

24th Meeting of the Energy Charter Conference Ministerial Session

RECENT TRENDS IN INTERNATIONAL INVESTMENT AGREEMENTS:

The Interplay Between Regional Agreements and Existing BITs

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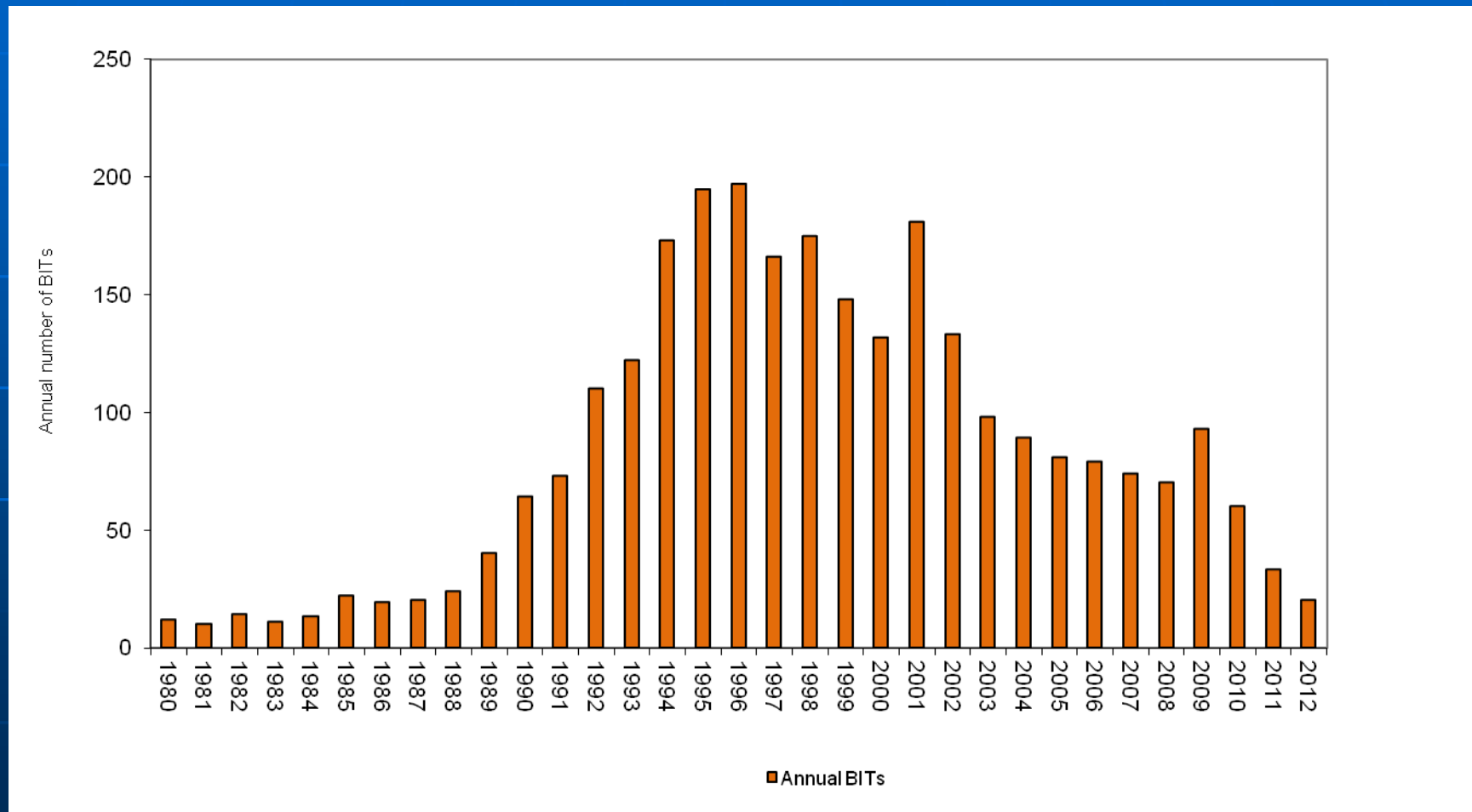
Nicosia, Cyprus



Outline

1. Current State of Play – Declining BITs and Rising Regional Agreements
2. The Interplay Between Regional Agreements and Existing BITs
 - Parallelism v. Replacement
 - The Role of Most-Favoured-Nation Clauses
3. Concluding Thoughts

