GAR Global Arbitration Review

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Investment Treaty Arbitration in the Asia-Pacific

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INTRODUCTION

Despite lingering discontent in certain regions of Asia with investor-state dispute settlement (ISDS), Asian countries are playing an increasingly significant role in the development of ISDS law and policy. This is in part due to Asia's rising global economic prominence, with foreign direct investment (FDI) flows into and out of Asia hitting historic highs. As China, Japan and the broader Asia-Pacific region emerge as major sources of outbound FDI in particular, Asian countries have a growing interest in protecting the rights of their nationals who invest in other countries.

Rather than rejecting ISDS or investment protections wholesale, countries in Asia are exploring ways to address what they perceive as problems with the current investment treaty regime and ISDS mechanisms. Some of these efforts have resulted in a shift in emphasis from traditional bilateral investment treaties (BITs) to multilateral agreements with investment chapters, which contain or propose (to the extent they are still being negotiated) their own specific provisions on ISDS. In addition, private arbitral institutions in Asia are innovating by adopting new arbitration rules specially geared towards investor-state arbitration.

China's One Belt One Road initiative, the signing of landmark trade deals such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the legalisation of third-party funding (TPF) in Hong Kong and Singapore all make it likely that the need for ISDS in the Asia-Pacific region will only grow. As a result, Asian countries can be expected to continue to experiment with new ideas in an attempt to make ISDS work for them, contributing to the development of investment treaty law and practice throughout the world.

This article provides a brief overview of the current state of ISDS in Asia, and is structured as follows:

- the first section summarises the historical development of investment treaty arbitration in Asia;
- the second section describes the multilateral treaties being concluded or negotiated by Asian countries;
- section three highlights some of the new ideas explored in those treaties and elsewhere; and
- section four provides an overview of developments in China and India, as well as a few other notable developments on a national level.

HISTORICAL BACKGROUND

Over the past few decades, global FDI has experienced exponential growth. In the Asia-Pacific region in particular, FDI has been hugely important for economic development. For example, India has seen its annual FDI inflows increase from less than US$1 billion in the early 1990s to nearly US$45 billion by 2016.[1] During this period, it has become one of the fastest-growing economies in the world.[2]

In a bid to attract FDI, countries in Asia sought to modernise their laws and policies governing foreign investment, notably by embracing BITs. BITs were intended to encourage cross-border investment by extending various protections to foreign investments, such as promises of non-discrimination and fair and equitable treatment, as well as by granting foreign investors the right to bring their claims directly against host states through access to ISDS mechanisms.3

BITs thus proliferated in Asia over the past half-century. Although there were fewer than 30 BITs in the 1970s, this figure had nearly doubled by the 1980s.4 BIT activity then exploded in the 1990s and 2000s, with 21 East Asian and Pacific countries signing 369 BITs in the 1990s and a further 234 BITs in the 2000s.5 This boom mirrored growth in the number of BITs concluded worldwide.6

After 2010, however, the number of new BITs being signed fell dramatically.7 This may be explained in part as a reaction to investment treaty claims being brought against countries in the Asia-Pacific region, generating a backlash against ISDS. For example, in response to an increase in investor claims between 2004 and 2014, Indonesia announced a plan to terminate its BITs and renegotiate new ones that would limit its exposure to claims.8 Similarly, and as discussed in further detail below, India issued termination notices to more than 80 per cent of its BIT counterparties in the aftermath of the White Industries case, the first publicly known investment treaty ruling against India, and also adopted a narrower Model BIT.9 Australia also denounced ISDS and sought to exclude it in all future investment treaties when it faced its first investment treaty case as a respondent state in Philip Morris,10 although it has softened its position since and would now consider ISDS provisions 'on a case-by-case basis in light of the national interest.'11

In the past few decades, many countries in Asia have also emerged as significant exporters of capital. China and Japan, for example, are two of the world's largest capital exporters, with FDI outflows in 2016 exceeding US$183 billion and US$145 billion, respectively.12 As their outbound FDI increases, countries in Asia would increasingly rely on investment treaties not just as a means of attracting FDI, but also as a means of protecting the overseas investments of their nationals.

