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INVESTMENT PROVISIONS IN ECONOMIC INTEGRATION AGREEMENTS

CHAPTER 2

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II. HISTORICAL EVOLUTION OF EIIAS: AN OVERVIEW[12]

A. EIIAs before the 1990s

The incorporation of investment provisions in EIAs has a long history. In the pre-war world, EIAs were typically bilateral and they were concerned primarily with the liberalization of trade in goods. However, provisions relating to foreign investment were found in bilateral commercial treaties already in the late eighteenth century when the United States — and to a lesser extent Japan and a few European countries — began to negotiate a series of bilateral treaties known as Friendship, Commerce and Navigation (FCN) Agreements. These agreements created a right to trade on a most-favoured-nation (MFN) basis and included over time an increasing number of property protection or investment-related provisions.

After the Second World War, bilateral commercial agreements lost significance owing to the establishment in 1947 of a multilateral trading system under the General Agreement on Tariffs and Trade (GATT) that was intended to achieve the widest possible membership. Prior to the GATT, an attempt to create a multilateral agreement covering trade and investment issues, instrumented in the Havana Charter, failed. The GATT itself was the outcome of the failure to ratify the Havana Charter. After the adoption of the GATT, the process of integration of international trade became primarily multilateral and separated itself from the process of investment integration. Behind this separation was the recognition that an international investment regime is more intrusive that an international trade regime, reaching further into traditional domestic economic processes, and making negotiations technically and politically more difficult (Kline and Ludema, 1997). Even in the area of trade, at the time, countries were not prepared to go much further than negotiating tariff reductions. This explains the relatively narrow scope and limited authority of the original GATT (Kline and Ludema, 1997).

Some countries, however, wished to achieve among themselves a level of economic integration that went beyond the commitments they were making to the world at large through the GATT, and they concluded customs union or free trade agreements. Such "preferential" agreements were permitted by article XXIV of GATT. That article allows a waiver of the MFN treatment for third countries provided that the group is willing to eliminate substantially all of its trade barriers. In fact, in all these years since the adoption of article XXIV, GATT has never blocked the formation of a preferential agreement under this article (Kline and Ludema, 1997). From the outset, many EIAs addressed investment issues, either as part of the main agreement's provisions or in separate agreements subsequently adopted by their members.

1. Europe

The first EIIA of the post-GATT era was launched in Europe with the adoption, in 1957, of the Treaty Establishing the European Community (EC) (Treaty of Rome).[13] The original main purpose of the EC was to create a borderless internal market. To achieve that goal, the Treaty of Rome stipulated the free movement of goods, services, capital and persons, including the right of establishment of individuals and enterprises within the Community. It also guaranteed national and MFN treatment for goods, services, capital and persons from a Community member after

[12] Most instruments reviewed in this study are reproduced in total or in part in the UNCTAD Compendium; see UNCTAD (1996-2005). Titles of instruments are sometimes abridged for ease of reading.

[13] The original founding members of the European Community were Belgium, France, Germany, Italy, Luxembourg and the Netherlands. Denmark, Ireland and the United Kingdom acceded in 1973, Greece in 1981, and Portugal and Spain in 1986, thus bringing the EC membership at the end of the 1980s to 12.

entry in another Community member. Competition rules completed the scheme, to guarantee the proper functioning of EC markets. Through these basic principles, investment activity within the EC became an integral part of the integration model sought by the Treaty of Rome. In 1960, another group of European countries founded the European Free Trade Association (EFTA).[14] Originally, EFTA applied to trade in goods only.

2. Developed countries

The main institutional framework for cooperation on trade and investment facilitation amongst developed countries, the Organization for Economic Co-operation and Development (OECD), was established in 1960.[15] In the area of trade, the OECD was to complement GATT's liberalization efforts.[16] In the area of investment, the OECD initiated a process of liberalization and integration with the adoption in 1961 of the Code of Liberalization of Capital Movements and the Code of Liberalization of Current Invisible Operations. The Codes constitute legally-binding rules, stipulating progressive, non-discriminatory liberalization of capital movements and current invisible transactions (mostly services) through stand-still (prohibition on adoption of new restrictive measures) and roll-back (commitments to dismantle existing restrictive measures) provisions. All non-conforming measures must be listed in country reservations against the Codes. They are implemented through policy reviews and country examinations, relying on “peer pressure” to encourage unilateral rather than negotiated liberalization. Over the years, the Codes were revised and expanded in scope. Important recent additions were the right of establishment (1984) and cross-border financial services (1992). In addition, the OECD members adopted in 1976 the Declaration on International Investment and Multinational Enterprises. The Declaration complements the Codes by elaborating provisions on the treatment of foreign investment, and on the behaviour of TNCs, after entry in a host country. The Declaration includes decisions on national treatment, incentives and disincentives, and conflicting requirements imposed on TNCs. The Guidelines for Multinational Enterprises were adopted as a set of recommendations addressed to enterprises.[17]

Regional economic integration agreements began soon to proliferate in other regions. Many of them incorporated investment provisions.

3. Arab and Islamic countries

The Arab countries were the first group among developing countries to create an EIA addressing investment issues when, in 1957, the members of the League of Arab States signed the Agreement on Arab Economic Unity.[18] Among other things, the agreement guaranteed freedom of movement of persons and capital, and the exercise of economic activities within the group. In

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[14] The original founding members of EFTA were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Later, Iceland, Finland and Liechtenstein acceded to this Convention. Denmark, the United Kingdom, Portugal, Austria, Finland and Sweden withdrew at different stages from the EFTA Convention as a result of their accession to the European Union.

[15] The original members of the OECD were Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Italy, Ireland, Island, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States.

[16] All original OECD members were also original members of GATT.

[17] While the OECD investment instruments are not part of a broader economic integration scheme in the strict sense, they have been mentioned in this study because they represent a model of liberalization and integration in the area of investment that has been broadly followed in EIIAs.

