Introduction

1. BACKGROUND

International investment agreements (IIAs) establish a preferential regime for the protection of the property of foreign investors. Under these treaties, covered investors are granted substantive rights, which are independent from (and often stronger than) those provided in domestic law. In addition, covered investors are given the option of enforcing these rights outside of the host state’s courts through international arbitration, in a process known as investor-state dispute settlement (ISDS).

The broad scope of coverage of investment treaty obligations means that virtually all aspects of a host state’s economy and regulatory system are subject to the investment treaty’s disciplines. Moreover, the varied and pervasive scope of foreign investment across economic sectors in many economies means that a wide range of entities and persons may take governmental decisions of one kind or another with respect to a foreign investment or investor for which the host economy will be legally responsible. Investment treaties thus raise difficult normative questions about the rights and obligations of international investors and sovereign states, and about the appropriate mechanisms for resolving disputes between them.

Over the past 30 years IIAs have proliferated, with more than 3,000 such treaties concluded to date. The bulk of these treaties were concluded in the 1990s and 2000s, largely between developed and developing states.

Over the past 20 years there has been a sharp rise in the number of claims brought by investors under ISDS provisions. As of the end of 2020, the number of known ISDS claims stood at more than 1,000. The cost of ISDS can be high. In cases decided in favour of the investor, the median amount claimed has been USD 113 million.

The median amount awarded has been USD 19 million, although awards over USD 1 billion are no longer uncommon. Moreover, even in cases in which respondents prevail, the costs of the proceedings are high. According to best estimates, the average cost of an investor-state arbitration case (arbitrator and legal fees) for respondents is estimated to be USD 5 million. Beyond the monetary costs, defending an investment treaty arbitration diverts time and attention away from the business of government.

It is against this background that states around the globe have begun to reappraise their existing investment treaty commitments and, particularly, the use of arbitration as the principal mode of ISDS. In connection with this policy debate, ISDS reform has received considerable attention, both in academic
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literature⁶ and in the context of international institutions, such as UNCITRAL,⁷


⁷ See the currently ongoing work of UNCITRAL Working Group III, at https://uncitrals.org/en/working_groups/3/investor-state.
Yet, despite this interest, to date there has been limited treatment of the issue from an ASEAN point of view. Such omission is critical for three reasons. First, there cannot be a ‘one-size-fits-all’ approach on the question of ISDS reform. Over the years different states have had different experiences as respondents in ISDS or as home states of investors, and may therefore have different priorities with respect to the reform effort. Second, the ASEAN region has become an increasingly important player in investment treaty-making, with more than 300 IIAs currently signed or in force and concluded either by ASEAN as a community or by the individual member states (together referred to here as ‘ASEAN economic agreements’). Third, the reform of ISDS is a live policy issue within ASEAN, especially in light of the conclusion of the Regional Comprehensive Economic Partnership (RCEP) in 2020, which

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12 RCEP entered into force on 1 January 2022 and brings together under a common legal framework the ten ASEAN member states and five of their existing FTA partners (Australia, China, Japan, the Republic of Korea and New Zealand).
creates the largest free trade area in the world and contains disciplines on the treatment of investment. As yet, however, the parties to RCEP have not agreed on provisions for ISDS, leaving that issue for negotiation and consideration over the next two years.

This book seeks to contribute towards filling this gap in the literature by presenting, analysing and assessing international proposals for the reform of ISDS from an ASEAN perspective, based upon the experience, needs and concerns of ASEAN as a community and of its member states. Further, it explores the conceptual possibility of developing ASEAN-specific options for reform in conjunction with broader global efforts. In so doing, this book addresses four main research questions:

1. What is the context and the rationale for ISDS reform internationally and in ASEAN? Is there overlap between the international and ASEAN contexts?
2. What is the range of non-structural ISDS reform options that might be available to ASEAN member states? How can these be implemented by ASEAN member states?
3. What is the range of structural ISDS reform options that might be available to ASEAN member states? How can these be implemented by ASEAN member states?
4. What opportunities do global reform efforts present for the further integration of ASEAN, such as through the possible establishment of an ASEAN Investment Tribunal?

