BILATERAL INVESTMENT TREATIES AND FOREIGN DIRECT INVESTMENT IN ASIA – LEGAL ASPECTS

Christina Pak, Principal Counsel & Team Leader, Law and Policy Reform

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Recent Developments in Investor-State Dispute Settlement

1. Transparency (UNCITRAL Rules on Transparency, Mauritius Convention on Transparency, ICSID Rules Amendment)

2. ISDS Reform at UNCITRAL Working Group III (Structural Reform v. Incremental Reform)

3. Structural Reform (i.e. EU Multilateral Investment Court)

4. Incremental Reform (creation of an advisory centre, treaty parties’ involvement and control mechanism on treaty interpretation, the creation of a dispute prevention and mitigation mechanism and arbitrators’ appointment methods and ethics)

Public Interest Provisions in Investment Treaties

Evolving International Law

1. Types of Public Interest Provisions – i.e. health, environment, climate change, Sustainable Development Goals

2. Covid-19 Measures – i.e. lockdowns, shutdowns of ports and airports, closure of businesses, price controls

3. State’s Defenses/Counterclaims - i.e. permitted regulation, exceptions such as necessity
Discussions on Investment Treaties in the Context of Covid-19 Pandemic

1. ISDS Moratorium During COVID-19 Crisis and Response *(similar to G20’s call on standstill on sovereign debt servicing)*

2. State’s Right to Regulate for Public Interest v. Need for Investment Protection
What Can Be Done?

✓ Awareness-Raising

✓ Strengthen “Early Warning Systems” for Potential Disputes with Investors

✓ Dispute Avoidance/Mitigation

✓ Dispute Management

✓ Treaty Termination/Renegotiation

✓ Technical Assistance