The "Noodle Bowl Effect" of Investment Treaties in Asia-- The Phenomenon, the Problems, the Practical Solutions

Julien Chaisse
ARTICLE

The ‘Noodle Bowl Effect’ of Investment Treaties in Asia: The Phenomenon, the Problems, the Practical Solutions

Julien Chaisse1 and Shintaro Hamanaka2

Abstract—The ‘noodle bowl effect’ of international investment agreements (IIAs) is a serious challenge posed to the coherence and legitimacy of international investment law in the Asian region where there is the highest density of IIAs in the world. 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 investment treaty. Furthermore, each IIA can allow the importing of ‘better’ provisions from other IIAs using its most favoured nation (MFN) clause, which significantly complicates the interpretation of IIAs. There are three ways to mitigate the problem. First, the scope of MFNs should be carefully drafted to limit the ‘mobility’ of provisions, eg 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 investment relocation. Third, the ‘mobility of countries’ should be enhanced by allowing them to join existing IIAs favourable to their investors and investments.

I. INTRODUCTION

The ‘noodle bowl’ problem has been the most debated issue in relation to the proliferation of free trade agreements (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 multiplication and abuse of trade agreements. This is because products would go back and forth among countries, tracing the path of

1 Professor, Faculty of Law, Chinese University of Hong Kong. Email: julien.chaisse@cuhk.edu.hk.
2 Senior Research Fellow, Institute of Developing Economies of Japan External Trade Organization (IDE-JETRO), Tokyo, Japan. Email: Shintaro_Hamanaka@ide.go.jp. The research began when Dr. Hamanaka was Principal Economist at the Asian Development Bank. The authors would like to thank Matthew Hodgson, Luke Nottage, Mia Mikic, Karl P Sauvant, Leon Trakman, Pierre Sauvé, Matteo Vaccaro-Incisa, and Heng Wang for comments on earlier drafts of this article. Thanks also to Qian Xu for her excellent research assistance. The views expressed by the authors are personal.

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myriad FTAs just to avoid paying tariffs. 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. However, the concerns associated with the noodle bowl of FTAs have not been too problematic, 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.

In sharp contrast to the trade scenario, the investment regime, which is made of international investment agreements (IIAs), is more exposed to the ‘noodle bowl’ problem. This is firstly because the number of investment agreements is much greater than that of trade agreements. In addition, there is a fundamental difference between the trade and investment scenario: while trade agreements concern state-to-state relations (eg interstate disputes on trade policy), investment agreements involve private sectors as well (e.g., investor–state dispute). While trade issues are governed by the World Trade Organization (WTO), the investment governance of WTO has been limited; there is no World Investment Organization and, by definition, no MFN principle at the multilateral level in investment. Finally, the noodle bowl problem of IIAs can only aggravate and become more serious in light of agreements under negotiations at regional level, as these future large pacts may overlap with many treaties that date back to the 1960s.

The purpose of this article 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) 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 (and, perhaps eliminated) if

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6 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.


9 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 <http://unstats.un.org/unsd/methods/m49/m49regin.htm> accessed 12 April 2018. See also Luke Nottage, Julien Chaisse and Sakda Thanitcul, ‘International Investment Treaties and Arbitration Across Asia: A Bird’s Eye View’ in Julien Chaisse and Luke Nottage (eds), Luke Nottage (eds), Luke Nottage (eds), Luke Nottage (eds), International Investment Treaties and Arbitration Across Asia (Brill 2018) 1.

negotiators understand the danger they create with inadequate drafting of treaty text. Therefore, this article suggests options to reduce the risk of the noodle bowl problems of investment. The abuse of IIAs by investors could be largely avoided through proper drafting of treaty.

Therefore, the methodological approach of this paper is eclectic, reflecting respective expertise in trade and investment matters of the two authors in international economic law and international political economy. Neither pure legal or textual analysis nor simple diplomatic or political angle is sufficient in understanding policy realities. We believe political economy analysis based on sound treaty knowledge regarding investment is necessary to identify the real problems that Asian policy makers are facing, and to consider possible ways to overcome them, which are systemic in nature.

