Rethinking the RCEP in the Third Regionalism: Paradigm Shifts in World Trade Law?

Pasha L. HSIEH
In today’s world, poverty, conflict, injustice and inequality are also legal and institutional regimes. The Anthem IGLP Rethinking Global Law and Policy Series explores the ways in which they are reproduced and what might be done in response. The series seeks contributions mapping the levers of global political, economic and legal authority, and which bring new and critical perspectives to international legal research and policy. We aim to encourage innovative approaches to global policy in the face of a legal and institutional architecture manifestly ill-equipped to address our most urgent global challenges. The series is particularly interested in contributions that highlight voices from and issues of concern to the Global South. Proposals that cross disciplinary lines and draw upon heterodox intellectual and political traditions are encouraged.

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World Trade and Investment Law Reimagined
A Progressive Agenda for an Inclusive Globalization

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changes in the Chinese system with repercussions for other emerging economies pursuing heterodox strategies?

Only time will tell. The odds are that we will endure a long period of conflict, tension and uncertainty before the dust settles and the major protagonists are ready to sit down and hammer out something new. But promising developments in many parts of the world offer hope that with time we will struggle toward a new equilibrium.

Chapter Nine

RETHINKING THE RCEP IN THE THIRD REGIONALISM: PARADIGM SHIFTS IN WORLD TRADE LAW?

Pasha L. Hsieh

The Regional Comprehensive Economic Partnership (RCEP) represents a new era of regionalism and offers a distinct paradigm for world trade law. When it is launched, the RCEP will be the world’s largest free trade agreement (FTA) and a clear alternative to the extant neoliberal trade regime. Built upon the Association of Southeast Asian Nations (ASEAN) free trade areas, the 16-party RCEP covers half of the global population and 30 percent of global gross domestic product (GDP).\(^1\) It also encompasses the world’s most vigorous economies, such as China, India and Indonesia. These countries significantly contribute to the bloc’s GDP growth rate of 4.6 percent, which is more than double that of the United States and the European Union (EU).\(^2\)

The RCEP, which is double the economic scale of the now 11-member Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), will be a key milestone in trade agreements.\(^3\) Yet the RCEP is not simply the latest stage of evolving Asia-Pacific regionalism. It also exhibits the Global South’s contemporary normative vision, which challenges the dominant neoliberal approach and the Indo-Pacific strategy of the Trump administration. Since the RCEP combines regional integration with a new perception of economic ordering, it is the harbinger of what I call a New Regional Economic Order (NREO).

In this essay, “The RCEP in the Third Regionalism” analyzes the geopolitical backdrop of the RCEP by detailing the current wave of regionalism and the Global South’s

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Trade Policies of Emerging Powers

The RCEP, which stands for Regional Comprehensive Economic Partnership, is a free trade agreement being negotiated among 16 countries in the Asia-Pacific region. It includes Australia, China, Japan, South Korea, India, and other countries. The RCEP aims to reduce trade barriers and increase investment among its members.

RCEP in the Third Regionalism

The RCEP can be seen as part of the third wave of regionalism, which denotes the creation of free trade areas outside the three main regional blocs in Europe, North America, and Asia. The RCEP is intended to cover almost half of the world's population and almost 25% of the world's GDP.

China, India, Japan, and South Korea are the key players in the RCEP negotiations. China is the world's second-largest economy, and its inclusion in the RCEP could significantly influence the outcome of the negotiations.

Global South in the RCEP

The Global South is a term used to describe developing countries, particularly those in Africa and Latin America. The RCEP has been criticized for excluding many of these countries, which could potentially limit its impact.

Regionalism and Globalization

The RCEP is seen as a step towards regionalism, which has been on the rise in recent years. Regionalism refers to the formation of trading blocs that exclude other countries, as opposed to globalization, which allows for free trade and investment across borders.

China's Role in RCEP

China is a key player in the RCEP negotiations and has been using its position to promote its economic interests. The RCEP could potentially undermine the World Trade Organization (WTO) as the dominant international trading body.

Regionalism and Multilateralism

Regionalism and multilateralism are often seen as competing forces. Multilateralism, as embodied by the WTO, seeks to promote free trade and investment on a global scale, while regionalism prioritizes trade within specific regions.

