ISDS IN THE ASIA-PACIFIC: A REGIONAL SNAP-SHOT

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Abstract

Asia-Pacific — Investor-State Dispute Settlement — International Arbitration ISDS — BIT — FTA — ICSID — Trans-Pacific Partnership Agreement — Australia-China FTA

The States of the Asia-Pacific are displaying a willingness to enter into trade and investment treaties that is, at present, unparalleled anywhere else in the world. A number of major bilateral and multilateral Free Trade Agreements have been announced in the past two years, and others are currently being negotiated. Even as public opinion has turned against Investment-State Dispute Settlement (ISDS) in many countries, ISDS provisions remain key features of this new generation of Asia-Pacific trade and investment treaties. But governments are clearly taking note of what their constituents are saying: the new treaties of the Asia-Pacific increasingly contain provisions designed to protect state prerogatives in key areas, such as the protection of public health and the environment. This paper provides an overview of major treaty developments in the past two years, a summary of how economic conditions are impacting on relations between foreign

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investors and host states, and a brief survey of the main ISDS cases in the region.

I INTRODUCTION

The Asia-Pacific is in a period of unprecedented economic integration. Even as economic conditions have softened, trading relationships between Asia-Pacific states have strengthened. This has helped support and stabilise foreign direct investment flows between countries in the region. But the markets of the Asia-Pacific are diverse in terms of economic development and sovereign risk; from the most developed countries like Japan, through to emerging economies like Myanmar. This is why investment protection instruments — particularly trade and investment treaties — continue to be critical to the economic architecture of the region.[1]

The countries of the Asia-Pacific are expanding their trade and investment treaty programs faster than any other region. Notwithstanding the growing controversy that surrounds Investment-State Dispute Settlement (ISDS) provisions,[2] the

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1 For an excellent overview of the region's treaty architecture, see Baxter Roberts, Michael Feutrill and Kanaga Dharmananda SC, *A Practical Guide to Investment Treaties — Asia Pacific* (Lexis Nexis Australia, 2015).

2 The ISDS debate has tended to focus on trade agreements, including the recently concluded *TPP* and the FTAs that Australia has entered into with Korea and China. The debate recently peaked in Australia when, in 2014, a Greens Senator (Whish-Wilson) introduced a Bill seeking to restrict the Australian Government's ability to enter into treaties containing ISDS clauses. The *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (Cth) did not progress, but the fact it was proposed — and the large volume of public submissions it generated — show how ISDS has become a high-profile issue in Australia. In conjunction with Dr Romesh

majority of the new generation of Asia-Pacific trade and investment treaties provide for ISDS, at least in some form and to some degree. The most recent example is the *Trans-Pacific Partnership Agreement* (*TPP*), the text of which was recently released. The *TPP* is the largest of a series of trade deals that have been made in the region this year. Others include the Free Trade Agreements (FTAs) concluded by Australia with China[3] and Korea.[4] The rights these treaties confer are in addition to the rights afforded to foreign investors under the dense web of existing bilateral and multilateral trade and investment treaties between countries in the region; instruments that currently form the basis of a number of ISDS cases in the region.

This article intends to provide a snap-shot of key developments in ISDS in the Asia-Pacific in the past two years (2014–15). It is not intended to be comprehensive, but rather to provide a high-level sketch of activity in the region. The article begins with an overview of major treaty developments. It then briefly considers how developments in the world economy, particularly in the area of commodity prices, are impacting state and investor behaviour. It then reviews key ISDS cases — pending or recently concluded — involving a claimant foreign investor or respondent state from the Asia-Pacific.

Weeramantry, the author made submissions opposing this bill. These and other submissions were referred to in the August 2014 Report of the Foreign Affairs, Defence and Trade Legislation Committee.

3 *China-Australia Free Trade Agreement*, signed 17 June 2015 (not yet in force).

4 *Korea-Australia Free Trade Agreement*, signed 8 April 2014 (entered into force 12 December 2014).

II DEVELOPMENTS IN THE TREATY FIELD

The past year has seen some major developments in treaty-making in the Asia-Pacific. By far the most significant was the announcement of the conclusion of negotiations for the *TPP* — a trade deal that has the capacity to change the way the markets and governments of the Asia-Pacific interact in the century ahead. Other important developments include the conclusion of the Australia-China FTA[5] ('*ChAFTA*') and, on the bilateral side, the beginning of the 'sunset' period under the Indonesia-Netherlands Bilateral Investment Treaty ('BIT').[6] The summary that follows focuses on these three developments.

A *Trans-Pacific Partnership Agreement*

The final text of the *TPP* was released on 5 November 2015. In 30 chapters, the *TPP* covers a wide range of subjects, from traditional trade liberalisation to services, investment, environmental protection and labour standards. The *TPP* is a very sophisticated, well balanced treaty. As a key sign of its modernity, all substantive chapters of the *TPP* contain carefully negotiated carve-outs and non-precluded measures clauses to ensure that *TPP* states' abilities to regulate in key areas, such as environment, public health, safety, security, employment and innovation, are not unjustifiably limited by the treaty. The *TPP*'s diverse carve-outs, when coupled with the positive rights and duties imposed in corresponding fields, operate to ensure that the interests of 12 countries and 800 million people within the *TPP* area are balanced with the objectives of rules-based trade and investment liberalisation. The task will now be for *TPP*

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5 *China-Australia Free Trade Agreement*, signed 17 June 2015 (not yet in force) ('*ChAFTA*').

