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Understanding Asian Investment Regime Complexity:

What to Do About It?

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Abstract

This study examines the evolving international regime for investment. It focuses on the Asian experience, which has not been extensively studied thus far unlike trade agreements. Existing studies mainly focus on the interpretation and application of international investment agreements (IIAs) in which the rules are given. In contrast, this study focuses on the development of rules, including investment protection. The noodle bowl syndrome of IIAs is potentially a serious problem. While trade disputes are state-to-state, an investment dispute involves investors who try to protect their investment using IIAs, such as the well-known case of Philip Morris, which launched proceedings against Australia via an Asian subsidiary using the Hong Kong–Australia Bilateral Investment Treaty. Furthermore, each IIA can conveniently import "better" provisions from other IIAs using its MFN clause, which significantly complicates the interpretation of IIAs. Because three factors affect the magnitude of noodle bowl problems of investment, there are three ways to mitigate the problem. First, the scope of MFNs should be carefully drafted to limit the "mobility" of provisions, e.g., MFN treatment does not apply to investor–state dispute provisions or older IIAs. Second, while investors are mobile and tend to relocate their base to seek convenient IIA protection, there should be some discipline on such relocations. Just to fight against the policy in question, IIAs should not create an incentive for relocation after it is decided. Third, the mobility of countries should be enhanced, which means that countries should be able to accede to IIAs favorable to their investors through accession. An appropriate balance among the "mobility" of these three factors is important.

Keywords: Investment treaties, BIT, FTA, noodle bowl, treaty shopping, Trans-Pacific Partnership (TPP)

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1. Introduction

This study examines the evolving international regime for investment. It focuses on the Asian[2] experience, which has not been extensively studied thus far unlike the case of free trade agreements (FTAs).[3] Existing studies mainly focus on the interpretation and application of international investment agreements (IIAs) in which the rules are given. In contrast, this study focuses on the development of rules, including investment protection. The term IIA refers to investment treaties (agreements that cover only investment) such as bilateral investment treaties (BITs) as well as to FTAs that contain an investment chapter.

There have been active discussions on the noodle bowl problem of FTAs. Soon after the launch of the North American Free Trade Agreement (NAFTA), prominent economists such as Bhagwati argued that international production would become unnecessarily complicated due to the abuse of trade agreements. This is because products would go back and forth among countries, tracing the path of myriad FTAs just to avoid paying tariffs.[4] In light of the massive proliferation of FTAs in the 2000s, Baldwin argued that the "multilateralization of regionalism" is necessary to reduce the harmful effects of FTAs.[5] However, the problems associated with the noodle bowl of FTAs have not been too bad, especially in Asia where tariffs have been lowered on an MFN basis rather than on a preferential basis. Consequently, non-use of FTAs, as opposed to the abuse of FTAs, has become the policy challenge among Asian trade officials.[6] However, investment seems to encounter the noodle bowl problem, that is, abuse of IIAs. This is partly because the number of investment agreements is much greater than that of trade agreements;[7] however, at the same time, we should not overlook the fundamental difference between the two: while trade agreements concern state-to-state relations (e.g., interstate disputes on trade policy), investment agreements involve private sectors as well (e.g., investor–state dispute).[8] While trade issues are governed by the World Trade Organization (WTO), the investment governance of WTO has been limited; there is no

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[2] According to the UN classification, Asia has five subregions, namely Central Asia, East Asia, South Asia, Southeast Asia, and West Asia. In this study, however, West Asia (Armenia, Azerbaijan, Bahrain, Cyprus, Georgia, Iraq, Israel, Jordan, Kuwait, Lebanon, the Occupied Palestinian territory, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Turkey, United Arab Emirates, and Yemen) is excluded from our analysis because the majority of the countries in the group seems to have many commonalities with Europe in terms of IIA practices, rather than Asia defined narrowly. See UN Classification of Composition of macro geographical (continental) regions, see http://unstats.un.org/unsd/methods/m49/m49regin.htm

[3] See esp. Peter K. Yu, (2014), Asia-Pacific Issue: Article: TPP and Trans-Pacific Perplexities, *Fordham International Law Journal, 37,* 1129; Wolfgang Alschner, (2014), Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?, *Journal of International Economic Law, 17(2),* 271; Ming Du, (2015), Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement, *Journal of International Economic Law, 18(2),* 407; Patrick B. Fazzone, (2012), The Trans-Pacific Partnership – Towards a Free Trade Agreement of Asia-Pacific?, *Georgetown Journal of International Law, 43,* 695.

[4] Jagdish Bhagwati and Anne O. Krueger, (1995), *The dangerous drift to preferential trade agreements,* Aei Pr.

[5] Richard Baldwin, (2006), Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade. The World Economy. *29(11).*

[6] Shintaro Hamanaka, (2013), Detecting Bias in Assessing the Use of FTAs: Choosing Right Data and Indicators, *Journal of Asian Economics, 26*

[7] See Wolfgang Alschner, (2014), Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?, *Journal of International Economic Law, 17(2),* 271.

[8] See Gary Clyde Hufbauer & Cathleen Cimino-Isaacs, (2015), How will TPP and TTIP Change the WTO System?, *Journal of International Economic Law, 18(1),* 679.

World Investment Organization and no MFN concept at the multilateral level in investment. The noodle bowl problem of IIAs would become more serious given that agreements recently signed and under negotiations are regional, which may overlap with many old BITs that date back to the 1960s.

The purpose of this study is twofold: empirical investigation and policy discussions. It is important to understand that the status of international investment regimes is undergoing significant transformation and that Asia is not an exception in this regard. In addition to a huge number of bilateral agreements, several regional agreements have been added (or are about to be added)[9] that would bring the noodle bowl problem to an unmanageable level. Second, the argument of this study is public policy-oriented. In our view, the noodle bowl problem of investment can be significantly mitigated, if not eliminated, as long as negotiators are aware of the fact that it is often caused by the unclear drafting of treaty text. Therefore, this study suggests how negotiators can reduce the risk of the noodle bowl problems of investment by including specific provisions or wordings in the agreement. The abuse of investment agreements by investors could be largely avoided through proper drafting of treaty.

The next section provides a macro mapping of IIAs in Asia by presenting the geographical dispersion of IIAs in Asia and the number of IIAs signed by each economy. Furthermore, it analyzes the recent phenomenon of "regionalization" of IIAs in Asia, which refers to the rise of plurilateral IIAs that involve three or more Asian entities. Then, the third section considers the problems associated with the so-called noodle bowl syndrome. It argues that the noodle bowl problem, which is caused by intersected, nested, and overlapped agreements, seems to be dangerous in the case of investment. The fourth section discusses possible methods to mitigate the negative sides of the proliferation of IIAs in Asia. We examine three issues: (1) the scope of MFNs (the "mobility" of provisions across IIAs); (2) investors' incentive to relocate their base (the "mobility" of investors); and (3) countries' accession into favorable IIAs for their investors (the "mobility" of members).[10] The final section concludes the study.

2. Evolving Investment Regime in Asia

2.1. Proliferation of IIAs

According to the United Nations Conference on Trade and Development (UNCTAD) Database of IIAs, so far more than 3,300 IIAs have been signed worldwide (Table 1)[11]. There are approximately 3,000 investment treaties worldwide, and Asian countries have signed

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[9] For instance by way of renegotiations of exiting treaties. See Antony Crockett, (2015) Indonesia's bilateral investment treaties: between generations?, *ICSID Review, 30(2)*, 437-448. See also, Prabhash Ranjan, (2014), India and bilateral investment treaties - a changing landscape, *ICSID Review, 29(2)*, 419-450.

[10] This article refers to "countries" in a broad sense to encompass any geographical entity with international personality and be capable of conducting an independent foreign economic policy. The designations employed do not imply the expression of any opinion concerning the legal status of any country or territory such as the Special Administrative Regions of Hong Kong and Macau or the international status of the Republic of China (Taiwan).

