APEC's Role in Rationalizing International Investment Obligations

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Abstract

The expanding and increasingly diverse global network of international investment agreements (IIAs) poses serious challenges to the ability of states to ensure that their international obligations are consistent with their domestic foreign investment policy. The coherence challenge is growing because the content of IIAs is evolving: (i) with a view to better preserving regulatory flexibility in host states, core obligations are being expressed in more specific terms and increasingly subject to extensive exceptions; (ii) new provisions designed to facilitate the contribution of foreign investment to host state development or to achieve other policy objectives are being included in IIAs; and (iii) some investor-state arbitration tribunals have adopted unexpectedly broad and/or inconsistent interpretations of IIA provisions. In light of the current impracticality of negotiating multilateral investment rules, APEC seems well placed to promote more coherence in international investment law. Its activities directly address the shortfall in domestic capacity to develop investment policy, a prerequisite to a country's ability to make informed choices regarding compatible IIA obligations. APEC has also sought to improve coherence by developing common principles, practices and treaty provisions. To date, however, the IIAs of APEC members continue to demonstrate significant diversity in their content.

I Introduction

The world is girdled by an increasingly dense web of international investment agreements (IIAs) involving more than 170 countries. Despite widespread participation in investment treaties, however, many countries, including developing countries in particular, have steadfastly opposed the development of a multilateral regime for investment. Investment was removed from the Doha round negotiating agenda in 2004 as part of efforts by members of the WTO to increase the likelihood of a positive outcome for the round.[1]

In this context, we will see continuing expansion in the number of bilateral and regional IIAs worldwide. Continued growth in IIAs, however, will make it even more difficult for countries to understand the precise nature and impact of their multiple obligations and to ensure that their international obligations and their domestic policy are consistent. The famous spaghetti bowl of treaties will increasingly threaten the ability of states to develop and implement a coherent policy on foreign investment that contributes to economic growth and development. At the same time, firms that seek to take advantage of the protections offered by IIAs are will be impeded by the difficulty of understanding what protection they will receive from the tangle of overlapping but not

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[1] See the discussion of the history of investment in the WTO, below n 25 & 26.

always consistent commitments undertaken by host states. The result may be to undermine the essential investment inducing objectives of these agreements.

This paper analyzes the challenges to coherence created by the current complex web of IIAs and explores the role that can be played by Asia-Pacific Economic Cooperation (APEC) in helping to develop a more coherent, comprehensible and effective international investment regime. APEC is well placed to contribute to resolving these challenges. Despite its promise, however, so far it is not clear to what extent APEC has contributed to coherence in the IIAs negotiated by its members and more generally to the coherence of international investment law.

II The Challenge of Diversity in International Investment Obligations

A. Strands in the Spaghetti Bowl

In the absence of multilateral rules, bilateral and regional arrangements relating to investment have mushroomed. Since the Germany-Pakistan bilateral investment treaty (a BIT) signed in 1959, developed and developing countries have been actively negotiating BITS and other international agreements relating to investment. Historically, the primary purpose of these treaties has been to provide protection to developed country investors from discrimination, uncompensated expropriation and other unfair measures of host country governments. For host countries, the hope is that by committing to the protections guaranteed in these treaties, they will attract investment. The number of these treaties began to expand rapidly in the 1990's and the early part of this century. In 2008, UNCTAD estimated that there were more than 5,500 treaties dealing with investment issues worldwide, representing an increase of almost 40% in the last decade alone.[2] The region leading the world in the expansion of IIAs is Asia. In the first half of 2008, most of the new BITs concluded involved Asian countries, many of them with neighbors in the region.[3] The ASEAN member states and Japan concluded a comprehensive agreement covering trade in goods and services and investment in 2008.[4] China concluded a Free Trade Agreement with New Zealand in April 2008 that includes a chapter on investment protection.[5] And in February 2009, ASEAN members concluded a Comprehensive Investment Agreement.[6]

[2] UNCTAD, *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward* (New York and Geneva: United Nations, 2008). UNCTAD estimates that only 76% of these agreements are in force and 2,700 are agreements that are limited to commitments to reducing double taxation. By the end of 2007, 120 BITS were renegotiated treaties between parties who were already parties to BITS.

[3] UNCTAD, IIA Monitor No. 2 (2008), *Recent developments in international investment agreements (2007-June 2008)* (New York and Geneva: United Nations, 2008). The Asia-Pacific region has the largest number of BITS with 1,050 by the end of 2007. China alone has signed more than 120 (UNCTAD, above n 2, 36.

[4] Agreement on Comprehensive Economic Partnership Among Japan and the Member States of the Association of Southeast Asian Nations (2008) <http://www.mofa.go.jp/policy/economy/fta/asean/agreement.pdf> accessed 30 June 2009.

[5] <http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php> (accessed 30 June 2009).

[6] ASEAN Comprehensive Investment Agreement (26 February 2009) <http://www.aseansec.org/22218.htm> accessed 30 June 2009.

While the more than 2,700 BITs involving 179 countries comprise the largest single group of investment treaties, an increasingly diverse variety of other treaties are deal with investment issues, including preferential trade and investment agreements (PTIAs) negotiated bilaterally and regionally. Indeed the rate of growth in BITs has been declining since 2001 and there is a shift toward treaties combining investment rules with trade liberalization in free trade agreements, economic partnership agreements and other forms of preferential trading arrangements.[7] The number of PTIAs has doubled in the past 5 years.[8] Some of these agreements provide protection equivalent to BITs while others provide only a framework for cooperation.[9] PTIAs deal with trade in goods, services, labour issues, the movement of people, the environment and other issues not typically addressed in BITs. IIA obligations also overlap with the trade commitments of WTO Members. Obligations under the WTO's General Agreement on Trade in Services[10] (*GATS*), Trade-related Investment Measures Agreement (TRIMs),[11] and Trade-related Intellectual Property Agreement[12] (TRIPS), among others, can all apply to host state rules related to investment.

