Assessing the Exposure of Asian States to Investment Claims

Julien Chaisse
ASSESSING THE EXPOSURE OF ASIAN STATES TO INVESTMENT CLAIMS

Julien Chaisse*

ABSTRACT

The developments which are now taking place show that Asian states are increasingly negotiating international investment agreements (hereinafter IIAs) — in the form of BITs or PTAs — which form a dense network of obligations. Although few cases had been brought against Asian states by 2009, the pattern has changed since 2010, with a sharp increase in the initiation of investor-state arbitration proceedings over the last three years bringing the total of investment claims against Asian States to a significant total of 87 international disputes. Although some IIAs have generated a few disputes for technical reasons (for example, those concluded by China before 2005 or by Thailand, Indonesia, and Malaysia, which require the pre-approval of investments), it is rather predictable that Asian states are currently entering an era in which foreign investors are likely to multiply claims. Such a trend requires host states to be prepared to litigate while reassessing the economic and political benefits of current investment treaty commitments.

KEYWORDS: investment, treaty, arbitration, claim

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I. INTRODUCTION

International investment law and policy have undergone profound transformations since the mid-1990s. The period since North American Free Trade Agreement’s (hereinafter NAFTA) coming into force has witnessed a literal explosion in the number of international investment agreements (hereinafter IIAs), in the form of both bilateral investment treaties (hereinafter BITs) and preferential trade agreements (hereinafter PTAs) involving all states which were earlier part of the Soviet Union. Primarily North–South in character at the outset, this phenomenon has also registered an important mutation in the 2000s, with an ever-growing number of South–South and South–North IIAs characterizing the evolution of emerging economies. It has been during the last decade that many Asian states (with China, India, and Korea being the most active), developed and reinforced their network of IIAs, thereby making investment a key aspect of their economic pacts with third states.

While not all countries and stakeholders share similar expectations of investment treaties application, the present article contributes to the study and understanding of the evolving international regime for investment in Asia at a crucial time. The Asian regime for investment is not static but, on the contrary, very dynamic. It continues to grow and change, and it will be

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2 Chang-fa Lo, Conditions and Ways of Restoring Investment to the WTO Negotiation Agenda: Establishing a linkage between BITs and WTO, in EXPANSION OF TRADE AND FDI IN ASIA: STRATEGIC AND POLICY CHALLENGES 269, 269-284 (Julien Chaisse & Philippe Gugler eds., 2009).

3 As explained by Ryan,

International investment law developed rapidly over the past thirty years to meet the expectations of a diverse constituency-developed (i.e., capital-exporting) countries, developing (i.e., capital-importing) countries, and private investors. While aligned in their desire to create a stable framework for international investment, each of these groups brings unique expectations and demands to the system.


4 See generally J. Chaisse & M. Matsushita, Maintaining the WTO’s Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism, 16(1) J. INT’L ECON. L. 9 (2013). (Nowadays WTO members are actually trying to conclude bilateral and regional agreements instead of multilateral agreements within the WTO framework, which inevitably inaugurate a new era of trade negotiations . . . . The complexity and slow pace of WTO negotiations (with one round lasting five to ten years) inevitably drive states
affected by various factors in the coming months and years which relate to the rise of some new actors; these include the likely increase of investment arbitration in Asia, the regionalization of investment rule-making (illustrated by the Transpacific partnership (hereinafter *TPP*)) and the rise of European Union (hereinafter *EU*) as an foreign direct investment (hereinafter *FDI*) negotiator. Firstly, the last decade has witnessed an exponential surge of investment disputes between foreign investors and host country governments.\(^5\) Arbitral panels have been charged with the task of applying the rules of IIAs in specific cases, a task often not straightforward, given the broad and sometimes ambiguous\(^6\) terms of these arrangements.\(^7\) This new phenomenon of investment arbitration has brought about a number of decisions from different arbitral fora, contributing to the investment law regime by giving meaning to its provisions. Secondly, the TPP is a twenty-first-century PTA\(^8\) seeking to change PTAs by “multilateralising regionalism”.\(^9\) The TPP represents a major PTA, which illustrates the regionalization of investment rule-making and probably represents the benchmark for a state of the art of international law of foreign investment. Thirdly, in the EU, in 2009 the *Treaty of Lisbon* extended the Common Commercial Policy to be the second most important field of international economic relations, namely, foreign direct investment. The shift from the national to the supra-national level is in itself a major legal development — such an external dimension is relevant to Asian states

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5 The cumulative number of treaty-based cases had risen to more than 400 by 2013, with more than 200 brought before the International Centre for Settlement of Investment Disputes (ICSID). Few disputes, however, involve Asian parties. However, as this paper will explain, the picture is likely to change in the near future by reason of the multiplication of Asian IIAs combined with a greater knowledge and practice (in both public and private circles) of investment rules. In any event, many lessons can be drawn for disputes and cases involving non-Asian claimants and countries; that is why the case law will be a major component in the current paper.

6 In this case, the tribunal will turn to the Vienna Convention if a term is ambiguous, or if further interpretation of a treaty provision is required. See, e.g., LG & E Energy Corp. et al. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 89, 122 (Oct. 3, 2006).


8 The term PTA encompasses many different kinds of bilateral and regional trade agreements and underscores their common denominator which is to establish preferences for the signatories over others in trade relations. Indeed, many of the so-called FTAs favor certain countries in trade relations and are basically discriminatory rather than “free trade”. See generally Julien Chaisse et al., *The Three-pronged Strategy of India’s Preferential Trade Policy: a Contribution to the Study of Modern Economic Treaties*, 26(4) CONN. J. INT’L L. 415 (2011).

9 As early as 2006, Richard Baldwin argued that since the “spaghetti bowl’s inefficiencies are increasingly magnified by unbundling and the rich/poor asymmetry, the world must find a solution. Since regionalism is here to stay, the solution must work with existing regionalism, not against it. The solution must multilateralise regionalism.” See generally Richard Baldwin, *Multilateralising Regionalism: Spaghetti Bowls as Building Bloks on the Path to Global Free Trade*, 29(11) THE WORLD ECON. 1451 (2006).
because the EU, instead of one or all of the 28 EU members, will become partners in future negotiations.\textsuperscript{10} Given this, the EU is likely to employ its significant bargaining power when negotiating IIAs to improve, for instance, the standards of investment protection or to develop new forms of all-encompassing agreements. This will affect the whole architecture of the international law of foreign investment, and Asian investment commitments in particular, since the EU intends to conclude very soon new investment treaties with China, India and the ASEAN.

The current analysis focuses on the international dispute scenario involving Asian states\textsuperscript{11} as defending parties; which has hitherto not been studied.\textsuperscript{12} There is a wealth of information on various, usually national, Asian practices in treaty-making,\textsuperscript{13} and there is also a general analysis of the increasing role of international arbitration on investment matters; but, as yet, there has been no broad analysis of the participation of Asian states in investor-state arbitration. Of course, one may object that each dispute is unique and depends on specific rules (including, but not limited to, IIAs)

\textsuperscript{10} The “negotiation mandate” for EU–Canada/India/Singapore PTAs was approved by the General Affairs Council on 12 September, 2011. This confidential document confirms the trend that the EU will negotiate broad encompassing PTAs to replace narrow and conventional BITs. See generally Julien Chaisse, Promises and Pitfalls of the European Union Policy on Foreign Investment — How Will the New EU Competence on FDI Affect the Emerging Global Regime?, 15(1) J. INT’L ECON. L. 51 (2012).

