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

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Debevoise & Plimpton

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

- *Asian Agricultural Products Ltd v Sri Lanka*
- *LSF-KEB Holdings SCA and others v South Korea*
- *Phillip Morris Asia Limited v Australia*
- *Philippe Gruslin v Malaysia (I); Philippe Gruslin v Malaysia (II)*
- *SGS Société Générale de Surveillance SA v Pakistan*
- *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.

1 International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/87/3.

2 The Sri Lanka–United Kingdom BIT (1980) is available on the Electronic Database of Investment Treaties (EDIT). The Hong Kong investor was protected under the terms of the treaty as, at that time, Hong Kong was a territory of the United Kingdom and the BIT had been extended to Hong Kong by virtue of an exchange of notes with effect as of 14 January 1981 (see *Asian Agricultural Products Ltd v Sri Lanka* award, paragraph 1).

3 The Investment Dispute Settlement Navigator is available on the United Nations Conference on Trade and Development's website. At the time of writing, the content is accurate to 31 July 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.

4 United Nations Population Fund, 'Asia and the Pacific: Population trends' (11 February 2022).
5 World Economics, 'Asia-Pacific'.

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]

6 Kenneth J Vandevelde, 'A Brief History of International Investment Agreements', 12 *UC Davis J Int'l L & Pol'y* 157, 171 (2005).
7 Luke Nottage, 'The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification', 17 *Melb J of Int'l L* 313, 321 (2016).
8 id.
9 C T Salomon and S Friedrich, 'Investment Arbitration in East Asia and the Pacific', *The Journal of World Investment & Trade* 16, 5–6, 800, 807–808 (2015).
10 See footnote 1 (ICSID Case No. ARB/87/3).
11 *American Manufacturing & Trading, Inc v Democratic Republic of the Congo* (ICSID Case No. ARB/93/1).
12 *Philippe Gruslin v Malaysia (I)* (ICSID Case No. ARB/94/1).
13 *Philippe Gruslin v Malaysia (II)* (ICSID Case No. ARB/99/3).
14 id.
15 *Saipem SpA v Bangladesh* (ICSID Case No. ARB/05/7).
16 *Bechtel Enterprises Holdings, Inc and GE Structured Finance (GESF) v India* (2003) (United Nations Commission on International Trade Law (UNCITRAL)); *ABN Amro NV v India* (2004) (UNCITRAL); *ANZEF Ltd v India* (2004) (UNCITRAL); *BNP Paribas v India* (2004) (UNCITRAL); *Credit Lyonnais SA v India* (2004) (UNCITRAL); *Credit Suisse First Boston v India* (2004) (UNCITRAL); *Erste Bank Der Oesterreichischen Sparkassen AG v India* (2004) (UNCITRAL); *Offshore Power Production CV, Travamark Two BV, EFS India-Energy BV, Enron BV, and Indian Power Investments BV v India* (2004) (UNCITRAL); *Standard Chartered Bank v India* (2004) (UNCITRAL).
17 *Cemex Asia Holdings Ltd v Indonesia* (ICSID Case No. ARB/04/3).

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

18 *Malaysian Historical Salvors, SDN, BHD v Malaysia* (ICSID Case No. ARB/05/10).
19 *Alstom Power Italia SpA and Alstom SpA v Mongolia* (ICSID Case No. ARB/04/10); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Mongolia* (2007) (UNCITRAL).
20 *Yaung Chi OO Trading Pte Ltd v Government of Myanmar* (Association of Southeast Asian Nations ID Case No. ARB/01/1).
21 *SGS Société Générale de Surveillance SA v* Pakistan (ICSID Case No. ARB/01/13); *Impregilo SpA v Pakistan (I)* (ICSID Case No. ARB/02/2); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan (I)* (ICSID Case No. ARB/03/29); *Impregilo SpA v Pakistan (II)* (ICSID Case No. ARB/03/3).
22 *SGS Société Générale de Surveillance SA v Philippines* (ICSID Case No. ARB/02/6); *Fraport AG Frankfurt Airport Services Worldwide v Philippines (I)* (ICSID Case No. ARB/03/25).
23 *Mihaly International Corporation v Sri Lanka* (ICSID Case No. ARB/00/2); *Deutsche Bank AG v Sri Lanka* (ICSID Case No. ARB/09/2).
24 *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag v Thailand (formerly Walter Bau AG (in liquidation) v Thailand)* (2005) (UNCITRAL).
25 *Trinh Vinh Binh and Binh Chau Joint Stock Company v Vietnam (I)* (2004) (UNCITRAL).
26 See footnote 21 (ICSID Case No. ARB/01/13).
27 See footnote 22 (ICSID Case No. ARB/02/6).

