

HIGHLIGHTS OF THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT (ACIA)

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- **Structure of ACIA**
- **Contents of ACIA – An Assessment**
- **Benefits of ACIA**

Mandate of 10TH AIA Council / 39th AEM

- To revise and merge the AIA and IGA Agreements into a comprehensive ASEAN investment agreement (ACIA).
- To draft ACIA taking into account:
 - Main objectives:
 - ❖ to create a free and open investment regime
 - ❖ to achieve economic integration
 - The Guiding Principles approved by AIA Council/AEM
 - The need to enhance ACIA based on international best practices

Structure of ACIA

- **A more comprehensive Agreement:**
 - **Covering 4 pillars i.e. liberalisation, protection, facilitation and promotion**
 - **Inclusion of additional provisions**
 - **Improvement of existing provisions**
- **A total of 49 Articles, 2 Annexes, and 1 Schedule (reservation list of Member States)**

Contents of ACIA - An Assessment -

- **ACIA is in line with the Objectives and Guiding Principles endorsed by the Ministers.**
- **ACIA is more comprehensive than the AIA and ASEAN IGA.**
- **ACIA has taken into account international best practices:**
 - **US Model Investment Text**
 - **NAFTA**
 - **OECD Guidelines for Multinational Enterprises**
 - **Draft ASEAN FTAs (Investment) with China, Korea, Australia/New Zealand**
 - **UNCTAD's assessment on international investment agreements**

Contents of ACIA
- An Assessment -
ACIA vs Guiding Principles

ACIA vs Guiding Principles

GUIDING PRINCIPLE 1

Forward looking, reaffirming, improving and building upon the existing AIA and ASEAN IGA.

ACIA

Forward looking with new provisions such as:

- ❖ Prohibition of Performance Requirements (PPR)
- ❖ Senior Management and Board of Directors (SMBD)

Reaffirm the relevant provisions of AIA and ASEAN IGA, such as:

- ❖ National Treatment (NT)
- ❖ Most Favoured Nation Treatment (MFN)

Further improvement of existing AIA and ASEAN IGA provisions:

- ❖ Investment Dispute between an Investor and Member State (ISDS)
- ❖ Transfer
- ❖ Treatment of Investments

ACIA vs Guiding Principles

GUIDING PRINCIPLE 2

No back-tracking of commitments except with compensation.

ACIA

ACIA has a provision on compensatory adjustment to deal with modification of commitments.

GUIDING PRINCIPLE 3

Balanced in its focus: incorporating liberalisation, promotion, facilitation, and protection

ACIA

ACIA incorporates provisions on liberalisation, promotion, facilitation and protection.

ACIA vs Guiding Principles

GUIDING PRINCIPLE 4

Progressive liberalisation to achieve free and open investment environment, in line with AEC.

ACIA

ACIA adopts a single negative list approach on reservation. Progressive reduction or elimination of reservations in accordance with the Strategic Schedule of AEC in 3 phases (2008-2010, 2011-2013, 2014 -2015).

GUIDING PRINCIPLE 5

Benefit ASEAN-owned investors and companies and foreign-owned ASEAN based investors.

ACIA

ASEAN investors and foreign-owned ASEAN-based investors will enjoy benefits of the ACIA.

ACIA vs Guiding Principles

GUIDING PRINCIPLE 6

Consider granting special and differential (S&D) treatment for the newer ASEAN Member States.

ACIA

New S&D provision through technical assistance, capacity building and facilitation.

Longer timelines to achieve commitments.

GUIDING PRINCIPLE 7

Flexible treatment taking into account individual countries sensitivities.

ACIA

Specific concerns of Member States addressed in ACIA, e.g. through notes and clarifications.

ACIA vs Guiding Principles

GUIDING PRINCIPLE 8

Reciprocal treatment in the enjoyment of concessions as in AIA.

ACIA

No longer relevant to include provision on reciprocity to ensure the benefits of ACIA is enjoyed by all Member States. International investment agreements do not have this provision.

GUIDING PRINCIPLE 9

Preservation of ASEAN preferential treatment.

ACIA

Extends MFN automatically to all Member States as provided for in the AIA. New provision containing commitment to enhance ASEAN economic integration

ACIA vs Guiding Principles

GUIDING PRINCIPLE 10

Allow expansion to cover other sectors in the future.

ACIA

Article on Scope of Application allows for the inclusion of any other sector as may be agreed upon by all Member States.

Contents of ACIA
- An Assessment -
ACIA vs AIA/ASEAN IGA

ACIA vs AIA/ASEAN IGA

- **ACIA is more comprehensive than AIA/ASEAN IGA.**
- **Generally, they have similar objectives: to enhance the investment environment in ASEAN to attract domestic investments and FDI.**
- **Generally similar provisions:**
 - National Treatment,
 - Treatment of investments,
 - Transfers,
 - Expropriation and Compensation,
 - Subrogation,
 - BOP Safeguards,
 - General Exceptions,
 - Transparency,
 - State-State Dispute Settlement,
 - Investor-State Dispute Settlement.

ACIA vs AIA/ASEAN IGA

- **ACIA maintains automatic MFN provision of AIA. Preferential treatment granted by any Member State under any existing or future Agreement must be extended to all other Member States.**
- **ACIA has incorporated new provisions and made improvements to existing provisions of AIA/IGA.**

ACIA vs AIA/ASEAN IGA

ACIA

- A single investment agreement that provides clearer interaction of relevant provisions: e.g. liberalisation and protection.
- Grants immediate benefits to both ASEAN investors and ASEAN-based foreign investors. Shorter deadline to achieve free and open investment environment (2015).