\textsuperscript{11} In terms of methodology, it is important to clarify that Asian countries are understood in this paper as being those states which are geographically located in the Asian region and which are members of the Asian Development Bank. In total, 48 states belong to the Asian regional members category. Apart from North Korea, all states (regardless of their size, population and political regime) are considered in this study and their respective investment treaties analyzed. For a detailed list of the 48 countries, see Annex 1.

\textsuperscript{12} As pointed out by Gantz,

The large volume of literature and commentary on resolution of investor-state disputes tends to focus primarily on the rights of the foreign investor and the process through which the investor may protect her interest through investor-state arbitration, either at the World Bank’s ICSID or in some other forum. Where issues relating to governments-as-respondents have been addressed, the emphasis has often been on nations such as the three NAFTA Parties and other relatively large and affluent nations such as Argentina. Until relatively recently, much less attention has been paid to challenges facing small developing respondents, such as the member nations of CAFTADR, Chile, Colombia or Ecuador.

and special factual circumstances. I can only agree with such a view which however does not allow going beyond the mere case study of an increasing number of treaty practices and disputes.

This paper aims at providing an analytical framework useful in two ways: firstly, it identifies the key trends in investment claims against Asian states and allows making sense of complex scenario; secondly, it provides a scientific framework for further analysis of each claim or responding state in the broad Asian context. Such an analysis is needed because investment disputes are a reliable indicator of the region’s current compliance with international norms, and it simultaneously sheds light on domestic reforms undertaken to liberalize foreign investment. This paper intends to fill this gap by providing a comprehensive analysis of investment disputes against Asian states. Basically, the international treaties of each state are seen as one the variables which contribute to international arbitration. In this regard, international commitments (which are analyzed from quantitative and qualitative points of views) represent an amount at risk taken by contracting states which allows measuring their respective exposure (i.e. simply, the fact or condition of being exposed as the condition of being at risk of claims). The main thesis is that Asian states are currently entering an era in which foreign investors are likely to multiply claims that require host states to be prepared to litigate while assessing the benefits of the current investment treaties.14

This article first provides a macro-analysis of Asian rule-making. This section helps to understand the quantity and the key characteristics of the Asian IIAs (Section 2). Once the relevant IIAs are identified, the paper will review the increasing share and practice of investment disputes involving Asian states (Section 3). A holistic analysis of the Asian regime for investment would not be complete without a thorough analysis of the qualitative reasons which explain and, partly, determine international investment claims against Asian parties (Section 4). In the concluding section, lessons are drawn and prospects are sketched.

II. Revisiting the Dynamics of Investment Rule-Making in Asia

In terms of substance, Asian investment treaty practice (as are all other national treaty practices in this regard) shows that virtually all treaties listed above regulating foreign investment matters cover classic issues of international investment treaties. Given this, the current paper does not detail these provisions (which are well known) but it simply refers to

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available publications. The following nine topics are classic issues in investment law: (1) definitions and scope of application;\textsuperscript{15} (2) investment promotion and conditions for the entry of foreign investments and investors;\textsuperscript{16} (3) general standards for the treatment of foreign investors and investments;\textsuperscript{17} (4) issues of monetary transfers;\textsuperscript{18} (5) expropriation (direct or indirect);\textsuperscript{19} (6) operational and other conditions;\textsuperscript{20} (7) losses from armed conflict or internal disorder;\textsuperscript{21} (8) treaty exceptions, modifications, and terminations;\textsuperscript{22} and (9) dispute settlement.\textsuperscript{23} These diverse provisions are important to reassure foreign investors that they will be able to reap the benefits of their investment, and no trend denies such an approach, although evidence on the extent to which investment decisions are influenced by investment treaties is mixed.\textsuperscript{24}

To understand the dynamics of Asian rule-making in international investment requires the knowledge of international treaties (in the form of BITs or PTAs which have investment chapters) that involve at least one Asian country. If at least one Asian country has signed such an investment pact, then the host economy is likely to be affected by foreign investment

\textsuperscript{16} See generally Claudia Annacker, Protection and Admission of Sovereign Investment Under Investment Treaties, 10(3) CHINESE J. INT’L L. 531 (2011).
\textsuperscript{22} See generally Chaisse, supra note 17.
\textsuperscript{24} The extent to which BITs actually attract increased flows of foreign direct investment is disputed. According to Salacuse and Sullivan, entering a BIT with the United States of America would nearly double a country’s FDI inflows. However, entering BITs with other OECD countries had no significant effect on FDI. See Jeswald W. Salacuse & Nicholas P. Sullivan, Do BITs Really Work? : An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 HARV. INT’L L.J. 67, 105-111 (2005). Another important study concludes that there is “little evidence that BITs have stimulated additional investment”. Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract FDI? Only a Bit...and They Could Bite 22 (World Bank Dev. Research Group, Research Working Paper No. 3121, 2003).
and, in any case, its domestic investment policy is subject to the international obligations which are expressed in the investment agreement. One methodological challenge lies in the fact that there is no international organization informed by Asian states of their international treaties. Also, not all Asian governments publish the results of their negotiations. As a result, one of the contributions of the current paper is to provide a mapping of these Asian practices based on a survey on the main IIAs databases complemented by national governments’ sources of information. Asian investment rule-making can be depicted as a three-tier structure reflecting the various levels of involvement of states in treaty negotiations (see II.A), which shows that states also tend to increasingly rely on PTAs to regulate investment instead of on pure BITs (see II.B).

A. The Three-tier Classification of Asian States

The current section looks at the investment agreements concluded by the 48 Asian Development Bank (hereinafter ADB) members. In total, since 1959 Asian states have concluded 1,194 BITs and 61 PTAs that contain an investment chapter. Since approximately 2,850 BITs have been concluded worldwide over the same period of time, it means that Asian states have taken part in no less than 40 percent of international rule-making. In order to facilitate an analysis of the huge number of treaties, one can distinguish the main groups of Asian states that reflect their respective roles and importance in Asian investment rule-making. While the distinction between those States without any investment commitments (Group 1) and the others with investment treaties is obvious, it is preferable to further identify key patterns among Asian countries involved in investment rule-making. Given this, and considering the average number of IIAs signed by countries worldwide, I suggest that Group 2 should include, Asian States with less than eleven IIAs, Group 3 should include, Asian States with ten to forty IIAs; and Group 4 should include, Asian States with more than forty IIAs.

Firstly, a group of 13 Asian states have yet to conclude a single investment agreement as of August 2013. This means that Bhutan, Cook Islands, Fiji, Kiribati, Maldives, Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Samoa, Solomon Islands, Timor-Leste, and Tuvalu have so far been reluctant to engage in international investment rule-making.