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]

28 *Philip Morris Asia Limited v Australia* (Permanent Court of Arbitration (PCA) Case No. 2012-12); *APR Energy LLC, Power Rental Asset Co Two LLC, Power Rental Op Co Australia LLC v Australia* (2017) (UNCITRAL).

29 *Ekran Berhad v China* (ICSID Case No. ARB/11/15); *Ansung Housing Co, Ltd v China* (ICSID Case No. ARB/14/25); *Hela Schwarz GmbH v China* (ICSID Case No. ARB/17/19); *Jason Yu Song v China* (PCA Case No. 2019-39).

30 *White Industries Australia Limited v India* (2010) (UNCITRAL); *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v India (I)* (PCA Case No. 2013-09); *Maxim Naumchenko, Andrey Poluektov and Tenoch Holdings Limited v India* (PCA Case No. 2013-23); *Deutsche Telekom AG v India* (PCA Case No. 2014-10); *Khaitan Holdings Mauritius Limited v India* (PCA Case No. 2018-50); *Louis Dreyfus Armateurs SAS v India* (PCA Case No. 2014-26); *Vodafone International Holdings BV v India (I)* (PCA Case No. 2016-35); *Cairn Energy PLC and Cairn UK Holdings Limited v India* (PCA Case No. 2016-7); *Astro All Asia Networks and South Asia Entertainment Holdings Limited v India* (2016) (UNCITRAL); *Ras-Al-Khaimah Investment Authority v India* (2016) (UNCITRAL); *Strategic Infrasol Foodstuff LLC and The Joint Venture of Thakur Family Trust, UAE with Ace Hospitality Management DMCC, UAE v India* (2016) (UNCITRAL); *Vedanta Resources PLC v India* (PCA Case No. 2016-05); *Carissa Investments LLC v India* (2017) (UNCITRAL); *Nissan Motor Co., Ltd v India* (PCA Case No. 2017-37); *Vodafone Group Plc and Vodafone Consolidated Holdings Limited v India (II)* (2017) (UNCITRAL); *Korea Western Power Company Limited v India* (PCA Case No. 2020-06).

31 *Hesham Talaat M Al-Warraq v Indonesia* (2011) (UNCITRAL); *Rafat Ali Rizvi v Indonesia* (ICSID Case No. ARB/11/13); *Churchill Mining and Planet Mining Pty Ltd v Indonesia* (ICSID Case No. ARB/12/40 and 12/14); *Nusa Tenggara Partnership BV and PT Newmont Nusa Tenggara v Indonesia* (ICSID Case No. ARB/14/15); *Indian Metals & Ferro Alloys Ltd v Indonesia* (PCA Case No. 2015-40); *Oleovest Pte Ltd v Indonesia* (ICSID Case No. ARB/16/26).

32 *LSF-KEB Holdings SCA and others v South Korea* (ICSID Case No. ARB/12/37); *Mohammad Reza Dayyani and others v South Korea* (PCA Case No. 2015-38); *Hanocal Holding BV and IPIC International BV v South Korea* (ICSID Case No. ARB/15/17); *Elliott Associates LP v South Korea* (PCA Case No. 2018-51); *Mason Capital LP and Mason Management LLC v South Korea* (PCA Case No. 2018-55); *Schindler Holding AG v South Korea* (PCA Case No. 2019-44); *Jin Hae Seo v South Korea* (Hong Kong International Arbitration Centre Case No. 18117).

33 *Lao Holdings NV v Lao People's Democratic Republic (I)* (ICSID Case No. ARB(AF)/12/6); *Sanum Investments v Lao People's Democratic Republic (I)* (PCA Case No. 2013-13); *Lao Holdings NV v Lao People's Democratic Republic (II)* (ICSID Case No. ARB(AF)/16/2); *Sanum Investments Limited v Lao People's Democratic Republic (II)* (ICSID Case No. ADHOC/17/1).

34 *Beijing Shougang Mining Investment Company Ltd, China Heilongjiang International Economic & Technical Cooperative Corp, and Qinhuangdaoshi Qinlong International Industrial Co, Ltd v Mongolia* (PCA Case No. 2010-20); *Khan Resources Inc, Khan Resources BV and Cauc Holding Company Ltd v the Government of Mongolia and Monatom Co, Ltd* (PCA Case No. 2011-09); *Mohammed Munshi v Mongolia* (2018).

