

Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of
Law

Yong Pung How School of Law

12-2019

Asia's response to the US Indo-Pacific strategy: Building the RCEP: Legal and political implications

Pasha L. HSIEH

Singapore Management University, pashahsieh@smu.edu.sg

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research



Part of the [Commercial Law Commons](#), and the [International Law Commons](#)

Citation

HSIEH, Pasha L.. Asia's response to the US Indo-Pacific strategy: Building the RCEP: Legal and political implications. (2019). *Proceedings of the ASIL Annual Meeting: 113th ASIL 2019, Washington, DC, March 27-30*. 367-370.

Available at: https://ink.library.smu.edu.sg/sol_research/3099

This Conference Proceeding Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

ASIA'S RESPONSE TO THE U.S. INDO-PACIFIC STRATEGY

This panel was convened at 9:00 a.m., Saturday, March 20, 2019, by its moderators, Weixia Gu of the University of Hong Kong and Pasha Hsieh of the Singapore Management University, who introduced the panelists: Ronald Eberhard Tundang of the Indonesian Embassy to the United States; Matthew Erie of Oxford University; Julian Ku of Hofstra University School of Law; and Inu Manak of the Cato Institute.

BUILDING THE RCEP: LEGAL AND POLITICAL IMPLICATIONS

doi: 10.1017/amp.2019.192

*By Pasha L. Hsieh**

INTRODUCTION

The Trump administration declared the “Free and Open Indo-Pacific” (FOIP) strategy as the new U.S. policy on Asia in 2017. This new strategy will have far-reaching implications for U.S.-Asia relations and global governance. The FOIP is conventionally perceived to focus on security dimensions. By “free,” the United States expects all countries “to exercise their sovereignty free from coercion by other countries.”¹ The qualifier, “open,” is meant to refer to regional connectivity, in particular including freedom of navigation.² Notably, the economic dimensions of this component also envision “fair and reciprocal trade” and “transparent agreements.”³

This roundtable organized by the ASIL-Law in the Pacific Rim Region Interest Group, centers on Asia’s response to the FOIP from dispute resolution and trade perspectives. We seek to address the following issues: What are Asian countries’ legal and political response to the U.S. agenda? How will recent diplomatic developments of the Association of Southeast Asian Nations (ASEAN), China, and India counter U.S. unilateralism? In a similar vein, how will Asia’s alternative strategies, such as the Belt and Road Initiative (BRI) and the Comprehensive and the Regional Comprehensive Economic Partnership (RCEP), shape international law and commercial transactions?

Weixia Gu and Matthew Erie will shed light on the impact of the BRI on commercial courts and arbitral institutions. Inu Manak will assess the renegotiations of the Korea-U.S. Free Trade Agreement (FTA) and the U.S.-Mexico-Canada Agreement. Ronald Eberhard Tundang will explore ASEAN’s evolving internal integration into the ASEAN Economic Community. Julian Ku will examine the role of Taiwan and South China Sea issues that are pertinent to the

* Associate Professor of Law and Lee Kong Chian Fellow, Singapore Management University & Co-Chair, ASIL-Law in the Pacific Rim Region Interest Group.

¹ U.S. Dep’t of Defense, Indo-Pacific Strategy Report: Preparedness, Partnerships, and Promoting a Networked Region, at 4 (2019).

² *Id.*

³ *Id.*

Indo-Pacific strategy. Below, I analyze the development of the RCEP, which is expected to be the world's largest free trade agreement (FTA) without U.S. participation.

THE RCEP AS ASIAN POWERS' STRATEGY

The sixteen-party RCEP includes major powers in the Asia-Pacific region and many of them, such as Australia, India, and Japan, are key allies under the FOIP. Once it is launched, the RCEP will cover half of the world's population and 30 percent of global gross domestic product (GDP), which is more than double that of the eleven-party Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).⁴

