



Chapter 2

Investment-Related Issues and Solutions for Improving the ASEAN–China Free Trade Area

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1. Introduction

On 13 November 2022, the leaders of the Association of Southeast Asian Nations (ASEAN) and China announced the launch of negotiations for the upgrade of the ASEAN–China Free Trade Area (ACFTA) (ASEAN, 2022). This paper analyses investment-related issues and solutions that should be dealt with for the upgrade of the ACFTA. ASEAN and China concluded the Agreement on Investment of the Framework on Comprehensive Cooperation in 2009.¹ Recent changes to the global economic landscape necessitate a careful reflection and review of the investment agreement to ensure that it remains relevant and responsive to the needs of businesses. Challenges that need to be addressed include the dramatic shifts in global and regional supply chains, the impact of the coronavirus disease (COVID-19) pandemic, and the adoption of advanced technologies in trade and investment facilitation. Taking these issues into account, there is a need to review the provisions of the investment agreement in light of other agreements involving ASEAN and China, including Chapter 10 of the Regional Comprehensive Economic Partnership (RCEP),² and other ASEAN and non-ASEAN free trade agreements (FTAs) and bilateral investment treaties (BITs), including the ASEAN Comprehensive Investment Agreement (ACIA)³ and the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP).⁴ This paper will elucidate the expected content of the new ASEAN–China Investment Agreement, which should build on these agreements.

¹ The Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China, signed on 15 August 2009, entered into force on 1 January 2010 (ASEAN, 2009a).

² The RCEP agreement, signed on 15 November 2020, entered into force on 1 January 2022.

³ The ACIA, signed on 26 February 2009, entered into force on 29 March 2012 (ASEAN, 2009b).

⁴ The CPTPP, signed on 8 March 2018, entered into force on 30 December 2018 for Australia, Canada, Japan, Mexico, New Zealand, and Singapore; on 14 January 2019 for Viet Nam; on 19 September 2021 for Peru; on 29 September 2022 for Malaysia; and on 22 February 2023 for Chile.

2. The 2009 ASEAN–China Investment Agreement

2.1. The 2009 ASEAN–China Investment Agreement as the last element of the ACFTA

On 15 August 2009, ASEAN and China signed the Agreement on Investment, which was the last of the agreements constituting the ACFTA. The other agreements are the Framework Agreement,⁵ the Agreement on Trade in Goods,⁶ the Agreement on Trade in Services,⁷ and the Agreement on Dispute Settlement Mechanism.⁸

The Framework Agreement set out the objective, amongst others, to create a transparent, liberal, and facilitative investment regime (Art. 1(b)). To achieve this objective, the parties agreed to (i) enter into negotiations to progressively liberalise the investment regime; (ii) strengthen cooperation in investment, facilitate investment, and improve the transparency of investment rules and regulations; and (c) provide for the protection of investments (Art. 5). Therefore, the investment regime should contain rules in three areas: investment liberalisation, investment facilitation, and investment protection. The provisions of the investment agreement will be reviewed to examine their contribution to these goals.

2.2. Investment protection and investment liberalisation

The ASEAN–China Agreement on Investment provides for national treatment, most favoured nation treatment (MFN), and fair and equitable treatment (FET).

⁵ The Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and China, signed on 4 November 2002, entered into force in July 2005 (ASEAN, 2002).

⁶ The Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China, signed on 29 November 2004, entered into force July 2005 (ASEAN, 2004b).

⁷ The Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Co-operation Between ASEAN and China, signed on 14 January 2007, entered into force on 1 July 2007 (ASEAN, 2007).

⁸ The Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation Between ASEAN and China, signed on 29 November 2004, entered into force on 1 January 2005 (ASEAN, 2004a).

In the investment agreement, national treatment is granted to foreign investors and their investments ‘with respect to management, conduct, operation, maintenance, use, sale, liquidation, or other forms of disposal of such investments’ (Art. 4). Hence, national treatment applies to the post-entry stage only. Due to the absence of pre-entry national treatment, there is no obligation of investment liberalisation. Although ASEAN Member States (AMS) insisted on investment liberalisation, China was not prepared to undertake investment liberalisation obligations in the agreement. As Xiao stated, the investment agreement represents ‘old wine in the new bottle’ (Xiao, 2010: 2).⁹

China’s hesitant attitude towards investment liberalisation reflected its overall policy at the time. China had concluded well over 100 BITs by the time it concluded the investment agreement, but it had never agreed on investment liberalisation.¹⁰

The MFN clause of the investment agreement applies not only to the post-entry stage, but also to the pre-entry stage, as the MFN is accorded to the ‘admission, establishment, acquisition, expansion’ of investments as well (Art. 5.1). Besides, the investment agreement expressly excludes dispute resolution procedures from the scope of the MFN clause (Art. 5.4).

However, national treatment and MFN treatment are substantially derogated by Article 6.1, which provides that the obligations shall not apply to any existing or new nonconforming measures maintained or adopted by a party. It allows a party to withdraw the non-discriminatory treatment of foreign investors in the future without violating its national treatment or MFN obligations. The investment protection granted by Articles 4 and 5 would be undermined to a great degree (Xiao, 2010: 10).

The investment agreement provides for FET as well as full protection and security in Article 7.1. It sets two restrictions on the application of FET. First, FET refers to the obligation not to deny justice only (Art. 7(a)). Second, a breach of another provision of the agreement does not amount to a breach of FET (Art. 7.3). The language resembles Article 11 of the ACIA. It may be concluded that the ACIA was utilised as a reference when the FET clause of the ASEAN–China investment agreement was negotiated.

On the transfer and repatriation of profits, Article 10.1 of the investment agreement provides that each party shall allow all transfers in respect of investment in any freely usable currency. On the other hand, the investment agreement provides a number of exceptions to this principle, including the right to impose capital controls in the case of a serious balance-of-payments crisis, which is consistent with the Articles of Agreement of the International Monetary Fund (IMF) (Art. 11.1).

In sum, with respect to investment protection, though the common standards of treatment are provided for by the investment agreement, their application is substantially restrained due to several restrictions.

⁹ See also Berger (2013: 22–23).

¹⁰ In 2013, Berger categorised three generations of Chinese BITs since its first BIT in 1982. Even the latest third-generation BITs provide for post-establishment national treatment (Berger, 2013: 8).

2.3. Transparency, promotion, and facilitation of investment

To facilitate investment and improve transparency, the investment agreement provides for obligations of transparency (Art. 19), promotion of investment (Art. 20), and facilitation of investment (Art. 21). These include the publication and notification of laws and policies affecting investment (Art. 19.1(a)), establishing enquiry point (Art. 19.1(c)) and one-stop investment centres in the respective host parties (Art. 21(d)), and various forms of cooperation amongst parties to promote and facilitate investment.

2.4. Investor–state dispute settlement

China's early BITs provided either no investor–state dispute settlement (ISDS) provisions or a narrowly constructed ISDS clause that only admits the amount of compensation for expropriation to arbitration (Li and Bian, 2020: 505). According to Li and Bian, the second-generation Chinese BITs signed from 1998 to 2011 allow for the admission of legal disputes to arbitration (Li and Bian, 2020: 505). The investment agreement belongs to this generation. Article 14 on ISDS applies to disputes concerning an alleged breach of substantive obligations under Articles 4, 5, and 7 (standards of treatment); 8 (expropriation); 9 (compensation for losses); and 10 (transfer of profits).

After a cooling-off period of 6 months, the dispute may be submitted at the choice of the investor to one of four international arbitration procedures¹¹ or to the domestic courts of the host state (Art. 14.4(a)). This so-called fork-in-the-road rule is mitigated to the benefit of the investor, as the investor may submit the dispute to an international arbitration procedure even if it has been submitted to a competent domestic court, provided that the investor has withdrawn its case from the domestic court before a final judgement has been reached in the case (Art. 14.5).

