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AGAINST POPULIST ISOLATIONISM: NEW ASIAN REGIONALISM AND GLOBAL SOUTH POWERS IN INTERNATIONAL ECONOMIC LAW

PASHA L. HSIEH*

Abstract

This article provides the most up-to-date examination of the Regional Comprehensive Economic Partnership (RCEP), which is poised to become the world's largest free trade agreement (FTA). It argues that the 16-country mega-FTA will galvanize the paradigm shift in Asian regionalism and build a normative foundation for the Global South in international economic law. Based on intertwined theoretical and substantive claims, this article opens an inquiry into the assertive legalism of developing nations in the new regional economic order. It further manifests the pivotal force of emerging economies against populist isolationism in the Trump era that undermines the neoliberal foundation of global trade liberalization.

By analyzing the converging policies of the Association of Southeast Asian Nations (ASEAN), China and India, the article first demonstrates the status of the RCEP in Asian powers' contemporary FTA practice. In light of the ASEAN Economic Community, the new 11-member Trans-Pacific Partnership and EU FTAs with Singapore and Vietnam, caution should be given to the utilization of tariff preferences, services liberalization and investor-state dispute settlement. Finally, the article assesses the RCEP's systemic impact on the legal fragmentation due to jurisdictional conflicts under trade and investment agreements. The consolidation of divergent trade rules and the pro-development operative mechanism will fortify the RCEP as a pathway to the Free Trade Area of the Asia-Pacific and reinvigorate the multilateral trading system.

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I. Introduction

International economic law and the Global South are at a crossroads in the era of populist isolationism.¹ The resurgence of Westphalian sovereignty in economic policy has endangered the neoliberal basis of free trade that has underpinned the world’s development since the inception of the postwar Bretton Woods system.² Evolving mega-regionals were once perceived to remedy the long-standing impasse of the Doha Round of the World Trade Organization (WTO). Nevertheless, the globalization backlash, evidenced by Brexit and the Trump administration’s withdrawal from the Trans-Pacific Partnership (TPP), has invigorated developing countries to pursue a new normative foundation for economic integration.³

¹ See Arif Dirlik, *Global South: Predicament and Promise*, 1:1 GLOBAL SOUTH 12, 12-15 (2007) (analyzing the notion of the Third World and the South); Deniz Altınbaş, *South-South Cooperation: A Counter-Hegemonic Movement? in THE RISE OF THE GLOBAL SOUTH: PHILOSOPHICAL, GEOPOLITICAL AND ECONOMIC TRENDS OF THE 21ST CENTURY* 29, 29 fn 1 (Justin Dargin ed. 2013) (clarifying the North-South divide in global politics).

² For the nexus between sovereignty and emerging trade protectionism, see Wallace S. Cheng, *To Open up Global Trade We Need to Understand “Protectionism,”* June 13, 2017, <https://www.weforum.org/agenda/2017/06/global-trade-protectionism-g20-explained/>; Douglas A. Irwin, *The False Promise of Protectionism: Why Trump’s Trade Policy Could Backfire*, 96:3 FOREIGN AFF. 45, 45-53 (2017).

³ The impact of Brexit and the US withdrawal from the Trans-Pacific Partnership (TPP) on Asian states, see Hoang Thi Ha et. al., *ASEAN’s Reflections from Brexit*, 9 ASEAN FOCUS 19, 20-21 (2016); Marina Tsirbas et. al., *The Future of the TPP*, 11 ASEAN FOCUS 8, 10-15 (2016).

Trade nationalism across the Atlantic has not deterred the dynamic development of Asian regionalism, which is witnessing a nearly four-fold growth of free trade agreements (FTAs) that represent half of global trade pacts.⁴ A salient feature of the Asian FTAs is the transformation of conventional South-South geopolitical cooperation into new-generation economic instruments. As the most ambitious mega-regional agreement led by the Global South, the Regional Comprehensive Economic Partnership (RCEP) is poised to be the world's largest FTA in 2018.⁵

Built upon the Association of Southeast Asian Nations (ASEAN) FTAs, the 16 RCEP countries account for 32% of world goods exports and 28% of global gross domestic product (GDP).⁶ Incorporating the world's ten most vigorous economies, including ASEAN states, China and India, contributes to the bloc's GDP growth rate of 4.6%, which is more than double that of the United States or the European Union.⁷ More fundamentally, the RCEP agenda will converge fragmented trade rules and the economic priorities of Asia's powerhouses, such as the ASEAN centrality, Beijing's "One Belt One Road" (OBOR) initiative and New Delhi's Act East Policy.⁸

⁴ The number of Asian free trade agreements (FTAs) in effect increased from 39 to 147 from 2000 to 2017. Table 1. FTAs by Status (cumulative), <https://aric.adb.org/fta> (last visited June 28, 2017); *see also* Regional Trade Agreements, https://www.wto.org/english/Tratop_e/region_e/region_e.htm (last visited June 28, 2017) ("As of 5 May 2017, 274 RTAs were in force.").

⁵ Joint Leaders' Statement on the Negotiations for the Regional Comprehensive Economic Partnership (RCEP) (2017), at 1; Giovanni Di Lieto, *Understanding RCEP in Xi Jinping's World Trade Game*, ASIA TIMES, Sept. 27, 2017., <http://www.atimes.com/understanding-rcep-xi-jinpings-world-trade-game/>; Rebecca Fatima Sta Maria, *RCEP More Relevant Now Than Ever*, STRAITS TIMES, Jan. 18, 2017, <http://www.straitstimes.com/opinion/rcep-more-relevant-now-than-ever>.

⁶ External free trade agreements (FTAs) of the Association of Southeast Asian Nations (ASEAN) were concluded between ten ASEAN states collectively with China, Japan, Korea, Australia, New Zealand, India and Hong Kong. Sanchita Basu Das et. al., *Can ASEAN+1 FTAs Be a Pathway towards Negotiating and Designing the Regional Comprehensive Economic Partnership (RCEP) Agreement?* 50:2 J. WORLD TRADE 253, 254-60 (2016); Yoshifumi Fukunaga & Ikumo Isono, *Taking ASEAN+1 FTAs towards the RCEP: A Mapping Study*, ERIA Discussion Paper Series (2013), at 4-6; ASEAN Connections (2016), at 13. As a comparison, 11 TPP members and the United States encompass 26% of world goods exports and 32% of global gross domestic product (GDP). ASEAN Connections (2016), at 12.

⁷ *The Long View: How Will the Global Economic Order Change by 2050?* (2017), at 7; ERIA East Asia Updates, Special 2017 Annual Edition (2017), at 1; ASEAN Connections (2016), at 12-13.

⁸ *See* Zhao Hong, *China One Belt One Road: An Overview of the Debate*, 6 Trends in Southeast Asia 1, 1-30 (investigating current economic policies of ASEAN, China and India).

Double the economic scale of the “reborn” TPP, which is the now 11-party Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the RCEP will be the most critical milestone since the Asia-Pacific Economic Cooperation (APEC) was established in 1989.⁹ To a large extent, premature aspirations for the TPP have overshadowed academic and policy discourse on the RCEP. To fill a much-needed gap in legal literature, this article offers a timely and “on the ground” response to the systemic implications of the RCEP for international economic law. By making interrelated theoretical and substantive claims, the article opens an inquiry into the assertive legalism of developing countries in the new regional economic order (NREO).¹⁰ The new-generation South-South FTAs that underpin the NREO also manifest the pivotal role of Global South powers in reshaping world order amid populist isolationism in the Trump era.

This article argues that the emerging RCEP represents the NREO, which will prompt paradigm shifts in Asian regionalism and construct a normative foundation for the Global South in international economic law. It further contends that revolutionizing the RCEP as Asia’s economic framework mandates commitments beyond ASEAN+1 FTAs and the new ASEAN Economic Community (AEC). The roadmap, which takes into account of the nexus between the AEC

⁹ Trans-Pacific Partnership Ministerial Statement (2017) [TPP Statement], at 1; see Minister Champagne Welcomes Progress on the Comprehensive and Progressive Trans-Pacific Partnership, Nov. 10, 2017, https://www.canada.ca/en/global-affairs/news/2017/11/minister_champagnewelcomesprogressonthecomprehensiveandprogressi.html (“The members of the CPTPP represent 494 million people, with . . . 13.6% of global GDP”); APEC Outcomes & Outlook (2016-2017) [APEC 2016-17], at 48-51 (explaining the milestones of the Asia-Pacific Economic Cooperation (APEC) since 1989).

¹⁰ Although the term, new regional economic order (NREO), was previously used by commentators, none of them have substantiated the theoretical or substantive claims related to mega-regionals and Asian regionalism. *E.g.*, Adriano R. Garcia, *Toward a New Regional Economic Order in Asian and the Pacific*, X:1-b *J. PHIL. DEV.* 45, 45-53 (1983); Greg Fry, “Pooled Regional Governance” in *The Island Pacific: Lessons from History*, in *PACIFIC ISLANDS REGIONAL INTEGRATION AND GOVERNANCE* 89, 92 (Satish Chand ed. 2005); KUNIKO ASHIZAWA, *JAPAN, THE US, AND REGIONAL INSTITUTION-BUILDING IN THE NEW ASIA: WHEN IDENTITY MATTERS* 66 (2013). I will make a further distinction between the NREO and the new international economic order (NIEO) in the 1970s in subsequent sections.

Blueprint 2025 and Asia-Pacific trade pacts, will necessitate the realization of the Free Trade Area of the Asia-Pacific (FTAAP) and reenergize the Doha round talks.¹¹

The article proceeds as follows. Part II provides the geopolitical context of Asian regionalism by deciphering the progress and impediments of mega-regionals and South-based agreements in Third Regionalism.¹² To buttress the NREO argument, the analysis offers insight into the RCEP's development, negotiating structure and constitutional issues that commentators overlook. By deciphering the legal strategies of ASEAN, China and India, it explains the Global South's contemporary practice of international economic law. Part III substantiates the RCEP's paradigm shifts in Asian regionalism. Based on the implementation of ASEAN+1 FTAs and the AEC, it challenges the loopholes of tariff eliminations and the rules of origin (ROOs) that result in the "noodle bowl syndrome."¹³ Given the recent progress of the TPP and EU FTAs with Singapore and Vietnam, it also examines the implications of professional mobility and investor-state dispute settlement (ISDS) provisions.

Part IV details the RCEP's systemic impact on regional and multilateral trading systems. In particular, it sheds light on the transformation of normative conflicts amid trade fragmentation. The overlapping jurisdiction between intra-RCEP FTAs and bilateral investment treaties (BITs) requires in-depth scrutiny of WTO jurisprudence and the Vienna Convention on the Law of Treaties (VCLT). Moreover, the RCEP as the pathway to the APEC-based FTAAP and the pro-development operative mechanism will be critically analyzed. Finally, the conclusion draws

¹¹ APEC Outcomes & Outlook, *supra* note 9, at 5 & 48.

¹² Built on Jagdish Bhagwati's explanation of the first two waves of regionalism beginning in the 1960s and 1980s, I coined the term, Third Regionalism, which refers to the new trends of FTAs in the Doha Round. Jagdish Bhagwati, *Regionalism versus Multilateralism*, 15 *WORD ECO.* 535, 538-42 (1992).

¹³ See generally Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism*, ADB Working Paper Series on Regional Economic Integration, No. 7 (2007).

together theoretical and substantive arguments and offers legal and policy advice for Asia-Pacific governments and practitioners.

II. The RCEP in the New Regional Economic Order

The RCEP's impact on Asian regionalism has been arguably intertwined with the China-US rivalry or the North-South divide. Yet, the existing research that discusses the TPP as the "gold standard" FTA for the 21st century has dismissed the RCEP, either explicitly or implicitly, as a low-ambition, unpromising South-driven pact.¹⁴ This position cannot hold true. The populist backlash in America prompted other TPP members to conclude the CPTPP on a smaller scale in March 2018 and substantiated the significance of Global South powers in world trade law.¹⁵ It is thus vital to understand the RCEP's evolution vis-à-vis the legal and policy priorities of stakeholding countries in the emerging NREO.

A. Asian Regionalism in Theoretical and Geopolitical Contexts

The RCEP should not be interpreted in clinical isolation from the geopolitical volatility of Asian regionalism and the Asian approach to international economic law. As a mega-regional alliance, the RCEP is representative of the NREO in Third Regionalism. The new trend is distinct from the movement that culminated in the 1974 United Nations General Assembly declaration, which called for a New International Economic Order (NIEO).¹⁶ In rationalizing global

¹⁴ E.g., Michael Wesley, *Trade Agreements and Strategic Rivalry in Asia*, 69:5 *AUS. J. INT'L AFF.* 479, 489-90 (2015); Deborah Kay Elms, *The Trans-Pacific Partnership Agreement: Looking Ahead to the Next Steps*, ADBI Working Paper Series, No. 447 (2013), at 8-9; Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths toward Deeper Asian Economic Integration*, 8:2 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 359, 368-69 (2013).

¹⁵ Comprehensive and Progressive Agreement for Trans-Pacific Partnership Ministerial Statement, Mar. 8, 2018; Iman Pambagyo, *RCEP is the Only Game in Town*, 14 *ASEAN FOCUS* 26, 26-27 (2017). The original TPP's ratification problems and the stalled negotiations of US-EU Transatlantic Trade and Investment Partnership (TTIP) made the RCEP a "promising" mega-regional agreement.

¹⁶ Programme of Action on the Establishment of a New International Economic Order (NIEO), A/RES/S-6/3201, May 1, 1974.

regionalism, Jagdish Bhagwati propounded the term “First Regionalism” in reference to the failure of FTAs in the 1960s owing to overriding political interferences.¹⁷ He further asserted that in “Second Regionalism,” robust economic motivations prompted the success of the European single market and the North American Free Trade Agreement (NAFTA) in the 1980s and 90s.¹⁸

Following the demise of the NIEO, I propose the NREO as the normative framework to understand the contemporary dynamics of FTAs. Built on Bhagwati’s account, what I call “Third Regionalism” has surfaced in the Doha Round and fertilized the NREO since the 2000s. This new wave highlights a different nature of Asian regionalism that bolsters the assertive legalism of the Global South. The “new dependency theory” that rectifies the classical dependency theory provides the theoretical basis for the NREO in Third Regionalism in which the RCEP has been developed. The dependency school that influenced the NIEO presupposes the underdevelopment of developing countries as the result of the North-South neocolonial relationship.¹⁹ As theorists contended, entrenched external unfairness has subordinated the development of developing countries to the self-interests of the developed nations.²⁰ By accelerating the North-bound trade surplus from the South, international economic relations have only worsened the dependency and imparity.²¹

¹⁷ Bhagwati, *supra* note 12, at 538-39.

¹⁸ *Id.* at 540-42; for different phases of Asian regionalism, see Amita Acharya, *Foundations of Collective Action in Asia: Theory and Practice of Regional Cooperation*, ADBI Working Paper Series, No. 344 (2012), at 5-16; Baldwin, *supra* note 13, at 7-17.

¹⁹ Theotonio Dos Santos, *The Structure of Dependence*, 60:2 AM. ECO. REV. 231, 232-34 (1970); FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA 16-17 (Marjory Mattingly Urquidi trans.1979); GAVIN FRIDELL, FAIR TRADE COFFEE: THE PROSPECTS AND PITFALLS OF MARKET-DRIVEN SOCIAL JUSTICE 31 (2007).

²⁰ ALVIN Y. SO, SOCIAL CHANGE AND DEVELOPMENT: MODERNIZATION, DEPENDENCY, AND WORLD-SYSTEM THEORIES 95-102 (1990).

²¹ *Id.*

The classical dependency theory posits that the solution for the Global South is to cut trade ties with the North.²² Nonetheless, the isolationist stance contravened the economic trajectory of developing countries, particularly those that propelled contemporary Asian regionalism. Addressing the theoretical weakness, the new dependency theory argued for the possible coexistence of dependency and development.²³ The nature of dependency is dynamic because developing nations could transform dependent capitalism into the export-driven economies.²⁴ Rather than becoming preoccupied with the unequal external relationships, the new theory emphasizes the impact of the South's internal structures on changing neocolonial ties with the North.²⁵

As the experiences of East Asian and ASEAN states reinforce, dependency is dynamic by nature because the South could escape from dependent capitalism and pursue export-driven growth. New-generation South-South FTAs that streamline the supply chain further augment the cost-effectiveness and the collective power of developing nations to change the structure with the North that was once perceived as unfair. Consequently, the corollaries of the new dependency theory underline the theoretical responses to the South-initiated NREO.

Asian regionalism, which gave rise to the RCEP in the emerging NREO, can trace its roots back to the 1955 Bandung Conference in Indonesia, where anticolonial nationalism of Asian-African states escalated to the Non-Aligned Movement.²⁶ Peripheral to political solidarity, the

²² *Id.* at 104-05.

²³ See generally SO, *supra* note 20, at 164-65; FERNANDO HENRIQUE CARDOSO, REINVENTING DEMOCRACY IN BRAZIL (1999); THOMAS BARON GOLD, STATE AND SOCIETY IN THE TAIWAN MIRACLE (1986).

²⁴ Based on Taiwan's development model, Gold explained how the country transformed its dependent relations with Japan and the United States to become a neoliberal export-oriented country. GOLD, *supra* note 23, at 21-90; SO, *supra* note 20, at 157-64.

²⁵ Katharina Serrano, *The Trade-Development Nexus in EU-Pacific Relations: Realism, Dependence or Interdependence*, 23:1 GLOBAL CHANGE, PEACE & SECURITY 89, 104 (2011); SO, *supra* note 20, at 137-42.

²⁶ Acharya, *supra* note 18, at 5-7.

economic perception of South-South cooperation was to parochially enforce the nationalistic concept of self-help by minimizing reliance on the West.²⁷ In the 1970s, Non-Aligned Movement states joined the Group of 77 in pushing for NIEO principles that demanded absolute sovereignty and affirmative action in international economic law.²⁸ Their efforts through the UN Conference on Trade and Development (UNCTAD) shaped the rules of the General Agreement on Tariffs and Trade (GATT), which the United States and Europe had dominated.

