Chapter 9

Learning from the ASEAN+1 Model and the ACIA

Nanda Nurridzki
University of Indonesia, and Consultant, The World Bank, Indonesia

August 2015

This chapter should be cited as

Nurridzki, N. (2015), ‘Learning from the ASEAN+1 Model and the ACIA’, in Ing, L.Y. (ed.), *East Asian Integration*. ERIA Research Project Report 2014-6, Jakarta: ERIA, pp.261-280.

Chapter 9

Learning from the ASEAN+1 Model and the ACIA

Nanda Nurridzki

University of Indonesia

As the Regional Comprehensive Economic Partnership (RCEP) is a new regional integration initiative intended to achieve a modern, comprehensive, high-quality, and mutually beneficial economic partnership agreement amongst the Association of Southeast Asian Nations (ASEAN) Member States (AMSs) and ASEAN's free trade agreement (FTA) partners, it important to review similar existing agreements in ASEAN, including ASEAN+1 and the ASEAN Comprehensive Investment Agreement (ACIA). This chapter aims to provide input for RCEP through analysis of the current ASEAN+1 FTA agreements. We discuss the evolution of the agreements on investment in ASEAN, namely the Investment Guarantee Agreement (IGA), the ASEAN Investment Agreement (AIA), and the ACIA; the progress of the ASEAN+1 FTA Agreements on Investments, as well as some characteristics of the ACIA Reservation Lists. Our analysis is expected to become an input for policy on the baseline for RCEP negotiation in the area of investment.

In principle, there is equivalence in the goals and norms between agreements, both the general FTA agreements and the more specific investment agreements. Based on its development, it can be assumed that the ACIA is the most comprehensive basis agreement, which underlies other FTA agreements. In the commitments that are more specifically sector related, it can be seen that each AMS has its own unique approach to scheduling its sectors in the agreement frame, although there are some similarities in the substance of reservation lists proposed under the ACIA.

Hence, the challenge for the RCEP is to formulate a higher-level agreement, which is able to consolidate a variety of concerns, needs, and national policies of each AMS in a modern, comprehensive, high-quality, and mutually beneficial economic partnership agreement.

1. Introduction

The Regional Comprehensive Economic Partnership (RCEP) is a new regional integration initiative intended to achieve a modern, comprehensive, high-quality, and mutually beneficial economic partnership agreement amongst the Association of Southeast Asian Nations (ASEAN) Member States and ASEAN's free trade agreement (FTA) partners. The RCEP initiative was announced by ASEAN Leaders at their 19th ASEAN Summit held in November 2011. It is believed that this ASEAN-led process will enable ASEAN to broaden and deepen its economic engagements with its FTA partners. RCEP will enhance access to a huge potential market, bringing benefits to businesses and consumers in the participating countries. The agreement is between 16 countries, which make up 45 percent of the world's population and contribute one third of the world's gross domestic product (GDP). RCEP should lead to greater economic integration, support equitable economic development, and strengthen economic cooperation amongst the countries involved.

In general, RCEP can be seen as regional economic integration in East Asia on a higher level. It is assumed that RCEP will produce a commitment from ASEAN Member States (AMSs) and all partners (although there are several possible exceptions). The commitments to be made under RCEP are supposed to be substantially better than the existing ASEAN+1 commitments. This technical note aims to provide input for RCEP through analysis of the current ASEAN+1 FTA agreements. We expect that our analysis will become an input for policy on the baseline for RCEP negotiation in the area of investment.

This chapter is made up of the following parts: an account of the evolution of the Investment Guarantee Agreement (IGA), the ASEAN Investment Agreement (AIA), and the ASEAN Comprehensive Investment Agreement (ACIA); a discussion on the progress of the ASEAN+1 FTA Agreements on Investments; a comment on the ACIA Reservation Lists, and a brief conclusion.

2. Evolution of IGA, AIA, and ACIA

Accelerating the industrialisation of ASEAN countries has been a most important issue for ASEAN leaders. To achieve this, healthy flows of technology and investment into ASEAN countries were needed, which necessitated the creation of profitable conditions for investment for ASEAN companies and companies from outside ASEAN. This led to the establishment of the Investment Guarantee Agreement (IGA), which was signed in 1987. The objective of the IGA was to promote greater investment flows between pairs of countries by providing a legal framework that clearly set out the investment norms and protection applying when investing in the other country.

