APEC-UNCTAD REGIONAL TRAINING COURSE ON THE
CORE ELEMENTS OF INTERNATIONAL INVESTMENT
AGREEMENTS IN THE APEC REGION

Presentations

Kuala Lumpur, Malaysia
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Overview of Presentation

1. Foreign direct investment: trends and implications
2. Objectives of the legal investment framework
3. Trends in international investment agreements (IIAs)
4. Features and challenges

Global FDI inflows surpassed the peak of 2000...

FDI inflows, globally and by group of economies, 1980-2007 ($ billion)

- UNCTAD expects worldwide FDI down by 15% in 2008

Worldwide FDI inflows with three different trajectories, 1990-2012
Emerging issues

- Protection of strategic industries
- Economic Crisis
- Increase in South-South FDI
- Emerging economies as outward investors

Implications of the financial crisis

- The global economic and financial crisis has come to dominate international economic relations
- This raises important questions about the role that the international investment regime can play in responding to today’s global challenges
- Several governments are taking emergency measures in response to the crisis, frequently addressing social and economic concerns
- These measures may also have serious implications for FDI and TNC operations

Objectives of the legal investment framework
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Restrictions
- Entry and establishment
- Ownership and control
- Operational restrictions
- Authorization and reporting

Standards of treatment & protection
- Treatment (NT, MFN, FET)
- Expropriation & compensation
- Transfer of funds
- Allegation settlement
- Transparency

These objectives can be achieved through:
- National policies
- Investment contracts/State contracts
- International investment agreements (IIAs)

Legal framework for investment: Hierarchy of norms

Multilateral disciplines and specific agreements (WTO GATS, TRIMs, TRIPS, ICSID, NY Convention, MIGA)
Regional (APEC) and sectoral agreements (Energy Charter)
Preferential trade and investment agreements
Bilateral investment treaties (BITs) for the promotion and protection of investment
Double taxation treaties (DTTs)
State contracts, investment agreements, stabilization agreements
National laws and regulations, investment codes

The international investment legal framework: role and objectives

International investment agreements (IIAs):
- Contribute to the creation of a stable, predictable and transparent regulatory framework for international investment - strengthen the enabling framework for FDI (promotion, protection, liberalization)
- Facilitate the coordination of investment relations (relations between host States, home States, international investors and other development stakeholders) through internationally agreed common denominators
- Complement national laws on investment (interface between national and international investment policies)

Why do countries sign IIAs?

For host countries (traditionally developing)
- To improve their investment climate and to attract foreign investors
- To portray a positive international image of openness

For home countries (traditionally developed)
- To protect their investments abroad
- Some countries are both capital importing and exporting (both home and host) - twin objectives: investment attraction and investment protection.

Impact of IIAs on FDI flows? Diverging views
Impact on economic development? Diverging views

A great number of IIAs cover more or less the same issues
- Preamble
- Definitions (investment/investor)
- Admission and establishment
- Core standards of protection:
  - Fair and equitable treatment
  - Non-discrimination (NT/MFN)
  - Expropriation
  - Transfer of funds
- Dispute settlement (State-State and investor-State)

Trends in international investment agreements

...but the concrete way in which they are addressed differs substantially
The network of BITs continues to grow rapidly, there are now over 2500 BITs

Increased role of developing countries

- Growing number of developing countries involved in the conclusion of IIAs:
  - 76% of all BITs
  - 61% of all DTTs
  - 81% of all other IIAs
- Growing number of South-South IIAs:
  - 27% of all BITs
  - 35% of all other IIAs

This also reflects growing outward FDI from developing countries.

The top ten signatories of BITs in the world, June 2008

New generation of BITs: Increasingly sophisticated and complex

- United States and Canadian model BITs (2004)
- Tend to be increasingly sophisticated in content
- Clarifying in greater detail the meaning of a number of standard clauses
- Putting more emphasis on public policy concerns, such as the protection of national security, health, safety, the environment, and labor rights
Economic integration agreements with investment provisions

- International investment rules are increasingly being formulated as part of agreements that encompass a broader range of issues (including trade, services, competition, intellectual property).
- These agreements can be free trade agreements, regional integration agreements, partnership agreements, or economic cooperation agreements.
- The total number of such economic agreements with investment provisions exceeded 254 as of June 2008.

