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# **Monitoring and Implementing AEC Investment Policy in ASEAN's Regional Treaties**

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# Monitoring and Implementing AEC Investment Policy in ASEAN's Regional Treaties

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Investment regimes in ASEAN Member States continue to be enhanced through improvements and removal of restrictions under the ASEAN Comprehensive Investment Agreement (ACIA) ...to enhance ASEAN's competitiveness in attracting investments into the region.

**—Chairman's Statement at the 26th ASEAN Summit, April 27, 2015**

ASEAN bucked the trend [of declining FDI for regional groupings] with a 5 percent increase in inflows.... Longer-term cooperation efforts will, for the most part, lead to increased FDI in regional groups, by opening sectors to investment and aligning policies for the treatment of investors.

**—United Nations Conference on Trade and Development, World Investment Report (Reforming Regional Investment Governance) 2015**

Governments can fully implement [investment protection] principles while still preserving the authority to adopt and maintain measures necessary to regulate in the public interest to pursue certain public policies... 1) Open and nondiscriminatory investment climates; 2) a level playing field; 3) strong protection for investors and investments; 4) fair and binding dispute settlement; 5) robust transparency and public participation rules; 6) responsible business conduct; 7) narrowly-tailored reviews of national security considerations.

**—Statement of the European Union and the United States on Shared Principles for International Investment, April 2012**

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# Executive Summary

The ASEAN Economic Community (AEC) Blueprint emphasizes that the AEC should have “more transparent, consistent, and predictable investment rules, regulations, policies and procedures” (para. 28). To fulfill this objective, ASEAN’s regional investment agreements—whether in the form of standalone international investment agreements or investment chapters in ASEAN’s comprehensive free trade agreements (FTAs)—must be examined. The ASEAN regional investment treaties contain legally binding commitments on investor protection that are assumed by ASEAN Member States toward their external state partners. To date, there are six regional investment agreements: ASEAN Comprehensive Investment Agreement or ACIA; the ASEAN-Korea Investment Agreement; the ASEAN-China Investment Agreement; the ASEAN-Australia-New Zealand Investment Chapter; the ASEAN-Japan Investment Chapter; and the ASEAN-India Investment Agreement. Discussions for further agreements are pending with the European Union, the 16 countries involved in the draft Regional Comprehensive Economic Partnership (RCEP); and potentially the United States, and Canada.

The following three areas are of immediate significance to the monitoring and implementation of the ASEAN regional investment treaties.

***1. Information transparency and coordination.*** The public policy provisions in these treaties necessitate more information transparency and information coordination among ASEAN Member States. When states act as hosts to investment, they ordinarily assume guarantees of investment protection toward nationals (juridical or natural persons) of investment treaty partners who invest in their territories. The ASEAN regional investment treaties are significant among the corpus of international investment agreements because they have distinct provisions that build in significant discretion for the host state in deciding whether it is bound to comply with guarantees of foreign investor protection in the ASEAN regional investment treaty. These provisions include:

- Those defining the scope of covered investment according to the laws, regulations, and national policies of the ASEAN Member States.
- Those stipulating the inapplicability of the treaty to certain sectors and measures that may not be easily severable from the entire scope and process of complex multistate investment projects.
- Standards of treatment owed to investors that refer to domestic laws of ASEAN Member States.

- Expanding reservations clauses or lists that could also potentially cover critical parts of complex, multistage investment projects and exclude investor protection for those parts of the projects.
- Broad self-judged restrictions on capital transfers and host state measures to protect the balance of payments.
- Special and differentiated treatment provisions in favor of the newer ASEAN Member States—Cambodia, Laos, Myanmar, and Vietnam (CMLV)—which do not clearly specify their effect on the kind of compliance with investment treaty commitments that investors and their home states are entitled to expect from the CMLV.
- The legal effect of exceptions clauses modeled after Article XX of the General Agreement on Tariffs and Trade (GATT) and/or Article XIV of the General Agreement on Trade in Services, which have been invoked in trade disputes under the World Trade Organization (WTO) but not in the different contours and objectives of investor-state claims.<sup>1</sup>
- Transparency rules and restrictive disclosure rules which help create the baseline of investor expectations to comply with regulatory measures in the host state.

Section 2 provides detailed tables on the kinds of domestic information that have been guaranteed under the regional treaties' transparency rules, and what information all member states will be expected to produce and coordinate to implement and to monitor compliance with such rules.

**2. *Treaty Incompatibility.*** The ASEAN regional investment treaties were concluded while ASEAN Member States each maintained their own bilateral investment treaty (BIT) programs or investment chapters in their own FTAs. Incompatibilities between the regional treaties and the BITs could jeopardize or detract from the AEC's investment policy objectives in the AEC Blueprint and must be identified.

Under Art. 5(2) of the ASEAN Charter, ASEAN Member States are continuously required to “take all necessary measures, including the enactment of appropriate domestic legislation...to comply with all obligations of membership.” The regional investment treaties fall well within these obligations, having been concluded by all member states as binding treaty law in their respective jurisdictions, to provide a certain quality of investment protection for the region. To enable member states to properly discharge their duty to comply with the ASEAN regional investment treaties, Section 3 discusses five areas requiring immediate and further detailed technical study involving the entire dataset of ASEAN regional investment treaties plus over 600 BITs and/or FTA investment chapters of all member states. These areas could impair the quality of investment protection guarantees and investor obligations progressively prescribed in the ASEAN regional investment treaties:

1. *Normative imbalances.* Normative imbalances between differing standards of investor protection, host state obligations, and investor obligations (if any), between the ASEAN regional investment treaties and the member states' BIT programs and/or FTA

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<sup>1</sup> See Diane A. Desierto, *Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making*, 26 Florida Journal of International Law 1 (April 2014).



- investment chapters can create an incentive for foreign investors to go “treaty shopping” or conduct “regulatory arbitrage” to initiate treaty claims against ASEAN Member States based on the terms of treaties most favorable to them and which provide few defenses or calibration mechanisms for the host state.
2. *Most Favored Nation clauses.* MFN clauses in the ASEAN regional investment treaties and the continuing intra-ASEAN and individual BIT programs of the member states can dangerously create gateways for the incorporation of other norms—substantive and procedural—that go beyond the rest of the textual commitments made by parties under the terms of the ASEAN regional investment treaties.
  3. *Applicability of domestic law.* The applicability of domestic law to standards of treatment under the ASEAN regional investment treaties could include individual BITs if the same are deemed incorporated as “part of domestic law” of the individual member state. The possibility of a direct interpretive feedback between the substantive content of individual BITs could likely affect the future interpretation of the ASEAN regional investment treaties in ways that may not have been immediately foreseen by the ASEAN Member States.
  4. *Parallel proceedings.* There is a risk of parallel proceedings for an investor-state dispute arising from an asserted breach of an ASEAN regional investment treaty (and following dispute settlement mechanisms prescribed therein), as well as from asserted breach of an individual member state’s BIT under its own dispute settlement mechanism. While parallel proceedings are common in international law, they can require host states to expend significant resources to defend themselves in multiple forums absent a treaty coordination mechanism—and adaptive “fork in the road clause” that limits the investor to the chosen remedy in that clause (regardless of the treaty source), as well as rules for preclusive effects in other similar proceedings involving related incidents from the investor-state dispute.
  5. *Investor-state dispute settlement.* The ASEAN regional investment treaties, individual states’ BIT programs and FTA investment chapters, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, and the ASEAN Charter all have settlement mechanisms. The hierarchy and linkage between these mechanisms for investor-state claims is a matter for urgent clarification by ASEAN Member States as well as their current and prospective foreign investors, particularly because the ASEAN Protocol applies to “future ASEAN economic agreements” [Art. 1(1) of the ASEAN Protocol]. The likelihood of multiple suits and rising transaction costs for host states will diminish once procedures and steps for investor-state dispute settlement (whether administrative, adjudicative, or arbitral) are clarified in as uniform and transparent a procedure as possible.

**3. Monitoring, Coordination, and Implementation.** Some immediate steps are necessary to ensure the proper discharge of the monitoring, coordination, and implementation functions of the ASEAN CCI and of member states participating in the monitoring and implementation coordination bodies of the regional investment treaties. These functions, which facilitate, promote, and regulate foreign investment at the regional and member state level, are central to

actions required by the AEC Blueprint (para. 28) to harmonize and ensure the predictability of investment rules, laws, regulations, and policies. Section 4 discusses recommendations for

- Maintaining consistency with ASEAN’s investment treaty best practices.
- Coordinating substantive, procedural, technical, and empirical information on ASEAN Member States’ BIT programs and FTA investment chapters for entry into a common ASEAN CCI information database.
- Creating an ASEAN regional investment agency to centralize and realize regional investment promotion, spread information to foreign investors in Southeast Asia, and to centralize monitoring, information coordination, and ASEAN CCI oversight of ASEAN Member States’ compliance with the ASEAN regional investment treaties.
- Providing official CCI guidance documentation and notes on the parallel existence of the ASEAN regional investment treaty program and member states’ overlapping individual BIT programs with ASEAN external partners.
- Drafting an ASEAN instrument containing authoritative rules for the coordination, interpretation, and managed interaction of current and future ASEAN regional investment treaties, current and future member state BITs and FTA investment chapters, and rules for centralizing a regional framework for preventing and managing investor-state disputes.
- Continuing to develop technical capacity for ASEAN CCI, ASEAN treaty negotiators, ASEAN Legal Affairs Divisions, and related entities in the ASEAN Secretariat to genuinely achieve the “free flow of capital” envisaged for the AEC.

# 1. Introduction

The free flow of investment in ASEAN is the third element of the single market and production base envisaged for the ASEAN Economic Community (AEC), together with the free flow of goods, the free flow of services, the freer flow of capital, and the free flow of skilled labor.<sup>1</sup> Accordingly, the AEC Blueprint recognizes that a free and open investment regime “is key to enhancing ASEAN’s competitiveness in attracting foreign direct investment (FDI) as well as intra-ASEAN investment.”<sup>2</sup> To achieve this regime, the AEC Blueprint mandates the establishment of “more transparent, consistent and predictable investment rules, regulations, policies and procedures,”<sup>3</sup> to be undertaken through specific enumerated actions, such as:

- (i) harmoniz[ing], where possible, investment policies to achieve industrial complementation and economic integration;<sup>4</sup>
- (ii) streamlin[ing] and simplify[ing] procedures for investment applications and approvals;<sup>5</sup>
- (iii) promot[ing] dissemination of investment information: rules, regulations, policies and procedures, including through one-stop investment centre or investment promotion board;<sup>6</sup>
- (iv) strengthen[ing] databases on all forms of investments covering goods and services to facilitate policy formulation;<sup>7</sup>
- (v) strengthen[ing] coordination among government ministries and agencies concerned;<sup>8</sup>
- (vi) consultation with ASEAN private sectors to facilitate investment;<sup>9</sup> and
- (vii) identify[ing] work towards areas of complementation ASEAN-wide as well as bilateral integration.<sup>10</sup>

ASEAN’s regional investment agreements in distinct international investment agreements or investment chapters in ASEAN free trade agreements (FTAs)—as well as individual member states’ bilateral investment treaty (BIT) programs and investment chapters in their respective FTAs—collectively constitute the legal foundation of ASEAN’s emerging regional investment policy. Unlike the European Union, which is still defining its architectural “comprehensive European international investment policy”<sup>11</sup> and debating proposed investor-state dispute settlement,<sup>12</sup> ASEAN is the only regional organization to swiftly conclude six regional investment agreements as standalone treaties or chapters in FTAs.<sup>13</sup> These six agreements are as follows:

1. ***The ASEAN Comprehensive Investment Agreement (ACIA)***, applicable to foreign investments in the 10 member states by a national of any member state in another member state’s territory.<sup>14</sup>

2. ***The Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Association of Southeast Asian Nations and the Republic of Korea (ASEAN-Korea Investment Agreement)***, applicable to foreign investments by a national of Korea in any ASEAN Member State, or by a national of a member state in Korea.<sup>15</sup>
3. ***The Agreement on Investment on the Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People's Republic of China (ASEAN-China Investment Agreement)***, applicable to foreign investments by a national of China in any ASEAN Member State, or to investments by a national of any member state in China.<sup>16</sup>
4. ***Chapter 11 (Investment) of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (ASEAN-Australia-NZ Investment Chapter)***, applicable to foreign investments by a national of an ASEAN Member State in Australia or New Zealand, foreign investments by an Australian national in either an ASEAN Member State or New Zealand, as well as foreign investments of a New Zealand national in either an ASEAN Member State or Australia.<sup>17</sup>
5. ***Chapter 7 (Investment) of the Agreement on Comprehensive Economic Partnership Among Japan and Member States of the Association of Southeast Asian Nations (ASEAN-Japan Investment Chapter)***, applicable to foreign investments by a national of Japan in any ASEAN Member State, as well as foreign investments by a national of any member state in Japan.<sup>18</sup>
6. ***The Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (ASEAN-India Investment Agreement)***, applicable to foreign investments by a national of any ASEAN Member State in India, as well as foreign investments by an Indian national in any ASEAN Member State.<sup>19</sup>

ASEAN is exploring other regional arrangements, albeit at different stages of political dialogue, with the European Union, the United States, and Canada. The EU has undertaken bilateral FTAs with individual member states such as Singapore,<sup>20</sup> but has expressed interest in a region-to-region FTA after the AEC commences on December 31, 2015.<sup>21</sup> One objective of the United States' Expanded Economic Engagement/E3 Initiative is to develop principles of investor protection.<sup>22</sup> And potential cooperation with Canada is largely structured under the 1991 ASEAN-Canada Economic Cooperation Agreement.<sup>23</sup>

The ASEAN Regional Comprehensive Economic Partnership (RCEP), covering member states and Australia, China, India, Japan, Korea, and New Zealand, was also reported to have an investment chapter under negotiation.<sup>24</sup> The goal is to conclude the text of the agreement by the end of 2015.<sup>25</sup> Brunei, Malaysia, Singapore, and Vietnam are also involved in negotiations with the United States, Australia, Canada, Chile, Japan, Mexico, New Zealand, and Peru over the Trans-Pacific Partnership (TPP), which is also reported to contain an investment chapter.<sup>26</sup>

## ASEAN REGIONAL AND BILATERAL INVESTMENT TREATIES

When ASEAN's regional investment agreements were concluded, each member state maintained its BIT program in the form of standalone BITs or as investment chapters in FTAs with other partners. According to publicly available data from the investment agreements database of the United Nations Conference on Trade and Development (UNCTAD), there are 644 BITs or investment chapters in FTAs from all 10 member states.<sup>27</sup> The overlap between these and the coverage of new ASEAN regional investment treaties is substantial, as shown in Tables 1-1 through 1-6. The BITs reflect the investment-protection slanted models of treaties from the 1980s, 1990s, and early 2000s that have few, if any, public policy calibration mechanisms for host states.<sup>28</sup>

Table 1-1

*Overlap of ACIA and Intra-ASEAN Treaties*

| Member State      | Intra-ASEAN Bilateral Investment Treaties  |
|-------------------|--|
| Brunei Darussalam | No BITs with other AMS   |
| Cambodia          | Cambodia-Singapore BIT (signed 4/11/1996; entered into force 24/2/2000)<br>Cambodia-Thailand BIT (signed 29/3/1995; entered into force 16/4/1997)  |
| Indonesia         | Indonesia-Laos BIT (signed 18/10/1994; entered into force 14/10/1995)<br>Indonesia-Malaysia BIT (signed 22/1/1994; entered into force 27/10/1999)<br>Indonesia-Singapore BIT (signed 16/2/2005; entered into force 21/6/2006)<br>Indonesia-Thailand BIT (signed 17/2/1998; entered into force 05/11/1998)<br>Indonesia-Vietnam BIT (signed 25/10/1991; entered into force 03/04/1994)  |
| Lao PDR/Laos      | Laos-Indonesia BIT (signed 18/10/1994; entered into force 14/10/1995)<br>Laos-Singapore BIT (signed 24/3/1997; entered into force 26/3/1998)<br>Laos-Thailand BIT (signed 22/8/1990; entered into force 7/12/1990)<br>Laos-Vietnam BIT (signed 14/1/1996; entered into force 23/6/1996)  |
| Malaysia          | Malaysia-Indonesia BIT (signed 22/1/1994; entered into force 27/10/1999)<br>Malaysia-Vietnam BIT (signed 21/1/1992; entered into force 9/10/1992)  |
| Myanmar           | Myanmar-Philippines BIT (signed 17/2/1998; entered into force 11/9/1998)<br>Myanmar-Thailand BIT (signed 14/3/2008; entered into force 08/06/2012)   |
| Philippines       | Philippines-Myanmar BIT (signed 17/2/1998; entered into force 11/9/1998)<br>Philippines-Thailand BIT (signed 30/9/1995; entered into force 06/9/1996)<br>Philippines-Vietnam BIT (signed 27/2/1992; entered into force 29/1/1993)  |
| Singapore         | Singapore-Cambodia BIT (signed 4/11/1996; entered into force 24/2/2000)<br>Singapore-Indonesia BIT (signed 16/2/2005; entered into force 21/6/2006)<br>Singapore-Laos BIT (signed 24/3/1997; entered into force 26/3/1998)<br>Singapore-Vietnam BIT (signed 29/10/1992; entered into force 25/12/1992)   |
| Thailand          | Thailand-Cambodia BIT (signed 29/3/1995; entered into force 16/4/1997)<br>Thailand-Indonesia BIT (signed 17/2/1998; entered into force 5/11/1998)<br>Thailand-Laos BIT (signed 22/8/1990; entered into force 7/12/1990)<br>Thailand-Myanmar BIT (signed 14/3/2008; entered into force 8/6/2012)<br>Thailand-Philippines BIT (signed 30/9/1995; entered into force 6/9/1996)<br>Thailand-Vietnam BIT (signed 30/10/1991; entered into force 7/2/1992) |
| Vietnam           | Vietnam-Indonesia BIT (signed 25/10/1991; entered into force 3/4/1994)<br>Vietnam-Laos BIT (signed 14/1/1996; entered into force 23/6/1996)<br>Vietnam-Malaysia BIT (signed 21/1/1992; entered into force 9/10/1992)<br>Vietnam-Philippines BIT (signed 27/2/1992; entered into force 29/1/1993)   |

| Member State | Intra-ASEAN Bilateral Investment Treaties                             |
|--------------|---|
|              | Vietnam-Thailand BIT (signed 30/10/1991; entered into force 7/2/1992) |

Table 1-2

*ASEAN-India Investment Agreement and India BITs*

| Treaty Partner    | Signed     | Entered into Force |
|-------------------|------------|--------------------|
| Brunei Darussalam | 22/05/2008 | 18/01/2009         |
| Indonesia         | 10/2/1999  | 22/1/2004          |
| Lao PDR           | 9/11/2000  | 5/1/2003           |
| Malaysia          | 1/8/1995   | 12/4/1997          |
| Myanmar           | 24/6/2008  | 8/2/2009           |
| Philippines       | 28/1/2000  | 29/1/2001          |
| Thailand          | 10/7/2000  | 13/7/2001          |
| Vietnam           | 8/3/1997   | 1/12/1998          |

Table 1-3

*ASEAN-China Investment Agreement and China BITs*

| Treaty Partner    | Signed     | Entered into Force         |
|-------------------|------------|----------------------------|
| Brunei Darussalam | 17/11/2000 | Not yet entered into force |
| Cambodia          | 19/7/1996  | 1/2/2000                   |
| Indonesia         | 18/11/1994 | 1/4/1995                   |
| Lao PDR           | 31/1/1993  | 1/6/1993                   |
| Malaysia          | 21/11/1988 | 31/3/1990                  |
| Myanmar           | 12/12/2001 | 21/5/2002                  |
| Philippines       | 20/7/1992  | 8/9/1995                   |
| Thailand          | 12/3/1985  | 13/12/1985                 |
| Vietnam           | 2/12/1992  | 1/9/1993                   |

Table 1-4

*ASEAN-Korea Investment Agreement and Republic of Korea's BITs*

| Treaty Partner                   | Signed     | Entered into Force |
|----------------------------------|------------|--------------------|
| Brunei Darussalam                | 14/11/2000 | 30/10/2003         |
| Cambodia                         | 10/2/1997  | 12/3/1997          |
| Indonesia                        | 16/2/1991  | 10/3/1994          |
| Lao People's Democratic Republic | 15/5/1996  | 14/6/1996          |
| Malaysia                         | 11/4/1988  | 31/3/1989          |
| Philippines                      | 7/4/1994   | 25/9/1996          |
| Thailand                         | 24/4/1989  | 30/9/1989          |
| Vietnam                          | 15/9/2003  | 5/6/2004           |

Table 1-5

*ASEAN-Australia-NZ FTA Investment Chapter and Australia's BITs*

| Treaty Partner | Signed     | Entered into Force |
|----------------|------------|--------------------|
| Indonesia      | 17/11/1992 | 29/7/1993          |
| Lao PDR        | 6/4/1994   | 8/4/1995           |
| Philippines    | 25/1/1995  | 8/12/1995          |
| Vietnam        | 5/3/1991   | 11/9/1991          |

*Note: New Zealand has no known BITs with any of the ASEAN Member States*

Table 1-6

*ASEAN-Japan FTA Investment Chapter and Japan's BITs*

| Treaty Partners | Signed     | Entered into Force |
|-----------------|------------|--------------------|
| Cambodia        | 14/6/2007  | 31/7/2008          |
| Lao PDR         | 16/1/2008  | 3/8/2008           |
| Myanmar         | 15/12/2013 | 7/8/2014           |
| Vietnam         | 14/11/2003 | 19/12/2004         |

The presence of Southeast Asian BITs and investment chapters in FTAs means that considerable substantive, procedural, and dispute resolution variances in investment protection and the obligations of host states to foreign investment will persist,<sup>29</sup> despite efforts to harmonize investment policy under the new ASEAN regional investment treaties. Because of the ensuing pluralisms—both in treaty language and institutional architectures that govern investment in Southeast Asia—separate studies will be necessary to investigate four issues:

1. The effect of interactions—specifically through “most-favored nation clauses”<sup>30</sup> and other treaty gateways<sup>31</sup> for otherwise incorporating norms or provisions from other treaties—between the nature and scope of qualitative protections in the ASEAN regional investment treaties and each individual Southeast Asian BIT and investment chapters in Southeast Asian FTAs.
2. How to reconcile these differences in qualitative protections afforded in regional, as opposed to bilateral treaty regimes, to avoid treaty conflict or treaty inapplicability.
3. How to anticipate, if not avoid, the clear risk of moral hazard from “treaty-shopping”<sup>32</sup> by foreign investors seeking the treaty with the least investor obligations and the most actionable host state obligations favorable to establishing their claims against states, or any other forms of “regulatory arbitrage”<sup>33</sup> where firms take advantage of loopholes in regulatory systems to avoid certain types of regulation.
4. How to design short-term and long-term modalities for mutual coordination of information and joint monitoring of the implementation of member states’ obligations to investors, whether at the regional or bilateral level.

