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Running a marathon: the evolution of investment disputes in the Asia-Pacific region

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Summary

IN SUMMARY

This article discusses the industrialisation of Asia-Pacific states and the rapid growth of export-oriented industries in the region, which has contributed to the redirection of foreign investment to and from such states. As a consequence, Asia-Pacific states have rapidly adopted investment treaties with protections that are beneficial for states and investors alike. Investor–state dispute settlement, which has been on the rise for the past several years in the region, is expected to continue its upward trajectory in the short to medium term.

DISCUSSION POINTS

- Rapid adoption of investment treaties by Asia-Pacific states
- Recent treaties seek to strike better balance between investor and state protection
- Anticipated trends include shift towards mediation or conciliation

REFERENCED IN THIS ARTICLE

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- *Qiong Ye v Cambodia*
- *Axiata Investments (UK) Limited v Nepal*
- *Barrick (PD) Australia Pty Limited v Papua New Guinea*
- *AsiaPhos Limited v China*
- *Munshi v Mongolia*
- *Dangelas v Viet Nam*
- *Shift Energy v Japan*
- *KLS Energy Lanka Sdn Bhd v Sri Lanka*

INTRODUCTION

Global foreign direct investment (FDI) continues to flow to the Asia-Pacific region from a diversified pool of investors. 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[1] 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'.[2] 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 in the 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 of 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 (1980s–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 by the industrialisation of Southeast Asian economies, the rapid growth of export-oriented industries and India opening itself up to foreign capital inflows.[3]

The rapid adoption of bilateral investment treaties (BITs) 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 BITs 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 BITs in force with an Asia-Pacific state party by the turn of the century. What was a sprint evolved into a marathon, with a further 241 BITs 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 inflows.[4]

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 BITs. 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 BITs and the

investment chapters of free trade agreements (FTAs). A number of states went further by terminating their first-generation ISDS-backed BITs.

Australia committed to avoiding ISDS mechanisms in future trade agreements[5] after its first experience as a respondent to the ***Philip Morris*** claim.[6] Following the first public investment treaty award against India in the ***White Industries*** case,[7] India issued at least 57 unilateral termination notices under its BITs to the applicable counterparty states.[8] Similarly, between 2004 and 2014, Indonesia announced plans to terminate, and terminated several of, its BITs while renegotiating new investment treaties with more limited claims exposure from foreign investors.[9]

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

More recently, the Asia-Pacific region has emerged as a significant capital exporter.[10] 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 towards 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 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 European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part	EU member states, Singapore	Signed 15 October 2018, not in force	Comprehensive ISDS mechanism in Chapter 3, covering consultation, mediation and arbitration
Comprehensive and Progressive Agreement for Trans-Pacific Partnership	Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam	Signed 8 March 2018, entered into force 30 December 2018	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	ASEAN member states, Australia, China, Japan, New Zealand, South Korea	Signed 15 November 2020,‡ 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	Second round of drafting completed in November 2022 and third round scheduled for March 2023§

* See also the Trans-Pacific Partnership Agreement (signed on 4 February 2016 ([2016] ATNIF 2), not in force). Article 1.1 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership incorporates the former's provisions with some exceptions.
† [2018] ATS 23.
‡ [2022] ATS 1.
§ As at April 2023.

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.[11]

Second Generation (1990–1997)

Access to ISDS remained generally restricted to disputes concerning the amount of compensation for expropriation. Nevertheless, these BITs 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, in the event that 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.[12]

Third Generation (1998–present)

BITs 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[13] – a tendency that, some say, has contributed to an increasing Americanisation of Chinese investment treaties.[14]

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.[15] 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.[16] Treaties also include security exceptions, preserving the ability of the host state to protect its national security without the risk of breaching a treaty.[17] Some investment treaties incorporate labour, health and environmental standards, requiring states not to lower such standards to attract foreign investment.[18] For example, the broad obligation in the 2021 BIT between Georgia and Japan imposes obligations regarding health, safety and environmental measures, inclusive of labour standards, on inward investment from all investors.[19]

While 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.-[20] 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.[21]

To meet 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 on 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 renewables 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.[22]

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.[23]

With still less than 10 per cent of BITs in the Asia-Pacific region containing an investment obligation exemption for implementing environmental regulations,[24] 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.[25] China, Japan and South Korea have, for example, committed to cease public support for coal investments abroad.[26] It is clear that the transition from carbon-based energy generation to renewables will rely on private markets.[27] Those private markets, however, will be regulated by government policies and laws aligned with a net-zero target.[28] 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.

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.[29]

Number Of Cases

Traditionally, Asia-Pacific participation in investor–state dispute resolution was not significant. According to one study, only one investment arbitration case was brought against an Asia-Pacific-state in the 1990s, while nine were brought in the 2000s and 16 between 2010 and 2015.[30] 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.[31]

Contrary to this view, the number and yearly average of investor–state claims against Asia-Pacific states increased significantly from 2011, rising from an average of 3.44 cases per year between 1987 and 2000 to an average of 9.2 cases per year between 2011 and 2015.[32] In 2015, one commentator posited that this 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.

