The scope of new investment laws and international instruments

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In recent years, there has been a proliferation of new laws, bilateral treaties and multilateral instruments addressing the treatment of foreign investors and investments by their host states. These new laws and international instruments generally promote the liberalization of investment regimes and embody high standards of protection of foreign investment. Together, the instruments reflect a remarkable consensus on issues relating to the treatment of foreign investment. This article examines an equally significant aspect of the instruments, the extent of their coverage of investments and investors. As the article points out, the instruments generally apply not only to foreign direct investment but also to all possible forms of portfolio investment. Indeed, many of the instruments are expressed as covering "any kind of asset" or all "property and property rights". Investors that may benefit from the instruments include individuals of foreign nationality and companies established outside the host state. They frequently also include local nationals resident abroad, stateless persons, foreign unincorporated bodies, locally-incorporated companies controlled by foreigners and, in some instances, intergovernmental organizations and foreign States. In short, the instruments together have a vast scope of application, further blurring such traditional distinctions as those between foreign and local investment, private and public investment and, even, between the fields of investment and trade.

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Introduction

The 1990s have seen, and continue to witness, intensive law- and treaty-making activity in the field of foreign investment. This activity stems, of course, from the renewed importance attached to the private sector in general, and private foreign investment, in particular, for countries' economic progress. In an effort to make their legal environments more hospitable to such investment, some 45 developing and former socialist countries have in the past five years enacted new investment laws or "codes".[1] During the same relatively brief period, as many as 500 new bilateral investment treaties (BITs) have been concluded, bringing to about 900 the total number of such treaties.[2] Parties to BITs now include more than 140 countries. To help States in their national and international law-making on investment, a multilateral forum, the Development Committee of the Boards of Governors of the World Bank and International Monetary Fund,[3] issued in 1992 a set of guidelines on the subject, the "World Bank Guidelines on the Treatment of Foreign Direct Investment".[4] Since the issuance of the Guidelines, several multilateral treaties with provisions on the treatment of foreign investment have been concluded: the North American Free Trade Agree-

[1] The texts of these laws are published or forthcoming in ICSID, 1973.

[2] The texts of most of these treaties are published or forthcoming in ICSID, 1983. For a recent listing of these treaties see UNCTAD, forthcoming. See also Dolzer and Stevens, 1995.

[3] The Boards of Governors are the supreme organs of the World Bank and the International Monetary Fund. They are composed of one governor and one alternate, generally ministers of finance or officials of similar rank, appointed by each member country. In October 1974, both Boards of Governors resolved to establish the Joint Ministerial Committee of the Boards of Governors of the World Bank and the International Monetary Fund on the Transfer of Real Resources to Developing Countries, commonly referred to as the Development Committee. The Development Committee is required to advise and report to the Boards of Governors of the two institutions on all aspects of the broad question of the transfer of real resources to developing countries and to make suggestions for their implementation. The Development Committee presently consists of twenty-four members appointed for periods of two years by one of the countries or a group of countries that designates a member of the Bank's or the Fund's board of executive directors.

[4] The Guidelines were prepared in response to a request made in 1991 by the Development Committee for a "legal framework" embodying "the essential legal principles" conducive to the promotion of foreign direct investment. The preparation of the Guidelines was entrusted to a working group chaired by the Bank's General Counsels and consisting also of the two General Counsel of the Bank's financial affiliates, the International Finance Corporation and the Multilateral Investment Guarantee Agency. Following their preparation, the Guidelines were endorsed by the Development Committee in its Fall 1992 meeting. They, and an accompanying Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment are published in World Bank, 1992; and in 7 ICSID Rev.—FILJ 295 (1992). For an account of the drafting history of the Guidelines and an analysis of their provisions, see Shihata, 1993.

ment (NAFTA),[5] the Energy Charter Treaty[6] and the Colonia and Buenos Aires Investment Protocols of MERCOSUR.[7] Another recent multilateral instrument is the Statement on Investment Protection Principles adopted by the Council of the European Communities (EC) to elaborate upon the relevant provisions of the Fourth ACP-EEC (Lomé IV) Convention.[8]

These new laws, bilateral treaties and multilateral instruments generally promote the liberalization of investment regimes and embody high standards of protection of foreign investment. Thus, several of the newer investment laws provide in principle for open admission while limiting exceptions to that principle to investments in economic sectors specified in a "negative list" attached to the law. The laws frequently also assure foreign investors that they will receive treatment no less favourable than that accorded by the State to national investors. Other guarantees commonly included in investment laws are guarantees against currency-transfer restrictions and against uncompensated expropriations. In respect of expropriations, the laws increasingly use the familiar formula calling for "prompt, adequate and effective" compensation. Almost all modern investment laws provide, in addition, for the possibility of settling disputes between the State and foreign investors by arbitration. A considerable number of the laws specifically refer in this connection to forms of arbitration widely used in international trade and investment. These include, notably, arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID)[9] or of

[5] The North American Free Trade Agreement, 17 December 1992, is intended to liberalize trade as well as to promote and protect investment flows among the parties to the treaty (Canada, Mexico and the United States). The principal provisions related to investment are contained in chapter 11 of NAFTA. For an analysis of the provisions of this chapter, see Price, 1993.

[6] The Energy Charter Treaty, 17 December 1994, sets forth energy-sector trade liberation and investment promotion and protection obligations of the parties. The signatories to this treaty currently comprise 49 countries and the European Communities. The treaty is reprinted in 34 ILM 360 (1995).

