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New investment rulemaking in Asia: Between regionalism and domestication

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ORIGINAL ARTICLE

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

[1]Asian Development Bank (2011) 'Asia 2050: Realizing the Asian Century: Executive Summary', at 3–5.

[2]Centre for Economics and Business Research (CEBR) (2020), 'World Economic League Table 2021', at 70–71.

[3]Australian Government, 'ASEAN's Economic Growth', www.austrade.gov.au/asean-now/why-asean-matters-to-australia/asean-economic-growth/ (accessed 14 March 2022).

[4]From 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.

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]

[5]Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP) (Joint Leaders' Statement on the RCEP) (2020); United Nations Conference on Trade and Development (UNCTAD) (2021) 'World Investment Report 2021: Investing in Sustainable Recovery', at 6.

[6]World Trade Organization (WTO) (2020) 'Trade Shows Signs of Rebound from COVID-19, Recovery Still Uncertain', 6 October 2020, www.wto.org/english/news_e/pres20_e/pr862_e.htm (accessed 14 March 2022); UNCTAD, 'Investment Trends Monitor (2021)', Issue 38, at 1; UNCTAD, supra n. 5, at 18 and 54; K. Olaoye and M. Sornarajah, 'Domestic Investment Laws, International Economic Law, and Economic Development', this special issue (explaining that the notion of 'development' represents the 'continued dialectical battle for supremacy between domestic law and international law on foreign investment'.).

[7]WTO, 'Investment, Competition, Procurement, Simpler Procedures', www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (accessed 14 March 2022).

[8]WTO (2021) *Annual Report 2021*, at 58.

[9]M. Langford et al. (2020) 'Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction', *Journal of World Investment and Trade* 16(21), 172–177.

[10]Submissions from Asian governments, United Nations Commission on International Trade Law: Working Group III: Investor–State Dispute Settlement Reform, https://uncitral.un.org/en/working_groups/3/investor-state (accessed 3 September 2021).

[11]J. Chaisse and G. Dimitropoulos, 'Domestic Investment Law and International Economic Law in the Liberal International Order', this special issue; J. Hepburn, 'The Past, Present and Future of Domestic Investment Laws and International Economic Law', this special issue.

[12]See generally J. Williamson (2008) 'A Short History of the Washington Consensus', in M. Serraand and J.E. Stiglitz (eds.), *The Washington Consensus Reconsidered: Toward a New Global Governance*, Oxford University Press, 14, 15–17.

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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.[13] To follow 'embedded liberalism', Asian countries have been rule-takers rather than rule-makers.[14] 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.[15] 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'.[16] On the other hand, Washington eagerly supported the founding of the European Economic

[13]J.G. Ruggie (1982) 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', *International Organization* 36(2), 379, 392–398.

[14]Ibid.

[15]J. Bhagwati (2008) *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*. Oxford University Press, 29–32.

[16]Ibid., at 31; J. Bhagwati (1992) 'Regionalism versus Multilateralism', *World Economy* 15, 535, 539.

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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 (ICSID 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

[17]WTO (2011) '*World Trade Report 2011*', at 52l; S. Cho (2001) 'Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism', *Harvard International Law Journal* 42(2), 419, 427; F. Söderbaum and L. van Langenhove (2005) 'Introduction: The EU as a Global Actor and the Role of Interregionalism', *European Integration* 27(3), 249, 255.

[18]A. Acharya (2012) 'Foundations of Collective Action in Asia: Theory and Practice of Regional Cooperation', ADBI Working Paper Series, No. 344, at 5–10.

[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.

[21]UNCTAD (2018) 'UNCTAD's Reform Package from the International Investment Regime', at 14.

[22]J.P. Meltzer (2015) 'Investment', in S. Lester et al. (eds.), *Bilateral and Regional Trade Agreements: Commentary and Analysis*, 2nd edn. Cambridge University Press, 245, 246.

[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.

[26]UNCTAD, supra n. 21, at 14. Note that the first modern bilateral investment treaty (BIT) was concluded between West Germany and Pakistan in 1959. J. Chaisse et al. (2017) 'The Changing Patterns of Investment Rule-Making Issues and Actors', in J. Chaisse et al. (eds.), *Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration*. Springer, 13, 14.

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

[28]Acharya, supra n. 18, at 5–16.

[29]Ibid.

[30]Resolution adopted by the General Assembly: 3201 (S-VI): Declaration on the Establishment of a New International Economic Order, A/RES/S-6/3201 (1974); Resolution adopted by the General Assembly: 3202 (S-VI): Programme of Action on the Establishment of a New International Economic Order, A/RES/S-6/3202 (1974); K. Olaoye and M. Sornarajah, 'Domestic Investment Laws, International Economic Law, and Economic Development', this special issue.

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that disputes should be settled under domestic laws and courts.[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.[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.[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'.[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.[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.[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.[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.[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.[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.

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,

[31]United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States (1974), art. 2(c).

[32]Meltzer, supra n. 22, 246–248; Chaisse et al., supra n. 26, at 14.

