signatories of the Convention (ICSID/3) (as of April 12, 2016)' <<https://icsid.worldbank.org/en/Documents/ICSIDdocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>> accessed 14 June 2017.

to negotiating trade agreements. Both market access and protection of outward investment are considered important objectives by Brunei.

This chapter reviews some of the key provisions (namely the definition of ‘investment’, the drafting of the most favoured nation clauses, and the clauses on expropriation) of Brunei’s international investment treaties. The goal is to assess consistency in the drafting of the key provisions, which would help to characterise Brunei as rather a rule-maker rather than a rule-taker<sup>21</sup>.

### 3.1 Definition of ‘Investment’

The subject matter of the investment agreement is determined by the definition of the term ‘investment’ together with that of the ‘investor’. The concept of investment governs the assets that fall under the scope of application of the agreement. In other words, it answers the question of *what type* of investments are covered by Brunei’s investment treaties.

#### 3.1.1 Asset-Based Definition

Typically, investment agreements adopt a broad definition that refers to ‘every kind of asset’, suggesting that any economic value is covered by the agreement. This asset-based definition is usually followed by an illustrative list of assets covered, which includes:

- *movable and immovable property and other property rights*. This category includes property rights on any goods, as well as ownership of land or any sort of real-state interest, such as mortgages, liens and pledges;
- *interests in the property of companies, such as shares, stock and debentures*. Under these terms, there is no minimum equity participation required to be covered by the agreement, nor is the foreign investor required to be in a position of control over the enterprise. Moreover, other forms of participation as bonds, loans, and debt instruments, may also be included in this category;
- *claims to money and claims to a performance under a contract having financial value*. This category suggests that the agreement applies not only to property rights but contractual rights as well. Many agreements expressly refer to rights acquired under concession contracts, including those for the exploitation of natural resources. The inclusion of contractual rights under the definition of investment raises a number of questions as to contractual relations for cross-border trade in goods and services can be considered ‘investment’ for the purposes of the agreement. The general wording adopted does not seem to restrict the scope of the agreement to long-term contracts, for which under this category, any kind of portfolio investment is included;
- *intellectual property rights*. This grouping encompasses trademarks, trade secrets, patents and copyrights. Some BITs expressly include technical processes, know how, geographical indications and goodwill, indicating that the agreement also covers newer forms of intellectual property rights. There is no express requirement that these rights were registered or acquired under the laws of the host country.

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<sup>21</sup> See generally Chesterman, Poulson and Alschner et al. (discussed in the introductory chapter in this volume).

Under this broad asset-based definition of investment, any asset of economic value retained by the investor as a result of its business operations in the host country can be considered to fall under either one of the categories expressly listed by the agreement, or, ultimately, under the all-encompassing terms of the chapeau of the provision, i.e. ‘every kind of asset’.

Some investor-State arbitration tribunals in recent years have addressed the definition of investment in several agreements featuring an asset-based definition, although not necessarily including the terms ‘every kind of asset’. Some operations that have been considered to be covered investment include, for instance, the establishment of an office to sell cross-border services<sup>22</sup>, market share through trade<sup>23</sup>, promissory notes<sup>24</sup>, loan agreements<sup>25</sup>,<sup>24</sup> lease agreements<sup>26</sup>,<sup>25</sup> construction contracts<sup>27</sup>,<sup>26</sup> and the establishment of a law firm<sup>28</sup>.

Some countries have included language in their agreement to clarify the scope of the term ‘investment’, and hence the subject matter of the treaty. Along this line, for instance, the US Model BIT of 2012, while maintaining an open-ended list of assets that have ‘the characteristics of an investment’, has also introduced clarifying language in regard to certain assets. In this sense, a footnote to the definition of investment recognises that

- [s]ome forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims

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<sup>22</sup> The *Bosca v Lithuania* Award found that a services agreement has the necessary elements of contribution, risk and duration typically considered basic characteristics of an investment. See Luigiterzo Bosca v Republic of Lithuania, PCA Case No 2011-04, Award (19 February 2016) at 168.

<sup>23</sup> The *Ryan and Schooner Capital v Poland* Award found that under its privatisation agreement, the claimant undertook to acquire shares in a company; this falls squarely within the definition of investment in the underlying treaty, which provides that ‘investment’ is ‘shares of stock or other interests in a company’. See *Vincent J Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v Republic of Poland*, ICSID Case No ARB(AF)/11/3, Award (24 November 2015) at 255.

