New Investment Rulemaking in Asia: Between Regionalism and Domestication

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Abstract
The article analyses investment rulemaking in new Asian regionalism in the context of evolving national legislation and regional trade strategies. It argues that the Association of Southeast Asian Nations (ASEAN) and the Regional Comprehensive Economic Partnership (RCEP) represent Asia’s pragmatic incrementalism in reforming the investment regime. The process reinforces the relationship between international economic law and domestic investment laws. In tandem with transforming international investment agreements, ASEAN expedited investment and services trade, and established the modern investor–state dispute settlement (ISDS) mechanism. The RCEP further buttresses the ASEAN centrality in regional frameworks by consolidating ASEAN Plus One agreements. Yet, the RCEP’s omission of ISDS reflects a distinct approach that may confront challenges to state-to-state proceedings and treaty shopping under overlapping pacts. Finally, the research sheds light on Asian countries’ recent investment agreements and domestic dispute settlement that complement the liberal international order. These developments provide valuable models for developing countries and contribute to the understanding of global investment reforms from an Asian perspective.

Keywords: ASEAN; CPTPP; ISDS; investment law; RCEP

1. Introduction
The rise of Asia has galvanized pivotal changes to the international economic order in the post-World War II era. Amid ascending trade protectionism and the COVID-19 pandemic, Asian countries have become the engines of global regionalism and have propelled the shift of the commercial centre of gravity to the region. By 2050, more than half of global gross domestic product (GDP) will arise from Asia, enabling it to gain the dominant economic status that it possessed before the Industrial Revolution.1

Tellingly, China is expected to replace the United States as the world’s largest economy in the next decade.2 As a ten-country bloc, the Association of Southeast Asian Nations (ASEAN) will ascend to the equivalent of the fourth largest economy.3 The six ‘ASEAN Plus One’ free trade agreements (FTAs) with Asia-Pacific economies have underpinned the legal regimes of new Asian regionalism.4 The ASEAN-centred framework further led to the Regional Comprehensive

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4From 2002 to 2017, the Association of Southeast Asian Nations (ASEAN) concluded six ‘ASEAN Plus One’ free trade agreements (FTAs) sequentially with seven economies, China, Japan, India, Korea, Australia and New Zealand, and Hong Kong.

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Economic Partnership (RCEP), which is now the world’s largest FTA by economic scale and includes 15 partners such as China, Korea, and Japan. This mega-regional trade agreement accounts for 30% of global GDP and 26.2% of foreign direct investment (FDI) inflows.5 Facing a substantial decline of trade and investment due to the pandemic, the RCEP manifests Asia’s normative response to economic recovery and future development.6

Like trade law, investment law forms an integral part of international economic law and is critical to the sustainable growth of developing countries. The lack of consensus among World Trade Organization (WTO) members removed investment from the WTO Doha agenda.7 The scope of current WTO negotiations on ‘investment facilitation for development’ is limited and excludes core issues of investment liberalization and protection.8 As investor–state dispute settlement (ISDS) has encountered massive backlash, the United Nations Commission on International Trade Law (UNCITRAL) entrusted Working Group III to discuss procedural reforms for ISDS under investment treaties.9 At these multilateral forums, Asia has yet to form a unified group to advance common positions.10 It is therefore vital to explore Asian states’ agendas on investment law at the regional and national levels to understand the Asian approaches to investment reforms.

The article reinforces the theme of this special issue and fills a gap in the existing literature by providing the most up-to-date and comprehensive account of Asia’s investment rulemaking approach in light of domestic legislative changes and regional trade strategies. It argues that normative developments of ASEAN and the RCEP represent the Asian way of pragmatic incrementalism in reforming investment law. The practice of these member states has energized the new trend of ‘domesticating’ international economic law. The cross-fertilization between regional and national investment regimes also ensures the parallel development of the two regimes.11

The neoliberal assumption that prioritizes internationalism based on multilateral efforts no longer dominates national economic policies. ASEAN and RCEP countries demonstrate the changing priority of regional and national approaches. In practice, modern provisions of regional agreements have often been incorporated into domestic investment and dispute settlement laws, which in turn shape prospective bilateral and regional investment pacts. Asian states’ experiences therefore provide valuable lessons and the impetus for the Global South to consider alternative models to the Washington Consensus.12

Following the introduction, Section 2 examines the economic and geopolitical context of investment rulemaking in new Asian regionalism that has developed in the third wave of global regionalism. It sheds light on paradigm changes to contemporary Asia-Pacific FTAs and bilateral investment treaties (BITs), as well as domestic investment laws in selected countries. Section 3 analyses the legal framework of the ASEAN Economic Community (AEC) with a focus on the bloc’s new investment rules, as well as the successive package structure for services commitments on foreign equity restrictions pertinent to Mode 3-related FDI. It also discusses ISDS mechanisms under ASEAN’s internal and external agreements.

Section 4 assesses the RCEP’s evolution, as well as its core investment and services rules that reflect the new consensus of Asia-Pacific countries. Furthermore, it provides insight into legal options which emerged as a result of the RCEP’s omission of ISDS and potential treaty-shopping problems under overlapping agreements. Asian countries’ ISDS reform proposals for UNCITRAL Working Group III will also be examined. Section 5 highlights investment and dispute settlement reforms by explaining new designs of international investment agreements (IIAs) and domestic arbitration and court rules that complement the liberal international order. Section 6 outlines investment reforms in new Asian regionalism and the implications for the Global South.

2. New Asian Regionalism and the Liberal International Order

It is imperative to contextualize Asia’s changing regulatory frameworks for investment. There have been three waves of global regionalism since World War II. After the first wave occurred in the 1950s and 1960s, the second wave dominated economic integration in the 1980s and the 1990s. The world is now confronting the third wave that has evolved since 2000. New Asian regionalism in the latest wave of global regionalism has had a profound impact on the international investment regime. After World War II, the ‘US-led liberal hegemonic order’ became the dominant force that led to the Bretton Woods system. To follow ‘embedded liberalism’, Asian countries have been rule-takers rather than rule-makers. Nevertheless, the 1997 Asian financial crisis prompted paradigm shifts.

New Asian regionalism that developed in the latest wave of global regionalism has propelled the evolution of regional investment rules in tandem with the domestication of such rules. Do these developments challenge the liberal international order? From the geopolitical perspective, the challenge arguably lies in the transformation of rulemaking power from the trans-Atlantic alliance to trade blocs in Asia. From the normative aspect, intertwined regional and national investment reforms have enriched rather than undermined the liberal international order and allowed states to regain additional power to enforce regulatory changes.

