

UNITED NATIONAL CONFERENCE ON TRADE AND DEVELOPMENT

**TRENDS IN INTERNATIONAL
INVESTMENT AGREEMENTS:
AN OVERVIEW**

UNCTAD Series
on issues in international investment agreements



UNITED NATIONS
New York and Geneva, 1999

NOTE

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to foreign direct investment and transnational corporations. In the past, the Programme on Transnational Corporations was carried out by the United Nations Centre on Transnational Corporations (1975-1992) and the Transnational Corporations and Management Division of the United Nations Department of Economic and Social Development (1992-1993). In 1993, the Programme was transferred to the United Nations Conference on Trade and Development. UNCTAD seeks to further the understanding of the nature of transnational corporations and their contribution to development and to create an enabling environment for international investment and enterprise development. UNCTAD's work is carried out through intergovernmental deliberations, research and analysis, technical assistance activities, seminars, workshops and conferences.

The term "country" as used in this study also refers, as appropriate, to territories or areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. In addition, the designations of country groups are intended solely for statistical or analytical convenience and do not necessarily express a judgement about the stage of development reached by a particular country or area in the development process.

The following symbols have been used in the tables:

Two dots (..) indicate that data are not available or are not separately reported. Rows in tables have been omitted in those cases where no data are available for any of the elements in the row;

A dash (-) indicates that the item is equal to zero or its value is negligible;

A blank in a table indicates that the item is not applicable;

A slash (/) between dates representing years, e.g. 1994/95, indicates a financial year;

Use of a hyphen (-) between dates representing years, e.g. 1994-1995, signifies the full period involved, including the beginning and end years.

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UNCTAD/ITE/IIT/13
UNITED NATIONS PUBLICATION
Sales No. E.99.II.D.23
ISBN 99-1-112463-8

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IIA Issues Paper Series

The main purpose of the UNCTAD Series on issues in international investment agreements is to address key concepts and issues relevant to international investment agreements and to present them in a manner that is easily accessible to end-users. The series covers the following topics:

- Admission and establishment
- Competition
- Dispute settlement (investor-State)
- Dispute settlement (State-State)
- Employment
- Environment
- Fair and equitable treatment
- Foreign direct investment and development
- Funds transfer
- Home country measures
- Host country operational measures
- Illicit payments
- Incentives
- Investment-related trade measures
- Lessons from the Uruguay Round
- Lessons from the MAI
- Modalities and implementation issues
- Most-favoured-nation treatment
- National treatment
- Trends in international investment agreements: an overview
- Scope and definition
- Social responsibility
- State contracts
- Taking of property
- Taxation
- Transfer of technology
- Transfer pricing
- Transparency
- Trends in international investment agreements: an overview

Preface

The United Nations Conference on Trade and Development (UNCTAD) is implementing a work programme on a possible multilateral framework on investment, with a view towards assisting developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces capacity-building seminars, regional symposia, training courses, dialogues between negotiators and groups of civil society and the preparation of a series of issues papers.

This paper is part of that series. It is addressed to government officials, corporate executives, representatives of non-governmental organizations, officials of international agencies and researchers. The series seeks to provide balanced analyses of issues that may arise in discussions about international investment agreements. Each study may be read by itself, independently of the others. Since, however, the issues treated interact closely with one another, the studies pay particular attention to such interactions.

The series is produced by a team led by Karl P. Sauvant and Pedro Roffe. The principal officer responsible for its production is John Gara, who oversees the development of the papers at various stages. The members of the team include S. M. Bushehri, Obiajulu Ihonor and Jörg Weber. The series' principal advisors are Arghyrios A. Fatouros, Sanjaya Lall and Peter T. Muchlinski. The present paper is based on a manuscript prepared by Arghyrios A. Fatouros, with contributions from Victoria Aranda. The final version reflects comments received from Giorgio Sacerdoti. The paper was desktop-published by Teresita Sabico.

Geneva, November 1999

Rubens Ricupero
Secretary-General of UNCTAD

Acknowledgments

UNCTAD's work programme on a possible multilateral framework on investment is implemented by a team of UNCTAD staff members and consultants headed by Karl P. Sauvant and Pedro Roffe and including S.M. Bushehri, Arghyrios A. Fatouros, John Gara, Obiajulu Ihonor, Anna Joubin-Bret, Sanjaya Lall, Peter T. Muchlinski, Miguel Rodriguez and Jörg Weber. Administrative support is provided by Hélène Dufays and Antonia Künzel.

UNCTAD has carried out a number of activities related to the work programme in cooperation with other intergovernmental organizations, including the Secretariat of the Andean Community, L'agence intergouvernementale de la Francophonie, the Inter-Arab Investment Guarantee Corporation, the League of Arab States, the Organization of American States, and the World Trade Organization. UNCTAD has also cooperated with non-governmental organizations, including the Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico — Universidad de Buenos Aires, the Consumer Unity and Trust Society — India, the Economic Research Forum — Cairo, the European Roundtable of Industrialists, the Friedrich Ebert Foundation, the International Confederation of Free Trade Unions, Oxfam, SOMO — Centre for Research on Multinational Corporations, the Third World Network, Universidad del Pacífico, University of the West Indies, and World Wildlife Fund International.

Funds for the work programme have so far been received from Australia, Brazil, Canada, France, the Netherlands, Norway, Switzerland, the United Kingdom and the European Commission. Countries such as China, Egypt, India, Jamaica, Morocco and Peru have also contributed to the work programme by hosting regional symposia. All of these contributions are gratefully acknowledged.

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EXECUTIVE SUMMARY

In the past two decades, there have been significant changes in national and international policies on foreign direct investment (FDI). These changes have been both cause and effect in the ongoing integration of the world economy and the changing role of FDI in it. They have found expression in national laws and practices and in a variety of international instruments, bilateral, regional and multilateral.

While in earlier times indirect foreign investment was far more important than direct, FDI acquired increasing importance as the twentieth century advanced, and it began gradually to assume the forms prevalent today. In international legal terms, however, FDI long remained a matter mainly of national concern, moving onto the international plane, where rules and principles of customary international law applied, only in exceptional cases, when arbitrary government measures affected it.

After the end of the Second World War, attitudes towards FDI and policies and conditions in host countries were shaped by the prevalence of political support for state control over the economy and the beginnings of decolonization. Socialist countries for a long time excluded FDI from their territories, while developing countries endeavoured to regain control of their natural resources from foreign interests. At the same time, controls and restrictions over the entry and operations of foreign firms were imposed in many countries, with a view to excluding FDI from certain industries for the benefit of domestic investors (or the State), determining the specific terms under which investments were to be made, and ensuring the participation of local nationals in major industries. No international consensus on the pertinent legal norms could be reached at the time.

In the 1980s, a series of national and international developments radically reversed the policy trends prevailing until then, with an immediate impact both on national policies regarding inward FDI and on regional and world-wide efforts at establishing international rules on the subject. Now at the end of the 1990s, host countries

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are seeking to attract FDI, by dismantling restrictions on its entry and operations and by offering strict guarantees, both national and international, against measures seriously damaging the investors' interests. The tone and direction of international legal discourse has significantly changed. Debate among policy makers is now centred on the most efficient ways of attracting FDI and deriving benefits from it rather than on questions of jurisdiction.

An international legal framework for FDI has begun to emerge. It consists of many kinds of national and international rules and principles, of diverse form and origin, differing in strength and degree of specificity. The entire structure rests on the twin foundations of customary international law and national laws and regulations and relies for its substance on a multitude of international investment agreements (IIAs) and other legal instruments.

An extensive network of bilateral investment promotion and protection treaties has come into existence. They are highly standardized, yet they appear to be capable of adapting to special circumstances. Their principal focus has been from the very start on the protection of investments against nationalizations or expropriations and on free transfer of funds, although they also cover a number of other areas. Regional and plurilateral international arrangements, while binding on a limited number of countries in each case, are increasingly important in matters of FDI. They help to change pre-existing structures of law and policy and create important habits and patterns of expectations on a broader transnational level. Economic integration agreements are a significant subcategory of regional instruments, whose importance has grown in recent years. At the multilateral level, there is no comprehensive instrument on the subject, although a number of recent multilateral instruments of less comprehensive scope are directly relevant, dealing with particular aspects of the FDI process.

Legal rules of other kinds, of varying normative intensity and general applicability, are also relevant. "Soft law" texts, adopted by States or international organizations on a non-binding basis, are important elements of the framework. Corporate codes of conduct and other texts of private origin help to formulate widely accepted prescriptions. Transnational arbitration not only provides

useful procedures for dispute settlement but also, through the corpus of its awards, gradually fills in the normative conceptual framework for FDI issues.

In terms of substance, the provisions of IIAs must be perceived in their constant interaction with national policies and measures. They concern two principal types of issues. A first class of provisions is linked to the process of liberalization, which, in its application to FDI, involves the gradual decrease or elimination of measures and restrictions on the entry and operations of firms, especially foreign ones; the application of positive standards of treatment with a view to the elimination of discrimination against foreign enterprises; and the implementation of measures and policies seeking to promote the proper operation of markets. A second category of issues covers provisions that concern the protection of foreign investments already made against government measures damaging to them. As to both types of issues, it is important to consider the provisions and approaches which import into the operation of IIAs the flexibility necessary for enhancing the development of the host countries concerned.

An examination of the key issues involved starts from the question of definition. In legal instruments, definitions are not neutral and objective descriptions of concepts; they form part of the instrument's normative content and determine the object to which an instrument's rules apply. The way in which a term is defined, whether by a formal definition or through the manner in which it is used, affects significantly the substance of the legal rules involved.

Government measures concerning FDI have historically often involved the exercise of controls over the admission of investments. Such controls may extend from prohibition to selective admission to mere registration. Certain key industries may be closed to foreign investment, or investment in them may be allowed subject to conditions. The screening of investments before admission was once very common but is now to be found in fewer cases and is less strict and demanding.

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Once admitted in a country, foreign affiliates are subject to that country's jurisdiction. Recent efforts have focused on the elimination (or limitation) of discrimination against them, by applying with respect to entry as well as post-admission operations the relevant international standards of treatment, namely, "most-favoured-nation" treatment and national treatment, involving respectively no discrimination between foreign firms on account of their national origin and no discrimination as between foreign and domestic firms. In the application of treatment standards, a number of exceptions or qualifications are allowed, the most frequent among them being those grounded on public order and health and national security. The national treatment standard may expressly not apply to particular industries, whether through "negative" or "positive" lists.

In an increasingly integrated world economy, the proper functioning of the market depends not only on the control of government measures that seek directly to regulate the conduct of foreign investors, but also on the presence of a broader national and international legal framework protecting the market from public or private actions and policies that distort its operation. Regional and to a lesser extent multilateral instruments already embody rules and mechanisms to that effect, although the general picture is still mixed and no comprehensive regulatory framework has emerged. In the context of FDI, certain international standards may be emerging which relate to the conduct of TNCs and their affiliates. While the legal mechanisms by which such standards may become operative are complicated and at this moment still uncertain, the contents of such standards are becoming increasingly clear and definite in a number of areas, such as competition and restrictive business practices, the protection of the environment and bribery and illicit payments.

The second principal category of issues in IIAs concerns "investment protection", that is to say, the international rules and principles designed to protect the interests of foreign investors against host government actions unduly detrimental to their interests. The norms in question have their roots in customary law but in recent years they have found expression in numerous treaty provisions.

The principal government measures against which investors seek protection are expropriations, nationalizations and other major cases of deprivation of property and infringement of property rights of investors. Relevant international law norms have been the object of considerable debate in the decades since the Second World War. While a number of preconditions for the legality of such takings are mentioned in relevant instruments and debates, in practice, most of the debate has centred on the requirement of compensation and the modalities of its assessment and payment. More recently, in the past two decades, concern has shifted from dealing with past situations to establishing rules for the future. Host countries appear to be increasingly inclined to provide assurances of fair treatment to future investors, including undertakings against expropriation, promises of full compensation and acceptance of dispute settlement procedures. The formulation of pertinent provisions in international instruments raises issues related to the problems of definition. Efforts to expand the scope of the notion of expropriation or “taking”, by covering indirect measures or by including permits and licences in the definition of investors’ assets, raise the possibility of excessively limiting generally accepted regulatory powers of the host State.

In the second place, protection provisions seek to cover other government measures, possibly less catastrophic but still seriously detrimental to an investor’s interests, such as discriminatory taxation, disregard of intellectual property rights, or arbitrary refusal of licences. In this respect, the general non-discrimination standards may be invoked as well as certain broad standards, such as that of “fair and equitable treatment”.

A third category of protection provisions covers measures which, although not necessarily unfair or even unpredictable, affect foreign investors in a disproportionate manner, compared to domestic enterprises, so that pertinent assurances are considered necessary. The principal such provisions concern the transfer of funds (profits, capital, royalties, etc.) by the investor outside the host country and the possibility of employing foreign managerial or specialized personnel without restrictions.

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Protection provisions are supplemented by provisions concerning the settlement of disputes. Of the several types of disputes possible, those between the investor and another private party are normally left to be resolved by the host country judicial system or by voluntary arbitration between the parties. Disputes between States concerning the interpretation or application of the IIA involved are usually dealt with on the basis of State- to-State arbitration or adjudication before the International Court of Justice. Disputes between an investor and the host State are the ones where the search for a dispute settlement method has been most active in recent years. In the past, such disputes either were resolved by the host country's national courts or resulted in an interstate dispute, through espousal of the private claim by the State of the investor's nationality. Today, most IIAs contain provisions that allow investors to have recourse to international arbitration. A choice of procedures is usually provided for, ranging from ad hoc proceedings to procedures under the World-Bank-sponsored 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Developing country Governments participate in IIAs because they believe that, on balance, these instruments help them in their efforts towards economic development. The manner and extent to which this is true may vary, depending on the actual contents of the IIA involved. Since IIAs, like all international agreements, limit to a certain extent the freedom of action of the States party to them, the question arises whether and how far developing countries can retain the ability to make the choices and decisions necessary for promoting their development by influencing, through direct or indirect measures, the amount and kinds of FDI that they receive and the conduct of the foreign firms involved.

Several IIAs address such concerns by including in their text, usually in their preamble, declaratory language concerning the promotion of development. Such language may have greater impact when it is formulated in a manner that permits its utilization -- in negotiations, in court, or in arbitration -- so as to make development a test for the interpretation or application of the instrument's provisions. Promotion of development may also be manifested

in the very structure of IIAs, where, for instance, distinctions are made between developed and developing participating countries, and the members of each category do not necessarily have the same rights and duties. There may also be general clauses allowing for special and differential (in fact, favourable) treatment of developing countries. A common device to similar effect is the inclusion of exceptions and special clauses, essentially granting developing countries increased freedom to disregard certain provisions of the instrument, with a view to taking action to promote their development. Such exceptions may take a great variety of forms.

Thus, while non-legal factors -- especially economic ones -- play a primary role in the determination of FDI flows and their contribution to economic development, IIAs also have an established role in the determinants matrix of FDI and, given the dynamics between economic, social and political factors, IIAs need therefore to provide for a certain flexibility for countries to follow their policies for economic growth and development.

This paper provides both an overview of the developments in the international legal framework for FDI and an introduction to the collection of *UNCTAD's Issues Papers Series on IIA*. It sets the overall context for each of the issues separately examined in the different papers in the Series.

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INTRODUCTION

The growth of FDI in quantitative as well as qualitative terms, is at the core of the continuing process of global integration, usually referred to as “globalization”. The total volume of FDI has kept increasing: in 1998, the world’s FDI stock exceeded \$4 trillion in book value, while global sales of foreign affiliates had reached \$11 trillion, considerably above the level of world exports of goods and services (\$7 trillion). In terms of operational forms, the relatively isolated operators of the past have been replaced by increasingly integrated transnational corporations (TNCs). A new international actor has thus come to the fore, whose activities have been a major factor in the unprecedented degree of integration of the world economy. In fact, not only FDI but also a good part of trade, technology transfer and finance are now conducted under the common governance of TNCs. Each of these activities can best be understood today as one of several interwoven modalities of international production rather than as a separate, alternative form of operation (UNCTAD, 1999a and b).

In this transformation, legal and policy change, at the national and international levels, has been both cause and effect. The lowering of national barriers to trade and other forms of economic intercourse, throughout the half century since the end of the Second World War and at an increasing pace in the past decade, has made possible close interactions across borders and has thereby facilitated the internationalization of production. This process has put continuing pressure on national policy makers at all levels to help create a legal framework to match the needs and capabilities of the world economy, while ensuring that particular national economies share in world growth and development.

A major consequence has been that the legal regulation of FDI is now increasingly accepted as a matter of international concern. Only a few decades ago, FDI was still perceived as being governed mainly by national legal rules and principles. International law was deemed to be relevant chiefly with respect to the initial allocation of national jurisdiction and in exceptional circumstances, especially in cases of government action causing major disruptions to foreign

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investment operations. Today, the accepted role of international law rules and processes -- customary, conventional or other -- in investment matters has considerably expanded and is under constant pressure to expand further. The substance of pertinent rules is itself rapidly changing.

While there is no single legal instrument covering all aspects of FDI, a broad international legal framework is taking shape, consisting of a wide variety of principles and rules, of diverse origins and forms, differing in their strength and specificity and operating at several levels, with gaps in their coverage of issues and countries. This framework includes rules of customary international law, bilateral, regional and multilateral agreements, acts of international institutions, and authoritative texts without formal binding force, such as declarations adopted by States or resolutions of international organization organs, all in interplay with and against the background of national legal rules and procedures.¹

This paper seeks to present a broad overview of this international legal framework, focusing on international agreements (in force or not yet in force) that directly concern and affect FDI, while also taking into account other major components of this framework (trends in national law, non-binding international instruments, etc.)² (annex table 1). It is in a way a substantive introduction to this UNCTAD Series on issues in international investment agreements (IIAs). The Series addresses key concepts and issues in IIAs, seeking to present and analyse them, with a view to assisting officials from member countries, especially developing ones, who may participate in international negotiations concerning foreign direct investment (table 1).

The present paper starts with a summary historical overview of law and policy on FDI, with an emphasis on the recent decades. It then considers the “sources” of international FDI law, reviewing the general approaches and the types of legal instruments in use over the years. The core of the paper is the next chapter, which examines the key substantive issues of law and policy concerning FDI. The paper concludes with a discussion of the ways in which IIAs and their provisions seek (or may seek) to take into account

Table 1. Topics covered by the IIA Issues Papers Series

Admission and establishment	Competition	Dispute settlement (investor-State)
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Fair and equitable treatment	Foreign direct investment and development	Funds transfer
Home country measures	Host country operational measures	Illicit payments
Incentives	Investment-related trade measures	Lessons from the MAI
Lessons from the Uruguay Round	Modalities and implementation issues	Most-favoured-nation treatment
National treatment	Scope and definition	Social responsibility
State contracts	Taking of property	Taxation
Transfer of technology	Transfer pricing	Transparency
Trends in IIAs: an overview		

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the need to give effect to the overriding necessity to promote the development of the developing and least developed countries.³

A necessary caveat should be made at the very start: law, national and international, has played a prominent role in the radical transformation of the world economy in the past 50 years. Yet, focusing on the legal dimensions of current trends concerning FDI should not obscure the primordial importance of political, economic, social and other non-legal factors. Laws and policies may facilitate and channel, sometimes indeed may make possible, business action and economic developments, but they are not, as a rule, the prime movers, the initial causes.⁴ They may be necessary, but they are rarely, if ever, sufficient. Accordingly, this discussion of legal and policy aspects of FDI, while recognizing the fact that they affect outcomes in important ways, does not imply a claim to the effect that they are controlling.