Studies of these many strands of the global IIA web have found that there is an emerging consensus on the key substantive obligations for investor protection that should be included in IIAs.[13] At the same time, however, there are considerable variations in the ways in which these obligations are expressed and the exceptions and reservations to these obligations that different IIAs permit. In part, this is due to the recent adoption by some developed countries, like Canada[14] and the United States,[15] of new model agreements that respond to the world's experience with investment obligations including the explosion of investor-state arbitration cases.[16] New treaty provisions also reflect changing policy preoccupations, including greater concern regarding environmental and social issues related to investor activities and greater respect for the host country's right to regulate to achieve development objectives. For example, the recent EU - CARIFORUM Economic Partnership Agreement expressly permits the parties to take

[7] UNCTAD, *World Investment Report, 2008* (New York and Geneva: United Nations, 2007), 17.

[8] UNCTAD, above n 2, 26. The 254 PTIAs remain a fraction of the number of BITs.

[9] E.g., the ASEAN – US Trade and Investment Framework Agreement (25 August 2006) <http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file932_9760.pdf > accessed 30 June 2009.

[10] Annex 1B to the Marrakesh Agreement establishing the World Trade Organization (15 April 1994), 33 I.L.M. 81 (*GATS*).

[11] Part of Annex 1A to the Marrakesh Agreement establishing the World Trade Organization (15 April 1994), 33 I.L.M. 81 (*TRIMS*).

[12] Annex 1C to the Marrakesh Agreement establishing the World Trade Organization (15 April 1994), 33 I.L.M. 81 (*TRIPS*).

[13] UNCTAD, *Identifying core elements in investment agreements in the APEC region* (New York and Geneva: United Nations, 2008)(APEC Report). This report analyzes a sample of 28 IIAs between and/or involving APEC member economies. These comprise 14 bilateral investment treaties (BITs) and 14 preferential trade and investment agreements (PTIAs). In UNCTAD, above n1, the current state of affairs is described as 'unity at the core' and 'variation at the periphery' (at 2).

[14] Canada's New Model Foreign Investment Protection Agreement adopted in 2004, <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf> accessed 20 June 2009 (Canadian Model FIPA).

[15] US 2004 Model Bilateral Investment Treaty, online: <http://www.state.gov/documents/organization/38710.pdf> accessed 23 June 2009 (US Model BIT).

[16] By the end of 2007, there had been at least 290 investor-state cases initiated. UNCTAD, above n 2, 35.

measures to prevent investors from engaging in bribery and corruption, and to ensure compliance with core labour standards.[17]

Variations in treaty content are also driven by a shift in the context in which investment obligations are being negotiated. While traditionally BITs were entered into between developed countries seeking protection for their investors and developing countries hoping to attract investment, increasingly developing countries are signing investment agreements among themselves, reflecting their increasing importance as capital exporters. Thirteen of 44 BITs signed in 2007 (27%) were such south-south agreements. China led the way with 4 new agreements with other developing countries. South-south treaties often do not mirror investment treaties traditionally negotiated between developed and developing countries.[18] The 2005 India-Singapore Comprehensive Economic Cooperation Agreement,[19] for example, does not include some provisions that have been thought of as core IIA provisions, like most favoured nation treatment and 'fair and equitable treatment'. The 19 member states of the Common Market for Eastern and Southern Africa (COMESA) entered into the COMESA Common Investment Agreement in 2007 which contains a variety of innovative features, including a mandate for a committee created under the agreement to make recommendations to member states with respect to 'the development of common minimum standards relating to investment in areas such as: (i) environmental impact and social impact assessments, (ii) labour standards; (iii) respect for human rights; (iv) conduct in conflict zones; (v) corruption; (vi) subsidies'.[20]

As well, though they are relatively few in number, recent treaties between developed countries also contain distinctive features. Unlike US investment treaties with developing countries and the North American Free Trade Agreement,[21] the US-Australia Free Trade Agreement does not provide for investor-state dispute settlement in its investment chapter.[22]

Finally, there has been a significant increase in the number of investor-state arbitrations under investment treaties. In 2008 alone, at least 30 new cases were filed, bringing the total of known treaty arbitrations to 317.[23] These cases involve at least 77 governments. In most cases (92%), claims have been by investors from developed countries against developing countries. About half of the cases decided so far have found in favour of the investor in some cases based on broad interpretations of vaguely worded IIA provisions, especially the obligation commonly imposed on host states to provide investors with 'fair and equitable treatment.' Another troubling aspect of these cases has

[17] Economic Partnership Agreement between CARIFORUM States and the European Community, done at (15 October 2008), OJ L289/1/3, 30 October 2008. CARIFORUM includes the states of the Caricom and the Dominican Republic.

[18] UNCTAD, above n 2.

[19] India – Singapore, Comprehensive Economic Cooperation Agreement (29 June 2005), Chapter 6 <http://commerce.nic.in/ceca/toc.htm> accessed 30 June 2009.

[20] Investment Agreement for the COMESA Common Investment Area, Art 7.2(d) <http://programmes.comesa.int//attachments/104_Investment%20agreement%20for%20the%20CCIA%20 FINAL%20_English_.pdf> accessed 16 June 2009). See generally, OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (Paris: OECD, 2008), c 3.

[21] (17 December 1992), (1993) 32 I.L.M. 670.

