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ASIAN TREATY-MAKERS AND INVESTMENT TREATY ARBITRATION: NEGOTIATING WITH A WARY EYE

Locknie Hsu*

ABSTRACT

The recent increase in bilateral investment treaties and free trade agreements entered into by Asian states has exposed them to increased commitments to foreign investors and the risk of investor-state arbitration. The rise in such arbitrations elsewhere has led to a considerable body of arbitral case law. This article examines the trend of such increased exposure of Asian states, salient issues that have emerged in arbitration case law and lessons for Asian treaty-makers and their legal advisors.

KEYWORDS: *BITs, FTAs, investor-State arbitration, dispute settlement, Asia*

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I. INTRODUCTION: OVERVIEW OF INVESTMENT AND TREATY TRENDS IN THE ASIAN REGION

Investment flows from and into Asian economies have on the whole been significant in the last ten years. While the 2008-9 financial crisis no doubt made a dent on investment flows, they have generally been recovering in the Asian region.[1] Inward foreign direct investment (IFDI) in the Association of Southeast Asian Nations (ASEAN) region in particular has recovered robustly.[2] ASEAN provides substantial attraction for IFDIs in view of its economic integration plan which not only includes the ASEAN Free Trade Area and ASEAN Investment Area, but also, an integrated ASEAN Economic Community by 2015.[3]

As some economies in the South-east Asia region shift from being investment destinations to also being global suppliers of foreign direct investment, interest in investment promotion and protection mechanisms can be expected to increase. While Bilateral Investment Treaties (BITs) are not new to Asian economies, the increasing entry of these economies into Free Trade Agreements (FTAs) is a more recent trend. Many of these FTAs carry investment chapters with significant legal commitments accompanied by provisions for investor-State arbitration as a dispute settlement option.

BITs and FTA investment treaty provisions are changing the Asian legal landscape. Globally, Investor-State Dispute Settlement (ISDS) cases have been rising alongside the increase in investment-related treaties signed.[4] While relatively few Asian states have been involved in ISDS as

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[1] This is particularly true for Southeast Asia; FDI in 2010 declined for South Asia, *see* United Nations Conference on Trade and Development [UNCTAD], *World Investment Report 2011*, UNCTAD/WIR/2011, at 10-15 (July 26, 2011), *available at* http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf; *see also* UNCTAD, *World Investment Report 2010*, UNCTAD/WIR/2010, Figure B (July 22, 2010), *available at* http://unctad.org/en/Docs/wir2010fas_en.pdf. FDI outflow in the period 2000-2009 has increased steadily and FDI outflow from East Asia alone accounted for close to US$120 billion in 2009, while such outflow for East, South and South-East Asia accounted for about US$150 billion. While the financial crisis of 2008 caused some slowing down in FDI, a rebound in inflows particularly into Asia has been observed in 2010, *see generally* ADB & THE BOAO FORUM FOR ASIA, PROGRESS OF ASIAN ECONOMIC INTEGRATION, ANNUAL REPORT 2009 1-37 (2009), *available at* http://www.rcie-cn.org/Boao-Forum/2009/Boao%20Eng%20report.pdf; *see also* UNCTAD, *Global and Regional FDI Trends in 2010* (Jan. 17, 2011), Table 2, at 3, http://www.unctad.org/en/docs//webdiaeia20111_en.pdf; *see also* UNCTAD, *World Investment Report 2011*, *supra*, at 10-13.

[2] *See generally* Locknie Hsu, Inward FDI in Singapore and Its Policy Context (May 31, 2012), http://www.vcc.columbia.edu/files/vale/documents/Singapore_IFDI_-_FINAL_-_31_May_2012.pdf. The ten member countries of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Laos PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

[3] On the ASEAN Economic Community (AEC) and other aspects of economic integration, *see ASEAN Economic Community*, ASSOCIATION OF SOUTHEAST ASIAN NATIONS, http://www.aseanse c.org/18757.htm (last visited Oct. 28, 2012). The integration process comprises three pillars or areas: economic, political-security and socio-cultural.

[4] UNCTAD, *World Investment Report 2010*, *supra* note 1, at 83.

compared with other regions, the legal developments arising from investment disputes can have an impact on treaty activity in Asia, since the provisions giving to some disputes may be very similar to those in treaties made by Asian states. In fact, a sure sign that Asian treaty-makers are monitoring case developments can be seen from the fact that some recent Asian FTA provisions have already begun to reflect the implications of some of these decisions.

