UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

KEY TERMS AND CONCEPTS IN IIAs: A GLOSSARY

UNCTAD Series
on Issues in International Investment Agreements

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NOTE

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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;

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

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The material contained in this study may be freely quoted with appropriate acknowledgement.

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IIA Issues Paper Series

The main purpose of the UNCTAD Series on issues in international investment agreements – and other relevant instruments – is to address 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:

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Dispute settlement: State-State
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Environment
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Social responsibility
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Taxation
Transfer of funds
Transfer of technology
Transfer pricing
Transparency
Trends in international investment agreements: an overview

Preface

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) is implementing a work programme on international investment agreements. It seeks to help developing countries to participate as effectively as possible in international investment rule-making at the bilateral, regional, plurilateral and multilateral levels. The programme embraces policy research and development, including the preparation of a Series of issues papers; human resources capacity-building and institution-building, including national seminars, regional symposia and training courses; and support to intergovernmental consensus-building, as well as dialogues between negotiators and groups of civil society.

The present glossary of key terms and concepts in international investment agreements (IIAs) complements this Series. It is provided as a facilitating tool for the understanding of key issues in IIAs.

The Series is produced by a team led by Karl P. Sauvant and James Zhan. The principal officer responsible for its production is Anna Joubin-Bret who oversees the development of the papers at various stages. The members of the team include Federico Ortino and Jörg Weber. The Series' principal advisors are Peter Muchlinski and Patrick Robinson. The present paper is based on a manuscript prepared by Mark Koulen. The final version reflects comments received from Marcela Anzola, Marino Baldi, Philippe Brusick, Rajan Dahjee, Marie-France Houde, Joachim Karl, Mina Mashayekhi and Christoph Schreuer. The paper was desktop published by Teresita Sabico.

R Ricupero

Rubens Ricupero
Secretary-General of UNCTAD

Geneva, May 2004

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UNCTAD has carried out a number of activities related to the work programme in cooperation with other intergovernmental organizations, including the Agence pour la Francophonie, Banco Centroamericano de Integración Económica, CARICOM Secretariat, German Foundation for Development, Inter-Arab Investment Guarantee Corporation, Inter-American Development Bank (BTD/INTAL), League of Arab States, Organization of American States, Secretaria de Integración Económica Centroamericana and the Secretaria General de la Comunidad Andina. UNCTAD has also cooperated with non-governmental organizations, including the Centre for Research on Multinational Corporations, the Consumer Unity and Trust Society (India), the Dutch Foundation for Research on Multinationals (SOMO) (the Netherlands), the Economic Research Forum (Egypt), the European Roundtable of Industrialists, the Friedrich Ebert Foundation (Germany), the German Foundation for International Development, the International Confederation of Free Trade Unions, the Labour Resource and Research Institute (LaRRI) (Namibia), Oxfam, the Third World Network and World Wildlife Fund International. Since 2002, a part of the work programme has been carried out jointly with the World Trade Organization (WTO).

Funds for the work programme have so far been received from Australia, Brazil, Canada, France, Japan, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the European Commission. Argentina, Botswana, China, Colombia, Costa Rica,

Croatia, Cuba, Czech Republic, Djibouti, Egypt, Gabon, Germany, Guatemala, India, Indonesia, Jamaica, Malaysia, Mauritania, Mexico, Morocco, Namibia, Pakistan, Peru, Qatar, Singapore, South Africa, Sri Lanka, Thailand, Trinidad and Tobago, Tunisia, Venezuela and Yemen have also contributed to the work programme by hosting regional symposia, national seminars or training events.

In pursuing this programme of work, UNCTAD has also closely collaborated with a number of international, regional and national organizations, particularly with the Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico (the Universidad de Buenos Aires), the Indian Institute of Foreign Trade, the Legon Centre of Accra (Ghana), ProInversión (Peru), Pontificia Universidad Católica del Perú, the National University of Singapore, Senghor University (Egypt), the University of Dar Es Salaam (Tanzania), the University de Los Andes (Colombia), the University of Campinas (Brazil), the University of Lima (Peru), the Universidad del Pacífico (Peru), the University of Pretoria (South Africa), the University of Tunis (Tunisia), the University of Yaoundé (Cameroon), the Shanghai WTO Affairs Consultation Center (China) and the University of the West Indies (Jamaica and Trinidad and Tobago). All of these contributions are gratefully acknowledged.

List of abbreviations

ACP	African, Caribbean and Pacific States
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
CARICOM	Caribbean Community
COMESA	Common Market for Eastern and Southern Africa
DSU	Dispute Settlement Understanding
EC Treaty	Treaty establishing the European Community
FDI	Foreign direct investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IIA	International investment agreement
ILO	International Labour Organization
IMF	International Monetary Fund
MAI	Multilateral Agreement on Investment
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most-favoured-nation treatment
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
OECD	Organisation for Economic Co-operation and Development
TNC	Transnational corporation
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
WTO	World Trade Organization

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INTRODUCTION

The purpose of this glossary is to provide brief explanatory commentaries on the main terms and concepts used in international investment agreements (IIAs). These terms and concepts have mainly a legal connotation and have been selected because they provide a broad coverage of the principal issues that are dealt with in IIAs. The commentaries are based to a large extent on the papers that have been published in the *UNCTAD Series on Issues in International Investment Agreements* and reference to such papers is made whenever appropriate.

Each entry provides a short definition of the term, followed by examples of relevant provisions in IIAs. To allow for additional information on specific topics, each entry has been complemented by references to related publications for further reading. A list explaining frequently used abbreviations precedes the text, whereas a listing of IIAs can be found at the end of the paper. An index at the end of the paper is meant to facilitate the use of this glossary.

GLOSSARY OF TERMS

Admission and establishment

Customary international law imposes no obligations upon host countries to permit the entry of aliens, including foreign investors. Accordingly, rights of natural and legal persons of one State to enter and conduct business in the territory of another State principally derive from international treaties.

1. Distinction between "admission" and "establishment"

"Admission" refers to the right of entry or presence *per se*, whereas "establishment" refers to a particular type of presence. While a right of admission can be temporary or permanent in nature, a right of establishment involves the setting up of a permanent business presence in a host country. For example, in the European Community (EC) Treaty, which aims *inter alia* at the realization of a freedom of establishment, "establishment" means the right of nationals and companies of one member State to a permanent presence in the territory of another member State for the purpose of taking up economic activity as self-employed persons (in the case of natural persons) or for the purpose of setting up, acquiring and managing of companies (in the case of natural and legal persons).[1] The word "establishment" is also used in agreements such as the NAFTA and some bilateral investment treaties (BITs) that contain obligations of non-discrimination regarding "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments".[2]

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[1] See EC Treaty (consolidated version 1997), Articles 43-48 (ex Articles 52-58).

[2] See NAFTA (1992), Articles 1102, 1103.

2. National regulations on the admission and establishment of foreign investment

The main forms of regulation that have traditionally been employed by host countries with respect to the admission and establishment of foreign investment in their territories consist of (a) measures to control the presence of foreign investment in specific industries or activities; (b) measures to influence the level of foreign ownership or control in specific industries or activities; and (c) measures that permit foreign investment subject to certain conditions. Recent decades have witnessed a widespread trend towards the unilateral liberalization of laws and regulations affecting the admission and establishment of foreign investment. This has been accompanied by an increase in the number of investment agreements that limit the ability of host country governments to adopt measures that restrict the admission and establishment of foreign investment.

3. Provisions in IIAs on the treatment of investors with regard to the admission and establishment of investment

a. Agreements that subject the admission and establishment of foreign investment to domestic law

IIAs vary considerably as to the treatment of investors with regard to the admission and establishment of foreign investment. Most BITs preserve a large measure of discretion of host countries regarding the admission and establishment of foreign investment. A standard clause in such treaties requires each party to encourage and create favourable conditions for investors of the other party to make investments in its territory and to admit such investments, subject to its domestic laws and regulations, and, in some cases, policies. Thus, for example, Article 2 (1) of the model BIT of Austria provides that:

> "[e]ach Contracting Party shall, according to its laws and regulations, promote and admit investments by investors of the other Contracting Party".

Similarly, the model BIT of the United Kingdom provides in its Article 2 (1):

> "Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital."

A number of regional agreements adopt the same approach, including, for example, the 1987 *Application* ASEAN Agreement for the Promotion and Protection of Investments.

b. Application of national and most-favoured-nation treatment

In contrast, recent BITs of Canada and the United States adopt a "combined national treatment and most-favoured-nation treatment model" with regard to the admission and establishment of foreign investment. This means that under such treaties each party is required to accord investors of the other party the better of most-favoured-nation (MFN) treatment and national treatment in respect of both the establishment of investment and the treatment of investment in the post-establishment phase, subject to the ability of the parties to make or maintain exceptions in sectors or matters specified in an annex to the treaty. Thus, Article II of the BIT between El Salvador and the United States provides in its relevant part:

> "1. With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter

> 'national treatment') or to investments in its territory of nationals or companies of a third country (hereinafter 'most favored nation treatment'), whichever is most favorable (hereinafter 'national and most favored nation treatment'). […]
>
> 2. a. A Party may adopt or maintain exceptions to the obligations of paragraph 1 in the sectors or with respect to the matters specified in the Annex to this Treaty. In adopting such an exception, a party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective."

This approach has also been adopted in a number of recent free trade and economic integration agreements, including the NAFTA, the 1994 Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR, the Canada-Chile Free Trade Agreement and the Free Trade Agreement between Chile and Mexico.

c. Right of establishment

The most far-reaching approach to the admission and establishment of foreign investment consists in the granting of a right of establishment. This approach is exemplified by the EC Treaty, which provides for a right of establishment of nationals of a member State in the territory of another member State. This right includes the right to set up agencies, branches or subsidiaries and the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected.[3] The right of establishment also applies to companies or firms formed in accordance with the law of a member State and having their registered office,

[3] EC Treaty, Article 43 (ex Article 52).

central administration or principal place of business within the Community.[4]

The right of establishment does not apply to activities connected with the exercise of official authority and is subject to exceptions on grounds of public policy, public security or public health. The EC Treaty also prohibits all restrictions on movements of capital and payments between the member States and between the member States and third countries. This is without prejudice to the application to third countries of any restrictions that existed on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment, including in real estate, establishment, the provision of financial services or the admission of securities to capital markets. In addition, member States retain the right to apply certain measures in the field of taxation and the prudential supervision of financial institutions and to take measures justified on grounds of public policy or public security. Finally, in exceptional circumstances the Council may adopt safeguard measures with regard to third countries if capital movements to or from third countries cause difficulties for the operation of the economic and monetary union.[5] The requirement to remove obstacles to the free movement of capital also applies to restrictions that do not discriminate on grounds of nationality.[6]

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[4] EC Treaty, Article 48 (ex Article 58).

[5] EC Treaty, Articles 56-60 (ex Articles 73b-g).

[6] Rules on the granting of a right of establishment and on free movement of capital are also contained in agreements concluded by the European Community and its member States with third countries, including notably the various association agreements with countries in Central and Eastern Europe. In some of these cases, however, the scope of such rules is significantly more limited than in the case of the EC Treaty.

d. Admission of investment as an aspect of the liberalization of capital movements

The OECD Code of Liberalisation of Capital Movements, which was originally adopted in 1961 and has since been regularly updated by OECD Council decisions, obligates OECD member countries to liberalize progressively between one another restrictions on movements of capital, including direct investment. The Code allows for country-specific reservations and contains temporary derogations, including in the event of adverse balance-of-payments developments, and exceptions for measures taken on grounds of public order and security, measures taken pursuant to obligations under existing multilateral agreements and measures applied by members forming part of special customs or monetary systems.[7]

e. Admission and establishment of investment in the context of provisions of the GATS on commercial presence

The GATS covers FDI by including into the definition of "trade in services" the supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member".[8] The GATS adopts to a large extent a "selective liberalization model" regarding the admission and establishment of foreign investment. Whether a WTO member is obligated to permit the establishment of a commercial presence in a sector by a foreign service supplier depends upon whether that member has made specific commitments to accord market access and national treatment in the sector in question and upon whether any such commitments are subject

[7] Another OECD legal instrument – the OECD Code of Liberalisation of Current Invisible Operations –obligates OECD member countries to eliminate restrictions on current invisible transactions and transfers. It is relevant to investment insofar as it covers the establishment of branches and agencies in the area of banking and other financial services.

[8] Article I (2) (c). See infra section on Commercial Presence.

to limitations or conditions. “Market access” in this context means that, in a sector in which market access commitments are undertaken, a member shall not apply certain restrictions enumerated in Article XVI of the GATS, unless otherwise specified in its Schedule of Specific Commitments.[9] These restrictions include certain measures that relate specifically to FDI.[10] “National treatment” means that, in a sector inscribed in its Schedule, and subject to any conditions and limitations set out therein, a member “shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers”.[11] It should be noted that in virtue of Article II of the GATS a member is required to accord MFN treatment with respect to any measure affecting trade in services, which includes measures affecting the establishment of a commercial presence by service suppliers of other WTO members. This obligation is of general application and does not depend upon whether a member has made a specific commitment in a sector, but members have been allowed to exempt from this obligation measures that are listed in an annex on Article II Exemptions.

Further reading

UNCTAD (2003). *World Investment Report 2003. FDI Policies for Development: National and International Perspectives* (New York and Geneva: United Nations), United Nations publication, Sales No. E.03.II.D.8, pp. 102-110; UNCTAD (1999). *Admission and Establishment. UNCTAD Series on Issues in International Investment*

[9] See Article XX of the GATS.

[10] Article XVI (2) includes “(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment”.

[11] Article XVII (1).

Agreements (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.10; Wallace, Cynthia D. (2003). *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization* (The Hague: Kluwer Law International); OECD (2002). *Forty Years' Experience with the OECD Code of Liberalisation of Capital Movements* (Paris: OECD); WTO Working Group on the Relationship between Trade and Investment (2002). "Modalities for pre-establishment commitments based on a GATS-type, positive list approach", Note by the Secretariat (Geneva: WTO), WT/WGTI/W/120, http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/W120.doc; Juillard, Patrick (2000). "Freedom of establishment, freedom of capital movements, and freedom of investment", *ICSID Review: Foreign Investment Law Journal*, 15, pp. 322-339; Muchlinski, Peter T. (1999). *Multinational Enterprises and the Law* (Oxford: Blackwell); UNCTAD (1998). *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva: United Nations), United Nations publication, Sales No. E.98.II.D.8, pp. 46-50; Carreau, Dominique and Patrick Juillard (1998). *Droit International Economique* (Paris: Librairie générale de droit et de jurisprudence), pp. 417-443; Conklin, David W. and Don Lecraw (1997). *Foreign Ownership Restrictions and Liberalization Reforms* (Aldershot, England: Ashgate); UNCTAD (1996). *World Investment Report 1996: Investment, Trade and International Policy Arrangements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.96.II.A.14; Dolzer, Rudolf and Margrete Stevens (1995). *Bilateral Investment Treaties* (The Hague, Boston and London: Martinus Nijhoff), pp. 50-57; Rubin, Seymour J. and Don Wallace, eds. (1994). *Transnational Corporations and National Law.* The United Nations Library on Transnational Corporations, vol. 19 (London: Routledge); Safarian, Alfred E. (1993). *Multinational Enterprise and Public Policy* (Aldershot, England: Edward Elgar); Khalil, Mohamed I. (1992). "Treatment of foreign investment in bilateral investment treaties", *ICSID Review: Foreign Investment Law Journal*, 7, pp. 339-383; Tschofen, Franziska (1992). "Multilateral approaches to the treatment of foreign investment", *ICSID*

Review: Foreign Investment Law Journal, 7, pp. 384-427; UNCTC (1990). *Key Concepts in International Investment Arrangements and their Relevance to Negotiations on International Transactions in Services* (New York: United Nations), United Nations publication.

Bilateral investment treaties

Since the late 1950s, bilateral treaties for the promotion and (reciprocal) protection of investment have become the most widely used type of treaty in the field of foreign investment. Such treaties have replaced an earlier type of bilateral treaty, the treaty of Friendship, Commerce and Navigation which included provisions on rights of foreign nationals and companies among rules on a broad range of aspects of bilateral economic and political cooperation. By contrast, the distinguishing feature of the modern BIT is that it deals exclusively with issues concerning the admission, treatment and protection of foreign investment.

BITs exhibit a certain pattern of uniformity in their structure and content. Elements common to virtually all such treaties are the use of a broad definition of the term "investment", the inclusion of certain general standards of treatment of foreign investment, such as fair and equitable treatment and constant protection and security, and more specific standards of protection regarding expropriation and compensation, transfer of funds, and the protection of foreign investment in case of civil strife. Most such treaties also provide for national and MFN treatment, although this is frequently limited to the treatment of foreign investment after admission. Many such treaties provide for the ability of States as well as foreign investors to resort to international arbitration.

The number of BITs has increased significantly, especially during the 1990s. From a total of 386 BITs signed by the end of the 1980s, the number rose to 2,181 at the end of 2002.[1] The majority of

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[1] See UNCTAD (2003). *World Investment Report 2003. FDI Policies for Developmen:National and International Perspectives* (New York and Geneva: United Nations), United Nations publication, Sales No. E.03. II.D.8, p. 21; UNCTAD (2000). *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development* (New York and Geneva: United

these treaties are between a developed country, on the one hand, and a developing country or economy in transition, on the other, but the proportion of BITs concluded between developing countries and between developing countries and countries in transition is increasing. BITs have rarely been concluded between developed countries.

Further reading

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customary international law", *Northwestern Journal of International Law and Business*, vol. 14, pp. 327-375; Khalil, Mohamed I. (1992). "Treatment of foreign investment in bilateral investment treaties", *ICSID Review: Foreign Investment Law Journal*, vol. 7, pp. 339-383; Vandevelde, Kenneth J. (1992). *United States Investment Treaties: Policy and Practice* (Cambridge: Kluwer Law International); Salem, Mahmoud (1986). "Le développement de la protection conventionelle des investissements étrangers", *Journal du Droit International*, vol. 113, pp. 579-626; Laviec, Jean-Pierre (1985). *Protection et Promotion des Investissements* (Paris: Presse Universitaire de France); Juillard, Patrick (1979). "Les conventions bilatérales d'investissements conclues par la France", *Journal du Droit International,* vol. 106, pp. 274-321.

Commercial presence

"Commercial presence" is used in the GATS as one element of the definition of "trade in services".[1] According to Article I of the GATS, "trade in services" comprises four modes of international supply of a service, one of which is the supply of a service by a service supplier of one member "through commercial presence in the territory of any other Member".[2] As defined in Article XXVIII (d) of the GATS, "commercial presence" in this connection means:

> "any type of business or professional establishment, including through
>
> (i) the constitution, acquisition or maintenance of a juridical person, or
>
> (ii) the creation or maintenance of a branch or a representative office,
>
> within the territory of a Member for the purpose of supplying a service".

The term "juridical person", as defined in Article XXVIII (l) means:

> "any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association".

[1] See above section on Admission and Establishment.
[2] See Article I (2) (c).

Further reading

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Compensation for losses

Aside from compensation for expropriation or nationalization of foreign investment,[1] IIAs often contain requirements with respect to the payment of compensation in the case of losses suffered by foreign investors as a result of war, armed conflict, a state of national emergency, revolution and other disturbances.

First, the parties to such agreements are typically required to accord non-discriminatory (national and MFN) treatment to foreign investors in respect of any compensation paid for such losses. As an example, Article 4 (1) of the BIT between Ecuador and the United Kingdom states:

> "Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State. Resulting payments shall be freely transferable."

Second, many agreements also require the parties to compensate foreign investors, regardless of the treatment of domestic investors, if losses suffered by foreign investors in such situations are caused by the requisitioning or destruction of their property by a party's forces or authorities. In this respect, Article 4 (2) of the BIT between Ecuador and the United Kingdom states:

[1] See infra section on Expropriation and Nationalization.

"Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:

(a) requisitioning of their property by its forces or authorities, or

(b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution or adequate compensation in freely convertible currency. Resulting payments shall be freely transferable."

Further reading

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Competition

Competition laws seek to prevent distortions of competition resulting from anti-competitive arrangements between enterprises or from the abuse of market power by dominant firms. The fact that such anti-competitive practices often have an international dimension has given rise to international cooperation in line with various types of instruments, including bilateral agreements, regional free trade and economic integration agreements, competition-related aspects of WTO rules and non-binding instruments adopted by UNCTAD and the OECD. Besides, much co-operation takes place on an informal basis, without the benefit of any instrument.

A number of bilateral agreements exist[1] that do not envisage substantive harmonization of competition law standards but instead aim at cooperation between the parties in the application of their domestic competition laws through provisions on notifications, consultations, avoidance of conflicts and mutual assistance. In some cases, such cooperation extends to the exchange of confidential and non-confidential information and the application of competition policy by one party at the request of another party ("positive comity").

Provisions on competition policy in free trade and economic integration agreements vary considerably in terms of the extent to which they contemplate the adoption of common substantive standards for the control of anti-competitive practices. On the one hand, certain agreements such as the NAFTA and the Canada-Chile Free Trade Agreement only contain a general obligation of the parties to adopt or maintain measures to prevent anti-competitive practices in their

[1] For a list of such agreements in force see e.g. UNCTAD (2002). "Experiences gained so far on international cooperation on competition policy issues and the mechanisms used", Revised Report by the UNCTAD Secretariat (Geneva: United Nations), TD/B/COM.2/CLP/21/Rev.1, www.unctad.org/en/docs//c2clp21r1.en.pdf.

territories without setting forth substantive standards.[2] On the other hand, the EC Treaty provides for supranational competition policy rules.[3] Substantive coordination of competition policy standards is also featured in many agreements concluded by the European Community with third countries, including notably the Agreement on the European Economic Area and the Europe Agreements that have been concluded with countries in Central and Eastern Europe.[4] A coordination of competition policy rules is also envisaged, to varying degrees, in other regional agreements such as the COMESA Treaty, the Energy Charter Treaty, the MERCOSUR Agreement and the Andean Community of Nations (the Cartagena Agreement).

Among the WTO agreements relevant to competition policy, the GATS requires WTO members to ensure that monopolies and exclusive service suppliers do not act in a manner that is inconsistent with their MFN obligations and their specific commitments.[5] The GATS also recognizes that anti-competitive business practices of service suppliers may restrain competition and thereby restrict trade in services, and in this respect requires members to enter into consultations, upon request, with a view to eliminating such practices.[6] A Reference Paper on the regulatory framework for basic telecommunication services, adopted in 1996 in the context of GATS negotiations on basic telecommunication services, includes a commitment to maintain appropriate measures to prevent major suppliers from engaging in anti-competitive practices. The WTO TRIPS Agreement allows members to take appropriate measures to address

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[2] Article 1501 of the NAFTA and Article J-01 of the Canada-Chile Free Trade Agreement.

[3] Articles 81 and 82 (ex Articles 85 and 86).

[4] 1991 with Hungary and Poland; 1993 Bulgaria, Czech Republic, Romania and Slovakia; 1995 Estonia, Latvia and Lithuania; 1996 Slovenia, see http://europa.eu.int/comm/enlargement/pas/ europe_agr.htm.

[5] Article VIII of the GATS.

[6] Article IX.

anti-competitive practices in the licensing of intellectual property rights and provides for a consultation procedure in this regard.[7] The WTO Agreement on Safeguards proscribes measures such as orderly marketing agreements and voluntary export restraints and prohibits members from encouraging or supporting the adoption or maintenance by public and private enterprises of equivalent, non-governmental measures.[8]

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set) was adopted by the General Assembly in Resolution 35/63 of 5 December 1980 in the form of a recommendation to States. Nevertheless, in the four Review Conferences that followed (1985, 1990, 1995 and 2000), it was always unanimously reconfirmed, and the latest Review Conference in 2000 recommended, that its name be shortened to that of "UN Set of Principles and Rules on Competition". Apart from provisions on objectives, scope of application and principles, the Set contains norms addressed to enterprises to refrain from specified forms of anti-competitive agreements and abuse of market power (section D); norms addressed to States regarding the adoption and application of legislation for the control of restrictive business practices and international cooperation in this respect (section E); and the establishment of an institutional framework for cooperation through UNCTAD with respect to the implementation of the Set, including a mechanism for consultation between States with respect to specific instances of restrictive business practices (sections F and G).

