

ASIA-PACIFIC INTEREST GROUP NEWSLETTER

Note from the Co-Chairs

This second Asia-Pacific Interest Group Newsletter follows on our inaugural newsletter that was issued in January 2021. The newsletters are designed to spotlight international law developments in the Asia-Pacific region. In this iteration, we have continued the format of the earlier version by including a Feature (this one on the EU-China Comprehensive Agreement on Investment), an essay (on India's role in the Regional Comprehensive Economic Partnership), and regional updates. In addition, we have included new sections on an IG webinar summary for the first IG Webinar of 2021 ("The Potential Impacts of the RCEP on the Asia-Pacific Region," held on January 21, 2021), IG Members' publications, and also conference highlights and announcements. We are extremely grateful to Ms. Chiann Bao for her excellent editing of the newsletter.

We are still exploring whether to continue this newsletter and would greatly appreciate any feedback from IG Members. Thank you for your continued interest and support. We hope you enjoy the newsletter.

Matthew S. Erie, University of Oxford
Manjiao Chi, University of International Business and Economics

Message from the Editor

In this second edition of the ASIL Asia-Pacific Interest Group Newsletter, we present in-depth views on a few key issues in international law arising in the Asia-Pacific region. Our feature article offers diverse observations from academics as well as practitioners on the European Union ("EU") and China comprehensive agreement on investment, which was agreed in principle at the end of 2020. The next article is intended to be a follow up from our feature article in the inaugural edition on the Regional Comprehensive Economic Partnership ("RCEP"). As one of the major players in region absent from the RCEP, this article focuses on the significance of India's withdrawal from the RCEP as well as what this means to India and proposes a way forward for engaging India as the RCEP develops.

The remainder of the newsletter covers updates from the region as well as new sections as Matthew and Manjiao mention in their message. This newsletter is intended to bring to you unique insights and updates on topical issues in international law from the Asia-Pacific region. We welcome feedback as always and look forward to any contributions you may wish to offer. Enjoy the newsletter and have a safe summer.

Chiann Bao, Arbitration Chambers

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Feature: Expert Perspectives on the EU-China CAI

By: Dr. Monika PRUSINOWSKA, Assistant Professor,
China-EU School of Law

On December 30, 2020, the European Union and China reached an agreement in principle on a comprehensive agreement on investment (the "**EU-China CAI**" or "**CAI**"). The first round of negotiations took place already in January 2014 and the agreement was reached after 34 more rounds of talk. It is intended to replace bilateral investment agreements between China and individual EU member states. The CAI carries both economic and political significance. However, the future remains uncertain. The necessary ratification approvals have not been obtained yet, and the current political tensions, involving mutual sanctions, make the situation even more complex.

This Feature section showcases interviews with experts and industry insiders on the topic. The interviewees include, in alphabetical order: Dr. Ulrike GLUECK, the managing partner of CMS China Shanghai Office; Mr. Omar PUERTAS, a partner of Cuatrecasas specializing in inbound & outbound investment and dispute resolution involving Asian, European and Latin American parties; Mr. Grzegorz STEC, EU-China & CEE-China analyst at Mercator Institute for China Studies; Dr. ZHAO Chunlei, a researcher at the Institute for International Dispute Settlement, Tsinghua University; and the interviewer, Dr. Monika PRUSINOWSKA, assistant professor at the China-EU School of Law.

What is your view regarding the establishment of the EU-China CAI and its potential implications?

PUERTAS: Overall, this is a hard-won achievement between two major economies after years and rounds of negotiations, which I believe is beneficial to both sides. The flow of Foreign Direct Investment ("**FDI**") between China and EU in recent years is far below its potential, and, if successfully ratified, the CAI will promote FDI inflows and outflows, open a new era for the EU-China FDI, and facilitate lasting economic cooperation between the two. Most importantly, the CAI rebalances the lack of symmetry between the two economies in terms of market openness. It gives EU investors access to the Chinese market to an unprecedented level. In particular, China undertakes under the CAI to lift certain market access restrictions in several key sectors for EU investors such as automotive sector, financial services, health (private hospitals), R&D (biological resources), telecommunication/cloud services and computer services.

Also, the CAI may bring increased transparency and legal certainty for EU investors in China. It tackles issues which are of the biggest concerns to EU investors in China, including neutrality of China's State-owned Enterprises ("**SOEs**") in their commercial dealings, transparency in subsidies, forced technology transfers, as well as foreign investors' participation in standard setting. Moreover, the CAI contains commitments on sustainable development, including provisions on labor, environment, corporate social responsibility etc. So, in general, I think the CAI would benefit EU as a whole and promote the common interest and values of the EU. However, as China-EU relations are increasingly complex and the two sides have different interests in the CAI, how China will implement its commitments once the CAI is ratified remains unclear, despite the monitoring and dispute settlement mechanisms established in the agreement.

ZHAO: After seven years and 35 rounds of negotiation talks, the conclusion of the CAI is undoubtedly a great achievement in various senses. In terms of the contents of this investment deal, the CAI binds China and the EU to their current levels of market openness and prevents potential rollbacks, with some fresh openings in other sectors. This is important in consideration of the recent rise of protectionism and unilateralism. At the same time, it is interesting to note that the timing of the conclusion, just before Joe Biden took his office, may indicate that this investment deal bears more political considerations. In this regard, the CAI provides an opportunity for China to drive a wedge between the EU and the US; and for the EU, the deal evidences its efforts towards strategic autonomy.