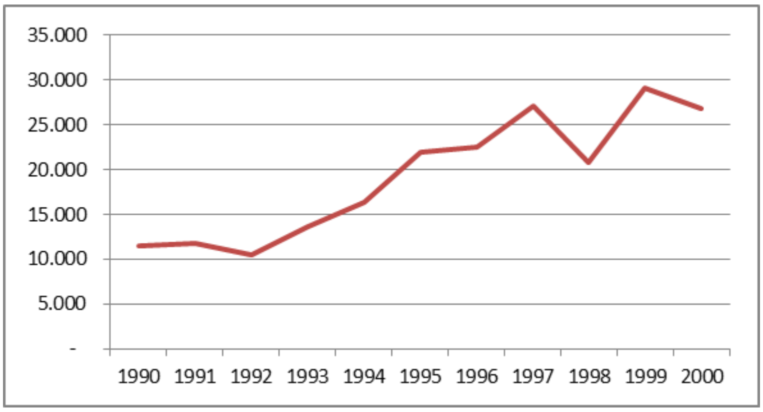
There were several basic principles underlying the IGA:

1. Principle of fair and equitable treatment;
2. Principle of non-discrimination (National Treatment and/or Most-Favoured Nation Treatment);
3. Compensation in the event of expropriation;
4. Free transfer of funds; and
5. Investor-state dispute settlement mechanisms.

Furthermore, the ASEAN countries' objectives shifted from just trying to increase investment flows into each country, to also developing ASEAN into an integrated united economic system, thus reducing restrictions on investment flows amongst ASEAN countries. The expansion of the ASEAN market through economic integration and the wider acceptance of investment inflows amongst ASEAN countries was aimed to increase foreign direct investment (FDI) in each ASEAN country.

Such considerations resulted in the need for a more comprehensive agreement than the existing IGA agreement, resulting in the signing of the ASEAN Investment Agreement – an enhancement of the IGA – on 7 October 1998. Moreover, the economic crisis experienced by ASEAN countries in 1998 triggered the implementation of the AIA.

Figure 9.1: FDI Inflows, in million US$



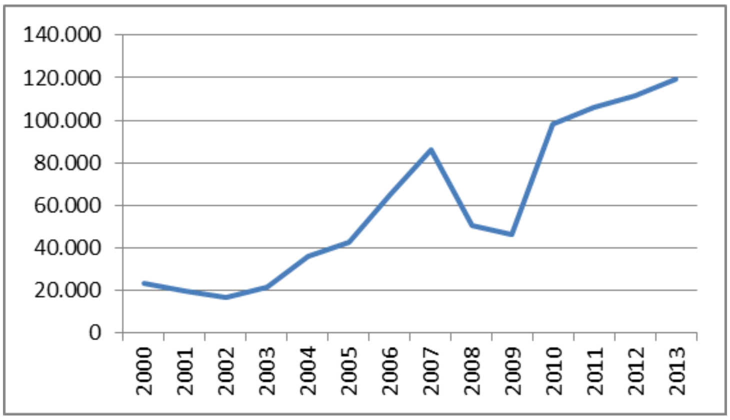
Source: Economist Intelligence Unit.

The trend of FDI inflows in ASEAN countries showed a significant increase between 1992 and 1997, from US$ 11,549 million in 1992 to US$ 27,042 million in 1997. The economic crisis suffered by ASEAN countries in 1998 resulted in a drastic decline of FDI, to US$ 20,817 million, in that year. Several ASEAN countries, such as Malaysia and Thailand, managed to rapidly recover from the crisis, but others, including Indonesia, needed several years to recover.

As stated in the Framework Agreement on ASEAN, the objectives of the AIA were (i) To establish a competitive ASEAN Investment Area, with a more liberal and transparent investment environment amongst Member States, so as to increase FDI inflows into ASEAN; (ii) To jointly promote ASEAN as the most attractive investment area, and to strengthen and increase the competitiveness of ASEAN's economic sectors; (iii) To reduce or eliminate regulations and conditions which impede investment flows and the operation of investment projects in ASEAN; and (iv) To contribute towards a free flow of investment by 2020.

In 2008, a global financial crisis occurred, initiated by the collapse of the financial sector in the United States (US). As newly emerging countries, ASEAN countries ran the risk of investment fund withdrawals by the developed countries, and their companies, that had invested in ASEAN territories.

Figure 9.2: Inward Direct Investment to ASEAN



Source: Economist Intelligence Unit.

