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International Cooperation and Organizational Identities: The Evolution of the ASEAN Investment Regime

*Sungjoon Cho** & *Jürgen Kurtz†*

Abstract: This article first conceptualizes the ASEAN Investment Regime (AIR) as an Interstate Cooperative Regime (ICR), defined as a stable interstate cooperative nexus on a particular regulative subject, comprising the regulation of foreign investment in this case. It then seeks to explain the evolution of AIR in terms of its identity formation. In doing so, this article employs three ideal types of cultural logic - Hobbesian, Lockean and Kantian - across each stage of AIR's evolution, largely overlapping with the three main IR theories of neorealism, neoliberal institutionalism and constructivism, respectively. Using those models, we find a clear evolutionary pathway with the AIR following this sequential trajectory as it has transitioned towards a closer, regional investment community. This article nonetheless concludes that AIR's organizational development has not always been linear and that one can detect sovereigntist regressionism in certain areas.

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I. INTRODUCTION

Since the institutional turn in International Relations (IR) theory, scholars have considered international organizations (IOs) such as the Association of South East Asian Nations (ASEAN) to be important avenues for international cooperation.¹ Yet the state-oriented theories entrenched in the rationalist tradition often give short shrift to the ontology of IOs as independent entities, rather than as instruments of those states who founded them.² This article aims to construct ASEAN's identity *qua* organization as it probes ASEAN's institutional evolution for the past several decades. Although ASEAN encompasses multiple economic and political dimensions, this article focuses on ASEAN's identity as it concerns the *intra*-regional investment regime. To the extent that the investment regime is an important factor driving economic integration among the ASEAN states, scrutinizing the ASEAN's identity formation in that particular area offers a unique way of understanding ASEAN's institutional development.

To fully understand the ASEAN Investment Regime (AIR)'s organizational development, part of our chosen methodology is to anthropomorphize the investment regime so as to investigate its identity formation process using Erik Erikson's identity theory. According to Erikson, an infant's early identifications with its parents are subject to change as it encounters its peers in a later stage (adolescence). Critically, an adolescent undergoes an "identity crisis" before its genuine identity is formed. An identity crisis is a necessary step for an adolescent to establish autonomy as it adapts to various challenges

¹ See, e.g., Nicholas Onuf, *Institutions, Intentions and International Relations*, 28 REV. INT'L STUD. 211 (2002).

² See Sungjoon Cho, *An International Organization's Identity Crisis*, 34 NW. J. INT'L L. & BUS. 359 (2014).

imposed by the environment. Likewise, while AIR aligned its early identification (the “ASEAN Way”) with the original vision of its founders, AIR subsequently formed a new identity (expansive investment liberalization) under external peer pressure from the Bretton Woods institutions. Then, it encountered a further (exogenous) crisis moment comprised of the devastating Asian financial crisis and the rise of China as a potential economic threat. It was only after the AIR experienced these diverse crises that it firmly constituted its collective, integrationist identity as an investment community, rather than as a loose arrangement among individual members.

Interestingly, however, the AIR’s identity formation did not follow a simple linear process. Although it evolved from weak to stronger integration, its initial sovereigntist, inward-looking traits (ASEAN Way) remained stubbornly salient even in later stages. For example, the AIR’s most advanced development, the 2009 ASEAN Comprehensive Investment Agreement (ACIA), envisions certain issue areas that remain largely unaffected by investment liberalization. This “encapsulated” identity,³ which is characterized by an undeniable gap between a supranational aspiration and an intergovernmental reality,⁴ appears to depart from the main thesis of identity-formation theory, and may reflect other theoretical frameworks, not least “path-dependency.”⁵

This article makes three main claims. First, it argues that conventional IR theories, such as neorealism or neoliberal institutionalism, do not offer a convincing macro model by which to identify and explain the evolution of an Interstate Cooperative Regime (ICR). It defines an ICR as a stable interstate cooperative nexus or relationship on a particular regulative subject, such as the treatment of investment within the AIR. Instead of these conventional theories, this article’s approach is one of constructivism which, given its structural and holistic nature, is better equipped to map an ICR’s evolution on questions of identify formation. Second, this article argues that because an ICR is an open, organic system that incessantly interacts with the environment, an ICR is destined to undergo an identity crisis at some point in its organizational development. An identity crisis provides an ICR with a valuable opportunity for organizational maturing and is therefore an essential

³ The notion of “encapsulation” in psychology means that an earlier form of identification remains unchallenged and thus unchanged (“encapsulated”) even in later stages of identify formation. See e.g., Earl Hopper, *Encapsulation as a Defence against the Fear of Annihilation*, 72 INT’L J. PSYCHOANAL. 607–24 (1991).

⁴ See David Martin Jones & Michael L.R. Smith, *Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order*, 32 INT’L SECURITY 148, 184 (2007).

⁵ “Path-dependency” can be defined as a “process in which the structure that prevails after a specific moment in time (often a critical juncture) shapes the subsequent trajectory in ways that make alternative institutional designs substantially less likely to triumph, including those that would be more efficient according to a standard expected utility model.” Orfeo Fioretos, *Historical Institutionalism in International Relations*, 65 INT’L ORG. 367, 376 (2011).

juncture for its survival and maturation. Third, this article argues that certain properties in the initial identity of an ICR may remain largely unchanged even in a later stage of its identity formation. This phenomenon of an encapsulated identity tends to question the conventional identity formation theory and call for an alternative theoretical framework, such as historical institutionalism.⁶

This article proceeds in the following sequence. The Part II conceptualizes an ICR based on constructivism. It demonstrates why rationalism cannot fully capture an organizational structure of an ICR due mainly to its methodological individualism. Constructivism enables a holistic investigation of the AIR and therefore offers an especially useful analytical tool for the purpose of this article. It then introduces Erik Erikson's identity-formation theory to undertake a dynamic investigation on the evolution of AIR. Part III applies constructivism and identity-formation theory to AIR and explains its organizational development process. It illustrates how the AIR evolved from a loose interstate arrangement to an investment community. Part IV argues that AIR's organizational development was not linear and that one can detect sovereigntist regressionism in certain areas.⁷

II. CONCEPTUALIZING AN INTERSTATE COOPERATIVE REGIME

To truly understand the evolution of the ASEAN investment regime, we must first choose a conceptual or theoretical framework. Such a framework may represent a micro foundation focusing on individual members and their interactions or a macro foundation concerning a systematic, organizational structure. Conventional IR theories⁸ mostly adopt the micro framework. Agency-oriented theories, such as neorealism, rational choice theory and neoliberal institutionalism, adopt methodological individualism (state-oriented). Based on a Hobbesian view of international anarchy, neorealists adopt something of a dismissive view of ICR, in particular trivializing its

⁶ One might make a reasonable observation that the ASEAN Way has exerted a much stronger influence on security cooperation in ASEAN than on initiatives directed at economic cooperation. See Beverly Loke, The 'ASEAN Way': Towards Regional Order and Security Cooperation?, 30 MELB. J. POL. 8 (2006); Jürgen Haacke, ASEAN's Diplomatic and Security Culture: A Constructivist Assessment, 3 INT'L REL. ASIA-PAC. 57, 59 (2003).

⁷ A word of caution is in order. This article does not address the ASEAN as a whole, but only its investment regime (AIR). AIR is entitled as a subject of serious investigation as a separate system—both functionally and culturally—distinct from the ASEAN in its entirety. Likewise, there could be other operational areas of ASEAN, such as security, that might or might not warrant the same approach as the one this article adopts. Therefore, the ASEAN's identity in terms of security may exhibit different properties from the one discussed here, although the two identities could be interrelated.

⁸ Regarding various strands of IR theories, see generally SUNGJOON CHO, THE SOCIAL FOUNDATIONS OF WORLD TRADE: NORMS, COMMUNITY AND CONSTITUTION (2015).

constitutive infrastructure, such as international law and institutions.⁹ To them, any interstate cooperation is tantamount to a mere “epiphenomenon of underlying power” or a “coincidence of state interests or coercion by powerful states.”¹⁰

Informed by an economic methodology, rational choice theory views any institution as a program or script that *ex ante* maps out actors’ rational strategies as well as their results.¹¹ These institutions bind and shape actors’ behaviors only because choices over them can be measured and predicted through a rational (cost-benefit) analysis.¹² In this regard, an ICR may be seen as a welfare-maximizing contract in which states’ interests and preferences determine various institutional choices.¹³ The theoretical assumption behind rational choice theory leads naturally to a proposition that a state will respect an ICR *if and only if*, its payoff from compliance (cooperation) is greater than the cost incurred through such compliance.¹⁴ In other words, cooperation is a result of a complicated calculation on various utilities (such as positive reputation and reciprocal cooperation by others) and disutilities (such as negative reputation and penalties).¹⁵

Neoliberal institutionalism shares a set of premises with neorealism and rational choice theory. As neorealists do, neoliberal institutionalists’ main analytical focus is individual actors (states).¹⁶ Meanwhile, similar to rational choice theorists, neoliberal institutionalists argue that individual actors (states) basically pursue competing interests, subject to various (material and non-material) constraints.¹⁷ Based on an integrated view of a domestic and international sphere,¹⁸ neoliberal institutionalists’ main concern is how to coordinate diverging domestic preferences with a minimum cost. In this sense,

⁹ See Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64, 73–76 (2006); see also KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 105 (1979); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES 1* (Stephen D. Krasner ed., 1983); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 36–37, 118, 225 (2005).

¹⁰ Steinberg & Zasloff, *supra* note 9, at 74–75.

¹¹ See Kenneth A. Shepsle, *Rational Choice Institutionalism*, in *OXFORD HANDBOOK OF POLITICAL INSTITUTIONS* (Sarah A. Binder, R.A.W. Rhodes & Bert A. Rockman, eds., 2008).

¹² See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985) (using the “transaction cost” approach in analyzing institutions); DOUGLAS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (James Alt & Douglas North eds., 1990).

¹³ See generally Sungjoon Cho, *Beyond Rationality: A Sociological Construction of the World Trade Organization*, 52 VA. J. INT’L L. 321 (2012).

¹⁴ See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 55–60 (2008).

¹⁵ See *id.* at 36–40, 45, 47–48.

¹⁶ See Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT’L L. 673, 681–83 (2001).

¹⁷ See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 516 (1997).

¹⁸ Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC’Y INT’L L. 240, 241

an ICR can be an important avenue to facilitate such coordination by creating norms, supplying useful information and monitoring compliance.¹⁹

The aforementioned conventional IR theories are collectively coined “rationalism” in that they presuppose isotropic, rational actors (states) whose actions are guided by a common thesis of substantive rationality represented by efficiency, power and interest.²⁰ While these conventional IR theories offer useful heuristics in understanding the *origin* of an ICR (explaining why states cooperate at first instance), they cannot fully capture the complex “changes” that an ICR makes over time. The paradigms provided by conventional IR theories are necessarily functional and therefore inherently static. Their characteristic methodological individualism adopts states (agency) as a primary analytical unit.²¹ Under this view, an ICR is merely an instrument that serves various utilitarian functions that rational states would desire, such as providing information, reducing uncertainties, and monitoring cheating.²² Under functionalism, the only occasion in which states are compelled to re-tool their ICRs is when they face extreme external shocks, such as catastrophes.²³ This functionalism hardly accords an ICR its ontological autonomy²⁴ that enables us to observe its postcreation evolution process in which an ICR adapts itself, on its own terms, to environmental challenges.²⁵ In sum, conventional IR theories may offer various functional snapshots of an ICR, but not its panoramic identity *qua* organization.

Moreover, as long as ICRs are viewed as tools, their unique institutional contexts tend to be underappreciated. As Gayl Ness and Steven Brechin aptly observe, “[ICRs] differ over time, or . . . they perform differently from one another, or . . . they achieve their ends with varying effectiveness or efficiency.”²⁶ Thus, conventional IR theories cannot fully capture the various

(2000).

¹⁹ ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984) (viewing that international institutions facilitate decentralized cooperation among state actors).

²⁰ Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT’L STUD. Q. 379, 386–87 (1988).

²¹ Alexander Wendt, *The State as Person in International Theory*, 30 REV. INT’L STUD. 289, 299 (2004) (“We-intentions are *nothing but* interlocking I-intentions toward a group.”).

