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**Investment Arbitration for Japan and Asia:
Five Perspectives on Law and Practice**

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“Investment Arbitration for Japan and Asia: Five Perspectives on Law and Practice”

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I. Introduction: A Gap or Lag in ISA in Asia?

1. Australasia has enjoyed an increasing engagement with international commercial arbitration (ICA), at multiple levels, especially since the 1990s.¹ Countries in the region desiring to be more open to trade and investment acceded to the New York Convention. Their courts have generally come to uphold its principles, respecting foreign arbitral proceedings and the awards they generate. Jurisdictions seeking also to become the seat for such proceedings have also improved their arbitration laws, usually based on the UNCITRAL Model Law.
2. Often in conjunction with this, and enjoying in-kind or financial support from their home government, they have established new Centres for ICA. Leading European and United States law firms with practitioners based in their Asian offices, as well as practitioners from Asian “home grown” firms have begun providing expert advice for ICA proceedings, and some are now very active as arbitrators regionally and world-wide.²
3. Some parallels are emerging in the overlapping field of investor-state arbitrations (ISA), but significant differences also remain. As developing countries in Asia became less sceptical of foreign direct investment (FDI), they began to include bilateral investment treaties (BITs) with Western countries, and then major net capital exporters from the region (such as Japan, and now the PRC). In recent years, BITs between Asian countries have begun to extend some substantive protections to the pre-investment phase (eg Japan with Korea or Singapore), and they increasingly include the facility for the home state’s investors to bring arbitral proceedings directly against the host state. They are also now folding such protections into bilateral Free Trade Agreements (FTAs) or the like, with the further possibility soon of regional treaties providing for ISA.³

Despite this new legal framework, however, comparatively few Asian countries seem to contest ISA proceedings. **Figure 1** and **Appendix A** identify 22 (or 8%) out of a total of 281 claims instituted under the ICSID Rules or ICSID Additional Facility

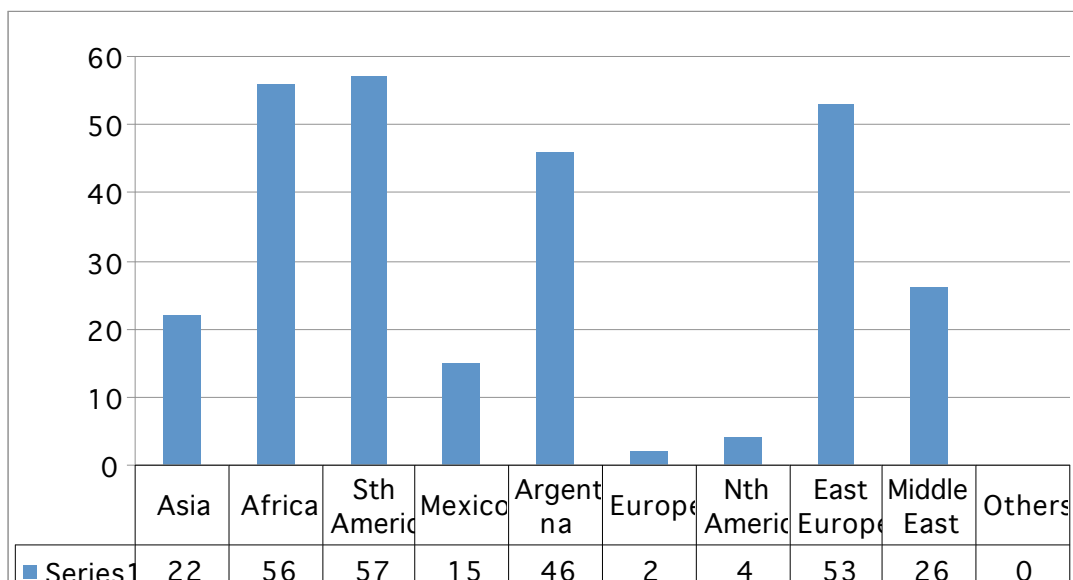
¹ {Nottage 2006}; {Nottage 2008}; {Greenberg et al forthcoming}; {Pryles and Moser 2007}.