[22] Australia-US Free Trade Agreement (18 May 2004), (2005) ATS 1, c 11.

[23] UNCTAD, IIA Monitor No. 1 (2009), *Latest Developments in Investor-State Dispute Settlement (2007-June 2008)* (United Nations: New York and Geneva, 2009). This represents a slight decrease from 2007, when 35 new cases were initiated. Increased awareness regarding the existence and nature of investor-state proceedings resulting, in part, from increased transparency along with a few large high profile awards may also be responsible.

been a lack of consistency in tribunal awards creating uncertainty regarding the scope of IIA obligations.[24]

An attractive solution to the chaotic proliferation of IIAs would be a multilateral agreement but the prospects for such an agreement appear remote. Investment was added to the WTO agenda at the Singapore ministerial conference in 1996 with the creation of a working group on trade and investment.[25] When the Doha round of negotiations was initiated in 2001, the members agreed that negotiations on investment would take place after the 2003 Ministerial meeting on the basis of a decision to be taken at that meeting on the modalities of negotiations.[26] After much study and discussion, however, investment was formally removed from the negotiating agenda in 2004 as part of efforts by members of the WTO to narrow the focus the negotiations with a view to increasing the likelihood of a positive outcome for the round.

In summary, the global network of IIAs has several important characteristics. It is rapidly expanding at both the bilateral and regional level. While there is general agreement on the kinds of protections for investors that may be included in an IIA, there is increasing variation in the content of these protections and exceptions and reservations are more frequently found. As well, new types of provisions addressing a range of new issues in some agreements seek to better preserve the ability of countries to regulate foreign direct investment to achieve development and other public policy goals. This is particularly true in the burgeoning number of south-south IIAs. There is an increasing trend for investment protection provisions to be integrated into much more comprehensive treaties dealing with trade in goods and services and other issues. Finally, investment arbitrations are becoming more frequent and, sometimes, have resulted in some surprising and conflicting decisions. As a result of all of these characteristics, the universe of IIAs is becoming more diverse and complex, presenting a serious challenge to policy coherence as discussed in the next section.

B. The Policy Coherence Challenge

1. Introduction

The adoption of new treaty models and new approaches to investment protection in some treaties demonstrates one of the benefits of the current practice of independent uncoordinated bilateral and regional negotiation of IIAs: the prospect for experimentation and innovation. In principle, this gives countries choices when determining what international investment obligations they undertake and allows them to customize their obligations to their particular situations. Often, in practice, especially for developing countries, this is not the case. When negotiating with developed countries, negotiations may begin and end with a model agreement drafted by the developed country and offered on a take it or leave it basis.

There is also a tension between the need to ensure the international investment regime's adaptability to respond to our evolving understanding of the nature and effect of investment obligations and to the differential development needs of host countries and the

[24] Ibid, at 12.
[25] Singapore Ministerial Declaration, WT/Min(96)/DEC/1, Adopted on 13 December 1996.
[26] Doha Ministerial Declaration, WT/MIN(01)/DEC/1, Adopted 20 on November 2001, para. 20.

need for consistency and coherence. The complex and variable international investment rules to which countries have committed themselves create a serious challenge to policy coherence. This policy coherence challenge operates on at least two different levels for each country: coherence between domestic policy and international obligations and coherence between different international obligations. For developing countries this challenge is often compounded by limited capacity to fully engage in a careful assessment of what treaty provisions are optimal for them as well as compatible with their domestic policy and their other international obligations. For all countries the coherence challenge has grown as a result of innovation in the terms of IIAs, the incorporation of investment rules in more broadly focussed economic integration agreements, and evolution in our understanding of IIA provisions through the decisions by investor-state arbitration tribunals.

2. Coherence Between Domestic Policy and International Commitments

For many countries, it is difficult to ensure that their multiple diverse IIAs are compatible with their current foreign investment policy. As well, since IIAs typically operate for long terms with lengthy notice requirements for termination, states need to be able to forecast their future foreign investment policy and ensure that the treaties that they sign do not constrain their ability to implement that policy. Throughout the term of the treaty, states need to constantly bear in mind their obligations as domestic policy evolves to ensure that they remain in compliance over time. [27]

These challenges can only be met if a state has a developed domestic policy on foreign investment to which it is prepared to make a long term commitment. In many developing countries, this degree of policy development, certainty and commitment simply does not exist. In these circumstances, it is extremely difficult to make effective choices regarding what level of international obligation to undertake.

A threshold domestic policy issue for each state negotiating an IIA to consider in relation to commitments it proposes to undertake is how open its domestic markets should be to foreign investment. For example, if a country has already adopted a policy of opening the domestic economy to foreign investment without restriction, the effect of an IIA provision guaranteeing that access (often called a *right of establishment*) would not require any change in government policy. However, such a provision in an IIA would preclude a future return to a policy of excluding or limiting foreign investment. It is precisely this limitation on future policy change by the host state that is the mechanism by which the IIA commitment encourages foreign investment. By contrast, if a state does not permit foreign investment, either generally or in particular sectors, if it does not have a robust system in place to make decisions about permitting particular foreign investments, or if it lacks the capacity to regulate foreign investors who enter the country, a commitment to a right of establishment would force a substantial and likely inappropriate shift in domestic policy on foreign investment. This simple example shows the importance of developing domestic foreign investment policy before a country can make appropriate choices about what IIA commitments to undertake.

