

EVALUATING FOREIGN INVESTMENT IN RCEP MEMBER STATES FROM A DISPUTE RESOLUTION PERSPECTIVE

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This is the third alert in a four-part series on the Regional Comprehensive Economic Partnership (RCEP). Check out our [first](#) and [second](#) alerts.

The recent signing of the RCEP¹ in November 2020 has been heralded as a “*historic milestone*” for economies across Southeast Asia. Many investors may find this historic development to be of interest, whether in terms of any immediate implications that may arise for planned foreign investment in the region or as a strategic consideration in longer term planning. Undoubtedly, any benefits arising from the RCEP will be specific to the relevant investment or trade context, but foreign investors would be wise to conduct reasonable due diligence before finalizing business plans in anticipation of the potential opportunities afforded by the RCEP.

This alert highlights a few aspects of the RCEP with respect to investor-state dispute settlement that will have some relevance from the perspective of foreign investors considering investment in the RCEP member states.

LEGAL PROTECTIONS AND REMEDIES

One important aspect of due diligence in preparation for investment in the RCEP member states is an exploration of the legal remedies potentially available in the event that a host state were to breach any public international law obligation it may have for the promotion and protection of investment in its territory. This perspective can be particularly important, for example, in the event that a foreign investment receives unfair treatment by a host state or is expropriated directly or indirectly, resulting in potentially significant loss in the value of the investment. Indeed, the outcome of this analysis may provide the determining factor for a foreign investor's decision to invest in one jurisdiction rather than another, and may well have direct implications for the legal remedies (and consequent tone of any negotiations with a respondent state) in the event that an investor-state dispute were to arise.

As an initial matter, RCEP Article 10 (*Investment*) does contain a number of treaty obligations with regard to the promotion and protection of foreign investments, including the following standards of investment protection:

- National Treatment (Article 10.3);
- Most-Favored-Nation Treatment (Article 10.4);

- Fair and Equitable Treatment (Article 10.5);
- Full Protection and Security (Article 10.5); and
- Expropriation (Article 10.13).

There are, however, some variations from the familiar terms of many international investment agreements in the RCEP formulation of investment protection. For example, RCEP Article 10.5(1) creates the following substantive public international law obligation for the RCEP member states:

Each Party 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.

To further confirm the scope of investment protection created by this language, RCEP Article 10.5(2)(c) confirms as follows:

...the concepts of fair and equitable treatment and full protection and security do not require treatment to be accorded to covered investments in addition to or beyond that which is required under the customary international law minimum standard of treatment of aliens, and do not create additional substantive rights.

This language limits the much broader scope of investment protection that is present in some earlier generations of bilateral investment treaties. For example, the 1981 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments (the UK-Malaysia BIT) provides as follows at Article 2(2):

Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

This broader formulation of the “*fair and equitable treatment*” standard allows for a greater degree of interpretation by arbitral tribunals considering investor-state disputes arising under such treaties. By contrast, as noted above, the amended form of the “*fair and equitable treatment*” standard employed in the RCEP limits the scope of such protection to “*the customary international law minimum standard of treatment of aliens*.” As such, the guarantee of “*fair and equitable treatment*” under the RCEP may not provide the same degree of substantive protection available under other international investment agreements into which an RCEP member state may have entered, including any other bilateral investment treaties, free trade agreements, or domestic investment protection laws that may be applicable.

Further, RCEP Article 10.14 (*Denial of Benefits*) provides that RCEP Parties may deny any benefits that may otherwise be applicable under RCEP Article 10 in certain circumstances. For example, RCEP Article 10.14(1) states that “[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: is owned or controlled by a person of a non-Party or of the denying Party; and has no substantial business activities in the territory of any Party other than the denying Party.”

This language would seem potentially to deny benefits under the RCEP to a foreign investor of a non-RCEP member state (or to an investor of the host state itself), preventing such an investor from benefitting from the investment protections of the RCEP by, for example, incorporating a subsidiary in one RCEP member state for the sole purpose of investment in another. Corporate foreign investors will also need to consider whether their present or future ownership or control structures may affect any benefits they may otherwise have received under the RCEP. In this regard, RCEP Article 10.14(3) provides that RCEP member states may deny the benefits of RCEP Article 10 to foreign investors where “persons of a non-Party own or control the juridical person [i.e., the investing entity] and the denying Party does not maintain diplomatic relations with the non-Party.” As such, foreign investors would be wise to remain aware of any implications of a relevant change in control, ownership, or diplomatic relations that could trigger a heightened risk of diminished investment protection under the RCEP.

Most importantly, however, it remains to be seen whether and how the RCEP may provide a mechanism for dispute resolution between foreign investors and RCEP member states at all. RCEP Article 10.18(1) (*Work Programme*) provides that “[t]he Parties shall, without prejudice to their respective positions, enter into discussions” with regard to (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” within two years after the RCEP’s date of entry into force, with the outcomes of such discussions remaining “subject to agreement by all Parties.” Until such a mechanism for investor-state dispute settlement is agreed among RCEP member states, investors will be unable to initiate proceedings independently under the RCEP as the need may arise from the breach of substantive obligations for the promotion and protection of covered investments. As such, other existing international investment agreements that are applicable in a given jurisdiction (as discussed above) are likely to continue to serve as important points of comparison for foreign investors considering investment in RCEP member states.

OPPORTUNITIES BECKON, BUT LOOK BEFORE YOU LEAP

From the analysis of new opportunities under the RCEP to the negotiation and drafting of contracts arising from such opportunities, considerations of legal rights in dispute resolution provide one important perspective for the evaluation of foreign investment opportunities in the territories of RCEP member states. Ultimately, while the RCEP may open interesting doors of opportunity for trade, foreign investors would be wise to consider the broader context of investment promotion and protection in specific jurisdictions (including any investment protections that may exist under other applicable international investment agreements) prior to entering into investments in RCEP member states.

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