

Legal Claims on the Rise...

When telecom giants Telenor of Norway and Sistema of Russia invested significant capital in India's 2G spectrum, they were probably not expecting the subsequent cancellation of their allocation by the Government of India (GOI). The cancellation came on account of corruption allegations relating to their Indian joint venture partners, as well as irregularities in spectrum allocation decisions taken by the relevant ministries. The decision by the GOI jeopardises all of Telenor's and Sistema's investments in their respective Indian joint ventures, and both entities have either filed or threatened to file arbitration against the GOI.

In another recent example, Astro Group, a Malaysian conglomerate with substantial media interests, formed a joint venture with Lippo Group, an Indonesian conglomerate, to build a satellite TV business in Indonesia. The joint venture ceased operations in October 2008 due to commercial disagreements. Subsequently, Astro Group alleged non-payment of over US\$240 million from Lippo Group and submitted the matter to arbitration at the Singapore International Arbitration Center (SIAC).

These examples illustrate the growing trend in Asia Pacific for companies to pursue legal claims through arbitration, rather than through national courts. The factors contributing to the growth in arbitration in Asia Pacific include:

- Rising cross-border investments
- A desire to avoid delays and uncertainties in local courts, particularly among foreign investors
- A desire to avoid the prevailing law in the jurisdictions to which the investment is directed
- The opportunity to tailor proceedings and governing law to suit the parties

Companies from North America, Western Europe and Japan, facing slower growth in their domestic markets, are increasingly looking for outbound investments in Asia Pacific. Equally, companies from within the Asia Pacific region are venturing beyond their home markets to look for new opportunities. With transnational investments on the rise, a significant escalation in arbitration and therefore increased demand for specialised legal and financial expertise seems likely. This paper will highlight a few key circumstantial and economic indicators in certain Asia Pacific countries that we believe may serve as forward indicators for the future trend in disputes.

Arbitration has long been considered an efficient and flexible way to settle disputes. This is especially true of high-value, cross-border commercial and investment-treaty disputes that have a time-sensitive nature. In such proceedings, there is often a preference for confidentiality. There may also be a desire to circumvent the potential problems of parties belonging to different jurisdictions or the governing law of the host country. The arbitration process does not compromise on enforcement; awards are binding and may be easier to enforce internationally than court judgments.

The recent growth in arbitration filings may be partly attributable to the 2008 financial crisis, which has tested both prevailing economic and financial principles and commercial relationships. We note that more than 73 percent of the cases filed at the SIAC in 2011 related to contracts signed between

2008 and 2011, and 13 percent of the cases had contract dates of 2012.¹

The financial crisis itself, however, may useful guide either to the recent past or to the future of the arbitration landscape in the Asia Pacific region.

We expect another wave of arbitrations to flow in over the next few years, driven by cross-border expansion and growth activities actioned in the region from 2005 onwards. The figures below show FDI and M&A statistics for selected developing economies in Asia between 2005 and 2011.

The World Bank FDI values (inbound and outbound) indicate the levels of investments in enterprises (via equity, loans and retained profits) made across each border in each year.²

¹ 2012 SIAC Annual Report, p.7, Section: "Contract Dates".

