

RIETI International Seminar

Investment Risk and International Investment Agreement

July 25, 2008

Session Two: How to Make Investment Safe

# International Investment Agreement

*From a business perspective*

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# Key Questions

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1. What do international investment agreements (IIAs) mean for businesses?
2. Are IIAs important to businesses?
3. Do businesses make the best use of IIAs? What are the problems? How should IIAs be?

# 1. What do IIAs mean for businesses?

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- Last resort to protect global investment and business activities from “unreasonable” exercise of states’ authority
  - ① Can file a claim to domestic courts if acts violate laws of host countries
  - ② Even if the acts violate laws of host countries, some countries have no (adequate) legal system to sue governments
  - ③ If “legal” under laws of host countries, some acts are still “unreasonable”
- System to effect further liberalization in cross-border investment

# Case

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- ◆ Import restrictions on steel products by China
  - Case after the conclusion of Japan-China investment protection agreement (Aug. 1988) and before China's accession to the WTO (Dec. 2001)
  - In June 1999, Chinese government placed restrictions on the import of steel products
  - A local steel company established and operated since 1997 by Japanese companies and others halted production for 6 months due to inability to procure necessary primitive plates

# How did the company react? (1)

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- Considered if legal remedies are possible.
  - Measures were taken for the purpose of tightening domestic supply and demand of steel and regarded as a policy of import control. Under Chinese law, placing restrictions on the import of steel is legal and we did not have the right to ask for a remedy.
- Is the Japan-China investment protection agreement applicable?

# How did the company react? (2)

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- ASK from beginning to end
  - Took every chance to ask for remedial actions to a wide range of government officials from local customs to premier of China
  - In addition, asked through Japanese government officials, such as PM, concerned ministries, Japanese embassy in China, and business groups
  - The Japanese government and others could do nothing but ask Chinese government to do something to remedy the difficulties of Japanese companies

# How did companies react? (3)

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- If relevant IIAs applicable, Japanese companies could have reacted differently.
  - Could begin with “possible violation of the treaty”
  - Could say, “Well, let’s settle this at the relevant venue.”
  - Could ask Japanese government for help based on a good cause that we should not overlook the treaty violations
  - Japanese government would not say businesses should bear the risk of policy change because companies invested in China based on the assumption that host governments would abide by the treaty.

## 2. Are IIAs important for businesses?

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- YES
- Source of strength of IIAs as last resort for businesses is the right to say, “let’s settle this at the relevant venue.”
  - investor-state dispute settlement procedures, BIT arbitration

### 3. Do businesses make the best use of IIAs?

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- ◆ Japanese companies' use of BIT arbitration
  - Only one publicly known case where a Japanese affiliate company brought BIT arbitration
  - Cases where companies took advantage of claiming BIT violations during negotiation with host governments?
  - 290 cases worldwide (up until 2007)

# Why don't Japanese companies use IIAs?

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- They have not been treated so severely.
- The device of IIAs is not in the toolbox of Japanese businessmen.
  - Completely unaware, have no experience, have not thought about it
  - Even if they know it, stay on the sidelines  
A government affair – state to state
- If there is desire to use IIAs, between states concerned and Japan, there is no IIA or applicable IIAs are defective.

Japan: 13 BITs + 8 EPAs (signed)

⇔ Germany 135, China 120, UK 102, France 98, Republic of Korea 85, USA 49

# Alternative solutions

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- Many businessmen continuously face problems related to foreign investment.
- The reality is, they cope diligently with the problems by other means than IIAs.
  - Negotiation, petition, using diplomatic channels?  
Shifts in production?
- On the other hand, many of them take a “wait-and-see” approach; i.e., just have patience.

# Need for IIAs

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- Not having used IIAs doesn't mean they are unnecessary
- Necessary as proper infrastructure for global businesses

## **On Improvement of Japan's Global Investment Environment *Toward the Creation of a Legal Framework for Japanese Foreign Investment***

April 15, 2008 Nippon Keidanren (Japan Business Federation)

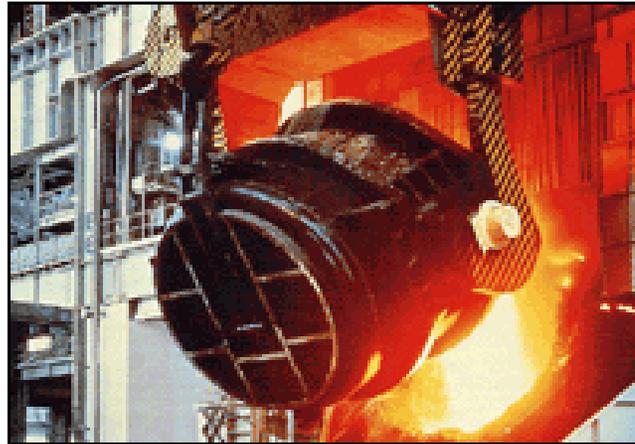
### **A) Countries receiving relatively sizable investments and where there is a strong need for investment protection and liberalization**

(Brazil, South Africa, United Arab Emirates, Argentina, Venezuela, Colombia, Poland, Czech Republic, Hungary, Slovakia, and Romania)

### **B) Countries with which to promote investment protection and liberalization from perspective of national interest**

(Algeria, Nigeria, Iran, Kuwait, Oman, Bahrain, Qatar, Peru, Panama, Bolivia, Ukraine, Kazakhstan, Israel, and Angola)

### **C) Revision of existing agreements (China, Russia, etc)**



Thank you