GAR Global Arbitration Review

The Asia-Pacific Arbitration Review

2025

Running a marathon: The evolution of investment disputes in the APAC region and anticipated trends

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Running a marathon: The evolution of investment disputes in the APAC region and anticipated trends

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Summary

IN SUMMARY

Having witnessed a redirection of foreign investment to and from the APAC-region, APAC states have rapidly adopted investment treaties with protections that are mutually beneficial for states and investors alike.

Like ISDS-backed investment treaties, ISDS cases involving an APAC participant are on the rise and have seen exponential growth in recent years, with a large number of cases in the mining and resource extraction, construction, telecommunications, banking and finance, and renewable energy sectors. At the same time, the APAC-region is leading the way with proposals to adopt mediation and conciliation as an alternative or adjunct to ISDS.

Given the inescapable tension between states' obligations to investors and their ability to regulate in the public interest (including to protect the climate system), ISDS in the APAC-region is expected to continue its upward trajectory in the near to mid-term.

DISCUSSION POINTS

- Evolution of investment treaties and ISDS mechanisms
- ISDS disputes
- Anticipated trends
- Strategic consideration for investors

REFERENCED IN THIS ARTICLE

- United Nations Commission on International Trade Law
- *Huawei Technologies Co Ltd v Sweden*
- ASEAN Comprehensive Investment Agreement
- SIAC Investment Rules
- Paris Agreement

Global foreign direct investment (FDI) continues to flow to the Asia-Pacific region from a diversified pool of investors.[1] At the same time, the region has been gaining visibility as a source of outward capital. Given this two-way capital flow, it is unsurprising that Asia-Pacific states have been and remain active in concluding international investment agreements. This has translated to a growing awareness of investor-state dispute settlement (ISDS) options for investors into and from the Asia-Pacific region. ISDS cases involving an Asia-Pacific participant are on the rise and have seen exponential growth in recent years.

Perhaps less obvious, however, is a trend seen through more recent Asia-Pacific treaties showing that Asia-Pacific states are transitioning from their historical ambivalence about international rule-making[2] to a more active role in negotiating investment treaties, leading one scholar to remark that 'there is little doubt that Asian countries . . . are becoming focal points in rule-making in international investment law'.[3] This activist stance is illustrated by both substantive provisions, which seek to strike a better balance between investor protections and regulatory freedom, and procedural innovations. Several newer Asia-Pacific

treaties provide for conciliation or mediation at early stages of the investor-state dispute cycle and some empower host states to require investors to engage in mandatory mediation before they can obtain recourse to arbitration. Others contemplate a future appellate review mechanism or give the contracting states the right to issue binding interpretative statements.

By adopting more sophisticated ISDS mechanisms and innovative treaty-drafting, and by engaging more critically with international investment law, the investment treaty perspectives and practice of the Asia-Pacific region are attracting attention and are likely to continue gaining prominence over time. The impact of these innovations on ISDS remain to be seen – in particular as investment in the region shifts from carbon-intensive industries to green technologies and renewable energy, and as Asia-Pacific states adopt regulations to meet their emissions reduction targets.

The aim of this article is to provide a general overview and the current state of ISDS in the Asia-Pacific region, focusing on key recent developments. We commence with a brief summary of the evolution of ISDS mechanisms and treaty-drafting in regional international investment agreements. We then provide an analysis of the past five years of ISDS in the Asia-Pacific region, leading to a discussion of the trends that emerge from this analysis. The article concludes with a discussion of some strategic factors that investors in the Asia-Pacific region should be mindful of as new investments give rise to new disputes and new investment treaties are negotiated or come into effect.

