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PART TWO

ENHANCING THE DEVELOPMENT DIMENSION OF INTERNATIONAL INVESTMENT AGREEMENTS

UNCTAD has been working on issues related to bilateral and regional investment agreements for some time, focusing on policy analysis and technical cooperation,[a] *and involving a wide range of countries. WIR03 draws on this experience.*

With the number of treaties that address FDI proliferating, issues relating to international investment agreements (IIAs)—agreements that, in their entirety or in part, address investment issues—have come to the forefront of international economic debate.

Part Two of WIR03 seeks to throw light, from the development perspective, on certain issues that arise in IIAs—irrespective of the ongoing multilateral investment discussions. Whether governments negotiate IIAs—and, if so, at what level and for what purpose—is their sovereign decision. And whatever the outcome of the investment discussions in the WTO, the issues raised here remain important, precisely because of bilateral and regional treaty-making.

[a] The results of this work are contained in various UNCTAD publications listed in the references. For the coverage of technical cooperation, see UNCTAD 2003e.

INTRODUCTION

Countries seek FDI to help them to grow and develop—and their national policies are key to attracting FDI and increasing benefits from it.

Many countries have also concluded international investment agreements (IIAs)—especially agreements at the bilateral, subregional or regional levels that address investment issues, at least in part. In doing so, they seek to make the regulatory framework for FDI more transparent, stable, predictable and secure—and thus more attractive for foreign investors. If frameworks liberalize FDI entry and operations, they reduce obstacles to FDI. At the same time IIAs limit the "policy space"—and thus flexibility—governments, especially of developing countries, need to pursue policies to attract FDI and increase benefits from it to further their development. The challenge for developing countries entering IIAs is to find the right balance between the attractiveness provided by IIAs and the loss of policy autonomy that they entail. This year's *WIR* seeks to identify the main issues.[1]

There has been significant liberalization of FDI policies over the past decade (table I.8). FDI flows have risen rapidly, partly in response. Still, FDI is only a complement to domestic investment, the main driver of growth. But since FDI is becoming more important in total investment, most developing countries and economies in transition are following the developed countries in removing restrictions to FDI entry and operations and improving standards of treatment of foreign affiliates. The results have been mixed. Opening has not, in many cases, led to the magnitude of FDI inflows that many developing countries expected. And even when inflows rose, the development benefits of FDI were often below expectations.

Why? Once an enabling framework has been established, economic factors—the main determinants of FDI flows—assert themselves. Host countries may not have the size of markets, growth rates, skills, capabilities or infrastructure that would make investment in productive capacity attractive—either for the domestic market or as export bases. Foreign investors may not have been well informed of the opportunities available—perhaps because host countries did not promote themselves effectively in an intensely competitive world market for FDI or were ambiguous about how much FDI they really wanted and on what terms. Prospective investors, in turn, may have found the investment environment deficient, difficult or risky—despite the liberalization.

More serious, the investment may not have had a substantial developmental impact on the host economy—expanding the export base, adding technology value to exports, contributing to easing balance of payment constraints, increasing local linkages, transferring technology and upgrading skills and management capabilities. Particularly for large TNCs, there might have been conflicts between the interests and needs of the host economy and the global corporate strategies of the investing firms, largely independent of concerns associated with specific locations.

Most countries—including developed ones—have tended to combine liberalization with more proactive measures to attract the right kind of FDI, including by setting up IPAs. They also have policies to draw greater benefits from FDI and reduce its negative effects.[2]

IIAs are put forward as an additional means to attract investment. They send a clearer signal to international investors, especially when they lock in the regulatory status quo, and they indicate a stronger commitment to the stability of rules. The number of IIAs has grown apace, and at all levels: bilateral (the most popular), regional (such as NAFTA and ASEAN) and multilateral (such as GATS and TRIMs). Many more IIAs are in the making.

But what about the loss of national policy space implicit in the rules that IIAs set? For a host country, finding the right balance in negotiating IIAs involves understanding two things:

- Host country policies and measures that are particularly important for attracting FDI and increasing benefits from it.
- Ways in which international agreements affect national policies.

Part Two of *WIR03* seeks to advance such understanding. Chapter III identifies key national policies and measures in inward FDI. It also reviews the rise, impact and features of IIAs. Chapter IV discusses eight issues that have passed a double filter: they are particularly important for national FDI policies and international investment negotiations, and they are particularly sensitive in the context of such negotiations. Chapter V focuses on one particular important issue: national policy space. Part Two also examines in chapter VI what else can be done in future IIAs to enhance the effectiveness of key national policies in promoting development. Concluding this Part is a summary of key messages.

CHAPTER III

KEY NATIONAL FDI POLICIES AND INTERNATIONAL INVESTMENT AGREEMENTS

National policies are key for attracting FDI, increasing benefits from it and assuaging the concerns about it. Those policies have to be seen in the broader context of the determinants of FDI, among which economic factors predominate (table III.1). Policies are decisive in preventing FDI from entering a country. But once an enabling FDI regulatory framework is in place, the economic factors become dominant. Even then, the regulatory regime can make a location more or less attractive for foreign investors and for maximizing the positive development effects of FDI, while minimizing negative ones.

Many policies affect FDI. This chapter deals only with those directly related to it, such as setting entry conditions for foreign investors, improving standards of treatment, enhancing benefits from FDI and coping with its less desirable effects.

Countries seek FDI to promote their growth and development. With its package of tangible and intangible assets, FDI can contribute directly and indirectly to building national capabilities. The growing appreciation of the benefits of FDI reflects several factors. Concessional aid is declining, and various financial crises have created a preference for long-term and more stable capital inflows. Access to innovative technologies is more important. And some of the earlier fears about FDI may have been exaggerated, given the economic benefits that many developing countries have drawn from FDI (*WIR99*). Many governments are now more confident in dealing with TNCs. And TNCs have learned to be more responsive to the concerns and priorities of host countries.

