RCEP Investment Rules: Help or Hindrances to Asia's COVID-19 Recovery?

By:

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The Regional Comprehensive Economic Partnership (RCEP), finally agreed in December 2020, is one of the most noteworthy investment chapters in a free trade agreement (FTA) signed in what was a historically disruptive year for global trade and foreign direct investment (FDI) flows due to the novel coronavirus disease (COVID-19) pandemic.

While a reported twenty-seven FTAs and forty-four bilateral investment treaties (BITs) exist among RCEP countries, this Agreement will be the first providing for the liberalization, protection, promotion and facilitation of investment among all fifteen of the signatory countries. The Agreement has been hailed as a much needed shot in the arm for investment flows among RCEP countries by providing greater predictability for investors in a scenario where regional FDI flows are estimated to drop 15% in 2020 in light of the pandemic.

RCEP parties constitute a diverse mix of countries, encompassing developed, developing and least developed countries, as well as major FDI-exporting and FDI-importing States. The Agreement's framers were, therefore, obliged to not only balance diverse national interests and development imperatives, but also to craft investment rules which encourage investment, without prejudicing host States' ability to regulate for legitimate public interest, especially during a pandemic. This article takes a preliminary look at the extent to which the investment rules in the RCEP are likely to help or hinder Asia's COVID-19 recovery.

Dispute Settlement

RCEP countries are among those which are participating in the UNCITRAL's Working Group III on Investor-State Dispute Settlement (ISDS) and some like China, Indonesia and Thailand have made submission on ISDS reform. However, one of RCEP's most lauded features is its current omission of investor-state dispute settlement. Investors, instead, have the option of seeking to convince their home state to bring a claim against the host state as provided for under RCEP's general dispute settlement chapter (Chapter 19).

This does not preclude the future inclusion of ISDS. Under Article 10.18, RCEP parties commit themselves to a work programme to enter into negotiations on ISDS, as well as the application of the expropriation provision to taxation measures that constitute expropriation, within two years after the Agreement's entry into force.

The current exclusion of ISDS may be viewed as a progressive step given the potential for investor claims under IIAs pursuant to host States' COVID-19 measures. However, the fact that an investor of a RCEP party can still rely on ISDS where provided for under an existing IIA between its home State and the host State begs the question why the RCEP's framers had not opted to include a joint statement limiting the applicability of ISDS under existing IIAs as between them either outright or in so far as COVID-19 related measures are concerned.

Covered Investments and Investors

RCEP's investment chapter shares many similarities with the investment chapter of the ASEAN-Australian-New Zealand-Free Trade Agreement

(AANZFTA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Like the AANZFTA and the CPTPP, the RCEP Agreement utilizes an asset-based definition of investment definition. In keeping the recommendation under UNCTAD's IIA Reform Accelerator, RCEP, however, narrows the definition by qualifying, for example, that such an asset has the characteristic of an investment such as the commitment of capital or other resources, the expectation of gains or profits or the assumption of risk. It also specifically carves out any acts taking place or situations that ceased to exist before the Agreement's date of entry into force.

There have been some country-specific qualifications. For example, for Cambodia, Indonesia and Vietnam, "has been admitted" means "has been specifically registered or approved in writing, as the case may be". The RCEP adopts a negative list approach to investment liberalization. Investor of a party is defined as a natural person or a juridical person of a party that seeks to make, is making or has made an investment in the territory of another Party, It goes on to further define "juridical person of a party" and "natural person of a party". It specifically excludes the branch of a juridical person from having a right to make a claim against any party under the Agreement.

Investment Protection

Under the RCEP Agreement, each party is to accord investors of another Party and to covered investments national treatment (NT) and most favoured nation (MFN) "in the circumstances". In keeping with best practice, it goes on to further qualify that "in like circumstances" depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

The multiplicity of IIAs existing among RCEP States makes treaty-shopping by claimant investors, including more favourable dispute settlement measures, a string possibility. The framers of the RCEP agreement seek to limit this by explicitly carving out from NT and MFN any international dispute resolution procedures or mechanisms under other extant or future international agreements. However, as Article 20.2 allows for investors to opt to utilize a more 'investor-friendly' treaty where one exists between the home and host States.

