RECENT POLICY DEVELOPMENTS

CHAPTER III

Current investment policies at the national and international levels are being shaped by a number of important developments, which are likely to also define future policy directions:

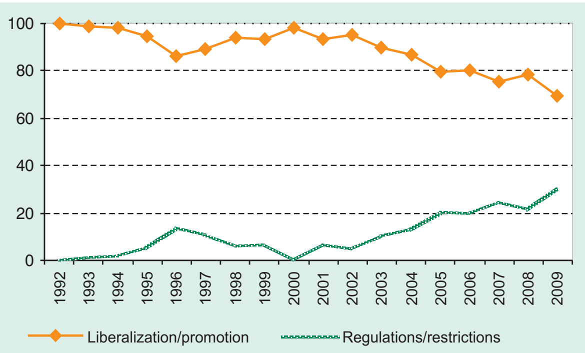
- There are simultaneous moves to (i) further liberalize investment regimes and promote foreign investment in response to intensified competition for foreign direct investment (FDI) on the one hand, and (ii) regulate and harness FDI in pursuit of broader policy objectives on the other. This dichotomy in investment policy trends contrasts with the clearer trends of the 1950s–1980s (that focused on regulation) and the 1990s–early 2000 (that focused on liberalization);
- At the national level, there is an increasing emphasis on the rights of the State and the obligations of the investors, including through new entry and operational measures. Economic stimulus packages and State aids have impacted on foreign investment, while instances of investment protectionism have so far not been observed.
- Rebalancing is also emerging within the rapidly growing multifaceted and multilayered network of international investment agreements (IIAs). In addition, the systemic evolution of the IIA regime in content and structure points towards achieving greater coherence.
- Other international investment initiatives – including those addressing broader economic, social and environmental issues – also point towards a greater emphasis on the role of regulation.

Overall, a pendulum swing towards a more balanced approach to the rights and obligations between investors and the State can be observed.

A. National policy developments

In 2009, a total of 102 policy measures affecting foreign investment were identified by UNCTAD. Of these measures, a little less than 70 per cent supported the liberalization and promotion of foreign investment. The share of more regulatory/restrictive measures observed in 2009 accounted for a little more than 30 per cent, which is the highest since 1992 (fig. III.1 and table III.1). Such measures range from tighter implementation of entry requirements to more stringent application of national regulations, expropriation measures and nationalizations as part of bail-outs and economic stimulus packages, and also include regulatory measures aimed at pursuing legitimate policy objectives.

Figure III.1. National regulatory changes, 1992–2009
(Per cent)



Source: UNCTAD database on national laws and regulations.

1. Investment liberalization and promotion

Most countries have continued to liberalize and facilitate FDI, confirming that the global economic and financial turmoil has so far not resulted in heightened investment protectionism.

A total of 71 measures were taken to liberalize and facilitate foreign investment during the review period (table III.1). Most active were countries in Africa and Asia. Relatively few new liberalization steps were taken in developed countries, reflecting the fact that these countries are already highly open to foreign investors.

Liberalization measures extended to many industries and a broad range of issues (box III.1). Policies included, inter alia, the opening up of previously closed sectors, the liberalization of land acquisition, the dismantling of monopolies and the privatization of state-owned companies.

In addition to continuous liberalization efforts, numerous countries also took steps to further promote and facilitate foreign investment (box III.2). Typical examples have been sector-specific policies and regulations, such as fiscal and financial incentives to encourage foreign investment in particular industries or regions, including special economic zones. Facilitation measures involved easing screening requirements, streamlining approval procedures, enhancing cooperation among national investment authorities in approval procedures or accelerating licensing processes for investment projects. Some of the measures also sought to promote outward FDI by simplifying approval and administrative procedures applicable to these investments, or granting preferential tax treatment.

To improve the business climate and attract investment, numerous countries also lowered the corporate tax rate. Such measures were taken in all regions, but particularly in developed countries and developing economies in Africa and Asia. On the other hand, numerous countries – particularly in the developed world – are confronted with very high and further mounting budget deficits as a result of State aid and stimulus packages. These countries could therefore start reversing the trend towards lower corporate tax rates observed over the past decade, in particular in light of global efforts

Table III.1. National regulatory changes, 1992–2009[a]

Item	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of countries that introduced changes	43	56	49	63	66	76	60	65	70	71	72	82	103	92	91	58	54	50
Number of regulatory changes	77	100	110	112	114	150	145	139	150	207	246	242	270	203	177	98	106	102
Liberalization/promotion	77	99	108	106	98	134	136	130	147	193	234	218	234	162	142	74	83	71
Regulations/restrictions	-	1	2	6	16	16	9	9	3	14	12	24	36	41	35	24	23	31

Source: UNCTAD database on national laws and regulations.

[a] Compared with reporting on these numbers in previous WIRs, the wording in the table has changed from "more favourable" to "liberalization/promotion" and from "less favourable" to "regulations/restrictions".

towards fiscal consolidation (G20 Summit in Toronto); and potential investors might not consider current rates as sustainable.

Investment liberalization and promotion efforts have spread across different regions. One prominent example for this ongoing trend is the case of the Asia-Pacific Economic Cooperation (APEC) (box III.3).

The trend towards further investment liberalization, facilitation and promotion is remarkable in light of the ongoing financial crisis. Governments did not revert to open investment protectionism, as was feared. On the other hand, instances of trade protectionism have been frequent, which could hurt FDI flows indirectly. In addition, some countries have set up or reinforced regulatory mechanisms for screening FDI that, in practice, could become protectionist tools. There are also concerns that the expected termination of State aid packages may lead to less favourable investment conditions (section A.3).

Box III.1. Examples of investment liberalization measures in 2009/2010

Australia removed the 25 per cent limit on individual foreign investors in Qantas and a 35 per cent cap for total foreign airline holdings. The overall cap of 49 per cent on foreign ownership was maintained.[a]

Brazil raised the limit of foreign participation in the capital of Banco do Brasil, a state-owned bank, from 12.5 per cent to 20 per cent.[b]

Malaysia increased, inter alia, the foreign shareholding threshold from 49 per cent to 70 per cent for insurance companies and investment banks, allowed full foreign ownership in the wholesale segment of fund management, and deregulated the purchase of real estate by foreigners.[c]

Qatar liberalized foreign investment in a number of sectors, including consultancy services, information technology, services related to sports, culture and entertainment, and distribution services.[d]

The *Syrian Arab Republic* now allows foreign majority ownership in the banking sector of up to 60 per cent, subject to certain conditions.[e]

Indonesia abolished the monopoly of the state electricity company on the supply and distribution of electricity – paving the way for private domestic and foreign investment.[f]

Source: UNCTAD.

[a] National Aviation Policy-White Paper". Commonwealth of Australia, December 2009.
[b] President Decree of 16 September 2009.
[c] Economic Planning Unit and Malaysian Industrial Development Authority.
[d] Law No 1 of 2010.
[e] Law No 3 of 2010.
[f] Law concerning electricity No. 30-2009.

Box III.2. Examples of investment promotion measures in 2009/2010

Costa Rica reformed its free trade zone regime, which aims at bringing more transparency, higher levels of FDI and promoting linkages with local companies. The reform also allows the country to comply with WTO commitments.[a]

China's State Council released opinions encouraging FDI, and indicating that the threshold of foreign-invested projects in the encouraged or permitted categories that triggers central level approval will be raised to $300 million, up from $100 million. The implementing regulation encourages, among others, foreign investment in high-tech industries, new energy, energy-saving and environmental protection industries.[b]

India introduced a "Consolidated FDI Policy" circular, which combines in one document all the prior policies/regulations on FDI in an effort to make FDI policies more transparent, predictable, simpler and clearer.[c]

The *Libyan Arab Jamahiriya* adopted an investment promotion law which encourages national and foreign investment projects in accordance with national development strategies.[d]

The *Russian Federation* amended its Law on Special Economic Zones to (i) reduce the minimum investment threshold, (ii) widen the list of permitted business activities, and (iii) simplify land acquisition and administration procedures.[e]

Rwanda improved its laws on company formation, organization, registration and operations, and simplified its business start-up procedures.[f]

Source: UNCTAD.