2.1 Earlier Waves of Global Regionalism

Jagdish Bhagwati coined the term ‘First Regionalism’, which denotes proliferating FTAs in the 1950s and 1960s. During this era, political considerations dominated the process of regionalism. On the one hand, the United States was reluctant to pursue trade pacts under Article XXIV of the General Agreement on Tariffs and Trade (GATT) because leaders ‘remained wedded to multilateralism and nondiscrimination in trade liberalization through the Kennedy Round’. On the other hand, Washington eagerly supported the founding of the European Economic

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14 Ibid.
Community, as it could prevent another French–German war and counterbalance Soviet influences.17 In Asia, the creation of ASEAN in 1967 marked the prelude to Asian regionalism.18 ASEAN was predominantly politically oriented. The initial goal of Southeast Asian states was to forge a loose security alliance against communist expansion.19 Akin to Bhagwati’s observation that most economic initiatives in the era failed due to political interventions, ASEAN’s trade-creation effect was marginal.20

The First Regionalism transformed investment agreements from the infant to mature stages and exposed Asian states to the normative demands of the West.21 At the outset, US Friendship, Commerce, and Navigation (FCN) Treaties incorporated investment issues.22 The 1946 US–Republic of China FCN Treaty is illustrative.23 The Treaty covered investment provisions on ‘the full protection and security required by international law’ and ‘prompt payment of just and effective compensation’ following expropriation.24 The key difference between FCN Treaties and modern IIAs is the former’s lack of detailed enforcement procedures for state-to-state disputes and the absence of ISDS provisions.25 As the first investment agreement with ISDS, the 1968 Netherlands–Indonesia BIT enabled investors to sue the host state.26 Claims could be brought to the Center created under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSIID Convention).27

Even before the birth of ASEAN, the Asian regionalism idea emerged at the 1955 Indonesia-hosted Bandung Conference, in which anticolonial nationalism of Asian–African states elevated the Non-Aligned Movement.28 These countries’ economic objective was confined to the nationalistic notion of self-help, which sought to minimize reliance on the Global North.29 In the 1970s, Non-Aligned Movement members joined the Group of 77 in passing the United Nations resolutions for establishing ‘a New International Economic Order (NIEO)’.30

The NIEO principles championed absolute sovereignty over economic activities and natural resources independent of foreign control. They stressed that states are entitled ‘[t]o nationalize, expropriate or transfer ownership of foreign property’ with ‘appropriate compensation’ and

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19 The founding members of ASEAN include Indonesia, Malaysia, the Philippines, Singapore, and Thailand. R.C. Severino (2006) Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General. ISEAS Publishing, 1–11.

20 Bhagwati, supra n. 15, at 29; Bhagwati, supra n. 16, at 538–539.


23 Pursuant to the Taiwan Relations Act, this 1946 Treaty continues to be valid between the United States and Taiwan.

24 Treaty of Friendship (1946) ‘Commerce and Navigation between the United States of America and the Republic of China’, art. VI(1) and (2).

25 E.g., ibid. art. XXVIII; Meltzer, supra n. 22, at 18.


27 Netherlands and Indonesia Agreement on Economic Cooperation (1968), art. 11.

28 Acharya, supra n. 18, at 5–16.

29 Ibid.

that disputes should be settled under domestic laws and courts.\textsuperscript{31} The NIEO compensation standard departed from the Hull formula, which was adopted in the United States, of according ‘prompt, adequate and effective’ compensation and deprived investors’ remedies before international tribunals.\textsuperscript{32} Capital-exporting countries rejected these demands. The NIEO movement waned quickly. The Bretton Woods institutions and new BITs reinforced the Washington Consensus and compelled the Global South to engage in free trade and investment defined by the trans-Atlantic alliance.\textsuperscript{33}

In the 1980s and 1990s, the second wave of global regionalism surfaced during the Uruguay Round. Bhagwati highlighted that the European Union (EU) and the North American Free Trade Agreement (NAFTA), the precursor to the United States–Mexico–Canada Agreement (USMCA), marked the success of the ‘Second Regionalism’.\textsuperscript{34} Richard Baldwin explained the ‘domino theory’, which posits that the driving force for regionalism is non-FTA members’ motivation to pursue trade agreements to maintain export advantages.\textsuperscript{35}

Asia’s most noteworthy trade initiatives were ASEAN and Asia-Pacific Economic Cooperation (APEC). As the domino theory predicted, the EU and NAFTA energized ASEAN to build the ASEAN Free Trade Area to accelerate internal integration.\textsuperscript{36} Unlike ASEAN, APEC is a dialogue forum that operates on n–on-binding rules and decisions. The APEC Non-Binding Investment Principles demonstrate 21 members’ desire to construct common investment standards, albeit on a soft-law basis.\textsuperscript{37} Given different rules for expropriation and compensation under constitutional and national laws, the APEC Principles guide regional and international standards.

In the ‘Second Regionalism’, Asia was in line with global trends where IIAs and ISDS cases radically proliferated.\textsuperscript{38} Also, Asian countries’ frustration with US-led monetary institutions’ responses to the Asian financial crisis prompted the signing of the ‘ASEAN Plus Three’-based Chiang Mai Initiative.\textsuperscript{39} This framework subsequently extended to trade and investment arenas and enlarged to ‘ASEAN Plus Six’ members, including Australia, India, and New Zealand as additional members. This 16-party framework has revolutionized Asia’s approach to investment rulemaking.

\section*{2.2 Third Regionalism}

Building on Bhagwati’s observations, I refer to the most recent wave of global regionalism as the ‘Third Regionalism’, which has evolved in tandem with the Doha Round since the 2000s. New Asian regionalism and the Third Regionalism are cross-fertilizing. As an integral part of the Third Regionalism, new Asian regionalism provides the economic and geopolitical context for trade pacts in Asia. As de-globalization resulted in backlash against Bretton Woods institutions,
the current era is witnessing the trend toward ‘domesticating’ international economic law. As the introductory article and the special issue aver, developments in new Asian regionalism demonstrate that the domestication of investment rules by no means abandons normative values of international economic law. This process instead creates an alternative impetus for reinforcing the neoliberal order by accelerating the cross-fertilization between regional and national investment laws. Markedly, there are three unique characteristics of current FTAs and BITs that distinguish them from their counterparts in the earlier two waves of global regionalism.