The next part of the article provides a macro mapping of IIAs in Asia by presenting the geographical spread of IIAs in the region and the number of IIAs signed by each Asian economy. Furthermore, it analyses 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, Section III considers the problems associated with the so-called noodle bowl syndrome. It demonstrates that the noodle bowl problem, which is caused by intersected, nested, and overlapped agreements, is dangerous in the case of investment. Section IV discusses possible methods to mitigate the negative sides of the proliferation of IIAs in Asia. We examine three issues: the scope of MFNs (the ‘mobility’ of provisions across IIAs); investors’ incentive to relocate their base (the ‘mobility’ of investors); and countries’ accession into favourable IIAs for their investors (the ‘mobility’ of members). Section V concludes the article and offers policy options to address a problem of systemic significance.

II. EVOLVING INVESTMENT REGIME IN ASIA

Investment treaties are now ubiquitous, and the global network of IIAs has grown considerably over the past years. It now consists of over 3304 treaties, 31 of which were concluded in 2015. By the end of 2016, 150 economies were engaged in negotiating at least 57 new IIAs. There are also states that are terminating BITs and the rate of signing of BITs has slowed considerably. Asian states have been prolific in entering into IIAs. More than one-third of investment treaties in the world involve at least one Asian state. This article refers to ‘countries’ in a broad sense to encompass any geographical entity with international personality and is 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).

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This section details the key characteristics of the normative proliferation of investment treaties in Asia before to focus on the phenomenon of regionalization.

A. Proliferation of International Investment Agreements

According to the United Nations Conference on Trade and Development (UNCTAD) Database of IIAs, so far more than 3300 IIAs have been signed worldwide (Table 1).\(^{17}\) There are approximately 3000 investment treaties worldwide and Asian countries have signed more than 1000 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.\(^{18}\) Hence, there are, in fact, a multitude of IIAs in Asia.

However, it is important to notice that most IIAs in Asia are cross-regional where a non-Asian party, such as the USA 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.\(^{19}\) 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 2217). Moreover, if we consider the recent trend of FTA ‘regionalization’, we find that the actual contribution of FTA

<table>
<thead>
<tr>
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<th>Total IIAs</th>
<th>Investment treaties</th>
<th>Investment chapter</th>
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<tbody>
<tr>
<td>World total</td>
<td>3360</td>
<td>2993</td>
<td>367</td>
</tr>
<tr>
<td>Non-Asia total</td>
<td>2217</td>
<td>1990</td>
<td>227</td>
</tr>
<tr>
<td>Asia total</td>
<td>1143</td>
<td>1003</td>
<td>140</td>
</tr>
<tr>
<td>Cross-regional</td>
<td>927</td>
<td>823</td>
<td>104</td>
</tr>
<tr>
<td>Intra-regional</td>
<td>216</td>
<td>180</td>
<td>36</td>
</tr>
</tbody>
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Source: UNCTAD Database of Investment Agreement (compiled by the authors as of 7 February 2018).

\(^{17}\) 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.


investment chapters to the international investment rule-making is even more significant because regional FTAs cover many 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.

According to the authors’ survey, 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 chapters with Asian partners. Because China has IIAs with almost all Asian countries, its treaty practice—although not consistent regarding substantive rules—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 many (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 towards signing modern IIAs that tend to be regional.