[7] The Common Market of the Southern Cone ("MERCOSUR") is the customs union established by Argentina, Brazil, Paraguay and Uruguay under the Treaty of Asunción of 26 March 1991. Following the conclusion of the Treaty, the parties concluded the two protocols on investment referred to in the text. Their full names are "Protocol on the Reciprocal Promotion and Protection of Investments in MERCOSUR" ("Colonia Protocol"), 17 January 1994, and "Protocol for the Promotion and Protection of Investments Made by Countries that do not belong to MERCOSUR" ("Buenos Aires Protocol"), 5 August 1994. The first protocol covers investments made by nationals of the member countries of MERCOSUR while the second, as its name indicates, covers investments made by nationals of non-member countries.

[8] "Community Statement on Investment Protection Principles in the ACP States", Doc. ACP-CEE 2172/92, adopted by the Council on 4 October 1992.

[9] For descriptions of arbitration under the auspices of ICSID, see, e.g., Broches, 1991; and Shihata, 1992. For further references on ICSID, see ICSID, 1994.

the International Court of Arbitration of the International Chamber of Commerce[10] and arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[11]

In BITs, each State typically undertakes to admit, in accordance with its laws and regulations, investments from the other State. Under most BITs, admitted investments are guaranteed not only national treatment but also most-favoured-nation (MFN) treatment, i.e., treatment at least as favourable as that given by the host State to investments from any third State. Bilateral investment treaties concluded by the United States have taken the path-breaking step of calling for national and MFN treatment in respect of admission also, with industries exempted from the general admission standards specified in lists annexed to the treaties. In virtually all BITs, there are, in addition, broad guarantees of "fair and equitable" treatment and "full protection and security" for investments. Like many investment laws, BITs generally assure investors freedom to transfer abroad capital, profits and other investment-related sums. These treaties typically also prohibit the expropriation of investments except against prompt, adequate and effective compensation. Finally, in almost every modern BIT, States agree to submit disputes with investors to arbitration, generally to arbitration under the auspices of ICSID or under the UNCITRAL Arbitration Rules.[12]

Many of these features of recent investment laws and bilateral investment treaties are commended to States in the World Bank Guidelines on the Treatment of Foreign Direct Investment. Thus, the World Bank Guidelines endorse as an "effective approach" having open admission in principle, subject possibly to a restricted list of those kinds of investments that are either prohibited or require screening and licensing.[13] General standards of

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[10] For a detailed study of arbitration under the auspices of the International Court of Arbitration of the International Chamber of Commerce, see Craig, Park and Paulsson, 1990. For further references on this form of arbitration, see Ziadé, 1991.

[11] For a recent discussion of arbitration under the UNCITRAL Arbitration rules, see Caron and Pellompää, 1994. For further references on arbitration under the UNCITRAL Arbitration Rules, see Ziadé, 1990.

[12] Some of the investment laws similarly set forth consents on the part of the States concerned to submit investment disputes to ICSID or other specified forms of arbitration. Most of the recent investment laws, however, do not contain such advance consents and instead provide for the conclusion on a case-by-case basis of arbitration agreements between foreign investors and the host State. In some respects, the scope of the recent investment laws, BITs and multilateral instruments may exceed the scope of the instruments governing arbitration under the auspices of ICSID. A forthcoming study by the author examines how the resulting questions may be addressed in laws, BITs and multilateral instruments providing for recourse to ICSID arbitration.

[13] Guidelines, see footnote 4, at guideline II (3).

treatment endorsed by the World Bank Guidelines include national treatment, non-discrimination among foreign investors, fair and equitable treatment and protection and security.[14] The Guidelines encourage States to permit investment-related currency transfers without undue delay and enjoin States against expropriating foreign investments without adequate, effective and prompt compensation.[15] A concluding Guideline recommends arbitration, and in particular ICSID arbitration, as a means of resolving disputes between investors and their host States.[16] These trends are continued in the multilateral treaties—the NAFTA, the Energy Charter Treaty and the Investment Protocols of MERCOSUR—concluded since the issuance of the World Bank Guidelines. Similar approaches are also taken by the EC Statement on Investment Protection Principles.

The new investment laws, bilateral treaties and multilateral instruments reflect a remarkable consensus on questions that not long ago were controversial. However, there remains little appreciation of the fact that the substantive and procedural guarantees of these various instruments do not just apply to traditional forms of investment, such as equity participations or natural resource concessions, or to what might once have been considered typical investors, such as transnational corporations. Rather, the new instruments and the guarantees that they extend or encourage have an extremely broad scope of application. They normally cover many different forms of investment and large classes of investors. Of course, instruments designed to promote investment can hardly do so if, instead, they are narrow in scope. The recent instruments, however, are even more inclusive, reflecting the proliferation of new types of transactions and actors in international investment. This article addresses this fundamental aspect of the new instruments. It examines in detail the kinds of investments and investors covered by the new investment laws, BITs and multilateral instruments.

The scope of investment laws

Investment laws normally define covered investments in part by reference to the investors covered by the laws. The 1994 investment law of Cambodia, for example, provides that coverage will extend to investments

[14] Ibid. at guideline III (2), III (3).

[15] Ibid. at guidelines III, IV.

[16] Ibid. at guideline V.

"made . . . by" covered investors.[17] The Albanian investment law mentions that covered investment may be made "directly or indirectly" by the investors.[18] This investment law thus explicitly covers investments made through intermediaries. Most of the laws, such as the 1994 investment law of Mexico, however, refer simply to investments "by" the investors.[19] It is perhaps equally obvious that investment laws apply to investments in the country that has enacted the law in question. Most recent investment laws make this clear in provisions stating, albeit without further elaboration, that they address investments "on the territory of" or simply "in" the country concerned.[20]

About two-thirds of the investment laws enacted in the 1990s apply only to foreign investments. The remaining approximately one-third of the laws address all investments, whether foreign or local. Some of the laws in the latter group nevertheless distinguish between foreign and local investments by reference to the foreign origin of the invested resources. For example, the 1993 investment law of Mozambique includes "foreign capital" within its definition of foreign investment and "national capital" in the law's definition of national investment.[21] A few of the laws that deal only with foreign investments, such as the 1993 investment law of the former Yugoslavian Republic of Macedonia, similarly refer to "foreign currency" in their definitions of covered investments.[22] In most cases, however, the origin of the investment itself is irrelevant. Rather, under most of the laws, an investment will be considered foreign or local if the investor can be characterized as foreign or local under the law.