First, mega-regional and comprehensive trade agreements are the defining features of the Third Regionalism. As the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the RCEP exhibit, these pacts involve a significant number of countries with massive economies of scale. Based on their collective GDP, the RCEP, the USMCA, the post-Brexit EU, and the CPTPP are the world’s top four trading blocs. In particular, the RCEP strengthens ‘ASEAN centrality’ and shows developing countries’ activism in advancing their own trade agendas in response to the US–China trade war and the COVID-19 pandemic.

Moreover, it has become the norm for mega-FTAs and other trade agreements to cover WTO-extra and plus commitments. Recent agreements no longer solely focus on tariff and services liberalization. The comprehensiveness of FTAs can be judged by their WTO plus and extra provisions. The dichotomy between FTAs and BITs became blurred because the former often incorporates the investment chapters. As of 2021, the number of these IIAs that include FTAs and BITs that govern investment liberalization and protection has increased to 2,558.

Second, countries have increased the scope of investment liberalization under their investment laws or legislation on special economic zones (SEZs) and free trade zones (FTZs). The practice of ASEAN and RCEP members showed that domestic investment rules led to higher levels of investment liberalization than those of commitments under FTAs and BITs. These investor-friendly schemes, which have in turn influenced IIAs, evidence that countries’ ‘unilateral acts’ fortify mutually reinforcing regional and domestic investment regimes.

To illustrate, Singapore attracts the most FDI inflows to ASEAN. According to the typology developed in the introductory article, Singapore is a jurisdiction that does not have specific legislation on foreign investment. Lawyers such as the Residential Property Act, the Newspaper and Printing Act, the Banking Act include restrictions on foreign ownership and vigorous restrictions on foreign ownership.

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41Joint Leaders’ Statement on the RCEP, supra n. 5.
46See generally Chaisse and Dimitropoulos, supra n. 11. See also J. Hepburn, ‘The Past, Present and Future of Domestic Investment Laws and International Economic Law’, this special issue (showing that the ‘domestic and international instruments used by states can be seen as complementary, working to achieve the same goals of the [liberal international order], even if with sometimes different and independent drivers behind each instrument’).
licensing regimes.\textsuperscript{48} Moreover, Singapore’s nine FTZs provide beneficial customs and tax treatment to firms that engage in ‘entrepot trade and transshipment activities’.\textsuperscript{39} Going beyond economic incentives in its SEZs, China experienced the ‘pre-establishment national treatment’ model and deregulated market access procedures in the Shanghai Pilot FTZ and the Hainan Free Trade Port.\textsuperscript{50} These reforms were incorporated into China’s recent IIAs and 2019 Foreign Investment Law.\textsuperscript{51}

As core ASEAN and RCEP members, Vietnam and Indonesia have also become magnets for FDI. Similar to China, foreign investments are governed by separate rules in these two countries. Vietnam has yet to ratify its SEZ law due to protests against China’s escalating influence for capital and investment in the region.\textsuperscript{52} However, the 2020 Law of Foreign Investment signifies a milestone, as it was the first time for Vietnam to shift from the positive list to the negative list approach to market access.\textsuperscript{53} Decree 31 clarifies the implementation of the new law by stipulating the negative lists, including the Prohibited List and the Market Entry List.\textsuperscript{54} The sectors listed in the former are closed to foreign investment, whereas those listed in the latter permit foreign investment subject to conditions determined by ministries.\textsuperscript{55} Foreign investments that fall outside the negative lists are thus accorded national treatment.\textsuperscript{56} These domestic reforms have developed in tandem with Vietnam’s commitments under the CPTPP and the EU–Vietnam FTA. The gap between FTA provisions and Vietnamese laws continues to exist in areas such as non-tariff barriers to investment in the renewable energy sector, financial and telecommunications services, and requirements pertaining to the entry and stay of foreigners.\textsuperscript{57} These impediments should be further remedied in order to facilitate FDI.

Indonesia’s 2007 Investment Law applies to both domestic and foreign investors, but the restrictions on foreign investment are consolidated in the negative-list Presidential Regulation.\textsuperscript{58} Notwithstanding the government’s termination of BITs, Indonesia follows the trend of investment liberalization in domestic laws. Enacted in 2021, the New Investment List amended the 2007 Investment Law and reduced the number of prohibited business fields for

\textsuperscript{55}Ibid.
\textsuperscript{56}Ibid.
\textsuperscript{57}World Bank (2020) ‘Vietnam: Deepening International Integration and Implementing the EVFTA’, at 44–45.
\textsuperscript{58}Bonnitcha, supra n. 47, at 8.
FDIs from 20 to 6 and removed the 67% foreign equity limitations on key sectors such as telecommunications and media. Moreover, current foreign ownership restrictions do not apply to foreign investors entitled to more favorable treatment under applicable IIAs and businesses in Indonesia’s SEZs. These new-generation domestic investment rules mark the feature of the Third Regionalism, as they demonstrate developing countries’ new investment rulemaking approaches.

Finally, while IIAs continue to grow, the number of new agreements has gradually declined since 2008 due to ongoing reforms associated with the ascending number of ISDS disputes. Other than the multilateral forum of the UNCITRAL, states have resorted to national, bilateral, and regional strategies to implement their agendas. Among Asian countries, India and Indonesia encountered the most ISDS claims, thus expediting those governments’ ISDS reforms. India lost the case of White Industries where an Australian company challenged delays in India’s judicial system. The Tribunal relied on the most-favoured-nation (MFN) clause of the Australia–India BIT and found that India violated the obligation under the India–Kuwait BIT to ensure an ‘effective means of asserting claims and enforcing rights’. This decision was seen as an attack on judiciary sovereignty and led to India’s new 2016 Model BIT that omits the MFN provision and vastly restricts access to ISDS.

Churchill Mining and Planet Mining also changed Indonesia’s stance on ISDS. Churchill Mining, a United Kingdom (UK)-listed company, and Planet Mining, an Australian subsidiary, sought damages for more than US$1 billion after Indonesia’s provincial government revoked their mining licenses for a coal project. The two companies resorted to ICSID arbitration based on Indonesia’s BITs with the UK and Australia. In the consolidated proceedings, the Tribunal rejected Indonesia’s jurisdictional challenges by holding that Jakarta had ‘consented’ to ICSID arbitration under respective BITs. Subsequently, Indonesia announced its intention to terminate all 67 BITs. The government has terminated more than 30 BITs.

