CHAPTER 8

The Investment Chapter in the Regional Comprehensive Economic Partnership: Enhanced Rules without Enforcement Mechanism

Henry Gao
Singapore Management University, Singapore

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This Chapter examines the legal rules in the investment chapter in the Regional Comprehensive Economic Partnership (RCEP). It starts with an overview and summary of the main provisions in the chapter, followed by an assessment of the rules by comparing established free trade agreements (FTAs), especially the Comprehensive and Progressive Trans-Pacific Partnership. In particular, it notes that the chapter, whilst largely following the established approaches to investment in other FTAs, also includes important twists to the common rules to favour the host states. The last part discusses the conspicuous absence of an investor–state dispute settlement mechanism, its pros and cons, and wider implications on regional integration, then concludes with some thoughts on future developments.

Introduction

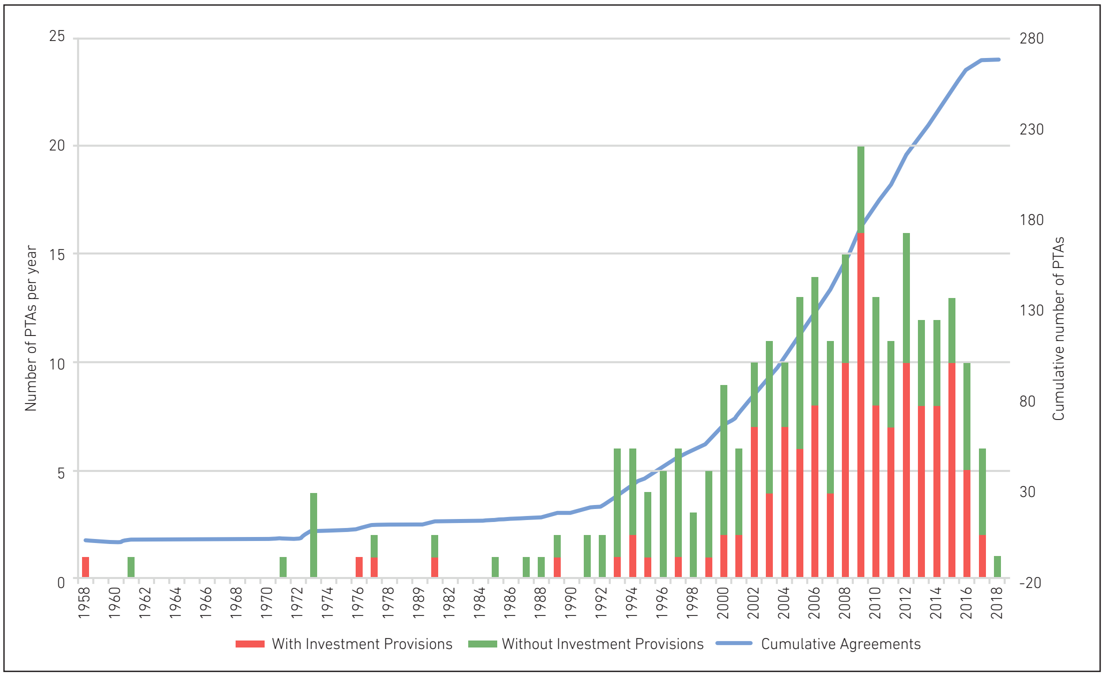
The inclusion of investment issues in trade agreements is a very recent phenomenon (Hoekman and Newfarmer, 2005), as such issues were traditionally governed by separate bilateral investment treaties (BITs). The problem with BITs, however, is that they only address investment protection issues and do not provide investment liberalisation. To deal with the problem, the Canada–United States (US) free trade agreement (FTA) concluded in 1989 became the first FTA to incorporate investment and provide both investment protection and liberalisation in one agreement. This approach was later inherited by the successor to the Canada–US FTA, the North American Free Trade Agreement (NAFTA), which was concluded in 1994. Investment chapters are popular in FTAs concluded between developed and developing countries due to the former's distrust of the latter's legal system, but in recent years, it has also become common even in FTAs amongst developing countries, with the Regional Comprehensive Economic Partnership (RCEP) as one of the latest examples. The rapid growth of FTAs with investment provisions is documented in a 2018 WTO Staff Working Paper by Crawford and Kotschwar, with the chart reproduced in Figure 8.1.

The World Trade Organization (WTO) was established at around the same time as NAFTA, and it also includes an Agreement on Trade-Related Investment Measures (TRIMs). Yet, the TRIMs Agreement does not really regulate investment. Instead, as its name suggests, it mainly targets investment measures that may distort trade, especially those contravening one of the core principles of the WTO: national treatment. It does not provide rules protecting investor's rights as commonly find in BITs or FTAs with investment chapters. As to market access for investment, they are addressed mainly

[1] This WTO staff working paper discussed preferential trade agreements (PTAs), which are often used interchangeably with free trade agreements (FTAs), even though strictly speaking, FTAs are only a sub-category of PTAs. Unless otherwise noted, PTAs and FTAs are regarded as the same in this paper.

under the WTO's General Agreement on Trade in Services (GATS), which includes rules on market access and national treatment for one of the modes of supply of trade in services – commercial presence – also known as mode 3 under the GATS. However, breaking from the tradition from the WTO, many FTAs nowadays have separate chapters on investment, which essentially carved out mode 3 from the services chapters. This is also the approach taken by RCEP.