None of these issues has yet been investigated in the detail merited.<sup>34</sup> The fundamental structural problems arising from a complex web of common regional investment treaties and remaining BITs explains, for example, is why the European Union has been hesitant to conclude regional investment treaties; the presence of “intra-EU BITs” may conflict or prove otherwise

incompatible with EU law.<sup>35</sup> As of June 18, 2015, the European Commission initiated infringement proceedings against Austria, the Netherlands, Romania, Slovakia, and Sweden, all of whom are seeking to end their BITs with other EU Member States. The European Commission is scheduling a meeting for all EU Member States in October 2015 for the “coordinated” termination of the “intra-EU BITs.”<sup>36</sup>

Initial examination of the Southeast Asian BITs shows considerable variance between investor protections afforded in different generations of treaties; different member states’ national interests in concluding such investment treaties; different bargaining leverage for ASEAN Member States that are net capital exporters as opposed to net capital recipients; and altogether different preferences as to modes and mechanisms for investor-state dispute settlement.<sup>37</sup>

It would be best to fully analyze the qualitative and procedural effects of the six current ASEAN comprehensive regional investment treaties, and the approximate 644 individual BITs/investment chapters in FTAs in separate but sequentially connected studies of the four issues noted above. Such studies would use the entire dataset of the ASEAN regional investment treaties and the 644 individual BITs/investment chapters. This is precisely the kind of long-term public research now authorized and required by the European Commission as it prepares its comprehensive European investment policy.<sup>38</sup>

Section 3 will offer recommendations on harmonizing treaty provisions to the “gold standard” of international investment treaties and on synthesizing ASEAN best practices, but without detailed study of the four issues, the recommendations are preliminary at best. The author supervised a research team to preliminarily scrutinize the effects of interactions between comprehensive provisions in regional investment treaties, and individual BITs and FTA investment chapters. The 720-page report of the research team is on file with, and under review by, the author.

## **SCOPE AND METHOD**

This study focuses on immediate questions for monitoring and implementing the six existing regional investment treaties listed above. Section 2 focuses on the monitoring of the implementation of transparency requirements and the unique public policy provisions and exceptions that are prevalent throughout ASEAN regional investment treaties.<sup>39</sup>

Section 3 discusses incompatibilities between the ASEAN regional investment treaties and individual BITs, to clarify and resolve ambiguities arising from the increasing pluralism of dispute settlement mechanisms offered under the treaties and under the AEC’s foundational instruments—such as the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, which applies to all “future ASEAN economic agreements”<sup>40</sup>—as well as the ASEAN Charter provisions on interstate disputes.<sup>41</sup>

Section 4 proposes structural and substantive changes for deliberations on future ASEAN regional investment treaties to ensure the best possible regulatory and governance balance in protecting and calibrating host state obligations and rights with investor rights and obligations.

The substantive analysis in Sections 2 and 3 is intended to furnish baseline information to help ASEAN discharge its monitoring functions as required for implementation of these treaties. With



regard to the ACIA, note that Art. 42(2) provides that the ASEAN Coordinating Committee on Investment (CCI) assists the ASEAN Investment Area Council in performing the following functions:

- (a) provide policy guidance on global and regional investment matters concerning promotion, facilitation, protection, and liberalization;
- (b) oversee, coordinate and review the implementation of this Agreement;
- (c) update the AEM on the implementation and operation of this Agreement;
- (d) consider and recommend to the AEM any amendments to this Agreement;
- (e) facilitate the avoidance and settlement of disputes arising from this Agreement;
- (f) supervise and coordinate the work of the CCI;
- (g) adopt any necessary decisions; and
- (h) carry out any other functions as the AEM may agree.<sup>42</sup>

Other ASEAN regional investment treaties also allocate monitoring functions. Art. 24 of the ASEAN-Korea Investment Agreement identifies the Implementing Committee (AEM+Korea) specified in Article 5.3 of the Framework Agreement on Comprehensive Economic Partnership between ASEAN and Korea as the institution that shall “oversee, supervise, coordinate, and review, as appropriate, the implementation” of the ASEAN-Korea Investment Agreement.<sup>43</sup>

Art. 22 of the ASEAN-China Investment Agreement refers to the establishment of a permanent body, the AEM-MOFCOM, to “oversee, supervise, coordinate the implementation of” the ASEAN-China Investment Agreement. Article 22(2) further mandates that the ASEAN Secretariat “shall monitor and report to the SEOM-MOFCOM on the implementation of this Agreement....”<sup>44</sup>

Article 17 of the ASEAN-Australia-NZ Investment Chapter establishes a “Committee on Investment,” composed of representatives of the parties, to review the implementation of the Chapter.<sup>45</sup>

Article 51 (2) of the ASEAN-Japan Investment Chapter provided for the creation of a Sub-Committee on Investment to “discuss and negotiate provisions for investment, with a view to improving the efficiency and competitiveness of the investment environment between Japan and ASEAN Member States through progressive liberalization, promotion, facilitation and protection of investment”.<sup>46</sup>

Article 23 of the ASEAN-India Investment Agreement creates a Joint Committee on Investment to review treaty implementation and operation, report to state parties, recommend treaty amendments, supervise and coordinate subcommittees established under the treaty, and carry out any other functions as agreed to by India and ASEAN Member States.<sup>47</sup>



## 2. Transparency and Public Policy

Unlike the usual models of BITs, the ASEAN regional investment treaties significantly reflect member states' desire to retain a broad scope of public policy discretion.<sup>48</sup> Many provisions in the treaties appear to have been grafted from world trade/WTO law, such as GATT Article XX exceptions that would ordinarily call for a state to calibrate or change a trade-restrictive measure, but which appear instead to have been built in to the regional investment treaty as the legal basis to avoid or excuse states from liability for breach of treaty-guaranteed investor protections.<sup>49</sup> There is also a marked proliferation of self-judged provisions that would enable any ASEAN Member State to opt out of usual investor treatment protections such as those on free transferability of capital, without needing the consent of other treaty parties,<sup>50</sup> as well as provisions referring to “non-discriminatory regulatory actions by a Party which are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment” which are deemed not to constitute expropriation.<sup>51</sup> There are numerous extensive regional transparency requirements for investors,<sup>52</sup> but no guarantee of a central regional repository of regulatory information for investors (e.g., on admission of investments, regulatory treatment and oversight of foreign investments, potential sources of changes to the regulatory framework applicable to foreign investment). Perhaps most unique among multiparty investment treaties,<sup>53</sup> the ASEAN treaties explicitly provide for “special and differentiated treatment”<sup>54</sup> for newer member states (Cambodia, Myanmar, Laos, and Vietnam), but do not specify the extent to which these states may derogate from investor protections in the treaties, as well as for how long such derogations would be permitted by the parties to the regional investment treaties.

The following subsections discuss provisions that describe a wider scope of deference in favor of host states' assertions of regulatory prerogatives. Lacking substantive clarification, these provisions are likely to introduce regulatory uncertainty<sup>55</sup> that increases investment risk and could also dampen investment in new assets. The difficulty in complying with these public policy provisions may make it more expedient for foreign investors to seek out other applicable treaties where there is no such regulatory bar (such as those in early generations of individual Southeast Asian BITs) in order to frame investor-state claims in a manner most advantageous to their interests and thereby avoid any possible higher threshold of investor obligation and broader deference extended to host states under the ASEAN regional investment treaties.<sup>56</sup> In addition, it appears that “foreign companies with operational subsidiaries in an ASEAN member state will...be able to access all of the advantages of the ASEAN investment protection agreements provided that they do not fall afoul of the denial of benefits clause.”<sup>57</sup>

## SCOPE OF COVERED INVESTMENT

The new investment treaties commonly define “covered investments” subject to member states’ domestic laws, administrative rules and regulations, decisions, and policies.

- The ACIA refers to investments that have “been admitted according to its laws, regulations, and national policies.”<sup>58</sup>
- The ASEAN-Australia-N.Zealand FTA Investment Chapter describes a covered investment as that “which, where applicable, has been admitted by the host Party, subject to its relevant laws, regulations and policies.”<sup>59</sup>
- The ASEAN-China Investment Agreement expansively defines investment as “every kind of asset invested by the investors of a Party in accordance with the relevant laws, regulations and policies of another Party in the territory of the latter,”<sup>60</sup> further clarifying that “policies” refer to “those affecting investment that are endorsed and announced by the Government of a Party, and made publicly available in a written form.”<sup>61</sup>
- Almost identically, the ASEAN-Korea Investment Agreement provides for covered investment as that which “has been admitted according to its laws, regulations, and national policies, and where applicable, specifically approved in writing by its competent authority.”<sup>62</sup>
- The ASEAN-Japan Investment Chapter, while containing only a single provision (Article 51), does refer to the obligation of each treaty Party to, “in accordance with its laws, regulations, and policies, create and maintain favorable and transparent conditions in the Party for investments of investors of the other Party.”<sup>63</sup>
- The ASEAN-India Investment Agreement likewise refers to investments that have been admitted by a Party “subject to its relevant laws, regulations and policies.”<sup>64</sup>

The ambiguous content of “laws, regulations, and policies” in these clauses introduces uncertainty as to investments deemed covered by the protections of the ASEAN regional investment treaties. The purpose of introducing such qualifications of compliance with “laws, regulations, and policies” to the scope of covered investment, ordinarily, is “to prevent the bilateral [investment] treaty from protecting investments that should not be protected, particularly because they would be illegal.”<sup>65</sup> However, it is the very same breadth and ambiguity of the corpus of “laws, regulations, and policies” that investments are expected to comply with, that could create opportunities for denying treaty protections to foreign investors in the future, including access to the investor-state dispute settlement mechanism. Investment jurisprudence, after all, has lent different contours to the interpretation of such “in accordance with host state law” clauses. In the first place, it is the host state that assumes the burden to prove the illegality of the investment as a jurisdictional challenge against any claim by a foreign investor of alleged breach by the host State of investment treaty protections owed to the investor.<sup>66</sup> Often, these kinds of clauses are also narrowly read to require that investments should comply with host state law only at the time of admission and/or establishment of the investment.<sup>67</sup>

The subject-matter scope of “in accordance with host State law clauses” have been classified to span: “(i) non-trivial violations of the host State’s legal order...(ii) violations of the host State’s foreign investment regime...and (iii) fraud—for instance, to secure the investment...or to secure profits.”<sup>68</sup> *Inceysa Vallisoletane SL v. El Salvador* treated this type of clause as a critical

requirement of threshold legality when assessing the existence of a covered investment, such that the investment's failure to comply with domestic legal principles (e.g., the prohibitions against unlawful enrichment and benefiting from one's own wrongdoing) due to the investor's acts during the bidding process were found by the arbitral tribunal to be sufficient to deprive them of subject-matter jurisdiction.<sup>69</sup> The "in accordance with host State law" clause has also been argued to encompass criminal acts, such as bribery and corruption,<sup>70</sup> as well as the host state's procedural rules for acceptance and admission of foreign investments.<sup>71</sup>

The award in *Fraport AG Frankfurt Services Worldwide v. Philippines* also accepted that an investment's failure to comply with local anti-dummy legislation (a statute imposing criminal penalties for violating foreign ownership restrictions in certain economic areas and transactions) militated against that investment benefiting from the coverage of the BIT subject of that dispute.<sup>72</sup> *Anderson and Others v. Costa Rica* noted that a BIT that contained an "in accordance with host State law" clause was a

clear indication of the importance that [the States Parties to the treaty] attached to the legality of investments made by investors of the other Party and their intention that their laws with respect to investments be strictly followed. The assurance of legality with respect to investment has important, indeed crucial, consequences for the public welfare and economic well-being of any country.<sup>73</sup>

The *Anderson* arbitral tribunal accepted banking regulations as one such type of host state law with which investments should comply in order to benefit from treaty protection coverage.<sup>74</sup> However, arbitral tribunals have not treated all such domestic laws as falling within the ambit of "in accordance with host State law" clauses that could deny treaty protection to investments.<sup>75</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, for example, illustrated that failure to comply with domestic laws on the mandatory registration of investments did not necessarily render said investments "illegal," when the domestic law does not provide for this consequence.<sup>76</sup>

A further ambiguity that could arise from the new treaties' broad language requiring compliance with "laws, regulations, and policies" is the time and duration of such compliance. For example, would these clauses require that the investment, to be "covered" by the protections of the treaty, comply only with "laws, regulations, and policies" at the time the investment is established or admitted (as has often been held in investor-state jurisprudence)? Or would the covered investments be subject to continuing requirements to comply with such laws during the life of the investment as a matter of reciprocity for the continuing protections granted by host states? After all, investor-state disputes rarely occur when investments are being established, but rather arise during the period of performance of investment treaty obligations years down the line when the investment operations are underway in the host state. The tribunal in *SGS Societe Generale de Surveillance SA v. Paraguay* would still answer these questions in favor of a narrow reading of legality only at the time of the establishment or admission of an investment.<sup>77</sup>

Finally, given the breadth of "laws, regulations, and policies" in the new treaties, it is also germane to inquire if one should differentiate between the consequences of non-compliance with various types of legal norms. The January 2013 award of the arbitral tribunal in *Vannessa Ventures Limited v. Venezuela* usefully distinguished its analyses of the compliance expected for various types of host state laws.<sup>78</sup> Venezuela had argued that the "laws of Venezuela" was

intended to refer to its entire legal system, thus encompassing contractual obligations and domestic contract principles.<sup>79</sup> The tribunal rejected this argument, concluding that reference to a host state's laws in determining a covered investment meant a "reference to the laws and regulations made by, or under the authority of, the public authorities of the State, and does not extend to purely contractual obligations,"<sup>80</sup> or "laws made by the host State, and not to obligations created under the law by private persons."<sup>81</sup> The tribunal then went on to find that other types of law were not necessarily determinative of the legality of the investment (a transfer of shares, in this case). It held that: (1) the "public procurement law does not impact whether Claimant's shareholding amounts to an "asset owned or controlled...in accordance with" Venezuelan law as required to satisfy the BIT's definition of "investment";<sup>82</sup> (2) the principles on "good faith and public policy that have been advanced in this case are not determinative of whether the Claimant's shares in PDV were owned or controlled in accordance with Venezuelan law;"<sup>83</sup> and that (3) "reporting obligations concerning the registration of foreign investments, which do not entail any application for permission or approval and which are not expressed as conditions of the making of an investment, are not relevant to the question whether the investment exists."<sup>84</sup>

In sum, by providing for a broad corpus of "laws, regulations, and policies" that investments should comply with before they are deemed covered under the new ASEAN investment treaties, the ASEAN Member States retained significant discretion over whether to confer treaty protections to a given investment. The converse challenge to affording member states this degree of regulatory freedom, however, lies with how the member states can enable prospective investors to predictably identify and disseminate the exact "laws, regulations, and policies" that the investment should comply with in order to be deemed as a properly qualified investment covered by the protections of the ASEAN regional investment treaties. *Ex ante* transparency between host states and investors on the agreed content of such "laws, regulations, and policies" will enable all parties to know in good faith, and well in advance, if the investment will also be protected and regulated under the ASEAN regional investment treaties.

## COMPLETE TREATY INAPPLICABILITY

The new investment treaties set out distinct provisions that expressly bar the application of those treaties to a closed list of member state measures. The ACIA does not apply to taxation measures, subsidies, or grants provided by a member state, government procurement, services supplied in the exercise of governmental authority by the relevant body or authority of a member state, as well as any measures adopted or maintained by a member state affecting trade in services under the 1995 ASEAN Framework Agreement on Services.<sup>85</sup>

The ASEAN-Australia-N.Zealand FTA Investment Chapter does not apply to government procurement, subsidies or grants provided by any of the treaty parties, as well as services supplied in the exercise of governmental authority by the relevant body or authority of any treaty party.<sup>86</sup>

The ASEAN-China Investment Agreement contains more extensively described areas of treaty inapplicability—it does not apply to taxation measures; laws, regulations, policies or procedures of general application governing the procurement by government agencies of goods and services purchased for governmental purposes; subsidies or grants provided by a party or to any conditions attached to the receipt or the continued receipt of such subsidies or grants; services supplied in the

exercise of governmental authority by the relevant body or authority of a treaty party; as well as to measures adopted or maintained by a party affecting trade in services.<sup>87</sup>

Similar to (but slightly broader than) the ASEAN-China Investment Agreement's treaty inapplicability provision, the ASEAN-Korea Investment Agreement rules out its applicability to government procurement; subsidies or grants provided by a treaty party; any taxation measure; claims arising out of events which occurred, or claims which had been raised, prior to the entry into force of the agreement; services supplied in the exercise of governmental authority such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care; and measures adopted or maintained by a treaty party to the extent that they are covered by the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea.<sup>88</sup>

The ASEAN-India Investment Agreement does not apply to government procurement, subsidies or grants, services supplied in the exercise of governmental authority by the relevant body or authority of a party, any taxation measure, as well as to claims arising out of events which occurred or claims which have been raised prior to the entry into force of the agreement.<sup>89</sup> The ASEAN-Japan Investment Chapter does not contain provisions similar to the foregoing, but the economic partnership agreement as a whole is not applicable to taxation measures.<sup>90</sup>

States can certainly stipulate and exclude various kinds of subject matter from the applicability of the investment treaty. The complexity arising from the foregoing provisions in the new investment treaties, however, is one of linkage with the ordinary scope of investment operations. As with any other business entity, it is foreseeable that income from investment operations (usually through onshore corporate activities in the host state) would usually be taxed (subject of course to any applicable tax treaties or exemptions). Investment operations may likewise include dealing with local entities that are supported by subsidies or grants from the host state. Investment operations may also entail contemporary legal configurations such as "public-private partnerships"<sup>91</sup> for the delivery of public goods and services, and which would ordinarily be subject to government procurement and bidding laws.<sup>92</sup> Host state measures in relation to trade in services may likewise affect aspects of investment operations and the latter's overall profitability.

Carving out these areas automatically from the protective guarantees in the new ASEAN investment treaties conveys the message that foreign investors would not be able to seek recourse under such treaties for a plethora of transactions (and interactions with host state measures) that ordinarily implicate investment operations on a periodic basis. This may prove problematic if taxation measures against an investment project are found to have the effect of an indirect expropriation.<sup>93</sup> One can anticipate that such exclusions from ASEAN regional investment treaty coverage could impel foreign investors to look for the more permissibly worded applicable BIT to enable redress for serious economic deprivations arising from arbitrary and confiscatory tax measures,<sup>94</sup> anti-competitive subsidies and public sector grants that might be discriminatory on other private firms,<sup>95</sup> and government procurement projects that often involve some foreign investor participation.<sup>96</sup> The breadth of these carve-outs from regional investment treaty coverage makes it all the more urgent to interpret them consistently for the States Parties to these treaties and their respective investors.

## REFERENCE TO DOMESTIC LAWS

Hybrid standards of protection are also created, directly and indirectly by means of references in the ASEAN regional investment treaties to the member states' domestic laws or legal principles—the substantive content of which could foreseeably vary given the highly disparate legal systems, constitutional traditions, and jurisprudential developments of each of the member states.<sup>97</sup> The ACIA, for example, defines the fair and equitable treatment (FET) standard as one that “requires each Member State not to deny justice in any legal or administrative proceedings *in accordance with the principle of due process*,”<sup>98</sup> while the full protection and security (FPS) standard is described as requiring each member state “to take such measures *as may be reasonably necessary* to ensure the protection and security of the covered investments.”<sup>99</sup> Expropriations relating to land are expressly indicated in the ACIA to 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,<sup>100</sup> and that payment of compensation, even if supposed to be made “without delay”,<sup>101</sup> could nevertheless be subject to unspecified “*legal and administrative processes* that need to be observed before payment can be made.”<sup>102</sup>

The new ASEAN investment treaties between ASEAN and its external partners exhibit much the same tendencies of merging domestic law understandings with the usual investment treaty protection standards. The ASEAN-Aus-NZ FTA Investment Chapter maintains similar domestic law references in its definition of expropriation.<sup>103</sup> The ASEAN-China Investment agreement defines FET and FPS standards in a manner identical to the ACIA formulation,<sup>104</sup> and expressly indicates that all expropriations should be “*in accordance with applicable domestic laws, including legal procedures*.”<sup>105</sup> Both the ASEAN-Korea Investment Agreement and the ASEAN-India Investment Agreement adopt restrictive definitions of FET and FPS,<sup>106</sup> and articulate domestic law grounds as part of the elements of expropriation.<sup>107</sup>

The main difficulties with references to domestic law in investment treaty standards lie with how to identify and reconcile these norms within the canons of investment treaty interpretation. In order to interpret the investment treaty standard, the law-applier would have to first ascertain the precise content of local or domestic law, and then determine how the latter interacts with the investment protection standard. Thus, for expropriations that are required to be “in accordance with domestic law” under the new ASEAN investment treaties, the nature of a tribunal’s review when assessing the legality of the expropriation under the treaty standard might well have to adopt a comparative public law lens.<sup>108</sup> While this is not an insurmountable difficulty, the kind of archaeological comparative work that has to be undertaken just to identify the relevant domestic laws of the ASEAN Member States would conceivably impose significant costs on the process of attracting investment—at the very least to the extent that prospective foreign investors conducting their due diligence should include the content of domestic laws *a priori* to evaluate the actual protection afforded by the new ASEAN investment treaties.<sup>109</sup>

## RESERVATIONS CLAUSES

The new ASEAN investment treaties contain detailed reservations clauses, possibly reflective of protectionist preferences or political sensitivities when the ASEAN Member States decide to refrain from issuing treaty protection guarantees in certain areas.<sup>110</sup> The ACIA provides for the



specific inapplicability of national treatment protection to measures indicated in the Schedule attached to the ACIA (regardless of whether such measures arise from the central, regional, or local levels of government).<sup>111</sup> The ASEAN-Aus-NZ FTA Investment Chapter likewise denies national treatment protection to various measures indicated in two Schedules to Lists I and II to the treaty,<sup>112</sup> while the ASEAN-India Investment Agreement bars the application of national treatment to measures maintained either at central, regional, or local levels of government according to schedules of reservations.<sup>113</sup>

Somewhat more broadly, the ASEAN-China Investment Agreement denies national treatment and MFN treatment to “any existing or new non-conforming measures maintained or adopted within its territory” as well as the “continuation or amendment of any [such] non-conforming measures.”<sup>114</sup> This potentially broad carve out—the Agreement does not indicate or describe which measures are deemed to be non-conforming—also does not appear to be addressed by any legal obligation to revise the measure to ensure its conformity with the Agreement. At best, the States Parties to the ASEAN-China Investment Agreement would simply “endeavor to progressively remove the non-conforming measures.”<sup>115</sup>

Finally, the reservations clause in the ASEAN-Korea Investment Agreement appears more extensive than those in the other new treaties. It denies national treatment protection, MFN treatment protection, as well as the applicability of rules on senior management and boards of directors for non-conforming measures indicated in the Schedule of Reservations in List 1, the continuation or prompt renewal of any [such] non-conforming measure, as well as amendments to such non-conforming measures.<sup>116</sup> National treatment and MFN treatment is likewise denied for measures set out in List 2, this time with respect to specified sectors, subsectors or activities.<sup>117</sup>

While reservations clauses, in principle, comprise fundamental treaty mechanisms<sup>118</sup> that could guarantee that the ASEAN Member States and their counterpart states in the new ASEAN investment treaties retain needed flexibility to insulate certain government measures or areas of regulation from subordination to international investment treaty obligations, member states should nevertheless also be aware of the corresponding administrative and institutional costs attendant to maintaining reservations to the new ASEAN investment treaties.<sup>119</sup> If reservations against investment treaty coverage are drawn too specifically and without the necessary adjustment and review clauses, the difficulty<sup>120</sup> in withdrawing or amending such reservations clauses in the regional investment treaties could, in the future, hinder the AEC’s evolution and development of further investment objectives and policies, investment promotion plans, regulatory incentives, and other legal protections to attract more inward direct investment to ASEAN.<sup>121</sup> Investments in services sectors, for example, which are often the subject of many reservations clauses in the investment treaties, could, in the future, be the next frontier of expansion for the AEC.

