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A Pacific Rim Consensus on International Investment Law

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Thank you to the Unpad Faculty of Law Transnational Business Law Department for the opportunity to present today.

I would like to discuss some key trends in investment treaty practice in the Pacific Rim region and what I call a Pacific Rim consensus on international investment law.

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In the 2020s, when analyzing investment treaty practice, geography remains a relevant factor, although not along traditional North-South lines.

The relevant geographic regions today – for purposes of investment treaty practice – can, in my view, be divided into three groups: first, Europe; second, the Pacific Rim; and third, what could be referred to as the "regional South".

I would include in the regional South states such as Brazil, India and Nigeria as well as certain regional organizations such as MERCOSUR and the African Union.

Pacific Rim investment treaty practice is far from uniform, but when compared to recent practice in Europe and the regional South, the Pacific Rim practice does tend to reflect, in most instances, certain shared, distinctive characteristics.

In particular, I would identify three core characteristics of Pacific Rim investment treaty practice.

First, the ability of disputing parties to play an active role in the selection of decision-makers.

Second, the imposition of binding treaty obligations on States but not investors.

Third, the inclusion of a basic set of substantive obligations, in some form.

Recent treaty practice of ASEAN, China, Japan, and Korea reflects such characteristics. Such a Pacific Rim consensus on international investment law can be expanded when including the CPTPP agreement, which extends to the Americas, in particular to Canada, Mexico, Chile and Peru.

The Pacific Rim consensus can be expanded further when including the Pacific Alliance, which includes Colombia together with three CPTPP signatories: Mexico, Chile and Peru.

With respect to investment law reform, Pacific Rim practice has tended to support incremental innovations, rather than pursuing more far-reaching alternatives, such as the bold policy reforms recently developed by the European Union, Brazil, India and Nigeria.

In a sense, a Pacific Rim consensus on investment treaty practice can be defined in part by what it is but in equal measure by what it is not.

On that point, I would highlight two areas of bold investment law reform that recently have been developed outside the Pacific Rim, specifically in Europe and the regional South.

First, the introduction of far greater levels of institutionalization, through the development of the EU's Investment Court System and the EU's ongoing efforts to advance development of a Multilateral Investment Court.

Second, the introduction of obligations that run to investors, which has been developed by a number of states, including Brazil and Nigeria.

I will discuss each of these issues in turn.

Institutionalization

On institutionalization, the EU has in recent years developed an institutionalized alternative to the well-established *ad hoc* investment arbitration model, known as the Investment Court System.

The Investment Court System includes a first instance Tribunal whose Members hear cases as

three-Member panels; decisions at the first instance level can then be appealed to an Appellate Tribunal, whose Members hear appeals as three-Member panels.

The EU has developed this model in bilateral negotiations with, among other states, Canada, Mexico, Singapore and Vietnam.

Under the EU's Investment Court System, investors – as recently observed by Marc Bungenberg and August Reinisch – "los[e] their influence"[1] in the appointment of adjudicators.

For the EU, it is necessary for investors to lose such influence given that, in the EU's view, "it is only by moving away from appointment by the disputing parties to a system of adjudicators on long, non-renewable terms that the concerns

[1] Marc Bungenberg and August Reinisch, *From Arbitral Tribunals to a Multilateral Investment Court: The European Union Approach*, Handbook of International Investment Law and Policy (J. Chaisse et al., eds.) (Springer 2020), p. 9.

on independence and impartiality can be definitively addressed."[2]

China addressed the issue of arbitral appointments by disputing parties in a 2019 UNCITRAL WGIII submission.

In that submission, China expressed support for the "study of a permanent appeal mechanism as a reform proposal for resolving the main problems in the current ISDS regime,"[3] but also observed, at the same time, that the "right of the parties to appoint arbitrators is a basic feature of international arbitration as traditionally practiced[.]"[4]

China further observed: "[p]articipants in investment arbitration" – including "investors, host-country Government officials, lawyers

[2] Submission of the European Union and its Member States to UNCITRAL Working Group III (18 January 2019), p. 11.
[3] Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of China (19 July 2019), p. 4.
[4] *Id*.

