

Chapter 8

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

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Chapter 8

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

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The members of the Association of Southeast Asian Nations (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) amongst 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 analyses 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.

1. Introduction

The Association of Southeast Asian Nations (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). In fact, this phenomenon had occurred earlier in international trade law with the conclusion of various FTAs, and was referred to by Jagdish Bhagwati as the ‘spaghetti bowl’ effect (Bhagwati, 1994).

In international trade law, the spaghetti bowl phenomenon had been predicted to potentially create trade diversion and exclusive clubs in the global trading system. However, this is less clear with IIAs. Should the parties involved 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 so far been a success (Koschwar, 2009). In any event, where multiple regimes exist, companies will structure their investments in such a way that they are able to enjoy the benefits from the best regime(s).

ASEAN Member States and their six dialogue partners have more than 80 IIAs themselves, either in the form of BITs, investment chapters of bilateral and plurilateral FTAs, or regional investment agreements (UNCTAD, 2013). The regional comprehensive economic partnership (RCEP), if concluded, could be an opportunity to consolidate the overlapping legal frameworks of investment protection. In this chapter, we review the existing legal frameworks and analyse the provisions based on previous investor – state arbitration cases to come up with recommendations on consolidated standards in RCEP’s investment chapter that could improve current standards in the existing IIAs of the negotiating states.

2. Nature, Object, and Purpose of RCEP

It is important to clearly identify the object and purpose of RCEP's investment chapter 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, the negotiating states can better customise 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 investor-state arbitral tribunals in interpreting the clauses. In this process, arbitral tribunals often look at the object and purpose of the agreement (Sauvant and Ortino, 2013).¹ Unfortunately, the object and purpose of some IIAs are often not clearly stated. Some tribunals have simply relied on the preamble of the BITs to find that the object and purpose of BITs is 'to encourage and protect investment'² or 'to promote greater economic cooperation'.³ Such a liberal interpretation of the object and purpose may put states at a disadvantage, especially if their measures have legitimate reasons despite their effects on some investors.

The Preamble of the ASEAN Comprehensive Investment Agreement (ACIA),⁴ one of the most comprehensive IIAs we reviewed, declares its purpose as being to create a favourable 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. This is one of the implementations of the ASEAN Economic Community Blueprint that seeks to create a competitive single market and production base (ASEAN, 2008).⁵ On this matter, Ewing–Chow's study finds that production networks in several sectors have actually been established within ASEAN. Nevertheless, IIAs amongst ASEAN countries remain useful to prevent backsliding of countries' commitments and ensure that freer flow of

¹ *Vienna Convention on the Law of Treaties*, 23 May 1969 (entered into force on 27 January 1980) [VCLT], Article 31(1).

² *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, p.307.

³ *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, p.124.

⁴ *ASEAN Comprehensive Investment Agreement* (entered into force 29 March 2012).

⁵ Declaration on the ASEAN Economic Community Blueprint (signed 20 November 2007).

capitals, goods, and investments can be achieved to create even stronger production networks (Ewing–Chow *et al.*, 2014). In this chapter we do not elaborate further on whether investment rules affect actual investment flows.⁶

In the context of RCEP, the region’s aggregate gross domestic product (GDP) of US\$17.2 trillion and a population of more than 3.4 billion reveal a huge potential that can be explored further through economic integration.⁷ 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.⁸

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.

It is understood that the core objective of RCEP’s investment chapter is to create an appealing investment environment to attract foreign investors. However, RCEP negotiating states still need to further specify the object and purpose of the agreement to avoid arbitral tribunals’ exercise of wide discretion in interpreting clauses in RCEP’s investment chapter based on its objective ‘to promote, protect, facilitate and liberalise investments’. RCEP’s investment chapter should also mention explicitly the object and purpose of creating a refined IIA that maintains the balance between investment protection and preservation of the member states’ policy space to pursue their legitimate policy objectives, including protection of public health and environment.

⁶ 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.