[a] Ministry of Foreign Trade of Costa Rica.
[b] Invest in China, Circular No. 914 of 2010.
[c] Ministry of Commerce and Industry, 1 April 2010.
[d] Law No. 9 of 2010.
[e] Federal Law 340-FZ of 25 December 2009.
[f] Rwanda Invest.

2. Investment regulation

Increased investment regulation, including new entry and operational measures, stricter application of existing rules, and some expropriations and nationalizations, have also been observed.

The regulatory framework for foreign investment tightened in numerous countries and across several regions during the review period, either through new measures concerning entry and operations, the stricter application of existing rules and regulations, or expropriation and nationalization.

Regarding FDI entry, new limitations on foreign participation were introduced in some industries, or the approval and screening procedures for inward FDI were tightened, sometimes on national security grounds (box III.4).

Greater State intervention in the economy was most obvious in expropriations, some of which affected foreign investors. Expropriations occurred in a few Latin American countries, affecting industries such as banking and electricity. Less severe measures affecting the operation of foreign investors included the introduction of local-content and other performance requirements (box III.5). In addition, numerous States increased their shares in companies as part of financial bailout measures, sometimes leading to the nationalization of the companies in question (section A.3).

A number of reasons may explain the move towards stronger State intervention in the economy. First, the protection of strategic industries and national security interests has gained momentum in recent years. Second, concerns over the crowding out of domestic companies by foreign ones, the perception that foreign investment failed to generate sufficient links with the domestic economy or the wish to achieve a "fairer" redistribution of wealth may have further accentuated this development. Third, the financial and other

Box III.3. FDI policy reform in thirteen APEC economies[a]

Fifteen years after the adoption of the Bogor Declaration, 13 APEC economies selected for an UNCTAD study have achieved considerable progress in reforming their investment regimes. They have greatly liberalized investment rules, set up transparent and conducive investment regimes and have been actively engaged in investment promotion and facilitation. However, all economies still maintain – to various degrees – sectoral investment restrictions, and some countries continue to apply a general screening system for FDI.

This progress has been achieved largely through the reviewed countries' unilateral efforts. In addition, international commitments laid down in numerous IIAs – particularly trade agreements that these economies have concluded among themselves and with other countries over the years – helped consolidate progress made at the national level. This created an open, stable and predictable investment climate in the region, and thereby contributed to achieving the Bogor Goals. The peer pressure generated through the APEC process at various levels over the past decade and a half has also played a role in maintaining the momentum towards a more open investment climate.

Driven by their shared commitment towards the Bogor Goals, the thirteen APEC economies that have gone for review have emerged as engines of global economic growth. Indeed, FDI inflows to these economies almost quadrupled between 1996 and 2008, accounting for almost three quarters of APEC's total and 32 per cent of global inward FDI in 2008. These 13 economies' outward investment nearly quadrupled during the same period and dominated FDI outflows from the APEC region, accounting for 85 per cent of the total in 2008. Their shares of FDI inflows and stocks in global and APEC totals have declined over the last 15 years, however, together with APEC's relative weight in their FDI.

Source: UNCTAD, 2010f.

[a] This is based on the study conducted for the Government of Japan, the APEC Chair of 2010, on the assessment of 13 economies towards the achievement of the Bogor Goals. These 13 selected APEC members are Australia, Canada, Chile, Hong Kong (China), Japan, the Republic of Korea, Malaysia, Mexico, New Zealand, Peru, Singapore, Taiwan Province of China and the United States.

crises (such as the food crisis) have translated into a desire to regulate specific industries more strictly (section A.3). Fourth, after a period of unrestricted growth, emerging economies are giving more weight to environmental and social protection. Likewise, least developed countries are filling gaps in their regulatory framework.

3. Economic stimulus packages and State aid

Managing the impact of crisis-response measures on investment flows, including public exits from bailed-out firms, constitutes a great challenge for governments.

The great majority of new policy measures potentially affecting FDI during the review period relate to the financial crisis. They include firm-specific, sector-specific and cross-sectoral measures intended to help improve economic conditions in host countries, which in turn can improve the investment climate and affect the economic determinants of foreign investments. Some countries' rescue packages also involved the temporary nationalization of distressed domestic companies, in full or in part.

The lion's share of these measures concerned the financial and automotive industries and was adopted by the Group of 20 (G20) countries, which pledged to keep them in place until the global economy is on a safe path to recovery.[1] Other industries that received State aid include agriculture, shipbuilding and "green" products. In line with their respective implementation schedules, most measures were maintained, while some have been closed to new entrants. Some schemes were extended and some new schemes were adopted in non-financial sectors. In general,

Box III.4. Examples of new entry regulations for foreign investors in 2009/2010

Algeria adopted new rules for foreign investments, including a 49 per cent equity share limit for the production of goods and services for the domestic market.[a]

Australia announced a tightening of the foreign investment rules relating to residential real estate.[b]

Canada amended the Investment Canada Act, authorizing the government to review investments that impair or threaten to impair national security.[c]

Germany amended its legislation to be able to exceptionally prohibit investments by investors from outside the EU and the European Free Trade Association that threaten to impair public security or public order.[d]

India banned FDI in the manufacture of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.[e]

Source: UNCTAD.
[a] Loi de finance complémentaire No. 09-01 of 22 July 2009.
[b] Foreign Acquisitions and Takeovers Amendment Regulations, 24 April 2010.
[c] Investment Canada Act registered on 17 September 2009.
[d] Amendment to the Foreign Trade and Payments Act, April 2009.
[e] Ministry of Commerce & Industry, Press Note No. 2 (2010 Series) and No. 3 (2009 Series).

both domestic and foreign investors have been eligible for State aid and no significant signs of investment protectionism have been observed. There continues, however, to be a risk of “hidden” investment protectionism in the implementation of economic stimulus programmes and rescue measures (UNCTAD, 2010e).

As a result of these sizable interventions, State control over distressed industries – in particular the financial services industry – continues to be high. For instance, the total amount of public commitments of the G20 countries – equity, loans and guarantees – on 20 May 2010 exceeded $1 trillion. In the financial sector, only about a tenth of the financial firms that had benefited from such

Box III.5. Examples of new regulatory measures affecting established foreign investors in 2009/2010

Further strengthening its control in strategic industries, the Government of the *Plurinational State of Bolivia* nationalized several electricity generation companies.[a]

The *Bolivarian Republic of Venezuela* took control over several domestic and one foreign controlled bank.[b]

Indonesia issued a regulation specifying the scope of the obligation of foreign investors to divest mining concessions. It requires that within five years of commencement of production, 20 per cent of the foreign capital must be sold to local parties.[c]

In *Kazakhstan*, a modified law provides for the inclusion of obligations on Kazakh content into the terms of subsoil use contracts and concession contracts. To be considered a Kazakh service provider, an entity now has to employ no less than 95 per cent of Kazakh nationals.[d]

Nigeria adopted an act which provides for the development of Nigerian content in the Nigerian oil and gas industry.[e]

Source: UNCTAD.
[a] Supreme Decrees 0493 and 0494 adopted on 1 May 2010.
[b] Government of the Bolivarian Republic of Venezuela, press release on 22 May 2009.
[c] Law concerning mineral and coal mining No. 4 of 2009 and Regulation No. 23 of 2010.
[d] Law No. 223-IV of 29 December 2009.
[e] Oil and Gas Industry Content Development Bill, 2010.

support had reimbursed loans, repurchased equity or relinquished public guarantees at that time. Several hundred financial firms thus continued to benefit from public support, and in non-financial sectors, at least 20,000 individual firms continued to benefit from emergency support programmes (UNCTAD and OECD, 2010).

Allegations have been made that the State control over these companies has affected their investment behaviour, in particular with regard to their investments abroad. A non-transparent application of State aids leaves ample room for discriminatory interventions in companies' economic decision-making – both from the point of view of curtailing new investment plans or dealing with ongoing foreign operations and their role on a company's value chains.

