



**MENA-OECD
INVESTMENT
PROGRAMME**

International Investment Agreements: Strategies and Content

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- **Alternative approaches:**
 - Bilateral investment treaties (preferred by European states)
 - Free trade agreements (combine trade and investment matters, preferred by US and Japan)
 - Regional investment treaty
- **Study typical content of treaties concluded by MENA countries: regional practice**



Investment Treaty Models

- Possibly draft a model bilateral agreement (model investment chapter for a FTA), involving an inter-ministerial process of coordination;
 - Downside: a complicated process –
 - Advantage: facilitates understanding by all relevant ministries, simplifies subsequent negotiations
- MENA countries are following a worldwide trend by signing an increasing number of BITs/FTAs
- To facilitate negotiations model treaties are used by MENA negotiators
- Drafting group for model BITs/FTAs can be set up with the OECD

Modern BIT/FTA Models

- Models have been evolving over the past decade
- Example 1: The US model treaty
- Example 2: The Egyptian model treaty



Strategy for Country Selection

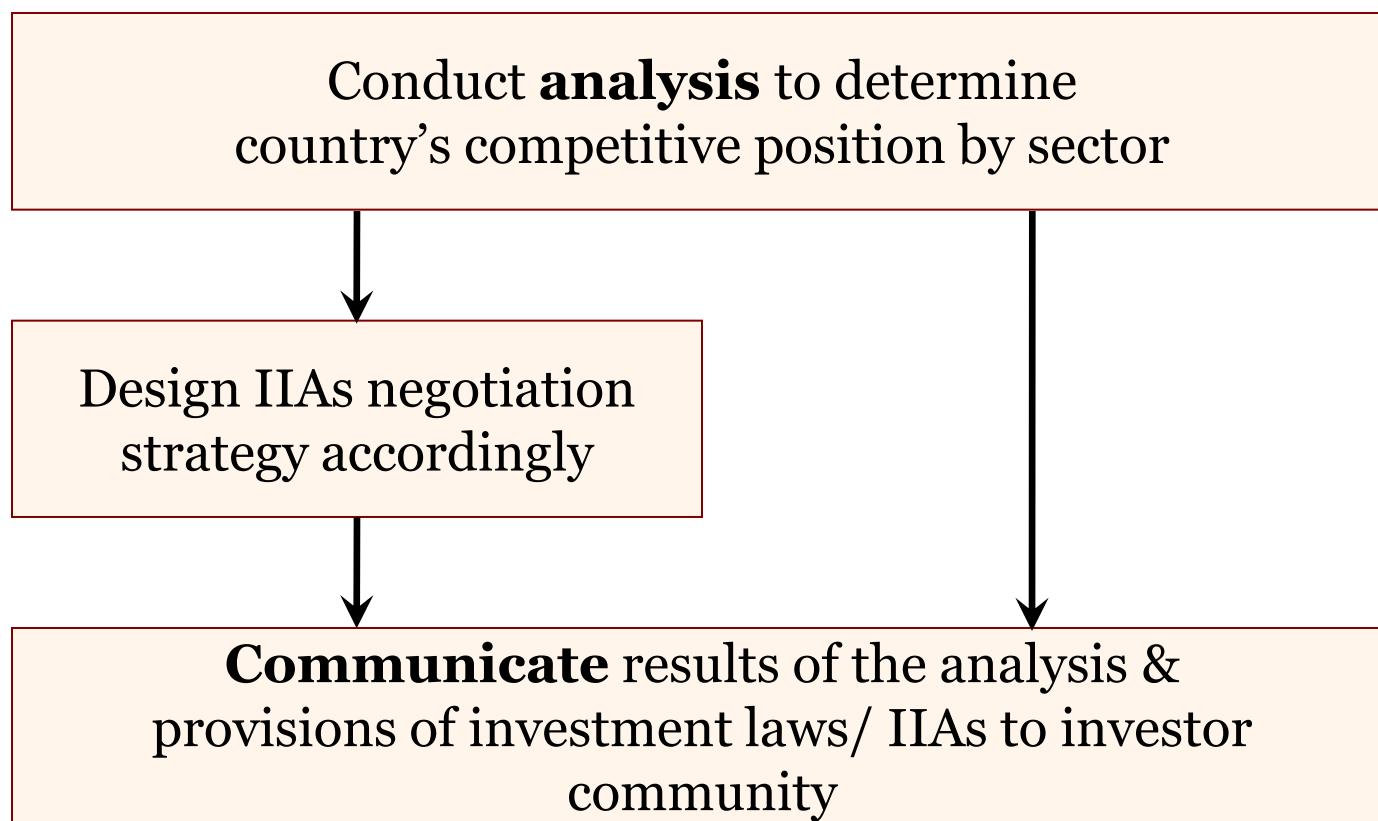
- BITs/FTAs promote cooperation and trigger bilateral Investment flows.
- As a preliminary step, listing the countries with which cooperation should be reinforced is necessary
- This involves a country selection process.

