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Core Elements of IIAs:
A Cross-Regional Comparative Study

APEC Committee on Trade and Investment

Investments Experts Group

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I. Introduction

The APEC-UNCTAD Core Elements Project aims to further a comparative understanding of the contents of International Investment Agreements (IIAs). Initially a pilot study of 28 APEC Agreements was undertaken for APEC (APEC#207-CT-01.14 and UNCTAD, 2008). The project has now mapped close to 300 IIAs.[1] The aim of this report is to compare approaches to negotiating and drafting IIA "core elements" in APEC and in other regions, with a view towards contributing "to the knowledge base of developing member negotiators", so as to "enable them to minimize efforts on elements identified a common to many agreements" (project document paragraph 5) . This report, together with the underlying analysis is intended to form the basis of future capacity building activities to assist APEC member economies in the negotiation of IIAs and management of their IIA network.

For the purpose of this report, "core elements" can be defined as common and relatively standard provisions consistently found in a great number of IIAs. Identifying the core elements of IIAs enhances the understanding of convergence and divergence in approaches to negotiating. It also supports the objective of a consistent and predictable regulatory framework for investors and governments. And it provides negotiators with a deeper understanding of how economies have approached the liberalization, protection and promotion of investment.

For the purpose of this report, an "investment principle" can be defined as a core element which enjoys a high level of consistency in use and approach in the examined IIAs. Thus investment principles are those issues addressed in a consistent way and consistently included in these IIAs.

The analysis is based on 154 APEC negotiated IIAs (67 intra APEC and 87 between an APEC member economy and another state), further divided between 114 bilateral investment treaties (BITs) and 40 Economic Integration Agreements (EIAs), such as Free Trade Agreements (FTAs), Closer Economic Cooperation Agreements (CECAs), and Closer Economic Partnership (CEP) agreements. Non-APEC negotiated IIAs numbered 142 agreements, all of them BITs except the 2006 Central European Free Trade Agreement (CEFTA).[2] The broadening of the mapping exercise is made so that APEC practice can be looked at in relation to practice from other regions giving a meaningful sample of diverse agreements from which to draw "core elements" and "investment principles" and, in the process, to assess how far APEC practice contributes to the development of these features of IIAs.

The APEC-UNCTAD Core Elements Project has examined in total 29 different elements in IIAs. The report will therefore briefly address IIA drafting practice with respect to each element and will assess whether there is sufficient consistency in use and approach to label it as an investment principle.

[1] The analysis is based on a sample of 296 APEC and Non-APEC IIAs. In addition to the 200 agreements UNCTAD has mapped for APEC under the Core Elements project (phases I and II), UNCTAD has included, for the purposes of this report, an additional 96 agreements analysed under the ongoing UNCTAD IIA mapping project.

[2] It was difficult to find an EIA between two non-APEC countries containing substantial investment provisions. EU treaties concluded to date do not contain substantive investment protection provisions because competency on these issues remains with individual member countries.

II. Identifying Investment Principles

The report distinguishes between those core elements that can be viewed as investment principles for the purposes of this study due to the consistency in their use and approach, and those that lack the requisite general level of consistency in IIA practice. The level of consistency was measured by reference to the frequency of use of a particular "core element" (e.g. in more than 80 per cent of agreements) and the identification of a common and relatively settled formulation of the underlying legal principle. The higher the frequency and the more settled the formulation the stronger was the case for labelling a provision an "investment principle". The findings below will emphasise, in some cases, that only some aspects of the relevant "core element" could be viewed as an investment principle, given the variations in use and drafting of provisions containing the "core element" in question, but that there is a sufficient identifiable principle used in most agreements for that part of the "core element" to be regarded as an "investment principle" for the purposes of this study.

A. Investment Principles

The following "core elements" were found to have the requisite consistency in use and approach to be labelled as an "investment principle": definition of investment; Most-Favoured-Nation (MFN) treatment, national treatment, fair and equitable treatment, full protection and security, protection against unlawful expropriation, protection from strife, freedom of transfer, subrogation, investor-State dispute settlement and State-State dispute settlement.

1. Definition of Investment

Virtually all IIAs include a definition of investment, which is, after all, the subject matter of these agreements. Only 5 IIAs, almost exclusively Canadian treaties, use an enterprise definition limiting investment to assets associated with enterprises.[3] All other IIAs included a broad asset based definition. Furthermore, the words "every kind of asset" are now extensively used by IIAs as the leading formula to introduce a non-exhaustive definition of investment. They are typically followed by an illustrative list of covered investments. Some noticeable differences either in the coverage or language used are worth highlighting:

- A number of recent APEC IIAs,[4] specify that investment means every asset which has the characteristics of an investment and then list certain examples, such as commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.
- In recent Belgium-Luxembourg IIAs investment is defined as "*any kind of asset and any direct or indirect contribution in cash, in kind or in service, invested or reinvested in any sector of economic activity*".

