
Investment Law in the China-ASEAN Free Trade Agreement

Huan Qi *

Cooperation between China and the ASEAN has become more integrated as their common economic interests have been increasing due to globalization and recent changes in Southeast Asia. The formation and operation of the CAFTA provide incentive for investment and trade between China and the ASEAN. The objective of laws regulating to investment should promote investment, which can be realized through a liberal, facilitative and transparent investment regime. The CAFTA's investment regime continues along with the same trends of international investment agreements in general. However, in order to encourage regional integration, it needs to be improved in future practice.

Keywords

China-ASEAN Free Trade Area, CAFTA, Investment Agreement, BITs, WTO, Dispute Settlement

I. Introduction

In 2011, the global flows of Foreign Direct Investment (“FDI”) exceeded the pre-financial crisis levels at 1.5 trillion USD and the recovery is expected to level off in 2012 at an estimated 1.6 trillion USD.¹ Simultaneously, it is also projected that half of the global total FDI will flow to the developing and transitioning economies, including the least developed countries.² Accordingly, international investment policy has taken

* Associate Professor at the Law Faculty of the China University of Political Science and Law (“CUPL”), Beijing, China. LL.B./LL.M./Ph.D. (CUPL), Diplôme d’Université, Droit en Europe (Paris 1). The author may be contacted at: qihuanhuan66@hotmail.com /Address: No.25 Xi Tu Cheng Road, Haidian District, Beijing 100088, P.R. China. This paper has been supported by the Social Science Fund of the Ministry of Education of China (11YJA820054).

¹ United Nations Conference on Trade and Development (“UNCTAD”), *World Investment Report 2012: Towards a New Generation of Investment Policies* iii (2012), available at <http://www.unctad-docs.org/files/UNCTAD-WIR2012->

multi-dimensional shape emphasizing the balance between the rights and obligations of the host States and investors.³ In this context, the current reformation of the Association of Southeast Asian Nations (“ASEAN”) is remarkable. The ASEAN has improved its internal structure by making and implementing the ASEAN Charter, aiming at establishing the ASEAN Community by 2015 and strengthened its external relations by establishing free trade areas with China, Japan, South Korea, India, Russia, Australia, New Zealand and the United States, thereby forming ‘10+1,’ ‘10+3,’ ‘10+8’ mechanisms.

Among them, the China-ASEAN Free Trade Area (“CAFTA”) is noticeable considering that the total investments have exceeded USD 90 billion. Investment by Chinese enterprises in the ASEAN has rapidly increased in many types of industries. In 2011, non-financial direct investment from mainland China to ASEAN reached to 2.54 billion USD, growing up by 13.1 percent compared to the previous year resulting to the biggest market of investment abroad for Chinese enterprises.⁴ For the smooth functioning of this economic relation, different aspects of investment law play crucial role.

This paper analyzes investment law in the CAFTA. The author argues that revision of the existing investment law will help to protect the interests of both the investors as well as the region. This paper is composed of five sections including Introduction and Conclusion. Part two, along with the introduction of the investment legal regime as in force in China and the ASEAN, will discuss the relationship between the CAFTA, the World Trade Organisation (“WTO”) rules, Bilateral Investment Treaties (“BITs”) and other free trade agreements between China and the ASEAN member States. Part three will examine the definition and scope of ‘investment’ in the Investment Agreement since both the CAFTA and the BITs provide an excessively broad definition of ‘investment’ that undermines a stable and predictable legal environment. Part four will address the mechanisms available to settle disputes between the investors and the host States. Compared to BITs between China and the ASEAN member States, the CAFTA focuses more on balancing, between the sovereignty of the host States and the interests of investors, which coincides with the recent trend of dispute settlement in international investment agreements.

Full-en.pdf (last visited on Oct. 21, 2012).

² *Id.*

³ *Id.*

⁴ See ASEAN Has Become the First Choice of Chinese Enterprises Investing Aboard, available at <http://www.cafta.org.cn/show.php?contentid=63630> (last visited on July 30, 2012).