[33]C. Thomas and J.P. Trachtman (2009) 'Introduction', in C. Thomas and J.P. Trachtman (eds.), *Developing Countries in the WTO Legal System.* Oxford University Press, 1, 9–10; S.E. Rolland (2012), *Development at the WTO.* Oxford University Press, 51–52.

[34]Bhagwati, supra n. 15, at 31–35.

[35]R. Baldwin (1993) 'A Domino Theory of Regionalism', NBER Working Paper Series, No. 4465, at 2–5.

[36]Severino, supra n. 19, at 222–223; WTO, supra n. 17, at 96–97.

[37]UNCTAD Secretariat (2011) 'Core Elements of International Investment Agreements in Domestic Investment Frameworks in the APEC Region', at 11 and 40–43. The 1994 Principles were updated in 2011. The new Principles incorporate more provisions mandating the rule consistency and regulatory protections that prohibit the relaxation of health, labour, and environmental requirement to attract FDIs. APEC Non-Binding Investment Principles (2011). The 1994 version of the Principles, see Annex 3, in ibid., at 85–87.

[38]From the era of dichotomy (1965–1989) to the era of proliferation (1990–2007), the number of international investment agreements increased from 367 to 2,663 and the number of investor–state dispute settlements (ISDS) increased from 1 to 291. UNCTAD, supra n. 21, at 14.

[39]It covers ten ASEAN countries and China, Japan, and Korea. Severino, supra n. 19, at 256–257. This initiative became known as the Chiang Mai Initiative Multilateralization in 2010.

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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.[40] 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.[41]

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.[42] 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.[43]

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.[44]

To illustrate, Singapore attracts the most FDI inflows to ASEAN.[45] According to the typology developed in the introductory article, Singapore is a jurisdiction that does not have specific legislation on investment.[46] Laws of general application including contract and company laws govern foreign investment.[47] Yet, sectoral laws such as the Residential Property Act, the Newspaper and Printing Act, and the Banking Act include restrictions on foreign ownership and vigorous

[40]Joint Leaders' Statement on the RCEP, supra n. 5; ASEAN (2019) 'ASEAN Integration Report 2019', at 127; Government of Canada, 'About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership', 16 July 2019, www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/backgrounder-document_information.aspx?lang=eng (accessed 14 March 2022); World Bank, 'GDP (current US$)', data.worldbank.org/indicator/NY.GDP.MKTP.CD (accessed 14 March 2022).

[41]Joint Leaders' Statement on the RCEP, supra n. 5.

[42]C. Hofmann et al. (2017) 'Horizontal Depth: A New Database on the Content of Preferential Trade Agreements', Policy Research Working Paper, No. 7981, at 4; R. Baldwin (2013) 'Multilateralizing Asian Regionalism', ADBI Working Paper Series, No. 431, at 8–9.

[43]UNCTAD (2022) 'World Investment Report 2022: International Tax Reforms and Sustainable Development', at 65; UNCTAD, supra n. 5, at 122; Meltzer, supra n. 22, at 250. Currently, there are 350 FTAs in force. WTO, 'Regional Trade Agreements: Database', https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (accessed 14 March 2022).

[44]For detailed explanation about special economic zones as unilateral acts, see J. Chaisse and G. Dimitropoulos (2021) 'Special Economic Zones in international Economic Law: Toward Unilateral Economic Law', *Journal of International Economic Law* 24(2), 229, 244–253.

[45]ASEAN and UNCTAD (2021) 'ASEAN Investment Report 2020–2021: Investing in Industry 4.0', at 5–7.

[46]See 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').

[47]J. Bonnitcha (2017), 'Investment Laws of ASEAN Countries: A Comparative Review', IISD Report, at 19.

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licensing regimes.[48] Moreover, Singapore's nine FTZs provide beneficial customs and tax treatment to firms that engage in 'entrepot trade and transshipment activities'.[49] 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.[50] These reforms were incorporated into China's recent IIAs and 2019 Foreign Investment Law.[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.[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.[53] Decree 31 clarifies the implementation of the new law by stipulating the negative lists, including the Prohibited List and the Market Entry List.[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.[55] Foreign investments that fall outside the negative lists are thus accorded national treatment.[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.[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.[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

[48]Ibid.; 'Singapore's Foreign Investment Regime', Pinsent Masons, 26 November 2020, www.pinsentmasons.com/out-law/guides/singapores-foreign-investment-regime (accessed 26 October 2021).

[49]'Depositing Goods in Free Trade Zones', www.customs.gov.sg/businesses/importing-goods/import-procedures/depositing-goods-in-ftz (accessed 26 October 2021); 'Singapore – Customs Regulations', www.export.gov/apex/article2?id=Singapore-Customs-Regulations (accessed 26 October 2021).

[50]W. Yin (2018) 'Challenges, Issues in China–EU Investment Agreement and the Implication on China's Domestic Reform', *Asia Pacific Law Review* 26(2), 170, 188; A. Chen and C. Lim, 'Hainan Free Trade Port: Hainan's Transformation Ushers in New Opportunities for Foreign Investors', *Lexology*, 5 August 2021, www.lexology.com/library/detail.aspx?g=efe76d12-77b8-4b76-aa4d-ada826a93cdb (accessed 6 September 2021); J. Hu (2021) 'From SEZ to FTZ: An Evolutionary Change toward FDI in China', in J. Chaisse et al. (eds.), *Handbook of International Investment Law and Policy*. Springer, 2395, 2396–2400.