2. ASEAN ECONOMIC AGREEMENTS, INVESTOR-STATE DISPUTES AND REFORM

The investment treaty making of ASEAN and the ASEAN member states (AMS) tracks closely with observable global trends. After relatively modest treaty-making activity in the 1960s–1980s, one observes an exponential increase in new ASEAN economic agreements concluded during the 1990s and 2000s, which is then followed by a marked decline in the number of new treaties throughout the 2010s. A notable feature of ASEAN treaty-making activity is the complex web of overlapping IIA relationships existing by and among AMS. At any given time, AMS may be subject to multiple international rules on the protection of foreign investors found in their territory – more so
when the foreign investors in question originate from another AMS or an ASEAN FTA partner country.\textsuperscript{13}

With regard to ISDS in particular, the treaty-making practice of AMS is likewise broadly similar to the practice of states in other regions. The investment treaties that AMS have concluded (both individually and as part of ASEAN investment and free trade agreements (FTAs))\textsuperscript{14} contain provisions on ISDS that reflect trends in global practice over the past two decades. In the main, throughout this period AMS have continued to rely on investor-state arbitration for the resolution of disputes under their treaties, adapting and refining this mechanism in significant but largely incremental ways. The only break in this trend has occurred in the recent past, with Singapore and Viet Nam entering into treaties with the European Union (EU) which replace investor-state arbitration with the establishment of standing investment courts specific to each treaty.

In terms of actual experience with ISDS claims, AMS have been respondents in relatively few – a combined 31 – investor-state arbitrations since the early 1990s. Where AMS have faced claims under investment treaties, those claims have been overwhelmingly brought by non-ASEAN investors, although as yet no claims have been brought under any of ASEAN’s FTAs. Notably, while ASEAN investors have been reluctant to bring investment treaty claims against AMS, they have been similarly reluctant to bring claims against

\textsuperscript{13} As discussed further in Chapter 1, we trace this to two particular features of ASEAN treaty-making activity. The first feature is that there exists a general absence of clarity with respect to the treaty-making competencies of the AMS and of ASEAN as an organisation separate from its member states. ASEAN external economic agreements are concluded as plurilateral agreements which means that, because each AMS separately and individually owes the same obligations to every other AMS in the same way that it does to the non-AMS party or parties, AMS may be exposed to legal claims originating from investors whose home state is another AMS. The second feature, which expands the scope of international liability even further, is the fact that AMS tend to conclude multiple IIAs with the same counterparties, albeit in various contexts and at various levels. By way of example, AMS’ counterparties in RCEP (2020) include five out of the seven countries or entities with which ASEAN as a community has concluded IIAs.

\textsuperscript{14} Not including the most recent agreement, RCEP, ASEAN as a community has signed six external, plurilateral investment agreements and FTAs with: Hong Kong; India; China; the Republic of Korea; Japan; and Australia and New Zealand. These agreements each contain investment protection commitments and, except for the one with Hong Kong, provide for investor access to ISDS in the event of disputes. RCEP, as mentioned, contains investment protection commitments but does not provide for ISDS, although it contains provision for the parties to include ISDS in the future should they so choose.
non-ASEAN governments as well. In this respect, ASEAN investors appear to be ‘underusing’ investment treaties relative to investors from other regions. Where AMS have faced claims, their rates of success in defending these claims are roughly commensurate (if not slightly better) than the experience of states globally. As yet, no AMS has been subject to the intensity of filed claims experienced by states in other regions (such as Argentina, the Czech Republic, Egypt, Spain and Venezuela). Similarly, based on available data, AMS have thus far avoided the kinds of massive awards that states in other regions have faced.

Although AMS experience with investor-state arbitration has been largely favourable relative to global trends, AMS have determined rightly that it is an opportune time to take stock of the ISDS regime and consider possibilities for reform. The investment treaty regime is indeed at a point of inflection and reform is being debated in a number of international fora, including ICSID and Working Group III of UNCITRAL. Viewed broadly, drivers of the reform debate include: (i) concerns about the consistency, coherence, predictability and correctness of outcomes in ISDS arbitrations; (ii) concerns about the appointment (including the geographical makeup), ethics and qualifications of arbitrators; (iii) concerns about the cost and duration of ISDS proceedings; and (iv) concerns about the overall balance of control in the ISDS process in general.

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15 Our research shows that, to date, there have been only:

1. three cases brought by an ASEAN investor against an AMS (that is, Oleovest Pte. Ltd. v Republic of Indonesia, ICSID Case No. ARB/16/26; Cemex Asia Holdings Ltd v Republic of Indonesia, ICSID Case No. ARB/04/3; Yaung Chi Oo Trading Pte. Ltd. v Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1);

2. nine cases brought by an ASEAN investor against a non-ASEAN country (that is, Akfel Commodities Pte. Ltd. and I-Systems Global B.V. v Republic of Turkey, ICSID Case No. ARB/20/36; AsiaPhos Limited v People’s Republic of China, UNCITRAL Rules; Goh Chin Soon v People’s Republic of China, ICSID Case No. ARB/20/34; IC Power Ltd and Kenon Holdings Ltd v Republic of Peru, ICSID Case No. ARB/19/19; KLS Energy Lanka Sdn. Bhd. v Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/18/39; PACC Offshore Services Holdings v United Mexican States, ICSID Case No. UNCT/18/5; Ekran Berhad v People’s Republic of China, ICSID Case No. ARB/11/15; Telekom Malaysia Berhad v The Republic of Ghana, PCA Case No. 2003-03; MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID Case No. ARB/01/7).

