



# **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.*:

UNCTAD Investment Policy Review, Vietnam, Sept. 2008  
<http://www.unctad.org/Templates/webflyer.asp?docid=10104&intItemID=2554&lang=1&mode=highlights>

OECD Investment Policy Review, Peru, Nov. 2008  
[www.oecd.org/daf/investment/countryreviews](http://www.oecd.org/daf/investment/countryreviews)

OECD Investment Policy Toolkit  
[www.oecd.org/investment/pfitoolkit](http://www.oecd.org/investment/pfitoolkit)

## 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

## Recommendations (cont'd)

- Effective Legal Frameworks
- Effective Administrative Practices

## II. Effective Legal Frameworks

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

## 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;**

## Lead State Agency (cont'd)

- (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

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## Authority To Pursue Settlement

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

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## 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.

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## 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))

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## Authority To Pursue Settlement (cont'd)

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

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## Payment And Reimbursement Of Settlements & Awards

- Who pays?
  - National budget
  - Offending ministry's budget
  - Hybrid models

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## Payment And Reimbursement Of Settlements & Awards (cont'd)

- *Ad hoc* allocation of resources
- Standing Fund
  - US Judgment Fund
  - <http://www.fms.treas.gov/judgefund/background.html>

## 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

## III. Effective Administrative Practices (cont'd)

- Information memorandum
- Press release, with advice from counsel
- Budgetary authority to settle
- Timelines for action

## IV. Productive Consultations (cont'd)

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

## 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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