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Citation for published version (APA):

Schill, S. W. (2016). Changing Geography: Prospects for Asian Actors as Global Rule-Makers in International Investment Law. (Columbia FDI Perspectives; No. 177). New York: Vale Columbia Center on Sustainable International Investment.

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Download date: 23 May 2018



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 177 July 4, 2016

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Changing geography: prospects for Asian actors as global rule-makers in international investment law

by

Stephan W. Schill *

Capital-exporting countries of Europe and North America have shaped international investment law for most of its history. They pushed for the customary international minimum standard of protection, forged the classical model of bilateral investment treaties (BITs) and drive the present-day recalibration of international investment law. Despite counter-proposals from the “South” over decades, the making of international investment law has been essentially a transatlantic enterprise with the “North” as predominant global rule-maker.

However, the past years have witnessed a marked shift in the geography of international investment law. Despite the negotiations of the Transatlantic Trade and Investment Partnership (TTIP), there is little doubt that Asian countries, and particularly the economic powerhouses in the Far East, are becoming focal points in rule-making in international investment law. The conclusion of the Trans-Pacific Partnership (TPP), the negotiation of the Regional Comprehensive Economic Partnership (RCEP), the remarkable activity of Asian actors (including the Association of Southeast Asian Nations (ASEAN)) in concluding international investment agreements (IIAs), and Asia’s increasing involvement in investment arbitrations, as claimants and respondents, indicate a fundamental shift towards the transpacific.

This development is only logical given that Asia is not only a recipient, but an increasingly important source of outward capital. Indeed, “[d]eveloping Asia has become the world’s largest investor region”.¹ This shift in geography may influence not only where the international investment law of the future is made, but also what content it will have and who will shape it. Asian actors are in a good position to translate their economic importance into global rule-making power, perhaps even heralding the dawn of an “Asian century” in which they imprint their vision for global investment governance.

We can already observe that Asian actors are increasingly developing a critical edge in redefining their engagement with international investment policy. At the same time, as a recent multi-author study of the approach to international investment law in Asia shows, many Asian actors still face considerable obstacles in becoming global rule-makers in the field.² Some are just too small to have global policy clout; but even the bigger ones, as contributions to the study reveal, still grapple domestically with defining their global voice in international investment law.

China, for example, although it has become an important capital-exporter, does not push sufficiently to see its own BIT model prevail. Instead, China's IIA practice shows little consistency across treaties, hampering its powers as a global standard-setter. India, with its new model BIT just finalized, appears too inward-looking and insufficiently concerned with its offensive interests to set a broadly acceptable global standard. Japan is also too passive to assume a leading global role.

Curiously, the medium-sized powers in Asia seem better placed to influence international investment law at a global level. The Republic of Korea is a case in point. It is both a capital-importer and exporter, and has had a controversial domestic debate about the benefits and challenges of IIAs when concluding the Korea-United States Free Trade Agreement in 2006. The country's newer IIA practice reflects balance and may thus be globally attractive. Regional initiatives prove promising, in particular ASEAN, which has concluded the emblematic ASEAN Comprehensive Investment Agreement among its members and is itself a contracting party to several IIAs. Its ASEAN+ agreements indicate that the trend to integrate trade and investment and to balance investment protection with policy space is pervasive. ASEAN's practice could therefore be a lodestar for global investment governance.

All in all, as Asian countries become aware of the need to engage more critically and actively with international investment law, their role in the field is likely to become more important. Looking at TPP, RCEP and ASEAN+ agreements, it seems that regional approaches so far promise greater global impact than the positions of individual Asian countries. This may change if heavyweights China and India become more aware of their prospects for leadership in international investment governance. Either way, transatlantic dominance in the field is coming to an end. This suggests that the international investment law of the future may become more balanced and, above all, more representative.

At the same time, the rise of Asia may further propel the European Union and the United States towards the conclusion of TTIP in order to preserve some of their standard-setting clout in international investment law. In that sense, Asia is already determining the fate of global investment governance. Yet, the impact of Asian actors in global investment law rule-making could be even greater with a broader pan-Asian approach or the creation of a more effective regional platform for debating investment law and policy.

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¹ UNCTAD, *World Investment Report 2015* (Geneva: UNCTAD, 2015), p. 5.

² See the contributions on the positions of different Asian actors in Stephan W. Schill, ed., “Special issue: dawn of an Asian century in international investment law?”, *The Journal of World Investment & Trade*, vol. 16 (2015), pp. 765-1123.

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