⁷ Ministry of Trade and Industry of Singapore, ‘Factsheet: What you need to know about RCEP’, available at: [https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/FACTSHEET-WHAT-YOU-NEED-TO-KNOW-ABOUT/Factsheet%20on%20RCEP%20\(June%202014\).pdf](https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/FACTSHEET-WHAT-YOU-NEED-TO-KNOW-ABOUT/Factsheet%20on%20RCEP%20(June%202014).pdf)

⁸ 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 8.1: FTAs with Investment Chapter/IAs amongst ASEAN Member States + Dialogue Partners [Reviewed IAs]

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
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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
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Indonesia + Dialogue Partners FTA

18.	Japan–Indonesia Economic Partnership Agreement	1 July 2008
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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
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Source: Author's compilation.

3. Searching for Appropriate Standards

3.1. Investment Promotion

BITs are normally titled ‘Agreement on the Promotion and Protection of Investments’. However, most BITs do not further elaborate on the promotion obligation, and simply use the generic phrase of requiring the Contracting Parties to encourage and create favourable conditions for foreign investors.

In some plurilateral IIAs, the obligation to promote is made clearer with a list of actions to be undertaken by the parties involved. For example, Article 24 of ACIA 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).*

While having a more detailed investment promotion clause is beneficial for providing clearer guidance for implementation by host states, any investment promotion actions will be even more useful if the host states have a favourable investment climate as we elaborate further below in the discussion about investment protection.

The promotion clause in ACIA is considered as soft law because it only imposes an obligation to cooperate rather than being a strong, binding obligation.

Nevertheless, due to its comprehensiveness, RCEP could use ACIA's clause as a baseline to develop an investment promotion clause that imposes binding obligations and provides capacity building for the less developed members to fulfil the obligations therein.

3.2. Investment Protection

Investment protection provisions should be the main focus of RCEP's investment chapter negotiation as it contributes to the creation of a favourable investment climate. These provisions become ever more important due to foreign investors' perception of the public sectors of some countries in the region as reflected in the 2014 Corruption Perception Index below.

Table 8.2: 2014 Corruption Perception Index (CPI) 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

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

Source: Transparency International (<https://www.transparency.org/cpi2014/results>).

Having investment protection provisions in RCEP magnifies the negotiating states' commitments to upholding the rule of law in the region. A recent survey of 301 senior decision makers at Forbes 2000 companies revealed that an average of

more than 70% of respondents across various sectors – energy and natural resources, technology, media and telecoms, life sciences, consumer and retail, and financial institutions – affirmed that the absence of investment protection treaties in a country deterred them from investing or caused a reduction in their investments.⁹

Yet, investor–state arbitration mechanisms to enforce these investment protection provisions has been under scrutiny due to diverging interpretations of the provisions by arbitral tribunals (Echandi and Sauve, 2013). The lack of clarity in these provisions is actually one of the sources of the problem.

Governments have also realised that the existing IIAs (particularly the earlier generation BITs) often do not explicitly specify 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 violations of protection guarantees in IIAs.

ACIA and the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA) contain more precisely formulated protection provisions that attempt to strike a balance between investment protection and the right of states to regulate. Their investment protection clauses can be used as a baseline for those that should be improved further in RCEP’s investment chapter. In analysing the various investment protection provisions of ASEAN+ dialogue partners’ FTAs, we focus on the plurilateral IIAs rather than the bilateral IIAs, as the former are relatively more advanced. Note that we also include the trilateral investment agreement between China, Korea, and Japan as a reference to the recent approach of the East Asian countries to IIAs.¹⁰

⁹ Hogan Lovells, Bingham Centre for the Rule of Law, and BIICL, *Survey Tool: Foreign Direct Investment and the Rule of Law*, available at: <http://www.hoganlovellsruleoflaw.com/survey-tool>

¹⁰ *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 8.3: Snapshot Comparison of Investment Protection Provisions in Investment Chapters of ASEAN Member States + Dialogue Partners' FTAs and other Regional Investment Agreement

	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 CL, 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 exceptions	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: CIL – customary international law; NT – national treatment; MFN – most-favoured nation; FET – fair and equitable treatment; ISDS – investor–state dispute settlement; SMBoD – senior management and board of directors.

Source: Author’s compilation.

3.2.1 Scope and Coverage

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

(a) Admission Clause – Approval in Writing

Admission clauses govern the entry of investments into host states. In some IIAs, the clause requires investments to be admitted in accordance with the host state’s national 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 foreign direct investment (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).

