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## Signing the RCEP As a Milestone

### I Introduction

Fifteen Asia-Pacific countries concluded the Regional Comprehensive Economic Partnership (RCEP) at the virtual summit in November 2020, making the RCEP the world's largest free trade agreement (FTA).<sup>1</sup> As Figure 3.1 below demonstrates, the RCEP's share of global gross domestic product (GDP) amounts to 30 percent, which exceeds that of any existing trade bloc ranging from the United States-Mexico-Canada Agreement (USMCA) to the Pacific Alliance.<sup>2</sup> As a market that covers a population of 2.2 billion and 40 percent of the world's mergers and acquisitions, the economic scale of the RCEP is comparable to that of the European Union (EU) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) combined.<sup>3</sup> More fundamentally, the RCEP highlights the pivotal role of Global South powers in world trade governance. This mega-FTA represents a historic milestone of new Asian regionalism that manifests Asia's collective response to populist protectionism and the recovery of the economic effects of the COVID-19 pandemic.

From a normative perspective, the RCEP contributes to the shaping of the New Regional Economic Order (NREO) in the Third Regionalism. The NREO departs from the South's approach of the New International Economic Order (NIEO) in the 1970s. The NREO is overtaking the North-dominated Washington Consensus that underpinned postwar economic

<sup>1</sup> Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP) (Joint Leaders' Statement on the RCEP) (2020).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; United Nations Conference on Trade and Development (UNCTAD), *RCEP Agreement as a Potential Boost for Investment in Sustainable Post-COVID Recovery, Investment Trends Monitor* (2020), at 8.

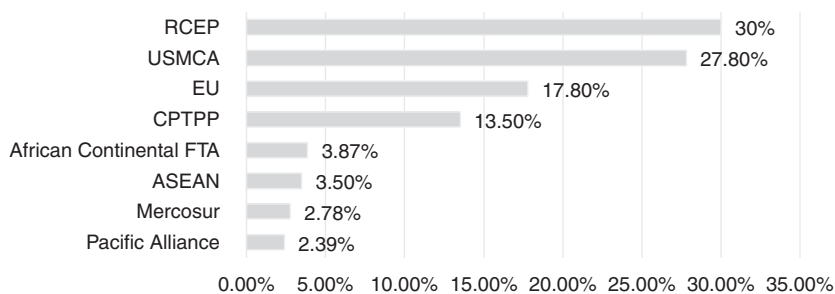


Figure 3.1 Trade blocs: shares of global GDP<sup>4</sup>

order. The new dependency theory expounds the implications of the RCEP. The original, classical dependency theory that influenced the NIEO presupposed the underdevelopment of developing countries to be the result of the neocolonial relationship between the North and the South.<sup>5</sup> The theory predicted the perpetual underdevelopment of the South because international trade only exacerbated dependency on the North.<sup>6</sup> Nevertheless, the economic development of four Asian tigers and the People's Republic of China (PRC) disapproved the prediction.

To remedy the theoretical weakness, the new dependency theorists contended that dependency and development can co-exist.<sup>7</sup> Specifically, dependency is dynamic because certain developing countries have utilized dependent capitalism to pursue export-driven growth and altered neo-colonial ties with the North.<sup>8</sup> While the new dependency theory

<sup>4</sup> Joint Leaders' Statement on the RCEP, *supra* note 1; Association of Southeast Asian Nations (ASEAN) Secretariat, *ASEAN Integration Report 2019* (2019), at 127; Government of Canada, *About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, July 16, 2019, [www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/background-document\\_information.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/background-document_information.aspx?lang=eng) (last visited Dec. 31, 2020). Gross domestic product of the United States-Mexico-Canada Agreement (three countries), the European Union (twenty-seven countries, after Brexit), African Continental Free Trade Area (fifty-five countries), Mercosur (five countries), the Pacific Alliance (four countries) are based on statistics of the World Bank at <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD> and the International Monetary Fund at [www.imf.org/external/datamapper/PPPSH@WEO/OEMDC/ADVEC/WEOWORLD/VUT](http://www.imf.org/external/datamapper/PPPSH@WEO/OEMDC/ADVEC/WEOWORLD/VUT) (last visited Dec. 31, 2020).

<sup>5</sup> E.g., Theotonio Dos Santos, *The Structure of Dependence*, 60 *Am. Econ. Rev.* 231, 232–34 (1970); Fernando Henrique Cardoso & Enzo Faletto, *Dependency and Development in Latin America* 16–17 (Marjory Mattingly Urquidí trans., 1979).

<sup>6</sup> Alvin Y. So, *Social Change and Development: Modernization, Dependency, and World-System Theories* 95–102 (1990).

<sup>7</sup> *Id.* at 164–65.

<sup>8</sup> *Id.* at 157–64; Thomas Baron Gold, *State and Society in the Taiwan Miracle* 21–90 (1986).

relies on the cases of Taiwan and South Korea in the Second Regionalism, it can be applied to the Third Regionalism in which the Association of Southeast Asian Nations (ASEAN) played a pivotal role. The “ASEAN Plus Six” structure provides new empirical insight into the theory. In particular, the signing of the RCEP augments the economic and normative capacities of Asian developing countries. The collective power of these nations has enabled them to escape from the underdevelopment dilemma. Amid the World Trade Organization (WTO) impasse and eroding US influence, the RCEP further empowers these countries to fill the leadership vacuum left by America and to guide the emerging NREO.

The RCEP should be understood objectively without subscribing to the EU or US-centric standpoint of regionalism.<sup>9</sup> I will clarify the three main myths associated with this mega-FTA. First, the RCEP has been inaccurately portrayed as a China-led trade pact.<sup>10</sup> This understanding is parochial in situating the RCEP in the context of the US-China rivalry. It misses the larger picture of the RCEP’s impact on regional and multilateral trading systems. In fact, the RCEP was initiated and led by the ten-country ASEAN.<sup>11</sup> Although the role of China cannot be ignored, RCEP parties including Beijing recognize that the RCEP reinforces the “ASEAN centrality in regional frameworks.”<sup>12</sup> While the normative power of the EU has been coined as the “Brussels Effect,” what drove new Asia regionalism is the ASEAN Effect premised on the ASEAN Plus Six framework.<sup>13</sup> The RCEP will enhance the transformation of the “ASEAN way” from soft-law obligations into hard-law rules with structured flexibility.

<sup>9</sup> E.g., Amitav Acharya, *Whose Ideas Matter? Agency and Power in Asian Regionalism* 27 (2009); Fredrik Söderbaum, *Rethinking Regionalism* 7–8 & 175 (2016).

<sup>10</sup> E.g., Keith Bradsher & Ana Swanson, *China-Led Trade Pact Is Signed, in Challenge to U.S.*, Nov. 15, 2020, N.Y. Times, [www.nytimes.com/2020/11/15/business/china-trade-rcep.html](http://www.nytimes.com/2020/11/15/business/china-trade-rcep.html) (last visited Jan. 1, 2021).

<sup>11</sup> Joint Leaders’ Statement on the RCEP, *supra* note 1; Grace Ho, *RCEP Negotiators Recount Twists and Turns in 8-Year Journey to World’s Biggest Trade Pact*, Nov. 28, 2020, Straits Times, [www.straitstimes.com/business/economy/rcep-negotiators-recount-twists-and-turns-in-8-year-journey-to-worlds-biggest-trade](http://www.straitstimes.com/business/economy/rcep-negotiators-recount-twists-and-turns-in-8-year-journey-to-worlds-biggest-trade) (last visited Jan. 1, 2020).

<sup>12</sup> Joint Leaders’ Statement on the RCEP, *supra* note 1; Deng Xijun, *RCEP: Historic Milestone for ASEAN Centrality*, Nov. 20, 2020, Jakarta Post, [www.thejakartapost.com/academia/2020/11/20/rcep-historic-milestone-for-asean-centrality.html](http://www.thejakartapost.com/academia/2020/11/20/rcep-historic-milestone-for-asean-centrality.html) (last visited Jan. 1, 2021).

<sup>13</sup> For information on the Brussels Effect, see Anu Bradford, *The Brussels Effect: How the European Union Rules the World* 26–36 (2020).

Second, since the inception of its negotiations, the RCEP has been dubbed an FTA of low quality and ambition.<sup>14</sup> Even after its conclusion, RCEP leaders' proclamation of the RCEP "as a modern, comprehensive, high-quality and mutually beneficial agreement" is regarded as political rhetoric.<sup>15</sup> Criticism against the RCEP is often based on comparisons to the Trans-Pacific Partnership (TPP) or the CPTPP that incorporates higher-standard provisions and value-based commitments on labor and environmental protection. This position ignores two complementary approaches of regionalism. The vertical approach pursues innovative and high-standard norms but is accepted by a smaller number of countries. The horizontal approach stresses the multilateralization of WTO-plus and extra rules to which more developing countries are willing to adhere. While the CPTPP follows the former, the RCEP represents the latter. By 2030, the CPTPP and the RCEP are projected to increase annual global incomes by \$147 and \$186 billion, respectively.<sup>16</sup> Neither regionalism approach should be taken lightly.

I concede that the RCEP is a rule-taker. It does not seek to "invent" rules that are absent in US or EU FTAs. However, the membership and economic scale of the RCEP indicate that the "Western" rules it adopts became "Asian" rules of global significance. For instance, the RCEP's consolidation of rules of origins alone will yield immediate and substantial benefits to Asian businesses. The pragmatic incrementalism of ASEAN's internal and external FTAs also suggests that various review clauses of the RCEP will make it a "living agreement."

Finally, while the RCEP cements the FTA network among RCEP members, it may worsen trade fragmentation. From the FTA linkage perspective, the RCEP makes Japan a clear "winner," as Tokyo presently lacks bilateral FTAs with China, Korea and New Zealand.<sup>17</sup> The RCEP fills the void and serves as the benchmark for sequent negotiations of agreements such as the China-Japan-Korea FTA. Notwithstanding these benefits, commentators averred that Asian integration has been hindered by the "noodle bowl" syndrome, as complex and divergent rules of origin

<sup>14</sup> Jeffery D. Wilson, *Mega-Regional Trade Deals in the Asia-Pacific: Choosing Between the TPP and RCEP?* 45(2) *J. Contemp. Asia* 343, 349 (2015); Tim McDonald, What Is the Regional Comprehensive Economic Partnership (RCEP)? Nov. 16, 2020, BBC, [www.bbc.com/news/business-54899254](http://www.bbc.com/news/business-54899254) (last visited Jan. 1, 2020).

<sup>15</sup> Joint Leaders' Statement on the RCEP, *supra* note 1.

<sup>16</sup> Peter A. Petri & Michael G. Plummer, *East Asia Decouples from the United States: Trade War, COVID-19, and East Asia's New Trade Blocs*, Peterson Institute for International Economics Working Paper (2020), at 4–5.

<sup>17</sup> *RCEP: A Guide to the World's Largest Trade Agreement*, Asia House Advisory Briefing (2020), at 5.

under different FTAs limit their actual usage.<sup>18</sup> In reality, the syndrome has influenced other areas ranging from services and investment regulations to dispute settlement mechanisms.

An ideal solution is to enable the RCEP to replace internal FTAs and bilateral investment agreements (BITs). This clean-slate model was what Australia, New Zealand and Singapore advocated during TPP negotiations.<sup>19</sup> Nevertheless, neither the CPTPP nor the RCEP will supersede existing agreement between members. In particular, the RCEP reiterates the parties' intention for the RCEP to coexist with other agreements already in place.<sup>20</sup> While the RCEP will not eliminate the noodle bowl syndrome on a *de jure* basis, it will alleviate the trade fragmentation problem on a *de facto* basis, galvanizing businesses to utilize the RCEP over existing pacts.

