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A Multilateral Approach to Investor-State Dispute Settlement Issues in the Asia-Pacific Region

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Bilateral agreements are not the optimal solution to address modern challenges regarding the resolution of investment disputes. The time has come for multilateral agreements to define a clear procedure for resolving investment disputes and the formation of arbitration for these purposes. On November 15, 2020, ASEAN members and five regional partners signed the Regional Comprehensive Economic Partnership (RCEP), arguably the largest free trade agreement in history. Although the RCEP agreement defines the basic principles of legal protection of investments, it does not contain a procedure for settling disputes directly between investors and parties to the agreement, i.e., Investor-State Dispute Settlement (ISDS), but rather postpones the issue for future negotiations. Nevertheless, a majority of countries understand the importance of investment protection and have significant outward FDI that will support stronger ISDS protections within a multilateral framework. Therefore, it is recommended that in the near future member countries will come to an agreement and adopt appropriate amendments to the RCEP regarding ISDS.

Keywords
Regional Comprehensive Economic Partnership, RCEP, Investor-State Dispute Settlement, ISDS, BIT, FTA, Multilateral Trade

1. Introduction

On November 15, 2020, ASEAN members and five regional partners signed the Regional Comprehensive Economic Partnership (RCEP), arguably the largest

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free trade agreement in history.[1] In addition to covering a market of 2.2 billion people with an estimated 30 percent of the world's GDP,[2] the RCEP was seen as a way for China to counter the US influence in the region, particularly following the withdrawal of the US from the Trans-Pacific Partnership (TPP; currently the Comprehensive and Progressive Trans-Pacific Partnership or CPTPP).[3] While not as comprehensive as the CPTPP in terms of labor rights, environmental and intellectual property protections, the RCEP's market size is nearly five times greater than that of CPTPP. Notably, it is the first trade agreement to include China, Japan and Korea altogether,[4] and may add additional members, including India, who opted out during negotiations over concerns related to Chinese imports.[5] Moreover, the RCEP may have significant political and diplomatic benefits, e.g., between Korea and Japan, whose relations have deteriorated dramatically over the last several years, but who will be incentivized to work together as they are poised to gain the most from the agreement through the elimination of tariffs on 83 percent of goods trade between them.[6]

Although the RCEP agreement defines the basic principles of legal protection of investments, it does not contain a procedure for settling disputes directly between investors and parties to the agreement. Investor dispute resolution mechanisms, found in most of today's BITs, FTAs and even some multilateral agreements such as the CPTPP, allow foreign investors of a party (individuals or companies) to pursue legal remedies directly against the government of another party arising out of the breach of an investment provision of the agreement. This system is called investor-state dispute settlement (ISDS) and was widely expected to be included in the RCEP. During negotiations, however, Malaysia's trade minister Datuk Darell Leiking revealed that each of the 15 parties had not only agreed to exclude ISDS provisions from the deal, but also agreed to re-examine the issue within two years.[7] Some experts oppose the inclusion of ISDS provisions in modern treaties, with many

1 ASEAN Secretariat, ASEAN Hits Historic Milestone with Signing of RCEP (Nov. 15, 2021), https://asean.org/asean-hits-historic-milestone-signing-rcep.

2 *Id*.

3 J. Pearson, *Explainer: What Happens Now the RCEP Trade Deal Has Been Signed?*, Reuters, Nov. 16, 2021, https://www.reuters.com/article/us-asean-summit-rcep-explainer-idCAKBN27W0WC.

4 *Id*.

5 R. Panda, *A Step Too Far: Why India Opted Out of RCEP*, 14 Global Asia (2019), https://www.globalasia.org/v14no4/feature/a-step-too-far-why-india-opted-out-of-rcep_rajaram-panda.

6 K. Ferrier, *Could RCEP Help Improve South Korea-Japan Relations?*, Diplomat, Nov. 24, 2020, https://thediplomat.com/2020/11/could-rcep-help-improve-south-korea-japan-relations.

