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RCEP's Impact on China's Overseas Investments

I. Introduction

The Regional Comprehensive Economic Partnership (**RCEP**) is a free trade agreement (**FTA**) between the ten member states of the Association of Southeast Asian Nations (**ASEAN**) (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam) and its five FTA partners (Australia, China, Japan, New Zealand and the Republic of Korea).

RCEP provides a framework aimed at lowering trade barriers and securing improved market access for goods and services for businesses in the region, through facilitation and enhanced transparency of trade and investment. RCEP has the potential to deliver significant opportunities for businesses, given the fact that the 16 RCEP contracting states account for almost half of the world's population; contribute about 30 percent of global GDP, and over a quarter of world exports.

In this publication, we aim to discuss how the RCEP, the largest regional FTA, would influence China's overseas investments. We hope the following analysis could facilitate a better understanding of RCEP's protection of cross-border investment, which would further help enterprises, especially companies that are planning on overseas investments, to better prepare themselves for the opportunities and challenges brought by RCEP in the field of cross-border investment.

II. An Overview of the Investment-related Articles in the RCEP

RCEP unifies regional economic and trade rules, facilitating an in-depth integration of regional economy. The investment chapter of RCEP "Chapter 10 – Investment" has a total of 18 articles, covering the liberalisation, protection, facilitation, and promotion of investment.

It is encouraging to see that the implementation of RCEP would bring the following changes to investment rules and would promote China's international investments, including both Foreign Direct Investment (**FDI**) and overseas Direct Investment (**ODI**).

III. Influence of the RCEP on Inbound and Outbound Investments

1. Enlargement of the definition of "Investment".

Under the RCEP, forms that an investment may take not only include the traditional forms of direct investment (including Greenfield Investment; and Mergers and Acquisitions) and indirect investment (including shares, stocks, and other forms of equity; as well as bonds, debentures, loans, and other debt instruments); but also the following enlarged areas of activities:

(i) **Rights under contracts**, including turnkey, construction, management, production, or revenue-sharing contracts;
(ii) **Intellectual property rights and goodwill**, which are recognised pursuant to the laws and regulations of the host Party;
(iii) **Claims to money or to any contractual performance** related to a business having financial value;
(iv) **Rights conferred**, such as concessions, licences, authorisations, and permits, including those for the exploration and exploitation of natural resources; and
(v) **Movable and immovable property, and other property rights** (leases, mortgages, liens, or pledges).
(vi) **Returns that are invested** shall also be treated as an investment.

The above scope of the definition of the term *Investment* is larger than those under China's "*Foreign Investment Law*" and other FTAs with China as a party, and so are the interests of investors fully protected under the RCEP regime. The expansion of the scope of cross-border investment allows the contracting states to provide cross-border investors with broader institutional protection.

2. Improvement of investment treatment

(1) National Treatment

RCEP incorporates pre-entry National Treatment, which refers to the extension of National Treatment to the investment access stage. That is to say, the treatment given to foreign investors and their investments at the stages of **establishment, acquisition, and expansion** of enterprises is no less than that of domestic investors and their investments. This is on top of National Treatment for the post-entry stages of management, conduct, operation, and sale or other disposition of investments.

(2) Most-Favoured-Nation Treatment

Compared with other FTAs between China and other countries, which have made reservations to a large extent, the Most-Favoured-Nation Treatment under the RCEP is more comprehensive, **with the sole exclusion of "international dispute resolution** procedures or mechanisms under other existing or future international agreements".

(3) Minimum Treatment of Investment

Under the RECP, each member state shall provide each other fair and equitable treatment (not to deny justice in any legal or administrative proceedings), as well as full protection and security (take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment), in accordance with the **customary international law minimum standard** of treatment of aliens.

3. Prohibition of performance requirements

Under the RCEP, a member state may not impose or enforce various requirements on foreign investors as conditions for establishment, acquisition, expansion, management, conduct, operation, sale, or other disposition of an investment in its territory, or the receipt or continued receipt of an advantage thereof. The expanded and detailed scope of the prohibition of performance requirements under the RCEP shows stronger protection and wider liberation for foreign investments than under China's current "*Foreign Investment Law*".

4. Reduction of compliance costs

RCEP has relaxed restrictive requirements for the appointment of Senior Management and Board of Directors, which did not exist under other FTAs between China and other countries. The related compliance costs to meet relevant requirements are thus decreased.

5. Lowering of the market entry threshold

Under Annex III of the Schedule of Reservations and Non-Conforming Measures for Investment, the member states have implemented a unified market access Negative List system for investment in five non-service sectors of manufacturing, agriculture, forestry, fishery, and mining.

The Negative List refers to the system in which the host country's government restricts foreign investment in the form of a list. Only areas of investment other than restricted areas are allowed for foreign investment. The contracting states shall not set additional thresholds or hidden restrictions on each other's investment other than those on the Negative List. This effectively means the RCEP Negative List is a legal promise of the member states to each other. Such promise helps to remove invisible barriers in key industries and enhance the certainty and predictability of cross-border investments.

6. Transfer of Investment

The main purpose of investment is to obtain income and realise asset appreciation. In practice, in addition to retaining and reinvesting the proceeds in the host country, the income of foreign investors is generally remitted out of the host country. Whether the investment income can be remitted freely and timely out of the host country is an important factor to be considered by the investor when making investment decisions.

Under the RCEP, each member state shall allow all transfers relating to an investment to be made freely and without delay into and out of its territory. The Transfer of Investment clause under the RCEP is an important tool to protect investors' freedom of capital transfer and the host country's maintenance of financial order. RCEP's specifications on the protection for investment transfer are more detailed than China's "*Foreign Investment Law*". It is conducive to the remittance of investment income of foreign investors, and further promotes the facilitation of cross-border investment.

7. Stricter rules on expropriation and compensation

Expropriation and nationalisation have always been one of the most common risks of cross-border investment. Under international practice, after expropriation and nationalisation, reasonable compensation shall be paid to damaged foreign investors.

In this regard, RCEP offers more comprehensive protection of the rights and interests of foreign investors in case their investment is expropriated or nationalised. It provides strict and detailed stipulations regarding the conditions and procedures for the implementation of expropriation and nationalisation, as well as the scope, payment standards, and payment methods of expropriation compensation.

IV. Conclusion

As the largest regional FTA, RCEP with its comprehensive articles, creates a fairer, more open, stable and transparent investment environment for investors in the region. It further reduces investment barriers, and promotes the liberalisation and facilitation of cross-border investment. This will encourage more Chinese enterprises to expand overseas markets in the region. In the meanwhile, it will also attract more overseas enterprises to invest in China and inject new vitality into the domestic market.

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