A BATTLE FOR CHOICE: SELECTING INVESTOR-STATE ARBITRATORS UNDER THE RCEP*

I. INTRODUCTION

States face many choices when negotiating trade agreements. The substantive considerations in trade agreements are numerous and can range from the large-scale considerations like the scope of the agreement[1] to more minute details such as which sectors of industry will receive favorable tariff treatment and how favorable that treatment will be.[2] However, states traditionally have put off some choices until the future.[3] When treaties cover international investment, they almost always save for later the selection of arbitrators who will oversee disputes.[4]

The decision to choose arbitrators only after a dispute has occurred is supported by tradition and logic.[5] The specific nature of a conflict cannot be known until that conflict has arisen. Thus, by waiting until an aggrieved investor lodges a complaint, treaty parties ensure that the arbitrators selected to adjudicate disputants' grievances are experienced in dealing with the relevant provisions of law.[6] However, in recent years, multiple parties have expressed concern about the potential for conflicts and bias that are allegedly perpetuated by this system and, accordingly, have argued for change.[7]

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1. *See, e.g.*, North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (covering objectives (Chapter 1), general definitions (Chapter 2), national treatment (Chapter 3), rules of origin (Chapter 4), customs procedures (Chapter 5), energy and basic petrochemicals (Chapter 6), agriculture and sanitary and phytosanitary measures (Chapter 7), emergency action (Chapter 8), standards-related measures (Chapter 9), government procurement (Chapter 10), investment (Chapter 11), and more).

2. *See, e.g.*, United States-Korea Free Trade Agreement, U.S. Tariff Schedule, U.S.-S. Kor., Annex 2-B, U.S.-S. Kor., June 30, 2007, 125 Stat. 428, http://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file199_12753.pdf [perma: http://perma.cc/4RVX-FS94] (setting tariff rates for products as diverse as "[l]ive purebred breeding horses" and "[p]arking meters").

3. See *infra* Part II.B.4 for a discussion of choices states wait to make in the future.

4. See *infra* Part II.B.4 for a discussion of the traditional method of arbitrator selection.

5. See *infra* notes 103–07 and accompanying text for an analysis of the reasons arbitrators are selected after a dispute has occurred.

6. Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy is Wrongheaded*, 29 ARB. INT'L 7, 18–19 (2013) ("The parties [to the dispute] likewise are in the best position to identify the corresponding knowledge, skills, and expertise desired (or needed) in a tribunal to adjudicate the dispute.").

7. See *infra* notes 108–30 and accompanying text for a discussion of the main criticisms of the

A leaked draft of the Regional Comprehensive Economic Program (RCEP), a Southeast Asian trade treaty created by states whose population represents nearly half the global total and who combine to make up nearly forty percent of the global trade market,[8] adopted one proposed change.[9] The RCEP has rejected tradition and boldly embraced one idea from reformers: creating a preselected list of potential arbitrators who will oversee all future trade disputes.[10]

In rejecting the traditional form of arbitrator selection, the RCEP has taken a leap into relatively uncharted territory.[11] This Comment contends that this leap will undermine the purposes of the international investment regime and weaken one of its main pillars of support: investor-state dispute settlement (ISDS).[12] While there may be good reasons to consider change to the traditional method of arbitrator selection for international disputes,[13] the preselected list system is particularly ill-suited to the investor-state context because it undermines the purpose of ISDS, and as such it should not be used when choosing adjudicators for ISDS panels.[14] By diverging from tradition, the RCEP member states are weakening a treaty that otherwise shows great potential to transform trade relations in the region.[15]

This Comment proceeds in three parts to reach this conclusion. Section II provides an overview of the RCEP, the development of ISDS, and the specific form of ISDS in the current draft of the RCEP. Section III discusses the consequences of the RCEP's ISDS term for the RCEP as a trade agreement and for ISDS as a dispute resolution mechanism. Section III further argues against the RCEP's proposed arbitrator selection process, suggesting that it is likely to have deleterious consequences for international investment in the region.

traditional system.

8. See *infra* notes 30–31 and accompanying text for information about the ASEAN+6 countries.

9. See *infra* Part II.C for a discussion of the arbitration selection provisions in the RCEP's draft.

10. *See infra* Part II.C.

11. *See* Brower & Rosenberg, *supra* note 6, at 13 ("[N]one of the major international arbitration institutions (with the exception of [the World Bank's International Centre for Settlement of Investment Disputes] ad hoc annulment committees) requires that arbitrators be appointed from a closed list."). Relatively few treaties or dispute resolution instruments include the preselected list form of arbitrator selection. For an example of one that does, see Code of Sports-Related Arbitration, Procedural Rule R33, Jan. 1, 2017, http://www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL__en_.pdf [perma: http://perma.cc/244J-GA5Z]. Even this code is only meant to govern a relatively narrow area of substantive law, and thus the relevant area of expertise for arbitrators is more narrowly defined than it would be in a major multilateral trade agreement. Brower & Rosenberg, *supra* note 6, at 21 ("We acknowledge the longstanding tradition of selection from a pre-existing list of arbitrators in certain specialized areas of law, in which the issues are generally finite, standard and repetitive.").

12. See *infra* Part III.C for a discussion of how investor-state dispute settlement is undermined by the RCEP; see also *infra* Part II.B for a discussion of investor-state dispute settlement.

13. See *infra* notes 108–30 and accompanying text for a discussion of criticisms of the traditional arbitration selection system.

14. See *infra* Part III.A for a discussion of the disadvantages of the preexisting list system in ISDS.

15. See *infra* Part II.A.2 for a discussion of the potential for the RCEP to improve regional trade among Southeast Asian nations.

Section IV concludes.

II. OVERVIEW

To understand the RCEP and the change to ISDS arbitrator selection included therein, one must first understand some of the pressures that have shaped the agreement: the international trade regime in Southeast Asia, the changing economic status of the RCEP's constituent members, and critics of traditional forms of ISDS. This Section explains these pressures in three Parts. Part II.A discusses the RCEP and the background in which it is being drafted. Part II.B covers the historical development of the concept of ISDS and then discusses some of the proposals for and against the traditional system of arbitrator selection. Part II.C considers the arbitrator selection clause within the RCEP's ISDS provision.

A. The Regional Comprehensive Economic Partnership

The RCEP is an international trade agreement that seeks to unite sixteen states in Southeast Asia.[16] This Part will discuss the driving forces behind the RCEP and the form the agreement appears to be taking.

1. The Noodle Bowl: International Trade and Investment in Southeast Asia

Shifting dynamics have affected how international law is made around the world, and Asia is no exception.[17] As disagreement among World Trade Organization (WTO) member states has hindered the WTO's ability to develop new rules on international trade,[18] states have created a variety of regional agreements to advance global trade in the absence of a dynamic multilateral system.[19] The continuing deadlock at the WTO and the accompanying expansion

16. *See infra* Part II.A.2. The parties to the RCEP are ASEAN (representing its ten member states: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam), Australia, China, India, Japan, South Korea, and New Zealand, collectively known as ASEAN+6.

17. William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L.J. 1, 31 (2015).

18. Some authors believe that the consensus method for rulemaking at the WTO is the source of its paralysis. *See, e.g.*, Wenwei Guan, *Consensus yet Not Consented: A Critique of the WTO Decision-Making by Consensus*, 17 J. INT'L ECON. L. 77, 102 (2014) ("[C]onsensus decision-making causes issues of paralysis and disenfranchisement in the realm of WTO general decision-making."). However, other authors claim that the true stumbling block in the WTO system is the lack of a fully formalized rulemaking process. *See, e.g.*, Debra P. Steger, *The Future of the WTO: The Case for Institutional Reform*, 12 J. INT'L ECON. L. 803, 832 (2009) ("It is not the final phase of adoption of a legislative proposal that causes the delays and blockage in the WTO system, but rather the lack of formal mechanisms at the initial and intermediate stages of the legislative or rule-making process.").

19. *See* Hanns Günther Hilpert, *Asia-Pacific Free Trade Talks Nearing the Finish Line*, 13 ASIA EUR. J. 223, 224 (2015). Note that the term "multilateral" is used throughout this Comment to refer to systems like the WTO that have a broad membership extending beyond any one geographical region—it is not herein only meant to indicate agreements with more than two members. *See, e.g.*, Craig Forcese, *Does the Sky Fall?: NAFTA Chapter 11 Dispute Settlement and Democratic*

of regional and plurilateral trade agreements[20] may relegate the WTO to a "set of 'minimum standards'" rather than the cutting-edge global trade system it once was.[21] Indeed, while "[t]he [Trans Pacific Partnership (TPP)], [Transatlantic Trade and Investment Partnership (TTIP)], and RCEP could be the biggest three trade deals in history, . . . account[ing] for about 80 per cent [sic] of the global economy,"[22] they are only three of the many regional trade deals filling the void caused by inaction at the WTO.[23]

The increasing number of bilateral and plurilateral trade deals can have negative consequences.[24] In Asia, the proliferation of trade agreements has led to a "noodle bowl" of trade treaties.[25] Also known as a "spaghetti bowl,"[26] this term denotes a situation in which less comprehensive bilateral and plurilateral trade agreements in a region have created a system of intertwining and overlapping trade rules.[27] This maze of regulation can discourage businesses from taking advantage of the benefits offered by preferential trade agreements.[28] As is discussed below, one of the RCEP's main goals is to reduce trading complexity in Southeast Asia.[29]

Accountability, 14 MICH. ST. J. INT'L L. 315, 318 (2006) (discussing multilateralism in the context of global governance); Zhao Jun & Hu Yu, *Formal or Informal? The Dispute Settlement Mechanisms of China's Free Trade Agreements*, 21 J. SHANGHAI JIAOTONG U. (SCI.) 44, 44 (2016) (identifying the WTO as multilateral).

20. The term "plurilateral" is used in this Comment to refer to agreements that consist of multiple state parties, usually regionally. *See, e.g.*, Bernard M. Hoekman & Petros C. Mavroidis, *Embracing Diversity: Plurilateral Agreements and the Trading System*, 14 WORLD TRADE REV. 101, 104 (2015).

