

Regional Comprehensive
Economic Partnership Agreement:
Need for a Strategy

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Regional Comprehensive Economic Partnership Agreement: Need for a Strategy

V. S. Seshadri*

Abstract: RCEP member countries cover half the world population, 30 per cent of world GDP and a quarter of world trade. The regional grouping has several countries including China whose economies are among the most export competitive in the world. The negotiations will be a very challenging one for India. India's earlier FTAs or CEPAs with countries in this region have not been models of success in their implementation even as there have been benefits. If RCEP has to be more successful, a great deal of planning and strategising is critical. India has to become more competitive for the concessions it secures to translate into realisable market access. It should also secure sufficient flexibilities to be able to ensure that domestic players have a fair playing field in being able to withstand competition. This paper outlines a possible approach and strategy.

Key words: RCEP, India-Singapore CECA, India-Korea CEPA, India-Japan CEPA, India-ASEAN FTA.

1. Seventeen rounds of negotiations have already taken place towards concluding the Regional Comprehensive Economic Partnership (RCEP) agreement since the commencement of the first round in May 2013. Its sixteen member countries include each of the ten ASEAN member states apart from Australia, China, India, Japan, Republic of Korea and New Zealand. The countries together account for around half of global population, 30 per cent of global GDP and over a quarter of world trade. Many of these participating economies in Asia have shown great dynamism in ushering economic growth and prosperity in the last few decades. If that trend should continue in the future, as seems well possible, their share of world trade and output can be expected to only grow further.

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2. For the first time, India is participating in the negotiations for a mega FTA having such a wide coverage. Its FTA with ASEAN no doubt covered all the South East Asian countries. The ongoing negotiations with the 28 member European Union (27?) will also span a wide expanse when completed even if BREXIT marches to its logical conclusion. But the RCEP deal if concluded will be bigger with potential for future growth.

3. From all indications, it also appears now that it will be quite deep at least in relation to concessions on trade in merchandise goods. The earlier Indian proposal to go for a three tiered approach, involving tariff concessions/elimination on 80 per cent of the lines for ASEAN countries, 62.5 per cent for Japan and Korea and 42.5 per cent for the other three countries with which India does not have any existing FTA tie-up has not found favour. It appears India has had to agree to a ‘common concessional approach’ even if it may be able to craft some limited flexibilities *vis-a-vis* certain members. With ASEAN countries like Singapore and Malaysia also (apart from the more developed Australia, Japan and Korea) making a pitch for RCEP to have deeper concessions than the ASEAN plus one FTAs, many of which including the India ASEAN FTA having over 80 per cent coverage of tariff lines, the pressure can be expected to mount.

4. It is not clear if India has been able to secure a reciprocal commitment from other RCEP members for their substantial liberalisation in the services sector including in respect of movement of professionals. All that is known is that members have reiterated to make the deal a single and balanced undertaking.

5. Investment is another important area of interest for India. This also becomes important in relation to mode 3 of services involving commercial presence. While India is relatively liberal in its investment framework, even compared to several of the east and south east Asian countries, and would expect others to also commit to a high degree of liberalisation, India’s model investment promotion and protection agreement is not in favour of prohibiting performance requirements, beyond the WTO TRIMS commitments, or in making commitments

on pre-establishment treatment. The model agreement also limits the scope for investor-state dispute settlement mechanism. Will the others be willing, particularly the seven TPP members who are also part of RCEP, since the TPP as it was concluded reflected readiness to make extensive commitments on these aspects?

6. And then there are a host of issues more in the form of rules as well as possible disciplines relating to intellectual property rights (IPRs), e-commerce, environment and labour on which the RCEP guiding principles for negotiations have not detailed much. Will the eventual provisions on them in RCEP be reiterating existing WTO disciplines or will they seek to go beyond?

7. The RCEP ministerial forum has now set a deadline for the negotiations to conclude by end 2017. It is to be seen if this new date will be adhered to. There is, however, a certain quickening in the pace of the negotiations after agreement was reached on a common concessional approach on goods. Six rounds and two ministerials were held in 2016 as against only four rounds and one ministerial each in the previous two years. The negotiations on the expected twenty chapters are progressing and the Press Releases after recent rounds suggest that the texts in respect of two chapters, Economic and Technical Cooperation and SMEs, have already been more or less finalised.

8. That said, however, the negotiations appear still far from reaching the final stages¹ in respect of the market access commitments that will be central to RCEP. Very likely, the negotiations are presently at a crucial phase that will determine the coverage, scope and depth of the eventual agreement. It is critical that India's approach and strategy are well thought out in order that the outcome is in line with its interests.

9. Before proceeding further, however, a few aspects may need to be recognised that make the task of our RCEP negotiators particularly challenging. Barring the LDCs, Cambodia, Lao PDR and Myanmar, which in any case may receive a kid glove treatment in the negotiations, India is the only participant that has a high level of merchandise trade

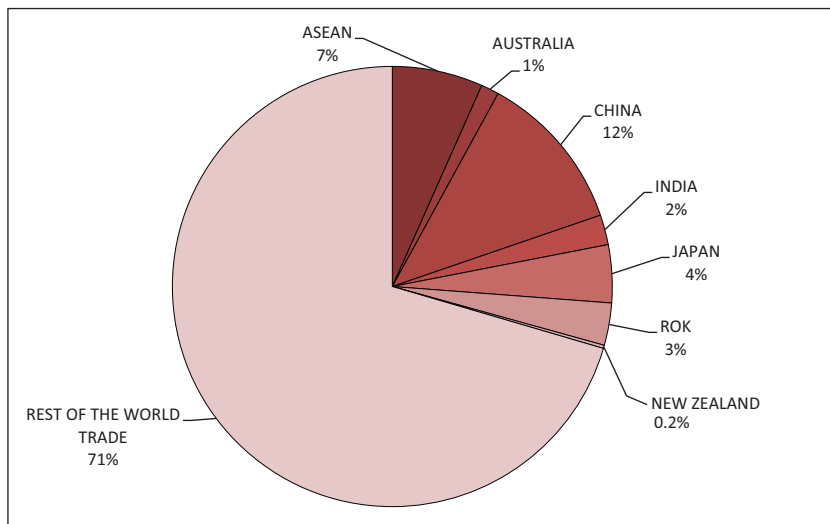
deficit amounting to 18 per cent of its overall trade and 45 per cent of its exports. Its trade deficit with RCEP countries is also more than half its global trade deficit. Its economy has not been export led as is the case with several other RCEP participants. Furthermore, it has the highest average MFN tariff levels (13.5 per cent) among all non-LDC participant countries making it potentially the most impacted, if tariffs were to be eliminated on a large set of products.

10. Moreover, all the other participating countries, barring again the three LDCs, are members of the twenty one member Asia Pacific Economic Cooperation (APEC) forum that has been actively involved in implementing various action plans aimed at bringing about trade and investment liberalisation, trade and investment facilitation including reduction in transaction costs and integration within the Asia Pacific region. This has had no small role in contributing to the continued dynamism shown by these economies. The negotiators from these countries are also personally more familiar with each other and with each other's institutions and systems. They are in constant interactive mode in respect of the numerous APEC activities and meetings that are held periodically. In some ways, the Indian negotiator could be the unenviable odd person in the room.

11. Equally, the opportunities offered by RCEP to India are several. Even if somewhat late in the game of trade liberalisation and facilitation, RCEP could enable India to integrate itself more closely with the dynamism that has been the hallmark of the east and south east Asian economies and benefit as a result.

12. RCEP member countries in all accounted for 31.45 per cent of world merchandise exports and 27.91 per cent of world imports in 2014 and the respective shares of ASEAN and the six partner countries in global trade may be seen in Figure 1.

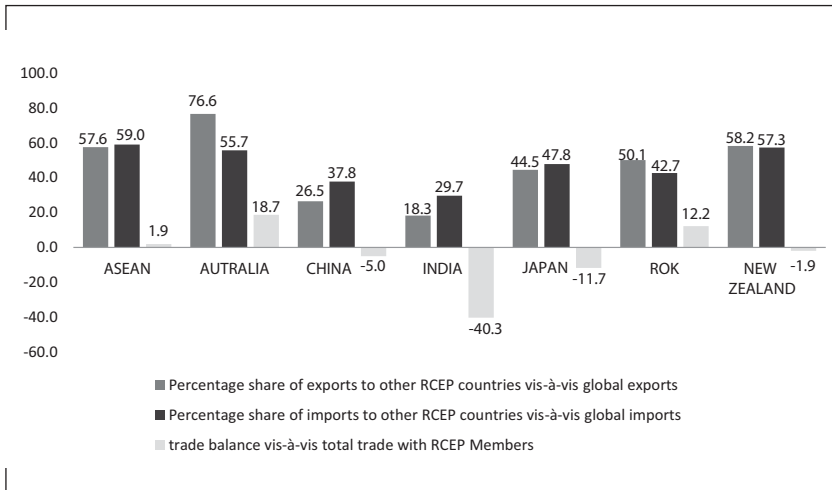
Figure 1 : Percentage Share of Each RCEP member country in World's total trade in 2014



Source: WITS.

