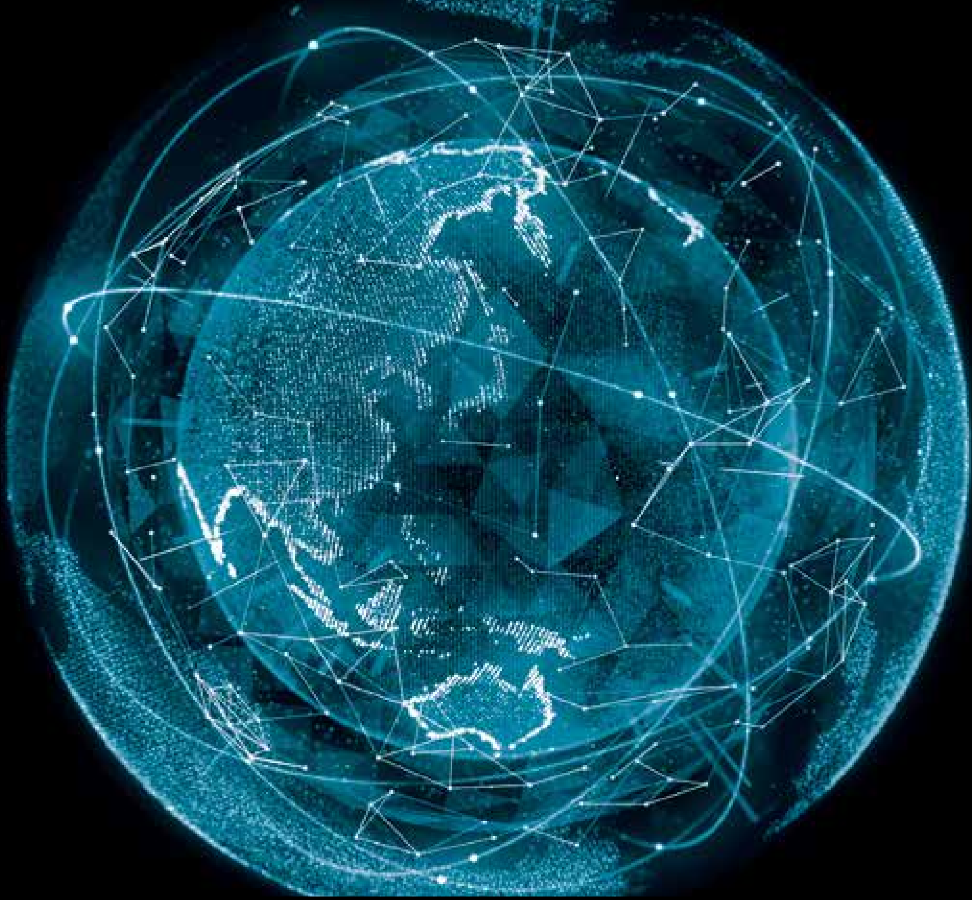

The Asia-Pacific Arbitration Review 2022

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The Asia-Pacific Arbitration Review 2022

A Global Arbitration Review Special Report

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Welcome to *The Asia-Pacific Arbitration Review 2022*, *a Global Arbitration Review* special report. For the uninitiated, *Global Arbitration Review* is the online home for international arbitration specialists the world over, telling them all they need to know about everything that matters.

Throughout the year, we deliver our readers pitch-perfect daily news, surveys and features; lively events (under our GAR Live and GAR Connect banners (GAR Connect for virtual)); and innovative tools and know-how products.

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The contributors' chapters capture and interpret the most substantial recent international arbitration events across the Asia-Pacific region, with footnotes and relevant statistics. Elsewhere they provide valuable background on arbitral infrastructure in different locales to help readers get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, Hong Kong, India, Malaysia, Singapore, Sri Lanka and Vietnam and has overviews on construction and infrastructure disputes in the region (including the effect of covid-19), the state of ISDS and what to expect there, and trends in commercial arbitration, as well as contributions by four of the more dynamic local arbitral providers.

Among the nuggets this reader learned is that:

- force majeure is not necessarily the only option for project participants affected by covid-19, especially if the FIDIC suite is in the picture;
- Korea's diaspora is known as its *Hansang* and more 'international' arbitrators are now accepting KCAB appointments (the number of KCAB 'first-timers' is up by 23 per cent);
- it has become far easier for foreign counsel and arbitrators to conduct cases in Thailand;
- there have been some strongly pro-arbitration decisions from the Philippines and Vietnam of late;
- Sri Lanka's courts also seem to have turned a corner on avoiding excessive interference; and
- improvements in the arbitral environment in Vietnam are part of a concerted effort that began in 2015.

I also found answers to some other questions that had been on my mind, such as whether an increase in case numbers in the SIAC in 2020 was matched by an increase in the total value at stake there (spoiler alert: no), and a number of components I plan to consult when the need arises – including a summary of key decisions in Singapore; a long explainer on the background to the Amazon-Future dispute in India; and a fabulous chart deconstructing the arbitral furniture in Uzbekistan.