²² See Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT’L ORG. 699, 702 (1999); see also THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 3–4 (1991) (Walter W. Powell & Paul J. DiMaggio eds., 1991); Anna Grandori, *Notes on the Use of Power and Efficiency Constructs in the Economics and Sociology of Organizations*, in INTERDISCIPLINARY PERSPECTIVES ON ORGANIZATION STUDIES 61 (Siegwart M. Lindenberg & Hein Schreuder eds., 1993).

²³ See Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 662 (2006).

²⁴ Barnett & Finnemore, *supra* note 22, at 704.

²⁵ Helfer, *supra* note 23, at 662.

²⁶ Gayl D. Ness & Steven R. Brechin, *Bridging the Gap: International Organizations as Organizations*, 42 INT’L ORG. 245, 247 (1988).

contexts of each ICR endemic to its unique subject-matter, history and culture.

Therefore, we need a new theoretical framework through which we can conceptually embrace the ontological autonomy of an ICR so that we can investigate its dynamic institutional development. An ICR's institutional decision, or collective consciousness, cannot be the result of an aggregation of the interests of its individual member states. Although its member states are building blocks of an ICR, an ICR "emerges" on its own, rather than is simply created by those states.²⁷ In this regard, a sociology-led approach, especially constructivism, distinguishes itself from those conventional IR theories as it highlights a social *structure*, rather than agency, that constructs the culture and identities of those actors.²⁸ Constructivists emphasize ideational factors, such as culture and norms, that guide state actions from within.²⁹ States build a collective identity as they share common goals and norms. Such a collective identity often bonds those participating states, with or without material incentives, and enables cooperation among them. In this regard, the International Court of Justice (ICJ) ruled that:

The resolutely positivist . . . approach of international law . . . has been replaced by an objective conception of international law, a law more readily seeking to reflect a *collective juridical conscience* and respond to the social necessities of States organized as a community.³⁰

This "collective juridical conscience" is a normative manifestation of social identity that cannot be reduced to a mere aggregation of individual, subjective intentionalities.³¹ Once we conceptualize an ICR as an autonomous institution or structure that is ontologically independent from its creators (states), we can observe its development (evolution) in a dynamic fashion.

Here, a note of caution is in order. Although this collective bond generates an "ontological security"³² among states and provides a source of cooperation within an ICR, these intersubjective qualities of social interaction should not be equated with cooperation itself. As witnessed in the Cold War,

²⁷ Wendt, *supra* note 21, at 301, 304.

²⁸ Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325, 333 (1996).

²⁹ See generally, ALEXANDER WENDT, *THE SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999).

³⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 268, 270–71, ¶13 (July 8) (Declaration of President Bedjaoui) (emphasis added).

³¹ See Judith Goldstein & Robert O. Keohane, *Ideas and Foreign Policy: An Analytical Framework*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 3 (Judith Goldstein & Robert Keohane eds., 1993) (observing that ideas, as well as material interests, shape behavior and noting the impact of beliefs shared by large numbers of people, such as world views).

³² See generally Jennifer Mitzen, *Ontological Security in World Politics: State Identity and the Security Dilemma*, 12 EUR. J. INT'L REL. 341 (2006).

social dynamics can be conflictual.³³ Neither should consequences of social interaction be necessarily celebratory: even slavery and Apartheid were once social norms.³⁴

Markedly, the recent development of public international law has countenanced an ICR's ontological autonomy in the form of "legal personality." As a departure from its traditional obsession with state sovereignty, postwar international law is characterized by the prominence of a thick set of IOs. Although the legal status of an IO was deeply contentious in the prewar period,³⁵ a number of postwar IOs (such as the UN and the WTO) explicitly claimed their autonomous legal personalities separate from their member states.³⁶ Now, an IO (ICR) is a "subject of international law and capable of possessing international rights and duties."³⁷ Likewise, such legal personality is deemed to be inextricably linked to a unique institutional specialty of each IO (ICR).³⁸ This specialty-laden legal personality promotes the "*mentalités collectives*" within an ICR by professionalizing its daily operation, relatively detached from direct interventions from the headquarters.³⁹ Juridical personhood tends to also bestow upon an IO (ICR) an institutional compass, in the form of object and purpose, by which it can maintain its permanency. In other words, an IO, and the ICR it espouses, can secure its survival through persistent normative engagement with, and even transformation of, its object and purpose. For example, an IO (ICR) brings meanings to its operation by interpreting various situations, such as disputes, based on the object and purpose.⁴⁰

While constructivism provides a theoretical underpinning of an ICR's organizational autonomy, we need another theoretical framework in which we can explain: first, when and how certain institutional changes transpire,

³³ Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 386 (1994).

³⁴ MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 128 (1996); AUDIE KLOTZ, NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID 19–20 (1995).

³⁵ See Giuseppe Marchegiano, *The Juristic Character of the International Commission of Cape Spartel Lighthouse*, 25 AM. J. INT'L L. 339, 339 (1931).

³⁶ U.N. Charter, art. 104; Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 1867 U.N.T.S. 14, (1994) [hereinafter WTO Agreement].

³⁷ Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11); see also Int'l Law Comm'n, *Responsibility of International Organizations*, http://legal.un.org/ilc/guide/9_11.shtml (last updated Sept. 19, 2016); Int'l Law Comm'n, *Draft Articles on the Responsibility of International Organizations* (2011), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf.

³⁸ The Legality of the Threat or Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1 I.C.J. Rep. 226 (1996).

³⁹ John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 157 (1993).

⁴⁰ See Cho, *supra* note 2, at 381, 390.

and second, what kinds of changes take place in the process of an ICR's institutional development. Here, one critical aspect of an ICR's institutional development is that as an autonomous organization, an ICR incessantly interacts with its surrounding environment for its growth and survival. The environment is a source for both resources and a threat to an organic entity like an ICR. Harnessing and adapting to its environment is essential to an ICR's survival.⁴¹

Here, the identity formation theory in developmental psychology can be a plausible candidate in explaining an ICR's evolution as a dynamic process of its adaption to its environment. Admittedly, this particular interdisciplinary attempt—an IR theory (constructivism) borrowed from psychology—is not without controversies.⁴² Put simply, an IO cocooning an ICR is not a complex human being. As Alexander Wendt observes, a corporate identity might not be of the same quality as that of a human being as a biological entity.⁴³ Nonetheless, this particular form of anthropomorphism is still conceivable in particular dimensions, especially considering the *open* operational structure shared by an IO and a human being: as an organic system, both an IO (juridical person) and a natural person must interact with their respective environments.⁴⁴ Maintaining a meaningful whole or integrity (that is, an identity) is a serious constitutive process both to an IO and an individual. Indeed, business administration scholars have already embraced this notion of corporate identity in illuminating the life cycle of a corporation.⁴⁵

Against this background, Erik Erikson's identity formation theory appears to offer a useful analogy for understanding an ICR. For Erikson, a human being's (subjective) identity is negotiated with that person's understanding of its (objective) social environment.⁴⁶ Erikson's identity formation model presupposes various stages that an individual developmentally experiences in his or her lifetime. Each stage is characterized by "its own set of

⁴¹ See RICHARD W. SCOTT, *ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS* 57 (3d ed. 1992); Alvin W. Gouldner, *Organizational Analysis*, in ROBERT MERTON ET AL., *SOCIOLOGY TODAY* 404–05 (1959).

⁴² See Cho, *supra* note 2, at 376–78.

⁴³ WENDT, *supra* note 29, at 221.

⁴⁴ WALTER BUCKLEY, *SOCIOLOGY AND MODERN SYSTEMS THEORY* 50 (1967).

⁴⁵ See Dennis Bromley, *Relationships between Personal and Corporate Reputation*, 35 EUR. J. MARKETING 316, 318 (2001) (observing the tendency to "personify" an organization); Stuart Albert & David A. Whetten, *Organizational Identity*, in 7 RESEARCH IN ORGANIZATIONAL BEHAVIOR 265 (L. L. Cummings & B. M. Staw eds., 1985); Peter Gorb, *The Psychology of Corporate Identity*, 10 EUR. MGMT. J. 310, 312 (1992); Henry Mintzberg, *Power and Organizational Life Cycles*, 9 ACAD. MGMT. REV. 207, 210 (1984); Andrew D. Brown & Ken Starkey, *Organizational Identity and Learning: A Psychodynamic Perspective*, 25 ACAD. MGMT. REV. 102, 104 (2000); Dennis A. Gioia et al., *Organizational Identity, Image, and Adaptive Instability*, 25 ACAD. MGMT. REV. 63, 65 (2000).

⁴⁶ See generally ERIK H. ERIKSON, *IDENTITY, YOUTH AND CRISIS* (1968); see also Willem L. Wardekker, *Identity, Plurality, and Education*, in THE YEARBOOK OF PHILOSOPHY OF EDUCATION (1995).

circumstances of particular sensitivity, identity crisis, and potential.”⁴⁷ Erikson observed that:

Identity formation employs a process of simultaneous reflection and observation, a process taking place on all levels of mental functioning, by which the individual judges himself in the light of what he perceived to be the way in which others judge him in comparison to themselves and to a typology significant to them; while he judges their way of judging him in the light of how he perceived himself in comparison to them and to types that have become relevant to him.⁴⁸

An adolescent defines his or her own existence as he or she transitions from childhood to adulthood.⁴⁹ At the end of adolescence, an individual person replaces his or her earlier identifications (with parents or other admirable adults) with a new identity resulting from socialization that reflects that person’s own unique value system.⁵⁰ Yet, this identity formation process is not necessarily uneventful. Adolescents often experience “a war within themselves”⁵¹ as they suffer from multiple identifications and the role confusion therefrom.⁵² It is only after they survive this rite of passage that they finally discover their place in society.⁵³

An ICR, just like an individual person, is given its original institutional DNA from its creators (states). An organizational history of an ICR starts with the founding member states. The initial goals those member states intended to achieve through that ICR leaves a deep, if not indelible, path-dependency within the ICR. Particular texts or arrangements engraved in an initial form of ICR tend to determine or explain what may be permitted or prohibited in the ICR’s institutional manifestations. For example, as stipulated in the Vienna Convention on the Law of Treaties (VCLT), “preparatory work of the treaty and the circumstances of its conclusion” may guide that treaty regime (ICR)’s present or future activities.⁵⁴

Yet, as the ICR responds to various challenges given by its environment, these institutional vestiges may lessen or even become obsolete. The ICR is often forced to “bring organizational structure, culture, and purpose in line with perceived environmental requirements.”⁵⁵ Erikson’s identity theory

⁴⁷ Cho, *supra* note 2, at 374; ERIKSON, *supra* note 46, at 91–141 (describing the different stages of the human life cycle).

⁴⁸ ERIKSON, *supra* note 46, at 22–23.

⁴⁹ ERIK H. ERIKSON, CHILDHOOD AND SOCIETY, 156–65 (W.W. Norton 1963) (1950).

⁵⁰ *Id.* at 155.

⁵¹ ERIKSON, *supra* note 46, at 17.

⁵² ERIKSON, *supra* note 49, at 163–64.

⁵³ *Id.* at 161.

⁵⁴ Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331.

⁵⁵ Matthias Finger & Bérangère Ruchat, *The Transformation of International Public Organizations: The Case of UNCTAD 3* (Institut de Hautes Etudes en Administration Publique, Working Paper No. 14/2000, 2000); *see also* HOWARD E. ALDRICH, ORGANIZATIONS AND ENVIRONMENTS 252–55 (1979).

aptly captures this struggle with the environment and a subsequent adaption as an “identity crisis.” An ICR can be said to form its unique identity as it assimilates complex information from its broader environment. Importantly, the legal personality of an IO enshrining an ICR tends to facilitate such adaptation process. Social interactions within an IO are mediated by discourse and communication among member states. As a juridical person, discourse and communication within an IO are based on normative goals and legal principles.⁵⁶ If an ICR is forced to modify its initial *raison d’être* after an identity crisis, such modification will be accompanied invariably by some kind of legal change, such as amendment or teleological interpretation. The World Bank’s widely documented “mission creep” is a case in point.⁵⁷ The World Bank’s original mission was a narrow goal of facilitating economic development as stipulated in Article I of its Charter (Articles of Agreement). Subsequently, however, social pressures from its various constituencies forced the World Bank to adopt an evolutionary interpretation of Article I that turned that narrow mission into a broad vision, requiring it to consider such diverse impacts as health, education, environment, and women’s rights.⁵⁸

III. THE EVOLUTION OF THE ASEAN INVESTMENT REGIME

The aforementioned IR theories provide useful analytical lenses through which one can understand the evolution of the ASEAN investment regime (AIR) in its true dynamic fashion. Each theoretical framework, be it neorealism, neoliberal institutionalism, or constructivism, can shed its distinct light on the AIR and its practices. Yet, relying entirely on insights offered by a single theory risks generating only a static snapshot of the regime, neglecting its panoramic nature. In this regard, this article attempts to match theoretical insights against temporal contexts by choosing and employing a given theory (at particular points in time) that is best equipped to capture the corresponding identity and properties of the regime. In that way, we seek to dynamically use identity formation theory to map and explain the sequential development

⁵⁶ See generally Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992).