13. Among the RCEP members, the level of trade by each member with the rest varied quite significantly. At one end was Australia whose exports to RCEP countries exceeded three quarters of its total exports and whose imports from RCEP sources accounted for two thirds of its total imports. At the other extreme was India whose exports to RCEP countries comprised only 18.33 per cent of its exports and whose imports from RCEP sources made up 29.74 per cent of its total imports. In a sense India was the least integrated in trade with the RCEP region. Figure 2 gives an idea of the intra-RCEP trade intensity of each member for 2014. The level of trade of ASEAN countries with other RCEP members added upto 58.26 per cent. In the case of China its trade with RCEP members was almost a third and for both Japan and Korea the shares exceeded 40 per cent of their global trade. While China, India, Japan and New Zealand all had deficits in their intra-RCEP trade, the percentage share of India was also the highest in this regard.

Figure 2 : Intra-RCEP Trade in 2014



Source: WITS.

14. India has full-fledged dialogues on the security front with many of the RCEP countries and also enjoys strategic partnerships with several of them. But the economic interlinkages have not kept pace. While India has no doubt made a start in the last decade and more, as reflected in its FTAs with ASEAN as well as its comprehensive bilateral trade and investment partnerships with Korea, Japan, Singapore and Malaysia, the coverage and scope of RCEP would likely go further. This would enable a further layer of integration on the economic front that enables a certain catch up if it can be successfully managed. It would no doubt also give a further fillip to the ‘Act East’ policy of the government.

15. The conclusion of the TPP agreement has also brought forth a new possible template of trade and investment rules with many disciplines which are WTO plus both in depth and in scope. These rules were also publicised as marking golden standards in trade policy that were appropriate for the twenty first century. While TPP itself seems now dead, it is still not clear if some of its rules in different disciplines, which were crafted under US leadership and which were also fairly in

line with those prevailing in US, will find backdoor entry into WTO or other multilateral fora. It will not be surprising if countries like Japan, Singapore or Australia seek to have them incorporated in some of the RCEP disciplines. India being a participant in RCEP negotiations has an opportunity to influence moulding the RCEP disciplines or limiting their impact so that its interests are preserved. Indeed if RCEP could come up with an alternative template that is less intrusive in terms of domestic policy making even as the deal is ambitious, it will perhaps be a significant contribution towards providing guidance for future WTO or other negotiations.

16. That said, it must also be stated that TPP may be having certain disciplines that can, from our interest point of view, be usefully imported into RCEP. This is particularly so in the services sector where WTO rules have still not evolved as well as in the goods sector and TPP could provide some useful guidelines.

17. This discussion paper will briefly look at the possible scenarios that may develop in the negotiations in the goods, services, investment and other areas in the RCEP negotiations in the coming months. The attempt will not be to make detailed suggestions since that in any case will require a much fuller knowledge of the various proposals on the negotiation table, the precise positions taken by different countries and the actual progress made so far in the negotiations. Information about them are unavailable in the public domain. However what will be attempted will be to outline possible approaches and objectives for our negotiators. These suggestions are also based on the appraisals undertaken by this author of the implementation of India's comprehensive FTAs with Korea, Japan and Singapore.

Trade in Goods

18. The five ASEAN plus 1 FTAs and the various bilateral FTAs among the six ASEAN dialogue partner countries already provide for substantial concessional market access for trade in goods among the RCEP countries. Table 1 which is a matrix of existing FTAs, treating ASEAN as one,

Table 1: Existing Bilateral FTAs in RCEP, taking ASEAN as one

(Entries indicate date of Entry into Force)

	ASEAN	Australia	China	India	Japan	ROK	New Zealand
ASEAN		1.1.2010	1.7.2005	1.1.2010	1.12.2008	1.9.2009	1.1.2010
Australia(3)**** M, S,Th	1.1.2010		20.12.2015	UN	15.1.2015	12.12.2014	1.1.1983
China(2) S,Th	1.7.2005	20.12.2015			UN (CJK)	1.6.2015	1.10.2008
India(2) M,S	1.1.2010	UN*			1.8.2011	1.1.2010	UN
Japan(7) Ten-CLM	1.12.2008	15.1.2015	UN** (CJK)	1.8.2011		UN** (CJK)	(TPP)
ROK(2) S,V	1.9.2009	12.12.2014	1.6.2015	1.1.2010	UN (CJK)		20.12.2015
New Zealand (3) M,S,Th	1.1.2010	1.1.1983	1.10.2008	UN	(TPP)	20.12.2015	

*UN stands for Under Negotiations.

**UN(CJK) stands for China-Japan-Korea trilateral FTA under negotiations.

***TPP has been concluded but has not come into force. The United States has also withdrawn from it.

**** Figure in Parenthesis of each dialogue partner country indicates the number of FTAs with individual ASEAN countries.

shows that while India and Japan do not have bilateral FTAs with three of the other dialogue partners, China and New Zealand do not have such bilateral FTAs with only two other dialogue partners. Furthermore, both Australia and Korea have no existing FTA tie-up with only one other dialogue partner. If FTAs under negotiations (apart from RCEP) are also taken into account, then only an FTA tie-up between India and China will be missing.

19. Apart from the ASEAN plus one FTAs, all the six dialogue partners also have bilateral FTAs with some of the individual ASEAN members. Japan tops the list with separate FTAs with seven of them with only the CLM countries not included in its FTA basket. While Australia and New Zealand each have FTAs with three ASEAN members, China, India and Korea each have with two ASEAN members.

20. In respect of the ASEAN plus one FTAs themselves, the percentage of tariff lines on which tariffs were agreed to be eliminated vary. At the one end was ASEAN-India FTA which provided for eventual elimination of tariffs on 78.5 per cent of tariff lines. These percentages were significantly higher in the other four FTAs as shown in Table 2.

Table 2: Percentage of Tariff Elimination of ASEAN+1 FTAs

	Percentage of Tariff Elimination		end of Phase-out Period	
	By ASEAN Dialogue Partner	By ASEAN ** Countries	By ASEAN Dialogue Partner	By ASEAN Countries
India-ASEAN FTA	78.80%	48.7%-88.4%*	2017 (2020)	2017-2022
Australia-NZ-ASEAN FTA (Australia)	100%	88.1%-99.2%	2020	2020-2025
Australia-NZ-ASEAN FTA (New Zealand)	100%	88.1%-99.2%	2020	2020-2025
China-ASEAN FTA	94.10%	89.9%-98.3%	2012	2012-2018

Table 2 continued..

Table 2 continued..

Japan-ASEAN FTA	91.90%	85.7%-97.7%	2018	2018-2024
Korea-ASEAN FTA	90.50%	89.4%-99.2%	2010	2012-2024

Source: ERIA Discussion Paper ‘Taking ASEAN+1 FTAs towards the RCEP : A mapping study’, by Yoshifumi Fukunaga.

* In case of India-ASEAN FTA, Indonesia offers the lowest, 48.7 per cent of tariff elimination. If excluded the tariff elimination range of the ASEAN members is 76.6 per cent-88.4 per cent.

** Singapore offers 100 per cent tariff elimination in all the above mentioned FTAs that has not been reflected in the table.

21. In the RCEP negotiations, the participant countries will evidently be looking at expanding their market access in other members through enhanced coverage beyond their respective existing FTAs. Because of wider gaps in India’s case, it may probably have to go the farthest in terms of fresh commitments. But having fewer pre-existing FTAs also implies that RCEP affords an opportunity for India to level the playing field for its exports, such as for example in the Chinese market where ASEAN countries have a more favourable access under the ASEAN-China FTA but India has only a very limited preferential access under the Asia Pacific Trade Agreement (APTA). Even with countries with which India has a bilateral FTA already, such as with Japan or Korea, it allows India to obtain better access through RCEP. For example, in the Japan market certain ASEAN countries have deeper concessions for some fishery products and leather goods than is the case for India under the India-Japan CEPA. Similarly, in Korea for several agricultural items including maize, fruits and vegetables and cotton yarn products ASEAN countries enjoy deeper concession. These again can be corrected through the RCEP process.

