



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

## **Presentations**

Kuala Lumpur, Malaysia  
15-19 June 2009

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Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

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**APEC-UNCTAD Regional Training Course on the Core Elements of International Investment Agreements in the APEC Region**

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**International investment rule-making: trends and emerging issues**

Jan Knoerich  
 Associate Expert, Work Programme on International Investment Agreements

**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

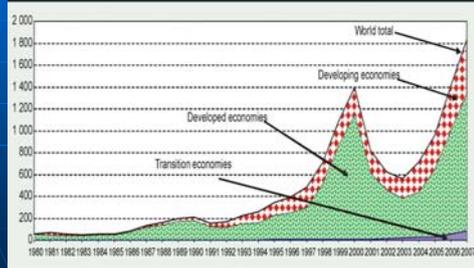
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**Foreign direct investment: trends and implications**

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**Global FDI inflows surpassed the peak of 2000...**

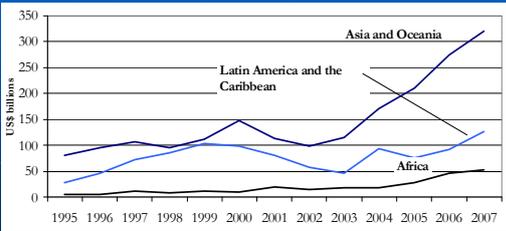
FDI inflows, globally and by group of economies, 1980-2007 (\$ billion)



\$1.8 trillion in 2007

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**... with record flows in developing regions ...**

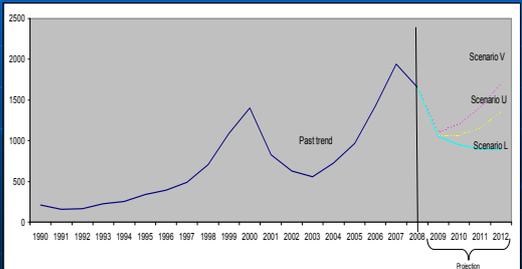


Africa: \$53 billion (+16%) – record  
 LAC: \$126 billion (+36%) – record  
 LDCs: \$13 billion (+4%) – record  
 East Asia: \$157 billion (+19%) – record  
 South-East Asia: \$61 billion (+18%) – record  
 South Asia: \$31 billion (+19%) – record  
 West Asia: \$71 billion (+12%) – record

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**... but FDI flows set to decline in 2008, with a rising trend in the medium term.**

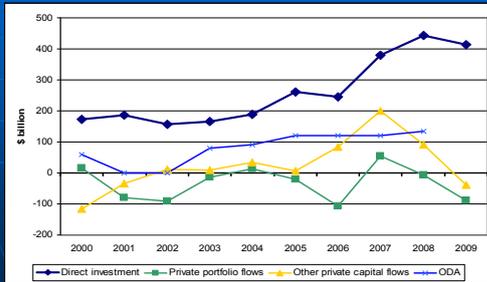
Worldwide FDI inflows with three different trajectories, 1990-2012



UNCTAD expects worldwide FDI down by 15% in 2008

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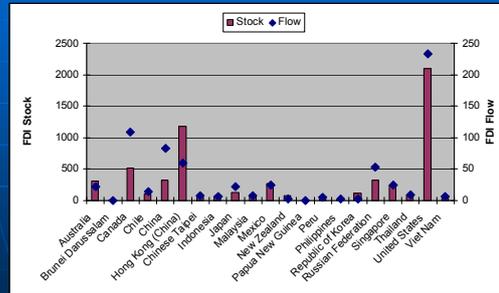
## Net capital flows to developing countries, 2000-2009



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## FDI into APEC Economies

Inward FDI stock and flows into APEC economies 2007 (\$ billion)

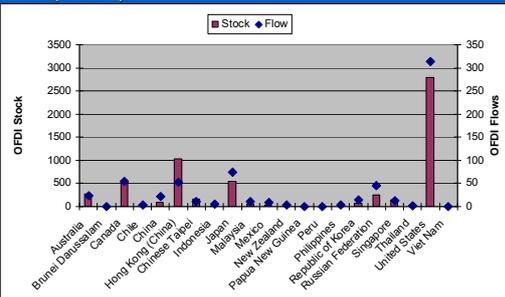


Total: US\$ 6 trillion, 40% of world FDI stock  
Total: US\$ 700 billion, 38% of world FDI flows

