7-2009

A missing part in international investment law: The effectiveness of investment protection of Taiwan's BITs vis-à-vis ASEAN states

Han-wei LIU
Singapore Management University, hanweiliu@smu.edu.sg

A MISSING PART IN INTERNATIONAL INVESTMENT LAW: THE EFFECTIVENESS OF INVESTMENT PROTECTION OF TAIWAN'S BITS VIS-À-VIS ASEAN STATES

Han-Wei Liu∗

ABSTRACT

Taiwan, classified as an "unrecognized state" or an "entity sui generis" by most international law scholars, has been excluded from most major international organizations and agreements for decades. This diplomatic isolation has had a negative influence on the protection of Taiwan's overseas investments. This Article explores the six bilateral investment treaties ("BITs") that the Taiwanese government has reached with the Association of Southeast Asian Nations ("ASEAN") States and compares the weaknesses of the Taiwanese agreements with the investment frameworks established within ASEAN States. This Article concludes that Taiwan's BITs with six ASEAN Member States fail to serve the very aim of a BIT.

First, investment treaties are entered into on the assumption that they will provide security for investors through the recognition of standards of treatment, compensation for expropriation, and repatriation of profits. While this assumption has been challenged, BITs nevertheless present a solution in tackling the "obsolescing bargain" problem and preventing ex-post opportunism of host states. By contrast, the BITs that Taiwan has reached with ASEAN States could hardly serve this end.

A lack of disciplining power is central to these six BITs' ineffectiveness. Additionally, among other issues, lack of sovereignty seriously weakens the effectiveness of the BITs. Despite the fact that these six BITs are concluded through semi-official organs of each state's governing bodies, they are nonetheless treaties and are binding upon the Taiwanese government and its

∗ Associate, Baker & McKenzie (Taipei); Magister Juris (M. Jur.), Oxford University (2008); LL.M., Columbia Law School (2009); Staff Editor, *Columbia Journal of European Law*. I am most grateful to Professor Pieter Bekker at Columbia Law School for his valuable comments on the earlier draft of this Article. Also, I would like to thank Professors Shin-Pyng Chang (Natioanl Chengchi University), Shin-Yi Peng (National Tsing-Hwa University), Petros C. Mavroidis (Columbia Law School) and Jagdish Bhagwati (Columbia Law School) and Professors Vaughan Lowe (Oxford University Faculty of Law) and Dan Sarooshi (Oxford University Faculty of Law) for inspiring me in international economic law and international dispute settlement, respectively. All errors are my own.

ASEAN counterparts. Yet in theory, these BITs fall within the ambit of public international law and are interpreted in accordance with principles of international law. Without UN membership and legal standing before the ICJ, Taiwan can hardly place checks on its ASEAN partners. Further, without a definite timeframe or specified procedures through which Contracting Parties may appoint arbitrators, interstate dispute settlement clauses under these BITs are not powerful enough to reduce the host state's opportunistic behavior in the post-investment stage. Investor-state dispute settlement provisions, on the other hand, may arguably render the "obsolescing bargain" problem even more severe in that the terms and conditions of arbitration proceedings are subject to post hoc negotiations of the parties to the dispute.

Taiwan's sovereignty issues cannot soon be solved due to its political reality. Those defects as to dispute settlement provisions – both interstate and investor-state as described above – call for a more in-depth consideration. At the very least, there should be a definite timeframe for a "cooling off" period and a clear default rule whereby the parties to a dispute may proceed to form the arbitral tribunal.

Notwithstanding these defects, Taiwanese investors may make use of the current investment framework of ASEAN. The flexible definition of an "ASEAN investor," together with the national treatment and Most Favored Nation ("MFN") provisions, in particular, may adjust Taiwanese investors' disadvantaged position vis-à-vis the investors from any third state which concluded an enhanced BIT with ASEAN States. Such a strategy, however, is better regarded as an expediency. To prevent the potential hollowing-out of Taiwan's industries and disinvestment of foreign investors, the Taiwanese government should consider renegotiating its BITs directly.

INTRODUCTION

Taiwan's unique history has resulted in its classification as an "unrecognized state" or an "entity *sui generis*" by most scholars of public international law. Because of its unique status, Taiwan has experienced difficulty building official relationships with other countries. Taiwan has thus been excluded from most of the major international organizations and agreements for decades.[1]

The resulting diplomatic isolation has had a negative influence on Taiwan's overseas investment in at least two respects. First, the number of bilateral investment treaties ("BITs") that the Taiwanese government has entered into is disproportionate to its economic power. Based on data from the United Nations Conference on Trade and Development ("UNCTAD"), as of 2007, the outward foreign direct investment ("FDI") of Taiwan ranked 31st out of 218 states and 6th in Asia.[2] Despite such large investment potential, the Taiwanese government has thus far entered into only twenty-seven bilateral investment treaties and four free trade agreements ("FTAs") containing investment protection.[3] The disproportionate number of BITs

---

[1] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 64-65 (6th ed. 2003); LORI F. DAMROSCH, ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 287-90 (4th ed. 2001); VAUGHAN LOWE, INTERNATIONAL LAW 165 (2007). For detailed consideration of Taiwan's legal status under international law, see JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 196-221 (2006).

[2] *See* UNITED NATION COMMISSION TRADE AND DEVELOPMENT: COUNTRY FACT SHEET – TAIWAN (2008), http://www.unctad.org/sections/dite_dir/docs/wir08_fs_tw_en.pdf. The other top five East Asia capital-exporting States include: Japan, South Korea, Singapore, Hong Kong and China.

[3] These twenty-seven BITs partners include: United States, Indonesia, Singapore, Malaysia, the Philippines, India, Vietnam, Thailand, Panama, Costa Rica, Paraguay, Nicaragua, Argentina, El Salvador, Belize, Guatemala, Nigeria, Malawi, Senegal, Swaziland, Burkina Faso, Liberia, Marshall Islands, Dominican Republic, Saudi Arabia, and Macedonia.

conceivably weakens the investment protection of Taiwanese investors abroad. Second, absent UN membership, Taiwan is not eligible to make use of the International Centre for Settlement of Investment Disputes ("ICSID"). Without ICSID eligibility, many of these BITs, therefore instead refer to the International Chamber of Commerce Arbitration Rules ("ICC Rules") or[4] The United Nations Commission on International Trade Law Arbitration Rules ("UNCITRAL Rules"),[5] while others do not even refer to specific arbitration rules.[6] The question whether and to what extent these existing arrangements could afford the Taiwanese investors meaningful protection remains uncertain.

In addition to its diplomatic isolation, Taiwan's isolation from the economic associations of this region – among others, the Association of Southeast Asian Nations ("ASEAN") Plus Three (China, Japan and South Korea) – could conceivably result in trade diversion and undermine Taiwan's economy as Taiwan is a major exporter in East Asia.[7] The preferred tariffs amongst the ASEAN Plus Three could likely drive Taiwanese investors to increase their investment within this region.[8] As such, the effectiveness of the existing BITs between Taiwan and its East Asia partners in terms of investor protection is of particular importance, and therefore deserves additional consideration.

This Article examines the ramifications of Taiwan's unique international status on its overseas investments and deconstructs the legal instruments that disadvantage Taiwan internationally. Part I briefly outlines Taiwan's status in international law in order to understand the reason why Taiwan's BITs never refer to the ICSID. Part II illustrates the inflow and outflow of Taiwan's investment in ASEAN States in order to highlight the

---

See Taiwan Ministry of Economic Affairs Website, http://www.dois.moea.gov.tw/asp/relation1_1_2.asp (last visited Mar. 15, 2010). The four FTAs include: El Salvador, Nicaragua, Panama as well as Guatemala. There are, therefore, only twenty-seven partners concluding investment protection agreements with Taiwan.

[4] *See, e.g.*, Agreement on Promotion and Protection of Investment, Taiwan-Arg., art. X, Nov. 30, 1993.

[5] *See, e.g.*, Agreement on the Promotion and Protection of Investment, Taiwan-India, art. 8(3), Oct. 17, 2002.

[6] *See infra* Part II.B.3.

[7] *See, e.g.*, Y.F. Low, *Taiwan Would Benefit from Cross-Strait Common Market: Ex-Premier*, CENTRAL NEWS AGENCY (Taiwan), May 24, 2005, at 1 ("The formation of a free trade zone between China and [ASEAN] will decrease Taiwan's GDP by 0.025 per cent, lower Taiwan's exports by 0.21 per cent and reduce imports by 0.64 per cent.").

[8] *See* Ke-shaw Lian, *Framework Doesn't Help Taiwan Face ASEAN Deal*, TAIPEI TIMES, Mar. 24, 2009, *available at* http://www.taipeitimes.com/News/editorials/archives/2009/03/24/2003439259 ("When ASEAN Plus Three takes effect, Taiwan's exports will face higher tariffs, possibly leading companies to relocate their factories to places that impose lower tariffs.").

importance of investor protection in this area. Part II also explores the status quo of Taiwan's current BITs with ASEAN States, outlining key features under these BITs. Part III examines the effectiveness of the current BITs concluded between Taiwan and ASEAN Member States, focusing primarily on the following two aspects: First, it explores the extent to which Taiwan's BITs are binding upon its trading partners in light of Taiwan's special status under international law. Second, Part III explores the major legal instruments governing investor protection in ASEAN in an attempt to flag the possible disadvantages of Taiwan's BITs.

I. HISTORICAL BACKGROUND ON TAIWAN'S LEGAL STATUS IN INTERNATIONAL LAW

In the mid-17th century, Chinese General Zheng Chenggong (Koxinga) defeated Dutch colonists in Taiwan (then Formosa), granting the Chinese state control of Taiwan and formally establishing a Chinese administration on the island.[9] In 1683, the Ching Dynasty took over Taiwan from Zheng's grandson and officially made Taiwan a province of the Chinese Empire in 1885.[10] In 1895, after the first Sino-Japanese War (spanning between 1894 and 1895), Taiwan was ceded to Japan by the Treaty of Shimonoseki.[11] During the1943 Cairo Conference between the WWII Allied Powers,[12] President Chang Kai-Shek of the Republic of China ("ROC"), U.S. President Roosevelt, and British Prime Minister Winston Churchill issued a joint communiqué, namely, the Cairo Declaration, mandating that Taiwan shall "be returned to the Republic of China."[13] The "Republic of China" referred to by the Allied Powers was the government led by the Nationalist Party ("Koumingtan" or "KMT"), which overturned the Ching Dynasty in

---

[9] Hungdah Chiu, *The International Legal Status of Taiwan*, *in* THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER 3 (Jean-Marie Henckaerts ed., 1997) [hereafter HENCKAERTS].

[10] *Id.*

[11] Treaty of Shimonoseki, China-Japan, 181 Consol. T.S. 217, art. 2, May 8, 1895 ("China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon: . . . The island of Formosa, together with all islands appertaining or belonging to the said island of Formosa . . . .").

[12] U.S. Dep't of State, Diplomacy in Action, *available at* http://www.state.gov/r/pa/ho/time/wwii/107184.htm ("In November and December of 1943, U.S. President Franklin D. Roosevelt met with Chinese President Chiang Kai-shek and British Prime Minister Winston Churchill in Cairo, Egypt, to discuss the progress of the war against Japan and the future of Asia. In addition to discussions about logistics, they issued a press release that cemented China's status as one of the four allied Great Powers and agreed that territories taken from China by Japan, including Manchuria, Taiwan, and the Pescadores, would be returned to the control of the Republic of China after the conflict ended.").