Figure 8.1 Trend of Free Trade Agreements with Investment Provisions



PTAs = preferential trade agreements.

Source: WTI RTA Database. http://rtais.wto.org (accessed May 2018).

Overview and Summary

The investment commitments in RCEP are composed of the following:
First, a main chapter setting out the main legal rules on investment, which include 18 articles covering issues such as definitions, scope of the agreement, national treatment, most-favoured-nation (MFN) treatment, minimum standard of treatment, prohibition of performance requirements, senior management and board of directors, reservations and non-conforming measures, transfers, special formalities and disclosure of information, compensation for losses, subrogation, expropriation, denial of benefits, security exceptions, investment promotion and facilitation, and work programme.

Second, two annexes that confirm the Parties' shared understandings on the interpretations of two issues: customary international law and expropriation.

Third, the respective Schedules of Reservations and Non-Conforming Measures for Services and Investment by the Parties, which are attached to RCEP as Annex III.

Due to space constraints, this paper will focus mainly on the legal rules in the first two components, with a detailed examination and summary of the specific provisions in this section.

Definitions

This article includes the definitions of nine terms, all relating in some way to investments and investors, which are the core issues in the investment chapter. As BITs were initially designed to attract foreign-direct investment (FDI), they have traditionally adopted a broad definition that takes an 'asset-based' approach, which covers 'every kind of asset' including both FDI and portfolio investment (Crawford and Kotschwar, 2018). However, due to ever-expansive interpretations by the arbitration panel in investment arbitration cases, many countries grew wary of the broad definition and shifted to a narrower 'enterprise-based' definition, as the one found in the Canada–US FTA. More recently, countries have been trying to strike a balance between the two by having a comprehensive definition of investment coupled with various techniques to make sure that assets meant to be excluded are not inadvertently covered. This is also the approach taken in the RCEP definition article, as it defines investment as 'every kind of asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment', which is followed by an open-ended list of possible forms of investment, a list that is even longer than the list under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). At the same time, it also retains considerable policy autonomy for the Parties by explicitly stating that 'covered investment' under the chapter is limited to those made 'subject to [the host Party's] relevant laws, regulations, and policies'.

Scope

Article 10.2 in RCEP delineates the scope for the chapter by specifying both the measures it covers, as well as those that are excluded. There are three requirements for the covered measures:

First, it should be 'adopted or maintained by a Party', which include both central and sub-central governments and authorities, as well as 'non-governmental bodies in the exercise of powers delegated by' such governments and authorities.[2]

Second, it should relate to 'investors of another Party', which is defined to include both a natural person and a juridical person.[3] A natural person includes not only nationals or citizens of a Party, but also permanent residents.[4] A juridical person is broadly defined to include 'any entity constituted or organised under applicable law, whether or not for profit, and whether private or governmental, including any corporation, trust, partnership, joint venture, sole proprietorship, association or similar organisation'.[5] It also includes 'a branch of a juridical person', but such branch is explicitly denied 'the right to make any claim against any Party' under RCEP.[6] This provision shall be read together with the Article on denial of benefits,[7] which specifies circumstances under which the benefits in the investment chapter may be denied to investors of another Party, such as ownership or control by a person from a non-Party, lack of substantial business operation, lack of diplomatic relations, or investments 'in breach of the provisions of the denying Party's laws and regulations that implement the Financial Action Task Force Recommendations'. There are also country-specific denial provisions for Thailand and the Philippines. Similar to the CPTPP, RCEP also includes in its definition of investors those seeking to make investments, which means that the pre-establishment phase of an investment is also covered.

Third, it should relate to 'covered investments', which are defined to include both existing investments at the time of entry into force of RCEP, and those which were established, acquired or expanded afterwards.[8] This is also subject to the requirement that such investments shall have been admitted by the host Party 'subject to its relevant laws, regulations, and policies'.

2 Art. 10.1.(h).
3 Art. 10.1.(e).
4 Art. 10.1.(i).
5 Art. 10.1.(f).
6 Footnote 10 of RCEP.
7 Art. 10.14.
8 Art. 10.1.(a).

Investment Liberalisation Commitments

The chapter also includes a host of investment liberalisation commitments, which mainly includes the twin provisions of non-discrimination, i.e. national treatment and most-favoured-nation treatment provision, and performance requirements. The national treatment provision under Article 10.3 serves to make sure that a covered investor would receive treatment no less favourable than that accorded by the host state to its own investor. The MFN provision under Article 10.4 requires the Parties to make sure that a covered investor receives treatment no less favourable than that accorded by the host state to the investor from anywhere, including both other Parties and a non-Party to the agreement. Article 10.6 prohibits a host of common performance requirements, such as those requiring export performance, domestic content, technology transfer, etc. These practices are similar to the ones found under the WTO's TRIMs Agreement and the CPTPP. Similarly, following the example of the CPTPP, RCEP also includes a provision banning nationality requirements for senior management, but the Parties may impose nationality or residency requirements for a majority of the board of directors.[9]

Scheduling

The scheduling of market access commitments is one of the key issues in the investment chapters of FTAs, which often goes together with market access for trade in services given the close relationship between investment and mode 4 (commercial presence) of services trade. There are two ways to schedule these commitments: the positive-listing approach as found under the GATS, and the negative-listing approach inspired by NAFTA. The main difference between the two is that, under the GATS positive-listing approach, obligations such as market access and national treatment does not apply to a sector unless it is explicitly included in the schedule of specific commitments, which means the default rule is no liberalisation. In contrast, under the NAFTA negative-listing approach, all the investment liberalisation commitments discussed above apply to all sectors unless a Party has scheduled specific restrictions for a given sector, which means the default rule is full liberalisation.

