Investment Protection and Dispute Settlement Mechanisms in ASEAN Comprehensive Investment Agreement (ACIA)

Dr Le Quoc Phuong
Deputy General Director
Vietnam Industry and Trade Information Center
(Ministry of Industry and Trade of Vietnam)
Contents

1. ACIA: Overview
   - ASEAN overall target: ASEAN Community by 2015
   - ACIA as a means to build ASEAN integrated investment area
     - ACIA’s main objective
     - ACIA=IGA+AIA
     - New enhanced provisions
     - ACIA’s pillars
     - ACIA’s benefits

2. Investment protection and dispute settlement mechanisms in ACIA
   - Investment protection
   - Dispute settlement mechanisms
1. ASEAN COMPREHENSIVE INVESTMENT AGREEMENT: OVERVIEW

1.1 ASEAN main target: ASEAN Community by 2015

Figure 1: ASEAN Community based on three pillars
1. ASEAN COMPREHENSIVE INVESTMENT AGREEMENT: OVERVIEW

1.1 ASEAN main target: ASEAN Community by 2015 (2)

b) ASEAN Economic Community (AEC)

Figure 2: AEC’s key elements
ACIA signed 26 February 2009, effective 29 March 2012

**Main objectives:**
- Enhance ASEAN’s attractiveness as an investment destination
- Create free, open investment regime
- Build ASEAN integrated investment area.

ACIA encourages further development of intra-ASEAN investment, especially among MNC based in ASEAN, through expansion, industrial cooperation, specialization, contributing to enhanced economic integration.

This, in turn, facilitates the establishment of AEC (Figure 3).
1. ASEAN COMPREHENSIVE INVESTMENT AGREEMENT: OVERVIEW
1.2 ACIA as a means to build ASEAN integrated investment area (2)

Figure 3: ACIA as a means to establish AEC and ASEAN Community

ACIA (effective March 2012) ➔ ASEAN free, open, integrated investment area ➔ AEC by 2015 ➔ ASEAN Community
Previously, AMS signed 2 ASEAN investment agreements:

- ASEAN Investment Guarantee Agreement (IGA 1987), covering investment protection
- Framework Agreement on ASEAN Investment Area (AIA 1998), covering market access.

ACIA 2009 is a merger of IGA 1987 and AIA 1998 (Fig.4)

- Preserves preferential treatment in AIA
- Reaffirms relevant provisions of AIA, IGA (eg NT, MFN treatment)
More than just merging IGA and AIA, ACIA offers new forward-looking provisions:

- Further improvements to existing AIA and IGA provisions on investor-state disputes, fund transfers, treatment of investments
- New article on “Prohibition of Performance Requirements”
- New article on freedom to appoint “Senior management and board of directors”, which facilitates inflows of key foreign managerial and senior management personnel
ACIA contains comprehensive investment provisions based on 4 pillars

Fig. 5: ACIA’s 4 pillars
ACIA offers many potential benefits to ASEAN investors.

Figure 6: Benefits for investors
Benefits for investors

- **Investment liberalization**
  - Progressive investment liberalization, beginning with 5 sectors (Manufacturing, Agriculture, Fishery, Forestry, Mining and Quarrying) and Services incidental to these 5 sectors
  - Investors have opportunity to invest in all liberalized sectors and expand markets for their products and services in all AMS

- **Non-discrimination**
  - Art. 5 (NT) and Art. 6 (MFN): AMS agree not to treat ASEAN investors less favorably than local or foreign competitors
  - Art. 7 prohibits AMS from imposing any performance requirements (such as production quota, export target)
  - Art. 8 grants ASEAN investors freedom to appoint senior management and board of directors, irrespective of their nationality
Benefits for investors

- **Transparency.** More transparent/predictable regulations:
  - Harmonized investment policies of AMS
  - Simplified procedures for investment application
  - Dissemination of info on rules/regulations/policies affecting investors and their investments

- **Investment protection.** ACIA’s comprehensive provisions:
  - Provide enhanced protection of investment
  - Improve investors’ confidence in investing in ASEAN

- **Dispute settlement mechanisms**
  - In case of any conflict with host governments, investors given option of resolving disputes through alternative dispute settlement mechanisms.
2. INVESTMENT PROTECTION AND DISPUTE SETTLEMENT MECHANISMS IN ACIA (1)

- **Issues of investment protection and dispute settlement in ACIA 2009:**
  - significantly enhanced compared to those found in IGA 1987 and AIA 1998.