I hope you enjoy the volume and get as much from it as I did. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
May 2021

Investment treaty arbitration in the Asia-Pacific: the impact of the CPTPP and the RCEP

Tony Dymond, Cameron Sim and Benjamin Teo
Debevoise & Plimpton LLP

In summary

Investment treaty arbitration in the Asia-Pacific rose to prominence following the exponential increase in bilateral investment agreements (BITs) entered into by states in the region. Over time, a backlash developed against investor-state dispute settlement (ISDS) provisions contained in these BITs. Subsequently, a number of multilateral treaties that contain investment chapters and provisions on ISDS have been negotiated. Most prominently, these include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). It is timely to consider the different manner in which investors are protected under these agreements and the ISDS options available under each.

Discussion points

- There has been a decrease in the number of new BITs following a backlash against ISDS in the Asia-Pacific region
- Several multilateral treaties have been negotiated, including most prominently the CPTPP and the RCEP
- Different approaches are taken to ISDS in the CPTPP and the RCEP
- The CPTPP permits investors to commence arbitration without any prior recourse to domestic proceedings or remedies
- The ISDS provisions for the RCEP are still subject to negotiation; currently, the RCEP only contains a dispute settlement mechanism that relies on the investor's home state to bring a claim on behalf of the investor

Referenced in this article

- The Comprehensive and Progressive Agreement for Trans-Pacific Partnership
- The Regional Comprehensive Economic Partnership
- The ASEAN Comprehensive Investment Agreement
- The Model Text for the Indian Bilateral Investment Treaty (Indian Model BIT)
- The ICSID Convention
- EU–Singapore IPA
- EU–Vietnam IPA
- *White Industries Australia Limited v Republic of India* (UNCITRAL)
- *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12)
- Canada–Chile–New Zealand Joint Declaration on Investor State Dispute Settlement

Introduction

The conclusion of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in 2018 and the Regional Comprehensive Economic Partnership (RCEP) in 2020 heralded the arrival of two trade agreements that are likely to shape global economics and politics in the years ahead, with the spotlight firmly on the Asia-Pacific region. The CPTPP covers approximately half a billion individuals and almost 14 per cent of the global economy.[1] The RCEP constitutes the world's largest trade bloc, covering roughly 30 per cent of global gross domestic product (GDP) and representing over 2 billion individuals.[2] Combined, the CPTPP and the RCEP are the most significant multilateral investment agreements to be entered into in recent times. They are situated within a new generation of free trade agreements (FTAs), which regulate not only trade in goods and services, but also include various objectives pertaining to free market and fair competition.

Within the Asia-Pacific, the CPTPP and the RCEP are also emblematic of the regional shift away from BITs in favour of multilateral agreements. Following a boom in BITs starting in the 1980s that lasted almost three decades,[3] the number of new BITs signed in the Asia-Pacific region has fallen dramatically in recent years.[4] States in the region have instead focused their efforts on the development of FTAs and multilateral pacts, as evidenced by the conclusion of the CPTPP and the RCEP.

In this article, we set out in brief the background on ISDS in the Asia-Pacific. We then examine the key components of the CPTPP and the RCEP, before exploring the different approaches taken to ISDS in the two agreements.

ISDS in the Asia-Pacific

In the Asia-Pacific region, foreign direct investment (FDI) has been hugely important for economic development. In the latter half of the twentieth century, in a bid to attract FDI, countries in Asia modernised their laws and policies governing foreign investment. This included embracing BITs. These were intended to encourage cross-border investment by extending various protections to foreign investments, such as promises of non-discrimination and fair and equitable treatment, as well as by granting foreign investors the right to bring their claims directly against host states through ISDS mechanisms.[5]

BITs proliferated in the Asia-Pacific over the past half-century. Although there were fewer than 30 BITs in the 1970s, this figure had nearly doubled by the 1980s.[6] BIT activity then exploded in the 1990s and 2000s, with 21 East Asian and Pacific countries signing 369 BITs in the 1990s and a further 241 BITs in the 2000s.[7] This boom mirrored growth in the number of BITs concluded worldwide.[8]

After 2010, however, the number of new BITs being signed fell dramatically.[9] This may be explained in part as a reaction to investment treaty claims being brought against countries in the Asia-Pacific region, generating a backlash against ISDS. For example, in response to an increase in investor claims between 2004 and 2014, Indonesia announced a plan to terminate its BITs and renegotiate new ones that would limit its exposure to claims.[10] Similarly, India issued termination notices to more than 80 per cent of its BIT counterparties in the aftermath of the *White Industries* case, the first publicly known investment treaty ruling against India, and also adopted a narrower model BIT.[11] Australia also denounced ISDS and sought to exclude it in all future investment treaties when it faced its first investment treaty case as a respondent state in *Philip Morris*,[12] although it has softened its position since and will now consider ISDS provisions 'on a case-by-case basis in light of the national interest'.[13]

While FDI has been, and remains, pivotal to economic development in the Asia-Pacific, many countries in the region have also emerged as significant exporters of capital. China and Japan, for example, are two of the world's largest capital exporters. FDI outflows from China totalled US$117 billion in 2019, compared to US$227 billion from Japan.[14] As their outbound FDI increases, states in the Asia-Pacific can be expected increasingly to rely on investment treaties not just as a means of attracting FDI, but also as a means of protecting the overseas investments of their nationals. Rather than wholesale abandonment of ISDS, states in the region have adopted innovative approaches to seek to reform the system.

