<u>Regionalism and Overlap in Investment Treaty Law –</u>

<u>Towards Consolidation or Contradiction?</u>

Wolfgang Alschner

Abstract

States increasingly conclude intra- and inter-regional treaties to protect foreign investment. In many instances, these regional treaties will overlap with existing bilateral investment treaties. This article finds that every fourth bilateral interstate relationship is affected by such overlap. Only few states use regionalism to de jure or de facto consolidate their investment treaty network. Most countries opt for parallel bilateral and regional treaty layers. Such overlap raises coordination challenges as parallel treaties may duplicate or contradict each other increasing the risk of parallel proceedings, double jeopardy and normative conflict. As these challenges are not specific to investment law, but also exist in trade law, states should draw from both fields in order to develop solutions. By using a comparative perspective, this article identifies new areas for cross-fertilization between both disciplines and offers guidance on how best to manage vertical treaty overlap arising from regionalism.

Table of Contents

Regionalism and Overlap in Investment Treaty Law – Towards Consolidation or Contradiction?

*Wolfgang Alschner**

I. Introduction

International investment law is traditionally associated with a web of almost three thousand bilateral investment treaties (BITs). In recent years, however, governments have increasingly turned away from this *bilateral* mode of governance and have begun to negotiate and conclude *regional* treaties to protect foreign investors.[1] This regionalisation of investment law takes place intra-regionally either as part of an organisation's deeper economic integration agenda, such as ASEAN's Comprehensive Investment Agreement (ASEAN CIA) entered into force in 2013, or ad hoc, like the Trilateral China–Japan–South Korea Investment Treaty signed in 2012.[2] Moreover, the trend towards regionalisation also encompasses inter-regional agreements connecting different parts of the globe as evidenced by the on-going negotiations of a Transpacific Partnership (TPP),[3] an African Tripartite Agreement[4] or the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States.[5]

---

* Graduate Institute of International and Development Studies (IHEID), Geneva, Switzerland. I want to thank UNCTAD's IIA team, Joost Pauwelyn, Jorun Baumgartner, Blerina Xheraj and the JIEL peer reviewers for their helpful comments. An earlier version of this paper was presented at the International Law Association (ILA) Regional Conference in Athens, Greece in August 2013.

[1] UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (Geneva: United Nations, 2013) at 103-107. Hamed El-Kady, 'An International Investment Policy Landscape in Transition: Challenges and Opportunities' (2013) 10 Transnational Dispute Management (TDM).

[2] Ministry of Foreign Affairs Japan, *Signing of the Japan-China-Korea Trilateral Investment Agreement*, Press release, 13 May 2012 available at www.mofa.go.jp/announce/announce/2012/5/0513_01.html (last accessed 19 August 2013). Matthew A. J. Levine & Junianto James Losari, *Gratin on the Noodle Bowl? New ASEAN Investment Agreement Promotes Regional Economic Integration*, Asia Pacific Memo, 9 May 2013 available at: www.asiapacificmemo.ca/gratin-on-the-noodle-bowl-new-asean-investment-agreement-promotes-regional-economic-integration (last accessed 19 August 2013).

[3] For more information see www.ustr.gov/tpp. For a critical view on TPP see tppinfo.org/.

[4] For more information see www.comesa-eac-sadc-tripartite.org/.

[5] For more information see ec.europa.eu/trade/policy/in-focus/ttip/.

The surge of regionalism raises new issues of treaty parallelism and overlap in investment treaty law. Of course, international investment agreements (IIAs) are no strangers to complexities, parallelism and overlap *per se*. As UNCTAD stated in its 2011 World Investment Report: '[w]ith thousands of treaties, many on-going negotiations and multiple dispute-settlement mechanisms, today's IIA regime has come close to a point where it is too big and complex to handle for governments and investors alike.'[6] Indeed, treaty provisions on 'indirect investments' coupled with arbitral tribunals' expansive interpretation of concepts such as reflective shareholder losses already today make more than one BIT potentially relevant in an investment relationship.[7] The parallel proceedings of the *CME/Lauder* dispute by one corporate entity (once via the Dutch company CME and once via its American shareholder Lauder) against the Czech Republic challenging an identical measure under two different BITs (Czechoslovakia–U.S. BIT and Czechoslovakia–Netherlands BIT) with two arbitral tribunals coming to opposite conclusions is a case in point.[8] Yet, while investment law is thus used to *horizontal* overlap of parallel BITs, regionalism has added a novel dimension to investment law: *vertical* overlap of BITs with regional investment agreements. Under this vertical overlap, an investor from country A investing in country B is protected by both a bilateral and a regional treaty signed between countries A and B. For example, a Thai investor in Indonesia can rely on, and may potentially

[6] UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (Geneva: United Nations, 2011) at xvii.
[7] Bart Legum, 'Defining Investment and Investor Who Is Entitled to Claim?' (2006) 22 Arbitration International 521; see generally Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009).
[8] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL and *Ronald S. Lauder v. The Czech Republic*, UNCITRAL. See also Filip De Ly and others, 'Who Wins and Who Loses in Investment Arbitration - Are Investors and Host States on a Level Playing Field: The Lauder/Czech Republic Legacy' (2005) 6 Journal of World Investment & Trade 59.

launch an arbitration claim under, the Thailand–Indonesia BIT (1998) as well as the ASEAN CIA (2009) for investment protection.

While such vertical treaty overlaps are a relatively recent phenomenon in investment law, overlapping bilateral, regional and multilateral treaties have been commonplace in international trade law throughout its history.[9] Since the inception of the GATT in 1947, multilateral liberalisation and regional economic integration have run side-by-side. In the last two decades, however, regionalisation has also picked up pace in trade law with the conclusion of an unprecedented number of free trade agreements (FTAs), more accurately known as preferential trade agreements (PTAs).[10] Hence, in both trade and investment law we observe an increasing turn towards regionalism and a multiplication of vertical treaty overlaps.[11] Indeed, it is often the very same agreements – PTAs with investment chapters also known as PTIAs (preferential trade and investment agreements) – that produces this overlap.

At the same time, the rise of regionalism plays out quite differently in both bodies of law. The creation of the GATT/WTO was meant to place the international trade regime on a strong multilateral basis. Hence, the recent surge in bilateral and regional PTAs is commonly understood as a shift *away from multilateralism*.[12] In investment law, the opposite is true. With the failure of

[9] WTO, *World Trade Report 2011*: *The WTO and preferential trade agreements: From co-existence to coherence* (Geneva: WTO, 2011) at 46-54.
[10] *Ibid*. at 56. Both terms will be used interchangeably.
[11] For a detailed analysis of overlapping PTAs, see Joost Pauwelyn and Wolfgang Alschner, 'Forget About the WTO: The Network of Relations between PTAs and "Double PTAs"', in Andreas Dür and Manfred Elsig (eds), *Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements* (Cambridge University Press, forthcoming 2014).
[12] See generally Jagdish Bhagwati, 'Preferential Trade Agreements: The Wrong Road' (1995) 27 Law and Policy in International Business 865; L Alan Winters, 'Regionalism versus Multilateralism' (The World Bank 1996) Policy Research Working Paper Series 1687; Kyle Bagwell and Robert W Staiger, 'Will Preferential Agreements Undermine the Multilateral Trading System?' (1998) 108 The Economic Journal 1162.

several negotiations to conclude a multilateral investment treaty[13] and the dominance of bilateral agreements, the rise of regional treaties moves investment law a step *closer towards multilateralism*. Moreover, in international trade law, PTAs are often perceived as a threat to coherence in international trade law.[14] In the over 350 PTAs in existence, tariff lines, service commitments and intellectual property protection differ from the multilaterally agreed levels resulting in a *fragmentation* of international trade relations. In investment law, in contrast, regionalism presents an opportunity for *coherence* as multi-party investment agreements can consolidate and harmonize investment protection provision that otherwise differ starkly in structure, precision and wording in the close to 2900 BITs.[15]

These differences between trade and investment law may, however, be more apparent than real. In both bodies of international economic law, the rise of regionalism and vertical overlap is, in essence, a governance challenge that presents both threats and opportunities. PTAs are not a danger to the WTO *per se*, but can be a 'stepping stone' for tariff liberalization and can foster coherence through deep integration commitments that *de facto* extend beyond the PTA members.[16] Similarly, the rise of regional investment arrangements can reduce but also exacerbate complexities in the investment universe furthering or diminishing the prospect of

[13] Under the OECD umbrella negotiations failed in the 1960s and 1990s. The issue was subsequently taken up by the WTO as part of the 'Singapore Issues' but then abandoned in the early 2000s. See also Schill (n 7); Jurgen Kurtz, 'General Investment Agreement in the WTO - Lessons from Chapter 11 of NAFTA and the OECD Multilateral Agreement on Investment, A' (2002) 23 University of Pennsylvania Journal of International Economic Law 713.

[14] Tania Voon and Andrew Mitchell, 'PTAs and Public International Law' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press 2009) 114. See also WTO, *World Trade Report 2011* (n 9) at 6.

[15] UNCTAD, *WIR 2013* (n 1) at 101, 107.

[16] WTO, *World Trade Report 2011* (n 9) at 9-10. Richard E Baldwin, 'Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade' (2006) 29 World Economy 1451.

coherence and convergence towards multilateralism.[17] Hence, the impact of regionalism in both trade and investment law is, in the end, what states make of it.

In managing the rise of regionalism in both trade and investment law, the increasing vertical overlap of different treaty layers pose particularly daunting challenges. In contrast to international trade law, where the topic has received extensive academic attention, much less is known about vertical overlap of investment treaties. Somewhat surprisingly, past investment law scholarship has focused on the overlap between different species of investment-related treaties, e.g. BITs and GATS[18] or BITs and EU law[19] rather than the co-existence of the more similarly worded BITs and PTIAs concluded between the same country pairs. Since overlap plays out differently when two treaties share an identical subject matter,[20] the latter type of parallelism warrants specific academic attention. Accordingly, this article focuses on overlapping bilateral, intra- and inter-regional treaties that protect foreign investment in a manner substantively equivalent to BITs and provides an assessment of the implications of such vertical overlap for investment treaty law.

