

Executive Summary

Introduction by Chair, Professor Hi-Taek Shin (Seoul National University, KCAB INTERNATIONAL, and Twenty Essex)

This session seeks a long-term perspective on reforms for the international investment regime. The panelists have been asked to address how countries in the region may implement reforms, what those reforms mean for international law in the region, and how different the landscape for international agreements might be decades down the line. The panelists were asked to address whether prior panels of this conference overlooked any major factors in the long-term development of international investment law in Asia. They were also asked to consider whether recently concluded IIAs involving Asian states share certain characteristics and reflect a greater integration of international investment law for the region.

Professor Surya Deva (City University of Hong Kong)

There is no monolithic “Asian” approach to international investment agreements (IIAs). Asia consists of a diverse set of nations which are not operating in a vacuum. Each nation’s approach is influenced not only by its own special set of interests but by their own sets of negotiating partners within Asia as well as from other regions. In addition, given Asia’s relatively new status as a major capital exporter, there has not been time for a calcified and unified approach to develop.

It is increasingly clear that IIAs have social dimensions. Future IIAs need to include provisions concerning the human rights of states and the responsibility of investors. While the drafts of the UN Code of Conduct for Multinational Corporations in the 1970s contained both rights *and* responsibilities for investors, the international community ultimately decoupled the two and addressed only the rights of investors in subsequent IIAs. As a result, IIAs generally do not contemplate the role foreign investors play in promoting/violating human rights or their duties to comply with economic and social rights. An imbalance results: while investors have a specialized path to justice for violations of their rights through investor-state dispute settlement (“ISDS”), the treaties do not provide venues for going after investors who derogate from human rights. The imbalance is not only seen in IIAs. The World Bank’s Ease of Doing Business rankings, for example, also promote irresponsible investors practices and diminish states’ domestic efforts to address economic and social rights violations. Labor and environmental violations go largely unpunished, while expropriations and other violations of investors’ rights are met with severe consequences.

Five challenges are insufficiently addressed in current IIA reform efforts. There is, first, a need to recognize not only the rights of states to regulate (“regulatory space”) but the duty of states to regulate. Second, the imbalance of IIAs needs to be corrected by including

responsibilities on foreign investors to enforce their social responsibility that are as “hard” as the rights now given to them. The soft guidelines to this effect that some IIAs now include have not been effective in holding investors to account for violations or irresponsible practices. Third, the IIAs’ lack of balance with respect to rule of law remedies needs to be addressed. Investors’ one-sided access to ISDS and its remedies needs to be corrected by something more than enabling some access to state counterclaims and enabling NGOs to file amicus. Fourth, the regime needs to address the selective way it applies the law. Unlike national laws, IIAs enable corporate shareholders to claim for their own damages, apart from the corporation, for example. At the same time, local communities directly impacted by those corporate actions – which are as much a ‘third party’ to a state-to-state IIA as is a private investor -- are not entitled to a remedy. Finally, the substance of international investment law – not merely the procedures for settling disputes under it – needs systematic reform.

The objective of IIAs needs to be redefined. These treaties need to enable inclusive, sustainable economic development. Reformers need to dismantle ISDS not just reform it. The system is broken and beyond mere procedural repair.

Professor Sufian Jusoh (Institute of Malaysian and International Studies)

Asia is evolving as an international rule maker. In the past it has shown a predilection for soft guidelines and principles rather than strict rules on investors, especially when it comes to their corporate responsibility. This has led to significant issues in ASEAN countries’ export industries, as exporters face sanctions for irresponsible practices in producing goods like palm oil and medical supplies. In other sectors, including renewable energy, Asian businesses have faced charges of engaging in forced labor and other illegal practices, even as the same guilty companies receive government subsidies.