STEC: The CAI can be a vehicle for addressing some of the challenges underpinning the economic relations between the EU and China. The key provisions of the agreement can be summarized as the EU's commitment to keeping the current market openness to China and China's commitment to increasing market access for the EU in a few selected sectors and slightly improving the level-playing field. China is to do so by committing its SOEs to work on the basis of commercial considerations and increasing transparency on subsidies that some of those SOEs benefit from. However, the importance of the CAI's provisions and its implications should not be overstated. If implemented, the CAI would not overhaul and rebalance the uneven economic relation between the EU and China. New market openings are targeted and mostly

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derived from China's pre-existing unilateral announcements. The positive directions of the level playing field and sustainable development provisions are tempered by a relatively weak enforcement mechanism. A very important issue of investment protection remains to be negotiated within the next two years, but the process may get delayed by the freeze put on political discussion on the CAI's ratification.

On top of that come two fundamental questions related to the CAI for the EU. First, there is the political significance of the agreement. Its conclusion amid growing concerns by the EU over Beijing's policies towards ethnic minorities and Hong Kong would be politically sensitive. Second, there is a question related to economic interdependence. Namely, whether it is desirable to further deepen economic interconnectedness with China at a time when Beijing is boosting its self-sufficiency and exhibits willingness to make use of coercive economic diplomacy. The fate of the agreement will be indicative of the wider direction of EU-China relations.

GLUECK: After seven years of negotiations, the EU and China finally announced agreement on the CAI. However, this does not mean that the CAI will actually be implemented in the near future. In fact, the current version is still not finalized. According to the officially published text by the EU, the text is published for information purposes only and without prejudice to the final outcome of the agreements between the EU and China. The CAI still needs to be approved and ratified by the European Parliament ("EP") and the Council of the EU. Likewise, it is still subject to ratification by China. Originally, it was widely believed that ratification at the EU level would happen sometime in 2021 leading to effectiveness of the treaty in 2022. However, recent political developments, including mutual sanctions, have made this timeline highly unlikely. As a result of political developments in the last months, the EP voted on May 20, 2021 to freeze the ratification of the CAI. Thus, the timeline for ratification is currently unclear. The longer the process of ratification is delayed, the more likely it also becomes that certain parts of the CAI may need to be re-negotiated and adjusted to the then current developments.

If the EU-China CAI is established, what do you think might be the biggest possible wins and losses for China and the EU?

ZHAO: Since the authentic treaty text is not available, all we can infer are based on the published text on the EU's web-

site. For China, the CAI will preserve and encourage EU investment in China, thus further fueling China's economy and technological development. In the CAI, China made concessions in a number of sensitive areas, which can be a great challenge to its domestic legal system. For the EU, correspondingly, it can benefit from the real commitments from China on increased market access, respect for intellectual property, subsidies to state-owned enterprises, sustainable development, labor protection, etc. This investment deal will create a better balance in EU-China trade relations.

GLUECK: The aim of the CAI is to improve market access and non-discriminatory national treatment for enterprises on both sides as well as the creation of level playing fields by introducing transparency. Currently, China still regulates market access for foreign investors by a so-called negative list system. Under the negative list approach, market access of foreign investors is possible, unless the relevant industrial sector or project is included in one of the negative lists. There are different negative lists for free trade zones and regions outside of free trade zones. In the past years, China has gradually shortened the negative lists and thus, continuously opened more sectors to foreign investment.

However, the current negative lists still list 30 sectors in free trade zones and 33 sectors outside of free trade zones to which access of foreign investors is restricted. Among them are investments in certain areas of telecommunication services, media and publications, education, exploration and exploitation of certain minerals, fishery and certain agricultural products, professional technical services like surveys, etc. According to the reservations made by China in Annex 1 of the CAI, this is not likely going to be changed. In fact, the reservations made by China in Annex 1 basically reiterate the currently applicable regulations. Improvements may be brought by the CAI for foreign investment only in a limited number of sectors. An example are wholly foreign investments in medical institutions in certain regions such as Beijing, Shanghai, Guangzhou, Shenzhen and Hainan Province. On the contrary, market access by foreign investors to the EU is already open for a long time. Already now, Chinese investors can freely invest in the EU. The CAI, however, does not change the foreign investment review mechanisms, which were introduced by several EU member states in the recent past. Nevertheless, the mere fact that the CAI was concluded amidst rising geopolitical competition

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between the U.S. and China, appears to be a diplomatic success for China.

STEC: For the EU, some of the key benefits of the CAI are internal. The agreement would provide the bloc with a legal framework for a more cohesive, EU-level approach to managing economic relations with China. It would also be a step towards establishing an EU-wide investment protections agreement that could substitute 25 national BITs that member states have with China. Also, parts of the CAI would support defensive instruments that Brussels is establishing to address challenges posed by China. Aside from the previously mentioned political considerations, the biggest risk for the EU is potential erosion of political will in European capitals to develop such instruments by commitment to seeing the CAI concluded.

For China, the most immediate win would be ensuring openness of the European market to Chinese companies. As referenced by China Chamber of Commerce to the EU, Chinese companies are concerned by the EU's increasing scrutiny of Chinese investments (e.g. through the new investment screening mechanism or upcoming foreign subsidy instrument). More broadly, China may hope that economic considerations embodied by the CAI can have a stabilizing effect on the EU-China relations and serve as an argument preventing the European capitals from antagonizing Beijing – also on the geopolitical stage. The biggest possible loss is likely also political. Ratification of the CAI has become a litmus test on China's policy for Europe encouraging many European governments and lawmakers to clearly define their position.