The chapter offers insight into the evolution of the RCEP and argues that this mega-FTA serves as a milestone for new Asian regionalism. It will examine how the RCEP converges the legal and political agendas of ASEAN and China. It will also explain India's decision to withdraw from RCEP negotiations in 2019.<sup>21</sup> The chapter will shed light on the RCEP's role in consolidating rules of origin, regulations services, as well as arguably weaker provisions on investment protection, government procurement and electronic commerce (e-commerce). A comparative analysis will be based on contemporary agreements such as ASEAN Plus One FTAs and the CPTPP. Lastly, the chapter will assess the systemic impact of the RCEP on regional and global trading systems. Prospective normative conflicts due to overlapping agreements and the institutionalization of the RCEP Secretariat will be of significance to world trade law.

## II Legal and Political Agendas of Asian Powers

The shift of economic gravity to Asia marks the most salient feature of the Third Regionalism. By 2050, 52 percent of global GDP will arise from Asia, enabling the region to attain a dominant economic status that it once possessed before the eighteenth-century Industrial

<sup>18</sup> Richard Baldwin & Masahiro Kawai, *Multilateralizing Asian Regionalism*, ADBI Working Paper Series, No. 431 (2013), at 11–12; AEC Blueprint 2025, para. 10(ii).

<sup>19</sup> Deborah K. Elms & C. L. Lim, *An Overview and Snapshot of the TPP Negotiations*, in *The Trans-Pacific Partnership: A Quest for a Twenty-first-Century Trade Agreement* 21, 35–37 (C. L. Lim et al. eds. 2012).

<sup>20</sup> Regional Comprehensive Economic Partnership (2020) (RCEP), art. 20.2.

<sup>21</sup> E.g., Surendar Singh & Ram Singh, *Domestic Sources of India's Trade Policy References in RCEP Negotiations*, 54(4) *J. World Trade* 503, 503–13 (2020).

Revolution.<sup>22</sup> China, Japan, ASEAN and India are among the world's top six largest economies.<sup>23</sup> China's rapid recovery from the COVID-19 pandemic is expected to allow the country to overtake America as the number one economy in 2028.<sup>24</sup> India and ASEAN will also become the world's third and fourth largest economies, respectively.<sup>25</sup>

In the 1990s, the evolution of the Asia-Pacific Economic Cooperation (APEC) escalated aspirations for Asian regionalism. Due to its institutional weakness, APEC itself has achieved no major breakthroughs from the Bogor Goals, which had targeted "free and open trade and investment in the Asia-Pacific" by 2020.<sup>26</sup> The Asian financial crisis exacerbated Asian leaders' frustrations over US-dominated global financial institutions and prompted the creation of the "ASEAN Plus Three" framework for currency stability.<sup>27</sup> The subsequent global financial crisis further accelerated Asian integration. The ASEAN-based framework evolved into the ASEAN Plus Six structure that forms the normative basis for the Asian FTA network.

### A ASEAN Centrality

ASEAN is not regarded as a conventional power. European integration has been premised on French-German cooperation, whereas ASEAN centrality became a consensus for new Asian regionalism because of the China-Japan rivalry. Beijing and Tokyo have been Asia's strongest regional powers since the Meiji Restoration. At the inception of the Third Regionalism, they vigorously competed for Asia's economic leadership. In 2001, the East Asian Vision Group proposed the East Asian Free Trade Area (EAFTA).<sup>28</sup> China preferred the EAFTA proposal, which was based on the ASEAN Plus Three framework.

<sup>22</sup> Asian Development Bank, *Asia 2050: Realizing the Asian Century: Executive Summary* (2011), at 3–5.

<sup>23</sup> ASEAN Secretariat, *ASEAN Key Figures 2020* (2020), at 39.

<sup>24</sup> Centre for Economics and Business Research (CEBR), *World Economic League Table 2021* (2020), at 70–71.

<sup>25</sup> *Id.* at 113–14; Australian Government, *ASEAN's Economic Growth*, [www.austrade.gov.au/asean-now/why-asean-matters-to-australia/asean-economic-growth/](http://www.austrade.gov.au/asean-now/why-asean-matters-to-australia/asean-economic-growth/) (last visited Jan. 4, 2021).

<sup>26</sup> 1994 Leaders' Declaration (1994), para. 6.

<sup>27</sup> ASEAN Plus Three countries (China, Korea and Japan) created the currency swap arrangement, the Chiang Mai Initiative, which was the predecessor to the Chiang Mai Initiative Multilateralisation Agreement.

<sup>28</sup> *Report of the East Asian Vision Group II (EAVGII)* (2012), at 43–46; Rodolfo C. Severino, *Japan's Relations with ASEAN*, in *ASEAN-Japan Relations* 17, 26–28 (Takashi Shiraishi & Takaaki Kojima eds. 2014).

In 2006, Japan proposed the alternative Comprehensive Economic Partnership for East Asia (CEPEA), which extended membership of the EAFTA to ASEAN Plus Six parties.<sup>29</sup> Tokyo favored the CEPEA because India, Australia and New Zealand would counterbalance Chinese influence and the CEPEA would help implement the Fukuda Doctrine by enhancing ties with ASEAN.<sup>30</sup> In the meantime, APEC's Free Trade Area of the Asia Pacific (FTAAP) proposal and the Obama administration's plan to join TPP negotiations made roadmaps to Asian regionalism increasingly complex.<sup>31</sup>

In 2009, leaders of the East Asia Summit began to task their officials with evaluating EAFTA and CEPEA proposals, which were later incorporated into a joint Chinese and Japanese initiative.<sup>32</sup> In 2011, to avoid being marginalized and to buttress the ASEAN centrality, the bloc "ended the debate by proposing its own model for" the FTA, known as the RCEP, which would serve as an alternative pathway to the FTAAP.<sup>33</sup> The ASEAN Framework for the RCEP highlighted this mega-FTA as "an ASEAN-led process."<sup>34</sup> ASEAN also outlined key principles, including the inclusion of "an open accession clause" and "special and differential treatment" accorded to Cambodia, Laos, Myanmar and Vietnam (CLMV countries).<sup>35</sup>

Pursuant to the subsequent Guiding Principles and Objectives for the RCEP, ASEAN Plus Six leaders essentially agreed to merge EAFTA and CEPEA initiatives and to utilize the RCEP to improve existing ASEAN Plus One FTAs.<sup>36</sup> After sixteen leaders announced the RCEP at the East

<sup>29</sup> Severino, *supra* note 28, at 27–28; Tamura Akihiko, "Extrovert Regionalism" – CEPEA Portends Direction of Japan's New Trade Policy, Japan Spotlight, Jul./Aug. 2017, at 38.

<sup>30</sup> Seungjoo Lee, *Institutional Balancing and the Politics of Mega-FTAs in East Asia*, 56 Asian Survey 1055, 1069 (2016); Suetō Sudo, Japan's ASEAN Policy: In Search of Proactive Multilateralism 69–75 (2015).

<sup>31</sup> Asia-Pacific Economic Cooperation (APEC), *ABAC Recommendations to APEC Leaders*, Nov. 11, 2004, [www.apec.org/Press/News-Releases/2004/1111\\_abacrecmldleaders](http://www.apec.org/Press/News-Releases/2004/1111_abacrecmldleaders) (last visited Jan. 4, 2021); Ian F. Fergusson & Brock R. Williams, *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress*, Congressional Research Service (2016), at 1–3.

<sup>32</sup> Department of Foreign Affairs and Trade (DFAT), *Background to the Regional Comprehensive Economic Partnership (RCEP) Initiative*, [www.dfat.gov.au/trade/agreements/negotiations/rcep/Pages/background-to-the-regional-comprehensive-economic-partnership-rcep-initiative](http://www.dfat.gov.au/trade/agreements/negotiations/rcep/Pages/background-to-the-regional-comprehensive-economic-partnership-rcep-initiative) (last visited Jan. 5, 2020).

<sup>33</sup> *Id.*

<sup>34</sup> See generally ASEAN Framework for Regional Comprehensive Economic Partnership (2011).

<sup>35</sup> *Id.*

<sup>36</sup> See generally Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (2012) (RCEP Guiding Principles and Objectives).



Asia Summit, negotiations commenced in 2013.<sup>37</sup> In 2015, the original deadline for completing the RCEP became unachievable because of divergent development levels and conflicting priorities among members.<sup>38</sup> The rapid development of the TPP under US leadership overshadowed the RCEP. When the TPP was concluded in 2016, RCEP parties were still working on market access commitments without producing the text of the agreement.<sup>39</sup>

President Donald Trump's "America first" policy changed the game. His decision to withdraw the United States from the TPP in 2017 shifted Asia-Pacific countries' focus back to the RCEP. The new CPTPP talks and the US-China trade war expedited RCEP negotiations. Following thirty rounds of negotiations and various ministerial and leaders' meetings, RCEP parties finally concluded the mega-FTA with twenty chapters and associated annexes in 2020.<sup>40</sup> Amid the recession caused by COVID-19, the RCEP also represents Asian countries' normative response to trade revitalization.

For ASEAN, the RCEP helps accomplish the "Global ASEAN" objective of the ASEAN Economic Community (AEC) Blueprint 2025 by "integrating the AEC into the global economy."<sup>41</sup> From 2002 to 2017, ASEAN concluded six ASEAN Plus One FTAs with China, Japan, India, South Korea, Hong Kong, Australia and New Zealand.<sup>42</sup> To address the criticism against the RCEP, I contend that the amendments and upgraded negotiations of ASEAN Plus One FTAs demonstrate the pragmatic incrementalism of the ASEAN way.<sup>43</sup> These FTA experiences suggest that the RCEP will evolve and should not be overlooked based on its current form.

<sup>37</sup> DFAT, *supra* note 32; Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership (2012); DFTA, *RCEP News*, [www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/news](http://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/news) (last visited Jan. 5, 2021).

<sup>38</sup> RCEP Guiding Principles and Objectives, sec. VIII.

<sup>39</sup> DFAT, *Eleventh Round of Negotiations – 15–19 February 2016, Bander Seri Begawan, Brunei Darussalam*, [www.dfat.gov.au/trade/agreements/negotiations/rcep/news/Pages/eleventh-round-of-negotiations-15-19-february-2016-bander-seri-begawan-brunei-darussalam](http://www.dfat.gov.au/trade/agreements/negotiations/rcep/news/Pages/eleventh-round-of-negotiations-15-19-february-2016-bander-seri-begawan-brunei-darussalam) (last visited Jan. 5, 2021).

<sup>40</sup> DFAT, *supra* note 37.

<sup>41</sup> ASEAN Economic Community Blueprint 2025 (2015), para. E.

<sup>42</sup> See generally ASEAN, *Free Trade Agreements with Dialogue Partners*, <https://asean.org/asean-economic-community/free-trade-agreements-with-dialogue-partners/> (last visited Jan. 5, 2021).

<sup>43</sup> ASEAN Secretariat, *supra* note 4, at 132. For the analysis of the pragmatic incrementalism in domestic law, see Shyamkrishna Balganes, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63(6) *Vanderbilt L. Rev.* 1543, 1564–67 (2010); Arie Freiberg, *Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?* 20 (2) *L. in Context* 6, 11 (2003).



The RCEP provides a legal foundation for consolidating Asia-Pacific FTAs and advancing the ASEAN centrality in regional frameworks. The RCEP evidences that new Asian regionalism is operated on the “ASEAN consensus” rather than the Washington or Beijing consensus. As the new dependency theory posits, the RCEP will enable the collective power of the South to play a leadership role in shaping the trade-development nexus and new relations with the North.