Over the last decade, the growth of Asian entities Sovereign Wealth Funds (SWFs) and their activities have also led to developments in domestic investment law, especially in certain host states, such as the United States and Canada. In these states, national investments laws have been amended to allow for greater admission control based on national security considerations.[5]

This article examines some recent investment treaty developments in the Asia region, with reference to some salient legal issues that have arisen from investment disputes.[6]

II. DEVELOPMENTS AND RESPONSES

A. Investment Agreements Within Asia and Beyond

Asian states have entered into a number of BITs, and FTAs containing investment chapters/provisions. As mentioned, FTAs are a relatively recent development in this region. FTA partners have included both Asian and non-Asian trade partners. Investor-State Dispute Settlement (ISDS) cases are increasing, as well as the number of agreements entered into by Asian states that contain significant investment commitments and ISDS provisions. In 2011, a World Trade Organization (WTO) report pointed out that Asian members were among the most active in signing regional and preferential trade agreements (many of which contain investment chapters).[7]

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[5] *See generally* Hsu, *SWFs, Recent U.S. Legislative Changes, and Treaty Obligations*, *infra* note 27; *see also* Hsu, *Multi-sourced Norms Affecting Sovereign Wealth Funds: A Comparative View of National Laws, Cross-Border Treaties and Non-binding "Codes"*, *infra* note 27.

[6] Due to the number of treaties entered into by Asian states in recent years and the complexities of their provisions, this article does not seek to set out all developments in an exhaustive manner. Rather, it aims to highlight for further study some recent agreements entered into by Asian states and the specific challenges represented or raised by particular provisions and related legal issues. These have either resulted from developments elsewhere, or are expected to attract debate and further review in future. For a general overview, *see generally* Mahnaz Malik, Recent Developments in International Investment Agreements: Negotiations and Disputes, *presented at* Background Papers of IV Annual Forum for Developing Country Investment Negotiators (Oct. 27-29, 2010), http://www.iisd.org/pdf/2011/dci_2010_recent_developments_iias.pdf.

[7] WTO, *World Trade Report 2011*, at 57, *available at* http://wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf; *see also* Press Release, Asia is at the Leading Edge of New Trade Pacts of World Trade Report 2011 (July 27, 2011), http://wto.org/english/news

The following Table shows examples of some recent Asian agreements that contain significant investment commitments.

TABLE: EXAMPLES OF AGREEMENTS BY ASIAN STATES CONTAINING INVESTMENT COMMITMENTS (2009-2012)

Bilateral FTAs, Intra-Asia	**Bilateral FTAs, Asian partner non-Asian partner**	**Regional, Intra-Asia**
China-Taiwan Economic Cooperation Framework Agreement (2010) Japan-India Economic Partnership Agreement (2010)	Singapore-Costa Rica FTA (signed April 6, 2010) Malaysia-New Zealand FTA (in effect from August 1, 2010) Malaysia-Australia FTA (in effect from January 1, 2013)[8] China-Peru FTA (in effect December 2009) Singapore-Peru FTA (in effect from August 1, 2009; Investment Chapter provides for the agreement to supersede the Singapore-Peru BIT of 2003: Article 10.20) Korea-EU FTA (in effect from July 1, 2011) Korea-U.S. FTA (in effect from March 15, 2012)	**Within ASEAN** ▪ ASEAN Framework Agreement on Investment ▪ ASEAN Comprehensive Investment Agreement (signed 2009, in effect as of March 29, 2012) **ASEAN "Plus" Investment Agreements*** ▪ China-ASEAN (in effect 15 February 2010) ▪ Australia-New Zealand-ASEAN (Chapter 11 of the FTA is on Investment; the FTA entered into effect on January 1, 2010) ▪ Korea-ASEAN (signed June 2009) *ASEAN has not signed an investment agreement with India and Japan yet although ASEAN has signed an FTA and Economic Partnership

_e/pres11_e/pr635_e.htm.

[8] *Malaysia – Australia*, Free Trade Agreement, MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_55b684ea-c0a8156f-2af82af8-5b2b191e (last visited Oct. 28, 2012).

		Agreement respectively with these two countries.
BITs		
Singapore-Russia BIT (2010)[9] China-Colombia BIT (2010)[10]		

The ASEAN Comprehensive Investment Agreement (ACIA) is a notable regional investment agreement which contains ISDS provisions. The ACIA came into force on March 29th 2012, superseding two previous ASEAN investment agreements. It comprises provisions that bind the ten ASEAN member countries to take steps towards investment liberalization and in investment protection. This new agreement provides clearer framework than its predecessors and is much more comprehensive.

Furthermore, ASEAN members have collectively signed a number of FTAs containing investment chapters, or investment agreements, with major trade partners such as Australia, New Zealand, China and Korea. ISDS cases have begun to reach Asian host states.

B. Salient Issues

The issues/provisions mentioned here are merely illustrative, given that numerous kinds of legal questions can arise in ISDS stemming from BITs or FTAs.

1. Scope Issues — Meaning of "Investment." — Investors and investments must usually satisfy several prerequisites before qualifying for a treaty's protection. These include satisfying requirements of being a covered "investor", having made a covered "investment" and so on. In some treaties, the host State may additionally require special written approval of an investment for it to qualify for protection. An example is the requirement in Article II.1 of the 1987 ASEAN Agreement for the Promotion and Protection of Investments. In the first (and only) ASEAN ISDS arbitration to date, the issue arose as to whether the investment in question was covered (and thus protected) under the relevant ASEAN investment agreements. This depended on whether the investment had fulfilled the written approval requirement in the treaty.[11] The ACIA, which supersedes that agreement, also provides for such written approval in Art.

