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RECENT TRENDS AND CHARACTERISTICS OF INTERNATIONAL INVESTMENT RULEMAKING

by

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I would like to give you an overview of the recent trends in international investment rulemaking and its main characteristics. In doing so, I intend to set the stage for our subsequent discussions on the challenges that the evolution of the IIA universe pose, and on what could be done to meet these challenges.

The universe of IIAs consists of bilateral investment treaties, treaties on the avoidance of double taxation, and other investment-related agreements, such as free trade agreements, partnership agreements or economic cooperation agreements. Today, there are over 5,500 investment related agreements. Let me start with a summary of the recent trends in international investment rulemaking.

I. Recent trends in IIAs

First, the IIA universe continues to grow rapidly. On average, more than 3 treaties were signed per week over the past few years.

- In 2006, 73 new bilateral investment treaties (BITs) were concluded, bringing the total number of BITs to 2,573 by the end of 2006.
- Likewise, the trend to renegotiate "old" BITs and to replace them with more modern and more sophisticated agreements continues. At the end of 2006, 109 BITs had been renegotiated, and there are no signs that this development will slow down.
- In 2006, 83 new DTTs were concluded, bringing the total number of DTTs to 2,651 by the end of 2006.
The tendency to establish international investment rules as part of free trade agreements or other treaties on economic cooperation has gained momentum. In 2006, 18 new agreements concluded, involving 62 countries. This brought their total number to 241 at the end of 2006. This figure is still small compared with the number of BITs (namely less than 10%), but it has nearly doubled over the past five years.

In addition, at least 68 agreements involving 106 countries were under negotiation at the end of 2006. This suggests an even more pronounced increase in such treaties in the near future. The more frequent use of these agreements demonstrates a trend towards a more integrated approach when dealing with interrelated issues in international investment rulemaking.

Second, the role of developing countries in international investment rulemaking continues to enhance. Today, developing countries are parties to 77% of all BITs, 61% of all DTTs, and 81% of all other IIAs. Some developing countries, such as China and Egypt, are amongst the "top" signatories of BITs worldwide.

There is also growing South-South cooperation on international investment rulemaking, as more and more developing countries are becoming sources of outward investment. By 2006, 680 BITs had been concluded among developing countries, constituting about 27% of all BITs. The total number of South–South IIAs other than BITs and DTTs exceeded 90 agreements at the end of 2006. Recent examples of such agreements include the ASEAN initiatives for the establishment of a free trade and investment area with China, India and the Republic of Korea, the Singapore-Panama FTA, and the China-Pakistan FTA.

Third, investor-State disputes continue to increase, albeit at a lower rate than in previous years. In 2006, the number of known treaty-based investor-State dispute settlement cases grew by at least 29, bringing the total number of known treaty-based cases to 259 by the end of 2006.

At least 70 governments have faced investment treaty arbitration. 44 of them are in the developing world, 14 in developed countries and 12 countries with economies in transition. Argentina tops the list (42 claims), followed by Mexico (18), the United States and the Czech Republic (11 each).
While international arbitration is an important means to strengthen the rule of law and to increase legal stability, a number of conflicting awards have also led to new uncertainties concerning the interpretation of core investment provisions. These concerns have led to the revision of several model BITs.

II. Main characteristics of the IIA system

I would now like to turn to the second part of my presentation, in which I will describe the main characteristics of the current IIA system. In doing so, I intend to show what opportunities, and what challenges these features imply for countries, in particular developing countries.

Now let us examine each of these features.

A first observation is that the IIA system is universal. International investment rulemaking proliferates in all regions. Today, almost all countries in the world are party to at least one IIA, and the majority of them are parties to several, if not numerous. This remarkable level of treaty-making activity reflects the willingness of the countries involved to provide an additional layer of protection, stability, predictability and transparency that goes beyond their unilateral efforts to attract FDI. It therefore complements the general trend in improving the climate for FDI, although there are recent signs of a backlash against foreign investment in some countries.

Second, the IIA network is highly atomized. That is, it consists of thousands of individual agreements that lack any kind of system-wide coordination. In the absence of global investment rules, countries continue to conclude investment treaties, thereby further perpetuating and accentuating the IIA universe.