<sup>24</sup> The Decision of the Tribunal on Objections to Jurisdiction, in *Fedax v Venezuela*, applying a BIT which contained several references to investments made ‘in the territory’ of the Contracting Parties, found that it is satisfied because the proceeds of the promissory notes at issue were being applied in the territory of the host State and involved a fundamental public interest (and therefore were to be distinguished from an ordinary commercial transaction). See *Fedax NV and The Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) at 41–43.

<sup>25</sup> The Decision of the Tribunal on Objections to Jurisdiction in *CSOB v Slovak Republic* found that a broad and non-exhaustive definition of ‘investment’ in the bit encompasses the loan transaction at issue. See *Ceskoslovenska Obchodní Banka, as v Slovak Republic*, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999) at 77.

<sup>26</sup> The Award in *Lee v Kyrgyzstan* found that lease agreements along with ‘contributions to the host State’s economy’ constitute an investment within the meaning of Article 1 of the Moscow Convention on the Protection of Investors’ Rights and Article 1 of the Kyrgyz Law ‘On investment’. See *Lee Jong Baek and Central Asian Development Corporation v Kyrgyz Republic*, Moscow Chamber of Commerce Case No A-2013/08, Award (13 November 2013) at 214–217.

<sup>27</sup> The *okkv(okkb) v Kyrgyzstan* Award admitted that an agreement on co-investing into a construction project qualifies as investment under Article 1 of the Moscow Convention for the Protection of Investors’ Rights. See *okkv(okkb) and others v Kyrgyz Republic*, Moscow Chamber of Commerce Case No A-2013/10, Award (21 November 2013) at 134–135.

<sup>28</sup> The *Nordzucker v Poland* Partial Award (Jurisdiction) characterised this type of definition of investment as an ‘open’ type, because the list of various specific investments is preceded by the terms ‘in particular’; it is not exclusive and leaves room for other ‘kinds of assets’ to be included in the notion of ‘investment’ under the bit. *Nordzucker AG v Republic of Poland*, UNCITRAL, Partial Award (Jurisdiction) (10 December 2008) at 166. See *Malaysian Historical Salvors, SDN, BHD v The Government of Malaysia*, ICSID Case No ARB/05/10, 17 May 2007 discussed by Sufian Jusoh in Chapter 7.



to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

A second footnote further clarifies that:

- [w]hether a particular type of license, authorisation, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorisations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law[...].<sup>29</sup>

All BITs concluded by Brunei under review retain a simpler and broad asset-based definition of investment.

In a rather unique approach amongst Brunei's investment agreements, its EPA with Japan, concluded in 2007, further expands the scope of the agreement by including those assets invested '*directly or indirectly*' by investors of one party in the territory of the other party. This wording covers investments made by investors of a party through companies it owns or controlled, even when these companies are located in the territory of a non-Party (as summarised in Table 2 below). In practice, the admission of 'direct or indirect' investments yields similar results to the adoption of a rule of origin for juridical persons based on the country of ownership or control.

The categories covered by all Brunei's IIAs remain substantially identical, namely: (a) movable and immovable property and other property rights, (b) interests in the property of companies, (c) claims to money and claims to a performance, (d) intellectual property rights, and (e) concession rights conferred by law or contract.

However, the definition of investment has varied in terms of language through the many investment agreements signed by Brunei, especially in what concerns the kind of assets expressly listed in the different categories. Evolution in language is most notable in regard to intellectual property, where new rights are being developed and becoming more relevant for international transactions, and in turn, are expressly covered by investment agreements. However, in general terms, differences in drafting in Brunei's BITs do not seem to alter the ostensibly broad scope of the definition of 'investment'.

The subject matter of the agreement may also be restricted by introducing additional limitations to the covered investments, other than the definition of 'investment' itself. For instance, although the parties may have intended to give the agreement broad coverage in regard to the types of investments that qualify for the protection of the agreements, they may wish to limit those benefits to investments that have fulfilled certain formalities. This is the case for some IIAs of certain ASEAN member states (notably Thailand, Indonesia, and Malaysia)<sup>30</sup>.

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<sup>29</sup> 2012 us Model Bilateral Investment Treaty, available at <<https://www.state.gov/e/eb/ifa/bit/>> accessed 28 July 2017.

<sup>30</sup> See Julien Chaisse, 'Assessing the Exposure of Asian States to Investment Claims' (2013) 6(2) *Contemp Asia Arb J* 187–225.