The UNCTAD pushed for including core special and differential treatment (SDT) provisions under the GATT, such as the non-reciprocity exception to the most-favored-nation (MFN) principle and the 1979 Enabling Clause that provides preferential market access for the South.²⁹ However, the NIEO movement quickly faded because of the Thatcher-Reagan coalition's refusal to additional demands and non-uniform interests within the Global South.³⁰ The rising Washington Consensus became the dominant driving force for creating the WTO and compelled developing nations to engage in North-defined "free trade."³¹ Since its inception, the WTO has been criticized for ignoring the development needs of the South.

²⁷ *Id.*

²⁸ The Early Days of the Group of 77, May 2014, <https://unchronicle.un.org/article/early-days-group-77>; History and Evolution of Non-Aligned Movement, Aug. 22, 2-12, <http://mea.gov.in/in-focus-article.htm?20349/History+and+Evolution+of+NonAligned+Movement>.

²⁹ General Agreement on Tariffs and Trade (GATT) (1994), art. XXXVI:8; Differential and More Favorable Treatment of Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903, Nov. 28, 1979. The contracting parties of the GATT adopted the permanent Enabling Clause after the 1971 decision that granted a ten-year waiver allowing generalized system of preferences to depart from GATT norms. Generalized System of Preferences, Decision of 25 June 1971, L/3545, June 28, 1971.

³⁰ JAMES M. CYPHER, *THE PROCESS OF ECONOMIC DEVELOPMENT* 238 (4th ed. 2014); Trade and Development Report (2014), at 67-68.

³¹ John Williamson, *A Short History of the Washington Consensus*, in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE* 14, 16-17 (Narcís Serra & Joseph E. Stiglitz eds. 2008); SONIA E. ROLLAND, *DEVELOPMENT AT THE WORLD TRADE ORGANIZATION* 51 (2012); Chantal Thomas & Joel P Trachtman, *Editors' Introduction*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* 1, 9 (Chantal Thomas & Joel P Trachtman eds. 2009).

The NREO is a reaction to the South's frustrations over the existing global economic order. Two paramount factors in Third Regionalism galvanized the convergence of policies of Global South powers in creating the RCEP. First, the deviation from the US-centric "unipolar moment" to multipolar trade governance became a reality in the Doha Round.³² Asia's ascending economies have weakened Washington's hegemonic power and materialized multipolar reality. In 2016, the Obama government's "pivot to Asia" strategy culminated in the inking of the TPP, which was seen as an initiative to tackle rising China.³³ However, soaring populist isolationism in the United States has undermined the TPP's strategic goals and the cross-Atlantic alliance on which the NIEO once relied. The stalled Transatlantic Trade and Investment Partnership (TTIP) negotiations and the EU agreements with ASEAN states have also aggravated the Western powers' divergent paths.³⁴

Second, South-South FTAs concluded between developing countries have departed from the NIEO's ideological bedrock of the North-South conflicts. As the new dependency theory suggests, developing countries and least developed countries (LDCs), such as Vietnam and Myanmar, diametrically shifted their policies from import substitution to export-driven orientation. Moreover, the West's economic slowdown and Asia's increasing intraregional trade led to South-South FTAs representing two-thirds of FTAs and substantially outpacing the North-South FTAs.³⁵ Different

³² For the unipolar and multi-polar discussions, see generally Charles Krauthammer, *The Unipolar Moment*, 70 FOREIGN AFF. 23 (1990-91); William W. Burke-White, *Power Shifts in International Law: Structure Realignment and Substantive Pluralism*, 56:1 HARV. INT'L L.J. 1 (2015).

³³ Hillary Clinton, *America's Pacific Century*, 189 FOREIGN POLICY 56, 60-62 (2011); David Nakamura, *Obama Turns on Personal Appeal while Trying to Bolster His Pivot to Asia*, WASH. POST, Nov. 20, 2015, https://www.washingtonpost.com/politics/obama-tries-to-land-his-pivot-to-asia/2015/11/20/e2222e62-8e8b-11e5-ae1f-af46b7df8483_story.html; Ian F. Fergusson & Brock R. Williams, *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress*, Congressional Research Service (2016), at 1-6.

³⁴ Szu Ping Chan, *New Trade War Threatens Global Order as TTIP Talks Stall*, TELEGRAPH, Sept. 3, 2016, <http://www.telegraph.co.uk/business/2016/09/03/new-trade-war-threatens-global-order-as-ttip-talks-stall/>. The EU concluded FTAs with Singapore and Vietnam and resume negotiations for the EU-ASEAN FTA. European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (2015), at 30-32.

³⁵ World Trade Report 2011 – The WTO and Preferential Trade Agreements: From Co-existence to Coherence (2011)

from their predecessors, more than 70% of today's Asian trade pacts encompass WTO-plus commitments.³⁶ This development illustrates how the assertive legalism of developing nations makes the South the center of the hub-and-spoke system.

B. The Global South's Practice of International Economic Law

The theoretical and geopolitical explanations shed light on the Global South's search for new norms to guide their international economic law development. In Second Regionalism, APEC's formation escalated aspirations for Asian integration. Nevertheless, the institutional weakness of APEC's soft-law approach has crippled the intended result of the Bogor Goals to achieve "free and open trade and investment in the Asia-Pacific" by 2020.³⁷ Renewed momentum for regionalism surged after the Asian financial crisis in 1997. Widespread frustrations over US-dominated global financial institutions invigorated the ASEAN+3 framework for currency stability.³⁸

At the inception of Third Regionalism, China and Japan vigorously vied for the regional leadership. The East Asian Vision Group, set up under the ASEAN+3 structure, proposed the East Asian Free Trade Area (EAFTA) in 2001.³⁹ While Beijing backed the EAFTA initiative, Tokyo countered it with the alternative ASEAN+6 Comprehensive Economic Partnership for East Asia

[World Trade Report 2011], at 52-53. In 2015, Asia's intraregional trade was 57.1%, higher than intra-regional trade in North America (64%) and lower than the European Union (EU) (63%). Asian Economic Integration Report (2016), at 18.

³⁶ See e.g., Richard Baldwin & Masahiro Kawai, *Multilateralizing Asian Regionalism*, ADBI Working Paper Series, No. 431 (2013), at 8-9 (finding that 77% of surveyed FTAs in Asia partially or completely include Singapore issues).

³⁷ See 1994 Leaders' Declaration, Nov. 15, 1994 (stating that industrialized economies and developing economies should achieve the goals by 2010 and 2020, respectively).

³⁸ The "ASEAN+3" framework includes ten ASEAN countries, China, Japan and Korea. Shujiro Urata, *Constructing and Multilateralizing the Regional Comprehensive Economic Partnership: An Asian Perspective*, No. 449 (2013), at 7. The result was the creation of the currency swap arrangement called the Chiang Mai Initiative, the predecessor to the Chiang Mai Initiative Multilateralisation Agreement.

³⁹ Summary of Stock-Taking Report on the ASEAN Plus Three Economic and Financial Cooperation, *in* Report of the East Asian Vision Group II (EAVG) 43, 43-46 (2013); Christopher M. Kent, *East Asian Integration Towards An East Asian Economic Community*, ADBI Working Paper Series, No. 665 (2017), at 23.

(CEPEA) in 2006.⁴⁰ In Japan's view, the CEPEA could deepen the foundation of the Fukuda Doctrine by enhancing ASEAN-Japan ties, and the inclusion of India, Australia and New Zealand would counterbalance Chinese influence.⁴¹

During the same period, the FTAAP proposal and US accession to the TPP further complicated the roadmap for Asian regionalism.⁴² To avoid being marginalized and fortify the bloc's centrality, ASEAN states introduced the framework for the "ASEAN-led process" to integrate FTA partners in 2011.⁴³ Based on ASEAN's 2012 Guiding Principles for the RCEP, the 16-party negotiations essentially merged EAFTA and CEPEA proposals and expect to create the world's most significant mega-regional deal by 2018.⁴⁴ In my view, the converging policies of ASEAN, China and India reinforce the status of the RCEP in global regionalism and their contemporary FTA practice. More fundamentally, these new policies help resist rising trade protectionism in the West and represent the assertive legalism of Global South powers in pursuing the NREO.

1. ASEAN

⁴⁰ In addition, Japan favored the ASEAN+6-based Comprehensive Economic Partnership for East Asia (CEPEA) because it was based on Japan's proposal and it was the work of the Japanese government-funded think tank, the Economic Research Institute for ASEAN and East Asia (ERIA). Rodolfo C. Severino, *Japan's Relations with ASEAN*, in ASEAN-JAPAN RELATIONS 17, 27-28 (Takashi Shiraiishi & Takaaki Kojima eds. 2014).

⁴¹ See SUEO SUDO, JAPAN'S ASEAN POLICY: IN SEARCH OF PROACTIVE MULTILATERALISM 69-75 (2015) (explaining the origin and principles of the Fukuda Doctrine); see also Seungjoo Lee, *Institutional Balancing and the Politics of Mega-FTAs in East Asia*, 56:6 ASIAN SURVEY 1055, 1069 (2016) ("Japan has attempted to take advantage of US influence to hold China in check.").

⁴² See generally Pasha L. Hsieh, *Reassessing APEC's Role as a Trans-Regional Economic Architecture: Legal and Policy Dimensions*, 16:1 J. INT'L ECO. L. 119, 142-43 (2013); Fergusson & Williams, *supra* note 33, at 1-2.

⁴³ ASEAN Framework for Regional Comprehensive Economic Partnership (2011).

⁴⁴ Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (2012) [Guiding Principles]. The first round of negotiations took place in Brunei in 2013 and the 18th round of negotiations was held in Vietnam in 2017. Regional Comprehensive Economic Partnership: News, <http://dfat.gov.au/trade/agreements/rcep/news/Pages/news.aspx> (July 5, 2017). The deadline for the RCEP's conclusion has shifted from 2015 to 2018. Joint Declaration on the Launch of Negotiations for the Regional Comprehensive Economic Partnership (2012); Amiti Sen, *RCEP Talks: India under Pressure to Offer Deeper Tariff Cuts*, HINDU, May 3, 2017, <http://www.thehindubusinessline.com/economy/policy/rcep-talks-india-under-pressure-to-offer-deeper-tariff-cuts/article9679098.ece>.

Contrary to the common misconception that China has dominated RCEP negotiations, in reality the FTA has been driven by ASEAN.⁴⁵ While China and Japan could not agree on the EAFTA and the CEPEA proposals, the two largest Asian economies compromised by enabling ASEAN to drive the RCEP process. From legal and political perspectives, relying on the existing frameworks of ASEAN+1 FTAs and the AEC constitutes the most feasible option for the unprecedented mega-regional pact. The ASEAN-initiated RCEP would also serve as a normative basis for pro-development FTAs.

ASEAN's internal and external integration provides the foundation for the RCEP that covers ASEAN's ten member states and six FTA partners. While the existing literature predominantly links the RCEP to ASEAN+1 FTAs, it is incorrect to ignore the implementation of the AEC.⁴⁶ The 1967 Bangkok Declaration gave birth to ASEAN by forming a loose security alliance that sought to contain widespread communism.⁴⁷ Resting upon the Indonesian concepts of *musyawarah* and *mufakat*, the postcolonial mind-set led to the "ASEAN way," which established the bloc's non-intervention principle based on consultation and consensus.⁴⁸

The constitutional moment was the enactment of the ASEAN Charter to codify the established practice and confer legal personality on ASEAN "as an inter-governmental" organization.⁴⁹ Distinguishable from the super-national EU, ASEAN has operated under the soft-law horizontal integration model rather than a top-down, hard-law approach. A result of this difference is the

⁴⁵ Maria, *supra* note 5; *see also* Pambargyo, *supra* note 15, at 27 ("[T]here has been no sign or sense that China has become more pro-active in RCEP negotiations other than a significant increase in the number of participants in the Chinese delegation.").

⁴⁶ An analysis of ASEAN+1 FTAs is the conventional approach to understanding the RCEP. *E.g.*, Das et. al., *supra* note 6, at 262-54; Fukunaga & Isono, *supra* note 6, at 8-18; Urata, *supra* note 38, at 12-17.

⁴⁷ RODOLFO C. SEVERINO, SOUTHEAST ASIA IN SEARCH OF AN ASEAN COMMUNITY: INSIGHTS FROM THE FORMER ASEAN SECRETARY-GENERAL 1-11 (2006).

⁴⁸ *Id.*; INGO VENZKE AND LI-ANN THIO, THE INTERNAL EFFECTS OF ASEAN EXTERNAL RELATIONS 9-17 (2016).

⁴⁹ Charter of the Association of Southeast Asian Nations (2007) [ASEAN Charter], art. 3.

lack of ASEAN law's "direct effect" to override domestic law. Although the Charter requires members to "take all necessary measures" to implement ASEAN treaties, national constitutions are unlikely to be interpreted as granting such treaties self-executing power.⁵⁰

As an integral part of the RCEP, the AEC represents a breakthrough in the NREO. In 2015, the creation of the AEC culminated ASEAN's internal integration that began with the 1993 ASEAN Free Trade Area (AFTA).⁵¹ The AEC architecture comprises new-generation South-based pacts. To remedy the AFTA's low-utilization, the ASEAN Trade in Goods Agreement (ATIGA) consolidated previous agreements on goods and reduced non-tariff barriers.⁵² As of 2017, the negotiations under the ASEAN Framework Agreement on Services (AFAS) have led to the ratification of nine packages of services commitments.⁵³ The ASEAN Comprehensive Investment Agreement (ACIA) streamlined the schedule of reservations and enhanced the investor-state arbitration mechanism.⁵⁴ These commitments and the target of the AEC Blueprint 2025 to build "a highly integrated and cohesive economy" collectively form the benchmark for RCEP negotiations.⁵⁵

⁵⁰ ASEAN Charter, art. 5:2; see also Diane A. Desierto, *ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter*, 49 COLUM. J. TRANSNAT'L L. 268, 300-03 (2010-11) (interpreting pertinent constitutional provisions of ASEAN states).

⁵¹ SEVERINO, *supra* note 47, at 222-25; Masahiro Kawai & Kanda Naknoi, *ASEAN Economic Integration through Trade and Foreign Direct Investment: Long-Term Challenges*, ADBI Working Paper Series, No. 545 (2015), at 12-13. Note that in 2007, ASEAN approved the ASEAN Economic Community (AEC) Blueprint 2015 with the intention to form "a single market and production base" in 2015. ASEAN Economic Community Blueprint (2015) [AEC Blueprint 2015], at 5-6. The AEC Blueprint 2025, which will govern ASEAN's development from 2016 to 2025, replaced the AEC Blueprint 2015 when the AEC was established. ASEAN Economic Community Blueprint (2025) [AEC Blueprint 2025], at 1-2.

⁵² Kanya Satyani Sasradipoera, *ASEAN Trade in Goods Agreement (ATIGA)*, in ASEAN: LIFE AFTER THE CHARTER 89, 90-92 (S. Tiwari ed. 2010); STEFANO INAMA & EDMUND W. SIM, RULES OF ORIGIN IN ASEAN: A WAY FORWARD 4-27 (2015).

⁵³ Also note that the conclusion of the final, 10th package of commitments was postponed from 2015 to 2017. Deunden Nikomborirak & Supunnavadee Jitdumrong, *An Assessment of Services Sector Liberalization in ASEAN*, in ASEAN ECONOMIC COMMUNITY SCORECARD: PERFORMANCE AND PERCEPTION 47, 53 (Sanchita Basu Das ed. 2013); Chairman's Statement on the 28th and 29th ASEAN Summits, Sept. 6-7, 2016, at 10.

⁵⁴ ASEAN Comprehensive Investment Agreement: A Guidebook for Business & Investors (2013), at 9-11.

⁵⁵ AEC Blueprint 2025, *supra* note 51, at 3. Presumably due to the challenge meeting all targets in the AEC Blueprint

A key point should be highlighted. The new Blueprint's "global ASEAN" initiative places the RCEP as ASEAN's priority.⁵⁶ From 2002 to 2017, ASEAN concluded six ASEAN+1 FTAs with seven Asia-Pacific partners, including Australia, China and India.⁵⁷ Akin to the AEC, the ASEAN+1 FTAs have strengthened the notion of ASEAN centrality, which is mandated by the ASEAN Charter to secure the bloc's economic and geopolitical relevance.⁵⁸ This concept empowers ASEAN to be an indispensable middle power in Asian regionalism.⁵⁹ Although policy debates on the RCEP have revolved around ASEAN+1 FTAs, their differences in legal structures and commitments could endanger the RCEP. The ASEAN-Australia-New Zealand FTA (AANZFTA) is the most comprehensive single-undertaking FTA.⁶⁰ Other ASEAN+1 FTAs have followed the incremental approach by enacting a framework agreement that facilitates the conclusion of sectoral agreements on trade in goods, services, investment and dispute settlement. The "incomplete" exception is the ASEAN-Japan FTA that merely finalized the agreement on goods because of Tokyo's reliance on higher commitments in seven bilateral FTAs with ASEAN states.⁶¹

2015, the new Blueprint dropped the term "single market."

⁵⁶ AEC Blueprint 2025, *supra* note 51, at 35-36.

⁵⁷ For the treaty texts, see Free Trade Agreements with Dialogue Partners, <http://asean.org/asean-economic-community/free-trade-agreements-with-dialogue-partners/> (July 7, 2017); Joint Media Statement, The Signing of the ASEAN-Hong Kong, China Free Trade Agreement and the ASEAN, China Investment Agreement (2017) [ASEAN-Hong Kong Statement], at 1.

⁵⁸ AEC Blueprint 2025, *supra* note 51, at 2. The development of the ASEAN centrality since the 1990s, see WALTER WOON, *THE ASEAN CHARTER: A COMMENTARY* 56-58 (2016); Yoshifumi Fukunaga, *ASEAN's Leadership in the Regional Comprehensive Economic Partnership*, 2:1 *ASIA & THE PAC. POL'Y STUDIES* 103, 106 (2014).