7 R. Yunus, *RCEP talks to proceed without ISDS*, Malaysian Reserve, Sept. 13, 2019, https://themalaysianreserve.com/2019/09/13/rcep-talks-to-proceed-without-isds.

issues such as cost, lack of appellate mechanism, third-country treaty shopping, and procedural legitimacy, among others having been cited by many government officials tasked with negotiating trade agreement,[8] as well as numerous UNCITRAL reviews.[9] Others believe that the lack of an investor-state dispute settlement procedure is a serious flaw in the agreement because foreign investors who feel that their rights under the RCEP have been violated cannot seek legal recourse via international arbitration, and instead have to rely on the judiciary of the particular member state-which is not always regarded as ideal.[10]

This research analyzes arguments for and against including an investor-state arbitration procedure within the RCEP. Although the agreement does not yet resolve the issue of investor protection, its pragmatic approach gives members time to re-assess and come to a consensus on how best protect and thereby encourage cross-border investment. This essay is divided into five sections including Introduction and Conclusion. Part II will discuss the development and key issues involved in investor-state arbitration in the Asia-Pacific Region, and highlights specific issues and cases involving major players such as China, South Korea, and India. Part III will analyze the investment dispute settlement issues in context of the RCEP, as well as other regional and multilateral agreements such as the CPTPP and the WTO, among others. Part IV will preview ISDS within RCEP. Part V will conclude that future RCEP negotiations should include a framework of investment protection that provides investors adequate access to remedies for violations of its investment provisions, while at the same time curbing some of the well-documented problems with the current ISDS regime.

8 *See, e.g.,* Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union (Jan. 15, 2019), https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

9 *See, e.g.,* Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session, UNCITRAL, A/CN.9/930/Rev.1 (Dec. 19, 2017), http://undocs.org/A/CN.9/930/Rev.1; Possible Reform of Invest-State Dispute Settlement (ISDS), UNCITRAL, A/CN.9/WG.III/WP.166 (July 30, 2019), https://uncitral.un.org/sites/uncitral.un.org/files/wp166.pdf.

10 L. Markert, Regional Comprehensive Economic Partnership (RCEP) - What You Need to Know: Investment Protection Perspective (Part II), Lexology (Jan. 25, 2021), https://www.lexology.com/library/detail.aspx?g=b934a88d-3344-46aa-8736-961b74643877.

2. Foreign Investment & Dispute Resolution in the Asia-Pacific Region

The Asia-Pacific is one of the most important and attractive regions for investment. It is a home to 60 percent of the world's population-some 4.3 billion people including the world's most populous countries such as China and India.[11] At the same time, the region continues to have the largest number of poor people in the world and 13 of the 30 countries are most vulnerable to climate change. It also bears the brunt of 70 percent of the world's natural disasters, which have affected more than 1.6 billion people since 2000. Pacific Island countries, where rising sea levels are threatening coastal areas and atoll islands, have been hit hard by climate-induced disasters, including Category Five Tropical Cyclone Harold, which left a path of destruction across Fiji, Tonga, Solomon Islands, and Vanuatu in April 2020.[12] Moreover, the economic shock from the Covid-19 pandemic and the financial impact of its containment measures have left many countries in the region with grim economic outlooks for 2021 and beyond. Therefore, the role of investment for this region is critical and vital.

Increasingly, experts are actively debating the problems associated with investment protection in the region. Until recently, FDI protection was effectuated in bilateral investment treaties (BITs). By 2013, countries in the Asia-Pacific region had concluded over 650 BITs and more than 50 free trade agreements (FTAs) with investment provisions. BITs in the region began in the early 1960s and grew in popularity, with the majority concluded in the 1990s (351 BITs), slowing considerably over the 2000s.[13] As shown more-fully below, controversy arose from investor-state disputes following the growth of FDI treaty protections, with some countries choosing to pull back support for such provisions, while others have chosen to incorporate more investor protections in their treaties. The following examples represent a number of the largest economies in the Asia-Pacific region, some of which have trended away from incorporating ISDS into their trade agreements:

[11] UN Population Fund, Population Trends, https://asiapacific.unfpa.org/en/node/15207#:~:text=The%20Asia%20and%20the%20Pacific,populous%20countries%2C%20China%20and%20India.

[12] The World Bank in East Asia Pacific (Oct. 7, 2020), https://www.worldbank.org/en/region/eap/overview.

[13] C. Saloman, *Investment Arbitration in the East Asia and Pacific Region: a Statistical Analysis*, INT'L J. COM. & TREATY ARB. (Nov. 4, 2013), https://www.lw.com/thoughtleadership/investment-arbitration-eastasia-pacific.

