

DISPUTE SETTLEMENT IN THE RCEP

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The largest free trade area

- 15 countries. 30% of the world population. 30% of the world GDP. Once it enters into force, the RCEP will be the largest free trade area in the world.
- Linking the ASEAN with their trade partners.
- Linking Japan, Korea, and China in a single agreement.

Research on dispute resolution has not kept pace

- Most trade disputes between Asian countries over the past two decades engage disciplines that are *exclusive* to the WTO
- Until recently, the WTO could boast that it housed one of the most sophisticated inter-state dispute resolution mechanisms in the world.
- Comprehensive RTAs were still something of a rarity in the Asia-Pacific region.

Structure of talk today

- First, I begin with a very brief exposition of the legal and institutional *multilateral* framework within which, or as against which, all RTA dispute resolution functions.
- Second, I discuss the dispute resolution mechanism of the RCEP.
- Third, I provide an analytical framework for how we can expect the RCEP DRM to work in practice.

RTAs-WTO interdependence

1. Consistent with Article XXIV
2. RTAs of necessity rely on terminology and concepts negotiated and - crucially - *developed* in the WTO (and the GATT before it).
3. Direct or implied incorporation of obligations
4. WTO-plus agreements

The WTO dispute resolution mechanism

- Mandatory and binding jurisdiction;
- An expert secretariat providing legal, economic, and policy support - and, significantly, continuity - to quasi-judicial decision-making;
- A two-step dispute resolution framework that included a semi-permanent appellate organ, itself supported by a legal secretariat;
- Overtime, credible and wide-ranging jurisprudence anchored in public international law; and
- Overseen by a mostly sober and expert political instance, the Dispute Settlement Body.

Structure of analysis of RCEP dispute resolution

1. The economic context of the RCEP.
2. The economic value of an FTA is determined by a combination of disciplines and scope of coverage.
3. Finally, the disciplines of an RTA - the economic concessions of one party to the other parties - have an economic impact if they are actually implemented as expected. To a large extent, the scope of obligations - that is, what the treaty means - and parties' failure to implement (that is, the consequences of not carrying out promised liberalization) is linked to a functioning dispute resolution mechanism.

Economic framework

- Already discussed economic coverage
 - RCEP could further promote trade in the region by strengthening regional production networks through greater harmonization of regulations and policies across members.
- First time that Japan enters into a free trade agreement with China and the Republic of Korea

Substantive coverage

- RCEP is not only broad but also ambitious in its coverage.
- It has been argued that RCEP's scope of *substantive* coverage and its tariff concessions are more modest than those in CPTPP - some have used the term "shallow".
- Look at the *totality* of an agreement and try to assess its *overall* contribution to trade liberalization

Overall contribution

- Sawada observes:
 - RCEP has made possible an agreement among the three economies, of which the progress has been stalling for quite some time.
- The RCEP “potentially replaces 28 existing bilateral/plurilateral FTAs among its members”.
- Whether the differences between the CPTPP and the RCEP will translate to “deeper” disciplines in one relative to the other depends on how the parties to each RTA implement and seek to enforce those obligations through dispute resolution.

Dispute resolution: contribution to implementation

- Inconsistent interpretation and implement of disciplines within an RTA brings its efficacy into question. Where there are *new* disciplines, therefore, an RTA needs to have a way of fixing the *scope* of those disciplines:
 - general agreement among the parties to the treaty;
 - state practice over time; or
 - “clarification” through dispute settlement.
- Rampant failure to implement clear disciplines brings the RTA into disrepute.

Structure of dispute resolutions in RCEP

- Consultations
- Good offices, conciliation, or mediation
- Choice of Forum
- Multiple complainants and third parties
- Panel establishment
- Implementation, compliance, level of suspension, post-retaliation
- Expenses

RCEP process compared to the WTO

- No appeal
- Disputing parties are responsible for the costs of the panel process itself
- The panel is never functus and is always “reconvened” to address specific steps of the process
- The dispute resolution mechanism of the RCEP does not have complete coverage.

How can we expect RECP DS to function?

- Difficult to predict the relative success of a dispute resolution mechanism in an RTA in abstract and before it becomes fully operational. This is because developments in trade, law, and politics are dynamic, and they react in unpredictable ways with institutional design.
- An analytical error to draw any conclusions about the success of an RTA by comparing its dispute resolution framework to that of the WTO, at least when it was functioning.

Substantive observations

- Likelihood of dispute resolution under an FTA is directly proportionate to the combined effect of three interrelated factors: the depth of tariff concessions in a sector, the complexity of the applicable rules of origin, and the sector's economic sensitivity.
 - And of course should any disputes arise in these areas, economists and accountants will be in particular demand. (I will come back to this in my institutional observations.)
- Where multilateral dispute settlement is dysfunctional, RTA mechanisms become more attractive.
 - But note: this is only a necessary and not a sufficient condition.

Institutional observations

- Using an untested dispute resolution mechanism carries political risk; this risk is increased when there is a tested, if imperfect, alternative.
- When?
 - WTO dispute settlement becomes essentially non-functioning, because of routine appeals into the void;
 - they can ensure that RCEP panelists will have adequate economist, policy, and research support; and
 - there is adequate *legal* support, at least for the complainant.

Institutional observations

- The absence of an agreed roster means that there will be a great deal of temptation, in the selection of a panelist, to appoint an advocate rather than a judge.
- The panel is expected to be “on call” for the life of a dispute. This is an important consideration to avoid discontinuity - especially given that there is no secretariat - but where you rely on part-time *ad hoc* panelists, this could end up being overly burdensome.

Innovative and alternative approaches

- The time and expense of trade litigation, or the expertise of the litigators, is not always reflected in a satisfactory outcome.
- That time and expense, and lack of expertise, themselves constitute a deterrent against bringing cases.
- For smaller economies, for least developed countries, for trade disputes that are important enough to be irritants but not so as to require the time and expense of dispute settlement, for issues that do not consume politicians - there is a vast number of trade disputes that formal mechanisms are not designed to address and do not do so.
- Mediation and conciliation facilities to address these forgotten disputes.