Session 2: New Regionalism and South-South Trade

Scene Setters
Ross O'Brien, The Economist Corporate Network
Mark Feldman, Peking University, School of Transnational Law

Chair
Salim Moollan, Essex Court Chambers

Speakers
Olufunke Adekoya, ÆLEX - Lagos
Alfredo Bullard Gonzalez, Bullard, Falla & Ezcurra Abogados
Judge Abdulqawi Ahmed Yusuf, International Court of Justice

Rapporteur
Alejandro I. Garcia, Winston & Strawn
ICCA/HKIAC 2015 HK Summit

New Regionalism and South-South Trade

The 21st Century Economic Center of Gravity: A Sharp Turn to the South

Prof. Mark Feldman
Peking University School of Transnational Law
13 May 2015
The Global Economy’s Center of Gravity Turns South

1. The first half of 21\textsuperscript{st} century will see a very significant rebalancing of global economic output from North to South.

2. The South will reshape the international development architecture.

3. A greater leadership role for the South also will be seen in the development of the 21\textsuperscript{st} century international economic law regime.

4. The changing nature of global investment will further contribute to the South’s enhanced leadership role in the global economy.

5. Two defining elements of 21\textsuperscript{st} century South-South economic relationships will be interdependence and complexity.
Rebalancing of Global Economic Output

OECD estimates

➢ By “around 2025,” the combined GDP of China and India will surpass the combined GDP of the G7 economies.

➢ By 2060, the combined China/India GDP will surpass the combined GDP of the entire OECD area (34 OECD member countries)

Reshaping the International Development Architecture

New Development Bank

➢ To be led by BRICS countries with headquarters in Shanghai

Asian Infrastructure Investment Bank (AIIB)

➢ Proposed by China, with headquarters in Beijing
➢ 57 founding members, including “half of the EU and all of ASEAN”

Lily Kuo, *Half of the EU and all of ASEAN are now members of China’s alternative to the World Bank*, Quartz (Apr. 15, 2015)
Reshaping the International Development Architecture

China’s “One Belt, One Road” Initiative

- **Silk Road Economic Belt and 21st Century Maritime Silk Road**

- The “Belt”: “a planned network of overland road and rail routes, oil and natural gas pipelines, and other infrastructure projects that will stretch from Xi’an in central China, through Central Asia, and ultimately reach as far as Moscow, Rotterdam, and Venice.”

- The “Road”: “a network of planned port and other coastal infrastructure projects that dot the map from South and Southeast Asia to East Africa and the northern Mediterranean Sea.”

Reshaping the International Development Architecture

China’s “One Belt, One Road” Initiative

➢ “New regional institutions, such as the Asian Infrastructure Investment Bank (AIIB) and New Silk Road Fund (NSRF) [are] designed in part to complement and support the Belt and Road’s development.”

➢ “China’s leaders calculate that the programs will touch 4.4 billion people in more than 65 countries, and that annual trade with participant nations could climb to $2.5 trillion within a decade.”

Scott Kennedy and David A. Parker, Building China’s “One Belt, One Road,” Center for Strategic and International Studies (Apr. 3, 2015)

Jacob Stokes, China’s Road Rules, Foreign Affairs (Apr. 19, 2015)
Reshaping the International Development Architecture

Critical need for infrastructure development


➢ According to UNCTAD, approximately 2 billion people are “projected to be moving into urban centres in emerging and developing countries in the next three decades.”

*Why China is Creating a New “World Bank” for Asia, The Economist (Nov. 11, 2014).*

*UNCTAD, A BRICS Development Bank: A Dream Come True?, Discussion Paper No. 215 (March 2014).*
Leading Role for the South in Developing the 21st Century International Economic Law Regime

Regional Comprehensive Economic Partnership (RCEP)

- If completed, RCEP agreement would cover about 3 billion people and nearly 30% of global trade.

- 16 negotiating States include the 10 ASEAN Member States, China, and India

China Daily, Backgrounder: Regional Comprehensive Economic Partnership (Nov. 13, 2014)

New Zealand Ministry of Foreign Affairs and Trade, Regional Comprehensive Economic Partnership, Overview
Leading Role for the South in Developing the 21st Century International Economic Law Regime

China: Active Negotiations and Recently Concluded Treaties

- RCEP
- China-US BIT
- China-EU BIT
- China-Australia FTA
- China-Japan-Korea trilateral investment agreement
- China-Canada BIT
- China-Mexico BIT
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ASEAN States: Active Negotiations and Recently Concluded Treaties

- RCEP
- ASEAN Investment Agreement
- ASEAN-China FTA
- ASEAN-India FTA
- ASEAN-Australia-New Zealand FTA
- ASEAN-Japan Comprehensive Economic Partnership
- ASEAN-Korea FTA
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Two Noteworthy Instruments: SADC and India Model BITs

- “The text above is on non-discrimination. Many treaties include two elements: national treatment . . . and Most-Favoured Nation treatment (MFN)[. . .] The Drafting Committee, as explained more below, has decided against including an MFN provision here.”