35 *Axiata Investments (UK) Limited and Ncell Private Limited v Vietnam Nepal* (ICSID Case No. ARB/19/15).

36 *Agility for Public Warehousing Company KSC v Pakistan* (ICSID Case No. ARB/11/8); *Ali Allawi v Pakistan* (PCA Case No. 2012-23); *Progas Energy Ltd v Pakistan* (2012) (UNCITRAL); *Tethyan Copper Company Pty Limited v Pakistan* (ICSID Case No. ARB/12/1); *Karkey Karadeniz Elektrik Uretim AS v Pakistan* (ICSID Case No. ARB/13/1); *Hilal Hussain Al-Tuwairqi and Al-Tuwairqi Holding v Pakistan* (2018) (UNCITRAL).

37 *Baggerwerken Decloedt En Zoon NV v Philippines* (ICSID Case No. ARB/11/27); *Fraport AG Frankfurt Airport Services Worldwide v Philippines (II)* (ICSID Case No. ARB/11/12); *Shell Philippines Exploration BV v Philippines* (ICSID Case No. ARB/16/22); *Chevron Overseas Finance GmbH v Philippines* (PCA Case No. 2019-25).

38 *Raymond Charles Eyre and Montrose Developments (Private) Limited v Sri Lanka* (ICSID Case No. ARB/16/25); *KLS Energy Lanka Sdn Bhd v Sri Lanka* (ICSID Case No. ARB/18/39).

39 *Surfeit Harvest Investment Holding Pte Ltd v Taiwan* (2017) (UNCITRAL).

40 *Kingsgate Consolidated Ltd v Thailand* (PCA Case No. 2017-36).

41 *Michael McKenzie v Vietnam* (2010) (UNCITRAL); *Dialasie SAS v Vietnam* (2011) (UNCITRAL); *RECOFI v Vietnam* (2013) (UNCITRAL); *Bryan Cockrell v Vietnam* (PCA Case No. 2015-03); *Trinh Vinh Binh and Binh Chau JSC v Vietnam (II)* (PCA Case No. 2015-23); *ConocoPhillips and Perenco v Vietnam* (2017) (UNCITRAL); *Shin Dong Baig v Vietnam* (ICSID Case No. ARB(AF)/18/2); *Maya Dangelas (Dang Thi Hoang Yen), US Global Institute Inc and Angels Company Inc v Vietnam* (PCA Case No. 2020-05).

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

42 See footnote 28 (PCA Case No. 2012-12).
43 id.; Australia's Department of Foreign Affairs and Trade, 'Investor-state dispute settlement (ISDS)'.
44 id.
45 See footnote 32 (ICSID Case No. ARB/12/37).
46 id.
47 Ben Bland and Shawn Donnan, 'Indonesia to terminate more than 60 bilateral investment treaties', *Financial Times* (26 March 2014).
48 Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction', 38 *Nw J Int'l L & Bus* 1, 16–18 (2017).
49 See footnote 28 (PCA Case No. 2012-12); Jürgen Kurtz, 'The Australian Trade Policy Statement on Investor-State Dispute Settlement', 15 ASIL Insights (2 August 2011).
50 Kurtz, 2011.

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]

51 The CPTPP (2018) is available on the EDIT.
52 The RCEP (2020) is available on the EDIT.
53 New Zealand's Ministry of Foreign Affairs and Trade, 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)'.
54 Japan's Ministry of Economy, Trade and Industry, 'Joint leaders' statement on the Regional Comprehensive Economic Partnership (RCEP)' (15 November 2020).
55 *Qiong Ye and Jianping Yang v Cambodia* (ICSID Case No. ARB/21/42).
56 *AsiaPhos Limited v China* (2020) (UNCITRAL); *Goh Chin Soon v China* (formerly ICSID Case No. ARB/20/34; now PCA Case No. 2021-30); *Macro Trading Co, Ltd v China* (ICSID Case No. ARB/20/22); *Eugenio Montenero v China* (2021) (UNCITRAL).
57 *GPIX LLC v India* (PCA Case No. 2020-36); *Maxis Communications Berhad and Global Communications Services Holdings Limited v India* (2020); *Earlyguard Limited v India* (2021); *CC/Devas (Mauritius) Ltd, Telcom Devas Mauritius Limited, and Devas Employees Mauritius Private Limited v India (II)* (PCA Case No. 2022-34).
58 *Shift Energy Japan KK v Japan* (2020) (UNCITRAL).
59 *Fengzhen Min v South Korea* (ICSID Case No. ARB/20/26); *Jason Hun Won v South Korea* (2021); *Mohammad Reza Dayyani and others v South Korea (II)* (2021).
60 *WM Mining Company, LLC v Mongolia* (ICSID Case No. ARB/21/8).
61 *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan (II)* (ICSID Case No. ARB/21/48); *Ozkartallar Inşaat Sanayi Ve Ticaret AS and Campak Temizlik Bilgi Işlem Otomasyon Saglik Hizmetleri Iletişim Sanayi Ve Ticaret AS v Pakistan* (ICSID Case No. ARB/22/16).
62 *Barrick (PD) Australia Pty Limited v Papua New Guinea* (ICSID Case No. ARB/20/27).
63 IA Reporter, 'Japan Faces Its First Known Investment Treaty Arbitration, as UNCITRAL Tribunal Is Quietly Put in Place to Hear Asian Energy Investors' Claims', (3 February 2021).
64 Tom Jones, 'Japan defeats first treaty claim', *Global Arbitration Review* (14 February 2023).