Setting out descriptive lists of regulatory sectors and government measures to which investment treaty protection standards would not apply, likewise interrelates the administrative function of treaty oversight with the interpretive function of determining the scope of applicability of a legal obligation (e.g., the investment treaty protection standard) to a given transaction. Complex multistage investment projects<sup>122</sup>—and the regulatory umbrella that extends over the entire project or operation—may not necessarily be easily compartmentalized into discrete sectors or

governmental measures for an arbitral tribunal or local court tasked with deciding an investor-state dispute. A reservations clause may apply to one aspect of the investment project, while not applying to another, but the injury asserted by an investor may be integral or holistic in nature (e.g., drop in shareholding prices for the holding company that manages the complex multistage investment project). To the extent that the new ASEAN investment treaties deliberately reserve various measures and sectors from treaty protection, a counterpart institutional or administrative architecture within the ASEAN Secretariat/Coordinating Committee on Investment may also be necessary to monitor and contextualize the implementation of these clauses.

## CAPITAL TRANSFERS AND BALANCE OF PAYMENTS

The new treaties contain virtually identical language with respect to permissible restrictions on capital transfers and measures to safeguard balance of payments. A treaty party could “prevent or delay a transfer” upon the nondiscriminatory and good faith application of its domestic laws. Examples of domestic laws that could justify preventing or delaying a transfer under these treaties, are those on bankruptcy, securities regulation, criminal offences, financial reporting, enforcement of administrative or judicial decisions, taxation, social security, labor claims, as well as other domestic requirements by central banks or other relevant authorities that would permit restrictions on transfers.<sup>123</sup>

Further non-conforming measures may also be contemplated in “exceptional circumstances” such as “serious economic or financial disturbance” or other similar balance of payments difficulties.<sup>124</sup> These provisions permit member states to impose restrictions on capital transactions and transfers relating to covered investments, during development or financial crises situations that are largely self-judged<sup>125</sup> by member states. Maintaining governmental control over monetary flows, even while attempting to liberalize investment, is particularly understandable for a region that bore the brunt of the 1998 Asian financial crisis.<sup>126</sup> However, these provisions also introduce unpredictability to the overall quality of investment protection afforded by the new investment treaties, not only because member states have complete discretion to determine whether any given fiscal, financial, economic, or developmental situation warrants intervention into the free flow of capital transactions and transfers, but also because the new treaties *do not* afford any direct investor recourse against the potential arbitrariness, illegality, or inconsistency of a member state’s imposition of capital and transfer restrictions. (At best, the ASEAN-India Investment Agreement calls for joint consultations between treaty parties to review such transfer restrictions.<sup>127</sup>)

Even if the measures to safeguard balance of payments are required to be “consistent” with the IMF Articles of Agreement, the investment treaty provisions remain the controlling *lex specialis*.<sup>128</sup> Since the new investment treaties leave it entirely to the member states to police the mode and manner of their imposition of capital transfer restrictions (e.g., leaving it to the treaty party determine when an economic, fiscal, financial, or developmental situation warrants such restrictions; as well as letting the treaty party decide on the proportionality, duration, and termination of such restrictions), one can well anticipate that investors’ risk estimations would accordingly have to be adjusted upward in view of this broad area of policy uncertainty.<sup>129</sup>

## SPECIAL AND DIFFERENTIATED TREATMENT

The newer ASEAN Member States—Cambodia, Laos, Myanmar, and Vietnam—benefit from different expectations of compliance with the new investment treaties. The ACIA recognizes that “commitments by each newer ASEAN Member State may be made in accordance with its individual stage of development.”<sup>130</sup> Similar formulations appear in the ASEAN-Aus-NZ FTA Investment Chapter,<sup>131</sup> the ASEAN-Korea Investment Agreement,<sup>132</sup> the ASEAN-Japan Investment Chapter,<sup>133</sup> and the ASEAN-India Investment Agreement.<sup>134</sup>

While Special and Differentiated Treatment (SDT) is a well-used principle in world trade law that permits developing countries to adjust policies to conform with trade commitments at a different pace and schedule than other WTO Members,<sup>135</sup> the incorporation of this provision in investment treaties is a relatively recent phenomenon.<sup>136</sup> SDT provisions have not yet been interpreted in investor-state jurisprudence. Lacking the monitoring mechanism and usual schedules of compliance notified to other member states by the developing countries covered by the SDT principle in world trade law, the operation of the principle in the new ASEAN investment treaties will foreseeably create administrative as well as interpretive ambiguities for counterpart treaty parties. The WTO Secretariat has taken an interpretive position on the content of the SDT principle in various trade agreements,<sup>137</sup> but none of the ASEAN Member States and their regional investment treaty partners have to date articulated their understanding of the application of the SDT principle in the ASEAN regional investment treaties to expectations of CMLV compliance.

To the extent that Cambodia, Laos, Myanmar, and Vietnam would be able to invoke the SDT principle to adjust their mode and manner of compliance with investment treatment obligations and other provisions on protection in the new treaties, there should be a mechanism for investors and their home states to anticipate, track, and monitor the changed quality of compliance for the newer states. If the SDT principle is envisaged to be an available defense in an investor-state dispute, would it operate to prevent investment treaty breaches from arising in the first place, suspend the binding effect of investment treaty protective guarantees, or simply mitigate any potential liabilities? None of the ASEAN regional investment treaties provide clarity as to the precise legal effect of an SDT principle. Considering that the CMLV countries nevertheless retain individual BIT programs, it is not unreasonable to expect that foreign investors would prefer to use BITs of the CMLV which generally do not contain any equivocal language on treaty compliance such as the SDT principle.

## EXCEPTIONS CLAUSES MODELED AFTER GATT

Several of the new ASEAN investment treaties also incorporate exceptions clauses modeled after GATT Article XX (General Exceptions) and Article XXI (Security Exceptions).<sup>138</sup> Exceptions clauses purposely grafted from GATT Article XX and XXI have not yet been tested interpretively in investor-state jurisprudence. The award in *Continental Casualty Company v. Argentina* attempted to infuse a GATT Article XX-type meaning to a one-sentence non precluded measures clause (Article XI of the Argentina-United States bilateral investment treaty), but that approach has been repeatedly critiqued<sup>139</sup> and has since not been emulated by the overwhelming majority of investment arbitral tribunals. These exceptions clauses in the new ASEAN investment treaties are thus likely to be among the most recent examples of direct transposition of GATT law into

investment treaty practices, and it would be well within the settled principles of treaty interpretation in Articles 31 and 32 of the Vienna Convention on the Law of Treaties to conduct some examination of GATT law and jurisprudence in interpreting these grafted provisions of GATT law into the new ASEAN investment treaties.

While there might well be nothing extraordinary about incorporating jurisprudential insights from trade law into investment treaty practices,<sup>140</sup> some caution may be warranted due to teleological and structural design differences between the two treaty regimes.<sup>141</sup> The most fundamental difference is a matter of remedy. WTO law requires the member state to adjust its policies prospectively to maintain the foreign market access guarantees built into the international trade treaties, while investment law confers compensation on investors for past economic injuries to their investment resulting from a host state's measures.<sup>142</sup> To the extent that a WTO Member State can successfully persuade the WTO tribunals (Panel and/or the Appellate Body) that the contested measure falls within any of the exceptions in GATT Article XX or Article XXI, it would not have to revise the measure at all and leave it as it is.<sup>143</sup>

On the other hand, if a host state to investment were to successfully show that its contested regulatory measure in an investor-state dispute falls well within an exception under either the General Exceptions or Security Exceptions clauses in the new ASEAN investment treaties, would these exceptions have the effect of foreclosing any finding of the existence of a breach of investment treaty protections (a first-order defense); would they excuse, suspend, or mitigate compensatory redress available to the investor (a second-order defense); or would they bar recourse to investor-state dispute settlement (a third-order defense)?

These are but a few of the challenges arising from the normative hybridity conceptualized and designed into the new ASEAN investment treaties to preserve member states' regulatory freedoms. But without a mutually coordinated and transparent system of interpretive controls inside the ASEAN investment system itself, the issues are left for case to case resolution by future investor-state arbitral tribunals. Uncertainty on the scope and application of these exceptions clauses could likewise make it prohibitive for foreign investors to avail of the ASEAN regional investment treaties, instead leading to more treaty-shopping practices for BITs of the ASEAN Member States that do not contain such broad and uncertain exceptions clauses.

## **TRANSPARENCY AND RESTRICTING DISCLOSURES**

The new ASEAN investment treaties generally make it obligatory for the member states to notify and publicize laws, regulations, administrative guidelines, and other commitments that would affect covered investments, while at the same time privileging the ability of member states to withhold confidential information that, in their view, would prejudice public interests.

The ACIA obligates member states to at least annually inform the ASEAN Investment Area (AIA) Council of "any investment-related agreements or arrangements...and where preferential treatment was granted,"<sup>144</sup> as well as "any new law or of any changes to existing laws, regulations, or administrative guidelines, which significantly affect investments or commitments of a Member State."<sup>145</sup> The member states are further obligated to "make publicly available, all relevant laws, regulations and administrative guidelines of general application that pertain to, or affect investments in the territory of the Member State,"<sup>146</sup> and more importantly, to designate an

“enquiry point”<sup>147</sup> for such information. A member state may “require an investor of another Member State, or a covered investment, to provide information concerning the investment solely for informational or statistical purposes.”<sup>148</sup> However, the states retain the prerogative of restricting disclosure of information in the interests of law enforcement, public interest, as well as the legitimate commercial interests of particular public or private juridical persons.<sup>149</sup>

The ASEAN-Aus-NZ FTA Investment Chapter contains similar transparency rules and restrictive disclosure rules,<sup>150</sup> but extends transparency rules (including notice requirements and reasonable opportunities to support or defend positions taken) to administrative proceedings relating to the application of all host state measures of general application covered in the treaty.<sup>151</sup> The ASEAN-China Investment Agreement<sup>152</sup> and the ASEAN-Korea Investment Agreement<sup>153</sup> both include similarly worded transparency rules and restrictive disclosure rules to those found in the ACIA. The ASEAN-India Investment Agreement contains similar transparency rules, but also explicitly requires that treaty parties “notify the other Parties through the ASEAN Secretariat at least once annually of any investment-related agreements or arrangements which grants any preferential treatment and to which it is a party.”<sup>154</sup>

While it is laudable that the new ASEAN investment treaties have fully embraced the principle of transparency to ensure regulatory accountability and improvement of member states’ collective investment environments,<sup>155</sup> the overall effectiveness of transparency guarantees could be undermined by member states’ complete discretion to restrict or prohibit disclosures that, in their view, would be prejudicial to public interest, law enforcement, or legitimate commercial interests. Absent a treaty mechanism for testing the legality of the host state’s restriction on the disclosure of information to investors or fellow member states, non-enforcement may altogether countermand the obligatory quality of the transparency rules upon the member states. Investment arbitral jurisprudence accepts the transparency principle as the basis for investors to expect that a host state would act

in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved hereunder, but also to the goals underlying such regulations...<sup>156</sup>

The broad restrictive disclosure carve-outs for ASEAN Member States in the new investment treaties, which are not susceptible to compulsory oversight or review by either investors or fellow member states, would ultimately make it all too easy to defeat this principle.

As may be seen from the analysis of the foregoing eight common public policy features of the new treaties, there is little by way of a checking mechanism in these agreements to safeguard against potential arbitrariness by a member state exercising unconstrained discretion to unilaterally opt out of complying with investment protection obligations. Neither is there reassurance of an open regulatory and information architecture that would enable a continuing dialogic process between the member states, on their mutual exercise of public policy prerogatives that might weaken or altogether undercut the qualitative investment protections

offered in the new ASEAN investment treaties. This could very likely lead foreign investors to apply pre-existing older generations of Southeast Asian BITs which contain fewer regulatory carve-outs favoring host states, rather than the higher public policy thresholds set under the ASEAN regional investment treaties.

The main remedy for ensuring regular implementation of the above public policy provisions (and without incurring the problem of regulatory uncertainty and triggering unfettered individual discretion among member states) is to ensure transparency and to keep liberalizing access to information. It would be unrealistic of foreign investors to expect laws, regulations, and policies in ASEAN Member States to remain unchanged and static during the life of the investment. However, foreign investors' expectations of investment risks and investment project returns in regard to ASEAN are affected by perceptions of the "regulatory restrictiveness" in member states.<sup>157</sup> Regulatory uncertainty can be significantly mitigated if foreign investors and the ASEAN Member States regularly exchange and update information on all laws, policies, and regulations that affect the establishment, admission, and implementation of investment.<sup>158</sup>

The following section details the substantive and procedural domestic information requirements that each ASEAN Member State is legally obligated to provide under each regional investment treaty, including any procedural provisions for transparency in dispute settlement, such as in investor-state arbitration proceedings. There is a continuing duty to coordinate such information among the ASEAN Member States, not only because of their corresponding responsibilities to the treaty-based body monitoring implementation, but also because, as affirmed in the *Champion Trading* case, the international principle of transparency requires host states to act "consistently" and provide a transparent regime for investor protection.

## INFORMATION REQUIREMENTS AND TRANSPARENCY

The new ASEAN regional investment treaties require various indices of domestic information in relation to ASEAN Member States' respective domestic legal requirements and measures applicable to the investment during the life of the investment, which, if deliberately or negligently denied by member states to a foreign investor, could also likely give rise to a separate actionable claim based on transparency obligations under the ASEAN regional investment treaties.<sup>159</sup> The same treaties also contain procedural transparency rules applicable to investor-state disputes, such as those involving the participation of *amicus curiae*, access to information by non-disputing parties, among others, which are not uniformly granted in investor-state arbitral jurisprudence.<sup>160</sup>

Such information is not only owed to foreign investors but also to fellow ASEAN Member States to ensure that the states are all compliant with obligations to foreign investors under these regional treaties.<sup>161</sup> These requirements are specified under each regional investment treaty, and not standardized in a separate treaty, such as the 2014 UN Convention on Transparency in Treaty-Based Investor-State Arbitration (otherwise known as the Mauritius Convention).<sup>162</sup> Because each regional treaty has its own corresponding institutional monitoring body it will be critical for each member state to regularly coordinate the provision of such information with ASEAN counter-parties and fellow ASEAN Member States whose nationals are also entitled to such information.

Domestic measures will more than likely vary between and across member states, since domestic foreign investment legislation and policy remains a matter for the ASEAN Member States' respective national competences. For the proper and consistent application of each ASEAN regional investment treaty and good faith compliance with the transparency rules in these treaties, it would best serve the interests of all member states and ASEAN's coordinating institutions, such as the ASEAN CCI, to have on hand the baseline domestic information requirements and procedural transparency guarantees under each regional investment treaty. Other international organizations that promote regional investment have also designed informational transparency measures, such as those implemented by the North American Free Trade Agreement (NAFTA) Commission<sup>163</sup> and the Common Market for Eastern and Southern Africa (COMESA) Regional Investment Agency.<sup>164</sup>

The following tables identify the domestic information requirements that ASEAN Member States should possess at their national enquiry points, and be able to provide to fellow ASEAN Member States and the respective treaty-based body monitoring the implementation of each regional investment treaty. Constructing an accurate and regularly updated one-stop repository or shared database of treaty-required domestic information at the ASEAN Secretariat/ASEAN Coordinating Committee on Investment will greatly facilitate and complement regional investment promotion efforts in ASEAN.

Table 2-1  
*Information Required by ACIA*

| Provision                                       | Domestic Information Sought from ASEAN Member State  |
|---|--|
| Art. 3(4): areas where the ACIA will not apply  | Legal definition and scope of: 1) taxation measures; 2) subsidies or grants provided by the member state; 3) government procurement; 4) services supplied in the exercise of governmental authority by the relevant body or authority of a member state, not supplied on a commercial basis or in competition with one or more service suppliers<br><br>Member state's schedule of commitments and list of measures maintained under the 1995 ASEAN Framework Agreement on Services (AFAS) |
| Art. 4(a): definition of covered investment     | Member state's "laws, regulations, and national policies" for the admission of investment, including, where applicable, any procedures for specific approval in writing by the competent authority of a member state (corresponding with Annex 1 to ACIA)<br><br>Member state's official "territory" (especially noting that various ASEAN Member States have disputed territorial claims)   |
| Art. 4(c): definition of investment             | Member state's "laws and regulations" on the conferral of intellectual property rights   |
| Art. 4(e): definition of juridical person       | Member state's applicable law for constituting or organising legal entities for profit or otherwise  |
| Art. 4 (g): definition of natural person        | Member state's "laws, regulations, and national policies" on nationality, citizenship, and right of permanent residence  |
| Art. 5: National Treatment                      | Member state laws and regulations with respect to "admission, establishment, acquisition, and sale or other disposition of investments"  |
| Art. 6: Most-Favored Nation Treatment           | Member state laws and regulations with respect to "admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments"<br><br>Preferential treatment granted by a member state to investors of any other member state or non-member state, "under any existing or future agreements or arrangements to which a Member State is a Party"   |
| Art. 7: Prohibition of Performance Requirements | Information for joint assessment on existing performance requirements under the Agreement on Trade-Related Investment Measures (TRIMS) in Annex 1A to the WTO Agreement<br><br>Accession commitments of any non-WTO member of ASEAN  |

| Provision   | Domestic Information Sought from ASEAN Member State  |
|---|--|
| Art. 13: Transfers  | Member state's laws and regulations that justify preventing or delaying a transfer:<br>"a) bankruptcy, insolvency, or protection of the rights of creditors;<br>b) issuing, trading, or dealing in securities, futures, options, or derivatives;<br>c) criminal or penal offences and the recovery of the proceeds of crime;<br>d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;<br>e) ensuring compliance with orders or judgments in judicial or administrative proceedings;<br>f) taxation;<br>g) social security, public retirement, or compulsory savings schemes;<br>h) severance entitlements of employees; and<br>i) the requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Member State." |
| Art. 14: Expropriation and Compensation                                 | Member state's domestic laws and regulations governing expropriation of land [required under footnote 10 of Article 14(1)]<br>Member state's laws and regulations on interest and compensation for expropriation [Art. 14(3)]  |
| Art. 15: Subrogation  | Member state's claims arrangements with investors, in exercising subrogated rights or claims [Art. 15(3)]  |
| Art. 17: General Exceptions   | Member state's "laws or regulations" relating to "the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract"; "the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts"; and "safety."   |
| Art. 19: Denial of benefits   | Member state's "laws, regulations, and national policies" on ownership of a juridical person by an investor [Art. 19(3)(a)]; and "control" of the investor power to name a majority of the juridical person's directors or legally direct the actions of the juridical person [Art. 19(3)(b)]  |
| Art. 20: Special Formalities and Disclosure of Information              | Member state's "laws or regulations and compliance with registration requirements" prescribing a certain legal form or special formalities for investments   |
| Art. 22: Entry, Temporary Stay, and Work of Investors and Key Personnel | Member state's "immigration and labor laws, regulations, and national policies, relating to the entry, temporary stay, and authorization to work"<br>Member state's commitments under the ASEAN Framework Agreement on Services (AFAS)   |
| Art. 39: Transparency of Arbitral Proceedings                           | Member state laws or regulations on disclosure of information that could impede law enforcement or would be contrary to the Member State's law protecting Cabinet confidences, personal privacy, or the financial affairs and accounts of individual customers of financial institutions   |

*Note: Requirements are set out in Art. 21 (Transparency); Art. 24(d) (Promotion of Investment) on "investment laws, regulations and policies"; Art. 25(c) (Facilitation of Investment) on "investment rules, regulations, policies and procedures."*