**Table 2. Definition of ‘Investment’ in Brunei IIAs.**

Brunei-Germany BIT (1998) Article 1	Brunei-Japan (EPA) BIT (2000not in force) Article 1.1	Brunei-Korea BIT (2000) Article 1
<p>(1) The term “investment” means every kind of asset and in particular, though not exclusively, includes:</p> <p>(a) movable and immovable property and any other property rights such as mortgages, liens or pledges;</p> <p>(b) shares in and stocks and debentures of a company and any other form of participation in a company as well as securities issued by a Contracting Party;</p> <p>(c) claims to money or to any performance under contract associated with any investment having an economic value;</p> <p>(d) intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trademarks, trade-names, trade and business secrets, technical processes, know how, and goodwill;</p> <p>(e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources; any alteration to the form in which the assets are invested shall not affect their classification as investments.</p>	<p>“investments” means every kind of asset owned or controlled, directly or indirectly, by an investor, including:</p> <p>(i) an enterprise and a branch of an enterprise;</p> <p>(ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom;</p> <p>(iii) bonds, debentures, loans and other forms of securities, including rights derived therefrom;</p> <p>(iv) futures, options and other derivatives;</p> <p>(v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;</p> <p>(vi) claims to money or to any performance under contract having a financial value, which relate to a business activity;</p> <p>(vii) intellectual property rights;</p> <p>(viii) goodwill;</p> <p>(ix) rights conferred pursuant to laws and regulations or contracts such as concessions, licences, authorisations and permits; and</p> <p>(x) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.</p>	<p>"Investments" means every kind of assets invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the legislation of the latter Contracting Party and in particular, though not exclusively, includes:</p> <p>(a) movable and immovable property and any other property rights such as mortgages, liens, leases or pledges;</p> <p>(b) shares in, stocks and debentures of, and any other form of participation in a company or any business enterprise and rights or interest derived therefrom as well as securities or bonds issued by a Contracting Party;</p> <p>(c) claims to money or to any performance under contract associated with any investment having an economic value;</p> <p>(d) intellectual property rights including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, technical processes, trade secrets and know-how, and goodwill; and</p> <p>(e) business concessions having an economic value conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.</p>

Although they commonly feature a broad asset-based definition of investment, they require written approval of the investment by the relevant authorities in order for that investment to be covered by the agreement<sup>31</sup>. However, Brunei has not adopted this practice in any of its BITs, remaining unaffected to the approach adopted by many of its neighbours.

<sup>31</sup> In that sense, for example, the ‘scope of application’ clause of the Thailand-Argentina bit of 2000 provides that ‘This agreement shall only apply in cases where the investment by the investors of one Contracting Party in the territory of the other Contracting Party has been admitted or otherwise approved in writing, if necessary, by the competent authority in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made’: Thailand-Argentina bit, Art 2. Such provisions have generated significant commentary, as outlined in Section 3.1.3 of the introductory chapter as well as Cho and Kurtz in this volume.

### 3.1.2 Enterprise-Based Definition

Alternatively, some investment agreements that have been concerned primarily with FDI have focused on foreign investment in an ‘enterprise’ rather than in the form of a variety of assets. This *enterprise-based* definition gives attention to the investor’s objective of establishing a long-term relation with the economy of the host country, through the acquisition of a lasting interest in the ownership or management control of an enterprise. While the over-whelming majority of BITs feature an asset-based definition of investment, a number of free trade agreements with investment chapters have resorted to enterprise-based definitions. The European Community had promoted this approach in its pre-Lisbon treaties, such as the Europe Agreements with Eastern European countries later acceded to the EU, the EuroMed Agreements signed with its Mediterranean partners, and some of its more developed Association Agreements<sup>32</sup>. This is also a feature of the new Model bit of India<sup>33</sup>.

In the East Asian region, only two FTAs with investment disciplines have dEPArtd from the asset-based definition to focus primarily in FDI. The Framework Agreement on the ASEAN Investment Area (AIA, signed in 1998) expressly excludes portfolio investment from the scope of the agreement<sup>34</sup>,<sup>33</sup> and the Australia-Thailand FTA (signed in 2004) limit the scope of horizontal investment disciplines to ‘direct investment’ as defined by the International Monetary Fund<sup>35</sup>.

Enterprise-based definitions, in principle, exclude from their coverage portfolio investment<sup>36</sup>. This means that assets such as equity securities, debt securities in the form of bonds and notes, money market instruments, and financial derivatives such as options and a variety of new financial instruments may be also excluded. For this reason, countries with particular concerns about the balance of payments and macroeconomic effects of removing restrictions on foreign investment, especially as it relates to short-term capital movements, may opt for this kind of enterprise-based definition.

None of the Brunei investment agreements under review features a definition of investment of this kind. Rather, as explained above, a broad asset-based definition, which encompasses foreign direct investment as well as portfolio investment.

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<sup>32</sup> Julien Chaisse, ‘Promises and Pitfalls of the European Union Policy on Foreign Investment’ (2012) 15(1) JIEL 51–84.

