

An Important Step Forward and a Delicate Balance – Observations on the Regional Comprehensive Economic Partnership

Introduction

After nearly eight years of negotiation, the Regional Comprehensive Economic Partnership Agreement (RCEP) has been completed. First conceptualized and initiated by the ten Association of Southeast Asian Nations (ASEAN) and joined by ASEAN's six free trade agreement partners—Australia, China, India, Japan, New Zealand, and Republic of Korea¹—the RCEP was signed on November 15, 2020, concluding with fifteen Parties after India withdrew.² RCEP Parties account for approximately 30% of the global gross domestic product (GDP) and around 30% of the world population.³ Its stated goal is to broaden and deepen economic integration in the region, strengthen economic growth and equitable economic development, and advance economic cooperation.⁴ The RCEP consists of 20 Chapters, 17 Annexes, and 54 Market Access Schedules; its coverage includes trade in goods, trade in services, e-commerce, intellectual property rights, investment, competition, government procurement, and more. This *Insight* focuses on two aspects of the RCEP and the balancing it seeks to achieve. The first relates to how the RCEP's efforts to enhance economic integration come with the costs of aggregated complexity as a result of its overlap with other treaties. The second relates to how the RCEP balances the goals of investment promotion and development and manages the sensitive process of resolving potential disputes between Parties at various stages of development.

Advancing Economic Integration—With Added Complexity

Signed in the midst of the COVID-19 pandemic and growing criticism towards globalization and integration, the RCEP reaffirms the importance of economic cooperation. The signing of the RCEP may produce momentum that can be harnessed toward needed reforms of the World Trade Organization (WTO). The RCEP, when fully implemented, lowers tariffs on goods traded between the signing Parties, facilitates trade by streamlining and consolidating rules of origin contained in other treaties between RCEP Parties, and provides rules governing e-commerce. It also establishes free trade relationships between Japan and South Korea and between China and Japan. Once ratified and implemented, the RCEP can promote economic growth, strengthen supply chains, and improve integration within the region, with potential positive spillover effects beyond the region.

At the same time, it generally advances the goal of economic integration, the RCEP adds to a problematic trend of increasing complexity with another layer in the web of overlapping free trade agreements (FTAs) and bilateral or multi-party international investment agreements (IIAs). As noted earlier, ASEAN already has FTAs with all the other RCEP Parties. Meanwhile, seven RCEP Parties—Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Vietnam—are also Members of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).⁵ China, Japan, and South Korea have a Trilateral Investment Treaty, the Investment Promotion and Protection Agreement Between Japan, Republic of Korea and China, which has been in effect since May 2014.⁶ Australia has bilateral FTAs with China⁷ and South Korea,⁸ as does New Zealand.⁹ This is an incomplete account that does not include FTAs or IIAs that other RCEP Parties have amongst themselves or with individual ASEAN states. The RCEP is intended to coexist with, and affirms existing rights and obligations under, other FTAs and IIAs.¹⁰ However, other than providing for a consultation mechanism between Parties to address potential inconsistencies,¹¹ the RCEP does not offer other interpretive guidance. Thus, navigating through different FTAs and IIAs may be a significant challenge.

Balancing Between the Goals of Investment Promotion and Development

Asia has in recent years been the largest recipient region of foreign direct investment (FDI) inflows,¹² and RCEP Parties account for 16% of global FDI stock and more than 24% of flows, with about 30% of total FDI taking place intra-regionally.¹³ Moreover, given that RCEP Parties are at different development stages, the RCEP provisions on investment will likely play an important role in facilitating development and economic

integration among the Parties. Following the standard paradigm, the RCEP's Investment Chapter guarantees national treatment and most-favoured-nation treatment to investors and covered investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The RCEP also provides for fair and equitable treatment and full protection and security assurances in accordance with the customary international law minimum standard of treatment. To address concerns about development and policy flexibility, the RCEP allows Parties to qualify their investment commitments using a "negative list" approach in a Schedule of Reservations and Non-Conforming Measures.¹⁴ Likewise, contrary to common practice (such as that of the CPTPP), the RCEP contains no investor-state dispute settlement (ISDS) mechanism in its Investment Chapter. It does, however, mandate that Parties enter into discussions on ISDS within two years after the RCEP enters into force.¹⁵

