CIL/USALI Conference on Investment Law Reform: The View from Asia, Executive Summaries for Panel 1: Reforming the International Law of Foreign Investment – State of Play in International Organizations (June 14, 2021)

Executive Summary

Welcomes from CIL Director Nilüfer Oral and USALI Faculty Director José E. Alvarez

Introduction by Professor N. Jansen Calamita (CIL)

The first two panels of this conference will survey (1) the reform agendas under contemplation in global venues (namely ICSID, UNCTAD, UNCITRAL's Working Group III, and the WTO) and (2) views on such reforms from select Asian capitals. The last two panels will take a step back and (3) evaluate whether, when it comes to concluding International Investment Agreements (IIAs), Asian states are rule-takers, rule makers, or rule breakers; and (4) from the long point of view whether there is a distinctive "Asian" voice or set of approaches on investment regime reform. Attendees may find a set of bibliographies prepared for this conference – focusing on "the view from Asia" – of interest by way of background.

Ms. Meg Kinnear (ICSID)

ICSID will soon be releasing the next iteration of its proposed rule amendments [released June 15m 2021]. These are nearing completion and, after delays caused by the pandemic, will hopefully go to a final vote over the next year. It is a very balanced and effective package that is close to reaching consensus and is the product of a lengthy consultation process and a considerable number of working papers. Those changes that require amendments to the ICSID Convention would require the assent of 2/3 of ICSID's parties (104 out of 155 members); other proposed rule changes (for mediation, fact-finding, and the additional facility) require a majority vote.

The changes reflect four objectives: (1) to modernize the rules to take into account prior experience and best practices that have become evident since the last such effort (in 2006); (2) to reflect procedural reforms sought by ICSID members; (3) to maintain a balance between the procedural rights of investors and states; and (4) to provide more alternatives to binding arbitration. The changes to the rules seek to reduce the time and costs of arbitration; address the controversial issues of third-party funding and security for costs; and achieve even greater transparency. While ICSID has long been a leader with respect to transparency and the Mauritius Convention has now come into effect, few ICSID members are parties to the Convention and it is important to get arbitral decisions and orders into the public domain.

On time and costs, the proposed changes take a multi-track approach. They include general duties on the parties and arbitrators to expedite matters as well as more specific prescriptions for shorter and more definite time frames for steps in the arbitral process, and the additions of a case management conference, electronic filing, and an optional expedited arbitration process that if parties choose it can reduce the time spent on resolving a dispute by 50 percent.

Given the wide spectrum of views on third party funding the amendment takes a compromise position: it mandates greater disclosure but does not ban the practice. With respect to enabling security for costs, the proposed change reflects jurisprudential trends: arbitrators are directed to take into account the party's ability and willingness to comply with an adverse award when they consider requests for security. The proposed changes promote greater transparency by providing for more automatic publication of awards, clarifying redaction and confidentiality rules to encourage the parties to publish awards, and include rules for the participation of non-disputing third parties. The changes also contemplate a new set of mediation rules that would complement the Singapore Convention and would be broadly available to all investors and even to non-ICSID parties, as well as a revised, simplified set of fact-finding rules.

ICSID, along with the UNCITRAL secretariat, is also developing a code of conduct for arbitrators. The draft code, first published in May 2020 and released in a second draft in April 2021, was the subject of consultations last week. The idea is to produce a code for ISDS that would address a number of complicated issues that elicit concerns over the independence or impartiality of investor-state arbitrators. It addresses the potential for conflicts due to double-hatting, repeat appointments, and insufficient disclosure, for example. The idea is that the general code could be adopted for use irrespective of the arbitral rules used for ISDS.

Mr. Hamed El-Kady (UNCTAD)

UNCTAD has been calling for the reform of the international investment regime for over a decade. Overall, it has sought to encourage an investment framework for sustainable development by assisting countries in reforming and modernizing their old BITs or investment chapters in FTAs to move towards a "new generation" of investment policies that maintain a better balance between investment protection and states' right to regulate and that also enable more effective responses to global contemporary challenges such as health, climate or economic crises. UNCTAD's Reform Package for the international investment regime identifies 3 phases for IIA reform. Phase 1 focuses on moving to a new generation of IIAs. Phase 2 is concerned with the modernization of the existing stock of investment agreements. And Phase 3 puts the spotlight on ensuring coherence between different levels of investment policy making. When it comes to Phase 1 of reform, moving to a new generation of IIAs, it is crucial to identify the country's strategic development objectives and their relation to investment policymaking. It also involves making choices on the extent and depth of the reform agenda, including with regards to substantive IIA clauses and investment dispute settlement. Phase 1 begins with a national review of the existing network of IIAs. It continues via the preparation of an action plan for reform, including revising the IIA model or drafting a new one. Finally, this phase culminates in the negotiation of new, more sustainable development-friendly treaties. Phase 2, modernizing the existing stock of IIAs, involves addressing the problems and risks posed by the large stock of existing, old-generation treaties. Those treaties that were concluded in the 1980s, 90s and early 2000s that do not reflect the sustainable development objectives and challenges of the 21st century. For this phase UNCTAD provides a multitude of concrete options ranging from treaty renegotiation,