[13] Chiu, *supra* note 9, at 3.

1912. After the Chinese Civil War, the ROC Government fled to Taiwan in 1949. Since then, China has had two regimes: the People's Republic of China ("PRC") on Mainland China and the ROC on Taiwan. Both governments claimed to be the only legitimate government representing the whole of China.[14]

Nearly two decades after its retreat, the Taiwanese ROC Government continued to retain its UN membership and was deemed the only legitimate government representing China. In 1971, with the support of allied developing countries, the UN General Assembly passed a resolution ousting the ROC and giving China's seat to the PRC.[15] Subsequently, the ROC was expelled from most UN-affiliated organizations in less than one year. With the deprivation of the ROC's UN membership and de-recognition by most nations, the legal status of the ROC on Taiwan became a complicated puzzle that has persisted as a subject of debate amongst international law scholars.

Some commentators argue that Taiwan's lack of diplomatic recognition does not affect its status as a state since, in practice, "courts in foreign states explicitly and implicitly recognize that Taiwan meets the 'state' requirements for particular legal purposes" and hold that Taiwan is not part of the PRC but rather of the ROC.[16] The prevailing view among public international law scholars on this score, however, points to the opposite conclusion. Professor James Crawford finds that "Taiwan is not a state because it still has not unequivocally asserted its separation from China and is not recognized as a state distinct from China."[17] In the same vein, Professor Vaughan Lowe seems to support Professor Crawford's argument implicitly by pointing to the fact that "Taiwan is the classic example [of] . . . entities that objectively appear to meet all the criteria of statehood, but which seem not to wish to be a state."[18] Professor Malcolm Shaw suggests, "Taiwan would appear to be a non-state territory entity which is *de jure* part of China under separate administration."[19] Professor Hans Kuijper expressly suggests that the ROC Government does not comply with the essential requirements of statehood on the grounds that the ROC has only effective control over part of its territory and has discontinued its attempt to re-conquer the mainland from the Communist Party.[20] While he states that the name "Republic of China" is based on a fiction, he also argues, "The government in Taipei should, therefore, under international law, be regarded

---

[14] Pasha L. Hsieh, *An Unrecognized State*, 28 MICH. J. INT'L L. 765, 769 (2008).

[15] G.A. Res. 2758 (XXVI), ¶ 2, U.N Doc. A/8429 (Oct. 25, 1971).

[16] Hsieh, *supra* note 14, at 772-73.

[17] CRAWFORD, *supra* note 1, at 219.

[18] LOWE, *supra* note 1, at 165.

[19] MALCOLM SHAW, INTERNATIONAL LAW 211 (5th ed. 2003).

[20] Hans Kuijper, *Is Taiwan a Part of China? in* HENCKAERTS, *supra* note 9, at 15.

and recognized as the government of the sovereign state [of] Formosa, the 'Republic of Taiwan.'"[21]

Notwithstanding the above, as Professor Lowe correctly observes, "Taiwan has dealings with foreign states and international organizations very much like those of an independent state, and is represented abroad by non-diplomatic missions."[22] In light of the sovereignty issue, however, Taiwan can rarely use its official name, the Republic of China, abroad. Instead, the Taiwanese government relies heavily on a pragmatic approach to develop substantial and informal relationships with foreign states.[23] The exchanges of ambassadors and establishment of permanent political relations would imply the will of a state to grant Taiwan "recognition."[24] In order to appease possible protests from the Mainland, many states, therefore, have downplayed the political implications behind these agreements or acts.[25] Many states employ institutions under various names handling consular work in Taiwan, and those ambassadors sent to Taiwan are often proclaimed to be "on leave."[26] For example, the United States' CIA World Factbook places Taiwan out of order in its otherwise alphabetical list of states, and yet records that "unofficial commercial and cultural relations with the people on Taiwan are maintained through an unofficial instrumentality – the American Institute in Taiwan ("AIT") – which has offices in the US and Taiwan."[27] As the result of such informal arrangements, with the exception of Taiwan's remaining allied states, most of the BITs that Taiwan has concluded so far were therefore made by virtue of unofficial diplomacy.

---

[21] *Id.* Though under the title of Republic of Taiwan may be the solution to its diplomatic isolation, Taiwan has been reluctant to do so for fear of military attack from China. On this score, Professor Crawford correctly observes that "[t]he reason why Taiwan has not more clearly stated its position is concern, on its own part and that of its allies, at the likely consequences of doing so (i.e. military attack from the mainland)." CRAWFORD, *supra* note 1, at 219, n.78.

[22] LOWE, *supra* note 1, at 165.

[23] Linjun Wu, *Limitations and Prospects of Taiwan's Informal Diplomacy*, *in* HENCKAERTS, *supra* note 9, at 37. Amongst others, Taiwan's accession into the WTO has been regarded as a major breakthrough in diplomacy for the past few decades. Taiwan's acquisition of WTO Membership is based upon Article XXXIII of the General Agreement Tariffs and Trade (GATT) and Article XII:1 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). Under these two provisions, insofar as the "separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matter," it is eligible for application to the WTO membership. Statehood is, thus, not a pre-requisite. *See* Steve Charnovitz, *Taiwan's WTO Membership and its International Implications*, 1 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 401, 404-05 (2006).

[24] Wu, *supra* note 23, at 39.

[25] *Id*.

[26] *Id*.

[27] LOWE, *supra* note 1, at 165.

II. TAIWAN'S FOREIGN INVESTMENT AND BITS WITHIN ASEAN

A. Overview of Taiwan's FDI within ASEAN

According to the data of UNCTAD (Table 1), the top ten sources of ASEAN FDI inflows are: the European Union ("EU-25"), Japan, ASEAN, the United States, most Central and South American countries, excluding Argentina, Brazil, Mexico and Panama, Hong Kong, South Korea, the Cayman Islands, Taiwan and China. As such, Taiwan's FDI in this region occupies the ninth place among ASEAN's major investing partners. As for the respective ASEAN members, the FDI inflow contributed by the Taiwanese investors ranks third in Thailand, Malaysia, Vietnam, and Cambodia, and takes the seventh place in the Philippines and Indonesia, respectively, as revealed in the statistics provided by the Department of Investment Services of the Ministry of Economic Affairs of Taiwan (Table 2). Yet, the question of whether the volume of Taiwanese investment and Taiwan's six BITs with ASEAN members are positively correlated is far from clear and calls for elaborate empirical studies. Taiwanese investors' large investments as shown in these data present the clearest evidence of the importance of the BITs for Taiwan and its ASEAN partners.

Table 1: Top Ten Sources of ASEAN FDI Inflow (13 August 2007)[28]

Country	Value				Share to total inflow			
	2004	**2005**	**2006**	2002-2006	**2004**	**2005**	**2006**	2002-2006
European Union (EU)-25	10,046.1	11,139.6	13,361.9	44,955.6	28.6	27.1	25.5	26.3
Japan	5,732.1	7,234.8	10,803.3	30,813.7	16.3	17.6	20.6	18.0
ASEAN	2,803.7	3,765.1	6,242.1	19,377.7	8.0	9.2	11.9	11.3
USA	5,232.4	3,010.6	3,864.9	13,736.1	14.9	7.3	7.4	8.0
Other Central & South America	(60.5)	919.4	1,035.1	3,958.3	(0.2)	2.2	2.0	2.3
Hong Kong	529.6	773.0	1,353.4	3,430.7	1.5	1.9	2.6	2.0
Republic of Korea	806.4	577.7	1,099.1	3,347.3	2.3	1.4	2.1	2.0
Cayman Island	2,029.1	(19.9)	476.4	3,003.7	5.8	(0.0)	0.9	1.8
Taiwan, Province of Taiwan	366.8	(66.8)	668.1	2,417.4	1.0	(0.2)	1.3	1.4
China	731.5	502.1	936.9	2,302.9	2.1	1.2	1.8	1.3

[28] ASEAN Foreign Direct Investment Statistics, http://www.aseansec.org/Stat/Table26.pdf (last visited Mar. 15, 2010).

Total top ten sources	28,217.1	27,835.4	39,841.2	127,343.3	80.4	67.8	76.1	74.5
Others	6,900.1	13,232.4	12,538.3	43,478.5	19.6	32.2	23.9	25.5
Total	35,117.2	41,067.8	52,379.5	170,821.9	100.0	100.0	100.0	100.0

Table 2: The Breakdown of Taiwan's FDI in ASEAN States (Value in US Millions)[29]

Country/Year	Thailand	Malaysia	Philippines	Indonesia	Singapore	Vietnam	Cambodia
1059-89	2097.25	1257.05	349.41	1384.58	22.72	4.69	0
1990	782.70	2347.83	140.70	618.30	47.60	135.80	0
1991	583.50	1326.17	12.00	1057.80	12.50	274.19	0
1992	289.90	574.70	9.10	563.30	95.11	665.80	0
1993	215.40	331.18	5.40	358.90	69.47	757.66	0
1994	477.50	1122.76	199.15	2484.03	171.19	575.48	15.87
1995	1803.90	567.80	13.60	567.40	31.65	963.34	63.04
1996	2785.20	310.40	117.11	534.60	165.00	478.62	53.41
1997	414.30	480.40	80.56	3419.40	144.01	470.23	44.04
1998	253.60	263.40	30.48	165.20	158.18	344.62	38.39
1999	211.10	70.26	19.15	1486.10	324.52	358.13	55.39
2000	437.41	241.07	5.42	134.54	219.53	493.06	95.35
2001	158.69	296.58	11.99	83.85	378.30	1004.92	56.97
2002	62.93	66.29	236.35	83.18	25.76	561.82	6.82
2003	338.83	163.69	47.11	117.54	26.40	590.67	1.00

[29] Department of Investment Services of Ministry of Economic Affairs, Key Statistics, http://twbusiness.nat.gov.tw/pdf/inv_3.pdf.

Country/Year	Thailand	Malaysia	Philippines	Indonesia	Singapore	Vietnam	Cambodia
2004	268.53	109.09	29.52	68.86	751.78	562.53	4.60
2005	417.66	113.64	25.30	133.39	97.68	570.59	4.19
2006	284.30	110.48	38.05	218.62	806.30	241.61	16.44
2007	247.75	118.79	444.86	51.40	1194.11	1786.91	13.99
2008 (1-6)	80.90	241.60	15.53	141.40	640.75	8483.16	6.50
Rank In each country	3	3	7	7	N/A	3	3

B. Taiwan's BITs with ASEAN States: An Overview

Thus far, Taiwan has concluded only twenty-seven BITs and four FTAs containing investment protections, six of which are between Taiwan and ASEAN States, namely Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam. Though there are some variations, all six BITs have several key features in common.

1. Official Agreements Under Unofficial/Semi-Official Mask

In contrast to the conventional BITs concluded between sovereign states directly, BITs between Taiwan and the six-abovementioned ASEAN States were made "semi-officially." Four of these BITs, specifically Taiwan-Malaysia, Taiwan-Philippines, Taiwan-Thailand and Taiwan-Vietnam – were created under the Taipei Economic and Cultural Office ("TECO") and its comparable institutions in its ASEAN partners. The BIT between Taiwan and Vietnam, for example, was signed by the Taipei Economic and Cultural Office in Hanoi and the Vietnam Economic and Cultural Office in Taipei. The contracting parties to the Taiwan-Indonesia and Taiwan-Singapore BITs, on the other hand, are slightly different. The former was concluded between the Taipei Economic and Trade Office and the Indonesia Chamber of Commerce to Taipei, whereas the latter was entered into between the Industrial Development & Investment Center in Taipei and the Economic Development Board in Singapore. Despite the variance in contracting parties, the Taiwanese government and its partners entered into all of the six BITs indirectly. It is worth noting that despite the special nature of most Taiwanese BITs, the Taiwan-Malaysia BIT's validity

was contingent on the approval of the relevant authorities.[30] Whether these agreements are really BITs and, if so, to what extent the Taiwanese government and its counterparties could be bound, is far from clear.

