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INTERNATIONAL INVESTMENT RULEMAKING*

Note by the UNCTAD secretariat

Executive summary

The evolution of international investment rules is a dynamic process, which offers new opportunities, but also poses new challenges for countries, particularly developing countries, at the beginning of the 21st century. This paper takes stock of recent trends in, and characteristics of, the existing universe of international investment agreements (IIAs), and identifies the most significant development-related challenges associated with the current investment regime. Among those are capacity constraints of developing countries and challenges related to the content of IIAs. Policy coherence, the proper balancing of private and public interests in investment matters, and the development dimension deserve particular attention in this respect.

The paper also presents a number of suggestions on how these various challenges could be addressed. It invites a discussion on how the development dimension could be strengthened in future international investment rule making.

* This document was submitted on the above-mentioned date as a result of processing delays.

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INTRODUCTION

1. At its session in March 2007 the Commission on Investment, Technology and Related Financial Issues confirmed that UNCTAD should serve as the key focal point in the United Nations system for dealing with matters related to international investment agreements, and continue to provide a forum to advance understanding of issues related to international investment agreements and their development dimension, involving all relevant stakeholders and with particular consideration of the needs of LDCs. Against that background, the Trade and Development Board agreed at its forty-first executive session, held from 18 to 20 April 2007, that the Commission on Investment, Technology and Related Financial Issues should convene an expert meeting on "development implications of international investment rulemaking". The secretariat has prepared the present paper as a background note for that meeting.

I. RECENT TRENDS AND CHARACTERISTICS OF INTERNATIONAL INVESTMENT RULEMAKING

A. Continuous expansion of the IIA universe

2. The universe of international investment agreements (IIAs) continues to expand in terms of the number and complexity of those agreements, with 2006 seeing further expansion and increasing sophistication of international investment rulemaking at the bilateral, regional and interregional levels.

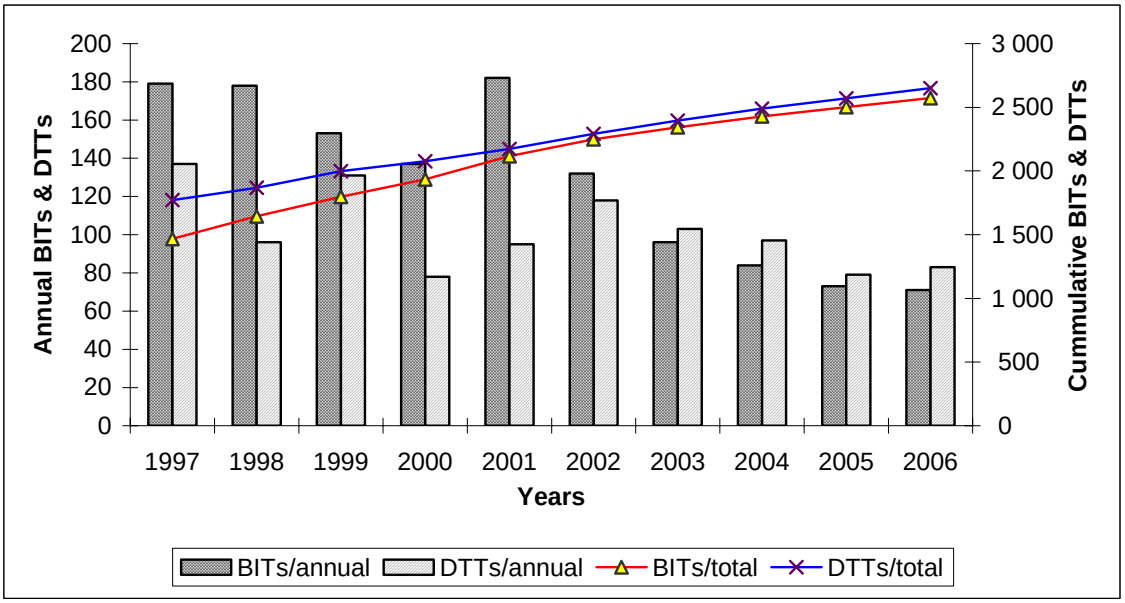
1. Bilateral investment treaties

3. Seventy-one new bilateral investment treaties (BITs) were concluded; as a result, the total number of BITs reached a new peak of 2,572 by the end of 2006 (figure 1). At the same time, the slowdown in the number of BITs concluded annually continued for the fifth consecutive year in 2006. The trend towards the renegotiation of existing treaties also continued to increase, with 13 BITs affected in 2006. To date, a total of 109 BITs have been renegotiated between countries.