Secondly, a group of eight Asian states has signed some IIAs but in a rather limited number: Tonga, Vanuatu, Afghanistan, Myanmar, Nepal, Papua New Guinea, Brunei Darussalam, and New Zealand have each signed less than eleven IIAs (see Figure 1). Although these States can justify a presence in investment rule-making, it is a very limited one. Such
a limited amount of signed IIAs are unlikely to result in a significant amount of international arbitration.
**Figure 1: Asian States with Less than 11 IIAs**

![Graph showing investment treaty agreements for various Asian states.](image)

*Sources:* Compiled by the author on the basis of United Nations Conference on Trade and Development (UNCTAD) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information.

A third and intermediate group of 14 ADB members has signed between 12 and 40 IIAs. This group of relatively active states is made up of Hong Kong SAR, Cambodia, Lao PDR, Turkmenistan, Taiwan and Japan (both with 27 IIAs), Australia, Kyrgyz Republic, Sri Lanka, Bangladesh, Georgia, Tajikistan, Armenia, and the Philippines (see Figure 2). This intermediate group represents Asian countries which have been moderately active in investment rule-making, and should consider their exposure to investment claims.
Finally, a fourth group of Asian states comprises the frontrunners; these are the states that have concluded more than 40 IIAs. This is a relatively significant number of IIAs for a single country and denotes a substantive exposure to investment claims. This group includes: Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, Republic of Korea, People’s Republic of China (PRC). It is on this group of countries that most of our micro-analysis will be based. Logically, the great number of IIAs these countries have concluded reflects a very active investment diplomacy, and this also means that there is bound to be a great number of third group states that have granted rights to a great number of foreign investors.

Sources: Compiled by the author on the basis of United Nations Conference on Trade and Development (UNCTAD) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information.
**Figure 3: Asian States with More than 40 IIAs**

Sources: Compiled by the author on the basis of United Nations Conference on Trade and Development (UNCTAD) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information.

**B. The Increasing Use of Preferential Trade Agreements**

Another trend worth mentioning is the increasing role of PTAs in Asian investment rule-making. An exhaustive view of all IIAs concluded among Asian states can also help us to understand an important feature of Asian investment rule-making, namely, the rise of PTA to regulate investment matters. In total, 24 Asian PTAs with investment chapters have been concluded since 2001 and subsequently have been notified to the WTO.
Sources: Compiled by the author on the basis of the WTO regional trade agreements database and national Ministries of Foreign Affairs public information (As of November 17, 2013).

A relatively significant list of PTAs promotes FDI liberalization and ensures FDI protection throughout key economies such as Singapore, Japan, Malaysia, and Hong Kong. One observes that PTAs seem to be the favourite legal instruments of Asian capital-exporting states to regulate FDI, as opposed to classic BITs. Among these PTAs, the ASEAN Comprehensive Investment Agreement has a specific position since it regulates FDI in ten states which aim to create a common market by 2015.25 Another important feature of note by Figure 4 which shows the increasing rise of PTAs over time to regulate FDI in the region.

Some countries seem to favour negotiations of investment within FTAs in order not to be subject to full MFN applicability under other BITs. The MFN treatment provisions in existing treaties may give rise to the so-called “free-rider” issue. Such a problem has been known for a long time and arises when benefits from customs unions, free trade agreements or economic integration organization agreements are extended to nonmembers. In order to avoid this result, many IIAs exclude the benefits received by a Contracting State Party to a regional economic integration organization from the scope of MFN treatment obligations through a Regional Economic Integration Organization (hereinafter REIO) exception. Virtually all IIAs include a carve-out from the MFN principle. A considerable number of existing IIAs cover, at least, specific types of regional integration that are expressly mentioned in the agreement. But some countries extend the scope of the REIO exception to similar arrangements. Such provisions allow countries to enter into new FTAs with investment chapters without the obligation to extend the benefits to countries with which they were bound through a BIT. In this regard, one might also assume that some countries may be tempted to negotiate investments in the context of FTA in order to isolate the newly negotiated treaty from other BITs.

Of course, the number of PTAs covering investment matters remains limited compared to Asian BITs. However, the trend tells us that a growing number of Asian states are willing to negotiate trade and investment in the
same document. Such broad treaties may of course be more difficult and longer to negotiate than classical BITs. However, they are also likely to produce greater economic impacts and benefits since both trade and investment are liberalized at the same time.

While the current paper focuses on existing data, it is important to underscore the important number of PTAs currently under negotiation which regulate FDI. The TPP, but also RCEP or the Triangular China, Korea, or Japan treaties, offer good examples and probably validate the idea that the future regulation of investment will take the form of widely encompassing PTAs rather than narrow BITs.

III. MAPPING THE SHARE OF INVESTMENT CLAIMS AGAINST ASIAN STATES

The last decade has witnessed an exponential surge of investment disputes between foreign investors and host country governments, and this illustrates the popularity of investment arbitration at international levels (see III.A). Arbitral panels have been charged with the task of applying the rules of IIAs in specific cases, a task not often straightforward given the broad and sometimes ambiguous terms of these arrangements. This new phenomenon of investment arbitration has brought about a number of decisions from different arbitral fora, contributing to investment law regimes by giving meaning to their provisions. The cumulative number of treaty-based cases rose to more than 400 by November 2013, with more than 200 brought before the International Centre for Settlement of Investment Disputes (hereinafter ICSID). This paper will detail the statistics for Asian states (see III.B).

A. Investor-State Dispute Settlement Options

In principle, foreign investors may choose to initiate legal proceedings in the domestic courts of the host country, i.e., a right they never lose. Alternatively, they may initiate international arbitration proceedings that can be more favourable to them: this is because international law is more widely known and practiced, and because international tribunals are not subject to domestic political pressure. 27 Should investors face

discrimination in a state with a weak legal order, it is possible to initiate international arbitration proceedings as a priority. International arbitration is the process by which neutral arbitrators settle disputes concerning bilateral IIAs between sovereign states and foreign investors. In order to ensure a proper respect and conformity with investment rules regarding protected foreign investments, investment treaties provide various dispute resolution mechanisms, “one of the most important of which is international investor-state arbitration which entitles an injured investor to sue the host government for damages because of a violation of treaty standards and rights”.

On the basis of these provisions, disputes between an investor and a host state are settled by international arbitration rather than by the domestic courts of the host state (as would otherwise be the case). The host government’s consent to the jurisdiction of an international arbitration tribunal is granted ex ante in the form of an open offer either in the investment treaty or in its national law. During the past few years investment disputes brought before international arbitrators have multiplied and have gathered attention because of the significant compensation which host states have in some instances had to pay.

Most Asian IIAs further allow the foreign investors to choose the venue for the arbitration. Ad hoc arbitration allows the parties to agree on the procedural rules to the dispute, although states commonly rely on the established UNCITRAL arbitration rules. The parties may also resort to organizations that provide a venue and have developed their own arbitral

management mechanisms that can enable host States and investors to effectively" prevent conflicts to degenerate as traditional and costly investor-state disputes.

