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

Presentations

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Avoidance and Settlement of Investment Disputes

APEC-UNCTAD Regional Training Course on International Investment Agreements

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Topics To Be Covered

I. Intro - Colombian case study
II. Effective Legal Frameworks
III. Effective Administrative Practices
IV. Consultations Practice Tips
V. Overcoming Settlement Obstacles

I. Introduction

- Colombian case study
  - Stocktaking for targeted training
  - Recommendations

II. Stocktaking

- Assess investment obligations
- Assess capacity to manage disputes

II. Stocktaking (cont’d)

- Identify sensitive sectors
  - Inward investment flows sources & destinations
  - Key “covered” sectors (e.g., telecoms)
  - Relevant regulatory authorities
- Target training to relevant officials

II. Stocktaking (cont’d)

- Catalog past investor claims and complaints:
  - Nationality of the investor
  - Relevant economic sector
  - Offending law, regulation or practice
  - Resolution of the dispute
II. Stocktaking (cont’d)

- Take advantage of prior analyses, e.g.:
    [Link to UNCTAD report]
    [Link to OECD report]

- OECD Investment Policy Toolkit
  [Link to OECD Toolkit]

Recommendations

1. Designate Lead State Agency
2. D.C.-based Liaison To Lead State Agency
3. Designate Interagency Contact Persons For Investment
4. Lead State Agency Budget
5. Authority To Collect And Produce Evidence
6. Authority To Pursue & Conclude Settlement
7. Informal Procedures For Interagency Consultation
8. Public Procurement Procedures
9. Payment & Reimbursement Of Settlements & Awards

II. Effective Legal Frameworks

- Lead State Agency
  - Authority To Collect & Produce Evidence
  - Authority To Pursue & Conclude Settlement
  - Payment & Reimbursement Of Settlements & Awards

Recommendations (cont’d)

- Effective Legal Frameworks
- Effective Administrative Practices

Lead State Agency

(i) serve as a resource on investment treaty obligations & disputes;
(ii) retain records relating to arbitration proceedings for policymakers and counsel;
(iii) serve as primary interlocutor for aggrieved investors;
(iv) facilitate early amicable settlements;
(v) collect evidence and information from other agencies regarding investment issues;
(vi) develop the State’s “institutional memory” on investment matters, including the contributions of expert outside counsel; and
(vii) in the event of a claim, take the lead in State’s defense (e.g., liaise with outside counsel and experts).
**Authority To Collect Information And Evidence**

- Power to gather evidence from all relevant government agencies & instrumentalities
- Legal consequences for uncooperative agencies or officials
- Establish procedures in advance for sensitive or confidential materials

**Authority To Pursue Settlement**

- Frequent amicable settlements
  - ICSID registry
  - UNCTAD statistics for 2008
    - 46 cases discontinued following settlement
  - NAFTA examples
    - Settlement
    - Deterrence

**Authority To Pursue Settlement (cont’d)**

**US-Singapore FTA art. 15.14**
**Consultation and Negotiation**

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.

**Authority To Pursue Settlement (cont’d)**

**US-Singapore FTA art. 15.15**
**Submission of a Claim to Arbitration**

Provided that...

- Written notice of intent to arbitrate at least 90 days before submission of claim (Art. 15.15(4)).
- Six months must have elapsed since events giving rise to claim (Art. 15.15(5))

**Authority To Pursue Settlement (cont’d)**

- Authority to conduct *and conclude* settlement
  - Who
  - When
  - Value
  - Other legal requirements

**Payment And Reimbursement Of Settlements & Awards**

- Who pays?
  - National budget
  - Offending ministry’s budget
  - Hybrid models
Payment And Reimbursement Of Settlements & Awards (cont’d)

- Ad hoc allocation of resources
- Standing Fund
  - US Judgment Fund

III. Effective Administrative Practices

- Publicly-known Lead State Agency
- Publicly-known contact person(s)
  - Interagency consultations
  - Speaking with one voice
  - Transparency of process

III. Effective Administrative Practices (cont’d)

- Establish interagency contact group
  - Sub-central governments
  - State-owned enterprises
- Informal procedures for interagency consultation
- Interagency agreement regarding outside communications re claim

III. Effective Administrative Practices (cont’d)

- Meet with officials at relevant agencies
- Collect relevant documents/archival records
- Identify experts/witnesses to assist counsel
- Organize in-house team to address claim and assist outside counsel

IV. Productive Consultations (cont’d)

- When held?
- Preparations for consultations
  - Expert input
  - Relevant agencies
  - Outside counsel
  - Confidential case analysis memo
  - Language issues

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IV. Productive Consultations (cont’d)

- State participants
  - Representatives from all relevant central government agencies
  - Representatives from all relevant levels of government
  - Authorized decision makers

- Claimant-investor participants
  - Counsel
  - Company executive should accompany counsel
  - Authorized decision makers

IV. Productive Consultations (cont’d)

- Inquiries – Listening mode
  - Facts
  - Legal theories

- Costs Awards
  - Provide specific examples (e.g., Methanex; Plama)

- Follow-up
  - Initial recommendations memo
  - Inter-agency input
  - Coordinated communications with investor
  - Encourage additional consultation meetings

V. Overcoming Obstacles

- Official unwillingness to agree to payment absent an award
- Government transitions
- Insufficient engagement on the part of decision makers
- The Press – a 4th pillar of government?

V. Overcoming Obstacles (cont’d)

- Timing may be key (critical junctures for settlement)
- Attorney payment structure
- The desire for an award by parties, their counsel and the tribunal
- Confidentiality of settlement negotiations and terms
- Creative solutions short of monetary payment

VI. Conclusion

- Assess obligations and capacities
- Adopt practical recommendations to enhance settlement prospects
  - Effective legal frameworks and
  - Effective administrative practices
- Seize opportunity of consultation meetings with investors
- Anticipate obstacles to achieve settlement

Thank you

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