New Regionalism and South-South Trade

1. Overview

The second session in the ICCA Hong Kong 2015 Summit was entitled “New Regionalism and South-South Trade”. It was moderated by Salim Moollan of Essex Court Chambers, London, UK. The session was divided into three sections; scene-setting for presentations, presentations and Q&A. The first scene setter was Ross O’Brien, the Hong Kong Director of The Economist Corporate Network, who highlighted the increasing importance of South-South trade within the global economy. The second scene setter was Mark Feldman, an Associate Professor of Law of the School of Transnational Law of Beijing University. In addition to providing economic analysis, he discussed the legal trends in South-South trade. The first speaker, Alfredo Bullard Gonzalez, a Peruvian lawyer, discussed the impact of free trade and institutional reform in Latin America. Then Olufunke Adekoya, a senior advocate from Nigeria, discussed whether the economic developments highlighted by the scene setters have had an impact on the development of international dispute resolution in the South and particularly in Africa. Finally, Judge Abdulqawi Ahmed Yusuf, the Vice President of the International Court of Justice, discussed the legal framework that has underpinned South-South relations since the early 1970s, with a particular focus on investment treaties. Alejandro I. Garcia of Winston & Strawn in London acted as rapporteur of this session.

2. Presentations of the two scene setters

2.1. Ross O’Brien

Mr O’Brien indicated that the phenomenon of South-South trade is of fundamental import to global growth: South-South trade is the global economy’s only source of growth. He added that his belief is that trade amongst and between emerging market regions is going to define economic growth, stability and innovation for the foreseeable future.

He added that since the advent of the global financial crisis some long-term trends have intensified.

Global exports in the last 10 years have been in the region of $1.5 trillion a year. The collective demand from advanced economies has essentially been flat since the global financial crisis. Export demand from the rich world is still less than it was at the end of 2007. From 2007 onwards, all the growth and increasing demand has come from consumers in developing countries, mostly Asia, but increasingly Africa and Latin America.

Trade between emerging economies grew three times over the last seven years. The entirety of the global economy is now 40 per cent composed by emerging market demand. That is up from less than 30 per cent a decade ago.

Most of the 20 of the world’s biggest manufacturing destinations are in emerging economies in Asia, where unemployment and inflation are low. They represent about 2-2.5 billion workers, roughly half the global workforce today. Not only are global consumers from the emerging world today; they are also the main and primary centres of global productivity.
Even China, with declining birth rate levels and being increasingly expensive to produce, cannot be written off as a manufacturing destination. China is taking measures to keep its position. For example, it is beginning to reinvent the Special Economic Zone ("SEZ") that it started in Shenzhen.

China is also transforming the way in which it is relating to other emerging economies from not only a trade and investment but a bilateral lending front. The Asia Infrastructure Investment Bank has been received with significant enthusiasm, not just from other Asian economies but also European economies as well. This type of initiative is helping speed up the pace of globalisation.

In a different context, in the ASEAN area there has been very significant wroth in regional investment.

Despite the increasing economic integration in Asia, Mr O’Brien pointed out that there is also an increasing amount of regional tension. These tensions do not appear to have a net negative impact on the way in which emerging economies in Asia trade with each other.

In conclusion, the growth in the global economy is going to be defined by its emerging economy simply because that is where the consumers are coming from and that is where the demand for goods and services is coming from. While Asia has some large bumps, particularly South Asia, it is Africa that has the largest boom.

Those two key points of connectivity between emerging Asia and emerging Africa are a central corridor for global growth. Global growth is going to be driven and defined by the increasingly sophisticated, increasingly aspirational demands of consumers in the largest growth pockets of the world today. It is not that the rich world is irrelevant in general, but in a demographic sense, it is. This has already been impacting demand to those regions. This demographic shift is going to redefine the flows and the directionality of capital, people, talent for the foreseeable future.

2.2. Mark Feldman

Mr Feldman’s presentation was hinged upon the following premise: that the South will play a far greater leadership role in the 21st century economy than ever before, and we will see that leadership role in five different settings; namely, (1) in terms of economic output; (2) in respect of the international development architecture; (3) the 21st century international economic law regime; (4) the changing nature of global investment; and (5) the South-South relationships becoming both more interdependent, and at the same time more complex.

First, with respect to global economic output, by around 2025, the OECD says the combined GDP of China and India will surpass the combined GDP of the G7 economies. OECD considers that by 2060, the China-India combined GDP will surpass the combined GDP of the entire OECD area, meaning 34 OECD member countries. Regardless of whether or not these predictions turn out to be accurate, the fundamental point is clear: in terms of global economic output in this century, the South will become the leader.

In respect of the second setting, this is the role of the South in reshaping the international development architecture, Mr Feldman noted that since their inception the World Bank and the Asian Development Bank have always been chaired, respectively, by American and Japanese nationals. Two newly-established international development banks will reshape the international development architecture of the global economy. The first, the New Development Bank, will be led by the BRICS countries with headquarters in Shanghai. The first president of the New Development Bank will be Indian; the first chairman of the Board of Governors, Russian; the first chairman of the Board of Directors, Brazilian; and the first regional centre will be located in South Africa.
The second international development bank that will have a significant impact is the Asian Infrastructure Investment Bank, proposed by China, with headquarters in Beijing. The Asian Infrastructure Bank has 57 founding members states, including half of the EU and all of ASEAN.

