The State of Investor-State Arbitration: A Reality Check of the Issues, Trends, and Directions in Asia-Pacific

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The State of Investor-State Arbitration: A Reality Check of the Issues, Trends, and Directions in Asia-Pacific

JULIEN CHAISSE AND RAHUl DONDE*

I. Introduction

The significant increase in the number of international investment agreements (IIAs) over the past two decades has been accompanied by a meteoric rise in the number of investor-state disputes. In 2015 alone, 77 investor-state arbitrations were initiated, the highest number of cases in a single year and significantly up from the 58 arbitrations initiated in the previous year. The Asia-Pacific region itself has witnessed a startling number of investment disputes; about 21 percent of all investment disputes

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2. WIR 2016, supra note 1, at xii; IIA Issues Note 2, supra note 1, at 1-2; U.N. CONF. ON TRADE & DEV. (UNCTAD), IIA Issues Note No. 1, Recent Trends in IIAs and ISDS, 1, 5, UNCTAD/WEB/DIAE/PCB/2015/1 (Feb. 2015). This is the number of publicly known cases. As a significant number of cases are conducted in a confidential framework, the actual number of disputes is likely to be higher.
involve Asian states. The vast majority of claims are against India (twenty-two), making it the eleventh highest sued country in the world, followed by Kazakhstan (eighteen) and Kyrgyzstan (thirteen) in the Asia-Pacific. Several authors foretell a greater number of disputes involving Asian parties, mainly because of the rising number of IIAs in parallel with increasing FDI flows, coupled with a greater awareness of investment rules shown by Asian actors.

While international arbitration remains the preferred mechanism for resolving disputes between an investor and a state, several states disenchanted with, or simply critical of, investment arbitration are proposing viable alternatives. Several states are redefining the current investor-state arbitration framework and its relationship to democratic decision-making. In fact, the EU-Vietnam Free Trade Agreement contemplates the creation of an "investment court" that would resolve disputes between investors and Member States. Other states have chosen to significantly reduce the scope

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3. Proportion of investment disputes involving Asian states compared to all investment disputes, Investment Dispute Settlement Navigator, U.N. Conf. on Trade & Dev. (UNCTAD), http://investmentpolicyhub.unctad.org/ISDS (follow “advanced search” hyperlink; then enter respondent's nationality as “Asia,” dates of initiation as “1980 to 2016,” and “Search”; see total number of cases loaded; then compare to results from enter respondent's nationality as “World,” dates of initiation as “1980 to 2016,” and “Search”) (last visited Sept. 25, 2017). See also Julien Chaisse, Assessing the Exposure of Asian States to Investment Claims, 6 Contemp. Asia Arb. J. 187, 202-03 (2013) (concluding that more than ninety investment disputes involving twenty-four Asia-Pacific states were filed since 1987). Dr. Chaisse’s study did not include cases involving Asian investors, or claims filed from 2014 to 2017.


8. On February 1, 2016, the text of the EU-Vietnam Free Trade Agreement was published, following the announcement of the conclusion of the negotiations. The legal review of the text has now begun and will be followed by translation into the EU’s official languages and Vietnamese. The Commission will then present a proposal to the Council of Ministers for approval of the agreement and ratification by the European Parliament. European Commission Press Release, The EU and Vietnam finalise landmark trade deal (Dec. 2 2015), http://
of issues that can be submitted to arbitration,⁹ while still others require such disputes to be submitted first to their own domestic courts.¹⁰

In addition, the G20 recently released its “Guiding Principles for Global Investment Policymaking” (G20 Principles), which insist that “[i]nvestment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible, including access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures.”¹¹ The Principles also emphasize the importance of adequate and modern dispute resolution mechanisms: “[d]ispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse.”¹² While the ramifications of the Principles have yet to be seen, it is expected that they will have a significant resonance in the Asia-Pacific region.

In this scenario, with the Asia-Pacific region also witnessing record foreign investment inflows and outflows,¹³ it is timely to review current trends, concerns, and recent developments in investment arbitration,
particularly as they affect the region. Section II of this Article briefly introduces IIAs and investment arbitration. Section III outlines current trends and concerns, focusing on the Asia-Pacific. Section IV reviews global developments in the traditional investment arbitration framework and examines their reception in the region. Section V concludes.

