



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 271 February 10, 2020

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The Regional Comprehensive Economic Partnership’s investment chapter: One step forward, two steps back? *

by
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Negotiations on the Regional Comprehensive Economic Partnership (RCEP) began in May 2013 “to achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN’s FTA Partners.”¹ During RCEP’s Summit on November 11, 2019, participating countries, except India, agreed on all 20 chapters and essentially all their market-access issues, and decided to proceed with “legal scrubbing.” RCEP will be signed in 2020.²

RCEP’s economic rationale resides in the scale of the economic area, as its consolidated market is large enough to create positive trade-creation effects and to boost more inclusive economic growth in this region. In fact, RCEP would create the world’s largest trade bloc, even larger than the United States–Mexico–Canada Agreement or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. RCEP’s regulatory rationale is to address the Asian noodle bowl of investment treaties: as of end-2019, RCEP members (excluding India) have concluded 695 bilateral investment treaties (BITs) and 281 preferential trade agreements containing investment chapters. This means that RCEP countries take part in 28% of all international investment agreements (IIAs).

Malaysia’s trade minister publicly stated that all countries involved had agreed to exclude ISDS provisions from RCEP.³ India’s strict position on ISDS and numerous other trade-related issues caused a lowest common denominator approach, explained by its own BITs renegotiations. Both India and Indonesia were opposed, as matter of principle, to ISDS. Despite India’s decision not to join the consensus, the investment chapter should remain untouched, partly because there is still hope that India will sign RCEP in 2020. Capital exporting countries (especially the Republic of Korea, Japan and Australia) agreed to the exclusion of ISDS. Japan could compromise on ISDS (as it did in the ASEAN-Japan FTA which has no investment chapter) as Japanese investors can still rely on BITs (containing ISDS) with ASEAN countries. This means that the noodle bowl of IIAs remains largely unaddressed. In terms of substantive protections, RCEP resembles a slightly enhanced ASEAN Comprehensive Investment Agreement (ACIA). In particular, RCEP further

clarifies—and limits—provisions regarding fair and equitable treatment, denial of benefits and performance requirements (which were provisions repeatedly re-assessed by ASEAN negotiators in the context of the ACIA implementation).

Four main policy lessons can be drawn from the RCEP investment chapter negotiations:

- While India was not part of the RCEP consensus in November 2019, the country has not formally withdrawn from the negotiations. Japan recently expressed doubt over whether it would sign RCEP without India. Time will tell if this was a tactic to obtain greater concessions before signature, or if India will step out of the largest trade bloc in the Asia-Pacific.
- While many commitments have been made in the text, the final agreement should be viewed as a framework rather than the last word on the topic. Like all ASEAN+1 FTAs, RCEP will include a built-in agenda (including on preparatory work for implementation and capacity development; economic integration; business utilization of RCEP opportunities). Moreover, domestic-level implementation will be extremely important. Once the negotiations are concluded, the next challenge will be for developing countries effectively to translate the broad guidelines, rules and regulations at the RCEP level into workable, effective laws, regulations and guidelines within individual member countries.
- Given the structure of many economies, domestic implementation will have to be designed with a careful eye toward enhancing the ability of smaller firms to take advantage—through adequate competition policy frameworks—of the opportunities created through RCEP.
- The RCEP investment chapter signals another—and major—blow to ISDS in the Asia-Pacific region, confirming earlier signals sent especially by India, Indonesia, Japan, and Australia. RCEP also shows China’s flexibility regarding dispute-settlement arrangements or even their absence, despite its increasing outward FDI and the Belt-and-Road Initiative: the China-Australia FTA foresees a bilateral court system (not put to use yet), while the China-Canada BIT foresees arbitration.

While RCEP negotiations were launched with great ambitions, the tangible outcome is rather disappointing. RCEP’s investment chapter represents two steps backwards. Negotiations are concluded, but India has not (yet) joined the consensus. Moreover, RCEP adds just another layer to the many existing investment treaties in the region which, given RCEP’s investment chapter limitations, remain more important than ever for most RCEP investors. No investment claims will be made under RCEP; instead, RCEP investors will rely on old BITs to challenge host country policies. However, RCEP still constitutes a step forward as it creates an investment framework that is tightly linked to trade and that could be refined in the future.

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Hsieh, Sufian Jusoh, Xu Qian, Richard Pomfret, and Heng Wang for constructive criticism and Manjiao Chi, Mark Feldman and Wen Shan for their helpful peer reviews.

¹ [Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership, Preamble.](#)

The partner countries are Australia, China, Japan, Republic of Korea, New Zealand, and (previously) India.

² [Matthew Mohan, "Negotiation outcome a major step forward for RCEP," *Channel News Asia*, Nov. 4, 2019.](#)

³ [Rahimi Yunus, "RCEP talks to proceed without ISDS," *The Malaysian Reserve*, Sep. 13, 2019.](#)

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