Another specific domestic policy area that may be affected by international trade and investment commitments is performance requirements imposed by states as a

[27] UNCTAD, above n 2.

condition of permitting an investment or granting a subsidy, such as a requirement to hire a minimum number of local employees. Some performance requirements that affect trade in goods, such as requirements for foreign manufacturers to source inputs locally, will be inconsistent with the obligations of WTO Members in the General Agreement on Tariffs and Trade[28] (*GATT*) to provide national treatment and not to impose quotas on goods. The application of these GATT rules to performance requirements imposed in connection with investments is confirmed by WTO Agreement on Trade-related Investment Measures (TRIMs), which provides an illustrative list of these trade distorting investment measures. A small but growing minority of IIAs imposes further restrictions on states' resort to performance requirements.[29] While constraints on use of performance requirements in an IIA may be beneficial in terms of attracting foreign investment and otherwise, the point here is simply that a well developed domestic policy and a sophisticated appreciation of the impact on domestic policy of international trade and investment rules is needed to avoid conflicts between domestic rules and international commitments. This is a challenge for most countries.

3. Coherence between International Commitments

A second policy coherence challenge for states is the complex interaction between the IIAs they have entered into as well as between their IIAs and any trade commitment they have undertaken that may have implications for investment. If a state is a WTO member, for example, it will have to consider the relationship between IIA commitments and its obligations under the WTO's General Agreement on Trade in Services (*GATS*). A country's GATS obligations may be relevant because GATS applies to the supply of services through a commercial presence, which includes some forms of investment. The possible interaction between IIAs and GATS is complex and will vary significantly from one country to the next.[30] To the extent that states may already have obligations under GATS, states must evaluate whether the obligations entered into under investment agreements are consistent with them. If a state has already agreed to a certain obligation under GATS, a similar commitment in an IIA may not represent a substantial additional commitment. For example, accepting an obligation to admit foreign investors in an IIA may seem to have only a marginal effect if the state has already committed through GATS to an unlimited national treatment obligation in relation to that country's services suppliers operating through a commercial presence. Even if an IIA commitment seems identical to a state's prior GATS commitment, however, the IIA provision is broader in fact because it is not limited to investors supplying services through a commercial presence as defined in GATS. A wider variety of investors in all sectors are protected. As well, if the IIA contains investor-state dispute settlement procedures, the IIA

[28] General Agreement on Tariffs and Trade (30 October 1947), 61 Stat. A-11, T.I.A.S. 1700,
55 U.N.T.S. 194. As of June 30, 2009, 153 countries are members of the WTO <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 30 June 2009).

[29] UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* (New York and Geneva: United Nations, 2003), 119-120.

[30] The scholarly literature on this subject is just beginning to develop. See R Adlung & M Molinuevo, 'Bilateralism in Services Trade: Is There Fire Behind the (BIT-) Smoke' (2008) 10 *Journal of International Economic Law* 1; M F Houde, K Yannaca-Small, 'Relationships between International Investment Agreements', Working Paper on International Investment No. 2004/1 (Paris: OECD, 2004).

commitment differs from the GATS obligation, because it can be enforced directly by the investor through those procedures.[31]

Most favoured nation (MFN) obligations, which appear in some form in most IIAs and GATS, raise particular problems for policy coherence. Though they vary in scope, MFN clauses in IIAs generally oblige each state party to treat investors from the other party states no less favourably than investors from any other country. MFN clauses in existing IIAs can have the effect of committing a state to extend the benefit of commitments undertaken in new IIAs to investors from states party to those existing agreements. By importing obligations agreed to in one negotiation into another treaty context, an MFN obligation might effectively harmonize obligations to the highest level negotiated in any treaty. For many states who have signed multiple IIAs, the operation of the MFN clause in this way might result in unanticipated consequences. In the arbitral decision in *Maffezini v. The Kingdom of Spain*,[32] the tribunal held that, subject to certain limitations, an MFN obligation could apply to treaty-based dispute settlement procedures, meaning that an investor protected by an MFN clause in an IIA could use the most favourable process found in any IIA to which the host state is a party rather than the specific dispute settlement process provided for in the treaty to which the investor's home state is a party. Subsequent cases have come to differing conclusions, and some recent model treaties have provisions that specifically address this problem. The model treaties of Canada and the United States now limit the MFN obligation to specific kinds of activities in relation to an investment with the result that MFN treatment does not apply to dispute settlement procedures and specifically exclude the application of MFN to most other international obligations and dispute resolution procedures. Most existing treaties, however, do not contain such protections.

4. Increasing Challenges to Policy Coherence Over Time

(a) Introduction

The challenges related to policy coherence are getting worse as a result of a number of contemporaneous trends. One is the proliferation of increasingly diverse IIAs, including in particular PTIAs. As well, while the core of investment protection obligations are well established, the content of IIAs is evolving in a number of ways: (i) with a view to better preserving host state policy space for the regulation of investment, the content of core obligations is being expressed in more specific terms and more treaties are including increasingly extensive exceptions and reservations; (ii) IIAs are beginning to include new kinds of provisions designed to facilitate the contribution of foreign direct investment to development in the host state and the achievement of other public policy objectives; and

[31] Ensuring coherence is more complicated still where, as in the case for most WTO members, a country has committed to providing national treatment only for some sectors in its national schedule of commitments. Also, GATS commitments are currently being negotiated as part of the Doha Round.

[32] ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000 and Award of the Tribunal of 13 November 2000; Rectification of Award, 31 January 2001. Subsequent decisions reaching varying conclusion are *Salini v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004; *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004; and *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

(iii) some investor-state arbitration tribunals have adopted unexpectedly broad and inconsistent interpretations of core IIA provisions.