Table 2-2  
*Information Required by ASEAN-India Agreement*

| Provision  | Information Required  |
|--|---|
| Art. 1(b): Scope of investments  | Member state's "relevant laws, regulations and policies" on admission of investment   |
| Art. 1(2): Areas where Agreement shall not apply   | Member state's legal definition of "government procurement", "subsidies or grants provided", "services supplied in the exercise of governmental authority" not supplied on a commercial basis nor in competition with one or more service suppliers; "taxation measure" |
| Art. 1(4)(b): Agreement does not apply to measures covered under ASEAN-India Trade in Services Agreement | Member state's specific services commitments under the ASEAN-India Trade in Services Agreement  |
| Art. 2(g): definition of   | Member state's "applicable laws" for constituting or otherwise organizing a legal entity, whether for   |



| Provision  | Information Required   |
|--|--|
| juridical person   | profit or otherwise, and whether privately-owned or governmentally-owned   |
| Art. 2(j): definition of natural person  | Member state's laws and regulations on nationality or citizenship  |
| Art. 3(1): national treatment  | Member state's laws and regulations in relation to "the establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer, or other disposition of investments"   |
| Art. 4: Reservations   | Member state's Schedule of Reservations, including those in relation to portfolio investments [Art. 4(6)]  |
| Art. 8: Expropriation and Compensation   | For member states such as Cambodia, Malaysia, Myanmar, the Philippines, Thailand, and Vietnam, the "laws, regulations, and policies" on "rate and payment of interest of compensation for expropriation of investments" [footnote 10 to Article 8(5)]<br>Member state domestic laws and regulations and amendments thereto for "any measure of expropriation relating to land" [Art. 8(8)]   |
| Art. 10: Subrogation   | Member state's claims arrangement with its investors [Art. 10(4)]  |
| Art. 11(3): preventing or delaying transfers   | Member state's "laws and regulations relating to":<br>“(a) bankruptcy, insolvency, or the protection of the rights of creditors;<br>(b) issuing, trading, or dealing in securities, futures, options, or derivatives;<br>(c) criminal or penal offences and the recovery of the proceeds of crime;<br>(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;<br>(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;<br>(f) taxation;<br>(g) social security, public retirement, or compulsory savings schemes, including provident funds, retirement gratuity programs and employees insurance programs;<br>(h) severance entitlements of employees;<br>(i) requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Party;<br>(j) in the case of India, requirements to lock in initial capital investments, as provided in India's Foreign Direct Investment (FDI) Policy...” |
| Art. 13(3): Denial of Benefits   | Member state's laws, regulations, and national policies defining "ownership" of a juridical person by an investor<br>Member state's laws, regulations, and national policies authorizing the investor to name a majority of the juridical person's directors, otherwise to legally direct its actions  |
| Art. 15: Special Formalities and Disclosure of Information   | Member State's laws or regulations that prescribe special formalities in connection with an investment   |
| Art. 20(17)-(18): Transparency in Investment Disputes  | Member state may make publicly available final awards and decisions made by the tribunal   |
| Article 8 (Third Parties) of the Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the Republic of India, in relation to Art. 19 of ASEAN-India Investment Agreement (for disputes between states Parties) | If the Party Complained Against agrees, any Party, having a substantial interest in a dispute before an arbitral panel and having notified its interest in writing to the parties to such a dispute and the rest of the Parties, shall have an opportunity to make written submissions to the arbitral panel. Third Party shall receive the submissions of the parties to the dispute at the first meeting of the arbitral panel.  |

*Note: Requirements are set out in Art. 14 (Transparency) (making available “all relevant laws, regulations policies, and administrative guidelines of general application that pertain to, or affect investments in its territory”); Art. 18(c) (Facilitation of Investment) (on dissemination of investment information, including “investment rules, regulations, policies and procedures”).*

**Table 2-3**  
**Information Required by ASEAN-Australia-New Zealand FTA**

| Provision  | Information Required  |
|--|---|
| Art. 1(2): Chapter does not apply                          | Member state’s legal definitions of “government procurement”, “subsidies or grants provided by a Party”, and “services supplied in the exercise of governmental authority by the relevant body or authority of a Party”   |
| Art. 2(a): definition of covered investment                | Member state’s “relevant laws, regulations and policies” on the admission of investment   |
| Art. 2(e): definition of juridical person                  | Member state’s “applicable law” for duly constituting or otherwise organizing an entity for profit or otherwise, whether privately-owned or governmentally-owned  |
| Art. 4: national treatment                                 | Member state’s laws and regulations on the “establishment, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer or other disposition of investments”   |
| Art. 8(3): preventing or delaying transfers                | Member state’s laws and regulations relating to:<br>“(a) bankruptcy, insolvency, or the protection of the rights of creditors;<br>(b) issuing, trading, or dealing in securities, futures, options, or derivatives;<br>(c) criminal or penal offences and the recovery of the proceeds of crime;<br>(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;<br>(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;<br>(f) taxation;<br>(g) social security, public retirement, or compulsory savings schemes; and<br>(h) severance entitlements of employees.” |
| Art. 9: Expropriation and Compensation                     | Malaysia’s domestic laws and regulations relating to land acquisition [footnote 8 to Article 1(a)]<br>Member state laws and regulations on compensation for direct expropriation, and “appropriate interest” [Art. 9(3)]<br>Singapore domestic legislation in relation to measures of expropriation relating to land [Art. 9(6)]<br>Vietnam domestic legislation in relation to measures of expropriation relating to land [Art. 9(6)]  |
| Art. 11: Denial of Benefits                                | Thailand’s “applicable laws and regulations” to deny benefits of this Chapter relating to the “admission, establishment, acquisition and expansion of investments to an investor of another Party to an investor of another Party that is a juridical person of such Party” [Art. 11(3)]<br>Philippines Commonwealth Act No. 108 as amended by Presidential Decree No. 715 [Art. 11(4)]   |
| Art. 13: Transparency                                      | “All relevant measures of general application covered by this Chapter”, including “international agreements pertaining to or affecting investors or investment activities to which a Party is a signatory” [Art. 13(1)]<br>Administrative procedures in relation to application of measures in Art. 13(1) to particular investors or investments  |
| Art. 14: Special Formalities and Disclosure of Information | Special formalities in connection with covered investments, including a requirement that “covered investments be legally constituted under the laws or regulations of the Party”  |
| Art. 16: Work Program                                      | Any agreement between the Parties as to the application of the most-favored-nation treatment clause to this Chapter [Art. 16(2)(a)]   |
| Art. 26: Transparency of Arbitral Proceedings              | Member state who is the disputing Party may make publicly available all awards and decisions produced by the arbitral tribunal [Art. 26(1)]<br>Member state laws on information disclosure for law enforcement; and those protecting against disclosure of Cabinet confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which Member State determines to be contrary to its essential security [Art. 26(5)]  |

*Note: Requirements are set out in Investment Chapter, Art. 13 (Transparency) (“all relevant measures of general application covered by this Chapter”, “international agreements pertaining to or affecting investors or investment activities”).*

Table 2-4  
*Information Required by ASEAN-Korea Investment Agreement*

| Provision   | Information Required  |
|---|---|
| Art. 1(c): Definition of covered investment               | Member state's definition of territory<br>Member state's laws, regulations, and national policies for admission of investment, including any procedures for specific approval in writing by competent authorities   |
| Art. 1(j): Definition of investment                       | Laws and regulations, and international agreements of the Member State recognizing intellectual property rights [Art. 1(j)(iii)]  |
| Art. 1(l): Definition of juridical person of a Party      | Member state's applicable laws for duly constituting or organizing any legal entity, whether for profit or otherwise, whether privately-owned or governmentally-owned   |
| Art. 1(o): Definition of natural person of a Party        | Member state's laws and regulations on nationality, citizenship, and the right of permanent residence   |
| Art. 2(2): Agreement does not apply to                    | Member state's legal definitions of "government procurement", "subsidies or grants provided", "taxation measures", "services supplied in the exercise of governmental authority", where such services are not supplied on a commercial basis or in competition with one or more service suppliers [Art. 2(2)(a) to (e)]<br>Member state's commitments under the Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea [Art. 2(2)(f) and Art. 2(3)]     |
| Art. 3: National treatment                                | Member state's laws and regulations "with respect to admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory"  |
| Art. 4: Most Favored Nation Treatment                     | Member state's preferential treatment accorded to investors and/or their investments "under any existing bilateral, regional, and/or international agreements or any forms of economic or regional cooperation with any non-Party" [Art. 4(3)(a)]<br>Member state's "existing or future preferential treatment accorded to investors and/or their investments in any agreement between or among ASEAN Member Countries" [Art. 4(3)(b)]  |
| Art. 6: Performance requirements                          | Member state commitments under the WTO Agreement on Trade-Related Investment Measures (TRIMs)   |
| Art. 9(5): Reservations                                   | Member state commitments under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) "and other treaties concluded under the auspices of the World Intellectual Property Organization"   |
| Art. 10(2): delaying or preventing a transfer             | Member state laws and regulations relating to:<br>(a) bankruptcy, insolvency or the protection of the rights of creditors;<br>(b) issuing, trading or dealing in securities, futures, options or derivatives;<br>(c) criminal or penal offences;<br>(d) social security, public retirement or compulsory savings scheme;<br>(e) ensuring compliance with the judgments in judicial or administrative proceedings;<br>(f) severance entitlement of employees;<br>(g) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; and<br>(h) taxation" |
| Art. 12(1)(a): public purpose in expropriation            | Where Malaysia is the expropriating party, laws and regulations of Malaysia relating to land acquisition [footnote 15 to Art. 12(1)(a)]   |
| Art. 12(4): expropriation by Singapore or Vietnam         | Measure of expropriation relating to land "shall be as defined in their respective domestic laws, regulations and any amendment thereto and shall be, for the purposes of and upon payment of compensation, in accordance with the aforesaid laws and regulations] [Art. 12(4)]   |
| Art. 15: Special Formalities and Treatment of Information | Member state's laws or regulations prescribing special formalities in connection with the establishment of investments by investors of any other Party [Art. 15(1)]   |
| Art. 17: Denial of benefits                               | Member state's law for constituting or organizing juridical persons, and which define, if any, what comprise "substantial business activities" in its territory [Art. 17(1)]  |

| Provision   | Information Required  |
|---|---|
|   | <p>For the Kingdom of Thailand, a juridical person is “owned by investors of a Party if more than 50 percent of the equity interest in it is beneficially owned by such investors” [Art. 17(4)(a)] and “controlled by investors of a Party if such investors have the power to name a majority of its directors or otherwise to legally direct its actions” [Art. 17(4)(b)]</p> <p>For the Republic of the Philippines, Commonwealth Act No. 108 (An Act to Punish Acts of Evasion of Laws on Nationalization of Certain Rights, Franchises or Privileges) as amended by Presidential Decree No. 715 otherwise known as the “Anti-Dummy Law” [Art. 17(5)]</p> |
| Art. 20(c): General exceptions—measures necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement | Member state’s laws relating to “prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract”; “the protection of privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts”; and “safety”  |
| Art. 22: Taxation   | All tax agreements to which the member state is a party   |

*Note: Requirements are set out in Art. 8 (Transparency) (“all laws, regulations, administrative rulings, and judicial decisions of general application as well as international agreements which pertain to or affect any matter covered by this Agreement...”; “any new laws or any changes to existing laws, regulations or administrative guidelines which significantly affect investments or commitments of a Party under this Agreement”).*

Table 2-5  
*Information Required by ASEAN-China Investment Agreement*

| Provisions   | Information Required  |
|--|---|
| Art. 1(1)(d): definition of investment                           | Member state’s “relevant laws, regulations, and policies”, where policies “refer to those affecting investment that are endorsed and announced by the Government of a Party, and made publicly available in a written form”, which determine and apply to every kind of asset invested by the investors of a Party  |
| Art. 1(1)(f): definition of juridical person of a Party          | Member state’s laws for duly constituting or otherwise organizing any legal entity, whether for profit or otherwise, and whether privately-owned or governmentally-owned  |
| Art. 1(1)(i): definition of natural person of a Party            | Member state’s laws and regulations on nationality, citizenship, and right of permanent residence   |
| Art. 3(1)(b): territorial scope of application of the Agreement  | For China, “the entire customs territory according to the WTO definition at the time of her accession to the WTO on 11 December 2001” [Art. 3(1)(b)(i)]<br>For ASEAN Member States, “their respective territories” [Art. 3(1)(b)(ii)]   |
| Art. 3(3): Scope of application of Agreement for Thailand        | Thailand domestic laws, regulations, and policies on admission and specific approval in writing of the investment by an investor  |
| Art. 3(4): Agreement shall not apply to                          | Member state’s legal definitions for:<br>“(a) any taxation measure...<br>(b) laws, regulations, policies or procedures of general application governing the procurement by government agencies of goods and services purchased for governmental purposes (government procurement) and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale;<br>(c) subsidies or grants provided by a Party or to any conditions attached to the receipt or the continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic investors and investments;<br>(d) services supplied in the exercise of governmental authority by the relevant body or authority of a Party...<br>(e) measures adopted or maintained by a Party affecting trade in services.” |
| Art. 3(5): applicability of specific obligations on treatment of | Member state’s Schedule of Specific Commitments made under the Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast   |

| Provisions   | Information Required  |
|--|---|
| investment/Art. 7, expropriation/Art. 8, compensation for losses/Art. 9, transfers and repatriation of profits/Art. 10, subrogation/Art. 12, and investment disputes/Art. 14 | Asian Nations and the People's Republic of China, signed 14 January 2007  |
| Art. 4: National treatment   | Member state laws and regulations on the "management, conduct, operation, maintenance, use, sale, liquidation, or other forms of disposal of such investments"  |
| Art. 5: Most-Favored-Nation treatment  | Member state laws and regulations, and agreements with third Parties (non-Parties to this Agreement) with respect to "admission, establishment, acquisition, expansion, management, conduct, operation, maintenance, use, liquidation, sale and other forms of disposal of investments" [Art. 5(1)]. *Note that Art. 5(3) excludes application of MFN treatment to "any existing bilateral, regional or international agreements, or any forms of economic or regional cooperation with any non-Party" as well as to "any existing or future preferential treatment accorded to investors and their investments in any agreement or arrangement between or among ASEAN Member States or between any Party and its separate customs territories"   |
| Art. 6: Non-Conforming Measures  | Member state's list of non-conforming measures  |
| Art. 8: Expropriation  | Member state domestic laws and legal procedures on expropriation [Art. 8(1)(b); Art. 8(4); Art. 8(5)]<br>Malaysia, Myanmar, Philippines, Thailand and Vietnam laws, regulations, and policies in relation to the rate, payment of interest for delay in the payment of compensation for expropriation of investments of investors of another Party [Footnote 6 to Article 8(3)]   |
| Art. 9: Compensation for Losses  | Member state laws and regulations as regards restitution, indemnification, compensation or other settlement for losses owing to war or other armed conflict, revolution, a state of emergency, revolt, insurrection or riot   |
| Art. 10(3): preventing or delaying a transfer  | Member state laws and regulations relating to:<br><ul style="list-style-type: none"> <li>“(a) bankruptcy, loss of ability or capacity to make payments, or protection of the right of creditors;</li> <li>(b) non-fulfillment of the host Party's transfer requirements in respect of trading or dealing in securities, futures, options or derivatives;</li> <li>(c) non-fulfillment of tax obligations;</li> <li>(d) criminal or penal offences and the recovery of the proceeds of crime;</li> <li>(e) social security, public retirement or compulsory saving schemes;</li> <li>(f) compliance with judgments in judicial or administrative proceedings;</li> <li>(g) workers' retrenchment benefits in relation to labor compensation relating to, amongst others, foreign investment projects that are closed down; and</li> <li>(h) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities.”</li> </ul> |
| Art. 10(4): formalities for transfers  | Member state's domestic laws and regulations and relevant formalities "relating to exchange administration"   |
| Art. 15: Denial of Benefits  | For Indonesia, Myanmar, the Philippines, and Vietnam, "ownership" and "control" of a juridical person are as defined in their respective domestic laws and regulations [Footnote 9(b) to Art. 15(2)]  |
| Art. 16: General exception for measure necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement              | Member state laws and regulations relating to "the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract"; "the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts"; "safety"  |

*Note: Requirements are set out in Art. 19 (Transparency) ("each Party shall make available, through publication, all relevant laws, regulations, policies, and administrative guidelines of general application that pertain to, or affect investments in its territory"; "notify the other Parties of the introduction of any new law or any changes to its existing laws, regulations, policies or administrative guidelines, which significantly affect investments in its territory, or its commitments under this Agreement").*

Table 2-6

*ASEAN-Japan Investment Chapter, Chapter 7 (Investment), Art. 51*

| Provision  | Information Required  |
|--|---|
| Art. 51(1): creating and maintaining favorable and transparent conditions for investment of investors of the other Parties | Member state's "laws, regulations, and policies" that would "create and maintain favorable and transparent conditions in the Party for investments of investors of the other Parties"<br>*Note that Art. 51(2) creates a Sub-Committee on Investment to further negotiate provisions for investment to be incorporated to this Agreement. |

Providing foreign investors with centralized regional information on the domestic information requirements of each member state, through the ASEAN Secretariat and/or the ASEAN Coordinating Committee on Investment, should be seen as a mode of institutionalizing compliance with the transparency obligations of ASEAN regional investment treaties and as a critical strategy in promoting regional investment. Providing such information at the regional level is not a novel or unheard of practice in investment promotion. For example, the Common Market for Eastern and Southern Africa (COMESA) Regional Investment Agency (COMESA RIA) was created in 2006 to serve as a one-stop regional information hub. COMESA RIA provides domestic information requirements—including information on domestic regulatory frameworks, incentives, and procedures—for investing in any of COMESA's 19 member states.<sup>165</sup> The OECD's 2003 *Framework for Investment Policy Transparency* also affirms the importance of international secretariats in enforcing transparency mandated under investment treaties.<sup>166</sup>

### 3. Treaty Incompatibility

The simultaneous applicability of ASEAN regional investment treaties, in parallel with pre-existing and continuing BIT programs and FTA investment chapters of the individual ASEAN Member States, creates regulatory uncertainty and normative dissonance over the nature of foreign investment governance in Southeast Asia. ASEAN Member States are duty-bound to implement all obligations of membership—such as those exemplified under the ASEAN regional investment treaties. Art. 5(2) of the ASEAN Charter states that all ASEAN Member States “shall take *all necessary measures*, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter *and to comply with all obligations of membership.*”<sup>167</sup>

Obligations of membership—a phrase undefined under the ASEAN Charter—may nevertheless be reasonably viewed as the “rules of the organization” in ASEAN. The International Law Commission’s 2011 Draft Articles on the Responsibility of International Organizations defines “rules of the organization” as “...the constituent instruments, *decisions*, resolutions, and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.”<sup>168</sup>

The ASEAN regional investment treaties comprise *decisions* of the ASEAN Summit members—the individual Heads of State of the member states—to commit to fulfill binding international obligations in regard to the management of foreign investment with each other and other states who are among ASEAN’s external partners.<sup>169</sup> Moreover, the ASEAN regional investment treaties are also binding on all ASEAN Member States as part of the wider corpus of external agreements concluded under “the centrality of ASEAN in external political, economic, social, and cultural relations”,<sup>170</sup> consistent with its objectives of “upholding international law”,<sup>171</sup> and adhering to “ASEAN’s rules-based regimes for effective implementation of economic commitments.”<sup>172</sup> Because of the positive mandate of member states to “take all necessary measures” to comply with obligations of membership such as those in the ASEAN regional investment treaties, each state may well find itself obligated to take all necessary measures to ensure that its individual BIT programs and FTA investment chapters do not undermine implementation of and compliance with ASEAN’s regional investment treaties.

As members of the AEC, member states continue to be bound by their collective duties under the AEC Blueprint to create “more transparent, consistent, and predictable investment rules, regulations, policies, and procedures.”<sup>173</sup>

## INVESTMENT PROTECTION AND HOST STATE OBLIGATIONS

The BIT programs and FTA investment chapters of individual member states could undermine implementation of and compliance with ASEAN's regional investment treaties. Foreign investors and firms will likely practice "jurisdictional or regulatory arbitrage"<sup>174</sup> to take advantage of fewer or less stringent compliance rules in the older BITs and FTA chapters. The regional investment treaties are more recent (such as the 2014 ASEAN-India Investment Agreement) than the current 640-plus BITs and FTA chapters. As discussed in Section 2, the regional investment treaties contain eight common features that appear to seek to calibrate the objectives of investment protection while maintaining member state flexibility to implement public policy throughout the duration of an investment.

However clearly or unsuccessfully such prerogatives have been formulated in the actual texts of ASEAN's regional investment treaties, it is still a fact that not all (if any) recent innovations in the treaties are in the BIT programs. Investment policy as contained in the ASEAN regional investment treaties may well be reaching for the "gold" standard in investment protection and public interest protection, while older BIT programs may well be characterized by much more liberal investment protection guarantees and fewer, if any, policy space for host states to vindicate public interest objectives. Closer study of member states' BIT programs is required to ascertain if the more liberal quality of investment protection offered in these treaties will end up incentivizing foreign investors to choose regulatory arbitrage and invoke compliance with these treaties, rather than the stricter thresholds imposed under the regional treaties.

The problem of normative imbalances between the regional investment treaties and individual Southeast Asian BIT programs can be illustrated through the continuing difference in the narrow formulation of the fair and equitable treatment (FET) clause under the regional treaties, as opposed to broader variants in several BITs. Article 11(2)(a) of the ACIA obligates member states to observe FET toward foreign investors by merely requiring "each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process."<sup>175</sup> Many Southeast Asian BITs, however, do not narrowly circumscribe FET in this manner.<sup>176</sup> The 1994 Malaysia-Albania BIT states that "the Contracting Party shall receive treatment which is fair and equitable",<sup>177</sup> without explaining or interpreting the qualitative contours of this treatment. The 1999 Argentina-Philippines BIT states that each Contracting Party "shall at all times ensure fair and equitable treatment of the investments by investors of the Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof through unjustified or discriminatory measures."<sup>178</sup>

Because of the more expansive formulations of FET in the BITs, member states remain bound to a stricter threshold of investment guarantees of "fair and equitable treatment," as opposed to the narrow scope of this treatment owed to investors under the regional investment treaties. It will not be surprising, therefore, if foreign investors claiming compensation for injury caused by ASEAN Member States would prefer an interpretively more expansive version of FET in the Southeast Asian BITs, rather than invoke the ASEAN regional investment treaties.

