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EDITORIAL

This issue of *Asian Dispute Review* begins with an article by Liang Wu on the tension between the ‘non-review of merits’ principle and the public policy exception in the context of foreign punitive damages awards in the PRC, proposing guiding principles for Chinese courts on the recognition and enforcement of such awards. It is followed by a contribution by Jeetendra Vishwakarma, who presents a proposed regulatory framework for the use of artificial intelligence in international arbitration. Paul Sandosham and Noah Lim then examine socio-cultural considerations in international arbitration across South East Asia, suggesting practical tips for counsel in navigating cross-border disputes within the region with due cultural sensitivity. Next, Olga Boltenko delves into the absence of individual responsibility under contemporary international investment law, set against the backdrop of several high-profile cases in Asia in which State breaches of investment law have been linked to senior government officials and members of the judiciary or State-owned entities.

For the In-house Counsel Focus article, Ting-kwok lu and Tin-yan Lee take an in-depth look at the role of mediators after settlement, particularly when parties experience ‘post-settlement blues’ following prolonged negotiations, substantial perceived concessions or an emotionally unsatisfying outcome.

The Jurisdiction Focus article by Byung-Woo Im, Boram Hong and Jae Ha Kwon provides an update concerning the Korean Commercial Arbitration Board’s 2026 revisions to its International Arbitration Rules, as well as an overview of recent legal developments and their relevance to arbitration in Korea. Mark Feldman then shares a review of the book, *Hong Kong as an Actor in International Economic Law* by Julien Chaisse, a professor of law at the City University of Hong Kong.

This issue concludes, as always, with the News section written by Robert Morgan.

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Can Individuals be held Accountable for Orchestrating State Breaches of International Investment Law?

Olga Boltenko¹

This article highlights the contribution made by individuals towards, and the absence of any liability on their part for, the commission of breaches of international investment law by States. Hurdles placed by public international law in the way of restructuring international investment law to accommodate individual liability and possible approaches to overcoming them are discussed.

“Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.”²

Introduction

Investment, particularly in human capital, infrastructure and agricultural development, is a primary driver for lifting millions out of poverty by fostering sustainable economic growth and creating jobs, according to World Bank reports. In

the past 20 years, over a billion people have been lifted out of extreme poverty, largely due to broad-based economic growth in East Asia and South Asia.³

Conversely, the destruction of investment and trade leads to consequences as dramatic for the communities affected as open warfare, with an arguably more pronounced and rarely correctible long-term effect on those communities and on their ability to flourish.⁴

Some notorious Asian examples

In recent years, a number of high-profile cases in Asia have involved breaches by host States of investment law – such as expropriation, breach of contract and failure to provide fair and equitable treatment – that have destroyed foreign investments. These breaches have often forced foreign businesses to close, caused job losses and harmed local communities more broadly. They are frequently linked to senior government officials or members of the judiciary or of State-owned entities acting under the cover of law. The following examples are informative.

“... State breaches of investment law ... that have destroyed foreign investments[,] ... forc[ing] foreign businesses to close, caus[ing] job losses and harm[ing] local communities more broadly[,] ... are frequently linked to senior government officials or members of the judiciary or of State-owned entities acting under the cover of law.”

In 2023, following the February 2021 military coup in Myanmar, Telenor, a Norwegian/Singaporean investor, was reportedly ordered to shut down its data network, block IP addresses and deny access to its services.⁵ Ultimately, Telenor sold its Telenor Myanmar operations at a loss, prompting complaints against it by 474 Myanmar-based civil society organisations for “irresponsibly disengaging” from Myanmar.⁶ The withdrawal coincided with a worsening economic crisis in the country, which saw a 23.5% increase in employment terminations in the country and a 41% rise in dismissals overall, making it harder for those leaving

Telenor to find new employment.⁷ While Telenor has, since then, lodged a treaty claim against Myanmar under the Myanmar-Singapore Bilateral Investment Treaty (BIT) 2019,⁸ the individual actors behind Telenor’s demise in Myanmar remain unaffected by that claim.

