



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

RIETI BBL

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

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I. Recent developments in FDI flows





Global FDI flows decline

- 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

Table 1. UNCTAD's FDI Global Quarterly Index

(2005 = 100)

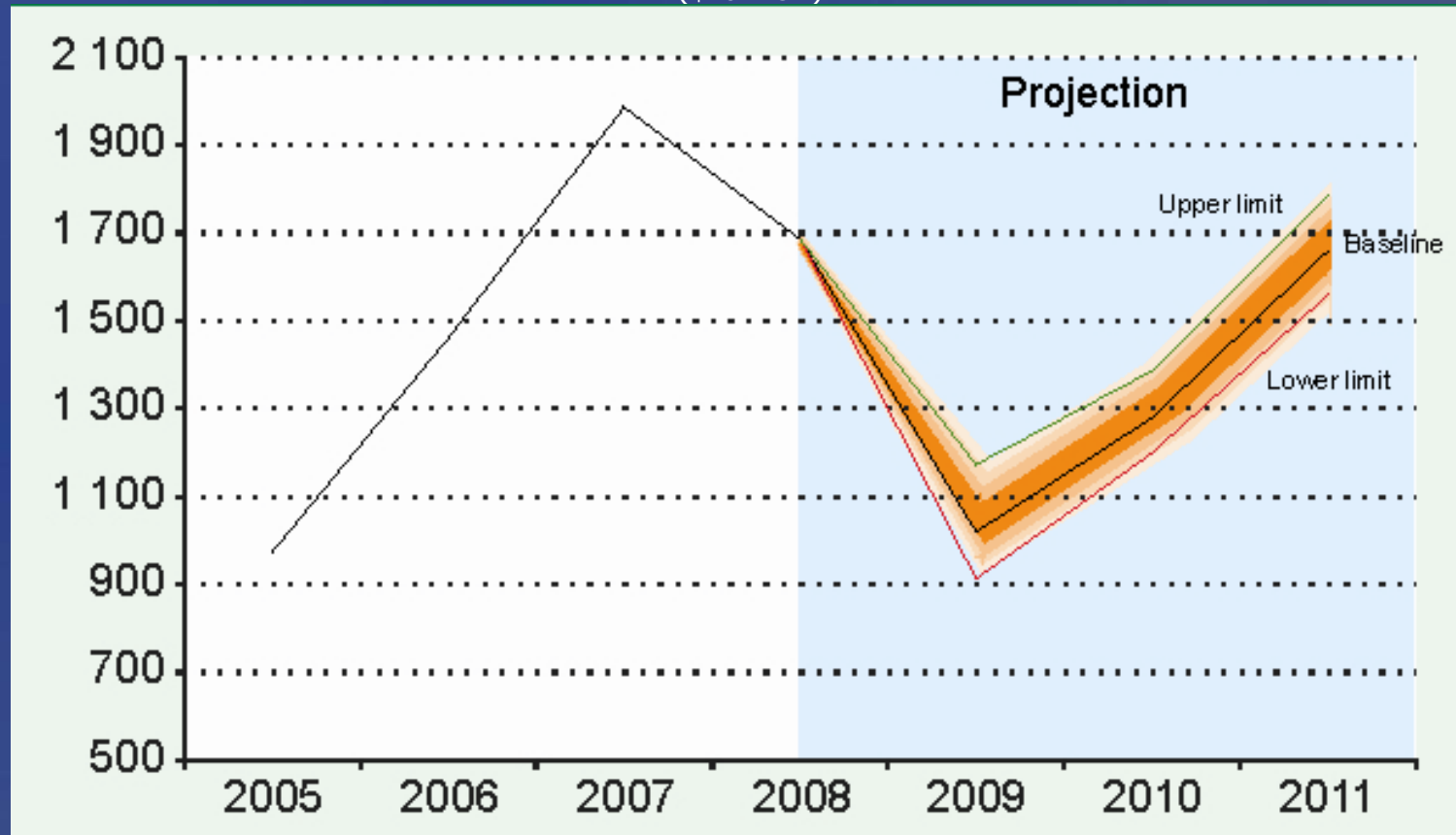
2008 Q1	218.5
2008 Q2	169.6
2008 Q3	155.6
2008 Q4	154.1
2009 Q1	72.0
2009 Q2	115.3
2009 Q3	117.5
2009 Q4	117.4

