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D. O. Deineko, Ph.D. Student in International Law at the Institute of International Relations Taras Shevchenko National University of Kyiv; Specialist for Consular and Administrative issues of the Embassy of Ukraine in the Kingdom of Thailand
ORCID 0000-0002-0373-7097

LEGAL ASPECTS OF APPLICATION OF RULES OF ORIGIN OF GOODS IN REGIONAL COMPREHENSIVE ECONOMIC PARTNERSHIP

The author analyzes the legal conditions of trade in goods in the markets of RCEP member states. The object of this research is the rules of origin of goods and the application of preferential tariffs under the Regional comprehensive economic partnership agreement in force since 1st January 2022. The author identifies the uniqueness of the rules of origin of goods, gives examples of determining the country of origin of goods, and how in practice the transformation of raw materials into ready-made is carried out in the sense of customs classification. The clarity of the provisions on the Rules of Origin and the Code of Practice for Certification of Origin will encourage the liberalization of trade in goods under the RCEP to be effective, transparent and fair to all parties.

The rules of the ASEAN FTA and the RCEP agreement are compared in detail to identify the advantages and disadvantages of trade in goods within the largest preferential zone in the world. RCEP members agreed to apply product-specific rules for every tariff-line. There is no General Rule under RCEP. All 5,205 products have their own Products-Specific Rules. The author shows the method of calculation of regional value content, explains under what conditions a product may fail to satisfy the RVC criteria. The article reveals the topic of customs clearance, id est, operational certification procedures. The author pays special attention to the issue of the impact of the RCEP agreement on trade in goods, especially agricultural products, between Ukraine and the Asian region. To assess the effect of RCEP agreement on the export of agricultural goods from Ukraine to Asian states, the author compared tariffs and schedules of commitments under WTO framework and RCEP. The results of the study show a slight impact of the new agreement on trade relations between Ukraine and the RCEP countries, but 15 RCEP MS will gradually reduce trade tariffs in the future and Ukraine needs to reconsider its trade strategy with Asian countries. Finally the author draws conclusions that the trade liberalization in RCEP entails considerable reforms, beyond simply removing tariffs and non-tariff barriers. This topic will be explored in upcoming publications of the author.

Key words: RCEP, ASEAN, Ukraine, rules of origin, FTA, economic diplomacy, tariff preferences.

Д. О. Дейнеко. Правові аспекти застосування правил походження товарів в Всебічному регіональному економічному партнерстві

Автор аналізує правові умови торгівлі товарами на ринках країн-учасниць ВРЕП. Об'єктом дослідження є правила походження товарів та застосування пільгових тарифів за Договором про всебічне регіональне економічне партнерство, що набрав чинності з 1 січня 2022 року. Автором визначено особливості правил походження товарів, наведено приклади визначення країни походження товару, розглянуто як на практиці здійснюється перетворення сировини в готову продукцію з точки зору митної класифікації. Чітке формулювання положень щодо правил походження та правил сертифікації сприятиме лібералізації торгівлі товарами у рамках ВРЕП, забезпечить її ефективність, прозорість та справедливість для всіх сторін.

Правила ЗВТ АСЕАН та угоди ВРЕП поглиблено порівнюються, щоб визначити переваги та недоліки торгівлі товарами в межах найбільшої преференційної зони у світі. Члени ВРЕП погодилися застосовувати специфічні ставки для кожної тарифної лінії. У рамках ВРЕП відсутнє поняття «загальне правило». Для усіх 5,205 продуктів розроблено власні специфічні/комбіновані ставки ввізного мита. У статті продемонстровано методику розрахунку частки регіонального продукту та пояснюється, за яких умов товар може не задовольнити критерії для преференційної торгівлі. У статті розкривається тема митного оформлення, а саме процедура сертифікації. Особливу увагу автор приділяє питанню впливу угоди ВРЕП на торгівлю товарами, зокрема сільськогосподарською продукцією, між Україною та азійським регіоном. Для оцінки впливу угоди ВРЕП на експорт сільськогосподарської продукції з України до країн Азії автор порівняв тарифи та зобов'язання держав у рамках СОТ та ВРЕП. Результати дослідження свідчать про незначний вплив нової угоди на торговельні відносини між Україною та країнами ВРЕП, але 15 країн-членів ВРЕП поступово знижуватимуть торговельні тарифи. Згодом Україні необхідно буде переглянути свою торговельну стратегію з країнами Азії. Насамкінець автор робить висновок, що лібералізація торгівлі в ВРЕП тягне за собою значні реформи, крім простого зняття тарифів і нетарифних бар'єрів. Ця тема буде розглянута в майбутніх публікаціях автора.

