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Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law

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Against Populist Isolationism: New Asian Regionalism and Global South Powers in International Economic Law

Pasha L. Hsieh†

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 arguably fortify the RCEP as a pathway to the Free Trade Area of the Asia-Pacific region and reinvigorate the multilateral trading system.

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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 World Trade Organization's Doha Round. 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

Trade nationalism across the Atlantic has not deterred the dynamic development of Asian regionalism, which is witnessing a nearly four-fold

1. See Arif Dirlik, *Global South: Predicament and Promise*, 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 n.1 (Justin Dargin ed., 2013) (clarifying the North-South divide in global politics).

2. For the nexus between sovereignty and emerging trade protectionism, see Shuaihua Cheng, *To Open up Global Trade We Need to Understand 'Protectionism'*, WORLD ECONOMIC FORUM (June 13, 2017), <https://www.weforum.org/agenda/2017/06/global-trade-protectionism-g20-explained/> [<https://perma.cc/AT65-LXT5>]; Douglas A. Irwin, *The False Promise of Protectionism: Why Trump's Trade Policy Could Backfire*, 96 FOREIGN AFF. 45, 45-53 (2017).

3. For the impact of Brexit and the US withdrawal from the Trans-Pacific Partnership 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).

growth of free trade agreements (FTAs) that represent half of global trade pacts.⁴ A salient feature of 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

Double the economic scale of the "reborn" TPP, which is the now 11-party Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),⁹ the RCEP will be the most critical milestone since the Asia-

4. The number of Asian free trade agreements (FTAs) in effect increased from 39 to 151 from 2000 to 2017. See *Free Trade Agreements, tbl.1 FTAs by Status (cumulative)*, ASIA REGIONAL INTEGRATION CENTER, <https://aric.adb.org/fta> (last visited Oct. 31, 2018); see also WORLD TRADE ORGANIZATION, *Regional Trade Agreements*, https://www.wto.org/english/Tratop_e/region_e/region_e.htm [<https://perma.cc/VQ2H-SLW9>] (last visited Oct. 31, 2018) ("As of 1 May 2018, 287 RTAs were in force.")

5. See 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/> [<https://perma.cc/32YV-7LYN>]. See generally 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> [<https://perma.cc/E3A7-NJ6W>].

6. External ASEAN FTAs were concluded between ten ASEAN states collectively with China, Japan, South Korea, Australia, New Zealand, India, and Hong Kong. See Sanchita Basu Das, Rahul Sen & Sadhana Srivastava, *Can ASEAN+1 FTAs Be a Pathway towards Negotiating and Designing the Regional Comprehensive Economic Partnership (RCEP) Agreement?* 50 J. WORLD TRADE 253, 254-60 (2016); Yoshifumi Fukunaga & Ikumo Isono, *Taking ASEAN+1 FTAs towards the RCEP: A Mapping Study 4-6* (European Res. Inst. For ASEAN, ERIA Discussion Paper Series, 2013), <http://www.eria.org/ERIA-DP-2013-02.pdf> [<https://perma.cc/U2EZ-MD6V>]; ANDREW STAPLES, THE ECONOMIST, ASEAN CONNECTIONS: HOW MEGA-REGIONAL TRADE AND INVESTMENT INITIATIVES IN ASIA WILL SHAPE BUSINESS STRATEGY IN ASEAN AND BEYOND 13 (2016). As a comparison, 11 TPP members and the United States encompass 26% of world goods-exports and 32% of global GDP.

7. See PRICEWATERHOUSECOOPERS, THE LONG VIEW: HOW WILL THE GLOBAL ECONOMIC ORDER CHANGE BY 2050? 7 (2017); ERIA, EAST ASIA UPDATES: SOUTHEAST ASIA WILL GROW AT 4.6% 1 (2016); ANDREW STAPLES, *supra* note 6, at 12-13.

8. See Zhao Hong, *China One Belt One Road: An Overview of the Debate*, in 6 TRENDS IN SOUTHEAST ASIA 1-30 (2016) (investigating current economic policies of ASEAN, China and India).

9. Trans-Pacific Partnership Ministerial Statement, GLOBAL AFF. CANADA (last modified Feb. 28, 2018), available at <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/statement-declaration.aspx?lang-eng&lang=Eng&lang=Eng> [<https://perma.cc/74QP-PC8W>] [hereinafter TPP Statement]; see Minister Champagne Welcomes Progress on the Comprehensive and Pro-

Pacific Economic Cooperation (APEC) was established in 1989.¹⁰ 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 the 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, this Article opens an inquiry into the assertive legalism of developing countries in the new regional economic order (NREO).¹¹ The new-generation South-South FTAs that underpin the NREO also manifest the pivotal role of Global South powers in reshaping world order amid Trump-era populist isolationism.

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 considers the nexus between the AEC 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.¹²

This Article proceeds as follows. Part I provides the geopolitical context of Asian regionalism by deciphering the progress and impediments of mega-regionals and South-based agreements in Third Regionalism.¹³ To buttress the NREO argument, the analysis offers insight into the RCEP’s development, negotiating structure and constitutional issues that commentators overlook. By deciphering ASEAN, China and India’s legal strategies, it explains the Global South’s contemporary practice of international economic law. Part II substantiates the RCEP’s paradigm shifts in Asian regionalism. Based on ASEAN+1 FTAs and the AEC being implemented, it

gressive Trans-Pacific Partnership, Global Aff. Canada (Nov. 10, 2017), available at https://www.canada.ca/en/global-affairs/news/2017/11/minister_champagne_welcomes_progress_on_the_comprehensive_and_progressive.html [<https://perma.cc/R8DH-UEME>] (“The members of the CPTPP represent 494 million people, with . . . 13.6% of global GDP”).

10. See APEC, APEC OUTCOMES & OUTLOOK 48–51 (2016–2017) (explaining the milestones of the Asia-Pacific Economic Cooperation (APEC) since 1989) [hereinafter APEC 2016–17].

11. 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. See, e.g., Adriano R. Garcia, *Toward a New Regional Economic Order in Asian and the Pacific*, X J. PHILIPPINE 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.

12. See APEC 2016–2017, *supra* note 10, at 5, 48.

13. 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. See Jagdish Bhagwati, *Regionalism versus Multilateralism*, 15 WORLD ECON. 535, 538–42 (1992).

challenges the loopholes of tariff eliminations and the rules of origin (ROOs) that result in the “noodle bowl syndrome.”¹⁴ 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 III 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 together theoretical and substantive arguments and offers legal and policy advice for Asia-Pacific governments and practitioners.

I. 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.¹⁵ 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 the Global South powers in world trade law.¹⁶ It is thus vital to understand the RCEP’s evolution vis-à-vis the legal and policy priorities of stake-holding 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 interna-

14. See generally Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism* (Asian Dev. Bank, ADB Working Paper Series on Regional Economic Integration No. 7, 2007), <https://www.adb.org/sites/default/files/publication/28464/wp07-baldwin.pdf> [<https://perma.cc/Q9SG-3325>].

15. See, e.g., Michael Wesley, *Trade Agreements and Strategic Rivalry in Asia*, 69 *AUSTL. J. INT’L AFF.* 479, 489–90 (2015); Deborah Kay Elms, *The Trans-Pacific Partnership Agreement: Looking Ahead to the Next Steps* 8–9 (Asian Dev. Bank Inst., ADBI Working Paper Series No. 447, 2013), <https://www.adb.org/sites/default/files/publication/156307/adbi-wp447.pdf> [<https://perma.cc/ZT7S-3C5H>]; Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths Toward Deeper Asian Economic Integration*, 8 *ASIAN J. WTO & INT’L HEALTH L. & POL’Y* 359, 368–69 (2013).

16. See Comprehensive and Progressive Agreement for Trans-Pacific Partnership Ministerial Statement (Mar. 8, 2018), available at <https://www.beehive.govt.nz/sites/default/files/2018-03/CPTPP%20Ministerial%20Statement.pdf> [<https://perma.cc/ZB3J-6YBB>]; 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.

tional 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).¹⁷ In rationalizing global regionalism, Jagdish Bhagwati propounded the term “First Regionalism” in reference to the failure of FTAs in the 1960s owing to overriding political interferences.¹⁸ 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.¹⁹

Following NIEO’s demise, 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 neo-colonial relationship.²⁰ As theorists contended, entrenched external unfairness has subordinated the development of developing countries to the self-interests of the developed nations.²¹ By accelerating the North-bound trade surplus from the South, international economic relations have only worsened the dependency and imparity.²²

The classical dependency theory posits that the solution for the Global South is to cut trade ties with the North.²³ 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 possi-

17. See G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order, U.N. Doc. A/RES/S-6/ (May 1, 1974).

18. Bhagwati, *supra* note 13, at 538-39.

19. *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* 5-16 (Asian Dev. Bank Inst., ADBI Working Paper Series No. 344, 2012), <https://www.adb.org/sites/default/files/publication/156199/adb-wp344.pdf> [<https://perma.cc/776Z-QAXL>]; Baldwin, *supra* note 14, at 7-17.

20. See Theotonio Dos Santos, *The Structure of Dependence*, 60 AM. ECON. 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* 31-32 (2007).

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

22. See *id.*

23. See *id.* at 104-05.

ble coexistence of dependency and development.²⁴ The nature of dependency is dynamic because developing nations could transform dependent capitalism into the export-driven economies.²⁵ Rather than becoming pre-occupied with the unequal external relationships, the new theory emphasizes the impact of the South's internal structures on changing neo-colonial ties with the North.²⁶

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.²⁷ Peripheral to political solidarity, the economic perception of South-South cooperation was to parochially enforce the nationalistic concept of self-help by minimizing reliance on the West.²⁸ 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.²⁹ 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.³⁰ However,

24. See *id.* at 164-65; see generally FERNANDO HENRIQUE CARDOSO, *REINVENTING DEMOCRACY IN BRAZIL* (1999); THOMAS BARON GOLD, *STATE AND SOCIETY IN THE TAIWAN MIRACLE* (1986).

25. 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. See GOLD, *supra* note 24, at 21-90; SO, *supra* note 21 at 157-64.

26. See Katharina Serrano, *The Trade-Development Nexus in EU-Pacific Relations: Realism, Dependence or Interdependence*, 23 *GLOBAL CHANGE, PEACE & SECURITY* 89, 104 (2011); SO, *supra* note 21, at 137-42.

27. Acharya, *supra* note 19, at 5-7.

28. See *id.*

29. Karl P. Sauvart, *The Early Days of the Group of 77*, UN CHRONICLE (May 2014), <https://unchronicle.un.org/article/early-days-group-77> [<https://perma.cc/7HVR-GJ3F>]; MINISTRY OF EXTERNAL AFF. (India), *History and Evolution of Non-Aligned Movement* (Aug. 22, 2012), <http://mea.gov.in/in-focus-article.htm?20349/History+and+Evolution+of+NonAligned+Movement> [<https://perma.cc/DJZ6-J6NK>].

30. 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

the NIEO movement quickly faded because of the Thatcher-Reagan coalition's refusal to additional demands and non-uniform interests within the Global South.³¹ The rising Washington Consensus became the dominant driving force for creating the WTO and compelled developing nations to engage in North-defined "free trade."³² Since its inception, the WTO has been criticized for ignoring the development needs of the South.

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 polices 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.³³ 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 a rising China.³⁴ 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.³⁵ The stalled Transatlantic Trade and Investment Partnership (TTIP) negotiations and the EU agreements with ASEAN states have also aggravated the Western powers' divergent paths.³⁶

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.

31. See JAMES M. CYPHER, *THE PROCESS OF ECONOMIC DEVELOPMENT* 238 (4th ed. 2014); U.N. Conference on Trade and Development, *Trade and Development Report, 2014* 67-68, U.N. Doc. UNCTAD/TDR/2014 (Sept. 10, 2014).

32. See 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).

33. 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 *HARV. INT'L L.J.* 1 (2015).

34. See Hillary Clinton, *America's Pacific Century*, 189 *FOREIGN POL'Y* 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 [https://perma.cc/F5G6-5VPH]; IAN F. FERGUSSON & BROCK R. WILLIAMS, *CONG. RESEARCH SERV.*, R44489, *THE TRANS-PACIFIC PARTNERSHIP (TPP): KEY PROVISIONS AND ISSUES FOR CONGRESS* 1-6 (2016).

35. See Taesuh Cha, *The Return of Jacksonianism: the International Implications of the Trump Phenomenon*, 39 *WASH. Q.* 83, 91 (2017).

36. See 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/> [https://perma.cc/YZ9Q-GYD7]. The EU concluded FTAs with Singapore and Vietnam and resumed negotiations for the EU-ASEAN FTA. See *TRADE FOR ALL: TOWARDS A MORE RESPONSIBLE TRADE AND INVESTMENT POLICY*, EUROPEAN COMMISSION 30-32 (2015)

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.³⁷ Different from their predecessors, more than 70% of today's Asian trade pacts encompass WTO-plus commitments.³⁸ 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 2020.³⁹ 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.⁴⁰

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

37. WTO, *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence* 52-53 (2011) [hereinafter *World Trade Report 2011*]. 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 DEVELOPMENT BANK, ASIAN ECONOMIC INTEGRATION REPORT 2016: WHAT DRIVES FOREIGN DIRECT INVESTMENT IN ASIA AND THE PACIFIC?* 18 (2016).

38. See, e.g., Richard Baldwin & Masahiro Kawai, *Multilateralizing Asian Regionalism* 8-9 (Asian Dev. Bank Inst., ADBI Working Paper Series No. 431, 2013), <https://www.adb.org/sites/default/files/publication/156286/adbi-wp431.pdf> [<https://perma.cc/M2T4-WLTQ>] (finding that 77% (53) of surveyed FTAs in Asia partially (37 or 54%) or completely (16 or 23%) include Singapore issues).

39. See APEC Economic Leaders' Declaration of Common Resolve, *ASIA-PACIFIC ECON. COOPERATION* (Nov. 16, 1994), https://www.apec.org/Meeting-Papers/Leaders-Declarations/1994/1994_aelm [<https://perma.cc/UX56-25SY>] [hereinafter 1994 Leaders' Declaration] (stating that industrialized economies and developing economies should achieve the goals by 2010 and 2020, respectively).

