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Building Towards the RCEP? Reflections on the ASEAN-China FTA

HENG WANG

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Building Towards the RCEP? Reflections on the ASEAN-China FTA

Heng Wang*

It will appear as a chapter in "ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms" (Pasha L. Hsieh & Bryan Mercurio eds.), Cambridge University Press, (2019, forthcoming).

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Abstract: Among the ASEAN's external FTAs, the ASEAN-China Free Trade Agreement (ACFTA) is of great significance to both the ASEAN and China. The ACFTA was one of the earliest trade pacts concluded by China. It is also part of the ASEAN's broader push toward concluding FTAs outside the multilateral trading system, in line with the proliferation of regional trade pacts. This chapter will analyze the following questions: what is the approach of the ACFTA? What are the implications of the ACFTA for the the Regional Comprehensive Economic Partnership (RCEP)? What national implementation issues are involved with the ASEAN? The potential implications of the AHKFTA will be explored. The ACFTA does reflect a more flexible approach than other Chinese FTAs, and its implementation faces a number of challenges. It may contribute to the shaping of the RCEP.

1. Introduction

It is of immense importance to analyze the evolution of the Association of Southeast Asian Nations (ASEAN) law from a global perspective. The ASEAN is playing an increasingly important role in world economic governance, as evidenced by the Regional Comprehensive Economic Partnership (RCEP) negotiations between the ASEAN and its free trade agreement (FTA) partners. The evolution of the ASEAN law from the global perspective will cover a wide range of areas, including goods, services, intellectual property, investment, and even social issues. The growing ASEAN Economic Community (AEC) will also exert current and prospective influence on the international economic legal order, including the increased attractiveness of the RCEP to other parties.

Meanwhile, the ASEAN may encounter legal challenges in its external interactions with Asia-Pacific economies, including China. Such interaction occurs at the bilateral (i.e. China's FTAs with Singapore and the ASEAN) and regional (i.e. the RCEP) levels. More broadly, it involves interactions between the law of the World Trade Organization (WTO) and FTAs.

Among the ASEAN's external FTAs, the ASEAN-China Free Trade Agreement (ACFTA) is of great significance to both the ASEAN and China. The ACFTA was one of the earliest trade pacts concluded by China. It is also part of the ASEAN's broader push toward concluding FTAs outside the multilateral framework of the WTO, in line with the proliferation of FTAs.¹ The AEC Blueprint 2025 emphasizes the importance of the ACFTA as well as the negotiations of the ASEAN-Hong Kong FTA (AHKFTA) and

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¹ Nargiza Salidjanova, et al., *China's Economic Ties with ASEAN: A Country-by-Country Analysis*, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 4 (2015).

the RCEP.² As highlighted in the AEC Blueprint 2025, the ASEAN will continue to integrate the region into the global economy through trade pacts with partners, including the ACFTA. These trade agreements, including the AHKFTA, lay the foundation for the ASEAN to “retain its centrality in global and regional engagements, where possible.”³ The AHKFTA and the ASEAN-Hong Kong Investment Agreement (AHKIA) are to be signed in November 2017.⁴ Notably, the ACFTA could affect the RCEP as the ASEAN and China are among its parties.

This chapter will analyze the following questions: what is the approach of the ACFTA? What are the implications of the ACFTA for the RCEP? What national implementation issues are involved with the ASEAN? The potential implications of the AHKFTA will be explored. Part II will analyze the approach of the ACFTA in comparison with other trade agreements of China, while other agreements of the ASEAN will be discussed when necessary. Part III analyzes the relevance of the ACFTA to the RCEP and its limits, followed by Part IV, which deals with the challenges in implementing the ACFTA. Part V concludes by summarizing the features of the ACFTA and looking into its future.

2. The Approach of the ACFTA

The ACFTA adopts a more flexible approach than China’s other FTAs. On the one hand, the ACFTA is comparable to China’s other FTAs, as they all adopt a pragmatic approach. These agreements are malleable, cooperation-oriented and WTO-based trade pacts. In part, this is because trading partners’ proposals are largely adopted in China’s FTAs. Salidjanova has observed that China prefers to work off the draft FTA provisions of partners, including Peru or Pakistan.⁵ For instance, China has accepted comprehensive investment rules, which respond to partners’ demands to a certain extent.⁶ In the same vein, China largely adopted the ASEAN model in the case of the Investment Agreement, with the Framework Agreement on ASEAN Investment Area serving as a template for the negotiations of the Investment Agreement.⁷ In the end, the Investment Agreement largely mirrors the ASEAN Comprehensive Investment Agreement, except for the market access provisions.⁸ China has further followed the ASEAN format in several ACFTA agreements, including the Trade in Goods (TIG) Agreement, and the Agreement on Dispute Settlement Mechanism (DSM Agreement) (adopting a similar template to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism).⁹

The FTAs’ focus on cooperation is reflected in, among other documents, memorandums of understanding (MoUs). In the ACFTA, MoUs were signed to promote cooperation in areas such as standards, technical regulations and conformity assessment, as well as intellectual property. Reflecting functional cooperation strategies proposed by China, MoUs were also concluded to facilitate cooperation in areas such as information and communications technology, as well as agriculture and transportation.¹⁰ These economic activities are put under the purview of the ACFTA Working Group on Economic and Technical Cooperation between ASEAN and China, and funding

² *ASEAN Economic Community Blueprint 2025*, 2015, at paragraph 79.

³ *Id.* at.

⁴ Xinhua, *ASEAN, HK to Sign Free Trade Agreement* (Sept. 10, 2017), available at http://www.chinadaily.com.cn/china/2017-09/10/content_31798251.htm.