[9] Singapore-Russia BIT (2010), signed in September 2010, not yet in force at the date of this writing, http://www.mfa.gov.sg/2006/press/view_press.asp?post_id=6395.

[10] *Colombian Senate Approves Investment Agreement with China*, ENGLISH.NEWS.CN (Oct. 27, 2010, 11:00 AM), http://news.xinhuanet.com/english2010/business/2010-10/27/c_13577708.htm.

[11] Yaung Chi Oo Trading Pte Ltd., v. Gov't of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award, ¶¶ 22, 28, 51-63, 77 (Mar. 31, 2003), http://www.unctad.org/iia-dbcases/jurisprudence.aspx?id=48.

4(a) (read with Annex 1). This is a requirement that may be easily overlooked by foreign investors that are unfamiliar with the approval process or the treaty provisions. Failure to satisfy this condition by an investor could lead to an arbitral tribunal lacking jurisdiction to hear the particular investment dispute. In essence, if ignored, it can be an obstacle to ISDS for the investor. In such a case the investor may need to resort to alternative means to pursue its claim, through domestic courts, for example.

Pre-establishment activities are sometimes excluded as "investments" qualifying for investment treaty protection. In the Singapore-India FTA (CECA) the exchange of letters however provides for Most Favored Nation (MFN) treatment to be given in respect of pre-establishment investment activities, if India provides such protection to a third party.

An illustration of an attempt to clarify the meaning of "investment" can be seen in the Investment Chapter of the ASEAN-Australia-New Zealand FTA. Article 2 contains the definition of "investments"; footnote 3 to that provision states: "For greater certainty, investment does not mean claims to money that arise solely from: (a) commercial contracts for sale of goods and services, or (b) the extension of credit in connection with such commercial contracts."[12]

2. Other Scope Issues. — A number of FTAs in the last decade contain significantly enhanced legal commitments, compared to those made in World Trade Organization agreements. A good example would be the FTA provisions that surpass the requirements of the WTO's Trade-Related Intellectual Property Rights Agreement (TRIPS). Such "TRIPS-plus" provisions in FTAs expand the obligations of their signatory states. For instance, the U.S.-Morocco FTA is an early example of an FTA with important TRIPS-plus commitments. Though many Asian states' FTAs do not contain such extensive obligations, a few have incorporated several TRIPS-plus commitments, including the U.S.-Singapore FTA (USSFTA), the KORUS FTA, and the EU-Korea FTA. There are additional obligations, ranging from having to provide an expanded scope of patentable matter (as compared with TRIPS), to requirements relating to the granting, challenge and revocation of patents, and marketing approval for medicines (generic medicines in particular). The investment chapters of such FTAs (and therefore the applicability of ISDS within them) apply to measures that affect not only commitments pertaining to trade in goods and services, but also such TRIPS-plus commitments, should they be shown to affect investors or investments adversely. In particular, given the potential breadth of the 'fair and equitable' treatment obligation typically found in such FTAs (and as interpreted in various ICSID disputes), such obligations now form new potential subject matter for ISDS for aggrieved investors;

[12] The next footnote in that Article also attempts to clarify the meaning of an investor who "seeks to make" an investment.

more is said of these challenges in the next part. Interestingly, China's FTAs have not so far included TRIPS-plus provisions.[13]

Another area of regulatory activity in relation to which ISDS as well as WTO and domestic challenges are emerging, is that of tobacco control.[14] The foundation of the measures lies in the Framework Convention on Tobacco Control (FCTC), to which a large number of countries (including many in Asia) are party. As countries increasingly implement the FCTC, measures may fall to be scrutinized – and possibly aggressively challenged – by tobacco companies in defence of the industry. As Australia and Uruguay seek to fend off these challenges, Asian countries implementing their FCTC obligations will no doubt have to carefully monitor the arguments and decisions, since they, too, may be host to investments in the tobacco sector. As these developments unfold, another is being watched keenly as well: eventual content (if any) with regard to tobacco regulation measures in the Trans-Pacific Partnership free trade agreement, which is still under negotiation at this point.[15]

3. Treatment Provisions. — The following are some examples of recent provisions dealing with the standard of treatment of investors/their investments.

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[13] *China's Free Trade Agreements*, CHINA FTA NETWORK, http://fta.mofcom.gov.cn/english/fta_qianshu.shtml (last visited Oct. 28, 2012).

[14] Tobacco company, Philip Morris, has initiated ISDS against Uruguay and Australia in separate arbitrations, while other companies have initiated domestic litigation against Australia based on constitutionality arguments. *See Investor-State Arbitration - Tobacco Plain Packaging*, AUSTRALIAN GOVERNMENT ATTORNEY-GENERAL'S DEPARTMENT, http://www.ag.gov.au/Internationallaw/Pages/Investor-State-Arbitration---Tobacco-Plain-Packaging.aspx (last visited Oct. 28 2012). At the WTO, Ukraine and Honduras have lodged complaints under the TBT Agreement and TRIPS Agreement against Australia, *see Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm (last visited Oct. 28, 2012), *see also Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm (last visited Oct. 28, 2012). (The claims also include a violation of the "national treatment" provision in Art. III of GATT 1994.) The most recent action reported is that taken by Philip Morris under European Economic Area (EEA) rules against Norway. *See Philip Morris Sues Norway over Tobacco Display Ban*, MEDICALXPRESS (June 4, 2012), http://medicalxpress.com/news/2012-06-philip-morris-sues-norway-tobacco.html.

