

THE HIDDEN COSTS OF **RCEP** AND CORPORATE TRADE DEALS IN ASIA



METHODOLOGY

This briefing presents data collated about ISDS cases filed against states party to the RCEP negotiations. The research was undertaken in November 2016. It uses data available in the public domain at that time. The majority of case information for this report was sourced using the UNCTAD investment policy hub database¹, supported by additional information from specialised magazines such as IAREporter,² Global Arbitration review, Italaw³, and other relevant journal articles when available and bringing missing details and data on the cases.

It attempts to provide a comprehensive overview of all known cases in RCEP countries, for which the relevant documentation is accessible. However, some ISDS cases are kept entirely confidential, even in cases where the dispute may be a matter of public interest. Due to the limited transparency around arbitration proceedings, the cases gathered here may not encompass all cases of ISDS taken against prospective RCEP states. Not all cases are published or fully documented. Even when case details are publicly available, many details of the amounts awarded, legal fees paid, or the nature of the settlement are not fully disclosed.⁴

Cases were defined as environmentally relevant based on whether the investment of the investor suing was in one of the following sectors defined by UNCTAD: mining & quarrying; water supply, sewerage, waste management and remediation activities; or electricity, gas, steam and air conditioning supply.

3 KEY FINDINGS

4 INTRODUCTION

5 THE IMPACTS OF ISDS IN ASIA

7 THE INVESTMENT PROTECTION REGIME OF RCEP COUNTRIES

CASE STUDIES

8 INDONESIA

9 INDIA

11 PHILIPPINES

12 AUSTRALIA

13 SOUTH KOREA

14 CONCLUSION

15 REFERENCES

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KEY FINDINGS

- 50 investment arbitration cases already filed against 11 RCEP (Regional Comprehensive Economic Partnership) countries since 1994, over 50% of which have been filed after 2010.
- India alone has been the target of 40% of the cases filed against RCEP countries.
- 68% of the cases filed against RCEP countries have been initiated by European-based investors.
- Foreign investors have claimed at least 31 billion USD from RCEP countries. Given the secrecy surrounding investor-state dispute settlement (ISDS) proceedings, this could be much more. This amount is 7 billion USD more than India's entire health budget for 2015.
- Of the 31 billion USD claimed by investors, 81% has been claimed from just four countries, India, South Korea, Australia and Vietnam.
- The largest known amount paid to a foreign Investor by an RCEP country is 337 million USD as part of the settlement in the Cemex versus Indonesia case.
- 36% of cases against RCEP countries concern environmentally relevant sectors.
- 42% of ISDS cases against RCEP countries are still pending.
- Investors can be considered to have won 67% of the cases against RCEP countries.
- RCEP countries have been sued for measures taken to protect public health, adjust corporate taxes, promote industrialisation, and review contracts acquired through allegations of corruption, among others.
- RCEP countries have signed a total of 831 international investment agreements (IIAs), out of which 676 are in force. Most of them were signed between 1990-2009.
- China, South Korea and India have signed the highest number of IIAs. New Zealand, Myanmar and Brunei have signed the least IIAs.
- 87% of the BITs signed by RCEP countries currently in force are likely to have passed the initial duration period and could be terminated.
- RCEP countries are currently negotiating at least six Free Trade Agreements with investment protection chapters which grant investors the right to sue governments at international investment tribunals. Together they are negotiating the Regional Comprehensive Economic Partnership (RCEP). Thailand, Malaysia, Indonesia, Philippines, Myanmar and India are also negotiating bilaterally with the European Union.



INTRODUCTION

The Regional Comprehensive Economic Partnership (RCEP) is currently being negotiated between 16 countries in the Asian region. It includes China, members of the Association of Southeast Asian Nations (ASEAN) and other key trading nations such as Australia, South Korea, Japan and India. Over 50% of the world's population lives in the negotiating countries, which account for over a quarter of global exports and almost 30% of the world's GDP.⁵ Like other trade agreements, such as the Trans Pacific Partnership (TPP), these negotiations include a focus on trade liberalisation, address varying regulatory disciplines and are largely secret.

“The RCEP and the TPP are both extensions of the WTO framework – designed to concentrate wealth in the hands of global corporate elites. Neither the US-led TPP nor the China-led RCEP will address the long-standing demand for an international trading system that responds to people’s needs”

Beverly Longid, from the International Indigenous Peoples Movement for Self-Determination and Liberation.⁶

RCEP also includes the controversial Investor-State Dispute Settlement mechanism (ISDS), which is facing increasing public criticism and scrutiny worldwide.⁷ ISDS is a one-way mechanism that empowers foreign investors to sue the state at international arbitration tribunals; it cannot be used by states. Foreign investors can circumvent domestic court systems and claim financial compensation from host governments in secret business-friendly international tribunals, if they deem their investments (including their potential future profits) are adversely affected by the introduction of regulatory and/or policy changes in the host state. These private tribunals are comprised of three for-profit arbitrators, who issue their decisions behind closed doors. Arbitrators often have serious conflicts of interest⁸, as many have financial incentives to rule in favour of the investor and keep the system alive. Arbitrators also often switch sides and go on to work as counsels, representing and defending the companies filing investment treaty cases.

Negotiating new treaties that include ISDS runs counter to the decision by some governments in the region to reform or terminate these agreements in order to protect their right to regulate. Among RCEP countries,

India, Indonesia and Australia have undergone review processes of the international investment framework. In the case of India⁹ and Indonesia¹⁰, the outcomes of the reviews have led to the termination of several treaties as well as the development of new model bilateral investment treaties (BITs) that highly restrict the rights of investors.

This report highlights the current and potential costs of ISDS to countries negotiating the RCEP agreement. The North American Free Trade Agreement (NAFTA) shows that mega regional trade deals are much harder to reform or change after ratification than bilateral agreements. The only way to roll back the rights granted to investors in free trade agreements is by terminating the entire treaties, not just their respective investment protection chapters. The dangerous impacts of investment treaties are likely to increase if governments in the region agree to grant far-reaching protection rights to investors in RCEP and other ongoing free trade negotiations. Furthermore it can reasonably be expected that RCEP would lock in the dangerous ISDS provision in the region for the foreseeable future. This would undermine governments' efforts to safeguard their right to regulate in the public interest.