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.

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Tony Dymond is a partner at Debevoise & Plimpton and co-chair of the firm's Asia arbitration practice. His practice focuses on complex, multi-jurisdictional disputes in both litigation and arbitration. He is widely acknowledged as a leading lawyer in high-value disputes arising from large-scale projects, particularly in the energy and infrastructure sectors.

Mr Dymond is consistently recognised as a leader in his field. He is recommended for international arbitration and construction disputes in *The Legal 500: UK* (2023), where sources say his 'knowledge, attention to detail, rigour and, above all, intelligence sets him apart'. Described as 'an exceptional legal mind' who is 'able to reduce complex issues to their key components' and 'the crown jewel of the firm's construction practice group', the guide also hails him as 'one of the few lawyers who genuinely understands construction and engineering delay matters' and a 'prolific, top-class strategic thinker'. *Chambers UK* (2023) also recommends Mr Dymond, describing him as 'an excellent pragmatist with very sharp attention to detail and an ability to grasp complex technical matters quickly.' He is named by Who's Who Legal as a Thought Leader in construction and by Expert Guides as one of the United Kingdom's leading construction law practitioners.

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Mr Sim is recommended for arbitration in *The Legal 500 Asia Pacific*, which notes his 'outstanding legal and commercial knowledge', and describes him as 'excellent' and a 'stand-out star'. He is also ranked by Who's Who Legal as a National Leader for arbitration in mainland China and Hong Kong, and as a Global Future Leader. He is noted to be 'a superb and unrelenting advocate' and 'a force to be reckoned with'. Mr Sim is also recognised as a Rising Star by the Euromoney Legal Media Group.

Mr Sim is the author of *Emergency Arbitration* (Oxford University Press, 2021), the first-ever treatise on the subject. Prior to his arbitration career, he clerked for the President of the Supreme Court of the United Kingdom and in the Judicial Committee of the Privy Council, and obtained first-class degrees in law from the University of Oxford, United Kingdom and the University of Melbourne, Australia.

Lillian Wong

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Lillian Wong is an associate and a member of the firm's international dispute resolution group. Her practice focuses on complex commercial litigation, international arbitration, and contentious regulatory matters and investigations.

Ms Wong joined Debevoise in 2021. Prior to this, she worked and completed her training with an international law firm in Hong Kong. She received her LLB and PCLL from the University of Hong Kong in 2018 and 2019, respectively.

Ms Wong was admitted to practise as a solicitor in Hong Kong in 2021 and was admitted to the New York State Bar in 2022. She is fluent in Mandarin, Cantonese, English and Japanese.

Debevoise & Plimpton

Debevoise & Plimpton has successfully represented clients in Asia-related arbitration for decades. The firm's arbitration practice in Asia reflects Debevoise's global strength in the area. It is one of few law firms in the world to combine sophisticated international arbitration, general commercial dispute resolution and public international law capacity in four major international arbitration centres: New York, London, Hong Kong and Paris.

The Asia team has a strong track record of advising on the most complex international disputes for leading multinationals, international organisations, sovereigns and non-governmental organisations.

Clients benefit from a team of internationally renowned arbitration lawyers. The firm has a deep bench of partners, counsel and associates who focus on arbitration in the region. The senior members of the team are also heavily involved in shaping the arbitration environment in Asia, taking leadership roles on bodies such as the Hong Kong International Arbitration Centre and the Singapore International Commercial Court Committee.

The team's long track record of work on arbitration in Asia, coupled with a deep level of involvement in the region's arbitration community, is incredibly powerful. It gives the team the experience and perspective needed to advise clients on their most critical arbitrations.

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