[15] The nine TPP negotiating partners are (by region): Australia, New Zealand, Brunei Darussalam, Malaysia, Singapore, Vietnam, Chile, Peru, and the United States. The four Trans-Pacific SEP partners are Brunei, Singapore, New Zealand and Chile, Trans-Pacific SEP, *see Overview of Trans-Pacific SEP (TPFTA)*, SINGAPORE'S FTA NETWORK, http://www.fta.gov.sg/fta_tpfta.asp?hl=12 (last visited Oct. 29, 2012). As in June 2012, Canada and Mexico will be joining these negotiations, with Japan having expressed interest but not yet included in the process, *see Trans-Pacific Partnership (TPP): 15th Round of TPP Negotiations Set for Auckland, New Zealand -- December 3-12, 2012*, THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, http://www.ustr.gov/tpp (last visited Oct. 29, 2012); *see also infra* note 40.

(a) Fair and equitable treatment (FET). — Although arbitral decisions have set out some useful guidance on the scope and meaning of such treatment, the scope of such a provision can still be quite broad.[16]

After some NAFTA decisions raised the question of whether such treatment went beyond the standard under customary international law, the NAFTA Free Trade Commission issued an Interpretative Note in 2001 in clarification that it did not.[17] Other FTAs have since begun to include such a similar clarification on the scope of this standard of treatment. Examples include: Singapore-U.S. FTA Article 15.5, exchange of letters (following NAFTA Free Trade Commission interpretative note), and the ASEAN-Korea Investment Agreement (June 2009) Article 5.

(b) Expropriation. — There is no single definition of "expropriation" and recent treaties have begun to spell out more detailed explanations of this term to try to clarify its scope and meaning. Examples of such explanatory provisions can be found in the Singapore-India FTA (CECA), Annex 3 and, Singapore-Peru FTA Annex 10A.

A noteworthy development is the inclusion of additional language (usually in an Annex) to help determine (and possibly circumscribe) the interpretation of what might or might not amount to "indirect expropriation."[18] This is evidently to permit for regulatory flexibility and to discourage challenges unless certain minimum conditions of expropriation are considered and met. Examples of such language can be found in Annex 11-B of the Korea-U.S. FTA (KORUS).

Similarly, the ACIA, similarly contains some exclusionary language with regard to expropriation.[19] Apart from setting out factors to determine if expropriation has occurred, it also specifically provides as follows: "Non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute expropriation of the type referred to in sub-paragraph 2(b)."[20]

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[16] *See, e.g.*, AES Summit Generation Ltd. & AES-Tisza Erömü Kft. v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, ¶ 9.3 (Sept. 23, 2010), *see also* Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶¶ 152-74 (May 29, 2003).

[17] NAFTA Free Trade Commission, *Dispute Settlement: NAFTA - Chapter 11 – Investment, Notes of Interpretation of Certain Chapter 11 Provisions*, FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA (July 31, 2001), http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en&view=d.

[18] The United States Model Bilateral Investment Treaty 2004, Annex B, ¶ 4 (2004), http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf. The United States Model Bilateral Investment Treaty 2012, Annex B, ¶ 4, http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[19] ASEAN Comprehensive Investment Agreement (ACIA), Annex 2, Feb. 26, 2009.

[20] *Id.* ¶ 4.

(c) MFN and Dispute Settlement. — Parties in this region have begun to address the prevailing uncertainty over the applicability of MFN clauses to dispute settlement mechanisms. This problem first surfaced in a significant way in the dispute of *Maffezini v. Spain.*[21] Since that arbitral decision, a number of arbitral tribunals have reflected differences in thinking as to whether MFN should extend to dispute settlement "advantages" offered to a third state. This has spawned debate among policymakers, investors, lawyers and legal academics.

In response, some treaty-makers are taking the precautionary step of excluding this possibility. The following are examples of express exclusions of dispute settlement from MFN provisions in agreements made by Asian parties:

i. Art. 11.5(3), Singapore-Costa Rica FTA (signed April 2010, not yet in force at the time of writing);
ii. Article 10.5(2), Malaysia-New Zealand FTA (in effect from 1 August 2010);
iii. Article 5.4, ASEAN-China Investment Agreement (in effect from February 2010); and
iv. ACIA, Art. 6 read with footnote 4 (a).[22]

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[21] Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 38-64 (Jan. 25, 2000), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565_En&caseId=C163. This author had earlier discussed this type of application of MFN clauses, *see generally* Locknie Hsu, *MFN and Dispute Settlement – When the Twain Meet*, 7(1) J. WORLD INV. & TRADE 25 (2006). Since then, there have been numerous other arbitrations in which this genre of argument has been pursued, in some cases successfully, in some unsuccessfully. For a recent overview of MFN provisions and ISDS, *see generally* UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD/DIAE/IA/2010/1 (Jan. 24, 2011), *available at* http://www.unctad.org/en/docs/diaeia20101_en.pdf. In 2011, a tribunal issued an arbitration award permitting application of an MFN clause to "import" more favourable treatment from another treaty signed by the same host State, *see* White Industries Australia Ltd. v. Republic of India, UNCITRAL, Final Award, ¶¶ 11.1-11.2 (Nov. 30, 2011).

