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Abstract

This Article probes the unique ontogenetic path of ASEAN's regulation of foreign investment by juxtaposing global investment law with the ASEAN investment regime. While the former delivers a powerful heuristic on isomorphism that ASEAN exhibits in its strong reflection of global investment norms, the latter sheds critical light on ideological and analytical blind spots by exploring distinct heterogeneities in ASEAN's investment regulation. Those heterogeneities, especially preferences towards non-legal forms of cooperation and tailored flexibilities to pursue public and development outcomes, are not simply outliers, but reflect important historical and cultural values inherent to ASEAN and its members. The insights uncovered in this Article invite scholars and policymakers to define a new form of global investment law that is more inclusive and flexible than the strict and conventional paradigm.

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I. INTRODUCTION

Southeast Asia is rife with gloomy collective memories. Its colonial past was followed by post-war geopolitical conflict and turbulence, including foreign interventions in Vietnam and Laos, as well as military hostilities between Indonesia and Malaysia. Ideological economic strategies designed to promote welfare in the region in the wake of this turbulence, such as import substitution, proved disappointing in their ability to deliver sustainable levels of economic growth and development outcomes.[1] Nonetheless, those states interlinked around the Association of Southeast Asian Nations (ASEAN) shifted their economic paradigm from a closed to open economy in the 1980s.[2] Ever since, trade and investment flows in and out of this area have been nothing short of spectacular. Between 1990 and 2014, the investment inflow to, and outflow from, this region have increased approximately ten times and thirty-four times, respectively.[3] By 2014, foreign direct investment (FDI) flows to ASEAN exceeded inflows to China, making it the largest recipient of FDI in the developing world.[4]

Notably, this paradigm shift from a closed to an open economy through liberalization of trade and investment restrictions by ASEAN countries has been powered by a thick set of global norms. A variety of treaties provided ASEAN nations with modern regulatory platforms necessary to integrate their economies into the global market. At the same time as the ASEAN nations were becoming more involved in the global market, policymakers and private practitioners from developed countries, as well as international organizations—such as the International Monetary Fund (IMF) and the World Bank—offered their technical assistance to the ASEAN nations in adopting neoliberal reform in the areas of trade and investment liberalization.[5] Naturally, ASEAN nations relied heavily on general legal principles and templates, such as model bilateral investment treaties (BITs) originally created by developed states and then dispersed mimetically.

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1 For exploration of the theory, adoption, and subsequent limits of import substitution as a development strategy, see MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 486, 486–88 (3d ed. 2005).

2 *See generally* THE POLITICS AND ECONOMICS OF INTEGRATION IN ASIA AND THE PACIFIC (Shiro Armstrong ed., 2011).

3 *FDI Statistics Division on Investment and Enterprise*, UNCTAD, http://unctad.org/en/Pages/DIAE/FDI%20Statistics/FDI-Statistics.aspx, 2 April 2016.

4 ASEAN Secretariat, *ASEAN Investment Report*, at xv (2015), https://perma.cc/W7YR-KJTB.

5 On the imposition of structural adjustment conditions in the lending policies of international financial institutions such as the International Monetary Fund, see TREBILCOCK & HOWSE, *supra* note 1, at 486–91.

Nonetheless, isomorphism of this benchmarking type (mimetic isomorphism)[6] does not necessarily mean identical treaty products ("equifinality").[7] Despite general convergence into global patterns in the basic legal structure and tenets, both the individual ASEAN BITs (signed between ASEAN nations and non-ASEAN nations) and the collective ASEAN investment regime (AIR) (addressing intra-ASEAN investment flows) feature unique departures from the global investment model. There is a temptation to dismiss these departures as mere outliers. This Article, however, takes those heterogeneities seriously and explores a structural explanation by juxtaposing world polity theory and historical institutionalism. While the former delivers a powerful heuristic on isomorphism that ASEAN BITs and AIR demonstrate in their manifestations toward Global Investment Law (GIL), the latter tends to complement the former by shedding critical light on the ideological and analytical blind spots exposed by those heterogeneities.

Against this background, Section II begins by defining GIL as an extensive and thick network of BITs, investment chapters of certain regional trade agreements, such as the North American Free Trade Agreement's (NAFTA) Chapter 11, and investment arbitration decisions derived from these primary sources. GIL is a relatively congruent legal regime whose original development has been nurtured by key developed countries, such as the U.S. and the E.U. member-states, since the 1980s. Those BITs and investment chapters comprising GIL are substantively similar, largely because of: (a) asymmetry of negotiating power with smaller states forced to act as law-takers; and (b) the automatic tendency—until recently—to replicate those terms throughout the network. In explaining both the emergence and prevalence of GIL, we employ world polity theory. According to this theory, GIL as a world investment culture holds a homogenizing effect over the AIR. Section III contrasts this converging force of GIL with key diverging trends within AIR. Certain tailoring of AIR is substantively and conceptually distinct to GIL, sometimes in problematic ways. From a comparative perspective, we highlight the uniqueness of AIR vis-à-vis GIL, including the striking asymmetry between extra-ASEAN and intra-ASEAN investment liberalization ("reverse open regionalism") as well as departures from a body of GIL classically represented by Chapter 11 of NAFTA. Here, we can

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6 *See generally* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983).

7 MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 138–39 (Peter J. Katzenstein ed., 1996).

benefit from "historical institutionalism" in tracing ASEAN's unique path-dependency, such as in its own vaunted "ASEAN Way."[8]

The insights uncovered in this Article hold broader implications beyond ASEAN. World polity or world culture is real, and its homogenizing power is undeniable. A vast network of transnational norm entrepreneurs—both public and private—offers recipients of such culture concrete manuals in the form of treaties and other regulations. In this regard, the "norm lifecycle" model—norm emergence, norm cascade, and internalization—is useful in grappling with this homogenizing process and its implications.[9] Yet, despite its strong gravitational pull, world culture's converging power should be placed into careful perspective. A number of factors, such as subject matter, may lead receivers of world culture to emulate the global script selectively rather than indiscriminately.[10] In this sense, globalization may be "the two-fold process involving the universalization of particularism and the particularization of universalism."[11] We should caution against the "inevitability assumption"[12] that underlies world polity theory. One may want to ask "what is happening in ASEAN regarding international economic governance?" rather than "how is ASEAN's investment liberalization going?"[13] As Daniel Lynch aptly observes, "rather than . . . viewing states as either already socialized or certainly on the way to becoming socialized into the [global] constitutive norms . . . it is significantly more satisfying to view states as choosing to embrace some norms while rejecting others fundamentally."[14] Indeed, the push to selectivity is given added momentum when one considers that global norms

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8 The "ASEAN Way" is a sovereignty-preserving, non-interference principle formed through the unique post-war experiences of ASEAN nations. The ASEAN Way has shaped not only geopolitical but also economic policies in the ASEAN region. 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); Gillian Goh, *The 'ASEAN' Way: Non-Intervention and ASEAN's Role in Conflict Management*, 3 STAN. J. E. ASIAN AFF. 113 (2003); Lee Jones, *ASEAN and the Norm of Non-Interference in Southeast Asia: A Quest for Social Order* (Nuffield C. Pol. Grp., Working Paper, 2009).

9 Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 895 (1998).

10 Roland Robertson, *Glocalization: Time-Space and Homogeniety-Heterogeneity, in* GLOBAL MODERNITIES 41 (Mike Featherstone et al. eds., 1995).

11 ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 102 (Mike Featherstone ed., 1992).

12 Daniel C. Lynch, *International "Decentering" and Democratization: The Case of Thailand*, 48 INT. STUD. Q. 339, 341 (2004).

13 *See* Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5, 17–18 (2002).

