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Searching for an Ideal International Investment Protection Regime for ASEAN+ Dialogue Partners (RCEP): Where Do We Begin?

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Abstract: *The members of the Association of the Southeast Asian Nation (ASEAN) and its six dialogue partners—Australia, China, India, Japan, South Korea, and New Zealand—decided in November 2012 to launch the negotiation of a free trade agreement (FTA) among them, also known as the regional comprehensive economic partnership (RCEP). The scope of the agreement includes investment despite the fact that the negotiating states already have various international investment agreements (IIAs) with each other. This article analyzes how RCEP can better improve and add more value to the current regime of international investment protection within the region by suggesting standards that should be considered by negotiators.*

Keywords: Investment, ASEAN, RCEP, ASEAN Free Trade Agreement

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1. Introduction

ASEAN Member States along with their six dialogue partners—Australia, China, India, Japan, South Korea and New Zealand—have concluded numerous international investment agreements (IIAs) at an unprecedented rate during the last three decades. Often, this leads to parallelism—overlaps of various legal frameworks, including bilateral investment treaties (BITs), regional investment agreements, and investment chapters in various free trade agreements (FTAs)—that potentially adds a layer of complexity (UNCTAD, 2013: 105-107). In fact, this phenomenon has occurred earlier in international trade law with the conclusion of various FTAs—what Jagdesh Bhagwatti called as the 'spaghetti bowl' (Bhagwati, 1994: 4).

In international trade law, the spaghetti bowl phenomenon was predicted to potentially create trade diversion and exclusive clubs in the global trading system. However, this is less clear with IIAs. Should parties avoid creation of such a spaghetti bowl, and instead strive to consolidate the various IIAs? Although there have been attempts to conclude a multilateral framework of investment agreements, this has not shown any success yet.[1] In any event where multiple regimes exist, companies will structure their investments in such a way so as to enjoy benefits from the best regime.

ASEAN member states and their six dialogue partners have more than 80 IIAs among themselves, either in the form of BITs, investment chapter of bilateral and plurilateral FTAs, and regional investment agreements (UNCTAD, 2013: 106-107).[2] Currently, they aim to conclude RCEP, which could be an opportunity to consolidate the overlapping legal frameworks of investment protection. This paper seeks to review the existing legal frameworks and analyze these provisions based on the previous investor-state arbitration cases to come up with recommendations on consolidated standards in RCEP's investment chapter that could potentially improve the current standards in the existing IIAs of the negotiating states.

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[1] For further elaboration on the attempts, see Barbara Koschwar, "Mapping investment provisions in regional trade agreements: towards an international investment regime?" in Antoni Estevadeordal, Kati Suominen, and Robert Teh, *Regional Rules in the Global Trading System* (Cambridge University Press, 2009), pp367-375.

[2] See Table 1.

2. Nature, Object and Purpose of IIAs

It is important to clearly identify the object and purpose of an IIA for the purpose of negotiation as well as interpretation of its contents at a later stage when disputes arise. By understanding the object and purpose of their IIA, the negotiating states can better customize the agreement to advance their own objects and purposes.

The lack of clarity in most investment protection clauses in existing BITs or bilateral FTAs of RCEP negotiating states leaves a wide margin of discretion for arbitral tribunals to determine the meaning of the clauses. In interpreting clauses in IIAs, investor-state arbitral tribunals often look at the object and purpose of the agreement (Sauvant and Ortino, 2013: 26-27).[3] Unfortunately, the object and purpose of some IIAs are often not clearly mentioned, therefore different tribunals have identified different objects and purposes. In past cases, some tribunals have simply read the object and purpose of BITs as "to encourage and protect investment"[4] or "to promote greater economic cooperation".[5] Such a liberal interpretation of the object and purpose may put states at a disadvantage especially if the measure has legitimate reasons despite the fact that it may affect some investors.

The Preamble of the ASEAN Comprehensive Investment Agreement (ACIA),[6] one of the most comprehensive IIAs, stipulates its purpose clearly, namely to create a conducive investment environment that will enhance a freer flow of capital, goods and services, technology and human resources and, eventually, overall economic and social development in the region. The ASEAN Economic Community Blueprint further seeks to create a competitive single market and production base.[7] On this matter, Ewing-Chow's study finds that production networks in several sectors have actually been established within ASEAN. Nevertheless, IIAs among ASEAN countries remain useful to prevent backsliding of countries' commitments and ensure that freer flow of capitals, goods and investments can be achieved to create even

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[3] *Vienna Convention on the Law of Treaties,* 23 May 1969 (entered into force on 27 January 1980) [VCLT], Article 31(1).
[4] *Azurix v. Argentina,* ICSID Case No. ARB/01/12, Award, 14 July 2006, at 307.
[5] *LG&E v. Argentina,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 at 124.
[6] *ASEAN Comprehensive Investment Agreement*, 26 February 2009 (entered into force on 29 March 2012) [ACIA].
[7] Declaration on the ASEAN Economic Community Blueprint, signed on 20 November 2007; ASEAN, ASEAN Economic Community Blueprint (ASEAN Secretariat, 2008), 6.

stronger production networks (Ewing-Chow, *et al.*, 2014: 134-138). Notably, this paper does not elaborate further on whether investment rules affect actual investment flows.[8]

In the context of RCEP, the region's aggregate gross domestic product (GDP) of US$21.2 trillion and a population of more than 3.4 billion reveal a huge potential that can be explored further through economic integration. One of the general guiding principles in the negotiation highlights RCEP's broader and deeper engagements with significant improvements over the existing ASEAN+1 FTAs.[9]

For the investment chapter negotiation, the guiding principle provides the following objective:

> *RCEP will aim at creating a liberal, facilitative, and competitive investment environment in the region. Negotiations for investment under RCEP will cover the four pillars of promotion, protection, facilitation and liberalization.*

In this regard, RCEP negotiating states still needs to clearly stipulate the object and purpose of the agreement to avoid tribunals' exercise of wide discretion in interpreting RCEPs' main objective "to promote, protect, facilitate and liberalize investments".

[8] There have been separate studies on this topic. It is acknowledged though that establishing a clear link between changes in foreign direct investment (FDI) flows and the existence of investment provisions is difficult.

[9] ASEAN, 'Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership , Available at: http://www.asean.org/images/2012/documents/Guiding%20Principles%20and%20Objectives%20for%20Negotiating%20the%20Regional%20Comprehensive%20Economic%20Partnership.pdf>

Table 1: FTAs with investment chapter/ IIAs among ASEAN member states + dialogue partners [Reviewed IIAs]

No.	Name	Date of entry into force
ASEAN + Dialogue Partners		
1.	ASEAN Comprehensive Investment Agreement [ACIA]	29 March 2012
2.	ASEAN-Australia-New Zealand Free Trade Agreement [AANZFTA] Investment Chapter	1 January 2010: Australia, Brunei, Malaysia, Myanmar, Philippines, New Zealand, Singapore and Viet Nam 12 March 2010: Thailand 4 January 2011: Cambodia and Lao PDR 10 January 2012: Indonesia
3.	Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the People's Republic of China [ASEAN-China Investment Agreement]	1 August 2010
4.	2009 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the ASEAN and the Republic of Korea [ASEAN-Korea Investment Agreement]	1 September 2009
Singapore + Dialogue Partners FTAs		
5.	Singapore – Australia FTA	28 July 2003
6.	Singapore – India Comprehensive Economic Cooperation Agreement	1 August 2005
7.	Agreement between Japan and Singapore for a New-Age Economic Partnership	30 November 2002
8.	Korea – Singapore FTA	2 March 2006
9.	Agreement between New Zealand and Singapore on a Closer Economic Partnership	18 August 2011
Malaysia + Dialogue Partners FTAs		
10.	Malaysia - Australia FTA	1 January 2013
11.	Malaysia - New Zealand FTA	1 August 2010
12.	Malaysia - India Comprehensive Economic Cooperation Agreement	1 July 2011
13.	Malaysia - Japan Economic Partnership Agreement	13 July 2006