One of the projects undertook by these new development banks work consist of China’s “One Belt, One Road” initiative. It has been estimated that the Belt and Road initiatives will impact more than 4 billion people in more than 65 countries, and that annual trade with participating nations could climb to $2.5 trillion within a decade.

Third, the South will take on a greater leadership role with respect to the development of a 21st century international economic law regime. In Asia, 16 states continue to make progress on a trade agreement that, if completed, would cover about 3 billion people and nearly 30 per cent of global trade, this is, the Regional Comprehensive Economic Partnership (“RCEP”). Most of the 16 states negotiating the RCEP agreement are from the South: China, India, all 10 ASEAN states.

These negotiations reflect a larger phenomenon, the development of so-called South-South bilateral investment treaties (“BITs”). In fact, one recent empirical study has found that about 40 per cent of the global network of investment treaties are composed of these South-South BITs.

In most key respects, these South-South BITs basically resemble investment treaties generally. There are, however, a few differences. Scholars have noted that national treatment more frequently will not be included in South-South BITs. It is more common to see limitations on free transfers in South-South BITs. The basic wording is the same to that in many North-South BITs.

There are however two recent instruments that have been introduced by members of the South, which if they were to gain transaction would represent, a distinct form of treaty practice; and those instruments are model investment treaties issued by the Southern African Development Community (“SADC”) and by India.

The SADC model excludes altogether a most favoured nation (“MFN”) obligation. Another noteworthy aspect of the SADC model is what could be characterised as a very narrow fair and equitable treatment provision, which includes clarifying language limiting the scope of the obligation to actions that are an outrage, in bad faith, wilful neglect of duty.

With respect to India’s model, India likewise has drafted what could be characterised as a very narrow, fair and equitable treatment provision.

Fourth, according to UNCTAD, in 2013, the South invested over $500 billion abroad, 39 per cent of global foreign direct investment compared with only 12 per cent in the early 2000s. This is likely to give rise to an active treaty practice as the South now looks to secure protections for their own investors abroad.

Fifth, on the independent and complex South-South relationships, the China-Africa relationship is of particular interest. Over the past 15 years, the Forum on China-Africa Cooperation has held 10 senior officials’ meetings and five ministerial conferences.

3. Interventions of the three speakers

3.1. Alfredo Bullard Gonzalez

Mr Bullard highlighted the importance of clear rules in respect of free trade. He first highlighted the good results arising from APEC, the Asia-Pacific Economic Cooperation. He mentioned that free trade reduces transaction costs to business to the improvement of the quality of the institutions of the relevant countries.
Development requires a series of essential ingredients. First, a clear definition of property rights. Second, enforceability of contractual rights. Third, "smart" regulation or deregulation. Fourth, elimination of barriers to the market including bureaucratic red tape. Fifth, improvement of governmental capacity and efficiency of the government. Sixth, an efficient dispute resolution system.

In most Latin American countries, arbitration developed only in the last 10 or 15 years. Thus, the laws and practice in Latin America have benefited from the trial and error learning curve of other countries with a longer arbitration tradition. Because of this, some Latin American countries avoided a generation of problems experienced in other countries, and went directly to the development of the most advanced frameworks for arbitration in the world. Arbitration centres, arbitrators and lawyers typically cost less in Latin America than in developed countries. The price-quality relationship is thus favourable. More broadly, this is a competitive advantage of the South-South trade. Not all countries in Latin America have the same stance on arbitration. Some have showed greater commitment with free trade and the development of a related institutional framework, including arbitration.

An example of initiatives that have boosted free trade in the region is the so-called Pacific Alliance formed by four Latin American countries: Mexico, Colombia, Peru and Chile. These countries, according to Mr Bullard, show a better economic performance with better rates of economic growth and poverty reduction than other countries in the region. Mr Bullard suggested that there is a correlation between GDP growth and increase in the use of arbitration in the four countries that belong to the Pacific Alliance. Growth based on free trade generates further development of arbitration.

By contrast, Mr Bullard continued, other countries in the region, including Venezuela, Ecuador, Bolivia or Argentina have a different approach to free trade and arbitration.

3.2. Ms Olufunke Adekoya

Ms Adekoya agreed with the view that there is a shift in the global economy. Against this background, she wondered whether this new reality has had any impact upon international dispute resolution services. Ms Adekoya suggested that up to now, arbitration has been seen, and probably to an extent correctly perceived, to be North led. Preferred destinations for arbitrations were London, Paris, Stockholm and Geneva. The international dispute resolution services of choice were the LCIA and the ICC.

Then she discussed whether this reality has changed. From the African viewpoint, Ms Adekoya added, although there is a rise in South-South trade and a greater sense of regionalism in the South, the fact that arbitration is North-driven has not changed. Where the parties are both from the South, for example, a contract between Nigerian and Chinese entities, the North is still seen as a preferred dispute resolution arena. Many arbitration centres have been established in the South, including in Nigeria. The establishment of these centres has not brought African arbitration to the African continent.