(b) Changing content of core obligations and increased use of exceptions and reservations

Some, but by no means all, countries have modified the core provisions in their more recent investment treaties to ensure that their IIA obligations strike an appropriate balance between protecting investors against state action and preserving sufficient regulatory flexibility for states. At least in part, these modifications have been in response to arbitral decisions adopting broad interpretations of those provisions. Another approach has been to add exceptions and to permit reservations to protect the policy space for states to regulate in areas like the protection of health or the environment. Both these changes were adopted by Canada and the United States in the most recent versions of their bilateral investment treaties.[33] Similar provisions have been adopted by Japan and Korea.[34]

Adopting new, more nuanced versions of provisions like those guaranteeing national treatment or prohibiting expropriation without compensation bolstered by exceptions may be desirable in terms of preserving domestic policy space, but this trend raises new policy coherence challenges. What are the implications of these new more balanced provisions for the interpretation of different versions of the same provision in older treaties? Should the older provisions be interpreted to provide broader protection for investors because either their language is not as specific or because the inclusion of exceptions in newer treaties implies that the exceptions did not exist previously? There is no straightforward answer to these questions. It is not clear to what extent the scope of IIA obligations in older agreements may be different from newer versions of the same provisions. There is no doubt, however, that the introduction of different versions of core provisions and exceptions has rendered IIA obligations less predictable.

(c) New provisions to facilitate the contribution of foreign direct investment to development in the host state and to achieve other public policy objectives

There is a debate about whether even these new IIA models reflect the right balance between investor protection and the interests of host countries. A number of countries have reevaluated the benefits of IIAs in light of weak empirical evidence of their investment inducing effects[35] as well as some surprisingly broad interpretations of IIA

[33] Canada's Model FIPA, above n 14; US Model BIT, above n 15. See generally, UNCTAD, *World Investment Report 2007*: *FDI in Extractive Industries* (New York and Geneva: United Nations, 2006). In 2009, a subcommittee to the Advisory Committee on International Economic Policy (ACIEP) has been asked to review the US Model BIT. ACIEP is a committee of non-government advisers to the US government on international economic policy (<Bilaterals.org> accessed 30 June 2009).

[34] UNCTAD, *World Investment Prospects Survey 2007-2009* (New York and Geneva: United Nations, 2007).

[35] L E Sachs & K P Sauvant, 'BITs, DTTs, and FDI flows: An Overview', in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows*, K P Sauvant, ed (Oxford: Oxford University Press, 2009) provide the most up to date survey of the evidence. They conclude that 'it is difficult to establish firmly the effect of BITs on foreign direct

obligations by arbitral tribunals. One result is that there is increased interest in investment promotion commitments from developing country parties to IIAs. Such provisions are seldom found in existing IIAs.[36] Where they have been included, investment promotion provisions contain vague, non-binding commitments or merely confirm the continuation of existing programs.[37]

More fundamentally, academics and governments are asking whether there is a need to change the content of IIAs to address more directly the development issues that are so vital to developing countries. Attracting investment is necessary but not sufficient for development. Effective host country regulation is also needed.[38] One way to achieve this would be to require greater investment by developed countries in technical assistance to support the creation of the kinds of robust, transparent and effective regulatory regimes that are likely to both encourage investment and facilitate the achievement by host states of their development objectives. Few treaties have provisions on technical assistance, though, like investment promotion, technical assistance is more often addressed in recent agreements.[39]

The adoption of investment promotion and technical assistance provisions in IIAs would not represent a threat to policy coherence for host states since they do not limit their policy making flexibility, in most cases. Indeed, at least with respect to technical assistance, such commitments may even assist host countries to better ensure policy coherence. Other new kinds of provisions do raise coherence issues.

Very recently a few treaties have begun to include provisions that support host state efforts to curtail bribery and corruption, meet minimum labour standards, and protect the environment. In some cases, these kinds of provisions may be attractive to host developing countries as ways to ensure that FDI leads to sustainable development. At the same time, some developed countries now routinely seek commitments regarding the maintenance of labour and environmental standards in their trade and investment agreements.[40] In part, these countries are interested in imposing standards for social responsibility on their investors in connection with their actions abroad.[41] As well, they may be seeking to reduce the outflow of capital to treaty partners with lower effective

investment flows' citing data problems, variability in BITs and the challenge of isolating the effect of IIAs from other variables affecting investment flows and that the evidence does not establish firmly that there is a positive effect on investment flows.

[36] UNCTAD, *Investment Promotion Provisions in International Investment Agreements* (New York and Geneva: United Nations, 2008) UNCTAD/ITE/IIT/2007/7.

[37] *E.g.*, Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States and the Russian Federation (24 June 1994), Art 58 <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=643> accessed 30 June 2009.

[38] J A VanDuzer, P Simons & G Mayeda, "Modeling International Investment Agreements for Economic Development" in *Bilateralism and Development: Emerging Trade Patterns*, V Qalo (ed) (London: Cameron May, 2008) at 359.

[39] APEC Report, above n 13.

[40] See, for instance, the recent Free Trade Agreement between Canada and Peru (29 May 2008) <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-perou-table.aspx> accessed 30 June 2009.

[41] Host states may legitimately view the extraterritorial application of home state regulation as an unwelcome intrusion on host state sovereignty or even as neo-colonialist or racist interference (S Seck, 'Home State Responsibility and Local Communities: the Case of Global Mining' (2008) 11 *Yale Human Rights & Development Law Journal* 177).

standards in these areas. While a few countries have taken some limited steps toward incorporating these kinds of provisions,[42] so far at least, no agreement has done so in a thorough going way.[43] Nevertheless, going forward, the changing assessment of the costs and benefits associated with IIAs and changing policy preoccupations in developed and developing countries are likely to combine to drive further innovation in IIA provisions to support development and other policy goals. However desirable such provisions may be, overall, these innovations will further aggravate the problem of policy coherence. As well, since development needs vary across countries adapting IIAs to take such needs into account may reduce coherence across IIAs.