One such approach has been the use of binding interpretative statements. Asia-Pacific states have begun to conclude agreements with procedures for contracting states to issue joint interpretations of treaty provisions. Such joint interpretation clauses either authorise or require tribunals established under ISDS provisions to request a joint interpretation by the parties to that agreement. Where the parties provide such an interpretation, it will be binding on the tribunal. However, should the parties fail to provide such an interpretation, it will fall to the tribunal to decide the issue at hand. One such example is the 2009 Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement, which allows for the tribunal (on its own or at the request of a disputing party) to request a joint interpretation of any provisions at issue in a dispute.[15] The member states would then have 60 days to submit the joint interpretation, failing which the tribunal would be entitled to decide the issue on its own account.[16] Similar provisions can be found in the Australia–Hong Kong Investment Agreement and the Armenia–Singapore Agreement on Trade in Services and Investment.[17]

In addition, the introduction of appellate mechanisms has been another way in which states in the Asia-Pacific have sought to improve the ISDS system. While decisions in investment treaty arbitrations have historically been final and subject to limited grounds of review,[18] certain Asia-Pacific international investment agreements have begun to contemplate the creation of an appellate mechanism. Thus, the United States–Singapore Free Trade Agreement (USSFTA) states that 'Parties shall strive to reach an agreement that would have [an appellate body that may be established by a separate multilateral agreement in force as between the parties] review awards' rendered under the USSFTA.[19] The China–Australia FTA obliges the parties 'to commence negotiations with a view to establishing an appellate mechanism to review awards' within three years of it entering into force.[20]

This is taken a step further in the European Union–Singapore investment protection agreement (the EU–Singapore IPA) and the European Union–Vietnam investment protection agreement (the EU–Vietnam IPA). These agreements establish both a permanent investment tribunal and a permanent appeal tribunal.[21] The permanent investment tribunal comprises six members under the EU–Singapore IPA and nine under the EU–Vietnam IPA. These members would be one-third from the European Union, one-third from Singapore or Vietnam, and one-third from third countries. The tribunal would be chaired by the national from the third country. The permanent appeal tribunal would hear appeals from the awards issued by the permanent investment tribunal.

China has also established judicial bodies to oversee investment-related disputes in relation to its Belt and Road Initiative (BRI).[22] China's BRI is a development plan that seeks to enhance both land and sea trade links between China and major markets in Europe, Asia and the Middle East. Currently, 143 countries are participating in the initiative.[23] China has established the China International Commercial Court to resolve BRI-related investment and commercial disputes. Nonetheless, it is unclear whether these courts would have jurisdiction over other states, thus providing a viable alternative forum for investment claims under the BRI. Instead, various Chinese arbitral institutions have begun to offer themselves as fora for the resolution of BRI-related investment disputes – the China International Economic and Trade Arbitration Commission, Shenzhen Court of International Arbitration and Beijing International Arbitration Centre have each adopted rules for international investment arbitration.[24]

Evidently, the negative sentiment against ISDS in the Asia-Pacific has been balanced against the economic benefits generated by investment agreements with sound dispute resolution procedures embedded in them. Enticing inbound FDI, and protecting outbound FDI, remain priorities for states in the region.

CPTPP and RCEP: an overview

In this section, we compare the approach taken to ISDS in the CPTPP and the RCEP. The CPTPP contains an ISDS mechanism, whereas currently the RCEP does not. ISDS provisions for the RCEP are still being negotiated, and in the meantime, as we will explore, disputes may be referred under an inter-state dispute settlement mechanism (DSM).

The Trans-Pacific Partnership (TPP) was signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam on 4 February 2016.[25] It was due to enter into force when at least six parties accounting for 85 per cent of the combined GDP of the signatory states ratified the agreement.[26] This meant that both Japan and the United States had to ratify the TPP for it to enter into force.[27] However, President Trump withdrew the United States from the TPP on 23 January 2017, effectively preventing the TPP from coming into force.[28]

Instead, in May 2017, the remaining TPP signatories agreed to revive the agreement.[29] This led to the signing of the CPTPP on 8 March 2018 between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.[30] The CPTPP contains detailed provisions on trade in goods and services, investment, labour mobility and government procurement. In incorporating the TPP into the CPTPP, the remaining signatories suspended or modified 22 provisions from the TPP (most of which initially had been proposed by the United States).[31]

The CPTPP has currently been ratified by Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam. The CPTPP is the third-largest free-trade area in the world, after the US–Mexico–Canada FTA and the EU–EEA Switzerland Common Market,[32] although it has been said to be 'much less integrated than a customs union (with shared tariffs), a common market (with fuller regulatory alignment) or an economic union'.[33]

The significance of the CPTPP will increase as more countries accede to it. On 1 February 2021, the United Kingdom submitted its formal request to commence accession negotiations to the CPTPP.[34] Elsewhere, Taiwan,[35] South Korea and Indonesia are contemplating accession.[36] It remains unclear if the United States under President Biden will seek to join the CPTPP following its withdrawal from the predecessor TPP under President Trump.