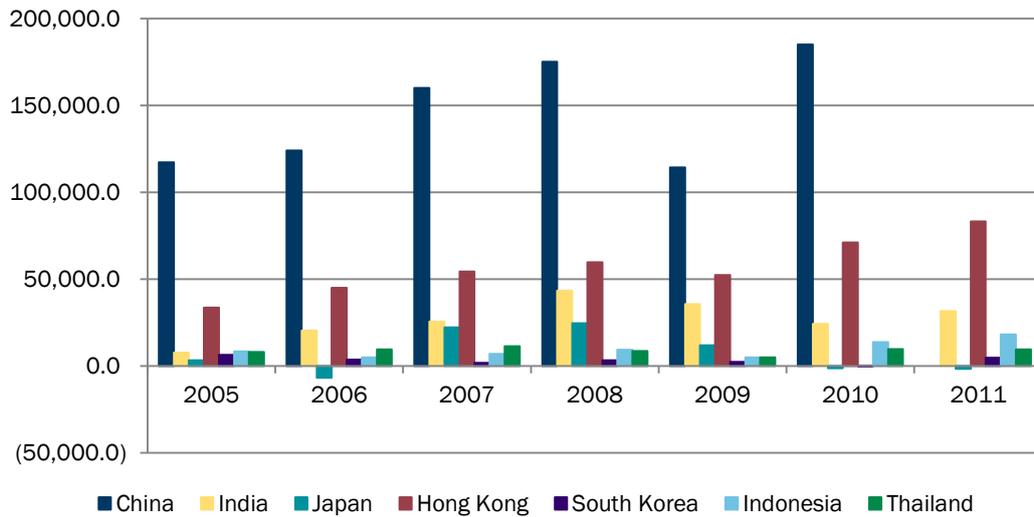
² M&A statistics include cross-border purchases and sales of businesses to and from each country. Cross-border M&A sales and purchases are calculated on a net basis as follows: net cross-border M&A sales in a host economy are calculated as sales of companies in the host economy to foreign Trans National Companies (TNCs) minus sales of foreign affiliates in the host economy. Similarly, net cross-border M&A purchases by a home economy is calculated as purchases of companies abroad by home-based TNCs minus sales of foreign affiliates of home-based TNCs. The data covers only M&A deals involving at least an equity stake of 10 percent.

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The numbers show that since 2005, there has been notable growth in both flows and stocks of investments. Each country has had significant movement of capital one way or the other. For example, while Japan has experienced low or negative net FDI inflows from 2005 to 2011, Japanese companies have

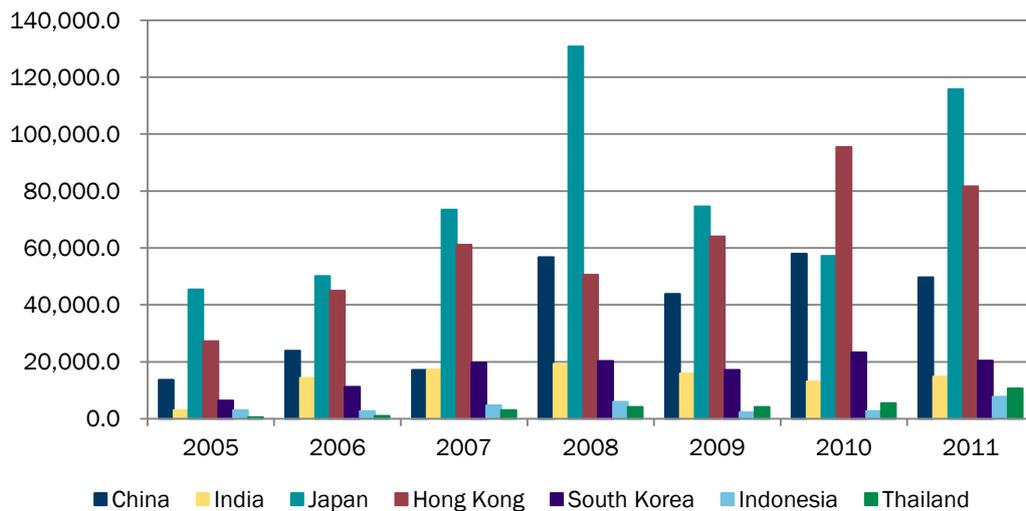
invested heavily abroad and in consequence, the country's outflows have substantially increased. On the other hand, China and Hong Kong have seen steady increases in their FDI inflow for the same time period.

