

International Investment Arbitration Across Asia: A Symposium

Kluwer Arbitration Blog

March 1, 2017

Ana Ubilava (University of Sydney)

Please refer to this post as: Ana Ubilava, 'International Investment Arbitration Across Asia: A Symposium', Kluwer Arbitration Blog, March 1 2017, <http://arbitrationblog.kluwerarbitration.com/2017/03/01/international-investment-arbitration-across-asia-symposium/>

Recent developments in the international investment scene have also impacted the Asian region. Notably, China and Southeast Asia have emerged not just as growing foreign direct investment (FDI) recipients but also as major sources of outbound FDI. In parallel, the Asian region experienced a proliferation in international investment agreements (IIAs). Asian countries were initially hesitant toward investor-state dispute settlement (ISDS) mechanisms. Later, however, as Asian countries began encouraging inbound and then outbound FDI, they started committing to treaties with ISDS mechanisms. Unlike some countries from other regions, which changed their course of action towards ISDS provisions after their first-ever ISDS cases, most of the ASEAN member states have continued incorporating ISDS provisions even after their initial encounters with ISDS claims.

On 16 February 2017, the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS) and the Sydney Centre for International Law (SCIL) co-hosted a symposium on the theme: "International Investment Arbitration Across Asia". The symposium, sponsored also by the Sydney Southeast Asia Centre and Herbert Smith Freehills, brought together leading experts of international investment law from Southeast Asia, North Asia, India and Oceania. The symposium re-examined the historical development of international investment treaties in the Asian region, focusing on whether and how the countries may be shifting from rule takers to rule makers. A focus was on the ASEAN(+) treaties, including the (ASEAN+6) Regional Comprehensive Economic Partnership (RCEP) at an advanced stage of negotiations, and the Trans-Pacific Partnership (TPP) Agreement, which was discussed more broadly as an urgent topic in the wake of the change of direction by the US under the new administration. Participants at the symposium also elaborated on the experiences of Asian countries with ISDS mechanisms, and the attitude towards ISDS before and after first major investor-state arbitration (ISA) cases in the region. The many speakers and discussants for the event further explored possible future trajectories of international investment treaty policymaking of Asia-Pacific countries, especially China, Japan, Korea, India, Australia and New Zealand.

Dr Luke Nottage (University of Sydney) delivered an opening speech, surveying pan-Asian FDI, major treaties (including the TPP) and ISDS patterns. Dr Nottage provided an overview of the increased inbound and outbound investments in the Asian region with a special focus on Southeast Asia. He also talked about the rule of law indicators in the ASEAN member states, corruption perceptions and consistency in their investment treaty making, as well as the timing of the first ISDS claims against ASEAN member states on the signing on IIAs. Dr Nottage suggested that these ISDS cases may have had less impact on subsequent signing bilateral investment treaties (BITs) and Free Trade Agreements (FTAs) by Asian countries compared to other parts of the world.

Dr Julien Chaisse (Chinese University of Hong Kong) joined this speech to outline the current state and future development trajectories of TPP, RCEP and the G20 Guiding Principles for Global Investment Policymaking. Dr Chaisse emphasized the importance of the TPP with regard to ISDS provisions and further elaborated on current issues with respect to the US and the TPP. He contrasted the Malaysian and Vietnamese experience, stating that their participation in TPP was a result of intensive negotiations and a huge commitment. Vietnam also incorporated parts of the TPP draft into negotiations to conclude an FTA with the EU. "TPP is not dead", Dr Chaisse concluded, expressing his belief in the TPP at least as a benchmark for ongoing and future IIAs. With regard to RCEP, Dr Chaisse stressed that it remained an ASEAN (not Chinese) initiative, and emphasised the treaty's complexity and importance, the success of which greatly depends on cooperation among all ten ASEAN member states. Lastly, Dr Chaisse analyzed characteristics and future implications of the G20 Guiding Principles for Global Investment Policymaking.

Deeper factors responsible for the evolving treaty practices were scrutinized by Dr Lauge Poulsen (University College London). Including reference to the Asian region, Dr Poulsen addressed motives of the governments signing up to treaties that constrain their regulatory authority and expose them to potentially expensive arbitration claims. A commonly assumed expectation of developing countries was that BITs would attract more FDI. Dr Poulsen pointed out two new empirical aspects for this, as well as risks associated with concluding such investment agreements, and questioned whether governments considered them before being bound by such agreements. This argument further led to the conclusion that although ISDS claims did not necessarily stop the process of signing the international investment treaties, they considerably slowed down the process.