Claims for compensation can – and do – amount to billions of dollars. However, ISDS cases are not fully disclosed to the public even when cases may relate to matters of public interest, such as the environment. When the state loses an ISDS case or settles a dispute with an investor, governments can be forced to foot the bill with public money. In other words, ISDS effectively allows foreign investors to pass their investment risks on to citizens and public budgets. Even when cases have been discontinued or when the outcome is said to be 'in favour of the state', the state will usually have to bear the exorbitant cost of legal defence and arbitrators' fees. According to the Organisation for Economic Cooperation and Development (OECD) estimates, expenses for a single ISDS case amount to US\$8 million on average for legal and arbitration fees alone, half of which will be footed by the State.¹¹

This report compiles available data on ISDS cases taken against countries party to the RCEP negotiations. The report highlights the ongoing corporate attack on Asian governments' right to regulate, including actions following the introduction of measures to protect the environment. It also underlines the costs that this system has already had to democracy in the region.

THE IMPACTS OF ISDS IN ASIA

There are currently 50 known investment treaty lawsuits against 11 RCEP countries. Five countries (Brunei, Cambodia, Singapore, Japan and New Zealand) have so far been spared. India alone has been the target of 40% of the cases filed against RCEP countries. Indonesia, Philippines and Vietnam are the next three most sued among RCEP countries.

15 of the cases filed against India were based on only four bilateral investment treaties: the India-United Kingdom BIT (five cases), the India-Mauritius BIT (four cases), the India-France BIT (three cases) and the India-Netherlands BIT (three cases).

THE EXPONENTIAL GROWTH IN THE NUMBER OF CASES FILED

Following the international trend, investment treaty disputes against RCEP countries have surged over the last decade. Only six cases were filed against RCEP countries between 1994 and 2003. The explosion of lawsuits started in 2004; at least 27 disputes were initiated between 2004 and 2013. From 2014 up until now, 17 ISDS lawsuits have already been registered, so it is likely that the decade 2014-2023 will supersede the previous one.

WHO ARE THE INVESTORS SUING?

Investors from 19 different nations have initiated lawsuits against RCEP countries. The most frequent home countries of investors initiating the cases include the Netherlands (9 cases), the United Kingdom (8 cases), France (5 cases), Belgium (4 cases) and Germany (4 cases). In fact, 68% of investors suing RCEP countries are based in Europe.

WHAT ARE THE TARGETED SECTORS?

31 out of 50 lawsuits are related to just four sectors: electricity and gas, mining, information and communication, and manufacturing.

WHAT ARE INVESTORS' FAVOURITE ARBITRATION RULES?

Against the international trend, investors suing RCEP countries have chosen the rules of the UN Commission on International Trade Law (UNCITRAL) in 60% of the cases, rather than ICSID's. This is probably due to the fact that a few RCEP countries have not signed the ICSID convention: India, Thailand, Vietnam, Myanmar and Laos.

STATUS OF THE ISDS CASES AGAINST RCEP COUNTRIES

Resolutions are still pending in a big portion of the cases (20). Among those that have been resolved (30 cases), the majority have favoured the investor either with a favourable award by the tribunal (3) or by a settlement with the State (17). The terms of most settlements are not disclosed, but largely involve a payment by the State, or the decision to grant exemptions, or roll back the piece of legislation that affected the investor in the first place.

WHO IS WINNING THE CASES AGAINST RCEP COUNTRIES?

When looking at the 30 cases in which the outcome is known, we found that 57% have been settled and 10% were decided in favour of the investor. **That makes a total of 67% of cases, in which the investor won something out of the case.** The tribunal dismissed the case and ruled that the State did not have to pay compensation to the investor in just 30% of the cases.

It is important to keep in mind that, regardless of the final outcome (whether in favour of the State, settled, etc.), the government would most likely have to pay its legal fees and part of the arbitration costs. On average, that amounts to 4.5 million USD¹², but can also be much higher.

THE FINANCIAL COSTS OF THESE LAWSUITS

Claims for financial compensation and the burden they create for public budgets in the host countries are a major problem in investment arbitration. While limited information is available in the public domain, we found that so far at least 31 billion USD have been claimed from RCEP countries. Given the secrecy surrounding ISDS proceedings, and the fact that for many cases the amount claimed by investors is not known, this could be much higher.

In terms of distribution of the financial claims across countries, India tops the ranking with at least 12.3 billion USD claimed by investors since 1994. South Korea, Australia and Vietnam are next on the list.

AMOUNT DEMANDED BY INVESTORS BASED ON ACCUMULATED ISDS LAWSUITS

INDIA	12.3 BILLION	PHILIPPINES	1 BILLION
SOUTH KOREA	4.9 BILLION	THAILAND	162.9 MILLION
AUSTRALIA	4.2 BILLION	CHINA	16.3 MILLION
VIETNAM	4 BILLION	MYANMAR	6.3 MILLION
INDONESIA	2.4 BILLION	MALAYSIA	5.3 MILLION
LAO	2 BILLION		

By way of comparison 31 billion USD is more than India's budget for health for the year 2015 (24 billion USD¹³), or the amount of foreign direct investments inflows into Indonesia in 2014 (26.2 billion USD).¹⁴

Data about the amounts claimed by investors is available for 40 cases. Out of these, the amount was more than 100 million USD in 21 cases (that is more than 50% of the cases). Most of the claims for financial compensation over 1 billion USD were filed after 2010, which is in line with international trends and proves that investors keep asking for ever higher financial compensations as the years pass.

While many of the cases do not result in States being ordered to pay such exorbitant amounts, the mere threat of having to pay these costs is likely to act as a deterrent to advance legislation in the public interest, for fear of being subjected to a lawsuit by a foreign investor in the future.