Table 1. FDI inflow by country 2005 to 2011 (US\$ million)



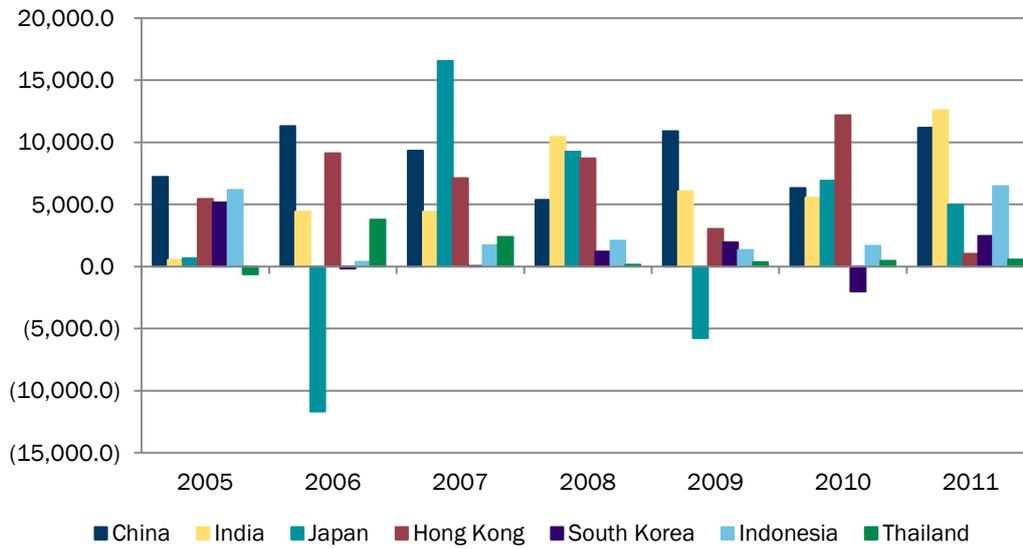
Source: The World Bank statistics.

Table 2. FDI outflow by country 2005 to 2011 (US\$ million)



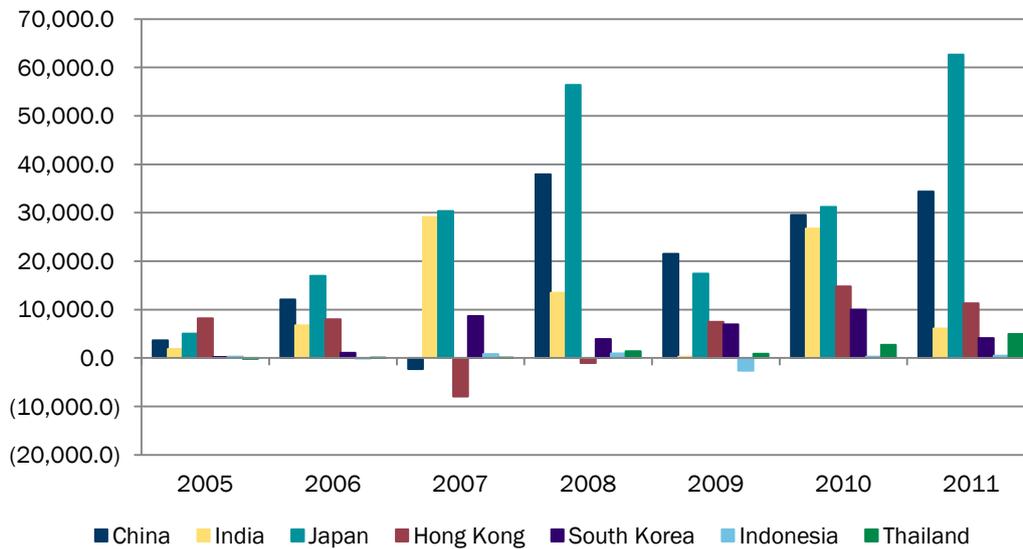
Source: The World Bank statistics.

Table 3. M&A activity, by economy of seller, 2005 to 2011 (US\$ million)



Source: UNCTAD statistics.