In this aspect, RCEP takes an interesting hybrid approach. Whilst all the Parties schedule their investment commitments pursuant to the negative-listing approach under Article 10.8, for the scheduling of services commitments, the Parties are allowed to pick and choose from either a positive-listing approach or the negative-listing approach according to Article 8.3. This resulted in a confusing set-up when it comes to Annex III, which not only records a Party's reservations and non-conforming measures on investment for

[9] Art. 10.7.

those that takes a positive-listing approach (Cambodia, Lao People's Democratic Republic, Myanmar, Philippines, Thailand, Viet Nam, China, and New Zealand), but also reservations and non-conforming measures on both services and investment for those that takes a negative-listing approach (Brunei Darussalam, Indonesia, Malaysia, Singapore, Australia, Japan, and the Republic of Korea).

As its title suggests, under Article 10.8, the Parties are allowed to schedule two types of restrictions: reservations and non-conforming measures. Non-conforming measures under List A of Annex III refer to the measures under the first paragraph, which are existing restrictions that the Parties are allowed to maintain. It does not allow a Party to introduce new restrictions, and thus essentially lock in the existing liberalisation such Party provides. If the Party wishes to maintain the flexibility of introducing new restrictions in the future, it can schedule it under List B of Annex III, which allows a Party to adopt new restrictions according to the second paragraph of Article 10.8. Each entry to the two lists shall list the sector or sub-sector it covers, with its classification under the Central Product Classification, which is also the basis of the services sectoral classification under the GATS.[10] The entry shall also specify the particular obligation it deviates from, describes the restrictions, and identifies the relevant laws and regulations that such restrictions are based on.

To avoid conflict between the investment and services chapters, Chapter 10 also explicitly states that the investment chapter does not apply to measures which are covered by either Chapter 8 on trade in services, or Chapter 9 on temporary movement of natural persons.[11] However, given the close relationship between commercial presence and investment, the Chapter made an exception for commercial presence by specifying that the provisions on investment protection do apply to measures affecting commercial presence to the extent that 'any such measure relates to a covered investment and an obligation under this Chapter.' [12]

Investment Protection

In addition to national treatment and MFN treatment, the chapter also includes a specific clause on treatment of investment, which is the most important investment protection commonly found in BITs and investment chapters in FTAs. Article 10.5 requires the Parties to accord to covered investments 'fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of Aliens'. It further elaborates the meanings of these treatments by noting that fair and equitable treatment means no denial of justice or legal protection, full protection

[10] WTO Services Sectoral Classification List MTN.GNS/W/120, 10 July 1991.
[11] Art. 10.2.2.
[12] Art. 10.2.3.

and security refers to physical protection and security of investment, whilst the meaning of 'customary international law is further clarified in an annex to that which 'results from a general and consistent practice of States that they follow from a sense of legal obligation'. [13]

More specifically, the chapter also spells out the specific obligations regarding protection of assets and investments, which include the requirement to allow free transfers of profits or capital into and out of the host country,[14] not undermine investment protection through specifical formalities,[15] compensation for losses arising from conflicts,[16] recognition of the subrogation or transfer of any right or claim in respect of covered investment,[17] and restrictions on expropriation (either directly or indirectly)[18] and the right to compensation. [19]

Regulatory Autonomy

The RCEP chapter on investment does not include explicit provisions on the right to regulate, unlike some FTAs, such as the CPTPP provision that confirms that the chapter shall not be construed to prevent a party from taking measures for environmental, health or other regulatory objectives.[20] However, this does not necessarily mean that the Parties have given up their regulatory autonomy. First, the annex on expropriation explicitly excludes non-discriminatory measures 'designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, public morals, the environment, and real estate price stabilisation'. Second, the general exceptions clause under Article 17.12 of RCEP applies to the investment chapter, and this clause incorporates both Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the GATS. The security exceptions are also incorporated, both through Article 17.13 and Article 10.15 in the investment chapter itself. Third, as the investment chapter does not include an investor–state dispute settlement (ISDS) mechanism, there is not much an investor could do if the host government indeed takes such regulatory measures, at least for the first 5 years after the entry into force of RCEP, before the ISDS is introduced.[21]

[13] Annex 10A.
[14] Art. 10.9.
[15] Art. 10.10
[16] Art. 10.11.
[17] Art. 10.12.
[18] Annex 10B.
[19] Art. 10.13.
[20] Art. 9.16.
[21] Art. 10.18.

