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Special Issue: Dawn of an Asian Century in International Investment Law?

An Introduction

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For the most part of its history over the past 150 years, international investment law has been shaped by capital-exporting countries in Western Europe and North America. Disputes between European and US investors and their governments, on the one hand, and Latin American countries, on the other hand, and the claims commissions established to resolve them, were at the forefront of legal developments in the second half of the 19th and early 20th centuries. After World War II, it was European countries that forged the classical model of bilateral investment treaties (BITs), which proliferated despite opposition from the New International Economic Order movement from the 1970s onwards. During the 1990s and beyond, it was the United States and Canada that led, building on their experience with the North American Free Trade Agreement (NAFTA), the process of rebalancing investor rights and policy space and fostered innovations in dispute settlement. NAFTA also stands paradigmatically for the reintegration of trade and investment rules in comprehensive economic cooperation agreements and for a trend towards regionalism in the field.¹

* This Special Issue had its origins in a panel held at the 4th Asian Society of International Law Biannual Conference in New Delhi from 14–16 November 2013. It addressed the international investment policies of China, Japan, India, and the Association of Southeast Asian Nations (ASEAN), and their potential global impact. The New Delhi papers were reworked and complemented by further contributions to form the present Special Issue. Stephan W Schill acknowledges support in preparing this Special from a European Research Council Starting Grant on ‘Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica’ (LexMercPub, Grant agreement no 313355).

¹ For a more detailed overview over the broader trends in contemporary international investment law see Stephan W Schill and Marc Jacob, ‘Trends in International Investment Agreements 2010–2011: The Increasing Complexity of International Investment Law’ (2013) 4 YB Intl Inv L & Poly 141.

Yet, recalibration, integration of trade and investment rules, and a turn towards regionalism are not the only key changes. Another one is the marked shift in the geography of international investment law from a transatlantic to a transpacific core. Despite the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union, there is little doubt that Asia, and particularly its economic powerhouses in the Far East, are nowadays the focal point in international investment law. As illustrated by the recently announced conclusion of the Trans-Pacific Partnership (TPP) and the ongoing negotiations of the US-China BIT, Washington nowadays looks more towards Beijing, Singapore, Tokyo, or Seoul than towards Brussels, Berlin, Paris, or London. This is only logical given Asia's increasing economic importance, not only as a trading partner and target of foreign investment, but also as a source of outward capital.² Moreover, many Asian countries are not only remarkably active in concluding international investment agreements (IIAs), but also in reassessing their stance on international investment policy, as the empirical *tour de force* of Claudia T. Salomon and Sandra Friedrich through the investment treaty practice of East Asian and Pacific countries in this Special shows.³ Regional investment initiatives in Asia are also at the cutting edge. In addition to TPP and the negotiation of the Regional Comprehensive Economic Partnership (RCEP), the Association of Southeast Asian Nations (ASEAN) has become a key player in IIA-making. Last but not least, Asian actors are becoming more prominent as participants in investment arbitrations, both as claimants and respondents.⁴

All of these factors account for a change in the geography of international investment law. They also raise salient questions about the role of Asian countries in the field and their engagement with the traditional European and North American investment treaty models. Where do Asian actors draw inspiration from when crafting IIAs? Are Asian actors merely rule-takers in international investment law, copying traditional Western IIA models or does Asia's economic importance translate into increasing influence in making and shaping the future of international investment law? Are we perhaps even witnessing

² UNCTAD, *World Investment Report 2015 – Reforming International Investment Governance* (United Nations 2015) 5 (noting that '[d]eveloping Asia has become the world's largest investor region').

³ Claudia T. Salomon and Sandra Friedrich, 'Investment Arbitration in East Asia and the Pacific: A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitrations in the Region' (2015) 16 *JWIT* 800.

⁴ *ibid* at 834–841; see also Julien Chaisse, 'Assessing the Exposure of Asian States to Investment Claims' (2013) 6(2) *Contemp Asia Arb J* 187.

the dawn of an 'Asian century',⁵ in which Asian actors not only factually have a deep impact, through the negotiations of IIAs with major Western economies, on global investment governance, but, as *Sundaresh Menon* argues in his contribution to this Special, have a responsibility to so do?⁶ In which direction will Asian actors push for in the development of global investment governance? Moreover, is there a specific Asian approach to international investment law or do different actors (and which ones?) pursue different strategies and interests, depending on size, economic structure, and geopolitical role?

