

# CIL – USALI Conference on Investment Law Reform

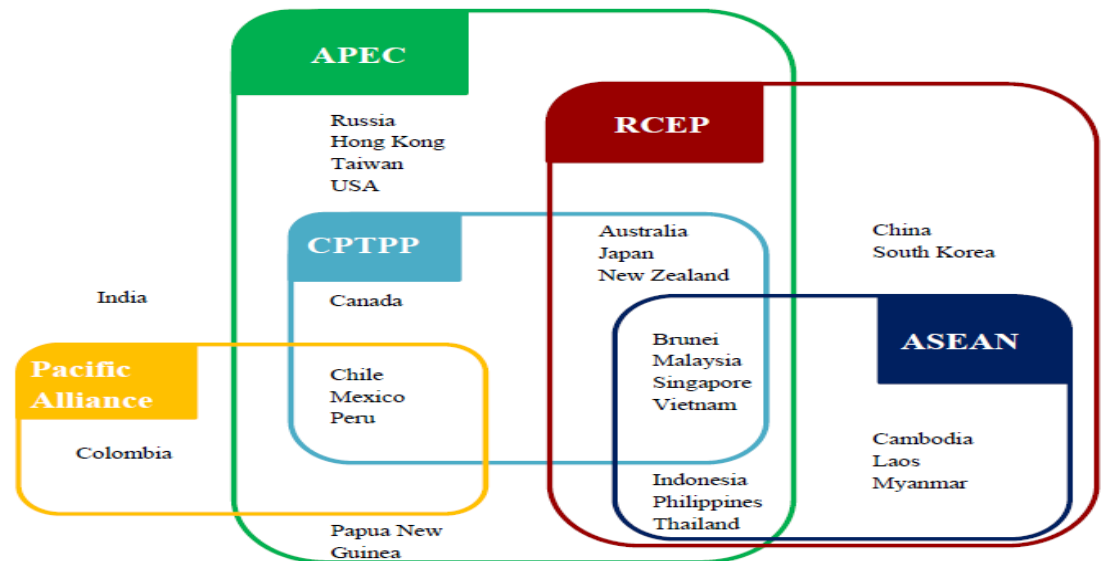
## The Long View on Reform in Asia

Pasha Hsieh  
June 2021



# Third Regionalism

- ▶ New Asian Regionalism & Investment Law Reform
  - ASEAN Economic Community, **AEC** – 2015
  - Comprehensive and Progressive Agreement for Trans-Pacific Partnership, **CPTPP** – 2018
  - Regional Comprehensive Economic Partnership, **RCEP** – 2020



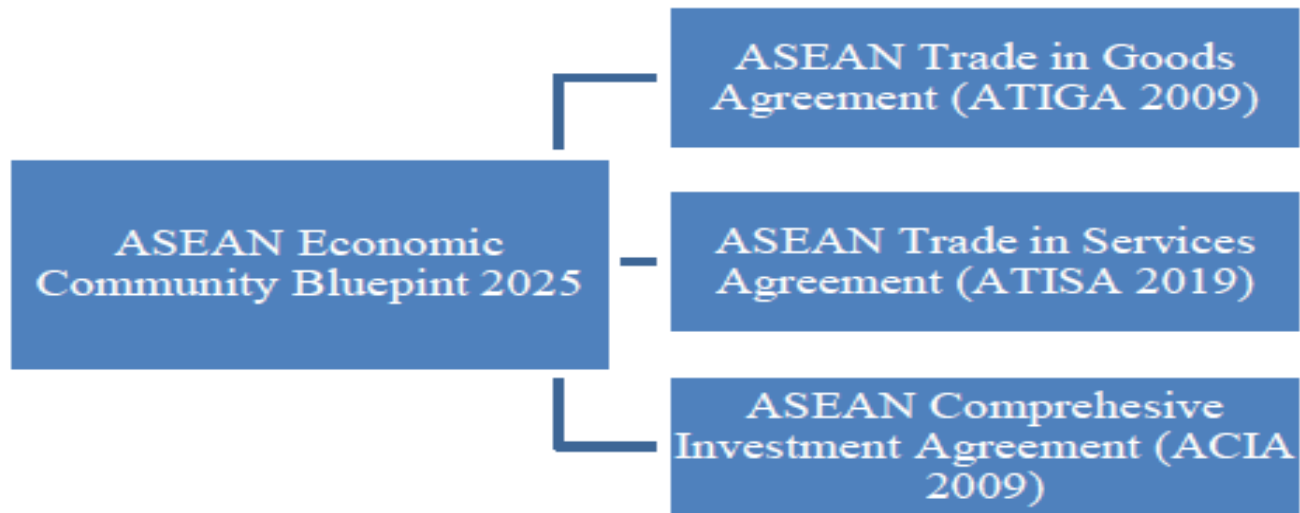
# APEC

- ▶ APEC Bogor Goals & APEC Putrajaya Vision 2040
  - Free and open trade and investment in the Asia-Pacific
  - Non-Binding Investment Principles
    - 1994 expropriation and compensation
    - 2011 prohibits the relaxation of health, labor and environmental regulations to induce foreign investment