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59 Presidential Regulation No. 10 of 2021 is referred to as the New Investment List, which implements the Omnibus Act that amends the 2007 Investment Law. D. Dawborn et al., ‘Indonesia’s New Investment List Increases FDI Opportunities for Foreign Investors’, Herbert Smith Freehills (5 March 2021), https://hsfnotes.com/indonesia/2021/03/05/indonesias-new-investment-list-increases-fdi-opportunities-for-foreign-investors/ (accessed 14 March 2022).
60 Ibid.
62 Ibid.
64 White Industries Australia Limited v. India, UNCITRAL, Final Award, 16.1.1, 30 November 2011.
65 Ibid.
68 The two cases were consolidated. Churchill Mining v. Republic of Indonesia, ICSID Arbitral Tribunal Cases No. ARB/12/40 and 12/14, Decision on Jurisdiction (24 February 2014); Planet Mining v. Republic of Indonesia, ICSID Arbitral Tribunal Cases No. ARB/12/40 and 12/14, Decision on Jurisdiction, 24 February 2014.
Following these disputes, the case of Philip Morris fundamentally changed investment rule-making in Asia. In this case, the US company, Philip Morris, challenged Australia’s plain cigarette packaging legislation intended to reduce smoking. The company was unable to resort to the Australia–US FTA that lacks ISDS provisions. Nonetheless, corporate restructuring followed by treaty shopping enabled the company’s Hong Kong subsidiary to resort to the Australia–Hong Kong BIT. According to the Tribunal, ‘this arbitration constitutes an abuse of rights’ because the dispute was foreseeable to Phillip Morris at the time of the restructuring. Notwithstanding the Tribunal’s decision in favour of Canberra, ISDS became widely criticized for resulting in skyrocketing legal costs and creating a ‘regulatory chill’ that makes public policy measures vulnerable to foreign investors’ legal challenges. The case of Philip Morris resulted in the tobacco carve-out clause of the Trans-Pacific Partnership (TPP) and the Australia–Singapore FTA. The CPTPP takes a further step to confine the ISDS application.

These ISDS reforms are critical to investment rulemaking in the Third Regionalism and propel Asian countries to resort to regional and domestic schemes for potential disputes. As the introductory article suggests, the domestication of international investment law also incorporates a new trend for domesticating international dispute settlement. For instance, Indonesia’s termination of BITs enabled ASEAN’s internal and external agreements to function as the primary avenues by which foreign investors bring ISDS claims against the country. With financial resources and sophisticated jurists, Singapore has revamped its courts and arbitral institutions to allow ISDS cases arising from BITs or ASEAN agreements to be handled by domestic mechanisms.

3. Investment Regime of the ASEAN Economic Community

The creation of the AEC in 2015 marked a milestone after the ASEAN Charter conferred legal personality on the association ‘as an inter-governmental’ organization. In response to the unsatisfactory ASEAN Free Trade Area and the Asian financial crisis, the AEC forms one of the three pillars of an ASEAN Community. The new AEC Blueprint 2025, which succeeded the AEC Blueprint 2015, is an integral part of the guiding document of ‘ASEAN 2025: Forging Ahead Together’. The first and foremost characteristic of the AEC Blueprint 2025 is ‘A Highly

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75Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) (CPTPP), art. 29.5; Agreement to Amend the Singapore–Australia Free Trade Agreement (2016), art. 22.

76Department of Foreign Affairs and Trade (DFAT) (2019), *CPTPP Suspensions Explained*, at 1–2.

77Charter of the Association of Southeast Asian Nations (2007), arts. 1(1) and 3.


Integrated and Cohesive Economy. Its key target is to ‘establish a more unified market’ by facilitating ‘the seamless movement of goods, services, investment, capital and, and skilled labour’.

3.1 Changing ASEAN Way

The AEC and ASEAN Plus One FTAs reinforced the concept of ASEAN law and restructured the so-called ASEAN way. Based on the Indonesian concepts of *musyawarah* and *mufakat* (consultations and consensus), the ASEAN way refers to the collective principles of sovereignty, non-interference and consensus in decision-making. In practice, it has functioned as the code of conduct in inter-state interactions and the decision-making process for reaching consensus by consultations. The ASEAN way contributed to the founding of ASEAN and elevated the bloc to the centre of new Asian regionalism under the legal approach of pragmatic incrementalism. I contend that the legalization of the AEC has galvanized the ASEAN way to be a hybrid political and legal notion. It is no longer accurate to deem the ASEAN way as a non-binding soft law approach to regionalism. Instead, the new ASEAN way has signified its hard-law obligations with structured flexibility.

The ASEAN Comprehensive Investment Agreement (ACIA) is the key instrument for investment liberalization and protection under the AEC Blueprint 2025. During the Third Regionalism, ASEAN’s FDI inflows have soared more than six-fold and the value of FDIs constitute 21% of FDI stock in developing countries. ASEAN also overtook China in attracting FDI. Signed in 2009, the ACIA merges the 1987 Agreement for the Promotion and Protection of Investments and the 1998 Framework Agreement on the ASEAN Investment Area. These pre-ACIA agreements and their amending protocols failed to generate the expected impact. The 1987 Agreement was comparable to conventional BITs that lack investment liberalization. Given its exclusion lists, the 1998 Framework Agreement was unable to enable ASEAN to recover from the Asian financial crisis. Hence, the ACIA aims at ‘progressive liberalization’ of existing restrictions and strengthens investment protection and transparency of investment rules.

Notwithstanding the absence of EU law-like direct effect, the ACIA facilitates the harmonization process of domestic investments laws in the ten ASEAN countries and provides best practices for investment reforms. While de-globalization may have undermined the effectiveness of multilateral institutions, the domestication of international economic law has reinforced the mutual relationship between regional and national investment regimes. In particular, new investment laws in Laos and Myanmar evidence the ACIA’s normative impact. Laos’ 2009 Law on Investment Promotion and its 2016 amendments apply to both domestic and foreign investments and brought national standards much closer to ACIA requirements. However, as the investment...
law merely addresses non-discrimination without clear-cut national treatment and MFN provisions, the ACIA and Laos’ IIAs remain ‘safe choices’ for foreign investors. New provisions incorporate key features of the ACIA including the single reservation list, as well as national treatment and MFN clauses. Even after the coup, the military government has continued the operation of the Myanmar Investment Commission and has yet to change the investment legal framework.

The ACIA applies to ASEAN investors and investments and demonstrates Asia’s evolving rule-making in investment law. While investors denote natural and juridical persons, a non-ASEAN enterprise can be entitled to the ACIA’s benefits and protection if the company is incorporated and maintains ‘substantive business operations’ in an ASEAN country. Influenced by the US Model BIT, the ACIA adopted a broad, non-exhaustive and asset-based definition of investments that encompasses ‘every kind of asset’. To prevent proliferating claims, the ACIA excludes assets that lack ‘the characteristics of an investment’.

