

# ASIA-PACIFIC INTEREST GROUP NEWSLETTER

## Note from the Co-Chairs

We are delighted to introduce to members of the ASIL Asia-Pacific Interest Group and beyond, the inaugural ASIL Asia-Pacific Interest Group Newsletter. The year 2020 will long be remembered for the coronavirus pandemic, but 2020 was also a year for a number of important developments in international law in the Asia-Pacific region. Along these lines, this newsletter spotlights some of these developments over the past year. By way of background, the central idea behind the newsletter initiative is the recognition that far from being marginal to developments in international law, Asia has moved to the center of both public and private international law. Whether major trade pacts like the 2020 Regional Comprehensive Economic Partnership or multilateral dispute resolution agreements as in the 2018 United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Medication Convention"), the Asian region has been setting the standard for creating legal frameworks to promote multilateralism, economic growth, and prosperity. At the same time, the Asian region has born legal conflicts and controversies that have attracted the attention of the world over, including maritime and border disputes such as the 2013 South China Sea Arbitration and the India-Pakistan conflict in Kashmir; war in Afghanistan; and human rights concerns such as the Rohingya refugee crisis and the treatment of Uyghurs in Xinjiang, to name a few examples. It is difficult to keep up with the pace and complexity of events. While this newsletter does not attempt to be comprehensive, it does flag key developments and trends. The newsletter not only includes news updates but also expert analysis on region-wide developments as well as hot button legal issues. We are privileged to have Ms. Chiann Bao, a leading expert in arbitration in Asia, to serve as the newsletter's editor. Ms. Bao has been assisted by a team of junior law-trained practitioners and scholars from a number of Asian jurisdictions who have conducted research for this newsletter. We are grateful to Ms. Bao and her editorial team. We welcome any feedback from readers in terms of scope and content for future newsletters.

Matthew S. Erie, University of Oxford  
Weixia Gu, University of Hong Kong Faculty of Law

## Note from the Editor

I am pleased to share with you the inaugural issue of the ASIL Asia-Pacific Interest Group Newsletter. At a time when we have become more siloed than ever as a result of the pandemic and also as a result of geopolitical trends, it is imperative that we remain vigilant in sharing information and establishing forums for healthy discussion and debate. The Asia-Pacific region has seen great activity in international law circles in the past year and this newsletter seeks to cover a few of the hottest and most important topics of the year.

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## Feature: Expert Perspectives on RCEP

by Chié NAKAHARA, Partner, Nishimura & Asahi (Japan)

On November 15, 2020, the Regional Comprehensive Economic Partnership ("RCEP"), a free trade agreement initiated in 2013, was signed – the first-ever virtual signing of an agreement that Association of Southeast Asian Nations ("ASEAN") has undertaken. RCEP involves the 10 ASEAN members and 5 other countries, namely, China, Japan, South Korea, Australia, and New Zealand. This massive development is intended to broaden and deepen ASEAN's engagement with RCEP-participating countries, which account for approximately 30% of the global GDP and 30% of the world's population. RCEP is well-positioned to be a significant boost to economic growth in the region, post-COVID-19 pandemic. Hence, this Feature section, which showcases interviews with leading experts and industry insiders, could not be more timely. The interviewees include, in alphabetical order: Mr. Lijun CAO, an expert in international arbitration, based in China and a partner at Zhong Lun Law Firm; Dr. Deborah ELMS, the founder and Executive Director of the Asian Trade Centre; Ms. Swee Yen KOH, an investment arbitration expert and a partner at Wong Partnership; Jason TAN, the lead counsel from Singapore's Attorney General's Chambers for RCEP negotiations; and the interviewer, Chié NAKAHARA, an expert in international arbitration, based in Japan and a partner at Nishimura & Asahi.

### *What are your perceptions as to what RCEP is, and its implications?*

**CAO:** I see RCEP as signaling a coming of age of the Asia-Pacific region and its various economies. The agreement's signature was achieved upon the tremendous growth and increased interconnection of the region's economies over the past few decades. Looking forward, in signing RCEP, I think all the signatory countries have shown a strong indication of belief as to the further growth potential of the entire region. Now that RCEP provides a clear legal framework for further promoting economic exchanges in the region, it may be that the Asia-Pacific may gradually become where the largest deals in the future will occur and where the largest quantity of deals in the future will be based.

**KOH:** The signing of RCEP is a bright spark in the midst of the COVID-19 pandemic, signalling the positive collaborative efforts of the contracting parties in the future forward, which is a major victory for multilateralism. Considering the coverage of RCEP, its implications are wide-ranging, as it effectively creates one of the world's largest free trade zone with tariffs eliminated for about 92 percent of the goods traded and the presence of a single rule for each product that applies across all 15 contracting parties.