[3] The Panama-Taiwan Province of China FTA was classified as an enterprise definition IIA although it differed in drafting from the traditional Canadian enterprise definition.
[4] C.f. Korea-Singapore, Brunei-Japan, Japan-Malaysia, Australia-United States FTA, Chile-United States FTA etc.

- A small number of APEC IIAs explicitly provide for the exclusion of portfolio investments[5] or claims of money that arise from commercial contracts for the sale of goods or services or from the extension of credit in connection with commercial transactions.[6]

The survey reveals that the majority of agreements use a definition for investment that encompasses any kind of asset invested by investors of one contracting Party in the territory of the other contracting Party, and providing a non-exhaustive list of the forms that an investment might take in the lines of examples in italic mentioned above.

2. Most Favoured Nation Treatment

96% of all IIAs, (289 out of 296 agreements) include general MFN treatment provisions. Furthermore, all IIAs define MFN treatment as treatment not less favourable than that accorded to third Party investors/investments. Most Bilateral Investment Treaties (BITs) combine MFN treatment and national treatment obligations in a single provision. This is uncommon in EIA investment chapters. Furthermore the majority of APEC as well as non-APEC countries apply these obligations separately to both investors and investments of investors.

80% of IIAs from all regions accord MFN treatment to investments in the post establishment phase only. APEC agreements account for most IIAs which extend MFN treatment also to investments in the pre establishment phase. This in part reflects the fact that the majority of EIAs examined were concluded by APEC member economies. It also reflects the fact that recent United States and Canadian IIAs even specifically accord in separate clauses pre and post establishment MFN treatment to both investors and investors' investments.[7]

More than 80% of IIAs of all regions with MFN provisions exclude advantages granted to third Party investors on the basis of a regional economic organization or economic integration agreements (REIO). In addition, more than 80% of IIAs from all regions exclude advantages accorded to investors of third Parties pursuant to a convention for the prohibition of double taxation. A small minority of agreements also exclude privileges that might exist from any future bilateral or multilateral agreement on intellectual property,[8] or from international agreements in respect to the protection of intellectual property rights to which the Parties are parties including the WTO Agreement on Trade Related Aspects of Intellectual Property Rights,[9] or any multilateral agreements on investments to which either of the contracting Parties is or may become a party.[10]

Only a small number of APEC IIAs, less than 16%, expressly address the issue of the application of MFN treatment to procedural matters such as access to courts, an issue that has gained prominence since the *Maffezini Case* where an MFN clause in a BIT

[5] C.f. Indonesia-Japan, Australia-Thailand FTA, New Zealand-Thailand CEP etc.
[6] C.f. Canada-Peru,
[7] C.f. Canada-Peru FTA, Rwanda-United States BIT.
[8] C.f. Ethiopia-Israel
[9] C.f. Japan-Korea
[10] C.f. Hungary-Uzbekistan, Hungary-Yemen

was held capable, in certain circumstances, of introducing more favourable dispute settlement procedures from other BITs (ICSID 2001). Of those IIAs that do address this issue, Korean IIAs consistently allow investors to import via other IIAs more favorable procedural conditions with respect to access to courts and arbitration, while United States IIAs exclude procedural issues from the scope of MFN treatment.

The MFN treatment provision, as applied to the post entry phase, can be viewed as an investment principle for the purposes of this study due to consistency in its use and approach. Advantages accorded to third Party investors resulting from regional economic integration agreements and from international taxation conventions are usually excluded.

3. National Treatment

Statistically, only 16% of IIAs did not provide foreign investors with national treatment. This percentage increases to 26% in APEC IIAs mostly due to the number of BITs concluded by Australia and Indonesia not including national treatment.[11] National treatment is commonly defined as treatment not less favourable than that accorded by a contracting Party to its own investors/investments. The majority of countries combine both MFN and national treatment obligations in a single provision. Furthermore the majority of APEC as well as non-APEC countries further apply these obligations separately to both investors and investments of investors. However, a large number of APEC IIAs, mostly EIAs, prefer separate MFN/NT provisions.

Some IIAs grant national treatment but diminish the scope of the principle by specifying that non discrimination shall be examined only in accordance with national laws.[12] Some 5% of IIAs with national treatment provisions make the distinction between investments and investors and accord national treatment only to investments of investors and not to investors,[13] while others accord national treatment only to investors and not to investments.[14]

Some 20% of IIAs extend national treatment to the pre establishment phase of investment. APEC IIAs accounted for the great majority of agreements offering investors pre *and* post establishment national treatment, again due to the number of United States and Canadian agreements that extend non-discrimination to the pre-establishment phase. Furthermore out of a total of 55 IIAs, 51 APEC member economies' agreements accorded national treatment "in like circumstances" to foreign investors. One non-APEC agreement accorded national treatment "in like situations" only to investors and not to investments.[15]

National treatment can be viewed as an investment principle for purposes of this study due to the consistency in its use and approach.

[11] Australia's FTAs include national treatment provisions.
[12] Essentially APEC IIAs, c.f. Australia-Sri Lanka, Australia-Turkey, Indonesia-Korea, etc
[13] Consistently found in Indian IIAs, as well as in Indonesia-Korea, China-New Zealand.
[14] C.f. Korea-Philippines, Egypt-Portugal etc.
[15] C.f. Bolivia-Italy.