Consequently, despite criticisms of ISDS and a move away from traditional BITs, countries in Asia have been actively negotiating multilateral treaties and free trade agreements (FTAs) with ISDS provisions. As Professors Peinhardt and Wellhausen note, such multilateral treaties constitute an 'overlapping channel[] of access to ISDS,' allowing states to 'act on domestic dissatisfaction with ISDS' – for example, by terminating BITs – 'without eschewing ISDS altogether.'13 This alternative route has generated renewed enthusiasm for multilateral treaties and FTAs across Asia as a vehicle for attracting FDI and protecting investments abroad.

MULTILATERAL TREATIES

A number of multilateral treaties that contain investment chapters and provisions on ISDS have been signed or are in the process of being negotiated by Asian states, reflecting active investment diplomacy in the region. Such agreements include preferential trade agreements, FTAs, economic partnership agreements and economic integration agreements with provisions for the promotion and protection of foreign investments through substantive and procedural safeguards.

Key to the recent initiatives is the Association of Southeast Asian Nations (ASEAN), a regional intergovernmental organisation comprising Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. In addition to concluding the 2009 ASEAN Comprehensive Investment Agreement (ACIA) among its 10 members,14

ASEAN is currently a contracting party to 13 international investment agreements. The latest investment agreements were signed in 2017 with Hong Kong[15] and in 2014 with India.[16] ASEAN has also concluded regional investment treaties with China,[17] Australia and New Zealand,[18] Korea[19] and Japan.[20]

ASEAN is also in the process of negotiating a free trade agreement with the European Union (EU). At the 16th consultations between ASEAN Economic Ministers (AEM) and the EU Trade Commissioner in March 2018, officials pledged to speed up their efforts to negotiate FTAs, both at the bilateral level and at the region-to-region level.[21] Negotiations are also ongoing with Canada.[22]

Another important development in treaty negotiations in Asia is the Regional Comprehensive Economic Partnership (RCEP), for which negotiations were officially launched in 2012. RCEP covers trade in goods and services, investment, intellectual property, and competition policy. Its aim is to create a 'modern, comprehensive, high-quality and mutually beneficial economic partnership agreement among the ASEAN member states and ASEAN's FTA partners'.[23] RCEP is being negotiated by 16 Asia-Pacific countries[24] with the aim of being finalised in November 2018.[25]

RCEP's final language on ISDS has yet to be revealed. It is also not clear what types of investments would be protected by RCEP and whether RCEP's scope would differ from those of existing agreements.[26] Nonetheless, the latest media statement from the Fourth RCEP Intersessional Ministerial Meeting in March 2018 announced that there was a 'growing convergence among [RCEP Participating Countries] on the outstanding issues on investment.'[27]

The increasing importance of the Asia-Pacific region in investment trade talks is evinced by Japan's role in spearheading the negotiations of the CPTPP after the United States withdrew from the TPP in January 2017.[28] Japan persuaded Canada to stay in the agreement and in November 2017, Japan announced the main breakthroughs in negotiations. The Japanese prime minister, Shinzo Abe, has also expressed hope for the revival of the original 12-nation TPP trade deal with the US.[29]

In the meantime, the CPTPP was signed on 8 March 2018 between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.[30] Despite certain provisions being suspended – notably the definitions of 'investment agreement' and 'investment authorisation'[31] – the CPTPP remains largely unchanged from the TPP in relation to ISDS, and importantly, preserves the option of investment treaty arbitration for violations of the investment protection standards contained in the agreement. Notably, however, additional side letters entered into in parallel with the CPTPP by New Zealand with Brunei, Malaysia, Peru, Vietnam and Australia specifically exclude ISDS entirely or allow ISDS only if the relevant state agrees.[32] In a joint declaration, Canada, Chile and New Zealand have also stated their intent 'to work together on matters relating to the evolving practice' of ISDS, 'including as part of the ongoing review and implementation' of the CPTPP.[33]

It remains to be seen what economic and legal effects these multilateral agreements will have, and how they will interact with BITs in the Asia-Pacific region. While the aim of these agreements is to liberalise trade between signatory states, different approaches have been adopted with regard to investor protections and there has been some reluctance wholeheartedly to adopt ISDS mechanisms. New Zealand's side agreements entered into in parallel with the signing of the CPTPP are particularly reminiscent of Australia's previously stated intent to reject ISDS in new investment treaties.