⁵ Nargiza Salidjanova, *China's Trade Ambitions: Strategy and Objectives behind China's Pursuit of Free Trade Agreements*, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 22 (2015).

⁶ Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agreements?* at https://www.die-gdi.de/uploads/media/DP_7.2013.pdf.

⁷ Huiping Chen, *China-ASEAN FTA: An Investment Perspective*, in *CHINA-ASEAN RELATIONS: ECONOMIC AND LEGAL DIMENSIONS* 140, (John Wong, et al. eds., 2006).

⁸ Berger, 23. 2013.

⁹ Hidetaka Yoshimatsu, *Domestic Political Institutions, Diplomatic Style and Trade Agreements: A Comparative Study of China and Japan*, 15 *NEW POLITICAL ECONOMY*, 410-411 (2010).

¹⁰ *Id.* at, 411-412.

may be secured from the ASEAN-China Cooperation.¹¹ In the upgrading of the ACFTA, the parties will further explore economic cooperation in a wide range of areas, ranging from trade-related issues, small and medium enterprises (SMEs), to the environment.¹² Similar arrangements can be found in other Chinese FTAs.

There are a very limited number of WTO-extra or WTO-plus obligations in these agreements. Preferring incremental development, China's FTAs do not focus on regulatory requirements. The ACFTA resembles China's other trade agreements in terms of harvesting "low-hanging fruit" (such as tariff cuts) and building on the WTO norms. Even in the WTO-extra areas, WTO rules could be considered. For instance, the ACFTA¹³ and some of China's FTAs, such as the China-New Zealand FTA,¹⁴ incorporate exceptions clauses in investment rules that are modelled on Article XIV of the General Agreement on Trade in Services (GATS).¹⁵ To sum up, the ACFTA and other trade pacts of China are not high-level ones. For instance, the ASEAN-China MOU on intellectual property¹⁶ does not advance or alter the parties' positions in the international intellectual property regime except for its Article 3, which calls for greater protection of "genetic resources, traditional knowledge and folklore".¹⁷ Like China's agreements with other countries, the ACFTA does not provide for national treatment regarding the pre-establishment of investment¹⁸ that covers "admission", "establishment" and "acquisition" of investment. These agreements focus on investment protection rather than investment liberalization.

On the other hand, China adopts a more flexible approach towards the ASEAN compared with other FTA partners. The flexibility is found in, among other aspects, (i) the approach of the ACFTA, (ii) the special arrangement or rules for specific ASEAN countries, and (iii) other special treatment under the ACFTA. In general, the ACFTA adopts a step-by-step approach (first framework agreement, and then specific agreements), rather than a single package as in most of China's trade pacts. A number of ACFTA agreements were signed as different stages: the Framework Agreement,¹⁹ the TIG Agreement,²⁰ the DSM Agreement,²¹ the ASEAN-China Agreement on Trade in Services (TIS Agreement),²² and the ASEAN-China Investment Agreement (Investment Agreement).²³

Such a progressive approach can be found in various ACFTA agreements. There are three protocols to amend the Framework Agreement,²⁴ and two protocols to amend the TIG Agreement.²⁵

¹¹ ASEAN – China Free Trade Agreements, available at http://asean.org/?static_post=asean-china-free-trade-area-2.

¹² China-ASEAN FTA Upgrading Protocol Article 7(II)(1) (2015).

¹³ China-ASEAN Investment Agreement Article 16 (2009).

¹⁴ China-New Zealand FTA Article 200(1).

¹⁵ Bryan Mercurio, *Awakening the Sleeping Giant: Intellectual Property Rights in International Investment Agreements*, 15 JOURNAL OF INTERNATIONAL ECONOMIC LAW 871, 905-906 (2012).

¹⁶ Memorandum of Understanding between ASEAN and China on Cooperation in the Field of Intellectual Property (2009).

¹⁷ Peter K. Yu, *The Incremental Development of the ASEAN-China Strategic Intellectual Property Partnership* 6 (2015).

¹⁸ China-ASEAN Investment Agreement Articles 4, 5. 2009.

¹⁹ China-ASEAN Framework Agreement (2002).

²⁰ China-ASEAN Agreement on Trade in Goods (2004).

²¹ China-ASEAN Agreement on Dispute Settlement Mechanism (2004).

²² China-ASEAN Agreement on Trade in Services (2007).

²³ China-ASEAN Investment Agreement. 2009.

²⁴ Protocol to Amend the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of South East Asian Nations and the People's Republic of China (2003); Second Protocol to Amend the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China (2006); Third Protocol to Amend the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People's Republic of China (2012).

²⁵ Protocol to Amend the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of

For services trade, the parties agreed on the second package of commitments under the TIS Agreement in 2011. The flexibility is more obvious in the ACFTA than other Chinese FTAs regarding the frequency of FTA amendments and commitments, although the ACFTA is not a high-level agreement.