² {Pryles and Moser 2007} pp. 12-13.

³ For bilateral FTAs, see eg Australia with Singapore, Thailand, Chile, and possibly soon Japan; and eg Japan with those first three countries, possibly Australia and several other countries especially in the Asia-Pacific {Nottage and Miles 2009}. For an example of a regional treaty that may eventually add an investment chapter including ISA, see www.mfat.govt.nz/Trade-and-Economic-Relations/Trade-Agreements/Trans-Pacific/.

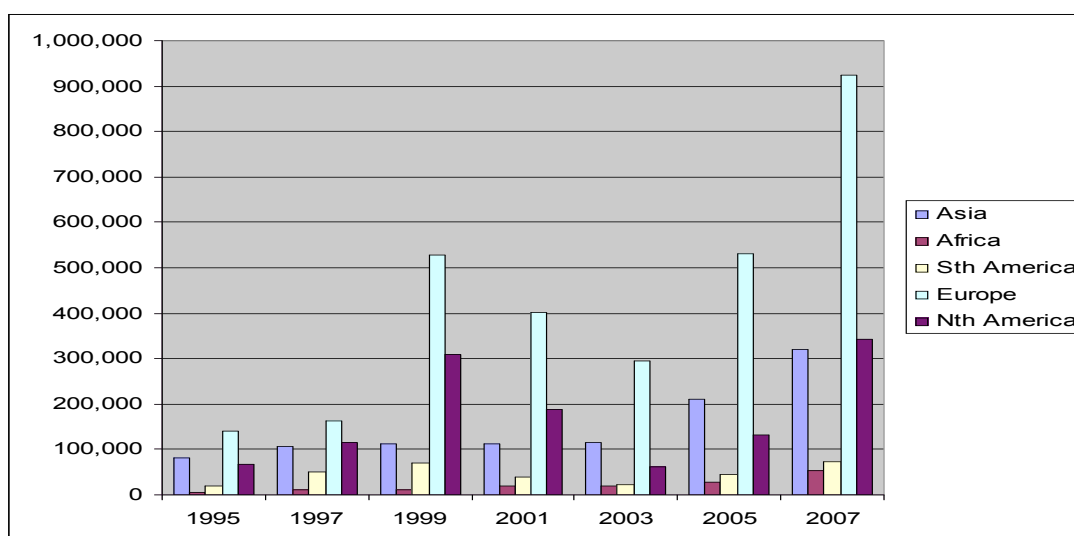
Rules, the predominant Rules selected for ISA proceedings, where foreign investors have brought ISA claims against Asian countries.

Figure 1: Respondent states (by region) in concluded and pending ICSID arbitrations⁴



4. This lack of ISA proceedings against Asian states may seem less anomalous when we exclude, as in **Appendix B**, cases involving Mexico (which concluded NAFTA with Canada and the US as long ago as 1994) and Argentina (subject to 46 ICSID claims in the wake of remarkable liberalisation followed by a massive economic crisis in 1999-2002). But still the number of claims against Asian states represents a small percentage (10%) of the aggregate number of ICSID claims instituted. More generally, although this deserves further empirical study, the timing and volume of FDI inflows may correlate with ISA claims against the host states. For example, former Eastern European countries also figure quite prominently in ICSID cases.
5. Thus, the 'gap' between black-letter law (ISA protections) and actual practice (ICSID and other claims) may be less remarkable than some commentators assume. Alternatively, it may constitute a transient 'lag' that will dissipate over time, as more recent large FDI flows into the region, as shown in **Figure 2** and **Appendix C**, eventually evolve into large disputes subject to ISA protections.

⁴ Based on ICSID data available at <http://icsid.worldbank.org> (accessed 22 January 2009).