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## Outward FDI from APEC Economies

Outward FDI stock and flows from APEC economies 2007 (\$ billion)



Total: US\$ 6 trillion, 39% of world outward FDI stock  
Total: US\$ 662 billion, 33% of world outward FDI flows

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## Emerging issues

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

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## 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

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## Objectives of the legal investment framework

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## Objectives of the legal investment framework



These objectives can be achieved through:

- National policies
- Investment contracts/State contracts
- International investment agreements (IIAs)

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## Legal framework for investment: Hierarchy of norms



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## 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)

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## 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

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## 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)

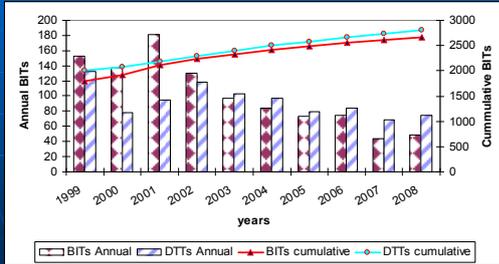
...but the **concrete way in which they are addressed** differs substantially

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## Trends in international investment agreements

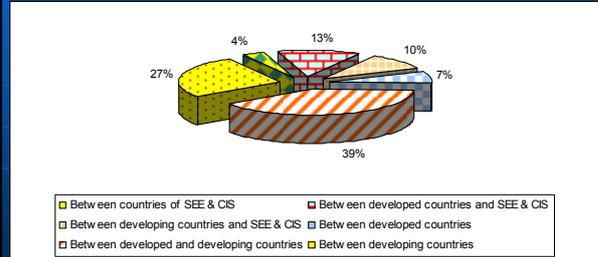
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## The network of BITs continues to grow rapidly, there are now over 2500 BITs



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## BITs concluded by country group



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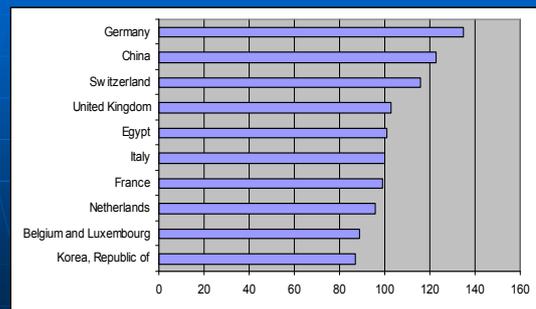
## Increased role of developing countries

- 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.

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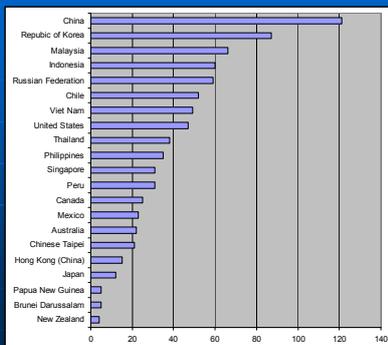
## The top ten signatories of BITs in the world, June 2008



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## BITs in APEC

BITs concluded by APEC economies, 1 June 2008 (cumulative)



Total: 808 BITs, ~ 31% of globally concluded BITs

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## 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

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## 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

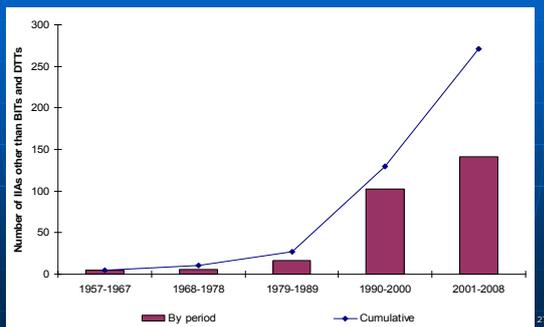
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## EIAs with investment chapters concluded in 2008