Since most cases in RCEP countries have been settled and there is almost no information on what the State agreed to give the investor as a condition for an early termination of the case, the exact financial impact of ISDS cases on RCEP governments is difficult to estimate. However the available information shows that at least one settlement resulted in compensation of 337 million USD. This is the amount paid by Indonesia to the world's third largest cement manufacturer Cemex after they settled their ICSID dispute. The company received almost all of the 400 million USD that was initially claimed as compensation in the lawsuit. Other governments that have paid investors as a result of settlements include Thailand (a Tribunal ordered the State to pay 41 million USD to German company Walter Bau) and India (compensated US company Bechtel 160 million USD as part of a settlement).

Many of the ISDS cases in the region are recent and still pending. Therefore further research will be needed to determine their full impact. The sheer quantity of cases currently in process however guarantees a significant cost to countries in the future. India, for instance, has nine claims still pending, totalling 5.8 billion USD. Indonesia and South Korea have three pending claims each, totalling 1.9 billion USD and 4.9 billion USD respectively.

RCEP INVESTORS' USAGE OF ISDS SYSTEM

While governments of RCEP countries are clearly being impacted by these costly lawsuits, Asian investors have only modestly made use of international investment agreements. These are mostly Chinese, Australian, Indian, Korean, Malaysian, Singaporean and Japanese investors.

THE INVESTMENT PROTECTION REGIME OF RCEP COUNTRIES

RCEP countries have signed a total of 831 international investment agreements (IIAs), out of which 676 are in force.¹⁵

The three countries that have signed the most IIAs are China, South Korea and India. New Zealand, Myanmar and Brunei are the three countries that have signed the fewest IIAs. Most RCEP countries treaties were signed between 1990 and 2009.

RCEP countries have terminated 53 BITs, but only 24 of those were not replaced by any other investment protection treaty. Indonesia has led the process of letting its BITs expire without replacement and has so far terminated 22 BITs.

On average, treaties can be unilaterally terminated once the initial ten-year period after signing comes to an end. When looking at RCEP countries, this means that 87% of the BITs currently in force are likely to have passed the initial period and could be terminated.

All the BITs signed by RCEP countries include a survival clause. This is a clause that extends the effects of the BIT for existing investments for a certain period of years after they are terminated. For BITs ratified by RCEP countries, the average is 10 years (although in some cases it goes up to 15 or 20 years).

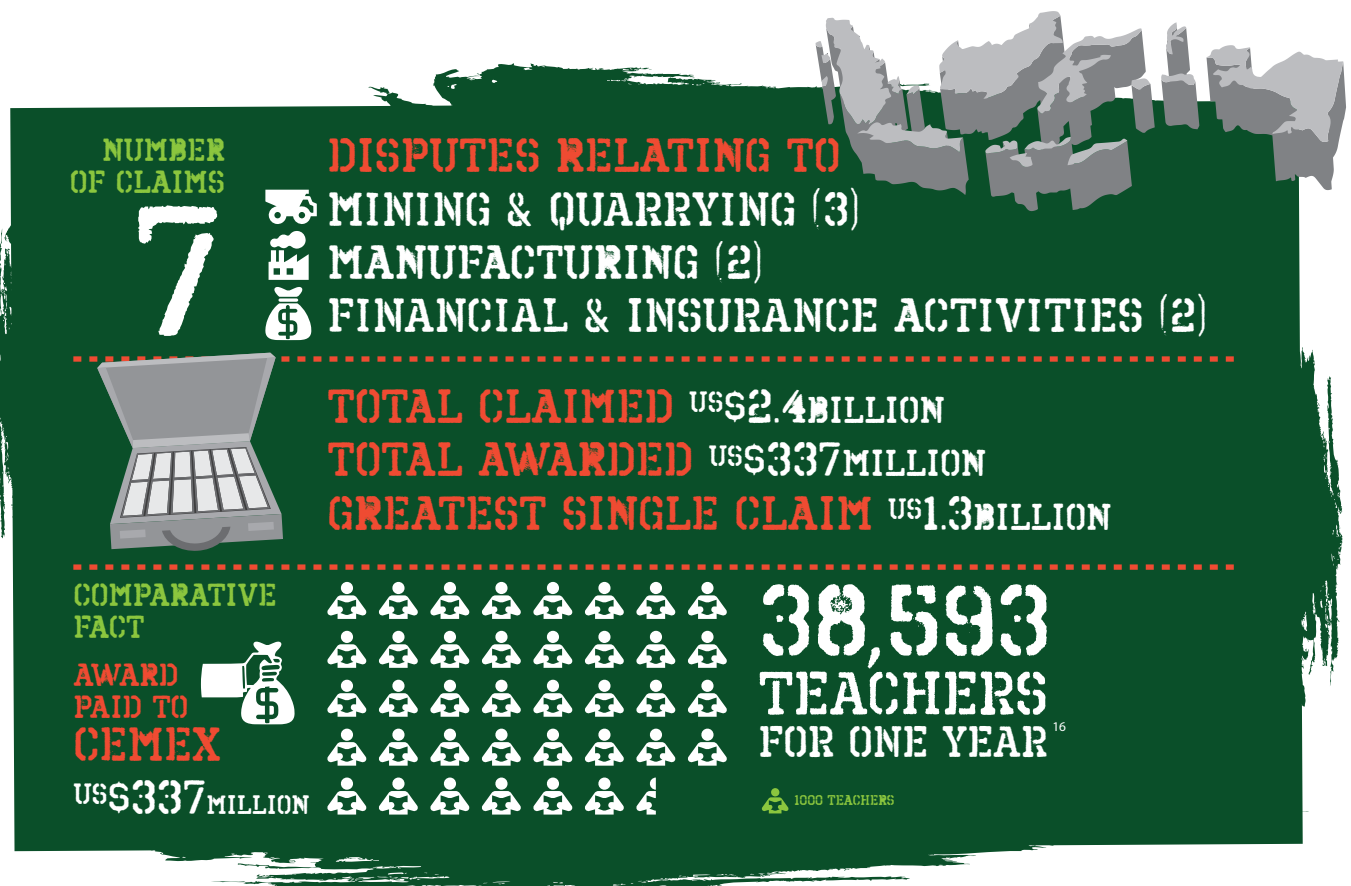
A big difference between BITs and Free Trade Agreements (that include an investment protection chapter) is that the latter do not include a termination clause. Under FTAs governments will find it much more difficult to withdraw their commitment to the rights granted to foreign investors. To terminate the clauses protecting foreign investors in FTAs, governments have to put an end to the whole agreement, rather than the investment protection chapter only.

