GAR Global Arbitration Review

The Asia-Pacific Arbitration Review

2024

The state of play of investment treaty arbitration in the Asia-Pacific

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2024

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Generated: May 10, 2024

The state of play of investment treaty arbitration in the Asia-Pacific

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Summary

IN SUMMARY
DISCUSSION POINTS
REFERENCED IN THIS ARTICLE
INTRODUCTION
THE STATISTICS
INVESTMENT TREATIES AND PROCEEDINGS
CONCLUSION
ENDNOTES

IN SUMMARY

In this article, we survey the state of play of investment treaty arbitration in the Asia-Pacific region. We provide a brief overview of the region's investment treaties and review investment treaty claims that have been pursued by investors against Asia-Pacific states. We identify states that have faced claims, the industries concerned and the outcomes of such claims. As we illustrate, a diverse range of Asia-Pacific states have now faced investment treaty claims across a variety of industries and several states have taken steps to limit the potential for future claims.

DISCUSSION POINTS

- At least 111 investment treaty claims have been pursued by investors against 20 Asia-Pacific states
- Highest number of claims against India, Pakistan, South Korea, Vietnam, China and Indonesia
- Oil, gas and mining; energy; manufacturing; telecommunications; and construction investors have been the most frequent claimants

REFERENCED IN THIS ARTICLE

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- *SGS Société Générale de Surveillance SA v Philippines*
- *Shift Energy Japan KK v Japan*

INTRODUCTION

The Asia-Pacific region is the birthplace of investment treaty arbitration. In 1987, a Hong Kong investor commenced the first-ever investment treaty arbitration in ***Asian Agricultural Products Ltd v Sri Lanka***.[1] This followed the Sri Lankan government's destruction of the investor's shrimp farming property through raids on suspected Liberation Tigers of Tamil Eelam hideouts. The investor succeeded in persuading the majority of an International Centre for Settlement of Investment Disputes tribunal that the Sri Lankan government had violated its obligations to protect and secure its investments pursuant to the bilateral investment treaty (BIT) between Sri Lanka and the United Kingdom.[2]

The investment treaty arbitration industry has since proliferated and investors have pursued claims against states from all corners of the globe. In this article, we provide some background on investment treaties in the Asia-Pacific region. We explore which Asia-Pacific

states have been targeted by investors, the results, the industries concerned and the steps that several states have taken at a policy level in response to such claims.

We base our analysis on the Investment Dispute Settlement Navigator repository, which was first released by the United Nations Conference on Trade and Development in February 2021 and was most recently updated in December 2022.[3] This useful resource contains a wealth of information on all known treaty-based investor–state arbitrations. As some of these arbitrations can be kept fully confidential, there are likely to be other treaty-based investor–state arbitrations against Asia-Pacific states not included in the repository and, therefore, not identified in our analysis.

THE STATISTICS

We begin by considering statistics regarding the state of play of investment treaty arbitration in the Asia-Pacific region.

Table 1 sets out the number of investment treaty arbitrations commenced against Asia-Pacific states between 1987 (when the first investment treaty arbitration was commenced) and mid-2022.

Table 1: Investment Treaty Arbitrations (1987–2022)

State	Number of arbitrations
India	29
Pakistan	12
South Korea	10
Vietnam	9
China, Indonesia	8
Mongolia, Philippines	6
Sri Lanka	5
Laos	4
Malaysia	3
Australia, Thailand	2
Bangladesh, Cambodia, Japan, Myanmar, Nepal, Papua New Guinea, Taiwan	1

Evidently, many states across the Asia-Pacific region have now faced investment treaty arbitration. Only a minority of Asia-Pacific states have not yet faced any investment treaty arbitrations including, most prominently, New Zealand and Singapore.