⁵⁹ The ASEAN exercises power as a collective bloc and is thus distinct from traditional middle powers such as Australia and New Zealand. For the definitions of middle powers, see Eduard Jordaan, *The Concept of a Middle Power in International Relations: Distinguishing Between Emerging and Traditional Middle Powers*, 30:1 *Politikon: South African Journal of Political Studies* 165, 165-75 (2003); Andrew Carr, *Is Australia a Middle Power? A Systemic Impact Approach*, 68:1 *AUS. J. INT'L AFF.* 70, 70-81 (2014).

⁶⁰ See generally Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (2009).

⁶¹ The framework agreement and the agreement on goods was concluded in 2003 and 2008, respectively. ASEAN – Japan Free Trade Area, http://asean.org/?static_post=asean-japan-free-trade-area-2. Japan has concluded FTAs with Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam. Trade Policy Review: Report by the Secretariat: Japan, WT/TPR/S/351, Jan. 18, 2017, at 24; Severino, *supra* note 40, at 26-27; David Chin Soon Siong, *ASEAN's Journey towards Free Trade*, in *ECONOMIC DIPLOMACY: ESSAYS AND REFLECTIONS BY SINGAPORE'S*

Significantly, notwithstanding the treaty-making power provision under the ASEAN Charter, the conferral of the EU concept of competence by member states on ASEAN to conclude treaties does not extend to those that will “create obligations upon individual” states.⁶² Thus, the Charter did not alter the negotiating practice of ASEAN+1 FTAs or the RCEP. Seeking the converged position at the “ASEAN Caucus” meeting prior to RCEP negotiations is perceived as a political exercise rather than a legal obligation.⁶³ Therefore, political consensus among ten ASEAN states is essential to ensure the status of the AEC in the NREO and to fortify the concept of the ASEAN centrality in the RCEP.

2. *China*

As part of the Global South, the People’s Republic of China (PRC) has emerged as a global economic power since its open-door policy commenced in 1978. Based on the evolution of socialism with Chinese characteristics, the Beijing Consensus allegedly provides developing nations with an alternative model to the Washington Consensus.⁶⁴ China’s trade strategy illustrates its changing international law practice. Its accession to the UN and the WTO was motivated by a desire to assert the legitimacy of the Chinese Communist Party. In Third Regionalism, China has transformed from a passive participant to an assertive stakeholder on global rule-making. The PRC’s new great power status under the principle of “peaceful development,” which replaced “peaceful rise” that suggested Sino-centric hegemony, has

NEGOTIATIONS 209, 229-30 (C. L. Lim & Margaret Liang eds. 2011).

⁶² ASEAN Charter, art. 41:7; Rules of Procedure for Conclusion of International Agreements by ASEAN (2011), rule 1.

⁶³ *E.g.*, Indicative ASEAN Notional Calendar (2017), at 7. Technically speaking, the Charter only requires states to “coordinate and endeavor to develop common positions.” ASEAN Charter (2007), art. 41:4.

⁶⁴ For a detailed analysis of the Beijing Consensus, see *THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT* (Weitseng Chen ed. 2017).

galvanized the Xi Jinping administration to fill the political vacuum in the wake of US isolationism.⁶⁵

Against this backdrop, three prime considerations underpin China's legal and political approach to the RCEP and other FTAs. First, as the largest RCEP economy, which accounts for one third of RCEP GDP, this FTA augments China's right of discourse in international law.⁶⁶ China has been a beneficiary of the capitalist, neoliberal trading system. The post-Mao regime has never challenged the normality of the "Western" rules that sustain the system. Instead, China has maximized its influence over global rule-making. Being a core RCEP member allows China to construct the legal pathway to the FTAAP. The Obama-backed TPP once posed threats to Beijing's strategy. China's TPP standpoint is exemplified by its acceleration of bilateral FTAs and the RCEP, as well as its experiment with higher-level liberalization in the Shanghai Pilot Free Trade Zone.⁶⁷ Ironically, the Trump administration's withdrawal from the TPP pushed Washington's Asian allies to embrace the RCEP and enabled Beijing to carry the torch for free trade and globalization.

Second, an interrelated legal controversy is Section 15 of China's Protocol of Accession to the WTO, which stipulates that the provisions allowing WTO members to treat China as a non-market

⁶⁵ See Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24:3 EUR. J. INT'L L. 755, 786-77 (2013) (explaining the transition from peaceful rise to peaceful development); Full text from President Xi Jinping's speech (2015), <https://www.ncuscr.org/content/full-text-president-xi-jinpings-speech> ("To demonstrate our commitment to peaceful development, I announced not long ago that the size of China's military will be cut by 300,000.").

⁶⁶ China's share of RCEP GDP, see Paul Hubbard & Dhruv Sharma, *Understanding and Applying Long-term GDP Projections*, EABER Working Paper Series, No. 18 (2016), at 15; Jianmin Jin, *RCEP v. TPP*, Feb. 22, 2013, <http://www.fujitsu.com/jp/group/fri/en/column/message/2013/2013-02-22.html>.

⁶⁷ Ming Du, *Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement*, 18 J. INT'L ECO. L. 407, 414-30 (2015); see also Rajah & Tann Regional Round-up, Issue 2 (2017), <http://eoasis.rajahtann.com/eoasis/gn/rn2.asp?n=17&c=2#A1> ("China officially released its updated negative list for admission of foreign investment in the free trade zones Compared to the 2015 version, the new negative list has cut 10 items and 27 restrictions across eight industries.").

economy “shall expire 15 years after the date of accession.”⁶⁸ The non-market economy status legalized foreign countries’ use of “surrogate” prices in anti-dumping proceedings, thus making it easier to find Chinese exporters liable for dumping.⁶⁹ Rather than attacking the normative value of Section 15 that it deems unfair, China has resorted to FTAs to circumvent the provision. The ASEAN-China FTA illustrates such efforts, as it accords China “full market economy” status to the exclusion of WTO rules.⁷⁰

Despite the statutory expiration of Section 15 in December 2016, the United States, the EU and Japan declined to alter the non-market economy methodology owing to political sensitivity involving the inflow of Chinese goods.⁷¹ In response, Beijing filed concurrent WTO complaints against Washington and Brussels.⁷² The RCEP could compel Japan to accept the ASEAN-China FTA practice of recognizing China as a market economy and thus marginalize US and EU positions in the interpretation of world trade law.

Lastly, the RCEP will advance China’s economic interests in the NREO. Empirical data demonstrate that the Chinese economy alone could gain \$88 billion if the TPP failed and the RCEP were passed, and this amount is \$16 billion more than the scenario where both mega-regionals came into effect.⁷³ The RCEP is a key instrument to implement China’s 13th Five-Year Plan, in

⁶⁸ Protocol on the Accession of the People’s Republic of China, WT/L/432, Nov. 23, 2001, sec. 15(d).

⁶⁹ Spokesman of the Ministry of Commerce Comments on China’s Indicting the US and European Union for their Practices of Anti-dumping “Surrogate Country” in the WTO, Dec. 13, 2016, <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201612/20161202192355.shtml>.

⁷⁰ 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 (2004) [ASEAN-China Framework Agreement], art. 14.

⁷¹ Shawn Donnan et. al., *China Challenges EU and US over Market Economy Status*, FINANCIAL TIMES, Dec. 12, 2016, <https://www.ft.com/content/6af8da62-bf5d-11e6-9bca-2b93a6856354?mhq5j=e1>.

⁷² DS515: United States – Measures Related to Price Comparison Methodologies (2016); DS516: European Union – Measures Related to Price Comparison Methodologies (2016).

⁷³ 2016 Report to Congress of the U.S.-China Economic and Security Review Commission (2016), at 24; Ronglin Li and Yang Hu, *RCEP, TPP and China’s FTA Strategies*, at 9, http://www.ipekpp.com/admin/upload_files/Report_3_54_RCEP_6192294083.pdf (last visited July 19, 2017).

which the National People's Congress first placed the "One Belt, One Road" initiative as a national priority in 2016.⁷⁴ This initiative fortifies China's long-standing approach to South-South cooperation that emphasizes concessional loans for infrastructure building to facilitate the export of Chinese production, capital and labor.

Contrary to the assertion of Beijing and pro-government academics, I argue that OBOR is primarily based on ambitious yet ambiguous policy statements that are far from legal commitments.⁷⁵ What was patently ignored in discourse is the financial risks that could arise from investment in many of the 68 OBOR members such as Iraq and Palestine.⁷⁶ OBOR's few substantive results include the creation of the China-led Asian Infrastructure Investment Bank (AIIB), which fills Asian states' infrastructure needs that global financial institutions fail to meet. As more than 60 members joined the AIIB, including all RCEP countries except Japan, the bank will facilitate ASEAN+6 economic cooperation through its development projects.⁷⁷

⁷⁴ The One Belt, One Road (OBOR) initiative is based on Chinese President Xi's announcement of "the Silk Road Economic Belt" and "the 21st-century Maritime Silk Road" in Kazakhstan and Indonesia, respectively, in 2013. Chronology of China's Belt and Road Initiative, Xinhuanet, Mar. 28, 2015, http://news.xinhuanet.com/english/2015-03/28/c_134105435.htm. See Katherine Koleski, *The 13th Five-Year Plan, U.S.-China Economic and Security Review Commission* (2017), at 1 & 22 (indicating the goal of the initiative is to "export China's enormous excess industrial capacity and strengthen debt-laden SOEs' international competitiveness").

⁷⁵ E.g., *Action plan on the Belt and Road Initiative* (2015). China and Hong Kong-based academics have attempted to link OBOR to business, investment and tax laws. *Legal Dimensions of China's Belt and Road Initiative* (Lutz-Christian Wolff & Chao Xi eds. 2016).

⁷⁶ Juvina Lai, *UN Warns about Financial Risk over China's One Belt One Road Project*, TAIWAN NEWS, May 26, 2017, <http://www.taiwannews.com.tw/en/news/3173396>; Chong Koh Ping, *Chinese President Xi Jinping's Belt and Road Forum Yields deals with 68 Countries and International Groups*, STRAIT TIMES, May 15, 2017, <http://www.straitstimes.com/asia/east-asia/chinese-president-xi-jinpings-belt-and-road-forum-yields-deals-with-68-countries-and>; *The Belt and Road Initiative: Country Profiles*, <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative-Country-Profiles/obor/en/1/1X000000/1X0A36I0.htm> (last visited July 19, 2017).

⁷⁷ Lee Hyuntai et. al., *Evaluation of Recent Development of the AIIB: The 2nd Annual Meeting of the AIIB Held in Korea and its Implications*, WORLD ECON. BRIEF, Vol. 7:15 (2007), at 1; Members and Prospective Members of the Bank, <https://www.aiib.org/en/about-aiib/governance/members-of-bank/> (last visited July 19, 2017). See also Min Ye, *China and Competing Cooperation in Asia-Pacific: TPP, RCEP, and the New Silk Road*, 11:3 ASIAN SECURITY 206, 212 (2015) ("China has promoted AIIB . . . to fund infrastructure projects in countries along the new Silk Road.").

OBOR also ascended to the PRC State Council's new FTA strategy, which goes beyond trade commitments and extends to e-commerce and environmental protection.⁷⁸ Four of China's FTAs encompass 13 RCEP members.⁷⁹ The ASEAN-China FTA is indicative. As Asia's largest South-South FTA that is currently in force, the ASEAN-China FTA was created under a framework agreement and four subsequent agreements signed between 2002 and 2009.⁸⁰ Despite criticism of its low liberalization level, the ASEAN-China FTA's "living agreement" design led to the 2011 second package of services commitments and the 2015 protocol to upgrade goods and investment commitments.⁸¹ Moreover, instead of joining the ASEAN-China FTA, Hong Kong concluded a free-standing FTA with ASEAN in November 2017.⁸² The ASEAN-Hong Kong FTA, the amended ASEAN-China FTA, and China's recent FTAs with Australia and Korea will shape the RCEP in line with OBOR.

3. *India*

India was the key stakeholder of the Bandung Conference and the Non-Aligned Movement that championed South-South cooperation.⁸³ In the 1990s, the bipartisan consensus formulated the Look East Policy in order to forge the neglected economic link to East Asia and counteract the rise of China.⁸⁴ This post-Cold War strategy substantiated the ASEAN-India Framework

⁷⁸ The Certain Opinions on Accelerating the Implementation of the Free Trade Area Strategy (2015).

⁷⁹ The four FTAs are China's FTAs with ASEAN, Australia, Korea and Singapore. China's Free Trade Agreement, <http://fta.mofcom.gov.cn/english/> (last visited July 19, 2017).

⁸⁰ ASEAN-China Free Trade Agreements, http://asean.org/?static_post=asean-china-free-trade-area-2 (last visited July 19, 2017).

⁸¹ *Id.*; Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China (2007), art. 23; Razeen Sally, *ASEAN FTAs: State of Play and Outlook for ASEAN's Regional and Global Integration*, in *THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS* 320, 352-53 (Sanchita Basu Das et. al. eds. 2013).

⁸² AEC Blueprint 2025, *supra* note 51, at 35; ASEAN Economic Community 2025 Consolidated Strategic Action Plan (2017) [AEC 2025 CSAP], at 47; ASEAN-Hong Kong Statement, *supra* note 57, at 1.

⁸³ Acharya, *supra* note 18, at 5-7; History and Evolution of Non-Aligned Movement, *supra* note 28.

⁸⁴ Malla V.S.V. Prasad, *Political and Security Cooperation between India and ASEAN: Implications for Economic Cooperation*, in *INDIA-ASEAN ECONOMIC RELATIONS: MEETING THE CHALLENGES OF GLOBALIZATION* 267, 269-84 (Nagesh Kumar et. al. 2006) 267, 269-84; SEVERINO, *supra* note 47, at 290-93.

Agreement and bilateral FTAs with three ASEAN countries, Japan and Korea.⁸⁵ Despite these legal efforts, India is yet to be at the core of Asian regionalism. New Delhi is not an APEC member and it stands outside the vertically-integrated supply chain of the East Asian market.⁸⁶ Economic data evidence India's *de facto* isolation from ASEAN. China and Korea constitute 15.2% and 5.4% of ASEAN's total trade, respectively, but India accounts for merely 2.6%.⁸⁷ While ASEAN primarily trades electrical devices with Asia-Pacific countries, ASEAN-India trade predominantly involves raw materials, such as dairy and mineral products.⁸⁸

In Third Regionalism, India's most compelling move is Prime Minister Narendra Modi's "Act East Policy," which was declared in Myanmar in 2014.⁸⁹ The new policy adopts a more action-based approach than its predecessor by reinvigorating defense and economic ties with Asian trading partners. Thus, the RCEP serves as the vehicle for India to be included in Asia-Pacific integration and benefits the "Make in India" campaign to make the nation a manufacturing and services hub.⁹⁰ The mega-regional pact will provide Indian businesses with market access to Australia and China. More importantly, akin to Beijing's motivation, the shaping of the RCEP empowers New Delhi to be recognized as a great power in global rule-making.

For RCEP countries, India's participation in the pact presents opportunities and risks. The RCEP legal framework that accommodates India and ASEAN's LDCs, Cambodia, Laos, Myanmar and Vietnam (collectively known as CLMV countries) presents the normative foundation for the

⁸⁵ V.S. Seshadri, *Evolution in India's Regional Trading Arrangement*, 43:5 J. WORLD TRADE 903, 908-09 (2009); India's FTAs, see http://commerce.nic.in/trade/international_ta.asp?id=2&trade=i (last visited July 21, 2017).

⁸⁶ Das et. al., *supra* note 6, at 262; Sally, *supra* note 81, 355.

⁸⁷ ASEAN Community in Figures: ACIF (2016), at 15.

⁸⁸ *Id.* at 24-31.

⁸⁹ Prashanth Parameswaran, *Modi Unveils India's 'Act East Policy' to ASEAN in Myanmar*, Nov. 17, 2014, <http://thediplomat.com/2014/11/modi-unveils-indias-act-east-policy-to-asean-in-myanmar/>.

⁹⁰ See generally *id.*; Sara Itagaki, *Understanding India's Evolving Role in Asia through an ASEAN Prism, Policy Q&A*, The National Bureau of Asian Research (2016).

Global South. Given China's economic slowdown, India's astonishing 7% GDP growth rate and infrastructure needs will yield additional trade gains.⁹¹ The jeopardy arises from Sino-Indian clashes that range from border disputes to leadership competition, which echoes China's discord with Japan as to the pathways to Asian regionalism. To check Chinese dominance, Singapore and Vietnam within ASEAN have actively called for India's greater role.⁹² Markedly, India did not join the Beijing-led OBOR.⁹³ The Modi-Abe alliance created the Asia-Africa Growth Corridor that resembles OBOR by focusing on infrastructure projects and capacity building.⁹⁴ Such interstate dynamics inevitably influence the RCEP progress.

India's conservative stance on trade liberalization has led Beijing to accuse New Delhi of "selfishly" obstructing RCEP negotiations and prompted ASEAN states to consider the "ASEAN Minus X" formula.⁹⁵ India's insistence on the RCEP's single-undertaking structure departs from the ASEAN-India FTA, which is modeled after the ASEAN-China FTA's incremental building-block approach.⁹⁶ The ASEAN-India services and investment agreements were only concluded in

⁹¹ Asian Development Outlook 2017: Highlights (2017), at xv.

⁹² Kenneth Lim, Singapore a 'Firm Believer' in India: PM Lee, Channel News Asia, Oct. 4, 2016, <http://www.channelnewsasia.com/news/singapore/singapore-a-firm-believer-in-india-pm-lee-7740730>; Kallol Bhattacharjee, VIETNAM FOR GREATER INDIAN ROLE IN SE ASIA, HINDU, July 4, 2017, <http://www.thehindu.com/news/national/vietnam-asks-india-to-play-security-role-in-south-china-sea/article19210720.ece>.

