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The World Bank Guidelines as a Foundation for a Global Investment Treaty: A Problem-Oriented Approach.

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Abstract

This thesis focuses on the law on foreign direct investment (FDI). It addresses international rules on the protection and treatment of FDI and does not deal with any domestic or regional investment regime. The dissertation argues that a multilateral convention on investment (Convention) is necessary in today's interdependent world economy. It demonstrates that the current bilateral and multilateral treaty regimes on foreign investment and rules of customary international law on the treatment of aliens are not sufficient to protect foreign investors and to promote investment flows. The thesis also explains why the World Bank Guidelines on the Treatment of Foreign Direct Investment (Guidelines) should serve as the foundation for a multilateral investment treaty.

The paper – following the structure of the Guidelines - addresses admission and treatment of FDI, expropriation of foreign investments, inter-State and investor-State dispute resolution as well as the proposed Convention's scope of application. In addition, it contains an overview of numerous past attempts multilaterally to regulate FDI. Each chapter selects key problems which often arise out of investment transactions, such as restrictions on admission of foreign investors, monetary transfers and compensation for expropriated investments. The thesis outlines the approach of the Guidelines to each of these issues, demonstrates strengths and weaknesses of such approaches, reveals certain inconsistencies within the Guidelines and suggests how a Convention should address the problems.

The dissertation concludes that a multilateral investment treaty is a necessity in a globalised world economy. It summarises the reasons for past failures to negotiate a Convention and proposes initial steps crucial for the conclusion of a future treaty. The study particularly emphasises the importance of a suitable forum for negotiation and awareness of social issues for the success of any future Convention.

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List of Abbreviations

AAA	American Arbitration Association
AALCC	Asian-African Legal Consultative Committee
AALR	Anglo-American Law Review
ABAJ	American Bar Association Journal
ACP States	African, Caribbean and Pacific States
AIA	ASEAN Investment Area
AIJV	Asian Industrial Joint Venture
AJIL	American Journal of International Law
Am.U.L.Rev.	American University Law Review
APEC	Asian-Pacific Economic Cooperation
Arb.Int.	Arbitration International
Arbitration J.	The Arbitration Journal
ARIEL	Austrian Review of International and European Law
Art.	Article
Arts.	Articles
ASEAN	Association of South East Asian Nations
ASIL	American Society of International Law
Austra.L.N.	Australian Law News
Austrian J.Pub.Int'l.L.	Austrian Journal of Public and International Law
AYIL	Australian Yearbook of International Law
BIT	Bilateral Investment Treaty
BYIL	British Yearbook of International Law
CA	Court of Appeal
Calif.W.Int'l.L.J.	California Western International Law Journal
Cam.L.J.	Cambridge Law Journal
Case West.Res.J.Int'l.L.	Case Western Research Journal of International Law
CEO	Chief Executive Officer
CEPMLP	Centre for Energy, Petroleum and Mineral Law and Policy (Dundee University)
CFO	Chief Financial Officer
Col.J.Transnat'l. L.	Columbia Journal of Transnational Law
Col.L.Rev.	Columbia Law Review
Comm.Mkt.L.Rev.	Common Market Law Review
Cornell Int'l.L.J.	Cornell International Law Journal
Cornell L.Q.	Cornell Law Quarterly
CTC Rep.	The CTC Reporter
CTE	Committee on Trade and Environment
DC	Development Committee
DCF	Discounted Cash Flow
DSB	Dispute Settlement Body

DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Agreement Establishing the WTO)
DTI	Department of Trade and Industry
Duke L.J.	Duke Law Journal
EC	European Communities
EEC	European Economic Community
Engl.	England
EU	European Union
Eur.Ct.H.R.	European Court of Human Rights
FCN	Friendship Commerce and Navigation
FDI	Foreign Direct Investment
FIAS	Foreign Investment Advisory Service
Ford.L.R.	Fordham Law Review
FTA	Free Trade Agreement
FYR	Former Yugoslav Republic
GA	General Assembly of the United Nations
Ga.J.Int'l.&Comp.L.	Georgia Journal of International and Comparative Law
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GM	General Manager
GNP	Gross National Product
GYIL	German Yearbook of International Law
Harv.Int'l.L.J.	Harvard International Law Journal
HL	House of Lords
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICJ	International Court of Justice
I.C.J. Rep.	Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
ICSID-Rev. FILJ	International Centre for the Settlement of Investment Disputes Review – Foreign Investment Law Journal
IDA	International Development Agency
IFC	International Finance Corporation
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
Ind.J.Int'l.L.	Indian Journal of International Law
Int'l.Bus.Law.	International Business Lawyer
Int'l. Lawyer	International Lawyer

Iran-US CTR	Iran-US Claims Tribunal Reports
ITO	International Trade Organisation
J.Air L.&Com.	Journal of Air Law and Commerce
J.Bus.L.	Journal of Business Law
J.Comm.Mkt.Stud.	Journal of Common Market Studies
J.Int'l.Arb.	Journal of International Arbitration
J.Int'l.Bus.Stud.	Journal of International Business Studies
J.Int'l.L.& Econ.	Journal of International Law and Economics
J.World Trade	Journal of World Trade
J.World Tr.L.	Journal of World Trade Law
L.&Pol.Int'l.Bus.	Law & Policy in International Business
LCIA	London Court of International Arbitration
m	million
MAI	Multilateral Agreement on Investment
Malayan L.J.	Malayan Law Journal
Mass.	Massachusetts
MEA	Multilateral Environmental Agreement
MFN	Most-Favoured Nation
Mich.J.Int'l.L.	Michigan Journal of International Law
MIE	Multinational Industrial Enterprise
MIGA	Multilateral Investment Guarantee Agency
M.I.T.	Massachusetts Institute of Technology
MNC	Multinational Corporation
MNE	Multinational Enterprise
Mod.L.R.	Modern Law Review
NAC	Non-aligned Countries
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organisation
Northwest.J.Int'l.L.&Bus.	Northwestern Journal of International Law and Business
N.Y.	New York
NYIL	Netherlands Yearbook of International Law
OAS	Organisation of American States
OECD	Organisation for Economic Cooperation and Development
OEEC	Organisation for European Economic Cooperation
para.	paragraph
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
P.C.I.J.	Permanent Court of International Justice Cases
PDR	People's Democratic Republic
PR	Performance Requirement

RBP	Restrictive Business Practices
RIA	Regional Investment Agreement
RIAA	Reports of International Arbitral Awards
Rep.	Report
Res.	Resolution
Sec.	Section
Stan.J.Int'l.L.	Stanford Journal of International Law
TRIM	Trade Related Investment Measure
TRIP	Trade Related Aspect of Intellectual Property Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNTS	United Nations Treaties Series
U.Pitt.L.Rev.	University of Pittsburgh Law Review
U.S.C.	United States Code
USD	United States Dollar
Van.J.Transnat'l.L.	Vanderbilt Journal of Transnational Law
Virg.J.Int'l.L.	Virginia Journal of International Law
WTO	World Trade Organisation
YB	Yearbook
YB Com.Arb.	Yearbook of Commercial Arbitration
YB World Aff.	Yearbook of World Affairs
Z.a.ö.R.u.V.	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Table of Cases

Decisions and Advisory Opinions of the ICJ and the PCIJ

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Part A - Introductory

I. Introduction

Foreign Direct Investment (FDI)[1] plays a significant role in today's world economy. As early as the 1980s FDI growth rates outpaced trade growth.[2] In 2000 FDI reached a record level of USD 1,149 billion of investment outflows worldwide.[3] This amount was achieved against the backdrop of numerous unfavourable circumstances, such as the recession in Asia and the instability of financial markets in Latin America, Asia and the Russian Federation. Some regions particularly benefited from the investment boom. FDI flows to Latin America, for instance, increased from less than USD 10 billion in the early 1990s to USD 33 billion in 1996 and reached USD 66 billion in 1999.[4]

Many developing country governments have considerably changed their attitude towards FDI in the past 15 years. While they were most suspicious of foreign investments during the 1970s and early 1980s, since the debt crisis they more and more recognise the benefits of FDI. Numerous States have changed their investment regimes and now provide a more favourable climate for foreign investors. Modern national investment codes establish liberal investment conditions. They offer, for example, attractive fiscal incentives to foreign investors and guarantee stability for investment projects.[5]

FDI brings a variety of advantages to host States and foreign investors. From the host State's point of view, FDI appears desirable as it promotes innovation, enhances productivity and thereby raises the living standard of the local population.[6] Foreign investors usually generate significant employment, particularly in export-oriented and labour-intensive manufacturing

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[1]) For a definition of this term, see infra: chapter A III 1-2.

[2]) The world trade volume grew at a compound annual rate of 5%, while global FDI increased by more than 20% per annum in real terms. See: Julius, *Global Companies and Public Policy: the Growing Challenge of Foreign Direct Investment* (London: Printer Publishers, 1990), 14. For more statistical data on FDI flows, see: Appendix G.

[3]) UNCTAD, *World Investment Report: Promoting Linkages* (New York and Geneva: UN, 2001), 296, UN Doc. UNCTAD/WIR/2001.

[4]) Research Department of the Inter-American Development Bank, "Foreign Direct Investment: Good Cholesterol?" (2000) 11:2nd Quarter Latin American Economic Policies, 1.

[5]) Wälde and Ndi, "International Petroleum Investment and Policies: Green, Privatising, and Moving Eastward?" in Wälde and Ndi (eds.), *International Oil and Gas Investment – Moving Eastward?* (London, Dordrecht, Boston: Graham & Trotman/Martinus Nijhoff Publishers, 1994) 3 at 13.

[6]) United States, *President's Statement Announcing United States Foreign Investment Policy,* December 26, 1991 (1992) 31 ILM 488.

industries of the host State.[7] They often provide training to their local employees, a feature which has proved to be a vital element in the modernisation of developing countries.[8] FDI injects a permanent input of technical, managerial and marketing know-how, and may thus contribute to the industrialisation of the host State and its integration into the world economy.[9]

FDI can help greatly to transform and restructure an economy. It may, for instance, assist in the privatisation of former State-owned enterprises in countries which transform a centrally planned economy into a market economy. Technical and managerial skills are often rare in those States, and domestic savings are too low to satisfy the economy's investment needs.[10] In addition, domestic investors may lack borrowing capacity on international capital markets for the amounts usually required for the privatisation process.[11]

Today FDI is crucial to the development of Third World countries.[12] Oil fields in the Persian Gulf, India's tea plantations and Argentine railroads are examples where FDI underpinned the development of industries and supporting infrastructure.[13] The initial development of natural resources often generates the economic potential to establish other industries. Developing countries usually lack domestic resources to finance the local costs of development. This is because a significant proportion of domestic savings is needed to service foreign debts, and because commercial bank lending to heavily indebted countries has been greatly reduced as a result of the debt crisis. Official development aid also remains inadequate.[14] This is where FDI may fill the gaps. In fact, private capital has already displaced official development finance as the main source of external financing for developing countries,

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7) UNCTAD, *Series on Issues in International Investment Agreements: Foreign Direct Investment and Development,* (Geneva: UN, 1999), 41, UN Doc.UNCTAD/ITE/IIT/10(Vol.I).

8) Shihata, "Promotion of Foreign Direct Investment – A General Account, with Particular Reference to the Role of the World Bank Group" (1991) 6 ICSID-Rev. FILJ 484 at 487.

9) Voss, "The Protection and Promotion of Foreign Direct Investment: Interests, Interdependencies, Intricacies" (1982) 31 ICLQ 686 at 688.

10) Megyery and Sader, *Facilitating Foreign Participation in Privatization,* FIAS Occasional Paper, No. 48 (Washington: The World Bank, 1996), 4.

11) UNCTAD, *Series on Issues in International Investment Agreements: Foreign Direct Investment and Development,* 33.

12) Bergsten, "Trade, Debt and Investment: The Importance of Foreign Private Investment for Development" (1986) 41:1 Aussenwirtschaft 27 at 32-33. Empirical studies of inter-State growth rates indicate that high growth rates are associated with high investment rates. See: UNCTAD, *World Investment Report: Foreign Direct Investment and the Challenge of Development* (New York and Geneva: UN, 1999), 157, UN Doc.UNCTAD/WIR/1999.

13) Lindbaek, Pfeffermann and Gregory, *The Role of International Financial Institutions in the 21st Century,* 9 (Paper submitted to the European Investment Bank in Commemoration of its 40th Anniversary, June 98), published at http://www.ifc.org/DEPTS/OPS/ECON/SPEECHES/JUNE98.HTM.

14) Shihata, *Multilateral Investment Guarantee Agency and Foreign Investment* (Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1988), 2.

accounting for 85% of the total in 1997 compared to 41% in 1990.[15] The advantage of FDI over other sources of external capital is that it is not debt-creating, and returns are directly linked to the performance of the investment. It sometimes works as a catalyst for associated lending for specific projects, thus increasing the overall availability of external capital to developing countries.[16] Finally, FDI encourages competition in the host State. Even in large developing countries, domestic markets tend to be small with oligopoly or monopoly conditions.

Foreign investors also benefit from FDI. The transfer of some production steps to less labour-expensive countries reduces costs and increases the competitiveness of the product. It also gives access to foreign markets.[17] In addition, foreign investors may enjoy local advantages of the host State, such as the size of its domestic market and the growth of its economy. Furthermore, the outflow of FDI is likely to have some positive effects on the investor's home country. It may, for instance, increase the flow of its exports and so help its balance of payments.[18]

FDI may, of course, have negative impacts too. It may, for instance, misdirect a country's resources only to the investor's interest, or aggravate the host State's balance of payments through exorbitant profits.[19] Foreign investors have been accused of generally increasing the economic dependence of host States, and of practices unfavourable to the economies of these countries. Transfer of inappropriate production technologies and the circumvention of local tax laws are well-known examples. Foreign investment may also lead to excessive market concentration because a large foreign investor may displace small and less efficient domestic firms.[20] National anti-trust laws are not always effective in eliminating too much foreign control in certain domestic industries, and attempts to enforce them may cause international friction. However, some of these disadvantages can be limited or completely avoided if host States follow suitable investment policies. Capital-importing countries may, for instance, offer attractive investment incentives to direct FDI in sectors seen as appropriate. Other drawbacks of FDI should be addressed in the proposed multilateral treaty on investment. For example, a balanced

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[15]) Lindbaek, Pfeffermann and Gregory, *The Role of International Financial Institutions in the 21st Century*, 10.

[16]) Shihata, "Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme" (1987) 21 Int'l. Lawyer 671 at 675.

[17]) Lindgren, "Private Investment in Developing Countries: A Practical Approach by the ICC" (1988) 25 CTC Rep. 42.

[18]) UNCTAD, *Series on Issues in International Investment Agreements: Foreign Direct Investment and Development*, 45.

[19]) Voss, *The Protection and Promotion of Foreign Direct Investment: Interests, Interdependencies, Intricacies*, 689.

[20]) UNCTAD, *Series on Issues in International Investment Agreements: Foreign Direct Investment and Development*, 42.

investment agreement could restrict a foreign investor's freedom to transfer funds out of the host State, if such transfer would result in the host State facing foreign exchange pressures.

FDI is a modern way of doing business. It brings numerous benefits to host States and foreign investors alike. It should be the aim of the international community further to encourage FDI flows, and at the same time to attempt to eliminate their negative effects.

The decision whether, and if so, where, to invest is a complex one, influenced by economic, political, infrastructural, legal, cultural and psychological considerations. They fall into three major categories:[21]

1. *Economic and financial factors.* These range from a country's macroeconomic framework - including its State budget deficit - to its microeconomic conditions. The latter includes its competition policy and its trade policy as well as the status of its financial sector where foreign investors may seek financing. The availability of public and professional services falls into this category too.[22] Finally, economic factors independent from the host State, such as the stability of the world economy and economic policies and activities of industrialised States may be decisive.[23]

2. *Legal and regulatory aspects.* These factors cover the substantive law governing foreign investment, such as domestic company, labour and tax laws and bilateral and multilateral instruments to which the proposed host State is a party,[24] as well as *how* such rules are being applied and *how* disputes over their application are settled.[25] Investors obviously worry about doing business within an unstable and unpredictable legal framework. Past and present attempts to codify rules on foreign investment emphasise the significance of legal aspects to the overall investment climate. Empirical studies have revealed that an underdeveloped legal system is one of the major barriers to FDI,[26] although this is challenged by others.[27] Asian countries, for

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[21]) Shihata, *Promotion of Foreign Direct Investment – A General Account, with Particular Reference to the Role of the World Bank Group,* 490-491.

[22]) *Ibid.* 490.

[23]) Shihata, *Multilateral Investment Guarantee Agency and Foreign Investment,* 7.

[24]) Siqueiros, "Bilateral Treaties on the Reciprocal Protection of Foreign Investment" (1994) 24 Calif.W.Int'l.L.J. 255 at 269.

[25]) Shihata, *Promotion of Foreign Direct Investment – A General Account, with Particular Reference to the Role of the World Bank Group,* 490. One has to look at the laws of a host State not only from a formal perspective and simply determine *what* the law is. It is equally – if not even more - important to evaluate *how* the law works in practice in the cultural, political, economic and institutional environment of the host State. See: Wälde, "Law, Contract and Reputation in International Business: What works?" (1998) 3:16 CEPMLP Internet Journal 1 at 5, published at http://www.dundee.ac.uk/cepmlp/journal/html/article3-16.html.

[26]) Foreign Investment Advisory Service (FIAS), "Multinationals Plan to Increase Investment in Emerging Markets" (1995) 1:1 FDI News 2-3, published at http://www.fias.net/pubs/fdinews/v1n1/index.html.

example, often considered as lacking an effective legal framework, have shown substantial economic growth over the past decades.[28] The sensitivity of foreign investors to the legal system of the host State differs according to the investor's nationality. Investors from the US, the UK and Western Europe tend to be more sensitive to legal regimes than investors from Singapore, Japan and South Asia. Sensitivity to legal frameworks also varies depending on the industry, in which the investment is made. For instance, export-oriented investors are likely to be less sensitive to the host State's legal system, since they are generally less affected by it.[29]

3. Political, infrastructural and cultural factors. A country's political stability and its relations with other States are decisive features in this category. The degree of sophistication of a State's administrative institutions belongs to these factors, as does the availability of basic infrastructure, such as water and power supply and rail, road, harbour and airport facilities.[30] Cultural aspects include the attractiveness of local educational institutions, for example universities and research centres, and the general quality of life.[31] Authorities differ in evaluating these factors. While some argue that political instability is the main barrier to foreign investment,[32] other studies suggest that economic considerations are more decisive than political risks.[33]

This study focuses on aspects within the second category. It is further limited to international rules on investment and does not deal with the domestic investment regime of any particular State or region. It will argue that a multilateral convention on investment is necessary in today's globalised world economy. It will explain why the different bilateral and multilateral treaty

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[27]) Perry, "Effective Legal Systems and Foreign Direct Investment: In Search for the Evidence" (2000) 49 ICLQ 779 at 784-787 and 796.

[28]) Wälde, *Law, Contract and Reputation in International Business: What works?,* 2. Wälde points out that a highly developed legal system is not a guarantee for high levels of FDI inflows. Excessive regulation in some Western States might even hinder further investment. On the other hand, a host State with an underdeveloped legal regime may attract major FDI inflows if it offers attractive economic conditions and a stable political climate to foreign investors. It is thus not the "highest" level of legal development States should aim for, it is rather an "optimal" level that may assist in attracting FDI. *Ibid.*, 4.

[29]) Perry, *Effective Legal Systems and Foreign Direct Investment: In Search for the Evidence,* 794-795.

[30]) Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme,* 679 and 683.

[31]) Bergsman, "The Multilateral Agreement on Investment & Latin America" (1996) 1:3 FDI News 1 at 3, published at http://www.fias.net/pubs/fdinews/v1n3/mai.htm.

[32]) FIAS, *Multinationals Plan to Increase Investment in Emerging Markets,* 2.

[33]) See: the different views summarised by Balasubramayam, *The Multilateral Agreement on Investment (MAI) and Foreign Direct Investment in Developing Countries*, Lancaster University Discussion Paper of the International Business Research Group (Lancaster: Lancaster University, Department of Economics, Management School, 1998), 5. Also: Research Department of the Inter-American Development Bank, "Stylized Facts: Surprise!" (2000) 11:2nd Quarter Latin American Economic Policies, 4.

regimes on foreign investment now operating, and rules of customary international law on the treatment of aliens, are not sufficient to protect foreign investors, and to promote investment flows to regions of the world most in need of foreign capital.

The World Bank Guidelines on the Treatment of Foreign Direct Investment (Guidelines)[34] would serve as a good foundation for rules on the protection of foreign investments in a convention on FDI (Convention). This thesis, however, is neither a commentary on the Guidelines nor a draft text of a treaty. It is an attempt to identify *key* problems in contemporary international law on the protection and treatment of foreign investments, and to offer solutions suitable for incorporation into a multilateral investment agreement. The study does not aim at proposing a treaty, which – from the legal point of view - would be "perfect," *i.e.,* an instrument without some vague provisions or a complicated structure. It is impossible to conclude such a treaty between States on a subject matter as complex as FDI. The thesis rather aims at suggesting a few provisions which may, in practice, form a realistic basis for a multilateral investment agreement.

The paper follows the structure of the Guidelines. It addresses *inter alia* admission and treatment of FDI, problems related to expropriation of foreign investments, inter-State and investor-State dispute resolution, as well as aspects of the proposed Convention's scope of application. In addition, an overview of the numerous past attempts to regulate FDI shows both the widespread desire for a comprehensive treaty on investment and the obstacles which stand in the way of the negotiations.

Each chapter selects key problems which *typically* arise out of an international investment transaction, such as restrictions on admission of foreign investors, monetary transfers, compensation for expropriated investments and dispute resolution.[35] The paper sets out the approach of the Guidelines to each of these issues, demonstrates their strengths and weaknesses, reveals inconsistencies within the Guidelines and suggests how a comprehensive multilateral investment treaty should address the problems. The thesis also considers the solutions offered by other instruments on FDI, such as Bilateral Investment Treaties (BITs), Regional Investment Agreements (RIAs), *e.g.,* the North American Free Trade Agreement (NAFTA), as well as arguments put forward by academic writers.

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[34]) Annex A. For reasons why the Guidelines were chosen as a starting point of this study, see infra: chapter A II.

[35]) Issues not addressed include *inter alia* the right of foreign investors to reinvest profits realised from an existing investment, transfer of compensation for loss due to war, armed conflict and revolution, tax provisions, insurance of foreign investments and the subrogation of insurers.

II. Why a Convention?

The question why the international community needs a multilateral investment treaty is a legitimate one. Customary international law, more than 1,900 BITs[1] and numerous regional instruments seem to regulate FDI in an extensive and sophisticated manner. Is there really a need for an additional multilateral treaty? Might it further confuse an already complex legal situation?

Careful analysis, however, reveals that neither customary international law nor treaties currently in force provide a legal framework adequate to encourage investment flows, and to ensure proper protection of foreign investors in a global context. The nature of customary international law on this subject makes it unsuitable for regulation of FDI. Aspects crucial to foreign investors, such as compensation for expropriated investments, are controversial among States, and there is no clear rule of customary international law.[2] A treaty, by contrast, would guarantee a more precise framework. Additional advantages of treaty law over customary international law, discussed in detail elsewhere,[3] may be briefly summarised. First, the Convention would provide for compulsory jurisdiction of an *ad hoc* arbitral tribunal to settle inter-State disputes arising out of its application or interpretation. This feature promotes the peaceful settlement of disputes. It avoids recourse to the ICJ – with its attendant uncertainties and delays - for adjudication of inter-State disputes under customary international law.[4] Secondly, negotiations on a treaty could ensure that all States interested in the subject matter had a chance to participate actively in the formulation of rules on FDI. Thirdly, multilateral treaties often allow reservations, giving States the option to become a party to a treaty, but limit the application of a specific treaty provision to suit their interests. Customary international law, by contrast, does not allow a State to apply a rule of customary international law to a limited extent. A State may only act as a persistent objector to avoid being bound by a rule of customary international law.

Existing bilateral and regional treaties on FDI are not very effective in regulating foreign investment in a global context because they constitute a network of partly overlapping and sometimes contradictory instruments. Some agreements give less than complete coverage to the

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1) UNCTAD, *World Investment Report: Promoting Linkages,* 6.

2) Lauterpacht, "Issues of Compensation and Nationality in the Taking of Energy Investments" (1990) 8:4 Journal of Energy and Natural Resources Law, 241 at 244.

3) See: *e.g.,* Sinclair, *The International Law Commission* (Cambridge: Grotius Publications, 1987), 39 and 138-145 on the interrelation of customary international law and codifying conventions. See also: Holloway, *Modern Trends in Treaty Law* (London: Stevens & Sons, 1967), 617.

4) For more details on the reluctance of States to accept the compulsory jurisdiction of the ICJ, see: Briggs, *Codification of International Law* (1969) I Recueil des Cours 241 at 295.

problems typically arising out of an investment transaction, or they have insufficient enforcement provisions.[5] There are, for instance, BITs currently in force which do not regulate investor-State dispute resolution.[6] The current legal framework of BITs and RIAs addresses issues relevant to a few countries or a particular region. Today's interdependent world economy, however, quickly moves towards a single marketplace. Principal players in international investment transactions, *i.e.* large multinational companies, are globally highly integrated in their structure and operations. Treaties, which apply between two or few States only, or which focus on issues pertinent to some States, but irrelevant to many others, are inadequate to reflect contemporary economic realities.[7]

The large number of BITs is not an adequate alternative to a multilateral investment treaty because the network of BITs among countries in various regions is far from complete. A substantial portion of FDI flows is not covered by any BIT. For example, there is no BIT concluded between the US and China, although US companies are major investors in China. An UNCTAD study revealed that in order to protect all investment flows in the world by BITs, it would be necessary to have a network of approximately 20,000 BITs in place.[8]

Nearly all non-US BITs and most regional investment treaties apply only to established investments. Admission of foreign investors is regulated entirely by domestic laws of the host States, which often contain a wide and changing variety of restrictions.[9] The proposed Convention could effectively abolish this limitation and guarantee *access* of foreign investors to the markets of Contracting Parties, subject to certain exceptions listed in the instrument. The draft Multilateral Agreement on Investment (MAI) adopted this approach, which proved very controversial among negotiating States. Some authorities have therefore concluded that the MAI's liberal approach to admission was, in fact, the reason for its failure.[10] This argument is not convincing for two reasons. First, there were other provisions in the draft MAI, for example those on dispute settlement and on the definition of "investment", which were as controversial amongst

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[5]) Sir Leon Brittan, "Investment Liberalisation: The New Great Boost to the World Economy" (1995) 4:1 Transnational Corporations 1 at 8 and Fatouros, "Towards an International Agreement on Foreign Direct Investment?" (1995) 10 ICSID-Rev. FILJ 181 at 188.

[6]) See: *e.g.*, Abkommen zwischen Österreich und China über die Förderung und den gegenseitigen Schutz von Investitionen vom 12. September 1985 and Treaty between the Federal Republic of Germany and Jordan Concerning the Encouragement and Reciprocal Protection of Investments, dated July 15, 1974.

[7]) Fatouros, *Towards an International Agreement on Foreign Direct Investment?*, 201-202.

[8]) UNCTAD, *Bilateral Investment Treaties in the mid 1990s* (New York and Geneva: UN, 1998), 18, UN Doc. UNCTAD/ITE/IIT/7.

[9]) For more details on this technicality and on how the proposed Convention should address restrictions to admission of foreign investors, see infra: chapter B II 2b(i)-(ii).

[10]) International Confederation of Free Trade Unions, *A Possible Framework for Multilateral Investment*, 2-3, (Discussion Paper), published at http://www.icftu.org/english/els/escl98mi.html.

States as the approach to admission of foreign investors.[11] Secondly, it was a variety of reasons – and not just one issue on the substance of the treaty – which caused the MAI to fail. The unexpected public opposition to the treaty, the choice of the OECD as a forum, the fact that negotiators underestimated the complexity of the subject matter and failed to considered "social issues", such as core labour standards, the loss of interest in the treaty by the business community and the "secrecy" surrounding the MAI resulted in the negotiations being broken off.[12] A future multilateral investment treaty is not doomed to failure just because it addresses admission of foreign investors in a manner similar to the MAI.

A comprehensive multilateral framework on investment would simplify the international economic system. The current diversity of international regimes on FDI, by contrast, causes excessive distortions between countries[13] resulting in increasing costs for both governments and foreign investors in dealing with this extensive treaty network.[14]

Empirical studies have revealed that BITs have a minor impact on FDI flows.[15] Their limited application to two States, and the fact that nearly all non-US BITs protect only investments after their admission have prevented substantial increases in FDI flows to States that are signatories to BITs.[16] Some countries, such as the Philippines, even showed a decline in investment inflows despite the increase in the number of BITs they concluded;[17] while other States that have abstained from signing BITs have managed to receive massive foreign investment.[18]

UNCTAD predicted that a comprehensive multilateral investment treaty would assist in increasing FDI flows because it would probably provide more extensive protection of

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[11]) Small, "Remarks to the Proceedings of the American Society of International Law" (1997) 91 ASIL Proceedings 494 at 498 and OECD, *Multilateral Agreement on Investment: Progress Report by the MAI Negotiating Group, OECD Working Paper, Vol. IV:32* (Paris: OECD, 1996), 5.

[12]) For more details on the failure of the MAI, see infra: chapter A IV 5c.

[13]) Fatouros, *Towards an International Agreement on Foreign Direct Investment?,* 202.

[14]) UNCTAD, *World Investment Report: Investment, Trade and International Policy Arrangements* (New York and Geneva: UN, 1996), 166, UN Doc.UNCTAD/WIR/1996.

[15]) UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 122, UNCTC, *Bilateral Investment Treaties* (New York: UN and London, Dordrecht, Boston: Graham & Trotman Ltd., 1988), 14, UN Doc.ST/CT/65 and McKinstry Robin, "The BIT Won't Bite: The American Bilateral Investment Treaty Program" (1983-84) 33 Am.U.L.Rev. 931 at 942-943.

[16]) Geist argues that the unwillingness of BITs to encroach upon established national law may explain their relative insignificance in affecting investment flows. See: Geist, "Towards a General Agreement on the Regulation of Foreign Direct Investment" (1995) 26:3 L.&Pol.Int'l.Bus. 673 at 685.

[17]) UNCTC, *Bilateral Investment Treaties*, 14.

[18]) Wälde, "International Investment under the 1994 Energy Charter Treaty" in Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London, The Hague, Boston: Kluwer Law International, 1996) 251 at 261.

investments,[19] and it would cover all problems typically arising out of foreign investment transactions. For instance, unlike certain BITs, it would adequately address investor-State dispute resolution. A multilateral treaty results in greater stability, predictability and transparency, so creating a generally more favourable climate for FDI.[20] This is particularly important for large-scale and long-term investments, such as infrastructure projects.

Opponents of a multilateral treaty on investment often argue that although removal of national constraints on FDI may increase the total FDI flow to a country, foreign investments may go to sectors where FDI is not desirable.[21] These writers often disregard the fact that a balanced multilateral investment treaty, taking concerns of developing countries and industrialised States equally into account, would not *remove* all national safeguards relating to FDI, but *incorporate* them - to a certain extent - into the treaty. For instance, sectors restricted or prohibited for foreign investors could be listed in country specific negative lists forming an Annex to the instrument.[22] Host States may also attempt to direct foreign investments to certain sectors by offering attractive investment incentives. A comprehensive multilateral investment treaty may *assist* national governments in resisting pressure from certain national interest groups aimed at capturing national investment policies only in their own interest. Such activities often result in a predominance of domestic producer interests over the wider national or consumer interests.[23]

In spite of the difficulties involved in reaching an agreement among a large number of countries, States should support negotiations on a multilateral investment treaty. The greater the number of parties to such an instrument, the greater the benefits for all those involved in international investment transactions, host States and foreign investors alike.

There is increasing awareness of the interrelation between the liberalisation of the world economy and its social impact, particularly with respect to labour and environmental issues. This interrelation has become more and more apparent during the worldwide trade liberalisation over the past decade. The Guidelines and most other bilateral and regional investment treaties are

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19) UNCTAD, *World Investment Report: Trends and Determinants* (New York and Geneva: UN, 1998), 129, UN Doc. UNCTAD/WIR/1998. Certain authorities question this finding arguing that the existence of a multilateral instrument on investment will not have any impact on FDI flows. See: Ramajah, "Towards a Multilateral Framework on Investment" (1997) 6:1 Transnational Corporations 117 at 119-120.

20) UNCTAD, *World Investment Report: Trends and Determinants*, 129-130.

21) Ramajah, *Towards a Multilateral Framework on Investment*, 119.

22) For more details on this, see infra: chapter B II 2b(ii).

23) UNCTAD, *World Investment Report: Investment, Trade and International Policy Arrangements*, 168.

silent on these matters.[24] Only a few agreements, such as NAFTA,[25] reflect the desires of environmental groups, non-governmental organisations (NGO's), trade unions and other interest groups to reconcile economic growth and a liberal international trade regime with the protection of the environment and the safeguarding of minimum labour standards. The most important among the international trade agreements, the Agreement Establishing the World Trade Organisation (WTO Agreement) and its related instruments, do not incorporate comprehensive provisions on environmental and labour related aspects of trade. The Preamble to the WTO Agreement, referring to "sustainable development" and the few exceptions permitted by Art. XX of the 1994 General Agreement on Tariffs and Trade (GATT), which allows WTO members to adopt measures otherwise incompatible with the GATT to protect the environment and ensure minimum labour standards[26] are not extensive. Furthermore, these exceptions have been interpreted rather narrowly by GATT panels.[27]

Environmental and labour related aspects would obviously arise in the negotiations for a multilateral investment agreement. How should a treaty reconcile the conflicting values of a global liberal investment regime to promote investment flows on the one hand, and the protection of the environment and the safeguarding of minimum labour standards on the other? Would an investment Convention necessarily increase harm to the environment, or encourage the circumvention of labour standards by promoting investment flows to developing countries? The protection of the environment and the establishment of labour standards may not be a high concern in these States. The approach adopted by the draft MAI,[28] which incorporated the non-

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[24]) Non-binding provisions are contained in some agreements, such as the Treaty between the US and Argentina Concerning the Reciprocal Promotion and Protection of Investments, dated November 14, 1991, which provides in para. 5 of its Preamble: "Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights." For more examples see: UNCTAD, *Series on Issues in International Investment Agreements: Employment* (Geneva: UN, 2000), 14, UN Doc.UNCTAD/ITE/IIT/19.