IIAS UNDER NEGOTIATION

Besides the 676 treaties in force, there are some ongoing negotiations for new international investment treaties. These include the Regional Comprehensive Economic Partnership (RCEP) and several Free trade Agreements with the EU, in particular EU-Thailand FTA (on hold), EU-Malaysia FTA (on hold), EU-India FTA (on hold), EU-Indonesia CEPA, EU-Philippines FTA, and EU-Myanmar BIT, all of which include an investment protection chapter and grant investors the right to sue governments at international investment tribunals.

COUNTRY	NUMBER OF IIAS SIGNED (BITS/OTHERS)	NUMBER OF IIAS IN FORCE
CHINA	145/19	141
SOUTH KOREA	102/20	109
INDIA	84/13	82
MALAYSIA	71/24	70
SINGAPORE	47/30	63
VIETNAM	64/23	63
INDONESIA	71/16	63
THAILAND	41/23	54
PHILIPPINES	38/15	42
AUSTRALIA	23/18	39
JAPAN	28/20	38
LAOS	25/17	32
CAMBODIA	24/16	22
BRUNEI	8/19	19
MYANMAR	10/16	17
NEW ZEALAND	4/14	15

INDONESIA



THE CRIPPLING COSTS OF INVESTMENT ARBITRATION: THE CASE OF CHURCHILL MINING VS INDONESIA

The Indonesian region of East Kalimantan is said to contain the second largest and the world's seventh largest undeveloped coal resource.¹⁷ Coal is the most polluting of all fossil fuels, releasing more methane and carbon dioxide than any other form of energy production.¹⁸ Despite the fossil fuel industry's continued push for coal as a preferred energy source, coal consumption has dropped rapidly since 2012, backed by economic imperatives and environmental evidence.¹⁹

British mining corporation Churchill Mining holds 75% of the stakes in the East Kalimantan coal mining project.²⁰ The construction of the mine was expected to begin in 2010. But local authorities revoked the company's mining licences for a variety of reasons including alleged forgery of the licences.²¹

Churchill Mining and its Australian subsidiary Planet Mining claimed that Indonesia had unlawfully revoked mining licenses²² and began international investment arbitration cases against the Government of Indonesia in 2012. Both claims rely on UK-Indonesia and Australia-Indonesia bilateral investment treaties. The companies are demanding 1.3 billion USD in compensation²³, yet they had only invested 40 million USD in exploration and exploitation.²⁴

The billions in compensation demanded by Churchill Mining is almost equivalent to Indonesia's budget allocation of subsidies for food in 2015. It is also more money than the value of the government's subsidies for seed for farmers, subsidies for small and medium enterprises and subsidies for public transportation combined.²⁵

The Indonesian Government has since withdrawn the forgery claim against Churchill. It is blaming instead Churchill's former local partner.²⁶ The case at ICSID however continues. So far, the cost of arbitration is estimated to have reached ten million USD.²⁷

INDIA



NUMBER
OF CLAIMS

20



DISPUTES RELATING TO

ELECTRICITY (9)



INFORMATION & COMMUNICATIONS (7)



MINING & QUARRYING (3)



TRANSPORTATION & STORAGE (1)

TOTAL CLAIMED US\$12.3BILLION

TOTAL AWARDED US\$164MILLION

GREATEST SINGLE CLAIM US\$4BILLION

COMPARATIVE
FACT

TOTAL AMOUNT
CLAIMED BY
FOREIGN
INVESTORS

US\$12.3BILLION



12.3MILLION
TONNES
OF WHITE RICE²⁸

PRIVATISING GAINS, SOCIALISING LOSSES: THE CASE OF BECHTEL, ENRON AND SEVEN EUROPEAN BANKS VS INDIA

The Dabhol project, formed in 1992, was conceived as the world's largest gas-fired electricity plant. It was established in Maharashtra near Mumbai and would cost a total of 2.9 billion USD.²⁹ The project was part of the Indian government's efforts to liberalize and privatize the energy sector with foreign capital. Three US companies were behind the investment: Enron Corporation (which owned 80% of the shares), and Bechtel and General Electric (owned 10% of the shares each).³⁰

Despite widespread public opposition to the project due to its social and environmental impact as well as human rights violations, and accusations of corruption,^{31 32 33} the government of India pushed through the deal with foreign companies in a speedy and untransparent way. Also problematic was the fact that the local government agreed to buy 90% of the power generated by the Dabhol plant regardless of market demand for electricity and at a cost that was more than double the price of power purchased from other suppliers in the state. This outlay amounted to half of Maharashtra's budget expenditure.³⁴

"The deal was considered highly unfavourable by Indian commentators from the perspectives of national energy policy, consumers, taxpayers, and other local interests that would bear costs of the project."³⁵

When the opposition alliance won the 1995 Maharashtra election, the new government initiated a review of the Dabhol project, which recommended to scrap it.³⁶ Based on the report's recommendations, the Government of Maharashtra first re-negotiated the terms of the deal, and by 2000 cancelled its payments for the overpriced energy.

