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# Foreign Investment and Dispute Resolution Law and Practice in Asia

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## Contents

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*Detailed table of contents*

*List of tables and figures*

*List of contributors*

*List of abbreviations*

*Acknowledgements*

Preface

*Akira Kawamura*

1 Foreign Investment and Dispute Resolution Law and Practice in Asia: An Overview

*Vivienne Bath and Luke Nottage*

2 Investment Arbitration in Asia: Five Perspectives on Law and Practice

*Luke Nottage and J. Romesh Weeramantry*

3 A Passive Player in International Investment Law: Typically Japanese?

*Shotaro Hamamoto*

4 The Quandary for Chinese Regulators: Controlling the Flow of Investment into and out of China

*Vivienne Bath*

5 China's Investment Treaties: A Procedural Perspective

*Nils Eliasson*

6 Foreign Investment in Indonesia: The Problem of Legal Uncertainty

*Simon Butt*

7 The Japan-Indonesia Economic Partnership Agreement: An Energy Security Perspective

*Sita Sitaresmi*

8 Foreign Investment Laws and the Role of FDI in Malaysia's 'New' Economic Model

*Salim Farrar*

9 Treaty Definitions of 'Investment' and the Role of Economic Development: A Critical Analysis of the *Malaysian Historical Salvors* Cases

*Govert Coppens*

10 The 'Object and Purpose' of Indian Investment Agreements: Failing to Balance Investment Protection and Regulatory Power

*Prabhash Ranjan*

11 The Evolution of Korea's Investment Treaties and Investor-State Dispute Settlement Provisions

*Joongi Kim*

- 12 Legal Issues in Vietnam's FDI Law: Protections under Domestic Law, Bilateral Investment Treaties and Sovereign Guarantees

*Hop Dang*

- 13 Review of Asian Views on Foreign Investment Law

*Muthucumaraswamy Sornarajah*

## Detailed table of contents

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### Preface

#### **Chapter 1: *Foreign Investment and Dispute Resolution Law in Practice in Asia: An Overview***

- I Introduction
- II Economic Development, Investment and Regulatory Regimes in Asia
  - A Historic Overview of Economic Development and Foreign Investment in Asia
  - B Recent Trends in Asia
- III Dispute Resolution in Asia
- IV Plan for the Rest of this Book
- V Conclusion

#### **Chapter 2: *Investment Arbitration in Asia: Five Perspectives on Law and Practice***

- I Introduction
- II Understanding Present and Future Investor-State Arbitration Claim Trends
- III Five Perspectives on ‘Gaps’ or ‘Lags’
- IV Tentative Normative Conclusions
- App A Respondent states (by region) in concluded and pending ICSID arbitrations
- App B Respondent states (by region) in concluded and pending ICSID arbitrations – differentiating Argentina and Mexico

#### **Chapter 3: *A Passive Player in International Investment Law: Typically Japanese?***

- I Introduction
- II Few Investment Treaties
  - A Japan as a Late Starter: Economic and Political Explanations
  - B Flying Too High? Pre-Establishment Protections and EPAs
- III Treaty Flexibility in Substance
  - A Adapting to the Evolution of Arbitral Jurisprudence: Pro-Host and Pro-Investor Shifts
  - B Incoherent Policy or Considerate Attitude? Examples and Causes
- IV Hesitance in Litigation
  - A No Treaty Arbitration
  - B Possible Explanations
- V Conclusion
- App A Japan's BITs and EPAs

- App B Japan's Inward FDI (stock)
- App C Japan's Outward FDI (stock)

**Chapter 4: *The Quandary for Chinese Regulators: Controlling the Flow of Investment into and out of China***

- I Introduction
- II Investment Policy
- III Domestic Policy relating to Inbound Investment
- IV Regulation of Outbound Investment
- V China's Approach to Investment through BITs and FTAs
- VI Challenges for Investors
- VII Conclusion

