Foreword

As the authors of this volume observe in their Introduction, ‘The global regime for investment is dynamic and continually growing’. This is certainly a correct observation. But the regime is not only growing, it also receives considerable attention and is subject to close scrutiny, both by the public and within the profession and academia.

The attention that the international investment regime receives is deserved, for at least two reasons.

First, the regime applies to the most important form of international economic transactions, namely international investment. The importance of this investment is reflected in the fact that the sales of foreign affiliates of multinational enterprises worldwide surpass world exports by far – and this does not even include the sales of firms abroad that are part of the corporate networks of multinational enterprises through various non-equity forms. This makes international investment the most important vehicle to bring goods and services to foreign markets. But international investment integrates not only markets through trade; it also integrates national production apparatuses through the international intra-firm division of labour that firms establish through the creation of regional and global value chains. The resulting emerging integrated international production system is the productive core of the globalising world economy. Together, this makes international investment the most important form of international economic transaction.

Second, the principal purpose of the international investment regime is to protect international investors and facilitate their operations – which, it is hoped, would encourage the flow of international investment. Accordingly, the content of international investment agreements reflects this purpose. The relevant provisions, in turn, are enforced through a powerful Investor-State dispute settlement mechanism, the heart of the international investment regime. Through it, firms – without having to go through any governments – can directly utilise international arbitration if they consider that rights given to them in over 3,000 international investment agreements have been violated. This private right to action makes the international investment regime arguably the strongest international law regime that we know.
Given the importance of international investment and the nature of the international investment regime, it is not surprising that it receives considerable attention and is subject to close scrutiny. The current focus of this attention and scrutiny is the Investor-State dispute settlement mechanism. Given the centrality of this mechanism to the investment regime, it has to be beyond reproach. This is all the more important since, on the one hand, litigating disputes is expensive and awards against states can be high, while, on the other hand, the potential for disputes is considerable, given (among other things) the number of multinational enterprises and their foreign affiliates and the number of international investment agreements with Investor-State dispute settlement provisions. Hence the importance of such efforts as enhancing the transparency of the dispute settlement mechanism, considering a code of conduct for arbitrators, dealing with frivolous claims through various filtering mechanisms and reducing the possibility of abusive treaty shopping. Beyond that, and more importantly, consideration is being given to establishing appeals mechanisms and even a world investment court. In fact, the legitimacy of the regime would be greatly enhanced if an Advisory Centre on International Investment Law were established, to strengthen the ability of more vulnerable countries to defend themselves adequately as respondents in investment disputes. Improving the regime’s dispute settlement mechanism is not only a technical matter, but also one that has implications for the very legitimacy of the international investment regime.

But the challenges that the international investment regime faces are broader. They begin with the question of what the regime’s principal purpose should be, and more and more voices are raised to argue for an expanded purpose. Expanding the regime’s purpose means that international investment agreements, apart from protecting international investment and facilitating the operations of international investors, also recognise the need to promote sustainable development and investment flows that support this objective: there is little doubt that the quest for sustainable development will remain the dominant challenge on the international economic agenda in the years ahead. Additional objectives include the protection of public welfare and human rights, including public health, labour standards, safety and the environment. Promoting such an expanded purpose of the regime also necessitates that governments preserve a certain amount of policy space that gives them the right to regulate in the interest of legitimate public policy objectives. And it also means that international investors commit themselves to responsible business conduct. In turn, the contents of international investment agreements need to reflect this broadened purpose.
To a certain extent, some of the investment regime’s weaknesses are a legacy issue. The regime was framed at a time of significant power asymmetries between capital exporting and capital importing countries, and long involved overwhelmingly unidirectional (that is, North-South) foreign direct investment flows. Today, however, it exists in an environment marked by the imperative to promote sustainable development, including the need to halt climate change; by growing economic inequality; by far greater economic and political interdependence, with foreign direct investment a genuine two-way street; by far greater public involvement in policy and rule-making, which has become singularly more contestable, and hence more democratic; and by a yearning for the preservation of policy space, which was by far not as constrained when developed countries were themselves growing their economies. The reformist quest for carefully balancing the regime to reflect changing circumstances should be welcomed as a sign of greater maturity and fairness in international economic relations. This is so even as this quest complicates the search for consensus in rule-making.

All these considerations are relevant to international investment rule-making in Asia in general and ASEAN in particular. The reason is that Asia, including ASEAN, is among the world’s most dynamic investment rule-makers. As the authors of this volume point out, Asia-Pacific countries have concluded nearly 1,200 bilateral investment treaties, nearly one-third of the world’s total, as well as a similar share of other international investment agreements. In addition, a great number of the region’s countries are actively negotiating other bilateral agreements dealing with investment matters. Moreover, they are key partners in two mega-regional agreements that also deal with investment matters, namely the Trans-Pacific Partnership agreement and the Regional Comprehensive Economic Partnership agreement. All these negotiations provide the opportunity to address the issues mentioned earlier and, more generally, improve the international investment regime.

These negotiations, in turn, need to be seen against what countries in the region have done in the past, as any new agreements build on past efforts. Among such past efforts, none is more important than the ASEAN Comprehensive Investment Agreement, the subject of the present volume. The authors provide a very thorough and perceptive analysis of this Agreement. It is an analysis that is a must-read for anyone interested in understanding investment rule-making in Asia and, beyond that, the future evolution of the international investment regime.

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The ASEAN Comprehensive Investment Agreement

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