[51]V. Bath and L. Nottage (2021), 'International Investment Agreements and Investor–State Arbitration in Asia', in Julien Chaisse et al. (eds.), *Handbook of International Investment Law and Policy*, Springer, 2562, 2580–2581; A. Huang et al., 'China Further Opens its Market with New "Foreign Investment Law"', Jones Day (February 2020) www.jonesday.com/en/insights/2020/02/chinas-new-foreign-investment-law (accessed 14 March 2022).

[52]A. Tomiyama, 'Vietnam's Economic Zones Derailed by Anti–China Protests', *Nikkei Asia*, 3 September 2018, https://asia.nikkei.com/Politics/International-relations/Vietnam-s-economic-zones-derailed-by-anti-China-protests (accessed 14 March 2022).

[53]S. Scoles and M. Solomon, 'Key Outcomes for Foreign Investors in Vietnam's New Law on Investment', White Case (30 November 2020) www.whitecase.com/publications/alert/key-outcomes-foreign-investors-vietnams-new-law-investment (accessed 14 March 2022); UNCTAD, supra n. 5, at 119; see also X. Qian, 'Domestic Investment Laws and State Capitalism', this special issue (discussing the successive reforms of State-owned enterprises and investment in Vietnam).

[54]'Vietnam Issues New Guidance on Foreign Investment', Allen & Gledhill (28 June 2021), www.allenandgledhill.com/vn/perspectives/articles/18840/vnkh-issues-new-guidance-on-foreign-investment (accessed 14 March 2022).

[55]Ibid.

[56]Ibid.

[57]World Bank (2020) 'Vietnam: Deepening International Integration and Implementing the EVFTA', at 44–45.

[58]Bonnitcha, supra n. 47, at 8.

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FDIs from 20 to 6 and removed the 67% foreign equity limitations on key sectors such as telecommunications and media.[59] 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.[60] 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.[61] Other than the multilateral forum of the UNCITRAL, states have resorted to national, bilateral, and regional strategies to implement their agendas.[62] Among Asian countries, India and Indonesia encountered the most ISDS claims, thus expediting those governments' ISDS reforms.[63] India lost the case of *White Industries* where an Australian company challenged delays in India's judicial system.[64] 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'.[65] 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.[66]

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.[67] 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.[68] Subsequently, Indonesia announced its intention to terminate all 67 BITs.[69] The government has terminated more than 30 BITs.[70]

[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.

[61]UNCTAD, supra n. 21, at 14; UNCTAD, *IIA Issues Note*, Issue 2 (2020), at 1.

[62]UNCTAD, supra n. 21, at 25–31.

[63]For a review of India's ISDS practice, see P. Ranjan and P. Anand (2020) 'Covid-19, India, and Investor–State Dispute Settlement (ISDS): Will India Be Able to Defend its Public Health Measures?', *Asia Pacific Law Review* 28(1), 225–247.

[64]*White Industries Australia Limited v. India*, UNCITRAL, Final Award, 16.1.1, 30 November 2011.

[65]Ibid.

[66]P. Ranjan (2017) 'Investment Protection and Host State's Right to Regulate in the Indian Model Bilateral Investment Treaty: Lessons for Asian Countries', in J. Chaisse et al. (eds.), *Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration*. Springer, 47, 49–55; Model Text for the Indian Bilateral Investment Treaty (2016), art. 15.

[67]D. Price (2017) 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment', *Asian Journal of International Law* 7, 124, 136–138; S. Schonhardt, 'British Mining Firm Sues Indonesia for Asset Seizure', *New York Times*, 6 June 2012, www.nytimes.com/2012/06/07/business/global/british-mining-company-sues-indonesia-over-1-8-billion-coal-project.html (accessed 14 March 2022).

[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.

[69]B. Bland and S. Donnan, 'Indonesia to Terminate More than 60 Bilateral Investment Treaties', *Financial Times*, 26 March, 2014, www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0 (accessed 14 March 2022); Price, supra n. 67, at 134–136.

[70]UNCTAD Investment Policy Hub: Indonesia, https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia (accessed 14 March 2022); S.L. Magiera (2017) 'International Investment Agreements and Investor–State Disputes: A Review and Evaluation for Indonesia', ERIA Discussion Series, at 4–16; Possible reform of Investor–State

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Following these disputes, the case of *Philip Morris* fundamentally changed investment rulemaking in Asia. In this case, the US company, Philip Morris, challenged Australia's plain cigarette packaging legislation intended to reduce smoking.[71] 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.[72] 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.[73] 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.[74] The case of *Philip Morris* resulted in the tobacco carve-out clause of the Trans-Pacific Partnership (TPP) and the Australia–Singapore FTA.[75] The CPTPP takes a further step to confine the ISDS application.[76]

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.[77] 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.[78] 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'.[79] The first and foremost characteristic of the AEC Blueprint 2025 is 'A Highly

dispute settlement (ISDS): Comments by the Government of Indonesia: Note by the Secretariat, A/CN.9/WG.III/WP.156, 9 November, 2018, at 2–3.