Administrative Provisions

The last three provisions of the chapter deal with various administrative provisions, such as the promotion of investment[22] and investment facilitation.[23] Both issues are not typically found in other major FTAs such as the TPP except the Chinese FTAs such as the Association of Southeast Asian Nations (ASEAN)–China Investment Agreement and the ASEAN Comprehensive Investment Agreement (ACIA),[24] which have mirroring languages.[25] They reflect the wishes of the RCEP members to attract more investment into the region. Whilst the clause on investment promotion focuses mainly on soft information exchange activities, the one on investment facilitation is more substantive and contains provisions on investment approval procedure, contact points, and mechanisms to deal with investment complaints. The inclusion of investment facilitation in RCEP is not surprising, as similar discussions were also launched in the WTO in December 2017 as a Joint Statement Initiative by 70+ WTO members, with all the non-ASEAN members of RCEP and five of the ASEAN members all part of the initiative,[26] especially China which plays a leading role (Gao, 2021).

The last article set out a work programme to initiate discussions on two issues: ISDS) (addressed below), and application of Article 10.13 (Expropriation) to taxation measures that constitute expropriation. Whilst most investment treaties do provide 'clear and unequivocal' exclusions of taxation measures, they have not been effective in preventing the challenge of tax-related measures in ISDS procedures (Uribe and Montes, 2019). Moreover, despite the carve-out of taxation measures in FTAs such as NAFTA,[27] some FTAs such as the US-led ones have explicitly provided for the possibility of application of the expropriation provisions to taxation measures.[28] It is worth noting that during the negotiation process for RCEP, the Republic of Korea proposed an Annex On Taxation And Expropriation, which sets out the factors to be considered in determining whether a taxation measure shall constitute expropriation (Knowledge Economy International, 2016). It is unclear why this did not make it into the final text, but it would be interesting to see if the RCEP members decide to follow the trend established by earlier FTAs in future negotiations.

[22] Art. 10.16.
[23] Art. 10.17.
[24] ASEAN Comprehensive Investment Agreement (2021).
[25] Articles 20 and 21 of the ASEAN–China FTA; Articles 24 and 25 of the ACIA.
[26] Joint Ministerial Statement on Investment Facilitation for Development, WT/MIN(17)/59, 13 December 2017.
[27] Article 2103 of NAFTA.
[28] See e.g. US–Colombia FTA Article 22.3.6, US–Oman FTA Article 21.3.6, CTPP 29.4.8.

Salient Features

As can be seen from the summary above, the investment chapter of RCEP largely follows the approaches in established FTAs such as the CPTPP. At the same time, it is also worth noting that important twists that favour the host state can also be found throughout the chapter, with the main examples discussed below.

Limited Scopes of Coverage

As mentioned earlier, the commonly-used definitions on investment in FTAs vary between the narrower enterprise-based approach and the broader asset-based approach. During the RCEP negotiations, India proposed the former, whilst the other Parties all opted for the latter. With India's withdrawal from RCEP in the end, it is no surprise that the Parties adopted the asset-based approach, i.e. including 'every kind of asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gains or profits, or the assumption of risk'. Note although, in the end, the specific examples for the forms of investment do not include 'enterprises' as under the CPTPP. Whilst this is not a problem for most enterprises due to the inclusion of 'shares, stocks, and other forms of equity participation in a juridical person', this could pose a problem for a branch of an enterprise, which has been explicitly included under the CPTPP.[29] Although the RCEP definitions of 'juridical person' and 'juridical person of a Party' explicitly includes the branch of a juridical person, the utility of such provision for claiming substantive legal rights under the investment chapter is arguably defeated by two footnotes, which make clear that 'a branch of a juridical person does not have any right to make any claim against any Party under this Agreement'.[30]

Moreover, to limit the scope of investment, the chapter also explicitly states that the term 'investment' does not include 'an order or judgment entered in a judicial or administrative action or an arbitral proceeding.' This is different from most FTAs, which only exclude 'an order or judgment entered in a judicial or administrative action'.[31] This is not an invention of RCEP, but follows the examples of other agreements such as the 2017 ASEAN–Hong Kong FTA[32] and the 2018 Indonesia–Singapore BIT.[33] India proposed the text in the RCEP negotiations, which is not surprising as the language mirrors the one found in India's model BIT.[34] Australia also supported the provision, probably due to its unpleasant

[30] Footnotes 10 and 13.
[31] CPTPP, Art. 9.1.
[32] Art. 1.(o).1, https://edit.wti.org/document/show/a3f45739-0637-4447-bc2d-230bc90dd804?textBlockId=75324fc6-4f0b-48d3-8118-260c9d60ada4&page=1
[33] Footnote 2, https://www.mti.gov.sg/-/media/MTI/improving-trade/IIA/Legal-Text-SG-ID-BIT-(2018).pdf
[34] Art. 1.4.(vii), https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf

experience in the investment arbitration cases on cigarettes, and this is probably why the provision was kept in the final text even after India pulled out.

Another effort to retain regulatory autonomy on investments takes the form of the additional qualification in the definition on 'covered investment', which states that only an investment that 'has been admitted by the host Party, subject to its relevant laws, regulations, and policies' is covered. Furthermore, Malaysia, Thailand, Cambodia, Indonesia and Viet Nam also specified, through footnotes to the provision,[35] that only those that are specifically registered or approved in writing could be regarded as those that have 'been admitted'. This can be interpreted to mean the denial of pre-establishment rights for foreign investors, which goes against the trend of expanding investors' rights from the post-establishment stage to pre-establishment phase in recent years.