Asian countries also face challenges in making large Western conglomerates accountable for their irresponsible practices. When major corporations that play a significant role in Asian economies refuse to comply with local rules and regulations, there is often no practical recourse for governments. Corruption and cronyism further restrict efforts toward responsible business behavior. The difficulty may not be with the official law. Myanmar’s Investment Law of 2016, for example, purports to require investors to comply with responsible business standards. But failures of government capacity and internal turmoil have made this requirement difficult to enforce -- as have corporate practices, such as restructuring, designed to avoid legal liability. Unless IIAs close loopholes that permit companies from reincorporating elsewhere or moving their operations to shield themselves from liability for irresponsible practices, they will continue to be ineffective tools for this purpose.

There is a governance gap: namely the absence of a single standard accepted worldwide for responsible business practices. There is also a need for a global monitoring system and framework that would be easier for countries to implement than attempts to do so piecemeal.

Asian countries also need the courage to implement the needed standards. They need to become more willing to enforce corporate responsibility and not shy away from it for fear of losing foreign investment.

Future IIAs need to permit countries to set up new regulations as their understanding of environmental and social needs evolve. Given the inability of national courts to have jurisdiction over corporate parents located abroad, there is also a need for more effective systems for making investors internationally accountable for unfair or irresponsible practices. This could include state to state dispute settlement to address such cases.

It remains to be seen whether, as Asian countries conclude future IIAs, they will have the capacity and desire to address corporate responsibility within their terms.

Dr. Jonathan Bonnitcha (University of New South Wales)

The international investment community's reforms are overly focused on "second-order questions." They assume that the primary framework of current IIAs should remain intact. IIAs require a broader overhaul but the agenda for reform should differ from that suggested by Professor Deva. The scope of IIAs as instruments of investment protection should be considerably narrowed. There may be some role for IIAs in addressing new problems of investment governance that receive little attention in existing policy debates, but expansion of scope into new areas needs to be carefully justified. IIAs should focus on solving only those problems they can actually solve.

While many rationales have been offered for IIAs, the most significant problem that they can actually address is the problem of opportunism by host countries, that is, the suspicion that once an investor sinks capital into a host state, that investment can be subject to capture. The best justification offered for IIAs is that they address the prospect that host states can rob investors – by, for example, expropriating their property – as if by gun-point and that this risk hinders beneficial capital flows that would otherwise occur. But IIAs now attempt to protect foreign investors from many more risks apart from the risks of underinvestment due to opportunism. Under existing IIAs investors are overly protected from sovereign risks and are wildly overcompensated for them at the expense of local communities. The award in *Tethyan Copper v. Pakistan*, for example, which was based on compensating an investor for "lost profits" for a mine that was never built illustrates the problem and the deleterious effects ISDS cases may have on host states and their peoples.

IIAs need to be redesigned to target only opportunistic behavior by states, not other acts that prove adverse to investor interests. Investors should only be compensated to the extent necessary to solve the problem of underinvestment due to opportunism and not to provide recompense for any and all perceived injuries to foreign investors, however nebulous. If we start with a clearer analysis of the problem that investment treaties should be trying to solve it

becomes clear that the issue of compensation should be central to the reform agenda. Unfortunately, current reform efforts focus instead on second-order issues like arbitrator appointment.

IIA reformers as well as those working on investment in the WTO are also wrongly focused on investment facilitation. These efforts are also misguided. IIAs, like all treaties, do not need to impose binding obligations on states to compel them to achieve things that they already have a self-interest in achieving unilaterally. Investment facilitation should be left to capacity building and not be subjected to binding rules. Moreover, certain conceptions of investment facilitation – of the sort embodied in the World Bank’s ease of doing business rankings, for example – may encourage the wrong kind of regulatory and institutional change. The fact that some conceptions of investment facilitation are contentious and may change over time is a further reason they should not be ‘locked in’ through binding international rules.

Reformers should be concentrating on how IIAs can benefit not only investors, but all constituencies affected by international investment. Reformers should look to other initiatives in the investment governance space, like the Extractive Industries Transparency Initiative, and try to harmonize their efforts with such targeted initiatives, for example on transparency of investor-state contracts. This is an example where including specific and binding commitments in investment treaties could improve investment governance to the benefit of constituencies in host states. Such commitments can make both investors and governments uncomfortable on occasion, which provides an explanation for why they are not on the reform agenda now and a reason why they should be.