At the Pittsburgh Summit in September 2009, the G20 countries agreed to continue developing cooperative and coordinated exit strategies, recognizing that the scale, timing and sequencing of this process will vary across countries and regions, as well as across types of policy measure.[2] The latter was confirmed at the Toronto Summit of June 2010 (G20, 2010a). Nonetheless, concerns have been raised that the future exit of public funds from rescued firms could not only provide opportunities for foreign investors, but also lead to heightened economic nationalism and investment protectionism. These worries have to do with the fact that the expected "de-nationalization" often relates to industries that host country governments may consider as being strategically important (in particular financial services, but also, for some countries, other industries such as car manufacturing), and therefore wish to keep in domestic hands.

Managing the investment impacts of emergency measures taken in response to the crisis still constitutes a great challenge for governments. This is a particular concern for developing countries whose industries might be negatively affected by unfair competition resulting from State aid, and who do not have the financial means to offer comparable aid to their companies. Developed countries should therefore ensure that such programmes are wound down at an appropriate pace without unduly affecting economic recovery and that the crisis is not used as a pretext to discriminate directly or indirectly against certain investors, including foreign investors (UNCTAD and OECD, 2010).

B. The international investment regime

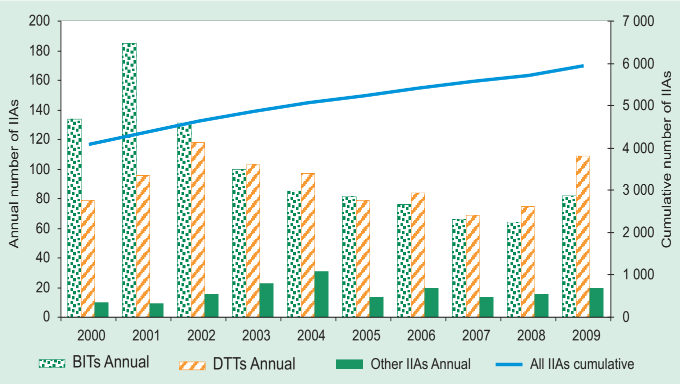
1. Developments in 2009

The IIA regime is rapidly evolving through both the conclusion of new treaties and an increasing number of arbitrations.

During the economic and financial crisis, countries have continued to negotiate IIAs as part of their efforts to attract and benefit from FDI.[3] In 2009, 211 new IIAs were concluded (82 bilateral investment treaties (BITs), 109 double taxation treaties (DTTs) and 20 IIAs other than BITs or DTTs) – on average about four new agreements per week. As a result, the IIA universe at the end of 2009 consisted of a total of 5,939 agreements, including 2,750 BITs, 2,894 DTTs and 295 other IIAs (fig. III.2).[4] The trend of rapid treaty making continued in 2010, with the first five months seeing the conclusion of 46 new IIAs (six BITs, 33 DTTs and seven other IIAs).

As a result, Germany and United Kingdom are now parties to 292 IIAs each (annex 3), followed by France (275 IIAs), the Netherlands (252), Belgium (243), Italy (236), Switzerland (231) and China (230). Germany and China have concluded the most BITs, with 135 and 125 treaties respectively; the United Kingdom and France are signatories

Figure III.2. Trends of BITs, DTTs and other IIAs, 2000–2009
(Number)



Source: UNCTAD, based on IIA database.

to the most DTTs, with 124 and 109 treaties respectively. Members of the EU are parties to most of the other IIAs.

Nineteen of the 82 BITs signed in 2009 were BITs between developing countries, and so were four of the DTTs and eight of the other IIAs – contributing to a further strengthening of the South-South IIA dimension.

Numerous newly concluded BITs follow the post-establishment protection model (including investor–state dispute settlement (ISDS)), with a few also including pre-establishment rights (such as the Canada-Jordan (2009) and Canada-Romania (2009) treaties).[5] Worth noting are certain innovative features aimed at rebalancing the agreements between the rights and obligations of investors and host countries, as well as between economic and other public policy objectives, such as the protection of the environment. Some of this occurs in the context of an increasing cross-fertilization between trade and investment negotiations (such as the inclusion of General Agreement on Tariffs and Trade-type general exceptions, prudential carve-outs relating to financial services or specific references to countries' right to regulate).

With regard to DTTs, the intense treaty-making activity in 2009 is partly due to the G20's efforts to eliminate international tax havens (chapter I). Hence 92 of the 109 new DTTs involve at least one country listed by the Organisation for Economic Co-operation and Development (OECD) as having "substantially implemented the internationally agreed tax standards". Four further DTTs involve countries (Cook Islands (one DTT) and Brunei Darussalam (three DTTs)) that are included in the OECD list as having committed to the internationally agreed tax standards, but not substantially implemented them yet.[6]

With respect to non-BIT or DTT agreements, IIAs concluded in 2009 are of three different types. The first type consists of agreements with substantive investment chapters (frequently similar to obligations commonly found in BITs) that usually provide for national treatment, most favoured nation (MFN) treatment, fair and equitable treatment (FET), protection in case of expropriation, transfer of funds and ISDS. There appears to be no fundamental difference between the content of traditional BITs and that of investment chapters in these broader economic cooperation agreements. The latter tend to include more innovative language, however, which could be a result of the cross-fertilization between trade and investment negotiations. An example is the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement (ACIA). The second type consists of agreements with limited investment-related provisions, and usually focuses on granting market access to foreign investors more than on the protection of investments once they are made (such as the Albania-European Free Trade Association free trade agreement (FTA)). The third type only deals with investment cooperation, usually providing for the creation of a consultative committee or a similar institutional arrangement to pursue common initiatives to encourage an open and transparent investment climate. Some agreements also commit the parties to enter into future negotiations, such as the Angola-United States Trade and Investment Cooperation Agreement.

Major recent developments relating to IIAs occurred in the EU, where the Lisbon Treaty transferred competences for FDI from the member States to the EU (box III.6). In addition, the European Court of Justice rendered three decisions, finding that certain BITs of EU members (Austria, Finland and Sweden) violated the European Community Treaty. Another notable development involves Chile, which signed an accession agreement with the OECD on 11 January 2010.[7]

In parallel to the expanding IIA regime, the number of ISDS cases continued to increase. At least 32 new treaty-based ISDS cases were initiated in 2009, bringing the total of known cases ever filed to 357 by the end of the year (fig. III.3).[8] The cases were brought to different forums, with the International Centre for Settlement of Investment Disputes (ICSID) (including its Additional Facility)[9] remaining the most frequent (with 225 cases by the end of 2009). The number of countries that have been involved in investment treaty arbitrations grew to 81. By now, 49 developing countries, 17 developed countries and 15 economies in transition have been on the defending/host country side of ISDS cases. The overwhelming majority of these claims were initiated by investors from developed countries.[10] An increasing number of arbitral tribunals had to address challenges related to their jurisdiction and issues related to the selection of arbitrators.

Altogether, 44 decisions were rendered in 2009, bringing the total number of known concluded cases to 164. Of these, 62 were decided in favour of host countries (either by rejecting the claims at the jurisdictional stage or on its merits), 47 in favour of the investor and 55 cases were settled. For the latter, there is little information available about the content and financial implications of such settlements.[11]

Awards issued in 2009 addressed numerous issues/clauses that are of systemic importance for the IIA regime. They relate, amongst others, to (i) the definition of investment for establishing the jurisdiction under an IIA; (ii) the definition of investment in the context of Article 25 of the ICSID Convention (*Salini* criteria); (iii) substantive standards of protection, such as expropriation, MFN, FET and full protection and security; as well as (iv) issues related to the burden and standard of proof. Some awards increased the inconsistency and lack of coherence between arbitral decisions, with the divergence of judicial opinions being further reflected by a number of dissenting opinions (for more on the content of 2009 awards, see UNCTAD, 2010b).