[11] The numbers are from the UNCTAD IIA database. Only IIAs that are signed and/or in force are counted, whereas those under negotiations are excluded. Investment chapters (classified as "treaties with investment provisions" in the UNCTAD database) are usually investment chapters in FTAs, while other types of treaties are also included in this category, such as the Energy Charter Treaty.

more the 1,000 investment treaties. Thus, nearly one-third of investment treaties in the world involve at least one Asian entity. There are around 370 FTA investment chapters in the world, of which 140 agreements involve Asian countries.[12] Hence, there are, in fact, a multitude of IIAs in Asia.

Table 1: Characteristics of Asian IIAs

	Total IIAs	Investment Treaties	Investment Chapter
World Total	3,360	2,993	367
Non-Asia Total	2,217	1,990	227
Asia Total	1,143	1,003	140
Cross-Regional	927	823	104
Intra-Regional	216	180	36

Source: UNCTAD Database of Investment Agreement

However, it is important to notice that the majority of IIAs in Asia are cross-regional where a non-Asian party, such as the US or a Western European country, is the capital-exporting country. This implies that the treaty might rather reflect the interest and bargaining power of the capital-exporting country.[13] To refine the contribution of Asian countries to international investment rule-making, it is necessary to narrow the analysis to IIAs that have been concluded only among Asian countries and those classified as intra-regional IIAs. Narrowing the analysis to pure Asian IIAs also helps identify Asian countries that play a leading role in the development of investment rules in Asia.

There are 180 signed intra-regional investment treaties. In addition, there are 36 intra-regional investment chapters in Asia, of which the majority are FTA investment chapters. Thus, in total, there are 216 intra-regional IIAs in effect. This large number of IIAs forms the core of the Asian noodle bowl of investment regimes. In Asia, investment chapters play a relatively more important role than investment treaties in investment rule-making (36 out of 216 IIAs) compared with the world outside Asia (227 out of 2,217). Moreover, if we consider the recent trend of FTA "regionalization," we find that the actual contribution of FTA investment chapters to the international investment rule-making is even more significant because regional FTAs cover a large number of bilateral pairs unlike BITs (see below for further discussion). Note that all Asian FTAs with investment chapters were concluded after 2001. This implies that Asian countries are attempting to regulate and deregulate intra-Asian economic activities, including both trade and investment, using the so-called modern FTAs, which go beyond tariff liberalization. Naturally, their FTAs cover not only investment protection, which is a traditional area of BITs, but also investment liberalization (pre-establishment phase). Simultaneously, we should also note that some Asian countries hesitate to include investment chapters in FTAs. For example, until recently, virtually all FTAs concluded by India and China have ignored investment matters.

Table 2 provides the number of IIAs signed by each Asian economy. China has signed the most number of IIAs; while China signed many BITs in the past with Western developed countries (mainly European countries), it has recently signed many FTAs with investment

[12] See Pasha L. Hsieh, (2015), Liberalizing Trade in Legal Services under Asia-Pacific FTAs: The ASEAN Case, *Journal of International Economic Law, 18(1),* 153.

[13] J. Chaisse and C. Bellak, (2011),Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology, *3(4) Transnational Corporations Review, 3-11*.

chapters with Asian partners. Because China has IIAs with almost all Asian countries, its treaty practice—although not consistent with regard to substantive rules[14]—can be the basis of future regional IIAs in Asia. For many countries (such as Japan, Singapore, and Malaysia), the number of investment treaties that are usually bilateral is almost the same as that of FTA investment chapters that are usually regional (especially the recent ones). For example, Japan did not have a strong interest in signing BITs in the past; however, it has started to sign a large number of (regional) FTAs recently wherein the investment chapter is one of the most important chapters. Further, Association of Southeast Asian Nations (ASEAN) as a group has recently signed many FTAs with investment chapters with external partners; these chapters tend to overlap with old BITs signed by individual ASEAN members. In short, Asia is departing from the old stage of IIAs dominated by BITs with Western countries and beginning to have its own momentum toward signing modern IIAs that tend to be regional.

Table 2: IIAs Signed by Asian Economies

	Total IIAs in the World	Investment Treaties in the World	FTA Investment Chapters in the World	Total IIAs in Asia	Investment Treaties in Asia	FTA Investment Chapters in Asia
China	150	131	19	33	23	10
Korea	111	91	20	30	22	8
India	95	82	13	28	19	9
Malaysia	91	68	23	32	17	15
Vietnam	83	61	22	34	20	14
Singapore	72	43	29	28	12	16
Indonesia	63	48	15	25	13	12
Thailand	62	40	22	29	16	13
Kazakhstan	60	48	12	20	12	8
Uzbekistan	55	50	5	18	14	4
Pakistan	57	50	7	23	18	5
Philippines	51	37	14	24	13	11
Japan	47	27	20	28	14	14
Mongolia	47	43	4	16	14	2
Tajikistan	44	37	7	19	13	6
Kyrgyz Republic	41	32	9	19	11	8
Lao PDR	40	24	16	24	13	11
Cambodia	38	23	15	21	11	10
Bangladesh	34	30	4	18	15	3
Turkmenistan	33	27	6	12	8	4
Sri Lanka	33	28	5	14	11	3
Chinese Taipei	28	23	5	7	6	1
Brunei Darussalam	26	8	18	17	3	14
Myanmar	25	10	15	20	9	11
Hong Kong	22	18	14	4	3	1
Nepal	9	6	3	3	1	2
Afghanistan	7	3	4	4	1	3

Source: UNCTAD Database of Investment Agreement

[14] See Dan Wei, (2012), Bilateral investment treaties: an empirical analysis of the practices of Brazil and China, *European Journal of Law & Economics, 33(3)*, 663-690.

2.2. Regionalization of International Investment Governance

A major recent trend in international investment rule-making is the increasing regionalization of negotiations. This will impact Asian regulations. Although the core of international investment regulations has been based on BITs and bilateral FTAs, it is important to underscore the importance of ongoing negotiations of broader pacts, which involve more than two countries and cover numerous economic areas.[15] The rise of regional FTA with a wider scope is likely to produce greater economic effects while spreading the basic principles of foreign investment protection to most Asian economies. In Asia, the regionalization of investment rules finds three strong drivers: (1) the ASEAN Comprehensive Investment Agreement (which entered into force on March 29, 2012), (2) the Trans-pacific Partnership (which has not yet entered into force but was signed on February 4, 2016), and (3) the Regional Comprehensive Economic Partnership (negotiations for which were formally launched in November 2012 at the ASEAN Summit in Cambodia).

ASEAN Comprehensive Investment Agreement

ASEAN Comprehensive Investment Agreement (ACIA), signed in February 2009, was not born overnight but was rather the outcome of a carefully planned evolution to ensure that the ASEAN economy continues to grow as an attractive destination for cross-border investment. ACIA is the result of an evolution in the ASEAN framework on investment. This evolution has been slow but has been benefited from many experiences conducted by other countries in their investment negotiations. As such, the ACIA reflects both internal dynamics and external influences, which make it an important investment agreement in the world. ACIA forms an important anchor of the economic transformation and economic integration of ASEAN in its quest to achieve the status of ASEAN Community and AEC by 2015.

ACIA consolidated two existing agreements: the ASEAN Investment Area (AIA) of 1998 and the ASEAN Agreement on the Promotion and Protection of Investments of 1987, which were also known as ASEAN Investment Guarantee Agreement.[16] ACIA superseded these two precursor investment agreements, including their subsequent amendments. Beyond the mere consolidation of earlier regional pacts, ACIA is an enhanced agreement that encompasses four pillars: liberalization, facilitation, protection, and promotion. ACIA has an expanded scope as it covers both FDI and portfolio investment (compared with AIA [FDI only]). Furthermore, the benefits of ACIA apply to both ASEAN investors and foreign-owned ASEAN-based investors.