6 *Indonesia-Netherlands Bilateral Investment Treaty*, signed 6 April 1994 (entered into force 1 July 1995).

Member States to convince their citizens that the right balance has been struck and that the treaty should be ratified. This balance is especially clear in the Investment Chapter (ch 9).

Despite much comment that the Investment Chapter will represent a significant departure from prior investment treaties, the Chapter has many similarities to the model bilateral investment treaty adopted by the United States ('US'). There are also provisions that reflect parts of the *North American Free Trade Agreement* and other US treaties. While the Investment Chapter contains 'teeth' in the form of ISDS rights, some of the investment protections granted under the *TPP* are tilted somewhat in favour of the host state. Nonetheless, the *TPP* generally contains the standards that are needed to give foreign investors comfort around sovereign risk. Notable features of the Investment Chapter of the *TPP* include:

- Covered investments are defined broadly but need to have the 'characteristics of an investment',[7] which follows the approach adopted in *Salini v Morocco* ('*Salini*').[8] The *Salini* criteria are typically only applicable in an International Centre for Settlement of Investment Disputes (ICSID) arbitration. However, under the *TPP*, the *Salini* criteria will apply to all of the ISDS options available to investors, not just the ICSID option. This gives *TPP* states more scope for jurisdictional objections.
- The Investment Chapter covers not just investments, but also investment agreements relating to natural resources that a national authority controls, supply services for

7 *Trans-Pacific Partnership Agreement,* opened for signature on 5 October 2015 (not yet in force) ('*Trans-Pacific Partnership Agreement*') ch 9 art 9.1.

8 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco (Jurisdiction)* (2000) (ICSID Arbitral Tribunal, Case No ARB/00/4, 31 July 2001).

consumption by the general public and infrastructure projects between investors of another party to the *TPP* and central government authorities.[9]

- The usual protections are offered, such as national treatment ('NT'),[10] most favoured nation treatment ('MFN'),[11] fair and equitable treatment ('FET'),[12] full protection and security ('FPS'),[13] and the prohibition against direct or indirect expropriation.[14] However, some protections contain restrictive language.[15]
- In investment claims challenging measures relating to regulation or supervision of financial institutions, markets or instruments, the *TPP* enables a state to make a defence on the ground that the measures were taken to protect investors, depositors or policy holders or to ensure the integrity and stability of the financial system.
- A detailed provision prohibits the imposition of performance requirements on foreign investors.[16]

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9 *Trans-Pacific Partnership Agreement* ch 9 art 9.1.

10 Ibid ch 9 art 9.4.

11 Ibid ch 9 art 9.5.

12 Ibid ch 9 art 9.6.

13 Ibid.

14 Ibid ch 9 art 9.7.

15 For example, such language may permit states to defend NT, MFN or expropriation claims on the ground that 'legitimate public welfare objectives' were involved. Further, in what appears to be a novel provision, departing from investment arbitration case law, the mere fact a state conducted itself in a way that was inconsistent with an investor's expectations may not constitute a breach of the FET or FPS provisions. Compulsory licences granted in relation to intellectual property rights in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPs') are also carved out from the expropriation provisions.

16 *Trans-Pacific Partnership Agreement* ch 9 art 9.9.

- A 'denial of benefits clause' prevents shell companies invoking rights under the Investment Chapter.[17] This will affect how investments are structured to take advantage of the *TPP*.
- A general provision enables states to ensure investment activity is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[18]
- In following recent trends towards transparency, pleadings and hearings will be open to the public,[19] much like court procedure. This provision should go some way to addressing concerns expressed regarding 'secret tribunals'.
- Another unique provision is the right of the disputing parties to comment on draft decisions and awards of arbitral tribunals prior to them being rendered.[20]

The *TPP* does not expressly establish an 'Investment Court', but it does leave the door open: the Investment Chapter refers to the possibility of an 'appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals' being 'developed in the future'.[21] This shows that the states concerned still have confidence in the ISDS system as the first-tier dispute resolution process and, although they recognised that centralisation of an appellate function might be desirable, they could not agree on the practicalities of such an appellate body. It appears that the US, which made similar allowance for the establishment of appellate ISDS mechanisms in some of its other multilateral agreements (such

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17 Ibid ch 9 art 9.14.

18 Ibid ch 9 art 9.15.

19 Ibid ch 9 art 9.23(2).

20 The author acknowledges Dr Romesh Weeramantry's contributions on these points.

21 *Trans-Pacific Partnership Agreement*, ch 9 art 9.22(11).

as the *Central American Free Trade Agreement*), influenced the drafting of these parts of the *TPP*.