A. Sri Lanka & Indonesia

It is obvious that in the context of globalization, bilateral agreements on investment protection are not able to solve the entire range of problems. As a result, several governments in the region announced that they would reform this mechanism. In late 2014, Sri Lanka announced its intention to move away from the traditional BIT models, due to controversy over the ISDS and the tendency of BITs to constrain domestic policy space, particularly following the loss of two notable ICSID cases.[14]

In 2014, meanwhile, Indonesia announced that it would terminate 67 of its BITs, 21 of which were denounced in 2015.[15] Former President Yudhoyono argued that he did not want multinational companies to pressure developing countries by enforcing "inappropriate and unjust" contracts.[16]

B. India

Although India did not agree to the final text of the RCEP, it may still become a member at a later time. As such, understanding its experience with ISDS is important, as well. First, India has been the target of 40 percent of all ISDS cases filed against RCEP countries, which is over USD31 billion to date.[17] There has been extensive backlash against ISDS, especially following the White Industries case, in which the Indian government was found in violation of its investment treaty obligation to provide an effective means to assert claims when its courts failed to enforce a commercial arbitration decision over an 8-year period.[18]

In response, in December 2015, India released a revised BIT model requiring investors to exhaust domestic remedies (Indian courts) before seeking international arbitration and removing "fair and equitable treatment" provisions. Then, India sent

14 Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3 (June 27, 1990), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/87/3; Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2 (Oct. 31, 2012), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/09/2.

15 Indonesia Ramps up Termination of Bits-And Kills Survival Clause in One Such Treaty-But Faces New $600 Mil. Claim from Indian Mining Investor, Bilaterals.Org (Nov. 20. 20150), https://bilaterals.org/?indonesia-ramps-up-termination-of.

16 D. Price, *Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?*, 7(1) Asian J. Int'l L. 124-51 (2017), https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/indonesias-bold-strategy-on-bilateral-investment-treaties-seeking-an-equitable-climate-for-investment/2B196186FE7A415E60E84D57E169803D.

17 C. Olivet, *The Hidden Costs of RCEP and Corporate Trade Deals In Asia*, TNI.Org (Dec. 8, 2016), https://www.tni.org/es/node/23334.

18 White Industries Australia Limited v Republic of India, UNCITRAL (2011), https://www.italaw.com/cases/documents/1170.

notices to 58 countries terminating or not renewing BITs that had expired. In January 2020, India signed a BIT with Brazil that excludes ISDS and favors dispute prevention as well as state-to-state dispute settlement.[19] In 2017, the Indian government commissioned a study to review the ISDS system and made the following recommendations:

1. Potentially replacing investor-state arbitration with state-state arbitration
"...state-state arbitration gives states greater control over the arbitral proceedings as compared to investor-state arbitration. The claimant and the respondent are the contracting states instead of investors who are beneficiaries of the BIT. The involvement of both the states directly can allow some room for reciprocity, prevent unnecessary arbitration claims and otherwise provide for greater involvement of states in the dispute resolution process."[20]

2. Including an appellate mechanism to the ISDS
"One of the common critiques of investor-state arbitration is that arbitral tribunals often rule in favour of the investor, leaving states without recourse to appeal. Additionally, critiques have pointed to problems of inconsistency and unpredictability-decisions of different arbitral tribunals constituted under ad hoc arbitration clauses may differ in similar fact situations, leading to uncertainty regarding the meaning of several public international law rights incorporated in BITs. Incorporating an appellate mechanism may resolve these problems to a large extent."[21]

3. Utilizing multilateral investment courts
"The European Union has been working since 2015 on the creation of a multilateral investment court. The proposed multilateral investment court would be a permanent body dealing with investment disputes and provides for both first instance and appellate tribunals, staffed with qualified judges with a fixed tenure."[22]

C. China

Initially, China was not interested in using ISDS for resolving investment disputes

[19] *See* Stop Investor-State Dispute Settlement Resources for Movements: Asia (Apr. 2020), https://isds.bilaterals.org/?-asia-264-.

[20] Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (July 30, 2017), at 106-8, https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

[21] *Id*.