[18] The founding members of the Arab Economic Unity were Egypt, Iraq, Jordan, Kuwait, Sudan, the Syrian Arab Republic and Yemen.

1970 the members of the Arab Economic Unity adopted the Agreement on Investment and Free Movement of Arab Capital among Arab Countries, intended to promote and protect investment between capital-exporting and capital-importing Arab countries The parties agreed to give preferential treatment to Arab capital, and to grant to Arab investments national treatment and treatment no less favourable than foreign investments received. Covered investment was entitled to fair and effective compensation in the event of expropriation. Investors had a right to transfer certain payments related to their investments and to reside in the host country in order to carry out investment activities. Complementing these provisions, in 1971, the group established the Inter-Arab Investment Guarantee Corporation to provide insurance guarantee to capital flowing between their members. As the membership of the Arab League expanded,[19] it adopted in 1980 the Unified Agreement for the Investment of Arab Capital in the Arab States. The new agreement reflected most of the policies of the 1970 Agreement providing for preferential treatment for Arab investors in certain cases. It also contained a provision for conciliation or arbitration of disputes between the parties arising under the agreement. Shortly thereafter, in 1981, the members of the Organization of the Islamic Conference,[20] in implementation of their Agreement on Economic, Technical and Commercial Cooperation, signed the Agreement on Promotion, Protection and Guarantee of Investments, which contains investment protection provisions similar to those in the 1980 Arab League agreement.

4. Africa

Sub-Saharan African countries had also an early start in the process of trade and investment-related integration. The first economic integration area was created in 1964 with the adoption of the Treaty Establishing the Customs and Economic Union of Central Africa (UDEAC or CEUCA), which later became the Monetary and Economic Union of Central Africa (CEMAC).[21] In 1965, the members of UDEAC signed the Common Convention on Investments. It contained only a few, relatively unique protection provisions applying to all foreign investors. These included a provision guaranteeing the acquired rights of any kind of undertakings lawfully established in the countries of the union; a guarantee of free transfer of capital and profits “within the framework of [members’] exchange restrictions”; the right of foreign investments to acquire rights deemed necessary for the exercise of their activities, such as real property, concessions and authorizations; a right of national treatment for foreign employers and workers with respect to their professional activities and taxation; and a right of national treatment for foreign investments with respect to intellectual property protection and access to courts. Most of the agreement, however, established a mechanism for granting preferences to certain Community investments. The Convention included four schedules of preferences that might be granted, and identified the criteria for selecting those proposed investments that might be granted preferences. These provisions on investment were complemented by the signing by the members of UDEAC, in 1972, of the Joint Convention on the Free Movement of Persons and the Right of Establishment. That agreement dealt principally with the right of UDEAC individuals to move freely within the

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[19] As of 1980, the members of the League of Arab States were Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Mauritania, Oman, Palestine, Qatar, Saudi Arabia, the Syrian Arab Republic , Somalia, Sudan, Tunisia, the United Arab Emirates and Yemen.

[20] As of 1995, the members of the Organization of the Islamic Conference were Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei Darussalam, Guinea-Bissau, Indonesia, the Islamic Republic of Iran, Iraq, Jordan, Kuwait, Kyrgyzstan, Lebanon, the Libyan Arab Jamahiriya, Maldives, Malaysia, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, the Syrian Arab Republic, Tajikistan, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, the United Republic of Tanzania and Yemen.

[21] The original members of UDEAC were Cameroon, the Central African Republic, Chad, Congo, Equatorial Guinea and Gabon.

Union, and to engage in professional or craft-related occupations, or to set up and manage enterprises, but only subject to the laws of the member countries. The investment framework of UDEAC was further expanded, in 1975, with the adoption of a Multinational Companies Code, granting a series of advantages to companies established in two or more member countries with a certain proportion of contributions from Community investors.

The Great Lakes countries established their own Economic Community (CEPGL)[22] in 1976, and, in 1982, adopted the Community Investment Code defining the guarantees, rights and obligations of joint enterprises and community enterprises, applicable principally, but not exclusively, to investors of Community members. This agreement is reminiscent in some respects of the 1965 UDEAC Common Convention on Investments, notably with respect to the recognition of acquired rights and similar guarantees. A right of free transfers was also granted, subject to existing legislation. Foreign investments were also guaranteed the same protection as enterprises with inter-Community capital, including with respect to intellectual property rights, and were not to be subject to discrimination under the law. Most of the Great Lakes Community agreement established a mechanism for providing preferences, such as tax advantages, to certain investments with Community capital.

In 1983 the original UDEAC and CEPGL members created a wider community under the Treaty for the Establishment of the Economic Community of Central African States (ECCAS).[23] The ECCAS treaty sought to eliminate gradually obstacles to the free movement of people, goods, services and capital, and to the establishment of enterprises between its member countries.

West African countries, for their part, signed in 1975 the Treaty Establishing the Economic Community of West African States (ECOWAS), [24, 25] whose article 2 called for the abolition by stages of obstacles to the free movement of persons, services and capital. A few years later (in 1979), they adopted Protocol A/P.1/5/79 on Free Movement of Persons, Right of Residence and Establishment to give effect to article 2. Another protocol relating to community enterprises, adopted in 1984, provides certain guarantees and privileges to enterprises that are totally or partially owned by nationals of member countries and meet certain specified criteria. Community enterprises may not be expropriated except upon payment of fair and adequate compensation, and benefits granted under the approval agreement may not be altered to the investor's disadvantage, except in certain circumstances. The agreement provides for arbitration of disputes between community enterprises and the Community through ICSID.

In Southern Africa, the Treaty for the Establishment of the Preferential Trade Area of Eastern and Southern African States,[26] signed in 1981, introduced the Charter on a Regime of Multilateral Industrial Enterprises, aimed at encouraging the establishment of regional enterprises meeting certain development-oriented conditions. The PTA was superseded in 1993 by the

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[22] The members of the Economic Community of the Great Lakes are Burundi, the Democratic Republic of the Congo and Rwanda.