⁹³ Avinash Nair, *To Counter OBOR, India and Japan Propose Asia-Africa Sea Corridor*, INDIAN EXPRESS, May 31, 2017, <http://indianexpress.com/article/explained/to-counter-obor-india-and-japan-propose-asia-africa-sea-corridor-4681749/>.

⁹⁴ *Id.*; Asia Africa Growth Corridor: Partnership for Sustainable and Innovative Development: A Vision Statement (2017), at 3-6.

⁹⁵ *India Selfishly Blocking RCEP Pact: Chinese Media*, ECON. TIMES, Jan. 18, 2017, <http://economictimes.indiatimes.com/news/politics-and-nation/india-selfishly-blocking-rcep-pact-chinese-media/articleshow/56644605.cms>. The ASEAN-X formula, which had been discussed on a limited scale at the RCEP meetings, was proposed by the Philippines, the ASEAN Chair in 2017. Pambagyo, *supra* note 15, at 27; Catherine Pillas, *Asean Minus X formula to fast-track RCEP-PHL*, BUS. MIRROR, May 8, 2017, <http://www.businessmirror.com.ph/asean-minus-x-formula-to-fast-track-rcep-phl/>.

⁹⁶ The single undertaking approach will lead to a single, comprehensive FTA that covers core areas of goods, services and investment. See Amiti Sen, *RCEP: India Gets Trade Ministers on Board on 'Single Undertaking' for Goods, Services*, HINDU BUS. LINE, Nov. 7, 2016, <http://www.thehindubusinessline.com/economy/rcep-india-gets-trade-ministers-on-board-on-single-undertaking-for-goods-services/article9316063.ece>.

2014, 11 years after the inking of the framework agreement.⁹⁷ The prolonged process reflects India's irreconcilable politics of protectionism.

On the WTO front, India applies MFN tariff rates up to 150% to support its domestic agriculture.⁹⁸ In the ASEAN-India FTA, Indian agricultural projects are mostly immune to liberalization because they are either excluded or scheduled under the sensitive track.⁹⁹ India has been the WTO forerunner for liberalizing labor mobility, known as Mode 4 within the definition of the General Agreement on Trade in Services (GATS).¹⁰⁰ This position facilitates the exportation of Indian professional services in information technology (IT) and other areas. As the ASEAN-India FTA has exacerbated deficits in trade in goods without generating sufficient services exports, the Modi government "will not repeat the mistake" in ASEAN-Indian negotiations.¹⁰¹ Hence, New Delhi demanded the single-undertaking formula adopted for the AANZFTA, so that concessions for tariff cuts will be tied to the potential gains for services market access.

As for controversial intellectual property (IP) provisions, the Indian position conflicts with Japan's and Korea's proposals that intend to "TPP-nize" the RCEP standards.¹⁰² A key example

⁹⁷ ASEAN-India Free Trade Area, http://asean.org/?static_post=asean-india-free-trade-area-3 (last visited July 21, 2017).

⁹⁸ Trade Policy Review: Report by the Secretariat: India, WT/TPE/S/313, Apr. 28, 2015, at 99-100.

⁹⁹ See Sally, *supra* note 81, 356-66 (analyzing the tariff elimination under the ASEAN-India Framework Agreement and the Trade in Goods Agreements).

¹⁰⁰ E.g., Communication from India: Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services (GATS), S/CSS/W/12, Nov. 24, 2000; Communication from Brazil, Dominican Republic, El Salvador, India, Indonesia, Nicaragua, The Philippines and Thailand, Review of Progress in Negotiations, Including Pursuant to Paragraph 15 of the Guidelines for Negotiations, TN/S/W/23, Sept. 29, 2004.

¹⁰¹ Amiti Sen, *India Pushes for Easy Visa for Professionals under RCEP*, HINDU BUS. LINE, Oct. 22, 2015, <http://www.thehindubusinessline.com/economy/india-pitches-for-market-access-for-professionals-in-rcep/article7792816.ece>; see also Blake Harley Berger, *India, ASEAN, and RCEP: The Challenges of Negotiating a Services Pact*, CHINA-INDIA BRIEF, No. 71, <https://lkyspp.nus.edu.sg/cag/publication/china-india-brief/china-india-brief-71> (last visited July 20, 2017) ("[The ASEAN-Indian] services pact as of 2016 has yet to be ratified by . . . Cambodia, Indonesia, and the Philippines, which is extremely significant as Indonesia is India's largest trading partner within ASEAN.").

¹⁰² The summary of Japan's and Korea's requests for the RCEP intellectual property provisions, see Belinda Townsend

is the protection of data exclusivity under the TPP. Article 18.50 of the TPP, which the CPTPP suspended, exceeds the requirement of Article 39 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).¹⁰³ Pharmaceutical companies normally invest dramatically in developing clinical trial data. For a fixed period of time, the TRIPS-plus protection obliges countries to prohibit such data from being utilized by subsequent manufacturers for generic drugs. Data exclusivity would give a monopoly to developed nations' corporations and significantly undermine the granting of compulsory licenses for handling public health crises, including India's tuberculosis epidemic.¹⁰⁴ The RCEP's draft investment chapter that incorporates IP rights in the definition of investments eligible for ISDS further fortifies India's resistance.¹⁰⁵ These issues illustrate India's legal considerations that may compromise RCEP commitments.

III. Key Components of RCEP Negotiations

By making interrelated theoretical and substantive claims, this article presents the NREO as the new normative framework for understanding Third Regionalism. Different from the NIEO that is preoccupied with the North-South conflicts, the RCEP represents the NREO that facilitates South-South FTAs. The theoretical underpinning of the NREO is thus reinforced by the assertive legalism of the Global South in transforming the dependency dilemma into active FTA policies.

Notably, the Guiding Principles have influenced the RCEP's legal structure. First of all, *de jure* integration that replaces intra-RCEP trade pacts is not intended. Instead, the RCEP will

et. al., *The Regional Comprehensive Economic Partnership, Intellectual Property Protection, and Access to Medicines*, 28:8 *ASIA PAC. J. PUB. HEALTH* 682, 684 (2016).

¹⁰³ TPP, art. 18.50(1); Agreement on Trade-Related Aspects of Intellectual Property Rights (1995), art. 39(3); Annex II – List of Suspended Provisions, TPP Statement, *supra* note 9.

¹⁰⁴ MSF Technical Brief, *Data Exclusivity in International Trade Agreements: What Consequences for Access to Medicines?* (2004), at 2; Jyotsna Singh, *Proposed Trade Pact Clause on Intellectual Property Could Endanger India's TB Programme*, *TB ONLINE*, Apr. 11, 2017, <http://www.tbonline.info/posts/2017/4/11/proposed-trade-pact-clause-intellectual-property-c/>.

¹⁰⁵ Based on the consolidated version dated Oct. 16, 2015. Townsend et. al., *supra* note 102, at 690.

improve five ASEAN+1 FTAs, and it will not “detract from” commitments under existing FTAs.¹⁰⁶ This approach poses the challenges to eliminate the noodle bowl syndrome of Asian FTAs. In addition, given “the different levels of development,” the RCEP will allow for flexibility by incorporating SDT provisions.¹⁰⁷ As RCEP members accepted India’s request for adopting the single-undertaking approach, the degree of policy space accorded to LDCs will be a critical trade-off for partners to reach consensus.¹⁰⁸

Political complexity and capacity constraints have added further complications to the RCEP. As of 2017, RCEP negotiations were finalized for the chapter on economic and technical cooperation and the chapter on small and medium-sized enterprises.¹⁰⁹ The core components that require the “Grand Bargain” to involve trade in goods, trade in services and investment will determine whether the RCEP can be completed as the new “ASEAN++” architecture by 2018.¹¹⁰ The increase from 60 to 800 negotiators from 16 countries illustrates the complexity of RCEP talks.¹¹¹ The insertion of ongoing negotiation of the China-Japan-Korea FTA into RCEP negotiations made the dynamics more intricate.¹¹² Equally significant, certain governments’ limited capacity has hindered officials from negotiating ROOs and trade facilitation in parallel working group meetings.¹¹³ Another hindrance is that political issues, which cause conflicts

¹⁰⁶ Guiding Principles, *supra* note 44, principles 2 & 5.

¹⁰⁷ *Id.* principle 4.

¹⁰⁸ Sen, *supra* note 96.

¹⁰⁹ Joint Media Statement, The Third Regional Comprehensive Economic Partnership (RCEP) Intersessional Ministerial Meeting (2017), at 1.

¹¹⁰ See Sylvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC* 285, 285-89 (Daniel L. M. Kennedy & James D. Southwick eds. 2002) (illustrating the “Grand Bargain” negotiations); Fukunaga, *supra* note 58, at 107-08 (explaining the ASEAN+1 and AESAN++ frameworks).

¹¹¹ Iman Pambagyo, RCEP: Progress, Challenges & Outlook, PPT Slides [RCEP Slides], at 6; *Trade Ministers in Asia-Pacific to Gather in RoK for RCEP Talks*, VOICE OF VIETNAM, Oct. 24, 2017, <http://english.vov.vn/economy/trade-ministers-in-asiapacific-to-gather-in-rok-for-rcep-talks-360918.vov>.

¹¹² RCEP Slides, *supra* note 111, at 11.

¹¹³ See *id.* at 7 (observing that “same officials in charge of 2 or more WG/SWGs (i.e., ROO & CPTF)”).

between trade liberalization and constitutional constraints, can only be handled at the ministerial level.¹¹⁴

Below I will analyze the legal implications for the RCEP's critical areas. From a comparative law perspective, the trade in goods issues are to be discussed with uneven tariff concessions and low utilization rates of ASEAN+1 FTAs, as well as the impact of the RCEP on fragmented ROOs. Services commitments are to be discussed with constitutional challenges and ASEAN's legal structure of professional mobility. By examining the legal positions of Australia, China, India, Indonesia and the EU, investment matters focus on the contentious investor-state arbitration mechanisms.

A. Tariff Eliminations and the Rules of Origin

Tariff cuts are the most transparent aspect of trade liberalization. The existing analyses on tariff eliminations under ASEAN+1 FTAs often neglect the drastic tariff reductions in the ASEAN Economic Community. To achieve the RCEP's goal of "the high level of tariff liberalization" and consolidation of Asian FTAs, going beyond the tariff concessions under ASEAN+1 FTAs and the intra-ASEAN ATIGA is paramount.¹¹⁵ A comparison of five external FTAs readily demonstrates that the AANZFTA is the most liberalized FTA, achieving 95.7% of the average tariff elimination coverage.¹¹⁶ The result is by no means a surprise, given the developed nation status of Australia and New Zealand and their progressive FTA trajectories.

¹¹⁴ There are three working levels at RCEP negotiations: Working Groups for technical issues, the Trade Negotiation Committee for policy/legislative issues and the Ministers for political/constitutional issues. *Id.* at 12.

¹¹⁵ Guiding Principles, *supra* note 44, sec. I.

¹¹⁶ Fukunaga & Isono, *supra* note 6, at 8.

In contrast, India's conservative posture made the ASEAN-India the lowest-level FTA, with 79.6% coverage.¹¹⁷ Under the ASEAN-India FTA, the average coverage of ASEAN states exceeds 90%, but Indonesia's tariff liberalization is merely 48.7%.¹¹⁸ The AEC's most noteworthy achievement is ASEAN-6 countries' elimination of 98.9% of tariff lines and CLMV countries' phase in of remaining duties for sensitive products by 2018.¹¹⁹ Consequently, I propose that the AANZFTA and the ATIGA should serve as the bases for RCEP tariff commitments.

Streamlining tariff eliminations of India, Indonesia and CLMV countries would make the RCEP the model for South-based FTAs. As evidenced by the ASEAN-India FTA and the bilateral FTAs of Japan and Korea with ASEAN countries, agricultural trade liberalization is key to the RCEP.¹²⁰ The AANZFTA provides the best practices, as it eliminated tariffs on substantial agricultural products when the agreement took effect.¹²¹ To be a comprehensive FTA, the RCEP's breakthrough in agriculture relies upon two key factors: the tariff elimination timeframes and potential market access.

The tariff phase-in periods, which extend to 18 years under the ASEAN-Japan FTA and 30 years under the TPP, exemplify critical trade-offs for the RCEP.¹²² In terms of market access,

¹¹⁷ *Id.*

¹¹⁸ *Id.*; Sanchita Basu Das & Masahiro Kawai, *Introductory Overview: Trade Regionalism in the Asia-Pacific: Developments and Future Challenges*, in *TRADE REGIONALISM IN THE ASIA-PACIFIC: DEVELOPMENTS AND FUTURE CHALLENGES* 1, 9 (Sanchita Basu Das & Masahiro Kawai eds. 2016).

¹¹⁹ AEC Blueprint 2015, *supra* note 51, at 7; AEC 2025 CSAP, *supra* note 82, at 2; *see also* ASEAN Trade in Goods Agreement, <http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/872/asean-trade-in-goods-agreement.html> (last visited July 26, 2017) ("Cambodia, Lao PDR, Myanmar, and Viet Nam have reduced their import duties to 0-5 percent on 98.86 percent of their tariff lines.")

¹²⁰ *See* Timothy E. Josling, *Agriculture*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 171, 194 (Simon Lester et. al. eds. 2015) (explaining Japan's FTA with Thailand and the Philippines and Korea's FTA with Thailand).

¹²¹ Tariff eliminations take place from 2010 to 2020. Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends, Prospects, and Challenges*, ADB Economics Working Paper Series, No. 226 (2010), at 16; OECD Review of Agricultural Policies OECD Review of Agricultural Policies: Indonesia (2012), at 192.

¹²² Urata, *supra* note 38, at 15. Canada, Japan and the United States are allowed to eliminate tariffs in 12-30 years under the TPP. Matthias Helble, *Salvaging the Trans-Pacific Partnership: Building Blocks for Regional and Multilateral Trade Opening*, ADBI Working Paper Series, No. 695 (2017), at 10.

keeping Japan's TPP commitment that raises its quota for Australian rice would be linked to the export of Japanese vehicles.¹²³ In 2016, India proposed a three-tiered tariff approach that grants RCEP countries 42.5%-80% tariff cuts, depending on three different categories.¹²⁴ The motivation was India's defensive position on agriculture and the significant \$52.7 billion trade deficit with China.¹²⁵ New Delhi subsequently dropped the proposal because of RCEP members' objections and India's reassessed gains in services and investment under the pact.

As the largest mega-regional initiative, the RCEP's harmonization of ASEAN+1 FTAs and the ATIGA impacts the businesses' utilization of the FTAs. In comparison, NAFTA's usage rate surpasses 60%, but the utilization rate of Asian FTAs is only 28%.¹²⁶ The strikingly low usage of ASEAN+1 FTAs, such as 5.1% of the ASEAN-India FTA for exporters and 2.3% of the ASEAN-Japan FTA for importers, has nullified the legal efforts for preferential tariff treatment.¹²⁷ The most used ASEAN FTAs are the ATIGA in exports and the ASEAN-China FTA in imports, with a utilization rate of only slightly above 30% for each.¹²⁸ Conventional answers to this problem are the limited access to the FTA information, low preference margins compared with MFN tariffs and complex ROOs.¹²⁹ An oft-neglected factor is the expanded commitments of the Information

¹²³ TPP Outcomes at a Glance, Dec. 8, 2016, <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-at-a-glance.aspx>.

¹²⁴ Asit Ranjan Mishra, *India's New Stance at RCEP May Benefit China*, LIVEMINT, Aug. 9, 2016, <http://www.livemint.com/Politics/qGEPZqVoHO4U4YYvIBgCNP/Indias-new-stance-at-RCEP-may-benefit-China.html> (“[India] proposed 80% tariff cuts to [ASEAN] countries, 65% to South Korea and Japan and finally 42.5% tariff liberalization to China, Australia and New Zealand with which it does not have free-trade agreements”).

¹²⁵ *Id.*; *India Changes Tack on RCEP Negotiations*, Oct. 31, 2016, <http://www.bilaterals.org/?india-changes-tack-on-rcep>.

¹²⁶ Jaime de Melo, *Developing Countries in the World Economy* 280 (2015); Masahiro Kawai & Ganeshan Wignaraja, *Main Findings and Policy Implications, in ASIA'S FREE TRADE AGREEMENTS: HOW IS BUSINESS RESPONDING?* 33, 34 (2011). *See also* FTAs in South-east Asia: Towards the Next Generation (2014), at 5-6 (indicating that the average utilization rate of FTAs concluded by four selected ASEAN countries is 26%).

¹²⁷ Lili Yan Ing et. al., *How Do Exports and Imports Affect the Use of Free Trade Agreements? Firm-level Survey Evidence from Southeast Asia, in THE USE OF FTAS IN ASEAN: SURVEY-BASED ANALYSIS* 1, 7 (2015).

¹²⁸ *Id.*; The usage of the ATIGA is presumably undermined by the uneven utilization by ASEAN states. Lili Yan Ing & Olivier Cadot, *Facilitating ASEAN Trade in Goods*, ERIA Discussion Paper Series (2016), at 11.

¹²⁹ FTAs in South-east Asia: Towards the Next Generation (2014), at 8; Kawai & Wignaraja, *supra* note 126, at 39-40.