As discussed in the introduction of this paper, it will be necessary to examine all Southeast Asian investment treaties and their interaction with the regional investment treaties in order to anticipate



and fully map all the legal consequences of the normative imbalances between both bilateral and regional treaty regimes.

## MOST FAVORED NATION CLAUSES

There are MFN clauses in several of the ASEAN regional investment treaties,<sup>179</sup> as well as in many of the Southeast Asian investment treaties and FTA investment chapters. As demonstrated in the table on the structure of MFN clauses below, the Philippines observed that ASEAN follows a “negotiated MFN approach”, in order to address a potential “free rider” situation in that the MFN standard commits a host country to extend unilaterally to its treaty partners any additional rights that it grants to third countries in future agreements:

| Agreement   | MFN   |
|-------------|---|
| AANZFTA     | To be discussed under the Work Programme  |
| ACIA        | Automatic MFN. MFN shall not cover investor-state dispute settlement  |
| ACFTA       | Negotiated MFN. MFN does not cover dispute resolution   |
| AKFTA       | Negotiated MFN. The discussion of the application of the Article shall be discussed under the Work Programme. |
| ASEAN-India | No MFN  |

The MFN clause in investment treaties is particularly controversial because it serves as the substantive gateway for the incorporation of norms from other treaty sources with third-party states.<sup>180</sup> These norms may not necessarily just be substantive standards of investment protection, but also procedural guarantees or benefits extended under the investor–state dispute settlement mechanism in an investment treaty. In *Emilio Agustin Maffezini v. Kingdom of Spain*,<sup>181</sup> the arbitral tribunal interpreted the MFN clause to extend to substantive as well as procedural dispute settlement provisions of the applicable bilateral investment treaty.

Given the variable formulations of MFN in the regional investment treaties and the BIT programs and FTA investment chapters of member states, comprehensive analysis and parallel bilateral-regional research is required to investigate the precise scope and reach of MFN clauses simultaneously applicable in the regional treaties, as opposed to Southeast Asian bilateral treaty regimes. The European Parliament, for example, recognizes the serious legal uncertainty created by the overlap between future investment policy to be directed at the regional level through the European Union, and the continuation of “intra-EU” BITs by the EU Member States with each other.<sup>182</sup>

Legal and regulatory uncertainty is magnified in the present situation by the continued overlapping existence of intra-ASEAN BITs and individual Southeast Asian BITs with ASEAN's regional investment treaty partners (India, China, Australia, New Zealand, Japan, and South Korea), alongside the ASEAN regional investment treaties. This is best illustrated by the problem of intra-ASEAN BITs existing alongside the ACIA.

Among its key objectives, the ACIA emphasizes the “provision of enhanced protection to investors of all Member States and their investments”;<sup>183</sup> the “improvement of transparency and predictability of investment rules, regulations and procedures conducive to increased investment among Member States”;<sup>184</sup> and the “joint promotion of the region as an integrated investment area.”<sup>185</sup> To accomplish these objectives, member states are purposely obligated, among others, to enhance ASEAN integration specifically by “harmonis[ing], where possible, investment policies and measures to achieve industrial complementation.”<sup>186</sup> The ACIA does not provide for any sunset clauses or termination of pre-existing intra-ASEAN BITs, as in fact the ACIA expressly states that, “nothing in this Agreement shall derogate from the existing obligations of a Member State under any other agreements to which it is a party.”<sup>187</sup> In the case of an investor-state dispute under the ACIA, intra-ASEAN BITs could very well apply, since the ACIA entitles the investor-state arbitral tribunal to “decide the issues in dispute in accordance with [the ACIA], *any other applicable agreements between the Member States*, and the applicable rules of international law.”<sup>188</sup>

With the simultaneous applicability of the ACIA and intra-ASEAN BITs, several issues are likely to arise. First, given the differences in the quality of investment protection afforded between the ACIA and the older models of intra-ASEAN BITs, could ASEAN Member States be deemed to have “complied” with the ACIA's duties for all member states to harmonize their investment policies to promote the region as an integrated investment area? Continuing deviations from the qualitative standards and obligations defined in the ACIA through the individual BITs between member states could encourage the *de facto* inoperability of the ACIA's envisaged level, strategy, and quality of investment protection.

Second, the simultaneous applicability of the ACIA and the intra-ASEAN BITs muddles the governing law for investor-state disputes under the ACIA. Where there are proven disparities between the quality of investment protection afforded by an ASEAN Member State under its intra-ASEAN BIT, and the quality of investment protection that the same member state is obligated to extend under the ACIA, it will likely be difficult for the member state to muster ACIA-based defenses to investor claims when foreign investors decide, in the first place, which investment treaty to invoke for purposes of initiating suit. One can expect that foreign investors will still frame their cause of action under the older intra-ASEAN BITs—which often do not contain any, if not all, of the public policy features discussed earlier. ASEAN Member States may still be burdened to find plausible defenses or calibration mechanisms against investor claims under the older generation of intra-ASEAN BITs.

Third and most important, the continued applicability of intra-ASEAN BITs alongside the ACIA could very likely trigger questions of the ASEAN Member States' compliance with their fundamental ASEAN Charter duties under Article 5(2) to “take all necessary measures...including the enactment of appropriate legislation, to implement obligations of

membership.” By continuing to pursue investment regulatory governance bilaterally (within the framework and purposes of an intra-ASEAN BIT) despite the existence of the ACIA, it is doubtful if an ASEAN Member State could indeed be said to have taken “all necessary measures” to implement its regional obligations, such as those that were specifically crafted and designed in the ACIA based on the consensus of all ASEAN Member States.

Such legal uncertainties likewise permeate the other ASEAN regional investment treaties, which also omit to provide harmonization and coordination mechanisms that would govern ASEAN Member States’ duties under their individual BITs with the ASEAN regional investment treaty partners India, China, South Korea, Japan, Australia, and New Zealand, without jeopardizing or undermining regional investment objectives and protections. The ASEAN-India Investment Agreement appears silent on the effects of this regional agreement on India’s individual BITs with ASEAN Member States,<sup>189</sup> while the ASEAN-China Investment Agreement explicitly recognizes the applicability of other international agreements that entitle investments to treatment that may be “more favorable” than provided for in the ASEAN-China Investment Agreement.<sup>190</sup> However, the ASEAN-China Investment Agreement does not also apply its favorable public policy features or calibration mechanisms the investors’ entitlement to the “more favorable treatment” provided for in China’s older individual BITs with the ASEAN Member States. The ASEAN-China Investment Agreement does not contain any language purporting to supersede or control the interpretation of investment treaty standards in China’s older individual BITs with ASEAN Member States, to make the same consistent with the standards as formulated in the ASEAN-China Investment Agreement. Neither does the agreement contain any provision creating a regional “sunset clause” for China’s BITs with individual ASEAN Member States, thus perpetuating the problem of treaty-shopping by foreign investors interested in invoking the highest degree of investment treaty protections, with the least amount of available defenses, mitigation mechanisms, or exculpatory exceptions for host states.

The ASEAN-Korea Investment Agreement contains a recognition clause similar to that in the ASEAN-China Investment Agreement for other agreements entitling investors to more favorable treatment,<sup>191</sup> sans the application of the host state’s calibrating mechanisms made available under the regional agreement. Just like the ASEAN-China Investment Agreement, the ASEAN-Australia-New Zealand FTA Investment Chapter explicitly permits “any other applicable agreements between the parties”<sup>192</sup> to apply as governing law to investor-state disputes, which could thus usher in Australia’s existing individual BITs with the ASEAN Member States. New Zealand does not have such BITs.

In sum, treaty standards under intra-ASEAN BITs and the individual BITs of ASEAN regional investment treaty external partners with the ASEAN Member States could thus infuse the content and operation of the ASEAN regional investment treaties in three ways.

***1. The operation of MFN clauses in these treaties opens the door for foreign investors to import treatment and protections beyond the four corners of the regional investment treaty.*** MFN clauses in ASEAN Member States’ BITs, in turn, could also result in importing standards of protection and treatment entitlements from BITs with third states (e.g., states who are not parties to the ASEAN regional investment treaties), which might not have been contemplated at all when standards of protection and other treaty provisions were drafted in the ASEAN regional

investment treaties. The vast uncertainty created by MFN clauses as to the actual scope of protection in the ASEAN regional investment treaties undermines the latter's usefulness to creating a predictable rules-based environment for regional investment in Southeast Asia, especially under the aegis of the AEC and the Charter-based ASEAN institutions.

***2. The ASEAN regional investment treaties' definition of investment "in accordance with laws, regulations, and policies" of ASEAN Member States and/or their regional external partners (India, China, Korea, Japan, Australia, New Zealand) could also create another opening for the applicability of intra-ASEAN BITs and individual BITs with ASEAN regional investment treaty external partners.*** If these intra-ASEAN BITs and other individual BITs are deemed to be part of the "laws, regulations, and policies" of the ASEAN Member States, investors under the ASEAN regional investment treaties could be burdened with ensuring that their investment complies with such BITs at the time of admission and/or establishment of such investment. The uncertain scope of "laws, regulations, and policies" tacked on to the definition of investment in the ASEAN regional investment treaties introduces another layer of uncertainty to how foreign investors are expected to comply with the regulatory framework for the admission of their investment and proper coverage under the ASEAN regional investment treaties. With no centralized exchanges or information made available to date between the ASEAN Member States in regard to their BITs, the foreign investor is thus left to assume the risk that its investment may be deemed in the future to have failed to comply with the "laws, regulations, and policies" of member states, including in the form of intra-ASEAN BITs and individual BITs with ASEAN regional investment treaty partners.

***3. Intra-ASEAN BITs and other individual BITs with ASEAN regional investment treaty external partners might also apply as part of the governing law of investor-state disputes under the ASEAN regional investment treaties, specifically for the ASEAN-China Investment Agreement and the ASEAN-Australia-N.Zealand FTA Investment Chapter.*** This expansion of the applicable law could affect an arbitral tribunal's future interpretation of standards of investment protection, host state defenses and exceptions, the scope of covered investment, transparency requirements and any other obligations of host states and home states of investment under the ASEAN regional investment treaties.

## **DOMESTIC LAW AND REGIONAL INVESTMENT TREATIES**

As discussed in Section 2, many provisions and substantive standards of the regional investment treaties routinely refer to the applicability of member states' domestic laws and regulations. These "legality clauses"<sup>193</sup> infuse meaning into the scope of covered investments under an investment treaty (e.g., "investments made in accordance with investment law"); the definition of nationality of investors and the legality of juridical persons; the "public purpose" element in expropriation; general exceptions clauses; transparency rules; procedural rules; among others, as seen throughout the ASEAN regional investment treaties. Precisely because references to "laws", "regulations," and "policies" in the ASEAN regional investment treaties often do not qualitatively delineate between different material sources of law, it may also be the case that an ASEAN Member State's treaties and international agreements forming part of its legal system<sup>194</sup> may also be included among the "domestic law" infusing substantive content into ASEAN regional investment treaty standards.

If Southeast Asian BITs could be transmitted as part of the applicable domestic law for interpreting ASEAN regional investment treaties, there is a real danger that stricter obligations for host states toward investors under the Southeast Asian BITs could also infuse the interpretation of host state obligations under the ASEAN regional investment treaties. On the other hand, the cross-fertilization of Southeast Asian BIT standards as part of the “domestic law” of an ASEAN Member State applying to standards in the ASEAN regional investment treaties could also introduce innovations in the latest generations of Southeast Asian BITs and FTA investment chapters.<sup>195</sup> In any case, how international law (specifically treaty law) is incorporated into each member states’ legal system<sup>196</sup> should be examined to ascertain the extent to which international law could form part of the corpus of “domestic law” applying to many critical ASEAN regional investment treaty standards. The scope of such domestic law is vast, given the diversity of legal systems among the ASEAN Member States, where one finds “civil law systems, common law systems, a mixture of both systems, and other legal traditions like Islamic law.”<sup>197</sup>

The domestic laws of ASEAN Member States have a role as governing law for investor-state disputes covered by the ICSID Convention. Article 42(1) of the Convention mandates the investor-state arbitral tribunal to

decide the dispute in accordance with such rules of law as may be agreed upon by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>198</sup>

Because of this provision, both international and domestic law would apply in parallel as sources of governing law for the dispute in the absence of any stipulation by the disputing parties.<sup>199</sup>

Here, the explanation of the annulment committee in *Wena Hotels v. Egypt* as to the role of the second sentence of Article 42(1) of the ICSID Convention is instructive. In that case, the *Wena Hotels* annulment committee acknowledged that while there was scholarly and jurisprudential divergence as to the actual scope of international law to be applied vis-à-vis and the host state’s domestic law to investor-state disputes under the ICSID Convention, in any event,

[w]hat is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.<sup>200</sup>

Thus, where an ASEAN Member State is able to show that its other BITs (particularly those that overlap with ASEAN regional investment treaty partners) are so integrated into its domestic law— particularly in monist legal systems that automatically apply treaties as domestic law without need of any subsequent legislative enactment or transformation of the treaty into legislative statute in order to be enforceable —potential disparities could also arise between the regional investment treaty standard and the body of domestic law applied by the member state.

## **RISK OF PARALLEL PROCEEDINGS**

Given the linguistic variability between the ASEAN regional investment treaties as well as the universe of over 640 Southeast Asian BITs and FTA investment chapters, it is highly foreseeable that many causes of action for separate investor-state claims could be framed for breaches of

standards in the ASEAN regional investment treaties as well as Southeast Asian BITs, even if the causes of action could fundamentally involve the same investment project. Parallel multiple proceedings in investor-state treaty arbitration as a result of the proliferation of investment treaties (regional and bilateral) cannot be addressed without treaty coordination mechanisms in place to control for preclusive effects such as *lis pendens*, *res judicata*, *forum non conveniens*, anti-suit injunctions, consolidations, among others.<sup>201</sup> None of the ASEAN regional investment treaties provide for any stay of further proceedings involving the same investment project or transaction.

Moreover, ASEAN Member States should also be aware that the definition of “investment” in the regional investment treaties to include shareholdings<sup>202</sup> may include minority shareholders. In *Compania de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, the arbitral tribunal affirmed that insofar as foreign shareholders of local companies, “[w]hatever the extent of [their] investment may have been, [they were] entitled to invoke the bilateral investment treaty in respect of conduct alleged to constitute a breach....”<sup>203</sup> Likewise in *Enron Corporation and Ponderosa Assets LP v. Argentina*,<sup>204</sup> the arbitral tribunal found that where the investment treaty specifies shares as part of its definition of investment and makes no distinction between majority and minority shareholdings, such treaty language and intent “is specific in extending this protection to minority or indirect shareholders.”<sup>205</sup> The Decision on Objections to Jurisdiction in *CMS Gas Transmission Company v. Argentina* also affirmed that, where investment treaties do not distinguish between majority and minority shareholders, these treaties likewise do not deprive minority shareholders of their rights as covered investors under such investment treaties.<sup>206</sup>

Given the simultaneous applicability of an ASEAN regional investment treaty and an individual BIT of an ASEAN Member State, there is a substantial risk of parallel proceedings arising from different treaty-based causes of action, as well as from the possibility of claims lodged by minority shareholders. ASEAN Member States should be concerned with this prospect of multiple investor-state disputes arising from essentially the same investment project or transaction.

## **MECHANISMS FOR SETTLING INVESTOR–STATE DISPUTES**

The ASEAN regional investment treaties provide for a full spectrum of investor-state dispute settlement mechanisms and applicable procedures. These include, among others: 1) conciliation; 2) consultations; 3) the joint interpretation mechanism for states Parties to the regional investment treaty; 4) administrative proceedings at the ASEAN Member State; 5) national or local court adjudication at the ASEAN Member State; 6) institutional investor-state arbitration (such as that administered by the International Centre for Settlement of Investment Disputes under the Washington Convention); and 7) ad hoc arbitration under UNCITRAL rules administered under the rules of any arbitral institution.<sup>207</sup> Over 640 Southeast Asian BITs and FTA investment chapters can be expected to show a similar diversity and range in investor-state dispute settlement mechanisms. There is no single “fork in the road” or “waiver” clause for all regional investment treaties, BITs, and FTA investment chapters that could legally bind an investor claimant to adhere to its single chosen remedy (whether judicial, administrative, or arbitral proceedings). Future regional treaties should explore possible formulations of such ‘fork in the road’ or ‘waiver’ clauses.

The hierarchy, preference, and/or linkage between these specialized treaty-based dispute settlement mechanisms and existing mechanisms under the ASEAN Charter-based system has not yet been studied. The 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism, for example, states that its rules and procedures “shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix I and *future ASEAN economic agreements* (the ‘covered agreements’).”<sup>208</sup> This provision could well be argued as a basis to invoke the dispute settlement system in the ASEAN Protocol, which appears more structurally analogous to the WTO’s dispute settlement processes through assembled panels with appeals brought to a standing Appellate Body.<sup>209</sup> It should be stressed here that Article 24 of the ASEAN Charter states that “[w]here not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.”<sup>210</sup> Further analysis not just of treaty texts but also the corresponding *travaux préparatoires* is necessary to examine the dispute settlement and procedural implications from all of the language of the ASEAN regional investment treaties, the 640-plus Southeast Asian BITs and FTA investment chapters, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, and the ASEAN Charter.

Considering the different areas of compatibility between regional investment treaties and BITs and FTA investment chapters, it will be critical to gather, coordinate, and monitor information from all member states’ national focal points/enquiry points designated in the ASEAN regional investment treaties to ensure that ASEAN Member States are able to comply with obligations under the regional treaties, including taking “all necessary measures” under Article 5(2) of the ASEAN Charter to ensure such compliance. For innovations in treaty language and the design of treaty-based monitoring institutions in the ASEAN regional investment treaties to be fully effective, it might be necessary to eventually require individual member states to consider corresponding reforms to existing and future Southeast Asian BIT programs and FTA investment chapters with their other treaty partners to ensure that member states remain consistent with the AEC’s regional investment policies.





## 4. Conclusion and Recommendations

This study has outlined the coordination and information challenges of monitoring member states' implementation of the ASEAN regional investment treaties alongside the continued existence and development of Southeast Asian BITs and FTA investment chapters. If left unaddressed, the cost of regulatory uncertainty will likely increase the political risks of foreign investment in the region.<sup>211</sup> That ASEAN Member States have come together to articulate a common regional policy on investment through six regional investment treaties thus far is not enough to ameliorate such risk.<sup>212</sup> Unlike the European Union or any other regional organization, only ASEAN to date has swiftly concluded numerous regional investment treaties of tremendous geographic scope and economic coverage. ASEAN is still contemplating other “mega-treaties” such as the Regional Comprehensive Economic Partnership (RCEP) spanning sixteen states. It will be critical to the success of the AEC's regional investment policies as reflected in the ASEAN regional investment treaties, that the AEC can facilitate the harmonization of information coordination and institutional monitoring in ways that enable member states to remain in continuous compliance with their core ASEAN Charter obligation to “take all necessary measures” to implement obligations of membership such as the ASEAN regional investment treaties. With these considerations in mind, we offer the following recommendations to the ASEAN Coordinating Committee on Investment.

### **MAINTAIN CONSISTENCY WITH BEST PRACTICES**

ASEAN's regional investment treaties contain several prudent best practices that should be maintained for the negotiation of future treaties. The definition of “investment” purposely rules out orders or judgments in judicial or administrative actions,<sup>213</sup> which forestalls the possibility that unanticipated or surprise third parties could assert treaty-based rights by mere purchase of rights arising from such judicial or administrative actions.

The treaties also carefully restrict the scope of investment protection standards in a manner that attempts to enable more calibration of host states' public interests. Expropriation standards, as detailed in the ASEAN-Aus-NZ FTA Investment Chapter's Annex on Expropriation and Compensation, rule out “non-discriminatory regulatory actions” that are “designed and applied to achieve legitimate public welfare objectives.”<sup>214</sup> In the ASEAN-India Investment Agreement, on the other hand, a set of explicit factors are specifically enumerated to guide future investor-state tribunals in their fact-based inquiry on whether government measures amount to indirect or creeping expropriation.<sup>215</sup> The national treatment standard has been also carefully defined to apply to a closed enumeration of acts (e.g., “admission, establishment, acquisition, expansion,

management, conduct, operation and sale or other disposition”<sup>216</sup>) that carefully limits the lens of scrutiny for host state conduct. While the ASEAN-India Investment Agreement opted to delete the most favored nation (MFN) clause altogether, it is still possible to include this treaty standard so long as it is modified to exclude applicability to individual BITs and FTA investment chapters. For example, the ACIA usefully restricted the scope of the MFN clause and denied its applicability to other subregional arrangements between member states or any existing agreements notified to the AIA Council.<sup>217</sup>

None of the regional investment treaties contain umbrella clauses that could elevate contract breaches automatically into treaty breaches.<sup>218</sup> It is also noteworthy that the treaties appear consistent when it comes to delimiting and defining the scope of the fair and equitable treatment (FET) standard: FET simply “requires each Party not to deny justice in any legal or administrative proceedings” and does “not require treatment in addition to or beyond that which is provided under the customary international law and do not create additional substantive rights,”<sup>219</sup> and breach of any other treaty provision or any other agreement will not result in a breach of FET.<sup>220</sup> These are welcome innovations that will avoid giving future investor–state arbitral tribunals too much scope and discretion over the interpretation of FET standards—which has been the frequent cause of action lodged under investor-state disputes precisely because of the vagueness of its formulation under the earliest generations of international investment treaties.<sup>221</sup>

Apart from their deft restriction of the scope of possible causes of action against member states for breach of investment protection standards such as the national treatment clause, the MFN clause, the expropriation standard, and the FET clause, the ASEAN regional investment treaties are also laudable for providing for transparency obligations that apply comprehensively from the time of admission of the investment, the execution and implementation of the foreign investment contract, up to the exceptional situations of disputes between foreign investors and host states of investment. This initiative should be maintained and strengthened in future regional treaties (possibly by incorporating the Mauritius Convention on Transparency spearheaded by UNCITRAL). Transparency and access to information are key in enabling the best and most accurate investment price reflecting appropriate levels of risks and returns to all parties to the investment—and in creating the proper environment to avoid and/or better manage investor–state disputes.<sup>222</sup>

## **CREATE ASEAN CCI INFORMATION DATABASE**

A regional database of all Southeast Asian BITs and FTA investment chapters will enable the ASEAN CCI to advise member states on current treaties and draft treaty texts pending negotiations, and on a treaty-by-treaty basis, of likely incompatibilities between

- Substantive standards (e.g., expropriation, FET, compensation valuation, MFN clauses, national treatment, transparency rules),
- Procedural rules (e.g., investor–state dispute settlement mechanisms, preconditions for triggering such mechanisms), and
- Institutional rules (e.g., monitoring and information sharing on technical assistance).