If the investor wants to submit a dispute to arbitration, they have to meet other conditions, including: (i) the submission of the dispute must be within 3 years of the time at which the investor became aware of a breach of an obligation under the agreement; and (ii) prior to submitting the claim to arbitration, the investor has to give 90 days advance written notice to the host state, and the host state may require the use of domestic administrative review procedures (Art. 14.6).

¹¹ These are procedures under the International Centre for Settlement of Investment Disputes (ICSID) Convention, under the ICSID Additional Facility Rules, under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, or under any other arbitration rules agreed upon by the disputing parties. See Art. 14.4.

2.5. Exceptions

The investment agreement provides for three types of exceptions: (i) measures to safeguard the balance of payments (Art. 11); (ii) general exceptions (Art. 16); and (iii) self-judging security exceptions (Art. 17). Article 17 enumerates cases in which the clause may be invoked: policies concerning the non-proliferation of nuclear weapons; trafficking in arms; protecting critical public infrastructure from attack; and war or other emergency in domestic or international relations (Art. 17.(b)). These cases are normally deemed to be situations where some kind of military threat is at stake. However, as Article 17 uses the phrase 'including but not limited to', it clarifies that the enumeration is not exhaustive. Therefore, the security exception may be invoked also under situations that are not explicitly mentioned, including the economic crisis (Xiao, 2010: 12).

3. Provisions of the RCEP Relating to Investment

As ASEAN and China are parties to the RCEP, its provisions on investment are also relevant when we consider the expected content of the new ASEAN–China Investment Agreement. Chapter 10 of the RCEP covers the four pillars of promotion, protection, facilitation, and liberalisation (ASEAN, 2012). The RCEP is the first FTA in which China has made commitments on investment liberalisation.

3.1. Investment liberalisation

In contrast to the ASEAN–China investment agreement, the RCEP provides for investment liberalisation through pre-establishment national treatment with a negative list. Article 10.3 provides for national treatment with respect to 'the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments'. Annex III, List A enumerates existing nonconforming measures that are maintained by a party, and an amendment to such measures is allowed to the extent that it does not decrease the conformity of the measure as it existed immediately before the amendment (ratcheting requirement) (Art. 10.8.1).¹² Annex III, List B enumerates nonconforming

¹² The requirement is applied to Australia, Brunei, China, Japan, the Republic of Korea (henceforth, Korea), Malaysia, New Zealand, Singapore, Thailand, and Viet Nam. See Art. 10.8.1(c)(ii). For Cambodia, Indonesia, the Lao People's Democratic Republic (Lao PDR), Myanmar, and the Philippines, an amendment is allowed to the extent that it does not decrease the conformity of the measure as it existed at the date of entry into force of the RCEP (standstill requirement). See Art. 10.8.1(c)(i).

measures that a party adopts or maintains after the entry into force of the RCEP (Art. 10.8.2). For these measures, therefore, a party does not assume a ratcheting requirement and has the autonomy to adopt or maintain any nonconforming measures after the entry into force of the RCEP. For instance, Annex III, List A of China has 12 items, including the exploration and ore dressing of rare earth and rare minerals, the manufacture of ground reception facilities for satellite television and broadcast, and processing of traditional Chinese medical materials. Annex III, List B of China has 11 items, including atomic energy, measures that grant rights or preference to ethnic minorities and ethnic minority areas, and any measure with respect to new sectors and industries.

With respect to trade in services, the RCEP employs a hybrid approach. Eight parties¹³ used positive list scheduling under Annex II, and seven parties¹⁴ adopted the negative list approach by including their nonconforming measures in Annex III. For instance, China's Annex II provides that the establishment of branches by foreign-owned enterprises is unbound, unless otherwise indicated in specific subsectors.¹⁵ According to Article 8.12, however, RCEP parties that initially adopted the positive list approach are required to transition to negative list scheduling within 3 years after the entry into force of the RCEP.¹⁶

Why could China make commitments for investment liberalisation under the RCEP? The pre-establishment national treatment and negative list initially arose as China's BIT policy in the context of the China–United States (US) BIT negotiations (Zhang, 2022: 1054–55). In 2013, China agreed to negotiate a BIT based on pre-establishment national treatment with a negative list with the US (Ministry of Commerce, China, 2013). This policy was implemented on a trial basis in the Pilot Free Trade Zones and promoted nationwide in 2018, before it was enacted in the Foreign Investment Law in March 2019.¹⁷ In sum, China was ready to make commitments for investment liberalisation under the RCEP as it had agreed to such commitments during the negotiation of the China–US BIT.

The RCEP provides for additional discipline for investment liberalisation by systematically prohibiting performance requirements, which is not provided for under the ASEAN–China investment agreement. Article 10.6.1 prohibits the imposition or enforcement of the following requirements as a condition for the establishment, acquisition, management, conduct, operation, or sale or other disposition of an investment: (i) to export a given level or percentage of goods; (ii) to achieve a given level or percentage of domestic content; (iii) to purchase, use, or accord a preference to goods produced in its territory;

¹³ Cambodia, China, the Lao PDR, Myanmar, New Zealand, the Philippines, Thailand, and Viet Nam.

¹⁴ Australia, Brunei, Indonesia, Japan, Korea, Malaysia, and Singapore.

¹⁵ RCEP, Annex II – China – 3.

¹⁶ For Cambodia, the Lao PDR, and Myanmar, the transition period is 12 years after the entry into force of the RCEP. See Art. 8.12.1.

¹⁷ Article 4 of the Foreign Investment Law provides that 'The State implements the management scheme of pre-establishment national treatment plus negative list with respect to foreign investment'. See Zhang (2022: 1055, 1058).

(iv) to relate the volume or value of imports to the volume or value of exports; (v) to restrict sales of goods in its territory that such investments produce by relating such sales to the volume or value of its exports or foreign exchange earnings; (vi) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;¹⁸ (vii) to supply exclusively from the territory of the party the goods that such investments produce to a specific regional market or to the world market; or (viii) to adopt a given rate or amount of royalty under a licence contract (footnote 42).

Although some of these requirements are allowed as a condition for granting an advantage to investors, the following requirements are prohibited even in such cases: (i) to achieve a given level or percentage of domestic content; (ii) to purchase, use, or accord a preference to goods produced in its territory; (iii) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments of that investor; or (iv) to restrict sales of goods in its territory that such investments produce by relating such sales to the volume or value of its exports or foreign exchange earnings (Art. 10.6.2). The RCEP, therefore, prohibits several World Trade Organization (WTO) Agreement on Trade-Related Investment Measures (TRIMs)-plus performance requirements,¹⁹ so that a foreign investor may enjoy a wide range of discretion in making decisions relating to their investment.

3.2. Investment protection

The MFN clause of the RCEP is quite similar to that of the investment agreement, including the exclusion of the clause regarding any international dispute resolution procedures or mechanisms under other existing or future international agreements (Art. 10.4.3). It must be noted, however, that this clause does not apply to Cambodia, the Lao People’s Democratic Republic (Lao PDR), Myanmar, or Viet Nam. Furthermore, MFN treatment shall not be accorded to investors from these countries.²⁰

The FET clause of the RCEP also resembles that of the investment agreement, as it covers FET and full protection and security. However, in contrast to that of the investment agreement, the FET clause of the RCEP refers to the customary international law minimum standard of treatment of aliens (Art. 10.5.1). Besides this, it has two provisions that restrict the coverage of the FET clause: (i) FET refers to the obligation not to deny justice (Art. 10.5.2(a)); and (ii) a breach of another provision of the agreement does not amount to a breach of FET (Art. 10.5.3).

On transfers, Article 10.9.1 of the RCEP provides that each party shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. It also provides for a number of exceptions which are similar to those of the ASEAN–China Agreement on Investment, including the rights of a party under the IMF Articles of Agreement (Art. 10.9.4).

¹⁸ This does not apply to Cambodia, the Lao PDR, or Myanmar. See Art. 10.6.1.

¹⁹ TRIMs provide for the prohibition of requirements that violate Articles III.4 (national treatment) and XI (prohibition of quantitative restrictions).