21. *Id.* at 115; *see also* Junji Nakagawa, *Global Supply Chains and FTAs in East Asia and the Pacific*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 439, 457 (2013) ("The failure of the WTO Doha Development Agenda to cover many of these policy measures has accelerated the need to implement them through FTAs in the region.").

22. Mohammad Masudur Rahman & Laila Arjuman Ara, *TPP, TTIP and RCEP: Implications for South Asian Economies*, 16 S. ASIA ECON. J. 27, 40 (2015).

23. Indeed, Asian countries are and have been leaders in the development and proliferation of free trade agreements. Dukgeun Ahn, *Dispute Settlement Systems in Asian FTAs: Issues and Problems*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 421, 421 (2013).

24. Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, *in* REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 215, 217 (Lorand Bartels & Frederico Ortino eds., 2006) (explaining that "'spaghetti bowl' agreements" can become unmanageable).

25. C.L. Lim, *East Asia's Engagement with Cosmopolitan Ideals Under Its Trade Treaty Dispute Provisions*, 56 MCGILL L.J. 821, 858 (2011). The term "spaghetti bowl" was originally coined to refer to this type of trade environment, but the Asian Development Bank, as well as other authors, have used the term "noodle bowl" when referring to the same problem in Asia. *See* Julien Chaisse, *The Shifting Tectonics of International Investment Law—Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region*, 47 GEO. WASH. INT'L L. REV. 563, 572 n.42 (2015).

26. *See* Jagdish Bhagwati, *U.S. Trade Policy: The Infatuation with Free Trade Areas*, *in* THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS 1, 2–3 (Jagdish Bhagwati & Anne O. Krueger eds., 1995).

27. Sanchita Basu Das, *The Regional Comprehensive Economic Partnership: New Paradigm or Old Wine in a New Bottle?*, 29 ASIAN-PAC. ECON. LITERATURE 68, 71 (2015) [hereinafter Basu Das, *RCEP*].

28. *Id.* at 70–71; *see also* Chaisse, *supra* note 25, at 620.

29. ASEAN has formally stated that the RCEP will help straighten out the "noodle bowl"

2. Straightening the Noodles: The Regional Comprehensive Economic Partnership

The RCEP is a proposed agreement between the ten member states of the Association of Southeast Asian Nations (ASEAN)[30] and six of its free trade agreement (FTA) partners—Australia, China, India, Japan, Korea, and New Zealand—a group known as ASEAN+6.[31] In November 2012, the parties formally declared their intent to begin negotiations,[32] and the first round was held from May 9 to May 13, 2013, in Brunei.[33] By the end of 2016, the member states had completed sixteen rounds of negotiations.[34] While there are some observers who believe the final draft will be completed soon after this Comment's late-2017 publication,[35] others are less optimistic.[36] The high number

problem, eliminating some of the concerns about the "effect of overlapping bilateral and regional agreements." Ass'n Southeast Asian Nations [ASEAN], *Regional Comprehensive Economic Partnership: A Coherent Approach Towards Economic Integration*, http://www.asean.org/storage/images/2015/October/outreach-document/Edited%20RCEP.pdf [perma: http://perma.cc/FV4M-KXAA]. Scholars have agreed. Nakagawa, *supra* note 21, at 459 (noting that the policy of the RCEP includes "measures required by globalized supply chains"); Murray Hiebert, *ASEAN and Partners Launch Regional Comprehensive Economic Partnership*, CTR. FOR STRATEGIC & INT'L STUDIES (Dec. 7, 2012), http://www.csis.org/analysis/asean-and-partners-launch-regional-comprehensive-economic-partnership [perma: http://perma.cc/QTR5-Z2FU].

30. ASEAN's ten member states are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. ASEAN, *ASEAN Member States*, http://asean.org/asean/asean-member-states/ [perma: http://perma.cc/NC5F-GWQ9].

31. SANCHITA BASU DAS, BROOKINGS INST., UNDERSTANDING THE REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP AND THE TRANS-PACIFIC PARTNERSHIP: AN ASEAN PERSPECTIVE 11 (2014), http://www.brookings.edu/wp-content/uploads/2014/01/11-asia-pacific-economic-integration-presentation-basu-das.pdf [perma: http://perma.cc/WD7A-T3BC] [hereinafter BASU DAS, UNDERSTANDING]. The ASEAN+6 countries have a total population exceeding three billion, a cumulative GDP of nearly seventeen trillion U.S. dollars, and a roughly forty percent share of world trade. Hiebert, *supra* note 29.

32. ASEAN+6, *Joint Declaration on the Launch of the Regional Comprehensive Economic Partnership* (Nov. 20, 2012), http://dfat.gov.au/trade/agreements/rcep/news/Documents/joint-declaration-on-the-launch-of-negotiations-for-the-regional-comprehensive-economic-partnership.pdf [perma: http://perma.cc/PCP2-BPVZ] (welcoming the ASEAN Framework for the RCEP).

33. ASEAN+6, *Regional Comprehensive Economic Partnership (RCEP): Joint Statement: The First Meeting of Trade Negotiating Committee* (May 13, 2013), http://dfat.gov.au/trade/agreements/rcep/Documents/130513-joint-statement.pdf [perma: http://perma.cc/YQ4P-HNX7].

34. *Regional Comprehensive Economic Partnership: RCEP Market Snapshot (Including Australia)*, AUSTRALIAN GOV'T, DEP'T OF FOREIGN AFFAIRS & TRADE, http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx [perma: http://perma.cc/Y32W-RVJW] (last visited Nov. 12, 2017) [hereinafter AUSTRALIAN GOV'T, *RCEP*].

35. *See* Hilpert, *supra* note 19; *see also Good Prospects for RCEP to Wrap Up Negotiations this Year*, STAR ONLINE (Jan. 6, 2017, 1:27 PM), http://www.thestar.com.my/business/business-news/2017/01/06/good-prospects-for-rcep-to-wrap-up-negotiations-this-year/ [perma: http://perma.cc/VL2L-3964] (quoting senior employee for HSBC).

36. *See* David A. Gantz, *The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim*, 33 ARIZ. J. INT'L & COMP. L. 57, 67 (2016) (noting that all the large international trade agreements—RCEP, TPP, and TTIP—were unlikely to be concluded by mid-2016); Nayanima Basu, *India*

of rounds seems to indicate that the RCEP member states are serious about completing the agreement. However, without access to more than a few leaked drafts, it is difficult to tell if the states are making progress.[37] Every round has yielded a joint statement vaguely indicating progress made,[38] but the negotiating states have released little information as to the actual text of the document, or how it has evolved from one round to another.[39] As such, we are only left with generalized statements and leaked documents to determine the actual content of what might become the final draft of this consequential trade agreement.

According to its supporters, one of the RCEP's greatest potential advantages is its ability to straighten out the "noodle bowl" of Asian trade treaties.[40] They claim that the RCEP's creation of a more sophisticated and comprehensive trade regime in the region would be a significant update from the existing network of bilateral FTAs.[41] By streamlining the rules and regulations of trade, the RCEP allegedly can reduce costs for all involved.[42] RCEP supporters also claim that, by harmonizing some of the overlapping rules and regulations in the region, the RCEP can serve as a meaningful step on the road to a more multilateral trading organization for the region.[43]

Expecting 'Hardened Positions' in RCEP Talks, BLOOMBERG BNA: INT'L TRADE DAILY (Jan. 25, 2016), http://www.bloomberglaw.com/print/X744U26K000000 [perma: http://perma.cc/7UU4-NPMG] (noting the likelihood of "hardened positions" as talks near finalization); Nora Macaluso, *Asia's RCEP May Be Influenced by TPP*, BLOOMBERG BNA: INT'L TRADE DAILY (Oct. 13, 2015), http://www.bloomberglaw.com/print/X288NJO0000000 [perma: http://perma.cc/6E7A-8RUL] (noting that RCEP was unlikely to be concluded before the end of 2016).

37. *See* AUSTRALIAN GOV'T, *RCEP*, *supra* note 34 (listing sixteen rounds completed in 2016, but providing no drafts).

38. *See id.*

39. Peter Martin, *And You Thought the TPP Was Secret. The RCEP Is Even Worse*, SYDNEY MORNING HERALD (Nov. 5, 2016), http://www.smh.com.au/comment/and-you-thought-the-tpp-was-secret-the-regional-comprehensive-economic-partnership-is-even-worse-20161104-gsiaaw.html [perma: http://perma.cc/VL9U-V4ZQ] ("[N]egotiators are releasing no texts and submitting none of what's proposed to cost-benefit analysis.").

40. *See supra* note 29.

41. Xiaoming Pan, *China's FTA Strategy*, DIPLOMAT (June 1, 2014), http://thediplomat.com/2014/06/chinas-fta-strategy/ [perma: http://perma.cc/95WM-B7SF].

42. Bipul Chatterjee & Surendar Singh, *Why RCEP Is Vital for India*, DIPLOMAT (Mar. 3, 2015), http://thediplomat.com/2015/03/why-rcep-is-vital-for-india/ [perma: http://perma.cc/MUB4-829Q] (specifically referring to India). "Noodle bowl" costs can result from "different schedules for phasing out tariffs, different rules of origin, conflicting standards, exclusions and differences in rules dealing with trade remedy, and other regulations and policies." Won-Mog Choi, *Aggressive Regionalism in Korea-U.S. FTA: The Present and Future of Korea's FTA Policy*, 12 J. INT'L ECON. L. 595, 608 (2009). By creating a single system that unites the region and can harmonize these different policies, the RCEP should reduce these costs. *See, e.g.*, Won-Mog Choi, *Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade*, 13 J. INT'L ECON. L. 111, 131 (2010) ("Regional cooperation institutions . . . can . . . help minimize the systemic harm that can be caused by the current uncoordinated approach.").

43. Basu Das, *RCEP*, *supra* note 27, at 69. The Free Trade Area of Asia and the Pacific (FTAAP) has been proposed as a more expansive multilateral agreement that will include all of the states in the region. Both the RCEP and the TPP were born from discussions at the Asia-Pacific Economic Cooperation (APEC) as to how to create the FTAAP. Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths Toward Deeper Asian Economic Integration*, 8 ASIAN J.