All of the reviewed IIAs contain admission clauses, but some require the investment 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 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.¹¹

Although such an approval requirement may be burdensome for investors, ACIA deals with this matter by means of the inclusion of Annex 1 that clarifies the specific procedure for approval. This can improve 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 requirement, they should include specific procedures as provided in Annex I of ACIA. They can improve Annex I further by listing each host state's focal point that will be responsible for the issuance of such approvals as well as procedures involved.

(b) Relationship with Other Chapters or Agreements

ACIA clarifies its relationship with the ASEAN Framework Agreement on Services (AFAS). In relation to liberalisation under AFAS, ACIA clarifies the sectors that will be liberalised 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 in trade law the term is normally understood as the opening up of certain sectors for foreign investors (market access), in investment law the term

¹¹ *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*, ASEAN ID Case No. ARB/01/1, Award, 31 March 2003 (ICSID Additional Facility Rules).

can also mean providing better protection for foreign investors. This provision becomes ambiguous and could be interpreted as limiting the scope of ACIA, including its investment protection provisions, only to the listed sectors.

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.*

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 includes the liberalisation 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.

3.2.2. Performance Requirements

A performance requirements clause places 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 of petroleum projects.¹² Under the government's guidelines, the operators were obliged to allocate certain amounts of funds for research and development matters – endowing a university chair, furnishing a classroom, providing scholarships, or an in-house research facility – 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.¹³

Most of the reviewed IIAs contain performance requirement clauses that refer to the Agreement on Trade-related Investment Measures (TRIMs) of the World Trade Organization (WTO). For example, Article 6 of the 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.

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

Since governments can easily issue regulations containing performance requirements, perhaps RCEP should look into the possibility of imposing an obligation to create a domestic review mechanism to deal with investors' allegations of a host state's performance requirements. Arguably, this could positively contribute to governance, provided the mechanism is fast and impartial so that issues that arise do not need to be brought before investor–state arbitration tribunals.

¹² *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012, pp.45–46.

¹³ *Ibid.* pp.237–38, and 242.

(a) 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 in the host state. A simpler and more liberal approach to this clause is found in Article 7 of the ASEAN–Korea Investment Agreement, which provides:

1. *A Party shall not require a juridical 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 increase spill over effects from foreign investment, including by requiring employment for domestic or indigenous workers. They also want to retain control over their immigration policies (UNCTAD, 2012). To address such concerns, the clause could be modified to be less liberal, as can be seen in Article 8 of the Trilateral Investment Agreement:

*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.*

Admittedly, such a provision provides host states with significant discretion. To maintain the facilitation element, RCEP's investment chapter should contain an obligation on host states, e.g. to install a transparent and streamlined mechanism for work permit applications of SMBoD. It must at least incorporate a timeline as well as an obligation on the part of the host state to provide the reason for refusing a work permit application of SMBoD.

(b) National Treatment (NT)

National treatment (NT) 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). To create a level playing field between foreign and domestic investors, the host state must provide no less favourable treatment of foreign investments or investors than of domestic investments or investors.

In analysing whether the NT obligation has been breached, tribunals normally assess whether there is *de jure* or *de facto* discrimination (Bjorklund, 2008). Additionally, some tribunals also consider whether the investors are in 'like circumstances' by analysing whether the difference in treatment has been justified by rational policy objectives of the government (Bjorklund, 2008).¹⁴

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 that were previously closed to foreign investors. These commitments are reflected in each member's schedule and relate to the liberalisation 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.***

Under Article 4(d) of ACIA, the protection is extended to natural or juridical persons who are making their investments – before the investment is fully established in the host state.

Normally, each party to an IIA maintains a reservation list of measures that will not constitute NT violation. Such flexibilities for an NT clause might be needed to

¹⁴ *Pope & Talbot Inc. v. Canada*, NAFTA, Award on the Merits of Phase 2, 10 April 2001, p.103; see also Alvaro Antoni and Michael Ewing-Chow, 'Trade and Investment Convergence and Divergence: Revisiting the North American Sugar War' 2013 1(1) Latin American Journal of International Trade Law 337-341.

preserve the policy space of host states. However, a long list of reservations may reduce the scope of protection, and thus become unfavourable to foreign investors.

