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

Presentations

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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.

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

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

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

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
Activities of specific projects of interest.

Outreach/education programs, joint promotion.

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.

The Free Trade Agreement between Panama and Singapore

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:

- (i) facilitating the provision and exchange of investment information including information on the laws, regulations and policies of the Parties;
- (ii) encouraging and supporting investment promotion activities of each Party in the business sectors of the other Party, 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
- (iii) discussing effective ways of creating stable, equitable, favourable and transparent conditions for investors.

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.

The Free Trade Agreement between Tunisia and Turkey

Article 37

The Parties will:

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

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 [...]"

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"*

Host country incentives

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

"Article 2
Promotion and Protection of Investments

(1) 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."

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).*

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
### 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.

### 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.

### 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:
  1. Joint promotion of trade opportunities, investment, and promotion of promising sectors.
  2. Development of uniform and simplified administrative procedures.

### 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 investment-related training programmes for officials of investment agencies.
  2. Conduct regular consultation among investment agencies of ASEAN on investment promotion matters.
  3. Exchange information on investment-related training programmes for officials of investment agencies of ASEAN.
  4. Exchange lists of interested parties or industries where Member States could encourage investments from other Member States and initiate promotional activities.
  5. Exchange possible ways by which the investment agencies of Member States can support the promotion efforts of other Member States.

### 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."
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.

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).

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.

Open discussion:

Investment promotion provisions in IIAs: the role of IPAs

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?