ASEAN Investment Treaties, RCEP, and CPTPP: Regional Strengths, Norms, Institutions, and Politics

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ASEAN INVESTMENT TREATIES, RCEP, AND CPTPP: REGIONAL STRATEGIES, NORMS, INSTITUTIONS, AND POLITICS

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Abstract: Southeast Asia attracts foreign investment more rapidly than elsewhere in the world, including China. Southeast Asia’s evolving regional strategies, norms, institutions, and politics for investment governance should be of considerable interest to global decision-makers. This Article compares evolving investment treaty strategies and norms between the regional investment treaties of: (1) the Association of Southeast Asian Nations (“ASEAN”); (2) the latest draft investment chapter of the China-led sixteen-member Regional Comprehensive Economic Partnership (“RCEP”), to which all ten ASEAN Member States are also negotiating parties; and (3) some features of the current draft investment chapter for the Trans-Pacific Partnership (now renamed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”)).


I. INTRODUCTION

The importance of the regional dimension in economic diplomacy has fluctuated over time because of doubts about the effectiveness of the multilateral system. ¹ Regional economic agreements, although often

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politically motivated, offer a more rapid way of opening markets. Liberalization may be easier for national interests to accept when it occurs within a regional group of countries with broadly the same levels of development and similar policy preferences.\(^2\) Regional economic integration necessitates policy and regulatory changes and refinements in most, if not all, Association of Southeast Asian Nations (“ASEAN”) Member States, taking into consideration their different levels of development.\(^3\)

Under the unique horizontally embedded economic integration model in the ASEAN Charter and ASEAN Economic Community (“AEC”) Blueprint, Southeast Asia is poised to escalate its regional investment rule-making and institutional architecture. This is particularly so with its massive cross-border projects targeted under the ASEAN Master Plan on Connectivity 2025, as well as with flagship investment projects with key ASEAN regional partners: China (through the One Belt, One Road program), Japan (in relation to its Quality Infrastructure program), South Korea, the European Union, Australia, New Zealand, Canada, and the United States.

Part II describes the current state of Southeast Asia’s burgeoning sources of foreign investment growth in the past decade and the targets for regional foreign investment expansion under the AEC Blueprint and Master Plan on Connectivity. Part III examines ASEAN’s regional investment treaties to date—scrutinizing various common features to establish both ASEAN’s preferences for investment openness and retention of regulatory space for host-states to foreign investment. These common features of regional commitments are then examined alongside Southeast Asia’s other contemplated regional commitments in the draft investment chapters of the Regional Comprehensive Economic Partnership (“RCEP”) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”), particularly in the substantive areas of scope of investment, investment protection standards, public policy provisions to defend host-state regulatory policies, transparency requirements and treaty monitoring policies, and investor-state dispute settlement options. Noting divergences in the quality of Southeast Asia’s regional commitments throughout these regimes, Part IV anticipates the likely sites for dispute. These sites for dispute are


largely due to the disparate approaches to investment monitoring, treaty-making, and investment governance among countries in Southeast Asia. The Conclusion suggests recommendations for legal harmonization and institutional coordination.

II. SOUTHEAST ASIA INVESTMENT TRENDS AND TARGETS UNDER THE AEC

In recent years, Southeast Asia has experienced a rapid expansion in foreign direct investment (“FDI”), with the region hailed as attracting “more foreign direct investment combined than China.”4 Individual Member States of ASEAN, such as Indonesia,5 Singapore,6 the Philippines,7 and Vietnam,8 are touted as among the world’s fastest-growing economies for FDI. The ASEAN Investment Report 2017, prepared by the ASEAN Secretariat and the United Nations Conference on Trade and Development (“UNCTAD”), found that despite the global economic situation resulting in the overall FDI flows in ASEAN falling twenty percent to $96.7 billion in 2016, “there were some bright spots. Flows from most of ASEAN’s major Dialogue Partner countries and intra-ASEAN investment rose.”9 The report reasoned that “[t]he decline

in 2016 was due to one-off factors,” whereas “[t]he growth of intra-ASEAN investment derived in part from a spate of greenfield investments and intraregional [merger and acquisition] activities.” 10 Factors such as establishment of the AEC and growing regional opportunities both “contributed to the rise of intra-ASEAN investment, which for the first time accounted for a quarter of total FDI in the region.” 11 The report concluded that:

Despite the atypical 2016 FDI performance, the region continued to attract a high level of FDI, reflecting ASEAN’s resilience and the region’s attractiveness and competitiveness in attracting investment. Twenty years on from the 1997–1998 Asian financial crisis, FDI flows in ASEAN have rebounded significantly to levels surpassing the precrisis peak by more than 2.8 times. The region will continue to attract strong FDI flows with greater regional value chain and supply chain activities in the years ahead. 12

Southeast Asia’s approach to investment policy and investment governance has gained significance since the launch of the AEC at the end of 2015, 13 spanning a market estimated at $2.6 trillion in value with a combined population of over 622 million people. 14 Southeast Asia’s approach to investment policy and governance is depicted as: (1) highly pluralist (especially regarding investment sources and forms of investment); (2) largely decentralized with ASEAN investment facilitated through “coordination” by the AEC institutions with the ASEAN Member State governments; and (3) relatively passive (at least compared to other regions such as Europe) when it comes to long-term standardization of investment protection standards, host-state public policy provisions, and investor-state dispute settlement reform. In an era where so much of the world is caught up on global reforms to the investment law system, 15 ASEAN focuses its efforts on regional investment

10 ASEAN INVESTMENT REPORT 2017, supra note 9, at 43.
11 Id.
12 Id.
promotion incentives\textsuperscript{16} while leaving investment protection to the individual initiatives of the respective governments of ASEAN Member States.\textsuperscript{17} As of this writing, ASEAN has not yet built any long-term regional governance infrastructure to address cross-border problems that may arise from such a rapid expansion of FDI across and within Southeast Asian borders.\textsuperscript{18}

The unique state of ASEAN investment policy-making should also be considered in the context of Southeast Asia’s ambitious targets for short- and long-term regional investment. The AEC Blueprint 2025 sets forth the following policy targets for ASEAN’s investment environment:

ASEAN aims to enhance further its attractiveness as an investment destination globally through the establishment of an open, transparent, and predictable investment regime in the region. The improvement in the investment environment in ASEAN is being achieved through the implementation of the ASEAN Comprehensive Investment Agreement (ACIA), which (i) provides for progressive liberalisation of existing investment restrictions in manufacturing, agriculture, fishery, forestry, and mining and the services incidental to these sectors; (ii) significantly strengthens investment protection; and (iii) ensures transparency of investment laws, regulations, and administrative guidelines.\textsuperscript{19}


\textsuperscript{19} \textit{AEC Blueprint 2025}, supra note 3, ¶ 14.
Strategic measures for attaining this investment environment identified within the AEC Blueprint 2025 range from eliminating “investment restrictions and impediments” to promoting “ASEAN as an investment destination.”

This Article examines the nature of ASEAN’s regional commitments towards investment protection and host-state public policy protection, along with its emerging investor-state dispute settlement mechanisms within the broader framework of dispute settlement in the AEC. It seeks to identify commonalities and differences in the quality of ASEAN’s regional obligations in its six current regional investment treaties (both intra-ASEAN and with the following countries: Australia and New Zealand, China, South Korea, India, and Hong Kong) alongside its draft investment chapters in the larger mega-regional agreements, such as the RCEP the CPTPP. It

20 Id. ¶ 15.
28 Comprehensive and Progressive Agreement for Trans Pacific Partnership ch. 9, expected to open for signature Mar. 8, 2018, https://mfat.govt.nz/assets/Trans-Pacific-Partnership/Text9.-Investment-Chapter.pdf [hereinafter CPTPP Draft Investment Chapter]. Although, note must be taken of the key elements of the CPTPP and the draft provisions of the TPP on investor-state dispute settlement that are to be suspended. See Donald Robertson et al., A Comprehensive and Progressive Agreement for Trans-Pacific Partnership, HERBERT SMITH FREEHILLS LLP (Nov. 17, 2017), https://www.herbertsmithfreehills.com/latest-thinking/a-comprehensive-and-progressive-agreement-for-trans-pacific-partnership; see also Press
considers the dearth of regional investment governance institutions in ASEAN, which may affect the harmonization of differing regional standards of investment protection and public policy innovation for Southeast Asia, and situates the current mechanisms for investor-state dispute settlement within the framework of dispute settlement under the AEC and the ASEAN Charter. These differences, should they remain unaddressed in the ASEAN regional governance institutions, will likely be detrimental to the achievement of ASEAN objectives for expanding Southeast Asia’s attractiveness as a global investment destination.

Preliminarily, one should note that not all ASEAN Member States enjoy the same level of FDI growth—among the ten ASEAN Member States, it has been variably favorable between the more established ASEAN-6 (Indonesia, Malaysia, the Philippines, Singapore, Brunei Darussalam, and Thailand) and the CMLV grouping (Cambodia, Myanmar, Laos, and Vietnam, or collectively “CMLV”). The 2016 ASEAN Investment Report notes that “[t]he performance of ASEAN Member States differed in attracting FDI; five received higher inflows, two had inflows at a level similar to that of 2014, and three witnessed a decline.” Key findings of the 2016 ASEAN Investment Report include, among others: (1) a marked rise of FDI in manufacturing and all-time highs in equity capital financing of FDI activities, combined with strong regional investment expansion by multinational enterprises (“MNEs”); (2) intra-ASEAN investment and mergers and acquisitions (“M&As”) remain the largest source of FDI flows; (3) investor perceptions improved after the launch of the AEC in December 2015; (4) ASEAN is a major FDI destination for South Korea as part of its value chain activities; (5) ASEAN is the largest host for United States companies in Asia, with over 1500 American companies operating in ASEAN and an expanding MNE regional footprint in ASEAN using the region as a production platform, a site for sourcing operations, and a base from which to

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30 Id. at xv.

31 Id.

32 Id.

33 Id. at xvii.

34 Id. at xviii–xix.
sell to regional and global markets;\textsuperscript{35} and (6) micro-, small-, and medium-sized enterprises ("MSMEs") remain key economic actors in all ASEAN Member States, with MSMEs often operating as contract manufacturers for local and foreign MNEs and later internationalizing themselves as FDI exporters to other countries.\textsuperscript{36}

The AEC’s Consolidated Strategic Action Plan for 2025 identifies various actions and measures to achieve the overall objective of “enhanc[ing] further ASEAN’s attractiveness as an investment destination globally through the establishment of an open, transparent[,] and predictable investment regime in the region.”\textsuperscript{37} These include: (1) completing the built-in agenda of the ASEAN Comprehensive Investment Agreement ("ACIA"), which is applicable to all ten ASEAN Member States, including the elimination or improvement of investment restrictions and impediments; (2) identifying appropriate mechanisms to phase out and reduce the ACIA reservation lists; (3) continuing and enhancing the work of the ASEAN Coordinating Committee on Investment ("CCI"), specifically its peer review mechanism; and (4) jointly promoting the ACIA and ASEAN, the latter as an “investment destination.”\textsuperscript{38}

Within the current structure of the AEC, there is no standing regional investment institution that is centrally responsible for investment promotion, monitoring, or oversight among the ASEAN Member States. Rather, it is the ASEAN Investment Area ("AIA") Council that is the “[m]inisterial body under the ASEAN Economic Ministers responsible for overseeing the implementation of the [ACIA], ASEAN’s main economic instrument to realise a free and open investment regime.”\textsuperscript{39} The Council “is composed of Ministers from the ten Member States responsible for investment and the Secretary-General of ASEAN.”\textsuperscript{40} The CCI supports the AIA Council in carrying out its functions and is composed of senior investment officials and officials from other government agencies.\textsuperscript{41}

\textsuperscript{35} Id. at xx–xxii.
\textsuperscript{36} Id. at xxii–xxiii.
\textsuperscript{38} Id. at 7–8.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
Notwithstanding the lack of any standing formal regional body or institution to oversee the harmonization of investment regulations within and between ASEAN Member States, ASEAN Member States have ambitiously enacted several regional investment treaties, distinct and separate from each state’s continuing respective bilateral investment treaty (“BIT”) program. Historically, the top sources of ASEAN FDI inflows are the European Union, Japan, ASEAN, China, Hong Kong, the United States, South Korea, Australia, Taiwan, and India. ASEAN’s foremost sources of FDI inflows from 2013–2015 are as follows:

<table>
<thead>
<tr>
<th>Partner Country/Region</th>
<th>2013 Percentage Share of Total Net Inflows</th>
<th>2014 Percentage Share of Total Net Inflows</th>
<th>2015 Percentage Share of Total Net Inflows</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASEAN</td>
<td>15.7</td>
<td>17.0</td>
<td>18.4</td>
</tr>
<tr>
<td>Australia</td>
<td>2.1</td>
<td>4.8</td>
<td>4.3</td>
</tr>
<tr>
<td>Canada</td>
<td>0.7</td>
<td>1.3</td>
<td>0.7</td>
</tr>
<tr>
<td>China</td>
<td>5.1</td>
<td>5.4</td>
<td>6.8</td>
</tr>
<tr>
<td>European Union (28)</td>
<td>19.6</td>
<td>19.2</td>
<td>16.7</td>
</tr>
<tr>
<td>India</td>
<td>1.7</td>
<td>0.5</td>
<td>1.3</td>
</tr>
<tr>
<td>Japan</td>
<td>19.8</td>
<td>12.1</td>
<td>14.5</td>
</tr>
<tr>
<td>New Zealand</td>
<td>0.3</td>
<td>0.4</td>
<td>1.9</td>
</tr>
<tr>
<td>Pakistan</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Republic of Korea</td>
<td>3.4</td>
<td>4.4</td>
<td>4.7</td>
</tr>
<tr>
<td>Russian Federation</td>
<td>0.5</td>
<td>0.1</td>
<td>0.0</td>
</tr>
<tr>
<td>United States</td>
<td>5.7</td>
<td>11.3</td>
<td>11.3</td>
</tr>
<tr>
<td>Others</td>
<td>25.4</td>
<td>23.6</td>
<td>19.3</td>
</tr>
<tr>
<td>Total FDI Inflows to ASEAN</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

According to UNCTAD, there are sixteen listed investment treaties to which ASEAN is a party. This Article focuses on scrutinizing the structure, commitments, and institutional design provided in the six regional investment treaties concluded under ASEAN’s charter-based regime since it came into force in December 2008. This Article contrasts these with the draft

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42 For other works on ASEAN regional investment treaties, see Diane A. Desierto, Investment Treaties: ASEAN, in ASIA RISING: GROWTH AND RESILIENCE IN AN UNCERTAIN GLOBAL ECONOMY 184 (Hal Hill & Maria Socorro Gochoco-Bautista eds., 2013); Desierto, supra note 17, at 1018–57.
investment chapter of the proposed RCEP\textsuperscript{47} (where all ten ASEAN Member States are negotiating parties) and the proposed draft investment chapter of the CPTPP (where ASEAN Member States Brunei, Malaysia, Singapore, and Vietnam are parties, \textsuperscript{48} while the Philippines \textsuperscript{49} and Indonesia \textsuperscript{50} are contemplating membership). There are other investment framework agreements or investment provisions in other agreements with ASEAN’s key economic partners, such as the United States\textsuperscript{51} and Japan.\textsuperscript{52}

However, these agreements and provisions remain incipient or undeveloped. They are largely agreements set up in principle to agree on specific commitments at a later point in time. This Article will focus on the following six specifically negotiated ASEAN regional investment treaties and contrast the same with the draft RCEP investment chapter and the draft CPTPP investment chapter: (1) the 2009 ACIA,\textsuperscript{53} which applies to investments made in ASEAN Member States by investors from any other ASEAN Member State;\textsuperscript{54} (2) Chapter 11 (Investment) of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area;\textsuperscript{55} (3) the 2009 ASEAN-South Korea Investment Agreement;\textsuperscript{56} (4) the 2010 ASEAN-China Investment Agreement;\textsuperscript{57} (5) the 2014 ASEAN-India Investment Agreement;\textsuperscript{58} and (6) the 2017 ASEAN-Hong Kong Investment Agreement.\textsuperscript{59}

\begin{thebibliography}{99}
\item \textsuperscript{47}See RCEP Draft Investment Chapter, supra note 27.
\item \textsuperscript{48}See CPTPP Draft Investment Chapter, supra note 28.
\item \textsuperscript{49}Richmond Mercurio, Philippines Revives Plan to Join Trans-Pacific Trade Bloc, PHILIPPINE STAR (Sept. 23, 2017, 4:00 PM), http://www.philstar.com/business/2017/09/24/1741930/philippines-revives-plan-join-trans-pacific-trade-bloc.
\item \textsuperscript{50}Indonesia Reconsidering TPP Plans, Eyes Bilateral Deals, REUTERS (Jan. 25, 2017, 3:26 AM), https://uk.reuters.com/article/us-indonesia-trade/indonesia-reconsidering-tpp-plans-eyes-bilateral-deals-idUKKBN15918X.
\item \textsuperscript{53}ACIA, supra note 21.
\item \textsuperscript{54}See JULIEN CHAISSE & SUFIAN JUSOH, THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT: THE REGIONALISATION OF LAWS AND POLICY ON FOREIGN INVESTMENT 72–73 (2016).
\item \textsuperscript{55}ASEAN-Aus-NZ FTA Investment Chapter, supra note 22.
\item \textsuperscript{56}ASEAN-Korea Investment Agreement, supra note 24.
\item \textsuperscript{57}ASEAN-China Investment Agreement, supra note 23.
\item \textsuperscript{58}ASEAN-India Investment Agreement, supra note 25.
\item \textsuperscript{59}ASEAN-Hong Kong Investment Agreement, supra note 26.
\end{thebibliography}
A careful understanding of the above treaties alongside ASEAN Member States’ prospective commitments in the RCEP and the CPTPP is critical in light of the AEC’s ongoing development and its distinct path to economic integration.60 The free flow of investment in ASEAN is the third core element of the envisaged ASEAN single market and production base under the AEC, together with the other core elements of free flow of goods, the free flow of services, the freer flow of capital, and the free flow of skilled labor.61 Accordingly, the AEC Blueprint explicitly recognizes that a free and open investment regime “is key to enhancing ASEAN’s competitiveness in attracting foreign direct investment as well as intra-ASEAN investment.”62

To achieve this regime, the AEC Blueprint mandates the establishment of “more transparent, consistent[,] and predictable investment rules, regulations, policies and procedures,” 63 to be undertaken through the following specific enumerated actions:

i. Harmonise, where possible, investment policies to achieve industrial complementation and economic integration;
ii. Streamline and simplify procedures for investment applications and approvals;
iii. Promote dissemination of investment information: rules, regulations, policies and procedures, including through one-stop investment centre or investment promotion board;
iv. Strengthen databases on all forms of investments covering goods and services to facilitate policy formulation;
v. Strengthen coordination among government ministries and agencies concerned;
vi. Consultation with ASEAN private sectors to facilitate investment; and
vii. Identify and work towards areas of complementation ASEAN-wide as well as bilateral integration.64

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61 AEC Blueprint 2025, supra note 3, ¶¶ 9, 11, 16, 19.
63 Id. ¶ 28.
64 Id. ¶ 28(i)–(vii).
ASEAN’s regional investment agreements (as contained in distinct international investment agreements (“IIAs”) or investment chapters in ASEAN free trade agreements (“FTAs”), as well as the individual ASEAN Member States’ BIT programs and investment chapters in their respective FTAs) collectively form the key legal foundations of ASEAN’s emerging regional investment policies. The European Union (“EU”), much unlike ASEAN, is still in the process of defining its architectural “comprehensive European international investment policy” and debating proposed investor-state dispute settlement innovations such as the creation of a “global investment court.” ASEAN is the only regional organization in the world to date that has swiftly concluded six regional investment agreements, as either stand-alone investment treaties or investment chapters in ASEAN FTAs.

As of this writing, ASEAN is still exploring other possible regional investment agreements, albeit at different stages of political dialogue. It is in negotiations with the EU. Notwithstanding the EU’s bilateral FTAs with individual ASEAN Member States (such as Singapore), the EU has indicated interest in a future region-to-region FTA. The United States has previously shown interest in a trade and investment partnership with ASEAN through the Obama Administration’s Expanded Economic Engagement (“E3”) Initiative, which sought to address investor protection.

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66 See Shawn Donnan, EU Calls for Global Investment Court, FIN. TIMES (May 5, 2015), https://www.ft.com/content/c1f2c4b2-f34a-11e4-8141-00144feab7b; see also Commission Concept Paper on Investment in TTIP and Beyond—The Path for Reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards an Investment Court (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

67 See Desierto, supra note 17, at 1020–22.


70 There is no FTA between the United States and ASEAN to date, with parties still proceeding under the 2006 TIFA. See US-ASEAN TIFA, supra note 51; see also Murry Hiebert, The E3 Initiative: The United States and ASEAN Take a Step in the Right Direction, CTR. FOR STRATEGIC & INT’L STUD. (Dec. 21, 2012), http://csis.org/publication/e3-initiative-united-states-and-asean-take-step-right-direction. Several ASEAN Member States (Brunei Darussalam, Malaysia, Singapore, and Vietnam) were individually engaged in
investment negotiations with Canada are being conducted under the 1991 ASEAN-Canada Economic Cooperation Agreement.\textsuperscript{71}

It is also critical to stress at the outset that each ASEAN Member State maintained its respective BIT program (either in the form of stand-alone BITs or as investment chapters in a Member State’s own FTAs with other partners) in addition to ASEAN’s regional investment agreements. As of this writing, there are a total of 644 BITs or investment chapters in FTAs from all ten ASEAN Member States.\textsuperscript{72} No reported investor-state dispute has yet arisen from any of the ASEAN regional investment treaties.\textsuperscript{73}

Part III of this Article will compare and contrast the ASEAN regional investment treaty provisions with provisions of the draft RCEP investment chapter on the following matters: (1) the definition of “investment” and


\textsuperscript{72}Data aggregated as of March 31, 2015, through IIAs databases provided by UNCTAD. See \textit{IIA Databases}, UNCTAD, http://unctad.org/en/pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Tools.aspx (last visited Feb. 24, 2018). Brunei Darussalam has eight BITs (five of which are in force) and seventeen investment chapters in FTAs (fifteen of which are in force). \textit{Id.} Cambodia has twenty-one BITs (eleven of which are in force) and fifteen investment chapters in FTAs (thirteen of which are in force). \textit{Id.} Indonesia has sixty-four BITs (forty-six of which are in force) and fifteen investment chapters in FTAs (thirteen of which are in force). \textit{Id.} However, Indonesia has recently announced its inclination to terminate, suspend, or review its pre-existing investment treaty program. See Ben Bland & Shawn Donnan, \textit{Indonesia to Terminate More Than 60 Bilateral Investment Treaties}, Fin. \textit{Times} (Mar. 26, 2014), https://www.ft.com/content/3755c1b2-b4e2-11e3-a9f2-00144feabdc0. Laos has twenty-four BITs (nineteen of which are in force) and sixteen investment chapters in FTAs (thirteen of which are in force). \textit{IIA Databases, supra}. Malaysia has sixty-nine BITs (fifty of which are in force) and twenty-two investment chapters in FTAs (nineteen of which are in force). \textit{Id.} Myanmar has eight BITs (five of which are in force) and fifteen investment chapters in FTAs (twelve of which are in force). \textit{Id.} The Philippines has thirty-seven BITs (thirty-one of which are in force) and fourteen investment chapters in FTAs (twelve of which are in force). \textit{Id.} Singapore has forty-five BITs (thirty-eight of which are in force) and twenty-seven investment chapters in FTAs (twenty-five of which are in force). \textit{Id.} Thailand has thirty-nine BITs (thirty-six of which are in force) and twenty-two investment chapters in FTAs (eighteen of which are in force). \textit{Id.} Vietnam has sixty BITs (forty-six of which are in force) and nineteen investment chapters in FTAs (fifteen of which are in force). \textit{Id.}

\textsuperscript{73}The sole arbitration case brought to date under an ASEAN investment agreement is Yaung Chi Oo Trading Pte. Ltd. v. Gov’t of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/01, Award (Mar. 31, 2003), 42 I.L.M. 540 (2003). The case involved pre-ASEAN Charter regional investment instruments, such as the 1987 Agreement Among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments; the 1996 Protocol to Amend the Agreement for the Promotion and Protection of Investments; the 1998 Framework Agreement for the ASEAN Investment Area; and the 1998 Agreement Between the Government of the Republic of Philippines and the Government of the Union of Myanmar for the Promotion and Reciprocal Protection of Investments. \textit{Id. ¶¶ 2, 683}.
“investors”; (2) the substantive investment protection treaty standards; (3) exceptions, reservations, and other host-state clauses to defend regulatory policies; (4) transparency requirements and treaty monitoring or oversight institutions (if any); and (5) investor-state dispute settlement options. Part IV discusses particular difficulties that can be anticipated from the continuing explosion of ASEAN regional investment treaties without providing for mechanisms for legal harmonization on investment protection standards and public policy innovations for host-states and omitting to design institutional coordination at the regional level for the proper monitoring, oversight, and implementation of these regional treaties. It will also discuss implications of the diversity of dispute settlement mechanisms in these regional treaties against the broader framework of dispute settlement processes contemplated by the AEC. This includes the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, which applies to all “future ASEAN economic agreements,” as well as the ASEAN Charter provisions on interstate disputes. In conclusion, this Article briefly identifies recommendations for legal harmonization mechanisms and institutional coordination for ASEAN Member States to consider.