- “The Drafting Committee noted that these should be bilateral treaties and that, as such, they should not establish unintended multilateralization through the MFN provision . . . The Committee also noted that the MFN provision has been very broadly, and on several occasions unexpectedly, interpreted in arbitrations, making it very unpredictable in practice. This poses unnecessary risks for States, especially developing countries.”

SADC Model Bilateral Investment Treaty with Commentary, pp. 21-22.
Leading Role for the South in Developing the 21st Century International Economic Law Regime

Two Noteworthy Instruments: SADC and India Model BITs

➢ “5.1 Each State Party shall accord to Investments or Investors of the other State Party fair and equitable treatment in accordance with customary international law on the treatment of aliens.”

➢ “5.2 For greater certainty, paragraph 5.1 requires the demonstration of an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency.”

SADC Model Bilateral Investment Treaty with Commentary, Article 5: Option 1: Fair and Equitable Treatment, pp. 21-22.
Leading Role for the South in Developing the 21st Century International Economic Law Regime

Two Noteworthy Instruments: SADC and India Model BITs

➢ “3.1 Each Party shall not subject Investments of Investors of the other Party to Measures which constitute:

   (i) Denial of justice under customary international law;

   (ii) Un-remedied and egregious violations of due process; or

   (iii) Manifestly abusive treatment involving continuous, unjustified, and outrageous coercion or harassment”

Model Text for the Indian Bilateral Investment Treaty, Article 3: Standard of Treatment (footnote omitted)
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Two Noteworthy Instruments: SADC and India Model BITs

➢ "20.1 For greater certainty, the Host State may at any time, including after the institution of arbitration proceedings in accordance with Chapter IV of this Treaty, deny the benefits of this Treaty to:

   (i) an Investment or Investor owned or controlled, directly or indirectly, by persons of a non-Party or of the Host State; or

   (ii) an Investment or Investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty."

Model Text for the Indian Bilateral Investment Treaty, Article 20: Denial of Benefits
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Transparency

China-Canada BIT

Article 17 Transparency of Laws, Regulations and Policies

1. Each Contracting Party shall, with a view to promoting the understanding of its laws and policies that pertain to or affect a covered investment:

   (a) make such laws and policies public and readily accessible;
   (b) if requested, provide copies of specified laws and policies to the other Contracting Party; and
   (c) if requested, consult with the other Contracting Party with a view to explaining specified laws and policies.
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Transparency

China-Canada BIT

Article 17 Transparency of Laws, Regulations and Policies

2. Each Contracting Party shall ensure that its laws, regulations and policies pertaining to the conditions of admission of investments, including procedures for application and registration, criteria used for assessment and approval, timelines for processing an application and rendering a decision, and review or appeal procedures of a decision, are administered in a manner that enables investors of the other Contracting Party to become acquainted with them.
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Transparency

China-Canada BIT

Article 28 Public Access to Hearings and Documents

1. Any Tribunal award under this Part shall be publicly available, subject to the redaction of confidential information. Where a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information.
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Transparency

China-Canada BIT

Article 28 Public Access to Hearings and Documents

2. Where, after consulting with a disputing investor, a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, hearings held under this Part shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.
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Transparency


Opened for signature in Port Louis, Mauritius on 17 March 2015.

Signatories:

- Canada
- Finland
- France
- Germany
- Mauritius
- Sweden
- Switzerland
- Syria
- United Kingdom
- United States
Changing Nature of Global Investment

In 2013, “[d]eveloping and transition economies together invested $553 billion, or 39 per cent of global FDI outflows, compared with only 12 percent at the beginning of the 2000s.”

Interdependent and Complex South-South Relationships

➢ In 2000, China hosted the first Ministerial Conference of the Forum on China-Africa Cooperation, which included leaders from 44 African States.

➢ Over the past 15 years, the Forum on China-Africa Cooperation has held 10 Senior Officials’ Meetings and 5 Ministerial Conferences.

Forum on China-Africa Cooperation, The First Ministerial Conference of FOCAC.

Interdependent and Complex South-South Relationships

““The [China/Africa] collaboration must not be limited to energy and infrastructure but expanded to industrialisation, urbanisation, the modernisation of agriculture, with more attention given to green, low-carbon development and environmental protection[.]”

Zhuang Pinghui, *Trade with Africa will double by 2020, Li Keqiang tells Ethiopia Conference*, South China Morning Post (May 6, 2014) (quoting Premier Li Keqiang)