Formally, the RCEP aims "to achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN's FTA Partners."[44] The RCEP will be consistent with the WTO and will provide for an "effective, efficient and transparent" dispute resolution process.[45] Further, the "RCEP will cover trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute settlement and other issues."[46]

The RCEP, when concluded, will cover many substantive areas of trade and investment. This Comment, however, focuses narrowly on the RCEP's ISDS system, a procedural device that will likely be included in the RCEP for resolving disputes about substantive rules between international investors and their host states. Specifically, this Comment addresses the mechanism by which arbitrators are chosen to resolve conflicts initiated under the RCEP's ISDS system.

B. Investor-State Dispute Settlement

Generally, ISDS[47] provisions allow international investors to pursue arbitration against a host state when a host state violates a provision of the treaty under which an investment was made.[48] Some of the most famous ISDS

WTO & INT'L HEALTH L. & POL'Y 359, 362–63 (2013); *see also* BASU DAS, UNDERSTANDING, *supra* note 31, at 20; Vinod K. Aggarwal, *Mega-FTAs and the Trade-Security Nexus: The Trans-Pacific Partnership (TPP) and Regional Comprehensive Economic Partnership (RCEP)*, ASIAPACIFIC ISSUES, Mar. 2016, at 6; Jack Kim, *China-Backed Trade Pact Playing Catch-Up After U.S.-Led TPP Deal*, REUTERS (Oct. 10, 2015, 8:02PM), http://www.reuters.com/article/us-trade-tpp-rcep/china-backed-trade-pact-playing-catch-up-after-u-s-led-tpp-deal-idUSKCN0S500220151011 [perma: http://perma.cc/2RC6-D6U5]; Zheng Wang, *China's Alternative Diplomacy*, DIPLOMAT (Jan. 30, 2015), http://thediplomat.com/2015/01/chinas-alternative-diplomacy/ [perma: http://perma.cc/JYZ8-84R5].

44. ASEAN+6, *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, at 1 (Nov. 20, 2012), http://dfat.gov.au/trade/agreements/rcep/Documents/guiding-principles-rcep.pdf [perma: http://perma.cc/YD72-Z3JR] [hereinafter *RCEP Guiding Principles*].

45. *Id.* Specifically, the RCEP will conform to the WTO rules for Customs Unions and Free Trade Agreements in article 24 of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, [hereinafter GATT] and Freedom of Transit in article 5 of the GATT. *See RCEP Guiding Principles*, *supra* note 44, at 1.

46. *RCEP Guiding Principles*, *supra* note 44, at 1.

47. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 706–07 (4th ed. 2015). Throughout this Comment, "ISDS" is used as an umbrella term to refer to treaty-based mechanisms through which international investors and the states that host their investments can resolve investment disputes through binding arbitration. This generic term will, of course, be difficult to apply perfectly in every situation. However, the expansive subject matter in this area requires some generalization. "There is not a single, monolithic international investment law regime. Instead, over 3,000 bilateral investment treaties and additional regional trade agreements with investment chapters form a network that promotes foreign investment and protects it once made." Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 778 (2014).

48. Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L L. 496, 498 (2009) ("An investor therefore can directly initiate

complaints were launched after a host state passed a law or regulation that would limit or eliminate the profits an international investor might have expected when it made its investment.[49] The following Parts briefly discuss the historical development of ISDS. They then focus on how ISDS arbitral panels are usually selected. Lastly, they discuss one proposal for change, adopted by the RCEP, and some of the pressures that drive it.

1. Historical Development of ISDS

As international investment has grown, so too has the number of international investment treaties.[50] For developed countries that export capital, an important goal of their traditional bilateral investment treaty (BIT) programs was to protect the investments their corporations and citizens made abroad.[51] Developing countries that import capital, however, have traditionally aimed to attract foreign investment while preserving sovereignty and their "authority to promote the public interest."[52] Initially, these somewhat conflicting interests between developed and developing states led to a relationship that was unbalanced, with developed countries fighting to get the best protections for their investors, inevitably exposing developing countries to liability.[53]

Before ISDS, those who chose to invest in foreign nations did so at the whim of host states and would often be frustrated in attempts to rectify a perceived wrong.[54] Without recourse to the legal system, investors had to rely on the government of their home state to resolve any conflicts they might have with

arbitration proceedings against the host State and invoke a violation of the provisions of the governing investment treaty.").

49. *See, e.g.*, Methanex Corp. v. United States of America (Can. v. U.S.), Final Award of the Tribunal on Jurisdiction and Merits, at ¶ 1, UNCITRAL (Aug. 3, 2005), http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf [perma: http://perma.cc/VL6B-QRHE].

50. Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 FORDHAM INT'L L.J. 138, 138 (2007) (stating that in 2007, the number of international investment treaties grew to nearly 2,500 among 180 countries).

51. *See* Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151, 154 (2012). While all states may export capital, developed states generally export more capital than they import because they, usually through their citizens, invest in developing countries. *See, e.g.*, Alexander Wu, *U.S. International Taxation in Comparison with Other Regulatory Regimes*, 33 VA. TAX REV. 169, 195 (2013) ("Suppose . . . that a U.S. company faces the choice between building a factory in Japan and building one in the United States. The United States is thus the capital-exporting nation and Japan is the capital-importing nation.").

52. Cross, *supra* note 51, at 154. Developing countries are also referred to, in this context, as capital-importing states because they tend to import more capital than they export. *See id.* The line between capital-exporting and capital-importing states has increasingly blurred in recent years as developing states like India and China begin to export more and more capital. *Id.* at 155–56.

53. *Id.* at 228–29.

54. Mark Weaver, Comment, *The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications*, 29 EMORY INT'L L. REV. 225, 233 (2014) ("Before WWII, most states adopted legislation providing 'absolute immunity' from relinquishing property in their state courts." (quoting Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 827 (2012))).

a host state.[55] States had the option to take up their citizen investors' causes and espouse their claims, a move that could lead to a resolution "irrespective of [the investors'] assent or protest."[56] States would make the claims of their injured citizens into claims of the nation, and any recovery would flow to the nation, not to the aggrieved investor.[57]

Historically, states have sometimes eschewed diplomatic resolution of their citizen investors' claims; instead, militarily powerful states have used force to protect the interests of their citizens that had invested abroad.[58] Known as "gun-boat diplomacy," this method of resolving disputes did not fall out of acceptance until the 1950s[59] when it was replaced by diplomatic and politicized forms of state-to-state dispute resolution, wherein states would use their political power to resolve investor-state conflicts.[60] Under pre-ISDS systems, investors were less willing to risk their fortunes abroad because home states were not obliged to take up the cause of their investors.[61] ISDS was developed to provide investors with assurances that their investments would be protected, thereby encouraging investment without risking political confrontations between states.[62]

ISDS has long been a part of the international investment regime but was and still is unique in that it "accords investors a private right of action against the host state, a right that is unavailable to private parties in other areas of international law."[63] There are many different potential arbitral fora available for investors to exercise their rights under ISDS, each with different rules regulating how complaints may proceed.[64] Treaty provisions can point to a

55. *Id.* at 229.

56. Maximilian Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 U. CHI. L. REV. 180, 182 (1946).

57. *See, e.g.*, *id.* at 188 ("Compensation was denied [to] the [private citizen whose injury formed the basis of Canada's claim,] but the sum of $25,000 was awarded to Canada because of the wrong done to that country.").

58. Ray C. Jones, *NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?*, 2002 BYU L. REV. 527, 529; *see also* Koessler, *supra* note 56, at 187–88 ("To consider each injury done to a national abroad as an affront to the honor of the nation easily lends itself to 'abuses of the right to protection . . . . which are intolerable to any self-respecting nation and are prolific breeders of international friction.'" (omission in original) (quoting N. Am. Dredging Co. of Tex. (U.S. v. Mex.), 4 R. Int'l Arb. Awards 26 (Mex.-U.S. Gen. Claims Comm'n 1926))).

59. Jones, *supra* note 58, at 529.

60. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 442 (2009). States could also seek redress for their investors under the terms of an "international dispute resolution treaty," if they were party to such. Jones, *supra* note 58, at 529.

61. Jones, *supra* note 58, at 529–31.

62. *Id.*

63. Cross, *supra* note 51, at 158–60. In most arenas, private parties must either rely on state governments to resolve conflicts with other state governments or file suit in domestic courts. *See* Koessler, *supra* note 56, at 180; Salacuse, *supra* note 50, at 130.

64. *See* Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 125–34 (2003) (discussing different levels of confidentiality required among different arbitral bodies).

specific forum or can allow for choice among different options.[65]

2. Pushback Against ISDS

ISDS was a generally accepted aspect of investment treaties in the West[66] until three claims were filed against the United States in the early 2000s under NAFTA's ISDS provision.[67] The sudden realization that it might be liable for the billions of dollars of incoming foreign investment "touched a nerve in the United States,"[68] even though it would ultimately prevail in its defense of all three claims.[69] The resulting backlash led to the collapse of a regional investment agreement and the passage of protective legislation meant to ameliorate the potential threat ISDS suits could pose to U.S. policy.[70] The new U.S. Model BIT, passed in 2004, is a template bilateral investment treaty developed by the United States Trade Representative and the State Department in cooperation with other U.S. agencies;[71] the Model BIT contains a carve-out for regulation meant

65. *See, e.g.*, Han-Wei Liu, *A Missing Part in International Investment Law: The Effectiveness of Investment Protection of Taiwan's BIT's vis-a-vis ASEAN States*, 16 U.C. DAVIS J. INT'L L. & POL'Y 131, 166 (2009) (noting an ASEAN treaty's "cafeteria style" freedom of choice among multiple arbitral fora (quoting CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 92–93 (1st ed. 2008))).

66. The term "the West" generally refers to the United States, Europe, Canada, Australia, and New Zealand. James Kurth, *Western Civilization, Our Tradition*, 39 INTERCOLLEGIATE REV. 5, 5 (2004). The term is a complicated one, and often defined in opposition to "non-Western societies." *See, e.g.*, *id.* (emphasis omitted) ("[R]eal discussion of Western civilization is usually undertaken by the political, intellectual, and religious leaders of *non-Western* societies . . ."). This Comment takes no stance as to the relative merits of such terms, their appropriateness, or their accuracy. This Comment instead uses "West" out of expedience to refer to a vaguely defined group of countries with some form of shared historical traditions.

