DREW & NAPIER

Rule of Law – Role in Attracting Trade and Investments in ASEAN – Free Trade Agreements and Bilateral Investment Agreements in ASEAN countries

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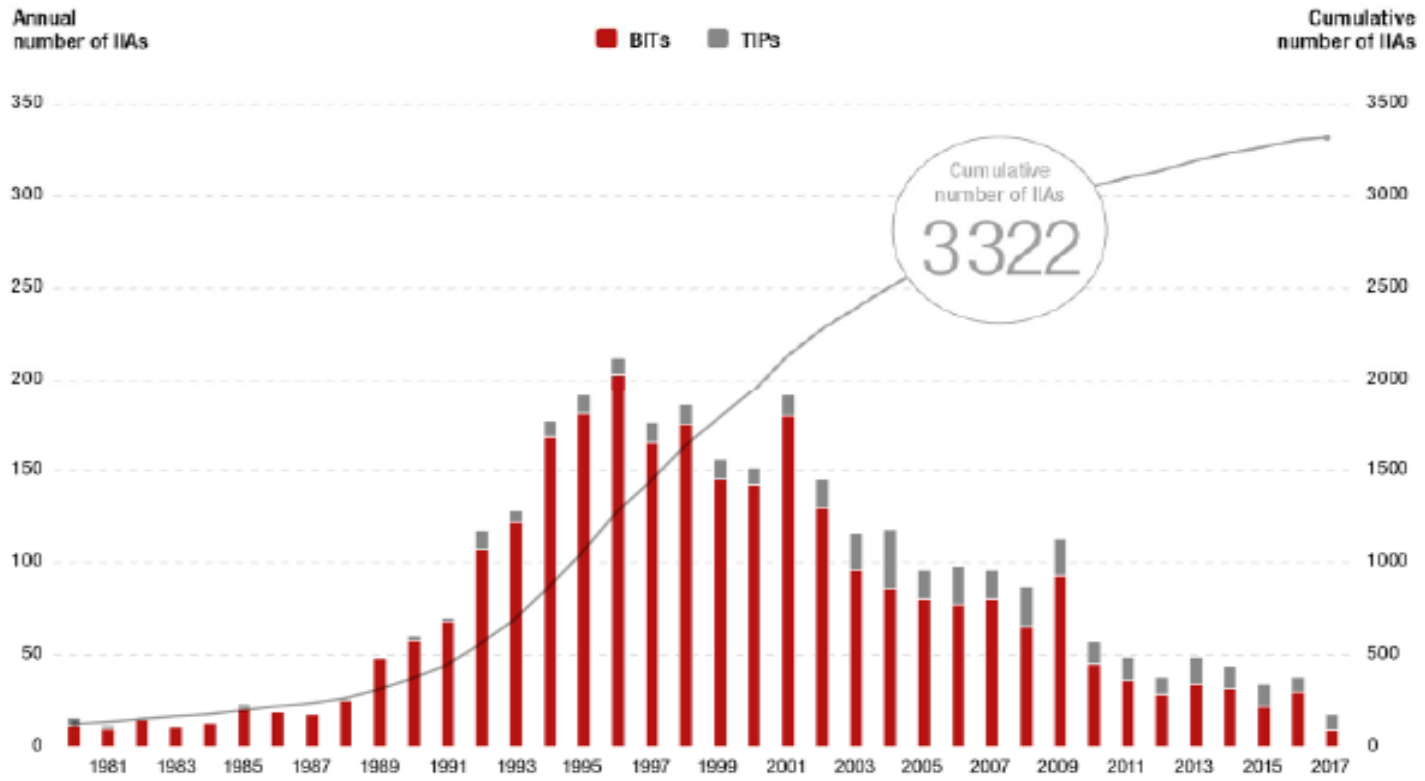
Growth of international investment agreements

Figure 1. Trends in IIAs signed, 1980–2017



Source: UNCTAD, IIA Navigator.
Note: The cumulative number of all signed IIAs, independently of whether they have entered into force, is 3,322. IIAs for which termination has entered into effect are not included.

The above diagram is taken from UNCTAD IIA Issues Note: Recent Developments in the International Investment Regime, 30 May 2018, p2.