4. Fair and Equitable Treatment

Only 10 agreements, (3%), were found not to contain an obligation to provide "fair and equitable treatment". The IIAs with fair and equitable treatment provisions can be divided in two categories: those that incorporate an objective standard (minimum standard of treatment, customary international law, international law), and those that do not. The latter category is by far the most often used both in APEC IIAs as well as those of other regions, accounting for almost 80% of all agreements with fair and equitable provisions.

The language of most IIAs has been standardized to a large extent and usually simply reads that each contracting Party shall accord fair and equitable treatment to investments or investments and returns of investors in its territory. Minor drafting differences persist, such as the combination of fair and equitable treatment with full protection and security, combining directly or indirectly in a separate provision the latter terms, combining fair and equitable treatment with only MFN and/or national treatment obligations,[16] or including fair and equitable treatment with full protection and security in the expropriation provision.[17]

On the other hand, close to 20% of IIAs with fair and equitable treatment provisions – essentially APEC agreements concluded by Canada, Japan, Mexico and the United States – provided some framework for giving meaning to the terms "fair" and "equitable".

- The most frequent method used was linking fair and equitable treatment to the customary international law minimum standard of treatment of aliens.
- Only the Peru-Belgium agreement contained a provision linking the treatment to customary international law alone.
- 10% of APEC provisions and 10% of IIAs from other regions link fair and equitable treatment to international law or to general international law principles.[18]

Irrespective of the category of IIA, a substantial number of APEC and non-APEC agreements provided in general terms what Party measures should not impair, namely the management, maintenance, use, enjoyment, or disposal of investments of investors. French agreements even provided a non-exhaustive list of possible measures that would contravene the fair and equitable treatment principle.

There is no convergence towards a single approach to drafting this standard, leaving considerable discretion as to the interpretation of its scope with arbitral tribunals. However, the consistent use of the fair and equitable treatment provision, in one form or another, implies that it can be viewed as an investment principle for purposes of this study.

[16] 15% of all IIAs with fair and equitable treatment clauses, the majority of them being APEC IIAs especially Korean BITs.
[17] C.f Japan-Korea BIT.
[18] C.f. China-New Zealand FTA.

5. Full Protection and Security

Only 10% of all IIAs do not include a provision offering investors full protection and security.[19] This provision requires the exercise of "due diligence" on the part of the host State and requires that the State take such measures protecting the foreign investment as are reasonable under the circumstances. Despite minor drafting differences, such as linking full protection and security with the fair and equitable treatment standard in the same sentence, referring only to "protection", or inserting such clauses in expropriation provisions rather than in promotion provisions, full protection and security provisions are highly standardized.[20]

28 IIAs (close to 10 % of all investment treaties surveyed; all of which APEC agreements) further define the concept of full protection and security by linking it with the customary international law minimum standard of treatment. In terms of drafting these IIAs combine the FET and FPS standards in a single provision specifying that "*1. Parties shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments*", and further clarifying that "*2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights*".

Very frequent use in IIAs, together with consistent language suggests that the concept of full protection and security of investments can be viewed as an investment principle for purposes of this study.

6. Expropriation

Protection of investors and their investment against expropriation is found in all the IIAs examined. The language and substance of conditions under which the expropriation should be made have been standardized to a large extent to the point that all IIAs authorize expropriation for the public benefit, against compensation and under due process of law. More recent agreements, APEC and non-APEC, add other requirements stipulating that expropriation measures should be taken on a non discriminatory basis. Several recent non-APEC IIAs modify these conditions by saying that expropriation measures should not be discriminatory or contrary to a specific commitment.[21] Virtually all IIAs say that compensation should be prompt, adequate and effective. A few agreements provide a further variation as they say that the prompt, adequate and effective compensation should be given in accordance with international law.[22] General consensus exists that the amount of compensation shall be equal to the fair market value of the expropriated investment immediately before the expropriation occurred.

[19] Turkish and Indian BITs omit on a regular basis to include provisions on security and protection.
[20] French BITs adopt this approach.
[21] Essentially French BITs, c.f. Bahrain-France, France-Madagascar.
[22] C.f. Finland-Kyrgyzstan.

In addition, all but four IIAs cover both direct and indirect expropriation, referring to "measures having effect equivalent to/tantamount to expropriation", or "direct and indirect measures of expropriation".[23] Recently Australian, Canadian and United States IIAs have included criteria in special annexes, articulating the difference between indirect expropriation and non-compensable regulation.[24]

Protection against unlawful expropriation can be viewed as an investment principle for purposes of this study due to the consistency in its use and approach, requiring that investments of investors not be directly or indirectly expropriated except for a public purpose, on a non-discriminatory basis, against prompt adequate and effective compensation and under due process of law. The amount of compensation should equal the fair market value of the expropriated investment immediately before the expropriation occurred.