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Our feature article presents the perspectives of four international law experts on the recently signed treaty, the Regional Comprehensive Economic Partnership ("RCEP"). These experts share their insights on questions such as how the treaty has been received in their respective jurisdictions and any relationship that might exist between RCEP and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") as well as China's Belt and Road Initiative ("BRI").

The next article discusses Hong Kong and its prospects in preserving its role as a hub for China-related international arbitration. No doubt readers will appreciate the political sensitivities involving Hong Kong over the past couple of years. The author of this article, a foreign lawyer working at a Chinese law firm based in Hong Kong who regularly han-

dles matters involving Hong Kong-seated China-related arbitrations, sheds light on the concerns as well as opportunities that exist in these circumstances.

Finally, we have brief regional updates which provide a flavor of the more interesting international law-related developments that took place during the course of this year.

I am grateful to Dr. Erie and Dr. Gu for their trust in me to bring this project to life as well as the helpful assistance from the contributors as well as the assistant to the editor. I hope that you will find this inaugural issue to be informative and thought-provoking and look forward to receiving any feedback you may have. Thank you for reading.

Chiann Bao, Arbitration Chambers

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**TAN:** The tremendous undertaking of RCEP with the emphasis on ASEAN centrality during the negotiations has cemented ASEAN's place in the regional economic architecture. While the earlier ASEAN plus one FTAs (which are FTAs concluded between ASEAN and a free trade partner, e.g. ASEAN-China FTA) had laid the ground, I see RCEP as setting a new precedent for ASEAN as an economic bloc and how it interacts with the rest of the world.

**ELMS:** RCEP includes three important elements. First, it delivers direct economic benefits creating a market in Asia for Asia. Second, it should be viewed as a baseline with future adjustments to broaden and deepen the included commitments. This could include the acceleration of tariff cuts and the elimination of additional services and investment restrictions. Third, although RCEP was not originally conceived to create a platform for managing trade and economic issues in Asia, by the time it comes into force, this function will likely be quite important. It allows officials, ministers, and leaders to get together regularly from across Asia.

### **How does RCEP work with the CPTPP/TPP? Also, How does RCEP work with China's Belt and Road Initiative ("BRI")?**

**CAO:** I see RCEP as clearly supporting the BRI. RCEP supplements the BRI in that it sets out an actual legal framework for regional and cross-border cooperation, whereas the BRI, as a large-scale global initiative, does not provide a self-contained legal framework.

RCEP and the BRI have strong overlap. In terms of the objectives, Article 1.3 of RCEP sets out RCEP's goals. The first of the listed goals is the establishment of a mutually beneficial economic partnership framework to facilitate the expansion of regional trade and investment. This entirely reflects the BRI's underlying philosophy. In terms of participation, we know that many RCEP signatory states are also involved in the BRI. For these states, RCEP will facilitate their continual involvement in the BRI.

**KOH:** As noted by Singapore's Prime Minister Lee Hsien Loong at a forum earlier in November 2020, the CPTPP went for a deep agreement that requires substantial commitments from all parties involved, while RCEP trade pact is a "different animal, for a different purpose" - not as deep, but still a significant step towards reducing trade barriers. That

being said, I believe that RCEP, together with the CPTPP, will work together to strengthen the economies of the contracting parties, building on their respective strengths in technology, manufacturing, agriculture, and natural resources. RCEP is a feather in the cap for global trade and multilateralism. RCEP shows that China and ASEAN have the responsibility to jointly fight against anti-globalisation and trade protectionism, and strive to bring bright prospects to the region and the world. It is of note that despite the severe economic impact of the COVID-19 pandemic, the trade volume between China and ASEAN has risen against the downward trend. In fact, ASEAN overtook the EU to become China's largest trading partner during the January-June period in 2020. The signing of RCEP echoes China's BRI to promote regional integration and further strengthen communications with countries along the BRI. They are complementary to each other, with RCEP reducing policy barriers and the BRI overcoming physical logistical hurdles to facilitate greater access to the vast Afro-Eurasian supercontinent.

**TAN:** RCEP will serve as a roadmap for other economic agreements within Asia such as the trilateral FTA being negotiated between China, Japan, and Korea. I believe RCEP complements CPTPP as well as BRI in facilitating greater and easier trade and investment flows across the Asia-Pacific region. Contrary to popular perception, RCEP is not in competition with CPTPP. Together with CPTPP and BRI, they are pathways towards a Free Trade Area of the Asia Pacific.

### **How is RCEP being received by your community? What is the expected impact of RCEP on trade in your jurisdiction?**

**CAO:** The general reception in China is optimistic. RCEP can pave the way both for Chinese goods and services to be more easily exportable to the entire region and for regional goods and services to be more easily sold and bought in China. This is of clear benefit to our people and economy, and also to our trading partners.