As indicated earlier, in most cases the coverage is potentially very broad. The 1991 Estonian law typifies this: "any kind of property and property rights" may qualify as investments under that law.[23] The regulations implementing the 1992 investment law of Honduras, to take another example, refer to covered investments as including "any contribution of capital"

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[17] Investment Law of the Kingdom of Cambodia, 4 August 1994, art. 1.

[18] Law on Foreign Investment of the Republic of Albania, 2 November 1993, art. 1.

[19] Foreign Investment Law of Mexico, 23 December 1993, art. 2.

[20] See, e.g., Poland's Law on Companies with Foreign Participation, 14 June 1991, art. 1; and Law on the Business Activity by Foreign Nationals and Protection of Foreign Investments in Bulgaria, 16 January 1992, art. 1.

[21] Law No. 3/93 of Mozambique, 8 June 1993, art. 1.

[22] Foreign Investment Law of the former Yugoslavian Republic of Macedonia, 20 May 1993, art. 3.

[23] Estonian Law on Foreign Investments, 11 September 1991, art. 2.

as well as "tangible and intangible assets."[24] Intellectual property has become an increasingly important component of investments in recent years (UN-TCMD, 1993). As a result, many of the new investment laws of Central and Eastern European countries specifically include intellectual property rights in their definitions of investment. An elaborate example is provided by the 1993 investment law of Albania which applies to, among other things, "intellectual property, including literary, artistic, and technical-scientific works, vocal recordings, inventions, industrial projects, designs for integrated circuits, know-how, trade marks, trade mark designs and trade names."[25]

Some investment laws contain broad limitations on the scope of covered investments. Several such laws qualify covered investments by reference to their purpose. For example, the 1995 investment law of Comoros "governs every form of investment, direct or indirect" that is made in pursuit of an "economic activity."[26] The 1991 investment law of Russia applies to "all kinds of property and intellectual values" invested "in order to derive profit."[27] The "generation of profit" is not the only possible motivation for an investment under the 1992 investment law of Tajikistan. In the case of that law, investments, i.e., "all of the different types of property and intellectual assets", may also be contributed for "the creation of social impact."[28]

A number of investment laws of African countries make it clear that the laws only apply to new investments. The 1991 investment law of Uganda, for example, defines a covered investment as meaning "the creation of new business assets."[29] To avoid thereby excluding a form of investment that is, in substance, also new, the law specifies that "the expansion, re-structuring or rehabilitation of an existing enterprise" falls within the definition of covered investments.[30] Similar approaches are taken in the investment laws of Algeria, Tanzania and Zambia.[31] Among recent investment laws, only one appears to take the opposite approach of extending its protec-

[24] Regulations Implementing the Investment Law of Honduras, 10 September 1992, art. 3.

[25] Investment Law of the Republic of Albania, 2 November 1993, at art. 1.

[26] Investment Code of the Federal Islamic Republic of Comoros, 30 June 1990, art. 1.

[27] Law on Foreign Investment in the Russian Federation, 4 July 1991, art. 2.

[28] Law on Foreign Investment in the Republic of Tajikistan, 10 March 1992, sec. 1.

[29] Investment Code of Uganda, 21 January 1991, art. 2.

[30] Ibid.

[31] Legislative Decree on Investment in Algeria, December 1993, art. 2; National Investment (Promotion and Protection) Act of the United Republic of Tanzania, 7 April 1990, art. 2; and Investment Act of Zambia, 8 August 1991, art. 3.

tion to investments made before as well as after enactment of the law. This is the 1993 investment law of Albania which covers investments carried out "in accordance with the laws that pertain to the period from the date 31 July 1990 and subsequently."[32]

Investors within the scope of investment laws typically include natural persons on the one hand and juridical persons or other legal entities on the other. The definitions are generally coupled with a reference to the nationality of such investors. This is so, even in the case of investment laws that apply both to local and foreign investments. One such law, the 1990 investment law of Cameroon, is expressed as applying to "[a]ll natural persons or corporate bodies of Cameroonian or foreign nationality."[33] Among most of the laws that apply only to foreign investors, the 1994 investment law of the Lao People's Democratic Republic, for example, defines covered investors as "foreign persons, either individuals or legal entities."[34] Many of the laws provide some indices of foreign nationality in this connection. The 1990 investment law of Namibia explains that the foreign nationals to which it applies include any "person who is not a citizen of Namibia."[35] This definition is broad enough to encompass stateless persons. Stateless persons are specifically mentioned as potential foreign investors under the 1991 investment law of Russia[36] and in recent investment laws of other former Soviet republics.[37] Under the 1990 investment law of Namibia, covered foreign nationals may also include any "company incorporated under the laws of any country other than Namibia."[38] In contrast to the Namibian law, a number of other recent investment laws specifically cover both incorporated and unincorporated bodies. For example, the 1992 investment law of Lithuania provides that "corporations (companies), partnerships, private firms, associations and other organizations that are formed or in any other manner organized in accordance with the laws of [another] State" may all "be considered foreign investors."[39]

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[32] Law on Foreign Investment of the Republic of Albania, 2 November 1993, at art. 1. 31 July 1990 is the date of the first modern Albanian investment law, Law No. 7406 on the Protection of Foreign Investments.