67. Cross, *supra* note 51, at 165. The International Centre for the Settlement of Investment Disputes, founded in 1966, was the first body created to handle complaints between investors and host states. *See* SCOTT MILLER & GREGORY N. HICKS, CTR. FOR STRATEGIC & INT'L STUDIES, INVESTOR-STATE DISPUTE SETTLEMENT: A REALITY CHECK 5 (2015), http://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/150116_Miller_InvestorStateDispute_Web.pdf [perma: http://perma.cc/63UR-4UZH].

68. Cross, *supra* note 51, at 177; *see also* William Greider, *The Right and US Trade Law: Invalidating the 20th Century*, NATION (Nov. 17, 2001), http://www.thenation.com/article/right-and-us-trade-law-invalidating-20th-century/ [perma: http://perma.cc/KSW8-UB8Y] (arguing that ISDS is a step on the road towards "corporate-dominated globalization").

69. Brower & Blanchard, *supra* note 47, at 724. Not only was the United States triumphant in all three of these early cases, in at least one of them the complainant, Methanex, was forced to pay the United States' legal costs as well as the full cost of the arbitration. *Id.* at 723–24; *see supra* note 49.

70. Cross, *supra* note 51, at 183–84. The scrapped investment agreement was the Multilateral Agreement on Investment, which was meant to extend the investment protections in NAFTA to OECD member countries. The protective legislation was the Trade Promotion Authority. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. §§ 3801–10 (2012).

71. *U.S. Model Bilateral Investment Treaty (BIT)*, OFF. OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFF. OF THE PRESIDENT, http://ustr.gov/archive/Trade_Sectors/Investment/Model_BIT/Section_Index.html [perma: http://perma.cc/M7L9-ZCRJ] (last visited Nov. 12, 2017). The 2004 Model BIT is available at OFF. OF THE U.S. TRADE REPRESENTATIVE, EXECUTIVE OFF. OF THE PRESIDENT, 2004 MODEL BIT, http://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf

to "protect legitimate public welfare objectives, such as public health, safety, and the environment."[72] The carve-out was included to prevent such regulation from forming the basis of a successful ISDS action against the United States.[73]

The United States is not alone—several powerful Western states have indicated some hesitance to include ISDS in future investment treaties.[74] However, none of these states have enacted lasting policy reversals. Though ISDS became controversial in the United States after the aforementioned NAFTA disputes,[75] ISDS is included in the most recent version of the TPP, a major trade deal in the Pacific initiated by the United States.[76] While the United States has since withdrawn from the TPP,[77] the withdrawal does not appear to have been linked to ISDS.[78] Similarly, despite recent objections by civil society organizations and the public in the European Union (EU), the TTIP, a transatlantic trade treaty between the United States and the EU, also includes a form of ISDS.[79] Lastly, while Australia claimed in 2011 that it would stop including ISDS in future trade treaties, it has since addressed the issue on a case-by-case basis, concluding a BIT as recently as 2014 with South Korea containing ISDS.[80] Thus, while ISDS may have suffered a setback in the eyes of some Western states, it still holds a place in their modern investment treaties.

3. ISDS and Shifting Developing-State Economies

Capital-importing states, unlike the developed Western economies that have recently expressed discontent with ISDS, have traditionally focused on attracting foreign investment, not on protecting investors.[81] However, the

[perma: http://perma.cc/Q8EN-RKCA].

72. Cross, *supra* note 51, at 191.

73. *Id.* The United States also passed a model BIT in 2012 that was very similar to the 2004 version. *Id.* at 189.

74. August Reinisch, *The Scope of Investor-State Dispute Settlement in International Investment Agreements*, 21 ASIA PAC. L. REV. 3, 5–6 (2013) (including the United States, Australia, and the EU).

75. Cross, *supra* note 51, at 153–54.

76. Todd Tucker, *The TPP Has a Provision Many Will Love to Hate: ISDS. What Is It, and Why Does It Matter?*, WASH. POST: MONKEY CAGE (Oct. 6, 2015), http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/10/06/the-tpp-has-a-provision-many-will-love-to-hate-isds-what-is-it-and-why-does-it-matter/ [perma: http://perma.cc/3H76-3LU2].

77. *See* Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 2017 DAILY COMP. PRES. DOC. 64 (Jan. 23, 2017).

78. The withdrawal appears to have been prompted by a shift to bilateral trade deals that President Trump believes will better serve the interests of American workers. *Id.*

79. *See* Frank J. Garcia et. al, *Reforming the International Investment Regime: Lessons from International Trade Law*, 18 J. INT'L ECON. L. 861, 883–84 (2015); *see also* James Crisp, *ISDS Decision Delayed to End of TTIP Talks*, EURACTIV (Jan. 13, 2015, updated Jan. 14, 2015), http://www.euractiv.com/section/trade-society/news/isds-decision-delayed-to-end-of-ttip-talks/ [perma: http://perma.cc/W65N-VDWJ]. Note, however, that TTIP has also seen proposals to revise the system for trade dispute resolution. *See* Jonathan Klett, Comment, *National Interest vs. Foreign Investment—Protecting Parties Through ISDS*, 25 TUL. J. INT'L & COMP. L. 213, 229 (2016).

80. DUNOFF ET AL., *supra* note 47, at 708. Australia also concluded a BIT in 2014 with Japan that did not include ISDS. *Id.*

81. *See* Cross, *supra* note 51, at 212.

dynamic between capital-importing and capital-exporting states is shifting as developing state economies transition and begin to export investment.[82] China, Singapore, and India, all parties to the RCEP, have been affected by this economic transition.[83] As their economies shift, these states are recognizing the increasing interests of their investors abroad, and they have created BITs to protect those investments.[84]

This shift in trading motivations and ideology is particularly pronounced in China. Earlier generations of Chinese BITs tended to exclude ISDS entirely, and if the mechanism was included, it was severely limited in scope.[85] Since 1998, however, China has liberalized its investment treaty practice.[86] The modern Chinese model BIT calls for "arbitration of 'any legal dispute' between an investor and the host state 'in connection with an investment' in the host state's territory."[87] This liberalization has occurred as China's outgoing foreign direct investment (FDI) rose to third in the world in 2012, behind only the United States and Japan.[88] The results of China's engagement with ISDS have been positive for China; as of 2015, China or Chinese investors had been party to only five BIT arbitration cases, and China was the respondent in only one of them.[89]

China is not alone among economically transitioning states in supporting ISDS. India, for example, also maintains a robust mechanism for protecting its

82. *Id.* at 210–11.

83. *Id.* Hong Kong, Brazil, and Russia have also shifted their economy increasingly towards capital exporting. *Id.*

84. *See id.* at 155–56.

85. Guiguo Wang, *China's Practice in International Investment Law: From Participation to Leadership in the World Economy*, 34 YALE J. INT'L L. 575, 584 (2009) [hereinafter Guiguo Wang]. Early Chinese BITs limited ISDS to "the arbitration of disputes 'involving the amount of compensation for expropriation,'" and no more. Cross, *supra* note 51, at 212–13 (quoting Chinese Model BIT Version I, art. 9(3), in NORAH GALLAGHER & WENHUA SHAN, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE, at Appendix I (2009)).

86. *See* Guiguo Wang, *supra* note 85, at 584.

87. Cross, *supra* note 51, at 213–14 (citing Draft New Model BIT, § III, *in* CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE, *supra* note 85, at Appendix V); *see also* Guiguo Wang, *supra* note 85, at 584. *But see* Lin Jacobsen, *International Investment Law with Chinese Characteristics: Zooming in on China's BIT Practice*, 26 AM. REV. INT'L ARB. 19, 24–26 (2015) (arguing that China's BIT and foreign direct investment (FDI) practice has actually historically been consistently liberal). Investors, in the context of FDI, are private parties that seek to invest their money in a foreign country. Cross, *supra* note 51, at 207 n.314. A host state, in the same context, is the country in which they would invest. *Id.*

88. Jacobsen, *supra* note 87, at 20.

89. *Id.* at 30. This author views this as an indication that the Chinese state is not necessarily taking advantage of ISDS provisions so much as it is enabling its international investors to do so. *Id.* This author argues that China has been respondent so few times in part because foreign investors in China may do more research about Chinese law, and also because those investors are less willing to burn bridges in China by resorting to international arbitration. *Id.* at 30–31. A survey cited indicates that foreign investors in China prefer negotiation or domestic courts over arbitration. *Id.* at 32. For statistics for other states, see Rachel L. Wellhausen, *Recent Trends in Investor-State Dispute Settlement*, 7 J. INT'L DISP. SETTLEMENT 117, 124 (2016) (noting that from 1990–2014 in a single arbitration venue, U.S. investors have initiated 151 claims, and the United States has been a respondent in sixteen).

citizens' foreign investments.[90] ASEAN, of which India is a member, was one of the first groups in the region to provide a formal instrument to protect transnational investment.[91]

Support for ISDS, however, is not unanimous among capital-importing RCEP countries. Indonesia, after a loss at an arbitral tribunal in 2014, renounced the BIT that was implicated in the dispute and announced that it would review all its concluded BITs.[92] The Philippines has also expressed discontent with how ISDS may affect its ability to enact and enforce environmental legislation.[93]

These cases indicate that the traditional dynamic of capital-exporting states on one side and capital-importing states on the other may no longer be consistent with reality.[94] Historic capital exporters like the United States have been forced to rethink their stance on ISDS.[95] Capital-importing states, as their economic fortunes rose, shifted their stance on ISDS as well.[96] As the dichotomy of capital-importing and capital-exporting states shifts, their negotiating positions are likely to follow suit.[97]

90. Cross, *supra* note 51, at 216–17 (describing India's BITs and FTAs as "strongly pro-investor"). While India may have a robust investment protection mechanism, its enthusiasm for ISDS itself may have chilled. *See* Rick Archer, *ISDS Clause Disputes Reportedly Delaying Indian Trade Deals*, LAW360 (Sept. 13, 2016), http://www.law360.com/articles/839442/isds-clause-disputes-reportedly-delaying-indian-trade-deals [perma: http://perma.cc/U734-3X8F] (noting that India is demanding investors exhaust domestic remedies before resorting to international arbitration); Anubha Sinha, *Where Is the Regional Comprehensive Economic Partnership Headed?*, SPICYIP (Sept. 7, 2016), http://spicyip.com/2016/09/where-is-the-regional-comprehensive-economic-partnership-headed.html [perma: http://perma.cc/TCU5-WE74]. However, all hope is not lost, as India appears to be at least engaged in the negotiation of the ISDS provision in the RCEP. *See* Kirtika Suneja, *RCEP Trade Ministers to Resolve Logjam on Goods, Services, Tiered Approach*, ECON. TIMES (Aug. 5, 2016, 4:03 AM), http://economictimes.indiatimes.com/news/economy/policy/rcep-trade-ministers-to-resolve-logjam-on-goods-services-tiered-approach/articleshow/53549855.cms [perma: http://perma.cc/79ZJ-NKSS].