REGIONAL DEVELOPMENTS

The proliferation of trade deals and negotiations described above promises a greater global impact for Asian states. Notably, recent developments in Asia have showcased the region as a marketplace for new ideas and experiments in the field of international investment law.

One type of provision that has gained traction in Asia is the use of binding statements and interpretation. In response to criticism that investment tribunals do not interpret international investment agreements (IIAs) in accordance with what the contracting states had in mind when they entered into those agreements, Asian states have concluded agreements with procedures for contracting states to issue joint interpretations of treaty provisions. For example, the ACIA contains a provision whereby the tribunal or a disputing party can request a joint interpretation of any provision of the ACIA at issue in a dispute.[34] Only if the member states cannot agree on a joint interpretation within 60 days would the tribunal be entitled to decide the issue; otherwise, any joint interpretation is binding on the tribunal.[35] A materially identical provision on joint interpretation features in the ASEAN-Australia-New Zealand FTA,[36] and a provision to the same effect is included in the ASEAN-India FTA.[37] The Canada-China BIT also provides that parties 'may take any action as they may jointly decide'[38] and in the event that the respondent state invokes a specific exception to the treaty as a defence, the contracting parties are to consult each other to determine whether such defence is valid.[39]

The China-Australia FTA (ChAFTA) goes one step further with an additional provision that enables parties to control the application of the treaty.[40] Under the ChAFTA, if an investor challenges a regulatory measure, the respondent state is entitled to issue a 'public welfare notice' explaining the basis for its position.[41] This would suspend the arbitration proceedings and trigger a 90-day consultation period with the non-disputing state.[42] If an agreement cannot be reached within that timeframe, the matter would be decided by the investment tribunal.

Another development in the field of investment treaty law that is receiving some attention in Asia consists of appellate mechanisms. Historically, decisions in investment treaty arbitrations are final and subject only to very limited grounds of review.[43] This has led to criticisms concerning the lack of corrective mechanisms if tribunals are seen as having made 'wrong' decisions.[44] Asian IIAs that contemplate the creation of an appellate mechanism include the Singapore-US FTA,[45] India's new Model BIT and the ChAFTA. The Singapore-US FTA states that the 'Parties shall strive to reach an agreement that would have [an appellate body that may be established by a separate multilateral agreement in force as between the parties] review awards' rendered under the US-Singapore FTA.[46] Similarly, the Indian Model BIT encourages the parties to 'establish an institutional mechanism to develop an appellate body or similar mechanism to review awards rendered by tribunals [under the BIT].'-[47] Under the ChAFTA, the states have an obligation 'to commence negotiations with a view to establishing an appellate mechanism to review awards' within three years after it enters into force.[48]

The appeal mechanism provision has more teeth in the recently negotiated EU-Singapore Investment Protection Agreement and EU-Vietnam FTA, as these agreements effectively establish a permanent Appeal Tribunal to hear appeals from the awards issued by the permanent investment tribunal (also established by the agreements and further discussed below).49 The grounds for appeal are:

- error in the interpretation or application of the applicable law;
- manifest error in the appreciation of the facts, including the appreciation of the relevant domestic law; and
- the grounds provided in article 52 of the ICSID Convention.50

The EU-Singapore Investment Protection Agreement and EU-Vietnam FTA also provide a novel provision for a permanent investment tribunal.51 The tribunal will comprise six members under the EU-Singapore Investment Protection Agreement and nine under the EU-Vietnam FTA – one-third from the EU, one-third from Singapore or Vietnam (as the case may be) and one-third from third countries – and the tribunal will hear cases in divisions of three members, chaired by the national from a third country. The members will be paid a retainer fee 'to ensure their availability',52 and such retainer fee may be permanently transformed into a regular salary,53 in which case the members will serve full-time on the tribunal and cannot accept other engagements.

NATIONAL DEVELOPMENTS

CHINA

China's One Belt One Road or Belt and Road (OBOR) initiative has generated substantial commentary and analysis since its launch in 2013. It is a development strategy that seeks to enhance land-based (the belt) and sea-based (the road) connectivity between China and major markets in Europe, Asia and the Middle East through massive investments in infrastructure development. OBOR has become a centrepiece of China's foreign policy and is part of Chinese president Xi Jinping's ambitious plan to deepen economic ties with the world and reshape international trade.54 So far, 72 countries are participating in the initiative, and the list continues to grow.55

Despite the enormous financial resources China has pledged for the OBOR initiative, it is not yet clear how much investment protection will be available to OBOR investors.56 This is an important issue for OBOR investors because infrastructure projects present heightened investment risks. These projects are characterised by complex structures and arrangements, and they involve payments of large sums of money over an extended period of time, often in countries that are politically or economically unstable. As implementation of the OBOR initiative unfolds, it is likely that investment disputes relating to it will also arise.