2. Typical Provisions

Typical provisions of BITs include the preamble and sections on definitions, the applicability of the agreement, the promotion and protection of investment, non-discrimination, exceptions, expropriation, compensation, repatriation, subrogation, dispute resolution as well as entry into force, duration and termination clauses.

The "umbrella clause," one of the widely used concepts in investment treaties, is not found in any of the six BITs. Umbrella clauses guarantee that host states will observe all obligations and commitments they make. This extends as far as the understanding that a breach of investment agreement or contract is upgraded to a breach of the BIT duty.[31] The reason that none of the six Taiwan BITs contain umbrella clauses is twofold. First, these BITs were made via unofficial or semi-official entities because of Taiwan's lack of UN membership. Second, and relatedly, Taiwan is not eligible to make use of the International Court of Justice ("ICJ"), and thus an umbrella provision would be unenforceable.

Another typical provision conventionally employed in international investment treaties, the "Calvo Clause," is also missing in these six BITs. Under traditional international law, investors have no direct access to international remedies to make claims against host states.[32] Those investors who fail to find a remedy in the host state's domestic courts can turn to their home states and ask them to litigate the claims on their behalf by virtue of international law – that is, to exercise the right of diplomatic protection.[33] To prevent interference from foreign states, the Argentine diplomat Carlos Calvo formulated the "Calvo Clause," which provides that foreign states and foreign nationals should settle claims under the jurisdiction of the domestic courts of host states, and excludes the foreign national's recourse to diplomatic protection from the foreign national's home state. The Draft Articles on Diplomatic Protection of the UN states that "[t]he state entitled

---

[30] Agreement for Promotion and Protection of Investment, Taiwan-Malay., art. 10, Feb. 18, 1993 (stipulating that "[t]his Agreement shall enter into force upon the exchange of letters between the parties informing each other of the approval of this Agreement by their respective authorities.") [hereafter Taiwan-Malay. BIT].

[31] CAMPBELL MCLACHLAN QC, ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 92-93 (2008); *see also* DOLZER & SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 153 (2008).

[32] DOLZER & SCHREUER, *supra* note 31, at 211.

[33] LOWE, *supra* note 1, at 198.

to exercise diplomatic protection is the state of nationality."[34] In light of its "unrecognized state" status and the resulting lack of legal standing (*locus standi*) in the ICJ, the Taiwanese government can hardly afford diplomatic protection for its nationals. Hence, the "Calvo Clause" is not employed by any of the six BITs.

Lastly, many BITs contain "fork in the road" clauses, which state that once a choice of a particular dispute settlement procedure has been made, the possibility of selecting any other dispute resolution avenues potentially available is foreclosed.[35] For unknown reasons, however, such provisions are missing in Taiwan's BITs as well.

3. Un-Specified Arbitration Rules

In general, most BITs do not contain specific provisions that either indicate the precise nature of disputes between investors and states amenable to arbitration or prescribe a priority between alternatives of dispute settlement.[36] The typical dispute settlement clause that BITs employ widely, described as a "cafeteria style" clause, usually provides investors with a range of dispute settlement fora from which to choose, including the courts of the host state and a number of arbitral tribunals.[37]

For unknown reasons, only the Taiwan-Vietnam BIT specifies the arbitration forum in advance (as shown in Table 3). In cases where investment disputes arise, the post hoc agreement of the parties to the dispute would determine the arbitral tribunal and arbitration rules. In contrast to the outcomes of disputes under typical BITs with dispute settlement clauses, therefore, the outcome of disputes is less predictable

---

[34] U.N. International Law Commission, Draft Articles on Diplomatic Protection, art. 3.1 (2006).

[35] MCLACHLAN, *supra* note 31, at 54-55.

[36] *Id.* at 46.

[37] *Id.* at 47. For example, Article 8.2 of the UK Model BIT provides that:

> [W]here the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to: (a) the International Centre for the Dispute Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or (b) the Court of Arbitration of the International Chamber of Commerce; or (c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a specific agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

under Taiwan treaties.

Table 3: Dispute Settlement Provisions in Six BITs between Taiwan and ASEAN States

BITs with Taiwan	Dispute Settlement Provisions
Thailand	Article 10: "Any dispute between the relevant authorities of one Contracting Party and the investor of the party in connection with the investment, shall, as far as possible, be settled amicably through negotiation between the parties to the dispute. If the dispute cannot thus be settled within six months from the negotiations, it shall, at the request of either party to the dispute, be submitted for settlement to an ad hoc arbitral tribunal, if so agreed by both parties to the dispute."
Malaysia	Article 7: "Any dispute (1) between an investor and the respective authorities of the relevant places in connection with its investments; (2) between the parties hereto concerning the interpretation or application of this Agreement; shall, as far as possible, be settled amicably through negotiation between the parties to the dispute, and failing which, shall be referred to arbitration on such terms and conditions as the parties may agree."
Philippines	Article X: "In case of dispute between the investor and the authority in the place of investment, the parties herein shall seek, as far as possible, an amicable settlement of the dispute through negotiations between the parties thereto, and failing which, its referral to arbitration on such terms and conditions as the disputing parties may agree."
Indonesia	Article X: "Any dispute between the investor and authority of one of the parties shall, as far as possible, be settled amicably through negotiations between the parties to the dispute, and failing which shall be referred to arbitration on such terms and conditions as the disputing parties may agree."
Singapore	Article X: "Any dispute: (a) between a resident or company and the IDIC or EDB in connection with an investment approved under Article 2; or (b) between the Contracting Parties concerning the interpretation or application of this Agreement; shall as far as possible, be settled amicably through negotiations between the parties to the dispute, and failing which shall be referred to arbitration on such terms and conditions as the parties may agree."
Vietnam	Article 8(1): "Any dispute or difference between either Contracting Party and investors of other Contracting Party that arise out o for in relation to investment made in its territory by investors of other Contracting Party shall be settled amicably through negotiations between the parties to the dispute. If failing then shall be referred to arbitration in the International Chamber of Commerce. For the arbitration procedure, the rules of arbitration 1988 of

	the International Chamber of Commerce shall be applied."

4. Non-ICSID Arbitration

In connection with the unspecified arbitration rules in dispute settlement provisions, another striking feature of Taiwan's BITs is the lack of any ICSID arbitration provision. While a majority of BITs make ICSID arbitration one of the options to resolve investment disputes, none of Taiwan's BITs with its ASEAN partners refers to it. The reason is simple: Taiwan is not a "contracting state" to the ICSID Convention.[38] The jurisdiction of ICSID extends only to disputes satisfying the criteria set out in Article 25 of the ICSID Convention. First, disputes have to be legal and arise directly out of an investment. In addition, both the host state and the investor's home state must have ratified the ICSID Convention. Finally, consent memorialized in a written instrument must express the acceptance of ICSID arbitration.[39] The ROC was one of the first signatories of the World Bank Articles of Agreement, and signed the ICSID Convention in 1966.[40] In 1980, however, with the PRC's acquisition of its representation, the ROC Government was ousted from the World Bank. Consequently, none of Taiwan's BITs refer to the ICSID Convention.

5. Inter-State Disputes

A dispute may arise between states directly because of a violation of international law or if a state espouses claims on behalf of investors. Most, if not all, BITs contain arbitration clauses for the settlement of disputes arising from their application between contracting states.[41] Despite the fact that the six Taiwanese BITs were created through unofficial/semi-official agreements, all of them contain state-state dispute resolution provisions. The only difference from typical BITs in the Taiwanese context is that the parties to the dispute under such clauses are not states themselves but their delegated agents. Absent a UN seat for Taiwan, the extent to which such a provision could operate is far from certain.

---

[38] *Id.* at 55.

[39] JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTE IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 61 (1999).

[40] *See* World Bank, Archive, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20035660~menuPK:56316~pagePK:36726~piPK:437378~theSitePK:29506,00.html (last visited Mar.15, 2010).

[40] DOLZER & SCHREUER, *supra* note 31, at 213.

[41] *Id.*

III. WEAKNESS OF TAIWAN'S BITS VIS-À-VIS ITS COUNTERPARTS

A. Inherent Limitations: Are These BITs Binding Commitments?

As mentioned *supra*, all of the Taiwanese six BITs were made through the Taipei Economic and Cultural Office ("TECO") and its comparable counterparts in the respective ASEAN States. As a result, whether and to what extent these BITs could be binding on the Taiwanese government and ASEAN States is far from clear. At the outset, the critical issue is whether these BITs are treaties governed by international law or merely private agreements governed by municipal law. Two inquiries tease out the subtlety of the issue: first, does Taiwan have the capacity to enter into international agreements; and second, what is the legal status of TECO and its comparable counterparts in respective ASEAN States?

Article 1 of the Vienna Convention on the Law of Treaties ("VCLT") seems to limit treaty status to agreements concluded between states. Some commentators maintain that, "all states may conclude treaties; but not only states may conclude treaties."[42] In support of this argument, Professor Lowe points to the fact that, in the nineteenth century, political entities that were not sovereign states continued to become parties to treaties.[43] Judge Sir Gerald Fitzmaurice explicitly states that an unrecognized entity could assume treaty obligations: "The parties to the treaty must possess treaty-making capacity according to international law, that is to say, they must be either (a) state . . . [or] (b) para-state entities recognized as possessing a definite if limited form of international personality, for example . . . *de facto* authorities in control of specific territory."[44] Under this view, despite its special status, Taiwan is nevertheless a subject of international law and has the competence to conclude international agreements.

The Taiwan-Philippines BIT, for example, was made between the TECO and the Manila Economic and Cultural Office ("MECO"). The former, under Article 4 of Taiwan's Organic Regulations of Overseas Representative Institutions of the Ministry of Foreign Affairs, "*shall equal that of a Consulate General or Consulate*."[45] TECO, therefore, is essentially an organ of the Taiwanese government though under an unofficial mask to reduce possible protests from the PRC. MECO's website explicitly states that it was organized as a non-profit and non-stock private corporation under

---

[42] LOWE, *supra* note 1, at 65.

[43] *Id*.

[44] Sir Gerald Fitzmaurice, *Special Repporteur for International Law Commission*, 2 Y.B. INT'L L. COMM'N 164, 164 (1958).

[45] Organic Regulations of Overseas Representative Institutions of the Ministry of Foreign Affairs, Taiwan, art. 4, *available at* http://db.lawbank.com.tw/Eng/FLAW/FLAWDA T0202 .asp (last visited Mar. 15, 2010) (emphasis added).

Philippines law, coordinated with Philippine government agencies to provide visa, consular, legal and other related services.[46] In particular, the preamble to Taiwan-Philippines BIT explicitly states that both TECO and MECO have been "duly authorized." From the functions and structures of TECO and MECO (and other comparable organs of each ASEAN state), it seems that these BITS were concluded between the Taiwanese government and respective ASEAN States in the form of less official organizations; that is, TECO and its counterparts essentially act as agents on behalf of their governments.