40. The "ASEAN+3" framework includes ten ASEAN countries, China, Japan and South Korea. Shujiro Urata, *Constructing and Multilateralizing the Regional Comprehensive Economic Partnership: An Asian Perspective* 7-8 (Asian Dev. Bank Inst., ADBI Working Paper Series No. 449, 2013), <https://www.adb.org/sites/default/files/publication/156303/adbi-wp449.pdf> (economic cooperation later led to such regionalism as CEPEA/EAFTA). The result was the creation of the currency swap arrangement called the Chiang Mai Initiative, the predecessor to the Chiang Mai Initiative Multilateralisation Agreement.

(EAFTA) in 2001.⁴¹ While Beijing backed the EAFTA initiative, Tokyo countered it with the alternative ASEAN+6 Comprehensive Economic Partnership for East Asia (CEPEA) in 2006.⁴² 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.⁴³

During the same period, the FTAAP proposal and US accession to the TPP further complicated the roadmap for Asian regionalism.⁴⁴ To avoid being marginalized and to fortify the bloc's centrality, ASEAN states introduced the framework for the "ASEAN-led process" to integrate FTA partners in 2011.⁴⁵ 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 2018.⁴⁶ In my view, the converging policies of ASEAN, China and India

41. See REPORT OF THE EAST ASIAN VISION GROUP II (EAVGII) 43-46 (2013); Christopher M. Kent, *East Asian Integration Towards An East Asian Economic Community* 23 (Asian Dev. Bank Inst., ADBI Working Paper Series No. 665, 2017), <https://www.adb.org/sites/default/files/publication/228896/adbi-wp665.pdf> [<https://perma.cc/3CFP-WYM4>].

42. 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). See Rodolfo C. Severino, *Japan's Relations with ASEAN*, in *ASEAN-JAPAN RELATIONS* 17, 27-28 (Takashi Shiraishi & Takaaki Kojima eds., 2014). See also Shujiro Urata, *CEPEA: Japan's New Regional Cooperation Initiative in East Asia*, JAPAN SPOTLIGHT, Nov./Dec. 2008, at 12.

43. 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 ASIAN SURVEY 1055, 1069 (2016) ("Japan has attempted to take advantage of US influence to hold China in check.").

44. See generally Pasha L. Hsieh, *Reassessing APEC's Role as a Trans-Regional Economic Architecture: Legal and Policy Dimensions*, 16 J. INT'L ECON. L. 119, 142-43 (2013); FERGUSSON & WILLIAMS, *supra* note 34, at 1-2.

45. See ASEAN, *ASEAN Framework for Regional Comprehensive Economic Partnership* (June 12, 2012), available at https://asean.org/?static_post=Asean-framework-for-regional-comprehensive-economic-partnership [<https://perma.cc/X3VA-9G2P>].

46. See *Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership*, ASEAN (2012) [hereinafter *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. See *Regional Comprehensive Economic Partnership*: News, DEP'T FOREIGN AFF. & TRADE (Austl.), <https://dfat.gov.au/trade/agreements/negotiations/rcep/news/Pages/news.aspx> [<https://perma.cc/E3TC-EUTG>] (last visited Nov. 1, 2018). The deadline for the RCEP's conclusion has shifted from 2015 to 2018. See Leader's Statement on the Negotiations for the Regional Comprehensive Economic Partnership (RCEP), DEP'T FOREIGN AFF. & TRADE (Austl.) (Nov. 2017), <https://dfat.gov.au/trade/agreements/negotiations/rcep/news/Documents/joint-leaders-statement-on-the-rcep-negotiations-14-november-2017-manila-philippines.pdf> [<https://perma.cc/XG7R-2KBX>]; Amiti Sen, *RCEP Talks: India under Pressure to Offer Deeper Tariff Cuts*, HINDU BUSINESS LINE (May 3, 2017), <http://www.thehindubusinessline.com/economy/policy/rcep-talks-india-under-pressure-to-offer-deeper-tariff-cuts/article9679098.ece> [<https://perma.cc/SAU8-LEEK>]. See also IISD, *RCEP partners miss third deadline and push negotiations through November 2018*, INVESTMENT TREATY NEWS (Dec. 21, 2017), <https://www.iisd.org/ita/2017/12/21/rcep-partners-miss-third-deadline-and-push-negotiations-through-november-2018/> [<https://perma.cc/U6S5-B2TY>]; Kentaro Iwamoto, *Conclusion*

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

Contrary to the common misconception that China has dominated RCEP negotiations, in reality the RCEP has been driven by ASEAN.⁴⁷ 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.⁴⁸ The 1967 Bangkok Declaration gave birth to ASEAN by forming a loose security alliance that sought to contain widespread communism.⁴⁹ Resting upon the Indonesian concepts of *musyawarah* and *mufakat*, the postcolonial mindset led to the "ASEAN way," which established the bloc's non-intervention principle based on consultation and consensus.⁵⁰

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.⁵¹ Distinguishable from the super-national EU, ASEAN has operated under a soft-law horizontal integration model rather than a top-down, hard-law approach. A result of this difference is the 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 inter-

to RCEP talks 'finally in sight,' Singapore PM says, NIKKEI ASIAN REV. (Aug. 29, 2018), <https://asia.nikkei.com/Politics/International-Relations/Conclusion-to-RCEP-talks-finally-in-sight-Singapore-PM-says> [<https://perma.cc/7DTS-PQBP>].

47. See Maria, *supra* note 5; see also Pambagyo, *supra* note 16, 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.").

48. An analysis of ASEAN+1 FTAs is the conventional approach to understanding the RCEP. E.g., Das et. al., *supra* note 6, at 262-74; Fukunaga & Isono, *supra* note 6, at 8-18; Urata, *supra* note 40, at 12-17.

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

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

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

preted as granting such treaties self-executing power.⁵²

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).⁵³ 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.⁵⁴ As of 2017, the negotiations under the ASEAN Framework Agreement on Services (AFAS) have led to the ratification of nine packages of service commitments.⁵⁵ The ASEAN Comprehensive Investment Agreement (ACIA) streamlined the schedule of reservations and enhanced the investor-state arbitration mechanism.⁵⁶ These commitments and the AEC Blueprint 2025's target to build "a highly integrated and cohesive economy" collectively form the benchmark for RCEP negotiations.⁵⁷

A key point should be highlighted. The new Blueprint's "global ASEAN" initiative places the RCEP as ASEAN's priority.⁵⁸ From 2002 to 2017, ASEAN concluded six ASEAN+1 FTAs with seven Asia-Pacific partners, including Australia, China and India.⁵⁹ Akin to the AEC, the

52. *Id.* at art. 5, ¶ 2; see 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 (2011) (interpreting pertinent constitutional provisions of ASEAN states).

53. See SEVERINO, *supra* note 49, at 222-25; see also Masahiro Kawai & Kanda Naknoi, *ASEAN Economic Integration through Trade and Foreign Direct Investment: Long-Term Challenges* 12-13 (ADB Working Paper Series No. 545, 2015), <https://www.adb.org/sites/default/files/publication/174835/adbi-wp545.pdf> [<https://perma.cc/2T7M-F5X2>]. 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, ASEAN ECONOMIC COMMUNITY BLUEPRINT 5-6 (2008) [hereinafter AEC BLUEPRINT 2015]. The AEC Blueprint 2025, which will govern ASEAN's development from 2016 to 2025, replaced the AEC Blueprint 2015 when the AEC was established. See ASEAN, ASEAN ECONOMIC COMMUNITY BLUEPRINT 2025 1-2 (2015) [hereinafter AEC BLUEPRINT 2025].

54. See Kanya Satyani Sasradipoera, *ASEAN Trade in Goods Agreement (ATIGA)*, in ASEAN: LIFE AFTER THE CHARTER 89, 90-92 (S. Tiwari ed., 2010); see STEFANO INAMA & EDMUND W. SIM, RULES OF ORIGIN IN ASEAN: A WAY FORWARD 10, 21-23 (J.H.H. Weller, Tan Hsien-Li, & Michael Ewing-Chow eds., 2015).

55. Also note that the conclusion of the final, tenth package of commitments was postponed from 2015 to 2017. See Deunden Nikomborirak & Supunnavee Jitdumrong, *An Assessment of Services Sector Liberalization in ASEAN*, in ASEAN ECONOMIC COMMUNITY SCORECARD: PERFORMANCE AND PERCEPTION 47, 53 (Sanchita Basu Das ed., 2013); see also Chairman's Statement on the 28th and 29th ASEAN Summits, *Turning Vision into Reality for a Dynamic ASEAN Community* 10 (Sept. 6-7, 2016), available at <https://asean.org/wp-content/uploads/2017/03/LN-02-Chairmans-Statement-of-the-28th-29th-ASEAN-Summits.pdf> [<https://perma.cc/QK2E-W8Q6>].

56. See ASEAN, ASEAN COMPREHENSIVE INVESTMENT AGREEMENT: A GUIDEBOOK FOR BUSINESS & INVESTORS 9-11 (2013).

57. AEC BLUEPRINT 2025, *supra* note 53, at 3. Presumably due to the challenge of meeting all targets in the AEC Blueprint 2015, the new Blueprint dropped the term "single market."

58. *Id.* at 35-36.

59. For the treaty texts, see *Free Trade Agreements with Dialogue Partners*, ASEAN, available at <http://asean.org/asean-economic-community/free-trade-agreements-with>

ASEAN+1 FTAs have strengthened the notion of ASEAN centrality, which the ASEAN Charter mandated to secure the bloc's economic and geopolitical relevance.⁶⁰ This concept empowers ASEAN to be an indispensable middle power in Asian regionalism.⁶¹ 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.⁶² Other ASEAN+1 FTAs have followed the incremental approach by enacting a framework agreement that facilitates the conclusion of sectorial 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.⁶³

Significantly, notwithstanding the treaty-making power provision under the ASEAN Charter, the application 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.⁶⁴ 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

dialogue-partners/ [https://perma.cc/5D38-RBHC]. See Joint Media Statement, The Signing of the ASEAN-Hong Kong, China Free Trade Agreement and the ASEAN-Hong Kong, China Investment Agreement 1 (Nov. 2017), available at <https://asean.org/storage/2017/11/FINAL-JMS-on-the-signing-of-AHKFTA-and-AHKIA.pdf> [https://perma.cc/EX3E-9DP8] [hereinafter ASEAN-Hong Kong Statement].

60. See AEC BLUEPRINT 2025, *supra* note 53, at 6. For the development of the ASEAN centrality since the 1990s, see WALTER WOON, *THE ASEAN CHARTER: A COMMENTARY* 56–58 (2016). See also Yoshifumi Fukunaga, *ASEAN's Leadership in the Regional Comprehensive Economic Partnership*, 2 *ASIA & PAC. POL'Y STUDIES* 103, 106 (2015).

61. 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 *POLITIKON: SOUTH AFRICAN JOURNAL OF POLITICAL STUDIES* 165, 165–75 (2010). See also Andrew Carr, *Is Australia a Middle Power? A Systemic Impact Approach*, 68 *AUSTL. J. INT'L AFF.* 70, 70–81 (2014).

62. See *ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA)*, AANZFTA (Sept. 15, 2017), <http://aanzfta.asean.org/key-aanzfta-trade-figures/> [https://perma.cc/K4GG-KRT8]. For additional detailed information on AANZFTA, see *ASEAN-Australia-New Zealand FTA*, DEP'T FOREIGN AFF. & TRADE (AUSTL.), <https://dfat.gov.au/trade/agreements/in-force/aanzfta/Pages/asean-australia-new-zealand-free-trade-agreement.aspx> [https://perma.cc/VWBT-96KX].

63. The framework agreement and the agreement on goods were concluded in 2003 and 2008, respectively. See *ASEAN–Japan Free Trade Area*, ASEAN, http://asean.org/?static_post=Asean-japan-free-trade-area-2 [https://perma.cc/9YC7-NBZC] (last visited Nov. 2, 2018). Japan has concluded FTAs with Brunei, Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam. Trade Policy Review Body, *Trade Policy Review: Report by the Secretariat: Japan*, WTO Doc. WT/TPR/S/351, at 24 (Jan. 18, 2017); see Severino, *supra* note 42, at 26–27; see also David Chin Soon Siong, *ASEAN's Journey towards Free Trade*, in *ECONOMIC DIPLOMACY: ESSAYS AND REFLECTIONS BY SINGAPORE'S NEGOTIATIONS* 209, 229–30 (C. L. Lim & Margaret Liang eds., 2011).

64. See ASEAN Charter, *supra* note 51, at art. 41, ¶ 7; *Rules of Procedure for Conclusion of International Agreements by ASEAN*, ASEAN Rule 1 (Nov. 11, 2011).

legal obligation.⁶⁵ 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.⁶⁶ China's trade strategy illustrates its changing international law practices. A desire to assert the legitimacy of the Chinese Communist Party motivated China's accession to the UN and the WTO. 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 galvanized the Xi Jinping administration to fill the political vacuum in the wake of US isolationism.⁶⁷

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.⁶⁸ 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-

65. E.g., *Indicative ASEAN Notional Calendar*, ASEAN 7 (Aug. 9, 2017). Technically speaking, the Charter only requires states to "coordinate and endeavor to develop common positions." ASEAN Charter, *supra* note 51, at art. 41, ¶ 4 (2007).

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

67. See Congyan Cai, *New Great Powers and International Law in the 21st Century*, 24 EUR. J. INT'L L. 755, 786-87 (2013) (explaining the transition from peaceful rise to peaceful development); Tyler Soper, *Full Text: China President Xi gives policy speech in Seattle, wants to fight cybercrime with the U.S.*, GEEKWIRE (Sept. 22, 2015), <https://www.geekwire.com/2015/full-text-china-president-xi-gives-policy-speech-in-seattle-pledges-to-fight-cybercrime-with-u-s/> [<https://perma.cc/6YYP-7HHD>](“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.”).