[28] In order to avoid multiple proceedings on the same matter, however, IIAs often establish that once a dispute has been brought to one forum — or, in some cases, a decision has been reached — the dispute may not be pursued in another venue. M.C.I. v. Ecuador holds that the “fork-in-the-road” rule is different from the lis pendens rule because the former rule refers to an option, expressed as a right to choose irrevocably between different jurisdictional systems; once the choice has been made there is no possibility of resorting to any other option. The right to choose once is the essence of the “fork-in-the-road” rule. M.C.I. Power Group, L.C. & New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award, ¶ 181 (July 31, 2007).


[30] The Wintershall v. Argentina tribunal, when discussing one trend in the case law (relating to the effect, if any, of an MFN clause on dispute settlement), commented that this closely follows the principle of general international law which states that international courts and tribunals can exercise jurisdiction over a state only with consent — this trend does not regard as sufficient a consent of the host state to international arbitration which would merely be a presumed consent. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14 [hereinafter Wintershall v. Argentine], Award, ¶ 179 (Dec. 8, 2008).

[31] One notable example is the case of CME Czech Republic B.V. v. The Czech Republic, an UNCITRAL arbitration under the Netherlands–Czech Republic BIT, which resulted in an award and payment of $355 million to an injured investor, one of the largest awards ever made in an arbitration proceeding. See generally CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award (Mar. 14, 2003).
procedures. The ICSID, established in 1967 under the umbrella of the World Bank, and which specializes in investor-state disputes, has received the most attention, totalling well over half the investor-state claims brought today. For the most part, IIAs feature more than one option for international arbitration. Most IIAs allow resorting to ICSID, and to ad-hoc arbitration under UNCITRAL rules. Additionally, some agreements allow the claim to be brought in other institutions, such as the Stockholm Chamber of Commerce or the International Chamber of Commerce.

B. Investor-(Asian) State Arbitration

The first to do so, the current paper collected all cases brought against Asian states. The results are significant since for the period from 1987 to the present, at least 87 investment disputes have involved 24 Asian states as defending parties. This is a relatively significant number of disputes, which amounts to almost 20% of all international investment disputes. Further scrutiny reveals that a great variety of states have faced such claims (Figure 5).

Figure 5: Ranking of Asian states per number of investor claims

Sources: Compiled by the author on the basis of United Nations Conference on Trade and Development (UNCTAD) Database of Treaty-Based Investor-State Dispute Settlement Cases, International Centre for Settlement of Investment Disputes Database of registered cases and national Ministries of Foreign Affairs public information.

India has faced 14 claims, whereas Pakistan (8), Georgia and Kirgizstan (7), Turkmenistan and Uzbekistan (6), Indonesia (5) follow with substantive experience of investment arbitration. In order to complement this initial picture, a further look is needed at the possible relation between the negotiation of treaties and the number of investment disputes. It is especially necessary to understand why India has had to face so many claims, whereas China, which has more IIAs, has only once been challenged.

IV. Investigating the Asian Trends in Investor-State Arbitration

In order to understand the trends and hence to give meaning to the current developments, this section looks at four key parameters. Firstly, the evolution over time of the investment claims made against Asian states (see IV.A). Secondly, the analysis of the “quality of investment treaties” is important because it provides a clearer view of the likely impact of the

34 The concept of «quality» refers to the averagetreaty value across 11 provisions for all BITs in force, see below footnotes 35, 38, 39 and 40. For a general presentation of the methodology on which the paper relies, see generally Chaisse & Bellak, supra note 14.
investment treaties. An earlier publication explained that not all investment treaties are drafted in the same manner; this is because many of their provisions may vary in significantly regarding their scope of application and likely economic impact (see IV.B). Thirdly, the other specific parameters that explain why Indonesia and Thailand have so far encountered a relatively low number of claims are reviewed (see IV.C). Eventually, the case of China is further analysed (see IV.D).

**A. The recent acceleration of investment claims against Asian States**

In order to provide a finer analysis of the international dispute involving Asian states, the current section looks at the evolution over time since the very first claim made against Sri Lanka in 1987 to the present claims made against Kazakhstan. The results of the survey cover 87 claims against 24 Asian states, and appear in Figure 6.

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35 “While the treaties continue to govern the same key aspect of investment, they have morphed over the 40 year period to include different types of clauses. We need to take into account the heterogeneity in order to better understand the motivations of states.” Srividya Jandhyala et al., (2010) *Pooling is a BIT Inappropriate: A Two Stage Model for Bilateral Investment Treaty Signing*, Jan. 27, mimeo. See also

While it should be recognized that a BIT could be an important commitment device, the nature of the commitment can vary enormously depending on the terms of the BIT. Too much attention has been placed on whether or not a BIT exists, than on the strength of the property rights actually being enshrined in these agreements


37 India, Pakistan, Georgia, Kyrgyzstan, Turkmenistan, Indonesia, Uzbekistan, Philippines, Mongolia, Sri Lanka, Vietnam, Armenia, Lao, Malaysia, Azerbaijan, Kazakhstan, Tajikistan, Australia, Papua New Guinea, Cambodia, Myanmar, China, Korea, and Thailand. See Figure 6.
The first-ever case brought against an Asian state was the one involving a Hong Kong claimant against Sri Lanka in 1987. Since then, a number of Asian states have been immune to investment arbitration. No claims have ever been made against New Zealand, Brunei Darussalam, Nepal, Afghanistan, Vanuatu, Tonga, Hong Kong China, Japan, Taiwan, or Singapore. However, since 1987 a growing number of states (24 in total) have been challenged by international arbitration. More importantly, since only an average of five claims a year was initiated from the early 2000s to 2010, a sharp increase has been seen since 2011. In 2011 and 2012 more than ten disputes were initiated. It is expected that 2013 will be another rich year, with twelve disputes already as of November 2013.  

As of November 17, 2013, the 12 investment claims identified by the author of this article were: Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1 (Notice of arbitration Feb. 8, 2013); Omar Faruk Bozbey v. Turkmenistan, UNCITRAL Ad-hoc (Apr. 2013); Omar Faruk Bozbey v. Turkmenistan, UNCITRAL Ad-hoc (Apr. 2013); Consolidated Exploration Holdings Ltd. and others v. Kyrgyz Republic, ICSID Case No. ARB(AF)/13/1 (Notice of arbitration Apr. 23, 2013); Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, (Apr. 24, 2013); Democratic Republic of East Timor (Timor-Leste) v. Australia, Ad-hoc 2002 Timor Sea Treaty (Notice of arbitration May 3, 2013); Federal Elektrik Yatirim ve Ticaret A.S. & others v. Republic of Uzbekistan, ICSID Case No. ARB/13/9 (May 24, 2013); Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13 (Notice of arbitration June 28, 2013); Güneş Tekstil Konfüksiyon Sanayi ve Ticaret Limited Şirketi & others v. Republic of Uzbekistan,
It is of course risky to predict the future, but one can understand that arbitration requires instruments, the knowledge of these instruments and a significant volume of FDI. These three parameters are now satisfied in most Asian states.