Section 2 finds that vertical overlap among investment treaties is widespread with about 24% of bilateral interstate relationships being governed by more than one investment treaty. Section 3 explores the various strategies adopted by states in addressing this overlap. While some

[17] UNCTAD, *WIR 2013* (n 1) at 106-7.
[18] Marie-France Houde and Katia Yannaca-Small, 'Relationships between International Investment Agreements' (2004) OECD Working Papers on International Investment; Rudolf Adlung and Martín Molinuevo, 'Bilateralism in Services Trade: Is There Fire Behind the (Bit-)Smoke?' (2008) 11 Journal of International Economic Law 365.
[19] Markus Burgstaller, 'European Law and Investment Treaties' (2009) 26 Journal of International Arbitration 181; Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 Common Market Law Review 383; Nikos Lavranos, 'Bilateral Investment Treaty (BITS) and EU Law' (Social Science Research Network 2010) SSRN Scholarly Paper ID 1683348 <http://papers.ssrn.com/abstract=1683348> accessed 19 August 2013.
[20] See infra notes 39-40, 77 and accompanying text.

states use regionalism to consolidate treaty overlap, most countries tend to leave BITs and regional investment treaties in co-existence resulting in a 'spaghetti-bowl' of parallel agreements similar to what we know from trade law.

Section 4 then adopts a comparative perspective investigating how trade and investment law coordinate between unconsolidated overlapping treaty layers. With a view to identifying strategies for cross-fertilization between both bodies of law, the section reviews three coordination challenges arising from vertical treaty overlap. First, treaty overlap requires *functional coordination*, *i.e.* an assignment of specific roles to each treaty layer, to prevent treaties from duplicating or contradicting each other. International trade law's approach to functional coordination consists of setting a multilateral minimum standard for liberalisation and intellectual property (IP) protection, while allowing countries to go deeper or further bilaterally or regionally. With some modification, this approach can be fruitfully adopted in investment law, where functional coordination is currently under-developed.

Second, treaty overlap requires *jurisdictional coordination* to mitigate the risk of parallel proceedings, inconsistent decisions and double jeopardy. Where overlapping treaties exist, an investor can bring the same claim to international arbitration under a BIT and, if unsuccessful, try again under an overlapping regional treaty. Similarly, a trade dispute initiated under NAFTA may subsequently be brought before a WTO panel. In preventing such overlapping proceedings, investment law fares better than trade law. Especially waiver clauses are an effective means of jurisdictional coordination that could also be transposed to trade law.

Third, treaty overlap requires *applicable law coordination* to resolve normative conflicts between parallel treaties. Here, the strategies employed by trade and investment law diverge. In trade law, normative conflicts tend not to arise because of a narrow applicable law or, are dealt with through harmonious interpretation. In investment law, in contrast, applicable law clauses tend to be broad allowing for a BIT and a regional treaty to be applied simultaneously. Ensuing normative conflicts can be resolved through harmonious interpretation or conflict of law clauses. The former tends to favour legal innovation over investment protection, while the opposite is true for the latter. Which approach is chosen by arbitrators will depend on the intentions of the contracting parties as reflected in the wording of the treaties involved.

In sum, investment law's turn towards regionalism requires careful consideration. On the one hand, it creates new challenges to effectively manage treaty overlap with a view to avoid duplication or contradiction, parallel proceedings and preserve legal innovation where it is desired. On the other hand, it offers new opportunities for cross-fertilization between trade and investment law spreading best practices in order to develop more effective responses to coordination challenges raised by overlapping treaties in both bodies of law.

II. Vertical treaty overlap in the IIA network

Although the IIA universe is still dominated today by over 2850 BITs in existence,[21] the investment law landscape is changing. The 2012 UNCTAD World Investment Report found that

[21] UNCTAD, *WIR 2013* (n 1) at 101.

‘the balance is gradually shifting from bilateral to regional treaty making’.[22] About every fourth IIA signed in 2012 was a regional one.[23] At the same time, the annual number of newly concluded BITs has dropped to pre-1990 levels.[24] Hence, regionalism is on the rise.[25]

Regional investment agreements typically add an extra treaty layer to the already existing BITs resulting in vertical overlap of investment treaties for the contracting parties. To quantify the degree of investment treaty overlap, we have built a new dataset. For BITs, we can readily draw from UNCTAD’s data on BITs concluded by each country. At the end of 2012, over 2200 BITs were reported to be in force and close to 2860 signed.[26] Compiling a list of regional investment treaties is more difficult. Although UNCTAD reports on so called ‘other IIAs’, it only publishes numbers but does not identify the underlying agreements. Moreover, UNCTAD’s definition of ‘other IIAs’ comprises a variety of investment-related treaties including PTAs with investment chapters, but also liberalisation or framework agreements without substantive investment protection provisions.[27] Hence, only a fraction of the 339 ‘other IIAs’ reported until the end of 2012 are similar in substance to BITs.[28]

For the purpose of this article, we are only interested in vertical overlap of two or more *substantively equivalent* investment treaties. We therefore build our own data set of regional

[22] UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (Geneva: United Nations, 2012) at 86.
[23] UNCTAD, *WIR 2013* (n 1) at 101.
[24] *Ibid.*
[25] El-Kady (n 1).
[26] See country lists of BITs available at: unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/Country-specific-Lists-of-BITs.aspx
[27] UNCTAD, *WIR 2013* (n 1) at 101-2.
[28] *Ibid.* at 101.

investment treaties using the WTO Regional Trade Agreements (RTA) database,[29] investigating which of the agreements listed there have an investment protection component 'substantively equivalent' to those found in BITs.[30] We exclude (*i.e.* not 'substantively equivalent') framework or liberalisation agreements and those treaties that cover only relative (non-discrimination), but not absolute (e.g. expropriation) investment protection standards from that list.[31] As not all BITs grant investors access to investor-state arbitration (ISA), we also include regional investment treaties that do not provide for such mechanism e.g. the Australia–United States FTA. Out of 262 agreements listed in the WTO RTA database, 85 treaties contain an investment component that makes them 'substantively equivalent' to BITs. To this, we add two important multilateral investment treaties that can also be considered as 'substantively equivalent': the Energy Charter Treaty (ECT) and the investment protection agreement of the Organization of the Islamic Conference (OIC). For both BITs and regional investment treaties, we only consider treaties that are currently in force. In total, our dataset comprises 180 countries and 2309 agreements.

So how pervasive is vertical overlap in the IIA universe? About 24% of bilateral relationships between the countries in our dataset are governed by more than one investment treaty. Put differently, every fourth investment agreement overlaps with another investment agreement. Of these overlaps, about 9% involve more than three investment treaties existing in

---

[29] Available at http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx. The database only lists preferential trade agreements notified to the WTO.

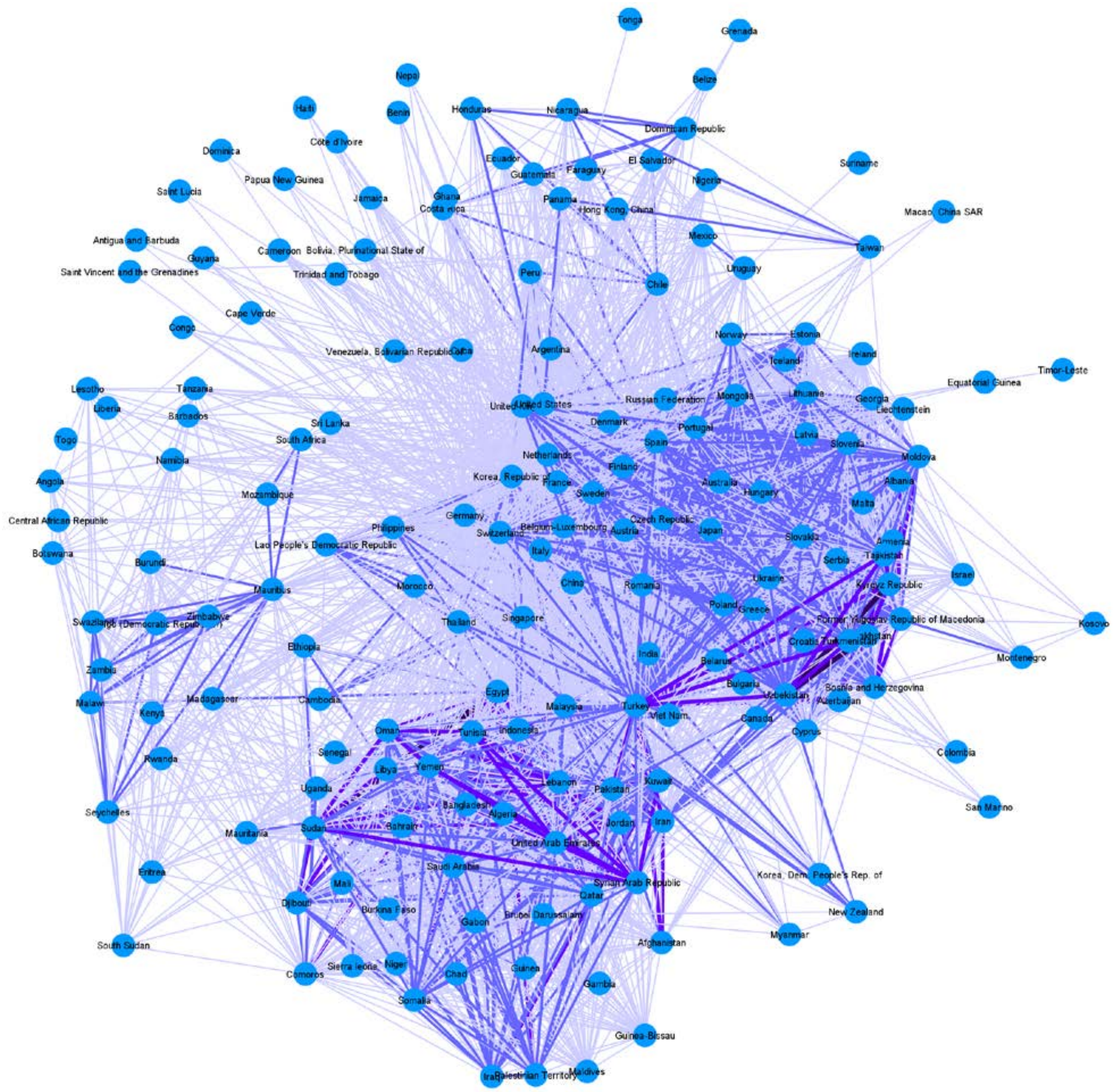
[30] We consider the specific agreements listed, but also check whether an investment agreement was concluded as part of the same regional integration project (e.g. the ASEAN treaty itself contains no investment chapter, but a separate instrument, the ASEAN Comprehensive Investment Agreement, governs intra-ASEAN investment protection) or was signed alongside an FTA (see e.g. Art. 1.4 of the EFTA–South Korea FTA).