[22] *Id*.

based on its suspicion regarding international law and international arbitration.[23] For example, the initial version of the 1982 China–Sweden BIT contained state–state dispute settlement only.[24] In the 1987 China–Sri Lanka BIT, international arbitration was accepted as a method to resolve investment disputes, but only those regarding the amount of compensation resulting from expropriation, with all other disputes being subject to the competent court of the domestic state.[25] Other BITs, *e.g.*, the 1987 China-Japan BIT, allow international arbitration of any dispute subject to specific consent by both parties.[26] Following its accession to the ICSID Convention 1993,[27] China changed its restrictive international investment policy tightly regulating the inward flow of FDI to a more liberal approach emphasizing the encouragement of outward Chinese FDI.[28] Since announcing its Belt and Road Initiative in 2013, where it has pledged enormous resources for investment in infrastructure, naturally China seeks to gain more protection for its investors and currently has more than 108 BITs, the second largest in the world, with most BITs created after 1998 having full ISDS provisions.[29]

According to UNCTAD's Investment Dispute Settlement Navigator, to date, China has been a respondent in four cases, and Chinese investors have been claimants in six cases.[30] Some notable and recent cases are as follows:

1. Ekran Berhad v. People's Republic of China[31]

This case was initiated under the 1995 China-Israel BIT and the 1988 Malaysia-China BIT to which the ICSID Convention-Arbitration Rules was applied. On May 24, 2011, Claimant filed a claim against China arguing that its land rights were improperly

[23] D. Pathiran, *A Look into China's Slowly Increasing Appearance in ISDS Cases*, Investment Treaty News, Sept. 26, 2017, https://www.iisd.org/itn/en/2017/09/26/a-look-into-chinas-slowly-increasing-appearance-in-isds-cases-dilini-pathirana.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] ICSID, Database of ICSID Member States, https://icsid.worldbank.org/about/member-states/database-of-member-states.

[28] A. Berger, China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making, German Development Institute (Nov. 14, 2008), https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf.

[29] T. Dymond, *Investment Treaty Arbitration in the Asia-Pacific*, Global Arb. Rev. (June 11, 2020), https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/investment-treaty-arbitration-in-the-asia-pacific#endnote-077.

[30] *See* Investment Dispute Settlement Navigator, UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement.

[31] Ekran Berhad v. People's Republic of China, ICSID Case No. ARB/11/15 (May 24, 2011), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/11/15.

revoked by the government. On May 16, 2013, the parties filed a request for the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1).[32] The terms of the settlement are unknown.

2. Señor Tza Yap Shum v. The Republic of Peru[33]

In 2008, a Chinese investor filed claims of indirect expropriation and violation of full and equitable treatment and full protection and security. Despite relying on an older China-Peru BIT 1994 that limited consent to arbitrate to the amount of compensation for expropriation, the tribunal rejected respondent's arguments and gave a broad interpretation to the applicability of the BIT.

3. Ansung Housing Co., Ltd. v. People's Republic of China[34]

On November 4, 2014, a Korean investor filed a complaint against China. The dispute related to the development of a golf course and condominium development project in Sheyang-Xian, China. On March 9, 2017, ICSID issued an award dismissing with prejudice all claims made by claimant as time-barred by the BIT pursuant to ICSID Arbitration Rule 41(5), holding that the BIT's most-favored nation clause did not apply to China's consent to arbitration.[35]

4. Macro Trading Co., Ltd. v. People's Republic of China[36]

This case was initiated under the 1988 China-Japan BIT and applied the ICSID Convention Arbitration Rules. Claimant is a Japanese company and recently filed this complaint on June 29, 2020.[37] The case involves a dispute about a real estate project in China and whether to adopt a narrow or broad interpretation of the "amount of compensation for expropriation" in first generation Chinese BITs.[38]

32 *Id*.

33 Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6 (Feb. 12, 2007), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/07/6.

34 Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25 (Nov. 4, 2014), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/14/25.

35 Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25, Award, ¶ 142 (Mar. 9, 2017), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3885/DC10053_En.pdf.

36 Macro Trading Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/20/22 (June 29, 2020), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/22.

37 *Id*.

38 B. Cheng, *China's Stance on Investor-State Dispute Settlement: Evolution, Challenges, and Reform Options*, 67 Neth. Int'l L. Rev. 503 (2020), https://link.springer.com/article/10.1007/s40802-020-00182-3.

5. Hela Schwarz GmbH v. People's Republic of China[39]

The case was filed on June 21, 2017, by German company Hela Schwarz GmbH. It relates to claimant's investment in China and is currently pending in ICSID.