68. For China's share of RCEP GDP, see Paul Hubbard & Dhruv Sharma, *Understanding and Applying Long-term GDP Projections* 15 (East Asian Bureau Economic Research, EABER Working Paper Series No. 119, 2016), <http://saber.eaber.org/system/tdf/documents/EABER%20Working%20Paper%20119%20Hubbard%20Sharma.pdf?file=1&type=node&id=25601&force=> [<https://perma.cc/Q743-37UH>]; see also Jianmin Jin, *RCEP v. TPP*, FUJITSU RES. INST. (Feb. 22, 2013), <http://www.fujitsu.com/jp/group/fri/en/column/message/2013/2013-02-22.html> [<https://perma.cc/S3MS-P6MA>].

level liberalization in the Shanghai Pilot Free Trade Zone.⁶⁹ 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.⁷⁰

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 economy "shall expire 15 years after the date of accession."⁷¹ 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.⁷² 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.⁷³

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.⁷⁴ In response, Beijing filed concurrent WTO complaints against Washington and Brussels.⁷⁵ 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 demonstrates that the Chinese economy alone could gain \$88 billion if the TPP failed and the RCEP were passed, and this

69. See Ming Du, *Explaining China's Tripartite Strategy Toward the Trans-Pacific Partnership Agreement*, 18 J. INT'L ECON. L. 407, 414-30 (2015); see also Rajah & Tann, *Rajah & Tann Regional Round-up, Issue 2 - Apr/May/June 2017*, EOASIS, <http://eoasis.rajahtann.com/eoasis/gn/rn2.asp?n=17&c=2#A1> [<https://perma.cc/2TM9-VPA7>] ("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.") (last visited Nov. 5, 2018).

70. See Suisheng Zhao, *A Revisionist Stakeholder: China and the Post-World War II World Order*, 27 J. CONTEMP. CHINA 643, 650 (2018).

71. World Trade Organization, *Accession of the People's Republic of China*, WTO Doc. WT/L/432 (Nov. 23, 2001), at 9.

72. See 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, MINISTRY COM. CHINA (Dec. 13, 2016), <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201612/20161202192355.shtml> [<https://perma.cc/URE8-T3TU>].

73. See 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, ASEAN-China, art. 14, Nov. 29, 2004.

74. See Shawn Donnan et. al., *China Challenges EU and US over Market Economy Status*, FIN. TIMES (Dec. 12, 2016), <https://www.ft.com/content/6af8da62-bf5d-11e6-9bca-2b93a6856354?mhq5j=E1> [<https://perma.cc/CCB8-EXG8>].

75. Request for Consultation by China, *United States-Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/1 (Dec. 15, 2016); Request for Consultation by China, *European Union-Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/1 (Dec. 15, 2016).

amount is \$16 billion more than the scenario where both mega-regionals came into effect.⁷⁶ The RCEP is a key instrument to implement China's 13th Five-Year Plan, in which the National People's Congress first placed the "One Belt, One Road" initiative as a national priority in 2016.⁷⁷ 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.⁷⁸ 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.⁷⁹ 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.⁸⁰

76. See U.S.-CHINA ECON. AND SECURITY REV. COMM'N, 114TH CONG., 2016 REPORT at 24 (2nd sess. 2016). See also RONGLIN LI & YANG HU, RCEP, TPP AND CHINA'S FTA STRATEGIES 9, http://www.ipekpp.com/admin/upload_files/Report_3_54_RCEP,_6192294083.pdf [https://perma.cc/953H-QGLM] (last visited Nov. 5, 2018).

77. 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. Tian Shaohui, *Chronology of China's Belt and Road Initiative*, XINHUANET (Mar. 28, 2015), http://news.xinhuanet.com/english/2015-03/28/c_134105435.htm [https://perma.cc/P6L4-GTEZ]. See KATHERINE KOLESKI, THE 13TH FIVE-YEAR PLAN, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, 3, 23 (2017), available at https://www.uscc.gov/sites/default/files/Research/The%2013th%20Five-Year%20Plan_Final_2.14.17_Updated%20%28002%29.pdf [https://perma.cc/FC38-3ULR] (indicating the goal of the initiative is to "export China's enormous excess industrial capacity and strengthen debt-laden SOEs' international competitiveness").

78. See e.g., STATE COUNCIL CHINA, *Full Text: Action Plan on the Belt and Road Initiative* (Mar. 30, 2015), http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm [https://perma.cc/C2SG-PMF8]. China and Hong Kong-based academics have attempted to link OBOR to business, investment and tax laws. See e.g. Chao Xi, *Legal and Regulatory Risks of "Belt and Road" Countries: An Index-Based Approach*, in LEGAL DIMENSIONS OF CHINA'S BELT AND ROAD INITIATIVE 33, 33-52 (Lutz-Christian Wolff & Chao Xi eds., 2016).

79. See 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> [https://perma.cc/QCS8-LPTQ]; 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.straittimes.com/asia/east-asia/chinese-president-xi-jinpings-belt-and-road-forum-yields-deals-with-68-countries-and> [https://perma.cc/5TBA-XQBQ]; *The Belt and Road Initiative: Country Profiles*, HONG KONG TRADE DEVELOPMENT COUNCIL (HKTDIC) RES., <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative-Country-Profiles/obor/en/1/1X000000/1X0A3610.htm> [https://perma.cc/5MDS-EFMJ] (last visited Nov. 5, 2018).

80. See generally Lee Hyuntai, Kim Junyoung & Oh Yunmi, *Evaluation of Recent Development of the AIIB: The 2nd Annual Meeting of the AIIB Held in Korea and its Implications*, 7 WORLD ECON. BRIEF 1, 1 (2017); *Members and Prospective Members of the Bank,*

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.⁸¹ Four of China's FTAs encompass 13 RCEP members.⁸² 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 2009.⁸³ 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.⁸⁴ Moreover, instead of joining the ASEAN-China FTA, Hong Kong concluded a free-standing FTA with ASEAN in November 2017.⁸⁵ The ASEAN-Hong Kong FTA, the amended ASEAN-China FTA, and China's recent FTAs with Australia and South 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.⁸⁶ In the 1990s, the bipartisan consensus among ASEAN nations formulated the Look East Policy in order to forge the neglected economic link to East Asia

ASIAN INFRASTRUCTURE INVESTMENT BANK, <https://www.aiib.org/en/about-aiib/governance/members-of-bank/> (last visited Nov. 5, 2018). See also Min Ye, *China and Competing Cooperation in Asia-Pacific: TPP, RCEP, and the New Silk Road*, 11 *ASIAN SECURITY* 206, 212 (2015) ("China has promoted AIIB . . . to fund infrastructure projects in countries along the new Silk Road.").

81. See *China Moves to Expedite Implementation of Free Trade Zone Strategy*, HONG KONG TRADE DEVELOPMENT COUNCIL (HKTDC) RES. (Dec. 31, 2015), <https://hkmb.hktdc.com/en/1X0A4R4N/hktdc-research/China-Moves-to-Expedite-Implementation-of-Free-Trade-Zone-Strategy> [<https://perma.cc/NL2M-GGPR>].

82. The four FTAs are China's FTAs with ASEAN, Australia, South Korea and Singapore. See *China's Free Trade Agreement*, CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/english/> [<https://perma.cc/8LRV-5KD9>] (last visited Nov. 5, 2018).

83. See *ASEAN–China Free Trade Agreements*, ASEAN, http://asean.org/?static_post=Asean-china-free-trade-area-2 [<https://perma.cc/WBM6-PB98>] (last visited Nov. 5, 2018). See also *Free Trade Agreements with Dialogue Partners*, ASEAN, <https://asean.org/asean-economic-community/free-trade-agreements-with-dialogue-partners/#f8aa8ce43f07eaf96> [<https://perma.cc/9FGT-LV4B>] (last visited Nov. 5, 2018).

84. See *id.*; see 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, ASEAN-China, art. 23, Jan. 14, 2007 [hereinafter ASEAN-China Agreement]; 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).

85. See AEC BLUEPRINT 2025, *supra* note 53, at 35; ASEAN, *ASEAN Economic Community 2025 Consolidated Strategic Action Plan* (Feb. 6, 2017), at 47, available at <http://asean.org/asean-updates-acc-2025-consolidated-strategic-action-plan-csap/> [<https://perma.cc/Y32J-BTSC>] [hereinafter AEC 2025 CSAP]; see ASEAN-Hong Kong Statement, *supra* note 59, at 1.

86. See Acharya, *supra* note 19, at 5–7; Affanul Haque, *Jawaharlal Nehru—The architect of India's foreign policy*, *TIMES OF INDIA* (May 20, 2017), <https://timesofindia.india-times.com/india/jawaharlal-nehru-the-architect-of-indias-foreign-policy/articleshow/58767014.cms> [<https://perma.cc/XBF4-XNYX>].

and counteract the rise of China.⁸⁷ This post-Cold War strategy substantiated the ASEAN-India Framework Agreement and bilateral FTAs with three ASEAN countries, Japan and Korea.⁸⁸ 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.⁸⁹ Economic data evidence India's *de facto* isolation from ASEAN. China and South Korea constitute 15.2% and 5.4% of ASEAN's total trade, respectively, but India accounts for merely 2.6%.⁹⁰ While ASEAN primarily trades electrical devices with Asia-Pacific countries, ASEAN-India trade predominantly involves raw materials, such as dairy and mineral products.⁹¹

In Third Regionalism, India's most compelling move is Prime Minister Narendra Modi's "Act East Policy," which was declared in Myanmar in 2014.⁹² 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 by making the nation a manufacturing and services hub.⁹³ 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 Global South. Given China's economic slowdown, India's astonishing 7% GDP growth rate, and infrastructure needs will yield additional trade gains.⁹⁴ The jeopardy arises from Sino-Indian clashes that range from bor-

87. See 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 Rahul Sen & Mukul Asher eds., 2005); SEVERINO, *supra* note 49, at 290-93.

88. See V.S. Seshadri, *Evolution in India's Regional Trading Arrangement*, 43 J. WORLD TRADE 903, 908-09 (2009). For a current comprehensive listing of India's WTO notified in force and announced RTAs, see <http://rtais.wto.org/UI/PublicSearchByMember-Result.aspx?MemberCode=356&lang=1&redirect=1> [<https://perma.cc/H59M-242S>].

89. See Das et. al., *supra* note 7, at 262; Sally, *supra* note 84, at 355.

90. See ASEAN, ASEAN COMMUNITY IN FIGURES: ACIF 15 (2016), available at <https://asean.org/storage/2012/05/25Content-ACIF.pdf> [<https://perma.cc/26PJ-ZDCT>].

91. See *id.* at 24-31.

92. See generally Prashanth Parameswaran, *Modi Unveils India's 'Act East Policy' to ASEAN in Myanmar*, THE DIPLOMAT (Nov. 17, 2014), <http://thediplomat.com/2014/11/modi-unveils-indias-act-east-policy-to-asean-in-myanmar/> [<https://perma.cc/99CF-WFZG>].

93. See generally *id.*; see Sara Itagaki, *Understanding India's Evolving Role in Asia through an ASEAN Prism: Interview with Michael Kugelman*, NAT'L BUREAU OF ASIAN RES. (Dec. 15, 2016), <https://www.nbr.org/publication/understanding-indias-evolving-role-in-asia-through-an-asean-prism/> [<https://perma.cc/6AHV-CQNK>].

94. See ASIAN DEVELOPMENT BANK, ASIAN DEVELOPMENT OUTLOOK 2017 HIGHLIGHTS: TRANSCENDING THE MIDDLE INCOME CHALLENGE xv (2017), available at <https://>

der 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.⁹⁵ Markedly, India did not join the Beijing-led OBOR.⁹⁶ The Modi-Abe alliance created the Asia-Africa Growth Corridor that resembles OBOR by focusing on infrastructure projects and capacity building.⁹⁷ Such interstate dynamics inevitably influence the RCEP's progress.

India's conservative stance on trade liberalization has led Beijing to accuse New Delhi of "selfishly" obstructing RCEP negotiations and has prompted ASEAN states to consider the "ASEAN Minus X" formula.⁹⁸ 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.⁹⁹ The ASEAN-India services and investment agreements were only concluded in 2014, 11 years after inking the framework agreement.¹⁰⁰ The prolonged process reflects India's irreconcilable protectionist politics.

On the WTO front, India applies MFN tariff rates of up to 150% to support its domestic agriculture.¹⁰¹ In the ASEAN-India FTA, Indian agri-

www.adb.org/sites/default/files/publication/237761/ado-2017-highlights.pdf [https://perma.cc/746E-6FCE].

95. See 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*, THE HINDU (July 4, 2017), <http://www.thehindu.com/news/national/vietnam-asks-india-to-play-security-role-in-south-china-sea/article19210720.ece> [https://perma.cc/ZS4T-3K49].

96. See generally 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/> [https://perma.cc/8RB9-LJGX].

97. See *id.*; HARDEEP S. PURI ET AL., ASIA AFRICA GROWTH CORRIDOR: PARTNERSHIP FOR SUSTAINABLE AND INNOVATIVE DEVELOPMENT: A VISION STATEMENT 3-6 (2017), available at <http://www.eria.org/Asia-Africa-Growth-Corridor-Documents.pdf> [https://perma.cc/RE7H-EM6W].

98. *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> [https://perma.cc/75DV-HFBT]. The ASEAN-X formula, which had been discussed on a limited scale at RCEP meetings, was proposed by the Philippines, the ASEAN Chair in 2017. See Pambago, *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/> [https://perma.cc/ZH8Q-JWBP].

99. 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> [https://perma.cc/2QRC-48R4].

100. Dezan Shira, *India's Free Trade Agreements*, INDIA BRIEFING (Aug. 23, 2018), <https://www.india-briefing.com/news/indias-free-trade-agreements-4810.html/> [https://perma.cc/D9RC-ND8C].