(d) Investor-state dispute arbitration cases

As noted, one consequence of the expansion of IIAs that provide for investor-state arbitration is that increasing numbers of cases are being brought. In each such case, an arbitral tribunal must decide how treaty obligations apply to a specific government measure. Decisions in individual cases can clarify the nature and content of a particular obligation in a treaty as well as identical or similar obligations in other treaties. So far, however, investment arbitrations have not greatly contributed to coherence in investment rules through a progressive refinement of our understanding of what IIA provisions require. One reason is that some decisions have adopted novel interpretations of vaguely worded treaty provisions. Also decisions have not always been consistent. While arbitral tribunals frequently rely on previous decisions for guidance, typically there is no requirement for a tribunal's decision in a particular case to be consistent with the decisions in previous cases, and there are numerous examples of inconsistent decisions.[44] Novel interpretations of IIA provisions may mean that IIA commitments apply in unexpected ways. Inconsistent interpretations reduce certainty regarding the scope of treaty obligations. Both pose challenges for governments seeking to ensure that their actions comply with their international obligations on an ongoing basis.

Another challenge to coherence is that the dispute settlement procedures are not the same in all treaties and are evolving in new treaties both as a result of innovations in procedures adopted by states in their investment treaties[45] and changes to the arbitral rules that govern arbitration proceedings.[46] Varying procedures make it harder for states

[42] See the discussion of the COMESA Common Investment Agreement and the EU - CARIFORUM Economic Partnership Agreement, discussed above n 20.

[43] A model BIT that does so has been proposed by the International Institute for Sustainable Development (H Mann, K von Moltke, L E Peterson & A Cosbey, *IISD Model International Agreement on Investment for Sustainable Development: Negotiator's Handbook*, 2d ed (Winnipeg: IISD, 2005).

[44] UNCTAD, above n 2, 35.

[45] See, for example, the extensive provisions in the Canadian Model FIPA, above n 14, Arts 20-47 that provide for, among other things, the issuance of binding treaty interpretations by a Commission of ministerial representatives of the party states, transparency of proceedings and detailed rules for the participation of *amicus curiae.* The Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (4 November 2005), obliges the parties to discuss the desirability of an appellate body to promote consistency in arbitration decisions (Annex E), <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/Uruguay_BIT.asp> accessed 30 June 2009.

[46] Most international investment arbitrations take place under the arbitration rules are in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), 575

to manage their participation in dispute settlement and their exposure to liability effectively.

III The Role of APEC

A. Introduction

APEC is well placed to help countries respond to the challenge of improving coherence in their international investment obligations. APEC is a grouping of developed and developing countries whose overall goal is to facilitate sustainable economic growth in the Asia-Pacific Region though trade and investment liberalization. To achieve this goal, APEC has adopted a number of instruments that are intended to contribute to greater coherence in IIA practice, including its Non-Binding Investment Principles.[47] APEC also promotes understanding of international investment issues and the development needs of its members through research and capacity building programs. In this way, APEC facilitates domestic policy development and informed choices regarding compatible IIA obligations. Despite its promise, however, so far it is not clear how significant APEC's contribution has been to coherence in the IIAs negotiated by its members.

B. The Advantages of APEC

1. The Nature of APEC

APEC possesses several characteristics that should allow it to contribute effectively to the development of a more coherent international investment regime. APEC operates on the basis of non-binding commitments, open dialogue and equal respect for the views of all participants. Unlike the WTO, APEC is not a forum for negotiating treaty obligations. Decisions made within APEC are reached by consensus and commitments are undertaken on a voluntary basis. While a multilateral treaty is undoubtedly the most effective way to achieve coherence in international investment law, attempts to develop a multilateral treaty on investment have foundered in the past.[48] The efforts to support coherence though a variety of other means employed by APEC, as described below, represent a second-best solution. Nevertheless, APEC's activities can contribute to a more coherent

U.N.T.S. 159, (1965) 4 I.L.M. 532 and the rules created by the ICSID Administrative Council pursuant to Arts 6(1)(a) to (c) of the ICSID Convention (Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules); Rules of Procedure for Arbitration Proceedings (Arbitration Rules) Doc. ICSID/15 (ICSID Arbitration Rules)). On 5 April 2006, the Administrative Council approved significant amendments to the ICSID Arbitration Rules. These amendments came into effect on 10 April 2006. See ICSID, News Release, 'Amendments to the ICSID Rules and Regulations' (5 April 2006), <http://ICSID/worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> accessed 30 June 2009.

[47] (November 1994) The Non-Binding Investment Principles are available on the APEC web site <http://www.apec.org/apec/apec_groups/committee_on_trade/investment_experts.html > accessed 30 June 2009.

[48] Including, for example, the attempt by the members of the Organization for Economic Cooperation and Development (OECD) to negotiate a multilateral agreement on investment which failed in 1998. See the materials on the OECD web site: Multilateral Agreement on Investment Documentation from the Negotiations < http://www.oecd.org/daf/mai/intro.htm> accessed 30 June 2009. On the history of investment and the WTO, see above n 25 & 26 and accompanying text.

regime for international investment and are likely the only feasible approach in the present environment.

