



INTERNATIONAL INVESTMENT LAW IN CENTRAL ASIA

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Abstract:

Despite the fact that Central Asian states have not been involved in regional investment treaty-making on a scale and thrust similar to that of ASEAN and NAFTA, their evolving approaches to international investment law merit attention, not least because of the unique geopolitical characteristics of the region. The aim of this article is to fill the gap in the existing scholarship by exploring regional characteristics of Central Asian participation in international investment law-making. It will critically evaluate the history of numerous regionalisation efforts and, through a case study of two Central Asian states, Kazakhstan and Uzbekistan, examine the shared patterns in the evolution of national approaches to investment protection rules. In particular, the identity of Central Asian states as rule-takers and the factors underlying the emergence of distinctive national stances on the scope and objective of investment rules will be analysed.

Keywords: Investment, Eurasian regional cooperation, arbitration, national implementation

Just like other countries on the Asian continent, Central Asian states have been active in the international investment law arena, both through signing international investment agreements (IIAs) and being involved in investor-state arbitration, and thus making their distinctive, albeit presently somewhat less pronounced, contribution to the shaping of the global investment protection regime. The Central Asian region consists of five countries: Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. They share the communist past and, with the exception of Turkmenistan, [1] went through a broadly similar transition trajectory after the collapse of the Union of Soviet Socialist Republics (USSR). Geopolitically, the region is placed between two emerging economies, China and Russia. Kazakhstan, Uzbekistan and Turkmenistan are top-ten oil or gas states in terms of reserves or production.

Despite the fact that Central Asian states have not been involved in regional investment treaty-making on a scale and thrust similar to that of the Association of South-East Asian Nations (ASEAN), the North-American Free Trade Agreement (NAFTA) or other regional alliances, their evolving approaches to international investment law merit attention, not least because of the unique geopolitical characteristics of the region and the currently underexplored strategies and values underlying its interaction with international investment law and its institutions. [2] While various aspects of Central Asian foreign policy have received considerable attention in political science scholarship, there is a dearth of legal analyses addressing Central Asian approaches to investment law and policy-

making. The aim of this article is to fill the gap in the existing scholarship by focusing on regional characteristics of Central Asian participation in international investment law-making.

A number of notable regional arrangements, such as the recently created Eurasian Economic Union, involve only some of the Central Asian states and have not as such facilitated the creation of a coherent regional framework—despite an expectation that such unity would be precipitated by geographic proximity, common history, culture and social values, the shared Soviet legacy and the need to manage the region's transboundary water and other natural resources. [3]

Initiatives as Part of the Commonwealth of Independent States One of the postulated benefits of regionalism as a privileged forum for international law-making is that relative homogeneity of the interests or outlooks of actors will then ensure a more efficient or equitable implementation of the relevant norms. The presence of a thick cultural community better ensures the legitimacy of the regulations and that they are understood and applied in a coherent way.

As a matter of legal policy, it may often be more efficient to proceed by way of taking a regional approach. [4]

So far as the creation of a privileged forum for shaping international law and policy reflecting the needs and interests of the countries of the region is concerned, Central Asian states were for a long time conspicuously 'hesitant and inconsistent in formulating regional agendas.'¹² In 1993, soon after the creation of the Commonwealth of Independent States (CIS), [5] Russia proposed a fully-fledged economic union



between the newly independent countries, including Central Asian states. The CIS Agreement on the Creation of Economic Union featured inchoate investment promotion and protection provisions, including an obligation to provide national treatment to business entities of contracting parties, as well as a commitment to coordinate investment policies. [6] It was envisaged that the Union would loosely imitate the EU model of gradual integration, with the 1994 agreement proposing a free trade area as a first stage in this process.

That Agreement, however, was not implemented as Russia failed to ratify key economic cooperation agreements. [7] Likewise, the proposed regional regime lacked effective institutional mechanism to ensure implementation of, and compliance with, the terms of the agreements at the domestic level.

