

Investment arbitration in the East Asia and Pacific region: a statistical analysis

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An increase in investment arbitrations in the East Asia and Pacific region follows a global trend in investment protection, according to **Claudia Salomon**, global co-chair of international arbitration at Latham & Watkins in New York, and her associate Sandra Friedrich.

Reflecting trade and investment patterns, countries in the region have concluded at least 658 bilateral investment treaties (BITs) and 54 free trade agreements (FTAs) with investment provisions, mostly since the 1990s. In addition, the region has seen a rising number of investment arbitrations following the BIT and FTA growth. Notably, 13.5 per cent of the region's BITs are intraregional (that is, concluded between two East Asian and Pacific countries), as are nearly 20 per cent of the region's investment disputes.

The East Asia and Pacific region comprises 35 countries, ranging from the world's most populous country and second-largest economy – China – to some of the world's most remote Pacific islands.



BITs in the East Asia and Pacific region

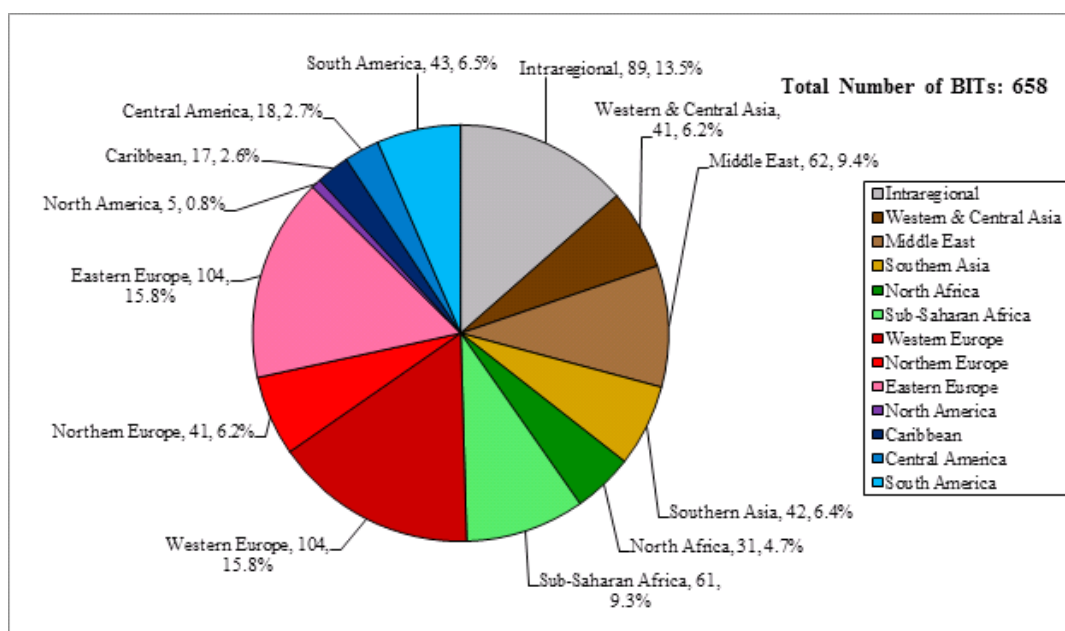
East Asian and Pacific countries have concluded at least 658 BITs, of which 517 are in effect. BITs involving at least one party from the region account for nearly a quarter of the world's BITs, estimated at 2,857 (see UNCTAD, World Investment Report 2013). BITs in the region began in the early 1960s and grew in popularity. The majority were concluded in the 1990s (351 BITs, or more than 53 per cent); and the rate at which new BITs have been signed since 2000 has slowed considerably.

China has concluded by far the most BITs in the region (129), followed by South Korea (90). Not surprisingly, other countries with large BIT portfolios include emerging markets such as Malaysia (67), Indonesia (63), Vietnam (60), Mongolia (43), and Thailand (39), which mostly acquired them since the early 1990s. North Korea has a little-known portfolio of 24 BITs, mostly with other countries in the region and in eastern Europe, of which 13 have come into effect.