16 We note, however, that publicly available information on exact amounts of compensation ordered against AMS or agreed in settlement is largely lacking.
Although there is widespread agreement about the need to reform the current system, there is as yet no agreement on the scope, range and form that reform should take. For some countries, reform of ISDS means improving the current system to take into account the experiences of states gathered in litigation over the past two decades. For others, the reform of ISDS requires more systemic or radical change, such as through the replacement of investor-state arbitration with a Multilateral Investment Court (MIC). Furthermore, in assessing the current international reform debate and the full gamut of proposals under consideration, including the proposal for an MIC, it is important to ask whether this international debate adequately addresses the concerns of ASEAN as a community of states. Given this, our analysis in this book examines both non-structural and structural reform proposals and critically analyses each from an ASEAN standpoint.

2.1 A Menu of Reform Proposals

In the first place, we present the full gamut of proposals for ISDS reform in a menu of reform options available to AMS. In so doing, we place each reform proposal into a ‘reform matrix’, from the non-structural and incremental to the structural and systemic. For the purposes of this book, reform proposals are characterised as ‘non-structural’ when they seek to maintain the core aspects of arbitration as the principal method for resolving investment disputes, with changes designed to target and address specific concerns expressed about the existing regime. The underlying idea, therefore, is that reform need not alter the fundamental mechanics of the system, including in particular its *ad hoc* nature and the system of party-appointed arbitrators. Structural reform proposals, by contrast, see the above core mechanics of ISDS as seriously flawed and thus seek to effect significant change to them. They are called ‘structural’ since their proponents advocate the creation of new and largely untested institutions (for example, an appellate mechanism or a full-fledged MIC containing a first instance and an appellate division), to effect reform that is widespread and all-encompassing.17

In the course of the discussion we identify that a majority of the reform proposals can act as a baseline for ISDS reform. That is to say, several of these proposals retain their usefulness and relevance irrespective of whether AMS, 17 We also identify a third kind of reform proposals, so-called paradigm-shifting proposals. These regard the entirety of the system of investor rights as irrevocably flawed. Proponents of this type of reform tend to reject altogether the utility of international dispute settlement mechanisms between investors and states and instead propose a series of alternatives, such as domestic courts, ombudsmen or state-to-state arbitration, to replace them.
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individually or collectively, elect to pursue reform that is otherwise structural or non-structural in nature. As such, AMS can examine and take on board these proposals with minimal transaction costs.

2.2 Structural Reform Proposals

Following the identification of the menu of reform, we enter into a more in-depth examination of structural reform options, including a standing appellate mechanism, an investment court system (with first instance and appellate divisions) that is specific to an IIA, and an MIC with first instance and appellate jurisdiction. The MIC proposal, in particular, is being spearheaded by the EU, with the support of Canada. While a concrete text for an MIC has yet to be produced, the EU has made clear certain key characteristics that an MIC is likely to possess. In particular, an MIC is envisioned as entailing the following characteristics:

- Replacement of *ad hoc* arbitration with a standing court system with a first instance and an appellate tribunal;
- Replacement of party-appointed arbitrators with tenured judges, operating under formal ethical standards and supported by a dedicated secretariat;
- Inclusion of wide-ranging rules on transparency, generally following the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014);
- Inclusion of rules to address the efficient and cost-effective resolution of cases and mechanisms to ensure the effective enforcement of the MIC’s decisions or awards; and
- Mechanisms to allow for the use of a new MIC to resolve disputes arising under existing and future IIAs.

While the proposal for an MIC is a radical one, it is notable that many of the reforms subsumed within it are baseline reforms; that is to say, they are available individually or as part of a package of less systematic, non-structural reforms (for example, the development of formal ethical standards; rules to address cost-efficiency; increased transparency of proceedings).

In the course of our discussion, we critically analyse the content, structure and modalities of operationalisation of structural reform proposals from an ASEAN standpoint, including their ability to address reform concerns that

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18 We find this to be the case in particular with respect to proposals seeking to address concerns about the appointment, ethics and qualifications of arbitrators; concerns about the cost and duration of the ISDS process; and concerns about the overall balance of control over the ISDS process.
may be particular to AMS. We also point to some of the structural limitations of these proposals, such as, for instance, with respect to the recognition and enforcement of their awards by non-participating countries.

