

International Investment Agreements (IIAs)

Issues and considerations for ASEAN

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Overview of presentation

- **Introduction to international investment agreements (IIAs)**
- **General trends and developments**
- **Do agreements help attract FDI?**
- **Emerging issues**
 - **Environment / climate change**
 - **Need for rebalancing?**
 - **Consolidation**

Introduction to IIAs

- **International investment agreements comprise:**
 - **Bilateral Investment Treaties (BITs)**
 - **Double taxation treaties (DTTs)**
 - **International agreements other than BITs or DTTs with investment provisions, e.g.**
 - **Free Trade Agreements (FTAs)**
 - **Economic Partnership Agreements (EPAs)**

Similar coverage but different scope

- **Preamble**
- **Positive vs. negative list**
- **Definitions/scope/coverage: investment normally defined widely**
- **Mostly protection, some promotion and sometimes liberalization**
- **MFN/NT; pre-establishment vs. post-establishment; investor vs. investment**
- **Exceptions**
- **Prohibition of performance requirement (increasing lists)**
- **Expropriation/compensation**
- **Fair and equitable treatment – more precise language**
- **Protection from strife**
- **Transparency**
- **Balance of payments protection**
- **Subrogation**
- **Denial of benefits**
- **Repatriation of funds/transfers**
- **Environmental/labour clauses (increasingly common)**
- **Joint investment committee**
- **Subnational government**
- **Dispute settlement: state-state; state-investor (ICSID, UNCITRAL, etc.)-trend towards more precise language**

Reasons for entering into IIAs

- **Attract more investment from abroad** (by providing protection which decreases the risk for investors)

- **Promote outward FDI** (by ensuring protection and fair and equitable treatment of own investors in partner country)

Recent developments (UNCTAD)

- **Number of BITs and DTTs steadily increasing, but at a declining rate**
- **More DTTs than BITs signed during last few years (partly due to efforts to eliminate tax havens)**
- **Increasing renegotiation of BITs**
- **FTAs and Economic Partnership Agreements with comprehensive investment chapters concluded at increasing rate**
- **Trend away from bilateral agreements to more integrated and inclusive approach/regional agreements**

Recent developments, cont.

- **From protection/promotion to include liberalization**
- **Increased rebalancing between investor and host country rights and obligations and economic and public policy objectives (e.g. environment)**
- **More innovative and precise language**
- **Ongoing review of arbitration rules; emphasis on dispute prevention and alternative dispute resolution**

Asian and Pacific countries active BIT signatories

- **ESCAP member countries in Asia and the Pacific signatories to 1355 BITs by May 2010 (~50% of global total)**
 - **243 between ESCAP members in the region**
 - **of which 26 between ASEAN members**
 - **1112 with other countries**
- **Also signatory to 1171 DDTs and 379 other IIAs.**
- **Two Asian countries among world top ten signatories**
 - **China (no 2 with 125 BITs)**
 - **Rep. of Korea (no 10 with 90 BITs)**

IIAs in ASEAN

- **ASEAN countries signatory to 352 BITs, 309 DDTs and 198 other IIAs (May 2010)**
- **26 BITs signed between ASEAN members**
 - 16 of which have entered into force
 - Viet Nam has the most (except with Brunei); Singapore the least
 - Brunei has no BIT with any other ASEAN member
 - Latest: In 2008 BITs were signed between Cambodia-Lao PDR, and Myanmar-Thailand.
- **ASEAN Comprehensive Investment Agreement (ACIA), signed Feb. 2009**
 - Overrides the earlier Framework Agreement on the ASEAN Investment Area (1998) and the ASEAN Agreement for the Promotion and Protection of Investments (1987)
- **ASEAN-China Investment Agreement, signed August 2009**
- **Other agreements with investment chapters include**
 - Tripartite ASEAN-Australia-New Zealand FTA (2009)
 - Economic Partnership Agreements between Japan and several ASEAN countries (Indonesia, Malaysia, Philippines, Singapore)

Commitments vary

- **Thailand-Indonesia, Thailand-Cambodia, China-Singapore BITs: no NT**
- **China-Singapore BIT: only investment (not investor)**
- **Thailand-Philippines; Singapore-Indonesia: MFN/NT**
- **Japan-ASEAN bilateral BITs/EPAs: MFN/NT, investors and investment**
- **Japan-ASEAN CEPA: like framework agreement, no commitments**

ACIA vs. AIA/IGA

- **Liberalization and protection combined in one agreement**
- **Both have MFN and NT**
- **ACIA also covers portfolio investment (AIA didn't)**
- **New article on prohibition of performance requirements**
- **New article on Senior Management and Board of Directors (SMBD)**
- **Immediate benefit for both ASEAN investors and ASEAN based foreign investors**
- **Shorter deadline for free and open environment (2015)**
- **More comprehensive ISDS provisions, more detailed procedures**
- **More comprehensive and clearer definitions**
- **Clearer procedures for approval in writing; modification of commitments**
- **Modifications of commitments subject to compensation**

Source: ASEAN secretariat, Highlights of the ACIA, presentation dated 26 August 2008.