Notes

- 1 For notable recent efforts to discuss particular aspects of this legal framework, see Juillard, 1994; Sornarajah, 1994; and Sacerdoti, 1997.
- 2 Unless otherwise noted, the agreements and other instruments mentioned in this paper are reproduced in UNCTAD, 1996a and forthcoming a.
- 3 The literature on the subject of this paper -- especially certain aspects such as nationalization -- is vast. The paper refrains from referring to this literature. Instead, the reader is referred to the bibliography that is part of this Series.
- 4 For a discussion of the determinants of FDI, see UNCTAD, 1998b.

Section I

HISTORICAL OVERVIEW

To understand current legal approaches to FDI, it is useful to begin with a brief look at the historical evolution of national and international law and policy on the matter.¹

A. The legal situation up to the Second World War

The rules of classical international law, i.e. public international law as crystallized by the end of the nineteenth century, were, as already noted, mainly concerned with the allocation of jurisdiction among States. Since FDI issues involve primarily relations between foreign investors and host States, they were treated in the main as matters of national law. International law dealt with related problems only in exceptional cases, in terms of the treatment of the property of aliens (foreigners) by the host State, the rules concerning the international responsibility of States for acts in violation of international law, and the exercise of diplomatic protection by the State of the aliens' nationality.

In the liberal era of the nineteenth century, States did not by and large attempt systematically to control or restrict international private capital transactions. In economic and political terms, indirect foreign investment -- loans and the floating of government bonds -- was far more important than direct (Nurkse, 1954). In the first decade of the twentieth century, multilateral efforts to address investment issues resulted in the Drago-Porter Convention of 1907 (AJIL, 1908), which imposed limitations on the use of armed force for the recovery of public debts. The FDI that did exist at that time involved in the main the exploitation of natural resources (e.g. plantations or mines) and on occasion the operation of public utilities. Roughly the same situation prevailed in colonial territories, which, however, were not treated as "foreign" in their relationship to the metropolitan country. In a few cases, disputes arose over the expropriation of the property of individual aliens to serve specific

public purposes, such as road-building, or sometimes on other, less widely acceptable, grounds. Most legal debate concerning the treatment of the property of aliens arose in the context of changes of sovereignty over territories (because of the creation of new States or the cession of territory). In terms of international law doctrine, the issue of the “acquired rights” of aliens related to matters of State succession, rather than investment protection in the modern sense of the term.

FDI started acquiring increased importance and assuming the forms prevalent today as the nineteenth century neared its end. The government measures involved also began to resemble those that have been of concern in more recent times, increasingly acquiring a general rather than an individualized character (e.g. land reform). In strict legal terms, FDI remained largely a matter of national concern, moving onto the international plane only in exceptional, although less and less rare, cases, whenever rules and principles of customary international law were deemed to have been infringed.

Then as now, two fundamental principles of public international law were involved in such cases: on the one hand, the principle of territorial sovereignty, asserting each State’s full and exclusive jurisdiction over persons and events in its territory, and on the other, the principle of nationality, involving each State’s interest in the proper treatment of its nationals abroad.

At the turn of the century, capital-exporting States insisted on the importance of the latter principle and treated all measures causing uncompensated injury to the person or property of foreigners as violations of the international minimum standard of treatment to which aliens were entitled. Developing, capital-importing, countries, especially Latin American ones, stressed the exclusive character of territorial sovereignty and held that foreign investors were entitled to no more than equality of treatment with the host State’s nationals. In legal doctrine, largely as a consequence of constitutional and other distinctions between property and contract, the taking of the property of aliens was clearly distinguished from measures affecting state contracts with aliens (usually involving public utility concessions and the like). Latin American countries, in particular,

insisted that such contracts were governed solely by national law, by virtue of both general principle and express contractual provisions (Calvo doctrine and related practices) (Shea, 1955).

Later on, during the first half of the twentieth century, FDI issues came increasingly to the fore, even though disputes concerning government debt continued to be more important (Borchard and Wynn, 1951). Generalized government measures affecting foreign property started to become more common. Prominent among them were land reform efforts in the aftermath of the Mexican Revolution and in some countries of Central and Eastern Europe after the First World War; the nationalization of an entire economy, after the advent of the Soviet Union; or the nationalization of natural resources, as in Mexico. The legal questions that arose became more and more difficult to resolve on the basis of classical international law rules, which had been developed under different conditions: they were meant to deal with individual measures and to protect physical persons, often in the aftermath of civil disturbances or changes in sovereignty over territories. The diplomatic correspondence between the United States and Mexico in the 1930s over the Mexican nationalizations of land and petroleum holdings of United States nationals illustrated clearly the difficulties of reaching a generally agreed position. Mexico relied on a State's sovereign right to control its natural resources and on the lack of established rules in international law requiring payment of full compensation in the case of generalized measures; the United States, while recognizing a Government's right to nationalize property, insisted that payment of "prompt, adequate and effective" compensation was required in all cases of takings of alien property.

B. Developments since 1945: the early years

This was the general international legal picture at the end of the Second World War. At that time, in the context of the creation of a broad organizational framework for the post-war economy, an attempt was made to formulate international principles concerning FDI in the Havana Charter of 1948. The Charter was intended to establish an International Trade Organization and dealt mainly with international trade (the original General Agreement on Tariffs

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and Trade (GATT) was based on its trade provisions) (United Nations, 1950). It also included, however, important provisions that addressed, directly or indirectly, other issues, such as investment and competition. The initial United States proposals for the provisions on foreign investment were intended to provide protection to investors, but, during the last phase of the negotiations, important qualifications were introduced through the efforts of developing, particularly Latin American, countries. The end product (box 1) met with strong opposition by investor interests in developed countries, and this was in fact partly responsible for the Charter's failure to enter into force. A comparable effort at the regional (inter-American) level, the Economic Agreement of Bogota of 1948 (OAS, 1961), had the same fate.

The first post-war years were marked by large-scale nationalizations of key industries, affecting foreign as well as domestic firms, not only in the countries that became part of the socialist bloc, but also in Western Europe (e.g. France and the United Kingdom) (Foighel, 1957; Katarov, 1960). As colonial territories began to acquire their independence, moreover, takings of foreign-owned property multiplied. For many of the countries emerging into political independence, but also for some of the economically weaker States that had been independent for some time, a principal political and economic goal was to regain national control over their natural wealth and their economy. Their Governments feared that foreign control over natural resources and key industries would deprive the countries concerned of economic benefits and compromise their newlyfound political independence. A sharp distinction was usually made at the time between old investments, made during the colonial period, and new ones, after independence. The number of cases of nationalization or expropriation of foreign property (chiefly in natural resources) kept increasing worldwide, reaching its peak in the early 1970s (figure 1).

As a result of such conditions, throughout the first three decades after the Second World War, concerns of host countries, particularly developing ones, and foreign investors and their countries of origin focused on FDI in natural resources and in key industries. The attitude of developing host countries towards FDI generally combined a realization of the need for and possible benefits from

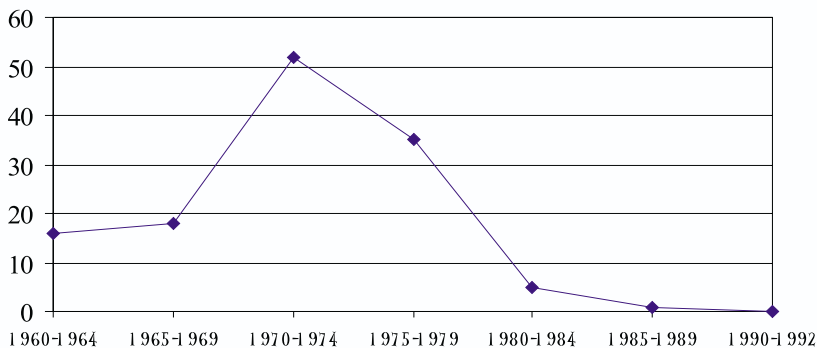
**Box 1. Havana Charter for an International Trade Organization (1948)
[excerpts]**

**Article 12
International Investment for Economic Development
and Reconstruction**

1. The Members recognize that:
 - (a) international investment, both public and private, can be of great value in promoting economic development and reconstruction and consequent social progress;
 - (b) the international flow of capital will be stimulated to the extent that Members afford nationals of other countries opportunities for investment and security for existing and future investments;
 - (c) without prejudice to existing international agreements to which Members are parties, a Member has the right:
 - (i) to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies;
 - (ii) to determine whether and to what extent and upon what terms it will allow future foreign investment;
 - (iii) to prescribe and give effect on just terms to requirements as to the ownership of existing and future investments;
 - (iv) to prescribe and give effect to other reasonable requirements with respect to existing and future investments;
 - (d) the interests of Members whose nationals are in a position to provide capital for international investment and of Members who desire to obtain the use of such capital to promote their economic development or reconstruction may be promoted if such Members enter into bilateral or multilateral agreements relating to the opportunities and security for investment which the Members are prepared to offer and any limitations which they are prepared to accept of the rights referred to in sub-paragraph (c).

Source: UNCTAD, 1996a, vol.1, pp. 4-5.

Figure 1. Changing moods: the number of nationalization measures, 1960-1992^a



Source: UNCTAD, 1993, p. 17.

- ^a Nationalization numbers refer to the average number of measures per year during the period indicated.

FDI with the conviction that national controls and limitations on FDI were necessary. This attitude also found expression in United Nations resolutions and studies concerning the need for an increase in FDI flows to developing countries and the appropriate methods for bringing this about.² A watershed in the efforts to find common ground between developed and developing countries on the topic was Resolution 1803 (XVII) of the United Nations General Assembly, adopted in 1962, concerning the principle of permanent sovereignty over natural wealth and resources. Coming after a series of less elaborate resolutions on the same topic in the 1950s, the 1962 text (box 2) gave to the principle its definite formulation. While recognizing the rights of peoples and nations over their natural resources, including their right to exercise control over investments in such resources and to nationalize them, the resolution provided expressly for the payment of appropriate compensation for any taking of property and stressed that agreements between foreign investors and Governments should be observed in good faith (Kemper, 1976; Rosenberg, 1983).

**Box 2. United Nations General Assembly Resolution 1803 (XVII) (1962):
Permanent sovereignty over natural resources
[Excerpts]**

The General Assembly,

.....

Declares that :

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.
2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.
3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.
4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

.....

/...

(Box 2, concluded)

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

Source: UNCTAD, 1996a, vol.1, pp. 22-23.

Initially, there was less legal concern over control of the entry of foreign firms and their routine treatment after establishment. These were left largely to the municipal law of host countries; only extreme regulatory measures, essentially tantamount to takings, were addressed by international law norms. Elaborate administrative machinery for the control of the entry and operations of foreign investments was put in place in many countries with a view to excluding such investments from certain industries for the benefit of domestic investors (or the State), determining the specific terms under which investments were to be made, and ensuring the participation of local nationals in major industries. While this trend was particularly strong in developing countries, such controls were also common, although less strict and less rigid, in many developed countries.

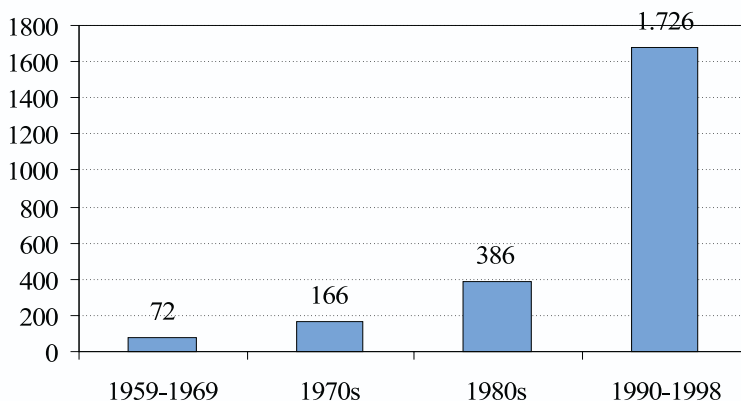
Several early proposals by private investor associations for the conclusion of a comprehensive international agreement were aimed primarily at the protection of foreign investments against expropriation rather than at the liberalization of the admission of investments. These proposals did not find wide support (Fatouros, 1961; Seidl-Hohenveldern, 1961). When developed country Governments took over the task, they had no greater success. In the Organisation for Economic Cooperation and Development (OECD), a draft Convention on the Protection of Foreign Property was prepared and in 1967 was approved by the Organisation's Council, but was never opened for signature. The one successful effort on a worldwide basis was directed at a specific aspect of

FDI protection. This was the World Bank-sponsored Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in 1965, initially with rather limited participation, although the number of States party to it eventually expanded considerably, especially in the 1980s, to reach 131 by October 1999 (Broches, 1972).

Around the same time, i.e. in the early 1960s, developed countries embarked upon a process of gradual investment liberalization. The two OECD Codes of Liberalisation, of Capital Movements and of Current Invisible Operations, established binding rules for continuing liberalization and provided effective machinery for gradual implementation and expansion (OECD, 1995). The creation and growth of the European Economic Community (as it was then called), established in 1957, initiated a movement towards regional economic integration, broadly followed later by other groups of countries, developed and developing, which has affected considerably the situation of FDI.

The early 1960s also saw the beginning of the process of negotiating bilateral investment promotion and protection agreements (BITs) (UNCTAD, 1998a). The conclusion of such agreements was recommended early on, in the Havana Charter, while unsuccessful efforts were made to include investment in broader traditional international treaties (treaties “of establishment” or “of Friendship, Commerce and Navigation”) (Wilson, 1960; Fatouros, 1962; Preiswerk, 1963). Specialized bilateral treaties, however, dealing solely with investment protection (and to a lesser extent with its promotion), proved more successful, although it was only later, in the late 1980s and 1990s, that they proliferated (figure 2). Through such agreements, an increasing number of developing countries subscribed to basic standards for investment protection and treatment (while rejecting them on the multilateral level), though typically not to positive rights of entry and establishment, which remained within the discretion of the host contracting party.

**Figure 2. Bilateral investment treaties, 1959-1998
(cumulative number)**



Source: UNCTAD database on BITs.

C. The decade of the 1970s

In the early 1970s, the energy crisis had a profound impact on the international environment for development and for FDI. The atmosphere in international forums became for a time more favourable to the views of the developing countries, and they were able to set the agenda -- although not to determine the eventual outcome -- in international economic organizations. Developed countries were apprehensive over the control of energy resources by what appeared to be at the time a rather solid coalition of developing countries. Before this short period was over, the developing countries sought to assert the legitimacy of their interests and perceptions on FDI issues, among others.

A direct result of the energy crisis was the Conference on International Economic Cooperation, which met in Paris from 1975 to 1977. Within its framework representatives from 27 developed and developing (including oil-exporting) countries conducted negotiations concerning energy, trade and financing, including FDI. While there was agreement on a significant, and wide-ranging,

agenda of issues, no common ground was reached on several critical points. Around the same time, the developing countries' demands for a radical restructuring of the world trading and financial system, under the banner of the creation of a New International Economic Order, found formal expression in a series of programmatic texts embodied in General Assembly resolutions, adopted by large majorities, but not without dissent. The most relevant for present purposes are the 1974 Declaration on the Establishment of a New International Economic Order and its accompanying Programme of Action (Resolutions 3201(S-VI) and 3202(S-VI)) and the Charter of Economic Rights and Duties of States (Resolution 3281(XXIX)), also adopted in 1974 (box 3). The latter, in particular, sought to restate the basic legal principles governing international economic relations, focusing attention on developing country demands for economic independence and stressing the legitimacy of their concerns. The Charter's provisions on the treatment of FDI emphasized the role of host country Governments and insisted on the exercise of host country jurisdiction and national controls over foreign investment and specifically over TNCs (Virally, 1974; Flores Caballero et al., 1976; Meagher, 1979).

The structure and role of TNCs had first been described by business administration experts and economists in the late 1950s and early 1960s. However, there was no universal agreement as to what the economic and social effects of such firms were. Some saw TNCs as a means of improving the well-being of the societies in which they operated, especially in their function as transferors of productive technology and know-how across borders. Others saw a different picture: they tended to view TNCs as monopolistic entities that grew through the exploitation of their competitive advantage in technology and know-how at the expense of host country competitors, bringing economic dislocation and dependency in their wake. More worryingly, some began to see TNCs as a threat to local political and cultural freedoms, given their power to influence the direction of local social and political development. The result was a polarization of views as to the costs and benefits of FDI. However, such polar opinions did not survive the growth in knowledge and experience about the actual operations of TNCs, with the result that now the study and discussion of TNCs have moved into a more informed and less partisan setting.

**Box 3. United Nations General Assembly Resolution 3281 (XXIX) (1974):
Charter of Economic Rights and Duties of States
[Excerpts]**

Article 1

Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each State has the right:
 - (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
 - (b) To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;
 - (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

Source: UNCTAD, 1996a, vol. 1, p. 61.

On the national level, and occasionally on the regional one as well, elaborate structures of control over the entry and operations of TNCs were established in many developing countries. In order to ensure that TNCs would serve on a concrete and immediate basis the development needs of the host country, as determined by its Government, entry of foreign firms or investment of foreign capital was allowed on the basis of sometimes quite elaborate approval procedures. A characteristic regional instrument that reflected national approaches and methods was Decision 24 of the Andean Pact, adopted in 1970, which imposed screening procedures and other controls on FDI and on technology transfer, including a “fade-out” provision, requiring the disinvestment of foreign firms after a number of years. At the national level, “investment laws” (or “codes”) provided for screening procedures, frequently combined with tax incentives and other measures intended to attract as well as regulate FDI.

At the same time, the efforts to establish standards for the conduct of TNCs led to negotiations for the adoption in legally non-binding forms of “international codes of conduct” for TNC activities (Horn, 1980; Metaxas, 1988). The lead was taken by the OECD. In 1976, the Organisation’s Council adopted a Declaration on International Investment and Multinational Enterprises that included a set of voluntary Guidelines for Multinational Enterprises. They consist of recommendations addressed to enterprises, not to Governments, which, while requiring respect of host country laws and policies, also establish international standards of proper conduct. They cover both general issues and specific topics, such as employment and industrial relations and the disclosure of information. The Guidelines are complemented by institutional machinery charged with two principal tasks: on the one hand, providing “clarifications” on the basis of concrete cases; and, on the other, ensuring the revision of the Guidelines as the need arises. The Guidelines are still valid, after several successive partial reformulations, and are indeed the object of increasing recent attention, as a process of reviewing is ongoing. In addition to the Guidelines, the Declaration included decisions addressed to Governments that dealt with several specific aspects of TNC treatment: national treatment; problems of incentives and disincentives; and conflicting requirements imposed on TNCs. Taken together, these

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instruments provided important elements of a framework on both the conduct and the treatment of TNCs in the OECD area.

Parallel efforts were undertaken within the framework of the United Nations system. The most comprehensive instrument of this kind was the United Nations draft Code of Conduct on Transnational Corporations (box 4). After lengthy negotiations, from the late-1970s to the mid-1980s, and despite agreement over the contents of many of its provisions, a number of important points were left open (especially as regards host country obligations), and the instrument was never adopted, even in non-binding form. Although the United Nations draft Code of Conduct and the OECD Guidelines resembled one another in significant respects, the former's scope was considerably broader.