Conversely, 11 Pacific island countries – none of which makes the news on a regular basis – have not concluded any BITs (the Cook Islands, Fiji, Kiribati, the Marshall Islands, Micronesia, Nauru, Niue, Palau, Samoa, the Solomon Islands and Tuvalu). While these countries have concluded several FTAs, none of them contains investment provisions.

Not surprisingly, a large number of the region's BITs have been concluded with European countries. Indeed, the very first BITs in the region were concluded with Germany in the early 1960s (the Germany-Malaysia BIT in 1960 and the Germany-South Korea BIT in 1964). A significant number of BITs has also been concluded with other Asian countries and with African countries.

BITs signed by East Asian and Pacific countries, by other contracting party



While East Asian and Pacific countries concluded the first BITs intraregionally and with other Asian countries as well as with eastern Europe and sub-Saharan Africa

as early as the 1980s, it was not until the 1990s that they concluded BITs with Central and South American and Caribbean countries.

Several reasons may account for the declining rate at which new BITs are signed in the region, consistent with the global drop in new BITs. To some extent, this development can be attributed to a saturation of the market, where most frequent trading and investment partner countries have already concluded the BITs necessary to achieve the desired level of investment promotion and protection. Some East Asian and Pacific countries also may show some reluctance to conclude new BITs after investors brought investment arbitration claims against them, seeking substantial compensation and relying on the substantive protections and procedural guarantees provided in a BIT.

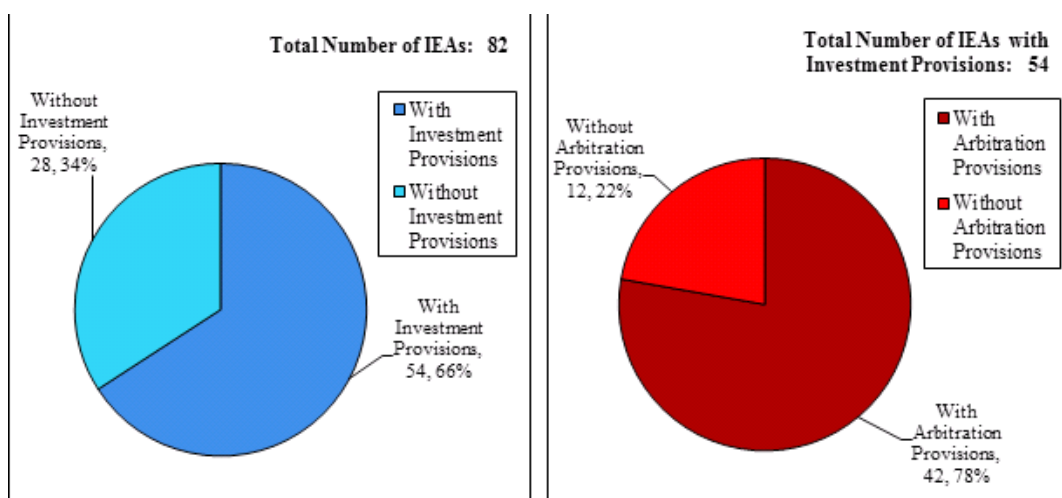
Notably, the Philippines seems to have stopped concluding any BITs following the filing of an ICSID claim by Swiss investor SGS Société Générale de Surveillance in 2002. The country concluded three BITs in the 1980s, 26 in the 1990s, and six between 2000 and 2002, when it signed its last BIT, with Portugal. While the Philippines has entered and negotiated a number of FTAs over the past few years, these agreements do not readily provide for investor-state arbitration.

International economic agreements in the region

East Asian and Pacific countries have also concluded at least 82 international economic agreements (IEAs). Some 90 per cent of these agreements have been signed since the 2000s, just as the conclusion of new BITs slowed down. Only three countries in the region have not concluded any IEAs: East Timor, Mongolia and North Korea, although Mongolia is currently negotiating several FTAs.

Two-thirds of IEAs in the region contain provisions on the promotion and protection of investments. Of those, nearly 80 per cent also provide for investment arbitration in case of a dispute.