Figure 2: Investment flows in US\$ millions (by region)⁵

6. Still, the paucity of cases so far, especially those brought by Asian investors, seems quite noticeable and likely to persist for quite some time. Even from the reported ISA cases involving Asian host states, let alone other reports, it is highly improbable that the low caseload is simply due to those states' consistently exemplary treatment of investors (and hence few disputes). This low caseload therefore deserves serious analysis.
7. Fortunately, we can draw on a sophisticated debate that has already developed around alleged 'gaps' and 'lags' observed in terms of regular civil proceedings brought before courts, especially in Asia. For example, Japan's per capita civil litigation rate (even including debt collection and court-annexed mediation cases) remains one of the lowest among industrialised democracies.⁶
8. Five major perspectives or paradigms, linked to shifting intellectual and economic trends, have emerged to explain this sort of phenomenon:⁷
 - a. The **culturalist thesis** emerged over the 1960s and 1970s to explain low levels of formal proceedings in terms of a traditional preference for harmony, hierarchy, and diffuse social relationships – in other words, the *Japanese don't like law*;
 - b. From the late 1970s, the **institutional barriers** thesis instead emphasised impediments such as delays and costs of bringing suit, related to insufficient judges and lawyers, as well as problems in civil procedure law and in executing judgments – the *Japanese can't like law*;
 - c. As trade friction escalated between Japan and the US over the 1980s, the **elite management** thesis argued that such barriers were manipulated by conservative politicians, bureaucrats and big business interests, setting up compensation and/or ADR schemes to divert disputes away from courts

⁵ Based on UNCTAD data available at <http://stats.unctad.org> (accessed 24 January 2009).

⁶ {Nottage and Wollschlaeger 1996}.

⁷ {Abe and Nottage 2006}, updated at <http://www.asianlii.org/jp/other/JPLRes/2008/1.html>.

- and into more informal but orderly processes of socio-economic change – the *Japanese are made not to like law*; and
- d. As deregulation and free-market policy spread from a resurgent US to Japan over the 1990s, the **economic rationalist** thesis instead suggests that substantive law and fact-finding are comparatively predictable, so Japanese claimants can credibly threaten and “bargain in the shadow of the law” for outcomes that track what they would get in court, thus saving costs for themselves and well as defendants – the *Japanese do like law*; and finally
 - e. As Japan re-emerged around 2002 from its “lost decade” of economic stagnation, and the US stumbled after major corporate collapses, **hybrid theories** emerged. These argued, through both quantitative and qualitative analysis, that culture can help explain the persistence of institutional barriers and elites; but that culture is not intractable and that social actors are partly economic rationalists – this perspective tends to conclude that the *Japanese sometimes like law but sometimes don't*.
9. These diverse paradigms are also useful in explaining developments in ICA in countries like Japan.⁸ Similarly, this paper argues that they can help explain any (even residual) ‘gap’ or ‘lag’ that may be observable in ISA claims involving Asian parties (Part II), and in drawing some normative conclusions to promote ISA in our region (Part III).

II. Five Perspectives on ISA in Asia

10. In ISA, the **economic rationalist** paradigm (d) is most implausible, at least in its original formulation. Substantive ISA principles, as well as fact-finding processes (often definitive in ISA cases) and even some procedural issues, are still in a formative and unclear state.⁹ A parallel can be drawn with the regime under the GATT and especially then in the early era of the WTO, where significant uncertainty in applying substantive law to the facts resulted in a bulge in case filings, appeals, and delays in having decisions rendered and enforced. ISA’s current situation is arguably even worse, because for example there is no permanent appellate body with powers to review substantive errors of law. With the law so uncertain, this economic theory generally would predict much higher levels of cases being contested in formal proceedings, unless the costs involved were so vast as to force one party to give up during negotiations. A particular problem for this theory is the lack of evidence that disputes involving Asian parties are significantly simpler (and hence less likely to result in contested cases) compared to those involving non-Asian parties.
11. The **culturalist** thesis (c) may retain some merit. At the level of the individual, a series of recent studies in experimental social psychology suggests that certain engrained differences exist between “Asians” and “Westerners”, despite some variations also within each group. Asians tend to have more holistic perception, allow for more complex causal attribution, categorise less when organising

⁸ {Nottage 2004}.