3.2 Investment/Services Liberalization and ISDS Issues

Paramount to investors, investment liberalization under the ACIA governs five main sectors (agriculture, fishery, forestry, manufacturing and mining and quarrying) and service sectors incidental to these main sectors. The original ACIA included a single, negative-list annex that covers states’ existing and future non-conforming measures in the liberalized sectors. The Fourth Protocol broadened the liberalization scope by changing a single annex to two-annex negative lists. ASEAN members are obliged to indicate their current non-conforming measures in the first index and schedule reservations for future measures in the second index. This new modality increases transparency for investors.

Investment liberalization under the ACIA closely links to services-related rules of the ASEAN Trade in Services Agreement (ATISA), which consolidates successive packages of services commitments under the 1995 Framework Agreement on Services (AFAS). Schedules of services commitments completed under various rounds of negotiations cumulatively ‘form an integral part of’ the AFAS. Due to the AFAS’s non-self-executing nature, each package of commitments will take effect after domestic ratification procedures. The unique package structure illustrates ASEAN’s pragmatic incrementalism, as ASEAN states could facilitate gradual domestic legal reforms under AFAS packages that eventually led to higher-level ATISA commitments.

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91 Jusoh, supra n. 89, at 221.
92 Ibid., at 224.
93 Ibid., at 225–226; Bonnitcha supra n. 47, at 16.
96 ACIA, art. 4(c).
97 Ibid., art. 4(c) and fn 2 (‘The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.’).
98 Ibid., art. 3(3).
101 Ibid., at 4 fn 6.
102 ASEAN, supra n. 40, at 34.
103 ASEAN Framework Agreement on Services (1995) (AFAS), art. VIII.
Comparable to the General Agreement on Trade in Services (GATS), AFAS commitments encompass four modes of services.\textsuperscript{104} Mode 3 (commercial presence) directly relates to FDIs because countries’ commitments liberalize foreign equity restrictions in services sectors. For instance, seven ASEAN states committed to allowing for 100\% foreign ownership in the hospital services sector, but Indonesia, Myanmar and Thailand kept the 70\% benchmark.\textsuperscript{105} The ATISA will shift the AFAS’ positive-list modality to the more progressive negative list approach that obliges all services sectors to be liberalized unless otherwise specified in the schedules.

As three ASEAN members – Laos, Myanmar, and Vietnam – are yet to join the ICSID Convention, the ACIA including ISDS plays a key role in investor–state disputes. Akin to the US Model BIT and the NAFTA, the ACIA goes beyond traditional BITs by incorporating more detailed arbitration procedures than those of the ICSID Convention.\textsuperscript{106} As a key issue of investment reforms, the interpretation of fair and equitable treatment (FET) has resulted in long-standing controversies in ISDS cases. Myanmar is the only ASEAN country that includes FET in domestic investment law, but its scope of FET is narrower than that of most IIAs.\textsuperscript{107} Case law suggests that FET ‘has turned into an all-encompassing provision’, which permits investors to utilize IIAs to challenge government actions they consider ‘unfair’.\textsuperscript{108}

The ACIA strikes a balance between domestic law and conventional BITs. It provides ‘greater certainty’ of FET, by preventing the host country’s denial of justice and according to the investors due process ‘in legal and administrative proceedings’.\textsuperscript{109} To safeguard regulatory sovereignty, the MFN clause of the ACIA also excludes ISDS proceedings.\textsuperscript{110} Arguably, based on the best practices of domestic laws, the ACIA’s denial of benefits provisions that exclude certain investors from the agreement further diminish treaty shopping.\textsuperscript{111} Comparable provisions are incorporated into ASEAN Plus One FTAs.\textsuperscript{112}

4. RCEP: Forging Asia’s New Consensus in Investment Law

While being the world’s largest FTA by economic scale, the RCEP has been inaccurately portrayed as a China-led trade pact.\textsuperscript{113} In reality, RCEP negotiations were initiated and led by ASEAN. RCEP parties including China recognize the RCEP’s role in reinforcing the ‘ASEAN centrality in regional frameworks’.\textsuperscript{114} Complementing the AEC, the RCEP consolidates ASEAN Plus One FTAs and ushers the ASEAN way into hard-law rules with structured flexibility. The RCEP’s

\begin{footnotesize}
\begin{enumerate}
\item General Agreement on Trade in Services (1994) (GATS), art. I:2.
\item Z. Zhong (2011) ‘The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community’, Asian Journal Comparative Law. 6(1), 1, 4–5.
\item Bonnitcha, supra n. 47, at 15–16.
\item UNCTAD, supra n. 21, at 35–36; Meltzer, supra n. 22, at 265–266.
\item ACIA, art. 11.
\item ACIA, art. 6 fn 4(1).
\item Ibid., at 1027–1029.
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revolution reinforces my AEC analysis because their approaches reflect Asia’s legal approach of pragmatic incrementalism, which diverges from the neoliberal model of the Global North.

The RCEP demonstrates Asian countries’ efforts to regionalize their domestic investment reforms that the ACIA and other IIAs have influenced. The RCEP’s omission of the ISDS scheme also propels the domestication of international dispute settlement mechanisms. As Table 1 below demonstrates, the RCEP reflects Asia’s new consensus of investment reforms incrementally forged under ASEAN’s internal and external agreements.115 Their shared characteristics crystallize the normative development of investment rulemaking in new Asian regionalism.116 Hence, these characteristics support and shed new light on the observation of the introductory article concerning the changing relationship between domestic and international economic laws. They exhibit Asian countries’ collective response to de-globalization by preserving normative value of international economic law in regional pacts, thus mutually reinforcing investment regimes at regional and national levels.

