



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

Presentations

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Consistency and Inconsistency in ASEAN Investment Agreements

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Order of Presentation

- (1) Why consistency is important but difficult to achieve;
- (2) Examples of consistencies and inconsistencies in ASEAN Investment Agreements; and
- (3) Conclusion.

Structure of ASEAN Investment Agreements

ASEAN Investment Agreements mainly:

- Covering 4 pillars i.e. liberalisation, protection, facilitation and promotion
- 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, and 1 Schedule (reservation lists of Member States and also bilateral partner)

Why Consistency is important?

- Predictability in the management of the agreements;
 - Post-signing and implementation.
- Prevention and management of dispute.
- Reason:
 - Managers of the IGA are different from the negotiators.
 - Negotiators may come from various departments which may not manage the agreements.
 - peculiarity and demand of trading partners may contribute to inconsistencies in various IGA signed by the same country.

Review of ASEAN Investment Agreements

- ASEAN Australia New Zealand Free Trade Agreement Investment Chapter signed in Cha-am Thailand, 2009.
- ASEAN Comprehensive Investment Agreement, signed in Cha-am Thailand, 2009.
- ASEAN Korea Investment Agreement signed in Jeju Island, 2 June 2009.

The ACIA

- incorporates elements of investment liberalisation, promotion, awareness, facilitation, and protection. Investment liberalisation will be progressive with a view towards achieving a free and open investment environment in the region in line with the goals of the ASEAN Economic Community (AEC).
- seek to improve investors' confidence in the region and encourage further development of intra-ASEAN investment, especially among multinational corporations based in ASEAN through expansion, industrial cooperation and specialisation. It will contribute to enhancing economic integration.

AANZFTA

- the single most ambitious undertaking made by ASEAN since expanding its outward-looking economic regime to include region-to-region free trade agreements with major trading partners.
- the first time ASEAN has embarked on comprehensive FTA negotiations covering all sectors including goods, services and investment, intellectual property simultaneously; AND
- the agreement is the most comprehensive trade agreement that ASEAN has ever negotiated.

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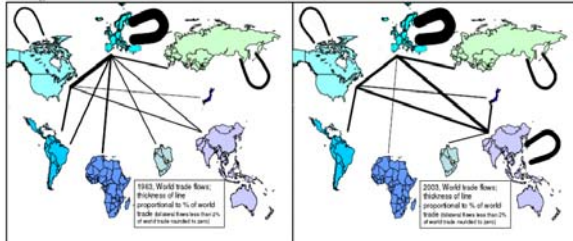
AKFTA

- complements the Trade in Goods Agreement which was signed on Aug 26, 2006 and Trade in Services Agreement on Nov 21, 2007;
- promote investment flows and create a liberal, facilitative, transparent and competitive investment regime in ASEAN and Republic of Korea through:
 - progressively liberalising the investment regime; creating conducive environment for ASEAN and Republic of Korea's investors and their investments; promoting cooperation on a mutually beneficial basis; encouraging and promoting the flow of investments and cooperation between ASEAN and Republic of Korea; improving transparency of investment rules; and providing for the protection of investments.

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Problems in Managing the Spaghetti Bowl in the multi-polar trade world

Figure 1: World direction of trade, 1963 and 2003.



Note: The left panel shows world trade flows in 1963; the thickness of lines indicates the bilateral flow's share of world trade (flows less than 2% are rounded to zero for clarity). The right panel shows the same for 2003.
Source: WTO (2004), GATT (1996, Table A.13).

Source: Baldwin 2006 9

Scope of the Agreement

- ACIA
 - does not cover pre-establishment.
 - Applies to existing investments as at the date of entry into force of this Agreement as well as to investments made after the entry into force of this Agreement
- Compared with ASEAN – Korea:
 - does not cover pre-establishment.
 - Does not apply to investment 'claims arising out of events which occurred, or claims which had been raised, prior to the entry into force of this Agreement.'
 - This implies that only existing and future investment between ASEAN Member States be protected.

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Covered Investment

- ACIA – has to be specifically approved in writing.
- AANZFTA – has been admitted by the host party
 - * Thailand – it has to be approved in writing,
 - Vietnam –has been specifically registered/ approved in writing).
- AKFTA – specifically approved in writing by competent authority.

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Investor

- ACIA - "a natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State";
- AANZFTA and AKFTA- "a natural person of a Party or a juridical person of a Party that seeks to make, is making, or has made an investment in the territory of another Party";
 - (fn) "seeks to make" an investment refers to an investor of another Party that has taken active steps to make an investment. Where a notification or approval process is required for making an investment, an investor that "seeks to make" an investment refers to an investor of another Party that has initiated such notification or approval process.

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National Treatment

- All national treatment provisions refer to the 'like circumstance'
- But different approach in drafting:
 - ACIA - 'in relation to investor'- "...with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory."
 - (note the difference is underlined) , AANZFTA and AKFTA follows the ACIA wordings.

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National Treatment (2)

AANZFTA and AKFTA

- the application of the National Treatment is subject to work programme.
- "Work Programme" concept: the parties to further discuss the applications and the schedules upon a certain period after entry into force of the Investment Agreement.

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MFN

- ACIA – refers to 'like circumstances' for 'admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.'
- AKFTA – subject to a 'work programme'.
- AANZFTA – still subject to a 'work programme'.

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MFN (2)

ACIA

- General MFN treatment does not mean that 'as to oblige a Member State to extend to investors or investments of other Member States the benefit of any treatment, preference or privilege resulting from:
 - (a) any sub-regional arrangements between and among Member States; or
 - (b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement.

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Senior Management

- Covered in the ACIA and AKFTA
 1. A Member State shall not require that a juridical person of that Member State appoint to senior management positions, natural persons of any particular nationality.
 2. A Member State may require that a majority of the board of directors of a juridical person of that Member State, be of a particular nationality, or resident in the territory of the Member State, provided that this requirement does not materially impair the ability of the investor to exercise control over its investment.

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Work Programme

- AANZFTA and AKFTA
- AANZFTA:
 - schedules of reservations; treatment of investment in services which does not qualify as commercial presence in Chapter on Trade in Services; the application of MFN treatment, and procedures for the modification of schedules of reservations.
- Discussions to be concluded within 5 years from the date of entry into force.

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Work Programme

AKFTA:

- MFN Treatment;
- TRIMs-plus elements on Performance Requirements; Schedules of Reservations;
- Procedures for modification of Schedules of Reservations;
- Annex on Expropriation and Compensation;
- Annex on Taxation and Expropriation; and
- Investment Dispute Settlement between a Party and an Investor of any other Party.

As in AANZFTA, discussions to be concluded within 5 years.

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Few Other Observations

- All investors must read the ASEAN agreements with care – many footnotes with exclusions and special provisions for certain ASEAN member states.
- ASEAN Agreements must be read with the BITs. No clear provision whether BITs are now repealed, null and void.
- BIT, where applicable still relevant, e.g. in the AKFTA – in reference to submission to jurisdictions/forums.

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Conclusions

- ASEAN Members States have more restrictive approach as between themselves in the ACIA;
- ASEAN Members States are more open when dealing with the bilateral partners; and
- ASEAN Agreements requires careful management approach.

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Thank You

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