



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

METHODOLOGY

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

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

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

You can download here the list of the ISDS cases filed against RCEP countries which served as the basis for this study: www.tni.org/excel-cases-rcep-isds

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KEY FINDINGS

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



INTRODUCTION

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

India is hosting the RCEP negotiating round at a time when 25 years of neoliberalism and corporate globalisation have devastated the lives and livelihoods of millions of peasants and workers across the country. India has already been hit with 20 known ISDS cases totaling over \$12 billion dollars, the new RCEP deal threatens to lock in these corporate tribunals and undermine India's Bilateral Investment Treaty reform process.

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

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

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

Negotiating new treaties that include ISDS runs counter to the decision by some governments in the region to reform or terminate these agreements in order to protect their right to regulate. Among RCEP countries, India, Indonesia and Australia have undergone review processes of the international investment framework. In the case of India⁹ and Indonesia¹⁰, the outcomes of the reviews have led to the termination of several treaties as well as the development of new model bilateral investment treaties (BITs) that highly restrict the rights of investors.

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

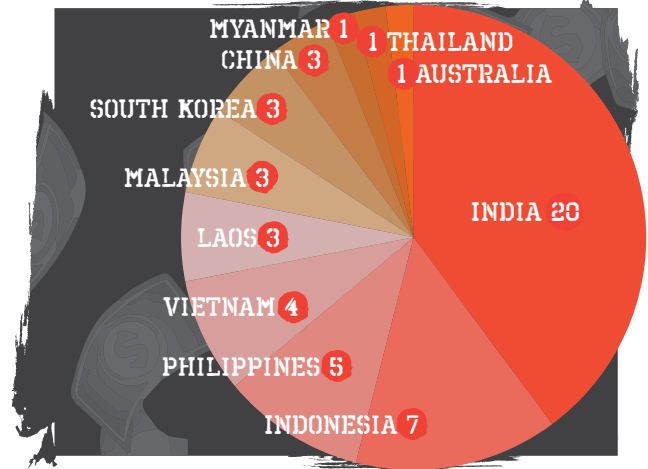
Claims for compensation can – and do – amount to billions of dollars. However, ISDS cases are not fully disclosed to the public even when cases may relate to matters of public interest, such as the environment. When the state loses an ISDS case or settles a dispute with an investor, governments can be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

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

THE IMPACTS OF ISDS IN ASIA

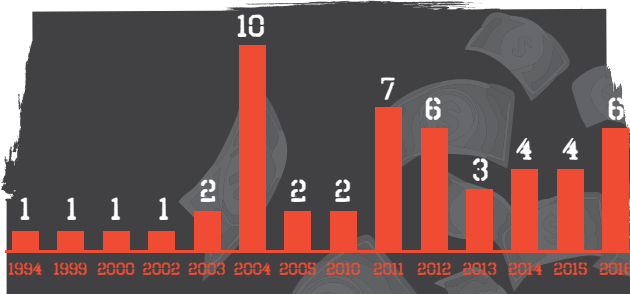
There are currently 50 known investment treaty lawsuits against 11 RCEP countries. Five countries (Brunei, Cambodia, Singapore, Japan and New Zealand) have so far been spared. India alone has been the target of 40% of the cases filed against RCEP countries. Indonesia, Philippines and Vietnam are the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

15 of the cases filed against India were based on only four bilateral investment treaties: the India-United Kingdom BIT (5 cases), the India-Mauritius BIT (4 cases), the India-France BIT (3 cases) and the India-Netherlands BIT (3 cases).



RCEP COUNTRIES SUED (INCL NUMBER OF CASES)

THE EXPONENTIAL GROWTH IN THE NUMBER OF CASES FILED

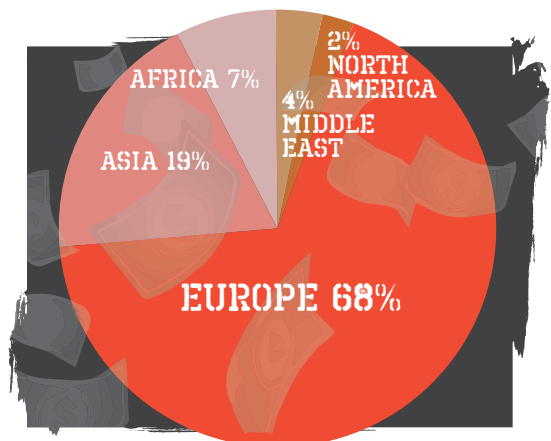


Following the international trend, investment treaty disputes against RCEP countries have surged over the last decade. Only six cases were filed against RCEP countries between 1994 and 2003. The explosion of lawsuits started in 2004; at least 27 disputes were initiated between 2004 and 2013. From 2014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

NUMBER OF ISDS CASES AGAINST RCEP COUNTRIES FILED PER YEAR

WHO ARE THE INVESTORS SUING?