EVOLUTION OF INVESTMENT TREATIES AND ISDS MECHANISMS

The Beginning (1960s–2000s)

Foreign investment in the Asia-Pacific region was once not as prolific as it is today. It was not until the late 1980s that FDI began to grow exponentially in the region. The following decade saw FDI increase by a factor of 15, largely spurred on by the industrialisation of Southeast Asian economies, the rapid growth of export-oriented industries and India opening itself up to foreign capital inflows.[4]

In the early 1960s, a handful of countries (Indonesia, Malaysia, South Korea and Thailand) commenced entering into international investment agreements (IIAs), including bilateral investment treaties (BITs). The rapid adoption of IIAs with ISDS provisions that began in the 1970s seems to have fuelled foreign investment in the region. At the start of the 1970s, fewer than 30 such IIAs with Asia-Pacific states were in force. This number doubled by the 1980s, followed by a flurry of activity in the 1990s, ultimately producing 368 IIAs in force with an Asia-Pacific state party by the turn of the century. Over this period, the counterparties to the BITs also became increasingly geographically diversified. Whereas the first BITs were almost exclusively concluded with Western European states, over time, Asia-Pacific states commenced entering into BITs with other countries in Southern Asia, Sub-Saharan Africa, the Middle East and Eastern Europe. What was a sprint evolved into a marathon, with a further 241 IIAs entered into with or between Asia-Pacific states in the 2000s. Through the strengthening of Asia-Pacific BIT networks, such nations accordingly continued to attract increased FDI flows.[5]

Reactionary Concerns (2000s–2010s)

By the 2010s, the pace of Asia-Pacific states' adoption of ISDS-backed investment treaties stalled as a result of a noted rise in the number of ISDS claims brought against Asia-Pacific

states under their existing IIAs. Several of these claims attracted a significant amount of attention and fears regarding a potential chilling effect on the states' freedom to regulate. In response, some states undertook to omit ISDS mechanisms from future IIAs and the investment chapters of free trade agreements (FTAs). A number of states went further by terminating their first-generation ISDS-backed IIAs.

Australia committed to avoiding ISDS mechanisms in future trade agreements[6] after its first experience as a respondent to the ***Philip Morris*** claim.[7] Following the first public investment treaty award against India in the ***White Industries*** case,[8] India issued at least 57 unilateral termination notices under its IIAs to the applicable counterparty states.[9] Similarly, following its experiences against the United Kingdom in the ***Churchill Mining*** case between 2004 and 2014,[10] Indonesia announced plans to terminate, and terminated several of, its IIAs while renegotiating new IIAs with more limited claims exposure from foreign investors.[11]

Renewed Incentive To Protect Outbound FDI (2010s–present)

More recently, the Asia-Pacific region has emerged as a significant capital exporter.[12] Accordingly, fears of the consequences of the proliferation of claims against Asia-Pacific states under ISDS-backed investment treaties have been challenged by calls from Asia-Pacific nationals seeking greater protection of their outbound investments.

Each Asia-Pacific state has balanced these two interests differently, often on a case-by-case basis. Nevertheless, a macro perspective reveals a trend toward the negotiation of multilateral and regional investment agreements and FTAs with various exclusions and carve-outs for public interest regulation, and a more limited coverage of ISDS provisions with regard to certain investments, substantive protections and counterparties. Examples underpinning this trend, including agreements concerning the Association of Southeast Asian Nations (ASEAN) and European Union member states, are set out in Table 1 below.

Table 1: Notable Multilateral And Regional FTAs

Treaty	Contracting parties	Status	Comments
ASEAN Comprehensive Investment Agreement	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam	Signed 26 February 2009, entered into force 24 February 2012	Comprehensive ISDS mechanism in section B, covering arbitration and conciliation
Investment Protection Agreement between the	EU member states, Singapore	Signed 15 October 2018, not in force	Comprehensive ISDS mechanism in Chapter 3, covering consultation,

European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part			mediation and arbitration
Comprehensive and Progressive Agreement for Trans - Pacific Partnership[[13]]	Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam	Signed 8 March 2018, † entered into force 30 December 2018[[14]]	Comprehensive ISDS mechanism provided in section B of Chapter 9 (on investment). Side letters from Brunei, Malaysia, Peru, Vietnam and Australia provide significant carve - outs for ISDS mechanisms
Investment Protection Agreement between the European Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part	EU member states, Vietnam	Signed 30 June 2019, not in force	Comprehensive investor - state dispute mechanism in Chapter 3, covering consultation, mediation and arbitration
Regional Comprehensive Economic Partnership (RCEP)	ASEAN member states, Australia, China, Japan, New Zealand, South Korea	Signed 15 November 2020,[[15]] entered into force 1 January 2022	Comprehensive investor - state dispute mechanism in Chapter 20, covering good offices, conciliation, mediation and arbitration
ASEAN–Canada Free Trade Agreement	ASEAN member states, Canada	Drafting	Expected to be concluded by 2024-[[16]]

China's Expanding Consent To ISDS

China's attitude to the inclusion of ISDS in its investment treaties has evolved over the past 40 years from almost complete rejection to acceptance. Looking at this evolution, there seem to be three generations of China's BITs, as set out below.