New international investment agreements signed in 2018

From January to May 2018, 6 international investment agreements were signed:

- Australia-Peru Free Trade Agreement
- Comprehensive and Progressive Agreement for a Trans-Pacific Partnership Agreement
- Republic of Korea and the Republics of Central America Free Trade Agreement
- Brazil-Suriname BIT
- Brazil-Ethiopia BIT
- United Arab Emirates-Paraguay BIT

Total international investment agreements which have been signed (as of May 2018): 3328

How the Rule of law is advanced by international investment agreements

- International investment agreements undergird the rule of law by putting in place a set of rules for international trade.
- Growth of international investment agreements signal that States recognise that they must abide by international standards if they want to propel their economic growth through international trade.
- Address any information asymmetry – investors may not be aware of domestic legal rules of the host State that would govern their investment, which could result in inaccurate analysis of political and legal risks. International investment agreements provide clarity and certainty as to the rules that would govern any investment.
- A clear and certain set of rules gives investors the confidence that the risk of arbitrary actions by a State will be confined, which in turn creates a healthy investment climate that would attract investments.

Why States enter into international investment agreements

- *Attract trade and propel economic growth*: Investment agreements are powerful tools to attract foreign investments. Attracting foreign investment is an engine to propel continued economic growth of a State.
- *Boost productivity of SMEs*: Investment agreements open up markets for local businesses to tie up with foreign firms and thereby increase productivity. Small and medium sized enterprises would be able to establish commercial links with a larger foreign firm.

Why States enter into international investment agreements

- *Reduce unemployment*: Investment agreements contributes to job creation and reduces the unemployment rate of the host State.
- *Build an investor hub*: Attract foreign investors to set up local entities as a stepping stone to invest in other States that may not have an investment agreement with the investors' home State. The State's wide network of trade agreements would thus serve to attract foreign investors.
- *Open up markets*: Investment agreements opens up markets for the State's exports of goods and services.

Why States enter into international investment agreements

- *Gain access to skills and technology*: Investment agreements enable local business to tap on foreign expertise and resources (e.g. provision of finance, managerial or technological expertise) and promote technological advances.
- *Investment protection*: Investment agreements provide investment protection for local firms investing abroad.
- *Develop infrastructure*: Investment agreements provide an opportunity for the State to leverage on foreign expertise to develop domestic infrastructure.

Investors' perspective on international investment agreements

- The rule of law is a magnet for foreign investment.
- Investors are more likely to invest in a State which *has* entered into an investment agreement with the investor's home State than in a State which has not.
- Investment agreements allow an investor to mitigate political and legal risks of investments in the host State.

Investors' perspective on international investment agreements

- Investment protection standards in international investment agreements include:
  - Establishing limits on expropriation of investments and compensating foreign investors for any expropriation;
  - Fair and equitable treatment clauses;
  - Umbrella clauses - Reinforcing obligations to foreign investors under investment agreements; and
  - Allowing foreign investors to submit investment disputes to international arbitration.

Enforcement of investment protection standards

- Investor state dispute resolution clauses in international investment agreements allow foreign investors to commence arbitration proceedings against the host State, providing an avenue for foreign investors to enforce investment protection standards in the agreement against the host State.
- Most cases are initiated under the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.
- With the exception of Laos, Myanmar and Vietnam, all other ASEAN Member States are ICSID Member States.
- Non-ICSID Convention arbitration may be commenced against a State which is not an ICSID Member State under UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules.

Investor-state dispute settlement

- Allowing foreign investors to submit investment disputes to international arbitration advances the procedural aspect of the rule of law in the international investment regime by:

  (a) establishing legal procedural certainty; and

  (b) creating a level playing field among disputing parties in a depoliticised forum where the rules are applied in an independent and impartial manner and where all parties must abide by the same rules.

Investor-state dispute settlement

- F.A. Hayek describes the rule of law as:

  "*mean[ing] that the* ***government is bound by rules fixed and announced beforehand*** *– rules that make it possible to foresee with fair* ***certainty*** *how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. Thus, within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts*". [Emphasis added.] (Hayek (1944), The Road to Serfdom, Routledge Press, UK.)