The OECD has adopted several Recommendations pertaining to international cooperation in the field of competition policy. Of particular relevance are the Revised Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade, which was

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[7] Articles 8 (2), 31 (k) and 40.
[8] Article 11 (1) (b) and (3).

adopted in 1995, and the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, adopted in 1998. The former Recommendation contains provisions regarding notification, exchange of information, coordination with respect to competition policy proceedings under the domestic laws of member countries; it also provides for procedures for consultations and conciliation that can be invoked when one member country considers that an investigation conducted by another member country affects its important interests or when a member country considers that its interests are affected by anti-competitive conduct of enterprises situated in another member country. The latter Recommendation describes the concept of "hard core cartels" and the sanctions and procedures that should be provided for by the domestic laws of member countries in order to ensure that such laws "effectively halt and deter" such cartels.[9] In addition, it provides for cooperation between member countries in dealing with hard core cartels, notably through the exchange of information.

Many of the above-mentioned instruments are relevant to foreign investment in a broad sense. For example, bilateral cooperation agreements provide a mechanism for cooperation and coordination between national competition policy authorities in reviewing international mergers and acquisitions. It is noteworthy, however, that competition policy issues do not figure explicitly in IIAs. Thus, for example, traditional BITs and similar investment rules contained in regional agreements generally do not lay down explicit obligations with regard to competition policy. It would appear in this respect that the NAFTA, which requires parties to ensure that monopolies and State enterprises do not engage in conduct that adversely affects investments of investors of the other parties, is one of the few agreements that

[9] OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, section I (A).

impose specific obligations in the field of competition policy as an aspect of the treatment to be accorded to foreign investment.[10]

Another specific linkage between investment and competition policy is a provision in several recent BITs and regional agreements that refers to the application of domestic competition laws as an exception to the prohibition of transfer of technology requirements. Thus, Article VI (1) (e)

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[10] With respect to monopolies, Article 1502 (3) of this Agreement requires each party to ensure that "any privately owned monopoly that it designates and any government monopoly that it maintains or designates:

(a) acts in a manner that is not inconsistent with the Party's obligations under the Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, […];

(b) …acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, […];

(c) provides non-discriminatory treatment to investments of investors, to goods and to service providers of another Party […] and

(d) does not use its monopoly position to engage […] in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct".

With respect to State enterprise, Article 1503 (2) and (3) require each party to ensure that any State enterprise that it maintains or establishes acts in a manner that is not inconsistent with the party's obligations under the chapters on investment and financial services, and accords non-discriminatory treatment in the sale of goods or services to investments in the party's territory of investors of another party. See also Articles J-02 and J-03 of the Canada-Chile Free Trade Agreement and (somewhat more limited in scope) Article 22 of the 1994 Energy Charter Treaty.

of the BIT between Nicaragua and the United States prohibits transfer of technology requirements, “except pursuant to an order, commitment or undertaking that is enforced by a court, administrative tribunal or competition authority to remedy an alleged or adjudicated violation of competition laws”.[11] It should be noted more generally in this regard that a prominent theme of debate in discussions in international fora has been whether the application of performance requirements and trade-related investment measures can be justified as a response to anti-competitive practices of foreign investors. The WTO Agreement on Trade-Related Investment Measures provides for a consideration of the possible need to complement this Agreement with provisions on both investment policy and competition policy in the context of the review of the Agreement.

Competition policy issues have also been addressed in the context of instruments on corporate social responsibility. The most prominent example in this respect is found in the 2000 OECD Guidelines for Multinational Enterprises, which state in chapter IX that enterprises should, within the framework of applicable laws and regulations, conduct their activities in a competitive manner. In particular, enterprises should refrain from entering into or carrying out anti-competitive agreements among competitors to fix prices; to make rigged bids; to establish output restrictions or quotas; or to share or divide markets by allocating customers, suppliers, territories or lines of commerce. Moreover, enterprises should conduct all of their activities in a manner consistent with all applicable competition laws; cooperate with the competent authorities of jurisdictions whose economies might be harmed by anti-competitive activity on their part; and promote employee awareness of the importance of compliance with all applicable competition laws and policies.

[11] See also Article 1106 (1) (f) of the NAFTA and Article G-06 (1) (f) of the Canada-Chile Free Trade Agreement.

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Corporate responsibility

"Corporate responsibility" has been defined as the responsibility of firms towards the societies in which they operate. It is a broader concept than "corporate governance", which involves "a set of relationships between a company's management, its board, its shareholders and other stakeholders".[1] Corporate responsibility is not typically addressed in IIAs but has been the subject of several legally non-binding instruments. Existing instruments with respect to corporate responsibility contain norms for corporate conduct in areas such as the role of firms in the socio-political system of host countries; consumer protection; corporate governance; ethical business standards; and the observance of human rights.

The broad potential scope of the concept of corporate responsibility is illustrated by the OECD Guidelines for Multinational Enterprises, which were originally adopted in 1976 and most recently revised in 2000. A chapter of these Guidelines on General Policies includes recommendations *inter alia* with respect to the contribution of enterprises to sustainable development; respect for human rights; encouragement of local capacity building; human capital formation and good corporate governance; and the need for enterprises to abstain from improper involvement in local political activities. This is followed by more specific sections that contain detailed recommendations regarding disclosure of information; employment and industrial relations; environment; bribery; consumer interests; science and technology; competition; and taxation. The draft United Nations Code of Conduct on Transnational Corporations addresses a similarly broad range of aspects of corporate conduct, divided into three main categories, "general and political", "economic, financial and social", and "disclosure of information". The United Nations Global Compact,[2] an

[1] 1999 OECD Principles of Corporate Governance, Preamble, 2nd paragraph.

[2] See: http://www.unglobalcompact.org/Portal/.

initiative launched by the United Nations' Secretary-General in July 2000, asks companies to observe nine principles in the areas of human rights, labour standards and environmental practice.[3] Its scope is thus narrower than the OECD Guidelines for Multinational Enterprises and the draft United Nations Code of Conduct on Transnational Corporations.

Apart from instruments adopted within the framework of international organizations, such as the OECD Guidelines for Multinational Enterprises, the United Nations Global Compact and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (as amended in 2000), guidelines regarding corporate responsibility are contained in a large number of documents adopted by industry associations, individual firms and non-governmental organizations.[4]

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[3] These nine principles are: in human rights (1) Business should support and respect the protection of internationally proclaimed human rights, and (2) Ensure that they are not complicit in human rights abuses; in labour standards (3) Business should uphold the freedom of association and the effective recognition of the right to collective bargaining, as well as (4) The elimination of all forms of forced and compulsory labour, (5) The effective abolition of child labour, and (6) Eliminate discrimination in respect of employment and occupation; in environmental practices (7) Business should support a precautionary approach to environmental challenges, (8) Undertake initiatives to promote greater environmental responsibility and (9) Encourage the development and diffusion of environmentally friendly technologies.

[4] Among global instruments developed by non-governmental organizations mention should be made of the Caux Round Table (CRT) Principles for Business (1994) (http://www.cauxroundtable.org/), the Global Reporting Initiative (1999) (http://www.globalreporting.org/), the Global Sullivan Principles (http://globalsullivanprinciples.org/principles.htm) and the Social Accountability 8000 Standard (http://www.cepaa.org/SA8000/SA8000.htm).

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Denial of benefits

A "denial of benefits" clause in an IIA allows parties to deny the benefits of the agreement to entities that are incorporated under the laws of one of the parties but that are controlled or owned by nationals or companies of a non-party. In most cases, this clause can be invoked on the ground of an absence of meaningful business activity carried out by such entities in their place of incorporation. Additional grounds that are sometimes provided as a basis for the invocation of this type of clause are the absence of normal diplomatic relations between a party and the third country in question and the application of economic sanctions by a party to the third country in question.

An example of a "denial of benefits" clause based solely on the absence of substantial business activity is Article 10 of the most recent Austrian model BIT:

> "A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organized."

A more complex version of a "denial of benefits" clause appears in Article 1113 of the NAFTA:

> "1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party:
>
> (a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized."[1]

Article XXVII (c) of the GATS provides that a WTO member may deny the benefits of the GATS

> "to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement".

Further reading

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[1] See also Article 17 of the Energy Charter Treaty.

WT/WGTI/W/108, http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/W108.doc.

The development dimension of IIAs[1]

The paramount objective for developing countries in seeking foreign investment is to promote their economic development. To that end, they conclude IIAs at various levels, because they believe that, on balance, these instruments help them to attract FDI and benefit from it. By their nature IIAs – like any international agreement – limit to a certain extent the policy options available to governments to pursue their development objectives through FDI. The challenge in IIAs is to strike a balance between the potential contribution of such agreements to increasing FDI flows and the preservation of the ability of countries to pursue development-oriented FDI policies that allow them to benefit more from FDI that is, the right to regulate in the public interest. This requires maintaining sufficient policy space to give governments the flexibility to use such policies within the framework of the obligations established by the IIAs to which they are parties.

A concept that can help link these objectives is "flexibility" which can be defined as the ability of IIAs to be adapted to the particular conditions prevailing in developing countries and to the realities of the economic asymmetries between these countries and developed countries. The concept of “flexibility” seeks to ensure the preservation of sufficient national policy space for host countries to pursue their development objectives, while at the same time limiting their freedom through IIA obligations.

Ensuring sufficient flexibility is a difficult balancing act. In IIAs, it is the result of negotiations in light of overlapping – but not identical – objectives. It finds its expression in the objectives of IIAs, their structure, content and implementation, including through the recognition of the concept of special and differential treatment and the

[1] This text draws on UNCTAD, 2003.

use of exceptions and the like to further development goals. Each is considered in turn. (See further, UNCTAD, 2000).

As to the *objectives* of IIAs, many such agreements incorporate the objective of development among their basic aims, purposes or principles, as a part of their preambular statements, or as specific declaratory clauses articulating general principles. The GATS Agreement (which covers FDI in services) for example, includes among its objectives "the expansion of [...] trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries". The main advantage of such provisions is that they may assist in the interpretation of other substantive obligations, permitting the most development-friendly interpretation to be adopted. This, in turn, assists in the promotion of flexibility for development by ensuring that the objective of development is implied into all obligations and exceptions thereto, and that it informs the standard by which the legitimacy of governmental action is to be assessed under an agreement.

As to the *structure* of agreements, this may reflect development concerns through the application of special and differential treatment for developing country parties. This entails a difference in the extent of obligations undertaken by developed and developing country parties, with the latter having less onerous obligations, either on a temporary or permanent basis, that are also non-reciprocal in nature. This may be achieved in a number of ways. First, agreements can distinguish between developed and developing countries, with differentiated obligations for both. The Convention establishing the Multilateral Investment Guarantee Agency (the MIGA Convention), for example, restricts investment insurance to investments in developing countries only. These are specifically listed in an annex to the MIGA Convention. Secondly, differences may be introduced as to stages and degrees of participation for developing country parties, with accession being made less onerous or allowing for association rather than full commitment to treaty obligations. Thirdly, even where high standards are contained in an IIA, they can be phased in gradually by a developing host country as through a GATS type “positive list” approach to the obligation in question, or through a phase out period, determined in the agreement, by the end of which a country is expected to have eliminated non-conforming national policy measures. The GATS-type positive list approach has the advantage of allowing countries to list, at their own pace, which industries or activities they would want to make subject to the provisions of an agreement, at what pace and under what conditions; for these reasons, it is generally regarded as development friendly. In theory, the use of the “negative list” approach (as used e.g. in NAFTA), in which countries list those industries or activities they do *not* wish to make subject to the provisions of an agreement, should arrive at the same result as the positive list approach; but it requires a greater capacity to assess individual industries or activities or at the time of concluding an agreement.

As to the substantive *content* of agreements, there are several approaches. Flexibility can be ensured by the exclusion of certain issues altogether. For example, the exclusion of provisions on incentives from the draft MAI would have allowed countries to have maximum policy flexibility in this area at least as far as this instrument would have been concerned (and consistent with other international obligations). Most IIAs exclude taxation issues (which are covered in Double Taxation Treaties). Where an issue is included, the relevant provision can be drafted in such a manner as to ensure its development friendliness. Thus, for example, the scope of an investment definition can be adapted to exclude certain types of investment that may create difficulties, e.g. because of their volatility. Equally, admission and establishment provisions can seek to take account of the development objectives of host countries.

Various traditional methods can be used by which policy space can be preserved. These range from various kinds of exceptions, reservations, derogations, and waivers to transitional arrangements whose aim is to ensure that signatories retain their prerogative to apply non-conforming domestic regulations in certain areas. Examples include: exclusions from the non-discrimination principle; safeguards aimed at preserving certain regulatory rights, as in the case of balance-of-payments difficulties and general exceptions for reasons of “public security and order, public health and morality”.

Furthermore, in pursuit of an overall balance, IIAs can include commitments by home countries. All developed countries already have various measures to encourage FDI flows to developing countries in place. These measures can influence the magnitude and quality of FDI flows, and offset some of the locational disadvantages of host developing country parties. Investors, too, can contribute more to advancing the development impact of their investments in developing countries, as part of corporate social responsibilities, whether through voluntary action or more legally-based processes. Aside from social aspects of development, areas particularly important from a development perspective are contributing fully to public revenues of host countries, creating and upgrading linkages with local enterprises, creating employment opportunities, raising local skill levels and transferring technology.

Given the preceding points made in relation to the substantive content of IIAs, it must be noted that the provisions of IIAs interact with one another to complement, clarify, expand, limit or elaborate on the rights and obligations of agreements. For example, general exclusion or exception clauses have the effect of limiting the scope of an agreement or modifying the application of its provisions. Similarly, general standards of treatment, such as national treatment or fair and equitable treatment, affect and complement the substance of more specific standards dealing with, for example, operational conditions or expropriation. These interactions offer multiple possibilities for structuring and combining provisions in IIAs to achieve the desired overall balance of rights and obligations, and accommodate diverging country interests. Thus they are a means of furthering the development dimension of IIAs.

As to the *implementation* of an IIA, this too can be designed with flexibility for development as its organising principle through a range of techniques. In particular, the legal character, mechanisms and effects of an agreement contributes to the process of implementation.

Whether an agreement is legally binding or voluntary in nature affects the intensity of particular obligations. Indeed, it is possible to have a mix of binding commitments and non-binding “best efforts” provisions in one agreement. Thus, development-oriented provisions could be either legally binding or hortatory in nature, depending on the extent to which the parties are willing to undertake commitments in this area. Furthermore, an IIA may specify the level at which implementation is to take place. This can occur at the national, regional or multilateral level, depending on the nature and scope of the IIA in question and the institutional context in which it is concluded.

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Dispute settlement provisions in IIAs

Dispute settlement provisions in IIAs contain the judicial mechanisms with which disputes arising between States (State-State) or between a foreign investor and a host State (investor-State) are dealt with.

1. *Settlement of disputes between States*

Most BITs provide that any dispute between States concerning the interpretation or application of the treaty which is not resolved through negotiations or consultations between the parties shall at the request of either party be submitted to an arbitral tribunal. The use of arbitration as a means of settlement of disputes between States distinguishes BITs from earlier Treaties of Friendship, Commerce and Navigation, which generally provided for the submission of inter-State disputes to the International Court of Justice.[1]

While the requirement that parties first attempt to resolve their dispute through diplomatic channels by negotiations or consultations is a common feature of the dispute settlement clauses of BITs, differences exist with respect to the application of a time limit to the conduct of negotiations or consultations. Whereas some treaties allow for resort to arbitration if diplomatic means have not resulted in a solution within a prescribed period of time, usually three months[2] or six months,[3] other

[1] A prominent example of an inter-State dispute brought before the International Court of Justice pursuant to the dispute settlement provisions of a Treaty of Friendship, Commerce and Navigation is the *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, I.C.J. Reports 1989, p. 15.

[2] See e.g. Article 7 (2) of the BIT between Brazil and Venezuela; Article 10 (2) of the BIT between Denmark and Peru.

[3] See e.g. Article X (2) of the BIT between Colombia and Spain; Article 9 (2) of the BIT between Chile and Norway; Article 7 (2) of the BIT

treaties refer to a failure of negotiations to yield a solution within a reasonable period of time[4] or omit any reference to the time period for negotiations or consultations. [5] Some agreements preclude the invocation of State-State arbitration if the dispute in question is also the subject of an investor-State arbitration.[6] In a few cases limitations exist with respect to the scope of the subject matter that can be referred to State-State dispute settlement.[7]

Arbitration of inter-State disputes under modern BITs is of an *ad hoc* or non-institutional character. The arbitration tribunal is constituted in each individual case in accordance with the provisions of the treaty in question and applies procedural rules that are either specified in the treaty or which the tribunal establishes pursuant to an authorization contained in the treaty.

The constitution of arbitration tribunals for the settlement of inter-State disputes under BITs is governed by a standard clause[8]

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between Argentina and China; Article VIII (2) of the BIT between Bolivia and Ecuador.

[4] See e.g. Article 12 (1) of the BIT between the Netherlands and Paraguay.

[5] See e.g. Article 9 (2) of the BIT between Ecuador and the United Kingdom; Article X (1) of the BIT between Bolivia and the United States; Article XIII (2) of the BIT between Canada and Uruguay; Article 9 (2) of the BIT between Costa Rica and Germany.

[6] See e.g. Article 9 (6) of the BIT between Costa Rica and Germany.

[7] Thus, for example, certain decisions on whether or not to permit an acquisition are excluded from the State-State dispute settlement pursuant to Annex I (VI) of the BIT between Canada and Uruguay.

[8] See e.g. Article XIII (3) of the BIT between Canada and Uruguay; Article 20 of the model BIT of Austria; Article 12 (1)-(4) of the BIT between the Netherlands and Paraguay; Article 9 (3)-(4) of the BIT between Ecuador and the United Kingdom; Article 10 (3)-(4) of the BIT between Germany and Honduras; Article 10 (2)-(4) of the BIT between El Salvador and Switzerland;

providing that each party will appoint one member of the tribunal who will select a national of a third State to serve as the chairperson of the tribunal, a third member, subject to the approval by the two parties. In most cases, there is a specific time limit of two months for the appointment of the members by the parties and two or three months for the appointment of the chairperson of the tribunal. Where such appointments have not been made within the prescribed time limits, the possibility usually exists for either party to request a third person, typically the President of the International Court of Justice, to make the appointments.

Apart from stating that an arbitration tribunal shall decide by majority, most BITs do not contain or refer to specific rules governing the procedural aspects of State-State arbitration proceedings and provide instead that the tribunal shall determine its own procedures. BITs of the United States adopt a different approach in that they provide for the application of the UNCITRAL Arbitration Rules[9] and contain a time limit for the submission of briefs, the conduct of hearings and the issuance of the decision of the arbitration tribunal.[10] The model

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Article 9 (3)-(4) of the BIT between Cuba and the United Kingdom; Article 9 (3)-(4) of the BIT between Costa Rica and Germany.

[9] For example, Article X (1) of the BIT between El Salvador and the United States provides: "[…] In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except to the extent these rules are (a) modified by the Parties or (b) modified by the arbitrators unless either Party objects to the proposed modification."

[10] Article X (3) of the BIT between El Salvador the United States states: "Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the arbitral panel shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later."

Under BITs of Canada, the arbitral panel is required to render its decision within six months from the date of the appointment of the chairman

BIT of Austria requires the arbitral tribunal to apply the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

Many BITs are silent on the question of the law to be applied by an arbitral tribunal in State-State disputes. To the extent that the matter has been addressed, a variety of formulations have been used. Thus, tribunals have been directed to decide disputes "in accordance with this Agreement and the applicable rules and principles of international law";[11] "on the basis of this Agreement and other relevant agreements between the two Contracting Parties, rules of international law and relevant rules of domestic law";[12] or "in accordance with the applicable rules of international law".[13]

While a standard clause provides that awards rendered by arbitral tribunals in State-State arbitration proceedings shall be final and binding on the parties,[14] most investment agreements are silent on the question of the nature of the remedies that may be awarded by arbitral tribunals and on the implementation of arbitral awards.[15]

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unless the parties agree otherwise. See e.g. Article XIII (5) of the BIT between Canada and Uruguay.

[11] Article 21 (1) of the model BIT of Austria.

[12] Article 12 (5) of the BIT between the Netherlands and Paraguay.

[13] Article X (1) of the BIT between El Salvador and the United States.

[14] See e.g. Article 12 (7) of the BIT between the Netherlands and Paraguay; Article 9 (5) of the BIT between Ecuador and the United Kingdom.

[15] Recent BITs concluded by Canada, however, contain a provision that envisages the possibility of the application of countermeasures in case the parties fail to reach agreement on implementation of an arbitral decision. Thus Article XIII (7) of the BIT between Canada and Costa Rica provides: "The Contracting Parties shall, within sixty (60) days of the decision of a panel, reach agreement on the manner in which to implement the decision of the panel. If the Contracting Parties fail to reach agreement, the Contracting Party

In addition to arbitration mechanisms in IIAs, mention should be made of the WTO dispute settlement rules, which can be invoked in disputes that arise between States with regard to investment-related matters covered by the WTO agreements, notably the GATS, the TRIMs Agreement and the TRIPS Agreement. The WTO Dispute Settlement Understanding (DSU) provides that, where a dispute has not been solved through consultations, it shall be referred to a panel which shall issue its report within a specified timeframe. The DSU contains detailed rules on matters such as the conduct of panel proceedings, the law to be applied by panels, the adoption of panel reports on the basis of the principle of "negative consensus", implementation of panel reports and procedures for the authorization of countermeasures where a WTO member has failed to comply with a panel report. An important feature of the DSU is the existence of a possibility for a member party to a dispute to appeal adverse panel rulings to the WTO Appellate Body.

2. Settlement of disputes between foreign investors and host countries

Virtually all modern BITs and investment protection rules contained in regional trade and economic agreements include a specific mechanism for the settlement of disputes between foreign investors and host countries, generally providing for the possibility to submit foreign investment disputes to international arbitration.

Prior recourse to consultations and negotiations is usually stipulated as a precondition for the invocation of international arbitration, by either the investor or the host country. A minimum period of time is often specified that must elapse before a dispute can be

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bringing the dispute shall be entitled to compensation or to suspend benefits of equivalent value to those awarded by the panel."

submitted to international arbitration. Usually this period is three[16] or six months.[17] Some IIAs also provide that a dispute can be submitted to arbitration only within a certain period of time.[18]

Investor-State dispute settlement clauses display significant differences with regard to the relationship between international arbitration and recourse to domestic courts or tribunals. In some cases the possibility of submitting a dispute to international arbitration is subject to a provision that the investor must first have sought redress in a domestic court or tribunal.[19] This can either mean that local remedies must be exhausted or that they must be pursued during a specified period of time. A different approach is reflected in IIAs that do not require exhaustion of local remedies but where resort to local remedies precludes the possibility of submitting the dispute to international arbitration at a subsequent stage.[20] A somewhat less restrictive version

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[16] See e.g. Article IX (3) (a) of the BIT between El Salvador and the United States; Article IX (3) (a) of the BIT between Bolivia and the United States; Article 26 (2) of the 1994 Energy Charter Treaty.

[17] A period of six months is mentioned in e.g. Article 8 (2) of the BIT between Brazil and Venezuela; Article 8 (2) of the BIT between Chile and Norway; Article 10 (2) of the BIT between Costa Rica and Germany; Article 9 (2) of the BIT between El Salvador and Switzerland; Article XII (2) of the BIT between Canada and Uruguay; Article 9 (2) of the 1994 Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR.