FIRST GENERATION (1982–1989)

China either excluded ISDS entirely or restricted the availability of ISDS for disputes concerning the amount of compensation to be provided for expropriation.[17]

SECOND GENERATION (1990–1997)

Access to ISDS remained generally restricted to disputes concerning the amount of compensation for expropriation. Nevertheless, these IIAs increasingly made reference to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) in circumstances where both contracting parties were or became parties to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). China acceded to the ICSID Convention in 1993. For example, the BIT between China and Australia provides that, if both China and Australia become party to the ICSID Convention, a dispute may be submitted to ICSID for resolution, subject to any exclusions notified to ICSID by the relevant contracting party.[18]

THIRD GENERATION (1998–PRESENT)

IIAs from this generation generally contain comprehensive ISDS provisions that grant access to international arbitration for all investor-state disputes (not just those in relation to compensation). This seems to derive from China's increased willingness to use the model texts of its partner countries as a starting point for negotiations[19] – a tendency that, some say, has contributed to an increasing Americanisation of Chinese IIAs.[20]

Substantive Evolution Of Asia-Pacific Treaties

While traditionally seen as rule-takers, Asia-Pacific states are increasingly redefining their engagement with international investment policy by recalibrating investor protections and regulatory freedom in new-generation investment treaties and FTAs.[21]

The prevailing pattern in the Asia-Pacific treaty practice is to include significant exceptions for measures introduced to protect public health, the environment and other policy space, provided that the measures are not arbitrary or unjustifiably discriminatory.[22] Treaties also include security exceptions, preserving the ability of the host state to protect its national security without the risk of breaching a treaty.[23] Some investment treaties incorporate labour, health and environmental standards, requiring states not to lower such standards to attract foreign investment.[24] For example, the broad obligation in the 2021 BIT between Georgia and Japan imposes obligations regarding health, safety and environment measures, inclusive of labour standards, on inward investment from all investors.[25]

Another way in which Asia-Pacific states have tried to reduce their exposure to ISDS claims is by moving away from the traditional IIAs that contain substantive standards of investment protection, to increasingly adopting agreements that have limited investment protection provisions.For example, the Australia–India Economic Cooperation and Trade Agreement, India–United Arab Emirates Comprehensive Economic Partnership Agreement and Indonesia–United Arab Emirates Comprehensive Economic Partnership Agreement contain limited protections for market access, national treatment standard

and most-favoured nation treatment with respect to commercial presence, investment promotion, facilitation and cooperation.[26]

Finally, Asia-Pacific states have been moving away from ISDS provisions, either leaving them open to subsequent negotiations[27] or by replacing them with provisions for recourse to national courts, complemented by state-to-state proceedings under the relevant IIA. This is the case of the Australia-Japan Economic Partnership Agreement, the Australia-Malaysia FTA, the Australia–New Zealand CEPA, the Japan–Philippines EPA and the Australia–United States FTA.[28] This development dovetails with a broader trend that is taking place in the Asia-Pacific region and globally: the domestication of international economic law.

Domestication Of International Economic Law

'Domestication of international economic law' refers to the 'process of devolution . . . a transition from the use of international to domestic legal instruments for the regulation of cross-border trade and investment flows'.[29] States are increasingly using domestic law, rather than IIAs to govern foreign investments, to give investors assurances for the repatriation of profits and resolve related disputes.[30] While the status of domestic foreign investment laws under international law is yet to be determined, we have already seen an increase in domestic investment law-based international arbitration claims.[31]

