alliurisbriefing

JANUARY 2021

RCEP- The Regional Comprehensive Economic Partnership Agreement for Asia Pacific

This agreement was signed after eight years of efforts on November 15th, 2020. Fifteen countries participated on it: the members of ASEAN (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam), from the "ASEAN plus three" (China, Japan and South Korea) and two from the "ASEAN plus six" (Australia and New Zealand). All of them together represent almost 30 percent of the global population and GDP. What are the consequences of it for the region and the world?

Agreement

This ambitious agreement is constituted by 20 chapters, 4 annexes and appendices. Some of the topics to be covered are very diverse, such as trade in goods and services, intellectual property law, investments, trade remedies and furthermore. It is important to state, that even though it is already signed, it has not entered into force. Art. 20.6 states that it shall be subject of ratification, acceptance, or approval by each signatory State according to their legal procedures and must be deposited with the Depositary (Secretary General of ASEAN in art. 20.5). Only when at least six signatory States members of ASEAN and three signatory States that are not members of ASEAN have deposited their instrument of ratification, acceptance or approval, then will enter this agreement into force after 60 days only for the ones that did the deposit. For the subsequent signatory States will enter into force too after these 60 days period of their deposit. It is considered that Parliaments of some countries might find difficulties for approving this agreement in the short term, mainly because of the aversion against China.

Trade in Goods

According to art. 2.4 of this agreement, each Party shall reduce or eliminate its customs duties on originating goods of others, establishing it in their own Schedule of Tariff Commitments.

ALLIURIS A.S.B.L.
ALLIANCE OF INTERNATIONAL BUSINESS LAWYERS

MANAGEMENT
D-30159 HANNOVER
LUISENSTR. 5
FON +49-511-307 56-50 505056-20
FAX +49-511-307 56-60

INTERNET
WWW.ALLIURIS.ORG
INFO@ALLIURIS.ORG

LEGAL SEAT
B-1000 BRUSSELS
AVE. DES ARTS 56

alliuris.law

That means, that every signatory Party has two alternatives: stating general reduction or elimination tariffs applied to all signatory members when entered into force into their countries, like Japan, Australia, New Zealand, etc.; or creating specific sections to regulate trade with certain Parties, being countries like China, South Korea, Philippines, etc., found into this category. There is not a regional market where all agree into how high tariffs should be.

Every Schedule considers the development of these tariffs into the next 20 years and further on. Interesting to consider is that only two countries (New Zealand and Singapore) have not established a product exclusion to this trade, meaning that all of their products, even though they may have a specific tariff, it can be in the future "amended" and being reduced or even eliminated, according to art. 20.4. In other words, there is not a protectionism seen from both.

There is also an explanation on art. 2.6 what should be understood as "Tariff Differentials". It is explained as *the different tariff treatment that an importing Party applies for the same originating good of the exporting Party*. This preferential treatment is in principle directed to a RCEP country of origin that shall be the exporting Party according to art. 2.6.2 and 2.6.3. Nevertheless, there is an exception on art. 2.6.4. This treatment is adopted by countries such as China, Indonesia, Japan, Korea, Philippines and others. The most interesting case is Singapore, because is the only country signing this agreement, that in their Schedule of Tariff Commitments eliminated the customs duties on all originating goods, without any exceptions.

Rules of Origin

Regarding the origin of goods, art. 3.2 established that they will be treated as such if:

a) they are wholly obtained or produced in a Party according to art. 3.3, which refers to plants, fruits, vegetables, etc., gathered there; live animals born and raised where the Party is; fishing, farming, minerals, etc. following the same logic, including waste and scrap with the purpose of disposal, recovery of raw materials or to recycle;

b) produced in a Party exclusively from originating materials of one or more Parties; or

c) if they are produced using non originating materials, satisfying the Product-Specific Rules of Annex 3A, among other requirements that are applicable. This Annex contains a multiplicity of abbreviations, such as RVC40 (regional value content no less than 40 percent), WO (Wholly obtained) CR (Chemical reaction rule) and others. There are 21 sections included that clarify every good and they are used as a foundational document for the Schedule before mentioned.

