



APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION

Presentations

Kuala Lumpur, Malaysia
15-19 June 2009

Produced for:
Asia Pacific Economic Cooperation Secretariat
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APEC#209-CT-01.5



APEC-UNCTAD Regional Training
Course on the Core Elements of
International Investment Agreements in
the APEC Region



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Investment promotion provisions in International investment agreements

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Why do countries sign IIAs?

For **host countries** (traditionally developing)

- To improve their investment climate and to attract foreign investors and FDI
- To portray a positive international image of 'openness' and legal stability and predictability

For **home countries** (traditionally developed)

- To protect their investments abroad
- Some countries are both capital importing and exporting (both home and host) - twin objectives: investment attraction and investment protection.

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The importance of investment promotion provisions in IIAs

- IIAs do not always have a substantial impact on FDI inflows
- In some cases the correlation between the conclusion of IIAs and increased FDI flows is weak
- Therefore investment promotion provisions in IIAs need to be strengthened

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IIAs and investment promotion strategies

- The prime objective of IIAs from a host country perspective is to attract FDI
- IIAs should be seen as an integral part of national investment promotion strategies
- IIAs create a stable and predictable legal environment for attracting FDI
- Despite this: IIAs focus clearly on investment protection NOT promotion

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Only a few IIAs include investment promotion provisions

- Only a small minority of IIAs include specific investment promotion provisions
- Investment promotion provisions are drafted as voluntary commitments (not legally binding)
- Usually the provisions are very broad, without follow up mechanisms
- IIAs are evolving rapidly, new issues are involved – this is an indication that countries are interested in exploring new provisions
- Opportunity to strengthen investment promotion provisions in IIA negotiations

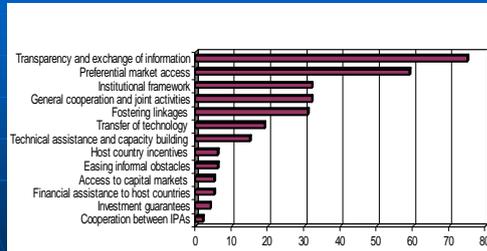
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Examples of investment promotion provisions in IIAs

- Transparency and exchange of information
- Creation of an institutional framework
- Joint activities (investment seminars)
- Fostering linkages (stimulate joint ventures)
- Transfer of technology
- Host country incentives
- Technical assistance
- Easing of informal obstacles to investment
- Cooperation between investment promotion agencies

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Forms of investment promotion measures in IIAs



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Transparency and exchange of information

ECONOMIC PARTNERSHIP AGREEMENT BETWEEN INDONESIA AND JAPAN

"Article 98

Promotion and Facilitation of Investment

1. (a) Both Parties shall cooperate in promoting and facilitating investments between the Parties in the energy and mineral resource sector through ways such as:

[...]

(ii) facilitating the provision and exchange of investment information including information on the laws, regulations and policies of the Parties;

(iii) encouraging and supporting investment promotion activities of each Party or the business sectors of the Parties, relating to, in particular, the exploration, exploitation and production of energy and mineral resource goods and the infrastructural facilities in the energy and mineral resources sector; and

(iv) discussing effective ways of creating stable, equitable, favourable and transparent conditions for investors"

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Transparency and exchange of information

Economic Partnership Agreement between Japan and Thailand

" Each Party shall ensure that its laws, regulations, administrative procedures, and administrative rulings of general application with respect to any matter covered by this Chapter [Investment] are published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them "

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Creation of an institutional framework

Economic Partnership Agreement between Japan and Mexico

Article 139: Cooperation in the Field of Trade and Investment Promotion

For the purposes of the effective implementation and operation of this Article, a Sub-Committee on Cooperation in the Field of Trade and Investment Promotion (hereinafter referred to in this Article as "the Sub-Committee") shall be established pursuant to Article 165 [Joint Committee]

The functions of the Sub-Committee shall be: (a) reviewing the implementation and operation of this Article; (b) discussing any issues related to this Article; (c) reporting the findings of the Sub-Committee to the Joint Committee".

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Joint activities

The Free Trade Agreement between Panama and Singapore

"Article 16.3

investment promotion shall include: organizing joint investment promotion activities, conferences, seminars, workshops, meetings, outreach/education programs, and joint promotion activities of specific projects of interest."

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Fostering linkages

The Free Trade Agreement between Tunisia and Turkey

"Article 37

With the view to further enhance trade and economic activities, the Parties shall give priority to promoting business and investment opportunities as well as joint ventures between small and medium sized enterprises (SMEs) of the two countries. Within this context, the Parties will:

- exchange expertise on entrepreneurship, management, research and management centers, quality and production standards;
- provide market information to create investment opportunities;
- furnish published documents concerning SMEs."

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Transfer of technology

Encouraging transfer of technology:

Cooperation Agreement between EU and Sri Lanka

"The Contracting Parties will, in accordance with their mutual interest and the aims of their development strategy in this area, **promote scientific and technological cooperation with a view to: (a) fostering the transfer of know-how and stimulating innovation**"

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Transfer of technology

Restricting transfer of technology:

Economic Partnership Agreement between Japan and Chile

Performance Requirements

"Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with investment activities of an investor of a Party or of a non-Party in its Area:

[...]
transfer technology
[...]"

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Technical assistance

Economic Framework Agreement between ASEAN and India

"[t]he Parties agree to implement **capacity building programmes and technical assistance**, particularly for the New ASEAN Member States, in order to **adjust their economic structure and expand their trade and investment with India**"

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Host country incentives

- Host developing countries often use fiscal instruments, such as tax holidays, favorable tax regimes and exemptions to attract FDI
- Some IIAs address the issue of host country incentives:

The Agreement on Promotion, protection and Guarantee of Investments between the Member States of the Islamic Conference:

"The contracting parties will endeavour to **offer various incentives and facilities for attracting capitals** and encouraging its investment in their territories such as commercial, customs, financial, tax and currency incentives, especially during the early years of the investment [...]" (emphasis added)."