It is also notable that the Administrative and Institutional Provisions chapter (ch 27) establishes a body called the 'TPP Commission'. The TPP Commission has a broad mandate, being empowered to perform a number of different functions — some administrative, some surveillance-focused, and some judicial or quasi-judicial. Examples of the judicial and quasi-judicial powers of the TPP Commission include: firstly, the power to issue interpretations of *TPP* provisions;[22] and secondly, the power to resolve disputes relating to the interpretation and application of the *TPP*.[23] The TPP Commission also has the power to establish standing committees of its own, which could include annulment committees, like those used to hear 'appeals' in the ICSID system.

These institutional aspects of the agreement suggest that some form of appellate or review body will be established if or once the *TPP* comes into force. However, at least for the first few years, any appellate function is likely to be performed by ad hoc committees formed by the TPP Commission under art 27, or ICSID annulment committees, for awards issued by ISDS tribunals constituted under the ICSID Convention. In this model, it would be for the *TPP* parties to determine how such committees would interact with other courts and institutions in the trade area. For example, the *TPP* parties would need to clarify the extent to which recourse to a *TPP* annulment committee limits or excludes recourse to the courts of the seat of the arbitration (in the case of an ad hoc ISDS process) and recourse to the ICSID annulment mechanism (in the case of an ISDS proceeding run under the ICSID Convention).

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[22] Ibid ch 27 art 27.2(2)(f).

[23] Ibid ch 27 art 27.2(2)(e).

The *TPP* is much more than an FTA; it is a regional economic constitution for the 21st century, covering around 40 per cent of the global economy.[24] In terms of its membership, the *TPP* group is diverse, including countries at varying stages of economic development with quite different political and legal traditions; from most developed countries like Japan, to developing countries like Vietnam.[25] Indonesia, the Philippines and South Korea have made it known that they may consider joining the *TPP* as well. The most notable *TPP* absentees are China and Russia.[26] In the case of China,

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24 In its recurring references to, and special rules for, IP exports and technology transfers, the *TPP* reveals a vision in which trade in the 21st century will be as much about ideas and services as it is about goods. From a trade-in-goods perspective, these objectives are supported by the special rules that pertain to the promotion of cross-border supply chains — for example, rules that should make it safer and cheaper for consumer electronics businesses to establish manufacturing bases, and engage contract manufacturers, in lower-cost locations. The *TPP*'s trade-in-services rules will further aid the development of regional supply chains and electronic commerce. Financial services businesses have also received special attention in the treaty. One of the main liberalising measures is the elimination of rules that require financial service providers in specified categories to establish operations in a country before they can supply services within its borders. That means, essentially, that it will be cheaper and more efficient for certain financial services businesses to access *TPP* markets.

25 The 12 *TPP* members are the United States, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

26 However, the *TPP*'s accession rules seem reasonably open, especially for APEC countries. As Russia and China are APEC members, there is scope for them to join the pact. However, the accession of these (and other) countries will present certain challenges, ranging from implementation difficulties through to more sub-textual issues such as diplomatic and security relationships and trade sanctions.

it may be that exclusion from the *TPP* incentivises it to conclude talks on its own Regional Comprehensive Economic Partnership ('RCEP');[27] the *TPP* may also encourage Russia to accelerate its regional trade deals.

B *China-Australia FTA*

The *ChAFTA* was officially signed on 17 June 2015, by Australia's Trade Minister, Andrew Robb, and China's Commerce Minister, Gao Hucheng.[28] While the *ChAFTA* is predominantly focused on the promotion of trading activity, it also covers bilateral investment in ch 9. However, in the field of investment protection, the *ChAFTA* is underwhelming; the only substantive protection for Australian and Chinese investors making covered investments is the right to non-discriminatory treatment where the host state is obliged to treat investors from the other state no less favourably than it treats its own national investors.[29] This kind of protection is designed to prevent a range of potentially unfair measures, for example, discriminatory taxation or unequal regulatory requirements. However, without granting other protections, such as FET, national legislation could still be used by the state to impair or expropriate investments covered by *ChAFTA*.[30] Given China has entered into a

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27 Negotiators from China and 10 other Association of South East Asian Nations ('ASEAN') countries are presently meeting in South Korea to continue negotiations. The Regional Comprehensive Economic Partnership ('RCEP') would link the 10 ASEAN nations with Australia, China, India, Japan, New Zealand and South Korea — countries that, between them, make up 30 per cent of global gross domestic product ('GDP').

28 The author acknowledges the assistance of Peter Harris in this part of the article.

29 *ChAFTA* art 8.5.

30 The *ChAFTA* Investment Chapter includes a formal placeholder for negotiations to take place between Australia and China for further

vast number of BITs that contain significantly more favourable terms (an example being China's BIT with Australia), it is open to question why China only granted such limited protections under *ChAFTA*.

In terms of who and what is protected under the *ChAFTA*, individual nationals and corporations incorporated in either Australia or China are afforded protection as investors.[31] The definition of 'investment' in the treaty is broad, covering direct and indirect investments.[32] This is good news for investors who use complex ownership structures and business models designed around the subsequent sale of foreign assets. The types of investments covered include: subsidiary companies and branches; most forms of debt and equity securities; contractual rights; intellectual property; concessions; licences; authorisations and permits; tangible and intangible

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investment protections. These negotiations will include discussion on protection from expropriation, imposing minimum standards of treatment for investments and the application of investment protection and ISDS to services supplied through commercial presence. It is to be noted that further protections are currently available under the *Australia-China BIT* (which has its own limitations). However, in the Investment Chapter of the *ChAFTA* the protections are expressly highlighted as areas for future negotiation. This suggests that the *Australia-China BIT* may be terminated or revised. If it is terminated, and no new investment treaty is put in place, the *ChAFTA* alone will leave investors with comparatively little in terms of enforceable rights against the host state.