2. Double taxation treaties

4. In 2006, 83 new double taxation treaties (DTTs) were concluded, and as a result, the total number of such treaties stood at 2,651 by the end of 2006 (figure 1). For the first time since 2002, the number of DTTs concluded increased compared with the previous year. The regional distribution of DTTs concluded by the end of 2006 (by country group) reveals that 38 per cent of all DTTs were concluded between developing and developed countries, while 16 per cent were concluded between two developing countries. The share of DTTs between developed countries (24 per cent) is significantly higher than in the case of BITs: this may be explained by the fact that double taxation poses a greater threat in those countries than political risk.

Figure 1. Number of BITs and DTTs concluded, cumulative and annual, 1996–2006



Source: UNCTAD (www.unctad.org/iia).

3. Preferential trade and investment agreements

5. The tendency in previous years to establish international investment rules as part of preferential trade and investment agreements (PTIAs) gathered momentum in 2006, with the conclusion of 18 new PTIAs involving 62 countries.* This brought the total number of PTIAs to 241 at the end of 2006 (figure 2).† While the total number of PTIAs is still small compared with the number of BITs (less than 10 per cent), it has nearly doubled over the past five years. In addition, at least 68 agreements involving 106 countries were under negotiation at the end of 2006. This suggests an even more pronounced increase in such treaties in the near future.

6. Among the most important PTIAs concluded in 2006 was the new Central European Free Trade Agreement (CEFTA), which consolidates over 30 bilateral FTAs. Other important FTAs concluded last year include the free trade agreements between the United States and Colombia, Oman, Panama and Peru, and the Economic Partnership Agreement between Japan and the Philippines.

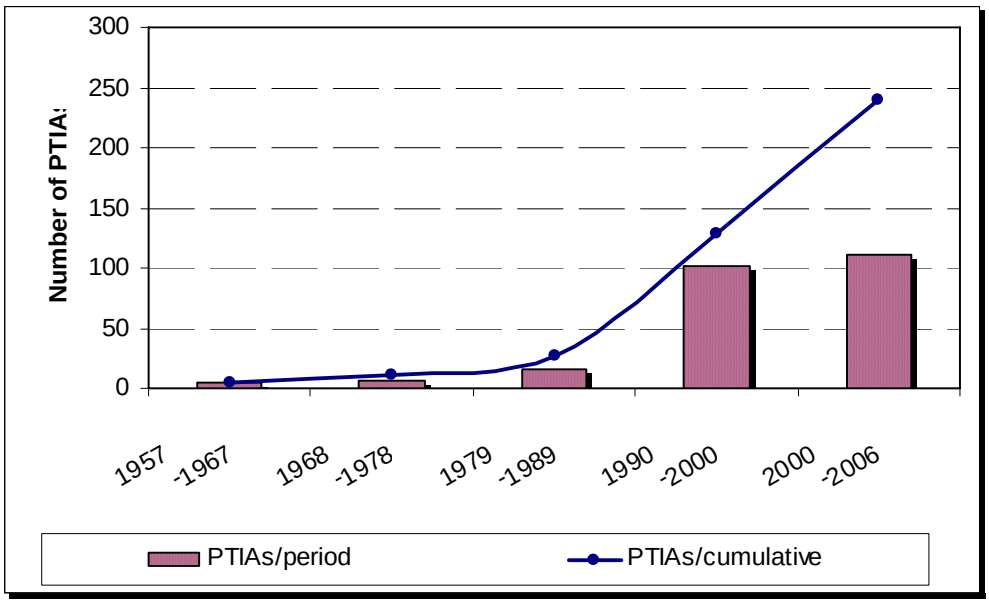
7. Those PTIAs often establish binding obligations for the contracting parties concerning the admission and protection of foreign investment (UNCTAD, 2006a). The scope of the protection commitments in these FTAs is comparable to that found in BITs. However, some agreements establish only a framework for cooperation between the contracting parties. Such cooperation often takes the form of establishing an institutional framework to follow up on investment issues and identify the time frames for the launching of future negotiations on investment liberalization and/or protection. A recent example of such an agreement is the

* These agreements appear under a variety of names, for example free trade agreements (FTAs), closer economic partnership agreements (EPAs), regional economic integration agreements or framework agreements on economic cooperation.