[31] Some treaties concluded by EFTA, e.g. EFTA–Colombia or EFTA–Ukraine, contain non-discrimination clauses but no expropriation clause. In addition, we also exclude the EU treaty in our quantitative analysis, as it contains a very different approach to investment protection as compared to that found in other IIAs. See *Electrabel S.A. v. Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19, para. 4.176; *Eureko B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, UNCITRAL, paras. 245, 258; *Eastern Sugar B.V. v. The Czech Republic*, Partial Award, 27 March 2007, SCC Case No. 088/2004, para. 159.

parallel. Currently, four treaties is the maximum overlap in our dataset. Hence, vertical overlap is widespread in the IIA universe.

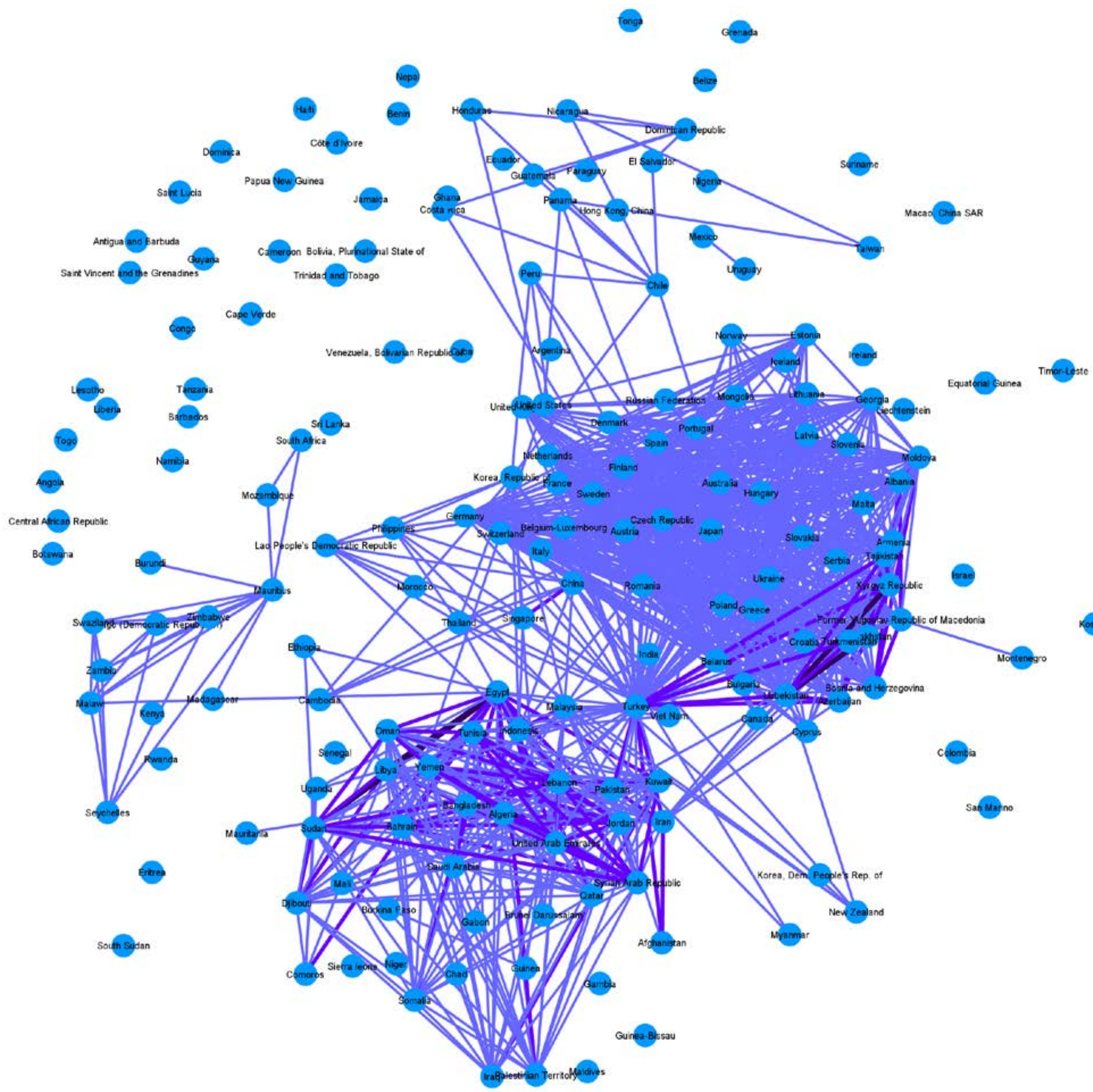
However, this vertical overlap is not evenly distributed among countries. Figure 1a) shows that overlap is concentrated in some parts of the IIA network. States are displayed as circles and lines represent the presence of an investment treaty. Bilateral relationships governed by only one treaty are marked by light, narrow lines. The more treaties govern a relationship, the darker and wider a line becomes.

Figure 1a) Vertical overlap in the IIA network



In figure 1b), bilateral relationships involving only one treaty are deleted offering a clearer view of the share of vertical overlap. It shows that vertical overlap is concentrated and affects some countries more than others.

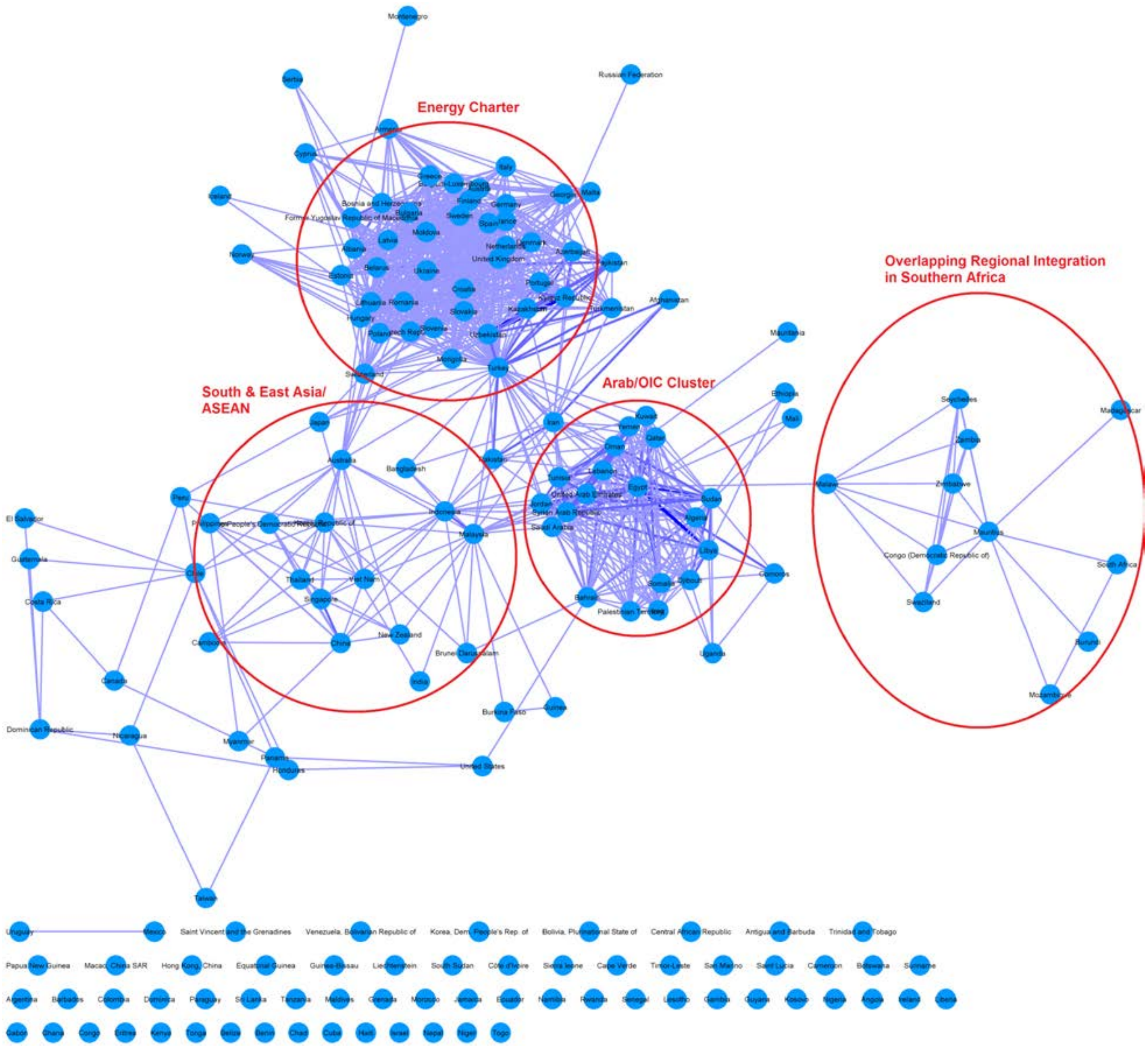
Figure 1b) Bilateral ties governed by vertical overlap



Finally, figure 1c) dissects the part of the IIA network affected by overlap further identifying a number of clusters. First, given their breadth of membership, the ECT (49 contracting parties) and the OIC investment treaty (40 contracting parties) are particularly prone to creating vertical overlap. But also regional integration efforts result in duplication. This is evidenced by the vertical overlap among, for instance, South and East Asian countries and ASEAN members. These overlaps are often the result of parallelism between a BIT and a regional treaty. In other instances, also two PTIAs may overlap either because one is a bilateral and another one is a regional PTIA, or, because countries are parties to multiple, but overlapping regional integration projects like in Southern Africa, where the SADC and COMESA membership overlaps.[32]

