



**National Training
On preparing to negotiate a potential CAREC-wide FTA**

Session 5:

Investment as an Issue in FTAs

**Almaty, Kazakhstan
May 2023**

Outline

01

**Overview of
Investment
Chapters and
Commitments
in FTAs**

02

**Substantive
Coverage and
Legal
Obligations**

03

**Strategic
Considerations
re Investment
and FTAs**

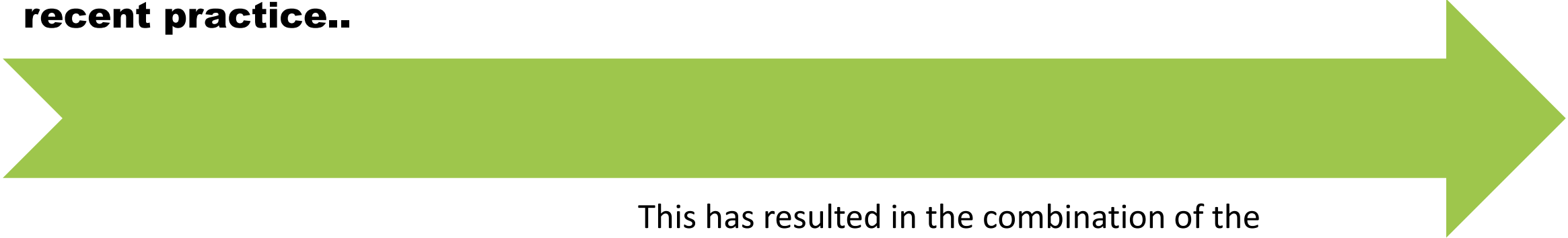
04

**Scheduling
Examples**

01

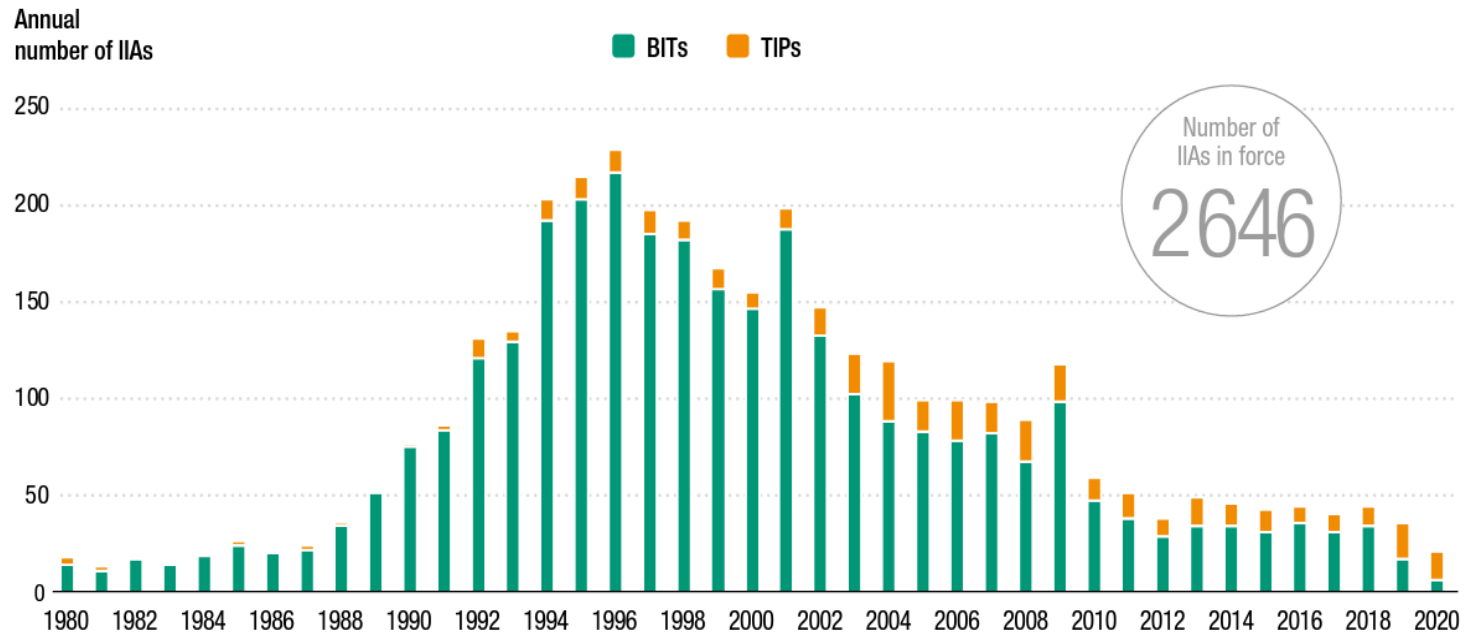
An Overview of Investment Chapters and Commitments in FTAs

The inclusion of investment issues in PTAs is a very recent practice..