Box 4. United Nations draft Code of Conduct on Transnational Corporations [Structure of the 1983 version]

PREAMBLE AND OBJECTIVES

DEFINITIONS AND SCOPE OF APPLICATION

ACTIVITIES OF TRANSNATIONAL CORPORATIONS

A. General and political

- Respect of national sovereignty and observance of domestic laws, regulations and administrative practices
- Adherence to economic goals and development objectives, policies and priorities
- Review and renegotiation of contracts
- Adherence to socio-cultural objectives and values
- Respect for human rights and fundamental freedoms
- Non-collaboration by transnational corporations with racist minority regimes in southern Africa
- Non-interference in internal political affairs
- Non-interference in intergovernmental relations
- Abstention from corrupt practices

/...

(Box 4, concluded)

- B. Economic, financial and social
- Ownership and control
 - Balance of payments and financing
 - Transfer pricing
 - Taxation
 - Competition and restrictive business practices
 - Transfer of technology
 - Consumer protection
 - Environmental protection
- C. Disclosure of information

TREATMENT OF TRANSNATIONAL CORPORATIONS

- A. General treatment of transnational corporations by the countries in which they operate
- B. Nationalization and compensation
- C. Jurisdiction

INTERGOVERNMENTAL CO-OPERATION

IMPLEMENTATION OF THE CODE OF CONDUCT

- A. Action at the national level
- B. International institutional machinery
- C. Review procedure

Source: UNCTAD, 1996a, pp. 161-180.

Other codes of conduct, dealing with specific issues, were also negotiated, with varying results: the International Labour Organization's (ILO) Governing Body adopted in 1977 a Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The United Nations General Assembly adopted in 1980 a Set of Multilaterally Agreed Equitable Rules and Principles for the Control of Restrictive Business Practices, negotiated under

the auspices of UNCTAD. On the other hand, long negotiations over an international Code of Conduct on Transfer of Technology within the framework of UNCTAD did not lead to adoption of a final agreed instrument. However, a number of other similar instruments, dealing with limited aspects of TNC activity, were adopted; for instance, the International Code of Marketing of Breast-milk Substitutes of the World Health Organization (WHO) and the United Nations guidelines for consumer protection.

The negotiations over international codes of conduct, whether ultimately successful or not, were instrumental in defining the areas of common understanding over the proper conduct of TNCs and in clarifying the standards for their treatment. While the proposed or adopted texts were largely concerned with reaffirming the competence of host States to determine and enforce national policies, they also sought to formulate international rules that went beyond merely requiring compliance with local laws and policies and themselves specified the appropriate kinds of conduct. Thus, the idea that international rules were appropriate for dealing with FDI and with important international actors, such as TNCs, acquired greater currency and acceptance, even though there remained considerable controversy concerning the actual substance of such rules.

D. The past two decades

When describing trends, an impression of uniformity, simplicity or clarity can be misleading. The general climate surrounding FDI started to change in the 1980s and is still fluid. It is now more favourable to FDI; but it still consists of many instruments and norms at several levels, differing from one another in many respects. Neither the past nor the present legal and policy situation concerning FDI is simple, universal and univocal. It is only by keeping this caveat in mind that one can correctly understand the current situation and its antecedents.

A series of national and international developments has led to a radical reversal of the policy trends prevailing.³ To begin with, the international economy has changed. The industries in which TNCs are active are not the same as those of 20 years ago, and

related attitudes have changed accordingly. As already noted, in the first decades after the Second World War, most discussions on FDI dealt, expressly or by implication, with the exploitation of petroleum and other natural resources. In recent years, while investment in natural resources has remained important, concern has shifted to investments in manufacturing, services and high technology. The very perception of the investment process has changed, reflecting current realities of the world economy. As the Uruguay Round negotiations have made evident, the *problématique* of FDI and technology transfer has become more closely linked to that of international trade, in the sense that they are both increasingly perceived as intertwined modalities of operation in the international production process. Some of these changes are reflected in varying manners in the more recent IIAs, but a more definite comprehensive picture of the process is only now beginning to appear.

The international political environment has also changed radically. The bargaining position of developing countries is now weaker, and their ability to determine the agenda of international economic relations decreased considerably. By the end of the 1970s, the developed countries had fully recovered from the “oil shock” and had regained their self-assurance and their willingness to pursue their perceptions and interests. On the other hand, the onset of the debt crisis in the developing countries, including in several of the oil-producing ones, helped to make these countries less assertive. The debt crisis brought about a relative scarcity of indirect investment and made FDI more desirable: not only was it relatively more easily available but it also did not burden the country as much with debt, and brought additional contributions to the host economy, in terms of know-how, technology, skills, and access to markets. Host countries thus became more interested in attracting foreign investors. Besides, in most developing countries, the process of gaining control over natural resources had considerably advanced since the immediate post-war period and was no longer a matter of first priority; interest shifted to the need for investment in other sectors and to the competition for it. Finally, the emphasis on the need to control FDI was further affected by a spreading perception that, despite marked successes in a few cases, the foreign investment control policies of host countries had often been ineffective.

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Other important developments played a role. On an international political level, the relative cohesion of the third world decreased considerably, while the gradual collapse of the socialist bloc and the end of the cold war helped to strengthen market-oriented attitudes and forces and deprived developing countries of a bargaining tool. The international economic environment was drastically altered by the growth of TNCs and increasing global integration. In the national policies of many developed countries, where the need for direct government intervention in the economy was for long widely accepted, market-oriented approaches gained political momentum. The hegemony of these views soon spread to many developing countries as well, directly affecting their national economic policies.

All these developments had a significant impact on national laws and policies regarding inward FDI. The past two decades have been a time of investment liberalization, promotion and protection: of the 895 national FDI policy changes identified for the period 1991-1998, 94 per cent went in the direction of creating a more favourable climate for FDI (table 2). The screening requirements and other entry regulations imposed earlier have been considerably softened or eliminated. Restrictions on the operations of foreign affiliates have weakened considerably; investors are increasingly allowed freely to transfer their profits and capital

Table 2. National regulatory changes, 1991-1998

Item	1991	1992	1993	1994	1995	1996	1997	1998
Number of countries that introduced changes in their investment regimes	35	43	57	49	64	65	76	60
Number of regulatory changes	82	79	102	110	112	114	151	145
of which:								
More favourable to FDI ^a	80	79	101	108	106	98	135	136
Less favourable to FDI ^b	2	-	1	2	6	16	16	9

Source: UNCTAD, 1999a, p. 115.

^a Including liberalizing changes or changes aimed at strengthening market functioning, as well as increased incentives.

^b Including changes aimed at increasing control as well as reducing incentives.

out of the host country. The incidence of property takings has greatly decreased. And acceptance of international arbitration for resolving conflicts between investors and host Governments is expanding. Host countries now seek to attract foreign investment, by offering strict guarantees, both national and international, against measures seriously damaging the investors' interests.

Equally important is the change in the tone and direction of legal discourse. Emphasis is no longer laid on the international principles concerning national jurisdiction and its limits or the customary international law on the treatment of foreign property and foreign firms. Debate among policy makers is now centred on the most efficient ways of attracting foreign investment and technology and deriving benefits from it so as to enhance a country's economic growth. At the same time, the role of international law rules and processes in investment matters is increasingly accepted, even though the substance of pertinent rules is itself still changing.

Recent policy changes at the national level, however, have not yet been extensively reflected in general multilateral instruments. The 1985 World Bank-sponsored Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) heralded a period of increased interest in FDI. Yet, the most important multilateral instruments expressing the new trends are those of the 1994 Uruguay Round agreements, which address only in part topics directly or indirectly related to investment, especially 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). Such trends have also found some expression in non-binding texts. The 1992 Guidelines on the Treatment of Foreign Direct Investment prepared within the framework of the World Bank are of particular relevance.

To understand fully the effects of current trends, one has to look at instruments at other levels, primarily regional and interregional, as well as bilateral. At the regional level, liberalization trends are particularly apparent in instruments reflecting the numerous efforts (of varying degrees of intensity and success) at economic integration. A particularly telling case is that of the 1991 amendments in the Andean countries' instruments on foreign investment and

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transfer of technology that replaced earlier, more restrictive, regulations. Equally relevant are the provisions of the association agreements concluded after 1989 by the European Community with countries of Central and Eastern Europe, as well as those of successive Lomé Conventions between the European Community and a large group of African, Caribbean and Pacific States. (A new one is under negotiation.)

Other economic integration instruments are also important. It is indeed significant that many, although not all, of the several recent free trade agreements do not limit themselves to trade issues only but also address FDI and related topics. The North American Free Trade Agreement (NAFTA) (1992) between Canada, Mexico and the United States may cover three States only, but their size and overall importance, as well as the process of liberalization the agreement has set in motion, make it particularly important. The two 1994 Protocols of the MERCOSUR countries specifically address FDI issues from countries inside and outside the regional economic integration arrangement.

Beyond regional integration efforts, similar processes are at work. The 1994 Asia-Pacific Economic Cooperation (APEC) Non-Binding Investment Principles and the Pacific Basin Charter on International Investments reflect in significant manner the prevailing trends. In October 1998, the members of the Association of South-East Asian Nations (ASEAN) concluded the Framework Agreement on the ASEAN Investment Area with a view to creating a more liberal and transparent investment environment in the area (ASEAN, 1998). Efforts in similar directions are under way in other regions (UNCTAD, 1999a, pp. 121-126).

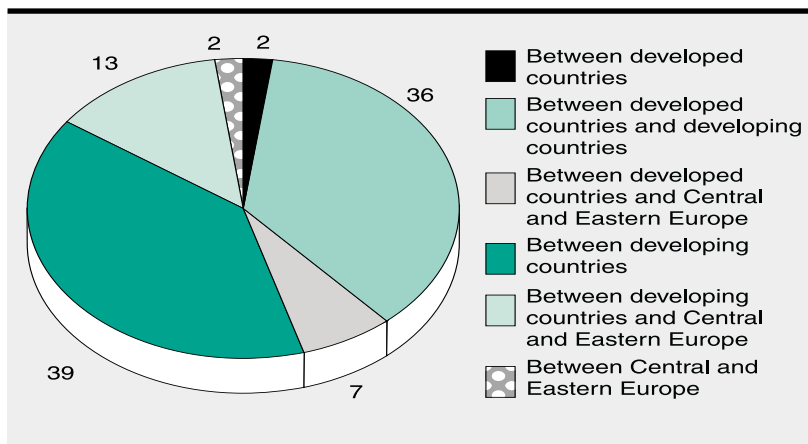
In a different context, the Energy Charter Treaty, adopted by 50 countries, including most OECD members, countries of Central and Eastern Europe and members of the Commonwealth of Independent States, is limited to the energy sector but contains important provisions on investment liberalization and protection (Waelde, 1996).

Developments at the OECD have been particularly interesting. The scope of the Liberalisation Codes was gradually expanded.

Thus, in 1984, inward direct investment was redefined to cover the rights of establishment, while over the years most member countries lifted the reservations and exceptions on which they had initially insisted. More recently, the fate of the negotiations on a multilateral agreement on investment (MAI) is characteristic both of the current hegemonic position of investment liberalization and protection policies and of the remaining uncertainties, ambiguities and ambivalence. The negotiations, aimed at a text that would promote both the liberalization of investment regulations and the protection of foreign investors, proceeded at first at a fast pace, but then, just when they appeared to be nearing their conclusion, unexpected resistance emerged and the effort was discontinued (UNCTAD, forthcoming b). The possibility that an agreement on the same topic might be negotiated in a different forum, at the worldwide level, remains open, yet such a text is likely to differ in important respects from the MAI draft (in part precisely because of the failure of the previous effort). The OECD negotiations have however contributed to an important learning process, whose significance was enhanced by the character and intensity of the reactions caused by the draft text.

BITs have continued to be negotiated in increasing numbers, so that by the end of 1998 more than 1,700 such treaties had been concluded, nearly fourfifths of them after 1990 (figure 2). In the beginning, the initiative for their conclusion was taken by the major capital-exporting developed countries, and most of these countries are now at the centre of extensive networks of BITs with developing countries or countries in transition. In recent years, however, a considerable number of such treaties has also been concluded by smaller capital-exporting countries, by countries with economies in transition and between developing countries. In 1998, for example, only 45 per cent of the BITs concluded involved developed countries (figure 3). While the treaties are by no means identical in their scope and language, they are by and large fairly similar in their import and provide important partial elements of the existing legal framework (UNCTAD, 1998a). Finally, the number of double taxation treaties has also risen, to reach 1,871 at the end of 1998 (UNCTAD, 1999a, p. 118).

Figure 3. BITs concluded in 1998,^a by country group
(Percentage)



Source: UNCTAD, database on BITs.

^a A total of 170 BITs were concluded in 1998.

Notes

- 1 There is considerable literature on this topic; see, e.g., Muchlinski, 1999; Sauvart and Aranda, 1994; and Fatouros, 1994.
- 2 See, for instance, UN-ECOSOC, 1956 and 1957.
- 3 Developments in national and international law and policy in the 1990s have been reported over the years in the successive *World Investment Reports*; see UNCTC, 1991; UN/DESD/TCMD, 1992; UNCTAD, 1993, 1994, 1995, 1996b, 1997, 1998b, 1999a.

Section II

METHODS AND INSTRUMENTS IN USE

As the preceding historical overview has indicated, the international legal framework for FDI consists of a wide variety of national and international rules and principles, differing in form, strength and coverage. The present section attempts a summary listing and review of the methods and instruments in use, seeking briefly to identify the characteristics, possibilities and constraints applicable in each case.

The entire structure rests on the twin foundations of customary international law, on the one hand, and national laws and regulations, on the other. For its concrete substantive content, however, it relies primarily on international agreements as well as on other international legal instruments¹ and on other methods and materials. This review, therefore, first looks at the background for the rules and instruments involved, namely, national laws and regulations and customary international law; then examines the types of international instruments used -- multilateral, plurilateral, regional and bilateral agreements as well as several kinds of "soft law" prescriptions -- and concludes with a glimpse of other materials of immediate relevance, such as the case law of international tribunals, private business instruments and practices and the contributions of scholars and commentators.

A. National laws and regulations

National laws and policies are of paramount importance for FDI, the most concrete and detailed part of its legal framework (Rubin and Wallace, 1994; Juillard, 1994; Muchlinski, 1999). Policy trends concerning the treatment of FDI often make their appearance first at the national level, before spreading into many countries. Of particular importance in this respect are the laws dealing expressly and specifically with FDI. Such foreign investment laws or "codes" have often sought in the past to regulate and attract FDI, on the

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one hand focusing on conditions for the admission of foreign affiliates and regulation of their operation and on the other seeking to promote foreign investment through tax incentives or special treatment. Recent concerns over countries' competitiveness for FDI have led both to the proliferation of laws establishing specific regimes for FDI (table 3) and to their extensive liberalization, in terms of entry and other conditions (see below).

Table 3. Countries and territories with special FDI regimes,^a 1998

Developed countries	Africa	Asia and the Pacific	Latin America and the Caribbean	Central and Eastern Europe ^b
Greece (1953)	Central African Republic (1963)	Kuwait (1965)	Brazil (1962)	Hungary (1988)
Turkey (1954, 1995) ^c	Kenya (1964)	Republic of Korea (1966)	Chile (1974)	Slovenia (1988)
Australia (1975)	Seychelles (1967, 1994) ^c	Pakistan (1976)	Argentina (1976)	Albania (1991)
Canada (1985)	Lesotho (1969)	Cook Islands (1977)	Barbados (1981)	Belarus (1991)
New Zealand (1985)	Liberia (1973)	Tonga (1978)	Panama (1983)	Croatia (1991)
Israel (1990)	Comoros (1982, 1992) ^c	Maldives (1979)	El Salvador (1988)	Estonia (1991)
Spain (1992)	Morocco (1983, 1995) ^c	Saudi Arabia (1979)	Bahamas (1990)	Latvia (1991)
Finland (1993)	Democratic Republic of Congo (1986)	Bangladesh (1980)	Bolivia (1990)	Poland (1991)
Ireland (1994)	Rwanda (1987)	Bahrain (1984)	Trinidad and Tobago (1990)	Romania (1991)
Portugal (1995)	Senegal (1987)	Samoa (1984)	Colombia (1991)	Russian Federation (1991)
France (1996)	Somalia (1987)	Solomon Islands (1984)	Nicaragua (1991)	Slovakia (1991)
	Botswana (1988)	Qatar (1985)	Peru (1991)	Bulgaria (1992)
	Gambia, The (1988)	Viet Nam (1987)	Honduras (1992)	Czech Republic (1992)
	Gabon (1989)	Myanmar (1988)	Paraguay (1992)	Republic of Moldova (1992)
	Mauritania (1989)	Iran, Islamic Republic of (1990)	Venezuela (1992)	Ukraine (1992)
	Niger (1989)	Sri Lanka (1990)	Ecuador (1993)	The former Yugoslav Republic of Macedonia (1993)
	Togo (1989)	Taiwan Province of China (1990)	Mexico (1993)	Lithuania (1995)
	Zimbabwe (1989)	Tuvalu (1990)	Cuba (1995)	

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(Table 3, concluded)

Developed countries	Africa	Asia and the Pacific	Latin America and the Caribbean	Central and Eastern Europe ^b
	Benin (1990)	Iraq (1991)	Dominican Republic (1995)	
	Mali (1991)	Thailand (1991)		
	Uganda (1991)	Yemen (1991)		
	Burkina Faso (1992)	Azerbaijan (1992)		
	Congo (1992)	Democratic People's Republic of Korea (1992)		
	Malawi (1992)	Nepal (1992)		
	Namibia (1992)	Papua New Guinea (1992)		
	Algeria (1993)	Mongolia (1993)		
	Cape Verde (1993)	Turkmenistan (1993)		
	Mauritius (1993)	Armenia (1994)		
	Mozambique (1993)	Cambodia (1994)		
	Sierra Leone (1993)	Indonesia (1994, 1995) ^c		
	Tunisia (1993)	Lao People's Democratic Republic (1994)		
	Zambia (1993)	Malaysia (1994)		
	Angola (1994)	Oman (1994)		
	Djibouti (1994)	Afghanistan (1995)		
	Eritrea (1994)	Bangladesh (1995)		
	Ghana (1994)	China (1995)		
	Côte d'Ivoire (1995)	Georgia (1995)		
	Guinea (1995)	Jordan (1995)		
	Nigeria (1995)	Palestinian territory (1995)		
	Libyan Arab Jamahiriya (1996)	Kazakhstan (1997)		
	Madagascar (1996)	Kyrgyzstan (1997)		
	Egypt (1997)	Micronesia, Federated States of (1997)		
	Ethiopia (1997)	Uzbekistan (1998)		
	United Republic of Tanzania (1997)			

Source: UNCTAD, 1998b, p. 56.

^a Refers to a law or decree dealing specifically with FDI. This table does not cover provisions contained in laws or regulations that do not deal specifically with FDI, but are relevant to FDI.

^b Includes developing Europe.

^c The country has more than one set of legislation dealing with FDI.

Note: the year in which the prevailing legislation was adopted is indicated in parenthesis. Economies are listed according to the chronological order of their adoption of FDI legislation.

