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

Presentations

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Coherence in IIAs
An Impossible Dream?

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I. How inconsistencies arise

- Ignorance (photo-ops)
- Negotiating power
- Temporal (c.f., USA, China)

II. Japan’s experience

- Temporal (photo-op BITs → FTA era → strategic BITs)
- Negotiating power (vs. Latin America)
  - FET / MST
  - Note on indirect expropriation
  - Characteristics of investment
  - PR / SMBD
  - Treatment of Mode 3
  - Length of ISDS article

III. Dealing with inconsistencies

(1) Coping with inconsistencies

- We’re screwed anyways.
  - Investor can choose disciplines and forums
  - NT reservations vs. FET
  - ICSID vs. UNCITRAL
  - Treaty shopping
  - Investors will set up offshore companies and use your “best” BIT

- Work with a checklist.
  - Have a handy version, extensive version

(2) Avoiding inconsistencies

- Have a smart MFN clause.
- Create “trademarks” --- Earn respect!
  - Philippines (ICSID)
  - Thailand (positive list)
  - Canada, France (cultural exceptions)
  - Japan (corruption prevention)
  - China (pre-NT, “duty of investors”?)
- Reservations should be trademarks, too.
- Choose your negotiating partners.
  - Macchiavellian style
  - Establish regional standards
    (ACIA → vs. China, Korea, Aus-NZ ... Japan?)