[and] arbitrators . . . generally believe" that the right of disputing parties to appoint arbitrators "is the core and most attractive feature of international arbitration."[5] China ultimately concluded that the "right of parties to appoint arbitrators at the first-instance stage of investment arbitration . . . should be retained in any reform process."[6]

Thus, in light of its WGIII submission, China supports consideration of a permanent appellate mechanism in some form, while also supporting the retention of the right of disputing parties to appoint arbitrators at the first instance level.

With respect to institutionalization, the EU has observed that a "certain level of flexibility would . . . need to be built into a standing mechanism," noting in particular that "some

[5] *Id*.
[6] *Id*.

countries may like to retain the flexibility to utilise only an appeal mechanism[.]"[7]

Pacific Rim investment treaty practice at times has expressed support for some degree of institutionalization through the development of appellate mechanisms.

The CAFTA-DR investment chapter, for example, includes an annex on an "Appellate Body or Similar Mechanism," under which the CAFTA-DR Free Trade Commission is obligated to establish, within three months of the CAFTA-DR's entry into force, a "Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals" under the CAFTA-DR investment chapter.[8]

[7] Submission of the European Union and its Member States to UNCITRAL Working Group III (18 January 2019), p. 9.
[8] CAFTA-DR Annex 10-F.

Where Pacific Rim practice departs from EU practice with respect to institutionalization is on the right of disputing parties to have some control over the appointment of decision-makers at the first instance level.

Under the CPTPP agreement, for example, 11 Pacific Rim states agreed to an investor-State dispute settlement mechanism under which disputing parties retain some control over arbitral appointments.

Notably, however, the EU has persuaded several Pacific Rim states - in bilateral negotiations - to agree to its Investment Court System.

Specifically, in bilateral negotiations with Canada, Mexico, Singapore and Vietnam, each of those Pacific Rim states agreed not only to the Investment Court System but also to a commitment to "pursue with other trading

partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes."[9]

With respect to institutionalization and future Pacific Rim investment treaty practice, a key question will be whether the policy choices made by Canada, Mexico, Singapore and Vietnam in bilateral negotiations with the EU will gain traction in the Pacific Rim region.

Recent Pacific Rim practice suggests otherwise.

Canada's 2021 model investment agreement retains the right of disputing parties to appoint arbitrators.[10]

China, in its 2019 UNCITRAL WGIII submission, emphasized the importance of

[9] Marc Bungenberg and August Reinisch, *From Arbitral Tribunals to a Multilateral Investment Court: The European Union Approach*, Handbook of International Investment Law and Policy (J. Chaisse et al., eds.) (Springer 2020), p. 3.

[10] Article 27.

retaining the right of disputing parties to appoint arbitrators at the first-instance level.

Of the two recently concluded Pacific Rim mega-regional agreements, one – the CPTPP – retains the right of disputing parties to appoint arbitrators and the other – RCEP – leaves the issue of an investor-State dispute settlement mechanism open for discussion, obligating the Parties to "enter into discussions" on the issue within two years of the agreement's entry into force.[11]

With respect to a Pacific Rim consensus on institutionalization, the RCEP discussions on an investor-State dispute settlement mechanism will be of central importance.

If both Pacific Rim mega-regional agreements – the CPTPP and RCEP – ultimately do retain the right of disputing parties to play an active role

[11] RCEP art. 10.18.

in the selection of decision-makers, the Pacific Rim consensus on institutionalization will be confirmed. China's participation in the RCEP discussions increases the likelihood of that outcome.

I would turn now to the issue of investor obligations.

Investor Obligations

The inclusion of obligations that run to investors in some recent investment treaties reflects a bold implementation of a larger policy trend, in which policymakers have responded to perceptions of a "severe imbalance"[12] between investors and host states with respect to rights and obligations under IIAs.

[12] Nathalie Bernasconi-Osterwalder, *Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements*, Handbook of International Investment Law and Policy (J. Chaisse et al., eds.) (Springer 2020), p. 2.

More common responses to that perceived imbalance have been to include language addressing corporate social responsibility in the preamble as well as the text of IIAs. This language normally has been expressed in aspirational terms, "encouraging" enterprises to undertake certain actions on a voluntary basis.