A notable award in 2009 concerned the *Yukos v. Russia* case[12] – a multi-billion dollar dispute arising out of the alleged expropriation of the Yukos Corporation. Here, the arbitral tribunal addressed, amongst others, issues related to the provisional application of the Energy Charter Treaty (ECT).[13] The tribunal ruled that the Russian Federation was bound by ECT provisions to the full extent, despite the fact that the Russian Federation had never ratified the ECT and had officially notified its intention not to become a Contracting Party in 2009. The tribunal thus dismissed the objections to its jurisdiction, and the case moved to the merits stage.

2. Systemic evolution of the international investment regime

The need to ensure coherence and reflect broader policy considerations into IIAs is inducing systemic changes in the international investment regime.

Developments in 2009 point to the systemic evolution of the international investment regime from a rapid expansion of IIAs at the bilateral level to a more integrated, inclusive and elaborate approach. There are indications that the landscape of the IIA system is consolidating in

Box III.6. The Lisbon Treaty and competences for FDI in the EU

On 1 December 2009, the Treaty of Lisbon entered into force, amending the EU's common commercial policy. Article 207 (1) of the Treaty on the Functioning of the European Union (ex Article 133 of the Treaty establishing the European Community) of the Treaty of Lisbon states:

> "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." (emphasis added) (Official Journal, C 306, Volume 50).

While the EU already had some competences on investment, this article shifts responsibilities in the field of FDI from the member States to the EU. Uncertainties remain about the exact extent of the EU's new role in this domain, however.

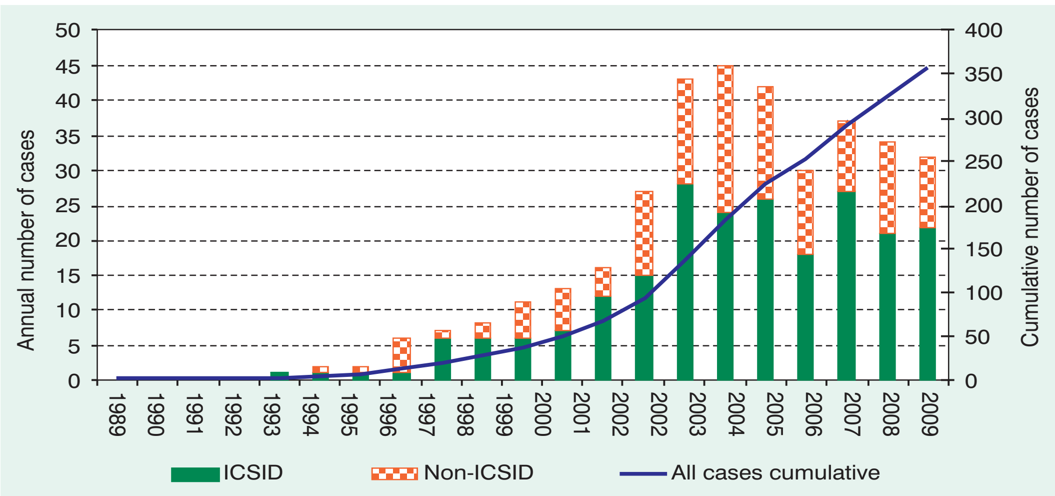
The shift may have important policy implications, both from a European perspective (such as a strengthened negotiating power in discussions with third countries, efficiency gains in terms of negotiations, a more harmonized policy approach concerning trade and investment) and from the perspective of developing countries (facing a negotiating partner with increased political clout and strength).

Questions remain over: (i) the fate of the high number of existing IIAs concluded by EU member States in the past; (ii) how to ensure coherence and compatibility in case the EU concludes IIAs with the same countries as member States, resulting in an overlap of treaty obligations; (iii) how to determine the standards to be favoured by the EU; (iv) how to approach investor-State dispute settlement (noting that the EU is not a member of ICSID and, as a supranational organization, cannot become one under current ICSID rules).

Finally, the competence shift between the EU and member countries may offer opportunities for novel features in IIA rule-making and a strengthening of these agreements' development dimension.

Source: UNCTAD.

Figure III.3. Known investment treaty arbitrations (cumulative and newly instituted cases), 1989–2009
(Number)



Source: UNCTAD, ISDS database.

different respects, including through (i) an increase of plurilateral agreements (more than two treaty partners) that encompass investment as one component of a broader economic agreement; (ii) efforts to create regional – notably South-South – investment areas; (iii) the competence shift within the EU, which is likely to lead to an increasing number of IIAs by the EU (box III.6); (iv) the abrogation of BITs to streamline the treaty landscape and eliminate contradictions with other legal instruments; and (v) efforts by numerous countries to reassess their international investment policies to better align them with development considerations through the revision of their model BITs, by reviewing their treaty network and its development implications or by denouncing their BITs.

In parallel, the ISDS system is also evolving, partly in response to concerns arising from the increasing frequency of disputes and the increasing number of divergent interpretations of treaty obligations made by international tribunals.[14] This evolution includes the ongoing review of arbitration rules, a new emphasis on dispute prevention and alternative dispute resolution (ADR), and new IIA clauses relating to ISDS.

a. Review of model BITs

Over the past few years, several countries have either created or revised their model investment agreement (the Russian Federation in 2001 with an amendment in 2002, France in 2006, and Colombia, Mexico, Austria and Germany in 2008).[15] Others are currently in the process of developing a new model BIT (Argentina, the Bolivarian Republic of Venezuela, Ecuador, Morocco, the Plurinational State of Bolivia, South Africa, Turkey, and the United States),[16] and more are planning a review process (Thailand and India with model BITs dating from 2002 and 2003, respectively). The manner in which these review processes are carried out differ, with different degrees of transparency and involvement of affected stakeholders.

Countries usually review their model BITs to (i) establish clearer rules and ensure greater precision in treaty-making; (ii) ensure consistency with the public interest and a country's overall economic agenda, including the host country's right to regulate in the public interest; (iii) seek a balance between protecting investors and the host country (including against the adverse effects of investor–state arbitration); and (iv) adjust the model BIT to new developments, such as the interpretations tribunals adopted in ISDS awards, and bring it up to date.

The model BIT revision process is sometimes triggered by political changes, as in the case of the Plurinational State of Bolivia and Ecuador where the adoption of new constitutions made it necessary to start the redrafting process.

Updating model BITs can also serve to pronounce a country's position on the proper interpretation of particular provisions found in earlier treaties. It remains to be seen, however, to what extent arbitral tribunals, when interpreting these earlier treaties, will be guided by countries' views as expressed in their subsequently revised model BITs.

b. Termination of IIAs

Some countries have fundamentally changed their approach towards BITs and denounced some of their treaties, setting in motion the process of terminating them. In January 2008, Ecuador declared its intention to cancel several of its BITs (with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay).[17] That step complemented its earlier effort to withdraw certain types of disputes from the jurisdiction of ICSID (subsection d). Moreover, the country's new constitution no longer allows Ecuador to sign international treaties that contain international arbitration as an adjudicative means for resolving commercial and contract disputes.[18] As a consequence, Ecuador is considering terminating several of its remaining BITs.[19] The Bolivarian Republic of Venezuela has denounced its BIT with the Netherlands, which will be renegotiated.

Several European countries have abrogated intra-EU BITs (the Czech Republic, for example, initiated in 2009 the termination process for 23 BITs, which the country had concluded with individual EU countries before its accession to the EU).[20] The Russian Federation submitted an official notification of its intention not to become a Contracting Party to the ECT and thereby, as confirmed in a recent arbitral decision, terminated the treaty's provisional application; this did not, however, affect the pending ISDS case (section B.1). Some countries have denounced their membership in ICSID (section B.2e).

The full legal and practical implications of these decisions on countries' obligations arising out of the treaties they denounce remain uncertain. Many BITs contain a "survival clause" stating that the treaty remains in effect for a number of years (usually five, ten or 15) after the denunciation. In such cases, investors retain the right to bring claims until the "survival period" expires.[21] Similarly, with respect to countries' withdrawal from the ICSID Convention, arbitral tribunals will need to decide whether a country's consent to ICSID arbitration given in earlier IIAs allows investors to bring ICSID claims even after a country has withdrawn from the ICSID Convention.

c. Renegotiation of BITs

Following a relatively stable trend of nine to 15 renegotiated BITs per year since 2000, 19 BITs were renegotiated in 2009; almost one quarter of the BITs concluded in 2009 are renegotiated ones. Based on available data for the past five years, the countries most active in renegotiations have been the Czech Republic (15 renegotiated BITs), Romania (8), China (6) and the Republic of Korea (6). The Czech and Romanian renegotiations can be seen in the context of these countries' accession to the EU.