Professor Pasha Hsieh (Singapore Management University)

The conclusion of a number of major regional and bilateral investment agreements among Asian countries indicates that there is a third wave of regionalism ongoing in Asia. Those focused on investment reform should not ignore the new forms of integration resulting from such treaties, their key characteristics, as well as the renewed importance of international investment law in Asia that they embody.

The Asia-Pacific Economic Cooperation’s (“APEC”) efforts in international investment reform are suggested by its prohibition, dating from 2011, on the relaxation of health, labor, and environmental regulations as a tool to induce investment. This development evinced a willingness to go beyond using such treaties only to enhance investor protection and compensation. Although these commitments were part of the pact’s non-binding investment principles, they guided states engaged in domestic law reform and in negotiating IIAs.

The Association of Southeast Asian Nations (“ASEAN”) has also initiated relevant reforms, including increasing trade liberalization provisions in a number of sectors. The creation of the ASEAN Economic Community (“AEC”) took a major step in its ASEAN Comprehensive

Investment Agreement (ACIA) by specifically liberalizing the fishing, agriculture, forestry, manufacturing and mining, and quarrying industries. Recent ASEAN+1 agreements now include Free Trade Agreements with both trade and investment provisions with major economics in the region (such as China, Japan, India, Korea, and Hong Kong). The conclusion of the Regional Comprehensive Economic Partnership (“RCEP”), and the absence of ISDS within that agreement, suggests there is reticence amongst Asian and Pacific states toward investment provisions and ISDS. But the exclusion of ISDS in that agreement (undertaken at the insistence of New Zealand) may be revisited two years after it enters in to force under the terms of its Article 10.

Indonesia, the largest economy in ASEAN, provides an example of how ASEAN nations are currently approaching ISDS and IIAs. That country’s loss in Churchill Mining and Planet Mining initiated a period of reflection that culminated in the country’s termination of 25 of its BITs. Today Indonesia attempts to negotiate IIAs with stricter provisions as to when investors may bring claims. These IIAs include a longer consultation period before granting access to ISDS arbitration and include a provision enabling state parties to issue interpretations of the treaty that are binding on arbitral tribunals. This wariness toward ISDS colors some other Asian nations’ approaches to IIAs and is likely to continue for some time.

The investment chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”), heavily influenced by the United States as its initial driver, gives it a unique flavor among Asian instruments. The original Trans-Pacific Partnership anticipated the possibility of establishing an appellate mechanism for investor-state arbitration but this provision did not survive the United States’ exit from the treaty and the conclusion of the CPTPP. But that agreement includes carve-outs from ISDS for private investor contracts and fair and equitable treatment claims in financial services, and some members, like New Zealand, have concluded side agreements with other CPTPP members that exclude ISDS entirely.

FTAs recently concluded between the European Union and Singapore and Vietnam respectively displace ISDS with investment courts under those instruments. While those respective FTAs’ investment courts differ in some respects, both treaties anticipate the establishment of a possible single multilateral international court system for investment arbitration -- a reform which has been championed by the EU.

The UN Convention on International Settlement Agreements Resulting from Mediation (otherwise known as the Singapore Convention on Mediation), originally had 53 signatories and now has 6 ratifications. While that treaty formally applies to agreements resulting from the mediation of commercial disputes, under the UNCITRAL Model Law it is likely to cover investment disputes. Should that treaty be ratified by a significant number of Asian states, it may provide fodder for those who argue that the region favors non-binding forms of international dispute settlement more generally.

These developments suggest three general conclusions. First, recent practice shows that Asian nations largely favor agreements that provide greater regulatory flexibility to states. A number, including the CPTPP, include narrower investor rights and accord greater interpretative powers to states. Second, a number of the new agreements suggest a general wariness toward ISDS and some do not include resort to it at all. Third, while recent agreements concluded between two Asian states and the EU replace resort to arbitration with access to a court for investor-state disputes, IIAs among Asian states inter-se do not. That fact, and the possibility that the Singapore Mediation Convention may become popular in the region, may signal regional caution about any form of binding investor-state adjudication in the future.