Country selection method

- Country selection depends on a number of factors.
 - Openness of the economy
 - The scope of the **privatisation** policy is crucial. Which are the State owned Enterprises that may be open to foreign participation? Under which terms?
 - A **sector based** development strategy should be designed: where does a country have a comparative advantage? Which sectors would be better off with additional foreign participation?
 - Industrial strenghts of the country selected

Framework

From country competitiveness assessment to investment rule-making and marketing/ promotion





Indicators of Competitive Position by Sector

Market Attractiveness

- Market growth
- Total output share and growth rate
- Value added
- Exports as proportion of total exports
- Trade balance
- Degree of industry consolidation
- Number of establishments

Country Benefit

- FDI stock
- Employment level
- Potential for employment generation
- Potential for innovation
- Spill-over to other industries

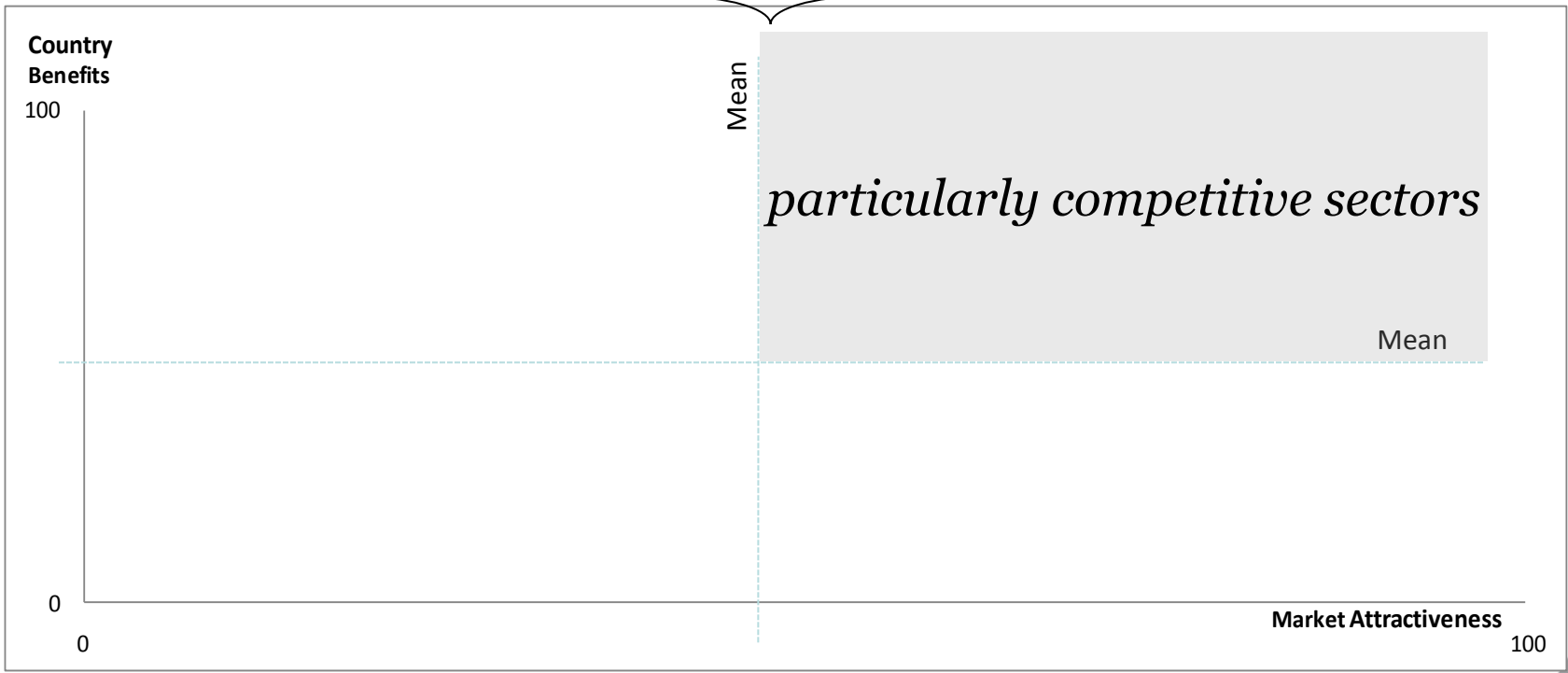


The OECD PSD Approach

Indicators of Competitive Position by Sector

Market Attractiveness

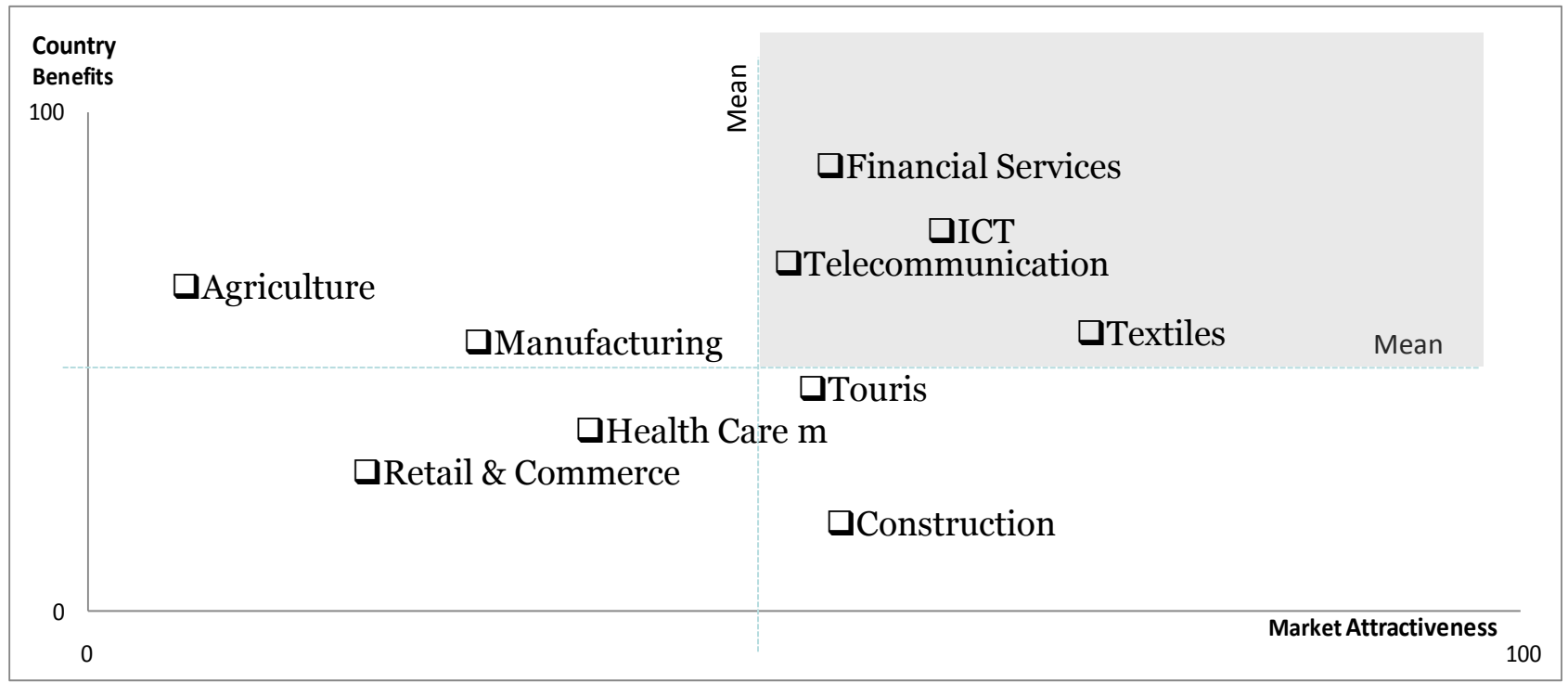
Country Benefit





The OECD PSD Approach

Example



What is the purpose of international investment agreements (IIAs)?

- Primary purpose
 - Reinforcing economic co-operation between the contracting parties.
 - Creating favourable conditions for investments made by one of the contracting parties in the territory of the other contracting party.
- **Underlying purpose**
 - Promoting joint economic prosperity and development.