The RCEP was concluded on 15 November 2020 between the member states of ASEAN (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam), as well as five of ASEAN's major trade partners – China, Japan, South Korea, Australia and New Zealand. The signing of the RCEP concluded a series of negotiations that spanned eight years. Notably, it represents China's first participation in a multilateral trade agreement.

India had also participated in negotiations for the RCEP. However, at an RCEP summit in November 2019, India announced that it would not be entering into the agreement, on the basis that its terms did not reflect the spirit and principles agreed for its negotiation.[37] Primarily, India was concerned with the potential for surges in imports, and the risk of circumvention of rules of origin for products.[38] In addition, India desired the exclusion of most-favoured nation (MFN) obligations in the investment chapter of the agreement.[39]

The RCEP covers trade in goods and services, investment, intellectual property and competition policy, with a stated aim to create a 'modern, comprehensive, high-quality and mutually beneficial economic partnership agreement among the ASEAN member states and ASEAN's FTA partners'.[40] It has been suggested that the RCEP could add US$209 billion annually to world income, and US$500 billion to world trade by 2030.[41] However, this remains to be seen, particularly given the large number of FTAs already in force in the Asia-Pacific region (and ASEAN has already concluded separate FTAs with China, Japan, South Korea, India, Australia and New Zealand). Furthermore, a number of signatories to the RCEP have also acceded to the CPTPP. The impact of the RCEP may be reduced by the narrower application of the RCEP which, in contrast to the CPTPP, provides only for trade and market access in goods, with limited provisions for services.

Finally, the attractiveness of the RCEP is likely to be tested by its current lack of ISDS provisions. While the RCEP contains a chapter on investment protection, it does not currently contain ISDS provisions. The inclusion of an ISDS mechanism became controversial during negotiations of the RCEP, and this was therefore carved out to avoid further delays in its conclusion.[42] Instead, the signatories to the RCEP agreed to start negotiations on ISDS provisions within two years of the RCEP coming into force, and for these negotiations to be concluded within three years.[43] However, any such amendments will require the approval of all signatories. The RCEP also expressly prohibits applying the ISDS mechanisms or procedures contained in other treaties through the RCEP's MFN clause.[44]

CPTPP and RCEP: ISDS mechanisms

In this section, we compare the differences in the DSMs contained in the CPTPP and the RCEP. The CPTPP permits what has been described as a 'modernised' form of investment arbitration, which enables investors to commence arbitration without any prior recourse to domestic proceedings or remedies.[45] In contrast, the RCEP provides for a DSM that relies on the investor's home state to bring the claim on behalf of the investor. We set out and compare the DSMs in the CPTPP and the RCEP in the following areas: (i) the form of DSM; (ii) pre-claim consultation requirements; (iii) limitation periods; (iv) fork-in-the-road clauses; (v) forum selection options; (vi) arbitrator and panel selection process; (vii) available remedies; (viii) treaty carve-outs; and (ix) side letter carve-outs. As will become apparent, the CPTPP and the RCEP take different approaches to DSMs.

Form of DSM

As set out in the previous section, the CPTPP incorporates the terms of the TPP by reference mutatis mutandis.[46] However, in following this approach, the signatories to the CPTPP agreed to suspend the application of certain provisions of the TPP that had been favoured by the United States, but not by the eventual signatories to the CPTPP.[47] This suspension includes the article 9 provisions of the TPP (as incorporated into the CPTPP) relating to 'investment agreement' and 'investment authorisation', particularly the provisions of the TPP that would enable the pursuit of claims arising out of investment authorisations and investment agreements.[48] The CPTPP preserves the option of investment treaty arbitration for violations of the investment protection standards contained in the TPP, save for any claims arising out of investment authorisations or investment agreements.

Under the CPTPP, the host state grants consent to arbitration via the CPTPP itself, with an open invitation to investors to initiate arbitration. There is no need for prior recourse to domestic remedies before the initiation of arbitral proceedings. Claimants under the CPTPP may choose to arbitrate under either:

- the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, where both the host state and the investor's home state are parties to the ICSID Convention;
- the ICSID Additional Facility Rules, where either the host state or the investor's home state is a party to the ICSID Convention;
- the UNCITRAL Arbitration Rules; or
- any other arbitral rules agreed upon by the investor and the state.[49]

The CPTPP thus confers investors with a range of options when it comes to initiating arbitral proceedings against host states.

In contrast, in the RCEP, in lieu of ISDS, an all-purpose inter-state DSM is provided for in Chapter 19 of the RCEP (the RCEP DSM). If a party to the RCEP breaches any of its obligations under the RCEP, the investor would need to request that its home state escalate its claims. The investor's home state would then be able to bring a claim against the host state under the RCEP. [50] Article 19 of the RCEP sets out the procedure for inter-state resolution of disputes.

The RCEP DSM procedure is thus heavily reliant on the willingness of the investor's home state to commence proceedings on its behalf. Whether investors are content with a DSM that makes their remedy reliant on the intervention of their home state will likely depend on the trust and confidence the investor has in their home state to pursue claims on its behalf.