14 Lynch, *supra* note 12, at 345.

(such as GIL) are not in complete coherence within themselves.[15] This yields contradictory claims and interpretations of the global norms by some states.[16]

The limits of functionalism—or rationalism—embedded in historical institutionalism teaches us that inter-state haggling may not be the only pathway to international cooperation. The values inherent in historical and cultural contexts are incalculable and, therefore, not prone to simple reciprocal bargaining. International negotiators should take these contexts of their counterparts into careful account before advancing market-opening requests and seek to negotiate sustainable international commitments through communication and dialogue. Indeed, a certain institutional heterogeneity departing from the world polity may subsequently become a global trend itself. Some observers have been struck by the prescience of the ASEAN states because of the way in which they remodeled the ASEAN investment treaty in light of the Asian financial crisis. We are only now seeing other states belatedly inserting flexibilities for financial restrictions, such as capital controls, particularly in the E.U., as they had been overly influenced by the orthodox position prosecuted aggressively under the neoliberal mantra. Ironic as it may sound, some local deviations from world culture may become internationalized.[17]

II. Global Investment Law and the ASEAN Investment Regime

A. Conceptualizing Global Investment Law

By interpreting various aspects of international relations, such as interstate cooperation, through global norms and value and meaning structure, world polity theory provides the theoretical underpinning of GIL. World polity theory is a macro-structural theory in that it emphasizes the broad "cultural" background that shapes states' identities and actions. Furthermore, as an institutionalist theory, it shares its sociological tradition with Emile Durkheim ("collective representation")[18] and Pierre Bourdieu ("field").[19] John Meyer and the Stanford school developed this theory in an effort to understand the phenomenon of post-war globalization.[20] In particular, the theory was developed in order to understand

15 Finnemore, *supra* note 7, at 137–138.

16 *Id.* at 138.

17 *Id.* at 136.

18 Emile Durkheim, Elementary Forms of Religious Life 22 (Joseph Ward Swain trans., 1915).

19 *See* Pierre Bourdieu, *Social Space and Symbolic Power*, 7 Soc. Theory 14, 14–16 (1989).

20 *See generally* John Boli et al., *World Society, World-Polity Theory and International Relations*, *in* International Studies Encyclopedia (Robert A. Denmark ed., 2010).

normative and institutional convergence and isomorphism.[21] Meyer et al. epitomize world polity theory as follows:

> The development and impact of global sociocultural structuration greatly intensified with the creation of a central world organizational frame at the end of World War II. In place of the League of Nations, which was a limited international security organization, the United Nations system and related bodies (the International Monetary Fund, World Bank, General Agreement on Tariffs and Trade [GATT]) established expanded agendas of concern for international society, including economic development, individual rights, and medical, scientific, and educational development. This framework of global organization and legitimation greatly facilitated the creation and assembly of expansive components of an active and influential world society.[22]

At the heart of world polity theory lies the thesis of inevitability and convergence. Bjorn Wittrock argues that "modernity is a global condition that now affects all our actions, interpretations, and habits, across nations and irrespective of which civilizational roots we may have or lay claim to."[23] Likewise, Martha Finnemore observes that "Weberian rationality is marching relentlessly across the earth, leaving in its wake a marketized, bureaucratized world of increasingly similar forms."[24] Therefore, as a symbol of modernization, world culture is naturalized and thus normativized as if this process was inevitable.[25] This inevitability thesis understands economic development in terms of *cultural* isomorphism,[26] in contrast to a "world-systems theory" that focuses on stratification, such as core versus periphery, from a materialist perspective.[27]

The inevitability and convergence thesis underlying world polity theory tends to determine its investigative methodologies. For example, if an unknown society was discovered, world polity theorists would analyze its economy "with standard types of data, organizations, and policies for domestic and international

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21 Connie McNeely, *World Polity Theory*, *in* THE WILEY-BLACKWELL ENCYCLOPEDIA OF GLOBALIZATION 2316, 2316–17 (George Ritzer ed., 2012).

22 John Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144, 163 (1997) (citation omitted).

23 Bjorn Wittrock, *Modernity: One, None, or Many? European Origins and Modernity as a Global Condition*, 129 DAEDALUS 31, 59 (2000).

24 FINNEMORE, *supra* note 7, at 138.

25 Lynch, *supra* note 12, at 341.

26 McNeely, *supra* note 21, at 2319.

27 "World-systems theory" views the world as a system comprised of core and periphery states organized in accordance with global divisions of labor based on states' political and economic power. CHRISTOPHER CHASE-DUNN, GLOBAL FORMATION: STRUCTURES OF THE WORLD ECONOMY 203–06 (1989); IMMANUEL WALLERSTEIN, THE MODERN WORLD-SYSTEM III 129–30 (1974).

transactions."[28] In this sense, world polity theory shares a rationalist tradition that measures regularities in political life by a scientific or positivist methodology.[29]

Against this theoretical background, GIL can be defined as a thick set of Western-initiated BITs and investment chapters in regional trade agreements, such as NAFTA, as well as related case law. Although traceable to customary international law as originally developed in the nineteenth and the early twentieth centuries, most of its contemporary corpus juris was formulated in the late 1980s following the tide of globalization. Throughout the nineteenth and early twentieth centuries, customary international law reflected the strategic interests of major state powers. In particular, takings of private property by the state were regarded as a deviant act that could only take place in exceptional circumstances. Even when authorized, expropriation would require the payment of full compensation to the affected property owner. Fundamental liberal precepts like these came under serious challenge by the mid-twentieth century, however.

The wave of decolonialization after the end of the Second World War drastically transformed such liberal precepts through escalating practices of expropriation and nationalization of foreign assets.[30] Newly decolonized countries pursued not only political independence, but also economic sovereignty. While continuing investment from the former colonizers may have contributed to economic development of those newly independent countries, the ASEAN nations politically shunned Western investment as a lingering legacy of colonialism. Instead, these newly independent states sought to indigenize their economies by acquiring full control of the infrastructural frameworks left by the former colonizers.[31] In a time of fierce political contestation, an array of ideological influences spanning from Marxism to import substitution fueled these inward-looking investment policies.[32]

It was not until the 1980s that the winds of change began to influence those developing countries that had long adhered to inward-looking development strategies. The disappointing outcome of their preferred models stood in striking contrast with the glaring economic performance by some Asian countries that had chosen an outward-looking (often export-driven), orientation. Once the developing countries resolved, or were forced through IMF-imposed lending

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28 Meyer, *supra* note 22, at 145.

29 *See* Shu-Yun Ma, *Political Science at the Edge of Chaos? The Paradigmatic Implications of Historical Institutionalism*, 28 INT'L POL. SCI. REV. 57, 61–62 (2007).

30 THOMAS BREWER & STEPHEN YOUNG, THE MULTILATERAL INVESTMENT SYSTEM AND MULTINATIONAL ENTERPRISES 52–54 (1998).

31 For targeted examples, see LOUIS WELLS & RAFIQ AHMED, MAKING FOREIGN INVESTMENT SAFE: PROPERTY RIGHTS AND NATIONAL SOVEREIGNTY 38 (2007).

32 TREBILCOCK & HOWSE, *supra* note 1, at 486–88.

conditions, to change gears in their development models, these former colonies had to send a strong signal to capital-exporting countries and their nationals that they were now ready to welcome foreign investment with due protection. For this purpose, the pro-investor terms of BITs were an ideal choice for these capital-importing states as it enabled them to communicate their commitment to the strict economic transitions of the post-Cold War period.

Not surprisingly, the primary focus of these new investment treaties was the contentious practice of government takings of property owned by foreign actors.[33] Even if a state was acting for a public purpose—which would encompass newer goals of nationalization[34] in a non-discriminatory fashion—the treaties now dictated that a government seizing a foreign national's property had to compensate the foreign property holder at a very particular rate.[35] The post-war authorities that had begun to tentatively affirm a loose customary standard of "appropriate" compensation were now displaced in favor of the fuller requirement of "prompt, adequate and effective" compensation.[36] This guarantee of compensation was also extended beyond the paradigmatic case of direct expropriation to encompass regulatory or tax measures that might be considered indirect public takings.[37] Yet there was no attempt in early BITs to delineate the level of disruption or impact on a foreign investor sufficient to trigger the obligation to pay compensation for "indirect" expropriation. This absolute guarantee is typically matched by other broad standards of protection required of a signatory host state within early BITs. The most abstract of these is the obligation to accord foreign investors "fair and equitable treatment"[38] with no real attempt across early BIT practice to define the outer contours of this amorphous

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33 *See* BREWER & YOUNG, *supra* note 30, at 52–61.

34 Am. Int'l Grp. v. Islamic Republic of Iran, 19 December 1983, 4 Iran–U.S. C.T.R. 96, 109–10 (1983-III); Amoco Int'l. Fin. Corp. v. Islamic Republic of Iran, 14 July 1987, 15 C.T.R. 189, 233 (1987-II).

35 For example, Article III of the Model U.S. Bilateral Investment Treaty provides:

> Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization . . . except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II(3).