China is currently party to 109 BITs that are in force (the largest number in Asia and second in the world only to Germany), and 19 treaties with investment provisions that are in force.57 China has investment agreements with the majority of the OBOR countries.58

Many Chinese BITs adopt a broad definition of 'investment'.59 Thus, although the outcome of individual cases will depend on the specific facts and legal instruments involved, as a theoretical matter, the employment of such a broad definition suggests that the infrastructure investments contemplated by the OBOR initiative would generally be covered.-60

In addition, as a general matter, in many cases Chinese BITs would also likely protect the Chinese state-owned enterprises (SOEs) that can be expected to lead OBOR investments.61 The more recent Chinese BITs expressly include SOEs within the definition of 'investor', while older Chinese BITs do not on their face exclude SOEs.62 The argument that Chinese SOEs would be protected even by the older Chinese BITs because they define 'investor' broadly enough to encompass SOEs, will certainly be made in future disputes.

In Beijing Urban Construction Group v Yemen, Chinese SOE Beijing Urban Construction Group Co Ltd (BUCG) was allowed to bring its claims of expropriation against Yemen under the 2002 Yemen-China BIT. That case concerned a US$100 million contract to construct part of the terminal at Sana'a International Airport in Yemen.63 Yemen did not challenge BUCG's standing as an 'investor' under the BIT, although it raised the objection that BUCG, as an SOE, did not qualify as a 'national of another Contracting State' under article 25 of the ICSID Convention.64 The tribunal rejected Yemen's objection, concluding that BUCG was not acting as an agent of the Chinese government or fulfilling Chinese governmental functions in Yemen.65

In terms of the substantive investment protections in Chinese investment agreements, most Chinese BITs with countries participating in the OBOR initiative include provisions for fair and equitable treatment (FET).66 All Chinese BITs with OBOR countries also prohibit expropriation or nationalisation of investments unless the taking is for the public interest, is non-discriminatory and in accordance with the law, and is accompanied by compensation.67 Most of these BITs also protect against indirect expropriation with phrases such as measures 'having an effect equivalent to' or 'tantamount to' expropriation.68

Finally, on the issue of access to ISDS, China's BITs have undergone an evolution over time. The BITs may be grouped into three different generations.69 The first generation of Chinese BITs, concluded between 1982 and 1989, either do not permit ISDS or limit its availability to disputes concerning the amount of compensation for expropriation.70 The second generation, from 1990 to 1997, also restrict access to ISDS but contain references to ICSID arbitration, particularly in those BITs concluded after China acceded to the ICSID Convention in 1993.71 The third generation, comprising BITs concluded after 1997, generally contain comprehensive ISDS provisions granting access to international arbitration for all investor-state disputes.72 Accordingly, the availability of ISDS would depend on which BIT applies.

The jurisdictional restrictions found in the older Chinese BITs have been invoked against Chinese investors, sometimes successfully. For example, in China Heilongjiang v Mongolia,73 the tribunal dismissed for lack of jurisdiction three Chinese investors' claims against Mongolia.74 Mongolia had cancelled a licence for the claimants to operate in the Tumurtei iron ore mine and the claimants sought to have the licence reinstated.75 The claims were brought under the 1991 China-Mongolia BIT, which provided that disputes 'involving the amount of compensation for expropriation' may be submitted to arbitration.76 Although the award is not public, reports indicate that the tribunal had concluded that the BIT's dispute settlement clause restricted its jurisdiction only to disputes over the amount of compensation for expropriation, not the legality of an expropriation.77