B. 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. The rise of regional FTA with a wider scope is likely to produce

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24 Such broad pacts also raise the problem of regulatory autonomy with even greater acuity. See Caroline Henckels, ‘Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP’ (2016) 19(1) J Int Econ L 27. See also Pasha L Hsieh, ‘Reassessing APEC’s Role as a Trans-Regional Economic Architecture: Legal and Policy Dimensions’ (2013) 16(1) J Int Econ L 119.
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 29 March 2012); (2) the Trans-Pacific Partnership (which has not—and may not—enter into force but was signed on 4 February 2016); and (3) the Regional Comprehensive Economic Partnership (negotiations for which were formally launched in November 2012 at the ASEAN Summit in Cambodia and should be completed by the end of 2017). Importantly, these three treaties and negotiations seem to be interrelated. The RCEP negotiations have run to some extent in parallel with completion of the ASEAN Economic Community (AEC) and the Trans Pacific Partnership (TPP). The AEC is a deep integration agreement and was officially completed at the end of 2015, which in principle should mean that the 10 ASEAN countries have a single negotiating position at RCEP. The differences and key features of each these three regional investment pacts are reviewed below with the view to assess the consolidation power (and the extent to which they may affect the noodle bowl syndrome).

(i) ASEAN Comprehensive Investment Agreement

ASEAN Comprehensive Investment Agreement (ACIA), signed in February 2009 was 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 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. ACIA superseded these two precursor investment agreements, including their subsequent amendments. Beyond the mere consolidation of earlier


26 In practice, the AEC remains short of the vision of free flows of goods, capital and unskilled labour plus common policies in areas such as competition or consumer protection and measures to narrow the development divide within ASEAN. In recognition that creation of the AEC is an ongoing project, at the November 2015 ASEAN Summit the leaders adopted the AEC Blueprint 2025, which ‘provides broad directions through strategic measures for the AEC from 2016 to 2025’. In their analysis of the ASEAN Comprehensive Investment Agreement and its transformation until 2025, Chaisse and Jusoh (2016) illustrate the benefits to ASEAN and third country investors from collective commitment to a common standard for laws and policy on foreign investment that can help to depoliticize potential conflict between individual investors and host states. See Julien Chaisse and Sufian Jusoh, The ASEAN Comprehensive Investment Agreement: The Regionalization of Laws and Policy on Foreign Investment (Elgar International Investment Law Series, Edward Elgar 2016) 265pp.

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. 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)).

ACIA also includes more comprehensive 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 rules 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 29 March 2012, and new investments after 29 March 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 (eg 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).

28 On this notion see Jorun Baumgartner, Treaty Shopping in International Investment Law (OUP 2016) 400 pp.
(ii) Trans-Pacific Partnership

Another driving force behind the regionalization of investment rules is Trans-Pacific Partnership (TPP). The TPP is technically an expansion of the Trans-Pacific Strategic Economic Partnership Agreement (or P4 agreement) signed by Brunei Darussalam, Chile, New Zealand and Singapore, but its evolution took a major step in 2008 when other countries, led by the USA joined the P4 in negotiations for a broader agreement. Twelve countries were in the TPP when negotiations were completed in November 2015 and signed the agreement in February 2016.²⁹

The agreement comes into force if at least six countries, which between them represent at least 85 percent of the total GDP of the 12 countries, have ratified it within two years. On 23 January 2017, President Trump signed a presidential memorandum to withdraw from the TPP which, given the size of the US GDP, eliminates any chance of ratification of the current text. The remaining 11 countries could renegotiate the ratification rules to exclude the US veto.³⁰ The list of potential members is long, including Korea, Thailand, Taiwan, the Philippines, Lao PDR, Colombia, Costa Rica, and even China.³¹ Should these countries join the TPP and ratify, among other provisions, the investment chapter, this may signify an embryonic version of a long-awaited multilateral agreement on investment.

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 NAFTA case law since 2001. The level of US leadership is palatable in both the form and substance of the TPP, even though other treaty practised earlier was considered in the same direction as the China–Mexico BIT 2008, which looks very much like the NAFTA.³² 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.

(iii) 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

³⁰ Many items were included under US pressure and for other countries the principal attraction in accepting the agreement was preferential access to the US market. Japan ratified the agreement in December 2016, but other countries are prevaricating or showing no interest. Canada and Mexico are waiting to see US intentions with respect to NAFTA.
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 in August 2015, the modality of tariff liberalization of RCEP was set as the abolishment of tariff for 80 percent 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.

