New Frontiers in Asia-Pacific Trade, Investment and International Business Dispute Resolution

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Abstract: Asia-Pacific trade and investment flows have burgeoned over recent decades, albeit impacted by China-US trade tensions and especially the COVID-19 pandemic (§1.02). International investment agreements have proliferated to liberalise and protect investments (§1.03), mostly adding the option of investor-state dispute settlement (ISDS). Asia-related ISDS cases have also started to grow, albeit somewhat belatedly (§1.04), complementing a more longstanding upward trend in international commercial arbitration (ICA) cases involving Asian parties filed in the region as well as the traditional Western centres (§1.05). The eastward shift in international dispute resolution has already involved initiatives to improve not just support for ICA and ISDS arbitrations, but also to develop alternatives such as international commercial courts and mediation. Core arguments from ensuing chapters (§1.06) cover the main existing venues for international dispute resolution in Asia (China, Hong Kong and Singapore) but also some emerging contenders (Japan, Malaysia, India and Australia). Overall (§1.07), can ICA venues improve their attractiveness through law reforms, case law development and other measures, despite growing concerns about costs and delays? Will some emerging concerns about ISDS prompt Asia-Pacific states to become more active 'rule makers' in international investment law? How might these issues be affected by the COVID-19 pandemic?

Keywords: international trade, foreign direct investment (FDI), free trade agreements (FTAs), international investment treaties, international economic law, arbitration, mediation, international commercial courts, Asia, COVID-19

§1.01 Introduction

Asia-related trade and investment flows have burgeoned over recent decades, although impacted by the US-China trade tensions from 2018 and especially the coronavirus disease of 2019 (COVID-19) pandemic declared from early 2020, as elaborated in §1.02 below. §1.03 outlines the parallel proliferation of standalone bilateral investment treaties (BITs) especially from the 1990s, and then free trade agreements (FTAs). These comprehensive FTAs go beyond commitments under the multilateral World Trade Organization (WTO) regime by including investment chapters aimed at both protecting and liberalising foreign investment. Both types of international investment agreements (IIAs) typically allow foreign investors to bring investor-state dispute settlement (ISDS) arbitrations directly against host states for violating substantive treaty commitments, like non-discrimination or adequate compensation for expropriation.

Accordingly, but somewhat belatedly compared to other parts of the world, Asia-related ISDS cases have also started to grow, as explained in §1.04 and [[Appendix A]] to this chapter. This complements a more longstanding upward trend in international commercial arbitration (ICA) cases involving Asian parties. The growth in ICA filings has occurred not only in the 'core' Western seats and arbitral institutions (France, Switzerland, England and US), but now also through those that have emerged in the Eastern 'periphery'.[1] §1.05 outlines this eastward shift for international dispute resolution services, tracking Asia's emergence as a global economic powerhouse. The shift may be dampened in the short term by restrictions on international travel and other logistical impediments to from the COVID-19 pandemic. Yet its disruptions to cross-border contracts and investments combined with pressures on profitability are likely to generate more disputes, and innovations in how to resolve them.[2] The eastward shift in international dispute resolution has already involved initiatives to improve not just support for ICA and ISDS arbitrations, but also to develop alternatives such as international commercial courts and mediation in and for the region. These new types of procedures, as well as innovations within ICA and ISDS, combine with geographical expansion to generate significant 'new frontiers' for Asia-Pacific cross-border business dispute resolution.

[1] Luke Nottage, *The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery*, 16 Arb. Int'l 53 (2000); Luke Nottage, *In/formalization and Glocalization of International Commercial Arbitration and Investment Treaty Arbitration in Asia, in Formalisation and Flexibilisation of Dispute Resolution* 211 (Joachim Zekoll, et al. (eds.), Martinus Nijhoff / Brill 2014).

[2] *See generally* e.g., Gary L. Benton, *How Will the Coronavirus Impact International Arbitration?*, Kluwer Arbitraion Blog (13 Mar. 2020), http://arbitrationblog.kluwerarbitration.com/2020/03/13/how-will-the-coronavirus-impact-international-arbitration/; Constantin-Adi Gavrila, *Reflections in the Age of Coronavirus (COVID-19)*, Kluwer Mediation Blog (14 Mar. 2020), http://mediationblog.kluwerarbitration.com/2020/03/14/reflections-in-the-age-of-coronavirus-covid-19/; and the concluding chapter in this volume.

Section §1.06 provides further background and summarises core arguments from ensuing chapters [[in this book, for which the Table of Contents is added as Appendix B, and book contributor bios in Appendix C]]. It outlines key developments not only in the existing key jurisdictions in Asia for international dispute resolution (China, Hong Kong and Singapore) but also in some emerging contenders (especially Japan, Malaysia, India, and Australia – itself on the periphery of Asia but, like neighbouring New Zealand, closely entwined economically and in other ways with the region). As reiterated in the concluding §1.07, one key theme throughout the book is whether existing and new venues for ICA can improve their attractiveness through law reforms, case law development and other measures,[3] despite growing concerns about costs and delays in arbitration. A second is whether emerging concerns about ISDS-backed investment treaty commitments will prompt Asian states to become ever more 'rule makers' in international investment law, rather than mostly 'rule takers'.[4] Both may well be impacted by changes in legal instruments, practices and attitudes related to the spread of COVID-19 in 2020, making that pandemic a further 'new frontier' for Asia-Pacific international dispute resolution.

§1.02 Transformations in Trade and Investment Flows in and Around Asia

Asia-Pacific economies have increased their share of global trade over the last few decades, and this has underpinned a wave of international investment in the region. The reason is the development of global value chains (GVCs), which are generated by the fragmentation of the production of goods and services into discrete segments.[5] These are localised in the best-suited countries in terms of costs, natural resources, logistics and technology. Around 50% of global trade is related to GVCs,[6] and multinational enterprises (MNEs) are the core actors within GVCs. MNEs coordinate large flows of intermediate products within their networks of affiliates, contractual partners (in non-equity modes of international production) and arm's-length suppliers.[7]

GVC trade operates mostly in three regions called 'Factory Asia', 'Factory Europe' and 'Factory North America'.[8] On average, the higher the degree of economic integration of a region, the higher the intra-regional GVC participation. Thanks to the European Union (EU), 'Factory Europe' had the highest share of intra-regional GVC participation in 2000, followed by 'Factory North America' and 'Factory Asia'. Ten years after the Global Financial Crisis (GFC) and economic slowdown over 2008-09, 'Factory Asia's' share of intra-regional participation exceeded that of 'Factory North America',[9] which reveals the progress of economic integration of Asia supported by regional and bilateral treaties (elaborated in **§1.03** below).[10] The intra-regional share of GVC activity has increased more regionally than globally in the Asia-Pacific region. This contrasts with Europe and North America, where the share of extra-regional GVC trade has increased, in particular due to their growing links with Asia.[11] The automobile industry is a good example: this value chain has become more regional and integrated more of Asia's sub-regions.[12] China traditionally

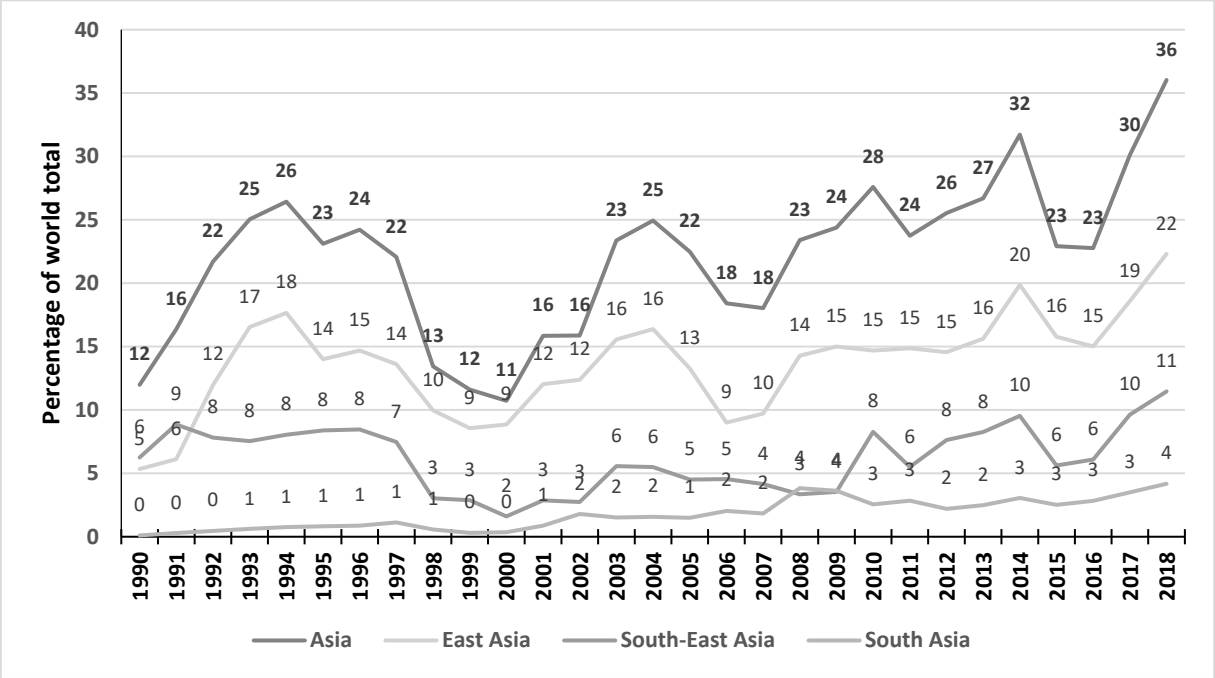
[3] Anselmo Reyes & Weixia Gu (eds.), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart Publishing 2018).
[4] Julien Chaisse & Luke Nottage, *International Investment Treaties and Arbitration: Across Asia: A Bird's Eye View*, *in International Investment Treaties and Arbitration Across Asia* 1 (Julien Chaisse & Luke Nottage (eds.), Brill | Nijhoff 2018).
[5] Richard Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Harvard Univ. Press 2016).
[6] World Bank, *World Development Report 2020: Trading for Development in the Age of Global Value Chains* 19 (World Bank Group 2020). The GVC participation measure is computed as the share of GVC exports in total international exports. GVC exports include transactions in which a country's exports embody value added that it previously imported from abroad (backward GVC participation), as well as transactions in which a country's exports are embodied in the importing country's exports to third countries (forward GVC participation).
[7] UNCTAD, *Global Value Chains and Development: Investment and Value Added Trade in the Global Economy* (United Nations 2013).
[8] Richard Baldwin & Javier Lopez Gonzalez, *Supply Chain Trade: A Portrait of Global Patterns and Several Testable Hypotheses*, 38 World Econ. 1682 (2015).
[9] UNCTAD, *World Investment Report 2019: Special Economic Zones* (United Nations 2019).
[10] Gianluca Orefice & Nadia Rocha, *Deep Integration and Production Networks: An Empirical Analysis*, 37 World Econ. 106 (2014).
[11] World Bank, *supra* n. 6, 23-25 reaches the same conclusion.
[12] Bruno Jetin, *Production Networks of the Asian Automobile Industry: Regional or Global?*, 18 Int'l J. Automotive Tech. & Management 302 (2018).

played the key role of final assembler of many of the regional supply chains of 'Factory Asia'.[13] However, the local content of Chinese exports has increased recently as China has been rebalancing its economy,[14] upgrading its technological capacities and investing more in the region.

GVC trade and foreign investment are 'inextricably intertwined through the international production networks of firms'.[15] Recent and earlier studies have demonstrated that GVC trade and Foreign Direct Investment (FDI) have grown in parallel.[16] An econometric study shows that 'the higher the GVC participation, the higher the bilateral FDI inward stocks'.[17] The rise of GVC participation by 'Factory Asia', plus the stronger links of other regions with Asia, explains the continued increase of FDI inflows into the region. By 2018, they amounted to 36% of the world total, as shown in §1.02 Figure 1 (and this chapter's [[Appendix A]]).

[13] Prema-chandra Athukorala, *Southeast Asian Countries in Global Production Networks, in ASEAN Economic Community: A Model for Asia-wide Regional Integration?* 79 (Mia Mikic & Bruno Jetin (eds.), Palgrave Macmillan 2016).
[14] Bruno Jetin & Luis Reyes, *Wage-led Demand as a Rebalancing Strategy for Economic Growth in China*, Journal of Post Keynesian Economics (2020 [[forthcoming, https://doi.org/10.1080/01603477.2020.1774392]]).
[15] UNCTAD, *supra* n. 7, at 3.
[16] World Bank, *supra* n. 6, at 33; UNCTAD, *supra* n. 7, at 137-139.
[17] Enrique Martínez-Galán & Maria Paula Fontoura, *Global Value Chains and Inward Foreign Direct Investment in the 2000s*, 42 World Econ. 175 (2019).

Figure §1.1: Inflows of Foreign Direct Investment in Asia, 1990-2018



Source: Authors' calculations based on data from UNCTAD.

Although East Asia contributed to most of the rise, Southeast Asia and more modestly South Asia have also increased their share of global FDI. This is in sharp contrast with Europe and North America, whose share of FDI inflows declined in 2018 to respectively 21.4% and 22.5% -- down from 50% and 28% in 2000.[18] Asia has also become the main global outbound investor. In 2018, FDI outflows from Asia amounted to 49% of the world total, exceeding the EU (38.5%) and the USA (27% in 2017).

These FDI flows give only an approximate view of the importance of MNE investment from a home country in the economy of a host country. This is due to 'conduit FDI', which 'arises when an MNE investing from home country A in host country B establishes an intermediate step through a third country C'.[19] One of the main motivations for conduit FDI is tax avoidance, but another consideration is increasingly an investment treaty between the intermediate and the host countries. In Asia, Singapore and Hong Kong are important hosts for conduit FDI whose final destination are other countries in Asia-Pacific. The existence of conduit FDI 'augments and blurs the scope of international treaties, producing a de facto multilateralising effect'.[20] Accordingly, a significant share of ultimate beneficiaries of the 'mega-regional' trade and investment agreements (like those outlined below in §1.03 and in several subsequent chapters) may be outside the regions involved. Table §1.2 (including some authors' calculations) gives a view of FDI shares by ultimate investor in the accumulated stock of selected Asia-Pacific economies.