In terms of investment liberalization, ACIA can be expanded to cover other sectors in the future, such as services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying [Article 3(3)(f)] and any other sectors, as may be agreed upon by all member states [Article 3(3)(g)]. In terms of investment protection, ACIA also includes more comprehensive

[15] Such broad pacts also raise the problem of regulatory autonomy with even greater acuity. See Caroline Henckels, (2016) Protecting regulatory autonomy through greater precision in investment treaties: the TPP, CETA, and TTIP, *Journal of International Economic Law, 19(1)*, 27-50. See also, Pasha L. Hsieh, (2013), Reassessing APEC's Role as a Trans-Regional Economic Architecture: Legal and Policy Dimensions, *Journal of International Economic Law, 16(1)*, 119.

[16] See Diane A. Desierto, (2011), ASEAN'S Constitutionalization of International Law: Challenges to Evolution Under the New ASEAN Charter, *Columbia Journal of Transnational Law, 49*, 268.

and clear provisions. Annex 1 of ACIA formalizes requirements for governments providing "approval in writing" for investments to be covered, and Annex 2 clarifies the key concepts of expropriation and compensation, including fair and equitable treatment [Article 11(2) on inclusion of "for greater certainty provision"]. Interestingly, ACIA remains flexible as it has a more comprehensive Modification of Commitments under Article 10, which includes clear procedures on the modification of commitments and the inclusion of provisions for compensatory adjustment to ensure a balance of benefits.

ACIA provides a more comprehensive dispute settlement mechanism by introducing four changes. First, to ensure that claims are intellectual and to avoid treaty shopping, the scope of coverage has been clarified (Article 29). The incurred loss or damage is regulated [Article 29(1)]. No claim against state-owned enterprises can be made under ACIA [Article 29(2)]. The second change is the promotion of alternative dispute settlement mechanisms, particularly conciliation (Article 30), consultations, and negotiation (Article 31). Third, there is greater transparency and detailed procedures for Investor State Dispute Settlement (ISDS) (Article 32 and Article 41). Fourth, a mechanism for state-to-state dispute settlement (Article 27), the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, was included in 2004.

Article 3 of ACIA provides the scope of application of ACIA, which include (1) measures adopted or maintained by an ASEAN Member State (AMS) in relation to (a) investors of any other member state and (b) investments, in its territory, of investors of any other member state; (2) investment existing as of March 29, 2012, and new investments after March 29, 2012; and (3) liberalization of five goods-related sectors and five related services sectors. At the same time, ACIA excludes the following areas from its scope of coverage: (1) taxation measures except for transfers and expropriation and compensation (such as corporate income tax and property tax); (2) subsidies or grants provided by an AMS (such as agriculture subsidies and grants for research and development in the manufacturing sector); (3) government procurement (e.g., of manufactured products or of fertilizer for distribution to farmers); (4) services supplied in the exercise of governmental authority by the relevant body or authority of an AMS (such as a company collecting taxes or issuing licences on behalf of the government); and (5) measures adopted or maintained by ASEAN member states affecting trade in services under AFAS (such as the liberalization of telecommunication and financial services).

Trans-Pacific Partnership

Another driving force behind the regionalization of investment rules is Trans-Pacific Partnership (TPP). The level of US leadership is obvious in both the form and substance of the TPP.[17] While exerting this leadership in a group of 12 countries, half of which are emerging economies, the negotiations have isolated the largest emerging economies: China, India, and Brazil.

The TPP investment chapter does not provide major innovations in terms of drafting of treaty. However, the TPP crystallizes innovations in terms of NAFTA interpreting notes and

[17] See Patrick B. Fazzone, (2012), The Trans-Pacific Partnership – Towards a Free Trade Agreement of Asia-Pacific?, *Georgetown Journal of International Law, 43,* 695. See also Paul F. Downs, (2013), Current Developments 2012-2013: The Trans-Pacific Partnership and Conflicting Customary International Norms, *Georgetown Journal of Legal Ethics, 26,* 661.

NAFTA case law since 2001. In fact, the TPP investment chapter largely resembles the more recent US IIAs rather than the 1995 text of NAFTA Chapter 11. The normative quality of the TPP, however, places the agreement among the most detailed and important investment treaties. The TPP represents a major FTA that illustrates the regionalization of investment rule-making and probably represents a benchmark for state-of-the-art international law for foreign investment.

The TPP is even more clearly a strengthening of investment disciplines for some developing countries in the Asia-Pacific region such as Vietnam and Malaysia, which have not previously been bound to the US. The list of prospective members is long, including Korea, Thailand, Taiwan,[18] the Philippines, Lao PDR, Colombia, and Costa Rica. Should all of these countries join the TPP and ratify, among other provisions, the investment chapter, this would no doubt signify an embryonic version of a long-awaited multilateral agreement on investment.

If the TPP reflects the US investment rule-making practice, the EU seems to be willing to negotiate new investment treaties largely inspired by this US practice. To these current developments, one should add the start of the Trans-Atlantic Trade and Investment Partnership (TTIP) announced by President Obama in his 2012 State of the Union address. These new negotiations may well confirm the global adoption of a NAFTA-like mode of investment regulation.

Regional Comprehensive Economic Partnership

Other than ACIA and TPP, Regional Comprehensive Economic Partnership (RCEP) is another crucial regional trade-related negotiation. In 2011, ASEAN proposed the development of RCEP, under which the modality of economic interaction in East Asia could be discussed by going beyond the current ASEAN membership. All countries that have FTAs with ASEAN members—including China, Japan, Korea, Australia, New Zealand, and India—are involved in RCEP. Officially, the RCEP will aim at creating a liberal, facilitative, and competitive investment environment in the region. However, at this stage, whether such a goal can be achieved is unclear. At the RCEP ministerial meeting on August 2015, the modality of tariff liberalization of RCEP was set as the abolishment of tariff for 80%[19] of tariff lines, which is much less ambitious than bilateral FTAs in Asia. The ambition level of the RCEP's investment chapter may be negatively influenced by tariff negotiations. The RCEP investment negotiations will cover the four pillars of promotion, protection, facilitation, and liberalization.[20]

The RCEP will likely interact with all current and developing IIAs in the Asia-Pacific region, which comprise both simple and sophisticated FTAs. An example of a simple FTA is the ASEAN–China FTA, whose investment chapter became effective in 2010 and covers only

[18] Taiwan President Ma Ying-jeou said his government would strive to create the conditions for Taipei, China to participate in the US-led TPP at an appropriate time. Lee Shu-hua and Y.F. Low. 2013. *President Pledges to Create Conditions for TPP access*. 21 March 2013.

[19] The majority of FTAs in Asia liberalize at least 90% of tariff lines.

[20] Press Release, ASEAN Secretariat, ASEAN and FTA Partners Launch the World's Biggest Regional Free Trade Deal (Nov. 20, 2012), *available at* http://www.asean.org/news/asean-secretariat-news/item/asean-and-fta-partners-launch-the-world-s-biggest-regional-free-trade-deal.

investment protection.[21] In contrast, Japan's EPAs with individual ASEAN members include relatively sophisticated investment chapters that cover both the protection and liberalization of investment.[22] Meanwhile, the Japan–ASEAN EPA, though signed in 2008, is still under negotiation for its investment chapter.[23] If the Japan–ASEAN EPA's investment chapter results in simply consolidating all of Japan's FTAs with individual ASEAN countries, it will become a relatively comprehensive agreement. However, the possibility that ASEAN as a bloc can be assumed to exercise its bargaining power to lower the level of ambition for this EPA still remains. Regardless, the modality of the future investment chapter for the Japan–ASEAN EPA would likely affect the investment chapter of RCEP.