ACIA vs. ASEAN BITs/FTAs

	ACIA	BITs/FTAs
MFN & NT	Includes both	Often includes both, but not always
Portfolio investment	Included	Not always included
Liberalization (Pre-establishment)	Yes (negative list)	Often not included
Performance requirements	Covered	Varies

Do IIAs help in attracting FDI?

- **IIAs can influence a company's decision to invest, but:**
 - **Role is limited (IIAs alone cannot do the job); economic determinants more important**
 - **Impact is generally stronger in the case of FTAs with investment chapters than with regard to BITs**
 - **Also depends on the kind of FDI**
 - **The conclusion of IIAs need to be embedded in broader policies covering all host country determinants of FDI**

Emerging issues

○ Rebalancing

- **the rights and obligations of investors and those of the host country**
- **economic and other policy objectives, e.g. protection of the environment**
- **Ensuring policy space**

○ Consolidation

Do investment agreements allow for the promotion of “clean” FDI?

- **Only few IIAs include obligations relating to pre-establishment**
 - **Most governments have retained the right to:**
 - **decide which kind of FDI will be allowed**
 - **decide which sectors, if any, they want to provide incentives for FDI attraction to**

Example from China

- **On 13 April 2010, the State Council of China announced new guidelines (*“Further Views on the Utilization of Foreign Capital”*), which aim to:**
 - **encourage foreign funds in:**
 - **high-end manufacturing, high technology, modern services, new energy, energy efficiency, outsourcing and environmental protection**
 - **China's central and western regions, with a particular focus on environmentally sound and labour-intensive businesses**
 - **restrict investment in polluting or energy-intensive projects and in industries suffering from overcapacity.**
- **China has not agreed to pre-establishment in its IIAs (China-Japan BIT exception).**

Do pre-establishment obligations limit action?

- **No difference in terms of the possibility or limits to enforce environmental legislation**
 - **It is only the fair and equitable treatment (standstills) and expropriation clauses that are part of normal agreements that could potentially impose limits**
- **The sectors for which pre-establishment rights have been negotiated can no longer be prohibited from entering country**
 - **But their environmental performance would still be governed by national regulations / legislation**

How can IIAs be adapted to increase policy space?

- **Clarifications on MFN/NT (“like circumstances”)**
- **Strengthening general exceptions/general obligations/investor obligations**
- **Stronger and binding commitments on investment promotion**
- **Introducing language that draws a line between a compensable indirect expropriation and the adverse effects endured by a foreign investor as a result of bona fide regulation in the public interest**
 - **e.g. Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (2007)**

Example of newer BIT language related to environment

- **Japan-Viet Nam BIT (Art. 21):**

“The Contracting Parties recognize that it is inappropriate to encourage investment by investors of the other Contracting Party by relaxing environmental measures. To this effect each Contracting Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion in its Area of investments by investors of the other Contracting Party.”

Example of newer BIT language related to environment - ACIA

- **Example: ACIA (2009).**
 - **Article 17 (General Exceptions):** “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:....
 - **“(b) necessary to protect human, animal or plant life or health;”**
 - **“(f) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production and consumption.”**

Rebalancing required???

- **Some criticisms against current agreements**
 - Too narrowly focused, addressing only the rights of the foreign investors (and not their obligations)
 - Investment protection provisions strong, investment promotion provisions weak
 - Dispute settlement mechanism has shortcomings (not transparent enough, prone to conflicts of interest)
 - In response, IISD developed in 2005 a “Model International Agreement on Investment for Sustainable Development”
- **At the same time**
 - Agreements are about protection of investors and initiated to attract investments by decreasing the risk for investors.
 - The obligations of investors are to follow host country law.
 - How strong can you make promotion provisions, and why?
 - Countries are still more or less following the usual form of agreements, with some modifications (e.g. provisions related to environment & dispute settlement).

Consolidation

- **Noodle bowl of IIAs, worse than RTAs**
- **Too many overlaps and duplications. Scope for consolidation, i.e. ACIA overrides ASEAN mutual BITs (?)**
- **As IIAs are increasingly subsumed in RTAs, consolidation of RTAs perhaps easier: ASEAN +++ , APTA?**
- **ASEAN countries FTAs vs. ASEAN as a group**
- **From MAI to RAI? Or better: towards an integrated Asian community**
- **ASEAN Economic Community first step but will it work? Move from rhetoric to action**

Thank you!



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