[18] Source: Authors' estimations with UNCTAD data.
[19] Bruno Casella, *Looking through Conduit FDI in Search of Ultimate Investors – A Probabilistic Approach*, 26 Transnational Corporations 109, 111 (2019).
[20] *Ibid*., 139.

Table §1.2. UNCTAD FDI estimates by ultimate investor, share in inward FDI stock, 2017, selected countries

Investor	Australia	Bangladesh	Cambodia	China	Hong Kong, China	India	Indonesia	Japan	Korea, Republic of	Malaysia	Mongolia	Myanmar	Nepal	Pakistan	Philippines	Singapore	Sri Lanka	Thailand
Australia	0,1	6,2	1,5	1,1	0,6	0,7	1,8	1,3	0,5	1,7	2,2	0,6	3,6	0,7	2,6	2,1	1,4	1,4
Bangladesh	-	-	0,1	-	-	-	-	-	-	-	-	0,0	2,6	0,0	-	0,0	0,1	0,0
Canada	4,6	1,5	2,8	1,6	2,4	1,0	2,0	1,5	1,8	0,6	26,2	0,3	0,1	0,7	0,9	2,0	2,6	1,1
China	5,5	3,3	24,9	7,8	25,6	0,8	3,5	1,7	3,5	5,1	26,7	34,1	10,7	7,6	2,0	5,1	12,0	3,7
EU	9,9	7,7	4,6	14,5	16,8	16,3	14,9	30,3	20,0	12,8	8,9	4,3	4,6	12,3	19,3	13,8	14,7	10,7
Hong Kong, China	1,3	2,3	4,9	18,3	1,0	0,7	1,6	1,8	1,4	3,7	2,3	1,2	1,2	1,0	3,3	1,9	3,0	2,9
India	0,2	3,8	0,4	0,2	0,2	1,6	0,4	0,2	0,4	0,2	0,1	1,7	19,6	0,2	0,4	2,3	11,5	0,6
Indonesia	0,0	0,5	0,1	0,1	0,1	0,1	0,1	0,2	0,1	0,1	0,1	0,2	0,0	0,0	0,5	1,6	0,1	0,2
Japan	11,4	2,9	8,7	8,2	4,5	11,8	10,7	1,0	23,2	13,8	4,3	5,4	1,0	5,7	25,2	8,1	3,9	37,5
Korea, Republic of	0,7	5,8	6,4	2,9	0,4	2,5	1,9	2,0	0,1	2,4	2,5	4,1	2,1	0,5	2,1	1,0	0,8	1,8
Malaysia	1,7	4,9	5,3	0,4	0,3	0,7	6,1	0,5	1,0	0,3	0,3	1,6	0,4	2,0	1,3	4,4	10,2	1,8
Singapore	2,3	4,7	4,5	3,8	2,9	8,7	16,6	6,5	5,0	14,1	6,4	20,0	2,9	0,7	5,9	0,5	6,1	10,3
Sri Lanka	-	1,9	1,8	-	-	0,0	-	-	-	-	-	-	0,1	-	-	0,0	-	0,0
Switzerland	1,6	0,9	0,5	2,3	3,4	5,4	2,6	4,3	3,3	5,8	1,3	0,6	0,4	14,3	7,2	4,1	5,9	2,5
Taiwan Province of China	0,1	1,9	6,2	1,5	0,9	0,1	0,2	2,8	0,4	1,0	0,2	0,7	0,0	0,0	1,9	1,5	0,2	1,6
Thailand	0,3	2,1	5,4	0,8	2,0	0,5	1,7	0,2	0,1	0,4	0,3	8,7	0,1	0,1	0,9	0,9	0,4	0,2
United Kingdom	8,6	9,7	4,0	3,7	6,0	13,7	9,0	7,4	7,3	4,3	3,3	6,5	2,0	24,3	3,5	6,2	6,4	4,2
United States	25,3	26,8	6,0	9,7	12,8	24,3	16,6	30,3	20,6	10,7	7,6	3,7	2,9	10,1	15,5	25,5	8,0	11,7
Viet Nam	-	-	4,6	-	-	-	0,0	-	-	-	0,1	0,9	-	-	0,0	0,0	-	-
Confidential/Unspecified	*24,1*	*4,1*	*5,5*	*18,0*	*14,1*	*5,0*	*6,6*	*5,6*	*5,9*	*20,4*	*4,0*	*3,9*	*40,2*	*6,3*	*4,3*	*10,4*	*3,7*	*4,1*
Total bilateral	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0

Source: *Annex table 22, World Investment Report 2019*, UNCTAD. Details in Casella, 2019, pages 109-146. *For the EU estimate, authors' calculations by summation of EU country members' shares.*
Note: Estimates cover 108 recipient countries, corresponding to 93% of the value of global inward FDI stock.

The USA and the EU remain large investors and still eclipse China in many key Asia-Pacific countries (Australia, India, Indonesia, Malaysia, Pakistan, Philippines, Singapore and Thailand). China is the largest investor in only three neighbouring countries (Cambodia, Mongolia and Myanmar). Japan remains the largest investor in Korea, the Philippines and Thailand, and is the second largest in Malaysia. Singapore is an important investor in Indonesia, India, Malaysia and Myanmar and Thailand, while Hong Kong is an important investor only in China. This wide range of investors means that the investment agreements signed in the region need to appeal to a large variety of interests.

Two recent shocks will likely have long-term consequences for the region, including perhaps for the central role that China has come to play in Asian GVCs: the trade tensions between the USA and China that escalated over 2019, and the COVID-19 pandemic since 2012. UNCTAD's *World Investment Report 2020* notes that:[21]

> *The COVID-19 crisis will cause a dramatic fall in FDI.* Global FDI flows are forecast to decrease by up to 40 per cent in 2020, from their 2019 value of $1.54 trillion. This would bring FDI below $1 trillion for the first time since 2005. FDI is projected to decrease by a further 5 to 10 per cent in 2021 and to initiate a recovery in 2022. A rebound in 2022, with FDI reverting to the pre-pandemic underlying trend, is possible, but only at the upper bound of expectations. …
>
> Developing economies are expected to see the biggest fall in FDI because they rely more on investment in [GVC]-intensive and extractive industries, which have been severely hit, and because they are not able to put in place the same economic support measures as developed economies. …
>
> Flows to *developing Asia* will be severely affected due to their vulnerability to supply chain disruptions, the weight of GVC-intensive FDI in the region and global pressures to diversify production locations. FDI is projected to fall by 30 to 45 per cent. In 2019, FDI flows to the region declined by 5 per cent, to $474 billion, despite gains in South-East Asia, China and India.

The US-China trade tensions and then the pandemic have caused many MNEs, especially in high technology, to consider the risks of overreliance on China for manufacturing. Trade tensions, which escalated from 2018, had led several MNEs to close some plants in China and relocate to Vietnam and other Southeast Asian countries.[22] The continuous rise of real wages in China was an additional motive for those seeking primarily to minimize costs. The pandemic from 2020 accelerated the trend.[23] The severity of the supply chain disruptions is intense: an estimated 20% of global trade in manufacturing of intermediate products originates in China, and the COVID-19 outbreak could

[21] UNCTAD, *World Investment Report 2020: International Production Beyond the Pandemic* (June 2020) x-xi (original emphasis), available via https://unctad.org/en/Pages/DIAE/World Investment Report/World_Investment_Report.aspx.

[22] Rei Nakafuji & Ken Moriyasu, *Multinationals Reroute Supply Chains from China -- for Good?: Komatsu, Daikin and Asics Shift Operations Elsewhere*, Nikkei Asian Review (15 Feb. 2020), https://asia.nikkei.com/Spotlight/Coronavirus/Multinationals-reroute-supply-chains-from-China-for-good.

[23] For example, Google and Microsoft are shifting their production of mobile phone, smart speakers and laptops to Vietnam and Thailand. *See* Cheng Ting-Fang & Lauly Li, *Google, Microsoft Shift Production from China Faster Due to Virus: 'Made in Vietnam' Pixel Phones and Surface Laptops Expected in 2020*, Nikkei Asian Review (26 Feb. 2020), https://asia.nikkei.com/Spotlight/Coronavirus/Google-Microsoft-shift-production-from-China-faster-due-to-virus.

result in a USD 50 billion decrease in exports across GVCs in 2020.[24] Accordingly, some products (and related investment)[25] could be relocated in Japan, Europe and North America. This is the case for many products that are considered critical for national security. For the Trump Administration, even before the pandemic during the China-US trade tensions, these have included several products entering the defence industry supply chain, such as steel, aluminium, and possibly even cars were considered eligible for 'national security-based tariffs'. Finished pharmaceuticals, drug ingredients and medical supplies might also be added to the list of products which, according to the Trump administration, should be produced in the USA.[26] The COVID-19 pandemic is a further game changer that is likely to transform globalisation or even lead to some de-globalisation. The big difference compared to even two decades ago is that GVCs, including across Asia, have become overlaid with another complex network: substantive commitments and dispute resolution enforcement mechanisms under bilateral and regional investment treaties.

§1.03 Proliferation of IIAs in Asia

Asian states remain very diverse in political or legal systems and economic development, and overall have tended to be less open to formalising international cooperation through treaty-based commitments. However, IIAs are somewhat of an exception,[27] and more generally regarding economic cooperation (say compared to security matters) there is a greater tendency to commit to 'hard law' (specific commitments linked to enforcement mechanisms) and/or formalised cooperation (regular meetings etc).[28] One example comes from the Association of Southeast Asian Nations (ASEAN). It has committed increasingly to trade and investment liberalisation within that subregion and with other Asia-Pacific economies through 'ASEAN+' FTAs, and formalised its arrangements in other ways, e.g., through the 2008 ASEAN Charter, although in some important 'behind the borders' areas (such as consumer law) policy-makers are still largely engaging in voluntary harmonisation and capacity building in the older-style 'ASEAN Way'.[29] Another example come from the Asia-Pacific Economic Forum (APEC). From 1994 APEC issued non-binding and general principles to assist member states voluntarily improving their foreign investment regimes, but more recently it has been providing detailed manuals and other capacity building relating to negotiating and drafting IIAs as well as dealing with treaty-based disputes with investors.[30]

Most Asian states significantly expanded signings of BITs especially over the 1990s and into the 2000s,[31] as socialist and other economies started to deregulate and engage in more regional and global trade, underpinned by the WTO system and trends outlined in §1.02 above. The BITs even from this era mostly still focused on protection for foreign investments once made, for example by requiring the host state to provide to counterparty investors the same 'national treatment' (NT) as for its local investors or 'most favoured nation' (MFN) treatment as for foreign investors from third

[24] According to estimates of UNCTAD. *See* UNCTAD, *Global Trade Impact of the Coronavirus (COVID-19) Epidemic, Trade and Development Report Update* (4 Mar. 2020), https://unctad.org/en/PublicationsLibrary/ditcinf2020d1.pdf.

[25] For instance, the fact that China produces 50 per cent of the world's face mask supply explain their global shortage. *See* Izabella Kaminska, *The Under Appreciated Importance of Non-woven Markets*, Financial Times (21 Feb. 2020), https://ftalphaville.ft.com/2020/02/21/1582279827000/The-under-appreciated-importance-of-non-woven-markets/. Diversification of supply may be accelerated by government responses. *See*, for example, *Japan to Pay Firms to Leave China*, Bloomberg (9 Apr. 2020), https://www.scmp.com/news/asia/east-asia/article/3079126/japan-pay-firms-leave-china-relocate-production-elsewhere-part.

[26] James Politi, *US Trade Adviser Seeks to Replace Chinese Drug Supplies: Navarro Says Coronavirus Is 'Wake-up Call' to Create American Pharmaceutical Supply Chain*, Financial Times (12 Feb. 2020), https://www.ft.com/content/73751cca-4d1a-11ea-95a0-43d18ec715f5.

[27] Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 European J. Int'l L. 945 (2016).

[28] Saadia M. Pekkanen, *Asian Designs: Governance in the Contemporary World Order* (Cornell Univ. Press 2016).

[29] Luke Nottage, et al., *ASEAN Consumer Law Harmonisation and Cooperation: Achievements and Challenges* (Cambridge Univ. Press 2019) Chs. 1 and 2 (partially available also via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398046). See also generally Anna Tevina, *Regional Economic Integration and Dispute Settlement in East Asia: The Evolving Legal Framework* (Hart, 2018).

[30] Vivienne Bath & Luke Nottage, *International Investment Agreements in Asia*, *in Handbook of International Investment Law and Policy* (Julien Chaisse, et al. (eds.), Springer 2020). A longer version is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544458, adding a part on Australia and New Zealand plus an Appendix (initially drafted by Nottage) adapted for this present chapter.

[31] Sandra Friedrich & Claudia Salomon, *Investment Arbitration in East Asia and the Pacific*, 16 J. World Inv. & Trade (2015). *See also* their Appendix available at https://ssrn.com/abstract=2591186.

states. In contrast to such 'post-establishment' NT and MFN, these BITs did not tend offer much liberalisation of market access through 'pre-establishment' NT or MFN, and even then qualified such commitments through extensive negative lists where discrimination was still permitted in favour of local investors. More liberalisation commitments have emerged in recent BITs, but especially through investment chapters contained in FTAs. The latter started to be concluded from the early 21st century, first bilaterally and then regionally (e.g., through ASEAN+ FTAs), as it became clear that the WTO (or the Organization for International Cooperation and Development: OECD) would find it difficult to promote a multilateral investment treaty protecting and liberalising investment.[32]

In standalone BITs and especially FTA investment chapters, it also became more common to include broadly applicable ISDS provisions, whereby the host state consented in advance to an arbitration claim being brought directly by an aggrieved foreign investor. Earlier treaties sometimes provided only for inter-state arbitration, a procedure that is still given in recent treaties as an extra option (and for resolving trade rather than investment disputes, as also under the WTO system). Yet this option was hardly ever taken by foreign investors, despite the costs involved in pursuing instead ISDS arbitration, because they would need to mobilise their home state (at its cost and despite potential diplomatic embarrassment) to commence the inter-state arbitration against the host state. However, perhaps reflecting some traditional ambivalence about IIAs and/or international arbitration, several Asian states (including important economies such as India, Thailand and Vietnam) did not go as far ratification of the 1965 Washington Convention establishing the International Centre for Settlement of Investment Disputes (ICSID). This framework ICSID Convention facilitates enforcement of ISDS commitments made separately by a host state through IIAs or in an ICSID arbitration clause in ad hoc investment contracts. Notably, the Convention requires the host state to enforce an award given in favour of a foreign investor from another state that has acceded to the ICSID Convention, after running through an arbitral process administered under the ICSID Arbitration Rules, as if the award is a final judgment of the host state's courts.