- 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



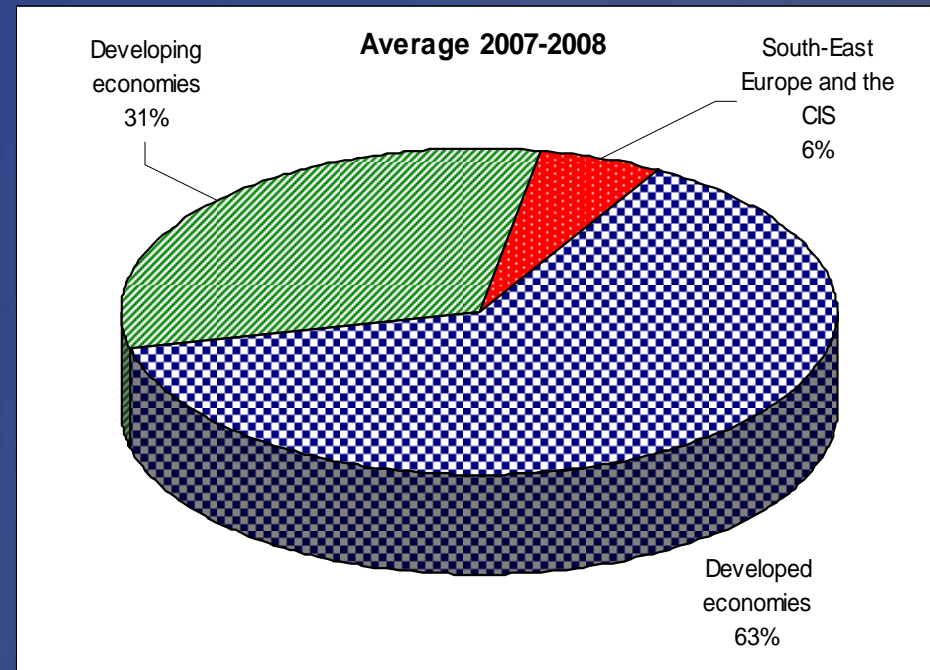
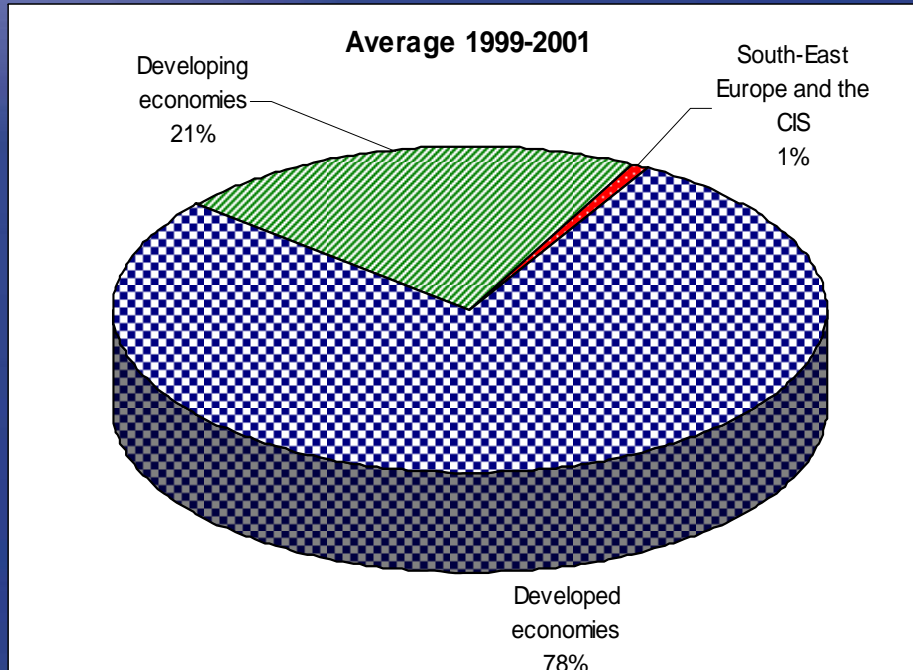
Global FDI Prospects, 2009 - 2011

Global FDI inflows, 2005-2007 and projection for 2009-2011
(\$ billion)





Evidence suggests the FDI landscape is shifting toward developing economies.