[23] The members of the Economic Community of Central African States are Burundi, Cameroon, the Central African Republic, Chad, Congo, the Democratic Republic of the Congo, Equatorial Guinea, Gabon, Rwanda, and Sao Tome and Principe and Zaire.

[24] The members of ECOWAS are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.

[25] ECOWAS replaced the Economic Community of West Africa (ECWA), established in 1973.

[26] The original members of the Southern African Development community were Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, the United Republic of Tanzania, Zambia, and Zimbabwe. Namibia, South Africa, Mauritius, the Democratic Republic of the Congo and Seychelles joined during the 1990s.

Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) (see below).

Other sub-Saharan African EIAs signed between 1960 and 1989 contained no or very limited investment-related provisions. These included the East African Community, established in 1967.

5. *America*

The treaty that created the Latin American Free Trade Association (LAFTA) in 1960 was the first attempt, after the establishment of GATT, to develop a long-term process of economic integration within the Latin American subregion. The LAFTA did not address investment issues. Only when it was replaced in 1980 by the treaty of Montevideo, establishing the Latin American Integration Association (LAIA or ALADI), did some provisions on investment begin to appear (article 48 of ALADI granted MFN treatment to capital originating from member countries).[27] As part of the process of economic integration, ALADI envisaged the adoption of bilateral “economic complementation agreements” (ECAs) between its members, which would be open to the participation of other members. In many cases, ECAs signed under the aegis of ALADI contain provisions on investment. In 1969, the group of five Andean countries (and Chile) [28] signed the Cartagena Agreement, aimed at the creation of an Andean Common Market (also known as the Agreement of Andean Sub-regional Integration), which in 1992 became known as the Andean Community. Among other things, the Cartagena Agreement envisaged the development of programmes and measures that facilitated the flow of investment within the subregion (article 89) and, in particular, the promotion of Andean multinational enterprises. The main manifestation of the Andean approach to regional and third-party investment in those days was the Andean Pact Commission Decision 24, adopted in 1970, on Common Regulations governing Foreign Capital Movement, Trade Marks, Patents, Licenses and Royalties, and Andean Pact Commission Decision 244 establishing a Uniform Code on Andean Multinational Enterprises. Decision 24 granted preferential treatment for foreign investment made in the form of joint ventures with Andean capital participation. It also introduced a system of controls and conditions on foreign investment and foreign technology from third countries. Decision 244 established a system of preferences for companies comprised under the definition of Andean multinational enterprises. Both decisions were superseded in the 1990s (see below).

Meanwhile, in the Central American subregion, a group of five Central American countries signed in 1958 the Multilateral Treaty on Free Trade and Economic Integration. [29] Among other things, the treaty granted, in article XVII, national treatment for the establishment of enterprises from other member countries. It also guaranteed fair and non-discriminatory treatment for the transfer of capital and funds. This agreement was the precursor of the General Treaty of Central American Integration signed in 1960. In the area of investment, the Central American integration system endorsed the pre-established “Regime for the Central American Integration of Industries”, granting preferential treatment to Central American enterprises engaging in certain priority industries (e.g. infrastructure). In the same year 1960, Guatemala, Honduras and El Salvador signed an Economic Association Agreement committing the parties to

[27] The members of the Latin American Integration Association were Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela.

[28] The members of the Andean Community are Bolivia, Colombia, Ecuador, Peru and Venezuela. Chile was a founder member but later withdrew.

[29] The members of the Central American Free Trade and Economic Integration Agreement were Costa Rica, Guatemala, Honduras, El Salvador and Nicaragua.

guarantee the free movement of goods, capital and persons. The Caribbean countries, for their part, signed in 1973 the Treaty of Chaguaramas with the purpose of creating a Caribbean Common Market (CARICOM).[30] Prior to the conclusion of the CARICOM Agreement, the Dickenson Bay Agreement Establishing the Caribbean Free Trade Association,[31] signed in 1966, committed its members to grant national treatment to other members' enterprises and avoid restrictions that jeopardized such treatment. The CARICOM Treaty itself committed the parties, among other things, to refrain from applying new restrictions on the establishment and operations of economic enterprises of CARICOM origin. In addition, a preferential regime for CARICOM enterprises was adopted in 1987.

In North America, Canada and the United States signed a Free Trade Agreement in 1987 which was the precursor of NAFTA. In particular, its chapter on investment contained a number of liberalization and protection provisions that were later developed and expanded in NAFTA.

6. Asia

The process of regional economic integration in the area of investment in Asia began with the creation of ASEAN in 1976.[32] The first formal manifestation of such integration was the Basic Agreement on ASEAN Industrial Joint Ventures adopted in 1983, which was revised in 1987. These agreements granted a number of preferences for companies that produced certain products in any of the participating countries, had equity participation from nationals of at least two participating countries and satisfied the equity ownership provisions specified in the agreement. Also in 1987, the members of ASEAN adopted the Agreement for the Promotion and Protection of Investments. This agreement follows the basic structure of a traditional European BIT and reflects most of its standard provisions, albeit with a few but significant departures. It was revised in 1996.

Investment issues were also included in the Unified Economic Agreement between the Countries of the Gulf Cooperation Council (GCC)[33] adopted in 1981. The agreement provides for national treatment among its members with respect to the free movement of capital and persons, right of ownership and freedom to exercise economic activity. On the other hand, until recently, investment issues were left outside the scope of the South Asian Association for Regional Cooperation established in 1985.[34]

In the Pacific, the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA), signed in 1981 by the members of the South Pacific Forum, featured the promotion of investment among its objectives.[35]

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[30] The members of CARICOM are Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago.

[31] The members of the Caribbean Free Trade Association were Antigua, Barbados and British Guiana.

[32] The founding members of ASEAN were Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei Darussalam joined in 1984, thus bringing the membership to six at the end of the 1980s.