Thailand + Dialogue Partners FTAs		
14.	Thailand - Australia FTA	1 January 2005
15.	Thailand - New Zealand Closer Economic Partnership	1 July 2005
16.	Thailand - Japan Economic Partnership Agreement	1 November 2007
Philippines + Dialogue Partners FTA		
17.	Philippines – Japan Economic Partnership Agreement	11 December 2008
Indonesia + Dialogue Partners FTA		
18.	Japan – Indonesia Economic Partnership Agreement	1 July 2008
Other IIA		
19.	Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment [Trilateral Investment Agreement]	Signed on 13 May 2012, but it has not entered into force

3. Searching for Appropriate Standards

3.1. Investment Promotion

Governments realize the importance of promoting more investment flows into their countries. Some BITs include this obligation but formulate it vaguely, such as:

> Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest in its territory.[10]

In some plurilateral investment agreements, the obligation to promote is made clearer with a list of actions to be done by the governments. For example, Article 20 of ASEAN-China Investment Agreement provides that:

> The Parties shall cooperate in promoting and increasing awareness of ASEAN-China as an investment area through, amongst others:
> (a) increasing ASEAN-China investments;
> (b) organizing investment promotion activities;

[10] *Agreement between the Government of the Republic of Singapore and the Government of the Republic of Indonesia on the Promotion and Protection of Investments* (entered into force 21 June 2006) [Singapore – Indonesia BIT], Article II(1).

(c) promoting business-matching events;
(d) organizing and supporting the organization of various briefings and seminars on investment opportunities and on investment laws, regulations and policies;
(e) conducting information exchanges on other issues of mutual concern relating to investment promotion and facilitation.

Article 24 of ACIA is exceptional as it incorporates one of the agreement's main objectives—enhancing production networks in the region—into this obligation. The provision reads as follows:

Member States shall cooperate in increasing awareness of ASEAN as an integrated investment area in order to increase foreign investment into ASEAN and intra-ASEAN investments through, among others:
(a) encouraging the growth and development of ASEAN small and medium enterprises and multi-national enterprises;
(b) **enhancing industrial complementation and production networks among multi-national enterprises in ASEAN**;
(c) organizing investment missions that focus on developing regional clusters and production networks;
(d) organizing and supporting the organization of various briefings and seminars on investment opportunities and on investment laws, regulations and policies; and
(e) conducting exchanges on other issues of mutual concern relating to investment promotion (*emphasis added*).

Indeed, ACIA's investment promotion clause will contribute better to investment promotion rather than a vague promotion provision. This list of investment promotion activities provides clearer guidance. Further, with more concrete actions, the implementation of the obligations can actually be assessed better. For this reason, RCEP should use ACIA's clause as the baseline for further negotiation of its investment promotion clause.

3.2. Investment Protection

Investment protection provisions should also be the main focus of RCEP's investment chapter negotiation. These provisions remain important as foreign investors still perceive certain amount of risks when investing in specific countries in the region. For example, the 2014 Corruption Perception Index below demonstrates that most countries in the region are still perceived as having problematic public sectors.

Table 2: 2014 Corruption Perception Index ranking of RCEP countries

Ranking	Country	Global ranking (175 countries and territories)
1	New Zealand	2
2	Singapore	7
3	Australia	11
4	Japan	15
5	Brunei Darussalam	38*
6	South Korea	43
7	Malaysia	50
8	Philippines	85
9	India	85
10	Thailand	85
11	China	100
12	Indonesia	107
13	Viet Nam	119
14	Lao PDR	145
15	Myanmar	156
16	Cambodia	156

* CPI 2013 as Brunei was not ranked in CPI 2014.

For this reason and in order to create a conducive investment environment, the investment chapter of RCEP should continue to provide a guarantee of protection to foreign investors and their investments. In addition, it is noteworthy that most countries in the region are no longer merely capital-importing, but also capital-exporting countries. Thus, foreign investors from a country in the region also need such protection when investing within the region. At the same time, having investment protection provisions in RCEP magnifies the negotiating states' commitments in upholding the rule of law in the region.

Yet, investor-state arbitration to enforce these investment protection provisions has been under scrutiny because of diverging interpretations of the provisions by

arbitral tribunals.[11] The lack of clarity in these provisions is actually the source of the problem as tribunals are left with wide discretion to interpret provisions in IIAs.

Governments have also realized that the existing IIAs (particularly the earlier generation BITs) often do not specify explicitly the right of states to regulate certain matters for public purposes, such as protection of public health, safety or the environment. Often, these measures affect foreign investments in ways that constitute violation of protection guarantees in the IIAs despite the legitimate reasons to undertake them. Therefore, it is important for states to clarify their investment protection provisions to ensure that there is balance between investment protection and their right to regulate matters within their territories.

ACIA and the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) contain more precisely formulated provisions that strike some balance between investment protection and the right of state to regulate. Their investment protection clauses can be used as the baseline for those that should be improved further in RCEP's investment chapter. In analyzing the various investment protection provisions of ASEAN+ dialogue partners' FTAs, the author focuses on the plurilateral IIAs rather than the bilateral IIAs as the former are relatively more advanced. Note that the author also includes the trilateral investment agreement between China, Korea and Japan as a comparison.[12]

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[11] See Johanna Kalb, 'Creating an ICSID Appellate Body' (2005) 10 UCLA J. Int'l L. & Foreign Aff. 180, 186; Charler H. Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2003) 36 Vand. J. Transnat'l L. 37, 67; Michael Ewing-Chow, 'Coherence, convergence and consistency in international investment law' in Roberto Echandi and Pierre Sauve (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press 2013) 231-232.

[12] *Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment* (signed 13 May 2012).

Table 3: Snapshot comparison of investment protection provisions in investment chapters of ASEAN member states+ dialogue partners' FTAs and other regional investment agreements

	ASEAN - Korea	**ASEAN - China**	**AANZFTA**	**ACIA**	**Trilateral China-Korea-Japan**
Covered investment, e.g. approval in writing	Art. 1 (c) and Annex 1	Yes, for Thailand (Art. 3 (3))	Yes, for Thailand and Viet Nam (Art. 2(a))	Art. 4(a) and Annex 1	Art. 2(2)
NT (both pre- and post-establishment)	Art. 1 (k) and Art. 3	(Art. 4) - no pre-establishment	Art. 2(d) on def. of investor and Art. 4	Art. 4(d) and Art. 5	Article 3 – no pre-establishment, and with a list of non-conforming measures.
MFN treatment (both pre- and post-establishment)	Art. 4(1)	Art. 1(1)(e) and Art. 5 - excludes ISDS	No MFN clause, Art. 16(2)(a)	Art. 6(1) – excludes ISDS	Article 4 – excludes ISDS
FET (Limited scope: not to deny justice or admin. proceedings)	Art. 5(2)	Art. 7(2)	Art. 6(2)	Art.11	Art. 5 (1) – scope limited to CIL, no elaboration.
Expropriation	Art. 12 (no annex on expropriation)	Art. 8 – exception for land and compulsory licenses (CL)	Art. 9 – annex on expropriation, and exception for land and CL.	Art. 14 – annex on expropriation, and exception for land and CL.	Art. 4.1 – Protocol on Expropriation, and exception for land acquisition.
Prohibition on performance requirement	Art. 6	-	Art. 5	Art. 7	Art. 7
SMBoD	Art. 7	-	See AANZFTA Chapter 9	Art. 8	Art. 8 – limited to facilitation.
Freedom of transfer and its exception	Art. 10	Art. 10	Art. 8	Art. 13	Art. 13
Balance of payment/ prudential measures	Art. 11	Art. 11	Chapter 15	Art. 16	Art. 19/20
General exception	Art. 20	Art. 16	Chapter 15	Art. 17	No, Art. 18 provides security exceptions.