[33] Investment Code of Cameroon, 8 November 1990, art. 2.

[34] Law on the Promotion and Management of Foreign Investment in the Lao People's Democratic Republic, 14 March 1994, art. 1.

[35] Foreign Investment Act of Namibia, 19 December 1990, art. 1 (1).

[36] Law on Foreign Investment in the Russian Federation, 4 July 1991, at art. 1.

[37] See, e.g., Law on Foreign Investments in Turkmenistan, 19 May 1992, art. 2; and Law on Foreign Investment in the Republic of Tajikistan, 10 March 1992, at sec. 3.

[38] Foreign Investment Act of Namibia, 19 December 1992, at art. 1 (1).

[39] Law on Foreign Investment in the Republic of Lithuania, 29 December 1990, art. 3.

Although most investment laws are expressed as applying only to foreign investors, it is increasingly common for such laws to deem certain classes of local nationals as foreign for the purposes of the law concerned. In some cases, this is done in respect of locally-incorporated companies that are majority-owned by foreigners. For example, the 1986 investment law of Zaire applies to investments made by "any corporate body in which at least 51 per cent of the registered capital is held by foreign persons or foreign corporations."[40] Among more recent investment laws, the above-mentioned Namibian law similarly provides that foreign nationals covered by the law will include "a company incorporated within Namibia in which the majority of the issued share capital is beneficially owned by foreign nationals."[41] The ambit of a substantial number of new foreign investment laws is also extended, in respect of natural persons, to local nationals who are resident abroad. Provisions to this effect are particularly common in the investment laws of republics of the former Soviet Union. The 1991 Estonian law provides that foreign investors may be "citizens of the Republic of Estonia permanently resident outside of the Republic of Estonia."[42] Similar provisions may be found in the investment laws of Azerbaijan, Belarus, Lithuania, Moldova, the Russian Federation, Tajikistan, Ukraine and Uzbekistan.[43] One new African investment law takes this approach a step further by defining foreign investors solely by reference to the foreign origin of their investments. According to the 1993 law of Mozambique, a foreign investor is an "individual or corporate person bringing to Mozambique from abroad capital and resources belonging to or at the account and risk of the said person."[44] Under this definition, even resident nationals of the host country and companies established and owned locally could qualify as foreign investors.

Among recent investment laws, only two, the investment laws of Algeria and Malawi,[45] are expressly restricted in scope to private investments.

[40] Investment Code of Zaire, 5 April 1986, art. 1.

[41] Foreign Investment Act of Namibia, 19 December 1990, at art. 1 (1).

[42] Estonian Law on Foreign Investments, 11 September 1991, at art. 3.

[43] Law on the Protection of Foreign Investment in the Republic of Azerbaijan, 15 January 1992, art. 2; Law on the Foreign Investments on the Territory of the Republic of Belarus, 14 November 1991, art. 3; Law on Foreign Investment in the Republic of Lithuania, 29 December 1990, at art. 3; Law of the Republic of Moldova on Foreign Investments, 1 April 1992, art. 2; Law on Foreign Investment in the Russian Federation, 4 July 1991, at art. 1; Law on Foreign Investment in the Republic of Tajikistan, 10 March 1992, at sec. 3; Ukraine Law on Foreign Investment, 20 May 1993, art. 1; and Law of the Republic of Uzbekistan on Foreign Investments and Guarantees of Foreign Investors' Activities, 14 June 1991, art. 1.

[44] Law No. 3/93 of Mozambique, 8 June 1993, at art. 1.

[45] Legislative Decree on Investment in Algeria 93-12, December 1993, at art. 1; and Investment Promotion Act of Malawi, 17 December 1991, art. 1.

New investment laws in Eastern Europe, on the other hand, take the approach of explicitly extending their protection to public foreign investors. Russia's investment law of 1991, for example, includes "foreign states" as possible investors under the law.[46] The same law, and the investment legislation of several other republics of the former Soviet Union, also specifically refer to "international organizations" in the law's provisions defining covered investors.[47]

The scope of bilateral investment treaties

Bilateral investment treaties are generally expressed as applying to investments "of" investors of either State party to the treaty in the "territory" of the other State party. The great majority of BITs do not elaborate on the circumstances under which an investment can be regarded as belonging to such an investor. Bilateral investment treaties made by the United States, however, provide some details in this respect. Such treaties typically provide that they apply to investments "owned or controlled directly or indirectly" by covered investors.[48]

In regard to the place of an investment, many BITs specify that a State's territory in this context encompasses not only land and internal waters but also maritime areas claimed by a State in accordance with international law. The 1992 Netherlands-Nigeria BIT, for example, makes it clear that the treaty's coverage also extends to investments in "the maritime areas adjacent to the coast of the State concerned, to the extent to which that State exercises sovereign rights or jurisdiction in those areas according to international law."[49] Some BITs, such as the 1994 Belarus-United Kingdom BIT, also make it clear that such maritime areas include not only the territorial sea but also "any maritime area situated beyond the territorial sea . . .

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[46] Law on Foreign Investment in the Russian Federation, 4 July 1991, at art. 1.

[47] Ibid. See also, e.g., Law on the Protection of Foreign Investment in the Republic of Azerbaijan, 15 January 1992, at art. 2; and Law of the Republic of Uzbekistan on Foreign Investments and Guarantees of Foreign Investors' Activities, 14 June 1991, at art. 1.

[48] See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991, Argentina-United States, art. 1(a); Treaty for the Encouragement and Reciprocal Protection of Investment, 13 January 1995, Latvia-United States, art. 1(a); and Treaty Concerning the Reciprocal Encouragement and Protection of Investment, 23 September 1992, Armenia-United States, art. 1(a).