[25]) NAFTA contains two side agreements: the North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation.

[26]) Art. XX (General Exceptions) provides that: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...(b) necessary to protect human, animal or plant life or health;..(e) relating to the products of prison labour;...(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." For more details on this provision see: Ward, "Common but Differentiated Debates: Environment, Labour and the World Trade Organisation" (1996) 45 ICLQ 592 at 597-598 and Schoenbaum, "International Trade and Protection of the Environment: The Continuing Search for Reconciliation" (1997) 91 AJIL 268 at 273-280.

[27]) For more details see: Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation,* 273-280. A Committee on Trade and Environment (CTE) has been established under the auspices of the WTO to make appropriate recommendation on environmental issues. However, the fact that the CTE is open to all WTO members makes decision-making due to the large number of members very difficult. *Ibid.,* 270.

[28]) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. X(1)(4).

binding OECD Guidelines for Multinational Enterprises as an Annex, is not an acceptable solution, because provisions without legal force do not effectively ensure compliance by foreign investors. The imprecise soft law provisions on environmental protection in the Energy Charter Treaty are not a suitable model for a future investment convention either. The treaty's list of "good government practices",[29] which are in reality rarely adhered to by States,[30] is not sufficient to guarantee the implementation of modern environmental standards.

What if there is a conflict of treaties, for instance, between a multilateral environmental agreement (MEA) and the proposed Convention? Should the latter provide, like NAFTA,[31] that the former shall prevail?[32] How could the Convention ensure that Contracting Parties do not relax domestic environmental and labour standards to encourage investment flows?[33]

Or should the instrument adopt a completely different approach? It could, for instance, provide that Contracting Parties may offer attractive investment incentives limited to foreign investors who transfer environmentally friendly technology to the host State, or who voluntarily adopt certain standard systems of environmental management, such as ISO 14001.[34] States could be permitted to introduce environmental taxes as a means of regulation or to set up a scheme of "independent environmental auditing" similar to independent financial accounting to enforce environmental legislation.[35]

If minimum labour standards need to be considered, which regulations should be adopted? International Labour Organisation (ILO) Conventions, such as that on the prohibition of

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29) Energy Charter Treaty, Art. 19(1). See also: the follow up Protocol on Energy Efficiency and Related Environmental Aspects.

30) Wälde, "Sustainable Development and the 1994 Energy Charter Treaty: Between Pseudo-Action and the Management of Environmental Investment Risk" in Weiss, Denters and de Waart (eds.), *International Economic Law with a Human Face* (The Hague, Dordrecht, London: Kluwer Law International, 1998) 223 at 239.

31) North American Free Trade Agreement, Art. 104.

32) Schoenbaum considered this problem with respect to MEA's conflicting with GATT provisions. He rejected the solution adopted by NAFTA as unworkable for the WTO given its large number of members. See: Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation,* 283. See also: Ward, *Common but Differentiated Debates: Environment, Labour and the World Trade Organisation*, 606.

33) NAFTA addresses this situation in Art. 1114(2) which provides that: "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement." Although this provision uses the expression "should" rather than "shall" in its second sentence and does not require any specific level of control by Contracting Parties, it at least sets up a channel of complaint.

34) For more details on this standards see: Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation,* 294.

35) Wälde, "International Energy Investment" (1996) 17 Energy Law Journal 191 at 214.

forced labour, or standards contained in the recently adopted ILO Declaration of Fundamental Principles and Rights at Work?[36] Should any of these sets of principles simply be incorporated into the proposed Convention or should they be "linked" to the substantive provisions of the treaty?[37] Should investors from countries not observing these standards be refused certain privileges under the Convention in other Contracting Parties?

Addressing this variety of issues is one challenge - making sure that environmental protection and labour standard arguments are not hijacked by protectionist concerns of Contracting Parties is another one. For instance, a provision restricting admission of a foreign investment by reference to its "environmental impact" may in reality be a way to screen investments to protect domestic industries. In addition, developing countries are probably suspicious that the implementation of certain labour standards, such as a global minimum wage, would deprive them of a major competitive advantage.[38]

None of the questions raised above can be finally answered in this paper, which focuses more narrowly on the substantive provisions governing foreign investment. However, drafters of a multilateral investment treaty have to address these issues in order to avoid the conclusion of a treaty, which is as lax on environmental and labour issues as the WTO Agreement and its related instruments. The shortcomings of the WTO framework may, however, be a helpful lesson and the approach of NAFTA, balancing economic interests with social needs, might be a suitable starting point for negotiations.

Complex and difficult legal problems, the potential disagreement among States on highly debated aspects of investment protection, such as the level of compensation for expropriated investments, and the inherent risk of not being able to reach an agreement should not discourage States from a further attempt to conclude a multilateral investment treaty. Consequent legal predictability, stability, transparency and a resulting increase in investment flows and in economic development around the globe would justify the effort.

No doubt negotiations on a multilateral treaty on investment would be a complex undertaking, given the large number of issues it would have to address. However, negotiators

[36]) These fundamental principles include the elimination of forced labour, the abolition of child labour, the elimination of discrimination in respect of employment, the freedom of association and the right of collective bargaining. For more details on this instrument see: UNCTAD, *Series on Issues in International Investment Agreements: Employment*, 25-26.

[37]) For more details on the GATT's Generalised System of Preferences linking labour and environmental issues with tariff concessions see: Ward, *Common but Differentiated Debates: Environment, Labour and the World Trade Organisation*, 628-629.

[38]) *Ibid.*

would not have to start from scratch. Numerous past attempts to codify rules on FDI, most recently the draft MAI, more than 1,900 BITs and a large number of RIAs, such as NAFTA, might be suitable models. Why should a set of non-binding Guidelines rather than any of these sophisticated treaties serve as a foundation for a Convention?

The Guidelines were adopted in 1992 by the Developing Committee (DC), a Joint Ministerial Committee of the Board of Governors of the International Bank for Reconstruction and Development (IBRD), known as the World Bank, and the International Monetary Fund (IMF). The DC consisted of 24 members representing 171 countries worldwide.[39]

The Guidelines are based upon extensive background studies summarising broadly acceptable norms in State practice.[40] So far, they are the *only* set of rules on foreign investment which enjoy unanimous endorsement by an inter-governmental organisation[41] reflecting their wide acceptance by both developing countries and industrialised States.[42] Negotiations based upon such an instrument are more likely to lead to the successful completion of a comprehensive investment treaty than using NAFTA or US BITs as a starting point. Third World countries would probably argue that these instruments reflect primarily Western values and cannot serve as a balanced model which takes concerns of industrialised States and developing countries equally into account.

The Guidelines should thus be the central basis for negotiations on a multilateral investment treaty. They do, however, not address all issues essential for the proposed Convention. They fail, for example, to cover aspects related to the safeguarding of core labour standards and the protection of the environment. A future multilateral investment agreement may therefore draw inspiration on those detailed aspects from other models, such as NAFTA.

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39) For more details on the history of the Guidelines, see infra: chapter A IV 5a.

40) The World Bank Group, *Legal Framework for the Treatment of Foreign Investment, Vol. I – Survey of Existing Instruments, Progress Report and Background Studies* (Washington: The World Bank Group, 1992) Progress Report 5 at 7.

41) Shihata, "Settlement of Disputes under Oil and Gas Exploration and Development Agreements – The Relevance of ICSID and the World Bank Guidelines" in Shihata, *The World Bank in a Changing World: Selected Essays and Lectures,* Vol. II, (The Hague, Boston, London: Martinus Nijhoff Publishers, 1995) 497 at 498.

42) For the opposite view see: Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994), 214 arguing that the Guidelines reflect in their Preamble only the neo-classical Western viewpoint that FDI is an unmitigated blessing to the developing host country.

III. Definition of Key Terms

1. What is an "Investment"?

The definition of an "investment" is crucial in a multilateral investment treaty because it determines its scope of application and its normative content.

The Guidelines do not define "foreign", "direct", "investment" or "investor". The instrument lacks definitions because it was not intended to restrict the application of the Guidelines or the nature of the investors, which would benefit from them.[1] Also, at the time of the Guideline's preparation and adoption it did not seem to be necessary to specify key terms because it was apparent that they would be non-binding, serving as a set of guiding principles.

Nearly all investment treaties, such as BITs, RIAs and some multilateral agreements, however, contain a more or less clear definition of what an "investment" is. Before considering these definitions in detail, we need to outline briefly which transactions are not "investments".

Investments need to be distinguished from trade transactions. The latter are usually carried out in the form of transborder flows of goods or services. Their main feature is that goods or services, sold by a manufacturer or service provider in one State, are purchased by traders or users in another State. The essential difference between foreign investments and transborder trade transactions is that the former necessarily involve a continuing relationship between the foreign investor and the host State.[2] Foreign investment usually has a much deeper impact on the local economy, as the investor is an active participant in the economic and often in the political processes of the host country.[3]

There is a wide variety of definitions of an "investment". Some national investment laws are silent on this matter.[4] Others describe an "investment" as "capital in terms of money or any

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[1]) Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1993), 68.

[2]) Sornarajah, *The International Law on Foreign Investment*, 7.

[3]) *Ibid.*

[4]) Foreign Investment Act of Namibia, 1990, which does define "foreign assets", but lacks a definition of "investment" although this term is subsequently used in the instrument.

type of assets."[5] Recent codes incorporate precise definitions very similar to those contained in most BITs.[6]

Model BITs, by contrast, are nearly identical and clearly define "investment". The model BITs of China, the UK, Germany, Chile and Switzerland determine "investment" as every kind of asset, in particular:

1. moveable and immovable property as well as any other rights *in rem,* such as servitudes, mortgages, liens, pledges and usufructs;[7]
2. shares, parts or any other kind of participation in companies;[8]
3. claims to money or to any performance having an economic value;[9]
4. copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;[10]

[5]) Law on Foreign Investment in Vietnam as amended, 1996, Art. 2(1).

[6]) Law on Foreign Investment in Albania, 1993, Art. 1(3).

[7]) Swiss model BIT, 1995 (Swiss model BIT), Art. 1(2)(a). Compare: German model BIT, 1991 (German model BIT), Art. 1(1)(a) with the same wording as the Swiss model BIT except for "servitudes" and "usufructs", which are not included in the German model BIT. Article 1(a)(i) of the UK model BIT, 1991 (UK model BIT) is the same as Art. 1(1)(a) of the German model BIT except for "any other rights *in rem*" which in the UK model BIT reads: "any other property rights". Article 1(1)(a) of the Chinese model BIT is the same as Art. 1(a)(i) of the UK model BIT without the words "any" and "liens". Article 1(2)(a) of the Chilean model BIT is identical to Art. 1(a)(i) of the UK model BIT. The Swiss, German, UK, Chinese and Chilean model BITs referred to are published by UNCTAD. See: UNCTAD, *International Investment Instruments: A Compendium, Vol. III – Regional Integration, Bilateral and Non-governmental Instruments* (New York and Geneva: UN, 1996), UN Doc. UNCTAD/DTCI/30(Vol.III), at pp. 177, 167, 185, 151 and 143 respectively.

[8]) Swiss model BIT, Art 1(2)(b). The German model BIT in Art. 1(1)(b) reads: "shares of companies and other kinds of interest in companies." Article 1(2)(b) of the Chilean model BIT states: "shares, debentures and any other kind of participation in companies", while Art. 1(a)(ii) of the UK model refers to "shares in and stock and debentures of a company and any other form of participation in a company". The Chinese model BIT includes in Art. 1(1)(b) "shares, stock and any other kind of participation in companies".

[9]) Swiss model BIT, Art. 1(2)(c). Article 1(1)(c) of the German model BIT slightly modifies this wording to "claims to money which have been used to create an economic value or claims to any performance having an economic value". Article 1(2)(c) of the Chilean model BIT is identical to Art. 1(2)(c) of the Swiss model BIT except for "loans or other", which is added at the beginning of the Article. Article 1(1)(c) of the Chinese model BIT is the same as Art. 1(2)(c) of the Swiss model BIT and Art. 1(a)(iii) of the UK model BIT refers to "claims to money or any performance under contract having a financial value".

[10]) Swiss model BIT, Art. 1(2)(d). The relevant provision in the UK model BIT includes: "intellectual property rights, goodwill, technical process and know-how". Article 1(1)(d) of the Chinese model BIT covers "copyrights, industrial property, know-how and technological process". Article 1(1)(d) of the Chilean model BIT refers to all assets listed in Art. 1(a)(iv) of the UK model BIT plus "industrial property rights, including copyrights, patents, trademarks, trade names". The German model BIT includes in Art. 1(1)(d) "intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trademarks, trade names, trade and business secrets, technical process, know-how and goodwill".

5. concessions under public law, including concessions to search for, extract or exploit natural resources as well as other rights given by law, by contract or by concession of the authority in accordance with the law.[11]

In addition to these five categories of assets, US BITs include a sixth type of investments, namely "rights conferred pursuant to law, such as licenses and permits."[12] Other model BITs follow the "five category definition", but differ in certain details.[13] Countries usually attempt to modify their model BITs as little as possible when negotiating real BITs. Many BITs in force therefore define an "investment" as the model BIT of one of the Contracting Parties.[14]

While model BITs and BITs in force incorporate a rather standardised definition of an "investment", RIAs differ in their approach to specifying the term. A reason for this is that it is easier to agree upon such a key term in a treaty between two parties, rather than between three or more States. Descriptions of an "investment" in RIAs range from "all assets (including everything that can be evaluated in monetary terms)... moveable, immovable, in cash, in kind, tangible...rights and claims...net profits...and the undivided shares and intangible rights",[15] to definitions very similar to those contained in model BITs.[16] A few RIAs embrace extremely detailed and carefully drafted lists of specific assets constituting an "investment."[17]

Finally, some multilateral treaties define an "investment". They are comparable to RIAs as regards the enormous range of solutions they offer. Early instruments, for instance the ICC

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[11]) Swiss model BIT, Art. 1(2)(e). Compare: the UK model BIT in Art. 1(a)(v) refers to "business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources". Article 1(2)(e) of the Chilean model BIT is identical to Art. 1(a)(v) of the UK model BIT without the word "business". The Chinese model BIT in Art. 1(1)(e) contains the same provision as the Chilean model BIT without the words "cultivate" and "extract". Finally, Art. 1(1)(e) of the German model BIT is tantamount to Art. 1(a)(v) of the UK model BIT except for the words "by law or under contract", which the German model BIT replaces with "under public law".

[12]) US model BIT, 1994 (US model BIT), Art. I(d)(vi), UNCTAD, *International Investment Instruments: A Compendium, Vol. III – Regional Integration, Bilateral and Non-governmental Instruments*, 195.

[13]) See, *e.g.*, the three versions of the AALCC model BIT, Art. 1(a), UNCTAD, *International Investment Instruments: A Compendium, Vol. III – Regional Integration, Bilateral and Non-governmental Instruments*, 115.

[14]) See: *e.g.*, Agreement for the Promotion and Protection of Investment between the UK and India, dated March 14, 1994, Art. 1(b) is identical to Art. 1(a) of the UK model BIT and Treaty Concerning the Encouragement and Reciprocal Protection of Investment between the US and Jordan, dated July 2, 1997, adopts in Art. I(d) the "six category definition" of an "investment" as drafted in the US model BIT.

[15]) Agreement on the Promotion, Protection and Guarantee of Investment Among Member States of the Organisation of the Islamic Conference, Arts. 4-5.

[16]) The definition of an "investment" in Art. I(3) of the Agreement on the Promotion and Protection of Investment between the ASEAN Countries is identical to the definition contained in Art. 1(a) of the UK model BIT, except for certain intellectual property rights, where the UK model BIT seems to be wider than the ASEAN Agreement.

[17]) See: North American Free Trade Agreement, Art. 1139 and Art. 1721(2).

Code of Fair Treatment for Foreign Investments, cover only typical assets, such as real property, commercial and financial enterprises, company shares and private and public loans.[18] Recent proposals, by contrast, embody a much more detailed list of assets constituting an "investment".[19]

The ICSID Convention does not define the term mainly because it was not intended to limit its scope, and thereby cause unnecessary jurisdictional problems.[20] As parties always have to consent to proceedings under this convention,[21] there was no need to give a precise definition of an "investment".[22] Parties may thus specify the term themselves within certain objective limits. ICSID lacks, for instance, jurisdiction over disputes obviously not related to an investment, even if disputing parties agree that their transaction constitutes an "investment". Such a conflict may, for example, arise out of the sale of goods.[23] This limitation of ICSID's jurisdiction is reflected in Art. 36(3) of the ICSID Convention. It allows the Centre's Secretary General to refuse to register a request for ICSID arbitration if the dispute "is manifestly outside the jurisdiction of the Centre". In practice, ICSID tribunals tend to interpret an "investment dispute" as required by Art. 25(1) of the ICSID Convention rather broadly, giving the express agreement of parties great weight as to what is an "investment".[24] *Fedax N.V. vs. Venezuela*[25] was the first case before an ICSID tribunal in which the jurisdiction of the Centre was challenged on the ground that the underlying transaction

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18) ICC Code of Fair Treatment for Foreign Investments, Art. 2. Unlike the draft MAI the ICC Code did not, for instance, include intellectual property rights and contractual rights other than those under loan agreements into its definition of an "investment".

19) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. II(1)(2) defining an investment as: (i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or nor for profit, and whether private or government owned or controlled, and including a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation); (ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom; (iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom; (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts; (v) claims to money and claims to performance; (vi) intellectual property rights; (vii) rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits; (viii) any other tangible and intangible, moveable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

20) Gopal, "International Centre for Settlement of Investment Disputes" (1982) 14 Case West.Res.J.Int'l.L. 591 at 599.

21) ICSID Convention, Art. 25(1). For more details on this requirement, see infra: chapter B V 3b(ii).

22) Amerasinghe, "The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation" (1976) 9 Van.J.Transnat'l.L. 793 at 804. For a critical view on this lack of definition in the ICSID Convention, see: Gopal, *International Centre for Settlement of Investment Disputes,* 599-600.

23) Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (London, Dordrecht, Boston: Martinus Nijhoff Publishers, 1993), 59-60. For a more comprehensive list of transactions not considered to be an "investment" under the ICSID Convention, see: Szasz, "A Practical Guide to the Convention on Settlement of Investment Disputes" (1968) 1 Cornell Int'l.L.J. 1 at 14-15.

24) *Alcoa Minerals of Jamaica Inc. vs. Jamaica* (Jurisdiction) [1975] 4 YB Com.Arb. 206 at 207 (excerpt).

25) (Jurisdiction) [1997] 37 ILM 1378.

was not an "investment". The arbitrators confirmed in this case that a loan may be an "investment" within ICSID's jurisdiction. The purchase of promissory notes, which are evidence of the loan, therefore also qualifies as an "investment" under Art. 25(1).[26] The *ad hoc* committee annulling the *Amco*[27] award rejected the argument of Indonesia that the initial ICSID tribunal had exceeded its competence because the conflict did not constitute an "investment dispute". Indonesia and Amco had argued *inter alia* about the legitimacy of a military intervention of the Indonesian army and police, interfering in the operation of a hotel set up and managed by Amco. The *ad hoc* committee held that these specific activities constituted an integral part of the entire controversy over Amco's investment in Indonesia and could not be separated from it.[28]

These few examples prove that there is no uniform description of an "investment". How should a future multilateral investment treaty best define this term? It will be essential that the definition serves the purpose of the agreement.[29] The Convention aims at encouraging international investment flows. This objective needs to be reflected in a broad definition, considering the variety of modern forms which an "investment" may take. The definition should go beyond traditional concepts of property and explicitly include assets which are not easily recognised as an "investment", such as industrial property rights and goodwill,[30] business secrets, licenses, permits and certain contractual rights, particularly those to exploit natural resources. These assets, with their inherent potential to earn revenue in the future, often have an enormous economic value far exceeding the monetary worth of properties, traditionally termed "investment", *e.g.* goods, real estate, shares or other ownership interests in an enterprise.

The definition of an "investment" has to utilise language which is flexible enough to extend the scope of the Convention to new forms of investment. They may emerge in the future and should be covered by the treaty without making re-negotiation of the agreement necessary.[31] This feature is particularly important because the concept of "investment" evolves over time and is not a fixed and unchangeable set of assets.

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26) *Ibid.*, 1384.

27) *Amco Asia Corporation and Others (Amco) vs. Indonesia* (Annulment) [1986] 89 ILR 514.

28) *Ibid.*, 535.

29) For more details on the purpose of the Convention, see supra: chapter A II.

30) The concept of goodwill as a separate property right is a more recent development. Earlier publications indicate that goodwill cannot be a separate right of its own, unrelated to an enterprise. See: White, *Nationalisation of Foreign Property* (London: Stevens & Sons Ltd., 1961), 49.

31) UNCTAD, *Series on Issues in International Investment Agreements: Scope and Definition* (Geneva: UN, 1999), 62, UN Doc.UNCTAD/ITE/IIT/11(Vol.II).

The definition ought to ensure that trade transactions are excluded. An investment Convention which regulates trade transactions is likely to cause unnecessary duplication of or even conflict with other multilateral treaties on trade, such as the WTO Agreement or any of its related instruments. For instance, the WTO system addresses inter-State disputes in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSU provides for a certain scheme of inter-State dispute resolution. This regime differs considerably from the arrangements for inter-State dispute settlement suggested for the Convention.[32] If an inter-State dispute on a trade-related issue arose, the dispute settlement provisions of the DSU and the investment agreement would conflict.[33]

However, it will be crucial to find the appropriate balance between a wide, flexible, broad and illustrative list of assets, which constitute an "investment" on the one hand, and the exclusion of non-investment transactions on the other. To determine the borderline between these objectives requires a high degree of sophistication and foresight from the drafters. There will never be a single definition of an "investment" for all contexts. But model BITs and the draft MAI may very well serve as a starting point for the most difficult task of defining the term in the Convention.

2. When is an Investment "Foreign" and "Direct"?

a) Foreign Investments

An investment is "foreign" if it is made by a "foreign" investor. The identification of a "foreign" investor appears quite straight forward: we only need to consider his citizenship. However, it can be hard to determine the nationality of an investor in today's interdependent world community.

(i) Natural Persons

If a given investor is a natural person, his nationality depends upon his citizenship, which is regulated by the national laws of his home country. Thus, an investor is "foreign" if he has the citizenship of any country other than the host State. There are, however, situations where the

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32) For more details on inter-State dispute resolution, see infra: chapter B V 2.

33) This problem actually arose during the negotiations on NATFTA. The instrument now regulates in Art. 2005 how such a conflict shall be resolved.

nationality of a natural person is problematic. Two situations are addressed here. First, the investor is a dual national, holding the citizenship of the host State and another country. Secondly, an investor of a country not party to the Convention permanently resides in a State which is a party to the treaty. He subsequently invests in a third Contracting State.

In some areas of law, for example in the law of diplomatic protection, a natural person enjoys the benefits of having two nationalities as long as there is no conflict between them.[34] There is no reason why the same principle should not apply in determining the status of a "foreign" investor. Thus, if a natural person is a national of State A and State B and invests in country C, he or she is clearly a "foreign" investor. If, on the other hand, the same individual invests in country B, a test is needed to clarify whether that person qualifies as a "domestic" or a "foreign" investor. The Convention needs to address this situation and specify the circumstances in which an individual is considered "foreign", because an investor cannot be a "domestic" and a "foreign" investor at the same time within one State.

The issue of dual citizenship is rarely taken up in investment agreements. An exception is the 1985 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention). Article 13(b) of this treaty sets forth that in the event that an investor has more than one nationality, the citizenship of a Member State shall prevail over the citizenship of a non-member, and the nationality of the host State shall prevail over the nationality of any other member.

One may argue that there is no necessity to regulate dual nationality in an investment treaty because there are customary and codified rules[35] which apply to situations of a conflict of citizenships. In fact, there are two general rules in customary international law on conflict of nationalities. First, the dual national is considered to be a citizen of the State with which this individual has the strongest bond.[36] This concept, known as the rule of "effective" nationality, is applied by the US.[37] Judicial decisions and arbitral awards have confirmed it.[38] Secondly, there is

[34]) See: Advisory Opinion of the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J. Rep. 174 at 186.

[35]) There was a Convention concluded at the Hague on April 12, 1930 Concerning Certain Questions Relating to the Conflict of Nationality Laws. However, given the fact that this treaty is 70 years old, and only 20 States became parties to it, its practical relevance is rather limited nowadays. See: Henkin, Pugh, Schachter and Smit (eds.), *International Law, Cases & Materials* (St. Paul: West Publishing Co., 1985), 383-384.

[36]) In order to evaluate this, factors such as the behaviour of the person in question, *e.g.* the residency and the citizenship he invoked on previous occasions against States, are decisive. See: Foighel, *Nationalisation and Compensation* (London: Stevens & Sons Ltd., 1964), 230.

[37]) Digest of United States Practice in International Law (1979), 656-657.

[38]) See: *e.g.*, the findings of the Permanent Court of Arbitration in the *Canevaro Case* (Italy vs. Peru) [1912] 6 AJIL 746. See also: the *Nottebohm Case* (Second Phase) [1955] I.C.J. Rep. 4, where the ICJ rejected a claim of

the UK practice. The UK does not allow diplomatic protection of one State against another State on behalf of a national who also possesses the citizenship of that other State.[39] This reflects Art. 4 of the 1930 Hague Convention Concerning Certain Questions Relating to the Conflict of Nationality Laws. Some authorities have finally attempted to reconcile these two approaches.[40]

Parra maintains that the definition of "foreign" investors as included in numerous BITs and some other treaties is sufficient. No provision specifically dealing with dual citizenship is needed. He emphasises that it is clear that dual nationals can benefit from the protection of a given agreement, for example a BIT, vis-à-vis the host State even if they are citizens of both the host State and the other Contracting Party to the BIT.[41] The defect of this solution is that a given investor may "choose", depending on the circumstances, whether he wishes to qualify as a "foreign" or a "domestic" investor. For example, investor X is a dual national of country A and B. There is a BIT in force between these two States. X invests in country A. Subsequently, when difficulties arise out of his investment, he seeks protection under the BIT, claiming to be an investor from State B. He requests arbitration against A under the dispute settlement clause of the BIT.[42] Years later X again invests in State A. He wants to establish an investment in an industry reserved for nationals of A. State A now argues that X cannot make his proposed investment as he previously claimed to be a "foreign" investor. Allowing dual nationals to "choose"

Liechtenstein against Guatemala on behalf of Mr. Nottebohm who was a national of Liechtenstein (and of Liechtenstein *only*). Mr. Nottebohm was born in Germany, and subsequently became a citizen of Liechtenstein, giving up his German citizenship shortly after the outbreak of World War II. Before becoming a Liechtensteiner, Mr. Nottebohm moved to Guatemala, where he spent 34 years of his life. The Court held that there was no bond between Mr. Nottebohm and Liechtenstein, as he had never established a residency in that country, and the main focus of his business activities had always been Guatemala.

39) See: Rules Regarding International Claims issued by the British Foreign and Commonwealth Office, 1985, Rule III and UK Materials on International Law in BYIL (1981) 52, 499; (1982) 53, 492-3; (1983) 54, 524; (1987) 58, 622. So also: Fitzmaurice, *The International Problem of State Nationality: Protection in the Personal and Demographic Sphere* (1957) II Recueil des Cours 191 at 193-4.

40) See: *e.g.*, the *Mergé Claim* [1955] 22 ILR 443 at 454-456. For a summary of the different views, see: Jennings and Watt (eds.), *Oppenheim's International Law, Vol. I,* 9th ed., Part 1 and Introduction, (London and New York: Longman, 1992), 515-517.

41) Parra, "The Scope of New Investment Laws and International Instruments" in Pritchard (ed.), *Economic Development, Foreign Investment and the Law: Issues of Private Sector Investments and the Role of the Law in the New Era* (London, The Hague, Boston: Kluwer Law International and the International Bar Association, 1996) 27 at 38.

42) However, in this scenario X could not resort to ICSID arbitration even if State A and State B are parties to the ICSID Convention and the BIT between A and B provides for ICSID arbitration. This is because Art. 25(2)(a) of the ICSID Convention excludes from the jurisdiction of ICSID any disputes between States and their own nationals even if such nationals possess another nationality too. This situation actually arose and ICSID had to inform the investor that he would be unable to resort to ICSID arbitration. See: Shihata and Parra, "The Experience of the International Centre for Settlement of Investment Disputes" in Shihata, *The World Bank in a Changing World,* Vol. III, (The Hague, London, Boston: Martinus Nijhoff Publishers, 2000) 731 at 741.

whether they qualify as a "foreign" or "domestic" investor, whichever is more advantageous to them, would hardly be acceptable to States.

The above scenario should be avoided. The Convention therefore has to clarify that: 1.) the citizenship of an individual determines his status of being a "foreign" or a "domestic" investor, and 2.) in the event of a conflict of nationalities, the citizenship of the host State shall prevail over the nationality of any other Contracting Party. This clear determination prevents any subsequent (mis)interpretation of the principle of "effective" nationality, a concept which is rather imprecise itself. It equally hinders dual nationals from invoking the citizenship most convenient to them.

Another case likely to arise in practice is that an investor has the nationality of country A but permanently resides in State B. The latter becomes a party to the Convention, while A chooses not to sign the treaty. The investor would not be covered by the agreement, if it only employed the outlined test of citizenship without taking the permanent residency into account. In modern times, however, countless people are nationals of one State and live permanently in another. The Convention should, in this scenario, consider the reality behind the formal concept of citizenship. It should protect individuals having the nationality of a country not party to the treaty, but permanently residing in a Contracting State. Such a provision would be of particular interest to high immigration countries, such as Canada and Australia where a considerable portion of investors may not yet be full citizens.[43] Indeed, numerous recent investment agreements reflect a trend towards covering both citizens and permanent residents of other Contracting Parties.[44]

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43) UNCTAD, *Series on Issues in International Investment Agreements: Scope and Definition,* 35.

44) See: *e.g.,* the Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. II(I)(1)(i), Energy Charter Treaty, Art. I(7)(a)(i) and Agreement on the Reciprocal Encouragement and Protection of Investments between Australia and China, dated July 11, 1988, Art. 1(d). It may, however, be difficult to agree upon such a provision in the proposed Convention, because there is no internationally accepted formal concept of "permanent residency". This term is differently applied for different purposes. For example, "permanent residency" may mean something different in treaties on double taxation than under domestic legislation. Compare: the definition of "permanent residency" in the Agreement on the Reciprocal Encouragement and Protection of Investments between Australia and China, dated July 11, 1988, Art. 1(d) and in the Agreement between Sweden and Austria for the Avoidance of Double Taxation with respect to Death Duties, dated November 21, 1962, Art. 3. The former refers to the definition of "permanent residency" as contained in domestic legislation. The latter states that the domicile of a person is considered to be his "permanent residency". In the event he has such permanent residency in both States, the State with which he has closer personal and economic ties shall be decisive. If such ties cannot be identified, his regular residence is deemed to be crucial. Finally, if the individual concerned has a regular residence in both or neither State, he shall be deemed to be domiciled in the State of his nationality.

(ii) Legal Entities

Since the beginning of the 20th century there has been a struggle to define a clear set of rules on the nationality of a legal entity. Today, in an age of globalisation of investors and markets, it seems nearly impossible to employ only one set of criteria, neglecting others without counting the danger of either being too "formalistic" or applying too complex concepts.

Traditionally, there was a major difference between Anglo-American practice and the approach of the civil law countries. While English and American law nearly always considered the place of incorporation of a company as the decisive factor of its nationality, civil law countries determined the nationality of an enterprise by its place of central administration, *i.e.,* the location where the company is *in fact* managed.[45] Originally, the places of incorporation and the location of central administration were usually the same. Nowadays, at a time of a growing number of multinational corporations (MNCs), they often differ. The traditional rules on establishing the nationality of a corporation were confirmed by the ICJ in *Barcelona Traction.* In this case the court held that for the purpose of diplomatic protection the nationality of a company depends upon its place of incorporation *and* its registered office.[46] The court thus rejected the principle of a "genuine connection" as the decisive factor of a company's nationality, which it held applicable in the *Nottebohm Case* with respect to the naturalisation of individuals.[47]

Another concept is the "control test" as set forth in Art. 25(2)(b) of the ICSID Convention. The treaty does not specify criteria for how to identify the nationality of a corporation for the purpose of ICSID's *jurisdiction.*[48] But it does allow in Art. 25(2)(b) that a legal entity having the nationality, *i.e.,* being incorporated under the laws of one Contracting Party, may because of foreign control be treated as a national of another Contracting Party, if the parties so agree. It is thus the citizenship of the shareholders which becomes decisive under the control test. ICSID

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45) van Hecke, "Nationality of Companies Analysed" (1961) 8 Nederlands Tijdschrift voor Internationaal Recht 223 at 225.

46) *Case Concerning the Barcelona Traction, Light and Power Company, Ltd.* (Second Phase) [1970] I.C.J. Rep. 1 at 42 (hereinafter *Barcelona Traction*).

47) [1955] I.C.J. Rep. 4. Mann, however, argues that the judgment of the court by listing the "links" between Canada and Barcelona Traction indicated that the court thought that the "genuine link" test of *Nottebohm* was applicable to diplomatic protection of legal entities. See: Mann, "The Protection of Shareholders' Interest in the Light of the Barcelona Traction Case" (1973) 67 AJIL 259 at 269. See also: Brownlie, *Principles of Public International Law,* 5th ed., (Oxford: Clarendon Press, 1998), 490-491.

48) Szasz, "The Investment Disputes Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)" (1970) 5 J.Int'l.L.&Econ. 23 at 33.

tribunals have shown a reluctance to interpret Art. 25(2)(b) literally.[49] For instance, in *Amco vs. Indonesia,* a tribunal held that even in the absence of an explicit agreement to treat a locally incorporated company as an American enterprise, the mere fact that there was an ICSID arbitration clause indicated that the parties intended to treat the venture as non-Indonesian. Otherwise the entire arbitration clause would be pointless.[50] ICSID tribunals applied again the same kind of reasoning in the *Klöckner*[51] and in the *LETCO*[52] awards.[53]

The variety of approaches to identify a company's nationality is reflected in numerous agreements. Islamic States, for instance, use the traditional concept of place of incorporation.[54] The Chilean model BIT combines this principle with the location of central administration.[55] Some BITs apply the control test. They explicitly affirm that for the purpose of Art. 25(2)(b) of the ICSID Convention, a company incorporated under the laws of one Contracting Party shall be considered to have the nationality of the other Contracting Party if the majority of shares are held by nationals of that other Contracting Party.[56] A number of national investment laws amalgamate a variety of

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49) For criticism, see: Sornarajah, "Power and Justice in Foreign Investment Arbitration" (1997) 14:3 J.Int'l.Arb. 103 at 125 and *idem, International Commercial Arbitration: The Problem of State Contracts* (Singapore: Longman Singapore Publishers, 1990), 180-181.