<sup>33</sup> See Prabash Ranjan, ‘Investment Protection and Host State’s Right to Regulate in Indian Model Bilateral Investment Treaty 2015: Lessons for Asian Countries’ in Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh, *Asia’s Changing International Investment Regime: Sustainability, Regionalisation, and Arbitration* (Springer, 2017, forthcoming).

<sup>34</sup> ASEAN Investment Area Agreement, as amended by the 2001 Protocol, art 2.1. Australia-Thailand Free Trade Agreement, art 901(c).

<sup>35</sup> The Australia-Thailand FTA art 901(c) reads “‘direct investment’ means a direct investment as defined by the International Monetary Fund under its Balance of Payments Manual, fifth edition (BMP 5), as amended.’ The IMF’s Balance of Payments Manual defines a direct investment enterprise ‘as an incorporated or unincorporated enterprise in which a direct investor, who is resident in another economy, owns 10 per cent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise)’ (IMF 1993) 86.

<sup>36</sup> Nonetheless, several questions arise in particular cases, and distinguishing what constitutes ‘foreign direct investment’ or ‘portfolio investment’ may not always encounter a clear-line division. The OECD Code of Liberalisation of Capital Movements includes financial loans longer than five years in its coverage. On the contrary, the old Canada-us FTA of 1988 (superseded by the North American FTA) adopted an enterprise-based definition and did not cover financial loans, regardless of their term. See also Jusoh et al. in this volume.

### 3.2 Most Favoured Nation

The principle of the most favoured nation (MFN) treatment is well rooted in international trade agreements, dating back to the first Friendship, Commerce and Navigation treaties<sup>37</sup>.<sup>36</sup> It aims at preventing discrimination amongst trading parties, setting a level playing field for all foreigners. In regard to investment, it seeks to establish equal conditions of competition for all foreign investors, independently of their country of origin. This principle constitutes one of the cornerstones of investment agreements and allows investors covered by one agreement to claim equal benefits to those granted to investors from other countries, irrespective of whether those benefits are established in other investment agreements, or in the actual regulatory practice of the host country. While traditionally regarded as a standard clause without major implications in regard to dispute settlement, and free of the policy sensitivities of other clauses – such as national treatment – the MFN principle has newly gained attention in the ambit of international investment rulemaking in light of the application of this provision recently by some arbitral panels.

The scope of the MFN obligation, like any other substantial provision of the treaty, is limited not only by the overall coverage of the agreement but by the wording introduced in the clause itself. Several aspects are relevant in this regard.

- First, whether the obligation applies to investments already established in the country, or whether it applies too to the ability of the investor to claim access to the host country: so-called pre-establishment rights.
- Second, the language which allows the comparison between the treatment of investors from different countries.
- Finally, whether the MFN principle covers issues pertaining to investor-State dispute settlement (ISDS) procedures.

While the first two aspects are general matters that also concern other substantive obligations of the investment treaty, such as national treatment, the third element relates exclusively to the operation of the MFN principle.

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Table 3 *Scope of MFN provisions in Brunei BITs*<sup>37</sup> See generally Kenneth J Vandevelde, *The First Bilateral Investment Treaties – US Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017) 592.

Table 3 Scope of MFN provisions in Brunei BITs

<b>Brunei China (2000 not in force)</b> Article 3	<b>Brunei Germany BIT (1998)</b> Article 3	<b>Brunei India (2008)</b> Article 4
<p>3. The treatment and protection as mentioned in Paragraphs 1 and 2 of this Article shall not be less favourable than that accorded to investments and activities associated with such investments of investors of a third State.</p> <p>4. The treatment and protection as mentioned in Paragraphs 1, 2 and 3 of this Article shall not include any preferential treatment given to investors of a third State under any existing or future customs union, free trade zone, economic union, any agreement or future customs union, free trade zone, economic union, any agreement or arrangement for the avoidance of double taxation, and any agreement for facilitating frontier trade.</p>	<p>1. Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.</p> <p>2. Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.</p> <p>3. Such treatment shall not relate to privileges which either Contracting Party accords to nationals or companies of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.</p> <p>4. The treatment granted under this Article shall not relate to advantages which either Contracting Party accords to nationals or companies of third States by virtue of a double taxation agreement or other agreements regarding matters of taxation.</p>	<p>(1) Each Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State. (2) In addition, each Contracting Party shall, at all times, accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.</p> <p>(3) The provisions of paragraphs (1) and (2) above shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party, the benefit of any treatment, preference or privilege resulting from:</p> <p>(a) any existing or future customs unions or a free trade area or a common market or similar international agreement to which it is or may become a party; or</p> <p>(b) any matter pertaining wholly or mainly to taxation.</p>
<b>Brunei Korea (2000)</b> Article 3	<b>Brunei Oman BIT (1998)</b> Article 3	<b>Brunei – Japan (EPA) (2007)</b> Article 58
<p>1. Each Contracting Party shall in its territory accord to investments and returns of investors of the other Contracting Party, treatment no less favourable than that which it accords to investments and returns of its own investors or to investments and returns of investors of any third State, whichever is more favourable to investors of the other Contracting Party.</p> <p>2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party as regards operation, management, maintenance, use, enjoyment or disposal of their investments,</p>	<p>1. Each Contracting Party shall at all times ensure fair and equitable treatment to the investments made in its territory by nationals or companies of the other Contracting Party.</p> <p>2. Each Contracting Party shall in its territory accord nationals and companies of the other Contracting Party treatment not less favourable than that which it accords to nationals and companies of any third State and in particular as regards management, maintenance, use, enjoyment or disposal of their investments as well as other activities connected with investments.</p>	<p>Each Party shall accord to investors of the other Party and to their investments, treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party and to their investments with respect to investment activities.**</p> <p>** (“investment activities” means establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments)</p>

