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The Pacific Rim as a platform for international investment law harmonization

by

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Over the past decade, the investment treaty practice of Japan, the Republic of Korea and China, and of the NAFTA, Pacific Alliance and ASEAN member countries, has substantially converged. That convergence is reflected in the recently completed Trans-Pacific Partnership (TPP) agreement and the new Pacific Alliance investment chapter. Several current initiatives look set to build momentum, including a Regional Comprehensive Economic Partnership (RCEP) agreement (which negotiating countries aim to complete in 2016) and a United States (US)-China bilateral investment treaty (BIT). In 2014, Asia-Pacific Economic Cooperation (APEC) leaders identified the TPP and RCEP as “possible pathways” toward a Free Trade Area of the Asia-Pacific (FTAAP). In November 2015, President Xi called on APEC leaders to “accelerate the realization” of a FTAAP.

This momentum establishes the Pacific Rim region as an exceptionally well-developed platform for achieving harmonization of the international investment law regime. TPP and RCEP each would cover about 30% of global FDI inflows, and a US-China BIT could help bridge remaining gaps between the TPP (which includes the US but not China) and RCEP (which includes China but not the US).

Although often characterized as “fragmented”, the international investment law regime lately has featured substantial convergence in treaty practice; particularly active treaty practice in the Pacific Rim region has highlighted that convergence. Signs of convergence are reflected in a wide variety of provisions often included in recent treaties:

- Liberalization commitments are increasing, as reflected in recent treaties negotiated by a diverse group of countries, including Chile, Colombia, Costa Rica, the Republic of Korea, Peru, and Singapore. In addition, and significantly, China has announced that the national treatment obligation under a US-China BIT will include market-access protections.

- Provisions to clarify that a fair-and-equitable-treatment commitment does not establish a blanket obligation to avoid “unfair” treatment in an ordinary sense.
- Expropriation obligations now consistently include elements that were often questioned in the 20th century: prompt payment of full compensation, based on fair market value and free from transferability restrictions.
- Provisions that endeavor to avoid “treaty shopping” by claimants, often authorizing host countries to deny treaty benefits to shell companies.
- Regulatory transparency commitments that obligate parties to make investment-related laws and regulations publicly available.

These areas of convergence are reflected in the TPP and Pacific Alliance, and most—if not all—should be reflected in the RCEP and US-China BIT agreements when completed.

Another important feature of this convergence is the increasingly frequent inclusion of investment provisions within chapters of broader trade agreements. Achieving investment law harmonization primarily through free trade agreements (FTAs), rather than stand-alone BITs, is a timely development, given that 21st-century global value chains have blurred traditional distinctions between trade and investment. By including an investment chapter alongside other chapters (such as trade in services and trade in goods), FTAs provide a broader perspective when making challenging distinctions between trade and investment activities. Achieving harmonization through FTAs also can provide opportunities for investment liberalization, given that FTA negotiations typically carve out sectors in a single set of annexes that apply not only to investment but also to trade in services.

But challenges to investment law harmonization in the Pacific Rim region certainly remain. Recent US and China treaty practice continues to differ on a number of relatively narrow issues such as performance requirements, free transfer provisions, state-owned-enterprise disciplines, and transparency of arbitral proceedings. India’s model BIT departs significantly from recent treaty practice. Australia continues to apply a cautious, case-by-case approach to investor-state dispute settlement (ISDS). Indonesia currently is reevaluating its investment treaty program.

In response to such challenges, Pacific Rim states can consider a number of strategies. In the recently concluded China-Australia FTA, the parties concluded an investment chapter incorporating ISDS, while also agreeing to hold further negotiations on additional, unresolved investment issues. The “opt-in” approach of UNCITRAL’s Mauritius Convention on Transparency provides another model. Here, standalone instruments can be developed addressing one or more discrete issues (e.g., transparency in dispute settlement or an appellate mechanism) that countries can elect to apply to existing treaties on an opt-in basis. Specifically regarding the development of an FTAAP investment chapter, the APEC Investment Experts Group—which has worked on initiatives promoting a favorable investment climate in that region for 20 years—could play a key role in bridging gaps between negotiating parties.

Beyond the Pacific Rim, an alternative model for achieving investment-law harmonization is the recent European Union (EU) proposal to establish an Investment

Court System in ongoing and future investment treaty negotiations, with a view toward establishing a permanent, multilateral International Investment Court. But unlike the signs of convergence outlined above, the EU proposal contemplates a fundamental reengineering of the ISDS regime, in particular by eliminating party-appointed arbitrators.

One advantage offered by the Pacific Rim model for harmonization is the momentum that has been building through more than a decade of active, converging treaty practice. That momentum establishes the Pacific Rim region as the optimal platform for achieving, in the near term, substantial harmonization of the international investment law regime.

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