Figure 1c) Clusters of overlaps

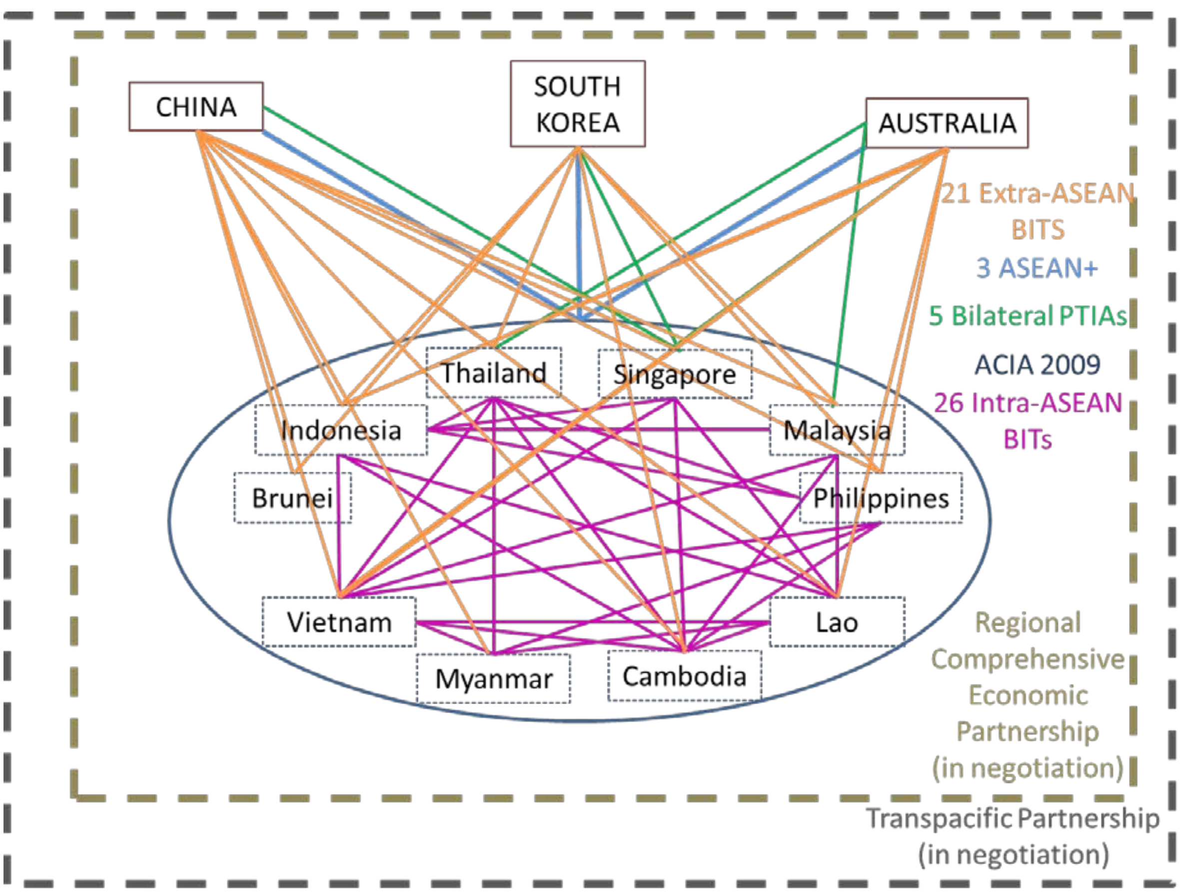
[32] For problems arising from this overlap of COMESA and SADC see Gerhard Erasmus, 'The COMESA Court of Justice: Regional Agreements Do Protect Private Parties' (2013) tralac Trade Brief 8 at 9; available at: www.tralac.org/2013/10/16/the-comesa-court-of-justice-regional-agreements-do-protect-private-parties/



The variety of types of overlap also suggests that there is no single explanation for the occurrence of vertical investment treaty overlap. In some cases, it may be the result of purposefully-conducted regional integration efforts that aspire to create a regional floor in investment protection efforts while maintaining special bilateral ties. In other cases, vertical overlap may be an almost accidental side effect of being part of two separate, but intersecting regional groupings.

To give a further illustration of how diversified investment treaty overlap can be, Figure 2 zooms in on South-East Asia's 'noodle bowl'. ASEAN members have concluded 26 BITs among themselves in addition to the regional ASEAN CIA. Moreover, each ASEAN member has BITs with countries in neighbouring regions such as China, South Korea and Australia. These BITs, in turn, overlap with PTIAs concluded by individual ASEAN members as well as PTIAs concluded by ASEAN as a whole (so called 'ASEAN+'). Finally, negotiations are on-going on the inter-regional level to create a Regional Comprehensive Economic Partnership (RCEP) and a Transpacific Partnership (TPP) adding a third or even fourth layer of investment protection.

Figure 2: The ASEAN+ 'Noddle Bowl'



III. Consolidation or co-existence: How do countries deal with vertical treaty overlap?

If regionalisation of investment law produces widespread vertical overlap among investment treaties, then how do countries deal with it in their treaty networks? Countries have two broad options in managing the rise of regionalism. They can either use regionalisation to *de jure* or *de facto* consolidate overlapping treaties or they can opt for a co-existence of overlapping treaty layers. Currently, the latter strategy seems to be the dominant one.

A. *De jure* consolidation

De jure consolidation remedies overlap between BITs and regional treaties by terminating one of the overlapping treaties so that a bilateral investment relationship will only governed by one treaty. For instance, when a regional investment treaty comes into force, a BIT among two of the contracting parties may become redundant and is terminated. Such *de jure* consolidation comes in two variations.

1. Consolidation *ex ante* – 'Clean slate'

Combining the negotiation of a new treaty with the termination of an overlapping old treaty is the most efficient and effective way to deal with treaty overlap. Strictly speaking, treaty overlap does not even arise in such *ex ante* consolidation. In case of the Central America–Mexico FTA, the termination of pre-existing bilateral FTAs formed part of the terms of the treaty.[33] *Ex ante* consolidation is also envisaged for the external EU investment policy. Through the 2009 Lisbon Treaty, competency over foreign investment policy-making shifted from the EU member states to

[33] See Article 21.7 Central America–Mexico FTA.

the EU.[34] As a result, the EU will be able to conclude investment treaties with third countries. As of this writing, negotiations with Canada are in their final stages and negotiations with the U.S., Japan and China, amongst others are ongoing. These negotiations raise overlap issues as many EU member states currently have BITs with these countries in place.[35] A recent EU regulation, however, has made clear that these BITs 'will be progressively replaced by agreements of the Union relating to the same subject matter'.[36] Hence, the EU seeks to avoid overlap altogether and instead starts EU investment relations with third countries on a clean slate by replacing existing BITs.[37]

2. Consolidation *ex post* – 'Tidying up'

Especially if many countries are involved, it may be impossible to negotiate the conclusion of a new treaty and the termination of an old one at the same time. In that case, sequencing is the best alternative, prioritizing the conclusion of a regional treaty to then progressively phase out overlapping older treaties. For example, the EU treaty contains investment protection obligations (albeit different from those found in typical IIAs)[38] which overlap with BITs concluded among EU members usually prior to their EU accession. The legal relationship and overlap between EU

[34] See Article 188 C (1) of the Treaty of Lisbon; Article 207 (1) Treaty on the Functioning of the European Union (TFEU).
[35] EU press release, The EU's bilateral trade and investment agreements – where are we? 1 August 2013, available at http://europa.eu/rapid/press-release_MEMO-13-734_en.htm (last accessed 19 August 2013).
[36] EU Regulation No 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal of the European Union 20 Dec 2012, L 351/40, recital 5.
[37] The EU proposal in the leaked investment chapter of the Canada–EU Trade Agreement (CETA) Article X.18 is instructive in this regard. Aside from replacing existing agreements by individual EU member states with Canada (paragraph 1), the Article sets out a survival period of three years during which claims may continue to be filed under the old agreements for violations that took place while the earlier agreements were still in force (paragraph 3). The leaked text is available at www.tradejustice.ca/leakeddocs/ (last accessed 19 March 2014).
[38] Various elements of EU law serve to protect investment, yet the normative structure is very different from that of BITs or PTIAs. Therefore, the tribunals in *Electrabel* (para. 4.176), *Eureko* (paras. 245, 258) and *Eastern Sugar* (para. 159) found that EU law and the IIAs in question, do not share the 'same subject matter', see above n 31. See also Jan Kleinheisterkamp, 'Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty' (2012) 15 Journal of International Economic Law 85 at 89–95.

law and these intra-EU BITs is complex and is subject to an intense academic and political debate[39] as well as actual litigation[40]. Because of these and other complexities, the Commission is advocating to phase out intra-EU BITs.[41] This *ex post* consolidation, however, is likely to be time-consuming and cumbersome as EU member states' consent is required and disagreement persists on whether investment protection is sufficiently reflected in EU law.[42] Hence, such *ex post* consolidation is prone to hold-ups and generally less efficient than *ex ante* consolidation.

B. *De facto* consolidation

An alternative strategy is *de facto* consolidation. It leaves overlapping treaties formally in place. However, it manages their interaction in a way so that, substantively, only one of the treaties governs a bilateral investment relationship at a given point in time. Again, such *de facto* consolidation comes in two variations.

[39] See, for instance, Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty' (2007) 24 Journal of International Arbitration 455; Eilmansberger (n 19); Lavranos (n 19); Burgstaller (n 19); Kleinheisterkamp (n 38).

[40] For example, *Eastern Sugar BV v. The Czech Republic* (n 31); *Eureko B.V. v. The Slovak Republic* (n 31); *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, Final Award, 11 December 2013, ICSID Case No. ARB/05/20, paras. 286-329.

[41] In *Eastern Sugar BV v. Czech Republic* (n 31), the EU Commission expressed the view in a January 2006 letter 'that intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence', para. 119. Furthermore, on 22 May 2013, EU Commissioner Karel De Gucht stated during the parliamentary hearing on *Financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the EU is party*: 'The Commission agrees that bilateral and investment treaties (BITS) between EU Member States do not comply with EU law.… Commission officials have therefore initiated informal discussions with them with a view to reaching agreement on the joint termination of all these agreements within an agreed time frame. Several Member States have already agreed bilaterally to terminate their agreements, and the Commission has encouraged them to proceed with doing so. However, in those cases where Member States are not willing to terminate agreements, the Commission is ready to play its role as a guardian of the Treaties so as to ensure compliance with EU law.' Available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20130522+ITEM-019+DOC+XML+V0//EN (last accessed 19 March 2014)

[42] Söderlund (n 39) at 464, 468 (arguing that at least in new member states with less developed judicial system, investment protection through BITs is still necessary); August Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations' (2012) 39 Legal Issues of Economic Integration 157 at 178 (arguing that BITs provide greater protection than EU law); Kleinheisterkamp (n 38) at 99–100 (showing that EU and BITs both protect investment, yet the former balances public-private concerns more explicitly).

1. Incorporation

One treaty may incorporate another treaty or parts thereof in order to avoid duplication. The China–Singapore FTA (2008), for instance, incorporates, *mutatis mutandis*, the ASEAN–China investment agreement (2009) in Article 84(1). Similarly, the Japan–Peru FTA (2011) in Article 2(3) incorporates the Japan–Peru BIT (2008).[43]

2. Suspension

A slightly more sophisticated strategy consists in the temporary suspension of an overlapping treaty. For instance, the Switzerland–South Korea BIT (1971) is to be suspended as long as the Switzerland–Liechtenstein–Iceland–South Korea investment treaty (2005) remains in force.[44] Switzerland thus plays it safe, akin to the proverbial belts and suspenders, ensuring that investment protection is secured even if the regional treaty were to fail, without risking unpredictable parallelism of treaties. Suspension is also adopted in some Canadian and U.S. treaties,[45] but it is largely absent in overlapping treaties involving only developing countries.