In terms of economic impact, I think RCEP seeks to "pierce the veil" in the form of the various barriers to trade that may have been historically present that have been limiting regional trade from further or faster growth. However, I should say that I think that regional trade in the Asia-Pacific does not depend on RCEP. For instance, over the past four

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or five decades, we know that trade volumes in the entire region have risen steadily and successfully reached very high levels without RCEP. This is the result of the dynamism and spirit of Asian societies. I think what RCEP seeks to do is to consolidate these gains and to provide a framework to assist the various countries in the region in breaking through any potential “glass ceilings” that may be holding back further economic growth.

**ELMS:** The business community is interested, although since Singapore already has a complex web of existing free trade agreements (and signed an additional one right after RCEP with the UK and substantially concluded negotiations with the Pacific Alliance), it remains unclear to many how RCEP will provide additional benefits. RCEP is complicated and will take time to understand for most companies.

From the viewpoint of Singapore and ASEAN, the biggest gains will not be tariff cuts. Instead, it will be the services and investment provisions, as the underlying ASEAN+1 agreements were, at best, quite weak. RCEP therefore goes beyond existing trade arrangements.

**KOH:** RCEP has received extremely positive reception within Singapore. Singapore’s Minister for Trade and Industry Chan Chun Sing said on November 15, 2020, after signing, that RCEP will be “*the bright spot that points the direction ahead*” during the COVID-19 global pandemic. RCEP will bring about additional preferential trade in goods market access coverage, notably further access into China, Japan and Korea, simplified customs procedure and enhanced trade facilitation measures, heightened foreign participation in the services sectors, improved investment rules and disciplines to better support investments, and streamlined rules of origin to enable businesses to better take advantage of regional value chains. While Singapore is already a party to many free trade agreements, including with the respective contracting parties to RCEP, and one may therefore conclude that RCEP pact (which has not come into effect yet) is unlikely to add much to Singapore’s trade numbers, the benefits are very much more nuanced and can only be seen in the long term. The general consensus is that Singapore, as a strategic regional hub with global connectivity, regulatory certainty and a business-friendly environment, will no doubt benefit from the spillover effects of a stronger ASEAN bloc in the long run.

**TAN:** Singapore fully supports RCEP which will help boost regional value chains; benefit stakeholders; promote development of regional economies; and support the multilateral trading system. More importantly, economic and trade integration also contributes towards regional peace and security. RCEP is a good example where countries have put aside their other differences (e.g., territorial disputes), to agree on a trade deal to benefit their people. It is projected that RCEP will lead to growth in trade, given that it is a big step up from the existing ASEAN plus one FTAs including additional preferential market access, new areas of cooperation as well as consolidated and enhanced rules and disciplines.

### *What are the ISDS provisions and the reasons behind such arrangement?*

**ELMS:** There is no ISDS in RCEP. Instead, there is a commitment to create an investment protection mechanism within two years of entry into force, and to complete the negotiations within three years after launch. The issue of ISDS became controversial partway through negotiations, so although they worked out a very thorough ISDS mechanism in the negotiations, they put it on hold for future review.

**CAO:** There appears to be no provision providing a mechanism for individual investors to sue signatory governments for breaches of the standards for treatment of investments set forth in Chapter 10. This appears to reflect a hesitance, or at least an inability to presently reach a consensus, amongst RCEP signatories in relation to the world’s existing ISDS arbitration regime. Nonetheless, Article 20.2 of RCEP does provide that RCEP is to coexist with the national parties’ existing international agreements. Thus, it would appear that ISDS provisions from existing investment treaties between or among member states can continue to be invoked by investors in their disputes with host states. On reflection, a potential issue may be whether the standards of protection of investments that are set out in RCEP can be utilized by investors in ISDS claims that they may wish to commence under procedures set out in existing investment treaties between and among the various RCEP signatory states. That perhaps might be an interesting area for deeper consideration.

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### *Are there any lessons that RCEP states can learn from the CPTPP concerning the ISDS mechanism?*

**KOH:** RCEP may draw from some of the substantive provisions in the CPTPP, for example: One, the affirmation of the states' authority to regulate and specifically stating that its provisions should not be construed "to prevent a Party from adopting, maintaining or enforcing any measure" intended to "ensure that investment . . . is undertaken in a manner sensitive to environmental, health or other regulatory objectives." A special Annex similarly records the parties' "shared understanding" that a state's "nondiscriminatory regulatory actions" directed towards "legitimate public welfare objectives" will not ordinarily constitute indirect expropriation. Two, the text in the CPTPP which seeks to define and narrow the scope of its guarantee of fair and equitable treatment (FET) to foreign investors, and specifically stating the mere fact that a state may act in a manner inconsistent with an investor's expectations will not in itself constitute a breach of FET. Three, the establishment of an official commission appointed by the state parties with the power to issue binding joint interpretations of treaty provisions on behalf of the state parties.

### *What are your perceptions as to what RCEP might mean for the United States in the incoming Biden administration?*

**ELMS:** RCEP presents challenges to all non-members and particularly to the United States, the EU, and India. RCEP creates greater opportunities for companies in Asia to craft goods and services and manage investments in Asia. It is harder to compete with products and services being delivered from California or Iowa. If RCEP members seize the opportunities of creating future trade rules for the region, it will put further pressure on non-member governments.