The best way of attracting and drawing benefits from FDI is not always passive liberalization (an

Table III.1. Host country determinants of FDI

Host country determinants
I. Policy framework for FDI • economic, political and social stability • rules regarding entry and operations • standards of treatment of foreign affiliates • policies on functioning and structure of markets (especially competition and M&A policies) • international trade and investment agreements • privatization policy • trade policy (tariffs and non-tariff barriers) and coherence of FDI and trade policies • tax policy
II. Economic determinants
III. Business facilitation • investment promotion (including image-building and investment-generating activities and investment-facilitation services) • investment incentives • hassle costs (related to corruption, administrative efficiency, etc.) • social amenities (bilingual schools, quality of life, etc.) • after-investment services

Type of FDI classified by motives of TNCs	Principal economic determinants in host countries
A. Market-seeking	• market size and per capita income • market growth • access to regional and global markets • country-specific consumer preferences • structure of markets
B. Resource/ asset-seeking	• raw materials • low-cost unskilled labour • skilled labour • technological, innovatory and other created assets (e.g. brand names), including as embodied in individuals, firms and clusters • physical infrastructure (ports, roads, power, telecommunication)
C. Efficiency-seeking	• cost of resources and assets listed under B, adjusted for productivity for labour resources • other input costs, e.g. transport and communication costs to/from and within host economy and costs of other intermediate products • membership of a regional integration agreement conducive to the establishment of regional corporate networks

Source: *WIR98*, p. 91.

"open door" policy). Liberalization can help get more FDI, but alone it is not enough. Attracting FDI in a highly competitive market for investment now requires stronger locational advantages and more focused efforts at promotion. Getting FDI in technologically advanced or export-oriented activities is even more demanding.

Having attracted foreign investors into a country, policies are crucial to ensure that FDI brings more benefits. Policies can induce faster upgrading of technologies and skills, raise local procurement, secure more reinvestment of profits, protect the environment and consumers and so on. They can also help counter the potential dangers of FDI—say, by containing anticompetitive practices and preventing foreign affiliates from crowding out viable local firms or acting in ways that upset local sensitivities.

Free markets do not always ensure efficient and equitable outcomes, particularly in developing countries with weak markets and institutions. Hence, the need for policy intervention. The groundwork for making markets work well—sound legal systems, clear and enforceable rules of the game, responsive market institutions, a vibrant domestic enterprise sector and the like—has to be laid down by the host country government. But even then, the strategic objectives of TNCs may not match the development goals of host governments. Policies need to bring them more in line with those goals.

The list of market failures and policy responses is long. The basic point here is that, in the real world of imperfect markets, governments have a major role. They can influence FDI in many ways with varying degrees of intervention, control and direction.

A. Key national FDI policies

Developed countries have moved towards "market-friendly" policies—pursuing sound macro management, having stable and non-discriminatory rules on business entry and exit, promoting competition, building human capital, supporting innovation and so on. But even the most market-friendly countries have not given up promotional measures to attract foreign investors. Several use sophisticated promotion techniques as well as large grants and subsidies to target particularly valuable investments.

Developing countries are also trying to attract FDI and increase the benefits from it. And they, too, are moving towards market-friendly policies. But they have to be careful doing so, since their market structures are weaker and their development needs more pressing. That is why they are more concerned about preserving their national policy space for investment, to be able to use the policy instruments that can address their special needs.

The discussion here focuses on three objectives—attracting FDI, benefiting more from it and addressing concerns about TNCs. Some objectives and measures overlap, but they are considered separately for convenience.

1. Attracting investment

Countries can attract FDI in many ways. They can simply liberalize the conditions for the admission and establishment of foreign investors without doing much more. They can promote FDI inflows in general, without trying to attract particular kinds of investment—say, according to their technology content. Or they can promote FDI more selectively, focusing on activities, technologies or investors. Measures are often used together—by leaving most activities open to foreign investors, creating a better investment climate generally and putting special effort into bringing in particularly desirable investment.

The economic attractiveness of a country for FDI depends primarily on its advantages as a location for investors of various types. Market-seeking investors look for large and growing markets. Resource-seeking ones look for ample natural resources. And efficiency-seeking ones look for a competitive and efficient base for export production.[3]

More general factors affect all prospective host economies: political stability, a sound macroeconomic framework, welcoming attitudes to foreign investment, adequate skills, low business transaction costs, good infrastructure and the like (table III.1).

Given these factors it is still useful to use promotional policies to attract investors, particularly as competition for FDI mounts and investors become choosier. The information for basing investment decisions is not perfect, and subjective perceptions matter. Good marketing can make a difference (of course, only if other conditions are in place). And it is possible for host countries to create conditions that make investments more viable (rather than simply marketing what they already have). This may simply involve removing constraints to foreign affiliate operations. But it may also involve creating new skills, infrastructure or support institutions.

How much promotion is needed depends on the kind of FDI and the basic attractions of a host economy. A large and dynamic economy needs to promote itself less than a small and less dynamic one. The bulk of the massive inflows into China are not the result of active FDI promotion. And promotion can only go so far. If the economic base is weak or unstable, no amount of persuasion will attract large and sustained FDI inflows.

The main ways countries have sought to attract FDI and the key sensitive issues that arise in IIAs are:

- *Reducing obstacles to FDI* by removing restrictions on admission and establishment, as well as on the operations of foreign affiliates. The key issues here are how investment is to be defined for liberalizing entry or offering protection (direct and portfolio capital flows may be treated differently) and what kind of control should be exercised over FDI admission and establishment.
- *Improving standards of treatment of foreign investors* by granting them non-discriminatory treatment vis-à-vis domestic or other foreign investors. The key issue here is what degree of national treatment should be granted to foreign affiliates once they are established in a host country.
- *Protecting foreign investors* through provisions on compensation in the event of nationalization or expropriation, on dispute settlement and on guarantees on the transfer of funds. A key issue here is how far the right to expropriate or nationalize extends (especially to what extent certain regulatory actions of governments constitute takings of foreign property). Another is the acceptability of the kind of dispute settlement mechanisms available to foreign investors and countries. Third is what restrictions, if any, are acceptable on the ability of governments to introduce capital controls to protect the national economy.
- *Promoting FDI inflows* through measures that enhance a country's image, provide information on investment opportunities, offer location incentives, facilitate FDI by institutional and administrative improvements and render post-investment services. Host countries do most of this, but home countries may also play a role. The key issues here relate to the use of financial, fiscal or other incentives (including regulatory concessions) and the actions that home countries can take to encourage FDI flows to developing countries.

The general trend is to reduce obstacles, create investor-friendly settings and promote FDI. But the nature and balance of policies applied by countries varies. Why? Because locational advantages differ. Because the cost of some measures is much higher than others. And because governments differ in their perceptions of how best to attract FDI.