It is important to note, however, that not all agreements concluded between states (or, in Taiwan's case, between states and an entity *sui generis*) are governed by international law.[47] In principle, the intention of the parties to the agreement is controlling.[48] This is particularly true for the purpose of treaty interpretation, where a preamble plays a critical role.[49] In the preamble to each of the six Taiwanese BITs, both parties explicitly expressed their intention to promote and protect investment. For example, the preamble of the Taiwan-Vietnam BIT clearly states its purpose of "creat[ing] favorable conditions for greater economic cooperation and investments on the basis of the principle of equality and mutual benefits," and of "[r]ecognizing that the encouragement and reciprocal protection of such investments will be conducive to stimulating business initiative and increasing prosperity."[50] Thus, the above implies that both Taiwan and Vietnam do have intention to be bound by the agreements. The other five BITs follow the same pattern.

As mentioned *supra*, only one – the Taiwan-Malaysia BIT – was subject to a ratification procedure, a practice on which modern international treaties rely.[51] The remaining five BITs were made effective only upon signature. As Professor Ian Brownlie suggests, however, "[W]here the treaty is not subject to ratification, acceptance, or approval, signature creates the same obligation of good faith and establishes consent to be bound."[52]

---

[46] The Manila Economic & Cultural Office, Home Page, http://meco.ph/mecog/ (last visited Mar. 15, 2010).

[47] DAMROSCH, *supra* note 1, at 464.

[48] *Id.* at 456.

[49] BROWLIE, *supra* note 1, at 605 (citing VCLT Article 31(2)); *see also* CME Czech Republic BV (The Netherlands) v. Czech Republic, 9 ICSID Rep. 412, 431 (2003) (addressing in separate opinion preamble to BIT in dispute).

[50] Agreement for Promotion and Protection of Investment, Taiwan-Vietnam, preamble, Apr. 21, 1993 [hereinafter Taiwan-Vietnam BIT].

[51] GERBARD VON GLABA & JAMES LARRY TAULBEE, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 216 (8th ed. 2007).

[52] BROWNLIE, *supra* note 1, at 582; *see also* SHAW, *supra* note 19, at 818 ("Although consent by ratification is probably the most popular of the methods adopted in practice,

Taiwan and the relevant ASEAN States, therefore, shall be bound by the five BITs.

Even though these BITs are, in theory, binding upon the contracting parties, some questions may nevertheless arise after they enter into force. The first is how these BITs could be applied in their respective contracting states. The second is what remedies are available for the Taiwanese government if its ASEAN partners renege on their obligations.

If treaties were made applicable within states without the legislature's involvement, the executive branch would be able to legislate without the legislature.[53] Therefore, for the five BITs not subject to the ratification of the legislature, it is necessary to enact enabling acts before they can operate within the domestic sphere and bind the municipal courts. As for the Taiwan-Malaysia BIT, even though it was ratified by the Taiwanese legislature, it is unclear whether it can be applied directly by domestic courts. Taiwanese jurisprudence from the 1980s upheld the direct effect of treaties to the extent that such agreements are subject to the ratification procedure of the legislature and "self-executing" in nature.[54] However, Article 76(2) of the Malaysian Constitution states that the Parliament has the power to enact laws "for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member." Like most English common law jurisdictions other than the United States, Malaysia follows the traditional treaty doctrine such that the provisions of an international treaty to which Malaysia is a party do not necessarily form a part of Malaysian law nor do they give rise to rights unless those provisions have been validly incorporated into the municipal law by the legislature.[55]

An additional consideration is whether a legal remedy is available to Taiwan if any of the ASEAN States refuse to fulfill their obligations under the BITs. The answer seems to be "no" since Taiwan has no legal standing before the ICJ. Article 93 of the UN Charter provides that two classes of states may become parties to the ICJ Statute. They are (1) all members of the UN, which are *ipso facto* parties to the ICJ Statute; and (2) non-members, which may become parties on conditions to be determined in the

---

consent by signature does retain some significance, especially in light of the fact that to insist upon ratification in each case before a treaty becomes binding is likely to burden the administrative machinery of government and result in long delays. Accordingly, provision is made for consent to be expressed by signature.").

[53] *See* SHAW, *supra* note 19, at 135-36.

[54] *See, e.g.*, (72) Tai-Shan-Tze-1412 of Supreme Court; (73) Tai-Fei-Tze-69 of Supreme Court.

[55] *See* S. JAYAKUMAR, PUBLIC INTERNATIONAL LAW: CASES MALAYSIA AND SINGAPORE 22-28 (1974). For application of treaty in English common law jurisdictions, see generally SHAW, *supra* note 19, at 151-62.

case of each state by the General Assembly on the recommendation of the Security Council.[56] Meanwhile, according to the Statute, the ICJ is open to all parties to the ICJ Statute as well as other states, subject to the conditions laid down by the Security Council, which must not place them in a position of inequality before the Court.[57] Absent its UN seat, the only possible legal ground for Taiwan to be a party to the Statute may be Article 93(2), which Switzerland employed in 1946.[58] Taiwan nevertheless will likely face political pressure from the PRC should it resort to this approach. Under Article 93(2) of the UN Charter, Taiwan's accession to the ICJ would be determined by the General Assembly on the recommendation of the Security Council. Given that the PRC is a permanent member of the Security Council, it would be extremely difficult to pass such a recommendation.

Since most of the six BITs were not subject to ratification by the legislature of each of the states, their status in the legal order of each contracting state is cast into doubt. Moreover, while these BITs are theoretically binding upon the Taiwanese government and its ASEAN partners, in the absence of the legal standing before the ICJ, Taiwan would hardly have legal remedies if any of these ASEAN States were to renege on its obligations.[59] Thus, the issue of whether Taiwanese investors could be protected under these BITs relies on the extent to which ASEAN States respect the principle of *pacta sunt servanda* (agreements must be kept).

B. Comparative Analysis of Taiwan's BITs, ASEAN IGA and AIA

1. ASEAN's Investment Framework

ASEAN was founded in 1967 after the foreign ministers of Indonesia, Malaysia, the Philippines, Singapore, and Thailand signed the ASEAN Declaration in Bangkok.[60] Since then, Brunei Darussalam, Vietnam, Laos, Burma, and Cambodia have joined. Thus, ASEAN has ten Member States in Southeast Asia so far.

ASEAN Member States cooperate on a series of issues to achieve

---

[56] COLLIER & LOWE, *supra* note 39, at 125.

[57] *Id.* at 126.

[58] G.A. Res. 91 (I), ¶ 6, Doc. A/RES/ 91/1 U.N. (Dec. 11, 1946) (requiring Switzerland to accept provisions of the Statute, obligations of a Member of the UN under Article 94 of the Charter and to undertake to contribute to the ICJ's expenses).

[59] This does not mean that, however, Taiwan has no remedy to deal with ASEAN States' violation of the BITs. Though Taiwan has no legal standing before the ICJ given its economic advantages vis-à-vis these ASEAN partners, economic retaliation may be a possible avenue. Of course, such measures, if applicable, are nevertheless subject to WTO Rules.

[60] *See* The ASEAN Declaration, ¶ 1 (Bangkok 1967), *available at* http://www.aseansec.org/1212.htm (last visited Mar. 15, 2010).

economic integration. In addition to arrangements allowing free movement of goods, labor, and investment within ASEAN States, members take advantage of ASEAN to negotiate trade agreements with outsiders.[61] The implication of such an arrangement for investment is twofold: first, it encourages internal foreign direct investment amongst ASEAN States as it removes trade barriers to investment from ASEAN members investing in other ASEAN Member States; second, it spurs direct foreign investment within ASEAN.[62]

Since the 1990s, ASEAN – recognizing the strategic importance to their development – was one of the first regional groups in South Asia to employ formal instruments to promote and protect cross-border investment amongst nationals of ASEAN Member States.[63] To this end, ASEAN made two agreements that aligned with the policy architecture of ASEAN's investment regime in 1987 and 1998, namely, the ASEAN Agreements for the Promotion and Protection of Investment ("ASEAN IGA") and the ASEAN Investment Area ("AIA") Agreement.[64] The importance of ASEAN IGA, as suggested by commentators, lies not only in "the architecture it set in place and from which would evolve ASEAN's contemporary investment regime, but also the procedural, cooperative, consultative, and dispute process and procedures that would arise and largely embed themselves in ASEAN's subsequent investment agreements."[65] AIA was concluded during the time when ASEAN States had just gone through the Asian financial crisis. Thus, AIA went beyond any of the earlier economic cooperation arrangements between ASEAN States, illustrating the prevailing attitude of that period – moving towards a further economic liberalization.[66] As such, the AIA arrangement is by far the most comprehensive investment framework, which allows "investors to harness the various complementary advantages of ASEAN member countries in order to maximize business and production efficiency at lower costs" and provides "opportunity for investors to adopt

---

[61] Joel Vander Kooi, *The ASEAN Enhanced Dispute Settlement Mechanism: Doing it the "ASEAN Way"*, 20 N.Y. INT'L L. REV. 1, 20 (2007).

[62] *Id.*

[63] Darryl S. L. Jarvis, *Foreign Direct Investment and Investment Liberalization in Asia: Assessing ASEAN's Initiatives* 5 (July 15, 2008), *available at* http://ssrn.com/abstract=1160074.

[64] Protocol to Amend ASEAN Agreement for the Promotion and Protection of Investments, Sep. 12, 1996, http://www.aseansec.org/6465.htm (last visited Mar. 15, 2010) [hereafter ASEAN IGA Protocol]; Protocol to Amend the Framework Agreement on the ASEAN Investment Area, Sep. 14, 2001, http://www.aseansec.org/6467.htm (last visited Mar. 15, 2010) [hereafter AIA Protocol].

[65] Jarvis, *supra* note 63, at 5.

[66] Rukia Baruti Dames, *Provisions for Resolution of Investment Disputes Within ASEAN: The First Arbitral Award and its Implications for ASEAN's Legal Framework*, 22 J. INT'L ARB. 511, 540 (2005).

regional business strategies and establish network operations in the region."[67] In addition, pursuant to Article 12 of AIA, in cases where AIA provides for enhanced protections over ASEAN IGA and its protocol, AIA shall prevail.

2. Taiwan's Six BITs vis-à-vis ASEAN IGA and AIA

Generally speaking, the overall feature of Taiwan's six BITs with ASEAN States bears resemblance to ASEAN IGA. Both contain a preamble; definitions; applicability of the agreement; promotion and protection of investment; non-discrimination; exceptions; expropriation; compensation; repatriation; subrogation; dispute resolution; and entry into force clauses. ASEAN IGA, however, contains amendments and miscellaneous provisions. The former contemplates a means to amend the Agreement while the latter touches on reservations and depositories, a factor missing in the six BITs. There are many more differences between Taiwan's BITs and AIA, as the latter is a "programmatic" agreement and more inclusive than ASEAN IGA.[68] This section examines the key features of each arrangement such as the definition of "investor" and "definition," treatment of investors, and dispute settlement clauses, and thus points out the differences that may affect investment protection of Taiwan's BITs.

i. Preamble

As a general rule, a BIT's preamble denotes the desire of both parties to promote and protect one another's investments, thereby furthering economic cooperation between the contracting states.[69] The six Taiwanese BITs and ASEAN IGA are no exception. While the six BITs place emphasis on benefits arising from promotion and protection of investment, both ASEAN IGA and AIA seek to achieve higher policy goals.[70] Recognizing the

---

[67] ASEAN Investment Overview, http://www.aseansec.org/6460.htm (last visited Mar. 15, 2010). For detailed consideration as to the implementation of AIA, see generally Lawan Thanadsillapakul, Open Regionalism and Deeper Integration: The Implementation of ASEAN Investment Area (AIA) and ASEAN Free Trade Area (AFTA), http://www.dundee.ac.uk/cepmlp/journal/html/vol6/article6-16a.html (last visited Mar. 15, 2010).