**CAO:** We know that RCEP is a Asia-Pacific agreement which is not reliant on the United States. In recent years, we have seen that there has been some political and social instability in the United States. Against that, countries in the region had to adapt. The new US administration has to work with the reality brought about by that. It is interesting that many countries traditionally regarded as US allies are RCEP signatories, despite the US's absence from the agreement. When the US pulled out of the TPP some years ago, we know also that eleven Pacific nations proceeded to

sign the CPTPP, without the US. Both the CPTPP and RCEP show that the Asia-Pacific region is comprised of many independent countries which will all make the decisions that are in their own best interests. Even the UK, earlier this year, had publicly announced its wish to join the CPTPP. This shows that the new global reality is that the world is no longer like it was in the 1970s and 80s when I was growing up, when the US was solely dominant economically and politically. The incoming US administration has to work with the fact that Asia is comprised of big players now, players that are fully able to work with each other to set rules for their markets and to decide on their preferred trading partners.

**KOH:** Considering that the United States is not a party to the two major trade agreements in the Asia-Pacific region, the successful conclusion of RCEP may create incentives for President-elect Joe Biden to rejoin the CPTPP, to bolster US alliances and counter China's growing influence in the region. During the Trump administration, there appears to be a movement towards unilateralism, with the United States not actively seeking to collaborate with the region, and this may be an opportunity for the United States to reaffirm its commitment to multilateralism and global trade.

**TAN:** RCEP is the largest FTA in the world focusing on Asia and Oceania, without the involvement of the US. Leaving aside the issue of US's trade relations with China, the US will have to reconsider and recalibrate the US's engagement with the rest of Asia. One of the immediate priorities of the new administration will be economic recovery from the pandemic, and trade with Asia may very well contribute towards that. At a broader level, the US has to decide on its trade policy and approach, taking into account the domestic sentiments on trade agreements especially in light of the earlier retreat from the TPP.

✂ **Editor's note: Please note that the views expressed by interviewees are their own, and do not necessarily reflect the positions of their respective institutions and governments. ■**



## Can Hong Kong Preserve its Role as a Hub for Resolution of China-related International Arbitration?

by Eliza Jiang, Registered Foreign Lawyer, Fangda Partners

The special administrative region south of China has been known to be the gateway to connect China with the rest of the world, and a hub for China-related international commercial arbitration for its robust and independent judiciary, its pro-arbitration legislative scheme, and well-regarded arbitral institutions. In the last year, however, the widespread pro-democracy protests that engulfed the city and recent legislative and political developments in the territory have cast doubts over this status. In the new world order in which the economic centre of gravity is pulling towards Asia with China in the lead (especially with the signing of the RCEP), to what extent can Hong Kong maintain its role as a hub for the resolution of China-related international commercial disputes?

I do not intend to engage in crystal-ball gazing, but it is possible to outline the key components of the ecosystem required to maintain Hong Kong's vibrant international disputes status, and assess whether they have changed with the recent developments (and if not, could they?).

### One Country, Two Systems, and Two Arbitration Regimes Solidify Hong Kong's Position as an International Dispute Hub

As we know, Hong Kong maintains a separate governing and economic system from that of mainland China, which permits it to operate under its own legal system based on English common law. The territory's common law system underpins an arbitration regime fundamentally different from that of mainland China.

For instance, Hong Kong has adopted and enacted the 2006 UNCITRAL Model Law (the "Model Law") in its arbitration legislation, which upholds the principle of competence-competence by which an arbitral tribunal has the power to rule on its own jurisdiction. By contrast, China has not yet adopted the Model Law, so the competence-competence principle is not entirely enshrined in the Chinese Arbitration Law (though several top-tiered mainland Chinese arbitration institutions have been upholding the principle in their rules). Practically, this means that if a jurisdictional objection against the tribunal is raised to a Chinese court in a

Chinese-seated arbitration, the court would consider itself more competent to make the determination and stay the arbitration while doing so. In a Hong Kong-seated arbitration, the same objection would be determined by the tribunal and only be subject to the court's review if the tribunal decides that it has jurisdiction to decide the dispute.

Further, parties arbitrating in Hong Kong could choose either *ad hoc* or institutional arbitration, whereas an *ad hoc* arbitration with a mainland Chinese seat is generally not permitted with few exceptions for companies registered in designated free-trade zones. International arbitrations in mainland China must be administered by a mainland Chinese arbitral commission, and not by a "foreign" arbitral institution (with the exception of cases wherein the parties are wholly foreign owned entities incorporated in designated free-trade zones).

