

Executive Summary

Introduction by Chair, Professor N. Jansen Calamita (Centre for International Law)

Asian states now dominate the global economy. Countries like China, Indonesia, Japan, and Korea have emerged as economic powerhouses. They have grown from being primarily capital importers to capital exporters. The economic dominance of the region in global capital flows has been accompanied by a growing number of economic agreements and partnerships in the region. The establishment of the ASEAN Economic Community, the Regional Comprehensive Economic Partnership (RCEP), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP 11), and the China-EU Comprehensive Agreement on Investment headline an increasing number of free trade and investment agreements among Asian nations as well as with countries external to the region. The question for our panelists is what the contents of these agreements say generally about the region's approach within the international investment regime. When approaching the negotiation and conclusion of these agreements, are Asian countries: adhering to standard substantive and procedural rules developed outside the region, revising those rules to adapt them to their needs, or rejecting existing paradigms and norms to create their own? Are Asian countries, in short, rule makers, rule takers, or rule breakers?

Dr. Stefanie Schacherer (Centre for International Law)

One should not presume that there is a single, unified "Asian" approach to negotiating International Investment Agreements (IIAs). Even among ASEAN members, there is a great diversity of economic power, governance style, population size, and other key characteristics. ASEAN is not a monolith. Traditional western powers have been the driving force behind IIAs for many years. Asian, and ASEAN countries in particular have largely adopted a style of "refinement" toward these treaties. They have in general made adjustments to existing norms to fit the unique qualities of the respective states, without reinventing the investment wheel. These refinements include (as in RCEP) the explicit inclusion of state-owned entities as potential investors, a limitation that investments are only protected if they have been accepted under their host state's laws, and the inclusion of provisions designed with developing countries in mind (such as those facilitating investment).

Whether Asian countries are rule makers, takers, or breakers turns on how these terms are defined. If being a rule maker means having the ability to have a substantial economic impact on trade and capital flows, the region, and ASEAN in particular (including through its model investment agreement and ASEAN+1 agreements), have clearly had a global impact, including with respect to protecting the world's most extensive network of global supply chains. The

recently concluded “big deals” in the region, such as TPP 11, have adopted the more refined “gold standard” of investor protections such as more “balanced” provisions on fair and equitable treatment (FET), protections against more clearly delimited “indirect” expropriations, and clearer definitions of rights against discrimination. But if rule maker means creating innovative or unconventional rules, the region is more of a rule taker. This is because of the substantial economic differences among Asian countries as well as because Asian countries find it difficult to innovate in the face of the push for continued adherence to the traditional rules by the more powerful states (the US and the EU). It remains to be seen whether this will remain the case, or if Asian IIAs and their contents will evolve as the region continues to grow as an economic force.

Professor Heng Wang (University of New South Wales)

Does China have an identifiable approach to IIAs? China’s approach to international investment, and its recent transition from a major capital importer to a major capital exporter and importer has led to [a multi-stage approach to investment law over time](#). During the first stage in the 1980s and early 1990s, China gradually opened to incoming foreign investors and adopted restrictive bilateral investment treaties (BITs) particularly in terms of investor-state dispute settlement (ISDS) and national treatment. In the second stage in the late 1990s and early 2000s, it concluded more liberal BITs, including those incorporating full access to ISDS. In the third stage in late 2000s, the BITs are more detailed and balanced, which protect Chinese interests as a capital exporter.

The content of Chinese IIAs have also varied depending upon its negotiation partner(s). In agreements concluded with major Western powers, like the European Union, China largely adhered to the traditional IIA norms. China also backs investment facilitation at the WTO.

More recently, it has concluded an increasing number of Memorandums of Understanding (MOUs) on the Belt and Road Initiative (BRI) along with [project agreements](#). In the BRI, Chinese efforts seem to concentrate on [maximizing flexibility](#), which also faces challenges such as those concerning coherence and predictability of the Chinese approach to international investment law. China seeks to maximize its capacity to back a myriad of major projects by concluding MOUs with the many host states for outgoing Chinese investors. These Memoranda are non-binding and do not provide for ISDS. More concrete obligations emerge from many investment contracts and related agreements concluded under the BRI projects, which are not readily accessible. China also endeavors to develop new international institutions and mechanisms (like the Asian Infrastructure Investment Bank and Multilateral Cooperation Center for Development Finance) and reportedly promotes China’s standards in the BRI projects. These efforts suggest that China is [selectively reshaping international economic governance](#) through “uploading” China’s practices to extra-regional level. This would carry long-term implications for international investment law and practice. The future of China’s approach remains to be seen, including the responses of other stakeholders.