[49] Agreement on Encouragement and Reciprocal Protection of Investments, 2 November 1992, Netherlands-Nigeria, art. 1(c).

which has been or might in future be designated . . . in accordance with international law as an area within which [the countries concerned] may exercise rights with regard to the sea-bed and subsoil and the natural resources.''[50]

With respect to the forms of investment, the coverage of BITs is normally as extensive as the most all-embracing investment law. According to the formula widely used in BITs concluded by countries other than the United States, ''every kind of asset'' or ''all assets'' may qualify as an investment under the treaty.[51] In BITs, this statement is normally followed by a list of examples of types of assets that can qualify for coverage by the treaty. The examples themselves are normally also very broad. The 1991 Canada-Hungary BIT is typical in this respect. It provides that invested assets covered by the treaty include movable and immovable property and any other related property rights; any form of participation in a company or a business enterprise; claims to money and to any performance under contract having a financial value; intellectual property rights, including rights with respect to copyrights, patents, trade marks, trade names, industrial designs, trade secrets, goodwill and know-how; and business concessions and rights conferred by law or under contract.[52] Particularly in light of such a list of examples, it may be questioned whether such BITs leave any room for distinctions to be drawn between ''investments'' and other ''assets.'' The 1992 Denmark-Ukraine BIT (art.1) does allow for such a distinction by defining covered investments as assets ''acquired for the purpose of establishing lasting economic relations.'' This type of qualification is, however, extremely rare among BITs.

Bilateral investment treaties made by the United States are expressed as applying not to ''every kind of asset'' but instead to ''every kind of investment.''[53] This circular formula clearly seeks to bring within the scope of the treaties all possible forms of investment. After this general statement, United States BITs list examples of covered investments in terms as broad

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[50] Agreement for the Promotion and Protection of Investments, 1 March 1994, Belarus-United Kingdom, art. 1(e).

[51] See, e.g., Agreement on Reciprocal Protection and Promotion of Investments, 28 May, 1991, Spain-Tunisia, art. 1(c); Agreement Concerning the Promotion and Reciprocal Protection of Investments, 23 October 1992, Denmark-Ukraine, art. 1(1); and Agreement on the Promotion and Reciprocal Protection of Investments, 8 October 1991, Ghana-Switzerland, art. 1.

[52] Agreement for the Promotion and Reciprocal Protection of Investments, 3 October 1991, Canada-Hungary, art. 1(b).

[53] See, e.g., Agreement Concerning the Encouragement and Reciprocal Protection of Investments, 11 January 1995, Albania-United States, art. 1(d); Agreement Concerning the Encouragement and Reciprocal Protection of Investment, 23 September 1991, Bulgaria-United States, art. 1(a); and Argentina-United States BIT, at art. 1.

as those found in other BITs. The 1995 Latvia-United States treaty can be cited in this connection. Under it, "every kind of investment" includes "equity, debt and service and investment contracts". The treaty also makes it clear (art.1(d)) that coverage extends to tangible and intangible property; interests in a company; claims to money or claims to performance having economic value, and associated with an investment; intellectual property and any right conferred by law or contract, and any licenses and permits pursuant to law. In respect of intellectual property, the treaty specifies that this includes rights relating to literary and artistic works; inventions; industrial designs; semiconductor mask works; trade secrets, know-how and confidential business information; and trade marks, service marks and trade names.

The definitions of investment in most BITs can clearly accommodate returns and reinvested earnings from investments. A few BITs specifically extend to returns and reinvested earnings the same protection as initial investments. The Czechoslovakia-Greece BIT of 1991 provides an example.[54] In the great majority of BITs, however, returns are defined, if at all, separately from investments and are the subject of the special protections against currency-transfer restrictions referred to above.

After an investment is made, its form may change; debt, to take an obvious example, may be converted into equity. Most BITs contain provisions to the effect that such a subsequent change will not affect an asset's classification as an investment benefiting from the treaty. The 1993 Germany-Slovenia BIT, for example, stipulates that "[a]ny alteration of the form in which assets are invested shall not affect their classification as investment."[55]

It has now also become common for the scope of these treaties expressly to encompass investments made before as well as after the effective date of the BIT. The 1990 Bangladesh-Italy BIT, for example, applies to "any kind of property invested before or after entry into force of this Agreement."[56] Another example is provided by the 1992 Denmark-Ukraine BIT which applies (art. 13 (2)) to investments made "prior to" and "after" entry

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[54] Agreement for the Promotion and Reciprocal Protection of Investments, 3 June 1991, Czechoslovakia-Greece, art. 2, applicable, as of January 1993, to both the Czech Republic and Slovakia.

[55] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, 28 October 1993, Germany-Slovenia, art. 1.

[56] Agreement on the Promotion and Protection of Investments, 20 March 1990, Bangladesh-Italy, art. 1.

into force of the treaty. The 1992 Argentina-United States BIT and other recent BITs made by the United States declare that they apply to investments "existing at the time of entry into force" of the BIT "as well as to investments made or acquired thereafter."[57] While the scope of BITs concluded by the United States generally extends to existing investments, protocols to some such BITs specify that the provisions of the treaty do not bind either party "in relation to any act or fact which took place or any situation which ceased to exist" before the treaty's entry into force.[58]

Some BITs include a reference to legality in their definition of covered investments. Under the China-Peru BIT of 1994, for example, such investments must have been made "in accordance with the laws and regulations"[59] of the pertinent treaty partner. The 1994 Estonia-Israel BIT qualifies covered investments in a similar manner.[60]

As in the case of investment laws, BITs invariably cover investors who are natural persons. BITs uniformly require that such a person have the nationality of a State party to the treaty. For example, the 1994 Lithuania-Netherlands BIT provides that the term "investor" will include with regard to either State party "natural persons having the nationality" of that State.[61] Many BITs add words to the effect that such nationality should be possessed in accordance with, or be derived from, the laws of the home country in question. The 1993 United Kingdom-Uzbekistan BIT, for example, provides that covered nationals comprise, in respect of the United Kingdom, "physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom" and, in respect of Uzbekistan, "physical persons deriving their status as nationals of the Republic of Uzbekistan under the laws of the Republic of Uzbekistan."[62] Under such definitions, it is irrelevant if a natural person with the nationality of one of the treaty partners also has the nationality of the second treaty partner. In most cases, local

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[57] See, e.g., Argentina-United States BIT, at art.14; see also Albania-United States BIT, at art. 16.