RCEP, like the TPP, is taking much longer to negotiate than originally intended. This suggests that negotiators are aiming for more than just systematizing the existing ASEAN+6 FTAs, although given the confidentiality of the process it is difficult to know just how far beyond that negotiators are headed. That being said, the investment chapter that leaked in December 2016 and, again, in March 2017, suggest that the RCEP is very much taking inspiration of the TPP investment chapter.

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 investment protection. In contrast, Japan’s Economic Partnership Agreements (EPA) with individual ASEAN members include relatively sophisticated investment chapters that cover both the protection and liberalization of investment. Meanwhile, the Japan–ASEAN EPA, though signed in 2008, is still under negotiation for its investment chapter. 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. 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. The CJK TIT is not ambitious because it covers only investment protection, and its list of prohibited performance requirement measures is limited. The views expressed by Japan and China regarding the CJK FTA investment chapter in the Joint Study Report prepared in December 2011 well illustrate the disagreement. Japan emphasized on (1) NT and MFN at both pre- and post-establishment phases, (2) ISDS procedures for a wide range of investment disputes, (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. 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 CJK FTA and RCEP will end, mainly due to the disagreement between Japan and China regarding the depth of investment rules and liberalization commitments.

C. Proliferation of Investment Disputes

To understand the actual magnitude of Asian IIAs on the real economy, we should analyse 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. 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, seven cases were registered in 2010 and 16 cases in 2011. Over the last four years, 70 new cases were registered in 2012–15, 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, we can at least argue that IIAs are increasingly 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, most cases are still related to energy/infrastructure.

39 Pekkanen (n 38) 122, 137.
Simultaneously, however, a gradual diversification has emerged in types of investment disputes. 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 involving Asia states, with most them concluding that the tribunal lacks jurisdictions on the matter. As a principle, this category of decisions focuses on the fundamental question of law, namely, whether an arbitral tribunal has jurisdiction to preside over a given case. In this respect, a jurisdictional question may be segregated into three legal issues: 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). While decisions on jurisdiction are sometimes necessary because of the cutting-edge character of certain investment claims, jurisdictional issues also plainly result from major objections raised by the responding parties, as an attempt to avoid proceeding to a discussion on the merits.

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 (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 leaves relatively greater room for the claimant to creatively develop arguments which favour an expansive interpretation. In short, old BITs are have the potential to be relatively more powerful what is beneficial to foreign investors and, at the same time, more demanding for responding states.

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 difficult to manage. This will further increase as developing countries will soon face a greater risk of investment disputes (as a result of the multiplication of IIAs and FDI increase).

41 It is this debate on regulatory space that was a huge issue after the NAFTA cases against the USA. The Methanex case related to environmental regulation implemented by the Government of California. Changes made on the scope of application of the substantive provisions in the US Model BIT were as a direct result of its experience as Respondent State. See Methanex Corporation v United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005).

III. TREATY SHOPPING PROBLEMS: THEORY AND PRACTICE

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.

A. 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 multi-layered 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 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’ behaviour and policies become unclear if two or more IIAs are nested.

With regard to international 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.

B. 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 favourable 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 favourable 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. In 2010, Australia introduced plain packaging for all tobacco products (drab dark brown with no trademarks) (Table 2). 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. 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 MNCs and their capacity to opportunistly relocate to new jurisdictions to benefit from more favourable rights and access to arbitration even though in this very specific case the Tribunal eventually ruled out the claims on the ground of an abuse of rights showing the capacity of the system to address the issue of treaty-shopping.