1. Indeed, as earlier explained, most Asian states have entered into investment treaties over the last few years and are expanding their network of IIAs. These new agreements are the instruments on the ground of which more claims will soon arise.

2. Equally important are the knowledge of the treaties which relate to private practice and the legal education on investment matters. There is no wide study and measure of such knowledge but it seems to be a trend in many Asian-based law firms to develop an “arbitration” department and for many universities to establish programs on investment regulation. These developments can only nurture the capacity of investors to rely on expert legal advice to bring claims before arbitration against Asian states.

3. The regular increase of foreign investment into Asian economies is also important. By definition, there were fewer disputes in the early 2000s in Asia because the volume of FDI was lower. It is because FDI is increasing that the likelihood of having to face claims is becoming more significant.

These three parameters have to be combined to understand the prospects for investment claims against Asian states. Together, they reveal a great potential which hitherto has been ignored or marginalized. However, the current paper shows that investor-state arbitration is developing fast in Asia, and it predicts an intense practice in the coming years.

B. The Variations over the Quality of ISDS Provisions

The following table (see Table 2) provides detailed data extracted from the BITsel Index. It does so on a selected number of Asian states, such as: the Top 10 which are most frequently sued by arbitration (India, Pakistan, Georgia, Turkmenistan, Kyrgyz Republic, Indonesia, Philippines, Mongolia, Sri Lanka, and Vietnam); as well as some key Asian IIAs negotiators, e.g., Malaysia, Thailand, and China.

ICSID Case No. ARB/13/19 (Notice of arbitration Aug. 29, 2013); Deutsche Telekom v. India, ICSID (not public), (Notice of Arbitration Sept. 2, 2013); Khaitan Holdings Mauritius Limited v. India, UNCITRAL (Notice of Arbitration Sept. 30, 2013); Spentex Netherlands, B.V. v. Republic of Uzbekistan, ICSID Case No. ARB/13/26 (Sept. 27, 2013); Naumchenko, Poulouektov & Tenoch Holdings v. India (ByCell dispute), UNCITRAL (not public) (Notice of arbitration Oct. 29, 2013).
TABLE 2: QUALITY OF SELECTED ASIAN IIAs AND ISDS PROVISIONS

<table>
<thead>
<tr>
<th></th>
<th>Total IIAs</th>
<th>Total claims</th>
<th>BITsel quality indicator</th>
<th>Average of coefficient of variation</th>
<th>BITsel ISDS quality indicator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>Number</td>
<td>Average across 11 provisions for all BITs in force</td>
<td>Standard deviation over mean * 100 (in percent)</td>
<td>Average across ISDS provisions for all BITs in force</td>
<td></td>
</tr>
<tr>
<td>India</td>
<td>84</td>
<td>12</td>
<td>1.82</td>
<td>0.21</td>
<td>2.00</td>
</tr>
<tr>
<td>Pakistan</td>
<td>48</td>
<td>8</td>
<td>1.66</td>
<td>0.28</td>
<td>1.63</td>
</tr>
<tr>
<td>Georgia</td>
<td>29</td>
<td>7</td>
<td>1.77</td>
<td>0.23</td>
<td>2.00</td>
</tr>
<tr>
<td>Turkmenistan</td>
<td>23</td>
<td>6</td>
<td>1.82</td>
<td>0.20</td>
<td>2.00</td>
</tr>
<tr>
<td>Kyrgyz Republic</td>
<td>28</td>
<td>5</td>
<td>1.77</td>
<td>0.23</td>
<td>1.71</td>
</tr>
<tr>
<td>Indonesia</td>
<td>64</td>
<td>5</td>
<td>1.57</td>
<td>0.31</td>
<td>1.75</td>
</tr>
<tr>
<td>Malaysia</td>
<td>70</td>
<td>2</td>
<td>1.62</td>
<td>0.29</td>
<td>1.78</td>
</tr>
<tr>
<td>China</td>
<td>135</td>
<td>1</td>
<td>1.58</td>
<td>0.31</td>
<td>1.30</td>
</tr>
<tr>
<td>Thailand</td>
<td>41</td>
<td>1</td>
<td>1.72</td>
<td>0.24</td>
<td>1.61</td>
</tr>
</tbody>
</table>

Source: Compiled by the author on the basis of the BITsel Index v.4.00.

The BITsel Index\(^{39}\) provides an extremely detailed support for understanding national treaty practices.\(^{40}\) The data for the Top 6 Asian litigators have been extracted to shed some light on the substance and quality of these respective treaties. The results are stunning because the strongest average quality indicator goes to India and Turkmenistan (1.82), which are far more significant than those of states with relatively weaker investment treaties, such as Indonesia (1.57) and China (1.58). These average values are based on a relatively high number of treaties and confirm the significant gap among the Top 6 in terms of rule-making: not all Asian investment treaties are similar. India is inclined to grant

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\(^{39}\) BITs enshrine a series of obligations on the parties to ensure a stable and favorable business environment for foreign investors. These obligations pertain to the treatment that foreign investors are to be afforded in the host country by the domestic authorities. But, meanwhile, such “treatment” that encompasses many sorts of laws, regulations and practices from public entities also affects foreign investors or their investments to a significant extent. In light of the great number of BITs in which different provisions and their different wordings would give birth to a broad kaleidoscope of legal obligations and hence regulatory effects, the “BIT Selection” (BITsel) Index, which is based on the 11 most important elements is found in most of the existing BITs.

\(^{40}\) BITSEL (2013) BILATERAL INVESTMENT TREATIES SELECTION INDEX, VERSION 4.00, www.cuhk.edu.hk/proj/BITsel (last visited Nov. 17, 2013). The BITsel classifies each provision as to its “investment friendliness” as either conducive (= 2) or limiting (= 1).
significant rights to foreign investors, although it has signed fewer treaties than China has. Conversely, China has signed a large number of treaties but its average quality is among the poorest of the Top 6.

Of course, these averages also depend on the partner states. Treaties are by definition the result of negotiations and reflect the consensus that the two sides reached after exchanging their goals and ambitions. Given this, this paper will take a closer look at the BITsel and see which treaties for each country of the Top 6 are on the extremes of national practice.