4.1 Core Investment Rules and Commitments

Since the inception of the Third Regionalism, Beijing and Tokyo proffered different proposals for Asian regionalism.117 APEC’s proposal for the 21-member Free Trade Area of the Asia Pacific (FTAAP) and the Obama Administration’s accession to TPP negotiations further complicated roadmaps to Asian integration.118 In 2011, ASEAN ‘ended the debate by proposing its own model’, known as the RCEP, which would be a pathway to the FTAAP alternative to the TPP.119

Parties to the ASEAN Framework for the RCEP acknowledged the RCEP as ‘an ASEAN-led process’.120 According to the Guiding Principles and Objectives for the RCEP, ASEAN Plus Six leaders agreed to merge prior Chinese and Japanese proposals.121 Trump’s decision to withdraw the United States from the TPP, US–China trade tensions and the COVID-19 pandemic expedited RCEP negotiations. Despite India’s decision to opt out of RCEP talks in 2019, the remaining 15 RCEP parties signed this mega-FTA in 2020.122

The CPTPP, which was concluded under Japanese Prime Minister Shinzo Abe’s leadership in 2018, and the RCEP are now the most noteworthy mega-FTAs. The formal applications of the UK and China in 2021 to join the CPTPP and the intentions of Hong Kong and Bangladesh to accede to the RCEP indicate the potential expansion of these two pacts and their global impact.123 By restructuring regional value chains in the Asia-Pacific, the RCEP will advance

Table 1. ASEAN-Based Agreements Including Investment Rules

<table>
<thead>
<tr>
<th>Agreements/Parties</th>
<th>Agreements and Amendments</th>
<th>ISDS</th>
</tr>
</thead>
<tbody>
<tr>
<td>AEC: ASEAN Member States</td>
<td>– ASEAN Trade in Goods Agreement (2009)</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>– ASEAN Trade in Services Agreement (2019)</td>
<td></td>
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<td></td>
<td>– Agreement on Comprehensive Economic Partnership (2009)</td>
<td></td>
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<tr>
<td></td>
<td>(Chapter 7: Investment)</td>
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<td></td>
<td>– Protocol to amend the agreement to include the</td>
<td></td>
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<tr>
<td></td>
<td>Chapters on Trade in Services, Movement of Natural Persons and</td>
<td></td>
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<td></td>
<td>Investment (2019)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>– Dispute Settlement Mechanism Agreement (2009)</td>
<td></td>
</tr>
<tr>
<td>ASEAN–Australia–New Zealand FTA</td>
<td>– Free Trade Agreement (2009) (Chapter 11: Investment)</td>
<td>Yes</td>
</tr>
<tr>
<td>ASEAN–Hong Kong FTA and Investment Agreement</td>
<td>– Free Trade Agreement (2017)</td>
<td>No</td>
</tr>
<tr>
<td>RCEP: ASEAN Member States, China, Japan, Korea, Australia and New Zealand</td>
<td>– Regional Comprehensive Economic Partnership (RCEP, 2020) (Chapter 10: Investment)</td>
<td>No</td>
</tr>
</tbody>
</table>

Source: Elaborated by the author from public sources.

The CPTPP, which was concluded under Japanese Prime Minister Shinzo Abe’s leadership in 2018, and the RCEP are now the most noteworthy mega-FTAs. The formal applications of the UK and China in 2021 to join the CPTPP and the intentions of Hong Kong and Bangladesh to accede to the RCEP indicate the potential expansion of these two pacts and their global impact.123 By restructuring regional value chains in the Asia-Pacific, the RCEP will advance

the ‘Global ASEAN’ agenda under the AEC Blueprint 2025 and China’s FTA strategy based on its Belt and Road Initiative.\textsuperscript{124}

While the COVID-19 pandemic caused the contraction of global FDI by 35%, China played a major role in contributing to Asia’s 4% FDI growth.\textsuperscript{125} Transforming into a capital-exporting economy has influenced the normative shaping of third and fourth-phase Chinese BITs and the RCEP.\textsuperscript{126} Beijing’s earlier BITs echo its 1993 reservation to the ICSID Convention that confines an arbitral tribunal’s jurisdiction to ‘compensation resulting from expropriation and nationalization.’\textsuperscript{127} The 2015 Australia–China FTA’s notable expansion of the ISDS application to cover breaches in national treatment obligations evidence China’s investment rule-making in tandem with the global trend to widen the ISDS application.\textsuperscript{128}

The RCEP represents the new breakthrough to China’s economic reform. Thirty-seven areas of China’s investment liberalization under the RCEP exceed its WTO commitments.\textsuperscript{129} More importantly, the RCEP marks Beijing’s first application of the ratchet mechanism that disallows parties to change back to more restrictive forms.\textsuperscript{130} China also agreed to extend national treatment to pre-establishment investment, which was rarely included in recent BITs and was primarily implemented in free trade zones or ports.\textsuperscript{131} Although Beijing did not assert a leadership role in forging the RCEP’s investment rules, these changes make the position of China more in line with that of developed Asian partners such as Japan and Korea.

The RCEP and the ACIA include common core pillars of investment protection, liberalization, promotion, and facilitation. However, qualifying provisions indicate the RCEP’s more cautious approach and reflect its pro-development focus.\textsuperscript{132} The RCEP adopted the ACIA-like asset-based definition of investment but incorporated country-specific restrictions. For Cambodia, Indonesia and Vietnam, the provisions that require covered investment to be ‘admitted’ denotes that it ‘has been specifically registered or approved in writing, as the case may be’.\textsuperscript{133} The requirement thus buttresses the relationship between regional and domestic investment rules, given that the application of RCEP provisions will be conditional on national registration and approval procedures. In addition, an investor can be a juridical person, but its branch is excluded from having ‘any

\begin{thebibliography}{99}
\footnotesize
\item AEC Blueprint 2025, para. E; State Council (2015), Several Opinions of the State Council on Accelerating the Implementation of the Strategies for Free Trade Areas.
\item UNCTAD, supra n. 5, at 2–49.
\item Contracting States and Measures Taken by Them for the Purpose of the Convention, ICSID/8-D (2018).
\item Kim, supra n. 129, at 2. It is more common for recent Chinese investment agreements to apply MFN to pre-establishment investment; Wang and Wang, supra n. 126, at 2387.
\item Regional Comprehensive Economic Partnership (2020) (RCEP), art. 10.1(a) and In 2.
\end{thebibliography}
right to make any claim against any’ RCEP party. In light of investment reforms, the RCEP mandates that FET and full protection and security be interpreted according to the ‘minimum standard of treatment of aliens’ under customary international law. Akin to the ACIA, the RCEP and its annex also detail conditions and compensation for direct and indirect expropriation. These reform elements of the RCEP will harmonize Asian countries’ investment rule-making approaches.

RCEP parties scheduled their services and investment commitments in Annexes II and III. As for the modality of these commitments, the positive list approach allows states to retain regulatory sovereignty because they liberalize only the sectors indicated in their schedules. As all sectors are to be liberalized unless otherwise indicated, the negative list approach is usually more aggressive and automatically covers newly developed areas. Distinct from the GATT, the AFAS, and ASEAN Plus One FTAs, the RCEP adopted the hybrid model for services commitments. Eight parties used positive list scheduling under Annex II and seven parties followed the negative list approach by including their reservations and non-conforming measures in Annex III.