In a similar vein, broader economic agreements that include a BIT-like chapter on investment have replaced earlier BITs (for example, the China-Peru FTA, the Morocco-United States FTA and the India-Republic of Korea Comprehensive Economic Partnership Agreement (CEPA)). At the regional level, ASEAN replaced its 1998 investment agreement with the ACIA in 2009.

Again, the legal and practical implications of renegotiations are unclear. Questions remain over the extent to which (i) ISDS tribunals would take interpretative guidance from renegotiated BITs,[22] (ii) the previous treaty's "survival clause" would entail continued application of that treaty to the investments made during the time it was in force;[23] or (iii) renegotiation offers an efficient process for modernizing treaty content. Renegotiation is a painstaking process, in which treaties are modified one by one, and alternative avenues for clarifying and modernizing treaty content may also merit attention. Possible "soft law" approaches include, among others, a restatement of international investment law – which could be referred to (in whole or in part) in any IIA – or multilateral decisions or declarations that would provide guidance to arbitral tribunals in interpreting particular provisions of IIAs concluded by countries that sign the relevant decision or declaration.

d. Modernizing IIA content

IIA obligations have become increasingly sophisticated and refined. This partly reflects treaty makers' response to arbitral awards that had revealed difficulties arising from the traditionally broad language of older IIAs and which, on a number of occasions, had led to unintended and contradictory outcomes.

Many recent treaties – both new and renegotiated IIAs as well as revised model BITs – suggest that governments seek to formulate agreements more precisely, paying greater attention to ensuring that the treaty language reflects their domestic policy objectives, reaffirming and strengthening States' right to regulate in the public interest, and trying to enhance the legitimacy of ISDS processes. The following broad developments emerge from a review of selected recent IIAs:[24]

- *Clarifying the scope of the treaty*: (i) Excluding from the scope of the treaty certain areas of regulation: taxation, government procurement, grants and subsidies or financial services (see for example the India-Republic of Korea CEPA (2009)); (ii) excluding specific assets (such as public debt securities, claims arising from purely commercial contracts, trade finance operations, short-term loans) from the definition of investment (Belgium/Luxembourg-Colombia BIT (2009), Panama-Taiwan Province of China FTA (2003)); (iii) including objective criteria as to what constitutes an investment;[25] and/or (iv) requiring that an investment be specifically approved in writing by the competent authority of a member State (e.g. the ACIA).
- *Introducing general exceptions that allow more room for regulation by host economies*: (i) general exceptions that exempt measures necessary to protect human, animal or plant life or health, or for the conservation of exhaustible natural resources, public morals, etc. (Canada-Jordan BIT (2009), Peru-Singapore FTA (2008)); (ii) national security exceptions (Ethiopia-United Kingdom BIT (2009)), at times of a self-judging nature – that is, as considered necessary by the contracting party and not amenable to an arbitral review (India-Singapore Comprehensive Economic Cooperation Agreement (2005)); (iii) prudential carve-outs that typically cover measures aimed at the protection of financial market participants, the maintenance of the safety, soundness and integrity of financial institutions and ensuring the integrity and stability of a financial system (Rwanda-United States BIT (2008), Brunei Darussalam-Japan FTA (2009));[26] and, finally, (iv) traditional balance-of-payment exceptions (Malaysia–Pakistan FTA (2007)).
- *Clarifying the scope and meaning of specific obligations*: (i) FET: specifying that the concept of FET does not require treatment in addition to, or beyond that, which is required under customary international law (Mexico-Singapore BIT (2009)) or even limiting FET to denial of justice only (ASEAN-China Investment Agreement (2009)); (ii) full protection and security: clarifying that the standard relates to police protection (Australia-Chile FTA (2008)) and thus concerns only physical security, rather than other types of security (legal, economic, etc.); (iii) MFN: clarifying whether the MFN obligation encompasses ISDS provisions and thus allows an investor to invoke more favourable ISDS provisions from IIAs with a third country or not (Ethiopia-United Kingdom BIT (2009) and ASEAN-China Investment Agreement (2009)); (iv) indirect expropriation: introducing language that draws a line between a compensable indirect expropriation and the adverse effects endured by a foreign investor as a result of bona fide regulation in the public interest (Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (2007)); (v) expropriation: specifying that the issuance of compulsory licenses (in relation to intellectual property rights in accordance with the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) does not amount to an expropriation (Malaysia-New Zealand

FTA (2009)); (vi) umbrella clauses: omitting such clauses from the treaty altogether (Canada-Czech Republic BIT (2009), Belgium/Luxembourg-Colombia BIT (2009)).

- *Environmental clauses*: adding specific language to ensure the protection of the environment is not compromised – but instead enhanced – by IIAs. To this end, some countries have (i) included examples such as environmental protection measures in the general exceptions clauses (India-Republic of Korea CEPA (2009)); (ii) confirmed that each party has a right to establish its own level of environmental protection (Belgium/Luxembourg-Tajikistan BIT (2009)); (iii) committed to refrain from relaxing domestic environmental legislation to encourage investment (expressed as a binding obligation, as in the Panama-Taiwan, Province of China FTA (2003), or as a soft law clause); (iv) carved out environment-related disputes from ISDS (Belgium/Luxembourg-Colombia BIT (2009)); and/or (v) included language aimed at enhancing coherence between IIAs and multilateral environmental agreements (Canada-Peru FTA (2008)).
- *Ensuring appropriate corporate behaviour, including with respect to environmental and social practices:* while absent in traditional BITs, provisions aimed at rebalancing rights and obligations of foreign investors and host countries can be found in a number of recent FTAs and regional integration agreements. Such provisions vary considerably, ranging from a simple reiteration that foreign investors shall comply with the laws and regulations of the host countries (Southern African Development Community Protocol on Finance and Investment (2006)), to more elaborate provisions on anti-corruption requirements, respect of environmental and labour standards and the establishment of local community liaison processes (Caribbean Forum of African Caribbean and Pacific States-European Community Economic Partnership Agreement (2008)). Some have proposed including provisions that commit investors to transparency, which include publishing information on payments made by foreign investors to public authorities in host countries.[27] While IIA references to issues related to corporate social responsibility (CSR) are usually of a non-binding nature, obligations for investors are starting to emerge in the CSR framework (in relation to reporting).

As mentioned earlier, modernizing treaty content raises the question whether arbitral tribunals, when interpreting older IIAs, would take guidance from clarifications found in the same country's newer IIAs concluded with other countries.

e. Developments regarding ISDS

International investment arbitration has an increasing impact on the IIA regime. Systemic challenges are increasingly becoming apparent, and alternative approaches are being explored.

The ISDS system is also undergoing changes, including new language in IIA provisions dealing with ISDS, revisions to international arbitration rules, and domestic efforts to strengthen ADR and dispute prevention policies (DPPs).