Ключові слова: ВРЕП, АСЕАН, Україна, правила походження, ЗВТ, економічна дипломатія, тарифні пільги.

Introduction

From January 1, 2022, the Regional Comprehensive Economic Partnership agreement finally entered into force. The private sector, entrepreneurs as well as common people in Asia will benefit from the largest free trade area in the world. Its membership covers 15 countries, including 10 ASEAN states, plus 5 ASEAN dialogue partners, namely China, Japan, South Korea, Australia, and New Zealand. The agreement is supposed to facilitate trade among states with a population of 2.3 billion people or more than one-third of the world. It is a wide and comprehensive market for imports and exports of goods and services that benefit both producers and consumers in each member state.

Prima facie the reduction and subsequent elimination of import duties under the RCEP agreement will help: 1) reduce the cost of producing goods, 2) improve export efficiency; 3) increase competitiveness for entrepreneurs; 4) open up new markets for Asian developing states; 5) receive customs clearance for perishable goods within 6 hours and for common goods within 48 hours, which is of great importance given the tropical and subequatorial climate of most RCEP countries. However, the abovementioned advantages have a background story composed of 31 rounds of negotiations that resulted in the development of a mechanism for determining the origin of goods, and agreeing on preferential rates for most goods of the harmonized customs system. These issues, including the possible impact of RCEP on the Ukraine-Asia trade, are analyzed in this article.

Purpose of the article

This article aims to provide the distinguished reader with the results of the research of the rules of origin of goods under the RCEP agreement and their practical application on the examples of the author. Based on the existing legal regulations, the author makes assumptions about the impact of the RCEP agreement on its parties and Ukraine in a very narrow scope – obtaining preferential tariffs. No research has been conducted on this topic either by Ukrainian or European experts, which makes this article up-to-date and increases the demand for such information which has not yet been disclosed by specialists in international law.

Main body

There are two main concepts in respect of free trade in goods. First is «tariff concession», which means removing tariffs that are directly related to the prices of goods we purchase from the market. The second is «rules of origin» – essential requirements for tariff concessions. A tariff concession is the final destination of any preferential trade agreement. In the meantime, rules of origin are the road to the final destination. The substantial part of the concept of the rule of origin is origin criteria. States determine whether a good is eligible for tariff concessions or not by applying origin criteria. If the goods satisfy origin criteria and are eligible for tariff concession the goods will get benefits of tariff concessions laid down in procedural requirements. These procedural requirements connect the «origin criteria» with «tariff concessions». Procedural requirements and origin criteria are the main two pillars of rules of origin. The final destination of both is tariff concessions [1, p. 625–640].

Determination of a source of a good is necessary to 1) provide either most-favored-nation treatment or preferential treatment under an FTA; 2) calculate the amount of customs payments levied when importing products into the customs territory of another country (if applied); 3) protect the national producer in case of threat to the national market; 4) strengthen regional industrial production. In the world practice classification of the country of origin of goods causes significant difficulties due to the complexity of this process, as well as the abundance of ways to circumvent the established rules by states with a final aim to avoid or reduce costs when moving goods across the border.

Fortunately, the WTO Agreement on rules of origin cleared up most misunderstandings and laid the groundwork for detailed, clear, and predictable rules of origin. Article 9 of the Agreement on rules of origin contains basis fair rules for determination of the origin as well as major criteria (Article 9.2 (ii-iii)): 1) Wholly Obtained/Minimal operations; and 2) Substantial transformation. [2] Worth highlighting that the General agreement on trade and tariffs has no universal rule that determines the concept and criteria for rules of origin (RoO) among all WTO members. Each country is free to establish its own RoO and may maintain several of them at the same time. Bearing in mind that there is no universal PoO rule, theoretical composition and practical application of criteria in the RCEP and ASEAN is revealed by the author in this article.