44 This is, however, changing as more recent treaties include express reference to some of the Salini criteria, eg investment must be for a set duration, entail an element of risk and contribute to the economy. See the China–Japan–Korea Investment Treaty.
45 Philip Morris Asia Limited v The Commonwealth of Australia, UNCITRAL, PCA Case No 2012-12.
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.48

IV. STRENGTHENING THE INVESTMENT REGIME BY MITIGATING THE NOODLE BOWL PROBLEMS

The fundamental questions that must be addressed are how to promote international investment and how to avoid an unexpected use of IIAs. Unnecessarily complex webs of investment regimes are harmful. In this respect,

48 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.

Table 2. Philip Morris v Australiaa dispute timeline

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

Source: Authors’ compilation.

aPhilip Morris Asia Limited v The Commonwealth of Australia, UNCITRAL, PCA Case No 2012-12.
bFor a detailed analysis, see Tania Voon and Andrew Mitchell, ‘Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia’ (n 46).
future treaties must 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 favourable provisions or wordings in one IIA can be imported into another IIA. MFN is the tool to achieve this, but we should also carefully design MFN clauses because they may further complicate the noodle bowl situation. Second, investors are mobile. As discussed, investors 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.

A. 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.\(^4^9\) 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.\(^5^0\) In fact, the scope of the MFN obligation, like any other substantial provision of the treaty, is limited by not only the overall coverage of the agreement but also the wording introduced in the clause itself.\(^5^1\)

\(^4^9\) For a general review of the MFN principle in investment agreements, see UNCTAD, 1999d and OECD 2004a.

\(^5^0\) *Tza Yap Sum v Peru* recognizes the need to analyse the specific wording of each provision of a treaty in accordance with established rules of international law; an *a priori* decision is not appropriate, ie 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 196–98.

\(^5^1\) 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 SpA and Italsider SpA v Hashemite Kingdom of Jordan, ICSID Case No ARB/02/13, Decision on Jurisdiction (29 November 2004) paras 116–18). The *Tza Yap Shum v Peru* Decision on Jurisdiction and Competence recognizes the need to analyse the specific wording of each provision of a treaty in accordance with established rules of international law; an *a priori* decision is not appropriate, ie 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
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 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, common market, or any other form of regional economic organization’ (Article 4). Such provisions allow France or India to enter 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 favour negotiations of investment within FTAs in order not to be subject to full MFN applicability under other BITs.

In this light, the ACIA’s REIO exception is, logically, more limited. Article 6 of ACIA applies only to ‘any sub-regional arrangements between and among

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[53] The French BIT Model, as many other BITs models, can be found on the ITAlaw website. See <http://www.italaw.com/investment-treaties> accessed 21 April 2018.
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)\(^54\). 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.

The actual commercial magnitude of REIO exception partly depends on the difficulty in conducting investment in the REIO region. Hence, some REIOs have common investment policy vis-à-vis investment from non-REIO members. EU and MERCOSUR are typical examples of this.\(^55\) However, in Asia, individual REIO members can set entry conditions for investment from outside, because there is no REIO-wide harmonized policy regarding inward investment. For example, for non-ASEAN investors, conducting investment in Singapore is usually easier than that in Myanmar. Then, foreign investors can first invest in Singapore and such would be qualified as Singaporean or ASEAN investor in the ACIA context, provided that substantial operation is conducted at the Singaporean base. This implies that REIO exception is not too problematic in Asia.

(iii) **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.\(^56\) Furthermore, following the arbitral decision in the *Maffezini* case, much


\(^57\) The case was brought by Emilio Agustín Maffezini, an Argentine investor, against Spain on the basis of the Argentina–Spain BIT (signed 3 October 1991, entered into force 28 September 1992). 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 (signed 2 October 1991, entered into force 28 March 1994). Compared with 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
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, 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, others applied more restrictive criteria and seemingly reduced the scope of resorting to the MFN principle regarding dispute settlement provisions. 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.

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’, 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, most 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 negotiating history. 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.