UNCTAD, INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM 198 (vol. 3, 1996). This type of provision is by no means limited to investment treaties concluded by the U.S. It is instead a feature of most post-war investment treaty regimes.

36 *Id.*

37 *Id.*

38 UNCTAD, INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM 209–33 (vol. 1, 1996).

standard. At best, certain formulations—especially in treaties concluded by the U.S.—eventually link its coverage to treatment at customary international law.[39]

Notably, there was no real attempt to delineate these strong treaty obligations with core regulatory objectives. On this point, there was a striking departure with the post-Second World War attempts to facilitate the reduction of barriers to trade in goods in the General Agreement on Tariffs and Trade (GATT) 1947, which sought to accommodate key public values. Domestic taxes and regulations are fully permitted under the national treatment obligation provided that they are not protectionist devices that would distort the bargain on tariff reductions among GATT member states.[40] Yet other articles within the GATT facilitated intervention by states when required to maintain domestic stability.[41] There is even a list of general exceptions that enable states to prioritize key public values, such as health protection, over their commitments to liberalize trade.[42] In the classic BIT model, there is no equivalent of the flexibility for state action inherent in GATT Article XX to balance against the strict obligations formed during this inception period.

The unique dispute settlement processes under BITs offer an especially stark insight into this project of carving out a strong zone of protection for foreign investors. These processes provide the greatest normative departure from the pre-existing customary regime. The customary rules on diplomatic protection of aliens controlled when a state could bring international action for harm to its nationals, including economic actors operating abroad. The right to exercise diplomatic protection is vested exclusively in the state of the injured national and remains a

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39 For example, Article 1105(1) of NAFTA provides: "Each Party shall accord to investments of investors of another Party *treatment in accordance with international law*, including fair and equitable treatment and full protection and security." North American Free Trade Agreement art. 1105(1), Can.–Mex.–U.S., Dec. 17 1992, 32 I.L.M 289 (emphasis added).

40 General Agreement on Tariffs and Trade art. III(1), Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, ¶¶ 14–15, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 1996); Appellate Body Report, E*uropean Communities–Measures Affecting Asbestos and Asbestos Containing Products*, ¶¶ 97–100, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

41 For an account suggesting that the American emphasis on domestic stability in the GATT negotiations was a projection of New Deal policies on domestic regulatory intervention, see Anne-Marie Burley, *Regulating the World: Multilateralism, International Law and the Projection of the New Deal Regulatory State*, *in* MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 131–33 (John Gerrard Ruggie ed., 1993). For a reflection of this thesis in the GATT treaty text consider two particular clauses. GATT Article XII authorizes the use of quantitative restrictions to safeguard domestic balance of payments when payment difficulties had resulted from policies to secure full employment. GATT Article XIX authorizes emergency action to reintroduce tariff protection where a domestic producer (and by extension its employees) is threatened with serious injury from import competition. GATT, *supra* note 40, at arts. XII, XIX.

42 GATT, *supra* note 40, at art. XX.

discretionary power that the state is under no duty or obligation to exercise.[43] Aside from the sovereign election to champion the cause of the injured national, custom required the exhaustion of local remedies as a further prerequisite to the exercise of diplomatic protection.[44] The rationale here was to ensure that "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system."[45] Both of these customary practices were eroded after a slow period of maturation of the investment treaty movement, which culminated in the new dispute settlement processes of BITs. Early generation BITs maintained the classic public international law default of state-to-state mechanisms as the sole means of resolving disputes in this field.[46] The first BIT (between Italy and Chad) to break from this mold and include a radical new form of dispute settlement—investor-state arbitration—did not enter into force until 1969.[47] Moreover, only by 1974 could a clear trend for the inclusion of investor-state arbitration in investment treaties be discerned.[48]

Under these newer structures, foreign investors as private claimants are given standing to bring action in international fora for breaches of treaty obligations by host signatory states, and there is no requirement for them to first resort to or exhaust domestic legal processes as a condition of such action.[49] This dramatic elevation of private commercial interests is finessed through the idea of arbitration "without privity."[50] State signatories to investment treaties offer their consent, in advance, to the jurisdiction of an arbitral tribunal to hear disputes between investors and host states. Jurisdiction is ultimately crystallized when a foreign investor elects to commence a claim for breach by a signatory state. This structure is a conceptually distinct and far more expansive use of arbitration that

43 As stated by the International Court of Justice (ICJ), "[t]he State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case." Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgment, 1970 I.C.J. Rep. 44, ¶ 79 (Feb. 5).

44 The exhaustion of local remedies was recognized by the ICJ as "a well-established rule of customary international law" in the Interhandel Case. Interhandel (Switzerland v. U.S.), Preliminary Objections, 1959 I.C.J. Rep. 6, ¶ 27 (Mar. 21).

45 *Id.* at ¶ 27.

46 RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 122, 122–29 (1995).

47 ANDREW NEWCOMBE & LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 45 (2009).

48 Jason Web Yackee, *Bilateral Investment Treaties, Credible Commitment and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 L. SOC. REV. 805, 815 (2008).

49 Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 233 (1995).

50 *Id.*

extends the scope of arbitration beyond its traditional role of resolving discrete disputes in negotiated contracts between commercial parties. The standing consent offered in most investment treaties is usually to a range of systems of dispute settlement at international law.[51] The most prominent of these is the World Bank-based International Centre for the Settlement of Investment Disputes (ICSID), an arbitral institution that specializes in international investment disputes. ICSID was formed in 1966, in the eye of the storm of expropriatory behavior in the developing world.[52] It offers a self-contained mechanism to settle disputes between foreign investors and their host states. If a state extends its consent to ICSID, under a treaty, its right to espouse diplomatic protection is specifically excluded.[53]

The aforementioned body of international investment law, manifested in a dense network of over 3,000 bilateral and regional investment treaties,[54] constitutes GIL. By the 1990s, GIL, empowered by the triumphant zeitgeist of neoliberalism (the "End of History"),[55] claimed its place as a global model of economic governance. Developing countries subscribed to this model in droves as they elected to attract foreign investment based on free market policies.[56] The number of newly-signed BITs, as well as the number of investment disputes, subsequently skyrocketed. While there were only 385 BITs signed from 1959 to 1989, a staggering 1,857 BITs were concluded from 1990 to 1999.[57] Indeed, as José Alvarez has observed, "[t]he 1990s . . . were the era when the modern investment regime was born."[58] Capital-exporting countries, such as the U.S. and E.U. member-states, spread their model BITs to numerous capital-importing countries, explaining the isomorphic nature of most BITs signed in that period. Moreover, some of these model BITs began to be incorporated into investment chapters of certain regional trade agreements, such as NAFTA, which adopted conventional investor-state arbitration mechanisms such as the ICSID rules. In sum, the dense network of BITs, investment chapters of regional trade

51 These include UNCITRAL rules or arbitration under the processes of the International Chamber of Commerce. DOLZER & STEVENS, *supra* note 46, at 129–30.

52 BREWER & YOUNG, *supra* note 30, at 72.

53 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 27, Oct. 14, 1966, 575 U.N.T.S. 159.

54 UNCTAD, *Recent Trends in IIAs and ISDS*, 1 IIA ISSUES NOTE 2 (2015).

55 *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

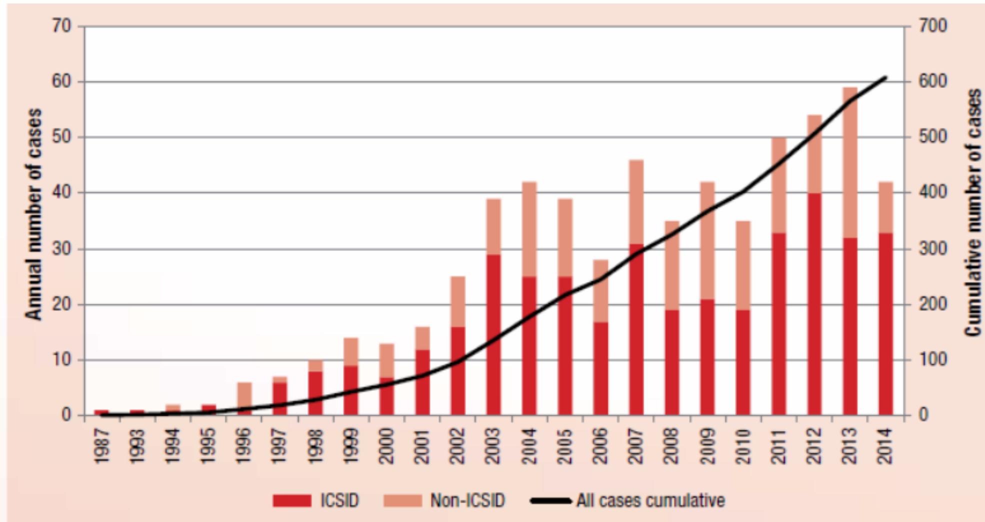
56 Kenneth Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373, 382 (1998).