RCEP's investment chapter should have an NT clause that contains both post-establishment and pre-establishment commitments. In the negotiation, the states must carefully choose the approach to list their pre-establishment NT commitments. There are two possible approaches – the negative-list and the positive-list. The former approach 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 open those sectors/activities that at the time the IIA is signed may not yet exist in the country. In contrast, the positive-list approach offers selective liberalisation. States create a list of industries in which investors will enjoy the rights of pre-establishment (UNCTAD, 2012). ACIA adopts a hybrid approach. Using the positive-list approach, ASEAN Member States limit their pre-establishment commitments for the purpose of market access liberalisation to only certain sectors.¹⁵ Furthermore, Article 9 provides that certain reservations (negative-list approach) shall apply to these sectors.

(c) Most-favoured Nation (MFN) Treatment

A most-favoured nation (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).

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 provisions¹⁶ or rules of dispute settlement¹⁷ 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.

¹⁵ ACIA, Article 3(3).

¹⁶ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, pp.227–35.

¹⁷ *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, pp.62–63.

For example, investors may not invoke an MFN clause to eliminate 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). Even so, questions might arise with regard to two different agreements with different treaty exceptions where one has less than the other. We refrain from addressing this issue as it is beyond the scope of this chapter.

The importation of more favourable rules of dispute settlement is controversial (Ewing–Chow and Ng, 2010). While some tribunals are willing to incorporate rules of dispute settlement from secondary treaties by virtue of an MFN clause,¹⁸ others have been reluctant.¹⁹ We are more inclined towards 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. This will be more consistent with the interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).²⁰

Due to the over-expansive application of MFN clauses, some states excluded the clause altogether or reformulated the MFN clause in their newer IIAs. The investment chapters of AANZFTA, ASEAN–India FTA, and some bilateral FTAs between ASEAN Member States and dialogue partners, do not contain any MFN clause. Most of the ASEAN+1 Dialogue Partner Investment Agreements, except the ASEAN–Korea Investment Agreement, explicitly exclude the application of the MFN

¹⁸ *Maffezini*, *supra* note 17, pp.62–63; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, pp.104–08; *RosInvestCo v. Russian Federation*, SCC Case No. Arb. V 079/2005, Award on Jurisdiction, October 2007, pp.124–35.

¹⁹ *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/04/15, Decision on Jurisdiction, 8 February 2005, pp.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, p.112; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, p.220.

²⁰ VCLT, *supra* note 1.

clause to provisions on ISDS. For example, Article 5(4) of the ASEAN–China Investment Agreement provides:²¹

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.

The most recent development as regards the MFN clause can be seen in Article X.7 (3) of the Draft Text of the Canada–European Union Free Trade Agreement (CETA)²² that provides:

[...] Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.

The main rationale for adding such a clause is to prevent the incorporation of other standards of treatment contained in other IIAs of host states. In fact, most MFN claims in investment arbitration clauses were invoked for such purpose, rather than to claim against different treatments between foreign investors. However, even the clause in the Draft CETA is not very clear and can lead to various interpretations by arbitral tribunals. If RCEP’s investment chapter is to include an MFN clause after all, it must consider adopting the Draft CETA’s limitation and improve it further. Otherwise, the efforts of negotiating refined standards of protection can become futile because investors can simply incorporate the provisions in older IIAs of the host state into RCEP’s investment chapter by virtue of an MFN clause.

(d) Fair and Equitable Treatment (FET)

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

²¹ See also Malaysia–New Zealand FTA, Article 10.5 (2); AANZFTA, Article 16(2)(a); ACIA, Article 6 footnote 4(a).

²² Consolidated Text Canada–European Union Free Trade Agreement (Draft), dated 26 September 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

*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.*²³

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).²⁴ 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 recognise its insufficiency’.²⁵ However, several tribunals opined that CIL evolves and therefore FET is not frozen to the standards developed in the *Neer* case.²⁶ Simply, the standard is broader and protects investors against ‘all such acts or behaviour that might infringe a sense of fairness, equity and reasonableness’.²⁷

Some of the reviewed IIAs have attempted to limit the standard only to the guarantee against denial of justice. For example, Article 11(2) of ACIA provides:

1. *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; ...*²⁸

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 mainly the guarantee for procedural matters and patently arbitrary and unjust decision

²³ *Agreement between Japan and the Republic of the Philippines for an Economic Partnership* (signed 9 September 2006), Article 91; see also the Trilateral Investment Agreement, *supra* note 10, Article 5(1).