22. Additionally, in respect of market access concessions already available in existing FTAs, the attempt by many participant countries may be to seek more liberal Rules of Origin (ROO) in RCEP including

Table 3: Rules of Origin in ASEAN’S FTA with Dialogue Partners

	ASEAN-India 2010	ASEAN- China 2004	ASEAN-Japan 2009	ASEAN-Korea 2007	ASEAN-Australia- New Zealand 2010
Change in Tariff Classification and /or Value Added (VA)	CTSH plus 35 per cent VA	40 per cent VA	CTH or 40 per cent VA	CTH or 40 per cent VA	CTH or 40 per cent VA
Product-specific Rules	Not yet negotiated	Negotiated for a few countries	CC, CTH, CTSH, RVC, process criteria; liberal or stricter than the general rule	CTH, CTSH, RVC, process criteria; stricter than the general rule	CC, CTH, CTSH, RVC, process criteria; liberal or strict
Regional Cumulation	Yes	Yes	Yes	Yes	Yes

Source: From the commentary on “Regional Comprehensive Economic Partnership: Implications for India’s Rules of Origin” by Sanchita Chatterjee, Economic & Political Weekly, November 8, 2014. CC- change in chapter; CTH- change in Tariff heading; CTSH- change in tariff sub-heading; RVC- Regional value content.

provisions for cumulation. While the cumulation provision already exists in the ASEAN plus 1 FTAs, investor countries like Japan and Korea will be interested in cumulation that would permit greater concessional exports to India, for example, from factories of their companies in ASEAN locations for products that may also have substantial content from their home countries. Several ASEAN countries hosting supply chain type arrangements will also push for it. A broad summary of the ROO provisions in the different FTAs may be seen in the Table 3. India has the relatively more stringent requirement of requiring value addition plus change in tariff heading or subheading for a very large number of tariff lines.

23. All these make it quite evident, when combined with the size of the Indian market and its potential for future expansion, that getting India to substantially increase its tariff elimination coverage and further relax its ROO will be a key negotiation objective of the other participating countries.

24. It needs to be noted here that even with the relatively lower standard of its FTAs, both in coverage and in ROO, India's partners have performed better than India itself in their implementation as was also evident in the earlier studies undertaken by this author. Indeed in several areas like chemicals and petrochemicals, plastics, steel, non ferrous metals and automobile products, imports from partner countries have significantly benefitted from tariff concessions. On the other hand, India's gains have been limited partly due to supply and infrastructural constraints. Lack of competitiveness such as for example in the apparel sector was also a serious limiting factor preventing our exporters from being able to make gains from the tariff concessions even as China has been vacating certain segments of apparel items in markets like Japan. Secondly, since its FTA partner countries also had FTAs with several other countries, India did not enjoy any particular edge. Thirdly, India's exports also got affected because of non tariff barriers such as in the area of generic pharmaceuticals and in agricultural items like sesame seeds

or fruits and vegetables where India has strengths and could have done better. Fourthly, stiff rules of origin for fishery items (product should be wholly obtained) or jewellery products (high value addition requirement) etc., also placed limitations on some of the exporters from benefitting from tariff concessions.

25. India's approach will have to be twofold. The tariff concessions it seeks in RCEP negotiations will have to be with reference to present and possible future export capacities and abilities. For the concessions it secures in the negotiations to also translate into realisable market access, India will need drastic domestic improvements in trade infrastructure, logistics and supply chain facilitation that can reduce transaction costs, standards compliance and certification mechanisms, industrial competitiveness, labour reform and also specific trade promotion efforts to difficult markets like Japan, Korea and China that also need some language facilitation. This is clearly demonstrated by the rather inadequate implementation performance in respect of earlier FTAs.

26. A medium and a long term strategy (5 and 10 years) will need to be conceived to bring this about by 2022 and beyond. Areas in which India already has some export strengths - automobiles, pharmaceuticals, refinery products, certain chemicals and dyes, cosmetics, jewellery, leather and leather goods, textiles and garments, steel and steel products, certain engineering items, shrimps and certain marine products and several of the agricultural products - could perhaps be first focused on and our competitiveness further built upon with improvement in quality standards and capacities in value addition and relaxations in labour regulations particularly in the garment and footwear sectors. Facilitating transportation and delivery chain will also be crucial in this effort. As for primary agricultural products, bringing stability and predictability to the available surplus for export will be important.

27. Chapter 7 in the Economic Survey 2016-17 captioned 'Clothes and Shoes: Can India Reclaim Low Skill Manufacturing?' has dwelt upon the challenges towards enhancing India's exports in the two

important labour intensive sectors. It has looked at the narrow window of opportunity still available for India to make good in these sectors and has suggested their focused promotion considering the externality generating attributes like employment, exports and social transformation.

28. Other products and sectors in addition to what are cited in the foregoing paragraphs can be added with time depending also on technology improvements. It must be recognised here that the strategy is not just related only to trade policy or promotion. While some of the elements to begin with can be captured in the proposed mid-term review of trade policy statement, an integrated effort involving several industry (and agriculture and food processing) and infrastructure ministries, finance and revenue department, apart from the trade and industry stakeholders and state governments will be essential in the formulation and implementation of the proposed medium and long term strategy. Key ongoing initiatives like ‘Make in India’, ‘Skill India’, introduction of GST, the ‘Single Window’ project of the Customs as also the other initiatives towards speedy implementation of the WTO Agreement on Trade Facilitation, the Delhi-Mumbai Industrial Corridor (DMIC) project, the Bengaluru-Chennai Industrial Corridor project and the fourteen coastal economic zones planned as part of ‘Sagarmala’ will all need to be suitably dovetailed to make it succeed. The initiatives already launched by the government in the textile and apparel sector and the proposed similar initiative in the leather sector can again become part of this overall strategy.

29. The strategy, the action plans and the steering committees being currently set in place by India for the implementation of the WTO Agreement on Trade Facilitation is a good model that can be emulated on a larger scale for drawing up and for the implementation of the proposed larger trade and competitiveness strategy. As for TFA implementation itself, it will be critical that it should result in sharply raising the ranking of India on aspects like ‘Ease of trading across borders’, ‘Dwell time at ports’ and ‘Logistics Performance Index’, to make it comparable to other RCEP partners.

30. Such a Trade and Competitiveness strategy if finalised soon will make clear our existing and possible future export capacities that can in turn help our RCEP negotiators in being able to fine tune the concessions that we should be seeking. Secondly, it will also help in the attempt that we should make towards getting recognition of our standards and certification for at least a few of our products in RCEP markets that can be expanded later. It is instructive to note here how certain countries in the TPP negotiations ensured that these were agreed to prior to the final outcome. The bilateral agreement between US and Japan on auto products (Japan's letters to US on safety regulations for auto products that forms part of TPP text) is an example.

31. This will also be particularly necessary vis-a-vis China with which we have been raising concerns² about access for products like buffalo meat, pharmaceuticals, agricultural items, animal feed, fishery products and certain engineering goods. While some progress seems under way on buffalo meat, the progress in respect of other issues is not known. The signing of certain MoUs on pharmaceuticals has not also had much impact. China's regulations that require factory inspections by Chinese officials at the expense of the exporters is a lengthy and costly procedure that should be done away with.

32. As has been seen in respect of India's CEPAs, once the agreement is signed, there is little interest shown by partner countries to take time bound actions on according such recognition. Trade protection sentiments take hold. While admittedly it may not be possible to get recognition for all the products of our interest before the conclusion of the negotiations, and indeed there may be work to do on our own side as part of the strategy mentioned earlier to upgrade certain products, some beginning is essential before the agreement is concluded. Additionally, an effective RCEP process needs to be put in place as part of implementation arrangements where member countries have avenues to raise issues relating to delay in accord of recognition by any member should the same happen.

33. In respect of ROO, we will also need to ensure that products of our interest get suitably addressed even as there will be pressure to try and harmonize them among all partners. In the India-Korea CEPA, the minimum value addition requirement rule stood in the way of some of our jewellery exports not being able to avail of the tariff concession. In such high value items, value addition is but a small proportion of total cost. Likewise, in the India-Japan CEPA the requirement of ‘wholly produced’ meant that some of the imported preservatives used in processing shrimps disqualified the final product even though their share of total cost was a meager 0.15 per cent. Suitable provisions need to be incorporated to have such products of interest to us become eligible for RCEP tariff concessions.

34. We will also need to have an effective negotiation strategy on the side of tariff concessions we ourselves may agree to. As already mentioned, imports in several areas like chemicals and petrochemicals, plastics, steel, non ferrous metals and automobile products from partner countries have significantly benefitted from tariff concessions in the existing FTAs signed by India with certain of the RCEP members. Imports have also sharply risen from China in recent years of both consumer and other industrial products even in the absence of an FTA (There are certain limited tariff preferences extended to China under the Asia Pacific Trade Agreement). The number of dumping cases that also involved injury determinations, particularly in the chemicals and steel sector but also others, were also numerous.

35. In the light of all these, some negotiating guidelines seem obvious. Firstly, we may need to exercise caution on grounds of food security particularly in respect of food grains and essential commodities. Similarly, some of the core and strategic industries with large domestic consumption requirements like textiles, automobiles, steel, some of the non ferrous metals, construction material, petroleum refining, pharmaceuticals, basic chemicals, etc., also need a cautious and graduated approach in tariff reductions. On the one hand getting these industries

to face imports will ensure they strive to become more competitive. But this will need phasing and will also depend on the improvements in infrastructure and other elements on which the industry has little control. As an adjunct therefore to the strategy earlier mentioned in Para 26, taking steps to create a facilitative environment for competitive production of goods meant for domestic consumption will also be essential for providing a level playing for Indian manufacturers. Where imported raw materials and intermediate goods are required for their production these will need import facilitation and appropriate tariff structuring so that instances of inverted tariffs are minimal if not nil.