57 UNCTAD, BILATERAL INVESTMENT TREATIES 1959-1999, at 1 (2000).

58 José Alvarez, *The Once and Future Foreign Investment Regime*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 617 (M. Arsanjani et al. eds., 2010).

agreements, and derivative arbitral jurisprudence from these treaties collectively form GIL.

Figure 1: Investor-State Dispute Settlement (ISDS) Cases (1987-2014)[59]



B. ASEAN's Adoption of Global Investment Law

As discussed above, GIL is an economic version of world culture that transnational actors, both state and non-state, share and advocate as a "policy script"[60] to guide and control behavior. A dense transnational network—comprised of government officials, private practitioners (who often have inherent incentives to champion strong investment protections), international organizations (the IMF and the World Bank), think tanks, and academic institutions—"translates" the neoliberal Washington Consensus on foreign investment into the operational language of legislation and enforcement.[61] These "norm entrepreneurs," often equipped with expertise and organizational apparatus, play an important role in the norm cycle of GIL as they help GIL spread and cascade so that norms are eventually internalized into the domestic

[59] *See* UNCTAD, *supra* note 54.

[60] Sarah Sunn Bush, *International Politics and the Spread of Quotas for Women in Legislatures*, 65 INT'L ORG. 103, 108 (2011).

[61] Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447, 456 (2006); John Boli & George Thomas, *INGOs and the Organization of World Culture*, *in* CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875, at 71 (John Boli & George Thomas eds., 1999).

legal systems of the ASEAN economies.[62] Indeed, ASEAN members' widespread use of BITs in the 1980s and 1990s with developed countries appear to have motivated such "norm cascade" through "a combination of pressure for conformity, desire to enhance international legitimation, and the desire of state leaders to enhance their self-esteem."[63] In particular, as "enactors" and "carriers" of world investment norms,[64] international organizations—such as the IMF, World Bank and APEC—strongly advocated trade and investment liberalization during the same period. These organizations often "lobby and harangue states to act on [global investment] principles."[65] In sum, this norm cycle, especially the process of norm cascade and internalization, may explain the isomorphism identifiable in substantive investment norms of ASEAN BITs and the subsequent AIR.[66]

While recognizing possible local deviations, world polity theorists still exhibit a firm belief on eventual convergence into the global model of economic development.[67] Under world polity theory, AIR is ASEAN's voluntary adoption of GIL through its socialization (learning and emulation) with "rationalized others,"[68] such as developed countries and international organizations, regarding world investment culture. ASEAN members are "embedded" in transnational investment networks and therefore socialized to "want" GIL.[69] World polity theory does not view such adoption as being forced by a hegemonic power, as world system theory is inclined to do. World polity theorists would argue that GIL provided ASEAN economies with a world investment model that is a highly rationalized, and thus universalized, form of economic governance, and that ASEAN members legitimate themselves in joining this world investment culture.[70] Any local, particularistic divergence from this world investment model, such as exclusion of certain sectors from investment liberalization, would in turn suffer a legitimacy deficit.[71]

In an apparent penetration of GIL into the ASEAN community, BITs signed by ASEAN members proliferated in the 1990s, with countries such as Laos (with France in 1989), Vietnam (with Italy in 1990), Cambodia (with Malaysia in

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62 Finnemore & Sikkink, *supra* note 9, at 896–98.

63 *Id.* at 895.

64 Boli & Thomas, *supra* note 61, at 34, 73.

65 *Id.* at 46.

66 Finnemore & Sikkink, *supra* note 9, at 905.

67 Meyer, *supra* note 22, at 146.

68 Boli & Thomas, *supra* note 61, at 14–17.

69 FINNEMORE, *supra* note 7, at 2.

70 Meyer, *supra* note 22, at 148.

71 *Id.*

1994), Brunei (with Germany in 1998), and Myanmar (with the Philippines in 1998).[72] Those BITs concluded by ASEAN members in the 1990s demonstrate a high degree of conformity with model BITs promoted by major capital-exporting countries (such as the U.S.). Thus, BITs concluded in the 1990s featured common core elements, such as national treatment obligations; most-favored-nation principle; broad protection of fair and equitable treatment; compensation for direct and indirect expropriation; and investor-state dispute resolution.

Yet in the heyday of ASEAN BITs (mostly concluded between ASEAN and non-ASEAN countries), ASEAN members *also* initiated the formation of a collective intra-ASEAN investment regime (AIR). The BITs that concerned extra-ASEAN investment flows played a decisive role in constructing the AIR. Consequently, much of the treaty language in the AIR can be traced to the BIT movement. The first version of the AIR, the "1987 ASEAN Agreement for Promotion and Protection of Investments,"[73] transplanted many of the major obligations for investor protection found in BITs, such as adequate compensation for direct or indirect expropriation,[74] fair and equitable treatment,[75] the right of foreign investors to repatriate their capital and earnings (regardless of impact on the financial system of the receiving state),[76] and an investor-state arbitration mechanism whose decision is binding as a matter of treaty obligation.[77]

The AIR that emerged from the 1987 Agreement subsequently evolved into the "1998 Framework Agreement on the ASEAN Investment Area."[78] With an ambitious goal of establishing "a competitive ASEAN Investment Area,"[79] the 1998 Framework Agreement shifted its strategic focus from investor protection, which was emphasized in the 1987 Agreement to the liberalization of intra-ASEAN investment flow. In the wake of the 1998 Framework Agreement, ASEAN members sought "a more *liberal* and transparent investment environment" in order to "substantially increase the flow of investments from *both*

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72 Zachary Elkins, Andrew Guzman, & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811, 820–21 (2006).

73 Agreement among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, 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].

74 *Id.* at art. VI.

75 *Id.* at arts. III(2), IV(2).

76 *Id.* at art. VII.

77 *Id.* at arts. X(2), (5).

78 Framework Agreement on the ASEAN Investment Area, Oct. 7, 1998 [hereinafter 1998 Framework Agreement].

79 *Id.* at art. 3(a).

ASEAN and non-ASEAN sources."[80] The level of ambition under the 1998 Framework Agreement was evidenced by determined commitments, such as national treatment being extended to ASEAN investors by 2010, and to all investors by 2020, and all industries being opened for investment to ASEAN investors by 2010 and to all investors by 2020.[81]

The AIR has culminated in the "2009 Comprehensive Investment Agreement" (ACIA).[82] In this latest iteration, the focus shifted from liberalization to a more expansive objective of "integration" between ASEAN states. The ACIA preamble envisions a "more integrated and interdependent future"[83] with "economic integration" to be achieved, inter alia*,* through "joint promotion of the region as an integrated investment area."[84] In the same line, with special recognition of least developed members, such as Cambodia, Laos, Myanmar, and Vietnam, development took center stage within AIR, leaving its explicit mark in a set of objectives[85] and guiding principles.[86] The level of ambition among the member states when it comes to key objectives (such as investment liberalization) has continued to escalate. Under ACIA, ASEAN members would develop a "comprehensive investment agreement" that is "comparable to international best practices."[87] The aspiration to meet "international best practices" naturally benchmarks the long-standing praxis created by the main lawmakers in the field being developed by countries, such as the U.S., and international organizations, such as the WTO.

III. The Limits of Global Investment Law's Homogenizing Effects in the ASEAN Investment Regime

A. The Limits of Global Investment Law

Despite the AIR's patterns of convergence into GIL, it appears puzzling that one can still witness a number of aberrations in the AIR vis-à-vis GIL. While some deviations are not uncommon in any local implementation of a powerful external benchmark, on close observation, those in AIR are not so much inconsequential

80 *Id.* at art. 3(a)(i) (emphasis added).

81 *Id.* at art. 4.

82 2009 ASEAN Comprehensive Investment Agreement, Feb. 26, 2009 [hereinafter ACIA].

83 *Id.* at recital 2.

84 *Id.* at art. 1(d).