[68] *See* Thanadsillapakul, *supra* note 67 (stating that AIA provides three pillars of broad-based programs to encourage investment in ASEAN, which are Cooperation and Facilitation [first pillar], Promotion and Awareness [second pillar] and the Liberalization Program [third pillar]).

[69] MCLACHLAN, *supra* note 31, at 28.

[70] *See, e.g.*, Preamble to Taiwan-Vietnam BIT ("Desiring to create favorable conditions for greater economic cooperation and investments on the basis of the principle of equality and mutual benefit . . . . [R]ecognizing that the encouragement and reciprocal protection of such investments will be conducive to stimulating business initiative and increasing prosperity . . . .").

importance that investments have on the industrialization of this region, ASEAN States purport, by virtue of ASEAN IGA, to facilitate "the flow of technology, knowhow and private investments among the member states" so as to "create favorable conditions for investment by nationals and companies of any ASEAN member state in the territory of the other ASEAN member states . . . to increase prosperity in their respective territories."[71] Bearing the establishment of the ASEAN Free Trade Agreement ("AFTA") and the implementation of the ASEAN Industrial Cooperation in mind, AIA seeks to establish a competitive ASEAN Investment Area to "attract higher and sustainable level of direct flows," thereby sustaining "the pace of economic, industrial, infrastructure and technology development" of this region.[72]

Thus, in contrast to Taiwan's six BITs, ASEAN IGA and AIA seek not only intra-ASEAN investment protection but, through such protection, to facilitate greater ease of movement of capital, technology, knowledge, and skills for the purpose of ASEAN's economic integration.[73]

ii. Definition

As a general rule, there are two important terms in a definition clause, which are "national" and "investment." The former determines the jurisdictional *ratione personae* (personal) of the treaty while the latter sets out the subject matter jurisdiction (*ratione materiae*).[74] These definitions together prescribe the qualifications of investment protections under the BITs.

a. Nationality of Investors

Either individuals (natural persons) or companies (juridical persons) may be investors, but each is defined differently. An individual's nationality, as a general rule, is determined by the law of the country whose nationality is claimed.[75] In terms of nationality of corporations, the most commonly used criteria are incorporation, control, or seat (*siège social*) of the company.[76]

In general, the approach to determining an individual's nationality under Taiwan's six BITs is similar to that of ASEAN IGA and AIA. In the

---

[71] ASEAN IGA Protocol, *supra* note 64, at Preamble.

[72] ASEAN Investment Agreement ("AIA Agreement"), Preamble & art. 3, *available at* http://www.ameicc.org/index.pl?id=6986&isa=Item&field_name=item_attachment_file&op=download_file (last visit Feb. 15, 2010).

[73] *See* Jarvis, *supra* note 63, at 3.

[74] MCLACHLAN, *supra* note 31, at 29.

[75] DOLZER & SCHREUER, *supra* note 31, at 47.

[76] MCLACHLAN, *supra* note 31, at 141.

Taiwan-Malaysia BIT, for example, the investor is defined under Article 1(d) as "any natural person who is a citizen or permanent resident of the relevant places." AIA and ASEAN IGA follow the typical pattern in defining the nationality of natural persons: under AIA, an individual ASEAN investor is a national of a Member State, which is subject to the applicable laws of respective Member State;[77] by contrast, under ASEAN IGA, this is determined by the respective constitution of each ASEAN state.[78]

The most striking difference in this respect is that the term "national" under Taiwan's six BITs is replaced by "citizen" (Taiwan-Indonesia; Taiwan-Thailand); "citizen or permanent resident" (Taiwan-Malaysia); "permanent resident" (Taiwan-Vietnam); or "resident" (Taiwan-Singapore). The Taiwan-Philippines BIT is the only exception – it employs the term "national" that appears in typical BITs between sovereign states. The Taiwan-Malaysia, Taiwan-Vietnam and Taiwan-Singapore BITs seem to cast a wider net as to the notion of "individual investor" than that under ASEAN IGA and AIA since they include not only "national" but also any natural person possessing "permanent resident" or "resident" permit status. The ambit of individual investor protection under the said three BITs goes beyond that of a typical BIT and, of course, ASEAN IGA.

As for juridical persons, in contrast to the incorporation principle employed by Taiwan's six BITs, ASEAN IGA seems to adopt both incorporation and real seat principles, thus narrowing down the scope of juridical persons.[79]

The incorporation and seat test was applied in *Yaung Chi Oo Trading v. Myanmar*, the one of the two cases under ASEAN IGA and AIA.[80] In this case, Myanmar argued that Article 1(2) provided for a "double-barreled" test that required both incorporation and effective management requirements to be satisfied and that Yaung Chi Oo Trading ("YCO"), a Singaporean corporation, was not thus qualified in that its key personnel had moved to Myanmar.[81] The Tribunal dismissed Myanmar's argument and held that this

---

[77] AIA Agreement, *supra* note 72, at art. 1.

[78] ASEAN IGA Protocol, *supra* note 64, at art. 1.

[79] AIA Agreement, *supra* note 72, at art. 1 ("[T]he term of a Contracting Party shall mean a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated.").

[80] *See* John Savage, *Investment Treaty Arbitration and Asia: Review of Development in 2005 and 2006*, 3 ASIA INT'L ARB. J.1, 12 (2007) (describing two cases, the first of which is *Yaung Chi Oo Trading PTE, Ltd. v. Gov't of the Union Myanmar*, and the second is *Cemex Asia Holdings, Ltd. v. Republic of Indonesia*, which is believed to be settled).

[81] *See* Yaung Chi Oo Trading PTE, Ltd. v. Gov't of the Union of Myanmar ("YCO v. Myanmar"), ASEAN I.D. Case No. ARB 01/1 42 I.L.M. 540 (2003) (describing that venue of

provision was implemented to prevent "protection shopping," and that the effective management test had to be satisfied only at the time when investment was initiated.[82]

AIA takes a different position from that of ASEAN IGA. AIA does not make reference to either the incorporation or seat principle but rather states that a qualified ASEAN investor is:

> [A]ny juridical person of a member state, making 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.[83]

An "effective ASEAN equity" in respect of an investment in an ASEAN Member State means "ultimate holdings by nationals or juridical persons of ASEAN member states in that investment."[84] A "juridical person" means "any legal entity duly constituted or otherwise organized under applicable law of a member state, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association."[85]

Thus, AIA seems to employ the control principle. A legal entity would be regarded as an "ASEAN investor" insofar as it satisfies the conditions of effective ASEAN equity on a cumulative basis. For example, if a U.S. firm owns a Singaporean subsidiary with ten percent local shareholdings, it would need an additional forty percent of local shareholdings to meet the fifty percent equity requirement under Malaysian law, and only an additional one percent to meet the minimum fifty-one percent requirement.[86] Unlike ASEAN IGA, the definition of an ASEAN investor, at least in terms of juridical persons, is less stringent, thus allowing non-ASEAN investors to enjoy free mobility within ASEAN States if they are so qualified.

---

annual meeting of directors was in Singapore, with YCO's appointment of a resident director in Singapore together with the auditing of YCO's account in Singapore sufficed the effective management test). For general discussion on this score, see Dames, *supra* note 66, at 532-40; Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area*, 53 INT'L & COMP. L.Q. 2004, 935, 949-52.

[82] Dames, *supra* note 66, at 535.

[83] AIA Agreement, *supra* note 72, at art. 1.

[84] *Id.*

[85] *Id*.

[86] *Id.* It is also suggested that such an arrangement indirectly encourages each ASEAN Member State to lower the national equity requirement or to eliminate discrimination between nationals and foreign investors at national level.

In a nutshell, the way to define nationality of individual investors under Taiwan's six BITs, ASEAN IGA and AIA is rather similar, if not identical. With respect to the definition of nationality of juridical persons, Taiwan's BITs seem to adopt a less stringent approach as opposed to ASEAN IGA and AIA, thereby enlarging the ambit of eligible investors under the said BITs. By contrast, ASEAN IGA sets out more rigid criteria for nationality of juridical persons since both incorporation and effective management requirements have to be satisfied. Foreign investors, however, could still take advantage of a flexible definition under AIA on the grounds that, according to Article 12 of AIA, whenever AIA provides a better provision over ASEAN IGA, AIA shall prevail.

b. Investment

Most BITs contain a general phrase defining "investment" (i.e., every asset) and a list of types of investments.[87] In general, all of Taiwan's six BITs follow the conventional format of listing types of investments. Article I of the Taiwan-Thailand BIT, for instance, provides:

> The term "investment" means any kind of asset invested by any investor of either relevant place in the other relevant place in accordance with the laws and regulations in force in the latter relevant and in particular, though not exclusively, includes: (a) moveable and immovable property as well as other rights such as mortgage, liens or pledge, (b) share stocks and debentures of companies whenever incorporated or interest in the property of such companies, (c) claims to money or to any performance related to investment having a financial value; (d) intellectual property rights and goodwill, (e) business concessions conferred by laws or under contract related to investment including concessions to search for, cultivate, extract or exploit natural resources.[88]

The Taiwan-Indonesia BIT, however, sets out an additional requirement as to its scope of application. Article III reads:

> This Agreement shall only apply to investment by investors of Taiwan in Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 and any law amending or replacing it at or after the entry into force if this Agreement. This Agreement shall only apply to investments by investors of Indonesia in Taiwan which have

---

[87] MCLACHLAN, *supra* note 31, at 173; DOLZER & SCHREUER, *supra* note 31, at 63.

[88] Agreement for the Promotion and Protection of Investment, Taiwan-Thail. Apr. 13, 1996, art. 1 [hereafter Taiwan-Thail. BIT]

> been granted admission in accordance with the Statute for Investment by Foreign Nationals and the Statute for Technical Cooperation of Taiwan, and any relevant laws or regulations at or after the entry into force of this Agreement.[89]

The definition of investment under ASEAN IGA is in the typical form as well. However, it is worth noting that Article 2 of ASEAN IGA lays down an additional requirement. Pursuant to Article 2, ASEAN IGA shall apply to investments "specifically approved in writing and registered by the host country and upon which conditions as it deems fit for the purpose of this Agreement."[90] This provision was considered by the Tribunal in the *YCO* case. Myanmar contended that the investments in dispute were made four years prior to Myanmar joining ASEAN and signing ASEAN IGA, and, therefore, shall be subject to special approval in writing and registration by the host state.[91] The Tribunal concurred with Myanmar on this score, finding that YCO had not made investments qualified under ASEAN IGA.[92]

The approach to defining investment under AIA, on the other hand, is distinct from conventional BITs. Article 2 of AIA stipulates that all direct investment shall be covered by AIA with the exception of "portfolio investments" and "matters relating to investments covered by other ASEAN Agreements, such as the ASEAN Framework Agreement on Services."[93] AIA Protocol had made the requirement less stringent. According to Article 1, direct investments in sector and services incidental to "manufacturing," "agriculture," "fishery," "forestry," and "mining and quarrying," as well as "such other sectors and services incidental to such sectors as may be agreed upon by all member states," are covered under the Agreement.[94]

The definitional provision under AIA was disputed in *YCO*. After the dismissal of its claims under ASEAN IGA, *YCO* argued that Article 1 and Article 2 had no special approval and registration requirements as it did under ASEAN IGA so that such a "better and enhanced" provision shall prevail under ASEAN IGA. *YCO* argued that AIA covered existing as well as future investments and it then became entitled to invoke arbitration under Article X of ASEAN IGA.[95] This argument, again, was rejected by the

---

[89] Agreement for the Protection and Protection of Investments, Taiwan-Indon. Dec. 19, 1990, art. III [hereafter Taiwan-Indon. BIT].