<p>treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is more favourable to investors of the other Contracting Party.</p> <p>3. The provisions of paragraphs (1) and (2) of this Article shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement relating wholly or mainly to taxation.</p> <p>4. Such treatment shall not relate to privileges which either Contracting Party accords to investors of third States on account of its present or future membership of, or association with a customs or economic union, a common market or a free trade area or similar international agreements.</p>	<p>3. The treatment mentioned above shall not apply to any advantage accorded to nationals and companies of a third State by either Contracting Party based on the membership of that Contracting Party in a Customs Union, Common Market, Free Trade Zone, Regional or Sub-regional arrangement, Multilateral International Economic Agreement or an agreement on avoidance of double taxation, or for facilitation of frontier trade, or any matter pertaining wholly or mainly to taxation.</p>	
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### 3.2.1 The MFN Obligation and Pre-establishment Rights

In general terms, Brunei's BITs, like the majority of BITs, do not provide entry rights to foreign investors into their territory. Rather, all IIAs signed by Brunei under review provide only a best-endeavours provision in regard to the admission of the foreign investments. For example, Brunei's agreement with China (signed in 1998) states that

Each Contracting Party shall encourage investors of the other Contracting Party to make investments in its territory and admit such investments in accordance with its laws and regulations.

The text of the MFN provision may nonetheless in some cases encompass preestablishment rights. The majority of Brunei IIAs feature broad language for which the parties are obliged to grant MFN treatment to investors from the other party in regard to their 'investments and activities associated' with such investment, as illustrated by the Brunei–Japan EPA in Table 13.3 above. While the terms 'activities associated' with the investment would unambiguously cover any matters relating to the management, operation and disposal of the investment, it is not equally clear whether or not it affects the investors' ability to establish in the host country.

Some agreements have attempted to clarify the scope of the MFN provision by listing activities to which the obligation applies, such as the agreements signed with Indonesia and Japan, as illustrated in Table 13.3. Nonetheless, language in these agreements fails to expressly include or exclude pre-establishment rights from the coverage of the MFN obligation.

Nonetheless, the MFN principle admits some important exceptions. First, Brunei IIAs have consistently excluded from the MFN obligations any preferences or privileges to foreign investors resulting from (a) customs union, free trade agreements, and arrangements for facilitating frontier trade and (b) international agreements on taxation. Under this economic integration exception, establishment rights granted by Brunei to investors from TPP and (future) RCEP countries would also be excluded from the MFN obligation enshrined in current BITs.

Second, the preferential access conditions and benefits that one investor may obtain based on an individual investment contract negotiated with the domestic authorities – so-called 'one-off deals' – fall also outside the MFN principle, since this obligation only applies when this individual behaviour becomes general practice in the host country. Indeed, in order to be covered by the MFN clause, the treatment has to be the *general* treatment *usually* provided to investors from a given foreign country.

### 3.2.2 Standard of Comparison between Investors

The principle of the most favoured nation, like its close cousin national treatment, is a comparative standard. It aims at preventing discrimination amongst foreigners in such a manner that no foreign investors are treated better than others. The precise wording of the MFN obligation is crucial as it sets the standard of comparison between those foreign investors. In other terms, the drafting of the MFN provision establishes which investors are to be compared in order to assess whether one is being treated in more favourable terms than the other.