Many recent Pacific Rim treaties have included such aspirational language on corporate social responsibility, including the CPTPP,[13] the USMCA,[14] the Pacific Alliance Additional Protocol,[15] and the Canada-Korea FTA.[16]

Recent treaty practice by states in the regional South, however, has in some instances gone beyond mere aspiration to include binding obligations that apply to investors.

[13] Article 9.17.
[14] Article 14.17.
[15] Article 10.30.
[16] Article 8.16.

The African Union draft Pan-African Investment Code, for example, imposes a number of obligations on investors and their investments, including an obligation to "encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises."[17]

The Code also requires investors to adhere to a set of "socio-political obligations," including "respect for social-cultural values" and "labor rights."[18]

A separate article on Corporate Social Responsibility imposes an additional set of obligations on investors, including an obligation to "contribute to the economic, social and environmental progress"[19] of the host State.

[17] Art. 19(3).
[18] Art. 20(1).
[19] Art. 22(3).

Under the Code, states can enforce the obligations by bringing counterclaims against investors.[20]

The Nigeria-Morocco BIT also imposes obligations on investors. In addition to an "Anti-Corruption" section,[21] the agreement also includes a provision on "Investor Liability," under which investors are "subject to civil actions for liability in the judicial process of their home state" for "acts or decisions" relating to their investment where such acts or decisions "lead to significant damage, personal injuries or loss of life in the host state."[22]

The Brazil-India Investment Cooperation and Facilitation Treaty includes a section on "Investor Obligations or Responsibilities,"[23] which reaffirms the obligation of investors to comply with domestic laws and regulations

[20] Art. 43.
[21] Art. 17.
[22] Art. 20.
[23] Part III.

generally and includes specific prohibitions on bribery-related activities.[24]

The Brazil-India treaty also includes a Corporate Social Responsibility provision, which requires investors and their investments to "endeavor to comply with" a detailed set of principles and standards, including the principle that enterprises should "contribute to the economic, social and environmental progress, aiming at achieving sustainable development."[25]

For Pacific Rim states, on the issue of investor obligations the question becomes whether responding to perceived imbalances in investment treaties requires the inclusion of investor obligations in some form.

On this point, I would like to offer a few thoughts on what it means for a particular

[24] Article 11.
[25] Article 12.

investment treaty to be “balanced” or “imbalanced”.

It is possible for an investment treaty to be seen as “balanced” without the need to include binding investor obligations. For a bilateral treaty, so long as investment capital is flowing in both directions between the two Parties to the treaty, the treaty can be considered “balanced” in the sense of extending the same protections to investors from both jurisdictions.

A treaty also can be seen as “balanced” in the sense of preserving a sufficient amount of regulatory space for host States, notwithstanding the protections that are made available to investors.

And a treaty can be seen as “balanced” in a third sense, applicable in situations when investment capital is flowing only in one direction. As discussed by Professor Salacuse, such treaties

between capital exporters and capital importers can reflect a "grand bargain" in the sense that a capital importer receives greater investment flows in exchange for agreeing to certain protections for capital exporters from the other jurisdiction.[26]

On this point, I would note that the extent to which investment treaties do in fact lead to increased investment flows is a much-debated issue, with scholars reaching a range of conclusions on the question.

I also would note that the FDI landscape in the 2020s is quite different from the FDI landscape in the 2000s, when Prof. Salacuse addressed the "grand bargain" between capital exporting states and capital importing states. It is far more common today for investment capital to flow in both directions under a bilateral investment

[26] Jeswald D. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 Harv. Int'l L. J. 67 (2005).

treaty, including treaties signed by developing states.

Considering the concept of "balance" from several different perspectives can inform the analysis of policymakers – including Pacific Rim policymakers – when considering whether an investment treaty must include binding investor obligations to be "balanced".

In their investment treaty practice to date, Pacific Rim states have responded to perceived imbalances in many different ways, but those responses generally have not included the incorporation of investor obligations.

As I mentioned, many recent Pacific Rim treaties include aspirational provisions on corporate social responsibility.

Canada's 2021 model investment treaty is noteworthy in this respect. The model includes a

section on “Responsible Business Conduct,” which includes both aspirational language as well as a binding obligation – applicable to investors and their investments – to comply with host state laws and regulations.