2. Benefiting more from FDI

Attracting FDI may not be enough to ensure that a host country derives its full economic benefits. Free markets may not lead foreign investors to transfer enough new technology or to transfer it effectively and at the depth desired by a host country. But policies can induce investors to act in ways that enhance the development impact—by building local capabilities, using local suppliers and upgrading local skills, technological capabilities and infrastructure. The main policies and measures used for this include:

- *Increasing the contribution of foreign affiliates to a host country through mandatory measures*. The objective is to prescribe what foreign affiliates should do to raise exports, train local workers or transfer technology. The key issue here relates to the use of performance requirements.
- *Increasing the contribution of foreign affiliates to a host country by encouraging them to act in a desired way.* The key issue here, as in attracting FDI, is using incentives to influence the behaviour of foreign affiliates. (Incentives may be tied to performance requirements.[4]) Particularly important here is enticing foreign affiliates to transfer technology to domestic firms and to create local R&D capacity.

Countries are learning that foreign affiliate activity can be influenced to enhance host country benefits only if they strengthen their capabilities. New technologies can be diffused in a host economy only if the skill base is adequate or if domestic suppliers and competitors can meet TNC needs and learn from them. Export activity can grow only if the quality of infrastructure so permits. Governments need to mount policies to build domestic capabilities, drawing on foreign affiliates and their parent firms in this effort. And again home countries can help in various ways through measures of their own. Indeed, even TNCs can try to increase the benefits to host economies.

3. Addressing concerns about TNCs

Despite the general shift of attitudes in favour of FDI, significant concerns remain about potential negative effects.[5] Some major areas of concern:

- Anticompetitive practices by foreign affiliates.
- Volatile flows of investment and related payments deleterious for the balance of payments.
- Tax avoidance and abusive transfer pricing by foreign affiliates.
- Transfers of polluting activities or technologies.
- Crowding out local firms and suppressing domestic entrepreneurial development.
- Crowding out local products, technologies, networks and business practices with harmful sociocultural effects.
- Concessions to TNCs, especially in export processing zones, allowing them to skirt labour and environmental regulations.
- Excessive influence on economic affairs and decisionmaking, with possible negative effects on industrial development and national security.

Voiced in the past by developed and developing countries, these concerns are diminishing in intensity. But they remain strong enough so that many governments feel the need to control inward FDI and the operations of foreign affiliates. Most important are concerns about anticompetitive practices of TNCs, especially restrictive business practices.

* * *

To sum up: governments in developing countries and economies in transition use a range of policies and measures to attract FDI, increase benefits from it and address concerns about it. The main ones address the ability of countries to pursue development-oriented national FDI policies and are particularly sensitive in the context of international investment negotiations:[6]

- Long-term investment flows that add to production capacity (the definition of investment).
- How to treat FDI entry (national treatment in the pre-establishment phase) and the subsequent operations of foreign affiliates (national treatment in the post-establishment phase).
- Circumstances under which government policies could be regarded as regulatory takings.
- The nature of dispute settlement.
- The use of performance requirements.
- The use of incentives.
- The encouragement of technology transfers.
- The role of competition policy.

When entering into international agreements, countries therefore face some difficult decisions to find the right balance between retaining policy space and flexibility and reaping the benefits from international cooperation.[7] Some policies or measures may be required to facilitate greater FDI inflows (such as opening up and raising standards of treatment). But applying restrictions and conditions to such inflows may be necessary to ensure that investment brings the desired outcomes. Finding the right balance is not easy—and it varies from country to country.

In the past two decades or so, governments have been concluding more agreements at the bilateral, regional and multilateral levels that address investment issues, at least in part. These are referred to here as “international investment agreements” (IIAs).[8] They complement national FDI policies—and interact with them.

B. The growth of IIAs

Investment rules are multifaceted, ranging from the voluntary to the binding. The obligations they set out differ in geographical scope and coverage. Some of them address only certain aspects of FDI policies. Others address investment policies in general, including policies that affect both domestic and foreign investors (competition rules or anticorruption measures). Still others cover most or all important elements of an FDI framework, ranging from admission and establishment, to standards of treatment to dispute settlement mechanisms. Rising in number (annex table A.I.13 and A.I.14), IIAs have created an intricate web of commitments that partly overlap and partly supplement one another, creating a complex set of investment rules.

The most important effort to create international rules for investment in the early years after World War II was multilateral—in the framework of the Havana Charter. It failed. The bilateral level proved to be most productive in terms of producing investment rules. It focused first on protection and then on liberalization. The first instruments of choice were treaties for the protection and promotion of foreign investment—bilateral investment treaties (BITs). Later, free trade agreements took up the matter as well.

1. Bilateral agreements

BITs are spinoffs from general treaties dealing with economic relations between countries (such as Friendship, Commerce and Navigation treaties). Since 1959, the year of the first BIT, their number has grown steadily—to 385 by 1989 and to 2,181 by 2002 (figure I.11).[9] Since the second half of the 1990s, their number almost doubled. Now encompassing 176 countries, more BITs are being concluded between developing countries as well as between them and economies in transition (see chapter I), reflecting the emergence of firms from these countries as foreign investors. Today, more than 45% of the BIT universe does not include developed countries. They are the most widely used international agreement for protecting FDI (table III.2).[10] For the world, roughly 7% of the FDI stock was in countries party to a BIT, 88% in those party to a DTT. For developing and CEE countries alone, these figures were, respectively, 27% and 64%.[11]

BITs have remained much the same over time (box III.1). The early focus on protection, treatment and dispute settlement—the reason for these treaties—remains at their centre. But a few countries extend them with provisions for the right to establishment, performance requirements and employment of key foreign personnel. These changes—mainly in recent BITs, including those being renegotiated—are giving rise to a new generation of BITs with greater obligations, with more far-reaching implications.[12]

The number of bilateral free trade agreements covering investment issues is rising as well, with most early ones involving neighbouring countries and newer ones tending to be concluded between distant countries in different regions and having investment commitments in a separate chapter. Among the main issues addressed: pre-establishment and post-establishment national treatment; most-favoured-nation (MFN) treatment; prohibitions of performance requirements (often going beyond that contained in the Trade-related Investment Measures (TRIMs) Agreement); promotion and protection, including that for expropriation and compensation; dispute settlement, both State-State and investor-State and transfer clauses guaranteeing the free transfer of payments, including capital, income, profits and royalties. An example of such a recent agreement is the Japan–Singapore Agreement for a New-Age Economic Partnership (box III.2).