[22] The matter was referred to candidly in a statement by Mr. Lionel Yee, Director-General, International Law Division, Attorney-General's Chambers of Singapore, Statement at the International Law Commission's Report on Chapters X, XI and XII on the Work of its 62nd session, *see* Lionel Yee, *Sixth Committee*, PERMANENT MISSION OF THE REPUBLIC OF SINGAPORE (Nov. 1, 2010), http://www.mfa.gov.sg/content/mfa/overseasmission/newyork/nyemb_statements/sixth_committee/2010/201011/press_201011.html:

> One of the perennial issues we face in negotiating FTAs and BITs relates to the scope of the MFN obligation. In particular, we face considerable uncertainty regarding the interpretation of this clause, given the differing approaches towards these clauses by dispute settlement bodies, in particular investor-State arbitration tribunals, in the last 10 years. The most notorious case is undoubtedly the Maffezini decision. While we recognise that the case involved a loosely worded MFN clause, and that the weight of tribunal decisions in the last few years, led by *Salini* and *Plama* cases, appears to have rejected that decision, there remain a handful of cases which have followed the Maffezini decision. As such, an undesirable level of uncertainty still surrounds the ambit of this clause, especially in the area of trade in

4. ISDS in FTAs. — Unlike BITs which deal primarily with investment promotion and protection, FTAs cover a much wider range of areas and issues. These may include, for instance, liberalization commitments in relation to trade in goods, services and investments. Government action affecting these areas may amount to "measures" that come under scrutiny under the investment provisions, if the action can be argued to adversely affect an investor or his investment in a manner contrary to those provisions.

The term "measures" covered in investment chapters of some recent FTAs could include a wide variety of government actions. For example, the definition of "measures" covered in Article 1 of the ASEAN-Korea Investment Agreement states:

> (n) "Measures" means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or in any other form affecting investors and/or investments, and include measures taken by:
> (i) central, regional or local governments and authorities; and
> (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities . . . .

The ACIA contains in its definition provision a similar (though not identical) definition of "measures" covered under it.

This raises the prospect that "measures" taken in respect of goods and services which also have a significant adverse impact on investors/investments may come under investment chapter ISDS scrutiny.

Hence, host State measures affecting the trade in goods or services of foreign investors or their investments (subject to any exceptions, reservations or "carve-outs") relating to chapters of an FTA other than the investment chapter could also come under scrutiny of the investment chapter provisions. This is particularly important in the case of investments made by "commercial presence", in WTO terminology. For instance, a government measure taken in respect of goods/services (e.g. to take an extreme example, a ban imposed on certain goods or services) which severely affects a foreign investor's local subsidiary's ability to trade in its goods and/or services may thereby leads to ISDS action against the host

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services and investments. *To manage this uncertainty, countries have attempted to insert language in the investment related provisions of their FTAs to specify that procedural rights do not fall within the ambit of the MFN clause. However, it remains to be seen whether tribunals will interpret this provision in the intended manner*. (Emphasis added)

government by that investor (in the absence of any clear exception, reservation or carve-out of such measures in the treaty). Possible claims – as typified in ISDS arbitrations seen over the years – could be of violations of FET, or of expropriation.

Apart from the usual requirements of being an eligible investor with a covered investment (which have given rise to numerous ISDS jurisdictional challenges), some Asian treaties contain additional pre-conditions for investments to be protected. The ACIA for instance, refers to approval processes put in place in ASEAN member states to be met before an investment is considered "covered." [23] Investors must therefore take necessary steps where such processes exist, or face the prospect of a tribunal finding a lack of jurisdiction over its ineligible investment in a challenge.

5. Other Developments. — Provisions that were previously less common in BITs/FTA investment chapters are beginning to make more of an appearance. In particular, transparency provisions now exist in several recent agreements signed by Asian countries, varying in the nature and level of obligations undertaken.

Examples can be found in the Singapore-U.S. FTA, Singapore-India FTA (CECA), the Malaysia-NZ FTA and the ASEAN-China Agreement on Investment, and the ASEAN-Australia-New Zealand FTA. The ACIA also includes a transparency provision.

In addition, as governments try to take measures to safeguard the environment, there may be challenges by investors whose investments are affected. Environment-related measures have already been the subject matter of some NAFTA ISDS cases.