101. Report by the Secretariat, *Trade Policy Review: India*, WTO Doc. WT/TPR/S/313 (Apr. 28, 2015), at 99-100.

cultural projects are mostly immune to liberalization because they are either excluded or scheduled under the sensitive track.¹⁰² 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).¹⁰³ 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.¹⁰⁴ 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 South Korea’s proposals that intend to “TPP-nize” the RCEP standards.¹⁰⁵ A key example 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).¹⁰⁶ 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.¹⁰⁷ Data exclusivity would give a monopoly to developed nations’ corporations and significantly undermine the granting

102. See Sally, *supra* note 84, at 356-57 (analyzing the tariff elimination under the ASEAN-India Framework Agreement and the Trade in Goods Agreements).

103. See e.g., Special Session of the Council for Trade in Services, Communication from India: Proposed Liberalisation of Movement of Professionals Under General Agreement on Trade in Services (GATS), WTO Doc. S/CSS/W/12 (Nov. 24, 2000); Special Session of the Council for Trade in Services, Communication from Brazil, Colombia, 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, WTO Doc. TN/S/W/23 (Sept. 29, 2004).

104. See 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> [<https://perma.cc/62F6-GYYT>]; see also Blake Harley Berger, *India, ASEAN, and RCEP: The Challenges of Negotiating a Services Pact*, CTR. ON ASIA & GLOBALIZATION, CHINA-INDIA BRIEF No. 71 (Mar. 8, 2016), <https://lkyspp.nus.edu.sg/cag/publications/details/china-india-brief-71> [<https://perma.cc/DC8Z-XHXE>] (“[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.”).

105. For the summary of Japan’s and South Korea’s requests for the RCEP intellectual property provisions, see Belinda Townsend et. al., *The Regional Comprehensive Economic Partnership, Intellectual Property Protection, and Access to Medicines*, 28 ASIA PAC. J. PUB. HEALTH 682, 684 (2016).

106. See Trans-Pacific Partnership, Feb. 4, 2016, OFF. U.S. TRADE REPRESENTATIVE, art. 18.50(1), available <https://ustr.gov/sites/default/files/TPP-Final-Text-Intellectual-Property.pdf> [<https://perma.cc/7SCY-9UGY>] [hereinafter TPP]; Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 39(3), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994); for list of suspended provisions, see TPP Statement, *supra* note 9.

107. See Ellen R. Shaffer & Joseph E. Brenner, *A Trade Agreement’s Impact on Access to Generic Drugs*, 28 HEALTH AFFAIRS w957, w959 (2009).

of compulsory licenses for handling public health crises, including India's tuberculosis epidemic.¹⁰⁸ The RCEP's draft investment chapter that incorporates IP rights in the definition of investments eligible for ISDS further fortifies India's resistance.¹⁰⁹ These issues illustrate India's legal considerations that may compromise RCEP commitments.

II. 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 improve five ASEAN+1 FTAs, and it will not "detract from" commitments under existing FTAs.¹¹⁰ This approach poses challenges to eliminating 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.¹¹¹ As RCEP members accepted India's request for adopting the single-undertaking approach,¹¹² the degree of policy space accorded to LDCs will be a critical trade-off for partners to reach consensus.

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.¹¹³ 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 2018.¹¹⁴ The increase from 60 to approxi-

108. See *Data Exclusivity in International Trade Agreements: What Consequences for Access to Medicines?*, MSF Technical Brief (May 2004), available at <https://www.citizen.org/sites/default/files/dataexclusivitymay04.pdf> [<https://perma.cc/XMR6-6QGC>]; 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/> [<https://perma.cc/3D2E-PLKB>].

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

110. Guiding Principles, *supra* note 46, at princ. 2 & 5.

111. *Id.* at princ. 4.

112. See Sen, *supra* note 99.

113. See Joint Media Statement, The Third Regional Comprehensive Economic Partnership (RCEP) Intersessional Ministerial Meeting (May 2017), available at <https://asean.org/wp-content/uploads/2017/05/RCEP-3ISSL-MM-JMS-FINAL-22052017.pdf> [<https://perma.cc/UW2N-HVKA>].

114. See Sylvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN*

mately 732 negotiators from 16 countries illustrates the complexity of the RCEP talks.¹¹⁵ The insertion of ongoing negotiation of the China-Japan-South Korea FTA into RCEP negotiations made the dynamics more intricate.¹¹⁶ Equally significant, certain governments' limited capacity has hindered officials from negotiating ROOs and trade facilitation in parallel working group meetings.¹¹⁷ Another hindrance is that political issues, which cause conflicts between trade liberalization and constitutional constraints, can only be handled at the ministerial level.¹¹⁸

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.¹¹⁹ A comparison of five external FTAs readily demonstrates that the AANZFTA is the most liberalized FTA, achieving an average tariff elimination coverage of 95.7%.¹²⁰ The result is by no means a surprise, given the developed nation status of Australia and New Zealand and their progressive FTA trajectories.

In contrast, India's conservative posture made the ASEAN-India the

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 60, at 107-08 (explaining the ASEAN+1 and ASEAN++ frameworks).

115. See IMAN PAMBAGYO, RCEP: PROGRESS, CHALLENGES & OUTLOOK 6 (Mar. 22, 2017), available at <https://www.iseas.edu.sg/images/centres/asc/pdf/RCEP1man.pdf> [<https://perma.cc/K468-J7HS>] [hereinafter RCEP Slides]; *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> [<https://perma.cc/D92P-9H8C>]. See also Yonhap, *Trade ministers in Asia-Pacific to gather for RCEP talks*, KOREA HERALD (Oct. 23, 2017), <http://www.koreaherald.com/view.php?ud=20171023000550> [<https://perma.cc/U3JU-DX55>].

116. See RCEP Slides, *supra* note 115, at 11.

117. See *id.* at 7 (observing that "same officials in charge of 2 or more WGs/SWGs (i.e., ROO & CPTF)").

118. 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.

119. See Guiding Principles, *supra* note 46, at 2.

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

lowest-level FTA, with 79.6% coverage.¹²¹ Under the ASEAN-India FTA, the average coverage of ASEAN states exceeds 90%, but Indonesia's tariff liberalization is merely 48.7%.¹²² The AEC's most noteworthy achievement is ASEAN-6 countries' elimination of 99.7% of tariff lines while CLMV countries' aim to achieve phasing in the remaining duties for sensitive products by 2018.¹²³ 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 South Korea with ASEAN countries, agricultural trade liberalization is key to the RCEP.¹²⁴ The AANZFTA provides the best practices because it eliminated tariffs on substantial agricultural products when the agreement took effect.¹²⁵ To be a comprehensive FTA, the RCEP's breakthrough in agriculture relies upon two key factors: 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,¹²⁶ exemplify critical trade-offs for the RCEP. In terms of market access, Japan keep its TPP commitment to raise its quota for Australian rice by linking it to the export of Japanese vehicles.¹²⁷ In 2016, India proposed a three-tiered tariff approach that grants RCEP countries 42.5% to 80% tariff cuts, depending

121. *Id.*

122. *Id.*; see also 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).

123. See AEC BLUEPRINT 2015, *supra* note 53, at 7; AEC 2025 CSAP, *supra* note 85, at 2; see also ASEAN Trade in Goods Agreement, INVEST IN ASEAN, <http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/872/asean-trade-in-goods-agreement.html> [<https://perma.cc/3ET6-SAQF>] (last visited Nov. 5, 2018) ("Cambodia, Lao PDR, Myanmar, and Viet Nam have reduced their import duties to 0-5 percent on 98.86 percent of their tariff lines.").

124. See Timothy E. Josling, *Agriculture*, in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 171, 194 (Simon Lester, Bryan Mercurio & Lorand Bartels eds., 2015) (explaining Japan's FTA with Thailand and the Philippines and South Korea's FTA with Thailand).

125. Tariff eliminations take place from 2010 to 2020. See Masahiro Kawai & Ganeshan Wignaraja, *Asian FTAs: Trends, Prospects, and Challenges* 16 (Asian Dev. Bank, ADB Economics Working Paper Series No. 226, 2010), <https://www.adb.org/sites/default/files/publication/28273/economics-wp226.pdf> [<https://perma.cc/664P-ANLW>]; OECD, *OECD REVIEW OF AGRICULTURAL POLICIES: INDONESIA* 192 (2012).

126. Urata, *supra* note 40, at 14. 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* 10 (Asian Dev. Bank Inst., ADBI Working Paper Series No. 695, 2017), <https://www.adb.org/sites/default/files/publication/234081/adbi-wp695.pdf> [<https://perma.cc/4XQ7-AWGP>].

127. See *TPP-11 outcomes at a Glance*, DEP'T FOREIGN AFF. & TRADE (AUSTL.), <https://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/outcomes-documents/Documents/tpp-11-outcomes-at-a-glance.pdf> [<https://perma.cc/3VJ4-2PUJ>] (last visited Oct. 9, 2018).

on three different categories.¹²⁸ India's motivation was their defensive position on agriculture and the significant \$52.7 billion dollar trade deficit with China.¹²⁹ New Delhi subsequently dropped the proposal due to RCEP members' objections and India's reassessed gains in services and investment under the pact.¹³⁰

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%.¹³¹ 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,¹³² nullified the legal efforts for preferential tariff treatment. The most used ASEAN FTAs are the ATIGA in exports and the ASEAN-China FTA in imports, with utilization rates of only slightly above 30%.¹³³ Conventional answers to this problem are the limited access to FTA information, low preference margins compared with MFN tariffs, and complex ROOs.¹³⁴ An oft-neglected factor is the expanded commitments of the Information Technology Agreement, a plurilateral WTO agreement that eliminates tariffs on IT products.¹³⁵ As 11 RCEP partners are parties to the Agreement, zero tariff treatment for

128. Asit Ranjan Mishra, *India's New Stance at RCEP May Benefit China*, LIVESMINT (Aug. 9, 2016), <http://www.livemint.com/Politics/qGEPZqVoHO4U4YYvfBgCNP/Indias-new-stance-at-RCEP-may-benefit-China.html> [<https://perma.cc/S5BQ-RTM4>] (“[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”).

129. See *id.*; Kavaljit Singh, *India Changes Tack on RCEP Negotiations*, BILATERALS.ORG (Oct. 31, 2016), <http://www.bilaterals.org/?india-changes-tack-on-rcep> [<https://perma.cc/SS78-QK35>].

130. See Singh, *supra* note 129.

131. JAIME DE MELO, *DEVELOPING COUNTRIES IN THE WORLD ECONOMY* 280 (2015); see MASAHIRO KAWAI & GANESHAN WIGNARAJA, *Main Findings and Policy Implications*, in *ASIA'S FREE TRADE AGREEMENTS: HOW IS BUSINESS RESPONDING?* 33, 34 (2011). See also ECONOMIST INTELLIGENCE UNIT, *FTAs IN SOUTH-EAST ASIA: TOWARDS THE NEXT GENERATION* 5-6 (2014) (indicating that the average utilization rate of FTAs concluded by four selected ASEAN countries is 26%).

132. Lili Yan Ing, Shujiro Urata & Yoshifumi Fukunaga, *How Do Exports and Imports Affect the Use of Free Trade Agreements? Firm-level Survey Evidence from Southeast Asia* 7 (European Res. Inst. for ASEAN, ERIA Discussion Paper Series, 2016), <http://www.eria.org/ERIA-DP-2016-01.pdf> [<https://perma.cc/W49P-AXGL>].

133. *Id.* The usage of the ATIGA is presumably undermined by the uneven utilization by ASEAN states. See Lili Yan Ing & Olivier Cadot, *Facilitating ASEAN Trade in Goods* 11 (European Res. Inst. for ASEAN, ERIA Discussion Paper Series, 2016), <http://www.eria.org/ERIA-DP-2016-20.pdf> [<https://perma.cc/L25X-NHK6>].

134. See ECONOMIST INTELLIGENCE UNIT, *supra* note 131, at 7-8, 14; KAWAI & WIGNARAJA, *supra* note 129, at 39-40.

135. One example is Philippine firms, see Ganeshan Wignaraja, Dorothea Lazaro & Genevieve DeGuzman, *FTAs and Philippine Business: Evidence from Transport, Food, and Electronics Firms* 4, 16-18 (Asian Dev. Bank Inst., ADBI Working Paper Series No. 185, 2010), <https://www.econstor.eu/bitstream/10419/53566/1/618027203.pdf> [<https://perma.cc/7GDA-LNYC>].

electronic devices renders the use of FTAs redundant.¹³⁶

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 2025,¹³⁷ the RCEP should consolidate the best practices of regional ROOs. Change in Tariff Classification (CTC) and Regional Value Content (RVC) are the most common ROOs in ASEAN FTAs.¹³⁸ 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.¹³⁹

Failure to meet the ROOs would disqualify exporters from receiving the certificate of origin for FTA preferences.¹⁴⁰ 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.¹⁴¹ The ASEAN-India FTA is now the sole exception to the rule after the 2015 protocol to the ASEAN-China FTA, which relaxed its ROO requirement to a CVC or RVC of 40%.¹⁴² In terms of the certificates of origin, all of the five ASEAN+1 FTAs have permitted third-country invoicing and movement certificates, so that exporters can manage foreign exchange risks and logistics operations.¹⁴³

136. See *Information Technology: Schedules of Concessions*, WTO, https://www.wto.org/english/tratop_e/intfec_e/itscheds_e.htm [<https://perma.cc/K4WV-XHSL>] (last visited Nov. 5, 2018).

137. See AEC BLUEPRINT 2025, *supra* note 53, at 3; AEC 2025 CSAP, *supra* note 85, at 3.

138. See Das et. al., *supra* note 7, at 267; INAMA & SIM, *supra* note 53, at 41-44 (providing a list of rules of origin in ASEAN FTAs); Fukunaga & Isono, *supra* note 6, at 12.

139. See Jong Bum Kim, *The Evolution of Preferential Rules of Origin in ASEAN RTAs: A Guide to Multilateral Harmonization*, 46 J. WORLD TRADE 1343, 1358-59 (2012); INAMA & SIM, *supra* note 54, at xvi-xvii.

140. See generally *Rules of Origin and Why They Matter*, EXPORT.GOV (Oct. 20, 2016), <https://www.export.gov/article?id=Rules-of-Origin-and-Why-they-Matter> [<https://perma.cc/EA58-U57D>].