[58] See, e.g., Treaty Concerning the Encouragement and Reciprocal Protection of Investment, 26 September 1994, Trinidad & Tobago-United States, protocol, para. 3.

[59] Agreement Concerning the Encouragement and Reciprocal Protection of Investments, 9 June 1994, People's Republic of China-Peru, art. 1.

[60] Agreement for the Promotion and Reciprocal Protection of Investments, 14 March 1994, Estonia-Israel, art. 1.

[61] Agreement on Encouragement and Reciprocal Protection of Investments, 26 January 1994, Lithuania-Netherlands, art. 1(b).

[62] Agreement for the Promotion and Protection of Investments, 24 November 1993, United Kingdom-Uzbekistan, art. 1(c).

nationals can therefore benefit from the protection of the BIT *vis-à-vis* the host State if they also have the nationality of the other party to the treaty. The coverage of some recent BITs may also extend to individuals who do not have the nationality of either party to the treaty. These are BITs that define covered nationals of a party as including not only its citizens but also permanent residents. The 1993 Australia-Romania BIT, for instance, covers any "natural person who is an Australian citizen or a permanent resident of Australia under its law".[63]

Under BITs, investors may, of course, also be "companies" or "legal entities" that can be regarded as nationals of a party to the treaty. In common law countries, the nationality of a company is typically determined by reference to its place of incorporation (see, e.g., North, 1979). Among civil law countries, reference is generally instead made to the company's centre of management or seat (see, e.g., Batiffol and Lagarde, 1993). These different approaches are reflected in BITs made by countries belonging to the respective legal traditions. Thus BITs concluded by the United Kingdom and the United States refer to the place of an entity's establishment. The 1994 Jamaica-United States BIT, to cite one such treaty, covers entities "legally constituted under the laws and regulations of a Party or a political subdivision thereof".[64] In contrast, BITs made by Germany refer to the seat of an entity. The 1994 Germany-Moldova BIT, for example, defines a covered "company" as "having its seat in" one of the parties to the BIT.[65] The two approaches in fact overlap insofar as in most civil-law legal systems it is not possible for a company to have a seat at a place other than that of incorporation (O'Connell, 1970). Some BITs explicitly combine the place of establishment and seat requirements and add to them the third requirement that the entity actually conduct business in the putative home country. For instance, the 1993 Chile-Venezuela BIT provides that "legal entities" may benefit from the treaty if they are "constituted or otherwise duly organized in accordance with the law" of a State party to the BIT and "have their seat, together with real economic activities" in such a State.[66] Provisions of this kind obviously ensure that the benefits of the BIT will not extend to entities

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[63] Agreement on the Reciprocal Promotion and Protection of Investments, 21 June 1993, Australia-Romania., art. 1(d).

[64] Treaty Concerning the Encouragement and Reciprocal Protection of Investments, 4 February 1994, Jamaica-United States, art. 1(b).

[65] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, 28 February 1994, Germany-Moldova, art. 1.

[66] Agreement on Promotion and Reciprocal Protection of Investments, 2 April 1993, Chile-Venezuela, art. 1(b).

that have merely formal bonds with one of the countries concerned. The Argentina-United States BIT quoted above, and other BITs made by the United States, make a narrower exception in this respect. Under those BITs, a company which is established in a party to the treaty but has no substantial business activities there may be denied "the benefits" of the BIT only if the company is also owned or controlled by nationals of a third country.[67] Bilateral investment treaties made by France take the approach of defining covered "companies" as those that are established and have their seat in a party to the treaty or that are controlled by nationals or companies of such a party. The 1991 France-United Arab Emirates BIT, for example, provides that an entity may be considered an investor of one party to the BIT if the entity is constituted in the party in accordance with its law and has its seat in that party or is "controlled directly or indirectly" by nationals of the party or by companies established and having their seat there.[68] In these BITs, the alternative criterion of control makes it possible for an entity to be treated as belonging to one party to the BIT even if the entity is organized under the laws of the other party or of a third country.

To a greater extent than investment laws, recent BITs make it clear that covered "corporate" investors need not, in fact, be incorporated. The 1994 Germany-Namibia BIT, to take one example, refers to "companies" protected by the treaties as comprising "any juridical person as well as any commercial or other company or association with or without legal personality."[69] In similarly broad terms, the 1995 Albania-United States BIT provides (art. l(a)) that "any entity," including "a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or other organization," may be a covered "company." A number of BITs also explicitly cover entities with public, as well as private, ownership or control. The 1991 Sri Lanka-United States BIT, for example, refers to "any kind of corporation, company, association, partnership, or other organization" irrespective of whether or not it is "privately or governmentally owned or controlled."[70] It is now also common for BITs to add, as does the 1992

[67] See, e.g., Treaty Concerning the Encouragement and Reciprocal Protection of Investment, 7 March 1994, Georgia-United States, art. 12; and Albania-United States BIT, 11 January 1995, at art. 12.