### B *China As the Largest RCEP Economy*

Since Deng Xiaoping’s economic reform in the 1970s, China has ascended to a “new great power” at the global stage.<sup>44</sup> The United States and the EU now perceive China as a “serious competitor” or “systemic rival” not simply because of China’s economic and industrial preeminence, but also because it advocates for a mercantilist Leninist model of development.<sup>45</sup> The Beijing model challenges Western dominance in the developing world. Departing from neoliberal private enterprise-based market economies, the PRC’s approach combines authoritarian governance with large-scale infrastructure investment by state-owned enterprises (SOEs).<sup>46</sup> As the RCEP and Chinese FTAs illustrate, values-based considerations such as human rights and sustainable development are “delinked” from China’s trade agreements and foreign economic policy.

As the largest RCEP economy, China’s evolving legal and political agenda underlies its motivation for pursuing the mega-FTA. First, as “legitimacy concerns first and foremost the right to govern,” the authority of the Chinese Communist Party has been premised on China’s economic performance rather than democratic authorization of political power.<sup>47</sup> Similar to the rationale for China to enter the WTO, Chinese leaders have pursued the “two-level game” for utilizing FTAs to internalize international commitments, hence locking in and accelerating domestic

<sup>44</sup> Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24(3) Eur. J. Int’l L. 755, 775–90 (2013).

<sup>45</sup> Lia Eustachewich, *Joe Biden Calls Russia an “Opponent,” China a “Competitor” during Town Hall*, Sept. 18, 2020, N.Y. Post, <https://nypost.com/2020/09/18/joe-biden-calls-russia-an-opponent-and-china-a-competitor/> (last visited Nov. 26, 2020); European Commission & High Representative of the Union for Foreign Affairs and Security Policy, *EU-China – Strategic Outlook*, Joint (2019) 5 final (2019), at 1.

<sup>46</sup> Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?* 23(3) J. Int’l Econ. L. 607, 610–11 (2020).

<sup>47</sup> Jean Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility* 10 (2002).

economic reform.<sup>48</sup> The RCEP allows the central government to incrementally intensify external pressure on the domestic industry. Regardless of criticism against the RCEP, it cannot be ignored that China, for the first time, agreed on the more liberal negative list of investment and on the transfer of cross-border data and the prohibition of data localization.<sup>49</sup>

China's 14th five-year plan (2021–25) and 2035 version call for a “dual circulation” development strategy.<sup>50</sup> In President Xi Jinping's words, China will use its “super-large market scale and the potential of domestic demand to establish a new development pattern featuring domestic and international dual circulations that complement each other.”<sup>51</sup> The dual circulation strategy responds to the economic recession caused by the US-China trade war and the COVID-19 pandemic. It aims to stimulate domestic consumption and demand to remedy the weakness of the current export-oriented economy. The RCEP will provide the impetus for the domestic restructuring that is essential to bolster domestic productivity and consumption.

Second, China has shifted from a passive participant to an assertive stakeholder in global rulemaking. As the most powerful PRC leader in the post-Mao Zedong era, Xi brought Deng's concept of “socialism with Chinese characteristics” to an unprecedented level. According to Xi's “Chinese dream of national rejuvenation,” China will construct “a socialism that is superior to capitalism” and seek “the dominant position” in

<sup>48</sup> Jacques deLisle, *China's Rise, the U.S., and the WTO: Perspectives from International Relations Theory*, 2018 Univ. Ill. L. Rev. 57, 64 (2018); Jappe Eckhardt & Hongyu Wang, *China's New Generation Trade Agreements: Importing Rules to Lock in Domestic Reform*, Reg. & Governance (2019), <https://onlinelibrary.wiley.com/doi/abs/10.1111/rego.12258> (last visited Jan. 6, 2021).

<sup>49</sup> Wang Fan, *China Vows to Expand Global Free Trade Area Network*, Nov. 25, 2020, ECNS, [www.ecns.cn/news/economy/2020-11-25/detail-ihaeatyh1835100.shtml](http://www.ecns.cn/news/economy/2020-11-25/detail-ihaeatyh1835100.shtml) (last visited Jan. 6, 2021); Ines Willems, *The EU, China and the Free Flow of Data – How Domestic Concerns Might Prevent Agreement at the Multilateral Level*, Nov. 15, 2019, [www.qmul.ac.uk/euplant/blog/items/the-eu-china-and-the-free-flow-of-data-how-domestic-concerns-might-prevent-agreement-at-the-multilateral-level.html](http://www.qmul.ac.uk/euplant/blog/items/the-eu-china-and-the-free-flow-of-data-how-domestic-concerns-might-prevent-agreement-at-the-multilateral-level.html) (last visited Jan. 6, 2021); Regional Comprehensive Economic Partnership (2020) (RCEP), arts. 12.14 & 12.15.

<sup>50</sup> 中共中央关于制定国民经济和社会发展第十四个五年规划和二〇三五年远景目标的建议 [The Central Committee of the Chinese Community Party's Proposals for Formulating the 14th Five-Year Plan (2021–25) for National Economic and Social Development and the Long-Range Objectives through the Year 2035] (2020) (14th Five-Year Plan), [www.gov.cn/zhengce/2020-11/03/content\\_5556991.htm](http://www.gov.cn/zhengce/2020-11/03/content_5556991.htm) (last visited Dec. 10, 2020).

<sup>51</sup> Denise Jia, “Dual Circulation”: 5 Things to Know about China's New Economic Development Strategy, Sept. 8, 2020, Straits Times, [www.straitstimes.com/asia/east-asia/chinas-new-economic-development-pattern-of-dual-circulation-5-things-to-know-about-it](http://www.straitstimes.com/asia/east-asia/chinas-new-economic-development-pattern-of-dual-circulation-5-things-to-know-about-it) (last visited Jan. 6, 2020); CEBR, *supra* note 24, at 70.

the world.<sup>52</sup> Launched in 2013, the Belt and Road Initiative (BRI) is recognized as Xi's noteworthy initiative to realize his "Chinese dream."<sup>53</sup> The BRI is also commonly known as One Belt One Road, which denotes Beijing's Silk Road Economic Belt and the twenty-first-century Maritime Silk Road. Absent a treaty-based framework, the BRI is primarily a soft law-based scheme.<sup>54</sup>

Enforcing the BRI requires institutional support and hard-law agreements. The China-led Asian Infrastructure Investment Bank (AIIB) represents the BRI-centered institution. The AIIB provides concessional loans for infrastructure building to facilitate the export of Chinese production, capital and labor, thus filling Asian countries' needs, which US-dominated financial institutions cannot fulfill. As AIIB membership includes all RCEP countries except Japan, the bank will be the financial cornerstone of the BRI and the RCEP.<sup>55</sup>

In 2015, China's State Council adopted the BRI as the guiding principle for Chinese FTAs.<sup>56</sup> The 14th five-year plan also pledges to pursue the BRI-based development plan and a "high-standard FTA network."<sup>57</sup> In addition to FTAs, China's recent BITs have included more comprehensive rules such as investment protection provisions.<sup>58</sup> The finalization of the RCEP and the EU-China Comprehensive Agreement on Investment in 2020 represents the most recent, concrete results of the BRI. In particular, the RCEP strengthens China's power of discourse in international lawmaking and refutes US protectionism by "showing that multilateralism and free trade is the right way."<sup>59</sup>

<sup>52</sup> Office of the Secretary of State, *The Elements of the China Challenge* (2020), at 4–36.

<sup>53</sup> Julien Chaisse & Mitsuo Matshshita, *China's "Belt and Road" Initiative: Mapping the World Trade Normative and Strategic Implications*, 52(1) *J. World Trade* 163, 165–70 (2018).

<sup>54</sup> Heng Wang, *China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability*, 22(1) *J. Int'l Econ. L.* 29, 35–41 (2019).

<sup>55</sup> Asian Infrastructure Investment Bank, *Members and Prospective Members of the Bank*, Jan. 6, 2021, [www.aiib.org/en/about-aiib/governance/members-of-bank/index.html](http://www.aiib.org/en/about-aiib/governance/members-of-bank/index.html) (last visited Jan. 7, 2021).

<sup>56</sup> State Council, 国务院关于加快实施自由贸易区战略的若干意见 [Several Opinions of the State Council on Accelerating the Implementation of the Strategies for Free Trade Areas] (2015).

<sup>57</sup> 14th Five-Year Plan, *supra* note 50.

<sup>58</sup> Wendy Leutert & Zachary Haver, *From Cautious Interaction to Mature Influence: China's Evolving Engagement with the International Investment Regime*, 93(1) *Pac. Aff.* 59, 70–73 (2020); Julien Chaisse & Jamieson Kirkwood, *Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty*, 23(1) *J. Int'l Econ. L.* 245, 251–52 (2020).

<sup>59</sup> Ministry of Foreign Affairs of the People's Republic of China, *Li Keqiang Attends the 4th RCEP Summit*, Nov. 15, 2020, [www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1832894.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1832894.shtml) (last visited Jan. 7, 2021).

Finally, the RCEP buttresses China's efforts to deepen ties with ASEAN and undermine US hegemony in Asia. In essence, the RCEP implements the Chinese version of the Monroe Doctrine and enables Beijing to garner support from ASEAN countries, which Obama and Trump administrations sought to lure under their TPP and Indo-Pacific strategies. Notably, China was the first ASEAN Dialogue Partner that concluded an ASEAN Plus One FTA and their subsequent Upgrade Protocol was implemented in 2019.<sup>60</sup> As locomotives for the Asian economy, ASEAN and China have become each other's largest trading partner.<sup>61</sup> As the world's most crucial South-South FTA, the evolving ASEAN-China FTA provides valuable lessons for the RCEP to be a "living agreement." The ASEAN-China FTA and the RCEP collectively fortify China's economic and political leverage in US-China conflicts, which will likely continue during the presidency of Joe Biden.

### C India's Withdrawal

India was a RCEP negotiating party. Its decision to opt out of RCEP talks in 2019 "was a political call at the highest level."<sup>62</sup> According to Indian Prime Minister Narendra Modi, "neither Gandhi's policy of self-reliance nor [his] wisdom" supports India's participation in the RCEP.<sup>63</sup> India's positions on the WTO, ASEAN and China have influenced its policy on the RCEP. Since 2017, India's annual merchandise trade deficit has exceeded \$160 billion.<sup>64</sup> The robust services sector contributes to India's services surplus, which only covers 53.9 percent of its deficit in merchandise trade.<sup>65</sup>

To protect farmers, India included high bound tariff rates on agricultural products in its WTO commitments and currently applies average tariff rates of 32.7 percent on agricultural imports in order to protect the

<sup>60</sup> ASEAN, *supra* note 42; ASEAN Secretariat, *supra* note 4, at 132.

<sup>61</sup> ASEAN Secretariat, *supra* note 4, at 127; *The State Council of the People's Republic of China, Full Text: Speech by Premier Li Keqiang at 23rd China-ASEAN Summit*, Nov. 13, 2020, [http://english.www.gov.cn/premier/speeches/202011/13/content\\_WS5fade6db c6d0f7257693f972.html](http://english.www.gov.cn/premier/speeches/202011/13/content_WS5fade6db c6d0f7257693f972.html)

<sup>62</sup> Nirmala Ganapathy, *Indian Official Says Delhi's Thinking Over Pact Has Not Changed*, Nov. 16, 2020, *Straits Times*, at A9.

<sup>63</sup> Prachi Priya & Aniruddha Ghosh, *India's Out of RCEP: What's Next for the Country and Free Trade?* Nov. 15, 2020, *Diplomat*, <https://thedi diplomat.com/2020/12/indias-out-of-rcep-whats-next-for-the-country-and-free-trade/> (last visited Jan. 7, 2020).

<sup>64</sup> World Trade Organization (WTO), *Trade Policy Review, Report by India*, WT/TPR/G403 (2020), at 6.