Also, as a broadly representative group, APEC is well placed to work toward investment rules that support the interests of countries at different stages of development. APEC's 21 members[49] include China and a number of smaller developing countries, the three NAFTA states as well as Japan, Australia, New Zealand, and Russia. APEC involves two of the three major trade and investment groups in the world — North American and Asia-Pacific — the latter being the region that is most actively engaged currently in the negotiation of IIAs. Together, APEC countries account for approximately 40% of the world's population, 54% of world GDP and 44% of world trade.[50]

APEC also has the capacity to link discussions about investment with other issues, such as corporate governance and social responsibility, anti-corruption, labour standards and movement of people. It seems clear that the next generation of investment rules will need to be much more closely integrated into rules relating to international trade in goods and services. Going forward, investment rules will have to be more responsive to the social dimensions of globalization and the development needs of host countries. APEC with its broad range of members and its programs on all of these issues is well placed to support the development of rules that meaningfully address them.

One final aspect of APEC that deserves mention is its engagement with the private sector. The APEC Business Advisory Council was created in 1995 to provide a business sector perspective on the various initiatives and activities undertaken by APEC. Business leaders from every country and representing a wide variety of sectors and large and small businesses make up its membership. Engagement of the business community is an important element of developing effective domestic policy on investment as well as workable international investment rules.

2. APEC Goals

Another advantage of APEC is that it has strongly embraced the goal of policy coherence in investment rules. To achieve its goal of facilitating sustainable economic growth in the Asia-Pacific Region though trade and investment liberalization APEC has endorsed the specific goal of promoting coherence. APEC ministers expressly accepted 'high quality, consistent and comprehensive' FTAs that include investment provisions as a goal of APEC at their last meeting in November 2008.[51]

[49] Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Republic of the Philippines; The Russian Federation; Singapore; Chinese Taipei; Thailand; United States of America; and Viet Nam.

[50] APEC web site < http://www.apec.org/apec/about_apec.html> accessed 30 June 2009.

[51] Joint Statement, The Twentieth Ministerial Meeting, Lima Peru, 19-20 November 2008 <http://www.apec.org/etc/medialib/apec_media_library/downloads/news_uploads/2008/aelm/amm.Par.0004.File.tmp/08_amm_jms.pdf> accessed 14 June 2009. The role of model FTA chapters in promoting coherence was also acknowledged in the 2008 Leaders Declaration, Sixteenth APEC Economic Leaders' Meeting 'A New Commitment to Asia-Pacific Development', Lima, Peru 22-23 November 2008, <http://www.apec.org/apec/leaders__declarations/2008.html> accessed 14 June 2009.

3. APEC Activities

The "three pillars" of APEC's activities are (i) Trade and Investment Liberalization, (ii) Business Facilitation and Economic, and (iii) Technical Cooperation. Together activities in these three areas form the foundation of a broad based approach that supports greater coherence in international investment law.

In terms of activities directly relate to IIAs, APEC has developed three major investment instruments that are useful policy tools for countries seeking greater coherence in their international investment obligations.

- *Non-binding Investment Principles*[52] adopted in 1994 set out 12 general principles that broadly correspond to the core provisions that are found in most IIAs and are intended, where adopted, to facilitate investment inflows.

- *Menu of Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies*[53] adopted in 1997 sets out a broad range of options for regulatory reform at the domestic level. The menu of options address a variety of policy areas with a view to assisting countries to identify measures that would liberalize their domestic investment regime and facilitate private sector investment. Some of these correspond directly to core provisions of IIAs, like those dealing with non-discrimination and expropriation, while others cover related policy areas, like competition policy and intellectual property. Progress on implementation is regularly reported by APEC members.

- *Investment Transparency Standards*[54] were adopted in 2002 by the economic leaders of APEC in 2002 and set out detailed transparency benchmarks for governments related to (i) trade and investment liberalization and facilitation, (ii) monetary, financial and fiscal policies, (iii) services, (iv) investment, (v) competition policy and regulatory reform, (vi) standards and conformity assessment procedures, (vii) intellectual property, (viii) customs procedures, (ix) market access, and (x) business mobility.

These instruments facilitate the development of domestic investment policy which was identified above as a prerequisite for countries to negotiate coherent international obligations. At the same time, their non-prescriptive character recognize the diversity among APEC's membership in terms of level of development and openness to foreign

[52] Above n 45. A comparison of the APEC principles and other major international investment obligations including those in the WTO, NAFTA and BITS is undertaken in P. Gugler & V. Tomsik, 'A Comparison of the Provisions Affecting Investment in the Existing WTO Obligations' (2006) Swiss National Centre of Competence in Research Working Paper 2006/15.

[53] The *Menu of Options for Investment Liberalization and Business Facilitation to Strengthen the APEC Economies* is available on the APEC web site <http://www.asianlii.org/apec/other/agrmt/ofilabftstaefviiiap1434/ > accessed 30 June 2009.

[54] *Investment Transparency Standards*: <http://www.apec.org/apec/leaders__declarations/2003_leaderssstmtimplapectranspstd.html> accessed 30 June 2009.

investment while encouraging common approaches to negotiating investment treaties amongst APEC member economies.

APEC is also directly engaged in providing technical assistance and capacity building in relation to investment through a variety of programs in a wide range of areas related to investment.[55] APEC's Investment Experts Group of the Committee on Trade and Investment (IEG), which has representatives from every APEC member government as well as other investment experts, is actively engaged in programs designed to improve transparency of investment regimes, promote dialogue with the APEC business community on ways to improve the investment environment, enhance investment promotion and facilitation, improve technical cooperation, training and other forms of capacity building as well as research on issues like the relationship between investment and development and how to foster a more favourable investment environment through IIAs.