In 2017, the Thai government ordered the suspension of gold mining operations by Kingsgate Consolidated (an Australian mining company) at the Chatree Gold Mine in Phichit, citing environmental and public health concerns.⁹ The shutdown destroyed hundreds of direct mining jobs, decimated local supply-chain businesses in the surrounding rural provinces and prompted a long-standing investor-State arbitration with parallel proceedings in domestic courts that cost the State substantial amounts in legal fees and impacted local job creation and welfare levels.¹⁰

In 2002, following a change in national administration, the Philippine government annulled a multi-million-dollar concession agreement for the construction of Terminal 3 at Ninoy Aquino International Airport (NAIA), citing contractual anomalies. The government then took physical possession of the nearly completed facility in 2004.¹¹ Foreign investors (including the German company Fraport AG) initiated ICSID arbitrations against the Philippines and argued that the unilateral seizure and annulment violated the Germany-Philippines BIT 1997 by failing to provide fair and equitable treatment and adequate compensation for the expropriation.¹² The prolonged legal battle delayed the terminal’s opening for years, stifling the projected creation of thousands of high-quality direct and indirect aviation, retail and service jobs for the National Capital Region.

The problem

Contemporary international investment law as we know it has produced a well-functioning, albeit often ferociously criticised, mechanism for resolving investment disputes between individual investors and their host States where the latter take measures that negatively affect foreign investment. In the recent past, according to the UN Conference on

Trade and Development (UNCTAD) database, Asian States have been named as respondents in over 60 investor-State arbitrations (or, depending on how one defines 'Asia', in many more cases than that).¹³

“Contemporary international investment law as we know it has produced a well-functioning, albeit often ferociously criticised, mechanism for resolving investment disputes between individual investors and their host States where the latter take measures that negatively affect foreign investment.”

Yet, one of the lines of criticism levelled at the existing dispute resolution mechanism is the lack of prompt and effective enforcement. This is because the resulting awards mark not the end of the story for investors but the beginning of an often long and uncertain road of trying to enforce investor-State awards against host States that may be unwilling to pay.

Therein lies the greatest irony: international law is designed to oblige States – fictional legal constructs – to compensate foreign investors for the destruction of their property, but lets the actual individuals who have masterminded an investment's demise roam freely, in some cases quite literally (such as in yachts parked at luxury harbours). This, in itself, offends the very notion on which international justice is built, *viz* that –

“[c]rimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.”¹⁴

“Therein lies the greatest irony: international law is designed to oblige States – fictional legal constructs – to compensate foreign investors for the destruction of their property, but lets the actual individuals who have masterminded an investment's demise roam freely, in some cases quite literally[.]”

Considering possible approaches to the problem

The time appears to be right for the investment community to seek to identify, enable and create international legal mechanisms that would engage international law responsibility of individuals (in addition to engaging State responsibility) for internationally wrongful acts in the context of investment protection.

Indeed, in 1956, when prominent Cuban jurist Garcia Amador (the then Special Rapporteur for the International Law Commission of the United Nations (UN)), first proposed the draft *Articles on State Responsibility for Internationally Wrongful Acts*, he noted that when it came to the acts of private individuals who had caused injury to foreign property, most authorities at the time relied on the following views first propounded by Hugo Grotius (1583-1645):

“Most authorities on this subject still adhere essentially to the view enunciated by Grotius, who rejected the notion of ‘community liability’ which was widely accepted in his day. In his opinion, the State could only be held responsible if its conduct with respect to the injurious act was inconsistent with its duties. The two most important and frequent forms of such conduct, according to Grotius, were *patientia* and *receptus*. The first

of these two terms denotes the situation in which the State is aware of an individual's intention to perpetrate a wrongful act against a foreign State or sovereign, but fails to take the proper steps to thwart his designs; the second term denotes the situation in which the State receives an offender and, by refusing either to extradite or to punish him, assumes complicity in the offence. By such conduct, which constitutes tacit approval of the offence, the State tends to identify itself with the offender. And it is this tacit approval – and not the relationship between the individual and the community – which gives rise to the responsibility of the State.”¹⁵

“The time appears to be right for the investment community to seek to identify, enable and create international legal mechanisms that would engage international law responsibility of individuals (in addition to engaging State responsibility) for internationally wrongful acts in the context of investment protection.”

In his work and commentary on the *Draft Articles on State Responsibility for Internationally Wrongful Acts*, Garcia Amador focused largely on how an act of an individual might be attributable to the State, so as to engage State responsibility. The question of whether such an individual might be held accountable for breaches of international law by the State stemming from that person's injurious conduct did not, however, cross the Special Rapporteur's mind at that time.



