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It's Asia, Stupid! The Race Between the EU and the US for Concluding Free Trade Agreements in Asia

Nikos Lavranos (NL-Investmentconsulting) · Tuesday, October 6th, 2015

While the focus of the debate concerning free trade and investment agreements in Europe has been almost exclusively on the transatlantic deals with the US (TTIP) and Canada (CETA), there is far more going on in Asia with potentially much more at stake.

Indeed, nothing less than a very competitive race is going on between the EU and the US to conclude as quickly as possible free trade agreements (FTAs) with investment protection and ISDS chapters with Asian countries.

The US has just announced (on 5 October) that the negotiations for the Trans Pacific Partnership (TPP) agreement have been successfully concluded.

Clearly, one of the driving forces for the US to conclude the deal as soon as possible has been the looming end of the presidency of Barack Obama. The successful conclusion of the deal at the close of his Presidency is a huge success for the American President.

TPP will form the world's largest free trade region, its members comprising about 40% of the global economy. TPP includes Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

Interestingly, China is not part of the TPP prospective members and the FTA negotiations between the US and China, which have been going on for many years, have not progressed very much.

On the other side of the pond, the EU has been negotiating with several Asian countries. The first success was the [announcement in October 2014](#) that the FTA negotiations with Singapore have been finalized.

However, the signature and ratification process of the EU-SING FTA has been halted by the European Commission's request for an [advisory opinion](#) from the Court of Justice of the European Union (CJEU) asking whether this treaty can be signed and ratified by the EU alone or whether it is a "mixed" agreement requiring the signature and ratification of all EU Member States as well. Until the CJEU renders its opinion, this deal is stalled.

Last August, the European Commission [announced the successful conclusion](#) of the FTA negotiations with Vietnam. However, until the question of "mixity" has not been resolved, also this deal cannot proceed towards signature and ratification.

Meanwhile, the negotiations between the EU and China for a sort of “enhanced bilateral investment treaty (BIT)”, which would include market access, are reportedly not going very fast.

Besides, the EU is currently negotiating with another handful of Asian countries, such as Japan, Myanmar, Malaysia and Thailand.

In fact, in April 2015, Trade Commissioner Malmström announced that it would “jumpstart” the [EU-ASEAN region-region FTA negotiations](#), which have been lingering on for many years.

In this context it is important to note that ASEAN as a whole represents the EU’s 3rd largest trading partner outside Europe (after the US and China) with more than US\$245 billion of trade in goods and services in 2013. The EU remains to be ASEANs 2nd biggest trading partner behind China, accounting for around 10% of ASEANs total trade in 2013. Also, trade in services has grown significantly in the past years, and the EU has by far been the largest investor in ASEAN countries over the last decade, with total Foreign Direct Investments (FDI) inflows up to US\$75 billion between 2011 and 2013 (22% of total).

But the failure of the EU-ASEAN negotiations was the very reason for the European Commission to change strategy by starting bilateral negotiations with individual ASEAN member states. Hence, potentially the European Commission (if mandated by the Council) could start negotiations with the remaining ASEAN members, i.e., Indonesia, Brunei, Laos, Myanmar, the Philippines and Cambodia. There are indeed signs that [Indonesia will start FTA negotiations with the EU soon](#).

In short, the European Commission is developing lot’s of activities with a large number of different Asian countries. If those FTAs are to enter into force, the gains for Europe are immense. However, it seems that the bilateral approach rather than the “regional bloc approach” is clearly the more fragmented, slower option compared to the now finalized TPP deal. Moreover, the bilateral approach forces the EU to accommodate the specific demands of every respective country in each FTA, whereas the US managed to do that in the TTP in one go.

Thus, while the EU’s piecemeal approach in Asia is a very time-consuming process, which will release the overall benefits only over a long period of time, the TPP deal will generate all advantages in a sort of “big bang” explosion, which would give American investors a huge advantage in Asia.

Consequently, the EU and its Member States have to move much quicker in order to limit the damages of having lost the race against the US in Asia.

In terms of content of the various FTAs, it is very interesting to note that the approach of the US and the EU is quite similar. For example, the investment chapters in the [TPP](#) and the [EU-Singapore FTA](#) are to a large extent based on the US model BIT of 2012. Thus, in both cases the well-known protection standards (MFN, NT, minimum standard of treatment based on customary international law and the indirect expropriation without compensation provision) as well as the usual ISDS provisions are included. The texts also include transparency provisions, code of conduct for arbitrators, the possibility of submitting amicus briefs and the adoption of binding interpretations by the Contracting Parties. Remarkably, these FTAs do not include the umbrella clause.

One notable difference though is the EU’s closed list of FET-breaches, which is included in the EU’s FTAs, but so far has not been adopted by the US and its trading partners.

In the slipstream of these numerous treaty negotiations, the activities and exposure of several arbitration institutions in the region, in particular the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Center (HKIAC) and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) have significantly increased. Accordingly, it is fairly safe to expect that investment treaty arbitration will continue to thrive in Asia as all these FTAs enter into force.

Hence, while it is understandable that all the efforts and focus of the European Commission and the Member States are currently directed towards TTIP, it is high time to change the focus towards Asia, where in my view, the potential benefits for European investors are arguable much higher!

Accordingly, the European Commission needs to develop very quickly a clear and comprehensive trade and investment strategy for Asia. This is especially important in order to avoid fragmentation between the various treaties, which the EU is currently negotiating in Asia – otherwise the potential benefits cannot be fully realized.

This strategy would also need to provide answers to the following questions: who will benefit the most from this race? how can one prevent that the Asian countries play the US and the EU against each other out? And finally, what does this regional “treaty spaghetti bowl” mean for any multilateral efforts?

Whatever the answers to these questions will be, one thing is certain: this is a once in a lifetime opportunity for the EU and its Member States, which they cannot afford to forego.

Put differently: leaving Asia to the US would be highly damaging for the European economy.

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