

Corporate Newsletter



Regional Comprehensive Economic Partnership (RCEP) – what you need to know: Investment protection perspective (Part II)

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A. INTRODUCTION

In our previous newsletter “[Regional Comprehensive Economic Partnership \(RCEP\) – what you need to know: A general introduction \(Part I\)](#)”, we provided a general overview of the long-awaited RCEP concluded by fifteen Asia-Pacific countries on 15 November 2020, following eight years of negotiations.¹

As of today, the RCEP represents the world’s largest free-trade agreement, exceeding the European Union, the revamped NAFTA (“USMCA”) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”), in terms of covered population (2.2 billion people) and cumulative GDP (USD 26.2 trillion).

In this month’s issue, we will cover the key investment protection provisions under the RCEP. We will also provide an outlook on how foreign investors operating or considering to invest in the Asia-Pacific region could maximize their benefits and protections under the RCEP as well as co-existing free trade and investment agreements.

¹ See text of the RCEP, available at: https://www.mofa.go.jp/ecom/ep/page24e_000272.html.

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B. INVESTMENT SCOPE OF THE RCEP

I. Investment protection

Following standard treaty practice, the RCEP guarantees national treatment and most-favoured-nation treatment to foreign investors and their investments. It also provides for fair and equitable treatment as well as full protection and security in accordance with the customary international law minimum standard of treatment. Moreover, foreign investors are entitled to compensation for expropriations and losses due to conflict or civil strife. RCEP signatories are further prohibited from introducing performance requirements as a condition for foreign investors to establish, expand or dispose of an investment.

A distinctive feature of the RCEP – compared to, for instance, the CPTPP – are the exceptions for international peace and security as well as essential security interests.² While the CPTPP only exempts host states from their obligation to make available or disclose information for security reasons during or after arbitral proceedings,³ the RCEP’s broad (though admittedly somewhat vague) language attempts to strike a better balance between foreign investors’ interests and host states’ rights to regulate their affairs.

II. Investor-state dispute settlement

While containing a chapter on investment protection, the RCEP currently does not provide for a complementary investor-state dispute settlement (“ISDS”) mechanism.⁴ The inclusion of an ISDS mechanism became controversial during the RCEP negotiations and was therefore carved out from the RCEP in order to avoid further delays in its conclusion.

Without an ISDS mechanism, foreign investors who feel that their rights under the RCEP have been violated cannot seek legal recourse via international arbitration. Instead, such foreign investors would have to rely on the judiciary of the particular member state – which is not always regarded as ideal.⁵

Against this background, the RCEP signatories committed to restart ISDS negotiations two years from the agreement’s entry into force at the latest, to be concluded within three years.⁶ However, it should be noted that any amendment of the RCEP – including on ISDS – will require approval by all member states.

C. OUTLOOK FOR FOREIGN INVESTORS

While undoubtedly a welcome step forward towards increased free trade and multilateralism in the Asia-Pacific region, the practical impact of the RCEP is yet to be tested. Particularly, considering its comparatively low level of economic

² Article 10.15 of the RCEP: “Notwithstanding Article 17.13 (Security Exceptions), nothing in this Chapter shall be construed to: [...] (b) preclude a Party from applying measures that it considers necessary for: (i) the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security; or (ii) the protection of its own essential security interests.”

³ Article 9.24.3 of the CPTPP: “Nothing in this Section, including paragraph 4(d), requires a respondent to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing, protected information, or to furnish or allow access to information that it may withhold in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information).”

⁴ The RCEP also expressly prohibits applying the ISDS mechanisms or procedures contained in other treaties through the RCEP’s MFN treatment clause. Article 10.4(3) of the RCEP: “For greater certainty, the treatment referred to in paragraphs 1 and 2 does not encompass any international dispute resolution procedures or mechanisms under other existing or future international agreements.”

⁵ Meanwhile, the CPTPP and many other existing treaties in the region do provide for ISDS.

⁶ See Article 10.18 of the RCEP: “1. The Parties shall, without prejudice to their respective positions, enter into discussions on: (a) the settlement of investment disputes between a Party and an investor of another Party; and (b) the application of Article 10.13 (Expropriation) to taxation measures that constitute expropriation, no later than two years after the date of entry into force of this Agreement, the outcomes of which are subject to agreement by all Parties. 2. The Parties shall conclude the discussions referred to in paragraph 1 within three years from the date of commencement of the discussions.”

integration, it remains to be seen whether the RCEP will be as competitive as its co-existing free trade and investment agreements, including the CPTPP, the ASEAN+1 FTAs and other bilateral treaties concluded by Asian states.

I. Relevance for Japanese investors

For Japanese investors conducting business in the region, the RCEP represents a welcome addition to Japan's roster of bilateral or multilateral agreements such as the CPTPP, the China-Japan-South Korea Trilateral Investment Agreement and the ASEAN-Japan Comprehensive Economic Partnership Agreement.

In terms of investment protection, however, RCEP's relevance will depend on whether its member states will adopt an ISDS mechanism similar to or exceeding the level of protection already provided for in Japan's above-mentioned treaties.

II. Relevance for non-RCEP investors

Unlike Japanese investors, foreign investors from non-RCEP states (primarily the United States and Europe) do not as of yet have any similar multilateral free trade and investment agreements which they can rely on when conducting business in Asia, and specifically in the ASEAN region.⁷

European and US investors should thus consider which alternative international agreements could protect their business activities and investments. This could be achieved through early investment structuring to the effect that such investors with Asia-Pacific subsidiaries would fall under the scope of the RCEP, CPTPP and ASEAN+1 FTAs, among others. At the same time, careful consideration should be given to so-called "*denial of benefits*" provisions in such treaties preventing foreign investors from operating through mere "*mailbox*" companies.⁸

D. OUR EXPERTISE

Our international arbitration group comprises a team of specialists in the areas of international law and investor-state dispute resolution. We would be happy to provide you with advice on how to optimize your business and investment opportunities in the region.

As a top international law firm headquartered in Tokyo and with offices across Asia, as well as in Germany and the USA, Nishimura & Asahi is ideally equipped to provide clients with comprehensive and high-quality service in Japan, the Greater Asia region, and beyond.

⁷ While the US has concluded so-called Trade and Investment Framework Agreements (TIFAs) with ASEAN (and some other Asian) states, these only provide strategic frameworks and principles for dialogue on trade and investment issues. Investors from the US are limited to protections contained in bilateral treaties with Asian states, for instance the Korea-US FTA and the Singapore-US FTA. European investors likewise have to rely on specific bilateral free trade and/or investment protection agreements such as those with Japan, Vietnam, Singapore or New Zealand.

⁸ See, e.g., Article 10.14 of the RCEP: "*1. A Party may deny the benefits of this Chapter to an investor of another Party that is a juridical person of that other Party and to investments of that investor if the juridical person: (a) is owned or controlled by a person of a non-Party or of the denying Party; and (b) has no substantial business activities in the territory of any Party other than the denying Party. [...]*". See similarly, Article 9.15 of the CPTPP and Article 51.21 of the ASEAN-Japan FTA, First Protocol.



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*Please note that we are not engaged in a Gaikokuho Kyodo Jigyo (the operation of a foreign law joint enterprise).