What has been the impact of BITs on FDI flows? An aggregate statistical analysis does not reveal a significant independent impact of BITs in determining FDI flows (UNCTAD 1998a). At best, BITs play a minor role in influencing global FDI flows and explaining differences in their size among countries.[13] Aggregate results do not mean, however, that BITs cannot play a role in specific circumstances and for specific countries. For example, they could signal that a host country's

Table III.2. How much FDI is covered by BITs—and how much by DTTs, 2000

	Proportion of outward stock protected[a]	
Home countries[b]	BITs	DTTs
United States		
Total outward FDI stock	6	96
Stock in developing countries and CEE	19	87
EU[c]		
Total outward FDI stock	9	93
Stock in developing countries and CEE	73	73
Japan		
Total outward FDI stock	7	89
Stock in developing countries and CEE	26	61
World [d]		
Total outward FDI stock	7	88
Stock in developing countries and CEE	27	64

Source: UNCTAD.

[a] As mentioned earlier, BITs are not concluded between developed countries.
[b] To the extent that data on outward FDI for specific recipient countries are not available, the percentage shares are underestimated. However, these countries are typically relatively small FDI recipients.
[c] The data cover nine EU countries that account for 72% of total EU outward FDI stocks.
[d] Based on 27 countries for which data on outward FDI stock by destination are available. They account for more than three-four-fifths of the world FDI stock.

Box III.1. The contents of BITs

The scope and content of BITs have become more standard over the years. Today, the main provisions deal with the scope and definition of foreign investment; admission and establishment; national treatment in the post-establishment phase; MFN treatment; fair and equitable treatment; guarantees and compensation in the event of expropriation; guarantees of free transfers of funds and repatriations of capital and profits; and dispute settlement provisions, both State-State and investor-State. But given the sheer number of BITs, the formulations of individual provisions remain varied, with differences in the language of the BITs signed some decades ago and those signed more recently.

Source: UNCTAD.

Box III.2. Investment highlights of a new-age economic partnership

The 2002 Agreement between Japan and Singapore for a New-Age Economic Partnership is an example of a recent bilateral agreement that covers a range of issues, comprising trade in goods, rules of origin, customs procedures, mutual recognition, trade in services (including financial, courier and telecoms services), investment, movement of natural persons and government procurement. It also sets out elements for partnership and cooperation: paperless trading, intellectual property, competition policy, financial services, information and communications technology, science and technology, human resource development, trade and investment promotion, SMEs, broadcasting and tourism.

The salient features of its chapter on investment are:

Definition. A broad, asset-based open-ended definition of investment: "every kind of asset owned or controlled, directly or indirectly, by an investor, including: ....".

National treatment. National treatment (save the exceptions scheduled in the annex of reservations) for the establishment, acquisition, expansion, management, operation, maintenance, use, possession, liquidation, sale or other disposition of investments.

Movement of persons. Facilitating the movement of natural persons between the two countries for business purposes and mutual recognition of professional qualifications.

Transfers. Free transfer of payments, including initial capital and additional amounts to maintain or increase investments; profits, capital gains, dividends, royalties, interests and other current incomes accruing from investments; proceeds from the total or partial sale or liquidation of investments; payments made under a contract including loan payments in connection with investments; earnings of investors who work in connection with investments, payments arising out of the settlement of a dispute.

Expropriation and compensation. Investments and investors of both countries receive equitable treatment and full protection and security in many respects, including guarantees from expropriation or nationalization of investments, except for a public purpose, on a non-discriminatory basis, in accord with due process of law and upon payment of compensation equivalent to the fair market value of the expropriated investments.

Prohibited performance requirements beyond those prohibited by the TRIMs Agreement. Requirement to locate headquarters for a specific region or the world market; requirement to export a given level or percentage of services; requirement to supply goods or services provided to a specific region of the world market exclusively from a given territory; requirement to transfer technology, production processes or other proprietary knowledge; requirement to achieve a given level or value of R&D; requirement to purchase or use services provided in its territory, or to purchase services from natural or legal persons in its territory; and requirement to appointment to senior management positions individuals of any particular nationality. Certain exceptions apply.

Dispute settlement. Comprehensive dispute settlement mechanism, both State-State and investor-State. In this regard, the Agreement, as a rule, encourages amicable settlement through consultations between the parties to an investment dispute. If such dispute cannot be settled through such consultations within five months and if the investors concerned have not submitted the investment dispute for resolution under administrative or judicial settlement, or in accord with any applicable, previously agreed dispute settlement procedures, they may either request the establishment of an arbitral tribunal in accordance with the procedures set out in the Agreement, or submit the investment dispute to conciliation or arbitration in accord with the provisions of the ICSID Convention or under the Arbitration Rules of the United Nations Commission on International Trade Law.

Monitoring (implementation). Establishes a monitoring system for the purpose of effective implementation of the chapter on investment. To this end, a joint committee on investment is to be set up, entrusted with reviewing and discussing the implementation and operation of the chapter on investment; reviewing the specific exceptions related to national treatment and the prohibition of performance requirements for the purpose of contributing to the reduction or elimination of such exceptions and encouraging favourable conditions for investors of both countries; and discussing other investment-related issues.

There are also provisions on investment in the services chapter.

Source: UNCTAD.

attitude towards FDI has changed and its investment climate is improving—and to obtain access to investment insurance schemes. Indeed, investors appear to regard BITs as part of a good investment framework.

Why this finding? The policy framework is at best enabling, having by itself little or no effect on FDI flows. It has to be complemented by economic determinants that attract FDI, especially market size and growth, skills, abundant competitive resources and good infrastructure. As a rule, IIAs tend to make the regulatory framework more transparent, stable, predictable and secure—that is, they allow the economic determinants to assert themselves. And when IIAs reduce obstacles to FDI and the economic determinants are right, they can lead to more FDI. But it is difficult to identify the specific impact of the policy framework on FDI flows, given the interaction and relative importance of individual determinants.