- **Enhancement includes:**
  - Broad definition of investment and investor
  - Substantive investment protection
  - Alternative dispute settlement mechanisms
2. INVESTMENT PROTECTION AND DISPUTE SETTLEMENT MECHANISMS IN ACIA (2)

2.1 Broad definition of investment and investor

Figure 7: Definition of “investment”

- Movable+Immovable property + property rights
- Shares+Stocks+Bonds+Debentures
- IPRs
- Rights under contracts (turnkey, construction, management, production or revenue-sharing contract)
- Claims to money/contractual performance
- Business concessions
2. INVESTMENT PROTECTION AND DISPUTE SETTLEMENT MECHANISMS IN ACIA (3)

2.1 Broad definition of investment and investor

Figure 8: Definition of “investor”

- Nationals/Citizen/Perm. Residents of AMS
- Juridical persons in AMS controlled by 3rd party nationals
- Juridical persons in AMS
- ASEAN Investor
- Juridical persons in AMS controlled by 3rd party nationals
2. INVESTMENT PROTECTION AND DISPUTE SETTLEMENT MECHANISMS IN ACIA (4)

2.2 Substantive investment protection

Figure 9: Investment protection

- Fair & equitable treatment (Art. 11a)
- Full protection & security (Art. 11b)
- No unlawful expropriation (Art. 14)
- Free transfer of funds (Art. 13)
- Compensation in case of strife (Art. 12)
2. INVESTMENT PROTECTION AND DISPUTE SETTLEMENT MECHANISMS IN ACIA (5)

2.2 Substantive investment protection

- **Fair and equitable treatment of investment** (Art. 11a)
  - Host AMS:
    - will make decisions in line with its laws
    - not allowed to make arbitrary decisions
  - If any legal action is taken by AMS against investor, investor has right
    - to defend itself through access to lawyers.
    - to appeal any adverse decisions/outcomes

- **Full protection and security for investment** (Art. 11b)
  - Host AMS to provide full protection/security to ASEAN investor’s investment.
  - Protection must be given at all times, including during riots/insurgency

- **Compensation in cases of strife** (Art. 12)
  - Host AMS to accord to investors of other AMS in relation to their investment suffered losses due to armed conflict/civil strife/emergency state
2. INVESTMENT PROTECTION AND DISPUTE SETTLEMENT MECHANISMS IN ACIA (6)

- **Freedom to transfer funds** (Art. 13)
  - Investors have right to make all transfers relating to investment: freely/without delay/in freely convertible currency at market rate/into and out of its territory.
  - Transfers include: contributions to capital; profit, capital gain, dividends, royalties, license fees, technical assistance, technical and management fees, interest, other income from investment.
  - However host AMS may limit investor's right to transfer payments only "through equitable, non-discriminatory, good faith application of laws" relating to bankruptcy, insolvency, protection of creditor’s right; issuing/trading/dealing with securities, futures, options, derivatives.

- **No unlawful expropriation** (Art. 14)
  - Host AMS expropriating investment, directly or indirectly, required to provide proper compensation to affected investors.
  - Host AMS may only expropriate/nationalize investment if:
    - It’s undertaken for public purposes
    - It’s done in non-discriminatory manner
    - Affected investors provided with prompt, adequate, effective compensation, in line with due process of law.
2.3 Alternative dispute settlement mechanisms

- **Under ACIA (Articles 28 - 41):**
  - ASEAN investors can benefit from access to the Investor-State Dispute Settlement (ISDS) mechanism

- **ISDS mechanism:**
  - applicable to claims by investor for damage or loss by reason of alleged breach of any rights (Figure 10)
2. INVESTMENT PROTECTION AND DISPUTE SETTLEMENT MECHANISMS IN ACIA (8)

2.3 Dispute settlement mechanisms

Figure 10: Investor-State Dispute Settlement (ISDS) mechanism
2. INVESTMENT PROTECTION AND DISPUTE SETTLEMENT MECHANISMS IN ACIA (9)

2.3 Dispute settlement mechanisms

a) Causes of action
Disputing investor may file action based on any of following causes:
- NT (Art.5)
- MFN (Art.6)
- Senior management and board of directors (Art.8)
- Treatment of investment (Art.11)
- Compensation in case of strife (Art.12)
- Transfers (Art.13)
- Expropriation and compensation (Art.14)
2. INVESTMENT PROTECTION AND DISPUTE SETTLEMENT MECHANISM IN ACIA (10)

2.3 Dispute settlement mechanisms

b) Forums
Disputing investor may submit claim to any of following institutions at choice:

- Domestic courts of host country, or
- Under various forms of international arbitration:
  - ICSID (International Center for Settlement of Investment Disputes) Convention
  - ICSID Rules of Procedure for Arbitration Proceedings
  - ICSID Additional Facility Rules
  - UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules, or
- Regional Center for Arbitration at Kuala Lumpur, or any other regional center for arbitration in ASEAN, or
- Any other arbitration institution
2.3 Dispute settlement mechanisms

c) Alternative dispute resolution mechanisms

- Although ACIA provides for resolution of disputes through local court/regional/international arbitration, it encourages prompt management of conflicts through other techniques:
  - *Meditation*
  - *Conciliation*: which may run concurrently with arbitration, may begin and be terminated at the request of investors at any time
  - *Consultations and negotiations*: which may be used by disputing parties prior to seeking arbitration
End of presentation

Thank you!