China Heilongjiang stands in contrast to three other cases brought by investors under Chinese BITs, namely Tza Yap Shum v Peru,78 Sanum Investments v Laos,79 and Beijing Urban Construction Group v Yemen.80 In Tza Yap Shum and Sanum Investments, the tribunals interpreted the language 'involving the amount of compensation for expropriation' in the dispute settlement clause of the respective BITs81 broadly to mean not only the calculation of the amount owed, but also other issues inherent in an expropriation, such as whether the expropriation had been carried out in compliance with the applicable BIT's requirements.82 The tribunal in Beijing Urban Construction Group also adopted a broad interpretation of similar language in the China-Yemen BIT's dispute settlement clause.83 The relevant treaty language in the China-Peru BIT and the China-Laos BIT is identical to that of the China-Mongolia BIT interpreted in China Heilongjiang. Although it is unknown why the China Heilongjiang tribunal chose to diverge from the approach taken by the earlier tribunals, China Heilongjiang is the most recent decision of the four cases on this issue and demonstrates the real risk that a Chinese investor may face substantial jurisdictional challenges in attempting to submit its claims against a foreign state to arbitration.

A temporal objection to jurisdiction was also invoked successfully against Chinese investors in Ping An Life Insurance v Belgium.84 In that case, the claimants alleged that Belgium had expropriated their 2007 investment in a banking and insurance group and sought to arbitrate the dispute in ICSID under the 1986 and 2009 BITs between China and the Belgian-Luxembourg Economic Union (BLEU). The 1986 BIT's dispute settlement clause does not contemplate ICSID arbitration as such and also restricts arbitration to disputes that '[arose] from an amount of compensation for expropriation, nationalisation or other similar measures'.85 By contrast, the 2009 BIT grants access to ICSID arbitration for all legal disputes between an investor of one state and the other state.86 Because the dispute crystallised before the 2009 BIT entered into force, the claimants sought to rely on the substantive obligations contained in the 1986 BIT as well as the procedural remedy of the 2009 BIT. The tribunal dismissed the case for lack of temporal jurisdiction, concluding that 'the more extensive remedies under the 2009 BIT' were not available to 'pre-existing disputes that had been notified under the 1986 BIT but not yet subject to arbitral or judicial process'.87 This case also highlights the risk that restrictive dispute settlement provisions in China's older BITs may be used against Chinese investors seeking to protect their OBOR investments, in the absence of any broader investment protections that may be negotiated as OBOR moves forward.

Various Chinese arbitral institutions also have begun to offer themselves as alternative fora for the resolution of OBOR-related investment disputes. Effective 1 October 2017, China International Economic and Trade Arbitration Commission (CIETAC), a leading arbitration institution in China, launched special international investment arbitration rules with the resolution of OBOR-related claims in mind.88 In conjunction with the launch of these new rules, CIETAC established an Investment Dispute Resolution Center in Beijing to hear such disputes.89 The rules also authorise CIETAC's Hong Kong Arbitration Centre to administer such arbitrations.90 In a similar vein, the Shenzhen Court of International Arbitration (SCIA) updated its arbitration rules in 2016 to provide that it would accept and administer investor-state arbitrations under the UNCITRAL Arbitration Rules.91

As the discussion above may suggest, China could possibly do more as OBOR unfolds to develop a comprehensive and uniform approach to investment protection, and particularly access to investor-state arbitration. One interesting development on this front, in addition to the developments with regard to rules and institutions noted above, is that China has announced plans to establish international courts in China to resolve OBOR-related investment and commercial disputes.92 It is unclear, however, whether and to what extent these courts would have jurisdiction over another sovereign state and thus provide a viable alternative forum for Chinese investors to pursue investor-state claims.

Finally, although not specifically related to OBOR, it is perhaps interesting to note when considering China's experience with ISDS that there have been only three known arbitrations involving China as a host state,93 and the only one that has proceeded to judgment was recently dismissed in a rarely used summary proceeding under ICSID Arbitration Rule 41(5). In Ansung Housing v China, Ansung, a Korean property developer, commenced ICSID arbitration against China under the 2007 China-Korea BIT alleging violations of an agreement to build a luxury golf course project in China. The tribunal held that Ansung's claim was time-barred under the China-Korea BIT, which provides that an investor could not submit a claim to international arbitration 'if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage'.94 Ansung had filed its request for arbitration in October 2014, more than three years after the date on which it first acquired knowledge of loss or damage in 'late summer or early autumn 2011'. 95 The tribunal also decided that Ansung could not save its time-barred claim through the most favoured nation (MFN) clause of the BIT,96 because that clause did not apply to the scope of a state's consent to arbitrate with investors, including temporal limitation periods.97