China and Japan have vigorously vied for regional economic leadership since the 2000s. While Beijing proposed the ASEAN+3 structure in 2001, Tokyo initiated the ASEAN+6 scheme in 2006. To break the impasse and strengthen the concept of ASEAN centrality, the ten ASEAN countries introduced the framework for "an ASEAN-led process" in 2011 and essentially merged the Chinese and Japanese proposals.⁵ On the basis of the 2012 Guiding Principles for the RCEP, negotiations commenced in 2013.⁶ As of March 2019, the RCEP parties have finalized seven out of eighteen chapters and will finalize the pact by the end of 2019.⁷ Expediting RCEP talks not only reflects Asian countries' consensus to fast-track regional economic integration amid the U.S.-China trade war, but also emphasizes their collective power to shape the international economic order. As evidenced by the cooperation of ASEAN, China, and India, their trade policies converged in the efficient conclusion of the RCEP as a prominent mega-regional trade agreement.

For ASEAN, its ASEAN Economic Community (AEC) Blueprint 2025 places the RCEP as a key priority. Instead of a "clean slate" approach, the RCEP will coexist rather than replace current FTAs and bilateral investment agreements between the parties. However, the RCEP will fortify the bloc's hub status and help consolidate its bilateral FTAs with China, Japan, India, Korea, Australia, and New Zealand. The RCEP and the AEC represent ASEAN's intertwined external and internal integration and will galvanize the emergence of "ASEAN law" as a legal framework for new Asian regionalism.⁸

China is the RCEP's largest member, which accounts for one-third of the pact's GDP. The RCEP would complement China's BRI that aims to facilitate the export of Chinese capital, labor, and production. Trump's withdrawal from the Trans-Pacific Partnership in 2017 has enabled Beijing to fill the power vacuum in Asia. This agreement will enhance Beijing's right of discourse in global rulemaking and enables it to gain additional leverage against Washington. Markedly, China's increasingly assertive stance on the RCEP is illustrated by its proposal to exclude India, which has insisted on its conservative tariff elimination offers.⁹

⁴ Regional Comprehensive Economic Partnership (RCEP), at https://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership; Yasu Ota & Shuichi Maruyama, *Ocean's Eleven*, NIKKEI ASIAN REV., at 16 (2018).

⁵ ASEAN Framework for Regional Comprehensive Economic Partnership (2011); Pasha L. Hsieh, *Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law*, 5 CORNELL J. INT'L L. 683, 691–95 (2018).

⁶ Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (2012).

⁷ Tham Siew Yean, *Commentary: Concluding the High-Stakes RCEP in 2019 Will Need a Different Approach*, CNA (Mar. 16, 2019), at <https://www.channelnewsasia.com/news/commentary/concluding-high-stakes-rcep-2019-will-need-different-approach-11336424>.

⁸ Pasha L. Hsieh & Bryan Mercurio, *ASEAN Law in the New Regional Economic Order: An Introductory Roadmap to the ASEAN Economic Community*, in *ASEAN LAW IN THE NEW REGIONAL ECONOMIC ORDER: GLOBAL TRENDS AND SHIFTING PARADIGMS*, 3, 3–19 (Pasha L. Hsieh & Bryan Mercurio eds., 2019).

⁹ Amiti Sen, *China Proposes ASEAN+3 Mega Free Trade Agreement Sans India, Australia and NZ*, HINDU BUS. LINE (May 26, 2019), at <https://www.thehindubusinessline.com/economy/china-proposes-ASEAN3-mega-free-trade-agreement-sans-india-australia-and-nz/article27255349.ece>.

For India, the RCEP will provide a critical opportunity for the country to integrate into the supply chain of East Asia. The pact therefore directly contributes to Prime Minister Narendra Modi's Act East policy, which adopted a more action-based approach over the preceding Look East policy. For RCEP negotiations, New Delhi aims at increasing the provision of outbound professional services while opposing the import of agricultural products and CPTPP-level intellectual property standards.

THE RCEP AS A PATHWAY TO NEW ASIAN REGIONALISM

In contrast with the FOIP that focuses on bilateral agreements, Asian countries have accelerated the plurilateral approach to constructing new Asian regionalism. A substantive objective of new Asian regionalism is evidenced in the Bogor Goals, which were set by Asia-Pacific Economic Cooperation (APEC) in 1994, to achieve "free and open trade and investment in the Asia-Pacific" by 2020. In 2004, the APEC Business Advisory Council introduced a Free Trade Area of the Asia-Pacific (FTAAP), which includes twenty-one APEC economies.