These fundamental differences align Hong Kong's arbitration regime with international practices and conventions. They have also been conducive to Hong Kong's rise as an international arbitration hub particularly with China-related international commercial disputes (e.g., with either of the parties being of Chinese nationality, with assets or evidence in China, with the subject matter of the dispute being in China, or with Chinese laws as the governing law).

However, the promulgation of the sweeping National Security Law ("NSL") in June 2020 in Hong Kong criminalising acts of secession, subversion, terrorism and collusion with foreign forces to endanger national security has sparked concerns over Hong Kong's autonomy from mainland China (with sweeping police powers, the dynamics of a new Beijing office set up in the city, and potential erosion of freedom of speech and dissenting voices). The legislation in itself does not alter the existing commercial dispute resolution order or arbitration regime in Hong Kong. This law (primarily criminal in nature) was intended to be a response to 2019's widespread social unrest and the largest protests the city had seen since its return to the Chinese sovereign in 1997.

There is also reassurance from the policy perspective that there is national Chinese support for the development of Hong Kong as an international legal and dispute resolution services centre in the Asia-Pacific region, as well as a service centre for resolving commercial disputes relating to the BRI.

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This support was expressed in the chapter dedicated to Hong Kong and Macao under the national “13th Five-Year Plan,” and the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area.

In line with this policy of support, Hong Kong arbitral awards have a great record of enforcement in the mainland under the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong (the Arrangement) signed in 1999, and its Supplemental Arrangement signed on November 27, 2020.

On October 1, 2019, Hong Kong became the first and only jurisdiction outside mainland China for which the mainland courts would grant interim measures in aid of foreign institutional arbitration seated in Hong Kong. Prior to this arrangement, Chinese courts would, in general, order interim relief in support of arbitrations seated in mainland China only. With this arrangement, parties to China-related arbitrations seated in Hong Kong could apply to Chinese courts for preservation of assets or evidence in mainland China.

Hong Kong’s connection with the mainland combined with its own separate arbitration regime enables parties arbitrating in Hong Kong to have the features of ‘foreign’ and ‘off-shore’ arbitration, while also reaping the benefits of enforcement of their arbitral awards in China and having the ability to apply for interim measures supported by the Chinese courts.

Further to this connection there is also Hong Kong’s integration into the Greater Bay Area plan to transform Hong Kong, Macau, and nine Guangdong cities into an integrated commercial, finance, and technology hub. As part of this integration, Hong Kong’s common law-trained lawyers will soon be allowed (upon passing the relevant exams) to practise civil and commercial law in the mainland cities of the Greater Bay Area as part of a pilot scheme launched in October 2020. From the arbitration human capital perspective, Hong Kong will be equipped with common law-trained lawyers who have practical experience with Chinese civil law issues. This bodes well for Hong Kong’s capacity-building of sophisticated practitioners to deal with China-related international arbitrations applying PRC law as the governing law.

### The Optics and Effects of China’s “Tighter” Grip on Hong Kong’s Arbitration Ecosystem

Notwithstanding the optimistic observations on Hong Kong’s arbitration regime, it is worth considering the optics of recent political and legislative events on the broader arbitration ecosystem.

Since the imposition of the NSL, a handful of events collectively create the impression that there might be cause for concern about Hong Kong’s autonomy under the “One Country, Two Systems”: police have raided a pro-democracy newspaper and arrested its head under the NSL; a non-permanent judge of the territory’s top court resigned citing unspecified reasons related to the NSL; a number of western countries have suspended their extradition agreements with the city; numerous activists have either fled or been arrested; four opposition legislators were disqualified under a new Chinese law barring anyone “unpatriotic” from sitting on its legislative council; Beijing has called for judicial reform in Hong Kong making it clear that anti-China activism will no longer be allowed among legislators and officials by law.

These events beg the question of whether Hong Kong can remain a neutral and independent dispute resolution venue for cases involving mainland Chinese parties (whether a private party or a state-owned entity). A closer look at the decision-makers in an arbitration would help answer this question – that is the arbitral tribunal, the arbitral institutions (for primarily procedural matters), the courts at the seat of arbitration, and the courts at the place of enforcement.

That the parties are able to choose their arbitrator is one of the key features of arbitration. Parties are involved and have control in selecting the individuals who decide their disputes. Each of the two parties designate its own co-arbitrators who jointly appoint the presiding arbitrator (except in certain situations involving, for instance, joinder of an additional party where the institution might appoint the entire panel). Arbitration laws (including Hong Kong’s) require arbitrators to be independent and impartial, with parties having the right to challenge the appointment of the arbitrators if there are justifiable doubts as to their impartiality or independence.

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For parties who choose institutional arbitration, the institutions issue decisions on procedural matters (preliminary jurisdictional objections, consolidation of arbitrations, joinder of additional parties, etc.) and constitution of the arbitral tribunal. Hong Kong is home to reputable arbitration institutions such as the Hong Kong International Arbitration Centre and the International Court of Arbitration of the International Chamber of Commerce - Asia Office. The decision-makers at these institutions are practitioners from a multitude of sectors, geographies, nationalities, and they are not required to have any links to Hong Kong or China. As matters currently stand, the arbitrators' and the institutions' roles are rather insulated from the political climate on the ground in Hong Kong. However, the same might be different for the Hong Kong courts.