²⁴ *Merrill & Ring Forestry LP v. Canada*, Award, 31 March 2010, p.121.

²⁵ *Neer v. Mexico*, 4 R. Int'l Arb. Awards, 15 October 1926, 4, pp.61–62; *Case Concerning Electrolux S.p.A (United States of America v. Italy)*, Judgment of 20 July 1989 [1989] ICJ Rep 1989, p.15; *Gami Investments, Inc. v. Mexico*, UNCITRAL (NAFTA), Final Award, 15 November 2004, pp.116, 123,125,127.

²⁶ *Maffezini*, *supra* note 17, p.179; *Pope & Talbot Award*, *supra* note 14, p.18; *Merrill & Ring*, *supra* note 24, p.193.

²⁷ *Merrill & Ring*, *supra* note 24, p.210, 213.

²⁸ ACIA, Article 11(2); ASEAN–China Investment Agreement, Article 7(2)(a); AANZFTA, Article 6(2)(a).

(Bjorklund, 2005).²⁹ In *Flughafen v. Venezuela*, the tribunal ruled that to establish a denial of justice, two elements must be fulfilled: 1) treatment that is clearly and manifestly anti-juridical, and 2) exhaustion of all local remedies to challenge the decision (unless proven that such remedies would be futile).³⁰ Relevant to this, due process principle also 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 (Vandeveld, 2010).

RCEP negotiators should consider limiting the scope of the FET clause to add more clarity and certainty for both investors and the host states.

(e) Expropriation

Generally, states 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). While in the past there were many cases of direct expropriation – seizure of investments or transfer of legal title over investments – nowadays the cases of indirect expropriation are more prevalent.

Unfortunately, expropriation clauses in older IIAs tend to be vague and fail to explain governmental measures that constitute indirect expropriation. As a result, different tribunals have developed different approaches in determining 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 of property rights, or conflicts with the investor's investment-backed expectations (Dolzer and Schreuer, 2008; Dugan, Wallace Jr. *et al.*, 2008),³¹

²⁹ *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, p.653.

³⁰ *Flughafen Zürich AG and Gestión e Ingeniería IDC SA v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, pp.635, 642.

³¹ *LG&E Energy Corp v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, p.190; *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (2000), Award,

with an emphasis on the existence of substantial interference/ deprivation of investor's right of ownership of its investments.³² Nonetheless, if the government actions only reduce the profits of the investments, they will not necessarily amount to indirect expropriation.³³

The second approach to defining indirect expropriation takes into account the nature or character of the governmental acts in pursuing its public policy objectives (Newcombe, 2005; Dugan, Wallace Jr. *et al.*, 2008).³⁴ 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 thereby and to the protection legally granted to the investments'³⁵ (emphasis added). With this approach, the analysis focuses on how the government measure is to be characterised and how much the nature or character should weigh against the depriving effects on investors (Dugan, Wallace Jr. *et al.*, 2008).

The last approach, as developed in *Methanex*, provides that a governmental 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 (Weiler, 2005; Schneidarman, 2008).³⁶ 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.³⁷

30 August 2000, p.103; *Nykomb Synergetics Technology Holding, AB, Stockholder v. Republic of Latvia, Riga*, SCC, 16 December 2003, p.4.3.1.

³² *EnCana Corporation v Ecuador*, LCIA, Case No. UN3481, Final Award, 3 February 2006, pp.172–83.

³³ *Ibid.*, pp.173–74; *Perenco Ecuador Ltd. v The Republic of Ecuador and Petroecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, p.672.

³⁴ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶115.

³⁵ *Ibid.*, p.122.

³⁶ *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005 Part IV Chapter D, p.7.

³⁷ *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, p.176; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 14 May 2009, p.356.

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

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.³⁸

Although the provision preserves the host state's right to regulate, the requirements to exercise such power should be clearer. Paragraph 4's requirements are not necessarily different from those developed by the tribunal in *Methanex* that conflated those requirements with the requirements of lawful expropriation.

Besides providing further clarification as Annex 2 of ACIA, RCEP's investment chapter could be improved further by including 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 to notify affected investors prior to the implementation of the measure and/or a domestic review mechanism for the investors to challenge the proportionality of the measure. The mechanism prevents abuse of government's policy space, thereby ensuring proper balance with investment protection.