⁵⁷ See, e.g., Jessica Einhorn, *The World Bank’s Mission Creep*, 80 FOREIGN AFF. 22 (2001) (arguing that member countries of the World Bank should control the currently unwieldy status of mission creep by devolving some of its derivative missions to other institutions and focus more on original, basic mission of the Bank); Sarah Babb & Ariel Buira, *Mission Creep, Mission Push and Discretion in Sociological Perspective: The Case of IMF Conditionality* (Mar. 9, 2004), <http://web.archive.org/web/20070719172319/http://www.g24.org/012gva04.pdf> (discussing the IMF’s expanded mandate over the years).

⁵⁸ See Ibrahim F.I. Shihata, *The Dynamic Evolution of International Organizations: The Case of the World Bank*, 2 J. HIS. INT’L L. 217, 249 (2000); Georg Ress, *The Interpretation of the Charter*, in THE CHARTER OF THE UNITED NATIONS – A COMMENTARY 28 (Bruno Simma et al. eds., 1994) (discussing “evolutionary dynamic interpretation”).

of the regime.

In describing a macro structure (culture) in each stage of AIR's organizational development, we adopt metaphoric representations, such as Hobbesian, Lockean and Kantian, developed by Alexander Wendt.⁵⁹ This metaphor signifies a dominant role, such as adversary, competitor, and fellow, that each developmental stage may assign in the Self-Others configuration. These are not necessarily empirical manifestations at each stage, but highly abstract ideal types of structural logic that hold unique explanatory power in social, rather than material, terms.⁶⁰ In general, these three cultures parallel neorealism (Hobbesian), neoliberal institutionalism (Lockean), and constructivism (Kantian), respectively. Although these three cultures tend to demonstrate a sequential development—from Hobbesian to Lockean to Kantian—a later stage may still retain certain theoretical properties from an earlier stage, depending on degrees of norm internalization.⁶¹ For example, as discussed below, AIR's last stage in its organizational development (Kantian culture) still holds neorealist traits, such as internal sovereignty (suspicion of Others or an inward-looking mentality). Likewise, constructivism can even explain the Hobbesian culture as shared conflictual, not cooperative, ideas.⁶²

A. The Sovereigntist Foundation (1950's – 1970's)

Turning to ASEAN, any inquiry into the creation of the collective rules governing foreign investment obviously requires assessment of the bilateral investment treaties (BITs) entered into by individual member states within ASEAN. Much of that BIT network temporally predates the construction of the ASEAN investment treaties, and thus operates as the legal and conceptual scaffolding for the construction of those dedicated collective rules. The historiography of those BITs is marked by features common to the investment treaty universe such as the original desire by capital-exporting states to use BITs to counter downward shifts in protection of foreign property under customary international law.⁶³ But from the specific perspective of the Asian states (as capital-importing countries in this unsettled period), their general approach to foreign investors (and by extension, international investment law) was characterized by a deep-seated desire to acquire and defend state sovereignty.⁶⁴ Here the insights of Erikson's theory can already be produc-

⁵⁹ See WENDT, *supra* note 29, at 247.

⁶⁰ In this sense, the social approach this article takes is distinguishable from Kenneth Waltz's traditional realist (materialist) one that emphasizes distribution of power or capabilities. See *id.* at 249.

⁶¹ See *id.* at 250.

⁶² See *id.* at 255.

⁶³ ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES – STANDARDS OF TREATMENT 18–44 (2009).

⁶⁴ Simon Chesterman, *Asia's Ambivalence About International Law & Institutions: Past, Present and*

tively employed. In the early development period, infants find first identification with their parents.⁶⁵

Likewise, the original intentions and disposition of its framers (ASEAN members) heavily influenced ASEAN's early institutional format. The collective memory of colonialism and postcolonial political and economic chaos borne by ASEAN members imbued its members with an obsession with survival and worst-case scenarios. As long as each member views another member as a potential adversary, negative reciprocity tends to prevail and complicates cooperation. This adversarial dimension is aptly illustrated by the violent conflict of "Konfrontasi" that stemmed from Indonesia's opposition to the amalgamation of the Federation of Malaya, Singapore and the crown colony/British protectorates of North Borneo and Sarawak.⁶⁶ Spanning 1963 to 1966, Konfrontasi was triggered by Indonesia's increasingly aggressive postcolonial foreign policy in the period, leading to overt and covert military operations in the region with hundreds of casualties.⁶⁷ In the economic sphere, too, we find similar levels of suspicion (albeit directed largely outwards at former colonial powers) and attachment to sovereignty. Not surprisingly then, the early stages of investment rules only occasioned weak levels of cooperation among the ASEAN states.

To begin with, the immediate decades following the Second World War were marked by a wave of forced takings of foreign assets throughout the developing world.⁶⁸ Expropriation was no longer an isolated and exceptional event; its frequent invocation reflected a fundamental realignment of interstate interests. An array of peoples and groups demanded political independence from the strictures of colonial power relations, including those within Asia. The demand for political independence was not surprisingly accompanied by a desire for economic sovereignty. Yet, the productive capacity of many of these states remained dependent on infrastructure and investment from former colonial powers. Foreign investment came in turn to be seen as a continuing proxy for colonialism with expropriation being used as a visible mechanism to complete the decolonization process. Formal laws passed to effect nationalization were often explicitly targeted at enterprises of the former colonial power. Thus, the 1958 Indonesian nationalization law was directed solely at Dutch enterprises.⁶⁹ The political sensitivity of the priority

Futures, 27 EUR. J. INT'L L. 945, 947–51 (2016).

⁶⁵ See ERIKSON, *supra* note 46, at 115.

⁶⁶ See generally J.A.C. MACKIE, KONFRONTASI: THE INDONESIA – MALAYSIA DISPUTE 1963–66 (1974).

⁶⁷ *Id.*

⁶⁸ See THOMAS L. BREWER & STEPHEN YOUNG, THE MULTILATERAL INVESTMENT SYSTEM AND MULTINATIONAL ENTERPRISES 52–53 (1998).

⁶⁹ See Martin Domke, *Indonesian Nationalization Measures Before Foreign Courts*, 54 AM. J. INT'L L. 305, 305–06 (1960) (extracting the meaning of the Indonesian Act No. 86 of 1958 concerning the nationalization of Dutch-owned enterprises within the territory of the Republic of Indonesia).

accorded to national ownership of state assets often transcended the immediate project of expelling nationals of the former colonial power. Wells and Ahmed capture this heightened sensitivity in their case analysis of Indonesia's much later nationalization (in the late 1970s) of a telecommunications satellite facility constructed by ITT. Writing of the political sensitivity of the pro-investor clauses in the initial infrastructure contract, the authors perceptively note:

[O]ne may dismiss a critique of these non-economic issues as "emotional." But in the real world, these very issues can cause discontent and conflict, particularly in countries that believe they have been subject to long periods of colonial suppression and exploitation – a feeling that was alive in Indonesia at the time. Although it found little voice in the tightly controlled press, that feeling would erupt in riots targeting Japanese investments in 1974.⁷⁰

The push to expropriate was further driven by the spread of alternative political models during this period. States that had adopted Marxist principles were hostile to *all* forms of private property, whether foreign or domestic. But even for other states, hostility to foreign investment is a natural consequence of strategies employed to achieve developmental outcomes. For instance, the tendency of most ASEAN states through the 1950s to 1970s was to engage in import substitution as a means of transitioning to a particular level of industrialization.⁷¹ The import substitution model posited development of indigenous industrial capacity as the primary mechanism for countries to achieve comparative advantage in manufactured trade.⁷² Such an indigenous industry was to be nurtured through restrictions on competitive imports⁷³ but constraints on entry of foreign investors (who would also act as potential competitors to domestic industry) were a further necessary complement to this program.

The common outcome of these diverse tensions is a general opposition

⁷⁰ LOUIS T. WELLS & RAFIQ AHMED, MAKING FOREIGN INVESTMENT SAFE: PROPERTY RIGHTS AND NATIONAL SOVEREIGNTY 38 (2007); *see* AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 120–21 (2003) (on the parallel between colonialism and the modern phenomenon of "market-dominant minorities").

⁷¹ For an overview of the influence of import substitution-based theory on development strategies throughout the 1950s and 1960s, *see* MICHAEL TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 486–88 (3rd ed., 2005).

⁷² For a historical overview of the origins and influence of the infant industry argument from Alexander Hamilton, Friedrich List to John Stuart Mill, *see* DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE 116–37 (1996).

⁷³ The dominance of this view of development is even reflected in post-war efforts to multilateralize trade liberalization. The GATT 1947 countenances the use of trade barriers to nurse indigenous infant industry. *See* General Agreement on Tariffs and Trade art. XVIII(2), Oct. 30, 1947, T.I.A.S. No. 1,700, 55 U.N.T.S. 194.

in developing states—albeit at different degrees—to the free entry and operation of foreign investment in this period. This generated significant political conflict between capital importing and exporting states on whether and how traditional customary international rules should apply to newer instances of forced taking of foreign property and particularly nationalization of industry.⁷⁴ Despite these significant advances in the multilateral sphere, these same states began to slowly enter into bilateral investment treaties (BITs) with capital exporting states to govern regulation of foreign investment. The first BIT was concluded between West Germany and Pakistan in 1959,⁷⁵ and soon thereafter, other European nations followed suit by building their own BIT programs.⁷⁶ Yet, in comparison to the frenetic treaty making of later periods, BIT growth throughout the 1960s to 1970s proceeded at a “largely desultory pace.”⁷⁷ There were only 72 BITs signed between 1959 and 1969, half of which were concluded by Germany.⁷⁸ The pace of negotiations accelerated slightly throughout the 1970s with a further 166 BITs concluded by the end of 1979.⁷⁹

The problem then in this early period is one of strident political and ideological conflict between developing and developed states. With this in mind, BITs play an important role over and above the immediate functional goal (for host states) of attracting foreign capital. They also represent a mechanism by which treaty partners could anticipate and manage the deep schisms concerning political ideology and variances in economic models. Specifically, BITs have a function of depoliticizing and preventing escalation of interstate conflict by carving out a zone of protection for foreign economic actors.⁸⁰ Newly independent states (including those in Asia) could use entry into BITs to signal that, regardless of the level of experimentation in development strategy, their overall political program was not driven by Marxism or its variants. In return, the major powers would refrain from various strategies of covert intervention and tolerate—at the margins—economic models that deviated from preferred liberal precepts. The zone of protection in the

⁷⁴ See, e.g., S.N. Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?* 55 AM. J. INT’L L. 863, 866–86 (1961); C.F. AMERASINGHE, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 128–31 (1967).

⁷⁵ NEWCOMBE & PARADELL, *supra* note 63, at 42.

⁷⁶ Between 1960 and 1966, Belgium, Denmark, France, Italy, Luxembourg, the Netherlands, Norway, Sweden and Switzerland all concluded their first BITs. U.N. Conference on Trade and Development, *International Investment Rule-Making: Stocktaking, Challenges and The Way Forward*, 11, UNCTAD/ITE/IIT/2007/3 (Feb. 9, 2009) [hereinafter UNCTAD, *Series on International Investment*].

⁷⁷ Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT’L L. 621, 627 (1998).

⁷⁸ U.N. CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 75, at 1–5.

⁷⁹ UNCTAD, *Series on International Investment*, *supra* note 70, at 13.

⁸⁰ For a similar account of the early BIT movement but one that focuses on “tribunalization” to manage interstate political and ideological conflict, see Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.J. INT’L L. & POL. 959 (2009).

typical BIT model of this period assumes—not without cause—an embedded hostility to foreign investors in the domestic political and judicial processes of host states.