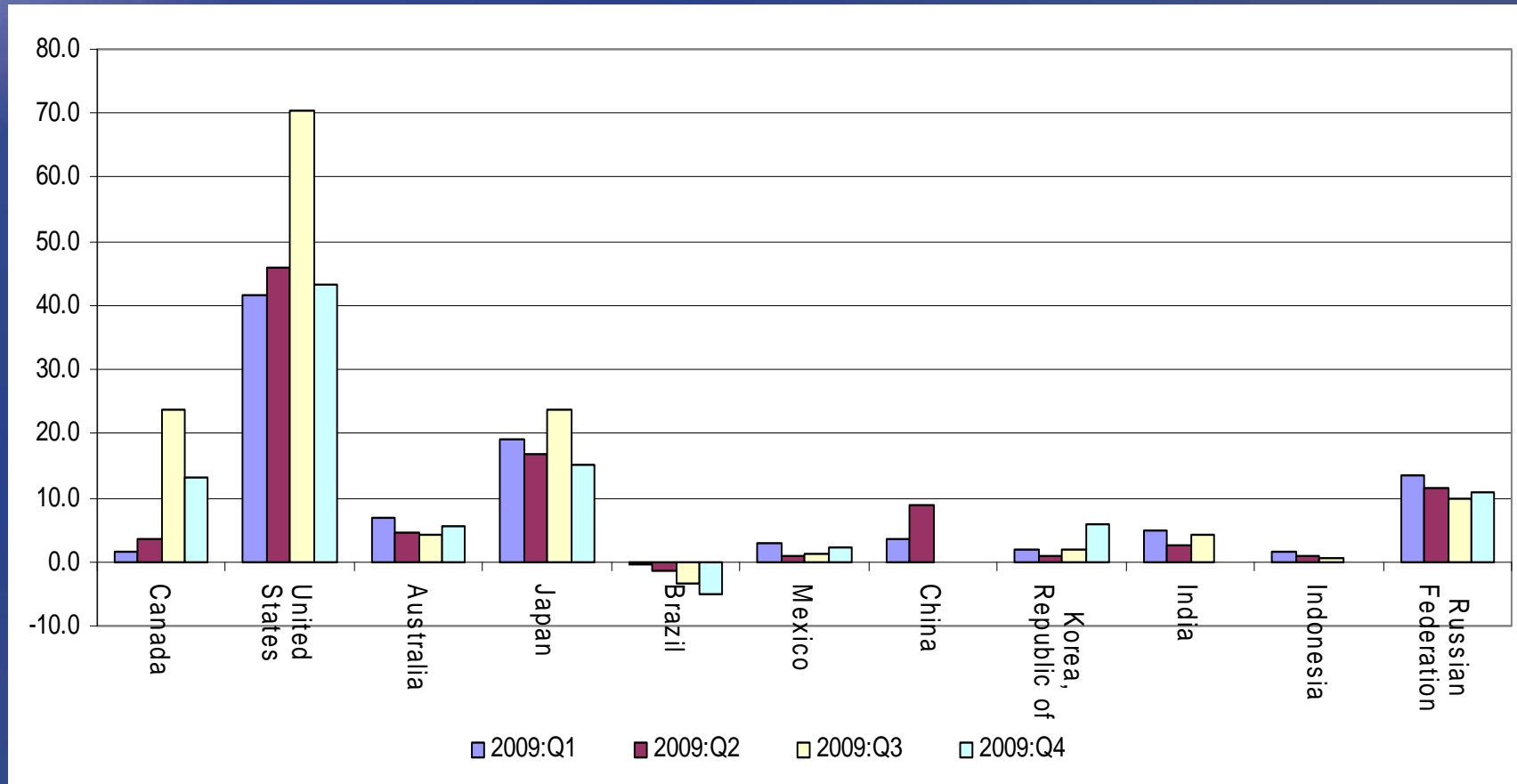


The share of **developing & transition economies** in inward FDI accounted for 43% in 2008 (31% in 2007).



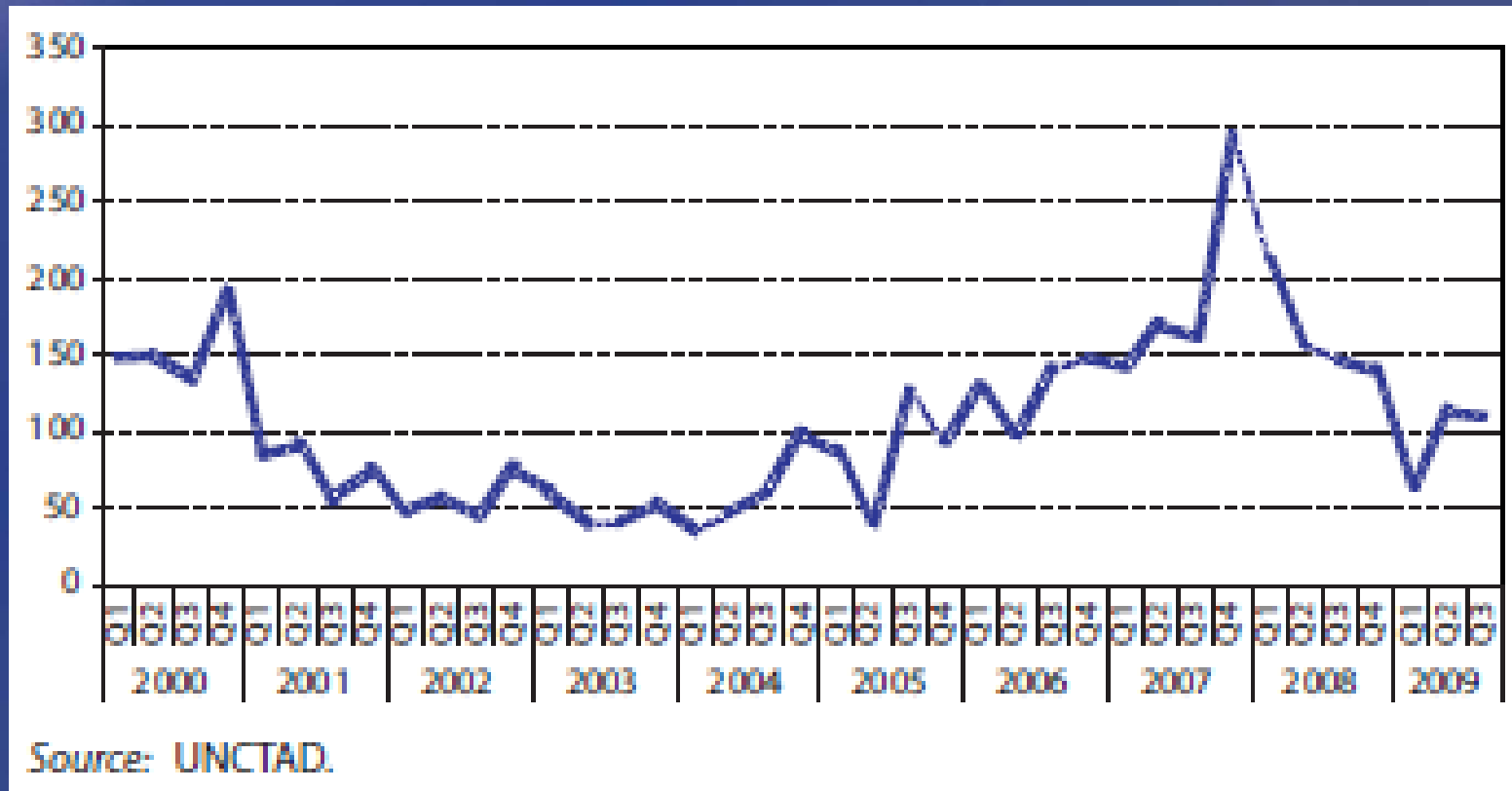
FDI outflows in selected economies, (2009)

(\$ billion)