Minimum Standard of Treatment

Under Article 10.5, the Parties shall 'accord to covered investments fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of aliens'. Moreover, the same article also explicitly states that 'full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment'. This essentially limits the scope of full protection and security to physical protection and security only and prevents it from being extended to cover also commercial and legal protection and security, as some arbitration panels have done (Moussly, 2019; Mundi, 2021). Such a narrow interpretation could be justified by the need to maintain a meaningful distinction between the twin obligations of the fair and equitable treatment standard and full protection and security so as to ensure that both standards are given effect according to the principle of effet utile, which dictates that all provisions in an agreement must be given effect. At the same time, it also reflects the political reality, especially as the political stability and abilities of the governments of several countries in the region have been cast in doubt by domestic turmoil in recent years. As revealed by the negotiating history, the emphasis on 'physical protection' was a joint effort by New Zealand and ASEAN, with each contributing one word to the phrase, whilst the word 'security' also shared the support of Australia, Japan, and the Republic of Korea (Knowledge Economy International, 2016).

[35] Footnotes 1, 2, and 3.

Extensive Exceptions

In addition to the exclusions and exceptions scattered throughout the investment chapter (some are discussed above), the chapter also contains broad exception clauses. First, pursuant to Article 17.12, the WTO general exceptions clauses are 'incorporated into and made part of this Agreement, *mutatis mutandis*'. There are two such general clauses under the WTO framework, with one under Article XX of the GATT and the other under Article XIV of the GATS. Whilst most chapters under RCEP only incorporate one of these exceptions, the investment chapter, along with Chapter 12 on electronic commerce, are the only two chapters where both the GATT and GATS general exceptions clauses are incorporated. This is partly due to the special nature of investment which straddles across goods and services, but it also reflects the Parties' concerns over the potential loss of regulatory autonomy as they open up investment.

Similarly, Article 17.13 of RCEP also incorporates the security exceptions to all chapters in the agreement. As if this is not enough, Article 10.15 repeats the security exceptions for the investment chapter, by stating that the commitments in the chapter shall not be construed to prevent a Party from applying measures it considers necessary for security, or require a Party to provide or allow access to information 'the disclosure of which it determines to be contrary to its essential security interests'. Such heightened emphasis on investment reflects the concerns of some Parties on the potential security implications of investments, which is not surprising given the frequent resort to national security to justify trade and investment restrictions by some of the major players in the world in recent years.

Investment Liberalisation

Also, as noted earlier, the investment market access commitments under RCEP are also limited, due to its adoption of the hybrid scheduling model, which allows some Parties to list their services commitments using the positive-listing approach. At the same time, it is also interesting to note that the agreement does include some interesting features which could potentially boost investment liberalisation. Two of such provisions are standstill provisions, which serve to make sure that a Party would not retreat from existing commitments and bind liberalisation at the status quo levels; and ratchet provisions, which go a step further by binding Parties to any autonomous liberalisation they might introduce in the future.

The negative-listing approach, by definition, includes a built-in standstill mechanism in the form of the list of non-conforming measures, which prevents the Parties from introducing any new restrictions in the future. To the extent that a Party wishes to retain the flexibility to introduce future restrictions, it will need to schedule the measure in its list of reservations. As the RCEP investment chapter requires all Parties to schedule their commitments in the negative-listing approach, the standstill obligations apply to every Party for investment commitments. The same is also true for those RCEP Parties that schedule their investment-related services commitments pursuant to the negative-listing approach under Article 8.8. As to those which schedule their services commitments pursuant to the positive-listing approach under Article 8.7, a standstill provision is provided under the third paragraph of the article, which asks the Parties to identify sectors or subsectors for future liberalisation with 'FL' marked in its Schedule in Annex II (Schedules of Specific Commitments for Services). Once so marked, any applicable terms, limitations, conditions, and qualifications on market access and national treatment shall 'be limited to existing measures of that Party'.

The ratchet provision is found in Article 10.8.1(c) of the investment chapter, which states that the four investment liberalisation commitments mentioned above (national treatment, MFN, performance requirements, and senior management and board of directors) shall not apply to 'an amendment to any non-conforming … to the extent that the amendment does not decrease the conformity of the measure'. The language mirrors the classical formulation of the ratchet clause as found in NAFTA, but interestingly, RCEP sets different reference points depending on the Party. For five ASEAN Members (Cambodia, Indonesia, Lao PDR, Myanmar, and the Philippines), the point of reference is set at the date of entry into force of RCEP, which means that post-RCEP liberalisation is not considered. For the other Parties, the reference point is set at 'immediately before the amendment', which includes both pre- and post-FTA liberalisation, as per the original wording of NAFTA. As indicated by the leaked draft of the investment chapter, ASEAN and India preferred to have no ratchet provision and India even proposed to revert to the standstill provision. ASEAN later softened its resistance but proposed the language mentioned earlier to set the reference point to the date of entry into force of RCEP, whilst the five non-ASEAN Parties proposed the classical formulation. Whilst not perfect, the current compromise language can be seen as a practical way to keep the ratchet clause despite resistance from some ASEAN members.

It is also worth noting that the ratchet provisions also found their way into the services chapter, with Articles 8.7.4 and 8.8.1(c) applying them to both those adopting the positive-listing approach and those taking the negative-listing approach. Whilst they both follow the NAFTA-style language and covers measures existed 'immediately before the amendment', there are still important differences between the two groups, with the former only applying to the national treatment and market access obligations, whilst the latter broadens the coverage to those relating to MFN treatment and local presence requirements.