Denial of benefits	Art. 17	Art. 15	Art. 11	Art. 19	Art. 22
ISDS	Art. 18	Art. 14	Art. 18	Section B – Article 29	Art. 15

Note: NT – national treatment; MFN – most favoured nation; FET – fair and equitable treatment; ISDS – investor-state dispute settlement; SMBoD – senior management and board of directors

3.2.1 Scope and Coverage

Determining the scope and coverage of an IIA is important to regulate the investments which are and the investors who are entitled to benefits from the agreement. These provisions include the definition of investments and investors, admission clause, explicit exclusion of certain investments, and, in FTAs, the relationship of the investment chapter with other chapters.

3.2.1.1 Admission Clause – Approval in Writing

Admission clauses govern the entry of investments into host states.[13] In some IIAs, the clause requires investments to be admitted in accordance with the host state's national laws. It is noteworthy that this type of clause does not prevent the relevant government to change its national laws regulating admission of foreign investors. Although it appears to put a lot of discretion on a host state, the clause remains useful in preventing the host state from refusing admission by disregarding its own domestic laws. In fact, this investment-control model is the one most commonly used. It does not grant a right to admission but allows the host state to control all inward FDI. While some argue that this type of admission clause is useful to protect sensitive industries, others argue that it may lead to rent seeking and corruption (Pollan, 2006: 140-141).

All of the reviewed IIAs contain admission clauses. However, some of them provide an additional requirement, namely that the investment has to be approved by the host state. Article 4(a) of ACIA provides the following:

> "[C]overed investment" means, with respect to a Member State, an investment in its territory of an investor of any other Member State 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

[13] *Ibid.* at 146.

policies, and where applicable, specifically **approved in writing**[1] by the competent authority of a Member State. (*emphasis added*)

Footnote 1 of the provision further provides "for the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1 (Approval in Writing)". It is pertinent to obtain such a specific approval because without it, the investment may not be protected at all.[14]

Such an approval requirement may be burdensome for investors and in certain countries may be potentially abused by some government officials due to the lack of transparency. However, ACIA has provided a way to deal with this matter with the inclusion of Annex 1 that clarifies the specific procedure for approval. This is partly how an IIA can increase governance in the host state, thus contributing to a better investment climate.

In the RCEP negotiation, if the negotiating states want to incorporate the approval in writing requirement, they should include this type of clarification and if possible, improve it further by listing each host state's focal point that will be responsible for the issuance of such approvals as well as procedures involved.

3.2.1.2 Explicit Exclusion of Certain Sectors

All of the reviewed IIAs exclude certain investments explicitly. Some agreements contain shorter lists while others have longer lists. For example, Article 2(2) of ASEAN-Korea Investment Agreement states that:

This Agreement does not apply to:
(a) governmental procurement;
(b) subsidies or grants provided by a Party;
(c) any taxation measure, except under Article 10 (Transfers) and Article 12 (Expropriation and Compensation);
(d) claims arising out of events which occurred, or claims which had been raised, prior to the entry into force of this Agreement;
(e) services supplied in the exercise of governmental authority such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, provided that such services are supplied neither on a commercial basis, nor in competition with one or more service suppliers; or

[14] *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*, ASEAN Case No. ARB/01/1 (31 March 2003), ASEAN Arbitral Tribunal (ICSID Additional Facility Rules).

(f) measures adopted or maintained by a Party to the extent that they are covered by the Agreement on Trade in Services under the Framework Agreement.

This type of exclusion may be necessary if host states do not consider certain activities as investments that need protection under an IIA or if the states believe that investments in certain sectors should be regulated under other international regime. This type of exclusion may be necessary to preserve the government's policy space in those areas.

3.2.1.3 Relationship with Other Chapters or Agreements

In certain IIAs, especially the investment chapter of FTAs, the investment protection provisions may have certain interaction with the services chapter of the relevant FTA or other agreement on services (e.g. General Agreement on Trade in Services - GATS), particularly mode 3 of liberalized sectors of services. For example, Article 3 of AANZFTA provides:

1. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Trade in Services) or Chapter 9 (Movement of Natural Persons).
2. Notwithstanding Paragraph 1, Article 6 (Treatment of Investment), Article 7 (Compensation for Losses), Article 8 (Transfers), Article 9 (Expropriation and Compensation), Article 10 (Subrogation) and Section B (Investment Disputes between a Party and an Investor) shall apply, mutatis mutandis, to any measure affecting the supply of service by a service supplier of a Party through commercial presence in the territory of any one of the other Parties pursuant to Chapter 8 (Trade in Services), but only to the extent that any such measures relate to a covered investment and an obligation under this Chapter, regardless of whether such a service sector is scheduled in a Party's schedule of specific services commitments in Annex 3 (Schedules of Specific Services Commitments) (*emphasis added*).

Such a provision clarifies that several investment protection provisions are also extended to sectors of investments falling under the services chapter.

Although ACIA is not an FTA, the IIA made reference to the ASEAN Framework Agreement on Services (AFAS). In relation to liberalization done by AFAS, ACIA clarifies the sectors which will be liberalized further by the member states. However, this clarification is done under the provision of Scope of Application. Article 3(3) of ACIA states that:

For the purpose of liberalization and subject to Article 9 (Reservations), this Agreement shall apply to the following sectors:
(a) manufacturing;
(b) agriculture;
(c) fishery;
(d) forestry;
(e) mining and quarrying;
(f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying; and
(g) any other sectors, as may be agreed upon by all Member States.

This provision is problematic because ACIA does not define the term 'liberalization'. While normally in trade law the term is understood as the opening up of certain sectors for foreign investments/investors (market access), the term can also mean in investment law as providing better protection to foreign investments/investors. For this reason, there can be a possible interpretation that ACIA, including its investment protection provisions, is only applicable to the listed sectors and not to the others.

However, if we read paragraph 3 in the context of the provision, we will find that Article 3(5) of ACIA indicates that the agreement applies more broadly. The provision provides:

> 5. Notwithstanding sub-paragraph 4 (e), for the purpose of protection of investment with respect to the commercial presence mode of service supply, Articles 11 (Treatment of Investment), 12 (Compensation in Cases of Strife), 13 (Transfers), 14 (Expropriation and Compensation) and 15 (Subrogation) and Section B (Investment Disputes Between an Investor and a Member State), shall apply, mutatis mutandis, to any measure affecting the supply of a service by a service supplier of a Member State through commercial presence in the territory of any other Member State but only to the extent that they relate to an investment and obligation under this Agreement regardless of whether or not such service sector is scheduled in the Member States' schedule of commitments made under AFAS.

The provisions suggests that the coverage of ACIA is broader than the sectors listed in Article 3(3). This can only mean that all investment protection provisions of ACIA are applicable to all sectors except those explicitly excluded under Article 3(4) and subject to Article 3(5).

The guiding principle of RCEP negotiation also provides the liberalization pillar within the investment chapter. Given the possible misinterpretation of the provision about scope of coverage in ACIA, RCEP negotiators should define the term 'liberalization' more clearly if the negotiating states seek to also restrict the agreement's scope of coverage.