[68] Agreement on the Encouragement and Reciprocal Protection of Investments, 9 September 1991, France-United Arab Emirates, art. 1 (4).

[69] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, 21 January 1994, Germany-Namibia, art.1.

[70] Treaty Concerning the Encouragement and Reciprocal Protection of Investment, 20 September 1991, Sri Lanka-United States, art. 1(b).

Denmark-Latvia BIT, that the entity's activities need not be "directed at profit."[71]

The scope of multilateral instruments

Like investment laws and BITs, several recent multilateral instruments refer to the investors in delineating covered investments. The North American Free Trade Association (art. 1139) and the Energy Charter Treaty (art. 1 (6)) do so in the same terms as BITs concluded by the United States: covered investments are those "owned or controlled directly or indirectly" by covered investors. The Colonia (art.1 (1)) and Buenos Aires Investment (art. 2) Protocols of MERCOSUR similarly refer to investments "invested directly or indirectly" by investors within the scope of the protocols.

With respect to the place of investments, the World Bank Guidelines state (guideline I (1)) that the Guidelines may be applied by members of the World Bank Group institutions to investments "in their respective territories." Following the pattern established by some BITs, the Energy Charter Treaty makes it clear (art. 1 (10)) that its coverage extends to investments in the land, internal waters and territorial sea under the sovereignty of the party to the treaty and in the sea, sea-bed and its subsoil with regard to which the party exercises sovereign rights and jurisdiction in accordance with international law. In defining their scope, the Colonia (art. 1 (4)) and Buenos Aires (art. 2) Investment Protocols of MERCOSUR focus on maritime areas beyond the territorial sea; those two instruments specify that they cover investments "in the territory" of a member country which includes "maritime zones adjacent to the external boundary of the territorial sea" over which the country concerned "may, in accordance with international law, exercise sovereign rights or jurisdiction." Under the NAFTA, too (annex 201.1), covered investments are those "in the territory" of a party, including areas beyond its territorial sea within which the party "in accordance with international law and its domestic law," exercises "rights with respect to the sea-bed and subsoil and their natural resources."

Despite their title, the World Bank Guidelines are not restricted to foreign "direct" investment. Indeed, the term "investment" is not defined at all in the Guidelines. The Report accompanying them describes (footnote 4) this as "the broadest approach" towards the question of covered invest-

[71] Agreement Concerning the Reciprocal Promotion and Protection of Investments, 30 March 1992, Denmark-Latvia, art. 3(b).

ments. In a passage reminiscent of the lists of examples of investments contained in most BITs, the Report explains (para. 13) that, as they make "no restrictions as to the nature of covered investments", the Guidelines "apply to indirect, as well as to direct, investments and to modern contractual and other forms of investment . . . as well as to traditional types of foreign investment such as equity contributions and concessions". The EC Statement on Investment Protection Principles (para. 1.02) points out that the Lomé IV Convention similarly contains "[n]o rigid definition" of the investments to which it applies. According to the Statement (para. 1.03), investments should thus be understood as encompassing "all types of assets, tangible or intangible, that have an economic value, including direct or indirect contributions in cash, kind or services invested or received."

Three recent multilateral instruments follow the example of many BITs in defining covered investments as comprising "every kind of asset": the Energy Charter Treaty (art. 1 (6)) and the Buenos Aires (art. 2) and Colonia (art. 1 (1)) Investment Protocols of MERCOSUR. As in the case of BITs, this is followed by a list of examples of covered investments that, by itself, seems to cover the entire range of possibilities. In the case of the Energy Charter Treaty (art. 1 (6)), it includes tangible and intangible property; a company or business enterprise and equity participation therein; claims to money and claims to performance pursuant to certain contracts; intellectual property; and rights conferred by law or contract or by virtue of certain types of licenses and permits. In the Buenos Aires (art. 2) and Colonia (art.1 (1)) Investment Protocols, covered investments may include movable and immovable property; participation in companies; claims to performance having an economic value; intellectual property rights; and economic concessions. The NAFTA takes the alternative approach of transforming what might in a BIT be a list of examples of investments into a wide-ranging definition. Under the NAFTA (art. 1139), covered investments comprise an enterprise; equity or debt securities of an enterprise; interests that entitle an owner to share in the income or profits of an enterprise; tangible and intangible assets acquired or used for business purposes; interests arising from the commitment of capital such as under turnkey or construction contracts; and contracts where the remuneration depends on the production, revenues or profits of an enterprise.

The EC Statement on Investment Protection Principles states (para. 1.04) that "encouraging reinvestment of earnings is at least as important" to development cooperation "as attracting new investment". According to the Statement, investment protection instruments should for this reason extend

to returns as well as to initial investments. As in the case of BITs, however, few of the multilateral instruments specifically assimilate returns to covered investments. Among the recent multilateral treaties, the Energy Charter Treaty is in fact alone in explicitly including (art. 1) returns within its definition of covered investments. That treaty also appears to be the only one of the recent multilateral instruments that includes the provision (art. 1) commonly found in BITs that any changes in the form in which assets are invested will not "affect their character as investment." In the cases of the other instruments, it was perhaps concluded that the wide definitions of investment made such a provision superfluous.

The EC Statement also cites (para. 1.04) the importance of reinvestment of earnings in urging that investment-protection instruments should cover investments made before as well as after the introduction of the protective instrument. Other recent multilateral instruments are in basic accord with this approach. Like United States BITs, the World Bank Guidelines (guideline I (2)) and the Energy Charter Treaty (art. 1) cover "existing" as well as new investments. In a manner similar to the protocols of some BITs concluded by the United States, the latter also specifies (art. 1) that the treaty's application to existing investments is limited to "matters affecting such investments" after entry into force of the treaty. NAFTA approaches the question as one of coverage of investors and provides (art. 1139) that these may include an investor that "has made", as well as one that "is making", an investment. Uniquely, NAFTA also specifically covers (art. 1139) an intending investor, that is, one that "seeks to make" an investment.