Despite provisions to lock in commitments such as the standstill and ratchet clauses, the commitments under RCEP could still be eroded with the inclusion of another provision allowing modification of schedules. Under Article 8.13, those Parties which scheduled their commitments using the positive-listing approach may modify or withdraw commitments in their schedules other than those indicated with an 'FL' 3 years after the commitment has entered into force. Whilst such Parties are required to enter into negotiations with other Parties to provide compensatory adjustments and an arbitration mechanism is provided in case no agreement is reached, the most other Parties could do is to retaliate against the modifying Party in case of non-compliance with the arbitration decision. Thus, the practical efficacy of the arbitration mechanism is questionable. The modification of schedules is only allowed under the services chapter, but it could have implications for the investment chapter as well due to the close relationship between FDI and commercial presence for services.

Investor-State Dispute Settlement Mechanism

The most conspicuous feature of the investment chapter in RCEP is the absence of an investor-state dispute settlement mechanism. The reason is certainly not the lack of trying, as China, Japan, and the Republic of Korea submitted proposed texts for an ISDS mechanism during the negotiations. The detailed text runs to 26 pages, which account for more than one-third of the consolidated draft text as of 2015. However, there was no alternative text proposed by the other Parties, which means that the rejection of an ISDS mechanism in the final agreement was probably not the result of disagreements over specific design features, but more due to categorical opposition to ISDS by the other 12 Parties. Amongst them, it is no surprise that most of the ASEAN member countries would oppose ISDS (Nottage and Thanitcul, 2016), as most developing countries tend to be suspicious of the ISDS mechanism due to the alleged biases of arbitration panels against host countries. For example, Indonesia announced in 2014 that it would terminate its existing BITs and renegotiate new ones limiting recourse to the ISDS mechanism (Bland and Donnan, 2014). But it is interesting that even Australia and New Zealand, two of the only three developed countries in RCEP, also opposed the ISDS mechanism. Australia used to favour an ISDS mechanism in the BITs and FTAs, but became disillusioned of ISDS after itself became the target of an ISDS claim by Philip Morris challenging Australia's plain packaging cigarettes legislation by invoking its old BIT with Hong Kong in 2011 (Nottage, 2019). Whilst Australia ultimately won the arbitration, it was only achieved after a messy legal battle spanning 7 years and costing $24 million in legal fees, of which the Australian government was only able to recover half from Phillip Morris (Ranald, 2019a).

As a result, the position of the Australian government has shifted from a more receptive attitude to considering ISDS provisions in FTAs 'on a case-by-case basis in light of the national interest' (Amokura and Nottage, 2017). Australia's shock with ISDS apparently reverberated through the Tasman Sea to reach New Zealand, which also announced in October 2017 that their trade negotiation officials would 'oppose ISDS in any future free trade agreements' (Amokura and Nottage, 2017). They also partially excluded ISDS in the CPTPP through bilateral side letters with several members, i.e. Brunei, Malaysia, Peru, Viet Nam, and Australia (Herbert Smith Freehills, 2018). Thus, it is not surprising that neither Australia nor New Zealand supported an ISDS mechanism in RCEP.

What are the implications of the lack of ISDS? It's hard to predict at this juncture as RCEP only entered into force on 1 January 2022 (ASEAN Secretariat, 2021), but it is useful to start with an overview of the changing perceptions on ISDS and the impetus for ISDS reform in general. It is commonly acknowledged that ISDS treaties originated after the Second World War (Van Harten, 2020; Choi, 2007), as former colonial powers sought to protect their investments in former colonies that became newly independent countries in the new wave of de-colonisation and tried to nationalise these assets. Whilst the Western countries were not successful in their efforts to establish multilateral treaty-making initiatives conferring substantive rights to foreign investors due to the resistance of developing countries (Puig and Shaffer, 2018), they were able to conclude the negotiation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States in 1965,[36] which led to the creation of the International Centre for Settlement of Investment Disputes at the World Bank. In the 1970s and 1980s, the United States (US) started to include direct investor claims in its BITs (Choi, 2007). With the arrival of a more favourable climate towards foreign direct investment facilitated by the fall of the Berlin Wall, the collapse of the Soviet Union, and the rise of the 'Washington Consensus' (Puig and Shaffer, 2018), the 1990s saw the growing popularity of ISDS and a boom in investment arbitration cases. As more and more investment claims were brought, however, people started to question the legitimacy of the ISDS regime (Puig and Shaffer, 2018).

Some of the criticisms of ISDS are based on the principled argument that it is not appropriate to have 'undemocratic and highly clandestine' (Puig and Shaffer, 2018) arbitration panels interfering with the policy choices made by democratically-elected governments, especially as such panels lack the accountability and transparency characterising domestic judicial tribunals. (UNCTAD, 2007) Similarly, it has been argued that the current ISDS model is based on international commercial arbitration, which by nature is ill-suited to deal with disputes involving public law and policy issues. (Puig and Shaffer, 2018).

[36] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 17 UST 1290, 575 UNTS 192.