This has resulted in the combination of the investment protection elements traditionally found in BITs being merged with the trade liberalization elements found in PTAs.

An Overview of Investment Chapters and Commitments in FTAs



Source: UNCTAD, IIA Navigator.

Note: This includes treaties (i) unilaterally denounced, (ii) terminated by consent, (iii) replaced by a new treaty and (iv) expired automatically.

An Overview of Investment Chapters and Commitments in FTAs

To which extent do PTAs such as free trade agreements go beyond traditional BITs in terms of investment protection?

PTA investment chapters essentially take their origins in BITs introduced in the late 1950s or early 1960s.

Today's PTA investment chapters typically provide broad investment coverage, strong protection and non-discrimination commitments and recourse to investor-state international arbitration.

Investment disciplines lodged in PTA services chapters are different (Obligations on market access and national treatment arise only to the extent liberalisation commitments are listed in separate schedules).

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Substantive Coverage and Legal Obligations

Scope

What's in

- Investors of another Party; and
- Covered investments

What's out

- Government procurement
- Subsidies or grants provided by a Party
- Measures imposed before the entry into force of the FTA

Substantive Coverage and Legal Obligations

01

Substantive Obligations

- National treatment
- MFN
- Fair and equitable treatment of investments
- No performance requirements
- Senior management and board of directors
- Transfers
- Expropriation
- Dispute settlement

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Strategic Considerations re Investment and FTAs

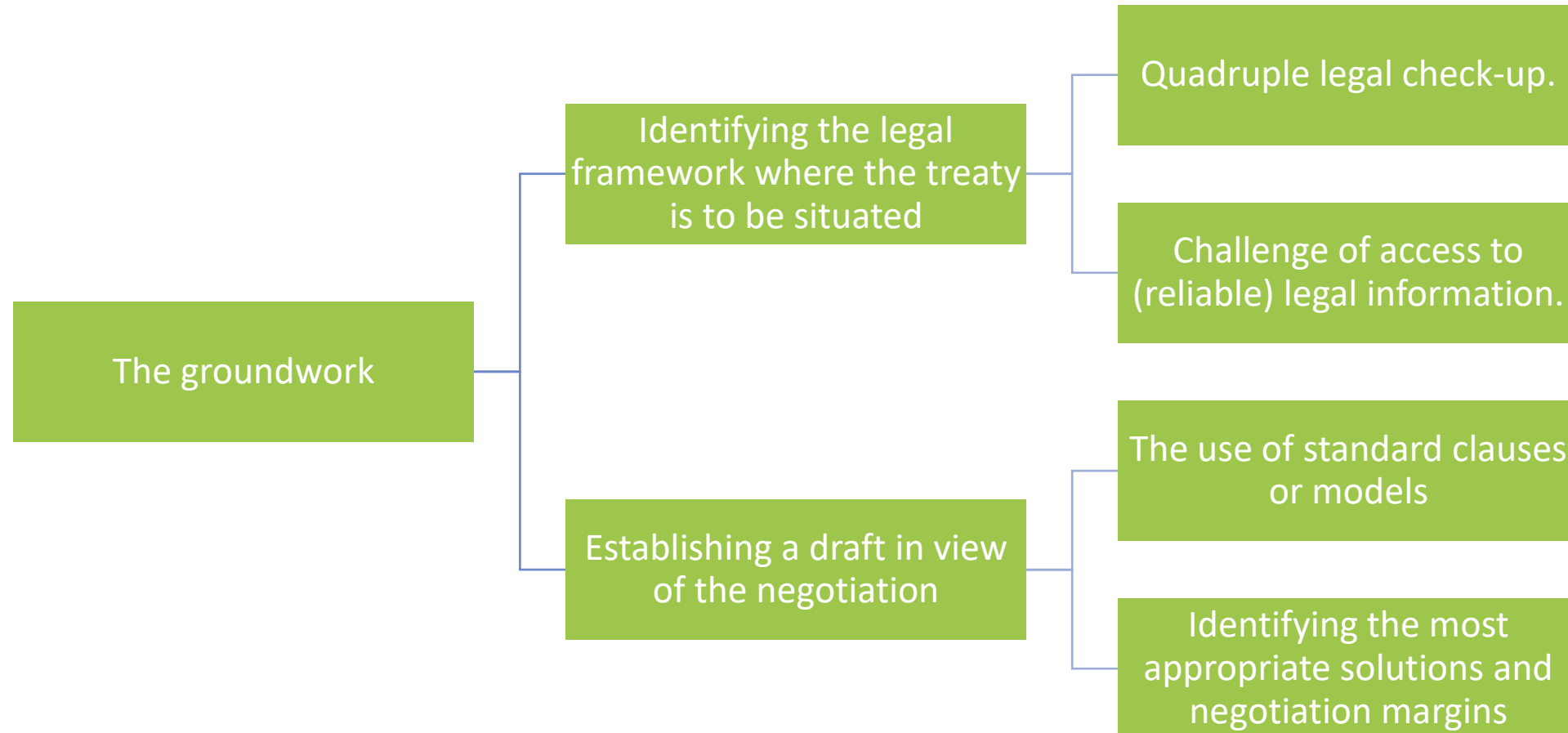
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Policy implications

