

Investment Issues of Interest to Developing Countries in the Context of Multilateral Negotiations and Regional Agreements

Trade-led Development in the Multilateral Trading System
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Structure

- Multilateral Agreement on Investment
- WTO - Singapore Issues
- Investment Agreements in Asia-Pacific Regional Trade Agreements
- Features of Investment Agreements in Asia Pacific RTAs
- Conclusion

Multilateral Agreement on Investment

History

- Negotiations on a Multilateral Agreement on Investment (MAI) were launched by governments at the Annual Meeting of the OECD Council at Ministerial level in May 1995. A Negotiating Group held its first meeting on 27 September 1995 with the participation of representatives of the OECD's then 25 member countries and the European Commission.
- The objective was to provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures, open to non-OECD countries.
- Negotiations were discontinued in April 1998 and were not resumed.

WTO - Singapore Issues

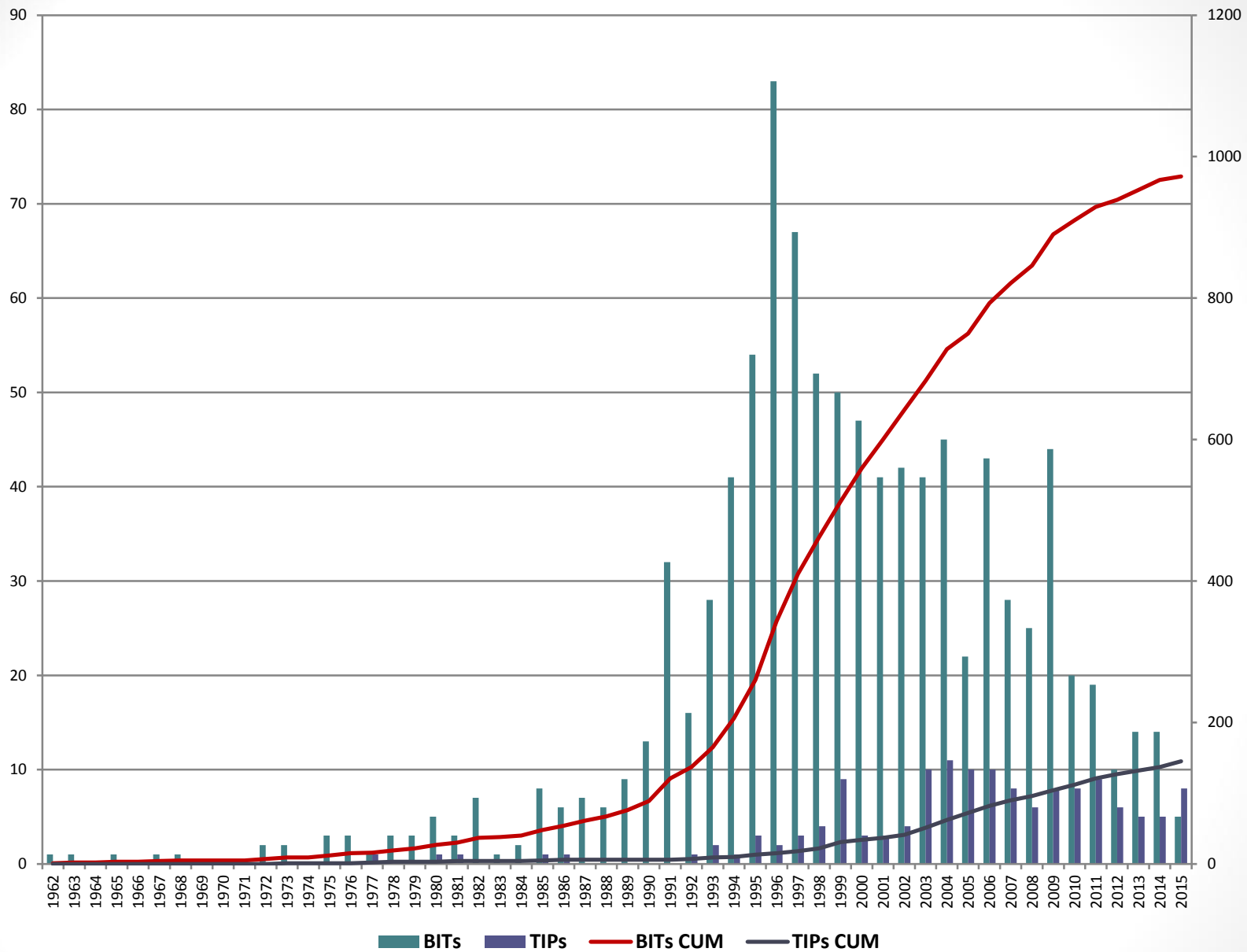
WTO and Investment

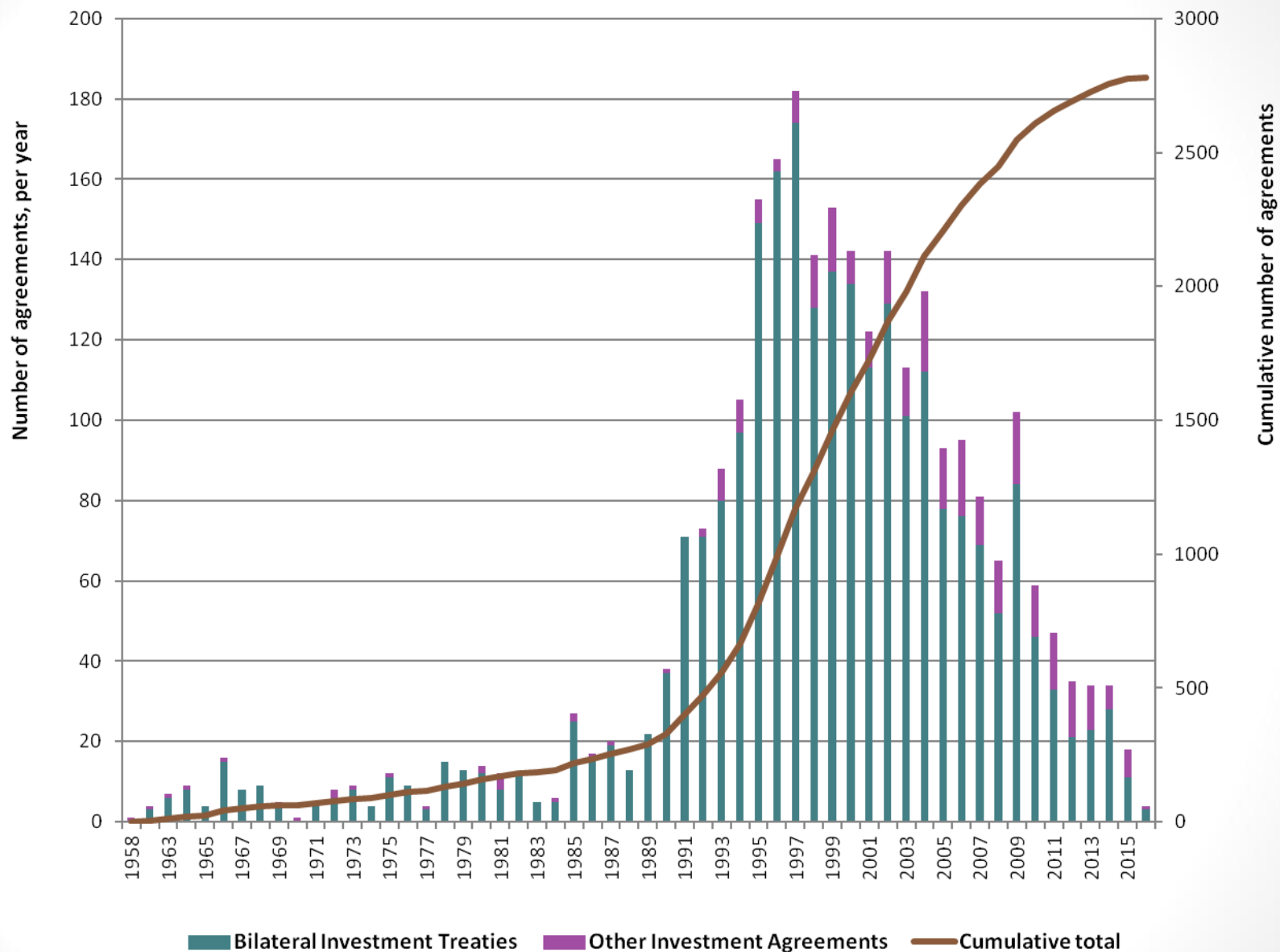
- A Working Group established in 1996 conducts analytical work on the relationship between trade and investment.
- The Agreement on Trade-Related Investment Measures (“TRIMS Agreement”), one of the Multilateral Agreements on Trade in Goods, prohibits trade-related investment measures, such as local content requirements, that are inconsistent with basic provisions of GATT 1994.
- The General Agreement on Trade in Services addresses foreign investment in services as one of four modes of supply of services (mode 3).