141. The ATIGA's rules of origin (ROO) are based on the rules of the 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. See Joint Media Statement, The 17th Asian Free Trade Area (AFTA) Council ¶¶ 11-12 (Sept. 2013), available at https://asean.org/?static_post=the-seventeenth-meeting-of-the-asean-free-trade-area-afta-council-1-september-2003-phnom-penh-cambodia [<https://perma.cc/9YUP-ZDD7>]; INAMA & SIM, *supra* note 54, at 27.

142. *A Guide to Understanding the ASEAN-China Free Trade Area Upgrade*, Ministry Trade & Industry (Sing.) (Sept. 2016), <https://www.mti.gov.sg/-/media/MTI/Legislation/Public-Consultations/2016/Guide-to-the-upgraded-ASEAN-China-Free-Trade-Area-ACFTA/a-guide-to-understanding-the-acfta-upgrade-final.pdf> [<https://perma.cc/P7KQ-KKAU>]; see also Kim, *supra* note 138, at 1361 (explaining the restrictiveness of the "RVC 35% and CTSH" rule under the ASEAN-India FTA).

143. See Kohei Shino, *How Far Will Hong Kong's Accession to ACFTA Impact its Trade in Goods* 12-19 (European Inst. Res. of ASEAN, ERIA Discussion Paper Series, 2013) available at <http://www.eria.org/ERIA-DP-2013-04.pdf> [<https://perma.cc/XRA2-AKSP>] (providing the various certificates of origin in ASEAN FTAs); 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).

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.¹⁴⁴ The ROOs of the AANZFTA, the ATIGA, and the ASEAN-China FTA apply a RVC of 40% for automotive parts and vehicles.¹⁴⁵ 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 AANZFTA's 'cumulative provision' creates a legal obstacle because it does not recognize the value of the cars' Chinese components for the RVC calculation.¹⁴⁶ In other words, the lack of a link 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

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%.¹⁴⁷ To implement the RCEP countries' commitments to the UN Sustainable Development Goals, trade in services is essential so as to develop policy that eradicates poverty and increases employment.¹⁴⁸ Modernizing services will enable RCEP members, such as

144. See 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> [<https://perma.cc/8VA8-5FXB>] (providing SAIC Motor's business plan as an example).

145. Erlinda M. Medalla & M. Supperamaniam, *Suggested Rules of Origin Regime for EAFTA 15* (Philippine Inst. for Dev. Studies, Discussion Paper Series No. 2008-22, 2009); see generally Annex 2 (Product Specific Rules), as Amended by the First Protocol, Agreement Establishing the ASEAN-Australia-New Zealand FTA (AANZFTA) 590-91, DEP'T OF FOREIGN AFF. & TRADE (Austl.), <https://dfat.gov.au/trade/agreements/in-force/aanzfta/official-documents/Documents/annex-2-product-specific-rules-first-protocol.pdf> [<https://perma.cc/U6J4-HTNT>].

146. See Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area ch. 3, art. 6, Feb. 27, 2009, [2010] N.Z.T.S. 1 [hereinafter AANZFTA]. See also Baldwin & Kawai, *supra* note 38, at 18 (listing cumulative provisions in other ASEAN+1 FTAs). 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. See INAMA & SIM, *supra* note 54, at 22-23. See also Report by Secretariat, *Trade Policy Review: Singapore*, WTO Doc. 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).

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

148. The Sustainable Development Goals that took effect in 2016 were built upon Millennium Development Goals that governed the development agenda from 2000 to

Malaysia and Thailand, to escape from the “middle income trap” that stag-nates the economy due to the eroding labor-intensive advantage.¹⁴⁹ In developing countries and LDCs, foreign direct investments (FDIs) are increasingly associated with service providers that help buttress the welfare of the poor through job creation.¹⁵⁰ Labor mobility results in remittances, which also benefit the Global South’s development.

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.¹⁵¹ Based on “the GATS and ASEAN+1 FTAs,” the RCEP’s target is to “substantially eliminate” barriers to services trade.¹⁵² To ensure ASEAN centrality, the RCEP should take evolving AFAS commitments into account. The AFAS’s “package” structure is similarly incorporated in ASEAN’s respective FTAs with China and South Korea.¹⁵³ ASEAN+1 FTAs, except for the ASEAN-Japan FTA, cover services commitments.¹⁵⁴ 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.¹⁵⁵

Contrary to the conventional understanding that ASEAN states committed the most in the comprehensive AANZFTA, for the first time intra-ASEAN commitments in the seventh package of AFAS commitments exceeded those under the AANZFTA.¹⁵⁶ Moreover, although the low

2015. See President of the General Assembly, *Draft Outcome Document of the United Nations Summit for the Adoption of the Post-2015 Development Agenda 3-27*, U.N. Doc. A/69/L.85 (Aug. 12, 2015).

149. See Kenichi Ohno, *The Middle Income Trap: Implications for Industrialization Strategies in East Asia and Africa* 93-112 (GRIPS Dev. F., Policy Discussion Papers, 2008); Tran Van Tho, *The Middle-Income Trap: Issues for Members of the Association of Southeast Asian Nations* 22-29 (Asian Dev. Bank Inst., ADBI Working Paper Series No. 421, 2013), <https://www.adb.org/sites/default/files/publication/156275/adbi-wp421.pdf> [https://perma.cc/P7QN-RP3Y].

150. See, e.g., Background Note by Secretariat, *Council for Trade in Services: Mode 3 - Commercial Presence*, WTO Doc. S/C/W/314 (Apr. 7, 2010), at ¶ 24 (“[S]ervices accounted for 65 per cent of developing economies’ inward FDI stock and for 86 per cent of their outward FDI . . .”) [hereinafter *Mode 3*].

151. See Sherry Stephenson, Alexandros Ragoussis & Jimena Sotelo, *Implications of the Trade in Services Agreement (TiSA) for Developing Countries* 33 (German Dev. Inst., DIE Discussion Paper, 2016), https://www.die-gdi.de/uploads/media/DP_10.2016.pdf [https://perma.cc/AB9D-56JS].

152. Guiding Principles, *supra* note 46, at sec. II.

153. See ASEAN-China Agreement, *supra* note 84, at 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, ASEAN-S. Kor., arts. 24 & 26, Nov. 21, 2007.

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

155. For the analysis of services commitments made by India and ASEAN states, see Report by Secretariat, *Trade Policy Review Body: Factual Presentation: Agreement on Trade in Services between India and the Association of Southeast Asian Nations (Services)*, ASEAN-India, WTO Doc. WT/REG372/1 (Aug. 22, 2016), at arts. 3.22-3.5 [hereinafter *WT/REG372/1*].

156. See Fukunaga & Isono, *supra* note 6, at 16. Although ASEAN states concluded the ninth package of commitments under the ASEAN Framework Agreement on Services

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.¹⁵⁷ These developments exhibit that AFAS commitments should form the benchmark for the RCEP. The package structure could also prevent a repeat of 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.¹⁵⁸ While the positive list modality allows FTA partners to retain regulatory sovereignty to schedule services commitments, the more aggressive negative list approach will enhance transparency and cover newly developed services.¹⁵⁹ Remarkably, the China-South Korea FTA signals China’s first use of the negative list approach and indicates its changing position in services commitments.¹⁶⁰ In the bilateral FTA, China and Australia scheduled their commitments on positive and negative lists, respectively.¹⁶¹ However, Beijing agreed to follow the negative list modality in the subsequent round of negotiations.¹⁶²

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.¹⁶³ 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” compo-

(AFAS), the most current AFAS data are based on the eighth package of commitments. See RCEP Slides, *supra* note 115, at 10; Hikari Ishido, *Harmonization of Trade in Services by APEC Members* 8–16 (Inst. of Developing Countries, IDE Discussion Paper No. 410, 2013).

157. See Yoshifumi Fukunaga & Hikari Ishido, *Assessing the Progress of Services Liberalization in the ASEAN-China Free Trade Area (ACFTA)* 3 (European Res. Inst. of ASEAN, ERIA Discussion Paper Series, 2013), <http://www.eria.org/ERIA-DP-2013-07.pdf> [<https://perma.cc/PQ3R-TV37>]; RCEP Slides, *supra* note 115, at 10.

158. See Martin Roy, Juan Marchetti & Hoe Lim, *Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?* 10–12 (WTO Econ. Res. and Stat. Division, Staff Working Paper, 2006), https://www.wto.org/english/res_e/reser_e/ersd200607_e.pdf [<https://perma.cc/T9KG-7KDC>].

159. See 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).

160. See Heng Wang, *The Challenges of China’s Recent FTA: An Anatomy of the China-Korea FTA*, 50 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.”).

161. See Report by Secretariat, *Committee on Regional Trade Agreements: Factual Presentation: Free Trade Agreement between Australia and China (Goods and Services)*, WTO Doc. WT/REG369/1/Rev.1 (Nov. 14, 2016), at 24.

162. See Free Trade Agreement between the Government of Australia and the Government of the People’s Republic of China, Austl.-China, art. 8.24(3), June 17, 2015 [hereinafter *Australia-China FTA*].

163. Malaysia-New Zealand Free Trade Agreement, Malay.-N.Z., art. 8.15(2), Oct. 26, 2009; Report by Secretariat, *Trade Policy Review*, WTO Doc. WT/TPR/S/292 (Jan. 27, 2014), at 32.

nents.¹⁶⁴ 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 the MFN-forward design, which requires a RCEP country to automatically extend any services concessions under its prospective bilateral agreements to other RCEP members.¹⁶⁵

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).¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ The RCEP’s external pressure to remove constitutional obstacles will similarly benefit ASEAN integration.

164. See Summary of Discussion, Ninth Meeting of the Regional Comprehensive Economic Partnership Working Group on Trade in Services (9th RCEP-WGTIS) 3 (Aug. 2015), available at https://www.bilaterals.org/IMG/pdf/services_discussion_summary_9th_round.pdf [hereinafter RCEP Services Chapter]; JANE KELSEY, REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP (RCEP) SERVICES CHAPTER: RISKS FOR DEVELOPING COUNTRIES’ AND LDCEs’ POLICY SPACE AND REGULATORY SOVEREIGNTY 2-7 (2016), available at <https://rceplegal.files.wordpress.com/2016/08/jk-memo-on-rcep-tis-final.pdf> [<https://perma.cc/DMS5-ATLE0>].

165. See RCEP Services Chapter, *supra* note 164, at 3-5; KELSEY, *supra* note 164, at 8-9.

166. GATS, General Agreement on Trade in Services, art. 1, ¶ 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

167. Mode 3, *supra* note 150, at 17; Background Note by Secretariat, *Council for Trade in Services: Presence of Natural Persons (Mode 4)*, WTO Doc. S/C/W/301 (Sept. 15, 2009), at 20-25; Ishido, *supra* note 155, at 24.

168. 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). For potential constitutional interpretations, see Stephen L. Magiera, *International Investment Agreements and Investor-State Disputes: A Review and Evaluation for Indonesia* 36 (European Res. Inst. of ASEAN, ERIA Discussion Paper Series, 2017), <http://www.eria.org/ERIA-DP-2016-30.pdf> [<https://perma.cc/ZW8M-MK3P>]; Ponciano S. Intal Jr., *AEC Blueprint Implementation Performance and Challenges: Investment Liberalization* 9, 17, (European Res. Inst. of ASEAN, ERIA Discussion Paper Series, 2015), <http://www.eria.org/ERIA-DP-2015-32.pdf> [<https://perma.cc/D7FP-E3AG>].

169. Report by Secretariat, *Trade Policy Review Body: The Philippines: Revision*, WTO Doc. WT/TPR/S/261/Rev.2 (May 9, 2012), at 95-96; see also 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.”).

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 Global South. Other than the poverty reduction effect of remittances, circular migration has brought back skills that modernize the economies of the original countries.¹⁷⁰ 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.¹⁷¹ This unfounded misconception has also caused global protectionism.

In terms of Mode 4, US FTAs turned drastically conservative after Singapore and Chile FTAs allocated additional quotas for work visas.¹⁷² Among ASEAN+1 FTAs, the AANZFTA is the only one that includes an MNP chapter.¹⁷³ Even the most recent ASEAN-India Services Agreement merely provides definitions of natural persons without substantive MNP provisions.¹⁷⁴ On the bilateral level, the most notable example is the movement of nurses and care workers under Japan's FTAs with four ASEAN states.¹⁷⁵ Nevertheless, limited sectors commitments as well as legal obstacles, such as qualification and language requirements, have impeded the intended results.¹⁷⁶

The RCEP negotiators have discussed the possibility of including a MNP chapter or annex.¹⁷⁷ The AEC's goal of facilitating the movement of "skilled" labor rather than all "natural persons"¹⁷⁸ could provide guidance for the mega-regional agreement. Under the AEC Blueprint 2025, the

170. See 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); Witada Anukoonwattaka & Adam Heal, U.N. ECON. & SOCIAL COMM'N FOR ASIA AND THE PACIFIC, *REGIONAL INTEGRATION AND LABOUR MOBILITY LINKING TRADE, MIGRATION AND DEVELOPMENT* 54-55 (2014), https://www.unescap.org/sites/default/files/publications/STE_SCAP2688_No81.pdf [<https://perma.cc/A7UC-DU7V>].

171. See ASEAN, *ASEAN INTEGRATION IN SERVICES* 32 (2015), [https://www.asean.org/storage/2015/12/ASEAN-Integration-in-Services-\(Dec%202015\).pdf](https://www.asean.org/storage/2015/12/ASEAN-Integration-in-Services-(Dec%202015).pdf) [<https://perma.cc/R5NF-U9AD>].

172. See 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).

173. See R.V. Anuradha, *Liberalization of Trade in Services under RCEP: Mapping the Key Issues*, 8 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 401, 409 (2013).

174. See WT/REG372/1, *supra* note 154, at 16.

175. 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. See Report by Secretariat, *Trade Policy Review Body: Japan*, WTO Doc. WT/TPR/S/351 (Jan. 18, 2017), at 125-27.

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

177. See also RCEP Services Chapter, *supra* note 162, at 6 (noting that "ASEAN has no consensus position on this issue yet" and "India had submitted a text for MNP" previously).