Other criticisms focus on the problems arising from the actual practices of the arbitration panels, including for example, the lack of consistency in arbitration awards even when the same facts were involved, (Puig and Shaffer, 2018; UNCTAD, 2007) and the potential conflict of interests of *ad hoc* arbitrators who have the incentives to decide in favour of the investors so as not to jeopardise their chances of 'double hatting' as representatives of the claimants in future cases. (Puig and Shaffer, 2018).

Moreover, it is worth noting that these criticisms are not voiced just by developing countries. Instead, with the onset of the global financial crisis in 2007 and the filing of strategic cases to interfere with the public policies in some countries, even developed countries such as Australia now started to rethink their approach towards ISDS (Dymond, Sim, and Teo, 2021). In view of this, it is no surprise that ISDS would be eschewed by RCEP.

This does not mean, however, that all hope is lost on ISDS for the following reasons:
First, as mentioned earlier, the investment chapter does include a built-in agenda for the Parties to discuss investment dispute settlement after RCEP goes into effect. According to article 10.18, the Parties shall enter into such discussions within 2 years after RCEP became effective, i.e. by 1 January 2024, and the discussions shall be concluded within 3 years of commencement of the discussions, i.e. by 1 January 2027. This means that there is possibility of bringing the ISDS mechanism into RCEP, especially as ASEAN countries start to include ISDS in the other FTAs they enter into in the meantime, and more business-friendly governments come to power in Australia and New Zealand. Of course, merely agreeing to have the discussion on such issues does not necessarily mean that the Parties would agree to ISDS in the end, as Article 10.18 explicitly states that the discussions shall be held 'without prejudice to their respective positions', and 'concluding the discussions' does not necessarily imply a positive outcome. Indeed, the wording used in the Article is neutral as it only refers to 'the settlement of investment disputes between a Party and an investor of another Party' without specifying a particular dispute settlement model like the arbitration-style ISDS mechanism commonly found in BITs and FTAs. Instead, it could be one of the many models currently under discussion, such as the professionalised multilateral investment court system championed by the European Union, the mediation model proposed by Brazil and South Africa, or those with other tweaks such as the requirement for exhaustion of domestic remedy for 5 years proposed by India, and even market mechanisms such as political risk insurance favoured by former United States Trade Representative Robert Lighthizer (Puig and Shaffer, 2018).

Second, even if in the end, the RCEP Parties, after lengthy discussion, decide not to incorporate an ISDS mechanism, this does not necessarily mean that foreign investors are left without any recourse. Instead, they could just make use of the existing ISDS mechanisms under the existing BITs and FTAs. This is explicitly confirmed by Article 20.2 of RCEP, which affirms the 'existing rights and obligations' between the Parties under their pre-existing agreements. As noted by Nottage in his comprehensive survey of the treaty practices of Southeast Asian countries, ISDS is already widespread (Nottage, 2021). In particular, the ISDS mechanism is present in all of the ASEAN+ FTAs[37] and the ACIA, which means that all of the RCEP Parties are covered. Of course, when such claims are made, they can only be based on the legal obligations under the respective FTAs they rely on rather than RCEP. But as RCEP does not deviate too much from common practices in investment chapters, it would not make much difference in practice.

If we take a further step back, we can see that even the complete absence of ISDS might not discourage international investors from investing in a foreign jurisdiction. China is a good example in this regard: even though China only started to fully embrace ISDS in its second generation of BITs from the late 1990s (Berger, 2013), investors have rushed to China in the preceding 2 decades, with annual growth rates in the double digits and even triple digits (150% in 1992 and 1993) (Whalley and Xin, 2010). It is also worth noting that the US, one of the biggest sources of FDI into China, has never had an investment or trade agreement with China which includes an ISDS, but apparently this has not deterred US firms from investing huge sums of money in China. This proves that the availability of an ISDS mechanism is never a main factor affecting the decisions of investors. Instead, international investors are presumably drawn by China's huge market potential coupled with its large skilled workforce. Both factored are also present in the ASEAN region, which is now made even more attractive as a safe haven amidst the ongoing US–China trade war and an integrated market with the formation of RCEP. Thus, even without an ISDS mechanism, ASEAN, and in turn the RCEP region, could well become a popular destination for international investors.

At a broader level, the fact that ISDS was rejected after considerable discussion amongst the RCEP Parties is a reflection of the ASEAN Way. This is despite ASEAN's sustained efforts to upgrade the dispute settlement mechanism in its trade agreements, with some features such as the automatic adoption of arbitral award being even more legalistic than the WTO's Dispute Settlement Understanding (Gao, 2019).

According to Walter Woon, the ASEAN Way is not, as some observers might claim dismissively, just 'an ineffective fig-leaf, a cover for inaction' (Woon, 2012). Instead, it is more sophisticated and includes three essential aspects:
First, a desire not to lose face in public or to make other members lose face. Second, a preference for consensus rather than confrontation. Third, a rejection of the notion that states have the right to interfere without consent in the internal affairs of other states.