Canada’s new model does not address how an investor’s failure to comply with host state law might be enforced under the dispute settlement provisions of the treaty, although such failure to comply with host state law could prevent an investment from qualifying as a “covered investment,” which, under the model, must be made “in accordance with” host state law.

With respect to another perceived imbalance in investment treaty practice – the imbalance between investor protections and the host state’s right to regulate – the state practice in the Pacific Rim region has been very active.

In recent investment treaties, Pacific Rim states have rebalanced investor protections and state regulatory space in many ways, including by clarifying the content of substantive obligations, including language on the right to regulate and sustainability, and including exceptions based on public policy or national security.

The RCEP agreement, for example, includes references to sustainability and the right to regulate,[27] clarifies that the minimum standard of treatment obligation is tied to customary international law,[28] and includes a set of security exceptions.[29]

With respect to investor obligations, the question for Pacific Rim states will be whether it is possible to achieve "balanced" investment treaties through the use of a range of clarifications and exceptions, without the need

[27] Preamble.
[28] Article 10.5.
[29] Article 10.15.

to incorporate a separate set of obligations that apply to investors.

I would turn now to what I consider to be the third key characteristic of Pacific Rim investment treaty practice: the inclusion of a core set of substantive obligations in investment treaties.

Core Set of Substantive Obligations

With respect to perceived imbalances in investment treaties, I discussed a number of rebalancing strategies adopted by states, which include the clarification of substantive obligations.

In some instances, however, states have pursued rebalancing strategies that do not merely clarify substantive obligations, but in fact eliminate certain substantive obligations entirely.

Investment treaties can include many different kinds of substantive obligations, but there are four substantive obligations in particular that, in my view, form what can be thought of as a core set of investment treaty obligations.

Two of those four obligations are "relative" obligations – national treatment and most-favored-nation treatment – and two of the obligations are "absolute" obligations – the minimum standard of treatment and expropriation.

These four substantive obligations normally are included – in some form – in most investment treaties. But in recent investment treaty practice, some states have opted to drop one or more of these core obligations entirely.

The Brazil-India Investment Cooperation and Facilitation Treaty, for example, includes a

national treatment obligation but not a most-favored-nation treatment obligation.

In the USMCA agreement, three Pacific Rim states – Canada, Mexico and the United States – included the four core obligations in the agreement, but Canada did not agree to an investor-state dispute settlement mechanism, and Mexico and the United States, while agreeing to such a mechanism, excluded from its scope the minimum standard of treatment obligation.[30]

On the question of whether a Pacific Rim consensus on retaining these four core substantive obligations in investment treaties will endure, the RCEP agreement will again play a critically important role, in my view.

The RCEP agreement includes the four core obligations, but, again, the issue of whether

[30] Article 14.D.3.

RCEP will include an investor-State dispute settlement mechanism remains to be discussed by the Parties to the agreement.

As I discussed, consistent practice on institutionalization under the CPTPP and RCEP agreements would confirm a Pacific Rim consensus on the issue; similarly, with respect to preserving a core set of substantive obligations under investment treaties, consistent practice under the CPTPP and RCEP agreements would again confirm a Pacific Rim consensus.

And just as China's participation in the RCEP discussions increases the likelihood of a Pacific Rim consensus on institutionalization, China's RCEP participation also increases the likelihood of a Pacific Rim consensus on the issue of core substantive obligations.

To conclude, geography remains relevant with respect to investment treaty practice, but not along traditional North-South lines. Instead, the relevant geography in the 2020s, in my view, can be divided into three regions: Europe, the regional South, and the Pacific Rim.

Pacific Rim treaty practice generally reflects three core characteristics: first, disputing parties playing an active role in the selection of decision-makers; second, the imposition of treaty obligations on States but not investors; and third, the inclusion of a basic set of substantive obligations, in some form.

Whether this Pacific Rim consensus on international investment law endures will depend in significant part on the outcome of discussions, under the RCEP agreement, on a potential investor-state dispute settlement mechanism. China's participation in those discussions increases the likelihood, in my view, of an enduring Pacific Rim consensus.