Third, the IIA universe is multilayered. It consists of investment treaties at various levels, i.e. bilateral, sub-regional, regional, inter-regional, sectoral, plurilateral and multilateral, that overlap each other.

Fourth, the IIA universe is multifaceted. It covers not only investment issues per se, but also related matters such as trade, services, intellectual property, industrial policies, labour issues, movement of personnel, environmental concerns, and others.
Fifth, the IIA universe can be characterized as having uniformity at the core, but increasing variation at the periphery. On a number of core issues, the agreements reflect considerable homogeneity in terms of the core principles, although with significant differences concerning drafting details. Provisions such as national and MFN treatment for established investment, fair and equitable treatment, guarantees of compensation for expropriation and of free transfers, and consent to investor-State and State-State dispute resolution appear in a large number of agreements. Other provisions, however, such as non-discrimination with respect to the admission of foreign investors, prohibitions of certain performance requirements, appear in only a minority of agreements, sometimes with considerable variation among treaties.

The IIA system is also evolving rapidly. That is, the system is innovative. For example, a small, but growing number of IIAs include revisions to the wording of various substantive treaty obligations, such as the meaning of “fair and equitable treatment” and the concept of indirect expropriation. Another new development is that some recent BITs emphasize in a stronger manner public policy concerns associated with foreign investment through exception clauses, covering, for instance, national security and public order, protection of health and the environment, respect for core labour rights, cultural diversity and prudential measures for financial services. Important innovations also take place in investor-State dispute settlement procedures in the IIAs of some countries in order to increase transparency, promote judicial economy, and foster sound and consistent results.

On the one hand, these developments demonstrate that international investment rulemaking is flexible to react to new challenges, such as newly emerging public concerns in respect of foreign investment. On the other hand, it should be no surprise that in a highly atomised IIA network, individual countries seek individual solutions in addressing these concerns - with significant implications for the overall coherence of the system.

One can also discern some areas for further strengthening the IIA system.

For instance, most IIAs are typically only indirectly promotional. This means that they seek to attract foreign investment through the granting of investment protection rather than through specific promotion measures by home and host countries. This raises the question whether more could be done to strengthen the promotional aspect of IIAs - an issue that we will discuss in more detail tomorrow.
Further, IIA\text{s only establish investor rights, but remain silent with regard to their obligations}. This means that host countries continue regulating foreign investment through their domestic legislation and not by directly imposing commitments on foreign investors in IIA\text{s}, for instance with regard to their corporate social responsibilities. We will come back to this issue this afternoon.

Furthermore, because the network of IIA\text{s} is large and increasingly complex, greater emphasis must be given to the issue of \textit{policy coherence in international rule making}. The growing number, breadth and complexity of investment agreements could undermine the coherence of the IIA system. This will be the focus of our first session and Mr Weber will present a more detailed overview of the issue.

III. Development implications

What development implications do all these characteristics of the current IIA system have?

The consolidation of core investment protection principles could contribute to clarity and stability of the investment climate. Moreover, the increasing variety and complexity of IIA\text{s} with regard to individual aspects of investment promotion and protection offer countries many options in terms of treaty making and in using IIA\text{s} as instruments to further their development policies.

On the other hand, the rapidly increasing variety and complexity of IIA universe also poses unprecedented challenges concerning the negotiation of the "right" agreement, the proper implementation of IIA obligations, and for keeping the IIA patchwork transparent and coherent. The risk is particularly high for developing countries with less expertise in IIA matters, frequent policy changes and weak negotiation positions. Furthermore, individual developing countries acting on their own may find it difficult to ensure in IIA\text{s} that the development dimension is properly taken into account and that they retain sufficient regulatory flexibility to pursue their economic and social goals.

In conclusion, coping with an increasingly complex IIA universe represents a difficult task for all countries, in particular developing countries. This underlines the importance of capacity-building and institution-building through technical assistance as a means to enhance the development dimension of IIA\text{s}. Our discussions today and tomorrow are part of these
efforts and will try to shed more light on this issue and to provide some ideas on how to deal with it in future international investment rulemaking.

Thank you very much for your attention.

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