Several of the recent multilateral instruments contain broad qualifications of their coverage of investments. The World Bank Guidelines are stated (guideline I (2)) as applying to investments "established and operating at all times as bona fide private foreign investments, in full conformity with the laws and regulations of the host State". Similarly, the Buenos Aires (art. 2) and Colonia (art. 1) Investment Protocols of MERCOSUR refer respectively to covered investments as being made "in accordance with the legislation" and "in compliance with the laws and regulations" of the host country. As may be expected from its name, the Energy Charter Treaty contains a sectoral qualification: it provides (art. 1) that "investment" under the treaty includes any investment associated with an activity defined by the treaty as an economic one in the energy sector.[72] Among recent multilateral

[72] The Treaty adds that covered investments also include investments notified to the Energy Charter Secretariat as "Charter efficiency projects" by any of the parties to the treaty.

instruments, however, it is NAFTA that most clearly reflects conceptual distinctions separating investments from other kinds of assets or transactions. Thus, for example, covered investments under NAFTA include (art. 1139) interests that can be assimilated to equity investments insofar as their "remuneration depends substantially on the production, revenues or profits of an enterprise"; and excluded from coverage are claims to money that arise solely from "commercial contracts for the sale of goods or services".

The World Bank Guidelines refer (guideline I (1)) to investors as a group including both "natural and juridical persons"; they are intended to apply to "private foreign" investments. As explained in the Report accompanying the Guidelines (para. 11), however, the broad general principles set out in the Guidelines equally apply to investments made by foreign public entities such as foreign State enterprises and to intergovernmental organizations. They also have obvious relevance to investments that are made by local nationals, and in that sense domestic, but with funds brought in from abroad. Like BITs, the NAFTA (art. 1139), the Energy Charter Treaty (art. 1 (7)) and the Colonia Investment Protocol (art. 1) all cover as potential investors natural persons and companies or other entities with specified bonds to a State party to the instrument in question. Also like BITs, those instruments do not, in respect of natural persons, exclude from coverage nationals of one party who are also nationals of the party hosting the investment involved. Like some BITs, the NAFTA, the Energy Charter Treaty and the Colonia Investment Protocol provide that both a "citizen" and a "permanent resident" of a State under its law may qualify as a covered "national" of the State. Similarly, in elaborating upon references in the Lomé IV Convention to investors of European States, the EC Statement explains (para. 1.05) that these may include an individual defined by the law of such a State as a local "national or resident".

In the case of investors that are companies or other legal entities, the Lomé IV Convention, as interpreted by the EC Statement (para. 1.05), requires that such an investor both be established in accordance with the law of a State party and have its seat, management or principal place of business in that State. The Colonia Investment Protocol takes a similar approach (art. 1) while also extending coverage to a "juridical person" which is established under the law of the State party hosting the investment but controlled, "directly or indirectly," by natural or juridical persons of another State party. In contrast to these other instruments, the NAFTA (art. 1139) and the Energy Charter Treaty (art. 1 (7)) simply require establishment in accordance with the law of a State party.

In their definitions of covered investors, the NAFTA and the Energy Charter Treaty, in common with recent BITs, specifically extend coverage to unincorporated entities. Under the NAFTA (art. 201), a covered ''enterprise'' of a party is ''any entity'' constituted or organized under the law of that party, ''including any corporation, trust, partnership, sole proprietorship or other association''. The Energy Charter Treaty (art. 1 (7)) provides in less detailed, but equally broad, terms that an investor of a party includes ''a company or other organization'' organized in accordance with the law of the party. According to the EC Statement (para. 105), the Lomé IV Convention applies to ''a company or firm'' constituted under applicable law; such a company or firm may be ''public or otherwise''. The NAFTA (art. 201) also specifies that an investing enterprise may be ''privately-owned or governmentally-owned'' and need not be organized ''for profit''. The NAFTA adds (art. 1139) that a covered investor may even be a State party to the treaty or a state enterprise.

Conclusion

In summary, the scope of application of investment laws now commonly extends, in respect of foreign direct investment, to ''all types of property assets and rights to them as well as rights to intellectual property'' invested in the host country by foreign individuals and foreign ''legal entities''. Recent bilateral investment treaties typically apply to ''any kind of asset'' in the territory, including the maritime zones, of a State party to the treaty and belonging to an individual having the nationality of the other State party or to ''any entity'' established or having its seat in that other State. The usual BIT covers such investments even if they change form after being made or were made before the treaty came into force. The new multilateral instruments apply to a similarly wide range of investments.

In the recent laws, bilateral treaties and multilateral instruments, significant categories of local nationals can be treated as foreign investors. As explained above, these include locally-incorporated companies that are foreign-controlled and individuals with the nationality of the host State who are resident abroad or, in the context of investment treaties, who also have the nationality of another State party to the treaty. Likewise, while the laws, bilateral treaties and multilateral instruments continue to be directed primarily at private investments, they now frequently purport also to cover invest-

ments by State-owned entities or even by States themselves. Investments of charitable or non-profit bodies are now also often specifically covered.

It will be recalled that the instruments highlighted in this article include some 45 new investment laws, about 500 recent bilateral investment treaties and half a dozen new multilateral instruments. The large, and continually growing, number of these laws, treaties and other instruments, combined with the wide scope that they normally each have, are making it increasingly likely that any given international transfer of resources will benefit from the provisions of at least one such law, treaty or other instrument. ■

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