



**MENA-OECD  
INVESTMENT  
PROGRAMME**

# **International Investment Agreements: Strategies and Content**

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**Dr. Alexander Böhmer,  
OECD Private Sector Development Division**

- **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

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



# Strategy for Country Selection

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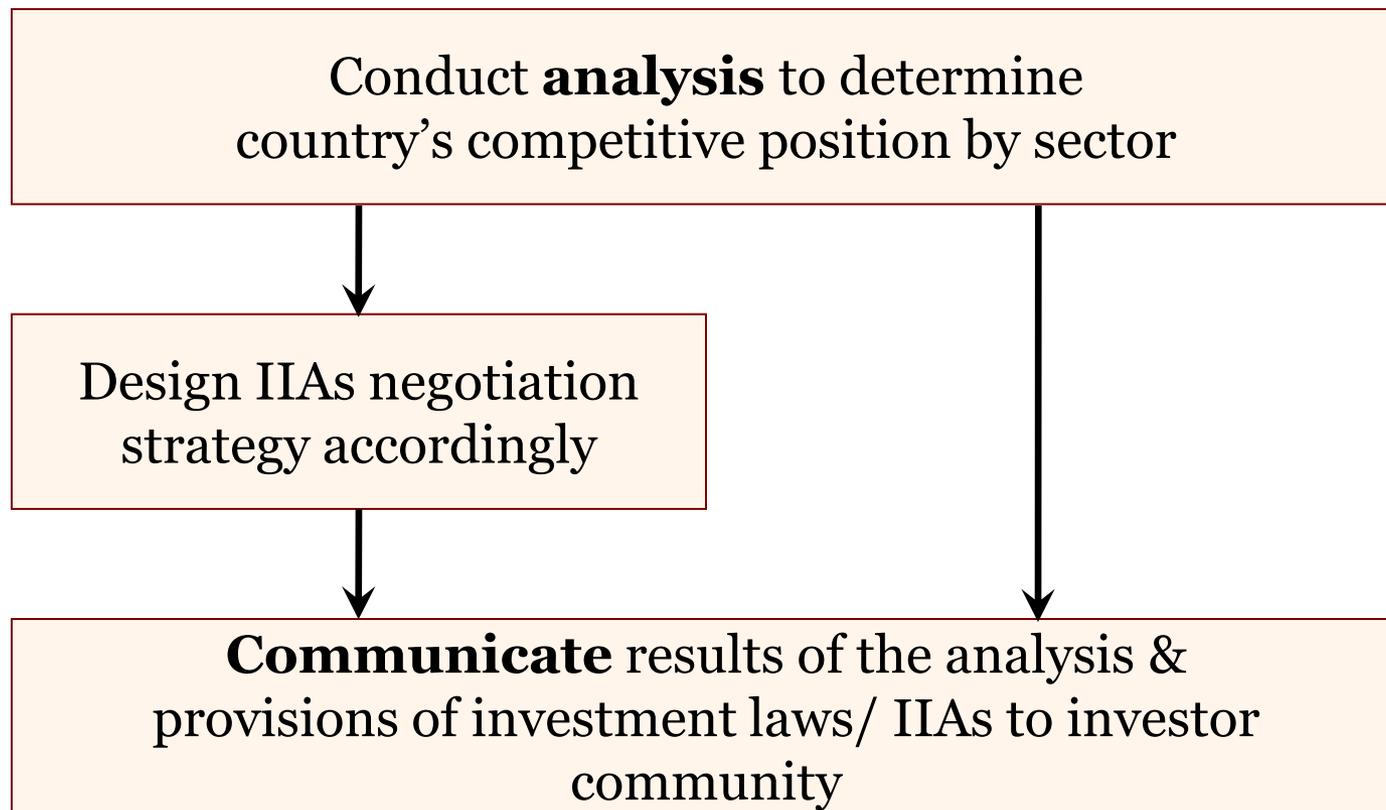
- BITs/FTAs promote cooperation and trigger bilateral Investment flows.
- As a preliminary step, listing the countries with which cooperation should be reinforced is necessary
- This involves a country selection process.