A deep conflict between China and Japan would largely affect the RCEP investment chapter negotiations.[24] The China–Japan–Korea trilateral investment treaty (CJK TIT), which has recently been signed after nine years of negotiations, suggests that the investment chapter in RCEP will face difficult negotiations.[25] The CJK TIT is not ambitious because it covers only investment protection (liberalization is not covered), and its list of prohibited performance requirement measures is limited. Japan is of the view that if a China–Japan–Korea FTA (CJK FTA) is to be pursued, its investment chapters should be more ambitious. The views expressed by Japan and China regarding the CJK FTA investment chapter in the Joint Study Report[26] prepared in December 2011 well illustrates the disagreement. Japan emphasized on (1) NT and MFN at both pre- and post-establishment phases, (2) ISDS procedures for a wide range of scope, (3) prohibition of PR beyond the TRIMs level, and (4) a negative list approach integrated with the services chapter. In contrast, China suggested investment promotion activities such as information exchange on investment opportunities rather than the introduction of strong discipline on investment policies. Hence, a likely position of Japan regarding RCEP investment chapter is that a deeper agreement is necessary. From the Chinese perspective, the trilateral investment treaty is a done deal upon which the investment chapter of a trilateral FTA and RCEP should be based. Thus, it is currently difficult to foresee how the investment chapter of RCEP will end, mainly due to the disagreement between Japan and China regarding the depth of these types of agreements.

2.3. Proliferation of Investment Disputes

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21 Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the People's Republic of China (ASEAN-China FTA), *entered into force* July 1, 2007, *available at* http://www.asean.org/news/item/twelfthasean-summit-cebu-philippines-9-15-january-2007.

22 On Japanese BITs and investment liberalization provisions, see *Japan National Reporter: Shotaro Hamamoto*, *in* THE LEGAL PROTECTION OF FOREIGN INVESTMENT 445, 457–58 (Wenhua Shan ed., 2012).

23 Agreement on Comprehensive Economic Partnership Among Japan and Member States of the Association of Southeast Asian Nations, Art. 51, Apr. 2008, *available at* http://www.mofa.go.jp/policy/economy/fta/asean/agreement.pdf (stipulating that Chapter 7 on investment agreements is still under discussion by the parties).

24 Saadia Pekkanen, *Investment Regionalism in Asia: New Directions in Law and Policy?*, 11 WORLD TRADE REV. 119, 124 (2012) ("[T]rends are being shaped mostly by two powers to date: Japan (mostly on the outflow side) and now also China (mostly on the inflow side, though changes on the outflow side, largely to Hong Kong, are also rapidly emerging).").

25 *See* Pekkanen, *supra* note 24, at 122, 137.

26 *Joint Study Report for an FTA among China, Japan and Korea*, Released on 16 December 2011.

To understand the actual magnitude of Asian IIAs on the real economy, we should analyze the state of actual investment disputes brought about by treaties, in addition to the development of IIAs *per se*. Our survey identified 110 investment cases that effectively involve Asia states as respondents or Asian investors [the list of investment disputes that involve Asian entities (Asian states and/or Asian investors) are included in **Annex 1**)] Several important observations can be made, coupled with interesting policy implications for Asian countries' IIA policies as well as international investment regimes.

First, the number of investment claims has significantly increased recently. One can observe a sudden increase in investment claims from 16 cases since the origin through 2008 to 15 new cases in 2009. In the subsequent years, 7 cases were registered in 2010 and 16 cases in 2011. Over the last four years, 70 new cases were registered in 2012–2015, thereby confirming the increased involvement of Asian stakeholders in investment disputes. IIAs are not obscure, useless rules, and ISDS are no longer a niche practice. Each government needs to understand both the costs and benefits of investment treaties in general and ISDS in particular.

Second, while optimists may argue that even investors in developing countries can also utilize IIAs, the reality is that almost all ISDS remain between investors in developed countries and governments in developing countries. However, we should not overlook the fact that several recent disputes have arisen between an investor in a developing country and the government in a developing country. Given the growing significance of "South-South" investment,[27] we can at least argue that IIAs are useful for developing countries in protecting their investors' asset in other developing countries.

Third, in the past, most investment disputes have concerned infrastructure and resource management. In the 1990s, IIAs were only justified by the need to attract FDI in infrastructure. Notably, a majority of cases are still related to energy/infrastructure. Simultaneously, however, a gradual diversification has emerged in types of investment disputes. In particular, there is a significant number of cases concerning service sector recently (e.g., financial services and insurances), which means that it is possible for ISDS to challenge countries' regulatory policies. The rise of service investment disputes is critical to Asian countries that have attempted to attract manufacturing FDI by providing incentives while maintaining policy space for services. This illustrates the greater/wider relevance for investment treaties for the region and makes the reshaping of investment rules even more important.

Fourth, there are exactly 14 decisions on jurisdiction, with a majority of them concluding that the tribunal lacks jurisdictions on the matter. This category of decisions focuses on the fundamental question of law, namely, whether an arbitral tribunal has jurisdiction to preside over a given case. A jurisdictional question may be segregated into three components: whether there is jurisdiction over the person (jurisdiction *ratione personae*), whether there is jurisdiction over the subject matter (jurisdiction *ratione materiae*), and whether there is jurisdiction over the subject matter at a specific point of time (*jurisdiction ratione temporis*). Decisions on jurisdiction are sometimes necessary because of the cutting-edge character of certain investment claims, but they also plainly result from major objections raised by the responding parties, which, to some extent, may suggest that Asian states attempt to avoid proceeding to a discussion on the merits.

[27] See UNCTAD, World Investment Report. 2006.

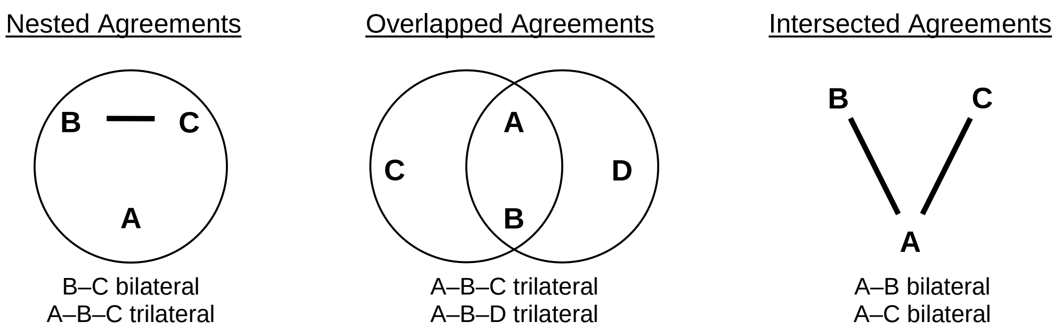
Finally, many disputes are based on a relatively old generation of investment treaties. The "average age" of IIAs upon which disputes are based is around 16 years. There are many disputes using old BITs, namely, the case *Deutsche Bank AG v. Sri Lanka*[28] (Germany–Sri Lanka BIT 1963). Some old treaties are poorly drafted; precisely, old treaties contain ambiguous languages that may cause a disagreement regarding the exact meaning of the provisions. Several key components of IIAs have been developed recently. New treaties are well crafted, which implies that they cannot be abused, but their MFN provisions can be used to invoke other treaties with more generous provisions. If a country has an old BIT that is not well crafted, such a BIT can be used by a new treaty partner in an unexpected way. In short, old BITs are super powerful and, at the same time, dangerous.

All points above suggest that IIAs are a key aspect of most Asian states' investment policies. We now reassess the pros and cons of the patchwork of rules because a more coherent set of rules is required, and the risks of being sued may outweigh the benefits of signing these treaties. The proliferation of not only IIAs but also disputes is becoming unmanageable. Developing countries are currently facing a serious risk of investment disputes although such a risk has not yet been fully realized.