[90] ASEAN IGA Protocol, *supra* note 64, at art. 1.

[91] *See generally* YCO v. Myanmar, ASEAN I.D. Case No. ARB 01/1 42 I.L.M. 540 (2003).

[92] *Id.*

[93] AIA Agreement, *supra* note 72, at art. 2.

[94] AIA Protocol, *supra* note 64, at art. 1.

[95] *See generally YCO v. Myanmar*, ASEAN I.D. Case No. ARB 01/1 42 I.L.M. 540, ¶ 1-2 (2003).

Tribunal on the grounds that ASEAN IGA and AIA shall operate separately; that is, the latter was apparently a freestanding Agreement and not intended to amend the former.

To sum up, the definition of "investment" under Taiwan's BITs, is less stringent than that under ASEAN IGA, as the latter imposes a "specific approval and registration" requirement. As for AIA, though it has no such restrictions, it nevertheless carves out portfolio investment and service investment such that its ambit seems to be narrower than that under Taiwan's BITs.

iii. Standards of Treatment

The standard of protection afforded to investors under a typical BIT, as a general rule, consists of two main categories: the non-contingent standard and contingent standard. The former denotes "fair and equitable treatment" and "full protection and security," while the latter embraces the Most Favored Nation ("MFN") and national treatment standards.[96]

While the fair and equitable treatment standard has not yet been finalized, some elements are nevertheless well settled. For instance, the standard mandates that states shall act in a consistent manner, free from ambiguity and in total transparency, in good faith and without arbitrariness.[97] Also, host states are expected to provide due process in handling investors' claims and to act in a non-discriminatory manner or proportionately to the policy aims it pursues.[98] Following the typical BITs, ASEAN IGA prescribes fair and equitable treatment in Article III and Article IV(2) respectively.[99] Similarly, all of Taiwan's BITs other than the Taiwan-Malaysia BIT contain such a provision. The typical provision, as set out in Article IV(1) of the Taiwan-Indonesia BIT, for instance, states that "both parties shall seek and obtain the approval of their respective

---

[96] MCLACHLAN, *supra* note 31, at 207.

[97] Peter Muchlinski, *"Caveat Investor"? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L.Q. 527, 529 (2006). For further discussion on fair and equitable treatment, see, e.g., MCLACHLAN, *supra* note 31, at 200-47; DOLZER & SCHREUER, *supra* note 31, at 119-49; Catherine Yannaca-Small, Fair and Equitable Treatment Standard in International Investment Law 2 (Org. for Econ. Co-operation and Dev. [OECD], Working Papers on International Investment No. 2004/3, 2004); Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW. 87, 87 (2005).

[98] MCLACHLAN, *supra* note 31, at 207.

[99] ASEAN IGA Protocol, *supra* note 64, at art. III ("Investments of nationals or companies of and obligations Party in the territory of other Contracting Parties shall at all times be accorded fair and equitable treatment…."); *id.* at art. IV (2) ("All investments made by investors of any Contracting Parties shall enjoy fair and equitable treatment in the territory of any other Contracting Party.").

authorities to the effect that all investments made by investors of any party shall enjoy fair and equitable treatment by the other party."[100]

On the other hand, though AIA does not contain such a clause, some provisions could nevertheless present the spirit of fair and equitable treatment. For example, Article 5 of AIA requests ASEAN Member States to "ensure that measures and programs are undertaken on a fair and mutually beneficially basis" and to undertake appropriate measures to ensure transparency and consistency in application and interpretation of their investment laws, regulations and administrative regime in ASEAN."[101]

The standard of "full protection and security" is embedded in the traditional treaty practice of the United States, which obliges the host states to take active measures to protect investment from adverse effects.[102] In contrast to a fair and equitable treatment provision, which is concerned with the process of decision-making by the organs of the host state, a full protection and security clause mainly deals with the exercise of police power, meant to protect investors from the actual damages resulting from miscreant behaviors by state officials.[103] While the full protection and security clause is spelled out in Article IV(1) of the Agreement for the Promotion and Protection of Investment ("APPI"), this clause is missing in all of Taiwan's BITs except the Taiwan-Thailand BIT, and even in that latter agreement the wording is not identical to those under typical BITs.[104]

Like typical BITs, all of Taiwan's BITs have MFN clauses. Except for the Taiwan-Indonesia BIT, however, the MFN clauses under the other five BITs impose an additional restriction on its application. That is, MFN treatment would be excluded if such benefits or privileges derive from any existing or future regional or multilateral agreements, such as customs union, free trade agreement or common market.[105] Despite this exception, Taiwan could nevertheless invoke the provisions under those BITs concluded by Taiwan and each ASEAN State or by an ASEAN State and a

---

[100] Taiwan-Indon. BIT, *supra* note 89, at art. IV(1)

[101] AIA Agreement, *supra* note 72, at art. 5.

[102] DOLZER & SCHREUER, *supra* note 31, at 149.

[103] MCLACHLAN, *supra* note 31, at 247.

[104] Taiwan-Thail. BIT, *supra* note 88, at art. 3(2) ("Investment of investors of one Contracting Party in the relevant place of the other Contracting Party shall enjoy the most constant protection and security under the law in the relevant place of the latter Contracting Party.").

[105] *See, e.g.*, Agreement for the Promotion and Protection of Investment, Taiwan-Phil., Feb. 28, 1992, art. IV ("The provision of this Agreement . . . shall not be construed as to oblige the respective authorities of the parties to extend to investors the benefits of any treatment, preference or privilege resulting from any existing or future customs, common, free trade area, or regional economic organization of which either contracting party may become a member . . . .").

third state on the grounds that BITs are neither "regional" or "multilateral," nor are they customs union, free trade agreement or even common market in nature.[106]

This raises the question whether Taiwan could, by virtue of a MFN clause, take advantage of ASEAN IGA or AIA MFN clause if ASEAN IGA or AIA accords favorable treatment to investors of each ASEAN state. On the first reading of the exception clause, Taiwan is not capable of doing so since, on the one hand, ASEAN IGA is a "multilateral" agreement, and AIA, on the other, is not only multilateral but also a programmatic agreement that can be regarded as a part of the free trade agreement.[107] Nevertheless, the Taiwan-Indonesia BIT seems to provide a legal basis for Taiwan to invoke the provisions under ASEAN IGA and AIA in that Article IV only prescribes that "this treatment shall be no less favorable than that granted to investors of any third country" and nothing beyond that.[108] Notwithstanding the above, the question whether Taiwan could become a free-rider and enjoy the privileges, if any, stemming from ASEAN IGA and AIA is far from clear in practice.

While both ASEAN IGA and AIA prescribe MFN clauses, their approaches are distinct. In general, ASEAN IGA models on the MFN clauses under typical BITs – though there are some variations. Article IV(2) of ASEAN IGA states that "[t]his treatment shall be no less favorable than that granted to investors of the most-favored-nations."[109] In addition, Article IV(3) provides that if investors of any contracting party suffer damages related to their investments deriving from the outbreak of hostilities or a national emergency, the treatment accorded to investors of contracting parties – with respect to restitution or compensation – shall be no less favorable than that accorded to investors of any third country.[110] In contrast, AIA affords MFN treatment only to "investors and investments of another member state."[111] This MFN treatment clause presents the very feature of

---

[106] For further discussion of customs union and free trade agreement, see generally PETROS C. MAVROIDIS, TRADE IN GOODS: THE GATT AND THE OTHER AGREEMENTS REGULATING TRADE IN GOODS 148-79 (2007).

[107] *See* Hong Tan, *supra* note 81, at 966. ("Together with AFTA [ASEAN Free Trade Area], the AIA and AICO are intended to give investors a highly conducive framework for regional integrated production activities, procurement, manufacturing, and resource-based investments activities. As such, ASEAN can only embrace open regionalism and will not be a closed bloc.").

[108] Taiwan-Indon. BIT, *supra* note 100, at art. IV.

[109] ASEAN IGA Protocol, supra note 64, at art. IV(2).

[110] *Id.*

[111] AIA Agreement, *supra* note 72, at art. 8(1):

> Subject to Article 7 and 9 of this Agreement, each Member State shall accord immediately and unconditionally to investors and investments of another

AIA as an "Open Regionalism" arrangement.[112] Investors from non-ASEAN States could not be entitled to MFN treatment unless they meet the criteria of ASEAN investors. In other words, if MFN treatment is generally and unconditionally extended to all investors – including ASEAN and non-ASEAN investors – AIA would turn out to be not a regional economic integration arrangement but rather one of general investment liberalization.[113] In addition, the MFN treatment under AIA is subject to the conditions set out under Article 7 and Article 9. First, each ASEAN Member State, according to Article 7(2), shall submit a "Temporary Exclusion List" and a "Sensitive List" with respect to the industries or measures that it is unable to grant access.[114] Second, Article 9(1) provides that in cases where a Member State is temporarily not ready to open up industries for ASEAN investors as set out in Article 7, it shall waive its right to enjoy the concessions that have been made by other Member State unless that Member State otherwise agrees.[115]

The above MFN clauses under ASEAN IGA and AIA, read in conjunction with the definition under each agreement, indicate that AIA goes beyond the focus of intra-ASEAN investment promotion and protection. AIA is primarily intended to facilitate investment from third countries outside ASEAN, thus, the attraction of intra-ASEAN investment is merely a secondary goal.[116] AIA confines MFN treatment to qualified ASEAN investors, and provides for a less stringent requirement to be an ASEAN investor. As such, investments owned by non-ASEAN Member State nationals would nevertheless be entitled to MFN treatment provided

---

> Member State, treatment no less favorable than that it accords to investors and investments of any other Member State with respect to all measures affecting investment including but not limited to the admission, establishment, acquisition, expansion, management, operation and deposition of investments. *Id.*

[112] Thanadsillapakul, *supra* note 67. Despite its ambitious goal towards an open investment regime, it is observed that many ASEAN Member States still maintain protectionist measures; *see also* Jarvis, *supra* note 63, at 21.

[113] Thanadsillapakul, *supra* note 67.

[114] AIA Agreement, *supra* note 72, at art. 7(2):

> Each Member State shall submit a Temporary Exclusive List and a Sensitive List, if any, within 6 months after the date of signing of this Agreement, of any industries or measures affecting investments . . . with regard to which it is unable to open up or to accord national treatment to ASEAN investors. These lists shall form an annex to this Agreement. In the event that a Member State, for justifiable reasons, is unable to provide any list within the stipulated period, it may seek an extension from the AIA Council. *Id.*

[115] *Id.* at art. 9(1).

[116] *See* Hong Tan, *supra* note 81, at 960.

they satisfied ASEAN investor requirements.[117] The MFN clause under AIA should be understood in the context of ASEAN's economic integration and its function. Thus, it is distinct from that under ASEAN IGA or any of Taiwan's BITs.