D. Korea

Like China, Korea has over 100 active bilateral and multilateral investment treaties, the majority of which contain investor-state arbitration.[40] A number of high-profile cases have soured the public's mood towards ISDS and the government has come under scrutiny for managing the cases brought against it. For example, in 2019, the High Court of Justice in England rejected the Korean government's request to nullify an ICSID award of USD 63 million ordered in favor of an Iranian investor's failed attempt to acquire Daewoo Electronics in 2010.[41] The arbitral tribunal and appellate court both interpreted the definitions of investor and investment in a very broad manner and that the Korean government violated fair and equitable treatment when it canceled claimant's contract.[42]

One of the biggest problem the Korean government had in defending this and other recent investment arbitrations was the lack of manpower managing the cases and the misleading strategies resulting from it.[43] This highlights one of the main criticisms of the ISDS system, namely, the complexity of issues and resulting cost in defending against such suits, which Korea has faced most notably in the Lone Star Funds (USD 4.7 billion) and Elliot Management Corporation (USD 770 million) arbitrations.

In *Lone Star*,[44] claimant alleged violations of the BLEU (Belgium-Luxembourg Economic Union)-Republic of Korea BIT (1974), by Korean regulatory authorities' failure, over a period of several years, to approve the purchase by third parties of claimant's stake in the Korea Exchange Bank and impose arbitrary capital gains taxes

39 Hela Schwarz GmbH v. People's Republic of China, ICSID Case No. ARB/17/19 (June 21, 2017), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/17/19.

40 R. Wachter, *Investment Treaty Arbitration: South Korea*, Global Arb. Rev. (Sept. 28, 2020) https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/south-korea.

41 *Korea Should Learn Lessons from Daewoo Electronics Case*, Korea Times, Dec. 22, 2019, https://m.koreatimes.co.kr/pages/article.asp?newsIdx=280692.

42 Gang-rae Kim, *S. Korea Loses in $62.9 Million ISD Suit against Iran's Dayyani*, Pulse News, Dec. 23, 2019, https://pulsenews.co.kr/view.php?year=2019&no=1075619.

43 *Korea Should Learn Lessons from Daewoo Electronics Case*, Korea Times, Dec. 22, 2019, https://m.koreatimes.co.kr/pages/article.asp?newsIdx=280692.

44 *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37 (Dec. 10, 2012), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/37.

on the sale.[45] The complaint was filed with ICSID 2012 with hearings on jurisdiction and the merits of the dispute in 2016. As of 2021, the USD 4.6 billion claim is still pending with claimant alleging making an offer of USD 875 million to settle the case.[46]

Likewise, in *Elliot Management Corp.*,[47] claimant brought an UNCITRAL arbitration before the Permanent Court of Arbitration for violating fair and equitable treatment and minimum standard of treatment under the Korea-US FTA related to the government's conduct that allegedly led to the merger of Samsung C&T Corporation with Cheil Industries, thereby causing financial losses to the claimant. As with *Lone Star*, *Elliot Management Corp*. is another high profile case highlighting the acrimonious tendency that ISDS cases can have between an investor and host state. In *Elliot Management Corp.*, the Seoul South District Prosecutor's Office threatened to indict the claimant for violating disclosure rules, but eventually dropped the charges following a four-year investigation that found "no legal grounds" for such a charge.[48]

As discussed more-fully below, given this patchwork of challenges over particular BITs in FDI policies, some Asia-Pacific countries came to the conclusion that the most effective instrument for protecting investment would be in the context of a multilateral agreement.[49] One of the hurdles that investors must overcome is to show that the court has jurisdiction over the claim in question. The issue of jurisdiction in expropriation disputes has been the subject of some debate. One viewpoint is that some facts and circumstances should be established in a way other than arbitration, for example, through legal proceedings in a local court.[50] Another widely held viewpoint is that the relevant treaties are sufficient to establish the jurisdiction of the arbitration to determine merits of an expropriation claim.[51] Considering the above-

45 LSF-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No. ARB/12/37, Claimant's Memorial ¶¶ 247-319 (Oct. 15, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw11846.pdf.

46 Jae-hyuk Park, *US PEF Confirms it Seeks to End 8-Year Conflict*, Korea Times, Dec. 1, 2020, https://www.koreatimes.co.kr/www/biz/2020/12/175_300193.html.

47 Elliott Associates L.P. (U.S. v. R.O.K.) (Perm. Ct. Arb. 2018-51) https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/893/elliott-v-korea.

48 Young-tae Jin, *Korean Prosecutors Drop Charges against Elliott over Samsung Merger*, Pulse News, June 30, 2020, https://pulsenews.co.kr/view.php?year=2020&no=667611.