Trends in International Investment Agreements: An Overview

While the laws specifically addressing FDI are of great importance for foreign investors and appear to influence their decisions, a country's entire legal system is directly relevant, as well. A country's commercial law, its property law, the laws concerning companies or labour, even civil procedure or criminal law, and of course the laws concerning the judicial system or the civil service, are also important. These laws create the legal environment for the operation of foreign firms and establish directly applicable sets of rules and reflect prevalent policy trends. While there is, naturally, great variety in national laws, because of differences in traditions, approaches and politics, there are also extensive similarities among legal systems, as far as FDI is concerned, reaching the point of uniformity on particular topics. At the same time, the legal system of each particular country, being limited in its territorial scope, can deal effectively only with a fraction of policies and operations of TNCs. The latter generally have a much wider geographical scope and are in a position to avoid some national prescriptions and regulation.

A last point of particular significance is that the legal concepts and categories used in national as well as international law are fashioned by national law -- what a "corporation" is or what the conditions are for the validity of a contract, is determined by national legal rules, not international ones. In fact, international rules and concepts operate in constant reference and interaction with national ones. While the number and importance of international norms keep increasing, their interplay with national ones remains at the heart of the matter. Much of the international legal regulation on FDI consists of rules that refer to national rules and principles and, in particular, determine the limits of permissible (or agreed) State action. Policy trends concerning FDI are thus manifested in national as well as international laws. National law and policies remain constantly in the visible background of the international legal framework for FDI.

B. Customary international law

To understand the ways in which the pertinent international legal rules are developed and applied, one must start from customary public international law, as crystallized at the end of the nineteenth

and the beginning of the twentieth century. The rules and principles of customary international law constitute the indispensable background for any consideration of international legal rules and instruments. Depending on their form and substance, international instruments may give effect to, specify or supplement customary law, they may replace or derogate from it, and they may help create new rules. From the perspective of international law, even national legislation may be understood as being founded on customary law principles, on what they allow or forbid.

As already noted, classical international law approaches FDI issues in terms of two fundamental international law principles, the synergy and conflict between which account for much of international economic law.

- On the one hand, the principle of territorial sovereignty, a foundation of modern international law, asserts that each State exercises full and exclusive jurisdiction over persons and events in its territory. From the viewpoint of international law, it is from this principle that flows the power of the State to admit or exclude aliens (whether physical persons or companies) from its territory, to regulate the operation of all economic actors, and to take the property of private persons in pursuit of public purposes.
- On the other hand, the principle of nationality recognizes that each State has an interest in the proper treatment of its nationals and their property abroad (i.e. by and within other States) and may, through the exercise of diplomatic protection, invoke the rules concerning the responsibility of States for injuries to aliens and their property in violation of international law (Lillich, 1983; Sornarajah, 1994).

The importance of customary rules and principles at the foundation of all international law cannot be gainsaid; yet their practical effectiveness, the possibility of their day-to-day use, is constrained by a number of factors: they are often not specific enough, their exact contents are not clear and definite, and they normally may be invoked only at the State level, thus requiring

the mediation of the State of the investor's nationality. At the same time, no international norm can be understood, nor its effects defined, without express or implied reference to its customary international law background. And in some domains, such as those involving the treatment of aliens, they may still be directly relevant in a great number of cases.

C. International agreements

Modern international economic law is largely based on international agreements -- bilateral, regional, plurilateral and multilateral. They are the most effective means for developing and applying international norms, with respect to FDI as in other areas. On the one hand, their contents reflect the common, agreed positions of more than one State; on the other, they are legally binding, and States are under a duty to conform to their provisions.

With respect to FDI, no comprehensive global international convention dealing with FDI exists, and various efforts in this direction, in the past as well as more recently, have met with no success. However, several multilateral instruments of less comprehensive scope are directly relevant. In addition, regional agreements have increasingly dealt with FDI, sometimes pioneering in expressing international trends in the field. Moreover, the expanding BIT network has developed principles directly concerned with the treatment and protection of FDI.

1. Multilateral agreements

As already noted, an effort to create a comprehensive instrument, although on a non-binding basis, was undertaken in the 1970s and early 1980s. The instrument in question, the United Nations draft Code of Conduct on TNCs, would have addressed many of the concerns of home and host countries, while reflecting, of course, the policies and positions of the period. Several declaratory texts of that period reflected similar concerns (see below).

Of the relevant multilateral agreements in existence, some deal with broader issues that are important for FDI, as in the case

of the Articles of Agreement of the International Monetary Fund, the GATT, or even the international conventions concerning intellectual property, within the framework of the World Intellectual Property Organization (WIPO) or the World Trade Organization (WTO). The pertinent international organizations constitute in fact the sole existing institutional structure at the worldwide level that is directly or indirectly relevant to FDI.

Other multilateral agreements, although not dealing with the FDI process in its entirety, address important aspects of it. Thus, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), concluded under the auspices of the World Bank and administered by it, provides a comprehensive framework for the settlement of disputes. It is complemented by other agencies dealing in particular with international commercial arbitration. The agreement creating the MIGA (1986), also under World Bank auspices, serves to enhance legal security for FDI and supplements existing national and regional investment guarantee operations.

Some of the WTO agreements concluded within the framework of the Uruguay Round are also closely related to FDI. The GATS covers several investment situations; perhaps more important, it provides an important model for the regulation of FDI matters. The TRIMs deals with one particular kind of national measure relating to FDI and provides a forum for the study and exchange of views on performance requirements and related measures. As previously noted, the TRIPs also covers several FDI-related issues, in parallel with existing conventions on intellectual property matters.

Multilateral agreements, especially those of worldwide scope, are the closest equivalent to “legislation” that exists in international law. They make possible the formulation and application of “universal” rules, agreed by and applicable to all States, or a large majority of them. Such agreements are often endowed with institutional machinery for their application and with provisions for their review and development. On the other hand, the necessity to find common ground among a large number of States often makes their provisions either very general or riddled with possible special cases. And the very difficulty of achieving agreement on topics such as FDI,

where the approaches and policies of States differ, accounts for the lack of comprehensive instruments of this type.

2. Regional and plurilateral agreements

Regional and/or plurilateral international agreements are agreements in which only a limited number of countries participate and which are often not open to the participation of all countries.² They are of course binding on the participating countries alone and applicable only to them. Such instruments are increasingly important in FDI matters.

Regional economic integration agreements are a significant subcategory. They often involve a higher than usual degree of unity and cooperation among their members, sometimes marked by the presence of “supranational” institutions, and it is therefore difficult to draw general conclusions from their provisions. The case of the European Community, now the European Union, is probably the most telling; the extensive liberalization of capital movements, the effective elimination of discriminatory measures and the adoption of common rules among its members has had far-reaching effects on FDI among member countries and an important impact on investment in and from third countries. Investment in developing countries has been affected by the successive agreements concluded between the European Union/ European Community and African, Caribbean and Pacific countries (the Lomé Conventions), although the pertinent bilateral and multilateral arrangements foreseen in the Conventions have been slow in their realization.

Other regional integration arrangements involve “shallower” integration, but still affect in important ways FDI regulation. NAFTA is a significant illustration of a regional agreement which is not limited to developed countries only and may indeed be extended to other countries. It is pertinent to note that, although NAFTA is formally only a “free trade zone” -- and not a common market or an economic union like the European Community/ European Union -- the agreement covers FDI. Its provisions on the subject have already significantly influenced other arrangements. It may in fact be considered as characteristic of a recent trend for free trade agreements to include FDI in their scope.

The recently negotiated Framework Agreement on the ASEAN Investment Area, on the other hand, is focused on FDI alone. It seeks to promote investment in the area through the cooperation of the countries in the region in the liberalization of investment regulations, the provision of national treatment to all investors from the countries involved, increased transparency and an interstate dispute-settlement system.

Particularly important, on the broadly regional level, are a number of other agreements, such as the two OECD Liberalisation Codes, covering Capital Movements and Current Invisible Operations, respectively. They have shown a remarkable capacity for growth. Their coverage now extends to most facets of inward FDI. The recent effort to negotiate a multilateral agreement on investment (MAI), in one sense constituted an ambitious departure from earlier approaches which were limited, both in geographical and in substantive terms.

An interesting recent example of an “interregional” agreement that covers major areas of FDI is the Energy Charter Treaty, signed in late 1994 and recently entered into effect. Contracting parties are the European Union and its member States, other developed OECD member countries, and the countries of Central and Eastern Europe and the Commonwealth of Independent States. The agreement covers only a particular economic sector, albeit a very important one. Its investment provisions are fairly elaborate and are to be supplemented by a second agreement covering the issues of investment admission.

Where all the member States of a regional integration agreement are developing countries, their provisions concerning inward FDI and the operation of foreign affiliates may follow patterns similar to those of national investment laws. That has been, for instance, the case of the Andean Pact, whose decisions on the treatment of FDI from the early 1970s to the mid-1990s have followed the general trends outlined earlier, from restrictions and limitations on FDI to increasing liberalization.

Regional and plurilateral instruments have some of the characteristics of multilateral ones: the agreement of many countries

is needed for their negotiation and conclusion, they often have important institutional structures and they generally provide for their continuing growth and development. At the same time, the number of countries involved is smaller and they tend to be relatively homogeneous; the adoption of instruments that serve common interests in fairly specific fashion is more feasible. With respect to FDI, regional and plurilateral agreements have helped to change pre-existing structures of law and policy and to create important habits and patterns of expectations on a broader transnational level, even though not a universal one. As a result in recent years, regional agreements have often been the harbingers of significant new trends in matters of investment law and regulation.

3. Bilateral investment treaties

BITs are a principal element of the current framework for FDI (UNCTAD, 1998a, with extensive bibliography). More than 1,700 bilateral treaties have been concluded since the early 1960s, most of them in the decade of the 1990s. Their principal focus has been from the very start on investment protection, in the wider context of policies that favour and promote FDI: the protection of investments against nationalization or expropriation and assurances on the free transfer of funds and provision for dispute-settlement mechanisms between investors and host States. BITs also cover a number of other areas, in particular, non-discrimination in the treatment, and in some cases, the entry, of foreign-controlled enterprises, subrogation in the case of insurance payment by the capital-exporting country's investment guarantee agency, and other topics. An important characteristic of the new generation of BITs is a considerable uniformity in the broad principles underlying the agreements, coupled with numerous variations in the specific formulations employed (box 5).

As elements of the international legal framework for FDI, BITs have been useful because they have developed a large number of variations on the main provisions of IIAs -- especially those related to the protection of investments, of course, but also those referring to the ways in which national investment procedures

Box 5. Similarities and differences between BITs

Similarities:

- The definition of investment is broad and open-ended so that it can accommodate new forms of foreign investment; it includes tangible and intangible assets and generally applies to existing as well as new investments;
- The entry and establishment of investment is encouraged, although it is typically subject to national laws and regulations (most BITs do not grant a right of establishment);
- Investment promotion is weak and is based mainly on the creation of a favourable investment climate for investment through the conclusion of a BIT;
- Most treaties provide for fair and equitable treatment, often qualified by more specific standards, such as those prohibiting arbitrary or discriminatory measures or prescribing a duty to observe commitments concerning investment;
- Most treaties specify that when various agreements apply to an investment, the most favourable provisions amongst them apply;
- Most treaties now grant national treatment, the principle also being often subject to qualifications (to take into account the different characteristics between national and foreign firms) and exceptions (relating mainly to specific industries or economic activities, or to policy measures such as incentives and taxation);
- A guarantee of MFN treatment, subject to some standardized exceptions, is virtually universal;
- Virtually all BITs subject the right of the host country to expropriate to the condition that it should be for a public purpose, non-discriminatory, in accordance with due process and accompanied by compensation, while the standards for determining compensation are often described in terms that could result in similar outcomes;
- A guarantee of the free transfer of payments related to an investment is common to virtually all BITs, although it is often qualified by exceptions applicable to periods when foreign currency reserves are at low levels;
- A State-to-State dispute-settlement provision is also virtually universal;
- An investor-to-State dispute-settlement provision has become a standard practice, with a growing number of BITs providing the investor with a choice of mechanisms.

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(Box 5, concluded)

In addition, some BITs include one or several of the following:

- A requirement that the host country should ensure that investors have access to information on national laws;
- A prohibition on the imposition of performance requirements, such as local content, export conditions and employment requirements, as a condition for the entry or operation of an investment;
- A commitment to permit or facilitate the entry and sojourn of foreign personnel in connection with the establishment and operation of an investment;
- A guarantee of national and MFN treatment on entry and establishment.

There are also a number of issues that are generally not addressed in BITs but are nevertheless relevant for investment relations. These include:

- Obligations regarding progressive liberalization;
- The treatment of foreign investment during privatization;
- Control of restrictive business practices;
- Private management practices that restrain investment and trade;
- Consumer protection;
- Environmental protection;
- Taxation of foreign affiliates;
- Avoidance of illicit payments;
- Protection against violations of intellectual property rights;
- Labour standards;
- Provisions concerning the transfer of technology;
- Specific commitments by home countries to promote investments;
- Social responsibilities of foreign investors in host countries;
- Obligations of subnational authorities.

Source: UNCTAD, 1998a, pp. 137-139.

may be taken into account. Although the treaties remain quite standardized, they are able to reflect in their provisions the differing positions and approaches of the many countries which have concluded such agreements. The corpus of BITs may thus be perceived as a valuable pool of possible provisions for IIAs (Kline and Ludema, 1997).

BITs were initially addressed exclusively to relations between home and host, developed and developing, countries. Yet, they have shown over the years a remarkable capability for diversification in participation, moving to other patterns, such as agreements between developing countries, or with countries with economies in transition or even with the few remaining socialist countries. Thus, while lacking the institutional structures and emphasis on review and development of multilateral and regional instruments, BITs appear capable of adapting to special circumstances. They have been successfully utilized, for instance, in the past decade throughout the process of transition of Central and East European countries towards a market-type economy. The recent increase in the number of BITs between developing countries suggests that they may also be useful in dealing with some of the problems in such relationships.

There is very little known on the use that countries and investors have made of BITs: they have been invoked in a few international arbitrations, and presumably in diplomatic correspondence and investor demands. Their most significant function appears to be that of providing signals of an attitude favouring FDI. Their very proliferation has made them standard features of the investment climate for any country interested in attracting FDI.

D. Soft law

In addition to rules found in customary law and international agreements, legal prescriptions of other kinds, of varying normative intensity and general applicability, form part of the international legal framework for FDI and are relevant for present purposes. Of particular interest among them are the category of standards that have become known by the term “soft law”. These standards are not always legal in the traditional sense, in that they are not formally binding on States or individuals, but they may still possess considerable legal and political authority, to the extent that they often represent widely held expectations that affect in a variety of ways the actual behaviour of economic and political actors. It is possible to distinguish two major types of such standards.

The first type comprises standards based on international instruments that have been adopted by States in non-legally-binding form, such as resolutions of the General Assembly of the United Nations or formal declarations of States. Important illustrations of such standards directly relevant to FDI are those found in the General Assembly resolutions relating to a New International Economic Order (e.g. the Charter of Economic Rights and Duties of States) or to the “international codes of conduct” negotiated in the 1970s and 1980s, whether eventually adopted by resolution of the General Assembly or never agreed upon and remaining in draft form. At the regional level, the instruments related to the 1976 OECD Declaration on International Investment and Multinational Enterprises have been of special importance, in particular the Guidelines for Multinational Enterprises, interest in which was recently revived.

An interesting recent case of such a non-binding set of standards is the document entitled “Guidelines for the Treatment of Foreign Direct Investment”, which was prepared by the legal services of the World Bank and MIGA, on the basis of a thorough study of recent practice (World Bank, 1992). The Guidelines were submitted to the IMF/World Bank Development Committee, which “called them to the attention of member countries” (World Bank, 1992, vol. II, p. 6). This instrument represents an effort to formulate “a set of *guidelines* embodying commendable approaches which would not be legally binding as such but which could greatly influence the development of international law in this area” (World Bank, 1992, vol. II, p. 5). They are addressed to all States (not only to developing countries) and were expected to be “both acceptable in view of recent trends, and likely to enhance the prospects of investment flows to developing countries” (World Bank, 1992, vol. II, p. 12). The soft law character of these prescriptions is made clear in the accompanying report, which stresses that the guidelines are not intended to codify international law principles and “are clearly not intended to constitute part of World Bank loan conditionality”, while also expressing the expectation that, through the consistent future practice of States, the guidelines might “positively influence the development of customary international law” (ibid).

A second major type of soft law prescriptions are those found in formally binding legal documents, such as international agreements, in provisions couched in language that precludes an implication of strict obligation or right. Typical illustrations of such language are references to “best efforts” or to “endeavouring” to act in a certain manner.

Closely related to such soft law norms (although not quite part of this class of prescriptions) are voluntary instruments prepared by international non-governmental associations, whether from business (see below, under subsection F) or from other social partners (labour union associations, environmental, non-governmental organizations, etc.). While of course they do not reflect the positions of Governments, such associations are increasingly influential in their proposals for international norms and practices.

The exact legal status of soft law has long been a matter of controversy. To the extent that such standards represent widely shared expectations, they may, through repeated invocation and appropriate utilization, move to the status of a binding and enforceable rule. It is with this possibility in mind that soft law has sometimes been called “green law”. Even apart, however, from an eventual elevation to the status of binding rules, standards of this sort may have other significant, albeit probably partial, legal effects: they may serve to confer increased legitimacy on actions and rules that conform to them, thus impeding their treatment as illegal, ensuring their eventual legal validity, or creating a basis for estoppel. They may also play an “educational” role, suggesting to Governments possible approaches acceptable to all concerned. Such effects are enhanced where an institutional implementation mechanism exists, even if it is based on persuasion rather than strict enforcement. A notable case in this respect is that of the role of the OECD Committee on International Investment and Multinational Enterprises (CIME) in the implementation of the Guidelines for Multinational Enterprises.

E. The case law of international tribunals

Relevant principles and rules may also be found in the norms applied by international tribunals, particularly arbitral ones, when deciding disputes relating to FDI. Transnational arbitration may thus not only provide the indispensable procedures for dispute settlement but may also, through the corpus of its awards, gradually fill in the gaps in the conceptual framework on FDI. While limited by the facts (and law) of each case and formally binding only on the parties to the specific arbitration, such decisions have contributed significantly to the development of the legal framework for FDI in the last four decades, though not at times without controversy. The extensive use of arbitration for settling disputes related to FDI obviously confers increasing importance on this class of rules.

F. Private business practices

Another category of standards of considerable importance are the rules and standardized instruments developed by professional or other associations and private business groups (e.g. the International Chamber of Commerce). In fields where powerful private actors are at work, private law-making has always been important. Through model clauses and instruments, patterns of private practices are developed and legitimized and the expectations of companies (and States) are crystallized. Such private sets of rules may even eventually be formally adopted at the national or international level and be incorporated in international agreements.

Individual enterprises, especially some of the larger and more powerful TNCs, have sometimes adopted “corporate codes of conduct” which spell out broader standards of social responsibility, as they relate to their operations (UNCTAD, 1999a, chapter XII). While the phenomenon is not new, it has recently acquired particular strength and support, in response to concerns involving human rights, the protection of the environment, or core labour standards, and to related pressures by non-governmental organizations. While sometimes, especially in the past, such corporate codes were mere exercises in public relations, they are increasingly becoming more significant instruments that affect the substance of corporate action.

G. The contribution of scholars

Finally, the contribution of private persons and groups, scholars and learned societies should not be ignored -- and not only because the Statute of the International Court of Justice, in its famous article 38, provides, under subsection (d), that “the teachings of the most highly qualified publicists of the various nations” are a subsidiary means for the determination of rules of international law (ICJ, 1989, p. 77). The writings of scholars and commentators do not, of course, provide authoritative rules; but they help to construct the conceptual framework and to crystallize approaches and expectations that may eventually find expression in formal binding texts.

