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by M. Ewing-Chow and G.R. Fischer

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ASEAN IIAs: CONSERVING REGULATORY SOVEREIGNTY WHILE PROMOTING THE RULE OF LAW?

BY MICHAEL EWING-CHOW[*] & GERALDINE R. FISCHER[+]

Investment flows have altered in just the last few years.

Traditionally, some have viewed the investment paradigm as a divide between developed (capital exporting) and developing (capital importing) countries. This view is evident in Judge Mohamed Shahabuddeen's dissent in the *Malaysia Historical Salvors v. Malaysia* Annulment Decision where he notes that the question that separates him from the majority is "whether a contribution to the economic development of the host State is a condition of an ICSID 'investment'."[1] In his opinion, ICSID jurisdiction was not meant to be solely dependent on the will of the parties but rather the will of the parties subject to conformity with the overriding objectives of ICSID as a body concerned with the economic development of the host State.[2] The former he referred to as the 'subjectivist' view and the latter as the 'objectivist' view, suggesting that "[t]he cleavage marks a titanic struggle between ideas, and correspondingly between capital exporting countries and capital importing ones."[3]

The very sudden economic rise of Asian and Latin American states (coupled with the on-going financial crisis of many developed states) have made that distinction not as clear as it may have been less than half a decade ago. China, ASEAN[4] and to a lesser extent India, Mexico and Brazil have all become significant capital exporters.[5] In the case of South Korea, it has in the last five years become a net capital exporter. The following table clearly illustrates this development.

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[1] *Malaysian Historical Salvors SDN Bhd. v. Malaysia*, ICSID Case No. ARB/05/10, para.2 (Annulment Decision Judge Shahabuddeen Dissenting Opinion, 16 April 2009) available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1031_En&caseId=C247 (visited 31 August 2011) (hereinafter "*MHS Annulment Dissent*").

[2] See *MHS Annulment Dissent*, para.4.

[3] *MHS Annulment Dissent*, para. 62.

[4] The Association for Southeast Asian Nations (ASEAN) is comprised of: Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

[5] *See also*, Karl Sauvant, *New Source of FDI: The BRICs- Outward FDI from Brazil, Russia, India and China*, 6(5) J. of World Investment & Trade 639 (Oct. 2005) (describing the increase in outward foreign investment from BRICs and policy implications).

Table 1. ASEAN, Brazil, China, India and Mexico Increase in Capital Imports and Exports[6] [USD at current prices and exchange rates in millions]

Region/ Country	Capital Import			Capital Export		
	2005	2010	% Increase	2005	2010	% Increase
ASEAN	404,044	938,059	232%	151,458	431,531	285%
Brazil	181,344	472,579	261%	79,259	180,949	228%
China[7]	272,094	578,818	213%	57,206	297,600	520%
India	43,202	197,939	458%	9,741	92,407	949%
Mexico	226,740	327,249	144%	29,641	66,152	223%
S. Korea	104,879	127,047	121%	38,683	138,984	359%

China's new economic reality has transformed its investment treaty policy.[8] China is now the second largest economy in the world and its capital exports have increased 520% (to about USD 297.6 Billion in 2010) from 2005-2010.[9] For example, the early Chinese Bilateral Investment Treaties (BITs) did not have a National Treatment (NT) clause. The China-UK BIT of 1986 contained the first NT clause, which still limited the obligation to a "best endeavors" provision rather than a binding commitment.[10] Further showing the trend towards liberalization, the China-Germany BIT of 2003 removed the "subject to local laws" limitation in the previous NT clause found in the 1983 China-Germany BIT, and merely grandfathered existing non-conforming Chinese measures that were incompatible with the NT clause.[11]

[6] The data on capital import and export was taken from UNCTADSTAT available at http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx (visited 29 August 2011). The ASEAN numbers are a compilation from the data from each of the 10 ASEAN members and as such reflect intra-ASEAN investments. As each ASEAN member is responsible for its own investment policies, this still reflects the rise in capital exports from ASEAN members. We are grateful to CIL Associate, Liu Gehuan for her assistance in creating this table.

[7] The numbers for China does not include Hong Kong, Macau and Taiwan.