Singapore Issues

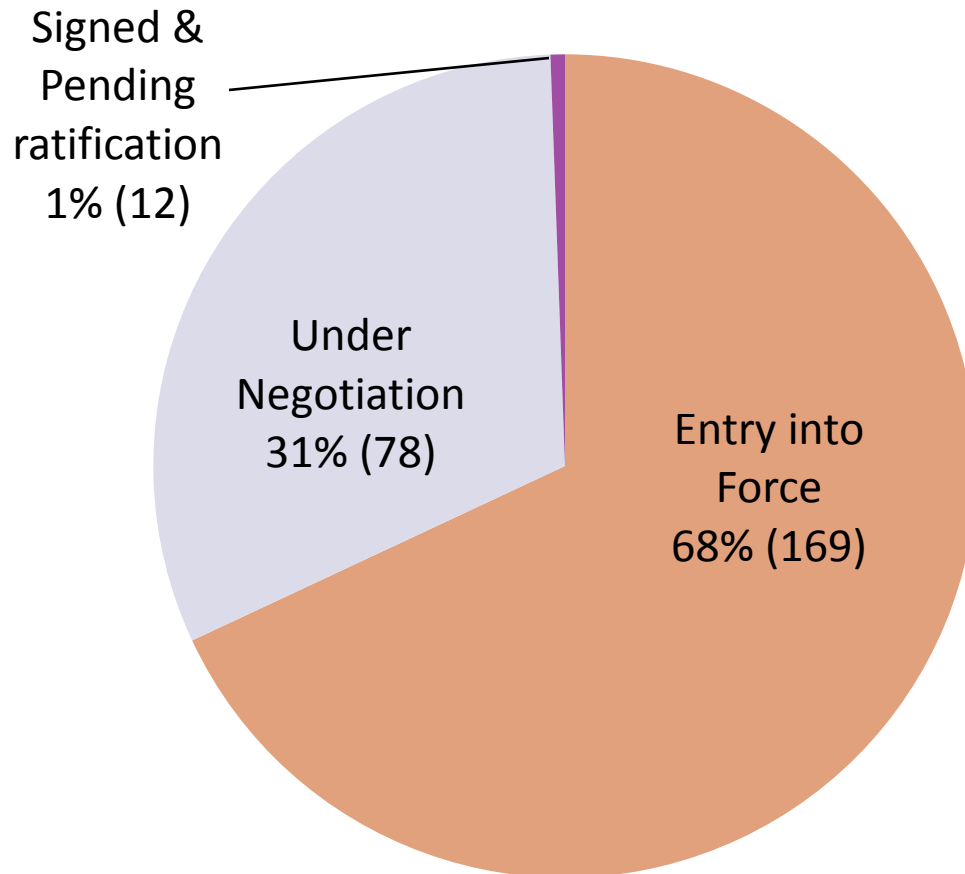
- Four issues introduced to the WTO agenda at the December 1996 Ministerial Conference in Singapore:
 - Investment
 - Competition
 - Procurement
 - Simpler procedure
- These four issues were originally included on the Doha Development Agenda. The carefully-negotiated mandate was for negotiations to start after the 2003 Cancún Ministerial Conference, “*on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations*”.
- There was no explicit consensus, and the members agreed on 1 August 2004 to proceed with negotiations in only one subject, trade facilitation. The other three were dropped from the Doha agenda.