²⁰ RCEP, Chapter 10, footnote 18.

3.3. Investment facilitation

The RCEP provides for the promotion of investment (Art. 10.16) and the facilitation of investment (Art. 10.17). The former includes best efforts obligations to organise joint investment promotion activities, promote business matching events, and organise various briefings and seminars on investment opportunities. The latter includes best efforts obligations to (i) simplify procedures for investment applications and approvals; (ii) promote the dissemination of investment information; and (iii) establish or maintain contact points, one-stop investment centres, focal points to provide assistance, and advisory services to investors (Art. 10.17.1). As an elaboration of the best efforts obligation (iii) above, Article 10.17.2 provides for a best efforts obligation to assist investors and covered investments to amicably resolve complaints or grievances with government bodies which have arisen during their investment activities. This is an ASEAN–China investment agreement plus component of the RCEP.

3.4. Omission of ISDS

The RCEP contains no ISDS. It leaves the ISDS mechanism for negotiations within 2 years after the entry into force of the agreement (Art. 10.15.1(a)). The negotiations are to be concluded within 3 years from the date of commencement of the negotiations (Art. 10.15.2). Although Japan and the Republic of Korea (henceforth, Korea) pushed for detailed ISDS rules during RCEP negotiations, the changing stances of other countries prompted the RCEP to omit ISDS (Hsieh, 2022: 89–90). In particular, New Zealand's new government declared its refusal to include ISDS in any FTAs in 2018 (Government of New Zealand, 2017: 1).

3.5. Exceptions

The RCEP provides for three types of exceptions – balance-of-payments exceptions, general exceptions, and security exceptions. On balance-of-payments exceptions, Article 17.15 provides that, where a party is in serious balance-of-payments difficulties, it may adopt or maintain restrictions on payments or transfers related to covered investments.

Chapter 10 of the RCEP does not provide for general exceptions. Instead, Article 17.12 provides for the incorporation of Article XX of the General Agreement on Tariffs and Trade (GATT) to Chapter 10 (investment), *mutatis mutandis*.

On security exceptions, in addition to Article 17.13 (security exceptions), which provides for general security exceptions, Article 10.15 provides that nothing in Chapter 10 shall be construed to preclude a party from applying measures that it considers necessary for (i) the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or (ii) the protection of its own essential security interests.

4. Other FTAs/BITs That Should Be Referenced

The new ASEAN–China Investment Agreement should build on Chapter 10 of the RCEP, as it is a recently concluded agreement involving both ASEAN and China. However, other ASEAN and non-ASEAN FTAs and BITs should also be referred to in considering the expected content of the new ASEAN–China Investment Agreement insofar as they represent the desirable content of a contemporary investment agreement between ASEAN and China. We refer to four such agreements: (i) the ACIA, as it represents a common policy stance of the AMS; (ii) the European Union (EU)–Viet Nam Investment Protection Agreement,²¹ as a recent BIT concluded by an AMS and the EU; (iii) the EU–China Comprehensive Agreement on Investment, negotiations on which were concluded in principle in December 2020 (European Commission, 2020a); and (iv) the CPTPP investment chapter, as China applied for its accession.

4.1. ACIA

The ACIA aims at investment liberalisation, protection, investment promotion, and facilitation (Art. 2(a)).

4.1.1. Investment liberalisation

The ACIA conducts investment liberalisation by providing pre-establishment national treatment plus negative lists. Article 5.1 provides that each AMS shall accord to investors national treatment with respect to 'the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments'. Article 9 provides that Article 5 shall not apply to any existing measure that is maintained by an AMS, as set out in its reservations list in the Schedule (Art. 9.1).²² The ACIA provides for the progressive liberalisation of investment, as each AMS commits to reduce or eliminate the reservation list in accordance with a blueprint created to facilitate the development of the ASEAN Economic Community (AEC) (Art. 9.4).

²¹ The EU–Vietnam Investment Protection Agreement, signed on 30 June 2019, will enter into force after it has been ratified by all EU member countries (European Commission, 2020b).

²² For the schedule of reservations of each AMS, please visit the ACIA database (ASEAN, n.d.).

At the same time, the ACIA provides two avenues of escape from these commitments. First, for a period of 12 months after the date of submission of each AMS reservation list, an AMS may adopt any measures or modify any of its reservations for prospective applications to investors, provided that such measures or modifications shall not adversely affect any existing investors (Art. 10.1). Secondly, after the expiration of the 12-month period, an AMS may, by negotiation and agreement with any other AMS, adopt any measure, or modify or withdraw such reservations, provided that such measure, modification, or withdrawal shall not adversely affect any existing investors (Art. 10.2).

4.1.2. Investment protection

Article 6 of the ACIA provides that a host state must provide MFN treatment to investors and their covered investment either at the pre-establishment or post-establishment stage (Art. 6.1 and 6.2). As in the case of the ASEAN–China investment agreement and the RCEP, MFN treatment shall not apply to ISDS procedures that are available in other agreements to which AMS are party.²³

The FET clause of the ACIA resembles that of the ASEAN–China investment agreement. It provides for FET and full protection and security (Art. 11.1). FET requires not to deny justice in any legal or administrative proceedings (Art. 11.2(a)). A breach of another provision of the ACIA does not amount to a breach of FET (Art. 11.3).

On transfers, Article 13.1 of the ACIA provides that each AMS shall allow all transfers relating to a covered investment to be made freely and without delay into and out of its territory. It also provides for a number of exceptions which are similar to those of the ASEAN–China investment agreement and the RCEP, including the rights of a party under the IMF Articles of Agreement (Art. 13.3 and 4). Besides, the ACIA provides for the right of an AMS to adopt or maintain a restriction on payments or transfers related to investments in the event of serious balance-of-payments and external financial difficulties or the threat thereof, provided that the restrictions are consistent with the Articles of Agreement of the IMF (Art. 14.1 and 2(a)).

4.1.3. Investment promotion and facilitation

The ACIA provides for the promotion of investment (Article 24) and the facilitation of investment (Article 25). The former includes cooperation obligations through encouraging the growth and development of ASEAN small and medium-sized enterprises; organising investment missions; and organising briefings and seminars on investment opportunities and on investment law, regulations, and policies. The latter provides for best efforts obligations to (i) create the necessary environment for all forms

²³ See ACIA, footnote 4(a).

of investments, (ii) streamline and simplify procedures for investment applications and approvals, (iii) promote the dissemination of investment information, (iv) establish one-stop investment centres, (v) strengthen databases on investments for policy formulation, (vi) undertake consultation with the business community on investment matters, and (vii) provide advisory services to the business community of the other AMS. These are similar to those of the RCEP, but the ACIA provides for a few activities that are not listed under the RCEP, such as (vi) and (vii) above.

4.1.4. ISDS

The ACIA provides detailed rules for ISDS. Under Article 32, if an investment dispute has not been resolved within 180 days of receipt of a request for consultations by a disputing AMS, the disputing investor may submit a claim under the ISDS mechanism. The subject matter of such disputes is an alleged breach of Articles 5 (national treatment), 6 (MFN treatment), 8 (senior management and board of directors), 11 (treatment of investment), 12 (compensation in cases of strife), 13 (transfers), and 14 (expropriation and compensation) relating to the management, conduct, operation, or sale or other disposition of a covered investment (Art. 32(a)).²⁴

The disputing investors may use the following forums to submit their claims: (i) courts or administrative tribunals of the disputing AMS; (ii) arbitration under the International Centre for Settlement of Investment Disputes (ICSID) Convention or the ICSID Rules of Procedure for Arbitration Proceedings; (iii) arbitration under the ICSID Additional Facility Rules; (iv) arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules; (v) the Kuala Lumpur Regional Centre for Arbitration or any other regional centre for arbitration in ASEAN; or (vi) any other arbitration institution, subject to the agreement of the parties (Art. 33). As in the case of ISDS under the ASEAN–China investment agreement, if the investor wants to submit a dispute to arbitration, he has to meet other conditions, including: (i) the submission of the dispute must be within 3 years of the time at which the investor became aware of a breach of an obligation under the agreement; and (ii) prior to submitting the claim to arbitration, the investor has to give 90 days advance written notice to the host state (Art. 34(a) and (b)).