The flexibility under the RCEP well illustrates pragmatic incrementalism. States that chose the positive list approach for services commitments will be required to transition to negative list scheduling in six years after the RCEP enters into force, but a 15-year transition period is accorded to three least developed ASEAN countries. RCEP services commitments are also vital to foreign equity restrictions that involve Mode 3-related FDI in the Asia-Pacific. To illustrate, RCEP members committed to liberalizing foreign ownership limits for at least 65% of sectors such as telecommunications and financial services industries.

Unlike the hybrid approach for services commitments, RCEP members scheduled their negative-list market access commitments for investment in Annex III. Similar to the ACIA Fourth Protocol, RCEP members specified their non-conforming measures that exclude or limit foreign investment in List A and their reservations for potential discriminatory measures in List B. Significantly, the ratchet clause of the RCEP applies to both services and investment so that 15 members ‘commit to automatically extend the benefits of any future’ agreements to all other parties. Hence, the clause propels the RCEP to stay as ‘the best deal’ for companies and governments.

4.2 Absence of the ISDS Mechanism and Legal Implications

ISDS has been the key focus in investment forums in new Asian regionalism. While the ACIA, the CPTPP and ASEAN Plus One FTAs follow US-style ISDS, an emerging trend is to replace ISDS with recourse to state courts and state-to-state proceedings. Recent IIAs such as the ASEAN–Hong Kong Investment Agreement, the UK–Japan FTA, and the EU–China Comprehensive Investment Agreement contain no ISDS mechanism, and instead articulate that pertinent rules will be subject to subsequent negotiations. The RCEP follows a similar approach. Article

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134 Ibid., fn 10.
135 UNCTAD, supra n. 21, at 36; Ibid., art. 10.5(1), fn 20, and annex 10A.
136 RCEP, art. 10.13, fn 25 and annex 10B.
138 These three countries include Cambodia, Laos, and Myanmar. RCEP, art. 8.12.7.
141 New Zealand Ministry of Foreign Affairs and Trade, supra n. 130, at 41 and 85; RCEP, annex III – Schedules of Reservations and Non-Conforming Measures for Services and Investment.
142 The ratchet clause applies to List A rather than List B in Annex III. RCEP, arts. 8.7.3, 8.7.4, and 10.8.1.
143 UNCTAD, supra n. 21, at 55–57.
144 Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People’s Republic of China and the Member States of the Association of Southeast Asian Nations (2017), art. 22.1(e); Agreement
10.18 mandates that parties commence negotiations for ISDS, as well as the application of expropriation rules to taxation measures, within two years after the RCEP becomes effective and that they conclude the talks in three years.\footnote{RCEP, art. 10.18(1) and (2).}

It is decisive to understand the rationale for RCEP parties’ changing positions on the inclusion of the ISDS. At the inception, the RCEP’s 2012 Guiding Principles and Objectives highlighted the significance of investment protection.\footnote{RCEP Guiding Principles and Objectives, sec. III.} In 2015, RCEP parties agreed to encompass ISDS provisions.\footnote{DFAT (2017) ‘Regional Comprehensive Economic Partnership (RCEP): Discussion Paper on Investment’, at 4.} Although Japan and Korea pushed for detailed ISDS rules during negotiations, other countries and the CPTPP development prompted the RCEP to discard ISDS.\footnote{B. Townsend (2015) ‘Update on the Regional Comprehensive Economic Partnership agreement – NGO briefing’, at 2.} Other than the CPTPP’s suspended clauses that circumscribe the ISDS ambit of the original TPP, some countries’ side letters exclude ISDS entirely.\footnote{DFAT, supra n. 76, at 1–2; New Zealand’s CPTPP Investor–State Dispute Settlement Side Letters with Australia, Brunei, Malaysia, Peru, and Vietnam (2018).} Thus, the RCEP parties decided to discuss ISDS as part of the future work program so that ISDS issues will not hamper the signing of the mega-pact.

The specific exclusion of pre-establishment rights from dispute settlement under Article 17.11 also suggests RCEP parties’ intention to fall back on state-to-state dispute procedures to deal with investment matters.\footnote{RCEP, art. 17.11.} To curtail the recourse to other FTAs or BIAs that provide more favourable procedures, the RCEP excludes ‘any international dispute resolution procedures or mechanisms under other existing or future international agreements’.\footnote{RCEP, art. 10.4(3); M. Ewing-Chow and J.J. Losari, ‘The RCEP Investment Chapter: A State-to-State WTO Style System for Now’, arbitrationblog.kluwerarbitration.com/2020/12/08/the-rcep-investment-chapter-a-state-to-state-wto-style-system-for-now/ (accessed 11 September 2021).} This co-existence approach manifests that RCEP members are still entitled to investor–state and state–state arbitration under current IIAs such as ASEAN Plus One FTAs among the disputing parties.\footnote{Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (2009), art. 2; Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan (2008), art. 10; RCEP, art. 20.2.1(b).} Markedly, to protect Cambodia, Laos and Myanmar, the RCEP stipulates that the parties bringing complaints against these states should ‘exercise due restraint’ and that the panel must identify how special and differential treatment is considered in procedures.\footnote{Vienna Convention on the Law of Treaties (1969), art. 10.3; A. Orakhelashvili (2016) ‘Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter’, ICSID Review-Foreign Investment Law Journal 31, 344, 361.}

The RCEP’s prospective ISDS mechanism will likely result in treaty shopping between applicable agreements. According to Article 30.3 of the Vienna Convention on the Law of Treaties (VCLT) on the application of successive treaties, ‘the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty’.\footnote{Vienna Convention on the Law of Treaties on the Application of Successive Treaties (1969), art. 10.3; A. Orakhelashvili (2016) ‘Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter’, ICSID Review-Foreign Investment Law Journal 31, 344, 361.} Nevertheless, this later-in-time rule cannot easily solve the problem. Arguably, Article 20.2 of the RCEP can be interpreted as a special law that overrides Article 30.3 of the VCLT as a general rule. Even assuming the VCLT prevails, various IIAs and RCEP will likely have distinct scopes and carve-outs, making the application of Article 30.3 legally unfeasible.
The normative development of the RCEP represents the Asian way of pragmatic incrementalism in reforming investment law. The future ISDS mechanism of the RCEP should be understood in line with key members’ ISDS reform proposals for the UNCITRAL Working Group III. China, Indonesia, Korea, and Thailand stressed their preference for the prevention of disputes. In particular, Indonesia proposed to condition investors’ claims on the exhaustion of local remedies, the government’s separate written consent and mandatory mediation. Thailand also indicated the importance of exploring the best practice for setting up the domestic mechanism of ISDS management to settle potential disputes.