The number of investment treaty arbitrations faced in the region is perhaps not as high as one might have expected. As at 31 July 2022, there had been 1,230 known investment treaty arbitrations worldwide, but only 111 of these (9 per cent) were commenced against Asia-Pacific states. The region accounts for 60 per cent of the world's population[4] and its share of global gross domestic product has continued to grow, representing 64 per cent

of global GDP growth for the past decade, with the region now accounting for 44 per cent of global GDP.[5] As identified below, Asia-Pacific states have entered into several hundred BITs. Seen in this light, Asia-Pacific states have faced a disproportionately low number of investment treaty arbitrations.

Table 2 below sets out the industries to which the 111 investment treaty arbitrations commenced against Asia-Pacific states between 1987 and mid-2022 relate.

Table 2: Industry Spread (1987–2022)

Industry	Number of cases
Oil, gas and mining	20
Energy	19
Manufacturing	13
Telecommunications	11
Construction	9
Real estate	9
Financial services	6
Casinos and gaming	4
Transport and storage	3
Aviation	2
Water supply	2
Agriculture	1
Arts and entertainment	1
Life sciences	1
Other	10

As Table 2 shows, investors from a wide variety of industries have pursued investment claims against states. While the energy and oil, gas and mining industries have accounted for 35 per cent of cases, and the construction industry for 8 per cent of cases, many other economic sectors have also been engaged.

Table 3 sets out the status and outcome of the 111 known investment treaty arbitrations.

Table 3: Status Of Investment Treaty Arbitrations (1987–2022)

Status	Number of cases
Pending	38
Settled	20
Discontinued for unknown reasons	9

Investor succeeded	15
State succeeded	25
Unknown	4

Table 4 sets out the basis on which tribunals determined the 40 known cases against Asia-Pacific states in which awards have been issued.

Table 4: Basis Of Determination (1987–2022)

Determination	Number of cases
Claims dismissed on jurisdictional grounds (state succeeded)	16
Claims dismissed on the merits (state succeeded)	9
Claims allowed on the merits (investor succeeded)	15

The host state succeeded in 62.5 per cent of cases determined by tribunals, including in 40 per cent of cases on the basis that the tribunal lacked jurisdiction.

It is commonplace for states to raise jurisdictional objections to investment treaty claims. Often, proceedings are bifurcated, with a separate jurisdictional phase taking place before the tribunal determines whether the investor's claims should be heard on the merits. When determining jurisdiction, tribunals will consider whether they have subject matter, personal and temporal jurisdiction. Tribunals need to establish the consent of the host state to submit the dispute to arbitration. The investor must also qualify as a protected investor under the treaty. Its investment must likewise qualify as a protected investment under the treaty and it must have been protected at the time of the host state's alleged breaches of its obligations. The high number of claims dismissed on jurisdictional grounds, as outlined in Table 4, highlights the importance of thoroughly assessing jurisdictional arguments before commencing an investment treaty arbitration.

INVESTMENT TREATIES AND PROCEEDINGS

The statistics above demonstrate that investment treaty arbitration has gained a strong foothold in the Asia-Pacific region. In this section, we provide some further background on investment treaties in the region and the nature of the investment treaty arbitrations that have taken place.

Foreign direct investment (FDI) has been instrumental for economic development in the Asia-Pacific region. In a bid to attract FDI, Asia-Pacific states have sought to modernise their laws and policies governing foreign investment; notably, by embracing BITs, which are intended to encourage cross-border investment by extending various protections to foreign investments (ie, promises of non-discrimination, and fair and equitable treatment). Typically, BITs also grant foreign investors the right to bring their claims directly against host states through investor–state dispute settlement (ISDS) mechanisms.[6]

At the start of the 1990s, Asia-Pacific states had only entered into around 60 BITs.[7] In the 1990s, BIT activity gained momentum in the region as states entered into 369 BITs.[8] This boom mirrored growth in the number of BITs concluded worldwide.[9] The successful

outcome for the investor in the first-ever investment treaty arbitration of *Asian Agricultural Products Ltd v Sri Lanka*[10] did not dampen the appetite of Asia-Pacific states for agreeing to additional protections for foreign investors by signing up to investment treaties containing ISDS mechanisms. This is likely because the investor's successful claim in that case did not lead to an immediate uptick in investment treaty arbitrations. In fact, it was six years until another investor commenced the second investment treaty arbitration.[11]