<sup>65</sup> *Id.* at 8–9.

domestic industry.<sup>66</sup> At the WTO, India has advocated for the liberalization of liberalizing labor mobility, known as Mode 4 within the definition of the General Agreement on Trade in Services (GATS).<sup>67</sup> This strategy facilitates the exportation of India's information technology (IT)-related professional services. India's withdrawal from RCEP talks should not be construed as a policy against ASEAN. In fact, India has supported the ASEAN centrality and acknowledged the significance of bilateral economic relations, making India the sixth largest trading partner of ASEAN.<sup>68</sup> The ASEAN Outlook on the Indo-Pacific also signifies ASEAN's intention to further engage India.<sup>69</sup>

In the 1990s, India's "Look East Policy," which sought to forge neglected economic links to East Asia, led to the 2003 ASEAN-India Framework Agreement, as well as FTAs with Thailand, Singapore and Malaysia.<sup>70</sup> Nevertheless, in the ASEAN-India trade pact, Indian agricultural products are largely immune to liberalization, as they are either excluded or scheduled under the sensitive track.<sup>71</sup> The fact that bilateral services and investment agreements were only concluded in 2014, eleven years after the Framework Agreement, demonstrates India's conservative stance.<sup>72</sup> The services commitments are barely GATS-plus and mutual recognition arrangements have limited progress.<sup>73</sup> At present, India only

<sup>66</sup> Dutch Ministry of Agriculture, *Nature and Food Quality, Tariff Changes on Import of Agricultural Products in India*, Mar. 13, 2020, [www.agroberichtenbuitenland.nl/actueel/nieuws/2020/03/13/tariff-changes-agricultural-products-in-india](http://www.agroberichtenbuitenland.nl/actueel/nieuws/2020/03/13/tariff-changes-agricultural-products-in-india) (last visited Jan. 7, 2021).

<sup>67</sup> See generally Special Session of the Council for Trade in Services, Communication from India: Proposed Liberalisation of Movement of Professionals Under General Agreement on Trade in Services (GATS), WTO Doc. S/CSS/W/12 (2000); Special Session of the Council for Trade in Services, Communication from Brazil, Colombia, Dominican Republic, El Salvador, India, Indonesia, Nicaragua, The Philippines and Thailand: Review of Progress in Negotiations, Including Pursuant to Paragraph 15 of the Guidelines for Negotiations, WTO Doc. TN/S/W/23 (2004).

<sup>68</sup> Chairman's Statement of the 17th ASEAN-Indian Summit (2020), paras. 4 & 7.

<sup>69</sup> *Id.* para. 6.

<sup>70</sup> WTO, *supra* note 64, at 18; Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* 290–94 (2006).

<sup>71</sup> Razeen Sally, *ASEAN FTAs: State of Play and Outlook for ASEAN's Regional and Global Integration*, in *The ASEAN Economic Community: A Work in Progress* 320, 356–57 (Sanchita Basu Das et al. eds. 2013).

<sup>72</sup> ASEAN, *supra* note 42.

<sup>73</sup> See ISEAS Yusof Ishak Institute, *Webinar on "Trade Implication of RCEP for ASEAN and India"*, Dec. 15, 2020, [www.iseas.edu.sg/media/event-highlights/webinar-on-trade-implication-of-rcep-for-asean-and-india/](http://www.iseas.edu.sg/media/event-highlights/webinar-on-trade-implication-of-rcep-for-asean-and-india/) (last visited Jan. 8, 2021) (referring to Pralok Gupta's observations).

accounts for 2.9 percent of ASEAN's total trade.<sup>74</sup> As the FTA has exacerbated deficits and failed to generate much services exports, the Modi administration pledged not to "repeat the mistake" in RCEP negotiations.<sup>75</sup>

Arguably, the RCEP could benefit Modi's "Act East Policy," which he announced in 2014 with the aim of adopting more action-based strategies to revitalize economic relations with Asian partners.<sup>76</sup> In particular, the RCEP could advance the "Make in India" campaign to transform the country into a global manufacturing hub.<sup>77</sup> Contrary to Indian leaders' pessimistic view, empirical studies suggest that the RCEP will have an enormous income effect on India. Joining the RCEP can help India gain \$60 billion, whereas withdrawing from the pact will result in a \$6 billion loss.<sup>78</sup>

Notwithstanding potential positive effects, India had specific reasons for its opposition to the RCEP. India had trade deficits of more than \$100 billion with all RCEP parties except Cambodia, Laos, Myanmar and the Philippines.<sup>79</sup> Lower-cost dairy products from Australia and New Zealand and industrial goods from China were main concerns.<sup>80</sup> In particular, India runs a trade deficit of \$53 billion with China and border disputes that caused the death of Indian soldiers made the RCEP with Beijing politically unacceptable.<sup>81</sup>

Based on its WTO and ASEAN-India FTA experiences, India intended to tie its tariff concessions to access to other services markets, but RCEP members' services commitments disappointed New Delhi. During negotiations, India proposed to grant RCEP countries 42.5 percent to 80 percent tariff reductions, depending on three categories of

<sup>74</sup> ASEAN Secretariat, *supra* note 4, at 127.

<sup>75</sup> Amiti Sen, *India Pushes for Easy Visa for Professionals under RCEP*, Nov. 23, 2018, Hindu Bus. Line, [www.thehindubusinessline.com/economy/india-pushes-for-easy-visa-for-professionals-under-rcep/article7792816.ece](http://www.thehindubusinessline.com/economy/india-pushes-for-easy-visa-for-professionals-under-rcep/article7792816.ece) (last visited Jan. 8, 2021).

<sup>76</sup> Ashok Sajjanhar, *Taking Stock of India's "Act East Policy,"* ORF Issue Brief, No. 142 (2016), at 1–4.

<sup>77</sup> WTO, *supra* note 64, at 11.

<sup>78</sup> Petri & Plummer, *supra* note 16, at 24.

<sup>79</sup> Gaurav Choudhury, *India Decides Not to Join RCEP: Decoding the Reasons behind Its Decision*, Nov. 4, 2019, [www.moneycontrol.com/news/economy/policy/india-decides-not-to-join-rcep-decoding-the-reasons-behind-its-decision-4602701.html](http://www.moneycontrol.com/news/economy/policy/india-decides-not-to-join-rcep-decoding-the-reasons-behind-its-decision-4602701.html) (last visited Jan. 8, 2021); Sachin Kumar Sharma et al., *A Quantitative Assessment of India's Withdrawal from RCEP: Issues and Concerns* (2020), at 6–7.

<sup>80</sup> ISEAS Yusof Ishak Institute, *supra* note 73; Sharma et al., *supra* note 79, at 7.

<sup>81</sup> Choudhury, *supra* note 79; Prachi Priya & Aniruddha Ghosh, *India's Out of RCEP: What's Next for the Country and Free Trade?* Dec. 15, 2020, Diplomat, <https://thediplomat.com/2020/12/indias-out-of-rcep-whats-next-for-the-country-and-free-trade/> (last visited Jan. 8, 2021).

countries.<sup>82</sup> RCEP parties turned down this proposal. They also rejected India's demand to be excluded from most-favored-nation (MFN) requirements for investment and to include "an auto-trigger mechanism" that could be invoked against unexpected flows of imports.<sup>83</sup>

For Australia, China and New Zealand, Modi's decision means a loss of an exceptional opportunity to forge the FTA link with India. When the RCEP was concluded in 2020, RCEP ministers included a declaration that indicated "their strong will to re-engage India in the RCEP" and authorized India to participate in RCEP meetings as an observer prior to its accession.<sup>84</sup> Despite these efforts, it is unlikely that New Delhi will soon change its cautious position on the RCEP.

### III Strengths and Weaknesses of the RCEP

There are currently thirty FTAs that cover 83 percent of international trade among RCEP members.<sup>85</sup> A common approach to assessing the RCEP's extra benefits to Asian integration is to compare the RCEP with the "high-standard" TPP or the CPTPP. Commentators following this approach often reached a conclusion that dismissed the meaningful impact of the RCEP. This viewpoint does not stand. It ignores the impact of the RCEP's economic scale on FTA developments. For instance, the RCEP improved ASEAN Plus One FTAs in four areas, including competition, e-commerce, government procurement and intellectual property rights.<sup>86</sup>

Given the diverse economic stages of fifteen parties, the RCEP pursues pragmatism instead of perfectionism. As Table 3.1 below demonstrates, the RCEP does not include key CPTPP rules on SOEs, labor and environmental protection, anti-corruption and investor-state dispute settlement (ISDS). Unlike modern US and EU FTAs, the RCEP's omission of

<sup>82</sup> Singh & Singh, *supra* note 21, at 511; *see also* Asit Ranjan Mishra, India's New Stance at RCEP May Benefit China, Aug. 9 2016, Livemint, [www.livemint.com/Politics/qGEPZqVoHO4U4YYvfBgCNP/Indias-new-stance-at-RCEP-may-benefit-China.html](http://www.livemint.com/Politics/qGEPZqVoHO4U4YYvfBgCNP/Indias-new-stance-at-RCEP-may-benefit-China.html) ("[India] proposed 80% tariff cuts to [ASEAN] countries, 65% to South Korea and Japan and finally 42.5% tariff liberalization to China, Australia and New Zealand with which it does not have free-trade agreements.").

<sup>83</sup> Choudhury, *supra* note 79; ISEAS Yusof Ishak Institute, *supra* note 73.

<sup>84</sup> Ministers' Declaration on India's Participation in the Regional Comprehensive Economic Partnership (RCEP) (2020) (Ministers' Declaration on India's Participation).

<sup>85</sup> United Nations Economic and Social Commission for Asia and the Pacific (UN ESCAP), *Preferential Trade Agreements in Asia and the Pacific: Trends and Development, Asia-Pacific Trade and Investment Trends 2020/2021* (2020), at 7 & fn. 8.

<sup>86</sup> *See* ISEAS Yusof Ishak Institute, *supra* note 73 (referring to Sulaimah Mahmood's discussion).



Table 3.1 Comparison between the RCEP and the CPTPP<sup>87</sup>

	RCEP	CPTPP	Notes
Status	Signed in 2020	Signed and entered into force in 2018	12-member TPP was signed in 2016
Members	15 India withdrew in 2019	11 United States withdrew in 2017	7 common members: Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, Vietnam
Global trade	28%	15%	
Global population	30%	7%	
Contents	20 Chapters	30 Chapters	Main CPTPP areas not covered in the RCEP: SOEs, Labor, Environment, Anti-corruption, ISDS
Countries/economies that intend to join	Hong Kong	China, Columbia, Indonesia, Philippines, Korea, Thailand, Taiwan, United Kingdom	

<sup>87</sup> Petri & Plummer, *supra* note 16, at 7–9; RCEP. *A Guide to the World's Largest Trade Agreement*, *supra* note 17, at 1–3; Fung Business Intelligence, *RCEP: A Game Changer for Trade in Asia – Textile and Apparel Supply Chains Are Key Beneficiaries* (2020), at 5; DFAT, *CPTPP News*, [www.dfat.gov.au/trade/agreements/in-force/cptpp/news/cptpp-news](http://www.dfat.gov.au/trade/agreements/in-force/cptpp/news/cptpp-news) (last visited Jan. 8, 2020); Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) (CPTPP).

these sensitive areas reflects the need to balance comprehensiveness with regulatory sovereignty. Presumably, the RCEP's strategy of "having the deal first and establishing details later" is embedded in Asia's legal practice, which is distinct from that of Western legalist culture.

