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Mega-Regional Investment Arbitration

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Investment obligations and investor-State arbitration provisions normally have been negotiated under bilateral investment treaties (BITs), or, more recently, in the larger context of free trade agreements (FTAs). For investment provisions, the movement from BITs to FTAs recently has taken an additional, significant step: the negotiation of such provisions in the even larger context of mega-regional FTAs.

This shift in context — from BITs to FTAs, and now from FTAs to mega-regional FTAs — will significantly affect the content and operation of international investment law provisions. Although ratification of the Trans-Pacific Partnership (TPP) will face significant challenges due to anticipated shifts in U.S. trade policy, the Regional Comprehensive Economic Partnership (RCEP)—which currently includes 16 negotiating States and would cover approximately 30% of global FDI inflows—is expected to be concluded soon, and China recently has renewed calls to actively pursue an even larger Free Trade Area of the Asia-Pacific (FTAAP) agreement. Some combination of these three mega-regional FTAs likely will have a significant impact on 21st century trade and investment activity, including investor-State dispute settlement. Indeed, investment arbitration under these mega-regional FTAs likely will be distinctive in several important respects.

First, a significant number of claims likely will require tribunals to address distinctions between interrelated trade and investment activities. Such claims would arise in the context of international production networks, which mega-regional FTAs are intended to encourage and support. By clarifying the outer limits of "investor" activities, tribunals constituted under mega-regional FTAs could build upon the groundbreaking guidance provided by the TPP, which limits damages under the investment chapter to those incurred by a claimant in its "capacity" as an investor. Investment tribunals constituted under mega-regional FTAs thus could make significant—and much needed—contributions to the development of investment law by analyzing distinctions between intertwined trade and investment activities occurring in the context of international production networks.

Second, mega-regional FTAs could provide particularly good opportunities for the development of effective appellate mechanisms. If appellate tribunals were to be tied to one—and only one—individual mega-regional FTA, each such appellate tribunal could have a systemic impact on the international investment law regime, given the active investment arbitration practice likely to develop under each treaty. At the same time, because each appellate tribunal would oversee the interpretation of only one treaty, such appellate tribunals could avoid the temptation to understate the significance of textual distinctions across treaties, which can arise from a perceived need to achieve greater consistency in the case law.

Third, mega-regional FTAs likely will increase the availability of investment liberalization commitments. By offering compelling trade benefits—in particular, enhanced access to regional and global value chains—mega-regional FTAs could encourage developing States to agree to investment liberalization commitments that otherwise would be difficult to secure, as illustrated by commitments made by Brunei, Malaysia, and Vietnam under the TPP.

Fourth, mega-regional FTAs can encourage investment liberalization in another respect: by relying on existing momentum for trade liberalization to create momentum for investment liberalization, particularly when reserved sectors are set out in a single set of annexes that apply both to the investment and trade in services chapters of an agreement. The TPP illustrates such an approach.

Fifth, by including a large number of signatories, mega-regional FTAs could give rise to coordination challenges. Such coordination challenges could weaken the effectiveness of joint interpretation mechanisms—a form of control mechanism on which States can rely to limit the independence of tribunals constituted under a particular treaty. In response to the risk of coordination challenges, policymakers should consider a wide range of alternative control mechanism options, including soft law options, which recently have been used effectively by the NAFTA Parties (when developing non-binding “Statements” on arbitral procedure) and UNCITRAL (when developing transparency rules that apply largely on a voluntary, opt-in basis).

With the conclusion of the TPP (subject to a challenging ratification process), the likely conclusion of an RCEP agreement, and the active development of an FTAAP agreement, these distinctive characteristics of mega-regional investment arbitration ultimately could be seen, more generally, as characteristics of 21st century investment arbitration.

For further discussion of these issues, see Mark Feldman, Investment Arbitration under Mega-Regional Free Trade Agreements: a 21st Century Model (working draft available here).

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