31 However, there is a limitation on investor identity in the form of a 'Denial of Benefits' clause. This means that investments made through an Australian or Chinese company that: firstly, does not have substantial business operations in its home country; and secondly, is not ultimately owned by investors from that country, would not be protected by the *ChAFTA*.

32 *ChAFTA* art 9.1(d).

property; property rights; and security.[33] In terms of its temporal scope, the *ChAFTA* covers pre-FTA investments, but only in relation to post-FTA measures.

As noted above, the *ChAFTA* provides that investors and investments covered by the treaty will be afforded treatment that is no less favourable than that which each state confers upon its own nationals 'in like circumstances'.[34] This means that where an investor wishes to challenge a measure on the basis that it is discriminatory, its position will have to be compared against a national company working in the same sector.[35] However, the definition of 'in like circumstances' is open in nature, and it may be possible for a state to raise other factors, such as the size of an enterprise or market share, in order to defeat claims.[36]

The *ChAFTA* also offers investors and investments MFN treatment — meaning that Australia and China are obliged to treat the other

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33 It is interesting to note that the *ChAFTA* does not cover pre-investment expenditures. Potential investors may incur significant expenses setting up their investments in China, before the investment crystallizes, and those expenses will not benefit from protection under *ChAFTA*.

34 *ChAFTA* art 9.3.

35 This was the measure used by tribunals in the *North American Free Trade Agreement* ('*NAFTA*') cases; notably *S D Myers v Canada* (*First Partial Award)* (2000) 40 ILM 1408.

36 Additionally, international law jurisprudence allows for states to defend claims against discriminatory measures, on the basis that the relevant measure is in the public interest or achieves legitimate public policy objectives. For example, state subsidies for national companies in particular sectors may be excused. Some international tribunals have also taken the view that for breach to be established, it is necessary to establish intention to discriminate; see, eg, *Genin v Estonia (Award)* (2001) 17 ICSID Rep 395, starting page.

state's investors and investments with no less favourable treatment than they grant to other foreign investors. However, protections given to investors under existing bilateral or multilateral agreements are excluded, as are protections relating to aviation, fisheries and maritime matters given to investors in future treaties. Thus, the scope of MFN under the *ChAFTA* is rather limited. Indeed, the current thinking of many Australian lawyers is that the *ChAFTA* offers fewer protections than those available to investors under the *Australia-China BIT*.[37]

Consistent with the prevailing pattern in treaty practice, all provisions of the Investment Chapter of the *ChAFTA* are subject to a number of significant carve-outs including measures to protect public health and the natural environment, so long as such measures are not arbitrary, unjustifiably discriminatory or disguised

[37] The *Australia-China BIT* entered into force on 11 July 1988. It covers investments made by Australian and Chinese investors in each other's territory. The protections afforded to covered investments include: an obligation on the host state to ensure fair and equitable treatment towards investment; an obligation on the host state to treat investments with no less favourable treatment than that afforded to investments made by any other foreign investor; rights of access to the host state for the management of the investment; access to justice; protection from unlawful expropriation; and free movement of investment capital, proceeds and returns. These protections are relatively comprehensive, however, the dispute resolution clause is a source of debate — it is doubtful that arbitration at ICSID is available for any claims, except expropriation claims, without China's express agreement. To date there have been no registered ICSID arbitrations under the *Australia-China BIT*. The *Australia-China BIT* can be terminated by either party giving one year's notice to the other. Upon termination, investments made or acquired prior to the date of termination will be protected for a 'sunset' period of 10 years.

restrictions on international investments and trade.[38] Additionally, there is a carve-out for measures relating to 'the conservation of living or non-living exhaustible natural resources'.[39] This carve-out gives the host state a relatively wide discretion to implement measures that may affect investors and investments in the energy and resources sector.

Notably, government procurement is expressly excluded from the scope of 'investments' that are covered by the *ChAFTA*. From an Australian investor's perspective, it is unclear whether this exclusion extends to investments relating to procurement by State-Owned Enterprises (SOEs). Given the important role SOEs play across the Chinese economy, if this exclusion does apply to dealings with SOEs, a significant number of Australian investors in China would not be afforded protection under the *ChAFTA*.[40] Greater clarity will be brought to this issue in the future: ch 16 of the *ChAFTA* provides that the parties will commence negotiations regarding government procurement as soon as possible once China has completed negotiations on its accession to the *World Trade Organisation Agreement* ('*WTO Agreement*') on Government Procurement.[41] Australia has recently announced its intentions to accede this agreement.

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38 As is true of the *TPP* carve-outs, it is likely that some of these provisions were proposed by Australia as a means of limiting claims, like that being made by Philip Morris Asia in relation to Australia's tobacco plain packaging legislation (discussed below).