Notes

- 1 The use of the more comprehensive term “international instrument” is meant to reflect the variety of form and effect of the international acts and documents involved, whose diversity is enhanced by their varying substantive scope and their differing policy orientations. Moreover, while the term “international agreements” refers, of course, to legally binding treaties between or among States, the term “international instruments” includes, in addition to agreements, other international texts with no legally binding force, such as recommendations, declarations and agreements not in effect.
- 2 The relevant international law terminology is not very clear or fully consistent. In United Nations language, in particular, the term “regional” does not necessarily have a geographical connotation; it covers essentially multilateral arrangements which are not, in fact or in prospect, worldwide. The recent introduction of the terms “plurilateral” and “interregional” has further complicated the terminology. On the other hand, the geographical connotation is preserved in the case of “regional integration agreements”.

Section III

KEY SUBSTANTIVE ISSUES

At this stage in the evolution of the international legal framework for FDI, no description of its substantive contents can be exhaustive and all-encompassing. The situation is fluid. A number of trends are at work with respect to each particular topic or issue, and they are not all equally strong or in the same phase of their evolution. It is therefore futile to seek to construct a definitive catalogue of topics and issues for discussion.

Comprehensive classifications of issues -- or, for the purpose of this paper, of provisions in IIAs -- can only be tentative. The various categories of measures and policies often overlap and cannot sometimes be clearly distinguished one from another. As a result, although a number of classifications and categories are in general use, there is as yet no general agreement on the matter.

A useful listing has to be so structured as to capture the interrelationships among issues, provisions and trends. A possible central criterion for the classification of key issues and provisions is their relationship to the interests of the parties involved: which issues serve the interests of, or are promoted by, investors and their countries of origin, which are defended by host countries, and so forth. It is, however, not clear that such a criterion would be particularly helpful: one is dealing here with key issues in actual international agreements (or other instruments), that is to say, with provisions agreed to by the parties involved. It follows that such issues relate, by definition, to interests that have been accepted as common, albeit, obviously, with differences in degree and in approach, since investors may be more interested in certain provisions and host countries in others, while the preferred substance of such provisions may also, from the point of view of each party, differ to a degree from the one agreed upon.

Another classification, prevalent in the recent practice of IIA negotiations, focuses on what is apparently a temporal dimension of investment, looking at issues in terms of their dealing with problems

and situations that occur before or after an actual investment is made. Obviously, “pre-investment” issues concern measures that address prospective investors, foreign firms which have not yet invested in the host country concerned, have not entered it or been admitted into it. “Post-investment” issues, on the other hand, concern the situation and treatment of investments that have already been made.

The distinction reflects the differential treatment of these issues in classical international law: the principle of territorial sovereignty gives States the power to admit or exclude aliens, including foreign firms, from their territory as well as full jurisdiction over existing investments. While, however, the exercise of that jurisdiction has been traditionally subject to qualifications -- for instance, by reference to so-called “acquired rights” of foreigners or by virtue of the rules of State responsibility for the treatment of aliens -- State powers over admission have been far less circumscribed. It is true that much of modern international law concerning foreign investment consists of interpretations of and qualifications to the principle of territorial sovereignty, whether by national law or through international agreements. Yet, it remains true that, even today, there are fewer limitations on a State’s right to exclude investment (or aliens in general) than on its jurisdiction over investors already established (admitted) in its territory.

The distinction therefore retains its validity. For the purposes of this paper, however, it is of limited usefulness because the issues and provisions under review are unequally divided between the two categories. Problems of admission and establishment are but a relatively small part of the *problématique* arising in connection with FDI, much of which either refers to post-investment alone or covers both pre- and post-investment situations.

A more appropriate criterion is that of the object and purpose of the provisions in question, or of what each category of provisions seeks to accomplish. In seeking to classify provisions in this manner, existing policy trends and tendencies provide the controlling tests. It is thus possible to distinguish today two principal categories of key issues, each of which covers a variety of sub-issues closely (and sometimes, not so closely) linked to one another:

- A first class of issues may be linked to the process of liberalization, a process which, in its application to FDI, involves the gradual decrease or elimination of measures and restrictions on the admission and operations of firms, especially foreign ones, the application of positive standards of treatment with a view towards the elimination of discrimination against foreign enterprises, and the implementation of measures and policies seeking to promote the proper functioning of markets (UNCTAD, 1994, ch. VII).
- A second category covers provisions that concern the protection of foreign investments after they have been made against Government measures damaging to them.

Another class of provisions and approaches, of a different character, must also be examined. It cuts across, as it were, the two former categories, and serves as a possible corrective to them. It covers provisions and approaches which, by importing into the operation of IIAs the necessary flexibility, seek to ensure and enhance the development of the host countries concerned.

After a brief discussion of the preliminary question of definitions in IIAs, the rest of this section will then address the two classes of key issues enumerated. This involves, in effect, going over the “key issues” already listed (table 1), which form the subject of this Series.¹ The last category, flexibility, will be briefly considered in the next section.

A. Definitions

In legal instruments, definitions are not neutral and objective descriptions of concepts; they form part of an instrument’s normative content. They determine the object to which an instrument’s rules apply and thereby interact intimately with the scope and purpose of the instrument. Particular terms may be given a technical meaning, which may or may not coincide with their “usual” or “generally accepted” meaning. The meaning of a term, as found in a definition in a particular instrument, may be specific to that instrument, and may or may not be easily transferable to other instruments and contexts.

The way in which a term is defined in an international instrument, whether by a formal definition or through the manner in which it is used, affects significantly the substance of the legal rules involved. Moreover, like all provisions in an instrument, those on definitions interact with other provisions. The meaning of a term may change, because of the way in which another term is defined or because of the formulation of a particular rule. Thus, the definition of “investment” may determine the exact scope of a provision concerning expropriation; at the same time, the exact formulation of a provision on expropriation may in fact supplement or amend the formal definition of “investment”.

The definition of the key term “investment” will be briefly discussed here, as an illustration of the kinds of problems that arise. With respect to the definition of that term, earlier instruments dealing with FDI fall in two broad categories:

- Instruments that concern the cross-border movement of capital and resources usually define investment in narrow terms, distinguishing FDI from other types of investment (e.g. portfolio investment) and insisting on an investor’s control over the enterprise as a necessary element of the concept of FDI. Such instruments thus tend to stress the differences between various types of investment of capital. A classical definition of this type is found in Annex A of the OECD Code of Liberalisation of Capital Movements.
- Instruments mainly directed at the protection of FDI usually define investment in a broad and comprehensive manner. They cover not only the capital (or the resources) that have crossed borders with a view to the acquisition of control over an enterprise, but also most other kinds of assets of the enterprise or of the investor -- property and property rights of various kinds; non-equity investment, including several types of loans and portfolio transactions; and other contractual rights, sometimes including rights created by administrative action of a host State (licences, permits, etc.). Such a definition is found, for instance, in BITs, as well as in the World Bank-sponsored Convention on the creation of MIGA.

The rationale for these differing approaches is evident. Capital movement-oriented instruments look at investment before it is made, whether with a view to its regulation and control (as was the case in past decades), or with a view to removing obstacles to its realization (as in the current context of liberalization). Since the package that constitutes an investment consists of resources of many kinds, the policy context, and therefore the legal treatment, of each type may differ; it would not do therefore to define investment in broad terms covering all types of resources.

Protection-oriented instruments, on the other hand, seek to safeguard the interests of the investors (or, in broader context, to promote FDI by safeguarding the investors' interests). For the purposes of protection, investment is understood as something that is already there (or that will be there, by the time protection becomes necessary). The older terminology, which referred to "acquired rights" or to "foreign property" (see, for example the 1967 OECD draft Convention on the Protection of Foreign Property), makes the context clear, as does the more recent usage of "assets" as the key term. From such a perspective, the exact character of the particular assets is not by itself important, since protection (mainly against extraordinary Government action damaging to them) is to be extended to them after their acquisition by the investor, when they already form part of the investor's patrimony. Definitions tend therefore to be broad, in order to cover as many as possible of the investor's assets.

The two types of definitions are not inconsistent. They simply serve different purposes. In fact, they overlap, since the broader, protection-oriented, definition normally contains all the elements of the narrower one, along with additional elements. Use of a single definition in a multi-purpose instrument assumes that the same policies apply to all the investment transactions and activities involved, in particular, both to the act of investing and to the treatment of assets already acquired. Recent practice in regional and multilateral agreements that are intended both to liberalize investment regulation and to protect investments appears to favour broader definitions -- witness the definitions found in NAFTA, the MERCOSUR Protocols, the Energy Charter Treaty and especially the draft MAI. This practice extends the scope of

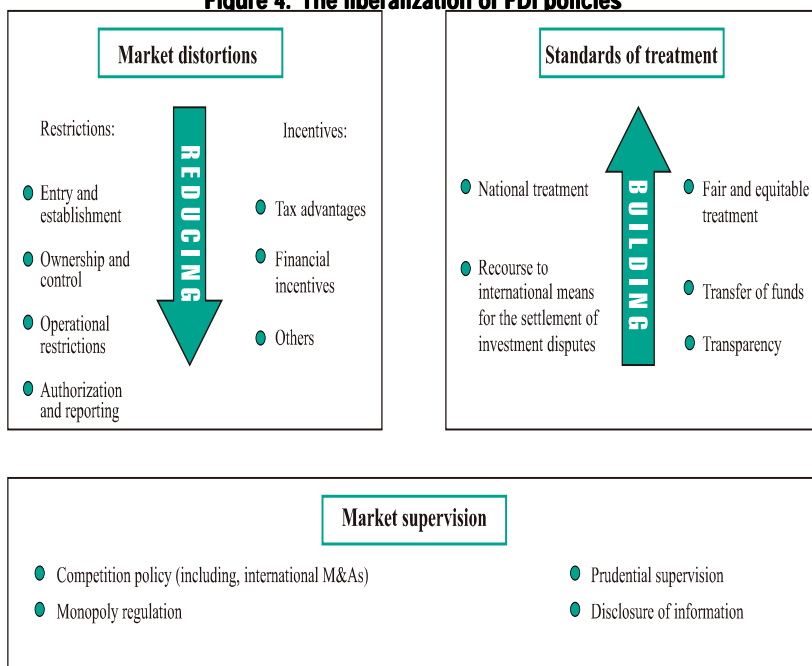
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liberalization, since obstacles and discriminatory measures are removed with respect to a greater variety of investments and investment operations.

B. Liberalization

As already noted, the process of liberalization of FDI laws and policies may be understood as consisting of three principal elements: (a) the removal of restrictive, and thereby market-distorting, Government measures; (b) the application of certain positive standards of treatment, primarily directed at the elimination of discrimination against foreign investors; and (c) measures intended to ensure the proper operation of markets (figure 4).

Figure 4. The liberalization of FDI policies



Source: UNCTAD, 1998b, p. 94.

These types of measures are closely interconnected. But it is useful for analytical purposes to keep them distinct. Restrictions and standards of treatment may apply to different phases or different aspects of an investment: its entry and establishment, its ownership or its operations after entry. They were and are established by national law. They are reflected in international instruments chiefly to the extent that international rules may seek to restrict or even prohibit certain kinds of national measures. A necessary background element may be added, namely, the presence of a general legal, administrative and even political framework. To the extent that this element is reflected in international instruments on FDI, it may take the form of recognizing certain types of international duties of investors and the promotion of national and international measures to ensure the proper functioning of the market.

To understand the process of liberalization concerning FDI, it is necessary to view current developments against the background of earlier trends. As already noted, in the early post-war decades, extensive restrictions were imposed on foreign affiliates, with a view to protecting the national economy from excessive foreign influence or domination and supporting local firms against powerful foreign competitors. Current directions of national and international FDI regulation may reflect a reconsideration of the need for such measures but also of the form they are to take. Not only is the reality of the dangers against which they are directed contested, but there are doubts, based on the experience from their application, as to the possibilities for effective administration of restrictive measures, and there is also an awareness of their impact on a country's position in the competition for FDI. Moreover, as later discussion will show, in no case is it a matter of all or nothing; like all policies, liberalization is a matter of degree, phasing and manner of implementation.

Investment measures may be directed at both domestic and foreign investment. In many instances, however, they are directed specifically at foreign investment. In that case, the relaxation or elimination of investment measures and restrictions directed at FDI may be brought about through adoption of general standards of nondiscriminatory treatment. The application of general standards as the principal method for the decrease or elimination of restrictive

measures is indeed an important, and relatively novel, feature of current trends in IIAs.

1. Standards of treatment

The most common standards of treatment in use in IIAs are the “most-favoured-nation” (MFN) standard, the national treatment standard and the standard of “fair and equitable” treatment. The first two are known as relative (or contingent) standards, because they do not define expressly the contents of the treatment they accord but establish it by reference to an existing legal regime, that of other aliens in the one case and that of host State nationals in the other. The legal regime to which reference is made changes over time, and the changes apply to the foreign beneficiaries of MFN or national treatment as well. The last standard is qualified as “absolute” (or non-contingent), because it is supposed itself to establish, through its formulation, its unchanging contents.

While the distinction between the two kinds of standards is not in fact all that clear and rigid, it does point to an important characteristic of the two. They are meant to ensure, not uniformity of treatment at the international level, but nondiscrimination, as between foreign investors of differing origins -- from different (foreign) countries -- in the case of the MFN standard, and as between foreign and domestic investors, in the case of the national treatment standard.

The usual formal definitions of these two standards refer, not to equal or identical treatment, but to “treatment no less favourable” than that accorded to the “most-favoured” third nation, in the one case, and to the nationals (and products) of the host country, in the other. The clear implication of the formula is that privileged treatment, discrimination in favour of the foreign investor, is allowed, even though, with few exceptions, equality of treatment is accorded in practice. There have been some cases where actual equality of treatment is provided for.

The precise interpretation of the two relative standards, when applied to concrete circumstances, raises a number of problems. Since they are, by definition, comparative in character, their actual

content depends on the extent to which the legal situation of other aliens or nationals can be determined with any degree of clarity. In United States practice, the standard is said to be applicable “in like situations”, a formula that sounds reasonable but is criticized as introducing new complications.

When providing for the application of treatment standards, IIAs allow for a number of exceptions or qualifications. The most frequent among the express exceptions refer to matters relating to public order and health and national security; the latter exception may be interpreted so as to cover a wide number of topics. In a number of cases, particular industries or types of business activities may be listed where these standards (especially that of national treatment) may not apply. In recent practice, exceptions, particularly to national treatment, may be provided for in a number of ways. The practice of attaching to the main instrument extensive detailed “negative lists”, often by each country involved, has been developed both in BITs and in some plurilateral or multilateral agreements. It is also possible to provide for “positive lists”, that is to say, for listing the cases where the country concerned accords the relevant general standard of treatment.

There is a recent trend towards utilization of both the MFN and national treatment standards, “whichever is more favourable”, with respect to post-investment treatment. Who judges what is or is not more favourable, on the basis of which criteria and as to what feature of the investment or its treatment, is by no means clear.

The two standards are increasingly accepted in the current practice concerning foreign investment. More precisely, the MFN standard appears by and large generally accepted in current pre- and post-investment practice with few specific exceptions; discrimination as between firms from different countries is not common. The national treatment standard, for its part, is increasingly but by no means universally accepted; many host countries still wish to retain the ability to favour their own domestic firms when needed, not only with respect to the admission and establishment of investments, but also in some cases to the treatment of investments after their admission.

In earlier treaty practice, a number of absolute or noncontingent standards were used (e.g. treatment “according to international law”). Some of them are still in use (box 6). However, the 1967 OECD draft Convention on the Protection of Foreign Property introduced the standard of “fair and equitable treatment”. Initially proposed in a draft for an investment convention (Abs and Shawcross, 1960), this standard has made its fortune since the 1960s in BITs practice. Although its precise purport is not quite clear, since its meaning is not defined in the pertinent instruments, it is gradually acquiring a more specific content through diplomatic and arbitral practice. Since it is an absolute standard, its contents do not vary according to local law and policy, and its comprehensive character has found favour among investors and capital-exporting countries.

**Box 6. Noncontingent standards of treatment:
the example of the Energy Charter Treaty**

Article 10

**PROMOTION, PROTECTION AND TREATMENT OF
INVESTMENTS**

- (1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to Make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any Contracting Party.

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Source: UNCTAD, 1996a, p. 555.

2. Entry and establishment

Measures concerning FDI involve in many instances the exercise of controls over the admission of investments. Such controls may extend over a very broad spectrum: from prohibition to selective admission to mere registration. Total prohibition of FDI was always very rare and is no longer to be found anywhere nowadays. Certain key industries may be closed to foreign investment, or investment in them may be allowed subject to conditions (e.g. foreign investors may only have minority participation).

The screening of investments before admission was once very common, nearly universal. The prevailing pattern, with numerous variations, was fairly settled. Prospective investors had to apply to the host country's authorities for permission to invest; the latter would allow an investment only when it met the policy criteria set out in the relevant laws and regulations, including possible conditions relating to the structure of ownership (e.g. participation of local investors) or to the nature of a firm's operations (e.g. employment of local personnel, utilization of local raw materials and supplies, emphasis on exports).

Today, screening is to be found in far fewer, although still numerous, cases. Where it exists, it tends to be less strict and demanding. As noted, restrictions relating to the protection of national security, sometimes very broadly defined, are still common. In countries where exchange controls are in effect, the registration or authorization of foreign investment on entry is often a precondition for allowing later transfer of profits or capital outside the host country.

Restrictions and other requirements were and are established by national law. They are not imposed by international instruments, although some regional economic agreements provided for such a possibility. Thus, Decision 24 of the Commission of the Cartagena Agreement (1970) allowed (and in some cases required) member States to take specified types of measures with a view towards controlling the entry and operations of foreign investors. Decision 24 was amended in 1988 and eventually replaced by Decision

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291 of 1991, which removed many of the restrictive features of the earlier provisions.

Despite the extensive changes in policies in the past decade, recent surveys of investment admission requirements in national law show that, while there is a definite trend towards their elimination, controls and restrictions on entry of widely varying import are still in effect in many countries. In most cases, they involve limitations on entry into particular sectors or industries, or the direct or indirect application of screening.

Since entry restrictions often apply only to foreign investment, their removal may be brought about, as already noted, by the application of non-discriminatory standards of treatment, especially national treatment, even though, at first blush, the position of foreign investors seeking admission is not formally comparable to that of domestic investors (since the latter are already in the host country). Most BITs recommend a favourable approach to FDI and the removal of entry restrictions, but provide that investments are to be admitted in accordance with local laws and regulations. The position of the World Bank's Legal Framework for the Treatment of Foreign Investment is essentially similar, accepting the host countries' right to regulate entry, yet recommending "open admission, possibly subject to a restricted list of investments (which are either prohibited or require screening and licensing)" (World Bank, 1992, p. 37). The APEC Non-Binding Investment Principles provide for MFN treatment as far as admission of investments is concerned.

A number of international instruments, however, including some bilateral agreements -- those that adopt the United States approach -- provide for national and MFN treatment in matters of entry and establishment, that is to say, for removal of all discrimination in matters of admission. It is nevertheless common, to allow notification of "negative lists" of the industries in which the rule of nondiscrimination does not apply.