III. JUXTAPOSING ASEAN REGIONAL INVESTMENT TREATY POLICY WITH THE RCEP AND CPTPP

There are common provisions and similar approaches in the ASEAN regional investment treaties and the draft investment chapters in the RCEP and CPTPP, which should cause concern over how ASEAN could consistently defend the policy and regulatory spaces of the ASEAN Member States at the regional level.

A. Definition of “Covered Investment”

The definition of “covered investment” is crucial to determining the threshold scope of the applicability ratione materiae of any investment treaty. The RCEP draft investment chapter defines a “covered investment” as:

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[A]n investment in [the] territory of an investor of another Party, which is in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted, according to its laws, regulations and national policies, at that time[,] and where applicable, specifically approved in writing by its competent authority.\textsuperscript{77}

Furthermore, the same draft defines “investment” as:

[A]n enterprise constituted, organised and operated in good faith by an investor in accordance with the law of a Party in whose territory the investment is made, taken together with the assets of the enterprise [or] every kind of asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, certain duration, the expectation of gain/s or profit/s, or the assumption of risk . . . and a significance for the development of the host State.\textsuperscript{78}

The RCEP draft investment chapter also contains a non-exhaustive enumeration of different forms of investment that would be protected under this treaty, including:

[S]hares, stocks, bonds and debentures . . . rights under contracts . . . [c]opyrights, . . . patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the host State; . . . claims to money or to any contractual performance related to a business . . . licences, authorisations, permits, and/or similar rights conferred pursuant to domestic . . . law of the Host State . . . [and] any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value.\textsuperscript{79}

The above definitions are almost identical to the definitions of “covered investment” and “investment” in the CPTPP draft investment chapter.\textsuperscript{80}

\textsuperscript{77} RCEP Draft Investment Chapter, supra note 27, at 5 (drafting markups omitted).
\textsuperscript{78} Id. at 7 (footnote omitted) (drafting markups omitted).
\textsuperscript{79} Id. at 7–9 (footnotes omitted) (drafting markups omitted).
\textsuperscript{80} See CPTPP Draft Investment Chapter, supra note 28, art. 9.1.
Unlike the RCEP draft investment chapter, the definition of “investment” in the CPTPP draft investment chapter does not contain any reference to money claims, and expressly excludes from its enumerated forms of investment any “order or judgment entered in a judicial or administrative action.” This is similar to an alternative provision in the draft RCEP investment chapter, which does contain a clause “for greater clarity,” specifying that “investment” does not include certain assets of an enterprise, such as: portfolio investments, futures, or debt securities; claims to money arising from commercial sales contracts or from the extension of credit in a commercial transaction; “goodwill, brand value, market share or similar intangible rights;” or any “order or judgment sought or entered in any judicial, administrative, or arbitral proceeding.” The draft RCEP language defining “covered investment” and “investment” resembles treaty language adopted in various other investment agreements. They differ distinctly from the CPTPP draft investment chapter, which defines “covered investment” and “investment” without any legality clauses (e.g. investment is made in accordance with laws of the host-state), and also do not consider the significance of the investment’s contribution to the development of the host-state. ASEAN’s regional investment treaties, together with the RCEP draft investment chapter and the CPTPP draft investment chapter, still generally permit a fairly expansive asset-based assessment in the forms of investment beyond the traditional sources of FDI (e.g. manufacturing operations, greenfield investments, utilities and energy concessions, among others).

Definitions of “investors” in the draft RCEP investment chapter and the ASEAN regional investment treaties also carefully reflect the diversity of nationality, citizenship, and residency requirements as well as the laws of Southeast Asian states and their external partners. The draft RCEP investment chapter defines the “investor of a Party” as:

81 Id.
82 RCEP Draft Investment Chapter, supra note 27, at 10.
83 See, e.g., ACIA, supra note 21, art. 4, ¶ 1(a), (c); ASEAN-India Investment Agreement, supra note 25, art. 2, ¶ 1(e); ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 2, ¶ 1(a), (c); ASEAN-Korea Investment Agreement, supra note 24, art. 1, ¶ 1(c), (j); ASEAN-China Investment Agreement, supra note 23, art. 1, ¶ 1(d); ASEAN-Hong Kong Investment Agreement, supra note 26, art. 1, ¶ 1(b), (c).
[A] Party [or a] state enterprise thereof[, a] national/natural person of a Party or a juridical person/an enterprise of a Party, that seeks[,] attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.\textsuperscript{86}

The definition carries a “for greater certainty” footnote, stating that:

[T]he Parties understand that an investor that . . . “seeks[” or] “attempts to make” an investment when that . . . investor . . . has taken concrete action or . . . active steps to make an investment such as channelling resources or capital in order to set up a business, or applying for permits or licences. Where a notification or approval process is required for making an investment, an investor that “seeks to make” an investment refers to an investor of another Party that has initiated such notification or approval process.\textsuperscript{87}

This is a more elaborate definition with substantial qualifiers when compared to how narrowly “investor” is defined in other ASEAN investment agreements.\textsuperscript{88} Significantly, Article 9.1 of the CPTPP draft investment chapter purposely considers whether States can themselves be deemed as investors.\textsuperscript{89} It should also be noted that, while both the ASEAN regional investment treaties and the draft RCEP investment chapter painstakingly clarify the respective rules and requirements for citizenship, naturalization, and permanent residency that would qualify an individual to qualify as a covered investor, as well as rules for juridical persons, none of these agreements contain any guidance on the matter of “territory” in which

\textsuperscript{86} RCEP Draft Investment Chapter, supra note 27, at 12 (footnotes omitted) (drafting markups omitted).

\textsuperscript{87} Id. (drafting markups omitted).

\textsuperscript{88} See, e.g., ACIA, supra note 21, art. 4, ¶ 1(d) (“[A] natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State”); ASEAN-India Investment Agreement, supra note 25, art. 2, ¶ 1(f); ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 2, ¶ 1(d); ASEAN-Korea Investment Agreement, supra note 24, art. 1, ¶ 1(k); ASEAN-China Investment Agreement, supra note 23, art. 1, ¶ 1(e); ASEAN-Hong Kong Investment Agreement, supra note 26, art. 1, ¶ 1(f).

\textsuperscript{89} CPTPP Draft Investment Chapter, supra note 28, art. 9.1 (“[I]nvestor of a Party means a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party.”).
investment is made. The CPTPP draft investment chapter does not attempt to clarify these aspects. For a region such as Southeast Asia, which remains mired in considerable unsettled maritime and territorial delimitation disputes, it is concerning that no guidance exists in any of these treaties on the interpretation of “territory” in relation to the definition of “investors,” “investments,” and “covered investments.”

A notable feature in the ASEAN regional investment treaties is how they 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.” The ASEAN-Aus-NZ FTA Investment Chapter describes a covered investment as one “which, where applicable, has been admitted by the host Party, subject to its relevant laws, regulations[,] and policies.” 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.” It further clarifies that the term “policies” is limited to “those affecting investment that are endorsed and announced by the Government of a Party, and made publicly available in a written form.” 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.” The ASEAN-India Investment Agreement likewise refers to investments that have been admitted by a Party “subject to its relevant laws, regulations[,] and policies.” The ASEAN-Hong Kong Investment Agreement refers to covered investments as those that have been “admitted, according to its laws, regulations[,] and policies, and where applicable, specifically approved in writing by its competent authorities.”

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91 ACIA, supra note 21, art. 4, ¶ 1(a).
92 ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 2, ¶ 1(a) (footnote omitted).
93 ASEAN-China Investment Agreement, supra note 23, art. 1, ¶ 1(d) (footnote omitted).
94 Id. art 1, ¶ 1(d) n.1.
95 ASEAN-Korea Investment Agreement, supra note 24, art. 1, ¶ 1(c) (footnote omitted).
96 ASEAN-India Investment Agreement, supra note 25, art. 1, ¶ 1(b). Although this provision contains a clarifying footnote limiting protection to investments “which have been specifically approved in writing for protection by the competent authorities” in regard to Thailand, and “in the case of Cambodia and Vietnam, ‘has been admitted’ means ‘has been specifically registered or approved in writing,’ as the case may be.” Id. art 1, ¶ 1(b) n.1.
writing by its competent authority.”97 These are almost identical to the RCEP draft investment chapter’s formulation for covered investments. The RCEP draft investment chapter attempts to enumerate measures taken by a host-state to include “any law, regulation, rule, procedure, requirement or practice[.,] decision, administrative action, or in any other form affecting investors and/or investments.”98 Significantly, the CPTPP draft investment chapter does not contain any such reference to “laws, regulations, and policies” in its definition of covered investments.

The asymmetric and ambiguous content of the phrase “laws, regulations, and policies” in the ASEAN regional investment treaties and RCEP draft investment chapter, coupled with its omission from the CPTPP draft investment chapter, introduces uncertainty as to the scope of covered investments in ASEAN’s regional investment treaty commitments. The purpose of introducing such qualifications of compliance with “laws, regulations, and policies” to the scope of covered investment, ordinarily, is “to prevent the [BIT] from protecting investments that should not be protected, particularly because they would be illegal.”99 However, it is the very same breadth and ambiguity of the corpus of “laws, regulations, and policies” with which investments are expected to comply. This 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 “in accordance with host state law” clauses. The host-state has the burden to prove the illegality of the investment as a jurisdictional basis to deny a foreign investor the applicability of investment treaty protections.100 Often, these kinds of clauses are narrowly read to require investments to have complied with host-state law only at the time of the admission or establishment of the investment.101 Early investor-state arbitral decisions interpreting these kinds of clauses, such as L.E.S.I. v. Algeria and Desert Line

97 ASEAN-Hong Kong Investment Agreement, supra note 26, art. 1, ¶ 1(b).
98 RCEP Draft Investment Chapter, supra note 27, at 13 (drafting markups omitted).
v. Yemen, both took the position that these clauses only referred to "fundamental principles of the host State’s law."  

The above narrow position has been repudiated in subsequent arbitral awards. The subject-matter scope of “in accordance with host-state law” clauses can be 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. Inceysa Vallisoletana v. El Salvador treated this type of clause as a critical requirement when assessing the existence of a covered investment. The arbitral tribunal found sufficient grounds for depriving subject-matter jurisdiction for the investment’s failure to comply with domestic legal principles (i.e. the prohibitions against unjust enrichment and benefiting from one’s own wrongdoing) due to the investor’s acts during the bidding process. The “in accordance with host state law” clause has also been argued to encompass criminal acts, such as bribery and corruption, as well as the host-state’s procedural rules for acceptance and admission of foreign investments. In Fraport AG Frankfurt Services Worldwide v. Philippines, the tribunal also held that when an investment fails to comply with local anti-dummy legislation, it is less likely to benefit from the coverage of the relevant BIT. Anderson v. Costa Rica noted that a BIT that contained an “in accordance with host-state law” clause was a:

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102 Desert Line Projects L.L.C v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, ¶ 104 (Feb. 6, 2008), 48 I.L.M. 82 (2009); see also L.E.S.I. S.p.A. v. République algérienne démocratique et populaire, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶ 83(iii) (July 12, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C48/DC528_Fr.pdf.