91. Liu, *supra* note 65, at 148–49.

92. DUNOFF ET AL., *supra* note 47, at 708–09; *see also* Ben Bland & Shawn Donnan, *Indonesia to Terminate More Than 60 Bilateral Investment Treaties*, FIN. TIMES (Mar. 26, 2014), http://www.ft.com/content/3755c1b2-b4e2-11e3-af92-00144feabdc0 [perma: http://perma.cc/R3HZ-NNLG].

93. *See* Hannah Sheehan, *UN Says Investor-State Dispute Settlement Cases Growing*, LAW360 (June 8, 2016), http://www.law360.com/articles/804975/un-says-investor-state-dispute-settlement-cases-growing [perma: http://perma.cc/M5R2-67S3]; Caroline Simson, *Trade Deals Threaten Philippines' Sovereignty, Report Says*, LAW360 (May 25, 2016), http://www.law360.com/articles/800351/trade-deals-threaten-philippines-sovereignty-report-says [perma: http://perma.cc/2S96-2EQG] (calling ISDS a "legal straitjacket").

94. Cross, *supra* note 51, at 154–55.

95. *Id.* at 177.

96. *Id.* at 212–17. Notably, Brazil, a traditionally capital-importing state, has strongly resisted this trend, going so far as to, as of 2012, completely reject the ratification of a single BIT or FTA with an investment chapter. *Id.* at 220. Brazil is also one of the very few countries to have withdrawn from the ICSID Convention. *Id.* at 220–21. Russia, once more active in creating "relatively rigorous investment protections," has, since the election of Vladimir Putin in 2000, slowed its BIT practice. *Id.* at 218.

97. *Id.* at 231; *see also* Reinisch, *supra* note 74, at 5–6.

4. Traditional Arbitrator Selection Under ISDS

Under traditional international arbitration rules employed when ISDS provisions are invoked, three-member arbitral panels are created ad hoc for every case.[98] Each party to the dispute selects one arbitrator unilaterally and, in theory, the parties jointly agree on a third.[99] When parties cannot agree on a third arbitrator, a person or body perceived as neutral will choose the final arbitrator.[100] That neutral body may be the head of the arbitral organization that is being used to adjudicate the dispute or the two panelists unilaterally selected by the parties.[101]

This system of party-selected arbitrators has been in existence since at least 1794.[102] As such, the alleged right of states to select arbitrators to oversee their dispute has been perceived as "timeless" and has received support in most global international arbitration laws.[103]

The party-selected arbitrator system also exists, its proponents say, to increase the confidence of the parties in the proceedings.[104] By allowing parties to select arbitrators, traditional arbitration panels allow disputants to invest themselves in the proceedings not only as parties, but also as creators of the tribunal that oversees their dispute.[105] Thus, all parties to the dispute, whether winning or losing, have an active role in choosing who resolves the conflict, heightening the legitimacy of the tribunal's award.[106]

The current arbitrator selection system, though well established, has recently come under criticism. The chief criticisms are that the traditional system (1) inherently creates conflicts of interest that undermine arbitrator independence,[107] (2) leads to the selection of arbitrators who are predisposed to find for the party that selected them,[108] and (3) encourages compromise rather than "sincerely motivated awards" that reflect a genuine interpretation of the treaty text.[109]

Conflicts of interest are created when arbitrators who are appointed by one

98. Klett, *supra* note 79, at 225–26.

99. *Id.*; *see, e.g.*, Weaver, *supra* note 54, at 270–71 (discussing the "traditional approach" in the U.S. Model treaty).

100. *See Number of Arbitrators and Method of Their Appointment - ICSID Convention Arbitration*, INT'L CTR. FOR SETTLEMENT INV. DISPUTES, http://icsid.worldbank.org/en/Pages/process/Number-of-Arbitrators-and-Method-of-Appointment-Convention-Arbitration.aspx [perma: http://perma.cc/VE33-P6MS] (last visited Nov. 12, 2017).

101. *Id.*

102. Brower & Rosenberg, *supra* note 6, at 9–11.

103. *Id.* at 8, 13. *But see* Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV.—FOREIGN INV. L.J. 339, 348 (2010) (arguing that there is no right for parties to name arbitrators to panels).

104. Brower & Rosenberg, *supra* note 6, at 13.

105. *Id.* at 18.

106. *Id.* at 22.

107. Klett, *supra* note 79, at 225–26.

108. *Id.* at 226.

109. Paulsson, *supra* note 103, at 353.

party may also represent that party as counsel in other situations.[110] Critics of the current system claim that these dual roles encourage arbitrators, who "often simultaneously serve as . . . expert[s] and as counsel in other investor-state disputes," to rule in favor of the party they have represented in other contexts and may be dependent upon for reappointment or future employment.[111] However, supporters of the traditional system argue that the purpose of party-selected arbitrators is not to create confidence in the individual arbitrators, but in the panel as a whole.[112] For this reason, supporters argue that parties must be allowed to choose their arbitrators to provide the whole panel with greater legitimacy in the eyes of the disputants.[113] Traditionalists also claim that statistics do not support the assertion that arbitrators are more likely to favor one side in a dispute over the other.[114] Further, arbitrators who fail to act independently will injure their professional reputation; thus, the motivations for impartiality far outweigh the potential benefits of partisan behavior.[115]

Arbitrator bias arises in a subtly different manner. Here, critics of the current system argue that parties choose arbitrators in large part because they believe that those arbitrators will be predisposed to rule in their favor.[116] This argument essentially sees party-selected arbitrators not as neutral adjudicators, but as an extension of the parties' counsel—another arm of their persuasive efforts.[117] Under this system, while the potential conflicts of interest may not undermine an arbitrator's independence, the parties will nonetheless select an arbitrator who, based on their previous work, will be anything but intellectually impartial.[118] Traditionalist scholars claim, however, that the parties' careful selection of a supposedly favorable arbitrator does not mean that the selected arbitrator will "violate his or her duty to be and to remain independent and impartial in adjudicating the dispute."[119] These scholars argue that the vetting of potential arbitrators by parties is benign, as the past decisions of an arbitrator do not necessitate similar future findings.[120]

Supporters of the traditional system have compiled statistical evidence to broadly counter claims that arbitrators are somehow biased or conflicted in favor of the commercial clients for whom they may also serve as counsel.[121] Parsing

110. Stefanie Schacherer, *TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor-State Disputes Under Mega-Regionals*, 7 J. INT'L DISP. SETTLEMENT 628, 634 (2016).

111. Becky L. Jacobs, *A Perplexing Paradox: "De-Statification" of "Investor-State" Dispute Settlement?*, 30 EMORY INT'L L. REV. 17, 25 (2015); *see also* Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 454–55 (2013).

112. Brower & Rosenberg, *supra* note 6, at 13.

113. *Id.*

114. *See* Brower & Blanchard, *supra* note 47, at 709.

115. Brower & Rosenberg, *supra* note 6, at 15–16.

116. Klett, *supra* note 79, at 226.

117. Schacherer, *supra* note 110, at 634.

118. Brower & Rosenberg, *supra* note 6, at 17.

119. *Id.* at 17–18.

120. *Id.*

121. Brower & Blanchard, *supra* note 47, at 713–15.

data from tribunals established under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), traditionalist commentators note that claims do not reach the merits over half of the time.[122] Cases that do reach the merits were decided in favor of investors less than half of the time, and the awards granted were typically less than half of the initial damages sought.[123] Thus, these writers argue, the assertion that investment arbitrators are partial to or favor investors simply cannot be sustained by the history of the practice.[124]

The remaining critique is that party appointment "militates in favor of compromise."[125] Because each party will appoint an arbitrator it believes is predisposed to rule in its favor, the dynamic will be one of compromise between the two views rather than of an objective adjudicative process.[126] Thus, a party with a perfectly valid claim will likely only be partially vindicated as the arbitrators seek a palatable middle ground rather than a more principled determination of the rights of the parties.[127]

In response to this critique, traditionalist scholars note that the rendering of unanimous awards does not, in and of itself, indicate that they are the result of compromise decisions.[128] Not only is such an argument unsupported in theory, these commentators claim it is also unsupported in fact, as a recent study has shown that tribunals with elite arbitrators do not tend towards compromise awards.[129]

This rift in opinion as to the appropriateness of the traditional arbitrator selection system has not been conclusively resolved in either direction. To bolster their arguments that a different system would yield better results, proponents of change have offered multiple alternative systems, including the use of preselected arbitrator pools.

5. Preselected Arbitrator Pools

The reform the RCEP seeks to impose, and the reform on which this Comment focuses, is that of preselected arbitrator pools.[130] Proposed by Jan

122. *Id.* at 711 (citing Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 59–61 (2007) [hereinafter Franck, *Empirically Evaluating*]). ICSID is a major institution for international investment dispute resolution established by a treaty formulated by the World Bank. *About ICSID*, ICSID, http://icsid.worldbank.org/en/Pages/about/default.aspx [perma: http://perma.cc/H34P-73NL] (last visited Nov. 12, 2017).

123. Brower & Blanchard, *supra* note 47, at 711.

124. *Id.* at 711–12.

125. Paulsson, *supra* note 103, at 353.

126. *See id.*

127. *Id.*

128. Brower & Rosenberg, *supra* note 6, at 25–26.

129. *Id.* at 25 (citing Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 60 (2010) (defining "elite arbitrators" as those who "received appointments at least four times" between 1994 and 2009)).