Member states will be better equipped to decide whether to adapt regional treaties or reform BITs when such information is consolidated and made accessible to all the Member States.

## CREATE AN ASEAN REGIONAL INVESTMENT AGENCY

ASEAN CCI can mitigate political risk for investors in ASEAN—and thereby fulfill its mandate to assist member states in promoting investment—by fully discharging its duty to monitor and disseminate all public information on member states’ regulatory policies, executive decrees, judicial decisions, and statutory enactments.

There is operational precedent for a coordinating committee that has assumed these broader tasks in order to implement a regional agreement and answer foreign investors’ questions about the scope of protection afforded in a regional agreement—the Common Investment Area Committee of the Common Market for Eastern and Southern Africa (COMESA), in conjunction with the COMESA Secretariat and the COMESA Regional Investment Agency (RIA).<sup>223</sup> The COMESA RIA undertakes the following activities to ensure joint regional investment promotion for its 19 Member States in a manner that complements national investment promotion:

To be able to increase intra-COMESA trade and thus deepen integration between COMESA Member States, making the region an attractive investment destination and attracting investment in all sectors are crucial. It is with the latter in mind that COMESA set-up its investment promotion arm, the COMESA Regional Investment Agency (RIA).

Movements in investment flows occur as a result of a large array of factors which work together over variable periods of time. COMESA Regional Investment Agency plays its part; indeed, its activities serve as enablers which have direct and indirect effects on the generation of investments in the region and the ability of Member States to generate investments.

Since its inception in 2006, RIA has been focusing on two main pillars of operations:

- Promoting the COMESA region as an attractive investment destination;
- Improving the business and investment climates of Member States, namely through capacity-building programs targeting Member States Investment Promotion Agencies (IPAs) and relevant Government Officials.

Promoting the COMESA region as an attractive investment destination

The first way COMESA RIA serves as a driver of investment into the region is through its promotional activities. Examples include: the organization high-level International COMESA investment forums and ministerial road shows, the participation to key events and support to Member States’ events, the development of an investor portal now attracting over 200,000 visitors a year, various country-level and regional investors’ guides and other promotional tools, the promotion of specific investment opportunities and projects, as well as the dissemination of positive news and information about facilities, regulatory frameworks, incentives and procedures.

To be considered are also the multiple meetings which have been organised at COMESA RIA’s premises with various companies looking to invest and do business in the COMESA region. These meetings serve as vehicles through which COMESA RIA has been promoting the COMESA region as an attractive investment destination.

Promotional efforts have succeeded in reducing the gap between perceptions and reality with regard to doing business in the COMESA region and Africa, and raising the profile and image of the COMESA region as a whole and of its Member States as

destinations, where not only is it easier to do investment but where returns on investments are higher than anywhere else in the world.<sup>224</sup>

The ASEAN CCI can proactively anticipate, coordinate, and address investor concerns about regulatory information from ASEAN Member States. This falls well within the ASEAN CCI's explicit mandate to monitor the implementation of ASEAN regional investment agreements and provide policy guidance and investment promotion assistance to the ASEAN Member States. An ASEAN Regional Investment Agency that can build on this mandate of the ASEAN CCI will be even more crucial and urgent for investment projects that involve more than one member state (and thus may accordingly entail different sets of regulatory measures and policies), such as those underway in the Greater Mekong Subregion (GMS).

By coordinating information from all member states' national investment boards, commissions, or agencies, an ASEAN Regional Investment Agency will better enable the CCI and the ASEAN Secretariat to carry out the regional mandate and strategy for joint investment promotion and information dissemination to foreign investors looking at value-chain prospects and greenfield opportunities in Southeast Asia. It will also ensure that the entire region benefits equitably from enhancement of opportunities to all member states under the integration contemplated under the AEC Blueprint. Most important, a central agency can also be an effective platform for the AEC's delegated oversight to the ASEAN CCI of ASEAN Member States' implementation of obligations under the ASEAN regional investment treaties. The agency can design and marshal the necessary information infrastructure access for all member states, ASEAN External Partners, and prospective foreign investors, giving updated and real-time information necessary for the AEC's coordinated monitoring of each member state's compliance with and implementation of the ASEAN regional investment treaties.

## **ISSUE ASEAN CCI GUIDANCE ON TREATY OVERLAPS**

When the AEC officially begins at the end of 2015, foreign investors will likely seek clarification from the CCI on the relationship between investment protection provided under the ASEAN regional investment agreements, and the specific protections provided in each BIT program of individual member states. It is not clear, for example, if the investment treaty that provides better investment protection (whether a regional treaty or BIT) includes any mechanism that would prevent any other investment treaty from being applicable to the same investment transaction. As pointed out previously, the regional investment treaties and BITs appear, on preliminary examination, to be capable of applying simultaneously. Future regional investment treaties could explicitly provide that BITs would not be applicable to all subject-matter already covered in the regional treaties.

To date, there has been no issuance or guidance on this high priority matter, whether from the ASEAN Secretariat or from an independent academic work. The ASEAN CCI should conduct a technical study of this matter because differences in qualitative protection afforded by regional investment treaties and BITs could create unjustified investor discrimination. Such discrimination could be the basis of investor claims that could make member states vulnerable to compulsory investor-state arbitration or investor claims before national courts. The inevitable differences in qualitative protections among member states of the European Union spurred the European Commission in 2010 to propose a Regulation<sup>225</sup> permitting EU member states to renegotiate

provisions in existing BITs that may conflict with EU law (including forthcoming EU regional investment treaties under the exclusive competence gained by the European Union under the Lisbon Treaty to conclude investment agreements), as well as to possibly enable EU Member States to still conclude new investment agreements for specific economic areas.

The sooner that the CCI assists ASEAN Member States by providing policy guidance on this matter, the better it can help promote foreign investment without triggering fear among members states that they will be vulnerable to investor claims. Such fear was recently expressed by Indonesia, which is terminating its BITs<sup>226</sup> but at the same time cannot unilaterally withdraw from any of the ASEAN regional investment treaties.

As discussed in this study, the repeat interactions between the growing universe of ASEAN regional and Southeast Asian bilateral investment treaties will have consequences for

- The nature and scope of qualitative standards of investor protection offered in the region,
- The width of public policy prerogatives maintained by the individual member states,
- The dispute settlement options available to foreign investors as well as to the states involved, and
- The administrative functions and mandates of regional and/or national institutions for monitoring performance of investment obligations.

An individualized and particularized analysis of each ASEAN regional investment treaty in relation to its interactions and overlap with member states' 644 BITs and FTA investment chapters will require more time. While this author supervised a small research team mapping all the BITs of ASEAN Member States to preliminarily test for the effects of MFN clauses, more time and resources are necessary to produce comprehensive legal and individualized policy analyses on the treaty-by-treaty effects of the specific interactions of each ASEAN regional investment treaty with each BIT from the much older generations of ASEAN Member State BIT programs.

Before member states attempt any further reforms—whether to revise, amend, adapt, or eliminate BIT programs to conform to the regional treaty standards—particularized analysis of testing harmonization, conformity, or dissonance from the ASEAN regional investment treaty standard for *each* pre-existing BIT or investment chapter of *each* ASEAN Member State should be done, since none of those earlier agreements reflect uniform treaty design or institutional obligations.

## **CONSIDER DRAFTING A COORDINATING INSTRUMENT**

An ASEAN coordinating instrument for the interpretation and design of regional investment treaties can help provide authoritative binding guidance on the applicable *lex specialis* rules, normative hierarchy rules, dispute settlement options, as well as transparency, participation, and information access rules for states Parties as well as non-disputing Parties. This will leave less room for investor-state arbitral tribunals to exercise case-by-case discretion when interpreting ASEAN regional investment treaties (and any possibly overlapping individual BITs and investment chapters of the ASEAN Member States with the ASEAN regional investment treaty external partners).<sup>227</sup>

The same ASEAN coordinating instrument could also provide the blueprint for a region-wide framework for preventing and managing investor-state disputes in ASEAN. Interesting insight can be drawn from the practices of Peru under its 2006 State Coordination and Response System for International Investment Disputes:

In 2006 Peru created the State Coordination and Response System for International Investment Disputes (Response System). The legal framework is comprised of:

- Law No 28933 (December, 2006): established the International Investment Disputes State Coordination and Response System.
- Supreme Decree 125-2008-EF (October, 2008): set out regulations for Law No. 28933, such as transparency and mandatory guidelines with regard to international dispute settlement clauses.
- Supreme Decree 002-2009-EF (January 2009): set out specific procedures for hiring legal counsel and law firms and other advisors to support ISDS cases.

Given the broad and encompassing scope and coverage of the policy, the Response System required the support and commitment of the legislative branch that approved the Law and of the highest level of government that issued and adopted the Supreme Decrees. Peru's Response System not only creates and provides certainty with regard to the institutional structure that defends the State in ISDS proceedings, but also provides guidelines for future investment agreements' arbitration provisions, and consolidates all existing commitments for consultation of relevant agencies. The System expressly requires all government agencies involved in an investment dispute to cooperate and provide all relevant information, thereby creating accountability at all levels of government for IIA inconsistent measures or policies.

Peru redesigned its investor-state dispute prevention and management institutional framework in a very inclusive manner, bringing in the different State agencies and actors that create the international investment legal framework and commitments (IIAs, investment contracts and stability agreements) and those with specific knowledge or experience that may contribute to the best representation in an ISDS context:

- The Ministry of Economy and Finance, agency responsible for international investment policies in Peru, was named coordinator and chair of the Special Commission (SC).
- The Ministry of Foreign Affairs was the agency that had up to that point represented Peru in all investor-state dispute settlement cases, and brought the experience and history of managing investment disputes as well as that of international negotiations of BITs.
- ProInversión is a key member of the Bilateral Investment Treaty negotiating team and the agency in charge of the negotiation and adoption of legal stability agreements.
- The Ministry of Justice brings its expertise in the areas of litigation and legal interpretation and application of laws and regulations.
- The Ministry of Trade and Tourism provides the Free Trade Agreements' negotiating history and experience.

Additionally Peru's Response System requires continuous training for all relevant agency officials at all levels of government on IIA commitments and on the benefits, characteristics and obligation of the Response System.<sup>228</sup>

Integrating, coordinating, and streamlining the work of various institutions in the ASEAN Secretariat (SEOM, ASEAN CCI, ASEAN Legal Affairs Division, and all other related groupings in the three pillar communities) will ensure

- Systemic cohesion in the negotiation of regional investment treaties;
- Proper monitoring of treaty implementation and provision of information to foreign investors and all ASEAN Member States as required under the treaties; and
- Real-time updated evaluation and assessment of ASEAN’s evolving regional investment policies, strategies, treaty obligations, and functions of implementing, line, or other operational institutions.

Designing ASEAN’s internal and external functional and oversight relationships for attracting, promoting, and protecting foreign investment well in advance will help minimize the possibility of, or at worst manage the settlement of, investor-state disputes—regardless of whether investor claims are initiated on the basis of alleged breach of the ASEAN regional investment treaties or the overlapping individual BITs and FTA investment chapters of the member states. This institutional, informational, and implementational coordination architecture must be in place in the AEC before any further regional investment agreements are concluded with other critical ASEAN investment external partners such as the United States, the European Union, and Canada.

## **FURTHER DEVELOP TECHNICAL CAPACITY**

ASEAN CCI and related ASEAN institutions have to continue developing technical capacity to be able to:

- Devise a monitoring and coordinating system that gives foreign investors access to information on the investment and investment-related regulatory policies of ASEAN Member States, which span legislative (statutes and laws), judicial (court decisions), and executive (executive orders, decrees, agreements) issuances.
- Design CCI capacity and processes for providing policy guidance to assist member states in improving transparency over self-judged public policy provisions in the ASEAN regional investment treaties (e.g., restrictions on capital transfers, economic emergencies and safeguarding balance of payments, general and security exceptions clauses, definitions of investment, “non-discriminatory regulatory actions” that are deemed not to constitute expropriation).
- Provide foreign investors with a reliable basis for comparing the qualitative investment protections afforded under the ASEAN regional investment treaties as opposed to the BIT programs of the member states.
- Provide ASEAN Member States with guidance on the interaction and relationship between the regional investment treaties and their own BIT programs in order to avoid any potential investor claims of discriminatory treatment due to the differences in qualitative protections in both sets of treaties.
- Provide timely and necessary policy guidance for the ASEAN Member States and the ASEAN Secretariat personnel assisting FTA negotiators in drafting and vetting future ASEAN investment treaty language with other partners (e.g., India, the European Union,

Canada, the RCEP parties, and potentially the United States should there be any initiative to formalize an investment treaty after the TIFA).

Enabling ASEAN's negotiators and treaty monitors to build long-term technical capacity to use, apply, and scrutinize techniques of international investment law and investment dispute settlement, will encourage innovation and vigilance over the development of future norms in regional investment treaties. Treaty-based monitoring institutions in the ASEAN regional investment treaties will be able to discharge their monitoring and oversight responsibilities better, reduce information asymmetries between investors and the ASEAN Member States, help avoid frequent investor-state disputes, and also provide coherence in applying AEC Blueprint objectives to the evolving ASEAN regional system for investment in Southeast Asia.



# Notes

## **Introduction**

<sup>1</sup>ASEAN Economic Community Blueprint [hereafter, “AEC Blueprint”], para. 9, at <http://www.asean.org/archive/5187-10.pdf> (last accessed 1 May 2015).

<sup>2</sup> AEC Blueprint, para. 23.

<sup>3</sup> AEC Blueprint, para. 28.

<sup>4</sup> AEC Blueprint, para. 28(i).

<sup>5</sup> AEC Blueprint, para. 28(ii).

<sup>6</sup> AEC Blueprint, para. 28(iii).

<sup>7</sup> AEC Blueprint, para. 28(iv).

<sup>8</sup> AEC Blueprint, para. 28(v).

<sup>9</sup> AEC Blueprint, para. 28(vi).

<sup>10</sup> AEC Blueprint, para. 28(vii).

<sup>11</sup> See Communication from the European Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Toward a comprehensive European international investment policy*, Brussels, 7 July 2010, at [http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc\\_146307.pdf](http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf) (last accessed 1 May 2015).

<sup>12</sup> “EU Calls for Global Investment Court”, *The Financial Times*, 5 May 2015. See also EU Trade Commission Concept Paper, *Investment in the TTIP and beyond—the path of reform: Enhancing the right to regulate and moving from current ad hoc arbitration toward an Investment Court*, May, 2015, at [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF) (last accessed 1 May 2015).

<sup>13</sup> For purposes of this technical study, all such regional standalone investment treaties as well as investment chapters in ASEAN FTAs will be referred to as “ASEAN regional investment treaties” as referred to in academic literature. See Diane A. Desierto, *Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties*, *Journal of World Investment and Trade* (April 2015 Asia Special Issue).

<sup>14</sup> ASEAN Comprehensive Investment Agreement, at <http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20I>

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[nvestment%20Agreement%20\(ACIA\)%202012.pdf](#) (last accessed 1 May 2015). The ACIA was signed on 26 February 2009, and entered into force on 29 March 2012. See [http://investasean.asean.org/index.php/ajax/exec\\_ajax/file\\_download/824/newsid/973/asean-comprehensive-investment-agreement-a-guidebook-for-businesses-and-investors.pdf](http://investasean.asean.org/index.php/ajax/exec_ajax/file_download/824/newsid/973/asean-comprehensive-investment-agreement-a-guidebook-for-businesses-and-investors.pdf) (last accessed 1 May 2015).

<sup>15</sup> Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (“ASEAN-Korea Investment Agreement”), signed 2 June 2009, and entered into force on 1 September 2009. Full text at <http://akfta.asean.org/uploads/docs/agreements/Investment-Full.pdf> (last accessed 1 May 2015).

<sup>16</sup> Agreement on Investment on the Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People’s Republic of China [hereafter, “ASEAN-China Investment Agreement”], signed 15 August 2009, entered into force 1 January 2010. Full text at <http://www.asean.org/images/archive/22974.pdf> (last accessed 1 May 2015).

<sup>17</sup> Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, signed 27 February 2009, entering into force on 1 January 2010 for Australia, Brunei, Myanmar, Malaysia, New Zealand, Singapore, the Philippines, and Vietnam; on 12 March 2010 for Thailand; on 1 January 2011 for Lao PDR; 4 January 2011 for Cambodia; and 10 January 2012 for Indonesia. Full text at <http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf> (last accessed 1 May 2015).

<sup>18</sup> Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan, signed 14 April 2008, entered into force 1 December 2008. Full text at <http://www.asean.org/images/archive/agreements/AJCEP/Agreement.pdf> (last accessed 1 May 2015).

<sup>19</sup> Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India, signed 12 November 2014. Full text at [http://www.asean.org/images/pdf/2014\\_upload/ASEAN-India%20Investment%20Agreement%20-%20Scanned%20ASEAN%20version.pdf](http://www.asean.org/images/pdf/2014_upload/ASEAN-India%20Investment%20Agreement%20-%20Scanned%20ASEAN%20version.pdf) (last accessed 1 May 2015). This agreement has not yet entered into force. See Article 30 (Entry into Force), which states:

1. Each Party shall notify the other Parties in writing upon completion of its internal requirements necessary for entry into force of this Agreement. This Agreement shall enter into force on 1 July 2015 for any Party that has made such notifications provided that India and at least four (4) ASEAN Member States have made such notifications by that date. 2. If this Agreement does not enter into force on 1 July 2015 it shall enter into force, for any Party that has made the notification referred to in paragraph 1 of this Article, sixty (60) days after the date by which India and at least four (4) ASEAN Member States have made the notifications referred to in paragraph 1 of this Article. 3. After the entry into force of this Agreement pursuant to paragraph 1 or 2 of this Article, this Agreement shall enter into force for any Party sixty (60) days after the date of its notifications referred to in paragraph 1 of this Article.

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<sup>20</sup> See Chapter 9 (Investment) of the EU-Singapore FTA at [http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc\\_152844.pdf](http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf) (last accessed 15 June 2015).

<sup>21</sup> “Foreign ministers rekindle interest in ASEAN FTA”, 4 August 2014, at <http://www.bilaterals.org/?foreign-ministers-rekindle> (last accessed 1 October 2014); Government of the United Kingdom Press Release, “EU agrees mandates for negotiations on investment with China and with the ASEAN Member Countries”, 18 October 2013, at <https://www.gov.uk/government/news/eu-agrees-mandates-for-negotiations-on-investment-with-china-and-with-the-asean-member-countries> (last accessed 1 May 2015).

<sup>22</sup> There is no US-ASEAN FTA to date, with parties still proceeding under the 2006 Trade and Investment Framework Agreement (TIFA) between the United States and ASEAN. On the E3 Initiative, see <http://csis.org/publication/e3-initiative-united-states-and-asean-take-step-right-direction> (last accessed 1 October 2014). Several ASEAN Member States (e.g., Brunei Darussalam, Singapore, and Vietnam) are individually engaged in negotiations with the United States on the Trans-Pacific Partnership Agreement. See <https://ustr.gov/tpp/overview-of-the-TPP> (last accessed 1 May 2015).

<sup>23</sup> See <http://www.asean.org/asean/external-relations/canada/item/asean-canada-dialogue> and the 2 October 2011 Joint Declaration between ASEAN and Canada on Trade and Investment.

<sup>24</sup> See <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/RCEP/> (last accessed 1 October 2014).

<sup>25</sup> See <http://www.asean.org/news/asean-statement-communiques/item/regional-comprehensive-economic-partnership-rcep-joint-statement-the-first-meeting-of-trade-negotiating-committee> (last accessed 1 May 2015).

<sup>26</sup> See <https://ustr.gov/tpp> (last accessed 15 June 2015). An unauthenticated text asserted to be the current investment chapter of the TPP draft is accessible here: <https://wikileaks.org/tpp-investment/WikiLeaks-TPP-Investment-Chapter.pdf> (last accessed 15 June 2015).

<sup>27</sup> Data aggregated as of 31 March 2015 through the UNCTAD IIA database at [http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-Tools.aspx](http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx) (last accessed 1 May 2015).

Brunei Darussalam has 8 BITs, 5 of which are in force; 17 investment chapters in FTAs, out of which 15 are in force.

Cambodia has 21 BITs, 11 of which are in force; 15 investment chapters in FTAs, out of which 13 are in force.

Indonesia has 64 BITs, 46 of which are in force; 15 investment chapters in FTAs, out of which 13 are in force. [Indonesia recently announced its inclination to terminate, suspend, or review its pre-existing investment treaty program. See Ben Bland and Shawn Donnan, “Indonesia to terminate more than 60 bilateral investment treaties”, *The Financial Times*, 26 March 2014, at <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz3aWgy6ZpY> (last accessed 1 May 2015)].

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Lao PDR has 24 BITs, 19 of which are in force; 16 investment chapters in FTAs, 13 of which are in force.

Malaysia has 69 BITs, 50 of which are in force; and 22 investment chapters in FTAs, 19 of which are in force.

Myanmar has 8 BITs, 5 of which are in force; and 15 investment chapters in FTAs, 12 of which are in force.

The Philippines has 37 BITs, 31 of which are in force; and 14 investment chapters in FTAs, 12 of which are in force.

Singapore has 45 BITs, 38 of which are in force, and 27 investment chapters in FTAs, 25 of which are in force.

Thailand has 39 BITs, 36 of which are in force; and 22 investment chapters in FTAs, 18 of which are in force.

Vietnam has 60 BITs, 46 of which are in force; and 19 investment chapters in FTAs, 15 of which are in force.