Investment Agreements in Asia-Pacific Regional Trade Agreements





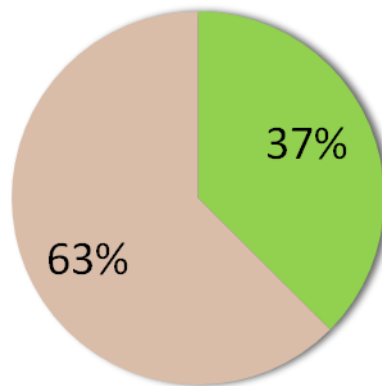
Total RTAs: 259



RTAs with Investment/Goods/Service Provisions

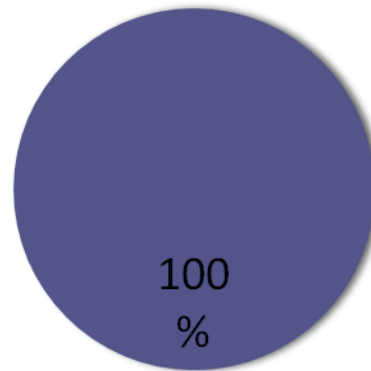
■ Investment Provisions

■ Without Investment Provisions



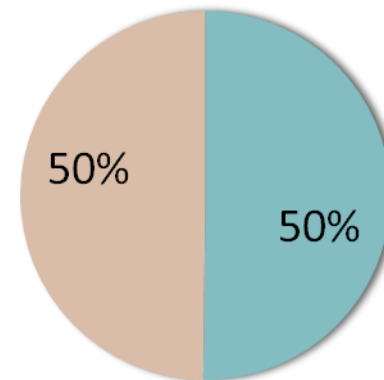
■ Goods ■ Witout Goods

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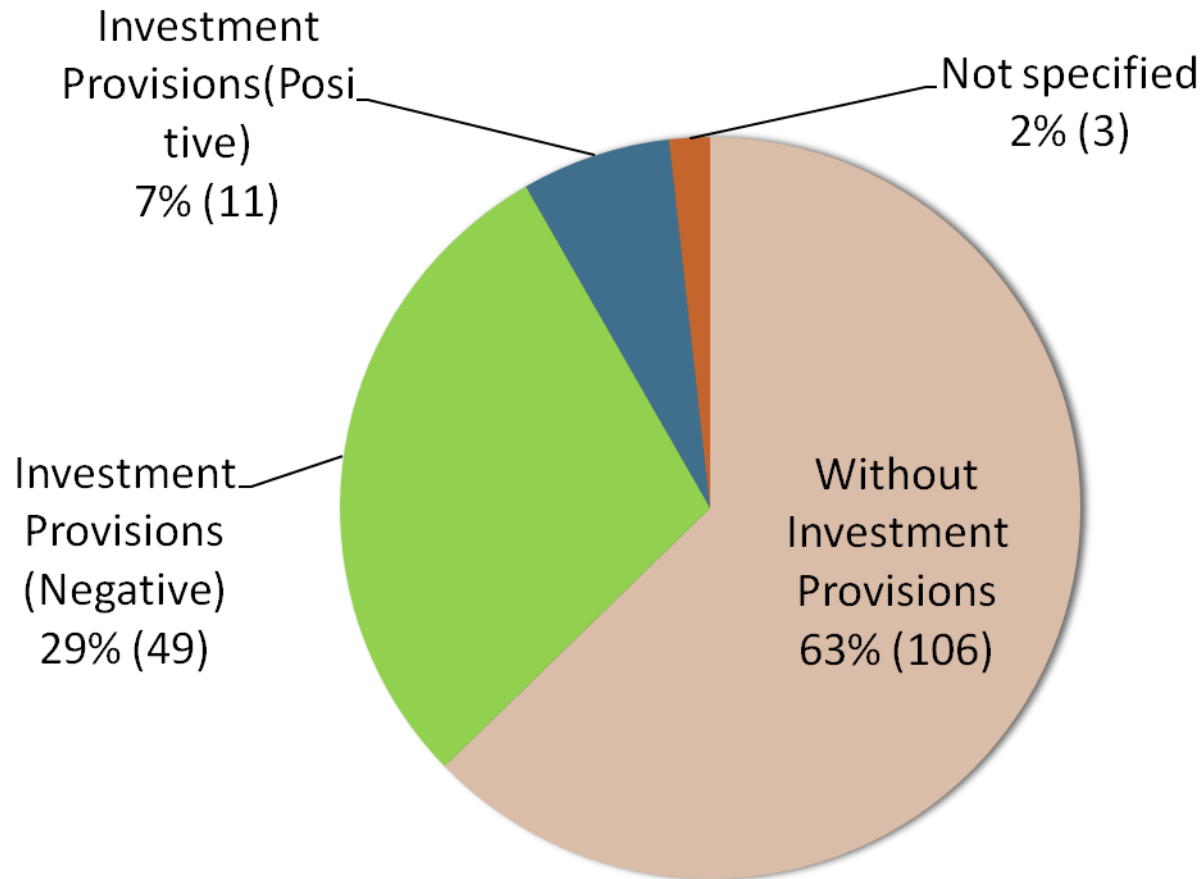