[18] An example is the NAFTA, which precludes resort to arbitration if more than three years have elapsed since the investor first acquired or should have first acquired knowledge of the alleged breach of an obligation by a party and knowledge that the investor has incurred loss or damage as a result of such a breach. See Articles 1116 (2) and 1117 (2) of the NAFTA. See also Articles G-17 (2) and G-18 (2) of the Canada-Chile Free Trade Agreement; Article XII (3) (c) of the BIT between Canada and Uruguay.

[19] See e.g. Article 11 (2) of the BIT between the Belgo–Luxembourg Economic Union and Uruguay.

[20] See e.g. Article IX (3) of the BIT between Nicaragua and the United States; Article IX (3) of the BIT between Bolivia and the United States;

of this approach requires that an investor waive the right to initiate or continue proceedings in domestic courts as one of the conditions for the submission of a dispute to international arbitration.[21] A third category of agreements is that which simply identifies recourse to domestic courts as one possible avenue without requiring it as a prerequisite for access to international arbitration or preventing such access once domestic courts have been involved.[22]

As a rule, arbitration of investor-State disputes pursuant to IIAs is of an institutional nature in that the agreements provide that the arbitration shall take place under the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of

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Article 8 (2) of the BIT between Chile and Norway; Article 8 (2) of the BIT between Brazil and Venezuela; Article 9 (3) of the 1994 Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR. Article 26 (2) and (3) of the 1994 Energy Charter Treaty provides that in the case of contracting parties listed in an annex ID to the Treaty the unconditional consent to the submission of disputes to international arbitration does not apply where an investor has previously submitted a dispute to domestic courts.

[21] See e.g. Article 1121 of the NAFTA; Article G-22 of the Canada-Chile Free Trade Agreement; Article XII (3) (b) of the BIT between Canada and Uruguay.

[22] See e.g. Article 9 of the BIT between the Netherlands and Paraguay. It has been argued that, since the ICSID Convention allows Contracting States to require exhaustion of local remedies as a condition for their consent to arbitration, the exhaustion of local remedies rule does not apply if an investment agreement that refers to the 1966 ICSID Convention is silent on the matter. A comparative analysis of BITs concluded during the 1990s found that the vast majority of such treaties do not require exhaustion of local remedies as a condition precedent to the submission of a dispute to international arbitration. See Peters, Paul. “Exhaustion of local remedies: ignored in most bilateral investment treaties”, *Netherlands International Law Review*, 1997, vol. XLIV, pp. 233-243.

other States (ICSID Convention), which entered into force in October 1966.[23] Other forms of institutional arbitration that are sometimes mentioned in IIAs are the 1975 Rules of Arbitration of the ICC, administered by the International Court of Arbitration of the ICC, and the 1999 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. In some cases, *ad hoc* arbitration is provided for, often with reference to the Arbitration Rules of the UNCITRAL.[24] A key feature of modern IIAs is that the choice between various possible venues for arbitration is usually left to the foreign investor.

Article 25 (1) of the ICSID Convention requires that consent to ICSID arbitration be in writing. In this regard, many IIAs express the advance consent of the States parties to the submission of disputes with investors of the other parties to arbitration under the ICSID Convention.[25] Under Article 26 of the ICSID Convention, unless otherwise stated, consent of both parties to arbitration under the ICSID Convention is deemed consent to such arbitration to the exclusion of

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[23] Where one of the parties to an investment agreement is not a party to the ICSID Convention, the arbitration clause usually refers to arbitration under the ICSID Additional Facility Rules, which were adopted in 1978 to provide for arbitration in investment disputes where either the host country or the home country is not a party to the 1966 ICSID Convention.

[24] The UNCITRAL Arbitration Rules were adopted on 15 December 1976 by the United Nations General Assembly Resolution 31/98.

[25] E.g. Article 8 of the BIT between Ecuador and the United Kingdom: “Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as ‘the Centre’) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 (to which they are both parties) any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former. […]”. But not every mention of ICSID in an IIA amounts to consent.

any other remedy. Thus, unless otherwise stated, parties are also precluded from requesting provisional measures in domestic courts. Some IIAs expressly preclude the possibility of resort to State-State dispute settlement in respect of disputes with regard to which an investor and a host country have expressed their consent to arbitration under the ICSID Convention, except where the host country does not abide by an award resulting from such arbitration.[26]

Many IIAs provide that investor-State dispute settlement procedures apply to any legal dispute "concerning", "related to" or "regarding" covered investments,[27] without stating explicitly that the dispute must involve a claim of a breach of the agreement in question. Some agreements, however, require that there be an allegation of a breach of the agreement, sometimes in conjunction with a requirement that the investor has suffered damage as a result of such a breach.[28] In BITs of the United States, the term "investment dispute" is used to cover both disputes between an investor and a host country that arise out of alleged breaches of rights conferred to, created or recognized by such treaties and disputes between an investor and a host country

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[26] See e.g. Article 9 (6) of the BIT between Costa Rica and Germany.

[27] See e.g. Article 8 of the BIT between Ecuador and the United Kingdom; Article 9 (1) of the BIT between the Netherlands and Paraguay; Article XI (1) of the BIT between Colombia and Spain; Article 10 (1) of the BIT between Costa Rica and Germany; Article 8 (1) of the BIT between Brazil and Venezuela.

[28] For example, Article XII (1) of the BIT between Canada and Uruguay states: "Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them. […]"

See also Articles 1116 and 1117 of the NAFTA and Articles G-17 and G-18 of the Canada-Chile Free Trade Agreement.

"arising out of or relating to an investment authorization" or an "investment agreement".[29]

The ICSID Convention applies to any legal dispute "arising directly out of an investment". Whether the subject matter of a dispute concerns an "investment" and whether it "arises directly" out of such investment are matters to be decided on a case-by-case basis. The scope of investor-State dispute settlement clauses is sometimes qualified by the exclusion of certain subjects. The NAFTA, for example, provides that its investor-State dispute settlement provisions do not apply to a decision taken by a party on grounds of national security to prohibit or restrict the acquisition of an investment in its territory.[30] Some IIAs contain limitations and special procedural requirements with respect to the application of investor-State dispute settlement clauses to taxation.[31]

Regarding admissibility *ratione personae*, the ICSID Convention does not enable natural and legal persons with the nationality of the host country to resort to international arbitration in disputes with that country. In respect of legal persons, however, this is qualified by Article 25 (2) (b) of the Convention, which states that a juridical person which on the basis of place of incorporation and location of seat has the nationality of a host country may by agreement of the parties be treated as a national of another Contracting State by reason of foreign control. Many IIAs provide that, for the purposes of

[29] See e.g. Article IX (1) of the BIT between Bolivia and the United States; Article IX (1) of the BIT between Nicaragua and the United States.

[30] Article 1138 (1) of the NAFTA. See also Article 1138(2) and Annex 1138.2 of the NAFTA. For a more broadly formulated exception see BITs between Canada and Uruguay and between Canada and Costa Rica, Annex I (VI) (1).

[31] See e.g. Article XIII of the BIT between El Salvador and the United States providing that the investor-State dispute settlement clause applies to taxation matters only with respect to expropriation, investment agreements and investment authorizations.

Article 25 (2) (b) of the ICSID Convention, legal persons incorporated under the laws of one State but controlled by nationals or companies of another State shall be treated as nationals of that other State.[32] This clause thus enables foreign-controlled, locally incorporated companies to submit a dispute to international arbitration under the ICSID Convention. A similar effect is achieved if the definition of investment includes participation in companies. In that case the shareholding in the locally incorporated company is regarded as the investment, giving the foreign shareholders standing in investment arbitration. Today, this is the standard form of proceeding in the case of locally incorporated companies.

Where investor-State arbitration takes place under the auspices of ICSID, the law governing the procedural aspects of the arbitration is contained in the ICSID Convention and in supplementary rules adopted by ICSID. In the case of *ad hoc* arbitration the applicable procedural rules need to be agreed upon by the parties. UNCITRAL Arbitration Rules are often used for this purpose.

Relatively few IIAs contain a specific provision on the applicable substantive law. In some agreements, tribunals are instructed to apply the rules of the agreement itself and of other relevant treaties, the laws of the host country that is a party to a dispute, the terms of any agreements concluded with respect to the investment in question and the applicable principles of international law. Other agreements exclusively provide for application of the rules of the agreement in question and of rules (and principles) of international law.[33]

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[32] See e.g. Article 26 (7) of the 1994 Energy Charter Treaty; Article 9 (2) of the BIT between the Netherlands and Paraguay; Article IX (8) of the BIT between Nicaragua and the United States; Article 8 (3) of the BIT between Chile and Norway.

[33] Article 26 (6) of the 1994 Energy Charter Treaty; Article XII (7) of the BIT between Canada and Uruguay; Article 1131 of the NAFTA. The latter

Most IIAs are silent on the nature of the remedies that may be awarded by tribunals in the context of investor-State arbitration proceedings. However, a number of recent agreements, notably the NAFTA and agreements containing similar investment provisions, have expressly addressed this issue. These agreements provide that the remedies available are limited to monetary damages, which may include applicable interest; restitution of property with the possibility of monetary damages and applicable interest in lieu of such restitution; and the costs of the arbitration proceedings.[34] Thus arbitral tribunals in investor-State proceedings under agreements with such provisions are precluded from ordering or recommending that States modify or revoke a measure that is subject to arbitration.

The ICSID Convention allows either party to a dispute that is submitted to arbitration to request a review of an award rendered by an arbitral tribunal if (1) there is disagreement between the parties as to the meaning or scope of the award; (2) new facts arise that were unknown to the Tribunal and which decisively affect the award; (3) or either party considers there are grounds for annulment of the award.[35] In the case of non-ICSID awards, the domestic courts of the place of the arbitration remain competent for the setting aside of an award.

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provision also requires arbitral tribunals to apply interpretative decisions adopted by the NAFTA Free Trade Commission.

[34] See e.g. Article 1135 (1) of the NAFTA; Article XII (8) of the BIT between Canada and Uruguay; Article G-36 (1) of the Canada-Chile Free Trade Agreement.

[35] See Articles 50-52. Annulment of an award can be requested if the Tribunal was not properly constituted; the Tribunal manifestly exceeded its powers; there was corruption on the part of a member of the Tribunal; there has been a serious departure from a fundamental rule of procedure; or the award has failed to state the reasons on which it was based.

IIAs typically state that awards rendered in investor-State arbitration proceedings shall be final and binding on the parties to the dispute. Regarding the enforcement of an award rendered pursuant to an arbitration proceeding under the ICSID Convention, Article 54 (1) of the Convention requires each contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by that award within its territory as if the award were a final judgement of a court in that State. Another method to ensure the enforcement of awards rendered in investor-State arbitration is to refer to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). A number of IIAs contain provisions requiring the parties to provide in their territories for the enforcement of awards pursuant to investor-State arbitration.[36] Such provisions are of particular relevance where a State is a party to neither the ICSID nor the New York Convention.

Further reading

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[36] See e.g. Article 26 (8) of the 1994 Energy Charter Treaty; Article 1136 (4) of the NAFTA; Article XII (9) of the BIT between Canada and Uruguay.

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Employment

The inclusion of employment issues into IIAs is a relatively new phenomenon. On the other hand, the development of international labour standards has a long history, dating back to the establishment of the International Labour Organization (ILO) in 1919. Accordingly, there exist several international instruments in relation to TNCs that need to be considered in this section.

1. Norms for corporate conduct developed in the ILO and OECD

Substantive norms in the area of employment practices in a context specific to foreign investment are set forth in instruments that address the issue of the responsibility of enterprises: the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted in 1977 and amended in 2000, and the employment chapter of the OECD Guidelines for Multinational Enterprises, originally adopted in 1976 and most recently revised in 2000. The main areas covered by the non-legally binding norms contained in these two instruments are: employment promotion; equality of treatment and opportunity and security of employment; development of human resources; conditions of work and life; and industrial relations. The last item comprises the right of freedom of association and the right to organize, collective bargaining, consultation, examination of grievances and settlement of industrial disputes.

2. Core labour standards

While not specific to foreign investment, an important recent development is the identification of a set of core labour standards. The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, provides that irrespective of whether they have accepted the ILO conventions in question, ILO members have an obligation to observe four fundamental rights, namely (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced or compulsory labour; (3) the effective abolition of child labour, and (4) the elimination of discrimination in respect of employment and occupation.

Some recent IIAs contain a reference to internationally recognized worker rights in their preambles. The BITs of the United States thus often include in their preambles the phrase:

> "Recognizing that the development of economic and business ties can promote respect for internationally recognized worker rights…".[1]

3. Provisions on "key personnel"

International agreements that lay down rules concerning the treatment of foreign investment, such as BITs and free trade agreements that include rules on treatment and protection of foreign investment, generally, do not address employment issues. Some of these agreements, however, prohibit host countries from imposing nationality requirements upon foreign investors with respect to the appointment of senior management. Thus, for example, Article 1107 (1) of the NAFTA provides:

> "No Party may require that an enterprise of that Party that is an investment of an investor of another Party appoint to senior management positions individuals of any particular nationality."

Closely related to this are provisions in some agreements on intra-company transferees, which, albeit subject to national law, require host

[1] See e.g. the BIT between El Salvador and the United States, the BIT between Bolivia and the United States.

countries to permit the temporary entry and stay of certain categories of key personnel employed by investors. For example, Article V (3) of the BIT between Canada and Costa Rica provides:

> "Subject to its laws, regulations and policies relating to the entry of aliens, each Contracting Party shall grant temporary entry to citizens of the other Contracting Party employed by an enterprise or a subsidiary or affiliate thereof, in a capacity that is senior managerial or executive or requires specialized knowledge. For further certainty, however, nothing in this Article shall be interpreted as an authorization to carry on a professional practice in the territory of a Contracting Party."

As part of a chapter on Temporary Entry for Business Persons, the NAFTA provides in this respect in Annex 1603, Section C (1):

> "Each Party shall grant temporary entry and provide confirming documentation to a business person employed by an enterprise who seeks to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge, provided that the business person otherwise complies with existing immigration measures applicable to temporary entry. A Party may require the business person to have been employed continuously by the enterprise for one year within the three year period immediately preceding the date of the application for admission".

In the context of the GATS, a very substantial proportion of the specific commitments that have been made by WTO members regarding the supply of services through the movement of natural persons concerns the intra-company transferees of managers, executive personnel and specialists.[2]

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[2] See also Article 11 of the Energy Charter Treaty.

Further reading

UNCTAD (2000). *Employment*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.00.II.D.15; Muchlinski, Peter T. (1999). *Multinational Enterprises and the Law* (Oxford: Blackwell), chapter 13.

Environment

The inclusion of provisions on environmental protection in IIAs is a recent phenomenon. The main issues addressed by such provisions pertain to: (1) the responsibility of governments or enterprises with regard to environmental protection; (2) the ability of governments to take measures for the protection of the environment;[1] (3) the avoidance of relaxation of environmental standards as a means of attracting FDI; and (4) the development and transfer of environmentally sound technologies and management practices.

1. *Responsibility of governments or enterprises regarding the protection of the environment*

Some agreements contain provisions regarding the responsibility of governments or enterprises in the area of environmental protection. For example, the Energy Charter Treaty requires each contracting party to

> "strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. […]"[2]

Chapter V of the OECD Guidelines for Multinational Enterprises contains norms with respect to the contribution of TNCs to environmental protection. This chapter opens with the following general recommendation:

> "Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international

[1] See infra section on Expropriation and Nationalization.
[2] Article 19 (1).

agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development."

2. Protection of parties' right to take measures for environmental purposes

A number of recently concluded IIAs contain provisions designed to preserve the ability of the parties to such agreements to apply environmental protection measures. A first type of clause of this nature is exemplified by Article 1114 (1) of the NAFTA:

> "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[3]

Another kind of provision in this category creates an exception for environmental measures in a formulation that closely resembles Article XX (b) and (g) of the GATT. As an example, the BIT between Canada and the Philippines states in Article XVII (3):

> "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement

[3] See also Article XVII (2) of the BIT between Canada and the Philippines; Article G-14 (1) of the Canada-Chile Free Trade Agreement; Annex I (III) (1) of the BIT between Canada and Uruguay; Articles 9-15 (1) of the Free Trade Agreement between Chile and Mexico and Articles 14-16 (1) of the Free Trade Agreement between El Salvador, Guatemala, Honduras and Mexico.

> shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
>
> […]
>
> (b) necessary to protect human, animal or plant life or health; or
>
> (c) relating to the conservation of living or non-living exhaustible natural resources."

While in this example the exception for environmental measures applies to all provisions of an investment agreement, several other agreements provide for this exception only with respect to certain provisions on performance requirements.[4]

In addition, some agreements that contain a prohibition of transfer of technology requirements include a statement that "[a] measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements…" shall not be construed to be inconsistent with that prohibition.[5]

The Energy Charter Treaty affirms the right of parties to regulate certain environmental and safety matters in an article on sovereignty over energy resources. In this respect, Article 18 (3) of the Treaty states:

> "Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the

[4] See e.g. Article 1106 (6) of the NAFTA and Article G-06 (6) of the Canada-Chile Free Trade Agreement.

[5] See e.g. Article 1106 (2) of the NAFTA and Article G-06 (2) of the Canada-Chile Free Trade Agreement.

> optimalization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises."

3. Avoidance of relaxation of environmental standards

Some agreements address the issue of the risk of a relaxation, by a host country, of environmental standards as a means of attracting foreign investment. The NAFTA provides in this regard:

> "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement."[6]

Recent BITs of the United States often include a statement in their preambles that the objectives of these treaties "can be achieved without relaxing health, safety and environmental measures of general

[6] Article 1114 (2) of the NAFTA. The same provision appears, for example, in Article G-14 (2) of the Canada-Chile Free Trade Agreement and Article 9-15 (2) of the Chile-Mexico Free Trade Agreement.

application".[7] One of the recommendations in the chapter on "General Policies" of the OECD Guidelines for Multinational Enterprises provide that enterprises should:

> "Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues".[8]

4. Transfer of environmentally sound technologies and management practices

The issue of the development and the transfer of environmentally sound technologies and management practices is another facet of the interface between foreign investment and the protection of the environment that has recently been addressed in some international instruments. Provisions on this subject are often addressed to governments. Thus, for example, the Energy Charter Treaty contains an article on environmental aspects, which requires the contracting parties *inter alia* to encourage favourable conditions for the transfer and dissemination of energy efficient and environmentally sound technologies.[9] However, "Agenda 21" of 1992 and the OECD Guidelines for Multinational Enterprises contain recommendations specifically directed to the role of multinational enterprises and FDI regarding the adoption and transfer of environmentally sound technologies and management practices.

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[7] See, for example, the preamble to the BIT between El Salvador and the United States.

[8] 2000 OECD Guidelines for Multinational Enterprises, chapter II (5).

[9] Article 19 (1) (h) of the 1994 Energy Charter Treaty. Rules aimed at encouraging the transfer of environmentally sound technology feature in many international environmental agreements.

Further reading

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Expropriation and nationalization

BITs and other international instruments for the protection of foreign investment virtually always contain provisions prohibiting the taking of foreign investors' assets by public authorities, except if done for a public purpose, on a non-discriminatory basis, against payment of compensation, and, in many cases, with due process of law.

1. "Expropriation" versus "nationalization"

It has sometimes been suggested that the term "expropriation" refers to the taking of property of an individual firm whereas "nationalization" denotes the taking of property in a context of industry- or economy-wide measures of social and economic reform.[1] Related to this, the argument has been advanced that expropriation is subject to a different standard of compensation than nationalization. In practice, however, IIAs do not make such a distinction and apply a single set of rules to both expropriation and nationalization. Typical in this respect is Article 13 (1) of the 1994 Energy Charter Treaty, which states:

> "Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is…".

[1] UNCTAD (2000). *Taking of Property*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.00.II.D.4, p.2.

2. Indirect expropriation/nationalization

It is generally accepted that the concept of expropriation is not limited to instances in which there is a formal transfer of title to property but can also cover certain forms of interference by a State with property rights. IIAs reflect this notion that expropriation and nationalization can occur in various forms. They typically include references to "indirect" expropriation/nationalization and/or to measures that are "tantamount" to expropriation and nationalization. For example:

> "Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except …".[2]

> "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation') except: …".[3]

> "Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except …".[4]

It has been suggested that a "direct" expropriation/nationalization is characterised by acts that transfer title and physical possession, whereas "indirect" expropriation/nationalization involves acts that effectuate the loss of management, use or control, or a significant depreciation in the

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[2] Article III (1) of the BIT between El Salvador and the United States.
[3] Article 1110 (1) of the NAFTA.
[4] Article 5 (1) of the BIT between Ecuador and the United Kingdom.

value, of assets.[5] It is important to underline, however, that notwithstanding the widespread use of concepts like indirect expropriation/nationalization and of measures that are tantamount or equivalent in effect to such expropriation/nationalization, investment agreements generally do not define these terms.[6] Nor is it possible to derive a general, authoritative definition of these terms from decisions of international tribunals.

The term “creeping expropriation” is sometimes used in the literature as being synonymous with indirect expropriation/ nationalization but it has also been used to denote a particular type of indirect expropriation/nationalization that occurs as a result of "the slow and incremental encroachment on one or more ownership rights of a foreign investor that diminishes the value of its investment."[7] The term "creeping expropriation" as such does not appear in the actual text of most investment agreements.

[5] UNCTAD (2000). *Taking of Property*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.00.II.D.4, pp. 3-4.

[6] The Free Trade Agreements between Singapore and the United States and between Chile and the United States, which were signed, respectively, in May and June 2003, provide that a determination of whether an act or series of acts constitutes indirect expropriation requires a case-by-case inquiry that considers, among other factors, the economic impact of the measure, the extent to which the government action interferes with distinct, reasonable investment-backed expectations, and the character of the government action. They also stipulate that "except in rare circumstances, non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation." See e.g. Annex 10-D to the Free Trade Agreement between Chile and the United States.

[7] UNCTAD (2000). *Taking of Property*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.00.II.D.4, p. 11.

3. Regulatory takings

The broad scope of the concepts of expropriation and nationalization as used in IIAs, arising out of the references to indirect expropriation and to measures with similar effects, has raised the question of when the exercise by a State of its regulatory powers in matters such as trade, taxation and public health would amount to a compensable expropriation/nationalization of foreign investment. As a result, in addition to the concepts of direct and indirect expropriation, the literature often employs the concept of "regulatory takings". One suggested definition is that regulatory takings "are those takings of property that fall within the police powers of a State, or otherwise arise from measures like those pertaining to the regulation of the environment, health, morals, culture or economy of a host country."[8] However, IIAs do not explicitly employ the term "regulatory takings"; such takings are arguably subsumed under the rubric of indirect expropriation. IIAs generally do not provide specific guidance on how to determine whether or not the exercise of regulatory powers by a host country is to be regarded as a compensable expropriation/ nationalization.[9] Against this background, controversy has recently emerged regarding the appropriate treatment of certain regulatory measures, particularly measures in the field of environmental protection, under provisions in IIAs on expropriation and nationalization. In particular, this issue has arisen in connection with

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[8] Ibid., p.12.

[9] However, as described in footnote 84, the recent Free Trade Agreement of the United States with Chile and Singapore explicitly address this matter. In the context of the OECD negotiations on a MAI, a statement was adopted by OECD Ministers to the effect that “the MAI will not inhibit the exercise of the normal regulatory powers of government and that the exercise of such powers will not amount to expropriation” (1998 MAI Negotiating Text, Annex 2, paragraph 8). Some agreements limit or qualify the application of provisions on expropriation and nationalization to taxation and to certain measures relating to intellectual property rights.

several arbitration proceedings under the investment chapter of the NAFTA.[10]

4. Standard of compensation

A core element of provisions on expropriation/nationalization in IIAs are rules on the amount and timing of the payment of compensation, the currency in which compensation must be paid and the right to transfer any payment of compensation. Recent agreements display a trend towards an increasing use of a standard of "prompt, adequate and effective" compensation. Many such instruments explicitly use this phrase or alternative formulations that have the same meaning.