China shows flexibility towards specific ASEAN countries in key areas such as agriculture (e.g. the Early Harvest Programme (EHP)) and investment. Concerning agricultural trade liberalization, the flexibility is reflected in a number of aspects. The ACFTA provides for an EHP to cut tariffs on selected products, which is an integral part of the trade agreement.²⁶ It allows an eight-year early harvest period.²⁷ China signed a special agriculture deal with Thailand to open both countries' agricultural markets before the ACFTA came into force,²⁸ which is an EHP. As an essential element of the EHP, China has provided unilateral concessions to the ASEAN countries who feel they could not benefit much from the EHP.²⁹ The ACFTA emphasizes early harvest schemes that are not common in other Chinese trade agreements. As a distinct policy adopted by China, the offer of the EHP (eliminating tariffs on agricultural products before the normal track) was a critical decision for China, since agricultural liberalisation was one of the most vital policy issues after its WTO entry.³⁰ The early harvest program under the ACFTA provided ASEAN countries with more generous terms than China would be required to under an arm's-length negotiation.³¹ It is observed that Chinese negotiators were less amenable to agricultural liberalisation in talks with New Zealand than in the ASEAN negotiations, and the implementation of the ASEAN early harvest agreement has substantially increased the export of ASEAN countries' fruits and vegetables to China.³²

The Investment Agreement also contains special provisions for several ASEAN member countries on major issues such as the scope of application and the denial of benefits. Concerning coverage, the Investment Agreement only applies to investment that has been admitted in Thailand, and that has been specifically approved in writing for protection by the relevant authorities as per domestic law and policy.³³ Regarding the provision on the denial of benefits, Thailand could deny foreign investors the benefits of investment treaty protection when the investor is controlled by a person of a non-party or the denying party.³⁴ It is easier to meet the conditions for the denial of benefits in the case of Thailand. Under this special provision, there is no need to prove that the relevant juridical person lacks substantive business operations in another ACFTA party.³⁵ Moreover, the Philippines may deny foreign investors the benefits of the Agreement if the investment violates "The Anti-Dummy Law".³⁶ Therefore, the domestic law of the Philippines is taken into account. Other special provisions for individual ASEAN members exist in the choice of the procedure in investor-state dispute settlement (ISDS),³⁷ and the rate and payment of interest on compensation in the case of expropriation.³⁸

China (2006); Second Protocol to Amend the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-Operation between the Association of Southeast Asian Nations and the People's Republic of China (2010).

²⁶ China-ASEAN Framework Agreement Article 6.1. 2002.

²⁷ Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 16 (2015).

²⁸ China Daily, *China, Thailand Reach Trade Deal*, china.org.cn(2003), available at <http://www.china.org.cn/english/2003/Jun/66252.htm>; *China-Thailand*, bilaterals.org(2012), available at <http://www.bilaterals.org/?-China-Thailand->.

²⁹ Jiangyu Wang, *Association of Southeast Asian Nations-China Free Trade Agreement*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES* 196, (Simon Lester & Mercurio Bryan eds., 2009).

³⁰ Yoshimatsu, *NEW POLITICAL ECONOMY*, 409, 414 (2010).

³¹ Yu, 3. 2015.

³² Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 16 (2015).

³³ China-ASEAN Investment Agreement Article 3.3.

³⁴ *Id.* at, Article 15.2.

³⁵ *Id.* at, Article 15.1(a).

³⁶ *Id.* at, Article 15.3.

³⁷ *Id.* at, Article 15.5.

³⁸ *Id.* at, Article 8.3, footnote 6.

Other forms of special treatment regarding the ACFTA include the unique position of the ACFTA in China's FTAs (e.g. the utilization of the "enabling clause" of the WTO, the FTA upgrading, the higher level of national treatment in investment), and the treatment of newer ASEAN countries. The ACFTA is the only FTA for which China used the "enabling clause" of the WTO to ensure the WTO-consistency of a lower-standard FTA with developing countries.³⁹ The ASEAN-China Free Trade Area is the first and largest one that China has negotiated, which started with early-harvest schemes in 2002 and was established in 2010.⁴⁰ Notably, the ACFTA is also the first Chinese FTA that has been updated.⁴¹ In 2015, the Protocol to Amend the Framework Agreement on Comprehensive Economic Co-operation and Certain Agreements thereunder between the ASEAN and China (Upgrading Protocol) was signed.⁴² For post-establishment national treatment in investment, China has only granted Pakistan and the ASEAN full national treatment, while other partners are treated as per "customary international law".⁴³ Moreover, flexibility is required for newer ASEAN members under the ACFTA. The Framework Agreement recognizes the need for flexibility,⁴⁴ and requires the negotiations on trade in services and investments to consider special treatment and flexibility for the newer ASEAN members.⁴⁵ As another example, the TIG Agreement contains special and differential treatment and flexibility for newer ASEAN members.⁴⁶

Outside of China's FTAs, the ACFTA appears to take a more flexible approach than some of the ASEAN FTAs, such as the ASEAN-Japan Comprehensive Economic Partnership (AJCEP) Agreement. This is reflected in the general arrangement of the ACFTA (i.e. the approach to establishing the FTA) and specific rules (e.g. the progressive tariff reduction).

Flexibility is found in China's approach towards the ACFTA, which differs from that towards the AJCEP Agreement. In respect of the ACFTA, China is willing to accept the ASEAN's formats of a "framework agreement plus protocol plus annexes" and a "step-by-step" approach (from goods to services and then to investment) that was adopted in the ASEAN Free Trade Area (AFTA), ASEAN-Korea FTA and the ASEAN Investment Area (AIA).⁴⁷ In contrast, the AJCEP Agreement adopts a single-undertaking approach, which covers goods, services, investment, and economic cooperation in one pact.

Regarding the agreement(s) with specific ASEAN countries, China adopts a more accommodating approach towards the ASEAN than Japan. Differing from Japan, China signed a bilateral FTA with an ASEAN member (i.e. Singapore) only after that of the ACFTA. China was willing to sit down with all ten ASEAN countries at the negotiation table from the outset.⁴⁸ The China-Singapore Agreement was signed in 2008,⁴⁹ which was much later than the signing of the Framework Agreement, the TIG Agreement, the DSM Agreement, and the TIS Agreement. In the AJCEP negotiations, Japan took a

³⁹ Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 20-21 (2015).

