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A Comparative Study of APEC IIAs

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**Capacity Building on Existing International
Investment Agreements in the APEC Region,
Relevance, Emerging Trends, Challenges and
Policy Options to Address Coherence in Treaty**

Making

Lima, Peru

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**Workshop on Capacity Building on Existing IIAs of the APEC Region:
Relevance, Emerging Trends, Challenges and Policy Options**

A Comparative Study of APEC IIAs: The General Picture and Some Selected Topics

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Outline of Presentation

1. The landscape of APEC IIAs
2. Analysis of selected core IIA provisions
 - 3.1. Definition - Investor and Investment
 - 3.2. Protection - Expropriation and compensation
 - 3.3. Treatment – NT, MFN, FET
 - 3.4. Exception clauses
 - 3.4. ISDS clause
 - 3.5. Selected Emerging (Public Interest) rules
 - 3.6. Some IIAs under negotiation (e.g. China-US/EU BIT, TTIP, RCEP, etc.)
4. Major observations and prospects
5. Brief mentioning of Chinese IIAs

APEC Member Economies

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IIAs of APEC Member Economies

APEC Member	BITs with Non-APEC Countries	Other IIAs with Non-APEC Countries	BITs with APEC Countries	Other IIAs with APEC Countries	Total
China	112	9	17	10	148
USA	45	54	1	11	111
Korea	77	8	13	9	107
Malaysia	60	17	8	5	90
Vietnam	49	16	11	5	81
Russia	65	5	9	0	79
Chile	40	16	9	12	77
Singapore	36	21	7	7	71
Indonesia	41	1 *	10	14	42
Canada	32	13	5	5	55
Thailand	29	16	10	6	61
Peru	20	16	9	10	55
Philippines	27	13	10	1	51
Mexico	27	12	4	4	47
Japan	19	13	7	6	45
Australia	8	4	13	13	38
Chinese Taipei	18	3	5	2	28
Brunei	6	15	2	2	25
HK SAR	11	1	6	3	21
New Zealand	1	4	3	8	16
Papua N. Guinea	2	2	4	1	9
TOTAL	725	259	163	134	1281

(*) = exclusive ASEAN countries / Source: UNCTAD

The Landscape

1. APEC members are active in concluding IIAs. They have concluded a large number of IIAs, occupying almost one third of the world's total (2923 BITs + 358 other IIAs). Both 'internal' IIAs (within APEC members) and 'external' IIAs (between members and non-members). Internal IIAs are the majority of APEC IIAs.
2. Given the economic importance of APEC members, integration of ASEAN, negotiation of mega-IIAs involving APEC members, e.g. TTIP, RCEP (ASEAN+6), China-US/EU BITs, APEC IIAs may have profound regional and global impacts.
3. The developmental levels of APEC members are different. Different modes and contents of IIAs. 'Comprehensive' and 'high standard' IIAs v. 'general' and 'basic level' IIAs. China has both types (American style v. European style).
4. TPP as the new model for future IIAs (esp. of APEC region)?

Definition of Investment

1. The basis of IIA. Two general modes: enterprise-based (EB) and asset-based (AB) definitions. EB associates inv. With enterprises, pro-FDI; AB is broader and may be used to cover indirect inv. APEC IIAs have both types of definitions, but AB is getting broader used.
2. Open list and Close list: It is possible to exclude certain types of inv. from the coverage of the IIA.
3. Compliance requirement: inv. should be conforming to the laws of the host country.
4. Exclusions of certain types of inv., such as portfolio, sovereign debts, court judgements etc.
5. Chinese IIAs — shift from EB to AB, mostly open list, with no or few exclusions, compliance requirement included. Few mention investment authorization or agreement, but some have umbrella clause.

Definition of Investor

1. Nationality of individuals (nationality and/or permanent resident status requirement). Dual nationality can be accepted or rejected.
2. Nationality of enterprises (different standards and risks), place of incorporation and/or substantive business operation or seat of company.
3. The China dilemma: due to the OCTS policy in Chinese law, HK and Macau investors protected under Chinese IIAs? E.g., *Tza Yap Shum v. Peru* and *Sanum v. Laos*.
4. Nationality design and “special scenarios”: companies constituted abroad but controlled by national of the home state may be deemed as investor; while companies constituted in the host state but do not have substantive business in the host states may be denied as investor (denial of benefits clause).

