Kluwer Arbitration Blog

The Emerging Harmonization of the International Investment Law Regime

Mark Feldman (Peking University School of Transnational Law) · Monday, July 20th, 2015 · Institute for Transnational Arbitration (ITA), Academic Council

Given the existence of thousands of international investment agreements, the international investment law regime has been described as "complex and confusing," "highly fragmented," and "characterised by overlaps and incoherence".

Two key developments, however, are contributing to the harmonization of that regime. First, a set of major agreements is being negotiated by many of the world's largest economies, which, if completed, will cover a very significant share of global investment. Second, given the recent treaty practice of the States participating in those negotiations, that set of major agreements likely would include relatively consistent approaches to some of the most challenging issues in international investment law.

Those major agreements include a trio of agreements that are being negotiated by three major economies, China, the EU, and the US: the Transatlantic Trade and Investment Partnership ("TTIP") (EU/US), a US-China bilateral investment treaty, and an EU-China bilateral investment treaty. The agreements also include two major Pacific Rim trade agreements: the Trans-Pacific Partnership ("TPP") (covering 12 APEC member economies representing nearly 40% of global GDP) and the Regional Comprehensive Economic Partnership ("RCEP") (covering 16 States (including the 10 ASEAN members) representing nearly 30% of global trade).

Recent treaty practice by many of the States negotiating those agreements—including China, the EU, the US, Canada, Mexico, Japan, Korea, and the ASEAN States—reflects an emerging consensus on many important issues of international investment law. Such issues include policy goals (investment liberalization), substantive obligations (fair and equitable treatment, expropriation, and regulatory transparency), as well as responses to so-called "treaty shopping" by investors. While convergence on those issues remains in the early stages, the conclusion of the TTIP, TPP, RCEP, US-China BIT, and EU-China BIT agreements, taken collectively, could achieve substantial harmonization of the international investment law regime.

Regarding policy goals, with increasing frequency investment agreements seek not only to promote and protect, but also to liberalize, foreign investment. As observed in the UNCTAD 2015 World Investment Report, international investment agreements with "pre-establishment" commitments are "on the rise". Although "most" of those agreements involve developed economies, the UNCTAD report notes that Chile, Costa Rica, Korea, Peru, and Singapore have been "actively concluding pre-establishment" agreements. In a 2013 joint statement, China and the US announced that a US-China BIT "will provide national treatment at all phases of investment, including market access". China's recent support for a negative list approach to investment commitments—as reflected in US-China BIT negotiations and the recent Australia-China free trade agreement—provides further momentum for investment liberalization within the international investment law regime.

With respect to substantive obligations, fair and equitable treatment, expropriation, and regulatory transparency are three noteworthy areas of convergence. Recent investment agreements have adopted a variety of approaches to clarify that the fair and equitable treatment obligation does not extend to every instance of "unfair" government conduct. Such approaches have included (i) linking the fair and equitable treatment obligation to customary international law, (ii) specifically identifying the set of protections included within the obligation, and/or (iii) clarifying that a breach of a separate obligation does not establish a breach of fair and equitable treatment.

Recent treaties generally have adopted a consistent approach to the expropriation obligation, identifying fair market value as the amount of compensation due and further providing that such compensation should be paid promptly and without restrictions on transferability. With respect to such elements of the expropriation obligation, there was far less international consensus in the 20th century.

States also are committing to regulatory transparency obligations with increasing frequency. As one example, the recent Japan-Korea-China trilateral investment agreement includes obligations to "make publicly available . . . laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application . . . which pertain to or affect investment activities." China has agreed to similar transparency commitments in its recent agreements with Canada and the ASEAN States.

Finally, many recent investment agreements include provisions authorizing host States to deny treaty benefits to shell companies. Such "denial of benefits" provisions have been developed in response to concerns over "treaty shopping," i.e. the practice of establishing a corporate presence in a jurisdiction solely to gain access to certain treaty protections.

The conclusion of five major agreements currently under negotiation—TTIP, TPP, RCEP, a US-China BIT, and an EU-China BIT—would accord protections to a very significant share of global investment. Based on recent treaty practice, an international investment law regime that included those five agreements could not be characterized as "incoherent," but rather would reflect an emerging consensus on many key 21st century investment law issues.

For more detailed discussion of these developments, particularly with respect to the Pacific Rim region, see Mark Feldman, Rodrigo Monardes Vignolo, and Cristian Rodriguez Chiffelle, The Role of Pacific Rim FTAs in the Harmonization of International Investment Law: Towards a Free Trade Area of the Asia-Pacific. E15Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum (forthcoming 2015).

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Monday, July 20th, 2015 at 6:39 am and is filed under BIT, Investment agreements, Investment Arbitration, Investment protection, Trade, Trans-Pacific Partnership, Transatlantic Trade and Investment Partnership
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.