50) *Amco vs. Indonesia* (Jurisdiction) [1983] 89 ILR 379 at 392-393. Compare: the decision in *Holiday Inns vs. Morocco* analysed by Lalive, "The First World Bank Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems" (1980) 51 BYIL 123 at 141 where the tribunal held that an agreement under Art. 25(2)(b) of the ICSID Convention should normally be explicit. An implied agreement would only be acceptable if specific circumstances would exclude any other interpretation of the intention of the parties. For more details on Art. 25(2)(b), see infra: chapter A III 3.

51) *Klöckner Industrie-Anlagen GmbH and Others vs. Cameroon* (Merits) [1983] 2 ICSID Rep. 3 at 16.

52) *Liberian Eastern Timber Corporation vs. Liberia* [1986] 89 ILR 313 at 322.

53) For more details about ICSID's case law on Art. 25(2)(b) see: Lamm and Smutny "The Implementation of ICSID Arbitration Agreements" (1996) 11 ICSID-Rev. FILJ 64 at 72-78, Broches, "A Guide for Users of the ICSID Convention" (1991) 8:1 News from ICSID 5 at 6, Tupman, "Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes" (1986) 35 ICLQ 813 at 834-836 and Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*, 86-92. See also: *Vacuum Salt Products, Ltd. vs. Ghana* [1994] 9 ICSID-Rev. FILJ 72 where the tribunal held that regardless of the parties' explicit agreement to treat a company as a national of another Contracting Party, Art. 25(2)(b) sets an objective limit beyond which ICSID lacks jurisdiction if there is clearly no foreign control involved. *Ibid.*, 89. In *Société Quest Africaine Des Bétons Industriels (SOABI) vs. Senegal* (Jurisdiction) [1984] 2 ICSID Rep. 165 at 180-183 the tribunal argued that indirect control by nationals of a Contracting State of a company established under local laws was sufficient to satisfy the nationality requirement of Art. 25 of the ICSID Convention. Thus ICSID has jurisdiction even if direct control is exercised by nationals of a non-contracting State as long as indirect control belongs to nationals of a Contracting Party. For a critical analysis of the "control" requirement in Art. 25(2)(b), see: Berger, "Internationale Zentrale zur Beilegung von Investitionsstreitigkeiten" (1965) 11 Aussenwirtschaftsdienst des Betriebs-Beraters 434 at 440.

54) Agreement on Promotion, Protection and Guarantee of Investment Among the Member States of the Organisation of the Islamic Conference, Art. 1(6)(b).

55) Chilean model BIT, Art. 1(1)(b).

56) See: *e.g.,* Agreement for the Promotion and Protection of Investments between the UK and Singapore, dated July 22, 1975, Art. 8(1).

tests. The *Investment Canada Act*, for instance, refers to the place of incorporation, the control test, the citizenship of the members of the board of directors and of the Chief Executive Officer (CEO), and the principal place of business.[57]

All outlined approaches have been subject to criticism. The place of incorporation, for example, was often rejected as a "superficial" test[58] that emphasises the formal concept of "registration" without considering economic facts behind legal principles and the control test was attacked because it contradicts the rule of the separate legal personality of the enterprise.[59]

The determination of the nationality of a legal entity in the Convention should attempt to comply with economic realities. A MNC, for instance, might have its corporate headquarters in country A, its technical headquarters in country B and its General Counsel including the entire legal department in State C. These three parts need to interact in order to run the business effectively. The enterprise cannot operate without any of them. Thus the concept of central administration is out-dated in today's globalised world economy. It is nearly impossible to identify the seat of central administration of some enterprises, *i.e.,* the location from where the business is actually "run".

The control test is a rather useless concept too. A corporation may have thousands of shareholders with dozens of nationalities. Even if one were to look at the citizenship of the majority of the shareholders, it would still be difficult to set a fixed threshold. Also, the mere number of shares held by certain shareholders does not necessarily reflect their degree of control over the company.[60] One would have to examine the rights, such as voting rights, attached to each share in order to discover how much control the shareholders in question really have. Furthermore, there are additional difficulties if the identity and thus the nationality of shareholders was to change from one day to the next. For instance, a company incorporated in the US has 55% American and 20% French ownership interests. The remaining shares are spread among shareholders from all over the world. 35% of the US ownership interest is subsequently sold to

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57) Investment Canada Act, 1985, Art. 26(3).

58) Kronstein, "The Nationality of International Enterprises" (1952) 52:8 Col.L.Rev. 983 at 986. Sutherland argued that the authority of the decision in *Barcelona Traction* is restricted to the context of diplomatic protection. See: Sutherland, "The World Bank Convention on the Settlement of Investment Disputes" (1979) 28 ICLQ 367 at 385.

59) The very same argument is raised when denying shareholders diplomatic protection for measures addressed against the company, but not directly against the shareholders. For a detailed analysis of this issue, see infra: chapter A III 3. A writer who argues that the "corporate veil" does not allow the diplomatic protection of shareholders in such cases, would also reject the argument that the nationality of a company can be determined by the nationality of its shareholders. See: White, *Nationalisation of Foreign Property*, 68.

60) Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*, 91.

the French shareholder. The company remains incorporated in the US. Does the company switch nationality because 35% of its ownership interest has been sold from one shareholder to another? The example illustrates that the control test is an impractical concept. It would mean that an enterprise could alter its nationality almost at will, which creates legal instability and unpredictability.

The most suitable test is the place of incorporation.[61] Unlike the location of central administration, the place of incorporation can be determined without any doubt, and does not easily change. The argument that the test of incorporation is rather superficial, because companies are incorporated all over the world for reasons different from legal consideration,[62] is not well founded. The laws of the place of incorporation *govern* the form and function of the company, and thus have a decisive impact on its operations.[63] The Convention therefore should define a "foreign" legal entity as an entity incorporated under laws other than those of the host State.

b) Direct Investments

Most investment treaties do not explicitly define "direct" investments. The reason for this omission is that either: a) a given agreement was intended to cover both "direct" and "portfolio" investments,[64] or b) a definition was not necessary because it was clear from the context of an instrument that only "direct" investments were covered. For example, provisions addressed to MNCs on the conduct of foreign investors would not make any sense if these investors would not have enough control over their investment activities to influence such conduct.[65]

The difference between "direct" and "portfolio" investments primarily depends upon the degree of control an investor enjoys. However, a clear dividing line between these two forms is sometimes hard to draw. Some commentators distinguish "direct" from "portfolio" investments by

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61) So also: *Amco vs. Indonesia* (Jurisdiction) [1983] 89 ILR 379 at 385-387.

62) Kronstein, *The Nationality of International Enterprises*, 986.

63) Foighel, *Nationalisation and Compensation*, 234.

64) See: *e.g.*, Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. II (I)(2) and the analysis of this provision by Enering, "The Multilateral Investment Agreement" (1996) 5:3 Transnational Corporations 147 at 148-149. Some RIAs, such as NAFTA (Art. 1139) cover direct and portfolio investments. This, however, seems to be a rather recent development because the predecessor of NAFTA, the US-Canada Free Trade Agreement, only applied to "direct" investments. For more details on this see: Gestrin and Rugman, "The North American Free Trade Agreement and Foreign Direct Investment" (1994) 3:1 Transnational Corporations 77 at 80-81. See also: Convention Establishing the Inter-Arab Investment Guarantee Corporation, Art. 15 explicitly covering direct and portfolio investments.

65) See: *e.g.*, ILO Tripartite Declaration of Principles Concerning Multilateral Enterprises and Policy of 1977.

asserting that the latter does not involve any control over the use of the assets invested.[66] Other authorities use a threshold of 10% of the ownership interest[67] or 25% of the voting power in an enterprise as the decisive factor.[68] Hymer, recognising that "the dividing line between some control, and no control is arbitrary,"[69] relies on thresholds set by State authorities, such as the US State Department of Commerce.

Another contrast between "direct" and "portfolio" investment is that the latter often requires only the movement of money from one country to another for the purpose of buying shares in a company organised under the laws of that other country. The former, by contrast, usually involves the transfer of tangible and intangible assets to the host State and often demands the physical presence of the investor and some of his management staff.[70]

Finally, "direct" investment differs from "portfolio" investment with respect to the degree of risk involved. While a "portfolio" investor may usually pull out his investment and transfer it into other portfolio investments, a "direct" investor cannot easily withdraw.[71] This feature was often stressed by authorities arguing that portfolio investments are disadvantageous to host States, as such investment flows are rather volatile.[72] The economy of host States may easily be destabilised if a substantial number of portfolio investors quickly withdrew large amounts of capital. It is impossible to completely eliminate this risk. But the Convention may at least minimise it by incorporating provisions on monetary transfers[73] restricting the right of foreign investors to repatriate funds in scenarios where the host State faces balance of payments problems. These restrictions would equally apply to portfolio investments. Also, host States may adopt internal policies suitable to reduce the potential volatility of portfolio investment flows.

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66) Pritchard, "The Contemporary Challenges of Economic Development" in Pritchard (ed.), *Economic Development, Foreign Investment and the Law: Issues of Private Sector Investments and the Role of the Law in the New Era* (London, The Hague, Boston: Kluwer Law International and the International Bar Association, 1996) 1 at 3.

67) Research Department of the Inter-American Development Bank, "What is FDI?" (2000) 11:2nd Quarter Latin American Economic Policies, 2.

68) Macalister-Smith (ed.), *Encyclopaedia of Public International Law,* Vol. II, (Amsterdam, Lausanne, New York, Oxford, Shannon, Tokyo: Elsevier, 1992), 435.

69) Hymer, *The International Operation of National Firms: A Study of Direct Foreign Investment* (Cambridge, Mass. and London, Engl.: M.I.T. Press, 1976), 1.

70) Sornarajah, *The International Law on Foreign Investment,* 5.

71) *Ibid.*

72) UNCTAD, *World Investment Report: Transnational Corporations, Market Structure and Competition Policy* (New York and Geneva: UN, 1997), 118, UN Doc.UNCTAD/WIR/1997.

73) For more details, see infra: chapter B III 2.

The differences between "direct" and "portfolio" investments seem substantial. However, in practice they may turn out to be of little significance. A huge "portfolio" investment of, for example, 10% of the ownership interest in a large company, incorporated in a host State, may have a higher economic value than a 100% "direct" shareholding in a small local enterprise. A "portfolio" investor should not be granted less protection simply because there are less perils associated with his investment. By contrast, "portfolio" investors choose this form of investment in order to limit their personal involvement and commitment as well as their risks. If they were denied the protection a "direct" investor enjoys under the Convention, they may actually decide not to invest at all because the limitation of risks, a key feature of portfolio investments, would be set off by a lack of application of the treaty. If the instrument only protected "direct" investments, it would prove to be counterproductive as it would not encourage international investment flows.

The main differences between "direct" and "portfolio" investments, *i.e.*, the degree of control and risk involved, specify the relationship between the foreign investor and the *enterprise* in which he invests. They do not describe the relationship between the foreign investor and the *host State* where the investment is made. For instance, to return to the outlined example: a "portfolio" investor, having 10% ownership interest in a large local enterprise needs the same degree of protection as a 100% "direct" owner of a small local company. In the event of an expropriation of these investments by the host State, the "portfolio" investor may suffer far greater loss than the "direct" investor. The host State should not be in a position to compensate the "direct" investor promptly, adequately and effectively, but deny payment of such compensation to the "portfolio" investor by arguing that "portfolio" investments are not covered by the Convention.[74] The distinguishing aspects between "direct" and "portfolio" investments, which justify the different treatment of these investors in relation to the *company* in which they invest, cannot be used as excuses by *host States* to circumvent their obligation to pay compensation for expropriated investments.

Finally, portfolio investments enjoy a paramount practical importance in today's world economy. They amounted in the mid-1990s to more than USD 10 billion in Asia and more than USD 5 billion in Latin America and the Caribbean.[75] Particularly for developing countries with emerging capital markets portfolio investments represent a vast source of capital inflows.[76] They

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74) In this event the portfolio investor may very well have recourse to remedies under local law, customary international law or other instruments concluded between his home country and the host State, but he would lack protection *under the Convention.*

75) UNCTAD, *World Investment Report: Transnational Corporations, Market Structure and Competition Policy*, 113.

76) Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme*, 676.

assist in broadening and deepening domestic capital markets and thereby support future direct investors.[77] A multilateral investment treaty which ignores these facts does not reflect economic realities.

For these reasons the Convention has to apply to "direct" *and* "portfolio" investments alike.[78] Its definition of "investment" should explicitly confirm that both forms are covered in order to avoid any subsequent misinterpretations.

3. Are Shareholders "Investors"?

If an individual invests abroad, the "investor" is clearly determined. However, it is not so easy to identify the "investor" if an investment is made by a corporate entity, particularly if it forms part of a corporate group. For example,[79] company 1 incorporated in State A invests in country B by setting up a wholly owned subsidiary, company 2. Company 1 belongs 100% to company 3, which is located in country C. Company 3 controls and manages the investment transaction by using company 1 as a vehicle to found company 2. Country B and C are parties to the Convention, whereas country A is not a Contracting State. Country B subsequently expropriates company 2. Country B is obliged to pay compensation under the Convention to the foreign "investor". Is company 1 from country A, or its parent company 3 from country C, or are both, "investors"? Does it matter that company 1 is a wholly owned subsidiary of company 3?[80] What if there were more intermediaries between company 3 and company 2, all incorporated in different jurisdictions all over the globe?

This issue, known as the problem of shareholder protection or "indirect investors", arose with respect to diplomatic protection of shareholders in *Barcelona Traction.*[81] The ICJ held in this

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[77]) Pfeffermann, *Low-Income Countries: Prospects for Increasing Capital Flows Focus on FDI,* 1 (Presentation at an International Monetary Fund/World Bank Conference on External Financing for Low Income Countries, Washington, December 10-11, 1996), published at http://www.ifc.org/DEPTS/OPS/ECON/SPEECHES/IMF/IMF.HTM.

[78]) For the sake of clarity it should be mentioned that the abbreviation "FDI" used in this paper shall not only cover "direct" investments, as it suggests, but equally apply to "portfolio" investments.

[79]) This is a rather simplistic example to demonstrate the difficulty in identifying the actual "investor". In practice, the interrelation between different companies belonging to a corporate group or to different ultimate owners is usually far more complex.

[80]) This is linked to the problem mentioned in chapter A III 2a(ii) of determining the nationality of a corporate entity by employing the "control"-test.

[81]) (Second Phase) [1970] I.C.J. Rep. 1. See also: separate opinion of Judge Oda in the *Case Concerning Elettronica Sicula SpA* (*ELSI)* [1989] I.C.J. Rep. 83 at 85, 88, 91-92. The case was concerned with a claim for reparation brought by the US against Italy on behalf of two US corporation for an alleged violation of the 1948 Friendship, Commerce and Navigation Treaty (FCN Treaty) concluded between the US and Italy. A wholly owned

case that Belgium had no *locus standi* to intervene on behalf of Belgian shareholders of a Canadian company, whose investments in Spain had been subject to certain measures by Spain, which made the operation of the Spanish subsidiary of the Canadian company literally impossible. The court allowed exceptions to this general rule, and thus diplomatic protection of shareholders by their home States only if: a) the act complained of was aimed at a direct right of shareholders, such as the right to a declared dividend,[82] b) the company has ceased to exist,[83] or c) the company's home State lacked capacity to act on its behalf.[84] However, the court did not elaborate on the practically important scenario where the corporation has the nationality of the State responsible for the acts complained of. The ICJ did not adjudicate this situation because it held that Barcelona Traction was a Canadian, not a Spanish company.[85] ICSID tribunals, by contrast, dealt with cases where locally incorporated enterprises affected by measures of the host State invoked the responsibility of such State. Article 25(1) of the ICSID Convention requires for the jurisdiction of the Centre an investment dispute between a Contracting Party and a national of another Contracting Party. In reality, however, most "investments" are implemented by establishing locally incorporated companies. These would fall outside the scope of the ICSID Convention because they are not nationals of *another* Contracting Party. Article 25(2)(b) addresses this common situation. It allows locally incorporated enterprises to be treated as nationals of another Contracting Party if the parties so agree. As outlined in the previous section, ICSID tribunals tend to interpret this clause rather broadly, extending ICSID's jurisdiction to locally incorporated companies, even in the absence of an explicit agreement under Art. 25(2)(b).[86] Only

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subsidiary of the two US companies, incorporated in Italy, was subject to certain measures by Italian authorities which, according to the US, violated the said treaty. The ICJ rejected the claim because it found no violation of the FCN treaty. Judge Oda in his separate opinion stressed the concept of separation of the corporate entity from its shareholders. Certain rights protected by the FCN treaty and allegedly violated by Italy were rights of the company, not of the shareholders. It is therefore questionable whether the US could espouse a claim based upon such rights.

82) [1970] I.C.J. Rep. 1 at 36.

83) *Ibid.*, 41.

84) *Ibid.* The court also held that Belgium could have pursued its own claim if one of *its* rights had been infringed. *Ibid.*, 46.

85) *Ibid.*, 48. Some judges, however, recognised that the judgment of the Court would leave shareholders such as those in *Barcelona Traction,* and in cases where locally incorporated companies were affected by acts of the host State, completely powerless. They emphasised the need of looking behind the artificial concept of the separate legal personality of the company and "pierce the corporate veil" where the strict application of this concept finds its limitations, leaving the shareholders without any legal remedies. See: *e.g.,* separate opinion of Judge Fitzmaurice [1970] I.C.J. Rep. 72-75 and separate opinion of Judge Tanaka, *Ibid.*, 130-135. See also: Mann, *The Protection of Shareholders' Interest in the Light of the Barcelona Traction Case,* 271 indicating that the court seems to think that diplomatic protection of shareholders is possible if the company is a national of the State whose responsibility is invoked.

86) For more details on this provision, see supra: chapter A III 2a(ii).

in the *Holiday Inns Case* did the tribunal insist upon an express agreement between the parties.[87] But no such express consent was given in this case. The tribunal nevertheless upheld its jurisdiction by arguing that the immediate Swiss parent company of a locally incorporated enterprise may invoke the ICSID arbitration clause contained in a contract between the Moroccan government and itself. The fact that it was not yet incorporated, and Switzerland was not yet a party to the ICSID Convention on the date when the contract was concluded, was irrelevant.[88] In addition, even the ultimate US parent company, *i.e.,* the sole shareholder of the Swiss corporation, which was not a party to the contract could request ICSID arbitration on the basis of having been assigned certain rights, and having performed certain obligations under the contract.[89]

Shareholder protection is rarely addressed in older investment treaties. The Agreement on Promotion, Protection and Guarantee of Investment Among the Member States of the Organisation of the Islamic Conference, for instance, simply describes an investor as someone "who owns the capital".[90] By contrast, more recent agreements recognise indirect ownership. The draft MAI[91] and NAFTA,[92] protect shareholders by covering investments which are owned or controlled directly or indirectly. BITs differ in their approach to this problem too. Certain BITs, such as the BIT between the US and Turkey, explicitly mention the scenario where an investment is made in the territory of one Contracting Party through a subsidiary of an investor of the other Contracting Party, which might be located and incorporated in any third State not party to the

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87) Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems,* 141.

88) *Ibid.,* 142-146.

89) *Ibid.,* 147-151.

90) Agreement on Promotion, Protection and Guarantee of Investment Among the Member States of the Organisation of the Islamic Conference, Art. I(6).

91) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. II(I)(2). The definition of an "investor" under the draft MAI was one of the most controversial issues during the negotiation process. Some countries, such as France followed the more traditional approach of defining an "investor", and thereby restricting the application of the instrument to direct owners of investments. For more details on this matter see: Francq, "Definition and Treatment of Investments and Investors" in OECD, *The Multilateral Agreement on Investment: State of Play as of July 1996, OECD Working Paper, Vol. IV:90* (Paris: OECD, 1996), 14-17.

92) North American Free Trade Agreement, Art. 1139. For more details on the protection of indirect investors under NAFTA, see: Gestrin and Rugman, *The North American Free Trade Agreement and Foreign Direct Investment,* 80.

treaty.[93] Other BITs, for instance the Agreement between Japan and Hong Kong for the Promotion and Protection of Investments, dated May 17, 1997, are silent on this matter.[94]

The lack of shareholder protection in international investment transactions, as spelled out in *Barcelona Traction*, needs to be remedied in practice. Therefore, an increasing number of BITs addressing the issue have been concluded since the early 1970s.[95] In fact, an explicit confirmation in a treaty guaranteeing shareholders' rights is the only safeguard for certain foreign investors who may otherwise be left without any adequate protection.[96]

How could a multilateral investment treaty best ensure the protection of shareholders? One could argue that a provision on this issue causes unnecessary complexities in practice. Direct investors may enjoy more favourable treatment than shareholders or *vice versa* within one State. This occurs if either of them belongs to a group of investors entitled to privileged treatment beyond the requirements of the Convention. Such a scenario may, for instance, arise if regional investors are granted preferential treatment in a given State, which non-regional investors may not request under the MFN clause of the Convention.[97] In this case direct investors and shareholders are treated differently within one State. Also, from the host State's point of view it is not desirable to guarantee to a corporate investor favourable treatment under the Convention if its ultimate parent company would not be entitled to such treatment, *e.g.*, because it is located in a non-Contracting State. Some investment agreements address this scenario. There are US BITs, for example, which affirm that companies incorporated in one Contracting Party may not enjoy the protection of the BIT, if such companies are owned or controlled by nationals of a third State.[98]

93) Treaty between the US and Turkey Concerning the Reciprocal Encouragement and Protection of Investments, dated December 3, 1985, Art. I(1)(d).

94) Some national investment laws, such as the Law on Foreign Investment in Albania, 1993, (Art. 1(3)) expand their definition of "investor" to shareholders, while others, such as the Foreign Investment Act of Cuba, 1995, do not address the issue.

95) Sornarajah, *The International Law on Foreign Investment,* 246.

96) Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, 241.

97) For more details on this exception, see infra: chapter B III 1b. Recent BITs contain a similar clause providing that investors from one Contracting Party shall not be able to request certain treatment under the MFN clause if such treatment is granted to investors from third States on the basis of a customs union. See: *e.g.,* Agreement between the UK and Peru for the Promotion and Protection of Investments, dated October 4, 1993, Art. 4. The EC would probably also insist on an EC clause in the Convention as an exception to MFN treatment in order to prevent non-EC investors to request treatment granted to EC investors.

98) See: *e.g.,* Treaty between the US and Turkey Concerning the Reciprocal Encouragement and Protection of Investments, dated December 3, 1985, Art. I(2). Compare: more recent US BITs deny the benefits of the treaty to companies of the other Contracting Party owned or controlled by nationals of third States only if a) the denying Contracting Party does not maintain normal economic relations with the third State; or b) the company has no substantial business activities in the territory of the Contracting Party under whose laws it is constituted or organized.

NAFTA and the Energy Charter Treaty also restrict the application of their investment provisions with respect to companies of Contracting Parties that are owned or controlled by nationals of States not parties to these instruments.[99]

Despite these difficulties the Convention should explicitly define an "investor" as any natural person or legal entity of any Contracting Party, which *directly or indirectly* owns or controls an investment in any other Contracting Party.[100] A variety of reasons justify this approach.

First, many investments are made by MNCs using a subsidiary in a given country and then setting up another subsidiary (*i.e.,* the "investment") of this intermediate subsidiary in a third State.[101] The ultimate parent company usually controls both the activities of the intermediate subsidiary *and* the actual investment transaction. The motives for choosing the intermediate subsidiary often include tax considerations, the geographical proximity between the locations where the investment is made and the intermediate subsidiary, or the staff available at the latter. A Convention which defines only the intermediate subsidiary as the "investor", excluding the ultimate parent company, looks at the surface of the transaction disregarding the economic realities and the degree of management dominance behind it. Thus, when defining an "investor" the treaty should "pierce the corporate veil" of a corporate entity, ensuring that *both* the subsidiary and the ultimate parent company qualify as "investors".

Secondly, if the agreement applied only to "direct" investors, countries may attempt to contract out of the instrument and again have recourse to BITs, as such treaties would offer a higher degree of shareholder protection. Extensive "contracting out", however, undermines the

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See: *e.g.,* Treaty Concerning the Encouragement and Reciprocal Protection of Investment between the US and Jordan, dated July 2, 1997, Art. XII.

99) North American Free Trade Agreement, Art. 1113 and Energy Charter Treaty, Art. 17. A common requirement is that legal entities from a Contracting Party owned or controlled by nationals of a third State have to have substantial business activities in the area of the Contracting Party under whose laws such entities are organised in order to enjoy the protection of the respective treaty. In other words, pure incorporation in a member State with the intention to be covered by the investment provisions of the treaty is not sufficient; substantial business activity at the place of incorporation is what is required. See: Energy Charter Treaty, Art. 17(1) and North American Free Trade Agreement, Art. 1113(2).

100) This definition would clarify that investments in non-Contracting States made by investors from countries parties to the Convention would not be covered by the treaty. Some investment agreements, *e.g.* the Energy Charter Treaty do not clearly address this scenario. For more details see: Wälde, *International Investment under the 1994 Energy Charter Treaty,* 275. The Convention may also contain restrictions similar to those in Art. 1113 of NAFTA and Art. 17 of the Energy Charter Treaty to accommodate host States reluctant to expand the protection of the treaty to companies owned or controlled by nationals of non-Contracting States.

101) An indication for the practical relevance of this scenario is the fact that exactly this situation is described and addressed in some BITs, such as the Treaty between the US and Turkey Concerning the Reciprocal Encouragement and Protection of Investments, dated December 3, 1985, Art. I(1)(d).

Convention's objective.[102] It would probably again result in a wide network of BITs, which has not proved to be effective in promoting investment flows.[103]

Thirdly, the protection of shareholders is essential, because they otherwise may be left without any remedies *under the Convention.*[104] Such a scenario arises if the direct owner of the investment is not able or willing to protect it, *e.g.* because the "direct" investor is not a national or resident of a Contracting Party.[105] This case is comparable to the unfortunate situation of the Belgian shareholders in *Barcelona Traction.* It was subsequently remedied in practice by concluding BITs protecting shareholders,[106] and by including "shares" in the definition of an "investment."[107]

Fourthly, developments in recent years have indicated that at least in the area of diplomatic protection the criteria set forth by the ICJ in *Barcelona Traction* no longer prevail, and that shareholders are increasingly entitled to diplomatic protection on their own merit.[108]

Finally, the protection of shareholders is not only advantageous to investors, but equally guards host States against a destabilising withdrawal of already existing investments. If only "direct" investors were covered, many MNCs, incorporated in a Contracting Party to the Convention, may wind up their already existing intermediate subsidiaries in countries not parties to the instrument. In the event that a substantial number of MNCs did that in a comparatively small and economically weak State, the latter may face serious economic disturbances. Thus, a small country not party to the treaty would not attract new investments *and* would suffer from losing already existing ones.

The agreement also has to clarify whether any State or State enterprise can be an "investor". The Guidelines are silent on this matter, although they were intended to apply to

102) For more details on its objective, see supra: chapter A II.

103) For more details on the negative effects of the current BIT network, see supra: chapter A II.

104) Another way to protect shareholders would be to define the nationality of a legal entity by the nationality of its shareholders. For reasons stated in chapter A III 2 a (ii), this approach does not seem reasonable.

105) The opposite scenario, *i.e.*, where the country of the ultimate patent company is not a party to the instrument, while the country of a given intermediate subsidiary, which invests in a third State, is a Contracting State, may arise too. In this situation, of course, only the intermediate subsidiary enjoys the protection of the treaty as the instrument cannot expand its scope to investors, *i.e.*, the ultimate parent company, whose home States are not parties to it.

106) See: *e.g.*, Agreement for the Promotion and Protection of Investments between the UK and Singapore, dated July 22, 1975, Art. 5(2).

107) Sornarajah, *The International Law on Foreign Investment*, 247.

108) International Law Association, *First Report of the Committee on Diplomatic Protection of Persons and Property* (London: International Law Association, 2000), 42.

private investments only.[109] Other treaties, such as NAFTA,[110] the draft MAI,[111] and some BITs[112] explicitly include in their definition of an "investor", other Contracting Parties or legal entities incorporated under the laws of other Contracting Parties, which are governmentally owned or controlled.

In fact, there is no reason why private investments should be treated differently from investments made by another State or a foreign State enterprise, as long as the latter are based on commercial activities.[113] Neither of them requires special protection nor justifies privileged treatment.[114] The Convention should therefore equally cover both types of investors.

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[109]) Shihata, *Legal Treatment of Foreign Investment,* 69.

[110]) North American Free Trade Agreement, Art. 1139.

[111]) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. II(I)(1)(ii).

[112]) Treaty between the US and Turkey Concerning the Reciprocal Encouragement and Protection of Investments, dated December 3, 1985, Art. I(1)(a).

[113]) Shihata, *Legal Treatment of Foreign Investment,* 69.

[114]) This, however, raises the issue of State immunity. There seems to be a trend of general acceptance of the concept of restrictive immunity of States in international law. See: *e.g.,* International Law Commission (ILC), *Report of the Commission to the General Assembly: ILC Draft Articles on Jurisdictional Immunities of States and their Property* (1991) II:2 YB of the ILC, 12, UN Doc.A/46/10, Art. 10 and Art. 15(1). See also: 1972 European Convention on State Immunity, Arts. 6-9. Many domestic courts, particularly in Western jurisdictions, do not afford absolute, but only restrictive immunity from jurisdiction to a foreign State. See: Higgins, *Problems & Process: International Law and How we use it* (Oxford: Clarendon Press, 1994), 82. For more details on State immunity, see infra: chapter B V 4.

IV. Historical Background on Past Attempts to Regulate Foreign Investment

1. Earliest Proposals

a) The League of Nations and the UN Havana Charter

The international community has been struggling for more than 70 years[1] to codify uniform standards on the treatment and protection of foreign investment. As early as 1929 the League of Nations (League)[2] sponsored an international conference on the treatment of foreigners. It devoted years to the preparation of a draft convention, which was supposed to be adopted at that conference.

The draft set forth rather liberal standards granting admission to foreign investors without discrimination and guaranteeing national treatment to them. The adoption of the convention was supposed to contribute significant progress in international economic relations.[3] Only a few voices, raised prior to the conference, indicated the major differences in the legislation of States and the complexity of the issues at stake.[4] When the conference finally took place, it became obvious that the codification of rules on the treatment of foreigners and foreign companies would be a complicated undertaking. After three weeks of debates, the original draft had been so profoundly modified that most countries favouring the previous liberal draft stated their intention of not signing the convention.[5]

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1) Prior to 1929 international rules governing FDI were rarely codified and primarily found in customary international law, which began to develop as early as the eighteenth century. At this time, the twin foci of legal disputes relating to the property of aliens were a) the principle of State sovereignty and exclusive territorial jurisdiction on the one hand, and b) the doctrine of State responsibility for injury to foreigners and their property on the other. For an overview of international customary law on the subject matter prior to 1929 see: Fachiri, "International Law and the Property of Aliens" (1929) 10 BYIL 32-55.

2) The League was set up in order to provide peace and stability after World War I. It ceased to exist in April 1946. The fact that it was not able to prevent the outbreak of World War II was often cited as evidence of its failure. See: Henig (ed.), *The League of Nations* (Edinburgh: Oliver & Boyd, 1973), 170-171.

3) League of Nations, *Records of the 10th Ordinary Session of the Plenary Assembly: Annex 22 (Economic Work of the League of Nations) Report of the Second Committee to the 10th Ordinary Session of the Plenary Assembly,* Geneva 1929, Sec. A5, LN Doc.A.68.1929.II.

4) League of Nations, *Records of the 10th Ordinary Session of the Plenary Assembly, Minutes of the Second Committee, 8th Meeting of the Second Committee on September 18, 1929: Examination of the Report Presented by Dr. Breitscheid and of the Amendments Proposed by the Drafting Committee (Annex 2a): Adoption of Resolutions,* Geneva 1929, Statement by Mr. Kolstad (Norway), LN Doc.A.II.3.1929.

5) League of Nations, *Work of the International Conference on the Treatment of Foreigners: Report by M. Devèze, President of the Conference,* Geneva, January 14, 1930, LN Doc.C.10.1930.II.

The major controversy at the conference was the amount of sovereignty States were required to give up. While some countries, which already guaranteed non-discriminatory treatment to foreign enterprises, were keen to secure this principle in the convention, the majority of nations intended to retain as much flexibility as possible without any limitations on their sovereignty.[6]

Finally, negotiators admitted that no generally accepted solutions could currently be found.[7] They decided to set up a second session of the conference. In December 1929 the conference adjourned, never to meet again. The first attempt to regulate the treatment of foreigners and foreign enterprises on a multilateral basis had failed.

The worldwide depression at the beginning of the 1930s, and the subsequent World War II prevented substantial flows of FDI during the 1930s and early 1940s. No major attempt was made between 1930 and 1947 to codify rules multilaterally on FDI. However, the UN Conference on Trade and Employment, held in Havana in 1947-1948, drew up a proposal to regulate FDI and other economic issues. The Charter for an International Trade Organisation (ITO) prepared at this conference was signed by 53 parties[8] and became known as the "Havana Charter". It was a comprehensive agreement addressing various issues, such as commercial policies, the power and structure of the future ITO and finally the treatment and protection of FDI. The Executive Secretary of the Conference acknowledged the Havana Charter as "...more comprehensive, more carefully worked out and potentially more influential than any comparable document in the history of world trade."[9] The Havana Charter encouraged Contracting Parties to treat foreign investments just and equitable.[10] However, other aspects crucial to foreign investors, such as compensation for expropriated investments, were not addressed in the instrument. Canada[11] and

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6) *Ibid.*

7) League of Nations, *Final Protocol of the First Session of the Conference on the Treatment of Foreigners,* Paris, December 5, 1929, LN Doc.C.10.1930.II.