Declining Annual Number of BITs, 1980-2012



Source: UNCTAD

Rising Number of Regional Arrangements

Regional Agreement	Affected bilateral treaties
ASEAN Comprehensive Investment Agreement	26
ASEAN-China Investment Agreement	10
ASEAN-Korea Investment Agreement	8
Central European Free Trade Agreement (CEFTA)	33
Common Market for Eastern and Southern Africa Common Investment Area	24
Eurasian Investment Agreement	9
Central America-Mexico FTA	4
Energy Charter Treaty	654
Central American Free Trade Agreement (US-DR-CAFTA)	4
ASEAN-Australia-New Zealand FTA	2
China-Korea-Japan IPPA	3
Economic Community of West African States Energy Protocol	14
Southern African Development Community Protocol on Finance and Investment	16

Source: UNCTAD

More Regional Arrangements on the Horizon

Regional initiative	Existing BITs btwn the parties
Inter-Arab investment draft agreement	96
Regional Comprehensive Economic Partnership Agreement (RCEP) between ASEAN and Australia, China, India, Japan, New Zealand and the Republic of Korea	68
EU-MERCOSUR FTA	55
Tripartite Free Trade Area between COMESA – EAC - SADC	47
EU-India FTA	23
Trans-Pacific Partnership Agreement (TPP)	21
EU-Morocco Deep and Comprehensive Free Trade Area (DCFTA)	20
EU-Singapore FTA	12
EU-Thailand FTA	12
EU-US Transatlantic Trade and Investment Partnership (TTIP)	8
Canada-EU Comprehensive Economic and Trade Agreement (CETA)	6
PACER-Plus	2
Total:	370

Is Regionalization Leading to Increased Coherence and Harmonization?

- **No. Because --**
 - Treatment of existing BITs under new regional arrangements
 - Operation of MFN clauses

Sample Provisions on Treaty Relationships

ASEAN Comprehensive Investment Agreement (2009),
Art. 44

“Nothing in this Agreement shall derogate from the existing rights and obligations of a Member State under any other international agreements to which it is a party.”

Sample Provisions on Treaty Relationships

China-Korea-Japan IPPA (2013), Article 25

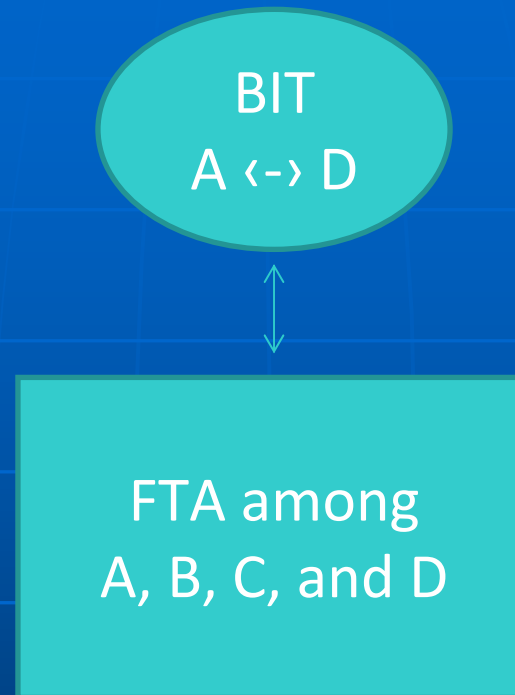
“Nothing in this Agreement shall affect the rights and obligations of a Contracting Party, including those relating to treatment accorded to investors of another Contracting Party, under any bilateral investment agreement between those two Contracting Parties existing on the date of entry into force of this Agreement, so long as such a bilateral agreement is in force.

Note: It is confirmed that, when an issue arises between an investor of a Contracting Party and another Contracting Party, **nothing in this Agreement shall be construed so as to prevent the investor from relying on the bilateral investment agreement** between those two Contracting Parties which is considered by the investor to be more favorable than this Agreement.”