With the failure of World Trade Organization (WTO) negotiations, bilateral and multilateral FTAs developed between ASEAN as an economic union and neighbouring countries, such as China, Korea, Japan, India, Australia, and New Zealand. Additionally, all ASEAN countries had concluded bilateral agreements with one another, all of those FTA agreements having more comprehensive provisions than the AIA or the ASEAN IGA. For that reason, ASEAN countries felt the need to review the AIA and tried to redesign a new agreement to suit the current situation and conditions. A review of the AIA and the ASEAN IGA was conducted for the 34th ASEAN Economic Ministers (AEM) meeting and a set of principles and guidelines as a basis for formal negotiations had been developed by AIA/AEM. On 26 February 2009, the ASEAN Comprehensive Investment Agreement (ACIA) was completed and signed by the AEM.

> As stated in the ACIA Agreement, the aims of the ACIA are: '(i) Progressive liberalisation of the investment regimes of Member States; (ii) Provision of enhanced protection to investors of all Member States and their investments; (iii) Improvement in transparency and predictability of investment rules, regulations and procedures conducive to increased investment amongst Member States; (iv) Joint promotion of the region as an integrated investment area; and (v) Cooperation to create favourable conditions for investment by investors of a Member State in the territory of the other Member States' (ASEAN Secretariat, 2009)

The AIA Agreement covers manufacturing, agriculture, fishery, forestry, mining and quarrying, and services incidental to these five sectors. The ACIA has the same scope as the AIA, but, unlike the ACIA, the AIA does not include portfolio investments. In addition, according to the ACIA it is possible to add new sectors to the reservation lists – the headnote of the ACIA Schedule states that each member state reserves the right to make future reservations, including new and emerging sectors or subsectors or existing sectors that are unregulated at the time of submission of the reservation lists.

Both the AIA and ACIA have lists of sectors/subsectors known as the reservation list. In relation to the reservation lists, the AIA applied a two-track approach, using a Temporary Exclusion List in which a sector/subsector was to be reviewed every two years and to be phased out in general by 2010, and a Sensitive List, which would also be reviewed periodically. The ACIA, in contrast, applies a single negative-list approach, in which the progressive reduction or elimination of reservations refers to the Strategic Schedule of ASEAN Economic Community (AEC) over three phases (2008–2010, 2011–2013, and 2014–2015).

The AIA consists of three main programmes – (i) a co-operation and facilitation programme; (ii) a promotion and awareness programme; and (iii) a liberalisation programme. The ACIA consists of more comprehensive provisions covering the 'four pillars of investment' – liberalisation, protection, facilitation, and promotion.

Associated with the protection pillars, the ACIA has broadened its scope to include investors from outside ASEAN. As stated in the ACIA agreement, 'investor' means a natural person of a Member State or a juridical person of a Member State who/that is making, or has made an investment in the territory of any other Member State. Thus, a person can be considered as an ASEAN investor as long as he/she founds a juridical entity in one of the ASEAN countries even if the person comes from a non-ASEAN country. He/she can then also invest in other AMSs.

Another difference between the ACIA and the AIA is the period of limitation. According to the AIA, all industries were scheduled to be open for investment by ASEAN investors by 2010, and for all investors by 2020. The ACIA, however, sets a target date of 2015 for both ASEAN investors and ASEAN-based foreign investors.

3. The Progress of ASEAN+1 FTA Agreements in Investment

One means by which ASEAN countries have sought integration with other global economies has taken the form of the ASEAN+1 agreement. This scheme aims to open opportunities for economic cooperation, investment, and market development both inside and outside ASEAN.

The first ASEAN+1 agreement was between ASEAN and China. The Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China was signed on 4 November 2002. The Framework Agreement on Comprehensive Economic Cooperation amongst the Governments of the Member Countries of ASEAN and the Republic of Korea was signed on 13 December 2005. The ASEAN–Japan Comprehensive Economic Partnership Agreement (AJCEP) was signed in April 2008. The ASEAN–Australia–New Zealand Free Trade Area (AANZFTA) was signed in February 2009. These four agreements were all ratified on 1 January 2010 and amongst the areas they cover are trade in goods, trade in services, and investment. Another ratified agreement is the ASEAN–India FTA, which only covers trade in goods. Negotiations on an ASEAN–European Union (EU) FTA, another version of the ASEAN+1 FTA model, were paused by the Joint Committee in 2009, and the approach is to be changed to a bilateral model.

Both Korea and China have made specific agreements on investment with ASEAN, which were signed on 2 June 2009 and 15 August 2009, respectively. Australia and New Zealand have entered a specific chapter on investment into their FTA, comprising protection, promotion, and facilitation. Exclusively for ASEAN–Japan collaboration, a subcommittee on trade in service and investment was responsible to do the negotiations.