C. Co-existence

Finally, countries can also refrain from consolidating overlapping treaties altogether leaving them in mere coexistence. This can either be done through simple silence or through an implicit or explicit affirmation of existing parallel treaties.

[43] Although the incorporated treaty text could be interpreted differently than the original treaty (e.g. because of differences in the treaties' object and purpose), incorporation should still be considered as *de facto* consolidation since, leaving aside the interpretive margin, both treaties will thereby contain identical disciplines, which minimizes, or even prevents entirely, the potential for functional or normative conflict encountered otherwise under our heading of 'co-existence'.
[44] See Article 27, Switzerland–Liechtenstein–Iceland–South Korea investment treaty (2005).
[45] Canada–Peru FTA (2008) Article 845 suspending the Canada–Peru BIT (2006). See also Panama–United States FTA (2007) Article 1.3(2) or Morocco–United States FTA (2004) Article 1.2 (3).

1. Silence

Surprisingly few regional investment treaties are silent on the issue of overlapping BITs. One example is the SADC Protocol on Finance and Investment (2005). While it overlaps with 16 existing BITs, Article 26 of the Protocol only affirms the right of members to conclude BITs with third countries but is silent on the issue of existing agreements among its members. Fortunately, silence, and the uncertainty that comes with it, remains an anomaly among the reviewed agreements.

2. Parallelism

More often regional treaties will implicitly or explicitly affirm the existence of overlapping treaties. This can be done in very explicit ways such as in the China–Japan–South Korea Trilateral Investment Agreement (2012) 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.[46]

Other treaties do not refer to overlapping BITs directly, but re-affirm existing agreements more generally, like the ASEAN CIA (2012) in Article 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.'[47]

Table 1: Strategies to address vertical treaty overlap

***DE JURE* CONSOLIDATION**	
1) 'Clean Slate': Consolidation *ex ante* (*i.e.* termination of overlapping bilateral treaties).	Central America–Mexico FTA Art. 21.7; Extra-EU BITs
2) 'Tidying up': Consolidation *ex post* (*i.e.* phase-out of overlapping bilateral treaties).	intra-EU BITs (?)
***DE FACTO* CONSOLIDATION**	

[46] Emphasis added. Similarly, the CEFTA treaty (2006) involving Albania, Bosnia and Herzegovina, Macedonia, Moldova, Montenegro, Serbia and Kosovo Article 30 refers to Annex 6 which lists existing BITs and affirms the rights and obligation contained therein

[47] See similarly ASEAN–China Investment Agreement in Article 23; ASEAN–South Korea FTA (Article 23 (1)) and ASEAN–Australia–New Zealand FTA (Chapter 18, Article 2(2)); Article 1.3 CAFTA–DR.

3) Incorporation: One treaty incorporates investment provisions of another treaty.	Japan–Peru FTA (2011) Art. 2(3); China–Singapore FTA
4) 'Belts and Suspenders': Suspension of bilateral treaties as long as regional treaty remains in force.	Switzerland–Liechtenstein–Iceland–South Korea Investment Agreement (2005) Art. 27; Panama–United States FTA (2007) Art. 1.3(2) or Morocco–United States FTA (2004) Art. 1.2 (3)
CO-EXISTANCE	
5) Silence: No reference made to exiting parallel treaties.	SADC Protocol on Finance and Investment
6) Parallelism: Reaffirming existing bilateral treaties (explicitly or implicitly).	explicitly: China–Japan–South Korea Trilateral Investment Agreement Art. 25; CEFTA Art. 30 implicitly: ASEAN Investment Area Art. 44, COMESA Art. 24

D. Conclusion

The above account of different strategies in dealing with overlap suggests that there is variation in how countries deal with overlap. Some seize regionalism as an opportunity for consolidation, others opt for parallel treaty layers. Indeed, the same country may approach treaty overlap differently depending on the treaty and the parties involved.[48] At this point in time, it is impossible to determine whether the regionalisation of IIAs will bring about a significant consolidation of the BIT universe since, especially in the EU context, the consolidation process is still in the making.[49] What can be said, however, is that, currently, most states opt for co-existence rather than *de facto* or *de jure* consolidation in their treaty networks. Across the globe, regionalisation has thus lead to an increase of unconsolidated layers of vertically overlapping investment treaties.

IV. Managing unconsolidated vertical overlap: Trade and Investment Law compared

Whenever states do not opt for consolidation and instead leave vertically overlapping treaties in mere co-existence, various legal questions arise. If the same investment transaction is governed by two or more treaties, then under which treaty will an arbitral tribunal be constituted and which treaty will be applied? Can an investor first try its luck under the BIT and, when it fails, bring the same claim under the regional treaty? What happens if two overlapping treaties were to provide different solutions to the same legal problem? Which treaty prevails in such normative conflict and which treaty would yield? This section discusses the three most pressing legal coordination challenges that arise in case of unconsolidated overlap. These challenges include 1) functional coordination to avoid duplication or contradictions among treaty layers, 2) jurisdictional coordination to prevent overlapping proceedings and 3) applicable law coordination to resolve conflicts of norms.

[48] Chile, for instance, has refrained from including investment standards in the Chile–Panama FTA (2006) and instead in Article 9.2 referred to the 1996 BIT existing between the two parties. In contrast, the Chile–Peru FTA (2006), signed the same year, contains an investment chapter overlapping with a prior BIT (2000).

[49] The EU members are party to over 1350 BITs – almost half of all the BITs in existence (see List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 2013/C 131/02, Official Journal of the European Union, 8 May 2013). If the EU achieved a consolidation of these BITs, it would significantly reduce the size and complexity of the BIT universe.

These challenges are not specific to investment treaty law, but are associated with vertical overlap of co-existing treaties more generally. Therefore, we can look at them from a comparative perspective. By drawing from the international trade regime, which has long been marked by the interaction of bilateral, regional and multilateral treaties, we can assess the challenges international investment law faces and the solution it develops from a comparative angle. Of course, there are a number of important differences in the legal architecture of the two bodies of law. Yet, while being mindful of these differences, this section will show that there is still considerable potential for cross-fertilization.

A. Functional coordination: Duplication, contradiction or differentiation

Where two treaties govern the same bilateral relationship, functional coordination describes what role the contracting parties have assigned to each instrument. If the contracting parties have not purposefully assigned specific roles to each treaty layer, *i.e.* no functional coordination, the two treaties may simply duplicate each other, providing no value-added. Even worse, a lack of functional coordination could also result in unintended contradictions undermining the objective of either treaty. Therefore, it is desirable for contracting parties to assign each treaty its particular role. For example, a regional treaty may set a minimum floor, as for instance done in the OIC investment treaty, allowing bilateral treaties to provide more preferential treatment.[50] Or, a regional treaty may complement bilateral treaties, e.g. by setting up an additional infrastructure

[50] See OIC investment treaty, Preamble (‘consider the provisions contained therein as the minimum in dealing with the capitals and investments coming in from the Member States’) and Article 18 (‘Two or more contracting parties may enter into an agreement between them that may provide a treatment which is more preferential than that stipulated in this Agreement’).

like the Unified Agreement on Arab Capital establishing the Arab Investment Court.[51] Whatever these assigned roles may be, it is important that they exist so that the inevitable interaction among treaty layers takes place in a purposefully design, structured and anticipated manner rather than in an unexpected and potentially detrimental haphazard fashion.

In international trade law, we observe such a functional differentiation. Undoubtedly, this is facilitated by the existence of the WTO as a multilateral institution providing countries with a common reference point for functional differentiation. As compared to the WTO base line, countries conclude PTAs to deepen WTO obligations (WTO-plus), to contract-out of WTO disciplines (WTO-minus) or to cover issues not addressed under the WTO (WTO-extra).[52] Unsurprisingly then, one of the main explanations for the recent rise of regionalism in trade law is that countries seek to advance their liberalisation, harmonisation or economic integration agenda beyond what is currently possible at the WTO.[53] This functional differentiation in trade law relies on several mechanisms of functional coordination that, albeit imperfectly, structure the interaction of bilateral, regional and multilateral layers of trade governance. Most importantly, GATT Article XXIV and GATS Article V allow countries to pursue liberalisation beyond the WTO through PTAs that remove 'substantially all' trade barriers among PTA members. At the same time, these articles do not condone PTAs that impose additional trade restrictions on non-

[51] Article 30 of the Unified Agreement; see also Walid Ben Hamida, 'The First Arab Investment Court Decision' (2006) 7 Journal of World Investment & Trade 699 at 709–10.
[52] Gabrielle Marceau, "News from Geneva on RTAs and WTO-plus, WTO-more, and WTO-minus," in *Proceedings of the 103rd Annual Meeting,* Vol. 103, 2009, 124–128. Of these three, WTO-minus provisions in PTAs are most problematic raising the fundamental question to what extent WTO members can contract out of their WTO obligations *inter se*. See Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 European Journal of International Law 907.
[53] See, for instance, Daniel Drache & Marc D. Froese, "Omens and Threats in the Doha Round: The Decline of Multilateralism?" Globalization Working Papers 08/1 May 2008 (referring to pessimists' view that the 'deadlock at Doha will drive deal making towards a "spaghetti bowl" of many different bilateral and regional arrangements') at 30.

members. Admittedly, in practice, trade law's functional coordination and differentiation is rather imperfect. PTAs often simply duplicate GATT provisions and their compliance with GATT Article XXIV and GATS Article V is insufficiently monitored and even less enforced.[54] Nevertheless, these coordination clauses provide an essential ideational framework setting out the 'dos and don'ts' for regional integration that assist states and policy-makers to rationalize the interaction between different layers of trade governance.

In international investment law, functional coordination and differentiation is more difficult to achieve. First, a common multilateral focal point like the WTO is missing. Second, levels of investment protection are not as easily measured as reductions in tariff lines or extensions of patent durations. Third, investment treaties today are not anymore only about 'more' investment protection. Rather increasingly bi-directional investment flows coupled with the threat of investor-state arbitration have given rise to a new generation of investment treaties that protects investment abroad while safeguarding policy space at home through more fine-tuned and balanced treaties.[55] Preferentialism is thus not equivalent to stronger investment protection. In investment law, we are hence looking at a more decentralized and more complex functional differentiation between treaties along the lines of 'investment-protection-plus', 'investment-protection-extra' and, increasingly also, 'investment-protection-minus' provisions.

