

Searching for An Ideal Investment Protection Regime for ASEAN+ Dialogue Partners in RCEP: Where Do We Begin?

Asia FDI Forum
5 November 2015

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Key Points

- One of the few studies attempting to analyse investment protection provision baselines to better advise RCEP negotiators.
- RCEP's Investment Chapter can potentially resolve the issue of parallelism (BITs, regional investment agreements, and FTAs with investment chapters) through the consolidation process.
- The investment protection provisions can be improved to add more clarity and balance.

Methodology of developing baseline

- Traditionally, economists studied IIAs through indexes, especially for liberalisation pillar.
- However, what index for investment protection?

RCEP Negotiation Guiding Principle

*“RCEP will aim at creating a **liberal, facilitative, and competitive investment environment** in the region...”*

Methodology of developing baseline

- Normative analysis considering several objectives:
 - Supporting global supply chains in the region;
 - Facilitation of trade through investment protection (legalisation); but also
 - balancing between investment protection and government's legitimate regulatory power.

Index for investment protection

- Trade and investment facilitating provisions (fairness and stability):
 - Absolute protection
 - E.g. Autonomous FET clause
 - Good exceptions/ clarifications
 - E.g. Annex on expropriation
- With limitation
 - E.g. FET clause only covering denial of justice

Baseline Findings Sample

- **Most-Favoured Nation Treatment**
 - Currently under heavy scrutiny due to over-expansion of its applicability.
 - ASEAN – India Investment Agreement and AANZFTA do not have any MFN clause.
 - RCEP should limit MFN clause to ensure that the consolidation effort works effectively (see Draft CETA’s Investment Chapter).

Draft CETA

Article X.7 Most-Favoured-Nation Treatment

1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords in like situations, to investors and to their investments of any third country with respect to the establishment, acquisition, expansion, conduct, the operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

[...]

4. For greater certainty, the “treatment” referred to in Paragraph 1 and 2 **does not include investor-to-state dispute settlement procedures** provided for in other international investment treaties and other trade agreements. **Substantive obligations** in **other international investment treaties** and other trade agreements **do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this article, absent measures** adopted by a Party pursuant to such obligations.

Baseline Findings Sample

- **Fair and Equitable Treatment (FET)**
 - The lack of precise meaning leads to multiple interpretations by arbitral tribunals.
 - RCEP should clarify the protection granted under the FET clause. For example: Article 11(2) of the ACIA limits it to the obligation not to deny justice in any legal or administrative proceedings in accordance with the principle of due process.
 - Draft CETA and TTIP provide a list of treatments under the FET clause.

Draft TTIP

Article 3 – Treatment of Investors and of covered investments

1. Each Party shall accord in its territory to covered investments of the other Party and investors with respect to their covered investments **fair and equitable treatment** and full protection and security in accordance with paragraphs 2 to 5.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or a series of measures constitutes:

- (a) Denial of justice in criminal, civil or administrative proceedings; or
- (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or
- (c) manifest arbitrariness; or
- (d) targeted discrimination on manifestly wrongful grounds, such as gender, race, or religious belief; or
- (e) harassment, coercion, abuse of power or similar bad faith conduct; or
- (f) a breach of any further elements of the fair and equitable obligation adopted by the Parties in accordance with paragraph 3 of this Article.

[...]

ANNEX 2 ACIA EXPROPRIATION AND COMPENSATION

1. An action or a series of related actions by a Member State cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.
2. Article 14(1) addresses two situations:
 - a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
 - b) the second situation is where an action or series of related actions by a Member State has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
3. The determination of whether an action or series of actions by a Member State, in a specific fact situation, constitutes an expropriation of the type referred to in sub-paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors:
 - a) the economic impact of the government action, although the fact that an action or series of actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
 - b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and
 - c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).
4. **Non-discriminatory measures** of a Member State that are **designed and applied to protect legitimate public welfare objectives**, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b).

Baseline Findings Sample

• Treaty Exceptions

- Important to strike a balance between investment protection and safeguarding other values or objectives considered to be fundamental to the host State.
- Most investment chapters of the FTAs among RCEP countries have treaty exception clauses.
- RCEP should include a comprehensive list of exceptions, such as 1) exceptions to transfer of funds, 2) measures to safeguard balance of payments, 3) general exceptions, and 4) security exceptions.

Searching for Appropriate Standards Investment Protection – Baseline Findings

- **Dispute Settlement - ISDS**
 - Many countries have voiced objections to the ISDS for various reasons.
 - In order to deal with some of the problems raised, RCEP:
 - impose an obligation on the host States to create an alternative dispute resolution through Ombudsman Office;
 - incorporate joint-Interpretation mechanism by Member States;
 - require certain qualification of arbitrators (expertise or experience in public international law, international investment law);
 - detailed code of conduct (China-Australia FTA, TTIP); and
 - introduce a mechanism to deal with frivolous claims.

Conclusions

- While RCEP's Investment Chapter can be a consolidation opportunity for various IIAs in the region, the standards in RCEP need to be further improved.
- Since 16 countries are involved in the negotiation and they have different views, some ambitious commitments may be hard to obtain.