Technology Agreement, a plurilateral WTO agreement that eliminates tariffs on IT products.¹³⁰

As 11 RCEP partners are parties to the Agreement, zero tariff treatment for electronic devices renders the use of FTAs redundant.¹³¹

Complex and distinct ROOs in overlapping Asian FTAs have contributed to the noodle bowl syndrome and inhibited FTA usage. Built on the ROO reform agenda in the AEC Blueprint 2025, the RCEP should consolidate the best practices of regional ROOs.¹³² Change in Tariff Classification (CTC) and Regional Value Content (RVC) are the most common ROOs in ASEAN FTAs.¹³³ While the former qualitatively assesses whether the products are classified under tariff schedules different from original materials, the latter quantitatively examines whether the products meet the FTA value-added thresholds.¹³⁴

Failure to meet the ROOs would disqualify exporters from receiving the certificate of origin for FTA preferences. The ATIGA and most ASEAN+1 FTAs have adopted the flexible co-equal rule, which permits ROOs to be satisfied by either the CTC or the RVC.¹³⁵ The ASEAN-India FTA is now the sole exception to the rule after the 2015 protocol to the ASEAN-China FTA that had its ROO requirement relaxed to a CVC or RVC of 40%.¹³⁶ In terms of the certificates of origin, all of the five ASEAN+1 FTAs have permitted third-country invoicing and movement certificates,

¹³⁰ The case of Philippine firms, see Ganeshan Wignaraja, *FTAs and Philippine Business: Evidence from Transport, Food, and Electronics Firms*, ADBI Working Paper Series, No. 185 (2010), at 4 & 16-18.

¹³¹ Schedules of Concessions, https://www.wto.org/english/tratop_e/inftec_e/itscheds_e.htm (last visited July 27, 2017).

¹³² AEC Blueprint 2025, *supra* note 51, at 3; AEC 2025 CSAP, *supra* note 82, at 3.

¹³³ The list of rules of origin in ASEAN FTAs, see Das et. al., *supra* note 6, at 267; INAMA & SIM, *supra* note 52, at 41-44; Fukunaga & Isono, *supra* note 6, at 12.

¹³⁴ Jong Bum Kim, *The Evolution of Preferential Rules of Origin in ASEAN RTAs: A Guide to Multilateral Harmonization*, 46:6 J. WORLD TRADE 1343, 1358-59 (2012); INAMA & SIM, *supra* note 52, at xvi-xvii.

¹³⁵ The ATIGA's rules of origin (ROO) are based on the rules of ASEAN Free Trade Area (AFTA). In 2003, the AFTA Council changed ASEAN's ROO, which was limited to the regional value content of 40%, to include the change in tariff classification. Joint Media Statement of the 17th AFTA Council Meeting (2013), paras. 11-12; INAMA & SIM, *supra* note 52, at 27.

¹³⁶ A Guide to Understanding the ASEAN-China Free Trade Area Upgrade (2016), at 2; *see also* Kim, *supra* note 134, at 1361 (explaining the restrictiveness of the "RVC 35% and CTSH" rule under the ASEAN-India FTA).

so that exporters can manage foreign exchange risks and logistics operations.¹³⁷ These evolved practices and harmonized ROOs provide the model for the RCEP.

Additionally, the RCEP will consolidate the regional supply chain by filling the ROO gap among ASEAN FTAs. To illustrate, Chinese automotive companies plan to expand their operations in Thailand by assembling completely knocked-down units imported from China and exporting finalized cars to Indonesia and Australia.¹³⁸ The ROOs of the AANZFTA, the ATIGA and the ASEAN-China FTA apply the RVC of 40% for automotive parts and vehicles.¹³⁹ While the completed cars sold in ASEAN are entitled to ATIGA or ASEAN-China FTA preferences, those exported to Australia may be denied preferential tariffs under the AANZFTA. The legal obstacle occurs because the AANZFTA's "cumulative provision" does not recognize the value of the cars' Chinese components for the RVC calculation.¹⁴⁰ In other words, the lack of the linkage between the ATIGA and ASEAN+1 FTAs obstructs the needs of contemporary transactions. Consequently, an ASEAN+6 cumulative provision under the RCEP will consolidate ASEAN FTAs and propel the paradigm change in Asian regionalism.

B. Services Liberalization and Professional Mobility

¹³⁷ The various certificates of origin in ASEAN FTAs, see Kohei Shino, *How Far Will Hong Kong's Accession to ACFTA Impact its Trade in Goods*, ERIA Discussion Paper Series (2013), at 12-19; Erlinda M. Medalla & Maureen Ane D. Rosellon, *Rules of Origin in ASEAN+1 Free Trade Agreements and the Supply Chain in East Asia*, in ASEAN AND REGIONAL FREE TRADE AGREEMENTS 171, 180 (Christopher Findlay ed. 2015).

¹³⁸ I use SAIC Motor's business plan as an example. Hiroshi Kotani, *China's SAIC Motor to Make Thailand an Export Hub*, NIKKEI ASIAN REV., May 17, 2017, <https://asia.nikkei.com/Business/AC/China-s-SAIC-Motor-to-make-Thailand-an-export-hub>.

¹³⁹ Erlinda M. Medalla & M. Supperamaniam, *Suggested Rules of Origin Regime for EAFTA*, Discussion Paper Series, No. 2008-22 (2009 rev.), at 15; Annex 2 (Product Specific Rules), as Amended by the First Protocol, Agreement Establishing the ASEAN-Australia-New Zealand FTA [AANZFTA], at 590-91.

¹⁴⁰ AANZFTA, ch. 3, art. 6. Cumulative provisions in other ASEAN+1 FTAs, see Baldwin & Kawai, *supra* note 36, at 18. Another important step is for the RCEP to clarify the roll-up concept in applying the cumulative provision. Article 54.2 of the ATIGA does not provide clear guidance. INAMA & SIM, *supra* note 52, at 22-23. See also Trade Policy Review: Report by the Secretariat: Singapore, WT/TPR/S/343, June 7, 2016, at 20 (elaborating that the EU-Singapore FTA permits "the sourcing from other ASEAN countries as originating content" for selected products).

The significance of trade in services is no less than that of tariff eliminations. In Third Regionalism, financial and logistics services underpin cross-border trade in goods. The intimate correlation between the two modes of trade is evidenced by a 10% growth in trade in services augmenting trade in goods by 6%.¹⁴¹ To implement RCEP countries' commitments to the UN Sustainable Development Goals, services trade is essential to development policy that eradicates poverty and increases employment.¹⁴² For RCEP members such as Malaysia and Thailand, modernizing services will enable them to escape from the "middle income trap" that stagnates economy due to the eroding labor-intensive advantage.¹⁴³ In developing countries and LDCs, foreign direct investments (FDIs) are increasingly associated with services providers that help buttress the welfare of the poor through job creation.¹⁴⁴ Labor mobility results in remittances, which also benefit the Global South for development purposes.

The TPP's unforeseen future and the fact that no ASEAN countries are participating in the WTO Trade in Services Agreement (TiSA) negotiations enable the RCEP to set the standards for Asian FTAs.¹⁴⁵ Based on "the GATS and ASEAN+1 FTAs," the RCEP's target is to "substantially eliminate" barriers to services trade.¹⁴⁶ To ensure ASEAN centrality, the RCEP should take evolving AFAS commitments into account. The AFAS's "package" structure is similarly

¹⁴¹ Juan Blyde & Natalia Sinyavskaya, *The Impact of Liberalizing Trade in Services on Trade in Goods: An Empirical Investigation*, 11:3 REV. DEV. ECON. 566, 573 (2007).

¹⁴² The Sustainable Development Goals that took effect in 2016 were built upon Millennium Development Goals that governed the development agenda from 2000 to 2015. Draft Outcome Document of the United Nations Summit for the Adoption of the Post-2015 Development Agenda, A/69/L.85, Aug. 12, 2015, at 3-27.

¹⁴³ Tran Van Tho, *The Middle-Income Trap: Issues for Members of the Association of Southeast Asian Nations*, ADBI Working Paper Series, No. 421 (2013), at 22-29; Kenichi Ohno, *The Middle Income Trap: Implications for Industrialization Strategies in East Asia and Africa*, GRIP Development Forum (2008), at 93-112.

¹⁴⁴ See e.g., Mode 3 – Commercial Presence, S/C/W/314, Apr. 7, 2010 [Mode 3], at 9 ("[S]ervices accounted for 65 per cent of developing economies' inward FDI stock and for 86 per cent of their outward FDI . . .").

¹⁴⁵ Australia, Japan, Korea and New Zealand are parties to the Trade in Services Agreement. Sherry Stephenson, *Implications of the Trade in Services Agreement (TiSA) for Developing Countries*, DIE Discussion Paper (2016), at 50.

¹⁴⁶ Guiding Principles, *supra* note 44, sec. II.

incorporated in ASEAN's FTAs with China and Korea.¹⁴⁷ ASEAN+1 FTAs cover services commitments except for the ASEAN-Japan FTA.¹⁴⁸ Although the 2014 ASEAN-India Services Agreement is the latest services pact in external FTAs, its core commitments in financial and transport services rarely exceed the WTO level.¹⁴⁹

Contrary to the conventional understanding that ASEAN states committed most in the comprehensive AANZFTA, intra-ASEAN commitments in the seventh package of AFAS commitments for the first time exceeded those under the AANZFTA.¹⁵⁰ Moreover, although the low degree of the first package of commitments under the ASEAN-China FTA suffers from "GATS-minus" situations, the second package has brought it up to par with the ASEAN-Korea FTA.¹⁵¹ These developments exhibit that AFAS commitments should form the benchmark for the RCEP. The package structure could also prevent repeating the TPP and TTIP mistakes that aimed to achieve high-standard services liberalization without an incremental approach in light of protectionist politics.

With respect to the modality of services liberalization, the AFAS and ASEAN+1 FTAs adopt the GATS-like positive list approach, whereas EU and US FTAs, such as the TPP, employ the negative list approach. While the positive list modality allows FTA partners to retain regulatory

¹⁴⁷ Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China (2007), arts. 23 & 27; Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (2007), arts. 24 & 26.

¹⁴⁸ The ASEAN-Japan FTA has not included a services agreement.

¹⁴⁹ The analysis of services commitments made by India and ASEAN states, see Factual Presentation: Agreement on Trade in Services between India and the Association of Southeast Asian Nations (Services), WT/REG372/1, Aug. 22, 2016, at 18-37.

¹⁵⁰ Fukunaga & Isono, *supra* note 6, at 16. Although ASEAN states concluded the ninth package of commitments under the ASEAN Framework Agreement on Services (AFAS), the most current AFAS data are based on the eighth package of commitments. RCEP Slides, *supra* note 111, at 10; Hikari Ishido, *Harmonization of Trade in Services by APEC Members*, IDE Discussion Paper, No. 410 (2013), at 8-16.

¹⁵¹ Yoshifumi Fukunaga, *Assessing the Progress of Services Liberalization in the ASEAN-China Free Trade Area (ACFTA)*, ERIA Discussion Paper Series (2013), at 3-9; RCEP Slides, *supra* note 111, at 10.

sovereignty to schedule services commitments, the more aggressive negative list approach will enhance transparency and cover newly developed services.¹⁵² Remarkably, the China-Korea FTA signals China's first use of the negative list approach and indicates its changing position in services commitments.¹⁵³ In the bilateral FTA, China and Australia scheduled their commitments on positive and negative lists, respectively.¹⁵⁴ However, Beijing agreed to follow the negative list modality in the subsequent round of negotiations.¹⁵⁵

A different hybrid mechanism is included in the positive list-based Malaysia-New Zealand FTA, under which Malaysia agreed to "commence re-negotiation of the specific commitments" if it concludes an agreement on a negative list with a third country.¹⁵⁶ These dynamics and the collective lobbying of four TiSA members influenced the RCEP to be negotiated under an innovative positive list formula with "value added" components.¹⁵⁷ This approach provides guidance for South-based regionalism because it incorporates negative list advantages without overly compromising regulatory sovereignty. New components include the "ratchet" that imposes a standstill by disallowing future governments from adopting more restrictive measures, as well as

¹⁵² Aaditya Mattoo & Pierre Sauvé, *Services*, in *PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK* 235, 251-52 (Jean-Pierre Chauffour & Jean-Christophe Maur eds. 2011).

¹⁵³ See Heng Wang, *The Challenges of China's Recent FTA: An Anatomy of the China-Korea FTA*, 50:3 *J. WORLD TRADE* 417, 418 (2016) ("[I]t is the first time that China will commit to conduct FTA negotiations on a negative list for services and investment.").

¹⁵⁴ Factual Presentation: Free Trade Agreement between Australia and China (Goods and Services), WT/REG369/1/Rev.1, Nov. 14, 2016, at 24.

¹⁵⁵ FTA between the Government of Australia and the Government of the People's Republic of China (2015), art. 8.24(3).

¹⁵⁶ Trade Policy Review, Report by the Secretariat, Malaysia, WT/TPR/S/292, Jan. 27, 2014, at 32 & 104; Malaysia-New Zealand FTA (2009), art. 8.15(2).

¹⁵⁷ Ninth Meeting of the Regional Comprehensive Economic Partnership Working Group on Trade in Services (9th RCEP - WGTIS), Aug. 3-7, 2015 [RCEP Services Chapter], at 3; Jane Kelsey, *Regional Comprehensive Economic Partnership (RCEP) Services Chapter: Risks for Developing Countries' and LDCS' Policy Space and Regulatory Sovereignty* (2016), at 2-7.

the MFN-forward design, which requires a RCEP country to automatically extend any services concessions under its prospective bilateral agreements to other RCEP members.¹⁵⁸

As for substantive commitments, the RCEP will be modeled after the GATS and the AFAS that cover four modes of the services trade: Mode 1 (cross-border supply), Mode 2 (consumption abroad), Mode 3 (commercial presence), and Mode 4 (movement of natural persons or MNP).¹⁵⁹ ASEAN+1 FTAs reflect the WTO trend. Mode 2, which seldom involves hard bargains, is most committed, whereas professional mobility under Mode 4 is least committed.¹⁶⁰ The existing literature rarely addresses the potential constitutional challenges to services negotiations. For example, Article 12 of the Philippine Constitution and Article 33 of the Indonesian Constitution mandate that natural resources be “owned by” or “controlled by the State.”¹⁶¹ These provisions may outlaw the RCEP’s Mode 3 foreign equity reforms in mining and forest sectors. The Philippines’ constitutional principle that confines professional practice to citizens equally challenges Mode 4 liberalization.¹⁶² The RCEP’s external pressure to remove constitutional obstacles will similarly benefit ASEAN integration.

In my view, to accelerate much-needed professional mobility in the Asia-Pacific and refute the prevalent low-level contention, the RCEP should be built upon the AEC’s Mode 4 commitments and mutual recognition arrangements (MRAs). This focus will create TPP-plus benefits for the

¹⁵⁸ RCEP Services Chapter, *supra* note 157, at 3-5; Kelsey, *supra* note 157, at 8-9.

¹⁵⁹ GATS (1994), art. I:2.

¹⁶⁰ Mode 3, *supra* note 144, at 17; Presence of Natural Persons (Mode 4), S/C/W/301, Sept. 15, 2009, at 20-25; Ishido, *supra* note 150, at 24.

¹⁶¹ The Constitution of the Republic of the Philippines (1987), art. XII, secs. 2 & 10; The Constitution of the Republic of Indonesia (1945), art. 33(3). Potential constitutional interpretations, see Stephen L. Magiera, *International Investment Agreements and Investor-State Disputes: A Review and Evaluation for Indonesia*, ERIA Discussion Series (2017), at 36; Ponciano S. Intal Jr., *AEC Blueprint Implementation Performance and Challenges: Investment Liberalization*, ERIA Discussion Paper Series (2015), at 9 & 17.

¹⁶² Trade Policy Review: Report by the Secretariat: The Philippines: Revision, WT/TPR/S/261/Rev. 2, May 9, 2012, at x & 95-96; see The Constitution of the Republic of the Philippines (1987), art. XII, sec. 14 (“The practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law.”).

Global South. Other than the poverty reduction effect of remittances, circular migration has brought back skills that modernize the economies of the original countries.¹⁶³ Despite the pro-development effect, the WTO's liberalization over the MNP was restrictive because of the concern about creating the back door to immigration. This unfounded misconception has also amounted to global protectionism.

In terms of Mode 4, US FTAs turned drastically conservative after Singapore and Chile FTAs allocated additional quotas for work visas.¹⁶⁴ Among ASEAN+1 FTAs, the AANZFTA is by far the only one that includes an MNP chapter.¹⁶⁵ Even the most recent ASEAN-India Services Agreement merely provides definitions of natural persons without substantive MNP provisions.¹⁶⁶ On the bilateral level, the most notable example is the movement of nurses and care workers under Japan's FTAs with four ASEAN states.¹⁶⁷ Nevertheless, limited sectors in the commitments and legal obstacles, such as qualification and language requirements, have impeded the intended results.¹⁶⁸

The RCEP negotiators have discussed the possibility of including a MNP chapter or annex.¹⁶⁹

The AEC's goal to facilitate the movement of "skilled" labor rather than all "natural persons"

¹⁶³ Simon Feeny & Mark McGillivray, *The Role of ASEAN Connectivity in Reducing the Development Gap*, in *NARROWING THE DEVELOPMENT GAP IN ASEAN: DRIVERS AND POLICY OPTIONS* 84, 113 (Mark McGillivray & David Carpenter eds. 2013); Regional Conference on Services Trade Liberalization and Labor Migration Policies in ASEAN: Towards the ASEAN Economic Community (2008), at 8.

¹⁶⁴ Sherry Stephenson & Gary Hufbauer, *Labor Mobility*, in *PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK* 275, 281-83 (Jean-Pierre Chauffour & Jean-Christophe Maur eds. 2011).

¹⁶⁵ See R.V. Anuradha, *Liberalization of Trade in Services under RCEP: Mapping the Key Issues*, 8:2 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 401, 416-7 (2013) (explaining Modes 3 and 4 in Asian FTAs).

¹⁶⁶ Factual Presentation: Agreement on Trade in Services between India and the Association of Southeast Asian Nations (Services), *supra* note 149, at 16.

¹⁶⁷ While the Japan-Thailand FTA only provides a framework for future negotiations, Japan's FTAs with Indonesia, the Philippines and Vietnam include commitments on nurses and caretakers. Trade Policy Review: Report by the Secretariat: Japan, WT/TPR/S/351, Jan. 18, 2017, at 125-27.

¹⁶⁸ To gain better residency conditions, ASEAN workers that entered Japan under FTAs are required to take the examinations. However, "[t]he rate of success . . . is around 35% for caretakers and slightly over 10% for nurses." *Id.* at 126-27.