8) The signatories were: Afghanistan, Australia, Austria, Belgium, Bolivia, Brazil, Burma, Canada, Ceylon, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, France, Greece, Guatemala, Haiti, India, Indonesia, Iran, Iraq, Ireland, Italy, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Southern Rhodesia, Sweden, Switzerland, Syria, Transjordan, South Africa, the UK, the US, Uruguay, Venezuela as well as the UN and UNCTAD. Argentina, Poland and Turkey took part in the proceedings, but did not sign the instrument.

9) Barton, "World Economy at Cross-roads: Trade Policy and the Havana Conference" (1948) XIV:1 World Trade, 1.

10) Charter for an International Trade Organisation, Art. 11(2)(a)(i) and Art. 72(1)(c)(i).

11) "In our view the provisions dealing with the treatment of international investment suffer from this defect of immaturity. It is a matter of some regret that the necessary studies of the intricate problems involved in the treatment of capital movements could not have been undertaken before this Charter assumed its present form..." See:

Peru[12] emphasised this particular weakness which, among other shortcomings, prevented the Havana Charter from entering into force. With its failure the international community had once again missed a chance to set forth a legal framework on FDI.

b) The ICC[13] International Code of Fair Treatment for Foreign Investments

In June 1949 the ICC endorsed the International Code of Fair Treatment for Foreign Investments (ICC Code).[14] It was a non-binding instrument intended to serve as a basis for negotiations among governments. In 1957 the ICC proposed - without any success - to call an international conference in order to prepare a convention based upon this Code.

The ICC Code was a liberal instrument providing for national,[15] non-discriminatory treatment of foreign investors, [16] free monetary transfers[17] and fair compensation for expropriated investments.[18]

However, as the instrument was prepared by representatives of the business community only, it suffered from a rather unbalanced approach. While it embodied a wide range of rights of foreign investors, it did not address any obligations foreign investors might have towards host States. Businessmen praised the ICC Code as "...an outstanding achievement of collaboration between the business communities of the world...".[19] Given the difficult economic and social situation, particularly in post-war Europe, the ICC Code was a starting point for discussions,

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International Chamber of Commerce, "After the Havana Conference: What They Think of the I.T.O. Charter" (1948) XIV:2 World Trade 4 at 12, Statement of Canada.

12) "...Also the provisions tending to stimulate international investment in function of economic development should merit a special attention, for in the Charter they appear lacking in the effectiveness that the situation would require." See: *Ibid.,* Statement of Peru.

13) The Paris based International Chamber of Commerce (ICC), a non-governmental organisation of business firms, was founded in 1920. It represents the business community of the world, particularly towards governments.

14) Resolution No. 1 on the Economic Expansion and Foreign Investment. See: ICC, "Summary of Quebec Resolutions. 12th Congress of the ICC in Quebec (Canada), June 13-17, 1949" (1949) XV:3 World Trade 8 at 10-11.

15) International Code of Fair Treatment for Foreign Investments, Art. 3, Art. 5 and Art. 7.

16) *Ibid.,* Art. 4 and Art. 6.

17) *Ibid.,* Art. 9.

18) *Ibid.,* Art. 11.

19) Barton, "Ending the Emergency: Short and Long Term Issues of Economic Policy" (1949) XV:2 World Trade 5 at 8.

rather than a serious attempt to set forth a legal framework on FDI. Thus, the impact of the Code on any future instruments on foreign investment was limited.[20]

c) Proposals of the OECD[21] in the 1960s

In the 1960s the OECD prepared three instruments on FDI: 1.) the Draft Convention on the Protection of Foreign Property (OECD Draft Convention), 2.) the Code of Liberalisation of Current Invisible Operations, and 3.) the Code of Liberalisation of Capital Movements (OECD Codes). While the latter two Codes were adopted in 1961 and afterwards amended,[22] the OECD Draft Convention was never opened for signature and ratification by OECD governments. Reasons for this failure were the fact that it was originally intended to be applicable to all States, not only OECD members, and that the international community was unable to agree upon recognised principles for the treatment of FDI at that time.[23] Even OECD member States, such

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20) The Code apparently inspired private persons to prepare draft conventions on investment. The most famous amongst numerous private proposals, was the International Convention for the Mutual Protection of Private Property Rights in Foreign Countries (Abs Draft Convention) prepared in 1957 by a German Organisation named Society to Advance the Protection of Foreign Investments (Gesellschaft zur Förderung des Schutzes von Auslandsinvestitionen, e.V.) under the chairmanship of Dr. Hermann Abs. The Abs Draft Convention was designed to serve as a basis for negotiations among interested nations. Its major objective was to provide the most extensive protection of FDI by guaranteeing national treatment, limiting the right of host States to expropriate investments, establishing international tribunals for the settlement of investor-State disputes and enforcing provisions of the convention through the application of sanctions in cases of non-compliance. The instrument was probably the most investor-friendly draft convention on FDI ever prepared. For example, Art. V(1) prohibited expropriations of FDI for 30 years (!) after the investment was made, except for reasons of "national emergency". The Abs Draft Convention was subsequently amended and combined with the Shawcross Draft Convention.

The Draft Convention on Foreign Investment prepared by a group of European jurists under the guidance of Lord Shawcross in 1958 (Shawcross Draft Convention) was not as "investor friendly" as the Abs Draft Convention. It granted in its Art. 1 fair, equitable and non-discriminatory treatment to aliens and the most constant protection for their property. Expropriations for a "public purpose" and upon payment of just and effective compensation (Art. 3) were legal.

As mentioned above the Abs Draft Convention and the Shawcross Draft Convention were combined into a new draft, known as the Abs/Shawcross Draft Convention on Investment Abroad. After amendments this draft convention was submitted to the OEEC in 1959. Subsequently, it served as a model for the OECD Draft Convention on the Protection of Foreign Property.

21) As of November 30, 2001 the OECD had the following members: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Rep. of Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the UK and the US.

22) Both Codes have been amended on several occasions since they came into force. For details see: OECD, *Code of Liberalisation of Current Invisible Operations* (Paris: OECD, 1997) and OECD, *Code of Liberalisation of Capital Movements* (Paris: OECD, 1997).

23) Dolzer and Stevens, *Bilateral Investment Treaties* (The Hague, London, Boston: Martinus Nijhoff Publishers, 1995), 2.

as Greece and Portugal, were not willing to bind themselves to some of its provisions because certain clauses were seen as serving primarily the interests of capital-exporting countries.[24]

The draft convention guaranteed fair and equitable treatment of foreign property, and its most constant protection and security.[25] Expropriations of foreign assets had to serve a "public interest" and "just" compensation had to be paid "without undue delay".[26]

The OECD Draft Convention is a balanced approach between the unrealistic, extremely pro-investor draft conventions of private interest groups, such as the Abs Draft Convention in the 1950s, and the highly restrictive, host country protective draft treaties of certain developing States in the 1970s.[27] Although the instrument failed to achieve any formal status, it had a considerable impact on BITs concluded since the 1960s by major capital exporting countries, and it was recommended by the OECD to its members to serve as a basis for drafting model BITs.[28]

The OECD Codes are similar instruments regulating capital movements and invisible operations. The former includes, for example, capital movements for the establishment of a subsidiary;[29] the latter covers invisible operations, such as the assignment and licensing of patent rights and trademarks.[30] The OECD praised its Codes as having "pioneered the codification of international investment rules."[31] This statement, however, hardly acknowledges the limited scope of the Codes, which permit members to lodge reservations to basic principles.[32] It also fails to face the fact that neither Code contains formalised dispute settlement or enforcement procedures.[33] And finally, it disregards the limited application of the Codes. They, of course, apply to OECD members only.

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24) Muchlinski, "The Energy Charter Treaty: Towards a New International Order for Trade and Investment or a Case of History Repeating Itself?" in Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London, The Hague, Boston: Kluwer Law International, 1996) 205 at 210.

25) Draft Convention on the Protection of Foreign Property, Art. 1(a).

26) *Ibid.* Art. 3.

27) See: *e.g.*, the Draft Statute for the Treatment of Foreign Investment, Transnational Corporations and the Transfer of Technology of Non-Aligned Countries.

28) Denza and Brooks, "Investment Protection Treaties: United Kingdom Experience" (1987) 36 ICLQ 908 at 910.

29) Code of Liberalisation of Capital Movements, Annex A, List A, Sec. A1.

30) Code of Liberalisation of Current Invisible Operations, Annex A, List A, Sec. A4.

31) OECD, *Instruments for Providing the Liberalisation of Foreign Direct Investment, OECD Working Paper, Vol. III:24* (Paris: OECD, 1995), 4.

32) Geist, *Towards a General Agreement on the Regulation of Foreign Direct Investment*, 682.

33) Brewer and Young, "The Multilateral Agenda for Foreign Direct Investment: Problems, Principles and Priorities for Negotiations at the OECD and WTO" (1995) 18:4 World Competition 67 at 69.

d) The Establishment of ICSID

The International Centre for the Settlement of Investment Disputes (ICSID) in Washington, D.C. was created by the Convention on the Settlement of Investment Disputes in 1965 (ICSID Convention), entering into force in 1966. More than 140 States are Contracting Parties to this instrument.[34] ICSID is the only institution specialised in providing facilities to conduct investor-State dispute resolution, *i.e.*, conciliations and arbitrations. The Centre does not itself engage in such mechanisms of dispute settlement. It rather provides administrative support and assists disputing parties in the initiation and conduct of conciliations and arbitrations. ICSID was established with the intention to "de-politicise" the settlement of investment disputes by removing the conflict from the intergovernmental level to a more appropriate forum.[35] This was achieved by providing that once a State and a foreign investor have submitted a given dispute to ICSID, the investor's home State shall not exercise diplomatic protection.[36] The ratification of the ICSID Convention does not automatically constitute an obligation to use the ICSID machinery. Both the Contracting State and the foreign investor have to consent to submit each specific dispute to ICSID.[37] This requirement has caused some difficulties in the past, which are addressed in more detail in the chapter on dispute settlement.[38]

ICSID had a slow start. During its first 12 years, only 9 requests for dispute resolution had been submitted.[39] However, in recent years a growing number of conflicts have been referred to the Centre,[40] a trend which proves an increasing awareness of and trust in the system by both host States and foreign investors. The hesitation to resort to ICSID in the past has partly been caused by a lack of confidence in the ICSID machinery. Repeated annulments of ICSID awards seemed to prevent speedy and final dispute resolution. Also, foreign investors sometimes felt that ICSID's enforcement provisions were too lax, because they do not affect State immunity from execution.

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34) For a list of Contracting States, see: Appendix C.

35) Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" in Shihata, *The World Bank in a Changing World: Selected Essays* (Dordrecht, London, Boston: Martinus Nijhoff Publishers, 1991) 309 at 313.

36) ICSID Convention, Art. 27(1).

37) *Ibid.*, Art. 25(1).

38) Chapter B V 3b(ii).

39) Sutherland, "The World Bank Convention on the Settlement of Investment Disputes" (1979) 28 ICLQ 367 at 398.

40) As of November 30, 2001, 37 cases were pending before the Centre and 58 cases had been concluded.

Despite these criticisms, ICSID is a success. The ICSID Convention was the first treaty addressing issues on foreign investment which enjoys widespread support from developing countries and industrialised nations alike.[41] In the past 10 years ICSID has become a suitable alternative to other means of investor-State dispute resolution, such as international arbitration under the auspices of private organisations, *e.g.*, the ICC.

The early decades of the 20th century, before de-colonisation reached its peak, were characterised by a trend to attempt to regulate FDI on a multilateral basis. Most of these proposals failed. However, the need for economic growth and expansion, particularly after the two World Wars, had apparently encouraged the investor-friendly approach in nearly all of these early proposals. Their major objective was to establish rules to protect foreign investors from any unreasonable actions by host countries, rather than protecting host States from foreign investors. This trend completely reversed in the 1970s, preventing the codification of a legal framework on FDI for more than a decade.

2. Global Trends in the 1970s

a) The ICC Guidelines for International Investment

The ICC issued in 1972 the non-binding Guidelines for International Investment. This instrument was supposed to contribute to a "rational discussion" of the regulation of FDI at the inter-governmental level.[42] Unlike the 1949 ICC Code, the Guidelines were addressed to three parties: a) foreign investors, b) governments of host States, and c) governments of investors' home States. They set forth numerous duties and obligations for each of these parties.

The Guidelines granted considerably less favourable treatment to foreign investors than the ICC Code. For example, while the latter provided for non-discriminatory treatment,[43] the

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[41]) Cherian, *Investment Contracts and Arbitration: The World Bank Convention on the Settlement of Investment Disputes* (Leyden: Sijthoff International Publishing Company, 1975), 67. A similar success was the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) in 1985, coming into effect in 1988. The treaty has been signed by more than 150 States. MIGA encourages FDI flows, particularly to developing countries, by providing insurance to foreign investors against non-commercial risks, such as political unrest, expropriation and monetary transfer restrictions.

[42]) ICC, "Foreign Investment" (1973) XXXIX:1 ICC Information, 1.

[43]) International Code of Fair Treatment for Foreign Investments, Art. 4.

Guidelines explicitly stated a "right" of the host country to discriminate against foreign investors.[44] The requirement of national treatment contained in the ICC Code[45] was considerably moderated to fair and equitable treatment in the Guidelines.[46] Finally, the Guidelines dealt with "social issues", such as labour policies,[47] which were not addressed in the ICC Code. These examples illustrate the shift within the ICC from an investor-friendly instrument in 1949 towards a host country protective one in 1972.

The ICC Guidelines were the first instrument containing provisions for the treatment of FDI *and* rules on the conduct expected of foreign investors. This feature makes it a document of historic importance. However, its practical relevance was rather limited, due to the appearance of subsequent OECD Codes, which enjoyed greater political weight and thus replaced the ICC Guidelines in practice.[48] The latter did, however, serve as a model for other Codes. OECD texts, in particular, have been influenced by the ICC Guidelines.[49]

b) The UN Draft Code of Conduct on Transnational Corporations

The UN Draft Code of Conduct on Transnational Corporations (UN Draft Code) was an ambitious attempt by the UN, to codify rules on the conduct expected of Multinational Corporations (MNCs). It also addressed certain related issues, including the treatment of FDI. The UN Draft Code was intended to be a voluntary instrument in the form of a General Assembly (GA) resolution,[50] but it never reached the stage of final adoption because developed States objected to its inadequate provisions on investment.[51]

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44) Guidelines for International Investment, Art. I (3)(d).

45) International Code of Fair Treatment for Foreign Investments, Art. 3, Art. 5 and Art. 7.

46) Guidelines for International Investment, Art. V (3)(a)(i).

47) *Ibid.*, Art. VI.

48) Horn, "International Rules for Multinational Enterprises: The ICC, OECD and ILO Initiatives" (1980-81) 30 Am.U.L.Rev. 923 at 927.

49) *Ibid.*

50) The legal nature of the Code was not clear from the early stages of its drafting. Socialist and developing States favoured a mandatory instrument. Most developed, market-economy countries preferred a voluntary one. Subsequently, it became obvious that it was more likely that the Code would be non-binding. See: United Nations Centre on Transnational Corporations, *The United Nations Code of Conduct on Transnational Corporations, UNCTC Current Studies Series A, No. 4* (New York: UN, 1986), Sec. III, UN Doc.ST/CTC/SER.A/4.

51) Rubin, "Introductory Note to the World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment" (1992) 31 ILM 1363 at 1364.

The UN Draft Code not only provided for rules on the conduct expected of MNCs, it also contained norms directly addressing FDI, such as provisions on treatment of MNCs,[52] compensation for expropriated FDI[53] and ownership and control of foreign investments.[54] Additionally it attempted to regulate such diverse issues as: environmental protection,[55] respect for human rights,[56] abstention from corrupt practices,[57] and tax issues.[58]

The original purpose of the UN Draft Code, *i.e.*, to reconcile the developmental objectives and economic goals of host countries, particularly in the Third World, with the business activities of major investors, is noteworthy and commendable. Unfortunately, throughout the drafting process, some of this aim was abused to justify placing strong obligations on potential investors, while inadequately addressing their rights. For instance, on the one hand, MNCs had to adhere to the economic goals, developmental and socio-cultural objectives[59] of a host country. On the other hand, many Third World countries were not willing to submit investor-State disputes to international arbitration, particularly on issues related to compensation for expropriated investments. They insisted on adjudication by local courts applying local laws. Thus, the UN Draft Code was not, as some authors suggest, "a reflection of emerging international standards of corporate practice".[60] It was an instrument, which attempted to regulate too many different issues on a basis detrimental to foreign investors. The fact that it "represents the longest efforts to draw up an universally accepted instrument on the treatment and duties of foreign investors"[61] does not justify the paramount significance attached to it in the past. It remains a draft resolution with significant shortcomings. It is a set of unbalanced norms and inadequate rules on investment. Instead of codifying rules encouraging FDI flows *and* setting forth international standards on the

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52) Draft Code of Conduct on Transnational Corporations, Summer 1986, Arts. 48-49.

53) *Ibid.,* Art. 54.

54) *Ibid.,* Arts. 21-25.

55) *Ibid.,* Arts. 41-43.

56) *Ibid.,* Art. 13.

57) *Ibid.,* Art. 20.

58) *Ibid.,* Art. 34.

59) *Ibid.,* Arts. 9-10 and Art. 12.

60) Asante, "The Concept of the Good Corporate Citizen in International Business" (1989) 4 ICSID-Rev. FILJ 1.

61) Tschofen, "Multilateral Approaches to the Treatment of Foreign Investment" in Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1993) 267 at 276.

conduct expected of MNCs, thus stimulating economic growth and development, it focused too much on the latter. It is, therefore, not surprising that it failed to receive sufficient support from developed nations, a fact which finally prevented its adoption.[62]

The UN Draft Code apparently inspired the UN and other organisations, such as the OECD and the ICC,[63] subsequently to adopt numerous "Codes" on a variety of subjects. The UN, for example, negotiated the Draft International Code on the Transfer of Technology. [64] In a similar pattern to the UN Draft Code, this Code underwent several stages of drafting, but finally failed to be adopted by the GA because industrialised nations and developing countries could not agree upon certain issues. For instance, restrictions on the adaptation of imported technology[65] and the treatment of technology transactions between affiliated enterprises[66] were controversial among States.

c) The OECD Declaration on International Investment and Multinational Enterprises and the OECD Guidelines for Multinational Enterprises

The 1976 OECD Declaration on International Investment and Multinational Enterprises (OECD Declaration) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), which form an annex to the OECD Declaration, are not legally binding instruments.

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62) Schrijver argues that its positive impact was that it identified issues and problems involved in the operation of MNCs. See: Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997), 82. For more details on the Code, see: Minta, "The Code of Conduct on TNC's: In the Twilight Zone of International Law" (1985) 25 CTC Rep., 29-37. For Codes of Conduct generally, see: Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Antwerp, Boston, London, Frankfurt: Kluwer-Deveter, 1980).

63) The ICC adopted a wide range of "Codes", such as: ICC, *Environmental Guidelines for the World Industry* (Paris: ICC, 1976); ICC, *International Code of Marketing Practice* (Paris: ICC, 1974) and ICC, *International Code of Direct Sales Practice* (Paris: ICC, 1978). For OECD Codes, see: next section infra, chapter A IV 2c.

64) See also: the adoption of the Guidelines on Consumer Protection. GA Res. 39/248 dated April 9, 1985.

65) Draft International Code of Conduct on the Transfer of Technology, 1985, Art. 7. For an early summary of the different views of developed nations, developing countries and socialist States on several issues addressed in this Code, see: UNCTAD, *Report of the Intergovernmental Group of Experts on the Code of Conduct on Transfer of Technology* (Geneva: UNCTAD, 1975), Chapter I, Annex II and Annex III, UN Doc.TD/B/C.6/1.

66) Roffe, "Code of Conduct on the Transfer of Technology" (1987) 24 CTC Rep., 39.

The central provision of the OECD Declaration[67] is its section 2 granting national treatment to foreign enterprises of Member States. This section, often referred to as "National Treatment Instrument", is a milestone in the liberalisation of rules on FDI.[68] It applies to admission of foreign investors and to post-admission investment activities. However, the OECD Declaration fails to cover other key issues, such as provisions on expropriation or dispute settlement.

The OECD Guidelines, the first inter-governmental instrument addressing standards of conduct expected of MNCs, were in line with the trend during the 1970s of regulating such conduct on a multilateral basis. They were thought to carry "considerable weight of moral persuasion",[69] but it has not been proved that they have influenced or changed the behaviour of foreign investors in practice.[70] All enterprises, domestic and foreign, operating in the territory of Member States were supposed to observe these Guidelines.[71] They contained numerous provisions on competition, taxation, employment and industrial relations. Reviews between 1979 and 2000 provided additional clarifications and comments.

Writers attributed much of the success of the OECD, in agreeing to the Declaration and the Guidelines, to the fact that Member States have homogeneous economic, political and legal systems, as well as a similar level of development.[72] The lack of common concepts of international business between Western countries, developing States and socialist nations, by contrast, was often cited as a reason for the UN's failure in its efforts to achieve global agreement.[73] Less attention was given to the fact that the OECD instruments represented a more balanced approach, *i.e.*, incorporating recommendations to MNCs *and* addressing the protection of investments, a key feature UN proposals were lacking.

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67) Since its adoption in 1976 the OECD Declaration has been amended several times. See: *e.g.*, Third Revised Decision of the Council of the OECD, dated December 19, 1992. OECD, *Third Revised Decision of the Council on National Treatment, OECD Working Paper, Vol. III:40* (Paris: OECD, 1995).

68) Houde, "Foreign Direct Investment: Trends and Policies" (1992) 176 The OECD Observer 9 at 13.

69) Schwamm, "The OECD Guidelines for Multinational Enterprises" (1978) 12 J. World Tr.L. 342 at 350.

70) Wälde, *International Investment under the 1994 Energy Charter Treaty*, 260.

71) Guidelines on Multinational Enterprises, Sec. 9.

72) Aranda, "Experience with the OECD Guidelines: The Clarifications" (1988) 25 CTC Rep., 34.

73) Vogelaar, "The OECD Guidelines: Their Philosophy, History, Negotiation, Form, Legal Nature, Follow-up Procedure and Review" in Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Antwerp, Boston, London, Frankfurt: Kluwer-Deveter, 1980) 127 at 129.

Throughout the 1970s there was no (draft) multilateral instrument which comprehensively addressed the treatment and protection of FDI. Nearly all proposals were heavily influenced by the demands of host States, particularly Third World countries, to protect their independence from "economic imperialism" and to control the activities of MNCs. Many host States, which became independent during the 1960s, were concerned that too much economic influence from foreign investors would undermine their newly established sovereignties. The large number of new nations enabled developing countries to gain considerable influence in the international fora, particularly within the GA. Thus, it is not surprising that many voices demanding radical changes in the world's trading and financial system were raised in this forum. The most prominent of these projects was the Charter of Economic Rights and Duties of States, adopted by the GA in 1974.[74] It was not mainly intended to be an instrument on investment, but it contained certain provisions indirectly affecting the activities of foreign investors. Its famous Art. 2(2)(c) emphasised the right of States to expropriate foreign property upon payment of "appropriate compensation" with no further objective definition of this term. The same article provided for investor-State dispute resolution over such compensation by local courts applying local laws; a restatement of the Calvo Doctrine.[75] The Charter failed to receive support from most developed States, which either voted against it or abstained. Its focus on sovereign rights of host States and its lack of adequate provisions to protect foreign investors resulted in a continuing denial of authoritative status for it by major capital exporting countries.[76]

Similar instruments were the Declaration on the Establishment of a New International Economic Order, adopted by the GA in 1974[77] and the Resolution on Development and International Economic Co-operation adopted in 1975.[78] These and other GA resolutions[79] had a certain impact on the trend in the 1970s to leave aside the codification of a comprehensive legal framework on FDI, and to focus instead on norms protecting the economy and sovereignty of

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[74]) GA Res. 3281 (XXIX) dated December 12, 1974.

[75]) Rogers, "Of Missionaries, Fanatics and Lawyers: Some Thoughts on Investment Disputes in the Americas" (1978) 72 AJIL 1 at 5-6. For more details on the Calvo Doctrine, see infra: chapter A IV 3a.

[76]) Denza and Brooks, *Investment Protection Treaties: United Kingdom Experience*, 910.

[77]) GA Res. 3201 (S-VI) dated May 1, 1974. See also: GA Res. 3202 (S-VI) dated May 1, 1974. For a critical analysis of the New International Economic Order see: Wälde, "A Requiem for the 'New International Economic Order' – The Rise and Fall of Paradigms in International Economic Law" in Al-Nauimi and Meese (eds.), *International Legal Issues Arising under the United Nations Decade of International Law* (Dordrecht, The Hague, Boston: Martinus Nijhoff Publishers, 1995), 1301.

[78]) GA Res. 3362 (S-VII) dated September 16, 1975.

[79]) GA Res. 1803 (XVII) dated December 14, 1962 on permanent sovereignty over natural resources.

host States. The Codes of Conduct described above are examples of this tendency. The trend declined, and in fact even reversed, in the 1980s and 1990s, when host countries realised that FDI was not as evil to their economy as they had earlier predicted, and that they could not adequately fund their own development by frightening off inward investment. The failure of the economic model of central planning as evidenced by the collapse of communism has probably supported this tendency.[80] Instead of imposing broad restrictions on FDI, States nowadays adopt liberal investment policies, and nationalisations of foreign private properties – *the* main concern of investors in the 1970s and 1980s - are rare in times of increasing privatisation of former Stated-owned enterprises.

3. Regional and Sectoral Agreements

a) The Andean Community and MERCOSUR

The Agreement on Andean Subregional Integration, known as the "Cartagena Agreement", was signed by Bolivia, Chile, Colombia, Ecuador and Peru in 1969. Venezuela joined the agreement in 1973. Chile withdrew from it in 1976. The treaty was not intended to regulate investment but to serve as a basis for regional integration. It mainly addressed liberalisation in the trading of goods,[81] and it was the foundation of subsequent economic agreements between the parties.

The first step towards a uniform investment regime in the Andean region was Decision No. 24 adopted by the Commission of the Cartagena Agreement in 1970. This decision is known as the "Andean Foreign Investment Code".[82] It set forth a common regime on the treatment of foreign capital, trademarks, patents, licenses and royalties. The instrument distinguished three categories of investors: a) national investors, b) subregional investors, and c) foreign investors. Subregional investors, *i.e.*, investors from another Member State, were granted national

80) Wälde, *A Requiem for the 'New International Economic Order' – The Rise and Fall of Paradigms in International Economic Law*, 1335.

81) Agreement on Andean Subregional Integration, Arts. 41-60.

82) Decision No. 24 of the Commission of the Cartagena Agreement, dated December 31, 1970. This decision was subsequently amended by the following decisions: Decision No. 37 dated June 24, 1971, Decision No. 37-A dated July 17, 1971, Decision No. 70 dated February 13, 1973, Decision No. 103 dated October 30, 1976, Decision No. 109 dated November 30, 1976 and Decision No. 220 dated March 21, 1991.

treatment under certain circumstances,[83] whilst foreign investors were discriminated against. They had, for instance, no access to local long-term credits.[84] In addition, admission of FDI was always subject to governmental approval[85] and certain restrictions applied to monetary transfers of foreign investors.[86]

In 1991 the Commission of the Cartagena Agreement adopted two additional decisions on FDI.[87] Decision No. 291 abandoned the former common investment regime and now grants national treatment to foreign investors. Decision No. 292 updated several provisions of the 1971 Standard Code on Multinational Enterprises (MNEs) and Regulations of the Treatment Applicable to Subregional Capital (Code on MNEs).[88] The decision provided for even more favourable treatment of regional MNEs.[89]

In past years the Andean Community concluded numerous trade and investment cooperation agreements with other States, such as the US and Canada. The purpose of these treaties is to facilitate trade and investment between the region and these countries. Finally, in 1999 the Andean Community decided to work on new common rules regarding foreign investment.[90]

This latter objective has already been put into practice by four other Latin American countries. Argentina, Brazil, Paraguay and Uruguay, Member States of the Southern Common Market, known as "MERCOSUR", entered into two protocols on investment promotion and protection in 1994.[91] The protocols are intended to attract investment flows from MERCOSUR States and other foreign countries. The instruments incorporated liberal standards on the protection of both regional and non-MERCOSUR investments.

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[83]) See: Decision No. 24 of the Commission of the Cartagena Agreement, dated December 31, 1970 as amended by Decision No. 109 dated November 30, 1976, Art. 1 (a-d).

[84]) *Ibid.*, Art. 17.

[85]) *Ibid.*, Art. 2. See also: Arts. 41-42 on admission of FDI in specific sectors.

[86]) *Ibid.*, Art. 37.

[87]) Decision No. 291 and Decision No. 292 of the Commission of the Cartagena Agreement both dated March 21, 1991.

[88]) Decision No. 46 of the Commission of the Cartagena Agreement dated December 9-18, 1971.

[89]) For example, Art. 16 of Decision No. 292 of the Commission of the Cartagena Agreement, dated March 21, 1991, granted certain export incentives to MNEs, which they did not enjoy under the initial Code on MNEs.

[90]) UNCTAD, *World Investment Report: Foreign Direct Investment and the Challenge of Development,* 125.

[91]) Protocol on Reciprocal Promotion and Protection of Investments in Mercosur, Colonia, January 17, 1994 (known as the "Colonia Protocol") and Protocol for the Promotion and Protection of Investments made by Countries that do not belong to Mercosur, Buenos Aires, August 5, 1994.

Both the Andean Community and Member States of MERCOSUR have increasingly departed from their past practice when Latin American countries argued that aliens are only entitled to legal rights and privileges enjoyed by nationals, and that investor-State disputes should therefore only be settled in domestic courts applying national laws, rather than through international arbitration.[92] This practice, known as the "Calvo Doctrine", was reflected in Art. 51 of the Andean Foreign Investment Code. The doctrine explains the long refusal of Latin American countries to become parties to the ICSID Convention and other instruments on international arbitration[93] and to conclude BITs. However, this trend has declined in the past 15 years.[94] States, such as Argentina, Chile and Paraguay signed and ratified the ICSID Convention and have together entered into more than 80 BITs. In fact, almost 50% of the proceedings pending before ICSID tribunals in 2000 involved Latin American States or investors as parties.[95]

Liberalisations in regional investment regimes in Latin America and the departure from the Calvo Doctrine illustrate the continuing tendency of South American States gradually to eliminate obstacles to FDI.

b) From Lomé I to Lomé IV and Beyond

The first Convention of Lomé was concluded by the European Economic Community (EEC)[96] and certain African, Caribbean and Pacific (ACP) States[97] in 1975. It was the foundation of a long-lasting relationship in the form of a general agreement on development and economic cooperation. Subsequently, it became a comprehensive instrument addressing such diverse

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92) Asante, "International Law and Foreign Investment: A Reappraisal" (1988) 37 ICLQ 588 at 591.

93) The Calvo Doctrine was incompatible with Art. 42(1) of the ICSID Convention. For more details on this provision see infra: chapter B V 3b(ii). See also: Abbott, "Latin America and International Arbitration Conventions: The Quandary of Non-Ratification" (1976) 17 Harv.Int'l.L.J. 131 at 139.

94) Rowat, "Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIGA" (1992) 33 Harv.Int'l.L.J. 103 at 108.

95) Shihata and Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 750.

96) The countries on the EEC side were: Belgium, Denmark, France, Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands and the UK.

97) The ACP countries were at that time: Bahamas, Barbados, Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo, Dahomey (now Benin), Equatorial Guinea, Ethiopia, Fiji, Gambia, Ghana, Gabon, Grenada, Guyana, Guinea-Bissau, Jamaica, Côte d'Ivoire, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Niger, Nigeria, Rwanda, Sierra Leone, Swaziland, Senegal, Somalia, Sudan, Tanzania, Togo, Trinidad and Tobago, Uganda, Upper Volta (now Burkina Faso), Western Samoa, Zambia, and Zaire.

issues as: industrial development,[98] cultural cooperation[99] and the treatment and protection of investments.[100]

The initial Convention of Lomé had a modest provision on investment, stating that investors from Contracting States would be treated in a non-discriminatory way.[101] The treaty failed even to grant most-favoured nation (MFN) treatment to foreign investors.[102] Lomé II,[103] in force between 1980-1985,[104] recognised the need for more detailed provisions on investment,[105] but lacked comprehensive rules on the subject matter. Instead, it referred Contracting States to BITs.[106] It was not until Lomé III,[107] in effect between 1985-1990,[108] that more substantial provisions on investment were incorporated in the instrument. Unlike the two previous conventions, it guaranteed fair and equitable treatment to investors from Contracting States,[109] and it provided more extended rules on investment promotion, which were to be practically implemented by means of bilateral agreements.[110] Finally, Lomé IV,[111] in force between 1990-

98) The Fourth ACP-EEC Convention of Lomé, Title V.

99) *Ibid.,* Title XI.

100) *Ibid.,* Title III, Chapter 3.

101) The ACP-EEC Convention of Lomé, Art. 62. For provisions on capital movements, see: *Ibid.*, Arts. 65-66.

102) Commission of the European Communities, *Information - The Lomé Convention - ACP-EEC* (Brussels: Commission of the European Communities, 1975), 20.

103) Parties to Lomé II were all signatories to the initial Lomé Convention plus, on the EEC side: Greece (joined the EEC in 1981); on the ACP side: Cape Verde, Comoros, Djibouti, Dominica, Kiribati, Papua New Guinea, St. Lucia, Sao Tomé and Principe, Seychelles, Solomon Islands, Surinam, Tuvalu, and Zimbabwe (joined in 1980).

104) The initial Lomé Convention expired on March 1, 1980. See: The ACP-EEC Convention of Lomé, Art. 91. The Lomé II Convention expired on February 28, 1985. See: The Second ACP-EEC Convention of Lomé, Art. 188(1).

105) The Second ACP-EEC Convention of Lomé, Art. 65.

106) *Ibid.,* Art. 64 and Annex IX, Joint Declaration on Investments relating to Art. 64 of the Convention. For capital movements, see: Arts. 156-157. For investments in the service sector, see: Art. 100.