178. See AEC BLUEPRINT 2025, *supra* note 53, at 5; see also ASEAN Agreement on the Movement of Natural Persons, preamble (2012) [hereinafter ASEAN MNP Agreement].

ASEAN MNP Agreement and MRAs liberalize professional mobility.¹⁷⁹ 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."¹⁸⁰ In other words, the governments retain their regulatory power to maintain visa requirements for public purposes, provided that treaty benefits are not impaired.¹⁸¹

Furthermore, the implementation of ASEAN MRAs that cover eight professions provide valuable experiences.¹⁸² Compared with APEC and TPP's soft-law schemes, the ASEAN pacts on engineering and architecture services are most conspicuous.¹⁸³ 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.¹⁸⁴ Upon approval as an "ASEAN Chartered Professional Engineer," the engineer is qualified to apply to be a foreign engineer in another ASEAN country.¹⁸⁵

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.¹⁸⁶ ASEAN's experiences in Mode 4 liberalization and MRAs are integral to the RCEP, which aims to achieve "comprehensive" services com-

179. See AEC BLUEPRINT 2025, *supra* note 53, at 10; see also AEC 2025 CSAP, *supra* note 84, at 11-12.

180. ASEAN MNP Agreement, art. 2, ¶ 2, *supra* note 178.

181. *Id.* at art. 2, ¶ 3.

182. From 2005 to 2014, eight ASEAN mutual recognition arrangements (MRAs) were concluded and apply to engineering, nursing, architectural, dental, medical, tourism and accounting services. See DOVELYN RANNVEIG MENDOZA & GUNTUR SUGIYARTO, ASIAN DEV. BANK, THE LONG ROAD AHEAD: STATUS REPORT ON THE IMPLEMENTATION OF THE ASEAN MUTUAL RECOGNITION ARRANGEMENTS ON PROFESSIONAL SERVICES 1 (2017).

183. TPP, *supra* note 106, at art. 10.9 & annex 10-A; see DOVELYN RANNVEIG MENDOZA ET. AL., ASIAN DEV. BANK, REINVENTING MUTUAL RECOGNITION ARRANGEMENTS: LESSONS FROM INTERNATIONAL EXPERIENCES AND INSIGHTS FOR THE ASIAN REGION 34 (2017) (demonstrating that only five architects registered under the APEC framework); ASEAN, ASEAN INTEGRATION REPORT 2015 24 (2005) ("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.").

184. See ASEAN Mutual Recognition Arrangement on Engineering Services, art. 3 (2005).

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

186. 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. See ASEAN, ASEAN MUTUAL RECOGNITION ARRANGEMENT (MRA) ON TOURISM PROFESSIONALS: HANDBOOK 1, 18 (2013).

mitments.¹⁸⁷ 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.¹⁸⁸

C. Investor-State Dispute Settlement

Trade in goods, trade in services, and investment form the 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 2013.¹⁸⁹ Under the AEC Blueprint 2025, ASEAN will strengthen the ACIA-based investment regime to enhance its regional competitiveness.¹⁹⁰ As of 2017, ASEAN and other six countries agreed to expedite bilateral or plurilateral negotiations, including investment liberalization, on a request and offer basis.¹⁹¹

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.¹⁹² RCEP negotiations on investment "promotion, protection, facilitation and liberalization" are built upon the intra-ASEAN ACIA and external ASEAN FTAs.¹⁹³ Nevertheless, these instruments vary in substantive provisions on covered investments, MFN and national treatment, and compensation following expropriation.¹⁹⁴ The most contentious investment issue that may amount to a "deal breaker" are 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 crystallized the multilateral efforts to adjudicate investor-state disputes under the auspices of the World Bank.¹⁹⁵ However, four RCEP members (India, Laos,

187. See Guiding Principles, *supra* note 46, at 2.

188. See AEC BLUEPRINT 2025, *supra* note 53, 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.").

189. JUSTIN WOOD, ECONOMIST INTELLIGENCE UNIT, RE-DRAWING THE ASEAN MAP: HOW COMPANIES ARE CRAFTING NEW STRATEGIES IN SOUTH-EAST ASIA 4 (2014).

190. AEC BLUEPRINT 2025, *supra* note 53, at 7.

191. ASEAN Economic Ministers to Step up RCEP negotiations, WTOCENTER: VCCI: TRUNGTAMWTO (Sept. 11, 2017), <http://wtocenter.vn/other-agreement/asean-economic-ministers-step-rcep-negotiations>; see also RCEP Slides, *supra* note 115, at 12.

192. 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 167, at 27.

193. See Guiding Principles, *supra* note 46, at 2.

194. See Das et. al., *supra* note 7, at 271-72. See generally Luke Nottage, *The Investment Chapter and ISDS in the TPP: Lessons from Southeast Asia 15-17* (Yusof Ishak Inst., ISEAS:Economics Working Paper No. 2017-2, 2017), https://www.iseas.edu.sg/images/pdf/ISEAS_EWP_2017-02.pdf, [<https://perma.cc/TV2J-2A3R>].

195. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the ICSID Convention was ratified by 154 states. INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF

Myanmar and Vietnam) are not parties to the Convention.¹⁹⁶

In line with the universal trend, Asian BITs and FTAs often include ISDS provisions because they are perceived to incentivize investments.¹⁹⁷ The ACIA and ASEAN+1 FTAs follow the modality of the US Model BIT and the NAFTA, and go beyond earlier BITs by incorporating more detailed arbitration procedures than the ICSID Convention.¹⁹⁸ In reality, the “ASEAN way” and the fear of undermining relations with 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.¹⁹⁹ Here, 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.²⁰⁰

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 Asian-Pacific state respondents have doubled the number of those as claimants.²⁰¹ ISDS provisions have become the source of global protectionism and underpin public criticism against FTAs. They are perceived to be undemocratic for permitting foreign corporations to bypass domestic courts’ jurisdiction. ISDS provisions are 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

THE CONVENTION (AS OF AUG. 27, 2018), <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> [<https://perma.cc/6H2V-REH5>].

196. *Id.* at 1-5.

197. See ASIAN DEV. BANK, ASIAN ECONOMIC INTEGRATION REPORT 2016: WHAT DRIVES FOREIGN DIRECT INVESTMENT IN ASIA AND THE PACIFIC? 166 (2016) (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* 21-22 (Inst. for Int’l Law & Justice, IILJ Working Paper 2017/1 (MegReg Series), 2017), https://www.iilj.org/wp-content/uploads/2017/04/Howse_IILJ_2017_1-MegaReg.pdf [<https://perma.cc/KK5G-RT2L>]. Rare exceptions also exist in recent agreements, such as Australia’s FTAs with the United States and Japan, and the New Zealand-Taiwan FTA.

198. 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 ASIAN J. COMP. L. 1, 4-16 (2011); Amokura Kawharu & Luck Nottage, *Models for Investment Treaties in the Asian-Pacific Region: An Underview*, 34 ARIZ. J. INT’L & COMP. L. 461, 501-03 (2017).

199. *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1 (Mar. 31, 2003), 42 I.L.M. 540 (2003).

200. See *id.* at 540-41, 556-58. The dispute involves the interpretations of pre-ACIA investment agreements, such as the 1987 Agreement for the Promotion and Protection of Investments (IGA) and the 1998 Framework Agreement on the ASEAN Investment Area (AIA).

201. As of January 2017, there are 767 publicly known investor-state cases. U.N CONFERENCE ON TRADE AND DEV. (UNCTAD), INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2016 1-2(2017) [hereinafter ISDS review]; CARLOS KURIYAMA, APEC POLICY SUPPORT UNIT, TRENDS AND DEVELOPMENT IN PROVISIONS AND OUTCOMES OF RTA/FTAs IMPLEMENTED IN 2015 BY APEC ECONOMIES 30 (2016).

resulted in the tobacco carve-out clause of the TPP's ISDS provisions.²⁰² In this case, Philip Morris challenged Australia's plain cigarette packaging legislation that intended to reduce smoking.²⁰³ Although the Virginia-based company was unable to resort to the Australia-US FTA, that did not include ISDS—corporate restructuring entitled Philip Morris's Hong Kong subsidiary to sue Canberra under the Australia-Hong Kong BIT.²⁰⁴ 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.²⁰⁵ Despite the result, the case incurred public outcry, and fueled states' concerns about regulatory sovereignty and legal expenses. The direct response was that tobacco control measures were excluded from the TPP. This carve-out has also been adopted in the Australia-Singapore FTA and will likely influence the RCEP's ISDS design.²⁰⁶

In addition to Australia's position, a compromise of RCEP stake-holding countries is of significance to the investor-state arbitration mechanisms under FTAs in the Global South. India and Indonesia are the most resistant to "pro-investor" ISDS. As the No. 1 ISDS target among RCEP countries, India has been the respondent in twenty-one disputes—the amount of compensation that investors claimed reached \$12.3 billion.²⁰⁷ 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.²⁰⁸

Other than "losing control" over its energy policy, India lost the case of *White Industries*, in which an Australian company challenged delays in the Indian judicial system.²⁰⁹ 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

202. See generally TPP, *supra* note 106, at art 29.5.

203. See *Philip Morris Asia Ltd. v. Commonwealth of Austl.*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶ 7-8, 89 (Dec. 17, 2015).

204. See *id.* ¶ 536-70; Julien Chaisse & Shintaro Hamanaka, *Understanding Asian Investment Regime Complexity: What to Do About It?*, 12-13 (Inst. of Developing Economies, Japan External Trade Org., Discussion Paper No. 626, 2017); UNCTAD, *INVESTOR-STATE DISPUTE SETTLEMENT*, *supra* note 201, at 15.

205. *Phillip Morris Asia Ltd.*, *supra* note 203, ¶ 580-85.

206. See Agreement to Amend the Singapore-Australia Free Trade Agreement, art. 22 Feb. 17, 2003, DEP'T OF FOREIGN AFF. & TRADE (Austl.), <https://dfat.gov.au/trade/agreements/in-force/safta/Documents/agreement-to-amend-the-singapore-australia-free-trade-agreement.pdf> [<https://perma.cc/Z2NM-Y3FM>] (stating that "[n]o 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*, 17 *WORLD TRADE REV.* 33, 57 (2018) (stating that the amendment was "modelled on the TPP provision.").

207. UNCTAD, *INVESTOR-STATE DISPUTE SETTLEMENT*, *supra* note 201, at 1, 34; see also CECILIA OLIVET ET. AL., *THE HIDDEN COSTS OF RCEP AND CORPORATE TRADE DEALS IN ASIA* 3-6 (2016) ("India alone has been the target of 40% of the cases filed against RCEP countries.").

208. OLIVET ET AL., *supra* note 207, at 9-10.

209. See *White Industries Australia Limited v. India*, UNCITRAL, Final Award, ¶ 16.1.1 (Nov. 30, 2011).

rights.”²¹⁰ These incidences led India to redraft the Model BIT that significantly limited access to ISDS by imposing a condition that required exhaustion of local remedies.²¹¹ For similar policy reasons, Indonesia has terminated more than 15 BITs since its government unilaterally abrogated its BIT with the Netherlands in 2014.²¹² 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, South Korea and Japan are at the forefront of ISDS proposals in RCEP negotiations.²¹³ Their position in “TPP-nizing” 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.²¹⁴ For Beijing, investment arbitration benefits the OBOR initiative by protecting outbound Chinese FDIs and can hardly undermine the 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.”²¹⁵ Nonetheless, the Australia-China FTA remarkably expanded the ISDS application to cover violations of national treatment obligations.²¹⁶ Although Beijing has yet to push for ISDS provisions vigorously, its changing practice will be critical to the RCEP.

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

211. See *Model Text for the India Bilateral Investment Treaty* ¶ 14.3, *AFRICAN L. REP.* (2015), http://jurisafrica.org/html/pdf_indian-bilateral-investment-treaty.pdf [https://perma.cc/E2RX-99R8]. See also David M. Trubek & Sonia E. Rolland, *Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries*, 39 *U. PA. J. INT’L L.*, 358, 367–68 (2017) (comparing the 2003 and 2015 Model BITs and suggesting that the latter focuses more on sovereignty and development).

212. See Magiera, *supra* note 167, at 4, 16.

213. See Belinda Townsend, Patricia Randal & Deborah Gleeson, *Update on the Regional Comprehensive Economic Partnership agreement—NGO Briefing*, *BILATERALS.ORG* (Sept. 14, 2015), http://bilaterals.org/spip.php?page=print-art&id_article=28479 [https://perma.cc/YP2R-ZJVE].

214. 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 20 WTO cases as a complainant and 152 cases as a third party. See *Disputes by Member*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (follow “Disputes by Members” hyperlink) (last visited Nov. 10, 2018).

215. Contracting States and Measures Taken by Them for the Purpose of the Convention, ICSID/8-D(2018), <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%208-Contracting%20States%20and%20Measures%20Taken%20by%20Them%20for%20the%20Purpose%20of%20the%20Convention.pdf> [https://perma.cc/YRL5-WWFV]; see Jie (Jeanne) Huang, *Silk Road Economic Belt: Can Old BITs Fulfil China’s New Initiative?* 50 *J. WORLD TRADE* 733, 751–52 (2016).

216. In comparison, ISDS provisions do not apply to MFN treatment. See Australia-China FTA, *supra* note 162, at arts. 1.2 & 1.3. China’s BITs in the late 1990s reflect the same trend to widen the scope of ISDS. See also Vivienne Bath, “One Belt, One Road” and

The US model of ISDS provisions has been the model for ASEAN FTAs. It was contended that the European model shaped the RCEP structure.²¹⁷ 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.²¹⁸ 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.²¹⁹ Similar to the TPP, the EU-Singapore FTA merely includes references to a potential appellate mechanism.²²⁰ Washington's unclear stance, which has halted negotiations of the TTIP, makes its "Appeal Tribunal" provisions futile.²²¹ By far, the EU only succeeded in incorporating its proposal in the FTAs with Canada and Vietnam.²²²

The EU's new trade policy is to evaluate the resumption of FTA negotiations with Thailand and Malaysia and eventually conclude the ASEAN-EU FTA.²²³ The RCEP negotiators should be advised that almost 70% of ISDS cases against their countries were filed by European investors.²²⁴ The potential result is that the EU could merely persuade less developed RCEP countries to accept the appellate mechanism suggests the neocolonial relationship, which is what 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 European Union Court of Justice addressed whether the EU was entitled to have exclusive competence to include ISDS provisions in the FTA, and the

Chinese Investment, in LEGAL DIMENSIONS OF CHINA'S BELT AND ROAD INITIATIVE 165, 177 (Lutz-Christian Wolff & Chao Xi eds., 2016).