36. A key challenge for our negotiators will be to secure appreciation and understanding from their counterparts from other RCEP countries (other than from China) that we have a serious imbalance of trade with China. It will be seen from Table 4 that India's trade with China as a percentage of trade with all RCEP members is quite high, coming almost close to India's trade with all of ASEAN members. Secondly, the trade deficit India has with China is over three times its exports to China, a situation not matched by any other RCEP member except Cambodia and this percentage has also been increasing over the years.

Table 4: RCEP Members Trade with China for 2014 (value in US\$ billion)

	Exports to China (in US\$ billion)	Imports from China (in US\$ billion)	Deficit/ Surplus as a percentage of Exports (in %)	Total trade with China (in US\$ billion)	Total trade with RCEP (in US\$ billion)	Trade with China as a percentage of Trade with RCEP (in %)
Australia	81.41	46.85	42.45	128.27	310.40	41.32
India	13.43	58.23	-333.45	71.66	194.82	36.79
New Zealand	8.26	7.20	12.85	15.46	47.62	32.47
Japan	126.36	181.29	-43.47	307.66	695.55	44.23

Table 4 continued..

Table 4 continued..

ROK	145.33	90.07	38.02	235.40	511.71	46.00
ASEAN (as a whole)	137.78	196.58	-42.67	334.36	1371.73	24.38
ASEAN Countries:						
Brunei	0.10	0.36	-275.21	0.45	12.04	3.76
Indonesia	17.61	30.62	-73.94	48.23	229.37	21.03
Cambodia	0.36	3.71	-940.42	4.07	8.74	46.54
Malaysia	28.22	35.32	-25.16	63.54	275.30	23.08
Singapore	51.50	44.42	13.75	95.92	416.94	23.01
Thailand	25.07	38.50	-53.53	63.57	259.86	24.46
Vietnam	14.93	43.65	-192.38	58.58	169.49	34.56

Source: WITS.

37. Unlike the earlier FTAs signed by India, RCEP also brings forth some new challenges:

- The agriculture and dairy sector in which both Australia and New Zealand have significant competitive strengths;
- The cumulation provision that will enable countries like Japan and Korea to combine their capital and technology with cheaper wages of some ASEAN countries like Vietnam or lower taxes (and investment incentives) of well connected locations like Singapore to manufacture and export products that have originating elements from two or more RCEP countries;
- The participation in RCEP of China which has already built up a huge surplus in bilateral trade with India even without any significant tariff concessions; and
- The unknown dimension arising from impact of automation, digitisation and other technological developments in future that can disrupt inter-se competition.

38. India will need to secure substantial flexibilities to meet these challenges even within a common concessional approach.

- If, for example, the common concession level is deemed as tariff elimination of 80 per cent of tariff lines then India may have to seek a flexibility of at least 6 to 10 per cent in either direction for certain members. For China, it should seek to be allowed to only eliminate tariffs up to 70 per cent.
- Secondly a longer phase out of up to fifteen to twenty years should be sought for phasing out. While some percentage of tariff lines could have an earlier phase out, the rest should be allowed to be phased out till the end of flexibility period. Where necessary back loading may need to be resorted to even as we seek front loading by some of the more competitive countries for our exports.
- India's liberalisation of sensitive agricultural items could be in the form of limited tariff rate quotas at best.
- A product specific safeguards provision (without the element of compensation) should be included for other sensitive products that can enable India to put a stop on imports for that year if they exceeded the average of previous three year's imports of that item by ten per cent or so. For agricultural products apart from volume trigger, price trigger will be essential. The provision for industrial products could also be invoked if serious injury to the industry in the form of job losses arises. (Following the recent US Presidential elections where job losses from FTAs became a major issue this should become an easier argument to advance).

39. India will also have to harmonise its approach in the RCEP negotiations with the strategy that it is adopting in the periodic negotiations on review of existing CEPAs. For example, it is known that the Republic of Korea has submitted a long list of items that were earlier excluded from tariff concession under India-Korea CEPA or were in the sensitive list for tariff elimination. Similarly, negotiations are also underway between India and EU for concluding a BTIA with EU demanding concessions on a range of products including in the sensitive automobiles sector. Generally speaking, giving concessions to only one

Table 5: Total Trade in Services of RCEP Countries in 2014(value in USD Mn.)

Economy	Exports	% Share in Global Exports	Imports	% Share in Global Imports	Total Trade	% Share in Total Trade	Trade Surplus/ Deficit
WORLD	5139260.00		5044210.00		10183470.00		95050.00
Australia	54243.74	1.06	63455.33	1.26	117699.08	1.16	-9211.59
China	280477.10	5.46	452832.10	8.98	733309.20	7.20	-172355.00
India	156252.00	3.04	127668.07	2.53	283920.07	2.79	28583.93
Japan	163074.57	3.17	192146.32	3.81	355220.90	3.49	-29071.75
New Zealand	14394.12	0.28	13191.71	0.26	27585.84	0.27	1202.41
Korea, Republic of	112105.90	2.18	115784.40	2.30	227890.30	2.24	-3678.50
ASEAN Countries:							
Cambodia	3810.89	0.07	1881.50	0.04	5692.39	0.06	1929.39
Indonesia	23530.90	0.46	33540.60	0.66	57071.50	0.56	-10009.70
Brunei Darussalam	556.81	0.01	2186.83	0.04	2743.64	0.03	-1630.02
Lao People's Dem. Rep.	765.27	0.01	488.97	0.01	1254.24	0.01	276.30
Malaysia	41948.20	0.82	45351.90	0.90	87300.10	0.86	-3403.70
Myanmar	4211.67	0.08	2602.27	0.05	6813.94	0.07	1609.40
Philippines	25498.10	0.50	20921.60	0.41	46419.70	0.46	4576.50
Singapore	150750.00	2.93	155481.00	3.08	306231.00	3.01	-4731.00
Thailand	55346.90	1.08	53231.40	1.06	108578.30	1.07	2115.50
Viet Nam	10970.00	0.21	14500.00	0.29	25470.00	0.25	-3530.00
Total of all ASEAN	317388.74	6.18	330186.07	6.55	647574.81	6.36	-12797.33
Total of all Rcep Members	1097936.18	21.36	1295264.01	25.68	2393200.19	23.50	-197327.83

Source: www.unctad.org

set of players can distort competition. A more harmonious approach vis-à-vis all ongoing negotiations and reviews may be necessary in working for a cohesive and balanced outcome.

40. A brief word about Trade Facilitation. It will be a good idea to get more RCEP countries to enter into Mutual Recognition Agreements (MRAs) for the Authorised Economic Operator (AEO) Programme of Indian Customs, particularly with countries to which India has substantial exports. Currently a pilot project is understood to be under implementation with Republic of Korea. Trade facilitation is also an area where several RCEP members have rich experience based also on APEC's trade facilitation action plans that systematically brought down transaction costs in each of APEC's members. It will bring great benefit if RCEP could have cooperative activities involving sharing of experiences and training and technical cooperation programmes in this important area.

Trade in Services under RCEP

41. Members of RCEP account for 21.36 per cent of world exports of services and an even higher 25.68 per cent of world imports. These percentages are somewhat less than those for trade in goods. Several RCEP members also have a deficit on their services trade account globally. China tops this list. India on the other hand enjoys some surplus and the other countries which similarly have a surplus on their services trade account are Philippines, Thailand, New Zealand and the CLM countries. Table 5 gives more details including about the balance of trade of RCEP members at the global level.

42. India's bilateral services trade with individual RCEP members, however, shows trade deficits with several of them. While disaggregated country wise trade figures are not available for all RCEP countries, those that could be obtained from different sources (Table 6) indicate that India's trade in services with Australia, Japan, Korea, Singapore and New Zealand, which can be expected to constitute a good share of services trade with countries in RCEP, is in the deficit. Evidently, India's

strengths in the areas of Computer and Information services and Other business services that have enabled India to have a surplus at the global level have not tilted the balance of trade in India's favour as yet in the RCEP countries.

Table 6: India's Bilateral Trade in Services with certain RCEP Member Countries (value in US\$ million)

Country	Export	Import	Trade Balance	Source	Year in which the data was taken
Australia	2159.798	1291.732	3451.53	thttp://stats.oecd.org	2014
New Zealand	408.98	153.47	562.454	thttp://stats.oecd.org	2014
Japan	2085.99	1348.82	3434.808	thttp://stats.oecd.org	2014
Korea	1579.30	1024.20	2603.5	thttp://stats.oecd.org	2011
Singapore	3435.066	2882.443	6317.509	thttp://stats.oecd.org	2014

43. Drawing upon the findings from the earlier studies by this author on the implementation of our CEPAs with Japan and Korea and the CECA with Singapore, it is felt that a possible strategy for the RCEP negotiations would need to look at the following broad areas:

Liberalisation of Market Access in all Modes with Significant Coverage

Generally speaking, actual market access that is available in most RCEP countries is significantly higher on MFN basis than offers or commitments made by countries either as part of Doha Round or in the different FTAs they are already party to. This applies to India as well.