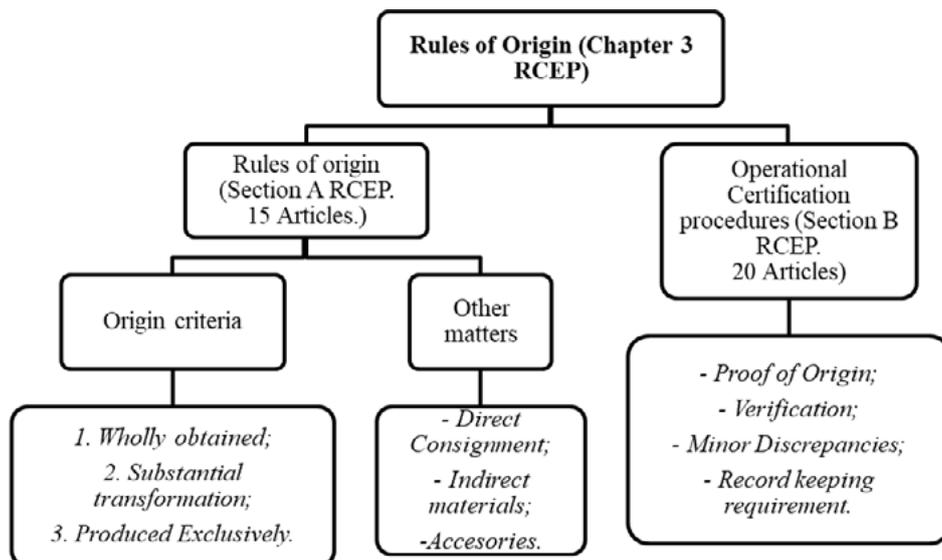
In order to ensure the proper functioning of the agreement, where the main goal is duty-free trade in goods, the states have defined a criterion under which goods enjoy preferential treatment – the origin of good in any party to the agreement. To this end, the parties have agreed firstly on rules applicable to tariff differentials (Article 2.6 RCEP), secondly on rules of origin (Article 3.2 RCEP), and thirdly on Schedules of tariff commitments (Annex 3A RCEP).

Three major origin criteria (features that indicate whether a product is eligible for the preferential treatment) under Article 3.2 RCEP are as follows:

1. Wholly obtained (WO);
2. Produced Exclusively (PE);

and in case the product didn't satisfy either of the two abovementioned, the exporter tries to meet a condition under criteria 3, namely Product-specific rules (SPRs) [3].

SPRs envisage regional value content components (RVC), change of tariff classification (CTC), and specific production rules (SP).



Per Article 3.3 RCEP, the wholly obtained criteria is mainly applied to unprocessed food, e.g. raw vegetables, fungi, live animals, or goods obtained from live animals. The product that is obtained or produced wholly in the party to the Regional Comprehensive Economic Partnership is sure to have the wholly obtained status and eligible for preferential treatment under RCEP. That means that mineral products extracted from soil, waters of each RCEP Member state are granted WO status. [4]

Next status – produced exclusively goods worth deeper consideration. PE means goods are produced in a Member state exclusively from originating materials from any other RCEP party or parties. Let’s suppose first – Thailand produces canned sardine, secondly – only 3 components are necessary to produce canned sardine: 1) sardines; 2) cans; 3) vegetable oil. If an enterprise in Thailand uses fish from Japan, cans from Indonesia, and sardines from Singapore, then canned sardines in Thailand gain the status of Produced Exclusively commodity. In this case, PE may also be considered as 100% regional value content. *Vice versa*, if Thailand in the abovementioned case decides to use components from non-RCEP parties it fails to satisfy the PE criteria.

At this point, the author has the pleasure to stress that RCEP MS agreed that PE as one of the origin criteria may apply to all tariff lines. The author has to mention that just a small number of FTAs before resorted to such commitments. Currently, only ASEAN-China FTA, ASEAN-Japan FTA, ASEAN-Australia FTA, and finally RCEP allowed the use of «PE». PE allows RCEP members to become production bases for each other. It also promotes regional supply chain and cross-border trade RCEP Members [5]

«PE» criteria in ASEAN+1 FTAs

Agreement	Origin Criteria
ASEAN trade in goods agreement	WO, General rule (GR), PSRs
ASEAN-Australia-New Zealand Free Trade Area	WO, PE, GR, PSRs
ASEAN-China Free Trade Area	WO, PE, GR, PSRs
ASEAN-Japan Comprehensive Economic Partnership	WO, PE, GR, PSRs
ASEAN Korea Free Trade Area	WO, GR, PSRs
ASEAN-India Free Trade Area	WO, GR
Regional Comprehensive Economic Partnership	WO, PE, PSRs

RCEP members agreed to apply product-specific rules for every tariff–line. There is no General Rule under RCEP. All 5,205 products (at 6 digit level of HS) have their own Products-Specific Rules (PSR). PSRs will reflect the real production process of each product. ASEAN and most ASEAN+1 FTAs apply General Rules for a majority of products, and PSRs for a limited number of products. Worth highlighting that for ASEAN-India FTA, a General rule (Regional Value Content 35% + Change in Tariff Sub-Heading) is applied to all products.