The Hong Kong courts could play a supervisory or enforcement role if the arbitrating parties choose Hong Kong as the seat of the arbitration, or if they wish to enforce an award in Hong Kong. A specialist list of judges in the Hong Kong Court of First Instance adjudicates on arbitration matters referred to as in the construction and arbitration lists. These tribunals have injunctioned proceedings including in mainland China and have enforced arbitral awards against entities including Chinese state-owned enterprises.

According to the World Economic Forum's 2019 judicial independence rankings, Hong Kong ranked first in Asia and eighth overall globally for judicial independence. Eminent judges from other Commonwealth jurisdictions are invited to sit as non-permanent judges of the Court of Final Appeal (the "CFA"), Hong Kong's highest court.

However, in September 2020, one of these judges, the former Chief Justice of New South Wales, Justice James Spigelman, resigned from the court presumably over concerns with the content of the NSL. This event, along with news in late November 2020 that British officials were reviewing whether British judges should continue to sit as non-permanent judges on the CFA due to the "chilling effects" of the NSL, created the optics in the international community (whether justified or not) that something has changed with Hong Kong's legal system. This perception may dissuade parties from arbitrating in Hong Kong.

In September 2020, Hong Kong's Secretary for Justice Teresa Cheng wrote in an op-ed in the *South China Morning Post* that the doctrine of separation of powers has no place in the political structure of Hong Kong. She averred that the executive, legislative, and judicial branches are interrelated with delegated powers and functions to discharge their constitutional duties under the executive-led system.

It is undeniable that Hong Kong's constitutional and political structures, a special administrative territory of the PRC under the "One Country, Two Systems", are fundamentally different to that of other sovereign states. So, it is difficult to measure Hong Kong's legal system by the same yardstick as western sovereign democracies. Singapore, a city-state with its unique political and civil liberties features also differ from other western democracies, yet it has thrived at becoming a favoured arbitration hub.

While a full discussion of the effects of the political structural differences on Hong Kong's legal system is beyond the scope of this commentary, it suffices to consider (for our purposes) whether a sophisticated, efficient, reliable, and neutral arbitration ecosystem can thrive in Hong Kong's current socio-political environment. This depends on whether the arbitration ecosystem can be insulated from being politicised to focus on solidifying its capabilities (a pool of international practitioners and arbitrators, an arbitration regime aligned with international standards, an arbitration-friendly judiciary, world-class arbitral institutions, and preferential measures for China-related arbitration). That and if the prospective judicial reform to instill principles of patriotism in legislation do not impact upon the arbitration ecosystem and its capabilities, then Hong Kong's longevity as a popular dispute resolution hub can be preserved.

*The views expressed herein are the author's own and do not represent the views of Fangda Partners. ■*



## Regional Updates

### Australia

#### **Australian Defense Force to release report on Afghan war crimes**

On November 19, 2020, Australian Defense Force chief Angus delivered results of a four-year inquiry into Australian special forces in Afghanistan. The war crime report has "credible evidences" that nineteen current or ex-Aussie soldiers executed 39 Afghan prisoners and civilians between 2005 and 2016. The report examined 57 incidents of alleged misconduct and discovered that army commanders encouraged junior Australian soldiers to shoot prisoners to get their first dispatch. Australian Prime Minister Scott Morrison assured that Australia will prosecute its soldiers in response to the allegations. The unlawful murders may tarnish the country's international reputation.

The Inspector-General of the Australian Defense Force Afghanistan Inquiry Report is available at <https://afghaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

#### **Australian government to reevaluate its Bilateral Investment Treaties (BITs)**

In July 2020, the Australian Federal Government announced that it would undertake a four year review its fifteen bilateral investment treaties: those with Argentina, China, Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay. Triggered by the continued public debate over investor-state dispute settlement, the Australian Department of Foreign Affairs and Trade is tasked with carrying out this review, taking consideration of the criticism of the current system, including the costly and time-consuming arbitration claims from investors. Upon review and consideration of submissions made by the public, the Government will decide whether to continue, reconsider, or terminate the Australia's BITs, or substitute them with free trade agreements.

The discussion paper is available at <https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties>.

#### **Australia and India reach an agreement to use each other's military bases**

On June 4, 2020, Australian Prime Minister Scott Morrison and Indian Prime Minister Narendra Modi signed a deal to

get a hold of each other's military bases. The deal, known as the Mutual Logistics Support Agreement (MLSA), permits Australian and Indian navy and military aircrafts to replenish and use maintenance facilities at one another's bases. For more information see <https://www.aljazeera.com/news/2020/6/4/india-and-australia-sign-deal-to-use-each-others-military-bases>.