References to "prompt, adequate and effective" compensation can be found in, for example, the 1994 Energy Charter Treaty[11] and numerous BITs. Thus, Article 5 (1) of the BIT between Ecuador and the United Kingdom (1994) states:

> "Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public

[10] See further UNCTAD (2003). *World Investment Report 2003.FDI Policies for Development: National and International Perspectives* (New York and Geneva: United Nations), United Nations publication, Sales No. E.03.II.D.8, pp.110-114.

[11] See Article 13 (1) (d) of the Energy Charter Treaty.

> knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable in convertible currencies. […]"

The NAFTA exemplifies an approach that does not actually use the phrase "prompt, adequate and effective" but that paraphrases this standard by providing that compensation shall be in accordance with the following requirements:

> "2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. […]
>
> 3. Compensation shall be paid without delay and be fully realizable.
>
> 4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
>
> 5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

> 6. On payment, compensation shall be freely transferable as provided in Article 1109."[12]

Instead of "fair market value", IIAs sometimes refer to concepts such as "genuine value", or "full and genuine value" of expropriated investment as the standard governing the amount of compensation payable upon expropriation or compensation,[13] but it would appear that such concepts are not intended to represent a standard that is substantially different from a "fair market value" standard.

5. Valuation

While it is thus common in current IIAs to require compensation in an amount corresponding to the "fair market value" or "genuine value" of the investment, relatively few agreements expressly provide for specific methods to determine that value. The NAFTA states in this respect:

> "[…] Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value."[14]

The most detailed provisions on this question of valuation methods appear in the World Bank Guidelines on the Treatment of Foreign Direct Investment.[15] The Guidelines provide that the fair market value is to be determined according to a method agreed by the State and the foreign investor, or by a tribunal or another body designated by the parties, and that in the absence of a determination agreed by, or based

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[12] Article 1110 (2)-(6) of the NAFTA.

[13] See e.g. Article 6 (c) of the BIT between the Netherlands and Paraguay (1992): "Such compensation shall represent the genuine value of the investments affected…".

[14] Article 1110 (2) of the NAFTA.

[15] See section IV (4)-(6) of the World Bank Guidelines.

on the agreement of, the parties, the fair market value will be acceptable if it is determined by the State in question according to reasonable criteria related to the market value of an investment. More specifically, the determination will be regarded as reasonable if conducted as follows:[16]

> "(i) for a going concern with a proven record of profitability, on the basis of the discounted cash flow value;
>
> (ii) for an enterprise which, not being a proven going concern, demonstrates lack of profitability, on the basis of the liquidation value;
>
> (iii) for other assets, on the basis of (a) the replacement value or (b) the book value in case such value has been recently assessed or has been determined as of the date of the taking and can therefore be deemed to represent a reasonable replacement value".

"Going concern" in this connection means:

> "an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State".

"Discounted cash flow value" means:

> "the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected

[16] World Bank Guidelines, section IV (6).

> minus that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market on alternative investments of comparable risk on the basis of their present value".

"Liquidation value" means:

> "the amounts at which individual assets comprising the enterprise or the entire assets of the enterprise could be sold under conditions of liquidation to a willing buyer less any liabilities which the enterprise has to meet".

"Replacement value" means:

> "the cash amount required to replace the individual assets of the enterprise in their actual state as of the date of the taking".

"Book value" means:

> "the difference between the enterprise's assets and liabilities as recorded on its financial statements or the amount at which the taken tangible assets appear on the balance sheet of the enterprise, representing their cost after deducting accumulated depreciation in accordance with generally accepted accounting principles".

Further reading

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Fair and equitable treatment

"Fair and equitable" treatment is one of several general standards of treatment that appears in most BITs and other international agreements on the promotion and protection of foreign investment. The antecedents of this standard can be found in the 1948 Havana Charter for an International Trade Organization, bilateral Friendship, Commerce and Navigation Treaties concluded during the 1940s and 1950s, and the 1967 OECD draft Convention on the Protection of Foreign Property. The formulations used in different instruments have varied somewhat, with some instruments referring to "equitable" treatment or "just and equitable" treatment instead of "fair and equitable" treatment. However, such differences in formulation do not imply substantive differences in meaning.

The reference to fair and equitable treatment in an IIA usually appears in a provision that also requires the parties to accord full or constant protection and security to foreign investments and not to impair the management, maintenance, use, enjoyment or disposal of foreign investments by unreasonable or discriminatory measures. For example, Article 3 (1)-(2) of the model BIT of Austria states :

> "(1) Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.
>
> (2) A Contracting Party shall not impair by unreasonable or discriminatory measures the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment by investors of the other Contracting Party."

In addition, in some cases, the fair and equitable treatment standard is combined with a requirement of treatment in accordance with international law.[1]

The application of the fair and equitable treatment standard to the facts of a given case involves a significant measure of subjective judgement as this standard is less amenable to a technical specification than rules requiring national treatment and MFN treatment of foreign investors. Moreover, there has been very little international judicial or arbitral practice that could provide guidance regarding the interpretation of this concept. In the context of arbitration proceedings under the investment provisions of the NAFTA, controversy has recently arisen on the question of whether the fair and equitable treatment standard differs from the international minimum standard.[2]

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[1] Thus Article 1105 (1) of the NAFTA provides: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Article II of the bilateral investment treaty between Canada and Uruguay prescribes "fair and equitable treatment in accordance with principles of international law."

[2] With respect to the requirement in Article 1105 (1) of the NAFTA to accord investments “treatment in accordance with international law, including fair and equitable treatment and full protection and security”, several arbitration tribunals have interpreted the fair and equitable treatment required by this phrase as an autonomous standard that is additional to what is required by international law. The States parties to the NAFTA have rejected this approach (FTC Interpretation of July 31, 2001) by adopting an interpretative statement to the effect that Article 1105 (1) does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. This interpretation of the fair and equitable treatment standard as not requiring treatment going beyond what is required by the customary international law minimum standard has also been incorporated into the recent Free Trade Agreements concluded by the United States with Chile and Singapore.

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Home country measures

Apart from restrictions on the outward flow of FDI, which in the case of the major exporters of FDI have largely been dismantled under the OECD Code of Liberalisation of Capital Movements, various measures of home countries can influence outward FDI. Examples are the provision of information and technical assistance; the transfer of technology; the granting of financial and fiscal incentives; the provision of investment insurance; and market access regulations. Such measures are only to a very limited extent addressed in IIAs, which typically focus on the treatment to be accorded by host states to foreign investors in their territories.

Statements on the promotion and the encouragement of investment in IIAs tend to be of a very general and hortatory nature and are usually not accompanied by provisions envisaging specific steps by home countries regarding the promotion of FDI to host countries. BITs, for example, reflect the view that investments will be promoted by the observance by the parties, as host countries, of the rules contained in such treaties on the treatment and protection of foreign investment.[1] The promotion of outward FDI through steps taken by home countries is generally not addressed in such treaties.[2]

[1] See, for example, the third recital of the preamble to the BIT between Nicaragua and the United States (1995): “Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties”. The BIT between Ecuador and the United Kingdom (1994) states in its preamble: “Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States”.

[2] An example of a clause that is exceptional in committing one of the parties to a BIT to the promotion of investments in the other party is Article 2 (3) of the BIT concluded in 1980 between the Belgo–Luxembourg Economic Union and Cameroon, which provides that the Belgo–Luxembourg Economic

Policy statements that are more specific as to the means of promoting outward FDI, including through measures by home countries, appear in certain international instruments that address the enhancement of private investment flows to developing countries as an aspect of development cooperation. Prime examples of such instruments are the MIGA Convention[3] and the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States, of the other Part (Cotonou Agreement).[4]

Several international instruments envisage the establishment of mechanisms to facilitate the provision of information on the existence of investment opportunities. Examples are the Treaty on Free Trade between Columbia, Mexico and Venezuela[5] and the Cotonou

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Union "shall strive to adopt measures capable of spurring its commercial operations to join in the development effort of the United Republic of Cameroon in accordance with its priorities".

[3] The preamble of this Convention states that the Convention is adopted "to enhance the flow to developing countries of capital and technology for productive purposes under conditions consistent with their development needs, policies and objectives, on the basis of fair and stable standards for the treatment of foreign investment". Apart from the provision of investment insurance, the Convention seeks to attain these objectives through specific investment promotion activities involving research, information dissemination and technical assistance (Article 23).

[4] Articles 21 and 75-78 of the 2000 Cotonou Agreement contain an elaborate statement of modalities of cooperation in the area of investment and private sector development, including through investment promotion, investment finance and support, investment guarantees and investment protection.

[5] Article 17-14 (1) of which states: "With a view to increasing reciprocal investments, the Parties shall design and implement mechanisms for the dissemination, promotion, and exchange of information relating to investment opportunities."

Agreement.[6] The latter agreement also contains provisions on technical assistance with respect to investment promotion, including through “capacity building for domestic investment promotion agencies and institutions involved in promoting and facilitating foreign investment”.[7]

The promotion of the international transfer of technology has been addressed in various instruments, including the Energy Charter Treaty, the WTO TRIPS Agreement and various international environmental agreements.[8]

Many developed countries maintain programmes to provide financial support for FDI in developing countries. Examples include the German Finance Company for Investment in Developing Countries and the Export-Import Bank of Japan. The Cotonou Agreement addresses the provision of investment finance, for example in the form of grants or the provision of risk-capital for equity or quasi-equity investments, as one aspect of cooperation in the area of investment and private sector development.

With respect to the impact of fiscal measures of home countries on outward FDI, an important problem that has arisen is that the method used by a country to avoid double taxation of foreign source income of residents can offset the effect of tax incentives granted by the host countries where this income has been earned. In order to avoid this, many developed countries have accepted tax-sparing provisions in double taxation treaties with developing countries whereby an investor is granted a tax credit for the amount of taxes that would have been paid in the host country absent the use of the tax incentive. Outward FDI can also be negatively affected by the impact on an investor’s tax liability of

[6] Article 75 (h) of which requires the parties to inter alia “disseminate information on investment opportunities and business operating conditions in the ACP States”.

[7] Article 75 (g) of the Cotonou Agreement.

[8] See also infra no. XXVI.

differences between transfer pricing policies of home and host countries.

The provision of investment insurance against non-commercial risks has traditionally been one of the most important ways in which home countries promote outward FDI, especially to developing countries. Thus, for example, the United States Overseas Private Investment Corporation provides investment insurance for FDI in developing countries that have concluded Investment Incentive Agreements with the United States. Investment insurance can also be provided pursuant to regional and multilateral agreements, as illustrated by the Cotonou Agreement and the MIGA Convention.

Finally, trade preferences and rules of origin are examples of measures relating to market access in home countries that may affect outward FDI.

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Host country operational measures

The term "host country operational measures" has been used to refer to any policy measure adopted by a host country to influence the operations of foreign investors in its territory. Such measures are adopted within the framework of specific host country policies, can cover a wide range of aspects of the operations of foreign affiliates, are specifically designed to affect foreign investment, generally focus on the post-entry phase of investment, and are frequently applied in conjunction with investment incentives. They can take the form of restrictions imposed on the operations of foreign affiliates or of requirements regarding the performance of such affiliates. Examples of the former are restrictions on the employment of foreign key personnel; restrictions on imports of capital goods, spare parts and manufacturing inputs; restrictions on access to local credit facilities; restrictions on access to foreign exchange and restrictions on the repatriation of capital and profits. Examples of requirements with respect to the performance of foreign affiliates are requirements to attain a certain level of local content; to achieve a balance between the value of imports of certain goods by a foreign affiliate and the value of or the foreign exchange generated by that affiliate; to meet a certain level of exports; to conduct research and development and to operate in the form of a joint venture with a local partner.

In the context of IIAs, the ability of host countries to subject foreign investors to these operational measures is constrained by general rules for the treatment of foreign investment, such as requirements to accord foreign investment non-discriminatory as well as fair and equitable treatment and by more specific investment protection rules, notably provisions on expropriation and free transfer of funds. The last two decades have also witnessed the emergence of special provisions in international trade and investment agreements on specific categories of host country operational measures, namely "trade-related investment measures" and "performance requirements".[1]

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[1] See infra sections on Performance Requirements and Trade-Related Investment Measures.

Illicit payments

Illicit payments, or bribery, as it is more commonly called, are one of the many facets of corruption in public service or private transactions. In international business transactions, it involves an offer or demand to or by a foreign public official of any payment by a person or corporation and for undue consideration of (non-) performance of duties. Combating bribery may be pursued by laying down obligations of States as well as through documents containing norms on corporate responsibility.

1. Instruments on the responsibility of States to combat illicit payments

While international and national initiatives had been taken on this subject during the 1970s,[1] international co-operation in this area has intensified considerably during the 1990s. This has culminated in the adoption of a number of international instruments, chief among them being the 1996 Inter-American Convention Against Corruption; the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the 1999 Council of Europe Criminal Law Convention on Corruption; and the 2003 United Nations International Agreement on Illicit Payments.[2]

[1] See e.g. the United Nations ECOSOC Report of the Committee on an International Agreement on Illicit Payments of 1979, document E/1979/104, with the text of the draft agreement as an annex. An important development at the national level was the adoption of the Foreign Corrupt Practices Act of 1977 by the United States.

[2] In addition, bribery is also addressed in the World Bank Guidelines on the Treatment of Foreign Direct Investment, section III (8) of which states that: "[e]ach state will take appropriate measures for the prevention and control of corrupt business practices and the promotion of accountability and transparency in its dealings with foreign investors, and will cooperate with other States in developing international procedures and mechanisms to ensure the same".

The key element in these recent instruments is the requirement that the parties treat bribery as a criminal offence[3] and take the necessary steps to establish their jurisdiction to prosecute bribery on the basis of the principles of territoriality and nationality. In addition, these recent instruments include detailed provisions regarding international co-operation with regard to extradition and mutual legal assistance in the investigation or prosecution of bribery, sanctions and enforcement action, and co-operation to minimize conflicts of jurisdiction. The scope of these instruments differs, however, with respect to whether they are confined to such bribery in a transnational context or also include bribery in purely domestic transactions and whether the instrument is concerned with both active and passive bribery or only with active bribery. Thus, for example, unlike the 1996 Inter-American Convention Against Corruption, which covers active and passive bribery and domestic as well as international transactions, the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is limited in scope to active bribery of foreign public officials in international business transactions. In this connection, a key issue is the definition of a "public official". While a narrow definition would include only personnel in central government, a broad definition would also cover personnel in statutory or quasi-governmental bodies.

[3] Thus Article 1 (1) of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions provides: "Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

2. *Illicit payments in the context of instruments on corporate responsibility*

Besides the instruments that lay down obligations of States regarding measures to be taken to combat illicit payments, the subject at hand has also been addressed in documents containing norms on corporate responsibility. Among the international instruments that are relevant in this regard, mention should be made of the OECD Guidelines for Multinational Enterprises. As revised in 2000, the Guidelines include in chapter VI a set of recommendations specifically dedicated to the responsibility of TNCs to combat bribery, the introductory paragraph of which states:

> "Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage."

The recommendations in this chapter further exhort TNCs not to pay public officials or the employees of business partners any portion of a contract payment; to ensure that remuneration of agents is appropriate and for legitimate services only; to enhance the transparency of their activities in the fight against bribery and extortion; to promote employee awareness of and compliance with company policies against bribery and extortion; to adopt management control systems that discourage bribery and corrupt practices and adopt appropriate accounting and auditing practices; and not to make illegal contributions to candidates for public office, political parties or other political organizations. Norms regarding appropriate corporate conduct to combat bribery can also be found in instruments drawn up by NGOs and in company codes of conduct. On a global level, Transparency International, a non-profit organisation with an exclusive focus on issues of corruption, plays an important role through its monitoring and reporting activities.[4]

3. Illicit payments in the context of IIAs

IIAs typically do not address illicit payments, but a number of their provisions, for example, on transparency of investment laws and regulations, are of relevance to efforts to combat such practice.[5]

Further reading

UNCTAD (2001). *Illicit Payments. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.20; Vincke, F., F. Heimann and R. Katz, eds. (2002). *Fighting Corruption: A Practical Guide for Corporate Managers* (Paris; International Chamber of Commerce Press); Manfroni, Carlos A. (1998). *Soborno Transnacional* (Buenos Aires: Abeledo-Perrot); Rose-Ackerman, Susan (1999). *Corruption and Government: Causes, Consequences and Reform* (Cambridge, CUP).

[4] See www.transparency.org.
[5] See infra section on Transparency.

Investment

In BITs and regional agreements that are modelled on such treaties, the term "investment" has generally been defined as comprising a broad range of assets. This asset-based approach contrasts with narrower, enterprise-based and transaction-based approaches that conceive investment in terms of the ownership and control of an enterprise or in terms of a movement of capital. In the past, the asset-based approach has been typically used in instruments aiming at the protection of foreign investment, whereas enterprise-based and transaction-based approaches were characteristic of instruments aimed at the liberalization of foreign investment. Recently, however, there has been a trend towards an increased use of the asset-based approach in instruments aimed at both the protection and liberalization of investment.

1. Asset-based definitions of investment

IIAs that adopt an asset-based approach to the definition of investment typically provide that investment means "every kind of asset"[1] and contain an illustrative list of assets that normally comprises (1) movable and immovable property and other property rights such as mortgages, liens and pledges; (2) shares, stock and debentures and any other kind of participation in companies; (3) claims to money and titles to performance having a financial value; (4) intellectual property rights; and (5) concessions conferred by law or under contract. For example, Article I (3) of the ASEAN Agreement for the Promotion and Protection of Investments provides:

[1] Bilateral treaties of the United States employ a different formulation: "'investment' of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of…". See e.g. the BIT between Nicaragua and the United States, Article I (1) (d).

> "The term 'investment' shall mean every kind of asset and in particular shall include, though not exclusively:
>
> a) movable and immovable property and any other property rights such as mortgages, liens and pledges;
>
> b) shares, stocks and debentures of companies or interests in the property of such companies;
>
> c) claims to money or to any performance under contract having a financial value;
>
> d) intellectual property rights and goodwill;
>
> e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract, or exploit natural resources."

The asset-based definition does not require that an investor have a controlling interest in companies and includes both debt and equity interests. It thus covers both portfolio and direct investment. Moreover, the inclusion of various kinds of property and property rights shows that the term "investment", as defined in this asset-based approach, is also broader in scope than the term "capital", which is usually understood to refer to productive capacity.

The scope of this broad, asset-based definition of investment can be limited in various ways. First, IIAs sometimes limit the scope of the definition to assets that have been approved or duly registered in accordance with the domestic laws of a host country. A slightly different technique that achieves the same result is to limit the scope of an agreement to investment that has been approved or duly registered in accordance with the domestic laws of the host country. For example, Article II (1) of the ASEAN Agreement for the Promotion and Protection of Investments states:

> "This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement."

Second, the scope of an asset-based definition can also be limited with respect to the nature of an investment. The NAFTA, for example, excludes from the term "investment" debt securities of and loans to State enterprises; includes real estate and other tangible or intangible property on the condition that the property is "acquired in the expectation or used for the purpose of economic benefit or other business purposes"[2] and excludes from the definition of investment claims to money that arise solely from commercial contracts for the sale of goods and services or from the extension of credit in connection with a commercial transaction.

Third, in agreements that pertain to a particular sector of economic activity, the definition of investment is confined to investment in that sector. An example is the definition of investment in Article 1 (6) of the 1994 Energy Charter Treaty:

> "[…] 'Investment' refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as 'Charter efficiency projects' and so notified to the Secretariat."

Fourth, some IIAs have limited their application in time by excluding from their coverage investment made before their date of conclusion or entry into force. However such a temporal limitation is

[2] Article 1139, "investment", paragraph (g) of the NAFTA.

not typical as many recent investment agreements explicitly state that they shall apply to investment made in the territories of the parties before and after the entry into force of the agreement.

A number of BITs and similar agreements concluded in a regional context extend their coverage to investment made "indirectly", i.e. through a company located in a third country. Thus, for example, BITs concluded by Canada define "investment" as:

> "any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws…".[3]

2. Enterprise-based and transaction-based definitions of investment

An enterprise-based definition of investment focuses on foreign investment as the establishment of a new enterprise, or the acquisition of a controlling interest in an existing enterprise, in the territory of another State. This approach was exemplified by the definition of investment in the Canada-United States Free Trade Agreement (which has since been superseded by the NAFTA):

> "a) the establishment of a new business enterprise, or
>
> b) the acquisition of a business enterprise;
>
> and includes:
>
> c) as carried on, the new business enterprise so established or the business enterprise so acquired, and controlled by the investor who has made the investment; and

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[3] See e.g. Article 1 (f) of the BIT between Canada and the Philippines. BITs of the United States adopt the same approach.

d) the share or other investment interest in such business enterprise owned by the investor provided that such business enterprise continues to be controlled by such investor”.[4]

A transaction-based approach to the definition of investment focuses on foreign investment as the cross-border movement of capital and related assets that are involved in establishing or liquidating a foreign investment. An example of this approach is the definition of direct investment used by the IMF for purposes of balance-of-payments statistics:

> “359. *Direct investment* is the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy. (The resident entity is the direct investor and the enterprise is the direct investment enterprise.) The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise. *Direct investment* comprises not only the initial transaction establishing the relationship between the investor and the enterprise but also all subsequent transactions between them and among affiliated enterprises, both incorporated and unincorporated. […]
>
> 368. Direct investment capital is (i) capital provided (either directly or through other related enterprises) by a direct investor to a direct investment enterprise or (ii) capital received from a direct investment enterprise by a direct investor. […]

[4] Article 1611.

> 369. The components of direct investment capital transactions […] are equity capital, reinvested earnings, and other capital associated with various intercompany debt transactions."[5]

The concept of a "lasting interest" has been defined to mean that an investor owns 10 per cent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise). Where an investor owns less than 10 per cent of the shares or voting power, an investment can still be considered as direct investment if the investor has an effective voice in the management of the enterprise.

Similarly, the OECD Code of Liberalisation of Capital Movements defines "direct investment" as follows:

> "Investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof:
>
> A. In the country concerned by non-residents by means of:
>
> 1. Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise;
>
> 2. Participation in a new or existing enterprise;
>
> 3. A loan of five years or longer.

[5] See IMF Balance of Payments Manual, 5th edition, Chapter XVIII, Direct Investment, see: http://www.imf.org/external/np/sta/bop/BOPman.pdf.

B. Abroad by residents by means of:

1. Creation or extension of a wholly-owned enterprise, subsidiary or branch, acquisition of full ownership of an existing enterprise;

2. Participation in a new or existing enterprise;

3. A loan of five years or longer."[6]

The OECD applies a 10 per cent share ownership criterion as evidence of the ability of a direct investor to exercise an effective influence on the management of an enterprise.

3. Commercial presence

The GATS defines "trade in services" by listing four modes of supply of a service, including the supply of a service by a service supplier of one member "through commercial presence in the territory of another Member".[7]

Further reading

UNCTAD (2003). *World Investment Report 2003.FDI Policies for Development: National and International Perspectives* (New York and Geneva: United Nations), United Nations publication, Sales No. E.03.II.D.8, pp. 99-102; UNCTAD (1999). *Scope and Definition*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.9; WTO Working Group on the Relationship

[6] OECD Code of Liberalisation of Capital Movements, Annex A, List A, Article I.

[7] Article I (2) (c) of the GATS, see supra section on Commercial Presence.

between Trade and Investment (2002). “Scope and definitions: ‘investment’ and ‘investor’”, Note by the Secretariat (Geneva: WTO), WT/WGTI/W/108, http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/W108.doc; Juillard, Patrick (2000). “Freedom of establishment, freedom of capital movements, and freedom of investment”, *ICSID Review: Foreign Investment Law Journal*, vol. 15, pp. 322-339; UNCTAD (1998). *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva: United Nations), United Nations publication, Sales No. E.98.II.D.8, pp. 32-37; Carreau, Dominique and Patrick Juillard (1998). *Droit International Economique* (Paris: Librairie générale de droit et de jurisprudence), pp. 394-416; Dolzer, Rudolf and Margrete Stevens (1995). *Bilateral Investment Treaties* (The Hague, Boston and London: Martinus Nijhoff), pp. 25-31.