As a result, nine international arbitration lawsuits were launched against India's government by different companies that had invested in the project:

- Bechtel and GE filed a claim through their Mauritius-based affiliates using the India-Mauritius bilateral investment treaty despite the fact that the companies themselves are US-based.³⁷ They claimed 1.2 billion USD.
- Enron also filed a claim through a Dutch subsidiary using the India-Netherlands BIT. It claimed four billion USD in compensation.
- Seven European Banks (Credit Suisse, Erste Bank, Standard Chartered Bank, ANZEF, Credit Lyonnais (now Calyon), BNP Paribas and ABN Amro) engaged in arbitration against the Indian Government, claiming that their investments in the Dabhol project had not been protected. They used BITs signed by India with the Netherlands, UK, France, Switzerland and Austria. The total value of the claims is 291 million USD.³⁸

All of these claims were subsequently settled, so no Tribunal got to deliver a final ruling. The details of the cases and the terms of the settlements are unknown in most cases. The only disclosed information is in the case of Bechtel and GE, which in 2005 agreed to abandon arbitration in exchange for 160 million USD for Bechtel³⁹ and 145 million USD for General Electric.⁴⁰ Both companies had bought all the shares of Enron after its collapse in 2000.

The Dabhol Power Plant debacle and the international arbitration cases that followed illustrate some of the flaws of the ISDS system:

THE SOCIALISATION OF LOSSES OF FOREIGN INVESTORS

These cases are a clear example of how ultimately people will have to absorb the losses of both bad government decision in privatising energy and compensation for reckless investors behaviour paid out of public coffers. Back in 1993, the World Bank had refused to finance the project arguing it was "not economically viable".⁴¹ As a result of this project, people in the State of Maharashtra saw their land confiscated, lost part of their livelihood, and had to pay premium prices for electricity. Yet, part of the public money that should have been invested in health or education or affordable public services was paid to foreign investors.

TREATY SHOPPING AND SHELL COMPANIES

Investment treaties with broad definitions of what constitutes an investor and investment, which allow companies to route investments through third countries to acquire the protection of investment treaties that investors would not, otherwise, have in their home state jurisdiction, have been highly criticised. Enron, Bechtel and GE are US companies that were not entitled to investment protection under a bilateral investment treaty (BIT) because the US does not have a BIT with India. Yet, they set up subsidiaries in treaty havens like Mauritius and the Netherlands⁴² to make use of their vast web of ill-defined BITs.

THE SECRECY OF INVESTMENT ARBITRATION

Very little is known about these nine investment arbitration claims, which relate to a high profile public interest case and could have cost the government 5.5 billion USD, illustrating the dangerous secrecy of the ISDS system.

PHILIPPINES



NUMBER OF CLAIMS

5



DISPUTES RELATING TO

MINING & QUARRYING

WATER SUPPLY & SEWERAGE, WASTE MANAGEMENT & REMEDIATION ACTIVITIES

TRANSPORTATION & STORAGE

PROFESSIONAL, SCIENTIFIC & TECHNICAL ACTIVITIES



TOTAL CLAIMED US\$1BILLION

TOTAL AWARDED NO DATA AVAILABLE

GREATEST SINGLE CLAIM US\$425MILLION

COMPARATIVE FACT

LEGAL FEES FOR FRAPORT CASE

US\$58MILLION



VACCINATION OF 3.8 MILLION CHILDREN⁴⁹

AGAINST DISEASES SUCH AS TUBERCULOSIS (TB), DIPHTHERIA, TETANUS, POLIO (DTP)

WIN OR LOSE, CITIZENS FOOT THE BILL: THE CASE OF FRAPORT V. PHILIPPINES⁴⁴

The longest-running ISDS lawsuit in the Philippines is with the German transport company Fraport, which operates Frankfurt and other European Airports. It sued the Philippines government twice. The first time was in 2003 for 425 million USD when the government annulled a concession for the construction and operation of a new airport terminal in Manila. The government claimed the concession contract was ill-conceived and the result of bribery. The tribunal dismissed the case, supporting the state's assertion that Fraport's investment in the airport was not in alignment with the Philippines' Constitution and the Foreign Investments Act. The company circumvented the restriction of foreign ownership of a public utility to 40% through secret shareholder agreements and "indirect" ownership.^{45 46} In 2011, Fraport sued again for the same case and it was again dismissed.

Although the tribunal had ruled twice against the investor's demands, the Philippines government was left with a hefty bill. In 2011, Jimmy Gianan, state auditor from the Commission on Audit (COA), disclosed that the arbitration cost incurred by the Philippines government (up to that point) had reached 58 million USD for paying its local and foreign lawyers. In terms of the 2012 Philippines budget, that is the equivalent of a year's salary for 12,500 teachers; or the vaccination of 3.8 million children against diseases such as tuberculosis (TB), diphtheria and tetanus and polio (DTP).

AUSTRALIA



NUMBER OF CLAIMS

1



DISPUTE RELATING TO MANUFACTURING



TOTAL CLAIMED US\$4.2 BILLION

TOTAL AWARDED NO DATA AVAILABLE

GREATEST SINGLE CLAIM US\$4.2 BILLION⁴⁷

COMPARATIVE FACTS

LEGAL FEES COST



US\$40 MILLION



866 TRAINED NURSES⁴⁸

CLAIM



US\$4.2 BILLION



PUBLIC HEALTH EXPENDITURE FOR ABOUT 1.5 MILLION PEOPLE FOR A YEAR⁴⁹

ISDS USED TO DELAY PUBLIC HEALTH POLICIES: THE CASE OF PHILIP MORRIS VS AUSTRALIA

In 2011, Australia introduced plain packaging for all tobacco products, part of a range of comprehensive tobacco control measures recommended by the World Health Organisation.⁵⁰

Tobacco giant Philip Morris challenged the plain packaging legislation suing the Australian Government in the national court system but also at international investment arbitration using the Australia-Hong Kong Bilateral Investment Treaty (BIT). Philip Morris was claiming 4.1 billion USD and argued that Australia's policy was "not for a proven public purpose" because, "there is no credible evidence that plain packaging will reduce smoking". Yet, since the introduction of plain packaging, smoking rates have continued to drop in Australia, reducing the risk of numerous health conditions including lung and heart disease and decreasing the strain on the public health system.⁵¹

In 2012, the Australian High Court rejected the domestic challenge. The international arbitration case continued until 2015 when the tribunal dismissed the case. However, the international tribunal never got to rule on whether the public health measure taken by Australia constituted a breach of the international investment protection treaty. Instead, the tribunal dismissed the case because Australia had orchestrated a corporate restructuring that "constitutes an abuse of rights" to access international arbitration through the Australia-Hong Kong BIT.⁵²