[33] The members of the Gulf Cooperation Council are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

[34] The members of the South Asian Association for Regional Cooperation are Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

[35] The founding members of the South Pacific Forum were Australia, the Cook Islands, Fiji, Kiribati, Nauru, New Zealand, Niue, Papua New Guinea, the Solomon Islands, Tonga, Tuvalu and Western Samoa.

A principal common characteristic of the early EIIAs was that, typically, they were signed between countries sharing similar economic and social conditions, usually in the same region and at similar level of economic development. Exceptions to this trend were the cooperation agreements signed by the European Community, starting in the late 1960s, with a number of developing countries and groups (many of which have been superseded by more recent and advanced EIIAs),[36] the Agreement for the Establishment of a Free Trade Agreement between Israel and the United States of America, and SPARTECA. The coverage of investment issues in most of these agreements is, however, very limited.

At the same time, there were clear differences in the approach to investment issues in the early EIIAs signed between developed countries and those signed between developing countries. The developed countries' EIIAs sought mainly to liberalize foreign investment among their members. The processes of liberalization were typically followed up and monitored by common institutional mechanisms. While they normally did not restrict investments from outside the EIIA area, investment relations with third countries were often left outside the scope of the EIIA to be decided by the individual member countries, either through national investment regimes or through bilateral investment treaties. Similarly, specific investment protection issues were not normally spelt out by earlier developed country EIIAs.

In contrast, most EIIAs signed between developing countries between 1960 and 1989 emphasized promotion of investments within the member countries, with many of them granting various types of regional preferences to companies originating (at least in part) and operating within the group. Such preferences were, however, restricted to investment in strategic sectors or activities, and were subject to detailed approval procedures and controls spelt out in the agreements. A level of investment protection, especially against expropriation, was also often granted. The mechanisms for implementation of the agreements tended to be weak. This resulted in poor follow-up on their commitments and programmes. With respect to investment from third countries, early agreements that explicitly addressed it sometimes established controls and restrictions, including compulsory joint ventures, technology licensing, fade-out requirements and performance requirements, as conditions for investing in the area and, in particular, for participating in the Community's preferential regime (e.g. the Andean Pact through its Commission Decisions 24 and 244). Other agreements, such as the UDEAC and Great Lakes countries' Investment Codes, extended certain legal guarantees to all foreign investors. Those agreements reflected the development concerns of that era, which included some caution about the potential negative effects of foreign direct investment from developed countries and some hope of stimulating development through cooperation among developing countries.

B. EIIAs in the 1990s and early 2000s

The pattern that had emerged in the post-war era changed in very important ways during the 1990s. The first important change was the dramatic increase in the number of EIIAs concluded, together with the increase in the number of countries that became party to such treaties in all parts of the world, reflecting both the expansion of the membership of existing regional EIIAs and the adoption of new EIIAs at bilateral, regional, plurilateral and interregional levels. The new developments were partially the result of an important qualitative change that took place during this period: EIIAs that previously had been reserved only for countries at similar levels of economic development started to be concluded between developed and

[36] For example, the agreements signed by the EC with the East African States, ASEAN, China, Cyprus, the Syrian Arab Republic and the countries of the Gulf Cooperation Council, and, of course, the Lomé Conventions with the ACP countries.

developing countries. One early notable example was the North American Free Trade Agreement (NAFTA), concluded by two highly developed countries, Canada and the United States, and a developing country, Mexico. The change was also reflected in the movement by the EC and EFTA towards negotiating various types of EIIAs with an increasing number of transitional economies and developing countries and groups. The trend was later followed by developed and developing countries in all regions.

Simultaneously with these quantitative and qualitative changes, the process of economic integration already initiated in various EIIAs continued to deepen during this period through the incorporation, expansion and elaboration of provisions aimed at facilitating foreign investment. Thus, the process of investment liberalization initiated under inter alia the EC treaty, the OECD codes of liberalization and CARICOM continued its course. Other EIIAs that had not significantly addressed investment at the outset were revised or new provisions were adopted dealing with investment issues. Examples include ECOWAS, the Central American Common Market and EFTA. Still other EIIAs that had originally set out restrictive regimes on foreign investment originating from non-member countries changed their approach in the direction of liberalizing and facilitating such investment. Changes in the Andean Community reflected this trend. At the same time, an increasing number of EIIAs, new or revised, began to incorporate — often in addition to their liberalization provisions — detailed provisions on the legal protection of investment between their members, including notably provisions for the settlement of investment disputes between investors and their host countries. NAFTA, for example, included investment provisions similar in scope and depth to the provisions of the United States BITs.

The expansion of EIIAs containing increasingly comprehensive and detailed provisions on investment reflected not only the convergence of several trends moving in the same direction, but also changes in the nature of economic activity itself. Whereas trade and investment had once been seen as substitutes, they were increasingly seen as complementary. Investment did not necessarily take the place of trade; it might promote trade as well. If trade and investment were intertwined, agreements relating to each inevitably would become interrelated.

The new approach was reflected in the renegotiation of the GATT itself. The Uruguay Round of GATT negotiations ended with the formation of the World Trade Organization (WTO) in 1995 and, more importantly for the purposes of this study, the conclusion of the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Trade-Related Investment Measures (TRIMs). These developments meant that the strengthened multilateral trading system that had emerged under the WTO had added to its responsibilities at least some investment-related matters, principally those dealing with the delivery of services through the establishment of investment, the protection of investment in the form of intellectual property and the treatment of investment (i.e. preventing host countries from imposing certain trade-distorting performance requirements on foreign investment). Thus, the intermingling of trade- and investment-related concerns within the WTO paralleled the willingness of countries to mix trade and investment commitments in bilateral, regional, interregional and plurilateral agreements concluded outside the WTO. Indeed, the decision to conclude an agreement on trade in services, given that services are often delivered through the establishment of foreign direct investment, meant that trade and investment inevitably and unavoidably would be addressed by the same agreements.

The old boundaries, in short, were largely gone. EIIAs were now being concluded between two countries or many countries. The countries were similar or dissimilar in economic circumstances and they were in the same or in different regions. The agreements addressed trade in goods, trade in services, investment, or any combination of the three. Any permutation of

these features could also appear in any given agreement. The review of developments in EIIAs concluded during this period bears this out.