[54] Joost Pauwelyn, 'Legal Avenues to "Multilateralizing Regionalism": Beyond Article XXIV' in RE Baldwin and P Low (eds), *Multilateralizing Regionalism* (Cambridge University Press 2009) at 368–9.

[55] Wolfgang Alschner, 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law', Goettingen Journal of International Law, forthcoming 2014; SA Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 Journal of International Economic Law 1037; A Van Aaken, 'International Investment Law between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 Journal of international economic law 507.

Nevertheless, a simple functional differentiation seems possible also for overlapping investment treaties. Here WTO law may provide useful guidance, especially in the more analogous field of intellectual property (IP) rights protection. TRIPS Article 1(2) states that

> Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.

The article ensures functional coordination and differentiation in three ways that can also be applied to the investment treaty context. First, the TRIPS sets a minimum standard which makes existing bilateral IP treaties that correspond or fall below this standard superfluous. Second, it allows more extensive protection standards for those countries willing to go further through bilateral IP treaties. Third, it ensures consistency between the different levels of governance by mandating compliance with the TRIPS Agreement.

Unfortunately, current investment treaties largely lack such explicit functional differentiation and coordination among treaty layers or do not go far enough. For instance, whereas Article 3 of the Unified Agreement on Arab Capital identifies the treaty as setting a minimum standard, it does not regulate consistency issues with bilateral agreements that go beyond this standard. Similarly, Article 32 of the COMESA Investment Area comes close to the TRIPS approach regulating the content of future overlapping agreements (para. 2) as well as existing agreements with third countries (para. 5), but it remains silent on the content of existing overlapping BITs concluded among its member states.[56]

In any event, the relationship between BITs and regional agreements does not always follow the pattern of regional floors and deeper bilateral integration ('investment-protection-plus'/'investment-protection-extra'). The trilateral investment treaty between China, Japan and South Korea (2012), which overlaps with three BITs, is a case in point. The China–Japan BIT (1988) limits investor-state arbitration to compensation over expropriation. Hence it provides *less* instead of *more* substantive protection (no 'investment-protection-plus') than the regional treaty. The BIT is also more limited in scope not containing, for instance, limitations on performance requirements (no 'investment-protection-extra'). The Japan–Korea BIT (2002), in contrast, contains arguably more investor friendly protection standards than the Trilateral Agreement e.g. an unqualified (not linked to customary international law) fair and equitable treatment clause ('investment-protection-plus') and is broader in scope providing for pre-establishment national treatment and more extensive limitations on performance requirements ('investment-protection-extra'). However, it also has exceptions, e.g. on public health, absent in the Trilateral Agreement ('investment-protection-minus'). Hence, rather than developing a coherent approach of functional differentiation and coordination, it seems that the drafters made little effort to effectively manage

[56] The COMESA Investment Area Article 32 reads:

> 1. This Agreement or any action taken under it shall not affect the rights and obligations of the Member States under existing agreements to which they are parties.
> 2. Nothing in this Agreement shall affect the rights of the Member States to enter into other agreements not contrary to the principles, objectives and terms of this Agreement.
> 3. In the event of inconsistency between this Agreement and such other agreements between Member States mentioned in paragraph 2 of this Article, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.
> 4. This Agreement shall not cover matters relating to investments covered by non-COMESA Agreements.
> 5. Where Member States have an international investment agreement with a third party, they shall strive to renegotiate that agreement to make it consistent with the present Agreement.

the treaty overlap. If the three countries had followed a TRIPS-like approach instead, they would have 1) terminated the China–Japan BIT which is largely superfluous, 2) let the Japan-Korea BIT remain in place for its additional commitments e.g. on pre-establishment (‘investment-protection-extra’) and 3) streamlined its ‘investment-protection-plus’ and ‘investment-protection-minus’ commitments through amendments to make it consistent with the principles of the 2012 Trilateral Treaty.

The failure of contracting states to functionally coordinate overlapping treaties *ex ante* has unfortunate consequences. First, it results in unnecessary duplication and inherent contradictions, which ultimately harms all stakeholders by increasing transaction costs and decreasing predictability in investment protection. Second, the task of coordinating these treaties *ex post* is farmed out to arbitral tribunals. The interplay of parallel investment treaties will then have to be tested in actual disputes. We will consider next the two main questions of coordination tribunals will need to decide in such cases: whether investors can bring parallel proceedings and which treaty prevails in case of a normative conflict.

B. Jurisdictional coordination: Proceedings in parallel fora

Where two investment treaties overlap and each provides states’ consent to international arbitration, the same investor can have two shots at a respondent state: first filing a claim under the BIT and then, after being (un)successful, trying it again under the regional treaty (or vice versa) – a problem also known as double jeopardy. Double jeopardy poses a serious threat to finality, consistency and justice in international economic law adjudication and must therefore be avoided.

Parallel or subsequent proceedings resulting from overlapping treaties have occupied trade and investment lawyers alike. Yet, arguably because of the greater threat posed by investment claims, which can be launched by private parties and may result in an award of pecuniary damages (in contrast to WTO law where only states litigate and damages cannot be awarded), investment law has developed more effective techniques in dealing with preventing parallel litigation. First, international law principles are more likely to apply in the investment context. Second, waiver clauses found in some investment treaties can prevent more types of parallel litigation than fork-in-the-road-clauses typically found in trade treaties.

The international law principles of *res judicata* and *lis pendens* are frequently cited in academic writings as tools to avoid double jeopardy.[57] *Res judicata* prevents the re-litigation of already decided disputes safeguarding finality in adjudication.[58] *Lis pendens* prevents parallel proceedings of on-going disputes.[59] To be applied, both principles require a triple identity: 1) identity of the dispute, 2) identity of the parties and 3) identity of the cause of action.[60] The strict application of this triple-identity test inhibits the application of these principles to factually related, yet formally independent, proceedings. In investment law, the principles could not be used in the *CME/Lauder* case, because, at least formally, two different investors were involved,

[57] See, for instance, August Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 Law and Practice of International Courts and Tribunals 37; Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' (2003) 41 Canadian Yearbook of International Law 83; Joost Pauwelyn and Luiz Eduardo Salles, 'Forum Shopping before International Tribunals:(real) Concerns,(im) Possible Solutions' (2009) 42 Cornell International Law Journal 77.

[58] William S Dodge, 'Res Judicata' in: Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1670?rskey=5ElBtc&result=2&q=&prd=EPIL.

[59] Hanno Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (Oxford University Press 2013) at 129 (note that, according to Wehland, the status of the principle is not universally recognized).

[60] *Chorzów Factory Case*, Interpretation of Judgments Nos. 7 and 8, Dissenting Opinion by M. Anzilotti, PCIJ, 16 December 1927, para 1.

advancing their claim pursuant to two different BITs.[61] In trade law, the principles could not mediate between NAFTA and WTO proceedings in the so-called *Sugar War* between Mexico and the United States as the claims originated from two distinct causes of action (NAFTA and WTO).[62] The fact that a claim is filed under two different treaties may thus prove fatal to an application of these principles to either trade or investment law prompting some commentators to advocate a more relaxed reading of these criteria.[63]

In the case of vertically overlapping investment treaties, however, one should not brush aside the possible application of *res judicata* or *lis pendens*. In such proceedings, not only are the parties and the dispute likely to be identical, but also the causes of action may be the same. What is required is a careful comparison of the jurisdictional basis of each tribunal. Some investment treaties limit state's consent to international arbitration to disputes over that particular investment treaty.[64] The Chile–Vietnam BIT (1999), for instance, restricts jurisdiction in Article IX to 'disputes *which arise within the terms of this Agreement*, between a Contracting Party and an investor of the other Contracting Party [...]' (emphasis added). As a result, the tribunal's jurisdiction will be limited to that investment treaty and no identity of causes of action with a claim launched under a parallel regional investment treaty can arise. Other BITs, however, contain broader jurisdictional clauses involving 'any dispute relating to investment'.[65] In that case, an arbitral tribunal's mandate is not confined to the four corners of the treaty. It may thus

---

[61] See above n 8.
[62] Pauwelyn and Salles (n 57) at 102–3.
[63] Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (n 57) at 55ff.; Campbell MacLachlan, *International Investment Arbitration: Substantive Principles* (Oxford University Press 2008) at 124–5. Legal Opinion Prepared by Christoph Schreuer and August Reinisch, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republ*ic, UNCITRAL, Quantum Proceedings, paras. 49-55, available at: www.univie.ac.at/intlaw/wordpress/pdf/other_2_cmequant_2.pdf
[64] Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) at 235.
[65] See for example, Germany–India BIT (1995), Article 9(1); similarly broad Chile–Netherlands BIT (1998), Article 8(1) or Pakistan–Philippines BIT (1999), Article 9(1).

assess the conduct of a state on the basis of both investment treaties simultaneously applicable. Were the investor, after being unsuccessful under such a first arbitration, then to launch a subsequent claim under the regional treaty, the tribunal would be bound to reject the claim for reason of *res judicata* as the triple identity test is met.

Many regional investment treaties characterized by parallelism, however, tend have a limited jurisdictional ambit precluding the successful application of these principles.[66] An alternative means to regulate interaction between parallel fora is through explicit treaty clauses. In trade agreements these clauses vary in sophistication.[67] Deep integration organizations like the EU tend to allocate exclusive jurisdiction to its courts preventing members from bringing an intra-regional trade dispute to the WTO. Simple free trade argreements, in contrast, tend to leave it to the claimant which forum to invoke, but typically make this choice final. Such fork-in-the-road clauses are also employed in investment law to coordinate between domestic courts and international proceedings. For example, Article 8(2) of the Argentina–France BIT reads:

> Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.

[66]See e.g. Article 29(1) ASEAN Comprehensive Investment Agreement; Article 18(1) ASEAN-Korea Investment Agreement; Article 15(1) of Trilateral Investment Treaty and ASEAN–China Investment Agreement Article 14(1); Article 28(1) COMESA Investment Area. DR–CAFTA is a special case since it follows the American-style jurisdictional clause that includes the treaty in question, an investment authorization or an investment agreement claim (Article 10.16), the latter being defined as a state contract not inter-state treaty. Since no other investment treaty is included, the effect of the clause will be similar to those other provision listed in this footnote.

[67] Joost Pauwelyn, 'Going Global or Regional or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with Other Jurisdictions, in Particular that of the WTO' (2004) 1 Minnesota Journal of Global Trade at 271–286.