PUERTAS: The EU tends to consider the CAI a market-access deal while China clearly deems it a geopolitical win, believing it will add more weight to multilateralism. The biggest win for the EU would probably be that, as the President of the European Commission, Ursula von der Leyen said, the CAI will “provide unprecedented access to the Chinese market for European investors, enabling our businesses to grow and create jobs.” The CAI may boost the economic recovery of the EU in the post-pandemic era. As core elements of the CAI are a number of commitments undertaken by the Chinese side, there appears to be no direct loss for the EU, only that it is at risk of a strategic failure. In other words, will strengthening the economic ties, or even economic integrations with China be of the EU's benefit in the long run? As with the wins and losses for China, CAI commitments may

be against the interests of some domestic companies, especially SOEs. However, China's undertakings in the CAI (those in connection with environment, labor, subsidy issues) may lead to external-driven reforms that may generate better and stronger economic growth.

How is your community reacting to the EU-China CAI? How do you anticipate it will impact trade in your jurisdiction?

GLUECK: Overall sentiment of European investors to the CAI does not seem to be overly enthusiastic. The reason might be that the CAI does not seem to be the big step forward which everybody hoped for, because market access for foreign investors in China is still restricted and controlled in quite a number of sectors. Trade between the EU and China is not covered by the CAI, and, thus, will not be influenced by the CAI. A potential positive outcome of the CAI, however, is that Chinese subsidiaries of EU companies are allowed to participate in the formulation of industrial standards of China. While this has already been granted to all foreign invested enterprises in the PRC Foreign Investment Law which took effect in 2020, reiteration in the CAI may be helpful to back up relevant requests.

ZHAO: The CAI is generally deemed as beneficial by Chinese industries. In particular, this agreement is expected to provide Chinese enterprises stable market access to the EU market. In recent years, there are measures taken at both the Union and Member States levels to strengthen foreign investment screening mechanisms, which made Chinese enterprises face difficulties when entering the EU market. The Covid-19 pandemic intensified the challenges. Hopefully the CAI will bring some breathing space in this regard. At the same time, the CAI will exert positive effect on China's domestic legal system by promoting reform, and thus make China more attractive to European investors and investors from other areas.

STEC: The CAI is a contentious issue within the EU with multiple division lines. While the European Council endorsed the conclusion of CAI negotiations in December 2020, the European capitals do not seem fully aligned on the agreement. The current German administration appears to be committed to seeing the CAI ratified, but many other governments are much more critical of it. For instance, some Central and Eastern Europe (“CEE”) member states criticized the agreement over its supposed impact on the

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transatlantic partnership and its development primarily on the basis of German and French interests. Between the EU Institutions, there is also no clear line on the CAI. The Commission has been promoting provisions of the agreement, while the EP has adopted a much more critical tone, even since before the exchange of sanctions in March.

PUERTAS: In my view the potential of the CAI has yet to reach most of the business community. I believe this is due to two reasons. First, the CAI has yet to be developed in specific areas and tangible policies. Businessmen are preoccupied with “whats” and “whens” for their own matters and will only be fully engaged once they see the actual benefits. Second, part of the business community believes that the CAI may not have a real impact on their businesses – whatever they have been doing in China for the last 10, 20 or 30 years will not be impacted by high-flying policies. In this sense, there seems to be certain disconnect between the positive messages both parties have been sending to the world and the actual day-to-day business.

How do you think the EU-China CAI will affect the global economic order?

PUERTAS: Maintaining a free and open multilateral economic order will certainly help rebuilding confidence for investors. This is, by itself, a goal worth seeking as companies can only compete if they are on a levelled playing field. Globally this may lead the way for other regions and countries to open their economies, attract foreign investment, encourage outbound investments and overall, improve their competitiveness.

GLUECK: If finally ratified by both parties, the CAI will be a positive signal for the cooperation between the EU and China and mutual investment. However, since to a large extent, it only reiterates existing regulations, it is not very likely to affect the global economic order. Since ratification has now been postponed by the EU to the future, it is unclear whether the content of the version that may at some point be finally ratified will still be the same as the one stipulated in the current draft.

ZHAO: The CAI will strengthen collaboration between both sides, build an open economic order and thus promote globalization. The CAI updates some regulations under the World Trade Organization (“WTO”) system, and moves the needle relative to China’s WTO accession commitments. In

particular, investors from all countries will benefit from China’s commitments on services, as they will apply on a most-favored-nation (“MFN”) basis. Furthermore, the specific commitments contained in this investment deal between two big economic entities of the world could serve as a model for other entities in their bilateral, regional and multilateral investment treaty negotiations.

STEC: The CAI’s provisions are relatively limited and are unlikely to have a major impact on the wider global economic order. China’s services market openings under provisions of the CAI would apply to the MFN clause, meaning that these openings would be beneficial also for other actors. Overall, the CAI could serve as a signal of stability of EU-China economic ties and commitment to maintaining the vibrancy of this dimension of EU-China relations. That in turn could be an indication of the level of political will within the EU to confront China on a number of levels including on economic governance.

What are some obstacles that might deter the conclusion of the EU-China CAI?

GLUECK: Main obstacles threatening the ratification of the CAI are geopolitical tensions and developments, especially the current mutual sanctions imposed by the EU and China on each other.

PUERTAS: The recent diplomatic spat between China and the EU adds much delay and uncertainty to the adoption and ratification of the CAI by the EP. Just days ago, the EP voted through a motion on to halt the ratification. However, despite the recent diplomatic disputes and the possible pressure or influence from the US, one major hurdle is the internal divergence of interests over the issue among the EU members and different mindsets of legislators and governors who actively promoted the deal.