Pending your question about the calculation of Regional Value Content [6, p. 4-10, 61] under the RCEP Agreement, the author immediately clarifies this rule hereunder. Article 3.5 of the RCEP Agreement provides the following formula for calculating the RVC.

$$\text{RVC} = (\text{FOB} - \text{VNM}) / \text{FOB} \times 100$$

Let's suppose Thailand has a finished product – turbine for marine propulsion (HS 8406.10) that costs USD 40,000 (FOB). China provided a company based in Thailand with components worth USD 15,000 (VNM). According to Annex 3A of the RCEP Agreement, the Product-specific rule of HS 8406.10 is CTSH or RVC40. This means that the turbine for marine propulsion should either be constructed from non-originating materials that had changed their tariff classification at 6-digit HS in the process of creating the product OR the commodity should have at least 40 percent of regional value content. In the present case, the CTSH option may not be successfully applied as «Wire» from China used as a part has HS code 8102.96. Thus, there was no change in tariff classification at the 6-digit HS level. But what if we try the RVC40 rule?

$$\text{RVC in turbine for marine propulsion} = (40,000 - 15,000) / 40,000 \times 100$$

$$\text{RVC in turbine for marine propulsion} = 62,5\%$$

$$62,5\% > 40,00\%$$

As you have seen, the condition for obtaining preferential treatment is met under the RVC40 rule. If regional value content was 35%, the product would not qualify both under RVC40 and CTSH.

After a thorough analysis of Annex 3A, the author concluded that the most common option is the use of the Change of Tariff Heading rule. CTH was used as a product-specific rule for 988 goods, less popular was CTSH used with 615 products. CC (transformation at 2-digit level) rule is used with almost 500 goods, mostly in Chapters 2-24 and Chapters 56-63. Practically, transformation at CC from raw material to a finished product is as follows: coconut is a raw material (HS 0801.11), the finished product is coconut crude oil (HS 1513.11). Since there is a change in the tariff chapter, the product may qualify as originating good of a member state of RCEP.

RCEP integrates Rule of Origin of ASEAN Trade in Goods Agreement (ATIGA) and ASEAN+1 to help 15 MS to use a single set of rules of origin. RCEP's product-specific rules use single rules and co-equal rules which make PSRs under RCEP less restrictive than other ASEAN+1 FTAs. This could increase the utilization rate of the RCEP agreement. Combination rules are deemed to be unnecessary and too difficult for businesses to follow. The author finds that RCEP PSRs are more consistent with the production process of each product. Under the existing legal framework, ASEAN and ASEAN+1 FTAs use different rules to determine the origin of the same product. For example, in 6 FTAs 4 different origin rules are used in respect of canned tuna (HS1604.14). ATIGA, AANZFTA and ACFTA use RVC40 or CC rule. In AJCEP there is a requirement to the change chapter rule, except for chapter 3. In AIFTA parties agreed to use RVC45+CTSH, but for RCEP we have simple CC. In respect of sugar (HS1701.99) it is even more complicated. Six FTAs use 5 different rules. Since the RCEP agreement came into force all 15 MS have the right to use unified rule – RVC40 or CC [7].

The author kindly draws your attention that RCEP members are free to choose the forum in the determination of rules of origin, A member state may check the commitments under ATIGA or *e.g.* ACFTA, and see what fits the exporter the most and under which FTA it should trade goods.

RCEP allows «originating material» to be cumulated among 15 Member States. Hence, the scope of cumulation will be broader than in ATIGA and ASEAN+1 FTAs (which have 10-12 Members). Cumulation rules are not an innovation; they have been tested in the ASEAN and ASEAN+1 FTAs. At the same time, the previous agreements have never involved 15 countries, including powerful economies like China and Japan. Hence, businesses have a greater chance to meet origin criteria and utilize tariff preferences under RCEP. It also helps to promote the regional supply chain within RCEP Members.