¹⁶⁹ See also RCEP Services Chapter, *supra* note 157, at 6 (noting that "ASEAN has no consensus position on this issue

could provide guidance for the mega-regional agreement.¹⁷⁰ Under the AEC Blueprint 2025, the ASEAN MNP Agreement and MRAs liberalize professional mobility.¹⁷¹ The Agreement, which will supersede AFAS Mode 4 commitments, encompasses services trade on a non-permanent basis. To avoid immigration concerns, it resembles the GATS by excluding ASEAN governments' "measures affecting natural persons seeking access to the employment market" and "measures regarding citizenship, residence or employment on a permanent basis."¹⁷² In other words, the governments retain their regulatory power to maintain visa requirements for public purposes, provided that the treaty benefits are not impaired.¹⁷³

Furthermore, the implementation of ASEAN MRAs that cover eight professions provide valuable experiences.¹⁷⁴ Compared with APEC and TPP's soft-law schemes, the ASEAN pacts on engineering and architecture services are most conspicuous.¹⁷⁵ The regional level professional institutions and national regulatory bodies have created a three-step registration process. For instance, an engineer who meets the educational and experience requirements can be first certified by the domestic body, which submits the application to the ASEAN committee.¹⁷⁶ Upon approval

yet" and "India had submitted a text for MNP" previously).

¹⁷⁰ AEC Blueprint 2025, *supra* note 51, at 10-11; ASEAN Agreement on the Movement of Natural Persons (2012) [ASEAN MNP Agreement], preamble.

¹⁷¹ AEC Blueprint 2025, *supra* note 51, at 10-11; AEC 2025 CSAP, *supra* note 82, at 10-11.

¹⁷² ASEAN MNP Agreement, art. 2:2.

¹⁷³ *Id.* art 2:3.

¹⁷⁴ From 2005 to 2014, eight ASEAN mutual recognition arrangements (MRAs) were concluded and apply to engineering, nursing, architectural, dental, medical, tourism and accounting services. The Long Road Ahead: Status Report on the Implementation of the ASEAN Mutual Recognition Arrangements on Professional Services (2017), at 1.

¹⁷⁵ TPP, art. 10.9 & Annex 10-A; see Reinventing Mutual Recognition Arrangements: Lessons from International Experiences and Insights for the Asian Region (2017), at 32-33 (demonstrating that only four architects registered under the APEC framework); ASEAN Integration Report 2015 (2015), at 24 ("To date, there are a total of 1,252 engineers on the ASEAN Chartered Professional Engineers Register and 284 architects on the ASEAN Architect Register.").

¹⁷⁶ ASEAN MRA on Engineering Services (2005), art. 3.

as an “ASEAN Chartered Professional Engineer,” the engineer is qualified to apply to be a foreign engineer in another ASEAN country.¹⁷⁷

The ASEAN MRA on tourism professionals exemplifies a rare scheme that facilitates “unregulated” services due to the absence of international standards for tourism services providers. The MRA not only created a database to assist registered tourism professionals, but also consolidated the regional tourism industry by developing competency standards for 32 job titles.¹⁷⁸ ASEAN’s experiences in Mode 4 liberalization and MRAs are integral to the RCEP, which aims to achieve “comprehensive” services commitments.¹⁷⁹ Given the procrastinated status of the TPP and the TiSA, the AEC’s consolidation of commitments in the prospective ASEAN Trade in Services Agreement will further prompt the RCEP to fortify services trade in the Asia-Pacific.¹⁸⁰

C. Investor-State Dispute Settlement

Trade in goods, trade in services and investment form cardinal pillars of the RCEP. Investment law and policy is critical to FDI inflows that catalyze pro-poor development in the Global South. Given the slowing Chinese economy, ASEAN overtook China in attracting FDI for the first time in 2013.¹⁸¹ Under the AEC Blueprint 2025, ASEAN will strengthen the ACIA-based investment regime to enhance its regional competitiveness.¹⁸² As of 2017, ASEAN and other six countries

¹⁷⁷ *Id.*; Deunden Nikomborirak & Supunnavee Jitdumrong, *ASEAN Trade in Services*, in *THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS* 95, 104-05 (Sanchita Basu Das ed. 2013).

¹⁷⁸ A person who possesses a tourism certificate issued by a national agency in compliance with MRA requirements can be recognized as a “Foreign Tourism Professional” in another ASEAN state. ASEAN MRA on Tourism Professionals, arts. II-III; ASEAN Mutual Recognition Arrangement on Tourism Professionals (MRA) – Handbook (2013), at 18.

¹⁷⁹ Guiding Principles, *supra* note 44, sec. II.

¹⁸⁰ See AEC Blueprint 2025, *supra* note 51, at 6 (“The next agenda is to [conclude] the ASEAN Trade in Services Agreement (ATISA) as the legal instrument for further integration of services sectors in the region.”).

¹⁸¹ Re-drawing the ASEAN Map: How Companies Are Crafting New Strategies in South-east Asia (2017), at 4.

¹⁸² AEC Blueprint 2025, *supra* note 51, at 7.

agreed to expedite bilateral or plurilateral negotiations, including investment liberalization, on a request and offer basis.¹⁸³

One should note that the signing of the ASEAN-India Investment Agreement left the ASEAN-Japan FTA the sole ASEAN+1 FTA without an investment component.¹⁸⁴ RCEP negotiations on investment “promotion, protection, facilitation and liberalization” are built upon the intra-ASEAN ACIA and external ASEAN FTAs.¹⁸⁵ Nevertheless, these instruments vary in substantive provisions on covered investments, MFN and national treatment, and compensation following expropriation.¹⁸⁶ The most contentious investment issue that may amount to a “deal breaker” is ISDS provisions, which entitle foreign investors to sue host states in international judicial bodies. ISDS was initially designed to overcome the local court bias and the hurdle for exercising diplomatic protection by investors’ home states in public international law. The ICSID Convention crystalized the multilateral efforts to adjudicate investor-state disputes under the auspices of the World Bank.¹⁸⁷ However, four RCEP members (India, Laos, Myanmar and Vietnam) are not parties to the Convention.¹⁸⁸

In line with the universal trend, Asian BITs and FTAs often include ISDS provisions because they are perceived to incentivize investments.¹⁸⁹ The ACIA and ASEAN+1 FTAs follow the

¹⁸³ *ASEAN Economic Ministers to Step up RCEP negotiations*, Sept. 11, 2017, <http://wtocenter.vn/other-agreement/asean-economic-ministers-step-rcep-negotiations>; RCEP Slides, *supra* note 111, at 12.

¹⁸⁴ Nonetheless, Japanese enterprises can resort to existing bilateral investment treaties (BITs) or investment chapters of bilateral FTAs. For investor-state dispute settlement provisions in ASEAN+1 FTAs, see Magiera, *supra* note 161, at 27.

¹⁸⁵ Guiding Principles, *supra* note 44, sec. III.

¹⁸⁶ Das et. al., *supra* note 6, at 271-72; Luke Nottage, *The Investment Chapter and ISDS in the TPP: Lessons from Southeast Asia*, ISEAS Economics Working Paper, No. 2017-2 (2017), at 15-17.

¹⁸⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the ICSID Convention, was ratified by 153 states. List of Contracting States and Other Signatories of the Convention (as of April 12, 2016), ICSID/3.

¹⁸⁸ *Id.*

¹⁸⁹ Asian Economic Integration Report (2016), at 166 (stating that such provisions could “increase greenfield FDI projects into Asia by 28.5%”). Cf. Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework*, IILJ Working Paper 2017/1 (MegaReg Series), at 21-22. Rare exceptions also exist in recent agreements,

modality of the US Model BIT and the NAFTA and go beyond earlier BITs by incorporating more detailed arbitration procedures than the ICSID Convention.¹⁹⁰ In reality, the “ASEAN way” and the fear of undermining relations with the governments have deterred foreign investors from filing complaints against host states. *Yaung Chi Oo v. Myanmar* remains the only case that arose from ASEAN FTAs.¹⁹¹ A Singaporean company challenged the Myanmar government’s expropriation of a joint venture brewery, but the Tribunal dismissed the case on jurisdictional grounds based on the interpretation of pre-ACIA agreements.¹⁹²

In Third Regionalism, the soaring number of investor-state disputes has shaped the NREO and the stance of the Global South. Since the 2000s, reported ISDS cases have increased fivefold, and the number of Asia-Pacific states as respondents doubled the number as claimants.¹⁹³ ISDS provisions became the source of global protectionism and underpin public criticism against FTAs. ISDS is perceived to be undemocratic for permitting foreign corporations to bypass domestic courts’ jurisdiction. It is also criticized for creating a “regulatory chill” that makes public policy measures vulnerable to foreign investors’ legal challenges.

The case of *Philip Morris v. Australia* changed the landscape and resulted in the tobacco carve-out clause of the TPP’s ISDS provisions.¹⁹⁴ In this case, Philip Morris challenged Australia’s plain

such as Australia’s FTAs with the United States and Japan, and the New Zealand-Taiwan FTA.

¹⁹⁰ For the evolution of the ASEAN Comprehensive Investment Agreement (ACIA) and the AANZFTA, see Zewei Zhong, *The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community*, 6:1 *ASIAN J. COMP. L.* 1, 4-5 (2011); Amokura Kawharu & Luck Nottage, *Models for Investment Treaties in the Asian Region: An Underview*, Legal Studies Research Paper, No. 16/87 (2016), at 33-34.

¹⁹¹ *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*, 42 *I.L.M.* 404 (2003).

¹⁹² *Id.* paras. 4-8 & 76-86. The dispute involves the interpretations of pre-ACIA investment agreement, the 1987 Agreement for the Promotion and Protection of Investments (IGA) and the 1998 Framework Agreement on the ASEAN Investment Area (AIA).

¹⁹³ As of January 2017, there are 767 publicly known investor-state cases. *Investor-State Dispute Settlement: Review of Developments in 2016* (2017) [ISDS Review], at 2; *Trends and Development in Provisions and Outcomes of RTA/FTAs Implemented in 2015 by APEC Economies* (2016), at 30.

¹⁹⁴ *See generally* TPP, art. 29.5.

cigarette packaging legislation that intends to reduce smoking.¹⁹⁵ Although the Virginia-based company was unable to resort to the Australia-US FTA that does not include ISDS, corporate restructuring entitled its Hong Kong subsidiary to sue Canberra under the Australia-Hong Kong BIT.¹⁹⁶ In the Tribunal's view, "this arbitration constitutes an abuse of rights" because the dispute was foreseeable to Phillip Morris at the time of the restructuring.¹⁹⁷ Despite the result, the case incurred public outcry and states' concerns about regulatory sovereignty and legal expenses. The direct response was the TPP's exclusion of tobacco control measures. This carve-out has also been adopted in the Australia-Singapore FTA and will likely influence the RCEP's ISDS design.¹⁹⁸

In addition to Australia's position, a compromise of RCEP stake-holding countries is of significance to the investor-state arbitration mechanisms under South-based FTAs. India and Indonesia are most resistant to "pro-investor" ISDS. As the No. 1 ISDS target among RCEP countries, India has been the respondent in 21 disputes and the amount of compensation that investors claimed reached \$12.3 billion.¹⁹⁹ For example, the Dobhol power plant project dispute led US-based Enron, General Electric and Bechtel to file nine cases against India under various BITs.²⁰⁰

¹⁹⁵ Philip Morris Asia Ltd. v. Commonwealth of Australia, PCA Case No. 2012-12 (2015), paras. 7-8 & 89.

¹⁹⁶ *Id.* paras. 536-70; Julien Chaisse & Shintaro Hamanaka, *Understanding Asian Investment Complexity: What to Do About It?* IDS Discussion Paper No. 626 (2017), at 12-13; Investor-State Dispute Settlement: Review of Developments in 2015 (2016), at 15.

¹⁹⁷ Philip Morris Asia Ltd., *supra* note 195, para. 580-85.

¹⁹⁸ See Agreement to Amend the Singapore-Australia Free Trade Agreement (2016), art. 22 ("No claim may be brought under this Section in respect of a tobacco control measure of a Party."); Tania S.L. Voon, *Consolidating International Investment Law: The Mega-Regionals as a Pathway Towards Multilateral Rules*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929145 (last visited Aug. 10, 2017), at 25 (stating that the amendment was "modelled on the TPP provision").

¹⁹⁹ ISDS Review, *supra* note 193, at 52; see also Cecilia Olivet et. al., *The Hidden Costs of RCEP and Corporate Trade Deals in Asia* (2016), at 3-6 ("India alone has been the target of 40% of the cases filed against RCEP countries.").

²⁰⁰ Olivet et. al., *supra* note 199, at 9-10.

Other than “losing control” over its energy policy, India lost the case of *White Industries*, in which an Australian company challenged the delays of the Indian judicial system.²⁰¹ Based on the Australia-India BIT’s MFN clause, the Tribunal held that New Delhi breached the obligation under its BIT with Kuwait to ensure an “effective means of asserting claims and enforcing rights.”²⁰² These incidences led India to redraft the Model BIT that significantly limits the access to ISDS by imposing the exhaustion of local remedies as the condition.²⁰³ For similar policy reasons, Indonesia has terminated 17 BITs since the government unilaterally abrogated its BIT with the Netherlands in 2014.²⁰⁴ In other words, the ACIA, ASEAN+1 FTAs and the RCEP will be the primary avenues by which foreign investors can utilize ISDS against Jakarta.

Contrary to India and Indonesia, Korea and Japan are at the forefront of ISDS proposals in RCEP negotiations.²⁰⁵ Their position to “TPP-nize” RCEP ISDS provisions is to ensure that their significant investments in India and Southeast Asia are guaranteed. Notably, China’s evolving position on ISDS stands unique in the Global South. While Beijing’s “Westphalian fundamentalist” doctrine continues to apply to territorial disputes in arbitration, it has revamped the ISDS strategy in tandem with the increasingly active use of WTO disputes.²⁰⁶ For Beijing, investment arbitration benefits the OBOR initiative by protecting outbound Chinese FDI and can hardly undermine the

²⁰¹ Final Award, *White Industries Australia Limited v. India*, UNCITRAL (2011), para. 16.1.1.

²⁰² *Id.*; for disputes involving most-favored-nation (MFN) clauses in BITs, see Andrian M. Johnston & Michael J. Trebilcock, *Fragmentation in International Trade Law: Insights from the Global Investment Regime*, 12:4 WORLD TRADE REV. 621, 643-47 (2013).

²⁰³ Model Text for the India Bilateral Investment Treaty (2015), at 14.3. See also David M. Trubek & Sonia, *Legal Innovation in Investment Law: Rhetoric and Practice in the South*, Legal Studies Research Paper Series Paper No. 1406 (2017), at 6-7 (comparing the 2013 and 2015 Model BITs and suggesting that the latter focuses more on sovereignty and development).

²⁰⁴ Magiera, *supra* note 161, at 4 & 16.

²⁰⁵ *Update on the Regional Comprehensive Economic Partnership agreement – NGO Briefing*, Sept. 14, 2015, <http://bilaterals.org/?update-on-the-regional&lang=en>.

²⁰⁶ I learned of the term “Westphalian fundamentalist” from Professor James Zhaojie Li of China’s Tsinghua University in May 2017. China’s non-participation in the South China Sea Arbitration is a key example. As of August 2017, China has 15 WTO cases as a complaint and 140 cases as a third party. Dispute by Member, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Aug. 10, 2017).

communist leadership. China's earlier BITs echo its 1993 reservation to the ICSID Convention that confines the jurisdiction of a tribunal to "compensation resulting from expropriation and nationalization."²⁰⁷ Nonetheless, the Australia-China FTA remarkably expanded the ISDS application to cover violations of national treatment obligations.²⁰⁸ Although Beijing has yet to push for ISDS provisions vigorously, its changing practice will be critical to the RCEP.

The US model of ISDS provisions has been the model for ASEAN FTAs. It was contended that the European model may shape the RCEP structure.²⁰⁹ This contention is problematic. The EU's proposal for creating a multilateral investment court through the appellate mechanism in bilateral FTAs has raised concerns about its practicability and implications for developing countries.²¹⁰ Given that the ICSID annulment proceedings are confined to limited grounds, the appellate system aims to increase the partiality, transparency and predictability of ISDS awards.²¹¹ Similar to the TPP, the EU-Singapore FTA merely includes references to a potential appellate mechanism.²¹² Washington's unclear stance that has halted negotiations of the TTIP makes its "Appeal Tribunal" provisions futile.²¹³ By far, the EU only succeeded in incorporating its proposal in the FTAs with Canada and Vietnam.²¹⁴

²⁰⁷ Contracting States and Measures Taken by Them for the Purpose of the Convention, ICSID/8-D (2017), at 1; Jie (Jeanne) Huang, *Silk Road Economic Belt: Can Old BITs Fulfil China's New Initiative?* 50:4 J. WORLD TRADE 733, 751-52 (2016).

²⁰⁸ In comparison, ISDS provisions do not apply to MFN treatment. Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (2015) [Australia-China FTA], arts. 9.3 & 9.4. China's BITs in the late 1990s reflect the same trend to widen the scope of ISDS. Vivienne Bath, "One Belt, One Road" and Chinese Investment, in *Legal Dimensions of China's Belt and Road Initiative* 165, 177 (Lutz-Christian Wolff & Chao Xi eds. 2016).

²⁰⁹ E.g., Luke Nottage, *Towards a European Model for Investor-State Disputes?* July 1, 2016, <http://www.eastasiaforum.org/2016/07/01/towards-a-european-model-for-investor-state-disputes/>.

²¹⁰ The European proposal, see Concept Paper: Investment in TTIP and Beyond – The Path for Reform (2015), at 1-8.

²¹¹ *Id.*; ICSID Convention, art. 52.