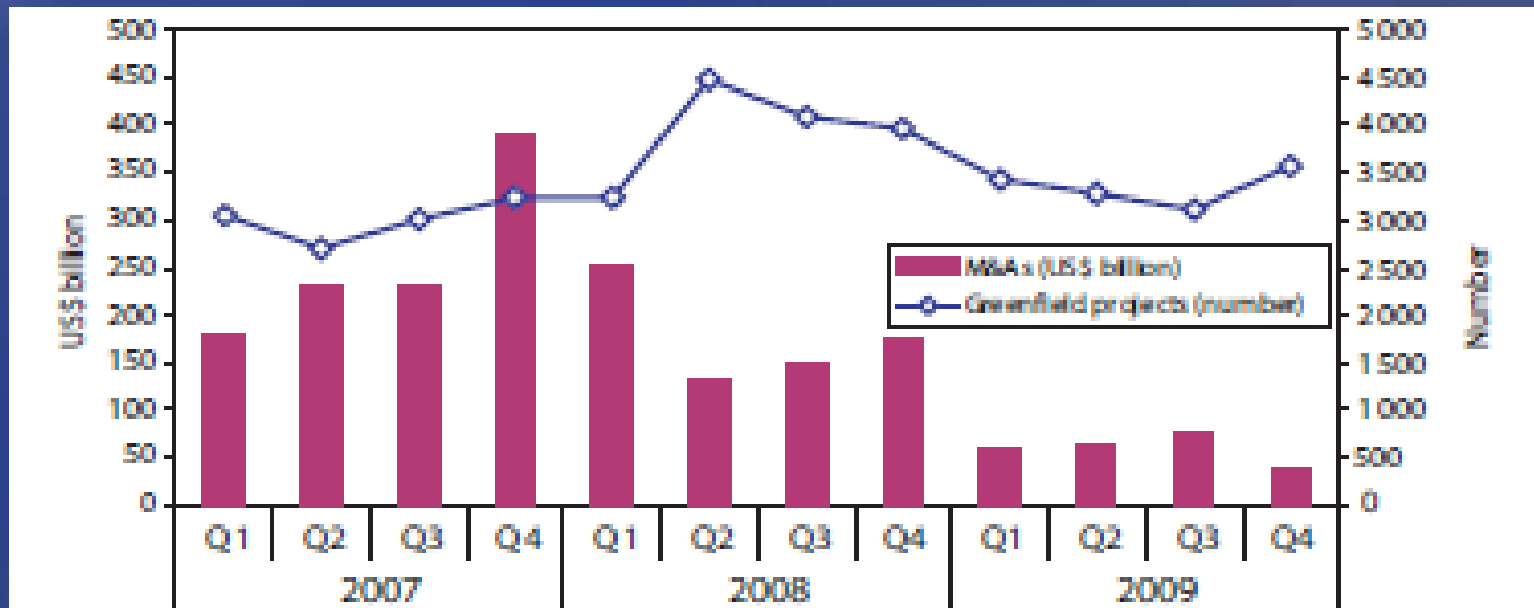
Global FDI Quarterly Index, 2000-2009



Base 100: quarterly average of 2005



Cross-border M&A Sales & Int. Greenfield Projects, 2007-2009



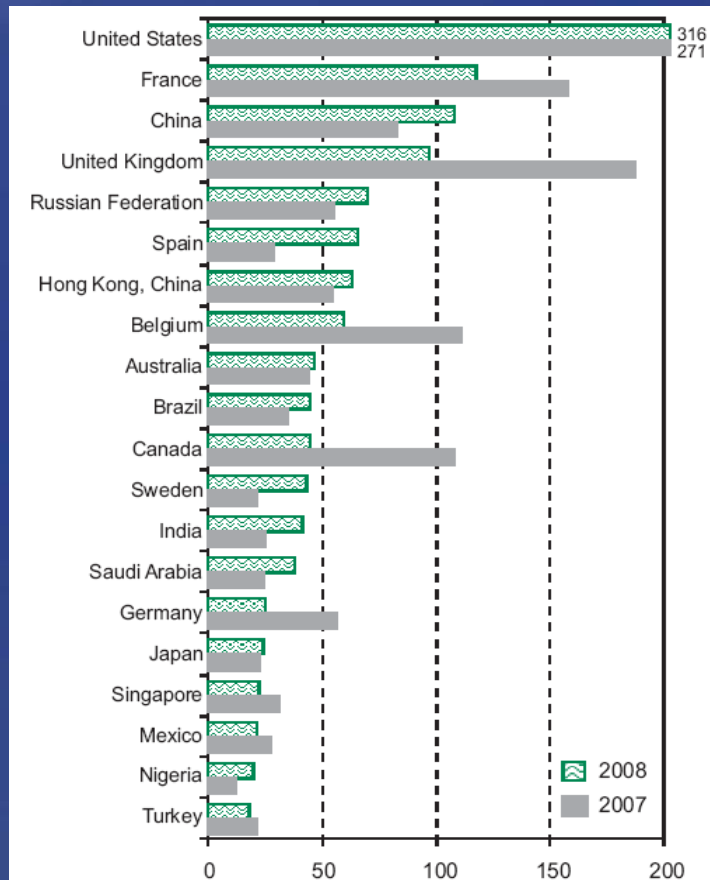
Source: UNCTAD, cross-border M&A database for M&As; and information from the Financial Times Ltd, fDi Markets (www.fDimarkets.com) for greenfield projects.

Note: Data on greenfield projects for 2009:Q4 are estimates based on available figures for October and November.



Top Recipients of FDI Inflows

Global FDI inflows, top 20 economies, 2007–2008
(\$ billion)

