Multilateral Investment Treaties in Asia: Alternatives to the Investment Chapter of the Trans Pacific Partnership Agreement in Asia?

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The Asian economy is considered an engine of global economic growth, accounting for almost two-thirds of forecasted global economic growth for 2016.[fn]"Asia: Growth Remains Strong, Expected to Ease Only Modesty", International Monetary Fund Survey Magazine, 3 May 2016, http://www.imf.org/external/pubs/ft/survey/so/2016/CAR050316B.htm.[/fn] Over the last decade, the flows of foreign investment into and out of Asia have consistently increased with Asia now taking a lion's share of total foreign direct investment into developing countries.[fn]UNCTAD 2015 World Investment Report, Chapter II: Regional Investment Trends, p. 30. In 2014, a total of US$681 billion foreign direct investments flowed into developing countries, of which Asia received US$ 465 billion.[/fn] A sizable portion of international investments in Asia is intra-Asia in nature, particularly in respect of investments in infrastructure developments.[fn]Ibid., p. 42. The report gives examples of intra-Asia investments such as the activities of Metro Pacific Investments Corporation, an affiliate of First Pacific (listed in Hong Kong), which is one of the leading infrastructure investment firms in the Philippines and the investment of US$600 million by Taekwang and Huchems Group (Republic of Korea) for producing chemical and related products in Myanmar.[/fn]

On 4 February 2016, twelve States in the Asia Pacific region signed a landmark treaty, the Trans Pacific Partnership Agreement ("TPP"), which is intended to address the concern that closer regional integration is necessary to promote sustainable growth, with increased trade and investment achieved through easier movement of goods, services, information and people. The TPP contains an Investment Chapter which imposes substantive obligations on its member States for protection of foreign investments and provides for arbitration and other dispute settlement mechanisms to resolve disputes between protected investors and host States. The TPP has been subject of much controversy, so it remains to be seen whether it will be ratified by all the signatory States. Even if it is ratified and comes into force, the TPP arguably offers more restrictive investment protections compared to some bilateral investment treaties.

It is estimated that there are in excess of 3000 international investment agreements in the world, of which Asia has more than 1200, mostly comprising bilateral investment treaties and an increasing number of free trade agreements.[fn]Shintaro Hamanaka, Asian Noodle Bowl of International Investment Agreements, Presentation to the ARTNeT Conference, 10 December 2013, http://www.unescap.org/sites/default/files/pari-shintaro.pdf.[/fn] The scope of investment protections

provided under bilateral investment treaties and free trade agreements vary greatly but the fact of their abundance and sometimes broadly worded provisions have contributed to their common use when a foreign investor seeks redress against its host State.

This blog will examine the following multilateral investment treaties in Asia which are often overlooked and may be used as alternatives to the TPP, bilateral investment treaties and free trade agreements, for protecting foreign investments:

- the ASEAN Agreement for the Promotion and Protection of Investments dated 15 December 1987 ("1987 ASEAN Agreement"); and
- the ASEAN Comprehensive Investment Agreement dated 26 February 2009 ("2009 ASEAN Framework Agreement")
  (together, the "MITs").

These MITs contain provisions on investment protection that are similar to those found in conventional bilateral investment treaties, including definitions of qualifying investors who may bring claims in arbitration in respect of their qualifying investments. The key provisions will be explored below.

What countries are covered under the MITs?

- **1987 ASEAN Agreement**: The following States are signatories to the 1987 ASEAN Agreement – Brunei, Darussalam, Indonesia, Malaysia, The Philippines, Singapore and Thailand.
- **2009 ASEAN Framework Agreement**: In addition to the States that are parties to the 1987 ASEAN Agreement, Vietnam, Laos and Myanmar are parties to the 2009 ASEAN Framework Agreement.

A qualifying investor of one of the States listed above (e.g. Singapore) is entitled to claim remedies in the event of breach of substantive guarantees under the MITs, in relation to its investments in a host State listed above (e.g. Thailand).

What investors are protected?