† Owing to the abrogation of a large number of agreements as a result of the accession of Bulgaria and Romania to the EU and the conclusion of the new CEFTA agreement, which consolidated over 30 bilateral FTAs, the total number of PTIAs did not increase unlike the previous year.

Trade and Investment Framework Agreement (TIFA) concluded between the United States and ASEAN.

Figure 2. The growth of PTIAs, 1957–2006
(Number)



Source: UNCTAD.

B. Investor–State disputes

8. In 2006, the number of known treaty-based investor–State dispute settlement (ISDS) cases grew by at least 28, with the total number of such cases reaching a new peak of 258 by the end of 2006.[‡] The 2006 figure appears to indicate a slowdown in the previous enormous growth of ISDS cases. Out of the total of 258 cases, 160 were filed with the International Centre for Settlement of Investment Disputes (ICSID). Most other cases were brought under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) (65) or the Arbitration Rules of the Stockholm Chamber of Commerce (18).

9. The surge in the number of investment disputes arising from IIAs is not necessarily an unhealthy development. It may be regarded as an expression of the rule of law and hence an indication that IIAs contribute to creating a favourable investment climate in host countries. Often, awards made in investor–State arbitrations have helped to clarify the meaning of particular treaty provisions, thereby improving the transparency of the IIA structure through a developed body of case law. However, there have also been some inconsistent awards that have contributed to uncertainty. Furthermore, concerns have arisen about the possibility of multiple proceedings involving the same set of events, which would increase the cost of dispute settlement while creating a risk of inconsistent results (UNCTAD, 2005a, 2005b).

10. These concerns have led to steps being taken in the reform of the ICSID system as well as to the revision of several model BITs (UNCTAD, forthcoming a). The latter revisions

[‡] This number does not include cases where a party signalled its intention to submit a claim to arbitration but has not yet commenced the arbitration (notice of intent); if these cases are submitted to arbitration, the number of pending cases will increase.

include significant innovations aimed at greater predictability, transparency and consistency in the process.

C. Greater role of developing countries

11. The role of developing countries in international investment rulemaking is evolving in at least two important ways. First, developing countries are now routinely parties to IIAs among themselves. The result is a substantial increase in the number of IIAs concluded among developing countries. For example, by the end of 2006, 679 BITs had been concluded between developing countries, accounting for about 26 per cent of all BITs. The total number of South–South PTIAs totalled over 90 agreements at the end of 2006. Recent examples of South–South PTIAs include the ASEAN initiatives for the establishment of a free trade and investment area with China, India and the Republic of Korea, the Singapore–Panama FTA and the China–Pakistan FTA.

12. Second, a number of developing countries have increasingly become capital exporters. They no longer define their role within the IIA regime solely as that of recipients of foreign investment from developed countries: they may also be sources of capital flowing into developed or other developing countries (UNCTAD, 2006b, 2005c).

D. The evolving nature of the current IIA system

13. At the beginning of the 21st century, the regime of international investment arrangements can be identified in terms of the following key systemic characteristics:[§]

- The system is *universal*, in that nearly every country has signed at least one BIT and the great majority of countries are party to regional, plurilateral or multilateral agreements relating to investment.

- The structure of agreements is *atomized*. No single authority coordinates the overall structure or the content of the thousands of agreements that make up the system.

- The system is *multilayered* — that is, IIAs now exist at the bilateral, regional, plurilateral and multilateral levels, and IIAs at different levels overlap.

- The system is *multifaceted*. IIAs include provisions that are specific to investment, but also provisions that address related matters, such as trade in goods, trade in services and intellectual property protection.