107) Parties to Lomé III were all signatories to Lomé II plus, on the EEC side: Spain and Portugal (joined the EEC in 1986); on the ACP side: Angola, Antigua and Barbuda, Belize, Mozambique, St. Christopher and Nevis, St. Vincent and the Grenadines, and Vanuatu.

108) The Lomé III Convention expired on February 28, 1990. See: The Third ACP-EEC Convention of Lomé, Art. 291.

109) The Third ACP-EEC Convention of Lomé, Art. 240(b). Compare: *Ibid.,* Art. 252 sticking to the non-discriminatory treatment of investors just as in Lomé II regarding investments in the service sectors.

110) *Ibid.,* Arts. 241-245.

111) Parties to Lomé IV were all signatories to Lomé III plus, on the ACP side: Dominican Republic, Haiti, and Namibia.

2000,[112] contained detailed articles on investment promotion,[113] investment protection,[114] investment financing[115] and investment support.[116] Its key principle is still fair and equitable treatment of investors,[117] rather than national or MFN treatment. However, considering the large number of Contracting Parties, it is significant that they could agree upon the provisions as extensive as those in Lomé IV, compared to the previous instruments.

In 2000 the ACP Group and the EC concluded the Cotonou Agreement,[118] which replaces Lomé IV. The treaty differs from the Lomé Conventions in important ways. It places more emphasis on political cooperation between the parties and on elimination of corruption. It gives priority to policies to reduce poverty in ACP countries, and it changes the regime of trade and economic cooperation between the parties. The provisions on investment, by contrast, are no substantial advances on Lomé IV. The treaty incorporates provisions on investment promotion,[119] investment finance and support,[120] investment guarantees[121] and investment protection;[122] but it does not deal explicitly with the treatment of investors. Instead, it encourages parties to conclude BITs.

The different approaches in the Cotonou Agreement were negotiated because implementation of the previous Lomé Conventions did not show the desired effects. For instance, in spite of the trade preferences granted to ACP States, export growth and diversifications did not occur in these countries,[123] and the anticipated development of ACP States did not happen.[124]

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112) The Lomé IV Convention expired on February 29, 2000. See: The Fourth ACP-EEC Convention of Lomé, Art. 366.

113) The Fourth ACP-EEC Convention of Lomé, Arts. 258-259.

114) *Ibid.*, Arts. 260-262.

115) *Ibid.*, Arts. 263-266.

116) *Ibid.*, Arts. 267-272.

117) *Ibid.*, Art. 258. Compare: *Ibid.*, Art. 274(1) for non-discriminatory treatment of investors in the service industries.

118) Parties to this treaty are all signatories to Lomé IV plus, on the ACP side: Micronesia, Cook Islands, Nauru, Niue, Marshall Islands, and Palau.

119) Cotonou Agreement, Art. 75.

120) *Ibid.*, Art. 76.

121) *Ibid.*, Art. 77.

122) *Ibid.*, Art. 78.

123) McMahon, "Negotiating in a Time of Turbulent Transition: The Future of Lomé" (1999) 36 Comm.Mkt.L.Rev. 599 at 600.

124) *Ibid.*, 608.

Also, previous aid policies had led to disappointing results.[125] It remains to be seen whether the new arrangement provides for a framework more suitable to assist ACP countries in their development.

c) The ASEAN[126] Region

The Agreement for Promotion and Protection of Investment between the ASEAN Countries (ASEAN Agreement) was signed in 1987 and came into force in 1990. Like many other regional investment agreements, it only addressed the treatment of regional investors without establishing a common regime on the treatment of non-ASEAN investments. The instrument granted fair, equitable and MFN treatment to regional investors.[127]

In 1998 ASEAN member States, except for Cambodia, signed the Framework Agreement on the Establishment of the ASEAN Investment Area (AIA Agreement). This treaty implemented several programmes for cooperation, liberalisation and promotion of FDI. ASEAN States intended to create a competitive investment area and to attract investments from other ASEAN countries and from non-ASEAN investors.[128] The AIA Agreement is not limited to the treatment and protection of regional investors. It sets forth a common regime on the treatment of non-ASEAN investors.

The treaty grants national and MFN treatment to regional investors.[129] Exceptions to free admission of regional investments are to be phased out by 2015.[130] Non-regional investors shall be freely admitted by 2020.[131]

ASEAN members have just started to implement the AIA Agreement. Its success will thus be tested in the aftermath of the 1998 crisis.

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125) *Ibid.*, 600.

126) The Association of the Southeast Asian Nations (ASEAN), a regional integration organisation, was set up in 1967. Initial ASEAN members were: Indonesia, Malaysia, Philippines, Singapore and Thailand. Subsequently, Brunei Darussalam, Cambodia, Laos, Vietnam, and Myanmar joined.

127) Agreement on Promotion and Protection of Investment between the ASEAN Countries, Art. IV (2).

128) UNCTAD, *World Investment Report: Foreign Direct Investment and the Challenge of Development*, 121.

129) Framework Agreement on the ASEAN Investment Area, Arts. 7-8.

130) *Ibid.*, Art. 7(3).

131) *Ibid.*, Art. 4(b-c). For general exceptions see: *Ibid.*, Art. 13. Also: *Ibid.*, Arts. 14-15 on Emergency Safeguard Measures and Measures to Safeguard the Balance of Payments.

d) The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) was signed by Canada, Mexico and the United States in 1992. It came into force in 1994. NAFTA is the most comprehensive, best structured and most carefully worked out regional agreement currently in force, which addresses the protection of regional investors. No other regional instrument goes as far as NAFTA with respect to the scope and depth of its coverage and the enforcement of its rules.[132]

Chapter 11 of NAFTA[133] covers numerous investment issues including: expropriation,[134] performance requirements,[135] monetary transfers,[136] and investor-State dispute resolution.[137]

The treaty grants in its Art. 1102 national treatment to regional investors. In the event of national treatment not being granted, *e.g.,* because a State has made a reservation to this provision, Art. 1103 ensures that regional investors enjoy at least MFN treatment. Article 1105 further requires parties to grant fair and equitable treatment to regional investors.

Given its high standards, NAFTA has been considered a suitable model for the development of international investment rules.[138] Negotiators of the MAI often referred to it.[139] The treaty is undoubtedly a sophisticated instrument, which adequately addresses investment issues. Nevertheless, the acceptability of a regional agreement as a foundation for a multilateral instrument remains questionable.

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132) Gestrin and Rugman, "The NAFTA Investment Provisions: Prototype for Multilateral Investment Rules?" in Sauvé and Zampetti (eds.), *Market Access After the Uruguay Round: Investment, Competition and Technology Perspectives* (Paris: OECD, 1996), 63.

133) Chapter 11 is not the only part of NAFTA addressing investment. For rules dealing with investment issues related to the provision of services, see: North American Free Trade Agreement, Chapters 12 and 14. See also: *Ibid.,* Chapter 17 on intellectual property rights.

134) *Ibid.,* Art. 1110.

135) *Ibid.,* Art. 1106.

136) *Ibid.,* Art. 1109.

137) *Ibid.,* Art. 1115-1138. For details on investor-State dispute settlement mechanisms see: Gestrin and Rugman, *The North American Free Trade Agreement and Foreign Direct Investment,* 81.

138) Schott, "The Future Role of the WTO" in Sander and Inotai (eds.), *World Trade after the Uruguay Round: Prospects and Policy Options for the 21st Century* (London, New York: Routledge, 1996) 105 at 110.

139) For example, regarding the employment of foreign personnel. Comparing the provisions of the draft MAI with NAFTA, see: Engering, "The Multilateral Investment Agreement" (1996) 5:3 Transnational Corporations 147 at 156.

e) The Energy Charter Treaty

The Energy Charter Treaty, based on the non-binding European Energy Charter, was concluded in 1994, coming into force in 1998.[140] 51 States have signed it.[141] The treaty is a trade and investment instrument facilitating the integration into world markets of the energy sector of countries of the former Soviet Union and Central and Eastern Europe. The instrument was particularly intended to promote Western energy investments to assist Central and Eastern European countries and the republics of the ex-Soviet Union in their transition from communism to market economy; a process seen as crucial for the political stability of the region.[142] In addition, the agreement was to support trade in energy and related products between Eastern and Western European States. Many countries in Eastern Europe were not GATT members and some of them have not yet joined the WTO. The Energy Charter Treaty thus aimed for the elimination of trade barriers.[143]

The treaty addresses *inter alia* issues related to investment,[144] transit,[145] environmental protection[146] and competition.[147] Its chapter on investment is comprehensive, guaranteeing

[140]) For a brief summary of the Energy Charter Treaty's background and content see: Wälde, *International Energy Investment,* 212-214.

[141]) Signatories are: Albania, Armenia, Austria, *Australia,* Azerbaijan, *Belarus,* Belgium, Bosnia Herzegovina, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, EC, Finland, France, Georgia, Germany, Greece, Hungary, *Iceland,* Ireland, Italy, *Japan,* Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mongolia, Moldova, Netherlands, *Norway,* Poland, Portugal, Romania, *Russian Federation,* Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tajikistan, FYR of Macedonia, Turkey, Turkmenistan, Ukraine, Uzbekistan, and the UK. States written in italics have as of August 20, 2001 not yet ratified the treaty. Belarus and the Russian Federation apply the treaty provisionally.

[142]) Wälde, *Sustainable Development and the 1994 Energy Charter Treaty: Between Pseudo-Action and the Management of Environmental Investment Risk,* 231.

[143]) *Ibid.* Wälde points out that the treaty not only establishes an East/West investment regime, as commonly thought. The instrument also has a West/West dimension that was probably not intended by the time the negotiations started. Investors from "Western" States, such as Switzerland, may now sue under the treaty's investor-State dispute settlement scheme other "Western" governments, *e.g.* Germany, for breaches of key treaty obligations. See: Wälde, *International Investment under the 1994 Energy Charter Treaty,* 252.

[144]) Energy Charter Treaty, Arts. 10-17.

[145]) *Ibid.,* Art. 7.

[146]) *Ibid.,* Art. 19 and Protocol on Energy Efficiency and Related Environmental Aspects.

[147]) *Ibid.,* Art. 6.

national and MFN treatment to established investors,[148] providing liberal provisions on monetary transfers[149] and setting up an effective mechanism for investor-State dispute resolution.[150]

The US is not a party to the instrument. It argues that the Energy Charter Treaty contains "unacceptable low standards in several key areas".[151] It is correct that the treaty does not measure up to the standards guaranteed in US BITs. For instance, it does not grant national and MFN treatment to investors with respect to admission. African, Asian and Latin American countries are not parties to the treaty either, a fact emphasised in order to criticise the instrument as a "club of rich people".[152] Its sectoral limitation to the energy industry and transitional measures granted to the Eastern partners, which caused some delay in the implementation of the treaty, were also considered to be disadvantageous.[153] The same applies to its lack of legally binding environmental obligations.[154] Finally, the treaty's unclear, inconsistent and ambiguous language in some provisions[155] may give rise to controversies in the future.

Despite its imperfections, the Energy Charter Treaty is an interesting precedent. It is the first multilateral trade and investment treaty negotiated and signed by States of Central and Eastern Europe in the post-communist era. It is particularly important for countries of the former Soviet Union, since it is the first major treaty on economic relations, which they negotiated as independent States.[156] From the Western European countries' point of view, it is an instrument which gives them access to the energy resources of Eastern and Central Europe, and thus

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148) *Ibid.*, Art. 10(7).

149) *Ibid.*, Art. 14.

150) *Ibid.*, Art. 26.

151) United States, *US Government Statement at the European Energy Charter Treaty Meeting,* December 15-16, 1994, (1995) 34 ILM 557 at 558. This is one of the official reasons the US gives to explain its reluctance to sign the treaty. In practice, however, the US may be concerned about having to treat foreign investments within its territory as favourable as it claims US investments should be treated abroad with the consequence that failure to provide such treatment may result in an arbitral award against the US. See: Wälde, *International Investment under the 1994 Energy Charter Treaty*, 318.

152) Dolé and de Bauw, *The Energy Charter Treaty: Origins, Aims and Prospects* (London: The Royal Institute of International Affairs, 1995), 88.

153) *Ibid.*, 88-89.

154) Wälde, *Sustainable Development and the 1994 Energy Charter Treaty: Between Pseudo-Action and the Management of Environmental Investment Risk*, 235-236.

155) *Ibid.*, 232.

156) Dolé and de Bauw, *The Energy Charter Treaty: Origins, Aims and Prospects*, 36.

decreases their dependence on other energy suppliers, particularly on States in the Middle East.[157]

Regional Investment Agreements[158] are instruments adopted to serve specific regions. It may therefore be difficult to identify features common to all RIAs without oversimplification. Some general patterns may, however, deserve mention.

Nearly all RIAs have developed out of, and on the basis of, regional integration or free trade agreements. Decades ago when international investment flows were low, and investment was considered as an appendage to trade, the codification of rules on the treatment and protection of regional investors was not a high priority. It is still too early to identify a clear trend away from including investment provisions in other treaties, particularly free trade agreements, and towards concluding "pure" RIAs, such as the AIA Agreement.

Early RIAs only regulated the treatment and protection of *regional* investments, except for Decision No. 24 of the Commission of the Cartagena Agreement, dated December 31, 1970 as amended by Decision No. 109, dated November 30, 1976. Some recent treaties, by contrast, such as the AIA Agreement, not only address the treatment of regional investors but also set forth a common regime between Contracting States on how to treat non-regional investments.

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157) Muchlinski, *The Energy Charter Treaty: Towards a New International Order for Trade and Investment or a Case of History Repeating Itself?*, 205.

158) Not all RIAs can be considered here. Three other RIAs are: 1.) The Agreement on Promotion, Protection and Guarantee of Investment Among Member States of the Organisation of the Islamic Conference, coming into effect in 1986. This agreement grants in its Art. 8 MFN treatment to regional investors, subject to certain exceptions. It also addresses compensation for expropriated or damaged investments (Art. 10, Art. 13), monetary transfers (Art. 11) and investment incentives (Art. 4).

2.) The Draft Convention on the Protection of Investment between the Member States of the European Communities and the members of the Arab League, prepared in the mid 1980s, as part of the Euro-Arab Dialogue. (For more details see: Allen, "The Euro-Arab Dialogue" (1978) 16 J.Comm.Mkt.Stud. 323-342.) It has never been signed, due to political reasons. The draft convention (version 1986) guaranteed in its Art. 4(1) national or MFN treatment, whichever is more favourable to the investor. Such treatment was subject to certain exceptions (Art. 4(4)).

3.) The Draft Statute for the Treatment of Foreign Investment, Transnational Corporations and the Transfer of Technology of Non-Aligned Countries (NAC Draft) was prepared *inter alia* by Algeria, Cuba, Egypt, India, Peru, Syria, Uganda, Yugoslavia, and Zambia in 1975. It was intended to be a model instrument for the Third World, but a lack of acceptance prevented its adoption. It is a unique instrument *discouraging* investment flows by emphasising the sovereign rights of States (Art. 1). It contained an unprecedented list of provisions discriminating against foreign investors. For example: foreign investors would not have access to local long or medium term credits (Art. 8); they would be under an obligation to transfer their ownership interest in an operating enterprise to a national investor within a reasonable period of time (Art. 11); they would not be allowed to reinvest profits without approval by the competent national authority of the host State (Art. 6); and finally, foreign investors would have to observe a comprehensive list of rules of conduct (Art. 13). Such radical provisions excluded the NAC Draft from consideration as a serious attempt to establish a legal framework on FDI.

Given the high degree of economic integration within the EC with the set up of a single market and the introduction of a single currency, the EC is no longer regarded as a "region" for the purpose of this study. Internal EC laws and regulations on the treatment and protection of foreign investors are therefore considered "domestic" laws of the EC and are not addressed in this paper.

The existence of a RIA results in a shift of importance attached by investors to certain determinants of FDI flows. Since local factors, such as the market size, are the same in the entire region, other aspects, for instance, investment incentives offered by individual countries, may become more decisive.[159] The choice of a country within a region increasingly depends on the local advantages this particular country offers, compared to other States in the region. This usually causes more competition for FDI among members of the region.[160]

RIAs have successfully stimulated investment flows because the possibility of accessing a market larger than that of a single country is often an inducement to invest in a given region.[161]

4. Bilateral Investment Treaties

Modern BITs, of which more than 1,900 currently exist,[162] are preceded by Friendship, Commerce and Navigation (FCN) Treaties of the 19th and early 20th centuries.[163] There are major differences between these earlier treaties and BITs. First, the former addressed subjects other than investment, such as trade, maritime and consular relations; and secondly, FCN treaties were predominantly concluded between developed States, while early BITs have been entered into between Western European States and developing countries.[164] In the past few years, however, an increasing number of BITs has been concluded between developing States.[165] The first BIT was signed in 1959 by the Federal Republic of Germany and Pakistan. Today more than 170 countries have concluded BITs.[166]

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159) UNCTAD, *World Investment Report: Trends and Determinants*, 119.

160) *Ibid.*, 127.

161) *Ibid.*, 122.

162) For more statistical data on BITs, see: Appendix F.

163) For instance, the first German FCN treaty was concluded in 1857 between the German Customs Association and Argentina. See: Karl, "The Promotion and Protection of German Foreign Investment Abroad" (1996) 11 ICSID-Rev. FILJ 1 at 5. As early as 1782/1783 the US concluded FCN treaties with the Netherlands and Sweden respectively. See: Vandevelde, "The Bilateral Investment Treaty Program of the United States" (1988) 21 Cornell Int'l.L.J. 201 at 203.

164) UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 8.

165) UNCTC and ICC, *Bilateral Investment Treaties 1959-1991* (New York: UN, 1992), iii, UN Doc.ST/CTC/136.

166) UNCTAD, *World Investment Report: Foreign Direct Investment and the Challenge of Development*, 117.

States entered into BITs because of the difficulties involved in agreeing upon an acceptable multilateral investment treaty.[167] Developed countries signed these treaties to increase investment flows and to reduce risks foreign investors had often faced.[168] The decision of the ICJ in *Barcelona Traction*[169] also encouraged States to conclude BITs, as it was doubtful whether diplomatic protection of the interests of shareholders was an entitlement under customary international law. BITs clarified this by incorporating definitions of "investment" and "investors", which made it clear that diplomatic protection of shareholders was permissible.[170] Developing countries became more interested in signing BITs after the debt crisis when foreign bank loans decreased and FDI became a major source of development financing.[171]

BIT programmes in Europe started in the 1960s. After the German initiative in 1959,[172] other European States followed suit and negotiated BITs. European BITs have been a success in the past decades, and some European States have concluded more BITs than the US.[173] This is because US BITs are more demanding with respect to guarantees on admission of foreign investors, monetary transfers and the abolition of performance requirements.[174]

The US was late in concluding BITs. It signed its first BIT in 1982 with Egypt. Up until 1966 it entered into FCN treaties. Its early FCN treaties did not contain substantial provisions on investment protection. But FCN treaties concluded after World War II recognised the need to protect foreign investments and contained core provisions on treatment of foreign investors and on expropriation.[175] The necessity of a BIT programme for the US became pertinent in the 1970s

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167) Kronfol, *Protection of Foreign Investment: A Study in International Law* (Leiden: Sijthoff International Publishing Company, 1972), 35.

168) Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24 Int'l. Lawyer 655 at 661.

169) *Case Concerning the Barcelona Traction, Light and Power Company, Ltd.* (Second Phase) [1970] I.C.J. Rep. 1.

170) See also: Sornarajah, "State Responsibility and Bilateral Investment Treaties" (1986) 20 J.World Tr.L. 79 at 87.

171) Burkhardt, "Investment Protection Treaties: Recent Trends and Prospects" (1986) 41:1 Aussenwirtschaft 99.

172) Maschke argues that one reason for the German approach, concluding a large number of BITs in the 1960s was the attempt by the former Federal Republic of Germany to avoid international recognition of the former German Democratic Republic, particularly by developing countries. See: Maschke, "Investitionsschutzabkommen: Neue vertragliche Wege der österreichischen Wirtschaft" (1986) 37 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht 201 at 215.

173) For instance, up to the end of 1996 Germany had concluded 112 BITs, the UK 84 BITs, France 65 BITs and the US only 37 BITs. For more statistical data on BITs, see: Appendix F.

174) Salacuse, "Towards a New Treaty Framework for Direct Foreign Investment" (1984-85) 50 J.Air L.&Com. 969 at 992.

175) Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 204-207.

when US overseas investments grew rapidly and substantial US investments had been expropriated by certain States.[176] Also, the US intended with its BITs to de-politicise investment disputes by establishing legal remedies for investor-State disputes, which would not involve the investors' home State.[177]

Opponents of BITs have criticised these instruments as "unequal treaties" on the ground that only the capital exporting State gets the advantages of the BIT. The fact that these treaties cover bilateral flows of investment is irrelevant, as in reality it is only a one-way flow of capital.[178] At the time of an increasing number of BITs being concluded between two developing countries, this argument is no longer persuasive.

BITs have served as models for subsequent regional and sectoral investment agreements. The Energy Charter Treaty, for instance, has been influenced by BITs.[179] Whether or to what extent, BITs have had an impact on the development of rules of customary international law on foreign investment remains an ongoing controversy, which cannot be resolved here. However, most authorities seem to reject the view that the large number of BITs has changed the controversial state of customary international law,[180] particularly on such sensitive issue as compensation for expropriated investments.

BITs can contribute to the establishment of a favourable legal climate for foreign investors and enhance their confidence in the host State.[181] However, empirical data prove that the existence of a BIT is not crucial to major investment decisions, and that BITs have not substantially increased FDI flows to States parties to these treaties.[182]

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176) *Ibid.*, 209.

177) Vandevelde, "U.S. Bilateral Investment Treaties: The Second Wave" (1993) 14 Mich.J.Int'l.L. 621 at 626.

178) Sornarajah, "Compensation for Nationalization: The Provisions in the European Energy Charter Treaty" in Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London, The Hague, Boston: Kluwer Law International, 1996) 386 at 400. Less critical, see: Peter, "Settlement of Investment Disputes" (1985) 5:1 J.Int'l.Arb. 67 at 76.

179) Salacuse, "The Energy Charter Treaty and Bilateral Investment Treaty Regimes" in Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London, The Hague, Boston: Kluwer Law International, 1996) 321 at 322.

180) See: *e.g.*, Kishoiyian, "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law" (1994) 14 Northwest.J.Int'l.L.&Bus. 327 at 329. Van De Voorde, "Belgian Bilateral Investment Treaties as a Means for Promoting and Protecting Foreign Investment" (1991) XLIV:1 Studia Diplomatica 87 at 109, Schachter, "Compensation for Expropriation" (1984) 78 AJIL 121 at 126. Compare: Robinson, "Expropriation in the Restatement (Revised)" (1984) 78 AJIL 176 at 177.

181) Pogany, "Bilateral Investment Treaties: Some Recent Examples" (1987) 2 ICSID-Rev. FILJ 457 at 472.

182) See supra: Chapter A II.

5. Global Developments Since 1990

a) The World Bank Guidelines

The non-binding Guidelines on the Treatment of Foreign Direct Investment were unanimously adopted by the Development Committee (DC)[183] of the IBRD and the IMF in 1992. They are the *only* set of principles on FDI, which enjoy unanimous endorsement by an inter-governmental organisation representing developing countries and industrialised nations alike.

The instrument originated from a proposal by Pierre Bérégovoy,[184] the then French Minister for the Economy, who suggested a report on essential principles relating to the treatment of FDI. At its 1991 spring meeting, the DC, recognising the need for a legal framework on FDI,[185] adopted the French proposal and appointed a working group.[186]

The Guidelines were to be a non-binding instrument, rather than a draft text of a treaty. Drafters wanted to avoid any overlap with the continuing efforts of the UN on its Draft Code. Otherwise, political suspicion might have been raised among developing countries, which could have suspected that the World Bank Group was being used to undercut the efforts of the UN, where such countries had a much stronger vote.[187]

The Guidelines were to be based on State practice. The working group undertook comprehensive background studies with the focus on admission and treatment of foreign investors, dispute settlement and expropriation. These studies surveyed *inter alia* 253 BITs,[188] 26 multilateral instruments,[189] 56 national investment laws,[190] approximately 300 arbitral awards and

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183) The DC, established in 1974, is a Joint Ministerial Committee of the Board of Governors of the IBRD and the IMF.

184) French Treasury, Principes Essentiels en Matiere de Promotion et de Protection des Investissements (Paris: The French Treasury, 1991); reprinted in Shihata, *Legal Treatment of Foreign Investment,* 385-386. An English translation is published in *Ibid.,* 387-388.

185) Development Committee, *Communiqué of the Development Committee, Representations to the 41st Meeting of the Development Committee, Washington DC,* April 3, 1991 (Washington: Development Committee, 1991); excerpt reprinted in *Ibid.,* 383-384.

186) Members of the working group were: Ibrahim Shihata, Jose Camacho, Luis Dodero, Daoud Khairallah, Bertrand Marchais, and certain staff members of ICSID, in particular Antonio Parra.

187) Shihata, *Legal Treatment of Foreign Investment,* 44.

188) Khahil, "Treatment of Foreign Investment in Bilateral Investment Treaties" in *Ibid.,* 221-265.

189) Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment*, 267-310.

190) Parra, "Principles Governing Foreign Investment as Reflected in National Investment Codes" in Shihata, *Legal Treatment of Foreign Investment,* 311-335.

judicial decisions of international tribunals and courts as well as 43 publications, mainly on expropriation.[191] In 1992 the DC prepared a progress report on the legal framework for the treatment of foreign investment (Progress Report), which laid down four major areas - admission, treatment, expropriation and dispute settlement - as the key issues to be addressed in the Guidelines. [192]

The initial draft of the Guidelines, prepared on the basis of the Progress Report was discussed within the World Bank Group. A revised version was presented to an informal meeting of the Board of Governors of the IBRD in May 1992, where the US suggested amendments to nearly all of the Guidelines[193] and requested standards comparable to those in recent US BITs and the then draft of NAFTA. The US did not accept that its small number of BITs[194] and its political involvement with Canada, Mexico and the Russian Federation[195] at this time could not determine international rules on FDI, which would require the agreement of the majority of States in the world.

A final draft of the Guidelines incorporating comments from States,[196] the business community,[197] and international organisations was prepared and circulated in August 1992. Upon the request of the US it was slightly modified. On September 21, 1992 the DC, consisting of 24 members, representing 171 countries of the world, unanimously adopted the Guidelines.

Given that the preparation of the Guidelines was not a long planned and well budgeted[198] project, but rather an initial response to the French proposal, the Guidelines are a remarkable outcome. Within 18 months[199] the working group prepared a properly drafted and clearly structured instrument based upon extensive research on existing BITs, multilateral

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191) Westberg and Marchais, "General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists" in *Ibid.*, 337-378.

192) The World Bank Group, *Legal Framework for the Treatment of Foreign Investment, Vol. I - Survey of Existing Instruments, Progress Reports and Background Studies*, 12.

193) A summary of the US comments on the May 6, 1992 draft is provided in Shihata, *Legal Treatment of Foreign Investment*, 107-114.

194) At this time, the US was party to 16 BITs of which 9 were in force, compared to, for example, Germany that was party to 74 BITs of which 64 were in force.

195) At this time, the US was negotiating BITs with the Russian Federation and other former Soviet Republics.

196) For comments from Germany, the Netherlands and the UK, see: Shihata, *Legal Treatment of Foreign Investment*, 114-117.

197) For comments from business groups, see: *Ibid.*, 118.

198) In fact, there was no budget at all for the project. See: *Ibid.*, 441.

199) Compare: it took the UN 20 years (from 1972-1992) to realise that it is impossible to agree upon its Draft Code.

treaties, awards of international tribunals and countless other documents. The World Bank Group came as close as "humanly possible"[200] to its goal of the project: to set forth a framework on FDI acceptable both to industrialised States and to developing countries. The Guidelines and State practice as reflected in BITs subsequently constituted the precedent for the investment provisions of the Energy Charter Treaty.[201] They also proved useful in the preparation of modern national investment laws and some BITs as well as in the negotiations on the draft MAI.[202]

b) The Final Act of the Uruguay Round

The Final Act of the Uruguay Round (Final Act),[203] was signed in 1994 by the Contracting Parties of the GATT.[204] Although it covered numerous agreements, there was no instrument prepared during the Uruguay Round that specifically deals with FDI, mainly because it was not on the agenda.[205] The focus with respect to investment issues was rather the concern of some countries[206] that certain types of investment measures imposed upon foreign investors by host States, such as performance requirements, distort *trade* and should therefore be prohibited.

Three agreements of the Final Act contain provisions on investment measures: a) the Agreement on Trade-Related Investment Measures (TRIMs Agreement),[207] b) the General Agreement on Trade in Services (GATS) and, c) the Agreement on Trade-Related Aspects of

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200) Seidl-Hohenveldern, Review of *Legal Framework for the Treatment of Foreign Investment, Vol. I - Survey of Existing Instruments, Progress Reports and Background Studies and Vol. II - Guidelines, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment,* by the World Bank Group (1993) 46 Austrian J.Pub.Int'l.L. 104.

201) Wälde, *International Investment under the 1994 Energy Charter Treaty,* 265.

202) Shihata, "The Settlement of Disputes – General Propositions and the World Bank's Approach and Experience" in Shihata, *The World Bank in a Changing World,* Vol. III, (The Hague, London, Boston: Martinus Nijhoff Publishers, 2000) 215 at 242.

203) The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Final Act).

204) For a list of Contracting Parties, see: Appendix D.

205) Sauvé, "A First Look at Investment in the Final Act of the Uruguay Round" (1994) 28:5 J. World Trade 5.

206) Particularly the US was a strong supporter of the TRIMs Agreement.

207) Trade-Related Investment Measures (TRIMs) are certain types of performance requirements imposed upon an investment. TRIMs may distort or interfere with trade. Typical TRIMs are export performance requirements and local content requirements. For more details on TRIMs see: Graham and Krugman, "Trade-Related Investment Measures" in Schott (ed.), *Completing the Uruguay Round: A Result-Oriented Approach to the GATT Trade Negotiations* (Washington: Institute for International Economics, 1990), 147-163.

Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPs Agreement). The TRIMs Agreement and the GATS include most of the rules related to investment measures.[208]

The TRIMs Agreement, which applies only to investment measures related to trade in goods,[209] lists in its annex illustrative TRIMs, which no Contracting Party may apply if such a TRIM is inconsistent with Article III (national treatment) or Article XI (quantitative restrictions) of the GATT 1994.[210] Illustrative TRIMs cover trade-balancing requirements[211] and export limitations.[212]

The TRIMs Agreement suffers from significant shortcomings. First, it does not define a TRIM, apparently because States could not agree upon a definition.[213] Secondly, the treaty applies only to investment measures affecting trade in goods, not trade in services. This artificial differentiation adds to the unclear arrangement of provisions on investment measures in the Final Act and cannot be justified.[214] Thirdly, the instrument is rather limited in scope. It allows governments to impose other forms of TRIMs not listed in the instrument.[215] Such measures range from demands for local equity to licensing requirements.[216]

The GATS contains most of the investment-related provisions. Its cornerstone is Art. II (MFN treatment), Art. XVI (market access) and Art. XVII (national treatment). While Art. II is applicable to all parties and all sectors, Art. XVI and Art. XVII apply only to specific sectors. The provisions of the GATS appear liberal, but in fact they only define categories of restrictions, such as limitations on monetary transfers, which may not be imposed upon a foreign service provider.[217]

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[208]) Only provisions in the TRIMs Agreement and the GATS are mentioned here. For more details TRIPs Agreement see: Sauvé, *A First Look at Investment in the Final Act of the Uruguay Round,* 13-14. For additional investment-related provisions, see also: Agreement on Subsidies and Countervailing Measures.

[209]) Investment measures related to the trade in services are set forth in the GATS.

[210]) Agreement on Trade-Related Investment Measures, Art. 2(1).

[211]) Annex to the Agreement on Trade-Related Investment Measures, Art. 1(b).

[212]) *Ibid.,* Art. 2(c).

[213]) Footer, "Trade and Investment Measures in the Energy Charter Treaty" in Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London, The Hague, Boston: Kluwer Law International, 1996) 445 at 452.

[214]) Sauvé, *A First Look at Investment in the Final Act of the Uruguay Round,* 8.

[215]) Compare: The North American Free Trade Agreement, Art. 1106, which is wider in scope.

[216]) Footer, *Trade and Investment Measures in the Energy Charter Treaty,* 453.

[217]) General Agreement on Trade in Services, Art. XI(1).

The Final Act does not address the treatment and protection of FDI in as much detail as the significance of the subject matter requires. The few investment-related provisions are not included in a single document, but are spread through different agreements. They therefore lack a broad scope of application, clear definitions and adequate transparency.[218] Some issues addressed, such as TRIMs, appear isolated from other aspects. Investment incentives, for instance, are inter-related with TRIMs.[219] The Final Act illustrates that the regulation of *some* investment issues in an agreement meant to regulate trade, adds to the complexity and creates confusion. Investment should either be adequately dealt with in such instruments, as for example in NAFTA, or not addressed at all. Given the comprehensiveness of FDI, it may be wiser to conclude a separate investment treaty, rather than to deal inadequately with investment issues in trade agreements.

c) The OECD Multilateral Agreement on Investment

The MAI was an ambitious attempt by the OECD countries to prepare an investment agreement more comprehensive than any other treaty on the subject. It was never finalised and opened for signatures. The draft treaty was an investor-friendly instrument granting national and MFN treatment to foreign investors with respect to both admission and post-admission investment activities.[220] It contained comprehensive rules on dispute settlement[221] and numerous other provisions on investment protection.[222] It incorporated mechanisms, such as rollback[223] and standstill,[224] to ensure continuous liberalisation. The MAI was intended to be open to all States wishing to accede to it.

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218) For more details on these particular shortcomings, see: Sauvé, *A First Look at Investment in the Final Act of the Uruguay Round*, 16.

219) TRIMs may have a distorting effect on trade, but in practice TRIMs are often "softened" by granting investment incentives. The advantage of such incentives may set off the drawbacks suffered by foreign investors from any TRIMs. The overall investment climate in a given country applying TRIMs *and* investment incentives may therefore be better than in a State without TRIMs and investment incentives. The isolated regulation of TRIMs, without linking them to other issues, is a rather awkward attempt to improve the investment climate and liberalise international trade and investment. See: Moran, "The Impact of TRIMs on Trade and Development" (1992) 1:1 Transnational Corporations 55 at 63.

220) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. III(1).

221) *Ibid.*, Sec. V.

222) *Ibid.*, Sec. IV.

223) Rollback means that certain reservations are gradually lifted over a certain period of time.

224) Standstill means that once a country has joined the MAI it cannot add additional reservations to its initial ones.

In 1991, the OECD established internal working groups to study the feasibility of a multilateral investment treaty.[225] Four years later, the OECD ministers decided to open negotiations, which started among OECD countries in September 1995.[226] The agreement was to be completed and submitted to the OECD Council in spring 1997.[227] This goal was not achieved. Reputable newspapers declared the MAI dead on April 29, 1998[228] and the French government officially announced its withdrawal from the negotiations on October 14, 1998. At a recent OECD conference on international investment,[229] the MAI was not on the agenda.

The reasons for its failure are manifold. Negotiators underestimated the difficulty and complexity of their undertaking.[230] Later in the drafting process when negotiations focused more on "social issues", such as core labour standards, it became clear that these aspects had not been considered enough at the outset.

The second and major reason for the MAI debacle was the strong and unexpected opposition to the treaty. NGOs and other interest groups[231] started an international campaign against the agreement via the internet. Neither the OECD nor governments anticipated the extent and success of this movement. Surprised by the strength of this opposition the OECD and member governments made no effective rejoinders.

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225) Larson, "The Multilateral Agreement on Investment: Origins and State of Play" in OECD, *The Multilateral Agreement on Investment: State of Play as of July 1996, OECD Working Paper, Vol. IV:90* (Paris: OECD, 1996), 5.

226) The WTO, IMF and ICSID attended meetings of the drafting groups as observers. Brazil, Argentina, Chile, Hong Kong, China and the Slovak Republic were also granted the status of observers. See: OECD, *Report by the Chairman of the Negotiating Group,* April 28, 1998 (Paris: OECD, 1998). Other countries, such as Latvia, Estonia, and Lithuania have been invited as observers. Many other States were informed about the negotiating process. See: OECD, *Multilateral Agreement on Investment: Progress Report by the MAI Negotiating Group,* 5.

227) OECD, *Multilateral Agreement on Investment: Progress Report by the MAI Negotiating Group, OECD Working Paper, Vol. IV:32*, 3.

228) Drohan, "How the Net Killed the MAI", The Globe and Mail, April 29, 1998.

229) OECD Conference on the Role of International Investment in Development, Corporate Responsibilities and the OECD Guidelines for Multinational Enterprises held in Paris on September 20-21, 1999. See: OECD Press Release, *OECD Conference on the Role of International Investment in Development, Corporate Responsibilities and the OECD Guidelines for Multinational Enterprises* (Paris: OECD, September 16, 1999).

230) Henderson, *The MAI Affair: A Story and Its Lessons* (London: The Royal Institute of International Affairs, 1999), 22.

231) NGOs supporting the opposition movement were *inter alia*: the Third World Network, Oxfam-UK and Ireland, Sierra Club of Canada, The Council of Canadians, Friends of the Earth-US as well as the WWF. The coalition of NGOs lobbying against the MAI in fact consisted of 565 NGOs. See: Beveridge, *The Treatment and Taxation of Foreign Investment under International Law* (Manchester: Manchester University Press, 2000), 198.

Negotiators may not have given *sufficient* publicity to the proposal, a fact that raised suspicions against the treaty.[232] Although the draft text of the MAI had been circulated widely among experts, lawyers and NGOs[233] - resulting in a public debate unknown in past negotiations on multilateral conventions – some trade unions, NGOs and other interest groups felt that they were consulted too little and too late in the negotiation process, and that their concerns were not adequately taken into consideration. The resulting "secrecy" surrounding the MAI, primarily pretended by certain NGOs, was the foundation of the subsequent strong opposition to the treaty.[234]

An often underestimated aspect was the change of the political climate during the negotiation process. New centre/left governments in some influential OECD countries had new political priorities and generally became more cautious regarding capital flows, due to the Asian crisis. Also, the business community quickly lost interest in the treaty once it became clear that the instrument would not include taxation provisions.[235]

Finally, the OECD was not the most suitable forum. It appeared to many opponents of the treaty that like-minded developed countries were chosen to set the terms on international investment on a wider, global scale.[236] Numerous non-OECD countries were therefore suspicious of an agreement they were not involved in drafting.[237] States most attractive for foreign investors, such as Asian and Latin American countries, are not OECD members and any attempt to conclude a multilateral investment Convention that prevents these key players from participating in the negotiation process is unlikely to work successfully in practice.[238]

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232) See: *e.g.*, Mabey, "Defending the Legacy of Rio: The Civil Society Campaign Against the MAI" in Picciotto and Mayne (eds.), *Regulating International Business: Beyond Liberalisation* (Houndmill, Basingstoke, London: MacMillan Press Ltd., 1999) 60 at 62-65.

233) Denza, "Two Legal Orders: Divergent or Convergent?" (1999) 48 ICLQ 257 at 274-275. Henderson also argues that there was no such secrecy. The OECD published articles on the MAI, held conferences on the subject matter and provided information on its web page. See: Henderson, *The MAI Affair: A Story and Its Lessons,* 21.

234) UNCTAD, *World Development Report: Foreign Direct Investment and the Challenge of Development,* 136.

235) *Ibid.*

236) Picciotto, "A Critical Assessment of the MAI" in Picciotto and Mayne (eds.), *Regulating International Business: Beyond Liberalisation* (Houndmill, Basingstoke, London: MacMillan Press Ltd., 1999) 82.

237) For the opposite view: Henderson, *The MAI Affair: A Story and Its Lessons,* 20.

238) Wälde, "Changing Directions for International Investment Law in the Global Economy: An Overview of Selected Issues" (1999) 4:2 CEPMLP Internet Journal 1 at 27, published at http://www.dundee.ac.uk/cepmlp/journal/html/article4-2.html.

The most frequent criticism against the MAI was that it would cause loss of sovereignty for States.[239] It was also condemned as reflecting a one-sided approach, conferring rights on foreign investors without addressing related "social issues", such as human rights, rules on the protection of the cultural heritage of host countries and norms on environmental protection.[240] Opponents of the MAI also claimed that the treaty restricted the ability of countries to choose their own appropriate development strategy, and that it conflicted with national and international environmental regulations.[241]

While some of these assertions may be useful criticisms, most views advanced particularly by certain NGOs can hardly be taken seriously.[242] The MAI in fact was too one-sided, setting out a pro-investor regime, while considering key "social issue" too late in the negotiation process.[243] This could have been avoided, at least to some extent, had negotiators more carefully studied past proposals on investment agreements. Issues, such as core labour standards and provisions on environmental protection, for instance, already arose in the negotiations on NAFTA and should have been familiar to negotiators. The point that the instrument would have conflicted with other treaties, particularly those on environmental protection, was premature because negotiations come to a halt before potential conflicts with these instruments could be discussed in detail.

However, a multilateral investment treaty is a better alternative than the current confusion and insecurity on the treatment of FDI caused by a wide range of different investment regimes. Numerous RIAs, countless BITs, many voluntary Codes of Conduct and the controversial state of customary international law add to the complexity of an already intricate subject. Negotiators of a future multilateral investment treaty should attempt to learn from the lessons of the MAI, and choose an approach in preparing such an instrument which is more likely to succeed. Consultations not only between governments, but with NGOs, trade unions and other interest groups, more information publicly available during the drafting process and a serious attempt to reconcile a sound international investment regime with "social issues", such as core

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239) Khor, *Multilateral Agreement on Investment (MAI): Policy Implications for Developing Countries* (Penang: The Third World Network, 1997), 1.

240) *Ibid.*, 3, Mayne, *The OECD Multilateral Agreement on Investment (MAI) - Executive Summary* (London: Oxfam UK and Ireland, 1997), 2 and Werksman, *Is the Multilateral Agreement on Investment Sustainable? WWF Discussion Paper-October 1997* (WWF: London, 1997), 5.

241) Mabey, *Defending the Legacy of Rio: The Civil Society Campaign Against the MAI*, 69-71 and 74-78.

242) For a comprehensive analysis of the arguments advanced by NGOs, see: Henderson, *The MAI Affair: A Story and Its Lessons*, 33-48.

labour standards and provisions to ensure adequate protection of the environment, would be a first step in the right direction.

In the past 10 years proposals to codify a legal framework on FDI have been characterised by a general tendency away from the extremely pro-host country provisions contained in numerous instruments prepared during the 1970s and 1980s, such as the UN Draft Code, towards further liberalisation, promotion and protection of FDI. However, the most recent attempt by the international community to conclude a multilateral investment agreement, *i.e.,* the MAI has failed. Since then a public promotion of a multilateral investment treaty has been carefully avoided in all international fora.

6. What is next?

During the past 70 years the international community has attempted on numerous occasions to codify a legal framework on FDI. Up until now it has failed. Several RIAs and countless BITs have been concluded and successfully implemented, but there is no global agreement on the subject matter. A variety of reasons have so far prevented agreement among States. One factor is probably the difficulty and complexity of investment issues, which results in lengthily negotiations. This becomes even more important today than in the past, since it seems to be clear that a "pure" investment treaty, not addressing key "social issues", such as core labour standards, is not realistic.

Another aspect is political. A multilateral investment treaty may not be the highest priority for governments of all States. Negotiations on the MAI demonstrated that political pressure from NGOs and other interest groups can effectively prevent the conclusion of a multilateral treaty. Prior to the MAI, this would probably have been thought impossible.

Inappropriate approaches by some States have also caused failures. In the 1970s, newly independent States prevented any development of balanced global standards on treatment of FDI by using their voting power within the GA to push for adoption of international rules to protect their newly established sovereignties. These proposals attempted to regulate investment as an appendage, rather than as the key issue. The UN Draft Code and numerous GA resolutions are

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[243]) So also: Muchlinski, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?" (2000) 34 Int'l. Lawyer 1033 at 1050.

examples of this shift of focus, away from investment issues towards host-country protective provisions.

Since the failure of the MAI, issues on FDI are on ice in international fora. But this is probably temporary. Given the outstanding significance of investment flows in today's globalised economy,[244] the international community eventually has to agree upon a multilateral investment treaty to provide for more transparency, stability and predictability in this area of international law. The current legal framework, consisting of more than 1,900 BITs, countless RIAs, numerous Codes of Conduct and an unclear number of other instruments addressing investment, not to mention the controversial state of customary international law, necessitates the conclusion of a comprehensive international agreement.[245]

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244) For an overview of FDI flows, see: Annex G.

245) See also: Guertin, "A Program Leading to an International Agreement on Foreign Direct Investment" in Wallace (ed.), *Foreign Direct Investment in the 1990s: A New Climate in the Third World* (London, Dordrecht, Boston: Martinus Nijhoff Publishers, 1990) 119 at 136 and Wälde and Ndi, *International Petroleum Investment and Policies: Green, Privatising, and Moving Eastward?*, 28.

Part B - From the Guidelines Towards a Convention

I. Scope of Application - Guideline I

1. The Convention and other Instruments on FDI

Guideline I(1) states that the Guidelines are non-binding,[1] serving as a complement to existing investment treaties. The Convention, however, will have to adopt a different approach. As a legally binding treaty, the instrument will have to regulate how it relates to existing agreements, particularly BITs and RIAs. It must also address the right of States to "contract out", *i.e.,* to agree among themselves to provisions different from those contained in the Convention. Finally, the treaty has to address the questions of reservations.

a) The Proposed Convention and BITs Already in Force

There are now about 1,900 BITs in force.[2] Some investment treaties do not regulate their relationship with existing BITs. The Energy Charter Treaty and the draft MAI are among them. Both treaties address how they relate to other instruments, such as the IMF Articles of Agreement and the GATT, but fail to consider a potential conflict with existing BITs.[3] This method, however, results in a high degree of uncertainty. Which provisions would govern the mutual rights and obligations of the parties concerned in case of a conflict of treaties? Two problematic scenarios[4] may be outlined:

1.) If both Contracting Parties to a given BIT became parties to the proposed Convention and to the 1969 Vienna Convention on the Law of Treaties (Vienna Convention),[5] the provisions of the latter instrument dealing with successive treaties on the same subject matter apply. Article

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1) For reasons why the Guidelines are not a draft text of a treaty, see supra: chapter A IV 5a.

2) UNCTAD, *World Investment Report: Promoting Linkages,* 6.

3) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. X and Energy Charter Treaty, Art. 4.

4) Other situations are: 1.) Both parties to a BIT (State A and B) are parties to the Vienna Convention. Subsequently only State A becomes a party to the proposed Convention. In this event, Art. 30(4)(b) of the Vienna Convention provides for the application of the BIT between State A and State B. 2.) If only one party to a BIT becomes a party to the proposed Convention and to the Vienna Convention neither of these Conventions, but only the BIT, would be applicable between these States. The principle *pacta tertiis non nocent,* a general rule of customary international law, applies to this scenario.

5) The Vienna Convention on the Law of Treaties was signed in 1969 and came into force in 1980. For a list of parties see: http://www.untreaty.unorg/English/treaty.asp.

30(3) of the Vienna Convention states that the later treaty enjoys priority over the earlier treaty,[6] to the extent that its provisions are inconsistent with the earlier treaty. The earlier agreement applies with respect to all provisions not inconsistent with the later treaty. Consequently, the BIT and the Convention on FDI would be simultaneously applicable. However, Art. 30(3) is subject to Art. 59. Article 59(1) provides that the earlier treaty is considered terminated, if it appears from the later treaty that the parties intended to replace the earlier treaty, or if the provisions of the later treaty are so incompatible with the earlier one that the two treaties are not capable of being applied at the same time.[7]

It is a matter of interpretation to determine under Art. 59 whether or not parties to a BIT intended that it should be superseded by the proposed Convention. It would depend on the specific provisions of both treaties and the degree of conflict between them.[8]

2.) In a second scenario both parties to a BIT become parties to the Convention but one State, such as Indonesia or China, is not a party to the Vienna Convention. In this case, customary international law needs to determine how a conflict between the treaties should be resolved.

Article 30 of the Vienna Convention was not a mere reproduction of a rule of customary international law.[9] This is reflected in the wide range of proposals made by the International Law Commission (ILC) during the preparation of what is now Art. 30.[10]

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[6]) In determining the earlier/later treaty, the date of adoption of the text of a treaty not the date of its entry into force is decisive. See: Zuleeg, "Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten" (1977) 20 GYIL 246 at 256. Subject that both treaties have entered into force for both States. Otherwise, there is no conflict.

[7]) In certain circumstances the earlier treaty is considered suspended. See: Vienna Convention on the Law of Treaties, Art. 59(2). The wording of Art. 59(1) is based on Judge Anzilotti's separate opinion in *The Electricity Company of Sofia and Bulgaria Case* (Preliminary Objection) [1939] P.C.I.J., Series A/B, No. 77, 64 at 92, where he considered the relation between a treaty and a declaration under the optional clause as follows: "it is generally agreed that, beside express abrogation there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions." Treaty provisions on inter-State dispute resolution and conflicting unilateral declarations under the optional clause have repeatedly caused difficulties in the past. Both the PCIJ and the ICJ held that treaties and conventions in force and declarations under the optional clause are two *different* sources of jurisdictions, *i.e.* that if the examination of one of these sources produces a negative result this does not dispense the court from considering the other source of jurisdiction. See for the PCIJ: *The Electricity Company of Sofia and Bulgaria Case* (Preliminary Objection) [1939] P.C.I.J., Series A/B, No. 77, 64 at 76 and 80. For the ICJ: the joint dissenting opinion of four judges in the *Nuclear Tests Case (Australia* vs. *France)* (Judgment) [1974] ILR 398 at 493-493. The majority in this case did not discuss the relation between the 1928 General Act for Pacific Settlement of International Disputes and France's and Australia's declarations under the optional clause because it held that there was no dispute between the parties in the first place. The idea advanced by France in the *Nuclear Tests Case* that the situation where unilateral declarations under the optional clause were made after a treaty that provided for the compulsory jurisdiction of the PCIJ had come into force is analogous to the scenario where a later treaty on the same subject matter is concluded between all States parties to the earlier treaty, was thus rejected by the dissenting judges.

[8]) There are some instruments where rights under a treaty have been waived under a subsequent treaty. See: Detter, *Essays on the Law of Treaties* (Stockholm, London: P.A. Norstedt & Söners förlag, Sweet & Maxwell, 1967), 86. However, in practice it is rare that subsequent treaties contain an *express* termination of an earlier one. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., (Manchester: Manchester University Press, 1984), 184.

Article 59(1), by contrast, may codify an existing rule of customary international law. The concept of implied termination of a treaty if *all* parties to it enter into a subsequent agreement on the same subject matter, was known and recognised prior to the adoption of the Vienna Convention.[11] Thus, if both parties to a BIT become parties to the Convention, it may be argued that the concept of Art. 59, reflecting a rule of customary international law, applies.

If the Convention was silent on its relationship to existing BITs, either the Vienna Convention or customary international law would determine any potential conflict between the treaties. This is unsatisfactory for the following reasons:

a) The Vienna Convention does not deal systematically and exhaustively with successive treaties.[12] Its rules suffer from substantial shortcomings.

(i) Article 59(1)(b) states that the earlier treaty is deemed terminated if "the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time". This is a vague provision, open to different interpretations. Would it matter, for instance, *which* provisions are incompatible? If clauses in the BIT and the Convention on compensation for expropriated investments differ, would that be sufficient to consider the *entire* BIT terminated under Art. 59(1)(b)? Would the result differ if norms on admission of foreign investors conflict? Is Art. 59(1)(b) in the latter scenario not applicable, so that Art. 30(3) determines the relation between the treaties? Or does Art. 59(1)(b) mean that *all* provisions of the later treaty need to be incompatible with *all* provisions of the earlier treaty? In other words, where exactly is the dividing line between the application of Art. 59 and Art. 30(3)?

(ii) Neither Art. 30(3) nor Art. 59 refer to the general principle of *lex specialis derogati legi generali.*[13] A party to a BIT may argue that the provisions of the BIT and the Convention are so far incompatible that, according to Art. 59(1)(b), the BIT should be considered terminated. However, the BIT may be the more specific treaty between the parties, *i.e., lex specialis* to the

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9) Sciso, "On Article 103 of the Charter of the United Nations in the Light of the Vienna Convention on the Law of Treaties" (1987) 38 Österreichische Zeitschrift für öffentliches Recht und Völkerrecht 161 at 163. Aust, by contrast, argues that Art. 30 of the Vienna Convention codified customary international law. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000), 181.

10) For more details, see infra: chapter B I 1b.

11) See: *e.g.*, McNair, *Law of Treaties* (Oxford: Clarendon Press, 1961), 508. The ILC confirmed that: "Where the parties to the two treaties are identical, there can be no doubt that, in concluding the second treaty, they are competent to abrogate the earlier one." See: ILC, *Report of the Commission to the General Assembly* (1963) II YB of the ILC, 203, UN Doc.A/5509.

12) Reuter, *Introduction to the Law of Treaties*, 2nd ed., (London, New York: Kegan Paul International, 1995), 131.

13) Zuleeg, *Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten*, 257.

Convention. Should Art. 59(1)(b) or the *lex specialis* principle then enjoy priority of application in resolving the conflict?

(iii) Finally, Art. 59(1)(a) declares that the earlier treaty is considered terminated if it "appears from the later treaty...that the parties intended that the matter should be governed by that treaty". This clause appears to be of little, if no, practical relevance. If it did appear from the later treaty that the earlier treaty is terminated, *i.e.*, if the parties *expressly* regulated in the later treaty that the earlier one is terminated, Art. 59(1)(a) would not be applicable. The earlier treaty would then be terminated according to Art. 54(b) of the Vienna Convention, and the later treaty would govern the mutual rights and obligations of the parties.[14] If, on the other hand, the later treaty does not explicitly terminate the earlier one, how is it supposed to appear from the later treaty that termination of the earlier treaty is what the parties intended?[15] If the mere fact that they did enter into the subsequent agreement would be sufficient to justify the assumption that the earlier treaty is considered terminated, the additional sentence that it needs to "*appear* from the later treaty" that the earlier one is terminated, would not be necessary. It seems difficult to establish the intent of the parties to terminate the earlier treaty by requiring that such intent needs to be manifest in the later treaty, in any form *other* than in a provision terminating the earlier agreement. Haraszti therefore suggested that the mere fact of entering into the subsequent treaty should be sufficient evidence of the parties' intent to terminate the earlier one, unless an intention of the parties *to the contrary* can be proven.[16]

b) If the Vienna Convention is not applicable, matters are even more complicated. One may accept that its Art. 59(1) reflects customary international law. In this case, the same difficulties in applying this provision mentioned above, may arise. It would not be clear *how* the intent of the parties to terminate the earlier agreement needs to be manifested, or whether the mere fact of entering into the proposed Convention would itself be sufficient to prove such intent under customary international law. If, on the other hand, one argued that Art. 59 does not codify customary international law, alternative rules would need to be employed to resolve any conflict. There is no established set of rules in customary international law on treaty conflicts.[17] Jenks therefore suggested a list of principles, such as the *lex prior* principle, the *lex posterior* principle,

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[14]) Elias, *The Modern Law of Treaties* (Leiden: Sijthoff International Publishing Company and Dobbs Ferry, N.Y.: Oceana Publications, Inc., 1974), 113.

[15]) See also: Plender, "The Role of Consent in the Termination of Treaties" (1986) 57 BYIL 133 at 153.

[16]) Haraszti, *Some Fundamental Problems of the Law of Treaties* (Budapest: Akadémiai Kiadó, 1973), 295.

[17]) Sciso, *On Article 103 of the Charter of the United Nations in the Light of the Vienna Convention on the Law of Treaties*, 165.

and the *lex specialis* principle to resolve a conflict of treaties.[18] However, Jenks also admits that the major shortcoming of these principles is that "none of these can be regarded as absolute validity...they must be weighted and reconciled in the light of the circumstances of the particular case."[19] These principles, their individual importance and their relation to each other are an imprecise and not clearly defined set of rules. They are not useful in resolving treaty conflicts. It is, for example, not clear in *which* circumstances the *lex prior* principle enjoys priority over the *lex posterior* principle and how these concepts are to be related to the *lex specialis* principle.

Neither the Vienna Convention nor customary international law provides for a satisfactory set of rules to resolve a potential conflict between any existing BIT and the Convention. The latter should therefore contain a provision regulating such a conflict.[20] In practice, an increasing number of modern multilateral treaties seek to address their relationship with other existing instruments. Common clauses state that existing treaties shall not be affected, an approach adopted by Art. 4(2) of the 1991 Protocol on Environmental Protection to the Antarctic Treaty, or that the present agreement prevails between States that are parties to it and to an earlier treaty or earlier treaties on the same subject matter. This latter solution was, for example, chosen in Art. 28(1) of the 1957 European Convention on Extradition. It would also be the optimal solution for a multilateral investment treaty, which should clearly state that all BITs of any Contracting Party with any other Contracting Party are superseded by the Convention. This approach has numerous advantages. First, it would avoid any misinterpretations of the "parties' intent" under Art. 59 of the Vienna Convention, because a conflict of treaties would not arise in the first place. Secondly, the replacement of BITs between Contracting Parties would result in greater clarity as to what provisions should govern the parties' mutual rights and obligations. A simultaneous application of BITs and the Convention under Art. 30(3) of the Vienna Convention, by contrast, would probably cause considerable difficulty in applying two different co-existing treaty regimes. It will, however, be crucial that the Convention measures up to the standards of BITs. Otherwise there would be no incentive to States to replace their BITs with the Convention. Finally, as no conflict of treaties would arise, Contracting Parties to the Convention would not have to rely on insufficient rules of customary international law on treaty conflicts where the Vienna Convention is not applicable.

[18]) Jenks, "The Conflict of Law-Making Treaties" (1953) 30 BYIL 401 at 436.

[19]) *Ibid.*

[20]) Art. 30 of the Vienna Convention is a residuary rule, *i.e.*, it is applicable only if the parties did not expressly regulate potential conflicts of treaties. See: Sinclair, *The Vienna Convention on the Law of Treaties*, 97.

b) The Proposed Convention and Regional Instruments Already in Force

The previous section illustrates that conflicts between treaties may be a complex matter. In the event that there are numerous parties to an earlier treaty, for example, where an existing RIA conflicts with the Convention, solving the conflict may be even more complicated.

Such a conflict may arise if treatment of regional investors under a RIA differs from treatment granted to foreign investors under the Convention. Different scenarios may arise:

a) If all parties to a RIA are parties to the Vienna Convention, Art. 59 and Art. 30 of the latter determine any conflict between the RIA and the Convention. The previous section demonstrated that these provisions suffer from considerable shortcomings. If only some parties to the RIA become parties to the Convention, Art. 30(4)(b)[21] of the Vienna Convention determines that the RIA governs the mutual rights and obligations between parties not signatories to the Convention and between parties and non-parties to the Convention. The Convention prevails between States that are parties to it (Art. 30(4)(a)).

b) If the Vienna Convention is not applicable, rules on customary international law have to resolve potential conflicts. As suggested above, Art. 30 of the Vienna Convention did not reflect a rule of customary international law. A clear set of customary rules on treaty conflicts does not exist. An example illustrates the dilemma. States A, B, C and D are parties to a RIA and subsequently State A and B become parties to the Convention. The provisions on how to treat regional investors under the RIA and the rules on treatment of foreign investors under the Convention are incompatible. State A is not party to the Vienna Convention. How should State A treat investor B' from State B? If it granted to B' the treatment according to the Convention, it may violate the RIA, for example, by infringing the rights of C and D under the regional regime.[22] If, on the other hand, it treats B' as required by the RIA, it may undermine the Convention.

One answer to this problem is that the second treaty is void if its performance involves the breach of another treaty obligation, and thereby seriously interferes with the interests of the other parties to that other treaty.[23] Fitzmaurice, by contrast, took the position that the second

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21) Art. 30(4)(b) reads as follows: "When the parties to the later treaty do not include all the parties to the earlier one: (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

22) This difficulty particularly arises if the RIA, such as the AIA Agreement, sets up a common regime on treatment of non-regional investors, which conflicts with the provisions on treatment of foreign investors under the proposed Convention.

23) ILC, *Report by H. Lauterpacht* (1953) II YB of the ILC 90 at 156, UN Doc.A/CN.4/63. Lauterpacht emphasised that: "This result follows cogently from general principles of law governing the subject, from requirements of international public policy and the principle of good faith which must be presumed to govern international relations." *Ibid.*

treaty is not void, but the defaulting State may incur responsibility for failure to perform its treaty obligations.[24] McNair argued that the validity of the subsequent treaty depends upon the nature of the two conflicting instruments.[25] Waldock asserted that: "a conflict raises questions of priority and of legal liability but not of validity".[26] The concept that the later treaty is not void simply because it contains contradicting obligations with an earlier treaty of one or more of the parties, was confirmed by the PCIJ in the *Oscar Chinn Case*[27] and in its advisory opinion in the *European Commission of the Danube Case*.[28]

This short survey of opinions proves that there is no clarity on the subject.[29] Even if one accepted the concept that it is a customary rule that the second treaty is not normally void, simply because its performance implies a breach of an earlier treaty,[30] one is still left with the question: *what* is the customary rule? Are there *special* circumstances, in which the second treaty should be considered void? Does it make a difference whether the earlier treaty was of a purely "reciprocating" nature, or an "independent" or "integral" agreement? If so, which criteria exactly determine the difference between these types of treaties?[31]

It would be good if a potential conflict between existing RIAs and the Convention could be addressed before it arises. There are some agreements on different subject matters, which have a provision stating that if the Contracting Parties become parties to a general agreement on

[24]) ILC, *Third Report by Fitzmaurice* (1958) II YB of the ILC 20 at 42, UN Doc.A/CN.4/115. In certain exceptional circumstances, however, subsequent treaties are void. *Ibid.* See also: Elias, *The Modern Law of Treaties,* 57 rejecting the voidness of the later treaty.

[25]) McNair, *Law of Treaties*, 220-222.

[26]) ILC, *Second Report on the Law of Treaties by Waldock* (1963) II YB of the ILC 36 at 55, UN Doc.A/CN.4/156. Waldock also rejected the differentiation between multilateral treaties of primarily reciprocating nature and "independent" or "integral" agreements. *Ibid.*, 56 and 58-59.

[27]) [1934] P.C.I.J., Series A/B, No. 63.

[28]) *Jurisdiction of the European Commission of the Danube between Galatz and Braila* [1927] P.C.I.J., Series B, No. 14, 6 at 23. For an overview of case law, see: Jenks, *The Conflict of Law-Making Treaties,* 420.

[29]) Jennings and Watts (eds.), *Oppenheim's International Law,* 9th ed., Vol. I, Parts 2-4, (London and New York: Longman, 1992), 1214-1215.

[30]) Zuleeg, *Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten*, 249-250. The second treaty should not be void because its voidness would deprive a State that is only party to this later treaty of all its rights under it. This would be a particularly unreasonable result if such State did not know about the earlier treaty, or the conflict between the earlier and the later treaty. See also: Haraszti, *Some Fundamental Problems of the Law of Treaties*, 305.

[31]) Waldock demonstrated that one treaty may have different kinds of provisions, some of which are reciprocating in nature; others have more "independent" or "integral" types of obligations. See: ILC, *Second Report on the Law of Treaties by Waldock,* 59-60. Haraszi emphasised that such different categories of treaties cannot have any effect on the relation between an earlier and a later treaty. See: Haraszti, *Some Fundamental Problems of the Law of Treaties*, 297.

the same subject matter, the earlier treaty should be replaced or amended.[32] In RIAs, these clauses rarely exist, probably because at the time when most RIAs were concluded, it seemed rather unlikely that there would be a multilateral investment treaty in the foreseeable future.

The Convention should therefore incorporate a clause regulating its relation to existing RIAs. A general provision stating that all RIAs of Contracting Parties shall be considered terminated would probably not be acceptable to most States for two reasons. First, many RIAs, unlike BITs, are not "pure" investment agreements. They are regional economic integration agreements, which do not only regulate investment, but equally cover other issues, particularly trade. A clause in the Convention terminating such regional integration agreements would mean that States have to conclude new non-investment-related regional economic integration agreements. Secondly, some RIAs have advanced further with their internal investment liberalisation than the Convention possibly can. NAFTA, for instance, prohibits performance requirements, which should be allowed under the Convention.[33] States parties to such highly integrated regional regimes would probably be unwilling to give up the level of liberalisation already achieved in the region. The termination of RIAs is therefore not an acceptable option.

One problem which could occur in practice[34] is that treatment granted under a RIA to regional investors is more favourable than treatment granted to foreign investors under the Convention. Should the favourable RIA regime or the less advantageous Convention govern the mutual relations between RIA members as parties to both instruments? The Convention can effectively avoid such a conflict by incorporating a clause guaranteeing that any present or future provisions under national or international law, which provide for more favourable treatment of investments of Contracting Parties than itself, shall prevail over the Convention. Present and future RIAs granting more favourable treatment to regional investors would thus apply between RIA members. Some BITs contain a similar provision.[35] It resolves this particular conflict and clarifies that regional investors should enjoy the more favourable treatment under the RIA.

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[32]) For an overview of bilateral treaties containing such a clause, see: ILC, *Second Report by H. Lauterpacht* (1954) II YB of the ILC 123 at 138, UN Doc.A/CN.4/87. See also: UN, *Report of the International Law Commission* (1965) 59 AJIL 203 at 230, UN Doc.A/CN.4/173 (1964).

[33]) North American Free Trade Agreement, Art. 1106 and infra: chapter B II 2b(iii).

[34]) There are other scenarios, which cannot all be considered here. One problem, for example, is how to resolve a treaty conflict between a RIA and the proposed Convention, if the RIA, such as the AIA Agreement, not only provides for the treatment of regional investors but also establishes a *common* regime on how to treat non-regional investments, which then conflicts with the treatment granted to foreign investors under the proposed Convention.

[35]) See: *e.g.,* Agreement between the UK and Honduras for the Promotion and Protection of Investments, dated December 7, 1993, Art. 11.

Another difficulty involving RIAs is the so-called "free rider problem". It arises if a RIA member and a non-RIA State conclude a treaty, *e.g.,* a BIT, with a MFN clause.[36] Such a clause would entitle investors from the non-RIA country to privileged treatment in the RIA State. This is because the MFN clause would require the RIA member to grant to this investor the same privileged treatment internally enjoyed by other RIA members. Some BITs[37] and certain other treaties, such as the Energy Charter Treaty,[38] address this issue. They provide that Contracting Parties which are parties to a RIA shall not be obliged, through the application of the MFN clause, to extend to other Contracting Parties which are not parties to the RIA, preferential treatment applicable between RIA members. The purpose of such a provision is to allow members of a RIA to advance with their internal liberalisation at a faster pace than that to which non-RIA States have agreed.[39] The Convention has to adopt a similar rule for the following reasons:

1.) Without such a clause, a non-RIA member would benefit from the internal liberalisations of a region through the application of the MFN clause in the Convention without being subject to the obligations derived from the RIA. In other words, it would be a "free rider".[40]

2.) In highly integrated regions, such as the EC, individual member States may have transferred their competence for internal liberalisation to a regional organisation. The extension of this competence towards external relations of the region - through application of the MFN clause of the Convention - is normally excluded.[41]

3.) Non-RIA States are usually outside the institutional framework of a region. They do not participate in the internal decision-making process. They are not bound by judicial decisions of a regional court, nor do they contribute to the budget of any regional organisation implementing the RIA.[42]

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36) For more details on MFN clauses, see infra: chapter B III 1b.

37) See: *e.g.,* Agreement between the UK and Kenya for the Promotion and Protection of Investments, dated September 13, 1999, Art. 7.

38) Energy Charter Treaty, Art. 25.

39) UNCTAD, *Series on Issues in International Investment Agreements: Most-Favoured-Nation Treatment* (Geneva: UN, 1999), 20, UN Doc.UNCTAD/ ITE/IIT/10(Vol.III).

40) *Ibid.,* 21.

41) *Ibid.*

42) *Ibid.*

c) The Proposed Convention and Future Instruments on FDI

Finally, the Convention has to regulate how it relates to future investment treaties. Should States be allowed to "contract out", *i.e.,* agree among themselves to provisions different from those contained in the treaty? This issue was not addressed in the Guidelines[43] and is rarely dealt with in other investment agreements.