49 RCEP Partners Conclude 13th Negotiating Round in Auckland; Three Further Rounds in 2016, IISD (Aug. 10, 2016), https://www.iisd.org/itn/en/2016/08/10/rcep-partners-conclude-13th-negotiating-round-in-auckland-three-further-rounds-in-2016/; *See also Submission to Department of Foreign Affairs and Trade on the Regional Comprehensive Economic Partnership* (*RCEP*), AFTINET (Sept. 2015), http://aftinet.org.au/cms/sites/default/files/RCEP%20second%20sub%200915.pdf.

50 B. Horrigan, China-Related Investment Arbitrations: Three Recent Developments, Herbert Smith Freehills (July 17, 2017), https://hsfnotes.com/arbitration/2017/07/17/china-related-investment-arbitrations-three-recent-developments.

51 *Id*.

examples, we see that the effectiveness of resolving investment disputes within the framework of bilateral agreements is rather low and not in favor of the investor. In any case, there is serious disagreement on which view is better.[52] It is proposed that the problem is not ideological, but due to the lack of clear wording in BITs and the sheer number of them. As such, the best solution to this problem will mostly likely come in the form of a multilateral investment treaty such as the RCEP, which we now turn to.

3. Investor-State Dispute Settlement within the RCEP

As noted above, on November 15, 2020, RCEP was signed as the largest free trade agreement in history between 10 ASEAN members and five regional partners including China, Japan and Korea.[53] Although the RCEP was originally contemplated to include ISDS rules, because of public pressure and opposition of some governments (notably New Zealand), the parties excluded ISDS clause in September 2019. Despite the fact that the agreement defines the basic principles of legal protection of investments, the RCEP does not contain a procedure for settling disputes between investors and parties to the agreement. Many experts think that the lack of an investment dispute settlement procedure is a serious flaw in the agreement.[54] Without an ISDS mechanism, foreign investors who feel that their rights under the RCEP have been violated cannot seek legal recourse via international arbitration. Instead, such foreign investors would have to rely on the judiciary of the particular member state, which is not always regarded as ideal, or through representation by its government in state-state arbitration.[55] The importance of resolving the investor dispute resolution mechanism cannot be understated as demonstrated by the following statistics:

52 S*uddenly, The World's Biggest Trade Agreement Won't Allow Corporations to Sue Governments*, CONVERSATION, Sept. 16, 2019, https://theconversation.com/suddenly-the-worlds-biggest-trade-agreement-wont-allow-corporations-to-sue-governments-123582.

53 P. Petri & M. Plummer, RCEP: A New Trade Agreement That Will Shape Global Economics and Politics, Brookings Blog (Nov. 16, 2020), https://www.brookings.edu/blog/order-from-chaos/2020/11/16/rcep-a-new-trade-agreement-that-will-shape-global-economics-and-politics.

54 M. Ewing-Chow, The RCEP Investment Chapter: A State-to-State WTO Style System for Now, Kluwer Arbitration Blog (Dec. 8, 2020), http://arbitrationblog.kluwerarbitration.com/2020/12/08/the-rcep-investment-chapter-a-state-to-state-wto-style-system-for-now.

55 L. Markert & A. Doernenburg, Regional Comprehensive Economic Partnership (RCEP) - What You Need to Know: Investment Protection Perspective (Part II), Nishimura & Asahi (Jan. 27, 2021), https://www.lexology.com/library/detail.aspx?g=b934a88d-3344-46aa-8736-961b74643877.

- 50 investment arbitration cases already filed against 11 RCEP countries since 1994, over 50% of which have been filed since 2010.
- India alone has been the target of 40% of the cases filed against RCEP countries.
- Foreign investors have claimed at least 31 billion USD from RCEP countries.
- Of USD 31 billion claimed by investors, 81% has been claimed from just four RCEP countries: India, South Korea, Australia and Vietnam.
- 36% of cases against RCEP countries concern environmentally relevant sectors.
- 42% of ISDS cases against RCEP countries are still pending.
- Investors can be considered to have won 67% of the cases against RCEP countries.
- RCEP countries have been sued for measures taken to protect public health, adjust corporate taxes, promote industrialization, and review contracts acquired through allegations of corruption, among others.
- RCEP countries have signed a total of 831 international investment agreements (IIAs), out of which 676 are in force. Most of them were signed between 1990-2009.
- 87% of the BITs signed by RCEP countries currently in force are likely to have passed the initial duration period and cannot be terminated.
- RCEP countries are currently negotiating at least six Free Trade Agreements with investment protection chapters which grant investors the right to sue governments at international investment tribunals.
- Thailand, Malaysia, Indonesia, the Philippines, Myanmar and India are also negotiating bilaterally with the European Union.[56]