<sup>28</sup> All data on investment treaties in these tables were obtained from the UNCTAD International Investment Agreements (IIA) Navigator database at <http://investmentpolicyhub.unctad.org/IIA/liaByCountry#iiaInnerMenu> (last accessed 30 June 2015). On the history of various models or generations of international investment agreements (IIAs), see KENNETH J. VANDELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (Oxford University Press, 2010), Chapter 2.

<sup>29</sup> See Appendix A. This is the 720-page manuscript of a separate technical study the author supervised in her Spring 2015 ASEAN Law Seminar class at UH William S. Richardson School of Law, where students (Jonathan Brenner, Kevin Chen, Jordan Davis, Michael Dunford, Jacob Garner, Garrett Halydier, Ryan Little, Grant Nakaya, Jeneline Nicolas, Antony Makana Paris, John Reiss, and Katherine Vessels) investigated and examined all publicly available Southeast Asian BITs (excluding investment chapters in FTAs) to test for substantive differences in investment and investor coverage, any regulatory carve-outs permitted to host states, exceptions, investor treatment standards, reservations, dispute settlement procedures, duration and termination of treaties.

<sup>30</sup> See OECD Working Papers on International Investment, *Most Favoured Nation Treatment in International Investment Law*, September 2004, at [http://www.oecd.org/daf/inv/investment-policy/WP-2004\\_2.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf) (last accessed 1 May 2015).

<sup>31</sup> Investment treaties could explicitly refer to and explicitly incorporate provisions from other treaties, accept the interpretive value of similarly-worded provisions, as well as be argued (with debatable, context-driven effect) as “relevant rules of applicable international law” under Article 31(3)(c) of the Vienna Convention on the Law of Treaties. See Diane A. Desierto, *Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment During Economic Crises*, *Transnational Dispute Management* 1 (2013), at <http://www.transnational-dispute-management.com/article.asp?key=1930> (last accessed 1 May 2015).

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<sup>32</sup> Defined as “the process of routing an investment so as to gain access to a bilateral investment treaty where one did not previously exist or for gaining access to a more favorable BIT protection. The focus is on restructuring by transfer of shares or otherwise at the time when the investment is already under some threat such as in the case of a revocation of a license or termination of a contract.” See Inna Uchkunova, *Drawing a Line: Corporate Restructuring and Treaty Shopping in ICSID Arbitration*, Kluwer Arbitration Blog, 6 March 2013, at <http://kluwerarbitrationblog.com/blog/2013/03/06/drawing-a-line-corporate-restructuring-and-treaty-shopping-in-icsid-arbitration/> (last accessed 1 May 2015); Matthew Skinner, Cameron A. Miles, and Sam Luttrell, *Access and Advantage in investor-State arbitration: The law and practice of treaty shopping*, 3 *Journal of World Energy Law & Business* 3 (2010), pp. 260–285 (defining ‘treaty shopping’ as “the conduct of foreign investors who deliberately seek to acquire the benefits of an investment treaty by making foreign investments or bringing claims from third countries that have more favorable treaty terms with the target host State.”).

<sup>33</sup> See definition <http://lexicon.ft.com/Term?term=regulatory-arbitrage> (last accessed 1 May 2015).

<sup>34</sup> The author was engaged as ACTI’s Short Term Legal Adviser for this study from 28 January 2015 to 31 March 2015.

<sup>35</sup> See among others Christian Tietje, *Bilateral Investment Treaties Between EU Member States (Intra-EU BITs)—Challenges in the Multilevel System of Law*, *Transnational Dispute Management* 2 (2013), at <http://www.transnational-dispute-management.com/article.asp?key=1945> (last accessed 1 May 2015); Steffen Hindelang, *Member State BITs—There’s still (some) life in the old dog yet: Incompatibility of existing Member State BITs with EU Law and possible remedies—A position paper*, pp. 217–242 in KARL P. SAUVANT (ED.), *YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2010–2011*; Rumiana Yotova, *The new EU competence in foreign direct investment and intra-EU investment treaties: does the emperor have new clothes?*, pp. 387–414, in FREYA BAETENS (ED.), *INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES* (Cambridge University Press, 2013).

<sup>36</sup> See Allen & Overy LLP, “European Commission Seeks Termination of Five EU Member States’ Intra-EU Bilateral Investment Treaties,” 29 June 2015, at <http://www.jdsupra.com/post/documentViewer.aspx?fid=b3a971e2-acef-4372-97fb-5d9d281d2693> (last accessed 30 June 2015).

<sup>37</sup> JESWALD W. SALACUSE, *THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL* (Oxford University Press, 2013), at p. 361 (“...Recognizing that the BIT essentially defines the developing country’s obligations toward investment from the developed country, the developing country tends to negotiate obligations that are more general than specific, vague rather than precise, and subject to exceptions rather than absolute requirements. On the other hand, capital-exporting countries seek guarantees of protection that are precise and all-encompassing.”).

<sup>38</sup> See for example Stephan Schill’s European Council-funded research project, “Private-Public Arbitration as Transnational Regulatory Governance: Charting and Codifying the Lex Mercatoria

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Publica”, at <http://www.uva.nl/en/news-events/news/uva-news/content/professor-appointments/2015/02/stephan-schill-professor-of-international-and-economic-law-and-governance.html> (last accessed 1 May 2015).

<sup>39</sup> This study applies a similar methodology as that which I have theorized and devised at a more general level in previous work. See DIANE A. DESIERTO, PUBLIC POLICY IN INTERNATIONAL ECONOMIC LAW: THE ICESCR IN TRADE, FINANCE, AND INVESTMENT (Oxford University Press, February 2015), Chapter V [hereafter, “DESIERTO 2015”].

<sup>40</sup> ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Art. 1(1) at <http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism> (last accessed 1 May 2015).

<sup>41</sup> Charter of the Association of Southeast Asian Nations (hereafter, “ASEAN Charter”), Arts. 24-26.

<sup>42</sup> ACIA, Art. 42(2) and 42(3).

<sup>43</sup> ASEAN-Korea Investment Agreement, Art. 24.

<sup>44</sup> ASEAN-China Investment Agreement, Art. 22.

<sup>45</sup> ASEAN-Australia-NZ Investment Chapter, Art 17.

<sup>46</sup> ASEAN-Japan Investment Chapter, Art. 51(2).

<sup>47</sup> ASEAN-India Investment Agreement, Art. 23.

## **Section 2. Investment and Public Policy**

<sup>48</sup> Indonesia has thus far announced its intention to revise its BIT program. See Grace D. Amianti, “Govt revises investment treaties”, The Jakarta Post, 12 May 2015, at <http://www.thejakartapost.com/news/2015/05/12/govt-revises-investment-treaties.html> (last accessed 15 June 2015).

<sup>49</sup> For a detailed dissection of all the public policy provisions across the ASEAN regional investment treaties, see Diane A. Desierto, *For Greater Certainty: Balancing Economic Integration and Investor Protection in the New ASEAN Investment Agreements*, 5 Transnational Dispute Management (2011); Diane A. Desierto, *Investment Treaties: ASEAN*, in HAL HILL AND MA. SOCORRO GOCHOCO-BAUTISTA (EDS.), ASIA RISING: GROWTH AND RESILIENCE IN AN UNCERTAIN GLOBAL ECONOMY (Edward Elgar Publishers, 2013).

<sup>50</sup> See for example ACIA Article 13(3) [permitting a host State to delay an investor’s capital transfers due to self-judged economic emergencies], Article 16 [restrictions on transfers and payments due to measures taken by a host State to safeguard its balance of payments], Article 17 [general exceptions], and Article 18 [security exceptions]; ASEAN-Australia-NZ Investment Chapter Article 8(3) [permitting delay of investor’s transfers in enumerated domestic situations]; ASEAN-Korea Investment Agreement Article 10(2) [permitting delay of investor’s transfers], Article 20 [general exceptions], Article 21 [security exceptions]; ASEAN-China Investment



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Agreement Article 10(4) [permitting restrictions on investor's transfers], Article 11 [permitting investment restrictions when the same are part of measures to safeguard the balance of payments], Article 16 [general exceptions], Article 17 [security exceptions].

<sup>51</sup> ASEAN-Australia-NZ Investment Chapter Annex on Expropriation and Compensation, clause 4; ACIA Annex 2 on Expropriation and Compensation, clause 4.

<sup>52</sup> ACIA Articles 20 [special formalities and disclosure of information] and 21 [transparency]; ASEAN-Australia-NZ Investment Chapter Article 13 [transparency] and Article 14 [special formalities and disclosure of information]; ASEAN-Korea Investment Agreement Article 8 [transparency] and Article 15 [special formalities and treatment of information]; ASEAN-China Investment Agreement Article 19 [transparency].

<sup>53</sup> *See for example* the Investment Agreement for the 2007 COMESA Common Investment Area (comprising Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe), which does not provide for any special and differentiated treatment principle. Full text of the Investment Agreement for the COMESA Common Investment Area at [http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment\\_agreement\\_for\\_the\\_CCIA.pdf](http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf) (last accessed 1 May 2015).

<sup>54</sup> ACIA Article 23; ASEAN-Australia-NZ Investment Chapter Article 15; ASEAN-Korea Investment Agreement Article 16.

<sup>55</sup> Higher regulatory uncertainty has been found to dampen investment in new assets as well as to raise the investment price due to higher estimated risks to the investment. *See among others* Kira R. Fabrizio, *The Effect of Regulatory Uncertainty on Investment: Evidence from Renewable Energy Generation*, 29 *Journal of Law, Economics, & Organization* 4 (2013), pp. 765–798; George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 *Cato Journal* 3 (Winter 2001), pp. 295–325; IBRD/THE WORLD BANK, *WORLD DEVELOPMENT OUTLOOK 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE* (World Bank and OUP 2005), at pp. 46–47 (“...firms in developing countries rate policy uncertainty as their dominant concern among investment climate constraints...some investments are more sensitive to policy changes than others. Investments in heavily regulated sectors such as infrastructure can be especially sensitive to policy uncertainty because the profitability of the venture is often determined directly by government regulation...”).

<sup>56</sup> *See* Matthew Skinner, Cameron A. Miles, Sam Luttrell, *Access and advantage in investor-state arbitration: The law and practice of treaty shopping*, 3 *Journal of World Energy & Business* 3 (2010), at p. 260 (“...Treaty shopping refers to the conduct of foreign investors who deliberately seek to acquire the benefits of a Bilateral Investment Treaty/BIT by making foreign investments or bringing claims from third countries that have more favorable treaty terms with the host State....Treaty shopping is, and will likely continue to be, permissible under international law.”).

<sup>57</sup> *Id.* at p. 275.

<sup>58</sup> ACIA, Art 4(a).

<sup>59</sup> ASEAN-Aus-NZ FTA Investment Chapter, Art 2(a).

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- <sup>60</sup> ASEAN-China Investment Agreement, Art 1(d).
- <sup>61</sup> *Ibid*, at footnote 1 of the ASEAN-China investment Agreement.
- <sup>62</sup> ASEAN-Korea Investment Agreement, Art 1(c).
- <sup>63</sup> ASEAN-Japan Investment Chapter, Art 51.
- <sup>64</sup> ASEAN-India Investment Agreement, Art 1(b). Although note that this provision contains a clarificatory footnote, stating: “for greater certainty...in the case of Thailand, [referring to investments] which have been specifically approved in writing for protection by the competent authorities...in the case of Cambodia and Vietnam, ‘has been admitted’ means ‘has been specifically registered or approved in writing, as the case may be.”
- <sup>65</sup> *Tokios Tokeles v. Ukraine*, Decision on Jurisdiction and Dissent, ICSID Case No. ARB/02/18, 29 April 2004, para. 85.
- <sup>66</sup> *Fakes v. Turkey*, Award, ICSID Case No. ARB/07/20, 12 July 2010, para. 129.
- <sup>67</sup> *Teinver SA and ors v. Argentina*, Decision on jurisdiction, ICSID Case No. ARB/09/1, 21 December 2012, paras. 317–323.
- <sup>68</sup> *Metal-Tech Limited v. Uzbekistan*, Award, ICSID Case No. ARB/10/3, 4 October 2013, para. 165.
- <sup>69</sup> *Inceysa Vallisoletane SL v El Salvador*, ICSID Case No ARB/03/26, Award, (2 August 2006) paras 207, 252–257.
- <sup>70</sup> *TSA Spectrum de Argentina SA v. Argentina*, ICSID Case No. ARB/05/5, Award (19 December 2008) paras 163–176.
- <sup>71</sup> *H&H Enterprises Investments Inc. v. Egypt*, ICSID Case No. ARB/09/15, Decision on respondent’s objections to jurisdiction (5 June 2012), paras 44–56.
- <sup>72</sup> *Fraport AG Frankfurt Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007) paras 387–401. See however, *Fraport AG Frankfurt Services Worldwide v Philippines*, ICSID Case No ARB/03/25, Decision on Application for Annulment (17 December 2010) paras 268 and 269.
- <sup>73</sup> *Alastair Ross Anderson and Others v Costa Rica*, ICSID Case No ARB(AF)/07/3, Award (10 May 2010) para. 53.
- <sup>74</sup> *Ibid* paras 55–57.
- <sup>75</sup> The tribunal in *Tokios Tokeles v Ukraine* rejected minor administrative defects as a basis to show the illegality of an investment. See *Tokios Tokeles v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction and Dissent (29 April 2004) paras 83–86.
- <sup>76</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and ors v Ukraine*, ICSID Case No ARB/08/8, Decision on Jurisdiction (8 March 2010) para 145.



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<sup>77</sup> *SGS Societe Generale de Surveillance SA v Paraguay*, ICSID Case No ARB/07/29, Award on Jurisdiction (12 February 2010) paras 118–123.

<sup>78</sup> *Vannessa Ventures Limited v. Venezuela*, ICSID Case No ARB(AF)/04/6, Final Award (16 January 2013).

<sup>79</sup> *Ibid* para 129.

<sup>80</sup> *Ibid* para 134.

<sup>81</sup> *Ibid* para 135.

<sup>82</sup> *Ibid* para 160.

<sup>83</sup> *Ibid* para 164.

<sup>84</sup> *Ibid* para 167.

<sup>85</sup> ACIA, Art 4(a) to (e).

<sup>86</sup> ASEAN-Aus-NZ FTA Investment Chapter, Art 1(2)(a) to (c).

<sup>87</sup> ASEAN-China Investment Agreement, Art 3(4)(a) to (e).

<sup>88</sup> ASEAN-Korea Investment Agreement, Art 2(2)(a) to (f).

<sup>89</sup> ASEAN-India Investment Agreement, Art 1(2)(a) to (d) and Art 1(3).

<sup>90</sup> ASEAN-Japan Investment Chapter, Arts 6(1) to (3).

<sup>91</sup> See Catherine Donnelly, ‘Public-Private Partnerships: Award, Performance, Remedies’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 476, 477 (‘Currently PPPs are used in various forms across the full gamut of governmental activities from the traditional procurement context to complex externalization projects including infrastructure and construction, collection of child support payments, management of the federal Medicare program and state healthcare programs such as Medicaid, federal student loan programs, probationary services, schools, prisons, and military services.’).

<sup>92</sup> On the inevitable tensions between public interest concerns and government contracting practices, see Anne Davies, *Accountability: A Public Law Analysis of Government by Contract* (OUP 2001) 19–26.

<sup>93</sup> *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, para. 101 (‘By their very nature, tax measures, even if they are designed to and have the effect of an expropriation, will be indirect, with an effect that may be tantamount to expropriation.’).

<sup>94</sup> *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481 (February 2006), at para. 177 (finding that indirect expropriation through the application of tax laws should demonstrate that these tax laws are “extraordinary, punitive in amount, or arbitrary in its incidence”).

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<sup>95</sup> ASEAN Member States have been known to directly capitalize various connectivity efforts, subsequently bringing in foreign investment partners. *See* SANCHITA BASU DAS (ED.), ENHANCING ASEAN'S CONNECTIVITY (ISEAS, 2013), pp. 85–87.

<sup>96</sup> *See* Organisation for Economic Cooperation and Development (OECD), *Southeast Asia Investment Policy Perspectives*, December 2014, at <http://www.oecd.org/daf/inv/investment-policy/Southeast-Asia-Investment-Policy-Perspectives-2014.pdf> (last accessed 15 June 2015), at pp. 76–82.

<sup>97</sup> *See* Michael Ewing-Chow and Tan Hsien-Li, 'The Role of the Rule of Law in ASEAN Integration' (European University Institute Working Papers, RSCAS 2013/16) <[http://cadmus.eui.eu/bitstream/handle/1814/26452/RSCAS\\_2013\\_16.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/26452/RSCAS_2013_16.pdf?sequence=1)> accessed 1 September 2013.

<sup>98</sup> ACIA, Art 11(2)(a) (*italics added*).

<sup>99</sup> ACIA, Art 11(2)(b) (*italics added*).

<sup>100</sup> ACIA, Art 14(1) (*italics added*).

<sup>101</sup> ACIA, Art 14(2)(a).

<sup>102</sup> ACIA, Art 14(2)(a) (*italics added*).

<sup>103</sup> ASEAN-Aus-NZ FTA Investment Chapter, Art 9(1)(a) and Art 9(2)(a).

<sup>104</sup> ASEAN-China Investment Agreement, Art 7(2).

<sup>105</sup> ASEAN-China Investment Agreement, Art 8(1)(b) (*italics added*).

<sup>106</sup> ASEAN-Korea Investment Agreement Art 5(2); ASEAN-India Investment Agreement Art 7(1), Art 7(2)(a) to (c).

<sup>107</sup> ASEAN-Korea Investment Agreement Art 12(a) ('where Malaysia is the expropriating Party, any measure of expropriation relating to land shall be for the purposes as set out in the domestic laws and regulations relating to land acquisition.');

Art 12(1)(b) expropriation shall be 'in accordance with due process of law' (*italics added*). ASEAN-India Investment Agreement (n 11) Art 8(1)(a) to (d).

<sup>108</sup> *See* Benedict Kingsbury and Stephan W Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality' in Schill (n 52) 76–105.

<sup>109</sup> The only handbook as of this writing on an ASEAN regional investment treaty does not contain any index on the relevant domestic laws that may apply, nor any references or authorities for investors to locate such domestic laws. *See* ASEAN COMPREHENSIVE INVESTMENT AGREEMENT: A GUIDEBOOK FOR BUSINESSES AND INVESTORS (2013) [http://investasean.asean.org/index.php/ajax/exec\\_ajax/file\\_download/824/newsid/973/asean-comprehensive-investment-agreement-a-guidebook-for-businesses-and-investors.pdf](http://investasean.asean.org/index.php/ajax/exec_ajax/file_download/824/newsid/973/asean-comprehensive-investment-agreement-a-guidebook-for-businesses-and-investors.pdf) (accessed 1 March 2015).

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<sup>110</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), PRESERVING FLEXIBILITY IN IIAS: THE USE OF RESERVATIONS (2006), pp. 39–45, at [http://unctad.org/en/Docs/iteiit20058\\_en.pdf](http://unctad.org/en/Docs/iteiit20058_en.pdf) (last accessed 15 June 2015).

<sup>111</sup> ACIA, Art 9.

<sup>112</sup> ASEAN-Aus-NZ FTA Investment Chapter, Art 12.

<sup>113</sup> ASEAN-India Investment Agreement, Art. 4(1) to 4(6).

<sup>114</sup> ASEAN-China Investment Agreement, Art 6(1)(a) and (b).

<sup>115</sup> ASEAN-China Investment Agreement, Art 6(2).

<sup>116</sup> ASEAN-Korea Investment Agreement, Art 9(1).

<sup>117</sup> ASEAN-Korea Investment Agreement, Art 9(2).

<sup>118</sup> Vienna Convention on the Law of Treaties Arts 19-23. For an interesting historical account of reservations and the interplay of state interests involved in crafting reservations into treaties see Edward T Swaine, ‘Reserving’ (2006) 31 Yale J Int’l L 307.

<sup>119</sup> *Id.* at footnote 109 at p. 70.

<sup>120</sup> See International Law Commission (ILC), *Guide to Practice on Reservations to Treaties*, 2011, at [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1\\_8\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf) (last accessed 15 June 2015), at Article 2.5 et seq.

<sup>121</sup> See PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES & THE LAW* (2<sup>nd</sup> Ed., Oxford University Press, 2007), pp. 216–262.

<sup>122</sup> See ASWATH DAMODARAN, *THE DARK SIDE OF VALUATION: VALUING YOUNG, DISTRESSED, AND COMPLEX BUSINESSES* (FT Press, 2009), at pp. 125–126.

<sup>123</sup> Article 13 of the ACIA contains substantially the same, if not identical, language as Article 8 (Transfers) of the ASEAN-Aus-NZ FTA Investment Chapter, Article 10 (Transfers and Repatriation of Profits) of the ASEAN-China Investment Agreement, Article 10 (Transfers) of the ASEAN-Korea Investment Agreement, and Article 11 of the ASEAN-India Investment Agreement.

<sup>124</sup> Article 16 of the ACIA contains substantially the same, if not identical, language as Article 11 (Temporary Safeguard Measures) in the ASEAN-Korea Investment Agreement, Article 11 (Measures to Safeguard the Balance of Payments) in the ASEAN-China Investment Agreement, and Article 12 (Temporary Safeguard Measures) in the ASEAN-India Investment Agreement. The ASEAN-Aus-NZ FTA Investment Chapter and the ASEAN-Japan Investment Chapter do not contain any such provisions.

<sup>125</sup> On the nature of self-judging clauses see Stephan Schill and Robyn Briese, ‘“If the State Considers”: Self-Judging Clauses in International Dispute Settlement’ (2009) 13 Max Planck Yearbook of United Nations Law 61–140.

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<sup>126</sup> Michael P Dooley, ‘Origins of the Crisis in Asia’ in William C Hunter, George G Kaufman and Thomas H Krueger (eds), *The Asian Financial Crisis: Origins, Implications, and Solutions* (International Monetary Fund 1999) 27–32.

<sup>127</sup> ASEAN-India Investment Agreement (n 11), Art 12(5) to 12(6).

