

What to expect from the Regional Comprehensive Economic Partnership Agreement in the Vietnamese market: Rules of Origin, IP laws and Data regulations

Keigo Sawayama

Ngoc Hoang

Tran Phuong Mai

Following the successful ratification of six members of ASEAN (Brunei, Cambodia, Laos, Singapore, Thailand and Vietnam) and their four partners (Australia, China, Japan and New Zealand), the Regional Comprehensive Economic Partnership Agreement (“RCEP” or “Agreement”) has just come into force on 1 January 2022. Covering a market of approximately 30% of the global population and 30% of the global trade value, RCEP is expected to support the establishment of the largest free trade area in the world. With that said, the specific commitments of Vietnam with respect to opening its services sectors to foreign investment in alignment with RCEP are not enhanced in comparison to other FTAs of which Vietnam is a member (i.e., the level of Vietnam’s commitments with respect to services after entering into RCEP are equivalent to the FTA of ASEAN+, but lower than the intra-ASEAN FTA, EVFTA, and CPTPP). However, owing to the harmonization of the rules of origin within RCEP, the investment and trade in and with Vietnam, as a ratified member of RCEP, has the potential to be considerably changed by RCEP if its measures prove effective. Accordingly, the following issues are key legal points of RCEP that an investor in the Vietnamese market should take note of:

- Harmonized rules of origin;
- Participation of Vietnam in new intellectual property treaties;
- Data protection regulations; and
- Impact of RCEP on Vietnam’s post-pandemic economic recovery.

Harmonized rules of origin (“ROOs”) will facilitate supply chains

While the Agreement does not introduce highlighted tariff reductions, harmonized ROOs are widely seen as the most important benefits of RCEP. Indeed, Vietnam is not expanding its reach to any new export markets because it has already entered into free trade agreements with all the members of RCEP in advance; however, the easing of ROOs is expected to grow the scale and types of exported goods and facilitate supply chains.

ROOs are regulated under Chapter 3 of RCEP. In this regard, a good is considered to be originating from Vietnam if it is “wholly obtained or produced in a Party” (as defined in RCEP), “produced in a Party exclusively from originating materials from one or more of the Parties,” or “produced in a Party using non-originating materials, provided the good satisfies the applicable requirements in Annex 3A” (Article 3.2). If the good falls within the third classification of originating good, the regional value content (RVC), the change in tariff classification (CTC) and the chemical reaction rule (CR) will be applied. Notably,

- the RVC rate in RCEP is kept at 40 per cent, which is relatively low and stable throughout the applicable goods, and
- even if the good does not satisfy a CTC requirement in Annex 3A, they may still be treated as originating if they meet all other requirements in Chapter 3 and the value of those non-originating materials used in the production of a good classified in Chapters 01 through 97 of the HS Code did not undergo the CTC does not exceed 10 percent of the FOB value of the goods, or the weight of the non-originating materials used in the production of a good classified in Chapters 50 through 63 of the HS Code does not exceed 10 per cent of the total weight of the good (Article 3.7).

The procedures for accepting certificates of origin are interestingly harmonized among the Parties. The Agreement applies a single fixed rule, and any of the following documents will be accepted as proof of origin:

- A certificate of origin issued by an issuing body of an exporting Party, or
- A declaration of origin issued by an approved exporter (approved by each Party), or
- A declaration of origin issued by an exporter or producer, which is to be applied after 10 years from 1 January 2022 in relation to Vietnam.

In order to perform its commitments, the Ministry of Industry and Trade of Vietnam is drafting a circular promulgating the ROOs under RCEP.

Vietnam joins new intellectual property treaties as a consequence of RCEP's entry into force

From an intellectual property (IP) perspective, Article 11.9 of RCEP requests each of its members to compulsorily ratify or accede to the following treaties:

- Paris Convention for the Protection of Industrial Property,
- Berne Convention for the Protection of Literary and Artistic Works,
- Patent Cooperation Treaty,
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks,
- WIPO Copyright Treaty ("WCT"),
- WIPO Performances on Phonograms Treaty ("WPPT"), and
- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled.