2. Regional and interregional agreements

The universe of regional and interregional agreements dealing directly with investment matters is growing as well (annex table A.I.13).[14] But only few are devoted exclusively to investment, with the OECD liberalization codes covering capital movements and current invisible operations (1961) and the OECD Declaration on International Investment and Multinational Enterprises (1976) being particularly noteworthy. Recent examples involving developing countries include the Framework Agreement on the ASEAN Investment Area and the Andean Community's Decision 291. Unlike BITs and bilateral free trade agreements, not all regional instruments are binding. Norms of a non-binding nature relating to foreign investment in the Asia–Pacific Economic Cooperation (APEC) have been adopted in the 1994 APEC Non-Binding Investment Principles.

The trend is towards comprehensive regional agreements that include both trade-related and investment-related provisions, even extending to services, intellectual property rights and competition. Indeed, most regional free trade agreements today are also free investment agreements, at least in principle. NAFTA and the MERCOSUR Protocols are examples. So is the Free Trade Area of the Americas, now under negotiation (box III.3). The general aim is to create a more favourable trade and investment framework—through the liberalization not only of regional trade but also of restrictions to FDI and through a reduction of operational restrictions, all to increase the flow of trade and investment within regions.

Generally addressing a broader spectrum of issues than bilateral agreements, regional agreements allow tradeoffs across issue areas. And those between developed and developing countries typically use the panoply of traditional international law tools—such as exceptions, reservations and transition periods—to ensure flexibility in catering to the different needs, capacities and policy objectives of countries.

As with BITs it is difficult to identify the impact on FDI of regional or interregional agreements dealing only with the harmonization of investment frameworks of member countries. They improve the enabling framework. And where they reduce obstacles to FDI (as most regional agreements do), they can increase investment flows—again, if the economic determinants are favourable. The main economic determinant that influences FDI flows in regional agreements is market size. But that is the result of reducing barriers to trade—not of FDI.

3. Multilateral agreements

Renewed efforts to create comprehensive multilateral rules for FDI, even non-binding ones undertaken occasionally in the postwar period, have shared the fate of the first effort—and failed. Most prominent among them were the United Nations Code of Conduct on Transnational Corporations (in the late 1970s and 1980s) and a Multilateral Agreement on Investment by the OECD (in the late 1990s). But the World Bank Guidelines on the Treatment of Foreign Direct Investment, a non-binding instrument, set down (in 1992) certain standards of treatment for investors on which a level of international consensus could be said to exist.

Some efforts dealing with specific investment aspects bore fruit as well. The Convention on the Settlement of Investment Disputes between States and the Nationals of other States provides a framework for the settlement of investment disputes. The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy deals with a range of labour-related issues. The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) enhances the legal security of FDI by supplementing national and regional investment guarantee schemes with a multilateral one.

The WTO Agreement on TRIMs prohibits certain trade-related investment measures (adopted as part of the Uruguay Round). And the General Agreement on Trade in Services (GATS), also concluded as part of the Uruguay Round, offers a comprehensive set of rules covering all types of

Box III.3. The Free Trade Area of the Americas

By May 2003 the countries participating in the negotiation of a Free Trade Area of the Americas (FTAA) had completed three negotiating phases, with the fourth to be concluded by a meeting of FTAA ministers responsible for trade in November 2003. Two results are important: the preparation of a draft agreement and the launching of market access negotiations.

The single most important achievement is the draft agreement covering the issues addressed by the FTAA negotiating groups, including the Negotiating Group on Investment. The first draft Agreement was prepared for the FTAA Ministerial Meeting held in Buenos Aires on 7 April 2001, the second draft for the Quito Ministerial Meeting on 1 November 2002. Both drafts are available on the official FTAA website (http://www.ftaa-alca.org). A third draft is being prepared for the November 2003 Ministerial.

The Negotiating Group on Investment is one of the negotiating groups (market access, agriculture, services, government procurement and investment) instructed by FTAA ministers to initiate market access negotiations on 15 May 2002. As agreed by the FTAA Trade Negotiations Committee, initial offers had to be presented between 15 December 2002 and 15 February 2003, with submissions of requests for improvements of the offers to be made between 16 February 2003 and 15 June 2003. The process for the presentation of revised offers began on 15 July 2003. In the case of the Negotiating Group on Investment the Committee stated that the initial offer had to be comprehensive and in accordance with current laws and regulations. A negative list approach had to be used. The Committee also agreed that investment offers for the supply of services through commercial presence may be submitted and discussed in the Negotiating Group on Services, in the Negotiating Group on Investment or in both. The Negotiating Groups on Services and Investment shall, as general rule, continue to meet separately. However, if deemed necessary, both groups may meet to hold joint discussions on issues in common, particularly commercial presence. At its April 2003 meeting, the Committee instructed the Chairs of these Negotiating Groups on Services and Investment to hold a joint meeting to discuss commercial presence and investment in services.

All of the text in the Investment Chapter of the November 2002 FTAA draft Agreement is bracketed—that is, participating countries have yet to agree on its language. Issues covered in the chapter include scope, basic definitions, national treatment, MFN treatment, exceptions to national treatment and MFN treatment, standard of treatment, fair and equitable treatment, performance requirements, key personnel, transfers, expropriation, compensation for losses, general exceptions and reservations, dispute settlement, transparency, the commitment not to relax domestic labour or environmental laws to attract investment, the relationship with other chapters, extraterritorial application of laws on investment-related issues and special formalities and information requirements.

The 2002 FTAA draft Agreement contains several proposals on the definition of investment, most adopting a broad asset-based definition covering not only FDI but also portfolio and intellectual property, among other elements. As the draft text suggests, the discussion in the Negotiating Group on Investment focuses on whether to adopt a broader definition based on the term "asset" or a narrow "FDI-only" definition, whether to include an illustrative or exhaustive list of elements covered in the definition of investment and whether to include a list that clarifies what should not constitute an investment.

There are two different approaches to national treatment. One implies a market access component with a list of reservations (country-specific exceptions). Some proposals under this approach specify all phases of an investment (establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of investment) and require that national treatment be accorded "in like circumstances". In the other approach, national treatment is granted in accordance with the laws and regulations of the host country. The draft Agreement also includes a provision on national treatment at the subnational level.

On performance requirements, there are two main views in the draft Agreement. One is to adopt a list of prohibited performance requirements (operation and incentives) covering goods and services, the other to favour a much narrower view, not going beyond the WTO TRIMs Agreement. As in NAFTA the issue of investment incentives is addressed under performance requirements only. Some performance requirements, prohibited when mandatory, are allowed when they are combined with an advantage or a subsidy. Examples include requirements to locate production, provide a service, train or employ workers, construct or expand particular facilities or carry out R&D.