II. IIAs and Investment Arbitration

IIAs may be broadly understood as treaties between sovereign states to protect and promote investments made by investors from one state in the territory of the other.\(^{14}\) They are entered into with the aim of mutual development of both states by \textit{inter alia} promising a stable and predictable business environment.\(^{15}\) IIAs may take the form of bilateral investment treaties (BITs)—\textit{i.e.} treaties between two states (such as the India-Australia BIT), or investment chapters in broader economic agreements (like Chapter 9 of the Australia-China Free Trade Agreement).\(^{16}\)

A. IIAs AND INVESTMENT ARBITRATION

IIAs are now ubiquitous, and the global network of IIAs has grown considerably over the past years. It now consists of over 3,322 treaties, thirty-seven of which were concluded in 2016.\(^{17}\) By the end of 2016, 150 economies were engaged in negotiating new IIAs.\(^{18}\)

Asian states have been prolific in entering into IIAs.\(^{19}\) More than half of investment treaties in the world involve at least one Asian state.\(^{20}\) In 2016 and 2017, three Asian states concluded the highest number of IIAs.\(^{21}\)


\(^{17}\) WIR 2016, \textit{supra} note 1, at 101.

\(^{18}\) Id.

\(^{19}\) See Chaisse, \textit{The Shifting Tectonics of International Investment Law}, \textit{supra} note 5, at 567-69.


\(^{21}\) WIR 2016, \textit{supra} note 1, at 101 (noting that Japan, the Republic of Korea, and China were among the “most active” in concluding IIAs).
B. INVESTMENT ARBITRATION

Investment arbitration—also known as investor-state arbitration—is a mechanism through which foreign investors may obtain a binding adjudication of their claims against host states that have either violated IIA obligations or, in some circumstances, have breached their contractual commitments or their national foreign investment laws.22

As we mentioned above, investment arbitration is by far the most popular mechanism for resolving investor-state disputes.23 Indeed, investment arbitration is attractive from an investor’s perspective as it allows the investor to make a claim without having to rely on its home state24 to initiate inter-state proceedings against the host state25 for a violation of the latter’s treaty obligations. This is in stark contrast to the dispute resolution procedures of the World Trade Organization (WTO) that only allow Member States to initiate proceedings against other Member States in the event of a violation.26 Investment arbitration is attractive to states too, as it improves the investment climate of the host state, making it easier for the host state to attract foreign investment.27

There is no single global forum under which investor-state disputes are conducted.28 The majority of such disputes are conducted under the procedural framework of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the ICSID Arbitration Rules.29 The next most popular procedural framework for resolving disputes is the UNCITRAL Arbitration Rules.30 Unlike ICSID, the UNCITRAL framework has no formal or permanent institutional support, and the contracting states to the IIA need not be


23. U.N. CONF. ON TRADE & DEV. (UNCTAD), IIA Issues Note No. 1, Recent Trends in IIAs and ISDS, 1, UNCTAD/WEB/DIAE/PCB/2015/1 (Feb. 2015). See also WIR 2016, supra note 1, at xii; IIA Issues Note 2, supra note 1, at 1-2.

24. ‘Home state’ refers to the investor’s state of nationality.  

25. ‘Host state’ refers to the state in which the investment is made.


29. IIA Issues Note 2, supra note 1, at 4 (finding that 62 percent of all known cases have been filed under the ICSID Convention or ICSID Additional Facility Rules).

parties to the ICSID Convention. For states like India that have not ratified the ICSID Convention, initiating a dispute under the UNCITRAL framework is an option available to investors.

Investment arbitration awards frequently run into several million U.S. dollars. Despite this, states tend to comply with them, arguably because the economic costs of non-compliance are higher than compliance. For instance, non-payment of an ICSID award may restrict a state’s ability to access World Bank funding. Further, in non-ICSID contexts, non-compliance may significantly impact a state’s sovereign risk rating, in turn increasing its borrowing costs. Other consequences could be equally severe: in 2012, the U.S. suspended Argentina’s preferential trade status due to its failure to comply with two investment arbitration awards.

Having broadly set out the contours of the IIA and investment arbitration framework, we now turn to examine trends, concerns, and developments in this framework.

III. Investment Arbitration: Trends and Concerns

The first investment arbitration arising out of an IIA was filed in 1987 by a Hong Kong corporation against an Asian state, Sri Lanka. Since then,

there have been over 800 investment claims. Significantly however, a recent study found that no investment dispute has arisen under more than 90 percent of the BITs presently in force. This Section reviews the global trends in order to assess the significance of the ISA related developments in the Asia-Pacific region.