3.2.2 Performance Requirements

A performance requirements clause lays an obligation on host states not to impose certain requirements on foreign investors during the operations of their investments, such as local content requirements, trade-balancing requirements, or export controls. In *Mobil v. Canada,* the tribunal found that Canada breached the prohibition on domestic performance requirement of the North America Free Trade Agreement (NAFTA) Article 1106 by imposing a research investment target on operators as a condition of the operator's production operations authorization. [15] Under the government's guidelines, the operators were obliged to make certain levels of expenditure on research and development matters for each of the exploration, development and production phases of the project. The tribunal further found that this constituted a performance requirement to acquire services locally.[16]

Most of the reviewed IIAs contain performance requirements clauses that refer to the Agreement on Trade-related Investment Measures (TRIMs) of the World Trade Organization (WTO). For example, Article 6 of ASEAN-Korea Investment Agreement provides as follows:

> The provisions of the WTO Agreement on Trade-related Investment Measures which are not specifically mentioned in or modified by this Agreement, shall apply, *mutatis mutandis,* to this Agreement unless the context otherwise requires.

Article 7(2) of ACIA indicates an attempt to liberalize the investment regime in the host states beyond the TRIMs commitments by providing possibilities for a future review to make additional commitments:

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[15] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* [*Mobil v. Canada*], ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012 at 215.
[16] *Ibid.* at 237-238, and 242.

> Member States shall undertake joint assessment on performance requirements no later than 2 years from the date of entry into force of this Agreement. The aim of such assessment shall include reviewing existing performance requirements and considering the need for additional commitments under this Article.

In RCEP, the negotiating states should consider including a clause on prohibition of performance requirement in order to create a better and more liberal investment environment for foreign investors. They need the freedom to determine their production processes, including goods and services involved to gain more efficiency. If some of the negotiating states are not ready to make certain commitments in this regard, they may make reservation by listing their non-conforming measures. However, this should be temporary and soon phased out.

Since performance requirements can be passed easily by governments, perhaps RCEP should look into the possibility of imposing an obligation on member states to create a domestic review mechanism to deal with investors' allegations of a host state's performance requirements. Arguably, this can positively contribute to governance, provided the mechanism is fast and impartial so that the issue does not need to be brought before investor-state tribunals. At the same time, for the purpose of monitoring more closely the implementation of the agreement, RCEP may also require its member states to notify a designated body of all performance requirements that they are applying, including those applied under discretionary authority.

3.2.3 Senior Management and Boards of Directors (SMBoD)

An SMBoD clause normally is meant to facilitate the entry of foreign employees and grant foreign investors the right to hire expatriate personnel. This provision is critical because foreign investors may need to place their senior management team who understand their business operations. A simpler and more liberal approach to this clause is found in Article 7 of ASEAN-Korea Investment Agreement which provides:

> 1. A Party shall not require a judicial person of that Party that is covered investment appoint to senior management positions natural persons of any particular nationality.
> 2. A Party may require that a majority of the board of directors, or any committee thereof, of a juridical person of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Host states often want to encourage spill-overs through employment for domestic or indigenous workers. As this also interacts with the host states' immigration laws, they often want to retain control over their immigration policies (UNCTAD, 2012: 151). In order to do this, the clause can be modified to simply facilitate the entry and the issuance of work permits for nationals of one party into the territory of the other party for purposes relating to an investment, subject to national immigration and other laws (UNCTAD, 2012: 151). This can be seen in Article 8 of the Trilateral Investment Agreement which provides:

> Each Contracting Party shall endeavor, to the extent possible, in accordance with its applicable laws and regulations, to facilitate the procedures for the entry, sojourn and residence of natural persons of another Contracting Party who wish to enter the territory of the former Contracting Party and to remain therein for the purpose of conducting business activities in connection with investments.

It is admitted that such a provision provides the host states with significant discretion. If RCEP seeks to improve the provision to better facilitate investment, the negotiating states may consider obliging the host states to install a more transparent and streamlined procedures for the application of work permits for SMBoD. Such a procedure should at least incorporate the timeline as well as the obligation of the relevant officials to provide a reason for refusing a work permit application. This can add more clarity and facilitate foreign investors better.

3.2.4 National Treatment (NT)

National treatment is a contingent standard of treatment because its application requires a comparative analysis between the treatment granted by the host state to its domestic investments or investors and the treatment granted to foreign investors of another contracting party to an IIA (UNCTAD, 2007: 36). In order to create a level playing field between foreign and domestic investors, the host states must provide no less favourable treatment to foreign investments or investors over domestic investments or investors.

In analysing whether the NT obligation has been breached, tribunals normally assess whether there is either *de jure* or *de facto* discrimination (Bjorklund, 2008: 30).

Additionally, in evaluating whether discrimination exists, some tribunals have questioned whether the difference in treatment has been justified by rational policy objectives of the government by analyzing whether the investors are in "like circumstances" (Bjorklund, 2008: 247-251).[17]

Some IIAs contain NT clauses that grant the right of pre-establishment to foreign investors. This can be in the form of market access commitments, such as allowing foreign equity ownership in certain sectors which were previously closed to foreign investors. These commitments are reflected in each member state's schedule and relate to the liberalization pillar of an IIA. For example, Article 5(1) of ACIA provides:

> 1. Each Member State shall accord to investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the **admission, establishment,** acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. (*emphasis added*)

This shall be read together with Article 4(d) of ACIA:

> "[**I]nvestor**" means 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;

Normally a member state also has a reservation list of measures that will not constitute NT violation. In this connection, Article 9 of ACIA provides:

> 1. Articles 5 (National Treatment) and 8 (Senior Management and Board of Directors) shall not apply to:
> (a) any existing measure that is maintained by a Member State at:
> i) the central level of government, as set out by that Member State in its reservation list in the Schedule referred to in paragraph 2;
> ii) the regional level of government, as set out by that Member State in its reservation list in the Schedule referred to in paragraph 2; and
> iii) a local level of government;

Despite the fact that such flexibilities for an NT clause might be needed to preserve policy space of host states, a long list of reservations may reduce the scope of protection under this standard, and thus become unfavorable to foreign investors.

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[17]*; Pope & Talbot Inc. v. Canada*, NAFTA, Award on the Merits of Phase 2, 10 April 2001 [*Pope & Talbot Award*] at 103.

RCEP should have an NT clause that contains both post-establishment and pre-establishment commitments. This is because the guiding principle for RCEP negotiation provides that liberalization is one of the pillars that should be developed further to create a more liberal investment environment. At the same time, the negotiating states must carefully choose the approach to list their pre-establishment NT commitments. There are two possible approaches, namely the negative-list approach and the positive-list approach. The former requires more resources as the negotiating states must conduct a thorough audit of existing domestic policies. In the absence of specific reservations, a negotiating state commits to openness those sectors/ activities which at the time the IIA is signed may not yet exist in the country. In contrast, the positive-list approach offers selective liberalization by listing up industries in which investors will enjoy the rights of pre-establishment (UNCTAD, 2012: 137). ACIA adopts the hybrid-approach by limiting the granting of the right of pre-establishment for the purpose of market access liberalization to only certain sectors (positive-list in Article 3(3)). Further, Article 9 provides that certain reservations apply to these sectors (negative-list).

3.2.5 Most-favoured Nation (MFN) Treatment

An MFN treatment clause in an IIA is meant to create a level playing field between all foreign investors of different nationalities. It can apply to conditions of entry and operation of foreign investors (UNCTAD, 2010: 14).

In practice, besides claiming violation of MFN treatment, investors/claimants use the MFN clause in the primary IIA—under which a dispute is brought—to incorporate/import more favourable substantive provisions [18] or rules of dispute settlement[19] from a third-party treaty (secondary IIA) into the primary agreement.

Although it is possible to import substantive protection standards from third party agreements by virtue of an MFN clause, there are limitations.

First, in order to import "more favourable" substantive protection standards, the investor must be able to prove the existence of the more favourable standard that it

[18] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 [*Bayindir*] at 227-235.
[19] *Emilio Augustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the tribunal on the objections of Jurisdiction, 25 January 2000 [*Maffezini*] at 56, 62-63.

seeks to import law.[20] This is particularly the case where the provision is drafted vaguely, such as NAFTA Article 1105 on fair and equitable treatment in accordance with international law.