STEC: The most immediate obstacle is related to the sanctions exchanged by the EU and China in March. The ratification process is now effectively frozen, as the EP passed with an overwhelming majority a resolution suspending their discussions on the CAI for as long as China’s sanctions remain in place. At current, it seems highly improbable that China would withdraw the sanctions or that the EP would revert its position. More similar political tensions may arise in the near future. Many of European parlia-

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India - The Missing Elephant in the RCEP

By: Rishab Gupta and Shreya Jain¹

The RCEP is the largest free trade agreement (“FTA”), originally negotiated between ASEAN and its six FTA partners (Australia, China, India, Japan, New Zealand and South Korea). Although having actively participated in the RCEP negotiations since its inception, India announced on November 4, 2019 its withdrawal from the negotiations, citing its unresolved concerns with the RCEP Agreement. At the RCEP Summit in Bangkok, India’s Prime Minister Mr. Narendra Modi noted that “[t]he present form of the RCEP Agreement does not fully reflect the basic spirit and the agreed guiding principles of RCEP. It also does not address satisfactorily India’s outstanding issues and concerns”.²

India’s withdrawal is a major setback for RCEP and arguably India as well. In this article, we analyse: (a) India’s importance for the RCEP; (b) its reasons for withdrawal; and (c) the way forward for India.

India’s significance as the ‘missing elephant’

India holds a vital position in the RCEP for several reasons. India is one of largest regional and economic powers in the Asia Pacific region and would have been the third largest economy in the RCEP. In 2018 (the financial year prior to India’s withdrawal from RCEP), India enjoyed a higher GDP growth rate than its RCEP counterparts such as China, Japan, Australia and Singapore – only falling short of Cambodia and Vietnam.³ India’s position as the second largest country by population after China also gives RCEP States

access to its huge consumer base. This is also strategically important to counter China’s hegemony in the region and prevent overreliance on China as a trading partner. Further, India’s geographical position gives RCEP States easier access to South Asian markets through India’s membership in the South Asian Free Trade Agreement. Given these metrics, India’s withdrawal is undoubtedly a huge setback for the RCEP.

India’s reasons for withdrawal

India attributed its withdrawal to its unresolved concerns with the RCEP Agreement during the previous rounds of negotiations. At the outset, India was concerned by the proposed tariff rules in the RCEP Agreement, which would progressively abolish 90% of all tariffs on goods between the member States. India previously had a disappointing experience with FTAs with several RCEP States, such as ASEAN, Korea and Japan, which led to an increase in trade deficit as the FTAs failed to increase India’s exports in those countries.⁴ While this is attributable to several factors such as India’s failure to adequately leverage the FTAs, India feared that RCEP could result in Indian markets being flooded with cheaper and lower tariff products, especially from China (with whom India has the highest trade deficit).

To address this, India proposed an auto-trigger mechanism, which would entail automatic application of special safeguard duties in situations where imports from a member nation exceeded a threshold limit. This proposal however was not accepted by RCEP countries. This, coupled with India’s escalating border dispute with China, also resulted in apprehensions about the potential conflict between RCEP obligations and any economic sanctions that India may need to impose on China.

Equally, India felt it was receiving little in return. Under the RCEP Agreement, the States agreed to slash tariffs by using the base date of 2014. India wanted to use a more updated base date of 2019, when it had revised tariffs on various products. Likewise, India’s push for more stringent rules of

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2 RCEP trade deal a no-go, PM Modi says conscience doesn’t allow, Hindustan Times, available at <https://www.hindustantimes.com/india-news/neither-gandhi-s-talisman-nor-my-conscience-allows-to-join-rcep-pm-modi/story-MwoYlJchVp3S1OKIEKilHK.html>.

3 P. Gaur, India’s Withdrawal from RCEP: Neutralizing National Trade Concerns, Journal of the Asia Pacific Economy (2020), p. 5.

4 NITI Ayog, A Note on Free Trade Agreements and their Costs, p. 7-9, available at https://niti.gov.in/writeread-data/files/document_publication/FTA-NITI-FINAL.pdf.

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origin, to protect against surges in imports, was also unsuccessful. Under international trade law, rules of origin are used to trace the national origin of a product, which is used to determine trade duties on imports. The RCEP Agreement proposes common rules of origin for all member States, which would enable manufacturers to import from any State at reduced costs. India wanted stricter rules of origin to ensure that States cannot route their goods through a third State which enjoys lower tariffs pursuant to its FTA with India. India was also opposed to the most-favoured nation clause in the RCEP Agreement, which meant that it could not discriminate between its trading partners. India did not wish to confer the same benefits on all RCEP States, especially China with whom it had an ongoing border dispute.

Way forward for India

Keeping in mind India's strategic importance, the RCEP has left open the option for India to join the RCEP Agreement. India's decision to exit the RCEP is one in a series of protectionist actions, such as its 'Make in India' campaign and widespread termination of its bilateral investment treaties. However, India also has a lot to lose by staying out of the RCEP in the long term, particularly during the present economic recession exacerbated by COVID-19. The RCEP is a unique and an extremely critical FTA for India. It involves four of the five largest economies in Asia (i.e. China, Indonesia, Japan and South Korea), which represent 45% of the world's population and account for 25% of the global GDP, 30% of the global trade and 27% of India's total

trade.⁵ Critics warn that India's withdrawal may affect its trade ties with individual RCEP States, as they may prioritize strengthening economic trade within the bloc. By exiting the RCEP, India may lose out on immense potential arising from trade & investment opportunities within this bloc.

A more pragmatic approach for both India and the RCEP would be to find a middle ground that addresses their key concerns. India's policy of protectionism is neither desirable nor effective in today's globalized economy. While India has alternative options such as bilateral trade agreements, they do not carry the same potential of investment and trade opportunities as the RCEP, and entail greater time and resources for negotiation. Likewise, for the reasons discussed above, the RCEP would be a much stronger trade bloc if it includes India. To that end, the RCEP may wish to reconsider its decisions on India's key concerns such as auto-trigger mechanism and other safeguard tools, or propose other effective alternatives. Aside from access to India's large consumer base, India's inclusion is also important to balance China's dominance within the RCEP and attain the goal of integrating Asia Pacific economies. India's return to the RCEP would undoubtedly be a win-win situation for both sides.