National Treatment

1. IIAs of APEC members are different in respect of pre-/post-establishment NT. In general, Pre-E NT: inv. liberalization or market accession; post-E: non-discriminatory treatment of Inv. (typically establishment, acquisition and expansion). Major variations of IIAs: (1) NT + Pre-E in general; (2) NT + Pre-E + exception (portfolio investment); (3) NT-Pre-E + positive list; (4) NT-Pre-E + negative list; (5) NT + Post-E in general. There is divergence of APEC IIAs.
2. Competition to the Bottom? — What can be expected if national protection of investment/property is weak .
3. Chinese IIAs: no IIA contain Pre-E NT. A focus of China-US BIT negotiation and China-EU BIT negotiation. China-Canada BIT (Art.6.3 – “partial pre-E NT, expansion of inv. subject to NT according to the national law”).

Most-favored-nation Treatment

1. The MFN treatment as inv. treatment and liberalization.
2. Different modes of APEC IIAs: Pre-E MFN and Post-E MFN; granted to investor / investment / investor + investment.
3. The application of MFN treatment to procedural issues: unsettled question. Different practice of case law, depending on the specific wording of the IIA.
4. Certain exclusions, such as financial services (Canadian Model BIT), public procurement, subsidies (2012 US Model BIT), differential treatment to minority groups (2009 China-Peru FTA); ISDS (recent Chinese IIAs, e.g. 2012 China-Canada BIT, 2015 China-Australia FTA); excluding prior IIAs, etc.
5. Chinese IIA — China-Canada BIT provides for Pre-E MFN clause, which can remedy the “imbalanced NT” clause; often excluding prior IIAs.

Fair & Equitable Treatment (FET)

1. An absolute treatment. The exact meaning of FET depends on the treaty wording and interpretation.
2. Different modes of treaty wording:
 - 2.1. FET without reference (e.g. China-ASEAN FTA, CJK TIT);
 - 2.2. FET linked with IL/CIL (e.g. China-Canada BIT);
 - 2.3. FET linked with minimum standard of treatment (MST) of aliens under CIL (e.g. NAFTA, Korea-US FTA; China-Korea FTA).
3. FET clause as an open/descriptive provision or close provision (a close list, CETA).
4. Subject to debate in practice and should be assessed on a case-by-case basis.
5. Chinese IIAs: cautious of FET clause. Some IIAs feature FET linked with MST. A symbol of Americanization of Chinese IIAs.

Expropriation (direct & indirect) Clause

1. Expropriation clause of APEC IIAs have a high level of similarity, recognizing host states' right to expropriate foreign investment, but lays down certain conditions.
2. Direct or indirect Exp.: some IIAs expressly cover both, some do not mention (which is likely to cover both).
3. Conditions for Exp.: for public purpose (different versions); due process of law; Non-discriminatory basis; compensation.
4. Chinese IIAs – the key of Chinese IIAs. Debate remains on due process (due process of the law? The law of host state or/and international law?); compensation standard (appropriate / Hull formula), non-discriminatory (some IIAs do not have this condition). Some IIAs incorporate Annex on Indirect expropriation (balance between investment protection and regulatory power).

General Exceptions

1. Mainly serve to preserve state regulatory space. Modeled after GATT Art. XX in structure and contents, covering non-investment values, such as protection of the environment, public health, safety, morals, etc.
2. Not a typical IIA provision, getting common in recent IIAs.
3. Some IIAs contain standalone exception clauses, such as environmental, public health and safety exception (e.g. US and Canadian Model BITs, TPP with chapters).
4. The application of general exceptions is difficult. Specificity tests and necessity (and proportionality) tests. Refer to WTO/GATT Art. XX cases.
5. Chinese IIAs – recent IIAs contain such exceptions (2012 China-Canada BIT). Likely to be included in future IIAs, esp. China-US BIT and China-EU BIT. China's recent industrial policy change and the future risk of exception clause invocation.

National Security Exception

1. Some APEC IIAs contain such exception to help preserve policy space, esp. in recent IIAs and Americanized IIAs.
2. Different terms, e.g. national security, essential interest, public order, public interests. No uniform interpretation of these terms. Different formula (open provision or a list).
3. Debate on its application: (1) the specificity (measures designed for national security?); (2) the necessity test (proportionality of the measures for the purpose?); (3) the “self-Judging nature” (external review allowed?). The US-Argentina cases shows (1) difficult to invoke; (2) no rules established.
4. National security as trade/investment barrier? *The China-Japan-Korea TIT* prohibits it to be used as a “means of avoiding obligations”.