IEAs signed by East Asian and Pacific countries with investment provisions



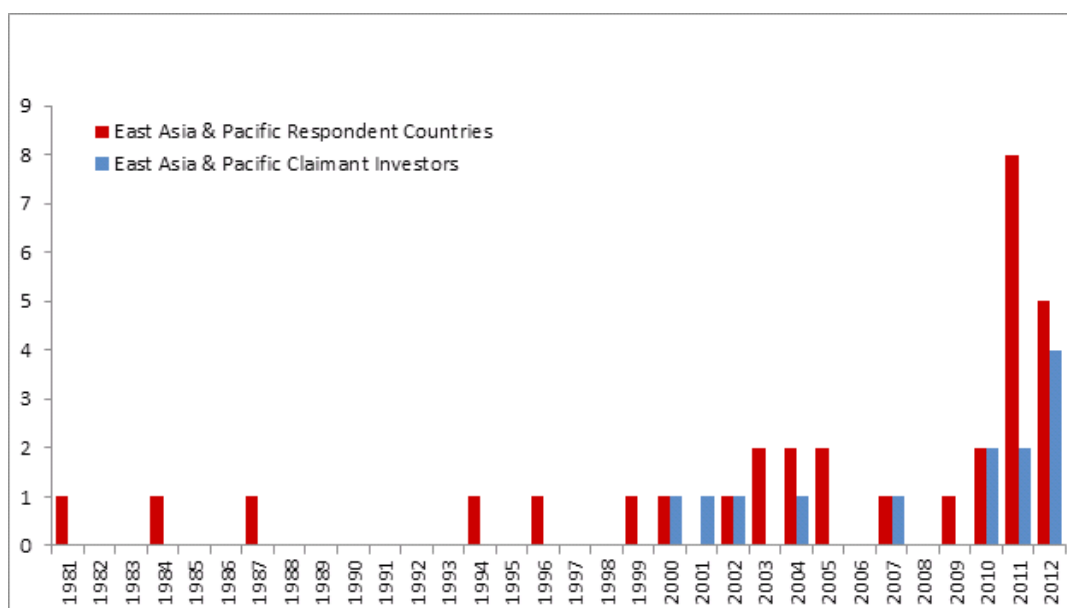
This trend to provide for the promotion and protection of trade and investment under

one umbrella agreement undoubtedly also contributes to the lower number of new BITs signed in the region since the early 2000s.

Investment claims in the region

At least 37 investment arbitrations have been brought against East Asian and Pacific countries or brought by East Asian and Pacific investors.

Investment arbitrations involving East Asian and Pacific countries or investors



Investment arbitrations involving East Asian and Pacific countries or investors

The first investment arbitrations against countries in the region were brought in the 1980s. Overall, at least 31 investment claims have been brought against countries in the region, most frequently against Indonesia, Mongolia and the Philippines. Not surprisingly, claimant investors in those disputes are mostly from Western Europe, but investors from the region now account for a quarter of the disputes brought. As yet, no claims have been brought by investors from Africa, Central and South America or the Caribbean; and only one Asian investor outside of the East Asia and Pacific region (from Saudi Arabia) has brought a claim.

Conversely, East Asian and Pacific investors did not bring any investment arbitration claims until the early 2000s. Overall, at least 13 investment arbitrations have been brought by investors from the region, with Chinese, Australian and Malaysian investors using this dispute resolution mechanism most frequently, reflecting the fact that China has evolved from being mostly the recipient of foreign investment to a capital-exporting country. While the majority of investment arbitration claims by investors from the region were brought intraregionally, an increasing number of claims against African, South American and other Asian countries reflects increased investment activity in those regions.

Overall, seven investment arbitrations are intraregional disputes between East Asian and Pacific parties. Of those, only two were brought under the 1987 ASEAN Agreement. This substantial number of East Asian and Pacific investors instituting investment arbitration against other countries in the region indicates an increased willingness to resolve investment disputes by arbitration.

Countries which were predominantly recipients of foreign investment are shifting toward becoming capital-exporting countries, driving a concurrent rise in the number of BITs concluded with African and Central and South American countries. The rising number of investment arbitration claims by East Asian and Pacific investors also mirrors this economic development.