It is also true that countries have generally refrained from making commitments for their participation in new RTAs beyond their present autonomous policies. This was the case even in respect of the 'high standard' TPP. There were very few areas in which member countries did anything more than bring their commitments closer to their autonomous policies.³ (Among the few new areas of Malaysia and Singapore, for

example, it needs to be noted, were the commitments to allow cross border trade in certain professional services like auditing and accounting that may be of interest to us.)

Very likely, this is what may also happen under RCEP. Even to achieve this fully may not be easy. ASEAN countries, for example, have taken a very conservative approach on services. This is also demonstrated by the extended time they took to agree on an India-ASEAN deal on services and investment. They are also not party to the ongoing Trade in Services Agreement (TISA) negotiations. Keeping all this in view it would be best if India focused its attention on securing market access commitments in sectors and modes of particular interest to it where actual benefits can accrue rather than working only on an across the board target in the twelve sectors and the 155 sub-sectors. Getting substantial access in Mode 1, for example, will be very important in sectors in which we may have an edge and in which cross border or electronic delivery will work.

This measured approach will also help India to be equally cautious and somewhat balanced while offering concessions. Here it is recommended that we do not subscribe to a negative listing approach for services. Newer services, new technologies for delivery of known services, or even in the form of three dimensional printing, can transform market conditions. A negative listing approach could by default result in positive commitments by India in such new services. India is also a large market and this should necessarily be a factor in dealing with specific requests. (We have seen how, for example, under India-Korea CEPA, Korea has got its companies working in India on online gaming, TV marketing and dental centre for children while Indian IT companies continue to struggle for market access in Korea).

A Separate Chapter on Movement of Professionals

This has generally been a key negotiating objective for India. However, separate chapters in India's existing CEPAs intended to facilitate movement of professionals have not in reality resulted in any significant

Table 7: Commitments taken by partner countries in India's FTAs on temporary movement of professionals

Specific Commitments under Mode 4	India-Singapore CECA (2005)	India-Malaysia CECA (2011)	India-Japan CEPA (2011)	India-ROK CEPA (2010)	India-ASEAN FTA (2013)
Business Visitors	√	√	√	√	√
Intra-Corporate Transferees	√	√	√	√	√
Contractual Service Suppliers including installers and servers (as per commitments)	√	√	√	√	√
Independent Professionals (as per specific commitments in each agreement)	√	√	√	√	
Whether Economic needs test waived for market access commitments?	Yes*	Yes	Yes	Yes	Yes
Whether exemptions from social security contributions explicitly stated?	Yes		To hold consultations on the feasibility of a social security agreement**	Yes	

*The India-Singapore CECA is the only FTA, among those in this table, that has a provision for no economic needs test in not only the Article dealing with market Access in the Chapter on Services but also in the chapter on temporary movement of professionals. In fact, in the latter, the relevant provision goes on to say that neither party shall require labour market testing, economic needs testing or other procedures of similar effect as a condition for temporary entry.

** India and Japan Social Security Agreement signed on 16 November 2012 has come into force with effect from 1st October 2016.

improvement on that front. Despite their commitments, partner countries take refuge under immigration regulations. Even where we have a separate provision in the separate chapter on the subject, as in Singapore CECA that specifies that no labour market test or economic needs test will be applied, this is not being strictly adhered to. That said, a country like Japan has been making incremental positive changes in response to issues being taken up by us.

On balance, it would appear to be a good idea to have a separate chapter or annexure in the RCEP agreement on the subject. This is even as, considering the rising global sensitivity to the issue of movement of professionals, Indian companies need to rework their business model that has greater reliance, in terms of work support, on their Indian headquarters and reduces their site personnel presence requirements.

The separate chapter should include, as in our CEPAs, not only business visitors, intra corporate transferees, and contractual service suppliers but also independent professionals. It is instructive that in TPP, rather than having one common chapter on temporary entry of business persons, there are separate annexures for each member listing the commitments taken by it. USA took no commitments and hence has no separate annex, for itself. The annex for Singapore is also very brief listing its commitments on temporary entry of only business visitors and investors. On the other hand, the commitments taken by Australia and Canada in their annexures are quite extensive covering business visitors, intra-corporate transferees, investors, professionals and technicians. Additionally, the annexure of Canada affirms, based on reciprocity, that it will not require labour certification or impose any numerical restriction relating to temporary entry. It is also interesting to note that Vietnam whose annexure includes commitments on intra corporate transferees further specifies that at least 20 per cent of the managers and executives and specialists should be Vietnamese nationals but a minimum of three managers, executives and specialists will be permitted from outside of Vietnam.

It is noteworthy too that the separate chapter on temporary movement of professionals in the India-ASEAN FTA includes only commitments on business visitors, intra-corporate transferees and contractual service providers and not independent professionals (see Table 7). With countries like Singapore turning more restrictive in recent years on the subject, attempting a commonly accepted text for all sixteen members may only produce a minimal result. It may be more advisable for the architecture for this chapter on temporary entry to be based on the TPP model of a separate annexure for each country so that countries have the option to exchange more extensive commitments under RCEP based on the principle of reciprocity. Some institutional mechanism should also be attempted for oversight of implementation within the RCEP framework. APEC has a mechanism for regular meetings of immigration officials which also coordinates on the APEC business visa/card. Could such a system be instituted in RCEP?

Regulatory Cooperation

Market access can at times get affected or undermined by restrictive regulatory regimes in the host countries which seek to go beyond securing legitimate objectives. This is seen as also affecting India's access in its FTA partner countries in certain sectors including in the financial services sector. This can be addressed to some extent by RCEP having an institutional mechanism for holding regular consultations on regulatory oversight by members. Regulatory bodies in specific areas like banking and finance, insurance, accountancy, telecom services and architecture could also hold annual consultations.

This is, of course not, so easy to accomplish since services regulations are seen as a sovereign national preserve. Regulatory structures are also heterogeneous in character with varying standards across nations and differ also from sector to sector. A country's economic philosophy also plays a part. The complexities involved in forging

regulatory cooperation and the likely gains from it have been well elaborated in a paper³ on the subject by Dr. Aaditya Mattoo who has argued that while regulatory cooperation may not be sufficient to deliver liberalization, it is necessary. If regional integration is a key objective behind RCEP, regulatory cooperation should be an important aspect. The objective here, it must be clarified, is not to aim for regulatory coherence. It is to ensure that market access commitments taken by a member are not undermined by any regulatory discrimination.

Improved system for arriving at MRAs

Reaching agreements on mutual recognition between professional bodies on professional qualifications and competence in a more timely and effective manner should be another objective that we will need to pursue. India has not made much progress even with partners with which it has entered into comprehensive economic partnership agreements even though concluding such MRAs formed part of the in-built agenda. The only exception is in respect of Singapore with which India has concluded an MRA on nursing services. Even this however has not been formally signed yet. Separately, the Institute of Chartered Accountants of India (ICAI) has an MoU with CPA Australia that allows for a pathway for a full associate member of ICAI to become an associate member of CPA Australia. It needs to be mentioned here that ASEAN countries have made some progress on this front among themselves in a number of areas including engineering services, medical services, nursing services, accountancy, architecture, tourism professional services and surveyors. They proceeded in sequential steps from an initial framework agreement to a subsequent MRA and, where relevant, they have also instituted a licensing register/arrangement that requires fulfillment of a certain procedure before the licensed persons can actually practice the profession. Box 1 indicates the various existing MRAs between individual RCEP countries.

Box 1: Existing MRAs Among Rcep Member Countries

Sectors	Country	Partners	Date of Signing
Accountancy Services	ASEAN	Among ASEAN Countries	13-Nov-14
	Australia	India	19-Sep-14
		China	
		Singapore	3-Aug-09
Architectural Services	ASEAN	Among ASEAN Countries	19-Nov-07
Dental Practitioner	ASEAN	Among ASEAN Countries	26-Feb-09
Engineering Services	ASEAN	Among ASEAN Countries	9-Dec-05
	Australia	Korea	Dec-14
Medical Practitioners	ASEAN	Among ASEAN Countries	26-Feb-09
Nursing Services	ASEAN	Among ASEAN Countries	8-Dec-06
	Indonesia	Japan *	
	Japan	Philippines*	
Surveying Qualifications	ASEAN	Among ASEAN Countries	19-Nov-07

* There is no MRA between Indonesia and Japan and Japan and Philippines in nursing. However, there is a provision for allowing entry of nurses and careworkers under the Japan-Indonesia EPA and the Japan-Philippines CEPA. The nurses will need to have stipulated nursing experience and also undergo Japanese language tuition and test.

Source: Report on APEC Work on Services and Baseline Indicators, ERIA Discussion Paper Series: Assessing the Progress of ASEAN MRAs on Professional Services and official text documents of some of the FTAs by Yoshifumi Fukunaga and the texts of CEPAs.

What would be important in RCEP is to have an institutional mechanism that is facilitative and promotive of such MRAs. In this regard, the establishment of a Working Group on Professional Services, as in Annex 10 A of the TPP agreement, could be one possibility. The TPP Working Group was intended to *inter alia* facilitate activities that could result in recognition of professional qualifications, licensing or registration.