FTAs emerged as the multilateral trade process under the auspices of the WTO stagnated. Gains from FTAs can be divided into traditional and non-traditional benefits (Zhang, 2013). Some traditional benefits are: trade creation and trade diversion by cutting tariff barriers; improving terms of trade by having common standards for production technology, product regulations, distribution and after-sales service; increasing returns to scale by export expansion, more efficient allocation of resources, and stimulating regional and outside investment which will subsequently create more jobs and facilitate transfers of advanced technology. Some non-traditional benefits are: having assurance through regional cooperation; a more secure international environment; improved bargaining power in external negotiations; and promotion of domestic reforms.

But there are also some concerns with regard to ASEAN+1 FTAs, such as trade diversion effects on FDI. By utilising an ASEAN+1 agreement, multinational companies have less need for direct investment to expand to each ASEAN country (Chirathivat, 2013). This implies that ASEAN countries that rely heavily on FDI will suffer as a result of a trade diversion effect. Moreover, the implementation of a cumulative regional policy on Rules of Origin based on an ASEAN+1 agreement can lead to an increase in exports from the ASEAN partner country. There is also a longer-term concern that an ASEAN+1 FTA might lower ASEAN's potency as the hub of Asia for economic matters.

Another concern relates to the weak bargaining power of ASEAN vis-à-vis each of its dialogue partners, since there is no official resolution that binds all ASEAN members prior to negotiations with a dialogue partner (Chirathivat, 2013). An ASEAN+1 agreement is regarded as a result of negotiations by each ASEAN country with one powerful trade partner, not for ASEAN as a whole.

The two sections below discuss several matters regarding the ASEAN+1 FTAs, especially those which already have an Investment Agreement with ASEAN – the ASEAN–China FTA, the ASEAN–Korea FTA, and the ASEAN–Australia–New Zealand FTA.

3.1. Negotiation Approach

In general, the approaches to conducting negotiations between ASEAN and FTA partners can be divided into: negotiation's approach regarding the area of agreement and the negotiation's approach regarding the coverage of ASEAN member countries.

(i) Based on the area of agreement, the ASEAN–China and ASEAN–Korea FTAs employ the gradual/sequential approach when conducting FTA negotiations with trading partners. As a general rule, the first phase relates to goods, the second phase to services, and the third phase to investment.

   By contrast, the ASEAN–Australia–New Zealand FTA used the 'comprehensive and single undertaking upon signing' approach. The agreement has eighteen substantive chapters, with the schedule of specific commitments annexed. It has one chapter on Investment and another on Economic Cooperation, which provide a framework for trade and investment-related cooperation. To complete this agreement and to ease its implementation, another agreement called the Implementing Agreement for a five-year Economic Cooperation was concluded.

(ii) Under the *country-based* negotiation approach, in general the negotiations between ASEAN and a developing partner are conducted inclusively and comprehensively as a unity. The negotiations do, however, also consider sensitive issues and discrepancies in levels of development amongst ASEAN member countries. This consideration could include the provision of Standard and Differential Treatment to ASEAN and consideration of the flexibility of some ASEAN countries, especially the CLMV countries – Cambodia, Myanmar, Lao PDR, and Viet Nam – in implementing the points of agreement.

Referring to the guidelines, it is likely that RCEP will adopt the single undertaking approach. Besides, country based approach might still also be employed, as it will consider the sensitive issues and discrepancies in the level of development amongst AMSs.

3.2. Objectives and Principles of ASEAN+1 FTAs

In general, all of the ASEAN+1 FTA countries have similar backgrounds, which means that all have several main objectives. These are to:

(i) minimise barriers and deepen as well as widen economic linkages amongst parties;

(ii) lower business costs;

(iii) increase trade and investment;

(iv) increase economic efficiency;

(v) create larger markets with more opportunities and greater economies of scale for business.

Or, more specifically:

(vi) To progressively liberalise and, through progressive eliminations of tariff and non-tariff barriers, to facilitate trade in goods amongst parties;

(vii) To promote investment flows and create a liberal, facilitative, transparent and competitive investment regime;

(viii) To establish a cooperative framework, which further strengthens economic relations amongst the countries."

Some ASEAN+1 FTA objectives are summarised in the table below:

Table 9.1: Summary of Objectives of some ASEAN+1 FTA

ASEAN–KOREA	ASEAN–CHINA	ASEAN–A&NZ	ACIA
Create a liberal, facilitative, transparent, and competitive investment regime with business-friendly environment	To promote investments flows and to create a liberal, facilitative, transparent, and competitive investment regime	To move towards deeper economic integration between the two regions through progressive elimination of all forms of barriers to trade in goods, services, and investment; and through trade and investment facilitation, and economic cooperation measures	Create a liberal, facilitative, transparent, and competitive investment environment in ASEAN
Source			
Article 2.3 (Investment) Framework Agreement on CEP	Article 5 (Investment) Framework Agreement on CEP	Guiding Principles for Negotiation	Article 2 (Guiding Principle) of ACIA

Source: Some ASEAN+1 Framework Agreements.

