

ASEAN IIAS – CREATING REGULATORY SPACE BY USING DEFINITIONS, PROCESSES AND EXCEPTIONS

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ASEAN IIAs

- In 2009, ASEAN countries entered into 4 successive IIAs:
 1. ASEAN Comprehensive Investment Agreement (ACIA)
 2. ASEAN-AUS-NZ FTA with an Investment Chapter (AANZFTA)
 3. ASEAN-China Investment Agreement (ACHIA)
 4. ASEAN-Korea Investment Agreement (AKIA)
- These ASEAN IIAs could suggest a convergence towards a rule of law system while recognizing the limitations of their developing administrative processes (in particular):
 1. Transparency for Approval in Writing
 2. Use of General Exceptions
 3. Regulatory Measures not amounting to an Indirect Expropriation.

TRANSPARENCY FOR APPROVAL IN WRITING

Article II 1987 ASEAN IIA

1. 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.
 3. This Agreement shall also apply to investments made prior to its entry into force, provided such investments are specifically approved in writing and registered by the host country and upon such-conditions as it deems fit for purpose of this Agreement subsequent in its entry into force.
- *Yaung Chi Oo Trading v Myanmar (2003)*
 - Armed seizure between 17 Dec 1997 and 12 January 1998.
 - Bank accounts frozen. Winding up order of JV company.
 - **No specific approval in writing** given to the investment.

ASEAN Comprehensive Investment Agreement (ACIA) (2009)

- Article 4
- For the purpose of this Agreement:
- (a) “covered investment” means, with respect to a Member State, an investment in its territory of an investor of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, and where applicable, **specifically approved in writing** [fn.1] by the competent authority of a Member State;
- Fn 1. For the purpose of protection, the procedures relating to **specific approval in writing shall be as specified in Annex 1** (Approval in Writing).
- Note: Mirrored by the AKIA, ACHIA for Thailand to some extent (the only country with the writing requirement). AANZFTA - not reflected for Thailand and Vietnam (the only two countries with the writing requirement).

ACIA Annex 1: Approval in Writing

- Where specific approval in writing is required for covered investments by a Member State's domestic laws, regulations and national policies, that Member State shall:
- (a) **inform** all the other Member States through the ASEAN Secretariat of the contact details of its competent authority responsible for granting such approval;
- (b) in the case of an incomplete application, **identify and notify** the applicant in writing within 1 month from the date of receipt of such application of all the additional information that is required;
- (c) **inform** the applicant in writing that the investment has been specifically approved or denied within 4 months from the date of receipt of complete application by the competent authority; and
- (d) in the case an application is denied, **inform the applicant in writing of the reasons for such denial**. The applicant shall have the opportunity of submitting, at that applicant's discretion, a new application.

USE OF GENERAL EXCEPTIONS

Recent Argentinean Cases on Interpretation of Exception Clauses

- *CMS, Sempra & Enron*– A.IX of the US-Argentina BIT
“necessary” means the customary international law standard of “necessity” being the “only way” for the State to safeguard an essential interest ; (Annulments) – “only way” requires factual findings of the measure’s “reasonableness”
- *LG&E*– Argentina could invoke A.IX – while there were different ways to draft the economic recovery plan, there were no other ways to respond to the crisis (factual finding)
- *Continental*– WTO GATT A.XX (GATS A.XIV?) test of necessity applied - balancing test of whether there were reasonable alternatives less in conflict with the obligations that could achieve the reasonable objective (Not Annulled)

Article 17 ACIA General Exceptions

- 1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination** between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:
 - (a) necessary to protect public morals or to maintain public order; [fn.12]
 - (b) necessary to protect human, animal or plant life or health;
- Fn.12 The public order exception may be invoked by a Member State only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
- Note: All ASEAN IIAs except the AANZFTA have included this General Exception Clause. AANZFTA has a narrower exception clause limited to cultural issues.

REGULATORY MEASURES & INDIRECT EXPROPRIATION

Methanex v US (2005) Part IV Chapter D

- Para 7: But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with **due process** and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable **unless specific commitments had been given by the regulating government** to the then putative foreign investor contemplating investment that the government would refrain from such regulation.
- Para 9: Methanex entered a political economy in which it was **widely known**, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.

Methanex

- Para 10: Methanex entered the United States market aware of and actively participating in this process. It did not enter the United States market because of **special representations** made to it.
- Hence this case is not like *Revere*, where specific commitments respecting restraints on certain future regulatory actions were made to induce investors to enter a market and then those commitments were not honoured.
- Para 15: For reasons elaborated here and earlier in this Award, the Tribunal concludes that the California ban was made for **a public purpose, was non-discriminatory and was accomplished with due process.**
- Hence, Methanex's central claim under Article 1110(1) of expropriation under one of the three forms of action in that provision fails.
- From the standpoint of international law, the California ban was **a lawful regulation and not an expropriation.**

2004 U.S. Model BIT and ACIA on Indirect Expropriation

- **Economic impact** of measure (US & ACIA).
- **Interference with reasonable investment-backed expectation** (US) cf. **Breach of Government prior binding written commitment** to investor (ACIA).
- **Character of measure** (US & ACIA), including its objective and whether it's disproportionate to the public purpose referred to previously (only ACIA).

Article 14 ACIA

- Expropriation and Compensation [fn.9]
- 1. A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation ("expropriation"), except:
 - (a) for a public purpose
 - (b) in a non-discriminatory manner;
 - (c) on payment of prompt, adequate, and effective compensation; and
 - (d) in accordance with **due process of law**.
- Fn.9 This Article shall be read with **Annex 2 (Expropriation and Compensation)**
- **Note:** The ACIA and AANZFTA both include an Expropriation Annex that further elaborates on certain expropriation principles. The Parties to the AKIA agreed to enter into discussion on an Expropriation Annex within five years of the date of entry into force unless the Parties agreed otherwise.
- ACHIA does not have an Annex but replaces "due process of law" with "applicable domestic laws including legal procedures"

ACIA Annex 2:

Expropriation and Compensation

- 1. An action or a series of related actions by a Member State cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment.
- 2. Article 14(1) addresses two situations:
 - (a) the first situation is where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and
 - (b) the second situation is where an action or series of related actions by a Member State has **an effect equivalent to direct expropriation** without formal transfer of title or outright seizure.

ACIA Annex 2

- 3. The determination of whether an action or series of actions by a Member State, in a specific fact situation, constitutes an expropriation of the type referred to in sub-paragraph 2(b), requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (a) the economic impact of the government action, although the fact that an action or series of actions by a Member State has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred;
 - (b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; and
 - (c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose referred to in Article 14(1).
- 4. **Non-discriminatory** measures of a Member State that are designed and applied **to protect legitimate public welfare objectives**, such as public health, safety and the environment, **do not constitute an expropriation** of the type referred to in sub-paragraph 2(b).

ASEAN Comprehensive Investment Agreement

- **Article 11 Treatment of Investment**

1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security.

2. For greater certainty

(a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with **the principle of due process**; and

(b) Full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

Conclusion

- ASEAN IIAs seem to be creating a “lex mercatoria” for investments in Asia because of the ASEAN hub.
- These provisions guard the sovereign’s right to regulate while circumscribing the parameters within which the host State may regulate.
- They attempt to balance the interests of the investors with the interest of states with limited administrative capacity.
- Rule of Law or Rule by Law?