



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

Presentations

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Course on the Core Elements of
International Investment Agreements in
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Interactions and Policy Coherence

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TRENDS

Among the most important recent trends is the **increasing number and complexity of IIAs**

- risk that countries face overlapping and sometimes inconsistent obligations
- possibly detrimental to their policy objectives.

Several factors: substantive, systemic, subject-specific

IMPLICATIONS

→ Countries and companies operate within an **increasingly intricate framework of multi-layered and multi-faceted investment rules**, which may contain overlapping and perhaps even inconsistent obligations.

→ This may render economic policies of host countries **more complicated**.

→ Complex treaty structures could to some extent **deter foreign investors** as it becomes increasingly difficult for them to properly assess the degree of protection and liberalization afforded by IIAs.

Several Factors

- Divergent model agreements
- Protection-oriented BITs and liberalization-oriented FTAs
- Compatibility/implementation at the national level

Challenges to the Management of the IIA Network

In view of the increasingly complicated network of IIAs and the different interpretations of treaty provisions given by arbitration tribunals, the maintenance of **policy coherence** becomes a major challenge for States.

POLICY COHERENCE FOUR ASPECTS

- First, identify similarities and dissimilarities: stocktaking and monitoring.
- Second, coherence **between different IIAs** to which countries are a party; sometimes, this may even be a concern with regard to different provisions of the *same* IIA.
- Third, coherence among IIAs concluded with **one** other country.
- Fourth, coherence with **domestic** economic and development policies.

Interactions Within an IIA

- Cumulating interactions: services/investment chapters in FTAs, ISDS/general DS in the FTA
- Contradiction interactions: policy-space issues
- Explication interactions: definitions or exceptions with substantive provisions

Interactions With Other IIAs

- Reinforcement interactions: services-related provisions reinforcing GATs
- The MFN provisions (see below)
- Cumulating interactions: dispute settlement provisions (FTAs/WTO)
- Contradiction interactions: interactions with State Contracts

EXAMPLE 1 DIFFERENT MODES OF INVESTMENT

One IIA may establish an upfront liberalization based on a **"top-down" approach**, whereas another IIA may provide for gradual market access on the basis of a **"bottom-up" strategy**

→ As a result, the **degree of liberalization** may be **unclear** for an economic activity covered by both agreements.

→ Soft law v.s. hard law approaches

EXAMPLE 2 APPLICATION OF THE MFN CLAUSE

The application of the MFN Clause may, against the intention of a contracting party, **incorporate** into the IIA certain **procedural or substantial rights** from other IIAs.

→ This may lead to **unexpected results**.

→ The problem has been exacerbated by some recent contradictory interpretations on the scope of the MFN clause by arbitration tribunals.

EXAMPLE 3 ADMITTING FDI?

Most BITs leave it to the **discretion of host countries** of whether they want to admit foreign investment or not.

By contrast, **regional free trade agreements** increasingly include establishment rights for foreign investors.

Market access rights are also provided for in the **GATS**. Implication on investment in services.

EXAMPLE 4 UMBRELLA CLAUSE

The so-called **"umbrella" clause** extends the protection by the IIA to **"any other obligation"** of the contracting parties in respect of an investment.

→ As a result, a breach by the host country of such other obligation (e.g. one deriving from a contract with the investor) becomes a **violation of the IIA**, and the latter's **dispute settlement mechanism applies** - an outcome that a contracting party to the IIA may wish to avoid.

CONSISTENCY: DOMESTIC CONCERNS

- The negotiation of IIAs includes **interrelated and complicated policy issues** that, at least in principle, touch upon a whole range of **domestic concerns**.
(Ex.: social and environmental matters)
- Balancing private and public interests:
 - Protect host country interests: clarification, stronger emphasis on public policy concerns, strengthen public role in ISDS. Transparency.
 - **create a certain balance** between rights and responsibilities of investors.
- Preserving regulatory flexibility to pursue national policies.

CONCLUSIONS

- **Stocktaking: IIA reviews**
- **Dealing with inconsistencies in IIAs: revising, clarifying, keeping track, limiting the agenda, active involvement in ISDS**
- **Transparency in the conduct of investment negotiations and ISDS plays a key role in securing the necessary support for and legitimacy of IIAs**
- **Addressing domestic concerns: balancing PP interests**