39 *ChAFTA* art 9.8.

40 From the Australian government's perspective, it may have sought to reserve its freedoms in relation to government procurement contracts given the public scrutiny that followed its engagement with Japanese companies for the possible award of submarine contracts in South Australia in 2014.

41 The Government Procurement Agreement ('GPA') aims to break down legal barriers for foreign firms competing for public contracts.

Although it is rather light-on in terms of substantive protections, the Investment Chapter of the *ChAFTA* does provide for ISDS. At first instance, any dispute must be the subject of consultations between the disputing parties. If a settlement cannot be reached by consultation within 120 days, the claimant may submit the claim to arbitration in accordance with the Chapter. However, only an alleged breach of art 9.3, national treatment, may be submitted to arbitration. As in the *TPP*, MFN treatment is not extended to ISDS — a rule that excludes *Maffezini* type arguments, and which is now increasingly common in multilateral treaties. Arbitration may take place under the ICSID Convention and Rules of Procedure, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any other arbitration rules or at any other arbitration institution agreed by the disputing parties. While the *ChAFTA* contains China and Australia's consent to the submission of a claim to arbitration, there are temporal limits on the ability to make claims; claims must be submitted within three years from when the claimant had, or should have had, knowledge of the breach and resulting loss or damage and not later than four years since the occurrence of the measures and/or events giving rise to the alleged breach.[42]

Another notable feature that the *ChAFTA* shares with the *TPP* is that China and Australia have undertaken to commence negotiations for an appellate and review mechanism for the hearing of questions of law arising out of arbitral awards issued under the Investment Chapter. Given that the *TPP* refers to the possibility of an appellate mechanism for reviewing awards rendered by ISDS tribunals being developed in future, there is now a real possibility that some kind of

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This is of special significance to China, where public procurement represents such a substantial part of the economy and market access for foreign investors competing for public contracts can be difficult.

[42] *ChAFTA* art 9.14.

regional investment appeals body will be established in the coming years.

C *'Sunset' Under the Indonesia-Netherlands BIT*

On 20 March 2014, the Netherlands Ministry of Foreign Affairs announced that Indonesia had decided to cancel the *Netherlands BIT*. The *Netherlands BIT* entered its 15-year 'sunset' phase on 1 July 2015. Under the treaty, sunset protection is only granted to investments made prior to the date the sunset began. Investments made before 1 July 2014 are therefore protected, and will be for some time.

Investors expressed concern at the news of the cancellation of the *Indonesia-Netherlands BIT*. This was largely due to reports that the Indonesian Government had told the Dutch Government that it intends to terminate all of its 67 bilateral investment treaties. At the time of writing, Indonesia has terminated (or elected not to renew) nine other BITs, these being its BITs with Argentina (by mutual termination), China, Laos, Malaysia, Italy, France, Slovakia, Bulgaria and Egypt. Indonesia has also announced its intention to terminate a further 12 BITs next year. Many investors, particularly those making new, long-term investments in Indonesia, have reacted to these developments by adopting alternative investment protection strategies.

In particular, foreign investors have turned their attention to the *ASEAN Comprehensive Investment Agreement* ('*ACIA*'), which is a relatively new, multilateral investment treaty between ASEAN Member States, which came into force on 29 March 2012. The current signatories to the ACIA are Indonesia, Brunei, Singapore, Cambodia, Laos, Philippines, Malaysia, Myanmar, Thailand and Vietnam. As the ACIA is an important feature of the ASEAN framework, it is perceived by many to be a more durable instrument

for long-term investments in Indonesia; that is, withdrawing from the ACIA would implicate multiple trading relationships, whereas cancellation of a BIT only implicates a single relationship. Significantly, the ACIA contains an ISDS clause under which covered investors have a range of dispute resolution options, including arbitration at ICSID and under the rules of certain regional institutions.

The contraction of Indonesia's BIT program should not be taken as an indication that the country is turning its back on the international investment law system. Indonesia has indicated that it is interested in acceding to the *TPP* and other regional trade and investment agreements. This suggests Indonesia is adopting a strategy of multilateralism (rather than bilateralism) in the area of investment promotion and protection.

III Economic Signal

The downturn in China — which has been felt across the Asia-Pacific — has led to a tightening of trading conditions in a number of sectors in which foreign investors are active and which, therefore, have the capacity to generate ISDS claims. The energy and resources sector is the best example.