The aspiration underlying a mechanism that would engage individual responsibility for breaches of investment law by host States would be to broaden the remedies available to foreign investors in protecting investments made in high sovereign risk jurisdictions, whether at times of war, or in the face of adverse legislation, or when facing other undue government interference.

“The aspiration underlying a mechanism that would engage individual responsibility for breaches of investment law by host States would be to broaden the remedies available to foreign investors in protecting investments made in high sovereign risk jurisdictions, whether at times of war, or in the face of adverse legislation, or when facing other undue government interference.”

If such a mechanism were to be implemented, a regime of individual responsibility for State breaches of investment law could do more than merely fill a remedial gap: it could also reshape incentives. By exposing to legal accountability

not only States but also the officials and actors behind wrongful conduct, such a regime might deter conduct that destroys foreign investment. Even where deterrence proves imperfect, it would still give injured investors a path along which to pursue those personally responsible for the loss of their investments – an avenue that domestic legal systems provide only with significant difficulty, if at all, and at the mercy of domestic law, as opposed to the workings of international investment law. In that way, a mechanism for individual responsibility could strengthen the rule of law and help foster a more secure and sustainable environment for global investment.

“... [A] regime of individual responsibility for State breaches of investment law could do more than merely fill a remedial gap: it could also reshape incentives. ... [Such a mechanism] could strengthen the rule of law and help foster a more secure and sustainable environment for global investment.”

Lessons from international criminal law

International criminal law inquiry plays a significant role in this quest. This is because the most direct form of individual responsibility for breaches of international law (as at the current state of international law-making) arises out of international criminal law.

Individuals who commit international crimes – genocide, war crimes, crimes against humanity or crimes of aggression – face personal legal liability under international criminal law. The Rome Statute of the International Criminal Court 1998 (Rome Statute)¹⁶ is unambiguous, in that the Court “shall

have jurisdiction over natural persons”¹⁷ and as to what acts engage the international criminal responsibility of a person.

“[International investment law’s] development is so far behind that it does not even recognise that an individual might be (and should be) held accountable for host State breaches of investment law as well as the host State itself.”

That said, international criminal law scholars have long recognised that there exists a significant overlap between the State and individual criminal liability for international crimes, muddying the divide between the two – in the words of Professor Beatrice I Bonafè, “in particular as regards the distinction between the elements of crimes entailing individual criminal liability and the elements of serious wrongful acts entailing state responsibility.”¹⁸

Significant effort has therefore been undertaken in international criminal law to bridge this divide, such as by differentiating the elements of State responsibility and individual liability.¹⁹ The growing autonomy of rules governing individual liability for war crimes, crimes of genocide, torture and crimes against humanity has also significantly contributed to the clarity of the rules for attribution of liability.²⁰

Hurdles to change in international investment law cases

International investment law has not yet advanced to the point of realisation that the blurry line between State and individual responsibility is an issue. Its development is so far behind that it does not even recognise that an individual might be (and should be) held accountable for host State

breaches of investment law as well as the host State itself. At present, international investment law does not offer any useful body of research, legal instruments or case law that would allow the very notion of the responsibility of individuals under it to come to the forefront of debate.

While international criminal law, in this sense, offers valuable guidance into engaging international individual responsibility, it does not – for the following reasons – offer any ready-made answers when it comes to the international liability of an individual for State breaches of investment law.

Firstly, the *actus reus* that underlies individual liability in international criminal law is uniquely confined to that area of international law and, largely, to the Rome Statute.

“At present, international investment law does not offer any useful body of research, legal instruments or case law that would allow the very notion of the responsibility of individuals under it to come to the forefront of debate.”

This is in contrast to the position under international investment law. For example, investment treaties contain standards of investment protection, whereas the provisions governing liability for breach of those standards are designed to engage the responsibility of a State, while leaving individual masterminds of those breaches essentially with a proverbial ‘licence to kill’ an investment.