5 NITI Ayog, A Note on Free Trade Agreements and their Costs, p. 14, available at https://niti.gov.in/writeread-data/files/document_publication/FTA-NITI-FINAL.pdf. ■

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ments are discussing motions condemning the mistreatment of Uyghurs in Xinjiang, while the Commission is set to propose a supply chain due diligence mechanism in the coming weeks. The mechanism would scrutinize human rights violations and forced labor practices and many see it as a tool that could be deployed in the context of Xinjiang. There is also the issue of the support for the agreement itself. The upcoming elections in Germany and France may affect the, so far favorable, stance towards the CAI in the two administrations that helped to conclude the negotiations process.

ZHAO: Currently, the main obstacle is the mutual sanctions regarding China's alleged abuses against the Uyghur

Muslim minority population. In fact, because of this, the EC has suspended the efforts to ratify the proposed the CAI. In this regard, it is up to the doer to undo the knot, and we can only hope that the EU will not stop this mutually beneficial investment deal because of any unfounded claim. Even without such political tensions, the agreement needs to undergo a legal scrubbing and translation process, and be submitted for approval by the EU Council and EP. In particular, debates over sensitive issues may put the fate of the concluded part of the CAI uncertain. Regarding the parts to be further negotiated, such as investor-state dispute settlement, the future of reaching an agreement thereon can be gloomy considering both sides' different practices and preferences. ■



ASIL APIG RCEP Webinar Summary

By: Professor Manjiao CHI, Professor and Founding Director, Center for International Economic Law and Policy (CIELP), University of International Business and Economics (UIBE), China.

Ms Mary Elizabeth Chelliah

Ms Mary Elizabeth Chelliah first reviewed the making of the RCEP. The RCEP is not a China-driven agreement, but should be understood as an ASEAN plus six agreement. India was expected to join the RCEP, but India withdrew as it was not ready to open up certain industries given its domestic situation. But it is possible for India to “rejoin” the RCEP. Now we are waiting for the ratification of the RCEP, which, from a business standpoint, should be done as soon as possible. However, the RCEP states themselves need to make sure that their economy is running and ready for it. Regarding the chapters of the RCEP, they have a strong focus on regulation coherence compared with ASEAN plus one agreements, which can be shown from the Sanitary and Phytosanitary measures (“SPS”), Technical Barriers to Trade (“TBT”), intellectual property, and e-commerce chapters of the RCEP. The sort of open accession to the RCEP is another question that is worth mentioning. States can join the RCEP immediately after 19 months of the date of entry into force of the RCEP, and there are no criteria at the moment for becoming a member of the RCEP.

Ms Mia Mikic

Ms Mia Mikic discussed the RCEP from an economic perspective, especially focusing on the potential economic (as well as social) impacts. It cannot be denied that the RCEP is a very important agreement, because it is the first time for such a huge region to operate based on a single trade rulebook. As for the development-friendly impact, the RCEP carries benefits for low-income countries. It brings these countries to the same economic growth space as other countries, and requires the same commitment. But the RCEP also gives these countries the opportunity to have a longer term for implementation. As for the economic impact, the real income growth impact of the RCEP is estimated to be about \$190 billion, with China getting the biggest part of the pie, followed by Japan, Korea and the rest. Small countries will get most in relative terms. However, the estimation is based on the static effects covered by the economic models. The ultimate effect of the RCEP is difficult to predict, since it will come from the dynamic effects (changes in growth, productivity etc.) and be based on both the liberalization of

goods and the combined effect of opening markets in services, investment and from reducing regulatory distances. In terms of the overall impact of the RCEP, it would be better if members could ratify it as soon as possible.

Prof. Trinh Hai Yen

Prof. Trinh Hai Yen talked about the impact of the investment protection provisions of the RCEP’s investment chapter. The first observation is that the RCEP investment chapter is an unfinished work, because a work program will commence, no later than two years after entry into force (to be concluded within the following three years), to consider whether or not to amend the RCEP to include an investor-state dispute settlement (“ISDS”) mechanism. According to Art 10.18, dispute settlement procedures cannot be imported by an MFN clause from other international investment agreements (“IIAs”) because Art 10.4 of the RCEP explicitly excludes that option. There are two scenarios after the entry into force of the RCEP. The first scenario is that RCEP parties reach no agreement on ISDS after the timeline for the work program expires and thus, there would be no an international forum for investors to challenge the implementation of the investment chapter. However, the investors can still rely on other international protection schemes created by other IIAs that coexist with RCEP (Art 20.2). In this scenario, the RCEP investment protection rules will not have much impact on the investment law landscape. The second scenario is that the RCEP’s state parties will reach an agreement on ISDS, which would likely be a reformed arbitration based on what they have agreed before in their IIAs. The RCEP standards of investment protection follow verbatim what ASEAN member states have reached in their negotiations with external partners. Since the standards are restrictive, investors might want to import more favorable protections in applicable IIAs pursuant to an MFN clause, except for states which opted out of this clause. This scenario, therefore, does not change the international investment law landscape either.