In the case of China, the treaty with the highest quality was concluded with Germany (1.90). This confirms the fact that China truly entered a new generation of investment treaties (with greater rights and access to ISDS) only after 2005, and the treaty with Germany represents a milestone. On the other extreme, China concluded a series of relatively weak treaties with Bulgaria, Mexico, Colombia, and Costa Rica. One can further fine-tune the analysis and note that there is a significant difference between its IIAs concluded before and after 2005. In the wake of the China–Germany BIT, China further negotiated treaties which were rather more favorable to foreign investors. This generation provides broader and more substantive obligations in regard to the treatment of foreign investment. After the establishment of national treatment — albeit with sectorial reservations in some cases — no substantial restrictions on the abilities of foreign investors to challenge the host country’s measures in international arbitration are now standard in this category. China’s “new-generation” BITs concluded since the beginning of this century seem to fit in this category. As a result, these post-2005 IIAs obtain a score of 1.65 whereas before that turning point it was only 1.55. India, on the contrary, concluded more than a dozen treaties with rather high quality (for instance with Switzerland and Mauritius) after it reached the value of 1.90. But it also signed a relatively weak-quality treaty with Mexico (1.63). As for Indonesia, it ranks fourth among the Asian states in terms of the number of investment treaties. However, it has a rather low average quality. In this light, it is interesting to note that the Germany–Indonesia treaty provides a very high level of protection (1.90), much higher than the Indonesian average. However, on the other hand, the Indonesia–Denmark treaty offers an example of a rather weak treaty (1.27). Last but not least, Malaysia, whose economic policy is deeply intertwined with politics, has concluded a rather strong treaty with Saudi Arabia (1.81). However, the Malaysia–Lebanon treaty scores poorly (1.36).

The next step is calculating the “coefficient of variation”, which is a better measure of the heterogeneity. The number itself expresses the

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41 The key advantage of the coefficient of variation is that it is directly comparable between countries. If we have a coefficient of variation of country A, say 30%, and of country B, say 60%, we can say that the heterogeneity of country B is twice as large as that of country A.
relation of the standard deviation (a measure for the dispersion of the data) to their mean. If the coefficient of variation is lower than 0.5, the mean value is a good representation for all the data. For example, Malaysia’s is 0.29. What does this tell us? This means that Malaysia variations in the provisions is 29%. As all the coefficients of variation are well below 0.5 for each BIT of Malaysia, the mean is a good representation for all the single BIT provisions. What does the coefficient of variation say in comparison to other states? The one for China is 0.31, so the heterogeneity of BITs is slightly larger for Chinese BITs than for Malaysian BITs. While the mean value of each country tells us how investor-friendly their BITs provisions are, the coefficient of variation tells us how heterogeneous they are.

Finally, the BITsel ISDS Quality Indicator represents the **Average across ISDS provisions for all BITs in force**. An investor-state dispute mechanism is an incentive to invest because it provides the ultimate resort access to international (neutral) jurisdiction. In the BITsel Index, if such a mechanism is included in the BIT, it can be expected to have a positive effect on FDI flows, but if it is subject to conditions, the effect is expected to be less. The ISDS procedures can however be subject to conditions. For example, here are some possible conditions: Foreign investors must refer the dispute to an administrative review procedure in accordance with domestic law in the first place, and if the dispute still exists three months after the investor has brought the issue to the review procedure, he or she can submit the dispute to international arbitration.\(^\text{42}\)

At this stage, it is important to mention two lessons. Firstly, there is a significant discrepancy not only between Asian treaty practices but also between individual treaty practices. Secondly, it also underlines the need to look more carefully at the key provisions found in each investment treaty, such as ISDS. Clearly, India has granted a relatively easier access to ISA than China has: the former obtains a coefficient of 2.00 whereas China has the lowest of all Asian states with 1.30.

**C. The Tribunal Lacks Jurisdiction: Explaining the “Trompe L’œil”**

In general terms, Asian investments agreements, like the majority of BITs, do not provide entry rights to foreign investors into their territory (see Table 2). Only a very limited number of IIAs, such as the Japan–Thailand PTA and the Indonesia–Japan PTAs, provide establishment rights.

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\(^{42}\) Possible Conditions: If the issue has been brought to a Chinese court, investors must be able to withdraw the case according to domestic law. Otherwise, they cannot submit the dispute to international arbitration. This rule so-called the “fork in the road”, requires the investor to make a choice between submission to a domestic court or to international arbitration, and where the choice once made becomes final and irreversible. See generally J. R. Weeramantry, Investor-State Dispute Settlement Provisions in China’s Investment Treaties, 27(1) ICSID Rev. 192 (2012).
Most Asian BITs provide only a best-endavour provision in regard to the admission of foreign investments (see the India–China BIT). Such IIAs follow the well-known admission clause model, which allows the host country to apply any admission and screening mechanism for foreign investment which it may have in place and therefore determines the conditions on which foreign investment will be allowed to enter the country. In these cases, in order to receive the protection of a bilateral investment treaty, the disputed investments have to be in conformity with the host state’s laws and regulations; but, usually investments in the host state will only be excluded from the protection of the treaty if they have been made in breach of the fundamental legal principles of the host country. Furthermore, in White v. India, giving regard to the views of commentators, it was noted that the “encourage and promote” provisions are generally not seen to give rise to substantive rights (and they hold in any event that the specific obligations contended for by the claimant are not supported by the provision’s general wording).

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43 See e.g., Rumeli Telekom A.S. et al. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 319 (July 29, 2008).
44 White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award, ¶s 9.2.5-9.2.13 (Nov. 30, 2011).
### TABLE 3: VARIATIONS ON ESTABLISHMENT IN ASIAN IIAS

<table>
<thead>
<tr>
<th>Treaty name</th>
<th>Regulation of entry of foreign investment</th>
<th>Type of regulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>India–China BIT (2007) Article 3.1</td>
<td>“Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and admit such investments in accordance with its laws and policy.”</td>
<td>Admission clause</td>
</tr>
<tr>
<td>Taiwan–Thailand (1996) Article 4.1</td>
<td>“Each Contracting Party shall seek and obtain approval from the authorities of its relevant place to the effect that investments by investors of the other relevant place and the returns therefore shall receive treatment which is fair and equitable and not less favorable than that accorded to investments by investors of any third party.”</td>
<td>Treaties that require pre-approval of investments</td>
</tr>
<tr>
<td>Indonesia–Thailand BIT (1998) Article 2.1</td>
<td>“This Agreement shall apply to investments [...] to investments by investors of the Republic of Indonesia in the territory of the Kingdom of Thailand which have been specifically approved in writing by competent authorities of Thailand in accordance with the applicable laws and regulations of the Kingdom of Thailand and any laws amending or replacing them.”</td>
<td>Treaties that require pre-approval of investments with a triple condition: approval, in writing by relevant authorities</td>
</tr>
<tr>
<td>Japan–Thailand PTA (2007) Article 93</td>
<td>“each Party shall accord to investors of the other Party and to their investments treatment no less favourable than that it accords, in like circumstances, to its own investors and to their investments with respect to the establishment, acquisition and expansion of investments in its Area. 2. Each Party shall, subject to its laws and regulations existing on the date of entry into force of this Agreement, accord to investors of the other Party and to their investments treatment no less favourable than that it accords, in like circumstances, to its own investors and to their investments with respect to the management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments in its</td>
<td>Pre-establishment right</td>
</tr>
</tbody>
</table>
Area"  

<table>
<thead>
<tr>
<th>Japan–Indonesia PTA (June 2007) Article 59 1.</th>
<th>“Each Party shall accord to investors of the other Party and to their investments treatment no less favourable than that it accords in like circumstances to its own investors and to their investments with respect to investment activities.” Art. 58 (g) “the term ‘investment activities’ means establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments”.</th>
<th>Pre-establishment right</th>
</tr>
</thead>
<tbody>
<tr>
<td>TPP Draft (June 2012) Articles 12.4 and 12.5</td>
<td>“1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”</td>
<td>Pre-establishment right</td>
</tr>
</tbody>
</table>