Pre-claim consultation requirements

It is commonplace for investment treaties to contain cooling-off periods, during which an investor is required to seek to settle their dispute with the host state prior to the commencement of arbitration proceedings.

The CPTPP provides for a mandatory six-month consultation and negotiation period prior to the commencement of any claims.[51] Under the relevant provisions of the CPTPP, by way of trigger letter, the investor would need to deliver a written request for 'consultations' with the state.[52] The investor and the host state are then encouraged to seek to resolve the dispute through 'consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation'.[53] Should the dispute not have been resolved within the cooling-off period, the investor may then submit its claim to arbitration.[54]

Under the RCEP, disputing parties may enter into a confidential consultation period.[55] However, such consultation is not mandatory. While there are no mandatory cooling-off periods, the investor's home state may only request the establishment of the panel under the RCEP DSM if the host state does not reply to the request for consultation within seven days of receipt of the request, or otherwise does not enter into consultations within 30 days of receipt of the request.[56] In either scenario, the home state of the investor may proceed to request the establishment of a panel to determine the dispute.[57]

Limitation period

Limitation periods are included in investment treaties to require that arbitrations are brought within a specified time period, often defined with reference to the date that any breach or damage occurred.

The CPTPP contains a limitation period of three years and six months, commencing from the 'date on which the claimant first acquired, or should have first acquired, knowledge of the breach . . . and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage'.[58]

The RCEP DSM is not subject to a limitation period. Given the protection and certainty provided to states by limitation periods, it is likely that limitation periods will form part of the negotiations for the ISDS provisions of the RCEP.

Fork-in-the-road clauses

Fork-in-the-road clauses require investors to elect to either pursue their claim via arbitration under the provisions of the agreement or treaty, or in local courts or other venues available. The aim of such clauses is to prevent investors from commencing a multitude of proceedings against a state.

The CPTPP contains a fork-in-the-road clause in respect of proceedings in Chile, Mexico, Peru and Vietnam. The CPTPP precludes investors from bringing arbitration claims where those claims have already been pursued before domestic courts or administrative tribunals in those states.[59]

In addition, the CPTPP requires that any notice of arbitration be accompanied by a written waiver of any right to initiate or continue the same claims before any court, administrative tribunal or other dispute settlement procedure.[60] However, claims for interim injunctive relief that do not involve the payment of monetary damages are not subject to this requirement, and may be initiated or continued.[61]

The RCEP DSM does not contain any fork-in-the-road clause. As with limitation periods, given the protections offered to states by fork-in-the-road clauses, it is likely that negotiations on the ISDS mechanism for the RCEP will include discussions on this issue.

Forum selection options

Similar in nature but distinct from fork-in-the-road clauses, where disputes arise concerning similar rights or obligations under multiple trade agreements, choice of forum clauses set out the circumstances in which investors may choose to pursue claims ostensibly arising from one agreement under the DSM mechanisms of another.

The CPTPP does not require substantial equivalence for resolution of a dispute under the CPTPP and another international trade agreement. Rather, where any dispute arises under the CPTPP and another international trade agreement to which the investor's home state and the respondent state are party, the investor may select the forum in which to settle the dispute.[62]

The RCEP provides that where a dispute arises concerning 'substantially equivalent rights and obligations' under the RCEP and another international trade or investment agreement to which the investor's home state and the respondent state are party, the complaining party may select the forum in which to settle the dispute, which will then be used to the exclusion of other fora.[63]

Arbitrator and panel selection procedure

The selection of the adjudicators of disputes is often a contentious process, and plays an essential part in ensuring equality and fairness between the parties. Investment treaties and agreements often set out the procedures by which arbitrators or panellists are appointed.

Under the CPTPP, unless the disputing parties agree otherwise, the arbitral tribunal shall comprise three arbitrators, with one arbitrator appointed by each of the disputing parties and the presiding arbitrator appointed by agreement of the disputing parties.[64] Should no tribunal be constituted within 75 days of the submission of the claim to arbitration, the secretary general of ICSID, at the request of a disputing party, shall appoint the arbitrators not yet appointed.[65]

The RCEP similarly provides that unless the disputing parties agree otherwise, the panel shall comprise three panellists. However, the initial procedure for constitution of the panel is that the disputing parties are to 'enter into consultations with a view to reaching agreement on the procedures for composing the panel'.[66] It is only where the parties do not agree to a specific procedure that the alternative procedure set out in the RCEP applies.[67] Under the alternative procedure, each of the parties will appoint one panellist, following which the disputing parties will agree a third panellist who will serve as chair of the panel. Should any panellist not have been appointed within 35 days of commencement of appointment of the panel, any of the disputing parties may request that the director general of the World Trade Organization (WTO) appoint the remaining panellists. Should the director general of the WTO fail to appoint the remaining panellists within 30 days, any of the disputing parties may request that the secretary general of the Permanent Court of Arbitration appoint the remaining panellists.[68]

Remedies

The remedies available under an investment treaty also play a key role in the investor's selection of the forum to pursue their claims, particularly where there is a fork-in-the-road provision in the treaty.