Replacement v. Parallelism

Regional Agreement	Affected treaties	Relationship	Relevant article
ASEAN Comprehensive Investment Agreement	26	Parallel	Art. 44
ASEAN-China Investment Agreement	10	Parallel	Art. 23
ASEAN-Korea Investment Agreement	8	Parallel	Art. 23
Central European Free Trade Agreement	33	Parallel	Art. 30
Common Market for Eastern and Southern Africa Common Investment Area	24	Parallel	Art. 32
Eurasian Investment Agreement	9	Silent	N/A
Central America-Mexico FTA	4	Replace	Art. 21.7
Energy Charter Treaty	654	Parallel	Pt. III, Art. 16
Central American Free Trade Agreement (CAFTA)	4	Parallel	Art. 1.3
ASEAN-Australia-New Zealand FTA	2	Parallel	Ch. 18, Art. 2
China-Korea-Japan IPPA	3	Parallel	Art. 25
Economic Community of West African States Energy Protocol	14	Parallel	Art. 16
Southern African Development Community Protocol on Finance and Investment	16	Silent	N/A

Consequences of Provisions Allowing for Parallel Operation



- FTA contains parallel operation provision. Investor from A, invests in D.
- Parallel operation provision creates multiple fora in which dispute may be heard and may create multiple standards of treatment.
 - FTA ISDS and FTA standard
 - A/D BIT ISDS and A/D BIT standard

Observations on Parallel Operation Provisions

- By not replacing existing BITs of the contracting parties, regional agreements simply add a layer of complexity and uncertainty to an already complex and uncertain field of law.
- A number of ongoing negotiation contemplate replacement.
 - All EU negotiations
 - TPP

BITs and Regional Arrangements: The Operation of Most-Favored-Nation Clauses

- Most BITs include MFN clauses and most MFN clauses in BITs exclude FTAs and regional integration arrangements.

“The provisions of this Agreement relating to the grant of treatment not less favorable than that accorded to the nationals and companies of any third State **shall not be construed so as to oblige** one Contracting Party to extend to the nationals and companies of the other Contracting Party the benefit of **any treatment, preference or privilege resulting from:**

- (a) **any regional arrangement for customs, monetary, tariff or trade matters (including a free trade area) or any agreement designed to lead in future to such a regional arrangement”**

The Varied State of MFN Clauses in Regional IIAs

- **Inapplicable only to taxation treaties and intellectual property agreements.**
 - CAFTA-DR, Art. 21.3
- **Inapplicable only to sub-regional agreements among contracting parties.**
 - ASEAN Comprehensive Investment Agreement, Art. 6(3)
- **Applicable to BITs; inapplicable to FTAs or economic integration agreements.**
 - ASEAN-China, Art. 5(3); ASEAN-Korea, Art. 4(3); COMESA Investment Agreement, Art. 19(3); Mexico-Central America, Art. 11.5; Energy Charter Treaty, Art. 24(4) & 25; China-Japan-Korea, Art. 4(2); ECOWAS Energy Protocol, Art. Art. 24(4) & 25
- **Inapplicable to any agreements with third parties pre-dating the IIA.**
 - COMESA Investment Agreement, Art. 19(1)
- **Inapplicable to future agreements.**
 - China-ASEAN, Art. 5(2); ASEAN-Korea, Art. 4(4)
- **Applicable to any agreement but only as to certain protections.**
 - SADAC Protocol, Art. 6(2) ('fair and equitable treatment')
- **IIAs which contain no MFN clause.**
 - ASEAN-Australia-New Zealand FTA