If the ICSID option is unavailable, because the host state has not consented in advance to ICSID Arbitration Rules or because it has not ratified the ICSID Convention, the foreign investor typically can only invoke the host state's advance consent to ad hoc proceedings under United National Commission on International Trade Law (UNCITRAL) Arbitration Rules – or occasionally other agreed rules. Awards are then typically enforced under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC). A key difference compared to enforcement of an ICSID Convention Arbitration Rules award is that courts in a NYC member state where the award creditor is pursuing assets of the losing party can refuse enforcement as contrary to that state's 'public policy' (NYC Convention Art V(2)). Although that public policy exception is supposed to be interpreted in an internationalist spirit,[33] it is likely to be a major hurdle where the arbitral award from ISDS is sought to be enforced through the courts of the host state. This is presumably why, for example, the German award creditor (Walter Bau) from a 2009 UNCITRAL Arbitration Rules award did not attempt to enforce it through the courts in Thailand, but instead through the US and then successfully Germany – although that took around a decade, as the Thai government vigorously contested NYC enforcement through Germany courts.[34] Given such problems, it is unsurprising that investors choose the option of ICSID Convention arbitration (528 out of 983 treaty-based ISDS cases known since 1987), if available, rather than ad hoc UNCITRAL Rules arbitration (308 cases).[35]

[32] On the stalling of the OECD treaty in the late 1990s, *see* Joachim Karl, *The Negotiations on the OECD Multilateral Agreement on Investment, in International investment law* 283 (Marc Bungenberg, et al. (eds.), Hart Publishing 2015).

[33] *See generally* UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* 225 (United Nations Publishing and Library Section 2016), also available at http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac_view=-1.

[34] Luke Nottage & Sakda Thanitcul, *International Investment Arbitration in Thailand: Limiting Contract-Based Claims While Maintaining Treaty-Based ISDS*, 18 J. World Inv. & Trade 767 (2017), with a more detailed chronology at https://ssrn.com/abstract=2770889.

[35] Data from https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search (as of 26 Feb. 2020). There were also 61 arbitration cases administered by the ICSID Additional Facility Rules, which can be offered in the IIA if either the host state or the foreign investor's home state has ratified the Convention. But this does not benefit from the ICSID Convention arbitration applicable if both states have ratified, and Additional Facility awards must be enforced instead through the NYC for example.

On the one hand, the selective ratification of the ICSID Convention, combined with some unusual wording in Thailand's IIAs plus consistency in drafting IIAs by some other ASEAN states relative to economic scale (e.g., by Malaysia and Indonesia),[36] suggests that at least some Asian states have tried to be rule makers rather than just accepting the early templates proposed by European and then US treaty negotiators.[37] The picture is now further complicated first because several Asian states have recently been subjected to ISDS claims, notably Indonesia but also especially India (in a case brought by White Industries under an old BIT with Australia). Both states have therefore terminated old BITs, perceived as having wider commitments favouring foreign investors, and in India's case have sought to conclude new treaties based on a publically debated and then disclosed 2016 Model BIT that retains but with significantly *reduced* commitments to foreign investors.[38] A second complication, by contrast, is that several Asian states (notably Singapore and China / Hong Kong, but also in some years Thailand) have recently become significant exporters of foreign direct investment (FDI), rather than just destinations for FDI especially from the 1990s. This shift generates a greater incentive to (re)negotiate instead *more expansive* ISDS-backed commitments, not only for their bilateral IIAs but also in the growing number of 'mega-regional' FTAs containing investment treaties.

Adding to the 2009 ASEAN Comprehensive Investment Agreement (ACIA, protecting and partly liberalising investment within Southeast Asian states) and the five ASEAN+ IIAs, including the 2009 ASEAN Australia-New Zealand FTA (AANZFTA),[39] the ten ASEAN states plus Australia, New Zealand, Japan, Korea and China (but not India) concluded in late 2019 the Regional Comprehensive Partnership (RCEP) FTA. [[When available for signature it will be possible to check what extra liberalisation and other commitments are made. It has already been disclosed that the 15 states did not agree to add the ISDS option in RCEP, but that issue will be revisited within two years of the FTA coming into force, and the COVID-19 pandemic created uncertainty about whether Japan (and others) would be able to sign RCEP in 2020 as originally planned.[40] Anyway, Table §1.3 below shows that ISDS-backed commitments are already available (at least for core substantive protections, if not extensive liberalisation commitments) among almost all RCEP 15 states (and even partly India):[41]

[36] Nottage and Thanitcul, *supra* n. 33; Luke Nottage, et al., *International Investment Treaties and Arbitration Across Asia: A Bird's Eye View*, *in International Investment Treaties and Arbitration Across Asia* 1 (Luke Nottage & Julien Chaisse (eds.), Brill | Nijhoff 2018), especially Figure 1.5 on treaty drafting consistency by ASEAN Member States.

[37] Compare the studies by Lauge Poullsen, reviewed in Luke Nottage, *Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches*, 17 J. World Inv. & Trade 1015 (2016).

[38] Antony Crockett, *The Termination of Indonesia's BITs: Changing the Bathwater, but Keeping the Baby?*, *in International Investment Treaties and Arbitration Across Asia* 159 (Luke Nottage & Julien Chaisse (eds.), Brill | Nijhoff 2018); Prabhash Ranjan & Pushkar Anand, *Investor State Dispute Settlement in the 2016 Indian Model Bilateral Investment Treaty: Does It Go Too Far?*, *in International Investment Treaties and Arbitration Across Asia* 579 (Luke Nottage & Julien Chaisse (eds.), Brill | Nijhoff 2018).

[39] Bath & Nottage, *supra* n. 31.

[40] *See* https://dfat.gov.au/trade/agreements/negotiations/rcep/Pages/regional-comprehensive-economic-partnership.aspx and Julien Chaisse, *The Regional Comprehensive Economic Partnership's Investment Chapter: One Step Forward, Two Steps Back*, Columbia FDI Perspectives (10 Feb. 2020), http://ccsi.columbia.edu/files/2018/10/No-271-Chaisse-FINAL.pdf; and *Pandemic May Force Japan to Give Up on RCEP in 2020*, Japan Times (19 Apr., 2020), https://www.japantimes.co.jp/news/2020/04/19/business/coronavirus-pandemic-japan-give-up-rcep-trade-2020/#.XrSYuJolGUZ.

[41] Treaties analysed from https://investmentpolicy.unctad.org/international-investment-agreements.

Table §1.3: Separate ISDS-Backed Investment Treaty Commitments Among RCEP Parties (and India)

	ASEAN	Australia	NZ	Korea	Japan	China	(India)
ASEAN	Y (among AMS under ACIA)	Y		Y	N (with Philippines ISDS-backed BITs or FTAs with all other AMS	Y (for most commitments)	(N - ISDS in 2014 Investment Agreement but not yet in force)
Australia	Y	n/a	N	Y	Y (CPTPP)	Y (but BIT & FTA both limited)	(N - BIT terminated in 2017 but sunset clause for existing investments)
NZ	Y	N	n/a	Y	Y (CPTPP)	Y	(N)
Korea	Y	Y	Y	n/a	Y (BIT and trilateral IIA)	Y (trilateral Investment Ageement & FTA)	(Y - CEPA)[42]
Japan	N (with Philippines: all others via BIT or FTA)	Y (CPTPP)	Y (CPTPP)	Y (BIT & trilateral IIA)	n/a	Y (trilateral IIA)	(Y - FTA)
China	Y (for most commitments)	Y (but limited [43])	Y	Y (FTA & trilateral IAA & FTA)	Y (trilateral IIA)	n/a	(Y - BIT 2006)
(India)	(N – Agreement not yet in force)	(N - BIT terminated in 2017 but sunset clause)	(N)	Y (CEPA)	(Y - FTA)	Y (BIT 2006)	(n/a)

On the other hand, suggesting that Asian states are also still partly rule takers, the ASEAN+ FTAs and indeed most Asia-Pacific FTAs as well as many recent standalone BITs do largely follow contemporary US-style IIA drafting.[44] That template was based originally on the 1993 North American FTA (NAFTA, renegotiated recently by the Trump

[42] The India-Korea BIT also had an ISDS clause, but the BIT was denounced by India in 2017. However, the ISDS-backed bilateral FTA (Closer Economic Partnership Agreement) was signed in 2009 and came into force from 2010.
[43] But cf., a more expansive (re-)interpretation proposed recently by Tania Voon & Elizabeth Sheargold, *Australia, China, and the Co-Existence of Successive International Investment Agreements, in The China-Australia Free Trade Agreement: A 21st-Century Model* 215 (Colin Picker Picker, et al. (eds.), Hart Publishing 2017).
[44] Wolfgang Alschner & Dmitriy Skougarevskiy, *The New Gold Standard? Empirically Situating the TPP in The Investment Treaty Universe*, 17 J. World Inv. & Trade 339 (2016).

Administration[45]), with provisions somewhat revised in later US FTAs and a Model BIT in light of experiences with NAFTA ISDS cases, seeking to rebalance host state and foreign investor interests. It is epitomised by the Trans-Pacific Partnership (TPP) signed in 2016 by 12 Asia-Pacific states,[46] including by the Obama Administration although the Trump Administration withdrew US signature in 2017. These US-style provisions are very largely retained in the Comprehensive Partnership for TPP, signed by the original signatories (other than the US) and in force from 2019 among six Asia-Pacific states.[47]

Asian states have therefore been contributing to investment treaty making significantly but in complex ways at the regional level.[48] Diverse states are also now participating in diverse ways to multilateral reform discussions. They are engaged by the United Nations Conference on Trade and Development (UNCTAD), which has gone from being a keen proponent of 1990s-style (and arguably quite pro-investor) IIAs for developing countries, to an advocate for reform or rebalancing in newer treaties.[49] Some Asian states have also provided written submissions and made active oral interventions in the UNCITRAL deliberations underway since 2018 on reforming the ISDS system generally.[50] Yet their interests somewhat diverge,[51] arguably reflecting interests as outbound versus inbound investor states but also their experiences with ISDS cases, as indicated in some of this book's later chapters.

§1.04 Belated Expansion of Asia-related ISDS Arbitrations

The growth in FDI and IIAs including ISDS-backed commitments has led to more investment disputes around Asia, but somewhat later and in lower proportions compared to other parts of the world. Initially, some attributed this to a general 'cultural' aversion in Asia to formal dispute resolution processes generating binding outcomes by impartial adjudicators. Yet this rubbed up against the growth in ICA cases in Asia, and the belated increase in ISDS arbitrations involving Asian parties. Arguably, a better explanation for greater use of ISDS lies in diminishing 'institutional barriers' to initiating or defending claims, including greater availability of experienced counsel and arbitrators in the region and learning from experience of initial cases.[52]

Like treaty-based ISDS cases generally, most of these arbitrations are conducted under ICSID rather than UNCITRAL Rules. A few treaties with Malaysia as party add the option for investors to use instead the rules of the Kuala Lumpur Regional Centre for Arbitration (recently renamed the Asian International Arbitration Centre or AIAC, as mentioned in chapter 9 of this volume). There is no known case using them, despite the institution's efforts to promote itself as a suitable venue for ISDS (as well as ICA) cases.[53] But it also very rare for investors to choose the option of non-ICSID or non-UNCITRAL Rules, even when offered in treaties.[54] Nonetheless, arbitration rules tailored to ISDS proceedings have been developed or promoted by various regional arbitration centres, notably the Singapore International

[45] Orlando F. Cabrera, *The US-Mexico-Canada Agreement: The New Gold Standard to Enforce Investment Treaty Protection?,* Columbia FDI Perspectives (13 Jan. 2020), http://ccsi.columbia.edu/files/2018/10/No-269-Cabrera-C.-FINAL.pdf. *See also* Niyati Ahuja, *USMCA: An Analysis of the Proposed ISDS Mechanism,* Kluwer Arbitration Blog (26 Nov., 2019) http://arbitrationblog.kluwerarbitration.com/2019/11/26/usmca-an-analysis-of-the-proposed-isds-mechanism/.

[46] Luke Nottage, *The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification*, 17 Melb. J. Int'l L. 313 (2016). *See also generally* Julien Chaisse, Henry Gao and Chang-fa Lo, (eds.), *Paradigm Shift in International Economic Law Rule-Making: TPP as a Model for Trade Agreements?* (Springer 2017).

[47] https://dfat.gov.au/trade/agreements/in-force/cptpp/Pages/comprehensive-and-progressive-agreement-for-trans-pacific-partnership.aspx

[48] Luke Nottage & Ana Ubilava, *Asia's Changing International Investment Regime: Sustainability, Regionalization and Arbitration – Review Essay* 44 U. W. Australia L. Rev. 195 (2018).

[49] *See generally* Nicholas Perrone, *UNCTAD's World Investment Reports 1991–2015: 25 Years of Narratives Justifying and Balancing Foreign Investor Rights,* 19 J. World Inv. & Trade 7 (2018).

[50] https://uncitral.un.org/sites/uncitral.un.org/files/report_1004-add1_for_submission_rev_002.pdf.

[51] *See generally* the blog postings co-authored by a semi-official delegate from Australia, Professor Anthea Roberts: https://www.ejiltalk.org/author/aroberts/.

[52] Luke Nottage & J Romesh Weeramantry, *Investment Arbitration in Asia: Five Perspectives on Law and Practice,* 28 Arb. Int'l 19 (2012).