A. **Global Trends**

The large number of investment claims led to the undertaking of studies meant to identify and analyse trends in investment arbitration. While these studies have not always reached the same conclusion (because of different units of analysis and different sources of data), they largely conclude that most disputes are decided in favour of the state.

According to a study recently conducted by UNCTAD, 495 investor-state proceedings have been concluded up to 2016. Of these, a quarter were settled, approximately one-third were decided in favour of the state, and about one-fourth were decided in favour of the investor. About half the cases that were favourable to states were dismissed for lack of jurisdiction. Where cases moved beyond jurisdiction to the merits (i.e. where a tribunal made a determination of whether the state breached any of the IIAs substantive obligations), 60 percent were decided in favour of the investor and 40 percent in favour of the state.

In another study, Franck and Wylie observed that states “win” approximately 60.4 percent of the time and investors “win” approximately 39.6 percent of the time. Miller and Hicks came to largely similar conclusions: about one-third investment claims settle amicably, and for those that are not settled, states generally win twice as many times as investors. Further, they conclude that when investors do prevail, they are

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42. WIR 2016, *supra* note 1, at 107.

43. *Id.*; IIA Issues Note 2, *supra* note 1, at 5.

44. WIR 2016, *supra* note 1, at 107.

45. *Id.*; IIA Issues Note 2, *supra* note 1, at 1.

46. A ‘win’ for the investor is defined as the awarding of one U.S. dollar or more, even if *de minimis* or less than the investor’s unrecovered expenses, to the claimant. A ‘win’ for a state is when the preceding does not occur. Franck & Wylie, *supra* note 33, at 485.

47. *Id.* at 489-90.

usually awarded a small fraction of their initial claim—usually less than 10 percent of the amounts claimed.49

The most recent study of 676 public international investment arbitrations filed from the 1990's too reached similar conclusions: cases are settled about one-third of the time, and states win more than one-third of disputed cases.50

While this empirical analysis has been criticised by some, it cannot be denied that states overall have been more successful than investors in investment arbitration, a conclusion that undermines arguments that the investment arbitration system is biased in favour of investors.51

B. TRENDS IN ASIA

Unlike the global trends in investment arbitration considered above, it is difficult to identify particular trends in investment arbitration in Asia. Prominent scholars have often reached contradictory conclusions.

In terms of the likely number of investment claims involving Asia, in 2012, Nottage and Weeramantry predicted that there would be few Asia-centric claims possibly because of institutional barriers—including costs and a paucity of experienced counsel and arbitrators in Asia—rather than any specific cultural aversion to adversarial forms of dispute resolution (such as arbitration).52 A study conducted a few months later, however, reached a different conclusion. Citing the higher number of claims seen in 2011, it predicted that the future would see more claims against Asian states as well as claims being made by Asian investors.53

In 2015, Chaisse conducted a comprehensive review of investor-state claims involving the Asia-Pacific. Like the other studies mentioned above, he noted a sharp jump in 2011 (ten claims, compared to five each year over the previous decade), which was maintained in 2012 and 2013 (thirteen claims each).54 He observed that the growth in investment claims could be explained by increased FDI, a larger number of IIAs, as well as a better understanding of these instruments by both Asian states and Asian investors.55 He too predicted an increasing number of claims involving Asia.56 Other authors have come to the same conclusion, while others

49. Id.
53. Kim, supra note 5, at 415.
54. Chaisse, The Shifting Tectonics of International Investment Law, supra note 5, at 611.
55. Id. at 621.
56. Id.
submit that it is simply too early to tell whether investor-state arbitration will proliferate in the region.57

Few studies have been conducted examining claims brought by Asian investors. Salomon and Friedrich observe that twenty-nine investment arbitrations have been brought by investors in the East Asia and Pacific region, twenty-two of which were under the ICSID Convention.58 Nineteen investment arbitrations were based on an IIA, two of these on the ASEAN Agreements.59 They note that after a period of decline in the 1990s, where only one claim was brought, there were nine new cases between 2000 and 2010, and sixteen cases from 2010 to 2015.60 Overall, 112 cases have been initiated by Asian claimants, sixty-five of which (58 percent) have been initiated in 2013 or later.61