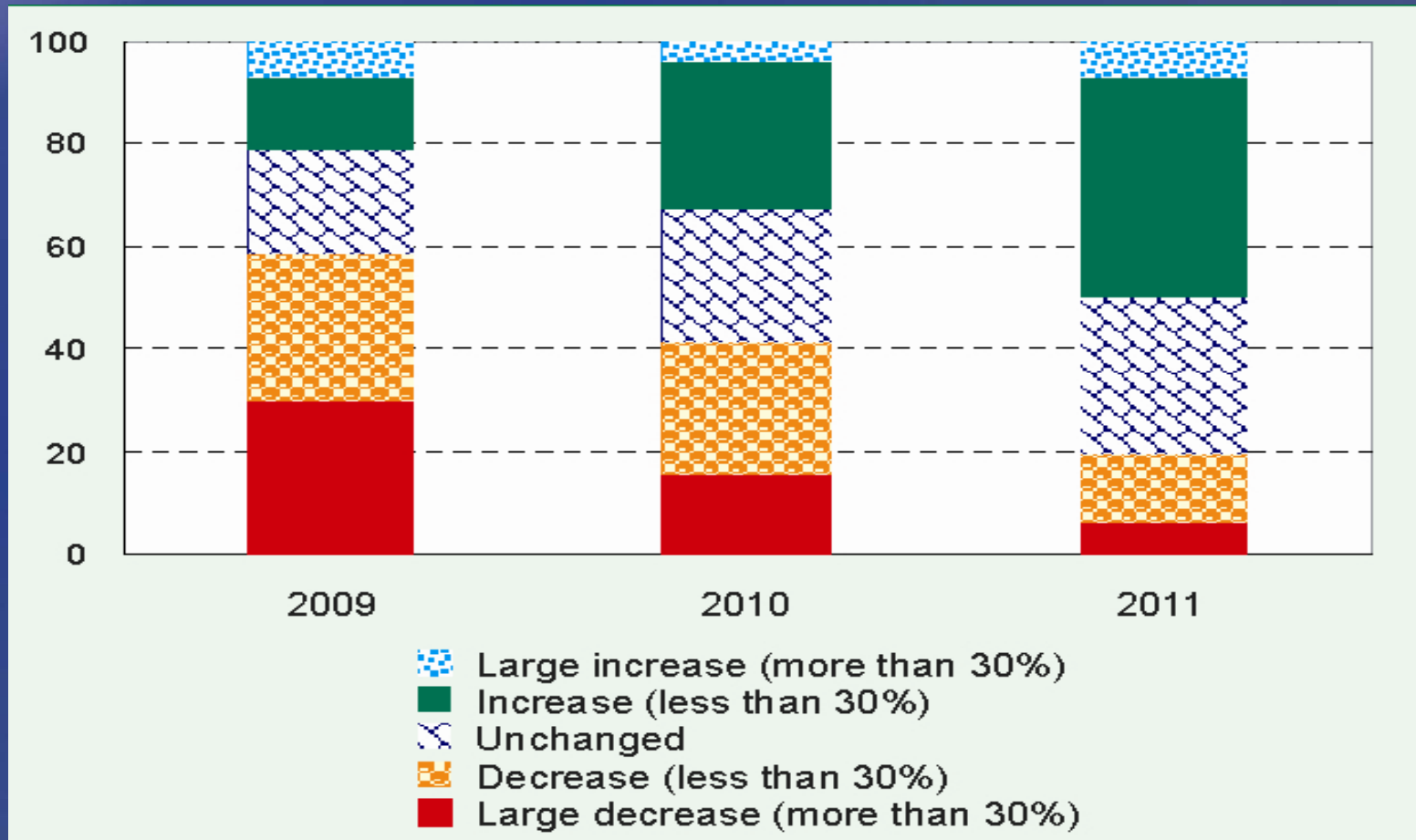


The **US** remained the largest recipient country, followed by **France, China, UK & the Russian Federation.**