The ACIA provides detailed rules for the ISDS procedure, including the formation of an arbitral tribunal and the selection of arbitrators (Article 35), the conduct of the arbitration (Article 36), the consolidation of arbitration (Article 37), expert reports (Article 38), the transparency of arbitral proceedings (Article 39), the governing law (Article 40), and arbitral awards (Article 41).²⁵

²⁴ This means that an alleged violation of pre-establishment national treatment does not fall within the coverage of ISDS.

²⁵ For details of the ISDS procedure under the ACIA, see Chaisse and Jusoh (2016: 166–73).

4.1.5. Exceptions

The ACIA provides for balance-of-payment exceptions, general exceptions, and security exceptions. On balance-of-payments exceptions, Article 16 provides that an AMS may adopt or maintain restrictions on payments or transfers related to investments in the event of serious balance-of-payments difficulties.

The ACIA provides for general exceptions under Article 17. Based upon the chapeau of Article XX of the GATT, measures enacted to address certain public policy purposes cannot be claimed as violating the ACIA, provided that the measures are not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination (Art. 17.1). The exceptional public policy purposes include measures (i) necessary to protect public morals or to maintain public order; (ii) necessary to protect human, animal, or plant life or health; (iii) necessary to secure compliance with laws or regulations which are not inconsistent with the agreement; (iv) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors; (v) imposed for the protection of national treasures of artistic, historic, or archaeological value; and (vi) relating to the conservation of exhaustible natural resources.²⁶

Article 18 of the ACIA provides for security exceptions. It adopts a self-judging approach whereby an AMS may take any action which it considers contrary to its essential security interests, including but not limited to:

- (i) actions relating to fissionable and fusionable materials or the materials from which they derived;
- (ii) actions relating to the trafficking of arms, ammunition, and implements of war and to trafficking of other goods and materials for the purpose of supplying a military establishment;
- (iii) actions taken in time of war or other emergency in domestic or international relations; and
- (iv) actions taken to protect critical public infrastructure from attempts to disable or degrade them (Art. 18(b)).

4.2. EU–Viet Nam Investment Protection Agreement/FTA

The EU–Viet Nam Investment Protection Agreement, signed in October 2018, is analysed here as a recent investment agreement concluded by an AMS and the EU.

²⁶ Similar wording of Article XX of the GATT may allow us to refer to GATT/WTO dispute settlement cases when we interpret Article 17 of the ACIA. See Chaisse and Jusoh (2016: 142–49).

4.2.1. Investment liberalisation

As its title reflects, the EU–Viet Nam Investment Protection Agreement (IPA) provides for investment protection and does not provide for investment liberalisation. Article 2.3 provides for national treatment with respect to ‘the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of’ investments, and it does not cover the establishment of investments. On the other hand, the EU–Viet Nam Free Trade Agreement, signed on the same day, provides for investment liberalisation. It adopts a positive list approach. Its Appendix 8-B provides for Viet Nam’s liberalisation commitments in services sectors (Section A) and liberalisation commitments of investment in non-services sectors (Section B). This split of an investment-related agreement into two (IPA and FTA) was based on Opinion 2/15 of the Court of Justice of the European Union (CJEU), which ruled that most aspects of the FTA are within the EU’s exclusive competence, but provisions on portfolio investment and ISDS fall outside the common commercial policy and hence involve the shared competence between the EU and its member countries.²⁷

4.2.2. Investment protection

Chapter 2 of the EU–Viet Nam IPA provides for investment protection. It provides for national treatment (Art. 2.3), MFN treatment (Art. 2.4), and FET (Art. 2.5). On national treatment, it provides that each party shall accord national treatment to investors with respect to the operation of the covered investments (Art. 2.3.1). On MFN treatment, it provides that each party shall accord MFN treatment to investors with respect to the operation of the covered investments (Art. 2.4.1).

At the same time, it provides for certain carveouts of these treatments. On national treatment, Viet Nam may adopt or maintain any measure with respect to the operation of a covered investment, provided that such measure is not inconsistent with Appendix 8B, where such measure is (i) a measure that is adopted on or before the entry into force of the agreement; (ii) a measure referred to in (i) that is being continued, replaced, or amended after the entry into force of the agreement, provided that the measure is no less consistent with Article 2.3.1 after it is continued, replaced, or amended than the measure as it existed prior to its continuation, replacement, or amendment; or (iii) a measure not falling within (i) or (ii) provided that it is not applied in respect of, or in a way that causes loss or damage to, investments made before the entry into force of the agreement (Art. 2.3.2). In addition, Annex 2 of the EU–Viet Nam IPA provides for exemptions for Viet Nam on national treatment including, amongst others, (i) newspapers and news-gathering agencies, printing, publishing, radio, and television broadcasting; (ii) production and distribution of cultural products; (iii) production, distribution, and projection of television programmes and cinematographic works; and (iv) investigation and security, provided that such measure is not inconsistent with Annex 8-B.

²⁷ Opinion 2/15 of the CJEU dated 16 May 2017.

On MFN treatment, it does not apply to the following sectors: (i) communication services, except postal services and telecommunication services; (ii) recreational, cultural, and sporting services; (iii) fishery and aquaculture; (iv) forestry and hunting; and (v) mining, including oil and gas. As in the case of the ASEAN–China investment agreement, the RCEP, and the ACIA, the MFN treatment does not include dispute resolution procedures or mechanisms provided for in any other agreements (Art. 2.4.5).

On FET, the EU–Viet Nam IPA provides that each party shall accord FET and full protection and security to investors (Art. 2.5.1). FET requires not denying justice, amongst others (Art. 2.5.2). A breach of another provision of the agreement does not amount to a breach of FET (Art. 2.5.7).

4.2.3. Investment promotion and facilitation

The EU–Viet Nam IPA does not provide for investment promotion and facilitation.

4.2.4. ISDS

The EU–Viet Nam IPA provides detailed rules for the settlement of investment disputes. Instead of an ordinary ISDS procedure, it provides for a permanent investment court system (ICS), consisting of a tribunal (Art. 3.38) and an appeal tribunal (Art. 3.39). The EU has been trying to adopt the ICS in its FTAs, and the ICS was adopted in the Canada–EU Comprehensive Economic and Trade Agreement (CETA)^{28 29} and the EU–Singapore IPA.³⁰ The EU–Viet Nam IPA is the third EU agreement that adopts the ICS.³¹

There are a few differences in the structure of the ICS in these three agreements. While the tribunal in all three agreements shall hear cases in divisions consisting of three members of the tribunal, the number of the members differs – 15 in the case of the CETA (Art. 8.27.2), six in the case of the EU–Singapore IPA (Art. 3.9.2), and nine in the case of the EU–Viet Nam IPA (Art. 3.38.2). On the appointment of members of the tribunal, while the EU–Singapore IPA allows parties to directly appoint two members each (Art. 3.9.2), the CETA and the EU–Viet Nam IPA only permits the joint committees to appoint members.³²

²⁸ The CETA, signed on 30 October 2016, provisionally entered into force on 21 September 2017 (European Commission, 2016: Chapter 8, Section F, Art. 8.18–8.45).

²⁹ According to Opinion 2/15 of the CJEU, the part of the CETA relating to investment protection and the ICS has not entered into force, as it must be ratified by all EU member countries. See Kleimann and Küber (2018: 31).

³⁰ The EU–Singapore IPA, signed on 15 October 2018, will enter into force when it has been ratified by all EU member countries (European Commission, 2019: Art. 3.1–3.24).

³¹ The agreement in principle of the EU–Mexico Trade Agreement, dated 21 April 2018, also provides for the ICS. See European Commission (2018: Section [X]).