1. Intraregional EIIAs

a. Europe

In Europe, the EC continued its geographical expansion, with the addition of three new members in 1995, and ten in 2004, reaching a total of 25 members. In 1992, the members of the EC adopted the Treaty of the European Union (Maastricht Treaty) which, among other things, advanced the process of investment liberalization and integration between its members. It also prohibited all restrictions to the free movement of capital between its member countries and third countries. Some pre-existing restrictions applying to third countries were however allowed to apply.

The EFTA Convention of 1960 was also revised during this period. With the 2001 Vaduz Convention, the EFTA States draw up comprehensive chapters aimed at a general liberalization of investment and trade in services among themselves. The revised Convention establishes inter alia a right of establishment, subject to exceptions in a negative list contained in an annex, and provides for consultations to address restrictive business practices. Other provisions grant a right of free movement of persons and require that laws be made public. A parallel chapter on trade in services prohibits restrictions on the right to supply services and provide for national treatment with respect to trade in services. Regarding the protection of investment, the agreement guarantees national treatment after establishment and obligates the parties to provide protection for intellectual property.

The process of European integration was further expanded in 1992, with the adoption by the member countries of the EC and EFTA of the Agreement on the European Economic Area. The agreement provides for a right of establishment, post-establishment national treatment and free transfer of capital, and requires the parties to restrict certain anticompetitive practices.

Also during the 1990s the EC and EFTA concluded EIIAs with a number of transition economies in Central and Eastern Europe. The association agreements concluded by the EC with Central and South-Eastern European countries establish a framework for the liberalization of investment and trade in services to be completed in several stages. In many cases, these agreements are considered preliminary steps towards full accession to the Community and are to be superseded upon accession. With the Russian Federation, the Balkan countries and the countries members of the Commonwealth of Independent States (CIS), the EC has signed partnership and cooperation agreements intended mainly to provide institution-building and technical assistance to implement free market reforms. They contain commitments to promote and gradually liberalize trade in services and investment with a view to creating, in some cases, a free trade area at a later stage.

The EFTA countries signed free trade agreements with Central, Eastern and South-Eastern European countries. These agreements include a general commitment to progressively open markets for investment and trade in services. A joint committee is set up to follow up on these commitments. They also include commitments to protect intellectual property rights and to limit anticompetitive practices. An expanded version of the agreement includes a right to make transfers related to an investment. The EFTA agreements with third European countries have inspired the adoption of bilateral free trade agreements the investment provisions of which are

similar in scope and content. After the first Central European countries joined the European Community, other less advanced European countries have continued to sign this type of bilateral free trade agreements between themselves as preliminary steps towards national economic reform, to prepare for EC- and EFTA-consistent regulatory approaches to investment and services.[37]

b. America

The North American Free Trade Agreement (NAFTA), signed in 1992 by Canada, Mexico and the United States, contains some of the most advanced and detailed provisions for the liberalization and protection of investment found so far in EIIAs. Thereafter, Canada and Mexico concluded additional EIIAs with Latin American countries that follow the NAFTA model closely in their investment chapter. Other American developing countries and groups also concluded NAFTA-type EIIAs between themselves. Since 2002, the same practice has been followed by the United States.

In 1994, the four Southern Latin American countries signed the Agreement Establishing the Southern Common Market (MERCOSUR), which was complemented by two protocols dealing with investment issues. The Colonia Protocol on Reciprocal Promotion and Protection of Investments within MERCOSUR resembles the United States BIT model, granting national and MFN treatment at the pre-establishment and post-establishment levels. The Protocol on the Promotion and Protection of Investments coming from States not Parties to MERCOSUR, on the other hand, follows the European BIT pattern in that it does not grant rights of establishment. Thus, national and MFN treatment applies only after entry. Both protocols provide for investor-State dispute mechanisms. A few years later, the Protocol of Montevideo on Trade in Services added further depth to the integration efforts within MERCOSUR. In 1998, the four countries members of MERCOSUR and Canada signed the Trade and Investment Cooperation Arrangement establishing a framework for enhancing trade and investment relations. The Arrangement contains a plan of action which foresees the conclusion of bilateral investment agreements and the identification of trade- and investment-distorting measures. The plan of action also provides for consultations on the negotiation and implementation of rules in multilateral and regional forums.

Other pre-existing EIIAs in the Americas were revised, updated and/or expanded during this period to bring their investment provisions into line with recent approaches. For example, the Central American Group consolidated its earlier (1960) free trade and investment area with the adoption of the Agreement on Trade in Services and Investment (2002). Also, the CARICOM countries adopted in 1997 the Protocol Amending the Treaty Establishing the Caribbean Community on Establishment, Services and Capital. The protocol amendments of the provisions on investment and services reflect recent liberalization trends elsewhere. In 2001, the Treaty of Chaguaramas was further revised to establish the CARICOM Single Common Market and Economy and consolidate the previous reforms. Among other things, it contains provisions creating mechanisms for removal of existing restrictions on investment and services. The CARICOM countries also signed free trade and investment agreements with the Dominican Republic and with Venezuela. Moving in the same direction, the 1991 amendments to the Andean Community instruments on foreign investment and transfer of technology (Commission Decisions 291 and 292 superseding Decisions 24 and 244 respectively) replaced earlier more

[37] Among the European countries that have recently signed these bilateral free trade agreements are Albania, Bulgaria, Croatia, Macedonia, Romania, and Serbia and Montenegro.

restrictive regulations. And, with the adoption of Decision 439 in 1998, the Andean Community established a general framework for the liberalization of trade in services within the Community. Subsequently, a Framework Agreement for the Creation of a Free Trade Area was signed between MERCOSUR and the Andean Community. In 1999 the countries of the Andean Community signed a Trade and Investment Cooperation Arrangement with Canada similar in content to the Arrangement between MERCOSUR and Canada. The Central American countries and Canada for their part signed in 1998 a Memorandum of Understanding on Trade and Investment to strengthen their cooperation with a view to liberalizing trade and investment between the parties and prepare the ground for the completion of the Free Trade Area of the Americas. The parties agreed on a series of investment promotion activities, including the adoption of BITs.