Philip Morris Australia was owned by Philip Morris International based in Switzerland. Australia does not have a BIT with Switzerland. Philip Morris Asia acquired the assets in Australia in February 2011 after the government had announced in 2010 it would introduce plain packaging legislation. The shares were purchased specifically to take advantage of the BIT.^{53 54}

Despite the ultimate failure of the case for Philip Morris, it illustrates the risk of ISDS when it comes to the state's ability to enact legislation for the benefit of its citizens. The threat of having to spend billions in lawsuits put a chill into other countries' decisions to move forward with similar legislation. New Zealand, for example, delayed the introduction of plain packaging in response to the Philip Morris claim.⁵⁵

Furthermore, regardless of the outcome of the case, Australia is left to carry the burden of the legal fees to defend itself from this frivolous claim, a cost that is estimated to be 50 million Australian dollars⁵⁶ (just under 40 million USD).

SOUTH KOREA

NUMBER OF CLAIMS

3



DISPUTES RELATING TO

MANUFACTURING

MINING & QUARRYING

FINANCIAL & INSURANCE



CONSTRUCTION



REAL ESTATE



TOTAL CLAIMED US\$4.9 BILLION

TOTAL AWARDED NO DATA AVAILABLE

GREATEST SINGLE CLAIM US\$4.7 BILLION

COMPARATIVE FACT

TOTAL CLAIMED

US\$4.9 BILLION



TOTAL FOREIGN DIRECT INVESTMENT THAT SOUTH KOREA ATTRACTED IN 2015

US\$5 BILLION⁵⁷



ISDS ATTACKING TAX POLICY:

THE CASE OF HANOCAL & IPIC INTERNATIONAL VS SOUTH KOREA

Hanocal Holdings is the name of a mailbox company registered in the Netherlands but owned by a state-run United Arab Emirates (UAE) company. Hanocal owned a 70% stake in an oil refinery and petroleum production company based in South Korea. In 2010 Hanocal sold its shares for 2.1 billion USD.^{58,59} According to the company, the sale was tax-exempt under a double-taxation treaty between the Netherlands and Korea. But, the South Korean government withheld taxes, a decision supported by a Korean court ruling that noted that Hanocal "is a mere ghost company, owned by Abu Dhabi-based International Petroleum Investment Company, and should be regarded as an Arab company, which is not subject to the double-taxation avoidance pact."⁶⁰

In 2015, Hanocal sued the South Korean Government at ICSID for 168 million USD arguing that the government retention of taxes violated the Korea-Netherlands Bilateral Investment Treaty.⁶¹ This is the same cost of putting 7,000 medical students through university in Korea.⁶² Only a year and a half after the lawsuit was filed, the investor withdrew the case for unknown reasons.

The case of Hanocal vs South Korea is one of the 40 tax-related lawsuits filed by investors against 24 countries around the world.⁶³ RCEP countries have been part of four tax-related lawsuits, two of which have been made against Korea, one against India and one against Laos.⁶⁴

Tax evasion and avoidance undermine public services and budgets. The IMF estimates that up to 600 billion USD is lost globally every year due to tax avoidance alone.⁶⁵ The ability of these governments to review and alter tax policy previously granted to foreign investors is essential, but is put at risk by ISDS clauses in trade agreements.⁶⁶

This case is also yet another example of investors creating Dutch mailbox companies for tax-related purposes and to acquire investment protection they would not acquire otherwise. In 2015, UNCTAD reported about ISDS cases based on Dutch BITs that in "three quarters of Dutch cases, the ultimate owners of the claimants are not Dutch. In two-thirds of those cases, the relevant foreign-owned group of companies does not appear to engage in substantial business activities in the Netherlands."⁶⁷

CONCLUSION

ISDS is undemocratic, discriminatory, investor-biased and unnecessary. It has already been used to threaten countries currently involved in the RCEP negotiations, with citizens and public budgets footing bills of millions of dollars for the risks taken by foreign investors.

These lawsuits should provide a warning of the potential high costs of the proposed RCEP trade deal.

Including the harmful ISDS clause in the RCEP trade agreement under negotiation contributes to cementing investors' rights and expanding the scope of private arbitrators' power. RCEP will lock in place this system of privatised justice. Governments will find it much more difficult to withdraw their commitments to the rights accorded to foreign investors in RCEP than in Bilateral Investment Treaties, because they would need to put an end to the whole agreement and not just the sections on investors' rights.

This will likely result in a surge of new cases that will weigh heavily on governments' budgets. This will jeopardise the ability of national and local authorities from RCEP countries to regulate in the public interest, diverting public money from essential policies such as on health, education and environment protect. This constitutes an unacceptable and unnecessary attack on democracy.

The evidence is compelling in showing that the risks of ISDS are higher than its proclaimed benefits. We call on all governments involved in the RCEP negotiations to exclude ISDS from this negotiation, and any other trade deal in the future.

RCEP governments have a golden opportunity to work together to build a new trade and investment regime that helps to develop sustainable societies, by supporting local economies, workers' rights, a clean environment and food sovereignty.