In addition, there are also some main principles, which have developed into the objectives for ASEAN countries and their partners to conclude the FTA agreements. These objectives are:

(i) The FTA should be consistent with and build on members' commitments in the World Trade Organisation (WTO);
(ii) There should be special differential treatments, because there are discrepancies in the level of development and capacity amongst member countries, both in the ASEAN countries and the potential ASEAN partners;
(iii) The FTA has to boost economic cooperation, which mutually benefits all parties, both the ASEAN countries and the potential ASEAN partners.

Thus, we can assume that an ASEAN FTA complements the multilateral WTO agreement framework, rather than substituting it. Although it is difficult to determine which is the most preferable trade regime, especially from the perspective of business operators, we conclude that the ACIA offers more comprehensive provisions than other FTAs.

The Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership state that RCEP will aim at creating a liberal, facilitative, and competitive investment environment in the region. Negotiations on investment under RCEP will cover the four pillars of promotion, protection, facilitation, and liberalisation, so the guiding principles and objectives for negotiating RCEP are in line with the ACIA.

3.3. Liberalisation Pillar

One of the pillars in the ACIA, *liberalisation,* has also been part of the framework of the ASEAN+1 Free Trade Agreement, mainly as a target to conclude more specific negotiations on trade in goods, trade in services, as well as investment. As stated in the Framework of Agreement, implementation of liberalisation should keep into consideration the special and differential treatment and flexibility for the newer AMSs.

Furthermore, the liberalisation principle was also highlighted in the Agreement on Investment in ASEAN–China FTA, ASEAN–Korea FTA, ASEAN–Australia–New Zealand FTA, as well as ACIA, primarily under the objectives of the agreements. The more specific objectives of the agreements related to investment liberalisation are: to promote investment flows and to create a liberal, facilitative, transparent, and competitive investment regime in ASEAN and its partner countries, through progressively liberalising the investment regimes of ASEAN and its partner countries[1].

More specifically, the liberalisation principle is also included in the articles of the agreements, particularly in the lists of sectors to be liberalised. Compared with the ASEAN+1 Agreement, the ACIA presented a clearer liberalisation provision in terms of forward looking principles, as it has a list of five sectors to be liberalised and a list of reservations that contains country-specific and sector-specific measures that do not conform to the ASEAN countries' obligations under Article 5 (national treatment) and Article 8 (Senior Management and Board of Directors) of the ACIA. . This would imply that all other parts of those five sectors not in the single reservation list are subject to national policy, liberalised, and open to ASEAN Investors. AMSs would then reduce or eliminate the existing restrictions, which this would refer to Strategic Schedule of the AEC Blueprint, including its timeline.

Conversely, there is no specific provision in ASEAN+1 FTA that has a list of sectors prioritised for opening up, but only a schedule of specific commitments regarding trade in services. However, there is room to provide a restriction elimination provision, as stated in Article 6(1) of the ASEAN–China Agreement on Investment: 'The Parties will endeavor to progressively remove the non-conforming measures'[2]. Besides, an article of the ASEAN–Korea Agreement on Investment stipulated that modification of the schedule of reservation will refer to a work programme, namely discussions with the members within five years.

In addition, there are some provisions in the ACIA and the ASEAN+1 FTA on National Treatment and Most-Favoured Nation Treatment, which principally extend the non-discrimination principle to all investors, both local and foreign investors.

We suggest RCEP follows what has been proposed under the ACIA, since it is clearer about what sectors are to be liberalised, what parts of the sectors will be subject to reservations, and the schedule for reducing or eliminating the reservation lists in the future.

[1] As stated in the IA ASEAN–China.
[2] Ibid.

4. Reservation List in ACIA

To implement the transparency principle towards investors under a host country investment regime, each ASEAN Member State has submitted a list of reservations which provides non-conforming measures[3] and regulations maintained in the sectors under the ACIA – manufacturing, agriculture, fishery, forestry, mining and quarrying, as well as services incidental to these five sectors (ACIA Guidebook, 2013).

The Schedule of Reservations is based on a single reservation list, which provides ASEAN Member States with policy space in the liberalisation of investment in the above-mentioned five sectors. This also means that all other parts of the five above-mentioned sectors not included in a single reservation list are, subject to the national policy, liberalised, and open to ASEAN Investors.