105 Id.


[C]lear 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.\textsuperscript{109}

The banking regulations at issue in the \textit{Anderson} tribunal decision were one type of state law with which investments must comply to benefit from treaty protection.\textsuperscript{110} However, arbitral tribunals have not construed all domestic laws to fall within the ambit of “in accordance with host state law” clauses so as to deny treaty protection to investments.\textsuperscript{111} \textit{Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine}, for example, illustrated that failure to comply with domestic laws on the mandatory registration of investments did not necessarily render investments illegal when domestic law did not provide for this consequence.\textsuperscript{112}

Finally, the recurring references to domestic law throughout ASEAN’s regional investment commitments cause difficulty when determining the precise content of the local policy or domestic law to which the “covered investment” is supposed to conform. One should bear in mind that ASEAN Member States include a vast number of legal regimes, traditions, and systems of government.\textsuperscript{113} It is not readily evident how much of domestic law is contemplated—does “covered investment” refer not just to investment statutes and administrative issuances, but also to related statutes on environment, labor laws, social laws, corporate reportorial requirements, among others? Undertaking the comparative work 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,

\textsuperscript{110} Id. ¶¶ 55–57.
\textsuperscript{111} See Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Award, ¶ 97 (July 26, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0866.pdf (rejecting minor administrative defects as a basis to show the illegality of an investment).
prospective foreign investors now conducting their due diligence in ASEAN Member States would have to include the content of domestic laws *a priori* to evaluate the actual protection afforded by ASEAN’s regional investment treaties and prospective commitments under the RCEP draft investment chapter and CPTPP draft investment chapter. More importantly, the lack of clarity and harmonization in how ASEAN treats the scope of “covered investments” could give rise to claims that some external partners are ultimately favored and given better access to investment protection by ASEAN than other external partners.

**B. Substantive Investment Protection Standards**

The RCEP draft investment chapter provides very detailed clauses, consolidated criteria, tests, and footnoted clarifications on extending protections to investors and investments based on national treatment, most-favored-nation treatment, and minimum standard of treatment. In regard to the national treatment standard, for example, the RCEP draft investment chapter defines national treatment as the obligation to:

[A]ccord to investors of another/the other Party, and to covered investments of investors of any other Party[,] treatment no less favorable than that it accords through its measures, in like circumstances, to its own investors with respect to the establishment, . . . acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

However, the next provision in that same Article states:

A determination of whether investments or investors are in “like circumstances” should be made, based upon an objective assessment of all circumstances on a case-by-case basis, including, inter alia:

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114 As of this writing, the only handbook on an ASEAN regional investment treaty does not contain any index on the relevant domestic laws that may apply, nor does it contain any references or authorities for investors to locate such domestic laws. See ASEAN SECRETARIAT, ASEAN COMPREHENSIVE INVESTMENT AGREEMENT: A GUIDEBOOK FOR BUSINESSES AND INVESTORS (2d ed. 2015).
116 *Id.* at 1820.
117 *Id.* at 20–22.
118 *Id.* at 16–17 (drafting markups omitted).
i. the sector the investor is in;
ii. the location of the investment;
iii. the aim of the measure concerned; and
iv. the regulatory process generally applied in relation to the measure concerned. The examination shall not be limited or biased towards any one factor.\footnote{Id. at 17.}

The most-favored nation (“MFN”) standard is the obligation to “accord to investors of another/any other Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or . . . non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”\footnote{Id. at 18–19 (drafting markups omitted).} However, the RCEP draft investment chapter also sets forth matters that will not be subject to MFN treatment, such as “any 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;” as well as “any existing or future preferential treatment accorded to investors and/or their investments in any agreement or arrangement between or among ASEAN Member States.”\footnote{Id. at 19.} The minimum standard of treatment is spelled out in the RCEP draft investment chapter as a duty of all parties not to:

[S]ubject Covered Investments made by investors of the other Party to measures which constitute a violation of customary international law, through:

i. denial of justice in any judicial or administrative proceedings; or
ii. fundamental breach of due process; or
iii. targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
iv. manifestly abusive treatment, such as coercion, duress and harassment.\footnote{Id. at 20 (footnote omitted).}

The same provision continues on to detail specific provisions prescribing fair and equitable treatment, full protection, and security, among other things.
Most significantly, the draft RCEP investment chapter articulates the parties’ express understanding that “each Party has different forms of administrative, legislative and judicial systems and that each Party at different levels of development may not achieve the same standards at the same time,” noting that the minimum standard of treatment provision “does not establish a single international standard in this context.”

In contrast, the CPTPP draft investment chapter contains fewer detailed qualifications in its standards for investment protection than the RCEP draft investment chapter. The CPTPP draft investment chapter’s traditional formulation of national treatment determines the required treatment “in like circumstances” according to the “totality of circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives,” without explaining the conceptual parameters of such “legitimate public welfare objectives.” The MFN treatment standard is liberal in scope and is only barred from application to dispute resolution mechanisms. This is intended to avoid controversies over third parties accessing the investor-state dispute settlement mechanism through MFN clauses.

There is even more disparity between the substantive investment protection standards in the RCEP investment chapter and the more concise and restrained language in the ASEAN regional investment treaties. Unlike these provisions in the ASEAN regional investment treaties which are largely confined to definitions of the treaty standards and express exclusions (e.g., ruling out subject matter not covered by the treaty standard), the RCEP draft investment chapter provides determinative tests clearly intended to guide the task of interpreting treaty standards. Similarly, the more recent ASEAN-Hong Kong Investment Agreement followed the RCEP model by limiting the application of MFN treatment with qualifications and determinative tests.

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123 Id. at 21–22.
124 CPTPP Draft Investment Chapter, supra note 28, art. 9.4 & n.14.
125 Id. art. 9.5, ¶ 3 (“For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).”.
126 See Martins Paparinskis, MFN Clauses and International Dispute Settlement: Moving Beyond Maffezini and Plama?, ICSID REV., Fall 2011, at 14.
127 See ACIA, supra note 21, arts. 5, 6, 11; ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, arts. 4, 6; ASEAN-Korea Investment Agreement, supra note 24, arts. 3–4, 6; ASEAN-India Investment Agreement, supra note 25, arts. 3, 7; ASEAN-China Investment Agreement, supra note 23, arts. 4–5, 7.
128 See ASEAN-Hong Kong Investment Agreement, supra note 26, art. 4, ¶ 3(a), (b) (excluding MFN treatment for “(a) preferential treatment accorded to investors or their investments under any existing
as well as by providing for a much narrower scope to the protection afforded under the fair and equitable treatment (“FET”) standard and full protection and security (“FPS”) standard.

C. Exceptions, Reservations, and Other Host-State Calibration Clauses

Similar to the ASEAN regional investment treaties’ detailed exceptions provisions, reservations clauses, and other clauses intended to calibrate the host-state’s regulatory discretion and policy space, the RCEP draft investment chapter contains extensive provisions designed to protect the host-state’s right to regulate. These include more restrictions on the applicability of the RCEP draft investment chapter, such as the right to exclude government procurement measures, subsidies or grants; state aid or financial assistance in pursuit of legitimate public purposes (such as health, safety, and the environment); and taxation measures. The RCEP draft investment chapter also contains a separate Article XX listing detailed reservations and non-conforming measures, legal justifications for host-states to restrict capital transfers, and a separate annex to clarify the rules on expropriation (including tests for indirect expropriation). Unlike the ASEAN regional investment treaties, the draft RCEP investment chapter does not contain separate provisions on general exceptions and/or security exceptions. The ASEAN regional investment treaties usually pattern these exceptions after Article XX (General Exceptions) and Article XXI (Security Exceptions) of the General Agreement on Tariffs and Trade (“GATT”).

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129 Id. art. 5, ¶ 1(a) (“[FET] requires each Party not to deny justice in any legal or administrative proceedings in accordance with the principle of due process of law”); id. art. 5, ¶ 1(b) (“[FPS] requires each Party to take such measures as may be reasonably necessary for the physical protection and security of the covered investment”); id. art. 5, ¶ 1(c) (“[T]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights”); id. art. 5, ¶ 2 (“[A] determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article”).

130 For a detailed discussion, see generally Desierto, supra note 17.


132 Id. at 27–30.

133 Id. at 30–35.

134 Id. at 42–45.
In contrast, the CPTPP draft investment chapter does not make extensive use of the above kinds of provisions to protect the host-state’s right to regulate. Rather, it relies on a single provision in Article 9.16 of the CPTPP, which does not specify the consequences for a host-state that invokes its right to regulate in a manner that breaches investment treaty protection standards. The provision states that “[n]othing in this Chapter shall be construed to prevent a Party from adopting, maintaining[,] or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.”

It is not clear from this provision if the host-state adopting, maintaining, or enforcing its self-judged regulatory measure would be able to avoid or mitigate liability for a breach of investment treaty standards. The CPTPP draft investment chapter does not contain any general exceptions or security exceptions clauses. This contrasts with several of ASEAN regional investment treaties that also incorporate exceptions clauses modeled after GATT Article XX (General Exceptions) and Article XXI (Security Exceptions).

Exceptions clauses purposely grafted from GATT Articles XX and XXI have not yet been interpreted in investor-state jurisprudence. The award in *Continental Casualty Company v. Argentina* attempted to apply a GATT Article XX-type meaning to a one-sentence non-precluded measures clause. However, that approach has been repeatedly critiqued and disregarded by most investment arbitral tribunals. The exceptions clauses in the new ASEAN investment treaties are thus likely to be the most recent examples of direct transposition of GATT law into investment treaty practices. 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

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135 CPTPP Draft Investment Chapter, supra note 28, art. 9.16.
136 ACIA, supra note 21, arts. 17–18; ASEAN-China Investment Agreement, supra note 23, arts. 16–17; ASEAN-Korea Investment Agreement, supra note 24, arts. 20, 21; ASEAN-India Investment Agreement, supra note 25, arts. 21–22; ASEAN-Hong Kong Investment Agreement, supra note 26, arts. 8–9.
conduct some examination of GATT law and jurisprudence in interpreting the provisions of GATT law grafted into the new ASEAN investment treaties.

While there might well be nothing extraordinary about incorporating jurisprudential insights from trade law into investment treaty practices, some caution may be warranted due to teleological and structural design differences between the two treaty regimes. The most fundamental difference is a matter of remedy. World Trade Organization (“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 to investors for past economic injuries to their investment caused by a host-state’s measures. To the extent that a WTO Member State can successfully persuade the WTO tribunals (Panel or Appellate Body) that the contested measure falls within any of the exceptions in GATT Articles XX or XXI, it would not have to revise the measure at all.

On the other hand, if a host-state were to successfully show that its contested regulatory measure in an investor-state dispute falls within an exception under the general exceptions or security exceptions clauses in the new ASEAN investment treaties, would they foreclose 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)? Would they bar recourse to investor-state dispute settlement (a third-order defense)? The exceptions clauses in ASEAN regional investment treaties do not resolve any of these questions. It is thus entirely reasonable to expect that foreign investors would not be likely to bring their claims under the ASEAN regional investment treaties, where it is not clear what the legal consequences are when a host-state invokes a general exceptions clause or security exceptions clause in any of the ASEAN regional investment treaties.

142 Id. at 117–33.
Finally, it should also be observed that the ASEAN regional investment treaties expressly bar the application of the treaty to a closed list of Member State measures. These provisions in the ASEAN regional investment treaties are difficult to reconcile given evolving understandings of the ordinary scope of business practices. As with any other business entity, income from investment operations (usually through onshore corporate activities in the host-state) would generally be taxed (subject 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. Additionally, investment operations may entail contemporary legal configurations, such as “public-private partnerships,” for the delivery of public goods and services, which would ordinarily be subject to government procurement and bidding laws. Host-state measures in relation to trade in services may likewise impact investment operations and overall profitability. Carving out these areas automatically from the protective guarantees in the ASEAN regional investment treaties conveys 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.