In sum, the unique collective historical consciousness that derived from the colonial past and internal struggle within some states (*Konfrontasi*) embedded a strong ideology of non-interference and self-determination among ASEAN members (the “ASEAN Way”).⁸¹ This centrifugal political ideology compounded the difficulties of seeking intra-ASEAN investment liberalization as each ASEAN member sought to retain firm control of investment flows in and out of its own territory. Protectionist policies (such as through import substitution) are a natural reflection of this general goal as they deter foreign investment in areas where there is potential competition and conflict with domestic rivals.

B. The Lockean Expansion (1980s – 1990s)

According to Erikson’s identity-formation theory, an adolescent defines his or her own existence (identity) as he or she incessantly explores his or her right place in the society.⁸² The adolescent experiments with various roles and replaces earlier identifications with parents with a new identity as he or she socializes and competes with peers.⁸³ The AIR’s embrace of neoliberal prescriptions in the 1980–90s can be understood as its members’ socialization with peers (such as the Asian “tigers”) as well as with global institutional partners (such as the IMF and the World Bank). The Zeitgeist of the Washington Consensus pushed the AIR from old inward-looking development strategies to trying to find identification with the ideological preferences of the Bretton Woods institutions. AIR’s functionalist appeal, such as investment liberalization of both *intra*- and *extra*-ASEAN region, reflected a Lockean culture as its members demonstrated a limited trust among themselves based on self-interest. Nonetheless, cooperation remained fragile given stubborn vestiges of mercantilist competition. Paradoxically, intra-ASEAN investment liberalization was preceded by extra-ASEAN investment liberalization conducted by a web of BITs signed between individual ASEAN members and developed countries.

By the 1980s, a broad array of political and economic factors had begun

⁸¹ Lee Jones, *ASEAN and the Norm of Non-Interference in Southeast Asia: A Quest for Social Order* (Nuffield College Politics Group Working Paper, Mar. 2009) (regarding the history of the ASEAN Way); see also Gillian Goh, *The ‘ASEAN’ Way: Non-Intervention and ASEAN’s Role in Conflict Management*, 3 STAN. J. EAST ASIAN AFF. 113 (2003) (shedding a positive light on the ASEAN Way); Vinod K. Aggarwal & Jonathan T. Chow, *The Perils of Consensus: How ASEAN’s Meta-Regime Undermines Economic and Environmental Cooperation*, 17 REV. INT’L POL. ECON. 262 (2010) (shedding a negative light on the ASEAN Way).

⁸² ERIKSON, *supra* note 49, at 261–63.

⁸³ *Id.* at 155.

to coalesce that forced and shaped change in the investment policy pursued by ASEAN members. Firstly, expropriation declined sharply as now independent states had largely completed the postcolonial project of acquiring control of natural resources and infrastructure.⁸⁴ Second, many of those states had begun to move away from political and developmental models predicated on opposition to foreign and private capital. The continuing feasibility of the import substitution approach to economic development had always depended on its ability to generate successful and competitive industrial champions. Yet by the late 1980s, it became clear that this model was producing disappointing results for those countries (especially in Sub-Saharan Africa and Latin America) that had chosen this development path.⁸⁵ On the other hand, policies linked to export growth and market openness had led to demonstrable economic growth in the newly industrializing “tiger” states of East Asia.⁸⁶ Meanwhile, the collapse of the Soviet Union weakened the case for Marxism as a realistic alternative to economic and political liberalism. And finally, the sovereign debt crisis of the 1980s reduced developing state access to private bank loans. Unable to borrow to finance policies of economic development, developing states increasingly sought to attract foreign direct investment (FDI) for their development needs.

The net effect of these trends was the emergence of, as Vandevelde aptly describes it, “a consensus in the developing world about the desirability of attracting foreign investment through free market policies”.⁸⁷ This is illustrated firstly and sharply by the direction of changes in domestic laws. States take unilateral steps to liberalize domestic restrictions on the entry and operation of foreign investment throughout the 1990s. Between 1991 and 2006, out of 2,533 national legal and regulatory changes relevant to foreign investment, 91% were in the direction of making the host country more favorable for FDI.⁸⁸ This trend encompassed widespread expansion in practices of positive discrimination as both developed and developing states offer locational

⁸⁴ Michael S. Minor, *The Demise of Expropriation as an Instrument of LDC Policy 1980 - 1992*, 25 J. INT’L BUS. STUD. 177 (1994) (discussing the reduction of expropriations of foreign assets amongst developing countries).

⁸⁵ For an overview of the policy failures associated with import substitution, see TREBILCOCK & HOWSE, *supra* note 71, at 486–87.

⁸⁶ These countries, though, did not by any means simply adopt policies of unconstrained market liberalization. Some of them offered a range of targeted industrial policies including export incentives to specific firms. South Korea for instance prominently used a range of subsidies and incentives to encourage private investment in strategic industries. See generally ALICE AMSDEN, *ASIA’S NEXT GIANT: SOUTH KOREA AND LATER INDUSTRIALIZATION* (1989).

⁸⁷ Kenneth Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT’L L. 373, 390 (1998).

⁸⁸ Lisa Sachs & Karl Sauvant, *BITs, DTTs and FDI Flows: An Overview*, in *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS* xlix (K. Sauvant & L. Sachs eds., 2009).

incentives to attract foreign capital into their jurisdictions.⁸⁹ Even for those developing states that remained skeptical of the merits of the market model, the ideological structural adjustment policies imposed on them by the Bretton Woods institutions left many of them with little alternative but to liberalize their domestic economies.⁹⁰

The constellation of these various factors drove explosive growth in investment treaty-making throughout the 1990s. State parties had concluded a relatively modest 385 BITs in the 30 years from 1959 to 1989.⁹¹ In comparison, 1857 BITs were concluded in the next ten years.⁹² With this dramatic expansion of the BIT network, José Alvarez has argued that “[t]he 1990s, not the 1980s and certainly not the 1970s, were the era when the modern investment regime was born.”⁹³ Not surprisingly then, we began to see a range of individual ASEAN states also beginning to accelerate their entry into BITs during this period. While ASEAN members sporadically used BITs during the 1960s to 1980s, there was significant exponential growth and clustering of BIT activity throughout the 1990s.⁹⁴ Generally speaking, though, there was stability in the underlying form and structure of treaty making by individual ASEAN states as the basic features of the classic BIT model continue to be replicated in this fertile growth period. Put differently, the core DNA within BITs created by capital-exporting states—national and most-favored-nation treatment, the amorphous guarantee of fair and equitable treatment, the obligation to compensate for direct and indirect expropriation and investor-state arbitration—appear with regularity throughout most of the BITs entered into by individual ASEAN members. Yet underlying this general degree of conformity is a highly distinct degree of conservatism within specific elements of Asian investment treaty practice.

In tandem with the neoliberal Zeitgeist, by the mid-1980s, the ASEAN states had begun the process of constructing a dedicated ASEAN treaty on foreign investment. The negotiations towards the 1987 ASEAN Agreement for Promotion and Protection of Investments⁹⁵ (1987 ASEAN Agreement)

⁸⁹ See generally U.N. CONFERENCE ON TRADE AND DEVELOPMENT, INCENTIVES AND FOREIGN DIRECT INVESTMENT (1996).

⁹⁰ ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER, 317–21 (2001).

⁹¹ U.N. CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES 1959–1999 1 (2000).

⁹² *Id.*

⁹³ José Alvarez, *The Once and Future Foreign Investment Regime*, in LOOKING TO THE FUTURE ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 607 (M. Arasanjani et. al. eds., 2010).

⁹⁴ Beth Simmons, *East Asia, Investment and International Law: Distinctive or Convergent?*, 13(3) KOR. J. INT’L. STUD. 461, 469–71 (2015) (outlining the “timing of Asia’s [international investment agreements]”); see also Zachary Elkins, Andrew Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000* 60 INT. ORG. 811, 821 (2006).

⁹⁵ Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia,

coincided with the fertile period of BIT-making by individual ASEAN member states. Unsurprisingly then, the strategic direction and tenor of those BITs have clearly influenced this early iteration of the ASEAN investment project. Most visibly, there is a distinct shift from earlier (state-driven) assumptions that the ASEAN parties can or should control the factors leading to the establishment of industrial economic activity. It is certainly true that “acceleration of industrialization of the region” remains as a core objective in the 1987 ASEAN Agreement. But there is now explicit recognition that freer “flow of *private* investments” is the preferred mechanism to achieve that goal.⁹⁶

Yet there is a clear mismatch between this new normative direction (of facilitating greater flow of foreign investment within ASEAN) and the substantive content of the obligations within the 1987 ASEAN Agreement. This tension illustrates the limits of Lockean cooperation in given settings. On scope of operation for instance, the definition of covered investment encompasses a wide variety of foreign capital extending beyond FDI to less permanent sources including debt capital and portfolio investment.⁹⁷ The latter would become a focal point for dissatisfaction by key ASEAN members in the aftermath of the 1997–1998 Asian financial crisis, feeding eventually into key changes to the ASEAN investment treaty landscape. But even at this early stage, the new ASEAN investment treaty offered a far more restrictive standard of protection than most (although not all) BITs entered into by individual ASEAN members. In particular, there is a distinct ambivalence to the lauded goal of ensuring free operation of foreign capital within the ASEAN grouping. The substantive treaty obligations only apply if an ASEAN member has “specifically approved in writing” and “registered” an investment, upon which it can impose “such conditions as it deems fit for the purposes of this Agreement”.⁹⁸ Strict threshold conditions of this sort are certainly at play in the BIT practice of certain ASEAN members (including Indonesia and Thailand) but others (such as the Philippines) offer a far more liberal admission regime in their BITs.⁹⁹ The framers then have thus chosen to elevate into the collective sphere the most restrictive mechanism in oper-

the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments, Dec. 15, 1987 [hereinafter 1987 ASEAN Agreement].

⁹⁶ *Id.* Preambular Recitals 2 and 3.

⁹⁷ *Id.* art. I(3).

⁹⁸ *Id.* art. II(1).

⁹⁹ Dato’ Cecil Abraham, *State Approval in South East Asian Bilateral Investment Treaties*, in *INVESTOR-STATE ARBITRATION: LESSONS FOR ASIA* 123 (M. Moser ed., 2008) (on the differences in admissions clauses in BITs concludes by these various South East Asian countries); *see also* Ignacio Gómez-Palacio & Peter Muchlinski, *Admission and Establishment*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 227 (P. Muchlinski, F. Ortino & C. Schreuer eds., 2008).

ation across the entire suite of individual BITs entered into by ASEAN members.¹⁰⁰

Strict threshold conditions of this sort theoretically offer ASEAN members an important flexibility to vet and control their exposure to investment disciplines. Yet, it may well be that the balance is tilted too far in favour of the host state vis-à-vis foreign investors. This precondition to legal coverage in the 1987 ASEAN Investment Agreement was examined in some detail in *Yaung Chi Oo Trading Pte Ltd v Myanmar*. The Tribunal in that case declined jurisdiction precisely because the claimant was unable to prove that its existing investment (which had received earlier acceptance by Myanmar under domestic law) had been officially approved in writing at the time the 1987 ASEAN Agreement came into operation.¹⁰¹ Yet Myanmar had not at that time implemented such a formal process of investment approval (for the specific purposes of the 1987 ASEAN Agreement) making it simply impossible for the claimant to discharge this burden. Outside of the ASEAN context, certain arbitral tribunals have criticized the way in which formalized preconditions of this sort “advance no real interest of either signatory State” and “constitute an artificial trap depriving investors of the very protection the BIT was intended to provide.”¹⁰²

But even assuming this artificial and highly restrictive threshold condition is met, the remaining substantive provisions of the 1987 ASEAN instrument offer little promise of meaningful market access for flows of intra-ASEAN investment. Like most of the BITs entered into by the ASEAN members, those substantive obligations only apply on a post-admission basis. In other words, the sensitive determination of when and under what conditions foreign investment from one ASEAN member may enter the economy of another ASEAN member is purely a question for the latter to decide in exercise of full sovereignty. However, there is a fundamental and inexplicable omission in the 1987 ASEAN Agreement compared to that universe of BITs, even when the latter are also operating on a more conservative post-admission basis. There is no targeted obligation¹⁰³ on ASEAN members to extend national treatment to foreign investors and investments from another ASEAN state

¹⁰⁰ Along these lines, when ruling on this part of the 1987 ASEAN Agreement, the *Yaung Chi Oo v. Myanmar* Tribunal expressly noted that “[t]he 1987 Agreement was thus subject to important limitations in terms of its coverage, as compared with other bilateral and multilateral investment protection treaties.” *Yaung Chi Oo Trading Pte Ltd. v. Gov’t of the Union of Myanmar*, ASEAN I.D. Case No. ARB 01/1, 42 ILM 540, ¶ 23 (2003).