Below are some of the main measures and regulations included in the reservation list:

1. **Sectors closed for investment**

   Amongst AMSs presenting closed commitments to foreign investors, Indonesia is one country that often proposes very detailed lists of reservations. This relates to Presidential Regulation No. 36 of 2010 Concerning the Lists of Closed and Open Businesses with Reservation in the Investment Sector.

   Usually, the reasons why certain sectors are closed to foreign investments relate to several concerns, such as:

   a. ***To provide safety and control***

      Cambodia applied closed investment treatment to foreign investors, especially in the fields of poisonous chemicals, agricultural pesticides/insecticides, and other goods that use chemical substances. *Indonesia* also closed the possibility for foreign investors to get involved in the production of weapons, ammunition, explosive devices, and war equipment. However, these subsectors are still open to local investors with a special permit from the Ministry of Defence.

[3] A non-conforming measure is any law, regulation, procedure, requirement, or practice that violates certain articles of the investment agreement. For example, a law prohibiting an investor of another member state from owning a factory would not conform to the article on national treatment.

b. ***To provide protection for traditional or small-scale economies***

Generally, this category includes fisheries, manufacturing, and agriculture for some ASEAN member states. The traditional fisheries subsector is closed to foreign investors in *Indonesia*, *the Philippines,* and *Malaysia* (using the term 'captured fisheries'), as many people with small incomes work in this field. In *Brunei*, particularly, the reservation is also applied to fisheries and services incidental to fishing, which stipulate that National Treatment shall not apply to any measures relating to any fishing activities, including in its Economic Exclusive Zone (EEZ).

In the manufacturing sector, *Indonesia, Lao PDR,* and *Myanmar* are also closed for foreign investments in traditional/micro-economic sectors such as: Salting/drying fish, Hand painted Batik, Handicrafts including specific cultural assets, arts value using natural or artificial raw materials, etc., in *Indonesia*; production, processing, and preserving of meat and meat products (cattle, pigs, sheep, horses), traditional textiles, etc., in Lao PDR; and manufacture of bakery products, etc., in *Myanmar*.

Regarding the agricultural sectors, *Indonesia* has put up barriers to foreign investments, especially in individual crop cultivation in areas smaller than or equal to 25 hectares, and to many other similar investments.

c. ***To maintain sustainability of natural resources***

Several business fields are closed to foreign investors, especially those with issues of sustainability. *Malaysia* had closed foreign equity participation especially in the Forestry sector and Services Incidental to Forestry subsector. More specific is the limitation on foreign investment in the extraction and harvesting of timber. This policy has been implemented in Peninsular Malaysia and Sabah. In *Indonesia* several business fields are closed, such as fishery, manufacturing, mining & quarrying, and services incidental to the mining & quarrying sectors.

2. Sectors open for investment or managed by certain parties

In the ACIA reservation list, there are also reservations for several industries, which can only be handled by certain institutions, such as Petronas in Malaysia, to explore, exploit, win, and obtain petroleum, either onshore or offshore, especially for Oil and Gas Upstream Industries. In *Myanmar*, several sectors such as the Manufacture of Pharmaceutical drugs, the Manufacture of Refined Petroleum Products and some Forestry sectors are only open to state-owned enterprises under the associated ministry. In addition, newspapers can be run by government bodies only.

3. Restrictions on land ownership

In general, foreign investors cannot own land, but they can acquire certain rights of land use including concessions and leases. Commonly, the only difference in reservations amongst AMSs is the length of the lease periods allowed by each AMS.

Countries that restrict land leases include *Cambodia,* Lao PDR, *and Myanmar*. *Cambodia* allows a land lease period of 15 years or more, or renewable short-term leases. In Lao PDR, the reservation including the period of lease is between 35–50 years and can be extended for another 25 years to a maximum of 75 years, in the fields of agriculture, mining, and energy. *Myanmar's* period of land lease is initially 30 years, extendable by two consecutive terms of 15 years, subject to the approval of the Myanmar Investment Commission.

Other AMSs, such as *Indonesia, Malaysia, and Singapore*, assert that National Treatment[4] may not apply to any measures affecting land, property, or natural resources associated with the land, including acquisition, ownership, and lease of land and property. In some ways, therefore, land use may be seen as *'unbound',* a term used under WTO and ASEAN Framework Agreement on Services (AFAS) commitments, or to put it differently, the countries have not decided on a particular restriction or provision, but it cannot be said that the sector is totally open or that there are no restrictions.