The 2010 APEC Leaders' Declaration identified ASEAN+3, ASEAN+6, and the CPTPP as pathways to the FTAAP. The "ASEAN+" framework is the basis of the RCEP. In its 2014 Beijing Roadmap, APEC declared the RCEP as a feasible pathway to the FTAAP for the first time. Below, I identify selected features of the RCEP that distinguish it from those of the CPTPP and other "Western" style FTAs. These features may make the RCEP a preferable model for developing countries to pursue the FTAAP in new Asian regionalism.

First, unlike most trade agreements that involved the United States and the European Union (EU), the RCEP does not include chapters on state-owned enterprises (SOEs), and labor and environmental protection.¹⁰ The exclusion of SOE provisions that require SOEs to behave like commercial market actors is presumably important to developing countries because SOEs serve the policy goal of maintaining employment and social stability. This exclusion particularly favors China and Vietnam, which have relied on SOEs to drive their economic growth. Importantly, the omission of labor and environment chapters also illustrate developing nations' desire for avoiding the trade-plus provisions that delay negotiations. These provisions are often mandated by the Global North to address social demands in their domestic politics but have yielded limited results in developing countries.

Second, the investor-state dispute settlement (ISDS) mechanism has been criticized for transferring sovereignty to multilateral corporations and creating a regulatory chill detrimental to the implementation of the public policy. It is financially and legally onerous for developing nations to handle ISDS challenges. Given the resistant positions of certain RCEP countries, including India and Indonesia, the ISDS under the RCEP will have a limited scope and will not be applied on a most-favored-nation basis.¹¹ Tellingly, the CPTPP also 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. On a national level, countries such as New Zealand further signed bilateral "side letters" to either exclude ISDS entirely or condition arbitration on the government's approval. Although the EU has promoted and included provisions on the two-tiered investment court system in its agreements with Canada, Singapore, and Vietnam, none of RCEP partners have considered adopting this system for regional agreements.

¹⁰ Outline of the RCEP Agreement (as of Nov. 2018), in Joint Leaders' Statement on the Negotiations for the Regional Comprehensive Economic Partnership (RCEP).

¹¹ *Reduced Scope of Application of ISDS in RCEP; Negotiating Partners Still Aim at End-2018*, INV. TREATY NEWS (Oct. 17, 2018), at <https://www.iisd.org/itm/2018/10/17/reduced-scope-of-application-of-isds-in-rcep-negotiating-partners-still-aim-at-end-2018>.

Finally, similar to the CPTPP, the RCEP contains an open accession clause. The CPTPP is open to “any State or separate customs territory” after it becomes effective. The RCEP permits “any ASEAN FTA partner” or “any other external economic partners” to join the agreement. Neither pact elaborates specific conditions and procedures for accession. The term “separate customs territory” is commonly understood to refer to Taiwan, officially the Republic of China. Taiwan and the United Kingdom have indicated their interest in joining the CPTPP. As a result of conflicts with Japan, strong political and business support for Korea to accede to the CPTPP is lacking. Interestingly, as a CPTPP party, the Mahathir Mohamad government of Malaysia has now adopted a more cautious stance and has yet to ratify the deal. For the RCEP, the 2017 ASEAN–Hong Kong FTA made China’s Special Administrative Region a potential RCEP member. Chile and Peru, both CPTPP and APEC members, are also considering applying for RCEP membership. The accession of these countries to the RCEP will invigorate the Bogor Goals and provide a basis for this pact to be a new trans-Pacific mega-regional.

CONCLUSION

The FOIP offers both challenges and opportunities to Asia. Various approaches adopted by Asian countries, including the RCEP, demonstrate the collective response of Asian countries to the legal and political uncertainty that arises from U.S. unilateralism. From a global perspective, the RCEP will have a systemic impact on new Asian regionalism and world trade law. Its pro-development design, principle of flexibility and the institutional mechanism will likely offer a new model for the Global South to pursue economic integration.