Countries have been further refining ISDS provisions in their IIAs, particularly in areas where ISDS cases could touch upon non-investment public policy concerns. Examples include new clauses which seek to reduce host countries' exposure to investor claims, by (i) carving out certain areas from ISDS provisions[28] or limiting claims in certain industries to selected IIA obligations[29] or (ii) introducing a limitation period for IIA claims of usually three years (ASEAN-China Investment Agreement (2009)) and sometimes five years (Japan-Switzerland FTA (2009)). Other examples focus on increasing the legitimacy and efficiency of ISDS processes, for instance by: (i) addressing frivolous claims on a time- and cost-effective basis through the introduction of a procedure leading to an early decision that a claim is manifestly without legal merit (Australia-Chile FTA (2008)); (ii) allowing the consolidation of claims, when two or more claims have a question of law or fact in common and arise of the same facts or circumstances (Rwanda-United States BIT (2008)); (iii) improving the transparency of arbitral proceedings, which can include making available to the public all relevant documents, starting with the notice of intent and finishing with the arbitral award, and opening hearings to the public (COMESA CIAA (2007));[30] and (iv) allowing amicus curiae briefs (ibid.).[31]

With respect to international arbitration rules, several revisions are underway, with two being completed. These revision processes address issues such as transparency, openness, independence of arbitrators, tribunal's costs and efficiency. ICSID, whose rules have undergone continued revision since their drafting in 1965, focused its most recent revision on substantive issues, in response to public concerns over lack of transparency, jurisdictional efficiency and tribunals' costs.[32] The Stockholm Chamber of Commerce, which revised its 1999 rules in 2006, focused on remedying textual ambiguities and improving the effectiveness of the proceedings. In 2008, the International Chamber of Commerce (ICC) created a task force on the revision of the 1998 ICC Rules of Arbitration. The task force was mandated to make proposals for enhancing the existing rules with special regard to procedural considerations. A second task force was created in 2009 to look into specific requirements for ICC arbitrations involving States or State entities. UNCITRAL started the first-ever revision of its 1976 procedures in 2006, with a view towards modernizing its rules (for instance by filing documents electronically). With the UNCITRAL's generic rules being adopted, discussions are now expected to turn to ISDS-specific issues. Transparency (such as access to information about cases, access to documents and participation of non-State actors) is expected to be a key topic in these discussions.

In parallel, transparency in dispute settlement is promoted at a practical level, for example through the use of modern technology that facilitates public hearings (such as simultaneous closed-circuit screenings). ICSID tribunals have been at the forefront in opening hearings to the public in 2002,[33] with several cases – including UNCITRAL cases – following suit.[34]

Countries are also responding to the increasing number of ISDS cases at the domestic level. Measures include denouncing the ICSID Convention (such as the Plurinational State of Bolivia in May 2007 and Ecuador in 2009) or announcing the intention to do so (the Bolivarian Republic of Venezuela). Ecuador first excluded gas, oil and minerals disputes from ICSID arbitration in December 2007[35] and fully denounced the ICSID Convention in July of 2009 (effective as of January 2010).[36]

Numerous countries are also looking into other ISDS arrangements by developing ADR and dispute prevention, avoidance and mediation policies. Countries spearheading DPPs include Peru (improved information sharing), Colombia (lead agency approach), the Republic of Korea (ombudsman) and Japan (Joint Committees in IIAs). Countries such as Ecuador, Guatemala and Panama are also embarking on processes aimed at developing ADR/DPP policies. In this context, UNCTAD has expanded its research and policy analysis to ADR and DPPs[37] and is offering technical assistance to countries that are putting in place domestic mechanisms for ADR or DPP. UNCTAD has also contributed to exploring the establishment of regional advisory centres to help developing countries avoid and better manage ISDS cases.

3. Possible future direction of the IIA regime

The systemic evolution of the IIA regime is taking shape, potentially creating the opportunity for a more coherent, balanced and effective international investment regime.

Overall, there are indications that the IIA regime, which has been characterized by a multitude of overlapping and sometimes contradictory rules, is moving towards a more convergent and coherent body of international law. Increasing investment law-making activity at the regional level (both in developing-country regions as well as in the context of European integration), combined with an emerging streamlining of the treaty landscape (e.g. the denunciations and renegotiations of BITs) and countries' reassessment of their international investment policies with a view to strengthening their development contribution (e.g. model BIT revisions or BITs reviews) are indications of such a move.

Moreover, the IIA system's increased interaction with key and emerging global policies and its simultaneous consolidation may ultimately contribute to fostering a globally shared view on the way forward for the IIA universe. In that context, several developments may occur, including (i) the evolution of a common understanding of key issues in IIAs; (ii) the emergence of a more coherent and systematic interpretation of IIA obligations – possibly aided by the normatively "softer" approach provided by new model BITs or other manifestations of modernized treaty content; (iii) the development of more coordinated and collective approach towards complex IIA issues; and (iv) the enhancement of interactions between IIAs and other public policy regimes such as those dealing with social, broader economic and environmental concerns. All of this would go a long way in ensuring that the international investment regime will function in a way that is more efficient and conducive to growth and development. However, making IIAs effectively work for development remains a challenge.

Additional elements that are central in this context include, the identification of a suitable forum for consensus-building; sharing of experiences and best practices, including through multilateral cooperation, as well as novel – and operational – initiatives for fully harnessing the development enhancing potential of IIAs and attendant FDI flows. Capacity- and institution-building is central for developing countries to effectively participate in – and benefit from – international efforts to reform the international policy framework for foreign investment and to deal with an increasingly complex policy agenda. Novel initiatives, in turn, would combine the benefits of investment liberalization and protection with tangible contributions, allowing developing countries to effectively benefit from FDI in terms of strengthening their productive and supply capacities, maximizing business linkages and ensuring that potential FDI-related benefits will spill over to the local economy and attendant stakeholders, including the poor and marginalized.

C. Other investment-related initiatives

1. Investment in agriculture

International investment relations are also affected by policy initiatives taken in related areas.

Serious food shortage in many developing countries requires substantially more investment in agricultural production. Foreign investment can make an important contribution in this respect, but it also poses significant risks, including the potential crowding out of local farmers, land grabbing or environmental degradation (for a discussion, see WIR09).

Against this background, several international efforts have been launched, including a joint initiative to develop principles for responsible agricultural investment (box III.7).

Such principles, if agreed upon and implemented, could contribute to enhancing the positive and reduce the potential negative effects of foreign investment in agricultural production. They could help overcome the reservations of some host countries towards foreign investment in the sector (FAO, IIED and IFAD, 2009). Host countries could benefit from investments that strengthen local food security and have a positive impact on local development. For foreign investors, the adoption of such principles could improve legal certainty and reduce the risk of political and social disputes in the host country. The development of such principles has been endorsed by the Group of Eight (G8) Summit in Muskoka, Canada, in June 2010 (G8, 2010).

2. G20 and G8 investment-related policy actions

Important international initiatives relating to foreign investment policies have also been taken in response to the financial crisis. The G20 Summit in Toronto (26–27 June 2010) extended the commitment by G20 countries to refrain from protectionism in the trade and investment area until 2013. G20 countries asked intergovernmental organizations, including UNCTAD, to continue monitoring and public reporting on developments related to trade and investment protectionism (G20, 2010a). In response to the requests by the G20 at earlier summits (Washington, London and Pittsburgh), UNCTAD – together with the OECD and the WTO – published three reports on this issue (UNCTAD, OECD and WTO, 2009; 2010; UNCTAD and OECD, 2010), offering detailed information on G20 countries' investment policy action at the national and international levels (box III.8). In addition, UNCTAD launched a new quarterly publication – the Investment Policy Monitor – which regularly reports on new investment-related policy developments, offering country-specific data on national and international investment policies for all United Nations member countries (UNCTAD, 2009g; 2010e).

The G8 Summit in L'Aquila (8–10 July 2009) noted the need for enhancing predictability and stability in the international investment environment (G8, 2009a). It also reconfirmed the "commitment to keep markets open and free and to reject protectionism of any kind", recognizing the need to respect "obligations and commitments to non-discriminatory treatment under … international agreements" and committing to "maximise efforts and steps to promote and facilitate trade and investment" (G8, 2009b: para. 45). The summit's concluding documents made reference to UNCTAD's national and international investment policy work, including UNCTAD's contribution to the discussion on the development dimension of investment.

Box III.7. Draft Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources

UNCTAD, the Food and Agriculture Organization of the United Nations (FAO), the International Fund for Agricultural Development (IFAD) and the World Bank have come together to propose seven principles for responsible agricultural investments. The seven principles are now subject to consultation and refinement. Once support is obtained from major home and host countries relevant to agricultural FDI, the goal would be to translate the principles into actions for investors, governments, donors and international agencies.