Such a fork-in-the-road provision has two main drawbacks. First, it is contingent on the dispute definition under the treaty and, as a result, may suffer from similar limitations as the general principles discussed above.[68] Hence, when disputes under a treaty are limited to breaches of that treaty, the clause will not bar an investor from submitting a claim to another arbitral tribunal under another treaty as a formally different dispute. Second, even if the clause applies more broadly, or if, as in the trade context, it explicitly concerns litigating the same dispute under a different treaty, like NAFTA Article 2005 referring to the GATT, such a clause may have no legal effect on the parallel treaty, where jurisdiction and applicable law are limited to each treaty. The initiation of a second claim under treaty B in spite of a fork-in-the-road clause under treaty A may be a violation of treaty A, but it will not necessarily prevent a tribunal from hearing the case under the independent treaty B. In that vein, the WTO Appellate Body left the question open, whether an exercised fork-in-the-road clause in a PTA could function as 'legal impediment' preventing a WTO panel from hearing a case.[69] Hence, such clauses may fail to inhibit parallel litigation.

A more effective way of preventing parallel proceedings lies in waiver clauses. Such clauses are found in some investment agreements, but are not used in trade law. This difference may be explained by investment law's broader possibilities of treaty and forum shopping, e.g. through nationality planning and multi-national corporate structures, that make equally sophisticated

[68] Christoph Schreuer, 'Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road' (2004) 5 Journal of World Investment & Trade 231, 243–248; BM Cremades and I Madalena, 'Parallel Proceedings in International Arbitration' (2008) 24 Arbitration International 507, 530–31; *Yukos Universal Limited v. The Russian Federation,* Interim Award on Jurisdiction and Admissibility, 30 November, 2009, UNCITRAL, paras. 598-600.
[69] Appellate Body Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006, para. 54.

safeguards necessary. For example, in order to submit a claim to arbitration, NAFTA Article 1121(1)b) requires from investors to:

> waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, *any proceedings with respect to the measure* of the disputing Party *that is alleged to be a breach* […]. (emphasis added)

Thereby, NAFTA excludes parallel proceedings, including under a vertically overlapping treaty, e.g. the TPP once it is in force. A waiver clause is superior to a fork-in-the-road clause in two ways. First, it does not depend on the jurisdictional clause of a treaty to be effective but can be framed more broadly as waiving *any* claims relating to the same measure.[70] Second, it has a life independent of the treaty. As a 'unilateral act' of the claimant,[71] it derives its legal value not only from the contractual instrument pursuant to which it is made but also, independently and more universally, from the principle of good faith and, relatedly, estoppel, preventing the claimant from reneging on the representation made to the detriment of the responding state that relied on this promise as pre-condition for consent.

While a subsequently seized tribunal must hence give effect to a waiver, much of its actual effectiveness depends on the exact wording of the waiver. The trilateral China–Japan–South

[70] *Waste Management Inc. v United Mexican States [I]*, Arbitral Award, 2 June 2000, ICSID Case No. ARB(AF)/98/2, para. 18 'when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages'. See also Cremades and Madalena (n 68) at 531.

[71] *Waste Management Inc. v United Mexican States [I]*, above n 70, para. 18: 'The act of waiver per se is a unilateral act, since its effect in terms of extinguishment is occasioned solely by the intent underlying same. The requirement of a waiver in any context implies a voluntary abdication of rights, inasmuch as this act generally leads to a substantial modification of the pre-existing legal situation, namely, the forfeiting or extinguishment of the right. Waiver thus entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect.'

Korea investment agreement, for instance, limits its waiver in Article 15(6) to 'any right to initiate [proceedings] before any competent court of the disputing Contracting Party with respect to any measure of the disputing Contracting' arguably still permitting the submission to a parallel arbitral tribunal under an overlapping agreement. Nevertheless, an unambiguously phrased waiver clause may be the most reliable way to prevent parallel proceedings and double jeopardy. Hence, they constitute one example of how trade law can learn from investment law. Indeed, nothing prevents a trade treaty from requiring a similar waiver from its claimants.

C. Applicable law coordination: Conflict of norms

A final problem of coordination between overlapping treaties arises with respect to the question of how normative inconsistencies are to be resolved.[72] Two examples may help to illustrate the issue. Imagine an Indonesian investor sets up a cigarette factory in Thailand. A few years later the Thai government bans the production and sale of all cigarettes. Can the investor claim compensation for a measure, which, in effect, indirectly expropriates its investment? Under the Indonesia–Thailand BIT's (1998) broadly framed expropriation clause in Article VI, Thailand would arguably have to compensate the investor.[73] In contrast, under the ASEAN CIA (2009), a non-discriminatory ban on cigarette production would be carved out from the expropriation provision in Article 14 read together with Annex 2 on non-compensable general public interest regulation (here for public health reasons), and thus no compensation would have to be paid.

[72] See generally, Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Repr 2004, Cambridge University Press 2004); R Michaels and J Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law* (Duke University 2010); Voon and Mitchell (n 14) at 131–135.

[73] Of course, a tribunal may also read implicit limitations into such a broadly framed clause drawing e.g. on the police powers doctrine, see e.g. *Saluka v Czech Republic*, Partial Award, 17 March 2006, para. 262. For the sake of argument, however, let us assume that the tribunal adopts a purely effect-based test of indirect expropriation, see e.g. *Tecmed v Mexico*, Award, 29 May 2003, para. 116.

Now shifting to trade law, while NAFTA contains a cultural industries exemption in Article 2106, such a clause is absent in the WTO. Hence Canada may be able to legally protect its cultural industry under NAFTA but may be prevented from doing so under WTO law. These examples illustrate that two overlapping trade or investment treaties may provide two very different solutions to identical fact patterns. How are such normative inconsistencies to be resolved?

There are two broad approaches to this problem. The first is the 'ostrich technique' pursued by trade law according to which normative inconsistencies do not translate into actual normative conflict, because each treaty-system is considered as largely self-contained for the purposes of applicable law. WTO panels will only apply WTO law but not NAFTA rules delegating what is left of normative interaction to the realm of treaty interpretation.[74] Investment treaties, in contrast, typically allow for the direct application of different bodies of law, *i.e.* both a BIT and a regional treaty apply in the same dispute. Conflict of law rules will then decide which norm prevails in a given dispute.[75]

The two approaches are based on a different mix of jurisdictional and applicable law clauses (see Table 2). Where a treaty combines a *narrow* jurisdictional clause, *i.e.* covering disputes only over that treaty, with a *narrow* applicable law clause, *i.e.* limited to the law contained in the treaty, a tribunal seized under treaty A will only be able to apply treaty A. Even

[74] If one is to follow the 'between the parties' reading of VCLT Article 31(3) c) advanced by the Panel in *EC–Biotech* as requiring all parties to the WTO to be also party to the overlapping treaty, PTAs will normally be excluded from influencing WTO via interpretation. See Panel Reports, *European Communities–Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006, para. 7.68. Harmonious interpretation does occur, however, when it comes to multilateral treaties e.g. on the environment. See Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, paras. 130-134.
[75] Pauwelyn, *Conflict of Norms in Public International Law* (n 72).

if an overlapping treaty B exists, no conflict of the applicable law can arise, because treaty A is self-contained. A NAFTA panel will therefore only apply NAFTA rules and a WTO panel will only apply WTO rules. Managing inconsistencies of overlapping treaties under this model must primarily be dealt with through the jurisdictions tools discussed in the previous section.

The situation is very different for treaties containing a *broad* applicable law clause. In that case, a tribunal seized under treaty A will be able to apply treaty A as well as an overlapping treaty B. How the applicable law can be used, however, depends in turn on the jurisdictional clause in which the tribunal's mandate is grounded. If the jurisdiction of a tribunal seized under treaty A is *narrow*, then treaty B can be used to excuse violations of that treaty. If the jurisdictional scope is *broad*, then both treaties A and B can be used to assess compliance with both treaties A and B. In the latter two scenarios, it is a question of conflict of norms which law will decide the issue.

Table 2: Combinations of jurisdictional and applicable law clauses and their effect

	Model 1	**Model 2a**	**Model 2b**
Jurisdictional Scope of Treaty A	Narrow	Narrow	Broad
Applicable Law Scope of Treaty A	Narrow	Broad	Broad
Conflict of Norms?	None	Yes, treaty B may excuse violations of treaty A	Yes, treaty A and treaty B can be used to determine

			compliance with treaty A and B
Example	Trade Law e.g. WTO	Investment Law e.g. ASEAN CIA	Investment Law e.g. Indonesia–Thailand BIT

Investment treaties typically follow the two latter approaches. The majority of regional investment treaties combine a *narrow* jurisdictional clause with a *broad* applicable law clause. To return to our example above, the ASEAN CIA is a case in point limiting the scope of jurisdiction to 'alleged breach of any rights conferred by this Agreement' in Article 28(1), while extending the applicable law in Article 40(1) to 'this Agreement, any other applicable agreements between the Member States, and the applicable rules of international law and where applicable, any relevant domestic law of the disputing Member State.' Hence in order to determine a measure's conformity with the ASEAN CIA, an overlapping BIT, like the Thailand–Indonesia BIT, can be applied. Since that tribunal could not make any findings on compliance with the BIT (narrow jurisdiction), the rights and exceptions granted in the BIT may prove more relevant than the obligations contained therein. Vice versa, the Thailand–Indonesia BIT has a *broad* jurisdictional clause (Art. 10(1) 'any dispute … concerning an investment') and is silent on its applicable law, which by reference to applicable arbitration rules, will be interpreted as allowing a *broad* applicable law.[76] Hence, a tribunal seized under the Indonesia–Thailand BIT will be able to assess compliance with both the BIT and the ASEAN CIA using both treaties as applicable law.

[76] ICSID Article 42 provides that an ICSID tribunal may apply the host states' law together with applicable international law. Under the UNCITRAL Arbitration Rules (2010) Article 35(1), absent an applicable law clause in the treaty, the arbitral tribunal has discretion to apply the rules it deems appropriate.