Arbitral tribunals constituted via the ISDS mechanism in the CPTPP may only award (separately or in combination): (i) monetary damages and interest thereon; and (ii) restitution of property (with the proviso that the state may pay monetary damages and any applicable interest in lieu of restitution). Punitive damages are expressly prohibited.[69]

Under the RCEP, the remedies attainable are limited to a finding by a panel in the form of a report that the host state has failed in its obligations under the RCEP.[70] If such a report is issued then: where a measure at issue is not in conformity with the host state's obligations under the RCEP, the host state must bring the non-conforming measure into conformity; or, where the host state has failed to carry out its obligations under the RCEP, the host state must carry out those measures.[71] Where the host state fails to comply with this order, the home state may then bring a compliance review, which will lead to either payment of compensation by the host state to the home state, or, if compensation is not agreed by the disputing parties, the home state may suspend concessions given to the host state under the RCEP.[72] Notably, an investor does not receive any direct compensation.

Treaty carve-outs

The inclusion of a provision in a treaty is no guarantee of its application. Provisions may be suspended pending the agreement of state parties,[73] or otherwise be limited in application.[74] The DSM provisions of the CPTPP and the RCEP contain examples of both suspended provisions and provisions limited in nature.

As set out above, the CPTPP suspends the provisions of the TPP that provided for investor claims arising out of investment authorisations and investment agreements.[75]

The RCEP includes a multitude of provisions carving out the availability of the RCEP DSM to other state parties. These include carve-outs for transparency lists,[76] electronic commerce,[77] grants of temporary entry for natural persons[78] and competition policy.[79]

Side letter carve-outs

State signatories may, via side letters, clarify bilateral matters between two parties that do not affect the rights and obligations of the other signatories. In the context of multilateral treaties, they allow for states to exclude the operation of certain provisions between themselves and other parties.

Side letters have been signed between New Zealand and five other signatories to the CPTPP (Brunei, Malaysia, Peru, Vietnam and Australia) to exclude the ISDS mechanism entirely or only permit it to be accessed if the relevant state agrees.[80] In a joint declaration, Canada, Chile and New Zealand have also stated their intent 'to work together on matters relating to the evolving practice' of ISDS, 'including as part of the ongoing review and implementation' of the CPTPP.[81] None of the RCEP signatories have yet signed side letters in relation to the RCEP.

Conclusion

The contrast between the DSMs in the CPTPP and the RCEP demonstrate the important – and contentious – role that ISDS plays in international investment agreements. The Asia-Pacific region is and is likely to continue to be a driving force for innovation in ISDS. The CPTPP does not yet include some of the newer innovations from the region, such as joint interpretation clauses or an appellate system. It remains to be seen whether the ISDS provisions to be negotiated for the RCEP will include these innovations. The further negotiations on an ISDS mechanism under the RCEP will thus be of great significance in determining the attractiveness of the agreement from the perspective of investors.

Notes

1 New Zealand Ministry of Foreign Affairs and Trade, 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership'. Available at https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/cptpp-overview/.

2 Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP) (15 November 2020). Available at https://www.meti.go.jp/press/2020/11/20201115001/20201115001-1.pdf.

3 Luke Nottage, 'The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification', 17 *Melb J of Int'l L* 313, 321 (2016); Claudia T Salomon and Sandra Friedrich, 'Investment Arbitration in East Asia and the Pacific', 16 *J World Inv & Trade* 800, 807–808 (2015).

4 See Claudia T Salomon and Sandra Friedrich, 'Investment Arbitration in East Asia and the Pacific', 16 *J World Inv & Trade* 800, at 808 and Chart B.1 (2015).

5 Kenneth J Vandevelde, 'A Brief History of International Investment Agreements', 12 *UC Davis J Int'l L & Pol'y* 157, 171 (2005).

6 Luke Nottage, 'The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification', 17 *Melb J of Int'l L* 313, 321 (2016).

7 id.

8 See Claudia T Salomon & Sandra Friedrich, 'Investment Arbitration in East Asia and the Pacific', 16 *J World Inv & Trade* 800, 807–808 (2015).

9 See id. at 808 and Chart B.1.

10 Ben Bland and Shawn Donnan, 'Indonesia to Terminate More Than 60 Bilateral Investment Treaties', *Financial Times* (26 March 2014). Available at www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0.

11 See Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction', 38 *Nw J Int'l L & Bus* 1, 16–18 (2017).

12 Jürgen Kurtz, 'The Australian Trade Policy Statement on Investor-State Dispute Settlement', 15 *ASIL Insights* (2 August 2011). Available at www.asil.org/insights/volume/15/issue/22/australian-trade-policy-statement-investor-state-dispute-settlement.

13 Austl. Gov't Dep't of Foreign Affairs and Trade, 'Investor-State Dispute Settlement (ISDS)'. Available at www.dfat.gov.au/trade/investment/Pages/investor-state-dispute-settlement.

14 United Nations Conference on Trade and Development, 'World Investment Report 2020 International Production Beyond the Pandemic', Figure I.9. (2020). Available at https://unctad.org/system/files/official-document/wir2020_en.pdf.

15 ASEAN Comprehensive Investment Agreement (ACIA), 26 February 2009 (entered into force 24 February 2012), article 40(2).