⁴⁰ Chinese Ministry of Commerce Information Office, *China and the ASEAN Concluded the Free Trade Area Upgrade Negotiations and Signed Upgrading Protocol*, fta.mofcom.gov.cn(2015), available at http://fta.mofcom.gov.cn/article/chinadongmeng/dongmengnews/201511/29455_1.html.

⁴¹ *Id.* at.

⁴² China-ASEAN FTA Upgrading Protocol. 2015.

⁴³ Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 18 (2015).

⁴⁴ China-ASEAN Framework Agreement Recital 7 of the preamble. 2002.

⁴⁵ *China-ASEAN Framework Agreement*, Article 8.3.

⁴⁶ See, e.g. China-ASEAN Agreement on Trade in Goods Annex 1, paragraph 6 (tariff reduction and/or elimination for tariff lines placed in the normal track), Annex 2, paragraph 3(iii) (reduction or elimination of the applied MFN tariff rates of tariff lines put in the sensitive track). 2004.

⁴⁷ Yoshimatsu, *NEW POLITICAL ECONOMY*, 405, 410 (2010).

⁴⁸ Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 16 (2015).

⁴⁹ China-Singapore FTA (2008).

“divide and conquer” approach: it signed FTAs with seven out of ten ASEAN countries before concluding the AJCEP Agreement to counteract the collective bargaining leverage of the ASEAN.⁵⁰

Such extra flexibility is also reflected in specific rules. A progressive reduction of tariffs is a typical example. The ACFTA provides for a progressive reduction of tariffs over a number of years, which is flexible according to different ASEAN countries. In the tariff reduction schedule of Brunei Darussalam under the ACFTA, ACFTA rates are set out from 2010 to 2018.⁵¹ For the Philippines, the ACFTA rates are set out from 2012 to 2018.⁵² Such a progressive tariff reduction arrangement is absent in the schedules of these two ASEAN countries under the AJCEP Agreement.⁵³

3. From the ACFTA to the RCEP?

The ASEAN attaches enormous importance to the RCEP. Through the RCEP, the ASEAN will influence the shaping of the regional economic legal order and the nexus between multilateralism and regionalism. As the ASEAN-centric agreement, the RCEP primarily serves two ASEAN objectives: to propel closer intra-ASEAN integration and the deepening of the AEC, and to harmonize policies between the ASEAN and its FTA partners.⁵⁴ As part of the strategic measures, the ASEAN strives for (i) “a more strategic and coherent approach” towards external economic relations; (ii) modern, comprehensive, and high-quality trade pacts that are more responsive to the needs of businesses, and (iii) strong support for the multilateral trading system and active participation in regional fora.⁵⁵ The RCEP will provide a mega-FTA model that is different from the Trans-Pacific Partnership (TPP), and may affect other FTA negotiations.

3.1 The potential for the ACFTA’s contribution to the RCEP

The ACFTA could contribute to the development of the RCEP. The ACFTA and the AHKFTA, along with other FTAs of the ASEAN, provide a solid foundation for the ASEAN to “retain its centrality in global and regional engagements, where possible”.⁵⁶ From the Chinese perspective, the Upgrading Protocol will contribute to the RCEP negotiations and the development of the FTAAP.⁵⁷ Notably, the ACFTA should lead to growing consensus between China and the ASEAN countries. In this way, the ACFTA could be a building block for the RCEP. It is advisable for China and the ASEAN to cooperate to promote the RCEP negotiations. China and the ASEAN support the multilateral trading system, and the ACFTA largely follows WTO norms. The ASEAN FTA model bears close similarities with China’s “developing country” FTA pattern, highlighting regulatory co-operation rather than regulatory rights.⁵⁸

⁵⁰ Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 16 (2015); Yoshimatsu, NEW POLITICAL ECONOMY, 406 (By the end of 2008, Japan concluded trade agreements with all ASEAN countries except for Laos, Cambodia, and Myanmar.) (2010).

⁵¹ Tariff Reduction Schedule of Brunei Darussalam under the ACFTA, http://asean.org/?static_post=asean-china-free-trade-area-2.

⁵² Tariff Reduction Schedule of the Philippines under the ACFTA, http://asean.org/?static_post=asean-china-free-trade-area-2.

⁵³ Annex 1 – Schedule of the Philippines under the ASEAN-Japan Comprehensive Economic Partnership Agreement, <http://www.asean.org/storage/images/archive/agreements/AJCEP/Annex1-Philippines.pdf>; Annex 1 - Schedule of Brunei under the ASEAN-Japan Comprehensive Economic Partnership Agreement, <http://www.asean.org/storage/images/archive/agreements/AJCEP/Annex1-Brunei.pdf>.

⁵⁴ Jeffrey J. Schott & Lu Zhiyao (Lucy), *Asia-Pacific Regionalism after the TPP*, in US-CHINA COOPERATION IN A CHANGING GLOBAL ECONOMY 137, (Adam S. Posen & Ha Jiming eds., 2017).

⁵⁵ ASEAN Economic Community Blueprint 2025 paragraph 80. 2015.

⁵⁶ ASEAN Economic Community Blueprint 2025 paragraph 79. 2015.

⁵⁷ Chinese Ministry of Commerce Information Office. 2015.

⁵⁸ Christopher M. Dent, *Free trade agreements in the Asia-Pacific a decade on: evaluating the past, looking to the future*, 10 INTERNATIONAL RELATIONS OF THE ASIA-PACIFIC 201, 231 (2010).