### New Zealand

#### **The Supreme Court of New Zealand hears Taranaki seabed iron sand mining appeal**

A company wanting to extract millions of tonnes of iron sand from the seabed off the South Taranaki coast is making a final appeal to the Supreme Court of New Zealand. Trans-Tasman Resources (TTR) wants to overturn a Court of Appeal decision from April, which said multiple mistakes were made at the decision-making committee level of the Environmental Protection Authority (EPA). The court said it could not rule out the possibility that a more limited application on different terms might be acceptable, and it referred the case back to be reconsidered.

### Central Asia and Mongolia

#### **Uzbekistan ratified Commonwealth of Independent States (CIS) Convention on legal assistance and legal relations in civil, family and criminal matters 2002 (Chisinau Convention)**

On July 12, 2020, Uzbekistan ratified the Chisinau Convention which is aimed at ensuring reliable legal protection of personal, property and non-property rights of persons residing in the territory of the parties, as well as cooperation of the competent authorities of the parties in the field of legal assistance in civil, family and criminal cases. Currently, the participants of the Convention are Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan. The Convention is available in English at <http://cisarbitration.com/wp-content/uploads/2017/02/Minsk-Convention-on-Legal-Assistance-and-Legal-Relations-in-Civil-Family-and-Criminal-Matters-english.pdf>.



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### **Kazakhstan lost a dispute against Moldovan Investors at Dutch Appellate Court**

This dispute arose from an oil investment in 2010, when Kazakhstan's state authorities took over two oil and gas fields near the Mangistau region, in the southwest of Kazakhstan. Moldovan investors submitted the dispute to the Arbitration Institute of Stockholm Chamber of Commerce (SCC) according to art. 26(4)(c) of the Energy Charter Treaty. In 2013, the arbitral tribunal found Kazakhstan liable for breaching the fair and equitable treatment provisions of the Art. 10 (1) of the Energy Charter Treaty. Although Kazakhstan created obstacles for recognition of the award, on July 14, 2020, the Amsterdam Court of Appeal conclusively rejected all of Kazakhstan's objections and recognized the arbitral award. The Dutch Appellate Court granted recognition of USD 543 million arbitration award in favor of Moldovan investors. Kazakhstan is currently considering its appeal options.

For more information see <https://globalarbitrationreview.com/dutch-appeal-court-recognises-award-against-kazakhstan>.

### **Kazakhstan overcomes a claim under Soviet treaty**

A Canadian joint venture commenced an UNCITRAL arbitration regarding a USD 917 million claim against Kazakhstan over the cancellation of a contract for a gold mining enterprise. In 1996, Gold Pool signed a contract under Kazakh law to manage a state-owned Kazakhaltyn JSC and its three gold mines in Northern Kazakhstan. According to the state's position, Kazakhaltyn encountered debts, idle and flooded mines, delays, unpaid wages, and underprepared working camps. In 1997, the state terminated the contract. After an international commercial arbitration claim in 2000, the claimant initiated arbitration proceedings in March 2016 under the Canada-USSR BIT of 1989. A hearing took place in Paris in June last year, and the tribunal concluded that Kazakhstan was not bound by the BIT. Although this claim was dismissed, Gold Pool won a USD 50 million award in 2019. The arbitral tribunal found that the state was not a legal successor to the Canada-USSR bilateral investment treaty (BIT) and accordingly dismissed the claim for lack of jurisdiction on July 30, 2020.

For more information see <https://globalarbitrationreview.com/kazakhstan-defeats-claim-under-soviet-treaty>.

### **International Criminal Court allows for War Crimes Inquiry into Afghanistan to Proceed**

A unanimous decision by the Appeals Chamber of the International Criminal Court (ICC) on March 5, 2020, authorized the Prosecutor to initiate an investigation into alleged crimes in relation to the situation in Afghanistan. The Prosecutor of the ICC, Fatou Bensouda requested authorization from Pre-Trial Judges to commence investigation into the alleged crimes in relation to the armed conflict in Afghanistan since May 1, 2003. However, on April 12, 2019, the Pre-Trial Chamber II rejected the request on the basis that the investigation would not be in the interest of justice. The Prosecutor filed an appeal against the decision, and the recent decision of the ICC amends the same in favor of the Prosecutor.

For more information see: <https://www.icc-cpi.int/afghanistan>.

### **United States-Taliban Peace Agreement 2020**

A historic peace deal was signed by the United States and the Taliban on February 29, 2020 following eighteen months of talks between the two parties in a bid to end the eighteen-year war in Afghanistan. The Agreement addresses a number of issues; namely, the removal of US forces from Afghan soil within fourteen months, the release of 5,000 prisoners, the elimination of sanctions against their members, the potential establishment of an Islamic system of governance, and assurance that Afghanistan would not again become a sanctuary for Al Qaeda or other terrorist groups that may pose a threat to the United States. The Agreement also provides for a permanent and comprehensive ceasefire and the start of intra-Afghan negotiations. The Agreement may be read here: <https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf>.