The section on expropriation in the second draft of the FTAA Agreement contains language found in many other investment agreements prohibiting a party from directly or indirectly nationalizing or expropriating an investment of an investor of another party—except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and on payment of prompt, adequate and effective compensation. Most relevant here is how the next drafts of the FTAA Agreement take into account the experience of free trade agreements signed in the past decade, such as NAFTA and the Chile–United States Free Trade Agreement. The same can be said of other issues such as fair and equitable treatment and investor-State dispute settlement.

With new governments having taken office this year, some modalities of the negotiations may be reviewed.

Source: UNCTAD.

international services delivery, including "commercial presence", akin to FDI. The GATS leaves member countries considerable flexibility on the scope and speed of liberalizing services activities. It allows them to inscribe, within their schedules of commitments, activities that they wish to open and the conditions and limitations for doing this—the positive list approach.

In their Declaration at the Fourth Session of the WTO Ministerial Conference in Doha in November 2001, members of the WTO agreed on a work programme on the relationship between trade and investment (paragraphs 20–22).[15] In doing so, they recognized (in paragraph 21) the need for strengthened technical assistance in the pursuance of that mandate, explicitly referring to UNCTAD.[16] In response, the WTO Working Group on the Relationship between Trade and Investment (set up at the WTO's 1996 Ministerial Conference in Singapore) has been deliberating on the seven issues[17] listed in paragraph 22 of the Declaration as well as technology transfer. In its meeting on 1 December 2002, the Group discussed its annual report and an intervention by a group of developing countries dealing with home country measures and investor obligations.

The discussions of the Working Group are reported to the WTO General Council. Recognized at Doha was "the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade" (paragraph 20). It was also agreed "that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations" (WTO 2001b, paragraph 20).[18]

C. Features of IIAs at different levels

What are the advantages and disadvantages of bilateral, regional and multilateral approaches to negotiating IIAs?[19] There is no straightforward answer, since the three approaches serve different purposes. The main objective of most BITs is to provide investor protection at the international level. Bilateral and regional approaches that combine investment and trade seek to reap the benefits of larger markets through trade liberalization accompanied by investment liberalization and sometimes protection. A multilateral approach can aim at both protection and liberalization. Presented here is a summary of arguments relating to the advantages and disadvantages of IIAs at different levels. They are presented without judgments about which countries should follow. It is their sovereign right to decide the approach that is best for them, if they wish to negotiate IIAs at all.

1. Bilateral approaches

The bilateral approaches, mainly BITs and free trade agreements with an investment component, have the advantage of allowing countries the freedom of choosing the partners to enter into an agreement and how to tailor the agreement to their specific situations. They offer countries flexibility in designing their networks of IIAs, concluding them with countries that are key investors, avoiding countries that are less interesting or that may insist on unwanted provisions. Allowing each treaty to be negotiated separately gives developing countries more flexibility than under a multilateral approach. In addition, BITs can be negotiated quickly. Important is also that the overwhelming number of BITs cover only the post-establishment stage of investment, leaving admission and establishment—which have the greatest development implications—to be determined autonomously by host countries.

On the other hand, asymmetries in bargaining power put weaker economies at a disadvantage in the negotiations of bilateral agreements. Although this applies in all negotiating situations, it is particularly relevant in agreements between large developed countries and small and poor developing ones—and when bilateral agreements go beyond a narrow coverage. In some recent cases, the principal objective of investor protection has been complemented with liberalization clauses related to the right of establishment and an expanded list of restricted performance requirements. So, the other side of the "flexibility" of the bilateral approach is that developing countries may be entering IIAs of broader scope. The implications of this are—for example because of the MFN clause—still far from fully understood (box V.2).

Moreover, imagine the negotiation of bilateral investment agreements (hypothetically) involving all combinations of members of the United Nations. More than 18,000 agreements would be needed to obtain complete coverage. Such an extensive network would be costly and a challenge to administer. In addition, the extension of bilateral treaty coverage and the freedom of pairs of countries to define their provisions, could lead to uncertainty, potentially inconsistent rules and legal conflicts.

2. Regional and interregional approaches

Regional and interregional approaches typically deal with a range of issues, so there is more room for tradeoffs and bargaining. With the overall purpose of expanding the regional market, they often include the liberalization of foreign entry and establishment—and reduce operational restrictions. They offer—indeed require—more flexibility in how treaty provisions are applied to the different countries. Hence, the frequent use of exceptions, reservations, transition periods and the like, intended to ensure flexibility and cater to the needs and capacities of parties at different levels of development (see also chapter V).

Where regional agreements include rules of origin, insiders may benefit in attracting FDI. The downside is that they are discriminatory. Countries outside the integrating region may be hurt by the diversion of investment. Investment by third countries in such a region may also divert trade.

3. Multilateral approaches

The advantages and disadvantages of multilateral approaches are difficult to assess. The balance of advantages and disadvantages depends on the objectives, structure, content and implementation. One of the first arguments put forward in favour of a multilateral framework for investment was that it would facilitate further expansion of FDI. It was argued that legally binding multilateral disciplines in investment would improve the enabling environment—by contributing to greater transparency, stability, predictability and security for investment in sectors not yet covered by multilateral rules. International obligations would also help reduce investor risk perceptions and narrow the gap between the actual risk of policy instability that may be suggested by a host country's domestic legislation, and the risk as perceived by foreign investors (Eglin 2002).[20] If multilateral disciplines further reduced obstacles to FDI beyond what other IIAs do, this (plus the right economic determinants) would presumably lead to higher investment flows.

Even then, however, multilaterally agreed investment rules would not by themselves guarantee higher FDI flows.[21] Nor would it be possible to predict the geographical distribution of FDI flows, because this would be determined first and foremost by the economic fundamentals of individual locations.[22]

So, is a new framework needed in the first place? Since the GATS allows selective liberalization to the opening of services (the sector with most restrictions), investment is already covered, and with that some two-thirds of worldwide FDI (although less in the case of the developing countries). Rules for primary and manufacturing industries would of course complete the existing rules on services. But FDI in agriculture is insignificant, and that in natural resources is largely covered by individual contracts between investors and governments. And manufacturing is already open to FDI, with countries competing among themselves to attract investors, providing various incentives. Moreover, a multilateral framework for investment insurance already exists, with MIGA—and for dispute settlement, with ICSID, UNCITRAL, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and various other mechanisms.

