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Session 3: Strengthening Regional Investment Frameworks in the MENA Region

Overview and characteristics of the bilateral and regional investment agreements in the MENA region

Dr. Marie-Estelle REY
Policy Analyst / Project Coordinator
MENA-OECD Investment Programme
OECD Private Sector Development Division
Overview

- Objectives of international legal investment frameworks
- International and regional trends in international investment agreements
- Strengthening regional investment frameworks
2009 Marrakech Ministerial Declaration on Governance and Investment

Orientation 10:
“MANDATE the Programme to pursue analysis of ways to Strengthen Regional Investment Frameworks including screening the effectiveness of regional investment protection instruments with a view to promoting intra-regional investment flows”.
Objectives of international investment frameworks
Legal framework for investment

- National laws and regulations, investment codes
- State contracts, investment agreements
- Bilateral investment treaties (BITs) for the promotion and protection of investment
- Double taxation treaties (DTTs)
- Bilateral and regional preferential trade and investment agreements
- Non-binding regional investment instruments (OECD, APEC)
- Sectoral agreements (Energy Charter)
- Multilateral disciplines and specific agreements (WTO GATS, TRIMs, TRIPs, ICSID, NY Convention, MIGA), but no multilateral agreement
Objectives of the legal investment framework

Restrictions

- Entry and establishment
- Ownership and control
- Operational restrictions
- Authorization and reporting
  Etc..

Standards of treatment & protection

- Treatment (NT, MFN, FET)
- Expropriation
- Transfer of funds
- Dispute settlement
- Transparency
- Etc.

These objectives can be achieved through:

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

- Reinforce economic cooperation and facilitate **coordination of investment relations** (between host States, home States, international investors and other development stakeholders) through agreed common denominators

- **Complement national laws** on investment (interface between national and international investment policies)

Impact of IIAs on FDI flows
Several possible objectives of IIAs

- Promotion
- Regional establishment agreements
- BITs
- Protection
- Liberalization

US-CAN-JAP BITs
FTAs with investment provisions
NAFTA
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 ways in which they are addressed differ substantially
Trends in international investment agreements
Recent trends in IIAs - highlights

• Rapid proliferation at all levels, including at the intra-regional level

• International investment rules are increasingly being formulated as part of agreements that encompass a broader range of issues (economic integration agreements)

• Investment provisions in new agreements tend to be increasingly sophisticated and complex in content, but clarify some issues

• IIA proliferation has been paralleled by a rise in investor-State disputes
The network of BITs continues to grow rapidly: 2,700 BITs

Source: UNCTAD, 2009
Top ten signatories of BITs in the world

Source: UNCTAD, 2009
Top 10 MENA BITs signatories

Source: UNCTAD data, June 2009

582 BITs signed by the MENA region (21% of all BITs concluded)
Intra-MENA BITs (73 concluded, 39 in force)

Source: UNCTAD data, June 2009
Investment agreements other than BITs

Variety of agreements:

- Different levels (bilateral, regional, multilateral)
- Different scope (investment provisions only or encompassing a broader range of issues such as trade, services, competition, intellectual property)
- Different objectives (investment promotion, protection, liberalization)
- Different obligations (binding vs. non-binding)

→ Bilateral free trade agreements, regional integration agreements, partnership agreements, economic cooperation agreements

The total number of such economic agreements with investment provisions reached 273, as of end 2008

50 in the MENA region
Over 270 economic agreements with investment provisions

Source: UNCTAD, 2009
• “Soft law” approach
  ➢ OECD Declaration on International Investment (Egypt and Morocco adhered – Jordan in the process)
  ➢ APEC Principles

• Preferential trade agreements with investment provisions
  ➢ Bilateral FTAs (MENA countries with the US, Turkey, Canada, Singapore...)
  ➢ US Trade and Investment Agreements (12 with MENA countries)
  ➢ EU Association Agreements (7 with MENA countries)
  ➢ NAFTA Chapter Eleven, MERCOSUR, Colonia Protocol

• Comprehensive investment agreements
  ➢ ASEAN Investment agreement
  ➢ COMESA Common Investment Agreement

• Sector-specific agreements
  ➢ Energy Charter Treaty
  ➢ GATS, TRIPS
Investment agreements in the MENA region

Arab League Council / Council of Arab Economic Unity:

- Agreement on Arab Economic Unity (1957): liberalization of persons, capital and goods

- Agreement on Investment and Free Movement of Arab capital among Arab countries (1970): preferential investment treatment

- Inter-Arab Investment Guarantee Corporation (1971, established in 1974): investment insurance

- Unified Agreement for the Investment of Arab Capital in the Arab States (1980): investment protection, institutional arrangements, establishment of the Arab Investment Court

- Agreement on the Encouragement and Protection of Investments and Transfer of Capitals among Arab countries and Agreement on the Settlement of Investment Disputes in Arab Countries (2000): not signed by all members of CAEU
Investment agreements in the MENA region (cont’d)

Islamic Conference

– 1986 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference

– Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit (ICIEC) (1995)

Union du Maghreb Arabe

– Convention relative à l’encouragement et la protection des investissements entre les pays de l’UMA (1993)


Gulf Cooperation Council


COMESA

– Investment Agreement for the COMESA Common Investment Area (2007)
Trends in investor-State dispute settlement (ISDS)
The increase in IIAs has been paralleled by an increase in investor-State disputes.

The cumulative number of known treaty-based cases reached 317 known claims by end 2008.

Fora:
- ICSID (306 cases)
- UNCITRAL
- Stockholm Chamber of Commerce
- International Chamber of Commerce
- CRCICA
- Arab Investment Court
Figure 1. Known investment treaty arbitrations, (cumulative and newly instituted cases, by year)

Source: UNCTAD 2009
Trends in MENA countries

- 34 known cases involving MENA countries
- 10% of ICSID cases by State party involved
- Most MENA countries are parties to the ICSID Convention except Djibouti, Iraq, Libya, Qatar and the PNA
- Most MENA countries are parties to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, except Iraq, Libya, Yemen and the PNA
To sum up:

- 582 BITs signed by MENA countries and 73 intra-MENA BITs
- 50 investment related instruments (bilateral and regional)
- 34 investor-State dispute settlement cases
IIA in the MENA region

The region follows the worldwide trends:

- Proliferation of IIAs
- Increased complexity
- Lack of coherence between agreements themselves and between national investment policies
- Lack of transparency for investors
- Increased ISDS cases and rising concerns: high costs involved in conducting procedures, arbitration awards can involve huge sums, technical complexity of ISDS
- Existing regional investment agreements but not effective or implemented

→ Need for modernization, harmonization and implementation of the regional framework
Strengthening regional investment framework

Objectives:

• Enhance Arab investor protection and provide more incentives to intra-Arab capital movement

• Foster regional integration. FDI is a major integration factor

• Rely on same standards for the region: increased transparency, predictability and convergence
Advantages

At the institutional level:

• Implementation body to foster investment promotion in the region (information gathering, business linkages, transfer of technology...)

• Depository of national and regional legal investment instruments

• Dispute settlement body (Arab Investment Court)

Investment promotion tool and image-building:

• Positive signal to the international community and foreign investors