In terms of subject-matter, oil, gas, and mining has traditionally been the dominant sector for claims in Asia.62 But “2015 saw a disproportionate increase in the number of disputes in the electric power and other energy sector[s] . . . perhaps a sign of industrial diversification in Asia . . ."63

In terms of outcome, a recent study concluded that states in Asia-Pacific have won fourteen out of the forty-one disputes considered.64 States in the Middle East, North Africa, and Europe (and the former Soviet Union) are found to win significantly more often than Asian states.65 Latest statistics, however, indicate that Asian states have won twenty-one (55 percent) out of the thirty-eight disputes that concluded with a decision on the merits.66

59. Id.
60. Id. at 838.
61. Total cases initiated by Asian claimants, and since the end of 2012, Investment Dispute Settlement Navigator, U.N. CONF. ON TRADE & DEV. (UNCTAD), http://investmentpolicyhub.unctad.org/ISDS (follow “advanced search” hyperlink; then enter claimant’s nationality as “Asia,” dates of initiation as “1980 to 2017,” and “Search”; see total number of cases loaded; then compare to results from enter claimant’s nationality as “Asia,” dates of initiation as “2013 to 2017,” and “Search”) (last visited Sept. 25, 2017).
62. Lindsay & Andemariam, supra note 20, at 1.
63. Id.; See also Julien Chaisse, Renewables Re-energized? The Internationalization of Green Energy Investment Rules and Disputes, 9 J. WORLD ENERGY L. & BUS. 269 (2016).
64. Wellhausen, supra note 51, at 131.
65. Id. at 130.
66. Proportion of claims resulting in a decision won by Asian state respondents compared to all decisions involving Asian state respondents, Investment Dispute Settlement Navigator, U.N. CONF. ON TRADE & DEV. (UNCTAD), http://investmentpolicyhub.unctad.org/ISDS (Follow “advanced search” hyperlink; then enter Respondent’s nationality as “Asia,” select “Decided in favour of State” under “Status/Outcome of original proceedings,” and “Search”; see total number of cases loaded; then compare to results from enter Respondent’s nationality as “Asia,” select “Decided in favour of State,” “Decided in favour of investor,” and “Decided in favour of neither party (liability found but no damages awarded)” under “Status/Outcome of original proceedings,” and “Search”) (last visited Sept. 25, 2017).
C. CONCERNS

The findings outlined above should lead one to conclude—or at least seriously question—the perception that investor-state arbitration favours investors over states. By contrast, however, there has been increasing criticism of investment arbitration as being pro-investor. The popular press has carried several (oft-misleading) articles on investor-state arbitration alleging, for instance, that secret trade courts pose a “real threat to the national interest from the rich and powerful.”

Nearly every aspect of investment arbitration has come under criticism. Concerns have been expressed about the biased interpretation of IIA provisions in favour of investors, the lack of predictability and transparency of arbitral proceedings, as well as the independence and impartiality of arbitrators. Other serious concerns include suggesting that investment arbitration has a chilling effect on a state’s regulatory power, and that foreign investors circumvent the operation of domestic law and national courts through the process.

Unfortunately, these criticisms have had a particular resonance in Asia. Indonesia’s termination of its IIAs, and India’s new model BIT have both been linked to the so-called pro-investor interpretation of IIA provisions by investment tribunals. Australia’s earlier rejection of investment arbitration

71. See Julia G. Brown, International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?, 3 WESTERN J. LEGAL STUD. 1 (2013) (noting that IIAs “do indeed prevent some countries from developing or enforcing effective environmental policies”).
73. See Press Release, Government of India, Model Text for the Indian Bilateral Investment Treaty (Dec. 16, 2015, 8:10 PM) (available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411) (“During the last few years, significant changes have occurred
too can be traced to a belief that investment arbitration was biased towards investors. A related concern is that of regulatory chill, with non-governmental organizations fanning the belief that Asian states fail to enact bona fide regulatory measures because of a perceived or actual threat of investment arbitration.

It is not within the scope of this Article to respond to these criticisms; this retort has been comprehensively done elsewhere and has even formed the subject-matter of a survey conducted by the International Bar Association to ascertain whether the criticism was justified. It suffices to say here that most of these concerns are overstated. In any event, significant attempts have been made to address them through the various reforms discussed below.