3. PROSPECTS FOR REGIONAL REFORM

As mentioned, while the ISDS regime found in ASEAN’s economic agreements appears to have functioned similarly to the way in which it has functioned for developing states generally, it may be that the reform solutions proposed internationally do not fully address the interests of AMS. For this reason, the present book goes beyond simply examining critically the various reform proposals from an ASEAN standpoint. Instead, it goes on to offer a ‘blue sky’ conceptualisation of the possibility of establishing a regional ASEAN Investment Tribunal (ASEAN IT) as either an alternative or complement to the above reforms. Our analysis of a possible ASEAN IT in particular proceeds under four heads, namely: (i) modalities; (ii) efficacy; (iii) feasibility; and (iv) advantages.

The head of ‘modalities’ entails an analysis of the different jurisdictional permutations that an ASEAN IT could take, as well as the institutional and technical modalities for operationalising each permutation. Four principal permutations are identified in the course of this book, each encompassing a larger or smaller number of investment treaties within its jurisdictional scope:

- An ‘intra-ASEAN’ IT with jurisdiction to hear disputes arising under the ASEAN Comprehensive Investment Agreement (2009) and the 23 BITs that AMS currently have among themselves;
- An ‘ASEAN FTA’ IT with jurisdiction to hear disputes arising under the investment chapters of the FTAs that ASEAN as a community has negotiated with its FTA partners (as of the time of writing, five such IIAs can be included in this permutation);
- An ‘ASEAN/AMS Partner IIAs’ IT with jurisdiction to hear disputes arising under the ASEAN FTAs and the IIAs that individual AMS have concluded with ASEAN FTA partners (as of the time of writing, a total of 50 treaties);
- An ‘ASEAN Plenary’ IT with jurisdiction over claims arising under the IIAs concluded between and among AMS, the ASEAN FTAs and the IIAs that individual AMS have concluded with ASEAN FTA partners (as of the time of writing, a total of 74 treaties).

We suggest that the broader the jurisdictional scope of an ASEAN IT, the more complicated the modalities for its operationalisation, and the costlier its possible establishment. That said, we also note that certain modalities, such as the use of an existing secretariat and the maintenance of a roster of adjudicators
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(rather than full-time, salaried staff), would seem capable of keeping costs down significantly.

The head of ‘efficacy’ refers to the ability of each permutation of an ASEAN IT to address AMS’ particular concerns vis-à-vis the existing ISDS regime. Comparing each permutation of an ASEAN IT with the other, and with a possible MIC, we indicate that not all permutations would likely be equally efficacious in addressing AMS’ concerns. Thus, for example, concerns about the consistency, coherence, predictability and correctness of decisions would seem better addressed by an ASEAN IT with limited jurisdictional scope (for example, an ‘intra-ASEAN’ IT or ‘ASEAN FTA’ IT) than by one with a broader jurisdictional scope (for example, ‘ASEAN/AMS Partner IIAs’ or ‘ASEAN Plenary’ IT) or, indeed, by an MIC. Moreover, concerns about the appointment and identity of arbitrators, including concerns regarding the representation of arbitrators from the ASEAN region, seem much more likely to be addressed by an ‘intra-ASEAN’ IT than by an ASEAN IT with broader jurisdiction or, again, by an MIC. While for other concerns efficacy appears less dependent upon the modality chosen, for these concerns the choice appears significant.

The head of ‘feasibility’ addresses the likelihood of political support for the establishment of an ASEAN IT. We note at the outset that for an ‘intra-ASEAN’ IT the political support needed must come from among AMS themselves. In this respect an ‘intra-ASEAN’ IT may be the most feasible option in theory, insofar as it would be an entirely ASEAN project. It may not be feasible politically, however, considering the rather piecemeal process of ASEAN economic integration since the organisation’s inception. Beyond an ‘intra-ASEAN’ IT, the political support of third states (that is, the ASEAN FTA partners) becomes essential to the remaining permutations. Relying upon both public and private, off-the-record sources, we conclude that although there exists a clear appetite for ISDS reform among ASEAN’s FTA partners, it is less clear: (i) whether all of the FTA partners are willing to entertain reform that is structural and systemic (as an ASEAN IT would be); and (ii) whether the FTA partners would welcome such reform at the regional level.