²¹² TPP (2016), at 9.23.11; Free Trade Agreement between the European Union and the Republic of Singapore (2015) [EUSFTA], art. 9.30.1(c). For ISDS provisions of the EUSFTA, see Locknie Hsu, *EU-ASEAN Trade and Investment Relations with a Special Focus on Singapore*, 6 EUR. YB INT'L ECO. L. 233, 245-47 (2015).

²¹³ The European Commission, Draft Text of the Transatlantic Trade and Investment Partnership (2015), art. 9.

²¹⁴ The Comprehensive and Economic Trade Agreement (2016), art. 8.28; Free Trade Agreement between the

The new EU trade policy is to evaluate the resumption of FTA negotiations with Thailand and Malaysia and eventually conclude the ASEAN-EU FTA.²¹⁵ The RCEP negotiators should be advised that almost 70% of ISDS cases against their countries were filed by European investors.²¹⁶ The potential result that the EU could merely persuade less developed RCEP countries to accept the appellate mechanism suggests the neocolonial relationship, which trade dependency theorists envisioned. More fundamentally, the legal dispute that substantially delayed the ratification of the EU-Singapore FTA has implications for ASEAN and the RCEP. The Court of Justice of the European Union case concerned whether the EU was entitled to have exclusive competence to include ISDS provisions in the FTA and the Court ruled against the EU Commission.²¹⁷ In the Court's view, the ISDS regime will remove disputes from domestic courts' jurisdiction and hence requires the consent of member states under the shared competence of EU law.²¹⁸ This decision would impose legal obstacles on the EU's Asian FTAs and limit the impact of the ISDS proposal on the RCEP.

IV. The Systemic Impact on Regional and Multilateral Trading Systems

This article sheds light on the theoretical underpinning of the NREO, which explains the legal strategies of ASEAN, China and India to pursue the RCEP. The discussion of the core elements of the RCEP buttresses the corollaries of the new dependency theory that the assertive legalism of the Global South can change its economic and development trajectory. The RCEP will invigorate

European Union and the Socialist Republic of Vietnam (2015), art. 28.

²¹⁵ Trade for All: Towards a More Responsible Trade and Investment Policy (2014), at 31-32.

²¹⁶ See Olivet et. al., *supra* note 199, at 5 (“68% of investors suing RCEP countries are based in [European countries, including the Netherlands, the United Kingdom and France].”).

²¹⁷ The interpretation concerns the Treaty on the Functioning of the European Union. Opinion 2/15 of the Court (Full Court) (2017), paras. 3-11 & 305.

²¹⁸ *Id.* paras. 288-293.

paradigm changes in Asian FTAs and constitute a normative foundation for the Global South in world trade law.

Notably, the implementation of the AEC and ASEAN+1 FTAs provides the joint impetus for the goals of the AEC Blueprint 2025 and the RCEP. The critical and systemic issues in Third Regionalism include normative conflicts of trade fragmentation. Jurisdictional clashes under overlapping agreements inevitably require scrutiny of WTO and VCLT case law. Equally critical matters involve the RCEP's nexus with the APEC-based FTAAP and the pro-development operative mechanism of the 16-country mega-FTA. These issues are of great significance to enhance the contributions of Global South powers to resist populist isolationism and reinvigorate the multilateral trading system.

A. Normative Conflicts of Trade Fragmentation

The 16-country RCEP will face new dynamics of trade fragmentation in international economic law, as the mega-FTA could further complicate the noodle bowl syndrome due to overlapping FTAs and BITs. The RCEP's consolidation of intra-RCEP trade and investment pacts could immensely benefit developing nations and the Doha Round. Three types of normative conflicts amid fragmented trade rules have emerged in Third Regionalism and complicated the application of WTO law and the Vienna Convention on the Law of Treaties.

First, the conventional phenomenon arises from the jurisdictional clashes between the WTO and FTAs. In *Mexico – Soft Drinks*, Mexico's defense relied on the NAFTA's forum exclusion clause when the United States brought a WTO complaint against Mexico's tax measures.²¹⁹

²¹⁹ Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted Mar. 24, 2006, DSR 2006:I, 3, para. 42.

Mexico argued that because the case constituted part of “a broader dispute” it had previously brought against Washington in NAFTA proceedings, the forum exclusion clause required the NAFTA to be the sole forum for the case.²²⁰ The Appellate Body held that a panel’s declining its own jurisdiction would “diminish” a complaining party’s right under the Dispute Settlement Understanding (DSU).²²¹ The Appellate Body further elaborated that although “legal impediments” may exclude the WTO’s jurisdiction, such impediments did not exist in the present case.²²²

In a more recent case, *Peru – Agricultural Products*, Guatemala challenged the consistency of Peru’s Price Range System with the Agreement on Agriculture and the GATT.²²³ Peru contended that Guatemala violated “good faith” obligations under the DSU, as Guatemala waived the right to bring the WTO complaint under their bilateral FTA.²²⁴ After scrutinizing paragraph 9 of Annex 2.3 of the FTA, the Appellate Body ruled that a waiver to relinquish DSU rights “must be made clearly” and “cannot be lightly assumed.”²²⁵ In other words, such provisions do not constitute the “legal impediments” that the Appellate Body explained in *Mexico – Soft Drinks*.²²⁶ Thus, based on WTO jurisprudence, even if the RCEP does not incorporate the “supremacy clause” that prioritizes the WTO Agreement, a forum exclusion clause can hardly be interpreted to bar the WTO’s jurisdiction.²²⁷

²²⁰ North American Free Trade Agreement (1992), Art. 2005.6. *Id.*, paras. 42 & 54.

²²¹ *Id.*, paras. 46 & 48-53.

²²² *Id.*, para. 54.

²²³ Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted July 31, 2015, para. 4.1.

²²⁴ Peru’s argument is based on Articles 3.7 and 3.10 of the Dispute Settlement Understanding. *Id.* para. 5.19.

²²⁵ *Id.* para. 5.25.

²²⁶ *See id.* ft. 106 (“[W]e do not consider that Members may relinquish their rights and obligations under the DSU beyond the settlement of specific disputes). For further discussion on similar cases and forum shopping issues, see generally Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42:1 CORNELL INT’L L. J. 77 (2009).

²²⁷ *See* Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan (2008) [AJFTA], art. 10.3. (“[T]he WTO Agreement shall prevail to the extent of the inconsistency.”)

Second, emerging FTA-FTA conflicts have arisen in tandem with proliferating trade pacts in Third Regionalism. FTAs with overlapping geographical scopes led to more complex issues than the noodle bowl syndrome due to divergent ROOs. For example, other than the WTO, Singapore could bring an identical complaint against China under the bilateral FTA, the ASEAN-China FTA and the RCEP. Forum shopping is a legal challenge. In practice, *de jure* consolidation that enables a wider FTA to terminate intra-FTAs is an ideal yet a politically sensitive exercise. A rare example is the Commonwealth of Independent States Free Trade Area that declared six bilateral FTAs “null and void” in 2012.²²⁸ During TPP negotiations, Australia, New Zealand and Singapore argued for the “clean slate” approach to supersede intra-TPP pacts.²²⁹ On the contrary, the United States vigorously opposed the proposal in order to keep its existing market access commitments under bilateral FTAs, such as FTAs with Australia and Korea.²³⁰ The end result is the TPP provision that merely allows the FTA “to coexist with” other agreements.²³¹

A cursory overview of the Guiding Principles for the RCEP suggests the same coexistence approach to ASEAN+1 FTAs.²³² Nevertheless, the diversity of treaty language reveals more intricate interpretations than the TPP. In their “relations to other agreements” provisions, the AANZFTA and the ASEAN-Japan FTA follow the three-phase approach that intra-RCEP bilateral FTAs adopted.²³³ Substantively, “[e]ach party reaffirms its rights and obligations under” existing agreements to which they are parties.²³⁴ The ASEAN+1 FTA should not “be construed to derogate

²²⁸ Notification by the Russian Federation, WT/REG/GEN/N/8, Apr. 1, 2016, at 1-2; Asia-Pacific Trade and Investment Report (2016), at 101.

²²⁹ Deborah K. Elms & C.L. Lim, *An Overview and Snapshot of the TPP Negotiations*, in *THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT* 21, 37 (Deborah Elms et. al. eds. 2012).

²³⁰ *Id.*

²³¹ TPP, art. 1.2.1; *see id.* (stating that in 2010, the parties to the TPP “essentially decided not to decide.”).

²³² *See* Guiding Principles, *supra* note 44, principle 5 (stipulating that ASEAN+1 FTAs and intra-RCEP FTAs “will continue to exist”).

²³³ *E.g.*, AANZFTA, ch. 18., art. 2.1-2.3; AJFTA, art. 10.1-2 & 4; Australia-China FTA, art. 1.2.1-3.

²³⁴ *E.g.*, AANZFTA, ch. 18., art. 2.1.1

from” existing obligations arising from other agreements.²³⁵ Procedurally, a party “shall immediately consult with” another party should inconsistency between ASEAN+1 FTAs and other agreements materialize.²³⁶

The ASEAN-Japan FTA endorses parallelism of FTAs by stressing the validity of a separate agreement between parties if it provides more favorable treatment.²³⁷ The “more favorable” assessment can be quantitatively determined if a single-issue dispute involves tariffs or a particular mode of services trade. However, multi-issue cases can complicate the qualitative application of the “more favorable” proviso.²³⁸ The Korea-Vietnam FTA that identifies “more favorable treatment of goods, services, investment, or persons” is an attempt to provide higher certainty and could be a basis for the RCEP to detail the conditions.²³⁹

Certain intra-RCEP FTAs, evidenced by the ASEAN-Japan FTA and the China-New Zealand FTA, encompass the interpretative role of “international law” in resolving treaty inconsistencies.²⁴⁰ Article 30 of the VCLT provides the authoritative guide on “successive treaties relating to the same subject-matter.”²⁴¹ The overlapping rights and obligations under the RCEP, ASEAN+1 FTAs and bilateral FTAs fall within the ambit of Article 30. Presumably, the *les posterior* rule codified in Article 30.3 applies to ASEAN+1 FTAs’ three-phase approach, under which “the earlier treaty

²³⁵ *Id.* ch. 18., art. 2.1.2.

²³⁶ *Id.* ch. 18., art. 2.1.3

²³⁷ AJFTA, art. 10.2.

²³⁸ See also Chang-fa Lo, *Coordinating Approach to Resolve Normative and Operational Conflicts between Inner and Outer-FTAs*, 50:1 J. WORLD TRADE 147, 157-58 (2016) (explaining the interpretations of the “more favorable treatment” in the Australia-Japan FTA).

²³⁹ Free Trade Agreement between the Government of the Socialist Republic of Viet Nam and the Government of the Republic of Korea (2015), art. 1.3.2.

²⁴⁰ AJFTA, art. 10.4; Free Trade Agreement between the Government of New Zealand and the Government of the People’s Republic of China (2008), art. 3.2.

²⁴¹ Vienna Convention on the Law of Treaties (1969) [VCLT], art. 30.3. Article 30.2 is inapplicable, as almost none of these agreements include “it is subject to” provisions.

applies only to the extent that” it is “compatible with” the subsequent treaty.²⁴² Nevertheless, a *lex specialis* argument may exclude the application of Article 30.3 because the FTAs’ three-phase provisions can be interpreted as a special law that prevails over the general VCLT rule.²⁴³ Even if the argument fails, applying the later-in-time rule under Article 30.3 would encounter obstacles akin to those raised under the “more favorable” provisions because of the “compatibility” assessment in multi-issue claims.

Finally, modern FTAs that incorporate investment chapters may conflict with coexistent BITs in investment-related disputes. In the overlapping FTA-BIT context, the application of the VCLT involves different jurisdictional disputes. ISDS mechanisms in FTAs and BITs with inconsistent scopes and carve-outs make the operation of Article 30.3 difficult.²⁴⁴ *Yaung Chi Oo v. Myanmar*, which concerned the 1987 and 1998 intra-ASEAN investment agreements, exemplified ASEAN jurisprudence on successive treaties.²⁴⁵ In the Tribunal’s view, the two agreements in dispute had different scopes of investment and ASEAN states had no intention to merge them.²⁴⁶ Article 12 of the 1998 agreement stipulates that it “shall prevail” if it “provides for better and enhanced provisions.”²⁴⁷ According to “the general practice of ASEAN with respect to successive agreements,” the Tribunal held that Article 12 should not be interpreted to amend the 1987

²⁴² Article of 30.3 of the VCLT reflects the later-in-time rule. See also Alexander Orakhelashvili, *Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter*, 31:2 ICSID REV. 344, 361 (2016) (“[T]o what extent the *lex posterior* rule stated in Article 30 VCLT would be applied in arbitral practice is not certain . . .”).

²⁴³ This argument, which was raised in the context of the co-existence of the Australia-China FTA and BIT, also applies to the FTA-FTA conflicts. See Tania Voon & Elizabeth Sheargold, *Australia, China, and the Co-existence of Successive International Investment Agreements*, at 13, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905516 (last visited Aug. 28, 2017) (discussing the Article 1.2.2 of the China-Australia FTA).

²⁴⁴ For detailed comparisons of FTAs and BITs, see *id.* at 3; Jean Ho, *Investment Protection under Successive Treaties*, 32:1 ICSID REV. 58, 68-82 (2017).

²⁴⁵ *Yaung Chi Oo Trading Pte Ltd.*, *supra* note 191, paras. 76-78.

²⁴⁶ *Id.* paras. 77 & 82.

²⁴⁷ *Id.* para. 79.

agreement because the two pacts “are clearly intended to operate separately.”²⁴⁸ This decision similarly buttresses the difficulty in applying Article 30.3 of the VCLT in practice.

RCEP negotiators should be aware that similar to FTA-FTA scenarios, *de jure* consolidation that solves FTA-BIT conflict is scarcely used. Article 9.10 of the EU-Singapore FTA, which will terminate 12 BITs between EU states and Singapore, illustrates this approach.²⁴⁹ The China-Singapore FTA (CSFTA) utilizes a different type of *de jure* consolidation, which incorporates a wider-FTA’s investment obligations.²⁵⁰ Without its own investment provisions, the CSFTA makes the ASEAN-China Investment Agreement under the ASEAN-China FTA “an integral part of” the CSFTA.²⁵¹

Because only the Investment Agreement provides the ISDS mechanism, no jurisdiction conflict exists in relation to the CSFTA. Yet, legal issues may relate to the China-Singapore BIT, which continues to be effective parallel with the CSFTA. The 1985 BIT limits ISDS to “the amount of compensation” and confines the forum to “arbitral tribunals established by both parties.”²⁵² A party may well resort to the CSFTA for additional procedural guarantees. In this regard, more detailed provisions under the CSFTA facilitate *de facto* FTA-BIT consolidation. This approach could enable the RCEP to minimize normative conflicts of trade fragmentation.

²⁴⁸ *Id.* paras. 80-82.

²⁴⁹ EUSFTA, art. 9.10.1 & Annex 9-D.

²⁵⁰ See Wolfgang Alschner, *Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction*, 17:2 J. INT’L ECO. L. 271, 282-84 (2014) (elaborating *de facto* consolidation). The author categorizes the China-Singapore FTA as an example of *de facto* consolidation. I hold a different view. Any formal legal approach to enabling one of the two or more co-existing agreements to govern the relations between the parties should constitute *de jure* consolidation. An approach that achieves the same result but without a legal mechanism is *de facto* consolidation.

²⁵¹ Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Singapore (2008) [CSFTA], art. 84.1.

²⁵² China and Singapore Agreement on the Promotion and Protection of Investment (1985), art. 13.3. In comparison, Article 14 of the ASEAN-China Investment Agreement has more detailed provisions on investment disputes. Article 112 of the CSFTA simply affirms parties’ “existing rights and obligations” and does not stipulate the application of the FTA and the BIT.

B. The RCEP as the Pathway to the FTAAP

The unsettled path of the TPP and the TTIP amid populist isolationism made the RCEP's status unique. Reinforcing the NREO argument requires an understanding of the RCEP as the pathway to the APEC-envisioned FTAAP in Third Regionalism. This analysis not only fills the much-needed gap in the existing literature, but also benefits the revitalization of the Doha Round. Currently, APEC includes 12 parties to the RCEP, which facilitates APEC's Bogor Goals to accomplish Asia-Pacific trade and investment liberalization by 2020.²⁵³ APEC's nature as a soft-law institution is distinct from FTAs that impose hard-law obligations. To minimize the "sovereign costs," APEC's operating basis neither involves the treaty-ratification process nor incurs trade retaliation due to a violation of the *pacta sunt servanda* rule.²⁵⁴ The voluntary foundation helped bypass trade politics of regionalism, but resulted in APEC's institutional weaknesses that marginalized its role.

In 2004, the APEC Business Advisory Council propounded the 21-party FTAAP in order to reinvigorate APEC in light of proliferating FTAs.²⁵⁵ After APEC adopted the FTAAP vision in 2006, the 2010 APEC Leaders' Declaration identified "ASEAN+3, ASEAN+6, and the Trans-Pacific Partnership" as pathways to the comprehensive trade pact.²⁵⁶ Optimism about the TPP echoed the Obama administration's engagement in P-4 agreement-based TPP negotiations in late

²⁵³ APEC 2016-17, *supra* note 9, at 53; 1994 Leaders' Declaration, *supra* note 37.

²⁵⁴ For the soft-law concept, see generally Chris Brummer, *Why Soft Law Dominates International Finance – and Not Trade*, 13:3 J. INT'L ECO. L. 623, 631-32; Harmut Hillgenberg, *A Fresh Look at Soft Law*, 10:3 EUR. J. INT'L L. 500, 509.

²⁵⁵ APEC News Release, Asia Pacific Business Leaders to Press APEC Leaders to Accelerate Regional Economic Integration, Feb. 14, 2014, at 1.

²⁵⁶ *Id.*; 2010 Leaders' Declaration, Nov. 13, 2010.

2009.²⁵⁷ Notably, the “ASEAN plus” frameworks that “codified” China and Japan’s EAFTA and CEPEA proposals were distinct from the RCEP, which underpins ASEAN centrality.