In specific areas, the Upgrading Protocol envisages future work in the liberalisation of trade in goods,⁵⁹ product specific rules,⁶⁰ and investment liberalization and protection.⁶¹ Trade in goods and investment is the priority. It could reflect the vision of China and the ASEAN for the future direction of economic integration, and both sides are likely to work closely in these aspects of the RCEP negotiations. For trade in goods, China and the ASEAN could cooperate on issues such as trade facilitation. In the most recent Chairman's Statement of ASEAN Summits, trade facilitation is emphasized by the ASEAN as one of its eight priorities.⁶² The ASEAN Trade Facilitation Framework is adopted as a priority deliverable.⁶³ China also supports trade facilitation,⁶⁴ which helps to promote the export of Chinese products. Concerning investment, the positions reflected in China's recent investment treaty practice are largely consistent with the ASEAN practice.⁶⁵ For instance, China and the ASEAN have a similar position in limiting the scope of the FET obligations.⁶⁶

The RCEP could, in turn, promote the future upgrade of the ACFTA. It is noteworthy that the ACFTA is a "living" or evolving agreement.⁶⁷ If properly managed, it could contribute to the negotiation and development of the RCEP.

3.2 The limit of the ACFTA's contribution to the RCEP

However, the contribution of the ACFTA to the RCEP does face challenges and uncertainties. The scenario of the ACFTA is essentially different from that of the RCEP. First, the nature of the ACFTA and the RCEP are not the same. The ACFTA is a bilateral trade pact between China and the ASEAN, although the ASEAN consists of 10 member countries. The flexibility of the ACFTA is due in large part to geopolitical considerations. China's initiation of the ACFTA was primarily driven by a need to ease concerns of a "China threat" in Southeast Asia,⁶⁸ which may also involve the concerns surrounding China's WTO accession. It may help to explain why the ACFTA does not have an accession clause. It is arguably easier for China to be more flexible in the ACFTA given its limited coverage compared with the RCEP.

In contrast, the RCEP is a mega trade pact that involves 16 countries. For China, the RCEP will extend to new and major partners, Japan and India. Moreover, the progress of the RCEP cannot be solely decided by the ASEAN and China, and other parties will play an important role. The ASEAN needs to coordinate with six partners in the RCEP negotiations. The RCEP negotiations proceed slowly due to the difficulties in engaging China, Japan and Korea to negotiate successfully with one another, and because India has yet to participate in a trade pact of moderately high standard.⁶⁹ It is

⁵⁹ China-ASEAN FTA Upgrading Protocol Chapter 5, paragraph 1. 2015.

⁶⁰ Id. at, Chapter 5, paragraph 2.

⁶¹ Id. at, Chapter 5, paragraph 3.

⁶² *Chairman's Statement of the 28th and 29th ASEAN Summits*(2016), available at <http://asean.org/storage/2016/08/Final-Chairmans-Statement-of-the-28th-and-29th-ASEAN-Summits-rev-fin.pdf>.

⁶³ Id. at, 8.

⁶⁴ Zhong Nan, *Commerce ministry urges G20 members to back trade facilitation agreement*(2016), available at http://english.gov.cn/state_council/ministries/2016/07/01/content_281475383920672.htm.

⁶⁵ Mark Feldman, et al., *The Role of Pacific Rim FTAs in the Harmonisation of International Investment Law: Towards a Free Trade Area of the Asia-Pacific* 9 (2016).

⁶⁶ Id. at, 10.

⁶⁷ Xinhua News Agency, *Minister of Commerce Interpretes the China-ASEAN FTA Upgrading Protocol*, China FTA Network(2015), available at http://fta.mofcom.gov.cn/article/chinadm/chinadmfguandian/201604/31478_1.html.

⁶⁸ Yuzhu Wang & Tong Sarah Y, *China-ASEAN FTA Changes ASEAN's Perspective on China*, 2 EAST ASIAN POLICY 47, 47 (2010).

⁶⁹ Meredith Kolsky Lewis, *The ASEAN–Australia–New Zealand FTA (AANZFTA)*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: CASE STUDIES* 131, (Simon Lester, et al. eds., 2015).

observed that India does not favour significant trade reform under the RCEP.⁷⁰ As another example, Australia and Japan may want high-level rules in the RCEP, which differ from the position of India.

Second, it remains unclear whether the ACFTA represents a coherent approach to regional economic integration, which is of great importance to the RCEP. There are differences between the ACFTA and other FTAs of the ASEAN, which may complicate the RCEP negotiations. In some aspects, other ASEAN FTAs are more liberal than the ACFTA. For example, the ACFTA focuses on the protection of investment rather than the protection and liberalization of investment in Japan's EPAs with single ASEAN members.⁷¹ It is observed that the ACFTA is a basic trade pact that does little beyond reducing tariffs and origin rules requirements for goods shipments.⁷²

In certain aspects, the ACFTA involves greater trade liberalized than other ASEAN trade pacts. As an example, China uses a different base for import tariff reduction compared with Japan in the trade agreements with the ASEAN. This is similar to the approach in the ASEAN–Korea FTA. Both “the import value” and “the number of imported items” measures were adopted in the ACFTA and ASEAN–Korea FTA as the base for calculating the percentage of tariff cuts, while the value base alone was adopted in the AJCEP for Japan, which permits it to reduce the scope of market liberalization and exclude certain agricultural products.⁷³ Moreover, the negative listing approach of the TIG Agreement (all tariff lines generally reduced and exceptions spelled out in an annexed list)⁷⁴ contrasts with the ASEAN–India and Japan–Singapore FTAs, which adopt a positive list approach whereby tariffs are reduced only for goods stipulated on a list by each party.⁷⁵ The negative listing approach covers all goods unless provided in the exceptions. Generally, it is more effective in tariff cuts than the positive list approach.