3. Noodle Bowl of IIAs: Treaty Shopping Problems

Considering the evolving investment regime in Asia, noodle bowl problems of IIAs might occur. While many simply refer to this phenomenon as "noodle bowl problems," we should distinguish several types of relation between or among agreements. The so-called "common-member agreements" can be classified into three categories: overlapped, nested, and intersected (Figure 1). The first type is a nested agreement in which the membership of a small agreement is a subset of members of a larger agreement. The second type is an intersected agreement in which one country has different agreements with different partners. The third type is an overlapped agreement that has features of both nested and intersected agreements.

Figure 1: Three Types of Common-Member Agreements



Note: A, B, C and D represent countries. Bilateral agreements are represented as a line and plurilateral agreements are represented as a circle.
Source: Authors' illustration.

[28] *Deutsche Bank AG v, Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2.

3.1. Nested IIAs: The Inconsistency Problem

There are some overlapped and nested IIAs in Asia. This is especially true for the relation between regional IIAs (regional FTAs with an investment chapter) and BITs. A concrete scenario of this kind is emerging with TPP negotiations, which involves, so far, four ASEAN countries: Vietnam, Singapore, Malaysia, and Brunei Darussalam. Investors from one of these countries may lodge a claim against another under the TPP ISDS rules and also under the ACIA, which incorporates different rules of procedure. One can add another layer to this scenario since Malaysia and Vietnam concluded a BIT in 1992, which offers a third instrument enabling Vietnamese and Malaysian investors to bring a claim against the host state. When thinking of the key objective of IIAs, which is to promote and protect investment, one might wonder what this complex multilayered regulation of FDI between two countries can add.

Nested IIAs may cause uncertainties, especially for procedural issues in investor–state disputes. Overlapped or nested IIAs may give investors more options for dispute settlement. Some may argue that this is good because investors are given choices among, at least, three fora as in the example above. Some may rather look at the risks taken by the host state, which may have to face various claims under different rules due to the inconsistent treaty practices over time. On the one hand, if IIAs stipulate that a domestic court or international arbitration can be used, such a statement would lead to multiple options, which is not necessarily good; on the other hand, if they stipulate that a domestic court or international arbitration shall be used, there would be a conflict between the two, which is not good. Moreover, consider a situation wherein a regional IIA requests that investors settle issues through domestic courts first, whereas a nested or overlapped bilateral IIA would allow investors to directly submit the issue to international arbitration. In short, confusion may occur if the necessary procedures stipulated in the overlapped or nested IIAs are mutually inconsistent.

Another possible inconsistency between overlapped and nested IIAs relates to the substance of rules (not procedures). Here, again, the investor is likely to simply opt for MFN, but the host country's administration may have difficulties in determining the substantive requirements in its treatment of foreign investors at an earlier stage. Suppose a situation wherein a regional IIA lists a few prohibited performance requirement measures and imposes no limitation on the introduction of other performance requirement measures, while a (nested) bilateral IIA includes a longer list of prohibited performance requirement measures. In such a case, it is difficult to foresee which set of rules prevails. In short, while one can assume that the host country always treats foreign investors in the best way it can, the effective rules that restrict states' behavior and policies become unclear if two or more IIAs are nested.

With regard to trade, dispute is always between states. A state, not a trader, can challenge the measures implemented by other governments. Relating to this, trade disputes should be solved using inter-state dispute settlement mechanism established under the WTO or FTAs. Domestic courts do not solve state–state disputes on trade policy. The options that traders have in the case of nested FTAs are those regarding preferential access to the partner market and not those regarding access to dispute settlement procedures.

3.2. Intersected IIAs: Treaty Shopping Problems and Unexpected Use of Agreements

Intersected agreements are a common phenomenon. While the number of the concerned agreements is relatively limited in the case of nested agreements, the issue of intersected agreements is aggravated by the indefinite number of agreements involved. Countries have signed a large number of IIAs and it is unrealistic to assume that those agreements will have a similar legal regime on FDI. If one country signs 10 different agreements with 10 different partners, all those agreements constitute an intersected agreement problem.

What is the problem with intersected IIAs? Why is a certain country signing different types of agreements with different partners so problematic? What is the point of differentiating partners and having different types of agreement with different partners? To tackle these questions, two inter-related issues should be considered: (1) treaty shopping and (2) unexpected use of the agreement. The problem here is that an investor moves its location and use an IIA unexpected way in order to protect its investment. Although the issue of nested agreements is limited to the choice among a limited number of agreements that include the same parties (trilateral A–B–C agreement versus bilateral B–C agreement), many more options exist in the case of intersected agreements if treaty shopping actually happens.

IIAs usually employ a broad definition of investment, and qualifications for investors are usually not demanding. Moreover, one should note that investors are significantly mobile nowadays, which is especially true for multinational corporations (MNCs). To best protect its investment assets, an MNC faces the temptation to partially (re)locate its base by selecting an economy that has entered into a favorable IIA with the country in which its investment is hosted. In addition, IIAs usually involve investor–state dispute mechanisms under which a state could be sued by an investor. Hence, the uncertainty with regard to the origin determination (of firms) and the mobility of firms may lead to an unexpected investor–state dispute, which is not favorable for governments. Interestingly, even a firm in a third country without an IIA with the concerned country may file a claim against it. In short, intersected IIAs provide investors with more legal options.

One of the most notable examples of treaty shopping is *Phillip Morris v. Australia.*[29] In 2010, Australia introduced plain packaging for all tobacco products (drab dark brown with no trademarks) (Table 3). The new bill aimed to discourage smoking and implement the Framework Convention on Tobacco Control as imposed by the World Health Organization. However, this regulation, which aims at protecting consumer health, is being challenged by Philip Morris Asia Limited (Hong Kong) before an international tribunal for an alleged breach of the Hong Kong–Australia BIT.[30] How did we get to a situation where there is a question whether Australia's plain packaging legislation violates a Hong Kong–Australia BIT? Philip Morris launched proceedings via an Asian subsidiary although it is an American company based in Virginia. Indeed, the US–Australia FTA does not have ISDS and would not allow Philip Morris to sue Australia for a breach of US–Australia FTA. As one can imagine, Australia never intended to give up its regulatory power to address health issues in the 1996 BIT concluded with Hong Kong. Equally unanticipated was the idea of a claim brought by an investor formally registered in Hong Kong but which is known as a powerful American MNC. Certainly, one might expect a sovereign state such as Australia to anticipate such developments. However, one can also perceive the considerable challenges raised by

[29] *Philip Morris Asia Limited v. The Commonwealth of Australia,* UNCITRAL, PCA Case No. 2012-126.

[30] See Jane Kelsey, (2013), The Trans-Pacific Partnership Agreement: A Gold-Plated Gift to the Global Tobacco Industry?, *American Journal of Law & Medicine, 39,* 237.

MNCs and their capacity to opportunely relocate to new jurisdictions to benefit from more favorable rights and access to arbitration.

Table 3: Philip Morris v. Australia[31] Dispute Timeline

April 2010	Australia announces plans for plain packaging; consultation papers, draft legislation
June 22, 2011	Philip Morris serves Notice of Claim to Australia to initiate negotiations before arbitration
November 21, 2011	Tobacco Plain Packaging Act 2011 and Trademarks Amendment (Tobacco Plain Packaging) Bill receive final legislative approval;[32] Philip Morris announces it will pursue remedies via the Hong Kong–Australia BIT and domestically in Australian courts
December 20, 2011	Philip Morris files writ against Australia government
March 2012	Ukraine complains to WTO
July 1, 2012	Tobacco legislation is in force
October 2012	Australia High Court rejects tobacco companies' claim
February 2013, July 2013, October 2013, February 2015	On-going arbitration hearings
December 17, 2015	The Arbitral Tribunal unanimously dismissed Philip Morris Asia's claim, on the ground that it has no jurisdiction.
May 16, 2016	The Permanent Court of Arbitration published the Arbitral Tribunal's Award on Jurisdiction and Admissibility.