[53] AIAC, *First Ever AALCO Annual Arbitration Forum Held to Discuss Business, Economy, and ADR Mechanisms to Safeguard Investments in Asia and Africa,* AIAC News (July 21, 2018), https://www.aiac.world/news/263/First-Ever-AALCO-Annual-Arbitration-Forum-Held-to-Discuss-Business,-Economy,-and-ADR-Mechanisms-to-Safeguard-Investments-in-Asia-and-Africa.

[54] According to UNCTAD's ISDS Navigator website, as of 26 Feb. 2020, *supra* n. 34, there had been 17 arbitrations through the otherwise very active International Chamber of Commerce (ICC), and 48 by the Stockholm Chamber of Commerce.

Arbitration Centre, but also in Hong Kong and China (as discussed in chapters 6-8 of this volume). Such a development and incorporation of such rules as an option in treaties was proposed for Australia and Japan a decade ago, but to no avail.[55] A key difference for such rules is enhanced transparency, rather than the usual default rule of confidentiality generally valued by commercial parties to ICA, because of the greater public interest in ISDS cases where an investor claims against a host state.[56]

Most ISDS claims nowadays are based on treaty-based consent to arbitration, and such treaties (or arbitral rulings) generally provide significant transparency around key aspects of proceedings and especially the outcomes.[57] However, sometimes the advance consent is provided through an arbitration clause in an investment contract negotiated individually between the foreign investor and a host state. If this consent is to ICSID arbitration, some transparency is available through its website.[58] But if to non-ICSID arbitration, the proceedings and even awards are generally confidential under the applicable Rules and/or arbitration law at the chosen seat (devised primarily with ICA in mind). This means a paucity of data on such cases, unless there are challenges relating to the proceedings or arbitral award enforcement that end up in the courts of the seat and/or where assets of the award debtor are located, and such courts provide public access to proceedings or awards.

Apart from growing public concerns about transparency around ISDS arbitrations, there are issues around delays and especially costs in arbitration. Arguably these problems are exacerbated by confidentiality, and hence a lack of accurate information about service provider quality. Another contributing factor may be the spread of large law firms into Asia, including 'billable hours' models of delivery (and internal promotion) for their lawyers.[59] As with ICA but even more so for ISDS arbitration, given its greater public interests, more discussions and initiatives are underway promoting alternatives or complements to arbitration for international dispute resolution. One example is a unique mediation step before ISDS arbitration that can be compelled by the host state, found in the Australia-Indonesia FTA signed in 2019 (analysed in chapter 5) Another is the 2019 UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) aimed at facilitating enforcement of settlement agreements, in force from 12 September 2020 (described in chapter 14).[60] A third 'new frontier' is the establishment of international commercial courts in Singapore and more recently in China, and proposed for Australia (in chapter 2).

§1.05 Emergence of Regional Centres and New Initiatives for International Dispute Resolution

This expansion in Asia-related ICA cases, and more recently ISDS cases, has underpinned the growth and new initiatives for regional centres providing international dispute resolution services. For example, the China International Economic and Trade Arbitration Commission (CIETAC) has developed the highest annual caseload of international cases filed in the world, although this counts also ICA cases between foreign-owned subsidiaries and local firms. The attraction is partly due to comparatively poor-quality (although improving) court procedures, which foreign investors and traders try to avoid by consenting instead to arbitration, combined with some strong negotiating power from Chinese parties seeking to secure China as the seat. Some foreign parties may not push for a foreign seat of arbitration out of concern for extra problems enforcing foreign awards even under the NYC, although the Chinese courts' record for enforcement has been improving. Chinese arbitration law also still does not allow ad hoc arbitrations, which further boosts the caseloads of CIETAC and other arbitral centres like the Beijing International Arbitration Centre. But they have also been innovating through publishing recently rules tailored for ISDS cases. Further momentum comes from the Chinese government establishing an International Commercial Court. These initiatives also aim to attract

[55] Luke Nottage & Kate Miles, *'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan for Public Interests*, 26 J. Int'l Arb. 25 (2009).
[56] Chief Justice James Allsop, *Commercial and Investor-State Arbitration: The Importance of Recognising Their Differences*, ICCA Congress 2018, Sydney, Opening Keynote Address, at https://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20180416.
[57] Luke Nottage & Ana Ubilava, *Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry*, 21 Int'l Arb. L. Rev. 111 (2018).
[58] Available via https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx
[59] Nottage *supra* n. 1.
[60] *See* UNCITRAL, *United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation")*, Texts and Status: International Commercial Mediation (20 Dec. 2018), https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements. *See also Mediation in International Commercial and Investment Disputes* (Catharine Titi & Katia Fach Gómez (eds.), Oxford Univ. Press 2019).

cases arising from China's westward investments and other projects along the Belt and Road, as elaborated also in chapters 6-8 of this volume

Hong Kong also has a high caseload and very strong reputation, including from early on for its courts applying the UNCITRAL Model Law on ICA (as template legislation) in an internationalist and pro-arbitration spirit.[61] Parties to contracts and their legal advisors have agreed on Hong Kong as a more neutral seat for arbitration between mainland Chinese and foreign parties. Hong Kong practitioners and policy-makers have been trying to promote new initiatives such as third-party funding for arbitration and mediation services,[62] while the government continues to negotiate comprehensive IIAs (including recently with ASEAN and Australia, each providing for ISDS), as elaborated in chapters 5 and 8. However, political tensions in 2019 and the coronavirus in early 2020 have created challenges for Hong Kong. Those may enhance the attraction of Singapore, which had already emerged as a similarly attractive venue for ICA, ISDS, mediation and international litigation.[63]

As for smaller players in the region, Malaysia and Korea have been making sustained efforts particularly to attract ICA cases. This has prompted new initiatives by Australia once more (like Hong Kong, an earlier adopter of the Model Law style of arbitration law) and more recently Japan, as elaborated in chapters 3, 6 and 10 of this volume. Even India, arguably prompted by losing in 2011 an ISDS claim brought by White Industries from Australia claiming violation of a treaty commitment to provide 'effective means' of enforcing ICA awards (elaborated in chapter 12),[64] has undergone legislative, case law and institutional developments in recent years that aim to promote more efficient arbitration in India. However, previous studies show how it is important for ICA venues to have and amend legislation carefully, develop consistent and widely disseminated case law, and expand arbitration 'infrastructure' and publicity generally. These countries also compete against the well-established reputations of the three more popular regional venues, not to mention the ongoing attraction (and marketing efforts into Asia) of 'core' arbitral institutions in the West. One strategy may be to focus on niche markets, including arbitration of particular types of disputes (e.g., intellectual property in Japan, or resources in Australia) or particular regions (e.g., along the Belt and Road) or new types of dispute resolution processes (such as standalone mediation or hybrid Arb-Med).

§1.06 Key Developments in Key Jurisdictions: Chapter Summaries and Further Context

[A] Australia (and New Zealand)

Australia and neighbouring New Zealand lie on the periphery of the Asian region, incorporate growing Asian and Eurasian populations, and have many close trade and investment links especially with each other but also across Asia. Their geographical location and other factors have so far prevented them from attracting many ICA cases. But they have internationally minded and respected courts, and various current and past judges in particular are exploring the potential for Australia to develop an international commercial court (inspired by Singapore and others) to offer enhanced international business dispute resolution services in the region. Australia and more recently New Zealand have also experienced intense political and media debate discussion over ISDS in IIAs, which risks giving arbitration

[61] *See* Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Focusing on Australia, Hong Kong and Singapore* (Kluwer Law International 2016), comparing mainly with Singapore and Australia, reviewed at https://japaneselaw.sydney.edu.au/2017/04/book-review-dean-lewis-the-interpretation-and-uniformity-of-the-uncitral-model-law-on-international-commercial-arbitration/.

[62] Singapore has also been recently competing in this space: *see* Gary Benton, *The Whispered Conversation: Hong Kong v. Singapore*, Kluwer Arbitration Blog (2 January 2019) http://arbitrationblog.kluwerarbitration.com/2019/01/02/whispered-conversation-hong-kong-v-singapore/. Curiously, Australia has not been actively promoting itself for ICA by emphasising a laissez-faire regime for third-party funding created much earlier through the High Court's decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited* [2006] HCA 41. After the COVID-19 pandemic, some limits on third-party funding have been legislated but primarily only impacting on 'retail' or individual claimants (rather than corporate claimants in ICA cases): *New Rules for Litigation Funders After Jump in Class Actions*, Sydney Morning Herald (22 May 2020) https://www.smh.com.au/politics/federal/new-rules-for-litigation-funders-after-jump-in-class-actions-20200521-p54vak.html.

[63] Chan Leng Sun, *Making Arbitration Work in Singapore, in The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* 143 (Anselmo Reyes & Weixia Gu (eds.), Hart Publishing 2018).

[64] Harisankar K. Sathyapalan, *Indian Judiciary and International Arbitration: A BIT of a Control?*, 33 Arb. Int'l 503 (2017).

more generally a bad name,[65] and such concerns around ISDS are also impacting on counterparties with which they have been negotiating IIAs.

In Chapter 2, as former senior judges from Victoria now practising as commercial arbitrators, Marilyn Warren and Clyde Croft argue that the time has come for Australia to join others in establishing a new 'International Commercial Court' as another international dispute resolution option especially for the Asia-Pacific region. They outline the existing international legislative architecture (the 1958 NYC for international arbitration, inspiring the 2005 Hague Choice of Court Convention), and the models provided by London's venerable Commercial Court and since 2015 the Singapore International Commercial Court (including the latter's composition, jurisdiction, procedure and confidentiality provisions, appeals, and cross-border enforceability of its judgements – facilitated by Singapore ratifying the 2005 Hague Convention). Warren and Croft use these topics to frame their proposal for an Australian International Commercial Court, including the possibility of allowing its litigants to exclude the application of the Australian Consumer Law (which otherwise may apply also to many business-to-business disputes).[66] They conclude that the COVID-19 pandemic has bolstered the case for such a new Court, by minimising the obstacle of Australia's physical distance as litigation has had to move rapidly online, and because the pandemic's economic dislocation will undoubtedly lead to more cross-border disputes.

In Chapter 3, Albert Monichino and Nobumichi Teramura discuss largely positive recent trends in ICA case law and other developments in Australia. They discuss interesting judgments recently applying the Model Law based International Arbitration Act regarding (still comparatively few) ICA proceedings seated in Australia, as well as those seated abroad (including enforcement of awards from Singapore, China and New York).[67] They conclude by recommending a suite of further useful reforms to the IAA, based on this case law and developments abroad, including allowing commercial parties to opt out of the Australian Consumer Law.[68] These initiatives could combine with ICA's widespread adoption of e-proceedings, since the COVID-19 pandemic, to put Australia more prominently on the map for ICA filings. The authors of this introductory chapter consider it plausible that not updating legislation

[65] *See generally* e.g., Luke Nottage, *International Arbitration and Society at Large, in* Andrea Bjorklund et al (eds) *Cambridge Compendium on International Arbitration* (CUP forthcoming), manuscript at https://ssrn.com/abstract=3116528.

[66] For an earlier more pessimistic assessment of the need for a separate court, *see* the speech by the President of the New South Wales Court of Appeal quite soon after his appointment: Justice Andrew Bell, *An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea?*, 2019 ABA Biennial International Conference, Singapore, at http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Bell_20190712.pdf.

[67] *See also* Russell Thirgood and Erika Williams, *Arbitrating Down Under: Highlights and Lessons Learned from 2018 to 2019*, 15(2) Asian Int'l Arb. J. 133 (2019).

[68] Monichino and Teramura focus on the statutory prohibitions regarding misleading and unconscionable conduct, which are indeed broadly worded and thus of major concern for commercial parties. But allowing ICA parties to opt-out of mandatory "consumer" guarantees and broader unfair terms regulation is also important, and may be even more justifiable on public policy grounds given that these provisions have fewer repercussions (or third-party effects) on market generally. Under Australian Consumer Law s3, "consumer" guarantees (eg for fitness of purpose under s55) apply even to business-to-business supplies goods or services under $40,000 (with a legislative amendment proposing to raise this threshold to $100,000) as well as in principle to supplies above the threshold if the goods or services are ordinarily for personal use (even if subjectively purchased for business purposes), unless for re-supply or using up in an industrial process. The Full Federal Court has furthermore interpreted s67 as requiring consumer guarantees to be applied to imports even if the objective governing law is foreign: *see* paras 96-115 of *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 224. If an Australian-seated arbitrator applied a chosen foreign law in such a scenario, rather than the Australian Consumer Law, the award therefore could well be challenged in Australian courts as contrary to public policy. Similar problems could arise regarding allegedly unfair terms, voided since 2016 in "small business contracts" under s23. For early discussion of such problems (evident already with the Law's predecessor statute), *see* Luke Nottage and Richard Garnett, *The Top 20 Things to Change In or Around Australia's International Arbitration Act, in International Arbitration in Australia* (ibid. (eds.), Federation Press 2010) 149, 153-5, with a manuscript version at https://ssrn.com/abstract=1378722. *See also* Nobumichi Teramura, Luke Nottage and James Morrison, *Judicial Control of Arbitral Awards in Australia, in The Cambridge Handbook of Judicial Control of Arbitral Awards* 173, 183-7 (Larry diMatteo et al. (eds.), Cambridge University Press, 2020); and, focusing on transactions involving individual consumers for non-business purposes, Richard Garnett, *Arbitration of Cross-Border Consumer Transactions in Australia: A Way Forward?*, 39 Sydney L. Rev. 569 (2017).

concerning major issues, after significant stakeholder consultation as in Hong Kong and Singapore,[69] might have further diminished Australia's relative attractiveness as a regional seat – or at least may do so into the future.