## **Mainland China**

### **ICC Prosecutor declines to hear case alleging genocide against Uyghurs in Xinjiang**

On December 14, 2020, the Office of the Prosecutor of the International Criminal Court in the Hague stated it will not take further complaints made by exiled Uyghurs that Chinese officials are responsible for acts amounting to

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genocide and crimes against humanity committed against Uyghurs falling within the territorial jurisdiction of the ICC on the basis that they occurred in part on the territories of Tajikistan and Cambodia, States that are party to the Rome Statute. The Office determined that since China, where most of the alleged acts occurred, is not party to the Rome Statute, the ICC does not have jurisdiction in the matter. Further, the alleged crimes of deportation that occurred in Tajikistan and Cambodia did not amount to the crime against humanity of deportation under article 7(1)(d) of the Rome Statute within the jurisdiction of the Court. <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>.

### Foreign administered arbitration upheld by Chinese courts

On June 29, 2020, the Shanghai No. 1 Intermediate People's Court upheld an arbitration agreement providing for Singapore International Arbitration Center ("SIAC") arbitration in Shanghai in the case of Daesung Industrial Gases Co., Ltd v Praxair (China) Investment Co., Ltd. Subsequently on August 6, 2020, in the case of Brentwood Industries (US) v Guangzhou Zhengqi Trading CO Ltd., the Guangzhou Intermediate People's Court also ruled that an ICC arbitration award made in Guangzhou should be considered as a Chinese arbitral award with foreign element and be enforced under the PRC Arbitration Law and Civil Procedural Law instead of the New York Convention. <https://www.chinajusticeobserver.com/law/x/2015-sui-zhong-fa-min-si-chu-zi-no-62-20200806/chn>.

### China welcomed the European Union ("EU")'s decision to authorize the signature on a China-EU agreement on geographical indications ("GI")

The EU recently adopted a decision on the signature of the GI agreement, which will protect each side's 100 GIs. Since the two sides concluded their negotiations on the agreement in October 2019, China and the EU have been respectively going through internal procedures for ratification, and China has completed the procedures. This is China's first comprehensive, high-level bilateral agreement on GIs, and the first major trade agreement between China and the EU in recent years. <https://data.consilium.europa.eu/doc/document/ST-8361-2020-INIT/en/pdf> (full-text).

## Hong Kong SAR

### Hong Kong National Security Law

The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the National Security Law) was gazetted and took immediate effect on June 30, 2020.

The full text of the National Security Law is available here: <https://www.elegislation.gov.hk/hk/A406>. An English translation of the National Security Law can be found here: [http://www.xinhuanet.com/english/2020-07/01/c\\_139178753.htm](http://www.xinhuanet.com/english/2020-07/01/c_139178753.htm) (for reference only).

The Chief Justice Geoffrey Ma has released a statement on the National Security Law and how he sees it operating within the current judiciary. The full text of the statement is available here: <https://www.info.gov.hk/gia/general/202007/02/P2020070200414.htm>.

## Singapore

### Changes to the Singapore High Court's admiralty jurisdiction

High Court (Admiralty Jurisdiction) (Amendment) Act 2020 was gazetted and came into force on June 10, 2020. It allows salvors to invoke the Singapore High Court's admiralty jurisdiction to obtain security for money they may be owed under Article 14 of the 1989 Salvage Convention or Special Compensation Protection and Indemnity Clause (SCOPIC). For the full text of the legislation see: <https://sso.agc.gov.sg/Acts-Supp/27-2020/Published/20200615?DocDate=20200615>.

## Japan

### Signing EPA between United Kingdom and Japan

On October 23, 2020, the representatives of the UK and Japan signed the Economic Treaty Agreement. Under the new treaty structure with UK and EU, Japan aims to protect economic profits that were generated before the UK left the EU.

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### **35th ASEAN Forum**

On October 14, 2020, the 35th ASEAN forum took place online and discussed the future of free interaction in Indo-Pacific Ocean and establishing an ASEAN centre of infectious diseases.

## **India**

### **The 'Enrica Lexie' Incident (Italy v. India)**

On June 26, 2015, Italy commenced arbitration in relation to claims arising from the United Nations Convention on the Law of the Sea ("UNCLOS"). The arbitral tribunal issued an award, finding that Italy, not India, had jurisdiction to prosecute two Italian marines accused of killing two Indian fishermen in 2012. The Court ordered India to halt its prosecution of the marines and Italy to prosecute them and pay compensation to India for the loss of life, material damage and "moral harm" suffered by the surviving crew of the fishing ship. The Permanent Court of Arbitration invited the two countries to enter into negotiations to reach a final financial settlement.

For further information see: <https://pca-cpa.org/en/cases/117/>. ■