



The 2009 ASEAN Comprehensive Investment Agreement

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Overview

- The 2009 ASEAN Comprehensive Investment Agreement (ACIA).
- Changes to the ASEAN investment regime.
- Unresolved issues / points to watch as counsel.
- Conclusion.

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ASEAN Membership



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ASEAN Comprehensive Investment Agreement

- ACIA was signed in 2009 and took effect on 29 March 2012.
- Terminates 1987 ASEAN Investment Treaty and 1998 ASEAN Investment Agreement.
- Transitional arrangements: prior ASEAN treaties available, at investor's option, for 3 years (ACIA Art. 47(3)).

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ACIA: New definition of “investment”

1987 ASEAN Treaty: Art. 2(1)	2009 ACIA: Art. 4(a)
<p>“This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement.”</p>	<p>“Covered investment means, with respect to a Member State, an investment in its territory of an investor of any other Member State . . . admitted according to its laws, regulations and national policies and, where applicable, specifically approved in writing by the competent authorities of a Member State.”</p>

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ACIA: New definition of “investment”

- Admission requirements: approval in writing required only “where applicable.”
- Requires ASEAN states imposing that requirement to do so transparently: Annex 1 to ACIA.
- Takes on board Tribunal’s comments in Yaung Chi Oo Trading PTE Ltd. v. Myanmar, ASEAN I.D. Case No. ARB/01/1, Award, 31 March 2003, paras. 58-59.

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ACIA: New definition of “investment”

- Article 4(c) defines “investment” as “every kind of asset, owned or controlled by an investor” + illustrative list.
 - New footnote: “Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.”
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ACIA: New definition of “investor”

- New definition of investor based on place of incorporation.
 - Drops the previous requirement for investor’s “place of effective management” to be in an ASEAN state.
 - But see new denial of benefits clause in Art. 19.
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ACIA: Denial of benefits

- Art. 19(1) allows Member States to deny ACIA benefits where an investor company has “no substantive business operations” in its home state and
 - (a) investment is owned or controlled by non-ASEAN nationals or
 - (b) investment is owned or controlled by host state’s nationals.
 - ACIA silent on when the host state must exercise its denial right. (See similar debate in respect of Art. 17 of the Energy Charter Treaty in *Plama / Yukos*).
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ACIA: Denial of benefits

- Article 19(1) also permits denial where the owner or controller’s home state does not maintain diplomatic relations with the ASEAN host state.
 - Art. 19(2) allows Member States to deny ACIA benefits where an investor has misrepresented its ownership in areas of investment which are reserved for natural or legal persons of the host state.
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ACIA: Substantive protections

- ACIA reaffirms the core investor protections introduced by the 1987 Treaty:
 - Fair and equitable treatment: ACIA Art. 11
 - Full protection and security: ACIA Art. 11
 - Transfers: ACIA Art. 13
 - Compensation in the event of expropriation: ACIA Art. 14
 - Most-favoured-nation treatment: ACIA Art. 6*

* MFN now explicitly excludes dispute settlement procedures.

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ACIA: Substantive protections

- ACIA adopts new substantive protections:
 - National treatment: ACIA Art. 5
 - Diluted new protection for senior management and board of directors: ACIA Art. 8
 - Host state may still require a majority of the Board of Directors of the host-state subsidiary to hold a particular nationality or residency, unless investor can prove that this “materially impairs” its control over the investment.

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Dispute resolution under ACIA

- Art. 31(2) requires the state to engage in amicable consultations within 30 days of the trigger letter.
 - After 180 days, investor may choose among:
 - ICSID
 - ICSID Additional Facility
 - UNCITRAL
 - ASEAN regional arbitration centres
 - host state's courts.
 - New limitation period of three years: Art. 34.
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Dispute resolution under ACIA

- Host state may object to the claim as being “manifestly without merit”: Art. 36(2)
 - Bifurcation of jurisdictional objections: Art. 36(3)
 - Consolidation permitted by consent: Art. 37
 - Tribunal-appointed experts: Art. 38
 - Enforcement of award stayed pending revision, annulment or set-aside proceedings: Art. 41(7)
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Points to watch: Scope of application

- New “scope of application” clause that did not exist in the 1987 ASEAN Treaty.
- Art. 3(3): “For the purpose of liberalisation and subject to Article 9 (Reservations), this Agreement shall apply to the following sectors: manufacturing; agriculture; fishery; forestry; mining and quarrying; services incidental to [those sectors]; and any other sectors, as may be agreed upon by all Member States.”
- Questionable whether this affects investment protections.

Points to watch: National investment laws

- ASEAN exists within a matrix of national laws, many of which regulate or restrict investment activities: e.g. Indonesia’s “Negative List” of prohibited investment sectors.
- For summaries of the principal national laws, see the ASEAN Investment Guidebook, available at: <http://www.asean.org/publications/Asean-Investment-2009.pdf>

Points to watch: ACIA Exceptions

- Art. 3(4): “This Agreement shall not apply to:
 - (a) any taxation measures, except for Articles 13 (Transfers) and 14 (Expropriation and Compensation);
 - (b) subsidies or grants provided by a Member State;
 - (c) government procurement;
 - (d) services supplied in the exercise of governmental authority by the relevant body or authority of a Member State . . .”
- Art. 17: General Exceptions (subject to non-discrimination) + Art. 18 (Security Exceptions).

Points to watch: Reservations

- The ACIA’s guarantees of national treatment and management personnel rights are substantially eroded by the many reservations entered under Article 9.
- ASEAN Comprehensive Investment Agreement Reservation List: available at:
http://www.aseansec.org/20632_a.htm
- Every ASEAN State has entered reservations.

Conclusion

BRUNEI DARUSSALAM

- Ministry of Industry and Primary Resources (MIPR)
 - www.bruneimipr.gov.bn
- Brunei Economic Development Board (BEDB)
 - www.bedb.com.bn
- Brunei International Financial Centre (BIFC)
 - www.finance.gov.bn/bifc

Appendix 1: ASEAN Investment Agencies

CAMBODIA

- Council for the Development of Cambodia (CDC)
- Cambodian Investment Board (CIB)
 - www.cambodiainvestment.gov.kh

INDONESIA

- The Investment Coordinating Board (BKPM)
 - www.bkpm.go.id
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Appendix 1: ASEAN Investment Agencies

LAO PDR

- Investment Promotion Department (IPD)
- Ministry of Planning and Investment (MPI)
 - www.invest.laopdr.org

MALAYSIA

- Malaysian Industrial Development Authority (MIDA)
 - www.mida.gov.my
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Appendix 1: ASEAN Investment Agencies

MYANMAR

- Myanmar Investment Commission (MIC) Secretariat
- Directorate of Investment and Company Administration (DICA)
 - www.dica.gov.mm

PHILIPPINES

- National Economic Research and Business Assistance Center Board of Investments
 - www.boi.gov.ph
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Appendix 1: ASEAN Investment Agencies

SINGAPORE

- Singapore Economic Development Board (EDB)
 - www.sedb.com
 - International Enterprise (IE) Singapore
 - www.iesingapore.com
 - The Standards, Productivity and Innovation Board
 - www.spring.gov.sg
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Appendix 1: ASEAN Investment Agencies

THAILAND

- Office of the Board of Investment (BOI)
 - www.boi.go.th

VIET NAM

- Foreign Investment Agency
- Ministry of Planning and Investment (MPI)
 - www.mpi.gov.vn and <http://fia.mpi.gov.vn>

* All contact details based on the 2009 ASEAN Investment Report.