During the 1990s, Malaysia was the only Asia-Pacific state to face investment treaty arbitrations. Two were commenced, both brought by the same investor. The first dispute concerned a construction project and is reported to have been amicably resolved.[12] In the second dispute, the investor claimed that Malaysia's imposition of exchange controls caused losses to his portfolio investment in securities listed on the Kuala Lumpur Stock Exchange and violated the terms of the BIT between the Belgium–Luxembourg Economic Union and Malaysia.[13] The tribunal dismissed the investor's claim on jurisdictional grounds on the basis that the investment did not fall within the scope of protected investments under the BIT.[14]

Asia-Pacific states entered into a further 241 BITs in the 2000s. At the start of the millennium, there had been only three known investment treaty arbitrations against states in the region. However, as the first decade of the 2000s progressed, it became apparent that investors were starting to wake up to the possibility of using investment treaties to seek recourse against Asia-Pacific states to recover their alleged investment losses. By the end of the decade, Bangladesh,[15] India,[16] Indonesia,[17] Malaysia,[18] Mongolia,[19] Myanmar,[20] Pakistan,[21] the Philippines,[22] Sri Lanka,[23] Thailand[24] and Vietnam[25] had faced a total of 25 further investment treaty claims.

These cases included the first wave of investment claims against Asia-Pacific states, with India facing nine claims under various BITs commenced by companies that had invested in the failed Dabhol power plant project in Maharashtra. Following initial investments in the project, a change of government in Maharashtra saw a renegotiation of the terms of the project and a cancellation of various associated payments. Ultimately, India settled all of these claims.

These cases also gave rise to two notable decisions issued in two separate investment treaty arbitrations commenced by the same investor on the effects of an umbrella clause contained in a BIT. An umbrella clause is a common provision in BITs and brings obligations or commitments entered into by the host state in connection with an investment within the protection of the treaty. An umbrella clause is often seen as a catch-all provision, which may enable a claim to be brought against a state when its acts have not otherwise breached the terms of the treaty. In *SGS Société Générale de Surveillance SA v Pakistan*,[26] the tribunal held that the umbrella clause contained in the BIT between Switzerland and Pakistan did not entitle the investor to elevate its claims based on breach of contract to a claim based on breach of treaty. In contrast, just one year later, the tribunal in *SGS Société Générale de Surveillance SA v Philippines*[27] considered this to be a highly restrictive interpretation. The tribunal held that the umbrella clause in the BIT between Switzerland and the Philippines elevated the investor's claim for breach of contract to a claim grounded on a breach of treaty. However, ultimately, the tribunal concluded that the umbrella clause in question did not override the exclusive jurisdiction clause in favour of the Philippine courts contained in the contract and stayed the proceedings pending the Philippine courts' consideration of the dispute.

Following the BIT boom of the 1990s and 2000s, in the 2010s, the number of investment treaty arbitrations increased significantly. In this decade, a total of 66 claims were commenced against Asia-Pacific states in both developed and developing economies. Investors pursued claims against Australia,[28] China,[29] India,[30] Indonesia,[31] South Korea,-[32] Laos,[33] Mongolia,[34] Nepal,[35] Pakistan[36] the Philippines,[37] Sri Lanka,[38] Taiwan,[39] Thailand[40] and Vietnam.[41]