- **1987 ASEAN Agreement**: A protected investor may be a natural or legal person. A natural person shall be defined in the respective Constitutions and laws of each of the signatory States.[fn]Article I(1) of the 1987 ASEAN Agreement.[/fn] As regards the definition of a qualifying investor who is a legal person, a corporation, partnership or other business association needs to be incorporated or constituted under laws in force in the territory of a contracting State "wherein the place of effective management is situated".[fn]Article I(2) of the 1987 ASEAN Agreement.[/fn] This means that a company that is set up to act as a shell "holding" company would not be considered a protected investor.
- **2009 ASEAN Framework Agreement**: A protected investor is defined as a natural or legal person of a member State that is making, or has made an investment in the territory of another Member State.[fn]Article 4(d) of the 2009 ASEAN Framework Agreement.[/fn] A juridical person is defined as a legal entity that is duly constituted or otherwise organised under the applicable law of a member State.[fn]Article 4(e) of the 2009 ASEAN Framework Agreement.[/fn] It is however not enough to simply incorporate a company in the host State to obtain protection under this agreement; if a legal person is owned by an investor of a non-ASEAN member State, that legal person would not be protected if it has no substantive business operations in the territory of the host State.[fn]Article 19(1)(a) of the 2009 ASEAN Framework Agreement.[/fn] This should be borne in mind when structuring investments for treaty protection.

What investments are protected?

- **1987 ASEAN Agreement**: An investment is defined as every kind of asset.[fn]Article I(3) of the 1987 ASEAN Agreement.[/fn] It is interesting to note that this expressly includes "business concessions conferred by law or under contract, including concessions to search for, cultivate, extract, or exploit natural resources".[fn]Article (I)(3)(e) of the 1987 ASEAN Agreement.[/fn] However, in order for an investment to be protected, it needs to be "specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this [a]greement".[fn]Article (II)(1) of the 1987 ASEAN Agreement.[/fn] Provided that this limitation is adhered to, an investment would be protected, even if it is "made prior to the entry into force" of the agreement.
- **2009 ASEAN Framework Agreement**: This agreement provides a broad "asset based" definition of "investment" which includes every kind of asset that is owned or controlled by the protected investor.[fn]Article 4(c) of the 2009 ASEAN Framework Agreement.[/fn] In order for an investment to qualify for protection, it needs to exist as of the date of entry into force of this agreement, or established, acquired or expanded thereafter.[fn]Article 4(a) of the 2009 ASEAN Framework Agreement.[/fn] Moreover, a protected investment should have been admitted "according to its laws, regulations and national policies, and where applicable, specifically approved in writing by the competent authority" of a host State.[fn]Ibid.[/fn] It is therefore important to ensure strict adherence to local laws and seek all necessary approvals before an investment is made.

Substantive Obligations

- **1987 ASEAN Agreement**: This agreement provides that protected investments shall at all times be accorded "fair and equitable treatment" and shall enjoy "full protection and security" in the territory of the host State.[fn]Article III(3) of the 1987 ASEAN Agreement.[/fn] This "full protection and security" is provided on the condition that the investments in question were made in accordance with the legislation of the host State,[fn]Article IV(1) of the 1987 ASEAN Agreement.[/fn] and "fair and equitable treatment" shall be no "less favourable than that granted to investors of the most-favoured nation".[fn]Article IV(2) of the 1987 ASEAN Agreement.[/fn] This most favoured nation treatment broadens the "fair and equitable treatment" standard which would assist a protected investor. It is important to note that this agreement does not apply to matters of taxation.[fn]Article V of the 1987 ASEAN Agreement.[/fn] This may present some challenges to investors as foreign investment disputes with host States often involve matters of taxation.[fn]A well-known example of this is the YUKOS arbitration which involved Russia's tax assessments which the claimants alleged were motivated by political considerations and led to the expropriation of their investments.[/fn] It is also provided in this agreement that protected investments shall not be subject to expropriation or nationalization except for a public purpose and under due process of law, on a non-discriminatory basis and upon payment of adequate compensation.[fn]Article V(1) of the 1987 ASEAN Agreement.[/fn] This is a fairly standard provision in international agreements. The compensation for this expropriation shall be "the market value of the investments affected, immediately before the measure of dispossession became public knowledge".[fn]Ibid.[/fn] This agreement also provides that an investor shall permit the free transfer of capital and earnings and that such transfer shall be accorded no less favourable treatment than that accorded to transfers originating from investments made by nationals or companies of any third State.[fn]Article VII(3) of the 1987 ASEAN Agreement.[/fn] There is only one case that was brought under this agreement – Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar, where the claims were unsuccessful, due to the tribunal's lack of jurisdiction, as the claimant failed to obtain approval in writing from the host State for the investment.[fn]ASEAN