### A *Incremental Tariff Liberalization and Trade Facilitation*

The level of tariff cuts provides a key reference for the RCEP's quality. While the CPTPP will eventually lead to 99 percent of tariff elimination rate, the RCEP aims to make 92 percent of goods traded among members duty free.<sup>88</sup> The RCEP's tariff concessions are not significant compared to those of ASEAN's external FTAs. The average tariff elimination of the ASEAN-Japan FTA, the ASEAN-Korea FTA, the ASEAN-China FTA and the ASEAN-Australia-New Zealand FTA ranges from 92.8 percent to 95.7 percent.<sup>89</sup>

#### 1 Exclusions and Extended Phase-In Periods

During negotiations, agricultural and automotive products emerged as challenging issues.<sup>90</sup> A compromise was achieved by excluding or extending the phase-in periods for these sensitive goods. Duties will remain in place for 39 percent of ASEAN's food exports, and Japan will keep its current tariffs on beef, dairy, sugar, pork, rice and wheat, all of which were eliminated under the CPTPP.<sup>91</sup> The phase-in periods in tariff schedules make it easier for domestic industries to make the necessary adjustments and upgrades. The four ASEAN Plus One FTAs above grant extra flexibility to CLMV countries, allowing tariff elimination for selected products in ten to eighteen years from the date of ratification.<sup>92</sup> The RCEP is even

<sup>88</sup> Government of Canada, About Tariff Elimination under the CPTPP, Feb. 11, 2019, [www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpp/tariff-elimination-droits\\_de\\_douane.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpp/tariff-elimination-droits_de_douane.aspx?lang=eng) (last visited Jan. 11, 2021); Ministry of Trade Industry Singapore (MTI), *Regional Comprehensive Economic Partnership Agreement Signed* (2020), at 4.

<sup>89</sup> Yoshifumi Fukunaga & Ikumo Isono, *Taking ASEAN+1 FTAs towards the RCEP: A Mapping Study*, ERIA Discussion Paper Series, ERIA-DP-2013-2 (2013), at 8.

<sup>90</sup> Ho, *supra* note 11.

<sup>91</sup> Stephen Olson, *Keep RCEP in Perspective*, Nov. 17, 2020, *Hinrich Foundation*, [www.hinrichfoundation.com/research/article/ftas/keep-rcep-in-perspective/](http://www.hinrichfoundation.com/research/article/ftas/keep-rcep-in-perspective/) (last visited Jan. 11, 2021); *The Meaning of RCEP, the World's Biggest Trade Agreement*, Nov. 15, 2020, *Economist*, [www.economist.com/finance-and-economics/2020/11/15/the-meaning-of-rcep-the-worlds-biggest-trade-agreement](http://www.economist.com/finance-and-economics/2020/11/15/the-meaning-of-rcep-the-worlds-biggest-trade-agreement) (last visited Jan. 11, 2021).

<sup>92</sup> Shujiro Urata, *Constructing and Multilateralizing the Regional Comprehensive Economic Partnership: An Asian Perspective*, ADBI Working Paper Series, No. 449 (2013), at 14–15.

more flexible. The phase-in periods can extend to twenty years or more and apply to parties other than CLMV countries.<sup>93</sup>

From the business perspective, RCEP members' tariff commitments and time frames for duty-free treatment for imports are vital. To illustrate, the Chinese market is of significance to Japanese and Korean automakers. However, China entered "U," denoting no commitments on its current 25 percent tariff, for most imported vehicles and Chinese tariffs for automotive parts will only gradually decrease from the first year to reach zero in the sixteenth year.<sup>94</sup> This example suggests that the RCEP's trade diversion effect, which will negatively impact nonparties, may only occur in the long run. For instance, Taiwan may lose up to \$3 billion because of its exclusion from the RCEP.<sup>95</sup> Yet, the immediate impact on Taiwanese exports to ASEAN is limited because 70 percent of them are IT products that have been made without tariffs under the WTO Information Technology Agreement.<sup>96</sup>

Notwithstanding exclusions and phase-in periods, the RCEP will likely alter the regional supply chain, making the RCEP a sourcing hub for key industries and "decouple" countries outside the region. When the RCEP is fully implemented, the tariff elimination rate for Japanese goods to China will rise from 8 percent to 87 percent and the pact will eliminate \$50 billion worth of tariffs from China-bound automotive parts.<sup>97</sup> The removal of tariffs will also enable ASEAN to become the largest overseas market of used cars for Chinese automakers.<sup>98</sup>

## 2 Harmonizing Rules of Origin of ASEAN Plus One FTAs

As a key trade facilitation effort, the RCEP will facilitate the consolidation of rules of origin between the AEC and the four ASEAN Plus One FTAs.

<sup>93</sup> See e.g., RCEP, Annex 1, Schedule of Tariff Commitments: Cambodia, at 2–3 (indicating that tariffs on certain products will only be eliminated in Year 20).

<sup>94</sup> See RCEP, Annex 1: Schedule of Tariff Commitments of China: Section C: For Japan, at 1069–72 (referring to categories of HS Codes 8703 and 8708).

<sup>95</sup> Petri & Plummer, *supra* note 16, at 11.

<sup>96</sup> Pan Tzu-yu et al., *Taiwan Not Expected to Be Hard Hit by New Regional Trade Pact: Experts*, Nov. 15, 2020, Focus Taiwan: CAN English News, <https://focustaiwan.tw/business/202011150013> (last visited Jan. 12, 2021).

<sup>97</sup> Jon Emont & Alastair Gale, *Asia-Pacific Countries Sign Major Trade Pact in Test for Biden*, Nov. 15, 2020, Wall St. J., [www.wsj.com/articles/asia-pacific-nations-sign-major-china-backed-trade-deal-11605434779](http://www.wsj.com/articles/asia-pacific-nations-sign-major-china-backed-trade-deal-11605434779) (last visited Jan. 12, 2021).

<sup>98</sup> Kentaro Iwamoto, *Five RCEP Takeaways: Asia Cements Grip as Free Trade Torchbearer*, Nov. 16, 2020, Nikkei Asia, <https://asia.nikkei.com/Politics/International-relations/Five-RCEP-takeaways-Asia-cements-grip-as-free-trade-torchbearer> (last visited Jan. 12, 2021).

Harmonizing rules of origin will yield a salient, immediate impact on value chains and alleviate the noodle bowl syndrome. Among ASEAN FTAs, Change in Tariff Classification (CTC) and Regional Value Contents (RVC) constitute the most common rules of origin that enable non-originating goods to benefit from FTAs.

Following the implementation of the Upgrade Protocol to the ASEAN-China FTA, all of ASEAN's internal and external FTAs follow the flexible co-equal rule, which allows rules of origins to be satisfied by either the CTC or the RVC.<sup>99</sup> It is therefore not a surprise that the RCEP adopted the same approach and set the RVC benchmark at 40 percent.<sup>100</sup> In other words, to meet the RCEP's product-specific rules, the use of materials from non-RCEP parties in the production of final products is permitted to go up to 60 percent of the value of these products.<sup>101</sup> The RCEP's RVC of 40 percent rule is "generous," particularly compared with the more "protectionist" USMCA that set the RVC benchmark at 60 percent.<sup>102</sup>

In practice, the RCEP's "cumulation" provision will enable materials from fifteen members to count toward the RVC's 40 percent benchmark, thus entitling them to RCEP tariff benefits.<sup>103</sup> The RCEP will therefore bridge ASEAN's internal and external FTAs that are presently "delinked." To illustrate, Chinese automotive companies may commence their operations in Bangkok by importing and assembling completely knocked down units that are manufactured in China. Finished vehicles can serve ASEAN and Australian markets.

The ASEAN Trade in Goods Agreement (ATIGA) and ASEAN FTAs with China and Australia encompass the RVC 40 percent rule for automotive parts and vehicles.<sup>104</sup> Nonetheless, preferential tariffs for

<sup>99</sup> ASEAN Secretariat, *supra* note 4, at 132; 266–67; Sanchita Basu Das et al., *Can ASEAN+1 FTAs Be a Pathway towards Negotiating and Designing the Regional Comprehensive Economic Partnership (RCEP) Agreement?* 50 *J. World Trade* 253, 266–67 (2016); see also MTI, *A Guide to Understanding the ASEAN-China Free Trade Area Upgrade* (2016), at 2 ("Previously, the majority of ACFTA exports would only qualify as originating when at least 40% of the value of a finished good originates from ACFTA Parties (RVC40).").

<sup>100</sup> See generally RCEP, ch. 3, Annex 3A: Product-Specific Rules; ASEAN, Summary of the Regional Comprehensive Economic Partnership Agreement (2020), at 3.

<sup>101</sup> Asian Development Bank (ADB), *Regional Comprehensive Economic Partnership Agreement: Overview and Economic Impact*, ADB Brief, No. 164 (2020), at 3.

<sup>102</sup> Gegory Spak et al., *Overview of Chapter 4 (Rules of Origin) of the US-Mexico-Canada Trade Agreement* (2018), at 2&6 fn. 16.

<sup>103</sup> RCEP, art. 3.4.

<sup>104</sup> Erlinda M. Medalla & M. Supperamiam, *Suggested Rules of Origin Regime for EAFTA*, Philippine Inst. for Dev. Stud. Discussion Paper Series, No. 2008–22 (Rev.) (2009), at 15–16.

completed cars that are exported to Australia will likely be denied because the cumulative provision under the ASEAN-Australia-New Zealand FTA does not recognize the value of the Chinese components for the RVC calculation. The RCEP's cumulative rules will facilitate business operations by filling the FTA gap.

The RCEP will similarly reduce business and legal costs for preparing different certificates of origin, depending on export destinations and the selection of FTAs. For instance, intra-ASEAN exports that utilize the ATIGA require "Form D," whereas the same products exported to Australia and Japan require "Form AANZ" and "Form AJ" under respective ASEAN Plus One FTAs.<sup>105</sup> The time and resources needed for compiling rules of origin documents, which certificates of origin require, often hinder the actual usage of FTAs. Shockingly, the utilization rate of Asian FTA is only 28 percent and the rate of exporters' use of Forms AANZ and AJ that entitle products to FTA tariff preferences is even lower than 5.5 percent.<sup>106</sup> With its uniform rules of origin and certificate of origin, the RCEP can remedy the weakness of fragmented ASEAN FTAs.

Compared with contemporary FTAs, the RCEP parties' tariff schedules are rather complex. Some countries including Australia and Brunei have single schedules for all members, but countries such as Indonesia and Vietnam have six schedules applying to different parties.<sup>107</sup> The governments' dissemination and analysis of the use of tariff benefits will be vital. Other trade facilitation provisions such as permitting exporters to self-declare the origin of imported products and customs procedures that enable the release of perishable goods in six hours will further enhance the utilization rate of the RCEP.<sup>108</sup> These provisions will also accelerate RCEP members' commitments under the WTO Trade Facilitation Agreement with country-specific special and differential treatment (SDT) for implementing requirements, including the release of goods and the application of IT.<sup>109</sup>

<sup>105</sup> Singapore Customs, *Application Procedures for a Certificate of Origin via TradeNet and Related Administrative Matters* (2020), at 4.

<sup>106</sup> Masahiro Kawai & Ganeshan Wignaraja, *Main Findings and Policy Implications, in Asia's Free Trade Agreements: How is Business Responding?* 33, 34 (2011); Lili Yan Ing et al., *How Do Exports and Imports Affect the Use of Free Trade Agreements? Firm-level Survey Evidence from Southeast Asia*, ERIA Discussion Paper Series (2016), at 7.

<sup>107</sup> See generally RCEP, Annex I – Schedules of Tariff Commitments.

<sup>108</sup> RCEP, arts. 3.16.1(b) & 4.11.6(a).

<sup>109</sup> See e.g., ch. 4, Annex 4A: Periods of Time to Implement the Commitments.