16 ACIA, article 40(2).

17 Agreement on Trade in Services and Investment between Armenia and Singapore, Arm.–Sing., article 6.11, 1 October 2019.

18 Under article 52 of the ICSID Convention, the grounds for annulment are limited to the following: (i) improper constitution of the tribunal; (ii) manifest excess of powers; (iii) corruption; (iv) serious departure from a fundamental rule of procedure; and (v) failure to state reasons. Under article V of the New York Convention, the grounds are: (i) incapacity of one of the parties to the arbitration agreement or invalidity of the arbitration agreement; (ii) the losing party was not given proper notice of the arbitral appointment or of the arbitration proceedings or was otherwise unable to present its case; (iii) matters decided exceed the scope of the submission to arbitration; (iv) and improper constitution of the tribunal or conduct of the arbitral proceedings.

19 United States–Singapore Free Trade Agreement, Sing.–U.S., article 15.19(10), 6 May 2003 (entered into force 1 January 2004). See also, Model Text for the Indian Bilateral Investment Treaty (Indian Model BIT), article 29. Available at https://static.mygov.in/rest/s3fs-public/mygov_15047003859017401.pdf.

20 Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, Austl.–China (ChAFTA), article 9.23, 17 June 2015 (entered into force 20 December 2015).

21 Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Singapore,

of the Other Part (EU–Singapore IPA), Chapter 3, section A, articles 3.9 and 3.10, 19 October 2018 (not yet in force); EU–Vietnam IPA, Chapter 3, section A, subsection 4, articles 3.38 and 3.39.

22 China International Commercial Court, 'A Brief Introduction of China International Commercial Court' (28 June 2018). Available at http://cicc.court.gov.cn/html/1/219/index.html.

23 See 'International Cooperation: Profiles, Belt and Road Portal'. Available at https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076 (listing the profiles of 143 participating countries).

24 CIETAC International Investment Arbitration Rules, China International Economic and Trade Arbitration Commission, article 4.3 (2 September 2017). Available at http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en; SCIA Arbitration Rules, Shenzhen Court of International Arbitration, articles 2(2) and 3(5) (21 February 2019). Available at http://120.25.66.138/web/doc/view_rules/914.html; Rules for International Investment Arbitration, Beijing Arbitration Commission/Beijing International Arbitration Centre, article 46 (1 October 2019). Available at http://www.bjac.org.cn/page/data_dl/2019投资仲裁规则0905%20英文.pdf.

25 Office of the United States Trade Representative, 'Trans-Pacific Partnership Ministers' Statement' (4 February 2016). Available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement#:~:text=February%204%2C%202016&text=TPP%20will%20set%20a%20new,one%20third%20of%20world%20trade.

26 Lars Markert and Anne-Marie Doernenburg, 'The Comprehensive and Progressive Agreement for Trans-Pacific Partnership', Lexology, section II(i) (30 April 2020). Available at https://www.lexology.com/library/detail.aspx?g=7450df43-c057-4ab3-b047-f5c247302849.

27 id., section II(i).

28 Federal Register, 'Withdrawal of the United States From the Trans-Pacific Partnership Negotiations and Agreement' (25 January 2017). Available at https://www.federalregister.gov/documents/2017/01/25/2017-01845/withdrawal-of-the-united-states-from-the-trans--pacific-partnership-negotiations-and-agreement.

29 Lars Market and Anne-Marie Doernenburg, 'The Comprehensive and Progressive Agreement for Trans-Pacific Partnership', Lexology, section II(i) (30 April 2020).

30 Tim McDonald, 'Asia-Pacific Trade Deal Signed by 11 Nations', BBC News (8 March 2018). Available at https://www.bbc.co.uk/news/business-43326314.

31 Lars Markert and Anne-Marie Doernenburg, 'The Comprehensive and Progressive Agreement for Trans-Pacific Partnership', Lexology, section II(ii) (30 April 2020). Available at https://www.lexology.com/library/detail.aspx?g=7450df43-c057-4ab3-b047-f5c247302849.

32 ICAEW, 'Chart of the week: CP Trans-Pacific Partnership' (12 February 2021). Available at https://www.icaew.com/insights/viewpoints-on-the-news/2021/feb-2021/chart-of-the-week-cp-trans-pacific-partnership.

33 id.

34 GOV.UK, 'Formal Request to Commence UK Accession Negotiations to CPTPP' (1 February 2021). Available at https://www.gov.uk/government/news/formal-request-to-commence-uk-accession-negotiations-to-cptpp.

35 Shirley Lin, 'Taiwan will apply to join CPTPP at the right time: Foreign ministry', Radio Taiwan International (2 February 2021). Available at https://en.rti.org.tw/news/view/id/2004776.

36 Kyodo, 'TPP countries to start accession talks for new members in 2019', *The Japan Times* (19 July 2018). Available at https://www.japantimes.co.jp/news/2018/07/19/business/tpp-countries-start-accession-talks-new-members-2019/.

37 ET Bureau, 'India decides to opt out of RCEP, says key concerns not addressed', *The Economic Times* (5 November 2019). Available at https://economictimes.indiatimes.com/news/economy/foreign-trade/india-decides-to-opt-out-of-rcep-says-key-concerns-not-addressed/articleshow/71896848.cms.