AIA/ASEAN IGA

- AIA and ASEAN IGA are 2 separate agreements with no clear interaction between the two.
- AIA benefits ASEAN investors first (between 2003-2010) and non-ASEAN investors (by 2020).

ACIA vs AIA/ASEAN IGA

ACIA

- Clear and transparent procedures for obtaining specific approval in writing.
- Comprehensive and clearer definitions in line with international investment agreements.
- Covers portfolio investment. However, reservations can be taken.

AIA/ASEAN IGA

- No procedures on approval in writing.
- Limited definitions.
- AIA excludes portfolio investment.

ACIA vs AIA/ASEAN IGA

ACIA

- **New Article on Prohibition of Performance Requirements (TRIMs), with provision for joint assessment to consider additional commitments (TRIMs-Plus).**
- **New Article on SMBD to encourage inflow of key foreign managerial and senior management personnel.**
- **Clearer procedures on Modification of Commitments.**
- **Modification of commitments subject to compensatory adjustment to ensure balance of benefits.**

AIA/ASEAN IGA

- **No Article on Performance Requirements.**
- **No article on Senior Management and Board of Directors (SMBD)**
- **Modification procedures not provided.**
- **No provision for compensatory adjustment.**

ACIA vs AIA/ASEAN IGA

ACIA

- ISDS provisions are more comprehensive, including detailed procedures.
- Clear transfer provisions, including criteria to delay or prevent transfers.
- Expropriation article has an annex to clarify “measures equivalent to expropriation”.

AIA/ASEAN IGA

- ISDS provision under ASEAN IGA are less comprehensive.
- No provision on delay or prevention of transfers.
- No such annex in ASEAN IGA. May expose host country unnecessarily to claims under ISDS.

ACIA vs AIA/ASEAN IGA

ACIA

- **New article on consultation among Member States on ACIA matters and its implementation.**
- **New article on S&D treatment to assist newer Member States to develop capacity. Timeline is shorter (in line with AEC).**
- **New article to deny benefits of ACIA to investors with no substantive business operations (e.g. shell companies).**

AIA/ASEAN IGA

- **No such provision in AIA.**
- **No specific article on S&D treatment. Longer timeline to phase out exceptions.**
- **No such article in AIA/ASEAN IGA.**

Contents of ACIA - An Assessment -

ACIA vs International Best Practices

ACIA vs International Best Practices

- **ACIA provisions on liberalisation and protection are comparable to international best practices. These include:**
 - **National Treatment (NT)**
 - **Automatic Most Favoured Nation (MFN) Treatment**
 - **Senior Management and Board of Directors (SMBD)**
 - **Treatment of investments – fair and equitable, full protection and security**
 - **Non discriminatory Compensation in Case of Strife**
 - **Prohibition of Performance Requirements**
 - **Balance of Payment Safeguard**
 - **General Exceptions**
 - **Security Exceptions**
 - **Denial of Benefits**

ACIA vs International Best Practices

ACIA

- ACIA has joint commitments to promote and facilitate investments in ASEAN through specific provisions.
- ACIA has definitive deadline for liberalisation and integration (2015)
- Adoption of single negative list approach with progressive liberalisation commitments.

International Best Practices

- Other international investment agreements do not have similar provisions.
- Most international investment agreements have no specific deadlines for liberalisation and integration.
- Similar to EU without deadlines.
- Agreements of other developed countries adopt US model, using 2 annexes approach.

ACIA vs International Best Practices

- **Compared to the model text of developed countries, ACIA has some limitations:**
 - **No TRIMs-plus commitments e.g.:**
 - ❖ prohibition of export requirement,
 - ❖ value-added requirement,
 - ❖ local hiring requirement,
 - ❖ technology transfer requirements, etc.

Policy space still required by some ASEAN Member States to develop domestic industries. However, there is provision for a joint assessment of Performance requirement to consider the need for additional commitments.

ACIA vs International Best Practices

(Cont)

- **Investor-State Dispute Settlement (ISDS) provisions covers only post establishment. Could be further expanded to cover the whole life cycle of investment.**
- **Does not provide for automatic binding (ratchet) of autonomous liberalisation. ASEAN still need policy flexibility to develop domestic industries.**
- **These element could be looked into when ASEAN economies become more developed.**

Benefits of ACIA to

- ASEAN Investment Environment
 - Business Sector

Benefits of ACIA to ASEAN Investment Environment

- Will achieve free and open investment regime by 2015 provided Member States are ready to reduce or eliminate investment impediments (reservation lists) according to the 3 Strategic Schedules of the AEC;
- ACIA's comprehensive provisions will enhance protection of investment and improve investors' confidence to invest in ASEAN;
- Encourages further development of intra-ASEAN investments, especially among MNCs based in ASEAN through expansion, industrial complementation and specialisation; and
- Enhances economic integration.

Benefits of ACIA to Business Sector

- **ASEAN-based investors can enjoy the benefits of non-discriminatory treatment when they invest in other ASEAN countries. They will be granted similar treatment as domestic (host country) investors, and also similar treatment vis-à-vis other ASEAN-based investors.**
- **In case of disputes with host governments, investors have a choice to bring a claim in domestic courts (where applicable), or international arbitration.**
- **Investors and their investments will be granted fair and equitable treatment and full protection and security.**

Benefits of ACIA to Business Sector (Cont)

- **Free transfer of funds, including capital, profits, dividends, etc.**
- **Investments will not be expropriated, except for public purposes. Clear provisions on compensation based on fair market value.**
- **Non-discriminatory treatment for compensation for losses arising from civil strife, riots, etc.**
- **Cooperation from ASEAN governments in terms of promotion and facilitation of investment.**

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