Investment incentives

While a precise definition and classification of "investment incentives" in the context of international legal instruments does not exist,[1] recent studies suggest various possible approaches. For example, an investment incentive could be defined as any host country measure designed to influence investment decisions and which has as its objective the attraction of investors. A somewhat narrower definition focuses on measures that are specifically addressed to certain investors. This definition encompasses any measurable economic advantage afforded to specific enterprises or categories of enterprises by, or at the discretion of, a government in order to encourage them to behave in a certain manner. Investment incentives can be distinguished on the basis of criteria such as whether they are made generally available or only to specific sectors; whether they are available only at the point of entry of an investment or whether they apply to post-entry operations only; whether they are conditional or unconditional; and whether they are direct or indirect. With regard to the form in which incentives are granted, a distinction can be made between fiscal incentives (e.g., reductions of taxes on income or profit and exemptions from payments of import duties on capital goods), financial incentives (e.g. direct grants, subsidized credits and credit guarantees and government equity participation), regulatory incentives (e.g., relaxation of environmental, health, safety or social standards) and other non-financial incentives (e.g. subsidised services, the granting of market privileges through import protection or preferential government procurement contracts).

[1] In the context of the OECD negotiations on a MAI a proposal was made to define "investment incentive" as "[t]he grant of a specific advantage arising from public expenditure [a financial contribution] in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment of a Contracting Party or a non-Contracting Party in its territory" (1998 MAI Negotiating Text, Investment Incentives, Article, paragraph 4).

The great majority of IIAs do not contain specific provisions explicitly addressing the issue of investment incentives but the ability of governments to grant such incentives may nevertheless be affected by certain provisions of such agreements.

Thus, non-discrimination rules in principle prevent parties from discriminating on the basis of nationality of the investor in the granting of incentives. This proposition must, however, be qualified in several respects. First, since in most BITs the MFN and national treatment rules do not apply to the admission of investment, incentives related to the making of investment typically are not subject to a non-discrimination obligation. Secondly, the application of non-discrimination rules to certain kinds of incentives has in some cases been explicitly excluded. For example, BITs of Canada provide that obligations regarding MFN and national treatment in the pre- and post-establishment phase do not apply to government procurement and subsidies or grants provided by a government or a State enterprise, including government-supported loans, guarantees and insurance.[2] The NAFTA contains an identical exclusion of government procurement and subsidies from non-discrimination rules.[3] Finally, especially with respect to fiscal incentives, the applicability of non-discrimination rules contained in investment agreements is further qualified by provisions that exclude or limit the application of these rules with respect to taxation.

Investment incentives are also subject to general transparency obligations contained in IIAs, which require parties *inter alia* to publish relevant laws, regulations and administrative practices. Requirements specifically relating to transparency of investment incentive programmes generally do not exist, subject to a few notable exceptions, such as the OECD Declaration on International Investment and

[2] See e.g. Annex I (III) (5) to the BIT between Canada and Uruguay.
[3] See Article 1108 (7).

Multinational Enterprises, which was originally adopted in 1976 and most recently revised in June 2000.[4]

Some IIAs address the issue of incentives that are granted in connection with the imposition of performance requirements. A distinction can be made between two types of agreement in this regard. First, some agreements prohibit the application of performance requirements both if such requirements are imposed through mandatory laws or regulations and if they are applied as conditions for the granting of incentives. This approach is illustrated by the WTO TRIMs Agreement. By contrast, provisions on performance requirements in the NAFTA differentiate between mandatory performance requirements and incentive-based requirements: while all the requirements covered by these provisions are prohibited if applied through mandatory laws or regulations, only some of these requirements are prohibited if applied as conditions for obtaining an incentive.[5]

Rules and procedures for the control of the granting of investment incentives exist mainly in regional and multilateral settings. The most prominent example is the control exercised by the European Commission pursuant to the rules on State aids in Articles 87-89 of the EC Treaty. Article 87 provides that

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[4] Part IV.3 of this Declaration provides that adhering governments will endeavour to make measures concerning investment incentives and disincentives "as transparent as possible, so that their importance and purpose can be ascertained and that information on them can be readily available". It is accompanied by a decision on procedures for consultation and exchange of information.

[5] See Article 1106 of the NAFTA. In the BITs of Canada and the United States this distinction is even sharper in that none of the performance requirements mentioned in these treaties is prohibited if applied as a condition for obtaining an incentive.

> "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market".

Other regional economic organizations, such as CARICOM, have adopted policies aimed at the harmonization of investment incentives granted by their member States.

At the multilateral level, the WTO Agreement on Subsidies and Countervailing Measures is of relevance, albeit in a somewhat indirect manner. The definition of the term "subsidy" in this agreement overlaps to some extent with the concept of investment incentives as commonly understood. As defined in Article 1 (1.1) of this Agreement, a subsidy exists if there is (a) a financial contribution by a government or any public body within the territory of a member or any form of income or price support and (b) a benefit is thereby conferred. The criterion of "financial contribution"[6] means that incentives of a fiscal or financial nature are covered by the definition of subsidy; by contrast, regulatory incentives, such as a lowering of social standards, are not covered by

[6] As defined in Article 1.1 (a) (1), "financial contribution" comprises the following:

"(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments".

this definition since they do not involve such a financial contribution. If an incentive is a "subsidy" within the meaning of Article 1 of this Agreement, it is subject to the disciplines of the Agreement if it is "specific" as defined in Article 2. The Agreement makes a distinction between subsidies that are prohibited *per se* (export subsidies and subsidies contingent upon the use of domestic over imported goods) and those that are subject to a special, expedited dispute settlement process, and those that are "actionable" if their use results in certain adverse trade effects.[7] Special and differential treatment is accorded to developing countries and to economies in transition. The WTO Agreement on Subsidies and Countervailing Measures is limited in its application to trade in goods. With respect to services, the establishment of multilateral disciplines on subsidies is the subject of ongoing negotiations among WTO members, as required by Article XV of the GATS.

Within the framework of the OECD, the Declaration on International Investment and Multinational Enterprises contains a section on "International Investment Incentives and Disincentives" in which adhering governments agree to give due weight to the interests of other member countries affected by specific laws, regulations and administrative practices regarding incentives and disincentives, and to endeavour to make such measures as transparent as possible.[8] A consultation mechanism in respect of such incentives and disincentives was established by a ministerial decision adopted in 1984. In April 2003, the OECD Committee on International Investment and Multinational Enterprises adopted Guiding Principles for Policies Toward Attracting Foreign Direct Investment and also issued a Checklist for Assessing FDI Incentive Policies. The Guidelines identify a number of factors conducive to the creation of a sound investment

[7] Provisions on "non-actionable subsidies" contained in Article 8 of the Agreement were applicable for a period of five years and have not been extended beyond 31 December 1999.

[8] Part IV of the Declaration.

environment and observe in this regard that the usage of tax incentives, financial subsidies and regulatory exemptions directed at attracting foreign investors is no substitute for pursuing the appropriate general policy measures. In certain circumstances, however, incentives may serve either as a supplement to an already attractive enabling environment or as compensation for market imperfections that cannot be otherwise addressed. The Checklist for Assessing FDI Incentive Policies is intended to serve as a tool to assess the costs and benefits of using incentives to attract FDI; to provide operational criteria for avoiding wasteful effects and to identify the potential pitfalls and risks of excessive reliance on incentive-based strategies.

The World Bank Guidelines on the Treatment of Foreign Direct Investment state that nothing in the Guidelines suggests that a State should grant tax or other fiscal incentives to foreign investors.[9] Where such incentives are deemed justified by a State, they may, to the extent possible, be automatically granted, directly linked to the type of activity to be encouraged and equally extended to national investors in similar circumstances. Competition among States in providing such incentives, especially tax exemptions, is not recommended. Reasonable and stable tax rates are deemed to provide a better incentive than exemptions followed by uncertain or excessive rates.

A noteworthy recent development is the inclusion in certain regional agreements of provisions on regulatory incentives. Thus, for example, agreements such as the NAFTA and the Canada-Chile Free Trade Agreement contain a provision in which the parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, the provision states that

> “a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an

[9] Section III (9).

> encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. […]"[10]

The inappropriateness of relaxing social rights as an investment incentive has been addressed in various instruments, notably the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, as amended in 2000.[11] The OECD Guidelines for Multinational Enterprises provide that enterprises should refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives or other issues, and the Guiding Principles for Policies Toward Attracting Foreign Investment that were adopted in April 2003 state that OECD members recognize that it is inappropriate to encourage investment by lowering health, safety or environmental standards or relaxing core labour standards.

Further reading

UNCTAD (2003). *World Investment Report 2003.FDI Policies for Development: National and International Perspectives* (New York and Geneva: United Nations), United Nations publication, Sales No. E.03.II.D.8, pp. 123-128; UNCTAD (forthcoming). *Incentives. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication; OECD (2003). "Checklist for foreign direct investment incentive policies" (Paris: OECD) mimeo.; OECD (2001). *Corporate Tax Incentives for Foreign Direct Investment* (Paris: OECD); UNCTAD (2001). *Host Country Operational Measures. UNCTAD Series on Issues*

[10] Article 1114 (2) of the NAFTA and Article G-14 (2) of the Canada-Chile Free Trade Agreement.

[11] Paragraph 46 provides: "Where governments of host countries offer special incentives to attract foreign investment, these incentives should not include any limitation of the workers' freedom of association or the right to organize and bargain collectively."

in International Investment Agreements (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.18; Oman, C. (2000). *Policy Competition for Foreign Direct Investment: A Study of Competition Among Governments to Attract FDI* (Paris: OECD); WTO Working Group on the Relationship between Trade and Investment (1998). “The impact of investment incentives and performance requirements on international trade”, Note by the Secretariat (Geneva: WTO), WT/WGTI/W/56, http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/W56.DOC; UNCTAD (1996). *Incentives and Foreign Direct Investment* (New York and Geneva: United Nations), United Nations publication, Sales No. E.96.II.A.6.

Investors

IIAs normally define two categories of investors: natural persons and legal entities. Instead of investors, some agreements refer to these two categories as "nationals and companies"[1] or as "nationals".[2]

1. Natural persons

Individuals or natural persons are usually treated as nationals or investors of a party to an investment agreement if they have the nationality of that party, as determined by that party's laws. A typical provision in this respect appears in Article 1 (b) of the BIT between the Netherlands and Paraguay:

> "[T]he term 'nationals' shall comprise with regard to either Contracting Party:
>
> (i) natural persons having the nationality of that Contracting Party…".

In some cases, a criterion of permanent residence has been used either in addition to or as an alternative to nationality. For example, the BITs of Canada define investor as including:

[1] See e.g. Article 1 (c) and (d) of the BIT between Ecuador and the United Kingdom.

[2] See e.g. Article 1 (b) of the BIT between the Netherlands and Paraguay which provides that the term "nationals" comprises natural and legal persons.

> "Any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws…".[3]

Few investment agreements address the possible problem of dual nationality of natural persons.[4]

2. Legal entities

With respect to the kinds of legal entities that are covered as investors, IIAs tend to adopt a comprehensive approach that includes various kinds of entity regardless of legal form, purpose and ownership. For example, the BIT between El Salvador and the United States defines the term "company" as:

> "any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other organization".[5]

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[3] See e.g. Article 1 (g) (i) of the BIT between Canada and the Philippines.

[4] Canada's BITs exclude natural persons who are citizens of both parties from the definition of investor. See e.g. Article I (e) of the BIT between Canada and Uruguay. Another example of an agreement explicitly addressing the problem of dual nationality is the 1985 Convention Establishing the Multilateral Investment Guarantee Agency. Article 13 (b) of the Convention provides that "[i]n case the investor has more than one nationality, […] the nationality of a member shall prevail over the nationality of a non-member, and the nationality of the host country shall prevail over the nationality of any other member".

[5] Article I (a) of the BIT between El Salvador and the United States.

In a similar vein, BITs of Canada, in which the term “investor” means an enterprise that makes an investment in the territory of one of the parties, define the term “enterprise” as follows:

> “any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association”.[6]

There are different criteria to determine the existence of a link of nationality between a legal entity and a State that is party to an investment agreement in order for that entity to be considered as an investor or a company “of” that party. The criteria most commonly used are: place of incorporation; location of the seat; and the nationality of control or ownership. Investment agreements sometimes employ a combination of some of these criteria.

The Energy Charter Treaty is illustrative of an approach that defines the link of nationality between an investor and party to an agreement on the basis of the place of incorporation, i.e. the country under whose laws an entity is constituted or organized. The Treaty defines the term “investor” in relation to a contracting party to include

> “a company or other organization organized in accordance with the law applicable in that Contracting Party”.[7]

Agreements that establish the link of nationality between a legal entity and a party to an agreement on the basis of the criterion of the place of incorporation, sometimes provide for a “denial of benefits” clause to exclude entities that are organised in one of the parties to the agreement but that are controlled by nationals of third countries if such entities do

[6] Article I (a) (i) of the BIT between Canada and the Philippines.
[7] Article 1 (7) (a) (ii) of the Energy Charter Treaty.

not engage in substantial business activity in the territory of the country in which they are organized.[8]

The seat of a company connotes the place where effective management takes place. An example of the use of location of seat appears in BITs of Germany, which define the term "company" to include in the case of Germany:

> "any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany…".[9]

BITs of Switzerland define the link of nationality between a legal entity and a country on the basis of a combination of three criteria: the place of incorporation of a legal entity; the location of its seat; and the conduct of real economic activities in the territory of the country. The model BIT of Switzerland provides in this regard that the term "investor" means, in addition to natural persons having the nationality of a party:

> "legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party".[10]

In addition, by using the criterion of the nationality of controlling interest, these treaties extend the meaning of the term "investor" to include entities established in third countries. The Swiss model BIT thus provides that the term investor also comprises:

[8] See above section on Denial of Benefits.
[9] See e.g. Article 1 (4) (a) of the 1991 model BIT of Germany.
[10] Article 1 (1) (b).

> "legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party".[11]

BITs of the Netherlands provide another example of the inclusion in the definition of investors of legal persons established in third countries. Such treaties include as investors: (1) legal persons constituted under the law of a party; and (2) legal persons not constituted under the law of that party but controlled, directly or indirectly, by natural persons having the nationality of that contracting party or by legal persons constituted under the law of that party.[12]

3. The link between investors and investment

Most investment agreements that rely on an asset-based approach to the definition of investment apply to investments "of" or "by" investors of one of the parties in the territory of another party without qualifying the nature of the link that must exist between the investment and the investor. Some agreements, however, are more specific in this respect in that they characterise the requisite link between the investor and the investment in terms of direct or indirect ownership or control. Thus, the NAFTA states that an "investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party".[13] BITs of Canada and the United States define investment as every kind of asset or investment "owned or controlled directly or indirectly" by investors or by nationals and companies of a party. Few of these agreements, however, provide a

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[11] Article 1 (1) (c).

[12] See e.g. Article 1 (b) of the BIT between the Netherlands and Paraguay.

[13] Article 1139 of the NAFTA. See also Article G-40 of the Canada-Chile Free Trade Agreement.

further explanation of the meaning of control and ownership in this connection.[14]

4. The concept of a service supplier of a party to the GATS

The GATS defines “service supplier” as any natural or juridical person that supplies a service.[15]

A “natural person of another Member” is a person who resides in the territory of that or any other member and who either has the nationality of that member or, under certain conditions, has the right of permanent residence in that member.[16]

A “juridical person” in the context of the GATS is defined as:

> “any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association”.[17]

A “juridical person of another member” means

> “a juridical person which is either:

[14] See e.g. Article I (g) of the BIT between Canada and Costa Rica: “[…] For the purpose of this Agreement, an investor shall be considered to control an investment if the investor has the power to name a majority of its directors or otherwise to legally direct the actions of the enterprise which owns the investment.”

[15] Article XXVIII (g) and (j) of the GATS.

[16] Article XXVIII (k) of the GATS.

[17] Article XXVIII (l) of the GATS.

(i) constituted or otherwise organized under the law of that other Member, and is engaged in substantive business operations in the territory of that Member or any other Member; or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

1. natural persons of that Member; or

2. juridical persons of that other Member identified under subparagraph (i)".[18]

Closely related to this, Article XXVIII (n) of the GATS defines the meaning of the terms "owned", "controlled" and "affiliated":

"a juridical person is:

(i) 'owned' by persons of a member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member;

(ii) 'controlled' by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;

(iii) 'affiliated' with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person".

[18] Article XXVIII (m) of the GATS.

Further reading

UNCTAD (1999). *Scope and Definition*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.9; WTO Working Group on the Relationship between Trade and Investment (2002). "Scope and definitions: 'investment' and 'investor'". Note by the Secretariat (Geneva: WTO), WT/WGTI/W/108, http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/W108.doc; Peters, Paul (1998). "Some serendipitous findings in BITs: the Barcelona Traction Case and the reach of bilateral investment treaties", in Denters, Erik and Nico Schrijver, eds., *Reflections on International Law from the Low Countries* (The Hague, Boston and London: Martinus Nijhoff), pp. 27-47; UNCTAD (1998). *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva: United Nations), United Nations publication, Sales No. E.98.II.D.8, pp. 37-41; Dolzer, Rudolf and Margrete Stevens (1995). *Bilateral Investment Treaties* (The Hague, Boston and London: Martinus Nijhoff), pp. 31-42.

Investment-related trade measures

"Investment-related trade measures" is a relatively novel concept that can be seen as the counterpart of "trade-related investment measures".[1] Whereas the concept of "trade-related investment measures" denotes the impact of investment measures on trade, the concept of "investment-related trade measures" covers a broad array of measures that intentionally or not affect the volume, sectoral composition and geographic distribution of FDI. The most important categories of such investment-related trade measures are market access restrictions, market access development preferences, export promotion devices and export restrictions.

Market access restrictions comprise the broadest and most numerous categories of investment-related trade measures. They include tariffs and quantitative restrictions on imports, sectorally managed trade arrangements, regional free trade agreements, rules of origin, anti-dumping regulations, national standards and non-monetary trade arrangements such as countertrade. The effect of such market access restrictions on investment is to create an incentive to locate production within the territory or territories of the country or countries imposing the trade restriction.

FDI can also be influenced by trade measures involving a preferential treatment of imports from particular countries. Thus, tariff preferences granted under programmes such as the Generalized System of Preferences can attract export-oriented FDI to developing countries benefiting from such preferences.

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[1] The concept was introduced in UNCTAD (1992). *World Investment Report 1992: Transnational Corporations as Engines of Growth* (New York and Geneva: United Nations), United Nations publication, Sales No. E.92.II.A.19, pp. 267-271. See infra the section on Trade-Related Investment Measures.

The usage of export promotion measures in a way that affects FDI is particularly evident with regard to export processing zones, which are often used by developing countries as policy instruments to attract FDI. Other export promotion devices, such as export financing support and the remission or exemption of taxes on exports, can also have a direct or indirect impact on FDI.

Finally, export restrictions, which are typically imposed for national security or other foreign policy purposes, may have an impact on FDI when firms in countries that impose such restrictions invest or expand their operations in third countries that do not apply such restrictions.

Further reading

UNCTAD (1999). *Investment-Related Trade Measures. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.12.; UNCTAD (1992). *World Investment Report 1992: Transnational Corporations as Engines of Growth* (New York and Geneva: United Nations), United Nations publication, Sales No. E.92.II.A.19, pp.267-271.

Most-favoured-nation treatment

The MFN treatment rule is one of several general requirements regarding the treatment of foreign investment normally included in IIAs. The rule requires host countries to accord to foreign investors and investments of foreign investors treatment that is no less favourable than the treatment accorded to investors of any third States and their investment.[1]

A basic distinction exists between investment agreements in which the MFN standard is limited to the treatment of investors and investments after the admission of an investment in the territory of a host country and agreements in which the MFN standard also extends to the admission and establishment of foreign investment. The former approach is characteristic of many BITs, especially those concluded by European countries. Thus, for example, Article 3 (3) of Austria's model BIT provides:

> "Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment no less favourable than that it accords […] to investors of any third country and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor."

Recent BITs concluded by the United States and Canada apply the MFN rule to both the establishment and the subsequent treatment of foreign investors and investment, subject to the ability of the parties to the treaties to make country-specific exceptions regarding specific sectors and measures. For example, Article II of the BIT between El Salvador and the United States provides in relevant part:

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[1] While some agreements apply the MFN rule to "investments", more recent agreements apply the rule to both "investments" and "investors".

> "1. With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, […] to investments in its territory of nationals or companies of a third country […].
>
> 2. a. A Party may adopt or maintain exceptions to the obligations of paragraph 1 in the sectors or with respect to the matters specified in the Annex to this Treaty. In adopting such an exception, a Party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective."

This approach of extending the MFN rule to the entry of foreign investment has also been adopted in several regional agreements such as the NAFTA and the Canada-Chile Free Trade Agreement.

While it is often provided that the MFN rule applies in respect of foreign and domestic investors and investments that are in like situations or in like circumstances, there is a considerable number of investment agreements that omit such a qualification.

MFN rules in IIAs are sometimes subject to country-specific exceptions in respect of particular measures or policies. In most cases, these country-specific exceptions are recorded through a "negative list" approach whereby the MFN rule applies except to the extent that a country has explicitly exempted a sector or policy from the rule. This also applies to the MFN rule in the GATS, which, unlike GATS provisions on market access and national treatment, is a rule that in principle applies as a general obligation.

In some agreements, the application of the MFN rule is further subject to exceptions of a general nature, for example with respect to measures necessary to protect national security interests or public order, prudential measures in the financial services sector, and more specific exceptions. In the latter regard, most investment agreements explicitly provide that the MFN rule does not apply to treatment accorded to investors by virtue of bilateral agreements on the avoidance of double taxation[2] and to measures applied pursuant to regional economic integration arrangements. Some agreements allow for specific exceptions to MFN treatment with respect to matters such as government procurement, subsidies and intellectual property.

Further reading

UNCTAD (1999). *Most-Favoured-Nation Treatment*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.11; WTO Working Group on the Relationship between Trade and Investment (2002). “Non-discrimination, most-favoured-nation treatment and national treatment”. Note by the Secretariat (Geneva: WTO), WT/WGTI/W/118, http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/ W118.doc.

[2] See infra section on Taxation.

National treatment

A national treatment rule in an IIA typically requires that host countries accord to foreign investors and their investments treatment that is no less favourable than the treatment accorded to domestic investors and investments.[1]

1. Scope of application

In most BITs, and a significant number of regional investment agreements, the scope of application of the national treatment rule is limited to the treatment of foreign investment after its admission in the territory of the host country. Accordingly, national treatment is not required in respect of the admission and establishment of foreign investment. An example of a national treatment clause limited to the post-entry phase is Article 3 (3) of Austria's model BIT:

> "Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment no less favourable than that it accords to its own investors and their investments or to investors of any third country and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor."

This "post-entry national treatment" model has been adopted in most BITs concluded by European countries and in many BITs concluded between developing countries. It also features in instruments such as the

[1] While some agreements apply national treatment to "investments", the more recent agreements generally provide for national treatment in respect of both "investments" and "investors".

(legally non-binding) OECD National Treatment Instrument[2] and the Energy Charter Treaty.

By contrast, recent BITs of Canada and the United States and a number of recent regional investment arrangements also require that national treatment be accorded in respect of the admission and establishment of foreign investment. In virtually all these agreements, however, the application of national treatment to the entry of foreign investment is subject to the ability of the parties to make exceptions in relation to particular sectors or policies.

As an example of the application of national treatment to both the pre-establishment phase and the post-establishment phase, Article II of the 1999 BIT between El Salvador and the United States provides:

> "1. With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favorable than that it accords, in like situations, to investments in its territory of its own nationals or companies […].
>
> 2. a. A Party may adopt or maintain exceptions to the obligations of paragraph 1 in the sectors or with respect to the matters specified in the Annex to this Treaty. In adopting such an exception, a Party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective."