I.D. Case No. ARB/01/1.[/fn]

- **2009 ASEAN Framework Agreement**: This agreement provides that protected investors and investments shall be accorded treatment that is no less favourable than it accords, in like circumstances, to its own investors (i.e. the "national treatment" obligation).[fn]Article 5(1) of the 2009 ASEAN Framework Agreement.[/fn] It also provides that protected investors shall be offered no less favourable treatment than that it accords in like circumstances to investors of any other Member State or a non-Member State (the "most favoured nation" obligation). Furthermore, this agreement provides for conventional guarantees of fair and equitable treatment, full protection and security and compensation for expropriation.[fn]Article 11 of the 2009 ASEAN Framework Agreement.[/fn]

What dispute settlement mechanisms are provided in these MITs?

- **1987 ASEAN Agreement**: The 1987 ASEAN Agreement provides that if a dispute is not settled amicably within six months of it being raised, either party can elect to submit the dispute for conciliation or arbitration.[fn]Articles X(1) and X(2) of the 1987 ASEAN Agreement.[/fn] The dispute may be brought before or under the International Centre for the Settlement of Investment Disputes ("ICSID"), the United Nations Commission on International Trade Law ("UNCITRAL") or the Regional Centre for Arbitration at Kuala Lumpur or "any other regional centre for arbitration in ASEAN".[fn]Article X(2) of the 1987 ASEAN Agreement.[/fn] The parties need to agree on one of these institutions and if there is no agreement within three months, an ad hoc tribunal would be constituted.[fn]Article X(3) of the 1987 ASEAN Agreement.[/fn] If the time limit for constituting the tribunal is not met, a request can be made for appointments to be made to the President of the International Court of Justice.[fn]Article X(4) of the 1987 ASEAN Agreement.[/fn] There is a provision on costs which provides for each disputing party to bear the costs of their respective members to the arbitral tribunal and share equally the cost of the chairman and "other relevant costs".[fn]Article X(5) of the 1987 ASEAN Agreement.[/fn]
- **2009 ASEAN Framework Agreement**: There are detailed provisions on dispute settlement in this agreement. A dispute may be resolved by arbitration or conciliation. The dispute resolution process begins when a disputing party submits a written request for consultations which is delivered to the disputing host State.[fn]Article 31(1) of the 2009 ASEAN Framework Agreement.[/fn] If the dispute is not resolved within 180 days,[fn]Article 32 of the 2009 ASEAN Framework Agreement.[/fn] the disputing investor may commence arbitration or local court proceedings against the host State.[fn]Article 33(1) of the 2009 ASEAN Framework Agreement.[/fn] If a dispute is arbitrated, it may be under the ICSID Convention and the ICSID Arbitration Rules, ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, the Regional Centre for Arbitration at Kuala Lumpur or other regional centre for arbitration in ASEAN, or any other arbitration institution with the agreement of the disputing parties.[fn]Article 33 of the 2009 ASEAN Framework Agreement.[/fn] Once a dispute resolution forum is chosen, it is not possible to bring the dispute before another forum.[fn]Article 33(1) of the 2009 ASEAN Framework Agreement.[/fn] An important condition to bringing an arbitration is that a claim for breach of an obligation under this agreement should be brought within 3 years of the time at which the disputing investor became aware, or should reasonably have become aware of a breach.[fn]Article 34 of the 2009 ASEAN Framework Agreement.[/fn] A provision of particular interest is on the transparency of arbitral proceedings, as a disputing host State may make publicly available all awards, and decisions produced by the tribunal.[fn]Article 39 of the 2009 ASEAN Framework Agreement.[/fn] This right to publish case materials in an arbitration is not given to the disputing investor. Once an award is published, restitution may be ordered by the tribunal but the host State has the option of paying monetary damages and interest in lieu of restitution.[fn]Article 41(2)(b) of the 2009 ASEAN Framework Agreement.[/fn]

Conclusion

The MITs examined in this blog contain limitations, particularly in relation to how a “protected investment” and a “protected investor” are defined. This may seem unattractive for an investor seeking protection for its investments. However, if there is no applicable bilateral investment treaty, if a host State is not a party to the TPP, or if new bilateral investment treaties or free trade agreements contain restrictive provisions on investment protection, then these MITs may be good alternatives for an investor seeking redress for actions of the host State.