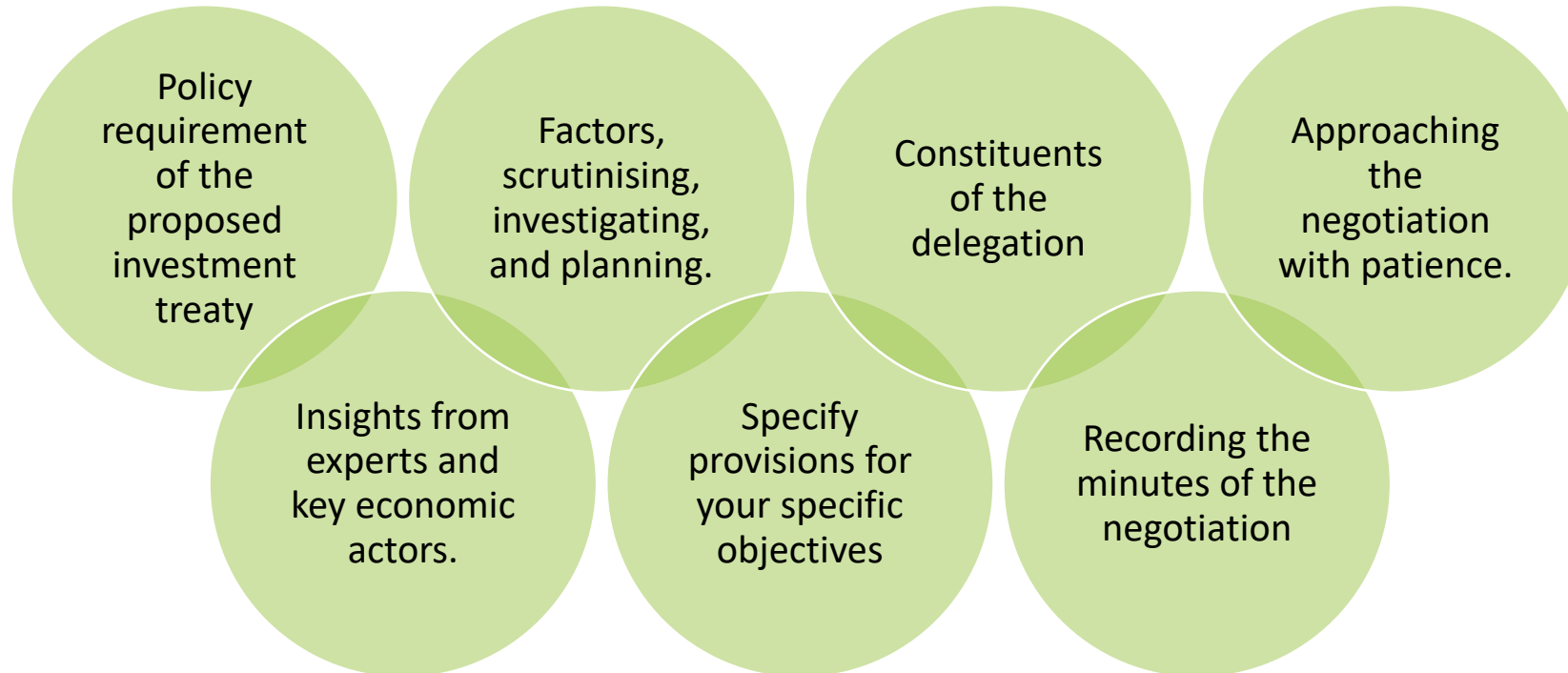
The cross sectional exponential model shows BITs and RTIAs can strongly encourage greenfield and M&A FDI projects. In the case of BITs, the presence of an investor-state-dispute mechanism (ISDM) is the only provision that appears to be significant across different model specifications. For RTIAs, foreign investors seem to be particularly sensitive to the provision expressed by TREAT, meaning that they will not be discriminated against domestic investors or other foreign investors. Provisions for national treatment and most-favored nation status in RTIAs may matter because they are possibly more comprehensive or take place alongside measures supporting international trade liberalization and the creation of regional supply chains. Overall a “pro-FDI” BIT can be expected to increase the number of FDI projects by 35.3%, or by 58.4% for a “pro-FDI” RTIA.⁶⁹ These findings suggest that IIAs which guarantee the credible protection of rights can be effective in attracting foreign investors.