■ Service Provisions

■ Without Service Provisions

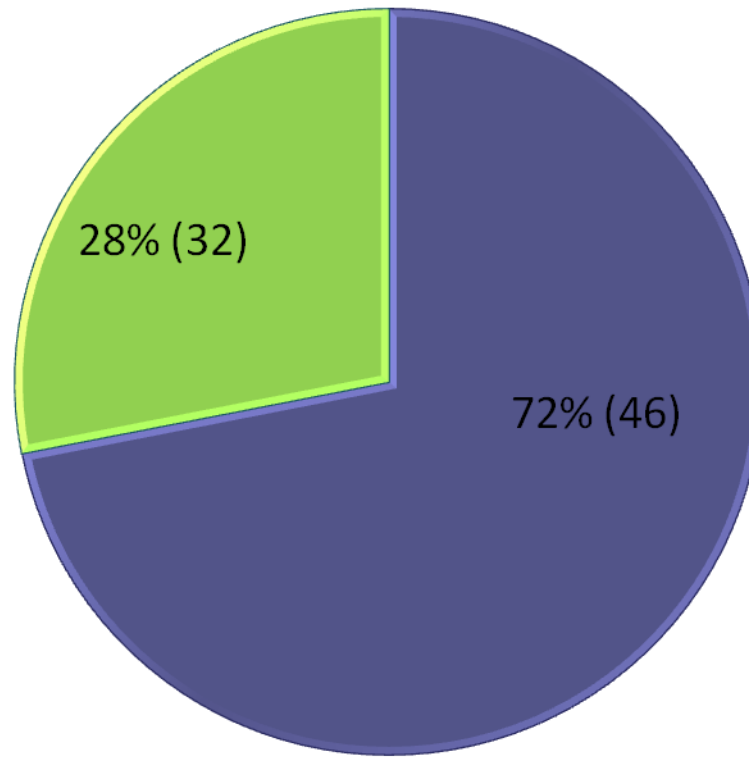


Entry into Force of RTAs (169) with Investment Provisions



RTAs under Negotiations (78)

■ Investment Provisions ■ Without Investment Provisions



Features of Investment Agreements in Asia Pacific RTAs

Issues for Negotiations

- **WTO Beyond**
- **BIT vs. RTAs**
- **Modality**
 - **Positive list**
 - **Negative list**
 - **Mixture of the two**
- **Scheduling**
 - **Exceptions**
 - **MFN**
 - **National Treatment**
 - **Sectors liberalised**

Features of investment agreement

- **Transparency**
- **National Treatment (pre and post establishment treatment)**
- **Most Favored Nation Treatment**
- **General Treatment**
- **Expropriation**
- **Transfers**
- **Dispute Settlement**
- **Prohibition of Performance**
- **Cooperation**

Transparency

❑ Defines how the exchange of information relating to available laws, regulations, procedures, administrative rulings, international agreements and any changes pertaining to investment agreements should take place. The confidential information is not to be shared.

❑ Treatment in various RTAs:

- No article dedicated to Transparency—TPP, India-Japan
- Transparency articles—
 - Public availability-----ACIA, ASEAN-Korea, India-Korea
 - Contact Point-----ACIA, ASEAN-Korea, ASEAN-China,
 - Publication of relevant measures---India-Korea, ASEAN-Australia-New Zealand
 - Respond to request-----Japan-Singapore, India-Korea, ASEAN-Australia-New Zealand

National treatment

- ❑ Non-discrimination clause between the foreign investors vis-a-vis local investors. Main issue is when (pre or post establishment)?

❑ Pre-establishment National treatment

- ACIA—**Admission**, establishment, acquisition, expansion, management, conduct, operation, sale
- TPP--**Establishment**, acquisition, expansion, management, conduct, operation, sale
- ASEAN-Korea---**Admission**, establishment, acquisition, expansion, management, conduct, operation , sale
- ASEAN-Australia-New Zealand--**Establishment**, acquisition, expansion, management, conduct, operation, liquidation, sale, transfer

❑ Post-establishment National treatment

- ASEAN-China—Management, conduct, operation, maintenance, use, sale, liquidation
- India-Korea---Management, maintenance, use, enjoyment, disposal

Most Favored Nation Treatment

☐ Most Favored Nation treatment

(No less favorable to any other party or any non-party)

- ACIA---Admission, establishment, acquisition, expansion, management, conduct, operation, sale
- TPP—Establishment, acquisition, expansion, management, conduct, operation, sale
- ASEAN-China---Admission, establishment, acquisition, expansion, management, conduct, operation, maintenance, use, liquidation, sale.
- ASEAN-Korea---Admission, establishment, acquisition, expansion, management, conduct, operation, sale.
- India-Japan----Management, conduct, operation, maintenance, use, enjoyment, sale.