EIAs with investment chapters concluded in 2008

- Economic Partnership Agreement between Japan and Vietnam – The provisions of the BIT between Japan and Vietnam (November 2003) are incorporated into and form part of this Agreement.
- Free Trade Agreement between Pakistan and Malaysia.
- Free Trade Agreement between Canada and Colombia.
- Free Trade Agreement between EFTA and Canada.
- Free Trade Agreement between Canada and Peru.
- Free Trade Agreement between China and New Zealand.
- Free Trade Agreement between an EU Member and Japan.
- Free Trade Agreement between Singapore and Peru.
- Free Trade Agreement between China and Australia.
- Free Trade Agreement between the EFTA States and Colombia.
- Trade, Investment and Development Cooperation Agreement between the United States and the Southern African Customs Union (SACU).
- Free Trade Agreement between Singapore and China.
- Energy Charter Treaty, GATS, Limited members: OECD rules, APEC.
- International Investment Agreements.
- Economic Partnership Agreement between Japan and Vietnam – The provisions of the BIT between Japan and Vietnam (November 2003) are incorporated into and form part of this Agreement.
- Free Trade Agreement between Singapore and the Gulf Cooperation Council (GCC).

Over 250 trade agreements with investment provisions

- Historical overview: The Havana Charter, the World Bank Guidelines, the UN Code of Conduct, the OECD MAI.
- Investment in the WTO.
- Investment-specific agreements: dispute settlement (ICSID, NY Convention, ...), insurance (MIGA, ...).
- Limited membership: OECD rules, APEC.
- Limited scope: Energy Charter Treaty, GATS, TRIMs, TRIPs.

The increase in IIAs has been paralleled by an increase in investor-State disputes

- The cumulative number of treaty-based cases reached 318 known claims by end 2008.
- While the awards rendered in these proceedings have helped to clarify the meaning and content of individual treaty provisions, some contradictory decisions have also created uncertainty.

Known investment treaty arbitrations

- Figure 1. Known investment treaty arbitrations, (cumulative and newly instituted cases, by year).
- ICSID, non-ICSID, All cases cumulative.
Known investment treaty claims, by defendants

Known investment treaty arbitrations in APEC countries

ISDS mechanism: concerns

- Increasing use of the ISDS mechanism
- High costs involved in conducting procedures
- Arbitration awards can involve huge sums
- Potential impact on a country’s reputation as investment location
- Technical complexity of ISDS: concerns on the technical capability of developing countries to handle investment disputes that they face

Features and Challenges

Systemic features of the IIA universe

The existing system is

- **universal** (nearly every country has signed at least one BIT)
- **atomized** (thousands of agreements that lack any system-wide coordination and coherence)
- **multi-layered** (different levels and overlaps)
- **multifaceted** (IIAs also include rules that address other related matters, such as trade in goods, trade in services, intellectual property, labour issues or environmental protection)

The spaghetti bowl of IIAs
Other features of the IIA universe

The existing system is:
- primarily protective, only moderately liberalizing
- indirectly promotional
- evolving and innovative
- only contains investor rights, not investor obligations
- does not address development concerns to a large extent

Challenges 1 – IIAs and development

Developing countries need to ascertain how to best integrate IIAs into their economic development policy.

They must in particular retain sufficient policy space to promote economic development, without undermining the effectiveness of the agreements.

Challenges 2 – Policy Coherence

Developing countries should try to establish and maintain policy coherence in the face of a large number of interacting IIAs.

This entails creating a coherent national development policy, which may require extensive discussions among different governmental agencies and consultations with the private sector and civil society.

Challenges 3 – Sufficient capacity

Developing countries need to ensure that they build up sufficient capacity to analyze the scope and content of obligations, which they take on when concluding an IIA.

Developing countries need to ensure that they have the necessary (human) resources to negotiate agreements that appropriately reflect their interests and needs.

Challenges 4 – Effective implementation

Developing countries should ensure effective implementation of the treaty commitments they have assumed.

Implementation entails, for instance, completing the ratification process, and bringing national laws and practices into conformity with treaty obligations.

Challenges 5 – Adaptation to new global trends

Capital importing countries that are now also becoming capital exporters have to reconsider their position when negotiating IIAs, to account for the parallel objectives of attracting inward FDI and protecting their own foreign investors abroad.