[71]E. Sheargold and A.D. Mitchell (2021) 'Public Health in International Investment Law and Arbitration', in J. Chaisse et al. (eds.), *Handbook of International Investment Law and Policy*. Springer 1851, 1857–1859; *Philip Morris Asia Ltd. v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility, 7–8, 89 (17 December 2015).

[72]J. Baumgartner (2016) *Treaty Shopping in International Investment Law* 7–15; J. Chaisse (2015) 'The Treaty Shopping Practice: corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration', *Hasting Business Law Journal* 11(2), 225, 228–239; C.-C. Kao (2015) 'Alternative Access to Investor–State Arbitration for Taiwanese Corporate Investor against China via Treaty Shopping', *Asia Pacific Law Review* 23(2), 121, 129–131; *Philip Morris Asia Ltd. v. Commonwealth of Australia*, supra n. 71, at 535–570.

[73]*Philip Morris Asia Ltd. v. Commonwealth of Australia*, supra n. 71, at 580–585.

[74]D. Behn et al. (2020) 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?', *Journal of World Trade & Investment* 21, 188, 197 ('[T]otal legal costs and tribunal fees in ICISD cases averaged USD 8 million'); A. Sands, 'Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo', this special issue (discussing regulatory chill in investment law generally).

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

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

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

[78]B. Mercurio (2011) 'Trade Liberalisation in Asia: Why Intra-Asian Free Trade Agreements Are Not Utilised by the Business Community', *Asian Journal of WTO and International Health Law and Policy* 6(1), 109, 110–136; Interview with Goh Chok Tong, The Story of the ASEAN Economic Community, 1/2017 ASEAN Focus 22, 22–23 (2017). Other pillars include the ASEAN Security Community and the ASEAN Socio-Cultural Community.

[79]Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together (2015).

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Integrated and Cohesive Economy.'[80] Its key target is to 'establish a more unified market' by facilitating 'the seamless movement of goods, services, investment, capital and, and skilled labour'.[81]

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.[82] In practice, it has functioned as the code of conduct in inter-state interactions and the decision-making process for reaching consensus by consultations.[83] 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.[84]

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.[85] ASEAN also overtook China in attracting FDI.[86] 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.[87] 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.[88]

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.[89] 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.[90] However, as the investment

[80]ASEAN Economic Community Blueprint 2025 (2015) (AEC Blueprint 2025), paras. 7–24.

[81]Ibid., para. 7.

[82]Severino, supra n. 19, at 1–11; A. Acharya (2014) *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order*. Routledge, 3–5.

[83]A. Archarya (1997) 'Ideas, Identity, and Institution-building: From the 'ASEAN Way' to the 'Asia-Pacific Way', *Pacific Review* 10(3), 319, 328–330.

[84]P.L. Hsieh (2022) *New Asian Regionalism in International Economic Law*. Cambridge University Press, 37–53.

[85]ASEAN Secretariat (2017) *ASEAN at 50; A Historic Milestone for FDI and MNEs in ASEAN*, at xiii and 6–7.

[86]J. Wood (2017) *Re-drawing the ASEAN Map: How Companies Are Crafting New Strategies in South-East Asia*, at 4,

[87]J. Chaisse and S. Jusoh (2016), *The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investment*. Edward Elgar, 67–68.

[88]AEC Blueprint 2025, para. 14.

[89]S. Jusoh (2019) 'Investment Liberalization in ASEAN: Moving Myths to Reality', in P.L. Hsieh and B. Mercurio (eds.), *ASEAN Law in the New Regional Economic Order: Global Trends and Paradigms*. Cambridge University Press. 209, 218–225. On Myanmar domestic investment law, see also T.G. Berge and O.K. Fauchald, 'The International Sources of National Legislation: International Organizations and Domestic Investment Laws', this special issue.

[90]Organisation for Economic Co-operation and Development (2017), 'OECD Investment Policy Reviews: Lao PDR', at 34 and 71.

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law merely addresses non-discrimination without clear-cut national treatment and MFN provisions, the ACIA and Laos' IIAs remain 'safe choices' for foreign investors.[91] Myanmar's 2016 Investment Law and 2017 Investment Rules represent the country's latest efforts to modernize the domestic investment regime.[92] New provisions incorporate key features of the ACIA including the single reservation list, as well as national treatment and MFN clauses.[93] 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.[94]

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.[95] 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'.[96] To prevent proliferating claims, the ACIA excludes assets that lack 'the characteristics of an investment'.[97]

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.[98] The original ACIA included a single, negative-list annex that covers states' existing and future non-conforming measures in the liberalized sectors.[99] The Fourth Protocol broadened the liberalization scope by changing a single annex to two-annex negative lists.[100] 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.[101] 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).[102] Schedules of services commitments completed under various rounds of negotiations cumulatively 'form an integral part of' the AFAS.[103] 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.

[91]Jusoh, supra n. 89, at 221.

[92]Ibid., at 224.

[93]Ibid., at 225–226; Bonnitcha supra n. 47, at 16.