Table 4. M&A activity, by economy of purchaser, 2005 to 2011 (US\$ million)



Source: UNCTAD statistics.

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Similarly, the value of cross-border M&A activity in Asia Pacific has risen since 2005, with companies in China and Japan leading the way for outbound activity. Indonesia has seen an increase in its inbound M&A, particularly in its natural resources sector. India has also witnessed significant M&A activity, both inbound and outbound, and transaction amounts in some years, such as 2007 and 2010, were close to or greater than those in China.

Given the recent trends in cross-border investment and M&A, and the associated growth in capital flows, we believe there may be significant scope for growth in the number of arbitration disputes in coming years if this investment activity proves to be a leading indicator for commercial disputes.

Recent statistics from the London Court of International Arbitration indicate that 20 to 25 percent of new cases each year relate to contracts signed between five and eight years earlier.³ Importantly, these data exclude cross-border service and licensing contracts, including intellectual property licenses. We expect particularly growth in these areas emerging economies grow their services sectors, adopt Western technology and products and move away from lower-skill, lower-margin activities. The statistics may therefore underestimate the potential for future cross-border disputes in the Asia-Pacific region.

Historically, it may have been perceived that international arbitrations were filed mainly by developed country parties in relation to their investments in emerging economies. As outbound investment from emerging economies grows, however, we expect strong growth in claims brought by investors from emerging economies. Certain commentators have observed that Bilateral Investment Treaties (BITs) have, in their view, been unfair to developing countries in the past. It is notable, however, that developing country investors are themselves seeking to enjoy the protections of BITs when venturing beyond their home markets, suggesting that their usefulness run both ways.

The rising trend of arbitrations may already have begun. SIAC reported the total sum in dispute amounted to just over US\$3.6 billion in 2012, with an average claim amount of US\$15.4 million (2011: US\$7 million). The highest claim amount in 2012 was US\$1.5 billion, compared to US\$304 million in 2011.⁴ The number of cases filed in Asia Pacific has increased significantly over the past decade, with the SIAC and

Hong Kong International Arbitration Center (HKIAC), the two most prominent arbitration institutions in the region, dominating the landscape.

The Future of Arbitrations in Asia Pacific

Many leading international law firms have responded to the expected growth of arbitration in Asia by increasing their commitments to selected Asian markets. For example, Singapore's legal market has seen growth of around 10 percent in each of the last five years. And while law firms seek to establish and extend their relationships with Asian corporations, some of their expansion is also driven by their existing multinational clients, who seek legal advice to support current investments and operations in the region.

Commercial contract disputes can potentially arise from any sector. FTI Consulting has been involved in commercial disputes in a wide range of sectors, including mining, chemicals, oil & gas, financial services, infrastructure, and telecoms, among many others. In the current economic climate, it appears that disputes arising from troubled M&A or private equity deals or failed joint ventures are particularly widespread. In light of current uncertainty in the world economy and the reasons set out above, cross-border commercial disputes can be expected to continue to rise.

We believe the recent relocation of international arbitration specialists to Asia Pacific is supported by:

- The growing commercial and investment interest in and from Asia, including continuing higher forecasted growth;
- The opening up of the policy framework in the region; and
- Recent revisions to arbitration acts in several jurisdictions, which generally increase the attraction and certainty of commercial arbitration.

China, Indonesia, Japan and India are the forefront of commercial activity and investments in the region, and may be expected to lead the rise in arbitrations, even as Singapore and Hong Kong act as the primary venues for dispute resolution.

The advantages of arbitration over litigation support an effective arbitration infrastructure that enables companies to pursue confidential, expeditious dispute resolution for high-value commercial and investment treaty disputes.

³ 2012 LCIA Director General's Report, p.3, Section: "Contract Dates".

⁴ 2012 SIAC Annual Report, p.5, Section: "Amount in Dispute".



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