As already noted, this "negative list" approach has found favour in recent multilateral or regional IIAs. It is, for instance, largely reflected in NAFTA. Most recently, it has been adopted with regard to pre-investment treatment in the draft Supplementary

Treaty to the Energy Charter Treaty. The main Treaty, concluded in 1994, provides that participating States will accord national and MFN treatment, whichever is most favourable, to existing energy investments of other Parties, but will merely “endeavour” to accord such treatment as far as admission is concerned (Art. 10 (2)). This was intended to be a provisional arrangement. On the basis of an express provision in the treaty, negotiations for a supplementary treaty started immediately upon the main Treaty’s conclusion, with a view to providing (in binding terms) for the grant of the same treatment to the admission of energy investments. The negotiations that followed led in December 1997 to a draft text which provides that national and MFN treatment will be accorded in the pre-investment phase, subject to the exemption of duly notified negative lists of non-conforming measures. As of October 1999, however, the Energy Charter Conference had not proceeded to adopt the draft.

The draft MAI negotiated in the OECD also adopted the “negative list” approach to commitments regarding the national treatment of foreign investments. The sheer bulk of the pertinent listing has indeed been cited as one of the problems that led to the abandonment of the negotiations.

It is, however, possible to provide for exceptions and qualifications on the basis of a “positive” approach, where States “open” particular industries and operations to FDI, usually in exchange for similar action by other States. This pattern, which moves along the lines of the exchange of “concessions” in trade negotiations, is found, for instance, in the GATS.

Regional arrangements, whether for the purpose of economic integration or other forms of closer economic cooperation, have often provided for special legal regimes regarding admission, as well as post-admission treatment, for enterprises from participating countries. Such efforts have multiplied in recent years, although the degree of their success or even of their reality, in terms of effective and extensive application, varies widely.

The Andean Pact countries were the first to create (in 1971) a subregional type of corporation, the “multinational enterprise”.

These are duly registered companies owned predominantly by nationals of participating countries (with limits on the participation of extraregional investors). Such enterprises are to be accorded special treatment, in most cases national treatment, in each participating State. Similar entities, with extensive variations as to their specific legal status and treatment, have also been created in the framework of other economic integration or cooperation efforts: “multinational companies”, in the Central African Customs and Economic Union; “community enterprises”, in the Economic Community of the Great Lakes Countries in Central Africa; “ASEAN industrial joint ventures”, in the ASEAN framework; “CARICOM enterprises”, in the framework of the Caribbean Common Market; and “multinational industrial enterprises”, in the Preferential Trade Area for Eastern and Southern African States. It is not clear whether and how far this device has been successful. In the Andean countries, very few such “multinational enterprises” were established in the first two decades of the relevant Decision’s effect, and it was extensively amended in the early 1990s. In the European Community, proposals for the creation of a “European company” with a special status in Community law have been debated for a long time, but no agreement has been reached.

Investors from countries participating in economic cooperation or integration arrangements are frequently accorded national treatment as to admission and operation in the absence of a requirement for a common corporate form. This has been the case in the European Community, by virtue of the founding treaty’s provisions on establishment. Provisions for free admission of investments are found in other regionally oriented agreements, such as the Unified Agreement for the Investment of Arab Capital in the Arab States, the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, and NAFTA.

3. Treatment after admission

Foreign affiliates already admitted in a country are subject to that country’s jurisdiction and operate under its legal system. As a general rule, subject to specific exceptions, they are not entitled to special treatment. The main problems of international relevance

that may arise in this respect (apart from expropriation and similar measures) concern the possibility of restrictive and/or discriminatory national measures affecting their operations.

The rules on post-establishment treatment have been considerably liberalized in recent years. As already noted, the MFN standard is by now generally accepted in this context, while the national treatment standard has gained considerable strength, although it certainly is not universally accepted. The application of both standards is provided in several recent regional instruments, such as NAFTA and the Energy Charter Treaty, and in a number of important “soft law” texts, such as the World Bank-sponsored Legal Framework for the Treatment of Foreign Investment and the APEC Non-Binding Investment Principles.

Treatment after admission obviously involves many possible topics. Some of the older multilateral instruments had sought to deal with all or most of the relevant topics. This was eminently the case with the draft United Nations Code of Conduct on Transnational Corporations. Most recent instruments, however, address only a limited range of issues.

Many facets of post-admission treatment fall within distinct and well-established broader domains of international action. Accordingly, they are often regulated by general instruments -- multilateral and regional conventions, networks of bilateral treaties or decisions of international organizations -- that deal with the relevant domain as a whole, specific FDI matters being regulated incidentally along with other topics. This is the case, for instance, with taxation issues, which are of principal importance to investors, but which constitute a separate, large and highly technical field, regulated at the international level mainly through bilateral agreements. The United Nations Model Double Taxation Convention between Developed and Developing Countries and the OECD Model Tax Convention on Income and Capital provide model texts for such agreements that have been widely utilized. A related text that points to another direction of action is the Caribbean Common Market’s Agreement on the Harmonisation of Fiscal Incentives to Industry.

Some specific issues of this kind are of major importance to investments or assume special forms in connection with them, so that they are dealt with both in general agreements and in special, FDI-related, instruments. Thus, while many of the legal issues relating to transfer of technology are governed, apart from national legislation, by multilateral conventions on intellectual property, related matters are often found in instruments concerning FDI. Current definitions of FDI in international instruments, for instance, often cover the contractual aspects of technology transfer, such as licensing of patents, trademarks and other kinds of intellectual property rights, even when they are not associated with the acquisition of control over an enterprise. In the 1970s, in response to the growth of international technology flows and an awareness of the role of technology in the development process, there was an effort to prepare an international code of conduct that would establish universally acceptable norms and standards for transfer of technology transactions. After lengthy negotiations, in the United Nations Conference on an International Code of Conduct on Transfer of Technology in the framework of UNCTAD, no consensus was reached. The topic has come up again in recent years, although with a different focus and emphasis. Intellectual property issues were dealt with in the agreement on TRIPS, in the WTO framework, and transfer of technology issues were briefly addressed in the 1994 Energy Charter Treaty.

Beginning in the 1960s, and increasingly in the decades that followed, in order to enhance the local economy's benefits from FDI, host countries sought to impose on foreign investors, usually as conditions for admission or for the grant of special incentives, requirements concerning certain aspects of their operations, such as local content and export performance. By replacing stricter and more rigid regulations, such "performance requirements" contributed for a time to the liberalization of FDI admission, at the cost of creating trade distortions. Since the mid-1980s, however, their effects on trade have led to demands for their removal or limitation. The United States took the lead in including clauses to that effect in bilateral investment agreements, and by now other countries have followed suit. At the multilateral level, the Uruguay Round agreement on TRIMs ("trade-related investment measures", another name for performance requirements), which bans certain

categories of performance requirements, is of particular importance. Developing country arguments that performance requirements were necessary to counter possible restrictive practices of TNCs and to enhance the beneficial effects of FDI (Puri and Brusick, 1989; Fennell and Tyler, 1993; UNCTC and UNCTAD, 1991; Puri and Bondad, 1990) did not carry the day at the Uruguay Round, although the issue is still a matter of concern to many developing countries and considerable controversy persists.

4. Measures to ensure the proper operation of markets

Another important dimension in the legal regulation of FDI and TNCs has become apparent in recent decades. The liberalization process at work seeks to bring about a situation in which national, regional and world markets function efficiently and where the impact of Government measures that adversely affect or distort their functioning is minimized. In an increasingly integrated world economy, however, the proper functioning of the market depends not only on the control of Government measures that seek to regulate, or otherwise directly influence, the conduct of foreign investors, but also on the presence of a broader national and international legal framework protecting the market from public or private actions and policies that distort its operation (UNCTAD, 1997).

Regional and to a lesser extent multilateral instruments already embody rules and mechanisms to that effect, although the general picture is still mixed and no comprehensive regulatory framework has emerged. One difficulty in establishing such a framework, apart from obvious policy differences between States, is that international law and international instruments generally do not directly address investors. While they may impose on States duties (or recognize rights and competencies) that concern investors, to their benefit or to their detriment, they normally do not deal directly with TNCs or their affiliates, expressly recognizing rights to or imposing obligations on them. This pattern is beginning to change, just as the international law status of individuals, on which it is modelled, is changing. The development of international legal norms for the protection of human rights and for the suppression of international crimes and terrorism is increasingly bringing individuals within the ambit of international law as to rights as well as duties

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established by international law. There is obviously no clear and ready-made analogy between business activities, however harmful to the operation of markets, and the extreme kinds of conduct such recent developments address. Still, it is important to note that it can no longer be assumed with any certainty that international law norms cannot reach individuals and cannot regulate private conduct.

In the particular context of FDI, a number of international standards may be emerging which relate and may be directly applicable to the conduct of TNCs and their affiliates. The legal mechanisms by which such standards may become operative are complicated and at this moment still uncertain. This is even more so the case when it is taken into account that TNCs usually lack legal personality in national and even more in international law. The most convenient avenue for lending effectiveness to such standards and rules remains the traditional one of having recourse to national action through the recognition of national competence over related activities or the undertaking by States of specific international obligations to act on particular matters.

In a number of areas, however, the contents of international standards for TNC activities are becoming increasingly clear and definite. An important domain in which international standards appear to be developing is that of competition and restrictive business practices. International concern in this area dates back to the first post-war years. Repeated efforts have been made since then, although for a long time with very limited success. The only comprehensive related instrument is the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, negotiated in the framework of UNCTAD and adopted by the United Nations General Assembly in 1980. The issue was also extensively debated in UNCTAD, in the context of the negotiations over the draft International Code of Conduct on Transfer of Technology. Recently, the matter has come again to the foreground during the Uruguay Round negotiations, in the context of the agreements on TRIPS and TRIMs. The former Agreement addresses, among other things, the relation between restrictive business practices and transfer of technology. And as already noted, during the negotiations of the latter Agreement, developing countries placed

great emphasis on the need to counter restrictive business practices by TNCs. The resulting Agreement provides that, at the first review of related issues, the possibility of adding provisions on “competition policy” shall be considered. A significant amount of work on the topic has been undertaken since then in the framework of the pertinent WTO Working Group.

The protection of the environment is probably the domain in which the process of international regulation is today most active. Relevant provisions are found in many recent instruments. In some cases, most of them only indirectly related to FDI, as in the case of maritime pollution, legally-binding rules have been adopted. In most of the cases that are more directly related to FDI, either the instruments themselves are not legally binding, or, when they are, the formulation of the relevant provisions tends to be relatively “soft”. Among texts of the former type, one may cite the UNCTC Criteria for Sustainable Development Management: Towards Environmentally Sustainable Development, and the relevant provisions of the draft United Nations Code of Conduct on TNCs. An illustration of the latter case are the provisions on protection of the environment in the Energy Charter Treaty. At the regional level, the pertinent chapter of the OECD Guidelines for Multinational Enterprises, under renewed consideration at the end of 1999, is of particular significance. On specific issues, the series of OECD recommendations on the avoidance of transborder pollution is of immediate relevance.

Similar standards have been proposed in other areas of FDI-related activity. The codes of conduct adopted in the 1970s or early 1980s contain numerous pertinent provisions. Labour and employment issues are dealt with in the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and more recently in the ILO Declaration on Fundamental Principles and Rights at Work (ILO, 1998). The relevant chapters in the OECD Guidelines should have acquired increased significance in view of the renewed attention being paid to that instrument. Protection of consumers is the topic of several instruments, such as the WHO International Code of Marketing of Breast-milk Substitutes and the United Nations guidelines for consumer protection. Protection of privacy and regulation of transborder data flows have also been dealt with by a Council of Europe Convention and by important

OECD instruments. Other issues closely related to FDI are dealt with chiefly through networks of bilateral agreements; this is particularly the case with taxation problems and the related issue of transfer pricing.

The issue of bribery and illicit payments has recently received considerable attention. The topic had already been addressed earlier, at a time when efforts were made to draft international codes of conduct. In the past few years, however, several proposed international agreements have dealt with that issue, notably, the 1996 Inter-American Convention against Corruption (OAS, 1996), the 1997 OECD draft Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD, 1996) (which follows in the footsteps of an earlier Recommendation on the same topic), and the Council of Europe's 1999 draft Criminal Law Convention on Corruption (CoE, 1999). A number of other recent instruments have dealt with the same topic, in particular, two United Nations General Assembly resolutions in successive years, namely, resolution 51/191 (1996), United Nations Declaration against Corruption and Bribery in International Commercial Transactions (UNGA, 1997), and resolution 52/87, on International Cooperation against Corruption and Bribery in International Commercial Transactions (UNGA, 1998), as well as the International Chamber of Commerce's recently updated Rules of Conduct to Combat Extortion and Bribery.

It is clear that international standards relating to TNC conduct have by no means reached the stage of legal perfection that would render them capable of being effectively invoked by States (and others, whether non-governmental organizations or individuals) in their relations with TNCs and their affiliates. It is, however, significant that at the moment this is an area of active concern in international forums. Apart from providing models for national legislation, whose international legitimacy is thus ensured in advance, such standards may also be contributing to the creation of a general climate on their various subject matters, a climate that TNCs are increasingly taking into account in assuming the burden of socially responsible action in conducting their operations.

C. Investment protection

The general heading of “investment protection” covers international rules and principles designed to protect the interests of foreign investors against host Government actions unduly detrimental to their interests. The norms in question have their roots in customary law, but in recent years they have found expression in numerous treaty provisions.

Protection was a topic of particular importance in the decades after the Second World War, when established investments, especially in natural resources, were affected by Government takings, in the context of either large-scale sociopolitical reforms or recent decolonization. The wide spread use of exchange controls, in most countries, including for a long time most developed ones, created another major issue, less emotional perhaps but of great practical importance -- that of the “repatriation of benefits and capital”, as it was called at the time (nowadays covered by the broader term of “transfer of funds”). And a far-ranging spirit of mistrust towards foreign investment in host countries gave rise to fears that few neutral decision makers could be found in the courts and administrative agencies of these countries. By and large, these same topics, albeit with significant variations in intensity, are still on the agenda of international action concerning foreign investment.

It is obvious that whatever a Government does may affect, positively or negatively, the interests of the enterprises operating in its territory, foreign or, for that matter, domestic. Even routine regulatory action, such as zoning regulation or the issuance of construction permits and operation licences, can affect the profitability of an enterprise and may even sometimes lead to its closing down. The impact can be more serious where regulations for the protection of public health, the protection of the environment or other such core governmental responsibilities are concerned. An enterprise, whether domestic or foreign, functions under the laws in effect in the host country. One may construe the foreign investors’ demands for national treatment in precisely these terms: they seek to be able to operate under the laws in force, with no discrimination or differential treatment. It would be unreasonable to expect that

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foreign enterprises would be protected against any and all measures that, in one way or another, may be detrimental to their interests.

It is thus necessary to try to determine more clearly the kinds of measures against which protection might be sought. At first blush, they would have to be those that cause “undue” damage -- measures, that is to say, that either contravene accepted international norms or infringe on the legitimate expectations of investors. Given the diversity of situations and regimes in the world, it is necessary to explore in more specific terms the types of action that may be involved.

The Government measures against which protection may be sought may thus be seen as falling into three broad categories:

- First and foremost, measures, such as property takings and abrogations of contracts, that cause major disruptions to, or even terminate, an investor’s operations in the host country, contrary to what could be legitimately expected or foreseen at the time of entry.
- Secondly, other measures, possibly less catastrophic but still seriously detrimental to an investor’s interests, such as discriminatory taxation, disregard of intellectual property rights, or arbitrary refusal of licences.
- A third category would cover measures which, although not necessarily unfair or even unpredictable, affect foreign investors in a disproportionate manner, compared to domestic enterprises, so that pertinent assurances are considered necessary.

There is no clear borderline between these types of measures. Distinctions between them are chiefly based on the scale of the impact of the measures, on the intent behind the measures, even on what may normally be expected. Thus, the terms of “creeping”, “indirect” or “constructive” expropriation, or “regulatory takings”, are sometimes applied to measures that are not qualified expressly as expropriations or property takings, but whose intended impact is ruinous for the investor.

It is evident that the entire category of investment protection issues is a fluid one and depends largely upon the state of the broader international legal framework for FDI. To the extent that this framework evolves -- that restrictions are eliminated, for instance, or positive general standards applied -- the need for measures of protection will presumably diminish. The scope of investment protection may thus be understood as changing, in that the number of such issues decreases, as other international norms concerning investment are expanding. At the very least, problems will no longer be perceived as relating to investment protection but rather as concerning possible infringements of general standards of treatment.

Conceptually, in fact, these are issues that may be best understood as coming under the rubric of "treatment". It is not easy to specify what exactly serves to differentiate them from other treatment issues, apart from the fact that "investment protection" is an established class of issues in international law and practice. In many instances, the differentiating factor may be the intent behind the measures, especially where discrimination against aliens is present. In more objective terms, situations of vital importance to investors may be involved, which relate to their status as aliens and to the fact that they are not, at least initially, members of the political community of the host country or that they may continue to have close links outside the country (e.g. the foreign firms' profit centre may be located outside the host country, so that the application of "normal" exchange controls may be particularly detrimental to it).

One last point may help further to clarify matters. A number of possible assurances to investors, for example concerning special tax incentives or guarantees as to the immutability of the legal regime under which the investment was undertaken, are generally the subject of contractual or quasi-contractual arrangements between investor and host State. Such specific assurances are generally not covered by clauses in broader international instruments, save to the extent that the latter frequently seek to ensure that all promises to investors should be carried out in good faith.

1. Takings of property

The principal measures against which investors seek protection are expropriations, nationalizations and other major cases of deprivation of property and infringement of property rights of investors. As already noted, the first post-war decades saw many instances of large-scale action of this kind, the consequences of sociopolitical change, in Western and Eastern Europe, and of decolonization and resulting efforts to assert control over their natural resources, in other continents. Both the historical context and the ideological motivations have today changed. Although the not-so-distant past has left some mistrust and apprehension in its wake, the actual likelihood of large-scale action of this sort is today rather unlikely. However, because of political problems or of real or perceived failures in the application of laws or the administration of justice, the possibility of arbitrary measures against individual investors, has not totally disappeared.

In the classical international law of State responsibility for injuries to aliens, a sharp distinction was made between measures affecting the property of aliens and those dealing with their rights from contracts with the State. The distinction reflected in part doctrinal classifications (sometimes found in national constitutional law) which resulted in increased legal protection for property rights as compared to contractual ones. It was also based, however, on the perception that aliens entering into contracts with foreign Governments were cognizant of the risks and could not therefore complain as to any sovereign action affecting their interests. In the Latin American international law tradition, State contracts were generally subject to local jurisdiction, whether by an express clause inserted in the contract itself (the so-called “Calvo clause”) or by express constitutional provision (Shea, 1955). The distinction was of considerable practical significance, since the most important activities of interest to foreign investors were the exploitation of natural resources and the operation of public utility enterprises, both of which were generally based on contracts of concession with the Government. In the decades after the Second World War, the importance of State contracts for foreign investors was enhanced by the practice of according special tax treatment or other rights

by means of “investment conventions” or other special instruments, often deemed to be of a contractual character.