- The agreements might be characterized as having *uniformity at the core but increasing variation at the periphery*. That is, on a number of core issues, they reflect considerable consensus with respect to the main 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 guarantees of national and MFN treatment with respect to the right to establish investment and

[§] The UNCTAD secretariat is currently preparing a study that will shed light in greater detail on some of the most important characteristics of the IIA system as it has evolved during the last 60 years (UNCTAD, forthcoming b).

prohibitions on performance requirements, appear in only a minority of agreements, sometimes with considerable variation among agreements.

- They are only *negligibly regulatory*. Very few IIAs contain provisions that regulate international investment stocks or flows. The obligations imposed by these agreements fall almost entirely on host countries and occasionally on home countries, but rarely on investors or investments. Host countries regulate investment through their domestic legislation.

- They typically are *indirectly promotional*. The great majority of agreements contain no provisions directly promoting international investment flows. Rather, promotion occurs indirectly as a by-product of creating a favourable investment climate through the provision of investment protection.

- They are *moderately liberalizing*. Liberalization was rarely a goal in agreements concluded during approximately the first half century of the post-war era. Much has changed, however, in the past decade, with the entry into force of the GATS as well as the most recent free trade agreements, the ASEAN agreement, the BITs concluded by the United States, Canada and Japan, and the Energy Charter Treaty.

- IIAs *contribute only slightly to transparency*. While such agreements are typically described as agreements designed to protect investment by creating a stable and transparent investment climate, many of them 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.

14. As far as the development aspects of IIAs are concerned, two sets of characteristics of the IIA universe as described above are particularly relevant. First, the fact that IIAs have become increasingly complex and diversified offers new options, but also poses serious challenges for developing countries. Second, most existing IIAs do not specifically address development concerns. The implications of these features and shortcomings are dealt with in the next chapter.

II. DEVELOPMENT IMPLICATIONS

15. While the above issues are important to all countries at whatever level of development — developed, developing and transitional alike — they are more pertinent for developing countries that have less capacity to deal with them. In particular, developing countries are faced with two main challenges in this regard.

A. Challenges of capacity

16. The challenges of capacity arise from the fact that many countries lack the resources to participate fully and effectively in the development and implementation of the international investment system. Although the challenges of capacity affect every country, they are of special significance to developing countries.

17. Developing countries by definition possess fewer resources than developed countries and thus are more burdened by challenges of capacity. This may adversely affect their participation in the international investment system quantitatively or qualitatively. For

example, a developing country may find that it lacks the resources to negotiate the agreements it wishes to negotiate. Alternatively, it may choose to participate in negotiations, but without having the knowledge needed to obtain concessions it otherwise could have obtained, or without fully understanding the consequences of the agreement it ultimately concludes, or without having the ability to honour the agreement once it is concluded. In the end, the challenges of capacity may fall most heavily on those developing countries least able to steer the international investment system in the direction necessary for addressing those challenges.

18. Challenges of capacity are aggravated by many of the trends that are evident in the current international investment system. These include the growing number of IIAs, the increasing scope, complexity and diversity of IIAs, and the significant increase in the number of disputes submitted to investor–State arbitration (see above).[**]

19. The challenges of capacity need to be addressed for a number of reasons. First, countries' lack of capacity threatens the effectiveness of the entire IIA system. The system assumes a community of countries knowingly taking on obligations resulting in a stable and transparent framework for investment within their respective territories. If countries are unable to appreciate the content of the agreements to which they have agreed because of the complexity of the agreements, the risk arises that they will enter into agreements that they are unprepared to honour fully. This in turn will undermine the value of the agreements.

20. Even if challenges of capacity do not undermine the effectiveness of the system, they may skew its structure. Challenges of capacity, for example, may affect the content of IIAs. Countries lacking capacity may resist more complex, broader agreements, for instance with regard to liberalization commitments.

21. Finally, challenges of capacity also threaten the justness of the international investment system. Countries that lack the capacity to participate fully risk being marginalized and left behind in the integration of the global economy.

22. All this calls for more capacity-building in developing countries in order to effectively deal with the challenges of negotiating and implementing IIAs. International organizations such as UNCTAD are mandated to help countries, in particular developing countries, strengthen their domestic capacities. UNCTAD's main pillars of capacity-building are research and analysis to monitor trends, and analyse emerging issues and development implications, the maintenance of IIA databases, technical assistance and advisory services regarding human resources and institutional capacity-building, and the provision of a general platform for debate on IIA-related issues ("backstop" functions).