amendment or jointly interpreting old-generation IIAs all the way to terminating these treaties after carefully weighing the pros and cons. Phase 3 aims at pursuing coherence and synergies between different levels of investment policy making. It permeates phases 1 and 2 but also goes beyond. The successful implementation of phase 3 ensures internal consistency within a country's IIA network. It maximizes synergies between IIAs and the national framework for investment. And third, it manages interactions between IIAs and other bodies of international law.

UNCTAD's IIA reform recommendations are guided by five main action areas: (1) safeguarding the right to regulate while maintaining investment protection; (2) reforming ISDS; (3) promoting and facilitating sustainable investment; (4) ensuring responsible investment; and (5) enhancing the consistency of all aspects of investment policy making.

There is substantial global progress on UNCTAD's reform agenda. Progress on phase one is shown by countries' greater care in refining and clarifying key provisions, and in including provisions maintaining their right to regulate in the public interest. The importance of phase two is highlighted by the fact that 90 percent of the approximately 3000 IIAs in existence were concluded before 2010, and with the overwhelming majority of ISDS cases based on old-generation IIAs.

UNCTAD's policy guidance, technical assistance and capacity building – involving work with over 130 countries and a number of regional economic bodies – is having an impact. Its concrete policy guidance for rebalancing contemporary IIAs – such as its recommendations for incorporating clauses enabling IIA parties to issue joint interpretations of their treaty or including provisions for the protection of public health, human rights and environmental protection – are gaining traction. It has also released an "IIA Reform Accelerator" that can assist IIA negotiators by translating UNCTAD's general policy guidance into concrete and directly applicable treaty language.

Professor N. Jansen Calamita (Centre for International Law)

The reform agenda at UNCITRAL's Working Group III has three components. It seeks to identify concerns with ISDS; determine whether state proposals for reforms are desirable given the expressed concerns; and reach agreement on possible solutions in light of the concerns. The areas of concern echo key issues identified by UNCTAD and particularly those being addressed by ICSID's rule reform.

WG III has focused on criticisms directed at arbitral outcomes under ISDS. These include concerns over the consistency, coherence, and predictability of arbitral rulings as well as the absence of mechanisms for correction. It has also focused on criticisms directed at arbitrators: the absence of mandatory rules on their qualifications, fears that the party-appointment process threatens their independence and impartiality, and the absence of diversity and representativeness of the arbitral bar. The last concern has particular resonance for Asia since, according to ICSID's data, less than 9 percent of ICSID's cases involve arbitrations from the

region. With respect to cost and duration, WG III discussions, like those in ICSID, examine the numerical value of awards (where an award of billions of dollars is no longer uncommon), the costs of arbitrating an ISDS case irrespective of outcome (where a respondent state may spend five million dollars in legal fees), the impact of third party funding (which, given market realities, is generally available only to investors), and the duration of ISDS (which can take as long as four years to reach a conclusion in the first instance and an additional year or two for post-award efforts). States in the WG have also expressed concerns that they have lost control of the process given the procedural imbalances built into it (including expansive interpretations of investor rights by ISDS arbitrators).

Given the breath of the expressed concerns and the difference of views about them, WG III is examining a continuum of possible reforms – from incremental improvements to ISDS to more structural changes such as getting rid of ISDS altogether, adding an appellate mechanism to it, or replacing arbitration with access to a more judicial structure. Those advocating for a shift in paradigms, such as Brazil, want IIAs to address investment facilitation and contain only state-to-state dispute resolution along with non-binding methods such as mediation. Those seeking incremental reforms, such as the United States, Russia, and Japan, back an agenda that resembles ICSID's rule amendments. Others back structural reforms. The latter include China (which has expressed support for adding an appellate mechanism to ISDS) and the EU (which seeks one or more permanent investment courts).

The current WG III workplan reflects these divisions among its members. As released by the UNCITRAL secretariat, it identifies eight topics for the group's on-going work. Some of the topics are cross-cutting; that is, they address reforms that could apply irrespective of whether more structural reforms take place. Recommendations to encourage ADR or the prevention of disputes – which could include steps to encourage mediation to incorporating procedures for expedited dismissal of frivolous claims – could, for example, prove relevant whether one favors incremental improvement or a more structural change such as establishment of a single permanent investment court. The same can be said for the proposed code of conduct. But other proposals are specific to the modality of reform. Reforms directed at the selection or appointment of arbitrators obviously presume that there will continue to be investor-state arbitrators.