IV. Recent Developments

The criticism of ISDS outlined above has led to an evolution of international investment law—both in the substantive protections offered to investors, as well as in the procedural framework of investment arbitration. While most developments are incremental and address only some aspects of the system, others, such as the establishment of a permanent investment court, result in an entirely new system for investor-state disputes.


76. See, for instance, Gloria Maria Alvarez et al., A Response to the Criticism against ISDS by EFILA, 33 J. INT’L ARB. 1 (2016).

77. INT’L BAR ASS’N SUBCOMM. ON INV.TREATY ARBITRATION, REPORT ON THE SUBCOMMITEE’S INVESTMENT TREASURY ARBITRATION SURVEY 1 (2016).


These developments are particularly relevant for Asia-Pacific for several reasons. First, the backlash\(^\text{80}\) against investment arbitration has been severe in this region, with several Asian states substantially reforming their IIAs as a result.\(^\text{81}\) Others are either delaying ratification of IIAs,\(^\text{82}\) renegotiating them,\(^\text{83}\) or terminating them altogether.\(^\text{84}\) Second, by dominating global investment flows and entering into an increasing number of IIAs, "Asian actors are in a good position to translate their economic importance into global-rule-making power."\(^\text{85}\) Stephen Schill continues, "there is little doubt that Asian countries... are becoming focal points in rule-making in international investment law."\(^\text{86}\) Third, Asian states are already involved in a significant number of investment disputes that run into billions of dollars and concern increasingly sensitive issues.\(^\text{87}\) Some developments, such as transparency and third-party participation, could, thus, be usefully adopted in on-going proceedings to quell criticism that investment arbitration is a closed process. Fourth, the number of claims against Asian states is expected to rise in the future.\(^\text{88}\) Asian states should, thus, pay close attention to recent


82. See generally Yoram Haftel & Alexander Thompson, Delayed Ratification: The Domestic Fate of Bilateral Investment Treaties, 67 Int'l Org. 355 (2013).

83. This is the case with India, which has begun renegotiating 47 IIAs. See AP, India Wants New Foreign Investment Pacts to Limit Lawsuits, INDIAN EXPRESS (July 11, 2016), http://indianexpress.com/article/india/india-news-india/india-wants-new-foreign-investment-pacts-to-limit-lawsuits-2906478/.


86. Id.

87. Australia, for instance, recently won a case against Phillip Morris. Phillip Morris Asia Ltd. v. The Commonwealth of Australia, 12 (Perm. Ct. Arb. 2012); see generally Joongi, supra note 5.

developments to make sure that the oft-competing state and investor interests are adequately balanced.

It is not possible to review all the current developments in this chapter. Instead, we touch on a few procedural developments that will likely have the strongest repercussions in Asia. Some of these developments—such as controlling treaty interpretation—already exist within the Asian investment arbitration framework. Others, however, are notably absent.

A. CONTROL OF INTERPRETATION

As we mentioned above, one of the serious criticisms of the current investment arbitration framework is that investment tribunals interpret IIAs not precisely in accordance with what states had in mind when they negotiated and entered into those IIAs. Methymaki and Tzanakopoulos argue that at the time states entered into IIAs, they were not fully “aware at the time of the implications that the structure and language of the treaty provisions would have in practice.”

To address this concern, recent IIAs contemplate joint interpretations by the states party to the IIA in question. Arbitral tribunals are bound by such interpretations, although whether an interpretation would also apply to a pre-existing dispute remains to be seen. Several states including Canada, Chile, Mexico, the United States, and the European Union now include express provisions in their IIAs allowing for binding joint interpretations of the IIA.

89. See Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, art. 27 ¶ 3, Feb. 27, 2009, http://www.asean.org/storage/images/2013/economic/afta/AANZFTA/Agreement%20Establishing%20the%20AANZFTA.pdf (“A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.”); ASEAN Comprehensive Investment Agreement, art. 40 ¶ 3, Feb. 26, 2009, http://www.asean.org/storage/images/2013/economic/asia/ACIA_Final_Text_26%20Feb%202009.pdf (“A joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with the joint decision.”).