¹⁰¹ *Id.* at paras. 60–62.

¹⁰² *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶ 106 (Feb. 6, 2008).

¹⁰³ To be sure, there is a provision constraining “unjustified or discriminatory measures” in Article IV(1) of the 1987 Agreement. However, it is highly likely that this was not intended to operate as a guarantee of national treatment in the sense of requiring members to extend equal competitive opportunities to foreign investors because the ASEAN member explicitly reserve the question of national treatment protection for future negotiation under Article IV(4). See 1987 ASEAN Agreement *supra* note 95.

(which are typically present in almost all Asian BITs).¹⁰⁴

The absence of national treatment (even on a post-admission basis) is deeply problematic from an economic perspective. Such an obligation ensures that an ASEAN member extends equal competitive opportunity to foreign investment established in accordance with domestic entry laws. Put differently, it precludes an ASEAN state from intervening in the domestic economy (whether through tax or regulation) in such a way as to intentionally advantage domestic actors to the detriment of competing foreign investors (from another ASEAN state). Without such a guarantee, the most efficient and innovative (foreign) producers could be precluded from serving customers in the host state's market where there is successful protectionist lobbying of regulators by the competing domestic industry. Consumers would suffer as a result when denied the benefits of lower prices, greater product variety and/or higher service quality where provided by foreign investors. National treatment has a critical role in establishing a fundamental liberal guarantee against protectionism, as evidenced in its common employment across the suite of BITs entered into by individual ASEAN members. This omission in the 1987 ASEAN Agreement thus evidences a highly significant variance in strategic focus to those BITs. Liberalization of investment restrictions is simply not something that the ASEAN members as a collectivity were able or prepared to commit to in 1987. Their collective focus instead was simply and only one of investment protection. These elements are characteristic of a weak integrationist identity represented by the AIR in the 1980–1990s. Put simply, at this stage, the AIR was barely a community.

The investment protection provisions of the 1987 ASEAN Agreement closely track and mirror the strong BITs characteristic of this period (and the preferences of the Bretton Woods institutions). Thus, there are the usual clauses obliging an ASEAN member to pay adequate compensation where engaging in (direct or indirect) expropriation of foreign investment.¹⁰⁵ Similarly, the 1987 ASEAN Investment Agreement obliges members to extend “fair and equitable treatment” whose content, in line with treaty practice in the 1980s, is left undefined and ambiguous.¹⁰⁶ The 1987 instrument also extends a strong treaty right for foreign investors to repatriate their capital and earnings, subject only to the national laws of the ASEAN state from which transfers were to be made.¹⁰⁷ This too is an area in which later parts of the ASEAN investment project would diverge significantly especially as members digested the lessons and implications of the 1997–1998 Asian financial

¹⁰⁴ Instead, the ASEAN members simply reserve the possibility for future bilateral or multilateral commitments on national treatment to be struck under the framework of the 1987 ASEAN Agreement: “Any two or more of the Contracting Parties may negotiate to accord national treatment within the framework of the Agreement.” 1987 ASEAN Agreement, *supra* note 95, art. IV(4).

¹⁰⁵ *Id.* art. VI.

¹⁰⁶ *Id.* art. IV(2).

¹⁰⁷ *Id.* art. VII.

crises.

The analysis so far has identified a set of stringent protective obligations imposed on ASEAN members. To put this slightly differently, the many constraints on state action directed at foreign investment are not balanced in any significant way by flexibilities that would permit state regulation in key areas of public interest. In this respect, the 1987 ASEAN Investment Agreement matches most of the investment law universe at play in the 1980s, which stands in contrast to the law of the WTO.¹⁰⁸ In the latter, there has always been a set of important exceptions for state regulation to pursue key public objectives that had been formalized at inception of the GATT 1947. These mechanisms reflect a set of shared social purposes among the membership that, as John Ruggie argued, has led to historical norm-governed change *within* the dictates of the system rather than an irretrievable decline in multilateralism (given the slow erosion of the United States as a dominant hegemon over time).¹⁰⁹

Of course, the absence of exceptions is not the only significant departure from the WTO model in the 1987 ASEAN Investment Agreement. Dispute settlement in the WTO is reserved for state parties with a complex set of procedures formalized within the WTO Dispute Settlement Understanding. By contrast, there is no dedicated or specialized institution to monitor state compliance with the 1987 ASEAN investment instrument. Perhaps reflecting the ASEAN's then-rudimentary nature as an interstate negotiating forum to advance economic cooperation (in line with a Lockean conception), state-to-state disputes concerning the interpretation or application of the 1987 instrument were to be "settled amicably between the parties" and failing settlement, were simply to be "reported to the ASEAN Economic Ministers."¹¹⁰ Yet we are then faced with a fundamental disjuncture with the harder and formalized mechanisms to resolve disputes between foreign investors (as non-state actors) and member states under the 1987 ASEAN Agreement. Once again, the influence of the universe of BITs entered into by individual ASEAN members (and by extension, the Bretton Woods institutions) is apparent and explains this discrepancy. In line with standard BIT practice by the 1980s, the 1987 ASEAN Agreement extends standing to foreign investors (from an ASEAN state) who could bring a complaint against a signatory (ASEAN) member for breach of the treaty which could be ultimately resolved by arbitration whose outcome would be "binding" as a matter of treaty obligation.¹¹¹ Although used relatively sparsely in the future, the few cases

¹⁰⁸ SUNGJOON CHO, *FREE MARKETS AND SOCIAL REGULATION: A REFORM AGENDA OF THE GLOBAL TRADING SYSTEM* (2003) (discussing the GATT/WTO's legal and institutional arrangement for legitimate public objectives).

¹⁰⁹ John Ruggie, *Embedded Liberalism and Postwar Economic Regimes*, in *CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION* 82–83 (1998).

¹¹⁰ 1987 ASEAN Agreement, *supra* note 95, art. X.

¹¹¹ *Id.* art. X.

brought against individual ASEAN members (both under their BITs and the 1987 ASEAN Agreement) would eventually usher in treaty change based on the reasoning and outcome of those particular disputes. There seems then to be a selective learning effect from these BIT experiences. While the 1987 ASEAN Agreement adopted the investor-state investment arbitration mechanism, the Agreement was not as open as those individual BITs in key substantive areas of investor protection and investment liberalization, especially national treatment. This partly explains why there were so few disputes that arose under the early collective ASEAN rules. The general orientation of the regime closely mirrors the strongly pro-state decisions (especially on jurisdiction) made by certain arbitral tribunals.

In sum, during the 1980–1990s the AIR grew out of the earlier Hobbesian mutual suspicion and embraced a neoliberal identity as the ASEAN's global partners disabused the ASEAN economies of an outmoded development model, such as import substitution. The 1987 ASEAN Agreement provided the AIR with an operable organizational avenue in expanding intra-ASEAN investment flows. Nonetheless, the AIR during this period betrayed the limits of Lockean cooperation. Indeed, an ethos of intra-ASEAN investment was preceded by zeal for deep extra-ASEAN investment evidenced by a dense web of BITs between individual members of ASEAN and other developed countries. Markedly, extra-ASEAN capital flow dwarfed intra-ASEAN flows during the BIT growth period of the mid- to late-1990s. This puzzling irony, which might be dubbed “reverse open regionalism,” eloquently demonstrated the embedded rivalry among members of the AIR fueled by protectionist (mercantilist) competition.

Table 1: ASEAN Net FDI on a Balance of Payments Basis 1995–1999
(Unit: U.S. Million)¹¹²

Year	Intra-ASEAN FDI	Extra-ASEAN FDI	Total ASEAN FDI	Share of Intra-ASEAN FDI in Total ASEAN FDI
1995	4,653.0	16,668.0	21,321.0	21.8%
1996	2,777.7	23,238.4	26,061.0	10.7%
1997	5,537.05	22,597.5	28,135.0	19.7%
1998	2,019.8	17,575.2	19,595.0	10.3%
1999	1,217.5	15,693.5	16,911.0	7.2%

¹¹² Mohd Haflah Piei, *An East Asia FTA: A Malaysian Perspective*, in EAST ASIAN REGIONALISM: FEASIBILITIES AND CHALLENGES 109 (C.Y. Ah, R. Baldwin & I. Cheong eds., 2005).

C. The Identity Crisis: The Asian Financial Crisis and the Rise of
China

According to Erickson, at the final stage of identity formation, adolescents suffer from serious role confusion as they become exposed to a new, broadened horizon (environment).¹¹³ Their pre-established identification comes under question in the face of newly discovered challenges and opportunities. Only after they weather this “war within themselves,”¹¹⁴ adolescents may build a genuine sense of direction and unearth their suitable place in the society that they belong to.¹¹⁵ Erikson believed that this “identity crisis” is a rite of passage that is necessary for adolescents to develop a unique yet coherent whole (identity).¹¹⁶ If we apply this notion of crisis to an ICR’s identity formation, we may locate certain significant events or developments that compel a given ICR to rethink its earlier identification or organizational goal.

The AIR’s expansionist reform in the 1980–1990s, albeit limited and incremental, attests to its neoliberal identity formation. In this period, the AIR’s organizational identity may be described as a loosely-knitted ICR that still retains an intergovernmental nature, albeit with common functional goals, such as expansion of scope of liberalization and reduction of transaction costs. A member of AIR tends to perceive another member as a rival, if not an enemy, in a potentially competitive relationship, rather than as a fellow in a highly-integrated community.¹¹⁷ Nonetheless, two colossal external shocks—the Asian financial crisis and the rise of China as a common threat—forced the AIR to rethink and modify its earlier identity toward deeper integration and community-building among its members.

First, over the course of 1997 to 1998, the Asian financial crisis wreaked havoc with the economies of some of the world’s most successful performers.¹¹⁸ Its massive shockwave dealt a blow to its main economies, in particular Thailand, Indonesia, Malaysia, and the Philippines.¹¹⁹ Capital inflows into the region had fueled rapid credit expansion, which lowered the quality of credit and led to asset price inflation. Highly leveraged corporate sectors and large, unhedged short-term debt made the crisis countries deeply vulnerable

¹¹³ Erickson, *supra* note 49, at 163–64.

¹¹⁴ Erickson, *supra* note 46, at 17.

¹¹⁵ Erickson, *supra* note 49, at 161.

¹¹⁶ Erickson, *supra* note 46, at 16.

¹¹⁷ Wendt, *supra* note 29, at 250.

¹¹⁸ For a comprehensive overview of the causes of and responses to the crisis, see CARL-JOHAN LINDGREN, TOMAS BALINO, CHARLES ENOCK, ANNE-MARIE GULDE, MARC QUINTYN & LESLIE TEO, FINANCIAL SECTOR CRISIS AND RESTRUCTURING: LESSONS FROM ASIA (1999).

¹¹⁹ Andrew McIntyre, *Institutions and Investors: The Politics of the Economic Crisis in Southeast Asia*, 55 INT’L ORG. 81 (2001); see Diane A. Desierto, *Investment Treaties: ASEAN*, in ASIA RISING: GROWTH AND RESILIENCE IN AN UNCERTAIN GLOBAL ECONOMY 184 (H. Hill & M. Gochoco-Bautista eds., 2012).

to changes in market sentiment. Weaknesses in bank and corporate governance exacerbated excessive risk-taking, as prudential regulations were limited or poorly enforced. The crisis was ultimately triggered by the floating of the Thai baht in July 1997. Changing expectations led to the depreciation of most other currencies throughout the region, bank runs, rapid withdrawals of foreign private capital, and dramatic economic downturns.