Prof. Jaemin Lee

Prof. Jaemin Lee presented several issues with respect to the investment chapter of the RCEP. This chapter largely follows the framework and contents of investment chapters of existing IIAs, **but it has some key features**. First, the provisions relating to ISDS mechanism are omitted. In the next two years, we will see how the members will negotiate the ISDS

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Recent Publications

- Ali, S, I. Bantekas, M. Gomez, P. Ortolani, (2020) *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Cambridge, UK: Cambridge University Press).
- Nottage, L., Ali, S., Jetin, B., and Teramura, N. Eds. (2020) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution*, Kluwer Law.
- Michael C. Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law* (New York: Columbia University Press, AAS Series, 2020).
- Manjiao Chi, *Regulation of Special Economic Zones through Regional Trade Agreements: Confronting the Synergy Issue*, *Journal of International Economic Law* (2021) (forthcoming). Available [here](#).
- Manjiao Chi, 'The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead End or a Bright Future?', *Asia Pacific Law Review* (2021)(forthcoming). Available [here](#).
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Regional Updates

International Law Updates

Australia

Australian almond milk dispute to be heard in California

The Federal Court of Australia has ruled that litigation between an Australian food and beverage group and a US farmer' cooperative over the licensing of almond milk products should be stayed in favor of an International Center for Dispute Resolution ("ICDR") arbitration in California. The dispute between the two companies first became public at the start of last year when it was reported that California-based Blue Diamond was planning to sue Freedom Food over a licensing disagreement.

For more information visit: <https://globalarbitrationreview.com/australian-almond-milk-dispute-be-resolved-in-california>

Report reveals 'thriving' multi-billion dollar arbitration market in Australia

The study by the Australian Centre for International Commercial Arbitration ("ACICA") found that more than 223 cases valued at around USD 27 billion were heard in the three years from the start of 2016 to the beginning of 2019. Of these, 111 were international and 109 were domestic with the nature of three disputes remaining undisclosed. ACICA produced the report in conjunction with FTI Consulting, with support from the Australian Bar Association, the Western Australia Arbitration Initiative and Francis Burt Chambers.

For more information visit: <https://www.globallegalpost.com/big-stories/report-reveals-thriving-multi-billion-dollar-arbitration-market-in-australia-21076317/>

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Central Asia and Mongolia

Turquoise Hill provides an update on the Tax Arbitration and discussions with the Government of Mongolia and Proposed Class Action

Following Oyu Tolgoi LLC's initiation of formal international arbitration proceeding against the Government of Mongolia for the 2013-2015 Tax Assessment claims, Oyu Tolgoi has given notice of its intention to apply for leave from the arbitral tribunal to amend its Statement of Claim to include issues raised in the 2016-2018 Tax Assessment. On 11 January 2021, Turquoise Hill Resources Ltd. announced that Oyu Tolgoi LLC has evaluated the Tax Act claim for approximately USD 228 million from the Mongolian Tax Authority, as announced on 23 December 2020, including the seeking of a reduction of Oyu Tolgoi's carried-forward tax losses by approximately USD 1.5 billion.

For more information visit: <https://www.prnewswire.com/news-releases/turquoise-hill-provides-an-update-on-the-tax-arbitration-and-discussions-with-the-government-of-mongolia-and-proposed-class-action-301205216.html>

Dutch court sets aside Kazakh attachment ruling

The Dutch Supreme Court has set aside the Amsterdam Court of Appeal's decision related to an attachment of Kazakhstan's stake (via its sovereign wealth fund Samruk-Kazyna) in the international consortium developing the giant Kashagan oil field – a Dutch entity, KMG Kashagan B.V. Just prior to Christmas, the case was referred back to the Hague Court of Appeal for further consideration as the Supreme Court deemed the appellate court's assessment of immunity as based on an incorrect standard. The attachment, valued at USD 5.2 billion, remains fully in place as security for the

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issue. It may have been an inevitable outcome as ISDS reform discussion is underway in other international fora. Second, general exceptions and security exceptions are both applied to this chapter. The RCEP-wide general exceptions clause applies to investment chapter, and a separate security exceptions clause exist in the investment chapter. These exceptions are intended to help preserve the regulatory space of member states. The main difference is that the security exceptions in the investment chapter are broader than the RCEP-wide security exceptions in that the former do not contain additional conditions for the invocation. It is noteworthy that the security exceptions for the investment chapter are broader than the same exceptions for other chapters. Third, the RCEP includes a provision for investment facilitation, which raises a question as to the relationship between the ongoing WTO investment facilitation framework and investment facilitation rules in the RCEP and future IIAs. Fourth, in the absence of ISDS mechanism, the state-to-state dispute settlement in Chapter 19 will be applied for the settlement of investment disputes until the discussion of ISDS mechanism is completed. Even if an ISDS mechanism is introduced in six to seven years' time as planned, foreign investors of members states may prefer other IIAs due to the existence of the general exceptions and security exceptions in the RCEP, which might limit the

practical utility of the investment chapter. Fifth, as the RCEP encompasses large areas of trade and investment and may have robust dispute settlement activities among 15 states in the future, including state-to-state investment disputes, a standing secretariat will be very helpful.

Ms Chiann Bao

Ms Chiann Bao discussed the issue of dispute settlement under the RCEP. Since ISDS is quite controversial, state parties question whether ISDS should be incorporated into such a mega-FTA. ISDS rules are absent in the RCEP for now. Chapter 19 provides a state-to-state mechanism, which is inspired by the WTO dispute settlement. The proceedings, the appointment of a panel, the qualification of panelists, and remedies are all very similar to WTO rules. This state-to-state dispute settlement mechanism is not applied to the investment Chapter. In the next two to five years, we will see continuing negotiations of ISDS mechanism by RCEP members. In the meantime, there is the state-to-state dispute settlement mechanism that is available to see how effective the RCEP will be able to attract investment, if there is no enforcement mechanism to protect investors. Whatever dispute settlement mechanism the RCEP will finally adopt, for the time being, in the principle of the RCEP, it remains a positive encouragement for the general unification of the region. ■



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award of more than USD 540 million, payable to the owners and bondholders of Tristan Oil.