In addition to the recent BITs of Canada and the United States, this approach has been adopted in a number of free trade agreements concluded during the past decade, including the NAFTA; the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments

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[2] Contained in the OECD Declaration on International Investment and Multinational Enterprises.

within MERCOSUR; the Canada-Chile Free Trade Agreement; the Framework Agreement on the ASEAN Investment Area; and the Free Trade Agreement between Chile and Mexico.

The approach whereby the national treatment rule applies as a general obligation, unless otherwise specifically provided in country-specific exceptions, is generally known as a "negative list" approach. This contrasts with a "positive list" approach whereby an obligation applies in a particular sector only if a State has specifically included that sector in a list of commitments. The GATS combines a "positive list" approach to the scheduling of sectors with a "negative list" approach to the scheduling of limitations and qualifications of national treatment in the sectors inscribed in a member's schedule of specific commitments:

> "In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."[3]

Investment agreements often identify specific functions or economic activities in respect of which national treatment is to be accorded to foreign investors and investments. Thus for example, the Energy Charter provides for national treatment to investments and investors of other contracting parties, "and their related activities including management, maintenance, use, enjoyment or disposal …".[4] The NAFTA provides for national treatment in respect of "the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments".[5] The Framework

[3] Article XVII (1) of the GATS.
[4] Article 10 (7) of the 1994 Energy Charter Treaty.
[5] Article 1102 (1).

Agreement on the ASEAN Investment Area requires national treatment in respect of all industries and measures affecting investment, "including but not limited to the admission, establishment, acquisition, expansion, management, operation and disposition of investments …".[6]

In the case of federal States, the question arises whether the national treatment rule, as applied to measures of subfederal levels of government, requires a comparison with the treatment accorded by a local State or province to investors resident or incorporated in such a State or province or with the treatment accorded by the State or province to other domestic investors of that federal State. BITs of the United States address this question explicitly:

> "With respect to the treatment accorded by a State, Territory or possession of the United States of America, national treatment means treatment no less favorable than the treatment accorded thereby, in like situations, to investments of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of, other states, Territories or possessions of the United States of America."[7]

This provision thus establishes that national treatment is to be assessed by reference to the treatment of "out of state" domestic investors.

2. Substantive content of the standard

IIAs in some cases explicitly provide that the national treatment rule involves a comparison between foreign investors/investments and domestic investors/investments that are in "like" or "similar" situations or circumstances. Examples are the BITs of Canada and the United

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[6] Article 7 (1) (b).

[7] See e.g. Article XV (1) (b) of the BIT between El Salvador and the United States.

States, the OECD National Treatment Instrument,[8] the NAFTA and the Canada-Chile Free Trade Agreement. However, as evidenced by *inter alia* the BITs of Chile, France, Germany and Switzerland and the Energy Charter Treaty, in many investment agreements the national treatment rule is not qualified by a "likeness" criterion.

The national treatment rule is sometimes expressed as a requirement to accord foreign investors and investment the "same" or "as favourable treatment as" that accorded to domestic investors and investments. The most commonly used formulation of the national treatment rule, however, contemplates treatment of foreign investors and investments that is "no less favourable" than that accorded to domestic investors and investments of a host country.

The rationale for distinguishing between *de jure* and *de facto* national treatment is that a measure may entail less favourable treatment of foreign investors even where it provides for formally identical treatment of foreign and domestic investors. Articles XVII (2) and (3) of the GATS address this as follows:

> "2. A Member may meet the requirement of paragraph 1 [national treatment] by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member."

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[8] Contained in the OECD Declaration on International Investment and Multinational Enterprises.

3. Exceptions

Exceptions to national treatment rules in IIAs can be classified into three main categories:

> A number of agreements include general exception clauses that permit the parties to adopt measures necessary for the protection of public health, public order and morals, and national security.
>
> Investment agreements sometimes contain more specific exceptions to national treatment (and most-favoured nation treatment) rules with respect to matters such as taxation; intellectual property rights; prudential measures in financial services; incentives; government procurement; and cultural industries.
>
> Especially where an investment agreement applies the national treatment rule to the entry of foreign investment, it normally provides for the right of each party to make country-specific exceptions to the national treatment rule with regard to particular sectors and policies that the party has listed in an annex to the agreement.[9]

Few investment agreements include a "development clause", i.e. an exception to national treatment for measures taken for economic development purposes. This issue was the subject of intense debate during the United Nations negotiations on a draft Code of Conduct on Transnational Corporations.

[9] See e.g. Article 1108 (1)-(3) of the NAFTA.

Further reading

UNCTAD (2003). *World Investment Report 2003.FDI Policies for Development: National and International Perspectives* (New York and Geneva: United Nations), United Nations publication, Sales No. E.03.II.D.8, pp. 102-110; UNCTAD (1999). *National Treatment. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.16; WTO Working Group on the Relationship between Trade and Investment (2002). "Non-discrimination, most-favoured-nation treatment and national treatment", Note by the Secretariat (Geneva: WTO), WT/WGTI/W/118, http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/ W118.doc.

Performance requirements

Performance requirements are a specific category of host country operational measures,[1] imposed on foreign affiliates to act in ways considered beneficial for the host economy. The most common ones relate to local content, export performance, domestic equity, joint ventures, technology transfer and employment of nationals. The requirements can be mandatory (e.g. precondition for entry or access) or voluntary (e.g. condition for obtaining an incentive). Provisions on "performance requirements" that are contained in some recent IIAs, particularly the NAFTA[2] and the BITs concluded by Canada and the United States, prohibit a broad range of measures. Article 1106 (1) of the NAFTA prohibits a party to the NAFTA from applying to any foreign investment in its territory requirements

"(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

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[1] See supra section on Host Country Operational Measures. For another category of host country operational measures see infra section on Trade-Related Investment Measures.

[2] Provisions that are identical or very similar to the NAFTA rules on performance requirements can be found in a number of recent free trade agreements that have been concluded between countries in the Western Hemisphere since the early 1990s. See e.g. Article G-06 of the Canada-Chile Free Trade Agreement; Article 15-05 of the Free Trade Agreement between Bolivia and Mexico; Article 9-07 of the Free Trade Agreement between Chile and Mexico; Article 14-07 of the Free Trade Agreement between El Salvador, Guatemala, Honduras and Mexico.

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, […] or

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market".

Pursuant to Article 1106 (3), four of these performance requirements, namely those concerning domestic content, preferences for local goods and services, the balancing of imports and exports or foreign exchange inflows, and restrictions on domestic sales, are also prohibited if applied as conditions for the receipt or continued receipt of an advantage. However, Article 1106 (4) provides that parties are not prevented from conditioning the receipt of an advantage on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development. Apart from certain exceptions and qualifications, these NAFTA provisions on performance requirements are subject to country-specific reservations that are described in the annexes to the NAFTA.

Recent BITs of the United States[3] cover essentially the same performance requirements as the NAFTA, with the exception of

[3] See e.g. Article VI of the BIT between El Salvador and the United States (1999); Article VI of the BIT between Bolivia and the United States (1998); Article VI of the BIT between Nicaragua and the United States (1995)

requirements to act as an exclusive supplier to a specific region or world market. Unlike the NAFTA, these BITs also prohibit the imposition of requirements on foreign investors to carry out a certain level or type of research and development in the host country. Another difference with the NAFTA is that these bilateral treaties do not limit the right of the parties to apply any of these requirements in question as a condition for obtaining an advantage. BITs recently concluded by Canada similarly cover essentially the same kinds of mandatory performance requirements as the NAFTA, with the exception of exclusive supplier requirements.[4] In some cases, however, the scope of the provision on performance requirements is far more limited. Thus, the BIT between Canada and Costa Rica (1998) merely obligates the parties not to apply any requirements inconsistent with the TRIMs Agreement.[5]

Further reading

UNCTAD (2003). *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* (New York and Geneva: United Nations), Sales No. E.03.II.D.32; (UNCTAD (2003). *World Investment Report 2003.FDI Policies for Development: National and International Perspectives* (New York and Geneva: United Nations), United Nations publication, Sales No. E.03.II.D.8, pp. 119-123; WTO (2002). "Trade-related investment measures and other performance requirements", Joint Study by the WTO and UNCTAD Secretariats, G/C/W/307 and Add.1, mimeo.; UNCTAD (2001). *Host Country Operational Measures*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United

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and Article VII of the BIT between Trinidad and Tobago and the United States (1994).

[4] See e.g. Article VI of the BIT between Canada and Uruguay (1997) and Article V (2) the BIT between Canada and the Philippines (1995).

[5] See Article VI.

Nations), United Nations publication, Sales No. E.01.II.D.18; Moran, T. (2001). *Parental Supervision: the New Paradigm for Foreign Direct Investment and Development* (Washington, D.C.: Institute for International Economics); Moran, T. (1998). *Foreign Direct Investment and Development* (Washington, D.C.: Institute for International Economics); UNCTC and UNCTAD (1991). *The Impact of Trade-Related Investment Measures on Trade and Development: Theory, Evidence and Policy* (New York: United Nations), United Nations publication, Sales No. E.91.II.A.19.

State contracts

The term “State contracts” denotes contracts entered into by governments with foreign nationals, including loan agreements, contracts for supplies and services, contracts for employment, agreements for the operation of industrial and other patent rights under license, agreements for the construction and operation of transport or telephone systems, agreements conferring rights to exploit natural resources, and exploration and production sharing agreements.[1] While in general the breach of such a contract by a State does not by itself entail State responsibility under international law, the view has sometimes been expressed that a special category of State contracts exists, often referred to as “economic development agreements”, such as long-term agreements involving the exploitation of natural resources by foreign investors, which are governed by public international law. This view, however, has been widely contested.[2]

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[1] Brownlie, Ian. *Principles of Public International Law* (Oxford and New York: Clarendon Press, 1998), pp. 549-550.

[2] See on this controversy and other aspects of the legal regime applicable to State contracts, e.g. Maniruzzaman, A.F.M. “State contracts in contemporary international law: monist versus dualist controversies”, *European Journal of International Law*, 2001, vol. 12, pp. 309-328; Brownlie, Ian. *Principles of Public International Law* (Oxford and New York: Clarendon Press, 1998), pp. 549-555; Delaume, Georges R. “The proper law of state contracts revisited”, *ICSID Review: Foreign Investment Law Journal*, 1997, vol. 12, pp. 1-28; Nassar, Nagla. “Internationalization of State contracts: ICSID, the last citadel”, *Journal of International Arbitration*, 1997, vol. 14, pp. 185-207; Bernadini, Piero. “Development agreements with host governments”, in Pritchard, Robert, ed. *Economic Development, Foreign Investment and the Law* (The Hague, Boston and London: Kluwer Law International, 1996), pp. 161-174; Peter, Wolfgang. *Arbitration and Renegotiation of International Investment Agreements* (The Hague, Boston and London: Kluwer Law International, 1996); Maniruzzaman, A.F.M. “State contracts with aliens: the question of unilateral change by the state in contemporary international law”, *Journal of International Arbitration*, 1992, vol. 9, pp. 141-171; Pogany,

BITs and other international agreements on the protection and promotion of foreign investment usually do not specifically deal with the subject of State contracts *per se* but sometimes include clauses that enhance the protection of rights enjoyed by foreign investors under investment-related agreements with host States.

It should first be noted in this respect that the asset-based definition of the term "investment" that is employed in most current IIAs explicitly encompasses contractual rights of foreign investors. Thus, for example, "investment" has been defined to include:

> "business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources".[3]
>
> "rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources".[4]
>
> "(iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts; […]

Stephen I. "Economic development agreements", *ICSID Review: Foreign Investment Law Journal,* 1992, vol. 7, pp. 1-20; Paasivirta, Esa. "Internationalization and stabilization of contracts versus state sovereignty", *British Yearbook of International Law*, 1989, vol. 60, pp. 315-350; Bowett, Derek W. "State contracts with aliens: contemporary developments on compensation for termination or breach", *British Yearbook of International Law*, 1988, vol. 59, pp. 49-74.

[3] E.g. Article 1 (a) (v) of the BIT between Ecuador and the United Kingdom.

[4] Article 1 (f) (vi) of the BIT between Canada and the Philippines.

> (vi) rights conferred pursuant to law, such as licenses and permits”.[5]

Second, many IIAs contain what is commonly referred to as an “umbrella” clause or “respect” clause, which ensures that the performance by a host country of obligations under an agreement entered into with an investor becomes an obligation of that State under the IIA in question. Such a clause typically provides that:

> “[…] Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.”[6]

However, the inclusion of such a clause in IIAs, while frequent, is not as common as the inclusion of other treatment standards, such as the standard of fair and equitable treatment. Thus, for example, this type of clause does not feature in BITs of Canada and in certain regional agreements such as the NAFTA. It is also noteworthy that the Energy Charter Treaty includes the “umbrella” clause but allows parties to enter reservations with respect to the application of investor-State arbitration provisions to this clause.[7]

Third, BITs of the United States include “investment agreements” and “investment authorizations” within the scope of investor-State arbitration provisions by defining the concept of “investment dispute” as:

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[5] Article I (d) (iii) and (vi) of the BIT between Bolivia and the United States.

[6] Article 2 (2) of the BIT between Ecuador and the United Kingdom; see also e.g. Article 10 (1) of the 1994 Energy Charter Treaty; Article 3 (4) of the BIT between the Netherlands and Paraguay.

[7] Article 26 (3) (c) of the 1994 Energy Charter Treaty.

> "a dispute between a Party and a national or company of the other Party arising out of or relating to any investment authorization, investment agreement or alleged breach of any right conferred, created or recognized by this Treaty …".[8]

In this connection, "investment authorization" has been defined as:

> "an authorization granted by the foreign investment authority of a Party to a covered investment or a national or company of the other Party".[9]

"Investment agreement" means:

> "a written agreement between the national authorities of a Party and a national or company of the other Party that (i) grants rights with respect to natural resources or other assets controlled by the national authorities; and (ii) is relied upon by the national or company in establishing or acquiring a covered investment".[10]

BITs of the United States also specifically allow for recourse to investor-State arbitration regarding disputes that arise out of investment authorizations or investment agreements and which involve taxation measures.[11]

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[8] E.g. Article IX (1) of the BIT between Trinidad and Tobago and the United States.

[9] Ibid., Article I (1) (g).

[10] Ibid., Article I (1) (h).

[11] Ibid., Article XIII (1) (b). Canada's BITs likewise provide for investor-State arbitration in respect of taxation measures alleged to be in breach of an agreement between the central government authorities of a party and an investor. See e.g. Article XI (2) of the BIT between Canada and Uruguay.

Fourth, many IIAs contain a "preservation of rights" clause providing that an investor is entitled to any treatment under an agreement with a host country that is more favourable than the treatment provided for in the IIA. BITs of the United States, for example, state that the provisions of these treaties:

> "shall not derogate from any of the following that entitle covered investments to treatment more favorable than that accorded by this Treaty:
>
> […]
>
> (c) obligations assumed by a Party, including those contained in an investment authorization or an investment agreement".[12]

As with the "umbrella" clause, the inclusion of such a "preservation of rights" clause in IIAs, while frequent, cannot be considered to be a common characteristic of current IIAs. Contrary to "umbrella" clauses, which impose an unconditional, unqualified obligation on the host country to observe any obligations it may have entered into in relation to any investment, "preservation of rights" clauses only require the host country to observe such an obligation if it is more favourable than the treatment under the particular IIA. Moreover, "preservation of rights" clauses do not always cover agreements between host countries and investors. As an example, Article 11 of the BIT between Ecuador and the United Kingdom provides:

> "If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether

[12] E.g. Article XI of the BIT between El Salvador and the United States. See also Article 7 of the BIT between El Salvador and Switzerland.

general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement."

Further reading

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Subrogation

Subrogation is a term originating in insurance law and referring to the substitution of one person for another with respect to a claim. Subrogation clauses, which appear in most BITs, provide that, if a party or an agency of a party makes a payment to one of its investors pursuant to an investment insurance scheme, the other party shall recognize the assignment of the rights of that investor to the party or its agency. An example of a subrogation clause is Article X of the BIT between Canada and Costa Rica:

> "1. If a Contracting Party or any agency thereof makes a payment to any of its investors under a guarantee or a contract of insurance it has entered into in respect of an investment, the other Contracting Party shall recognize the validity of the subrogation in favour of such Contracting Party or agency thereof to any right or title held by the investor.
>
> 2. A Contracting Party or any agency thereof which is subrogated to the rights of an investor in accordance with paragraph (1) of this Article, shall be entitled in all circumstances, subject only to reasonable procedural requirements, to the same rights as those of the investor in respect of the investment concerned and its related returns. Such rights may be exercised by the Contracting Party or any agency thereof or by the investor if the Contracting Party or any agency thereof so authorizes."

Further reading

UNCTAD (1998). *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva: United Nations), United Nations publication, Sales No. E.98.II.D.8, pp. 46-50; Dolzer, Rudolf and Margrete Stevens (1995). *Bilateral Investment Treaties* (The Hague, Boston and London: Martinus Nijhoff).

Taxation

The paramount issue underlying all international tax considerations is how the revenue from taxes imposed on income earned by associated entities of a TNC is allocated among countries. There exist several instruments that deal, in different ways, with international taxation issues.

1. Taxation and international agreements on the admission, treatment and protection of foreign investment

International agreements on the admission, treatment and protection of foreign investment generally apply to taxation issues only to a limited extent. This is mainly due to the existence of a separate network of international tax treaties. Many IIAs provide for an exception of taxation matters from rules on national and MFN treatment. The model BIT of the Belgo-Luxemburg Economic Union, for example, states that the provisions on national and MFN treatment do not apply to tax matters.[1] Other BITs in this category provide more specifically that their provisions regarding national and MFN treatment are not to be construed as obliging a party to extend to investors of the other party the benefit of any treatment, preference or privilege resulting from any international agreement or arrangement or domestic legislation relating to taxation.[2] The "general exceptions" clause of the

[1] See Article 4 (4).

[2] See, for example, Article 7 of the BIT between Ecuador and the United Kingdom (1994). A slightly different formulation of the exemption of taxation issues appears in Article 4 of the BIT between the Netherlands and Paraguay (1992). This requires each of the parties to grant investors of the other party national and MFN treatment in respect of taxes, fees, charges and fiscal deductions and exemptions, except for fiscal advantages accorded by a party (1) under an agreement for the avoidance of double taxation; (2) by virtue of its participation in a customs union, economic union or similar institution, or (3) on the basis of reciprocity.

GATS provides for an exception from the national treatment rule in respect of certain measures aimed at "ensuring the equitable or effective imposition or collection of direct taxes" and an exception from the MFN rule in respect of treatment accorded pursuant to international instruments designed to avoid double taxation.[3]

Another method that has been employed to limit the coverage of taxation matters in IIAs consists of a general rule excluding the application of the agreement to taxation unless it is specifically provided for. In practice, agreements that employ this approach often stipulate that their provisions on expropriation and dispute settlement will apply to taxation. Thus, for example, BITs of the United States commonly contain a clause stating that no provisions of the treaty shall apply to taxation except that the expropriation and arbitration provisions will apply to claims that a taxation measure amounts to an expropriation,[4] and that the investor-State arbitration procedures will apply to taxation issues arising in the context of investment agreements or investment authorizations.[5] BITs of Canada adopt a similar approach. These treaties exempt taxation issues from their scope, but provide that the expropriation provisions shall apply to taxation measures and that the investor-State arbitration mechanism may be invoked by an investor in respect of a taxation measure that is alleged to be in breach of an agreement between an

[3] Articles XIV (d) and (e) of the GATS.

[4] A dispute arising from an assertion by an investor that a taxation measure involves an expropriation may only be submitted to arbitration if the investor has first referred the question of whether the measure involves an expropriation to the competent tax authorities of both parties. The investor may not submit the claim to arbitration if within nine months of the date of referral the competent tax authorities determine that the tax measure does not involve an expropriation.

[5] See, for example, Article XIII (1) of the BIT between El Salvador and the United States; Article XIII (1) of the BIT between Bolivia and the United States and Article XIII (1) of the BIT between Nicaragua and the United States.

investor and a party's central government. In both cases, however, resort to investor-State arbitration is precluded if the tax authorities of the parties within a certain period of time jointly determine that the claims raised by an investor are without foundation.[6]

NAFTA Article 2103 states a general rule of non-application of the NAFTA to taxation, which is then qualified in respect of specific subjects, including, with respect to investment, the provisions on national and MFN treatment, performance requirements and expropriation and compensation. First, national and MFN treatment apply to taxation measures other than certain categories, including taxes on income, capital gains or on the taxable capital of corporations and taxes on estates, subject to exceptions for advantages granted pursuant to double taxation treaties and to country-specific reservations. Second, the provisions of the NAFTA that prohibit the imposition of performance requirements as a condition for the receipt of an advantage also apply to taxation measures. Third, an investor may refer the issue of whether or not a measure is an expropriation to international arbitration only if the competent tax authorities have failed to agree on it within a period of six months after the date on which the matter is referred to them.[7]

The Energy Charter Treaty's provisions on the application of its investment disciplines to taxation issues are broadly similar to those of the NAFTA. Article 21 exempts taxation issues from the scope of the Treaty but provides for the qualified application to taxation of *inter alia* the requirements to accord national and MFN treatment to foreign investors and of the rules on expropriation. By virtue of Article 21 (3),

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[6] See e.g. Articles VIII (3) and XI of the BIT between Canada and Costa Rica (1998) and Articles VIII (3) and XI of the BIT between Canada and Uruguay (1997).

[7] Provisions identical or similar to NAFTA Article 2103 appear in several recent free trade agreements, for example, Article O-03 of the Canada-Chile Free Trade Agreement of 1996.

the national and MFN treatment provisions apply to taxation measures other than those on income or on capital, but they shall not impose MFN obligations with respect to advantages accorded by a party pursuant to double taxation treaties or resulting from membership of a regional economic organization, and they do not apply to measures aimed at ensuring the effective collection of taxes. With respect to expropriation, Article 21 (5) requires that questions whether a taxation measure involves expropriation, or whether a taxation measure alleged to constitute an expropriation is discriminatory, be referred in the first instance to the competent tax authorities of the contracting parties concerned.

2. Double taxation treaties

The aim of treaties for the avoidance of double taxation is to avoid the same income from being taxed by two or more States. Such double taxation occurs, for example, when a company resident in a country is taxed on its worldwide income, including income derived from an affiliate in another country on which that country has already levied a tax. A distinction can be made between juridical double taxation and economic double taxation. Juridical double taxation occurs when one and the same person is taxed on the same income by two or more States. Economic double taxation occurs when two separate persons are each taxed on the same income by two or more States.

Treaties aimed at the avoidance of double taxation (so called "double taxation treaties") are mostly of a bilateral nature. As of the end of 2002, the number of bilateral treaties for the avoidance of double taxation had reached 2,256. Such treaties, which are often based on model conventions developed by the OECD and the United Nations, provide for the allocation of exclusive or shared taxing rights to the contracting parties and for commonly agreed definitions. In addition, they often also contain a non-discrimination clause (national rather than

MFN treatment), provisions designed to avoid tax evasion and procedures for arbitration and resolution of conflicts.[8]

3. Taxation and corporate responsibility

Taxation issues have also been addressed in instruments concerning corporate responsibility. A recommendation in chapter X of the OECD Guidelines for Multinational Enterprises addresses the responsibility of TNCs in the area of taxation as follows:

> "It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with the tax laws and regulations in all countries in which they operate and should exert every effort to act in accordance with both the letter and spirit of those laws and regulations. This would include such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle."

4. Other types of international instruments relevant to taxation

Taxation issues are also addressed in regional agreements among developing countries that institute a regime of tax benefits for investors from member countries of a particular region. A case in point is the CARICOM Agreement on the Harmonisation of Fiscal Incentives to Industry. In addition, instruments that establish a distinct legal status for regional business associations, such as the European Economic Interest Grouping,[9] commonly include provisions on the tax regime applicable to such entities.

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[8] See above section on Most-Favoured-Nation Treatment.
[9] See http://europa.eu.int/scadplus/leg/en/lvb/l26015.htm.