The seven draft principles are:

- Existing rights to land and associated natural resources are recognized and respected;
- Investments do not jeopardize food security but rather strengthen it;
- Processes relating to investment in agriculture to be transparent, monitored and ensure accountability by all stakeholders, within a proper business, legal and regulatory environment;
- All those materially affected are consulted, and agreements from consultations are recorded and enforced;
- Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically and result in durable shared value;
- Investments generate desirable social and distributional impacts and do not increase vulnerability;
- Environmental impacts of a project are quantified, and measures taken to encourage sustainable resource use, while minimizing the risk/magnitude of negative impacts and mitigating them.

Source: UNCTAD, FAO, IFAD and World Bank, 2010.

3. Investment and financial system reforms

The global financial crisis highlighted serious gaps and weaknesses in the regulation of financial markets. As a result, governments – particularly those in the developed world – as well as intergovernmental bodies have introduced various initiatives to strengthen financial regulation and reform financial regulatory frameworks. These initiatives may have significant implications for foreign investment.

At the G20 Summits in Pittsburgh and Toronto, global leaders committed to act together to raise capital standards, implement strong international compensation standards, improve the derivatives market and create more powerful tools to hold large global firms to account for the risks they take.[38] G20 Finance Ministers and Central Bank Governors (when meeting in the United Kingdom on 7 November 2009) underscored their new approach to economic cooperation, adopted a detailed timetable (e.g. for setting out their policy frameworks and developing a basket of policy options) and initiated a new consultative mutual assessment process to evaluate whether their policies will collectively deliver the agreed objectives.[39] In that context, they also referred to assistance by international organizations, including UNCTAD. Also their subsequent April 2010 meeting referred to contributions from international organizations, including UNCTAD where appropriate.[40] At the operational level, national and international regulatory bodies (such as the Basel Committee of Central Banks) are formulating stricter principles for regulation and supervision. Attention needs to be given to the coherence between these efforts at reforming the international financial system and the international investment system, as both govern short- and long-term cross-border capital flows.

Box III.8. The UNCTAD–OECD–WTO reports on G20 trade and investment measures

In response to the request of the G20, UNCTAD, OECD and WTO have since September 2009 monitored adherence to the G20 undertakings to refrain from protectionism and to promote global trade and investment. The quarterly reports published so far have covered the period of sharp economic contraction that began in 2008 and accelerated in the first quarter of 2009, and the fragile recovery observed in the last quarter of 2009 and beginning of 2010.

With no indication of widespread trade or investment restrictions in reaction to the crisis, the first report of September 2009 concluded that G20 members and other governments have succeeded in keeping domestic protectionist pressures under control. In the area of investment, the thrust of G20 policy changes has been, for the most part, towards greater openness and clarity, with a substantial number of the policy changes meant to facilitate international investment and financial flows. G20 members have also continued to conclude international investment agreements. Some G20 governments, however, have established support schemes that could discriminate against foreign-controlled companies or obstruct outward investment flows.

In the wake of the fragile recovery, the second report of March 2010 also found that most investment and investment-related measures still point towards greater openness and clarity for investors. Yet the potential for non-transparent and discriminatory application of emergency measures remains a serious challenge. The report recommends paying close attention to the design, application and winding-up of policy measures taken in response to the crisis, and ensuring well-timed, credible and transparent withdrawals from emergency programmes.

The third report of June 2010 also considered that some G20 countries have moved into a new phase of the administration of their emergency measures and programmes. This includes the dismantling of some emergency schemes and the unwinding of advantages provided to individual companies under emergency schemes, but also the continuation and expansion of programmes and the introduction of schemes for new sectors. G20 leaders should ensure that such programmes are wound down at an appropriate pace and that the crisis is not used as a pretext to discriminate directly or indirectly against certain investors, including foreign investors.

International monitoring by UNCTAD, OECD and WTO can help ensure that current efforts to avoid investment protectionism do not remain one-off initiatives. In the same vein, UNCTAD continues to monitor global investment trends and policy developments on a quarterly basis.[a]

Source: UNCTAD, based on UNCTAD, OECD and WTO, 2009; 2010; UNCTAD and OECD, 2010.
[a] UNCTAD, 2009g; 2010d; 2010e.

Strengthened financial regulation across the world may have significant implications for global FDI flows. A healthier financial system at national and international levels, better monitored and controlled financial risks and improved macroeconomic stability will help the long-term growth of global FDI flows. Companies operating in a predictable financial and economic environment will be more willing to invest both at home and abroad, and banks more likely to lend.

In the short and medium term, however, the impact of financial regulatory changes on FDI flows is likely to be mixed. On the one hand, the propensity and ability of TNCs to invest abroad will improve, thanks to safer credit and regained confidence in the financial system. On the other hand, to the extent that restrictive measures make international investment and the operation of financial institutions more difficult, these measures may have a negative impact on FDI flows, especially in financial industries. For instance, private equity funds' foreign investment, one of the key drivers of global FDI growth during the past few years, is likely to slow down due to both de-leveraging and strengthened regulation. In addition, restrictive policy measures may hamper FDI financing by affecting national and international lending. Finally, investment could be diverted to countries where regulatory standards remain comparatively low, unless international action is well co-ordinated.

4. Investments by sovereign wealth funds

While still relatively small (chapter I), SWFs' growing foreign investments have raised concerns, particularly in developed countries, and in some cases have been met with restrictive policies. This led in May 2008 to the establishment of the International Working Group of Sovereign Wealth Funds, representing 23 countries with SWFs. They agreed on a set of Generally Accepted Principles and Practices, known as the "Santiago Principles" (*WIR09*). These principles seek to improve SWFs' transparency and ensure that they bring economic and financial benefits to home countries, recipient countries and the global financial system. On 11 April 2009, the working group decided to establish the International Forum of Sovereign Wealth Funds to follow up on the work undertaken in the context of the Santiago Principles. The forum held its inaugural meeting on 8–9 October 2009 and adopted the Baku Statement, which includes a commitment to continue contributing to a stable global financial system.

5. Political risk insurance

Investment insurance to mitigate non-commercial risk complements host countries' national and international efforts to provide an enabling investment environment. Composed of national and multilateral institutions as well as private firms, the market for political risk insurance (PRI) was estimated at some $146 billion in 2008 (World Bank 2009a).[41] Although PRI has historically covered only a small share of FDI, leaving most investments in developing countries uninsured, the persistence of political risk concerns (as illustrated by the Economist Intelligence Unit's political risk scores deteriorating for 52 countries (ibid)) and the growing interest in developing countries as investment destinations, especially in the wake of the crisis (chapter I), are most likely to contribute to a growth in PRI in the future (ibid).

Some of the largest official bilateral insurers are OPIC (United States), NEXI (Japan), Euler HERMES PwC (Germany), the Compagnie Française d'Assurance pour le Commerce Extérieur (France) and the Export Credit Guarantee Department (United Kingdom). Similar institutions exist in Austria, Australia, Canada, Italy, the Netherlands, Spain and Sweden (ibid). In general, these insurers focus on cross-border investments undertaken by their countries' firms in developing countries that have concluded a BIT with their own countries. Amongst the multilateral institutions, the Multilateral Investment Guarantee Agency (MIGA) is the largest, with $21 billion of guarantees (including amounts issued under the Cooperative Underwriting Programme), issued in support of 600 projects in approximately 100 member countries at the end of 2009 (World Bank, 2009b). Regional development banks and other institutions, such as the Inter-Arab Investment Guarantee Agency, the African Trade Insurance Agency, the Islamic Corporation for the Insurance of Investment and Export Credit, provide political risk insurance as well. In the EU, the European Investment Bank has established an Investment Facility to provide risk capital and guarantees in support of domestic and foreign investment, loans and credits. Political risk insurance is also provided by the private underwriting market, including about 18 Lloyd's syndicates and a number of insurance and reinsurance companies (World Bank, 2009a).