85 *Id.* at art. 1 (including the strategic goal of using the investment agreement to achieve the "end goal of economic integration").

86 *Id.* at art. 2(f) (recognizing the need to grant "special and differential treatment and other flexibilities to Member States depending on their level of development").

87 *Id.* at recital 1.

anomalies as structural heterogeneities that may qualify the general thesis underpinning aspects of world polity theory. These conspicuous heterogeneities from GIL can be witnessed in both individual ASEAN BITs and the subsequent collective investment project of the AIR.

Most ASEAN BITs fully preserve the right of the signatory host state to regulate the question of admission of foreign investment. The myriad of strong BIT protections thus only apply on a post-establishment basis, after foreign investment has been admitted into the host state. At its most extreme, this structure entitles a state to exclude entire economic sectors from participation by foreign investors, which may well be necessary if those sectors had been targeted for protected cultivation as part of an infant industry strategy. Even if a state chooses to open a given economic sector to foreign competition, they are free to impose conditions upon the entry of a foreign investor. In this respect, most Asian BITs are conceptually different from a stronger liberalization model that characterizes the investment treaty practice of a number of developed countries, especially the U.S. and Canada. Those states typically require combined national treatment and most-favored-nation treatment at the pre-admission stage, thus severely restricting discretionary regulatory mechanisms that prohibit entry, or offer it only on conditions that reduce the overall value of the investment to the investor.[88]

Relatedly, many Asian BITs delineate the operation of substantive investment treaty protections (even on a post-admission basis) by reference to compliance by the foreign investor with some element of domestic law. At the outset, however, it is important to note that there is heterogeneity on this key point across the entire field of Asian investment treaty practice.[89] Thailand, for instance, tends to sit at the most conservative end of a spectrum, as evidenced by Article 3(1) of the 1978 Thailand–U.K. BIT, which provides: "The benefits of this Agreement shall apply only in cases where the investment of capital by the nationals and companies of one Contracting Party in the territory of the other Contracting Party *has been specifically approved in writing by the competent authority of the latter Contracting Party*."[90]

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88 On what the authors call a "full liberalization model," see Ignacio Gomez-Palacio & Peter Muchlinski, *Admission and Establishment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 242–43 (Peter Muchlinski et al. eds., 2008).

89 Dato' Cecil Abraham, *State Approval in South East Asian Bilateral Investment Treaties*, *in* INVESTOR-STATE ARBITRATION: LESSONS FOR ASIA 123–33 (Michael Moser ed., 2008).

90 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Thailand for the Promotion of the Investment of Capital and for the Protection of Investments, Nov. 28, 1978, at Art. 3(1) (emphasis added). For a more recent example of this strategy in Thai BIT practice, see Kingdom of Thailand and the Federal Republic of Germany, Jun. 24, 2002, at art. 2(2).

The formula under Article 3(1) requires foreign investors to prove that they have met very specific and formalized preconditions to entry, not least of which is approval in writing by the host state. Unless foreign investors can do so, their investments will not be protected under the BIT. Approval—which will often be tied to registration under domestic law—is often a technique used by states to supervise the grant of benefits to attract foreign investment in key economic sectors (including through investment incentives),[91] and to monitor specific conditions imposed on foreign investors to maximize the development benefits to the host state from foreign investment in those sectors (through employment of performance requirements such as local content conditions).[92]

This type of stringent precondition—requiring a discrete and affirmative action on the part of the host state to guarantee coverage of investment protection—is also a characteristic of Indonesian and Malaysian BIT practice. For example, Article 9 of the 1970 Belgium–Indonesia BIT provides the following:

> [t]he protections afforded to investors by the provisions of the present Agreement shall apply . . . in the territory of the Republic of Indonesia only to investments which have been approved by the Government of the Republic of Indonesia pursuant to stipulations contained in the Foreign Investment Law No. 1 of 1967 or other relevant laws and regulations of the Republic of Indonesia.[93]

Likewise, under the 1981 Malaysia–U.K. BIT: "The said term [investment] shall refer . . . in respect of investments in the territory of Malaysia, to all investments made in projects classified by the appropriate Ministry of Malaysia in accordance with its legislation and administrative practice as an 'approved project.'"[94] There have been very few disputes initiated under the individual BITs of ASEAN members where a tribunal has proceeded to examine the merits of a

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91 For an explanation by Malaysia of its rationale in using this technique, see Philippe Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award, ¶ 17.1 (Nov. 27, 2000).

92 For the use of local content conditions by Indonesia when regulating foreign investment in the automotive sector (which were ruled contrary to the WTO Agreement on Trade-Related Investment Measures), see Indonesia – Certain Measures Affecting the Automobile Industry*,* Report of the Panel, WT/DS54/R, Jul. 2, 1998. *See also* Canada: Administration of the Foreign Investment Review Act, BISD 30S/140, adopted on Feb. 17, 1984 (ruling that the Canadian practice of enforcing certain undertakings given by foreign investors in order to gain discrete regulatory approval to invest in Canada breached the obligation of national treatment in GATT Article III(4)).

93 Agreement Between the Kingdom of Belgium and the Republic of Indonesia on the Encouragement and Reciprocal Protection of Investments, art. 9, Jan. 15, 1970. For a more recent example of this strategy in Indonesian BIT practice, see Agreement Between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments, art. III(1)(a), entered into force Jul. 29, 1993.

94 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments, art. 1(b)(ii), May 21, 1981.

claim. The obvious reason for this, as we have seen, is that many of those BITs provide ASEAN states with the extensive ability to plead non-compliance with domestic law as a basis for limiting jurisdiction of the BIT.

The 1987 Agreement, which was the first version of AIR, continued this inward-looking, sovereigntist trend, despite its goal of facilitating greater investment flows within the ASEAN community. Most of all, the 1987 Agreement effectively restricted treaty protection for foreign investors by subjecting those protected investments to formal government approval with possible conditions imposed by the host government.[95] Concomitantly, this strict threshold for investor protection prevented foreign investors from seeking remedies from the investor-state arbitration mechanism under the 1987 Agreement. In *Yaung Chi Oo Trading Pte. Ltd. v. Myanmar*, the tribunal refused to hear the investor's claim on the grounds that the investor failed to prove that the investment in question had been formally approved when the 1987 Agreement took effect.[96] Other arbitral tribunals outside of the ASEAN context have criticized such formalities as they "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."[97] Indeed, the *Yaung Chi Oo* tribunal itself admitted 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."[98]

The more advanced 1998 Framework Agreement also revealed a seriously limited dimension when compared to the typical orientation in GIL, despite its expansive mandate to "substantially increase the flow of investments into ASEAN *from both ASEAN and non-ASEAN sources*."[99] In contrast to the detailed roadmap on liberalization of restrictions on flows of foreign investment (at least within ASEAN), the 1998 Framework Agreement makes no direct reference to the usual investment protection mechanisms found in most BITs, such as guarantees of fair and equitable treatment; full protection and security; and compensation in the event of direct or indirect expropriation.[100] On first view, this would seem to raise the paradoxical possibility that the ASEAN members are providing lower standards of investment protection amongst themselves compared to what is offered (via BITs) to foreign investors from non-ASEAN states. Yet on closer examination, the framers seem to have adopted a scaffolding strategy that would

95 *Id.* at art. II(1).

96 Yaung Chi Oo Trading Pte Ltd v. Myanmar, 42 I.L.M. 540, at ¶¶ 60–62 (2003).

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

98 Yaung Chi Oo, *supra* note 96, at ¶ 23.

99 1998 Framework Agreement, *supra* note 78, at art. 3 (emphasis added).