The need for legislative reform can become clearer by comparing statutes especially in other Model Law states. An example is review by seat courts of tribunals' positive (not just negative) jurisdictional rulings, as from 2012 in Singapore (and earlier English law), as proposed by Teramura and Monichino. In addition, statutory reforms can focus on issues raised directly or indirectly by one or more court judgments. For example, Monichino and Teramura highlight how a first-instance judgment in 2016 by the Federal Court of Australia declined to follow case law in Hong Kong that has progressively applied the principle that indemnity costs should be awarded by courts against those challenging the arbitration, and indeed moves in that direction by some other judges in Australia.[70] Nonetheless, extending the traditional approach with due recognition that arbitration is supposed to be a cost- and time-effective process, Beach J did manage to award indemnity costs for two of three grounds of challenge that were held not to have sufficiently reasonable prospects of success. However, we find it curious that one such ground was a challenge to an arbitrator for apparent bias, which seems a stronger ground as this chairperson had been appointed by a co-arbitrator (with the other), despite them having worked together – albeit only for a few years ending six years prior to the appointment. By contrast, in a decision that provides helpful guidance given the shift to virtual hearings during the COVID-19 pandemic in 2020, Beach J did not award indemnity costs for the unsuccessful challenge based on the award debtor encountering difficulties in witness examinations using videoconferencing technology (as well as problems with interpreters), even though this challenge seems weak as the witnesses were their own and there had been prior agreement on videoconferencing. The time and costs associated with such challenges might been avoided if Australia moved to an indemnity costs principle, as in Hong Kong and suggested now by the authors (and earlier by others[71]).

Other issues could be usefully addressed by legislators even if there is less or less conflicting case law within Australia, or indeed if what seems to be the position might be debatable on policy grounds. For example, the earlier decision by Beach J in the same case indicated that the perspective for judging whether there was a 'real danger of bias' of arbitrators, as required by s 18A of the Act as amended in 2010 (elaborating on the Model Law) in light of English law, was that of the Court itself 'as opposed to merely that of a reasonable lay person'.[72] As laypeople may be more skeptical than judges about apparent bias or conflicts of interest, this might somewhat narrow the scope for challenges, consistently with specifying a 'real danger of bias'. As mentioned above, Beach J ended up finding that there was insufficient apparent bias, which might have been connected to adopting the perspective of the Court itself. However, Beach J added that the same result would apply in this particular situation even if the perspective was instead that of a 'fair-minded lay observer'.[73] In a judgment rendered the next year, Beach J instead adopted the latter view, before finding apparent bias by the arbitrator. He was brought around to the view that the correct perspective even for the English 'real danger' test is that of a 'reasonable bystander'. Beach J was bolstered in this shift partly by that the fact that IAA 's18A is silent on perspective', and partly because 'the difference in perspective may not make much practical difference'.[74]

Yet these limited Australian judgments indicate that the law remains uncertain, especially as Beach J's evolving thinking was only expressed at first-instance in one of the many courts within Australia with jurisdiction over ICA cases. Such uncertainty generates delays and costs not only in the two cases before Beach J, but also potentially for other challenges to arbitrators that have not ended up in court, as well as for future cases. It is also disappointing that

[69] For a possible further legislative innovation being suggested recently for Singapore, *see also* Weiyi Tan, *Allowing the Exclusion of Set-aside Proceedings: An Innovative Means of Enhancing Singapore's Position as an Arbitration Hub*, 15(2) Asian Int'l Arb. J. 87 (2019).
[70] *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd (No 2)* [2016] FCA 1169, available at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2016/1169.html.
[71] *See e.g.* Diana Hu and Luke Nottage, *The International Arbitration Act Matters in Australia: Where to Litigate and Why (Not)*, 35(1) The Arbitrator and Mediator 91 (2016), manuscript at https://ssrn.com/abstract=2862256.
[72] *Sino Dragon Trading Ltd v Noble Resources International Pte Ltd* [2016] FCA 1131, available at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2016/1131.html, at [197].
[73] *Ibid.* [at 198].
[74] *Hui v Esposito Holdings Pty Ltd* [2017] FCA 648, available at http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2017/648.html, at [241].

the Australian legislator still has not addressed this perspective issue, which raises interesting policy questions about whether and how to limit challenges to arbitrators, despite attention being drawn to it by commentators from around 2010.[75] The reflex of those working within the common law tradition may be to hope that courts will develop applicable principles gradually and optimally, but this is complicated because of multiple courts as well as still few Australia-seated ICA cases. In addition, this attitude may seem curious for legal advisors from its regional neighbours, more influenced by the civil law tradition and therefore putting less weight on case law and precedent.

In Chapter 4, focusing on Australia and Japan in Asian context, Luke Nottage examines transparency (increasing around treaty-based ISDS) and confidentiality (still largely seen as preferred by parties to ICA, and thus reflected in laws and especially arbitration rules). Australia has seen more legislative action in this field, although quite confusingly through three IAA amendments since 2010, whereas Japan has gradually increased confidentiality in ICA by revising arbitral institution rules. Nottage argues that growing transparency around ISDS arbitration (especially perhaps in Australia's treaties) is welcome given the greater public interests involved in such cases, but transparency should not be simply transposed into commercial dispute resolution through ICA, as the fields are overlapping but distinct. Confidentiality in ICA has the disadvantage of exacerbating information asymmetry, making it harder for clients and advisors to assess whether particular arbitrators and lawyers provide value for money. Yet confidentiality allows arbitrators in particular to be more robust in proceedings and drafting rulings, thus countering the rise in ICA delays and especially costs. More transparency around ISDS, as well as initiatives like 'Arbitrator Intelligence' and experiments in reforming arbitral rules, can help reduce information asymmetry for users anyway,[76] while retaining various advantages of confidentiality particularly in ICA.

In Chapter 5, Ana Ubilava and Luke Nottage provide an update on Australia's recent treaty-making related to international investment and ISDS. Including insights from participation in parliamentary inquiries into ratifying recent treaties, they mostly compare aspects of the CPTPP (also ratified by New Zealand) with Australia's treaties signed in 2019 with Indonesia (IA-CEPA) and Hong Kong (AHKIA), along with the UN Mauritius Transparency Convention that seeks to retrofit more transparency around ISDS provisions contained in pre-2014 investment treaties. As well as transparency, delays and costs are persistent contemporary concerns nowadays, so the analysis focuses mainly on those features.

By way of further background, it is worth looking more closely already at investment treaty-making by Australia and New Zealand for several reasons. First, they have mainly concluded treaties with Asian counterparties, thus already or potentially influencing those counterparties' approaches to negotiating investment treaties with other states. Secondly, Australia and New Zealand may provide some other ideas for intra-Asian economic integration, because they have longstanding shared interests and widespread cooperation in legal and economic affairs, and a comprehensive arrangement for closer economic relations bilaterally. These cover cross-border trade and investment, mutual recognition, free movement of people and agreements for the enforcement of court judgements and regulatory cooperation.[77]

Neither Australia nor New Zealand has been a particularly enthusiastic proponent of BITs, although Australia has signed 24 (of which six have since been terminated, four because of subsequent FTAs). The most recent is a BIT with Uruguay designed to replace the 2001 BIT, which is not yet in effect, and the AHKIA was signed in 2019 and came into force from 17 January 2020.[78] Both contain language derived from the CPTPP, but do not contain a NT provision, either for the pre-establishment phase (which means liberalising market access for foreign investors, unless a negative list schedules exclusions) or even for the post-establishment phase. Since 2003, Australian policy-makers have been much more focused on negotiating comprehensive FTAs, including regional FTAs, such as the ASEAN Australia-

[75] Sam Luttrell, *Australia Adopts the 'Real Danger' Test for Arbitrator Bias*, 26(4) Arb. Int'l 625 (2010).
[76] *See* Catherine Rogers, *The Market for Arbitrators and the Market for Lemons*, Kluwer Arbitration Blog (June 10, 2020) http://arbitrationblog.kluwerarbitration.com/2020/06/10/the-market-for-arbitrators-and-the-market-for-lemons/.
[77] Vivienne Bath & Gabriël Moens, *Law of International Business in Australasia* (The Federation Press 2nd ed. 2019); Luke Nottage, *Asia-Pacific Regional Architecture and Consumer Product Safety Regulation beyond Free Trade Agreements, in Trade Agreements at the Crossroads* 114-138 (Susy Frankel & Meredith Kolsky-Lewis (eds.), Routledge 2014).
[78] Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments, signed 5 Apr. 2019.

New Zealand FTA (AANZFTA), the CPTPP and the RCEP.[79] Australia has signed 22 FTAs (including the Closer Economic Relations agreement and its 2011 investment protocol with New Zealand, and the 2019 IA-CEPA), although a few are not in effect, and the RCEP has not yet been finalized for signature. These in fact reflect more accurately Australia's close economic integration with the Asian region and the USA. New Zealand only ever signed four BITs, with China and Hong Kong (in force) and Chile and Argentina (not in force), but it has entered into 16 FTAs (including the CER and its investment protocol with Australia) plus the RCEP.[80] These are, like Australia's, focused on the Asian region. Collectively, therefore, the two nations could exercise a 'middle power' role in regional investment treaty making.[81]

Like many of its Asian counterparties, Australia and New Zealand have followed a NAFTA style in their negotiations of investment chapters in FTAs. Although New Zealand does not have an FTA with the US, they are both parties to the CPTPP, with its detailed and comprehensive investment chapter and ISDS provision. They are both also quite accommodating when dealing with their more cautious neighbours, particularly in relation to market access commitments, since trade liberalization and market access for goods and services is a fundamental aspect of FTAs for both countries. However, both are quite cautious in relation to market access for foreign investment. In the CPTPP, for example, although they both agreed to pre-establishment NT and MFN provision, this was subject to a negative list setting out measures and sectors in which investment may be restricted. They were also careful to maintain exceptions for legitimate public welfare objectives (fn 11 of the CPTPP investment chapter), and to ensure that the ISDS provision did not apply to pre-admission screening decisions made by either country (Annex 9-H).

Australia has only had a few ISDS claims made against it,[82] but experienced a similar shock to India (mentioned above) when in 2011 it too was subjected to a significant ISDS claim. This was initiated formally by Philip Morris Asia under the succinct 1993 Hong Kong-Australia BIT,[83] over Australia's pioneering tobacco plain packaging legislation. The claim under UNCITRAL Rules was dismissed on jurisdictional grounds in December 2015. An eminent tribunal found an abuse of rights by Philip Morris (under background customary international law) which reorganised its corporate structure to ensure that the Hong Kong subsidiary of the (originally US) tobacco company held the affected trademarks in Australia, when there was a reasonable prospect of a dispute arising though the Australian legislation.[84] The case nonetheless attracted much discussion in Australian media and politics, which retains a comparatively open market but also some historical ambivalence towards foreign investment (and perhaps the US generally).[85]

Australia's policy towards to ISDS has reflected both changes in government and a growing public debate. In 2010, the government's Productivity Commission recommended that Australia no longer agree to ISDS in future treaties, a policy shift that was adopted by the centre-left Gillard Government from 2011 until it lost the general election of 2013. The new government reverted to Australia's past policy of including ISDS provisions in treaties on a case-by-case assessment. ISDS was omitted from the 2004 Australia-US FTA, the 2012 bilateral FTA with Malaysia (but anyway applicable under AANZFTA) and the FTA with Japan in 2014 (but anyway applicable under the CPTPP).[86] The

[79] UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/11/australia. Accessed 14 Feb. 2020.

[80] UNCTAD, https://investmentpolicy.unctad.org/international-investment-agreements/countries/150/new-zealand. Accessed 14 Feb. 2020.

[81] Amokura Kawharu & Luke Nottage, *Models for Investment Treaties in the Asian Region: An Underview*, 34 Ariz. J. Int'l & Comp. L. 461 (2016).

[82] For details of claims filed or threatened, curiously under the Australia-US FTA that had omitted advance consent to ISDS, *see ibid*., and https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/816/.

[83] Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments [1993] ATS 30, signed 15 Sep. 1993, effective 15 Oct. 1993; terminated 17 Jan. 2020 on the coming into effect of the Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China [2020] ATS 5, signed 26 Mar. 2019, effective 17 Jan. 2020.

[84] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 Dec. 2015) noted in Jarrod Hepburn & Luke Nottage, *Case Note: Philip Morris Asia v Australia*, 18 J. World Inv. & Trade 307 (2017).

[85] Luke Nottage, *The Evolution of Foreign Investment Regulation, Treaties and Investor-State Arbitration in Australia*, 21 N.Z.B.L.Q. 266 (2015). *See also* Vivienne Bath, *Australia and the Asia-Pacific, in Reconceptualizing International Investment Law from The Global South* 95 (Fabio Morosini & Michelle Ratton Sanchez Badin (eds.), Cambridge Univ. Press 2017).

[86] Luke Nottage, *Investment Treaty Arbitration Policy in Australia, New Zealand and Korea*, 25 J. Arb. Stud. 185 (2015).