⁹ {Weeramantry 2009}; {Franck 2005}.

knowledge, and favour typicality (plausibility) or normative preferences (rather than logic) when drawing inferences.¹⁰

12. Yet, despite for example a broader revival in “neo-culturalist” approaches to Japanese legal studies,¹¹ it remains unclear whether and how any such psychological differences translate into alternative behaviour when filtered through institutions such as firms or entire governments.¹² Further, even at the individual level, there may not necessarily exist large divergences in attitudes (and practices) related to law-related phenomena, such as contract renegotiation following extreme changes in market conditions.¹³ Further experimental and attitudinal studies, of individuals and the relevant organisations involved in ISA, are needed to determine the extent and implications of any differences in cultural psychology.
13. Several challenges already seem to undermine a simple culturalist rationale for the relative paucity of ISA cases involving Asian parties. For example:
 - a. Why do Pakistan, the Philippines and the other respondent companies in **Appendix A** still contest ICSID cases vigorously, instead of always ‘harmoniously’ settling? Even Asian countries seem reluctant to try instead formal mediation (under Articles 28-35 of the ICSID Convention). Nor do they seem to settle cases distinctly more frequently than Western respondents during ISA proceedings.
 - b. Why does Japan go to considerable trouble now to include full ISA provisions in its BITs and FTAs? This fits with that nation’s growing ‘export’ of ‘rule of law’ based ‘legal technical assistance’, especially to South East Asia,¹⁴ which also sits uneasily with the idea of a blanket aversion to living by more black-and-white rules.
 - c. Why do Japanese firms not only encourage their government in this new strategy but also, directly or indirectly, go along with ISA claims brought by other countries’ firms (for example, in Indonesia)?¹⁵ Japanese firms may no longer be able to afford to resolve disputes informally (as for example Kumagai Gumi was forced to do, on unfavourable terms in 1994, regarding its involvement in the Bangkok Second Stage Expressway development¹⁶). They must be feeling more budgetary pressure from financial crises (1998, and now), as well as growing competition for (more secure) FDI into Asia.
14. **Elite management** theory (c) also faces problems, just as it does when trying to explain government-firm relations for example purely within contemporary Japan.¹⁷ In the context of Asian countries defending ISA claims, the theory would predict even less willingness to contest such claims. One reason is that,

¹⁰ {Nisbett 2004}.

¹¹ {Nottage 2009}; {Tanase forthcoming}.

¹² Compare, for example, {Kozuka and Nottage 2009}, following on from {Kozuka and Nottage 2008}.

¹³ {Nottage 1997; Nottage 2007}.

¹⁴ {Taylor 2006}.

¹⁵ <http://www.eastasiaforum.org/2008/07/24/investor-state-arbitration-for-indonesia-australia-and-japan/>, and {Nottage and Miles 2009} Part 3.1.1; and see para 18 below.

¹⁶ See eg paras 15.30-32 of www.worldbank.org/transport/roads/tr_docs/padeco/part3.pdf.

¹⁷ Kozuka and Nottage, op cit.

eventually, key facts are likely to come out from the proceedings (at least in a more or less public award¹⁸) that could drastically undermine the host state's elite – reliant, almost by definition, on maintaining a more opaque system. Moreover, BITs — usually through fair and equitable treatment provisions — emphasise transparency in governance. Deficiencies in the treatment of investors are likely to be exposed in ISA decisions ruling on such obligations.