100 *Id.*

see the new liberalization guarantees (in the 1998 Framework Agreement) apply concurrently with the largely protective standards (in the 1987 ASEAN Agreement):

> Member States affirm their existing rights and obligations under the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol. In the event that this Agreement provides for better or enhanced provisions over the said Agreement and its Protocol, then such provisions of this Agreement shall prevail.[101]

There are a number of problems with this general strategy, as well as with the particular framing of this clause. The strategy is certainly an opportunity lost for the ASEAN members. Many of the unqualified standards in the 1987 ASEAN Agreement reflect the high-water mark of investment protection as articulated in BITs, and thus GIL, entered into throughout the 1980s. By the mid to late 1990s (especially within NAFTA), a number of states had begun to calibrate those standards more carefully in an attempt to better balance investment protection with core components of regulatory autonomy. Of course, the new 1998 Framework Agreement contains a range of very extensive exceptions that are designed to supply precisely such a recalibrated balance among the ASEAN members. Yet one can easily imagine a scenario whereby there is legal lacuna in how the two instruments relate to each other. For instance, the 1987 ASEAN Agreement provides for a largely unqualified obligation among member states to allow for free transfer of capital[102] and also provides for investor-state dispute resolution.[103] Yet the 1998 Framework Agreement inserts a range of exceptions that would enable an ASEAN member to impose capital restrictions. In a hypothetical dispute surrounding the imposition of capital controls, the question arises whether the ASEAN member can invoke the later exceptions to justify any *prima facie* breach of the earlier obligations. The framing of the loose conflict component in the formula above seems to suggest that the provisions of the 1998 Framework Agreement will prevail if they provide for "better or enhanced provisions."[104] Yet, this only begs the question of what evaluative criteria should be employed to identify whether the later 1998 Framework Agreement meets this standard. From a strict investor protection viewpoint, the earlier 1987 Agreement obviously provides a higher, and thus presumably "better," standard.[105] But one

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101 *Id.* at art. 12(1).

102 1987 ASEAN Agreement, *supra* note 73, at art. VII (Repatriation of Capital and Earnings).

103 *Id.* at art. X.

104 1998 Framework Agreement, *supra* note 78, at art. 3.

105 This seems to be the position taken by the Yaung Chi Oo Tribunal: "[A]rticle 12(1) [of the 1998 Framework Agreement is] not [to] be interpreted as applying *de novo* the provisions of the 1987 ASEAN Agreement, including Article X, to ASEAN Investors. It simply makes it clear that in relation to any investment which is covered by both Agreements, the investor is entitled to the

might also argue that the increased detail of the 1998 Agreement (especially on exceptions) necessarily constitutes "enhanced provisions" (and relatedly, to the extent they represent the new sovereign choice among ASEAN member states to recalibrate investment treaty exposure, also represent a "better" standard).

Moreover, the dispute settlement provisions of the 1998 Framework Agreement are marked by a further pullback from earlier investment protection standards. Specifically, the ASEAN members have confined dispute settlement to state-to-state procedures, revoking entirely the standing of foreign investors as private claimants to initiate investor-state arbitration (which continues to operate only under the 1987 ASEAN Agreement). The wisdom of this choice is questionable. The new treaty is characterized by both limited scope of operation (in that it only extends to FDI) and a broad range of flexibilities (in the form of exemptions from investment treaty strictures for compelling state purposes). With this in mind, the likely concerns of unmeritorious instigation of investor-state arbitration, as well as the possibility of expansive pro-investor readings, seem to be countered (at least partly) by these treaty innovations. The costs of omission of investor-state arbitration are very real and significant. Affected foreign investors from a given ASEAN state are now left to the mercy of the discretion of their home governments to espouse their claim in the state-to-state forum. This significant gap in legal protection is vividly illustrated by the *Yaung Chi Oo* dispute, where the Singaporean investor in Myanmar was denied protection under the 1987 ASEAN Agreement (for failure to show that Myanmar had "specifically approved" its investment for the purposes of that treaty), and, although falling within the scope of the later 1998 Framework Agreement, had no standing to commence a claim under that treaty.[106] In cases such as this—where the amount of invested capital is relatively small and the economic actor does not have political traction within the home state—the prospect of espousal under state-to-state dispute settlement process is remote at best. This weak intra-ASEAN investor protection is increasingly costly to ASEAN members and tends to necessarily impede further economic integration. In particular, considering the more liberal extra-ASEAN investment treaties, this asymmetry deters ASEAN members from fully taking advantage of synergies between intra- and extra- ASEAN investment treaties, tracking the inherent limitations of the "hub and spoke" model in regional trade agreements.[107]

benefit of both and thus of the most beneficial treatment afforded by either." Yaung Chi Oo*, supra* note 96, at ¶ 82.

106 *Id.*

107 In the regional trade agreement setting, a hub (developed country) can get free access to multiple spokes (developing countries), while spokes do not usually offer the same access between each other unless they form a "rim" among themselves. Frank Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 VA. J. INT'L. L. 539, 557–58 (1995).

Interestingly, the ACIA, as the most recent version of AIR, also exhibits asymmetry between intra-ASEAN and extra-ASEAN investment treatment, yet in a diametrically opposite fashion. Now the ambitious liberalization package would apply *only* to intra-ASEAN investment, abandoning a dual goal of facilitating both intra-ASEAN and extra-ASEAN investment flows under the 1998 Framework Agreement. Even the effective scope of intra-ASEAN investment has diminished in comparison with the 1998 Framework Agreement. While the 1998 Framework Agreement required ASEAN members to "open immediately *all* its industries for investments by ASEAN investors,"[108] ACIA only provides a positive list of liberalized areas, such as manufacturing, agriculture, fishery, forestry, mining and quarrying, and services incidental to manufacturing, agriculture, fishery, forestry, mining, and quarrying.[109]

The AIR's approach to the investor-state arbitration mechanism demonstrates a salient departure from GIL, including the NAFTA Chapter 11 and its arbitral jurisprudence. The arbitral jurisprudence—especially in cases brought against ASEAN member states—is not the only external influence that has shaped the contours of the ACIA. The expressed desire to develop an investment initiative "comparable to international best practices"[110] has also led the ASEAN negotiators to draw on a range of external treaty practices. While NAFTA Chapter 11 is an obvious comparator,[111] the ASEAN negotiators have also drawn on subsequent changes to the investment treaty practices of the U.S. and Canada made in light of their experiences as respondents to cases brought under NAFTA Chapter 11. Yet the modeling from that experience is by no means one of simple and crude transplant, as is occasionally evident in the practice of some states in the international community. The evidence shows that the negotiators have been reasonably careful in sifting through those lessons and adapting them to the specific context of the ASEAN grouping.

For instance, NAFTA Chapter 11 excludes subsidies and government procurement from the obligation to ensure non-discriminatory treatment of foreign investment vis-à-vis domestic counterparts.[112] The ACIA does the same, but goes one step further. It excludes subsidies and grants from *all* of the disciplines of the treaty.[113] This seemingly small distinction is especially significant in the ASEAN context. Under NAFTA Chapter 11, subsidies could still be subject to investor-state complaints as breaching the separate obligation of fair and

108 1998 Framework Agreement, *supra* note 78, at art. 7(1)(a) (emphasis added).

109 *Id.* at art. 3(3).

110 ACIA, *supra* note 82, at rec. 2.

111 NAFTA, *supra* note 39.

112 *Id.* at art. 1108(7).

113 ACIA, *supra* note 82, at art. 3(4)(b).

equitable treatment, and that discipline, for a select group of arbitral tribunals, has been understood to include a particular constraint against discrimination.[114] Certain forms of subsidies are, by definition, discriminatory in that they are only extended to domestic actors and if that reading of fair and equitable treatment were to be applied by a hypothetical tribunal, it would preclude their use entirely in key settings. That litigation risk, however, is foreclosed in the ASEAN context, which is particularly important given the complex economic and political issues associated with the use of subsidies. Alan Sykes, for instance, has cast doubt from an economic perspective on whether many legal systems (including but not limited to the WTO) can differentiate socially constructive subsidies from those that are economically problematic.[115]

There is also evidence of a clear feedback loop between key investor-state arbitral cases and particular negotiation choices made in the ACIA. When it comes to the obligation to accord most-favored-nation treatment, a distinct set of arbitral tribunals have ruled that that obligation can be used by a foreign claimant to import dispute settlement mechanisms from another treaty entered into by the respondent host state. In that way, claimants have been able to avoid preconditions to the commencement of investor-state arbitration in the primary treaty, such as a mandatory period of litigation in the domestic courts of the host state. In the first ruling of this jurisprudential line, the *Maffezini v. The Kingdom of Spain* Tribunal relied on a comparative methodology (drawing on different formulations within the universe of BITs) to justify its broad interpretation of the most-favored-nation obligation, pointing out that where States Parties have decided to confine the obligation to substantive rather than procedural differences, they have done so explicitly in a given clause.[116] The ACIA negotiators in turn have provided future tribunals with precisely that sort of explicit direction in footnote four, which provides that "[f]or greater certainty . . . this Article shall not apply to investor-State dispute settlement procedures that are available in other agreements to which Member States are party."[117]

The 2009 ACIA also now includes obligations of fair and equitable treatment and full protection and security which had been omitted in the 1998 Framework

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114 The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*,* ICSID Case No. ARB(AF)/98/3, Award, ¶¶ 135–36 (Jun. 26, 2003).