# ASEAN



## ▶ ASEAN Law: AEC + ASEAN Plus Six Frameworks



- ▶ Reforming the Investment Regime
  - No direct effect
  - Domestic law reforms in Laos, Myanmar

# ASEAN

- ▶ ACIA Features: US Model BIT
  - A broad, non-exhaustive definition of investments
  - Investor: natural and juridical persons & substantive business operations
  - Liberalization of investment: **five main sectors (agriculture, fishery, forestry, manufacturing and mining and quarrying)** & sectors that cover services incidental to these main sectors
  - **2019 Fourth Protocol** transformed a single negative annex to two-annex negative lists – transparency
  - Indirect expropriation
    - a public action that “has an effect equivalent to direct expropriation without formal transfer of title or outright seizure”
    - a case-by-case, fact-based inquiry

# ASEAN

External Parties	Components/Agreements
China	<ul style="list-style-type: none"> <li>-Framework Agreement (2002)</li> <li>-Trade in Goods Agreement (2004)</li> <li>-Dispute Settlement Mechanism Agreement (2004)</li> <li>-Trade in Services Agreement (2007)</li> <li>-Investment Agreement (2009)</li> </ul>
Japan	<ul style="list-style-type: none"> <li>-Framework Agreement (2003)</li> <li>-Agreement on Comprehensive Economic Partnership (2009)</li> <li>-Protocol to amend the agreement to include the Chapters on Trade in Services, Movement of Natural Persons and Investment (2019)</li> </ul>
India	<ul style="list-style-type: none"> <li>-Framework Agreement (2003)</li> <li>-Trade in Goods Agreement (2009)</li> <li>-Dispute Settlement Mechanism Agreement (2009)</li> <li>-Trade in Services Agreement (2014)</li> <li>-Investment Agreement (2014)</li> </ul>
Korea	<ul style="list-style-type: none"> <li>-Framework Agreement (2005)</li> <li>-Dispute Settlement Mechanism Agreement (2005)</li> <li>-Trade in Goods Agreement (2006)</li> <li>-Trade in Services Agreement (2007)</li> <li>-Investment Agreement (2009)</li> </ul>
Australia and New Zealand	<ul style="list-style-type: none"> <li>-Free Trade Agreement (2009)</li> </ul>
Hong Kong	<ul style="list-style-type: none"> <li>-Free Trade Agreement (2017)</li> <li>-Investment Agreement (2017)</li> </ul>

# Indonesia



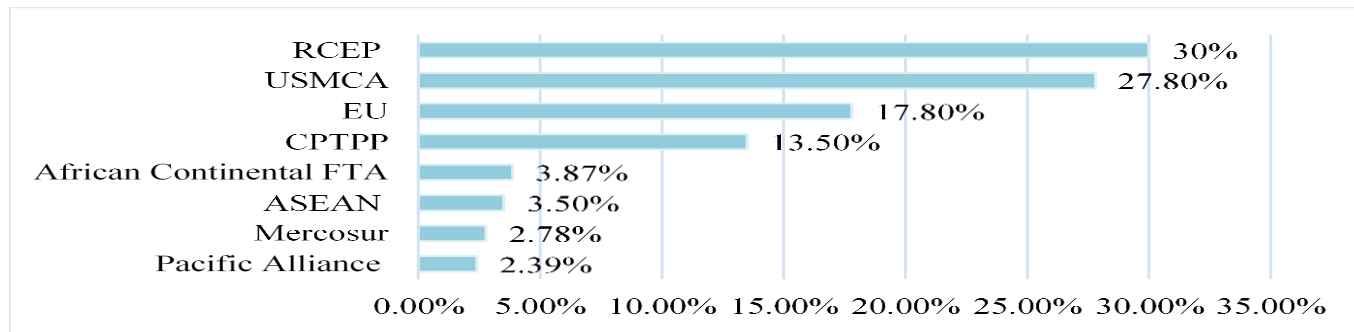
- ▶ 2014: Intention to terminate 67 BITs
  - 2021: 25, Australia, Belgium, Cambodia, China, France, Laos Singapore etc
- ▶ ICSID: Churchill Mining (UK) & Planet Mining (Aus) Indonesia–SG BIT, 2018
  - Cooling-off period, 6 m to 1 year
  - Protocol to amend ASEAN–Japan CEPA, 2019
    - Written consent for ICSID arbitration
    - ACIA: Philippines as a respondent state
  - Indonesia–Australia CEPA, 2019
    - Tribunal: Joint interpretation, binding
    - Excludes claims “in relations to an investment that has been established through illegal conduct including fraudulent misrepresentation, concealment or corruption”