To take just one specific example of APEC's activities, as part of APEC's efforts to develop a comprehensive business facilitation program, a project entitled, 'Capacity Building for Investment Liberalization and Facilitation' was proposed by Japan and endorsed by the APEC Human Resources Development Working Group Capacity Building Network in 2006. The project was implemented in collaboration with the IEG. One component of the program was to develop a series of case studies on investment to assist business and government stakeholders to more successfully carry our investment transactions. These case studies were published by APEC as *Opportunities and Challenges for Foreign Investment in the APEC Region: Case Studies* in December 2008.[56] Another component consisted of capacity building workshops and other training programs for stakeholders based on the case studies. These and similar programs on investment policy generally as well as a myriad of industry specific issues assist not only governments seeking to enhance their capacity to develop effective investment policy, but also businesses seeking to invest in APEC member countries.

Another important initiative is APEC's ongoing work to develop a model Free Trade Agreement chapter dealing with investment. Following APEC's Ministerial Meeting in Santiago, Chile in 2004, APEC's Committee on Trade and Investment was charged with developing a non-binding set of best practices for FTAs. By November 2008, 15 chapters had been endorsed by APEC Members. An investment chapter has been drafted but only a majority of APEC members has so far endorsed it.[57] A model

[55] Many examples may be found on the APEC web site such as APEC, *Market Liberalization and its Relationship with Market Structure, Conduct and Performance of the Food Processing Industry in ASEAN Economies*, April 2008 APEC#208-SM-01.1, <http://www.apec.org/apec/enewsletter/may_vol16/publication.html> accessed 30 June 2009. APEC adopted an Investment Facilitation Action Plan in 2007, the implementation of which is to be monitored by the new APEC Policy Support Unit. APEC members also have Individual Action Plans for trade and investment liberalization, the implementation of which are subject to peer review.

[56] APEC, *Opportunities and Challenges for Foreign Investment in the APEC Region: Case Studies*, December 2008 APEC #208-HR-01.7, <http://www.apec.org/apec/publications/all_publications/human_resources_development.html> accessed14 June 2009. The project was led by the Institute for International Studies and Training, a non-government organization, under the supervision of Japan's Ministry of Economy, Trade and Industry.

[57] Joint Statement, The Twentieth Ministerial Meeting, Lima Peru, 19-20 November 2008 <http://www.apec.org/etc/medialib/apec_media_library/downloads/news_uploads/2008/aelm/amm.Par.0004.File.tmp/08_amm_jms.pdf> accessed 14 June 2009.

investment chapter, if used by parties in practice, could be an effective source of harmonized rules for APEC members and other countries. In the past, the OECD's Draft Convention on the Protection of Foreign Property served as the model for many of the BITS negotiated in the 1970's and 1980's, which resulted in a high degree of consistency of investment obligations during that period.[58] Greater consistency in investment treaties based on an APEC model would facilitate greater policy coherence. APEC model provisions could contribute, in some ways, to redressing the chronic inequality of bargaining power between developed countries and developing countries resulting from unequal economic and political power, as well as asymmetries in information and experience with IIAs and in the resources available to evaluate the impact of IIAs on the domestic investment environment, and on social and economic policies. Even if not adopted, an investment chapter would have a positive educational impact, helping governments learn from the experience of others and providing a useful reference point for negotiations.

C. APEC's Success to date in Promoting Policy Coherence

Despite APEC's activities directed to promoting coherence in the IIAs negotiated by its members, substantial differences remain in those agreements. A recent study of APEC IIAs found that there was considerable uniformity regarding core investor protections, but increasing variation in their content.[59] Also, while APEC's investment instruments have been substantially followed at the level of the general structure and intent of IIAs, there remains significant inconsistency between the instruments and IIA practice in the APEC region. What the situation would be in the absence of APEC's efforts, however, is not obvious. It seems likely that APEC has been able to assist some of its members in the formulation of more effective domestic policy regarding foreign investment and enhanced their capacity to negotiate compatible IIAs, though success in this regard is hard to measure.

The failure by APEC to adopt a model investment chapter for Free Trade Agreements at its meeting in November 2008 suggests, however, that while APEC's broad-based cooperative approach may facilitate understanding, enhance domestic policy making and accommodate the differing development needs of its members, the diversity in its membership may be a substantial impediment to real progress in achieving coherence in the IIAs they negotiate.[60]

[58] OECD, 1967 Draft Convention on the Protection of Foreign Property <http://www.oecd.org/dataoecd/35/4/39286571.pdf> accessed 30 June 2009. Regarding the influence of the OECD model on the United Kingdom's Model Investment Protection and Promotion Agreements, see A. Walter, 'British Investment Treaties in South Asia: Current Status and Future Trends', (2000) Report prepared for the International Development Center of Japan.

[59] APEC Report, above n 13.

[60] G. Hufbauer and J. Schott, 'Multilateralizing Regionalism: Fitting Asia-Pacific Agreements into the WTO System,' paper presented at Conference on Multilateralizing Regionalism, Geneva 10-12 September 2007. Hufbauer and Schott are also skeptical that it will be possible to agree on a draft investment chapter.

IV Conclusions

The complex and expanding web of agreements to which countries are committed poses serious challenges to the coherence between their domestic policy and their international obligations. A threshold problem for some countries is that they lack domestic capacity to formulate and implement domestic policy on foreign investment and to ensure that their international obligations are compatible with and supportive of their domestic policy. APEC's work directly addresses the shortfall in domestic capacity, supporting learning and sharing of experience on a wide range of investment policy issues. At the same time APEC is actively working toward improved coherence through its research and other programs and by developing common principles, practices and treaty provisions relating to investment. In light of the current impracticality of negotiating multilateral investment rules, efforts like APEC's that are not linked to specific treaty negotiations are needed if coherence is to be advanced. Nevertheless, it is remains unclear whether APEC's efforts will substantially improve coherence in the international investment rules that bind its members in light of the many factors encouraging diversity in IIA obligations.