The contributions in this Special Issue that follow *Salomon/Friedrich* and *Menon* tackle these questions through the analysis of the international investment policies and accompanying domestic debates in a number of particularly influential countries as well as in regional organizations and platforms. In articles on China, India, Japan, Korea, Indonesia, and on regional approaches under ASEAN, TPP, RCEP, and in Central Asia, the authors, which, with one exception, all stem from the region, consider the impact of international investment law on Asian countries and the impact of Asian countries on international investment law. While their assessments are much more nuanced, they largely agree that Asian actors in the past have been primarily rule-takers, but are increasingly developing critical edge and redefine their engagement with international investment policy. For the contributors in this Special Issue, Asia is certainly one, if not 'the', most promising place where the future of international investment law is shaped; at the same time, the contributions show that many Asian actors still face considerable obstacles and hesitation in assuming responsibility and leadership in becoming global rule-makers in the field.

This mixed assessment certainly holds true for the People's Republic of China (PRC), which has concluded the largest number of IIAs in Asia, second worldwide only to Germany. While it has adopted, over the course of the last decade, European and US investment treaty models, in particular as regards access to dispute settlement, this development, as *Cliff Manjiao* and *Xi Wang* show,⁷ is not due to the PRC simply accepting Western models, but a results of its interest to afford protection to Chinese investors abroad. At the same time,

⁵ On this notion in the context of international legal scholarship see David P Fidler, 'The Asian Century: Implications for International Law' (2005) 9 Singapore YB Intl L 19 (with further references on the earlier use of the notion in other economic, historic, political and legal contexts).

⁶ Sundaresh Menon, 'The Impact of Public International Law in the Commercial Sphere and Its Significance to Asia' (2015) 16 JWIT 772, 797.

⁷ Cliff Manjiao and Xi Wang, 'The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications' (2015) 16 JWIT 869.

as argued by *Axel Berger*,⁸ China's attitude is perhaps too pragmatic and not sufficiently principled in order to influence investment treaty making at a global level. While recently increasingly resembling the NAFTA model, China's actual treaty-making practice is largely inspired by its partner countries. This results in an overall inconsistent treaty network and reflects the lack of a coherent framework for international investment policy, hampering China's leadership in shaping investment governance globally.

India's engagement with international investment law, in turn, still seems largely inward-looking, although the country has concluded more than 80 IIAs. As shown by *Prabash Ranjan*,⁹ India has been a typical rule-taker, signing IIAs without deeper thought for a long time until it faced the first investment treaty cases. These cases led to a temporal freeze of India's BIT program and to the start of an ongoing process for the development of a new model BIT that would better balance investment protection and policy space. The current draft, however, is, as *Ranjan* argues, insufficiently protective of offensive Indian interests, and therefore arguably little attractive as a global standard. He recommends instead that a new model BIT should draw more on the India's practice in recent free trade agreements.

Despite its economic importance, Japan, having only concluded a small number of IIAs, has also not assumed global leadership in international investment law. This notwithstanding, it has been the site of an interesting domestic debate about the appropriateness of international investment law and investor-State dispute settlement (ISDS), which is not dissimilar to the one we encounter in some parts of Europe with respect to TTIP. *Shotaro Hamamoto* analyzes that debate, focusing particularly on arguments in Japan's parliament.¹⁰ He argues that the anti-ISDS discourse in the Diet is not genuinely caused by concerns about the international investment regime as such, but is used as a proxy by the opposition to criticize the government generally. In addition, much of the criticism reflects fears about US hegemony more than discontents with investment law proper. The remedy, then, to mitigate concerns should be, one would assume, more Japanese engagement and leadership in international investment governance. This, however, does not (yet?) seem to be Tokyo's conclusion.

⁸ Axel Berger, 'Hesitant Embrace: China's Recent Approach to International Investment Rule-Making' (2015) 16 JWIT 843.

⁹ Prabash Ranjan, 'Comparing Investment Provisions in India's FTAs with India's Stand-Alone BITs: Contributing to the Evolution of New Indian BIT Practice' (2015) 16 JWIT 899.

¹⁰ Shotaro Hamamoto, 'Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-Up But Glaring Hypocrisy' (2015) 16 JWIT 931.

The Republic of Korea, which has concluded roughly 100 IIAs, in turn, seems to have had its (no doubt heated) domestic debate on the benefits and challenges of international investment law and ISDS, when the country negotiated the Korea-United States Free Trade Agreement (KORUS) in 2006. Yet, as *Hi-Taek Shin* and *Liz (Kyo-Hwa) Chung* argue, Korea has been invigorated by that debate, reviewed its international investment policy as a result, and recalibrated its treaty practice along the lines of the US model.¹¹ This policy now being domestically accepted, and given the need to optimize both domestic policy space and protection of its outward investment, the authors consider Korea to be in a strong position to influence the stance of other countries in Asia and beyond.