### B *Hybrid Services Schedules and Commitments*

Liberalizing trade in services is pivotal to realize the WTO's Doha Development Agenda and the United Nations (UN) Sustainable Development Goals. For developing countries, services trade accounts for 65 percent of their inward foreign direct investment (FDI) and helps them escape from the "middle income traps."<sup>110</sup> Prime RCEP examples include income contributions of tourism services to Cambodia and Thailand, as well as remittances by overseas workers to Indonesia and the Philippines. Transport, financial and digital services also constitute the backbone of trade in goods and became even more critical amid the COVID-19 crisis.

In terms of the modality of services commitments, the ASEAN Framework Agreement on Services and ASEAN Plus One FTAs adopt a GATS-like positive list approach, whereas the CPTPP follows the negative list approach. The positive list modality enables countries to retain regulatory sovereignty because they liberalize only the sectors indicated in their services schedules. The negative list approach is considered more aggressive and automatically covers newly developed areas because all sectors are to be liberalized unless otherwise specified. The RCEP employs a hybrid approach. Eight members used positive list scheduling under Annex II and seven parties adopted the negative list approach by including their reservations and nonconforming measures in Annex III.<sup>111</sup>

A scrutiny of schedules is necessary for understanding the actual degree of services liberalization. The fact that the negative list schedules of Korea and Malaysia exceed 100 pages exemplifies the complexity of services commitments.<sup>112</sup> Moreover, constitutional limitations can compromise RCEP members' services liberalization. For example, constitutions of the Philippines and Myanmar stipulate that natural resources are owned by the state.<sup>113</sup> These constitutional provisions resulted in reservations on the

<sup>110</sup> WTO, *Background Note by Secretariat, Council for Trade in Services: Mode 3 – Commercial Presence*, S/C/W/314 (2010), para. 24; Pasha L. Hsieh, *Reassessing the Trade-Development Nexus in International Economic Law: The Paradigm Shift in Asia-Pacific Regionalism*, 37(2) NW. J. Int'l L. & Bus. 321, 346–47 (2017).

<sup>111</sup> RCEP, Annex II – Schedules of Specific Commitments for Services & Annex III – Schedules of Reservations and Non-Conforming Measures for Services and Investment.

<sup>112</sup> Korea's and Malaysia's schedules include 112 and 137 pages, respectively. RCEP, Annex III – Schedules of Reservations and Non-Conforming Measures for Services and Investment.

<sup>113</sup> Constitution of the Republic of the Union of Myanmar (2008), art. 37(a); Constitution of the Republic of the Philippines (1987), art. XII, secs. 2 & 10.

part of these RCEP members about the national treatment requirement of investment for “mining and quarrying” and their related services.<sup>114</sup>

The RCEP’s provisions on services trade reinforce my argument for the ASEAN way-based pragmatic incrementalism. The RCEP contains the ratchet mechanism for services and investment, under which members “commit to automatically extend the benefits of any future” agreements to all other RCEP countries.<sup>115</sup> This mechanism thus enables the RCEP to always be “the best deal” for enterprises. Furthermore, according to Article 8.12, RCEP parties that initially adopted the positive list approach are required to transition to negative list scheduling in six years after the RCEP enters into force.<sup>116</sup> The same provision exhibits the RCEP’s development-oriented nature by permitting Cambodia, Laos and Myanmar to have a fifteen-year transition period instead.<sup>117</sup>

Based on current services commitments, RCEP members will increase foreign ownership restrictions for 65 percent of sectors such as computer and logistics services industries.<sup>118</sup> The ASEAN-Australia-New Zealand FTA is the ASEAN Plus One FTA with the highest level of services liberalization.<sup>119</sup> New and extra services commitments of the RCEP that exceed those of the ASEAN-Australia-New Zealand FTA and other intra-RCEP FTAs will result in de facto consolidation of agreements.<sup>120</sup> In addition, the annexes on financial, telecommunication and professional services will form the basis for regulatory harmonization and mutual recognition involving these services.<sup>121</sup> Comparable to the ASEAN-Australia-New Zealand FTA, the RCEP includes a separate Annex for specific Mode 4 (movement of natural persons) commitments.<sup>122</sup> The extended periods of stay accorded to business visitors and intra-corporate transferees will energize Asia-Pacific operations of multinational enterprises.

<sup>114</sup> RCEP, Annex III: Schedules of Reservations and Non-Conforming Measures for Services and Investment: Myanmar, at 19 & Annex III: Schedules of Reservations and Non-Conforming Measures for Services and Investment: The Philippines, at 10.

<sup>115</sup> RCEP, Arts. 8.7.3, 8.7.4 and 10.8.1; New Zealand Foreign Affairs & Trade, *Regional Comprehensive Economic Partnership: National Interest Analysis* (2020), at 36.

<sup>116</sup> RCEP, art. 8.12.7.

<sup>117</sup> *Id.*

<sup>118</sup> MTI, *supra* note 88, at 4.

<sup>119</sup> Fukunaga & Isono, *supra* note 89, at 16.

<sup>120</sup> DFAT, *Regional Comprehensive Economic Partnership: Outcomes: Services and Investment* (2020), at 4–6.

<sup>121</sup> RCEP, Annex 8A: Financial Services; Annex 8B: Telecommunication Services; and Annex 8C: Professional Services; New Zealand Foreign Affairs & Trade, *supra* note 115, at 37–40.

<sup>122</sup> RCEP, Annex IV – Schedules of Specific Commitments on Temporary Movement of Natural Persons.



### C *Investment Issues and the Absence of ISDS*

36 percent of global FDI outflows amounting to \$6.5 trillion come from fifteen RCEP countries.<sup>123</sup> Both chapters on services and investment of the RCEP include provisions on national treatment and MFN, thus harmonizing ASEAN Plus One FTAs and improving the investment environment.<sup>124</sup> The rules on expropriation and the prohibition of performance requirements, including the imposition of conditions for acquisitions or a certain percentage of domestic content, are vital to foreign investors.<sup>125</sup> Much academic attention on trade agreements focuses on ISDS reforms such as the EU-proposed Investment Court System. ASEAN's internal and external agreements mostly adopted US-style ISDS schemes with detailed rules on arbitration. While the ASEAN-Hong Kong Investment Agreement contains no ISDS, it articulates that investor-state dispute rules will form part of its work program.<sup>126</sup> The RCEP follows the same approach. It leaves the ISDS mechanism for negotiations within two years after the RCEP becomes effective.<sup>127</sup>

Undoubtedly, ISDS enforces investment protection, which the RCEP's Guiding Principles and Objectives identified as a pillar of investment.<sup>128</sup> In 2015, RCEP parties agreed to include ISDS provisions.<sup>129</sup> Why did the final text of the RCEP depart from the consensus? Although Japan and Korea pushed for detailed ISDS rules during RCEP negotiations, the changing stances of other countries and the CPTPP prompted the RCEP to omit ISDS.<sup>130</sup> In particular, New Zealand's new government declared its refusal to include ISDS in any FTAs in 2017.<sup>131</sup> In addition to

<sup>123</sup> UNCTAD, *supra* note 3, at 6

<sup>124</sup> RCEP, arts. 8.4, 8.6, 10.3 and 10.4; Das et al., *supra* note 99, at 271–72.

<sup>125</sup> RCEP, art. 10.6; Annex 10B: Expropriation, art. 2.

<sup>126</sup> Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People's Republic of China and the Member States of the Association of Southeast Asian Nations (2017) (ASEAN-Hong Kong Investment Agreement), at art. 22.1(e).

<sup>127</sup> RCEP, art. 10.18.1.

<sup>128</sup> RCEP Guiding Principles and Objectives, sec. III.

<sup>129</sup> DFAT, *Regional Comprehensive Economic Partnership (RCEP): Discussion Paper on Investment* (2017), at 4.

<sup>130</sup> Belinda Townsend, *Update on the Regional Comprehensive Economic Partnership Agreement – NGO Briefing* (2015), at 2.

<sup>131</sup> Post-Cabinet Press Conference: Monday, Oct. 31, 2017 (2017), at 1; Deborah Elms on the Absence of ISDS, *Prospects for a Secretariat, and Dispute Settlement in RCEP*, Nov. 18, 2020, Int'l Econ. L. & Policy Blog, <https://ielp.worldtradelaw.net/2020/11/the-absence-of-isds-in-rcep.html> (last visited Jan. 18, 2021).

the CPTPP's suspended provisions that narrow the ISDS scope of the original TPP, New Zealand's side letters with five countries exclude ISDS entirely.<sup>132</sup>

To prevent a "loophole" for utilizing ISDS under other pacts, the RCEP's nonapplication of MFN to "any international dispute resolution procedures or mechanisms" makes it impossible for investors to resort to agreements with ISDS provisions. However, an investor's home state may still exercise diplomatic protection by using the RCEP's state-to-state dispute settlement mechanism, except for disputes involving pre-establishment rights.<sup>133</sup> In response, the host state may rely on general exceptions that incorporate Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the GATS.<sup>134</sup> In terms of security exceptions, the scope of RCEP is broader than that of Article XXI of the GATT. Article 17.13 of the RCEP extends to measures protecting "critical public infrastructures," which may be "publicly or privately owned," and to actions "taken in time of national emergency."<sup>135</sup> According to the WTO panel in *Russia – Traffic in Transit*, "emergency" refers to unexpected and urgent dangers, conflicts or disasters.<sup>136</sup>

Markedly, the RCEP accords SDT to "Least Developed Country Parties" when they involve dispute settlement procedures.<sup>137</sup> ASEAN's external FTAs, such as the ASEAN-Australia-New Zealand FTA and the ASEAN-Hong Kong Investment Agreement, extend SDT to "newer ASEAN Member States" that denote CLMV countries.<sup>138</sup> Given that the UN does not consider Vietnam as a least developed country, the RCEP departs from the ASEAN practice and confines SDT to Cambodia, Laos and Myanmar.<sup>139</sup> The RCEP mandates that the

<sup>132</sup> DFAT, *CPTPP Suspensions Explained* (2019), at 1–2; New Zealand's CPTPP Investor-State Dispute Settlement Side Letters with Australia, Brunei, Malaysia, Peru and Vietnam (2018).

<sup>133</sup> RCEP, art. 17.11; Michael Ewing-Chow & Junianto James Losari, *The RCEP Investment Chapter: A State-to-State WTO Style System for Now*, Dec. 8, 2020, Kluwer Arb. Blog, <http://arbitrationblog.kluwerarbitration.com/2020/12/08/the-rcep-investment-chapter-a-state-to-state-wto-style-system-for-now/> (last visited Jan. 19, 2021).

<sup>134</sup> RCEP, art. 17.12.

<sup>135</sup> RCEP, art. 17.13(b)(iii) & (iv).

<sup>136</sup> Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R (2019), para. 7.72.

<sup>137</sup> RCEP, art. 19.18.

<sup>138</sup> Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (2009) (AANZFTA), ch. 17, art. 18; ASEAN-Hong Kong Investment Agreement, at art. 18

<sup>139</sup> E.g., RCEP, arts. 15.6 & 19.18.

parties bringing complaints against these three countries “exercise due restraint” and that the panel explicitly identify how SDT is considered in procedures.<sup>140</sup>

#### *D Soft-Law Rules on Government Procurement and E-Commerce*

As I previously identified, four chapters of the CPTPP that are absent in the RCEP include the chapters on SOEs, labor and environmental protection, and anti-corruption.<sup>141</sup> Article 17.10, which is the only RCEP provision on environmental obligations, requires parties to comply with the Convention on Biological Diversity.<sup>142</sup> The lack of these CPTPP chapters increases criticism against the quality and standards of the RCEP. Yet, the fact that selected RCEP countries have incorporated these areas in their new agreements suggests that such areas may be included in the RCEP in the future. To illustrate, four ASEAN countries accepted commitments under the CPTPP. The recent EU-China Comprehensive Agreement on Investment also covers SOE disciplines.<sup>143</sup> Considering domestic opposition in least developed country members, the RCEP’s omission of more sensitive CPTPP chapters can be construed as a necessary compromise to finalize the world’s largest FTA.