Yet, as we saw above, the BIT and the ASEAN CIA contradict each other on what counts as compensable expropriation; so which of the two will prevail in a normative conflict? The answer to the question depends on general international law and the intention of the contracting parties as expressed in the treaties at hand. General international law, as codified in the Vienna Convention on the Law of Treaties (VCLT) Articles 30 and 59, provides three conflict resolution clauses for a situation where the same countries are parties to successive treaties on the same subject matter without having expressed the intention to suspend or terminate the earlier treaty:

1) The earlier treaty may be terminated impliedly if its provisions as a whole are inherently opposed to the new treaty. (VCLT Art. 59 1(2))
2) If there is no such inherent opposition, the earlier treaty remains in force, but applies only to the extent that it is compatible with the later treaty (*lex posterior* rule). (VCLT Art. 30 (3))
3) If a newer treaty subjects itself to or affirms that it is not incompatible with the provisions of an earlier treaty, the provisions of the earlier treaty prevail. (VCLT Art. 30 (2))

Several tribunals grappling with the overlap between EU law and intra-EU BITs/ECT scrutinized these three possibilities. In these cases, however, the differences, amongst others, of subject matter between EU law and IIAs precluded the applicability of these conflict clauses, as no normative conflict arose.[77] The situation will be different, however, when dealing with a

[77] See *Eastern Sugar*, (n 31), paras. 142-181; *Eureko* (n 31) paras. 230-283; *Electrabel* (n 31), paras. 4.111-4.176. However, the *Electrabel* tribunal stated *obiter* that, if a normative conflicted existed between the ECT and EU law, EU law would prevail over the ECT by virtue of Articles 351 TFEU and 30 VCLT (paras. 4.172-4.191). On the

bilateral and a regional investment treaty that do share the same subject matter. Here these three clauses become relevant. Nevertheless, category 1, the implied termination, is unlikely to apply since the provisions of successive investment treaties may differ from each other but usually do not reflect such fundamental opposition as to infer an implied termination.[78] Category 2 arises in cases where the later treaty is silent on the issue of conflict; then the VCLT presumes that the treaty later in time better represents the intentions of the parties on how to regulate a given subject matter. Most regional investment treaties, however, will fall under category 3 because they affirm the continued validity of earlier treaties.[79] An example of the latter is the ASEAN CIA, which provides in Article 44 that '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'. Hence, in our case of an Indonesian investor bringing a claim against Thailand under the BIT, the normative conflict will be resolved in favour of the earlier treaty – the BIT – so that Thailand has to pay compensation. Had the ASEAN CIA opted for silence the *lex posterior* rule would have applied (category 2) making the regional treaty prevail over the BIT resulting in Thailand not having to pay compensation.

The above example demonstrates that it is crucial that states think carefully about how they want normative conflicts to be resolved. If states want to preserve normative innovation, they should opt for category 2, which, in the investment law context, will typically mean favouring a more recent generation of treaties that balances regulatory concerns and investment protection. If

relevance of Articles of these VCLT provisions see also Reinisch, 'Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action' (n 42).

[78] Pauwelyn, *Conflict of Norms in Public International Law* (n 72) at 283 ('The incompatibility or conflict required for the earlier treaty to be terminated must hence be of a rather serious nature: it must result in the impossibility of both applying both treaties – not just the two provisions of the two treaties to be applied at the same time').

[79] *Ibid.* at 332-335.

states opt for category 3, they chose to favour an older generation of bilateral treaties that typically have more stringent investment protection standards and few public policy exceptions.

States may also want to make these choices explicit, rather than relying on public international law default rules, and design specific conflict clauses in their treaties. The Chile–Peru FTA (2006), for example prevails over a prior BIT (2000) between the two countries to the extent of any inconsistency.[80] The Energy Charter Treaty explicitly resolves conflicts in favour of more investment protection. It provides in Article 16:

> Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,
>
> (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
> (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is *more favourable to the Investor or Investment*. (emphasis added)[81]

[80] See Article 19.2 Chile–Peru FTA.
[81] See also Korea–China–Japan IIA (2012) Article 25; Korea–ASEAN FTA (2009) Art. 23(2). Given that ECT Art. 16 is confined to conflicts of norms over the same 'subject matter', the Tribunal in *Electrabel* determined that it was not applicable to resolve normative conflicts between the ECT and EU, which according to the tribunal cover different subject matters (n 31) (para 4.176).

Similarly, most BITs contain so-called non-derogation or preservation of rights clauses that have the more favourable rule to the investor, found in domestic law or in another international treaty, prevail in case of a conflict.[82] An interesting alternative mechanism is adopted in the ASEAN–Australia–New Zealand FTA (Ch. 18, Art. 2(3)). It stipulate that

> [i]n the event of any inconsistency between this Agreement and any other agreement to which two or more Parties are party, such Parties shall immediately consult with a view to finding a mutually satisfactory solution.

The advantage of such ad hoc consultations is that states can wait until a normative conflict arises before having to make their policy choices. At the same time, in light of an on-going dispute, state parties may have opposing interests making it unlikely that a diplomatic solution to the normative conflict can be found.

Given that most regional treaties reviewed contain conflict clauses that either explicitly or implicitly (by letting the earlier treaty prevail) favour investment protection, responding states will find it difficult to benefit from legal innovation directed at introducing more policy space in newer regional investment treaties that overlap with older BITs. As we saw above, Thailand is likely to lose its fictional expropriation dispute. But all may not be lost for Thailand. In international trade law, because of its restrictive applicable law, much of the interaction between

[82] The Germany–Bahrain BIT (2007) for instance provides in Article 8(1): 'If the legislation of either Contracting State or obligations under international law existing at present or established here-after between the Contracting States in addition to this Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting State to a treatment more favourable than is provided for by this Treaty, such regulation shall to the extent that it is more favourable prevail over this Treaty.' See, similarly, United States–Uruguay BIT (2006) Article 16(2). See also Houde and Yannaca-Small (n 18) at 9.

WTO and non-WTO law takes place through interpretation.[83] Furthermore, under general international law, a presumption against normative conflict exists.[84] Hence, before an arbitral tribunal has to resort to conflict of law clauses, it a may be able to resolve apparent contradictions through a harmonious interpretation. In our fictional case, the ASEAN CIA could be read not as contradicting the expropriation clause under the Indonesia–Thailand BIT, *i.e.* no conflict of norms, but as merely clarifying the ambit of 'indirect expropriation' allowing for a harmonious interpretation.

The argument would be as follows. Article 31(3)c) of the VCLT provides that 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account when interpreting a treaty term. Since, in case of a BIT dispute, the parallel regional treaty will be by definition 'applicable in the relations' between the contracting parties, it will inform the BIT for the purposes of interpretation.[85] Article VI of the BIT on expropriation must then be interpreted in light of the overlapping ASEAN Agreement, which, in Annex 2, clarifies the meaning of expropriation and states in paragraph 4 that

> [n]on-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation.

[83] See above n 74.
[84] Pauwelyn, *Conflict of Norms in Public International Law* (n 72) at 240–244.
[85] Of course, vice-versa the same technique would not work, as a BIT overlapping with a regional treaty may not be used for interpreting the latter since it is not applicable in the relations of all the parties to the regional treaty.

As a result, a tribunal may find that the measure in question is not an expropriation in the meaning of BIT Article VI read together with Annex 2 of the ASEAN CIA.

Whether an arbitral tribunal opts for the harmonious interpretation or the conflict of law route will depend on the proper construction of the contracting parties' intention as expressed in the treaty.[86] If this indicates that contracting parties wanted each parallel treaty to be a self-standing instrument with its own insulated treaty terms, a true conflict of law should be presumed, and a tribunal should give effect to the conflict clause. The China–Japan–South Korea Trilateral Agreement Article 25 is an unambiguous example of contracting states mandating a conflict of law approach by explicitly leaving BITs 'unaffected' by the regional treaty.[87] Similarly, in Article 4.1(3) of EFTA–Ukraine FTA, the parties explicitly prevent the regional treaty to be used for interpretation.[88] If, however, the later treaty clarifies and expands on the meaning of treaty terms also found in the earlier treaty, legal innovation rather than a conflict of norms should be presumed and a harmonious interpretation pursued.[89] This is because international law expects that contracting states act consistently in the relations between the same parties and imposes a high threshold of explicitness before a tribunal finds that two countries engaged in contradictory treaties as between the same parties on the same subject matter.[90] In case of the ASEAN CIA, it is doubtful whether this higher threshold of wilful contradiction is met, which suggests instead a

[86] The Tribunal in *Electrabel* rejected the existence of a principle of harmonious interpretation (para. 4.130), yet nevertheless determined that EU law and the ECT should be read harmoniously drawing from the ECT's genesis, objectives and its implicit recognition of EU law to ascertain the intention of the parties to leave both agreements in harmonious coexistence (n 31) (paras. 4133-4.142).

[87] 'Nothing in this Agreement shall affect the rights and obligations of a Contracting Party […] under any bilateral investment agreement …'

[88] 'The provisions of this Chapter shall be without prejudice to the *interpretation* or application of the rights and obligations under any other international agreement relating to investment or taxation to which Ukraine and one or several EFTA States are parties.' (emphasis added)

[89] Pauwelyn, *Conflict of Norms in Public International Law* (n 72) at 242 ('The presumption against conflict is a presumption in favour of continuity').

[90] *Ibid*. at 240 ('For a new norm to deviate from existing law explicit language must be found. In cannot, in other words, be presumed that states "changed their minds"').

harmonious interpretation that favours legal innovation. So Thailand may not have to pay compensation after all.

V. Conclusion

The regionalisation of investment law has given rise to widespread vertical overlap among investment treaty layers. Today, every fourth bilateral interstate relationship is covered by more than one investment treaty and on-going negotiations of large inter-regional investment treaties will further exacerbate this overlap. What makes this situation particularly challenging is that regionalism is not widely used to consolidate ensuing treaty overlap. Most countries opt for parallel treaty layers, with BITs and regional PTIAs existing side-by-side, rather than for *de facto* or *de jure* consolidation.

Unconsolidated overlap can create a number of serious legal problems ranging from functional duplication or contradiction to parallel proceedings and normative conflicts. As a result, states must carefully design and manage the interaction of parallel layers of investment governance. The good news is that coordination tools exist to successfully tackle these challenges. Here, trade and investment law, both facing similar governance challenges arising from treaty overlap, can learn from each other. Investment law can benefit from the mechanism trade law uses to achieve functional coordination. Trade law can draw from investment law’s experience in preventing parallel proceedings. In terms of conflicts of norms, both fields have developed distinct but equally effective strategies.

The bad news is that managing treaty overlap requires considerable foresight and sophistication. Treaty interaction has to be anticipated and purposefully channelled by the contracting states. Where states fail in this task, the consequences are dire. Some investors will be lost in the labyrinth of uncoordinated overlapping investment agreements. Others will take advantage of the system risking double jeopardy and an increased exposure of host states to investment claims. Finally, treaty innovation will be undermined as old treaties trump new ones in case of normative conflict. It is thus indispensable that states, if they opt for co-existing treaties, carefully coordinate between different treaty layers in terms of their function, jurisdiction and applicable law. Farming this task out to arbitral tribunals to be resolved in actual disputes on an ad hoc basis is undesirably and even irresponsible given the important underlying policy issues involved.