[94]'Commission News', Ministry of Investment and Foreign Economic Relations, https://mifer.gov.mm/en/news/commission-news/detail/myanmar-investment-commission-mic-holds-its-regular-meeting-22021437 (accessed 28 October 2021).

[95]ASEAN Comprehensive Investment Agreement (2009) (ACIA), arts. 3(1), 4(d) and 19; Chaisse and Jusoh, supra n. 87, at 76–78; L. Nottage (2017) 'The Investment Chapter and ISDS in the TPP: Lessons from Southeast Asia', ISEAS Yusof Ishak Institute Economics Working Paper, No. 2017-2, at 2–3.

[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).

[99]Ibid., art. 9; J. Chaisse and S. Jusoh (2016) *ASEAN Comprehensive Investment Agreement: A Guidebook for Businesses and Investors*. Edward Elgar, 10–11.

[100]Ministry of Trade and Industry Singapore (MTI) (2019) 'Minister Chan Chun Sing at the 25th ASEAN Economic Ministers' Retreat in Phuket, Thailand', at 4.

[101]Ibid., at 4 fn 6.

[102]ASEAN, supra n. 40, at 34.

[103]ASEAN Framework Agreement on Services (1995) (AFAS), art. VIII.

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Comparable to the General Agreement on Trade in Services (GATS), AFAS commitments encompass four modes of services.[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.[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.[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.[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'.[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'.[109] To safeguard regulatory sovereignty, the MFN clause of the ACIA also excludes ISDS proceedings.[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.[111] Comparable provisions are incorporated into ASEAN Plus One FTAs.[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.[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'.[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

[104]General Agreement on Trade in Services (1994) (GATS), art. I:2.

[105]ASEAN and UNCTAD (2019) 'ASEAN Investment Report 2019: FDI in Services: Focus on Health Care', at xxv.

[106]Z. Zhong (2011) 'The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community', *Asian Journal Comparative Law*. 6(1), 1, 4–5.

[107]Bonnitcha, supra n. 47, at 15–16.

[108]UNCTAD, supra n. 21, at 35–36; Meltzer, supra n. 22, at 265–266.

[109]ACIA, art. 11.

[110]ACIA, art. 6 fn 4(1).

[111]I.M. Ramli (2021) 'Denial of Benefits in Investment Arbitration: Genesis, Trends, and Application', in J. Chaisse et al. (eds.), *Handbook of International Investment Law and Policy*. Springer, 1014, 1016–1026.

[112]Ibid., at 1027–1029.

[113]E.g., K. Bradsher and A. Swanson (2020) 'China-Led Trade Pact is Signed, in Challenge to US', *New York Times*, 15 November 2020, www.nytimes.com/2020/11/15/business/china-trade-rcep.html (accessed 1 January 2021). See also J. Chaisse et al. (2022) 'Drafting Investment Law: Patterns of Influence in the Regional Comprehensive Economic Partnership (RCEP)', *Journal of International Economic Law* 25(1), 1, 1–23 (suggesting that according to the quantitative text analysis, the RCEP was primarily influenced by ASEAN and the CPTPP rather than China).

[114]Joint Leaders' Statement on the RCEP, supra n. 5; G. Ho, *RCEP Negotiators Recount Twists and Turns in 8-year Journey to World's Biggest Trade Pact*, *Straits Times*, 28 November 2020, www.straitstimes.com/business/economy/rcep-negotiators-recount-twists-and-turns-in-8-year-journey-to-worlds-biggest-trade (accessed 1 September 2021); D. Xijun, 'RCEP: Historic Milestone for ASEAN Centrality', *Jakarta Post*, 20 November 2020, www.thejakartapost.com/academia/2020/11/20/rcep-historic-milestone-for-asean-centrality.html (accessed 1 September 2021).

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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]

[115]ASEAN, supra n. 40, at 19–41 & 131–132; Free Trade Agreements with Dialogue Partners, https://asean.org/asean-economic-community/free-trade-agreements-with-dialogue-partners/ (accessed 2 February 2021).

[116]The comparison between selected ASEAN agreements on investment, see Nottage, supra n. 95, at 17; J.J. Losari (2017), 'A Baseline Study for RCEP's Investment Chapter: Packing the Right Protection Standards', in J. Chaisse et al. (eds.), *Asia's Changing International Investment Regime: Sustainability, Regionalization, and Arbitration*. Springer, 141, 146; T.H. Yen (2019) 'Fragmented Approaches to Investor–State Dispute Settlement Mechanisms in Intra-ASEAN and Extra-ASEAN Investment Treaties', in P.L. Hsieh and B. Mercurio (eds.), *ASEAN Law in the New Regional Economic Order: Global Trends and Paradigms*. Cambridge University Press, 252, 257.