In the meantime, this does not mean in practice that there will be no investor-state disputes between RCEP Parties, given the complex web of FTAs and IIAs noted above. Therefore, depending on the exact issue and the nationality of the investor or the covered investment and the host State, a dispute arising under the RCEP's Chapter 10 may be resolved in ISDS under other treaties where jurisdiction exists. Presumably, investors from the seven Parties that are also Members of the CPTPP may rely on the latter's ISDS provisions if a dispute satisfies its criteria.¹⁶ Likewise, assuming preconditions are satisfied, investors may bring ISDS claims under the Trilateral Investment Treaty between China, Japan, and South Korea,¹⁷ the New Zealand–China FTA,¹⁸ and bilateral investment treaties such as those between South Korea and New Zealand,¹⁹ and Australia and South Korea.²⁰ Given that the preconditions differ among those FTAs and IIAs, investors, as well as respondent states, will need to navigate carefully.

Apart from ISDS, one substantive feature of the Investment Chapter that is distinctive is the "essential security interests" exception.²¹ Article 10.15 provides that "[n]otwithstanding Article 17.13 (Security Exceptions), nothing in this Chapter shall be construed to: ... (b) preclude a Party from applying measures that it considers necessary for: (i) the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security; or (ii) the protection of its own essential security interests." The RCEP's approach is broader than that of the CPTPP, which referenced "Security Exceptions" in the investment chapter only as an exemption from the obligation to make available or disclose information during or after arbitral proceedings.²² By incorporating essential security interests as a substantive exception in the Investment Chapter, the RCEP places an important limitation on investor rights. However, Article 10.15 does not define "essential security interests," nor does the more generally applicable Article 17.13.

Going forward, WTO jurisprudence may provide some useful guidance, given the similarity in wording between Articles 10.15 and 17.13 and GATT Article XXI.

The RCEP also takes a distinctive approach to state-to-state dispute settlement, providing special and differential treatment to disputes involving Least Developed Country Parties, in recognition of the different development stages of RCEP Parties.²³ Article 19.18 provides that “particular consideration shall be given to the special situation of Least Developed Country Parties.” In particular, it urges a Complaining Party (using the word “shall”) to “exercise due restraint in raising matters,” and even when a violation is found, the complaining Party “shall exercise due restraint” regarding compensation and suspension of obligations.²⁴ Likewise, the RCEP obliges the panel, in its report, to “explicitly indicate the form in which account has been taken of relevant provisions on special and differential treatment for a Least Developed Country Party that form part of this Agreement which have been raised by that Party in the course of the dispute settlement procedures.”²⁵ Given the web of FTAs and IIAs between RCEP Parties, it is significant that the RCEP provides for the settlement of disputes pursuant to the rules of other FTAs or IIAs, so long as they concern substantially equivalent rights and obligations.²⁶ This differs from the CPTPP approach, which does not require such substantial equivalence.²⁷ The RCEP further sets forth a timetable for panel proceedings and relevant procedural rules to make the mechanism effective and efficient.

Read together with the Investment Chapter, and in particular the absence of an ISDS provision, the RCEP’s dispute resolution mechanism suggests a concerted effort to address the particular concerns of RCEP’s Least Developed Country Parties.

Conclusion

The RCEP has received a mixed reception.²⁸ Given the various development stages of its Parties and current obstacles to expanding economic integration, the conclusion and signing of the RCEP signals an important reaffirmation of the value of trade liberalization. Especially in light of the RCEP’s provision for a periodic general review,²⁹ there will be opportunities to improve and update its terms. In the meantime, the RCEP is an important step forward in global efforts toward improved economic cooperation.