☐ No MFN Provision mentioned---ASEAN-Australia-NZ, Japan-Singapore, India-Korea

General Treatment

□ Fair and equitable treatment and full protection and security

- Fair and equitable treatment---
 - TPP---the **obligation not to deny justice** in criminal, civil or administrative adjudicatory proceedings
 - ASEAN-China—the obligation of each party not to deny justice in any legal or administrative proceedings;
 - ASEAN-India; ASEAN-Korea; ASEAN-AU-NZ; ACIA
- Protection and security---
 - TPP---**provide the level of police protection** required under customary international law
 - ASEAN-China-take such measures as may be reasonably necessary to ensure protection and security
 - ASEAN-India; ASEAN-Korea; ASEAN-AU

Expropriation

❑ Generally, No party shall expropriate or nationalize a covered investment

❑ Exception:

- for a public purpose;
- in a non-discriminatory manner

❑ Compensation:

- **Prompt, adequate and effective** compensation is required.
- be accorded with **due process** of law; (TPP, ASEAN-Korea, ACIA)
- Or in accordance with **applicable domestic laws**, including legal procedures (ASEAN-China)

❑ Exclude the issuance of compulsory licenses granted in relation to **intellectual property rights** in accordance with the **TRIPS agreement** of the scope of application of the provisions. (TPP, ASEAN-Korea, ACIA, ASEAN-China)

Transfers

- All transfer to be made freely and without delay into and out of its territory
- Include contributions to capital, profits, dividends, interest, payments
- In a freely usable currency
- Restrict, prevent or delay a transfer relating to bankruptcy, trading or dealing in securities, criminal offences, financial reporting when necessary to assist law enforcement (TPP)
- Also delay or prevent a transfer of social security , public retirement, severance entitlements of employees (ACIA, Japan-Singapore)

Dispute Settlement

□ State-State Dispute Settlement

- India-Korea-----Negotiation -- ad hoc arbitral tribunal
- ACIA-----ASEAN Protocol on Enhanced Dispute Settlement Mechanism.
- ASEAN-China---Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between PRC and ASEAN.

□ Investor-State Dispute Settlement

- TPP-----Consultation/Negotiation (through good offices, conciliation or mediation)→Arbitration
- India-Korea----Negotiation/local remedy→ agree on a dispute settlement procedure → International arbitration
- ACIA-----Conciliation or consultation → court or administrative tribunals / arbitration

Prohibition of performance requirement

- ❑ Prohibit a Party from imposing or enforcing any requirement , commitment and undertaking to achieve the Party's certain content.
- ❑ Prohibition of performance requirement
 - Refer to Annex 1A TRIMS agreement from WTO (ACIA, ASEAN-Australia-New Zealand, ASEAN-Korea)
- ❑ No reference to TRIMS agreement, but still prohibit performance requirement
 - Japan-Singapore, India-Korea, India-Japan
- ❑ No mention of prohibition of performance requirements
 - ASEAN-China

Cooperation

❑ ACIA---Enhancing ASEAN Integration—

- Harmonize investment policies to achieve industrial complementation;
- Build and strengthen capacity of Member States;
- Share information
- Support investment promotion

❑ ASEAN-China—Promotion of investment

- Increase investments;
- Organizing investment promotion activities;
- Promoting business matching events;
- Organizing various briefings and seminars;
- Conducting information exchanges

Conclusion

❑ Tendency:

- More RTAs (TPP, ACIA, RCEP, APTA)

❑ Crucial Negotiation Points:

- Liberalization
- National treatment – pre and post
- Investor State Dispute Resolution

❑ New Development:

- Sustainable Development and Environment
- Human rights

Acknowledgment

- 1. Ms. Soo Hyun Kim, AEAO, ESCAP**
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Thank you for your attention !