The international law of “State contracts”, as it came to be called, went through several phases and an extensive case law of arbitral awards developed (Fatouros, 1962; Kuusi, 1979; Sacerdoti, 1972; Paasivirta, 1990). On the one hand, the contractual (or “quasi-contractual”) character of administrative acts governing a State’s relations with foreign private persons was put in doubt, and their administrative character emphasized. On the other hand, for many international jurists, the actual importance of such arrangements for the host State and even for the world economy brought them increasingly closer to the status of international (i.e. intergovernmental) agreements and outside the exclusive jurisdiction of the State involved. Yet, the consequences of such “internationalization” were by no means clear. For some writers (and arbitrators), “internationalization” meant that the strict international law rules governing treaty obligations were applicable. For others, to the contrary, a politically informed approach was necessary, whose reasoning went along the more flexible lines of “administrative contracts” in national law (especially, French administrative law). By and large, however, the trend has been to treat aliens’ rights derived from State contracts in manners approximating those of property rights.

Relevant international law norms, concerning both deprivation of foreign property and abrogation of State contracts, have been the object of considerable debate in the decades since the end of the Second World War. In practice, most of the debate centred on the requirement of compensation and the modalities of its assessment and payment. Developed countries have insisted that, for such actions to be internationally lawful, they have to meet the requirements established in classical international law: the measures have to be taken in the public interest, they should not be discriminatory, and they should be accompanied by full compensation. Developing countries, while frequently allowing that appropriate compensation should normally be paid, have asserted that any conditions or prerequisites for property takings within a country’s territory are to be determined by that country’s own laws and are subject to the exclusive jurisdiction of its courts.

Trends in International Investment Agreements: An Overview

The controversies just outlined are mirrored in several of the earlier international instruments. A successful effort at reaching a compromise, in a specific context, was the 1962 United Nations General Assembly resolution 1803(XVII), on permanent sovereignty over natural wealth and resources (box 2). The developed countries' positions are reflected in such texts as the 1967 OECD draft Convention, while the positions of developing countries in the 1970s may be seen in the General Assembly resolutions associated with a New International Economic Order. The problems of investment protection were a major point of difference in the negotiations on the United Nations draft Code of Conduct on Transnational Corporations.

The current situation is not totally clear, although, once again, certain trends are unmistakable. The most important change in the attitudes of both Governments and investors has been one in perspective. To begin with, the dichotomy between home and host countries characteristic of earlier discussions has been overtaken by changes in the structure of the world economy. An increasing number of countries now see themselves on both sides of that divide. Partly as a result, concern has shifted from dealing with past situations to establishing rules for the future. Host countries appear to be increasingly inclined to provide assurances of fair treatment to future investors, including undertakings against expropriation, promises of full compensation and acceptance of dispute-settlement procedures, both because they consider it useful for attracting FDI and because they do not consider it probable that they would wish to take such measures in the foreseeable future. The positions that thus appear to crystallize in several recent texts are closer to those that were in the past supported by the capital-exporting countries. In fact, for several decades now, host countries have accepted many of these positions in BITs, while generally resisting their incorporation into regional and multilateral instruments. It is chiefly in this last respect that their attitudes appear to be evolving. As a result, strong provisions on the subject are found in such recent instruments as NAFTA, the Energy Charter Treaty and the World Bank Guidelines on the Treatment of Foreign Direct Investment.

The formulation of pertinent provisions in international instruments raises issues related to the problems of definition already discussed. Efforts to expand the scope of the notion of expropriation or “taking”, by covering “indirect” measures, so that so-called “regulatory takings” are covered, raise the possibility of excessively limiting generally accepted regulatory powers of the host State. Recent debate over the MAI brought such concerns to the fore. One suggested way of coping with the issue is to include in IIAs declaratory provisions on preserving the State’s regulatory powers. Yet, the actual value of such general statements will become clearer only when such texts are applied and are interpreted by arbitral or other tribunals. In the past, indeed, such issues were sometimes dealt with when fixing the amount of compensation to be awarded, for instance, by taking into account not only the extent of an investor’s injury but also the State’s benefit or enrichment from the measures (or lack thereof).

In the wake of provisions on property takings in regional and multilateral instruments, provisions may also be found that concern protection against injuries caused by civil war or internal disorder. These provisions, however, assure investors not of indemnification in all cases, but of non-discrimination in the award of compensation. That is to say, contrary to the usual run of expropriation provisions, foreign firms in such cases are to be compensated only when domestic firms in similar situations are.

2. Other issues of investment protection

Provisions on other possible measures detrimental to the investors’ interests are found in international instruments specifically directed at investment protection, particularly BITs. Since they cover a variety of possible situations, they are usually less specific and concrete than the provisions on protection against expropriation and they are closely related to the provisions on the general treatment of investors. Thus, the general nondiscrimination standards may be invoked to protect against discriminatory treatment in matters of taxation. In addition, absolute standards, preeminently that of “fair and equitable treatment”, are utilized.

The case of the Energy Charter Treaty is characteristic. The first paragraph in the article dealing with investment provides a series of norms and (essentially non-contingent) standards regarding the appropriate treatment of investments (before and after admission) (box 6). According to that provision, parties shall “accord at all times to investments ... fair and equitable treatment” and treatment no less favourable than “that required by international law”; investments “shall enjoy the most constant protection”; and no party “shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal”. Subsequent paragraphs address other issues, such as nondiscrimination.

Finally, an important aspect of investment protection is the availability, at both the national and international levels, of investment insurance against non-commercial risks, which cover measures relating to several protection issues. National programmes to that effect have been operating for several decades in most capital-exporting countries. On the international level, the adoption in 1985 of the convention establishing MIGA, under the auspices of the World Bank, made possible the provision of insurance to investments that might not have been fully eligible under national programmes. The Agency has also undertaken a useful role in promoting the development of a favourable legal climate for foreign investments.

At the regional level as well, several international agreements have established investment guarantee agencies, as in the case of the Convention Establishing the Inter-Arab Investment Guarantee Corporation, and the Articles of Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit. BITs, as well as several regional and multilateral instruments, supplement these schemes by providing for the possibility of subrogation of the guarantee agencies to the investors’ rights.

3. Transfer of funds and related issues

A major category of investment protection provisions consists of measures that seek to address concerns that are specific to foreign investors, because, for instance, their investment crosses national

borders, their base of operations and profit centres are in another country, their managerial personnel is often foreign, etc. The main such provisions are those concerning the transfer of funds (profits, capital, royalties and other types of payments) by the investor outside the host country and the possibility of employing foreign managerial or specialized personnel without restrictions.

These matters fall within the broad area of the regulation of movement of capital and payments, on the one hand, and persons, on the other. Many of the former issues are covered by the Articles of Agreement of the International Monetary Fund and its decisions and acts. Among OECD members, the Liberalisation Codes provide for the removal of restrictions not only on capital movements but also on current payments, including transfer of profits from investments.

Given the presence of exchange controls and restrictions in many host countries, instruments specifically concerned with investment frequently address this issue. In many cases, indeed, provisions on transfer of funds go beyond the mere assurance that foreign investors will be free to buy foreign exchange; where exchange restrictions are in effect, foreign investors may be guaranteed that foreign exchange will be made available to them or that they will have priority access to it. In national legislation on FDI, provisions were common, and still persist in a number of cases, whereby investors were guaranteed the right to transfer abroad, under specified conditions, their profits (or a percentage thereof) and, usually under more restrictive terms, the capital invested.

In the first post-war decades, when exchange controls were still widely prevalent, international instruments, even among developed countries, tended to avoid strong provisions on fund transfers. The pertinent recommendation in the OECD 1967 draft Convention is characteristically weak. Recent instruments tend to be stronger, although this is true of few multilateral instruments; one important example is that of the World Bank Guidelines on the Treatment of Foreign Direct Investment. Such provisions are more common on the regional level, as, for instance, in Decision 291 of the Andean Pact and in several regional instruments. Provisions allowing the free transfer of funds are also found in the APEC Non-Binding

Investment Principles, in the Energy Charter Treaty and in BITs. In several cases, the provisions are subject to an exception when the host country faces major balance-of-payments problems.

4. Settlement of disputes

The complex operations of a modern enterprise give rise to a host of legal problems that may lead to disputes. Proper legal planning combined with good management may succeed in resolving most of them before they reach the point where they become legal disputes. Still, it is to be expected that, since problems will arise, some of them will not be resolved through negotiations or other friendly arrangements. With respect to the operations of a foreign affiliate in a host country -- and depending on the parties concerned -- three classes of possible disputes may be distinguished: disputes between the investor and another private party; interstate (or State-to-State) disputes; and disputes between the host State and the investor.

Disputes between private parties. These are normally left to be resolved through recourse to the host country judicial system or to arbitration between the parties ("commercial arbitration"). The presence of a properly functioning national system of administration of justice is a central element of a country's investment climate. It is also a necessary part of the general legal framework that is indispensable for effective liberalization. International instruments can encourage the growth of such institutions but they cannot establish them. In the past, capital-exporting countries had sometimes sought to ensure that the option of private commercial arbitration would be available to investors, but such proposals are no longer common, at least at a governmental level.

Classical international law has generally not been directly concerned with disputes between private parties, save in exceptional cases, where some failure on the part of the State organs might be detected and the rules of the law of State responsibility can be invoked. IIAs and other international instruments have addressed this issue with a view towards facilitating the execution of eventual arbitral awards, something that in many countries had initially

met with procedural and jurisdictional obstacles. This is the task that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has performed with considerable success.

Arbitration procedures and mechanisms that can be voluntarily used by private investors in such disputes (as well as in disputes between States and investors) have been established by various intergovernmental and non-governmental instruments. The United Nations Commission on International Trade Law (UNCITRAL) rules of arbitration and the International Chamber of Commerce rules and institutional mechanisms are prime illustrations of successful such efforts.

State-to-State arbitration. State-to-State arbitration or adjudication is, of course, a major possibility in traditional public international law. Older instruments as well as the relatively recent Rules of Arbitration prepared by the International Law Commission provide for relevant procedures. Many IIAs provide that, with respect to any dispute concerning the interpretation or application of the instrument itself and usually after the failure of diplomatic or other efforts at resolving the dispute, recourse may be had to interstate arbitration (or adjudication before the International Court of Justice). Such provisions are of direct relevance to the topic at hand because they also would normally cover the possibility of espousal of an investor's claim by his home State, on the basis of the rules on diplomatic protection and the law of State responsibility. It is precisely in order to avoid elevating an investment dispute to an interstate problem that provision for investor-to-State arbitration is made in many investment-related international instruments.

Investor-to-State disputes. The disputes between an investor and a host State are the ones where the search for a dispute-settlement method has been most active in recent years. In the past, such disputes either were resolved by the host country's national courts or resulted in an interstate dispute, through espousal of the private claim by the State of the investor's nationality. In several instances, on the basis of international agreements between the host State and the State of the investor's nationality, concluded after the dispute had arisen, such disputes came before special (arbitral) tribunals (sometimes called "mixed claims commissions"). A major

recent instance is the operation of the Iran-United States Claims Tribunal. Such an approach may be appropriate where a considerable number of disputes have accumulated or where the disputes have arisen in special contexts.

Investor-to-State disputes are normally subject to the jurisdiction of the host State's courts. To the extent, for instance, that foreign investors have been accorded national treatment, they are entitled to seek redress before the local courts. In most instances this remains an option open to the investors, and many States insist that, with respect to at least some issues (e.g. taxation or constitutional questions), foreign investors should remain subject to local jurisdiction.

Investors, and their States of nationality, have insisted, however, that alternative means of dispute settlement are preferable and help better to protect investments, because of a number of possible considerations: the mistrust towards foreign investment prevalent in many host countries, combined with the high political importance of some of the disputes, which gives rise to fears that no neutral national decisionmakers can be found; the lack of judicial expertise in modern financial and other issues in some developing countries; and a desire for speedier resolution of possible conflicts. All these arguments militate in favour of a recourse to special dispute-settlement procedures, on the basis of existing international commercial arbitration mechanisms. Providing for some form of arbitration before a dispute has arisen helps moreover to avoid elevating a future dispute to the intergovernmental, political, level.

One major instrument to that effect is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded in 1965 (Broches, 1972). It was proposed by and negotiated under the auspices of the World Bank and is administered by the International Centre for Settlement of Investment Disputes, which operates in the framework of the World Bank. A permanent machinery and binding procedures for arbitration (and conciliation) of investment disputes has thus been established. In addition, Permanent Court of Arbitration has issued a set of optional Rules for such disputes (not necessarily restricted to investment). Other instruments and institutions that deal in the

main with disputes between private persons are also available for disputes between investors and States. This is the case with the rules and institutional machinery of the International Chamber of Commerce and with the UNCITRAL Rules, which were applied before the Iran-United States Claims Tribunal.

Most recent IIAs contain provisions on dispute settlement. Among recent regional and interregional instruments, NAFTA, the Energy Charter Treaty and the draft MAI cover in lengthy provisions the possibilities of State-to-State and investor-to-State arbitration. Similar clauses are found in the numerous BITs that have been concluded in the past four decades.

The practice that has prevailed is to allow a choice of procedures, often after unsuccessful recourse to negotiations or conciliation procedures. The adjudication procedures range usually from the local courts and tribunals to any of several arbitration institutions or sets of rules, such as those named above, at the choice of the party that has recourse to them -- that is to say, usually the foreign investor.

Interesting problems of legal sociology arise out of the operation of such a diffuse and decentralized system of dispute settlement, which are outside the scope of this paper (Dezaley and Garth, 1996). One important facet, however, should be mentioned. Dispute-settlement procedures of any kind have two basic functions. One is to settle in a fair and mutually acceptable manner the particular dispute that has arisen. The other is to contribute to the eventual development of a body of rules on the topics involved. Many national and international bodies of law have developed through the case law of individual courts. While the first function is predominant from the point of view of any individual investor, the second becomes increasingly important when one deals with a broader framework of rules and procedures that covers a large number of possible investment relationships. In the current practices (and debates) concerning investment-related dispute settlement, the first function is taken fully into account. It may be, however, that more attention should be paid to the manner in which the second function is served by the methods today prevalent.

Note

- ¹ References to individual Issues Papers seem redundant in this context, except when specific points at issue are involved. Since the Issues Papers, moreover, contain the relevant bibliography, bibliographical references in this section have been kept to a minimum.

Section IV

THE DEVELOPMENT DIMENSION OF IIAs AND THE NEED FOR FLEXIBILITY

In considering current trends concerning IIAs, it is important to pay particular attention to their impact on development. Developing countries seek FDI in order to promote their economic development; this is their paramount objective. To that end, by participating in IIAs and through national legislation, they have sought to establish a legal framework that would reduce obstacles to FDI, strengthen positive standards of treatment and ensure the proper functioning of markets, while also assuring foreign investors of a high level of protection for their investments. A question that must be examined, then, at the end of this brief study of IIAs, is the manner and extent to which participation in IIAs may indeed assist developing countries in their efforts to advance their economic development.

To begin with, it is by now generally accepted that host countries can derive considerable benefits from increased FDI (UNCTAD, 1999a and b). Developing country Governments participate in IIAs because they believe that, on balance, these instruments help them attract FDI and benefit from it. At the same time, IIAs, like all international agreements, limit to a certain extent the freedom of action of the States party to them, and thereby limit the policy options available to decision makers for pursuing development objectives. A question arises, therefore, as to whether and how far developing countries participating in IIAs can maintain a certain policy space to promote their development by influencing, through direct or indirect measures, the amount and kinds of FDI that they receive and the conduct of the foreign firms involved. National Governments, after all, remain responsible for the welfare of their people in this, as in other, domains.

Thus, when concluding IIAs, developing countries face a basic challenge: how to link the goal of creating an appropriate stable, predictable and transparent FDI policy framework that enables

firms to advance their corporate objectives on the one hand, with that of retaining a margin of freedom necessary to pursue their national development objectives, on the other. These objectives are by no means contradictory. A concept that can help link them is “flexibility”, which, for present purposes, can be defined as the ability of IIAs to adapt to the particular conditions prevailing in developing countries and to the realities of the economic asymmetries between these countries and developed countries (UNCTAD, forthcoming c).

A discussion of flexibility in IIAs can be approached from four main angles:

- **Objectives.** IIAs often address development concerns by including in their text, usually in the preamble, declaratory statements referring to the promotion of development as a main objective of the agreement, or to specific ways by which to contribute to development objectives, or a generally worded recognition of the special needs of developing and/or least developed country parties requiring flexibility in the operation of the obligations under the agreement. There are many variations of such language, and it is hard to generalize regarding its actual role and importance. Preambles and similar declarations normally do not directly create rights and obligations for the parties to the instrument, but they are relevant to its interpretation. In fact, the texts of preambles are often the result of hard bargaining. To the extent that such language reflects the will of the participating countries, it helps to reaffirm the acceptance of development as a central purpose of current international arrangements. The specific language used in each case and its relationship to the rest of the instrument is, of course, important. The pertinent language may be less significant if it is merely a declaration of intentions, while it may have greater impact when it is so formulated (or so located in the instrument) as to permit its utilization, in negotiations, in court, or in arbitration, so as in turn to make development a test for the interpretation or application of other provisions or otherwise to vary their effect.

- **Overall structure.** Promotion of development can also be manifested in the very structure of IIAs. For example, an agreement may expressly (or, in certain cases, by clear implication) distinguish between developed and developing participating countries, by establishing, for instance, separate categories, the members of which do not have exactly the same rights and duties. There may also be general clauses allowing for special and differential (in fact, more favourable) treatment of developing countries.

The most common device aimed at promoting the development of developing countries in IIAs is the inclusion of various kinds of exceptions and special clauses, essentially granting developing countries a certain freedom to waive or postpone the application of particular provisions of the instrument, with a view to taking action to promote their development. Such exceptions take a great variety of forms: they may be general (e.g. for the protection of national security) or sectoral (e.g. the so-called “cultural exception”), they may set a time limit (so-called “transitional provisions”) or they may be country-specific. It is also possible to allow the gradual expansion of commitments on the basis of a positive listing of industries or activities, as opposed to a listing of exceptions. The compilation of the latter is by no means easy, since it involves a thorough command of the actual effects of national measures, an accurate prediction of future interpretations of particular provisions of the IIA involved and a full understanding of future needs and policy decisions.

- **Substantive provisions.** A balance of rights and obligations can also find expression in the substantive content of an IIA -- beginning with the choices countries make about the issues they wish to include in an IIA, and those they wish to keep outside the scope of an agreement -- and in the formulation of its substantive provisions, through ways that allow countries to retain some flexibility regarding the commitments they made, keeping also in mind the various interactions between issues and provisions. The range of approaches and permutations that can be used in formulating substantive provisions in IIAs is broad. Of course, flexibility

might need to be approached in different ways for each individual substantive issue depending on its characteristics and developmental effects. For example, the type of approaches to flexibility that can be useful in a development context regarding the admission and establishment of FDI might not be relevant to post-establishment national and MFN treatment provisions, or to expropriation, labour or environmental standards. There are no general prescriptions on the matter. The choice of approach depends on the conditions prevailing in each country and the particular development strategies pursued by each Government.

Furthermore, it is self-evident that, for the purposes of assessing its impact on development, it is the entire instrument that counts and not particular facets or provisions.

- **Modalities of application.** Flexibility for development can also be exercised during the application stage of an IIA. The manner in which an IIA is interpreted, and the way in which it is to be made effective, determine whether its objectives, structure and substantive provisions produce the desired developmental effects. The degree of flexibility allowed for the interpretation and application of an IIA depends to a large extent on the legal character of an agreement and the formulation of individual provisions. Legally binding agreements, even if they do not provide for implementation mechanisms, impose on the States signatories a legal obligation under international law to comply with their provisions. How far such an obligation actually limits the subsequent freedom of action of the States concerned largely depends on the language of the agreement or the type of obligations imposed. Voluntary instruments, on the other hand, are not legally enforceable but can have an influence on the development of national and international law.