In the Asia-Pacific, the domestication of international economic law has reinforced the relationship between regional and national investment regimes. For example, Myanmar's 2016 Investment Law and 2017 Investment Rules incorporate key features of the ASEAN Comprehensive Investment Agreement, including a single reservation list and national treatment and MFN clauses.[32] Similarly, Laos' 2009 Law on Investment Protection and its 2016 amendments, which apply to domestic and foreign investments, contain 'non-discrimination' provisions, which foreign investors may rely on in lieu of the national treatment and MFN standards.[33]

Emergence Of ASEAN As A Regional Leader, Demonstrated Through RCEP

Since its creation in 2015, the ASEAN Economic Community has been leading the 'ASEAN Way', which emphasises the collective principles of sovereignty, non-interference and consensus in decision-making. This approach has been increasingly shaping the development of the investment treaty landscape and practice in the Asia-Pacific.

By way of example, the negotiations of RCEP, which is the world's largest FTA by economic scale, were initiated and led by ASEAN,[34] and RCEP has been recognised as reinforcing 'ASEAN centrality in regional frameworks'.[35] The provisions of RCEP, which have been labelled as a new 'consensus' in the Asia-Pacific region, reflect ASEAN's values as demonstrated in its internal and external investment agreements.

RCEP is characterised by its pro-development focus and cautious approach to investment liberalisation. For example, the definition of 'investment' is broad and asset-based but qualified by country-specific restrictions such as by a prior registration or approval process (for Cambodia, Indonesia and Vietnam).[36] Similarly in the case of the definition of 'investor', it may be a juridical person, but a branch of a juridical person has no right to make any claim against an RCEP signatory.[37] In terms of its substantive protections, RCEP mandates that the standards of fair and equitable treatment and full protection and security be interpreted 'according to the minimum standard of treatment of aliens' under customary international

law,[38] while it provides detailed conditions and compensation requirements for direct and indirect expropriation.[39]

RCEP's intention to embody the Asian way of pragmatic incrementalism to investment law reform can also be seen in its seemingly complex approach to dispute settlement. ISDS was left for future negotiations as a way to avoid delaying the signing of the agreement. However, article 17.11 specifically excludes pre-establishment rights from dispute settlement, which suggests that RCEP parties may fall back on state-to-state dispute procedures to deal with investment matters. That said, while RCEP excludes 'any international dispute resolution procedures under other existing or future international agreements',[40] it affirms 'existing rights and obligations' arising from other agreements.[41] As a result, RCEP members are still entitled to ISDS provisions under current IIAs, such as the ASEAN Plus One FTAs.[42]

ISDS DISPUTES

The effects of economic growth in the Asia-Pacific region reach beyond the increasing adoption of ISDS mechanisms in regional investment treaties. They have also driven an increase in ISDS claims brought by investors and against states within the region, as well as changes in the nationality of frequent claimant investors and respondent states.

As the number of regional ISDS disputes rises, the data points to interesting shifts beneath the surface as states and investors are increasingly relying on different types of international investment instruments and institutional rules to resolve their disputes. There have also been shifts in the sectors within which investor-state disputes commonly arise.

In this section, we discuss the developments and trends that emerge from a statistical analysis of the past five years of ISDS within the Asia-Pacific region.[43]

Number Of Cases

Traditionally, Asia-Pacific participation in investor-state dispute resolution was not significant. According to one study, only two investment arbitrations were brought against an Asia-Pacific state in the 1990s, while seven were brought in the 2000s and 37 in the 2010s. Despite this rise, some believed that the number of region-centric claims in the twenty-first century would remain limited for various reasons, including high institutional barriers comprising high costs, and a paucity of experienced counsel and arbitrators.[44]

Contrary to this view, the number and yearly average of investor-state claims against Asia-Pacific states has continued to increase significantly. Just in the four years between 2020 to 2023, 17 claims have been brought against an Asia-Pacific state. In 2015, one commentator posited that the increase in investor-state arbitration in the Asia-Pacific region would continue given the conclusion of further investment instruments (and heightened legal understanding of these instruments) and a significant rise in the volume of FDI for all Asia-Pacific states.