**Chapter 5: *China's Investment Treaties: A Procedural Perspective***

- I Introduction
- II Foreign Investments in China and Chinese Outbound Investments
- III The Different Generations of Chinese BITs
- IV The Decision on Jurisdiction in *Tza Yap Shum*
  - A Background
  - B Mr Shum's Claim
  - C The Decision on Jurisdiction
- V The Scope of the Investor's Right to Arbitration under Narrowly-worded Arbitration in 'First Generation' Chinese BITs
- VI *Most Favoured Nation-Clauses* and the Importing of More Favourable Procedural Provisions in Other BITs
- VII Indirect Investments, Investment Planning and Treaty Shopping
  - A Do Chinese BITs Protect Indirect Investments made through Companies Incorporated in Third States?
  - B Establish Protection by 'Investment Planning' or 'Treaty Shopping'
- VII Territorial Application of Chinese BITs
- IX Conclusion

**Chapter 6: *Foreign Investment in Indonesia: The Problem of Legal Uncertainty***

- I Introduction
- II Post-Suharto Law Reform
  - A The Investment Law

- III Legal Uncertainty: What is 'The Law'?
- A The Mass of Law
- B Broadly Cast Legislation
- C Accessing laws
- IV Factors Compounding Uncertainty
- A Regional Autonomy
- B Uncertainty and the Courts
- C Unpredictable Decisions
- D Judicial Review
- V Conclusion
- App A Indonesia's BITs

**Chapter 7: *The Japan-Indonesia Economic Partnership Agreement: An Energy Security Perspective***

- I Introduction
- II Indonesia: BIT Practice and Domestic Law Reform
- A Reasons for the JIEPA Negotiation
- III Structure of the Agreement
- A Services Chapter
- B Investment Chapter
- C Energy and Mineral Resources Chapter
- IV Implications of Dual Coverage of Services Investment
- A Standards of Treatment and Dispute Settlement Procedure
- B Definition of Investment
- C Liberalization Commitments
- V Liberalization Commitments and Regulatory Autonomy
- VI Potential Causes of Investment Disputes
- VII Conclusion

**Chapter 8: *Foreign Investment Laws and the Role of FDI in Malaysia's 'New' Economic Model***

- I Introduction
- II The Historical Role of FDI in Malaysia's Pre-NEM Socio-Economic Development
- III Malaysian Investment Laws
- A Domestic Policy Relating to FDI
- B Malaysia's Approach to Investment through BITs and FTAs
- IV Conclusion

**Chapter 9: *Treaty Definitions of ‘Investment’ and the Role of Economic Development: A Critical Analysis of the Malaysian Historical Salvors Cases***

- I Introduction
- II The MHS Award
- III The MHS Annulment Decision
  - A The Majority Decision
  - B The Dissenting Opinion by Judge Mohamed Shahabuddeen
- IV A Better Balancing Act?
  - A Development and Investment
  - B A Different Focus on ‘Investment’?

**Chapter 10: *The ‘Object and Purpose’ of Indian International Investment Agreements: Failing to Balance Investment Protection and Regulatory Power***

- I Introduction
- II India’s IIA Programme
- III Title of the IIAs
- IV Preamble
- V Treaty Provisions
  - A Definition of Investment
  - B Promotion and Protection of Investment
  - C Fair and Equitable Treatment
  - D Most Favoured Nation and National Treatment
  - E Expropriation
  - F Monetary Transfer Provisions
  - G Treaty Exceptions
  - H Investor-State Dispute Resolution
- VI Conclusion

**Chapter 11: *The Evolution of Korea’s Modern Investment Treaties and Investor-State Dispute Settlement Provisions***

- I Introduction
- II Korea’s Investment Treaties
- III FDI Inflow and Outflow
- IV Investor-State Dispute (ISDS) Provisions Korea’s IIAs
- V Institutional vs Ad Hoc Arbitration

- VI Korea's Most Comprehensive and Specialized IIA: KORUS FTA
- VII Conclusion

**Chapter 12: *Legal Issues in Vietnam's FDI Law: Protections under Domestic Law, Bilateral Investment***

***Treaties and Sovereign Guarantees***

- I Introduction
- II Nationalization
- III Changes in Law
- IV Foreign Exchange Controls
- V Dispute Resolution
- VI Choice of Law
- VII Mortgages of Land Use Rights
- VIII Conclusion