For a discussion on the implications of Mafezzini and evolving jurisprudence on MFN and dispute settlement, see inter alia Gaillard (2005); Teitelbaum (2005); Ku¨rtz (2004); Hsu (2006); Freyer and Herlihy (2005); Ferna ´ndez Masía (2007). In regard to the Mafezzini case and its relationship with BITs signed by China, see Schill (2007) and Cymrot (2006).

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The ‘Noodle Bowl Effect’ of Investment Treaties in Asia

The footnote to art 4.2 of the draft USA–Thailand FTA text, as proposed by the USA, 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 Mafezzini 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 Mafezzini case.’ Available online at <http://www.bilaterals.org/article.php3?id_article=4144#nh1> accessed 21
In the case of IIAs that have not attempted to prevent arbitral tribunals from extending the MFN principle to ISDS matters by emphasizing the intention of parties, there are greater doubts as for possible interpretation and outcome. 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’. 63

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.

(iv) 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 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

April 2018. The draft ASEAN–China FTA featured a similar provision. See Teitelbaum (2005) 229 and Appleton (2005) 20. There are also other treaties that include such an express exclusion, eg China–New Zealand FTA investment chapter, art 39.

signing of this Agreement’. Because fellow ASEAN members might include any past IIAs in the notification list, the ASEAN parties needed to exhaust effort to make all attractive provisions in the other ASEAN Members’ past IIAs reflected in the ACIA text. Likewise, China–New Zealand FTA (came into force in 2008) clearly states that the scope of the REIO exception is limited to past agreements. 64 Hence, for example, any favourable treatment that China gave to Hong Kong under Closer Economic Partnership Arrangement between Mainland China and Hong Kong (came into force in 2003) may not be given to New Zealand, but China’s future FTA investment chapters are subject to the MFN principle. Those provisions well illustrate that MFN should be used in a forward-looking way.

B. Limiting Investor Mobility: The Timing Issue

Investors switching between jurisdictions to optimize their investment returns not an exception. To optimize investments, the availability of favourable 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 unfavourable domestic policy already implemented or announced. In the case study of Philip Morris, the problem was that investment was re-routed 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 5 years qualify for protection by IIAs. Even without limiting the scope of investment, 65 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.

C. Enhancing the Mobility of Countries: Establishment of Open Investment Treaty in Asia–Pacific (OITAP)

The existence of a high-quality regional IIA does not eliminate the IIA noodle bowl problems. First, regarding problems associated with nested agreements, one way to eradicate the problem is to suspend any smaller nested IIAs. However, such an option is not realistic especially for FTA investment chapter, because signed FTAs are the negotiation outcomes covering multiple issues, and the suspension of

64 Free Trade Agreement (FTA) between the Government of New Zealand and the Government of the People's Republic of China (signed 7 April 2008, entered into force 1 October 2008) art 107 states: ‘The Parties reserve the right to adopt or maintain any measure that accords differential treatment to third countries under any free trade agreement or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.’

65 Many treaties do have a temporal limit on its application—eg this treaty will apply to investments made in the states after the treaty enters into force or sometimes from a specified date.
investment chapter alone would make the agreement ‘unbalanced’. Second, the problems associated with intersected agreements, especially the treaty shopping problem, would be more serious after the launch of a high-quality regional IIA because firms from outside the region may try to derive benefit from the regional IIA, which is more powerful than any IIAs that their origin country signed. If a third country firm invests in one country in the regional IIA and reinvests in another country that belongs to the same IIA, such a reinvestment could be considered as intra-regional investment, if conditions are met.

How can this problem be overcome? We think ‘open accession’ is one effective solution. Our basic idea is to let countries be a part of a commercially attractive IIA, so that there is no need for their investors to move locations to take advantage of such an IIA. Because even investors outside the region would be able to take advantage of a regional IIA, it is natural for the members of the IIA to consider ‘why not invite outsiders’. Non-party of the regional IIA may also have an incentive to join the agreement, because membership in such an agreement has a significant signalling effect of its desire to be a part of regional economic integration or value chains.