Some countries see multilateral disciplines as an important complement to the bilateral and regional IIAs, to create a common legal basis.[23] Indeed, a multilateral agreement could create the "floor" of standards applicable to IIAs in general (though this would not necessarily be uniform if a GATS-type positive list approach were used). Some fear that the floor would be too low, providing lower standards of protection and market access than BITs and regional agreements. Others fear that the floor could be too high (even when exceptions, derogations and the like are allowed), constraining national policy space too much.

Whether the floor is low or high, a multilateral framework would lock in whatever would be agreed. But it would not constitute a ceiling of rules in the investment area[24] because countries would still be free to go beyond multilateral standards when they negotiate bilaterally or regionally. In other words, a multilateral framework would most likely not replace the large and rapidly growing number of IIAs. And it could well be that a multilateral instrument would serve as a starting point for more far-reaching bilateral and regional negotiations in the future.

One reason it may be difficult to reach a high-standard agreement is that the negotiating dynamics of multilateral negotiations often lead to lowest-common-denominator compromises.[25] But there is also a substantive reason: developing countries are concerned that their policy space would be unduly restricted—and that the balance of rights and responsibilities would be tilted against them. By their nature, multilateral negotiations tend to seek uniform one-size-fits-all solutions, though exceptions and other provisions can be built in. It is in this context that flexibility, special and differential treatment and specific development provisions become pertinent (chapter V).

One also needs to consider that multilateral negotiations may open opportunities for tradeoffs. In reaching explicit consensus on the modalities of investment negotiations, developing countries could put a few issues of their own on the bargaining table (apart from the ones that are already there, beginning with agriculture):

- Broadening mode 4 of the GATS (movement of natural persons).
- Increasing flexibility for the use of prohibited TRIMs and clarifying the precise scope of the TRIMs Agreement's illustrative list to contain its extension.
- Committing to reduce gradually certain investment-related trade measures (UNCTAD 1999e), such as tariff peaks, tariff escalation and anti-dumping rules adopted by developed countries.
- Committing home countries to bind a range of measure to encourage FDI flows to developing countries and increase their benefits.
- Committing to encourage good corporate citizenship by TNCs.
- Agreeing on a substantial and sustained technical cooperation effort in investment.

It is difficult to assess the feasibility of any of these ideas at this stage. But they could be part of a positive investment agenda by developing countries—in an effort to be prepared, if need be, to discuss investment matters on the basis of their own needs and priorities.

Ultimately, the case for a multilateral framework on investment may rest on the extent to which countries judge multilateralism to be a more attractive approach. It has been argued that multilateralism can be a way for weaker countries to pool their influence to give them a better position vis-à-vis stronger ones. However, this does not mean that differences in power disappear. As with bilateral and regional agreements, multilateral negotiations involve bargaining power and negotiating capabilities, with the built-in risk that stronger parties can gain over weaker ones. Moreover, multilateralism in the investment area is not necessarily the same as in the trade area, where the defining characteristics include reciprocity, non-discrimination and special and differential treatment:

- Reciprocity in trade is based on the fact that every country imports and exports. In investment, every country attracts at least some investment, but for the great majority of developing countries, outward FDI is negligible.
- In trade non-discrimination applies to the treatment of goods and services in markets and is fairly clearly circumscribed, at least in principle. In investment it relates to a broad set of policies—in principle all those bearing on the production (indeed development) process. So it is much more intrusive and sensitive and thus more difficult to tackle.
- The principle of special and differential treatment is well established in trade, finding its expression there in a number of ways, although even here it is not fully implemented. It still needs to be developed further in investment, and put in operation.

So, a multilateral approach to investment, if pursued, raises distinctive questions of its own—questions that also arise for bilateral and regional approaches.

In this respect, multilateral negotiations could in principle give developing countries greater leverage than regional or bilateral ones, at least for those substantive issues on which they can reach common positions. In particular, by pooling their influence, developing countries might be able to obtain what seems to be more difficult to obtain (or protect) at the bilateral and regional levels, foremost more development friendly outcomes on key issues and development provisions. A multilateral framework could also serve as a benchmark for agreements at the bilateral and regional levels, helping countries in this respect by offering an accepted model to consider. And it could be of help to those governments that might want to use multilateral disciplines to support domestic investment reforms.

With investment conflicts likely to become more frequent as FDI grows, it might also be desirable for developing countries to carry out disputes in a framework based on the "rule of law" as opposed to "the rule of power". But bringing investment issues into the WTO increases the risk of developing countries finding themselves at the receiving end of retaliatory, trade-related actions in the WTO dispute settlement mechanism. Unless ways are found to insulate them from cross-retaliation,[26] the mechanism could be used to penalize countries in non-investment areas for breaches of investment rules.

There are also broader concerns, most notably that launching multilateral negotiations on investment in the WTO could divert attention from more pressing issues on the already full international economic agenda. If investment liberalization is already happening on a unilateral, bilateral and regional basis, should not the WTO focus on such areas as agriculture, the implementation of existing agreements and special and differential treatment? The negotiation of a multilateral framework within the WTO requires particular attention to coherence across the whole range of WTO agreements and their relation to other agreements in both trade and investment—a difficult task.

To reiterate, these are arguments advanced in the discussions of a multilateral framework for investment. Each country has to decide for itself which of these (and others) reflect its own interest and, in the light of this, decide its own course of action.

* * *

All in all, the proliferation of IIAs at all levels means that national FDI policies take place in a very different context from just 20 years ago. The various approaches to international rule-making all have their merits and weaknesses, their benefits and costs. Whether it is desirable for a country to pursue one approach thus depends primarily on what it seeks from an agreement—investor protection, liberalization, broader international cooperation. Finally, the development orientation of any agreement depends on its objectives, structure, substantive provisions and implementation. What is clear is that agreements affect, and interact with, the eight key national policy issues identified at the beginning of this chapter. How and how much are the subject of chapter IV.