Table 2 below outlines the investor-state disputes that occurred in the Asia-Pacific region between 2019 and 2023 and shows a continued growth in ISDS in the region. During the relevant period, 28 investment cases were commenced involving an Asia-Pacific party as either claimant or respondent, with 17 cases as a respondent and 21 cases as a claimant (of which 11 cases involved Asia-Pacific parties on both sides). Investor-state disputes involving Asia-Pacific parties also represent a sizeable portion of all recorded investor-state disputes over the same period. As at 19 March 2024, 357 cases were pending resolution, of which 25 involved at least one Asia-Pacific party and 23 were brought against an Asia-Pacific state.

Table 2: Cases Initiated Per Year (2019–2024)

Year	Asia - Pacific claimants	Asia - Pacific respondents	Asia - Pacific parties on both sides
2019	2	2	0
2020	7	6	6
2021	4	3	1
2022	4	3	1
2023	4	3	3

It is also interesting to observe the distribution of investor-state disputes within the region based on the nationality of claimants and respondent states. Vietnam and South Korea have been the most prominent respondent states, while China and Singapore have been the most prominent states of the claimants' nationality; Australia with Japan being the only (other than China) Asia-Pacific state to have featured on both sides of investor-state disputes in the past five years. These figures are reflective of the strong GDP and outgoing FDI figures.[45] The rise in ISDS cases against China and brought by Chinese investors in particular is unsurprising given China's manufacturing output coupled with its Belt and Road Initiative, which have spurred a rise in outbound investment over the past five years.

A general observation is that, increasingly, there appear to be repeat players in the Asia-Pacific ISDS landscape. This may be reflective of a more general sentiment among the majority of Asia-Pacific states who increasingly disfavour ISDS.

Underlying Treaties

Of the 28 ISDS cases in Asia-Pacific over the past five years, 19 were brought under BITs, four under the investment chapter of an FTA, and the remainder under other investment agreements or treaties with investment provisions. This reflects the overall global trend of older-generation BITs being replaced by growing numbers of FTAs and broader-coverage treaties with investment provisions, as well as regional trade and investment agreements.

Arbitration Rules

The past five years have seen a shift in the choice of arbitral rules for ISDS cases. According to a 2015 study, 65.7 per cent of cases brought between 1980 and 2014 against an East Asian or Pacific state were administered by ICSID, whereas the remaining 34.3 per cent were mostly conducted under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. A slightly higher preference for ICSID arbitration was seen in cases brought by an East Asian or Pacific claimant investor (75.9 per cent) with the balance predominantly being governed by UNCITRAL's arbitration rules (24.1 per cent).[46]

As outlined in Table 3 below, between 2019 and 2023, only 10 of the 28 cases identified in the Asia-Pacific region were conducted under the auspices of ICSID or the ICSID Additional Facility. It is also clear that the primary alternative remains UNCITRAL's arbitration rules, with only one investor-state arbitration identified as being governed by the International Chamber of Commerce arbitration rules.

This appears to follow a broader trend of investors choosing rules other than the ICSID arbitration rules.[47] There are several reasons for this change in preference, including:

- greater permission for dual national investors to bring claims against a state, avoiding the need to meet the definition of 'investment' under the ICSID Convention in addition to the relevant investment treaty's definition;[48]
- greater transparency under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration; and
- certain other procedural matters, such as third-party intervention and public hearings.[49]

It remains to be seen whether the procedural innovations introduced in the 2022 revision of the ICSID's rules will impact the use of ICSID arbitration in the region in the coming years.

Table 3: Arbitration Rules Utilised (2019–2023)

Rules	Overall	Asia - Pacific claimants	Asia - Pacific respondents
ICSID and ICSID Additional Facility	10	10	4
UNCITRAL	10	6	7
Ad hoc	2	2	2
ICC	1	0	1
Unknown	5	4	3

Disputes By Sector

A sectoral analysis of ISDS cases in the Asia-Pacific region over the past five years reveals further interesting developments and trends.