Dispute Settlement

Disputes between Parties regarding the interpretation or application of the RCEP; or inconformity or failing to the obligations stated in this Agreement might be settled according to customary rules of interpretation of public international law (arts. 19.3 and 19.4.). The proceeding will be conducted only in English (art. 19.21).

Consultations

Art. 19.6 establishes the possibility for a Party to request consultations with another Party related to the disputes before mentioned. They must indicate the issue and reasons, including the factual and legal basis of their complaint. Also, the Responding Party shall reply no later than 7 days after receiving the request; and enter consultations no later than 30 days in general, or in 15 days in case of urgency regarding perishable goods (arts. 19.6.5 and 19.6.6). Third parties might join to the consultations if they have substantial trade interest, only if the Parties from the dispute agree so (art. 19.6.9). There is also the opportunity for the so-called Good offices, conciliation or mediation (art. 19.7) if the Parties agree to it.

Panel

If the requirements of art.19.8 are fulfilled (for example, no reply for consultations), a request for the establishment of a Panel will take place. The Panel shall consist of three panellists that will be nominated through consultations between the Parties in a dispute (arts. 19.11.2 and 19.11.3). They must have expertise in international trade and law, among other requirements (art. 19.11.10) and will be taking decisions by consensus, when it is reachable (art. 19.13.6). The development of the dispute includes the possibility to set out written the facts of their allegations, including arguments and counter arguments in the form of Submissions (art. 19.13.9). Generally, the Parties will be provided with the opportunity to present their case to the panel in the form of one Hearing (art. 19.13.10). The panel shall issue an interim report within 150 days of the establishment date, or when the matter concerns perishable goods, within 90 days (art. 19.13.14).

Implementation

The final report elaborated by the panel is binding for the Responding Party. If it is impracticable to comply, a reasonable time shall be given. The Parties shall agree the length of it when possible, or the chair of the panel will do. As a guideline, this time should not exceed 15 months from the date of this final report (arts. 19.15.3, 19.15.4 and 19.15.6). If the Responding Party does not comply (following already the implementation procedure for the final report of art. 19.15), compensation and suspension of concessions or obligations are available, if they are temporary (art. 19.17). A restrain of these measures will be considered if the procedure involves least developed country parties (art. 19.18).

Critics

The Dispute Settlement is excluded of several chapters of this agreement. For instance, it shall not apply to: chapter 5: “Sanitary and Phytosanitary Measures” (art. 5.17), chapter 6: “Standards, Technical Regulations, and Conformity Assessment Procedures” (art. 6.14), chapter 7: “Trade Remedies” and the Annex 7A related to Anti-Dumping and others (art. 7.16), chapter 12: “Electronic Commerce” (art. 12.17.3), chapter 13: “Competition” (art. 13.9), chapter 14: “Small and Medium Enterprises”, chapter 15: “Economic and Technical Cooperation” (art. 15.7), chapter 16: “Government Procurement” (art. 16.8), among others, and specific articles, such as measures against corruption (art. 17.9) and more. Even though some countries address some issues locally, there are still controverted chapters to consider.

One of them is chapter 6: "Standards, Technical Regulations, and Conformity Assessment Procedures". The agreement fails into establishing harmonised technical regulations regarding international standards to all members. In their art. 6.7 states that Parties shall explain their reasons why international standards or relevant parts of them are not being used. In order to promote trade, the other Parties must give reasons too, why those standards are needed, as if they must "negotiate" into which guides shall be followed.
Another is Chapter 12: "Electronic Commerce", where there is not a consensus of a legal framework that applies to all members that ensures protection of personal information regarding this chapter. There is even an exception for Cambodia, Lao PDR and Myanmar to not be obliged to apply this for five years (art. 12.8).

A last one is in chapter 8: "Trade in Services", by Telecommunications services and their access and use, where countries may take the necessary measures to ensure security of messages and protecting personal information of the end users, without this being arbitrary or an act of discrimination (annex 8B art 4.4). This is meant to be ambiguous for certain Parties to limit the access of social networks into their countries, among others.