In addition, the ACFTA is not comparable with other FTAs of China regarding regulatory requirements, non-trade concerns, and new sectors. In this sense, it does not fit well with the aim of the RCEP to be a high-quality agreement.⁷⁶ Within China's FTAs, the ACFTA is a low standard agreement compared with others such as China's trade pacts with New Zealand and Switzerland,⁷⁷ and China's agreements with Korea and Australia, which seek to promote regulatory improvements in certain albeit limited areas. The features of the China–Korea FTA are expanded coverage, highlighted focus on services and investment, increased incorporation of non-trade concerns of competition and the environment, and enhanced good governance norms.⁷⁸ The China–Australia FTA (ChAFTA) focuses not only on trade and investment facilitation through market liberalization, but also on carefully written good governance norms.⁷⁹ Non-trade concerns (e.g. environment) have started to be addressed in the China–Korea FTA.

The approach of the ASEAN–China FTA differs from these new China FTAs. The ACFTA arguably focuses on market liberalization and contains fewer new regulatory obligations than some of China's FTAs (e.g. the ChAFTA). This is strongly supported by the fact that China has only utilized an enabling clause once to ensure the WTO-consistency of lower-standard FTAs with developing countries, in the

⁷⁰ Schott & (Lucy), 137. 2017.

⁷¹ Julien Chaisse, *The Shifting Tectonics of International Investment Law-- Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region*, 47 *GEORGE WASHINGTON INTERNATIONAL LAW REVIEW* 563, 615-616 (2015).

⁷² Salidjanova, et al., U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 9 (2015).

⁷³ Yoshimatsu, *NEW POLITICAL ECONOMY*, 406 (2010).

⁷⁴ A negative listing approach is adopted in the EHP to provide tariff cuts before the establishment of the ACFTA in 2010.

⁷⁵ Wang, 199. 2009.

⁷⁶ *Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP) 8 September 2016, Vientiane, Lao PDR*(2016), available at http://asean.org/storage/2016/09/56-RCEP_Joint-Leaders-Statement_8-September-2016.pdf.

⁷⁷ Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 22 (2015).

⁷⁸ Heng Wang, *The Features of China's Recent FTA and Their Implications: An Anatomy of the China–Korea FTA*, 11 *ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW & POLICY* 115, 115-154 (2016).

⁷⁹ Heng Wang, *An Assessment of the ChAFTA and Its Implications: A Work-in-Progress Type FTA with Selective Innovations?* 1 (2017).

trade pact with the ASEAN.⁸⁰ Concerning the future work programme envisaged by the Upgrading Protocol, issues such as intellectual property and non-trade concerns are not the focus.

For new sectors, it appears that the ACFTA does not attach as much attention to these as the China-Korea FTA and the ChAFTA do. Going significantly beyond the ACFTA, China's recent agreements with Australia and Korea provide for preferential access to China's market in specific areas (e.g. information technology, and retail services).⁸¹

4. Challenges in the FTA implementation

Both the ACFTA and the AHKFTA are important trade pacts. The ACFTA is one of the most important South-South FTAs for both parties, while the AHKFTA is the first FTA to be signed by the ASEAN over a period of around eight years.⁸² However, a number of challenges exist in FTA implementation. Two points deserve attention at the beginning. One is that the implementation of the ACFTA varies from one ASEAN country to another due to a lot of factors. These factors include the different development level, individual ACFTA schedules, and the bilateral trade surplus or deficit of ASEAN countries. As an example, different ASEAN countries may run a trade surplus or deficit with China. The ASEAN's goods trade with China has gone from surplus to an increased trade deficit in 2015,⁸³ although the causal link between trade deficit and the ACFTA merits scrutiny.⁸⁴ The other challenge is that some implementation hurdles (e.g. the low FTA usage rate including its usage by SMEs⁸⁵) are not unique to the ACFTA.

First, the ACFTA may negatively affect certain sectors of the importing country, as is the case with other trade pacts. A major challenge in the ACFTA implementation is the possible impact on industrial development (especially labor intensive industries), since ASEAN-China trade (e.g. agricultural products) is considered more competitive rather than complementary in its character.⁸⁶ The ACFTA has caused concerns in certain sectors (such as steel, petrochemicals, cosmetics and herbal medicines) due to possible overwhelming competition from imports under the agreement.⁸⁷ It is observed that the implementation of the ACFTA does not bring significant economic benefits to improving the competitiveness of the Indonesian economy.⁸⁸

Meanwhile, the implementation of the ACFTA is influenced by the dynamics and challenges of political and economic changes in the region, which could include internal factors in economic recovery.⁸⁹ For instance, one writer indicates that Indonesia is not very serious in addressing the opportunities and challenges of regional economic integration, and that Indonesia faces internal constraints in the implementation of the ACFTA.⁹⁰ In any case, adequate support to the sectors negatively affected by the ACFTA is crucial.

Second, the utilization rate of the ACFTA remains low. According to a WTO report, the ASEAN partners under the ACFTA had preference utilization rates of 12%, lower than Pakistan and New

⁸⁰ Salidjanova, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 21 (2015).

⁸¹ Nargiza Salidjanova, et al., *China's Economic Ties with ASEAN: A Country-by-Country Analysis*, see id. at, 9.

⁸² Xinhua. Sept. 10, 2017.

⁸³ ASEAN Economic Community Chartbook 2016. (2016).

⁸⁴ Salidjanova, et al., U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION STAFF RESEARCH REPORT, 3, 4 (2015).

⁸⁵ For instance, the TPP also presents challenges to SMEs including the insufficiency of the opportunities to SMEs, the complexity of rules, difficulties in interpretation, and remained regulatory differences. See Heng Wang, *The Implications of the Trans-Pacific Partnership for SMEs: Opportunities and Challenges*, 6 KLRI JOURNAL OF LAW AND LEGISLATION 45, 65-75 (2016).