Source: Authors' compilation

Relatively, treaty shopping and unexpected use of FTAs are well-managed in the field of trade (in goods) because of the established Rules of Origin concept for goods trade. Usually, there are three ways to establish the origin: (1) change in tariff classification rule; (2) regional value-added rule; and (3) special processing rule. To avail preferential access, traders need to demonstrate that goods are originating from the partner country by submitting a certificate of origin. This is in sharp contrast with IIAs, where investors can easily satisfy the conditions for "origin." The possibility of abuse of FTAs cannot be ruled out, but as discussed, the use of FTAs is only for preferential market access, not access to dispute settlement.[33]

4. What to Do About It?

Notably, the fundamental questions are how to promote international investment and how to avoid an unexpected use of IIAs. Unnecessarily complex webs of investment regimes are harmful. To achieve the aforementioned aims, we may deal with the three factors that affect the magnitude of the noodle bowl problem of IIAs. The first factor is the mobility of provisions in IIAs. This means that more favorable provisions or wordings in one IIA can be imported into another IIA. MFN is the tool to achieve this, but we should also carefully

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[31] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-126.

[32] For a detailed analysis, see Tania Voon and Andrew Mitchell, Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia, *Journal of International Economic Law, 14(3)*, 515.

[33] Economically, an FTA that has "leaky" ROO that leads to unexpected ways of using the agreement simply reduces the trade distortive effects of the FTA.

design MFN clauses because they may further complicate the noodle bowl situation. Second, investors are mobile. As discussed already, investors such as Philip Morris can switch between jurisdictions to fully utilize investment protection opportunities. Negotiators should carefully draft treaty texts to mitigate investor abuse and treaty shopping. Third, the mobility of country, namely the accession into an IIA, is critical to the noodle bowl problem because it is intertwined with the mobility of the other two factors.

4.1. Limiting the Mobility of Provisions: Scope of MFN Clause

With regard to investment, MFN treatment seeks to establish equal conditions of competition for all foreign investors, independent of their country of origin. This principle constitutes one of the cornerstones of investment agreements and allows investors covered by one agreement to claim benefits equal to those granted to investors by other countries, irrespective of whether those benefits are established in other investment agreements or in the actual regulatory practice of the host country.[34] The role of MFN provisions became particularly important after the proliferation of IIAs because the level playing field can be maintained by the MFN clause despite the different treatments given under each IIA. An MFN clause has important implications, especially to the intersected IIAs, because providing differentiated treatment to different partners makes little sense if MFN treatment is included.

But at the same time, MFN treatment may even further complicate the complexity of investment regimes. While traditionally regarded as a standard clause without major implications with regard to dispute settlement and free of the policy sensitivities of other clauses—such as national treatment—the MFN principle has gained new attention in the ambit of international investment rule-making in light of this provision's recent application by some arbitral panels.[35] In fact, the scope of the MFN obligation, like any other substantial

[34] For a general review of the MFN principle in investment agreements, see UNCTAD, 1999d and OECD 2004a.

[35] *Tza Yap Sum v. Peru* recognizes the need to analyze the specific wording of each provision of a treaty in accordance with established rules of international law; an *a priori* decision is not appropriate, i.e., it is not possible to decide in general that MFN clauses are efficacious in some sorts of situations whereas they are not in others; each MFN clause is a world in itself, which demands an individualized interpretation to determine its scope of application. See *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June, 2009, paras. 196–198.

provision of the treaty, is limited by not only the overall coverage of the agreement but also the wording introduced in the clause itself.[36]

MFN and Pre-Establishment

The critical question regarding MFN treatment is whether the obligation applies to established investments in the country or whether it also applies to the ability of the investor to claim access to the host country—so-called pre-establishment rights. For example, Article 6 of ACIA provides that a host ASEAN member state must, in like circumstances, provide MFN treatment to ASEAN investors and their covered investment either at pre-establishment or post-establishment stages of investment. However, few Asia-Pacific IIAs expressly extend the coverage of the MFN obligation to pre-establishments rights.

Regional Economic Integration Organization Exception

The increase of Asia-Pacific FTAs with investment chapters raises an important issue in terms of connections with existing BITs. Indeed, MFN treatment provisions in existing treaties may give rise to the so-called free-rider issue when benefits from customs unions, FTAs, or economic integration organization agreements are extended to non-members. To avoid this outcome, many BITs exclude the benefits received by a contracting state party to a regional economic integration organization (REIO) from the scope of MFN treatment obligations through a REIO exception. Essentially, all IIAs include a carve-out from the MFN principle.

However, the precise scope of the carve-out differs across BITs. A considerable number of existing BITs cover, at least, specific types of regional integration that are expressly mentioned in the agreement. Some countries extend the scope of the REIO exception to similar arrangements. For instance, the Indian model agreement[37] refers to "any existing or future customs unions or similar international agreement to which it is or may become a party" (Article 4). The French model agreement refers to a "free trade zone, customs union,

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[36] Many tribunals have adverted to the different formulations of the MFN standard in different treaties. The *Salini v. Jordan* Decision on Jurisdiction notes that some BITs provide expressly that the most-favoured-nation treatment extends to the provisions relating to settlement of disputes; others do not contain such a provision, but refer to "all rights" contained in the agreement or to "all matters" subject to the agreement; and in the BIT before the tribunal, the MFN clause does not include any provision extending its scope of application to dispute settlement, nor does it envisage "all rights or all matters covered by the agreement" (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004 at 116-118). The *Tza Yap Sum v. Peru* Decision on Jurisdiction and Competence recognizes the need to analyze the specific wording of each provision of a treaty in accordance with established rules of international law; an *a priori* decision is not appropriate, i.e., it is not possible to decide in general that MFN clauses are efficacious in some sorts of situations while they are not in others; each MFN clause is a world in itself, which demands an individualized interpretation to determine its scope of application (*Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009 [Spanish] at 196-198). *Impregilo v. Argentina* Award notes that the MFN clauses in BITs vary and this has led to different interpretative results (although it finds, by a majority, a "massive volume of case-law" that indicates that, at least when there is an MFN clause applying to "all matters" regulated in the BIT, more favorable dispute settlement clauses in other BITs will be incorporated) (*Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 at 103-107).

[37] See J. Chaisse, D. Chakraborty, & J. Mukherjee, 2013. Deconstructing Service and Investment Negotiating Stance: A Case Study of India at WTO GATS and Investment Fora. *Journal of World Investment & Trade, 14,* pp. 44–78.

common market, or any other form of regional economic organization" (Article 4).[38] Such provisions allow France or India to enter into new FTAs with investment chapters without obligation to extend the benefits to countries with whom they were bound through a BIT. In this regard, one might also assume that some countries may be tempted to negotiate investment agreements in the context of a FTA to isolate the newly negotiated treaty from other BITs. Pakistan, for instance, seems to favor negotiations of investment within FTAs in order not to be subject to full MFN applicability under other BITs.

In this light, the ACIA MFN exception is, logically, more limited. Article 6 of ACIA applies only to "any sub-regional arrangements between and among Member States; or…" Therefore, selected ASEAN members can sign a more favourable agreement than ACIA among themselves, without extending the same treatment to other ASEAN members. However, if an ASEAN member signs more favourable agreements than ACIA with non-ASEAN parties, such shall be extended to other ASEAN members. The effect of such a provision is to maintain the applicability of the basic MFN for the benefits of the members. Certainly, in the context of a regional integration scheme such as ACIA, members have an interest in being granted better treatment than that granted by a third country to an individual member through an IIA in the form of an FTA or a BIT.