130. Other reform proposals include appointment of the panel entirely by the arbitral institutions, as well as the creation of an international investment court. *See* Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-*

Paulsson, a highly respected scholar and international arbitrator, this system requires that parties to a treaty create a preexisting list of potential arbitrators from which to choose in the event disputes arise.[131] According to its supporters, this system would reduce the favoritism that may be found in the traditional arbitration selection process by making the arbitrators beholden to the treaty rather than to any party.[132] However, proponents of this reform have written sparingly in its support.[133]

Opponents of such reform, led by another highly respected scholar and international jurist, Charles N. Brower, are far from silent.[134] These writers point to failures to establish preselected arbitrator lists even when called for by a controlling instrument, indicating the impracticability of such a system.[135] This practical difficulty is bolstered by a robust theoretical challenge to the supposed increased independence gained by creating a preexisting list of arbitrators.[136]

Traditionalist writers argue that the creation of such lists will inevitably infuse political considerations into arbitrator selection.[137] Under such a system, potential arbitrators will be forced to lobby state parties for consideration, a barrier to entry that may well drive down the number of potential arbitrators.[138] Further, by politicizing the arbitrator appointment process, this proposed system could result in a pool of arbitrators who are politically savvy but less qualified for their arbitral duties.[139] Finally, these critics argue that creating a list of arbitrators in advance would not prevent states from selfishly seeking to protect their national interest, but would instead encourage them to simply plan further ahead by only proposing or supporting those arbitrators whom they felt would serve their interests whenever they became empaneled.[140]

Making, 4 J. INT'L DISP. SETTLEMENT 553, 553 (2013).

131. Paulsson, *supra* note 103, at 352. A similar system has been proposed in the TTIP. Klett, *supra* note 79, at 229. There, the state parties were to publicly appoint fifteen judges who would serve for a period of time and be subject to a code of ethics requiring full independence. This would allegedly have reduced the conflicts and bias inherent in the current ISDS arbitrator selection process. *Id.*

132. Klett, *supra* note 79, at 231–32; *see also* Paulsson, *supra* note 103, at 352 ("[E]ach potential nominee has been vetted by the institution and is less likely to be beholden to the appointing party.").

133. *See, e.g.*, Georgios Dimitropoulos, *Constructing the Independence of International Investment Arbitrators: Past, Present and Future*, 36 NW. J. INT'L L. & BUS. 371, 422 (2016) (mentioning the idea and only briefly offering justifications); Paulsson, *supra* note 103, at 352–53. See *infra* Part III.A for a full discussion of the deficiencies of Paulsson's argument.

134. *See, e.g.*, Brower & Rosenberg, *supra* note 6, at 12–13.

135. *Id.* at 12 (citing NAFTA and the Iran-United States Claim Tribunal).

136. *Id.* at 22–23.

137. *Id.*

138. *Id.*

139. *Id.* Hypothetically, we could imagine a generally qualified arbitrator, Susan, with many friends in the state department of Country A. If a dispute arises about a specific subject matter, say, Country B's policies regarding the marketability and inspection requirements of bitter melon, Country A may appoint Susan even though also-hypothetical-Mary is available and has significant experience in arbitrating bitter melon-related policy disputes.

140. Giorgetti, *supra* note 111, at 462.

6. Pressure for Change: Dissatisfaction with the Current ISDS System

The current, generally accepted form of ISDS, which employs the traditional form of arbitrator selection, has been met with wide opposition in recent years.[141] One of the dominant reasons for this opposition has been the perception that ISDS's potential to allow investors to win significant awards based on disputes over legitimate regulations limits states' ability to effectively control domestic policy.[142] These state sovereignty concerns are especially pressing in the environmental sphere.[143] Critics point to two NAFTA claims, *Ethyl Corp. v. Government of Canada*[144] and *Metalclad Corp. v. United Mexican States*,[145] as examples of ISDS infringing upon the ability of the state to affect its own public policy.[146] In both claims, U.S. companies used ISDS to extract money from Canada and Mexico, respectively, when those states enacted environmental measures.[147]

One suggested solution to this problem is to allow states more control to determine which arbitrators may be selected for ISDS disputes.[148] This proposal, which runs along the same lines as Paulsson's, has also been vehemently opposed by the same traditionalist scholars who resist any change to the current system of arbitrator selection.[149] This kind of change is especially poignant in light of the

141. *See, e.g.*, Garcia et al., *supra* note 79, at 863 (civil society groups and the public); Crisp, *supra* note 80 (environmental group and trade union); Greider, *supra* note 68 (political commentator and journalist); Alex Lawson, *Watchdogs Aim to Sink Arbitration in China-Led Trade Pact*, LAW360 (Aug. 3, 2016), http://www.law360.com/articles/824592/watchdogs-aim-to-sink-arbitration-in-china-led-trade-pact [perma: http://perma.cc/8MXF-KRA9] (advocacy groups); Fuseworks Media, *RCEP Trade Agreement 'must not allow corporations to sue govts'*, VOXY.CO.NZ (June 13, 2016, 10:14 AM), http://www.voxy.co.nz/politics/5/254287 [perma: http://perma.cc/9PWY-MRCE] (New Zealand's Green Party).

142. DUNOFF ET AL., *supra* note 47, at 707.

143. Cross, *supra* note 51, at 177, 191 (specifically mentioning environmental regulations); *see also* Brower & Blanchard, *supra* note 47, at 701, 724, 728, 751–52.

144. Ethyl Corp. v. Canada, Award on Jurisdiction, 38 I.L.M. 708 (NAFTA Ch. 11 Arb. Trib. 1998).

145. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 40 I.L.M. 36 (2001).

146. Cross, *supra* note 51, at 167–69. *Ethyl* never actually reached the merits—when the arbitral panel agreed to hear the case, Canada settled, paying Ethyl $13 million. *Id.* at 168. In *Metalclad*, a U.S. investor had purchased a Mexican company to construct a hazardous waste plant and a landfill in central Mexico. *Metalclad Corp.*, ICSID Case No. ARB(AF)/97/1, at ¶¶ 28–31. The Mexican federal government had assured Metalclad that the project could go forward. *Id.* at ¶¶ 30–36. When Metalclad started construction, local and state authorities denied Metalclad necessary permits. *Id.* at ¶¶ 37–45. In arbitration, Metalclad was awarded about $16.7 million. *Id*. at ¶ 131.

147. See *supra* note 146 for a discussion of *Metalclad*. *Ethyl* involved claims by a company whose international investments were harmed by a ban imposed by the Canadian government on the "import and inter-provincial transport of a fuel additive." *Ethyl*, 38 I.L.M. at 709, ¶¶ 5–6; *see also* Sergio Puig, *Emergence & Dynamism in International Organizations: ICSID, Investor-State Arbitration & International Investment Law*, 44 GEO. J. INT'L L. 531, 566 (2013).

148. Jacobs, *supra* note 111, at 42. Jacobs's proposals include completely abandoning party-appointed arbitrators and creating some kind of a standing international investment court that could replace the current ISDS system. *Id.*

149. Brower & Blanchard, *supra* note 47, at 695.

appearance of conflicts and biases that are present in the traditional arbitrator selection scheme.[150] In the context of ISDS, despite the fact that statistical evidence may not support such claims,[151] arbitrators have a reputation for supporting investors rather than states.[152] Reformers seek to grant states more control over arbitrator selection to reduce even the possibility of unscrupulous behavior.[153]

C. Arbitrator Selection in the RCEP's ISDS Provisions

Though the parties to the RCEP have regularly released joint statements expressing optimism as to the progress of negotiations,[154] they have yet, as of this Comment's publication, to formally release even a draft text of any part of the agreement.[155] Fortunately, a draft of the investment chapter of the RCEP has been leaked and is available online.[156] Acknowledging that this is a draft and not a finalized version of the treaty text, this Comment treats the draft as it exists in late 2017 as indicative of the direction negotiations are headed and the shape the final agreement may take.

The text currently provides that a Committee created by the RCEP will "establish a list of individuals who are willing and able to serve as arbitrators."[157] Arbitrators will be experienced in international law and will be formally independent of all parties to the treaty in all "matters related to the dispute."[158] Though the number of individuals who will form that list is currently

150. See *supra* notes 111–24 and accompanying text for a discussion of conflicts of interest and arbitrator bias.

151. See *supra* notes 122–25 and accompanying text for a discussion of statistical evidence of arbitrator neutrality.

152. Brower & Blanchard, *supra* note 47, at 692 (citing Sundaresh Menon, Attorney-General of Sing., International Arbitration: The Coming of a New Age for Asia (and Elsewhere) (June 11, 2012) (transcript available at http://www.arbitration-icca.org/AV_Library/ICCA_Singapore2012_Sundaresh_Menon.html [perma: http://perma.cc/Z98R-WNDY])).

153. *See* Jacobs, *supra* note 111, at 48.

154. *See, e.g.*, ASEAN+6, *Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP)* (Sept. 8, 2016), http://asean.org/storage/2016/09/56-RCEP_Joint-Leaders-Statement_8-September-2016.pdf [perma: http://perma.cc/HL4U-E3P2]. Other updates are publicly available online. For instance, Australia's Department of Foreign Affairs and Trade currently has a website dedicated to RCEP updates: *Regional Comprehensive Economic Partnership*, AUSTRALIAN GOV'T DEP'T OF FOREIGN AFFAIRS & TRADE, http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx [perma: http://perma.cc/7M93-8NGC] (last visited Nov. 12, 2017).

155. Martin, *supra* note 39.

156. James Love, *2015 Oct 16 Version: RCEP Draft Text for Investment Chapter*, KEI ONLINE: JAMES LOVE'S BLOG (Apr. 21, 2016, 11:19 PM), http://keionline.org/node/2474 [perma: http://perma.cc/N6XP-PZP5] [hereinafter Love, *RCEP Draft*].

157. *Id.* Based on the version of the text that has been leaked, it is not entirely clear what this "Committee" is or how it will be selected. It seems to be a fair assumption, however, that any committee created by a treaty will likely be selected by the parties to that treaty. See *supra* Part II.B.4 for an overview of the traditional method of party-selected arbitrators. This Comment will operate under this assumption.