[4] The National Treatment obligation means that investors from other ASEAN Member States and their investments will not be discriminated vis-à-vis the domestic/local investors and their investments unless specified in their reservation lists.

4. **Obligation to divest**

Provisions regarding the obligation to divest are applied in *Indonesia*. Foreign investors are able to own 100 percent of an enterprise, subject to prior notifications before the license is granted, but after a certain period following commencement of commercial production, the foreign investors are obliged to sell a part of the company to domestic investors. This provision is applied in every business sector.

In the case of the Mineral and Coal Mining subsectors in Indonesia, foreign investors, subject to prior notification before the license is granted, should sell shares to domestic investors, so that after five years from the commencement of commercial production, domestic investors own at least 20 percent of the company's shares.

5. **Restriction on the percentage of the foreign investor ownership**

This restriction is the most common form of reservation, in WTO, AFAS, and other ASEAN FTAs. Among AMSs there are differences as to how each AMS schedules its reservations for ACIA.

Brunei has not scheduled towards foreign investor ownership in the ACIA business sectors, but requires a 30 percent foreign equity limitation for the following sectors: manufacturing, agriculture, fishery and forestry including services incidental to those sectors.

Indonesia imposes many restrictions on foreign investors in various subsectors or business fields, with foreign equity limitations ranging from 49 percent to 95 percent, including business partnership with SMEs, needs for specific permits in certain areas. The Indonesian reservation list in the ACIA corresponds with Presidential Decree No. 36 of 2010 on the Indonesian Negative Investment list.

For Lao PDR, particularly for joint ventures, the foreign equity limitation is 30 percent, with a minimum registered capital of US$ 100,000. In addition, the investment term of a foreign investment enterprise can be no more than 75 years, depending on the nature, size, and condition of the business activities or projects.

The reservation list submitted by *Malaysia* is quite interesting. All privatised projects are subject to Malaysia's development policies and the Privatisation Master Plan in respect of foreign equity participation. Privatisation projects must be at least 75 percent owned by Malaysian shareholders. In addition, foreign participation may be considered in the following cases:

- When foreign expertise is needed to upgrade efficiency because such expertise is not available locally;
- When their participation is necessary to promote export markets;
- When local capital is insufficient; and
- When the nature of the business requires international linkages and exposure.

All conditions imposed on existing privatised entities will continue to be applicable.

There is also a limitation on foreign equity (up to 30 percent only) regarding certain activities/products, of which batik fabrics and apparel, and Integrated Portland Cement are examples. Other provisions in the reservation list only mention that there is a list of business fields that may be inconsistent with National Treatment, or in other words, may be considered as *unbound*.

Cambodia has quite a short list of reservations regarding maximum foreign investment, which consists only of tourism and travel-related service sectors and the telecommunication service sector, in which each sector's limit is 51 percent.

Myanmar and *Singapore* have not submitted a reservation list for foreign equity limitation. As implied in the reservation list that all other parts of the five said sectors are not in the single reservation list, subjects to national policy, are liberalised and open to ASEAN Investors (ACIA Guidebook, 2013).

For *the Philippines*, in general, the maximum foreign equity limitation is 40 percent for domestic market enterprises with paid-in equity capital of less than the equivalent of US$ 200,000. This foreign equity limitation is also applied to forestry and services incidental to forestry, but is also subject to government approval. There is also a requirement for foreign-owned corporations/entities to export at least 60 percent of their output to be considered as an export enterprise, subject to certain terms and conditions.

In *Thailand*, generally foreign equity participation in an enterprise has to be below 50 percent. Foreign investors may own more than 50 percent of shares if they meet certain conditions – (i) if they obtain permission from the Minister of Commerce with the approval of the Cabinet, and several other conditions are fulfilled; (ii) if they meet the requirement of the minimum capital used at the commencement of the business operation; (iii) if they obtain a license or certificate from the Department of Business Development, Ministry of Commerce; and (iv) if they comply with other conditions prescribed in the Foreign Business Act and related laws.

In Viet Nam there are several schemes for foreign equity limitation, depending on the sector. As stated in the reservation list, there are several limits on foreign equity – 30 percent, 40 percent, 49 percent, and 51 percent. The types of sectors included in the ACIA reservation list are limited to the services incidental to Mining and Quarrying, Fishery and Agriculture, and Hunting and Forestry. Manufacturing is limited to manufacturing related to infrastructure and transportation, which are the manufacture of railway rolling stock, spare parts, wagons, and coaches, as well as the aircraft manufacturing industries.