Sovereign risk remains a key concern for mining companies, particularly those with assets and projects in developing countries that are heavily dependent on mining revenue. Generally speaking, in the lower-price environment that prevails at present, producers have more exposure than explorers. Classic expropriation risk — meaning the risk of the host Government outright seizing foreign-owned property or revoking a title instrument such as a mining licence — seems to have fallen somewhat, as commodity prices have softened. Essentially, without high commodity prices, states have less incentive to take foreign-owned mines and 'do the

projects themselves'; the pool of willing buyers of expropriated mining assets has also shrunk, due to tighter trading conditions. The abundance of willing buyers seems to have driven or at least informed a number of expropriations during the last peak of the price cycle. However, 'creeping expropriation risk' — meaning the gradual destruction of the economic value of a mining investment through measures that do not affect title — remains high, particularly in sectors where commodity prices have remained relatively robust or have recovered; gold is an example. States now typically take sophisticated legal advice, often from major foreign law firms, on how to frame 'creeping' measures in ways that make them more defensible before international tribunals.[43]

Broadly similar patterns can be observed in the oil and gas sector. One area in which there is now discrete sovereign risk is intellectual property; with lower oil prices, there is more pressure to keep costs down, which makes it more important than ever to have the most efficient extraction and processing technology. International oil companies in joint ventures with national oil companies are coming under pressure to transfer more of their technology to their

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[43] Tax is proving to be the 'frame of choice', the reason being that the tax power is understood, under international law, as a key sovereign prerogative, and the case law sets a very high bar for when a tax measure will amount to expropriation. Within the tax domain, there are also examples of investors being subjected to incremental measures, such as Value Added Tax ('VAT') levies and ad hoc tariffs — steps that present cash-flow difficulties for investors and which tend to be difficult to prosecute as a treaty claim. These kinds of measures can also see the foreign investor end up in the host state's courts, where the quality of justice may not be high. Finally, 'value adding' requirements, such as those introduced by Indonesia, which require foreign mining companies to process certain minerals within Indonesia (that is, to build smelters) continue to be used by some governments.

counter-parties. The prospect of 'IP expropriation' claims is, therefore, increasing across the oil-rich states of the region. Most investment treaties recognise IP as a class of protected investment, and so there is considerable scope for claims of this kind.[44]

IV ISDS Cases Around the Region

ISDS case-load continues to increase across the Asia-Pacific steadily, but not exponentially. The list of cases that follows is limited to ICSID proceedings. There are a number of ad hoc ISDS cases around the region. An example of a major non-ICSID case is *Philip Morris Asia Ltd v Australia*,[45] the tobacco plain-packaging case brought under the Hong Kong-Australia BIT and currently being arbitrated under the UNCITRAL Rules. Other examples include the ad hoc UNCITRAL Rules arbitration between oil major ConocoPhillips and the Government of East Timor, concerning disputed tax assessments in respect of the Bayu Undan field,[46] and a recently-filed UNCITRAL Rules arbitration against Vietnam, under the *Netherlands BIT*.

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[44] For a wider discussion of these themes, see Sam Luttrell, 'Resource Nationalism: Old Problems, New Solutions' in Gabriël Moens and Phil Evans, *Arbitration and Dispute Resolution in the Resources Sector: an Australia Perspective* (Springer International Publishing Switzerland, 1st ed, 2015) 197.

[45] (PCA Case No 2012-12).

[46] There are also reports of another, recently-filed UNCITRAL Rules arbitration against East Timor, brought by Australian oil companies, also in relation to the Bayu Undan field.

A *Churchill Mining & Planet Mining Pty Ltd v Republic of Indonesia*[47]

This high-profile case relates to a coal project in East Kalimantan, in which Churchill Mining Plc ('Churchill'), and its Australian subsidiary Planet Mining Pty Ltd ('Planet'), invested in 2005. After several years of exploration activities, Churchill announced that it had discovered a major coal reserve. In May 2010, the mining licences underpinning the project were revoked by the local government, on the basis of alleged violations of forestry laws. After attempts to overturn the revocation orders failed in the Indonesian courts, Churchill and Planet commenced ICSID arbitration under the UK-Indonesia and Australia-Indonesia BITs respectively. The claims are being dealt with in a consolidated proceeding.

Indonesia objected to the jurisdiction of the Tribunal, but the State's objections were dismissed.[48] In September 2014, the State filed an application to dismiss the claimants' claims on the basis that certain aspects of the underlying mining licences were 'forged and fabricated'. Churchill and Planet are opposing the State's motion. A hearing on the State's application was held in Singapore in August 2015. At the time of writing, the parties have recently completed the post-hearing briefs phase and now await the Tribunal's decision. The author's firm is counsel for the claimants in

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[47] *Churchill Mining & Planet Mining Pty Ltd v Republic of Indonesia (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/12/14 and 12/40).

[48] For a more detailed discussion of the Tribunal's ruling on jurisdiction, see Sam Luttrell and Isuru Devendra, 'Consent in ICSID Arbitration: Case of *Planet Mining Pty Ltd v Republic of Indonesia*' (2014) 10 *Asian International Arbitration Journal* 195.

this ongoing matter, and so the scope for further comment here is limited.

B *Baggerwerken Decloedt En Zoon NV v Republic of the Philippines*[49]

In this case, the Belgian company Baggerwerken Decloedt En Zoon NV ('BDEZ') is seeking €70 million in damages for the alleged unlawful termination of a contract for the rehabilitation of Laguna Lake. The project mainly focused on flood-control, but also aimed to provide new infrastructure, especially new ports. The Philippine government cancelled the project and terminated the contract, on the basis of alleged corruption. BDEZ requested ICSID arbitration in October 2011. A tribunal was constituted and a hearing on jurisdiction and the merits was held in March 2014. A final award is yet to be rendered.