**Chapter 13: *Review of Asian Views on Foreign Investment Law***

- I Introduction
- II The Paucity of Asian Investment Disputes Involving Treaty Violations
  - A The Requirement that the Investment is an Approved Investment
  - B The Requirement of Conformity with Laws on Entry and Operation
  - C The Existence of Exceptions
- III Negative Experiences with Investment Arbitration
- IV The Global Economic Crisis and the End of Neo-Liberalism
- V Looking to the Future

## List of tables and figures

---

### Tables

- 2.A Respondent states (by region) in concluded and pending ICSID arbitrations
- 2.B Respondent states (by region) in concluded and pending ICSID arbitrations – differentiating Argentina and Mexico
- 2.C Investment inflows (US\$ million, by region)
- 2.D Selected list of claimants possessing Asian nationality in ISA arbitrations (alphabetical)
- 2.E Asian Respondents in ICSID arbitrations (by year of filing)
- 2.F Numbers of arbitrators (by nationality) appointed in concluded ICSID arbitrations
- 7.1 Indonesia's list of reservations for existing non-conforming measures in energy sectors
- 8.1 Global rankings for ease of doing business
- 12.1 Differences between Vietnam's 2003 Arbitration Ordinance and 2010 Law on Arbitration

### Figures

- 1.1 Total trade in merchandise services, Eastern, Southern and South-Eastern Asia: Exports (US\$millions)
- 2.1 Respondent states (by region) in concluded and pending ICSID arbitrations
- 2.2 ICSID claims filed against State respondents from Asia versus rest of the world
- 2.3 Investment inflows (US\$ millions, by region)
- 2.4 ICSID settlement rate of state respondents by region
- 2.5 Numbers of arbitrators (by nationality) appointed in concluded ICSID arbitrations
- 3.1 Japan's balance on goods and balance on income (in 100 million yen)
- 6.1 FDI inflows in Indonesia

## List of contributors

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## List of Abbreviations

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AANZFTA	Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area
ADR	Alternative Dispute Resolution
AFC	Asian Financial Crisis
ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of South East Asian Nations
ATS	Australian Treaty Series
BIT	Bilateral Investment Treaty
BSMB	Bursa Securities Malaysia Berhad
CECA	Comprehensive Economic Cooperation Agreement
CEDR	Centre for Effective Dispute Resolution
CIETAC	China International Economic and Trade Arbitration Commission
CIL	Customary International Law
EMR	Energy and Mineral Resources
EPA	Economic Partnership Agreement
EPU	Economic Planning Unit
EPZ	Export Processing Zone
FCZ	Free Commercial Zone
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIA	Foreign Investment Agency of Vietnam
FIC	Foreign Investment Committee
FIZ	Free Industrial Zone
FTA	Free Trade Agreement
FZA	Free Zones Act
G-20	Group of Twenty
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade

GFC	Global Financial Crisis
GGU	Government Guarantees and Undertakings Agreement (Vietnam)
GLC	Government-Linked Companies
GOC	Government-owned Corporation
GSP	General System of Preference
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICA	Industrial Coordination Act (Malaysia)
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution (of the American Arbitration Association)
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILM	International Legal Materials
IMF	International Monetary Fund
ISA	Investor-State Arbitration
ISDS	Investor-State Dispute Settlement
JIEPA	Japan-Indonesia Economic Partnership Agreement
KORUS	Korea-US FTA
LDC	Least Developed Country
LNG	Liquefied Natural Gas
M&A	Mergers and Acquisitions
MAI	Multilateral Agreement on Investment
MDTCA	Ministry of Domestic Trade and Consumer Affairs
METI	Ministry of Economy, Industry and Trade
MIDA	Malaysian Industrial Development Authority
MFN	Most Favoured Nation
MHS	Malaysian Historical Salvors Sdn Bhd
MITI	Ministry of International Trade and Industry
MNC	Multinational Corporation
MOFA	Ministry of Foreign Affairs
MOFCOM	Ministry of Commerce (PRC)