Investment agreements have used different benchmarks for the comparison. The most restrictive formulation would be to limit the MFN obligation to those investors in the 'same' or 'identical' circumstances. Some earlier BITs signed by the United Kingdom applied this standard, by establishing that:

[n]either Contracting Party shall [...] subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords in the same circumstances to investments or returns of [...] nationals or companies of any third State<sup>38</sup>.

A number of investment agreements, notably those concluded by the United States, Canada, but also the ASEAN Comprehensive Investment Agreement (ACIA) limit the application of the MFN obligation – as well as National treatment (NT)- to investors ‘in like circumstances’. Article 10.4:1 of the Central America Free Trade Agreement (CAFTA) states ‘that Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party’. Most FTAs with investment disciplines also include a reference to ‘like circumstances’.

At the multilateral level, the General Agreement on Trade in Services (GATS) introduced the standard of ‘like services and services suppliers’. The analogous benchmark of ‘like investors and investments’ was adopted by the ASEAN countries in the ASEAN Investment Area, although only regard to the national treatment obligation, while the MFN provision features no qualification of this nature<sup>39</sup>.

Finally, the majority of bilateral investment agreements do not feature any qualification as regard the standard of comparison between investors. This is also the case of most reviewed investment agreements signed by Brunei, as illustrated in Table 13.3. These agreements establish that the parties shall grant investors of the other party a treatment no less favourable than the one it accords to ‘investors of any third State’ – or to ‘its own investors’ when it concerns a national treatment obligation. Brunei’s approach offers the widest scope for comparison as, in principle, any matter that is relevant to determining whether the foreign investor is being given preferential treatment can be considered.

### **3.3 Expropriation**

The protection of foreign investors has historically been the main goal of international investment agreements. Hence, the inclusion of disciplines against the nationalisation or expropriation of foreign investments constitutes a pivotal guarantee for foreign investors. Virtually all investment agreements feature provisions against the taking of property of the investor.

#### **3.3.1 Forms of Expropriation**

Investment agreements typically provide guarantees against all forms of expropriation. The Australia-us FTA (signed in 2004), for instance, contains a typical clause on the issue. Article 11.7 of the agreements provides that:

Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (‘expropriation’), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with due process of law.

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<sup>38</sup> UK-Belize bit, art 3.1.

<sup>39</sup> See ASEAN Investment Area Agreement, arts 7.1(a) and 8.1.



Investment agreements entered in by Brunei commonly provide guarantees against measures having 'effect equivalent' to expropriation or nationalisation (see Table 4).

### 3.3.2 Conditions for Expropriation

Investment agreements do not prohibit the adoption of expropriatory measures – a sovereign right of the States – but require that they fulfil certain conditions to be considered lawful under international law. Expropriations are required to be for public interest, on a non-discriminatory basis, against the payment of compensation and through due legal process. Such a standard is traditionally complemented by the so-called 'Hull formula'<sup>40</sup>, which sets the requirements of 'prompt, adequate and effective compensation' being paid for an expropriation to be considered lawful under international law.

As in most Brunei BITs, a detailed explanation of such requirements is provided by the ACIA. Article 14 requires that compensation is to be 'paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable; (c) not reflect any change in value because the intended expropriation had become known earlier; and (d) be fully realisable and freely transferable in accordance with Article 13 (Transfers) between the territories of the Member States'.

In other words, compensation must 'be paid without delay and be fully realisable'. An adequate compensation shall 'be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value'. Moreover, it 'shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment'. In order not to impair the effectiveness of the compensation, 'it shall be freely transferable'.

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<sup>40</sup> John Murphy, 'Compensation for Nationalisation in International Law' (1993) 110(1) South African L J 79–99. See also Paul Peters, 'Recent Developments in Expropriation Clauses of Asian Investment Treaties' (1995) 5 Asian Ybk Int'l L 45–110.