7. Protection from Strife

Protection from strife is of apparent concern to all countries. Only six IIAs were found not to contain some sort of provision guaranteeing compensation in case of any man-made violence. 80% of IIAs in the sample say that compensation to foreign investors in the event of man-made violence shall be given in accordance with the principles of national and MFN treatment. A further 16% of IIAs accord foreign investors only MFN treatment with respect to compensation, while 2% of IIAs accorded only national treatment:[25] The remaining IIAs do not contain provisions on protection from strife. The same proportions are observed in APEC IIAs as well as in agreements in other regions of the world. A small number of IIAs provide investors indirectly with a choice between the better of national or most favored nation treatment with respect to compensation by simply according investors' full non-discriminatory treatment or non discriminatory treatment;[26] or by splitting MFN and national treatment into two different paragraphs in the protection and compensation provision:[27] A further common element found in the same proportions in both APEC and non-APEC treaties (20% of IIAs) is an additional clause specifying that compensation shall also be given to investors, when violent and forceful government actions damage investments.

That countries shall compensate investors who have suffered losses due to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events on a basis that provides these investors with national or MFN treatment subject to certain variations in the relationship between these standards can be viewed as an investment principle for purposes of this study due to the consistency in the use and approach to this provision.

8. Freedom of Transfer

[23] Lebanon-Malaysia, Egypt-Nigeria, Jordan-Lebanon, and Jordan-Morocco.
[24] C.f. Canada-Peru FTA 2008, Rwanda-United States BIT 2008, Australia-Chile FTA 2008.
[25] The majority of them were included a Middle Eastern country: Egypt-Serbia, Jordan-Syria, Saudi-Arabia-Switzerland.
[26] C. f. Bulgaria-United States.
[27] Essentially German BITs, examples Germany-Thailand, Germany-Madagascar, Germany-Nigeria.

Provisions guaranteeing the free transfer of all investment-related transactions are found in virtually all the IIAs examined. The language used and structure of transfer provisions is very similar. Treaties usually provide a general rule guaranteeing that "all payments relating to an investment in the territory of a Party of an investor of the other contracting Party may be freely transferred into and out of its territory without delay", or more simply that "Each Contracting Party shall assure to the investors of the other Contracting Party the free transfer of all funds related to their investments". Several non-APEC IIAs distinguish themselves by limiting the scope of free transfer provisions by clarifying that transactions shall be possible only when investors have fulfilled and honored their tax obligations in host countries.[28] The vast majority of IIAs then set out a non-exhaustive list of examples of payments that can be transferred.[29]

Although transfer provisions generally vary little, some recent BITs set out certain exceptions where transfers may be prohibited or delayed. These are in addition to safeguard measures that restrict transfers in cases of serious balance-of-payments difficulties or exceptional financial and economic difficulties. The inclusion of such clauses underlines the different drafting and negotiating approaches undertaken by APEC member economies and other regions. 33% of APEC IIAs contain a BOP exception, compared to 13% of IIAs from other regions. Furthermore other exceptions to the guarantee of free transfers appear in 44% of APEC IIAs compared to a mere 3% in other regions IIAs. Together these exceptions are used in approximately 23% of IIAs.

The right to free transfer of all funds related to investments, coupled with an open ended list of examples of payments that can be transferred, appears in a sufficiently consistent manner to label it an investment principle for the purposes of this study.

9. Investment Cooperation and Promotion

87% of all treaties surveyed contained a clause relating to investment cooperation and promotion. The great majority of these provisions contain very broad statements that do not explicitly state what form cooperation might take. A minority of IIAs, mostly APEC EIAs, go beyond generalities and provide examples of activities that Parties should undertake. One APEC member economy, the United States, has consistently not included promotion provisions in its IIAs. Paradoxically, EIAs, despite their length and detailed coverage of many issues, account for almost all those IIAs that do not include promotion clauses.

Given the frequency of references to investment cooperation and promotion in the examined IIAs, it is reasonable to conclude that the issue of investment cooperation and promotion amounts to an investment principle for the purposes of this study. However, it needs to be kept in mind that the majority of the provisions found are hortatory in nature and there is little convergence on content.

10. Subrogation

[28] Essentially Dutch BITs as well as the Finland-Kyrgyzstan BIT.
[29] United Kingdom BITs consistently omit to insert a list of such payments.

Only 6% of IIAs studied did not possess a subrogation provision. All non-APEC IIAs had included such a provision while in contrast 13% of APEC IIAs did not contain this provision. Two economies – the United States and Chile – accounted for more than half of these APEC IIAs that did not have a subrogation provision. Furthermore, only the United States has generally not included subrogation provisions in its treaties.

The text of subrogation provisions has been consolidated to a large extent and typically is drafted in the following manner:

> *If one Contracting Party or its designated agency makes a payment to its investor under a guarantee given in respect of an investment made in the territory of the other Contracting Party, the latter Contracting Party shall recognize the assignment of all the rights and claims of the indemnified investor to the former Contracting Party or its designated agency, by law or by legal transactions, and the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right to same extent as the investor.*

A recent trend in APEC FTAs is to add to the above clause a sentence saying that once a Party and has taken over rights and claims of the investor, that investor shall not, unless authorized to act on behalf of the Party or the agency of the Party making the payment, pursue those rights and claims against the other Party.[30]

Subrogation provisions of this type are common and widespread. The consistency in their use and approach allows labeling them an investment principle for the purposes of this study.