[8] Wei Shen, *Is this a Great Leap Forward? A Comparative Review of the Investor-State Arbitration Clause in the ASEAN-China Investment Treaty: From BIT Jurisprudential and Practical Perspectives*, 27(4) J. OF INT'L ARB. 379 (2010)("the underlying rationale of signing BITs has changed and has focused more on using BITs as legal instruments for the protection of Chinese overseas FDI while Chinese enterprises strive for global growth").

[9] See *supra* n.6. See also Norah Gallagher and Wenhua Shan, CHINESE INVESTMENT TREATIES: POLICIES AND PRACTICE (Oxford University Press, 2009); Stephan Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L COMP. L. 73-118 (2007).

[10] *Ibid*, Gallagher and Shan (2009), 45 and the China-UK BIT, Art 3(3).

[11] *Ibid*, Gallagher and Shan (2009), 45 and the China-Germany BIT (2003) Art 3(2) and Protocol, point 3.

In addition, where previously all of China's IIAs have required that any claim alleging a breach of China's obligations be dealt with exclusively by the Chinese People's Courts or other designated administrative bodies, China's latest and current Model BIT (Version III) grants access to international arbitration, including ICSID arbitration, for all investor-state disputes.[12] This reflects China's increasing self-awareness of its role as a major capital exporter, and the importance of having rules to protect its investors going abroad. While there has only been one investor-State dispute filed in ICSID against China in the past,[13] the reciprocal nature of IIAs will mean that China's new openness is likely to result in more cases against it in the future. China understands this and has made the strategic decision to allow this remedy in order to balance the totality of its interests.

ASEAN's international investment agreements (IIAs) also reflect its new position as a major capital exporter with a 285% increase (to about USD 432 billion in 2010) in its capital exports in the same period.[14] As we will see in more detail below, the ASEAN states' desire to protect outbound investments (including intra-ASEAN investments) is evident even in provisions conventionally seen as carve-outs to protect a sovereign's right to regulate.

In this paper, we will scrutinize certain key provisions of these IIAs to demonstrate that, while the host State retains its regulatory rights, they are tempered with conditions we believe were meant to encourage more transparent administrative processes, which may not be as prevalent in many ASEAN states' domestic legal system. This development is in line with the ASEAN Investment Agreements' objectives to "create a liberal, facilitative, transparent and competitive investment environment in ASEAN"[15] as well as to improve "transparency and predictability of investment rules, regulations and procedures conducive to increased investment among Member States."[16] We will elaborate on this below.

In a recent article, Schill suggests that the requirement that investors first exhaust China's Administrative Review Procedure, established in 1999, before accessing international arbitration, which is found in Chinese BITs since 2000, could have been "to strengthen the effectiveness of this newly created domestic remedy and the domestic institutions in charge of it". [17] Similarly, one could suggest that ASEAN countries have undertaken international obligations to strengthen their domestic administrative structures. Even if this was not the conscious intent, it could be an unintended result in ASEAN.

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[12] *Ibid*, Gallagher and Shan (2009), 39-40.

[13] *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15 (filed 24 May 2011). The ICSID website indicates that on 22 July 2011 the proceedings were suspended pursuant to the parties agreement.

[14] See *supra* n.6.

[15] ACIA, Art. 2. *See also* ACHIA, Preamble; AKIA, Preamble memorializing the Contracting Parties' "commitment to create a liberal, facilitative, transparent and competitive investment regime, with business-friendly environment.

[16] ACIA, Art. 1(d).

[17] *See* Stephan Schill, *Tearing Down the Great Wall: the New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. OF INT'L & COMP. LAW 73, 92 (2007).