INDIA

Alongside China, India is one of the fastest growing economies in the world.98 The United Nations Conference on Trade and Development (UNCTAD) reported in 2017 that it was the third most attractive destination for FDI, after China and the United States.99 India's investment policy from the 1990s called for the use of BITs to attract foreign investors. Between 1994 – when it signed its first BIT, with the UK – and 2011, India signed an average of four to five BITs per year, granting broad investment protections to foreign investors.100

India's stance on investment treaties underwent a dramatic reversal in 2011, when for the first time India was found to have violated BIT obligations, in the White Industries case.-101 Before White Industries, only nine reported BIT cases had been brought against India, and they all had settled.102 White Industries concerned prolonged judicial delays that left the claimant unable to enforce an arbitral award against an Indian state-owned mining company. Although the tribunal found that the delays did not constitute a denial of justice, it applied an 'effective means' standard from another Indian BIT through the MFN clause of the Australia-India BIT.103 The tribunal held that India had failed to provide White Industries with an effective means of asserting claims and enforcing rights, and it ordered India to pay the amounts due under the award plus interest, as well as most of the claimant's costs.104

At least 14 investment treaty cases against India followed White Industries,105 challenging the legality of India's actions ranging from the assessment of retrospective taxes,106 to the cancellation of spectrum licenses107 and telecom licences,108 to criminal investigations of bribery allegations.109 All of these cases remain pending, and India has reportedly already been found in breach of its investment treaty obligations in at least two of the cases: Deutsche Telekom and CC/Devas.110

White Industries and subsequent cases prompted a reevaluation of India's investment treaty programme: India adopted a new policy of terminating its existing BITs and published a new, narrower Model BIT.111 In July 2016, India sent BIT termination notices to as many as 57 countries.112 With regard to some 25 BITs that India could not terminate unilaterally because their initial terms had not expired, India requested to enter into joint interpretative statements with the other countries to prevent expansive interpretations by tribunals.113 The first Joint Interpretative Note was signed with Bangladesh in July 2017.114

The new Model BIT was approved by the Indian Cabinet in December 2015 and introduced significant changes to India's investment regime. The scope of protected investors and investments has been narrowed, specifically excluding portfolio assets and intangible rights-115 and requiring protected investors to have 'substantial business activities' in the home state where they are incorporated.116

The Model BIT also does not apply to tax disputes117 – a provision clearly intended to foreclose the possibility of future claims like the ones brought by Vodafone, Cairn Energy and Vedanta Resources. It also contains a general exceptions provision reserving India's right to implement and enforce regulatory measures in the public interest, for example to protect public morals or to conserve the environment.118 Additionally, the Model BIT specifically excludes from the scope of the expropriation clause state measures that are 'designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment.'119

Other notable changes are the deletion of the FET and MFN clauses, which featured in most of India's existing BITs,120 and the addition of conditions precedent before ISDS becomes available to a foreign investor. For example, investors must first exhaust all available local remedies, and there are strict limitation periods for submitting claims to arbitration.121

Since India adopted the Model BIT, it has successfully concluded a BIT with Cambodia which reportedly adopts almost all of the Model BIT's text.122 India is also negotiating a BIT with Brazil that reportedly replaces ISDS with other alternative dispute resolution mechanisms such as an ombudsman, state-state arbitration and 'dispute prevention procedures.'123

India has maintained its scepticism of ISDS; in July 2017, a High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India issued a report suggesting that India should consider 'shift[ing] away entirely from investor-state dispute resolution', or including appellate mechanisms in BITs if India decides to maintain ISDS.124

Although India's efforts to protect its national interests are commendable, they arguably fail to give sufficient consideration to India's interests as a home state. India's annual outward FDI has increased from less than US$100 million in the early 1990s to over US$5 billion by 2016, although the numbers have steadily declined from a peak of US$21 billion since the 2008 financial crisis.125 Indian investors have also commenced five arbitrations against other states, the latest filed in September 2017 against Bosnia and Herzegovina.-126 Accordingly, India's investment treaty policy should be calibrated to balance its right to regulate with the need to protect the overseas investments of its nationals.