The head of ‘advantages’ of an ASEAN IT is here treated as an extension of that of ‘efficacy’. That is to say, we ask whether an ASEAN IT (in any of its possible permutations) seems capable of addressing matters of concern to AMS that will not otherwise be addressed (or seem unlikely to be addressed) by other modes of reform (for example, an MIC). Reviewing the full range of concerns expressed by AMS for the reform of ISDS, we conclude that an ASEAN IT may be considered advantageous in order to address certain concerns identified by AMS. Thus, with respect to concerns regarding the general absence of arbitrators from the ASEAN region and with respect to concerns about the consistency, coherence, predictability and correctness of decisions,
an ASEAN IT of the ‘intra-ASEAN’ and ‘ASEAN FTA’ permutations, particularly, would offer solutions and options for reform that are not available under other approaches to ISDS reform.

4. OUTLINE OF THE BOOK

The discussion in the book proceeds as follows. Chapters 1 and 2 play a foundational role. Both address matters that will be of use in contextualising the various ISDS reform proposals vis-à-vis ASEAN in the later parts of the book, and also serve to bring readers who may not be familiar with ASEAN and its practices up to speed. In particular, Chapter 1 serves as a brief introduction to the ASEAN community, including its history, its legal-institutional framework, division of powers between it and the member states, and economic treaty-making activity to date. Chapter 2, similarly, helps to introduce ISDS concepts and procedures that are critical in understanding the global drive for reform. It thus addresses issues such as the general features of IIAs, the principal modes of dispute settlement under existing IIAs and the principal features of the current ISDS regime (that is, jurisdiction, consent, applicable law, procedure, cost/duration, recognition/enforcement of awards, challenge/review of awards).

Having laid the groundwork, Chapter 3 shifts the focus back to ASEAN. This chapter examines the universe of ASEAN’s economic agreements, including: (i) agreements between and among AMS; (ii) agreements between ASEAN and its FTA partners; (iii) agreements between individual AMS and individual ASEAN FTA partners or third countries. We use publicly available sources to undertake an original analysis and ‘mapping’ of the content of 315 ASEAN economic agreements, with particular emphasis placed on their dispute settlement provisions and on their use in ISDS cases to date.\(^{19}\)

\(^{19}\) The principal sources used are: (i) UNCTAD’s IIA Navigator database; (ii) UNCTAD’s Mapping Project database; and (iii) UNCTAD’s ISDS Navigator database. The IIA Navigator and the Mapping Project databases are updated irregularly. Accordingly, data sourced from these databases are, to the authors’ best knowledge, up-to-date and accurate as of the end of October 2021. By contrast, the ISDS Navigator is updated at regular increments, bi-annually. Accordingly, data sourced from this database is, to the authors’ best knowledge, up-to-date and accurate as of 31 December 2020. A further caveat that is applicable in all references to ISDS data throughout the book is that, given the nature of the ISDS regime, complete data on it are lacking. This is in large part due to the ability of disputing parties to keep arbitral proceedings fully confidential. As a result, the figures included here reflect UNCTAD’s compilation of publicly available, treaty-based ISDS cases. UNCTAD’s databases can be accessed at https://investmentpolicy.unctad.org/.
Chapter 4 then moves towards the international context of ISDS reform. It offers an analysis of the four principal concerns or drivers for pursuing ISDS reform, as well as the menu of reform options put forward internationally by states and commentators as a response (ranging from the non-structural and incremental to the structural and systemic). In so doing, this chapter critically assesses reform proposals from an ASEAN standpoint. Proposals are divided and examined under the specific kind of concern that each seeks to address. Each proposal is then elaborated upon, analysed for its expected advantages and potential limitations and assessed from an ASEAN standpoint.

Chapter 5 delves into structural reform proposals in more detail. Our analysis in this chapter revolves around three principal structural reform options that have been identified in international discussions: (i) a standing appellate mechanism; (ii) an investment court system specific to an IIA; (iii) an MIC. Each of these proposals is presented, analysed, elaborated upon for its content and modalities and then subjected to critical assessment from an ASEAN standpoint. Particular emphasis is placed on identifying challenges that all structural reform proposals may face, such as, for example, challenges relating to the recognition and enforcement of their awards by non-participating countries.

Chapter 6 focuses exclusively on conceptualising the possibility of structural regional reform within ASEAN, specifically through the establishment of an ASEAN IT. In addressing the possibility of ASEAN-based reforms we root our analysis firmly in considerations of ASEAN’s development as an integrated community. Chapter 6 thus addresses five factors of likely relevance to AMS when considering the establishment of an ASEAN IT: (i) scope and modalities; (ii) efficacy; (iii) feasibility; (iv) necessity; (v) interaction with other instruments, including RCEP (2020) and a possible future MIC.

A general conclusion then follows, summarising our key findings and takeaways.