217. See e.g., Luke Nottage, *Towards a European Model for Investor-State Disputes?*, EAST ASIA F. (July 1, 2016), <http://www.eastasiaforum.org/2016/07/01/towards-a-european-model-for-investor-state-disputes/> [<https://perma.cc/D8PT-ZSUD>].

218. For the EU's proposal, see *Investment in TTIP and beyond—The Path for Reform*, European Council 1–8 (concept paper, May 2015).

219. See *id.*; INT. CTR. FOR SETTLEMENT OF INV. DISP., CONVENTION, REGULATIONS AND RULES 26–27 (2006).

220. See TPP, *supra* note 106, at art. 9.23.11; Free Trade Agreement between the European Union and the Republic of Singapore, EU-Sing., art. 9.30.1(c), June 29, 2015 [hereinafter EUSFTA]. For ISDS provisions of the EUSFTA, see Locknie Hsu, *EU-ASEAN Trade and Investment Relations with a Special Focus on Singapore*, 6 EUR. Y.B. INT'L ECON. L. 233, 245–47 (2015).

221. See generally EUROPEAN UNION, PROPOSAL FOR INVESTMENT PROTECTION AND RESOLUTION OF INVESTMENT DISPUTES: TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: TRADE IN SERVICES, INVESTMENT AND E-COMMERCE, art. 10 (2015).

222. See Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, Canada-E.U., art. 8.28, Oct. 28, 2016; Free Trade Agreement between the European Union and the Socialist Republic of Vietnam, E.U.-Viet., art. 28, Feb. 1, 2015.

223. See Trade for All, *supra* note 36, 31–32.

224. See Olivet et al., *supra* note 206, at 5 ("68% of investors suing RCEP countries are based in [European countries, including the Netherlands, the United Kingdom and France].").

Court ruled against the EU Commission.²²⁵ 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.²²⁶ This decision would impose legal obstacles on the EU's Asian FTAs and limit the impact of the ISDS proposal on the RCEP.

III. 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 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.²²⁷ Mexico argued that, because the case constituted part of "a broader dispute" it

225. The interpretation concerns the Treaty on the Functioning of the European Union. See Opinion Pursuant to Article 218(11) TFEU, Opinion 2/15 of the Court, EU:C:2017:376, 2007, ¶¶ 3-11, 305.

226. *Id.* ¶¶ 288-93.

227. See Appellate Body Report, *Mexico-Tax Measures on Soft Drinks and Other Beverages*, ¶ 42, WTO Doc. WT/DS308/AB/R (adopted Mar. 24, 2006).

had previously brought against Washington in NAFTA proceedings, the forum exclusion clause required NAFTA to be the sole forum for the case.²²⁸ 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).²²⁹ The Appellate Body further elaborated that although "legal impediments" may exclude the WTO's jurisdiction, such impediments did not exist in the present case.²³⁰

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.²³¹ 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.²³² 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."²³³ In other words, such provisions do not constitute the "legal impediments" that the Appellate Body explained in *Mexico-Soft Drinks*.²³⁴ 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.²³⁵

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 caused by divergent ROOs. For example, other than the WTO, Singapore could bring an identical complaint against China under the bilateral FTA, the ASEAN-China FTA or 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

228. See North American Free Trade Agreement, Can.-Mex.-U.S., art. 2005.6, Dec. 17, 1992, 32 I.L.M. 289 (1993). See also Appellate Body Report *supra* note 227, ¶¶ 42, 54.

229. *Id.* ¶¶ 46, 48-53.

230. *Id.* ¶ 54.

231. See Appellate Body Report, *Peru-Additional Duty on Imports of Certain Agricultural Products*, ¶ 4.1, WTO Doc. WT/DS457/AB/R (adopted July 31, 2015).

232. Peru's argument was based on Articles 3.7 and 3.10 of the Dispute Settlement Understanding. See *id.* at ¶ 5.19 ("Peru alleges that Guatemala . . . acted contrary to good faith . . . obligations under Articles 3.7 and 3.10 of the DSU.")

233. *Id.* ¶ 5.25.

234. See *id.* at 21, n.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 CORNELL INT'L L.J. 77 (2009).

235. See Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan, ASEAN-Japan, art. 10.3 (Apr. 14, 2008) ("[T]he WTO Agreement shall prevail to the extent of the inconsistency.") [hereinafter AJFTA].

declared six bilateral FTAs “null and void” in 2012.²³⁶ During TPP negotiations, Australia, New Zealand and Singapore argued for the “clean slate” approach to supersede intra-TPP pacts.²³⁷ 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 South Korea.²³⁸ The end result is the TPP provision that merely allows the FTA “to coexist with” other agreements.²³⁹

A cursory overview of the Guiding Principles for the RCEP suggests the same coexistence approach to ASEAN+1 FTAs.²⁴⁰ Nevertheless, the diversity of treaty language reveals more intricate interpretations than the TPP. In their “relations to other agreement[]” provisions, the AANZFTA and the ASEAN-Japan FTA follow the three-phase approach that intra-RCEP bilateral FTAs adopted.²⁴¹ Substantively, “[e]ach Party reaffirms its rights and obligations under” existing agreements to which they are parties.²⁴² The ASEAN+1 FTA should not “be construed to derogate from” existing obligations arising from other agreements.²⁴³ Procedurally, a party “shall immediately consult with” another party should inconsistency between ASEAN+1 FTAs and other agreements materialize.²⁴⁴

The ASEAN-Japan FTA endorses parallelism of FTAs by stressing the validity of a separate agreement between parties if it provides more favorable treatment.²⁴⁵ The “more favorable” assessment can be quantitatively determined if a single-issue dispute involves tariffs or a given mode of services trade. However, multi-issue cases can complicate the qualitative application of the “more favorable” proviso.²⁴⁶ The Korea-Vietnam FTA that identifies “more favorable treatment of goods, services, investments, or persons” is an attempt to provide higher certainty and could be a basis for

236. *Notification by the Russian Federation*, WTO Doc. WT/REG/GEN/N/8 (March 28, 2016); see also U.N. ECON. & SOCIAL COMM. ASIA & PACIFIC, ASIA-PACIFIC TRADE AND INVESTMENT REPORT 2016: RECENT TRENDS AND DEVELOPMENTS, at 101, U.N. Doc. ST/ESCAP/2760, U.N. Sales No. E.16.II.F.23 (2016).

237. 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).

238. See *id.*

239. See TPP, *supra* note 106, at art. 1.2.1; Elms & Lim, *supra* note 236, at 37 (stating that in 2010, the parties to the TPP “essentially decided not to decide.”).

240. See Guiding Principles, *supra* note 46, princ. 5 (stipulating that ASEAN+1 FTAs and intra-RCEP FTAs “will continue to exist”).

241. E.g., AANZFTA, *supra* note 146, at ch. 18., arts. 2.1-2.3; AJFTA, *supra* note 235, at arts. 10.2 & 10.4; Australia-China FTA, *supra* note 162, at art. 1.2., ¶¶ 1-3.

242. E.g., AANZFTA, *supra* note 146, at ch. 18., art. 2.1.

243. *Id.* at ch. 18., art. 2.2.

244. *Id.* at ch. 18., art. 2.3.

245. See AJFTA, *supra* note 235, at art. 10.2.

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

the RCEP to detail the conditions.²⁴⁷

Certain intra-RCEP FTAs, evidenced by the ASEAN-Japan FTA and the China-New Zealand FTA, assume the interpretative role of “international law” to resolve treaty inconsistencies.²⁴⁸ Article 30 of the VCLT provides the authoritative guide on “successive treaties relating to the same subject-matter.”²⁴⁹ 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 applies only to the extent that” it is “compatible with” the subsequent treaty.²⁵⁰ 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.²⁵¹ But even if the argument fails, applying Article 30.3’s later-in-time rule still runs into 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. Applying the VCLT in the overlapping FTA-BIT context involves different jurisdictional disputes. ISDS mechanisms in FTAs and BITs with inconsistent scopes and carve-outs make operating Article 30.3 difficult.²⁵² *Yaung Chi Oo v. Myanmar*, which concerned the 1987 and 1998 intra-ASEAN investment agreements, exemplified ASEAN jurisprudence on successive treaties.²⁵³ The Tribunal believed that the two disputed agreements had different scopes of investment, and the ASEAN states had no intention to merge them.²⁵⁴ Article 12 of the 1998 agreement stipulates that it “shall prevail”

247. Free Trade Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Korea, Viet.-S. Korea, art. 1.3.2, Dec. 20, 2015.

248. AJFTA, *supra* note 235, at art. 10.4; *see also* Free Trade Agreement between the Government of New Zealand and the Government of the People’s Republic of China, China-N.Z., art. 3.2, Apr. 7, 2008.

249. Vienna Convention on the Law of Treaties art. 30.3, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Article 30.2 is inapplicable because almost none of these agreements include “it is subject to” provisions.

250. Article of 30.3 of the VCLT reflects the later-in-time rule. *See id.* *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 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 . . .”).

251. 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*, in *THE CHINA-AUSTRALIA FREE TRADE AGREEMENT: A 21ST CENTURY MODEL* 215, 228 (Colin B. Picker, Heng Wang & Weihuan Zhou eds., 2017) (discussing Article 1.2.2 of the China-Australia FTA).

252. For detailed comparisons of FTAs and BITs, *see id.* at 217–18; *see also* Jean Ho, *Investment Protection under Successive Treaties*, 32 ICSID REV. 58, 68–82 (2017).

253. *Yaung Chi Oo Trading Pte Ltd.*, *supra* note 199, ¶¶ 76–78.

254. *See id.* ¶¶ 77, 82.

if it “provides for better and enhanced provisions.”²⁵⁵ 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 agreement because the two pacts “are clearly intended to operate separately.”²⁵⁶ This decision similarly exemplifies the difficulty of applying Article 30.3 of the VCLT in practice.

RCEP negotiators should be aware that, similar to FTA-FTA scenarios, parties rarely use *de jure* consolidation to resolve FTA-BIT conflict. Article 9.10 of the EU-Singapore FTA, which will terminate 12 BITs between EU states and Singapore, illustrates this approach.²⁵⁷ The China-Singapore FTA (CSFTA) utilizes a different type of *de jure* consolidation; it incorporates a wider-FTA’s investment obligation.²⁵⁸ Without its own investment provisions, the CSFTA makes the ASEAN-China Investment Agreement under the ASEAN-China FTA “an integral part of” the CSFTA.²⁵⁹

Because the Investment Agreement alone provides the ISDS mechanism, no jurisdiction conflict exists with the CSFTA. Yet, legal issues may relate to the China-Singapore BIT, which continues to be an 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.”²⁶⁰ 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 trade fragmentation conflicts.

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 AEPC-envi-

255. *Id.* ¶ 79.

256. *Id.* ¶¶ 556-57.

257. See EUSFTA, *supra* note 219, at art. 9.10.1 & Annex 9-D.

258. See Wolfgang Alschner, *Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction*, 17 J. INT’L ECON. 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. *De jure* consolidation should constitute any formal legal approach to enabling one of the two or more co-existing agreements that govern the relations between the parties. *De facto* consolidation on the other hand should constitute any approach that achieves the same result but without a legal mechanism.

259. Free Trade Agreement between the Government of the People’s Republic of China and the Government of the Republic of Singapore, China-Sing., art. 84.1, Jan. 1, 2009 [hereinafter CSFTA].

260. China and Singapore Agreement on the Promotion and Protection of Investment, art. 13.3, Nov. 21, 1985, 1443 U.N.T.S. 293. In comparison, Article 14 of the ASEAN-China Investment Agreement has more detailed provisions on investment disputes. See Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People’s Republic of China and the Association of Southeast Asian, ASEAN-China, art. 14, Aug. 15, 2009. Article 112 of the CSFTA simply affirms parties’ “existing rights and obligations” and does not stipulate the application of the FTA and the BIT. CSFTA, *supra* note 259, at art. 112.

sioned FTAAP in Third Regionalism. This analysis not only fills the much-needed gap in the existing literature, but it also helps revitalize the Doha Round. APEC currently has 12 representatives in the RCEP, which facilitates APEC's Bogor Goals—to accomplish Asia-Pacific trade and investment liberalization by 2020.²⁶¹ APEC's nature as a soft-law institution is distinct from FTAs that impose hard-law obligations. To minimize "sovereign costs," APEC's operating basis neither involves the treaty-ratification process nor incurs trade retaliation from *pacta sunt servanda* rule violations.²⁶² The voluntary foundation helped bypass the trade politics of regionalism, but it also caused APEC's institutional weaknesses, further marginalizing its role.

In light of proliferating FTAs, the APEC Business Advisory Council propounded the 21-party FTAAP in 2004 to reinvigorate APEC.²⁶³ 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 a comprehensive trade pact.²⁶⁴ Optimism about the TPP followed from the Obama administration's engagement in P-4 agreement-based TPP negotiations in late 2009.²⁶⁵ Notably, the "ASEAN plus" frameworks that "codified" China and Japan's EAFTA and CEPEA proposals were distinct from the RCEP framework, which underpins ASEAN centrality.

To enrich the existing literature that only focuses on the TPP-FTAAP nexus, I offer an analysis advocating for 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.²⁶⁶ The US-China rivalry led to the delicate language. Beijing argued vigorously for the FTAAP when it hosted the APEC meetings.²⁶⁷ Washington opposed the proposal due to

261. See APEC 2016-17, *supra* note 10, at 53; see also 1994 Leaders' Declaration, *supra* note 39, ¶ 6.2.

262. For a discussion on the soft-law concept, see Chris Brummer, *Why Soft Law Dominates International Finance—and Not Trade*, 13 J. INT'L ECON. L. 623, 631-33 (2010); see also Harmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 500, 509 (1999).