D. Concluding remarks

National and international policy developments (both in IIAs and other international policy initiatives) point towards a rebalancing between the rights and obligations of the State and investors. Striking the *proper* balance between the two policy goals of further investment liberalization/promotion, and regulating in the public interest, has become a key policy challenge. This is particularly difficult today, as countries are striving to overcome the financial, economic, energy, food and climate crises that have had a profound impact on the global economy and human development goals, whilst dealing with the systemic evolution of the IIA regime, and broader geopolitical changes occurring at the international level (Epilogue). Policymakers need to ensure that their crises response measures do not negatively affect investment determinants and contribute to increasing uncertainty in investment relations. This also relates to non-core investment policies. For example, instances of trade protectionism resulting from the economic crisis (WTO, 2009) influence foreign investment, potentially impacting the global value chains of TNCs.

Future investment policies need to take all of these developments into account, so as to not to hurt the prospects for a rebound in FDI that could otherwise be expected in a post-crisis scenario. Moreover, these investment policy changes are taking place against the background of other broader developments. Today, international relations are shifting, with new forums gaining influence in international economic decision-making (such as G20), regional organizations (such as the EU) undergoing fundamental changes in their FDI policymaking and emerging economies playing an increasing role as both prominent FDI recipients and outward investors (chapter I). Efforts to avoid further marginalization of other developing, and particularly least developed, countries are essential. The United Nations, with its global membership, can make an important contribution in this regard.

Endnotes

1 See UNCTAD, OECD and WTO, 2009; 2010.

2 See G20 Pittsburgh Summit, 2009.

3 For a discussion of the impact that IIAs can have on promoting inflows of foreign investment, see UNCTAD, 2009d.

4 For more details on IIAs negotiated until April 2010, see UNCTAD, 2009g; 2010e.

5 IIAs following the post-establishment model protect covered investors and their investments once these are established or admitted in the host country. IIAs following the pre-establishment model, in turn, grant covered investors additional – sometimes qualified – rights to establish an investment in the host country (UNCTAD, 2007b).

6 This category differentiates between "tax havens" (Cook Islands) and "other financial centres" (Brunei Darussalam). See http://www.oecd.org/dataoecd/50/0/43606256.pdf.

7 Following parliamentary approval, Chile has become a member of the OECD and be subject to key investment-related instruments including, amongst others, the OECD Codes of Liberalisation (i.e. of Capital Movements and of Current Invisible Operations), the Declaration on International Investment and Multinational Enterprises and attendant follow-up decisions and guidelines and the OECD Guidelines for Recipient Country Investment Policies Relating to National Security.

8 Since ICSID is the only arbitration facility to maintain a public registry of claims, the total number of actual treaty-based cases is likely to be higher. This number does not include confidential proceedings instituted under the United Nations Commission on International Trade Law (UNCITRAL) or other arbitral rules, cases that are exclusively based on investment contracts (state contracts) and cases where a party has so far only signalled its intention to

submit a claim to arbitration, but has not yet commenced the arbitration (notice of intent); if these latter cases are submitted to arbitration, the number of pending cases will increase.

9 Under the Additional Facility rules, the ICSID Secretariat can administer – at the request of the parties concerned – certain proceedings between states and nationals of other states which fall outside the scope of the ICSID Convention (e.g. when one of the parties is not an ICSID Contracting State or national of an ICSID Contracting State).

10 See UNCTAD, 2010b.

11 Ibid.

12 See *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 19 November 2009. See also *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*, PCA Case No. AA 228, UNCITRAL Rules, Interim Award on Jurisdiction and Admissibility of 19 November 2009, para. 338.

13 The Energy Charter Treaty entered into force on 16 April 1998. It is a plurilateral agreement establishing a legal framework for international energy cooperation, including in the field of investment promotion and protection. See www.encharter.org.

14 The increasing number of ISDS cases has given rise to cost-related challenges (cost of litigation and for awards), challenges regarding a country's reputation as an attractive FDI destination and capacity-related challenges, particularly for developing countries.

15 While Norway commenced the review of its model BIT in 2006, the country has not adopted a revised version of the agreement. See http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtale2.doc.

16 UNCTAD has provided technical assistance advisory services in connection with the new model BITs of Colombia, Dominican Republic, Guatemala, Morocco, Norway and Turkey.

17 See http://www.asambleanacional.gov.ec/200911051406/noticias/boletines/intensifican-debate-sobre-denuncia-de-tratados-de-proteccion-reciproca-de-inversiones.html.

18 Adopted November 2008, Article 422. Available at http://www.asambleanacional.gov.ec/documentos/Constitucion-2008.pdf.

19 See http://www.mmrree.gov.ec/2010/com001.asp.

20 UNCTAD, 2009c.

21 This would only apply to investments made prior to the treaty's termination.

22 For example, there are questions whether ISDS tribunals, in their interpretation of a country's earlier IIA, take guidance from a later renegotiated IIA that this country has with another treaty partner.

23 This problem may arise where the old treaty contains rules that are more favourable to an investor than the new treaty and where the new treaty does not explicitly address the issue.

24 The list of developments does not mean that all identified elements are found *en bloc* in a single IIA; rather they are scattered around various treaties. Furthermore, this does not mean that all new agreements include these elements; some countries have preferred to continue concluding IIAs of the traditional first generation type.

25 Criteria of what constitutes an investment under a specific IIA tend to be formulated either as alternatives (i.e. the fulfilment of one criterion is sufficient for an investment to be covered by the IIA in question) or cumulatively (i.e. all of the criteria have to be fulfilled for an investment to be a "covered investment").

26 Some IIAs totally exclude all measures relating to financial services: India–Republic of Korea CEPA (2009), Article 10.2.7; Panama-Taiwan Province of China FTA (2003), Article 10.01.2.

27 See for example the International Institute for Sustainable Development Model International Agreement on Investment for Sustainable Development (2005), available at http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf .

28 The Canada-Jordan BIT (2009) carves out measures taken by Canada in the area of competition law and security reviews of potential acquisitions and the Jordanian decision relating to foreign participation in big development projects (annex IV).

29 The Canada-Jordan BIT (2009) provides that financial institutions and investors therein can bring claims of violation of expropriation, transfers and denial of benefits provisions only (article 21).

30 Transparency provisions usually contain safeguard against disclosure of confidential business information or other privileged information.

31 An amicus curiae, or "friend of the court", brief is a document presented by a person or organization interested in influencing the outcome of a case but who is not a party to it; typically – but not exclusively – occurring in cases with a public interest dimension.

[32] For example, the 2006 ICSID rules mandate the ICSID Secretariat to publish promptly excerpts of the legal reasoning of the tribunal, allow a tribunal to accept amicus curiae briefs by any non-dispute party under the non-exhaustive conditions, require a declaration of independence related to the appointment of the tribunal, provide for accelerated provisional measures and envisage a possibility to dismiss claims that are manifestly without legal merit.

[33] In 2002, parties to the North American Free Trade Agreement (NAFTA) dispute *United Parcel Service of America, Inc. v. Government of Canada* agreed to allow simultaneous public video broadcasting in another room of the World Bank building. A similar practice is being established in the WTO, where both Panel and Appellate Body hearings were already opened to the public with the parties' consent (e.g., *US-Zeroing* (December 2008/ March 2009), *EC-Bananas* (October 2008)).

[34] See *Glamis Gold Ltd. v. USA*, *Methanex v. USA*, *Merrill Ring Forestry L.P. v. Canada*, *Canfor Corporation v. USA* and *Railroad Development v. Guatemala*. It has to be noted that these cases were based on NAFTA or the Central American Free Trade Agreement, both of which contain provisions on transparency in arbitration proceedings.

[35] See http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9.

[36] See http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20

[37] See UNCTAD, 2010 forthcoming b. See also, Washington & Lee University-UNCTAD Joint Symposium on International Investment and ADR: Preventing and Managing Investment Treaty Conflict, held on March 29, 2010, in Lexington, Virginia, United States; http://investmentadr.wlu.edu/. For the rapporteur reports of the pre-conference blogs, see http://investmentadr.wlu.edu/symposium/page.asp?pageid=602.

[38] See G20, 2009a and 2010a.

[39] See G20, 2009b.

[40] See G20, 2010b.

[41] As measured by the maximum limit of liability in investment insurance of the 73 members of the Berne Union, an industry association that includes most export credit agencies and investment insurers, both public and private.