Recent trends in international investment agreements (IIAs) and Investor State Dispute Settlement (ISDS)

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I. Recent developments in FDI flows

II. Recent trends in IIAs
   - Bilateral investment treaties (BITs)
   - Other agreements with investment provisions
   - Trends in ISDS

III. Core elements of APEC IIAs
   - Systemic evolution in IIA provisions
I. Recent developments in FDI flows
Global FDI flows have been severely affected worldwide by the economic and financial crisis

- After falling 14% in 2008 to $1.7 trillion
- Fell further to below $1.2 trillion in 2009
- With a slow recovery in 2010 (to a level up to $1.4 trillion)
- Gaining momentum in 2011 (approaching $1.8 trillion).
Decline in FDI flows in 2009

- Foreign direct investment (FDI) flows remained relatively stable during the fourth quarter of 2009, though at a level much lower than that of 2007 and 2008.

- UNCTAD’s FDI Global Quarterly Index was practically unchanged at 117 over the previous quarter, and half the level in the first quarter of 2008.

<table>
<thead>
<tr>
<th>Year &amp; Quarter</th>
<th>Index Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008 Q1</td>
<td>218.5</td>
</tr>
<tr>
<td>2008 Q2</td>
<td>169.6</td>
</tr>
<tr>
<td>2008 Q3</td>
<td>155.6</td>
</tr>
<tr>
<td>2008 Q4</td>
<td>154.1</td>
</tr>
<tr>
<td>2009 Q1</td>
<td>72.0</td>
</tr>
<tr>
<td>2009 Q2</td>
<td>115.3</td>
</tr>
<tr>
<td>2009 Q3</td>
<td>117.5</td>
</tr>
<tr>
<td>2009 Q4</td>
<td>117.4</td>
</tr>
</tbody>
</table>
Global FDI Prospects, 2009 - 2011

($ billion)
Evidence suggests the FDI landscape is shifting toward developing economies.

The share of developing & transition economies in inward FDI accounted for 43% in 2008 (31% in 2007).
FDI outflows in selected economies, (2009)

($ billion)

[Bar chart showing FDI outflows for selected economies such as Canada, United States, Australia, Japan, Brazil, Mexico, China, Korea, India, Indonesia, and Russian Federation from 2009:Q1 to 2009:Q4.]
Global FDI Quarterly Index, 2000-2009

Base 100: quarterly average of 2005

Source: UNCTAD.

Source: UNCTAD, cross-border M&A database for M&As; and information from the Financial Times Ltd, fDi Markets (www.fDimarkets.com) for greenfield projects.
Note: Data on greenfield projects for 2009:Q4 are estimates based on available figures for October and November.
Top Recipients of FDI Inflows

The US remained the largest recipient country, followed by France, China, UK & the Russian Federation.

The fact that half of the top 20 recipients are emerging economies is symbolic of the changing FDI landscape of 2008.
TNC’s Int. Investment Plans

- Large increase (more than 30%)
- Increase (less than 30%)
- Unchanged
- Decrease (less than 30%)
- Large decrease (more than 30%)
II. Recent Trends in IIAs
The network of BITs continues to grow rapidly, there are now almost 2600 BITs

- Source: Unctad
Number of BITs concluded by APEC economies, 1994-2009

- Source: Unctad
Top 10 APEC economies in terms of BITs concluded, end 2009

- China
- Korea, Republic of
- Malaysia
- Russian Federation
- Indonesia
- VietNam
- Chile
- United States
- Thailand
- Singapore

Source: Unctad
Number of other IIAs concluded by APEC economies, 1994-2009: a shift from BITs to FTAs with investment chapters?

- Source: Unctad
III. Recent Trends in ISDS
Known investment treaty arbitrations

cumulative and newly instituted cases

1989–2009

Source: UNCTAD
## ISDS Cases in APEC Countries

<table>
<thead>
<tr>
<th>Country</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mexico</td>
<td>19</td>
</tr>
<tr>
<td>Canada</td>
<td>14</td>
</tr>
<tr>
<td>United States</td>
<td>14</td>
</tr>
<tr>
<td>Russian Federation</td>
<td>8</td>
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<tr>
<td>Malaysia</td>
<td>2</td>
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<tr>
<td>Peru</td>
<td>2</td>
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<tr>
<td>Philippines</td>
<td>2</td>
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<tr>
<td>Thailand</td>
<td>1</td>
</tr>
<tr>
<td>Vietnam</td>
<td>1</td>
</tr>
</tbody>
</table>
IV. Core elements of APEC IIAs
Recent cases – Convergence/divergence