Second, investors may face difficulty in invoking an MFN clause to eliminate of provisions of the basic agreement. The claimant in *CMS v. Argentina* attempted to eliminate the emergency exception clause in the primary agreement, the US-Argentina BIT. However, the tribunal ruled that the absence of such a provision in other agreements simply did not eliminate the provision from the primary agreement (UNCTAD, 2010: 24). Even so, questions might arise with regard to two different agreements with different treaty exceptions where one has less than the other. The author refrains from addressing this issue as it is beyond the scope of this paper.

Besides substantive provisions, investors have also attempted to import more favourable rules of dispute settlement. However, this practice is particularly controversial,[21] especially with regard to admissibility and jurisdictional threshold issues. While some tribunals are willing to incorporate rules of dispute settlement from secondary treaties by virtue of an MFN clause,[22] other tribunals have been reluctant.[23]

The author is more inclined with the view that some MFN clauses may extend to rules of dispute settlement as in the case of *Maffezini*, provided the language of the clause is broad enough, e.g. "in all matters", and there is no explicit statement from the parties to the treaty against it. However, the parties may also explicitly limit the scope of the treaty as could be seen in more recently concluded IIAs that carve out the application of MFN clauses to rules of dispute settlement.[24] This application will be

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[20] *ADF Group Inc. v. USA*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 [*ADF*] at 194.

[21] For further reading, Michael Ewing-Chow and W. Ng, "*Caveat Emptor*: Three Aspects of Investment Protection Treaties", Asian Yearbook of International Law 14 No. 2008 (2010).

[22] *Maffezini*, *supra* note 19 at 62-63; *Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Award, 21 June 2011 at 104-108; *RosInvestCo v. Russian Federation,* SCC Case No. Arb. V 079/2005, Award on Jurisdiction, October 2007 at 124-35.

[23] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/04/15, Decision on Jurisdiction, 8 February 2005 at 202, 215*; Salini Costruttori S.p.A and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004 at 112; *Tza Yap Shum v. Republic of Peru,* ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009 at 220.

[24] ASEAN-China Investment Agreement, Article 5(4) provides: "For greater certainty, the obligation in this Article does not encompass a requirement for a Party to extend to investors of another Party dispute resolution procedures other than those set out in this Agreement."

more consistent with the interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).[25]

Some of the reviewed IIAs do not have any MFN clause (especially bilateral FTAs between ASEAN Member States and dialogue partners). On the other hand, most of the ASEAN+1 Dialogue Partner Investment Agreements, except ASEAN-Korea Investment Agreement, explicitly exclude the application of MFN clause to provisions on ISDS. For example, Article 6 footnote 4(a) of ACIA provides as follows:[26]

> For greater certainty:
> (a) this Article shall not apply to investor-State dispute settlement procedures that are available in other agreements to which Member States are party;…

Such a clarification is needed so investors will settle a dispute according to the procedures specified in the agreement. This will also be useful for RCEP so investors will use the prescribed ISDS procedures for disputes brought under the agreement. Having said this, the procedure can be improved further (as elaborated in Part 3.2.11).

3.2.6 Fair and Equitable Treatment (FET)

In IIAs, FET clauses often lack a precise meaning and have raised lots of controversies leading to multiple interpretations by arbitral tribunals (UNCTAD, 2007: 28). Some of the reviewed IIAs link the FET clause with CIL, and the clause can be phrased as follows:

> This Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not *ipso facto* establish that there has been a breach of this Article.[27]

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[25] VCLT, *supra* note 3.
[26] See also Malaysia – New Zealand FTA, Article 10.5 (2); AANZFTA, Article 16(2)(a).
[27] *Agreement between Japan and the Republic of the Philippines for an Economic Partnership*, signed on 9 September 2006, Article 91; see also the Trilateral Investment Agreement, *supra* note 12, Article 5(1).

In *Merrill & Ring*, Canada argued that a CIL-linked FET clause refers to the standard of protection that was developed by the *Neer* case (Vandevelde, 2010: 192-3).[28] Violation occurs when the conduct of the host state amounts to an "outrage", "bad faith", "wilful neglect of duty", or conduct "so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[29] However, several tribunals opined that CIL evolves and therefore FET is not frozen to the standards developed in the *Neer* case.[30] According to one of the tribunals, the standard is broader and protects investors against "all such acts or behaviour that might infringe a sense of fairness, equity and reasonableness".[31]

Some of the reviewed IIAs have attempted to limit the standard only to the guarantee against denial of justice. This type of clause has been used in several reviewed IIAs, including Article 11(2) of ACIA which states:

> 2. For greater certainty:
>
> a. fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; …[32]

Although there has been no case suggesting how tribunals interpret this type of clause, it is expected to limit broad interpretation of the standard to only the guarantee for procedural matters (Bjorklund, 2005: 809) as the due process principle requires a host state: 1) to provide prior notice to the relevant party upon whom the state applies coercive power, and 2) to provide an opportunity for the party to contest the application before an international tribunal including the right of legal representation (Vandevelde, 2010: 49-50). RCEP negotiators should consider following this approach. Otherwise, the scope of the FET standard will be too broad and unclear.

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[28] *Merrill & Ring Forestry LP v. Canada,* Award, 31 March 2010 [*Merrill & Ring*] at 121.
[29] *Neer v. Mexico*, 4 R. Int'l Arb. Awards, 15 October 1926, 4 at 61-62; *Case Concerning Electtronica Sicula S.p.A (United States of America v. Italy)*, Judgment of 20 July 1989 [1989] ICJ Rep 1989 at 15; *Gami Investments, Inc. v. Mexico*, UNCITRAL (NAFTA), Final Award, 15 November 2004 at 116, 123,125,127.
[30] *ADF*, *supra* note 20; *Maffezini*, *supra* note 19 at 179; *Pope & Talbot Award*, *supra* note 17 at 118; *Merrill & Ring*, *supra* note 28 at 193.
[31] *Merrill & Ring*, *Neer v. Mexico* at 210 and 213.
[32] ACIA, *supra* note 6, Article 11(2); see also ASEAN – China Investment Agreement, Article 7(2)(a); AANZFTA, Article 6(2)(a).

3.2.7 Expropriation

Generally, countries may expropriate foreign investments under the notion of lawful expropriation provided it is done on a non-discriminatory basis, for public purposes, in accordance with the due process of law, and against the payment of compensation (UNCTAD, 2007: 44). While in the past there were many cases of direct expropriation—seizure of investments or transfer of legal title over investments, nowadays there are more cases of indirect expropriation before investor-state tribunals.

Unfortunately, expropriation clauses in older IIAs tend to be very vague. For example: the phrase "measures tantamount to or equivalent to expropriation" does not explain the degree of interference or deprivation of investors' ownership rights that can amount to indirect expropriation. As a result, different tribunals have been developing different approaches of what constitutes indirect expropriation.

First, the *sole effect* approach proposes that a measure or a set of measures constitutes indirect expropriation when it has a permanent character, or substantially deprives the investor's property rights, or conflicts with the investor's investment-backed expectations,[33] with an emphasis on the existence of substantial interference/ deprivation of investors' right of ownership of its investments.[34] Nonetheless, if the government actions only reduce the profits of the investments, they will not necessarily amount to indirect expropriation.[35]

The second approach in defining indirect expropriation takes into account the nature or character of the governmental acts in pursuing its public policy objectives.[36] The tribunal in *Tecmed* found it necessary to consider "whether such actions or measures [of the host state] are proportional to the public interest presumably protected

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[33] *LG&E Energy Corp v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 [*LG&E*] at 190; *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (2000), Award, 30 August 2000 [*Metalclad*] at 103; *Nykomb Synergetics Technology Holding, AB, Stockholder v. Republic of Latvia, Riga,* SCC, 16 December 2003 at 4.3.1; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (New York: Oxford University Press, 2008) [Dolzer and Schreuer] at 65-93; Christopher F. Dugan, Don Wallace Jr., et al., *Investor-State Arbitration* (New York: Oxford University Press, 2008) [Dugan, Wallace, et al.] at 455.