# RCEP



## ► Significance of the RCEP



## ► No ISDS

- ASEAN–HK Investment Agreement, UK–Japan FTA
- Review clause, Art. 10.18, 2 years
- 2015 Japan, Korea v. 2017 NZ Jacinda Ardern
- State-to-state dispute settlement mechanism, except for disputes involving pre-establishment rights



# CPTPP



## ▶ TPP

- Australia, Philip Morris case, tobacco carve-out clause

## ▶ CPTPP

- Disallows investors' claims based on private investment contracts and violations of the minimum standard of treatment pertinent to financial services
- New Zealand's side agreements – excludes ISDS entirely with Australia, Brunei, Malaysia, Peru and Vietnam

# EU IPAs



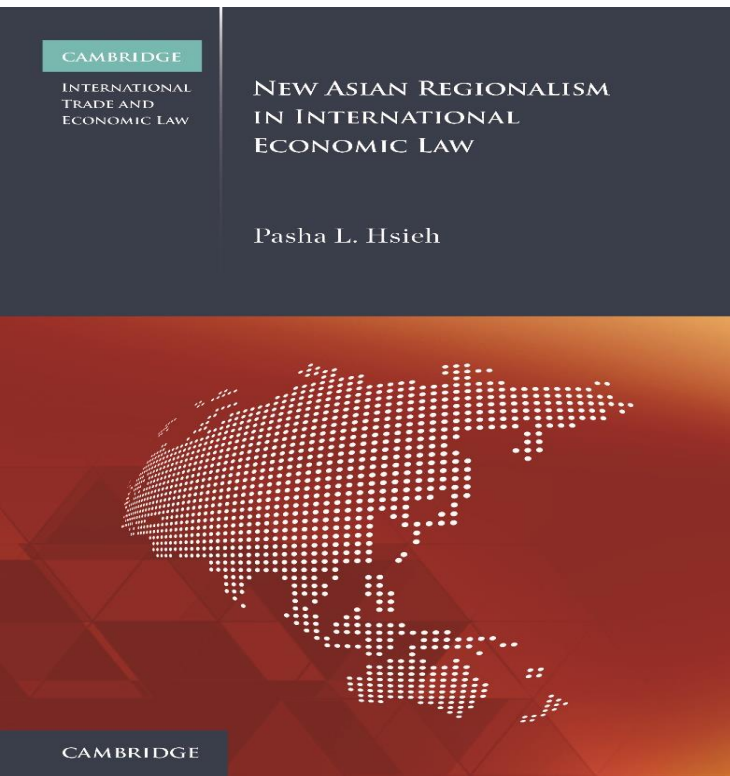
- ▶ EU–Singapore FTA
  - Opinion 2/15 of 2017, the Court of Justice of the EU
    - Provisions on portfolio investment (non–foreign direct investment) and ISDS fall outside the common commercial policy & the EU’s exclusive competence
    - FTA & Investment Protection Agreement, **IPA**
- ▶ EU–Vietnam FTA & IPA
- ▶ Differences
  - Scope of investment: other financial assets and licenses under domestic law; MFN
  - Investment Court System, **ICS**: ICSID Secretariat & Appeal: “the Tribunal has manifestly erred in the appreciation of the facts”
    - Tribunal of First Instance (6 v. 9), Appeal Tribunal (6)
    - Appointment (direct appointment v. joint committee)

# Singapore Mediation Convention

- ▶ Entered into force in 2020
  - 53 signatories
  - Ratification: Singapore, Fiji, Qatar, Saudi Arabia, Belarus and Ecuador
- ▶ Art 1, scope of application
  - This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a **commercial** dispute ...
  - UNCITRAL Model Law, Annex E of the ICSID (Additional Facility) Mediation Rules
  - EU IPAs: rules for **investor–state mediation** and the code of conduct for mediators

# Conclusion

- ▶ Narrower interpretation of rights accorded to investors
- ▶ Greater interpretative power to states
  - Issue binding interpretation of treaty provisions
- ▶ No ISDS v. Appellate mechanisms



Thank you!  
Cambridge University Press, forthcoming 2022

[pashahsieh@smu.edu.sg](mailto:pashahsieh@smu.edu.sg)