OTHER DEVELOPMENTS

Beyond China and India, there has also been plenty of activity in other Asian countries concerning ISDS, both in terms of defending investor-state claims and undertaking new initiatives to develop ISDS in the region.

ARBITRATIONS TO WATCH

In the past six years, South Korea has been on the receiving end of three investor-state disputes, two of which are still ongoing.127 The Lone Star case, in particular, has received substantial media attention and generated hostility towards ISDS in South Korea.128 This case involves a protracted and acrimonious dispute between South Korea and US private equity firm Lone Star Funds over the latter's investment in Korea Exchange Bank (KEB) and the taxation of Lone Star's investment gains. Lone Star acquired a majority stake in KEB in 2003, at a time when KEB was reportedly in dire financial straits. Korean law prohibited the sale of a majority stake in a Korean bank to Lone Star unless that bank was in financial distress. As the economy rebounded, the value of KEB shot up and the Korean government began to scrutinise the acquisition based on suspicions that KEB might not actually have been in financial distress at the time of the acquisition. A governmental agency subsequently announced that Lone Star's acquisition of KEB was illegal and financial regulators blocked Lone Star's attempts to sell KEB between 2005 and 2011. Lone Star eventually sold its majority stake in KEB in 2012. The Korean government also imposed 85 billion won in taxes on Lone Star in respect of the sale of all its investments in South Korea.

Lone Star commenced ICSID arbitration in 2012 under the 1974 Korea-BLEU BIT, demanding over US$4.6 billion in damages allegedly caused by South Korea's actions, which allegedly delayed the KEB sale process and depressed the sale price, and subjected Lone Star's investment gains to unjustified taxation. A hearing on jurisdiction took place in January 2016 and a hearing on the merits followed in June 2016.129 The award is yet to be rendered, but given the amount of public attention to this dispute in South Korea, whatever the outcome, it is expected to have a significant influence on the country's approach to foreign investment going forward. Already, ostensibly due to the Lone Star dispute, South Korea has adopted a policy of including a denial of benefits clause in all of its BITs, in order to exclude so-called 'mailbox companies' from the scope of investment protections, whereas only one Korean BIT had such a clause before Lone Star commenced arbitration.130

Indonesia has also been in the news as the respondent state in a number of investor-state arbitrations. While it has generally prevailed in the cases brought against it – UNCTAD reports that cases against Indonesia were either decided in its favour, or discontinued, or settled131 – it is worth noting that the latest two investor-state arbitrations commenced against Indonesia in recent years involved investors of other Asian countries: India132 and Singapore.133 As Asian countries continue to strengthen their economic ties with one another, it is likely that such arbitrations between investors of one Asian country and another Asian country will become more common.

ISDS INITIATIVES

Alongside regional trade agreements and the concurrent development of ISDS, there have been important initiatives in the region, in Singapore and Hong Kong.

First, the Investment Arbitration Rules of the Singapore International Arbitration Centre (SIAC IA Rules) came into force in January 2017, becoming the first set of investment arbitration rules to be promulgated by a private arbitral institution.134 Commentators have highlighted that the SIAC IA Rules 'actively address some of the main points of criticism which have been raised against investment arbitration in recent years, in particular, with respect to the transparency of proceedings and the participation of non-disputing stakeholders'.135 These rules showcase Singapore's continued dedication to becoming a hub for international dispute resolution.

Second, in 2017, both Singapore and Hong Kong legalised third-party funding (TPF) in international arbitrations seated in those jurisdictions,136 following the meteoric rise in demand for TPF in international arbitration.137 The increased availability of TPF may well encourage both prospective claimants and respondent states to arbitrate investor-state claims in Singapore or Hong Kong, as TPF may ease the financial burden of prosecuting or defending against those claims. This could increase the number of investment treaty arbitrations in Asia, although the impact of TPF in Hong Kong and Singapore on the volume of such arbitrations remains to be seen.

CONCLUSION

It remains to be seen whether and to what extent the new investment protection standards and approaches to ISDS that Asian countries are adopting or proposing are here to stay, as they have not yet been tested. The trend certainly seems to be that ISDS will at least persist in one form or another in Asia, and perhaps grow. As Asian economies continue to expand, their approach towards and use of ISDS will surely be closely watched, with one possible outcome being that at least some of their continued experimentation with new ideas could lead to improvements to the current international investment regime.

Endnotes

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