Accordingly, Vietnam has become a new member to WCT and WPPT, which collectively reinforce the protection of copyrights and performance rights of the country.

Besides, Vietnam has recently been discussing amendments to its IP law to reflect the high standards of IP rights protection under newly-signed treaties, such as CPTPP and EVFTA. Such amendments are consistent with the application of RCEP.

Data regulations in domestic laws may be affected by the application of RCEP

Not until the entry into force of RCEP has Vietnam taken careful consideration on its data regulations.

For the past three years, Vietnam has intended to adapt the data localization requirements for enterprises in certain specific industries in accordance with several legal instruments (e.g., Cyber Security Law and its draft guidance etc.), to which there have been back-and-forth comments between the governing authority and business communities. However, under Article 12.14 of RCEP, a Party is not allowed to require an investor to use or locate its computing facilities within its territory as a business condition, and this will only be permitted for "legitimate public policy objectives" and "essential security interests". The requirement will oblige Vietnam after five years from 1 January 2022. Accordingly, as RCEP is enforceable, RCEP may push Vietnam to recalibrate the data localization requirements which it is currently drafting.

Moreover, a hotly debated draft Personal Data Protection Decree may also be changed from RCEP's entry into force. In the current draft released in February 2021, any cross-border transfer of personal information must be approved by the governing authority. In this regard, Article 12.15 of RCEP prohibits the country from preventing cross-border transfer of information if it is for the conduct of business, with the exceptions of "legitimate public policy objectives" and "essential security interests". The prohibition takes effect for Vietnam after five years from 1 January 2022.

Although it may not be easy to determine what constitutes "legitimate public policy objectives" or "essential security interests," RCEP can provide support by making a push on any of the data regulations of Vietnam, for the sole purpose of achieving its reasonable aims.

The effect of RCEP will boost the post-pandemic economic recovery

The pandemic has slowed down opportunities for economic integration between all countries in the past two years. From time to time, countries have shut down their borders physically and commercially to avoid the spread of COVID-19 and its variants. ASEAN and its partners are no exceptions. As an agreement that enters into force amidst this situation, there is high hope that the Agreement will bring motivation and the following opportunities for the economic recovery of all the Parties, of which Vietnam is a part of.

Firstly, the advantages from the newly adapted ROOs will soon help Vietnam keep track of the suspended supply chains. Along with an access to the larger markets of ASEAN and its partners, Vietnam's businesses would easily be able to reach a wider range of suppliers and customers with the help of ROOs. Foreign investors would naturally

consider entering the dynamic Vietnamese market to directly or indirectly sell their products to customers within the Parties of the Agreement and in other countries, thus benefiting Vietnam.

Secondly, RCEP is expected to make great contributions to the emergence of a digital economy in the country. Vietnam is becoming increasingly fast in building its digital economy, which currently accounts for approximately 8.2% of the national GDP.¹ The State has in turn been drafting and issuing regulations to govern its commercial activities, with an emphasis on the new amendments to Decree on E-commerce, the draft amendments to Decree on Activities on the Internet, and the draft regulations related to Personal Data Protection and Cyber Security. Moving ahead, RCEP will, through its separate Chapter 12 on electronic commerce, ensure not only the online protection of its subjects but also facilitate trade by preventing Vietnam from adopting any unreasonable measures against businesses.

Thirdly, RCEP will encourage small and medium-sized enterprises (SMEs) and micro enterprises to recover more quickly. Accounting for more than 90% of the total number of enterprises,² both domestic and FDI SMEs and micro enterprises are in the group of subjects that have borne the strongest adverse effects from the pandemic.³ With the cooperation of the Parties under Chapter 14 of RCEP, Vietnam can look forward to these companies cooperating with foreign players on both economic and technical platforms to aid their post-pandemic recovery. By way of analogy, such companies would be able to access a common market of 30% of the global population, and enjoy supply chain facilitation from uniformed ROOs and an electronic system for transactions.⁴

Economic cooperation is a force which plays an undeniable role in helping Vietnam and any other country recover in the post-pandemic era. With RCEP just entering into force, investors who wish to ride the waves of development in Vietnam should quickly prepare themselves to take advantage of the multifarious opportunities.