115 Alan O. Sykes, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, 2 J. LEGAL ANALYSIS 473, 473, 501 (2010).

116 Maffezini v. Kingdom of Spain*,* ICSID Case No. ARB/97/7, Objections to Jurisdiction, ¶¶ 51–54 (Jan. 25, 2000), 5 ICSID Rep. 396 (2002). For an analysis of the justifications used by the Tribunal to support its expansive reading, see Jürgen Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit?*, 5 J. WORLD INV. & TRADE 861, 877–79 (2004).

117 ACIA, *supra* note 82, at art. 6, note 4(a).

Agreement.[118] The fair and equitable standard has been a primary driver of state dissatisfaction with the expanding investor-state arbitral jurisprudence, as it has been applied broadly with tribunals often adopting strained interpretative methodologies. Here there is a qualitative break with the preferred strategies of key NAFTA members in responding to the growing arbitral jurisprudence on fair and equitable treatment. The U.S., for instance, has elected to constrain the zone of discretion of arbitral adjudicators by explicitly linking fair and equitable treatment obligations to the minimum standard of protection for aliens under customary international law.[119] Yet, if the goal of this treaty recalibration is not only to confine protection but also to deliver certainty in adjudication, then the wisdom of this method is questionable given the notorious difficulty of locating customary international law. For example, the requirements of opinio juris are famously difficult to pin down.[120] Instead, the ASEAN framers have elected to restrict the fair and equitable standard to the one clear dimension that is commonly accepted as part of its customary scope: the obligation not to deny justice to foreigners in legal and administrative proceedings.[121]

B. Contextualizing Global Investment Law within ASEAN

While world polity theory is useful in explaining AIR's general patterns of institutional development—especially its isomorphic relationship with GIL—world polity theory still cannot fully grasp AIR's unique historical specificity characterized by "legacies of founding moments in shaping long-term power relations" and the "prevalence of incremental reform over stasis and fundamental transformations."[122] Indeed, those general patterns, such as the expansion of investment liberalization, are often interrupted by unpredictable, and even inefficient, developments.[123]

Admittedly, even world polity theorists do not envision perfect adoption of world culture by states. They are prepared to concede particular incoherence

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118 *Id.* at art. 11(1).

119 U.S. 2004 Model BIT, arts. 5(1) and (2), *in* CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 397 (2007).

120 *See, for example*, Glamis Gold Ltd. v. United States of America, Award, at 231–353 (NAFTA Ch. 11 Arb. Trib., Jun. 8, 2009).

121 ACIA, supra note 82, at art. 11(2)(a).

122 Orfeo Fioretos, *Historical Institutionalism in International Relations*, 65 INT'L ORG. 367, 369 (2011).

123 *See generally* Sungjoon Cho & Jürgen Kurtz, *International Cooperation and Organizational Identities: The Evolution of the ASEAN Investment Regime*, 36 NW. J. INT'L L. & BUS. (forthcoming 2017); PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS AND SOCIAL ANALYSIS (2004). *See also* Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 253 (2000).

between dominant world culture and local variations ("decoupling"). Indeed, any wholesale importation of world culture into diverse local conditions appears infeasible,[124] especially as the highly idealized nature of world culture would inevitably conflict with various local contexts.[125] To that extent, they appear to acknowledge that isomorphism does not necessarily mean "equifinality."[126] Nonetheless, from a highly rationalist—or functionalist—perspective, world polity theorists tend to equate local variations with local *resistance* to world culture. They believe that states, "as a matter of identity," have already committed themselves to "such self-evident goals as socioeconomic development."[127]

AIR members certainly obtain their collective identities from GIL, as GIL constitutes those members' actions (policies) regarding international investment liberalization and regulation.[128] In a Durkheimian sense, those actions collectively "represent" GIL. At the same time, however, social actors do not mechanically follow global scripts; they may "select" from, and even "modify," them.[129] Thus, their identities are also constituted by domestic values. For instance, this is the case with the claim to particularity inherent in the vaunted "ASEAN Way."[130] As Laurence Whitehead observes, "[N]ational historical memories may filter the interpretation of transmissions from abroad."[131] Likewise, Daniel Lynch contends that "states differ dramatically on the question of whether to submit to complete reconstitution by yielding to global socialization and allowing international symbol markets to shape domestic collective identity."[132] In this setting, the level of AIR members' socialization with contemporary peers, or the titular "rationalized others," cannot but be limited. In particular, to tackle unique *local*—not global—problems, "different and shifting" solutions will be tried.[133]

Against this background, historical institutionalism can brighten analytical blind spots left by world polity theory. Historical institutionalists capture subtlety and complexity in historical development of international organizations under the

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124 John Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 340 (1977).

125 *See generally* David Strang & John Meyer, *Institutional Conditions for Diffusion*, 22 THEORY AND SOC'Y, 487 (1993).

126 FINNEMORE, *supra* note 7, at 138–39.

127 Meyer et al., *supra* note 22, at 160.

128 Boli & Thomas, *supra* note 61, at 17–18.

129 *Id.* at 18; Ann Swindler, *Culture in Action*, 51 AM. SOC. REV. 273, 281 (1986).

130 *Cf.* Lynch, *supra* note 12, at 340.

131 LAURENCE WHITEHEAD, THE INTERNATIONAL DIMENSION OF DEMOCRATIZATION: EUROPE AND THE AMERICAS 8 (1996).

132 Lynch, *supra* note 12, at 342.

133 FINNEMORE, *supra* note 7, at 139.

notion of "path dependency." According to Fioretos, path dependency is "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."[134] Likewise, Pierson and Skocpol define path dependency as a situational context in which "outcomes at a 'critical juncture' trigger feedback mechanisms that reinforce the recurrence of a particular pattern into the future."[135] The concept of path dependency is instrumental in deciphering sociocultural codes shared by ASEAN members that tenaciously affect AIR's institutional development despite a strong pro-market headwind from GIL.[136] As Roland Robertson trenchantly observes, economic internationalization does not lead to the demise of "nationally constituted society."[137]

Importantly, initial historical conditions do not determine outcomes per se; rather, they are "stochastically" related.[138] That set of initial conditions generates "its own law of inertia" that will decrease the compliance cost yet dramatically increase the cost of departure therefrom.[139] Economists often refer to this phenomenon as "increasing returns."[140] The notion of increasing returns, and therefore path dependency, tends to gain unique persuasive traction given various characteristics of political life, such as its collective, intersubjective nature, the lack of exit options, its self-reinforcing nature, and the prevalence of interpretive heuristics.[141]

Historical institutionalism may offer the following explanation regarding the tenacious legacy effects of sovereigntism even in AIR's most recent development stage (ACIA). The strong, inward-looking cultural norm, as represented by the ASEAN Way, shaped the founding moments of ASEAN. The ASEAN Way can be defined as "traditions of consultation and consensus-building and, in particular,

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134 Fioretos, *supra* note 122, at 376.

135 Paul Pierson & Theda Skocpol, *Historical Institutionalism in Contemporary Political Science*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 699 (Ira Katznelson & Helen Milner eds., 2002).

136 Robertson, *supra* note 11, at 4.

137 *Id.* at 5.

138 Jack A. Goldstone, *Initial Conditions, General Laws, Path Dependence and Explanation in Historical Sociology*, 104 AM. J. SOC. 829, 834 (1998).