11. Investor-State Dispute Settlement

Virtually all IIAs contain provisions regarding investor-State dispute settlement.[31] International arbitration procedures are the common mechanism in all IIAs for investor-State dispute settlement. While a number of IIAs require prior exhaustion of local remedies or specify that arbitration will not be available if the investor has submitted the dispute for resolution to local courts, the majority of IIAs allow the submission of the dispute to arbitration without any such preconditions.

Close to 95% of all IIAs examined provide investors with a right to seek redress under the auspices of the ICSID. Some only allow for ICSID whilst others offer ICSID or alternative arbitration rules. It is also noteworthy that the vast majority of IIAs provide investors with a choice of two or more forms of investment dispute arbitration.

While virtually all EIAs contain extensive and carefully drafted articles on investor state dispute settlement, only a few APEC BITs – in particular those concluded by the United States, Canada and Korea – provide more detailed provisions regulating various aspects of the arbitration process.

[30] See art. 814 Canada-Peru FTA, art. 148.2 China-New Zealand FTA and art. 9.12.2 Panama-Singapore FTA.

[31] Of all IIAs examined so far only the Morocco-Spain BIT did not contain provisions allowing for investor state dispute settlement trough arbitration.

Investor-State dispute settlement through arbitration can be viewed as an investment principle for the purposes of this study in light of the consistency in its use and approach.

12. State-State Dispute Settlement

Provisions on State-State dispute settlement were found in all the IIAs examined. Usually provisions stipulate that any dispute between Parties concerning the interpretation or the application of the treaty has to be resolved through consultations or other diplomatic channels. If such measures fail, Parties may submit the dispute to arbitration for a binding decision or award by an ad hoc tribunal. While non-APEC IIAs seldom regulate procedural matters beyond stipulating that the tribunal shall reach its decision by a majority of votes and that the decision shall be final and binding for both contracting Parties, APEC EIAs, particularly recent United States, Canadian and New Zealand agreements, include entire sections dedicated to dispute settlement between Parties. Some of these sections provide detailed rules on the establishment, composition and functions of the arbitral tribunal, as well as on the procedure, expenses, timeframes of the dispute and provisional measures available to Parties.

A particularity is present in the Belgium-Peru and Belgium-Democratic Republic of Congo BIT, as they provide that in the absence of a settlement through diplomatic channels, the dispute may be submitted to a joint commission consisting of representatives of the two Parties. If the commission fails to settle the dispute only then the dispute shall be submitted to an arbitration court.

State-State dispute settlement is ubiquitous and consistently contained in IIAs. Furthermore there seems to be a trend towards greater expansion of this principle by the addition of more detailed rules governing proceedings at the arbitral tribunal. The provision can be viewed as an investment principle for the purposes of this study in light of the consistency in its use and approach.

B. Other Core Elements

The remaining “core elements” studied can not be labelled “investment principles” due to the lack of consistency in their use and approach in the surveyed IIAs. These include the definition of “investor” which, though a key element to the effectiveness of IIAs, remains subject to so wide a range of definitions that no common principle can be safely asserted. Other “core elements” involve highly specific issues that only some States include in their IIAs. These include prohibitions on performance requirements, the appointment of senior management, entry and sojourn of personnel, the use of schedules of exceptions, denial of benefits, transparency, technical co-operation and timeframes. A third set of “core elements” in this category include general exceptions relating to taxation, essential security and public order and public health and safety. A fourth set concerns social issues including labour and environmental standards and corporate social responsibility. Each is examined briefly.

1. Definition of Investor

All IIAs examined so far contain a definition of "investors".[32] Despite the extensive presence in IIAs of provisions defining investors, establishing whether there is sufficient convergence in the approach taken to this core element to qualify the definition of “investor” as an investment principle is difficult because many variations exist.

IIAs of all regions include under the term investor both physical persons as well as juridical persons. Physical persons are, in the great majority of IIAs, defined as nationals or citizens of a contracting Party. Many IIAs further specify that the terms nationals/citizens shall be interpreted in accordance with the contracting Parties' laws, while others still specify exactly which laws for each Party will determine nationality of investors. Another variation, found almost exclusively in APEC IIAs,[33] allows permanent residents in one contracting Party to be qualified as investors and benefit there from the agreement.[34] Additional complication for the establishment of any general tendency arises from the fact that some IIAs qualify as investors, permanent residents only with respect to one Party,[35] while other IIAs qualify investors as nationals of one Party and permanent residents of the other Party.[36]

