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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Riccardo Loschi (Riccardo.Loschi @columbia.edu)

Facilitating investment through IIAs: The case of the Regional Comprehensive Economic Partnership Agreement*

by
Stefanie Schacherer**

On November 15, 2020, the Regional Comprehensive Economic Partnership (RCEP) agreement was signed. It is one of the world's largest trade and investment pacts, compromising almost 30% of global GDP and one-third of the world's population. The RCEP counts 15 signatories composed of the Association of Southeast Asian Nations (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam) and ASEAN's free trade agreement partners (Australia, China, Japan, New Zealand, the Republic of Korea). India stepped out of the negotiations in November 2019.

RCEP's provisions on trade and investment facilitation should give a significant boost to FDI in the region.[1] Facilitating quantitatively and qualitatively more sustainable investment will be especially crucial in the post-Covid-19 era. RCEP's Investment Chapter seeks to facilitate investment originating from both inside and outside the region by promoting transparency and streamlining administrative procedures for investors within the RCEP region. Hence, RCEP further consolidates the increasing trend of including specific provisions on investment facilitation in international investment agreements.[2]

RCEP's provision on investment facilitation follows ASEAN treaty practice, as its wording is no different from the ASEAN-China FTA (ACFTA) and the ASEAN Comprehensive Investment Agreement (ACIA). Under the RCEP "each Party shall endeavor to facilitate investments among the Parties" through the implementation of four measures:

> "(a) Creating the necessary environment for all forms of investment; (b) Simplifying its procedures for investment applications and approvals; (c) Promoting the dissemination of investment information, including investment rules, laws, regulations, policies, and procedures; (d) Establishing or maintaining contact points, one-stop investment centers, focal points, or other entities in the respective Party to provide assistance and advisory services to investors, including the facilitation of operating licenses and permits."[3]

Like ACFTA, but different from ACIA, the RCEP provision is "subject to [the] domestic laws and regulations" of the parties. Hence, the provision is programmatic in nature and does not further dictate how RCEP parties are to facilitate investment. Such a "built-in work program" is a typical approach of ASEAN treaty practice. While the provision may appear liberal, many ASEAN states have rather restrictive legal frameworks, often requiring foreign investors to obtain written permission to enter.

The remainder of the provision on investment facilitation suggests alternative means of facilitating dispute resolution (e.g., through grievance mechanisms) and preventing disputes. While the listed measures are not binding on the parties, the RCEP favors a more collaborative approach to resolve and/or prevent disputes between investors and states.[4]

Flexibility for domestic implementation is welcome. The RCEP region comprises a highly diverse group of economies, and each of them has different requirements and imperatives on how to manage investment and how investment facilitation should unfold concretely. For instance, some RCEP economies rely heavily on agriculture, whilst others focus on investment in services and high-tech manufacturing. The region's least developed countries (Myanmar, Lao's People Republic, Cambodia), in particular, face quite different economic challenges than their more advanced economies. The common objective of all investment facilitation efforts should be to fill the investment gap for achieving the Sustainable Development Goals (SDGs).

To gain the benefits of quality investment, the question of what kind of investment is targeted remains crucial. While RCEP's investment facilitation provision suggests that "all forms of investment"[5] should benefit from investment facilitation, sector-specific facilitation is fundamental and should allow targeting of SDG-related investment. A concrete example is the 2016 Law on Investment Promotion of the Lao People's Democratic Republic, which establishes a specific administrative mechanism to create favorable conditions to attract investment that uses innovation in the production of agricultural products to save natural resources and energy. Whilst investment facilitation is mostly associated with streamlining processes, improving efficiency and reducing timelines, it should likewise be about improving the quality of engagement and outcomes. Put differently, facilitating sustainable FDI is not about securing quick environmental and other approvals, but about enhancing the likelihood of long-term success for all stakeholders.

The RCEP can be an opportunity to set a collaborative framework for investment facilitation, allowing for exchanges among the contracting parties on best practices, building on their experiences. The framework could be organized by the RCEP Joint Committee or with the support of the ASEAN Secretariat. In particular, the exchange of practices on sustainable FDI can be a valuable source for generating policy ideas. Cooperative processes might also include capacity building, information sharing and sector-specific guidance. An example is policy benchmarking for investment promotion agencies, thus avoiding one-fits-all rules at the regional level. In other words, approaches to address administrative procedures at national and local levels should be preferred over implementing top-down regional or multilateral commitments.

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** Stefanie Schacherer (stefanie.schacherer@unige.ch) is a Swiss National Science Foundation post-doctoral research fellow at the World Trade Institute, University of Bern. The author wishes to thank Julien Chaisse, Makane Moïse Mbengue and M. Sornarajah for their helpful peer reviews.

[1] Julien Chaisse, "The Regional Comprehensive Economic Partnership's investment chapter: One step forward, two steps back?," *Columbia FDI Perspectives*, No. 271, Feb. 10, 2020.

[2] See, e.g., the recent negotiations between the EU and Angola.

[3] RCEP, Article 10.17.1.

[4] RCEP, Article 10.17.2-4. The provision is not subject to the treaty's dispute-settlement mechanism (Article 10.17.5).

[5] It is unclear how this notion relates to the definition of "covered investment" under RCEP, Article 10.1. Considering that Article. 10.17.2 refers to "covered investment", it seems that the parties deliberately chose "all forms of investment" as to mean a wider category of investment.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Riccardo Loschi, riccardo.loschi@columbia.edu.

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