Latin American countries have also continued the practice of concluding bilateral economic complementation agreements (and in some cases also between a group and a third country) under the aegis of ALADI, in order to advance the various ongoing processes of economic integration within the subregion. These ECAs vary considerably in terms of their coverage of investment issues.

Recently, most countries in the American continent embarked on the negotiation of the Free Trade Area of the Americas (FTAA). Launched in 1997, and still under negotiation, the FTAA, should it be adopted, is expected to establish an a American economic integration area covering most of the American continent, and incorporating detailed rules on investment, trade in services, competition and intellectual property protection and dispute resolution.

c. Asia

Meanwhile in Asia, the membership of ASEAN was extended to include Myanmar, the Lao People's Democratic Republic and Cambodia. In 1995, they adopted the ASEAN Framework Agreement on Services providing for the liberalization of trade in services in a substantial number of sectors within a reasonable time frame. This was to be accomplished through negotiations directed towards achieving market access commitments beyond those specified in the GATS. The Protocol Establishing the ASEAN Dispute Settlement Mechanism applies to trade and investment disputes under the various ASEAN agreements. More recently, the Framework Agreement on the ASEAN Investment Area, adopted in 1998, addresses the admission of investment. The Framework Agreement applies only to direct investment, explicitly excluding portfolio investment as well as investments covered by the ASEAN Framework Agreement on Services. The agreement commits the parties to open all industries to investments by ASEAN investors, subject to a negative list of exclusions that is to be revised biennially with a view to achieving complete liberalization by 2010. For non-ASEAN countries, 2020 is the date for investment liberalization. The Framework Agreement grants ASEAN investors and their investments both pre-establishment and post-establishment national and MFN treatment. It also has transparency provisions. The ASEAN Dispute Settlement Mechanism also applies to disputes under this agreement.

In recent years ASEAN has started to conclude association and framework agreements with other Asian countries. The framework agreements signed with India and China commit the parties to promote investment through inter alia entering into negotiations with a view to progressively liberalizing their investment regimes, improving the transparency of investment rules and providing for the protection of investments. A similar framework agreement has been signed by ASEAN with Japan.

In addition, individual Asian countries have concluded bilateral EIIAs among themselves in recent years, pursuing various levels of integration through trade and investment. Through the 1990s and early 2000s, Australia concluded trade and cooperation agreements with, for example, China, Fiji, Japan and Papua New Guinea. India has signed a free trade agreement with Thailand which is similar to the framework agreements signed by ASEAN with India and China. The agreement also contains commitments on services. The Trade and Economic Framework Agreement between Australia and China is somewhat narrower in scope, the parties agreeing to cooperate by exchanging information, improving the investment climate through the protection of investments and building institutional linkages. Provisions on services are also included. Especially noteworthy are also some comprehensive and elaborate bilateral EIIAs which, with different titles, have been concluded by Australia, Japan, the Republic of Korea, New Zealand, Thailand and Singapore. Although these agreements vary, they represent — along with similar interregional agreements discussed below — the cutting edge in EIIAs in terms of the number of investment-related topics covered and the level of detail of the investment-related provisions.

Finally, several subregional Asian groups that until recently had remained outside this treaty practice have started to build their own EIIA processes. In 2004, the member countries of the South Asian Association for Regional Cooperation (SAARC)[38] signed the Framework Agreement on the South Asian Free Trade Area, in which they agreed to consider the adoption of measures for the removal of barriers to intra-SAARC investments and rules for fair competition. Also in 2004, the countries members of the Bay of Bengal Initiative for Multi-Sectoral and Economic Cooperation[39] (BIMST-EC) adopted the Framework Agreement on the BIMST-EC Free Trade Area, in which they agreed to provide for the promotion and protection of investment, strengthen cooperation to facilitate investment, improve transparency of investment rules and enter into negotiations in order to progressively liberalize the investment regime through a positive-list approach.

d. Africa

In Africa, a number of new EIIAs were adopted, and some existing ones were revised or expanded during the 1990s. The Treaty Establishing the African Economic Community (AEC), signed in 1991, contains provisions under which the parties agree to ensure the free movement of capital within the Community through the elimination of restrictions on capital transfers in accordance with a timetable to be adopted. It also contemplates the progressive granting of rights of residence and establishment for nationals within the Community. Detailed provisions on establishment are to be formulated in a protocol. In 2001, the Community was transformed into the African Union, pursuing further its economic integration goals. In another regional effort, the Common Market for Eastern and Southern Africa (COMESA),[40] signed in 1993 to replace the Preferential Trade Area for Eastern and Southern African States, contains framework provisions on investment promotion, with some general principles on investment protection, but not dispute settlement. Also in 1993, the earlier (1975) ECOWAS Treaty was revised. The purpose of the Revised Treaty of ECOWAS is to establish a common market through the removal of obstacles to the free movement of goods, services, persons and capital, and to the right of establishment. It

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38 The members of the South Asian Association for Regional Cooperation are Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

39 Members of BIMST-EC are Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka and Thailand.

40 The members of COMESA are Angola, Burundi, Comoros, Djibouti, Egypt, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Rwanda, Somalia, Sudan, Swaziland, Uganda, the United Republic of Tanzania, Zambia and Zimbabwe.

envisages the adoption of a regional agreement on cross-border investments to promote joint ventures. The members of ECOWAS have also undertaken to complete, within five years following the creation of a customs union, an economic and monetary union. In 2003, the members of ECOWAS signed the Protocol on Energy (A/P4/1/03). The Energy Protocol contains a chapter (chapter III) on investment promotion and protection in the energy sector similar to a BIT, including provisions on investor-State settlement of disputes.