Further reading

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Trade-related investment measures

Trade-related investment measures are a specific category of host country operational measures.[1] The term denotes the impact of investment measures on trade.

The WTO Agreement includes in one of its annexes an Agreement on Trade-Related Investment Measures (TRIMs Agreement), which prohibits TRIMs that are inconsistent with Articles III or XI of GATT 1994.[2] Since the TRIMs Agreement essentially clarifies already existing GATT disciplines in the field of trade in goods, it does not apply to measures affecting trade in services. The Agreement does not contain a general definition of the term "trade-related investment measure" but lists examples of measures that are inconsistent with Article III (4) of GATT 1994 and Article XI (1) of GATT 1994. These examples include local content requirements, trade-balancing requirements and export restrictions. The Illustrative List provides:

> "1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under

[1] See supra section on Host Country Operational Measures. For another category of host country operational measures see supra section on Performance Requirements.

[2] Article III requires WTO members to accord imported products national treatment with respect to internal taxation and regulation. Article XI of the GATT 1994 prohibits the introduction of quantitative restrictions on imports or exports. Transition provisions in Article 5 of the TRIMs Agreement have allowed WTO members to maintain TRIMs that were notified in 1995 during a transition period of five years for developing countries and seven years in the case of least developed countries. In 2001, a number of developing countries were granted an extension of this transition period until the end of 2003.

domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in

> terms of a proportion of volume or value of its local production."

Several recent IIAs have incorporated the prohibition of TRIMs contained in the TRIMs Agreement. Examples are the Treaty on Free Trade between Colombia, Mexico and Venezuela; the Energy Charter Treaty; the BIT between Canada and Costa Rica; and the Agreement between the Socialist Republic of Vietnam and the United States of America on Trade Relations.

Further reading

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Transfer of funds

A variety of international instruments contain obligations regarding the transfer of funds related to foreign investment. The precise scope of such obligations depends upon the coverage and the objectives of the instrument in question. Thus for example, the scope of transfer of funds provisions in the context of investment protection rules differs from the scope of transfer of funds provisions in instruments aimed at the liberalization of capital movements.

1. Transfer of funds and investment protection

BITs and regional agreements that are modelled after such treaties virtually always require that host countries guarantee the free transfer of payments related to investments as an important aspect of investment protection. This requirement only applies to transfers related to inward investment made by investors of one party in the territory of another party: transfers related to outward investment by domestic investors of the parties are not covered by such a requirement. The main categories of payments in respect of which this right of free transfer applies are:

- Outward transfers of amounts derived from or associated with protected investments. This category typically includes returns on investment (profits dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and returns in kind); proceeds of the total or partial liquidation of investments; repayment of loans; and earnings and other remuneration of personnel engaged from abroad in connection with an investment.

- Outward transfers of payments made by a host country as compensation for an expropriation of investment or for losses suffered by foreign investors as a result of an armed conflict or civil disturbance and of payments that arise from dispute settlement proceedings.

- Inward transfers of amounts to be invested by a foreign investor, including inward transfers to develop or maintain an existing investment and, in the case of investment agreements that contain obligations to admit foreign investment, inward transfers for the purposes of making an investment.

As an example, Article 14 (1) of the Energy Charter Treaty provides:

> "Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party guarantee the freedom of transfer into and out of its Area, including the transfer of:
>
> (a) the initial capital plus any additional capital for the maintenance and development of an Investment;
>
> (b) Returns;
>
> (c) payments under a contract, including amortization of principal and accrued interest payments pursuant to a loan agreement;
>
> (d) unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment;
>
> (e) proceeds from the sale or liquidation of all or any part of an Investment;
>
> (f) payments arising out of the settlement of a dispute;

(g) payments of compensation pursuant to [the provisions on compensation for losses and compensation for expropriation]."

Provisions on transfer of funds often require host countries to ensure that transfers can be made without delay, in freely usable or freely convertible currencies, at the normal exchange rate applicable at the time of the transfer.

The right of free transfer of funds is often unqualified but in a number of treaties it is subject to the application of the laws of the host country in respect of matters such as taxation, adjudicatory proceedings and the protection of creditor rights. In some cases, provision has been made for the possibility of limiting the free transfer of funds under a temporary balance-of-payments safeguard clause. A prominent example is the balance-of-payments safeguard clause in the NAFTA.[1]

2. Transfer of funds and the OECD Liberalisation Codes

In the context of the OECD, rules relevant to the transfer of funds related to foreign investment are contained in the Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations. In addition to covering outward transfers of all proceeds of inward investment, the Codes also apply to inward

[1] Article 2104. BITs concluded by Chile contain provisions that permit the parties not to allow the transfer of capital during a period of one year after the date of entry. The investment provisions of the Canada-Chile Free Trade Agreement contain an annex in which Chile reserves the right to take certain measures "[f]or the purpose of preserving the stability of its currency" (annex G-09.1 (1)). These measures include the maintenance by Chile of requirements that transfers of proceeds from the sale or liquidation of an investment not take place until the expiry of a specified period of time and the application by Chile of a reserve requirement on investment from Canada, other than FDI, and on foreign credits relating to an investment.

transfers related to the making of investment by non-residents and to transfers related to the making of outward investment by residents.

The obligation to permit a transfer under the OECD Codes includes the obligation not to limit the availability of foreign exchange for the purpose of making the transfer. The Codes cover both transfers and underlying transactions but differentiate between transfers and underlying transactions in terms of the nature of the applicable obligation. Whereas underlying transactions are subject to an obligation of non-discrimination, whereby transactions between residents may not be treated more favourably than transactions between residents and non-residents, the obligation not to restrict transfers is of an absolute nature and applies also to measures that are non-discriminatory.

The OECD Codes enable OECD members to make reservations in respect of restrictions in force at the time a country becomes a member of the OECD. In principle, new restrictions may not be introduced except on a temporary and non-discriminatory basis in case of balance-of-payments difficulties and in case of "serious economic and financial disturbance".[2] In addition, a member may lodge reservations when a new item is added to the Codes covered by the Code and when the obligation relating to an item is extended or begins to apply to a member. Furthermore, members may at any time lodge new reservations in order to impose restrictions on certain short-term financial transactions.[3]

3. Transfer of funds and the IMF Articles of Agreement

Article VIII (2) (a) of the Articles of Agreement of the IMF provide that IMF members may not "impose restrictions on the making

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[2] OECD Code of Liberalisation of Capital Movements, Article 7 (b).

[3] See OECD Code of Liberalisation of Capital Movements, Article 2 (b);OECD Code of Liberalisation of Current Invisible Operations, Articles 2 (b) and 7.

of payments and transfers for current international transactions" except where such restrictions are approved by the IMF. This provision protects the ability of an investor to repatriate income arising from investment but does not cover payments and transfers arising from the liquidation of investment and from the making of a new investment.

- "Current" transactions. Payments that arise from "current" transactions include, in addition to payments relating to trade and services, certain payments related to investments: income arising from investments, including interest on loans and other debt instruments, net of any income tax that may be levied by the country from which the payment is to be made; and a "moderate amount" for amortization of the principal of loans (or other debt instruments) or for the depreciation of direct investments. Not covered are other investment-related payments, such as payments arising from the liquidation of the original capital or any capital appreciation. Article VI of the IMF Articles of Agreement specifically preserves the right of IMF members to impose restrictions on capital transactions.

- "International" transactions. "International" transactions are transactions between residents and non-residents. Thus transactions between a foreign affiliate and other companies in a host country are not considered international in this sense.

- "The making of payments and transfers". The obligation in Article VIII (2) (a) comprises the right of a resident to make a payment to a non-resident and the right of a non-resident to transfer the proceeds of that payment from the country in question. It extends only to the making of outward payments and transfers and not to the receipt of inward payments and transfers. Thus in the case of investment-related payments and transfers, the provision protects the ability of a non-resident to transfer proceeds from an investment but does not apply to inward payments and transfers related to the making of an investment.

- "Restriction". The concept of restriction comprises any governmental action whether of a formal or informal nature that impedes the making of current international payments and transfers, including limitations with respect to the purchase of foreign exchange for the purpose of making a payment or transfer. A restriction on an underlying current transaction is not considered to constitute a restriction on the making of payments and transfers for that transaction.

Closely related to the prohibition on restrictions on current payments and transfers is the prohibition in Article VIII (3) of the IMF Articles of Agreement of the use of multiple currency practices. The application of the obligations in Article VIII (2) and (3) is subject to transitional arrangements set forth in Article XIV (2) of the IMF Articles of Agreement whereby members have been allowed to "maintain and adapt to changing circumstances" exchange restrictions and multiple currency practices in force at the time of their accession to the IMF. In addition, the IMF may authorize a member to introduce temporary non-discriminatory restrictions on payments and transfers for current transactions in case of balance-of-payments difficulties.

4. Transfer of funds and the GATS

The GATS covers capital movements to the extent that such movements are related to specific commitments made by members with regard to market access. This is expressed in footnote 8 to Article XVI of the GATS:

> "If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I [from the territory

> of one Member into the territory of any other Member] and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I [by a service supplier of one Member, through commercial presence in the territory of any other Member], it is thereby committed to allow related transfers of capital into its territory."

In addition, Article XI of the GATS provides that:

> "1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.
>
> 2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund."

Article XI of the GATS thus ensures that the imposition or maintenance by a member of restrictions on current payments or transfers relating to its specific commitments with the approval of the IMF will not be considered to give rise to a breach of the member's obligations under the GATS. By permitting members to restrict capital transactions at the request of the IMF it also accommodates the (limited) jurisdiction of the IMF regarding capital transactions.[4]

Finally, as referred to in Article XI, restrictions on current payments and transfers and on capital transactions may be justified under a temporary derogation clause in Article XII (1) which can be invoked in the event of "serious balance-of-payments and external financial difficulties or threat thereof …". Measures imposed under this provision must be non-discriminatory and consistent with the IMF Articles of Agreement; must avoid unnecessary damage to the commercial, economic and financial interest of any other member; may not exceed those necessary to deal with the problems that justified the invocation of this provision; and must be temporary and be phased out progressively as the situation improves.[5] Procedural requirements attached to this provision include prompt notification of the WTO General Council and consultations in a Committee on Balance-of-Payments Restriction. In the latter regard, Article XII (5) (e) assigns an important role to the IMF by providing that:

> "In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member."

An open question regarding the scope of Article XII in relation to capital flows is whether it only allows for restrictions on outflows of

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[4] Article VI (1) of the 1944 IMF Articles of Agreement provides that the IMF can request a member using IMF resources to restrict capital transactions in order to avoid the IMF's general resources from being used to meet a large and sustained outflow of capital.

[5] Article XII (2).

capital or also permits the imposition of restrictions on inflows of capital.

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Transfer of technology

1. Definition of "technology" and "transfer of technology"

The term "technology" can be defined as "systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service".[1] Excluded from this definition are transactions involving the mere sale or lease of goods. Technology encompasses both the technical knowledge on which the end product is based and the operational capacity to convert relevant productive inputs into a finished item or service. "Transfer of technology" is the process whereby commercial technology is disseminated. As described in the UNCTAD draft International Code of Conduct on the Transfer of Technology, the transfer of technology can occur in various forms:

"(a) The assignment, sale and licensing of all forms of industrial property, except for trade marks, service marks and trade names when they are not part of transfer of technology transactions;

(b) The provision of know-how and technical expertise in the form of feasibility studies, plans, diagrams, models, instructions, guides, formulae, basic or detailed engineering designs, specifications and equipment for training, services involving technical advisory and managerial personnel, and personnel training;

(c) The provision of technological knowledge necessary for the installation, operation and functioning of plant and equipment, and turnkey projects;

[1] This is the definition used in the UNCTAD draft International Code of Conduct on the Transfer of Technology, Chapter 1 (1.2).

(d) The provision of technological knowledge necessary to acquire, install and use machinery, equipment, intermediate goods and/or raw materials which have been acquired by purchase, lease or other means;

(e) The provision of technological contents of industrial and technical co-operation arrangements."[2]

2. Internalized and externalized transfers of technology

In respect of the role of TNCs in the process of transfer of technology, a distinction is usually made between *internalized* and *externalized* transfer of technology. An internalized transfer of technology is the transfer of technology by a firm to a foreign affiliate under its ownership and control. An externalized transfer of technology is a transfer of technology by a firm to other, unrelated firms operating in the receiving country. Externalized transfers of technology can take such forms as licensing, sale of capital goods, the provision of technical assistance, minority joint ventures, subcontracting and original equipment manufacturing arrangements. The choice between an internalized and an externalized mode of transfer of technology is determined by a range of factors, such as the nature and pace of change of the technology; the business strategy of the seller of the technology; the capabilities of the buyer, and host country policies.

3. Diffusion of technology

A transfer of technology through FDI may benefit a host country not only as a result of the use of that technology by its recipient but also as a consequence of its subsequent *diffusion* to other firms. Such diffusion of technology can occur through various channels, the most important of which are demonstration effects; competition effects; the movement of labour from foreign affiliates to local firms and the

[2] Chapter 1 (1.3).

creation of vertical linkages between foreign affiliates and local suppliers and customers.

4. *Transfer of technology to developing countries as a subject of international arrangements and initiatives*

The question of the appropriate scope for regulation of the process of international transfer of technology has historically been a subject of controversy between developed and developing countries, as reflected in the failed attempt to reach agreement on the UNCTAD draft International Code of Conduct on the Transfer of Technology. In this connection developing countries have expressed concerns regarding *inter alia* the predominant role of TNCs in the generation and dissemination of commercial technology; the unequal bargaining relationship between buyers and sellers of technology; and the negative effects on their economic development of various kinds of restrictions often associated with transfer of technology arrangements. However, as compared with the approach that was once favoured by developing countries which sought to regulate in detail the terms and conditions of individual transfer of technology arrangements, recent decades have witnessed a shift towards a more market-based approach. This approach emphasizes the private property character of technology and the free commercial transfer of technology and views the need for intervention as being limited primarily to instances of anti-competitive abuse of transfer of technology arrangements. Accompanying this shift has been a strengthening of international standards for the protection of intellectual property rights, as illustrated by the WTO TRIPS Agreement. A number of recent agreements inspired by this market-based approach also provide for commitments regarding international cooperation to encourage the transfer of technology. A prominent example is Article 66 (2) of the TRIPS Agreement:

> "Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of

> promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base."

Other examples of similar provisions can be found in the 1994 Energy Charter Treaty, various international environmental agreements and a number of WTO instruments such as the GATS Annex on Telecommunications.

The 2000 OECD Guidelines for Multinational Enterprises address the issue of transfer of technology from the perspective of the social responsibility of (multinational) enterprises. A chapter on "Science and Technology" includes a recommendation that TNCs should:

> "Adopt, where practicable in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights."[3]

Another recommendation in this chapter recommends that TNCs should:

> "When granting licenses for the use of intellectual property rights or when otherwise transferring technology, do so on reasonable terms and conditions and in a manner that contributes to the long term development prospects of the host country."[4]

[3] Chapter VIII (2).
[4] Chapter VIII (4).

5. Treatment of technology in IIAs

A limited number of IIAs prohibit the application of measures that require investors to transfer technology.[5] Notable examples are the NAFTA, free trade agreements between countries in the Western Hemisphere and recent BITs concluded by Canada and the United States.

Thus the NAFTA prohibits the imposition or enforcement by a party of requirements "to transfer technology, a production process or other proprietary knowledge to a person in its territory …"[6] in connection with the admission or treatment of an investment of an investor of any party or non-party. This prohibition is subject to an exception if a transfer of technology requirement "is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement".[7] Article 1106 (2) of the NAFTA further provides that requirements "to use a technology to meet generally applicable health, safety or environmental requirements …" shall not be construed to be inconsistent with this prohibition. In addition, the prohibition of transfer of technology requirements does not apply to government procurement.[8]

[5] See supra section on Host Country Operational Measures.
[6] Article 1106 (1) (f) of the NAFTA.
[7] Ibid.
[8] Article 1108 (8) (b) of the NAFTA. The NAFTA provisions on performance requirements also prohibit a party from imposing on an investment of an investor of a party or a non-party a requirement "to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market" (Article 1106 (1) (g)). This prohibition does not apply to government procurement (1108 (8) (b) of the NAFTA).

The NAFTA provisions on performance requirements draw a distinction between mandatory performance requirements and measures that condition the receipt or continued receipt of an advantage on compliance with specified requirements. Transfer of technology requirements are prohibited if applied as mandatory requirements but not if they are applied as conditions for the receipt or continued receipt of an advantage. Furthermore, the prohibition of certain advantage-based performance requirements shall not "be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage […] on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory".[9]

Aside from the above-mentioned exceptions and qualifications, the prohibition of performance requirements in Article 1106 of the NAFTA is subject to country-specific reservations that the parties have been permitted to make in respect of existing and future non-conforming measures, as set out in each party's schedule in an annex to the NAFTA.[10]

Provisions on transfer of technology requirements that are identical to the NAFTA provisions on transfer of technology requirements are contained in several free trade agreements that have been concluded during the last decade between countries in the Western Hemisphere.[11] The prohibition of mandatory transfer of technology

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[9] Article 1106 (4) of the NAFTA.

[10] Articles 1108 (1) and (3) of the NAFTA.

[11] See e.g. Article G-06 of the Canada-Chile Free Trade Agreement; Article15-05 of the Free Trade Agreement between Bolivia and Mexico; Article 9-07 of the Free Trade Agreement between Chile and Mexico, and Article 14-07 of the Free Trade Agreement between El Salvador, Guatemala, Honduras and Mexico. These free trade agreements also include a prohibition of requirements imposed on investments to act as exclusive suppliers of goods or services to a specific region or to the world market.

requirements is also a feature of many recent BITs of Canada and the United States.[12] Unlike the NAFTA, BITs of the United States also often include a prohibition of mandatory requirements "to carry out a particular type, level or percentage of research and development…" in the territory of a party.[13] Such a provision does not appear in the BITs of Canada.

Besides specific provisions that appear in relatively few investment agreements on requirements regarding the transfer of technology and the conduct of research and development, another way in which technology-related issues may be affected by such agreements pertains to the treatment of intellectual property. Intellectual property rights normally constitute one of several categories of assets included in the definition of the term investment. As a consequence, in the absence of qualifying provisions, IIAs apply to intellectual property rights viewed as a form of investment.

Provisions that qualify the application of an agreement to intellectual property can be found in some agreements, especially with regard to rules on national and MFN treatment and on expropriation and compensation. The NAFTA states in this respect that the requirements to accord national and MFN treatment to covered investments do not apply to exceptions or derogations from the national treatment article in the NAFTA chapter on intellectual property. Similarly, the provision on expropriation and compensation does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the NAFTA chapter on intellectual property rights.[14]

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[12] BITs concluded by other countries generally do not contain provisions on performance requirements.

[13] See e.g. Article VI (f) of the BIT between Bolivia and the United States (1998).

[14] Articles 1108 (5) and 1110 (7) of the NAFTA.

BITs of Canada likewise provide that in respect of intellectual property rights the parties may derogate from the provisions on national and MFN treatment "in a manner that is consistent with the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations …".[15] They also preclude the application of the provisions on expropriation and compensation to the issuance of compulsory licenses that are consistent with the Uruguay Round Final Act. The 1994 Energy Charter Treaty exempts intellectual property from the application of its national and MFN treatment provisions and states that in this respect the "corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties" shall apply.[16]

Further reading

UNCTAD (2001). *Transfer of Technology*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.33; WTO Working Group on the Relationship between Trade and Investment (2002). "Key issues concerning foreign direct investment and the transfer and diffusion of technology to developing countries", Note by the Secretariat (Geneva: WTO), WT/WGTI/W/136, http://docsonline.wto.org/DDFDocuments/t/WT/WGTI/W136.doc; UNCTAD (2001). *Host Country Operational Measures*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.18; UNCTAD (2001). *Compendium of International Arrangements on Transfer of Technology: Selected Instruments* (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.28; Patel, Surendra J., Pedro Roffe and Abdulqawi Yusuf,

[15] Annex I (IV) (1) of the BIT between Canada and Uruguay; see also e.g. Article VI (1) (a) of the BIT between Canada and the Philippines.

[16] Article 10 (10) of the Energy Charter Treaty.

eds. (2001). *International Technology Transfer: The Origins and Aftermath of the United Nations Negotiations on a Draft Code of Conduct* (London, The Hague and Boston: Kluwer Law International); WTO Working Group on the Relationship between Trade and Investment (2000). "Survey of literature on trade, foreign direct investment and the transfer of technology" (Geneva: WTO), WT/WGTI/W/88, http://docsonline.wto.org/ DDFDocuments/t/WT/ WGTI/W88.doc; UNCTAD (1999). *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.3; Muchlinski, Peter T. (1999). *Multinational Enterprises and the Law* (Oxford: Blackwell), pp. 425-456; Chen, Edward K.Y. (1994). *Transnational Corporations and Technology Transfer to Developing Countries*. The United Nations Library on Transnational Corporations, vol. 18 (London: Routledge).

Transfer pricing

A key aspect of the centralized financial strategy of TNCs concerns the determination of the prices at which goods, services knowledge and intellectual property are transferred across borders between foreign affiliates and the parent corporation. The difficulty of applying open market prices to intra-firm transactions necessitates the use of an alternative mechanism to determine such internal transfer prices. Two basic methods are typically being used by TNCs in this respect. The first method, the "cost-plus" method uses the basic cost of the item transferred, calculated according to one of a number of possible costing criteria, to which a percentage mark-up is added allowing a margin of profit to accrue each seller in the chain. The second method is the "sale minus" or "resale price" method. This starts with the price of the finished product from which a discount is subtracted, leaving the buyer with a margin of profit on the transfer based on the assumption that the affiliated buyer will add value to the product prior to the resale at the final price. One of the principal regulatory issues arising in connection with transfer pricing practices is the possible abuse of transfer pricing practices to shift profits to countries with relatively low tax rates. In this respect, the tax authorities of most countries consider transfer pricing methods acceptable if they are based on the arm's length principle. This requires a transaction between related parties to be valued at what would have been charged had the transaction taken place between independent companies. The arm's length principle is reflected in Article 9 of the OECD Model Tax Convention on Income and on Capital.[1] The 1995 OECD Transfer

[1] The arm's length principle also appears in a recommendation on taxation in chapter X of the 2000 OECD Guidelines for Multinational Enterprises: "[…] enterprises should comply with the tax laws and regulations in all countries in which they operate and should exert every effort to act in accordance with both the letter and spirit of those laws and regulations. This would include such measures as providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed in

Pricing Guidelines for Multinational Enterprises and Tax Administrations provide detailed guidance on how to apply the arms' length principle.

Specific methods to apply the arm's length principle can be divided into transactional methods and transactional profit methods.[2] Transactional methods include the "comparable uncontrolled price" method,[3] the "resale price" method,[4] and the "cost plus" method.[5] Transactional profit methods include the "profit split"[6] method, the

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connection with their operations and conforming transfer pricing practices to the arm's length principle."

[2] The 1995 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations express a preference for transactional methods over transactional profit methods, which are to be used only as methods of last resort. It should be noted that transfer pricing regulations of the United States, while also based on the arm's length principle, depart in several respects from the 1995 OECD Transfer Pricing Guidelines, including with respect to documentation requirements, the burden of proof, penalties and the preference for transactional methods.

[3] This method, also known as the "market price" method, compares the price of tangible goods transferred in a controlled transaction to the price of property or services transferred in a comparable uncontrolled transaction.

[4] The "resale price" method uses the price at which a product that has been purchased from an associated enterprise is resold to an independent enterprise and subtracts a resale gross margin from that resale price.

[5] The "cost plus" method uses the costs incurred by the supplier of a tangible product in a controlled transaction and adds to these costs an appropriate cost plus mark-up to allow for an appropriate profit in light of the functions performed by the buyer of the product and the market conditions. between entities of a TNC.

[6] The "profit split" method identifies the combined profit to be split for the associated enterprises from controlled transaction between entities belonging to a TNC and then allocates this combined profit between those entities based upon an economically valid basis that approximates the division

"transactional net margin"[7] method, and the "comparable profits"[8] method.