MOJ	Ministry of Justice (Vietnam)
MTP	Monetary Transfer Provision
NAFTA	North American Free Trade Agreement
NDRC	National Development and Reform Commission (PRC)
NEAC	New Economic Advisory Council
NEM	New Economic Model
NEP	New Economic Policy
NIC	Newly Industrialized Country
NGO	Non-Governmental Organization
NT	National Treatment
NYC	New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958
OECD	Organisation for Economic Co-operation and Development
OID	Organisation of the Islamic Conference
PCA	Permanent Court of Arbitration
PIA	Promotion of Investments Act
PTA	Preferential Trading Agreement
PTS	Preferential Trading System
PRC	People's Republic of China
SAFE	State Administration for Foreign Exchange (PRC)
SASAC	State-owned Assets Supervision and Administration (PRC)
SIEC	Sakhalin Energy Investment Company
SME	Small and Medium Enterprises
TPP	Transnational Public Policy
TPPA	Trans-Pacific Strategic Economic Partnership Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNITAR	United Nations Institute for Training and Research
UNTS	United Nations Treaty Series
US or USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## Acknowledgments and Note on Style

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This book is partly derived from an international symposium on ‘Investment Treaty Law and Arbitration: Evolution and Revolution in Substance and Procedure’ held at the University of Sydney Law School over 19-20 February 2010, for which Nottage was a co-organizer. From the 65 presentations, we solicited seven of the thirteen chapters in this book (from Hamamoto, Bath, Eliasson, Sitaesmi, Butt, Farrar and Coppens), and also prevailed on one of the Distinguished Speakers at the conference (Sornarajah) to provide a new concluding chapter reviewing foreign investment law developments across the Asian region. The editors are grateful for the financial support offered by Sydney Law School (including its Sydney Centre for International Law, the Centre for Asian and Pacific Law, the Parsons Centre for Commercial, Corporate and Taxation Law) and the University of Sydney’s Institute of Social Sciences (‘new capacity project’ grant). We also acknowledge sponsorship for the conference from Allens Arthur Robinson as well as our media partners, the International Arbitration Reporter and the Transnational Dispute Management Journal. We also thank the co-organizers of the conference, our colleagues Chester Brown and Kate Miles, for their subsequent collaboration as they too brought together another book from this major antipodean event (*Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, 2011).

We are very grateful to our other contributors, who stepped up promptly to fill out our geographical coverage of both international and domestic law regimes affecting foreign investment in Asia (Weeramantry, Ranjan, Kim and Dang), as well as the President of the International Bar Association (Kawamura) for adding a Preface to this book. Last, but certainly not least, we acknowledge the research and editorial assistance of Wan Sang Lung and Andrew Cong, supported by a grant from the Law School’s Legal Scholarship Support Fund.

We should also mention some editorial decisions regarding style. First, due to the large numbers of investment treaties mentioned throughout this book, we do not provide their full titles or treaty series references. Instead, we refer to each of them by their country or region names and (the first time it is cited) the year in which the agreement was signed, such as the Japan-Korea BIT (2002) or the China-New Zealand FTA (2009). For consistency, we also generally refer to an ‘FTA’ (Free Trade Agreement) even if the

particular treaty uses different nomenclature (such as ‘Economic Partnership Agreement’); and to a ‘BIT’ (Bilateral Investment Treaty) even if the treaty is entitled an ‘Investment Promotion Agreement’ or has a similar title. Although collectively there now exist thousands of such investment treaties world-wide, many can now be accessed in English text through the UNCTAD website (<[http://www.unctadxi.org/templates/Startpage\\_\\_\\_718.aspx](http://www.unctadxi.org/templates/Startpage___718.aspx)>) or via the websites of individual countries or organizations (such as: <[http://www.meti.go.jp/english/policy/external\\_economy/trade/FTA\\_EPA/index.html](http://www.meti.go.jp/english/policy/external_economy/trade/FTA_EPA/index.html)> or <<http://www.aseansec.org/4920.htm>>). Hundreds of international investment arbitration rulings can also be freely accessed via the International Centre for the Settlement of Investment Disputes (<<http://icsid.worldbank.org/>>), or the ‘Investment Treaty Arbitration’ database (<<http://ita.law.uvic.ca/>>) and the UNCTAD website (<<http://www.unctad.org/>>), both of which also include rulings and other information related to arbitrations resolved outside ICSID procedures.