However, there are other points to consider that do not play a controversial role but whose regulatory scope is understood to be due to the very nature of the agreement. One of these is the issue of Intellectual Property and all that it encompasses (Chapter 11). In the area of generalities, although it is true that principles are established regarding national treatment and the obligations of the States Parties to develop their own procedures to guarantee these rights, the agreement as such takes up in its general form various principles already established in the TRIPS Agreement. Likewise, the section on copyright and trademarks lacks uniqueness of criteria in that it does not refer to a specific framework of years of protection, as are other treaties concluded by the European Union and others. The only aim is for countries to adhere to various treaties from which this protection can be extrapolated, and as such it is not binding in principle if any country refuses to do so.

On the other hand, when dealing with the issue of geographical indications, the agreement lacks protection for certain products: a consensus to determine, even in its basic form, a list of names that should be protected, according to the region from which they originate. It is understandable, however, that if member countries only list product descriptions in their lists of commitments, it is because they are not yet ready, both in their markets and in their own political will, to regulate such names, which will surely be part of future discussions for the possible extension of this agreement.

Conclusion

This Agreement represents a big economical deal between very different economies. It is not a total integration of markets, but they strive to consolidate the ASEAN region to make it competitive against the EU and USA. Positive economic changes for all members might be plausible in the middle term to be seen.

The vision of this treaty can be understood as a successful attempt to establish trade fundamentals among all participants in the bloc for the medium term. The geopolitical vacuum that the United States once ceded to its own refusal to pursue old treaties in the same region in the name of national protectionism has been taken by China to consolidate its own trade agenda.

Some projections indicate that, while it is true that the commitments made by the parties to reduce tariff and trade barriers unilaterally will happen progressively over twenty years, it is also true that new integration agreements can be concluded even before the expiry of this period. There is also the possibility for the block to involve economic allies, such as India, which has remained on the sidelines as China's economic proposals are still risky for certain products in its own market, although some experts also suggest that they are expecting a more attractive counter-proposal from the United States.

Even though the larger economic actors would seem to benefit most from this agreement, such as China, Japan, among others, the reality is that the region itself will grow internally in competitiveness and will outline new sectors of specialisation in the region for the world.

+++

THE ALLIURIS GROUP

ALLIANCE OF INTERNATIONAL BUSINESS LAWYERS

Member Firms

- 4|5|3 Lawfirm, Barcelona/Madrid, Spain
- Armstrong Teasdale, London, UK
- ATPR Sociedade de Avogados, Lisbon, Portugal
- BCO Bazán Cambré Orts, Buenos Aires, Argentina
- Brand & Partner, Moscow/Minsk, Russia
- Farthouat & Associés, Paris, France
- FDL Studio legale e tributario, Milan, Italy
- Fellows Advocaten, Knokke, Belgium
- Guangdong Junhou Law Firm, Guangzhou, China
- Hammurabi & Solomon Partners, New Delhi, India
- Herfurth & Partner, Hanover, Germany
- Karytinos Partners, Athens, Greece
- Key Legal Law Firm, Brussels, Belgium
- LEXTRUST Avocats, Luxemburg, Luxemburg
- Marree en Dijxhoorn, Amersfoort, Netherlands
- Baumann Inderkum & Muheim, Zug, Switzerland
- Nyborg & Rørdam, Copenhagen, Denmark
- Pacheco Neto Sanden Teisseire, Sao Paulo, Brazil
- Saône Rhône, Cabinet Juridique, Lyon, France
- SMPS Legal, Mexico City, Mexico
- TGC Corporate Lawyers, Warsaw, Poland
- VHM Vavrovsky Heine Marth, Vienna/Salzburg,Austria
- Yamaner & Yamaner, Istanbul, Turkey

Imprint

Published by

ALLIURIS A.S.B.L.
ALLIANCE OF INTERNATIONAL
BUSINESS LAWYERS
Avenue des Arts 56,
B-1000 Brussels / Belgium

Editors:
Chief editor (responsible): Ulrich Herfurth

Management :

ALLIURIS A.S.B.L.
Luisenstr. 5
D-30159 Hannover
Fon ++49 511 30756-0
Fax ++49 511 30756-10
Mail info@alliuris.org
Web www.alliuris.org