As predicted, an empirical analysis of investor–state disputes that occurred between 2018 and 2022 shows a continued growth in ISDS in the region. As outlined in Table 2 below,[33]

during the relevant period, 51 investment cases were commenced involving an Asia-Pacific party as either claimant or respondent, with 30 cases as a respondent and 33 cases as a claimant (of which 12 cases involved Asia-Pacific parties on both sides). Investor–state disputes involving Asia-Pacific parties also represent a sizable portion of all recorded investor–state disputes over the same period. As at 31 July 2022, 329 cases were ongoing, of which 15.2 per cent involved at least one Asia-Pacific party and 9.1 per cent were brought against an Asia-Pacific state.[34]

Table 2: Cases Per Year (2018–2022)

2018	9	8	3
2019	4	5	1
2020	13	8	7
2021	5	7	1
2022	2	2	Zero

It is also interesting to observe the distribution of investor–state disputes within the region based on the nationality of claimants and respondent states. Most prominent are China, India and South Korea, all of which have been at the upper echelon of activity as both respondents and states of the claimants' nationality, 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.-[35] 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.

Other Asia-Pacific states have featured on either side of investor–state disputes. Five Australian and five Singaporean investors have brought ISDS proceedings in the past five years, while Malaysian investors brought three. In terms of state respondents, ISDS claims have been brought against a range of Asia-Pacific states, including first-time respondents such as Cambodia,[36] Nepal[37] and Papua New Guinea.[38] This is reflective of the increased participation of the Asia-Pacific region in ISDS-backed investment treaties and increased FDI inflows to the region.

Underlying Treaties

Of the 51 ISDS cases over the past five years, 34 were brought under BITs, six under the investment chapter of an FTA, four under the Energy Charter Treaty, and the remainder under other 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).[39]

Between 2018 and 2022, the preference seems to have changed in favour of ad hoc arbitration under UNCITRAL's rules over ICSID-administered arbitration. As outlined in Table 3 below, only 19 of the 51 cases identified in the Asia-Pacific region were conducted under the auspices of ICSID. 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 Stockholm Chamber of Commerce arbitration rules.

This appears to follow a broader trend of investors choosing rules other than the ICSID arbitration rules.[40] 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;[41]
- 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.[42]

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

Table 3: Arbitration Rules Utilised (2018–2022)

Rules	Overall	Asia-Pacific claimants	*Asia-Pacific respondents*
ICSID and ICSID Additional Facility	19	10	15
UNCITRAL	20	13	10
Stockholm Chamber of Commerce	1	1	1
Ad hoc	3	1	3
Unknown	8	5	4

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 electricity and gas supply, construction, 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.[43] Cases in the mining sector involved claims:

- of direct and indirect expropriation of mining investments and assets;[44]
-

arising out of the blocking, suspension, freezing or termination of projects, licences, assets and contracts associated with mining;[45] and

- in relation to the retroactive application of a capital gains tax to share sales.[46]

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.[47]

Table 4: Disputes By Sector (2018–2022)

Mining and quarrying	10	Mining of coal, metals, minerals and ores; extraction of oil and gas
Electricity, gas, steam and air conditioning supply	8	Renewable energy sources, including wind and solar; gas and power company investments
Construction	7	Key public infrastructure and large-scale property developments
Information and communication	6	Telecommunication investments, including infrastructure and enterprise
Real estate activities	6	Real estate development and enterprise
Manufacturing	4	Steel, elevators, aircraft engine and other technical engineering
Financial and insurance activities	2	Banking; mergers and acquisitions
Water supply; sewerage, waste management and remediation activities	1	Waste management services
Transportation and storage	1	Airport services
Administrative and support service activities	1	Vessel charter business (oil and gas)
Wholesale and retail trade; repair of motor vehicles and motorcycles	1	Investment in a Chinese business centre in Finland
Arts, entertainment and recreation	1	Refusal of local government to authorise jazz festival
Unknown	3	Unknown

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[48] and Japan[49] (in Japan's first ISDS case) regarding reforms to the subsidy programmes that affect relevant domestic renewable energy sectors and project cancellations.[50] 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 and M&A transactions. 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 Sweden following 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.[51]

Regarding M&A transactions, claims were brought against South Korea by various US hedge funds and minority shareholders of Samsung C&T, claiming that South Korea had breached provisions in the investment chapter of the FTA between South Korea and the United States by wrongfully interfering in a merger of Samsung C&T with Cheil Industries Incorporated on terms favourable to a large domestic shareholder, which devalued the claimants' investment.[52]

PROCEDURAL INNOVATIONS

Despite the rising number of ISDS claims brought against Asia-Pacific states, there has not been a widespread denunciation of ISDS within the region (although Australia has recently announced that it would not support the inclusion of ISDS in future trade and investment deals).

Asia-Pacific states have, however, 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[53] and, more recently, the FTA between China and Australia[54] – 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[55] and between China and Australia.[56] 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.[57] 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, creating appeal tribunals.[58] These tribunals are empowered to hear appeals in relation to awards rendered by a standing tribunal of first instance.[59]

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

The Asia-Pacific region has led the way for 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.[60] 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.[61]

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.-[62] Under some treaties – such as the comprehensive economic partnership agreement between Indonesia and Australia, and the BIT 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.[63] 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.[64]

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.[65]

ANTICIPATED TRENDS

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.[66] 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 came into force on 12 September 2020.[67] Although it is only in force in 10 states – of which only two are in the Asia-Pacific region (Fiji and Singapore) – the Convention has been signed by several Asia-Pacific states.[68] With the United Kingdom poised for ratification,[69] accession to the Convention in the Asia-Pacific region and beyond may grow.

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.[70] 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 CONSIDERATIONS 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

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