Other African regional integration agreements adopted during this period contain framework programmatic commitments on investment liberalization that have yet to be articulated into operational provisions. These include the Agreement establishing the West African Economic and Monetary Union (WAEMU or UEMOA)) [41] (formerly WAMU or UMOA)), adopted in 1994 to implement a customs and monetary union among its members with a single currency (the Franc of the Communauté Financière Africaine or F, CFA). Among the stated objectives of WAEMU are to guarantee the free flow of persons, goods, services and capital and the right of establishment. The treaty creates a Capital Issues Committee to promote the elimination of controls on the transfer of capital among the member countries. The Southern Africa Development Community (SADC)[42] was established in 1992 to replace the Southern African Development Coordination Conference (SADCC) in existence since 1980. SADC commits its members to develop and harmonize policies to gradually establish the free movement of goods, services, capital and persons within the Community. Similarly, the Treaty for the Establishment of the East African Community,[43] signed in 1999 to revive the earlier EAC (1967), contains a commitment by which the States parties agreed to adopt measures to achieve the free movement of persons and services, and to grant the right of establishment and residence to their citizens.

New investment cooperation and integration efforts through EIIAs by Arab countries in the 1990s have proceeded more in the context of the geographical regions where the relevant countries are located (mainly Middle East Asia and Africa) than through the adoption of new Arab or Islamic agreements, expanding also through various interregional and bilateral EIIAs.

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Since the early 1990s EIIAs have been concluded in every region of the world. At the same time, there are significant differences between agreements concluded by each region.

Agreements signed by the European Community, including the European Community Treaty itself, are concerned more with liberalization of investment flows than with investment protection. They often confer a right to establishment or at least contain a commitment to future liberalization. Provisions guaranteeing a right of free transfer are also common. Thus, these agreements are concerned with the flow of capital into and out of the host country. Provisions to ensure the proper functioning of markets by limiting anticompetitive practices are also very common among EC EIIAs.

The EC agreements, on the other hand, have few investment protection provisions. This may be explained in part by the division of labour between the European Commission and the

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[41] The members of the West African Economic and Monetary Union are Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal, Togo and Guinea-Bissau .All of them share a common currency, the CFA Franc.

[42] The original founder members of SADC are Angola, Lesotho, Botswana, Malawi, Mozambique, Swaziland, the United Republic of Tanzania, Zambia and Zimbabwe. South Africa joined in 1994, followed by Mauritius (1995), the Democratic Republic of the Congo (1997) and Seychelles (1997).

[43] The members of the East African Community are Kenya, Uganda and the United Republic of Tanzania.

member States with respect to the negotiation of third party trade and investment issues. While the European Commission, which typically negotiates EC trade agreements with third parties, has authority to negotiate market access issues, including investment liberalization, the negotiation of investment protection issues remains vested in individual EC members (and they have typically negotiated mainly through BITs).[44] The most common protection provision in EC agreements is one intended to protect intellectual property rights. Some EC agreements also provide for national treatment of investment once established. However, EC agreements do not provide for investor-State dispute resolution. Instead, investment disputes under these agreements are normally dealt with under the general dispute settlement provisions that cover all matters under the agreement at the State-to-State level. Some EC agreements with transition economies include provisions for investment promotion, principally through economic cooperation. Until recently, EC agreements with developing countries contained limited provisions on investment which typically address investment promotion. However, this trend is being revised in particular in a number of agreements signed with advanced developing countries (see next section).

Recent EIIAs concluded by States in the American region have been greatly influenced by NAFTA, which contains an investment chapter that follows the United States' BITs rather closely in substance, albeit with some notable differences. The NAFTA investment chapter contains comprehensive and detailed provisions on investment liberalization as well as investment protection. In addition, the NAFTA includes chapters that liberalize trade in services, restrict anticompetitive behaviour and protect intellectual property rights. Many EIIAs in the Americas have provisions similar to those in NAFTA, although sometimes they also have important differences.

A significant deviation from the NAFTA approach in the America region is the CARICOM agreement, in which the investment provisions are more concerned with liberalization than investment protection. CARICOM, however, assumed investment protection commitments similar to those in a BIT in its 1998 free trade agreement with the Dominican Republic and its 2004 free trade agreement with Costa Rica.

On the other hand, bilateral ECAs signed between Latin American countries in the context of ALADI do not seem to follow a homogeneous approach to investment that is particular to this regional scheme. Instead, investment promotion, protection and liberalization provisions appear in different combinations in individual ECAs.

EIIAs in Asia also tend to emphasize both investment liberalization and investment protection. This is particularly evident in the various stand-alone but complementary ASEAN agreements dealing with investment and trade in services. This emphasis is also evident in the series of comprehensive and detailed bilateral EIIAs that have been recently concluded between Asian countries. Another group of recent Asian agreements commits only to further negotiations to liberalize and protect investments in the future.

Recent EIIAs in Africa are also moving in the direction of liberalizing and protecting investments, and away from the preferential investment regimes provided for in earlier agreements. Some of the new agreements, however, have not yet reached the stage at which specific operational provisions on investment are formulated beyond some general commitments and principles.

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[44] The issue of shared competence between the EC Commission and its member States on investment issues is explicitly addressed in the European Constitution Treaty signed in 2004, articles III-216 and III-217.

2. Interregional EIIAs

The foregoing picture is further complicated by the superposition of an increasingly complex web of agreements concluded between countries and groups situated in different geographical regions.

In 1994, the Energy Charter Treaty was adopted by a group of 50 countries that included most OECD countries, Central and Eastern European countries and members of the Commonwealth of Independent States (CIS) (former USSR republics). Three additional countries — Australia, Japan and Mongolia — joined recently. The Charter is a sectoral agreement covering trade, investment, transit and efficiency in the key energy industry. Its investment provisions are fairly elaborate and deal mostly with treatment and protection standards after entry of investment. Reference is also made to the observance of relevant provisions of WTO agreements such as TRIMs and TRIPS. The treaty is to be complemented by a second agreement dealing with issues of admission, to be adopted at a later date.