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



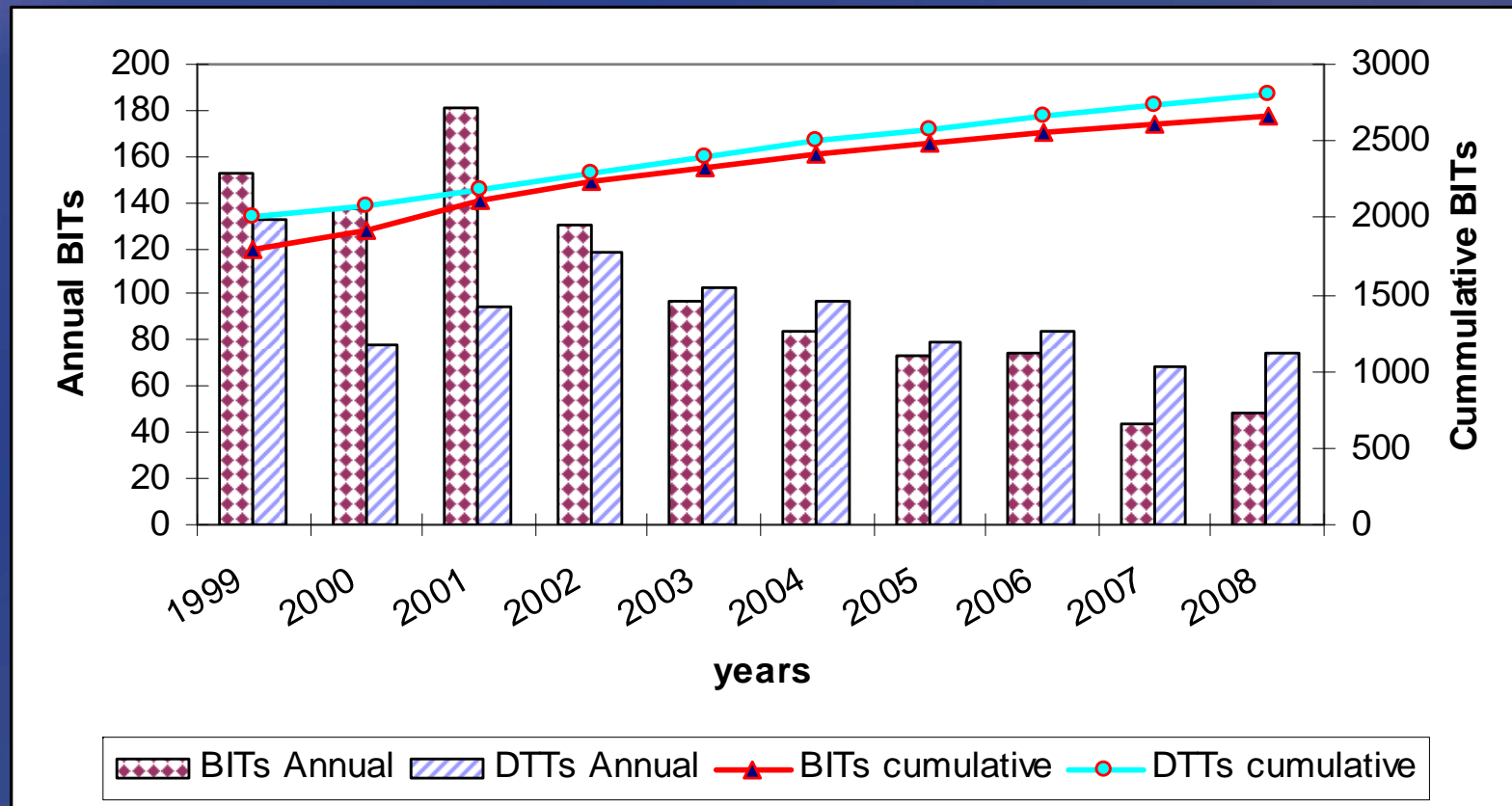


II. Recent Trends in IIAs





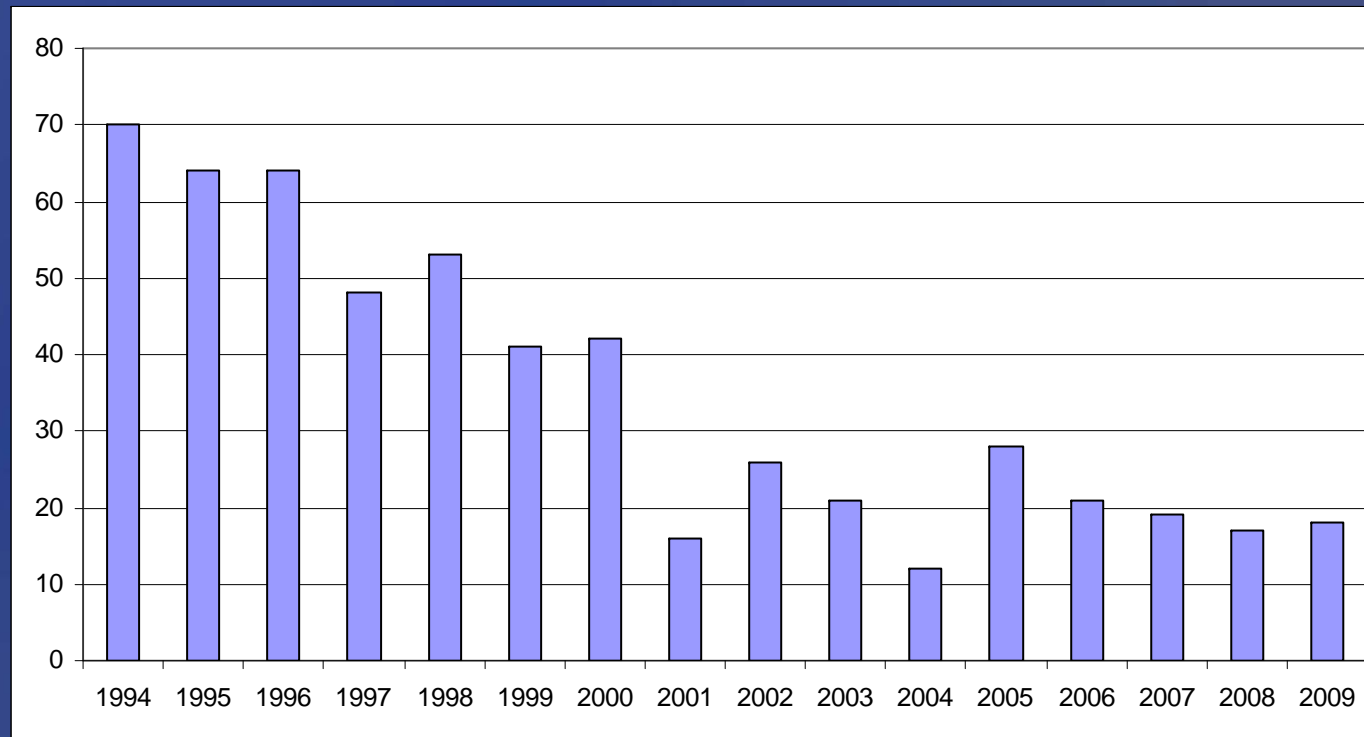
The network of BITs continues to grow rapidly, there are now almost 2600 BITs