In rare cases in which a State is found to be in breach of its investment law obligations, domestic machinery would be engaged to identify and call to account those individuals who would have masterminded, organised or contributed

to the breach. In such cases, typically, former State officials would be prosecuted domestically for bribery and corruption specifically relating to actions that have damaged foreign investment, primarily after a new government has sought to establish legitimacy after a political transition.²¹ Even when that occurs, the objective of a domestic legal system would not be to compensate an aggrieved investor or to restore its investment, but oftentimes to pursue a political agenda.

“... [I]nvestment treaties contain standards of investment protection, whereas the provisions governing liability for breach of those standards are designed to engage the responsibility of a State, while leaving individual masterminds of those breaches essentially with a proverbial ‘licence to kill’ an investment.”

The question here is, therefore, to ascertain whether an individual might be held accountable for host State breaches of international investment law alongside the State – for example, by allowing (1) an aggrieved investor to sue not only the State but also individual actors, and also (2) enforcement equally against both the State and the individual perpetrators.



Secondly, international criminal law has itself recognised the difficulty that is posed by the overlap of the rules governing international responsibility of an individual for international crimes and those governing the responsibility of the State for those crimes. Multiple inquiries have been conducted into this overlap, highlighting the important practical applications of overlapping rules.²²

An inquiry into the overlap between an individual's possible responsibility for investment law breaches, once established, and the responsibility of a State for the same breaches, is well justified. This is for a number of reasons that have profound practical implications, as reflected in the following questions.

“An inquiry into the overlap between an individual's possible responsibility for investment law breaches, once established, and the responsibility of a State for the same breaches, is well justified.”

- (1) Would it be possible to prosecute an individual despite the international and/or domestic immunity to which he or she may have been entitled while serving as a head of State or in another governmental capacity?
- (2) Would it be necessary to differentiate and establish different degrees of culpability for individuals on the basis of the positions of power they would have held within the State apparatus?
- (3) Would the elements of breach and attribution to be established on the same facts, but *vis-à-vis* different actors, be the same or different as between a State and individuals?
- (4) What role would State responsibility play in establishing individual liability for breaches of investment law (and

would it have to be established as a precondition to holding an individual accountable?).

- (5) Conversely, would individual responsibility play a role in establishing State responsibility for internationally wrongful acts in the context of foreign investment?

“One specific hurdle in the context of investment law is the apparent lack of consent on the part of any given individual to engage in investment disputes with foreign investors. That hurdle appears dramatic if not unsurmountable, amidst other hurdles, in particular given that consent is the cornerstone of investor-State arbitration.”

International criminal law has offered *ad hoc* solutions to analogous issues in international criminal justice. By contrast, international investment law has, to date, remained silent.

One specific hurdle in the context of investment law is the apparent lack of consent on the part of any given individual to engage in investment disputes with foreign investors. That hurdle appears dramatic if not unsurmountable, amidst other hurdles, in particular given that consent is the cornerstone of investor-State arbitration. At the centre of this inquiry is a simple but important relationship: the bond between the individual and the State in the law of State responsibility. The real issue is whether that bond – whether it arises from citizenship, public office or some other connection – can do more than link a person to the State. Can it also justify holding that person accountable for a State's breach

of investment law, perhaps even on the basis that such a connection amounts to a standing consent to a treaty claim?

“... [T]he more difficult question is ... whether the law of treaties, read together with domestic rules on nationality and principles of attribution of liability, may support the conclusion that certain individuals should be treated as having consented to treaty arbitration by virtue of their citizenship and of their role in the impugned conduct.”

This inquiry should be informed by the closely related scholarship on international criminal law. In particular, Professor Pierre-Marie Dupuy – whose work spans both seminal investment cases and a substantial body of International Court of Justice (ICJ) adjudication – has examined the dual structure of State responsibility and individual responsibility for internationally wrongful acts. This framework offers a compelling point of departure for investment law, because it confronts directly the foundational questions that any serious account of individual accountability in this field must answer.

- (1) What laws and legal instruments would govern the rules of attribution of individual responsibility for internationally wrongful acts?
- (2) What role would the domestic law of the nationality of an individual play in prosecuting that individual for breaches of investment law (eg, as to immunity or otherwise)?
- (3) What impact, if any, on individual responsibility would

the individual’s standing within the State at the time of the breaches have?²³

Indeed, international investment treaties focus on the obligations of States toward investors and do not, by design, create direct and enforceable obligations against individuals contributing to breaches of them.