B. Challenges of content

23. Recent trends in, and characteristics of, the IIA system as described above have generated several challenges relating to the content of IIAs. Three challenges are of primary importance.

24. The first challenge is to promote policy coherence. The growing number, breadth and complexity of agreements in a multilayered, multifaceted and atomized framework threaten to undermine the coherence of the IIA system. In addition, the surge in investor–State

[**] See also in this context UNCTAD (2006c).

arbitrations has raised the question of whether some provisions of IIAs should be revised to ensure that they receive their intended interpretations (UNCTAD, 2006d).

25. Second, there is the challenge of how to balance private and public interests within IIAs. The increasing breadth of the agreements raises new issues concerning the proper degree of regulatory discretion to reserve for countries concluding IIAs. Also, the increasing complexity of the agreements raises questions concerning the appropriate level of specificity at which IIA obligations should be prescribed and to what extent exceptions and reservations are needed.

26. Third, there is the issue of how to enhance the development dimension of these agreements. As already noted, most current IIAs promote foreign investment only indirectly through the granting of investment protection. A more proactive approach to encouraging foreign investment could become an important additional tool to enhance the development dimension of IIAs.

1. Promoting policy coherence

27. The problem of policy coherence with respect to IIAs arises in at least three different contexts.

- First, policy coherence means that the IIAs of a country should be consistent with its domestic economic and development policies. This entails creating a coherent national development approach that integrates investment, trade, competition, technology and industrial policies. As new IIAs are negotiated, there is a need to ensure that they are consistent with, and in fact promote, the country's economic development. On the one hand, the greater variation in the structure and content of IIAs presents an opportunity for developing countries, since they can adopt different approaches in IIAs to better reflect their special development needs. On the other hand, with the emerging multitude of policy devices deriving from IIAs, it could also become more difficult to use these agreements as a tool for achieving certain development goals. For instance, a policy of selected intervention vis-à-vis foreign investors might be undermined by the combined effect of granting establishment rights in individual IIAs and the application of the MFN clause, which could lead to the opening of the sector concerned to any foreign investor.

- Second, policy coherence is at stake with regard to the various IIAs that individual countries conclude with other countries. No country has such strong bargaining power that it can impose its IIA model on each and every of its treaty partners. That said, inconsistencies may appear with regard to practically any IIA provision. One area stands out since it represents a general divide in investment rulemaking — investment liberalization. New divergences are about to emerge with regard to the degree to which individual treaty provisions are specified, and the need to include exceptions and reservations in the agreement.[††]

- Third, the issue of policy coherence arises in respect of the interpretations that numerous arbitration awards have given to specific IIA provisions. In connection with the increase in investment disputes resulting in a number of contradictory awards, there are new concerns about how one could ensure coherence also with regard to

[††] On reservations, see UNCTAD (2006e).

arbitration tribunals' interpretation of IIAs. Furthermore, international arbitration systems, such as the ICSID Convention, the UNCITRAL Arbitration Rules or the ICC dispute settlement procedures, differ widely.

28. All these different aspects of policy coherence may have significant development implications. Obviously, the more the overall structure and content of an IIA reflects a host country's economic and development policies, the more it can contribute to achieving certain policy objectives. Conversely, the application of stable and coherent development policies can be severely undermined if a country's IIA network is inconsistent. For instance, if a country follows a policy of active intervention in favour of certain domestic industries, it might be hindered if some — but not all — of its IIAs provide for exceptions to the non-discrimination principle.

29. While the issue of policy coherence is relevant for all countries, developing countries might be more exposed to it than others. Because of capacity constraints and lack of expertise, they might have serious difficulties in establishing coherent economic and development policies and reflecting them properly in their IIA network. Developing countries with less experience in IIA matters, frequent policy changes and weak negotiation positions also run the risk of concluding inconsistent IIAs or those that do not conform to their national legislation. They may have to conduct negotiations on the basis of divergent model agreements of their developed-country negotiating partner. In fact, many developing countries have a highly atomized IIA network. In addition, the domestic regulatory framework in many developing countries is constantly evolving and subject to frequent changes. With more laws and regulations being adopted, there are also more occasions when such legislation or an individual measure might be in conformity with some IIAs of a country, but in conflict with others, thus giving grounds for claims of treaty violations. When it comes to investment arbitration, developing countries might have weaker means available to defend themselves effectively than their developed-country counterparts.