Professor Prabhash Ranjan (South Asia University)

India's approach to IIAs has changed dramatically over time. In the 1990s, India adhered to number of bilateral investment treaties with traditional investment protection norms championed by Western powers. But starting in 2011, as India began losing high profile ISDS cases like *White Industries v. India*, its response to the international investment regime changed. Following these losses, the Indian government repudiated all its existing BITs, and began attempting to negotiate new treaties based on a new Model BIT issued in the course 2015 and 2016.

India's new Model BIT, while still containing ISDS, creates a number of roadblocks for investors looking to bring claims against their host states. Under it, investor claimants face cooling periods and need to exhaust local remedies for five years before accessing ISDS. India's new Model also contains a number of other innovative provisions, including an attempt to refine the meaning of "necessary" measures for purposes of defining states' "essential security" defense, a list of grounds on which there would be justifiable grounds to question arbitrators' impartiality, and an exclusion from treaty protection for compulsory licensing granted in relation to intellectual property. As it tries to get others to enter into its Model, India may be transitioning into a rule maker. Its reluctance to accede to investment facilitation efforts in the WTO is also reflective of its new posture.

India's caution on ISDS and its decision, in response to the ruling in *White Industries*, to eliminate investors' guarantee to most favored nation treatment in its new Model BIT, suggests that the country is becoming something of a rule breaker as well. At the same time, India has not abandoned many other traditional IIA norms.

It remains to be seen how effective India's new Model BIT, and its attempts to transition to rule maker/breaker will be. While India has successfully concluded more recent BITs with a few nations, including Mozambique and Brazil, its Model BIT has yet to generate interest more broadly. In addition, the Brazil-India BIT is more reflective of Brazil's model investment facilitation treaty than it is of India's new model. If India is unable to attract major powers, like the EU, the US, and China, to its Model BIT it may consider that effort to be a failed experiment and return to more traditional IIAs.

India is casting doubt on the prospects of a monolithic Asian stance on trade and investment in other ways. Despite participating in prior negotiation sessions, it refused to sign RCEP. Reportedly, that refusal stems not from resistance to ISDS, but from protectionist fears that the non-investment parts of that treaty would result in a flood of cheap Chinese products into the country. It remains to be seen whether such protectionist fears will continue to prevail or whether a desire to deepen its engagement with the global marketplace would change its stance towards the RCEP.

Charlie Garnjana-Goonchorn (Thailand Ministry of Foreign Affairs)¹

ASEAN countries cannot be treated as a monolith. Each country brings its own priorities to the negotiating table. In Thailand's case, its stance towards IIAs reflects its posture as a medium sized economy as well as the substantial political impact of recent ISDS cases. The Thai government, like others in the region, is reconsidering whether to conclude IIAs as well as their contents but the answer as to whether it, like other Asian countries, are rule takers, makers or breaker is both "yes" and "no".

Five factors inform how Asian countries approach IIAs, including regional agreements with somewhat different goals like the RCEP and the TPP 11. The first is the shifting dynamics of Asian economies. As China and others grow in power, and India grows increasingly wary of ISDS, the altered power structures have changed governmental priorities from the early days when Asian states began to negotiate BITs. A second factor is the evolution that is occurring as more Asian nations transition from capital importing to capital exporting states. A third factor is the shifting nature of FTAs. As Asian countries take on more of the onus of negotiation, and gain more power, they have, without adopting a single position, shifted the focus to a more flexible and soft approach to free trade that complicates negotiations. A fourth influencer is whether a country has experienced the need to defend itself from one or more ISDS claims. A couple of major investment disputes has led to a wariness of international investment and a trepidation with respect to ISDS that did not exist when it signed its first BITs. Finally, the current popularity of investment reform possibilities is both a blessing and a curse. The many competing IIA models, processes for reform, counterparts with which to negotiate globally and regionally, and the many domestic agencies that need to be consulted are opportunities to be sure but also create a daunting labyrinth for medium-sized states like Thailand. Such states cannot assume, unlike the more powerful, that their policy preferences will prevail. They need to respond more slowly and cautiously.

Asia's role as a rule maker may be coming but it has not yet arrived. ASEAN remains unique as a regional institution. It is culturally and economically diverse, integrated only to a degree given that its states still largely compete with each other for foreign investment, and still defined by the need for each of its members to look out for itself rather than seek benefits as a bloc.

¹ Speaking in his personal capacity.