[117]These proposals aim to establish the 13-party East Asian Free Trade Area (EAFTA) and 16-party Comprehensive Economic Partnership for East Asia (CEPEA), respectively. China supported the EAFTA, whereas Japan preferred the CEPEA, which include additional members of India, Australia, and New Zealand. *Report of the East Asian Vision Group II (EAVGII)* (2012), at 43–46; R.C. Severino (2014) 'Japan's Relations with ASEAN', in T. Shiraishi and T. Kojima (eds.), *ASEAN–Japan Relations*. ISEAS Publishing, 17, 26–28; T. Akihiko, '"Extrovert Regionalism" – CEPEA Portends Direction of Japan's New Trade Policy', Japan Spotlight, July/August 2017, at 38; Severino, supra n. 19, at 27–28.

[118]Asia–Pacific Economic Cooperation (APEC), 'ABAC Recommendations to APEC Leaders', 11 November, 2004, www.apec.org/Press/News-Releases/2004/1111_abacrecmdleaders (accessed 4 January, 2021); I.F. Fergusson and B.R. Williams (2016) 'The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress', Congressional Research Service, at 1–3.

[119]DFAT, 'Background to the Regional Comprehensive Economic Partnership (RCEP) Initiative', www.dfat.gov.au/trade/agreements/negotiations/rcep/Pages/background-to-the-regional-comprehensive-economic-partnership-rcep-initiative (accessed 14 March 2022).

[120]See generally, ASEAN Framework for Regional Comprehensive Economic Partnership (2011).

[121]Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (2012) (RCEP Guiding Principles and Objectives).

[122]N. Ganapathy, 'Indian Official Says Delhi's Thinking Over Pact Has Not Changed', *Straits Times*, 16 November 2020, at A9; DFTA, 'RCEP News', www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/news (accessed 14 March 2022).

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Table 1. ASEAN-Based Agreements Including Investment Rules

Agreements/Parties	Agreements and Amendments	ISDS
AEC: ASEAN Member States	– ASEAN Trade in Goods Agreement (2009) – **ASEAN Comprehensive Investment Agreement** (2009) – ASEAN Trade in Services Agreement (2019)	Yes
ASEAN-China FTA	– Framework Agreement (2002) – Trade in Goods Agreement (2004) – Dispute Settlement Mechanism Agreement (2004) – Trade in Services Agreement (2007) – **Investment Agreement** (2009)	Yes
ASEAN–Japan FTA	– Framework Agreement (2003) – Agreement on Comprehensive Economic Partnership (2009) (**Chapter 7: Investment**) – Protocol to amend the agreement to include the Chapters on Trade in Services, Movement of Natural Persons and **Investment** (2019)	Yes
ASEAN–India FTA	– Framework Agreement (2003) – Trade in Goods Agreement (2009) – Dispute Settlement Mechanism Agreement (2009) – Trade in Services Agreement (2014) – **Investment Agreement** (2014)	Yes
ASEAN–Korea FTA	– Framework Agreement (2005) – Dispute Settlement Mechanism Agreement (2005) – Trade in Goods Agreement (2006) – Trade in Services Agreement (2007) – **Investment Agreement** (2009)	Yes
ASEAN–Australia–New Zealand FTA	– Free Trade Agreement (2009) (**Chapter 11: Investment**)	Yes
ASEAN–Hong Kong FTA and Investment Agreement	– Free Trade Agreement (2017) – **Investment Agreement** (2017)	No
RCEP: ASEAN Member States, China, Japan, Korea, Australia and New Zealand	– Regional Comprehensive Economic Partnership (RCEP, 2020) (**Chapter 10: Investment**)	No

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

[123]Department for International Trade (2021) 'UK Accession to CPTPP: The UK's Strategic Approach', at 4–5; D. Leussink and K. Komiya, 'First Meeting for UK's CPTPP Inclusion to be Held in a Month, Japan Minister Says', *Reuters*, 21 September 2021, www.reuters.com/world/uk/first-meeting-uks-cptpp-inclusion-be-held-month-japan-minister-says-2021-09-01 (accessed 20 September 2021); GT Staff Reporters, 'China Officially Applies to Jjoin CPTPP, as the US Increasingly Isolated in Trade', *Global Times*, 17 September 2020, www.globaltimes.cn/page/202109/1234550.shtml (accessed

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the 'Global ASEAN' agenda under the AEC Blueprint 2025 and China's FTA strategy based on its Belt and Road Initiative.[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.[125] Transforming into a capital-exporting economy has influenced the normative shaping of third and fourth-phase Chinese BITs and the RCEP.[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.'[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.[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.[129] More importantly, the RCEP marks Beijing's first application of the ratchet mechanism that disallows parties to change back to more restrictive forms.[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.[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.[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'.[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

20 September 2020); A. Kashem, 'Bangladesh Decides to Join Largest Trade Bloc', *The Business Standard*, 13 September, www.tbsnews.net/economy/bangladesh-decides-join-largest-trade-bloc-299347 (accessed 13 September 2021); W. Tianyu, *Hong Kong Actively Applying to Join RCEP, Says Financial Chief*, CGTN, 24 June 2021, https://news.cgtn.com/news/2021-06-24/Hong-Kong-actively-applying-to-join-RCEP-says-financial-chief-11m403kzPyM/index.html (accessed 12 September 2021).

[124]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.

[125]UNCTAD, supra n. 5, at 2–49.