# 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

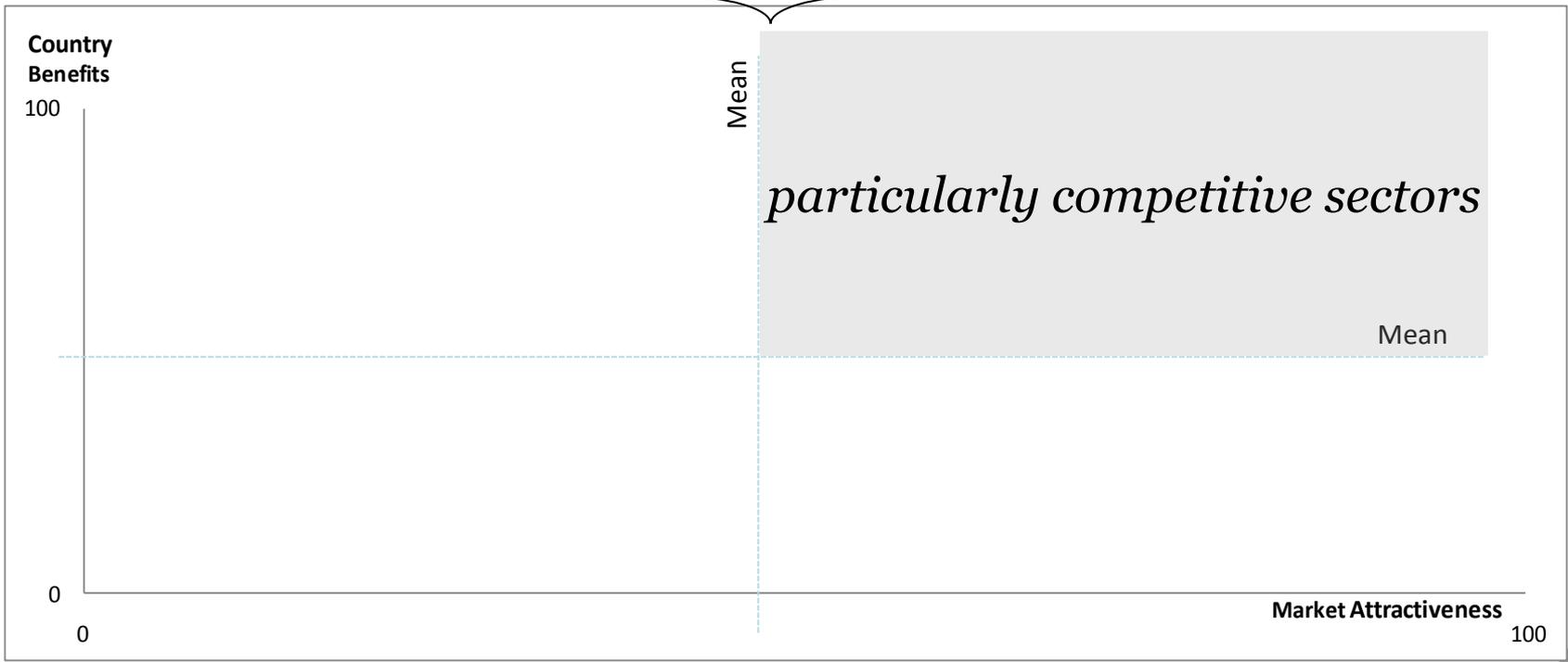


# The OECD PSD Approach

## Indicators of Competitive Position by Sector

Market Attractiveness

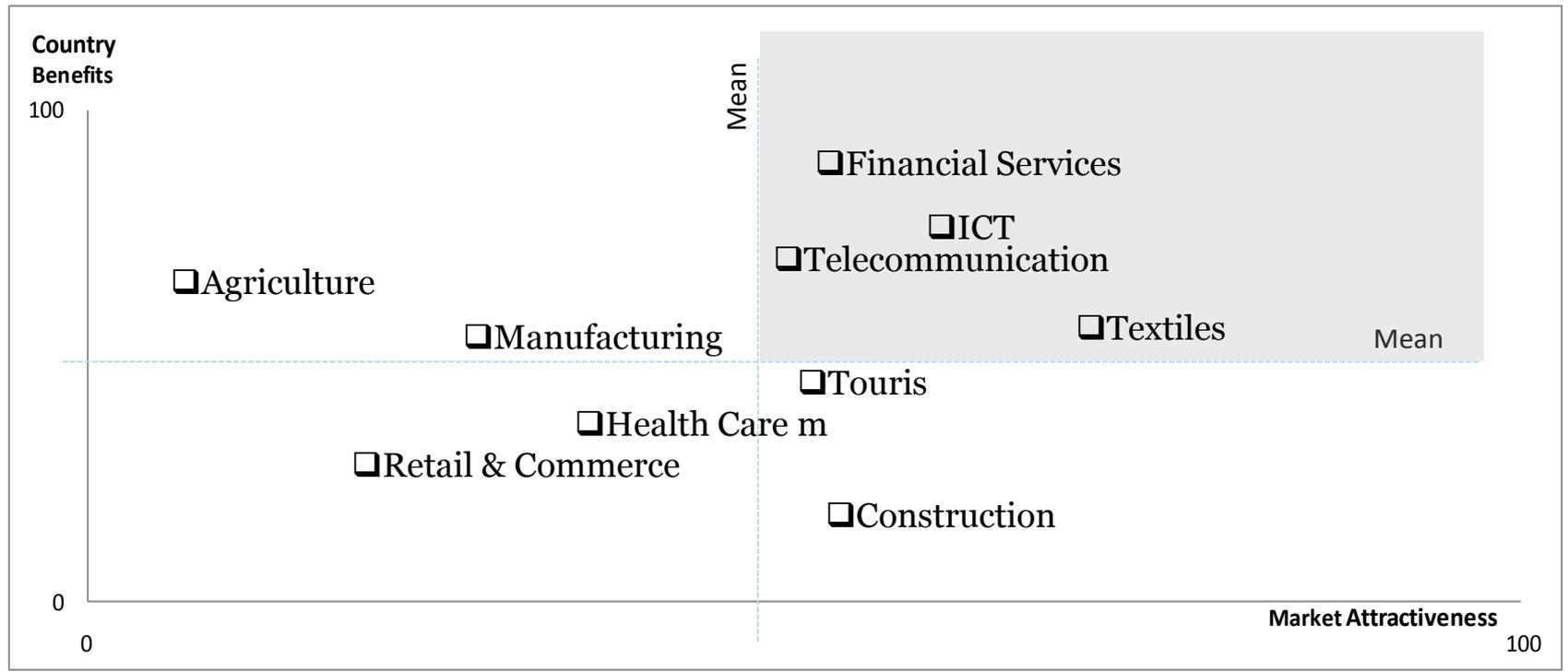
Country Benefit





# 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

# Contact Information

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Mr. Alexander Böhmer  
Head of Unit,  
OECD Private Sector Development  
Division  
2 rue André-Pascal, 75016 Paris,  
France  
Tel: +33-1 45 24 1912  
Fax: +33-1 44 30 6135  
Email: [alexander.boehmer@oecd.org](mailto:alexander.boehmer@oecd.org)

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

[www.oecd.org/mena/investment](http://www.oecd.org/mena/investment)