30. On the other hand, the possible effects of inconsistency might be mitigated by the MFN clause that is a standard feature in practically all IIAs. It basically prevents a host country from according different treatment to investors of different foreign nationality and could be used to transform originally inconsistent obligations into consistent ones. However, in the light of some recent contradictory awards, it is far from clear under what circumstances the MFN clause actually applies and how far-reaching its effects might be.

31. Developing countries should therefore adopt a preventive strategy and work towards addressing inconsistencies in their current IIA network. This includes the possibility of renegotiating or — as a last resort — terminating inconsistent treaties. Furthermore, as noted before, the continuing trend towards more uniformity with regard to core provisions of investment protection reduces the risk of inconsistency to some extent. Nonetheless, it needs to be stressed that the process of harmonization through individual IIA negotiations has its limitations. In the end, moving towards substantially more policy coherence in treaty-making would require finding ways and means of enhancing the multilateral building of consensus on key IIA issues.

32. Furthermore, international jurisprudence can make an important contribution to harmonizing the understanding of the interpretation of core principles of investment protection. Indeed, the recent reform of the ICSID system, which included significant innovations regarding investor–State dispute settlement procedures and aimed at greater transparency in arbitral proceedings, more involvement of interested third parties and the

consolidation of claims, marks a step in this direction. Similar efforts are under way in the context of the UNCITRAL rules.

2. Balancing private and public interests and the issue of regulatory flexibility

33. In any IIA negotiation, a key issue is how to balance the rights and interests of foreign investors on the one hand against those of the host country on the other hand. An unbalanced IIA system would hardly be sustainable over the long run. Furthermore, balancing private and public interests is a dynamic issue. Governments need to be able to react to newly arising public concerns with regard to foreign investment and to re-evaluate and revise existing policies.

34. Mostly as a result of the enormous increase in investment disputes in recent years, discussion of what should be the counterweight to investors' rights has gained momentum. So far, three main approaches have emerged.

- First, some countries have clarified individual IIA provisions, where there was concern that an expansive interpretation of those provisions could reduce host country regulatory flexibility. This has occurred, for example, with regard to provisions guaranteeing fair and equitable treatment of investment and compensation for indirect expropriation. Those efforts, however, could at the same time result in more inconsistency in the overall IIA network (see above).

- Second, numerous recent IIAs include a greater emphasis on public policy concerns. For example, they include general exceptions for host country measures to maintain national security, preserve public order, or protect health, safety or the environment. Regarding those exceptions, concern has been expressed that they may undermine the purpose of the IIA by providing the host country with a potentially broad justification for derogating from IIA obligations. Also, such provisions have been the subject of few arbitral awards and thus their scope is not yet widely understood. Other IIAs include provisions calling upon host countries not to depart from labour or environmental standards in regulating foreign investment, although often those provisions impose no binding obligation.

- Third, a few IIAs have strengthened the public's role in investor–State dispute resolution. For example, some IIAs allow individuals or entities not involved in the dispute to make written submissions, sometimes referred to as *amicus curiae* or "friend of the court" submissions, to the tribunal. Such submissions are most likely to come from NGOs representing environmental, labour or other interests and are therefore likely to argue in favour of preserving the host country's regulatory power. These provisions for public participation have been augmented by transparency provisions discussed above, such as provisions for publication of submissions to the tribunal and for public hearings.

35. Most of the above-mentioned approaches up to now have been limited to only a small, but growing, number of countries. Given that each of them raises potential concerns, it remains to be seen to what extent they will be utilized in the future.

36. An alternative approach to balancing private and public interests that has not been prominently explored in IIAs to date would be to establish investor obligations directly in an IIA, rather than merely leaving the host country with the regulatory flexibility to impose them

through its domestic laws. Such obligations may be merely passive, for example an obligation to refrain from activity of a certain type, such as activity that would violate human or labour rights, damage the environment or constitute corruption. The obligations, however, could also be active in nature, such as an obligation to make a development contribution. An instrument that imposed obligations on an investor might also grant to the host country recourse to the arbitral mechanisms that currently only investors can invoke.