In 2010-2011, two ISDS separate challenges based on tobacco product packaging laws were brought against States, and these cases are ongoing.[24]

A recent treaty contains an interesting exceptions provision which, subject to certain requirements, permits measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan . . . ."[25]

A similar exception can be found in the ASEAN-Korea: Article 11(i)-(j).

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[23] ACIA, *supra* note 19, art. 4 & Ann. 1.

[24] Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (Date Registered Mar. 26, 2010); and Philip Morris Asia Ltd. v. Australia, UNCITRAL, *see Investor-State Arbitration - Tobacco Plain Packaging*, *supra* note 14.

[25] Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation Between the Association of Southeast Asian Nations and the People's Republic of China art. 12, Nov. 29, 2004.

Notable, the ACIA contains a list of "General Exceptions" that resemble those in Article XX of GATT 1994, including exceptions pertaining to measures for the protection of human health and exhaustible natural resources.

Finally, Annex 5 of the Singapore-India FTA (CECA) expressly provides (unusually for an FTA) for non-justiciability of security exceptions.

6. Other Issues in ISDS.

(a)Treaty Limitations on ISDS Claims. — Another response noted in some recent Asian treaties is the insertion of limitation provisions for ISDS claims. These seek to ensure prompt prosecution of claims. Examples of such limitation periods can be found in the Singapore-India FTA (CECA) Article 6.21(4) and in the USSFTA Article 15.

Treaty Parties also limit the types of disputes that may be brought under ISDS by "carve-outs." An example of this can be found in the USSFTA.[26]

Some recent FTAs even includes provision for preliminary objections to "frivolous" ISDS claims, such as the Singapore-Peru FTA (Article 10.17(4) footnote 10-10), and the Malaysia-NZ FTA (Article 10.24, which refers to a claim that is "manifestly without merit").

(b) Provisions for Interpretations by Treaty Parties. — In an attempt to provide treaty parties with greater control over interpretative matters, some recent FTAs have included provisions allowing a joint decision-making body to issue interpretations. Examples of such provisions are in the Malaysia-NZ FTA (Article 10.26) and the ASEAN-Australia-NZ FTA (Article 27) which provide for tribunal to request a joint decision from the Parties declaring their interpretation of any provision that is in issue in a dispute. The joint decision is binding on the tribunal and its award must be consistent with the joint decision.

C. Investment Activities of Asian Sovereign Wealth Funds

SWF investing activity – particularly of entities originating in certain Asian countries – has become more and more significant in this last decade. Two particular examples illustrate this trend; SWF entity investments of China and Singapore have been on the rise (along with those of other countries such as Dubai and Norway).[27]

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[26] USSFTA n. 8-2.

[27] *See* UNCTAD, *World Investment Report 2010*, *supra* note 1, at 13, for a discussion of the rise of such funds' activities; *see also* Locknie Hsu, *SWFs, Recent U.S. Legislative Changes, and Treaty Obligations*, 43(3) J. WORLD TRADE 451, 451 (2009); Locknie Hsu, *Multi-sourced Norms Affecting Sovereign Wealth Funds: A Comparative View of National Laws, Cross-Border Treaties and Non-binding "Codes"*, 10(6) J. WORLD INV. & TRADE 793, 793 (2009). Note, too, that "soft

1. National Security-related and "Necessity" Defence. — Developments.

(a) National Investment Laws. — Within the last decade, some national governments have reviewed and amended their investment admission rules with a view to addressing security issues specifically. Examples of recent legislative responses include amendments of the investment approval/screening laws of the U.S. (2007); Canada (2009) and Germany (2009). These developments have been discussed in greater detail elsewhere.[28] While the discussion will not be repeated here, it does not detract from the importance of these developments in the international investment landscape faced by investors – particularly state-owned/-related investors – today.

It is noteworthy that some recent treaties contain provisions for liberalization of screening requirement, such as the Hong Kong-New Zealand EPA.[29]

(b) Necessity Defence. — The ground of "necessity" has been raised in some recent ISDS cases. These include *Sempra v. Argentina* and *Enron v. Argentina*, in which both arbitral awards were recently annulled.[30] Again, these have been discussed by many writers elsewhere and will not be repeated here. Suffice it to say that in the especially volatile world economic times we face today, the scope and applicability of the "necessity" defence in a BIT – especially in the volatile economic times we face today – are important, evolving matters.

In the Asian context, the ground of necessity also surfaced in a pending lawsuit brought against Mongolia.[31]

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law" such as the Santiago Principles and the OECD's guidelines have evolved in recent years to deal with some of the concerns surrounding SWF investments.

[28] For more information, *see generally* Hsu, *SWFs, Recent US Legislative Changes, and Treaty Obligations*, *supra* note 27. For a recent overview of the link between national security and international investment agreements, *see generally* UNCTAD, *The Protection of National Security in IIAs*, UNCTAD/DIAE/IA/2008/5 (Aug. 1, 2009), *available at* http://www.unctad.org/en/docs/diaeia20085_en.pdf. *See also* FDI PERSPECTIVES ISSUES IN INTERNATIONAL INVESTMENT, Ch. 16-20 (Vale Columbia Center on Sustainable International Investment, Karl P. Sauvant et al. eds., 2011), *available at* http://www.vcc.columbia.edu/files/vale/content/PerspectivesEbook.pdf.