³² Art. 8.27.2 of the CETA; Art. 3.38.2 of the EU–Viet Nam IPA.

It is premature to conclude that the ICS will become a new normal for settling investment disputes. As Hsieh pointed out, Asian states have viewed the EU proposal as another ISDS-plus scheme, and could not agree to appreciate the added value of the ICS in comparison with existing ISDS rules under Asian agreements such as the ACIA and ASEAN Plus One FTAs (Hsieh, 2022: 49). The EU declared that ISDS is dead for the EU while negotiating with Japan. However, Japan declined to accept the ICS, so the EU–Japan IPA will be subject to ongoing talks despite the entry into force of the EU–Japan Economic Partnership Agreement in 2019 (Hsieh, 2022: 150).³³

4.2.5. Exceptions

The EU–Viet Nam IPA provides for a number of exceptions. It provides for taxation carveout (Art. 4.4), prudential carveout (Art. 4.5), general exceptions (Art. 4.6), and security exceptions (Art. 4.8). The taxation carveout allows parties to implement taxation agreements (Art. 4.4.1) and to implement any measure to prevent double taxation (Art. 4.4.3), amongst others. The prudential carveout allows parties to adopt or maintain measures for prudential reasons, such as protection of investors or depositors, and ensuring the integrity and stability of the financial system (Art. 4.5.1).

On general exceptions, Article 4.6 adheres to Article XX of the GATT. First, its chapeau requires that the measures listed as general exceptions be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised protection on covered investment. Secondly, it lists the objectives of such measures that are allowed even if they violate Article 2.3 (national treatment) or Article 2.4 (MFN treatment), including those (i) necessary to protect public security or public morals or to maintain public order; (ii) necessary to protect human, animal, or plant life or health; (iii) relating to the conservation of exhaustible natural resources; (iv) necessary for the protection of national treasures of artistic, historical, or archaeological value; and (v) necessary to secure compliance with law or regulations which are not inconsistent with Articles 2.3 and 2.4.

Security exceptions of the EU–Viet Nam investment agreement adopt a self-judging approach whereby a member state may take any action which it considers contrary to its essential security interests, including but not limited to:

- (i) actions connected with the production of or trade in arms, munitions, and war materials and relating to traffic in other goods and materials and to economic activities carried out directly or indirectly for the purpose of provisioning a military establishment;
- (ii) actions relating to the supply of services carried out directly or indirectly for the purpose of provisioning a military establishment;
- (iii) actions relating to fissionable and fusionable materials or the materials from which they are derived; or
- (iv) actions taken in time of war or other emergency in international relations (Art. 4.8(b)).

³³ See also Clifford Chance (2018: 3).

4.3. EU–China Comprehensive Agreement on Investment

The EU and China reached an agreement in principle for the EU–China Comprehensive Agreement on Investment (CAI) in December 2020. It provides for investment liberalisation (Section II), investment facilitation (Section III), investment and sustainable development (Section IV), and state-to-state dispute settlement (Section V). It does not provide for investment protection or ISDS. The EU and China agreed to negotiate these matters and endeavour to complete the negotiation within 2 years of the signature of the EU–China CAI (Section VI, Subsection 2: Final provisions, Art. 3). We will analyse its content on investment liberalisation, investment facilitation, investment and sustainable development, and exceptions.

4.3.1. Investment liberalisation

The EU–China CAI adopts a negative list approach. Section II of the agreement provides for general obligations on the prohibition of performance requirements (Art. 3), pre-establishment national treatment (Art. 4) and MFN treatment (Art. 5), and senior management and boards of directors (Art. 6); it also provides a reservation list of the nonconforming measures of each party in its annexes. Annex I lists nonconforming measures and their amendments to the extent that they do not decrease the conformity of the measures as they existed immediately before the amendment (Art. 7.1(c)). Annex II lists nonconforming measures that the parties adopt or maintain either before or after the entry into force of the agreement (Art. 7.2). China's Annex I has 36 entries, and its Annex II has 17 entries.

On the prohibition of performance requirements, Article 3 lists a few TRIMs-plus performance requirements, including (f) to transfer technology, and (i) to achieve a given percentage or value of research and development in its territory (Art. 3.1). A performance requirement of transferring technology is also prohibited as a condition for an advantage in connection with the establishment or operation of investment (Art. 3.2(f)).

4.3.2. Investment facilitation

The EU–China CAI provides detailed rules for investment facilitation. Section III, Subsection III-1 of the agreement provides rules on the conditions for licensing and qualification (Art. 2) and licensing and qualification procedures (Art. 3). Subsection III-2 provides for general transparency obligations (Art. 2), the publication of laws and regulations (Art. 3), contact points and provision of information (Art. 4), administrative proceedings (Art. 5), and review and appeal (Art. 6). It also provides for the participation of covered investors in the development of standards by central government bodies (Art. 7) and the transparency of subsidies (Art. 8).

These contents largely adhere to the negotiating text of the WTO structured discussions on investment facilitation for development (WTO, 2023), as both the EU and China are parties to the negotiations. It should be noted that the following AMS are also parties to the negotiations: Cambodia, Indonesia, the Lao PDR, Malaysia, Myanmar, the Philippines, and Singapore.³⁴

4.3.3. Investment and sustainable development

Section IV of the EU–China CAI provides for investment and sustainable development. It consists of four subsections. Subsection 1 provides the context and objectives, Subsection 2 provides for investment and environment, Subsection 3 provides for investment and labour, and Subsection 4 provides for a mechanism to address differences. Subsection 1 lists relevant international documents including the Agenda 21 on Environment and Development (1992) and the United Nations Agenda for Sustainable Development and its Sustainable Development Goals (2015) (Art. 1.1).

Subsection 2 recognises the right of each party to determine its sustainable development policies (Art. 1), provides for best efforts obligations of each party to ensure that its laws and policies provide for high levels of environmental protection (Art. 2.1), and provides that it is inappropriate to encourage investment by weakening or reducing the levels of environmental protection (Art. 2.2). It also provides for a general agreement to dialogue and cooperate on investment-related environmental issues (Art. 3), the commitment of effectively implementing multilateral environmental agreements (Art. 4), and the commitment of enhancing the contribution of investment to the goal of sustainable development (Art. 5). On investment and climate change, Article 6 provides that the parties shall promote and facilitate investment of relevance for climate change mitigation and adaptation.

Subsection 3 reiterates the right of each party to determine its sustainable development policies (Art. 1), provides for best efforts obligations of each party to ensure that its laws and policies provide for high levels of labour protection (Art. 2.1), and reiterates that it is inappropriate to encourage investment weakening or reducing the levels of labour protection (Art. 2.2). It also provides for a general agreement to dialogue and cooperate on investment-related labour issues (Art. 3), the commitment of effectively implementing the International Labour Organization (ILO) Conventions that they have ratified (Art. 4), and the agreement to promote investment policies which further the objectives of the Decent Work Agenda (Art. 5).

Subsection 4 provides for a mechanism to address differences. It consists of consultations (Art. 1), a panel of experts (Art. 3), reports of the panel, and follow-up consultations (Art. 4).

³⁴ See WTO (n.d.-a, n.d.-b).

4.3.4. Exceptions

Section VI, Subsection 2 of the EU–China CAI provides for exceptions. Article 9 provides for restrictions in case of balance of payments difficulties. Article 4 provides for general exceptions. It provides that Article XX of the GATT is incorporated in the agreement, *mutatis mutandis*, for the purpose of Section II, Subsection 1 (investment liberalisation), and Section III (regulatory framework). Article 10 provides for self-judging security exceptions. It provides that nothing in the agreement shall be construed to prevent a party from taking an action which it considers necessary for the protection of its essential security interests:

- (i) connected to the production of or traffic in arms, ammunition, and implements of war;
- (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
or
- (iii) taken in time of war or other emergency in international relations.