5. Conclusion

In principle, there is equivalence in the goals and norms between agreements, both the general FTA agreements and the more specific investment agreements. Based on its development, the ACIA is the most comprehensive basis agreement, which underlies other FTA agreements. The ACIA and its reservation lists can be used as a basis for formulating the RCEP agreement since its provisions are comprehensive.

As RCEP may adopt a single undertaking approach, the agreement on investment should be concluded at the same time as the agreement on trade in goods and services. This would ensure the most comprehensive and optimum outcome.

RCEP should provide greater clarity in the liberalisation pillar, including the modalities and time frame of liberalisation, and also consider differentiated timeframes for countries and products at an early stage of the negotiations.

In the commitments, which are more specifically sector related, each AMS has its own unique approach to scheduling its sectors in the agreement.. As a result, it is difficult to standardise the limits on foreign equity ownership. In addition, if we compare the CLMV countries with others, there is no uniformity in the reservations they propose in the reservation list under the ACIA.

The relatively similar provisions are those that close certain sectors/subsectors to foreign equity ownership and specifically for traditional trade and micro and medium scale business trades. Both the CLMV and non-CLMV countries have the same concerns regarding the protection of their traditional business fields, which is apparent from their reservation lists.

There are also similarities regarding land ownership restrictions – typically foreign investors cannot own land or properties and only have the right of land use. There are differences in the time limits of land use, on which each AMSs has a different policy.

Other discrepancies can be seen in the reservation lists in the ACIA. For example, several countries impose an obligation on foreign investors to divest, while several AMSs require only SOEs who have opportunity to provide the services.

Thus, the challenge for RCEP is to formulate a higher level agreement that consolidates the variety of concerns, needs, and national policies of AMSs in a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement.

References

ASEAN Secretariat (2009), Agreement Establishing the ASEAN–Australia New Zealand Free Trade Area. Jakarta: ASEAN Secretariat.

Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the People Republic of China. Jakarta: ASEAN Secretariat.

Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation amongs the governments of the member countries of the ASEAN and the Republic of Korea. Jakarta: ASEAN Secretariat.

ASEAN Comprehensive Investment Agreement (ACIA) (2013), *A Guidebook for Businesses and Investors*. Jakarta: ASEAN Secretariat.

Chirathivat, S., and P. Srisangnam (2013), 'The 2030 Architecture of Association of Southeast Asian Nations Free Trade Agreements', *ADBI Working Paper* 419, Tokyo: Asian Development Bank Institute. Available at: http://www.adbi.org/working-paper/2013/04/25/5627.2030.architecture.asean.free.trade.agreements/

Core Elements of the Framework Agreement for ASEAN–Korea Free Trade Area. Jakarta: ASEAN Secretariat.

Framework Agreement on ASEAN Investment Area. Jakarta: ASEAN Secretariat.

Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea Kuala Lumpur, 13 December 2005. Jakarta: ASEAN Secretariat.

Framework Agreement on Comprehensive Economic Cooperation between the ASEAN and the People's Republic of China.

Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership. Jakarta: ASEAN Secretariat.

Guiding Principles for Negotiation on ASEAN–Australia and New Zealand Free Trade Area (FTA). Jakarta: ASEAN Secretariat.

Implementing Agreement for the ASEAN–Australia–New Zealand FTA Economic Cooperation work programme pursuant to chapter 12 of the agreement establishing the ASEAN–Australia–New Zealand FTA. Jakarta: ASEAN Secretariat.

Joint Declaration of the Leaders at the ASEAN–Australia and New Zealand Commemorative Summit. Jakarta: ASEAN Secretariat.

Joint Declaration on Comprehensive Cooperation Partnership between the Association of Southeast Asian Nations and the Republic of Korea. Jakarta: ASEAN Secretariat.

Joint Media Statement on the Signing of the Agreement Establishing the ASEANAustralia–New Zealand Free Trade Area, Cha-am, Thailand, 27 February 2009. Jakarta: ASEAN Secretariat.

Sallehuddin, M. (2012), Critical Issues on Investment Law Harmonization within ASEAN, Asean Law Association, Workshop, 2012 (online version).

Schedule to the ASEAN Comprehensive Investment Agreement (for all AMSs). Jakarta: ASEAN Secretariat.

Shimizu, K. (2012), 'Economic Integration in East Asia: Issues and Tasks in the PostWorld Financial Crisis Era', *Economic Journal Of Hokkaido University*, 41, pp.47–57.

Zhang, Y. and S. Minghui (2013), 'FTAs in the Asia-Pacific: a Chinese Perspective', *Kokusai Mondai* (International Affairs), No. 622, June.