Furthermore, the new ASEAN investment treaties contain detailed reservations clauses, which are reflective of possible protectionist tendencies and politically sensitive areas. The ACIA acknowledges that national treatment protection does not apply to measures indicated in the Schedule attached to the ACIA (regardless of whether such measures arise from the

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144 ACIA, supra note 21, art. 4, ¶ 1(a)–(e); ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 1, ¶ 2(a)–(c); ASEAN-China Investment Agreement, supra note 23, art. 3, ¶ 4(a)–(e); ASEAN-Korea Investment Agreement, supra note 24, arts. 2, ¶ 2(a)–(f); ASEAN-India Investment Agreement, supra note 25, art. 1, ¶ 2(a)–(d), 3; ASEAN-Hong Kong Investment Agreement, supra note 26, art. 2, ¶ 2(a)–(f), 3.

145 See Catherine Donnelly, Public-Private Partnerships: Award, Performance, and Remedies, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 476, 476–77 (Stephan W. Schill ed., 2010) (“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 programme and state healthcare programmes such as Medi-cal, federal student loan programmes, probationary services, schools, prisons, and military services.”).


central, regional, or local government).\textsuperscript{148} 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,\textsuperscript{149} 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.\textsuperscript{150} 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.”\textsuperscript{151} As the Agreement does not indicate or describe which measures are deemed to be non-conforming, this potentially broad carve out also does not appear to be subject to any legal obligation to revise the measure to ensure 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.”\textsuperscript{152} Finally, the reservations clause in the ASEAN-Korea Investment Agreement appears more extensive than the other new ASEAN investment treaties. It denies national treatment protection, MFN treatment protection, and the applicability of rules on senior management and boards of directors to non-conforming measures indicated in the Schedule of Reservations, continuation or prompt renewal of any non-conforming measure, and amendments to such non-conforming measures.\textsuperscript{153} National treatment and MFN treatment is likewise denied for measures set out in List 2, this time with respect to specified sectors, sub-sectors, or activities.\textsuperscript{154}

In principle, reservation clauses comprise fundamental treaty mechanisms\textsuperscript{155} that could guarantee ASEAN Member States and their counterpart states in the new ASEAN investment treaties retain flexibility to insulate certain government measures or areas of regulation from subordination to international investment treaty obligations. Nevertheless, Member States should also be aware of the corresponding administrative and

\textsuperscript{148} ACIA, supra note 21, art. 9.
\textsuperscript{149} ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 12.
\textsuperscript{150} ASEAN-India Investment Agreement, supra note 25, art. 4, ¶ 1–6.
\textsuperscript{151} ASEAN-China Investment Agreement, supra note 23, art. 6, ¶ 1(a), (b).
\textsuperscript{152} Id. art. 6, ¶ 2.
\textsuperscript{153} ASEAN-Korea Investment Agreement, supra note 24, art. 9, ¶ 1.
\textsuperscript{154} Id. art. 9, ¶ 2.
institutional costs attendant to maintaining reservations to the new ASEAN investment treaties. Reservations against investment treaty coverage that are drawn too specifically and without the necessary adjustment and review clauses may be difficult to withdraw or amend in the future. Such clauses could hinder the ASEAN Economic Community’s evolution and development of further investment objectives and policies, including investment promotion plans, regulatory incentives, and other legal protections to attract more inward direct investment to ASEAN. Investments in services sectors, for example, which are often the subject of many reservations clauses in investment treaties, could 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, multi-stage investment projects and the regulatory umbrella that extends over the entire project or operation may not be easily compartmentalized 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 and not the other, but the investor injury asserted may be integral or holistic in nature (e.g., a drop in shareholding prices for the holding company that manages the complex, multi-stage investment project). To the extent that the ASEAN regional investment treaties deliberately reserve various measures and sectors from treaty protection, a counterpart institutional or administrative structure within the ASEAN Secretariat/CCI may also be necessary to monitor and contextualize the implementation of these clauses.

The ASEAN regional investment treaties also 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

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156 RCEP Draft Investment Chapter, supra note 27, at 70.
158 For more on measures for encouraging inward direct investment, see PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES & THE LAW 216–62 (2d ed. 2007).
its domestic laws, such as those on bankruptcy, securities regulation, criminal offences, financial reporting, enforcement of administrative or judicial decisions, taxation, social security, labor claims, and other domestic requirements by central banks or other relevant authorities that would permit restrictions on transfers. 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. These provisions permit the Member States to impose restrictions on capital transactions and transfers relating to covered investments in development or financial crises situations that are largely self-judged by the Member States. The desire to maintain governmental control over monetary flows, even while attempting to liberalize investment, is particularly understandable for a region that bore the brunt of the Asian financial crisis. However, these provisions also introduce unpredictability to the overall quality of investment protection afforded by the new ASEAN investment treaties. 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. Furthermore, the new ASEAN investment treaties do not afford any direct investor recourse against the potential arbitrariness, illegality, or inconsistency of a Member State’s capital and transfer restrictions. At best, the ASEAN-India Investment Agreement calls for joint consultations between treaty parties to review such transfer restrictions. Even if the measures to safeguard the balance of payments are required to be “consistent” with the International Monetary Fund’s (“IMF”) Articles of Agreement, the investment treaty provisions remain the controlling

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160 Article 13 of the ACIA, supra note 21, contains substantially the same, if not identical, language as Article 8 (“Transfers”) of the ASEAN-Aus-NZ FTA Investment Chapter, supra note 22; Article 10 (“Transfers and Repatriation of Profits”) of the ASEAN-China Investment Agreement, supra note 23; Article 10 (“Transfers”) of the ASEAN-Korea Investment Agreement, supra note 24; and Article 11 of the ASEAN-India Investment Agreement, supra note 25.

161 Article 16 of the ACIA, supra note 21, contains substantially the same, if not identical, language as Article 11 (“Temporary Safeguard Measures”) in the ASEAN-Korea Investment Agreement, supra note 24; Article 11 (“Measures to Safeguard the Balance of Payments”) in the ASEAN-China Investment Agreement, supra note 23; and Article 12 (“Temporary Safeguard Measures”) in the ASEAN-India Investment Agreement, supra note 25. The ASEAN-Aus-NZ FTA Investment Chapter, supra note 22; and the ASEAN-Japan FTA, supra note 52, do not contain any such provisions.


164 ASEAN-India Investment Agreement, supra note 25, art. 12, ¶¶ 5–6.
lex specialis.\textsuperscript{165} Since the new ASEAN 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 to 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 anticipate that investors would have to forecast higher risks to their investment because of the increased uncertainty whenever an ASEAN Member State imposes restrictions on capital transfers.\textsuperscript{166}

The ASEAN regional investment treaties feature unique provisions addressing the development concerns between the different ASEAN Member States. The newer ASEAN Member States—Cambodia, Myanmar, Laos, and Vietnam—benefit from different expectations of compliance with the new ASEAN investment treaties. The ACIA recognizes that “commitments by each newer ASEAN Member State may be made in accordance with its individual stage of development.”\textsuperscript{167} Similar formulations appear in the ASEAN-Aus-NZ FTA Investment Chapter,\textsuperscript{168} the ASEAN-Korea Investment Agreement,\textsuperscript{169} the ASEAN-Japan Investment Chapter,\textsuperscript{170} the ASEAN-India Investment Agreement,\textsuperscript{171} and the ASEAN-Hong Kong Investment Agreement.\textsuperscript{172} Special and differential treatment (“SDT”) is a familiar principle in world trade law that permits developing countries to adjust policies to conform to trade commitments at a different pace and schedule.

\begin{itemize}
\item \textsuperscript{166} See Diane A. Desierto & Desiree A. Desierto, \textit{Investment Pricing and Social Protection: A Proposal for an ICESCR-Adjusted Capital Asset Pricing Model}, 28 ICSID REV. 405 (2013), 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.
\item \textsuperscript{167} ACIA, \textit{supra} note 21, art. 23, ¶ 1(c).
\item \textsuperscript{168} ASEAN-Aus-NZ FTA Investment Chapter, \textit{supra} note 22, art. 15, ¶ 1(d).
\item \textsuperscript{169} ASEAN-Korea Investment Agreement, \textit{supra} note 24, art. 16, ¶ 1(d) (recognizing that commitments by each new ASEAN Member State can be made in line with its respective development policies and strategies).
\item \textsuperscript{170} While the SDT provision does not appear in Article 51—the single investment provision—of the ASEAN-Japan FTA, SDT is provided for in Article 2, Paragraph 1(c) (“Principles”), which is not contained in the investment chapter. ASEAN-Japan FTA, \textit{supra} note 52, art. 2, ¶ 1(c) (“[S]pecial 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”).
\item \textsuperscript{171} ASEAN-India Investment Agreement, \textit{supra} note 25, art. 16.
\item \textsuperscript{172} ASEAN-Hong Kong Investment Agreement, \textit{supra} note 26, art. 18.
\end{itemize}
than other WTO members. However, the incorporation of this provision in investment treaties is a relatively recent phenomenon. SDT provisions have not yet been interpreted in investor-state jurisprudence. The operation of the SDT principle in the new ASEAN investment treaties will foreseeably create administrative as well as interpretive ambiguities for counterpart treaty parties in the new ASEAN investment treaties. This is due to the lack of monitoring mechanisms and usual schedules of compliance given to other Member States by the developing countries covered by the SDT principle in world trade law. While the WTO Secretariat has already taken an interpretive position on the content of the SDT principle in various trade agreements, none of the ASEAN Member States or their regional investment treaty partners have 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, Myanmar, Laos, 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 of investment protection in the new ASEAN investment 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 ASEAN Member 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 clarify the precise legal effect of an SDT principle. Considering that the CMLV countries nevertheless retain individual BIT programs, it is reasonable to expect that foreign investors would prefer to use BITs of the CMLV countries, which generally do not contain any equivocal language on treaty compliance such as the SDT principle.

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D. Transparency Requirements and Monitoring Institutions

The draft RCEP investment chapter contains various transparency requirements and incorporates rules on transparency for its investor-State dispute settlement provisions consistent with the United Nations Commission on International Trade Law (“UNCITRAL”) Rules on Transparency.\(^{176}\) Unlike the ASEAN regional investment treaties, however, the draft RCEP investment chapter does not contain separate obligations on information transparency and notification of regulatory changes to fellow treaty parties. It does not create a standing treaty monitoring committee or body, but only a “Committee for the Settlement of Investment Disputes.”\(^{177}\) The draft CPTPP investment chapter likewise does not impose detailed transparency requirements, other than to recognize that:

[A] Party may require an investor of another Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.\(^{178}\)

The draft CPTPP investment chapter instead provides for more extensive rules on transparency of arbitral proceedings, open hearings, and public access to information produced in the arbitral proceedings.\(^{179}\)

In contrast, and unlike the usual models of older generations of BITs, the ASEAN regional investment treaties reflect the ASEAN Member States’ desire to retain a broader scope of public policy discretion.\(^{180}\) Many of the ASEAN regional investment treaties’ provisions appear to have been grafted from world trade and WTO law, such as GATT Article XX exceptions that

\(^{176}\) RCEP Draft Investment Chapter, supra note 27, at 51, 66.
\(^{177}\) Id. at 70.
\(^{178}\) CPTPP Draft Investment Chapter, supra note 28, art. 9.14, ¶ 2.
\(^{179}\) Id. art. 9.24.
\(^{180}\) Indonesia has thus far announced its intention to revise its BIT program. See Grace D. Amianti, Govt Revises Investment Treaties, JAKARTA POST (May 12, 2015), http://www.thejakartapost.com/news/2015/05/12/govt-revises-investment-treaties.html.
would ordinarily call for a state to calibrate or change a trade-restrictive measure, but which are instead built into an investment treaty to foreclose any state’s liability for breach of investor protections. There is also a proliferation of many self-judged provisions that would enable any ASEAN Member State to opt out of usual investor treatment protections, such as provisions for free transferability of capital, without consent of other treaty parties, as well as provisions referring to “non-discriminatory regulatory actions by a Party designed and applied to achieve legitimate public welfare objectives, including the protection of public health, safety, and the environment,” which are deemed not to constitute expropriation. There are numerous extensive regional transparency requirements on investors, but no guarantee to those investors of a centralized regional repository of investment regulatory information (e.g., on admission of investments, regulatory treatment, and oversight of foreign investments, or potential sources of changes to the regulatory framework applicable to foreign investment). Perhaps most unique among multi-party investment treaties, the ASEAN regional investment treaties contain explicit provisions on “special and differentiated treatment” for CMLV, the newer ASEAN Member States, which do not specify the extent to which these states are

181 See Diane A. Desierto, ‘For Greater Certainty’: Balancing Economic Integration and Investor Protection in the New ASEAN Investment Agreements, TRANSNAT’L DISPUTE MGMT., no. 5, 2011, at 1, for a detailed dissection of all the public policy provisions across the ASEAN regional investment treaties. See also Desierto, supra note 42, 188–89.