Conclusion

The RCEP is a complex issue with both benefits and drawbacks. While it could potentially boost trade and investment within the region, it could also undermine the WTO and limit the participation of developing countries.

References

Nevertheless, as the largest party that accounts for one-third of the RCEP’s GDP, this mega-agreement will enhance China’s right of discourse in global rulemaking. The Obama-backed Trans-Pacific Partnership (TPP) once deterred China’s strategic goal. Ironically, Trump’s withdrawal from the TPP in 2017 has enabled the Xi Jinping government to fill the power vacuum in the Asia-Pacific region. The RCEP complements Beijing’s One Belt, One Road initiative, which facilitates the export of Chinese capital, labor and production.

The RCEP similarly supports India’s efforts to be recognized as a rising power in the international economic order. To further integrate the country into Asia’s supply chain, Prime Minister Narendra Modi’s Act East policy adopted a more action-based approach than its preceding Look East policy. On the development ground, New Delhi adopted a two-pronged approach to the RCEP. The government aims to facilitate the provision of outbound professional services while resisting the import of agricultural products and TPP-level intellectual property standards.

For the 10-country ASEAN, its ASEAN Economic Community Blueprint 2025 places the RCEP as the top priority. Under the concept of ASEAN centrality, the RCEP strengthens the bloc’s hub status and integrates its bilateral FTAs with six RCEP members. In addition, ASEAN agreements have consistently provided preferential treatment to its least developed country (LDC) members. By including the ASEAN mechanism that balances trade and development, the RCEP will serve as a model for the Global South.

**Distinct Features of the RCEP**

Seven Asia-Pacific countries are parties to both the RCEP and the CPTPP; whereas China, Korea and India have acceded only to the former. The CPTPP was primarily based on the 30 chapters of the TPP that 12 countries, including the United States, concluded in 2016. Agreed upon by the remaining parties in March 2018, the CPTPP amended and suspended 22 provisions of the TPP, which was heavily influenced by US FTAs. The differences between the RCEP and the CPTPP illustrate the RCEP’s departure from the dominant neoliberal approach.

First, unlike the CPTPP and the US and EU FTAs, the RCEP does not include a chapter on state-owned enterprises (SOEs), and labor and environmental protection. The omission of SOE provisions, which contrasts with the CPTPP, which seeks to make SOEs behave like commercial market actors, signals that the RCEP will not impose a narrow market-economy approach to development policy. This exclusion particularly favors China, which has relied on SOEs to drive its economic growth. SOEs also serve the policy goal of developing nations to maintain employment and social stability. In the case of India, potential layoffs following SOE reforms will directly contravene the government’s goal of job creation. Thailand and Myanmar present different types of considerations. The military exerts a dominant influence in these countries. Placing military officials as executives in SOEs ironically prevents them from causing political obstacles to economic reforms. Tellingly, the exclusion of labor and environment chapters also indicates the Global South’s normative vision that avoids the trade-plus provisions the North often mandated. Moreover, the agreement’s simpler structure avoids delaying negotiations and minimizes Western influences in domestic policy.

Second, the RCEP’s goods and services commitments will demonstrate its evolutionary approach, which recognizes different levels of development among members that range from Australia to Myanmar. Different from a single undertaking dealt like the CPTPP and most FTAs, the RCEP will provide a framework under which the agreed agenda stipulates various stages of liberalization for different countries. For instance, consistent with ASEAN agreements but rare in Western-style FTAs, the RCEP will accord longer transition periods for tariff eliminations to Cambodia, Laos, Myanmar and Vietnam.

To alleviate the impact on the infant services industry in developing nations, the RCEP will also adopt successive packages of services commitments that accomplish intended liberalization incrementally. The extensive special and differential treatment provisions highlight the RCEP’s role in development.

Third, labor mobility is critical to the Global South because of remittances and skill transfer. Yet, due to the perception that it creates a back door for immigration, the WTO and the United States, subsequent to its FTAs with Singapore and Chile, made little progress in facilitating such mobility. Similar immigration concerns arguably prompted Brexit. To allow countries to retain regulatory space, the RCEP will follow ASEAN’s model that confines labor mobility to skilled labor, which is narrower than the EU notion of free movement of labor.