An interesting proposal for structural reform is the idea of establishing a multilateral advisory center or facility to assist developing states with respect to IIAs. The scope of such a facility – whether it will assist states in negotiating IIAs, in implementing their IIA commitments, or in defending themselves from investor claims – remains unclear. But a leading proponent of the idea, the EU, has suggested that establishing a multilateral advisory center should be seen as part of a package that also would include the establishment of a permanent multilateral investment court.

As the process moves into its third phase, the WG's workplan stretches out through 2026 with 137 days of meetings planned. A number of secretariat papers are now out for comment and many more remain in the pipeline.

The WG III reform process has become increasingly complex: eight main reform tracks within UNCITRAL amid on-going efforts in ICSID, UNCTAD and the WTO. This constitutes a major capacity challenge for developing states as for UNCITRAL's secretariat (including with respect to translation services).

Participation by Asian states within WG III has been uneven. Some states – Japan, South Korea, and Singapore in particular – have been active throughout but China has been reluctant to exercise leadership in advancing a particular reform agenda. Within ASEAN, the voices of Singapore, Thailand, and Vietnam in particular have been heard but there is little evidence of coordination among those states or among others within the organization.

Professor Chi Manjiao (University of International Business and Economics)

The WTO has not been successful in international investment law making. Its prior attempts, dating from 1996, have failed, and an attempt to negotiate an international investment treaty was dropped in 2003. At present no stand-alone WTO agreement exist on the subject. But a number of WTO agreements, particularly the GATS, are connected with investment, so it is not entirely unprecedented for the matter to arise again. Its current effort – to negotiate a WTO framework on investment facilitation (or IF) – stem from concerns that today's integrated global economy depends on simplifying, speeding up, and coordinating administrative procedures to expand investment flows. IF measures seek to remove unnecessary red tape, bureaucratic overlap or out of date procedures that impede investments, and undermine efficiency and certainty. While many developed countries think of themselves as having high standards of IF, that is not the perception of a number of less developed countries who complain of the high barriers to entry and tend to be the demanders of an IF framework.

It is assumed that such a framework would aim at improving the transparency, predictability, efficiency and consistency of national regulatory schemes on investment but would not cover certain issues, including market access, investment protection, or ISDS.

The background to the WTO's current effort can be briefly stated. The WTO's 11th ministerial conference held in 2017 and joined by over 70 members announced the new IF initiative along with other matters. In 2020, 92 WTO members expressed support for the original 2017 statement and pledged to develop a framework to facilitate FDI. On Sept 25, 2020, formal negotiations of an IF framework attracted 105 members. Although many members submitted proposals for the emerging framework and a consolidated text was delivered this April, that text, still under negotiation, is not publicly available.

Outstanding issues include identifying precisely what are IF obligations or measures, the nature of the agreement within the WTO context and its integration with existing WTO rules (as under the GATS), and how best to insulate any IF agreement from existing IIAs.

A serious issue is the absence of a fixed or unanimous definition of IF. While there is wide agreement that the term encompasses requirements for transparency, streamlined administrative procedures, focal points for investors, and requirements of corporate social responsibility and anti-corruption, if IF embraces any rule that has an impact on capital flows, the prospective IF framework could embrace a much broader set of rules.

The joint ministerial statement envisions a multilateral and not plurilateral agreement that binds only its parties. Such an agreement would require endorsement by consensus among all WTO members. This is a high hurdle that differs from the plurilateral agreement on trade facilitation that requires only a critical mass of signatories.

A final challenge is how to integrate the IF framework particularly with WTO members' obligations under the GATS, where some 60 percent of service trade is estimated to arise from foreign direct investment. Will the IF framework incorporate the GATS' corresponding obligations on transparency, consistency and predictability and if so, will these be interpreted the same way? Will the new agreement incorporate new investment obligations not covered by the GATS and if so, how will those be harmonized?

The insulation challenge relates to the interface between the envisioned IF agreement and existing IIAs. How will the IF agreement interact with MFN or umbrella clause provisions in existing IIAs? Will those provisions make IF obligations formally subject to ISDS under such treaties? There is also the possibility for more subtle adjudicative interaction. Apart from bringing in IF obligations directly into states' MFN or umbrella clause duties under IIAs, would the two regimes come to interact through interpretations by adjudicators who are inclined to flexible or expansive application of other IIA guarantees such as their prohibitions on indirect expropriation or requiring FET? Some see a high risk that IF rules will effectively become subject to ISDS one way or the other. To solve this issue, a firewall or insulation clause in the framework should be carefully drafted. A major question, therefore, is whether any IF framework will have negative spillovers on those seeking, within the broader investment reform agenda, to shift away from binding dispute settlement and increase, not erode, governments' regulatory discretion.