As presented in Table 4, it remains the case that disputes most commonly arise in the mining sector, closely followed by construction, electricity and gas supply, followed by information and communication, manufacturing and real estate. This is not particularly surprising given the high level of global FDI into carbon-intensive industries flowing to the Asia-Pacific region.[50] Cases in the mining sector involved claims:

- of direct and indirect expropriation of mining investments and assets;[51]
- arising out of the blocking, suspension, freezing or termination of projects, licences, assets and contracts associated with mining;[52] and
- in relation to the retroactive application of a capital gains tax to share sales.[53]

Cases in the construction sector arose from host state interference with, or suspension or termination of, project contracts in the context of public infrastructure and large-scale property developments.[54]

Table 4: Disputes By Sector (2019–2023)

Sector	Count	Investment details

Mining and quarrying	6	Mining of coal, metals, minerals and ores; extraction of oil and gas
Construction	5	Key public infrastructure and large - scale property developments
Electricity, gas, steam and air conditioning supply	4	Renewable energy sources, including wind and solar; gas and power company investments
Information and communication	3	Telecommunication investments, including infrastructure and enterprise
Real estate activities	3	Real estate development and enterprise
Manufacturing	3	Steel, elevators, aircraft engine and other technical engineering
Financial and insurance activities	2	Banking; mergers and acquisitions
Wholesale and retail trade; repair of motor vehicles and motorcycles	1	Investment in a Chinese business centre in Finland
Arts, entertainment and recreation	1	Accommodation and gambling activities

Unsurprisingly, several ISDS cases notified in this period related to investment into electricity and renewable energy-related infrastructure. These cases involved claims brought by Asia-Pacific investors against Spain[55] and Japan[56] (in Japan's first ISDS case) regarding reforms to the subsidy programmes that affect relevant domestic renewable energy sectors and project cancellations.[57] Given the scale of investment required to effect the net-zero transition, renewables-related ISDS cases will likely continue to become more common going forward.

There are other sectors rising to prominence: in particular, investments in telecommunications. A notable telecommunications case is ***Huawei Technologies Co Ltd v Sweden***, brought by shareholders of Huawei Technologies Sweden AB in January 2022. The investors claimed that Sweden had breached national treatment, fair and equitable treatment, and expropriation protections under the BIT between China and Swedenfollowing the exclusion of Huawei Sweden from an auction held by the Swedish telecommunications regulator to award licences for the Swedish 5G network, which prohibited auction participants from using Huawei's equipment or services in their 5G, 4G and 3G networks.[58]

PROCEDURAL INNOVATIONS

Asia-Pacific states have adopted various procedural innovations in more recent treaties, to provide for alternatives to ISDS and to address ISDS' legitimacy crisis.

Binding Interpretation Provisions And Appellate Mechanisms

One such innovation has been the inclusion of mechanisms for contracting states to weigh in on the proper construction of treaty provisions. Under some investment treaties – such as the ASEAN agreements[59] and, more recently, the FTA between China and Australia[60] – contracting states are given the opportunity to provide a binding interpretative statement that the tribunal hearing a dispute is required to abide by when interpreting an investment treaty. These clauses allow the contracting states to:

- submit any joint decision declaring their interpretation of the relevant agreement in writing to the tribunal; or
- require the tribunal to request such an interpretation before making its own determination about the meaning of a particular treaty provision.

Further, some newer treaties have introduced provisions that anticipate states commencing future negotiations with a view to establishing appellate review mechanisms for awards rendered by a first instance tribunal. These have been agreed in a number of BITs and FTAs with Asia-Pacific states, including the FTAs between Singapore and the United States[61] and between China and Australia.[62] While these provisions have led to negotiations between party states, to date, they do not appear to have meaningfully encouraged the adoption of appellate review mechanisms.[63] On the other hand, the European Union's investment protection agreements (IPAs) with Vietnam and with Singapore went a step further by, at the drafting stage,[64] creating a permanent 'investment tribunal system', which includes a permanent appeal tribunal empowered to hear appeals in relation to awards rendered by a standing tribunal of first instance.[65] Such an appeal system is expected to ensure consistency and certainty in the interpretation and application of the treaties.[66]

Asia-Pacific Leading A Shift Towards Non-binding Third-party Procedures

The Asia-Pacific region has led the way with the adoption of pre-arbitration non-binding procedures, such as conciliation and mediation. Treaties involving Asia-Pacific states have played a significant role in this shift.