[29] *See* Letter from Tim Groser, Minister of Trade, N.Z., to Rita Lau, Sec'y for Com. & Econ. Dev. H.K. (Mar. 29, 2010), *available at* http://www.mfat.govt.nz/downloads/trade-agreement/hongkong/NZ-HK-CEP-OIA-Letter.pdf.

[30] It appears that Sempra has resubmitted its claim following annulment of the earlier award, *see Sempra Goes Back to the Drawing Board in Long Battle with Argentina*, IA REPORTER (Nov. 25, 2010), http://www.iareporter.com/articles/20101126_5.

[31] *See generally* Sergei Paushok, CJSC Golden East Company & CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Order on Interim Measures (Sept. 2, 2008), http://www.globalarbitrationreview.com/_files/Mongolia.pdf.

D. Some ISDS Cases Involving Asian Host States

Although Asian host States have not faced as many ISDS challenges at the International Center for Settlement of Investment Disputes (ICSID) as, say, Latin American States (such as Argentina and Ecuador), the number of investment disputes involving Asian states has increased. With increasing exposure through treaty commitments in both BITs and FTAs, such a trend is unsurprising. Notably, Asian States such as Turkmenistan appear to be facing a growing number of such challenges, while newly industrializing States such as China and Vietnam have already each had at least one such formal challenge initiated.

Among ASEAN members, more than half have been involved in ICSID, UNCITRAL or ICC ISDS so far. To the best of this author's knowledge, the members which have had such complaints raised against them are Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Thailand and Vietnam. This leaves Brunei Darussalam, Laos PDR and Singapore as the only members not having had to face such challenges, to date.

Within the ASEAN investment regime, there has so far been one decision from an ASEAN arbitration tribunal. In *Yaung Chi Oo Trading PTE Ltd., v. Myanmar*, an investor based in Singapore instituted arbitration proceedings under the 1987 ASEAN Agreement for the Promotion and Protection of Investments against Myanmar for alleged violations of that treaty.[32] Myanmar argued that the tribunal lacked jurisdiction to hear the dispute. Due to the tribunal's interpretation of the scope and requirements of the Agreement, it agreed and ruled that it lacked jurisdiction. Hence, while the ASEAN investor-State mechanism has been invoked, the case never proceeded beyond the jurisdictional challenge to a full hearing on the merits.

In a recent case of note involving an Asian host State, India faced a challenge by an Australian investor, and was found by the ICSID tribunal to have violated the Australia-India BIT. In *White Industries Australia Ltd. v. The Republic of India*,[33] one of the grounds of claim that is noteworthy is that based on use of the BIT's MFN provision (Art. 4(2). Applying this clause, the tribunal found that, as a more favourable clause existed in the India-Kuwait BIT (the latter providing expressly that India would provide "effective means" of asserting of investors' claims and enforcement of rights), this obligation could be read into the Australia-India BIT. This resulted in the long delay of a hearing of an appeal (relating to another

[32] *See generally* Yaung Chi Oo Trading Pte Ltd., v. Gov't of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1, Award (Mar. 31, 2003). A second argument was also raised in the case, based on provisions in the 1998 Framework Agreement.

[33] *See generally* White Industries Australia Ltd. v. Republic of India, UNCITRAL, Final Award (Nov. 30, 2011).

award) in the India judiciary being found to be a violation of that obligation. The tribunal was however of the view that the delay in that case did not amount to a "denial of justice", taking into account that India was a "developing country with a population of over 1.2 billion people and an overstretched judiciary."[34] (Nevertheless, the tribunal concluded that India was in violation of another treaty provision to provide investors with effective means of asserting their claims.) This is an instructive decision on the possible attitudes of tribunals towards the circumstances faced by developing countries whose infrastructure (such as the judicial system) may be under strain due to a shortage of resources.

In 2011, a new BIT-related arbitration was also initiated against Indonesia,[35] while a number of other Asian State arbitrations are pending.[36]

In *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, [37] the German investor failed in 2007 in its arbitration challenge against the Philippines under the Germany-Philippines BIT. This award in favor of the Philippines was however subsequently annulled in 2010 by an ICSID *ad hoc* Annulment Committee, and the investor has, in 2011, initiated a fresh arbitration against the Philippines. This second arbitration is now pending.[38]

A BIT-related arbitration brought against Thailand, which had earlier resulted in an award in 2009 against Thailand, remains a matter of appeal in the US judicial system. In *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau AG (In Liquidation) v. The*

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[34] *Id.* ¶ 10.4.18.

[35] Rafat Ali Rizvi v. Republic of Indonesia, ICSID Case No. ARB/11/13 (Date Registered May 19, 2011).