[126]Ibid., at 7; W. Leutert and Z. Haver (2020) 'From Cautious Interaction to Mature Influence: China's Evolving Engagement with the International Investment Regime', *Pacific Affairs* 93(1), 59, 69–75; H. Wang and L. Wang (2021) 'China's Bilateral Investment Treaties', in J. Chaisse et al. (eds.), *Handbook of International Investment Law and Policy*. Springer, 2375, 2381–2385.

[127]Contracting States and Measures Taken by Them for the Purpose of the Convention, ICSID/8-D (2018).

[128]V. Bath (2016) '"One Belt, One Road" and Chinese Investment', in L.-C. Wolff and C. Xi (eds.), *Legal Dimension of China's Belt and Road Initiative*. Wolters Kluwer Hong Kong Limited, 165, 177. Note that ISDS provisions do not apply to most-favored-nation (MFN) treatment. Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (2015), arts. 1.2 and 1.3.

[129]Y. Kim (2021) 'Geoeconomic Opportunities and Geopolitical Risks of the RCEP', IFANS Perspective, at 2.

[130]Ibid.; New Zealand Ministry of Foreign Affairs and Trade (2020) *Regional Comprehensive Economic Partnership: National Interest Analysis*, at 41.

[131]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.

[132]United Nations Economic Commission for Asia and the Pacific (UNESCAP), 'Asia-Pacific Trade and Investment Trends: Foreign Direct Investment Trends and Outlook in Asia and the Pacific' (2020/2021), at 26; A. Nicholls, 'RCEP Investment Rules: Help or Hindrances to Asia's COVID-19 Recovery?', *Afronomics Law,* 17 February 2021, www.afronomics-law.org/category/analysis/rcep-investment-rules-help-or-hindrances-asias-covid-19-recovery (accessed 14 March 2022).

[133]Regional Comprehensive Economic Partnership (2020) (RCEP), art. 10.1(a) and fn 2.

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right to make any claim against any' RCEP party.[134] 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.[135] Akin to the ACIA, the RCEP and its annex also detail conditions and compensation for direct and indirect expropriation.[136] 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.[137]

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.[138] 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.[139]

Unlike the hybrid approach for services commitments, RCEP members scheduled their negative-list market access commitments for investment in Annex III.[140] 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.[141] 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.[142] 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.[143] 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.[144] The RCEP follows a similar approach. Article

[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.

[137]RCEP, annex II – Schedules of Specific Commitments for Services and annex III – Schedules of Reservations and Non-Conforming Measures for Services and Investment.

[138]These three countries include Cambodia, Laos, and Myanmar. RCEP, art. 8.12.7.

[139]MTI (2020) 'Regional Comprehensive Economic Partnership Agreement Signed', at 4.

[140]UNESCAP (2020/2021) 'Asia-Pacific Trade and Investment Trends: Preferential Trade Agreements in Asia and the Pacific: Trends and Developments', at 9–10.

[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

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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.[145]

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.[146] In 2015, RCEP parties agreed to encompass ISDS provisions.[147] Although Japan and Korea pushed for detailed ISDS rules during negotiations, other countries and the CPTPP development prompted the RCEP to discard ISDS.[148] Other than the CPTPP's suspended clauses that circumscribe the ISDS ambit of the original TPP, some countries' side letters exclude ISDS entirely.[149] 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.[150] 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'.[151] Moreover, based on the model of ASEAN Plus One FTAs, the RCEP affirms 'existing rights and obligations' arising from other agreements.[152] 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.[153] 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.[154]

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'.[155] 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.

between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership (2020), art. 8.5(3); EU–China Comprehensive Agreement on Investment (CAI): List of Sections (2021), sec VI, sub-section 2, art. 3 https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237 (accessed 2 September 2021).

[145]RCEP, art. 10.18(1) and (2).

[146]RCEP Guiding Principles and Objectives, sec. III.

[147]DFAT (2017) 'Regional Comprehensive Economic Partnership (RCEP): Discussion Paper on Investment', at 4.

[148]B. Townsend (2015) 'Update on the Regional Comprehensive Economic Partnership agreement – NGO briefing', at 2.

[149]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).

[150]RCEP, art. 17.11.

[151]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', Kluwer Arb. Blog, 8 December 2020, arbitrationblog.kluwerarbitration.com/2020/12/08/the-rcep-investment-chapter-a-state-to-state-wto-style-system-for-now/ (accessed 11 September 2021).

[152]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).

[153]RCEP, art. 19.3(2) and 20.2.

[154]RCEP, art. 19.18.

[155]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.

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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.[156] In particular, Indonesia proposed to condition investors' claims on the exhaustion of local remedies, the government's separate written consent' and mandatory mediation.[157] Thailand also indicated the importance of exploring the best practice for setting up the domestic mechanism of ISDS management to settle potential disputes.[158]

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.[159] Furthermore, RCEP countries including Japan wish to regulate third-party funding such as imposing disclosure requirements for transparency purposes.[160] Interestingly, China seems to be the sole RCEP member that indicated interest in setting up a permanent appellate mechanism for ISDS disputes.[161] 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.[162] 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.[163] 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.[164] This design shifted fundamentally from their 1992 BIT that allows the tribunal to reach its determination regardless of the joint interpretation.[165] 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.[166] Indonesia's approach may have been based on

[156]Submissions from Asian governments, supra n. 10.