Ms Adekoya also wondered whether arbitration practitioners from the South, either as counsel or arbitrators, have got a “fair share of the pie” in terms of cases. In relation to Africa, this does not seem to be the case: disputes are still going to arbitration in the North. Even arbitration counsel and arbitrators in African arbitrations are coming from the North.

It may be that this is due to insufficient experience on the part of African counsel and arbitrators. ICCA may have a role to play in this respect.

Mr Moollan stated his view that the arbitration community is becoming more aware of the need for capacity building in international arbitration if the South is actually to have a voice in the field.
3.3. Judge Abdulqawi Ahmed Yusuf

As a general remark, Judge Yusuf suggested that the law is not keeping pace with the shift to the South. From a historical viewpoint, in the 1970s, Judge Yusuf pointed out, the UNCTAD Secretariat launched the first South-South negotiations, aiming at creating an alternative to the North-South axis. This initiative was launched due to the failure of the New International Economic Order, advocated by developing countries. Against this background, the idea of the UNCTAD Secretariat was to probe the possibility of a new international economic order along South-South lines. At the time, trade at the South-South level was almost non-existent. Investment flows also did not exist amongst South countries.

Judge Yusuf, pointed out that, as discussed in earlier presentations at this session, the landscape has changed dramatically in recent years. The law has caught up in the area of South-South trade through the elaboration of the principles governing the Global System of Trade Preferences among the Developing States (“GSTP”), but still lags behind reality in respect of investment flows.

With regard to investment, South countries have never tried to lay down specific standards or principles that should be applicable amongst themselves. Many South countries accepted the model BITs received from the North. Some South countries, however, have decided more recently to have their own model BITs. That is how the COMESA Agreement was devised in the Eastern-Southern Africa economic community. The model BIT of the South African Development Community (“SADC”) was also developed. India and China have model BITs. All these BITs were in essence conceived for North-South investments, although they might be used also for South-South investment.

This being said, there are some peculiarities in some BITs concluded between countries of the South. First, with respect to security, public health and safety, some South-South BITs contain carve outs. Further, some of these BITs contain safeguards for balance of payment difficulties. Examples of such clauses are to be found in the China-Tanzania BIT or the India-ASEAN Investment Agreement.

Some South-South BITs also remove or limit the application of the MFN clause. Others do not provide for national treatment protection.

A new generation of BITs has more recently been concluded between China and Africa. They include the requirement of exhaustion of local remedies and exclude disputes on health, safety and environmental measures and disputes relating to denial of benefits of BITs to certain investors.

Despite these initiatives, it is difficult to pinpoint specific policy standards which inform in a consistent manner the South-South BITs. The guiding principles of the South-South Cooperation, which were announced in the Nairobi Outcome Document of the South-South Cooperation Conference of 2011, are not necessarily reflected in the South-South BITs. Judge Yusuf added that the standards and clauses, already alluded by him, that are included in certain South-South BITs, and may be considered to distinguish such BITs from their North-South counterparts, do not appear to be a product of a coherent or deliberate policy common to a large group of Southern States or to countries of the South as a whole.

Should the countries of the South wish to become “rule-makers” with respect to international investment, they will have to start by establishing specific standards and principles applicable to South-South investment flows.

4. Q&As

During the Q&A session, Mr Moollan, Mr Garcia and a member of the audience asked questions. Mr Moollan asked the panel whether China could still be considered a South state.
Judge Yusuf commented that according to the criteria elaborated by UNCTAD in the 1970’s in the context of the generalized system of preferences, this is a matter of self-election. Thus, in principle, a country claiming developing status has to declare itself as a developing country. He added that China has always considered itself as a country which belongs to the South.

Mr Feldman commented that notwithstanding the extremely significant scale of development in China over the past 30 years, China still has hundreds of millions of people who are living on very limited income. Per capita income that is still well below US$10,000 a year. This would then suggest that it is still a developing country.

Mr O’Brien had similar views. He indicated that in less than four years, China will be the world’s largest economy in pure market terms, but it will still have per capita income levels that are going to be a quarter or a third of those of the US.

Ms Adekoya said that from a Nigerian perspective, China, although an investor, remains a developing economy.

Mr Garcia asked the panel whether there is a new generation of BIT that considers the fact that developed states are increasingly at the receiving end of investment treaty claims.

In response, Mr Feldman referred to what Professor Salacuse termed as the “Grand Bargain” for investment treaties. The bargain being that the developed world gets investment protection, the developing world gets investment promotion. He added that this grand bargain has completely broken down. China is now, if Hong Kong is included, number two in the world in outbound investment. When China and the US are negotiating an investment treaty, each side has their own offensive and defensive interests.

A member of the audience asked about the exclusion in general of the MFN provisions from the India model BIT. Mr Feldman pointed out that a more tailored approach would have been to exclude the application of the MFN clause in respect of certain issues rather than applying a blanket exclusion.