(f) Transfers and Exceptions

All of the reviewed IIAs contain clauses on guarantee of transfers relating to a covered investment. The clause guarantees that such transfers can be made freely without delay into and out of the host state's territory. Normally, the clause also contains 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

³⁸ AANZFTA, Article 9, Annex on Expropriation and Compensation.

good faith. The difference between the clauses mainly lies in the list of exceptions. For example, Article 13(3) of ACIA lists the exceptions to freedom to transfer as follows:

- a) *bankruptcy, insolvency, or the protection of the rights of creditors;*
- b) *issuing, trading, or dealing in securities, futures, options, or derivatives;*
- c) *criminal or penal offences and the recovery of the proceeds of crime;*
- 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;*
- [...]

Such a list is important because in certain situations host states should be allowed to prevent transfer of funds by investors who seek to evade their obligations under the domestic law of the host states.

(g) Treaty Exceptions

The trend of including treaty exceptions in an IIA has begun 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). 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).

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.³⁹ This exception has its own complexity as reflected in diverging

³⁹ *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/08, Award, 25 April 2005 [CMS Award], pp.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 31; *Sempra Energy International v. Argentina*, ICSID ARB/02/16, Award, 28 September 2007 [*Sempra*

interpretations developed by the tribunals that had generated extensive debates amongst scholars.⁴⁰

On the other hand, the most comprehensive types of exceptions can be found in newer IIAs, such as ACIA, which contains 1) exceptions to transfer of funds, 2) measures to safeguard balance of payments, 3) general exceptions, and 4) security exceptions. Similar types of exceptions can also be found in AANZFTA, the ASEAN–Korea Investment Agreement, and the ASEAN–China Investment Agreement. As these exceptions have never been invoked in investment arbitration cases, we have yet to see how tribunals will interpret them. Notably, the general exception clause is similar to the General Agreement on Tariffs 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 (Kurtz 2008).

For example, the balance of payments exception in Article 16 of ACIA preserves host states' policy space in the event of financial difficulties to ensure that states can adopt or maintain restrictions on payments or transfers related to investments. This can be critical to prevent abrupt capital outflows from a host state during a financial crisis, which can worsen the situation in the country as had happened during the 1997 Asian Financial crisis. To prevent abuse, host states must comply with certain restrictions and procedures to be allowed to invoke the exception.

RCEP's investment chapter should incorporate these treaty exceptions to balance investment protection and states' legitimate right to regulate. At the same time, these exceptions provide greater clarity and certainty about the scope of host states' policy space.

Award], p.366–68; *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*], pp.324–26; *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, p.183.

(h) Denial of Benefits

The denial of benefits clause is inserted into IIAs to try to prevent treaty shopping and nationality planning by investors – both domestic and foreign (UNCTAD, 2014). For example, Article 19 of ACIA allows host states to deny the benefits of the agreement to non-ASEAN investors or domestic investors who establish a shell company with no substantive business operations in the territory of another ASEAN Member State.

Indeed, corporations often structure their companies in such a way that their investments are protected by a certain IIA. Law firms have been openly advising in favour of this.⁴¹ While some tribunals have allowed this type of corporate structuring,⁴² in certain cases where the restructuring is done much later for the purpose of bringing a dispute, tribunals rejected the claims and found them to be abuses of process despite the absence of the denial of benefits clause.⁴³ We believe that structuring investments is not illegal *per se* in the current economic context where multinational companies (MNCs) operate within their Global Value Chains (GVCs). It is only when restructuring is done at a later stage with the intention of merely accessing the international arbitration mechanism, that it becomes an abuse of process.⁴⁴ After all, the most important matter is not the source of the capital, which in itself is very difficult to trace in this era, but rather the contribution of the capital.

In *Pac Rim Cayman LLC v. the Republic of Ecuador*, the tribunal did not find any abuse of process, but it found that the host state may deny benefits to an American mailbox company based on the denial of benefits clause in the Dominican Republic–Central America–United States Free Trade Agreement.⁴⁵ If RCEP

⁴¹ 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](http://www.herbertsmithfreehills.com/-/media/Files/ebulletins/2014/20140512_-_Indonesia_update_what_are_the_possible_consequences_of_termination_of_Indonesias_Bilateral_Investment_Treaties.htm)>.

⁴² *Tokios Tokelos v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, 29.