The Vienna Convention in its Art. 41 addresses "contracting out". Parties to a multilateral treaty are allowed to "modify" it among themselves if the original instrument explicitly provides for the possibility of modification,[44] or if the modification is not prohibited in the initial treaty. In addition, rights of other parties should not be infringed and the object and purpose of the original agreement should not be undermined by the internal alterations.[45] Thus, if the Vienna Convention applies and the proposed Convention did not deal with "contracting out", parties would be allowed to modify it within the framework of Art. 41(1)(b).

There are treaties, such as the Genocide Convention,[46] where contracting out of central provisions would clearly undermine their purpose. Other agreements are based on a primarily bilateral and reciprocating concept of mutual rights and obligations. Contracting out of such agreements is usually in compliance with Art. 41(1)(b), because the purpose of the initial instrument is still observed.[47]

However, under the Convention it is not always clear whether the test of Art. 41(1)(b) is met. For example, two States parties to the Convention subsequently enter into a treaty altering certain provisions on inter-State dispute resolution. Rights of other Contracting Parties to the instrument are probably not infringed by this *inter se* arrangement. The treaty would also hardly undermine the purpose of the Convention. But would it be different if 50 States entered into BITs modifying provisions on compensation for expropriated investments? The rights of other Contracting States to the agreement, not parties to these BITs, may still not be infringed. However, one aim of the Convention, *i.e.,* to achieve a more uniform international regime on FDI, would be undercut. Indeed, Lauterpacht held that once a State becomes a party to a multilateral

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43) The complementary nature of the Guidelines did not require this matter to be addressed.

44) Vienna Convention on the Law of Treaties, Art. 41(1)(a).

45) *Ibid.*, Art. 41(1)(b).

46) Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

47) The difference between multilateral instruments setting up a common regime on a given subject and those agreements, which only provide for bilateral and reciprocating rights and obligations was emphasised by Fitzmaurice. See: ILC, *Third Report by Fitzmaurice,* 44. For criticism, see: ILC, *Second Report on the Law of Treaties by Waldock,* 56, 58-59.

agreement, none of the questions covered by it affect only a limited number of Contracting Parties. It is in the interest of all Contracting States that everybody adheres to the provisions of the treaty *"even if their general interest has no other object than that of securing uniformity for the sake of certainty and smoothness of international intercourse"*.[48]

Ten States may agree *inter se* to a different regime on inter-State dispute resolution. Would that already undermine the purpose of the Convention? Does it matter *which* States contract out - Burkina Faso or the US? Does it matter *how many* States contract out? *Which* provisions are so crucial that derogating from them automatically circumvents the objective of the Convention? Any of the four key matters addressed in the Guidelines,[49] or a combination thereof? What kind of combination? Thus it is hard to apply the test of Art. 41(1)(b), which is open to a variety of interpretations.[50]

In the event that the Vienna Convention is not applicable, customary international law has to determine whether States may "contract out" of the treaty. There is a wide-spread range of opinions on rights of States to *inter se* agreements. Authors who favour the approach that a subsequent treaty is void if its performance requires the breach of an earlier one, also suggest the prohibition of *inter se* arrangements, which are inconsistent with the original instrument.[51] Other commentators, recognising the need for a certain degree of flexibility and latitude, stress that *inter se* treaties are generally admissible, subject to certain restrictions.[52] These authorities point out that *inter se* agreements are sometimes the chief instrument to modify a treaty situation gradually, in circumstances where it is impossible to obtain initially the consent of all States to certain changes.[53] Finally, some jurists argue that only derogations from purely bilateral or reciprocating kinds of obligations, which do not constitute a common treaty regime,[54] should be

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[48]) ILC, *Second Report by H. Lauterpacht,* 135. [Emphasis added].

[49]) Admission, Treatment, Expropriation and Dispute Settlement.

[50]) Article 41(1)(b)(i) and Art. 41(1)(b)(ii) are cumulative, not alternative conditions. See: ILC, *Reports of the Commission to the General Assembly* (1966) II YB of the ILC 169 at 235, UN Doc.A/6309/Rev.1.

[51]) ILC, *Second Report by H. Lauterpacht,* 135. This proposal was subject to certain exceptions. In cases where the subsequent agreement was an "enactment of a fundamental character", or it was concluded "in the general international interest and is of such a nature as properly to override previous undertakings", the later treaty was not considered to be void. *Ibid.*

[52]) Elias, *The Modern Law of Treaties*, 96 and ILC, *Third Report by Fitzmaurice*, 43-44.

[53]) ILC, *Third Report by Fitzmaurice*, 43-44.

[54]) This differentiation may be rather artificial. Certain treaties may provide for reciprocating rights and obligations and nevertheless set up a common treaty regime on a given subject matter. See: ILC, *Second Report on the Law of Treaties by Waldock*, 56, 58-59.

allowed.[55] In other words, customary international law on the permissibility of *inter se* agreements is at least as controversial as customary rules on treaty conflicts.

The Convention has to address "contracting out." It should not rely on Art. 41(1)(b) of the Vienna Convention or on rules of customary international law. The provisions of the Convention are too diverse and manifold to clearly determine when the test of Art. 41(1)(b) is met. Customary international law lacks a clear set of rules on the subject matter.

Some modern multilateral treaties explicitly allow "contracting out", as long as parties do not thereby undermine the object, purpose or execution of the instrument. This approach was, for example, adopted by Art. 311(3) of the 1982 UN Law of the Sea Convention. A multilateral investment treaty could be even more specific on *inter se* agreements.

1.) It should always allow future arrangements, which provide foreign investors with more favourable treatment, *e.g.*, a new RIA. One of the treaty's key motives is to promote investment flows and to provide for a positive investment climate. If it prevented Contracting Parties from entering into *inter se* agreements, which further serve this purpose, it would contradict its own objective. Also, if *inter se* arrangements are prohibited, every Contracting Party has a kind of "veto" to prevent further regional integration with respect to FDI, even in a region to which it does not belong.[56] A potential conflict between such an *inter se* agreement and the Convention, for instance on the treatment of regional investors, would not occur. The instrument should permit - as outlined in the previous section - other treaties providing for more favourable treatment to prevail as between States parties to both.

2.) The Convention should specify which provisions are so crucial that contracting out of them to the detriment of foreign investors is not permissible. One example is the article on compensation for expropriated investments. A rule so limiting the right of Contracting Parties to contract out of *key* provisions is comparable to a standstill clause.[57] It guarantees that the level of liberalisation achieved in the treaty is not subsequently undermined.

3.) "Contracting out" of minor provisions, which are neither to the detriment nor to the advantage of foreign investors, should be permissible. Minor *inter se* agreements may, for example, contain alterations to the article on inter-State dispute resolution. This ensures a degree of flexibility, allowing States to modify some rules to best fit their individual needs.

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[55]) ILC, *Reports of the Commission to the General Assembly* (1966), 216.

[56]) Elias, *The Modern Law of Treaties*, 96.

[57]) For more details, see infra: chapter B II 2b(ii).

Finally, contracting out should be permitted because a prohibition of *inter se* agreements would probably prevent a number of countries from becoming parties to the Convention. A strict and inflexible set of rules would undercut the treaty's objective, reducing it to an instrument between a small number of States without much practical significance.

2. Reservations to the Proposed Convention

Article 2(d) of the Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".[58] Should the Convention explicitly allow parties to make such reservations? Or should it adopt the radical approach of the Energy Charter Treaty, stating that reservations are impermissible?[59] A third option is to be silent on reservations.

For States parties to the proposed Convention and to the Vienna Convention, Arts. 19-23 of the latter determine their rights to make reservations, and the legal effects of such reservations. Article 19 states that any State party to a treaty may formulate reservations unless, a) the treaty explicitly prohibits it, b) the treaty provides that only specified reservations, not including the reservation in question, may be made, or c) in cases other than those listed under a) and b), the reservation is incompatible with the object and purpose of the treaty. Reservations, other than those expressly authorised by the treaty,[60] require the acceptance of other Contracting Parties in order to be effective between such other Contracting Parties and the reserving State.[61] Acceptance of a reservation then modifies to the extent of the reservation the provision to which it relates between the reserving and the accepting State.[62] Objections to a reservation do not prevent the treaty from coming into force between the reserving and the objecting State, unless

[58]) This definition has given rise to difficulties to clearly distinguish "reservations," which have a legal effect from mere "declarations" of only explanatory or interpretative nature. For more details, see: McRae, "The Legal Effect of Interpretative Declarations" (1978) 49 BYIL 155-173, Bowett, "Reservations to Non-Restricted Multilateral Treaties" (1976-1977) 48 BYIL 67 at 68-69 and Aust, *Modern Treaty Law and Practice*, 101-103.

[59]) Energy Charter Treaty, Art. 46.

[60]) Vienna Convention on the Law of Treaties, Art. 20(1).

[61]) *Ibid.*, Art. 20(4)(a).

[62]) *Ibid.*, Art. 21(1)(a-b).

the contrary intention is definitely expressed by the objecting State.[63] The treaty then applies between these parties, except for the provision(s) to which the reservation relates.[64]

This system is far from perfect. It leads to well-known practical problems.

The first difficulty is Art. 19(c). It prohibits reservations incompatible with the purpose of the treaty. As there is no institution in the international community entitled to judge whether the test of Art. 19(c) is met, each State party to a treaty decides for itself whether a given reservation is incompatible. If no one characterises a reservation as incompatible, even if in fact it is, at least for an outside observer, the reserving State becomes a party to the treaty subject to the reservation.[65] In other words, Art. 19(c) only works if the incompatibility of the reservation is invoked by another State.[66] Thus, there is an unrestricted right to make whatever reservation a State pleases, as long as nobody objects. This is a significant shortcoming of the system established by the Vienna Convention because very few States in fact object to reservations, which are clearly objectionable.[67]

The compatibility test is a matter of appreciation.[68] It involves uncertainty and subjectivity. Fitzmaurice criticised the test even before the Vienna Convention was adopted[69] and when it was applied by the ICJ in its advisory opinion in the *Reservation Case*.[70] Also, the test assumes that a treaty has two sets of provisions: those which do, and others which do not form part of its objective. This is unrealistic as parties usually consider a treaty to be an integral whole without drawing this distinction.[71]

Article 21(3) of the Vienna Convention is yet another impractical rule. It allows an objecting State to prevent the entry into force of the treaty between itself and the reserving State. This leads to the illogical result that the reserving State may be a Contracting Party with respect

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63) *Ibid.*, Art. 20(4)(b).

64) *Ibid.*, Art. 21(3).

65) *Ibid.*, Art. 20(4)(a).

66) Mendelson, "Reservations to the Constitutions of International Organizations" (1971) 45 BYIL 137 at 148-149.

67) Aust, *Modern Treaty Law and Practice,* 115-116.

68) Brownlie, *Principles of Public International Law,* 615.

69) Fitzmaurice, "Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" (1957) 33 BYIL 203 at 286.

70) *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter "*Reservation Case*") [1951] I.C.J. Rep. 15.

71) Fitzmaurice, "Reservations to Multilateral Conventions" (1953) 2 ICLQ 1 at 7 and Anderson, "Reservations to Multilateral Conventions: A Re-examination" (1964) 13 ICLQ 450 at 461 arguing that even if such a distinction was possible, it would be a highly subjective one.

to Contracting Parties other than the objecting State. The reserving State would be a "relative" Contracting Party.[72] Thus, it would not be clear at a certain moment in time how many States are parties, a factor which might be decisive in order to determine whether the treaty has come into force.[73] The fact that in practice, objecting States tend to clarify that their objection does *not* prevent the treaty from entering into force between the reserving State and themselves does not eliminate the inherent defect of Art. 21(3).

Finally, the system of the Vienna Convention is incomplete. It fails to regulate the legal effect of impermissible reservations. Can impermissible reservations, *e.g.,* those incompatible with the purpose of the treaty, be "accepted" by other Contracting Parties or are they *per se* invalid? If so, does the invalidity of the reservation prevent the reserving State from being a party to the treaty? One may argue that the "acceptance" of an incompatible reservation under Art. 20(4) would render the application of Art. 19(c) pointless.[74] Also, an incompatible reservation is not one made "in accordance with" Art. 19 as required by Art. 21.[75] Bowett therefore argues that at least those impermissible reservations, which are fundamentally incompatible with the objective of the treaty and which are not severable, are invalid *and* invalidate the act of ratification, thus nullifying the reserving State's participation.[76] Ruda, by contrast, thinks that the validity of incompatible reservations under Art. 19(c) depends upon the acceptance by other States. As long as incompatible reservations are accepted, the reserving State is a party to the treaty in relation to such other States, regardless as to whether or not the incompatible reservation is severable from the rest of the treaty.[77]

In the light of these difficulties it appears desirable to avoid the application of the system established by the Vienna Convention. This could be achieved either by completely prohibiting any reservations, or by providing that reservations other than those specified in the treaty should

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[72]) Mendelson, *Reservations to the Constitutions of International Organizations,* 149 and Anderson, *Reservations to Multilateral Conventions: A Re-examination,* 472-473.

[73]) Fitzmaurice, *Reservations to Multilateral Conventions,* 7.

[74]) Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties" (1993) 64 BYIL 245 at 260. Tomuschat, however, argues that what is now Art. 20(4) of the Vienna Convention *is* applicable to impermissible reservations under Art. 19(c). Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties" (1967) 27 Z.a.ö.R.u.V. 463 at 477.

[75]) Aust, *Modern Treaty Law and Practice*, 117-118. Redgwell, however, seems to disregard this argument. See: Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties,* 261.

[76]) Bowett, *Reservations to Non-Restricted Multilateral Treaties,* 77 and 82-84. Impermissible reservations which are severable and do not fundamentally contradict the purpose of the treaty are still a nullity, but do not invalidate the act of ratification. The reserving State would still be a party to the treaty. See: *Ibid.,* 77. For criticisms: Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties,* 267.

[77]) Ruda, *Reservations to Treaties* (1975) III Recueil des Cours 95 at 190.

not be permissible.[78] Both options prevent application of the compatibility test of Art. 19(c)[79] and of Art. 21, because such a specified reservation is not one established in accordance with Art. 19(b), which relates to additional reservations *other than* those specified in the agreement.[80]

If the Vienna Convention is not applicable, customary international law has to determine whether States may make reservations to the Convention. Articles 19-23 of the Vienna Convention did not codify existing customary law.[81] There were at least five different theories on the permissibility and the legal effects of reservations in place at the time when the Vienna Convention was adopted.[82] Also, State practice was, and still is, rather inconsistent.[83]

The first proposal was the traditional principle of unanimity, which means that reservations to a multilateral treaty could only become effective if all other Contracting Parties agree. Otherwise the reserving State would not become a party to the treaty.[84] This theory was supported by the dissenting judges in the *Reservation Case*.[85] Their approach safeguards the integrity of the treaty, but it is completely unsuitable for instruments with a large number of parties. It gives every single State a power of "veto",[86] which may result in keeping one country out of a treaty whose participation would be valuable even with the reservation.[87]

The second extreme, promoted primarily by previously Communist States, became known as the "sovereignty theory". It argued that the making of reservations is an exercise of State sovereignty, and thus each State may make whatever reservations it pleases. Objections

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78) Vienna Convention on the Law of Treaties, Art. 19(b).

79) *Ibid.*, Art. 19(c), which refers to cases other than those listed in Art. 19(a-b) and Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 71.

80) See also: Tomuschat, *Admissibility and Legal Effects of Reservations to Multilateral Treaties*, 467 on the non-applicability of what is now Art. 20(4) of the Vienna Convention to reservations specified in the treaty. Article 20(4) is only applicable where the treaty is silent on reservations. Reservations specified in the treaty become effective against any other Contracting Party without their acceptance (Art. 20(1)).

81) Greig, "Reservations: Equity as a Balancing Factor?" (1995) 16 AYIL 21.

82) For a sixth approach combining certain aspects of the theories outlined below see: Anderson, *Reservations to Multilateral Conventions: A Re-examination*, 477-479.

83) Mendelson, *Reservations to the Constitutions of International Organizations*, 141. For more details on State practice on making reservations, see: Gamble, "Reservations to Multilateral Treaties: A Macroscopic View of State Practice" (1980) 74 AJIL 372 at 376-391.

84) Jennings, *General Course of International Law* (1967) II Recueil des Cours 327 at 534.

85) [1951] I.C.J. Rep. 15 at 41-43 and 47 and Anderson, *Reservations to Multilateral Conventions: A Re-examination*, 460-461.

86) Mendelson, *Reservations to the Constitutions of International Organizations*, 149.

87) Fitzmaurice, *Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 277.

by other States would not prevent the reserving State from becoming a party to the treaty. In practice, this theory would render the entire negotiation process of a treaty pointless. The ICJ rejected this concept by emphasising that each State would be free to undermine the treaty regime by excessive reservations.[88]

Fitzmaurice suggested a "collegiate" system. It is a modified version of the unanimity theory, providing that reservations may be made by States but that a certain majority of other Contracting Parties has to agree to such reservations. Otherwise the reserving State would not be a party to the treaty.[89] This regime avoids the subjectivity of the compatibility test and prevents the application of the strict unanimity principle.[90] However, the proposal was finally rejected by the ILC, and is not incorporated in the Vienna Convention because States could not agree on the appropriate majority.[91]

Pan-American States practised a fourth system realising that the all or nothing approach of the unanimity principle was rather unrealistic.[92] Reservations were generally permissible, but a treaty would not come into force between a reserving State and an objecting State. This practice encouraged universality at the expense of the treaty's integrity.[93] The Pan-American system was criticised as being unworkable for so-called "normative" conventions, *e.g.*, treaties not only conferring bilateral rights and obligations upon Contracting Parties, but establishing a common regime not primarily based on reciprocity, such as a commitment to respect human rights. The objecting State to such a treaty would still have to apply the treaty in full; thus its objection is rendered ineffective, while the reserving State only has to carry out the convention subject to its reservation.[94]

Finally, there was the system outlined above, established by the Vienna Convention. It was based upon the majority opinion of the ICJ in the *Reservation Case*,[95] and it is a compromise between the traditional unanimity principle and the sovereignty theory of the old Communist bloc.[96] It intends to promote the universal acceptance of treaties *and* to give objecting States the

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88) *Reservation Case* [1951] I.C.J. Rep. 15 at 24.

89) Fitzmaurice, *Reservations to Multilateral Conventions*, 23-24.

90) *Ibid.*, 24-25.

91) Mendelson, *Reservations to the Constitutions of International Organizations*, 143.

92) Jennings, *General Course of International Law*, 535.

93) Mendelson, *Reservations to the Constitutions of International Organizations*, 142.

94) Fitzmaurice, *Reservations to Multilateral Conventions*, 14 and 16.

95) [1951] I.C.J. Rep. 15 at 29-30.

96) Sinclair, "Vienna Conference on the Law of Treaties" (1970) 19 ICLQ 47 at 60.

opportunity of treating the reserving State as not being a Contracting Party.[97] The approach allows a flexible regime on reservations, which appears necessary in an international community of about 200 States.

Today States rarely rely on the traditional principle of unanimity or on the sovereignty theory where the Vienna Convention does not apply. This is because since World War II an increasing number of multilateral treaties have been adopted by majority and it has thus become necessary to give States the possibility to make reservations whose permissibility does not depend on the unanimous consent of all other Contracting Parties.[98] Also, many countries that promoted the sovereignty theory in the past have considerably changed their policies and attitudes towards State sovereignty after the collapse of communism. To what extent the regime adopted by the Vienna Convention has had an impact on the development of rules of customary international law on the permissibility and legal effects of reservations remains an ongoing controversy, which cannot be resolved here. But even if one accepted the view that Articles 19-23 of the Vienna Convention do, in fact, reflect contemporary customary international law one would still be left with the uncertainties and gaps of this regime outlined above and there is still no consistent State practice to cure these uncertainties or to fill these gaps.[99]

International law does not contain a comprehensive set of norms on the permissibility and the legal effect of reservations.[100] Therefore, the best way of dealing with reservations is that

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[97]) Mendelson, *Reservations to the Constitutions of International Organizations,* 144.

[98]) Sucharipa-Behrmann, "The Legal Effects of Reservations to Multilateral Treaties" (1996) 1 ARIEL 67 at 69.

[99]) Greig, *Reservations: Equity as a Balancing Factor?*, 21 and Redgewell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties,* 278 on state practice regarding the legal effects of reservations incompatible with the purpose of the treaty.

[100]) This fact may have inspired the ILC to address the topic "The Law and Practice Relating to Reservations to Treaties" on which it has been working since 1993. The ILC agrees that there is no reason to reopen the text of the Vienna Convention and that it should primarily try to fill gaps and remove ambiguities of the system established by the Vienna Convention. However, ILC members argued on the approach of their study. Some members wanted to draft guidelines and model clauses, while others preferred the preparation of draft protocols to existing conventions or a code of practice. See: ILC, *Report of the Commission to the General Assembly: The Law and Practice Relating to Reservations to Treaties* (1995) II:2 YB of the ILC 100 at 103, 106-107, UN Doc.A/50/10 and ILC, *Report of the Commission to the General Assembly: Reservations to Treaties* (1997) II:2 YB of the ILC 44 at 52, UN Doc.A/52/10. The current work of the ILC focuses on five main issues: 1.) the definition of reservations, 2.) the quarrel between the "opposability" and "permissibility" schools, 3.) settlement of disputes, 4.) succession of States, and 5.) whether or not there should be a special regime for reservations to human rights treaties. See: ILC, *Report of the Commission to the General Assembly: The Law and Practice Relating to Reservations to Treaties,* 103. Interestingly, the last problem (5.) was taken up first because the Special Rapporteur felt that it was a matter of some urgency. He concluded that the reservations regime of the Vienna Convention was suited to the particular features of normative treaties, including human rights treaties. See: ILC, *Report of the Commission to the General Assembly: Reservations to Treaties* (1996) II:2 YB of the ILC 79 at 81-83, UN Doc.A/51/10. This view was shared by the other ILC members in their "Preliminary Conclusions on Reservations to Normative Multilateral Treaties". See: ILC, *Report of the Commission to the General Assembly: Reservations to Treaties* (1997), 57.

the Convention itself incorporates provisions regulating this matter.[101] An increasing number of modern treaties address the questions of reservations[102] to avoid relying on Arts. 19-23 of the Vienna Convention or facing an unclear state of customary international law on reservations. The 1982 UN Law of the Sea Convention, for example, explicitly regulates in Art. 309 that no reservations other than those explicitly permitted in other articles of this convention may be made.

The easiest and most radical solution would be to prohibit any reservation, an approach adopted by Art. 46 of the Energy Charter Treaty and by Art. 120 of the 1998 Statute of the International Criminal Court. However, this is not an acceptable option for two reasons. First, the Convention would be a comprehensive treaty addressing a wide variety of issues. If it prohibited any reservations, many States might not wish to accede to it because it would be a fixed and inflexible treaty regime. Secondly, the content of the treaty requires acceptance of some types of reservation. For instance, the treaty should adopt the concept of free admission of foreign investors.[103] However, it has to allow host States to make reservations to this concept in the form of country specific negative lists.[104] Otherwise the treaty would be acceptable to very few States, because almost all countries wish to exclude foreign investment from certain sectors. The Convention should therefore *specify which reservations* are permitted. This solution would at least prevent application of the compatibility test of Art. 19(c)[105] and of Art. 21 of the Vienna Convention,[106] because such a specified reservation is not one established in accordance with Art. 19(b). It would, however, not be sufficient for the treaty to simply list the *articles* to which reservations would be allowed. This is because the category of "specified reservations" under Art. 19(b) of the Vienna Convention is usually considered narrower than "specified articles" to which reservations are permitted.[107] The instrument should therefore clearly indicate *inter alia* that all Contracting Parties should be allowed to make a reservation to Art. X (admission of foreign

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101) Jennings, *General Course of International Law,* 541 and Anderson, *Reservations to Multilateral Conventions: A Re-examination,* 476-477 and Aust, *Modern Treaty Law and Practice*, 109. Disagreeing: Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties,* 279 arguing that "there is very good reason why States have ignored exhortations to consider a reservation clause in treaty negotiations". Redgwell thinks that political, cultural and economic considerations prevent States from concluding reservation clauses.

102) Denza, *Two Legal Orders: Divergent or Convergent?*, 277-278.

103) Chapter B II 1.

104) Chapter B II 2b.

105) Article 19(c) refers to cases other than those listed in Art. 19(a-b). See also: Bowett, *Reservations to Non-Restricted Multilateral Treaties,* 71.

106) This option would, however, still not regulate the legal effect of an impermissible reservation, unless States address this issue separately.

107) Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties,* 256 and Bowett, *Reservations to Non-Restricted Multilateral Treaties,* 70-71.

investors), to the effect that those domestic industries of each Contracting Party listed in Annex Y to the treaty shall not be open to any foreign investor.[108]

3. The Requirement of Compliance with Local Laws

Many instruments on FDI, including (model) BITs, RIAs, and the Guidelines, address the obligation of foreign investors to comply with domestic laws of the host State. While all instruments aim at requiring foreign investors to act in accord with local laws, they differ with respect to the degree of observance of local legislation.

Some model BITs, for instance, restrict their application to investments made "in accordance with its [the host State's] laws and regulations",[109] or define investments covered by it as investments which are "in accordance with the laws and regulations"[110] of the host State. The UK model BIT lacks such a provision. The US model BIT defines "covered investments",[111] without the requirement that such "covered investments" need to be made in accord with local legislation.

BITs in force offer a similar spectrum of provisions. Some employ the standard formula of demanding foreign investors to invest "in accordance with the laws and regulations" of the host State[112] or refer to investments made "in accordance with the applicable laws and regulations".[113] BITs concluded by the UK[114] and the US[115] lack such clauses. RIAs and sectoral agreements

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108) Other reservations may, for example, relate to country specific negative lists for industries, in which foreign investors shall be allowed to invest, but subject to certain restrictions, *e.g.*, limitations on ownership interests.

109) Swiss model BIT, Art. 2. Similarly, the German and Chilean model BITs refer to investments made "in accordance with its [*i.e.*, the host country's] legislation." See: German model BIT, Art. 2(1) and Chilean model BIT, Art. 2. This latter treaty contains in Art. 3(2) another clause on compliance with local laws: "Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party..."

110) Chinese model BIT, Art. 1(1).

111) US model BIT, Art. I(e).

112) Agreement Concerning the Encouragement and Reciprocal Protection of Investments between China and Peru, dated June 9, 1994, Art. 1.

113) Agreement for the Promotion and Protection of Investments between Japan and Hong Kong, dated May 15, 1997, Art. 10.

114) For example, Agreement for the Promotion and Protection of Investments between the UK and India, dated March 14, 1994, Art. 2 which deals with the BIT's scope of application. It does not state that only investments which are in compliance with local laws are covered. However, Art. 11 provides that investments shall be *governed by the law* of the Contracting Party in whose territory the investment is made. Again, there is no reference to any requirement of observance of these laws.

have no uniform provisions either. Some recent instruments, such as the Energy Charter Treaty are silent on the matter.

Compliance with local legislation is often a prerequisite for insurance for foreign investments. Article 12(d)(ii) of the MIGA Convention and Art. 3.09 of the Operational Regulations of MIGA, for instance, state that for an investment to be insured, it must comply with local laws.[116]

Guideline I(2) reads as follows: "The application of these Guidelines extends to existing and new investments established and operating at all times as *bona fide* private foreign investments in full conformity with the laws and regulations of the host State." Needless to say, that the Guidelines, unlike the instruments examined above, provide for one slight modification: *full* conformity with local laws.

The working group drafting the Guidelines justified the wording of Guideline I(2) by arguing that the assumption that the Guidelines would only envisage investments which were carried out in *complete* compliance with local laws, is *often* articulated in existing investment treaties.[117] Others emphasised that Guideline I(2) would make the Guidelines acceptable to host countries, and that the requirement of full compliance is supported by case law.[118] Finally, the wording of Guideline I(2) cannot cover minor violations of local laws because "obviously the principle of proportionality was meant to apply in this case".[119] Guideline I(2) does not, in this view, mean that minor violations of local legislation would result in the foreign investor losing protection under the Guidelines.

However, closer examination reveals that these justifications are not well founded and that the wording of Guideline I(2) is misleading.

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115) For example, Agreement Concerning the Encouragement and Reciprocal Protection of Investment between the US and Jordan, dated July 2, 1997, Art. I(e). This provision defines "covered investments", but lacks any reference to a requirement of observance of local laws. Other US BITs, such as the Treaty Concerning the Encouragement and Reciprocal Protection of Investment between the US and Turkey, dated December 3, 1985 refer indirectly in certain provisions to the requirement of observing local laws. For instance, Art. II(5) provides that "Companies which are legally constituted *under the appropriate laws and regulations* of one Party...shall be permitted to engage top managerial personnel of their choice, regardless of nationality." Art. II(4) states that: "*Subject to the laws* relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and remain in the territory of the other Party..." [Emphasis added].

116) Similarly, Art. 15(6) of the Convention Establishing the Inter-Arab Investment Guarantee Corporation sets forth that Arab investors need to obtain written approval of the competent official authorities of the host country for their investments before an insurance contract may be concluded with them. This approval may imply that the investment is made in accordance with the host country's laws, as otherwise it seems unlikely to be granted.

117) Working Group, *Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment,* published in Shihata, *Legal Treatment of Foreign Investment,* 193 at 200.

118) Sornarajah, *The International Law on Foreign Investment,* 215.

119) Shihata, *Legal Treatment of Foreign Investment,* 73.

If there were a requirement on full compliance with local laws it could easily be argued that, according to the ordinary meaning of the words, *full* compliance means *full* compliance, *i.e.*, even minor violations of local laws would result in a loss of protection of a given investment. Otherwise the word "full" would not be there.

If there were on the one hand, a requirement of *full* compliance, and on the other hand a "principle of proportionality" which excludes minor violations, it is not obvious that the latter prevails over the clear wording of the former. The Netherlands Executive Director at the IBRD pointed out that Guideline I(2) is problematic because it gives host States the possibility of taking *disproportionately* harmful measures against foreign investors for minor infringements of local laws.[120]

The argument that the concept of *complete* compliance with local legislation is *often* articulated in existing instruments on FDI[121] is doubtful. Few, if any, RIAs or BITs embody a clause demanding "full" or "complete" compliance with domestic laws. On the contrary, most instruments refer to "compliance with", or "observance of", national legislation. If the Convention required *full* compliance, it would depart from common wordings by insisting upon *full* compliance in every circumstance.

A future multilateral investment treaty should not incorporate a clause based upon Guideline I(2). Such a provision is open to abuse by host States to impose upon foreign investors disproportionate measures, such as revocation of a business license for minor infringements of local laws.[122] The instrument only needs to affirm that it shall apply to investments of investors of any Contracting Party in the territory of any other Contracting Party which are in compliance with the laws of that other Contracting Party.

To summarise:

1.) The Convention should clearly state that all BITs of any Contracting Party with any other Contracting Party are superseded by the present treaty.

2.) Termination of existing RIAs is not an acceptable option. The instrument therefore has to ensure that:

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120) Comments from the Office of the Netherlands Executive Director on the May 6, 1992 draft of the Guidelines, published in *Ibid.*, 423.

121) Working Group, *Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment*, published in *Ibid.*, 193 at 200.

122) See: *e.g.*, *Amco vs. Indonesia* (Merits) [1984] 89 ILR 405 at 483-493, where an American investor failed to invest the entire amount of money as stated in its application for a license to operate an investment. The license was subsequently revoked by Indonesian authorities. The ICSID tribunal held that, given the complexities of accounting in this case and the fact that the license was revoked without warning, the insufficiency of the investment made was not material enough to justify revocation of the license.

(i) present and future RIAs which guarantee more favourable treatment to foreign investors shall prevail over the treaty, and

(ii) Contracting Parties which are parties to a RIA shall have no obligation to grant to non-RIA States – through the application of the MFN clause – preferential treatment applicable between RIA members.

3.) The treaty should explicitly allow *inter se* agreements which provide more favourable treatment to foreign investors than the Convention. In addition, it should define which provisions are so crucial that contracting out of them to the detriment of foreign investors is not acceptable.

4.) The Convention has to specify permissible reservations.

5.) The instrument should only apply to investments made in compliance with the domestic laws of the host State.

II. Admission of Foreign Direct Investment - Guideline II

1. The Concept of Free Admission of FDI

Free admission[1] of FDI is one of the cornerstones of a positive framework for investments. The concept of free admission means that foreign investors are permitted to invest freely in a given jurisdiction, without being subject to substantial legal restrictions or having any other unreasonable or discriminatory measures imposed upon them by the host State. Countries attempting to attract FDI often rely on the concept of free admission in their national investment laws or in treaties they conclude.

Provisions in domestic investment codes emphasising this concept confirm, for example, that "Foreign investment... is permitted and based on conditions no less favourable than those that apply to domestic investors...".[2] Other jurisdictions adopt a more restricted approach. They list specific industries in which foreign investors may invest,[3] set a minimum entry requirement regarding the size of an investment,[4] or generally state that admission of FDI is subject to domestic legislation.[5]

The concept of free admission of FDI is further reflected in numerous BITs[6] and RIAs. Article 5 of the Unified Agreement for Investment of Arab Capital in the Arab Countries, for

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[1]) The terms "admission" and "establishment" are used interchangeably in this paper. They mean the right of entry of a foreign investor. Certain authorities, by contrast, distinguish admission from establishment. The former means the right of entry, while the later deals with the type of presence that may be permitted. See: UNCTAD, *Series on Issues in International Investment Agreements: Admission and Establishment* (Geneva: UN, 1999), 12, UN Doc.UNCTAD/ITE/IIT/10(Vol.II). However, neither BITs nor RIAs (see: *e.g.,* NAFTA (Art. 1102(1) and Art. 1103(1)) adopt this terminology. NAFTA and US BITs usually only use the word "establishment" (to mean the right of entry) without any reference to "admission".

[2]) Law on Foreign Investment in Albania, 1993, Art. 2(1).

[3]) National Investment (Promotion and Protection) Act of Tanzania, 1990, Art. 19 and Schedules A-C.

[4]) Foreign Investment Act of Namibia, 1990, Art. 5.

[5]) Foreign Investment Law of Mongolia, 1990, Art. 3.