Both the CPTPP and the RCEP have provisions on the movement of natural persons. However, adopting ASEAN’s mutual-recognition arrangements will energize the RCEP more than the CPTPP in facilitating professional services. The CPTPP’s soft-law scheme only encourages relevant bodies to enter into recognition arrangements. In comparison, the ASEAN mutual-recognition arrangements cover eight professional services, such as architectural, engineering and medical services. ASEAN’s most recent mutual-recognition arrangement on tourism professionals is particularly distinctive, as it is a rare scheme that facilitates unregulated services absent international standards for the industry. This scheme can have a great development impact because tourism services empirically enable up to 25 percent of tourism expenditures to reach the poor in LDCs.

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Lastly, the investor-state dispute settlement (ISDS) mechanism has been an acutely contested topic in trade politics. ISDS entities foreign investors to bring complaints against host governments before international panels. ISDS is criticized for transferring sovereignty to multilateral corporations and creating a regulatory chill that deters authorities from implementing public policy. Considering India’s and Indonesia’s resistance to ISDS, the RCEP is unlikely to exceed the level of ASEAN FTAs, which are based on the US Model Bilateral Investment Treaty, which incorporates more arbitration procedures than previous investment agreements. Importantly, the *Philip Morris v. Australia* case, in which the tobacco company challenged Canberra’s plain cigarette packaging legislation, created public concern and resulted in the tobacco carve-out clause of the TPP’s ISDS provisions.

The CPTPP scales back the scope of ISDS by disallowing investors to sue the host government on the basis of the investment agreement and by suspending the minimum standard of treatment pertinent to financial services. Moreover, individual countries, such as New Zealand, signed side letters with counterparts to either exclude ISDS entirely or condition arbitration on governmental approvals. As for EU FTAs, Brussels has adopted a new policy to replace ISDS with an investment court system, which has been incorporated in bilateral agreements with Canada, Vietnam and Singapore. The EU system creates a permanent tribunal and provides an appellate mechanism for investor-state disputes. Nonetheless, neither ASEAN nor the RCEP will adopt the EU model. These developments will shape the RCEP design, which may deviate from Western-style FTAs.

**New Dynamics of Asia-Pacific Regionalism**

Similar to the CPTPP, the emerging RCEP offers a new paradigm in the Third Regionalism and world trade law. Parallel to the WTO, multiple trade and investment agreements exist between the same countries. For instance, Singapore’s trade relations with China will be governed by their bilateral FTA, the ASEAN–China FTA and the RCEP. Both the CPTPP and the RCEP will coexist with internal agreements rather than replace them. Exporters’ choice among FTAs with different rules of origin that entitle preferential treatment will increase business costs and undermine trade liberalization.

On the positive side, the RCEP will consolidate ASEAN’s six FTAs and construct the Free Trade Agreement of the Asia-Pacific (FTAAP). This process of expanding regionalism reinforces the normative vision of the Global South and the NREO that the RCEP represents. Presently, the Asia-Pacific Economic Cooperation (APEC) includes 12 parties to the RCEP. APEC’s Bogor Goals aim to accomplish regional trade and investment liberalization by 2020. In 2004, the APEC Business Advisory Council introduced the FTAAP, which includes 21 APEC economies. The 2010 APEC Leaders’ Declaration identified ASEAN+3, ASEAN+6 and the TPP as pathways to the FTAAP. Given the existing literature’s primary focus on the TPP, I offer an analysis on the RCEP as a feasible pathway to the FTAAP.

- Amid the US-China rivalry, the RCEP first appeared in the Beijing Roadmap, in which APEC declared that the possible pathways to the FTAAP encompass the TPP and the RCEP. Beijing argued vigorously for the FTAAP when it hosted the APEC meetings in 2014. The Obama administration opposed the Chinese proposal because it could have detracted from the TPP, thereby damaging the pivot-to-Asia strategy. A compromise was reached to enable Beijing to conduct APEC’s Collective Strategic Study on revitalizing the FTAAP. In 2016, APEC leaders’ endorsement of China’s study, which emphasizes the RCEP’s impact on the global economy, buttressed the status of the RCEP.