Expropriation clauses, particularly indirect expropriation, are among the most successfully invoked clauses used to challenge host State actions even where they are in the clear public interest. It is therefore, curious that RCEP parties have not followed the growing best practice of adopting a criterion for what would constitute indirect expropriation for the purposes of the Agreement. Moreover, while it has an explicit carve-out for the issuance of compulsory licenses, there is no general carve-out for non-discriminatory actions by the State to protect health and safety.

Unqualified FET clause have been generously interpreted by arbitral tribunals to the detriment of host States. The RCEP agreement keeps, but narrows the controversial fair and equitable treatment (FET) and the full protection and security clauses (FPS) by limiting them to the customary international law minimum standard of treatment of aliens and also defining what they mean for the purpose of the agreement. The definition of each follow those outlined as options in UNCTAD's IIA Reform Accelerator.

A denial of benefits clause has become a staple in contemporary IIAs. A RCEP party is allowed to deny the benefits of the provisions of the chapter to an investor that is a juridical person of another Party and to investments of that investor in two instances: first, where the juridical person is owned or controlled by a person of a non-Party to the RCEP or of the denying party and second, if it has no substantial business activities in the territory of any party other than the denying party. Thailand and the Philippines have country-specific provisions in the denial of benefits clause. A party may also deny benefits to an investor of another Party or a third Party and its investments where such investment is in breach of the host State's laws implementing the Financial Action Task Force's recommendations, that is, laws against money laundering and countering the financing of terrorism (ML/CFT).

Rebalancing Investor and Host State Rights and Special and Differential Treatment

Under the CPTPP, the RCEP does not include dedicated provisions on investment and environmental, health and other regulatory objectives or corporate social responsibility. The Agreement also lacks chapters on the environment and labour found in most contemporary FTAs in which parties

agree to maintain and not lower their environment and labour standards. It, however, contains security exceptions which, inter alia, protects the right of a party to apply measures it considers necessary for the protection of its own essential security interests. Article 17.12 also makes the general security exceptions under GATT Article XX applicable to the investment chapter, allowing States to rely on these defence.

RCEP lacks the special and differential treatment clause found in Article 15 of the AANZFTA's investment chapter, recognizing the importance of according special and differential treatment to the newer ASEAN Member States and outlining some of the ways in which assistance could be granted.

Investment Promotion and Facilitation

Promotion and facilitation of FDI will be critical for countries' financing not just their COVID-19 recovery, but also their achievement of the Sustainable Development Goals (SDGs). RCEP's promotion provisions are pretty standard best endeavour commitments by parties to encourage investments amongst each other, organize joint promotion activities and business matching events, inter alia. Concrete steps would need to be taken by the respective investment promotion agencies and chambers of commerce, in particular, to operationalize these provisions.

RCEP countries are also among those World Trade Organization (WTO) Members participating in the Joint Statement Initiative negotiations on investment facilitation for development. RCEP's provisions on investment facilitation are largely best endeavour and include typical commitments to simplify procedures for investment applications and approvals, promoting the dissemination of investment information and establishing and maintaining contact points. It also includes other best endeavour provisions by parties to assist investors to amicable resolve complaints or grievances and establish mechanisms to make recommendations to relevant government bodies to address recurrent issues affecting investors of another RCEP party.

Help or Hinderances to COVID-19 Recovery?

Without doubt, once in force, RCEP could stimulate COVID-19 recovery in the region by fostering greater investment among the fifteen Asia-Pacific countries. However, as the Agreement will be co-existing with other IIAs among the

countries, it adds another noodle to the already growing spaghetti bowl of IIAs among the Asia-Pacific States. Moreover, although it adopts many of the best practices on IIA reform seeking to protect the right of host States to regulate for legitimate public welfare , RCEP's co-existence with other more favourable IIAs between the parties in some cases, does not rule out the potential for investor treaty shopping. Nonetheless, the chapter's built-in work plan and general review clause (Article 20.8) suggests that there is room for future negotiations on these matters.

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