Investor-state dispute settlement

- In similar vein, UNCTAD recalled the rationale for allowing investors to pursue relief directly through investor-State arbitration as follows:

  "The ISDS mechanism was designed to ***depoliticize investment disputes and create a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal***. It was seen as a mechanism for rendering final and enforceable decisions through a swift, cheap and flexible process, over which disputing parties would have considerable control. Given that investor complaints relate to the conduct of sovereign States, taking these disputes out of the domestic sphere of the State concerned provides aggrieved investors with an ***important guarantee that their claims will be adjudicated in an independent and impartial manner***." [Emphasis added.] (UNCTAD IIA Issue Note No. 4, 2017, "Improving Investment Dispute Settlement: UNCTAD Policy Tools" (30 November 2017), p5)

Investor-state dispute settlement

- The number of new treaty-based investor state dispute settlement cases remains high.
- According to UNCTAD, in 2017, at least 65 new treaty-based investor state dispute settlement cases were initiated. This brings the total number of known cases to 855. (UNCTAD World Investment Report 2018, p17)
- So far, 113 countries have been respondents to one or more known claims. In 2017, tribunals rendered at least 62 substantive decisions in investor-State disputes. Of the total number of known cases decided on the merits, investors have won about 60%. (UNCTAD World Investment Report 2018, p17)
- 548 investor-state arbitrations were concluded in 2017, with 30% of all concluded cases decided in favour of the State and 25% in favour of the investor with monetary compensation awarded. 25% of cases were settled. On average, investors claimed US$1.3 billion, but were typically awarded only US$504 million or 40% of the amount claimed. (UNCTAD World Investment Report 2018, p94-95)

Investor-state dispute settlement

- There are concerns about systemic deficiencies in investor-state dispute settlement relating to the legitimacy of tribunals, transparency in the process, consistency of arbitral awards, erroneous decisions, arbitrators' independence and impartiality, and costs.
- On transparency, questions of interpretation of the treaty in question often arise in an investor-state dispute. However, the Non-Disputing State, who is a party to the treaty in question, is not typically involved in the tribunal's / national court's consideration of the proper interpretation of the treaty in question.
- In certain cases Non-Disputing States have expressed their disagreement with tribunal's or national court's treaty interpretation.

Investor-state dispute settlement

- For e.g., the Swiss government expressed disagreement with the arbitral tribunal's conclusion in *SGS v Pakistan* on the meaning of Article 11 of the Swiss and Pakistan bilateral investment treaty stating:

  "*the Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which … runs counter to the intention of Switzerland when concluding the Treaty*".

Investor-state dispute settlement

- For e.g., the People's Republic of China's Ministry of Foreign Affairs made known its disagreement with the Singapore Court of Appeal's conclusion in *Sanum v Lao* on the coverage of the PRC and Lao's bilateral investment treaty, stating:

  "*the geographical scope of application of the PRC-Laos investment agreement is a question of fact concerning acts of state, which is up to the contracting parties to decide. China has confirmed twice in diplomatic notes that the China-Laos investment agreement does not apply to Macao SAR. The ruling made by the Singaporean court on this question of fact is incorrect.*" (Ministry of Foreign Affairs of the People's Republic of China, "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October 2016")

Improving investor-state dispute settlement

- Improving investment dispute settlement has been high on the agenda in recent years.

- One important area is how we can improve the process of treaty interpretation in investor-state dispute settlement processes.

A proposed protocol for communication with Non-Disputing States on treaty interpretation

- The aim of the proposed protocol is to facilitate requests for Non-Disputing States to provide submissions or input on treaty interpretation, specifically:
  - on the proper interpretation of the treaty in question; and/or
  - whether there is any common agreement between parties to the treaty on an interpretation of the treaty and any evidence thereof.

A proposed protocol for communication with Non-Disputing States on treaty interpretation

- Such a request can be made by:
  - an arbitral tribunal hearing a dispute pursuant to an investor-state dispute resolution provision in any investment treaty between any of the ASEAN Member States; or
  - a national court within ASEAN which is asked to review a tribunal's decision on jurisdiction or to enforce or set aside a tribunal's award; or
  - a party to an arbitration. Such submissions to be made to the tribunal hearing the dispute or to the national court which is asked to review a tribunal's decision on jurisdiction or to enforce or set aside a tribunal's award.