The case commenced in 2011 by Philip Morris Asia Limited (a Hong Kong company) against Australia was particularly controversial.[42] Philip Morris challenged Australia's tobacco plain packaging legislation by alleging that, in violation of the BIT between Australia and Hong Kong, Australia had not afforded the company fair and equitable treatment and had indirectly expropriated its assets.[43] The case did not proceed to the merits. The tribunal found the claims to be inadmissible on the basis that the change in Philip Morris' corporate structure to gain the protection of the BIT at a time when the dispute with Australia was already foreseeable constituted an abuse of rights.[44]

Another controversial case concerned the claims filed against South Korea in 2012 by subsidiaries of US-based private equity firm Lone Star seeking US$4.68 billion in compensation.[45] Lone Star's subsidiaries contended that South Korea had deprived them of fair and equitable treatment and other protections guaranteed in the BIT between the Belgium-Luxembourg Economic Union and South Korea by failing to approve the purchase of Lone Star's stake in Korea Exchange Bank and by imposing capital gains taxes on the subsequent sale of the stake. Over a decade later, in August 2022, the tribunal ordered South Korea to pay Lone Star a fraction of the amount claimed (US$216.5 million plus interest).[46]

As the number of investment treaty arbitrations increased in the 2010s, the number of new BITs being signed fell dramatically as states reacted to the public backlash that adverse investment treaty arbitrations had generated. For example, in response to an increase in investment treaty claims, Indonesia announced a plan to terminate its BITs and renegotiate new ones that would limit its exposure to claims.[47] Similarly, India issued termination notices to more than 80 per cent of its BIT counterparties and adopted a narrower model BIT.[48] Australia also denounced ISDS and sought to exclude it in all future investment treaties following the claims pursued by Philip Morris in ***Phillip Morris Asia Limited v Australia***,[49] although it has since softened its position and now considers ISDS provisions on a case-by-case basis.[50]

As the popularity of BITs waned, states in the region turned to focus their efforts on the development of free trade agreements and multilateral pacts. Although FDI remains important for economic development in the Asia-Pacific region, several states are now significant capital exporters and multilateral arrangements also aim to protect the foreign investments of their nationals. Enticing inbound, and protecting outbound, FDI remains a priority for most Asia-Pacific states.

The 2010s also heralded the arrival of two trade agreements that are likely to shape global economics and politics over the coming years; namely, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in 2018[51] and the Regional Comprehensive Economic Partnership (RCEP) in 2020.[52] The CPTPP covers approximately half a billion individuals and almost 14 per cent of the global economy.[53] The RCEP constitutes the world's largest trade bloc, covering roughly 30 per cent of global GDP and representing over two billion individuals.[54] The CPTPP contains an ISDS mechanism whereas currently the RCEP does not. ISDS provisions for the RCEP are still the subject

of negotiation and, in the meantime, disputes may be referred under an inter-state dispute settlement mechanism.

Now, in the 2020s, investors are continuing to pursue investment treaty arbitrations against states in the region. Between 1 January 2020 and 31 July 2022, investors commenced at least 17 investment treaty arbitrations against Asia-Pacific states, including against Cambodia,[55] China,[56] India,[57] Japan,[58] South Korea,[59] Mongolia,[60] Pakistan[61] and Papua New Guinea.[62] These included the first-ever investment treaty claim against Japan, filed by a Hong Kong-based renewable energy company under the BIT between Hong Kong and Japan. The dispute arose following Japan's introduction of a subsidy programme to support renewable energy producers in 2012 and the subsequent scaling back of the levels of the feed-in tariffs provided.[63] Although the proceedings were highly confidential, it was reported in February 2023 that the tribunal had dismissed the investor's claims.[64]

CONCLUSION

As investors continue to seek to capitalise on the continuing economic growth throughout the Asia-Pacific region, they are also likely to continue to seek recourse to investment treaty arbitration when disputes arise with the host state of their investment and this is an available dispute resolution mechanism. By the end of the 2020s, a clearer picture will have emerged as to whether investment treaty arbitration in the region has peaked and whether this has been impacted by the multilateral arrangements that continue to be the current focus of Asia-Pacific states.

Endnotes

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