38 id.

39 Prabha Raghavan, 'Explained: The economic implications of India opting out of RCEP', *The Indian Express* (26 November 2020). Available at https://indianexpress.com/article/explained/india-out-of-rcep-china-economy-trade-angle-7053877/.

40 ASEAN, 'Regional Comprehensive Economic Partnership' (3 October 2016). Available at http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership.

41 Peter A Petri and Michael Plummer, 'RCEP: A new trade agreement that will shape global economics and politics', Brookings (16 November 2020). Available at https://www.brookings.edu/blog/order-from-chaos/2020/11/16/rcep-a-new-trade-agreement-that-will-shape-global-economics-and-politics/.

42 Lars Markert and Anne-Marie Doernenburg, 'Regional Comprehensive Economic Partnership (RCEP) – what you need to know: Investment protection perspective (Part II)', Lexology (27 January 2021). Available at https://www.lexology.com/library/detail.aspx?g=b934a88d-3344-46aa-8736-961b74643877.

43 RCEP, article 10.18.

44 RCEP, article 10.4(3).

45 Stephan W Schill and Geraldo Vidigal, 'Cutting the Gordian Knot: Investment Dispute Settlement à la Carte', RTA Exchange, section 4.1 (November 2018). Available at https://uncitral.un.org/sites/uncitral.un.org/files/rta_exchange_-_investment_dispute_settlement_-_schill_and_vidigal.pdf.

46 CPTPP, article 1.1.

47 CPTPP, article 2; Lars Markert and Anne-Marie Doernenburg, 'The Comprehensive and Progressive Agreement for Trans-Pacific Partnership', Lexology, section II(ii) (30 April 2020). Available at https://www.lexology.com/library/detail.aspx?g=7450df43-c057-4ab3-b047-f5c247302849.

48 CPTPP, article 2 and Annex. An 'investment agreement' is defined as a written agreement between 'an authority at the central level of government' of a state party and a covered investment or investor of another state that grants rights to the investor with respect to: (i) natural resources, such as oil, natural gas, rare earth, timber, gold, iron or other similar resources; (ii) the supply of power, water, telecommunications or other services for consumption by the general public; or (iii) infrastructure projects, such as the construction of roads, bridges, canals, dams or similar projects where such infrastructure is not for the predominant use and benefit of the government. An 'investment authorisation' refers to authorisations provided by foreign investment authorities of a state to an investor of another state party.

49 TPP, as incorporated in the CPTPP (TPP/CPTPP), article 9.19.4.

50 RCEP, article 19.3(1).

51 TPP/CPTPP, articles 9.18 and 9.19.

52 TPP/CPTPP, article 9.18(2).

53 TPP/CPTPP, article 9.18(1).

54 TPP/CPTPP, article 9.19(1).

55 RCEP, articles 19.6(1) and 19.6(8).

56 RCEP, articles 19.5 and 19.6. The investor's home state may also request establishment of the panel should the host state fail to enter into consultations within 15 days of receipt of the request for consultations in cases of urgency.

57 RCEP, article 19.8(1).

58 TPP/CPTPP, article 9.21(1).
59 TPP/CPTPP, Annex 9-J.
60 TPP/CPTPP, article 9.21(2)(b).
61 TPP/CPTPP, article 9.21(2)(b).
62 TPP/CPTPP, article 28.4.
63 RCEP, article 19.5(1).
64 TPP/CPTPP, article 9.22(1).
65 TPP/CPTPP, article 9.22(3).
66 RCEP, article 19.11(3).
67 RCEP, article 19.11(4).
68 RCEP, article 19.11(7) and 19.11(8).
69 TPP/CPTPP, article 9.29(6).
70 RCEP, article 19.15.
71 RCEP, article 19.15.
72 Michael Ewing-Chow and Junianto James Losari, 'The RCEP Investment Chapter; A State-to-State WTO Style System For Now', Kluwer Arbitration Blog (8 December 2020). Available at http://arbitrationblog.kluwerarbitration.com/2020/12/08/the-rcep-investment-chapter-a-state-to-state-wto-style-system-for-now/.
73 See, for example, CTPTPP article 2, which suspends the application of the provisions set out in the Annex to the CPTPP until the parties agree to end the suspension of each of those provisions.
74 See, for example, the side letters signed between New Zealand and Brunei Darussalam, Chile, Malaysia, Peru and Vietnam excluding the ISDS provisions of the CPTPP between them.
75 CPTPP, article 2 and Annex thereto.
76 RCEP, article 8.10.
77 RCEP, article 12.7.
78 RCEP, article 9.9.
79 RCEP, article 13.9.
80 Press Release, Hon David Parker, 'New Zealand Signs Side Letters Curbing Investor-State Dispute Settlement', New Zealand Government (9 March 2018). Available at https://www.beehive.govt.nz/release/new-zealand-signs-side-letters-curbing-investor-state-dispute-settlement.
81 Canada–Chile–New Zealand Joint Declaration on Investor State Dispute Settlement (9 March 2018). Available at https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/CPTPP-Joint-Declaration-ISDS-Final.pdf.

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