- Economic Partnership Agreement between Japan and Vietnam – The provisions of the BIT between Japan and Viet Nam signed (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 ASEAN and Japan
- Free Trade agreement between Singapore and Peru
- Free Trade Agreement between Chile and Australia
- Free Trade Agreement between the EFTA States and Colombia
- Trade, investment and development cooperative agreement between the United States and the Southern African Customs Union (SACU)
- Trade and Investment Framework Agreement between the United States and the East African Community (EAC)
- Free Trade Agreement between Singapore and China
- Interim Agreement on Trade and Trade-related matters between the European Community and Bosnia and Herzegovina
- Economic Partnership Agreement between the CARIFORUM States and the European Community
- Economic Partnership Agreement between the EC and Côte d'Ivoire
- Free Trade Agreement between Singapore and the Gulf Cooperation Council (GCC)

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## Over 250 trade agreements with investment provisions



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## Investment in the multilateral context

- 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

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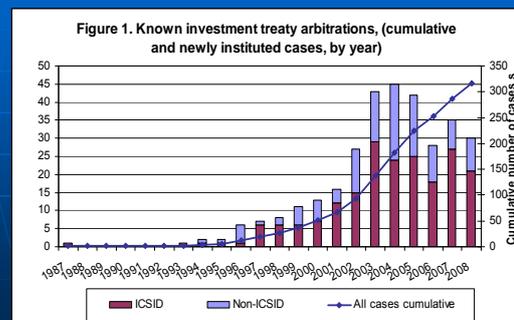
## The increase in IIAs has been paralleled by an increase in investor-State disputes

→ 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.

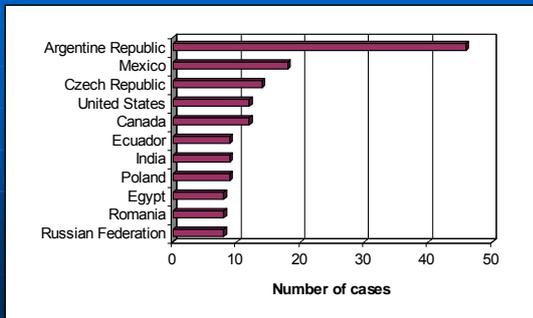
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## Known investment treaty arbitrations



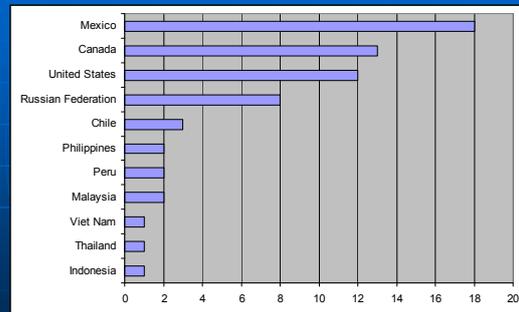
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## Known investment treaty claims, by defendants



## ISDS in APEC

Known investment treaty arbitrations in APEC countries



Total of 63 cases, 20% of all known cases worldwide

## 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

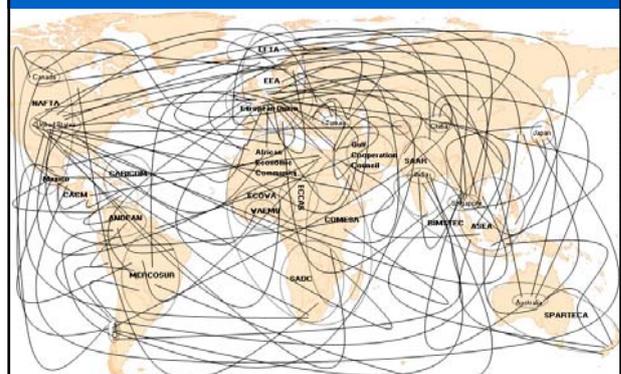
## Features and Challenges

## 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

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## 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.

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## 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.

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## 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.

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## 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.

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## 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.

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[iia@unctad.org](mailto:iia@unctad.org)  
[www.unctad.org/iia](http://www.unctad.org/iia)

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