• Source: Unctad



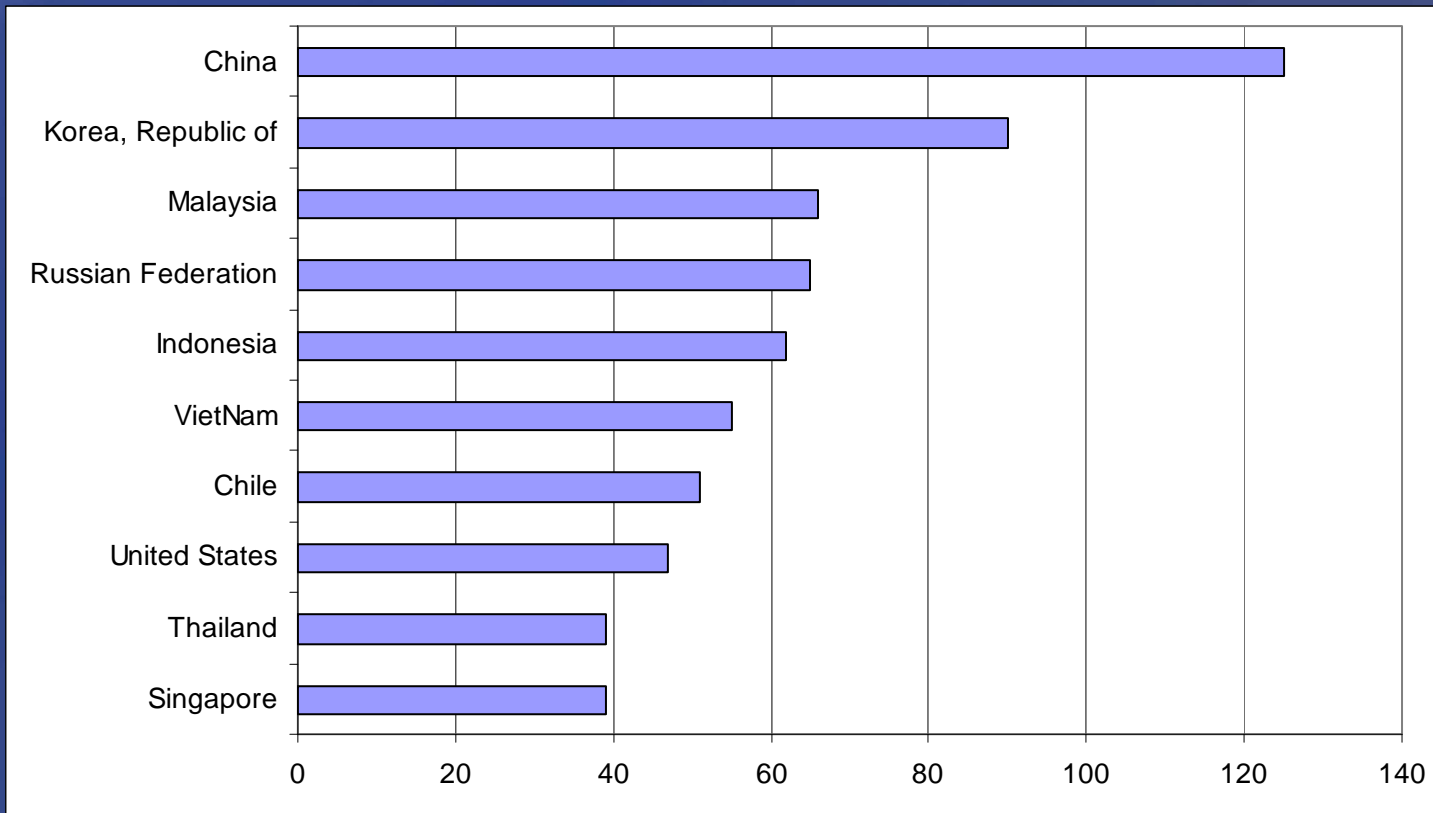
Number of BITs concluded by APEC economies, 1994-2009