⁴³ *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, p.146.

⁴⁴ *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, 140,142.

⁴⁵ *Pac Rim Cayman LLC v the Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, pp.4.80–4.82, 4.92.

negotiating states are eager to prevent treaty shopping, at the very least they should clarify the denial of benefits clause, especially as regards the factors to determine the existence of ‘substantive business operations’. This phrase has been interpreted by several tribunals, including those using the term ‘substantial business activities’.⁴⁶ 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 fulfil this requirement.⁴⁷ Even a holding company may carry out substantial business activities, except if the activities were simply to hold assets of its subsidiaries.⁴⁸

(i) 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 the scrutiny of many countries for several reasons. In fact, some recent FTAs’ investment chapters exclude ISDS.⁴⁹

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 problematic rule of law, including their judiciary systems. Many states involved in RCEP negotiations are increasingly becoming both capital-importing and capital-exporting countries. For this reason, they have an interest in ensuring 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. This may be true, but it can be resolved by ensuring that ISDS is used only as a last resort. For this reason, the creation of a dispute prevention mechanism in each respective member of RCEP can alleviate this issue. The mechanism is meant to

⁴⁶ *Limited Liability Company Amto v. Ukraine*, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 080/2005, Final Award, 26 March 2008, pp.61–62, 69.

⁴⁷ *Ibid.*, p.69.

⁴⁸ *Pac Rim Cayman v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, pp.4.72, 4.74, and 4.78.

⁴⁹ *Agreement between Japan and Australia for an Economic Partnership* (entered into force 15 January 2015).

prevent a conflict from escalating into a dispute and it should be implemented as an investor after-care service (Echandi, 2013). Further, RCEP members must ensure transparency by publishing the procedure of the mechanism. An example is the Republic of Korea's Office of the Foreign Investment Ombudsman.⁵⁰

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 binding joint interpretation mechanism, as found in Article 40 (2) and (3) of ACIA. Under this mechanism, the tribunal or a disputing party may request a joint interpretation on any disputed ACIA provision. Thus, member states can ensure that the agreement will be interpreted in accordance with their intentions.

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(5) of the Draft CETA requires the appointed arbitrators to 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.

This type of provision helps to ensure that members of a tribunal are qualified to adjudicate in the dispute. The preference to have arbitrators with multi-disciplinary expertise demonstrates the negotiators of the Draft CETA's cognisance of the greater level of convergence between international trade law and international investment law as a result of the rise of GVCs around the world (Antoni and Ewing-Chow, 2013).

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). There has been a proposal to create an International Investment

⁵⁰ The office was established in October 1999. For further information: <http://www.i-ombudsman.or.kr/eng/index.jsp>

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 (Bishop, 2005; Crawford, 2005). Nonetheless, there are concerns that an appeal mechanism could undermine the finality of an arbitral award, that it could ‘repoliticise’ the process, and that the added layer would replicate the difficulties in the current system (Sauvant and Ortino, 2013). Nonetheless, we believe that ensuring better governance in the system and a more harmonised interpretation – especially when the clauses in the IIAs are the same or very similar – should prevail over such concerns.

All the above suggestions should be considered by RCEP negotiating states to address the concerns that they have about the current ISDS mechanism. After all, this mechanism is one that has been perceived to be relatively reliable by foreign investors compared with domestic courts in some countries.⁵¹

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 on 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 centres; 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.

Similar to the investment promotion clause of ACIA, the investment facilitation clause basically constitutes soft law that only imposes the duty to cooperate. For this reason, ensuring compliance may be difficult. RCEP negotiating

⁵¹ 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).

states should consider complementing such a clause with an obligation to engage in capacity building or perhaps to offer more flexibility for the developing states so they are also able to fulfil their obligations under the agreement.

Another successful investment facilitation initiative is Korea's Office of the Foreign Investment Ombudsman, which provides assistance in resolving difficulties companies face both in business management and in daily life. The office has specialists in various fields, such as labour, taxation, finance, and construction, who will assist foreign investors' in resolving their grievances while investing in the country. If RCEP could push for all negotiating states to create such a kind of office, it would greatly facilitate investments.

3.4. Investment Liberalisation

If RCEP is meant to add more value to the existing IIAs amongst individual ASEAN Member States 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). They estimated that a host state could increase its FDI inflow by up to about 29 percent in the long 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). (For further discussion about the liberalisation pillar, see Chapter 6.)

