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Does ACIA bring a new dimension to international investment agreements?
“Technical aspects of ACIA and implementation plan of ACIA”

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The key argument

“ACIA brings a new dimension to IIAs, namely that it is, on the one hand, an instrument which is carefully designed to achieve ambitious, comprehensive goals. On the other hand, it incorporates many built-in flexibilities to accommodate the effective implementation. The combination of ambitious aims, flexibilities, and effective implementation mechanism are the important ingredients for the desired accomplishment.”



Presentation Outline

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1. Political Driving Force:

The Desire to build an economic integration in the region

- **Decision of 39th ASEAN Economic Ministers Meeting in 2007:**
 - a) Review the Framework Agreement on the 1998 ASEAN Investment Area (“AIA Agreement”) and the 1987 ASEAN Agreement for the Promotion and Protection of Investment (“ASEAN IGA”).
 - b) The ASEAN Economic Blueprint [the master plan] was adopted at the 13th ASEAN Summit on 20 November 2007 in Singapore.
- **Signing of ACIA by AEM in February 2009**
- **“A free and open investment regime” = the key to enhancing ASEAN’s investment competitiveness**



2. Key features as an integrating instrument

What make ACIA capable of achieving the aims?

More comprehensive investment agreement: covering 4 pillars

- Progressive liberalisation
- Enhanced protection
- Joint promotion
- Further cooperation/facilitation

Inclusion of forward looking provisions and improved features

- Art. 7 – Prohibition of Performance Requirements
- Art. 8 – Senior Management and Board of Directors

Incorporate international best practices

- NAFTA, BITs Models, Agreements with Dialogues, etc.

Institutional mechanism for implementation

- Guiding principles [Art.2]
- Clear objective [AEC Blueprint]
- Implementation mechanism [AIA Council, CCI]



3. ASEAN VISION: Liberalisation dimension

ACIA is an instrument adapted to accommodate the new investment trend.

3.1 Provisions which accommodate expansion of scope of this Agreement to cover other sectors in the future

“Article 3(3)

(f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying;

[Reaffirm our vision stated in AIA]

(g) any other sectors, as may be agreed upon by all Member States”



3.2 Provisions which facilitate further liberalisation

Expanded scope

- Coverage of both FDI and Portfolio investment – compared with AIA [FDI only]
- Benefits extended to (a) ASEAN Investor (b) Foreign-owned ASEAN-based investor

Flexibility - More comprehensive ‘Modification of Commitments’ [Art.10]

- Clear procedures on modification of commitments
- Inclusion of provision for compensatory adjustment to ensure balance of benefits



3.3 MFN provision: a crucial tool for creating deeper integration

Comparison of MFN provision in ACIA and ASEAN + Dialogue Partner

- ACIA [Art.6] – unconditional MFN

- ASEAN-KOREA [Art.4(4)] conditional MFN

“Notwithstanding paragraphs 1 and 2, if a Party accords more favourable treatment to investors of any other Party or a non-Party or their investments by virtue of any future agreements or arrangements to which the Party is a party, it shall not be obliged to accord such treatment to investors of any other Party or their investments. However, upon request from any other Party, it shall accord adequate opportunity to negotiate the benefits granted therein.”



4. ASEAN VISION: Enhanced Protection Dimension

ACIA = the instrument which accommodates the balancing of protection of legitimate regulation vs. investors' interests

4.1 More comprehensive and clearer provisions – ensure better protection

- Annex 1: Approval in writing
- Annex 2: Expropriation and compensation
- Fair and equitable treatment [Art. 11.2 – inclusion of ‘For greater certainty provision’]
- Art. 14.5: the issuance of compulsory licenses in accordance with the TRIPS Agreement excluded from expropriation provision



4.2 Strike a balance between investment protection and legitimate regulation:

ACIA is designed to face current regulatory issues [economic crisis, other development issues - health, environment, etc.]

- Art. 16: Measures to Safeguard the Balance of Payments
- Art. 17: General Exceptions
- Art. 18: Security Exceptions
- Art. 19: Denial of Benefits



4.3 ACIA provides a more comprehensive dispute settlement

The enhanced mechanism to accommodate the new trend for ISDS - reflecting the increasing importance of ISDS

Key Highlights of ISDS Provision

- Ensure Genuine claim: Scope of coverage [Art. 29]
 - * incurred loss or damage [Art.29.1]
 - * No claim against own-State [Art.29.2]
- Promotion of Alternative dispute settlement: conciliation [Art.30], consultations and negotiation [Art.31]
- Greater transparency and detailed procedures of investor-state dispute settlement [Art.32-Art.41]

Mechanism of State-to-State dispute settlement [Art.27]

- The ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed in 2004



5. Implementation Plan: the way forward

5.1 Guiding principles

- No back-tracking of commitments made under the AIA Agreement and the ASEAN IGA [Art.2(e)]
- Principle of Special and differential treatment and flexibilities depending on the level of development and sectoral sensitivities [Art.2(g) + Art.23]

5.2 Targets

- 2015 Objective
- Strategic Schedule for AEC



5.3 Institutional mechanism [Art.42]

- The AIA Council = the agent responsible for the implementation of the Agreement
- The ASEAN Coordinating Committee on Investment (“CCI”) in assisting
- Art.43 – Consultations by Member States ‘on any matter relating to investments covered by this Agreement, or otherwise affecting the implementation of this Agreement’



6. ASEAN Investment Noodle Bowl: ACIA and other ASEAN Agreements

6.1 Noodle Bowl

- The 1987 ASEAN Agreement for the Promotion and Protection of Investment
- The Framework Agreement on the 1998 ASEAN Investment Area
- ASEAN-Australia-New Zealand
- ASEAN-Korea
- ASEAN-China (entry into force 2010)
- ACIA (signed 2009)
- ASEAN-India (Under negotiation)
- ASEAN-Japan (Under negotiation)

What are the relations between them?



6.2 Observations on their interactions

- Investors' choices as to what agreements they use
- ACIA is the instrument that grants the maximum benefits among ASEAN members.
- Some agreements contain a provision governing the relation to other agreements

ACIA: Article 44 Relation to other agreements

Nothing in this Agreement shall derogate from the existing rights and obligations of a Member State under any other international agreements to which it is a party.

ASEAN-Korea: Article 22 relation to other agreements

1. Nothing in this Agreement shall be construed to derogate from any right or obligation of a Party under other international agreements to which the Parties are party.

2. If the international obligations existing at present or established hereafter between the Parties in addition to this Agreement result in a position entitling investors of any other Party and investments by investors of any other Party to treatment more favourable than is provided for by this Agreement, such position shall not be affected by this Agreement.



7. Concluding remarks: ACIA – the legal driving force for regional integration

7.1 ACIA = the forward-looking, mobilizing legal instrument

- ACIA as a model of comprehensive, regional investment instrument with comprehensive, well-balanced provisions.
- Designed to alleviate the ASEAN standards in line with international standards yet embodying flexibilities

Art.23 – Special and Differential Treatment for the Newer ASEAN Member States – reflecting different level of development

7.2 Effectiveness of the Agreement = development through time