Sample MFN Clause

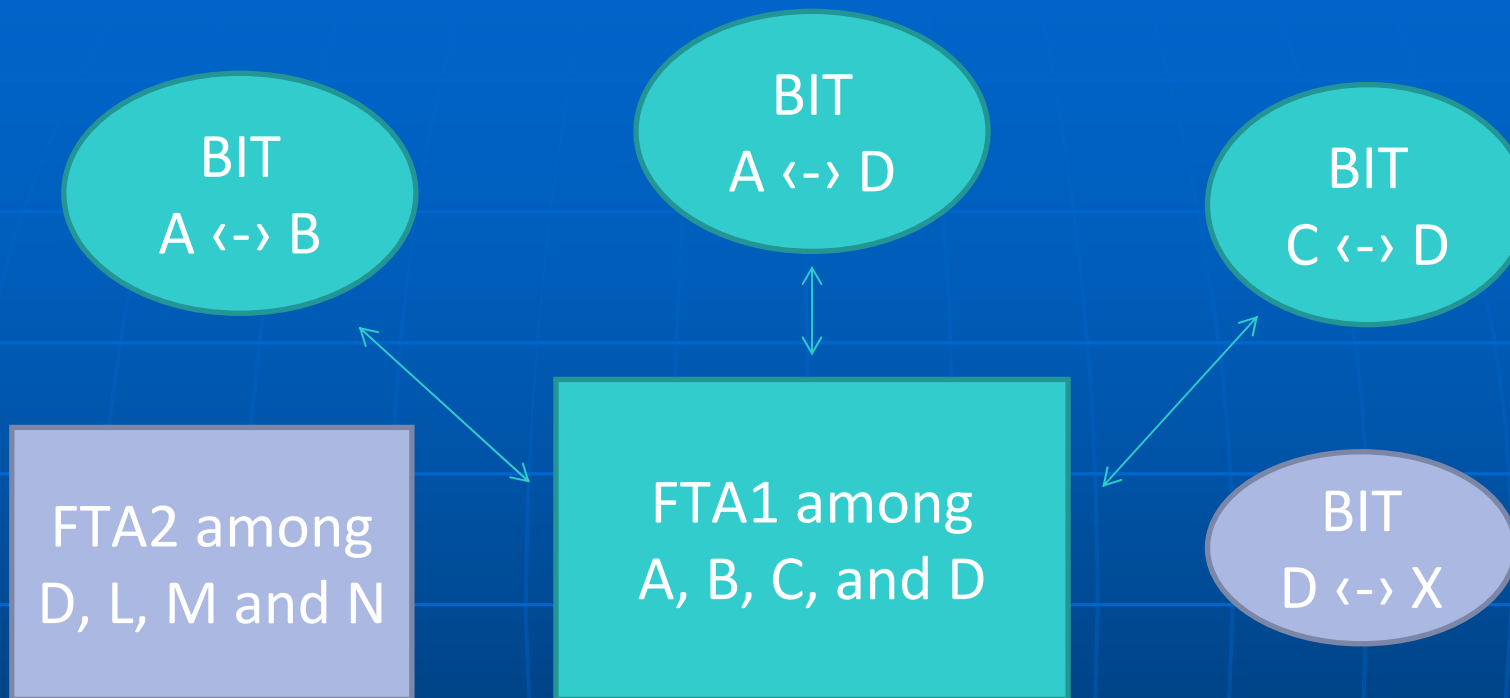
COMESA Investment Agreement, Art. 19

■1. Subject to the exceptions provided for under paragraph 3 of this Article, each Member State shall accord to COMESA investors and their investments treatment no less favorable than that it accords, in like circumstances, to investors and their investments from any third country with respect to the establishment, acquisition, expansion, management, operation and disposition of investments in its territory. **This paragraph shall not apply to investment agreements entered into by Member States with non-Member States prior to the entry into force of this Agreement.**

■3. Nothing in paragraph 1 of this Article shall oblige a Member State to extend to COMESA investors the benefits of any treatment, preference or privilege resulting from:

- (a) **any customs union, free trade area, common market or monetary union, or any similar international convention or other forms of regional preferential arrangements, present or future, of which any of the Member States is or may become a party; or**
- (b) any matter, including international agreements, pertaining wholly or mainly to taxation.

MFN Clauses in BITs and FTAs & Parallel Operation Provisions



- Investor from A, invests in D. MFN clause in A/D BIT excluding FTAs. FTA1 contains parallel operation provision and an MFN clause excluding FTAs.
 - FTA1 ISDS and FTA1 standard
 - A/D BIT ISDS and A/D BIT standard
 - ISDS under either and C/D BIT standard
 - **ISDS under either and standard found in any other D BIT (e.g., D/X), but not another D FTA (e.g., FTA2).**

Observations on MFN Clauses in Regional Arrangements

In the context of parallel operations of BITs and regional arrangements, MFN clauses make a messy situation messier.

- By facilitating the incorporation of bilaterally negotiated terms, MFN clauses in regional arrangements undermine the objective of regional harmonization.
- When unlimited in temporal scope, MFNs may undermine states' efforts to implement new investment treaty policies through the adoption of new treaty text.

Concluding Thoughts – Reasons for Optimism?

- The formulation and agreement of international norms is a long, non-linear process.
- Even though current regionalisation arrangements serve to make things more complicated in the short term, in the long term regional arrangements reflect ever larger groups of states agreeing on formulations of rights and obligations in the investor-state context.
 - A prerequisite for multilateralization.

Thank you

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