Trump’s withdrawal from the TPP substantially reduced its share of global GDP from 38.2 percent to 13.5 percent. The TPP’s original provision makes it difficult for the remaining parties to continue the deal. The absence of the United States is detrimental, as the TPP’s entry into force depends on the approval of members that account for 85 percent of the combined GDP of the original signatories. Under the leadership of Japan and Australia, the CPTPP remedied this obstacle by altering the requirement to six, or 50 percent, of the number of participating countries.

In terms of Asia-Pacific regionalism, the open accession clauses of the CPTPP and the RCEP are also noteworthy. The CPTPP is open to “any State or separate customs territory” after it becomes effective. In comparison, the RCEP allows “any ASEAN FTA partner” or “any other external economic partners” to accede to the pact. Neither agreement provides detailed conditions and procedures for accession. Markedly, the new ASEAN–Hong Kong FTA made China’s subsovereign region a potential RCEP member. Chile and Peru, both CPTPP and APEC members, are considering joining the RCEP. Their accession will enable the RCEP to be a TPP alternative and accelerate APEC’s FTAAP goal.

**Conclusion and Suggestions**

As the world’s largest FTA, the RCEP ushers regionalism into a new era and contributes to the shaping of world trade law. It not only challenges the existing neoliberal FTA approach but also represents the Global South’s normative desire to request development

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19 The 2014 Leaders Declaration: The Beijing Roadmap for APEC’s Contribution to the Realization of the FTAAP, Annex A.


needs. The converging policies of China, India and ASEAN on the RCEP have reinvigorated the structure and negotiations of the 16-party agreement. The comparison between the RCEP and the CPTPP illustrates how the former departs from Western-style regionalism and may proffer a model for developing nations. Furthermore, the RCEP will help accelerate the APEC goal of establishing the FTAAP, which will in turn energize Doha Round negotiations.

To ensure the RCEP’s legal and geopolitical significance, I provide the following suggestions for fortifying the trade-development nexus. First, the RCEP provides a new momentum for Asia-Pacific economic integration. Currently, China lacks FTAs with Japan and India. The RCEP will fill the FTA gap between these nations and solidify the regional supply chain. Nonetheless, multilayered agreements may hinder the effectiveness of FTAs because of the trade fragmentation problem commonly known as the “noodle bowl syndrome.” I recommend that the governments remedy the low utilization of agreements by traders. The usage rate of NAFTA exceeds 60 percent, but the utilization rate of Asian FTAs is only 28 percent.22 The usage of ASEAN agreements, such as 2.3 percent of the ASEAN-Japan FTA for importers, is strikingly low.23 The RCEP provides a timely opportunity to align the diverse rules of origin to increase the business sense of FTAs. The efforts of the authorities to enable small and medium enterprises to utilize FTA preferential treatment in a cost-effective manner could strengthen the RCEP’s development impact.

Second, the RCEP’s incorporation of appropriate forms of flexibility reinforces ASEAN’s implementation of the Doha Development Agenda and the UN Sustainable Development Goals. RCEP negotiators are advised to consider the ASEAN Minus X formula, which crystallized special and differential treatment provisions by permitting flexible participation. As ASEAN’s services liberalization illustrates, two or more members could liberalize selected sectors and allow other members to participate at a later stage. To eliminate the free rider problem, the concessions are conferred only on a reciprocal basis. However, this formula could result in fragmented commitments at divergent speeds. A legal loophole may emerge when a country initially agrees to its commitments but later decides to opt out of such commitments because they are too difficult to implement. The RCEP’s clarification of ASEAN’s flexibility rules will offer a model for the Global South.

Finally, a sound administrative structure is critical for monitoring and enforcing FTAs. The CPTPP provisions that create the Committee on Development and the Commission comprising government representatives failed to consider the practical significance of an impartial, permanent secretariat. Hence, I propose that the ASEAN Secretariat provide

23 Ledyan Ing, Shujiro Urata and Yoshifumi Fukunaga, “How Do Exports and Imports Affect the Use of Free Trade Agreements? Firm-Level Survey Evidence from Southeast Asia,” in The Use of FTAs in ASEAN: Survey-Based Analysis (South Jakarta: Economic Research Institute for ASEAN and East Asia, 2015), 1, 7.