Table 4 *Guarantees against expropriation in Brunei IIAs.*

ASEAN Comprehensive Investment Agreement (2009) Article 5.1	Brunei – China BIT (1998) Article 4	Brunei - India BIT (2008) Article 4
<p>1. A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (“expropriation”), except:</p> <p>(a) for a public purpose;</p> <p>(b) in a non-discriminatory manner;</p> <p>(c) on payment of prompt, adequate, and effective compensation; and</p> <p>(d) in accordance with due process of law.</p> <p>FN10 : For the avoidance of doubt, any measure of expropriation relating to land shall be as defined in the Member States’ respective existing domestic laws and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations.</p>	<p>1. Investments of investors of either Contracting Party shall not either directly or indirectly be expropriated or nationalised or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter together referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose of that Contracting Party on a non-discriminatory basis and against appropriate compensation or compensations.</p> <p>2. The compensation referred to in Paragraph 1 shall be equivalent to the genuine value of the expropriated investment immediately before the expropriated action was taken or became publicly known, whichever is the earlier, and shall include interest at the then current commercial lending rate until the date of payment. Compensation shall be paid without delay, be effectively realisable and freely transferable. An investor of either Contracting Party that asserts that all or part of its investment has been expropriated shall have a right under the law of the Contracting Party making the expropriation to prompt review by the appropriate judicial or independent administrative authorities to determine whether such expropriation and the valuation of his or its investment conforms with the principles set out in this paragraph.</p> <p>3. Each Contracting Party shall in accordance with its laws and regulations ensure that, in cases of expropriation of investments of a company which is incorporated or constituted under the law in force in any part of its own territory and in which an investor of the other Contracting Party has an investment, either (i) that company to be compensated in accordance with the provisions or Paragraphs 1 and 2 above or (ii) the investor of the other Contracting Party to be</p>	<p>(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “ expropriation”) in the territory of the other Contracting Party except for a public purpose in accordance with law on a non-discriminatory basis and against fair and equitable compensation. Such compensation shall amount to the fair market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a fair and equitable rate until the date of payment, shall be made without unreasonable delay, be effectively realizable and freely transferable in accordance with Article 7. Where the market value cannot be ascertained properly the compensation shall be determined in accordance with internationally recognised accounting principles. (2) The investor affected shall have right, under the law of the Contracting Party making the expropriation, to review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. The Contracting Party making the expropriation shall make every endeavour to ensure that such review is carried out without unreasonable delay. (3) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to ensure fair and equitable compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares. (4) The interpretation and/or implementation of this Article shall be in conformity with the annexed Protocol.</p>

	<p><b>compensated directly in accordance with provisions of Paragraphs 1 and 2 above: provided however that in no event shall this Paragraph be construed as to require a Contracting Party to provide for both (i) and (ii) above.</b></p>	
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## 4 International Arbitration and Brunei: All Quiet on the Eastern Front

### 4.1 Investor-State Dispute Settlement

There appear to be no examples of Brunei governmental authorities being involved in arbitrations with the seat in Brunei. Also, there are no known examples of Bruneian investors (private or government-linked companies) suing host states under ad hoc consent to ICSID arbitration (or even investment contracts containing consent to other non-ICSID arbitration).

There is arguably some preference for consultation and mediation to settle conflicts before arbitration both at the national and international level. All the BITs signed by Brunei states that disputes should be resolved amicably as far as possible<sup>41</sup>. Under the Brunei–Germany bit, Brunei–Oman bit and Brunei–South Korea bit, the dispute is submitted for arbitration after 6 months if it has not been settled amicably. Under the Brunei–China and Brunei–India BITs, additional steps may have to be taken. In the Brunei–China case, the exhaustion of domestic administrative procedure is required before submitting the dispute to arbitration, which may severely limit the investors' rights if it refers to the Chinese courts, which takes a long time. When a dispute is submitted for arbitration, all of Brunei's BITs allow for ICSID arbitration unless agreed otherwise by the parties.

Multilateral agreements signed by Brunei also prioritise amicable settlement. For instance, the Trans-Pacific Partnership agreement (signed in February 2016 but not yet in force) provides a cooling-off period for consultation in case of conflict which is much appreciated by Brunei.

### 4.2 Commercial Dispute Resolution and Arbitration

Bruneian companies are governed by the Companies Act while foreign companies are governed by the International Business Companies Order of 2000. In 2016, Brunei's Supreme Court announced the establishment of a commercial court to address business-related cases. In practice, the court system operates without government interference although Brunei's constitution does not provide for judicial independence. According to international studies, the institutions in Brunei are quite good overall – i.e. they are ranked 47th out of 138, including judicial independence, which is potentially relevant to investors. However, Brunei obtained a rather disappointing score for efficiency of legal system for challenging regulations<sup>42</sup>.

Brunei has adopted an Arbitration Order in 2009 for domestic disputes and an International Arbitration Order 2009 which came into force on 28th July 2009. This new legislation replaces the previous Arbitration Act, which was based on the Hong Kong Arbitration Ordinance and the English Arbitration Acts of 1950, 1975 and 1982<sup>43</sup>.

The revision of the law was motivated by Brunei's decision to become a centre of arbitration, somewhat ambitiously given the established reputations of Singapore and more recently Malaysia. It also was seen as appropriate for the object of economic diversification and to attract FDI<sup>44</sup>.<sup>43</sup> The new laws are based on the UNCITRAL Model Law. They are very similar

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<sup>41</sup> See 'Brunei' in Loretta Malintoppi and Charis Tan (eds), *Investment Protection in Southeast Asia: A Country-by-Country Guide on Arbitration Laws and Bilateral Investment Treaties* (Brill 2017) 63.