Section B of Chapter 3 RCEP Agreement covers operational certification procedures. In conformity with Article 3.16 RCEP members are to consider proof of origin either of the following:

1. Certificate of Origin;
2. Self-Certification by Approved Exporters;
3. Self-Declaration by any Exporter.

Therefore, RCEP is an upgrade from ASEAN+1 FTAs, where only Certificate of Origin can be used. The Rule of Origin which unites 15 countries is a complementary advantage for RCEP to unify the region's production chain. Investors in RCEP member countries can import high-value inputs from technology-developing member countries more conveniently than under ASEAN+1 FTAs.

RCEP is a fully integrated manufacturing FTA that combines upstream, midstream, and downstream production countries. Conditions laid down in RCEP for the first time were persuasive enough for Asian manufacturing technology owners from China, Japan, and Korea to support the same FTA, thus making it ready for production in Asia.

According to the various free trade agreements of «ASEAN+1», there are at least 22 rules of origin, and the level of complexity has caused great concern for traders and competent authorities in various countries. This is the so-called Spaghetti bowl phenomenon, which increases operating costs.

RCEP has introduced new rules of origin, and member countries will only need a certificate of origin to transport products to each other, without having to worry about specific origin standards in particular countries or

each manufacturing step. This move will drastically reduce costs for transnational corporations and could encourage small and medium-sized enterprises to try to expand within the region, allowing more competitive players to profit more.

Through the RCEP commitments, some countries that weren't engaged in FTAs have increased the possibility of expanding their trade exchanges. Based on the subjective opinion of the author, the agreement gave Japan the greatest advantage, as it is equivalent to reaching an agreement with three trading partners, namely China, South Korea, and ASEAN at one time, which is extremely helpful to the post-pandemic economy.

On the other hand, there is a room for a reasonable concern for ASEAN MS whose main export lines were aimed at ASEAN market, because, before the establishment of RCEP, only ASEAN members could preferentially access the markets of South Korea, Japan, and China under the existing ASEAN+1 FTAs and consequently enjoy the three countries' trade benefits [8]. South Korea, Japan, and China could enjoy advantages of the WTO MFN treatment, but the MFNs are as a rule higher than tariffs under preferential trade agreements, *inter alia* ASEAN. When all these countries join RCEP, the treaty will proximately reduce tariffs. This fact will undoubtedly increase the value of export/import among them, and simultaneously create challenges to Thailand, Malaysia, Singapore, and other countries. The author believes that ASEAN exporters and manufacturers should cooperate with China, Japan, and South Korea to maintain their market share.

Presumably, the countries that can get immediate benefits from RCEP, apart from Japan and South Korea should belong to the developing countries of ASEAN. According to estimates, by 2030, China will receive \$100 billion in revenue, followed by Japan with \$46 billion, South Korea with \$23 billion, and Southeast Asian countries with \$19 billion [9]. In the case of the Philippines, RCEP will open up the market for 92% of the country's products, including the most important service sector – offshoring. However, legal aspect of trade in services will be covered by the author in a separate research-based article.

In lieu to Comprehensive and Progressive Agreement for Trans-Pacific Partnership, RCEP does not have special chapters regulating state-owned enterprises. Separate arrangements have been made for the special cases of China, Vietnam, Cambodia, and other countries. These countries all have powerful state-owned enterprises. Some chapters of RCEP do not fully address future controversies, such as dispute settlement. Additionally, RCEP does not prohibit data localization or avoid blocking cross-border data flows, to prevent certain states from restricting the flow of information. Small economies require data localization laws, which may create obstacles for RCEP members to expand cross-border e-commerce in the future.

Special attention of the author was drawn to the study of the impact of the RCEP agreement on trade between Ukraine and RCEP member states. In conformity with Article 17.2 of the RCEP agreement, there is no direct effect or certain obligations imposed on non-members of the treaty. Ukrainian businesses and suppliers incorporated in RCEP MS may benefit from improved supply chains, but at the same time, it may affect their competitiveness. RCEP MS have foreseen the possible threats and developed both competition law enforcement mechanism (Article 13.4 RCEP) and measures to prevent unfair competition (Article 13.3 RCEP). Although RCEP is an economic partnership that has a narrower application compared to *e.g.* TFEU or NAFTA, Ukraine should cooperate with RCEP MS in both economic and political initiatives. The author supports the establishment of the ASEAN Center at the Institute of International Relations KNU in Ukraine in 2021 and encourages research on the indirect impact of bilateral and multilateral agreements concluded among Asian countries and Ukraine.

