



The Existing System of International Investment Agreements: Recent Trends

The main trends in international investment agreements (IIAs) principally concern four major developments:

1. First, the IIA universe¹ continues to grow substantially. By the end 2006, there were some 2,570 bilateral investment treaties (BITs), 2,800 Double Taxation Treaties (DTTs) and 240 other investment-related agreements were concluded. Almost all countries and economies in the world are members to at least 1 IIA, and the majority of countries are members to several, if not numerous, IIAs.
2. Second, the role of developing countries in international investment rulemaking continues to increase. For example, there are currently over 665 BITs and over 90 other investment-related agreements concluded between developing countries. South-South cooperation in this area is growing, and more developing countries are becoming sources of outward investment. In this new role, they need to reconcile their traditional objective of maintaining broad regulatory flexibility for development purposes with the goal to secure ample protection for their own investors abroad.
3. Third, IIAs are becoming increasingly sophisticated and complex. A small, but growing number of IIAs include significant revisions to the wording of various substantive treaty obligations, such as the meaning of “fair and equitable treatment” and the concept of indirect expropriation. Important innovations also take place in investor-State dispute settlement procedures. Some recent bilateral investment treaties also emphasize on policy concerns associated with foreign investment through exception clauses, covering, for instance, national security and public order, protection of health and the environment, respect for core labor rights, cultural diversity and prudential measures for financial services. Furthermore, investment provisions are increasingly being formulated as part of agreements that encompass a broader range of issues, including notably trade in goods and services.
4. Fourth, investor-state disputes continue to increase, albeit at a much lower rate than in previous years. By the end of 2006, there were at least 255 known claims. While international arbitration is an important means to strengthen the rule of law and to increase legal stability, a number of conflicting awards have also led to new uncertainties concerning the interpretation of core investment protection provisions, such as the MFN clause.

¹ Consisting of bilateral investment treaties (BITs), treaties on the avoidance of double taxation (DTTs), and other bilateral and regional investment-related agreements, such as free trade agreements or economic cooperation agreements.



What are the main characteristics of the current IIA system and what challenges do these raise, particularly for developing countries?

- A first observation is that the IIA system is highly *atomized*. In other words, it consists of thousands of individual agreements that lack any kind of system-wide coordination. In the absence of global investment rules, countries have no other choice but to continue concluding bilateral or regional agreements, thereby further perpetuating and accentuating the IIA universe.
- Second, the IIA universe is *multilayered*, in the sense that it consists of various levels of agreements, i.e. bilateral, regional, sectoral, plurilateral and multilateral, which overlap each other.
- Third, it is *multifaceted*, in the sense that it covers not only investment issues per se, but also matters related to trade, services, intellectual property, industrial policies, movement of personnel, and others.
- Fourth, the IIA world is a dynamic one, that is, the system is innovative. On the one hand, this demonstrates that IIA rulemaking is flexible to react to new developments, such as newly emerging public concerns in respect of foreign investment. On the other hand, it should be no surprise that in a highly atomized IIA network individual countries seek individual solutions in addressing these concerns.
- Fifth, the IIA system may be characterized as having *uniformity at the core*, but increasing *variation at the periphery*. That is, on a number of core issues, the agreements reflect considerable homogeneity in terms of the main contents, although with significant differences concerning drafting details and substantive content. Provisions such as national and MFN treatment for established investment, fair and equitable treatment, guarantees of prompt, adequate and effective compensation for expropriation and of free transfers, and consent to investor-State and State-State dispute resolution appear in a very large number of agreements. Other provisions, however, such as non-discrimination with respect to the admission of foreign investors, prohibitions of certain performance requirements, and other issues appear in only a minority of agreements, sometimes with considerable variation among treaties.

Key characteristics with regard to the nature of IIA provisions include:

- IIAs are *primarily protective*, that is, the vast majority of commitments are intended to protect established investment, whereas only a minority of IIAs contains liberalization commitments.
- IIA provisions are only *negligibly regulatory*, meaning that host countries continue regulating foreign investment through their domestic legislation and not by directly imposing obligations on foreign investors in IIAs.
- IIAs involve principally *passive obligations* whereby contracting parties commit themselves to refrain from particular conduct that is considered adverse to covered investment. By contrast, they usually do not require host countries to take any specific action.



- IIAs are typically only *indirectly promotional*. This means that they seek to attract foreign investment through the granting of investment protection rather than through specific promotion measures by home and host countries.
- Most IIAs are only *slightly transparent*. They contribute to transparency only insofar as the provisions of the agreements themselves are transparent, but do not require host countries to make their domestic laws transparent.

What implications do all these characteristics of the current IIA system have for foreign investors?

On the one hand, the consolidation of core investment protection principles contributes to clarity and stability of the investment climate. Moreover, the increasing variety and complexity of IIAs with regard to individual aspects of investment promotion and protection offer countries so many options in terms of treaty making and in using IIAs as instruments to further their development policies.

On the other hand, the latter aspect also poses unprecedented challenges concerning the negotiation of the "right" agreement, the proper implementation of IIA obligations, and for keeping the IIA patchwork transparent and coherent. The risk of incoherence is particularly high for developing countries with less expertise in IIA matters, frequent policy changes and weak negotiation positions. Furthermore, individual developing countries acting on their own may find it difficult to ensure in IIAs that the development dimension is properly taken into account and that they retain sufficient regulatory flexibility to pursue their economic and social goals.

In conclusion, against the background of an ever more complex system of IIAs it has become a major challenge for all countries, in particular developing countries, to negotiate, conclude, and implement the "right" IIA, to cope with the risks of inconsistencies, and to ensure that the development dimension is properly taken into account.

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Contributed by James Zhan

Head, Investment Policies and Capacity-building Branch

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