Types of IIAs

- Multilateral Agreements – the most difficult to achieve
 - MAI, WTO “Singapore issues”
- Regional Agreements
 - European Union association agreements
 - NAFTA
 - ASEAN Investment Area
 - Energy Charter Treaty
- Bilateral Free Trade Agreements, Investment Chapters
- Bilateral Investment Treaties

IIAs = BITs or FTAs

- Admission and treatment
 - Non-discrimination (MFN and/or national treatment)
 - **Fair and equitable treatment**
 - Full security
- Investor/investment
- Expropriation
 - Prompt, adequate and effective compensation
- Transfers
 - Free transfers of funds
- Key personnel
- Dispute settlement
 - State-to-state and investor-to-state disputes
- Exceptions and exemptions

Alternative rules for admission

Study and decide on alternative rules concerning modalities of admission:

- No rule on admission in treaties, this approach gives freedom to admit on basis of evolving domestic priorities; this approach preferred by European countries or
- Principle of free admission for national of other state (with negative list/indicating sectors which remain closed), (U.S. approach)
- Principle of free admission, with positive list of open sectors

1. **Notion of investor** (definition of nationals which benefit from treaty);
 - special issues :
 - Should nationals of other state benefit which have no genuine connection to that other state (“denial of benefit clause”, found in U.S. treaties?).
 - Should certain local companies be treated as foreign companies?

2. **Notion of investment** (definition of those assets to be covered by guarantees of treaty);
 - typically a broad clause (“every asset having an economic value”) and five illustrative groups of assets;
 - special issue: should only investments be covered which are made after entry into force of treaty, or should earlier investments also be covered?

National Treatment/MFN/FET

1. **National treatment** of investor of other side;
 - Special issue: is it desirable to exempt certain sectors in view of a need to protect certain weak domestic sectors?

2. **Most-favored-nation** clause;
 - Special issue: is it desirable to exempt certain areas? In particular: is it desirable to exempt rules on dispute settlement?

3. **Fair and equitable treatment (FET)**.
 - Special issue: should this clause refer to FET in accordance with international law”? This qualification will presumably lead to a lesser degree of protection. SPECIAL NOTE: Study this clause carefully; in arbitral practice, this is the clause which has most significance

Fair and equitable treatment

- Filling gaps ('good faith')
- Predictability and stability of legal regime (Argentinean cases)
- Unilateral approach prohibited – but: renegotiation clauses
- Respect basic expectations ('legitimate expectations'), not: business risks
- Respect permits, licenses granted
- Transparency
- Consistency
- Due process – notice, right to hearing, to challenge

- **Fair and equitable treatment in accordance with international law**
 - Refers to International Minimum standard – customary law
 - Past definition of customary law: outrageous, unfair
 - Now: flexible standard, evolves over time
 - Exact scope not clear
 - Some tribunals: no difference with ‘fair and equitable’

Expropriation

Note: In practice these clauses do not vary, neither for direct nor for indirect expropriation;
indirect expropriation: important in arbitral practice

•Direct Expropriation

‘new international economic order’, Charter of economic rights and duties of states (GA Resolution), reaction of ‘the West’: bilateral investment treaties

Compensation: scope remains an issue, ‘market value’

Rights of investors = definition of investment (broad asset based definition)

•Indirect Expropriation

Measures having the same effect, ‘tantamount to’

10 decisions of tribunals: narrow reading

General regulation (environment, others)

Transfer of funds, Umbrella clause

Transfer of funds (of investment, profits);

- Study: is it desirable to restrict the principle of free transfer of funds in order to protect foreign exchange reserves?

Umbrella clause, a clause that protects contracts with nationals of other state.

- Are such clauses desirable?

Harassment, impairment of management, full protection and security, due process, transparency; study content; in particular transparency and due process, other concepts less important in practice

International Investment Agreements

- **Dispute settlement**
 - State-to-state not important in practice
 - Investor-state disputes: typically forum ICSID, but also UNCITRAL
- Rules on **extraordinary circumstances**: emergencies, armed conflict etc;
 - study: which types of situations should be covered in these clauses?
- **Duration of treaty**;
 - length of protection for investments made while treaty is in force

Investor vs. State Arbitration

- ICSID = International Center for the Settlement of Investment Disputes
- 160 countries members
- Reference in BITs to ICSID arbitration, special consent necessary
- Past: not many cases
- Now: 120 cases pending
- Cheap, effective and speedy? Not really cheap, effective +, speedy in some cases (3 years on average)
- ICSID Arbitrations: no review, no standing body, problem of consistency of jurisprudence
- Alternatives? Reforms of ICSID unlikely in the immediate future
- Other arbitration bodies exist

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For information about the MENA-
OECD Investment Programme and its
Activities, please refer to:

www.oecd.org/mena/investment