REFERENCES

- 1 UNCTAD, Investment Policy Hub, <http://investmentpolicyhub.unctad.org/>
- 2 Investment Arbitration Reporter, <https://www.iareporter.com/>
- 3 Itlaw, <http://www.italaw.com>
- 4 A concern acknowledged by many including UNCTAD see for instance: http://unctad.org/en/publicationsLibrary/webdiaepcb2013b4_en.pdf
- 5 Australian government (2016) Regional Comprehensive Economic Partnership, Department of Foreign Affairs and Trade <http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx>
- 6 Asia Pacific Research Network (2016) Civil society groups reject RCEP: Excessive corporate power at the expense of people's rights, APRN Newsletter, Second Quarter 2016, p. 2-3, http://aprnet.org/wp-content/uploads/2016/09/APRN-Newsletter-2Q-2016_final.pdf
- 7 Criticisms have been raised in the context of several trade negotiations and agreements. For example: https://www.kent.ac.uk/law/isds_treaty_consultation.html ; <http://www.citizen.org/documents/isds-law-economics-professors-letter-Sept-2016.pdf> ; <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E> ; <http://www.s2bnetwork.org/wp-content/uploads/2016/10/Canadian-academics-open-letter-on-the-CETA-and-Wallonia.pdf> ; <http://www.s2bnetwork.org/isds-statement-feb2016/>
- 8 Pia Eberhardt and Cecilia Olivet (2012) Profiting from Injustice, Corporate Europe Observatory and Transnational Institute, <https://www.tni.org/en/briefing/profitting-injustice>
- 9 Both Ends (2016) India Terminates Bilateral Investment Treaties (BITs), 11th August, <http://www.bothends.org/en/News/Laatste-nieuws/newsitem/469/India-terminates-bilateral-investment-treaties-BITs>
- 10 Herbert Smith Freehills Dispute Resolution (2015) Indonesia announces renegotiation of BITs, 13th May, <http://hsfnotes.com/arbitration/2015/05/13/indonesia-announces-renegotiation-of-bits/>
- 11 D. Gaukrodger and K. Gordon (2012) Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, OECD Working Papers on International Investment, 2012/03, OECD Publishing, page 19, <http://dx.doi.org/10.1787/5k46b1r85j6f-en>
- 12 *ibid*, page 19
- 13 In 2015, the health budget of India was 1.2% of GDP (<http://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/indias-disproportionately-tiny-health-budget-a-national-security-concern/articleshow/49603121.cms>). India's GDP in 2015 amounted to 2 trillion USD so 1.2% is 24 billion USD.
- 14 World Bank data (2015) FDI inflows for Indonesia, <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=ID>
- 15 International Investment agreements only enter into force once both parties have completed the ratification process according to the national law.
- 16 Payscale (2016) High School Teacher Salary Indonesia http://www.payscale.com/research/ID/Job=High_School_Teacher/Salary
- 17 Churchill Mining (2012) Claimant's Letter to the President of the Republic of Indonesia, a Request for Legal Protection, Itlaw, <http://www.italaw.com/sites/default/files/case-documents/ita1042.pdf>
- 18 Greenpeace (2016) How the coal industry fuels climate change, www.greenpeace.org/international/en/campaigns/climate-change/coal/Coal-fuels-climate-change/
- 19 *ibid*.
- 20 Mining Technology (2016) East Kutai Coal Project, Indonesia, <http://www.mining-technology.com/projects/eastkutaicoalproject/>
- 21 By Matt Sharp (2015) Mining Co. Says Doc Spat Nears End In Indonesia Case, Law360 <http://www.law360.com/articles/733225/mining-co-says-doc-spat-nears-end-in-indonesia-case>
- 22 Unsted, S. (2015) Churchill Mining Disputes Comments Made On Indonesian Arbitration, Morningstar, 23rd December, http://www.morningstar.co.uk/uk/news/AN_1450863210470889000/churchill-mining-disputes-comments-made-on-indonesian-arbitration.aspx
- 23 UNCTAD (2016) Investment Policy Hub: Churchill Mining and Planet Mining V. Indonesia, <http://investmentpolicyhub.unctad.org/ISDS/Details/452>
- 24 Alison Ross (2011) Churchill: We shall fight them at ICSID, Global Arbitration Review, 8 December, <http://globalarbitrationreview.com/article/1030836/churchill-we-shall-fight-them-at-icsid>
- 25 Rachmi Hertanti and Rika Febriani (2014) State VS Corporations: Indonesia Bilateral Investment Treaties (BITs), Handbook Series on Bilateral Investment Treaties (BITs): International Investment Protection Agreements and Investors' civil lawsuit against Indonesia, Indonesia for Global Justice, <http://www.seatiniuganda.org/publications/research/64-modul-indonesia-bits-eng/file.html>
- 26 Joshua Warner (2015) Indonesian Government Withdraws Fraud Claims Against Churchill Mining, Alliance News, 4 June, <http://www.kitco.com/news/2015-06-04/Indonesian-Government-Withdraws-Fraud-Claims-Against-Churchill-Mining.html>
- 27 Kent Phillips (2015) Churchill vs Indonesia: managing costs in international arbitration, Mining Journal, 24 September, <http://www.mining-journal.com/services/legal-services/churchill-vs-indonesia-managing-costs-in-international-arbitration/>
- 28 India's 2015 health budget is estimated to be 24 billion USD. For details see endnote 13.
- 29 Power Technology (2016) Dabhol Power Plant, Ratnagiri District, Maharashtra, India, <http://www.power-technology.com/projects/dabhol-combined-cycle-power-plant-maharashtra-india/>
- 30 Tony Allison (2001) Enron's eight-year power struggle in India, Asia Times, 18 January, <https://web.archive.org/web/20111123172057/http://www.atimes.com/reports/ca13ai01.html>
- 31 Sandip Roy (2002) Enron in India: The Giant's First Fall, Alternet, February 7, http://www.alternet.org/story/12375/enron_in_india%3A_the_giant's_first_fall
- 32 Tony Allison (2001), see endnote 30.
- 33 Human Rights Watch (1999) The Enron Corporation. Corporate complicity in Human Rights Violations, <https://www.hrw.org/reports/1999/enron/enron3-0.htm>
- 34 Tony Allison (2001), see endnote 30.
- 35 Gus Van Harten (2011) TWAIL and the Dabhol Arbitration, Trade, Law and Development, Osgoode CLPE Research Paper No. 19/2011, page 7, <https://ssrn.com/abstract=1923859>
- 36 U.S. House of Representatives (2002) FACT SHEET Background on Enron's Dabhol Power Project, Committee on Government Reform, February 22, http://www.finance-mba.com/Dabhol_fact_sheet.pdf
- 37 Bechtel (2003) Bechtel and GE File Arbitration Over Dabhol Power Company, New Delhi, India, September 22, <http://www.bechtel.com/newsroom/releases/2003/09/bechtel-ge-file-arbitration-dabhol-power-company/>
- 38 The Financial Express (2004) Offshore banks launch arbitration for recovery of claims in Dabhol, 10 December, <http://www.financialexpress.com/archive/offshorebankslauncharbitrationforrecoveryofclaimsindabhol/122438/>
- 39 Bechtel (2005) Statement by Bechtel on Dabhol Settlement, 12 July, <http://www.bechtel.com/newsroom/releases/2005/07/statement-bechtel-dabhol-settlement/>