Other than physical persons, investors may take the form of legal entities. The definition of investors as legal entities may rely on one, or any combination of the following three criteria: incorporation, seat or head office, and control. Recent trends in APEC and other regions offer two definitions, one relating to one Party and the other relating to the second Party; however the majority of IIAs possess only one investor definition valid for both Parties. Furthermore, each investor criteria possesses variations. Ownership and control for example is sometimes simply mentioned as ownership and control by nationals of one contracting Party, while other IIAs specify that legal entities can be directly or indirectly owned and controlled. Still other IIAs talk of private or government ownership and control, while 15% of APEC IIAs, essentially concluded by Australia, Canada, and Japan, define what actual ownership and control means. Sometimes original combinations of criteria emerge. A few IIAs, for example, even define as investors legal entities not constituted under a Parties laws but controlled directly or indirectly by nationals of one Party.[37] Further defining the scope of the notion of investor, recent Canadian and United States IIAs specify what an investor of a non Party means. Overall IIAs examined seem to favour the incorporation criteria combined with either of the other two criteria (seat/head office and control). The requirement for a legal entity to have its seat in a Contracting Party seems to be less popular among IIA rule makers.

Despite the overwhelming use of a definition of investor, there is no consistency with regard to the use and approach towards this definition – save perhaps that investors

[32] The Kenya-United Kingdom BIT, while including the terms "nationals" or "companies", never defined neither "investors" nor "nationals" or "companies".
[33] Non APEC IIAs with such variations include only the Morocco-Spain and Ethiopia-Israel BITs.
[34] 35% of all APEC IIAs contain similar provisions.
[35] C.f. Ethiopia-Israel, and most Australian BITs.
[36] Typically Hong Kong BITs.
[37] C.f. Costa-Rica-Switzerland, Netherlands-Kazakhstan.

can be both physical and legal persons from contracting Parties and that physical persons will include nationals or citizens, while legal persons are defined as having been constituted in accordance with a contracting Party's laws. This could also extend to including permanent residents where such people have, to a substantial degree, the same rights as nationals.

2. Performance Requirements

66% of treaties contain such provisions. Performance requirements provisions were found equally commonly in both APEC and non-APEC IIAs. This statement however needs further explanation. The high percentage is due to the fact that 53% of IIAs with restrictions on performance requirements actually do not directly regulate the matter but refer, through an "application of more favourable rules" clause, the issue to the WTO TRIMS agreement. Only 13% of IIAs with restrictions on performance requirements explicitly provide lists of measures and rules governing these requirements.[38] Treaties either use the so called "TRIMS consistent approach"[39] where they explicitly say that the TRIMS agreement is incorporated mutatis mutandis into the IIA, or integrate the TRIMS agreement into the IIA via the "application of more favourable rules" provision.[40] In the second case, NAFTA-inspired performance requirements provisions take a "TRIMS plus" approach. This is exclusively used by APEC member economies and consistently adopted by four economies: Canada, Chile, Japan and the United States.

Despite either drafting approach to the inclusion of performance requirements in IIAs, the WTO TRIMS agreement is at the core of performance requirements provisions. However, there remain too many variations and exceptions to this basic approach for it to be viewed as an "investment principle" for the purposes of this study.

3. Senior Management

Senior management provisions were found only in APEC IIAs. Out of 154 APEC IIAs examined only 32 contained such clauses and all of them being signed after the 1992 NAFTA treaty. Furthermore four APEC members, Canada, Chile, Japan and the United States, accounted for 80% of IIAs with senior management provisions. Given the infrequent inclusion of this kind of provision in the examined IIAs it cannot be viewed as an investment principle for the purposes of this study.

4. Entry and Sojourn

43% of the IIAs examined require host countries to give favourable consideration to investors' applications for licences, sojourn of personnel, entry of employees, working permits etc. The exact same proportion of IIAs having such provisions, 43%, was observed in both APEC and non-APEC countries. Though a core element of some

[38] Exclusively composed of APEC agreements.
[39] Small minority of treaties, exclusively APEC IIAs, for example China-New Zealand FTA or Canada-Costa Rica.
[40] The vast majority of all IIAs with performance requirements provisions, non APEC countries used in fact only this method to include performance requirements into their agreements.

IIAs, entry and sojourn of personnel is not sufficiently consistent in use and approach to be viewed as an investment principle for the purposes of this study.

5. Scheduling

23% of APEC IIAs included schedules, but APEC economies accounted for almost four fifths of this number. The great majority of "post establishment" IIAs, be they APEC or not, did not posses any schedule of commitments. However all APEC IIAs which combined the pre- and post establishment phases contained party lists/sectors with schedules; however not all APEC IIAs with a schedule include a pre- and post establishment phase of investments. Furthermore the vast majority of APEC IIAs and all non-APEC IIAs with schedules use negative lists/top down approaches. One APEC agreement[41] included a positive list while other APEC IIAs[42] included a positive list for a member and a negative list for the other.

In light of the lack of consistency in use and approach, scheduling cannot be viewed as an investment principle for the purposes of this study.