Investor-State Dispute Settlement (ISDS)

1. There is a general convergence among APEC IIAs to include ISDS clause, though different. ISDS provisions as a “system”. Americanized IIAs (Comprehensive).
2. Coverage of ISDS clause: broad and narrow clause, excluding certain provisions/disputes/sectors from ISDS.
3. Relationship with local remedies: (1) compulsory (pre-Arb. requirements as consultation and negotiation; exhaust certain local remedies; certain time limit, etc.); (2) prioritize ISDS (no compulsory requirement on LR); (3) at the investor’s choice (fork in the road & waiver clause);
4. Chinese IIAs – (1) broadening of the scope of dispute; (2) stress pre-Arb. proceedings; (3) remove fork in the road; (4) enhance state intervention; (5) Americanize ISDS rules.
5. The attitudes towards current debate of ISDS reform (EU)?

Transparency Provision

1. To enhance the legitimacy of ISA and international rule of law, more IIAs begin to include transparency provisions.
2. Different modes: (1) transparency of investment-related laws and regulations (publish, translate, record etc.); (2) publicize ISA proceedings, especially the awards, hearings and decisions; (3) permit third party participation in ISA, such as *amicus curie* participation.
3. Chinese IIAs – some IIAs have transparency provisions. Friendly to type 1 (similar WTO obligation); acceptable to type 1 (may be public subject to confidentiality rules); resistant to type 3 (after consulting with the parties). 2012 China-Canada BIT is a bold step (Arts.27-participation of non-disputing contracting state, 28-publicize hearing and documents, 29-non-disputin party submission).

Sustainable Development Provision

1. SD is getting increasingly important in IIA-making, although it is generally agreed that IIAs should not be the primary discourse for SD promotion.
2. The exact contents of SD are broad and flexible. SD provisions encompass various types of IIA provisions, e.g. environmental protection, general exception, labor rights, anti-corruption, transparency, expropriation, FET clauses etc. Host state may have different attitudes towards the different values.
3. Some SD provisions have been applied in practice, esp. Exp. and FET clauses. No uniform established.
4. Chinese IIAs — SD provisions have not been systematically incorporated, although recent IIAs incorporate SD provisions. Different attitudes towards different types of SD provisions. Future implications to be observed.

Selected ‘Emerging’ IIA Rules (TPP)

1. TPP is the first FTA to seek to address comprehensively the commercial activities of State-owned enterprises (SOEs) that compete with private companies in international trade and investment. Potential impacts on China’s SOEs (“national”, what preferential policy?)
2. TPP Public interests chapters, e.g. labor (chap.19), environment (chap.20), development (incl. human rights) (chap.23), transparency and anti-corruption (chap. 26).
3. The EU’s proposal of investment court system (TTIP and China-EU BIT negotiation), a new round of rule-making?
4. These ‘emerging rules’ are seldom included in existing IIAs of APEC members (especially in a comprehensive manner). How APEC members adapt themselves to the new rules and developments remains to be seen.

Negotiation of Selected Major IIAs

1. RCEP (Regional Cooperation and Economic Partnership): ASEAN-6 (Australia, China, India, Japan, Korea, NZ), excluding N. American countries. Rival of TPP?
2. CETA just concluded, TTIP is under negotiation.
3. China-US BIT aiming at a high level IIA for international IIA-making in the future: (1) high level of investment protection; (2) bold step of investment liberalization (Pre-E NT on negative list); (3) public interests provisions; (4) strong and comprehensive ISDS rules.
4. China-EU BIT negotiation: speed up the efforts, should feature high level investment protection, more liberalized market access, public interests provisions. Points (1) The coordination of China-US BIT; (2) The EU's proposal on ISDS reform.

Major Observations and Prospects

1. IIAs are common & helpful tool for APEC members in economic development. By and large, the main objective of APEC IIAs remains investment protection. Different levels of economic development, social and political backgrounds, IIAs of APEC members are different in many aspects.
2. Economic changes within the APEC members and implications for IIA-making: (1) China's shift from FDI-importing country to an FDI-exporting country; (2) the active IIA-making (China-US and China-EU, TTIP, RCEP); (3) the Mega-FTAs involving APEC members (TPP, TTIP, RCEP); (4) regional integration of ASEAN.
3. Americanization of APEC IIAs: (1) purpose of liberalization; (2) comprehensive structure; (3) contents towards convergence, Hull formula, broad investment definition, exceptions; (4) more stress and detailed ISDS rules. (Recent Chinese IIAs, ASEAN Comprehensive Investment Agreement, etc.)

The End, Thank You

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