¹ Preamble, The Regional Comprehensive Economic Partnership Agreement [hereinafter RCEP], <https://rcepsec.org/wp-content/uploads/2020/11/Title-page-Table-of-Contents-and-Preamble.pdf>.

² *Joint Leaders’ Statement on The Regional Comprehensive Economic Partnership (RCEP)*, Association of Southeast Asian Nations (Nov. 15, 2020), <https://asean.org/joint-leaders-statement-regional-comprehensive-economic-partnership-rcep-2/>.

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- ³ *Summary of The Regional Comprehensive Economic Partnership Agreement*, <https://asean.org/storage/2020/11/Summary-of-the-RCEP-Agreement.pdf>.
- ⁴ Preamble, *supra* note 1.
- ⁵ Comprehensive and Progressive Agreement for Trans-Pacific Partnership [hereinafter CPTPP].
- ⁶ Investment Promotion and Protection Agreement between Japan, Republic of Korea and China, effective since May 2014 [hereinafter Trilateral Investment Treaty].
- ⁷ Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, effective since December 2015 [hereinafter Australia-China FTA (2015)].
- ⁸ Free Trade Agreement between Australia and the Republic of Korea, effective since December 2014 [hereinafter Australia-South Korea FTA (2014)].
- ⁹ Free Trade Agreement between the Government of New Zealand and the Government of the People's Republic of China, effective since October 2008 [hereinafter New Zealand-China FTA]; Free Trade Agreement between New Zealand and the Republic of Korea, effective since December 2015 [hereinafter New Zealand-Korea FTA].
- ¹⁰ RCEP, art. 20.2, <https://rcepsec.org/legal-text/>.
- ¹¹ *Id.*
- ¹² *World Investment Report 2019*, United Nations Conference on Trade and Development (UNCTAD), p. x, https://unctad.org/system/files/official-document/wir2019_en.pdf.
- ¹³ *Investment Trend Monitor RCEP Agreement A Potential Boost for Investment in Sustainable Post-Covid Recovery*, UNCTAD, https://unctad.org/system/files/official-document/diaeiainf2020d5_en_0.pdf?utm_source=World+Investment+Network+%28WIN%29&utm_campaign=14380f5017-EMAIL_CAMPAIGN_2017_05_22_COPY_01&utm_medium=email&utm_term=0_646aa30cd0-14380f5017-70651957.
- ¹⁴ RCEP, art. 10.8.
- ¹⁵ *Id.* art. 10.18.
- ¹⁶ CPTPP, Section B: Investor-State Dispute Settlement, Chapter 9 Investment, <file:///Users/indiansummer/Downloads/TPP-Final-Text-Investment.pdf>.
- ¹⁷ Trilateral Investment Treaty, *supra* note 6, Article 15: Settlement of Investment Disputes between a Contracting Party and an Investor of Another Contracting Party.
- ¹⁸ New Zealand – China FTA, ch. 11 Investment, § 2.
- ¹⁹ New Zealand – Korea FTA, ch. 10 Investment, § B.
- ²⁰ Australia – South Korea FTA (2014), ch. 11 Investment, § B.
- ²¹ RCEP art. 10.15.
- ²² CPTPP art. 9.24.3.
- ²³ RCEP art. 19.18.
- ²⁴ *Id.* art. 19.18.1.
- ²⁵ *Id.* art. 19.18.2.
- ²⁶ *Id.* art. 19.5.
- ²⁷ CPTPP art. 28.4 (“If a dispute regarding any matter arises under this Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.”).
- ²⁸ See “The meaning of RCEP, the world’s biggest trade agreement,” *THE ECONOMIST* (Nov. 15, 2020).
- ²⁹ RCEP art. 20.8 (providing a general review of the whole agreement every five years, starting from five years after the date of entry into force).