182 See ACIA, supra note 21, art. 13, ¶ 3 (permitting a host-state to delay an investor’s capital transfers due to self-judged economic emergencies); id. art. 16 (allowing restrictions on transfers and payments due to measures taken by a host-state to safeguard its balance of payments); id. art. 17 (“General Exceptions”); id. art. 18 (“Security Exceptions”); ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 3 (permitting delay of investor’s transfers in enumerated domestic situations); ASEAN-Korea Investment Agreement, supra note 24, art. 10, ¶ 2 (permitting delay of investor’s transfers); id. art. 20 (“General Exceptions”); id. art. 21 (“Security Exceptions”); ASEAN-China Investment Agreement, supra note 23, art. 11, ¶ 1 (permitting restrictions on investments and transfers as a measure to safeguard the balance of payments); id. art. 16 (“General Exceptions”); id. art. 17 (“Security Exceptions”).

183 ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, annex, ¶ 4; ACIA, supra note 21, annex 2, ¶ 4.

184 ACIA, supra note 21, arts. 20, 21; ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, arts. 11, 14; ASEAN-Korea Investment Agreement, supra note 24, arts. 8, 15; ASEAN-China Investment Agreement, supra note 23, art. 19.


186 ACIA, supra note 21, art. 23; ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 15; ASEAN-Korea Investment Agreement, supra note 24, art. 16.
permitted to derogate from investor protections in the ASEAN regional investment treaties.

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 allowing Member States to withhold confidential information that, in their view, would prejudice public interests. The ACIA obligates the Member States to at least annually inform the AIA Council of “any investment-related agreements or arrangements . . . where preferential treatment was granted,”187 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.”188 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,”189 and, more importantly, to designate an “enquiry point”190 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.”191 However, the Member States retain the prerogative to restrict disclosure of information in the interests of law enforcement, public interest, and the legitimate commercial interests of particular public or private juridical persons.192

The ASEAN-Aus-NZ FTA Investment Chapter contains similar transparency rules and restrictive disclosure rules as the ACIA,193 but extends transparency rules to administrative proceedings relating to the application of all host-state measures of general application covered in the treaty.194 The ASEAN-China Investment Agreement,195 the ASEAN-Korea Investment Agreement,196 and the ASEAN-Hong Kong Investment Agreement197 all

187 ACIA, supra note 21, art. 21, ¶ 1(a).
188 Id. art. 21, ¶ 1(b).
189 Id. art. 21, ¶ 1(c).
190 Id. art. 21, ¶ 1(d).
191 Id. art. 20, ¶ 2.
192 Id. art. 21, ¶ 2; id. art. 20, ¶ 2.
193 See ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 13, ¶¶ 1–8.
194 Id. art. 13, ¶¶ 9–12.
195 ASEAN-China Investment Agreement, supra note 23, art. 19, ¶¶ 1–3.
196 ASEAN-Korea Investment Agreement, supra note 24, art. 8.
197 ASEAN-Hong Kong Investment Agreement, supra note 26, art. 7.
contain transparency rules and restrictive disclosure rules similarly worded 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.”

It is laudable that the new ASEAN investment treaties have embraced the principle of transparency to ensure regulatory accountability and improvement of the Member States’ collective investment environments. Yet, the overall effectiveness of the transparency guarantees could be undermined by Member States’ 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 counteract the obligatory quality of the transparency rules. Investment arbitration jurisprudence accepts the transparency principle as the basis for investors to expect that a host-state would act:

[I]n 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 . . . .

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198 ASEAN-India Investment Agreement, supra note 25, art. 14, ¶ 1(c).
The broad restrictive disclosure carve-outs for the ASEAN Member States within the new ASEAN 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 seen from the analysis of the foregoing eight common public policy features of the new ASEAN investment treaties, there is little safeguard against a Member State exercising unconstrained discretion to unilaterally opt out of complying with investment protection obligations. Neither is there any reassurance of an open regulatory and information structure that would enable a continuing dialogue between the Member States on their mutual exercise of public policy prerogatives that might weaken or altogether undercut the qualitative protections offered in the new ASEAN investment treaties. This could lead foreign investors to apply older generations of Southeast Asian BITs, which contain fewer regulatory carve-outs favoring host-states.

The main remedy for ensuring regular implementation of the public policy provisions without regulatory uncertainty or unfettered discretion of ASEAN Member States is to ensure transparency and liberalize access to information. Foreign investors cannot realistically 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 the investment risks and returns with regard to ASEAN are inevitably affected by perceptions of the “regulatory restrictiveness” within individual ASEAN Member States. 201 Regulatory uncertainty can be 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. 202

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

201 “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, e.g., FDI Regulatory Restrictiveness Index, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/investment/fdiindex.htm (last visited Feb. 25, 2018); see also Protectionism, INT’L CHAMBER COM., http://www.iccwbo.org/global-influence/g20/reports-and-products/open-markets-index/ (last visited Feb. 25, 2018).

202 See Press Release, Council for Asset and Inv. Mgmt., Inst. Int’l Fin., Top 10 Impediments to Long-Term Infrastructure Financing and Investment (June 2014), https://www.iif.com/system/files/CAIM_Top_10_Impediments_to_LT_Investment_1.pdf (“Concerns about investor/creditor rights, as well as potential changes to the regulatory and policy framework over time can discourage long-term investment.”).
the life of the investment. If deliberately or negligently denied by ASEAN Member States to a foreign investor, these could also likely give rise to a separate actionable claim based on transparency obligations under the ASEAN regional investment treaties. The same treaties also contain procedural transparency rules applicable to investor-state disputes, such as those involving the participation of amicus curiae and access to information by non-disputing parties, among others, which are not uniformly granted in investor-state arbitral jurisprudence. Such information is not only owed to foreign investors but also to fellow ASEAN Member States to ensure Member States are compliant with obligations to foreign investors under these regional treaties. 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”). Because each regional treaty has its own corresponding institutional monitoring body as discussed in Part I.B., it will be critical for each of the Member States to regularly coordinate 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 ASEAN Member States, since domestic foreign investment legislation and policy remains a matter for the ASEAN Member States’ respective national competencies.

Given these regulatory disparities in access to information, it would best serve the interests of ASEAN Member States to ensure that the ASEAN

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203 See Champion Trading Co., Award, ¶ 162 (affirming that an investor could expect the host-state to act in a consistent manner, free from ambiguity, and 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).


205 See, e.g., ACIA, supra note 21, art. 25, ¶ 1(e) (describing 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”); id. art. 26, ¶ 1(c) (describing the duty of all ASEAN Member States to “share information on investment policies and best practices, including promoted activities and industries”).

CCI provide a “one-stop shop” or investment information clearinghouse, similar to those implemented by the North American Free Trade Agreement (“NAFTA”) Commission\(^{207}\) and the Common Market for Eastern and Southern Africa (“COMESA”) Regional Investment Agency.\(^{208}\)

### E. Investor-State Dispute Settlement Options

The draft RCEP investment chapter provides for three key dispute settlement options: consultations, negotiations, and arbitration. The bulk of the draft devotes the most attention to the rules for the conduct of arbitration proceedings.\(^{209}\) The provisions resemble the investor-state dispute settlement options in most of the ASEAN regional investment treaties.\(^{210}\) The 2017 ASEAN-Hong Kong Investment Agreement left its investor-state dispute settlement options to future agreement of the parties.\(^{211}\) The CPTPP draft investment chapter likewise leaves out any definitive investor-state dispute settlement option.

While dispute settlement is an area of ASEAN investment rule-making that is still shrouded in uncertainty, some observations can be made about the dispute settlement options adopted in the ASEAN regional investment treaties. First, despite certain criticisms of the structure, design, and interpretive approaches of arbitral tribunals in the investor-state dispute settlement system,\(^{212}\) ASEAN has not repudiated investor-state arbitration as one of its investor-state dispute settlement options. The ACIA provides for conciliation procedures, consultations, and submission of investor claims.

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\(^{208}\) See About Us: COMESA RIA, COMESA REGIONAL INV. AGENCY, http://www.comesaria.org/site/en/article.php?chaine=comesa-ria&id_article=56 (last visited Feb. 25, 2018) (“[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 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.”).

\(^{209}\) RCEP Draft Investment Chapter, supra note 27, at 45–70.

\(^{210}\) See ASEAN-China Investment Agreement, supra note 23, arts. 13–14; ASEAN-Korea Investment Agreement, supra note 24, arts. 18–19; ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, arts. 18–28; ASEAN-India Investment Agreement, supra note 25, arts. 19–20; ACIA, supra note 21, arts. 28–41.

\(^{211}\) ASEAN-Hong Kong Investment Agreement, supra note 26, art. 20.

\(^{212}\) See generally RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY (Jean E. Kalicki & Anna Joubin-Bret eds., 2015).
against host-states to arbitration. 213 The ASEAN-China Investment Agreement mandates initial consultations to resolve disputes between investors and host-states, and should such consultations fail, the investor is given the choice of local court adjudication, administrative tribunals, International Centre for Settlement of Investment Disputes (“ICSID”) arbitration, UNCITRAL arbitration, or arbitration administered by any other institution under any other rules. 214 The ASEAN-India Investment Agreement provides for a similar extensive choice of forum for investors, but contains strict conditions and limitations to the submission of investor claims. 215 The ASEAN-Korea Investment Agreement requires mandatory consultations and negotiations within a six month period before the investor can submit his or her claim against the host-state to ICSID arbitration, ICSID Additional Facility Rules arbitration, UNCITRAL arbitration, or any other arbitration institution, or to local courts or administrative tribunals. 216 The ASEAN-Aus-NZ FTA Investment Chapter provides for consultations before an investor can choose to submit a claim to local courts or tribunals, ICSID arbitration, ICSID Additional Facility Rules arbitration, UNCITRAL arbitration, or any other arbitration institution under any other arbitration rules. 217

Second, it is significant that ASEAN has not built in specific preferences for arbitral institutions within ASEAN Member States, such as the Singapore International Arbitration Centre (“SIAC”), the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”) in Malaysia, the Badan Arbitrasi Nasional Indonesia (“BANI”) Arbitration Centre in Indonesia, the Philippine Dispute Resolution Centre Inc. (“PDRCI”) in Manila, or the Thai Arbitration Institute. Of these arbitral institutions, SIAC has grown rapidly in the last decade, making it one of the world’s foremost dispute resolution hubs. 218 With the proliferation of arbitration centers in Southeast Asia, several of which are government-supported, it is not surprising that ASEAN’s regional investment treaties continue to emphasize resort to investor-state arbitration as the preferred dispute settlement option. It is more surprising that ASEAN regional investment treaties do not specify any of Southeast Asia’s renowned

213 ACIA, supra note 21, arts. 30–41.
215 ASEAN-India Investment Agreement, supra note 25, art. 20, ¶¶ 1–31.
216 ASEAN-Korea Investment Agreement, supra note 24, art. 18, ¶¶ 1–14.
217 ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, arts. 19–21.
regional arbitration centers, but do explicitly provide for the World Bank’s ICSID arbitration.

Third, the linguistic, cultural, political, economic, and institutional capacity diversity of court systems in the ten ASEAN Member States create additional incentives for foreign investors to insist on submitting their disputes to international arbitration. ASEAN Member States’ court systems are not all equally or fully prepared to handle complex regional investments and the economic disputes that arise from the influx of cross-border transactions. In this sense, international arbitration may supply investor confidence in stable dispute settlement mechanisms for complex foreign investment disputes, even as ASEAN Member States (especially the CMLV countries) continue to build national judicial capacities for resolving ASEAN-law-based disputes.