Article 10.18 of RCEP states that:

> ... the Parties shall, without prejudice to their respective positions, enter into discussions on the settlement of investment disputes between a Party and an investor of another Party no later than two years after the date of entry into force of the Agreement, the outcomes of which are subject to agreement by all Parties. The Parties shall conclude the discussions within three years from the date of commencement of the discussions.

The language of this article does not define the final date for signing of the investment dispute rules. However, one can assume the issue will be resolved one way or the other within five years because the parties have two years to begin negotiations with an additional three years to complete their discussions.

Until such a mechanism for ISDS is agreed among the RCEP member states, investors will be unable to initiate proceedings against a state independently under

[56] C. Olivet, *The Hidden Costs of RCEP and Corporate Trade Deals in Asia*, TNI.Org, Dec. 8, 2016, https://www.tni.org/es/node/23334 .

the RCEP. In cases of substantive violations of covered investments, investors will need to rely on other international investment agreements applicable in a given jurisdiction until when the RCEP incorporates an ISDS mechanism.[57] One example is the ASEAN Comprehensive Investment Agreement, which entered into force on March 29, 2012, with the aim to create a free and open investment environment through the consolidation and expansion of existing agreements between the ASEAN member countries.[58]

Meanwhile, the CPTPP is also a good example how to resolve disputes between investors and parties of the agreement. Pursuant to the CPTPP, an investor can directly initiate the dispute with the party of the agreement. In the event of an investment dispute, the claimant and the respondent should first seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.[59] Article 9.19 of the CPTPP in relevant part states that if an investment dispute has not been resolved within six months of the receipt by the respondent of a written request for consultations, the investor may submit to arbitration a claim for breach of the investment provision of the agreement.

Despite certain provisions being suspended-notably the definitions of "investment agreement" and "investment authorization"-the CPTPP remains largely unchanged from the TPP in relation to ISDS, and importantly, preserves the option of investment treaty arbitration for violations of the investment protection standards contained in the agreement. Notably, however, additional side letters entered into in parallel with the CPTPP by New Zealand with Brunei, Malaysia, Peru, Vietnam and Australia specifically exclude ISDS entirely or allow ISDS only if the relevant state agrees. In a joint declaration, Canada, Chile and New Zealand have also stated their intent "to work together on matters relating to the evolving practice" of ISDS, "including as part of the ongoing review and implementation" of the CPTPP.[60]

57 R. Boss, *Evaluating Foreign Investment in RCEP Member States from a Dispute Resolution Perspective*, Nat'l L. Rev. (Feb. 17, 2021), https://www.natlawreview.com/article/evaluating-foreign-investment-rcep-member-states-dispute-resolution-perspective.

58 S. Ulvund Solstad, Introduction to the ASEAN Comprehensive Investment Agreement, ASEAN Briefing, Apr. 12, 2013, https://www.aseanbriefing.com/news/introduction-to-the-asean-comprehensive-investment-agreement.

59 CPTPP, art. 9.18, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources.

60 T. Dymond, *Investment Treaty Arbitration in the Asia-Pacific*, Global Arb. Rev. (June 11, 2020), https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2021/article/investment-treaty-arbitration-in-the-asia-pacific#endnote-077.

4. Conclusion

As shown above, bilateral agreements are not the optimal solution to address modern challenges regarding the resolution of investment disputes. The time has come for multilateral agreements, which will define a clear procedure for resolving investment disputes and the formation of arbitration for these purposes. The RCEP is quite an optimistic agreement. Unfortunately, however, the parties to this agreement were not able to implement ISDS rules due to the well-publicized anti-investor sentiment. Instead, they have postponed this issue for future negotiations. Nevertheless, a majority of countries understand the importance of investment protection and have significant outward FDI that will support stronger ISDS protections (e.g., China, South Korea, Japan, etc.). Therefore, it is recommended that in the near future the RCEP countries will come to an agreement and adopt appropriate amendments regarding the ISDS rules.

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