RCEP members expressed concerns about developing countries’ limited capacity in responding to ISDS cases. Thailand and Korea supported the establishments of an advisory centre for investment disputes modeled after the Advisory Centre on WTO Law. Furthermore, RCEP countries including Japan wish to regulate third-party funding such as imposing disclosure requirements for transparency purposes. Interesting, China seems to be the sole RCEP member that indicated interest in setting up a permanent appellate mechanism for ISDS disputes. As explained below, Singapore and Vietnam are the only two ASEAN states that included such a mechanism in their investment pacts with Brussels. These developments will not only shape the RCEP’s ISDS direction, but also fill the gap in the literature that primarily focuses on the RCEP’s general dispute settlement mechanism under Chapter 19.

5. New IIAs and Alternative Mechanisms for Dispute Settlement

To understand ASEAN and RCEP strategies toward investment reforms in new Asian regionalism, it is vital to assess key members’ changing approaches to IIAs, as well as recent domestic arbitration and court rules for investor–state disputes. Indonesia provides a valuable case study. In addition to terminating BITs, Jakarta introduced new components into its new agreements, which may serve as models for the Global South. The 2018 Indonesia–Singapore BIT replaced their 2005 BIT, substantially lengthening the cooling-off period in which parties should try to settle disputes via consultations from six months to one year. This new time frame, which is longer than the three-to-six-month cooling-off periods contained in contemporary BITs, arguably compels investors to treat consultation much more seriously.

Also, the 2019 Indonesia–Australia FTA makes the governments’ joint interpretation of provisions at disputes binding on the arbitral tribunal. This design shifted fundamentally from their 1992 BIT that allows the tribunal to reach its determination regardless of the joint interpretation. ASEAN states’ stances have also influenced ASEAN Plus One FTAs. In the 2019 amendments to the ASEAN–Japan FTA, Indonesia and the Philippines required ICSID arbitration to condition the governments’ written consents. Indonesia’s approach may have been based on

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156 Submissions from Asian governments, supra n. 10.
158 A/CN.9/WG.III/WP.162, at 5.
165 Australia–Indonesia Bilateral Investment Treaty (1992), art. XIV(1).
166 First Protocol to Amend the Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations (2019), art. 51.13(9)(a) and note 1.
the ‘best practice’ of the Philippines’ ACIA reservation to subject ICSID disputes to ‘a written agreement’.

Indonesia wished to ‘rectify’ the perceived unfairness that it encountered in the Churchill Mining and Planet Mining cases, in which the tribunal ruled against Jakarta’s jurisdictional challenges irrespective of its argument for not consenting to arbitration. These developments will have an impact on prospective ISDS provisions of the RCEP.

Singapore and Vietnam have experienced different reforms in their investment pacts with the EU. Integral to its ISDS reforms agenda, Brussels has promoted the Investment Court System (ICS) including an appeals facility for investor–state disputes since 2014. Akin to the CPTPP, the original text of the Singapore–EU FTA that was completed in 2014 merely indicated a possibility for including an appellate mechanism. The ICS was incorporated into the EU–Canada Comprehensive Economic and Trade Agreement. In response to Opinion 2/15 of the Court of Justice of the EU (CJEU), EU and Singapore negotiators split the original EU–Singapore FTA into the new FTA and the Investment Protection Agreement (IPA).

The amended EU–Singapore FTA can be understood as an ‘EU-only’ agreement and the IPA is a ‘mixed’ agreement. Although the European Parliament gave consent to the new EU–Singapore FTA and IPA in 2019, the IPA will only enter into force after the 27 national parliaments of the EU ratify it. The EU–Vietnam FTA followed the same model, dividing it into the FTA andIPA, which the European Parliament ratified in 2020. The ICS mechanisms under the two IPAs may influence investment rulemaking in Asia in the future.

A new trend of facilitating domestic regimes to deal with ISDS cases is also in line with the domestication of investment law. This development enriches the liberal international order, as domestic mechanisms complement rather than exclude international counterparts. Markedly, the ACIA enables investors to resort to ICSID rules, regional arbitration centres, or domestic courts and administrative tribunals. The fork-in-the-road provision excludes resorting to other mechanisms once the disputing party chooses the judicial process. The RCEP’s prospective ISDS rules are expected to follow new developments to accord a greater role to domestic courts and arbitral institutions.

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167 ACIA, art. 33(1)(b) and fn 14.
171 The Court found that provisions on portfolio investment and investor–state dispute settlement fall outside the common commercial policy and thus involve the shared competence between the EU and its Member States. Opinion 2/15 of the Court (2017); European Parliament (2017) CJEU Opinion on the EU–Singapore Agreement, at 2.
175 ACIA, art. 33(1).
Countries have adopted different strategies to ease concerns about proliferating ISDS claims. Indonesia’s termination of BITs indicates its preference over the regional approach that makes the ACIA and ASEAN Plus One FTAs primary channels for disputes. Singapore has accelerated domestic reforms for handling ISDS cases. The Singapore International Arbitration Centre (SIAC) Rules 2016 stipulate an investment treaty as a basis for the SIAC’s jurisdiction. The Singapore International Commercial Court (SICC), which is a general division of Singapore’s High Court, was launched in 2015. As a claim of ‘international’ and ‘commercial’ nature is widely interpreted, the SICC is capable of adjudicating investor–state disputes. Recent proceedings that involved Sanum Investments and arose from disputes under the China–Laos BIT evidence the roles of the SIAC and the SICC in ISDS claims. Hence, the Singapore case signifies a new trend of domestic dispute settlement that complements the liberal international order.

6. Conclusion

The economic rise of Asia prompted academic and professional interests in investment rulemaking in Asia. This article aims to fill a gap in the existing literature by deciphering Asia’s legal approach of pragmatic incrementalism in the Third Regionalism. In particular, the article highlighted the new trend of domesticating international economic law by demonstrating the mutually reinforcing nature of domestic and regional investment laws.

As the cases of ASEAN and RCEP countries evidence, national investment and dispute settlements rules have not only incorporated but also propelled the best practice of regional agreements. These new developments enrich rather than undermine the liberal international order. Therefore, Asian countries’ experiences not only energize investment rulemaking in the region, but also provide valuable lessons for the Global South as a whole.

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177 Singapore International Arbitration Centre Rules 2016, rule 3.1(d).