Trade Facilitation in Services

India has recently submitted a proposal on the subject in the WTO⁴. RCEP negotiations could serve as a good laboratory to see if India can

get it included and elaborated in the RCEP agreement. In any case, refund of social security contributions to short term workers returning to their home countries after completion of their assignments, allowing transferability/portability of health insurance for availing treatment anywhere in the RCEP region, promoting freer data flows among RCEP countries subject to agreed privacy safeguards etc., are some of the trade facilitation elements that could possibly figure in the RCEP agreement.

44. It would however be necessary that Indian services companies would also need to be better prepared to be able to benefit from possible additional access arising from the RCEP agreement while also being able to withstand competition. Again, this would require a well planned strategy that also takes lessons from why our services companies have had limited success in the RCEP region. Special attention will need to be given to overcome challenges faced in terms of language and culture of doing business not only in major markets like China, Japan and Korea but also in populous ASEAN countries including Indonesia, Vietnam and Thailand. A key aspect to overcome here, particularly in the IT and IT enabled services sector, is the tendency among even private sector players in some of the RCEP countries to offer IT jobs/contracts to only local companies notwithstanding competitive offers from proven Indian IT majors. Invisible government intervention could also be a factor. This may again need vigilant tackling. Availability of institutional oversight mechanisms in RCEP would be particularly important here.

E-Commerce in RCEP

45. E-Commerce has emerged as an important issue in the RCEP negotiations. The guiding principles and objectives for the RCEP negotiations had mentioned e-commerce as an area for cooperation between RCEP partners under the broad rubric of ‘Economic and Technical Cooperation’. It had, however, not identified it as a separate subject on which to have trade rules. But the establishment of a separate working group on the subject along with news reports appearing about TPP type rules being mooted by some participant countries appear to suggest that a separate chapter of rules could well be a possibility.⁵

46. Electronic Commerce has not been dealt with separately in earlier bilateral CEPAs/CECAs signed by India or under the India-ASEAN FTA. Electronic Commerce is also not specifically covered under the chapter on Bilateral Cooperation in these agreements. The only exception is the India-Singapore CECA that has a separate but limited chapter on E-Commerce. It basically affirms the commitments by both parties of not applying customs duties on the importation and exportation of digital products by electronic means. It further specifies that each party will determine the customs value of imported carrier media bearing digital products according to the cost of the carrier medium alone without regard to the cost or value of the digital products stored on the carrier medium. But the parties have also affirmed that the supply of a service using electronic means will be governed by the commitments by the two countries in the services and investment chapters. They have also exempted measures affecting broadcasting from the application of the rules in the chapter on electronic commerce.

47. The practice of not imposing customs duties on digital transmissions has been a long standing one since 1998 even in the WTO. Every WTO ministerial has been extending such a decision till the next ministerial, as was done by the last WTO ministerial in Nairobi in 2015. Additionally, WTO has also been having a work programme on e-commerce covering a range of issues related to the subject.

48. The TPP, however, has gone significantly beyond in its separate chapter on e-commerce. Observers have noted that this chapter in TPP is one of the transformative elements of the agreement. Apart from making the WTO practice of zero customs duties on electronic transmissions permanent, it *inter alia* requires all members to freely allow cross border transfer of information by electronic means, including personal information, for business purposes. It prohibits requiring companies to use or locate computing facilities including servers in the country as a condition for doing business in that country. It provides for net neutrality but explicitly recognises that an internet access service supplier offering its subscribers certain content on an exclusive basis will not be acting

contrary to this principle. It also prohibits requiring access to software code as a condition for market access for the product containing the software code. There are no doubt exceptions to these rules from a security angle or on account of public policy objectives but these cannot be arbitrary or be an unjustified restriction on trade. The chapter is also covered by the dispute settlement provisions of TPP.

49. India has a keen interest in maintaining a free and open internet.⁶ The Digital India and the start up India programmes reflect its aspirations and its IT companies also depend on free movement of data for the conduct of their business. If India would like to promote itself as a global data centre hub it will again need to have a data friendly approach. It is also noteworthy that in the ‘Possible Elements for a Trade Facilitation in services agreement that India has circulated in the WTO (S/WPDR/W/57 dated 14 November 2016) it has underlined that the concept of free cross-border flow of information is very important for ensuring meaningful supply of services through Mode 1.

50. While India could show a positive approach to framing rules on e-commerce in RCEP, it needs to be borne in mind that several policy and regulatory issues also arise in e-commerce relating to security of critical infrastructure, security surveillance, consumer privacy protection, competition regulation (Brick and mortar Vs e-commerce outlets and Foreign e-commerce Vs. Local e-commerce firms) and even of consumer pricing (such as for cab services by cab aggregators). Certain competition related disputes in this regard have come to the Competition Commission of India. A few Indian e-commerce companies have also alleged⁷ ‘capital dumping’ by their foreign counter parts. Our laws on them and regulatory approaches to address them are still evolving and we may have to proceed on them on an iterative basis, at times even requiring some backtracking.

51. Entering into extensive and binding disciplines on E-Commerce in the RCEP at this present stage may therefore need careful consideration. Unlike TPP, a more graduated approach may be advisable, particularly considering that the region also has many large e-commerce players and companies. India’s experience with the earlier FTAs in the IT services

sector reveals the disadvantages our companies have faced in other markets on grounds of language and different cultures of doing business. It may therefore be preferable to keep the disciplines somewhat limited initially. RCEP members could also agree on a work programme of cooperation and go about further rule making when they are ready.

Investment

52. Investment flows between India and the RCEP members remain substantial and take place in both directions. FDI equity inflows into India from other RCEP members for the period 2000-2015 totaled US\$ 68.38 billion that amounted to 24.53 per cent of all FDI inflows into India during this period. While these have largely come from Singapore and Japan there were also inflows from South Korea, China, Malaysia, Australia and Indonesia as seen from Table 8.

Table 8: FDI Equity Inflows from RCEP Countries from January 2000 to December 2015

Country	Cumulative inflow till December 2015 (in US Dollars)	Percentage share of total FDI inflows into India
Singapore	43,173.41	15.48
Japan	19,514.38	7.00
South Korea	1,762.00	0.63
China	1,322.83	0.47
Malaysia	787.46	0.28
Australia	785.97	0.28
Indonesia	624.28	0.22
Thailand	213.69	0.07
Philippines	130.28	0.04
New Zealand	54.93	0.02
Myanmar	8.96	-
Vietnam	0.45	-
Brunei	0.09	-
Total of RCEP Countries	68,378.73	24.53
Total	278,755.28	100.00

Source: SIA Newsletter, DIPP.

53. India has also attracted portfolio inflows from RCEP countries. Two of them, Singapore and Japan, figured among the top ten portfolio investing countries in India as of December 2016 with inflows from FPIs based in these two countries adding up to Rupees 3,04,894 crores accounting for 13 per cent of all such investments into India. Figures for FPI investors from other RCEP countries are not available in a disaggregated fashion.

54. According to RBI, Singapore and Australia also figure among the top ten countries where India has its outward investments. As will be seen from Table 9 these two RCEP countries by themselves add up to 27.5 per cent of all Indian ODI stock. India also has substantial investments in other RCEP countries such as Republic of Korea, Thailand, Indonesia, Malaysia and Vietnam. A survey of the website of Indian Embassies in these countries indicate investments of US\$ 1.3 billion in Republic of Korea, US\$ 1 billion in Vietnam, US\$ 2 billion in Malaysia and an approved investment of US\$ 350 million in Thailand since 2012. Some of these investments could, however, have also been made by affiliates of Indian companies in third countries.

Table 9 : Country-wise distribution of ODI Stock: March 2015

Among Top Ten Countries	Equity	Debt	Total
Singapore	1114.6	200.3	1315
Australia	144.8	3.1	148
Total of World	4212.6	1107.5	5320.1

Source: Census on Foreign Liabilities, Reserve Bank of India.

55. It is not surprising therefore that India already has a mesh of investment promotion and protection agreements with several RCEP members. These bilateral instruments called bilateral investment promotion and protection agreements (BIPPAs) are in force with South Korea (1996), Malaysia (1997), Vietnam (1997), Australia (2000), Philippines (2001), Thailand (2001), Indonesia (2004), China (2007), Brunei (2009) and Myanmar (2009). Additionally, investment protection

provisions are also included in the bilateral comprehensive economic cooperation agreements signed by India with Singapore (2005), South Korea (2010), Japan (2011) and Malaysia (2011). Most recently, the India-ASEAN investment agreement (2015) that forms part of the FTA framework between India and ASEAN has also become operational.

56. Investment will also be an important chapter in the RCEP agreement. The RCEP negotiating guidelines aim to create a liberal, facilitative, and competitive investment environment and they are to cover the four pillars of promotion, protection, facilitation and liberalisation. What should be India's objectives in this regard?