PACER-Plus FTA with New Zealand and small Pacific Island states (2017) also omits ISDS,[87] seemingly because such micro-states would lack capacity to defend arbitration claims and rely much more anyway on trade than foreign investment. Similarly, Australia and New Zealand do not consider it necessary to provide for ISDS as between themselves, so it was omitted from the Australia-New Zealand Investment Protocol[88] and by side letter from the AANZFTA[89] as well as the CPTPP.[90]

All other FTAs signed by Australia have added the ISDS option for foreign investors, including the bilateral FTA signed with Indonesia signed in 2019. Australia has also begun procedures to ratify the 2014 Mauritius Convention, which retrofits transparency provisions to past treaties (where the counterparty ratifies the Convention as well).[91] Enhanced transparency in ISDS has in any event become a feature of Australia's treaty practice (although less evident in the Indonesia treaty, for example, compared to the Hong Kong treaty recently).[92]

In contrast to the limited number of cases against Australia, Australia's outbound investors (notably in the resources area) have now become active in utilising Australia's treaties bringing treaty-based claims against host states, including Indonesia, Pakistan and Thailand.[93] Most of these outbound ISDS claims are commenced under Australia's older BITs, signed mostly over 1988-2005. Those treaties were not been based on any (at least publically disclosed) Model BIT. However, they largely followed then European and US treaty drafting, and offered quite wide protections for investors, without the various express qualifications found in the FTAs signed since 2003 with Singapore (on an updated US FTA approach).[94] Australian outbound investors' treaty claims have occurred despite one ICSID tribunal finding that Australia's 1992 BIT with Indonesia (and indeed with several other states, including with Pakistan) lacked sufficient advance consent to ISDS.[95] However, several of these cases also involve investment contract claims containing ad hoc consent to ICSID arbitration (for example unsuccessfully recently against Timor Leste, and a claim against Papua New Guinea registered in 1996 and discontinued in 2001).[96]

The overlapping nature of investment treaties in Asia may also offer investors a choice of treaties when seeking to institute a claim. Australia has terminated and replaced a number of its BITs, particularly in conjunction with the

[87] Deborah Gleeson & Ronald Labonté, *Trade Agreements and Public Health: A Primer for Health Policy Makers, Researchers and Advocates* 30 (Palgrave Pivot 2020).
[88] [2013] ATS 10, signed 16 Feb. 2011, effective 1 Mar. 2013.
[89] An exchange of letters between Australia's Minister for Trade and New Zealand's Minister of Trade on the application of AANZFTA between Australia and New Zealand, 27 Feb. 2009, https://dfat.gov.au/trade/agreements/in-force/aanzfta/official-documents/Pages/official-documents.aspx. Accessed 14 Feb. 2020.
[90] Agreement between Australia and New Zealand regarding Investor State Dispute Settlement, Trade Remedies and Transport Services, 8 Mar. 2018, https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/sl15-australia-new-zealand-isds.pdf. Accessed 14 Feb. 2020.
[91] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, [2019] ATNIF 13.
[92] *See* Luke Nottage, *New Frontiers in International Arbitration for The Asia-Pacific Region (7): Australia's Parliamentary Inquiries into ISDS in HK, Indonesia and UN/Mauritius Treaties*, Japanese Law and the Asia-Pacific (1 Sep. 2019), https://japaneselaw.sydney.edu.au/2019/09/new-frontiers-in-international-arbitration-for-the-asia-pacific-region-7-australias-parliamentary-inquiries-into-isds-in-hk-indonesia-and-un-mauritius-treaties/; elaborated in Ubilava and Nottage, Chapter 5 in this volume.
[93] *See* https://investmentpolicy.unctad.org/investment-dispute-settlement/country/11/australia. The 2019 claim against Georgia invoking the Energy Charter Treaty is curious because Australia has signed but not yet ratified that treaty.
[94] *See generally* Andrew D. Mitchell, *Australia and New Zealand, in Research Handbook on Foreign Direct Investment* 390 (Markus Krajewski & Rhea Tamara Hoffmann (eds.), Edward Elgar Publishing 2019). Australia resumed signing BITs in 2019 through one with Uruguay, closely tracking (CP)TPP drafting and thus including extensive qualifications and some transparency provisions. Curiously, however, it did not contain an express exclusion for ISDS claims related to tobacco measures despite Uruguay having also successfully defended a claim over tobacco legislation against Philip Morris under a BIT with Switzerland. *See* generally Jarrod Hepburn, *After Respective Battles with Philip Morris, Australia and Uruguay Unveil New Bilateral Investment Treaty*, IA Reporter (15 Apr. 2019), https://www.iareporter.com/; and compare the express exclusion in Australia's IIA signed with Hong Kong in 2019, as elaborate by Ubilava and Nottage, chapter 5 in this volume.
[95] For a critical analysis of that argument, *see* Luke Nottage, *Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis and Regional Implications*, 12 TDM 1 (2015). Also available at, http://ssrn.com/abstract=2424987.
[96] Searchable via https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx

ratification of FTAs with investment chapters. However, its 1988 BIT with China coexists with ChAFTA,[97] although it may be reviewed as part of the overall work program provided under the FTA's investment chapter (Article 9.9).

New Zealand has followed developments in nearby Australia, although it has never been subjected to an inbound treaty-based ISDS claim.[98] Public debate escalated after the US and others joined the negotiations from 2010 for the TPP (signed in Auckland in 2016), and Korea obtained ISDS provisions in its bilateral FTA (signed in 2015). The New Zealand First Party submitted the 'Fighting Foreign Corporate Control Bill', which would have prevented the government from including ISDS provisions in future treaties, but this Bill was defeated in 2015. The Party joined however the Labour Government's coalition government from late 2017, which announced that New Zealand would seek not to agree to ISDS. New Zealand nonetheless ratified the CPTPP in 2018 (little changed from the TPP signed by the previous centre-right government). It excluded ISDS bilaterally through side letters with some member states (Brunei Darussalam, Malaysia, Viet Nam and Peru),[99] but for the first of those three ISDS-backed protections remain available anyway under AANZFTA.

The New Zealand government has created a Trade For All Advisory Board (TFAAB) for public consultations over New Zealand's international trade and investment policy. Its November 2019 Report[100] reviewed the pros and cons of ISDS for a developed country and legal system. In particular, it considered the implications for New Zealand's indigenous population. The TFAAB Report did not recommend changing the coalition government's policy shift against ISDS when negotiating new treaties, announced already two years earlier, but recommended caution, particularly if the alternative to agreeing to ISDS is to lose the broader benefits of the overall treaty.[101] TFAAB also recommended that New Zealand should become more prominent in regional and global public debates over international investment law:

> TFAAB supports the reform of investment arbitration systems. The Government should:
> a. swiftly complete and implement the [Waitangi Tribunal Report] Wai 2522 recommendation for an ISDS Protocol [for consultation if disputes could affect New Zealand's indigenous people];
> b. take a more active approach to international processes to reform arbitration arrangements and consider alternatives to ad hoc arbitration, particularly in the UNCITRAL Working Group and [UNCTAD];
> c. seek membership of UNCITRAL at the next available opportunity;
> d. review current arrangements in trade agreements with its partners as new arrangements become available.[102]

On the multilateral front, Australia is engaged in the UNCITRAL Working Group III discussions, although it does not appear to have made any written submissions. It was also one of primary advocates of a WTO discussion on Investment Facilitation, which has been slowly moving forward multilaterally. New Zealand is involved in the WTO discussions,[103] but is not a member of UNCITRAL and is not involved in the UNCITRAL Working Group III meetings (although the TFAAB notes that membership is not required for New Zealand to participate). This may change if New Zealand decides to play a more significant role at a multilateral level. Until 2020, and even now given the larger size of its economy, Australia is better placed to play a 'rule maker' role in international investment law. Arguably, however, it could improve that potential through even closer coordination with New Zealand in treaty-making, especially given the extra challenges for negotiating and implementing trade and investment treaties following the COVID-19 pandemic.

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[97] *See* Voon & Sheargold, *supra* n. 42.
[98] For an early claim by Mobil Oil that provided advance consent by investment contract, which settled, *see* Amokura Kawharu & Luke Nottage, *Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu*, 18/03 Sydney Law School Research Paper 1 (2018).
[99] Available via https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/.
[100] Available via the top page of https://www.tradeforalladvisoryboard.org.nz/, *see especially* 53-56 (paras. 133-153).
[101] *Ibid*., [149]-[150].
[102] *Ibid*., [8].
[103] New Zealand Foreign Affairs & Trade, WTO plurilateral discussions on investment facilitation for development. https://www.mfat.govt.nz/en/trade/our-work-with-the-wto/wto-plurilateral-discussions-on-investment-facilitation-for-development/. Accessed 14 Feb 2020.

[B] Japan (and Korea)

Japan initially concluded a similar number of BITs to Australia, which is comparatively low given Japan's much larger outbound flows and overall stock of FDI (as illustrated in [[Appendix A]]), and the wording of these BITs was quite flexible. Japan also then began to conclude FTAs (mostly all with investment chapters) from the early 21st century, after a new WTO negotiation round and OECD initiatives for a multilateral IIA foundered while income from Japan's investments abroad became increasingly significant. Drafting also became more consistent as these FTAs were mostly drafted in contemporary US style.[104] A difference from Australia is that Japan has recently kept signing more standalone BITs, under pressure from business associations, as Japanese firms find themselves with less treaty protection compared to outbound investors from Korea or China (both with much larger IIA networks).[105] Japan has also pushed in UNCITRAL deliberations to keep ISDS, while reforming particular aspects at different rates.[106] It also declined to sign an investment protection treaty alongside its FTA with the EU, presumably because the latter insisted on its 'investment court' alternative preferred since 2015 (and subsequently achieved in the EU's agreements with Vietnam, Singapore and Mexico).[107]

However, Japan has shown pragmatism and patience in other IIA negotiations, including recently. For example, Japan agreed to omit ISDS in its bilateral FTA with Australia signed in 2014, arguably because of domestic politics in Australia. Presumably Japan hoped to obtain ISDS anyway through regional treaty negotiations, and it in fact did obtain ISDS through the CPTPP (in force for disputes arising from 2019, including for pre-existing investments) although reportedly not also via RCEP (for now). Earlier, Japan had also agreed to omit ISDS in its 2006 FTA with the Philippines, seemingly at the latter's request and presumably because it hoped to obtain ISDS anyway through an FTA with ASEAN. In fact, the ASEAN-Japan FTA ended up omitting ISDS. However, other than with the Philippines (where Japan has relatively little investment) there are ISDS-backed commitments (even sometimes ICSID Rules options) between Japan and all the other nine ASEAN member states through BITs and/or bilateral FTAs, as shown in Table §1.4 below:

[104] Shotaro Hamamoto & Luke Nottage, *Japan, in Commentaries on Selected Model Investment Treaties* 347 (Chester Brown (ed.), Oxford Univ. Press 2013), with a partial version also at https://ssrn.com/abstract=1724999.
[105] Tomoko Ishikawa, *A Japanese Perspective on International Investment Agreements: Recent Developments, in International Investment Treaties and Arbitration Across Asia* 513–543 (Luke Nottage & Julien Chaisse (eds.), Brill | Nijhoff 2018).
[106] *See* https://undocs.org/en/A/CN.9/WG.III/WP.163; http://undocs.org/en/A/CN.9/WG.III/WP.182; http://undocs.org/en/A/CN.9/WG.III/WP.163.
[107] *See* https://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/.

Table §1.4: ISDS-Backed Commitments in IIAs Between Japan and ASEAN Member States

	FTA Investment Chapter	**BIT**	**ICSID Arbitration** (as an option for ISDS)
Indonesia	Yes (in force from July 2008)	No	Yes: Art 69 EPA
Malaysia	Yes (July 2006)	No	Yes: Art 85 EPA
Philippines	Yes (December 2008)	No	No ISDS: Art 107 EPA only requires negotiations towards an ISDS mechanism, otherwise only if by mutual consent of disputing parties)
Singapore	Yes (originally in force November 2002; amended September 2007)	No	Yes: Art 82 EPA
Thailand	Yes (in force from November 2007)	No	No (because Thailand not party to ICSID) but Yes under UNCITRAL Rules: Art 106 EPA
Brunei	Yes (July 2008)	No	Yes: Art 67 EPA
Laos	No	Yes (in force August 2008)	No (because Laos not party to ICSID) but Yes under UNCITRAL Rules: Art 17 BIT
Myanmar	No	Yes (in force August 2014)	No (because Myanmar not party to ICSID) but Yes under UNCITRAL Rules: Art 18 BIT
Cambodia	No	Yes (in force July 2008)	Yes: Art 17 BIT
Viet Nam	Yes (October 2007)	Yes (in force 2004)	No (because Viet Nam not party to ICSID) but Yes under UNCITRAL Rules: Art 14 BIT

In addition, although Japan traditionally has attracted few ICA cases, policy-makers since 2017 have tried to bring the nation out of the shadow of other regional centres (including recently Korea). In chapter 10, James Claxton, Nottage and Teramura show how the Japanese government, supported by various stakeholders, has recently been attempting to develop Japan as another hub for international business dispute resolution services. Tracking this development is important for both theoretical and practical reasons. How it unfolds should reveal which of various theories for explaining law-related behaviour in Japan (and perhaps other Asian jurisdictions) have more traction nowadays, especially the debate over whether general or legal 'culture' is more important than practical institutional barriers. Assessing Japan's new initiatives is also important for legal practitioners and others interested in the practical question of where to arbitrate or mediate cross-border business disputes. This chapter therefore reports on current attempts to promote existing and new international arbitration centres in Japan,[108] as well as the recent establishment of the Japan International Mediation Centre – Kyoto, in the context of intensifying competition from other Asian venues for

[108] *See also* Huw Watkins, *Product Differentiation and the JCAA's 2019 Sets of Arbitration Rules*, 21(3) Asian Dispute Rev. 114 (2019).

dispute resolution services. The new Centre's prospects are arguably enhanced by the COVID-19 pandemic, given its extensive impact on international business and related disputes. Mediation's advantages over arbitration of these disputes including more scope for preserving business relations, fewer costs and delays, and less challenges from trying to run formal online hearings or managing travel restrictions.

New frontiers for international dispute resolution processes have also been highlighted for Japan given some emerging disputes between Japan and Korea since 2019. In Chapter 11, Claxton, Nottage and Brett Williams first describe the trade tensions between Korea and Japan that escalated from mid-2019. They first assess Korea's prospects in a formal claim now brought before the WTO, noting difficulties under substantive law (especially Japan's likely arguments based on national security), but especially procedure (given the general breakdown in the WTO's usual two-tier inter-state dispute resolution process). The chapter then outlines the possibility of Japan bringing claims under a 1965 Treaty that purported to settle claims resulting from Japan's colonisation of Korea, or under bilateral or trilateral investment treaties, regarding Korean courts recently ordering Japanese companies to pay compensation to colonisation-era Korean labourers. Yet such claims also face procedural and/or substantive law difficulties. The chapter further elaborates the possibility of affected Japanese companies instead or in parallel bringing ISDS claims against Korea, similarly alleging denial of justice in Korean court proceedings, under the two investment treaties. The chapter concludes that these extra complications bolster the attraction of a formal mediation to bring both countries and the affected companies together in order to achieve an overall negotiated settlement. An approach involving formal mediation may also provide inspiration for other states in the region, and indeed globally, which also increasingly face complex issues intertwining economics with national security issues and potentially involving multiple treaty regimes.