I. ASEAN Investment Agreements

In 2009, the ASEAN member countries signed four agreements related to investment. The first, the ASEAN Comprehensive Investment Agreement (ACIA), governs the international investment regime among the members. The ACIA builds on the region's two earlier investment agreements, the 1987 ASEAN Agreement for the Promotion and Protection of Investments and the 1998 Framework Agreement on the ASEAN Investment Area.[18] Eight ASEAN members have ratified the ACIA and the agreement will come into effect once Thailand and Indonesia ratify it.[19] Indonesia is in the process of completing the relevant procedures,[20] and the recent elections in Thailand has given hope to ASEAN states that Thailand may be able to ratify it soon by providing the Thai officials with more certainty regarding governmental policies.[21]

After solidifying the international investment regime among the ASEAN member countries, ASEAN countries signed the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), which includes a chapter dedicated to investment, the next day, 27 February 2009.[22] Shortly thereafter, the ASEAN countries signed Agreements on Investment under the Framework Agreement on Comprehensive Economic Cooperation with the Republic of Korea and the People's Republic of China (AKIA and ACHIA) on 2 June 2009 and 15 August 2009, respectively.[23] Only the ACHIA and AANZFTA have entered into force.[24] These four investment agreements, the ACIA, AANZFTA, AKIA, and ACHIA, will be known collectively as the "ASEAN IIAs" throughout this paper.

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[18] ASEAN Secretariat, "ASEAN Comprehensive Investment Agreement, Fact Sheet" available at http://www.aseansec.org/Fact%20Sheet/AEC/2009-AEC-024.pdf (visited 31 August 2011).

[19] See ASEAN's Ratification list available at http://www.asean.org/Ratification.pdf (visited 31 August 2011) and ACIA Art 48 which provides that all 10 ASEAN members need to ratify the ACIA before it takes effect.

[20] Antara News, *RI to ratify ASEAN comprehensive investment agreement soon* (9 August 2011) available at http://www.antaranews.com/en/news/74599/ri-to-ratify-asean-comprehensive-investment-agreement-soon (visited 31 August 2011) citing Indonesian Trade Ministry`s Director for ASEAN Cooperation Iman Pambagyo's explanation that it took time to synchronize the ACIA's negative list and Indonesias own).

[21] *Ibid*.

[22] "Overview of ASEAN-Australia-New Zealand FTA" available at http://www.fta.gov.sg/fta_C_aanzfta.asp?hl=47 (visited 31 August 2011).

[23] The text of the Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the Republic of Korea ("AKIA") is available at http://www.fta.gov.sg/AKIA/ak%20investment%20agreement%20(signed).pdf (visited 31 August 2011). The text of the Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People's Republic of China ("ACHIA") is available at http://www.fta.gov.sg/acfta/asean-china_inv_agreement(certified_copy).pdf (visited 31 August 2011).

[24] Malaysia's Ministry of Trade and Industry reported that the ACHIA entered into force. See report available at http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_b609671a-c0a81573-aba0aba0-c94c2e0c (visited 31 August 2011). Similarly, the AANZFTA entered into force for all but Indonesia. See Australian Department of Foreign Affairs and Trade report available at http://www.dfat.gov.au/fta/aanzfta/index.html (visited 31 August 2011)

An article recently published on TDM describes the provisions of these IIAs.[25] We, therefore, do not propose to discuss the structure of the ASEAN IIAs, but instead focus on specific provisions in these IIAs that support our narrative.

In the subsequent sections, we will analyze the following ASEAN IIA provisions: (1) the "Approval in Writing" requirement; (2) the General Exception; and (3) the Expropriation Annex. We will examine these provisions to illustrate our thesis that the ASEAN states seek to preserve the right to regulate within a rule of law framework in the investment context, which also functions to protect outward-bound investments. This would be consistent with their evolution from traditional capital importing states with limited administrative procedures and their new role as capital exporters.

A. "Approval in Writing" Requirement

The 1987 ASEAN Agreement on the Promotion and Protection of Investments provided that ***"[t]his 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."[26] Therefore, in order for an investment to be protected by the 1987 Agreement, it had to be "approved in writing."

The ACIA and AKIA retain the requisite "approval in writing",[27] but provides "[f]or the purpose of protection, the procedures relating to specific approval in writing shall be as specified in Annex 1 (Approval in Writing)."[28] While this does not on the face of it appear to be a paradigm shift from the 1987 Agreement, this Annex outlining the "approval in writing" prerequisite is a major innovation. This elucidating Annex is particularly important in light of the *Yaung Chi Oo Trading PTE v. Gov't of Union of Myanmar*[29] (hereinafter "YCO") decision, the only investment arbitration that dealt with prior ASEAN investment agreements. The YCO tribunal held that it did not have jurisdiction, because the investor could not provide evidence that an existing investment had been officially approved in writing even though Myanmar never specified a specific

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[25] L. Marchessault, "Recent Trends in International Investment Agreements in Asia" TDM 1 (2011) *available at* http://www.transnational-dispute-management.com (visited 5 September 2011).