263. See APEC News Release, *Asia Pacific Business Leaders to Press APEC Leaders to Accelerate Regional Economic Integration* (Feb. 14, 2014) (on file with author), at 1.

264. See *id.*; APEC Economic Leaders' Declaration, ASIA-PACIFIC ECON. COOPERATION (Nov. 13, 2010), https://www.apec.org/Meeting-Papers/Leaders-Declarations/2010/2010_aelm [<https://perma.cc/8FYD-CDY2>].

265. The P-4 (Pacific 4) agreement, which was concluded in 2006 between Singapore, New Zealand, Chile, and Brunei, preceded the TPP. See Fergusson & Williams, *supra* note 34, at 1.

266. APEC Economic Leaders' Declaration, Annex A—The Beijing Roadmap for APEC's Contribution to the Realization of the FTAAP, ASIA-PACIFIC ECON. COOPERATION (Nov. 17, 2014), https://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014_aelm/2014_aelm_annexa.aspx [<https://perma.cc/9L3J-4WAW>] [hereinafter Beijing Roadmap].

267. See 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> [<https://perma.cc/2TMX-K6BT>].

concerns about detracting from the TPP and impairing the “pivot to Asia” strategy.²⁶⁸ The eventual compromise aimed to revitalize the FTAAP under the auspices of China by pursuing APEC’s two-year Collective Strategic Study.²⁶⁹ Markedly, APEC urged “the early completion of” RCEP negotiations in 2015.²⁷⁰ 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.”²⁷¹ APEC has thus placed the RCEP on par with the TPP as integral to the FTAAP roadmap, which could rejuvenate the stalled Doha Round negotiations.

The US withdrew from the TPP and thus diverted the status of the TPP vis-à-vis the RCEP. Article 30.5 of the TPP only executes if countries that account for 85% of the combined GDP “of the original signatories” approve, thus making US membership indispensable.²⁷² 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.²⁷³ With Australia’s and Mexico’s support, Japan became the driving force for the CPTPP.²⁷⁴ Nonethe-

268. See *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/> [<https://perma.cc/7Y4T-Q9FR>].

269. See APEC Economic Leaders’ Declaration, ASIA-PACIFIC ECON. COOPERATION (Nov. 11, 2014), https://www.apec.org/Meeting-Papers/Leaders-Declarations/2014/2014_aelm [<https://perma.cc/9ZMG-8KFG>] (“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.”).

270. APEC Economic Leaders’ Declaration, ASIA-PACIFIC ECON. COOPERATION (Nov. 19, 2015), https://www.apec.org/Meeting-Papers/Leaders-Declarations/2015/2015_aelm [<https://perma.cc/2LE2-XUU4>].

271. See APEC Economic Leaders’ Declaration, ASIA-PACIFIC ECON. COOPERATION (Nov. 20, 2016), https://www.apec.org/Meeting-Papers/Leaders-Declarations/2016/2016_aelm [<https://perma.cc/JA24-A4UM>] (“[W]e endorse the Recommendations of the Study as the Lima Declaration on FTAAP.”). In contrast, in the Study’s assessment of the TPP, it merely states the TPP’s signature and entry into force issues without “praising” its potential effect. ASIA-PACIFIC ECON. COOPERATION, COLLECTIVE STRATEGIC STUDY ON ISSUES RELATED TO THE REALIZATION OF THE FTAAP 166, 170 (2016).

272. TPP, *supra* note 106, at 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.

273. See Annex II – List of Suspended Provisions, GLOBAL AFF. CANADA (last modified Nov. 10, 2017), available at <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/annex2-annexe2.aspx?lang=Eng> [<https://perma.cc/8SU3-36QX>]; *Vietnam Proposes Amendments to Stalled TPP Trade Deal at Sydney Talks*, BILATERALS.ORG (Aug. 29, 2017), <http://bilaterals.org/?vietnam-proposes-amendments-to&lang=En> [<https://perma.cc/5VEE-T73Q>].

274. See Walter Sim, *Australia, Japan Lobby for TPP-11*, STRAIT TIMES (Apr. 21, 2017), <http://www.straitstimes.com/asia/east-asia/australia-japan-lobby-for-tpp-11> [<https://perma.cc/6KPS-EXXB>]; KYODO, *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> [<https://perma.cc/32U7-6DEB>]. Some countries, such as Singapore, favor the TPP 11 proposal without stressing their support for Japanese

less, 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.²⁷⁵

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 a new generation of South-South FTAs to alter 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 as an APEC member “the Parties may agree.”²⁷⁶ 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.²⁷⁷ 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.²⁷⁸ Furthermore, the 2016 ASEAN-Pacific Alliance Framework for Cooperation that expedites integration between the AEC and Latin America reinforces South-based cooperation.²⁷⁹ 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.²⁸⁰

leadership. See Yoichi Funabashi, *In America’s absence, Japan takes the lead on Asian free trade*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/news/global-opinions/wp/2018/02/22/in-americas-absence-japan-takes-the-lead-on-asian-free-trade/?noredirect=on&utm_term=.C319d78e4332 [https://perma.cc/VW7U-BGY3].

275. See Annex II - List of Suspended Provisions, *supra* note 273; Kelly Buchanan, *New Zealand: Ratification of Trans-Pacific Partnership Agreement Completed*, LAW LIBR. CONGRESS: GLOBAL LEGAL MONITOR (May 23, 2017), <http://www.loc.gov/law/foreign-news/article/new-zealand-ratification-of-trans-pacific-partnership-agreement-completed> [https://perma.cc/6X47-2WZM]. For the TPP ratification process in 11 countries, see Marina Tsirbas et. al., *supra* note 3, at 15; see also U.S. COALITION FOR TPP, *U.S. Coalition for TPP Diplomatic Working Group Newsletter, Issue 3*, (Aug. 25, 2016), https://www.usasean.org/system/files/downloads/u.s._coalition_for_tpp_diplomatic_working_group_newsletter_issue_2.pdf [https://perma.cc/FZ4A-ALFM].

276. TPP, *supra* note 106, at art. 30.4.

277. Guiding Principles, *supra* note 46, at princ. 6.

278. AEC BLUEPRINT 2025, *supra* note 53, at 35; ASEAN-Hong Kong Statement, *supra* note 59, at 1. From a legal aspect, Taiwan, as an APEC member, could also join the RCEP if China does not politically oppose.

279. The Pacific Alliance includes four Latin American countries and their bilateral FTAs with ASEAN states serve as the groundwork for the region-to-region FTA. See Anaïs Faure, *The New Trans-Pacific Partnership*, DIPLOMAT (Apr. 5, 2017), <http://thediplomat.com/2017/04/the-new-trans-pacific-partnership> [https://perma.cc/EJ9Y-W2W2].

280. See Nyshka Chandran, *After US drops TPP, China joins member states in trade talks*, CNBC (Mar. 14, 2017), <https://www.cnbc.com/2017/03/14/china-south-korea-join-tpp-members-in-trade-talks.html> [https://perma.cc/3DNM-TMES] (“At least two TPP member countries, Chile and Peru, have also expressed interest in joining RCEP talks.”).

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 "appropriate forms of flexibility, including" SDT provisions and "additional flexibility" accorded to LDCs.²⁸¹ 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.²⁸² The intertwined non-discrimination principle, commonly referred to as "open regionalism," often incurs free-riding concerns about extending liberalization to non-members.²⁸³

The APEC practice should not be confused with ASEAN's hard-law notion of flexibility, which the RCEP will follow.²⁸⁴ The "ASEAN Minus" formula that crystalized SDT provisions allows for flexible participation and avoids the lowest common denominator dilemma under conventional South-South FTAs.²⁸⁵ Subject to the Grand Bargain, ASEAN+1 FTAs include lengthier yet clearly stipulated liberalization timeframes for CLMV countries.²⁸⁶ Entry into force provisions of ASEAN+1 FTAs similarly adopted this formula.²⁸⁷

281. Guiding Principles, *supra* note 46, at princ. 4; see also ASEAN Taps on Vision 2025 to Support SDGs, ASEAN (June 25, 2016), <http://asean.org/asean-taps-on-vision-2025-to-support-sdgs-2>.

282. ASIA-PACIFIC ECON. COOPERATION, THE OSAKA ACTION AGENDA: IMPLEMENTATION OF THE BOGOR DECLARATION 2 (1995).

283. See *id.* at 1; Vinod K. Aggarwal & Elaine Kwei, *Asia-Pacific Economic Cooperation (APEC): Transregionalism with a New Cause?*, in INTERREGIONALISM AND INTERNATIONAL RELATIONS 67, 73 (Heiner Hanggi, Ralf Roloff & Jurgen Rulnd. eds., 2006) (explaining four schools of thought on open regionalism).

284. See Guiding Principles, *supra* note 46, at princ. 4 (stipulating that the norm of flexibility will be "consistent with the existing ASEAN+1 FTAs, as applicable").

285. See *Transcript of Reply by Minister for Foreign Affairs George Yeo to Questions in Parliament*, MINISTRY OF FOREIGN AFF., (Sing.) (Sept. 17, 2007), <https://www1.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2007/09/Transcript-of-Reply-by-Minister-for-Foreign-Affairs-George-Yeo-to-questions-in-Parliament-17-Septemb> [<https://perma.cc/2JXU-JKYP>].

286. For instance, the ASEAN-South Korea FTA's tariff liberalization timeframes include three categories: South Korea and ASEAN six countries; South Korea and Vietnam; and South Korea and Cambodia, Laos and Myanmar. See generally 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, ASEAN-S. Korea (2006). For services and investment negotiations, see ASEAN-China Framework Agreement, *supra* note 260, at art. 8.3; see also Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations, India-ASEAN, art 8.3, Oct. 8, 2003.

287. For example, "Australia, New Zealand and at least four ASEAN Member States" could enable the AANZFTA to enter into force. AANZFTA, *supra* note 146, at ch. 18, art. 7.2. In this regard, the ASEAN-China Agreement is the only exception to the ASEAN

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.²⁸⁸ As the AEC's services liberalization evidences, two or more members could liberalize selected sectors and permit the subsequent participation of other nations.²⁸⁹ 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.²⁹⁰ Therefore, the RCEP's elaboration of ASEAN's flexibility rules will not only benefit the AEC but also serve 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.²⁹¹ 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.²⁹² It may be suggested that as the RCEP functions as the pathway to the FTAAP, the institutional 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.²⁹³ The FTAAP will only "be realized outside of APEC" because APEC's soft-law mechanism

Minus X rule. See PIETER JAN KUIJPER, JAMES H. MATHIS & NATALIE Y. MORRIS-SHARMA, FROM TREATY-MAKING TO TREATY-BREAKING: MODELS FOR ASEAN EXTERNAL TRADE AGREEMENTS 97-98 (2015).

288. ASEAN Charter, *supra* note 51, at 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). See SEVERINO, *supra* note 49, at 352-53; WOON, *supra* note 60, at 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, Sharon Seah Li-Lan & Chang Li Lin eds., 2017) ("AMM instructed HLTF that ASEAN-X should be limited to the implementation of economic agreements.").

289. Based on the Protocol to Amend the ASEAN Framework Agreement on Services, art. 1, Sept. 3, 2003 (adding Article IV bias (ASEAN Minus X modality) to the AFAS).

290. See SEVERINO, *supra* note 49, at 352-53; Nikomborirak & Jitdumrong, *supra* note 55, at 59.

291. Under its \$20 million budget, the ASEAN Secretariat currently has 300 staff members recruited from Indonesia and other ASEAN states. See Termsak Chalermphanupap, *No Brexit Repeat in ASEAN*, DIPLOMAT (June 18, 2016), <http://thediplomat.com/2016/06/no-brexite-repeat-in-asean> [https://perma.cc/4FMK-56HP].

292. See TPP, *supra* note 106, at arts. 23.7 & 27.1.

293. APEC Economic Leaders' Declaration, Annex A: Lima Declaration on FTAAP, ASIA-PACIFIC ECON. COOPERATION (Nov. 20, 2016), https://www.apec.org/Meeting-Papers/Leaders-Declarations/2016/2016_aelm/2016_Annex-A [https://perma.cc/9AKY-6YA7].

remains unaffected.²⁹⁴ 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.²⁹⁵

Distinctively, the legal standing of ASEAN under the ASEAN Charter is reinforced by the conclusion of the ten-country agreement on privileges and immunities.²⁹⁶ 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.²⁹⁷ 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.²⁹⁸ The RCEP could consolidate the funding basis and enhance the capacity-building of the Secretariat. The streamlining of intra-ASEAN initiatives with parallel ASEAN+6 technical assistance projects will collectively narrow the development gap and augment the pro-development effect for the Global South.

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.

294. Beijing Roadmap, *supra* note 266.

295. The International Organisations (Immunities and Privileges) (APEC Secretariat) Order art. A.3, Feb. 12, 1993, G.N. No. S 25/1993. The basis for the APEC Secretariat to be established in Singapore is APEC's 1992 Bangkok Declaration, which technically does not constitute a “treaty.” See APEC Ministerial Meeting, Annex 3 - Bangkok Declaration on Asia-Pacific Economic Cooperation (APEC), ASIA-PACIFIC ECON. COOPERATION (Sept. 10, 1992), https://www.apec.org/Meeting-Papers/Annual-Ministerial-Meetings/1992/1992_amm/annex3 [<https://perma.cc/ND4L-4XM3>].

296. See ASEAN Charter, *supra* note 51, at art. 3; Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations, Oct. 25, 2009 [hereinafter Agreement on the Privileges and Immunities]; Woon, *supra* note 60, at 75-76.

297. Agreement on the Privileges and Immunities, *supra* note 296, at 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, Jan. 20, 1979.

298. AEC BLUEPRINT 2025, *supra* note 53, at 34-35; AEC 2025 CSAP, *supra* note 85, at 44-45. In comparison, the TPP's structural design for the “Committee on Development” lacks the institutional memory and funding. TPP, *supra* note 106, at art. 23.7.