[C] Hong Kong, China and BRI

China has emerged not just as a major destination for inbound FDI, but also more recently for outbound FDI, prompting a shift to more expansive substantive commitments in IIAs and wider ISDS protections.[109] Because much inbound and outbound FDI is with Hong Kong, it is also important to examine the latter jurisdiction's recent initiatives regarding ISDS and IIAs. Both are also important, as mentioned, for existing and future ICA and other forms of international dispute resolution services, especially as the Belt and Road Initiative (BRI) projects extend westwards from China.[110]

In Chapter 6, Shahla Ali examines the impact of both the BRI and the UNCITRAL Model Law on ICA on international commercial and investor state arbitration practice in Hong Kong. Given the significance of Hong Kong as a gateway to BRI project financing and logistics, understanding current dispute resolution policy is critical for gaining insights into China's approach to the resolution of BRI disputes. Measures taken to modernize the practice of arbitration including training programmes, and legislative reforms are examined with a view to gaining insights into challenges and future developments. However, the COVID-19 pandemic combined with revived political disturbances in Hong Kong in 2020[111] have cast somewhat of a shadow over its future as a leading neutral forum for international dispute resolution, opening up additional space for other contenders as outlined in this volume.

In Chapter 7, in the context of a rising volume of cross-border transactions generated by the BRI, Weixia Gu argues that a robust legal framework for dispute resolution is required to forge investor confidence and enable BRI's integral goal of economic integration.[112] In light of the substantial levels of harmonization among arbitration laws, arbitration is argued to constitute a primary vehicle of international commercial dispute resolution in an economically integrated

[109] *See generally* Julien Chaisse (ed.) *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (Oxford Univ. Press 2019).

[110] For earlier analogues to the Belt and Road, promoted through the Asian Development Bank under strong influence from Japan, *see also* Nikolay Murashkin, *Not-So-New Silk Roads: Japan's Foreign Policies on Asian Connectivity Infrastructure Under the Radar*, 72 Australian J. Int'l Aff. 455 (2018).

[111] For a pessimistic assessment generally, see Jeppe Mulich, *The End of Hong Kong Autonomy*, East Asia Forum (31 May 2020) https://www.eastasiaforum.org/2020/05/31/the-end-of-hong-kong-autonomy/.

[112] It should be added that the COVID-19 pandemic may exacerbate some diplomatic tensions, as well as economic stresses, resulting in additional or more difficult disputes along the Belt and Road. *See generally* eg Raffaello Pantucci, *Rising Nationalism Tests China's Uneasy Partnerships in Central Asia*, East Asia Forum (29 May 2020) https://www.eastasiaforum.org/2020/05/29/rising-nationalism-tests-chinas-uneasy-partnerships-in-central-asia/#more-259021.

Asia under the BRI. Against this backdrop, this chapter argues that the BRI provides a unique opportunity to contemplate the possibility of regional harmonization, as within the Asian economies along the BRI, of the public policy exception to arbitral award enforcement. Such an arbitration initiative in Asia, in which China is anticipated to take a proactive role, holds considerable potential to project renewed momentum on China as an engine of not only economic power, but also 'soft power' transformation in pioneering international legal norms.

In Chapter 8, Vivienne Bath outlines the latest developments in the People's Republic of China as it promotes itself as a regional hub not only for inbound investment (with 2019 legislation regulating foreign investment), but also for international dispute resolution. China is actively reviewing ISDS through UNCITRAL Working Group III and participating in WTO dispute settlement developments. The Supreme People's Court has been working to set up new institutions (notably the China International Commercial Court) and to improve mechanisms for the review and enforcement of arbitral awards and encourage mediation, both domestically and internationally.[113] Much of this activity has been encouraged by the BRI and an associated increase in related cross-border disputes. It also reflects the desire to encourage and expand the international use of Chinese law and to build up China as a centre for international dispute resolution. However, the Chinese Communist Party is tightening its ideological and administrative control over the courts and judicial system, potentially creating tensions.

[D] India and Malaysia

Malaysia and India are other Asian jurisdictions that have adopted both the NYC and then the UNCITRAL Model Law. In addition, Malaysia's case has a longstanding arbitration centre (the KLRCA, now AIAC).[114] However, delays throughout India's court system and decades of complex case law interpreting these international instruments, plus a preference for ad hoc arbitration including by former senior judges, have encouraged parties to India-related transactions to arbitrate elsewhere (notably recently in Singapore). India has also gone through significant changes in its approach to ISDS and investment treaties over the last decade, arguably prompting potentially significant reforms to the law and practice for ICA within India as well.

In Chapter 12, Jaivir Singh provides a perspective on investment treaty practice from India, which (somewhat like Australia) lies at the periphery of what is traditionally associated with the Asia-Pacific region. While seemingly on the frontier of this collection of states, India has signed investment and trade treaties with many of them. It has also recently become involved in disputes under them, and so has started to terminate many BITs. India now seeks to renegotiate fresh treaties using a template provided by a new model treaty that is oriented towards privileging state rights. The chapter looks at the narrative led to this point, including emergent nationalism (even before the COVID-19 pandemic), which also helps explain why India did not agree to join RCEP in late 2019. Singh sketches key ISDS claims brought against India, the most against any Asian state, including that the case decided in 2011 in favour of White Industries under a BIT with Australia (but terminated by India in 2017).[115] He then summarises original econometric evidence of the positive impact of India's investment treaties (cumulatively, until 2015) on the country's inbound foreign investment.[116] The analysis highlights the risks for India of its newfound caution towards ISDS-backed investment treaties, including the curious elision of trade and investment law in a new BIT with Brazil. But it also observes how the ISDS claims have recently prompted Indian legislators and judges to start improving the legal regime for arbitration generally within India.

In Chapter 9, A Vijayalakshmi Venugopal reviews Malaysia's involvement in international business dispute resolution. This includes actual involvement in cases in the WTO and through ISDS, and as a venue for international dispute

[113] *See also* Vicky Priskich, *The Recognition and Enforcement of New York Convention Awards in the People's Republic of China: Recent Reform of the Prior Reporting System and Trends in Recognition and Enforcement*, 21(2), Asian Dispute Rev. 70 (2019).

[114] Lam Ko Luen, *Arbitration Reform in Malaysia: Adopting the Model Law, in The Developing World of Arbitration* 123 (Anselmo Reyes & Weixia Gu (eds.), Hart Publishing 2018); Hiro Naraindas Aragaki, *Arbitration Reform in India: Challenges and Opportunities, in The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* 221 (Anselmo Reyes & Gu Weixia (eds)., Hart Publishing 2018).

[115] Jarrod Hepburn, *India Round-up: An Update on Seven Investment Treaty Cases Against the State*, Investment Arbitration Reporter (11 June 2020).

[116] Compare more generally Shiro Armstrong & Luke Nottage, *The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis*, 16/74 Sydney Law School Research Paper 1 (2016) on SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2824090.

resolution especially through the recently rebranded AIAC.[117] This chapter also extends to Malaysia's potential involvement in dispute resolution of international business disputes, especially through rather disparate provisions in its FTAs. The chapter therefore highlights how Malaysia has been involved in international dispute resolution and the continuing significance of this for Malaysia. Its analysis should be seen against the backdrop of significant domestic political changes in recent years.[118]

[E] Other Regional Developments

The rest of this book then turns to some wider developments on the 'frontiers' of Asia-Pacific international dispute resolution, but focusing more on new fields rather than particular jurisdictions. In Chapter 13, Jeanne Huang and Jiaxiang Hu examine whether provisions in FTAs can be adapted to more effectively encourage states to comply with other international instruments that have weaker dispute resolution provisions, to promote better protection of the environment and public health – including pandemics such as COVID-19. This question has not been well researched, although the International Convention for the Prevention of Pollution from Ships and its Protocols has been incorporated by references into FTAs since the 2006 US-Peru FTA and most recently in the CPTPP. This chapter explores the CPTPP's achievements and deficiencies to enhance marine environment protection from four aspects: flags of convenience, the vague role of coastal states, affecting trade or investment, and dispute resolution. It adds proposals to address the deficiencies, and draws on this analysis to consider how FTAs could also enhance enforcement of international instruments to promote public health. It concludes by assessing the broader potential for using FTA dispute resolution processes to assist in ensuring compliance with inter-linked treaties, especially for the Asia-Pacific region.

In Chapter 14, Strong seeks to provide insights into the 'black box' of early treaty-making processes by undertaking a case study of the development of the 2019 Singapore Convention on Mediation.[119] The discussion focuses on several issues that have seldom been discussed in the legal literature, including the way in which a proposal for an international treaty makes its way to the relevant decision-makers and how those decision-makers determine which of the various alternatives to pursue. In so doing, the article focuses particularly on the role that dispute system design (DSD) and empirical research played in the early development of the 2019 Convention. The analysis also considers how interested individuals can assist the treaty-proposing process, particularly if they are not NGO members. The chapter concludes with implications for international business dispute resolution policy development and treaty-making, including for the Asia-Pacific region.

As a related 'new frontier', an innovative recent hybrid avenue for engagement in international treaty-making can be found in the context of the deliberations underway since late 2017 in UNCITRAL's Working Group III, considering multilaterally whether and now how to reform ISDS. The Academic Forum on ISDS (ACFI) operates, on the basis of transparency governance arrangements, mainly to provide 'concept papers' elucidating key issues and evidence for national delegations to UNCITRAL. ACFI now comprises around 100 professors expert in ISDS and international investment law, and often also international commercial dispute resolution, including some East Asia, Oceania and the wider Pacific Rim.[120] A few ACFI members are even full or partial members of national delegations engaged in UNCITRAL's formal deliberations. ACFI is a recognised Observer at those deliberations, and if new questions arise

[117] Comparing the burgeoning field of statutory adjudication of construction disputes, *see also* John Cock, *Statutory Construction Adjudication: An International Overview*, 21(3) Asian Dispute Rev. 98 (2019).
[118] For ongoing upheavals in 2020 following a remarkable general election ousting the long-ruling party, in the context of the 1MDB corruption scandal, *see* Ahmad Fauzi Abdul Hamid, *The Return of Old-Style Malay-Centric Politics?* East Asia Forum (Apr. 25, 2020) https://www.eastasiaforum.org/2020/04/25/the-return-of-old-style-malay-centric-politics/#more-249463.
[119] *See also* Eunice Chua, *Enforcement Of International Mediated Settlement Agreements In Asia: A Path Towards Convergence*, 15(1) Asian Int'l Arb. J. 1 (2019).
[120] *See* https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/academic-forum-isds-members.html. For example, from Australia there are two members from the University of Sydney, one from the Australian National University (with a role on the Australian delegation to UNCITRAL), one from the European University Institute (but from and still with an affiliation with the University of Melbourne). There are also members from universities in China/Taiwan/Hong Kong (five professors), the National University of Singapore (although one of the two is non-Singaporean), Seoul National University and Yonsei University, Kyoto University (a full member of Japan's delegation to UNCITRAL), Auckland University, as well as for example a professor from the Philippines now at the University of Notre Dame in the United States. There are also many members from universities in the Americas.

has followed up with new research and papers. ACFI also organises side-events when the UNCITRAL Working Group meets (usually twice-yearly).[121]

§1.07 Conclusions

As elaborated in the brief concluding Chapter 15 by Reyes, Ali and Teramura, the Asian region is a path-breaking frontier for 'rule making' initiatives in international commercial and investment treaty arbitration,[122] as well as other forms of cross-border business dispute resolution, especially given the disruptions caused by the COVID-19 pandemic. They suggest that the significant regional rule makers are China (especially through BRI leadership) and Malaysia (through institutional innovation, such as rules for Islamic law related arbitrations), followed by Hong Kong (and Singapore), with Australia, India and Japan also now starting to experiment. They end with recommendations on these states and the wider Asia-Pacific region can work through and learn from the COVID-19 pandemic. They urge more pro-active engagement with new and emerging technologies, coming up with new procedures (rather than mainly adopting those developed outside the region, like emergency arbitrator or expedited procedures), and expanded communication and consultation channels including regional stakeholders. These constitute promising ways forward to further expand Asia-Pacific frontiers for international business resolution.

[121] *See* https://www.cids.ch/academic-forum.
[122] *See also* generally Carlos Esplugues (ed.), *Foreign Investment and Investment Arbitration in Asia* (Intersentia 2019).

[[APPENDIX A]]: Investment, treaties and ISDS claims in the Asian region

[[A.1]] Investment, Treaties and ISDS Claims in ASEAN (ranked by GDP)

Country (& **GDP**, USD in 2018)[123]	**Inbound FDI stock** (USD in 2018)[124]	**Outbound FDI stock** (USD in 2018)[125]	**Inbound FDI flow** (USD in 2018)[126]	**Outbound FDI flow** (USD in 2018)[127]	**BITs** signed (years) [or in force] [128]	**FTAs with investment chapters /IIAs** signed (years) [or in force or concluded] [129]	**Inbound treaty ISDS claims** (years) [won by investor] [130]	**Outbound treaty ISDS claims** [won by investor] [131]	**Inbound ICSID contract claims** [132]	**Outbound ICSID contract claims**[133]
Indonesia ($1 trillion)	$226b	$72b	$22b	$8b	72 (1968-2018) [26]	14 (1987-2019) [9]	7 (2004-2016) [nil]	nil	3 (1981-2007)	2 (1981 & 2007)
Thailand ($505 billion)	$222.7b	$121.4b	$10.5b	$17.7b	42 (1961-2015) [36]	24 (1980-2017) [21]	2 (2005-2017) [1]	nil	nil	nil
Singapore ($364 billion)	$1.5t	$1t	$77b	$37b	51 (1972-2-19) [39]	36 (1980-2019) [31]	nil	5 (2000-2019) [0]	nil	1 (2004)
Malaysia ($354 billion)	$152.5b	$119b	$8b	$5.2b	71 (1960-2012) [54]	26 (1980-2018) [22]	3 (1994-2005) [0]	4 (2001-2018) [1]	nil	nil
Philippines ($330 billion)	$83b	$52b	$6.5b	$0.6b	38 (1976-2009) [32]	17 (1980-2017) [14]	5 (2002-2016) [1]	nil	nil	nil
Viet Nam ($245 billion)	$145b	$10.6b	$15.5b	$0.6b	66 (1990-2014) [48]	25 (1980-2019) [18]	8 (2004-2018) [1]	nil	nil	nil
Myanmar ($71 billion)	$31b	nil	$3.5b	Nil	11 (1998-2019) [8]	16 (1980-2017) [13]	1 (2010) [0]	nil	nil	nil
Cambodia ($25 billion)	$23.7b	$1b	$3.1b	$0.124b	27 (1994-2018) [14]	16 (1980-2017) [14]	nil	nil	1 (2010)	nil
Laos ($18 billion)	$8.7b	$0.15b	$1.3b	$0	26 (1989-2013) [20]	17 (1980-2017) [14]	4 (2012-2017) [0]	nil	nil	nil
Brunei ($14 billion)	$6.7b	nil	$0.5b	Nil	8 (1998-2009) [6]	8 (1998-2009) [6]	nil	nil	nil	nil

[123] Data via https://data.worldbank.org/country (accessed at the indicated webpages as of 12 Dec. 2019, except for FTAs data accessed 3 Feb. 2020).
[124] https://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx?sCS_ChosenLang=en
[125] *Ibid*.
[126] *Ibid*.
[127] *Ibid*.
[128] https://investmentpolicy.unctad.org/
[129] *Ibid*.
[130] *Ibid*.
[131] *Ibid*.
[132] https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx
[133] *Ibid*.

