Approaches to IIAs in ASEAN: a perspective from private practice

Antony Crockett

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Some statistics

- Asian States have been respondents in 8% of pending and concluded ICSID arbitrations
- ASEAN States have been respondents in **less than 3%** of all pending and concluded ICSID arbitrations
- At least 5 known IIA claims involving claimants from ASEAN States
- There have been many more ICSID cases involving South America (40%), Eastern Europe (20%), Africa (20%)

Why so few cases?

- Cultural preferences for informal dispute resolution
- Relative political and economic stability
- More cautious approach to liberalisation / Political circumstances of liberalisation
- Consistently exemplary treatment of foreign investors
- Lack of awareness of IIAs
- Lower FDI flows into ASEAN

What causes IIA disputes?

- Withdrawal of incentives
- Breach of contract
- Regulatory changes/refusal of consents
- Fiscal changes
- Discrimination
- Unfairness/arbitrariness
- Lack of transparency
- Increasing IIA ‘literacy’ means it is more likely that investors will rely on treaty rights

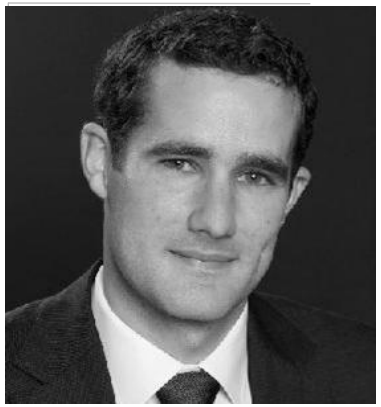
Particular concerns in ASEAN – liberalisation without regulation?

- Accessibility of laws and regulations – the requirements applicable to a particular investment are not always clear or readily accessible
- This leads investors to seek specific guarantees that may later turn out to be inconsistent with other obligations of the host State
- Failure to implement liberalisation commitments, particularly commitments related to regulation of privatised sectors in a predictable, fair and transparent way exposes host States to the risk of claims

Competition policy

- International investors have tended to see Asia as a "competition law free zone"
- Where competition laws exist or are being introduced, there is a lingering level of concern about unfair/discriminatory use of competition law against foreign investors
- More broadly investors' concerns are focused on predictability and policy coherence
- In some ASEAN countries, State-owned enterprises necessarily became private monopolies as sectors previously dominated by the State were opened to private investment
- In some cases the regulatory framework post privatisation has allowed private and State-owned enterprises to engage in anti-competitive practices creating a potential for disputes

Contact



Antony Crockett

Clifford Chance Pte Ltd
One George Street
Singapore 049145

T: +65 6410 2256

Antony is on secondment to Singapore from Clifford Chance's International Arbitration Group in London. Antony is admitted as a Solicitor in England and Wales and in Australia. He holds Science (B.Sc) and Law (LLB) degrees from the University of Melbourne, an LLM from the London School of Economics and Political Science and a Diploma in International Trade Law.

Antony has experience advising on international commercial disputes and international commercial arbitration, particularly in the energy and infrastructure and telecommunications sectors. Antony also has experience advising commercial and public sector clients in relation to public international law, including international investment treaty claims, international trade law, environmental law, boundary disputes and human rights.

Prior to joining Clifford Chance Antony worked with the United Nations Office of Legal Affairs (UNCITRAL Secretariat) in Vienna. Antony is an member of the Association of International Petroleum Negotiators, the International Bar Association, the International Law Association and the Chartered Institute of Arbitrators (MCIArb).

antony.crockett@cliffordchance.com

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www.cliffordchance.com

Clifford Chance Pte Ltd, One George Street, 19th Floor, Singapore 049145