Notes

1 For an earlier treatment of many of the issues discussed here see *WIR96;* UNCTAD's *Series on Issues in International Investment Agreements* (Geneva: United Nations, various years); UNCTAD 1998a; and the reports submitted by the WTO Secretariat to the Working Group on the Relationship between Trade and Investment, as well as the reports on its meetings (Geneva: WTO, various years).

2 Economic considerations have to be seen in the political, social, cultural and historical context in which host country policies are being pursued, though there has been a tendency for economic factors to become more important in influencing policy objectives.

3 For a fuller discussion of various types of FDI and their determinants, see *WIR98*, chapter IV.

4 Performance requirements are linked more to the provision of incentives, making them behavioural incentives as distinguished from locational incentives.

5 For a full discussion of such concerns, see *WIR99*.

6 Each of these issues is mentioned in paragraph 22 of the Doha Declaration or was brought up in the discussions of the WTO Working Group on the Relationship between Trade and Investment. The exceptions are regulatory takings and incentives. The former issue has played an important role in the NAFTA context, a role that contributed to the reference to the right to regulate in the Doha Declaration. Incentives are closely linked to performance requirements and, in any event, partly subject to the WTO's Subsidies and Countervailing Measures Agreement. Restrictive business practices were the aspect of competition policy most discussed in the Working Group.

7 There may be a difference between what kind of policies governments pursue at the national level and what they are prepared to agree to at the international level. For example, a government may have laws and regulations in place that open certain industries to foreign investors; at the same time, it may not be willing to enshrine the right of establishment in IIAs—precisely to maintain the flexibility to change its policy if need arises. The same phenomenon exists in the trade area where actual tariffs are often lower than bound tariffs.

8 Unless otherwise specified, the IIAs referred to in this chapter and the next ones are contained in UNCTAD, *International Investment Instruments: A Compendium* (Geneva: UNCTAD, various years). The creation of the European Union influenced many regional schemes that would like to repeat its success, even though they do not go as far as the EU on some elements of supranationality. Since the EU is an established supranational legal order dedicated to the integration of its member countries in the field covered by EU law, it will not be discussed in the following chapters.

9 BITs are not concluded between developed countries, as their legal systems reflect investor protection standards evolved over many years of experience with such issues. Parallel to BITs, countries have also concluded agreements for the avoidance of double taxation (DTTs), 2,256 by the end of 2002 (figure I.11). They address, among other things, the allocation of taxable income, reducing incidents of double taxation.

10 They are, however, a far cry from a full geographical coverage: 18,145 BITs would be needed to ensure full coverage of the world's 191 economies.

11 Based on 27 countries for which data on outward FDI stock by destination are available. They account for more than three-quarters of the world FDI stock.

12 The title of the "Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment", signed 22 March 2002, is perhaps indicative.

13 A more recent test similar to UNCTAD's also found that "there was little independent role for BITs in accounting for the increase in FDI" by the end of the 1990s and that "countries that had concluded a BIT

were no more likely to receive additional FDI than were countries without such a pact" (World Bank 2003, p. 129). But a study of determinants of FDI in CEE found that "bilateral investment treaties, the degree of enterprise reform and repatriation rules tended to stimulate FDI" (Grosse and Trevino 2002, p. 22).

14 Most of these instruments (or relevant excerpts) have been published in UNCTAD, *International Investment Instruments: A Compendium* (Geneva: UNCTAD, various years).

15 "Ministerial declaration" (WTO 2001b).

16 For the text of the relevant paragraphs, see *WIR02*, chapter I. For a progress report on UNCTAD's activities in this area, see UNCTAD, 2002h, 2003e.

17 The Doha Declaration provides in paragraph 22: "In the period until the Fifth Session, further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between Members".

18 In an explanatory statement at the end of the Doha Ministerial, the Chair observed: "I would like to note that some delegations have requested clarification concerning paragraphs 20, 23, 26 and 27 of the draft declaration. Let me say that with respect to the reference to an 'explicit consensus' being needed, in these paragraphs, for a decision to be taken at the Fifth Session of the Ministerial Conference, my understanding is that, at that session, a decision would indeed need to be taken by explicit consensus, before negotiations on trade and investment and trade and competition policy, transparency in government procurement and trade facilitation could proceed. In my view, this would also give each member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that member is prepared to join in an explicit consensus." (www.wto.org/english/thewto_e/minist_e/min01_e/min01_chair_speaking_e.htm)

19 There is a wide range of literature on this subject. NGOs have been particularly active in the discussions. See, most recently, for example Action Aid 2003; Chang and Green 2003; CUTS 2003; Hardstaff 2003; Khor 2002; Oxfam 2003a; Oxfam et al. 2003b; World Development Movement and Friends of the Earth 2003.

20 On the other hand (and this applies to the bilateral and regional levels as well), risk reduction can also be achieved through investment contracts between TNCs and host countries (as is common practice in some primary industries). These contracts typically have legally binding protection provisions over and above those in applicable bilateral or regional agreements, not to say in domestic legislation. In multi-country investment projects like large infrastructure developments, host countries may enhance investor security by supplementing existing BITs with an intergovernmental agreement committing them to certain standards and incorporating these into the investment contracts with the investors.

21 To quote a "Communication from Canada, Costa Rica and Korea" to the WTO Working Group on the Relationship between Trade and Investment: "Similarly, a multilateral framework for investment in the WTO would not *guarantee* greater investment flows" (WTO document WT/WGTI/W/162, p. 2). A recent World Bank report (World Bank 2003b, p. XVII) concludes similarly: "International agreements that focus on establishing protections for investors cannot be expected to expand markedly the flow of investment to new signatory countries".

22 In this connection, it has been suggested that a multilateral system of rules rather than a network of bilateral and regional agreements would contribute to a level playing field worldwide. This would allow investment decisions to be taken more on the basis of economic efficiency and actual opportunities in different host countries. Distortions caused by conflicting rules, incentives, subsidies and market access discrimination could be reduced by closer multilateral cooperation. This would ensure a better allocation of FDI, which would release additional resources that would otherwise be used inefficiently due to distortions.

23 One could also argue that multilateral negotiations may be more transparent (as compared to bilateral negotiations) in that they are more likely to receive scrutiny from the public, including civil society groups, given their higher profile.

24 Unless explicitly agreed upon in a variation of the GATT Article XXIV economic integration clause.

25 But not necessarily so: see the TRIPS Agreement.

26 Cases of cross-retaliation authorized by the WTO Dispute Settlement Body are rare.