<sup>128</sup> See Abba Kolo, ‘Transfer of Funds: the Interaction between the IMF Articles of Agreement and Modern Investment Treaties: A Comparative Law Perspective’ in Schill (n 52) 343, 362–368,

<sup>129</sup> For an econometric proposal on how to adjust risk estimations for cost of equity in view of host States’ good faith implementation of social protection measures, see Diane A Desierto and Desiree A Desierto, ‘Investment Pricing and Social Protection: A Proposal for an ICESCR-Adjusted Capital Asset Pricing Model’ (2013) 28 ICSID Review 405–419.

<sup>130</sup> ACIA, Art 23(c).

<sup>131</sup> ASEAN-Aus-NZ FTA Investment Chapter, Art 15(d).

<sup>132</sup> ASEAN-Korea Investment Agreement, Art 16(d) ‘recognizing that commitments by each new ASEAN Member Country can be made in line with its respective development policies and strategies.’

<sup>133</sup> While the SDT provision does not appear in the single provision Article 51 of the ASEAN-Japan Investment Chapter, Article 2(c) (Principles) of the rest of the entire Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations does provide for SDT (‘special and differential treatment is accorded to ASEAN Member States, especially the newer ASEAN Member States, in recognition of their different levels of economic development; additional flexibility is accorded to the newer ASEAN Member States’).

<sup>134</sup> ASEAN-India Investment Agreement, Art 16.

<sup>135</sup> See Sonia E Rolland, ‘Special and Differential Treatment in the WTO Agreements: A Legal Analysis’ in Sonia E Rolland, *Development at the World Trade Organization* (OUP 2012) 110–138.

<sup>136</sup> See Peter T Muchlinski, ‘Policy Issue’ in Peter T Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 4, 36–38.

<sup>137</sup> WTO Secretariat Note, Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMD/W/196, 14 June 2013.

<sup>138</sup> ACIA, Articles 17 and 18 (italics added); See ASEAN-China Investment Agreement, counterpart provisions in Art 16 (General Exceptions) and Art 17 (Security Exceptions); ASEAN-Korea Investment Agreement, Art 20 (General Exceptions) and Art 21 (Security Exceptions); ASEAN-India Investment Agreement, Art 21 (General Exceptions) and Art 22 (Security Exceptions).

<sup>139</sup> Diane A Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Martinus Nijhoff 2012) 171–183; Diane A Desierto, ‘Necessity and

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“Supplementary Means of Interpretation” for Non-Precluded Measures in Bilateral Investment Treaties’ (2010) 31 *University of Pennsylvania J Int’l L* 827–934; Jose E Alvarez and Tegan Brink, ‘Revisiting the Necessity Defense’ (2010–2011) *Ybk Int’l Inv L & Pol’y* 320–374.

<sup>140</sup> See Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 *University of Pennsylvania Journal of International Law* 1 (2014), pp. 1–87.

<sup>141</sup> See Diane A Desierto, ‘Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-Making’ (2014) 26 *Florida J Int’l L* 51–150.

<sup>142</sup> *Ibid* Part III.

<sup>143</sup> See Peter van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (CUP 2005) 597–632.

<sup>144</sup> ACIA, Art. 21(1)(a).

<sup>145</sup> ACIA, Art 21(1)(b).

<sup>146</sup> ACIA, Art 21(1)(c).

<sup>147</sup> ACIA, Art 21(1)(d).

<sup>148</sup> ACIA, Art 20(2).

<sup>149</sup> ACIA, Art 21(2), Art. 20(2).

<sup>150</sup> See ASEAN-Aus-NZ FTA Investment Chapter, Art 13(1) to 13(8).

<sup>151</sup> ASEAN-Aus-NZ FTA Investment Chapter, Art 13(9) to 13(12).

<sup>152</sup> ASEAN-China Investment Agreement, Art 19(1) to 19(3).

<sup>153</sup> ASEAN-Korea Investment Agreement, Art 8.

<sup>154</sup> ASEAN-India Investment Agreement, Art 14(1)(c).

<sup>155</sup> See Akira Kotera, ‘Regulatory Transparency’ in Peter T Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 617–635.

<sup>156</sup> *Champion Trading Company and Ameritrade International Incorporated v Egypt*, ICSID Case No ARB/02/9, Award (27 October 2006) para 162. See also *Railroad Development Corporation v Guatemala*, ICSID Case No ARB/07/23, Award (29 June 2012) para 219; *Metalclad Corporation v Mexico*, ICSID Case No ARB(AF)/97/1, Award (25 August 2000) para 76; *Saluka Investments BV v Czech Republic*, PCA, Partial Award (17 March 2006) paras 420–425.

<sup>157</sup> ‘Regulatory restrictiveness’ is measured according to various variables and different methodologies aiming to capture the conduciveness of a country or region to foreign investment. See for example the OECD FDI Regulatory Restrictiveness Index, at <http://www.oecd.org/investment/fdiindex.htm> (last accessed 15 June 2015); the International

Chamber of Commerce's Open Markets Index at <http://www.iccwbo.org/global-influence/g20/reports-and-products/open-markets-index/> (last accessed 15 June 2015).

<sup>158</sup> See Institute of International Finance, *Top 10 Impediments to Long-Term Infrastructure Financing and Investment*, (June 2014), at [https://www.iif.com/system/files/CAIM\\_Top\\_10\\_Impediments\\_to\\_LT\\_Investment\\_1.pdf](https://www.iif.com/system/files/CAIM_Top_10_Impediments_to_LT_Investment_1.pdf) (last accessed 15 June 2015), noting that “concerns about investor/creditor rights, as well as potential changes to the regulatory and policy framework over time can discourage long-term investment.”

<sup>159</sup> See *Champion Trading Company and Ameritrade International Incorporated v. Egypt*, Award, ICSID Case No. ARB/02/9, 27 October 2006, para. 162 (affirming that an investor could expect the host State to act in a consistent manner, free of ambiguity and to provide a transparent regime for its investment, both as a matter of investment treaty obligation as well as on the basis of a separate international law principle on transparency).

<sup>160</sup> See Joachim Delaney and Daniel Barstow Magraw Jr., *Procedural Transparency*, pp. 725–786 in PETER T. MUCHLINSKI, FEDERICO ORTINO, CHRISTOPH SCHREUER (EDS.), OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (OUP, 2008); *Agua Argentinas SA v. Argentina*, Order in response to a petition for transparency and participation as amicus curiae, ICSID Case No. ARB/03/19, 19 May 2005 (denying Petitioners' request to attend hearings of the case but granting Petitioners' request for leave to make *amicus curiae* submissions).

<sup>161</sup> See for example ACIA Art. 25(e) (on the duty of all ASEAN Member States to cooperate on investment facilitation by “strengthening databases on all forms of investments for policy formulation to improve ASEAN's investment environment”); ACIA Art. 26(c) (on the duty of all ASEAN Member States to “share information on investment policies and best practices, including promoted activities and industries”).

<sup>162</sup> This Convention has just opened for signature and has not yet entered into force. See full text and status at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html) (last accessed 1 May 2015). See also the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, UN General Assembly Resolution 68/109, 16 December 2013, entering into force 1 April 2014. The UNCITRAL Rules are incorporated by reference in the Mauritius Convention.

<sup>163</sup> See United States Trade Representative, *NAFTA Commission Announces New Transparency Measures*, October 2003, at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/archives/2003/october/nafta-commission-announces-new-transparen> (last accessed 15 June 2015).

<sup>164</sup> See *functions of the COMESA Regional Investment Agency (COMESA RIA)* in [http://www.comesaria.org/site/en/article.php?chaine=comesa-ria&id\\_article=56](http://www.comesaria.org/site/en/article.php?chaine=comesa-ria&id_article=56) (last accessed 15 June 2015), specifically describing that the COMESA RIA

provides a platform for private sector to interact with COMESA Governments and serves as an information hub through which it can promote the COMESA region, detailed information on legislation and policies affecting the business environment, cost of doing business, investment incentives, investment procedures, investment opportunities and projects, major events affecting

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investment and other relevant information. In doing so, RIA works closely with Member States' Investment Promotion Agencies (IPAs) to promote the COMESA region as a Common Investment Area, and in building a positive image of the region and its Member States for a worldwide audience.

<sup>165</sup> See COMESA RIA activities at [http://www.comesaria.org/site/en/article.php?chaine=comesaria-activities&id\\_article=306](http://www.comesaria.org/site/en/article.php?chaine=comesaria-activities&id_article=306) (last accessed 15 June 2015).

<sup>166</sup> OECD, *A Framework for Investment Policy Transparency*, 2003, at <http://www.oecd.org/investment/investment-policy/16793978.pdf> (last accessed 15 June 2015), at p. 4.

### **Section 3. Spaces of Treaty Compatibility**

<sup>167</sup> ASEAN Charter, Art. 5(2). Italics added.

<sup>168</sup> International Law Commission, Draft Articles on the responsibility of international organizations, 2011, full text at [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_11\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_11_2011.pdf) (last accessed 1 May 2015). Italics added.

<sup>169</sup> See JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* (Oxford University Press, 2<sup>nd</sup> ed., 2015), at p. 14 (finding that investment treaty texts “contain many specific prescriptions for action. Thus, in addition to norms, the treaties express rules about such matters as expropriation, monetary transfers, the compensation of injured investors because of war, revolution, and civil strife.”).

<sup>170</sup> ASEAN Charter, Art. 2(2)(m). See also Marise Cremona, David Kleimann, Joris Larik, Rena Lee and Pascal Vennesson, *ASEAN's External Agreements: Law, Practice and the Quest for Collective Action* (Cambridge University Press, 2015), pp. 23-50.

<sup>171</sup> ASEAN Charter, Art. 2(2)(j).

<sup>172</sup> ASEAN Charter, Art. 2(2)(n).

<sup>173</sup> ASEAN Economic Community Blueprint, Section A3, Clause 28, at <http://www.asean.org/archive/5187-10.pdf> (last accessed 15 June 2015).

<sup>174</sup> See NICHOLAS DORN, *DEMOCRACY AND DIVERSITY IN FINANCIAL MARKET REGULATION*, p. 67 (“Jurisdictional arbitrage (alternatively, regulatory arbitrage) refers to financial firms moving from one market to another—or conducting particular forms of business in or through some jurisdictions rather than others—because of perceived advantages vis-à-vis regulation in or between jurisdictions....jurisdictional arbitrage requires as its condition of existence that jurisdictions differ in their rules.”).

<sup>175</sup> ACIA Art. 11(2)(a). See also *identical narrow formulations of FET in ASEAN-India Investment Agreement*, Art. 7(2)(a); *ASEAN-Australia-New Zealand Investment Chapter*, Art. 6(2)(a); *ASEAN-Korea Investment Agreement*, Art. 5(2)(a); *ASEAN-China Investment Agreement*, Art. 7(2)(a).

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<sup>176</sup> See Appendix A (draft student manuscript for the Handbook on Southeast Asian BITs).

<sup>177</sup> 1994 Malaysia-Albania Bilateral Investment Treaty, Art. 3(1), at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/22> (last accessed 1 May 2015).

<sup>178</sup> 1999 Argentina-Philippines BIT, Art. III(1), at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/112> (last accessed 1 May 2015).

<sup>179</sup> ACIA, Art. 6 (although footnote 4 to Art. 6 does not apply the MFN clause to dispute settlement procedures, the same footnote does require that preferential treatment extended to other non-Parties to the ACIA in existing or future arrangements should also be granted to the Parties to the ACIA); ASEAN-Korea Investment Agreement, Art. 4 (although paragraph 3 does not apply MFN to preferential treatment already accorded in “existing bilateral, regional, and/or international agreements or any forms of economic or regional cooperation with any non-Party”); ASEAN-China Investment Agreement, Art. 5 (although paragraph 3 does not apply MFN to preferential treatment already accorded in “existing bilateral, regional, and/or international agreements or any forms of economic or regional cooperation with any non-Party”). The ASEAN-India Investment Agreement, ASEAN-Australia-New Zealand Investment Chapter, and the ASEAN-Japan Investment Chapter do not contain MFN clauses.

<sup>180</sup> See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), MOST FAVOURED NATION TREATMENT (United Nations, New York and Geneva, 2010), at [http://unctad.org/en/Docs/diaeia20101\\_en.pdf](http://unctad.org/en/Docs/diaeia20101_en.pdf) (last accessed 1 May 2015). MFN clauses have also been argued to create a ‘multilateralizing’ effect on investment treaties. See Stephan W. Schill, *Multilateralizing Investment Treaties through Most Favored Nation Clauses*, 27 Berkeley Journal of International Law 5 (2) (2009), pp. 496–569.

<sup>181</sup> *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, and Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.

<sup>182</sup> See European Parliament Directorate-General for External Policies of the Union, *The EU Approach to International Investment Policy after the Lisbon Treaty*, (2010), at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA\\_ET\(2010\)433854\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/433854/EXPO-INTA_ET(2010)433854_EN.pdf) (last accessed 15 June 2015), at pp. 58 et seq.

<sup>183</sup> ACIA Art. 1(b).

<sup>184</sup> ACIA Art. 1(c).

<sup>185</sup> ACIA Art. 1(d).

<sup>186</sup> ACIA Art. 26(a).

<sup>187</sup> ACIA Art. 44.

<sup>188</sup> ACIA Art. 40(1).

<sup>189</sup> See ASEAN-India Investment Agreement.

<sup>190</sup> ASEAN-China Investment Agreement, Art. 18(1).



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<sup>191</sup> ASEAN-Korea Investment Agreement, Arts. 23(1) and 23(2).

<sup>192</sup> ASEAN-Aus-NZ FTA Investment Chapter, Chapter 11 (Investment), Art. 27(1).

<sup>193</sup> See Rahim Moloo and Alex Khachaturian, *The Compliance with the Law Requirement in International Investment Law*, 34 *Fordham International Law Journal* 6 (2011), pp. 1473–1501.

<sup>194</sup> The Philippines, for example, does not strictly require legislative enactment for treaties incorporated into its legal system under the Incorporation Clause of Article II, Sec. 2 of the 1987 Philippine Constitution. See Diane A. Desierto, *A Universalist History of the 1987 Philippine Constitution (II)*, 11 *Historia Constitucional* (2010), pp. 427–484.

<sup>195</sup> See for example the draft Investment Chapter in the European Union-Singapore FTA, at [http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc\\_152844.pdf](http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf) (last accessed 1 May 2015).

<sup>196</sup> See the 10 forthcoming country monographs in the ASEAN Integration through Law Series of Cambridge University Press, which discuss these precise issues for each of the 10 ASEAN Member States.

<sup>197</sup> MOHAMMAD F.A. NSOUR, *RETHINKING THE WORLD TRADE ORDER: TOWARD A BETTER LEGAL UNDERSTANDING OF THE ROLE OF REGIONALISM IN THE MULTILATERAL TRADE REGIME* (Sidestone Press, 2010), at p. 213.

<sup>198</sup> ICSID Convention, Art. 42(1). Full text available at [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) (last accessed 15 June 2015).

<sup>199</sup> See CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (Cambridge University Press, 2009), at pp. 618–621; Emmanuel Gaillard and Yas Banifatemi, *The meaning of ‘and’ in Article 42(1), Second Sentence of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 *ICSID Review* 375 (2003).

<sup>200</sup> *Wena Hotels Limited v. Egypt*, Decision on Annulment Application, ICSID Case No. ARB/98/4, 28 January 2002, para.40.

<sup>201</sup> See Katia Yannaca-Small, *Parallel Proceedings*, pp. 1008–1048, in Peter Muchlinski, Federico Ortino, Christoph Schreuer (Eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008).

<sup>202</sup> ACIA, Art. 4(c); ASEAN-Korea Investment Agreement, Art. 1(j)(ii); ASEAN-China Investment Agreement, Art. 1(d)(ii); ASEAN-Aus-NZ FTA Investment Chapter Art. 2(c)(ii); ASEAN-India Investment Agreement Art. 2(e)(i).

<sup>203</sup> *Compania del Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 50.

<sup>204</sup> *Enron Corporation and Ponderosa Assets LP v. Argentina*, Decision on Jurisdiction (Ancillary Claim), ICSID Case No. ARB/01/3, 2 August 2004, paras. 29-39.

<sup>205</sup> *Id.* at para. 29.

<sup>206</sup> *CMS Gas Transmission Company v. Argentina*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/01/8, 17 July 2003, paras. 63–65. *See also*, *Lanco International Inc. v. Argentina*, Preliminary decision on jurisdiction, ICSID Case No. ARB/97/6, 1998; *LG & E Energy Corporation v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/02/1, 30 April 2004, para. 50.

<sup>207</sup> *See* ACIA Arts. 28 et seq.; ASEAN-India Investment Agreement, Arts. 20 et seq.; ASEAN-Australia-New Zealand Investment Chapter, Art. 18 et seq.; ASEAN-Korea Investment Agreement, Arts. 18 et seq.; ASEAN-China Investment Agreement, Arts. 13 et seq.

<sup>208</sup> ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Art. 1(1).

<sup>209</sup> ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Arts. 5–16.

<sup>210</sup> ASEAN Charter, Art. 24.

#### **Section 4. Conclusion and Recommendations**

<sup>211</sup> *See among others* Jason Webb Yackee, *Political Risk and International Investment Law*, 24 *Duke Journal of Comparative and International Law* (2014), pp. 477-500; Kira R. Fabrizio, *Investments Under Regulatory Uncertainty: Evidence from Renewable Energy Generation*, at [https://faculty.fuqua.duke.edu/bio/fabrizio/papers/pdfs/InvestUnderUncertainty\\_Fabrizio.pdf](https://faculty.fuqua.duke.edu/bio/fabrizio/papers/pdfs/InvestUnderUncertainty_Fabrizio.pdf) (last accessed 1 May 2015); Huseyin Gulen and Mihai Ion, *Policy Uncertainty and Corporate Investment*, 4 April 2013, at [http://web.stanford.edu/group/SITE/SITE\\_2013/2013\\_segment\\_2/2013\\_segment\\_2\\_papers/gulen.pdf](http://web.stanford.edu/group/SITE/SITE_2013/2013_segment_2/2013_segment_2_papers/gulen.pdf) (last accessed 1 May 2015); DESIERTO 2015, pp. 340–341.

<sup>212</sup> In the first place, the causation between concluding investment treaties and attracting FDI is hardly an uncontested one. *See among others* Jennifer L. Tobin and Marc L. Busch, *A Bit is Better than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 *World Politics* 1 (January 2010), pp. 1–42; KARL P. SAUVANT AND LISA E. SACHS (EDS.), *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* (Oxford University Press, 2009).

<sup>213</sup> ASEAN-India Investment Agreement, footnote 3 to Article 2(e) definition of investment.

<sup>214</sup> ASEAN-Aus-NZ FTA Investment Chapter, Annex on Expropriation and Compensation, para. 4.

<sup>215</sup> ASEAN-India Investment Agreement, Art. 8(3).

<sup>216</sup> ACIA Art. 5.

<sup>217</sup> ACIA Art. 6(3).

<sup>218</sup> *See* OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, (2008), at <http://www.oecd.org/investment/internationalinvestmentagreements/40471535.pdf> (last accessed 15 June 2015).

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<sup>219</sup> ASEAN-Korea Investment Agreement, Arts. 5(2)(a) and 5(2)(c); ACIA Art. 11(2)(a); ASEAN-India Investment Agreement Art. 7(2)(a) and (c); ASEAN-Aus-NZ FTA Investment Chapter Art. 6(2)(a) and (c); ASEAN-China Investment Agreement Art. 7(2)(a).

<sup>220</sup> ASEAN-China Investment Agreement Art. 7(3); ACIA Art. 11(3); ASEAN-India Investment Agreement Art. 7(3); ASEAN-Aus-NZ FTA Investment Chapter Art. 6(3).

<sup>221</sup> See United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment* (2011), UNCTAD Series on International Investment Agreements II, at [http://unctad.org/en/Docs/unctaddiaeia2011d5\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf) (last accessed 15 June 2015).

<sup>222</sup> See UNCTAD, *Transparency: A Sequel* (2012), UNCTAD Series on International Investment Agreements II, at [http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6\\_en.pdf](http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf) (last accessed 15 June 2015).

<sup>223</sup> See Investment Agreement for the COMESA Common Investment Area, Article 7, at [http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment\\_agreement\\_for\\_the\\_CCIA.pdf](http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf) (last accessed 1 October 2014); details on the success of the COMESA Regional Investment Agency in <http://www.comesaria.org> (last accessed 1 October 2014). For case studies on COMESA success stories in attracting and monitoring investments, see [http://www.acpbusinessclimate.org/pseef/documents/COMESA/Comesa\\_Success\\_Stories\\_en.pdf](http://www.acpbusinessclimate.org/pseef/documents/COMESA/Comesa_Success_Stories_en.pdf) (last accessed 1 October 2014), and [http://eeas.europa.eu/delegations/zambia/documents/eu\\_zambia/comesa\\_success\\_stories\\_2013\\_final\\_emailing\\_en.pdf](http://eeas.europa.eu/delegations/zambia/documents/eu_zambia/comesa_success_stories_2013_final_emailing_en.pdf) (last accessed 1 October 2014).

<sup>224</sup> Full text available at [http://www.comesaria.org/site/en/article.php?chaine=comesa-ria-activities&id\\_article=306](http://www.comesaria.org/site/en/article.php?chaine=comesa-ria-activities&id_article=306) (last accessed 15 June 2015).

<sup>225</sup> For a detailed summary of the Regulation and the issues surrounding “intra-EU” BITs, see <http://www.mwe.com/publications/uniEntity.aspx?xpST=PublicationDetail&pub=4858> (last accessed 1 October 2014); <http://www.diritticomparati.it/2012/11/the-eu-regulation-establishing-transitional-arrangements-for-bilateral-investment-agreements-between.html> (last accessed 1 October 2014).

<sup>226</sup> “Indonesia to terminate more than 60 bilateral investment treaties”, *The Financial Times*, March 26, 2014.

<sup>227</sup> See Amnon Lehavi, *Unbundling Harmonization: Public versus Private Law Strategies to Globalize Property*, 15 *Chicago Journal of International Law* 2 (2015), pp. 484–508.

<sup>228</sup> United Nations Conference on Trade and Development (UNCTAD), *Best Practices in Investment for Development: Lessons from Peru* (2011), pp. 21–22, at [http://unctad.org/en/Docs/webdiaepcb2011d9\\_en.pdf](http://unctad.org/en/Docs/webdiaepcb2011d9_en.pdf) (last accessed 15 June 2015).