TPP was a good candidate for a high-quality regional IIA in Asia–Pacific. The TPP would have been a de facto renegotiation of NAFTA and many other agreements such as the ASEAN–Australia–New Zealand FTA. TPP would have virtually superseded many IIAs in the region that overlap with TPP, as it was negotiated in the context of an agreement of great economic significance, including a broad MFN provision. Because attracting foreign investment and securing investment opportunity is so critical to the participation in regional value chains, it is not surprising if countries like China had a strong desire to join TPP. However, actual accession to TPP would have been difficult, because it follows single undertaking and Members have veto over new accession. Moreover, a simple political reality is that TPP will not enter into force as it was expected.

Instead, what we would like to propose is a creation of Open Investment Treaty in Asia–Pacific (OITAP). We borrow the idea of open accession modality suggested by Garnaut and Vines, who proposed the creation of Open Trade Agreement (OTA). There are three guiding principles regarding the accession to OITAP. First, OITAP membership is available to any country that agreed to meet the arrangement’s rules (non-Asia–Pacific can also join). Second, regarding the terms of accession, each member of OITAP agrees to extend to its OITAP partners investment treatment at least as favourable as it had made available to any country in the past agreement, including both investment treaties and investment chapter (hence, no REIO exception). Therefore, unless a certain country carves out a certain sector in all its past IIAs (including both investment treaties and chapters), the carve-out is impossible under OITAP. This rule implies that prolonged negotiation to determine the concessions of new members can be avoided. Third, if an incumbent refuses a new accession, new parties can still

66 Regarding BITs, letting smaller nested BITs expire would be a more moderate method than suspension.
obtain membership if at least two-thirds of the participating parties recommend its accession. In this case, OITAP is not applied between a new member and countries that do not support the new accession (opt-out clause). The point here is that no OITAP member can exercise veto regarding accession.

TPP investment chapter could be a good starting point for negotiations for OITAP. If OITAP text resembles to TPP investment chapter and includes open accession provisions in line with the three guiding principles outlined above, such would be attractive for all TPP parties, as well as non-TPP parties. Should countries other than TPP join the OITAP and ratify, this would no doubt signify an embryonic version of a long-awaited multilateral agreement on investment.

OITAP is an investment treaty, not an investment chapter under FTA. As discussed, on the one hand, as 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 create investment treaty aiming at the mitigation of investment noodle bowl problems. However, because OITAP is an investment treaty, no less favourable treatment than that to OITAP shall be given to OITAP members’ old BIT partners, if they have a MFN clause. One method to solve this problem is to include ‘OITAP exception’ in MFN clauses in their old BITs, using their amendment clause. This likely creates an incentive for the old BIT partners to join OITAP. The special treatment of OITAP in MFN clauses in BITs would be justified by its open accession policy. The fundamental purpose of OITAP is not give preferential treatment to the partners but to expand membership of preferential agreement.

V. Conclusion

This article 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 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 (eg ‘treatification’, proliferation, and regionalization), it is very likely to continue to evolve just as quickly.


71 It is interesting that this proliferation in treaty regimes is occurring alongside a growing global body of soft law more generally. For a fascinating theoretical treatment of the global growth of soft law, its influence, and why this proliferation is
The noodle bowl problem of investment is grave mainly because it entails investor–state disputes. Rules under nested or 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.

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 may 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 at the time of negotiations. 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 systematically on 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 MFN clauses. Our concrete proposal is to create OITAP. If ‘OITAP exception’ can be inserted in MFN clauses in past BITs between an OITAP member and a non-member, such innovation would create the latter’s incentive to join OITAP.

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occurring, see Bryan Druzin, ‘Why does Soft Law have any Power anyway?’ (2017) 7(2) AsianJIL 361. On the growth and stability of treaty regimes by the same author, see also Bryan Druzin, ‘Opening the Machinery of Private Order: Public International Law as a Form of Private Ordering’ (2014) 58 St Louis ULJ 423.