In terms of geographical coverage, one of the broadest interregional agreements is the Non-Binding Investment Principles adopted in 1994 by the members of Asia-Pacific Economic Cooperation (APEC).[45] The principles were adopted in the context of a gradual process of trade and investment liberalization in the spirit of APEC's underlying "open door" approach to regionalism based on MFN treatment. Being of a non-legally binding nature, the Principles are intended to guide investment relations between member countries. They address key investment issues such as transparency of national law, non-discrimination, national treatment, investment incentives, performance requirements, expropriation and compensation, repatriation of funds and currency convertibility, settlement of investment disputes, entry of foreign personnel, avoidance of double taxation, investor behaviour and removal of barriers to capital movements.

Also in the early 1990s, the EC began to negotiate with non-member countries in different regions a new generation of trade agreements addressing investment issues. With countries in North Africa and the Middle East, the EC has concluded Euro-Mediterranean association agreements. These agreements were part of the Euro-Mediterranean initiative launched in 1995 aimed at creating a free trade and investment area by 2010. They include commitments to create a right of establishment at a future date, to avoid new restrictions on capital movements and to curb anticompetitive behaviour. With respect to several Asian (e.g. Nepal) and Latin American countries and groups of countries (e.g. MERCOSUR and the Andean Community), the EC has continued to conclude partnership and/or cooperation agreements, under which the parties agreed to participate in various forms of investment promotion. Moreover, since 2000, the European Community has concluded economic partnership agreements with several advanced developing countries, notably with Mexico and Chile. They deal extensively with trade in services. In the area of investment, the parties commit to liberalization at a future date.

The agreement concluded by the EC with the widest geographical reach is the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Members States, of the Other Part, also known as the "Cotonou Agreement". It was signed in 2000 as the successor to the four Lomé Conventions that date back to 1975. The Cotonou Agreement does not provide for rights of establishment or national treatment after establishment but affirms the importance of private investment for

[45] The members of APEC are Australia, Brunei Darussalam, Canada, Chile, China, Indonesia, Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, the Philippines, the Russian Federation. Singapore, Taiwan Province of China, Thailand and the United States.

economic development and calls upon individual members to conclude reciprocal economic partnership agreements covering trade in goods and services, as well investment promotion and protection agreements. The Cotonou Agreement does contain detailed commitments on the part of the European Community to promote investment flows to APC countries through a variety of measures, such as provision of information on investment opportunities and technical and financial assistance for institution- and infrastructure-building, as well as making available risk insurance for private investment. In addition, the Cotonou Agreement underlines the importance of trade in services, reaffirms the parties' commitments under the GATS, includes a commitment to implement national and regional rules to protect competition, and recognizes the importance of adhering to the TRIPS agreement and certain other international conventions.

Pursuant to the mandate established by the Cotonou Agreement — and in view of the fact that under the enabling clause of GATT article XXIV the waiver for the preferential system of Cotonou is due to expire in 2007 — the European Community embarked after 2003 on the negotiation of reciprocal economic partnership agreements with existing regional groupings within ECP countries. These agreements are aimed at encouraging liberalization of trade in goods and services as well as protecting investment. However, the specific issue outline of these agreements is currently under discussion (World Bank, 2005, p. 31 and box 2.3).

During the late 1990s and early 2000s, EFTA also continued to conclude free trade agreements, this time including with countries in Northern Africa (e.g. Morocco), providing for cooperation with a view to achieving a gradual liberalization of services and investment, banning restrictions on transfers of payments related to investments, protecting intellectual property rights and restricting anticompetitive practices. More recently, EFTA has signed a more elaborate type of free trade agreement with a few developing countries with relatively advanced economies, such as Chile, Mexico and Singapore. Although the contents of the agreements vary, they contain a wider range of obligations than their predecessors, especially with respect to trade in services.

Interregional initiatives have also been undertaken by individual countries. Canada has engaged, starting in the mid-1990s, in the conclusion of a series of bilateral arrangements on trade and economic cooperation (TECA) with countries in different regions (e.g. Australia, Iceland, Norway, Switzerland and South Africa). Under these arrangements, the parties typically agree to "endeavor to create the most favourable conditions for liberalization of trade in goods and services as well as of investment" (article II (1) of the TECA with Norway) in accordance with a joint work programme set forth in an annex. The joint work programme includes matters such as the removal of barriers to trade and investment and information exchange, with a view to encouraging the expansion of trade and investment. These TECA contemplate the creation of a consultative group to ensure implementation of the work programme, including the identification and removal of impediments to trade and investment. Another important element of the joint programme is to strengthen the parties' cooperation on negotiations in the WTO.

Furthermore, the United States entered into, throughout the 1990s and in early 2000, a series of bilateral agreements concerning the development of trade and investment relations with countries outside the American region, notably African and Middle East countries. Typically, these agreements commit the parties to seek to encourage trade and investment flows between themselves and establish a "council on trade and investment" to hold consultations aimed at enhancing trade and investment and removing impediments to trade and investment flows. With Jordan and Viet Nam the United States signed free trade agreements that are far more detailed. They contain an investment chapter that is quite similar to the United States BIT model.

Since 2002, a number of countries (including Chile, Japan, Morocco, Singapore and the United States) have embarked on the conclusion of very elaborate bilateral EIIAs with countries outside their region. These agreements are in fact an expanded version of the NAFTA model, although there are significant individual variations.

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The preceding overview confirms that a complex network of EIIAs is rapidly expanding across regions and is involving most countries in the world. This network consists of an intricate web of heterogeneous instruments with overlapping membership and diverse structures, approaches, coverage of issues and depth of commitments, reflecting different policy priorities as well as regional preferences. Although, at first sight, the complexity of the network defies classification and synthesis, an attempt is made in the next chapter to quantify the incidence and geographical distribution of the EIIAs, and identify global patterns with respect to their approach to investment issues.