[34] *EnCana Corporation v Ecuador*, LCIA, Case No. UN3481, Final Award, 3 February 2006 [*EnCana v Ecuador*] at 172-183; *Waste Management, Sempra Award*, 2007 at 141 and 147.

[35] *EnCana v. Ecuador*, *ibid.* at 173-174.

[36] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 [*Tecmed*] at 115; Andrew Newcombe, "The Boundaries of Regulatory Expropriation in International Law", (2005) 20:1 ICSID Review – FILJ [Newcombe] at 2; Dugan, Wallace, et al, *supra* note 33 at 461.

thereby and to the protection legally granted to the investments"[37] (*emphasis added*). With this approach, the analysis focuses on how the government measure is to be characterized and how much the nature or character should weigh against the depriving effects on investors.[38]

The last approach as developed in *Methanex* provides that a government measure will not be expropriatory and no compensation shall be owed to investors when the measure is: 1) non-discriminatory, 2) in accordance with due process, and 3) for public purpose.[39] The potential implication of following this approach is that there could no longer be a notion of lawful expropriation as the criteria for a measure to be non-expropriatory is the same as the criteria for lawful expropriation, except for the obligation to compensate. This will render the clause of lawful expropriation in an IIA meaningless. This approach has received a lot of criticism and subsequent tribunals have been reluctant to follow this route.[40]

While all of the reviewed IIAs cover both direct and indirect expropriation, the differences lie on specific carve-outs as well as further explanation of what constitutes indirect expropriation. For example, ACIA carves out the expropriation of land and the issuance of compulsory licenses in accordance with the Agreement on the Trade-Related Intellectual Property Rights (TRIPS) from the rule of expropriation in the agreement.

In addition, Annex 2 of ACIA elaborates the factors to assess whether a governmental measure constitutes indirect expropriation. Paragraph 4 provides that non-discriminatory measures of a member state that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation.[41]

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[37] *Tecmed, supra* note 36 at 122.
[38] Dugan, Wallace, *et al*., *supra* note 33 at 465.
[39] *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005 [*Methanex*] Part IV Chapter D at 7; Todd Weiler, "Methanex Corp. v. U.S.A.: Turning the Page on NAFTA Chapter Eleven?" (2005) 6 Journal of World Investment and Trade at 918-919; David Schneidarman, *Constitutionalizing Economic Globalization: Investment Rules And Democracy's Promise* (Cambridge University Press, 2008) at 95.
[40] *Fireman's Fund Insurance Company v. The United Mexican States,* ICSID Case No. ARB(AF)/02/01, Award, 2006 at 176; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 14 May 2009 at 356.
[41] See also AANZFTA, Article 9, Annex on Expropriation and Compensation.

This is a way to provide governments with more policy space. However, the requirements to exercise such regulatory power should be clear. Paragraph 4's requirements are not necessarily different from those developed by the tribunal in *Methanex.* As mentioned above, the *Methanex* tribunal conflated those requirements with the requirements of lawful expropriation. RCEP should address this matter. For example, it can include a procedural mechanism that has to be followed by governments who seek to exercise its regulatory power. This could be in the form of a requirement on the relevant government to notify affected investors as well as a domestic review mechanism for the investors to challenge the proportionality of the measure.

3.2.8 Transfers and Exceptions

All of the reviewed IIAs contain clauses on guarantee of transfers relating to a covered investment and such transfer can be made freely without delay into and out of the host state's territory. Further, these clauses contain a list of exceptions under which the host state may prevent or delay a transfer so long as it is done in an equitable and non-discriminatory manner and in good faith. The difference among the clauses mainly lies on the list of exceptions as can be seen in the following sample.

Table 4: Comparison of the list of exceptions for transfers

ACIA Article 13 (3)	**AANZFTA Article 8 (3)**	**ASEAN – China Investment Agreement Article 10 (3)**
a) bankruptcy, insolvency, or the protection of the rights of creditors;	a) bankruptcy, insolvency, or the protection of the rights of creditors;	a) bankruptcy, loss of ability or capacity to make payments, or protection of the right of creditors;
b) issuing, trading, or dealing in securities, futures, options, or derivatives;	b) issuing, trading, or dealing in securities, futures, options, or derivatives;	(b) non-fulfilment of the host Party's transfer requirements in respect of trading or dealing in securities, futures, options or derivatives;
c) criminal or penal offences and the recovery of the proceeds of crime;	c) criminal or penal offences and the recovery of the proceeds of crime;	(c) non-fulfilment of tax obligations;
	d) financial reporting or record keeping of transfers when necessary to assist law	

d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; e) ensuring compliance with orders or judgments in judicial or administrative proceedings; f) taxation; g) social security, public retirement, or compulsory savings schemes; h) severance entitlements of employees; and i) the requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Member State.	enforcement or financial regulatory authorities; e) ensuring compliance with orders or judgments in judicial or administrative proceedings; f) taxation; g) social security, public retirement, or compulsory savings schemes; and h) severance entitlements of employees.	(d) criminal or penal offences and the recovery of the proceeds of crime; (e) social security, public retirement or compulsory saving schemes; (f) compliance with judgements in judicial or administrative proceedings; (g) workers' retrenchment benefits in relation to labour compensation relating to, amongst others, foreign investment projects that are closed down; and (h) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities.

It is important to have a list of exceptions because in certain situations, the prevailing circumstances may require the host state to take such measures, for example to prevent abrupt capital outflows from the country during a financial crisis, which can worsen the situation in the country. RCEP also needs to provide this guarantee of transfer and a similar list of exceptions.

3.2.9 Treaty Exceptions

The trend of including treaty exceptions in an IIA began just recently. Governments use treaty exception clauses as a policy tool to strike a balance between investment protection and safeguarding other values or objectives considered to be fundamental to the countries concerned, such as public health (Ewing-Chow and Fischer, 2011: 6-7). The clause provides the host state with significant room to manoeuvre when facing

circumstances that may justify derogation from its IIA obligations. If the host state successfully invokes the treaty exception, it is exempted from liability (Dugan, Wallace, *et al*, 2008: 178-179).

There are several types of treaty exception clauses. A simpler one could be found in BITs, such as the essential security exception clause in the cases involving Argentina.[42] This exception has its own complexity as reflected in diverging interpretations developed by the tribunals that had generated extensive debates among scholars.[43]

On the other hand, ACIA contains the most comprehensive types of exceptions, including 1) exceptions to transfer or funds, 2) measures to safeguard balance of payments, 3) general exceptions, and 4) security exceptions. Similar type of exceptions can also be found in AANZFTA, ASEAN-Korea Investment Agreement, and ASEAN-China Investment Agreement. As these exceptions have never been invoked in investment arbitration cases, we are yet to see how tribunals will interpret them. Notably, the general exception clause is similar to the General Agreement on Tariff and Trade (GATT) 1994 Article XX exception—word-by-word with minor modifications. It can be expected that some tribunals might refer to the WTO cases for interpretation.[44]

RCEP should seek to incorporate these treaty exceptions to balance investment protection and countries' legitimate right to regulate. At the same time, these provide more clarity and certainty to foreign investors regarding the scope of host states' legitimate right to regulate.