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



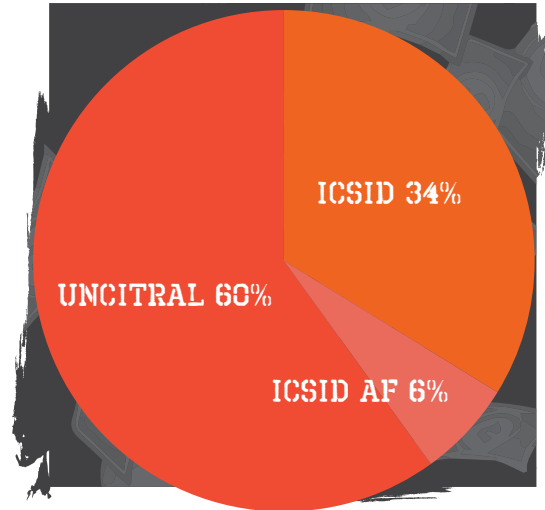
HOME REGION OF INVESTORS SUING RCEP COUNTRIES

WHAT ARE THE TARGETED SECTORS?

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

WHAT ARE INVESTORS' FAVOURITE ARBITRATION RULES?

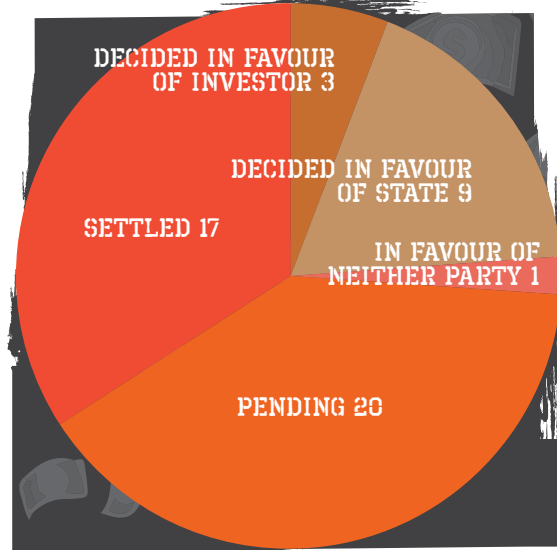
Against the international trend, investors suing RCEP countries have chosen the rules of the UN Commission on International Trade Law (UNCITRAL) in 60% of the cases, rather than ICSID's. This is probably due to the fact that a few RCEP countries have not signed the ICSID convention: India, Thailand,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



ARBITRAL RULES USED IN ISDS LAWSUITS AGAINST RCEP COUNTRIES

STATUS OF THE ISDS CASES AGAINST RCEP COUNTRIES

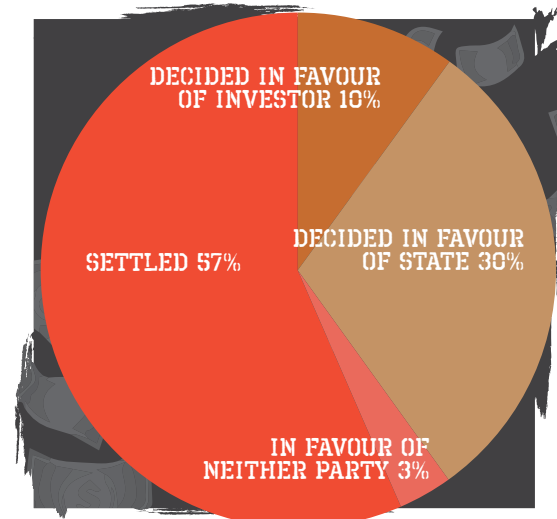
Resolutions are still pending in a big portion of the cases (20). Among those that have been resolved (30 cases), the majority have favoured the investor either with a favourable award by the tribunal (3) or by a settlement with the State (17). The terms of most settlements are not disclosed, but largely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



WHO IS WINNING THE CASES AGAINST RCEP COUNTRIES?

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

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



OUTCOME OF ISDS CASES AGAINST RCEP THAT HAVE BEEN RESOLVED

THE FINANCIAL COSTS OF THESE LAWSUITS

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

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

AMOUNT DEMANDED BY INVESTORS BASED ON ACCUMULATED ISDS LAWSUITS (USD)

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

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

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

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

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

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

RCEP INVESTORS' USAGE OF ISDS SYSTEM

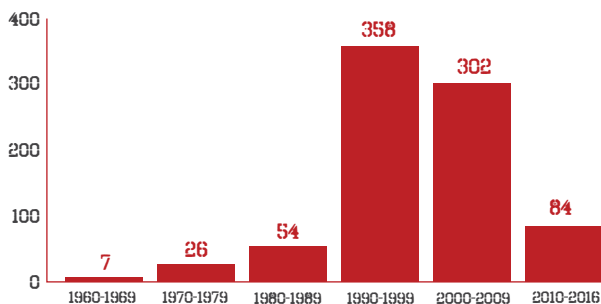
While governments of RCEP countries are clearly being impacted by these costly lawsuits, Asian investors have only modestly made use of international investment agreements. These are mostly Chinese, Australian, Indian, Korean, Malaysian, Singaporean and Japanese investors.

