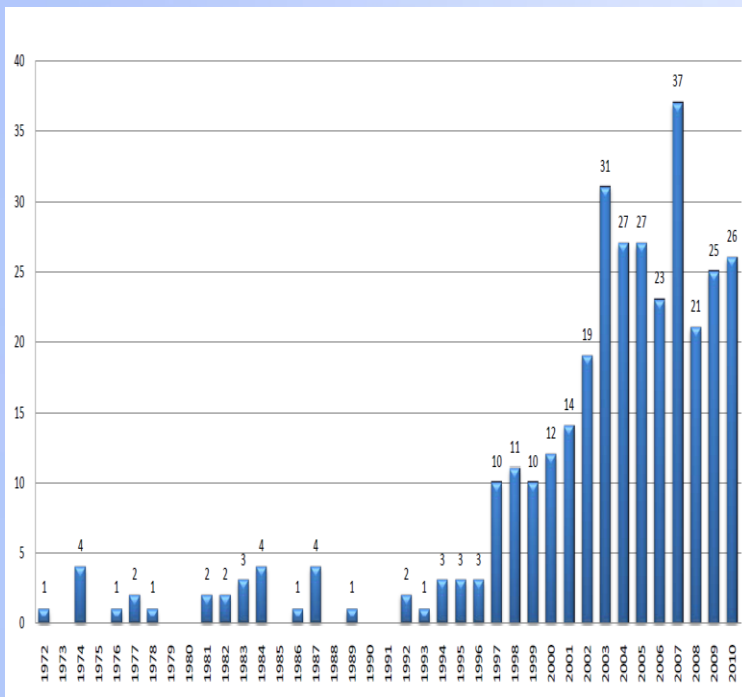


Trends and Tensions between Old and New IIAs

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Trends



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1. Increasing Litigation
2. Common Provisions - MFN, NT, FET, Expropriation, Free Transfer, ISD - APEC Report (2007)
3. Protect investors & promote FDI but recently more creation of policy space carve-outs

Responses to Financial Crises

- Capital Controls (Malaysia 1997)
- Pesification (forced conversion into pesos) (Argentina 2001)
- Freezing of utility tariff rates (Argentina 2001)
- Government Support of Some Financial Institutions
- Governmental Purchasing of Debt (US 2007)
- Domestic Stimulus Packages (to prevent Recession)
- Q: Expropriation, MFN, NT, FET, Free Transfer?

Old IIA – US-Argentina BIT (s. 1991)

- ARTICLE XI
- This Treaty shall not preclude the application by either Party of measures **necessary for the maintenance of public order**, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, **or the Protection of its own essential security interests.**

New IIAs – ASEAN (s. 2009)

- In 2009, ASEAN countries entered into 4 successive IIAs:
 1. ASEAN Comprehensive Investment Agreement (ACIA)
 2. ASEAN-AUS-NZ FTA with an Investment Chapter
 3. ASEAN-China Investment Agreement (ACHIA)
 4. ASEAN-Korea Investment Agreement (AKIA)
- All based on ACIA.
- The new ASEAN IIAs (like other new IIAs) tend to explicitly provide for public policy space for governmental regulation.

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: [fn 10]
 - (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)**

Fn 10 For the avoidance of doubt, **any measure of expropriation relating to land shall be as defined in the Member States’ respective existing domestic laws** and regulations and any amendments thereto, and shall be for the purposes of and upon payment of compensation in accordance with the aforesaid laws and regulations.

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 [indirect expropriation], requires a case-by-case, fact-based inquiry that considers, among other factors:
- (a) the **economic impact** of the government action, [...];
 - (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 [indirect expropriation]**.
- Q: **Methanex (without due process limitation?)** cf. **Metalclad?**

ACIA (s. 2009) A.7 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 ... to maintain public order**; [...]
(*US Gambling?*)
2. Insofar as measures affecting the supply of financial services are concerned, paragraph 2 (Domestic Regulation) of the [**Annex on Financial Services of the GATS**] shall be incorporated into and form an integral part of this Agreement, mutatis mutandis.

WTO GATS Exceptions

- General Exceptions “public order” (Art XIV) (replicated in ACIA A.7)
- IMF Fund Request (Art XI:2) (replicated in ACIA A.13)
- Safeguard BoP (Art XII) (replicated in ACIA A. 16)
- For Financial Services in Financial Services Annex (incorporated in ACIA by reference):
 - “measures for prudential reasons... to ensure the integrity and stability of the financial system”
- Note the absence of a “**necessary**” requirement like that found in GATS Art XIV.
- (Q: Self-judging? Good faith? Reasonable?)

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
- ***CMS, Sempra & Enron (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

Interpretative Tensions

1. Exceptions – how to interpret?
 - Secondary rule or primary rule? (***CMS Annulment***)
 - Customary international law or specialized jurisprudence? (Context?)
 - None or minimal exceptions c.f. explicit detailed carve-outs
2. Limited text to work with vs. Extensive new clauses to interpret:
 - “Non-discriminatory” measures that are excluded from indirect expropriation
 - “like conditions” and the chapeau to the General Exceptions in ACIA
 - “prudential” measures (Self-judging? Good faith? Reasonable?)
3. How do we give effect to the intention of the parties?
 - New IIAs are very different from the old IIAs. How should old IIAs be interpreted if states have not chosen to amend them?
 - Conversely, could the new IIAs be evidence of a new *telos* and therefore require a different teleological approach?