40 R. Venkataraman (2005) SC clears Dabhol settlement, *The Telegraph India*, 21 July, http://www.telegraphindia.com/1050721/asp/business/story_5015896.asp and J. Venkatesan (2005) Dabhol's out-of-court settlement approved, *The Hindu*, 21 July, <http://www.thehindu.com/2005/07/21/stories/2005072102971300.htm>

41 Tony Allison (2001), see endnote 30.

42 Roos van Os and Roeline Knottnerus (2011) Dutch Bilateral Investment Treaties: A gateway to 'treaty shopping' by multinational corporations for investment protection, SOMO, <https://www.somo.nl/wp-content/uploads/2011/10/Dutch-Bilateral-Investment-Treaties.pdf>

43 Data quoted from Cecilia Olivet et al. (2016) Signing away sovereignty: How investment agreements threaten regulation of the mining industry in the Philippines, Alyansa Tigil Mina, Focus on the Global South and Transnational Institute, page 11, <https://www.tni.org/en/publication/signing-away-sovereignty>

44 Text adapted from Cecilia Olivet et al. (2016), see endnote 43.

45 Jarius Bondoc (2014) Phl wins \$5 M against Fraport's slandering, *The Philippine Star*, 12 December <http://www.philstar.com/opinion/2014/12/12/1401697/phl-wins-5-m-against-fraports-slandering>

46 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/03/25), Introductory Note, <https://cil.nus.edu.sg/rp/id/arbcases/introdnotes/6%20Fraport%20v%20Philippines%20Introductory%20Note.pdf>

47 Philip Morris v Australia (PCA Case N° 2012-12), Award on Jurisdiction and Admissibility, 17 December 2015 http://www.italaw.com/sites/default/files/case-documents/italaw7303_0.pdf

48 According to OECD data, the public health expenditure per capita in 2014 was 2804 USD. Source: OECD (2016), Health spending (indicator). doi: 10.1787/8643de7e-en, <https://data.oecd.org/healthres/health-spending.htm>

49 The medium salary of a registered Nurse is 57,754 Australian dollars. Source: Payscale, 2016, Registered Nurse (RN) Salary (Australia), [http://www.payscale.com/research/AU/Job=Registered_Nurse_\(RN\)/Hourly_Rate](http://www.payscale.com/research/AU/Job=Registered_Nurse_(RN)/Hourly_Rate)

50 World Health Organisation (2016) Frequently asked questions: Plain packaging of tobacco products, <http://www.who.int/campaigns/no-tobacco-day/2016/faq-plain-packaging/en/index1.html>

51 Philip Morris v Australia (PCA Case N° 2012-12), see endnote 47.

52 *ibid.*

53 Permanent Court of Arbitration (2016) Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, <http://www.pcacases.com/web/view/5>

54 Inaê Siqueira de Oliveira (2016) Corporate restructuring and abuse of rights: PCA tribunal deems Philip Morris's claims against Australia's tobacco plain packaging rules inadmissible, *Investment Treaty news*, 10 August, <https://www.iisd.org/itn/2016/08/10/philip-morris-asia-limited-v-the-commonwealth-of-australia-pca-case-no-2012-12/>

55 Tariana Turia (2013) Government moves forward with plain packaging of tobacco products, 19 February, <http://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products>

56 Peter Martin (2015) Australia faces \$50m legal bill in cigarette plain packaging fight with Philip Morris, *The Sydney Morning Herald*, 28 July, <http://www.smh.com.au/federal-politics/political-news/australia-faces-50m-legal-bill-in-cigarette-plain-packaging-fight-with-philip-morris-20150728-gjm4xo.html>

57 OECD (2016) FDI flows (indicator). doi: 10.1787/99f6e393-en, <https://data.oecd.org/fdi/fdi-flows.htm>

58 International Petroleum Investment Company (2011) Chairman's Report, 31 December, <http://www.ipic.ae/media/18690/2011dec.pdf>

59 Clovis Trevino (2015) Korea round-up: Lone Star case reaches hearings, as at least two other investment treaty claims loom, *IAReporter*, 18 May, <http://www.iareporter.com/Korea+round-up%3A+Lone+Star+case+reaches+hearings%2C+as+at+least+two+other+investment+treaty+claims+loomarticles/23170/>

60 *ibid.*

61 UNCTAD (2016) Hanocal and IPIC International v. Korea, case details, <http://investmentpolicyhub.unctad.org/ISDS/Details/635>

62 Medical school tuition fee is a minimum of 4000 USD per year and the course runs for 6 years. The total tuition to complete medical school would be 24.000 USD. <http://www.medical-colleges.net/medical-schools-abroad/medical-schools-in-asia/study-in-korea-south#h3>

63 Claire Provost (2016) Taxes on trial. How trade deals threaten tax justice, *Transnational Institute, Global Justice Now*, <https://www.tni.org/en/publication/taxes-on-trial>

64 *ibid.*

65 A. Crivelli, R. de Mooij and M. Keen (2015) Base Erosion, Profit Shifting and Developing Countries IMF Working Paper 15/118, www.imf.org/external/pubs/ft/wp/2015/wp15118.pdf

66 Claire Provost (2016), see endnote 63.

67 UNCTAD (2015) Treaty-based ISDS cases brought under Dutch IIAs: An Overview, <http://investmentpolicyhub.unctad.org/Publications/Details/135>



THE HIDDEN COSTS OF RCEP AND CORPORATE TRADE DEALS IN ASIA