158. Love, *RCEP Draft*, *supra* note 156.

undetermined, the list is set to be completed by the time the RCEP takes effect.[159]

While the leaked text of the RCEP does not address how individual panels will be composed—either in the manner of arbitrator selection or even in such basic details as the number of panelists—it is clear that scholars arguing for change in the arbitral process have had some influence on policymakers here.[160] Specifically, the RCEP appears to adopt Jan Paulsson's proposal for a limited pool of preselected arbitrators, thereby discarding the traditional unilateral appointment system.[161]

III. DISCUSSION

The RCEP's diversion from the traditional form of arbitrator selection is likely to have deleterious consequences for international investment in the region.[162] Perhaps more concerning, however, is that the RCEP, due to the economic heft of its trading partners, may impact the development of ISDS provisions in treaties across the globe.[163] If the RCEP's arbitrator selection provision becomes a model, then the ISDS mechanism may become less effective. This Comment argues that the RCEP's reform is bad for ISDS because it infuses the dispute resolution system with political considerations while shifting control of the process away from investors, which thus undercuts the very purpose of ISDS provisions.[164] While the current ISDS arbitration system may have flaws, it is superior to Paulsson's preexisting pool method.[165]

This Section proceeds in three Parts. Part III.A argues that though the traditional system is not perfect, it is superior to the alternative proposed by Paulsson. Part III.B discusses the likely consequences of a preselected list arbitrator system for the RCEP and any investments thereunder. Part III.C discusses the broader consequences of the choices made in the RCEP for ISDS and the international investment system. The prominence of the RCEP in the modern international trade arena and the willingness of its member states to forego the norms supporting ISDS bode ill for the current international investment system.

A. A Leap Too Far: Why the Status Quo Is the Better Alternative

Neither Brower's traditional system nor Paulsson's preexisting list system is perfect.[166] While the traditional system might be flawed,[167] a shift to the

159. *Id.* See *supra* notes 35–36 and accompanying text noting the likely conclusion of the RCEP.

160. *See id.*

161. Paulsson, *supra* note 103, at 352.

162. *See infra* Part III.B.

163. *See infra* Part III.C.

164. See *infra* Part III.C for a discussion of the ways in which the RCEP weakens investor control over investment disputes, thereby undermining a major principle of ISDS—reducing investor anxiety.

165. *See infra* Part III.A.

166. See *supra* Parts II.B.4–B.5 for a discussion of the shortcomings of each system.

preexisting list system would undermine the purposes of international investment law by discouraging investment, and as such it is not worth the advantages it may pose.

The traditional system's flaws are well documented.[168] Much of Brower's arguments in favor of the system start from the presumption, well supported statistically,[169] that international arbitrators will hold their ethical obligations superior to their personal or national interests.[170] While this may be the case in a majority of arbitrations and for a majority of arbitrators, several glaring examples have shown that such a presumption cannot be applied uniformly.[171] Brower inherently rejects the idea that such bad actors are anything but a tiny minority of all international arbitrators.[172] Regardless of the statistical evidence, the belief remains that party-appointed arbitrators are not impartial judges of the merits of a case.[173]

By using statistics to refute the perception that international arbitrators are not the impartial jurists he claims them to be, instead of addressing the theoretical basis of their alleged impartiality, Brower's support of the traditional system for arbitrator selection perpetuates rather than extinguishes public distrust in arbitration pursued under ISDS provisions. When states are crafting treaty terms, public opinion matters.[174] An effective system lacking public support must in some way demonstrate its virtue in the face of presumably unsupported claims.[175] By dismissing rather than responding to critics' concerns, Brower's theories perpetuate the critics' dissatisfaction and motivation for change.

Nevertheless, the change proposed by Paulsson is an ill-suited remedy to what ails the current system. The first issue is the inability of state parties to compose a list of acceptable potential arbitrators. As noted by Brower,

167. See *supra* Part II.B.2 for a discussion of the pushback against the traditional ISDS system.

168. See *supra* Part II.B.4 for a discussion of dissatisfaction with the traditional system for arbitrator selection.

169. *See* Brower & Blanchard, *supra* note 47, at 711 (citing Franck, *Empirically Evaluating*, *supra* note 122, at 59–61).

170. Brower & Rosenberg, *supra* note 6, at 14.

171. *See, e.g.*, Paulsson, *supra* note 103, at 343–47.

172. Brower & Rosenberg, *supra* note 6, at 14–18.

173. See *supra* notes 111–24 and accompanying text for a discussion of arbitrator neutrality; *see also* Paulsson, *supra* note 103, at 353–54 (suggesting a type of quid pro quo corruption of arbitrators).

174. See *supra* note 141 for a discussion of objections to the ISDS by public groups.

175. Treaties, like all political instruments, are subject to pressure from public opinion. *See, e.g.*, David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1041–42 (2010) (discussing role of public opinion in the Jay Treaty); Robert Knowles, *The Balance of Forces and the Empire of Liberty: States' Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 398 (2003) ("Jefferson seemed to agree to disagree with his friends on the legality of the [Louisiana] [T]reaty while at the same time . . . trusting in the soundness of public opinion, rather than his own principles, for the good of the nation and his presidency."); Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 832 (2005) (claiming the Kellogg-Briand pact was the result of public opinion rather than diplomatic reality).

international agreements that have called for a preselected list have failed to draft one.[176] This indicates that it is not so easy to get state parties to agree in advance on a group of individuals to oversee their potential disputes. Without knowledge of the contours of disputes, it is likely that states will nominate individuals who will support their state interests regardless of whether they serve as complainant or respondent. Because the other parties to the treaty will be driven to do the same, and oppose any blatantly partisan choices that would undermine their national interests, it is quite possible that such a list could never be composed in the first place.[177]

This is especially true in the context of the RCEP and the shifting international status of its members. China and India, once capital-importing states, can no longer seek only to protect or attract investments; because both export and import investment, they cannot be certain on which side of an investment dispute they are likely to land.[178] As these states seek to balance their interests, China and India (and similarly situated states) cannot simply choose an arbitrator who favors protecting investments or maximizing state sovereignty.[179] This leaves these states with no choice but to nominate arbitrators who will pursue the interests of their state, whether those interests are represented by the complaint of an investor abroad or in the defense of a domestic policy at home.

This kind of aggressive political maneuvering is not entirely without precedent. At the WTO, the United States has been particularly insistent that its appointees support its national interests and has twice refused to reappoint a member of the Appellate Body who was not vigorous enough in the defense of American interests.[180] While the Appellate Body is more powerful than an ad hoc arbitral panel, this example demonstrates that at least some states are willing to use their appointment powers to support their interests rather than the effectiveness of the arbitral proceeding. This is almost expected under the current system, as states party to an ISDS arbitration aim to select arbitrators who will likely yield the best result for them.[181] However, because unilateral appointments cannot be blocked by others, the current ISDS system is not paralyzed.[182] Under the hypothetical system proposed by Paulsson, that freedom of choice would not be allowed at the arbitrator selection stage, and thus the entire system could be mired in gridlock before it even gets off the ground.[183]

Presuming that a list of mutually acceptable arbitrators could be created,

176. See *supra* note 135 and accompanying text for an overview of the failure to compile a list of effective arbitrators under NAFTA and the Iran-United States Claims Tribunal.

177. *See, e.g.*, Paulsson, *supra* note 103, at 351 ("Given the freedom to do so unilaterally, a party may find it politically impossible *not* to name one of its nationals as arbitrator.").

178. See *supra* Part II.B.3 for a discussion of the shifting international status of China and India.

179. *See supra* Part II.B.3.

180. *See* Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT'L L. 225, 267–68 (2017). The two judges were Merit Janow, a Columbia University professor, and Jennifer Hillman, a former official for the United States Trade Representative. *Id.*

181. *See supra* Part II.B.4.

182. *See supra* Part II.B.4.

183. *See supra* Part II.B.5.

political considerations would not disappear after that list was composed.[184] Not only could arbitrators be less qualified to serve on an arbitral tribunal,[185] there is no guarantee that their election would imbue them with loyalty to the treaty rather than to the state party that nominated them. The ability of those arbitrators to act independently would be highly dependent on the specific terms under which arbitration would be performed.[186] Because arbitration generally allows dissenting opinions, it is likely that state parties would be able to determine if the arbitrators they nominated to the list and to their panel had favored their interests. The state party could then refuse to select the errant arbitrators to a panel in the future or replace them once their term expires.[187] Because, after all, parties to arbitration play to win.[188] The preselected list system only shifts the conflict from the time of initiation of arbitration back to the time of list selection; it does not eliminate this conflict itself.[189]

In the ISDS context, the creation of a preselected list system results in complicated inequities that are not present in inter-state or private party arbitration where the parties stand on equal footing. In ISDS, the states create a treaty that allows investors to sue the host state.[190] The investors have no hand (at least formally)[191] in making the terms of the treaty text; rather, they must abide by the agreements made by states. When it comes to conflict resolution, investors traditionally regain some agency, for though they must operate within a framework created by states, they are at least allowed to select one of the three panelists who will oversee their dispute.[192]

Under a preselected list system, investors lose that freedom and become more subject to the whims of the treaty's member states.[193] This provision clearly places power in the hands of state parties by pulling control away from investors. It shifts the perceived nature of arbitrators away from their current image as being investor friendly toward an image of being state controlled. While this

184. See *supra* notes 137–40 and accompanying text for a discussion of political considerations under a preselected list system.

185. *See supra* note 139 and accompanying text.

186. *See generally* Dunoff & Pollack, *supra* note 180.

187. *Id.* at 235–37.

188. *See, e.g.*, Paulsson, *supra* note 103, at 352 ("Disputants tend to be interested in one thing only: winning.").

189. *See supra* Part II.B.5.

190. See *supra* notes 47–48 and accompanying text for an overview of ISDS provisions allowing international investors to pursue arbitration against a host state.

191. Investors could, of course, exert political pressure on their local governments. For example, companies belonging to the U.S. Business Coalition for TPP spent at least $658 million lobbying the U.S. government in 2014, according to one non-profit watchdog group. Jay Riestenberg & Justin Germain, *The Political Money Behind the Trans-Pacific Partnership*, COMMON CAUSE (June 25, 2015), http://www.commoncause.org/fact-sheets/the-political-money-behind-trans-pacific-partnership.html [perma: http://perma.cc/NA6M-UT92].