**Source:** Elaborated by the author.

Among the Asian IIAs adopting the admission clause, some of them deserve special mention in the way that they define the investment covered by the treaty because it has a significant impact on arbitration. Indeed, to date a significant proportion of the small number of investment claims advanced against Asian states has failed on the question of jurisdiction involving a precondition of this sort. For instance, in *Yaung Chi Oo Trading v. Myanmar* it was noted that the 1987 ASEAN Agreement requires that the investment must be “specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.” Also, it was found that if a state unequivocally and without reservation approves in writing a foreign investment proposal under its internal law, that investment must be taken to
be registered and approved for the purposes of the Agreement.\(^{45}\) Further illustrations are given by, for instance, *Gruslin v. Malaysia*\(^ {46}\) and *Fraport v. Philippines*.\(^ {47}\) Such claims are taken into account in this paper’s data, but they only resulted in an award on jurisdiction and not on the merits. These cases represent a specific kind of investment arbitration which could be seen as a “forced perspective” on case law involving Asian states, because they cannot result in any violation.

As it can be seen from Table 3 above, when it comes to Asian IIAs in practice (e.g., the Indonesia–Thailand BIT and the Taiwan–Thailand BIT), some states — Thailand, Malaysia, and Indonesia — delineate the operation of substantive investment treaty protections by reference to compliance with an element of domestic law regulating the entry of foreign investment. Thailand, for instance, often obliges foreign investors to show that they have been granted specific approval (see Thailand–Indonesia) which can, in extreme cases, explicitly require an approval in writing by a competent authority (see Thailand–Taiwan); this considerably reduces the chances that an investment will be protected by the BIT and hence decrease the exposure to investment claims.

Without clear proof of compliance with this one discrete element across a possible spectrum of entry conditions, foreign investment will not be protected by the BIT. An affirmative act of approval in writing is thus a necessary and sufficient condition for conferring treaty protection. This mechanism allows a state to calibrate its investment treaty exposure to the approval (which will often take the form of registration) of foreign investment under domestic law. It also explains why states such as Indonesia, Thailand, and Malaysia, which have concluded a high number of IIAs, have not been subject to a high number of claims (see Table 2 above). As a matter of fact, although Malaysia has concluded more IIAs than India or Pakistan, it has not faced many claims, partly because of the requirement of written approval.

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\(^{45}\) Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award, ¶¶ 53, 59 (Mar. 31, 2003).

\(^{46}\) In *Gruslin v. Malaysia* for instance, the single arbitrator declined to exercise jurisdiction over portfolio investment by a Belgian national that had incurred loss as a result of Malaysian capital controls imposed in response to the 1998 East Asian Financial Crisis. The arbitrator ruled that general approval by the Malaysian stock exchange for the listing of shares held by the Belgian national did not meet the required standard of an “approved project” under the BIT in question. *See generally* Philippe Gruslin v. The State of Malaysia, ICSID Case No. ARB/99/3, Award, (Nov. 27, 2000).

\(^{47}\) *Fraport v. Philippines* considers, for jurisdictional purposes, that the “in compliance with” requirement is a jurisdictional limitation *ratiune materiae* which relates the initiation of the investment and not the way it was subsequently conducted (although that may be relevant to a defence on the merits). *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, ¶¶ 334, 339-340, 344-5 (Aug. 16, 2007).
D. Deconstructing China’s Paradox

Very often, commentators on China’s investment policy focus on the number of Chinese investment agreements. It is true that China has concluded a great number of such instruments. However China has faced only one claim to date. It has been said that foreign awards would be difficult to be enforced in China which, however, a statement made on old Chinese Supreme Court interpretation, largely irrelevant today. As explained by China the International Economic and Trade Arbitration Commission (hereinafter CIETAC) Director in Boston, “an award made by an ICSID tribunal should be enforced without impediments and the enforcement of a foreign BIT award may also be realized.” 48 Also frequently heard, the cultural argument is invoked to explain that China would be averse to litigation. It may probably play a role, but there are other possible ways for foreigners to deal with Chinese authorities. However, there are technical explanations for the Chinese paradox in having a great number of treaties but only one dispute to date. The BITsel quality indicator reveals that China has a very low coefficient of 1.58. This relatively weak protection granted to foreign investors means that the Chinese IIAs do not provide strong protection. If the protection is not strong, it also means that the host state responsibility is rather limited, thereby offering few opportunities for a claim. On top of this, China’s BITsel ISDS Quality Indicator is also extremely low (1.30) compared with other Asian states. It means that Chinese ISDS clauses are full of restrictions which do not easily allow investors to bring claims before arbitration. A careful reading of the BITsel quality indicator and the BITsel ISDS Quality Indicator can only result in the conclusion that most Chinese IIAs are not likely to generate investment claims. The reasons are predominantly legal and technical.

Traditionally, China has restricted unilateral consent to arbitration to disputes on the amount of compensation to be granted in cases of expropriation.49 Controversies on other matters, such as the existence of expropriation itself, or breaches of treatment obligations, were to be settled in domestic courts, or could be submitted to arbitration by mutual consent

48 See generally Jie Wang, Investor-State Arbitration: Where Does China Stand?, 32(1) SUFFOLK TRANSNAT’L L. REV. 493 (2009). Wang also explains that both the accession of China to the New York Convention and the above judicial interpretation by the Supreme People’s Court took place long before China entered into the ICSID Convention. Article 236 of the Civil Procedure Law 2007 provides that if an international treaty concluded or acceded to by China contains provisions different from those of this Law, the provisions of the international treaty shall apply.

49 Id.
of the investors and national authorities (e.g., China–Korea BIT, Art. 9.3). A number of IIAs require the foreign investor to fulfill certain procedural requirements prior to filing the arbitration claim. The most usual procedural restrictions pertain to waiting periods and the exhaustion of local remedies. These types of requirements are commonly found in Sino–foreign BITs. Prior to the launch of arbitration, foreign investors must hold negotiations with China’s authorities with a view to reaching an amicable settlement. Should these negotiations fail to bring the parties to a commonly agreed solution within a six-month period, the investor may bring the claim to international arbitration. While the majority of Sino–foreign BITs require a six-month waiting period, a few agreements require somewhat shorter periods — three months: BITs with the Netherlands (2001), Germany (2003), and Finland (2004) — or, exceptionally, no waiting period at all in the case of Ghana (1989). The exhaustion of local remedies requires foreign investors to seek relief to their claim through domestic procedures before bringing the international dispute. Commonly, the investors would be required to file the claim before the competent domestic court. Should the domestic court fail to settle the dispute, or fail to reach a decision within a given period of time, the investor could be entitled to launch international proceedings.