57. India's approach towards such investment promotion and protection provisions has undergone significant changes during the last twenty years or so. Initially somewhat limited in scope, its bilateral investment agreements evolved to become more liberal. However, after a string of disputes raised by investors in more recent years, the proposed scope and level of commitment have been significantly narrowed down as in the model bilateral investment treaty (BIT) announced in December 2015.

58. Earlier BIPAs did not make any commitments, for example, on pre-establishment treatment. But the Singapore CECA signed in 2005 provided for a limited positive listing of pre-establishment rights for investors. Later CEPAs with Japan, Korea and Malaysia went even further also offering negative listing of commitments on this score. The new BIT does not envisage any commitment at the pre-establishment stage.

59. Stung by its experience in the ISDS with the Australian company White Industries, which saw the company making a treaty choice by availing of the MFN provisions in India-Australia BIPA and then basing itself on the more favorable provisions in the India-Kuwait BIPA, India's model BIT also does not offer MFN treatment that formed a fairly standard feature in most earlier agreements.

60. Earlier BIPPAs also did not have provisions prohibiting Performance Requirements. But the CECA agreement with Singapore incorporated the TRIMs agreement of WTO in the investment chapter. The CEPAs with Japan and Korea went even further and also prohibited requiring technology transfer as a performance requirement. There is no reference at all to performance requirements in the BIT.

61. In respect of investment coverage earlier agreements had an asset based approach and provided for a wide scope covering any asset invested in accordance with national laws. There were also specific references to movable and immovable property, shares, stocks and securities, rights under a contract, rights to claim money, IPRs, goodwill, business concessions and re-invested earnings as being included in the scope. The BIT instead follows an enterprise based approach and considerably restricts the scope to an enterprise that is established in the host state as per its laws.

62. Investor state Dispute Settlement, that has become a controversial issue even internationally, is another element on which the differences are wide. While earlier agreements that India is party to provides for international arbitration as an option after exhaustion of the mandatory period of consultations, the BIT makes it mandatory for investors to seek domestic judicial remedies before seeking international arbitration for investor state disputes.

63. It has been reported that India has already issued notice seeking termination of investment agreements with 57 countries with whom BIPPA agreements are falling due for renewal. It has further been indicated that India would want to negotiate joint interpretative statements with the remaining 25 or so countries to ensure restricting the scope of application of those agreements. It is not known if similar action is also proposed to be taken in respect of the comprehensive FTAs in which investment provisions are also covered.

64. These developments coming at a time when the RCEP negotiations have been underway since 2013 makes it a very challenging task for our negotiators to see if other RCEP members could be weaned towards accepting the very limited scope of BIT as a possible model for RCEP. This becomes particularly difficult in view of the RCEP Guiding principles also urging that the RCEP will have significant improvements over the existing ASEAN+1 FTAs. The India-ASEAN agreement on investment that was signed only in 2014 and came into effect in 2015 has more or less followed the earlier pattern of our BIPPAs.

65. There is no doubt, however, that there is a good case for somewhat limiting the scope of investment protection provisions in future agreements like the RCEP. The rapid increase in ISDS cases worldwide in recent years and the wide ranging interpretations of investment agreement provisions by arbitral tribunals have raised concerns in many countries that may be supportive of reform. In the RCEP region itself countries like Indonesia have been reviewing their existing investment treaties. There is also concern in the Philippines, particularly after the recent arbitral decision on the Baagerwerken Decloedt En Zoon (BDZ) versus the Philippines case in favour of the Belgian corporation. Civil societies in the Asia Pacific region including representative groups from Australia and New Zealand have also been raising voices against inclusion of extreme investor rights in RCEP.

66. It would be very important to see if all these prevailing sentiments can be mobilised and consolidated to bring about a lowering of expectations from other RCEP governments. A good amount of Track-2 and Track 1.5 efforts will be necessary if any success has to be achieved. India may, however, also need to show pragmatism in accepting constructive suggestions towards adapting its model BIT. India and its companies too have substantial interests in the region as investors.

Intellectual Property Rights (IPRs) in RCEP

67. According to the Guiding Principles for the RCEP negotiations, the text on IPRs will aim to reduce IP related barriers to trade and investment

by promoting economic integration and cooperation in the utilisation, protection and enforcement of IPRs.

68. The public have no way of knowing how far the negotiations have reached in finalising the text in this important area where there is substantial civil society interest. The Press Release put out by the Australian government after the seventeenth round earlier this month merely states that progress was made on rules issues including intellectual property.

Information from Leaked Texts

69. Earlier in October 2015 there was a leak by Knowledge Ecology International (EKI) of the IPR text as it had evolved after twelve rounds of negotiations with several articles in brackets. That brought out how attempts were being made by countries like Japan, Korea and Australia to insert several WTO plus provisions, not unlike TPP, into the text. Proposals made by some countries required members to commit adherence to several other international IPR treaties and conventions to which India was not a party. On patents it called for higher IPR standards with patent term adjustment for processing delays, five year data exclusivity for drugs and provision for an accelerated system for patent examination. It required a plant varieties protection system that was consistent with the UPOV 1991 convention which has not been subscribed to by India in view of the primacy it accorded to the rights of the breeder as opposed to the rights of the farmer. It sought to expand the coverage of trademarks to sounds and scents. It also proposed tougher enforcement measures including customs authorities acting on their own initiative to suspend the release of the suspected counterfeit trademark and pirated goods and for judicial authorities to have the power to seize and destroy infringing goods without compensation.

70. EKI had also leaked the paper that was titled the 'Working draft of IPR chapter from India'. The draft had underlined the need for the RCEP chapter on the subject to be consistent with the provisions of the TRIPS agreement. It also highlighted the importance of the Doha

declaration on the TRIPS agreement and public health that has been included as a separate Article in the draft RCEP text. The draft had also dwelt at length with genetic resources, traditional knowledge and folklore (GRTKF) that *inter alia* called for RCEP members to have legal provisions requiring patent applications to contain a mandatory declaration of the origin or source of the genetic resource and traditional knowledge used by the patent applicant or the inventor. It further required evidence of prior informed consent for access and fair equitable sharing of benefits for use of such resources and traditional knowledge. These provisions on GRTKF figured in the leaked text of the RCEP draft within brackets but with China and ASEAN also proposing a briefer text calling for measures to protect GRTKF and for according importance of providing disclosure of origin or sources of GRTK used in relevant intellectual property applications.

71. What can be broadly discerned from the draft text and the various brackets containing proposals/amendments of the different proposing and dissenting countries is that at the time of the leaked text the positions of the participant countries varied widely. At one end was Japan and Korea in wanting a significant TRIPS plus text whereas at the other end was India and also China which largely preferred as close an adherence to the TRIPS obligations as possible. In between were Australia, New Zealand and ASEAN with the positions of the former two being closer to that of Korea and Japan and the position of ASEAN being more proximate to that of China and India. Of course, on individual issues there were closer alignments on some and wider differences on others.

India's New IPR Policy

72. India announced its new National Intellectual Rights Policy in May 2016 to spur creativity and stimulate innovation. Of particular relevance in the RCEP context was its clear affirmation that India's laws were fully compliant with the TRIPS agreement and that India will continue to utilise the legislative space and flexibilities in international treaties and the TRIPS agreement even as it continued to engage constructively in

the negotiation of such international treaties and agreements. It expressed India's commitment to the Doha Declaration on TRIPS agreement and Public Health. As for traditional knowledge, genetic resources and traditional cultural expressions it said that India will continue to engage actively and constructively in the deliberations at various international fora to develop legally binding international instruments to protect them. The policy also announced several measures that will be taken to modernise and strengthen service-oriented administration of IPRs and to further strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements.

Approach to RCEP

73. Against the backdrop as in the foregoing, as well as in the light of the balance of negotiations on other issues where the other participants would gain substantially from greater access into the large Indian market, India should not be making any substantive concession on IPR standards in the RCEP. Nor should India be making commitments in RCEP to accede to IPR treaties or conventions to which it is not already a party. On the other hand, it would be a good opportunity to try and get acceptance for legally binding instruments to protect GRTKF as indeed it seems to be doing. (The TPP had a text on the subject in best endeavour terms that fell well short of what India has been seeking.)

74. Furthermore, in the light of the new national IPR policy which has modernisation of IPR systems and strengthening IPR enforcement as key elements, subscribing to more commitments on this score could have a positive spin off even in terms of refuting allegations that are sometimes made by other countries regarding 'inefficient patent protection and theft of intellectual property' (see reply⁸ of USTR nominee Robert Lighthizer at the US Senate hearing). Getting other RCEP members to live up to their IPR commitments through stronger enforcement measures such as by China should also be an important objective for India. There have been instances of copyright or trademark violations⁹ by Chinese companies of Indian brands such as Dabur, Godrej, Lakme, Fair & Lovely, Fevicol and Raymond. The look alikes also enter India in the guise of parallel imports.

75. That said India should certainly not be supportive of proposals in RCEP for introducing legislative or other measures being mooted by countries like Korea and Japan for customs or other law enforcing authorities to take proactive measures in case of suspect goods. IPRs are elaborated in TRIPs as private rights and they should remain so. It will in fact be a good idea if the draft RCEP text could specifically also recall this preambular para from the TRIPS text. The burden of proof should remain with the right owners and not sought to be transferred to law enforcement authorities.