192. See *supra* Part II.B.4 for a discussion of the traditional arbitration selection under ISDS.

193. See *supra* notes 138–41 for a discussion of preselected list systems enabling member states to plan ahead for their own interests.

increase in state power may be supported by reformers,[194] it significantly undercuts the independence of arbitrators,[195] which decreases the attractiveness of an ISDS provision (and consequently the terms of the treaty as a whole) to investors.[196] In doing this, Paulsson's suggestion undermines one of the core reasons that ISDS was created in the first place—to attract foreign investors.[197]

Investors preferred a system of international arbitration because they feared that state interests would receive preferential treatment in domestic courts.[198] Nevertheless, while investors under a preexisting list treaty would still be able to assert their own claims through binding arbitration, that arbitration would remain subject to a political process. Thus investors would have to rely on their home state to protect their interests, similar to investment protections before the arrival of ISDS.[199] Unlike the previous system of state espousal of claims and gunboat diplomacy, here, the state looks after its investors through the selection of as many friendly arbitrators as possible while the treaty is being drafted.[200] This threat to ISDS poses a threat to the entire international investment regime; ISDS is an important part of the investment calculations of most companies investing abroad, and if ISDS is ineffective it will likely decrease investor willingness to shift resources across borders.[201]

Paulsson is thus offering a solution that is more harmful than the problem it seeks to solve; his proposals for fixing investor arbitration seem both practically unworkable and theoretically undesirable.[202] While the traditional system has not effectively responded to the criticisms lodged against it, it continues to serve the key goals of investor-state arbitration—balancing the protection of international investments with the legitimate expression of state sovereignty.[203]

B. Consequences for the RCEP: Less Investment, More Politics

Without access to a finalized treaty text, it is challenging to draw a conclusion about what these changes to ISDS will mean for the RCEP. However, there are several inferences that can be drawn from what is currently known about the RCEP.

If the RCEP's investment provision aims to simultaneously protect investors and attract investment, enacting a preexisting list system for arbitrator selection will not serve this goal. The provision might assuage states (and other

194. Jacobs, *supra* note 111, at 48.

195. See *supra* notes 133–41 and accompanying text for a discussion of arbitrator independence in a preselected list system.

196. Brower & Blanchard, *supra* note 47, at 769.

197. Reinisch, *supra* note 74, at 26.

198. Brower & Blanchard, *supra* note 47, at 697.

199. See *supra* Part II.B.1 for a discussion of the historical development of ISDS.

200. See *supra* notes 54–62 and accompanying text for a discussion of pre-ISDS status of international trade.

201. Brower & Blanchard, *supra* note 47, at 704–05.

202. See *supra* Part III.A for a discussion of the potential harms of Paulsson's solution.

203. See *supra* notes 54–62 and accompanying text for a discussion of the purposes of ISDS.

critics) that fear that ISDS arbitrations are tilted in the favor of investors.[204] If arbitrators are beholden to states for their position, they may not be able to impartially determine if an investor's rights were violated and are due protection.[205] Investors will then be forced to rely on the ability of their home state to stack the preselected list with arbitrators who can protect their interests.[206]

Investors from powerful states like China may be more willing to go abroad, but investors that believe their state lacks the ability to ensure through political means that their interests will be represented will be less encouraged to invest internationally. There may be arenas in which the RCEP may level the playing field for competing industries in more and less politically powerful states. However, in the arena of arbitrator selection, the idea of sovereign equality will be outweighed by the reality of state power as member states leverage their political might to place friendly arbitrators on the list of potential adjudicators.

Not only is the RCEP's ISDS provision likely to discourage investment from its less politically powerful member states, it may also cause resentment among the governments of those member states. Investment disputes were removed from the political arena for good reason.[207] RCEP member states should be hesitant about reinfusing more political confrontation than necessary, lest they risk a return to the devastating consequences of mercantilist policy.[208]

C. Erosion of ISDS and International Investment Norms

Despite the fact that ISDS has grown increasingly unpopular,[209] it is nonetheless present in the RCEP.[210] The RCEP's inclusion of an ISDS provision indicates that, though states may be dissatisfied with the mechanism, it is still an indispensable element of modern trade treaties.[211] As long as major trading nations consider ISDS necessary, it will not be wholesale excluded from important trade agreements.

However, that does not mean that ISDS is immune to change. Scholarly arguments in support of the traditional regime notwithstanding,[212] the state parties to the RCEP have made a choice to depart significantly from the status quo in the area of arbitrator selection.[213] With the status of the TPP and the

204. See *supra* Part II.B.6 for a discussion of the concerns with ISDS.

205. See *supra* Part II.B.5 for a discussion of arbitrator independence under a preselected list system.

206. *See supra* Part III.A.

207. See *supra* notes 58–62 and accompanying text for a discussion of the consequences of mercantilist policies.

208. See *supra* notes 58–62 and accompanying text for a discussion of the consequences of mercantilist policies.

209. See *supra* note 141 for a list of groups that oppose ISDS.

210. Love, *RCEP Draft*, *supra* note 156.

211. See *supra* Part II.C for a discussion of arbitrator selection in the RCEP.

212. See *supra* notes 103–06 and accompanying text for a discussion of arguments in favor of the traditional system.

213. *See* Love, *RCEP Draft*, *supra* note 156 (departing from traditional system).

TTIP uncertain as of the publication of this Comment, the RCEP may have an outsized impact on the development of international trade norms.[214] If other international trade agreements echo the actions taken by the RCEP, then we are likely to see a systemic shift away from the prevailing norms of arbitrator selection.

This should trouble those who believe that ISDS serves an important function in keeping investment disputes out of the political inter-state realm.[215] Perhaps more concerning, however, is that the RCEP sacrifices some of the previous independence of ISDS despite the fact that it may undermine the goals of the entire international investment system.[216] This may be a symptom of a larger change playing out for the last several years as the global economy has shifted and become more complex.[217]

As developing economies have slowly transitioned and begun to export ever increasing amounts of capital, they have begun to demand a greater say in the norms and systems that govern their economic activities.[218] This may explain the paralysis of the multilateral trading system—rising powers are clashing with the traditional world leaders, refusing to give way where once they did.[219] This willingness to assert their power has played out in the RCEP's ISDS arbitrator selection clause, which allows transitioning economies to gamble that their political power will be more effective in obtaining a favorable panel for their citizens than the traditional system of unilateral arbitrator appointment.[220]

As ISDS is undermined, developing states may begin to question whether, in light of their increasing political power, they truly need to remove investment conflicts from the political sphere.[221] This should be troubling for all who believe that ISDS has been effective in discouraging inter-state conflict. Hopefully, a less effective ISDS would not justify continued erosion of the norms that govern the entire international investment system. If investors cannot use ISDS to keep host states honest about the commitments made in their international investment treaties, then the legalistic mechanism of ISDS will no longer be able to alleviate the pressures that led to its creation in the first place.[222] With those pressures

214. *See supra* notes 81–84 and accompanying text; *see also* Bhavan Jaipragas, *As Trump Kills the TPP, Can China-Backed RCEP Fill the Gap?*, S. CHINA MORNING POST (Jan. 9, 2017, updated on Jan. 12, 2017), http://www.scmp.com/week-asia/geopolitics/article/2060041/trump-kills-tpp-can-china-backed-rcep-fill-gap [perma: http://perma.cc/YZX4-7UZA] ("Experts say the RCEP can now be the centrepiece of 21st century free trade, a title they previously bestowed on the TPP."); *Prospects for TPP, TTIP Uncertain amid Political Pressures*, SANDLER, TRAVIS & ROSENBERG TRADE REP. (Sept. 14, 2016), http://www.strtrade.com/news-publications-TPP-TTIP-Congress-vote-trade-091416.html [perma: http://perma.cc/52WU-9LSH].

215. *See supra* notes 54–62 and accompanying text.

216. See *supra* Part III.A for an analysis of the RCEP.

217. See *supra* Part II.B.3 for an analysis of ISDS and developing economies.

218. See *supra* Part II.B.3 for a discussion of developing economies.

219. See *supra* note 21 and accompanying text for a discussion of the collapse of the Doha round of negotiations.

220. See *supra* Part II.C for an analysis of the RCEP's ISDS arbitrator selection clause.

221. *See supra* notes 54–62 and accompanying text.

222. See *supra* Part II.B.1 for an analysis of the historical developments of ISDS.

back in place, and the legal mechanism of ISDS proven ineffective in the face of changing global dynamics, what is to stop states from reverting back to political resolution of investment issues?[223]

IV. CONCLUSION

As it stands, the RCEP's ISDS arbitrator selection clause diverges significantly from traditional arbitrator selection procedures.[224] The exact impact this will have on international investment in the region will remain undetermined until the final treaty text is concluded, released, and absorbed by the investment community.[225] However, if the RCEP follows through on this draft, savvy investors may think twice about investing across borders when they will have significantly limited freedom in choosing who will adjudicate disputes that might arise.[226] While the RCEP member states may be willing to discourage international investment in order to gain more control over ISDS proceedings, they should be aware that their choices, especially in light of the waning hopes for completion of the TPP and the TTIP, may have an outsized impact on the international investment regime.[227]

The change in arbitrator selection contained in the RCEP may indicate more than mere dissatisfaction with the current system of ISDS.[228] As the global economy shifts and developing state economies transition from capital-importing to capital-exporting nations,[229] they may well use their increased economic power to reform the international trade arena in a manner that they find more palatable.[230] Only time will tell which trade norms will survive the increasing globalization of international rulemaking.[231]

223. See *supra* Part II.B.1 for a discussion of gunboat diplomacy.

224. See *supra* Part II.C for an analysis of the RCEP's ISDS arbitrator selection provision.

225. See *supra* note 155 and accompanying text noting that no treaty drafts have been released as of the publication of this Comment.

226. See *supra* Part II.B.5 for an analysis of preselected arbitrator pools.

227. *See supra* notes 54–62 and accompanying text.

228. See *supra* Part II.B.6 for an analysis of the RCEP's changes in arbitrator selection.

229. See *supra* Part II.B.3 for an analysis of developing state economies.

230. *See supra* notes 81–84 and accompanying text.

231. See *supra* note 21 and accompanying text for a discussion of the paralysis of the WTO and the multilateral trading system.