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[42] *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/08, Award, 25 April 2005 [CMS Award] at 349-352; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Application for Annulment, 21 August 2007 [CMS Annulment]; *LG&E*, *supra* note 33; *Sempra Energy International v. Argentina*, ICSID ARB/02/16, Award, 28 September 2007 [*Sempra Award*] at 366-368; *Sempra v. Argentine Republic*, Decision on Argentina's Application for Annulment of the award, 10 June 2010 [Sempra Annulment]; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 [*Enron Award*] at 324-326; *Enron v. Argentine Republic*, Decision on the Application for Annulment, 30 July 2010 [Enron Annulment]; *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 [Continental] at 183.

[44] For further discussion, see Jürgen Kurtz, "Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis" (2008) Jean Monnet Working Paper 06/08.

3.2.10 Denial of Benefits

This type of clause is inserted into IIAs to prevent treaty shopping and nationality planning by investors—both domestic and foreign.[45] The clause is meant to prevent fraudulent companies from gaining protection from the arrangements. For example, this clause is found in Article 19 of ACIA:

1. A Member State may deny the benefits of this Agreement to:
   (a) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of a non-Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State;
   (b) an investor of another Member State that is a juridical person of such other Member State and to investments of such investor if an investor of the denying Member State owns or controls the juridical person and the juridical person has no substantive business operations in the territory of such other Member State; and
   (c) an investor of another Member State that is a juridical person of such other Member State and to an investment of such investor if investors of a non-Member State own or control the juridical person, and the denying Member State does not maintain diplomatic relations with the non-Member State.

Corporations often structure their companies in such a way that their investments are protected by a certain IIA. Law firms have been openly advising for this.[46] While some tribunals have allowed this type of corporate structuring, in certain cases where the structuring is done much later for the purpose of bringing a dispute, tribunals rejected the claim and found them to be an abuse of process.[47]

The ACIA's denial-of-benefit clause can be used as a good starting point for RCEP members who seek to limit the usage of the agreement by investors of non-member states as well as domestic investors. However, RCEP negotiating states could perhaps add more clarity to the clause. For example, they could specify the factors considered

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[45] UNCTAD, "IIA Issues Note: Recent Developments in Investor-State Dispute Settlement (ISDS)", No. 1 April 2014 at 16.
[46] Herbert Smith Freehills, "Indonesia Update: What are the Possible Consequences of Termination of Indonesia's Bilateral Investment Treaties?" Jakarta, May 2014 <http://www.herbertsmithfreehills.com/-/media/Files/ebulletins/2014/20140512 – Indonesia update what are the possible consequences of termination of Indonesias Bilateral Investment Treaties.htm>.
[47] See for example: *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty… v. The Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013 at 146.

to determine the existence of 'substantive business operations.' This phrase has been interpreted by several tribunals, including those using the term 'substantial business activities.'[48] Substantial or substantive is defined as having 'substance and not merely form'. Some investment-related activities and the employment of a small but permanent staff have been considered sufficient to fulfill this requirement.[49] Even a holding company may carry substantial business activities. However, if the holding company's activities were simply to hold assets of its subsidiaries, it would not fulfill such requirement.[50]

3.2.11 Dispute Settlement – Investor-State Dispute Settlement (ISDS)

All the reviewed IIAs contain both state-state dispute settlement and ISDS. The latter has been subject to scrutiny of many countries for several reasons.

First, some developed countries argue that they do not need any ISDS mechanisms because they have fair and competent courts. While this may be true, in reality, investments do not go only to developed countries, but increasingly to developing countries, including those with judiciary systems which are perceived to be problematic—this includes most of RCEP negotiating states according to the CPI index in Table 2 above. In fact, most of the states involved in RCEP negotiations are also becoming both capital-importing and capital-exporting countries. For this reason, they have the interests to ensure that their investors have direct access to a competent and impartial judiciary when investing in the region.

Second, some argue that ISDS exposes governments to expensive litigation. It may be true but this can be resolved by ensuring that ISDS is done only as a last resort. For this reason, the creation of a dispute prevention mechanism in each respective member of RCEP can solve this issue. The mechanism is meant to prevent a conflict from escalating to a dispute and it is to be implemented as an investor after-care services. Further, RCEP members must ensure transparency by publishing the

[48] *Limited Liability Company Amto v. Ukraine*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 080/2005, Final Award, 26 March 2008 at 61-62, 69.
[49] *Ibid.* at 69.
[50] *Pac Rim Cayman v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012 at 4.72, 4.74, and 4.78.

procedure in using such a mechanism. An example can be seen in the Republic of Korea's Office of the Foreign Investment Ombudsman.[51]

Third, some argue that ISDS leads to various, often contradicting, interpretations of investment standards by different arbitral tribunals. This can be addressed in RCEP by the inclusion of a joint interpretation mechanism, as found in Article 40 (2) and (3) of ACIA which provide:

> 2. The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Member States shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. Without prejudice to paragraph 3, if the Member States fail to issue such a decision within 60 days, any interpretation submitted by a Member State shall be forwarded to the disputing parties and the tribunal, which shall decide the issue on its own account.
> 3. A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Under this mechanism, the tribunal or a disputing party may request a joint interpretation on any ACIA provision in dispute. With this mechanism, member states in an IIA can ensure that the agreement will be interpreted in accordance with their intentions. Unfortunately, the joint interpretation mechanism does not exist in most of the reviewed bilateral FTAs.

In addition, the negotiating states of RCEP can also improve its ISDS procedure by including a clause on the mechanism to select the members of a tribunal. For example, Article X-10 of the Draft of Canada-Europe Free Trade Agreement provides as follows:

> [...]
> 3. Pursuant to Article x-26(2), the Committee on Services and Investment shall establish, and thereafter maintain, a list of individuals who are willing and able to serve as arbitrators and who meet the qualifications set out in paragraph 5. The Committee on Services and Investment shall ensure that the list includes at least 15 individuals.

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[51] The office was established in October 1999. For further information <http://www.i-ombudsman.or.kr/eng/index.jsp>.

4. The list established in paragraph 3 shall be composed of three sub-lists: one sub-list for each Party and one sub-list of individuals, who are neither nationals of Canada nor the Member States of the European Union, to act as presiding arbitrators. Each sub-list shall include at least five individuals. The Committee on Services and Investment may agree to increase the number of arbitrators for the list.
5. Arbitrators appointed pursuant to this section **shall have expertise or experience in public international law, in particular international investment law**. It is desirable that they have expertise or experience in international trade law, and the resolution of disputes arising under international investment or international trade agreements [*emphasis added*].

This type of provision helps to ensure that members of a tribunal are qualified to adjudicate in the dispute. In this connection, it is important for tribunal members to have expertise or experience in the field of international investment law as well as other areas of international law. In fact, this type of multi-disciplinary expertise can be useful as we are witnessing a greater level of convergence between international trade law and international investment law (Antoni and Ewing-Chow, 2013). With the rise of Global Value Chains (GVCs) around the world, multinational companies invest in factories all around the world and trade component parts among them. This demonstrates how the two areas of law are closely related.

Another suggestion to improve the current ISDS mechanism is to create an independent appellate body to review decisions made by ad hoc tribunals (Sauvant and Ortino, 2013: 49). There has been a proposal to create an International Investment Court as a permanent appeals mechanism to resolve widespread and difficult questions of law, and interpretations that could eventually lend greater legitimacy to the regime.[52] Nonetheless, there are concerns that an appeal mechanism could undermine the finality of an arbitral award, 'repoliticize' the process, and that the added layer would replicate the difficulties in the current system (Sauvant and Ortino, 2013: 49). Although finality may be compromised, ensuring increasing governance in the system and a more harmonized interpretation—especially when the clause in the IIAs are the same or very similar—seem to prevail over such concern.

[52] Doak Bishop, "The Case for an Appellate Panel and its Scope of Review" in Federico Ortino, Audley Sheppard & Hugo Warner (eds.), 1 Investment Treaty Law: Current Issues 15 (BIICL, 2006) at 17; James Crawford, "Is there a Need for an Appellate System?" in Ortino *et al*., 2006, *ibid.* at 13.