[26] 1987 ASEAN Agreement for the Promotion and Protection of Investment, Art. II(1) available at http://www.asean.org/12812.htm (visited 31 August 2011) (emphasis added).

[27] ACIA Art. 4(a) states that a "covered investment" means "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". Footnote 1 provides that the processes specified in Annex 1 apply to "Approval in Writing".

[28] *Ibid*.

[29] *Yaung Choi Oo v. Myanmar*, 42 ILM 540 (2003), ASEAN ID Case No ARB/01/1 (Decision on Jurisdiction, 31 March 2003) (Sucharitkul, Crawford, Delon).

process for approval.[30] With the inclusion of Annex I, these ASEAN IIAs now provide some discipline, and perhaps transparency, to the authorization process.

Through Annex 1 of the ACIA and AKIA, the Member States are compelled to have a more transparent procedure.[31] In particular, Annex 1 of the ACIA and AKIA obliges each Member State "[w]here 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."[32]

With respect to the approval process, the ASEAN host State must at the very least provide the investor with these procedural protections. The terms "inform", "identify and notify" and require "reasons for such denial" are clear actions that the host State must undertake; a State's failure to do so could result in judicial or administrative review or international arbitration. In the past, many ASEAN states failed to provide a transparent process for approval and could reject the investment without providing reasons. Now the host State will have to comply with the transparency obligation and justify any denial. This, we believe, will inevitably encourage better process-oriented governance in the respective ASEAN Member State.

B. General Exception Similar to GATT Article XX

The ASEAN IIAs, with the exception of the AANZFTA, provide a broad General Exception clause, similar to Article XX of the General Agreement on Tariffs and Trade

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[30] *YCO*, at paras. 60 *et seq.*

[31] The ACHIA does not contain the Approval in Writing explanatory Annex, but Thailand, the only Party to the ACHIA that requires an approval in writing for an investment to be protected, must provide the name and contact details of the authority that grants the approval, although the same procedures outlined in Annex I are not specified. ACHIA, Art. 3(3). Under AANZFTA, only Thailand and Vietnam require approval in writing, but the countries are not required to give additional details. AANZFTA, Ch.11, Art. 2, n. 1.

[32] ACIA, Annex 1 "Approval in Writing"(emphasis added); AKIA, Annex 1 "Approval in Writing"(emphasis added).

(GATT),[33] aimed at protecting a State's right to regulate in important areas, such as to protect health.[34] This provision was first incorporated in ASEAN in the 1998 Framework Agreement on the ASEAN Investment Area.[35] Although traditionally viewed as a provision to carve out broad regulatory policy space, one can also consider the exception as providing general guidance to the host State. This General Exception clause shows the State how to regulate by focusing on the valid justification for such regulations, and the processes for introducing such regulatory measures.

The General Exception Clause (like the chapeau and list of GATT Article XX) elaborates that nothing in the agreement prevents a party from adopting or enforcing certain measures related to sensitive areas so long as they are not done in an arbitrary or unjustifiable discriminatory manner, where like conditions prevail, or as disguised restrictions on investors or covered investments, if they are:

- necessary to protect public moral or to maintain public order;[36]
- necessary to protect human, animal or plant life or health;
- necessary to secure compliance with laws or regulations not inconsistent with this agreement, including those related to:
  (i) prevention of deceptive/fraudulent practices to deal with effects of a default on a contract;
  (ii) protection of the privacy of individuals in relation to processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and
  (iii) safety;
- aimed at ensuring the equitable or effective imposition or collection of taxes in respect of investments/investors;[37]
- imposed for the protection of national treasures or artistic, historical or archaeological value;
- relating to the conservation of exhaustible natural resources if made effective in conjunction with restrictions on domestic production or consumption. [38]

The General Exception clause, like GATT Article XX, is very limited given its strict wording. These measures can only be availed if they are "necessary" and connected with