C *Ekran Berhad v People's Republic of China*[50]

In 2009, local authorities revoked a lease over 900 hectares of land in the Chinese province of Hainan. The lease was held by a subsidiary of the Malaysian construction and development company, Ekran Berhad. The revocation was based on a finding that the investor had failed to develop the land as stipulated under the local legislation. Ekran requested ICSID arbitration in May 2011. This case attracted a good deal of attention, as it was the first ICSID case against China. However, the arbitration was suspended by agreement a month after it was registered and a discontinuance order was issued two years later on 16 May 2013.

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[49] *Baggerwerken Decloedt En Zoon NV v Republic of the Philippines (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/11/27).

[50] *Ekran Berhad v People's Republic of China (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/11/15).

D *Lighthouse Corporation Pty Ltd and Lighthouse Co Ltd, IBC v Democratic Republic of Timor-Leste*[51]

A recent addition to the list of Asia-Pacific related ICSID cases concerns a dispute between Lighthouse Corporation and East Timor in relation to a fuel supply agreement. The request for arbitration was registered on 14 January 2015 and the Tribunal was constituted on 7 August 2015. The proceedings are pending, and no substantive decisions or awards have yet been published. This is the first ICSID case that East Timor has faced.

E *Ansung Housing Co Ltd v People's Republic of China*[52]

This dispute relates to investments in a country club and golf course made in 2006 by Korean company, Ansung Housing ('Ansung'). In November 2014, Ansung's request for arbitration under the Korea-China BIT was registered by ICSID. In its request, Ansung claimed that it had been deprived of the use of its investment as a result of interference by Chinese local government entities. This alleged interference includes the local government entities failing to transfer all of the land needed for the construction of the project and failing to prevent the construction of a nearby unlicensed golf club. Ansung alleges that, as a result of these failures, it was forced to sell its property at a price significantly lower than the amount Ansung had invested in the project. Ansung is seeking CNY100 million in damages. A tribunal is yet to be constituted.

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51 *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v Democratic Republic of Timor-Leste (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/15/2).

52 *Ansung Housing Co Ltd v People's Republic of China (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/14/25).

F *Nusa Tenggara Partnership BV & PT Newmont Nusa Tenggara v Republic of Indonesia*[53]

This high-profile dispute arose out of a mining investment by PT Newmont Nusa Tenggara (‘PTNNT’). PTNNT operates the Batu Hijau copper and gold mine under an investment agreement (‘Contract of Work’) with the Indonesian Government. The trigger for the dispute was the introduction of ‘value added’ or ‘onshore processing’ rules, under which certain minerals cannot be exported as ore but must rather be refined within the territory of Indonesia. In effect, these rules require mining companies to construct smelters in Indonesia, the policy rationale being to create jobs and for the state to gain more revenue from the mining value chain. In the case of PTNNT, the rules included new export conditions, a new export duty and a ban, effective from January 2017, on the export of copper concentrate.

After attempts to negotiate with the Indonesian Government failed, in July 2014 PTNNT and its Dutch majority shareholder, Nusa Tenggara Partnership BV, requested ICSID arbitration, seeking, inter alia, relief from the export restrictions. The request for arbitration was based on a claim that the new regulations violated PTNNT’s Contract of Work and the Indonesia-Netherlands BIT. The Indonesian Government committed to open formal negotiations to conclude a Memorandum of Understanding with PTNNT upon withdrawal of the arbitration. PTNNT requested discontinuance of the proceeding and the withdrawal of its claim on 25 August 2014. A Memorandum of Understanding was signed in September 2014.

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[53] *Nusa Tenggara Partnership BV & PT Newmont Nusa Tenggara v Republic of Indonesia (Discontinuance)* (ICSID Arbitral Tribunal, Case No ARB/14/15, 29 August 2014).

G *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea*[54]

This dispute, between Singapore company PNG Sustainable Development Program Ltd ('PNGSDP') and the Independent State of Papua New Guinea, concerned the Ok Tedi copper and gold mine. PNGSDP acquired a majority shareholding in Ok Tedi Mining Ltd ('OTML') — the owner of the mine — from BHP in 2001. The transfer was intended to entrust an independent, foreign-registered company with the management of the development of the Ok Tedi mine (through OTML) and the use of its earnings from the mine to promote sustainable development within PNG and to advance the general welfare of the people of PNG, particularly those of the Western Province, where the Ok Tedi mine is located. In 2013, the PNG government introduced legislation cancelling PNGSDP's 63 per cent shareholding in OTML. On 17 October 2013, PNGSDP filed a request for arbitration at ICSID, claiming, inter alia, that the new legislation amounted to unlawful expropriation. The claim was brought pursuant to the PNG *Investment Promotion Act 1992* ('IPA'), which PNGSDP argued contained a standing offer to arbitrate foreign investment disputes at ICSID.

The State objected to the Tribunal's jurisdiction. This objection was first made under r 41(5) of the *ICSID Arbitration Rules*, which provides for the dismissal of claims that are 'manifestly without legal merit'. The State's contentions included that the IPA did not convey its consent to ICSID arbitration. After a hearing in Singapore, that application was dismissed by the Tribunal. PNGSDP then applied for provisional measures of protection, and the

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[54] *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea (Award)* (ICSID Arbitral Tribunal, Case No ARB/13/33, 5 May 2015).