Dr Shiro Armstrong (Australian National University) presented the results of the econometric study, in collaboration with Dr Nottage, which examined the impact of investment treaties and ISDS provisions on FDI. The study found that on aggregate, while both weaker and stronger ISDS provisions have a positive impact on FDI, the effect of weaker ISDS provisions is more pronounced. Dr Nottage added that disentangling the factors at play and drafting policy implications remains a complex task, and both authors expressed concerns about the quality of the existing data on FDIs and other methodological issues. Making a virtual appearance via a Skype call from Bangkok, Dr Jason Yackee (University of Wisconsin) extended such methodological concerns, after presenting his preliminary research on the correlation of Thailand's commitments to ISDS with an increase in FDI, where results differed greatly depending on whether OECD or Thai government data was used. Dr Yackee urged participants to think outside the box to come up with new research strategies for future analysis of this controversial policy question.

Insightful observations on the ASEAN(+) treaties, including RCEP, were added by Dr Diane Desierto (University of Hawaii, by Skype from Stanford). Dr Desierto discussed strategies, norms, institutions and politics of the regional investment treaties. Dr Desierto also discussed some common features and ISDS provisions of the ASEAN in Southeast Asia as well as the risks of parallel proceedings associated with the fragmented investment treaty instruments in the Asian region. Elaborating the topic, Jurgen Kurtz (University of Melbourne) presentation focussed on South East Asian investment treaty practice. Dr Kurtz critiqued the assumption of isomorphism underpinning that practice arguing instead that unique political economy considerations (especially drivers of internalization of costs) have shaped distinctive (and at times, innovative) treaty choices. ASEAN's bold positioning of collective investment rules however have suffered from internal contradictions, not least the puzzling practice of reverse open regionalism. Dr August Reinisch (a discussant from the University of Vienna) sketched some parallels and contrasts between ASEAN and EU investment treaty developments, particularly with regard to the approaches now to ISDS provisions agreed within EU member states as well as with the rest of the world.

A succession of experts then deliberated on the investment treaty practices of other significant Asia-

Pacific countries. Dr Julien Chaisse analysed the investment policy of China, stating that “there are many rules leading to Beijing”. Reflecting on the current events in relation to Prime Minister Abe’s meeting with the President Trump, Dr Tomoko Ishikawa (Nagoya University) reviewed Japan’s current investment treaty regime. In particular, she focused on treaty practices before and after 2010, identifying novelties added by the TPP, not previously common in Japan’s practice. The case of Korea was presented by Dr Joongi Kim (Yonsei Law School). Dr Kim addressed three important areas: the extensive investment treaty practice of Korea; the ISDS cases where Korea was respondent but also now the claimant investor’s home country; and the trade and FDI inflows versus outflows. In addition, trends in the international investment regime globally and within Asia cannot be fully understood now without touching on India’s new Model BIT. Dr Prabhash Ranjan (South Asian University) explained the highly controversial ISDS and related provisions in the December 2015 Model BIT. Dr Ranjan set out the background to India’s novel approach and addressed some of the key issues of the new Indian Model BIT, recently accepted by Cambodia.

Topics presented at the symposium were not limited to “Asia” in the narrow or formalistic sense. Amokura Kawharu and Dr Luke Nottage offered a comparative study of key areas of the existing treaties for Australia and New Zealand, closely integrated economically with the Asian region and even more so bilaterally. They ended up examining the potential to facilitate more EU-style treaty innovations in the Asia-Pacific region and the influence these two countries collectively might have on such processes. The final main speaker of the symposium, Adjunct Professor Donald Robertson (Herbert Smith Freehills) addressed the relation of investment treaties with governance, focusing on principles of best-practice regulation, which sparked considerable potential for further debate.

Justin Gleeson SC, former Solicitor-General and leader of the team that successfully defended the Philip Morris claims against Australia, offered concluding remarks to sum up the symposium. He noted that despite the diversity of the objectives of the speakers, the core aim of these studies remained the same: “it is all about human wellbeing across the planet”.

The symposium therefore offered an excellent platform to share new findings and discuss ideas related to challenges and opportunities related to the investment treaty regime and associated peculiarities in the wider Asia-Pacific region. This marked a thought-provoking continuation of intellectual debate from a related previous conference on “International Investment Arbitration and Dispute Resolution in Southeast Asia” hosted by Chulalongkorn University on 18 July 2016, focusing on the experience of individual ASEAN member states. The research presented at both conferences, also related to an Australian Research Council project over 2014-7 (for Trakman, Armstrong, Kurtz and Nottage), will be brought together in a book on “International Investment Treaties and Arbitration Across Asia” to be co-edited by Dr Chaisse and Dr Nottage.