[[A.2]] Investment, treaties and ISDS claims in key states in non-ASEAN Asia plus Oceania (ranked geographically then by GDP)

Country (& USD GDP in 2018)	**Inbound FDI stock (USD in 2018)**[134]	**Outbound FDI stock (USD in 2018)**[135]	**Inbound FDI flow (USD in 2018)**[136]	**Outbound FDI flow (USD in 2018)**[137]	**BITs signed [or in force]** [138]	**FTAs/IIAs signed [or in force or concluded]** [139]	**Inbound treaty ISDS claims [won by investor]** [140]	**Outbound treaty ISDS claims**[141]	**Inbound ICSID contract claims** [142]	**Outbound ICSID contract claims**[143]
China ($13.6 trillion)	$1.6t (excl. HK&Macao)	$2t (excl. HK&Macao)	$139b (excl. HK&Macao)	$129b (excl. HK&Macao)	145 (1982-2015) [109]	22 (1985-2017) [19]	3 (2011-2017) [0]	6 (2007-2017) [3]	nil	2 (2010 & 2016) [2]
Japan ($5 trillion)	$213b	$1.7t	$10b	$143b	33 (1977-2018) [29]	20 (1994-2018) [19]	nil	4 (2015-2018)	nil	nil
Korea ($1.7 trillion)	$231b	$387.6b	$14.5b	$39b	105 (1964-2019) [90]	21 (1996-2018) [17]	3 (2012-2018) [1]	6 (2014-2018) [1]	1 (1984)	nil
India ($2.7 trillion)	$386b	$166.6b	$42b	$11b	84 (1994-2018) [14]	13 (1993-2014) [13]	24 (2003-2017) [1]	7 (2000-2018) [1]	nil	nil
Pakistan ($312.5 billion)	$42b	$1.9b	$2.35b	$0.008b	53 (1959-2014) [32]	7 (1981-2007) [6]	10 (2001-2013)	nil	nil	nil
Bangladesh ($274 billion)	$17b	$0.31b	$3.6b	$0.023b	31 (1980-2014) [24]	4 (1981-2009) [3]	1 (2005) [1]	nil	6 (1992-2018)	nil
Sri Lanka ($89 billion)	$12.7b	$1.4b	$1.6b	$0.068b	29 (1963-2011) [24]	6 (1994-2018) [5]	5 (1987-2018) [2]	nil	nil	nil
Australia ($1.4 trillion)	$683b	$491b	$60b	$3.6b	24 (1988-2019) [18]	22 (1976-2019) [17]	2 (2011-2017)	7 (2010-2019) [3]	nil	5 (1996-2015)
New Zealand ($205 billion)	$75b	$17b	$1.4b	$0.4b	4 (1988-1999) [2]	16 (1980-2018)	nil	nil	1 (1987)	nil
Papua New Guinea ($23 billion)	$4.56b	$0.5b	$335m	$-0.34b	6 (1980-2011) [5]	3 (1976-2000) [3]	nil	nil	2 (1996 & 2017)	nil

[134] https://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx?sCS_ChosenLang=en
[135] *Ibid*.
[136] *Ibid*.
[137] *Ibid*.
[138] https://investmentpolicy.unctad.org/
[139] *Ibid*.
[140] *Ibid*.
[141] *Ibid*.
[142] https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx
[143] *Ibid*.

[[Appendix B: Table of Contents for chapters in this book

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Appendix C: Bios of book editors and other contributors

Dr Shahla Ali is Professor and Associate Dean (International) and Deputy Director of the LLM in Arbitration and Dispute Resolution at the Faculty of Law of the University of Hong Kong. Her research and practice center on questions of governance, development and the resolution of cross-border disputes in the Asia Pacific region. Shahla is the author of *Court Mediation Reform* (Edward Elgar 2018), *Governing Disasters: Engaging Local Populations in Humanitarian Relief* (Cambridge University Press 2016); *Consumer Financial Dispute Resolution in a Comparative Context* (Cambridge University Press 2013); and *Resolving Disputes in the Asia Pacific Region* (Routledge 2010) and writes for law journals in the area of comparative ADR. She has consulted with USAID, IFC/World Bank and the United Nations on issues pertaining to access to justice, peace process negotiation training and land use conflict resolution. She serves as a bilingual arbitrator (English/Chinese) with CIETAC, HKIAC (ADNDRC), SIAC and has served on the IBA Drafting Committee for Investor-State Mediation Rules, the DOJ Mediation Regulatory Committee, the UN Mediation Roster and the FDRC Appointments Committee. Prior to HKU, she worked as an international trade attorney with Baker & McKenzie in its SF office. She received her JD and PhD from UC Berkeley in Jurisprudence and Social Policy and BA from Stanford University.

Dr Bruno Jetin is Associate Professor and Director of the Institute of Asian Studies, University of Brunei Darussalam (UBD). His current work focuses on the ASEAN Economic Community, the One Belt One Road initiative, Chinese investments in Southeast Asia, and the impact of income distribution on growth in Asia. He is also an expert in the automobile industry. Before joining UBD, he was a researcher at the Institute for Research on Contemporary Southeast Asia (IRASEC, CNRS-MAEE, Bangkok) and Associate Professor at the University of Paris 13 Sorbonne Paris Cité, where he obtained his PhD in economics and was Deputy Director of the Research Center in Economics. He was also involved in promoting taxes on financial transactions as alternative sources for financing development as well as innovative regulation of global finance. Bruno's recent publications include *ASEAN Economic Community: A model for Asia-wide Integration?* (Palgrave McMillan 2016, edited with Mia Mikic); *Global Automobile Demand* (Palgrave McMillan 2015, two edited volumes); *International Investment Policy for Small States: The Case of Brunei*, in *International Investment Treaties and Arbitration Across Asia* (Julien Chaisse and Luke Nottage eds., Brill 2018, with Julien Chaisse); *One Belt-One Road Initiative and ASEAN Connectivity*, in *China's Global Rebalancing and the New Silk Road* (B.R. Deepak ed., Springer 2018).

Dr Luke Nottage is Professor of Comparative and Transnational Business Law at Sydney Law School, founding Co-Director of the Australian Network for Japanese Law (ANJeL), and a senior solicitor at Williams Trade Law. He specialises in comparative and transnational business law (especially arbitration and product safety law), with a particular interest in Japan and the Asia-Pacific. Luke has or had executive roles in the Australia-Japan Society (NSW), the Law Council of Australia's International Law Section, the Australian Centre for International Commercial Arbitration, and the Asia-Pacific Forum for International Arbitration. Luke is also a Rules committee member of the Australian Centre for International Arbitration (ACICA) and listed on the Panel of Arbitrators for the AIAC (formerly KLRCA), BAC, JCAA, KCAB, NZIAC, SCIA and TAI. Luke serves on Working Group 6 (examining arbitrator neutrality) for the Academic Forum on ISDS. He qualified as a lawyer in New Zealand in 1994 and in New South Wales in 2001, and has consulted for law firms and organisations world-wide (including ASEAN, the EC, OECD, UNCTAD and the Japanese government). His 16 other books include *International Arbitration in Australia* (Federation Press, 2010, eds), *Foreign Investment and Dispute Resolution in Asia* (Routledge, 2011, eds) and *International Investment Treaties and Arbitration Across Asia* (Brill, 2018, eds). He has been Visiting Professor at universities in Europe, North America, Oceania and Asia (including from June 2020 at the Institute of Asian Studies, University of Brunei Darussalam).

Dr Nobumichi Teramura is an Associate at the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS) and Consultant at Bun & Associates (Cambodia). He is the author of *Ex Aequo et Bono as a Response to the Over-judicialisation of International Commercial Arbitration* (Wolters Kluwer 2020), based on his doctoral thesis from the University of New South Wales that received a PhD Excellence Award when completed in 2018. Nobu also published recently in the *Asian International Arbitration Journal* (2019) and *ASA Bulletin* (2020), and has co-authored a chapter comparing Australia forthcoming in Larry di Matteo et al (eds) *The Cambridge Handbook of Judicial Control of Arbitral Awards*. Specialising in commercial law, his current research interests include legal integration in Asia and legal development for South East Asian nations severely affected by colonisation and the Cold War, including Cambodia, Vietnam, Laos and Myanmar. He has teaching and research experience in Asia-Pacific jurisdictions including the Philippines, Australia, Japan, Taiwan, Hong Kong, Cambodia and Brunei.

* * *

Vivienne Bath is Professor of Chinese and International Business Law at Sydney Law School and Director of the Centre for Asian and Pacific Law at the University of Sydney (CAPLUS). Her teaching and research interests are in international business and economic law, private international law and Chinese law. She has first class honours in Chinese and in law from the Australian National University, and an LLM from Harvard Law School. She has also studied in China and Germany and has

extensive professional experience in Sydney, New York and Hong Kong, specialising in international commercial law, with a focus on foreign investment and commercial transactions in China and the Asian region. Representative publications include: Vivienne Bath & Gabriël Moëns, *Law of International Business in Australasia* (2nd ed., Federation Press 2019); *Overlapping Jurisdiction and the Resolution of Disputes before Chinese and Foreign Courts*, 17 Yearbook of International Private Law 111-150 (2015-2016) and *The South and Alternative Models of Trade and Investment Regulation – Chinese Outbound Investment and Approaches to International Investment Agreements*, in *Recalibrating International Investment Law: Global South Initiatives*, (Fabio Morosini & Michelle Ratton Sanchez Badin eds., Cambridge University Press 2018).

James Claxton is Professor of Law at Rikkyo University in Tokyo and Adjunct Faculty for the White & Case International Arbitration LL.M at University of Miami Law School, as well as an independent arbitrator and mediator. He teaches and researches in the fields of international investment law, business and human rights, and international dispute settlement. Previously, he was legal counsel at the International Centre for Settlement of Investment Disputes (ICSID) in Washington and attorney in the international arbitration practices of law firms in Paris. James regularly advises dispute resolution institutions in Asia and is a member of various working groups devoted to improving international dispute resolution systems.

The Hon Clyde Croft AM SC is Professor of Law at Monash University in Melbourne, as well as a commercial arbitrator and mediator. Until retiring in 2019 he was the judge in charge of the Arbitration List, the Taxation List, and a General Commercial List in the Commercial Court of the Supreme Court of Victoria. Prior to his Court appointment in 2009, he practiced extensively in property and commercial law and was an arbitrator and mediator in property, construction and general commercial disputes, domestically and internationally. Dr Croft was appointed Senior Counsel in 2000 and holds the degrees of BEc, LLB and LLM from Monash University, and PhD from the University of Cambridge. He has chaired the Expert Advisory Committee of the UNCITRAL National Co-ordination Committee of Australia (UNCCA) to support UNCITRAL Working Group II (Disputes) since May 2018. He represented the Asia Pacific Regional Arbitration Group (APRAG) at UNCITRAL from 2005 to 2010, revising the UNCITRAL Model Law and Arbitration Rules, and later co-authored *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013). Dr Croft is a Life Fellow of the Australian Centre for International Commercial Arbitration (ACICA) and of the Resolution Institute (incorporating the Institute of Arbitrators and Mediators Australia), a Fellow of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ), the Chartered Institute of Arbitrators, the Australian Academy of Law and UNCCA.

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Dr Jeanne Huang is Associate Professor at the University of Sydney Law School. She was previously Senior Lecturer at the University of New South Wales, and Associate Professor / Associate Dean at Shanghai University of International Business and Economics School of Law in China. She obtained her Doctor of Juridical Science (SJD) degree from Duke University School of Law in 2010. She was a Foreign Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, and also had research experience at The Hague Academy of International Law, and the Paris-based Academy of International Arbitration Law. Jeanne teaches and researches in the fields of private international law, e-commerce regulation, international investment law and dispute resolution (international litigation and arbitration). She has published four books including *Interregional Recognition and Enforcement of Civil and Commercial Judgments: Lessons for China from US and EU*

Laws (Hart, 2014) and her articles have appeared in many peer-reviewed law journals, with extensive competitive funding include from the China National Social Science Fund. In 2015, she won the First Prize of Excellent Scholarship awarded by the China Society of Private International Law and the Nomination Award of the Dong Biwu Prize for Youth Research in Law. Jeanne serves as an arbitrator at the Hong Kong International Arbitration Center, Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center), Nanjing Arbitration Commission and Xi'an Arbitration Commission. She also serves as expert witness on issues of private international law and Chinese law in courts in Australia and the US.

Michael Hwang SC is a Singapore-based international arbitrator. He was the Deputy Chief Justice of the Dubai International Financial Centre (DIFC) Courts upon its establishment in 2005, and subsequently appointed Chief Justice in 2010, retiring at the end of 2018. Throughout that period, he has continued practising as an international arbitrator in commercial and treaty arbitrations. He has written two volumes of essays on international arbitration and international dispute resolution respectively, and was awarded an honorary LLD from the University of Sydney.

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