15. As for Asian investors bringing claims, elite management theory implies that they are closely aligned through informal links with their home state, as part of a domestic elite. Specifically, this relationship involves the home state being able then to persuade the investors not to jeopardise its interests, and those of the broader elite they form part of, by bringing direct claims against the host state. Rather, the home state can first credibly emphasise the long-term and more diffuse benefits of investors remaining part of the local elite. Secondly, it may promise the possibility of more short-term benefits through the capacity to negotiate informally with the host state, so the latter adjusts its business relationships with the investors to some mutual benefit.
16. Such benefits may indeed have been realised in some cases, although that will be difficult to research and prove. But there will always be some temptation for the investors instead to try to extract benefits from the host state directly, by invoking the ISA provisions. Whether they will deviate in this way should be heavily influenced by whether they form, now or foreseeably, part of a local elite with the home state that provides offsetting longer-term benefits. In Japan and presumably elsewhere, however, the companies most likely to actively invest abroad are precisely the more internationalist ones. And generally, directly or through the *Keidanren* industry body, such companies have prompted a gradual reconfiguration of Japan's traditional post-War elite and its policy outlook.¹⁹
17. Despite such complications, elite management theory would not expect large and established companies from Asian countries (more likely to be part of a home country elite) to get involved in formal proceedings. Yet large Japanese firms have been involved in such cases, for example, either directly (eg Tomen, part of the consortium in the Karaha Bodas power project in Indonesia) or indirectly (eg Sakura Bank, helping finance the Dieng and Patuha projects). A Dutch subsidiary of Nomura (Saluka) also pursued an ISA claim against the Czech Republic.²⁰
18. However, we have yet to conduct a more comprehensive analysis of ISA claims directly initiated by foreign investors from Asia (our research so far has found only nine ISA cases, listed in **Appendix D**, in which a claimant is from Asia – and the *Amco Asia* claim was led by a US parent company). There are certainly few such claims, so overall it may still be true that some “elite” firms are not initiating proceedings because of pressure from their home states.

¹⁸ {Nottage and Miles 2009} Part .4.1. Elite management theory does emphasise how elites prefer to divert cases from courts to ADR processes, thus predicting more use of arbitration. But if ADR is also quite transparent (as, increasingly, in ISA), and/or cases are not easily brought before courts anyway (as was the case before ISA expanded especially via BITs), then such a prediction will not hold.

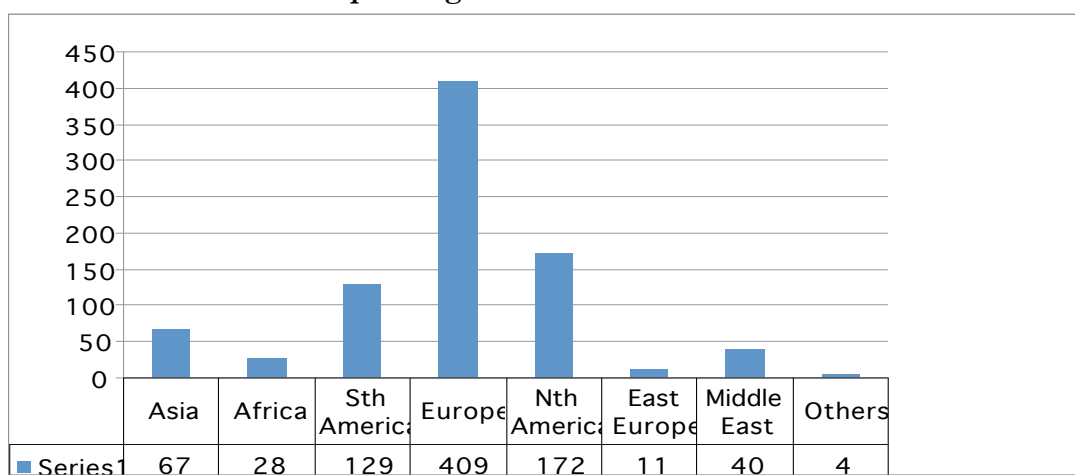
¹⁹ {Elder 2003}.

²⁰ Above note 13; under UNCITRAL Arbitration Rules via the Permanent Court of Arbitration, see http://www.pca-cpa.org/showpage.asp?pag_id=1149.

19. Nonetheless, **institutional barriers** theory (b) seems one of the best explanatory paradigms for explaining low levels of ISA cases (especially claiming) in Asia. Such impediments include:

- a. *Direct costs*, especially lawyers' fees – bearing in mind Asian respondent governments tend to engage international law firms rather than using in-house lawyers (as they may, at least more so, when now defending WTO cases against other states);
- b. *Indirect costs*: in particular, opportunity costs for government officials (for example when marshalling evidence);
- c. *Long-term costs*: for example, there may be some 'fear factor' in proceeding against the PRC (or perhaps even India), not just for the investor or its subsidiaries but also for law firms representing them that have offices in the host state;²¹
- d. *Delays* in progressing cases: particularly relevant to claimants, but problematic also for respondent governments when it comes to awards of interest;
- e. *Enforcement* difficulties: especially post-award execution against assets, under ICSID Convention Articles 54(3) and 55 as well as national legislation on sovereign immunity;
- f. *Problems with finding experienced and available arbitrators*, especially from within Australasia: **Figure 3** and **Appendix E** shows disproportionate appointment of ISA arbitrators from Europe (48%) compared with Asia (8%), the Middle East (5%), Africa (3%) and Eastern Europe (1%). Asian governments face particular challenges in finding arbitrators with views less likely to be influenced by having worked for years within large law firms (more likely to have private firms as clients), and ICSID has rarely selected Asian arbitrators to Chair tribunals.

Figure 3: Numbers of arbitrators (by region) appointed in concluded and pending ICSID arbitrations²²



20. Yet a **hybrid** theory (e) also seems feasible in the field of ISA. As latecomers to industrialisation/modernisation and foreign investment/arbitration, even developed countries in Asia like Japan may feel that actually invoking its ISA

²¹ {Franck 2007} does not deal with these sorts of less readily quantifiable costs.

²² Based on ICSID data available at <http://icsid.worldbank.org> (accessed 22 January 2009).

protections runs counter to its ‘Asian’ identity and culture.²³ In subtle and distinctive ways for many decades to come, this identity therefore may keep ‘framing’ how Japanese firms and the government weigh up more material interests implicated in the ISA system (highlighted especially by institutional barriers theory).²⁴

III. Tentative Normative Conclusions

21. Still, to the extent especially that institutional parameters – and, longer term, the clarity and accessibility of substantive principles – do and should matter, the following measures should be considered to achieve more active engagement by Japan and Asian nations in the evolving ISA system:

- a. A regional ICSID office could be established for filing claims, to take care of the arbitration process from within the region rather than from the other side of the globe (i.e., Washington), and to provide training (like ICC workshops).
- b. Relatedly, a regional “ISA Advisory Centre” could be set up, inspired by the Advisory Centre on WTO Law in Geneva.
- c. Asian countries (even or especially developed countries like Japan) should become more involved in promoting other reforms to the ISA system (such as other procedural/institutional reforms suggested recently for the Australia-Japan FTA²⁵).
- d. ICSID should redesign and then promote its conciliation process in the region, considering “institutional barriers” that may be impeding its acceptance rather than broad-brush “cultural” factors.
- e. More universities need to offer courses in international investment law to inform future practitioners who might represent investors or states about the very real rights and obligations under investment treaties.
- f. Their ICA courses should also include a significant component that explains the ISA process.
- g. More attempts should be made to educate practitioners in the subject area. They need to realise that ISA is relevant not just for law firm arbitration/litigation departments, but for commercial lawyers who plan and structure international investments.
- h. Local law societies or other groups should try to demystify the subject area by making available compendiums of their state’s BITs and other investment treaties. These should include a commentary that summarises the rights contained in them, identifies useful literature, discusses the most relevant cases, and explains how ISA claims may be instituted. At least some of this should be in Asian languages.
- i. There should be more support for more broadly-based conferences like this, and smaller study groups, in the region.

²³ This identity, whether real or imagined, also seems to underlie Japan’s new approach to ODA: see {Hatakeyama 2008}.

²⁴ Similar problems have afflicted Japan, but also other pro-whaling nations as well as now anti-whaling nations and NGOs, regarding commercial harvesting of whales: see {Epstein 2008}, reviewed at <http://blogs.usyd.edu.au/japaneselaw/>.

²⁵ Nottage and Miles, op cit.

22. Some more than others, these reforms should also help to change not only the more immediate material factors involved in pursuing ISA proceedings as claimant or respondent, but also the “identity” implications already involved in doing so. Just as ICA has witnessed the emergence of much discussion and some features in practice related to “commercial arbitration Asian-style”, such as various degrees and forms of Arb-Med, we can expect and welcome more debate and practices distinctive to “investment arbitration Asian-style”. This is particularly important as ISA faces serious challenges in terms of both legitimacy and efficiency.