4.4. CPTPP investment chapter

The investment chapter of the CPTPP is relevant to our analysis because, first, several AMS³⁵ are parties to the CPTPP, and second, China has applied for membership. It provides for investment liberalisation, investment protection, ISDS, and exceptions. It does not provide for investment facilitation.

4.4.1. Investment liberalisation

The CPTPP adopts a negative list approach on investment liberalisation. It provides for pre-establishment national treatment (Trans-Pacific Partnership (TPP) Agreement, Art. 9.4.1)³⁶ and MFN treatment (Art. 9.5.1), general prohibition of performance requirements (Art. 9.10.1 and 9.10.2), and senior management and boards of directors (Art. 9.11), as well as a reservation list of the nonconforming measures of each party in the annexes. Annex I lists nonconforming measures and their amendments to the extent that they do not decrease the conformity of the measures as they existed immediately before the amendment (Art. 9.12.1). Annex II lists nonconforming measures that the parties adopt or maintain either before or after the entry into force of the agreement (Art. 9.12.2).

On the general prohibition of performance requirements, the CPTPP provides for a few TRIMs-plus performance requirements, including (f) to transfer a technology, and (i) to adopt a given rate or amount of royalty under a licence contract or a given duration of the term of a licence contract (Art. 9.10.1).

³⁵ Brunei, Malaysia, Singapore, and Viet Nam.

³⁶ The TPP, signed on 4 February 2016, as incorporated in the CPTPP (Cabinet Secretariat, Japan, n.d.).

4.4.2. Investment protection

On investment protection, the CPTPP provides for national treatment (Art. 9.4), MFN treatment (Art. 9.5), and FET (Art. 9.6). On national treatment, the CPTPP provides that each party shall accord to investors and covered investments national treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments (Art. 9.4.1 and 9.4.2). Likewise, on MFN treatment, the CPTPP provides that each party shall accord to investors and covered investments MFN treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments (Art. 9.5.1 and 9.5.2). The MFN treatment does not cover international dispute resolution procedures, such as ISDS (Art. 9.5.3).

On FET, the CPTPP provides that each party shall accord to covered investments treatment in accordance with customary international law principles, including FET and full protection and security (Art. 9.6.1). FET includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process (Art. 9.6.2(a)). A breach of another provision of the agreement does not amount to a breach of FET (Art. 9.6.3).

4.4.3. ISDS

Chapter 9, Section B of the TPP provides detailed rules on ISDS. If an investment dispute has not been resolved within 6 months of receipt by the respondent of a request for consultations, the claimant may submit the claim to arbitration under one of the following alternatives: (i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, (ii) the ICSID Additional Facility Rules, (iii) the UNCITRAL Arbitration Rules, or (iv) any other arbitral institution if the claimant and the respondent agree (Art. 9.19.4). No claim shall be submitted to arbitration if more than 3 years and 6 months have elapsed from the date on which the claimant first acquired knowledge of the breach (Art. 9.21.1). It has a fork-in-the-road provision, and the claimant's notice of arbitration is accompanied by his written waiver of any right to initiate or continue before any court or administrative tribunal under the law of the respondent (Art. 9.21.2(b)).

Chapter 9, Section B of the TPP provides detailed rules on ISDS regarding the submission of a claim to arbitration (Art. 9.19), selection of arbitrators (Art. 9.22), conduct of the arbitration (Art. 9.23), transparency of arbitral proceedings (Art. 9.24), governing law (Art. 9.25), consolidation (Art. 9.28), awards (Art. 9.29), and service of documents (Art. 9.30). At the same time, it must be noted that the coverage of the arbitration proceedings was narrowed down by the CPTPP. The annex to the CPTPP suspended the application of several provisions of Article 9.19 on the subject matter of arbitration to exclude claims that the respondent has breached an investment authorisation (Art. 9.19.1(a)(i)B) and 9.19.1(b)(i)(B)) or an investment agreement (Art. 9.19.1(a)(i)(C) and 9.19.1(b)(i)(C)) from arbitration.

4.4.4. Exceptions

Article 29.3 of the TPP provides for balance-of-payments carveouts. Chapter 9 of the TPP does not provide for general exceptions. However, footnote 14 of Chapter 9 provides that whether treatment is accorded in 'like circumstances' under Articles 9.4 (national treatment) and 9.5 (MFN treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.³⁷ Article 9.10.3(d) provides for exceptions to the prohibition of performance requirements that largely adhere to the general exceptions under Article XX of the GATT. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, the prohibition of performance requirements shall not be construed to prevent a party from adopting or maintaining measures, including environmental measures:

- (i) necessary to secure compliance with laws and regulations that are not inconsistent with this agreement;
- (ii) necessary to protect human, animal, or plant life or health; or
- (iii) related to the conservation of exhaustible natural resources.

Chapter 9 of the TPP does not provide for security exceptions. Instead, a general provision on self-judgement security exceptions is applicable to Chapter 9. Article 29.2 provides that nothing in this agreement shall be construed to preclude a party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

We analysed the content of six FTAs/BITs that are relevant to considering the desirable content of the new ASEAN–China Agreement on Investment. Table 2.1 is the synthesis of the analysis that compares the content of these six FTAs/BITs.

Table 2.1 Comparison of the Contents of Six FTAs/BITs

FTAs/BITs	Investment liberalisation	Investment protection	Investment facilitation	ISDS	Exceptions
ASEAN–China Agreement on Investment	N	Y	Y	Y	Y
RCEP	Y	Y	Y	Y	Y
ACIA	Y	Y	Y	Y	Y
EU–Viet Nam IPA	Y	Y	N	Y	Y
EU–China CAI	Y	Y	Y	Y	Y
CPTPP	Y	Y	N	Y	Y

Note:

N: the treaty does not include related provisions

Y: the treaty contains related provisions

³⁷ It does not elucidate what are the legitimate public welfare objectives.

Table 2.1a The Contents of Investment liberalisation

FTAs/BITs	Investment liberalisation
ASEAN–China Agreement on Investment	None
RCEP	<ul style="list-style-type: none"> • Pre-establishment national treatment with a negative list • hybrid approach on services liberalisation (China: positive list)
ACIA	<ul style="list-style-type: none"> • Pre-establishment national treatment with a negative list • progressive liberalisation in accordance with an AEC Blueprint • each AMS may modify its reservation list, provided that such modification shall not adversely affect any existing investors
EU–Viet Nam IPA	Positive list approach (Appendix 8-B of the EU–Viet Nam Free Trade Agreement provides for Viet Nam’s liberalisation commitments in services sectors (Section A) and investment in non-services sectors (Section B))
EU–China CAI	Negative list approach (reservation list of nonconforming measures (pre-establishment national treatment and MFN treatment, performance requirements, senior management, and boards of directors) in Annexes I and II)
CPTPP	Negative list approach (reservation list of nonconforming measures (pre-establishment national treatment and MFN treatment, performance requirements, senior management, and boards of directors) in Annexes I and II)

Table 2.1b The Contents of Investment protection

FTAs/BITs	Investment protection
ASEAN–China Agreement on Investment	<ul style="list-style-type: none"> • Post-establishment national treatment and MFN treatment (derogated by new measures) • MFN treatment not applicable to dispute settlement • FET (independent) • FET refers to the obligation not to deny justice • a breach of the agreement does not amount to a breach of FET
RCEP	<ul style="list-style-type: none"> • Post-establishment national treatment and MFN treatment • MFN treatment not applicable to dispute settlement • FET (customary international law standard of minimum standard of treatment of aliens) • FET refers to the obligation not to deny justice • a breach of the agreement does not amount to a breach of FET
ACIA	<ul style="list-style-type: none"> • Post-establishment national treatment and MFN treatment • MFN treatment not applicable to dispute settlement • FET (independent) • FET refers to the obligation not to deny justice • a breach of the agreement does not amount to a breach of FET