Tribunal granted this application. The focus of the proceedings then turned to the State's jurisdictional objection under r 41(1). After the exchange of detailed submissions, a hearing was held in Singapore. On 5 May 2015, the Tribunal rendered an award upholding the State's jurisdictional objection on the ground that PNG had not given consent in writing to arbitrate under the ICSID Convention, as is required by art 25. The case involved fine points of ICSID jurisprudence and international law, including the rules for the interpretation of unilateral declarations made by way of national law. The author's firm was counsel for PNGSDP.

H *Lao Holdings NV v Lao People's Democratic Republic*[55]

This dispute arose out of investments by Lao Holdings NV ('Lao Holdings'), a company incorporated in Aruba, in the gaming and tourism sector in Laos. In 2012, Lao Holdings acquired Sanum Investments Ltd ('Sanum'), a Macao company that had been investing in gambling operations in Laos since 2007. In 2009, the Lao Government granted Savan Vegas, a subsidiary of Sanum, a five year Flat Tax Agreement ending in 2013. Lao Holdings claimed that it was promised that the Flat Tax Agreement, due to expire on 31 December 2013, would be replaced by a similar agreement, ideally for the remainder of its 50 year concession. Sanum initiated negotiations for a new flat tax arrangement in March 2011. However, the Lao Government declined to renew. In 2011, Laos introduced a tax of 80 per cent on casino revenues. Lao Holdings alleged that it was assured that the new casino tax would not apply to Sanum, as a new flat-tax agreement would be concluded. The Lao Government denied any concession in favour of Lao Holdings.

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[55] *Lao Holdings NV v Lao People's Democratic Republic (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB(AF)/12/6).

Lao Holdings filed a request for arbitration under the Laos-Netherlands BIT on 15 August 2012. The State objected to jurisdiction on the grounds that Lao Holdings only became incorporated under Dutch law in 2012, with the effect that it was not a Dutch national when the tax dispute arose. The Tribunal, however, held that it did have jurisdiction over the matter, as the State could not prove that the legal dispute arose prior to the acquisition of Dutch nationality by Lao Holdings. The claims were resolved by a Deed of Settlement between the parties during the merits hearing on 15 June 2014. Lao Holdings subsequently revived the proceedings, claiming the State had breached the settlement agreement. That claim was dismissed on 10 June 2015.

I *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*[56]

In 1997, a project company called PIATCO entered into a concession agreement with the former Philippine Government for the construction and operation of an international passenger terminal at Ninoy Aquino International Airport in Manila. Fraport first invested in PIATCO in 1999 with further investments in 2002 and 2003. In addition, Fraport made investments in other Philippine companies that had ownership interests in PIATCO. A dispute arose in 2002 when the new Philippine Government declared the contract with PIATCO to be legally invalid as, inter alia, PIATCO allegedly did not meet the financial requirements to have been awarded the concession in the first place. At that time, the terminal was already completed. The property of the terminal was transferred to the Philippine Government by court order in 2004.

[56] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (Award)* (ICSID Arbitral Tribunal, Case No ARB/11/12, 10 December 2014).

Fraport requested ICSID arbitration on 17 September 2003, seeking compensation for the annulment of the concession contract. The Tribunal declared that ICSID did not have jurisdiction to hear Fraport's claim and dismissed the case. However, that decision was later annulled by an ICSID Annulment Committee. Fraport then resubmitted its compensation case in 2011. The State again challenged the jurisdiction of the Tribunal, arguing that the investment had not been made in conformity with the laws of the Philippines, as required under *Philippines-Germany BIT*. The State further argued that Fraport's claims were inadmissible because of such violations, as well as corruption in obtaining and carrying out the concession.

The Tribunal rendered its award on 10 December 2014. The Tribunal upheld the State's objection to jurisdiction. The arbitrators found Fraport had evaded the nationality requirement limiting foreign ownership of the capital of a public utility to 40 per cent imposed by the 'Anti-Dummy Law', by a combination of 'indirect' ownership and secret shareholder agreements. However, the Tribunal dismissed the State's allegations of corruption due to its failure to provide clear and convincing evidence that Fraport was aware of and engaged in corruption and fraud when it made its initial investment. It is to be noted that the Supreme Court of the Philippines ultimately ruled in favour of Fraport and awarded substantial compensation.

V CONCLUSION

ISDS is increasing in the Asia-Pacific, both as an element of the regional trade and investment treaty architecture and as a practical means of resolving disputes between foreign investors and host states. Although the governments of the region vary in their attitudes towards ISDS, they display a common desire for further economic cooperation. The fact that ISDS provisions are being

included in the current generation of Asia-Pacific trade and investment treaties, of which the *TPP* is the most notable, shows that the governments concerned know that foreign investors and their advisors value ISDS coverage. Further, it demonstrates that, provided state rights are protected in key areas, the risk of being sued is outweighed by the benefits of increased economic cooperation. It is hoped that, as the new generation of treaties comes into force, those sections of the public that have expressed concerns as to ISDS will see the practical effect of the work their governments have done to balance sovereign prerogatives with legitimate investor protection.