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APPENDIX A**Respondent states (by region) in concluded and pending ICSID arbitrations**

	Concluded	Pending	Total	Percentage
Asia	16	6	22	8%
Africa	42	14	56	20%
Sth America (ex Arg & Mex)	28	29	57	20%
Mexico	11	4	15	5%
Argentina	13	33	46	16%
Europe	2	0	2	1%
Nth America	4	0	4	1%
East Europe	26	27	53	19%
Middle East	14	12	26	9%
Others	0	0	0	0%
	156	125	281	100%

Figures based on ICSID data available at <http://icsid.worldbank.org> (accessed 22 January 2009).

APPENDIX B**Respondent states (by region) in concluded and pending ICSID arbitrations – excluding Argentina and Mexico**

	Concluded	Pending	Total	Percentage
Asia	16	6	22	10%
Africa	42	14	56	25%
Sth America (ex Arg & Mex)	28	29	57	26%
Europe	2	0	2	1%
Nth America	4	0	4	2%
East Europe	26	27	53	24%
Middle East	14	12	26	12%
Others	0	0	0	0%
	132	88	220	100%

Figures based on ICSID data available at <http://icsid.worldbank.org> (accessed 22 January 2009).

APPENDIX C

Investment flows in US\$ millions (by region)

	1995	1997	1999	2001	2003	2005	2007
Asia	80,114	105,814	111,537	113,437	115,148	210,026	319,333
Africa	5,655	11,033	12,063	19,905	18,719	29,459	52,982
Sth America	18,633	49,310	69,640	38,656	22,938	44,305	71,699
Europe	139,140	162,321	529,357	401,370	293,552	531,499	925,032
Nth America	68,027	114,966	308,481	187,183	60,636	131,820	341,555

Figures based on UNCTAD data available at <http://stats.unctad.org> (accessed 24 January 2009).

APPENDIX D

Selected list of claimants possessing Asian nationality in ISA arbitrations

1. *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) – US company with its Indonesian and Hong Kong affiliates claiming against Indonesia under a hotel development contract
2. *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3) – Hong Kong company's claim under the UK-Sri Lanka BIT
3. *Malaysian Historical Salvors, SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10) – Malaysian company but controlled by UK national and therefore claim brought under the UK-Malaysia BIT
4. *MTD Equity Sdn Bhd and MTD Chile SA v. Chile* (ICSID Case No. ARB/01/7) – Malaysian investment company and its Chilean subsidiary claimed against Chile under the Chile-Malaysia BIT
5. *Sancheti v. United Kingdom* (*ad hoc* arbitration under UNCITRAL Arbitration Rules) – Indian citizen's claim under the India-UK BIT
6. *Telekom Malaysia Berhad v. Republic of Ghana* (*ad hoc* arbitration under UNCITRAL Arbitration Rules) – Malaysian company's claim under the Ghana-Malaysia BIT
7. *Trinh Vin Binh v. Vietnam* (*ad hoc* arbitration under UNCITRAL Arbitration Rules) – under the Dutch-Vietnam BIT
8. *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6) – Chinese citizen's claim under the Chinese-Peru BIT
9. *Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB/01/1) – Singapore company's claim under the ASEAN Agreement for the Promotion and Protection of Investments

Based on ISA data available from <http://icsid.worldbank.org>, the Investment Arbitration Reporter at <http://www.iareporter.com>, and the Investment Treaty Arbitration website at <http://ita.law.uvic.ca> (last accessed 30 January 2009).

We are undertaking searches into other sources and invite readers to inform of us any further arbitrations. Thanks already to Professor Tetsuya Nakamura, Luke Eric Peterson, and Professor August Reinisch.

APPENDIX E

Numbers of arbitrators (by region) appointed in concluded and pending ICSID arbitrations

	Concluded	Pending	Total	Percent
Asia	41	26	67	8%
Africa	19	9	28	3%
Sth America	67	62	129	15%
Europe	232	177	409	48%
Nth America	90	82	172	20%
East Europe	3	8	11	1%
Middle East	25	15	40	5%
Others	2	2	4	0%
	479	381	860	100%

Figures based on ICSID data available at <http://icsid.worldbank.org> (accessed 22 January 2009).