FTAs/BITs	Investment protection
EU–Viet Nam IPA	<ul style="list-style-type: none"> • Post-establishment national treatment and MFN treatment • carveouts of national treatment (mass media and cultural sectors, investigation and security) • carveouts of MFN treatment (communications services, recreational, cultural and sporting services, fishery and aquaculture, forestry and hunting, and mining) • MFN treatment not applicable to dispute settlement • FET (independent) • FET refers to the obligation not to deny justice • a breach of the agreement does not amount to a breach of FET
EU–China CAI	None (EU and China agree to complete the negotiation on investment protection within 2 years of the signature of the EU–China CAI)
CPTPP	<ul style="list-style-type: none"> • Post-establishment national treatment and MFN treatment • MFN treatment not applicable to dispute settlement • FET (customary international law standard minimum standard of treatment of aliens) • FET refers to the obligation not to deny justice • a breach of the agreement does not amount to a breach of FET

Table 2.1c The Contents of Investment facilitation

FTAs/BITs	Investment facilitation
ASEAN–China Agreement on Investment	<ul style="list-style-type: none"> • Publication of investment laws/policies • enquiry points and one-stop investment centres
RCEP	<ul style="list-style-type: none"> • Investment promotion (organise joint investment promotion activities, promote business matching events) • investment facilitation (simplify investment application/approval procedures; promote the dissemination of investment information; contact points, one-stop investment centres; amicably resolve complaints)
ACIA	<ul style="list-style-type: none"> • Investment promotion (organising investment mission, briefings and seminars on investment opportunities, and investment laws and policies) • investment facilitation (streamline and simplify procedures for investment applications and approvals, one-stop investment centres, strengthen databases on investments for policy formulation, undertake consultation with the business community, and provide advisory services to the business community)
EU–Viet Nam IPA	None
EU–China CAI	Detailed rules for investment facilitation (conditions and procedures for licensing and qualification, publication of laws/regulations, contact point, administrative proceedings, review and appeal, participation of covered investors in the development of standards by central government bodies, and transparency of subsidies)
CPTPP	None

Table 2.1d The Contents of ISDS

FTAs/BITs	ISDS
ASEAN–China Agreement on Investment	<ul style="list-style-type: none"> • Arbitration concerning breach of substantive obligations • 6-month cooling-off period • 90 days advance notice • fork-in-the-road • 3-year limit
RCEP	Omitted (start negotiation on ISDS within 2 years after the entry into force of the agreement; negotiation shall be concluded within 3 years)
ACIA	<ul style="list-style-type: none"> • Arbitration concerning breach of substantive obligations • 6-month consultation period • 90 days advance notice • fork-in-the-road • 3-year limit
EU–Viet Nam IPA	Investment court system, consisting of tribunal, and appeal tribunal
EU–China CAI	None (EU and China agree to complete the negotiation on resolution of investment disputes within 2 years of the signature of the EU–China CAI)
CPTPP	<ul style="list-style-type: none"> • Detailed rules on ISDS • 6-month consultation period • 90 days advance notice • fork-in-the-road • 3 years 6 months limit • CPTPP excludes disputes arising from investment authorisations and investment agreement from the ISDS coverage

Table 2.1e The Contents of Exception

FTAs/BITs	Exception
ASEAN–China Agreement on Investment	<ul style="list-style-type: none"> • Measures to safeguard the balance of payments • general exceptions • self-judging security exceptions
RCEP	<ul style="list-style-type: none"> • Measures to safeguard the balance of payments • general exceptions (incorporate Article XX of the GATT, mutatis mutandis) • self-judging security exceptions
ACIA	<ul style="list-style-type: none"> • measures to safeguard the balance of payments • general exceptions (adhering to Article XX of the GATT) • self-judging security exceptions
EU–Viet Nam IPA	<ul style="list-style-type: none"> • Taxation (Art. 4.4); prudential carveouts (Art. 4.5) • general exceptions (Art. 4.6, adhering to Article XX of the GATT) • monetary policy/exchange rate policy carveout (Art. 4.7) • self-judging security exceptions (Art. 4.8)
EU–China CAI	<ul style="list-style-type: none"> • Measures to safeguard the balance of payments • general exceptions (incorporate Article XX of the GATT, mutatis mutandis) • self-judging security exceptions
CPTPP	<ul style="list-style-type: none"> • Measures to safeguard the balance of payments • legitimate public welfare policy carveout for national treatment and MFN treatment • exceptions to the prohibition of performance requirements (adhering to Article XX of the GATT) • self-judging general security exceptions (Art. 29.2)

ACIA = ASEAN Comprehensive Investment Agreement, AEC = ASEAN Economic Community, AMS = ASEAN Member State/s, ASEAN = Association of Southeast Asian Nations, BIT = bilateral investment treaty, CAI = Comprehensive Agreement on Investment, CPTPP = Comprehensive and Progressive Agreement for the Trans-Pacific Partnership, EU = European Union, FET = fair and equitable treatment, FTA = free trade agreement, GATT = General Agreement on Tariffs and Trade, IPA = Investment Protection Agreement, ISDS = investor–state dispute settlement, MFN = most favoured nation, RCEP = Regional Comprehensive Economic Partnership.

Source: Author.

5. Desirable content of the new ASEAN–China Investment Agreement

The new ASEAN–China Investment Agreement should build on the five recent FTAs and BITs involving ASEAN and China, as they reflect the policies of AMS and China on investment liberalisation, protection, and facilitation. This section explores the desirable content of the new ASEAN–China Investment Agreement in terms of five components: investment liberalisation, investment protection, investment facilitation, ISDS, and exceptions.

5.1. Investment liberalisation

The ASEAN–China investment agreement does not provide for investment liberalisation, as China did not agree to make commitments on investment liberalisation. However, China later changed this stance and agreed to make investment liberalisation commitments. The RCEP and the EU–China CAI provide for pre-establishment national treatment with a negative list. The new ASEAN–China Investment Agreement should, therefore, provide for pre-establishment national treatment with a negative list. The AMS and China should negotiate the contents of the negative lists as annexed to the new ASEAN–China Investment Agreement.

They should also negotiate the list of performance requirements prohibited under the new ASEAN–China Investment Agreement, as this accords foreign investors a wide range of discretion in making decisions in the operation of investments. Here again, the RCEP should be referred to as a baseline of negotiation, as both AMS and China are parties to it. Whether to add some RCEP-plus items to the list will be a matter of negotiation. Candidates can be found in the CPTPP, as it has a long list of the prohibition of performance requirements. Candidates include (i) a requirement to purchase, use, or accord a preference to technology of the party or of a person of the party (TPP, Art. 9.10.1(h)(i)); (ii) a requirement that prevents the purchase or use of, or according of a preference to, a particular technology (TPP, Art. 9.10.1(h)(ii)); and (iii) a requirement to adopt a given duration of the term of a licence contract (Art. 9.10.1(i)(ii)). Under the RCEP, a couple of TRIMs-plus requirements shall not apply to Cambodia, the Lao PDR, and Myanmar (RCEP, Art. 10.6.1). Whether to accord the same treatment to these three AMS under the new ASEAN–China Investment Agreement might be a matter of negotiation.

5.2. Investment protection

The five agreements analysed in this paper, except the EU–China CAI,³⁸ have similar provisions on investment protection. They provide for post-establishment national treatment, MFN treatment, and FET. They provide that MFN treatment shall not be applied to dispute settlement, including ISDS. They also provide that FET refers to the obligation not to deny justice, and that a breach of the agreement does not amount to a breach of FET. The new ASEAN–China Investment Agreement should follow these precedents for investment protection.

A difference exists as to whether to link FET to the customary international law minimum standard of treatment of aliens. While the RCEP and the CPTPP adopt this approach, the ACIA, the EU–Viet Nam IPA, and the EU–China CAI do not, characterising FET as a stand-alone standard of treatment. The intention of the former is to clarify that FET does not require treatment beyond what is required by the customary international law minimum standard of treatment of aliens. The new ASEAN–China Investment Agreement should follow this approach, so that it may exclude the possibility that FET requires treatment beyond what is required by the customary international law minimum standard of treatment of aliens.