37. So far, the prevailing trend has been to deal with this issue in the context of voluntary guidelines for foreign investors, such as the OECD Guidelines for Multinational Enterprises. Thus, while not subjecting foreign investors to international obligations in the IIA, their home country and host country nevertheless convey the important political message that foreign investors are expected to behave in a certain manner. However, most existing instruments in this regard concern the "traditional" corporate social responsibility issues related to human rights, labour rights, environmental protection and prevention of corruption, and do not deal with economic development issues per se. Consideration could be given to developing guidelines on corporate economic development contributions to specifically address economic development concerns (UNCTAD, 2005d, 2003).

3. Enhancing the development dimension of IIAs

38. A final critical issue is how best to incorporate a development dimension into IIAs. At a basic level, this raises the question whether the current mechanisms designed to address development concerns have been effective and sufficient. Such mechanisms include reservations, exceptions, temporary derogations, transitional arrangements, and institutionalized monitoring and consultations mechanisms (UNCTAD, 2000).

39. One approach to underline the development dimension of IIAs is to ensure that developing countries retain a margin of freedom necessary for pursuing their particular national development objectives, while at the same time pursuing the goal of creating a stable, predictable and transparent FDI policy framework. It would therefore be one particular subset of the balancing of private and public interests in IIAs. Flexibility in IIAs may be approached from four different angles, namely the objectives of the agreement, its overall structure and modes of application, the substantive provisions, and its mode of application. In principle, every treaty provision could reflect development concerns, could be tailored to the needs of the participating parties, and, in particular, reflect existing asymmetries between countries at different levels of development.

40. Incorporating a development dimension might include adding new kinds of provisions not often seen in IIAs. As has been noted, IIAs are usually only indirectly promotional. The question arises as to whether IIAs should promote investment through more direct means, including home country measures. Such means could cover a broad range of issues, for example transparency and exchange of investment-related information, fostering linkages between foreign investors and domestic companies, capacity-building and technical assistance, granting of investment insurance, encouragement of transfer of technology, easing informal investment obstacles, joint investment promotion activities, access to capital, financial and fiscal incentives, and the setting up of an institutional mechanism to coordinate investment promotion activities. The worldwide network of investment promotion agencies could play a role in the implementation of IIAs and in policy advocacy aimed at further improving the global investment environment.

41. More recourse to investment promotion could have several advantages. As investment promotion provisions usually establish a commitment by contracting parties to actively do something for the encouragement of foreign investment, their promotional effect might be felt more rapidly and more strongly than in the case of passive obligations concerning investment protection. Also, investment promotion could be used in the context of strategic investment policies of developing countries in order to steer foreign investment in particular sectors, activities or regions where those countries see a comparable advantage for them or where they see a promising potential for the future. Another potential benefit has to do with the relatively rare use of specific investment promotion provisions in current IIAs. Developing countries including such rules in their investment agreements might therefore have a competitive advantage in the global competition to attract foreign investment.

42. On the other hand, there is a certain risk that a greater emphasis on investment promotion could result in more incentives-based investment distortion. Also, political considerations in capital-exporting countries might be a potential impediment to giving investment promotion a more prominent role in IIAs.

43. Another consideration in this respect is giving a more prominent role to alternative methods of dispute resolution (ADR) in future IIAs. At present, only very few IIAs consider the use of ADR techniques to settle investor–State disputes. ADR involves the intervention of a third person, usually with the agreement of the disputants, to assist the latter in negotiating a settlement of their conflict. For that reason, ADR is sometimes referred to as "facilitated negotiation". It can have several advantages over international arbitration. If successful, it may be cheaper, faster and more protective of the relationship between the foreign investor and the host country — important aspects for developing countries. The significant increase in investor–State disputes in recent years could be an additional argument in favour of ADR (UNCTAD, forthcoming c).

44. More generally, the issue of how best to incorporate a development dimension into an IIA raises the question of what kind of IIA best advances development objectives, a question that may not be answered in the same way for all countries. For example, a country may choose to enter into a traditional BIT focusing on investment protection, a BIT with pre-establishment commitments, a PTIA providing for comprehensive liberalization and covering issues other than investment, such as services, movement of labour, competition or intellectual property, or an economic cooperation agreement merely laying the groundwork for future rulemaking through such measures as provision of increased transparency.