93. Methymaki & Tzanakopoulos, supra note 91, at 163-64.

It is heartening to note that some Asian IIAs, such as the ASEAN Comprehensive Investment Agreement (ACIA) between ten major Asian nations,\(^9\) and the ASEAN-Australia-New Zealand FTA (AANZ-FTA), already contain such provisions.\(^9\) In fact, some Asian states have gone a step further by not only controlling the interpretation of the IIA, but also controlling its application. For instance, under the China-Australia FTA (ChAFTA), if an investor challenges a regulatory measure, the respondent state is permitted to issue a ‘public welfare notice’ specifying why it believes that the measure falls within this exception.\(^9\) After which, the arbitration proceedings are suspended and a ninety-day consultation period with the other treaty party is triggered.\(^9\) If the state parties agree that the challenged measure is excluded from the FTA, their decision would bind the investment tribunal.\(^9\) If the treaty parties are unable to agree whether the measure is excluded within the ninety-day period, the matter would be decided by the investment tribunal, which is not to draw any adverse inference from the non-issuance of a public welfare notice by the respondent, or from the absence of any decision between the respondent and the non-disputing Party as to whether a measure is an exception.\(^10\)

B. COUNTERCLAIMS

Investment arbitration is commonly perceived as being biased towards investors.\(^10\) It is assumed that the state must always adopt a defensive position when faced with an investment claim\(^10\) and can, at best, only hope to defeat the claims of an investor.\(^10\) Recent developments, however, are altering this perceived asymmetry, with counterclaims becoming increasingly common. Twenty-eight counterclaims are known to have been

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96. AANZFTA & ACIA, supra note 89.
98. See Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Austl.-China, art. 9.11.5-6, June 17, 2015, A.T.S. 15 [hereinafter China-Australia Free Trade Agreement/ FTA or ChAFTA].
99. See id. at art. 9.18.3.
100. Id. at art. 9.11.8.
103. Id.
raised so far, thirteen of which have been filed within the past six years.\footnote{104} Further, most recent treaties contemplate counterclaims.

The Asian experience with counterclaims is somewhat mixed. On the one hand, four Asian states have initiated counterclaims, with Indonesia so far being the only successful counterclaimant in its dispute with a Saudi Arabian investor.\footnote{105} Further, provided certain conditions are met, the Trans Pacific Partnership (TPP) allows counterclaims,\footnote{106} as does the Agreement for the Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, which comprises a large number of Asian states.\footnote{107} On the other hand, most Asian IIAs do not contemplate counterclaims, at least expressly.\footnote{108}

C. Transparency

A serious concern voiced about the existing ISDS system is the lack of transparency. Recently, however, there has been a global movement towards increased transparency and third-party participation in investment arbitration,\footnote{109} even among those states that have been traditionally opposed to transparency. For instance, Ecuador now regularly publishes information

\footnote{106. See Trans-Pacific Partnership Agreement, Investment, art 9.19.2, Feb. 4, 2016, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf [hereinafter TPP] (“When the claimant submits a claim pursuant to paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B), or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.”).}  
about progress of its investment cases on its government websites.\textsuperscript{110} A similar policy is being followed by the Czech Republic.\textsuperscript{111}

In 2014, the UNCITRAL Rules on Transparency in Investor-State Arbitration came into effect. These Rules apply to all UNCITRAL arbitrations initiated under IIAs concluded on or after April 1, 2014, unless the Parties to the IIA have agreed otherwise.\textsuperscript{112} They also apply to arbitrations under existing IIAs, provided the parties to those treaties consent to their application.\textsuperscript{113} The Rules chart new ground concerning public access to ISDS.\textsuperscript{114} They cover issues ranging from disclosure of the initiation of arbitral proceedings, to specifying the documents to be disclosed, to requiring open hearings and publication of awards.\textsuperscript{115} Further, the Rules are not limited to arbitrations conducted under the UNCITRAL Arbitration Rules; they are available for both institutional and other ad hoc investment arbitration proceedings.\textsuperscript{116} The Stockholm Chamber of Commerce, for instance, has issued a practice note which calls for the application of the Transparency Rules in investment arbitration.\textsuperscript{117}

In another noteworthy development, in 2015, states agreed on a Convention on Transparency in Treaty-Based Investor-State Arbitration (Transparency Convention).\textsuperscript{118} The Transparency Convention was designed to extend the scope of application of the UNCITRAL Transparency Rules by providing a mechanism by which states can agree to the application of the Transparency Rules to UNCITRAL arbitrations instituted under pre-April 2014 IIAs.\textsuperscript{119} While only Mauritius, Switzerland, and Canada have ratified

\begin{itemize}
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} See id.
  \item \textsuperscript{115} See generally id.
  \item \textsuperscript{116} See id. at 5.
  \item \textsuperscript{119} See id.
\end{itemize}
the Transparency Convention so far, more States are likely to do so in the near future. Twenty-one countries have signed the Transparency Convention to date, but none from the Asia-Pacific.