A proposed protocol for communication with Non-Disputing States on treaty interpretation

- The proposed protocol provides guidance on the contents of the written request to the Non-Disputing State:
  - Identify the provisions of the treaty in question that requires interpretation;
  - Specify the question of interpretation that is being decided by the tribunal or national court;
  - Identify any alleged common agreement between parties to the treaty on the interpretation of the treaty; and
  - Specify the question that the requesting party invites submissions on in respect of that alleged common agreement.
- The above is not exhaustive.

A proposed protocol for communication with Non-Disputing States on treaty interpretation

Directory:

- The Directory in the proposed protocol makes clear each ASEAN Member's state's preference for:
  - Who the request should be sent to (i.e. a designated office or representative);
  - Where the request should be sent;
  - How the request should be sent (e.g. by fax or email); and
  - The language that the request must be in.
- ASEAN Member States may amend the details in the Directory by sending the new details to other designated offices or representatives listed in the Directory.
- The Directory ensures clarity and certainty on the proper authority to deal with a request for submissions by a Non-Disputing State.

A proposed protocol for communication with Non-Disputing States on treaty interpretation

Response by the Non-Disputing State:

- 30 day deadline from the date of receipt of the request for the Non-Disputing State to respond to the request.
- The response can say that:
  - it will provide a response to some or all of the queries in the request within a specified period of time; or
  - it will not be providing any response to the request; or
  - it requires clarification on the request before it can inform the requesting party whether or not it will be willing to provide a substantive response to the request; and should specify the amount of time it requires after receipt of the clarifications to inform the requesting party whether it will or will not be providing any response; or
  - it is unable to respond within 30 days of receipt of the request and will respond within a specified period of time.

A proposed protocol for communication with Non-Disputing States on treaty interpretation

Response by the Non-Disputing State:

- The tribunal or national court which made a request retains the discretion whether or not to wait for a Non-Disputing State's substantive response.
- In furtherance of transparency, the response and/or any subsequent written communication from the Non-Disputing State shall be copied to all parties to the dispute and the tribunal or national court (as the case may be).

A proposed protocol for communication with Non-Disputing States on treaty interpretation

Written Request by Non-Disputing State:

- Though no request has been made of it, a Non-Disputing State may wish to provide submissions on the proper interpretation of a treaty which it is a party to, to either a tribunal hearing a dispute or a national court hearing an appeal against a decision on jurisdiction or an application to set aside or enforce an arbitral award.
- The proposed protocol provides guidance on the manner in which the Non-Disputing State may make a request.
  - The request should be in writing.
  - The request should be made by the office or representative identified by the Non-Disputing State in the Directory.
  - The request should specify the issues on which the Non-Disputing State wishes to make written submissions and the amount of time that that State requires to make those written submissions.
  - The request should be sent to the office or representative of a State which is party to the arbitral or court proceedings as specified in the Directory.

A proposed protocol for communication with Non-Disputing States on treaty interpretation

Conveying the written request by Non-Disputing State:

- Once the request has been sent to the office or representative of a State which is party to the arbitral or court proceedings as specified in the Directory, that office or representative shall within 30 days of receipt the request, convey the request to the arbitral tribunal or national court in a manner consistent with the applicable procedural rules.
- If the Non-Disputing State is aware of the contact details of the other parties to the arbitration or court proceedings, and/or the contact details of the arbitral tribunal or national court, the Non-Disputing State may concurrently provide a copy of the request to one or more of them.
- Non-Disputing State is not precluded from communicating with a tribunal or national court by other means.
- No deadline for a tribunal or court to respond to a written request from the Non-Disputing State, as a tribunal would not be bound to comply with the protocol. However, any tribunal or court would have its own incentives to be prompt.

Concluding remarks

- Investment agreements can play an important role in fostering the economic growth of ASEAN Member States.
- However, there must be a credible system of enforcing obligations.
- The credibility of that system is enhanced by tribunals getting the interpretation of treaties right.
- Appropriate engagement with Non-Disputing States can enhance such credibility.