As an alternative to the arm's length principle, the use of a global formulary apportionment method has been suggested. This allocates the global profits of a multinational enterprise group on a consolidated basis among the associated enterprises in different countries on the basis of a predetermined formula. This method, however, has not gained wide support.

Further reading

UNCTAD (1999). *Transfer Pricing*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.8; Muchlinski, Peter T. (1999). *Multinational Enterprises and the Law* (Oxford: Blackwell), pp. 277-321.

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of profits that would have been anticipated and reflected in an agreement made at arm's length with an independent customer.

[7] This method examines the net profit margin relative to an appropriate base (for example, costs, sales, assets) that a TNC realizes from a controlled transaction with its affiliates.

[8] The "comparable profits" method uses the amount of operating profit that an entity of a TNC would have earned on related party transactions with other entities within the enterprise if its profit level indicator were equal to that of an uncontrolled comparable transactions, i.e. the comparable operating profit the entity would have earned in a transaction with an independent customer.

Transparency

A key aspect of the concept of "transparency" as commonly understood in connection with international economic agreements involves the publication of domestic laws, regulations and administrative practices[1] that are relevant to the subject matter of the agreement in question. The prime example of a provision embodying such a publication requirement in the context of international trade agreements is Article X (1) of GATT 1994.[2] Obligations of this nature are not typically contained in traditional BITs,[3] but can be found in some recently concluded BITs. As an example, the BIT between Canada and Uruguay provides in Article XIV (1) ("Transparency"):

> "Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this

[1] In some agreements the publication requirement also applies to judicial decisions and international agreements.

[2] "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private."

[3] Thus, for example, BITs of the United Kingdom and Germany are silent on this issue.

> Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them."[4]

As compared with BITs, inclusion of provisions requiring the publication of domestic laws, regulations and practices is more prevalent in regional and multilateral investment agreements. Notable examples are Article III-B of the 1987 ASEAN Agreement for the Promotion and Protection of Investments, Article 20 of the 1994 Energy Charter Treaty, Article 1802 of the NAFTA and Article III of the GATS. The latter provision reads in relevant part:

> "1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.
>
> 2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available."

The idea that transparency is to be ensured through the provision of adequate information on relevant domestic laws,

[4] The BIT between El Salvador and the United States provides in Article II (5):

"Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain to or affect covered investments are promptly published or otherwise made publicly available."

Provisions concerning the publication or provision of information on domestic laws and regulations also appear in, for example, the model BITs of Austria and Finland.

regulations and administrative practices is also reflected in certain legally non-binding instruments, such as the 1994 APEC Non-binding Investment Principles and the World Bank Guidelines on the Treatment of Foreign Direct Investment.[5]

In addition to this obligation to publish laws, regulations and administrative practices, investment agreements, particularly regional and multilateral investment agreements, often include requirements to notify laws and regulations and changes thereto, to provide specific information upon request, and to establish “contact points”. As an example, Article III of the GATS reads in relevant part:

> “3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.
>
> 4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. […] Appropriate flexibility with respect to the time-limit within

[5] The World Bank Guidelines provide: “Each State is encouraged to publish, in the form of a handbook or other medium easily accessible to other States and their investors, adequate and regularly updated information about its legislation, regulations and procedures relevant to foreign investment and other information relating to its investment policies…”(section II (6)).

> which such enquiry points are to be established may be agreed upon for individual developing country Members. […]"[6]

Requirements with respect to publication and other forms of dissemination of information are generally subject to an exception to protect confidential business information and information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest.[7]

A third dimension of transparency provisions in IIAs involves requirements that rules and regulations be implemented in a manner that is "uniform" or "consistent", "impartial" and "reasonable". This type of provision can be found in, for example, Article VI (1) of the GATS:

> "In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner."

In this context, Article VI (2) of the GATS requires members to institute or maintain tribunals or procedures for an independent review of administrative action affecting trade in services. Article VI (3) provides that, where authorization is required for the supply of a service on which a specific commitment has been made, an applicant shall within a reasonable period of time be informed of the decision concerning his application.[8]

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[6] See also Article 20 of the 1994 Energy Charter Treaty and Article 1803 of the NAFTA. A notable feature of the latter provision is that it requires notification of both actual and proposed measures.

[7] See e.g. Article 20 (2) of the 1994 Energy Charter Treaty and Article III *bis* of the GATS.

[8] See, for another example of a provision on fairness of administrative proceedings, Article 1804 of the NAFTA.

Some IIAs contain provisions on consultations and exchange of information between the parties on investment opportunities. In such cases, transparency is an element of cooperation between the parties to promote the flow of investments between them. This approach is illustrated by the Partnership and Cooperation Agreements concluded by the European Communities and their member States with third countries.

While the above-mentioned transparency provisions contain rules addressed to States, several instruments in the field of corporate responsibility set forth norms designed to ensure transparency with regard to the structure and activities of enterprises. The recommendations on “Disclosure” in chapter III of the revised 2000 OECD Guidelines for Multinational Enterprises are an example of such an approach.

Further reading

UNCTAD (forthcoming). *Transparency*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication; OECD (2003). *International Investment Perspectives*, chapter 4-"Special Focus: Transparency and Investment" (Paris, OECD, 2003); WTO Working Group on the Relationship between Trade and Investment (2002). “Transparency”, Note by the Secretariat (Geneva: WTO), WT/WGTI/W/109, http://docsonline.wto.org/DDFDocuments/ t/WT/ WGTI/W109.doc; UNCTAD (2001). *Social Responsibility*. *UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.4; UNCTAD (1998). *Bilateral Investment Treaties in the Mid-1990s* (New York and Geneva: United Nations), United Nations publication, Sales No. E.98.II.D.8, pp. 85-86.

ANNEX
Main international instruments dealing with FDI, 1948-2003

(For further reference, visit the collection of BITs maintained online by UNCTAD at www.unctad.org/iia)

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	Council of Arab Economic Unity	Regional	Binding	Adopted
1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards	United Nations	Multilateral	Binding	Adopted
1959	Draft Convention on Investments Abroad	Abs-Shawcross Draft Convention	Non-Governmental	Non-binding	Not 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 GeneralAssembly 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	Model	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
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 adopted
1969	Agreement on Andean Subregional Integration	Andean Common Market	Regional	Binding	Adopted

Year[b]	Title	*Setting*	*Level*	*Form*	*Status*
1969	Agreement Establishing an Association between the European Economic Community and the Malagasy States	European Community Malagasy States	Inter-regional	Binding	Adopted
1969	Agreement Establishing an Association between the European Economic Community and the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya	European Community-Tanzania, Uganda and Kenya	Inter-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 Common Market	Regional	Binding	Superseded
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 Establishmen in the Central African	Central African Customs and Economic Union	Regional	Binding	Adopted
1972	Guidelines for International Investment	International Chamber of Commerce	Non-Governmental	Non-binding	Adopted
1973	Agreement on the Harmonisation of Fiscal Incentives to Industry	Caribbean Community	Regional	Binding	Adopted
1973	Treaty Establishing the Caribbean Community	Caribbean Community	Regional	Binding	Adopted
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	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-	Adopted

Year[b]	Title	Setting	Level	Form	Status
1976	Arbitration Rules of the United Nations Commission on International Trade Law	United Nations	Multilateral	Model	Adopted
1976	Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive	Germany-United States	Bilateral	Binding	Adopted
1977	ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy	International Labour Organization	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
1979	Draft International Agreement on Illicit Payments	United Nations	Multilateral	Binding	Not adopted
1979	United Nations Model Double Taxation Convention between Developed and Developing Countries	United Nations	Multilateral	Model	Adopted
1980	Cooperation Agreement between the European Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand member countries of the Association of South-East Asian Nations	ASEAN-EC	Inter-regional	Binding	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	Adopted

Year[b]	Title	Setting	Level	Form	Status
1982	Community Investment Code of the Economic Community of the Great Lakes Countries (CEPGL)	CEPGL	Regional	Binding	Adopted
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 Genera 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 Investments	ASEAN	Regional	Binding	Adopted
1989	Fourth ACP-EEC Convention of Lome	African, Caribbean and Pacific countries European Commnuity	Inter-regional	Binding	Adopted
1989	Cooperation Agreement between the European Economic Community, of the one part, and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (the State of the United Arab Emirates, the State of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait) of the other part	Arab States of the Gulf-European Community	Inter-regional	Binding	Adopted
1990	Criteria for Sustainable Development Management: Towards Environmentally Sustainable Development	United Nations	Multilateral	Non-binding	Adopted
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 Southern African States	Regional	Binding	Adopted

Year[b]	Title	*Setting*	*Level*	*Form*	*Status*
1984 1990	Protocol A/P1/11/84 Relating to Community Enterprises and Supplementary Protocol A/Sp.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons Right of Residence and Establishment	ECOWAS	Regional	Binding	Adopted
1991	Treaty Establishing the African Economic Community	African Economic Community	Regional	Binding	Adopted
1991	Decision 285 of the Commission of the Cartagena Agreement: Rules and Regulations for Preventing or Correcting Distortions in Competition Caused by Practices that Restrict Free Trade Competition	Andean Community	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, Licenses and Royalties	Andean Community	Regional	Binding	Adopted
1991	Decision 292 of the Commission of the Cartagena Agreement: Uniform Code on Andean Multinational Enterprises	Andean Community	Regional	Binding	Adopted
1991	The Business Charter for Sustainable Development: Principles for Environmental Management	International Chamber of Commerce	Non-Governmental	Non-binding	Adopted
1992	Agreement on the European Economic Area	EC-EFTA	Regional	Binding	Adopted
1992	Guidelines on the Treatment of Foreign Direct Investment	World Bank	Multilateral	Non-binding	Adopted
1992	Articles of Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit	Islamic Conference	Regional	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	Framework Cooperation Agreement between the European Economic Community and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama	EC-Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama	Inter-regional	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	Revised Treaty of the Economic Community of West African States (ECOWAS)	ECOWAS	Regional	Binding	Adopted

Year[b]	Title	*Setting*	*Level*	*Form*	*Status*
1993	Framework Agreement for Cooperation between the European Economic Community and the Cartagena Agreement and its Member Countries, namely the Republic of Bolivia, the Republic of Colombia, the Republic of Ecuador, the Republic of Peru and the Republic of Venezuela	EC-Andean Community	Inter-regional	Binding	Adopted
1993	Treaty Establishing the Common Market for Eastern and Southern Africa	Common Market for Eastern and Southern Africa	Regional	Binding	Adopted
1994	Free Trade Agreement between Azerbaijan, Armenia, Belarus, Georgia, Moldova, Kazakhstan, the Russian Federation, Ukraine, Uzbekistan, Tajikistan and the Kyrgyz Republic	Azerbaijan, Armenia, Belarus, Georgia, Moldova, Kazakhstan, the Russian Federation, Ukraine, Uzbekistan, Tajikistan and the Kyrgyz Republic	Regional	Binding	Adopted
1994	Free Trade Agreement between the United Mexican States and the Republic of Bolivia	Mexico-Bolivia	Bilateral	Binding	Adopted
1994	Free Trade Agreement between Mexico and Costa Rica	Mexico-Costa Rica	Bilateral	Binding	Adopted
1994	Treaty on Free Trade between the Republic of Colombia, the Republic of Venezuela and the United Mexican States	Colombia, Venezuela, Mexico	Regional	Binding	Adopted
1994	Marrakesh Agreement Establishing the World Trade Organization. Annex 1A: Agreement on Trade Related Investment Measures *(1994)*	World Trade Organization	Multilateral	Binding	Adopted
1994	Marrakesh Agreement Establishing the World Trade Organization. Annex 1B: General Agreement on Trade in Services	World Trade Organization	Multilateral	Binding	Adopted
1994	Marrakesh Agreement Establishing the World Trade Organization. Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights *(1994)*	World Trade Organization	Multilateral	Binding	Adopted
1994	Protocol of Colonia for the Reciprocal Promotion and Protection of Investments in the MERCOSUR	MERCOSUR	Regional	Binding	Adopted
1994	Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR	MERCOSUR	Regional	Binding	Adopted

Year[b]	*Title*	*Setting*	*Level*	*Form*	*Status*
1994	Agreement Among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Profits or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment	Caribbean Community	Regional	Binding	Adopted
1994	Recommendation of the OECD Council on Bribery in International Business Transactions	OECD	Regional	Non-binding	Adopted
1994	Free Trade Agreement of the Group of Three	Colombia, Mexico	Regional	Binding	Adopted
1994	APEC Non-Binding Investment Principles	APEC	Regional	Non-binding	Adopted
1994	Trade and Investment Agreement between the Government of Australia and the Government of the United Mexican States	Australia-Mexico	Bilateral	Binding	Adopted
1994	Energy Charter Treaty	European Energy Charter Organisation	Regional	Binding	Adopted
1995	Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part	EC-MERCOSUR	Inter-regional	Binding	Adopted
1995	ASEAN Framework Agreement on Services	ASEAN	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-Governmenta l	Non-binding	Adopted
1995	Agreement between the Government of the United States of America and the Government of Canada regarding the Application of Their Competition and Deceptive Marketing Practice Laws	Canada-United States	Bilateral	Binding	Adopted
1995	Osaka Action Agenda on Implementation of the Bogor Declaration	APEC	Regional	Non-binding	Adopted
1996	Protocol to amend the 1987 Agreement among ASEAN Member Countries for the Promotion and Protection of Investments	ASEAN	Regional	Binding	Adopted

Year[b]	Title	*Setting*	*Level*	*Form*	*Status*
1996	Protocol on the Protection of Competition of MERCOSUR	MERCOSUR	Regional	Binding	Adopted
1996	Inter-American Convention Against Corruption	Organization of American States	Regional	Binding	Adopted
1996	Acuerdo de Complementacion Economica MERCOSUR-Chile	Chile-MERCOSUR	Regional	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	Free Trade Agreement between Mexico and Nicaragua	Mexico-Nicaragua	Bilateral	Binding	Adopted
1997	Fourth Protocol to the Agreement on Trade in Services (on Basic Telecommunications Services	WTO	Multilateral	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	Not adopted
1997	United Nations General Assembly Resolution 52/87 on International Cooperation against Corruption and Bribery in International Commercial Transactions	United Nations General Assembly	Multilateral	Non-binding	Adopted
1997	Resolution (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption	Council of Europe	Regional	Non-binding	Adopted
1997	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	OECD	Regional	Binding	Adopted
1991 1998	Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws and Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the	European Community-United States	Bilateral	Binding	Adopted

Year[b]	Title	*Setting*	*Level*	*Form*	*Status*
1998	Agreement Establishing the Free Trade Area between the Caribbean Community and the Dominican Republic	Caribbean Community-Dominican Republic	Regional	Binding	Adopted
1998	Free Trade Agreement between Chile and Mexico	Chile-Mexico	Bilateral	Binding	Adopted
1998	DECISION 439 of the Andean Community: General Framework of Principles and Rules and for Liberalizing the Trade in Services in the Andean Community	Andean Community	Regional	Binding	Adopted
1998	DECISION 40 of the Andean Community: Approval of the Agreement Among Member Countries to Avoid Double Taxation and of the Standard Agreement for Executing Agreements on Double Taxation between Member Countries and Other States Outside the Subregion	Andean Community	Regional	Binding	Adopted
1998	Protocol Amending the Treaty Establishing the Caribbean Community. Protocol III: Industrial Policy.	Caribbean Community	Regional	Binding	Adopted
1998	Framework Agreement on the ASEAN Investment Area	ASEAN	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 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	OECD Council Recommendation Concerning Effective Action Against Hard Core Cartels	OECD	Regional	Non-binding	Adopted
1998	Draft Multilateral Agreement on Investment	OECD	Regional	Binding	Not 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	Not adopted

Year[b]	Title	*Setting*	*Level*	*Form*	*Status*
1998	Towards a Citizens' 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
1999	Resolution of the European Parliament on European Union Standards for European Enterprises Operating in Developing Countries: towards a European Code of Conduct	European Parliament	Regional	Non-binding	Adopted
1999	Criminal Law Convention on Corruption	Council of Europe	Regional	Binding	Adopted
1999	OECD Principles of Corporate Governance	OECD	Regional	Non-binding	Approved
1999	Model Clauses for Use in Contracts Involving Transborder Data Flows	International Chamber of Commerce	Model	Non-binding	Adopted
1999	Core Standards	World Development Movement	Non-Governmental	Non-binding	Not adopted
1999	Rules and Recommendations on Extortion and Bribery in International Business Transactions (1999 Revised Version)	International Chamber of Commerce	Non-Governmental	Non-binding	Adopted
1999	Agreement on Customs Union and Single Economic Area between the Kyrgyz Republic, the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan and the Republic of Tajikistan	Kyrgyz Republic, the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan and the Republic of Tajikistan	Regional	Binding	Adopted
1999	Civil Law Convention on Corruption	Council of Europe	Regional	Binding	Adopted
1999	The Treaty Establishing the East African Community	East African Community	Regional	Binding	Adopted
1982 1999	Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters and Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance	Australia United States	Bilateral	Binding	Adopted
1999	Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between Their Competition Authorities in the Enforcement of Their Competition Laws	Brazil-United States	Bilateral	Binding	Adopted

Year[b]	Title	*Setting*	*Level*	*Form*	*Status*
1999	Agreement between the European Communities and the Government of Canada Regarding the Application of their Competition Laws	Canada-European Union	Bilateral	Binding	Adopted
1999	Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities	Japan United States	Bilateral	Binding	Adopted
1999	Free Trade Agreement between the Governments of Central America and the Government of the Republic of Chile	Chile-Central American countries	Regional	Binding	Adopted
1999	Short-Term Measures to Enhance Asean Investment Climate	ASEAN	Regional	Binding	Adopted
2000	Free Trade Agreement between Mexico, El Salvador, Guatemala and Honduras	The Northern Triangle	Regional	Binding	Adopted
2000	Revised OECD Declaration on International Investment and Multilateral Enterprises (including the Revised Guidelines for Multinational Enterprises and commentaries)	OECD	Regional	Binding/ non-binding[c]	Adopted
2000	Revised United Nations Model TaxationConvention between Developed and Developing Countries	United Nations	Multilateral	Model	Adopted
2000	Agreement between New Zealand and Singapore on Closer Economic Partnership	New Zealand-Singapore	Bilateral	Binding	Adopted
2000	Protocol VIII of the Caribbean Community: Competition Policy, Consumer Protection, Dumping and Subsidies Amending the Treaty of Chaguaramas	Caribbean Community	Regional	Binding	Adopted
2000	Revised Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of The Other Part	African, Caribbean and the Pacific European community	Regional	Binding	Adopted
2001	European Convention on the LegalProtection of Services Based on, or Consisting of, Conditional Access	Council of Europe	Regional	Binding	Adopted
2001	Additional Protocol to the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data Regarding Supervisory Authorities and Transborder Data Flows	Council of Europe	Regional	Binding	Adopted
2001	Convention Establishing the European Free Trade Association (Amendment)	EFTA	Regional	Binding	Adopted
2001	Protocol to Amend the Framework Agreement on the ASEAN Investment Area	ASEAN	Regional	Binding	Adopted

Year[b]	Title	*Setting*	*Level*	*Form*	*Status*
2001	Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy	Caribbean Community	Regional	Binding	Adopted
2001	Free Trade Agreement between the Government of Canada and the Government of the Republic of Costa Rica	Canada-Costa Rica	Bilateral	Binding	Adopted
2002	Agreement between Japan and The Republic of Singapore for a New-Age Economic Partnership (JSEPA)	Japan-Singapore	Bilateral	Binding	Adopted
2002	Free Trade Agreement between the Central America and Panama	Panama-Central American countries	Regional	Binding	Adopted
2002	Treaty on Investment and trade in Services between Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua	Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua	Regional	Binding	Adopted
2002	ASEAN-China Framework Agreement on Comprehensive Economic Cooperation	ASEAN-China	Bilateral	Binding	Adopted
2003	Free Trade Agreement between the Government of the Republic of Chile and the Government of the Republic of Korea	Chile-Korea	Bilateral	Binding	Adopted
2003	Singapore-Australia Free Trade Agreement (SAFTA)	Singapore-Australia	Bilateral	Binding	Adopted
	ACP - EU	ACP - EU	Inter-regional		Under negotiation
	Algeria - United States	Algeria - United States	Bilateral		Under negotiation
	Andean Community - Canada	Andean Community - Canada	Bilateral		Under negotiation
	Andean Community - Mercosur	Andean Community - Mercosur	Inter-regional		Under negotiation
	Andean Community - Panama FTA	Andean Community - Panama	Bilateral		Under negotiation
	ASEAN - India	ASEAN - India	Bilateral		Under negotiation
	ASEAN - Japan	ASEAN - Japan	Bilateral		Under consultation
	Brazil - Russian Federation	Brazil - Russian Federation	Bilateral		Under negotiation
	CACM - Canada	Central American countries - Canada	Bilateral		Under negotiation
	CACM - United States	Central American countries - United States	Bilateral		Under negotiation
	Canada - CARICOM	Canada - CARICOM	Bilateral		Under negotiation
	Canada - Dominican Republic	Canada - Dominican Republic	Bilateral		Under negotiation
	Canada - Singapore FTA	Canada - Singapore	Bilateral		Under negotiation
	CARICOM - EFTA	CARICOM - EFTA	Inter-regional		Under negotiation
	CARICOM - EU	CARICOM - EU	Inter-regional		Under negotiation
	Chile - EFTA FTA	Chile - EFTA	Bilateral		Under negotiation
	Chile - Japan FTA	Chile - Japan	Bilateral		Under consultation
	Chile - New Zealand	Chile - New Zealand	Bilateral		Under negotiation
	China - Japan	Japan - China	Bilateral		Under consultation
	Costa Rica - Panama	Costa Rica - Panama	Bilateral		Under negotiation
	Ecuador - Mexico	Ecuador -Mexico	Bilateral		Under negotiation
	EU - Mercosur	EU - Mercosur	Inter-regional		Under negotiation
	Free Trade of the Americas (FTAA)	Americas	Regional		Under negotiation
	India - Singapore FTA	India - Singapore	Bilateral		Under negotiation
	Japan - Republic of Korea FTA	Japan - Korea FTA	Bilateral		Under negotiation

Year[b]	Title	*Setting*	*Level*	*Status*
	Japan - Malaysia	Japan - Malaysia	Bilateral	Under consultation
	Japan - Mexico FTA	Japan - Mexico	Bilateral	Under negotiation
	Japan - Thailand	Japan - Thailand	Bilateral	Under consultation
	Jordan - Singapore FTA	Jordan - Singapore	Bilateral	Under negotiation
	Mexico - Panama FTA	Mexico - Panama	Bilateral	Under negotiation
	Mexico - Peru FTA	Mexico - Peru	Bilateral	Under negotiation
	Mexico - Singapore FTA	Mexico - Singapore	Bilateral	Under negotiation
	Mexico - Trinidad and Tobago FTA	Mexico - Trinidad and Tobago	Bilateral	Under negotiation
	Singapore - ASEAN - China FTA	Singapore - ASEAN - China	Pluraliteral	Under negotiation
	Southern African Customs Union (SACU) - United States Agreement	SACU Member countries - United States	Bilateral	Under negotiation
	Uruguay - United States FTA	Uruguay - United States	Bilateral	Under negotiation

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a Bilateral treaties for the promotion and protection of investment (BITs) and for the avoidance of double taxation (DTTs) are not included in this table. For a list of BITs, as of 1 January 2000, see Bilateral Investment Treaties, 1959-1999 (UNCTAD/DITE/IIA/2), available on the Internet: www.unctad.org/en/pub/poiteiiad2.en.htm. The most recent list of BITs and DTTs (as of 1 January 2003) is available on the Internet: www.unctad.org. The list of bilateral association, partnership and cooperation agreements signed by the European Community and/or the European Free Trade Association and third countries, and including investment provisions, is available in a separate table (Annex table A.I.14).

b Dates given relate to original adoption. Subsequent revisions of instruments are not included, unless explicitly stated

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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