The collective nature of the crisis (a “regional” crisis) gave a sense of bonding among ASEAN members as they suffered the crisis together.¹²⁰ Also, after the crisis they had to respond to a common demand from foreign investors—and the Bretton Woods institutions—including invasive regulatory reform toward a more investor-friendly environment.¹²¹ More importantly, however, the ASEAN economies advanced the AIR itself into a more integrative format so as to dramatically augment intra-ASEAN investment flow. In this line, the Second Informal ASEAN Summit held in Kuala Lumpur in December 1997 decided to expedite the implementation of the ASEAN Free Trade Area as well as the formation of the ASEAN Investment Area.¹²²

Second, the rise of China and the consequential threat it poses to the ASEAN region as a main competitor in the global export market also pushed the ASEAN members into deeper economic integration. As a striking example, consider the fact that for the past three decades the ASEAN region has been a popular investment destination for most computer components as it has become the world’s second largest exporter of those components.¹²³ Recently, however, China, as the world’s largest computer assembler, challenged ASEAN’s hitherto dominant position in the production of computer components as it benefited from competitive edges in labor, local suppliers, and transportation.¹²⁴ As a result, between 2004 and 2008 ASEAN’s share of global computer parts export remained unchanged at 20%, while China’s share increased from 27% to 35%.¹²⁵ Likewise, China has surpassed ASEAN, by high margins, as a major FDI destination in Asia in the past decade. While FDI to ASEAN and FDI to China accounted for 66% and 16% of total FDI to Asia in 1990, respectively, these two numbers were exactly reversed in 2003.¹²⁶

¹²⁰ See Ralph Emmers, *Southeast Asia’s New Security Institutions*, in *ASIA’S NEW INSTITUTIONAL ARCHITECTURE: EVOLVING STRUCTURES FOR MANAGING TRADE, FINANCIAL, AND SECURITY RELATIONS* 201 (V. K. Aggarwal & M. G. Koo eds. 2008) (viewing that the Asian financial crisis revealed the ASEAN’s institutional frailty).

¹²¹ Edmund R. Thompson, *ASEAN After the Financial Crisis*, *ASEAN ECON. BULL.* 1 (2000).

¹²² Suthad Setboonsarng, *ASEAN Economic Cooperation: Adjusting to the Crisis*, *SOUTHEAST ASIAN AFF.* 35 (1998).

¹²³ CHARLOTTE R. LANE ET AL., *ASEAN: REGIONAL TRENDS IN ECONOMIC INTEGRATION, EXPORT COMPETITIVENESS, AND INBOUND INVESTMENT FOR SELECTED INDUSTRIES* 49 (USITC 2010).

¹²⁴ *Id.*

¹²⁵ *Id.* at 51.

¹²⁶ See Jones & Smith, *supra* note 4, at 165.

With these significant external shocks, the AIR could no longer maintain its simple pre-crisis identity as a loose ICR. It was forced to adapt to the post-financial crisis environment and locate a new engine for regional economic development.¹²⁷ At the same time, the AIR needed to check the rise of China. The AIR identified its solution in the intensification of intra-ASEAN investment flow allowing it to build sufficient scale and capacity to meet the new Chinese competitive threat. Obviously, this meant a dilemma over its long-standing legacy of the Lockean (mercantilist) competition among ASEAN economies. To the AIR, this was a central moment of identity crisis.

D. The Kantian Project in the Post-Crisis Era?

These dramatic environmental factors, such as the Asian financial crisis and the rise of China, forced ASEAN and the AIR to search for a new integrationist identity. The shared challenge begot the shared response. ASEAN economies realized that the erstwhile Lockean cooperation tinged with rivalry would no longer constitute a sustainable institutional arrangement governing their investment flows in and out of the ASEAN region. Instead, regional integration via an augmented intra-ASEAN investment foundation and attendant economic community-building surfaced as a new solution.¹²⁸ While the old identity of the AIR in the 1980–1990s may have operated as an agent of ASEAN economies to help them achieve a limited functional goal of facilitating intra-ASEAN investment, the postcrisis AIR has begun to morph into a trustee role with a deeper integrationist *telos*.¹²⁹ As discussed above, a constructivist lens can capture this new identity.¹³⁰ A strong collective bond among ASEAN economies with a shared goal of building an ASEAN investment community has heralded an aspiration for a Kantian future in the ASEAN region.¹³¹

¹²⁷ See Robert J. R. Elliott & Kengo Ikemoto, *AFTA and the Asian Crisis: Help or Hindrance to ASEAN Intra-Regional Trade?*, 18 ASIAN ECON. J. 1, 17 (2004) (finding that the Asian financial crisis prompted a strong aspiration among ASEAN countries to increase *intra*-ASEAN trade).

¹²⁸ Consider the first preambular recital of the 1998 Framework Agreement on the ASEAN Investment Area: “Affirming the importance of sustaining economic growth and development in all Member States through joint efforts in liberalising trade and promoting intra-ASEAN trade and investment flows enshrined in the Framework Agreement on Enhancing ASEAN Economic Co-operation signed in Singapore on 28 January 1992” (emphasis added). 1998 Framework Agreement on the ASEAN Investment Area [hereinafter 1998 Framework Agreement], signed Oct. 7, 1998, Recital 1.

¹²⁹ See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 179, 186 (2010).

¹³⁰ See Amitav Acharya, *Regional Institutions and Asian Security Order: Norms, Power, and Prospects for Peaceful Change*, in ASIAN SECURITY ORDER: INSTRUMENTAL AND NORMATIVE FEATURES 211–12 (Muthiah Alagappa ed. 2003) (arguing that the ASEAN security community could be better understood from a constructivist perspective emphasizing ideational forces, rather than a realist one based on power and interest).

¹³¹ But see Jones & Smith, *supra* note 4, at 148 (holding a skeptical view on the “community” identity of ASEAN due mainly to its loose organization nature as an association that has remained unchanged

If we consider the construction of ASEAN investment rules in the post-crisis era, we can identify both internal and external influences that have shaped the contours of that project. As we have seen, at the internal level, the pre-existing BITs of individual ASEAN member states have continued to play a role in shaping collective treaty choice within ASEAN as a grouping. Given these foundations, it is perhaps understandable that the earliest stage of the ASEAN investment project—the 1987 ASEAN Agreement for Promotion and Protection of Investments—reflected a conservative BIT-style project of *only* delivering investment protection. Put differently, liberalization of restrictions on entry and operation of foreign investment was a marginal element of early ASEAN investment rules. But with late-1990s triggering external crises facing the ASEAN grouping, the normative direction of the ASEAN investment project had pointedly reversed. Now under the 1998 ASEAN Investment Area, the ASEAN members had committed to strategically position the region as a single production base (as a means of countering the strategic threat posed by China), and foreign investment was a core component of that strategy. A single production base would supply ASEAN products for consumption not just in the region but also for export to elsewhere in the world. Foreign investment is a key driver of production networks that are so central to this vibrant aspect of the contemporary global economy. Large-scale foreign investment will locate different stages of a production process across different countries so as to achieve key efficiencies by minimizing overall production cost. Efficiency-seeking foreign investment “is by its very nature trade-creating” because “[b]y subdividing the production process in vertical stages between countries, trade is obviously created (compared to the situation where all stages are undertaken in one country).”¹³² This is no minor or tangential economic fact. Approximately half of the world’s trade today takes place between affiliates of multinational enterprises trading intermediate goods and services.¹³³ The potential benefits of using foreign investment to position ASEAN as an integrated production base are thus remarkably extensive, including the possibility of higher employment, wages, and overall development throughout the region.

We can plainly trace these momentous shifts in legal framing and positioning in the new set of collective investment rules in ASEAN. A fundamental objective of the 1998 Framework Agreement is the establishment of “a competitive ASEAN Investment Area” (AIA),¹³⁴ indicating a strategic desire to position the region as an alternative host of foreign investment that

since its inception).

¹³² WTO, *The Relationship Between Trade and Investment* 16 (Working Group on the Relationship Between Trade and Investment, No. WT/WGTI/W/7, Sept. 8, 1997).

¹³³ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions; Towards a Comprehensive European International Investment Policy* 3 (COM(2010)343, July 7, 2010).

¹³⁴ 1998 Framework Agreement, *supra* note 128, art. 3(a).

would normally flow elsewhere (not least China). The means chosen to achieve this strategic goal are naturally different from the purely investment protective focus of the 1987 ASEAN Agreement. The AIR's new identity represented by the AIA now overcame Lockean limits under its old identity in the 1980–1990s. Now member states would commit to a “more *liberal* and transparent investment environment” that would “substantially increase the flow of investments . . . from *both* ASEAN and non-ASEAN sources.”¹³⁵ This strong liberalization mandate was matched by an exceedingly ambitious timeframe whereby:

- (b) national treatment is extended to ASEAN investors by 2010, and to all investors by 2020, subject to the exceptions provided for under this Agreement;
- (c) all industries are opened for investment to ASEAN investors by 2010 and to all investors by 2020, subject to the exceptions provided for under this Agreement.¹³⁶

The remaining substantive provisions operationalize the core commitment to investment liberalization of the ASEAN members, at least when it comes to flows of FDI within and among ASEAN states. Most fundamentally, each ASEAN member commits in Article 7(1) to:

- (a) [O]pen immediately all its industries for investments by ASEAN Investors;
- (b) [A]ccord immediately to ASEAN investors and their investments, in respect of all industries and measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments, treatment no less favourable than that it accords to its own like investors and investments (“national treatment”).¹³⁷

Compared to the conservative post-establishment orientation of the 1987 ASEAN Instrument (as well as almost all of the BITs of individual ASEAN members), the 1998 Framework Agreement now dramatically liberalizes restrictions on entry of foreign investment. The significant and valuable promise of market access in Article 7(1)(a) is especially remarkable as it precludes an ASEAN member from reserving any industry to participation only by that state or its state-owned entities. The promise of national treatment in Article 7(1)(b) also prevents an ASEAN member from restricting operation in a given industry to domestic private actors. Given the political

¹³⁵ *Id.* art. 3(a)(i) (emphasis added).

¹³⁶ *Id.* art. 4.

¹³⁷ *Id.* art. 7(1).

challenges associated with this ambitious commitment to investment liberalization, it is unsurprising that the 1998 Framework Agreement provides for a degree of flexibility in meeting these obligations. ASEAN members are permitted to submit Temporary Exclusion Lists and Sensitive Lists, which specify the industries or sectors that would not be opened up to investment or for which the ASEAN member could not confer national treatment.¹³⁸ For most ASEAN members, the negative list exemptions (in the Temporary List) were to be reviewed biennially and phased out by 2010.¹³⁹

Interestingly, it is at this point that we see the challenges faced by the newer least-developed members of ASEAN find reflection as a matter of legal architecture. This too vividly illustrates the communal facets of the AIR. Vietnam and Laos are granted special and differential treatment in the form classically provided in the law of the WTO. These newer member states of ASEAN are given a staggered period of compliance with progressive phase-out of their Temporary List to be concluded by 2015.¹⁴⁰ This is by no means a small or incidental change. Within investment law, the usual and strongly held assumption across most BITs is that developing states should be fully responsible for weaknesses in governance structures where these constitute wrongful harm to a foreign investor, rather than the WTO-based notion that development status might variegate the depth of a given international law commitment. It is also important to recall that the ASEAN members can submit an entirely separate Sensitive List (to the Temporary List) excluding themselves from the immediate obligation to open their economies to investment from other ASEAN members. And when it comes to such a Sensitive List, there is no hard phase-out contemplated, with the AIA simply providing that it “shall be reviewed by 1 January 2003 and at such subsequent periodic intervals as may be decided by the AIA Council.”¹⁴¹

This hard promise of liberalization of entry restrictions to intra-ASEAN capital flows – even when accompanied by the possibility of negative list exemptions – has real potential to contribute to the key articulated goal of the construction of a competitive AIA that would “substantially increase the flow of investments into ASEAN.”¹⁴² In recent years, there have been multiple empirical studies that have sought to identify whether there is a causal relationship between state entry into BITs and an increase in inbound foreign investment.¹⁴³ This early empirical literature was characterized by methodological weakness in that investment treaties were treated as black boxes.

¹³⁸ *Id.* art. 7(2).

¹³⁹ *Id.* art. 7(3).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* art. 7(4).

¹⁴² 1998 Framework Agreement, *supra* note 128, art. 3(a)(i).