[157]A/CN.9/WGIII/WP.156, at 4.

[158]A/CN.9/WG.III/WP.162, at 5.

[159]Ibid.; A/CN.9/G.UUU/WP.179, at 5.

[160]E.g., A/CN.9/WGIII/WP/182, at 6.

[161]A/CN.9/WG.III/WP.177, at 4.

[162]See W. Setiawati (2021) 'ICS from South East Asia Perspective', in J. Chaisse et al. (eds.), *Handbook of International Investment Law and Policy*. Springer, 2540, 2542–2547.

[163]Indonesia–Singapore BIT (2015), art. 8(2); Indonesia–Singapore BIT (2018), art. 17(1); Drew Network Asia (2021), The New Singapore–Indonesia Investment Treaty and What It Means for Your Business, at 9.

[164]Indonesia–Australia Comprehensive Economic Partnership Agreement (2019), art. 14.33(3); G. Dimitropoulos (2018) 'Investor–State Dispute Settlement Reform and Theory of Institutional Design', *Journal of International Dispute Settlement* 9 (4), 535–569, 560.

[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.

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the 'best practice' of the Philippines' ACIA reservation to subject ICSID disputes to 'a written agreement'.[167] 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.[168] 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.[169] The ICS was incorporated into the EU–Canada Comprehensive Economic and Trade Agreement.[170] 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).[171]

The amended EU–Singapore FTA can be understood as an 'EU-only' agreement and the IPA is a 'mixed' agreement.[172] 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.[173] The EU–Vietnam FTA followed the same model, dividing it into the FTA and IPA, which the European Parliament ratified in 2020.[174] 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.[175] The fork-in-the-road provision excludes resorting to other mechanisms once the disputing party chooses the judicial process.[176] The RCEP's prospective ISDS rules are expected to follow new developments to accord a greater role to domestic courts and arbitral institutions.

[167]ACIA, art. 33(1)(b) and fn 14.

[168]UNCTAD, supra n. 21, 52–53; European Commission (2016) *Consultation Strategy: Impact Assessment on the Establishment of a Multilateral Investment Court for Investment Dispute Resolution*, at 1.

[169]CPTPP, art. 9.23.11; MTI (2020) *PowerPoint Slides: The EUSFTA: New Opportunities for Our Business*, at 2; M. Mohan (2018) 'The European Union's Free Trade Agreement with Singapore – One Step Forward, 28 Steps Back?', in J. Chaisse and L. Nottage (eds.), *International Investment Treaties and Arbitration Across Asia*. Brill, 180, 198.

[170]European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Report on the Implementation of the Trade Policy Strategy Trade for All: Delivering a Progressive Trade Policy to Harness Globalisation', COM (2017) 491 final (2017), at 8; C. Titi (2019) 'Recent Developments in International Investment Law', in M. Bungenberg et al. (eds.), 2018 *European YearBook of International Economic Law* 9, 383, 392–393.

[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.

[172]D. Kleimann and G. Kübek (2018) 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15', *Legal Issues of Economic Integration* 45(1), 13, 22–24.

[173]European Commission, 'Agreement with Singapore Set to Give a Boost to EU–Asia Trade', 13 February 2019, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1980 (accessed 22 September 2021).

[174]European Commission, 'EU–Viet Nam Free Trade Agreement – Joint Press Statement by Commissioner Malmström and Minister Tran Tuan Anh', 30 June 2019, trade.ec.europa.eu/doclib/press/index.cfm?id=2041&utm_source=dlvr.it&utm_medium=facebook (accessed 3 September, 2020); World Bank (2020) 'Vietnam: Deepening International Integration and Implementing the EVFTA', at 20.

[175]ACIA, art. 33(1).

[176]Ibid.; Man Yip (2019) 'Pro-Development Dispute Resolution Mechanisms and Norms for Investment and Commercial Dispute in ASEAN', in P.L. Hsieh and B. Mercurio (eds.), *ASEAN Law in the New Regional Economic Order: Global Trends and Paradigms*. Cambridge University Press, 271, 274.

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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.[177] The Singapore International Commercial Court (SICC), which is a general division of Singapore's High Court, was launched in 2015.[178] As a claim of 'international' and 'commercial' nature is widely interpreted, the SICC is capable of adjudicating investor–state disputes.[179] 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.[180] 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).

[178]Supreme Court of Judicature Act (Chapter 322) (2007), art. 18A; 'Establishment of the SICC', www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc (accessed 4 November 2021).

[179]Rules of Court, Interpretation (O. 110, r. 1); G. Dimitropoulos (2021) 'International Commercial Courts in the "Modern Law of Nature": Adjudicatory Unilateralism in Special Economic Zones', *Journal of International Economic Law* 24(1), 361–379, at 366–367, 377–379.

[180]*Government of Lao People's Democratic Republic (LPDR) v. Sanum Investments Ltd* [2015] 2 SLR 322; *Lao Holdings NV v. LPDR* and *Sanum Investments Limited v. LPDR*, [2021] SGHC (I) 10.

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