<sup>42</sup> See Klaus Schwab, *The Global Competitiveness Report 2016–2017* (World Economic Forum 2017) at 129, available at [http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf) accessed 28 July 2017.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Yang Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ASEAN i.d.* Case No. ARB/01/1, 31 March 2003.

to the arbitration statutes in Singapore, but have also included the new provisions adopted by UNCITRAL in 2006, especially with respect to interim measures.

So far, however, there are few examples of parties choosing Brunei as a seat. Interestingly, however, in *Oo v Myanmar*<sup>45</sup>, the first and only ISDS case brought under an ASEAN investment agreement in 2003, Brunei was the seat<sup>46</sup>. This may have been due to the claimant invoking Singaporean residence and Brunei offering, in these very specific circumstances, a convenient seat for the hearings.

#### **4.3 Multilateral Investment Treaties to which Brunei is a Party**

Being a member of ASEAN, Brunei is a party to all investment agreements signed by ASEAN. It is also involved in the negotiation of the ASEAN-Hong Kong Free Trade Agreement and the Regional Comprehensive Economic Partnership (RCEP). The RCEP is not expected to include strict investment clauses but if that were the case, Brunei would agree to negotiate them. Brunei is well prepared for this negotiation because it has signed the TPP which includes stringent investment agreements. Brunei is willing to enforce the TPP even after the withdrawal of the United States with all the other member states.<sup>46</sup> Chapter 9 of the TPP guarantees important protections to investments and contains Investor-State Dispute Settlement (ISDS) provisions that Brunei has accepted. It is a significant decision because there was no obligation in the TPP agreement to agree with the ISDS provisions. Brunei feels at ease with the ISDS of the TPP as the MFN clauses of the ASEAN Comprehensive Investment Agreement (ACIA) are considered more stringent due to their automaticity while the TPP clauses are more balanced because they take other dispute settlement mechanisms into consideration.

#### **5 Conclusion**

Recent Model BITs and investment chapters of the growing number of FTAs represent a nascent 'third generation' of investment agreements (ACIA and soon TPP and RCEP). These agreements maintain the high standards on the protection of investments recognised in 'second generation' agreements while they seek to open new investment opportunities in foreign markets through national treatment in regard to entry rights – subject to sectoral exclusions in the forms of positive and negative. Interestingly, 'third generation' investment agreements also aim at ensuring that rights for foreign investors do not override domestic regulatory powers in other key policy areas.

In the attempt to focus on the recent developments in international investment law, this last category has received the most attention throughout this Chapter. Some key points are worth of being highlighted at this stage.

- Brunei investment agreements are meant to be broad and encompass a wide range of situations. Nonetheless, Brunei IIAs do not liberalise.
- The MFN principle acts as the link between preferences enshrined in different investment agreements, with important legal implications. This old-school principle of international trade and investment law has been put again under examination, in the attempt to prevent discrimination between partners – such as in regard to investment establishment rights – while limiting its reach in other areas, like ISDS.

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<sup>45</sup> See Nottage, Chaisse and Thanitcul in this volume (Section 3.1.4), as well as Bonnitca in this volume.

<sup>46</sup> See generally Luke Nottage, 'The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification' (2016) 17 *mjl* 1 and Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh, *Asia's Changing International Investment Regime: Sustainability, Regionalisation and Arbitration* (Springer forthcoming).

- Obligations on unlawful expropriation have starred in investment arbitration as the main guarantees against mistreatment to foreign investments. At the same time, some countries have sought to limit the scope of these provisions to the extent that they may clash against key public policy interests of host states.
- Brunei more appears as a rule-taker than a rule-maker. There is great consistency in the IIAs signed by Brunei, but this is in the context of few BITs as well as mainly ASEAN investment treaties or regional FTAs. The main variations emerge in the Japan-Brunei EPA and ACIA, probably because of the counterparties' demands and initiatives.

As developing countries become capital-exporting nations, investment agreements may prove a useful tool to open business opportunities abroad. As developed countries receive foreign companies into their markets they too are bound by international investment law. Brunei's interest in investment agreements is twofold, as a leading capital-importing economy and an emerging leader in capital exports. Coping with the quickly evolving nature of the international investment law system and reaping the benefits of international agreements, while ensuring domestic regulatory capacity with a view to sustain its growing economy, remains a crucial challenge for Brunei as small economy located at the centre of Asia and involved in many significant negotiations – especially now the RCEP.