A further question that arises is whether consent by individuals to arbitrate the State’s disputes with investors for breaches of investment law that the former orchestrated could be established through either the notion and legal consequences of citizenship or the individual’s contribution to the breach.

“Contemporary investment law does not presently recognise a mechanism by which an undefined class of individuals may be taken to have consented to the jurisdiction of treaty tribunals for State breaches of investment law.”

Contemporary investment law does not presently recognise a mechanism by which an undefined class of individuals may be taken to have consented to the jurisdiction of treaty tribunals for State breaches of investment law. Individuals, do not, after all, negotiate or sign investment treaties in their personal capacity – but, having said that, nor do investors. Investment treaties are concluded only between States, yet they create rights for investors that lie dormant until a breach by a host State is alleged, at which point a qualifying investor acquires the right to bring a treaty claim against that State. If that is so, then the more difficult question is not whether such consent is conceptually impossible, but whether the law

of treaties, read together with domestic rules on nationality and principles of attribution of liability, may support the conclusion that certain individuals should be treated as having consented to treaty arbitration by virtue of their citizenship and of their role in the impugned conduct.

For Hugo Grotius, a State was a collective of individuals consenting, for the sake of personal utility, to join a State – and was thus a collection of individuals. He found, in his *De Jure Belli ac Pacis* (1625), that “the ruler of every state must exercise his authority either in person, or through the medium of others.” If that were to be the starting point for treaty interpretation, would States, by consenting to arbitrate investment disputes, also consent on behalf of their nationals who contribute to the breach to those nationals also being joined as respondent parties to treaty-based disputes?

“The task ... is to determine whether existing international investment law is already capable of being read as accommodating individual responsibility[.] ... If it cannot, the question becomes still more pressing: whether the time has come to reimagine the architecture of investment law so that individuals may be held accountable for the destruction of foreign investments.”

Conclusion

The task, then, is to determine whether existing international investment law is already capable of being read as accommodating individual responsibility – whether through

treaty interpretation, concepts of statehood, nationality and citizenship, customary international law and/or any other available doctrinal tools. If it cannot, the question becomes still more pressing: whether the time has come to reimagine the architecture of investment law so that individuals may be held accountable for the destruction of foreign investments.

The case for such a mechanism is especially strong – and also especially timely – in Asia. The region continues to attract substantial foreign investment, with ASEAN alone averaging roughly US\$220 billion in annual FDI between 2021 and 2023, even amid global uncertainty, while policymakers and investors alike increasingly recognise that legal predictability and the rule of law are economic assets, not abstractions.²⁴

“The case for such a mechanism is especially strong – and also especially timely – in Asia [, where] ... policymakers and investors alike increasingly recognise that legal predictability and the rule of law are economic assets, not abstractions.”

In this setting, a framework capable of reaching individuals who orchestrate or enable State breaches of investment law would serve more than a compensatory function. It would help align public power with legal responsibility, strengthen confidence in markets in which sovereign risk remains acute, and signal that the destruction of foreign investment is not merely a cost to be absorbed by the State, but a wrong that may carry personal consequences. For Asia – where development, infrastructure, energy transition and digital growth all depend on sustained investor confidence – that is not simply a theoretical refinement of investment law. It is a practical and urgent question of economic governance. [24](#)

“... [A] framework capable of reaching individuals who orchestrate or enable State breaches of investment law would ... help align public power with legal responsibility, strengthen confidence in markets where sovereign risk remains acute and signal that the destruction of foreign investment is not merely a cost to be absorbed by the State, but a wrong that may carry personal consequences.”

- 1 The views expressed in this article are mine alone, however aspirational or mistaken, and are not attributable to any of the institutions with which I am affiliated. I am tremendously grateful to Mahdev Mohan for his review and criticisms, as well as for guidance given by Professor Dr Eric de Brabandere.
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- 22 See, for example, Beatrice I Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (2009, Leiden: Brill/Martinus Nijhoff), pp 71-118, 119-145.
- 23 Dupuy, *op cit* (n 19).
- 24 See BIMP-EAGA, *ASEAN's Share in Global FDI Expands to 17% at \$230 billion in 2023* (23 October 2024), available at <https://bimp-eaga.asia/articles/aseans-share-global-fdi-expands-17-230-billion-2023> (accessed 2 May 2026).