It is now a foregone conclusion that investment arbitration should be conducted in an open, transparent manner. Given the public dimension of investment disputes and the growing interest of civil society, Asian states would do well to make their investment disputes more transparent. While a few Asian states have taken steps in this direction, others are lagging.

D. STATE-STATE DISPUTE SETTLEMENT

Most IIAs contain two dispute resolution clauses, one permitting investor-state arbitration for investment disputes and the other permitting state-to-state arbitration for disputes concerning the treaty's interpretation and/or application. State-state dispute resolution provisions are not commonly used to resolve investor-state disputes. This position has, however, changed recently with state-state dispute resolution emerging as a viable option through which states can exercise greater control over the interpretation and application of disputed IIA provisions. States have initiated claims against their counterparty in response to investor-state disputes that they were facing at the time. For example, in \textit{Peru v. Chile}, state-state arbitration was initiated to define the temporal limits of the Peru-Chile BIT. Similarly, in \textit{Ecuador v. United States}, a tribunal was called on to decide the scope of the states' obligations under the U.S.-Ecuador BIT.

Some Asian IIAs include state-state dispute resolution as the only dispute resolution mechanism—not one in addition to ISDS. For example, Australia's agreements with the United States and Malaysia, and the

121. See id.
122. See Zhao Jun Liu Yun, The Transparency Reform in International Investment Arbitration and China's Reactions, 44 J. ZHEJIANG U. 150, 150–63 (2014); Locknie Hsu, Asian Treaty-Makers and Investment Treaty Arbitration: Negotiating with a Wary Eye, 5(2) CONTEMP ASIA ARB. J. 243, 253 (2012) (For instance, while the ACIA and the AANZ contain transparency obligations, China is more reluctant).
Philippines' with Japan, subject all investment disputes to state-state dispute settlement.

Asian states should review and consider state-state dispute resolution mechanisms in their existing (and new) investment treaties to ascertain whether, and how, these provisions can be effectively used in an investor-state context.

E. Appeals Mechanism

Decisions of arbitral tribunals in investment arbitration are final, and usually subject only to very limited grounds of review.127 As mentioned above, the current ISDS system has been criticised as there is no corrective mechanism if tribunals get their decisions wrong.128 The ability to appeal decisions was one of the key concerns raised by both businesses and non-governmental organizations.129

In this context, the establishment of an appellate mechanism has regained currency.130 The EU-Vietnam FTA as well as the Canada-EU FTA both contemplate the creation of an Investment Court (examined below), as well as an appeal tribunal. Other IIAs also contemplate the creation of an appellate mechanism under which the correctness of a decision of an arbitral tribunal can be contested. The US-Singapore FTA contemplates the creation of an appeals mechanism,131 as does India’s new model BIT.132 The TPP refers to the possibility of an “appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals [being] developed in the future.”133 This possibility is also left open in the ChAFTA under which China and Australia are to commence negotiations for an

127. See generally Enforcement of Investment Treaty Arbitration Awards: A Global Guide (Julien Fouret et al. eds., 2015) (In the ICSID context, grounds for annulment are specified in Article 52 of the ICSID Convention. In non-ICSID context, the grounds specified in Article V of the New York Convention would apply.).
128. See Investment in TTIP and Beyond—the path for reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards an Investment Court, EUR. COMMISSION 1, 8 (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.
129. See id.
130. See generally Antonio R. Parra, Advancing Reform at ICSID, Reshaping the Investor-State Dispute Settlement System 569, 569–83 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015); see also Katia Yannaca-Small, Improving the System of Investor-State Dispute Settlement: The OECD Governments’ Perspective, in Appeals Mechanism in International Investment Disputes 223, 223–28 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008) (Proposals for an appeals mechanism were considered by ICSID in 2004 and by the OECD in 2005.).
appellate and review mechanism for hearing questions of law arising out of arbitral awards issued under that Agreement. Thus, "there is now a real possibility that some kind of regional investment appeals body will be established in the coming years."135

F. INVESTMENT COURT

Another development of considerable importance is the Investment Court System (ICS), which would altogether replace the current investment arbitration framework. This system is contemplated in the EU-Vietnam FTA as well as the Canada-EU FTA.136