45. Determining the type of IIA that best advances a country's development objectives also depends upon addressing the difficult question of the expected impact of IIAs. Empirical studies have reached somewhat inconsistent results concerning whether the conclusion of IIAs is associated with an increase in foreign direct investment. Most agree, however, that IIAs are only one factor in creating a favourable investment climate and that they may play a greater role in some developing countries than others. Furthermore, the role of IIAs in creating a favourable investment climate may be complex. For example, IIAs may contribute to locking in domestic reforms that themselves are important in attracting foreign investment. Efforts to implement an IIA may also trigger further domestic reforms that, over time, may contribute to creating a more favourable environment for investment. Also, IIAs may have unintended consequences, such as an arbitral award construing an IIA as guaranteeing a kind of protection against host-country regulatory activity that the host country had not intended to provide. Moreover, different IIA provisions may have different impacts, depending on the

economic circumstances of a particular country. Developing countries must make their own assessments of which types of IIAs on balance are likely to make the greatest contribution to their development objectives.

46. The development dimension is thus a consideration that arises both in selecting the type of instrument to negotiate and in drafting each individual provision of the agreement. The development dimension should be reflected not only in designated, separate provisions of the IIA, but also in the instrument as a whole.

CONCLUSIONS

47. The purpose of this paper, which is based on an analysis of recent trends in, and characteristics of, the existing IIA universe, was to show that developing countries have new opportunities, but also face new challenges in international investment rulemaking. The latter include both challenges of capacity and challenges of content. The extent to which the further evolution of the IIA system can contribute to economic and social development and to better integration of developing countries into the global economy crucially depends on whether appropriate responses to those challenges are found.

48. The paper has made some suggestions and invited a discussion on how the various challenges could be met. A key message of the paper is that while the development implications of investment rulemaking have since long been recognized, relatively few IIAs pay particular attention to this issue. This is most obvious with regard to the almost complete absence of specific investment *promotion* provisions in IIAs. As far as the balancing of private and public interests in IIAs is concerned, up to now only a small group of countries has found it necessary to re-evaluate existing approaches and to strengthen the role of the State. In addition, establishing and maintaining a coherent IIA policy will remain a difficult task for most developing countries as long as they have to negotiate investment treaties individually with stronger partners.

49. All this underlines the need for more capacity-building to help developing countries better understand the issues at stake and to design adequate IIA policies aimed at ensuring that these investment treaties make a positive contribution to the achievement of their national development goals.

QUESTIONS FOR DISCUSSION

50. Experts may wish to elaborate on the following questions:

- In relation to chapter I:

From your national/regional perspective, is the description of the IIA universe and its evolution appropriate? Is it comprehensive enough?

- In relation to chapter II:

Which characteristics of the existing IIA universe have particular development implications in your country/region?

In this context, would you agree that the issues of policy coherence and the balancing of private and public interests are of special relevance to your country/region?

In your country/region, what role do capacity constraints play in effectively dealing with the challenges of negotiating and implementing IIAs?

Are there any other issues that you think would need to be taken into account in assessing the development implications of international investment rulemaking?

- In relation to the issue of policy coherence:

How relevant is the issue of coherence of the IIA universe from the development aspect and from the perspective of your country/region? In your country/region, what policy areas does the issue of coherence mostly affect?

- In relation to the issue of balancing public and private interests:

From your national/regional perspective, is there a need to re-evaluate the actual balance of private and public interests in the IIAs to which your country/region is party? And, if so, in what areas would re-evaluation be required and how could it be achieved?

- In relation to the issue of the development dimension:

What is the experience with the "flexibility" mechanisms provided for in IIAs (e.g. exceptions, waivers, transition periods, safeguards) from your (national/regional) perspective?

Are these mechanisms sufficient to enable host developing countries to pursue their development strategies and derive maximum benefit from foreign investment?

Are there other elements that your country/region has used to enhance the development potential of IIAs? For example, do your IIAs include a reference to home country measures and investor obligations? And, if not, should there be references to such measures and obligations, and how should they be formulated?

What else could be considered in order to increase the investment promotion function of IIAs?

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