To enrich the existing literature that only focuses on the TPP-FTAAP nexus, I offer an analysis on the RCEP as a more feasible pathway to the FTAAP. The RCEP first appeared in the Annex on the 2014 Beijing Roadmap, in which APEC declared that “the possible pathways to the FTAAP” encompass the TPP and the RCEP.²⁵⁸ The US-China rivalry led to the delicate language. Beijing argued vigorously for the FTAAP when it hosted the APEC meetings.²⁵⁹ Washington opposed the proposal due to the concern about detracting the TPP and impairing the “pivot to Asia” strategy.²⁶⁰ The compromise was to pursue APEC’s two-year Collective Strategic Study to revitalize the FTAAP under the auspices of China.²⁶¹ Markedly, APEC urged “the early completion of” RCEP negotiations in 2015.²⁶² In the following year, APEC leaders endorsed the FTAAP Study that stresses the RCEP’s substantial impact on “the economic landscape of the region and the global economy.”²⁶³ Thus, APEC has placed the RCEP on par with the TPP as the integral part of the FTAAP roadmap, which could rejuvenate the stalled Doha Round negotiations.

²⁵⁷ The predecessor to the TPP is the P-4 (Pacific 4) agreement, which was concluded between Singapore, New Zealand, Chile and Brunei in 2006. Fergusson & Williams, *supra* note 33, at 1.

²⁵⁸ Annex A to the 2014 Leaders Declaration: The Beijing Roadmap for APEC’s Contribution to the Realization of the FTAAP [Beijing Roadmap].

²⁵⁹ Patrick Low, *Beijing Must Take a Different Route with the US to Realise FTAAP Goals*, S. CHINA MORNING POST, Nov. 13, 2014, <http://www.scmp.com/business/economy/article/1637967/beijing-must-take-different-route-us-realise-ftaap-goals>.

²⁶⁰ *Id.*; Shannon Tiezzi, *US Pressures China to Kill Asia-Pacific Free Trade Agreement Talks*, DIPLOMAT, Nov. 4, 2014, <http://thediplomat.com/2014/11/us-pressures-china-to-kill-asia-pacific-free-trade-agreement-talks/>.

²⁶¹ See 2014 Leaders Declaration, Nov. 11, 2014 (“We agree to launch a collective strategic study on . . . the FTAAP, and instruct officials to undertake the study, consult stakeholders and report the result by the end of 2016”).

²⁶² 2015 Leaders’ Declaration, Nov. 19, 2015.

²⁶³ See 2016 Leaders’ Declaration, Nov. 20, 2016 (“[W]e endorse the Recommendations of the Study as the Lima Declaration on FTAAP”). In comparison, in the assessment of the TPP, the Study merely states the TPP’s signature and entry into force issues without “praising” its potential effect. Collective Strategic Study on Issues Related to the Realization of the FTAAP (2016), at 166 & 170.

The US withdrawal from the TPP diverted the status of the TPP vis-à-vis the RCEP. Article 30.5 of the TPP conditions its entry into force on the approval of countries that account for 85% of the combined GDP “of the original signatories,” thus making US membership indispensable.²⁶⁴ The revision to this provision is a procedural hurdle for the remaining 11 TPP countries to overcome under the CPTPP. Substantively, it is contentious whether countries could retain the scope of concessions without having market access to the United States. For instance, the CPTPP’s list of suspended provisions evidence Canada’s cultural exception request and Vietnam’s concerns about its IP and labor rights commitments.²⁶⁵ With Australia’s and Mexico’s support, Japan became the driving force for the CPTPP.²⁶⁶ Nonetheless, the fact that only Japan and New Zealand ratified the TPP and the remaining items to be finalized under the CPTPP may still cast doubt on the eventual entry into force of the agreement.²⁶⁷

While the evolution of the TPP illustrates the structural North-South divide, the relative development of the RCEP strengthens the theoretical and substantive arguments for the NREO in Third Regionalism. From the new dependency theory perspective, the RCEP reaffirms the assertive legalism of developing nations by enabling new generation South-South FTAs to alter

²⁶⁴ TPP, art. 30.5.2. US GDP alone constitutes 65.2% of the combined GDP of original TPP 12 countries. Marina Tsirbas et. al., *supra* note 3, at 14.

²⁶⁵ Annex II – List of Suspended Provisions, TPP Statement, *supra* note 9; *Vietnam Proposes Amendments to Stalled TPP Trade Deal at Sydney Talks: Sources*, Aug. 29, 2017, <http://bilaterals.org/?vietnam-proposes-amendments-to&lang=en>.

²⁶⁶ Walter Sim, *Australia, Japan Lobby for TPP-11*, STRAIT TIMES, Apr. 21, 2017, <http://www.straittimes.com/asia/east-asia/australia-japan-lobby-for-tpp-11>; *Mexican Minister Supports Japan’s Leadership in Achieving TPP without U.S.*, JAPAN TIMES, July 31, 2017, <https://www.japantimes.co.jp/news/2017/07/31/business/mexican-minister-supports-japans-leadership-achieving-tpp-without-u-s/#.Wadwy7IjF0w>. Some countries, such as Singapore, favor the TPP 11 proposal without stressing their support for Japanese leadership.

²⁶⁷ Annex II – List of Suspended Provisions, TPP Statement, *supra* note 9; *New Zealand: Ratification of Trans-Pacific Partnership Agreement Completed*, May 23, 2017, <http://www.loc.gov/law/foreign-news/article/new-zealand-ratification-of-trans-pacific-partnership-agreement-completed/>; The TPP ratification process in 11 countries, see Marina Tsirbas et. al., *supra* note 3, at 15 and U.S. Coalition for TPP Diplomatic Working Group Newsletter, Issue 3, Aug. 25, 2016.

the subordinate relationship with the North. The *realpolitik* of international economic law elevated the RCEP from being considered a Plan B for global regionalism to the only “on track” mega-regional agreement that could considerably impact the multilateral trading system.

Markedly, the accession to the TPP is restricted to “any State or separate customs territory,” which is an APEC member “as the Parties may agree.”²⁶⁸ In comparison, the RCEP’s open accession clause, which allows “any ASEAN FTA partner” or “any other external economic partners,” could result in a greater impact beyond the FTAAP.²⁶⁹ Pursuant to the AEC Blueprint 2025, the new ASEAN-Hong Kong FTA constitutes a new ASEAN+1 FTA and will pave the way for the Special Administrative Region of China to join the RCEP.²⁷⁰ Furthermore, the 2016 ASEAN-Pacific Alliance Framework for Cooperation that expedites integration between the AEC and Latin America reinforces South-based cooperation.²⁷¹ The potential coverage of additional APEC and TPP members, such as Chile and Peru, can be the building block for the FTAAP and transform the RCEP as the new trans-Pacific architecture.²⁷²

C. The Pro-Development Operative Mechanism

The RCEP stands unique among mega-regionals because of its South-based origin and pro-development policy. A functional operative mechanism is essential to construct the RCEP as the normative foundation for the Global South. In line with ASEAN’s commitments to the Doha Development Agenda and the UN Sustainable Development Goals, the RCEP will incorporate

²⁶⁸ TPP, art. 30.4.

²⁶⁹ Guiding Principles, *supra* note 44, principle 6.

²⁷⁰ AEC Blueprint 2025, *supra* note 51, at 35; ASEAN-Hong Kong Statement, *supra* note 57, at 1. From a legal aspect, Taiwan, as an APEC member, could also join the RCEP if China does not politically oppose.

²⁷¹ The Pacific Alliance include four Latin American countries and their bilateral FTAs with ASEAN states serve as the groundwork for the region-to-region FTA. Anaïs Faure, *The New Trans-Pacific Partnership*, DIPLOMAT, Apr. 5, 2017, <http://thediplomat.com/2017/04/the-new-trans-pacific-partnership/>.

²⁷² See Nyshka Chandran, *After US Drops TPP, China Joins Member States in Trade Talks*, CNBC, Mar. 14, 2017 (“At least two TPP member countries, Chile and Peru, have also expressed interest in joining RCEP talks.”).

“appropriate forms of flexibility, including” SDT provisions and “additional flexibility” accorded to LDCs.²⁷³ The flexible mechanism is at the core of the legal framework of South-South FTAs, but its opaque interpretations run the risk of nullifying the RCEP’s effectiveness. The APEC principle of flexibility highlights the soft-law regime that empowers members to choose their liberalization timeframes and exclude sensitive sectors from liberalization.²⁷⁴ The intertwined non-discrimination principle, commonly referred to as “open regionalism,” often incurs free-riding concern about extending liberalization to non-members.²⁷⁵

The APEC practice should not be confused with ASEAN’s hard-law notion of flexibility, which the RCEP will follow.²⁷⁶ The “ASEAN Minus” formula that crystalized SDT provisions allows for flexible participation and avoids the lowest common denominator dilemma under conventional South-South FTAs.²⁷⁷ Subject to the Grand Bargain, ASEAN+1 FTAs include lengthier yet clearly stipulated liberalization timeframes for CLMV countries.²⁷⁸ Entry into force provisions of ASEAN+1 FTAs similarly adopted this formula.²⁷⁹

²⁷³ Guiding Principles, *supra* note 44, principle 4; ASEAN Taps on Vision 2025 to Support SDGs, June 25, 2016, <http://asean.org/asean-taps-on-vision-2025-to-support-sdgs-2/>.

²⁷⁴ The Osaka Action Agenda: Implementation of the Bogor Declaration (1995), at 2.

²⁷⁵ *Id.* at 1; see Vinod K. Aggarwal & Elaine Kwei, *Asia-Pacific Economic Cooperation (APEC): Transregionalism with a New Cause?*, in INTERREGIONALISM AND INTERNATIONAL RELATIONS 67, 73 (Heiner Hanggi et al. eds., 2006) (explaining four schools of thought on open regionalism).

²⁷⁶ Guiding Principles, *supra* note 44, principle 4 (stipulating that the norm of flexibility will be “consistent with the existing ASEAN+1 FTAs, as applicable”).

²⁷⁷ Transcript of Reply by Minister for Foreign Affairs George Yeo to Questions in Parliament, Sept. 17, 2007, para. 6.

²⁷⁸ For instance, the ASEAN-Korea FTA’s tariff liberalization timeframes include three categories: Korea and ASEAN six countries; Korea and Vietnam; and Korea and Cambodia, Laos and Myanmar. Annex 1, Agreement on Trade in Goods Under the Framework Agreement on Comprehensive Economic Cooperation Among the Government of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (2006). For services and investment negotiations, see ASEAN-China Framework Agreement (2004), art. 8.3; Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations (2009), at 8.3.

²⁷⁹ For example, “Australia, New Zealand and at least four ASEAN Member States” could enable the AANZFTA to enter into force. AANZFTA, ch. 18, art. 7.2. In this regard, the ASEAN-China is the only exception to the ASEAN Minus X rule. PETER JAN KUIJPER ET. AL., FROM TREATY-MAKING TO TREATY-BREAKING: MODELS FOR ASEAN EXTERNAL TRADE AGREEMENTS 97-98 (2015).

The RCEP should further take into account ASEAN's internal practice. Article 21 of the ASEAN Charter codified the ASEAN Minus modality and confined it to "the implementation of economic commitments" that all ASEAN states decided by consensus.²⁸⁰ As the AEC's services liberalization evidences, two or more members could liberalize selected sectors and permit the subsequent participation of other nations.²⁸¹ Unlike APEC, the concessions are only conferred on a reciprocal basis in order to eliminate the free rider problem. Arguably, the ASEAN Minus X formula could result in fragmented commitments at divergent speeds. A legal loophole may exist when a state first agrees to its commitments, but then decides to opt out of such commitments after finding the implementation difficult.²⁸² Therefore, the RCEP's elaboration of ASEAN's flexibility rules will not only benefit the AEC, but also serves as a pro-development model for the South-based FTAs.

For the sustainability of the mega-regional pact, I propose that the ASEAN Secretariat provide institutional support for the RCEP.²⁸³ The administrative design is often the last consideration of trade negotiators, but is critical to the FTA's enforcement, monitoring and dispute settlement proceedings. The TPP provisions to create the Committee on Development or the TPP Commission failed to consider the practical significance of an impartial, permanent secretariat.²⁸⁴ It may be suggested that as the RCEP functions as the pathway to the FTAAP, the institutional

²⁸⁰ ASEAN Charter (2007), art. 21.2. The "ASEAN-X" modality, which is different from "Two Plus X," can be traced back to the Framework Agreement on Enhancing ASEAN Economic Cooperation (1992). SEVERINO, *supra* note 47, at 352-53; WOON, *supra* note 58, 158-59. See also Chan Sze Wei, *Decision-Making in the ASEAN Charter Process, in 50 YEARS OF ASEAN AND SINGAPORE 235, 244* (Tommy Koh et. al. eds. 2017) ("AMM instructed HLTF that ASEAN-X should be limited to the implementation of economic agreements.").

²⁸¹ Based on the Protocol to Amend the ASEAN Framework Agreement on Services (2003), Article IV bis (ASEAN Minus X modality) was added to the AFAS.

²⁸² SEVERINO, *supra* note 47, at 352-53; Nikomborirak & Jitdumrong, *supra* note 53, at 59.

²⁸³ Under the \$20 million budget, the ASEAN Secretariat currently has 300 staff members recruited from Indonesia and other ASEAN states. Termsak Chalermphanupap, *No Brexit Repeat in ASEAN*, DIPLOMAT, <http://thediplomat.com/2016/06/no-brexite-repeat-in-asean/>.

²⁸⁴ TPP, arts. 23.7 & 27.1.

mechanism should be based on the APEC Secretariat. This position does not stand. Contrary to APEC's assertion to be "an incubator of issues related to the FTAAP by providing leadership," APEC's role is limited to facilitating RCEP or TPP discussions on the sidelines of APEC meetings.²⁸⁵ The FTAAP will only "be realized outside of APEC" because APEC's soft-law mechanism remains unaffected.²⁸⁶ In addition, the absence of treaty-based legal personality resulted in APEC's *sui generis* status. As only Singapore law conferred the 60-staff APEC Secretariat "the legal capacities of a body corporate," privileges and immunities cannot be asserted in foreign proceedings.²⁸⁷

Distinctively, the legal standing of ASEAN under the ASEAN Charter is reinforced by the conclusion of the ten-country agreement on privileges and immunities.²⁸⁸ The agreement, along with the detailed pact concluded between Indonesia and the ASEAN Secretariat, further extends functional benefits to "experts on missions for ASEAN" and "permanent missions" of foreign nations.²⁸⁹ The RCEP's *mutatis mutandis* application in such rules could increase the structural efficiency of the mega-regional agreement. Moreover, for development purposes, the institutional memory of the ASEAN Secretariat in enforcing the Initiative for ASEAN Integration that assists CLMV countries is indispensable.²⁹⁰ The RCEP could consolidate the funding basis and enhance the capacity-building of the Secretariat. The streamlining of intra-ASEAN initiatives with parallel

²⁸⁵ Annex A: Lima Declaration on FTAAP, 2016 Leaders' Declaration, *supra* note 263.

²⁸⁶ Beijing Roadmap, *supra* note 258.

²⁸⁷ The International Organizations (Immunities and Privileges) (APEC Secretariat) Order 1993, art. A.3. The basis for the APEC Secretariat to be established in Singapore is APEC's 1992 Bangkok Declaration, which technically does not constitute a "treaty."

²⁸⁸ ASEAN Charter, art. 3; Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations (2009) [Agreement on the Privileges and Immunities].

²⁸⁹ Agreement on the Privileges and Immunities, arts. 5-8; Agreement between the Government of the Republic of Indonesia and the Association of Southeast Asian Nations (ASEAN) on Hosting and Granting Privileges and Immunities to the ASEAN Secretariat, art. 15; WOON, *supra* note 58, 75-76.

²⁹⁰ AEC Blueprint 2025, *supra* note 51, at 34-35; AEC 2025 CSAP, *supra* note 82, at 44-45. In comparison, the TPP's structural design for the "Committee on Development" lacks the institutional memory and funding. TPP, art. 23.7.

ASEAN+6 technical assistance projects will collectively narrow the development gap and augment the pro-development effect for the Global South.

V. Conclusion

Emerging populist isolationism has diverted the path of the neoliberal international economic order and cast doubt on the TPP and other trade agreements. To assess the RCEP's evolution as a new trade architecture in the Asia-Pacific, this article provided the most up-to-date examination of the implications of the 16-country mega-FTA for Asian regionalism and the Doha Round. By making interrelated theoretical and substantive claims, the article moved the conventional FTA discourse to a new dimension on the assertive legalism of developing nations. It further shed light on the pivotal role of Global South powers in pursuing the NREO based on new-generation South-South FTAs.

The article argued that the RCEP will galvanize the paradigm change in Third Regionalism and provide a normative foundation for the Global South in international economic law. Achieving *de jure* and *de facto* integration mandates that the RCEP commitments exceed not only ASEAN+1 FTAs, but also the AEC under the AEC Blueprint 2025. To reinforce the new dependency theory, this research explored RCEP negotiations vis-à-vis the legal and policy strategies of ASEAN, China and India. Based on ASEAN practice, it reveals multifaceted challenges to tariff eliminations that resulted in the noodle bowl syndrome and the liberalization of services, such as professional mobility. The contentious ISDS cases involving ASEAN and the EU's recent FTAs with Asian states were also critically evaluated.

From a global perspective, the RCEP's systemic impact on mega-regionals and world trade law cannot be ignored. Based on WTO and VCLT jurisprudence, this article analyzed the new

dynamics of trade fragmentation owing to jurisdictional conflicts that arise from overlapping FTAs and BITs. Constructing the RCEP as the pathway to the APEC-based FTAAP is imperative to reinvigorate the Doha Round. The principle of flexibility and the institutional mechanism further buttress the pro-development effect of the FTA. Consequently, these issues are of paramount importance to the RCEP's indispensable position in Asian regionalism and the multilateral trading system.