50 Iberdrola v. Guatemala Award finds that Guatemala’s consent to arbitration does not cover all types of disputes relating to investments made within its territory, but, rather, that it is limited to disputes involving “matters regulated by” the treaty. Iberdrola Energia S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award, ¶¶ 306, 309 (Aug. 17, 2012).

51 For instance, Bayindir v. Pakistan considered the claimant’s failure to abide by a six-month waiting period, and it concluded that waiting periods are procedural, not jurisdictional. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶ 102 (Nov. 14, 2005).

52 Kilic v. Turkmenistan Award finds that the requirement to submit the dispute to local courts is a condition precedent, compliance with which constitutes a jurisdictional requirement, and is not a question of admissibility. Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, ¶ 6.2.9 (July 2, 2013).

53 However, not all waiting periods are requirements. Pan American Energy v. Argentina suggests, without deciding, that the text of the applicable BIT (since it uses the word “should”) indicates that the consultation and negotiation phase is not mandatory. Pan American Energy LLC & BP Argentina Exploration Company v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, ¶ 41 (July 27, 2006).

54 Art. 8.3 of Agreement Between the Government of the Republic of Korea and the Government of the Republic of Argentina on the Promotion and Protection of Investments, May 17, 1994, provides in this regard that the dispute may be submitted to international arbitration if one of the parties so requests, where, after a period of eighteen (18) months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision, or where the final decision has been made but the parties are still in dispute.
New-generation Sino–foreign IIAs are instead free of the substantial restriction, granting unilateral consent to disputes concerning all disciplines of the agreement. Only new and recent IIAs are likely to generate investment claims before IS on their own or through the application of most-favoured-nation treatment (hereinafter MFN) clauses in the wake of the Maffezini jurisprudence. Indeed, several Tribunals have applied MFN clauses to relieve claimants of having to comply with a “prior recourse” obligation. However, some other Tribunals and arbitrators which have rejected attempts to apply MFN clauses to relieve claimants of having to comply with a “prior recourse” obligation have created a schism across awards which may well become an issue when further exploring China’s IIAs.

V. CONCLUSION

This paper has been aimed at providing a framework analysis of investment claims against Asian states. All investment agreements concluded by at least one Asian country have been reviewed, and therefore contributed to various aspects of the analysis. The results show that Asian states are increasingly negotiating IIAs (in the form of BITs or PTAs) which form a dense network of obligations what increases the exposure of

55 Art. 9.3 of Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Djibouti on the Promotion and Protection of Investment, Aug. 18, 2003, for instance, provides that:

Any dispute, if unable to be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, shall be submitted at the request of either party to (a) International center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965; or (b) an ad hoc arbitral tribunal.

56 Maffezini v. Spain applies the BIT’s MFN clause to relieve the claimant of its non-compliance with the BIT’s requirement of prior to the respondent’s local courts before bringing an ICSID claim. Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 54-6 (Jan. 25, 2000). Later, Hochtief v. Argentine Republic Decision on Jurisdiction, by a majority, holds that the BIT’s MFN clause applies to dispute settlement and relieves the claimant of having to comply with the prior recourse provision of the treaty. Hochtief Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶ 75 (Oct. 24, 2011).

57 Wintershall v. Argentina holds that it is one thing to stipulate that the investor is to have the benefit of MFN treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the settlement resolution clause of the very same BIT when the Parties have not chosen language in the MFN clause which shows an intention to do this. Wintershall v. Argentina, at 167,168. Also, Hochtief v. Argentine Republic Separate and Dissenting Opinion of J. Christopher Thomas, Q.C. holds that the MFN clause in the particular BIT before the tribunal does no apply to access to international jurisdiction under the arbitration provision. Hochtief Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Separate and Dissenting Opinion of J. Christopher Thomas, Q.C., ¶¶ 74, 80-3 (Oct. 7, 2011).
these states to investment claims. Although, few cases were brought against Asian states by 2009, the pattern has changed since 2010, with a sharp increase over the last three years.

In this light, one can better understand some current negotiations on new treaties, such as the protracted TPP negotiations on investment arbitration provisions. In the TPP context, Australia has rejected investor-state dispute settlements. Indeed, they are trying to persuade some TPP members to do away with ISDS in the investment chapter. The reason for doing so, according to Australia, is that ISDS is not an important factor in securing FDI into TPP states and they confirm this through an independent study. This is an interesting issue for developing members of the TPP to seriously consider and they probably need to do an alternate study to confirm or rebut what Australia is saying.\(^{58}\) However, it is too early to say that Australia’s change in policy has immediately affected other states.\(^{59}\)

Although some IIAs (for instance, those concluded by China before 2005 or by Thailand, Indonesia, and Malaysia which require the pre-approval of investments) have generated a few disputes for technical reasons, it is rather predictable that Asian states are currently entering an era in which foreign investors are likely to multiply claims. The increasing number of treaties combined to their wide scope of application, while in parallel private law firms gradually acquire a finer understanding of the investment regime for the benefits of many foreign investors, should warn everyone about the logical consequence of a further increase of claimants and states subject to these claims. Such a trend requires host states to be prepared to litigate while assessing the benefits of current investment treaty negotiations with, for instance, the EU, the US and Canada.

Finally, the principle of MFN treatment is of paramount importance to the Asian investment regime, because it may create opportunities for investors against states that have developed rather restrictive provisions (such as China in the context of investor-state dispute settlement clauses). Equally important in terms of future investment claims, the more a country has IIAs, the more MFN might play an important role in the future. Malaysia, China, and Vietnam are, in this regard, the Asian states that

\(^{58}\) Much of the debate regarding the ISDS provisions of the KORUS FTA is viewed as more an outgrowth of political posturing prior to the parliamentary and presidential elections that are looming next year rather than of legal or economic argument. But the developments in Korea have potentially lasting effects throughout the Asia-Pacific region and beyond (especially in the context of Japan joining TPP negotiations).

\(^{59}\) In any case, one wonders what the alternative to ISDS should be. ISDS aimed to take these cases out of the (arbitrary) political realm of diplomatic protection on the one hand, and out of (non-neutral) domestic courts on the other. Everyone would agree that the ISDS process has deficiencies, and that the substantive rules it applies need refinement, but one would prefer to improve it rather than to abandon it.
should pay the greatest attention to MFN, since those three have already granted rights to a great number of their party investors and investments.
ANNEX 1. THE 48 ASIAN STATES (ASIAN DEVELOPMENT BANK MEMBERSHIP AS OF NOVEMBER, 2013)

<table>
<thead>
<tr>
<th>REGIONAL MEMBERS</th>
<th>YEAR OF MEMBERSHIP</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFGHANISTAN</td>
<td>1966</td>
</tr>
<tr>
<td>ARMENIA</td>
<td>2005</td>
</tr>
<tr>
<td>AUSTRALIA</td>
<td>1966</td>
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<td>1999</td>
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<td>BANGLADESH</td>
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<tr>
<td>BHUTAN</td>
<td>1982</td>
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<td>BRUNEI DARUSSALAM</td>
<td>2006</td>
</tr>
<tr>
<td>CAMBODIA</td>
<td>1966</td>
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