*“Overall a **“pro-FDI” BIT can be expected to increase the number of FDI projects by 35,3%, or 58,4% for a “pro-FDI” RTIA.** These findings suggest that IIAs which guarantee the credible protection of rights can be effective in attracting foreign investors.”*

Strategic Considerations re Investment and FTAs



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**Scheduling
Examples**

Sector	: All sectors
Subsector	: -
Level of Government	: Central
Type of Obligation	: Prohibition of Performance Requirements (Article 10.6)
Description of Measure	<p>Obligation under Article 10.6 (Prohibition of Performance Requirements) shall not apply to all existing non-conforming measures, which include measures related to these requirements:</p> <p>(a) to achieve a given level or percentage of domestic content;</p> <p>(b) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investments of that investor;</p> <p>(c) to restrict sales of goods in its territory that such investment produces by relating such sales to the volume or value of its exports or foreign exchange earnings;</p> <p>(d) to export a given level or percentage of goods;</p> <p>(e) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory.</p> <p>For specific purpose, a foreign investor or a legal entity established as Indonesian Limited Liability Company (<i>Perseroan Terbatas</i>) in accordance with <i>Law No. 40 of 2007 concerning Limited Liability Company</i>, which are employing foreign experts are required to provide trainings and transfer of technology to workers of Indonesian nationals pursuant to the laws and regulations.</p>
Source of Measure	<ul style="list-style-type: none"> • <i>Law No.25 of 2007 concerning Investment</i> • <i>Law No. 40 of 2007 concerning Limited Liability Company</i> • <i>Government Policy</i>

Scheduling Examples

03

RCEP

Annex III – Schedules of Reservations and Non-Conforming Measures for Services and Investment

Indonesia – Schedule of Reservations and Non-Conforming Measures for Investment

RCEP

Annex III – Schedules of Reservations and Non-Conforming Measures for Services and Investment

Indonesia – Schedule of Reservations and Non-Conforming Measures for Investment

LIST B

Sector	:	All Sectors
Subsector	:	-
Level of Government	:	Central and Regional
Type of Obligation	:	- National Treatment (Article 10.3) - Senior Management and Board of Directors (Article 10.7)
Description of Measure	:	Indonesia reserves the right to adopt or maintain any measure with respect to special preferences given to micro, small and medium sized enterprises and cooperatives (<i>Usaha Mikro, Kecil, Menengah dan Koperasi</i> or <i>UMKM</i>) in Indonesia ¹⁷ .
Source of Measure	:	<ul style="list-style-type: none"> • Law No. 20 of 2008 concerning Micro, Small and Medium Enterprises • Law No. 25 of 1992 concerning Cooperatives • Government Policy

Summing-Up and Take-Aways

01



The incorporation of investment-specific provisions that go beyond the simple granting of market access, national treatment and MFN adds additional complexity to these agreements ,

02



They also impose additional obligations on governments with respect to sound governance and the regulation of their economies.

03



Nevertheless, evidence shows that these instruments can play a significant role in attracting FDI and so governments need to consider them carefully.

Strengthening Knowledge and Capacities for the Design and Implementations of FTAs Involving CAREC Countries



Thank you!