The inclusion of some form of conciliation in Asia-Pacific investment treaties dates back to the 1960s and 1970s. Several Asia-Pacific states entered into BITs with the Netherlands, Belgium, the Belgium–Luxembourg Economic Union and the United Kingdom that included advance consent to conciliation or arbitration.[67] In 1980, the first intra-Asia-Pacific BIT with advance consent was introduced to investor-state conciliation mechanisms in the BIT between Sri Lanka and South Korea, which was followed by several other BITs that these two states concluded with other Asia-Pacific states with the same mechanisms into the 2010s. A study of 143 investment-related treaties with Asia-Pacific states that entered into force after 2010 revealed that 24 per cent of them had ISDS provisions providing for mediation or conciliation.[68]

By the 2010s, alternative dispute resolution mechanisms in investment and trade treaties with Asia-Pacific states were becoming more popular and increasingly complex. Several newer treaties, such as the 2019 investment agreement between Australia and Hong Kong, have provided for conciliation and mediation at the earlier stages of the ISDS lifecycle.-[69] Under some treaties – such as the comprehensive economic partnership agreement between Indonesia and Australia, and the BITS between Hong Kong and the United Arab

Emirates – it is mandatory for disputing parties to engage in conciliation before recourse to arbitration if the respondent state requires the claimant investor to do so.[70] Other treaties, most notably the ASEAN Comprehensive Investment Agreement, allow for hybrid or mixed-mode dispute resolution procedures where conciliation can run in parallel with arbitration.[71]

Meanwhile, treaties between Asia-Pacific parties and non-Asia-Pacific parties are converging to align with global trends. For example, several IPAs include complex mediation provisions that are similar in language to the Comprehensive Economic and Trade Agreement between Canada and the European Union, including the adoption of this agreement's rules of procedure for mediation. This trend is evident in certain intra-Asia-Pacific IPAs from recent years.[72]

SIAC Investment Rules

In response to some of the issues faced in the context of ICSID arbitrations, the Singapore International Arbitration Centre (SIAC) released its own Investment Arbitration Rules in 2017. The rules are the first of their kind, as SIAC was the first private arbitral institution to introduce a set of arbitration rules specifically intended for investment treaty disputes. In doing so, SIAC has adopted innovative solutions to common procedural issues arising in investment arbitrations. Some of these include that the presiding arbitrator can make procedural rules alone;[73] there are strict time limits imposed on the appointment of arbitrators to avoid delay tactics;[74] parties can seek early dismissal of claims and defences that are manifestly without legal merit, outside of the tribunal's jurisdiction or inadmissible.[75] There are also rules relating to the involvement of non-disputing parties, which is particularly pertinent in cases involving issues of public interest, and third-party funding.

While the uptake of the SIAC Investment Rules is yet to be tested, their use may increase over the coming years, especially with ASEAN gaining prominence in the Asia-Pacific region.

ANTICIPATED TRENDS

Investment Treaties As A Stepping Stone For Energy Transition

As newer Asia-Pacific treaties aim to preserve policy space, it remains to be seen whether such treaties will support the required FDI flows to effect the energy transition, and if they will protect the autonomy and ability of Asia-Pacific states to adopt and regulate climate change mitigation measures as well as related human rights obligations and concerns.-[76] The fact is that, historically, the Asia-Pacific region has attracted the largest share of global FDI in carbon-intensive industries, accounting for 33.1 per cent of inward FDI between 2008 and 2016, although investment into goods, services and projects with more positive environmental impacts, such as renewable energy projects, is on the rise.[77]

To meet the Paris Agreement targets, significant regulatory changes will be introduced by host states. Such changes may have wider ramifications than those contemplated by investors. While dynamic regulatory systems will focus upon phasing out fossil fuel-reliant energy generation and the extractive industries supporting such generation, they are likely to also encompass other less obvious and indirect regulatory measures, such as those concerning carbon sequestration, carbon credit-generating industries, land preservation and regeneration. They may even encompass the importation of materials and components required for renewable projects in circumstances where the relevant fabrication, production

and importation do not comply with the host state's supply chain regulations and obligations – in many instances beyond what any investor into the region may have anticipated.[78]

Affected investors will naturally look to recover their losses through investor-state arbitration. Seven of the 10 largest ISDS damages awards against states under investment treaties have involved fossil fuel investor claimants, each for over US$1 billion and all within the past 15 years.[79]