4. Monitoring Mechanism

Aside from the standards referred to above, a monitoring mechanism is essential to ensure implementation. The only mechanism that is close to being considered as a monitoring mechanism for the implementation of the various economic agreements of ASEAN, including ACIA, is the ASEAN Scorecard. This Scorecard endeavours to review the so-called implementation by focusing on the ratification and transposition of international agreements into domestic laws (ASEAN Secretariat, 2012). Unfortunately, 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 in its schedule, instead of merely analysing whether the commitment has been translated into domestic laws (Chia and Plummer, 2015).

RCEP negotiating states must consider including a more advanced monitoring mechanism such as the WTO's Trade Policy Review (TPR) mechanism for the investment chapter. This mechanism is used regularly to ensure compliance with 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 potentially non-compliant measures of the member state under review. This is a comprehensive mechanism that can promote greater transparency and alert member states about their non-compliant measures, thus promoting better implementation of the agreement.

5. Consolidation Efforts – Relation to Other Agreements

Due to the existence of various IIAs – BITs, FTA with investment chapters, and regional investment agreements – RCEP's investment chapter poses an issue of parallelism, which can potentially add more complexity for the states. Foreign investors, on the other hand, may welcome this as it presents them with opportunities to pick and choose the IIA that grants the best treatment. But it undermines the very purpose of concluding RCEP – to conclude a refined IIA that strikes a balance between investment protection and the states' right to regulate – because investors would most likely opt for the older IIAs, which appear to emphasise only investment protection.

RCEP's investment chapter should consolidate and simplify these complex and multiple regimes. This can be done by including a provision to terminate the existing IIAs negotiating amongst states upon enforcement of RCEP. Improving on Article 47 of ACIA, RCEP negotiating states could consider the following clause:⁵²

⁵² Article 47 of ACIA with some of the author's own revisions.

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) amongst 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 liberalisation 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.

Such a clause would give the region one harmonised investment rules regime applicable in all 16 member states, for all investors from these states, which may resolve the issue of parallelism.

6. Conclusion

With 16 negotiating states, including some major emerging economies in Asia, RCEP has broad geographical coverage. Despite the fact that most of these states may already have bilateral or multilateral IIAs amongst them, RCEP's investment chapter could add more value in four ways.

First, it can liberalise further access to these states by providing more aggressive liberalisation commitments. This can be done through the granting of a pre-establishment right in the NT clause as well as fewer reservations in each state's schedule. Second, RCEP can enhance the investment protection provisions by refining and adding clarity to find a 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 the various actions to be undertaken by member states to make investing easier. This should be

complemented with capacity building for the less developed members to fulfil those obligations. Finally, especially from the perspective of host states, RCEP is an opportunity to consolidate various IIAs amongst the negotiating states to come up with a refined agreement that can improve the investment climate in the region.

Despite such potential benefits, RCEP also faces various obstacles. The large number of negotiating states can also mean that the level of commitments – liberalisation, promotion, facilitation, and protection – may be lower as the negotiating states have differing interests. This makes it harder to reach an ambitious agreement. In particular, the lower level of commitments might be seen as a reflection of compromises amongst different points of views as regards the rights of pre-establishment under the NT clause. In addition, while some countries – Indonesia, Australia, and India – seem to take position against ISDS, others seem to be more supportive – Singapore, Korea, and China – as could be seen in their recent agreements. Nonetheless, the ongoing Trans-Pacific Partnership (TPP) negotiation may provide more incentives for RCEP negotiating states⁵³ to match the high level of commitments in the TPP.

For foreign investors in the region, the outcome from RCEP's investment chapter negotiation, particularly the investment protection provisions, may not necessarily be more favourable for them compared with the old regimes. They may want both RCEP and the other IIAs to continue to exist side-by-side. Such an arrangement would provide them with options to choose the most favourable regime to protect 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 states to regulate. It must be ambitious enough to add more value to the existing regime. Furthermore, it

⁵³ It is noteworthy that Brunei Darussalam, Malaysia, Singapore, and Viet Nam, are parties to both negotiations.

should also consolidate the multiple current regimes, or the efforts of negotiating RCEP's investment chapter could prove to be rather futile.

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