While each of Taiwan's six BITs with ASEAN States provides for fair and equitable treatment and MFN clauses, surprisingly, a national treatment clause employed in typical BITs is missing. Lacking available reliable evidence, it is difficult to discern the underlying reasons for such an omission. Nevertheless, neither the Taiwanese government nor its ASEAN counterparts are obliged to provide a level playing field for foreign investors. As such, Taiwanese investors would be placed at a disadvantage vis-à-vis their competitors – not only those of ASEAN States but also those from third countries if the relevant BITs prescribe national treatment.[118] Yet a fair and equitable treatment provision provides for a minimum standard of treatment for foreign investors and could fill the gap left by specific standards.[119] However, how the minimum standard could be applied in the case of national treatment is rather opaque.[120] Deviations from national treatment may be permissible if the standard of fairness is satisfied;[121] conversely, a fair and equitable treatment provision may be violated even in cases where the foreign investors are treated in the same way as host states treat their own nationals.[122] When disputes arise, the Tribunal would therefore enjoy wide discretion to decide upon the issue of whether Taiwanese investors receive fair and equitable treatment. It is hard to predict how this provision could fill the gap for the omission of national treatment. Hence, the function of Taiwan's BITs with ASEAN States, at

---

[117] It is observed that such a position is in contrast to other regional arrangements such as NAFTA and the EU. *See id.*

[118] *See, e.g.*, Agreement for Promotion and Protection of Investments, Korea-Thail., Mar. 1, 2002, art. 3(1) ("Each Contracting Party shall encourage and create favorable conditions in its territory for investments of the investors of the other Contracting Party and shall admit such investments in accordance with its laws and regulations.").

[119] *See* DOLZER & SCHREUER, *supra* note 31, at 122-23. Yet national treatment clauses were established under even earlier BITs, as some have suggested, from the 1960s through the 1980s, its focus was on expropriation and other minimum standards. National treatment in the context of investment has increasingly gained its importance since the late 1990s. Developing counties, as host states for foreign investors gradually increased their domestic standards, and this often went beyond international minimum standards. As the treatment of domestic investors rose above mere international minimum, and thus, the discipline of national treatment attracted attention. *See* Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?* 102 AM. J. INT'L L. 48, 109 (2008).

[120] *See* VAN HARTEN, INVESTMENT TREATY ARBITRATION PUBLIC LAW 87 (2007).

[121] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 251 (1994).

[122] DOLZER & SCHREUER, *supra* note 31, at 123.

least in terms of national treatment, is rather weakened and renders Taiwanese investment uncertain.

Turning to the national treatment provisions under the ASEAN IGA and AIA, Article IV(4) of ASEAN IGA states, "Any two or more of the Contracting Parties may negotiate to accord national treatment within the framework of this Agreement. Nothing herein shall entitle any party to claim national treatment under the most-favored-nation principle."[123] Notwithstanding this provision, Article IV(1) mandates that "[e]ach Party shall not impair by unjustified or discriminatory measures the management, maintenance, use enjoyment, extension, disposition or liquidation of such investments [investments made accordance with the laws of respective Contracting Party]."[124] Since the non-discrimination principle encompasses national treatment as well as MFN treatment, it seems that, each contracting party to ASEAN IGA must extend protections for investors of any other contracting party equivalent to that granted to nationals of its own, at least, in respect of management, maintenance, use enjoyment, extension, disposition or liquidation as spelled out in Article IV(1).[125] Any discrimination based upon nationality, if unjustified, would likely run afoul of Article IV(1) of ASEAN IGA.

Contrary to ASEAN IGA's position, AIA extends national treatment to ASEAN investors. Pursuant to Article 7(1), each ASEAN Member State is obliged to "accord immediately to ASEAN investors and their investments, in respect of all industries and measures affecting investments including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments, treatment no less favorable than that it accords to its own like investors and investments."[126] Yet this national treatment provision, as in the case of the MFN provision, is subject to a Temporary Exclusion List, a Sensitive List, as well as a waiver articulated under Articles 7 and 9. Furthermore, in accordance with Schedule III of AIA, all ASEAN Member States shall grant national treatment to ASEAN investors by 2010 and to non-ASEAN investors by 2020.[127] A ten-year differential between ASEAN and non-ASEAN investors would conceivably encourage investors of third countries to restructure their investment strategies and thus stimulate foreign investment within this

---

[123] ASEAN IGA Protocol, *supra* note 64, at art. IV(4).

[124] *Id.* at art. IV(1).

[125] A.F.M. Maniruzzaman, *Expropriation of Alien Property and Its Principle of Non-Discrimination in International Law of Foreign Investment: An Overview* 8 J. TRANSNAT'L L. & POL'Y 57, 70 (1998); *see also* DOLZER & SCHREUER, *supra* note 31, at 176-77.

[126] AIA Agreement, *supra* note 72, at art. 7(1).

[127] There are exceptions to this 2010 timeline, including Vietnam (2013), Laos (2015) as well as Myanmar (2015). Protocol to Amend the Framework Agreement on the ASEAN Investment Area, *supra* note 64, at art. 4.

region. In short, in terms of national treatment, Taiwan's six BITs are relatively weaker than either ASEAN IGA or AIA. Though ASEAN IGA does not explicitly set out a national treatment clause, it nevertheless prescribes non-discriminatory treatment in certain aspects. Under AIA, unless otherwise excluded, Member States shall extend national treatment to ASEAN investors and shall, in principle, phase out all exceptions on Temporary Exclusion List by 2010.

iv. State-to-State Dispute Settlement

Taiwan's BITs with each of the six ASEAN States set out state-to-state dispute resolution provisions, though the parties to the dispute are state organs rather than states themselves. In contrast to conventional BITs, the state-to-state dispute settlement provisions under these six BITs are made in a less sophisticated form. Article 10 of the Taiwan-Singapore BIT, for example, states, "Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement shall as far as possible, be settled amicably through negotiations between the parties to the dispute, and failing which shall be referred to arbitration on such terms and conditions as the parties may agree."[128] Unlike typical BITs, it prescribes neither a definite timeframe nor the method to appoint arbitrators if parties fail to do so.[129] Yet, Article 9(2) of the Taiwan-Thailand BIT stipulates that "[i]f a dispute between the Contracting Parties cannot thus be settled within six months, it shall at the request of either Contracting Party be submitted to an arbitral tribunal on such terms and conditions as the Contracting Parties may agree."[130] It only sets out the timeframe for negotiation or consultation. These remedies, though weak, seem to be the only choice available to the Taiwanese government. As mentioned earlier, absent its UN seat, Taiwan is not eligible to take any breaching counterparty to the ICJ. In brief, when investment disputes arise, the legal weapons that the Taiwanese government could employ seem weak and unworkable.

ASEAN IGA and AIA on the other hand, employ a different approach to govern inter-state disputes. The disputes between contracting parties under this Agreement, pursuant to Article 4 of ASEAN IGA Protocol and

---

[128] Agreement between the Industrial Development & Investment Center in Taipei and the Economic Development Board in Singapore on the Promotion and Protection of Investments, Taiwan-Sing. April 9, 1990, art. 10 [hereinafter Taiwan-Sing. BIT].

[129] *See, e.g.*, UK Model BIT, *supra* note 37, at art. 9 ("[W]ithin two months of receipt of request for arbitration, each Contracting Party shall appoint one member of the tribunal . . . (4) if within the periods specified in paragraph (3) of this Agreement the necessary appointment have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make necessary appointments . . .").

[130] *Id.* at art. 9(2).

Article 17 of AIA, shall be subject to the ASEAN Dispute Settlement Mechanism ("DSM"),[131] which was replaced by the Enhanced Dispute Settlement Mechanism ("EDSM") in 2004.[132] Shifting from its conventional decision-making process, namely the "ASEAN Way,"[133] the ASEAN dispute resolution regime has evolved from a consensus-oriented regime to a rule-oriented regime.[134]

According to Article 1 of the EDSM Protocol, EDSM shall apply to "disputes brought pursuant to the consultation and dispute settlement provisions of the Agreement as well as the agreements listed in Appendix I and future ASEAN economic agreements"[135] and ASEAN IGA and AIA are so listed in Appendix I. Contrary to Taiwan's BITs, inter-state disputes under ASEAN IGA and AIA are administered by the Senior Economic Officials Meeting ("SEOM") in an organized manner. In general, Member States shall first seek to resolve disputes by virtue of consultations.[136] If the Member State to which the request is made does not respond within "ten (10) days after the date of receipt of the request" or "does not enter into consultations within thirty (30) days," or "fails to settle a dispute within sixty (60) days," the complaining party may request the establishment of a panel unless the SEOM decides otherwise by consensus.[137] In the meantime, Member States are expected to resolve their disputes amicably and are permitted to resort to, at all times, good offices, conciliation or mediation.[138] The Panel shall submit its findings and recommendations to the SEOM within sixty days from its establishment, but exceptionally, Panels may be

---

[131] Protocol on Dispute Settlement Mechanism, Nov. 20, 1996, *available at* http://www.aseansec.org/16654.htm [hereafter DSM Protocol].

[132] ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Nov. 29, 2004, *available at* http://www.aseansec.org/16755.htm [hereafter EDSM Protocol].

[133] Due to cultural and historical reasons, ASEAN has adopted a unique decision-making process, namely the "ASEAN Way" in dealing with its economic integration. ASEAN Way is a consensus approach embedded in Malay terms *musyawarah* and *mufakat*, which relies on largely "patient consensus-building" to arrive at informal understandings or loose agreements. In contrast to the rule-oriented approach widely employed by other regional economic agreements, such as European Union, ASEAN Way has been criticized for its ineffectiveness to bring ASEAN towards further economic integration. On this score, *see* Vander Kooi, *supra* note 61, at 17-22; Paul J. Davidson, *The ASEAN Way and the Role of Law in ASEAN Economic Cooperation*, 8 SING. Y.B. INT'L L & CONTRIBS. 165, 166-67 (2004).

[134] Davidson, *supra* note 133, at 174.

[135] EDSM Protocol, *supra* note 132, at art. 1.

[136] *Id.* at art. 3.

[137] *Id.* at art. 5(1).

[138] *See* Vander Kooi, *supra* note 61, at 23-24 (arguing that ASEAN's dispute settlement mechanism nevertheless introduces several provisions keeping with ASEAN Way, which, for instance, is exemplified by consultation as a first resort, right to mediate, good offices, or conciliation).

granted an additional ten days.[139] According to Article 1, the SEOM shall adopt the panel report within thirty days upon receipt of the report unless the SEOM decides not to adopt by consensus or a party to the dispute formally notifies the SEOM of its decisions to appeal.[140] The Appellate Body established by the ASEAN Economic Ministers (AEM) shall govern the appellate procedure, and as a general rule, the appellate proceedings "shall not exceed sixty (60) days from the date a party to the dispute formally notifies its decision to appeal."[141] In addition, an Appellate Body report shall be adopted by the SEOM and "unconditionally accepted by the parties to the dispute" unless the SEOM otherwise decides by consensus. [142] Lastly, EDSM prescribes a surveillance procedure governing the implementation of findings or recommendations of the Panel or Appellate Body.[143]

In brief, Taiwan's BITs fail to provide a sound state-to-state dispute resolution mechanism. Some of these six BITs merely request that the parties settle disputes through negotiations amicably. As for the rest, though they confer upon the contracting parties the right to arbitration, the important factors of a definite timeframe and the way to appoint arbitrators or any specific arbitration rules is nevertheless missing. By contrast, EDSM, patterned after the dispute settlement mechanism under the World Trade Organization ("WTO"), presents a more efficient and effective method in light of the definite timeframe and implementation procedure.[144]

v. Investor-to-State Dispute Settlement

The investor-to-state dispute settlement clauses under Taiwan's BITs are, generally speaking, "toothless." First, as mentioned earlier, with the exception of the Taiwan-Vietnam BIT, none of these BITs prescribe specific arbitration rules. Rather, any arbitration is subject to the terms and conditions to which parties to the dispute mutually agree. The forum in which arbitration may proceed, as well as the arbitration rules and even the applicable substantive laws, depend to a large extent upon the outcome of the negotiation between both parties. Bargaining power seems to be a controlling factor in the process of dispute resolution. This result, however, runs counter to the purpose of a BIT – to reduce *ex post* opportunistic behaviors by the host state. Recalling the "obsolescing bargain theory"

---

139 EDSM Protocol, *supra* note 132, at art. 8(2).

140 *Id.* at art. 9(1).