Note that old BITs sometimes do not have REIO exception. For example, the MFN provision of China–Japan BIT signed in 1989, which is still in force, does not include a REIO exception clause. Interestingly, the BIT's MFN covers some elements relating to the pre-establishment (treatment with respect to investments, returns and business activities in connection with the investment is subject to MFN[39]). Therefore, for example, if the future investment chapter in China–Korea FTA includes significant pre-establishment liberalization, Japan may be able to free ride using the MFN treatment in the China–Japan BIT. Such a situation would further complicate the IIA noodle bowl problems in the Asia-Pacific region.

MFN and ISDS

The scope of the MFN obligation also pertains to the nature of the disciplines encompassed by the principle. The question regarding whether the MFN principle covers issues pertaining to ISDS procedures is a critical problem, largely because countries such as China have been inclined to give a rather narrow scope to ISDS clauses, which limits the possible access to arbitration for foreign investors.[40] Furthermore, following the arbitral decision in the

[38] The French BIT Model, as many other BITs models, can be found on the ITAlaw webiste. See http://www.italaw.com/investment-treaties

[39] See Article 3, China-Japan BIT.

[40] See J. Romesh Weeramantry, (2012), Investor-state dispute settlement provisions in China's investment treaties, *ICSID Review*, *27(1)*, 192-206. See also Gordon Smith, (2010), Chinese bilateral investment treaties: restrictions on international arbitration, *Arbitration*, *76(1)*, 58-69.

Maffezini case,[41] much attention has been drawn to the debate on whether provisions relating to the ISDS procedures enshrined in one agreement can be "imported" into another agreement by virtue of the MFN clause. Since the *Maffezini* case, many other arbitrations have dealt with the question of MFN obligations and its coverage of ISDS with different results. While some cases confirmed and, to some extent, expanded the interpretation admitted in *Maffezini*,[42] others applied more restrictive criteria and seemingly reduced the scope of resorting to the MFN principle regarding dispute settlement provisions.[43] The question posed by the *Mafezzini* decision ultimately addresses the general scope of the MFN principle and how the provision is crafted in each individual agreement.[44]

A few investment agreements, notably those signed by the UK, solve the controversy by including provisions on ISDS procedures among those expressly covered by the MFN provision. For instance, the UK–Vanuatu BIT of 2003 states that with regard to the MFN obligation "[f]or the avoidance of doubt it is confirmed that the treatment provided for in [the MFN obligation] shall apply to the provisions of Articles 1 to 11 of this Agreement,"[45] which includes Article 9 on ISDS procedures. By inserting such a clarification, the agreement makes clear that the intention of the parties is to include substantive and procedural aspects of dispute resolution among the matters subject to the MFN obligation.

In contrast, some agreements have attempted to prevent arbitral tribunals from extending the MFN principle to ISDS matters by emphasizing the intention of parties on the contrary. For example, recent US FTA investment chapters introduce and maintain a footnote explicitly affirming that the *Maffezini* interpretation would not apply to that agreement throughout its

[41] The case was brought by Emilio Agustín Maffezini, an Argentine investor, against Spain on the basis of the Argentina–Spain BIT of 1991. In the decision on jurisdiction, the ICSID arbitral court ruled that the claimant was allowed to bypass the waiting period of 18 months required the concerned treaty by virtue of its MFN provision, in light of the more beneficial terms—-a waiting period of 6 months—recognized in the Chile-Spain BIT. Compared with the all other investment agreements signed by Spain, its BIT with Argentina featured an exceptionally broad MFN provision since it applied to "all matters subject to [the] agreement." The arbitrators considered that this language gave the MFN obligation a greater coverage than that provided for in other Spanish BITs that usually featured to the narrower expression "this treatment." Given this broad scope of the MFN principle and the sheer importance of dispute settlement provision for the protection of foreign investors, the tribunal concluded that rights and obligations pertaining to the protection of investors—including in matters relating to dispute settlement—enshrined in other agreements would be covered by the MFN obligation to the extent that these other agreements related to the same subject matter as the basic treaty. *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of Jan 25, 2000, paras 54-64.

[42] See *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004, and *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction of June 17, 2005.

[43] See *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of February 8, 2005 and *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 9, 2004.

[44] For a discussion on the implications of Mafezzini and evolving jurisprudence on MFN and dispute settlement, see, *inter alia*, Gaillard, 2005; Teiteilbaum, 2005; Kürtz, 2004; Hsu, 2006; Freyer and Herlihy, 2005; Fernández Masiá, 2007. In regard to the Mafezzini case and its relationship with BITs signed by China, see Schill, 2007 and Cymrot, 2006.

[45] UK—Vanuatu BIT, Article 3.3.

negotiating history. [46] The purpose of the footnote is to express the intention of the parties although the clarification will not form part of the final signed text.

Greater doubts arose instead in those agreements. For instance, the BIT triggering the *Maffezini* case did not spell out the coverage of the MFN provisions with regard to dispute settlement. In the words of Prof. Gaillard, "[i]n those situations, the intention of the contracting parties can reasonably be interpreted to include the whole range of the rights accorded to the investors of a third country, including the right to the neutral and effective settlement of their investment disputes through international arbitration rather than through the judicial organs of the host state itself."[47]

Similar to other US FTAs, the MFN clause of TPP (Article 9.5) states that "this Article does not encompass international dispute resolution procedures or mechanisms." However, it should be noted that most Asia-Pacific IIAs do not exclude MFN treatment from their ISDS clauses.

Applicability of MFN to Older IIAs

As discussed above, the number of IIAs signed by Asia-Pacific countries is enormous. There are so many IIAs from which provisions can be imported into another IIA. One possible way to reduce the magnitude of the noodle bowl problem of IIAs is to limit the number of IIAs from which provisions can be imported. But how can we achieve such a limitation?

The main reason why MFN treatment is necessary is the unpredictability of the future IIA landscape. In general, countries tend to sign more liberal IIAs as time goes by. Yet, if a country decides to offer better treatment in a subsequent treaty negotiation, earlier treaty partners might become worse off. MFN treatment acts as a guarantee for the earlier treaty partners, as they can receive *pari passu* treatment as the subsequent partners. At the negotiation stage, partners can request to incorporate terms and treatments from earlier IIAs as part of their IIA package, but they cannot request the inclusion of specific provisions from unknown future IIAs to be signed by the partner into the current IIA being negotiated.

The discussion above, in turn, implies that no problem exists if provisions cannot be imported from older IIAs with MFN treatment because negotiators can make reference to precedential IIAs and request the inclusion of specific provisions from those IIAs, rather than keeping the

[46] The footnote to Article 4.2 of the draft US–Thailand FTA text, as proposed by the US, reads "The Parties agree that the following footnote will be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Treatment Article and the Maffezini case. This footnote will be deleted in the final text of the Agreement. The Parties note the recent decision of the arbitral tribunal in *Maffezini (Arg.) v. Kingdom of Spain*, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. […] In contrast, the Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section B of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case." Available online: http://www.bilaterals.org/article.php3?id_article=4144#nh1. The draft ASEAN-China FTA featured a similar provision. See Teitelbaum, 2005, p. 229, and Appleton, 2005, p. 20.

[47] Emmanuel Gaillard, Establishing Jurisdiction Through a Most-Favored-Nation Clause, New York Law Journal, Volume 233, No. 105 (2005) at 3.

possibility of importing provisions from the partner's old IIAs using MFN. In other words, negotiators should exhaust efforts to come up with the "complete" IIAs, rather than relying on MFN treatment, through which provisions in existing IIAs can be imported, while still relying on MFN treatment regarding the importation of better provisions in the partner's future IIAs.

In fact, for example, under ACIA, an MFN exception is possible for (but limited to) sub-regional arrangements among ASEAN members and "existing agreements notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement." Article 8(3) of the AIA Agreement stipulates that MFN treatment shall "not apply to existing agreements notified within 6 months after the date of signing of this Agreement." This well illustrates that ACIA MFN clause should be used in a forward-looking way.