For more information visit: <https://globalarbitrationreview.com/attachments-and-freezing-orders/dutch-court-sets-aside-kazakh-attachment-ruling>

President of the Republic of Uzbekistan has approved the Law on International Commercial Arbitration

On 16 February 2021, the President of the Republic of Uzbekistan approved the Law on International Commercial Arbitration. As a result, Uzbekistan became the 85th country and 118th jurisdiction to enact legislation based on the Model Law of the United Nations Commission on International Trade Law (“**UNCITRAL**”) on International commercial arbitration. The Law was approved by the UNCITRAL. The main aim of the Law is to establish a separate legal regime applicable to international commercial arbitration, to maximize the effectiveness of arbitral proceedings, and to minimize judicial intervention, making Uzbekistan a truly ‘arbitration-friendly’ country.

The document in Russian language is available at: <https://lex.uz/docs/5294087>

Hong Kong

Mutual recognition of and assistance to bankruptcy/insolvency proceedings between Hong Kong and Mainland China

The Secretary for Justice of Hong Kong Special Administrative Region, and Vice-president of the Supreme People’s Court in People’s Republic of China signed a Record of Meeting in Shenzhen on 14 May 2021, signifying the consensus on the mutual recognition of and assistance to insolvency proceedings between the two places. The new framework allows the courts of Hong Kong Special Administrative Region and Mainland China to cooperate on cross-border corporate insolvency.

Japan

Entry into force of the New Tax Convention between Japan and Spain

On 12 February 2021, Japan received from Spain the notifica-

tion confirming the New Tax Convention between Japan and Spain. This New Convention eliminated double taxation. Japan expects the New Convention to promote further mutual investments and economic exchanges between the two countries.

For more information visit: https://www.mofa.go.jp/press/release/press4e_002975.html

Signing of the Protocol Amending the Special Measures Agreement between Japan and the US

On 24 February 2021, the US and Japan signed a protocol amending the special agreement concerning the facilities, areas and status of US armed forces in Japan. The two countries agreed for Japan to continue to bear part of the US’s cost for one more year. Japan expects this special measures agreement to continue to play a vital role in maintaining and strengthening the Japan-US alliance.

For more information visit: https://www.mofa.go.jp/press/release/press3e_000173.html

Japan’s entry into Convention C111

On 9 March 2021, the Japanese National Diet started preparing entry into the 1958 C111 - Discrimination (Employment and Occupation) Convention as a result of Tokyo Olympic former general Mori’s discriminative statements against women.

Japan-US Summit Meeting on 16 April 2021

On 16 April 2021, Japanese Prime Minister Suga and the President of the US, Joseph Biden, held a Japan-US summit meeting in Washington, D.C. Biden welcomed Suga as the first foreign-leader to visit the US during his presidency. The following topics were discussed by the leaders; shared universal values, such as freedom, democracy, human rights, and the rule of law; strengthening the Japan-US Alliance; regional situations in China, North Korea, Republic of Korea, Myanmar, and elsewhere; strengthening the US-Japan economic relationship; climate change; and the Tokyo Olympics. Suga also requested the US to lift import restrictions on Japanese food products, including rice produced in Fukushima Prefecture after the East Japan Earthquake.

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For more information visit: https://www.mofa.go.jp/page4e_001123.html

Japanese Prime Minister Suga announces Japan's climate protection goals

On 22 April 2021, Japanese Prime Minister Suga attended the Leaders Summit on Climate held by the US. He declared that Japan aims to reduce its greenhouse gas emissions by 46% in 2030 from 2013 and showed his positive attitude to create a virtuous cycle of the economy and the environment.

For more information visit: https://www.mofa.go.jp/ic/ch/page6e_000236.html

Mainland China

The first Chinese local international commercial court was launched in Suzhou, Jiangsu Province

On 1 December 2020, the first Chinese local international commercial court was launched in Suzhou, Jiangsu Province to adjudicate foreign related disputes in this city upon the Supreme People's Court's approval. To provide judicial support for the Belt & Road Initiative, the Supreme Court previously launched two international commercial courts in June 2018, which are respectively based in the southern Chinese city Shenzhen and the northern city Xi'an.

For more information visit: <http://www.ourjiangsu.com/a/20201201/1606790027854.shtml>

China establishes new mechanism to counteract "unjustified" extraterritorial application of foreign measure

On 9 January 2021, China's Ministry of Commerce ("MOFCOM") released Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Laws and Other Measures ("Rules"). The Rules are read by many as a countermeasure to the waves of export controls, sanctions, and other trade restrictions in Western countries targeted at Chinese-controlled entities. It remains to be seen how the Rules will be enforced in practice and how they may affect the business operations of both multinational and Chinese companies.

For more information visit: <https://www.jonesday.com/en/insights/2021/01/china-releases-rules-to-address-extraterritorial-applications-of-foreign-laws>

Latest developments regarding the US-China trade war in 2021

In January, US President Joe Biden said that he did not have immediate plans to remove the tariffs and planned to review the phase one trade deal and discuss the matter with allies first. In February, the Chinese government called for the US President to lift the multiple restrictions imposed by former President Trump, and urged the Biden administration to lift the sanctions on trade and people-to-people contact. Recently in March, high-level talks took place in Anchorage, Alaska to discuss key disagreements between the US and China.

For more information visit: <https://www.scmp.com/economy/china-economy/article/3120986/us-china-trade-war-phase-one-trade-deal-largely-failure>

<https://apnews.com/article/joe-biden-donald-trump-beijing-global-trade-tibet-a9038d1fea6606a3d52e96a12a9e4ca2>
<https://www.theguardian.com/world/2021/mar/19/us-china-talks-alaska-biden-blinken-sullivan-wang>

New Zealand

New Zealand Government policies worsen housing crisis

On 25 February 2021, the New Zealand government took the unusual step of instructing the Reserve Bank to "take into account the government's objective to support more sustainable house prices" and affordability when setting monetary policy. Previously, the Reserve Bank's policies of ultra-low interest rates quantitative easing, which the government fully supported, pushed up house prices and worsened social inequality.