5.3. Investment facilitation

Investment facilitation is a relatively new topic in international investment law. While the ASEAN–China investment agreement has a few simple provisions on investment facilitation, the RCEP, the ACIA, and the EU–China CAI provide detailed rules on investment facilitation. The new ASEAN–China Investment Agreement should follow the latter approach, all the more because the plurilateral negotiation on investment facilitation for development recently reached agreement in principle (WTO, 2023). Although Brunei, Thailand, and Viet Nam are not participating in the negotiations, they should think of joining them.

The WTO Investment Facilitation for Development Agreement consists of Section I: Scope and General Principles; Section II: Transparency of Investment Measures; Section III: Streamlining and Speeding Up Administrative Procedures; Section IV: Focal Points, Domestic Regulatory Coherence, and Cross-Border Cooperation; Section V: Special and Differential Treatment for Developing and Least-Developed Country Members; Section VI: Sustainable Investment; and Section VII: Institutional Arrangements and Final Provisions.³⁹ The new ASEAN–China Investment Agreement may incorporate the whole agreement by referring to it in the new ASEAN–China Investment Agreement.

³⁸ The EU–China CAI lacks provisions on investment protection. Article 3, Subsection 2 of Section VI provides that the parties agree to continue negotiations on investment protection.

³⁹ See WTO. (n.d.-a). The draft Agreement on Investment Facilitation for Development has not yet been published. WTO (2021) is an earlier version of the draft agreement.

5.4. ISDS

The new ASEAN–China Investment Agreement may have three options on ISDS: no provision, detailed rules on ISDS, or the ICS. The third option is adopted under the EU–Viet Nam IPA (Section 4.2.4) and the EU–Singapore IPA. As this option reflects the policy of the EU, it is not likely that the new ASEAN–China investment agreement will adopt it. It is more likely that the new ASEAN–China investment agreement will adopt the second option – detailed rules on ISDS. The ACIA and the CPTPP will be referred to, as the former represents the common policy of AMS and because China applied for accession to the latter. The two agreements have similar provisions on ISDS, including the 6-month consultation period, 90-day advance notice, fork-in-the-road provision on forum choice between domestic court and arbitration, and 3-year (and 6 months) limit for resorting to ISDS. A major difference is the subject matter coverage of ISDS, as the CPTPP excludes disputes arising from investment authorisations and investment agreements from the coverage of ISDS (Section 4.4.3 above). Judging from the provisions of the ACIA on ISDS (Section 4.1.4 above), AMS will support wider coverage of ISDS, comprising disputes arising from an alleged breach of national treatment, MFN treatment, and FET. China will also support it, as it supports ISDS with wide coverage in its recent BITs.⁴⁰

Another issue for consideration with respect to ISDS under the new ASEAN–China Investment Agreement will be the choice of forum for arbitration. The ACIA provides that the disputing investors may use the following forums to submit their claims to arbitration: (i) arbitration under the ICSID Convention or the ICSID Rules of Procedure for Arbitration Proceedings; (ii) arbitration under the ICSID Additional Facility Rules; (iii) arbitration under the UNCITRAL Arbitration Rules; (iv) the Kuala Lumpur Regional Centre for Arbitration or any other regional centre for arbitration in ASEAN; or (v) any other arbitration institution, subject to agreement of the parties (ACIA, Art. 33). To decide on the forum for arbitration under the new ASEAN–China Investment Agreement, the parties should agree on (iv) above, as China has a number of arbitration institutions.⁴¹ Although these institutions are primarily aimed at private commercial arbitration, some accept claims for ISDS.⁴² Whether to add these Chinese arbitration institutions to the list of regional arbitration centres in ASEAN will be the subject of negotiation.

⁴⁰ Li and Bian (2020: 519) characterise the ‘Third Generation Chinese BITs (Circa. 2007–2013)’ as ‘gravitated towards the US model that is more comprehensive and elaborate’.

⁴¹ China International Commercial Court (2022) lists 10 third-party arbitration institutions in China.

⁴² For instance, Beijing Arbitration Commission adopted arbitral rules governing investor–state arbitration proceedings on 4 July 2019, which entered into force on 1 October 2019. See Aceris Law (2021).

5.5. Exceptions

The ASEAN–China investment agreement provides for three categories of exceptions: (i) measures to safeguard the balance of payments, (ii) general exceptions, and (iii) security exceptions (Section 2.5). These three categories of exceptions are common to the five agreements that are analysed in this paper. It is therefore likely that the new ASEAN–China Investment Agreement will provide for these three categories of exceptions.

On general exceptions, it is common to the five agreements that they either incorporate, *mutatis mutandis*,⁴³ or modify⁴⁴ Article XX of the GATT. The new ASEAN–China Investment Agreement may take either approach, as there is no practical difference between them.

On security exceptions, it is common to the six agreements – including the ASEAN–China investment agreement – that they adopt self-judging security exceptions, allowing a wide range of discretion of the parties. It is also likely that the new ASEAN–China Investment Agreement will adopt the same approach.

Table 2.2 compiles the suggested content of the new ASEAN–China Investment Agreement.

Table 2.2 Suggested Content of the New ASEAN–China Investment Agreement

Issues	Suggested provisions
Investment liberalisation	<ul style="list-style-type: none"> • Pre-establishment national • treatment with a negative list • contents of the list subject to negotiation • RCEP-plus prohibition of performance requirements subject to negotiation • carveouts to Cambodia, the Lao PDR, and Myanmar subject to negotiation
Investment protection	<ul style="list-style-type: none"> • Post-establishment national treatment • MFN treatment and FET • MFT treatment not applicable to dispute settlement including ISDS • FET refers to the obligation not to deny justice • a breach of the agreement does not amount to a breach of FET • FET refers to the customary international law minimum standard of treatment of aliens
Investment facilitation	<ul style="list-style-type: none"> • Detailed rules on investment facilitation • the WTO Agreement on Investment Facilitation for Development may be incorporated when it is adopted

⁴³ The RCEP and the EU–China CAI adopt this approach. See Sections 3.5 and 4.3.4.

⁴⁴ The ACIA, EU–Viet Nam IPA, and CPTPP adopt this approach. See Sections 4.1.5, 4.2.5, and 4.4.4.

Issues	Suggested provisions
ISDS	<ul style="list-style-type: none"> • Detailed rules on ISDS; 6 month consultation period • 90 days advance notice • fork-in-the-road provision on forum choice between domestic court and arbitration • 3 years (and 6 months) limit for resorting to ISDS • whether to include regional and domestic arbitration institutions subject to negotiation
Exceptions	<ul style="list-style-type: none"> • Measure to safeguard the balance of payments • general exceptions (either incorporating, mutatis mutandis, or modifying Article XX of the GATT) • self-judging security exceptions

FET = fair and equitable treatment, GATT = General Agreement on Tariffs and Trade, ISDS = investor–state dispute settlement, MFN = most favoured nation, RCEP = Regional Comprehensive Economic Partnership, WTO = World Trade Organization.

Source: Author.

6. Conclusion

The ASEAN–China investment agreement, concluded in 2009, should be updated to reflect the recent challenges in the world, including the dramatic shifts in global and regional supply chains, the impact of the COVID-19 pandemic, and the adoption of advanced technologies in trade and investment facilitation. The new ASEAN–China Investment Agreement should take these challenges into account and provide a reliable legal basis for businesses. Enhanced investment liberalisation, clear and transparent provisions on investment protection, and detailed rules on investment facilitation are the three principal components. Detailed rules on ISDS will support investors of the contracting parties to settle investment disputes in a transparent and timely manner. On the other hand, each contracting party should be able to implement policies to pursue legitimate public welfare objectives, such as public health, financial stability, and national security. The expected content of the new ASEAN–China Investment Agreement satisfies these requirements and will become a reliable legal platform for businesses in ASEAN and China.

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