4.2. Limiting Investor Mobility: The Timing Issue

Investors switching between jurisdictions to optimize their investment returns is not an exception. To optimize investments, the availability of favorable IIAs in the host country is usually an important consideration for investors. There is no problem at all if a company decides the investment location for reinvestment by mainly considering the IIAs signed by the host country and actually uses those IIAs if the problem actually happens later on.

What seems to be problematic, therefore, is the relocation of investment for reinvestment to mitigate the introduction of an unfavorable domestic policy already implemented or announced. In the case study of *Philip Morris*, the problem was that investment was rerouted to Hong Kong only after Australia announced the plans for plain packaging. Philip Morris's choice to invest in Hong Kong is not driven by Hong Kong's business environment but by an incentive to (ab)use the Hong Kong–Australia BIT to bring a claim against Australia for its plain package policy.

One possible solution to avoid retrospective application of BIT is by limiting the scope of investments protected under IIAs, for instance, by introducing a five-year threshold requirement. In essence, only investments persisting for a continuous period of over five years qualify for protection by IIAs. Even without limiting the scope of investment, the abuse of ISDS can be avoided if there is a provision stating that investors can use dispute settlement to protect an investment only five years after the investment was made.

4.3. Enhancing the Mobility of Countries: Accession to the Best IIAs

Many agreements will be overlapped and nested with TPP. TPP would virtually supersede NAFTA and other existing IIAs when there is an overlap, as it is negotiated in the context of an agreement of great economic significance, including a broad MFN provision. Interestingly, the TPP may be read as a *de facto* renegotiation of NAFTA and many other agreements such as the ASEAN–Australia–New Zealand FTA.[48] The TPP is even more clearly a strengthening of investment disciplines for some developing countries such as Vietnam and Malaysia, which have not previously been bound to the US.

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[48] See Pasha L. Hsieh, (2015), Liberalizing Trade in Legal Services under Asia-Pacific FTAs: The ASEAN Case, *Journal of International Economic Law, 18(1),* 153.

However, problems associated with nested agreements, namely possible inconsistencies across agreements, may continue to exist, even if a high-quality TPP is launched. One way to eradicate the problem is to suspend any smaller nested IIAs. The suspension of BITs is relatively easy because the WTO consistency problem does not seem to be serious. Letting smaller nested BITs expire would be a more moderate method than suspension. In the case of FTAs with an investment chapter, the termination of all provisions of an FTA when TPP is signed (replacing old FTAs with TPP) would be difficult. The suspension of the FTA investment chapter alone would be an option, though it is unclear at this stage if such an option is preferred by the contracting parties.

The problems associated with intersected agreements, especially the treaty shopping problem, would be more serious after the TPP launch because firms in the non-TPP party may try to derive benefit from investment provisions of the TPP, which is more powerful than any IIAs that their origin country signed. For example, Chinese firms may treaty shop to take advantage of TPP investment provisions even if Beijing is outside the TPP. If a Chinese firm invests in one TPP country and reinvests in another TPP country, such a reinvestment could be covered by the TPP investment chapter if conditions are met.

How can this problem be overcome? “open accession” seems to be an answer. Because Chinese investors would be able to take advantage of TPP’s investment chapter, it is natural for TPP parties to consider “why not invite China” at least for the investment chapter. Non-TPP parties like China may also have an incentive to TPP join investment chapter.[49] This proposal leads to one fundamental question: should investment be covered along with trade and other issues under the single umbrella of an FTA (including the TPP)? As discussed, on the one hand, Asian countries seem to consider trade and investment as inseparable, and governing a wide range of economic matters, including both trade and investment, under an FTA, is necessary. On the other hand, the noodle bowl problem of trade and investment are different—the latter seems to be more serious because it involves disputes between states and private sectors unlike trade disputes. Hence, it makes sense to adopt an open accession policy for an investment chapter under an FTA while it continues to stay under an FTA. Therefore, permitting countries that are reluctant to accede to the package of all provisions of the TPP to endorse the investment chapter alone would be an option worth considering. Alternatively, given the current ratification status of TPP, separating the investment chapter form other chapters in TPP would be an option; if the investment chapter alone enters into force with accession clause, as an exception to the single undertaking concept, such would already be a significant achievement. Should other countries join the TPP investment chapter and ratify, this would no doubt signify an embryonic version of a long-awaited multilateral agreement on investment.

5. Conclusion

This study provides a framework for and analysis of investment rule-making in Asia. Several important issues can be summarized following the presented discussions. First, as in the rest of the world, the regulation of international investment in Asia is a field of law that has experienced major developments, especially in the last decade. Second, there are currently 180 intra-regional BITs in force. In addition, there are 36 intra-regional FTAs in Asia that

[49] See Ming Du, (2015), Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement, *Journal of International Economic Law, 18(2),* 407.

contain investment chapters. This large number of IIAs forms the core of the Asian noodle bowl of investment treaties and associated problems. Third, among Asian economies, 12 comprise a group of frontrunners that have concluded more than 50 IIAs. This group comprises China, Korea, India, Malaysia, Vietnam, Singapore, Indonesia, Thailand, Kazakhstan, Uzbekistan, Pakistan, and the Philippines. Finally, although investment rule-making has undergone profound changes in recent years (e.g., treatification, proliferation, and regionalization), it is very likely to continue to evolve just as quickly.

The noodle bowl problem of investment is grave mainly because it entails investor–state disputes. Rules under nested and overlapped IIAs may not be consistent with each other, which lead to the confusion of interpretation. Moreover, when countries sign different types of IIAs with different partners, this creates the situation of intersected agreements, wherein the treaty shopping problem is severe, as illustrated by the example of the use of the Hong Kong–Australia BIT by Philip Morris. Regional agreements such as TPP may increase or mitigate the investment noodle bowl problems in Asia.

What can be done about the issues raised so far? We have two concrete suggestions. First, languages in IIA shall be clear and precise to avoid the confusion of the exacting meaning of the text. A proper drafting of IIAs is necessary to effectively control the mobility of both investors and its provisions. To avoid further complicating the noodle bowl of IIAs, IIAs should be explicit about whether MFN covers pre-establishment. The problems lie in the old IIAs signed during the time when ideas of pre- and post-establishment were not yet fully developed. BITs also need a REIO exception to isolate the negotiation outcome of FTAs from BITs so that the interpretation of BITs does not become too complicated. Likewise, an MFN agreement should spell out its coverage regarding dispute settlement. It is perhaps more reasonable if MFN treatment is not applicable to dispute settlement to reduce the uncertainty of procedural aspect of dispute. Furthermore, it is reasonable that MFN treatment is only applicable to future IIAs and not to past IIAs because negotiators can know the content of past IIAs. The purpose of MFN treatment is to ensure that earlier treaty partners should not be worse off. A careful drafting of the scope of investments protected by an IIA is also essential to avoid abuse of IIAs by investors. IIAs should not create an incentive for relocation after the policy in question is decided just to fight against it.

Second, it is important to strike a balance between appropriate levels of “mobility” for the three factors: mobility of provisions, mobility of investors and mobility of countries. If one factor is immobile, the burden will be transferred to other factors; they will become overly mobile. In fact, an investor frequently moves to a country that has a better IIA than the investor’s original country. Likewise, the investors tend to hire expensive international investment lawyers to take advantage of MFN clause with which better provisions in other IIAs can be imported into the low quality IIA signed by its origin country. Therefore, the mobility of such a factor should be enhanced. In short, a certain country’s accession to a “better” or even “best” IIA should be able to reduce investors’ incentive to relocate to a country that has better IIAs as well as reduce their incentive to import better provisions from other IIAs into the poor IIAs of its own original country using MFNs.