For more information visit: <https://www.wsws.org/en/articles/2021/03/01/nzho-m01.html>

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Singapore

The International Arbitration (Amendment) Act 2020

The International Arbitration (Amendment) Act 2020 was gazetted and came into force on 5 November 2020. Two amendments have been introduced that enhance the position of Singapore as a leading arbitral seat.

For the full text of the legislation see: <https://sso.agc.gov.sg/Acts-Supp/32-2020/Published/20201111?DocDate=20201111>.

UK-Singapore Free Trade Agreement (FTA)

The UK-Singapore Free Trade Agreement (FTA) affirms this deep commitment between Singapore and the United Kingdom to trade liberalization and investment under the global rules-based trading system.

For more information visit: <https://www.gov.uk/government/publications/singapore-uk-joint-statement-2021-a-partnership-for-the-future/singapore-uk-joint-statement-2021-a-partnership-for-the-future>.

South Asia

India

Indian Chronicles: EU DisInfo Lab Report

On 10 December 2020, the EU DisInfo Lab published a report highlighting a vast network aimed at disseminating propaganda against Pakistan. The report reveals that the operation run by an Indian holding company is spread across 116 countries, with 265 pro-Indian sites and at least 10 UN-accredited NGOs, along with several others, which were used to promote Indian interests and criticize Pakistan internationally.

For more information visit: <https://www.disinfo.eu/publications/indian-chronicles-deep-dive-into-a-15-year-operation-targeting-the-eu-and-un-to-serve-indian-interests/>

US v. India: Freedom of Navigation Operation in Exclusive Economic Zone

On 7 April 2021, the US deployed a guided missile-destroyer USS John Paul of the US Navy 7th Fleet, to conduct a routine

Freedom of Navigation Operation ("FoN") in the Indian Ocean. According to India, USS John Paul was sailing about 130 nautical miles west of India's Lakshadweep islands. In light of the same, India lodged a protest against the US naval vessel for conducting a transit inside India's Exclusive Economic Zone ("EEZ") without consent which is a violation of international norms.

Free Trade Agreement Negotiations begin between India and EU

On 8 May 2021, India and the EU resumed negotiations for a balanced and comprehensive trade agreement after a gap of eight years.

Pakistan

Islamabad Declaration 2021

The foreign ministers of Azerbaijan, Turkey and Pakistan issued a joint declaration on 13 January 2021. Under the Declaration, the ministers agreed to enhance joint efforts on combating discrimination and persecution of Muslims, enhanced international cooperation pertaining to economic growth and public health, strengthen cooperation in peace and security, and underlined the need to intensify cooperation for food and energy security, environment and sustainable development among others.

For more information visit: <http://mofa.gov.pk/2nd-trilateral-meeting-of-the-ministers-of-foreign-affairs-of-the-republic-of-azerbaijan-the-islamic-republic-of-pakistan-and-the-republic-of-turkey-13-january-2021/>

CPEC Authority Bill 2020

On 1 February 2021, the National Assembly passed a bill for the establishment of the China-Pakistan Economic Corridor ("CPEC") Authority, which will plan and coordinate the smooth implementation of the US\$62 billion connectivity project.

For more information visit: http://www.na.gov.pk/uploads/documents/1612267873_350.pdf

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Pakistan joins WIPO's Madrid System

On 24 February 2021, Pakistan formally joined the Madrid System for international trademark registrations, administered by the World Intellectual Property Organisation. The agreement entered into force on 24 May 2021, allowing Pakistani brand owners the ability to file a single international application to secure the protection.

Pakistan's plea on geographical indication tag of Basmati Rice gets accepted by EU

On 5 March 2021, the European Commission accepted the plea submitted by the Rice Exporters Association of Pakistan ("REAP") against India on the Geographical Indication ("GI") tag of Basmati rice. The negotiations between the parties were scheduled to last until 6 May 2021. In this pre-trial phase, both parties are encouraged to reach an amicable solution.

Pakistan Single Window Act 2021

On 9 April 2021, Pakistan promulgated the Pakistan Single Window Act 2021, which establishes an independent institution for facilitation of national and international trade. The institution will provide a coordinated one-window system to facilitate exports, imports and transit trade.

For more information visit: http://www.na.gov.pk/uploads/documents/1618999064__850.pdf

Sri Lanka

Indo-Japanese Cooperation for Colombo Port called to a halt

On 1 February 2021 the Prime Minister of Sri Lanka, Mahinda Rajapaksa, announced in a unilateral move that the Sri Lanka Ports Authority will manage the operations of East Container Terminal ("ECT") of Colombo Port on its own and that the port will not be sold to any foreign country. This statement effectively revoked a 2019 signed Memorandum of Cooperation on the joint operations of ECT with India and Japan.

The Currency Swap Deal

On 23 March 2021, Sri Lanka signed a 10 billion yuan (about USD 1.5 billion) agreement with China for a period of three years. Under this agreement, Sri Lanka will exchange currency with China. The Agreement is aimed at promoting trade and investment between the countries.

South Korea

South Korea and the US reach security arrangement on the cost of troops

On 7 March 2021, South Korea and the US reached an agreement that South Korea will pay higher costs for hosting the US troops. South Korea expects to play it as deterrence against North Korea.

For more information visit: <https://www.reuters.com/article/us-southkorea-usa-alliance-idUSKBN2AZ0S0> ■