Finally, it should be noted that ASEAN is not, as of this writing, pursuing any regional investment court or regional institutional appellate mechanism to handle investor-state disputes. Consistent with the mandate of the ASEAN Charter, the implementation of ASEAN law (e.g., treaties, commitments, and ASEAN Summit decisions, among others) remains a matter for the individual ASEAN Member States to ensure in their respective jurisdictions. The absence of any centralized regional enforcement mechanism for arbitral awards based on the ASEAN regional investment treaties could militate against the investors’ popular use of these treaties when bringing claims against ASEAN Member States.

IV. HARMONIZATION AND COORDINATION PROBLEMS IN SOUTHEAST ASIAN INVESTMENT POLICIES

It is not unusual for a state to adopt different investment treaty strategies with different counterpart states. However, Southeast Asian states should be concerned with the chaos arising from ASEAN’s multiple approaches to its treaty commitments under ASEAN regional investment treaties, the RCEP draft investment chapter, and the CPTPP draft investment chapter. These unmonitored differences impact the ability of ASEAN Member States to effectively implement these investment treaty commitments in a way that is in line with their fundamental obligations under the ASEAN Charter. Under

220 ASEAN Charter art. 5, ¶ 2.
Article 5(2) of the ASEAN Charter, ASEAN’s treaties form part of ASEAN law, such that 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.”221 “Obligations of membership”—a phrase undefined under the ASEAN Charter—may 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.”222

Furthermore, the ASEAN regional investment treaties comprise decisions of the ASEAN Summit members—the individual heads of state of the Member States of ASEAN—to commit to fulfill binding international obligations in regard to the management of foreign investment with each other and other states among ASEAN’s external partners.223 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,”224 consistent with its objectives of “upholding . . . international law” and adhering to “ASEAN’s rules-based regimes for effective implementation of economic commitments.”225 Because of the positive mandate of ASEAN Member States to “take all necessary measures” to comply with obligations of membership, such as those contained in the ASEAN regional investment treaties, each ASEAN Member State may well find itself obligated to take all necessary measures to ensure that its other investment treaty commitments—such as those in RCEP and the CPTPP—do not undermine ASEAN Member States’ implementation of, and compliance with, the ASEAN regional investment treaties.

221 Id.
223 Cf. SALACUSE, supra note 84, at 13 (“[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, and compensation of injured investors because of war, revolution, and civil strife.”).
224 ASEAN Charter art. 2, ¶ 2(m); see also MARISE CREMONA ET AL., ASEAN’S EXTERNAL AGREEMENTS: LAW, PRACTICE AND THE QUEST FOR COLLECTIVE ACTION 23–51 (2015).
225 ASEAN Charter art. 2, ¶ 2(j).
226 Id. art. 2, ¶ 2(n).
As members of the AEC, ASEAN 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.” 227 The following subsections discuss problems arising from the absence of substantive harmonization, institutional monitoring, and regional coordination when implementing ASEAN’s regional investment commitments in the ASEAN regional investment treaties, the RCEP draft investment chapter, and the CPTPP draft investment chapter.

A. Inconsistent Formulation of Foreign Investment Treaty Standards in Southeast Asia

ASEAN Member States can potentially undermine implementation of, and compliance with, the ASEAN regional investment treaties through their respective investment treaty commitments in new investment treaty obligations, such as those anticipated in RCEP and CPTPP. One way is by maintaining less stringent conditions in these other treaties that pose fewer regulatory burdens on foreign investors, who would practice “jurisdictional” or “regulatory” arbitrage. 228 The ASEAN-India Investment Agreement or the ACIA, for example, which contain more public policy clauses and host-state defenses, could fall into desuetude should investors prefer to bring claims under the RCEP or CPTPP (which, to date, do not have as many of these clauses, reservations, exceptions, or host-state defenses). Southeast Asia investment policy, as contained in the ASEAN regional investment treaties, might aspire for the highest “gold” standard in investment protection and public interest protection. Yet, if investors can still avail themselves of other regional investment treaties, such as RCEP and CPTPP, which have far fewer public interest provisions, the ASEAN regional investment treaties may end up being relics of scholarly analysis rather than actual dispute settlement. There is a need to undertake regular, close analysis of individual ASEAN Member States’ future commitments in RCEP and CPTPP to determine if the lower regulatory or compliance burdens in these treaties will end up incentivizing foreign investors to choose regulatory arbitrage and invoke compliance with the RCEP and CPTPP, rather than the stricter thresholds of

228 See NICHOLAS DORN, DEMOCRACY AND DIVERSITY IN FINANCIAL MARKET REGULATION 67 (2015) (“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 . . . . [J]urisdictional arbitrage requires as its condition of existence that jurisdictions differ in their rules.”).
the ASEAN regional investment treaties, which afford more space for public policy protection.

The problem worsens when we shift our analytical lens. ASEAN Member States not only have investment treaty commitments under the ASEAN regional investment treaties and potential future commitments in the RCEP or CPTPP draft investment chapters, but all ten of the ASEAN Member States have pre-existing BIT programs (numbering around 600 BITs and FTA investment chapters in total for all ten ASEAN Member States). There remains a glaring difference in the narrow formulation of the FET clause under the ASEAN regional investment treaties and the broader variants in several Southeast Asian BITs. Article 11, Paragraph 2(a) of the ACIA obligates ASEAN Member States to observe FET towards 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.” 229 Many Southeast Asian BITs, however, do not narrowly circumscribe FET in this manner. 230 The 1994 Malaysia-Albania BIT states that the “Contracting Party shall receive treatment which is fair and equitable,” 231 without explaining or interpreting the qualitative contours of this treatment. The 1999 Argentina-Philippines BIT states that “[e]ach Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment[,] or disposal thereof through unjustified or discriminatory measures.” 232 Because of the more expansive formulations of FET in the Southeast Asian BITs, the ASEAN Member States remain bound to a stricter threshold of investment guarantees of “fair and equitable treatment.” This is contrasted with the narrow scope of treatment owed to investors under the ASEAN regional investment treaties. It will not be surprising, therefore, if foreign investors claiming compensation for injury caused by ASEAN Member States would prefer a more expansive version of

229 ACIA, supra note 21, ¶ 2(a); see also ASEAN-India Investment Agreement, supra note 25, art. 7, ¶ 2(a); ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 6, ¶ 2(a); ASEAN-Korea Investment Agreement, supra note 24, art. 5, ¶ 2(a); ASEAN-China Investment Agreement, supra note 23, art. 7, ¶ 2(a).


FET in the Southeast Asian BITs, rather than invoking the ASEAN regional investment treaties. It will thus be necessary to examine all Southeast Asian investment treaties and their interaction with the ASEAN regional investment treaties, the RCEP draft investment chapter, and the CPTPP draft investment chapter. Doing so can help ASEAN anticipate and fully map the consequences of Southeast Asia’s inconsistent formulation of foreign investment treaty standards.

B. The Problem of MFN Clauses in Southeast Asia Investment Treaties

The RCEP draft investment chapter contains an MFN treatment clause, which, interestingly, attempts to carve out pre-existing preferential arrangements in other treaties from coverage under MFN treatment:

1. Each Party shall accord to investors of another/any other Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or . . . non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or . . . of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
3. The treatment, as set forth in paragraphs 1 and 2, shall not include:
   a) any 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; and
   b) any existing or future preferential treatment accorded to investors and/or their investments in any agreement or arrangement between or among ASEAN Member States.
4. Notwithstanding paragraphs 1 and 2, if a Party accords more favourable treatment to investors of any other Party or a non-Party of their investments by virtue of any future agreements or arrangements to which the Party is a party, it shall not be
obliged to accord such treatment to investors of any other Party or their investments. However, upon request from any other Party, it shall accord adequate opportunity to negotiate the benefits therein.

5. For greater certainty, the . . . treatment referred to in this Article does not encompass a requirement for a Party to extend to investors of another Party any international dispute resolution procedures or mechanisms such as those included in Section B . . . of this Chapter.233

The CPTPP draft investment chapter does not contain a similar carve-out against the applicability of MFN clauses to pre-existing treaty commitments of ASEAN Member States. It simply rules out international dispute resolution procedures or mechanisms from MFN coverage.234 There are MFN clauses in several of the ASEAN regional investment treaties,235 as well as in many of the Southeast Asian investment treaties and FTA investment chapters.

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.236 These norms may not necessarily be just 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,237 the arbitral tribunal interpreted the MFN clause to extend to substantive as well as procedural dispute settlement provisions of

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233 RCEP Draft Investment Chapter, supra note 27, at 18–20 (emphasis added) (footnote omitted) (drafting markups omitted).
234 CPTPP Draft Investment Chapter, supra note 28, art. 9.5, ¶ 1–3.
235 See ACIA, supra note 21, art. 6 n.4 (excluding application of the MFN clause to dispute settlement procedures, but requiring that preferential treatment extended to any investors under existing or future arrangements also be granted to parties to the ACIA); ASEAN-Korea Investment Agreement, supra note 24, art. 4, ¶ 3(a) (excluding MFN treatment to any 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, supra note 23, art. 5, ¶ 3(a) (same). The ASEAN-India Investment Agreement, supra note 25; ASEAN-Aus-NZ FTA Investment Chapter, supra note 22; and the ASEAN-Japan FTA, supra note 52, however, do not contain MFN clauses.
the applicable BIT. Given the variable formulations of MFN in the ASEAN regional investment treaties, the respective BIT programs, and FTA investment chapters of the individual ASEAN Member States, more time and resources for comprehensive analysis and bilateral-regional research are required to ascertain the precise scope of the MFN clauses simultaneously applicable in the ASEAN regional investment treaties, the RCEP draft investment chapter, the CPTPP draft investment chapter, and the MFN clauses still present in ASEAN Member States’ respective investment treaty programs. The same issue has been noted by the European Parliament. They recognized the serious legal uncertainty created by the overlap between future investment policy directed at the regional level through the EU, and the continuation of “intra-EU” BITs between EU Member States.238

The gravity of the MFN problem throughout Southeast Asia investment treaties (bilateral, regional, or mega-regional, as in the case of RCEP and CPTPP), can be illustrated by looking intra-ASEAN BITs that still exist alongside the ACIA. Among its key objectives, the ACIA emphasizes the “provision of enhanced protection to investors of all Member States and their investments;”239 the “improvement of transparency and predictability of investment rules, regulations[,] and procedures conducive to increased investment among Member States;”240 and the “joint promotion of the region as an integrated investment area.”241 To accomplish these objectives, the ASEAN Member States are obligated to enhance ASEAN integration by “harmonis[ing], where possible, investment policies and measures to achieve industrial complementation.”242 The ACIA does not provide for any sunset clauses or termination of pre-existing intra-ASEAN BITs, as the ACIA expressly states that “[n]othing in this Agreement shall derogate from the existing rights and obligations of a Member State under any other international agreements to which it is a party.”243 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

239 ACIA, supra note 21, art. 1, ¶ 1(b).
240 Id. art. 1, ¶ 1(c).
241 Id. art. 1, ¶ 1(d).
242 Id. art. 26, ¶ 1(a).
243 Id. art. 44.
dispute in accordance with [the ACIA], any other applicable agreements between the Member States, and the applicable rules of international law.\textsuperscript{244}

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 ASEAN 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 ASEAN 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 disparities between the quality of protection afforded by an ASEAN Member State under its intra-ASEAN BIT and the quality of investment protection that the same ASEAN Member State is obligated to extend under the ACIA, it will likely be difficult for the ASEAN Member State to muster ACIA-based defenses to investor claims when foreign investors decide 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 of the public policy features discussed in Part III. ASEAN Member States may still struggle to find plausible defenses or calibration mechanisms against investor claims under the older generation of intra-ASEAN BITs.

Third and most importantly, the continued applicability of the 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 domestic legislation, to . . . comply with all obligations of membership.”\textsuperscript{245} By continuing to pursue regulatory governance bilaterally (within the framework and purposes of an intra-ASEAN BIT) despite the existence of the ACIA, it is doubtful 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.