The institutional arrangements involved in the application of IIAs are crucial in the context of development. Action at the national level is fundamental to give effect to the provisions of an IIA. In fact, the adoption of an IIA, whether

as an international agreement or as a formally non-binding instrument, is bound to have an impact on the national policies of the adopting States. The impact, of course, would be stronger and more immediate in the case of the former. In that case, in giving effect to an IIA its provisions may require some kind of incorporation into national law. At the international level, the development outcome of an IIA is intimately related to the intergovernmental institutional machinery for follow-up and monitoring its application. There are various mechanisms that can be involved, ranging from simple reporting requirements (which nevertheless can be a significant inducement to act in compliance) and advisory and consultative functions (aimed at resolving questions arising out of the continuing application of an IIA), to complaint and clarification mechanisms (aimed at facilitating application of non-binding instruments under procedures of a non-adjudicatory nature) and various international methods of settlement of disputes (which may allow more or less freedom to the parties to accept proposed ways for resolution of the dispute). In addition, an agreement might eventually need partial or extensive revisions. This is a fundamental facet of the entire process of the elaboration of an IIA, which is to be understood neither as a preliminary document, nor as a final definitive formulation of rules and procedures. Instead, it may rather be seen as part of a continuing process of interaction, review and adjustment to changing realities and to new perceptions of problems and possibilities.

An important final consideration is the difficulties that many developing countries may experience in trying to apply an IIA, due to lack of adequate skills and resources. These constraints may prevent them from putting in place appropriate mechanisms and institutions to give effect to an IIA. To address such difficulties, IIAs can make special arrangements for technical and financial assistance. In addition, to ensure that the development goals of an IIA are fully realized, it may be desirable for developed countries parties to undertake promotional measures to encourage FDI flows to developing countries.

In conclusion, these are some of the techniques that can be used, combined in a multitude of manners, in the construction of an investment instrument to provide for a certain flexibility in the interest of development. Whatever the combination of elements, the point is that IIAs can be constructed in a manner that ensures an overall balance of rights and obligations for all actors involved, so that all parties can derive benefits from it. Nevertheless, it must be recognized that, like all international agreements, IIAs typically contain obligations that, by their very nature, reduce to some extent the autonomy of the participating countries. At the same time, such agreements need to recognize important differences in the characteristics of the parties involved, in particular the economic asymmetries and levels of development between developing and developed countries. More specifically, if IIAs do not allow developing countries to pursue their fundamental objective of advancing their development -- indeed make a positive contribution to this objective -- they run the risk of being of little or no interest to them. This underlines the importance of designing, from the outset, IIAs in a manner that allows their parties a certain degree of flexibility in pursuing their development objectives. To find the proper balance between obligations and flexibility -- a balance that leaves sufficient space for development-oriented national policies -- is indeed a difficult challenge faced by negotiators of IIAs. This is particularly important as international investment treaty-making activity at all levels has indeed intensified in recent years.

CONCLUDING OBSERVATIONS

In the past four decades, national and international legal policies and rules concerning FDI have repeatedly changed. FDI itself has also changed, in its form, its magnitude and its context. It is now generally agreed that many facets of the legal regulation of FDI are a matter of international concern.

In the national laws and policies relating to FDI, the trends towards liberalization and increased protection have gathered strength during the past 15 years, and at a faster pace in the 1990s.

Entry controls and restrictions have been relaxed and in many cases dismantled. Nondiscriminatory treatment after admission is becoming the rule rather than the exception. Guarantees of non-expropriation and of the free transfer of funds are increasingly given. These trends are gradually spreading to the international level. Guarantees of protection are predominant at bilateral level while, along with liberalization measures, they are expanding at the regional level and have begun approaching the multilateral, worldwide level.

The study of existing regional and multilateral instruments, however, raises a number of difficult questions. The international legal framework for FDI is fluid, chiefly because, despite recent developments, there is no established, clear policy consensus on the subject and its many facets. As a result, there is no comprehensive global instrument. Existing multilateral instruments are partial and fragmentary. Regional and bilateral agreements have in the recent past taken the lead in adapting legal rules to new conditions. But it is not self-evident that the approaches (and even the technical language) appropriate at the regional, and even less, at the bilateral, level are possible and proper at the worldwide level. While the trends in effect appear, in their general lines, reasonably definite, the actual situation in international law and policy with respect to investment lacks coherence and clarity, and the exact relationship among legal actions and measures at the various levels is unclear, since many developments in question are relatively recent and little actual practice and even less case law, judicial or arbitral, has had the chance to crystallize.

It is in this context that the present Series has been prepared. It not only covers most of the important issues that may arise in discussions about IIAs, but also seeks to provide balanced analyses that can shed more light on those issues. To that end, each paper develops a range of policy options that could facilitate the formation of consensus on the various facets of investment frameworks.

Trends in International Investment Agreements: An Overview

Annex table 1. Main international instruments^a dealing with FDI, 1948-mid-1999

Year ^b	Title	Setting	Level	Form	Status
1948	Havana Charter for an International Trade Organization	International Conference on Trade and Employment	Multilateral	Binding	Not ratified
1948	Draft Statutes of the Arbitral Tribunal for Foreign Investment and of the Foreign Investments Court	International Law Association	Non-governmental	Non-binding	Not adopted
1949	International Code of Fair Treatment for Foreign Investments	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1957	Treaty Establishing the European Economic Community	European Economic Community	Regional	Binding	Adopted
1957	Agreement on Arab Economic Unity	Agreement on Arab Economic Unity	Regional	Binding	Adopted
1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards	United Nations	Multilateral	Binding	Adopted
1961	Code of Liberalisation of Capital Movements	OECD	Regional	Binding	Adopted
1961	Code of Liberalisation of Current Invisible Operations	OECD	Regional	Binding	Adopted
1962	United Nations General Assembly Resolution 1803 (XVII): Permanent Sovereignty over Natural Resources	United Nations	Multilateral	Non-binding	Adopted
1963	Model Tax Convention on Income and on Capital	OECD	Regional	Non-binding	Adopted
1965	Common Convention on Investments in the States of the Customs and Economic Union of Central Africa	Customs and Economic Union of Central Africa	Regional	Binding	Adopted
1965	Convention on the Settlement of Investment Disputes between States and Nationals of Other States	World Bank	Multilateral	Binding	Adopted

/...

(Annex table 1, continued)

Year ^b	Title	Setting	Level	Form	Status
1967	Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade	OECD	Regional	Non-binding	Adopted
1967	Draft Convention on the Protection of Foreign Property	OECD	Regional	Non-binding	Not open for signature
1969	Agreement on Andean Subregional Integration	Andean Common Market	Regional	Binding	Adopted
1970	Agreement on Investment and Free Movement of Arab Capital among Arab Countries	Arab Economic Unity	Regional	Binding	Adopted
1970	Decision No. 24 of the Commission of the Cartagena Agreement: Common Regulations Governing Foreign Capital Movement, Trade Marks, Patents, Licences and Royalties	Andean Subregional Integration Group	Regional	Binding	Super-seded
1971	Convention Establishing the Inter-Arab Investment Guarantee Corporation	Inter-Arab Investment Guarantee Corporation	Regional	Binding	Adopted
1972	Joint Convention on the Freedom of Movement of Persons and the Right of Establishment in the Central African Customs and Economic Union	Central African Customs and Economic Union	Regional	Binding	Adopted
1972	Guidelines for International Investment Chamber of Commerce	International governmental	Non-binding	Non-binding	Adopted
1973	Agreement on the Harmonisation of Fiscal Incentives to Industry	Caribbean Common Market	Regional	Binding	Adopted
1973	Treaty Establishing the Caribbean Community	Caribbean Community	Regional	Binding	Adopted

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Trends in International Investment Agreements: An Overview

(Annex table 1, continued)

Year ^b	Title	Setting	Level	Form	Status
1974	United Nations General Assembly Resolution 3201 (S-VI): Declaration on the Establishment of a New International Economic Order and United Nations General Assembly Resolution 3202 (S-VI): Programme of Action on the Establishment of a New International Economic Order	United Nations	Multilateral	Non-binding	Adopted
1974	United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States	United Nations	Multilateral	Non-binding	Adopted
1975	The Multinational Companies Code in the UDEAC (Customs and Economic Union of Central Africa)	Customs and Economic Union of Central Africa	Regional	Binding	Adopted
1975	Charter of Trade Union Demands for the Legislative Control of Multinational Companies	International Confederation of Free Trade Unions	Non-governmental	Non-binding	Adopted
1975	International Chamber of Commerce Rules of Conciliation and Arbitration	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1976	Declaration on International Investment and Multinational Enterprises	OECD	Regional	Binding/non-binding ^c	Adopted
1976	Arbitration Rules of the United Nations Commission on International Trade Law	United Nations	Multilateral	(Model)	Adopted
1977	ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy	International Labour Office	Multilateral	Non-binding	Adopted
1977	International Chamber of Commerce Recommendations to Combat Extortion and Bribery in Business Transactions	International Chamber of Commerce	Non-governmental	Non-binding	Adopted

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(Annex table 1, continued)

Year ^b	Title	Setting	Level	Form	Status
1979	Draft International Agreement on Illicit Payments	United Nations	Multilateral	Binding adopted	Not adopted
1979	United Nations Model Double Taxation Convention between Developed and Developing Countries	United Nations	Multilateral	(Model)	Adopted
1980	The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices	United Nations	Multilateral	Non-binding	Adopted
1980	Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data	OECD	Regional	Non-binding	Adopted
1980	Unified Agreement for the Investment of Arab Capital in the Arab States	League of Arab States	Regional	Binding	Adopted
1980	Treaty Establishing the Latin American Integration Association (LAIA)	LAIA	Regional	Binding	Adopted
1981	International Code of Marketing of Breast-milk Substitutes	World Health Organization	Multilateral	Non-binding	Adopted
1981	Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data	Council of Europe	Regional	Binding	Adopted
1981	Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference	Islamic Conference	Regional	Binding	Adopted
1981	Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States	Preferential Trade Area for Eastern and Southern African States	Regional	Binding	No longer in effect
1982	Community Investment Code of the Economic Community of the Great Lakes Countries (CEPGL)	CEPGL	Regional	Binding	Adopted

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Trends in International Investment Agreements: An Overview

(Annex table 1, continued)

Year ^b	Title	Setting	Level	Form	Status
1983	Draft United Nations Code of Conduct on Transnational Corporations	United Nations	Multilateral	Non-binding	Not adopted
1983	Treaty for the Establishment of the Economic Community of Central African States	Economic Community of Central and African States	Regional	Binding	Adopted
1985	Draft International Code of Conduct on the Transfer of Technology	United Nations	Multilateral	Non-binding	Not adopted
1985	United Nations General Assembly Resolution 39/248: Guidelines for consumer protection	United Nations	Multilateral	Non-binding	Adopted
1985	Convention establishing the Multilateral Investment Guarantee Agency	World Bank	Multilateral	Binding	Adopted
1985	Declaration on Transborder Data Flows	OECD	Regional	Non-binding	Adopted
1987	Agreement for the Establishment of a Regime for CARICOM Enterprises	Caribbean Common Market	Regional	Binding	Adopted
1987	Revised Basic Agreement on ASEAN Industrial Joint Ventures	ASEAN	Regional	Binding	Adopted
1987	An Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the promotion and protection of investment	Agreement among the ASEAN countries	Regional	Binding	Adopted
1989	Fourth ACP-EEC Convention of Lomé	ACP-EU	Regional	Binding	Adopted
1990	Criteria for Sustainable Development Management: Towards Environmentally Sustainable Development	United Nations	Multilateral	Non-binding	Adopted

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(Annex table 1, continued)

Year ^b	Title	Setting	Level	Form	Status
1990	Charter on a Regime of Multinational Industrial Enterprises (MIEs) in the Preferential Trade Area for Eastern and Southern African States	Preferential Trade Area for Eastern and African States	Regional	Binding	Adopted
1991	Decision 291 of the Commission of the Cartagena Agreement: Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licences and Royalties	Andean Subregional Integration Group	Regional	Binding	Adopted
1991	Decision 292 of the Commission of the Cartagena Agreement: Uniform Code on Andean Multinational Enterprises	Andean Subregional Integration Group	Regional	Binding	Adopted
1991	The Business Charter for Sustainable Development: Principles for Environmental Management	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1992	Guidelines on the Treatment of Foreign Direct Investment	World Bank	Multilateral	Non-binding	Adopted
1992	North American Free Trade Agreement	Canada, Mexico and the United States	Regional	Binding	Adopted
1992	The CERES Principles	CERES	Non-governmental	Non-binding	Adopted
1993	Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of which only one is a State	Permanent Court of Arbitration	Multilateral	Binding	Adopted
1993	Treaty establishing the Common Market for Eastern and Southern Africa	Common Market for Eastern and Southern Africa	Regional	Binding	Adopted
1994	Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Multilateral Agreements on Trade in Goods. Agreement on Trade-Related Investment Measures	World Trade Organization	Multilateral	Binding	Adopted

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Trends in International Investment Agreements: An Overview

(Annex table 1, continued)

Year ^b	Title	Setting	Level	Form	Status
1994	Marrakesh Agreement Establishing the World Trade Organization. Annex 1B: General Agreement on Trade in Services and Ministerial Decisions Relating to the General Agreement on Trade in Services	World Trade Organization	Multilateral	Binding	Adopted
1994	Marrakech Agreement Establishing the World Trade Organization. Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights	World Trade Organization	Multilateral	Binding	Adopted
1994	Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in the MERCOSUR (Intra-zonal)	MERCOSUR	Regional	Binding	Adopted
1994	Recommendation of the Council on Bribery in International Business Transactions	OECD	Regional	Non-binding	Adopted
1994	Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR	MERCOSUR	Regional	Binding	Adopted
1994	Free Trade Agreement of the Group of Three	Colombia, Mexico and Venezuela	Regional	Binding	Adopted
1994	APEC Non-Binding Investment Principles	APEC	Regional	Non-binding	Adopted
1994	Energy Charter Treaty	European Energy Charter Conference	Regional	Binding	Adopted
1995	Consumer Charter for Global Business	Consumers International	Non-governmental	Non-binding	Adopted
1995	Pacific Basin Charter on International Investments	Pacific Basin Economic Council	Non-governmental	Non-binding	Adopted
1995	Osaka Action Agenda on Implementation of the Bogor Declaration	APEC	Regional	Non-binding	Adopted

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(Annex table 1, continued)

Year ^b	Title	Setting	Level	Form	Status
1995	Framework Agreement on Services	ASEAN	Regional	Binding	Adopted
1996	Protocol to Amend the 1987 Agreement among six ASEAN Member Countries for the Promotion and Protection of Investments	Six ASEAN member countries	Regional	Binding	Adopted
1996	Inter-American Convention against Corruption	Organization of American States	Regional	Binding	Adopted
1996	Singapore Ministerial Declaration	World Trade Organization	Multilateral	Non-binding	Adopted
1996	Resolution 51/191. United Nations Declaration against Corruption and Bribery in International Commercial Transactions	United Nations General Assembly	Multilateral	Non-binding	Adopted
1997	Resolution 52/191 on International Cooperation against Corruption and Bribery in International Commercial Transactions	United Nations General Assembly	Multilateral	Non-binding	Adopted
1997	Fourth Protocol to the General Agreement on Trade in Services (on Basic Telecommunications Services)	WTO	Multilateral	Binding	Adopted
1997	Convention on Combating Bribery of Foreign Officials in International Business Transactions	OECD	Regional	Binding	Adopted
1997	Fifth Protocol to the General Agreement on Trade in Services (on Financial Services)	WTO	Multilateral	Binding	Adopted
1997	Protocol Amending the Treaty Establishing the Caribbean Community. Protocol II: Establishment, Services, Capital	Caribbean Community	Regional	Binding	Adopted
1997	Draft NGO Charter on Transnational Corporations	People's Action Network to Monitor Japanese TNCs	Non-governmental	Non-binding	Adopted

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Trends in International Investment Agreements: An Overview

(Annex table 1, continued)

Year ^b	Title	Setting	Level	Form	Status
1998	Protocol Amending the Treaty Establishing the Caribbean Community. Protocol III: Industrial Policy	Caribbean Community	Regional	Binding	Adopted
1998	Trade and Investment Cooperation Arrangement between Canada and MERCOSUR	Canada and MERCOSUR	Regional	Binding	Adopted
1998	Memorandum of Understanding on Trade and Investment between the Governments of Canada, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua	Canada and Central American Countries	Regional	Non-binding	Adopted
1998	OECD Council Recommendation on Counteracting Harmful Tax Competition	OECD	Regional	Non-binding	Adopted
1998	The San Jose Ministerial Declaration	Free Trade Area of the Americas	Regional	Non-Binding	Adopted
1998	Model Clauses for Use in Contracts Involving Transborder Data Flows	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1998	OECD Council Recommendation concerning Effective Action against "Hard Core Cartels"	OECD	Regional	Non-binding	Adopted
1998	Draft Multilateral Agreement on Investment	OECD	Multilateral	Binding	Adopted
1998	ILO Declaration on Fundamental Principles and Rights at Work	International Labour Office	Multilateral	Non-binding	Adopted
1998	Draft International Agreement on Investment	Consumer Unity & Trust Society	Non-governmental	Non-binding	Adopted
1998	Towards a Citizen MAI: an Alternative Approach to Developing a Global Investment Treaty Based on Citizen's Rights and Democratic Control	Council of Canadians	Non-governmental	Non-binding	Adopted

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(Annex table 1, concluded)

Year ^b	Title	Setting	Level	Form	Status
1998	Tratado de Libre Comercio entre Centroamérica y la República Dominicana	Central American Countries and Dominican Republic	Regional	Binding	Adopted
1998	Trade and Investment Cooperation Arrangements between Canada and MERCOSUR	Canada and MERCOSUR	Regional	Binding	Adopted
1998	Acuerdo Marco para la Creación de la Zona de Libre Comercio entre la Comunidad Andina y el MERCOSUR	Andean Community and MERCOSUR	Regional	Binding	Adopted
1998	Framework Agreement on the ASEAN Investment Area	ASEAN	Regional	Binding	Adopted
1999	Rules and Recommendations on Extortion and Bribery in International Business Transactions (1999 version)	International Chamber of Commerce	Non-governmental	Non-binding	Adopted
1999	Criminal Law Convention on Corruption	Council of Europe	Regional	Binding	Adopted
1999	Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct	European Parliament	Regional	Non-binding	Adopted
1999	Core Standards	World Development Movement	Non-governmental	Non-binding	Adopted
1999	OECD Principles of Corporate Governance	OECD	Regional	Non-Binding	Adopted

Source: Updated from UNCTAD, 1996b, p. 135-139. The instruments listed here prior to 1996 are reproduced in whole or in part in UNCTAD, 1996a. Instruments listed as having been adopted after 1996 are being reproduced in whole or in part in UNCTAD, forthcoming a.

- ^a Bilateral investment treaties and directives of the European Union are not included in the table.
^b Dates given relate to original ratification. Subsequent revisions of instruments are not included.
^c The OECD Declaration on International Investment and Multinational Enterprises is a political undertaking supported by legally binding Decisions of the Council. The Guidelines on Multinational Enterprises are non-binding standards.

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