6. Denial of Benefits

Almost 20% of IIAs were found to contain a denial of benefits provision, the vast majority of these IIAs being concluded by APEC economies. This statement can be further refined as roughly 15% of all IIAs with such a provision were concluded by only four APEC economies, namely the United States, Canada, Australia and Japan. A broad denial of benefits clause, including cases where enterprises do not exercise any substantial business activities as well as where a Party maintains measures prohibiting transactions with certain enterprises, is used in more than half of these economies' IIAs. The denial of benefits clause is usually found in a special and separate provision in IIAs.[43] However a fairly substantial number of Australian BITs and some older United States BITs insert the denial of benefits reservation in the provision defining the scope and application of the agreement.[44] In addition drafting of such clauses varies from one APEC member to the other.

In light of their divergent as well as rare use, in most cases only by certain parties, denial of benefits provisions cannot be viewed as an investment principle for the purposes of this study.

7. Umbrella Clause

Umbrella clauses were found in 50% of IIAs. However non-APEC agreements contained such a clause in over 66% of cases compared to 33% in APEC agreements. The text of umbrella clauses has been consolidated to a large extent. Typically such provisions would read that each contracting Party shall observe any obligation/written

[41] C.f. New Zealand-Thailand CEP
[42] C.f. Índia-Singapore CECA
[43] Examples include the Canada-Peru FTA, Rwanda-United States BIT, Australia-Chile FTA etc.
[44] Examples include Australia-Czech Republic, Australia-Hungary, Bulgaria-United States, Ukraine-United States, etc.

obligation it has assumed with regard to investments in its territory by investors of the other contracting Party.

Although the text of the great majority of umbrella clauses remains fairly standard, they are used with insufficient frequency to be viewed as an investment principle for the purpose of this study.

8. Transparency

Only 20% of all IIAs (30% of APEC IIAs and 10% of non-APEC agreements) include transparency provisions. Furthermore the scope of these provisions is highly diverse. For example very few agreements provide one Party with the possibility to make enquires about possible changes in the other contracting Parties' regulations.[45] The majority of IIAs simply state that laws and other countries' measures affecting investment shall be made publicly available. In addition there is much divergence in the content of transparency provisions regarding the extent of disclosure, applicability to both home and host countries and the treatment of confidential information. In addition several APEC IIAs, both FTAs as well as BITs, implicitly or explicitly exclude transparency requirements from the scope of dispute settlement provisions.[46]

Some recent APEC FTAs establish special contact points or information centres responsible for facilitating communications on any matter covered in the agreement including on transparency requirements.[47]

Party consultations on any matter of the agreement were found in only 38% of IIAs, however in APEC IIAs they accounted for more than 50% compared to a mere 20% in other regions' treaties.

Transparency provisions are not widespread in their use and the approach to their drafting is not consistent. For purposes of this study, they therefore cannot be viewed as an investment principle.

9. Technical Cooperation

Specific areas of technical cooperation with respect to measures affecting investment were set out in connection with only one of the IIAs examined in this study, the United States-Morocco FTA. The cooperation set out in connection with that agreement includes technical assistance to support the Moroccan private sector in understanding business opportunities regarding investment in the United States and understanding how United States state measures may affect such opportunities. On the other hand several other IIAs (the majority of them being concluded by non-APEC countries) contained clauses stipulating that host countries shall grant permits in relation to the execution of technical assistance contracts without providing any more details.

[45] C.f. art 4 Austria-Macedonia BIT containing a classical provision allowing a Party to make enquires about changes in the other Parties' regulations.
[46] C.f. Rwanda-United States, Singapore-Panama FTA, Taiwan-Panama FTA, China-New Zealand FTA etc
[47] C.f. Taiwan-Panama FTA.

The lack of frequent use as well as of specific language precludes technical cooperation provisions being viewed as an investment principle for purposes of this study.

10. Timeframe

The great majority of IIAs analyzed possess a timeframe. All APEC and Non-APEC EIAs remain valid for indefinite periods, i.e. do not possess a timeframe. Second, all Non-APEC BITs remain in force a fixed period, usually 10 years, but some may remain in force for 15 or even 20 years, which is automatically extended for a similar number of years unless the agreement is denounced. This remains valid also for APEC BITs with the exception that four recent agreements do not posses any timeframe and remain valid until a Party decides to denounce them.[48] In addition, several APEC BITs were found to contain timeframes of only 5 years. Overall no consistency in use and approach can be retrieved from these IIAs except that FTAs do not posses a timeframe while BITs remain in force usually for 10 years and can automatically be extended unless they are denounced by one Party.

11. General Exceptions - Taxation

Taxation matters are carved out in 15% of all IIAs, the vast majority of them being APEC member economies agreements. FTAs accounted for half of APEC's IIAs which carved out taxation matters in contrast with other regions where taxation exceptions were found only in BITs. Rare use and divergent drafting of taxation provisions preclude viewing general taxation carve-outs as an investment principle for purposes of this study.

12. General Exceptions – Essential Security and Public Order

Out of nearly 300 IIAs, 80 were found to contain exceptions relative to "essential security and public order". However APEC member economies included such exceptions in over 33% of their IIAs compared to 14% in non-APEC IIAs. In addition APEC member economies were much more prone in drafting detailed provisions defining to a greater extent what the terms "essential security" encompass - nearly half of their provisions provided such specificity. In comparison other regions do not define "essential security and public order". Due to limited use essential security provisions cannot be viewed as an investment principle for purposes of this study.