Central Asian States and the Eurasian Economic Integration Project It is perhaps unsurprising that a further regional integration project was aimed not at promoting a closer cooperation within Central Asian states per se but rather at enhancing integration between the countries of the region and former USSR countries in Eastern Europe. A broader "Eurasianisation" project was launched in 1995, in the form of a treaty on the formation of a customs union between Russia, Belarus and Kazakhstan. [8] Two other Central Asian states, Kyrgyzstan and Tajikistan joined that treaty in 1996 and 1997 respectively. The signing of these agreements signalled a shift towards deeper economic integration between a smaller group of interested countries rather than the entire CIS. [9] The customs union agreement between Belarus, Kazakhstan and Russia merits attention here for its potentially significant role in shaping the patterns of investment and trade treaty-making in the region. The set of agreements specifying institutional and substantive arrangements on the Eurasian Customs Union (ECU) were approved in October 2007 and it was envisaged that ECU would come into existence in January 2010. In reality, a common customs area was implemented in 2011 and 2012, when controls were removed between Kazakhstan and Russia, and Belarus and Russia, respectively. [10] Importantly, the ECU has been in the process of negotiating comprehensive free trade agreements (FTAs) with New Zealand, Vietnam, and the European Free Trade Association (EFTA). [11] As these FTAs are likely to follow the traditional format, there is a distinct possibility of an investment chapter being included therein, which in turn can influence the drafting of future investment treaties of Kazakhstan and other members of the union.

In 2000, the Eurasianisation agenda was taken a step further, culminating in the creation of the Eurasian

Economic Community (EurAsEC) — a new international organization tasked with further implementation of the customs union and the creation of a single economic space. [12] The EurAsEC Treaty was signed between Russia, Belarus, Kazakhstan, Kyrgyzstan, and Tajikistan. With Uzbekistan's accession in January 2006, EurAsEC subsumed the Central Asian Cooperation Organisation. Although the formation of EurAsEC was accompanied by declarations to promote cooperation in trade, transit, investment, agri-culture and the environment, nothing concrete in the field of investment has been implemented. Neither has the organisation succeeded in bringing together all Central Asian states. Uzbekistan suspended its EurAsEC membership in October 2008. Turkmenistan has never been part of either EurAsEC or the CACO. The majority of the Central Asian countries continued to engage in bilateral agreements on strategic economic partnerships and the promotion of investment with countries outside the region.

Despite its ambitious start, the Eurasianisation project came to a halt with an agreement terminating the activities of EurAsEC signed in 2014 at a summit in Minsk. From 1 January 2015, EurAsEC is replaced by the Eurasian Economic Union (EEU) between Belarus, Kazakhstan and Russia. [13] The EEU Agreement is note-worthy for containing comprehensive provisions on the promotion and protection of investment, [14] including guarantees of national treatment, compensation for expropriation, transparency, and investor-state arbitration. The Agreement also takes further the implementation of the customs union and envisages the formation of the internal market, including the common market for energy and transport. To date, however, Kazakhstan is the only Central Asian state party to the EEU.

In conclusion, Central Asia is still defined by the fact that, partly due to the historical influence from international institutions and other external actors, the states of the region remain to be rule-takers and continue to emulate Western models of treaty-making, although one can witness the gradual burgeoning of distinctive national views on the aims and scope of investment protection guarantees.

Alongside other factors, the present lack of intra-regional impetus for regional economic integration diminishes the chances of Central Asian states resorting to a regional alliance as a means of ensuring that their evolving and shared national positions on foreign investment protection are duly aligned with and reflected in their international commitments. The regionalist perspective on the evolving patterns of interaction between Central Asian states and international investment law also points to a new research agenda by highlighting the importance of exploring, through comparative and interdisciplinary



lenses, the factors underpinning the recent emergence of a more progressive and participatory process of investment treaty-making in the EU and North America and the role of regionalism therein.

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