Secondly, authors have chosen their own conventions regarding transpositions of foreign words into the English alphabet, and any translations are their own (unless otherwise noted).

Vivienne Bath and Luke Nottage

March 2011

## Preface

Akira Kawamura

President, International Bar Association

It is a distinct honour to provide a preface for this valuable book on ‘Foreign Investment and Dispute Resolution Law and Practice in Asia’. It also happens to commemorate the final stage of my long career as a lawyer practising international business law, and as a humble student of this area of law and practice.

When I first saw the title of this book, edited and partly authored by legal academics at the University of Sydney, I was instantly reminded of the thesis I had submitted to Sydney Law School for my LL.M degree nearly 35 years ago. My topic was ‘A Comparative Study of Laws on Foreign Investment in Australia and Japan’. My thesis supervisor was Professor Ross Parsons, whose academic achievements are now honoured by the Ross Parsons Centre of Commercial, Corporate and Taxation Law established within Sydney Law School. I remember the days I spent with my family, my wife Masako and our two daughters, on the beautiful beachfronts around Sydney Harbour during the two years I studied at Sydney Law School. Now I look back and realize that it was the happiest time in my life. Hence, I am writing these short words with very personal and happy sentiments.

It seems to me that foreign investment law had become less of a critical concern for the international legal practice, and that the subject had been attracting less interest from academia, compared to when I was writing my thesis on this topic in 1970s. At that time, the foremost policy priority for foreign investment law in Australia was the protection of Australian companies and natural resources, through ownership and other restrictions, from takeovers by foreign interests. Likewise, in Japan, foreign investment policy was concentrated almost exclusively on the protection of domestic industries.

The world has changed and this timely book on ‘Foreign Investment and Dispute Resolution Law and Practice in Asia’ ambitiously surveys contemporary issues in foreign investment and dispute resolution law throughout the Asian region. The study reveals that the current policy priority in most of the countries in Asia is the promotion of foreign investment in the region, rather than the old-fashioned policy of protecting domestic companies.

The 21<sup>st</sup> century appears to be an era in which globalization can have a broad impact on people’s lives. Although we are not yet able to see clearly an ideal image of the global society that many aspire to, which still lies for us beyond the horizon, we have

many alternative legal and political means to reach towards the ultimate goal of a free society worldwide, where the well-being of citizens and sustainable economic growth can be realized.

This book deals with the international legal frameworks for promoting foreign investments including those established by the World Trade Organization, bilateral investment treaties and free trade agreements, as well as the domestic regulatory frameworks of major capital exporting or capital importing nations in Asia. The impact of the Trans-Pacific Strategic Economic Partnership Agreement (TPPA) on those domestic regulatory frameworks may prove to be more important than the existing regulatory frameworks themselves for those nations, like Japan, which are now considering joining the TPPA. This book is therefore a very important instrument for lawyers in both the public and private sectors to stay up to date about developments in foreign investment and dispute resolution law and practice in Asia.

The International Bar Association (IBA), which I presently head as its President, is the world's largest organization for the legal profession. It is composed of the bar associations and law societies of 137 countries. It is literally the global bar for the global legal profession. Since the collapse of Lehman Brothers and other major financial institutions, it has become apparent that the Global Financial Crisis (GFC) could not have been addressed as effectively and as quickly as required without the critical thinking and hard work of a highly organized global network of legal, accounting, financial and other professionals. The legal profession responded very effectively to this challenge and proved itself worthy of being called a global profession. After the GFC, it has often been said that economic power has shifted from the West to the East. The Asia-Pacific region is now the center stage for world economic growth, and naturally the laws of foreign investment and dispute resolution in the region should be critically important topics for the global legal profession.

I wholeheartedly welcome, on behalf of the global legal profession, the painstaking international and comparative study of the laws and practices in these fields, epitomized by this book.