All the suggestions mentioned above should be considered by negotiating states of RCEP to improve and address the concerns that they have with the current ISDS mechanism. After all, this mechanism is one that has been perceived relatively reliable by foreign investors compared to domestic courts.[53]

3.3.Investment Facilitation

An investment facilitation clause is relatively new in IIAs but it can be found in ACIA. This type of clause requires member states to cooperate in matters including the following: 1) streamlining procedures for investment applications and approvals; 2) promoting dissemination of investment information, including investment rules, regulations, policies and procedures; 3) establishing one-stop investment centers; 4) strengthening databases on all forms of investments for policy formulation; 5) consulting with the business community on investment matters; and 6) providing advisory services to the business community of the other member states. Although these obligations seem rather weak because they only oblige the states to cooperate, such a concrete list of actions provide better guidance on the specific focus areas that the member states should improve. RCEP negotiators should consider creating such a list based on the specific areas that they want to improve in order to facilitate investments in the region and thus, in the long run the efforts can improve their investment climate.

3.4.Investment Liberalization

If RCEP is meant to add more value to the existing IIAs among individual ASEAN members and the dialogue partners, it must cover deeper and broader areas. Berger et al. found strong evidence that liberal admission rules—IIAs with pre-establishment market access commitments (NT and/or MFN treatment)—promote bilateral FDI (Berger, *et al.*,2013: 252-253;268). They estimated that a host country could increase its share in total FDI flows from all source countries up to about 29 percent in the long

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[53] Office of the United States Trade Representative, 'The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors' 27 March 2014 <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> accessed 21 October 2014.

run by switching from an investment chapter of Regional Trade Agreement (RTA) without NT provisions to an investment chapter of RTA with NT provisions (Berger, *et al.*, 2013:268). This means that the schedule and non-conforming measures of members should be trimmed further thereby allowing more FDI to enter into their respective territories. Further discussion about the baseline study for the liberalization pillar is covered by other ERIA Discussion Paper.

4. Monitoring Mechanism

Aside from the standards previously mentioned, a monitoring mechanism is essential to ensure that RCEP will be fully implemented by its member states. ACIA can be used as a starting point to develop this mechanism. ACIA designates the ASEAN Investment Area Council to coordinate and review the implementation of the agreement. However, the Council neither explains the monitoring mechanism nor the significance of the implementation.

The only mechanism that is close to be considered as a monitoring mechanism of the implementation of the various economic agreements of ASEAN, including ACIA is the ASEAN Scorecard. This Scorecard endeavors to review the so-called implementation by focusing on the ratification and transposition of international agreements into domestic laws. Unfortunately, such a definition of implementation does not assess real implementation of the agreements. Real implementation goes beyond that. For example, with regard to market access, implementation should also assess whether investors are really granted permits/ approvals according to the relevant member state's commitment to its schedule, instead of merely looking at what the member state's law provides.

For the investment chapter of RCEP, the negotiating states must consider including a more advanced monitoring mechanism such as the Trade Policy Review (TPR) mechanism in the WTO. This mechanism is done regularly to ensure compliance with the WTO agreements. The TPR report is prepared by the WTO Secretariat based on the policy statements of the member under review and on a report of the Secretariat's TPR division. The issued policy statements will contain measures of the member states

that may not be in compliance with the agreement. This is a far more comprehensive mechanism compared to that of ACIA. It can promote more transparency and can alert the member states of their non-compliant measures. In the long run, this mechanism can promote better implementation of the agreement.

5. Consolidation Efforts – Relation to Other Agreements

The existence of various IIAs among the negotiating states of an IIA poses an issue of parallelism which can potentially add complexity, mainly to the negotiating states, as regards the applicable regime of investment protection in the region. RCEP also faces this issue as the negotiating states already have numerous BITs and bilateral FTAs with investment chapters between them as well as regional investment agreements among them.

On the other hand, foreign investors may not find this an issue but rather an opportunity to pick and choose the IIA that grants the best treatment. If this is the case, concluding new agreements—those that balance investment protection and the states' right to regulate—might become useless as investors would most likely opt for the IIA that provides them better protection. Therefore, RCEP should seek to consolidate and simplify these complex and multiple regimes.

In order to do this, RCEP's investment chapter should contain a provision to further effect this consolidation by terminating existing IIAs among negotiating states upon the enforcement of RCEP. Despite not solving this issue in the context of ASEAN, Article 47 of ACIA can be used as a template to improve further. For example, the clause in RCEP can be worded as follows:

Article X
Transitional Arrangements Relating to other International Investment Agreements

1. Subject to paragraphs 2, 3 and 4 of this paragraph, nothing 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.

2. Upon the entry into force of this Agreement, the International Investment Agreements (IIAs) among the Member States (as provided in Annex X) shall be terminated.
3. Notwithstanding the termination of the IIAs mentioned in Annex X, the Reservation List and Non-Conforming Measures of those agreements shall apply to the liberalization provisions of RCEP Investment Chapter, *mutatis mutandis*, until such time the Reservation List of RCEP Investment Chapter comes into force.
4. With respect to investments falling within the ambit of this Agreement, as well as under one of the IIAs mentioned in Annex X, investors of these investments may choose to apply the provisions, but only in its entirety, of either this Agreement or one of the IIAs mentioned in Annex X, as the case may be, for a period of x years after the date of termination of the IIAs mentioned in Annex X.

With such a clause, the region will have one harmonized investment rules regime that is applicable in all 16 member states for all investors from these states and potentially resolve the issue of parallelism.

6. Conclusion

With 16 negotiating states, including some major emerging economies in Asia, RCEP has a broad geographical coverage. Despite the fact that most of these states may already have bilateral or multilateral IIAs among them, RCEP can potentially add more value in four ways.

First, it can liberalize further access to these states by providing more aggressive liberalization commitments. This can be done through the granting of a pre-establishment right in the NT clause as well as less reservations in each state's schedule. Second, RCEP can enhance the investment protection provisions by refining and adding more clarity to ensure that there is balance between investment protection and the right of states' to regulate. Third, RCEP can also contribute further to the provisions on investment promotion and facilitation by providing a better list of various actions that member states should do to make investing easier. Finally, especially from the perspective of host states, RCEP is an opportunity to consolidate various IIAs among 16 negotiating states to ensure that they come up with a refined and appropriate agreement.

Despite the potentials, RCEP also faces various obstacles. With 16 negotiating states, this can also mean that the level of commitments–liberalization, promotion, facilitation and protection—may be lower as each negotiating state may have different interest. This setup makes it harder to agree on something that is too ambitious. In particular, the lower level of commitments might be seen as a reflection of compromises among different points of views as regards the rights of pre-establishment under the NT clause. Nonetheless, the ongoing Trans-Pacific Partnership negotiation (Brunei Darussalam, Malaysia, Singapore, and Vietnam are also parties) may provide more incentives for RCEP negotiating states[54] to match with high level of commitments.

For foreign investors in the region, any outcome of RCEP, particularly its investment protection provisions, may not necessarily be more favorable for them compared to the existing regime. They may want both RCEP and other IIAs—various bilateral BITs, regional investment agreements and FTAs with investment chapters among them—continue to exist side-by-side. Such an arrangement will provide them with options to choose the regime protecting their investments.

In conclusion, the investment chapter of RCEP must progress further through the formulation of new standards in international investment law that can strike a balance between investment protection and the right of state to regulate. It must be ambitious enough to add more value to the existing regime. Further, it should also consolidate the multiple regimes which are currently applicable. Otherwise, the efforts in negotiating RCEP could be relatively futile.

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[54] It is noteworthy that Brunei Darussalam, Malaysia, Singapore, and Vietnam, are parties to both negotiations.

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