\textsuperscript{244} Id. art. 40, ¶ 1.
\textsuperscript{245} ASEAN Charter art. 5, ¶ 2.
and designed in the ACIA based on the consensus of all ASEAN Member States.

Such legal uncertainties likewise permeate other ASEAN regional investment treaties. They also fail to harmonize and coordinate mechanisms to govern ASEAN Member States’ duties under their individual BITs with the ASEAN regional investment treaty partners without undermining regional investment objectives and protections. For example, the ASEAN-India Investment Agreement appears silent on the effects of this regional agreement on India’s individual BITs with ASEAN Member States, 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. However, the ASEAN-China Investment Agreement does not also apply its favorable public policy features or calibration mechanisms to the investors’ entitlement to “more favorable treatment” 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, or to make the same consistent with the standards as formulated in the ASEAN-China Investment Agreement. Neither does the ASEAN-China Investment Agreement contain any provision creating a regional “sunset clause” for China’s BITs with individual ASEAN Member States, thus perpetuating the same problems of likely treaty-shopping for 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 similar recognition clause regarding other agreements entitling investors to more favorable treatment, 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-Aus-NZ FTA Investment Chapter also explicitly permits “any other applicable agreements between the parties” to apply as governing law to investor-state disputes, which could

246 See generally ASEAN-India Investment Agreement, supra note 25.
247 ASEAN-China Investment Agreement, supra note 23, art. 18, ¶ 1.
248 ASEAN-Korea Investment Agreement, supra note 24, art. 23, ¶ 1–2.
249 ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 27, ¶ 1.
thus usher in Australia’s existing older individual BITs with the ASEAN Member States. New Zealand does not have such BITs.

In sum, treaty standards under the intra-ASEAN BITs and the individual BITs of ASEAN regional investment treaty external partners with the ASEAN Member States could infuse the content and operation of the ASEAN regional investment treaties in three ways. First, the MFN clauses in these treaties open 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 (i.e., states not parties to the ASEAN regional investment treaties), which might not have not been contemplated 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 scope of protection in the ASEAN regional investment treaties undermines the latter’s usefulness for 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.

Second, 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, and New Zealand) could 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 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 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 ASEAN Member
States, including in the form of intra-ASEAN BITs and individual BITs with ASEAN regional investment treaty partners.

Finally, 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-Aus-NZ 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.

C. Applicability of Domestic Law to Investment Treaty Standards in ASEAN Regional Investment Treaties

To reiterate, many provisions and substantive standards of the ASEAN regional investment treaties routinely refer to the applicability of the ASEAN Member States’ domestic laws and regulations. These “legality clauses”\textsuperscript{250} infuse meaning into the scope of covered investments under an investment treaty (i.e., “investments made in accordance with investment law”), the definition of nationality of investors, the legality of juridical persons, the “public purpose” element in expropriation, general exceptions clauses, transparency rules, and 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, an ASEAN Member State’s treaties and international agreements may also form part of its legal system\textsuperscript{251} and 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 towards investors under the


\textsuperscript{251} The Philippines, for example, does not strictly require legislative enactment for treaties incorporated into its legal system under the Incorporation Clause of the 1987 Philippine Constitution. CONST. (1987), art. II, § 2 (Phil.); see also Diane A. Desierto, A Universalist History of the 1987 Philippine Constitution (II), 11 HISTORIA CONSTITUCIONAL 427, 475 (2010).
Southeast Asian BITs could influence the interpretation of host-state obligations under the ASEAN regional investment treaties, the RCEP draft investment chapter, and the CPTPP draft investment chapter. 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 ASEAN regional investment treaties could also introduce innovations in the latest generations of Southeast Asian investment treaty commitments. In any case, it is crucial to examine how international law (specifically treaty law) is incorporated into each of the ten ASEAN Member States’ respective legal systems to ascertain the full 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.”

The domestic laws of the ASEAN Member States have a role as governing law for investor-state disputes covered by the ICSID Convention. Article 42(1) of the ICSID Convention mandates the investor-state arbitral tribunal “decide a 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 . . . and such rules of international law as may be applicable.” Because of this provision, both international and domestic law would apply in parallel sources of governing law in the absence of any stipulation by the disputing parties.

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

252 See, e.g., Draft EU-Singapore FTA, supra note 68, ch. 9.
253 Forthcoming country monographs in the ASEAN Integration Through Law series will discuss these precise issues for each of the ten ASEAN Member States. For more information on this series, see Academic: Integration Through Law, CAMBRIDGE U. PRESS, http://www.cambridge.org/us/academic/integration-through-law (last visited Feb. 25, 2018).
acknowledged that while there was scholarly and jurisprudential divergence as to the actual scope of international law to be applied vis-à-vis 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.\(^{257}\)

Thus, where an ASEAN Member State can show that its other BITs (particularly those that overlap with ASEAN regional investment treaty partners) are monistically integrated into its domestic law—meaning that it would automatically apply as domestic law without need of subsequent legislative enactment or transformation of the treaty into statute—potential disparities could also arise between the regional investment treaty standard and the body of domestic law applied by the ASEAN Member State.

D. Risk of Parallel Proceedings for Investor-State Claims Arising from Breach of an ASEAN Regional Investment Treaty, Individual Southeast Asian BIT, or FTA Investment Chapter

Given the linguistic variability between the ASEAN regional investment treaties and the universe of over 600 Southeast Asian BITs and FTA investment chapters, it is foreseeable that 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, and consolidations, among others.\(^{258}\) None of the

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ASEAN regional investment treaties provide for any stay of further proceedings involving the same investment project or transaction.

Moreover, the ASEAN Member States should be aware that the definition of “investment” in the ASEAN regional investment treaties including shareholdings might also include minority shareholders. In *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, the arbitral tribunal affirmed that insofar as foreign shareholders of local companies are concerned, “[w]hatever the extent of [their] investment may have been, [they were] entitled to invoke the BIT in respect of conduct alleged to constitute a breach.” Likewise in *Enron Corp. v. Argentine Republic*, 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 “[t]reaty language and intent is specific in extending this protection to minority or indirect shareholders.” The Decision on Objections to Jurisdiction in *CMS Gas Transmission Co. v. Argentina* also affirmed that, where investment treaties do not distinguish between majority and minority shareholders, the treaties do not deprive minority shareholders of their rights as covered investors.

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 the possibility of claims lodged by minority shareholders. ASEAN Member States should be concerned with this prospect of multiplicity of investor-state disputes arising from essentially the same investment project or investment transaction.

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259 ACIA, supra note 21, art. 4, ¶ 1(c)(ii); ASEAN-Korea Investment Agreement, supra note 24, art. 1, ¶ 1(j)(ii); ASEAN-China Investment Agreement, supra note 23, art. 1, ¶ 1(d)(ii); ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, art. 2, ¶ 1(c)(ii); ASEAN-India Investment Agreement, supra note 25, art. 2, ¶ 1(e)(i).


262 *Id.* ¶ 29.

E. Different Investor-State Dispute Settlement Mechanisms in ASEAN

There is no single global “fork in the road” clause that applies to all the ASEAN regional investment treaties, the RCEP draft investment chapter, the CPTPP draft investment chapter, and ASEAN Member States’ pre-existing and future individual BITs and FTA investment chapters that could bind an investor claimant to an exclusive choice of remedy. Investors can choose a combination of remedies from a full spectrum of court adjudication, administrative tribunals, consultations, negotiations, conciliation procedures, and investor-state arbitration. Within this vast universe of forums, the hierarchy, preference, and connection between these specialized treaty-based dispute settlement mechanisms with existing dispute settlement 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’).” This provision could be 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. 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.” Further analysis, not just of treaty texts but also of the corresponding travaux preparatoires, is necessary to examine the dispute settlement and procedural implications from all of the language of the ASEAN regional investment treaties, the RCEP draft investment chapter, the CPTPP draft investment chapter, the over 600 ASEAN Member States’ respective individual BITs and FTA investment chapters, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, and the ASEAN Charter.

264 See ACIA, supra note 21, arts. 28–41; ASEAN-India Investment Agreement, supra note 25, art. 20; ASEAN-Aus-NZ FTA Investment Chapter, supra note 22, arts. 18–28; ASEAN-Korea Investment Agreement, supra note 24, art. 18; ASEAN-China Investment Agreement, supra note 23, at arts. 13–15.

265 ASEAN Protocol on Enhanced Dispute Settlement Mechanism, supra note 74, art. 1, ¶ 1 (emphasis added).

266 Id. arts. 5–16.

267 ASEAN Charter art. 24.
V. CONCLUSION

The ASEAN regional investment treaties, the RCEP draft investment chapter, and the CPTPP draft investment chapter contain various mechanisms for host-states to retain regulatory discretion, policy space, and to narrow the scope of possible disputes with investors. On the one hand, the more concerted drafting efforts demonstrate the region’s preference to “rebalance” commitments to investors with states’ individual and regional interests. On the other hand, however, because ASEAN Member States have not given any formal precedence to these treaties, they continue to exist amid much older preexisting generations of BITs for each ASEAN Member State. These BITs do not contain as many public policy innovations as the ASEAN regional investment treaties (and the RCEP draft) attempt. Consequently, investors have not brought claims under these treaties, and instead pursue recourse under the more liberal provisions of the older BIT regimes that emphasize investment protection and reserve little prerogatives for host-states to defend their regulatory measures. Unless ASEAN (and parties to RCEP) purposely create mechanisms to govern the interaction of preexisting BITs with the stricter standards in the regional investment treaties, it will likely be a long time before these treaties are invoked in investor-state disputes.

The AEC Blueprint 2025 set out the vision to “[c]reate a deeply integrated and highly cohesive ASEAN economy” by “[p]romot[ing] the principles of good governance, transparency, and responsive regulatory regimes” through various stakeholders, and “[w]ork[ing] towards a common position . . . in global economic fora.”268 ASEAN Member States already recognize the need for “effective, efficient, coherent, and responsive regulations, and good regulatory practices.”269

Regional economic integration necessitates policy and regulatory changes and refinements in most, if not all, ASEAN Member States, taking into consideration their different levels of development . . . . ASEAN Member States need to ensure that the regulatory regime is relevant, robust, effective, coherent, transparent, accountable, and forward looking in terms of regulatory structures and design, as well as implementation processes.270

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268 AEC Blueprint 2025, supra note 3, ¶ 6(x).
269 Id. § B.7.
270 Id. ¶ 38.
Strategic measures identified in the AEC Blueprint 2025 to achieve these goals include enacting regulations that are “pro-competitive, commensurate with objectives, and non-discriminatory,” while undertaking regular “review of existing regulatory implementation processes and procedures for further streamlining.”

This regional concern for regulatory quality, predictability, coherence, and transparency should also extend now to ASEAN’s investment treaty commitments. With the continued robust growth of foreign investment in Southeast Asia under ASEAN economic integration, measures for legal harmonization and regional institutional coordination are increasingly necessary. The ASEAN Investment Area Coordinating Council, the ASEAN CCI, and all the ad hoc ASEAN bodies created under the ASEAN regional investment treaties must ensure regularly coordinated exchanges of information within a more formalized framework under the umbrella of the AEC. These information exchanges should centralize the pre-existing and future investment treaty commitments of each ASEAN Member State with those assumed by ASEAN at the regional level through the ASEAN regional investment treaties, as well as with those to be anticipated from mega-regional investment treaties such as the RCEP draft investment chapter and the CPTPP draft investment chapter. Ongoing monitoring of the formulation of standards on the coverage of these treaties (including areas for entry of other investment treaty norms) should be transparently reported to the ASEAN Member States before they sign any future ASEAN regional investment agreements. The impacts of diversified investment treaty protection standards, host-state defenses of their regulatory and public policy spaces, and avenues for participation of the widest possible stakeholders in foreign investment (especially including local communities directly affected by the operations of foreign investment) must be routinely examined, assessed, and reported by the AEC to the ASEAN Summit. It is only by properly implementing the objectives of legal harmonization and coordination in the realm of ASEAN (and ASEAN Member States’) investment treaty commitments that ASEAN will realize its vision of a cohesive, consistent, and predictable Southeast Asia investment policy driving the growth of balanced and sustainable Southeast Asia investment.

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271 Id. ¶ 39(i), (ii).