As government procurement and e-commerce provisions exemplify, some notable commitments of the RCEP cannot be enforced by the dispute settlement mechanism under Chapter 19.<sup>144</sup> These soft-law requirements serve as the foundation for subsequent hard-law obligations rather than loopholes. The public procurement market is vital to enterprises in RCEP countries. As of 2021, only five RCEP members are parties to the WTO Agreement on Government Procurement.<sup>145</sup> As no ASEAN Plus One FTAs include chapters on government procurement, the RCEP helps enhance transparency and cooperation for public

<sup>140</sup> RCEP, art. 19.18; Diane Desierto, *The Regional Comprehensive Economic Partnership (RCEP)’s Chapter 19 Dispute Settlement Procedures*, Nov. 16, 2020, EJIL: Talk! [www.ejiltalk.org/the-regional-comprehensive-economic-partnership-rceps-chapter-19-dispute-settlement/](http://www.ejiltalk.org/the-regional-comprehensive-economic-partnership-rceps-chapter-19-dispute-settlement/) (last visited Jan. 19, 2021).

<sup>141</sup> CPTPP, chs. 17, 19, 20 and 26.

<sup>142</sup> RCEP, art. 17.10.

<sup>143</sup> E.g., European Commission, *EU-China Comprehensive Agreement on Investment (2020)*, at 1.

<sup>144</sup> E.g., RCEP, arts. 12.17.3 and 16.8.

<sup>145</sup> These five countries include Australia, Japan, Korea, New Zealand, Singapore. WTO, *Parties, Observers and Accessions*, [www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (last visited Jan. 19, 2021).

procurement rules.<sup>146</sup> The RCEP excludes pertinent provisions from the dispute settlement mechanism and does not include specific government procurement commitments, which the parties may include pursuant to later negotiations based on the review clause.<sup>147</sup>

Enterprises also pay particular attention to e-commerce provisions of the RCEP. Digitalization is now a necessity in contemporary economic agreements, as e-commerce facilitates 12 percent of global trade in goods via digital platforms such as Amazon or Alibaba.<sup>148</sup> In the Asia-Pacific, lockdown and safe distancing measures in response to COVID-19 drove a 70 percent increase in e-commerce orders and benefited small and medium-sized enterprises.<sup>149</sup> Also, digitalization enables developing countries to be service economies without going through manufacture-based industrialization, thus helping them pursue an accelerated development path different from the experiences of Asian tigers and China.<sup>150</sup> Hence, the RCEP's consolidation of rules on e-commerce and data protection strengthens the trade-development nexus in the NREO.

The RCEP's e-commerce provisions are of the soft-law nature because various members such as Cambodia, Indonesia and Vietnam adopted protectionist data policies.<sup>151</sup> In addition, these provisions do not apply to government procurement and financial service suppliers.<sup>152</sup> Tellingly, the RCEP obliges parties to "maintain" the current practice of not imposing custom duties on electronic transmissions in line with the WTO decision.<sup>153</sup> In other words, the practice may change if WTO members decide not to extend the e-commerce moratorium. The RCEP also prohibits data localization and barriers to the cross-border transfer of data.<sup>154</sup> Under SDT provisions, Vietnam is given an additional period of five years to implement these rules and an eight-year transition period applies to Cambodia, Laos and Myanmar.<sup>155</sup>

<sup>146</sup> ASEAN, *supra* note 100, at 7; ADB, *supra* note 101, at 4; RCEP, arts. 16.4, 16.5 & 16.8.

<sup>147</sup> RCEP, arts. 16.6, 16.8 & 20.8.

<sup>148</sup> Mckinsey Global Institute, *Digital Globalization: The New Era of Global Flows* (2016), at 7.

<sup>149</sup> Organisation for Economic Co-operation and Development, *Leveraging Digital Trade to Fight the Consequences of COVID-19* (2020), at 10–11.

<sup>150</sup> Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* 89–91 (2018).

<sup>151</sup> Jeff Paine, *Asean's Digital Economy Offers Potential in Post-Covid World*, Bus. Time, Nov. 17, 2020, at A19.

<sup>152</sup> RCEP, arts. 12.1(b)(iii) & 12.3.2.

<sup>153</sup> RCEP, art. 12.11.

<sup>154</sup> RCEP, arts. 12.14–12.15.

<sup>155</sup> RCEP, fns. 11 & 13.

All RCEP countries may rely on other exceptions to e-commerce rules. Contradictory data-related measures “necessary to achieve a legitimate public policy objective” and “for the protection of its essential security interests” can be justified.<sup>156</sup> The implementing party can decide “the necessity behind the implementation of such legitimate public policy” and other parties cannot dispute measures that protect essential security interests.<sup>157</sup> On the one hand, these self-judging and exclusion of dispute clauses create vast policy space. On the other hand, the RCEP is an “improvement” to the ASEAN Agreement on E-commerce, as the RCEP no longer includes the vague “subject to their respective laws and regulations” clause.<sup>158</sup>

#### IV Implications for Regional and Multilateral Trading Systems

Pragmatism rather than perfectionism drove the finalization of the mega-FTA. ASEAN FTA experiences will guide the RCEP’s evolving process. Arguably, the RCEP is a rule-taker instead of a rulemaker. Nevertheless, the rules that the RCEP adopted became default standards for new Asian regionalism. The RCEP will therefore result in systemic implications for regional and multilateral trading systems.

##### *A Normative Fragmentation of Multilayered FTAs and BITs*

According to the Guiding Principles and Objectives for the RCEP, the four ASEAN Plus One FTAs and other pacts between RCEP members “will continue to exist and no provision in the RCEP agreement will detract from the terms and conditions in these” pacts.<sup>159</sup> Article 20.2 of the RCEP confirms the intention of fifteen parties to have the RCEP “coexist with their existing international agreements.”<sup>160</sup> Thus, the RCEP does not envision *de jure* consolidation of intra-RCEP FTAs and BITs.

Normative conflicts may arise from overlapping FTAs. To illustrate, forum shopping can occur under multilayered FTAs between China and Singapore. This is because dispute settlement mechanisms of the RCEP, the ASEAN-China FTA and the China-Singapore FTA may apply to the

<sup>156</sup> RCEP, arts. 12.14 & 12.15.

<sup>157</sup> RCEP, arts. 12.14.3(b) & 12.15.3(b) & fns. 12 & 14.

<sup>158</sup> ASEAN Agreement on Electronic Commerce (2019), arts. 4(a) & 6(b).

<sup>159</sup> RCEP Guiding Principles and Objectives, principle 5.

<sup>160</sup> RCEP, art. 20.2.1.

same dispute. Conflicting situations worsen if RCEP parties decide to include ISDS provisions because investors will be entitled to resort to the RCEP, ASEAN-Plus One FTAs and BITs.<sup>161</sup> Based on WTO jurisprudence and the Vienna Convention on the Law of Treaties (VCLT), the analysis of the RCEP vis-à-vis other pacts could shed light on the noodle bowl syndrome in the Third Regionalism.

### 1 WTO-RCEP Conflicts

Trade law scholars and practitioners are no strangers to jurisdictional clashes between the WTO and FTAs. WTO tribunals made it clear that FTAs can barely exclude the WTO's jurisdiction. In *Mexico–Soft Drinks*, Mexico's defense relied on the forum exclusion clause of the USMCA's predecessor, the North American Free Trade Agreement (NAFTA), when the United States challenged Mexico's tax measures at the WTO.<sup>162</sup> Mexico averred that the WTO complaint constituted part of "a broader dispute" it had brought against America in NAFTA proceedings and hence the forum exclusion clause mandates that the NAFTA be the sole forum.<sup>163</sup> The Appellate Body rejected this argument. It ruled that a panel's declining its own jurisdiction would "diminish" a complaining party's right under the WTO Dispute Settlement Understanding (DSU).<sup>164</sup> Although "legal impediments" may exclude the WTO's jurisdiction, the Appellate Body found that no such impediments exist in the case.<sup>165</sup>

*Peru–Agricultural Products* is the subsequent case where Guatemala challenged the consistency of Peru's Price Range System with the Agreement on Agriculture and the GATT.<sup>166</sup> Peru argued that Guatemala contravened "good faith" obligations under the DSU because Guatemala waived the right to bring the WTO complaint under their bilateral FTA.<sup>167</sup> The Appellate Body examined paragraph 9 of Annex 2.3 of the FTA and found that a waiver to relinquish DSU rights "must be made clearly" and "cannot be lightly assumed."<sup>168</sup> Such provisions

<sup>161</sup> RCEP, art. 10.18.1(a).

<sup>162</sup> Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R (2006), para. 42.

<sup>163</sup> *Id.* paras. 42 & 54; North American Free Trade Agreement (1993), art. 2005.6.

<sup>164</sup> Appellate Body Report, *supra* note 162, paras. 46 & 48–53.

<sup>165</sup> *Id.* para. 54.

<sup>166</sup> Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R (2015), para. 4.1.

<sup>167</sup> *See id.* para. 5.19 ("Peru alleges that Guatemala ... acted contrary to good faith ... obligations under Articles 3.7 and 3.10 of the DSU.")

<sup>168</sup> *Id.* para. 5.25.

therefore do not amount to “legal impediments,” which the Appellate Body articulated in *Mexico–Soft Drinks*.<sup>169</sup>

According to the RCEP, it is “without prejudice to the rights of a Party to have recourse to dispute settlement procedures” under the WTO or other applicable FTAs.<sup>170</sup> The choice of forum clause of the RCEP stipulates that once the complaining party selects the forum by requesting the establishment of a panel, the forum “shall be used to the exclusion of other fora.”<sup>171</sup> WTO jurisprudence indicates that this forum exclusion provision neither diminishes WTO members’ rights under the DSU nor excludes WTO jurisdiction. The RCEP’s lack of a “supremacy clause,” which prioritizes WTO agreements when they are consistent with the FTA, will have no impact on WTO tribunals’ jurisdictional decision.<sup>172</sup>

## 2 RCEP-FTA/BIT Conflicts

The RCEP coexists with four ASEAN Plus One FTAs and bilateral FTAs and BITs between RCEP parties.<sup>173</sup> How do parties reconcile the differences between rules of multilayered agreements? RCEP provisions reflect a common approach adopted by ASEAN’s external FTAs such as ASEAN-Australia-New Zealand FTA and the ASEAN-Japan FTA.<sup>174</sup> The RCEP first affirms “existing rights and obligations” arising from other FTAs.<sup>175</sup> Following a request, relevant parties are obliged to engage in consultations and reach “a mutually satisfactory solution.”<sup>176</sup> The RCEP also clarifies that favorable treatment provided by an agreement “does not mean there is an inconsistency.”<sup>177</sup>

The ASEAN-Japan FTA incorporates “general principles of international law,” which the parties should consider when they attempt to reach a solution in cases of inconsistency between agreements.<sup>178</sup> Despite the RCEP’s lack of a similar provision, the VCLT as customary international law applies to RCEP parties. Article 30.3 of the VCLT on the

<sup>169</sup> See *id.* at 21, fn. 106 (“[W]e do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes.”).

<sup>170</sup> RCEP, art. 19.3.2.

<sup>171</sup> RCEP, arts. 19.5.1 & 19.5.2.

<sup>172</sup> *E.g.*, Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan (2008) (ASEAN-Japan FTA), art. 10.3.

<sup>173</sup> RCEP, art. 20.2.1.