141 *Id.* at art.12(1), 12(5).

142 *Id.* at art.12(13).

143 *Id.* at art.15.

144 Davidson, *supra* note 133, at 174. For detailed discussion on dispute settlement mechanism, see generally MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 103-200 (2006).

suggested by Professor Raymond Vernon, the relationship between the investor and the host state is dynamic and varies with the nature of the investment.[145] Under "obsolescing bargain theory," investors would not commit capital to a project unless they are convinced by the host state that it promises not to unduly interfere with investments.[146] With the increase of sunk cost in investments, the bargain leverage shifts from investors to the host states after the investments have been made.[147] Put differently, there is a difference between the two stages – before and after investment – because investors and the host state both know that once the investments have been made, investors can rarely divest fully.[148] Thus, a BIT presents an appropriate solution to address this obsolescing problem.

On its face, Taiwan's ASEAN BIT partners have made open offers under each BIT. The said ASEAN States, therefore, shall be bound and refer the dispute to arbitration. These investor-state dispute settlement provisions, however, subject the terms and conditions to the mutual agreement of parties to the dispute. What if the given host state delays, or even declines the negotiations with the investors on the details of the arbitration procedure outright? The investors, again, would face the obsolescing problem.

Second, the abovementioned arbitration provisions are conditioned upon the failure of amicable negotiations.[149] To be sure, as some have observed, consent to arbitrate investment disputes is typically conditioned on the conclusion of an amicable negotiation period in an attempt to minimize the number of cases which may advance to arbitration.[150] Prior to commencing a long and expensive international arbitration procedure with potential political risk, states prefer a prior notification and "cooling off"

---

[145] RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTILATERAL SPREAD OF U.S. ENTERPRISE 45-59 (1971).

[146] THEODORE H. MORAN, HARNESSING FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: POLICIES FOR DEVELOPMENT AND DEVELOPING COUNTRIES 78-79 (2006).

[147] Erik J. Woodhouse, *The Obsolescing Bargain Redux? Foreign Investment in the Electric Power Sector in Developing Countries*, 38 N.Y.U. J. INT'L. & POL. 121, 127-28 (2006); *see also* MORAN, *supra* note 145, at 78-79.

[148] Andrew T. Guzman, *Why LDCs Sing Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 662 (1998).

[149] *See, e.g.*, Taiwan-Malay. BIT, *supra* note 30, at art. 7 (2) ("[Disputes] shall, as far as possible, be settled amicably through negotiation between the parties to the dispute, and failing which, shall be referred to arbitration on such terms and conditions as the parties may agree."). For a comparison of investor-state dispute settlement clauses under Taiwan's BITs with ASEAN States, see Table III *infra*.

[150] Nigel Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark), in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 220 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

period in which they could seek to resolve disputes amicably.[151] Such a "cooling off" period prior to arbitration normally lasts for three to six months.[152] Except for the Taiwan-Thailand BIT, the rest of Taiwan's BITs does not prescribe a definite "cooling off" period.[153] In light of this opaque "cooling off" period, such an amicable dispute resolution pre-condition may be employed by the host state to prevent arbitration proceedings.

By contrast, ASEAN IGA models on "cafeteria style" BITs employed by most BITs, providing a variety of dispute settlement fora from which ASEAN States may choose, including ICSID, UNCITRAL, the Regional Centre for Arbitration at Kuala Lumpur as well as "any other regional centre for arbitration in ASEAN, whichever body the parties to the dispute mutually agree to appoint for the purpose of Conducting the arbitration."[154] On the other hand, while the right to arbitrate under ASEAN IGA is contingent upon the completion of a "cooling off" period, ASEAN IGA nevertheless prescribes a definite timeframe: "if such a dispute cannot thus be settled within six months of its being raised, then either party can elect to submit the dispute for conciliation or arbitration and such election shall be binding upon the other party."[155] In addition, ASEAN IGA sets out a specific method and timeframe for the establishment of an arbitral tribunal. In cases where the parties to the dispute cannot agree on the formation of the arbitration tribunal within three months,[156] then the parties to the dispute may, absent any other arrangement, request the President of the ICJ to make the required appointment.[157] This method was first employed in the *YCO* case.[158]

On the other hand, surprisingly, while AIA establishes a clear state-state dispute settlement provision, it does not spell out an investor-state dispute clause. Absent an open offer under AIA, it seems that the source of the consent to arbitration does not lie in the said treaty itself but somewhere

---

[151] *Id.*; *see also* DOLZER & SCHREUER, *supra* note 31, at 50-51.

[152] *See* DOLZER & SCHREUER, *supra* note 31, at 50-51.

[153] Taiwan-Thail. BIT, *supra* note 88, at art. 9(2) ("If a dispute between the Contracting Party cannot thus be settled within six months, it shall at the request of either Contracting Party be submitted to an arbitral tribunal on such terms and conditions as the Contracting Parties may agree.").

[154] ASEAN IGA Protocol, *supra* note 64, at art. X(2).

[155] *See id*.

[156] *See id*. at art. X(3).

[157] *See id*. at art. X(4)

[158] *See* YCO v. Myanmar, ASEAN I.D. Case No. ARB 01/1 42 I.L.M. 540, ¶ 1-2 (2003). The President of the ICJ, His Excellency M. Gilbert Guillaume, acting accordance with Article X(4) of the ASEAN IGA, appointed James Crawford, Whewell Professor of International Law at the University of Cambridge; Francis Delon, a member of the Conseil d'Etat; and Sompong Sucharitkul, Distinguished Professor of International and Comparative Law at the Golden Gate University School to constitute the Tribunal. *Id.*

else, such as the national legislation of an individual host state or a direct agreement between investors and the host state.[159]

It is worth noting that though AIA lacks the open-ended advance consent to arbitration, ASEAN IGA seems to provide an additional avenue where the parties could bring claims under AIA. In the *YCO* case, for example, the legal basis which the composition of the Tribunal relied upon was Article X(4) of ASEAN IGA. However, the substantive rules under AIA, such as the definition of investment, were nevertheless disputed by both parties.[160] Yet the Tribunal maintained that AIA is a "free-standing" agreement that is not expressed to amend any earlier agreements,[161] and AIA and ASEAN are "clearly intended to operate separately."[162] Investors' rights to invoke AIA provisions while they initiate arbitration proceedings under ASEAN IGA seem unbarred. Hence, though AIA has no open consent to arbitration, investors may nevertheless make use of the arbitration provision under ASEAN IGA as an alternative way to claim their rights under AIA.

In short, by creating a definite timeframe and method in forming the arbitral tribunal, ASEAN IGA provides investors with a more predictable regime, thereby reinforcing would-be investors' confidence in making large sunk investments. On the other hand, while AIA does not prescribe an open consent to arbitration, it does not bar investors from initiating ASEAN IGA arbitration proceedings and thus invoking their rights under AIA. In respect of investor-state disputes, therefore, both ASEAN IGA and AIA prevail over Taiwan's BITs.

CONCLUSION

Investment treaties are entered into on the assumption that they will provide security for investors through recognition of standards of treatment, compensation for expropriation and repatriation of profits.[163] While this assumption has been challenged, BITs nevertheless present a solution in tackling the problem of "obsolescing bargaining" and in preventing *ex post*

---

[159] *See* DOLZER & SCHREUER, *supra* note 31, at 238-39 (describing three typical ways in which consent is given: first, consent may be included in a direct agreement between the parties; second, consent may be given by national investment law of the host state; and third, consent may be granted through a BIT); *see also* Christoph Schreuer, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 (Peter Muchlinski, et al. eds., 2008).

[160] *See supra* Part III.B.2.i.

[161] YCO v. Myanmar, ASEAN I.D. Case No. ARB 01/1 42 I.L.M. 540, 554.

[162] *Id.* at 557.

[163] M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, *in* APPEALS MECHANISM IN INTERNATIONAL DISPUTES 39 (Karl P. Sauvant ed., 2008).

opportunism of host states.[164] The BITs that Taiwan has concluded with ASEAN States could, however, fail to serve these ends.

A lack of disciplining power is central to the issues surrounding Taiwan's six BITs. Among other issues, Taiwan's lack of sovereignty most severely weakens the effectiveness of these BITs. Despite the fact that these six BITs were concluded through semi-official organs, they are nonetheless treaties and bind the Taiwanese government and its ASEAN counterparties. Yet in theory, these BITs fall within the ambit of public international law to be interpreted in accordance with principles of international law. Absent UN membership and legal standing before the ICJ, however, Taiwan can hardly check on its ASEAN partners by initiating proceedings before the ICJ. In addition, without a definite timeframe and specified procedure through which contracting parties may appoint arbitrators, state-state dispute settlement clauses under these BITs are not powerful enough to reduce the host state's opportunistic behavior in the post-investment stage. Investor-state dispute settlement provisions, on the other hand, may arguably render the "obsolescing bargain" problem even more acute in that the terms and conditions of arbitration proceedings are subject to the negotiations of the parties to the dispute *ex post*.

The sovereignty issues are unlikely to be solved immediately because of the political reality. Those defects as to dispute settlement provisions – both state-state and investor-state – as described above, call for a more in-depth consideration. There should be, at least, a definite timeframe for a "cooling off" period and a clear default rule whereby the parties to the dispute may proceed to form the arbitral tribunal. Notwithstanding these defects, Taiwanese investors may make use of the current investment framework of ASEAN. The flexible definition of "ASEAN investor" together with the national treatment and MFN provisions, in particular, may adjust Taiwanese investors' disadvantaged position vis-à-vis the investors from any third state that have concluded an enhanced BIT with ASEAN States.

Though this article suggests that the Taiwanese investors may, through direct investment in ASEAN States, benefit from the relevant arrangements under ASEAN IGA and AIA, the negative impacts arising from the increasing volume of Taiwan's investment in this region should be taken into account. In other words, given the ineffectiveness of Taiwan's six BITs with ASEAN States, Taiwanese investors may be driven by the better treatment under ASEAN IGA and AIA and presumably increase their investment in any of ASEAN Member States. In light of the trade diversion

---

[164] *See, e.g.*, Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33(10) WORLD DEV. 1567, 1567-85 (2005); Jason Webb Yackee**,** *Do We Really Need BITs? Toward a Return to Contract in International Investment Law*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 121-46 (2008).

stemming from ASEAN Plus Three, not only foreign investors may divest but Taiwan's local industries may also move out at a faster pace than ever, thus hollowing out Taiwan's industries and undermining the economy as a whole. While at this point it is difficult to solve this problem head-on, while participating in ASEAN Plus Three, Taiwan may nevertheless use its bargaining power vis-à-vis ASEAN States to renegotiate the said BITs to reduce the potential negative impacts to a lesser extent.