⁸⁶ The Political-Economy of ASEAN-China FTA: An Indonesian Perspective. (2014).

⁸⁷ Kevin Brown, *Biggest regional trade deal unveiled*, FINANCIAL TIMES, 2 January 2010. 2010.

⁸⁸ Ismanto & Indra, 26. 2014.

⁸⁹ For instance, the major challenge facing Indonesia in economic recovery is determined by internal factors such as political instability, rising terrorism, deteriorating infrastructure and stricter labor legislations. Id. at, 4, 26.

⁹⁰ Id. at, 26-27.

Zealand, who had utilization rates of between 20% and 30% of their exports to China.⁹¹ There may be many reasons for the low usage rate of the ACFTA, including different rules of origin (ROOs) that may lead to a noodle bowl effect, as discussed below. Other reasons could include non-tariff barriers (NTBs), and a lack of information on the ACFTA. Notably, it is challenging to ensure that small businesses and farmers will benefit from the trade agreement, as they generally lack the expertise and funding to utilize the trade pacts. For instance, the cooperation on regulations such as food safety standards will be desirable to reduce NTBs and help SMEs and small farmers to reap the FTA benefits.⁹²

Third, the ACFTA consists of some out-of-date or “shallow” obligations even after the FTA upgrading. A typical example is e-commerce. The Upgrading Protocol provides for cooperation in cross-border e-commerce.⁹³ It provides for information sharing and other cooperation without detailed obligations. The Upgrading Protocol has less detailed provisions compared with the counterparts in China’s trade pacts with Korea and Australia, which contain stand-alone chapters on e-commerce.⁹⁴ Therefore, one may argue that the ACFTA is not adequately prepared for e-commerce, since the rules may not be able to effectively deal with related legal issues (e.g. intellectual property issues in e-commerce, electronic authentication, electronic signatures, paperless trading, online consumer protection, and personal information protection). As analyzed above, the ACFTA contains few WTO-plus or WTO-extra regulatory disciplines to address NTBs.

The Upgrading Protocol has made limited progress. The areas covered in the upgrading are product specific rules, a *de minimis* rule, operational certification procedures, customs procedures and trade facilitation, liberalisation of services trade, investment promotion and facilitation, economic and technical cooperation, and commitments to further strengthen trade and investment conditions.⁹⁵ Its focus seems to be origin rules, market opening, and trade facilitation. However, it contains few new obligations in respect of issues such as NTBs, non-trade concerns, and investment liberalization.

Fourth, the relationship among the ACFTA, China-Singapore FTA (CSFTA) and other trade or investment agreements (e.g. the RCEP) needs to be clarified, and they may lead to the noodle bowl effect (the complication arising from the implementation of various fragmented trade pacts among jurisdictions). The lack of bilateral agreements between China and the ASEAN countries (except for the China-Singapore FTA) exempts businesses from the job of checking both bilateral agreements and the ACFTA for the FTA benefits. However, Singapore concluded a bilateral FTA with China that is unique in the ASEAN countries. As a trade pact between an ASEAN Member State and its strategic trade partner, the China-Singapore FTA complements the ACFTA.⁹⁶ That said, for trade between Singapore and China, businesses and other stakeholders need to check both agreements and the RCEP, if it is concluded.

In the future, the AHKFTA is also highly relevant in this context. On the one hand, the ACFTA and AHKFTA may bring competition between Hong Kong and Singapore. The AHKFTA will effectively give Hong Kong access to the ACFTA, such as by facilitating the staging of cargo and inventory in Hong Kong, and enabling third-party invoicing from Hong Kong trading companies to buyers and sellers under the ACFTA.⁹⁷ As indicated by the Singaporean Minister for National Development, Lawrence Wong, “Singapore and Hong Kong are in healthy competition with each other... But the competition

⁹¹ Maria Donner Abreu, *Preferential Rules of Origin in Regional Trade Agreements* 29 (2013).

⁹² For instance, there is concern about small farmers under the trade agreement, which involves food safety standards.China-Thailand. 2012.

⁹³ China-ASEAN FTA Upgrading Protocol Article 7(III). 2015.

⁹⁴ China-Korea FTA Chapter 13 (2015);ChAFTA Chapter 12 (2015).

⁹⁵ *A Guide to Understanding the ASEAN-China Free Trade Area Upgrade*, 1. Year? Page or para no?

⁹⁶ ASEAN Economic Community Blueprint 2025 paragraph 79. 2015.

⁹⁷ William Marshall, *Asean-HK FTA: What it means for Hong Kong and Singapore*, The Straits Times(Sep. 20, 2017), available at <http://www.straitstimes.com/opinion/asean-hk-fta-what-it-means-for-hk-and-spore>.

is not a zero-sum game".⁹⁸ On the other hand, the ACFTA could benefit ASEAN countries, including Singapore. For instance, it is reported that the Philippines will tremendously benefit from the AHKFTA and AHKIA as these two pacts will level up trade and investments relations through increased market access for Filipino businesses.⁹⁹ Meanwhile, it will be interesting to see how the relationship between the AHKFTA and AHKIA will be addressed, since the text of these two agreements is not publicly available at the time of writing.