¹⁴³ For a comprehensive overview of the principal empirical studies, see Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence* 51 *IRG. J. INT'L L.* 405–14 (2010). For one of the latest studies in this abundant stream of secondary

More recent empirical research has however disaggregated treaties based on form and content. It now appears that the specific content of investment treaties matters a very great deal in attracting foreign investment. And of all the various provisions in investment treaties, pre-establishment market access (via national treatment) offers the greatest potential for increasing foreign investment flows. One study has estimated that a host country can increase its share in total FDI flows by almost 30% in the hypothetical case of switching from particular investment treaties without pre-establishment national treatment commitments to those with such provisions.¹⁴⁴

The analysis so far has focused on the valuable, crystallized obligation of an ASEAN member in Article 7 to extend market access to FDI from another ASEAN member state. Yet, the broader articulated goal within the Framework Agreement was to “substantially increase the flow of investments into ASEAN *from both ASEAN and non-ASEAN sources*.”¹⁴⁵ On close observation however, there is a fundamental difference in treatment of investment from ASEAN states compared to investment from non-ASEAN, external sources. Article 7 of the 1998 Framework Agreement maps in some detail the “2010 promise” of free movement of capital *within* ASEAN. By contrast to this extended and nuanced treatment of investment flows *within* the ASEAN grouping, there are far fewer provisions directed at inflows of capital from sources *external* to the ASEAN members. For one thing, there is nothing within the actual text of the AIA designed to clearly crystallize the 2020 promise. Instead, Schedule III simply provides that member states shall implement “individual action plans” to meet that goal. Taken at face value (in the sense that the 2020 promise is formally structured as a hard legal obligation), this suggests a paradoxical distrust of intra-ASEAN investment compared to investment from other sources (given the abundant discretion to create exemption lists for the former). More realistically perhaps, the 2020 promise of opening up ASEAN to external capital might have been intended as an aspirational goal rather than a reflection of a fundamental sense of legal commitment.

That characterization is also confirmed by the manner in which the ASEAN members have sought to preserve the integrity of the valuable promise to *only* extend market access to investment from other ASEAN states. Before an economic actor can take the benefit of the newly liberalized ASEAN Investment Area (under the terms of the Framework Agreement), they must first meet the strict definition of an “ASEAN investor.”¹⁴⁶ This encompasses a national or juridical person of any ASEAN Member State,

literature (which post-dates Yackee’s summary), see Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 63 INT. ORG. 401 (2011).

¹⁴⁴ Axel Berger et al., *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box*, 10 INT’L ECON. & ECON. POLICY 247 (2013).

¹⁴⁵ 1998 Framework Agreement, *supra* note 128, art. 3 (emphasis added).

¹⁴⁶ *Id.* art. 4.

who makes “an investment in another Member State, the *effective ASEAN equity* of which taken cumulatively with all other ASEAN equities fulfills at least the minimum percentage required to meet the national equity requirement and other equity requirements of domestic laws and published national policies, if any, of the host country in respect of that investment.”¹⁴⁷ “Effective ASEAN equity” in turn is defined as the “ultimate holdings by nationals or juridical persons of ASEAN Member States in that investment,” without the treaty prescribing the legal test applicable to determine such “ultimate holdings.” Instead, the 1998 Framework Agreement prioritizes the ASEAN member state’s national rules and procedures for ascertaining such “effective equity.” This positioning explicitly entitles an ASEAN host state to use its own laws to trace through the ownership structure of a given investment to guarantee that ultimate equity is held by ASEAN nationals or companies. Obviously, this emphasis on intra-ASEAN investment over extra-ASEAN investment prominently reverses the earlier trend (reverse open regionalism) typified by strategic considerations driven by neorealist suspicion or by neoliberal calculation.

The latest iteration of ASEAN investment treaty practice is the 2009 ASEAN Comprehensive Investment Agreement (ACIA), which builds and deepens this communal orientation.¹⁴⁸ First, the ACIA goes beyond the standard purposes of either investment liberalization or protection that had dominated the positioning of the earlier (1987 and 1998) ASEAN instruments.¹⁴⁹ We now have a clearer understanding of the precise orientation and function of the AIR. The AIR now embraces a new identity (community) with a strong integrationist *telos*. In the preamble for instance, the member states envisage a “more integrated and interdependent future,”¹⁵⁰ and they then offer a clue as to how that goal is to be translated via a specific objective of the ACIA. “Economic integration” is to be achieved, *inter alia*, through “joint promotion of the region as an integrated investment area.”¹⁵¹ This language draws down directly from the commitments struck by the ASEAN members in the 2007 ASEAN Economic Community Blueprint (“AEC Blueprint”) to build “an ASEAN single market and production base” comprising free flow of goods and services as well as free movement of certain factors of production including capital.¹⁵² Strikingly, the AEC Blueprint on foreign investment seeks to position ASEAN as an “integrated investment area and production network” by, for example, promoting “industrial complementation and production networks among MNCs in ASEAN” and “joint investment missions

¹⁴⁷ *Id.* art. 1 (emphasis added).

¹⁴⁸ 2009 ASEAN Comprehensive Investment Agreement, Feb. 26, 2009 [hereinafter *ACIA*].

¹⁴⁹ *Id.* art. 2(a).

¹⁵⁰ *Id.* at Recital 2.

¹⁵¹ *Id.* art. 1(d).

¹⁵² ASEAN, 2007 ASEAN Economic Community Blueprint, para. 9 (adopted Nov. 20, 2007), <http://asean.org/wp-content/uploads/archive/5187-10.pdf>.

that focus on regional clusters and production networks”.¹⁵³ This core language is then repeated as a distinct legal obligation in the ACIA.¹⁵⁴ What we have now is a deliberate focus on attracting one key type of foreign investment—efficiency-seeking FDI that would construct supply chains across the region—to achieve both a given level of economic integration and a means of fulfilling the 1998 Framework Agreement’s objective of developing a competitive AIA.

Secondly, since the last investment instrument, Cambodia acceded to ASEAN joining Laos, Myanmar, and Vietnam as the least-developed members. Not surprisingly then, “development” continues to be articulated as a central value of the ASEAN investment treaty project. Unlike the earlier instruments, however, the negotiators of the ACIA have explicitly laid down those core purposes of the treaty in a set of objectives¹⁵⁵ and guiding principles.¹⁵⁶ Those specific objectives and principles supplement the general expressions of purpose in the preambular recitals to the ACIA. The former are especially important when one considers the taxonomy of treaty interpretation mandated by Article 31(1) of the VCLT. The ACIA negotiators have offered adjudicators rich tableaux to assist them in understanding the *telos* of the ACIA, with “development” now key to parts of the ACIA project. Recital 2 of the preamble explicitly recognizes “the different levels of development within ASEAN especially the least developed Member States which require some flexibility including special and differential treatment as ASEAN moves towards a more integrated and interdependent future.” The WTO-based notion that “special and differential treatment” should be accorded to states at lower levels of development is then repeated as one of the eight guiding principles in Article 2.¹⁵⁷ The newly coded undertaking of development in the ACIA vividly illustrates the AIR’s collective identity (community) in a postcrisis era.

Thirdly, there is a clear desire to achieve a high degree of refinement and sophistication in the legal construction of the ACIA, which engages both internal and external dimensions. This phenomenon is perfectly natural when we consider the AIR’s evolution into a *legal* community in which its members communicate with one another with legal tools, such as treaties and other legal instruments.¹⁵⁸ Internally, the ACIA avoids the legal uncertainties inherent in the crude scaffolding strategy adopted in the 1998 Framework Agreement building upon the earlier 1987 ASEAN instrument.¹⁵⁹ On entry

¹⁵³ *Id.* at para. 29.

¹⁵⁴ ACIA, *supra* note 148, art. 24(b)–(c).

¹⁵⁵ *Id.* art. 1.

¹⁵⁶ *Id.* art. 2.

¹⁵⁷ *Id.* art. 2(f).

¹⁵⁸ *Cf.* SUNGJOON CHO, THE SOCIAL FOUNDATIONS OF WORLD TRADE: NORMS, COMMUNITY AND CONSTITUTION (2015).

¹⁵⁹ 1998 Framework Agreement, *supra* note 128, art. 12(1).

into force of the ACIA, the 1987 and 1998 instruments are terminated, delivering welcome certainty on the question of when and what legal regime will apply.¹⁶⁰ But this internal strategy notably extends beyond this single (albeit, key) housekeeping maneuver. It also aims to correct the earlier problematic pathologies (of both *under*- and *over*-protection of foreign investment) that had characterized particular choices of legal rules in 1987 and 1998. On the external front, the ASEAN members have explicitly sought to develop a “comprehensive investment agreement” that is “comparable to international best practices.”¹⁶¹

To that end, there are distinct improvements in legal strategies used in the ACIA, embedded in the particular experiences of ASEAN members under the earlier legal structures or as respondents to investor–state arbitration (either under the earlier ASEAN investment treaties or individual country BITs). For instance, we saw that the broad and undefined approval precondition to coverage in the 1987 ASEAN instrument could potentially result in inappropriate *under*-protection of foreign investment. The ACIA now defines “covered investment” as investment in an ASEAN member “admitted according to its laws, regulations and national policies, and where applicable, specifically approved in writing by the competent authority of a Member State.”¹⁶² The ASEAN members no longer elevate into ASEAN law, the most restrictive precondition to coverage (requiring specific approval) in individual BIT practice (such as that of Indonesia). Those states that wish to retain that strict precondition may do so but for others (such as Singapore and the Philippines), compliance with general domestic laws on entry of foreign investment is a necessary and sufficient condition for ACIA coverage.

Critically, even for those ASEAN members that adopt the highly restrictive approval precondition, they are now subject to due process disciplines. The “approval in writing” requirement now provides “[f]or the purpose of protection, the procedures relating to specific approval in writing shall be specified in Annex 1 (Approval in Writing).”¹⁶³ Through Annex 1, ASEAN members are required to ensure that their approval procedure is transparent, in line with a centrally articulated objective to work towards “improvement of transparency and predictability of investment rules, regulations and procedures conducive to increased investment among Member States.”¹⁶⁴ Specifically, Annex 1 obliges each member:

¹⁶⁰ Despite that termination, the key Temporary Exclusion and Sensitive Lists that delineated individual member states’ market access obligations continue to apply to the liberalization provisions of the ACIA until reservations (under Article 9 of the ACIA) come into force. Further, for a period of three years from termination, investors can choose to apply the entirety of any of the three instruments. ACIA, *supra* note 148, art. 47.

¹⁶¹ *Id.* Recital 1.

¹⁶² *Id.* art. 4(a).

¹⁶³ *Id.* art. 4(1), n.1.

¹⁶⁴ *Id.* art. 1(c).

[w]here specific approval in writing is required for covered investments by a Member State's domestic laws, regulations and national policies, that Member State shall:

- (a) inform all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;
- (b) in the case of an incomplete application, identify and notify the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;
- (c) inform the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and
- (d) in the case an application is denied, inform the applicant in writing of the reasons for such denial. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.¹⁶⁵

Thus where ASEAN members elect to tightly control incoming foreign investment from another ASEAN member state (via a "specific approval in writing" requirement), they must now provide a foreign investor with distinct procedural protections. In fact, these are mandatory requirements to which a failure to comply could result in an investor-state challenge. These procedural guarantees represent a fundamental qualitative increase in the sophistication of the ASEAN investment treaty project because as vividly illustrated by the *Yaung Chi Oo v. Myanmar* award, some ASEAN states had failed to provide a transparent process for approval and could reject incoming investment without providing reasons.¹⁶⁶ Annex 1 largely precludes this self-judgment by requiring a host State to act transparently and provide reasons.

In sum, AIR's last (Kantian) stage of organizational development exhibits collective efforts of its members to deepen their integration via an enhanced level of investment liberalization and regulatory rationalization. Nonetheless, despite these fertile developments, even this stage of cooperation among members is not fully complete. In certain areas, the AIR betrays paucity of cooperation on account of strategic calculations.

¹⁶⁵ *Id.* Annex 1.

¹⁶⁶ *Yaung Chi Oo Trading Pte. Ltd. v. Myanmar*, 42 ILM 540 (2003).