Convergence:
Definition of investor
Host State laws and regulations
Expropriation – Indirect expro
NT

Divergence:
Definition of investment
FET-MST
MFN
Umbrella clause
Systemic evolution of the APEC IIA universe

Recent trends in substantive IIA content:

• Enhance coherence between investment and other legitimate policies
• Balancing the rights and obligations of investors and host countries
• Increasing predictability and stability in international investment relations

This is done through:

1) The review of model BITs
2) BIT renegotiations
3) Modernisation of treaty content
Review of model BITs of APEC economies

Many countries have started, or have already reviewed their model BITs - the revisions aim at:

• Establishing clearer rules and ensure greater precision in treaty making
• Ensuring consistency with the public interest and a country’s overall economic agenda
• Referring to the host State’s right to regulate in the public interest
• Balancing between protecting investors and the host State (including against the adverse effects of investor-state arbitration)

Most prominent examples of BIT model reviews by APEC economies:

• Russia (2002), Canada and United States (2004), Mexico (2008), United States (ongoing), Thailand (under consideration).
1. Some countries have engaged in the renegotiation of older BITs (e.g. Canada, China, Republic of Korea)

2. Economic agreements that include a chapter on investment have replaced earlier BITs:

- China-Peru FTA
- Morocco-United States FTA
- India-Republic of Korea CEPA
- At the regional level, ASEAN renegotiated its older investment agreement of 1998 and replaced it with the ASEAN Comprehensive Investment Agreement of 2009
Modernizing content in APEC IIAs

1. Clarifying the scope of the treaty
   • Excluding from the scope of the treaty certain areas of regulation and/or excluding specific assets
     See: ASEAN-China Investment Agreement (2009), Article 3.4; India-Korea CEPA (2009), Article 10.2 and 10.8
   
   • Including criteria of what constitutes an investment
     See: Australia-Chile FTA (2008), Article 10.1(j); Rwanda - United States BIT (2008), Article 1; Malaysia-Pakistan FTA (2007) Article 88(d)
Modernizing content in APEC IIAs

2. **Introducing general exceptions**
   - Including general exceptions that exempt measures necessary to protect human, animal or plant life or health
     See: Canada-Jordan BIT (2009), Peru-Singapore FTA (2008)

   - Including national security exceptions
     See: India-Singapore CECA (2005)

   - Prudential carve-outs covering measures aimed at the protection of financial market participants
     See: Rwanda-United States BIT (2008), Brunei-Japan FTA (2009)
Modernizing content in APEC IIAs

3. Clarifying the scope and meaning of specific obligations
   • FET does not require treatment in addition to what required under customary international law
     See: Mexico-Singapore BIT (2009)

   • Limiting FET to denial of justice only

   • Full protection and security: clarifying that the standard relates to police protection
     See: Australia-Chile FTA (2008)

   • Indirect expropriation: difference between a compensable indirect expropriation and the adverse effects endured by a foreign investor as a result of regulation in the public interest

   • Expropriation: specifying that the issuance of compulsory licenses does not amount to an expropriation
     See: New Zealand-Malaysia FTA (2009)
4. **Environmental clauses**

- Environmental clauses: adding specific language to ensure the protection of the environment
  
  See: India-Republic of Korea CEPA (2009)

- Including language aimed at enhancing coherence between IIAs and multilateral environmental agreements (MEAs)
  
  See: Canada-Peru FTA (2008)
5. **ISDS innovations**

- Clauses which aim at reducing States’ exposure to investor claims by **carving out** certain areas from ISDS
  See: Canada-Jordan BIT (2009) carves out measures taken by Canada taken in the area of competition law

- Limiting claims in certain sectors to some selected IIA obligations
  See: Canada-Jordan BIT (2009) financial institutions can bring claims of violation of expropriation, transfers and denial of benefits provisions only (Article 21)

- Limitation period for IIA claims, usually equivalent to three
  See: ASEAN-China Investment Agreement (2009) and Japan-Switzerland FTA (2009)

- Addressing frivolous claims through introducing a procedure for an early decision that a claim is manifestly without legal merit
  See: Australia-Chile FTA (2008)
5. ISDS innovations (continued)

- Consolidation of claims, which can be envisaged where two or more claims have a question of law or fact in common and arise of the same facts or circumstances
  See: Rwanda-United States BIT (2008)

- Providing for transparency of arbitral proceedings
Revision of Rules of Arbitration

• ICSID convention and additional facility rules

• UNCITRAL rules for arbitration

• International Chamber of Commerce Rules for Arbitration
Questions???

Thank you!

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