Under this approach, amicable resolution is favoured and settlement can be agreed at any time, including after arbitration proceedings have commenced.137 Where a dispute cannot "be resolved [amicably], a claimant . . . shall submit a request for consultations to the other party" which must usually take place within sixty days.138 Six months after the submission of this request for consultations, the claimant can submit a claim to the Tribunal of First Instance (the Tribunal).139

In the EU-Vietnam FTA, the Tribunal is composed of nine judges, appointed on a permanent basis, with three judges being nationals of a Member State of the EU, three judges being nationals of Vietnam, and a further three judges being nationals of third countries.140 Three judges hear each individual dispute, with one judge from the EU, one from Vietnam, and one from a third country.141

The Tribunal is to issue its "award within eighteen months of the date of submission of the claim."142 Any party dissatisfied with the award may approach the Appellate Tribunal on specific grounds, including errors in the application or interpretation of applicable law and "manifest errors" in the establishment of the facts, including the establishment of relevant domestic

137. See EU–Vietnam FTA, Investment, Annex Agreement between Member States of the European Union and Vietnam, §3.2 at art. 3.
138. See id. §3.2 at art 4.
139. See id. §3.3 at art 7.1.
140. See id. §3.4, at arts. 12.2, 13.
141. See id. at art. 12.6.
142. See id. §3.5, at art. 27.6.
law.\textsuperscript{143} The Appellate Tribunal is empowered to uphold, modify, or reverse an award.\textsuperscript{144}

The reception that the ICS will have in Asia-Pacific is yet unknown. In fact, some prominent Asian commentators have expressed their strong discontent with the ICS.\textsuperscript{145} But as the EU and Canada have expressed their strong support for the proposal,\textsuperscript{146} and as they are both currently negotiating investment agreements with important Asian states,\textsuperscript{147} it is likely that—at least for some Asian states—ICS will replace the traditional investment arbitration framework.

V. Conclusion

The Asia-Pacific region is in the midst of unprecedented economic growth. Foreign investment inflows and outflows are at historic highs. Investment protection instruments like IIAs continue to be critical to the investment framework of the region. In addition, the G20 Principles explicitly place foreign investment very high in terms of international economic policy by indicating that the G20 has "the objective of (i) fostering an open, transparent and conducive global policy environment for investment, (ii) promoting coherence in national and international investment policymaking, and (iii) promoting inclusive economic growth and sustainable development."\textsuperscript{148} The combination of favorable regional and global drivers suggest that investment flows and investment policies will gain in importance in the years to come as a key driver of the world economy.

A vast majority of Asian IIAs provide for investment arbitration, both as an element of the regional trade and investment treaty architecture as well as

\textsuperscript{143} See EU-Vietnam FTA, Investment, Annex Agreement between Member States of the European Union and Vietnam, §3.5 at art. 28.1.

\textsuperscript{144} See id. at arts. 28.2–3.

\textsuperscript{145} See e.g., M. SORNARAJAH, \textit{An International Investment Court: Panacea or Purgatory?}, COLUMBIA FDI PERSPECTIVES, COLOM. CTR. SUSTAINABLE INV. NO. 180 (Aug. 15, 2016), http://csci.columbia.edu/files/2013/10/No-180-Sornarajah-FINAL.pdf.


a practical means for resolving disputes. Nearly 21 percent of all investment disputes involve Asian states, and these numbers are likely to rise.\footnote{149}

Investment arbitration has, however, been facing a considerable backlash, which is leading to an adjustment in investment disciplines as well as dispute settlement procedures. This backlash has been particularly significant in Asia, with some Asian states exiting from the system altogether and others altering it in material ways.\footnote{150}

Several reforms to the present investment arbitration framework have been proposed to reaffirm state control while at the same time retain investor interest. These reforms are particularly significant for Asia, and it is heartening to note that some Asian states are adopting a more refined approach towards investment arbitration.\footnote{151} Asia-Pacific is, however, lagging in some respects. Having considerable investment jurisprudence before them, Asian states are uniquely placed now to benefit from the experiences of others.\footnote{152} Besides, the increase of Asia-centric investment flows places Asian states in an increasingly important position to determine the future of global investment governance. This is certainly an exciting time for those dealing with international investment law, particularly in the Asia-Pacific region.


