Special and Differential Treatment of LDC Parties in RCEP's Dispute Settlement Mechanism: Mere Words or Effective Safeguards?

By:

Farhaan Uddin Ahmed

February 17, 2021.

The Regional Comprehensive Economic Partnership (RCEP) provides for an all-purpose state-to-state dispute settlement mechanism in Chapter 19 (Dispute Settlement) of the Agreement. The RCEP has been credited for taking a distinctive approach to inter-State dispute settlement by providing for Special and Differential (S&DT) relating to Least Developed Country (LDC) parties. It should be noted that only three (Myanmar, Cambodia and Laos) out of the fifteen parties to the RECP are LDCs. Now, Article 19.18 of Chapter 19 of the RCEP provides that:

1. At all staged of the determination of the causes of a dispute and dispute settlement procedures involving a Least Developed Country Parties. In this regard, Parties shall exercise due restraint in raising matters under these

procedures involving a Least Developed Country Party. If nullification or impairment is found to result from a measure taken by a Least Developed Country Party, a Complaining Party shall exercise due restraint regarding matters covered under Article 19.17 (Compensation and Suspension of Concessions or Other Obligations) or other obligations pursuant to these procedures.

2. Where any Party to the dispute is a Least Developed Country Party, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on special and differential treatment for a Least Developed Country Party that form part of this Agreement which have been raised by that Party in the course of the dispute settlement procedures.

The text of paragraph 1 of Article 19.18 very closely resembles paragraph 1 of Article 24 of the WTO Dispute Settlement Understanding (DSU) which provides for 'special procedures' in WTO disputes involving LDC members. Fundamentally, paragraph 1 of Article 19.18 provides that at all stages of the determination of the causes of a dispute and of dispute settlement procedures involving an LDC party, particular consideration must be given to the special situation of LDC parties by exercising 'due restraint'. (i) in raising matters involving an LDC party under RCEP's dispute settlement procedures; and (ii) with regard to utilising temporary coercive measures in the event of non-compliance with the obligation to implement the final report of the dispute settlement panel within the reasonable period of time.

The RCEP does not define 'due restraint' nor does it provide any form of clarification the manner and circumstances in which 'due restraint' is to be exercised by the complaining party. The jurisprudence of the WTO does not provide any help in this regard. As of December 2020, no WTO member has invoked the WTO's dispute settlement procedures against an LDC member and only one LDC member (DS306) has invoked dispute settlement procedures against another member; the dispute was however settled through a mutually agreed solution. Hence, the lack of clarity surrounding the meaning of 'due restraint' and the consequent uncertainties relating to the duties which emanate from the obligation to 'exercise due restraint' under Article 19.18 of RCEP, may very well result in a situation where mere lip service is paid to the real need for special and differential treatment of LDC parties in dispute

settlement proceedings.

Additionally, paragraph 2 of Article 19.18 obliges the panel to explicitly indicate in its report the manner in which it has considered and taken account of the relevant RCEP S&DT provisions raised by the LDC party during the dispute settlement procedure. The explicit indication of the consideration and taking into account of the relevant S&DT provisions raised by the LDC party in dispute in panel reports is a welcome development. However, this obligation does not mean that it will necessarily result in an outcome which is more favourable to the LDC party. There is a wide gap between actually giving effects to S&DT provisions and merely taking them into account. Also, since the members of the RCEP dispute settlement panel must be individuals who have previously 'served on a WTO panel or the WTO Appellate Body or in the WTO Secretariat' (paragraph 11(b) of Article 19.11), any radical jurisprudential development is unlikely to be forthcoming.

Some have noted that the absence of ISDS and the S&DT provision relating to dispute settlement suggests a 'concerted effort to address the particular concern' of RCEP's LDC parties. Since the RCEP was negotiated behind closed doors, the text of the Agreement was not made available to the public until final stages, and there was little to no public participation; it would be a fool's errand to speculate about the bargains and compromises made, and horse-trading done during the negotiations.

Although the S&DT provisions relating to disputes involving LDC parties and the current state-to-state dispute settlement mechanism provided by the Agreement may seem comparatively more balanced than the mechanism of Investor-State Dispute Settlement (ISDS), nonetheless, the real extent of the effectiveness and advantages of the mechanism for the LDC parties cannot yet be inferred,

Additionally, the question of Investor-State Dispute Settlement (ISDS) under RCEP is far from settled. Rather Article 10.18 of Chapter 10 (Investment) oblige the parties to enter into discussions on ISDS 'no later than two years after the date of entry into force' of RCEP. The fact that this provision exists says a lot about the forces which were at play during the negotiations and the influence of the proponents of ISDS within the RCEP.

Lastly, it has been observed that the actual effect of the S&DT provision in RCEP's dispute settlement mechanism is to inhibit the impulses of complaining parties, rather than provide concrete safeguards to LDC parties,. This may very well be true. Only time; and possibly the RCEP negotiators, know the true meaning and effect (or intended effect) of the S&DT provisions relating to LDC parties in the RCEP's dispute settlement mechanism.

View online: Special and Differential Treatment of LDC Parties in RCEP's Dispute Settlement Mechanism: Mere Words or Effective Safeguards?

Provided by Afronomicslaw