- Source: Unctad



Top 10 APEC economies in terms of BITs concluded, end 2009

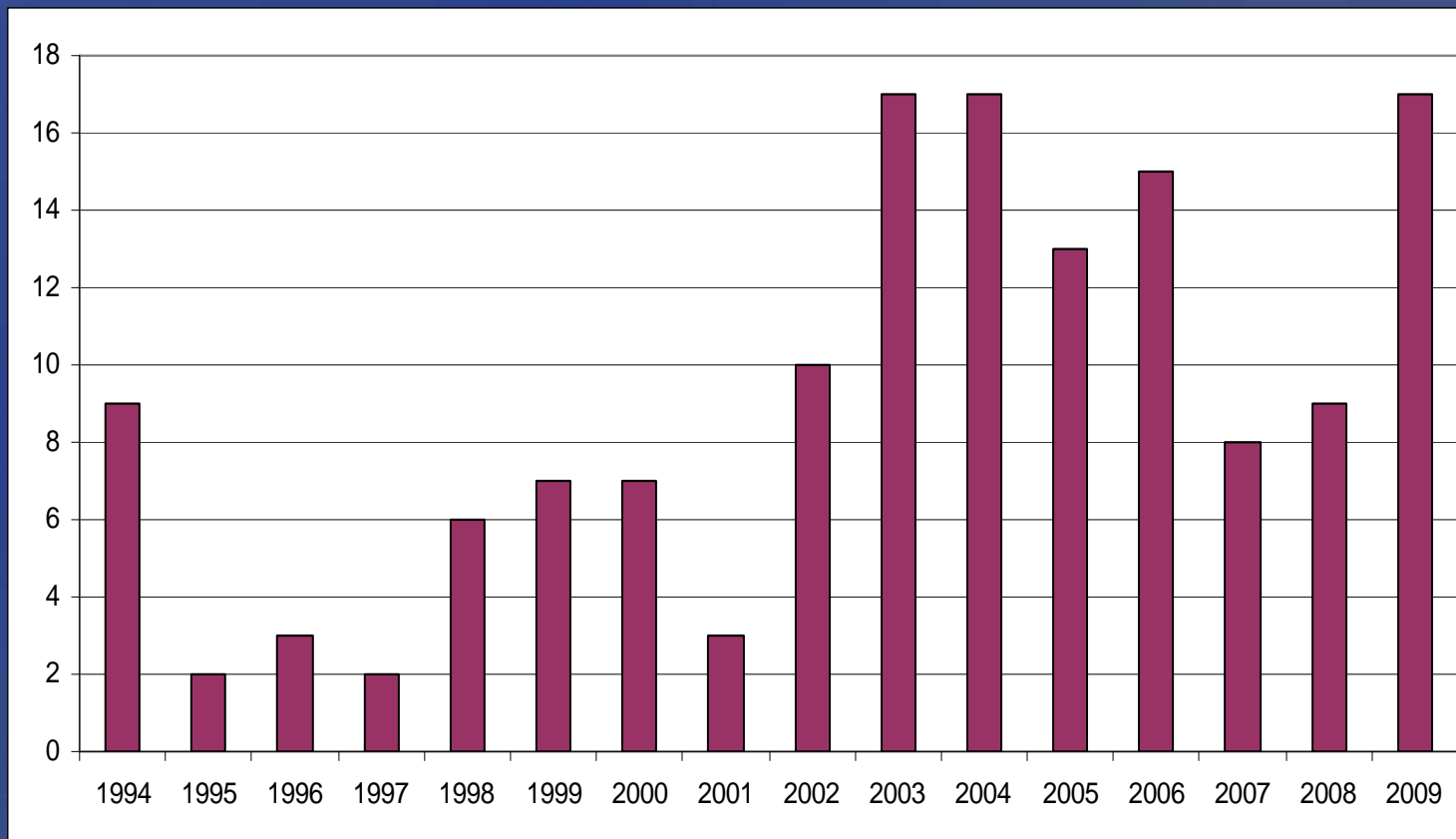


• Source: Unctad



Number of other IIAs concluded by APEC economies, 1994-2009:

a shift from BITs to FTAs with investment chapters ?



• Source: Unctad



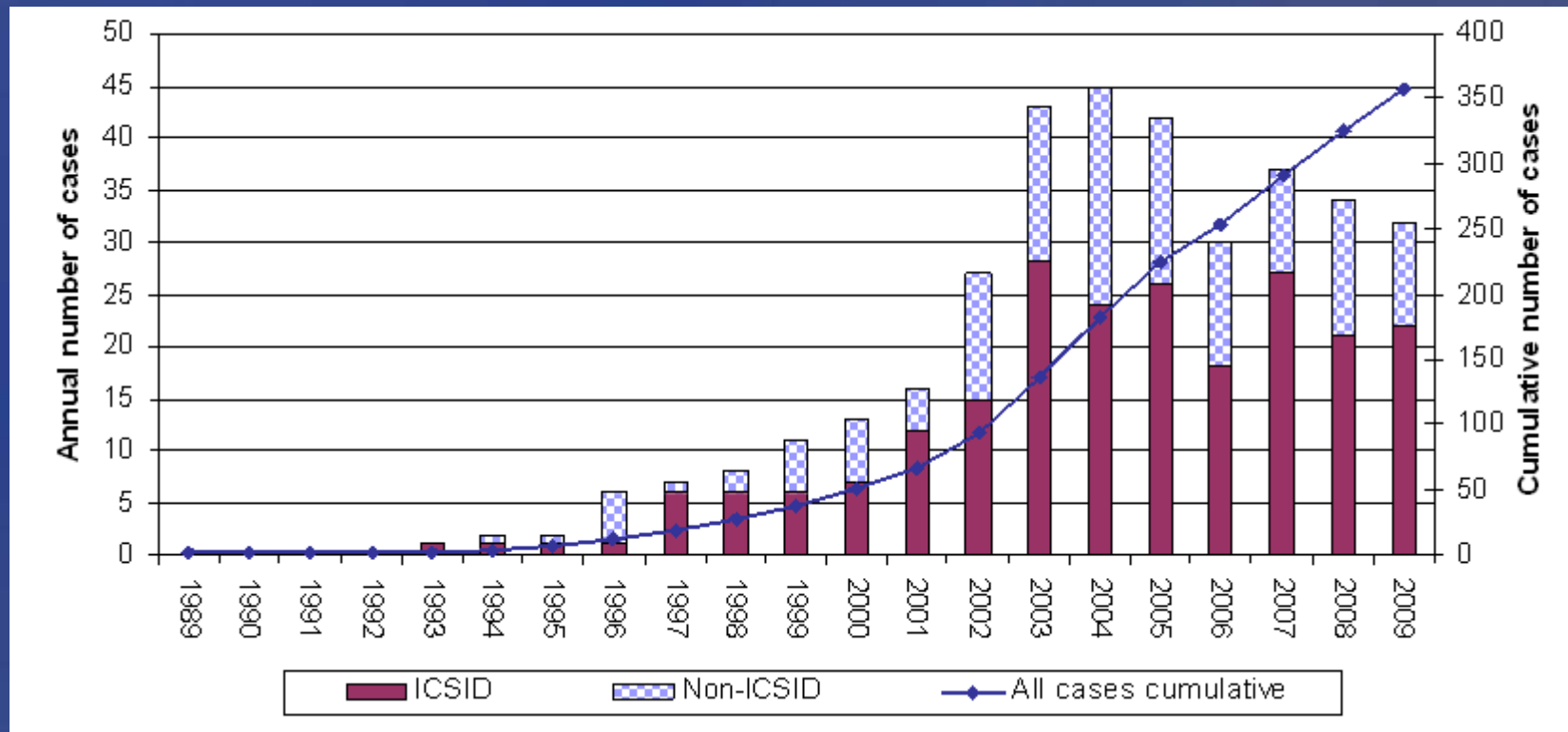
III. Recent Trends in ISDS





Known investment treaty arbitrations

cumulative and newly instituted cases 1989–2009



Source: UNCTAD



ISDS Cases in APEC Countries

Mexico	19
Canada	14
United States	14
Russian Federation	8
Malaysia	2
Peru	2
Philippines	2
Thailand	1
Vietnam	1



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).



Renegotiation of APEC IIAs

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

See: ASEAN-China Investment Agreement (2009) Article 7.2(a)

- 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)



Modernizing content in APEC IIAs

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)



Modernizing content in APEC IIAs

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)



Modernizing content in APEC IIAs

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

See: Australia-Chile FTA (2008) Article 10.22; Canada-Jordan BIT (2009) Article 38; Rwanda-United States BIT (2008)

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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