Indonesia, finally, presents a hotly debated case, as the country has recently announced to review its entire investment treaty program, consisting of more than 70 IIAs as a reaction to a surge in investment claims. It would be shortsighted, though, to interpret Indonesia's position as a consequence of problems caused by the structure and content of IIAs alone. Instead, as *Junianto James Losari* and *Michael Ewing-Chow* show,¹² a closer inspection suggests that many cases ending up in ISDS are merely symptoms of underlying governance problems in Indonesia, including problems with the domestic rule of law, corruption, and decentralization, which leads to uncontrolled action by local authorities. Ultimately, the authors predict that Indonesia is not going to abandon participation in the international investment regime completely, but will use the current momentum to recalibrate its terms of participation. It will abandon its role as rule-taker, but its global impact is still uncertain.

In addition to these country studies, the present Special contains contributions focusing on regional approaches to international investment law. First, *Diane Desierto* analyzes the role of ASEAN as a contracting party to IIAs.¹³ Her assessment of these so-called 'ASEAN+ agreements' shows that the trend towards recalibration and ensuring policy space is pervasive and that ASEAN's practice can be considered, in many regards, as innovating to find an appropriate balance between regulatory freedom and control. What is more, ASEAN IIA practice must not be seen exclusively as a regional phenomenon. Instead, the

¹¹ Hi-Taek Shin and Liz (Kyo-Hwa) Chung, 'Korea's Experience with International Investment Agreements and Investor State Dispute Settlement' (2015) 16 JWIT 952.

¹² Junianto James Losari and Michael Ewing-Chow, 'Difficulties with Decentralization and Due Process: Indonesia's Recent Experiences with International Investment Agreements and Investor-State Disputes' (2015) 16 JWIT 981.

¹³ Diane Desierto, 'Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties' (2015) 16 JWIT 1018.

global context is key, with ASEAN not only picking up emerging trends in treaty practice elsewhere, but trying to influence the future of investment protection and liberalization more generally. An obstacle to more global influence *Desierto* clearly identifies though is a lack of institutionalization, chiefly within ASEAN itself, but also across ASEAN+ agreements.

Next, *Amokura Kawharu* explores the likely content of TPP and RCEP,¹⁴ two mega-regionals in the Asia-Pacific that are likely going to set global standards for both investment protection and liberalization. Her analysis, which takes account, in a comparative fashion, of existing international agreements in the Asia-Pacific, including the ASEAN Comprehensive Investment Agreement, ASEAN+ agreements, as well as Australia's and New Zealand's treaty practice in order to predict the content of TPP and RCEP, shows that finding a consensus on the highly contested issues at stake is not unlikely. At the same time, using New Zealand as a case study, *Kawharu* shows the pressure these regional agreements will exercise on domestic regulatory space and procedures.

To conclude, *Mavluda Sattorova* takes us to Central Asia.¹⁵ She starts with an overview over the many futile attempts to form a regional approach to foreign investment protection there. Remarkably, most of these attempts, in which Russia, China, and the United States competed for influence, were motivated not primarily by concerns about the protection of foreign investments, but followed the broader intention of those actors to integrate Central Asian countries into their geopolitical strategies. Furthermore, zooming in on investment policy in Uzbekistan and Kazakhstan, *Sattorova* illustrates a significant gap between domestic foreign investment policy, which reacted quickly to a perceived overprotection of foreign investors, and the countries' international investment policies, which were largely left untouched by domestic learning experiences. The author suspects that, again, the influence of foreign governments and of international and non-governmental development organizations is key in keeping the gap between domestic and international investment policy open.

As all of the contributions to this Special show, international investment law in Asia is becoming increasingly relevant, in economic terms, in investment treaty-making, as a matter of public debate, and in investment arbitration. As Asian countries become aware of the need to engage more critically and

¹⁴ Amokura Kawharu, 'The Admission of Foreign Investment under the TPP and RCEP: Regulatory Implications for New Zealand' (2015) 16 JWIT 1058.

¹⁵ Mavluda Sattorova, 'International Investment Law in Central Asia: The Making, Implementation and Change of Investment Rules from a Regionalist Perspective' (2015) 16 JWIT 1089.

actively with international investment law, their role in the field is likely to become more important. At the same time, Asian actors still face considerable hurdles in assuming leadership in shaping the future of global investment governance, in particular when not acting in concert, but based on purely national interest.¹⁶ All in all, looking at TPP, RCEP, and ASEAN+ agreements, it seems that regional approaches are likely going to have a significantly bigger global impact than the positions of individual Asian countries. Thus, while the emerging Asian century may not mean Asian hegemony, Asia will certainly be the ‘most important laboratory ... of governance in world affairs’,¹⁷ including in international investment governance. What happens in Asia and how Asian actors position themselves *vis-à-vis* economic and political challenges will be a key component for the future of global governance generally, and international investment law in particular.

¹⁶ For a similar assessment in another context of international economic law see Ross P Buckley, ‘How East Asia Could Amplify Its Voice in Global Economic Governance’ (2014) 37 BC Intl & Com L Rev 19.

¹⁷ Fidler (n 5) 30.