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Host country incentives

The BIT between the Czech Republic and the United Arab Emirates:

"Article 2
Promotion and Protection of Investments
[...]"

(ii) Investors of either Contracting State shall be entitled to apply to the competent authorities in the host State for the appropriate facilities, **incentives** and other forms of encouragement and **the host State shall grant them all assistance, consents, approvals, licenses and authorizations to such an extent and on such terms and conditions** as shall, from time to time, be determined by the laws and regulations of the host State."

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Host country incentives

- As illustrated above, most IIA provisions on incentives are drafted in a general manner
- No sufficient clarification as to the conditions under which such measures should be granted, and to what extent
- This may create difficulties when the agreement enters the implementation phase

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Incentives and performance requirements

- Some IIAs condition the granting of incentives with the fulfillment of some performance requirements
- Host countries may impose certain types of requirements on foreign investors, requiring them to achieve certain objectives
- The objective: maximize the beneficial impact of foreign investment on national development objectives

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Easing of informal obstacles to investment

Free Trade Agreement between the EFTA States and Lebanon

"The EFTA States and Lebanon shall aim to promote an attractive and stable environment for reciprocal investment. Such promotion should take the form, in particular, of [...]
(c) development of uniform and **simplified administrative procedures**"

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Cooperation between investment promotion agencies

- Joint promotion activities may take the form of closer cooperation between investment promotion agencies of the contracting parties
- Most IIAs do not mention investment promotion agencies and their role in promoting foreign investment
- A few agreements call for closer collaboration in this respect

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Cooperation between investment promotion agencies

The Framework Agreement on the Association of Southeast Asian Nations (ASEAN) Investment Area (1998):

"In respect of the Promotion and Awareness Programme, Member States shall:

1. Organise joint investment promotion activities e.g., seminars, workshops, inbound familiarisation tours for investors from capital exporting countries, joint promotion of specific projects with active business sector participation;
2. Conduct regular consultation among investment agencies of ASEAN on investment promotion matters;
3. Organise investment-related training programmes for officials of investment agencies of ASEAN;
4. Exchange lists of promoted sectors/industries where Member States could encourage investments from other Member States and initiate promotional activities; and
5. Examine possible ways by which the investment agencies of Member States can support the promotion efforts of other Member States."

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Cooperation between investment promotion agencies

The investment promotion article of the Cotonou Agreement between the European Union and the group of African, Caribbean and Pacific states (ACP) calls specifically on the parties to:

"support capacity building for domestic investment promotion agencies and institutions involved in promoting and facilitating foreign investment"

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Cooperation between investment promotion agencies

The FTA between the Republic of Korea and Singapore:

1. The co-operation between the Korea Trade- Investment Promotion Agency ("KOTRA") and the International Enterprise Singapore Board ("IE Singapore") [...] shall include the following:
 - (a) joint organisation of industry specific business missions and activities which are focused on mutually agreed high growth sectors, including but not limited to, the infocommunications technology, electronics, automotive, food & beverage and the logistics sectors;
 - (b) electronically linking the online business matching databases of the Parties to bring together companies keen on establishing business ties with each other;
 - (c) facilitation of Korean enterprises to explore new markets in the region through Singapore and business collaboration with Singaporean companies by setting up a Korean Business Support Centre in Singapore, and subject to there being sufficient demand and interest by Singaporean companies, Singapore will establish a Business Centre in Korea; and
 - (d) using all reasonable efforts to encourage each Party's companies to participate in exhibitions organised by the other Party, in particular if the exhibitions pertain to sectors which the Party is actively promoting in its country.
2. The Parties shall, where appropriate, facilitate such co-operation between KOTRA and IE Singapore.

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Voluntary commitments or binding obligations ?

- Contrary to investment protection, investment promotion provisions are not legally binding
- Drafted in a very general manner (except in rare cases)
- No follow-up mechanism to monitor if the provisions have been implemented
- Ample flexibility for the parties as to how and whether or not to implement them

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Strengthening investment promotion provisions

- Investment promotion provisions are active in nature (commitment to do something) – investment protection provisions are passive (refrain from discriminatory measures)
- Most IIAs focus on host country measures (transparency, easing of obstacles to investment)
- Need to put more focus on home country measures (technical assistance, TOT, financial assistance to host countries,)
- Establish a follow up mechanism (council or a committee to monitor investment promotion provisions)

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Conclusion

- A major deficiency in most IIAs dealing with investment promotion is their lack of specificity
- They often provide no details on the pre-conditions and modalities of the investment promotion activities agreed upon
- Strengthening investment promotion provisions will contribute to more balanced IIAs (currently the provisions favour the capital exporting country)
- It will also increase the impact of IIAs on FDI flows

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THANK YOU

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Open discussion:

Investment promotion provisions in IIAs: the role of IPAs

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Making use of IIAs

- To what extent does your IPA use international investment agreements in its investment promotion strategy?

Involvement in the negotiations of IIAs

- Is your IPA involved in the actual negotiations of international investment agreements?
- What kind of provisions would you like to see included in IIAs?
- Is your IPA involved in IIA feasibility studies and identification of treaty partners?

Application of IIAs

- To what extent are investment promotion provisions in IIAs applied? What is the role of your IPA in implementing these provisions?
- Do you cooperate with IPAs from other countries as a result of an IIA Provision?

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