Table 2: The Evolutionary Pathway of the ASEAN Investment Regime

	<i>The Sovereigntist Foundation</i>	<i>The Lockean Expansion</i>	<i>The Identity Crisis</i>	<i>The (Limited) Kantian Project*</i>
<i>Time Period</i>	1950s - 1970s	1980s - 1990s	Late 1990s	Late 1990s – Present
<i>Identity Formation</i>	Early Identification	Peer Pressure	Crisis	An Identity Formed (yet with encapsulation)
<i>Structural Logic</i>	Hobbesian	Lockean	N.A.	Kantian
<i>Representative Theoretical Op-tic</i>	Neorealism	Neoliberal Institutionalism	N.A.	Constructivism
<i>Main Policies and Develop-ments</i>	Import Substitution Strategy North-South Conflict Enmity against Foreign Investors Limited Numbers of BITs	Export-Oriented Strategy Washington Consensus Pressure from Int'l Organizations (IMF; World Bank) Attracting Foreign Investment Proliferation of BITs 1987 ASEAN Agreement for Promotion and Protection of Investments	The East Asian Financial Crisis The Rise of China	The 1998 Framework Agreement (ASEAN Investment Area) The 2009 Comprehensive Investment Agreement (ACIA) The 2010 Promise (Free Movement of Capital <i>within</i> ASEAN) The 2020 Promise (Opening up ASEAN to External Capital) * Certain Past, Inward-Looking Relics

IV. A BLAST FROM THE PAST: THE HOBBSIAN RELIC IN THE KANTIAN PROJECT

Despite the significant organizational development of the AIR (from a modest investment protection and liberalization arrangement to an ambitious investment community), there are countervailing trends. The evolution of AIR and its identity-formation process is also partly shaped by strong *inward-looking* elements in determining various thresholds in regulating investment inflows.

Admittedly, part of the reason behind this ostensible regressionism is

the Asian financial crisis. On close examination, there were significant (although understandable) limitations to the degree of liberalization ushered in by the 1998 Framework Agreement. The definitional scope of that Agreement in particular breaks sharply with the usual expansive approach in investment treaties (of the 1980s and 1990s) that had been largely adopted (collectively or individually) within ASEAN up to this point. The disciplines of the Framework Agreement only extended to “direct investments” with “portfolio investments” and “matters relating to investments covered by other ASEAN Agreements, such as the ASEAN Framework Agreement on Services” specifically excluded from coverage.¹⁶⁷ Thus the member states had chosen to confine the 1998 Framework Agreement to FDI whose entry is classically understood as a positive input that boosts industrial development and job creation. But they have clearly exempted less permanent (and thus “sticky”) forms of capital such as minority equity (portfolio) and debt capital that, as the 1997–1998 Asian financial crisis had sharply demonstrated, are prone to sudden reversals or herd behavior that can quickly destabilize financial systems.¹⁶⁸ We have then our first visible manifestation of the profound impact of the Asian financial crisis on the legal contours of the ASEAN investment project.

Nonetheless, most of these irreversible trends appear deeper and more structural than mere (time-limited) reactions from the crisis. These structural regressions into sovereigntism, which is often synonymous with protectionist measures, may seem to be an aberration from the standpoint of global standards whose salient trends are ever-expanding investment liberalization commitments. Likewise, one might be tempted to characterize this apparent retrogression as pathology in AIR’s organizational development, particularly in terms of AIR’s identity formation. Those who believe that such trends are pathological might be inclined to find a persuasive analogy in the notion of “encapsulation” in psychoanalysis.¹⁶⁹ Early historical traumas, such as colonialism and *Konfrontasi*, may have left part of AIR’s identity encapsulated and therefore largely immune to the subsequent identity formation (collectivization) process. In other words, the historically entrenched survival instinct among ASEAN members may have impeded AIR’s full identity formation, which means lingering sovereigntist, and often protectionist, interventions in certain areas of investment liberalization.

For example, there are immediate questions as to whether the choices made by the ASEAN members in the text of the ACIA are likely to give

¹⁶⁷ 1998 Framework Agreement, *supra* note 128, art. 2.

¹⁶⁸ On the relative stability of FDI compared to the sudden withdrawals of short-term debt capital and portfolio investment during both the Mexican peso devaluation of 1994–1995 and the Asian economic crisis of 1997–1998, *see generally* ASAF RAZIN ET AL., SOCIAL BENEFITS AND LOSSES FROM FDI: TWO NONTRADITIONAL VIEWS, in REGIONAL AND GLOBAL CAPITAL FLOWS (Takatoshi Ito & Anne O. Krueger eds., Univ. Chicago Press (2001)).

¹⁶⁹ *See* Hopper, *supra* note 3.

effect to the critical normative goal of building a competitive and integrated production network within the region. As we have seen, the uncertainty inherent in a key part of the 1998 Framework Agreement has now been resolved. The liberalization obligations in the ACIA apply *only* to questions of intra-ASEAN investment flows. Thus, the seemingly ambitious promise in 1998 to construct investment rules within ASEAN that would also extend to FDI from external sources has been jettisoned. Liberalization now proceeds on a dual-track basis with the ACIA only regulating intra-ASEAN capital flows while the question of treatment afforded to external foreign investors remains subject to both treaties entered into by member states individually (including both BITs and investment chapters in FTAs) and the set of regional investment agreements entered into by ASEAN as a grouping with key partners such as China, Australia, and New Zealand.¹⁷⁰

Yet even when applied only to intra-ASEAN capital flows, the commitment to liberalize restrictions on admission of foreign investment in the ACIA is far less comprehensive than that set out in the earlier 1998 Framework Agreement. To be sure, ASEAN's conservative strategy in 1998 of only covering FDI has been jettisoned in the ACIA in favor of a broad asset-based definition of "investment" which pointedly includes debt capital in the form of bonds and debentures.¹⁷¹ But the market access obligations in the 1998 Framework Agreement also required, *inter alia*, each member state to "open immediately *all* its industries for investments by ASEAN investors," subject to the ability to impose targeted exemptions.¹⁷² By contrast, the ACIA only provides:

For the purpose of liberalization and subject to Article 9 (Reservations), this Agreement shall apply to the following sectors:

- (a) manufacturing;
- (b) agriculture;
- (c) fishery;
- (d) forestry;
- (e) mining and quarrying;
- (f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying; and
- (g) any other sectors as may be agreed upon by all Member States.¹⁷³

This reversal from the earlier liberalization obligations is problematic when one considers the expressed desire among the member states to build a competitive, integrated production base within the ASEAN region. Tradi-

¹⁷⁰ For a listing of these treaties, see Diane A. Desierto, *Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties*, 16 J. WORLD INV. & TRADE 1018, 1018–24 (2015).

¹⁷¹ ACIA, *supra* note 148, art. 4(c)(ii).

¹⁷² 1998 Framework Agreement, *supra* note 128, art. 7(1)(a) (emphasis added).

¹⁷³ ACIA, *supra* note 148, art. 3(3).

tionally, a select number of manufacturing industries have been at the forefront of value chain segmentation, especially the electronics and automotive industries where products can be broken down into discrete components that can be separately produced, easily transported, and assembled in low-cost locations.¹⁷⁴ While these gains will be potentially captured by the general inclusion of “manufacturing” in the positive list of covered sectors above, it is always possible for an individual member state to exempt itself from any obligation via a dedicated negative list reservation (under Article 9). An alternative approach would have been to identify and list which *specific* types of manufacturing are critical to building supply chains throughout the ASEAN region (while offering far less flexibility to all ASEAN members to refuse liberalization obligations in those targeted sectors). Moreover, the remaining insertions largely cover primary industries. Yet notably, extractive industries rank much lower in value chain segmentation as they require little imported content apart from some services.¹⁷⁵ There seems then to be a fundamental mismatch in the framing of the sectors subject to liberalization obligations against the overarching strategic goal to build an integrated production base within the region.

Furthermore, from the 1990s onwards, arbitral jurisprudence had tackled the thorny issue of precisely what constitutes “foreign investment” for the purposes of gaining protection under an applicable treaty or for the select purposes of the ICSID Convention. A single arbitrator in the *Malaysian Salvors v. Malaysia* award had ruled that various criteria needed to be met in order for a given asset to fall within the definition of “investment” under the ICSID Convention.¹⁷⁶ Some of these factors—especially the notion that an asset be shown to contribute to the economic development of the host state—have proven to be deeply controversial. For the most part, the ACIA negotiators have sensibly opted to avoid an approach that confers discretion on an adjudicator to make difficult judgments on the nexus between foreign investment and development outcomes. Instead, they have simply required that adjudicators satisfy themselves that an asset take the essential characteristics of investment understood as, *inter alia*, “commitment of capital, the expectation of gain or profit, or the assumption of risk.”¹⁷⁷ Nonetheless, these still operate as a bounded restriction on free flow of capital at odds with the deeper integration ethos of the AIR.

Lastly, there is an omission on substantive protections (compared to jurisdictional preconditions) possibly rooted in the particular arbitral experi-

¹⁷⁴ UNITED NATIONS CONFERENCE TRADE AND DEV. (UNCTAD), GLOBAL VALUE CHAINS AND DEVELOPMENT: INVESTMENT AND VALUE ADDED TRADE IN THE GLOBAL ECONOMY 6 (2013).

¹⁷⁵ *Id.*

¹⁷⁶ *Malaysian Historical Salvors Sdn BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶¶ 109-30 (May 17, 2007).

¹⁷⁷ ACIA, *supra* note 148, art. 4(c), fn. 2.

ence of one of the ASEAN members. In the *SGS v Philippines* award, a foreign investor had sought to use an umbrella clause to convert a claim for breach of a contract (entered into with the Philippines) into a treaty dispute, despite the fact that the contract featured an exclusive forum clause with all disputes to be referred to the Philippine judicial system.¹⁷⁸ As it happens, the Philippines ultimately succeeded in its defense in that case as the Tribunal found the claim to be non-admissible. Yet interestingly, despite that win by the Philippines, the ACIA contains no umbrella clause. The reason for that omission may come down to the fact that, despite the outcome of the case, much of the reasoning employed in *SGS v Philippines* represented an expansive and often poorly justified interpretation of the underlying function of an umbrella clause of any form. The omission in the ACIA may thus represent understandable caution by the ASEAN states to protect themselves against this broad interpretation which, if adopted by later tribunals, could render carefully negotiated contractual dispute clauses redundant. There are, however, more tailored options that could have been pursued so as to preserve an appropriate degree of foreign investment protection under an umbrella clause. For instance, the drafters could have clarified that a breach of the umbrella clause may only result from an exercise of sovereign power and not from ordinary breach of contract by the state.¹⁷⁹ Relatedly, the umbrella clause can be used to work in both directions in that it incorporates into the investment treaty not only a state's obligations but also those of an investor.¹⁸⁰ A "two way" umbrella clause of this sort would give host states a right to bring counterclaims against investors in investor-state arbitration proceedings.

In sum, one can still spot Hobbesian vestiges even in the most advanced form of AIR and related legal documents, which substantiates the incompleteness of the AIR's community-building project. This regressionism tends to challenge the application of developmental psychology (i.e., identity-formation theory) to AIR. After all, an ICR is a complex social organization and therefore its institutional development (evolution) is neither linear nor isomorphic. In this regard, path-dependency and cultural diversity (the "ASEAN Way") remain as strong explanatory factors in organizational development.

V. CONCLUSION

This article began by conceptualizing the ASEAN Investment Regime

¹⁷⁸ *SGS Société Générale de Surveillance S.A v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004).

¹⁷⁹ UNCTAD, *WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES* 150 (2013).

¹⁸⁰ *Id.*

(AIR) as an Interstate Cooperative Regime (ICR), defined as a stable interstate cooperative nexus on a particular regulative subject, comprising the regulation of foreign investment in this particular case. It has sought to describe and explain the complex evolution of the AIR in terms of its identity formation. To that end, we have employed three ideal types of cultural logic (Hobbesian, Lockean and Kantian) across each stage of the AIR's evolution, largely overlapping with the three main IR theories of neorealism, neoliberal institutionalism and constructivism respectively. Using those models, we have found a clear evolutionary pathway with the AIR following this sequential trajectory as it has transitioned toward a closer, regional investment community.

Importantly, however, this sequential evolution is not always linear and non-retrogressive. Indeed, one can still detect Hobbesian relics, such as sovereignty-preserving protectionism, even in the latest and most advanced form of AIR. While this regressionism challenges any uncritical application of identity-formation theory to AIR, it also eloquently demonstrates that an ICR is indeed a complex social organization whose institutional evolution may not be isomorphic. To that extent, "path-dependency," such as the "ASEAN Way," remains as a critical factor in mapping and understanding the nuances of AIR's evolution.

Finally, the findings and observations made by this article call for future research on such issues as organizational heterogeneities in the era of isomorphism. While world polity theory may offer a powerful heuristic on isomorphism that AIR certainly exhibits to a large degree, certain aspects of AIR, such as regressionism, shed critical light on isomorphism's analytical blind spots.