[36] *See, e.g.*, Sergei Paushok v. Mongolia (UNCITRAL); Khan Resources Inc., et al. v. Mongolia, (UNCITRAL); China Heilongjiang International & Technical Cooperative Corp. v. Mongolia (UNCITRAL); MacKenzie v. Vietnam and Dialasie SAS v. Vietnam. For instance the case lists, *see New Awards & Decisions*, INVESTMENT TREATY ARBITRATION, http://www.italaw.com/alphabetical_list_respondant.htm (last updated Oct. 9, 2012); *see also* IA REPORTER, http://www.iareporter.com (last visited Oct. 29, 2012), about MacKenzie v. Vietnam, *see generally Parties in NAFTA pharmaceuticals arbitration trade arguments on jurisdiction, as tribunal rejects amicus participation*, IA REPORTER (Dec. 1, 2011), http://www.iareporter.com/articles/20111201_4; about Dialasie SAS v. Vietnam, *see generally NAFTA News: Pulp company says it has put Canada on notice of claim, as redacted award from earlier case is released*, IA REPORTER (Jan. 31, 2012), http://www.iareporter.com/categories/20090724_7. IA REPORTER is a subscription web resource.

[37] *See generally* Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007).

[38] Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12 (Date Registered Apr.27, 2011). The Philippines subsidiary of Fraport AG, Philippines International Air Terminals Co., Inc. (PIATCO), had also brought ICC arbitration proceedings against the Philippines. The tribunal in that case had made an award in favor of the investor; upon an application to set aside the award brought before the Singapore High Court by the Republic of Philippines, the court dismissed the application, *see generally* Gov't of the Republic of the Philippines v. Philippine International Air Terminals Co., Inc. [2007] 1 SLR(R) 278 (Nov. 17, 2006).

Kingdom of Thailand, the U.S. Court of Appeals, Second Circuit, recently affirmed an earlier decision of the U.S. District Court for the Southern District of New York to confirm the award, dismissing Thailand's appeal.[39]

III. CONCLUSION

The general debate over whether ISDS arbitration is the most appropriate avenue of dispute settlement over claims that have a public dimension (in the form of challenging government measures and policy) is continuing in the meantime.

As treaty-makers review arbitral decisions and their implications in an attempt at clarification and dispute avoidance, it remains to be seen how any changes made will play out with investors and in ISDS. Recent treaty activity has shown evidence of departures of purely "formulaic" repetitions of provisions from past treaties or "template" language.[40] Some countries are reviewing their model BITs, while others are taking more drastic steps, such as renunciation of ICSID participation.[41]

It will be interesting to see whether these changes result in greater clarity – and perhaps a reduced need to resort to ISDS arbitration – or raise difficult new issues of their own.

Already, there are calls for use of alternatives to ISDS arbitration, such through greater use of negotiation and mediation and for greater information-sharing and communications between government and investors, to prevent ISDS arbitration from arising or escalating.[42] Some treaties contain provisions for investors and States to resort to "amicable settlement" of their disputes, while others include waiting periods of several months before international arbitration may be resorted to. Others include provisions on the so-called "fork in the road", where a party which selects a particular forum for ISDS (such as suing in a national court) would be precluded from subsequently resorting to another forum (such as in international arbitration) provided for in the treaty.

It will also be interesting to observe whether – and how – investors in Asia will use the provisions should disputes arise in future. The outcome of ongoing negotiations for a Trans-Pacific Partnership Agreement (TPP) among nine trading partners (roughly half of whom are Asian) will be an important milestone ahead. The predecessor of the TPP – the Trans-Pacific Strategic Economic Partnership Agreement [hereinafter Trans-Pacific SEP]

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[39] *See generally* Schneider AG v. Kingdom of Thailand, 688 F.3d 68 (2d Cir. 2012).

[40] UNCTAD, *World Investment Report 2010*, *supra* note 1, at 83-90.

[41] The U.S., for instance, is reviewing her 2004 Model BIT. Bolivia and Ecuador have recently renounced the ICSID.

[42] *See, e.g.*, UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD/DIAE/IA/2009/11 (Aug. 1, 2010), *available at* http://www.unctad.org/en/docs/diaeia20 0911_en.pdf.

taking effect in 2008 – currently includes neither an investment chapter nor an investor-State dispute settlement system, but the TPP, by contrast, is expected to include investment obligations.[43] An "open letter" was published in May 2012 calling for the exclusion of ISDS from the TPP.[44] For the four Asian countries in the TPP negotiations (Brunei Darussalam, Malaysia, Singapore and Vietnam), it remains to be seen whether, and if included, the content of, an ISDS mechanism in the TPP.

[43] Interestingly, in 2011, the Gillard Government of Australia announced that it would no longer include ISDS in future trade agreements, *see generally* Dept. Foreign Aff. & Trade, Australia, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (Apr. 2011), *available at* http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html. *See generally* Luke Nottage, *The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement"*, No. 11/32 SYDNEY L. SCH. LEGAL STUD. RESEARCH PAPER (2011).

[44] *See An Open Letter from Lawyers to the Negotiators of the Trans-Pacific Partnership Urging the Rejection of Investor-State Dispute Settlement*, TPP LEGAL, http://tpplegal.wordpress.com/open-letter (last updated May 8, 2012).

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