THE INVESTMENT PROTECTION REGIME OF RCEP COUNTRIES

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

The three countries that have signed the most IIAs are China, South Korea and India. New Zealand, Myanmar and Brunei are the three countries that have signed the fewest IIAs.

Most RCEP countries treaties were signed between 1990 and 2009.



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

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

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

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

IIAS UNDER NEGOTIATION

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

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

INDIA



NUMBER OF CLAIMS

20



DISPUTES RELATING TO

ELECTRICITY (9)

INFORMATION & COMMUNICATIONS (7)

MINING & QUARRYING (3)

TRANSPORTATION & STORAGE (1)



TOTAL CLAIMED US\$12.3BILLION

TOTAL AWARDED US\$164MILLION

GREATEST SINGLE CLAIM US\$4BILLION

COMPARATIVE FACT

TOTAL AMOUNT CLAIMED BY FOREIGN INVESTORS

US\$12.3BILLION



HALF OF INDIA'S NATIONAL HEALTH BUDGET IN 2015¹⁶

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

The Dabhol project, formed in 1992, was conceived as the world's largest gas-fired electricity plant. It was established in Maharashtra near Mumbai and would cost a total of 2.9 billion USD.¹⁷ The project was part of the Indian government's efforts to liberalize and privatize the energy sector with foreign capital. Three US companies were behind the investment: Enron Corporation (which owned 80% of the shares), and Bechtel and General Electric (owned 10% of the shares each).¹⁸

Despite widespread public opposition to the project due to its social and environmental impact as well as human rights violations, and accusations of corruption,^{19,20,21} the government of India pushed through the deal with foreign companies in a speedy and untransparent way. Also problematic was the fact that the local government agreed to buy 90% of the power generated by the Dabhol plant regardless of market demand for electricity and at a cost that was more than double the price of power purchased from other suppliers in the state. This outlay amounted to half of Maharashtra's budget expenditure.²²

"The deal was considered highly unfavourable by Indian commentators from the perspectives of national energy policy, consumers, taxpayers, and other local interests that would bear costs of the project."²³

When the opposition alliance won the 1995 Maharashtra election, the new government initiated a review of the Dabhol project, which recommended to scrap it.²⁴ Based on the report's recommendations, the Government of Maharashtra first re-negotiated the terms of the deal, and by 2000 cancelled its payments for the overpriced energy.

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

- Bechtel and GE filed a claim through their Mauritius-based affiliates using the India-Mauritius bilateral investment treaty despite the fact that the companies themselves are US-based.²⁵ They claimed 1.2 billion USD.
- Enron also filed a claim through a Dutch subsidiary using the India-Netherlands BIT. It claimed four billion USD in compensation.
- Seven European Banks (Credit Suisse, Erste Bank, Standard Chartered Bank, ANZEF, Credit Lyonnais (now Calyon), BNP Paribas and ABN Amro) engaged in arbitration against the Indian Government, claiming that their investments in the Dabhol project had not been protected. They used BITs signed by India with the Netherlands, UK, France, Switzerland and Austria. The total value of the claims is 291 million USD.²⁶

All of these claims were subsequently settled, so no Tribunal got to deliver a final ruling. The details of the cases and the terms of the settlements are unknown in most cases. The only disclosed information is in the case of Bechtel and GE, which in 2005 agreed to abandon arbitration in exchange for 160 million USD for Bechtel²⁷ and 145 million USD for General Electric.²⁸ Both companies had bought all the shares of Enron after its collapse in 2000.

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

THE SOCIALISATION OF LOSSES OF FOREIGN INVESTORS

These cases are a clear example of how ultimately people will have to absorb the losses of both bad government decision in privatising energy and compensation for reckless investors behaviour paid out of public coffers. Back in 1993, the World Bank had refused to finance the project arguing it was "not economically viable".²⁹ As a result of this project, people in the State of Maharashtra saw their land confiscated, lost part of their livelihood, and had to pay premium prices for electricity. Yet, part of the public money that should have been invested in health or education or affordable public services was paid to foreign investors.

TREATY SHOPPING AND SHELL COMPANIES

Investment treaties with broad definitions of what constitutes an investor and investment, which allow companies to route investments through third countries to acquire the protection of investment treaties that investors would not, otherwise, have in their home state jurisdiction, have been highly criticised. Enron, Bechtel and GE are US companies that were not entitled to investment protection under a bilateral investment treaty (BIT) because the US does not have a BIT with India. Yet, they set up subsidiaries in treaty havens like Mauritius and the Netherlands³⁰ to make use of their vast web of ill-defined BITs.

THE SECRECY OF INVESTMENT ARBITRATION

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

CONCLUSION

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

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

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

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

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

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

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