76. The guiding principles have talked of promoting ‘integration and economic cooperation’ in the field of IPR. It may be a good idea to establish a Committee on IPRs, as indeed proposed by some countries in the leaked text, that could *inter alia* discuss ways to facilitate cooperation between the members. Better understanding of each other’s systems forms an essential pre-requisite for greater regional integration. Additionally, if a way could be found for easing the excessive level of documentation that is required by some of the countries, by Japan, for example, for drug approvals, etc., particularly in local languages this could be helpful for Indian companies that find the documentation requirements onerous.

Other Issues

77. Among other issues for negotiations, the document outlining the guiding principles and objectives for RCEP negotiations specifically identifies competition as one. It calls for cooperation in the promotion of competition, economic efficiency, consumer welfare and the curtailment of anti-competitive practices. At the same time it recognises the significant differences in capacity and national regimes of RCEP countries in this area.

78. India has a well established competition law and regime. In the context of regional integration promoted by RCEP it will be helpful to have greater understanding of the other competition regimes in the region. Also of relevance would be to have regular discussions among

RCEP members of the role and impact on competition of state owned enterprises, sovereign wealth funds, etc., many of which have a significant presence in the region. It is presumed, however that the provisions on competition will be free from being subject to the dispute settlement provisions of RCEP. This was also the case in TPP.

79. Issues like labour and environment that are largely non-trade issues, do not find a mention in the RCEP negotiation guidelines. It will be advisable for RCEP to steer clear of them at the present stage.

Conclusions

- RCEP member countries cover half the world population, 30 per cent of world GDP and a quarter of world trade. The grouping has several countries including China whose economies are among the most export competitive in the world. The negotiations will be a very challenging one for India.
- There are, however, potential benefits. It can help India to plug further into the supply chains of east and south east Asia provided India's trade infrastructure also shows speed. It can step up India's engagement with these countries on the economic plane which has been somewhat lagging compared to participation in strategic and political affairs. It provides more substance to the 'Act East' policy of the government. India's participation can also help in influencing the emergence of a more development friendly RCEP. Templates of such mega FTAs can serve as alternative models for trade liberalisation at WTO or elsewhere.

Trade in Goods

- India's earlier FTAs or CEPAs with countries in this region have not been models of success in their implementation even as there have been benefits. If RCEP has to be more successful, a great deal of planning and strategising is critical. India has to become more competitive for the concessions it secures to translate into realisable market access.

- A medium and long term strategy up to 2022 and beyond for building export competitiveness beginning with sectors in which India already has some export strengths will be essential. The national mechanism set up to implement the WTO Trade facilitation agreement is a model that can be emulated on a larger scale.
- Getting recognition of standards and securing certification for at least some of India's products in key RCEP markets prior to the final outcome will be important. An effective institutional RCEP mechanism is also essential for oversight of implementation in this area.
- India will need to ensure that products of its interest, be it fisheries or jewellery items, get duly addressed in the rules of origin of RCEP.
- Considering India's vulnerabilities and large bilateral trade deficits, India will need substantial flexibilities to deal with China even as it has broadly agreed to a common concessional approach. A longer phase out period with backloading of concessions, particularly on sensitive products, will be essential. Indian industry should have sufficient time and be given a level playing field to face up to competition.
- India's liberalisation of essential food grains and other sensitive agricultural products could be in the form of tariff rate quotas at best.
- A product specific safeguards provision, without any compensation, should also be included for sensitive agricultural, industrial and other products if import growth breaches a certain percentage.
- Cooperative programmes on trade facilitation will be useful. MRAs for India's Authorised Economic Operator programme should also be attempted.

Trade in Services

- On services, it may be better for India to focus on sectors and modes of particular interest to it rather than working only on across the board targets. It is also recommended that we do not subscribe to negative listing of commitments.

- There should be a separate chapter on temporary movement of professionals. The TPP architecture could be followed in this case with specific commitments of each member in separate country annexures.
- Effective regulatory cooperation mechanisms should be provided to ensure that market access commitments are not undermined by regulatory discrimination.
- An RCEP institutional mechanism for facilitating and promoting MRAs in professional services would be important. The TPP model of having a Working Group on Professional Services could be one possibility.
- RCEP negotiations provide an opportunity for India to elaborate and get acceptance for its proposal on trade facilitation on services.

E-Commerce

- Entering into extensive and binding disciplines on E-Commerce in the RCEP at the present stage needs careful consideration. Unlike TPP, a more graduated approach may be advisable, particularly considering that the region also has many large e-commerce players and niche companies.

Investment

- It may be a challenging task for India's negotiators to get other RCEP members to accept India's new BIT model as a basis for rules on investment. However, there is a good case for limiting scope of investment protection provisions, particularly on investor state dispute settlement. India may need to engage extensively on Track 2 and Track 1.5 level efforts for an acceptable consensus to emerge. India's interests as a substantial investor in the RCEP region also need to be kept in view.

Intellectual Property Rights

- The balance of concessions in RCEP, among other factors, does not warrant India to make any substantive concession on IPR standards

in RCEP. Nor should India commit to accede to IPR treaties or conventions to which it is not already a party. It would however be important to try and get acceptance for legally binding instruments to get prior informed consent for use of genetic resources and traditional knowledge in intellectual property applications.

- Getting other RCEP members including China to live up to their IPR commitments through stronger enforcement measures should also be an important objective for India. IPRs are however elaborated in TRIPs as private rights and they should remain so. The burden of proof should remain with right owners.

Other Issues

- In line with the guiding principles for RCEP negotiations carrying no reference to non-trade issues like labour or environment these are best kept out of RCEP. However, it would be important for RCEP to have a work programme, even if there are no binding rules, on competition. Beginning a discussion on role of state owned enterprises and sovereign wealth funds, which play a substantial role in many of the region's economies, may also be important. Regional integration requires a better understanding of practices on this score.
- Language becomes a huge non tariff barrier in the region for enabling smooth business transactions or for foreign businesses to fulfill local documentation needs. Is there a way a beginning can be made in the use of English language as an option incrementally at least for documentary submissions?
- Finally, each RCEP participant country will be looking at the negotiations through the prism of its interests and objectives. For example, members of TPP, who have been disappointed by US pulling out from the agreement, rendering its future in doubt, may be looking at RCEP as an opportunity to create a TPP like agreement. Similarly, there are indications that China could be looking at synergies between RCEP and its Belt and Road initiative and is viewing RCEP as an opportunity to address its capacity overhangs in

investment and production. There are also suggestions¹⁰ that while China is pushing for a rapid conclusion of RCEP with focus mainly on lowering of tariffs, both Japan and Australia are aiming for a high quality RCEP deal covering services and investment that could in turn attract US back to the TPP table. India will have to weigh its options very carefully and push for a development a friendly deal that gives it sufficient flexibility. Ultimately, success will also depend on how well it can synchronise domestic reforms and improvements in trade infrastructure. If carefully managed, these should result in boosting competitiveness to be able withstand tough competition and to benefit from RCEP enabled openings in other markets.

Endnotes

- ¹ The Press Release by the Australian Government after the seventeenth round of RCEP negotiations held from 27 February to 3 March 2017 noted that ‘significant work remains to negotiate the market access outcomes and finalise text’.
- ² ‘China’s secret weapons in trade battle with India are NTBs’ by Banikinkar Pattanayak, 4th November 2016, *Financial Express*.
- ³ Batshur Gootiiz and Aaditya Mattoo, ‘Services in the Trans-Pacific Partnership – what would be lost’ World Bank Policy Research Working Paper 7964, February 2017.
- ³ Aadity Mattoo, ‘Strengthening Trade and Regulatory Cooperation’ The E-15 initiative on strengthening the global trade system, July 2015.
- ⁴ ‘Possible Elements of a Trade Facilitation in Services Agreement’, Communication from India, WTO Document S/WPDR/W/57 dated 14 November 2016.
- ⁵ An Australian Government Press Release of 10 March 2017 about the Seventeenth Round of RCEP negotiation has mentioned: ‘we are also working on developing contemporary rules for a more predictable trading environment-for example in newer areas such as electronic commerce’
- ⁶ It must be clarified this does not mean free market access for services dependant on free movement of data. That in any case will depend on market access commitments, which should be, as stated earlier, taken on a positive listing basis.
- ⁷ ‘Flipkart’s Sachin Bansal, Ola’s Bhavish Aggarwal seek government’s help in Battle against Amazon and Uber’, 8 December 2016, *Economic Times*.
- ⁸ US Trade Representative (USTR) nominee for ‘aggressive’ steps on IP’ by Varghese George, *The Hindu*, 17 March 2017.
- ⁹ India taking up fake brands issue with China’ by Piyush Pandey, *The Hindu*, 31st July 2016
- ¹⁰ ‘China and Japan in tug of war to shape trade pact’, by Robin Harding, Tom Mitchell and Michael Pad, *Financial Times*, 14 March 2017.

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