139 Ma, *supra* note 29, at 64.

140 ROBERT RYCROFT & DON KASH, THE COMPLEXITY CHALLENGE: TECHNOLOGICAL INNOVATION FOR THE 21ST CENTURY 263 (1999).

141 Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 257–62 (2000); Ma, *supra* note 29, at 65.

the norm of non-interference in each other's internal affairs,"[142] or as a "meta-regime of non-interference, sovereignty, incrementalism, informality and consensual decision-making."[143] This grand principle that became the bedrock of ASEAN originated from the resolution of a fierce regional conflict between Indonesia and Malaysia over disputed territory in Borneo from 1963 to 1966, which is coined *Konfrontasi*.[144] ASEAN countries had to suspend regional confrontation among one another to collectively respond to radical communism at home and abroad and focus on economic development.[145] The ASEAN Way is often expounded as a reason for the lack of any major military conflicts since ASEAN's inception as a regional organization.[146]

Yet political non-interference can easily translate into "protectionism" in an economic sense.[147] Once such an overarching norm is firmly established, power elites (politicians and bureaucrats) and domestic interest groups (including domestic producers of main products) in ASEAN economies configured their strategic position on the basis of this inward-looking orientation. This initial position also generates increasing returns, or positive externalities, through coordination and networking for those particular groups.[148] As long as these vested interests benefit from the initial arrangement, those beneficiaries have no reason to change the status quo. Admittedly, protectionism is ubiquitous especially in periods of economic decline, yet in general is destined to be defeated by increasing market openness in most economies. Nonetheless, ASEAN's unique path dependency defined by colonial experience and intra-ASEAN power struggle placed its priority products (such as agro-based and wood-based products) in a strategically important position. Thus, ASEAN economies remain "intransigently protectionist," despite potential benefits from an integrated internal market and

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142 Jones, *supra* note 8, at 2.

143 Aggarwal & Chow, *supra* note 8, at 283.

144 *See generally* J.A.C. MACKIE, KONFRONTASI: THE INDONESIA-MALAYSIA DISPUTE 1963-1966 (1974).

145 Jones, *supra* note 8, at 12.

146 Shunmugam Jayakumar, Opening Statement, ASEAN Ministerial Meeting, Subang Jaya, Malaysia, May 24, 1997, https://perma.cc/9L9W-WKCW ("ASEAN countries' consistent adherence to this principle of non-interference is the key reason why no military conflict has broken out between any two ASEAN countries since the founding of ASEAN."). However, some scholars question the rigor of this principle and observe that it has been violated multiple times. *See* Jürgen Rüland, *ASEAN and the Asian Crisis: Theoretical Implications and Practical Consequences for Southeast Asian Regionalism*, 13 PAC. REV. 421, 439 (2009).

147 *See* Aggarwal & Chow, *supra* note 8, at 262 (arguing that "ASEAN's underlying meta-regime has frustrated attempts to liberalize trade").

148 Fioretos, *supra* note 122, at 377, 384.

economies of scale therefrom.[149] This path dependency may explain a puzzling asymmetry between intra-ASEAN trade flows and extra-ASEAN flows regarding those priority products.[150] In these two product sectors, ASEAN trade statistics demonstrate a strong extra-ASEAN export bias.[151] In other words, ASEAN members producing those products elected to target global markets instead of ASEAN markets in the face of strong protectionism at the regional level. Likewise, a certain critical juncture, such as the 1997–1998 Asian financial crisis, may have led ASEAN members to further entrench the early sovereigntist culture (such as the ASEAN Way), while other non-ASEAN countries may have embraced the same event as an opportunity for transformation.[152] Table 1 exhibits the strong extent to which ASEAN members prioritized global markets over intra-ASEAN economic opportunities.

Table 1: Total Imports, Exports, and Intra-ASEAN Exports, by Priority Sectors, 2004–2008 (WITS)[153]

	2004	**2005**	**2006**	**2007**	**2008**
			Thousand		
Intra-ASEAN exports					
Agro-based products	1,360,040	933,008	1,144,436	1,687,945	2,788,211
Automotives	3,283,824	4,191,755	4,690,222	6,416,477	7,987,317
Electronics	47,876,167	52,268,178	56,110,336	57,982,542	56,928,581
Healthcare	869,375	987,092	1,235,436	1,685,250	2,000,350
Textiles and apparel	1,932,309	1,912,064	2,122,545	2,420,349	2,431,291
Wood-based products	1,143,053	1,230,734	1,237,746	1,394,430	1,424,370
ASEAN exports to rest of world					
Agro-based products	12,103,978	12,486,983	14,057,296	19,313,273	28,435,800

149 David Martin Jones & Michael L.R. Smith, *Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order*, 32 INT'L SECURITY 148, 166 (2007).

150 *Id.*

151 Charlotte R. Lane et al., *ASEAN: Regional Trends in Economic Integration, Export Competitiveness, and Inbound Investment for Selected Industries*, USITC Inv. No. 332-511, at 27 (2010).

152 Fioretos, *supra* note 122, at 375.

153 *See* Lane, *supra* note 151, at 47, Table 2.4 (citing WITS, Integrated Data Warehouse (accessed March 29, 2010)).

Automotives	11,893,715	15,714,044	18,579,336	25,174,340	27,124,044
Electronics	215,482,996	239,608,257	265,615,439	266,126,413	267,278,788
Healthcare	3,506,738	5,692,372	8,071,235	10,049,727	10,167,219
Textiles and apparel	28,252,081	29,279,163	33,140,705	36,301,953	38,527,881
Wood-based products	14,874,195	16,074,553	17,000,980	18,327,184	17,661,561
ASEAN imports from rest of world					
Agro-based products	2,858,852	3,280,498	3,798,554	5,090,003	6,695,704
Automotives	20,993,758	22,482,370	21,549,767	26,486,024	33,332,207
Electronics	112,712,493	115,987,928	135,143,296	140,732,507	146,680,531
Healthcare	5,299,171	6,456,913	7,290,542	8,359,650	9,339,715
Textiles and apparel	13,597,104	14,690,394	16,692,532	21,385,662	22,541,775
Wood-based products	865,724	989,336	1,255,923	1,615,914	1,543,718

Furthermore, AIR's institutional transformations appear more sporadic than linear, as world polity or rational choice theorists may envision. Such non-linearity in institutional evolution may be accounted for by a phenomenon coined "institutional layering."[154] The framers of ASEAN and AIR, as sovereigntists, were largely reluctant to transfer their regulatory power over investment to AIR. Instead, they preferred adding new regulatory layers to existing institutional arrangements (treaties). Thus, one can witness incremental institutional arrangements in regulating foreign investment, rather than a full-blown liberalization through ceding regulatory power to AIR.

ASEAN's sovereigntist path has led AIR to deviate from "historical efficiency"[155] (full-blown investment liberalization) that might have resulted from GIL as part of world culture. Given that divergence from world investment culture, AIR can be said to demonstrate "decentering" that protects core local values from GIL's homogenizing power.[156] In the same vein, the closer, and therefore the more directly, GIL affects core local *culture*, such as sovereignty, the

154 Fioretos, *supra* note 122, at 389.

155 Regarding "historical efficiency," see James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734, 737 (1984).

156 Lynch, *supra* note 12, at 340.

more likely GIL engenders resistance from the receiving entity (AIR).[157] Perhaps, the very content of GIL is incoherent and contingent, considering fierce competition among powerful actors who desire to advance their own standards as GIL.[158] The "dialectical and internally contradictory character"[159] of GIL may provide AIR members with ample justifications for their occasional departure from the core values of GIL.

IV. CONCLUSION

This Article has probed the unique ontogenetical path of AIR from two opposing perspectives. From the first perspective—reflecting world polity theory—AIR has demonstrably emulated GIL ever since ASEAN members fully subscribed to neoliberal reform, such as investment liberalization, in the 1980s. Saddled with the overpowering trends of globalization, ASEAN members made an ambitious paradigm shift toward free and open investment in their development strategy. From the second perspective, however, a number of non-trivial exemptions from GIL that AIR saliently exhibits raise into question any unreserved transplant of this world investment culture. Here, ASEAN members' socio-cultural background, epitomized by the ASEAN Way, tends to expound these selective divergences. Historical institutionalism frames this second perspective and illustrates ASEAN nations' distinct path-dependency under AIR.

To overcome a seemingly irreconcilable tension between GIL's prescription of pro-market economic governance and AIR's apparent departure therefrom, one should embrace the fact that the "globality" itself *transcends* the global economy, although the former may still include the latter.[160] Applied to the specific context of ASEAN, rather than viewing AIR as a mere outlier from a conventional normative model, scholars of international law and politics should acknowledge the necessity of defining a new form of GIL that is more inclusive and flexible than the conventional paradigm. Reimagining GIL in this edifying manner holds open the promise of offering policymakers and negotiators innovative conceptual tools with which to reconstruct a more effective and legitimate set of international norms for investment liberalization and protection.

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157 Halliday & Osinsky, *supra* note 61, at 447. *See also* Robertson, *supra* note 10, at 51.

158 Halliday & Osinsky, *supra* note 61, at 466.

159 Boli & Thomas, *supra* note 61, at 18.

160 Robertson, *supra* note 10, at 27.