With still less than 10 per cent of BITs in the Asia-Pacific region containing an investment obligation exemption for implementing environmental regulations,[80] the region's exposure to potential investor claims will most likely trend upwards. Further, state parties to the Paris Agreement also expressly agreed to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.[81] China, Japan and South Korea have, for example, committed to cease public support for coal investments abroad.[82] It is clear that the transition from carbon-based energy generation to renewables will rely on private markets.[83] Those private markets, however, will be regulated by government policies and laws aligned with a net-zero target.[84] The potential is high for the energy transition and low carbon investment in the Asia-Pacific region to be addressed in investment treaties, and investors should be aware of the growing support for carve-outs that expressly address a host state's autonomy and ability to regulate fossil fuel-related investments.

Expansion Of Mediation And Conciliation Options

Given the expense and time involved in arriving at an ISDS award, and given the deeply enshrined position of mediation in the Asian culture, we are likely to see an increase in alternative ISDS mechanisms, such as mediation and conciliation. Several factors point to this.

First, developments in recent years have catalysed this trend, with some Asia-Pacific treaties paving the way towards requiring mandatory investor-state conciliation as a precondition to arbitration.[85] The adoption of alternative ISDS methods may be further propelled by the recent introduction of rules developed specifically for ISDS alternative dispute resolution options, such as the 2012 International Bar Association Rules for Investor-State Mediation, the 2021 UNCITRAL Mediation Rules and the 2022 ICSID Mediation Rules.

Second, the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) came into force on 12 September 2020.[86] As at 20 March 2024, the Singapore Convention has 55 signatories (including several Asia-Pacific states) and is in force in 14 countries, including Fiji, Japan and Singapore.[87]

Finally, there has been increased focus on mediation and conciliation as part of the broader discussion of ISDS reform in UNCITRAL Working Group III, most notably by China, Indonesia and Thailand, as well as the European Union and the United States.

Increase In ISDS Cases

The economic disruption of the covid-19 pandemic has given rise to disputes globally and in the Asia-Pacific region, which is expected to continue even as economies start to rebound. The pandemic has increased costs and delays at all stages of the construction supply chain by limiting the supply of construction materials, causing transportation delays and restricting access to worksites and labour.[88] As many of the pandemic's consequences were driven by

governments' decisions and changes to laws and policies, project owners and contractors may look to ISDS to allocate the cost implications of such decisions to governments.

A further significant uptick in the number of ISDS cases is expected in the renewable energy sector as states adopt regulations to incentivise investment in new energy and reduce emissions to meet Paris Agreement targets. These changes will inevitably invite a more fluid regulatory environment, exposing foreign investors to sovereign risks as they invest in new energy infrastructure.

STRATEGIC CONSIDERATION FOR INVESTORS

Investors planning their investments in the Asia-Pacific region should be mindful of the changing ISDS landscape.

ISDS alternative dispute resolution mechanisms are gaining prominence and may become genuine avenues for a faster, more efficient and less costly resolution for investment disputes with a state. Alternative ISDS methods also have the potential to produce more tailored settlement outcomes. Investors may undertake mediation or conciliation either before or parallel to arbitration, depending on the applicable treaty and rules. Investors should also consider whether they can leverage the risk of a protracted, expensive and potentially public arbitration to bring the dispute into conciliation or mediation.

Investments required to effect the energy transition will give rise to new projects with new risk profiles, including in respect of sovereign risks heightened by the increase in public scrutiny of states complying with their international obligations to combat climate change. Investors will need to consider investment treaty protections at the time of structuring their investments to mitigate the risks of investing in new energy projects in a volatile environment.

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Endnotes

1 For purposes of this article, 'Asia-Pacific states' comprise the following countries or territories: Australia, Brunei, Cambodia, China, Cook Islands, East Timor, Fiji, Hong Kong (Special Administrative Region), Indonesia, Japan, Kiribati, Laos, Macao (Special Administrative Region), Malaysia, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, New Zealand, Niue, North Korea, Palau, Papua New Guinea, the Philippines, Samoa, Singapore, Solomon Islands, South Korea, Taiwan, Thailand, Tonga, Tuvalu, Vanuatu and Vietnam. ^ Back to section

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