Brace yourselves for the new wide-ranging and active free trade region.

End

1 Nguyen Trong Duong, "Vietnam's Growth Potential Lies In The Digital Economy, Vietnamnet (reposted on the Portal of Vietnam Ministry of Information and Communications)," <https://english.mic.gov.vn/Pages/TinTuc/147804/Vietnam-s-growth-potential-lies-in-the-digital-economy.html>, posted on 2 July 2021, accessed on 22 December 2021

2 Vietnam Ministry of Planning and Investment, "The White Book (Sách Trắng Doanh Nghiệp Việt Nam năm 2021)," Statistics Publishing House, page 84 of Part III, <https://www.gso.gov.vn/wp-content/uploads/2021/08/02-Sach-trang-DNVN-2021-so-lieu.pdf>, accessed on 22 December 2021

3 Le Thi Diem Quynh, "Báo Cáo Tác Động Của Dịch Covid-19 Đối Với Doanh Nghiệp Việt Nam, National Portal on Enterprise Registration," <https://dangkykinhdoanh.gov.vn/vn/tin-tuc/599/5326/bao-cao-tac-dong-cua-dich-covid-19-doi-voi-doanh-nghiep-viet-nam.aspx>, posted on 25 March 2021, accessed on 22 December 2021

4 ASEAN Secretariat, Webinar titled "Unlocking RCEP for Business: Competition, Government Procurement, SMEs, and Economic and Technical Cooperation," virtually organized on 16 December 2021

This article is given as general information for reference purposes only and therefore does not constitute our firm's legal advice. Any opinion stated in this article is a personal view of the author(s) and not our firm's official view. For any specific matter or legal issue, please do not rely on this article but make sure to consult a legal adviser. We would be delighted to answer your questions, if any.

www.noandt.com

NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
 Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com



Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, and collaborative relationships with prominent local law firms throughout Asia and other regions. The over 500 lawyers of the firm, including about 40 experienced attorneys from various jurisdictions outside Japan, work together in customized teams to provide clients with the expertise and experience specifically required for each client matter.

Singapore Office

(Nagashima Ohno & Tsunematsu Singapore LLP)



6 Battery Road #40-06
 Singapore 049909
 Tel: +65-6654-1760 (general)
 Fax: +65-6654-1770 (general)
 Email: info-singapore@noandt.com

Bangkok Office

(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)



34th Floor, Bhiraaj Tower at EmQuartier
 689 Sukhumvit Road, Klongton Nuea
 Vadhana, Bangkok 10110, Thailand
 Tel: +66-2-302-4800 (general)
 Fax: +66-2-302-4899 (general)
 Email: info-bangkok@noandt.com

HCMC Office

(Nagashima Ohno & Tsunematsu HCMC Branch)



Suite 1801, Saigon Tower
 29 Le Duan Street, District 1
 Ho Chi Minh City, Vietnam
 Tel: +84-28-3521-8800 (general)
 Fax: +84-28-3521-8877 (general)
 Email: info-hcmc@noandt.com

Hanoi Office

(Nagashima Ohno & Tsunematsu Hanoi Branch)



Suite 10.04, CornerStone Building
 16 Phan Chu Trinh, Hoan Kiem District
 Ha Noi City, Vietnam
 Tel: +84-24-3266-8140 (general)
 Fax: +84-24-3266-8141 (general)
 Email: info-hanoi@noandt.com

Shanghai Office

(Nagashima Ohno & Tsunematsu

Shanghai Representative Office)



21st Floor, One ICC, 999 Middle Huaihai Road
 Xuhui District, Shanghai 200031, China
 Tel: +86-21-2415-2000 (general)
 Fax: +86-21-6403-5059 (general)
 Email: info-shanghai@noandt.com

For more details on our overseas practice