Ukrainian entrepreneurs and exporters with whom the researcher maintains contacts for scientific purposes said that in addition to tariff restrictions, a common problem is the lack of clear information and instructions on the import of products, obtaining licenses, and customs clearance. To address the problem of insufficient information, the members of the RCEP undertook under Article 17.4 RCEP to promptly provide guidelines, laws, and comments on the application of regulations on trade in goods in their respective countries. Ukrainian businesses will benefit from this undertaking as well. Additionally, the general development of E-Commerce and customs clearance in the small economies of RCEP will benefit the potential export of Ukrainian goods to these states in terms of upgraded procedures. Since the Regional Comprehensive Economic Partnership came into force recently the primary tasks of Ukrainian exporters in short-term perspective are as follows: 1) study the market as well as beneficial supply chains; 2) explore potential investors and partners, and 3) verify credibility level of foreign partners through diplomatic missions of Ukraine.

To assess the effect of RCEP agreement on the export of agricultural goods from Ukraine to Asian states, the author compared tariffs and schedules of commitments under WTO framework and RCEP. The author found that the Kingdom of Thailand established the final bound AVG duty under the WTO rules for HS10 Cereals – 33%, due to the Schedule of commitments of Thailand under RCEP the import duty is 27%. Surprisingly, you will not find a universal Schedule of commitments under RCEP of some MS, including China. In case of China there are 5 different schedules of commitments for use of ASEAN and non-ASEAN RCEP MS. Nevertheless, the average MFN import tariff under the WTO rules for HS10 Cereals is 19,5%. Due to the China-ASEAN commitments under RCEP, the tariffs for agricultural products vary from 2% for Buckwheat (HS 1008.10.00) to 65% for groats of wheat (HS1103.11.00) [10]. The situations in the case of oilseeds, fats & oils is pretty similar, the MFN duty is 10,9%, the RCEP commitments vary from 9% to 30%. Indonesia, where, in 2019, Ukrainian wheat surpassed

foreign countries in terms of imports and amounted to 603 million US dollars, remains in demand. The government of Indonesia established a 4,4% import tariff on most HS15 lines. Therefore, there are no prerequisites for a sharp decline of demand on Ukrainian wheat (HS10), oil (HS15), ores, slag, and ash (HS26), etc. Despite the objective to liberalize trade among RCEP, parties in a lawful way protect their domestic markets from foreign effects and possible dumping.

The author highlights that trade liberalization entails considerable reforms, beyond simply removing tariffs and non-tariff barriers. RCEP MS entered a perspective project that has to address in the upcoming future environmental protection, labor rights, financial services, and other technical aspects of collaboration.

Conclusion

This research followed up with the next outcomes:

1. RCEP promotes the utilization of tariff preferences, as its origin criteria reflect actual production processes through line-by-line PSRs. There is no general origin rule under RCEP; all 5,205 products have their own PSR. Businesses have more choices of the forum if they cannot meet the origin criteria under ATIGA or any other ASEAN+1 FTA. ;

2. RCEP allows originating products from one party to the agreement state to be used as materials in the production of a new product in another Member State. With 15 Member States, businesses will have wider sources of raw materials and a greater chance of meeting the origin criteria. Change of heading rule is the most common tool applied by states;

3. RCEP facilitates trade by allowing exporters and producers to certify origin by themselves, the Self-Certification and Self-Declaration systems will save time and costs associated with obtaining Certificates of Origin;

4. RCEP agreement does not directly impact Ukraine-Asian trade in goods. Ukrainian businesses and suppliers incorporated in RCEP MS may benefit from improved supply chains, but at the same time, it may affect their competitiveness. The study confirmed the author's hypothesis that trade between Ukraine and ASEAN MS, China, Japan will not be affected by the agreement due to the maintenance of relatively similar import tariffs on agricultural goods as it was provided in ATIGA and ASEAN+1 FTAs. The gradual development of E-Commerce and customs clearance in the small economies of RCEP will benefit the potential export of Ukrainian goods to these states in terms of upgraded customs procedures and obligation to clarify all uncertainties connected with lack of information/guidelines concerning import requirements.

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