13. General Exceptions – Public Health and Safety

The public health and safety exception was found to be present in only forty IIAs, the vast majority of them being APEC FTAs. Two observations can be made. First, all IIAs except one that do include such a general exception were signed after the Marrakesh Agreement establishing WTO. Second, all these agreements are influenced by GATS Article XIVb), to the point that they either use the same language[49] or

[48] C.f. Korea-Peru 1993, Canada-Costa Rica 1998, Jordan-Singapore 2004 and Jordan-Thailand 2005.
[49] See art 18 Jordan-Singapore BIT, art 14.2 Eritrea-Uganda, art 20 Korea-EFTA FTA, art 8.3 Hong Kong China-New Zealand

incorporate the article *mutatis mutandis* into the respective agreement.[50] Typically such a provision reads that subject to the requirement that measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures necessary to protect human, animal or plant life or health or the environment. While recent trends regularly favor the inclusion of WTO inspired public health and safety provisions in IIAs, this is not a widespread treaty practice.

14. Environment

Environmental protection and environmental issues in general are underrepresented in IIAs as only 16% of agreements were found to contain some sort of an environmental provision. This statement however must be considered with care. A third of APEC member economies IIAs possess an environment provision, compared with a mere 5% in Non-APEC IIAs. Furthermore an environmental provision is almost always found in FTAs.

The drafting and meaning of environmental provisions varies. The majority are listed as exceptions to the substantive provisions of the agreement, but some include only a very broad "no lowering of standards" clause stipulating that Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental measures.[51] Furthermore if such encouragement is made Contracting Parties shall consult with the aim of avoiding such encouragement. In addition to such clauses, a number of these IIAs also include "quasi exceptions" which could be viewed as creating ambiguities as to their real meaning. This is illustrated in the United States-Rwanda BIT:

> "*Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."*

A number of IIAs with environmental exceptions borrow the language or directly refer mutatis mutandis to articles XX GATT and XIV GATS denoting strong WTO influence on investment rule making.[52]

15. Labour Standards

Only six IIAs in the sample include a labour clause.[53] Five of the six IIAs were concluded by APEC members. Of those the Canadian – Peru FTA from 2008 included a separate labour chapter. As in the case of some environmental clauses, labour provisions do not contain any direct and specific obligations nor do they represent any

[50] See art 18.1 Singapore-Panama FTA and art 200 China-New Zealand FTA
[51] Examples include Singapore-EFTA FTA 2002, Taiwan-Panama FTA 2003, Peru-Belgium 2005, Belgium-Congo DR 2005, Canada-Peru FTA 2008, United States-Rwanda FTA 2008.
[52] Examples include Uganda-Eritrea 2001, China-New Zealand FTA 2008, Singapore-Jordan 2004, Singapore-Panama FTA 2006, Singapore-EFTA FTA 2002
[53] Belgium-Peru 2005, Belgium-Congo DR 2005, United States-Uruguay 2005, Japan-Philippines 2006, Rwanda-United States 2008 and Canada-Peru 2008

substantive commitment from Parties but remain essentially broad political declarations using a “no lowering of standards” clause.

16. Corporate Social Responsibility

The Canada-Peru FTA of 2008 was the only IIA found to contain a "Corporate Social Responsibility" clause. The provision encourages international standards, endorsed by the Contracting Parties, to be voluntarily incorporated by investors operating in the territory of one of the Contracting Parties. The provision defines "Corporate Social Responsibility" as referring to issues such as labour, the environment, human rights, community relations and anti-corruption.

III. Conclusion

This paper has identified several "core elements" that can be viewed as "investment principles" for purposes of this study in light of the consistent use and approach through a broad set of IIAs, including APEC IIAs. The main feature of the findings is that these principles tend to be the ones that have been used since the inception of IIAs and are common to both early and recent agreements. The core elements identified as not yet having such status are in the main those that are to be found in more recent agreements. IIAs of certain APEC member economies, particularly Canada, Japan and the United States, are at the forefront of change and innovation in drafting of international investment treaties. Experience to date suggests that new developments and drafting approaches are more likely to appear in IIAs of these APEC economies, hence special attention must be accorded to them. Among non-APEC countries, the Belgium-Luxembourg Union concludes BITs containing noticeably different drafting.[54]

[54] Most notably concerning Labour, State-State dispute settlement and Investor definition provisions.

References

APEC (2007), *Identifying core elements in investment agreements in the APEC region*. An edited version also published by UNCTAD: UNCTAD (2008) *Identifying core elements in investment agreements in the APEC region* UNCTAD Series on International Investment Policies for Development (United Nations, New York and Geneva, 2008).

ICSID (2001) *Maffezini v Spain* ICSID Case No Arb/97/7 Decision on Objections to Jurisdiction 25 January 2000, 16 ICSID Rev-FILJ 212 (2001)