[37] Nottage's article noted that Japan's FTA with ASEAN was the only exception as it did not have an investment chapter. However, this changed with the recent conclusion of the First Protocol Amending the Agreement on Comprehensive Economic Partnership amongst Member States of the Association of Southeast Asian Nations and Japan, which entered into force in August 2020. The upgraded agreement includes an investment agreement, which includes detailed provisions on ISDS. See Article 51.13. https://www.enterprisesg.gov.sg/-/media/esg/files/non-financial-assistance/for-companies/free-trade-agreements/ASEAN-Japan-CEP/AJCEP_First_Protocol_to_Amend_the_Agreement_on_AJCEP.pdf

Indeed, the negotiation history on ISDS illustrates all of the three elements:
First, with two of the biggest ASEAN member countries (Indonesia and Malaysia) and two of the biggest external countries (India and Australia) all taking the official position of opposing an ISDS mechanism (Ranald, 2019b), some Parties would definitely lose face if the rift amongst the Parties were to be made public. Adding to this the internal competition to win over ASEAN between the three main proponents of ISDS, especially between Japan versus China and the Republic of Korea respectively, it is no surprise that the topic was dropped in the end.

Second, aggressively pushing for the incorporation of ISDS would create a confrontational environment and undermine the consensus necessary for the final conclusion of RCEP, which each of the three main proponents values as a major strategic goal, albeit for differing reasons. For China, concluding RCEP helps to rebuild and strengthen its regional value chain with major economies in the Asia-Pacific region, which was disrupted by the US-led TPP that excluded China from such value chains through the inclusion of de-coupling mechanisms such as the 'yarn-forwarding rule', which bans the use of inputs from non-TPP member countries. For Japan, RCEP acts as a way to counterbalance China's growing influence in the region, by involving like-minded countries such as Australia and New Zealand. The Republic of Korea, on the other hand, could not afford to miss RCEP again, as it already missed the boat before when the CPTPP was concluded.

Third, as mentioned earlier, with investment arbitration cases increasingly touching on the policy choices made by national governments of host countries, especially those relating to social policy issues, an aggressive push for an ISDS mechanism could be perceived as a plot to interfere with the internal affairs of other countries.

With all these reasons, it is understandable that the Parties decided to forego the ISDS mechanism by embracing the ASEAN Way. Yet, the rejection of ISDS does not necessarily mean that RCEP is discouraging regional integration, as ASEAN, both at the individual member level and collective level, is still enthusiastic about signing trade and investment agreements. But instead of rushing everything, they chose to forge ahead slowly but steadily, which is a better approach to prevent potential backlashes that might result from an over-zealous approach.

Conclusion

As can be seen from the discussions above, the investment chapter in RCEP generally follows the standard formats of investment chapters in recent mainstream FTAs. Compared with previous ASEAN+ agreements concluded between ASEAN and the five external partners and the ACIA, RCEP made progress in some areas. One example is the adoption of the negative-listing approach for investment commitments in RCEP. Amongst the previous ASEAN+ agreements, the one with China did not attempt to prohibit non-conforming measures, be it existing or new.[38] Whilst the others mentioned schedules of reservations[39] drafted according to the negative-listing approach, their applications are all subject to the result of discussions in the built-in work programme.[40] Whilst the agreements with Australia and the Republic of Korea both stated that such discussions shall be concluded within 5 years from the date of entry into force of the agreements, they were never concluded. The only one on track will be the investment agreement with Japan, which only entered into force on 1 August 2020 and thus could count RCEP as its deliverable (MOFA, 2020). As to the ACIA, whilst it also adopts the negative-listing approach, the sectors covered are limited to five main sectors, i.e. manufacturing, agriculture, fishery, forestry, mining and quarrying, as well as services incidental to them.[41] Whilst these five sectors are broad, they are mainly related to trade in goods and do not cover most services activities. The inclusion of the ratchet clause in the RCEP investment chapter is another new feature, and this makes sure that future autonomous liberalisation is also locked in, unlike the existing ASEAN+ agreements, which would not even bind the Parties' commitments to their status quo levels.

At the same time, due to the uneven levels of development, some of the new features in the RCEP investment chapter have to be compromised to be acceptable to all Parties. Such is the case of the ratchet clause, where the reference points for one third of the RCEP membership are not set as 'immediately before the amendment' as commonly found in other FTAs, but are pushed back to the much earlier date of the entry into force of RCEP.

On some of the issues, RCEP even backtracked from the previous ASEAN+ agreements as well as the ACIA, with the removal of ISDS as the prime example. Yet, this does not mean that the RCEP Parties are turning their back on foreign investors. This simply reflects the complex political reality when economic integration expands to a wider region, where the lowest common denominator becomes the standard. Moreover, as discussed earlier, the rejection of an ISDS mechanism must be understood as part of a global backlash against the mechanism. This means that, when views on ISDS become more positive at the global level, we could still see the acceptance of ISDS in RCEP. With the huge integrated market created by the new agreement, the RCEP region is poised to become the next magnet to investors from around the world.

[38] Art. 6, Agreement on Investment of the Framework Agreement on Comprehensive Economic. Co-operation between the Association of Southeast Asian Nations and the People's Republic of China, August 2009, https://asean.org/wp-content/uploads/images/archive/22974.pdf

[39] Art. 12, ASEAN–Australia & New Zealand Investment Agreement; Art. 9, ASEAN–Korea Investment Agreement; Art. 51.7, ASEAN–Japan FTA Chapter 7 on Investment.

[40] Art. 16, ASEAN–Australia & New Zealand Investment Agreement; Art. 27, ASEAN–Korea Investment Agreement; Art. 51.23, ASEAN–Japan FTA Chapter 7 on Investment.

[41] Art. 3.3, ACIA.

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