However, a number of questions remain open regarding the relationship among these agreements. In particular, how to address the conflict, if any, among provisions of these three agreements? How to determine the forum to resolve disputes among the parties if they cannot agree? The ACFTA does not prejudice the parties' right to resort to the dispute settlement procedures of treaties to which they are parties.¹⁰⁰ In practice, it may depend on the choice of the complainant as to whether its choice of forum will exclude other fora under the ACFTA.¹⁰¹

Taking Singapore as an example, the implementation of the ACFTA risks a noodle bowl effect arising from different FTA ROOs. Regarding products that are not wholly produced or obtained in the ACFTA zone, the TIG Agreement used to only provide for the 40 per cent value-added rule (i.e. the product needed to have 40% of its content originating from any ACFTA party).¹⁰² This is the regional value content (RVC) rule. As pointed out by Chinese Minister of Trade, these ACFTA ROOs are not flexible and origin determination is a complicated process.¹⁰³

The Upgrading Protocol brings the rule on a change in tariff heading (CTH) at the four-digit level of the Harmonised System (CTH rule): for goods classified in 46 chapters of the Harmonised System that are not wholly produced or obtained in the ACFTA zone, they are originating goods if all non-originating materials used in the production of the goods have undergone a CTH at the four-digit level of the Harmonised System.¹⁰⁴ Either the RVC 40% rule or the CTH rule apply under the ACFTA. This is similar to a number of the ASEAN's agreements (e.g. the ASEAN Trade in Goods Agreement, the ASEAN-Australia-New Zealand FTA, the AJCEP and the ASEAN-Korea FTA), but differs from the ASEAN-India FTA that adopts RVC 35% and a change in tariff sub-heading (CTSH) for products that are not wholly produced or obtained in the FTA parties.¹⁰⁵ For products that are not wholly produced in the FTA parties, the China-Singapore FTA uses the RVC 40% rule,¹⁰⁶ and contains product-specific ROOs, including a change in tariff classification,¹⁰⁷ and process criterion for textile and textile products.¹⁰⁸ The Singapore-Australia FTA provides for the general rule of a specified threshold of local value content of either 30 or 50 per cent, while each product has one corresponding specific ROO under the Japan-Singapore Economic Partnership Agreement, a significant portion of which requires 60 per cent of local content.¹⁰⁹ The implementation of the ACFTA could face the noodle bowl effect arising from inconsistent ROOs under various agreements. Singaporean businesses may face a different set of ROOs (e.g. CTH and CTSH rules), and this will affect the usage of trade pacts.

Last but not least, other challenges exist. For instance, one challenge is how to implement the Upgrading Protocol and further upgrade the ACFTA. The Upgrading Protocol provides for few stringent regulatory disciplines, and the details of economic and technical cooperation have not been laid out. In the future, the ACFTA needs to address the challenge of deepening trade

⁹⁸ Id. at.

⁹⁹ Xinhua. Sept. 10, 2017.

¹⁰⁰ China-ASEAN Agreement on Dispute Settlement Mechanism Article 2.5. 2004.

¹⁰¹ Id. at, Article 2.6.

¹⁰² China-ASEAN Agreement on Trade in Goods Annex 3, Rule 4(a)(i). 2004.

¹⁰³ Xinhua News Agency. 2015.

¹⁰⁴ China-ASEAN FTA Upgrading Protocol Annex 1, Article 4.1(b). 2015.

¹⁰⁵ Handbook on Rules of Origin for Preferential Certificates of Origin 25 (2017).

¹⁰⁶ China-Singapore FTA Article 13.2. 2008.

¹⁰⁷ Id. at, Annex 2, Section B.1.

¹⁰⁸ Id. at, Annex 2, Section B.2.

¹⁰⁹ Wang, 201. 2009.

liberalization (including the further removal of NTBs) and cooperation while protecting regulatory autonomy.

5. Conclusion

The ACFTA is not a high-level and modern trade agreement when compared with deep FTAs (e.g. the CETA and the TPP). On the one hand, the ACFTA does reflect a more flexible approach than other Chinese FTAs. On the other hand, however, the implementation of the ACFTA faces a number of challenges. If properly managed, the evolving ACFTA could contribute to the RCEP negotiations. However, it should be noted that the scenario of the ACFTA is markedly different from that of the RCEP.

The ACFTA will increasingly interact with other agreements. Among them, the RCEP and the AHKFTA are particularly relevant. The AHKFTA should promote development of the economic relationship between China and the ASEAN. Businesses could utilize either the ACFTA or the AHKFTA to tap the vast market of Mainland China. The AHKFTA will help firms to use Hong Kong as a gateway to conduct business with Mainland China. Moreover, the AHKFTA may provide higher level rules and liberalisation than the ACFTA in key areas such as intellectual property and services trade.¹¹⁰ It is possible that the RCEP, the AHKFTA and even the Mainland and Hong Kong Closer Economic Partnership Arrangement will be considered along with the ACFTA. Meanwhile, the AHKFTA may mean competition between Hong Kong and Singapore but such competition is a healthy one.¹¹¹ To fully utilize these agreements, the understanding of these agreements will be crucial and the challenges in the FTA implementation should be properly addressed. Therefore, the evolution of the ASEAN law from a global perspective, including the development of the ACFTA and its interaction with other agreements, deserves close attention.

Xinhua, *ASEAN, HK to Sign Free Trade Agreement* (Sept. 10, 2017), available at http://www.chinadaily.com.cn/china/2017-09/10/content_31798251.htm.

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¹¹⁰ Phila Siu, 'Hong Kong-Asean free-trade deal to be signed by November': *Philippine minister*, SOUTH CHINA MORNING POST, 13 July 2017. 2017.(the key elements of the FTA include tariff cuts, liberalisation of trade and services, and intellectual property cooperation)

¹¹¹ Charissa Yong, *Asean-Hong Kong free trade agreement on track to be inked this year*, THE STRAIT TIMES, 8 June 2017. 2017.

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