<sup>174</sup> RCEP, art. 20.2; AANZFTA, art. 2; ASEAN-Japan FTA, art. 10.

<sup>175</sup> RCEP, art. 20.2.1(b).

<sup>176</sup> RCEP, art. 20.2.2.

<sup>177</sup> RCEP, art. 20.2.2 & fn. 1.

<sup>178</sup> ASEAN-Japan FTA, art. 10.4.



application of successive treaties provides that “the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”<sup>179</sup> According to this later-in-time rule, the applicable scope of the RCEP should subsequently be confined to treaties on the same subject matter. Nevertheless, it can be averred that Article 20.2 of the RCEP constitutes a special law. Such a *lex specialis* interpretation may exclude the application of Article 30.3 of the VCLT, which is a general rule, therefore allowing the RCEP’s forum exclusion provision to prevail.<sup>180</sup>

Most of intra-RCEP FTAs and BITs include ISDS mechanisms. The RCEP’s prospective inclusion of ISDS provisions can thus lead to forum shopping between applicable agreements. Notably, Singapore and Vietnam’s investment agreements with the EU will terminate their bilateral BITs with EU states.<sup>181</sup> This clean-slate approach is nonetheless rare. For instance, the continuous validity of the China-Singapore BIT after the conclusion of the China-Singapore FTA, which incorporates the ASEAN-China Investment Agreement, creates overlapping jurisdiction over investor-state claims.<sup>182</sup> In practice, parties’ BITs and their subsequent FTAs usually have distinct scopes and carveouts, making the application of Article 30.3 of VCLT legally difficult.

Contrary to conventional wisdom, parties may even “intentionally” keep parallel agreements with ISDS mechanisms. ASEAN’s sole ISDS case, *Yaung Chi Oo v. Myanmar*, is illustrative of regional jurisprudence on successive treaties. This case concerned the 1987 and 1998 intra-ASEAN investment agreements.<sup>183</sup> According to the Tribunal, the two disputed pacts encompassed different scopes of investment and ASEAN countries had no intention to merge them.<sup>184</sup>

<sup>179</sup> Vienna Convention on the Law of Treaties (1969), art. 10.3; see also Alexander Orakhelashvili, *Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter*, 31 ICSID Rev. 344, 361 (2016) (“[T]o what extent the *lex posterior* rule stated in Article 30 VCLT would be applied in arbitral practice is not certain . . .”).

<sup>180</sup> E.g., Tania Voon & Elizabeth Sheargold, *Australia, China and the Co-Existence of Successive International Investment Agreements*, in *The China-Australia Free Trade Agreement: A 21st Century Model* 215, 228 (Colin B. Picker et al. eds. 2017).

<sup>181</sup> EU-Singapore Investment Protection Agreement (IPA) (2018), ch. 4, annex 5; EU-Singapore IPA (2019), ch. 4, annex 6.

<sup>182</sup> Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Singapore (2009), art. 84.1.

<sup>183</sup> *Yaung Chi Oo Trading Pte Ltd. v. Gov’t of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1 (Mar. 31, 2003), 42 I.L.M. 540 (2003), paras. 76–78.

<sup>184</sup> *Id.* paras. 77–82.

Article 12 of the 1998 agreements provides that it “shall prevail” if it “provides for better and enhanced provisions.”<sup>185</sup> Based on “the general practice of ASEAN with respect to successive agreements,” the Tribunal ruled that Article 12 should not be interpreted to amend the 1987 agreement because the two agreements “are clearly intended to operate separately.”<sup>186</sup> Article 20.2 of the RCEP can be understood as codifying the ASEAN FTA practice by confirming parties’ intention for the co-existence approach.<sup>187</sup> Given complexities associated with the application of the VCLT and overlapping pacts, the RCEP will only promote de facto rather than de jure consolidation of Asia-Pacific agreements.

### *B Institutionalization of the RCEP Secretariat and Beyond*

The RCEP is an evolving process. Its evolution will shed light on the institutionalization and expansion of FTAs and energize plurilateral trade approach to implementing Sustainable Development Goals. The RCEP represents the culmination of ASEAN Plus One FTAs. The evolution of the RCEP will build on ASEAN’s institutional memory, which the CPTPP and other agreements do not possess.

It is common for ASEAN Plus One FTAs to authorize parties to form joint committees and require the ASEAN Secretariat to provide administrative and technical support.<sup>188</sup> The RCEP takes a step further. In addition to creating the senior official-level RCEP Joint Committee, the agreement mandates that “a RCEP Secretariat” be established to provide support for the Joint Committee.<sup>189</sup> In comparison, the CPTPP merely creates “a Trans-Pacific Partnership Commission” without planning to establish a secretariat.<sup>190</sup> Moreover, the Secretary-General of ASEAN is designated as the depositary of the RCEP, whereas New Zealand serves as the depositary of the CPTPP.<sup>191</sup>

The development of the ASEAN Secretariat provides valuable lessons for the RCEP Secretariat. ASEAN was founded in 1967, but the

<sup>185</sup> *Id.* para. 79.

<sup>186</sup> *Id.* paras. 80–82.

<sup>187</sup> RCEP, art. 20.2.1.

<sup>188</sup> *E.g.*, AANZFTA, ch. 2, art. 11; ASEAN-Japan FTA, art. 11; Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (2005), art. 5.4.

<sup>189</sup> RCEP, arts. 18.2 & 18.3.1(i).

<sup>190</sup> CPTPP, art. 27.1.

<sup>191</sup> RCEP, art. 20.5; CPTPP, art. 30.7.

Jakarta-based ASEAN Secretariat was only established in 1976 and its legal capacity was merely recognized under Indonesian law.<sup>192</sup> The ASEAN Charter conferred legal personality on ASEAN as an international organization.<sup>193</sup> Pursuant to the mandate of the ASEAN Charter, a separate agreement details ASEAN's legal capacities, as well as privileges and immunities of ASEAN, its Secretary-General and staff of the ASEAN Secretariat.<sup>194</sup> These instruments are indispensable for the operation of the ASEAN Secretariat and for the future of the RCEP Secretariat.

The institutionalization of the secretariat will empower the RCEP to become a global rule setter. This substantiates my analysis of the new dependency theory, which posits that the collective power of developing countries will alter conventional North-South relations. While US and EU standards remain relevant, the pacts that RCEP parties ratify and the implementing regulations, which the RCEP Secretariat adopts, will become rules for Asia. It is particularly critical for new domains where Asian countries excel, such as artificial intelligence, drones or travel bubble schemes amid the COVID-19 pandemic. Built on the ASEAN FTA framework, the RCEP's normative power will therefore ascend.

To maintain ASEAN centrality and accelerate work efficiency, I recommend that the RCEP Secretariat form close institutional ties with the ASEAN Secretariat. The practice and experience of ASEAN's internal and external pacts are intertwined with the evolution of the RCEP. For example, in the arenas ranging from tariff liberalization to dispute settlement, the RCEP's SDT provisions that apply to least developed countries will follow the approach of ASEAN FTAs.

Implementing the RCEP's economic and technical cooperation activities also requires monitoring and the allocation of resources that RCEP partners, such as Australia and Japan, provided under ASEAN Plus One FTAs.<sup>195</sup> The consolidation of financial and technical support will benefit the implementation of the UN Sustainable Development Goals and the Initiative for ASEAN Integration Work

<sup>192</sup> ASEAN, ASEAN Secretariat, <https://asean.org/asean/asean-secretariat/> (last visited Jan. 26, 2021); Agreement between the Government of Indonesia and ASEAN Relating to the Privileges and Immunities of the ASEAN Secretariat (1979), arts. 2 & 3.

<sup>193</sup> Charter of the Association of Southeast Asian Nations (2007) (ASEAN Charter), art. 3.

<sup>194</sup> ASEAN Charter, ch. VI; Agreement on Privileges and Immunities of the Association of Southeast Asian Nations (2009), arts. 2–3.

<sup>195</sup> *E.g.*, RCEP, arts. 15.3 & 15.4; AANZFTA, ch. 12.

Plan IV (2021–25).<sup>196</sup> The role of the RCEP Secretariat in centralizing foreign assistance and setting the trade-development agenda will provide insight to the Global South.

To multilateralize RCEP rules by expanding this mega-FTA, the RCEP Secretariat's implementation of the accession process is essential. Building on the Bogor Goals, the new APEC Putrajaya Vision 2040 reiterates the significance of the FTAAP agenda.<sup>197</sup> As pathways to the FTAAP, both the RCEP and the CPTPP adopted open accession clauses, which allow states and separate customs territories to join these mega-FTAs.<sup>198</sup> The RCEP practice also implies that ASEAN Plus One FTA partners will be accorded priority in the accession process.

In response to India's withdrawal from RCEP negotiations, RCEP ministers emphasized their intention to re-engage India and accorded the country observer status.<sup>199</sup> Other than India, Hong Kong is the remaining ASEAN Plus One FTA partner that has not joined the RCEP. With Beijing's support, Hong Kong will be the most likely candidate for the RCEP.<sup>200</sup> The enlargement of both the RCEP and CPTPP will collectively contribute to the normative development of the NREO.

## V Conclusion

Since ASEAN issued its Framework for the RCEP in 2012, fifteen parties completed the mega-FTA in 2020, making it the world's largest FTA by economic scale and population. Contrary to conventional understanding, RCEP negotiations represent an ASEAN-led rather than a China-dominated process. As an instrument that is expected to follow the ASEAN way, the RCEP is a living agreement based on the pragmatic incrementalism. The immediate effect of the RCEP will be the harmonization of rules of origin among ASEAN's internal and external FTAs, thus promoting de facto consolidation of FTAs.

<sup>196</sup> UN, *The 17 Goals*, <https://sdgs.un.org/goals> (last visited Jan. 26, 2021); ASEAN, Initiative for ASEAN Integration (IAI) Work Plan IV (2021–2025) (2020), at 7–9.

<sup>197</sup> APEC, *APEC Putrajaya Vision 2040*, [www.apec.org/Meeting-Papers/Leaders-Declarations/2020/2020\\_aelm/Annex-A](http://www.apec.org/Meeting-Papers/Leaders-Declarations/2020/2020_aelm/Annex-A) (last visited Jan. 26, 2021).

<sup>198</sup> RCEP, art. 20.9; CPTPP, art. 30.4.

<sup>199</sup> Ministers' Declaration on India's Participation, *supra* note 84.

<sup>200</sup> Natalie Wong, *Mainland Chinese Commerce Official Backs Hong Kong Joining RCEP Trade Bloc, with City Leader Carrie Lam Hoping to Start Talks "at Earliest Opportunity,"* Nov. 30, 2020, S. China Morning Post, [www.scmp.com/news/hong-kong/hong-kong-economy/article/3111913/mainland-commerce-official-backs-hong-kong-joining](http://www.scmp.com/news/hong-kong/hong-kong-economy/article/3111913/mainland-commerce-official-backs-hong-kong-joining) (last visited Jan. 26, 2021).

This chapter found that the RCEP converges key legal and political agendas of Asian powers, including particularly ASEAN centrality and China's BRI and dual circulation strategy. Although the RCEP's tariff and services liberalization will be a lengthy process, it takes into account the development needs of least developed countries and minimizes the trade diversion effect. The absence of ISDS and the inclusion of soft-law government procurement and e-commerce also reflects the necessary compromise between states at diverse economic stages.

For international economic law, the RCEP's normative conflicts with intra-RCEP trade and investment agreements will provide valuable lessons. The institutionalization of the RCEP Secretariat and its role in facilitating accession procedures and setting the trade-development agenda will enhance the status of the RCEP as a global rulemaker. Consequently, the RCEP will energize the collective power of developing countries and serve as the legal foundation for new Asian regionalism.