[6]) Most BITs, however, do not contain a separate article on admission. They deal with admission in the general clause on "encouragement and promotion" of FDI. See: *e.g.,* Agreement for the Promotion and Protection of Investments between the UK and India, dated March 4, 1994, Art. 3(1). BITs concluded by the US usually regulate admission of a foreign investment together with its operation and management in the provision on treatment. See: *e.g.,* Treaty Concerning the Encouragement and Reciprocal Protection of Investment between the US and Jordan, dated July 2, 1997, Art. II(1). Some Australian BITs have a special provision on admission. See: *e.g.,* Agreement on the Reciprocal Encouragement and Protection of Investments between Australia and China, dated July 11, 1988, Art. 2(1).

instance, codifies that "Arab investors shall be free to invest in the territory of any Contracting State,...".[7]

Guideline II(3) also embodies the principle of free admission. As investment flows are to be promoted under the proposed Convention,[8] it is obvious that this concept must somehow be incorporated into the instrument. However, matters become disputable where restrictions on the general concept of free admission need to be defined.

2. Restrictions on Free Admission of FDI

Exceptions to the concept of free admission of FDI may be divided into two major categories: 1.) restrictions applicable to both national and foreign investors,[9] and 2.) restrictions applicable to foreign investors only. The former category includes restrictions on account of public policy, public health and the protection of the environment.[10] Such exceptions are often set forth in numerous national laws, such as land use and planning laws, rules on manufacture of tobacco and alcohol products, and regulations on the protection of the environment.

Restrictions applicable only to foreign investors are controversial. It seems difficult to find the appropriate balance between legitimate exceptions to admission of FDI on the one hand, and the need for open policies on entry to promote investment flows on the other. Guidelines II(3) and II(4) list three exceptions to the Guideline's general approach to free admission: a) investments constituting a threat to national security, b) investments in sectors reserved by the laws of the host State to its nationals on account of the State's economic developmental objectives or to strict exigencies of its national interest, and c) investments subject to pre-admission performance requirements.

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[7]) Unified Agreement for the Investment of Arab Capital in the Arab Countries, 1980, Art. 5. This general statement, however, is subject to certain exceptions.

[8]) See supra: chapter A II. See also: Department of Trade and Industry (UK), *International Investment: The Next Steps,* para. 6 (Paper prepared by the Department of Trade and Industry, July 21, 1999) arguing that there is a link between fewer barriers to FDI and investment flows.

[9]) As this study focuses on FDI, restrictions which equally apply to foreign and domestic investors are not analysed here.

[10]) See: Guideline II(5).

a) National Security

Nearly all investment treaties prevent foreign investors from certain investment activities which would constitute a threat to the national security of the host State. National investment codes,[11] model BITs,[12] BITs in force[13] and RIAs[14] reflect this generally accepted restriction. Guideline II(4)(a) declares that FDI inconsistent with clearly defined[15] requirements of national security, as contained in the legislation of the host State, may be refused admission. It appears not to be negotiable for many States to depart from this widely recognised restriction.[16] Thus, the Convention should allow each Contracting Party to limit, in accordance with its laws, admission of FDI in the interest of its national security.[17]

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[11]) See: *e.g.,* Foreign Investment Act of Cuba, 1995, Art. 10 and Law on Foreign Investment of Albania, 1993, Art. 10.

[12]) See: *e.g.,* US model BIT, Art. XIV.

[13]) See: *e.g.,* Agreement for the Promotion and Protection of Investments between the UK and India, dated March 4, 1994, Art. 11 and Treaty Concerning the Encouragement and Reciprocal Protection of Investment between the US and Jordan, dated July 2, 1997, Art. XIV(1).

[14]) See: *e.g.,* North American Free Trade Agreement, Art. 2102(1)(b) and Energy Charter Treaty, Art. 24(3)(a).

[15]) It remains questionable whether Sec. 5021 of the 1988 US Omnibus Trade and Competitiveness Act amending Sec. 721 of the US Defence Production Act, known as the so-called "Exxon Florio" provision, is in conformity with Guideline II(4)(a). This provision gives the US President wide powers to suspend or prevent mergers and acquisitions involving US nationals or US corporations, which may affect US national security interests. The EC has criticised this provision. It is very wide. The key criterion, *i.e.,* "national security", is not defined. The same applies to the degree of "foreign" control involved in the proposed merger or acquisition. In addition, there is no time limit on the presidential actions and such actions are not subject to judicial review. Therefore, the Exxon Florio provision is open to abuse. For more details on the concerns of the EC, see: EC, *Statement on US Policy on Foreign Direct Investment,* February 18, 1992; reprinted in (1992) 31 ILM 467-468. For a US statement on this subject see: United States, *President's Statement Announcing United States Foreign Direct Investment Policy,* December 26, 1991; reprinted in (1992) 31 ILM 488-489.

[16]) The exception of national security raises the question of whether this is a "self-judging" concept, or whether an invocation of such an exception can be challenged by dispute settlement. See: Engering, *The Multilateral Investment Agreement*, 152. Most investment treaties do not address this detail. However, the Protocol to the Treaty Concerning the Encouragement and Reciprocal Protection of Investment between the US and the Russian Federation, dated June 17, 1992, Art. 8 explicitly states that measures undertaken by each Contracting Party to protect its essential security interests are self-judging. By contrast, in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) [1986] I.C.J. Rep. 1 at 116, the ICJ rejected the argument of the US that "essential security interests" as referred to in Art. XXI(1)(d) of the 1956 US-Nicaragua FCN treaty are not subject to judicial review.

[17]) Many BITs, NAFTA (Art. 2102(1)(b)) and the Draft Multilateral Agreement on Investment (version: February 14, 1998, Sec. VI(2a)) allow Contracting Parties to take *any* measures they consider necessary for the protection of their essential security interests. Thus, these measures are not limited to restrictions on admission, but equally affect post-admission investment activities. See: *e.g.,* Treaty Concerning the Reciprocal Encouragement and Protection of Investments between the US and Turkey, dated December 3, 1985, Art. XIV(1).

b) Economic Developmental Objectives and other Restrictions

(i) Restrictions on Free Admission in other Instruments

All investment treaties restrict admission of FDI for reasons other than on account of national security. Countries may, for example, prevent admission of foreign investors because they wish to protect weak national industries from international competition. States usually prohibit FDI in sectors which are strategic industries, for instance, nuclear power production, or in sectors seen as crucial for the preservation of their cultural heritage, such as the film and TV industries.[18] These restrictions often exclude or limit FDI in certain sectors, generally require foreign investors to obtain special approvals, permits or business licenses before investing in any industry, or impose other performance requirements upon foreign investors. There is much variation in the types and extent of these limitations. For instance, some recent national investment codes[19] specifically list sectors in which FDI is either forbidden or restricted. An illustrative example is the 1998 Foreign Investment Law of Mexico, which provides in its Arts. 5-8 for detailed lists of prohibited or restricted sectors. Foreign investors may, for instance, hold only a minority ownership interest in certain Mexican enterprises.[20] Other investment codes do not list individual sectors in which FDI is limited or excluded, but generally require formal approvals for *all* FDI, such as permits and licenses before *any* investment may be made.[21] These latter laws

[18]) Media restrictions are common because States wish to control the diversity of information within their territory. For example, under the 1934 US Federal Communications Act, all radio and TV broadcasting requires a license from the Federal Communication Commission. Such license cannot be granted to foreign individuals, corporations and governments. The license may not be granted to any US corporation, which has a foreign director or officer, or in which more than 20% of the stock is voted or controlled by foreigners. See: 47 U.S.C. 310(a)(b).

[19]) For an overview of restrictions on admission of FDI in national investment laws, see: Parra, *Principles Governing Foreign Investment as Reflected in National Investment Codes*, 312-318.

[20]) Foreign Investment Law of Mexico, as amended 1998, Arts. 7-8.

[21]) Provisions requiring foreign investors to obtain numerous approvals, licenses and alike before investing are knows as "screening provisions". This approach was adopted, for example, by the Foreign Investment Law of Mongolia, 1990, in particular Art. 6. See also: Foreign Investment Act of Cuba, 1995, Chapter VIII, Arts. 20-25 and Foreign Investment Law of Angola, 1994, Chapter III, Arts. 18-45 and accompanying Regulations of the Foreign Investment Law, Arts. 11-31.

reflect the emphasis of some countries on the control of inward investment flows.[22] Finally, some national investment laws combine these two approaches.[23]

BITs offer a similar spectrum of restrictions to admit FDI. Most BITs do not contain an express provision on admission. They state that investments have to be made in accord with the laws of the host country. The obligation to admit investments is thus subject to any restrictions on admission, which may exist in the relevant laws.[24] US BITs, by contrast, regulate admission in the provision on treatment. They usually provide for the better of either national or MFN treatment[25] for both establishment of an investment and post-admission investment activities. This unique provision in US BITs requires parties to such treaties to address exceptions to admission in these BITs. Otherwise foreign investors would be free to establish an investment in any industry of the other Contracting Party open to domestic investors. Numerous US BITs classify specific sectors in which investors of the other Contracting Party are not granted national or MFN treatment as regards establishment of an investment.[26]

RIAs deal with restrictions on admission in a similar manner to BITs. Recent agreements, such as NAFTA, follow the approach of US BITs. They cover establishment of an investment together with its operation and management in the clause on treatment.[27] Exceptions to admission are contained in appendices to the instrument.[28] Other RIAs follow the structure of

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[22]) For economic and political policies of States following this approach, see: Shihata, "New Approaches to the Legal Treatment of Entry of Foreign Investment" in Shihata, *The World Bank in a Changing World: Selected Essays and Lectures,* Vol. II, (The Hague, London, Boston: Martinus Nijhoff Publishers, 1995) 391 at 394-396.

[23]) National Investment (Promotion and Protection) Act of Tanzania, 1990, Art. 19 and Schedule A-C and Part III of the law.

[24]) See: *e.g.,* Agreement on the Reciprocal Promotion and Protection of Investments between Australia and Vietnam, dated March 5, 1991, Art. 3(1) and Agreement for the Promotion and Protection of Investments between the UK and India, dated March 4, 1994, Art. 3(1). These BITs seem to establish a presumption in favour of admission. However, in fact they effect no change on admission over what would then be the case had the BIT not been concluded. Admission of FDI would then only be subject to local laws anyway. See: Shihata, *New Approaches to the Legal Treatment of Entry of Foreign Investment,* 402. However, if the Convention adopted this approach, it is arguable that host States would be precluded from obviously discriminatory restrictions resulting in a total ban on admission because such conduct would frustrate the object and purpose of the instrument. For an overview of restrictions on admission in BITs, see: Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties,* 232-233.

[25]) For more details on these types of treatment, see infra: chapter B III 1a-b.

[26]) These exceptions are usually addressed in an Annex or Protocol to US BITs. See: *e.g.,* Annex to the Treaty Concerning the Encouragement and Reciprocal Protection of Investment between the US and the Russian Federation, dated June 17, 1992, and Annex to the Treaty Concerning the Encouragement and Reciprocal Protection of Investment between the US and Jordan, dated July 2, 1997.

[27]) North American Free Trade Agreement, Arts. 1102-1103. For other RIAs adopting this approach see: UNCTAD, *Series on Issues in International Investment Agreements: Most-Favoured-Nation Treatment,* 15. See also: Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. III(1).

[28]) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IX and country specific Schedules in Annex A. As the MAI was not finalised, no country specific negative lists are available. North American Free Trade

non-US BITs, addressing admission of FDI in a general provision on "promotion and protection of investments".[29] Admission and any limitations on entry of FDI are then subject to local legislation.[30] The Energy Charter Treaty employs a third, intermediate method. It provides in its Articles 10(2) and 10(5) on "Promotion, Protection and Treatment of Investments" that Contracting Parties shall *endeavour* to accord national and MFN treatment as regards the entry of investments of any investor of any other Contracting Party.[31]

Finally, another approach in handling restrictions on admission was suggested by Reading. He argues that the complex and arduous process of negotiating sectors forbidden or restricted, or any other admission-related limitations, should be left to the host State and individual interested foreign investors. Reading highlights that this method guarantees a high degree of flexibility. He also emphasises that this approach was in fact accepted by some countries, such as Malaysia and Indonesia, in BITs they concluded.[32]

However, there are certain difficulties with this concept. It lacks transparency and predictability. An investor interested in a certain host State would always have to consult or start negotiations with governmental officials of this State. Small investors, in particular, may not want to allocate any resources to such negotiations and consultations only to find out that the

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Agreement, Annex I, Art. 1(a) and (b), Annex II, Art. 1(a) and (b), Annex III and Annex IV. The technicality of country-specific negative lists as incorporated in NAFTA and the draft MAI is known as the "top-down" or "opt-out" approach. Compare: GATS, Art. XVI and Art. XVII adopting the "bottom-up" or "opt-in" approach by listing sectors, in which countries grant market access and national treatment to other Contracting Parties. The "bottom-up" approach has not been considered as a possibility during MAI negotiations, probably because developed countries, particularly the US, would oppose it as it would provide for less liberalisation compared to their BITs.

29) See: *e.g.*, Agreement for the Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, Arts. 2-3.

30) *Ibid.*

31) The reason for this provision is the fact that numerous States of the former Soviet Union negotiating the Energy Charter Treaty were at a stage of transition. They did not yet have adequate revised legislation denying national or MFN treatment in sensitive industries. A commitment to national or MFN treatment regarding admission of foreign investors and any exceptions to such treatment was thus not negotiable as long as the actual substance and procedure of treatment under domestic law was uncertain. See: Fatouros, *Towards an International Agreement on Foreign Direct Investment?*, 194 and Bamberger, Linehan and Wälde, "The Energy Charter Treaty in 2000: In a New Phase" (2000) 7:1 CEPMLP Internet Journal 1 at 4, published at http://www.dundee.ac.uk/cepmlp/journal/html/article7-1.html. Contracting Parties therefore agreed to enter into a supplementary treaty regulating admission of foreign investors (Energy Charter Treaty, Art. 10(4)), which was supposed to be negotiated and opened for signature by January 1, 1998. As of November 30, 2001 no such agreement was concluded, though a draft text of the supplementary treaty has been prepared. It grants national and MFN treatment to foreign investors at the admission stage, subject to certain exceptions, such as those relating to privatisation measures. For reasons for the failure to conclude the supplementary treaty see: Bamberger, Linehan and Wälde, *The Energy Charter Treaty in 2000: In a New Phase*, 26-27.

32) Reading, "The Bilateral Investment Treaty in ASEAN: A Comparative Analysis" (1992) 42 Duke L.J. 679 at 701-702. However, this approach was primarily suggested for US-ASEAN BITs.

proposed investment is either completely prohibited or subject to broad restrictions.[33] Secondly, it appears that this approach would lead to even more corruption in some host States. If foreign investors were to negotiate with host States sectors, in which they are allowed to invest, they might attempt to bribe governmental officials to invest in high profit industries, such as the banking or insurance sector, which are normally not completely open to foreign investors. Finally, it seems that Reading's suggestion lacks support in practice. Instruments which implement this approach are the exception.[34] It is therefore unlikely that a multilateral investment treaty would leave admission for foreign investors to negotiate case by case.

(ii) Sectoral Restrictions and Prohibitions in the Guidelines and in the Proposed Convention

Guideline II(4)(b) incorporates an exception to the general approach of free admission set forth in Guideline II(3). It reads as follows: "Without prejudice... to Section 3 above, a State may... refuse admission to a proposed investment... which belongs to sectors reserved by the law of the State to its nationals on account of the State's economic development objectives or the strict exigencies of its national interest."

This provision was subject to controversy when the Guidelines were drafted.[35] Developing countries insisted on a clause permitting restrictions on admission of FDI in areas reserved for nationals, on account of the host States' economic developmental objectives.[36] Developed States, by contrast, argued that such a provision is counterproductive. The Netherlands, for instance, stressed that a Guideline allowing host States to restrict admission of FDI based on its contribution to the State's economic development is vague and open to

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[33]) If it is a big investment, however, there would normally be negotiations between the host State and the investors over numerous issues, such as investment incentives or performance requirements.

[34]) Certain early German BITs adopted this approach; *e.g.*, Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, dated November 25, 1959 allowing in Art. 2(1) discriminatory measures with respect to the admission of foreign investors if such measures were agreed upon by the investor and the host State. It seems likely that this provision was incorporated into the BIT on the request of Pakistan. There was no such provision in a BIT between the Federal Republic of Germany and Thailand concluded about two years later, *i.e.*, on December 13, 1961. Admission of FDI was subject to domestic legislation of the Contracting Parties, and discriminatory treatment of foreign investors was prohibited. See: Treaty between the Federal Republic of Germany and Thailand Concerning the Promotion and Reciprocal Protection of Investments, dated December 3, 1961, Art. 1(1) and Art. 2.

[35]) For an analysis of the history of Guideline II(4), see: Shihata, *Legal Treatment of Foreign Investment*, 73-77,107-110,114,128-129,140-141.

[36]) *Ibid.*, 75.

misinterpretation.[37] They recommended deletion of this clause. The US maintained that refusal of admission of FDI is unlikely to be conducive to the economic development of the host country[38] and that: "Blocking Foreign Investments if they are unlikely to be conducive to a country's 'economic development' really means that foreign investment could be 'screened' for any purpose whatsoever."[39]

The current wording of Guideline II(4)(b) aims to accommodate both developing and developed States. It authorises host States to refuse admission of FDI inconsistent with their developmental objectives, but only if the investment was made in a sector "reserved by the law of the State to its nationals on account of the State's economic development objectives...".[40] In earlier drafts of this Guideline host States could refuse admission of foreign investments if, in the opinion of the host government, such investments conflicted with its developmental objectives. There was no reference to the local laws of the host State.[41]

The structure and wording of Guidelines II(3) and II(4)(b) are, however, ambiguous. Guideline II(3) suggests the restrictive list approach. This concept means that a State lists, in its domestic legislation, sectors which are prohibited or restricted to foreign investors. National laws may confine foreign investors to a minority interest in enterprises engaged in certain industries, such as air transport and financial services.[42] However, limiting or excluding FDI in certain sectors defined in domestic legislation *only,* is problematic. First, these laws can change quickly,[43] particularly in transitional countries, such as Central Asian and former Communist States in Eastern Europe. In some jurisdictions the fourth generation of investment laws within a

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[37]) Comments from the Office of the Netherlands Executive Director to the May 6, 1992 draft of the Guidelines; published in *Ibid.,* 423-424.

[38]) Memorandum Outlining the US Concerns Relating to the Legal Framework for the Treatment of Foreign Investment, dated May 28, 1992; published in *Ibid.,* 413-414.

[39]) *Ibid.,* 414.

[40]) Guideline II(4)(b).

[41]) Guidelines II(5)(i) and (ii) of the May 6, 1992 draft of the Guidelines; published in Shihata, *Legal Treatment of Foreign Investment,* 401-411.

[42]) Foreign Investment Law of Mexico, as amended 1998, Arts. 7-8.

[43]) One way to circumvent this difficulty would be to make the investment subject to the local laws in force at the time when the proposed Convention comes into force. This approach, however, is hardly used in practice because it is rather inflexible. Subsequent liberalisation in the laws of host States would be of no benefit to foreign investors. One of the very few instruments, which employed this method was the Agreement between the UK and Lesotho for the Promotion and Protection of Investments, dated February 18, 1981, Art. 2(1).

period of ten years is currently in place.[44] Secondly, the applicable laws may not be easily accessible to foreign investors and other States. The drafters of the Guidelines recognised this difficulty in Guideline II(6), encouraging States to publish a handbook containing their relevant investment legislation and policies. However, this request seems overambitious. The volume of relevant legislation, and the fact that the handbooks need to be updated regularly to remain useful,[45] may prevent any such handbook from ever being published.

The current wording of Guideline II(4)(b) is no improvement compared to earlier drafts. It still allows host States to refuse admission of FDI on account of economic developmental objectives, as long as these prohibited investments are defined by domestic laws. However, a State can always change and amend its own laws and argue that such amendments reflect adjustments on account of its economic development. Thus, in practice, host States can restrict admission for whatever purpose. The only difference is that under earlier drafts of the Guidelines a State could refuse admission of FDI if, in the opinion of its government, such investment was not conducive to its economic development. Now it can still exclude the very same investment as long as it defines it as "prohibited" under its own laws. The wording of Guideline II(4)(b), qualifying Guideline II(3), is therefore pointless and should not be incorporated into the treaty.

Shihata argued that negative lists defining prohibited and restricted industries may - just as a general provision giving host States wide discretion to limit admission – be counterproductive if they are too long or broad in their sectoral coverage.[46] However, practice has proved that properly drafted long negative lists are useful. For example, Annexes I-IV to Arts. 1102-1103 of NAFTA, listing exceptions to national and MFN treatment are rather long. Yet, they provide for an *exhaustive* list of restrictions and they guarantee transparency.

The Convention should not rely on exceptions to admission of FDI defined by local laws of host States. It needs to provide itself for country specific negative lists. Sectors, prohibited or restricted for foreign investors, should be listed in the form of specified reservations[47] to the

[44]) For example, the Law on Foreign Investment in Vietnam, enacted in 1987 was amended in 1990, 1991, 1992 and 1996.

[45]) See: International Finance Corporation (IFC) comments on the initial draft of the Guidelines; published in Shihata, *Legal Treatment of Foreign Investment,* 100-101.

[46]) Shihata, *New Approaches to the Legal Treatment of Entry of Foreign Investment,* 399 and UNCTAD, *Series on Issues in International Investment Agreements: Admission and Establishment,* 42.

[47]) For more on reservations, see supra: chapter B I 2.

articles on admission and treatment[48] in an annex to the treaty. This approach best reconciles the interests of both developed and developing States. It allows developing countries to implement their developmental programmes by choosing which industries they close or restrict for foreign investors on account of their development objectives. At the same time it accommodates developed States because it guarantees transparency better than permitting host States generally to screen inward FDI could achieve.

Should the Convention contain a standstill clause?[49] A standstill clause is a provision that prohibits Contracting Parties from adding any additional sectors to their country specific negative lists after the Convention has been concluded.[50] It ensures that country specific negative lists cannot be subsequently enlarged by a Contracting Party to the detriment of foreign investors. Contracting States would remain committed to the level of liberalisation agreed upon in the treaty.[51] Investors could thus easily assess whether or not a given investment in a particular industry is prohibited or restricted in a certain country. A standstill clause creates predictability. On the other hand, such a provision may prevent developing countries from implementing new economic programmes in the future, *e.g.*, to exclude FDI in sectors previously open to foreign investors. There are different approaches to such future limitations and prohibitions. One option is to allow Parties to add sectors to their country specific negative lists as they please, provided that they notify other Contracting Parties.[52] This solution, however, renders the standstill clause pointless. Each State could add whatever and as many sectors as it wants. Other Contracting Parties would not know in advance which industries might by restricted or prohibited in future. A second option is to permit the amendment of country specific negative lists as long as there is no increase in non-conformity with the concept of free admission.[53] This approach could again be

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48) Restrictions to certain sectors are usually not limited to the admission stage, but equally affect post-admission investment activities. Thus, measures adopted by a Contracting Party may be inconsistent with the national treatment or MFN clause of the treaty with respect to the operation of an investment.

49) A standstill clause was intended to be included into the MAI. See: Engering, "Keynote Address" in OECD, *Multilateral Agreement on Investment: State of Play in April 1997, OECD Working Paper, Vol. V:51* (Paris: OECD, 1997) 6 at 9.

50) Standstill clauses usually affect both admission and post-admission treatment of FDI. See: Messing, "Towards a Multilateral Agreement on Investment" (1997) 6:1 Transnational Corporation 123 at 131.

51) Engering, *The Multilateral Investment Agreement*, 152.

52) See: *e.g.*, Treaty between the US and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, dated June 17, 1992, Art. II(1).

53) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IX(b) and North American Free Trade Agreement, Art. 1108(1)(c) for *existing* measures.

coupled with a notification requirement. Its deficiency is that an "increase in non-conformity" is impossible to measure if it comes to replacing sectors from country specific negative lists. NAFTA adopts a third approach. The treaty lists in its Annex II sectors, in which Contracting Parties may adopt new or more restrictive measures *in the future.* This technique seems preferable for two reasons.[54] First, it guarantees explicitness, and it avoids vague interpretations on whether or not the introduction of new sectors prohibited or restricted for foreign investors, perhaps replacing old sectors, amounts to an "increase in non-conformity". Secondly, the regime has already been successfully implemented in practice. Admittedly, this approach has the drawback that States would probably attempt to keep as many sectors open for future restrictions or prohibitions as possible.

A rollback provision, *i.e.,* a clause guaranteeing the gradual removal of some sectors from country specific negative lists over a certain period of time, would also assist in predicting future developments in investment laws and policies of host States.[55] However, negotiations on the draft MAI proved such a provision to be currently unrealistic. Many States, particularly developing countries, are unlikely to commit themselves to liberalise their foreign investment regime further in the future on a strict timetable imposed upon them by other States. In addition, rollback clauses are difficult to negotiate. A small number of States may agree upon schedules for rollback, but many countries are probably unable to consent to fixed timetables. This is because such schedules would need to be adjusted for each State, depending on its current stage of development. Further liberalisation, otherwise achieved by rollback, could subsequently be negotiated after the instrument has been in force for a couple of years, and Contracting Parties intend to revise it. This approach would encourage more States to sign the treaty.

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[54]) Opponents of country specific negative lists would again argue that such lists for future measures are too complex and long, creating a "Swiss cheese", with more holes than cheese, *i.e.,* the exceptions become the rule and thereby undermine the concept of free admission. See: Muchlinski, *The Rise and Fall of the Multilateral Agreement on Investment: Where Now?,* 1042 on difficulties of the MAI in this respect.

[55]) Messing, *Towards a Multilateral Agreement on Investment,* 131.

(iii) Performance Requirements in the Guidelines and in the Proposed Convention

Performance requirements (PRs) are measures imposed upon foreign investors by host States. PRs take different forms. They range from screening provisions,[56] export requirements, import limitations or local content requirements to demands concerning the transfer of technologies. Some PRs qualify as TRIMs, and are therefore phased out under the TRIMs Agreement.[57] PRs which do not qualify as TRIMs, such as requisitions for technology transfer, are allowed under international law and usually regulated in domestic laws of host States.

PRs are not unique to the admission of FDI, but can equally apply to post-admission investment activities. For example, screening provisions, such as extensive feasibility studies of a proposed investment or substantial licensing and approval obligations, affect the admission of an investment, whereas trade-balance requirements have an impact on its operation.

The Guidelines address PRs only in Guideline II(3) with respect to PRs on admission,[58] without specifically considering post-admission PRs in the Guideline on treatment. Guideline II(3) suggests including screening and licensing requirements in country specific negative lists. These PRs should form part of the Convention itself.[59] For the reasons outlined in the previous section, it would not be sufficient to list them only in the domestic laws of Contracting Parties. Guideline II(3) also states that introducing other admission-related PRs is generally counterproductive and may result in evasion or corruption. Should the proposed Convention restrict PRs other than those indicated in Guideline II(3)?

Most BITs,[60] RIAs[61] and multilateral instruments[62] do not specifically deal with PRs. PRs are indirectly covered by the provision on treatment. For example, if an instrument grants

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56) A screening provision is a pre-admission requirement imposed upon foreign investors by host States to obtain certain licenses, permits, governmental approvals, etc., or to undertake feasibility studies of the proposed investment together with the host State. For more details, see: Sornarajah, *The International Law on Foreign Investment,* 100-104.

57) Typical PRs which qualify as TRIMs are, for instance: import limitations, export requirements and local content requirements. See: Annex to the Agreement on Trade-Related Investment Measures. For more details on this instrument, see supra: chapter A IV 5b.

58) Guideline II(3) refers to "...performance requirements introduced as conditions of admission... . Such performance requirements often discourage foreign investors from initiating investment..."

59) It needs to be stressed that this requirement affects screening provisions, which only apply to foreign investors. Country specific negative lists should not include provisions contained in the domestic laws of Contracting Parties requiring *both* domestic and foreign investors to obtain general business licenses, permits, etc., in the host State, which would be impractical to incorporate into the Convention.

60) See: *e.g.,* Treaty between the Federal Republic of Germany and Jordan Concerning the Encouragement and Reciprocal Protection of Investments, dated July 15, 1974 and Agreement between Australia and China on the Reciprocal Encouragement and Protection of Investments, dated July 11, 1988.

national treatment to established foreign investors, the respective host State cannot impose any PRs on foreign investors only, as such practice would violate the national treatment provision. The exception to this general approach is instruments concluded by the US. Most US BITs[63] and NAFTA[64] specifically prohibit certain PRs.[65] Writers justify these interdictions by several reasons: 1.) PRs need to be eliminated because they are artificial trade distortions;[66] 2.) The prohibition of PRs guarantees greater entrepreneurial autonomy, since certain sourcing and sales decisions are made by the investor, not by the host State;[67] 3.) PRs have to be regulated because general provisions on admission and treatment do not always offer adequate safeguards against PRs,[68] *e.g.,* import limitations may be imposed equally upon both domestic and foreign investors; and 4.) PRs which mandate the transfer of technology are counterproductive because they make foreign investors reluctant to transfer technology beyond what is absolutely necessary, or to upgrade the technology content of local production.[69]

Closer examination reveals that the Convention does not need to deal with PRs other than those already mentioned in Guideline II(3).

Typical PRs are already addressed in and phased out under the TRIMs Agreement. Given the large number of States parties to the WTO Agreement[70] and its related instruments,

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61) See: *e.g.,* Unified Agreement for Investment of Arab Capital in the Arab Countries, 1980 and Agreement for Promotion and Protection of Investment Between the ASEAN Countries, 1987.

62) See: *e.g.,* Energy Charter Treaty.

63) See: *e.g.,* Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. VI. Compare: Treaty between the US and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, dated June 17, 1992, Art. II(5) for a narrower provision.

64) North American Free Trade Agreement, Art. 1106.

65) PRs usually prohibited include local content requirements, import limitations, export requirements or limitations, sales limitations, demands related to the transfer of technology and to the conduct of research. See: *Ibid.* and Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. VI and Treaty between the US and Turkey Concerning the Encouragement and Reciprocal Protection of Investment, dated December 3, 1985, Art. II(7).

66) Norton and Bloodworth (eds.), *NAFTA and Beyond: A New Framework for Doing Business in the Americas* (London, Dordrecht, Boston: Martinus Nijhoff Publishers, 1995), 92.

67) *Ibid.*

68) Shenkin, "Trade Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty" (1994) 55 U.Pitt.L.Rev. 451 at 580.

69) Kleitz, "Trimming Investment Disincentives" (1990) 162 The OECD Observer 23 at 25-26.

70) For a list of parties, see: Appendix D.

there is no reason why the prohibition of PRs which qualify as TRIMs should be duplicated in a multilateral investment treaty.

There are PRs which are not defined as TRIMs. A host State may, for instance, require an investor to carry out a particular percentage, level or type of research and development in its territory.[71] Such PRs are not forbidden under international law. Authorities who strongly advocate the elimination of all PRs often ignore the fact that, in practice, PRs do not stand alone. They are in many instances coupled with investment incentives.[72] For example, a foreign investor may *voluntarily* conduct research in the host State if it grants generous incentives to him, *e.g.,* tax holidays, for doing so. If the Convention were to prohibit PRs currently allowed under international law, it would create an isolated regulation of *one* aspect, while ignoring other factors interrelated with PRs.

One could argue that currently unregulated PRs, which may qualify as TRIMs, might be detrimental to foreign investors. The illustrative list of TRIMs in the TRIMs Agreement is not exhaustive, and the entire TRIMs Agreement only applies to trade in goods, not trade in services. Creative governments may therefore invent new TRIMs not (yet) covered by the TRIMs Agreement. However, the overall investment climate of a State is not only determined by its approach to PRs. Numerous other aspects play an important role. The country's infrastructure, its general investment policies, its legal framework, its economic and political stability and its natural resources are decisive.[73] As most countries want to attract FDI, there is little likelihood that States will impose extensive PRs upon foreign investors without adequately setting off this disadvantage by offering generous investment incentives.

The argument that PRs related to technology transfer need to be forbidden, because they result in foreign investors transferring old and out-dated technology to host States, is not valid either. In highly competitive globalised world markets, investors cannot afford to transfer out-dated technology to their operations abroad, as such a practice would usually undermine these investors' competitiveness.

There is no need to prohibit non-admission related PRs in the Convention. Each State is free, within the limits set by international law, to adopt its own investment policy, which is *inter alia* reflected in its approach to PRs.

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71) See: Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. VI(f).

72) Moran, *The Impact of TRIMs on Trade and Development,* 63. For more details on investment incentives, see infra: chapter B III 3.

To summarise:

1.) The Convention should require free admission of FDI, subject to certain widely accepted exceptions, such as reasons of national security.

2.) Sectors prohibited or restricted to foreign investors should, for the sake of predictability and precision, be listed in country specific negative lists as suggested by Guideline II(3). The same applies to any admission-related PRs, such as screening or licensing requirements.

3.) Country specific negative lists should form part of the Convention itself, preferably in the form of an Annex, rather than requiring reference to changeable domestic laws.

4.) Guideline II(4)(b) is pointless and should not be included in the Convention. If a State wants to exclude certain kinds of FDI on account of its development objectives, it may do so in its negative list.

5.) There is no need to regulate non-admission related PRs.

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[73]) For an overview of aspects influencing the investment climate of host States, see: Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme* and supra: chapter A I.

III. Treatment of Foreign Direct Investment - Guideline III

The Guideline on treatment of FDI covers a variety of issues. These range from general treatment of foreign investors,[1] employment of foreign personnel,[2] and monetary transfers[3] to corrupt business practices[4] and finally, investment incentives.[5] Most BITs and RIAs deal with all or some of these matters individually in different articles.[6] For the sake of clarity the Convention should split up these different aspects into separate articles too.[7]

1. General Standards of Treatment of FDI

a) National Treatment

National treatment is a concept widely used in international economic law. As regards investment protection it means that foreign investors shall enjoy treatment no less favourable than the treatment granted by the host State to its domestic investors.[8] Countless investment

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[1]) Guideline III(2-4).

[2]) Guideline III(5)(b).

[3]) Guideline III(6).

[4]) Guideline III(8).

[5]) Guideline III(9).

[6]) See: *e.g.,* Agreement for the Promotion and Protection of Investments between Singapore and the UK, dated July 22, 1975, Arts. 2-3 for general standards of treatment and Art. 6 for monetary transfers. Agreement on the Reciprocal Promotion and Protection of Investments between Australia and Vietnam, dated March 5, 1991, Arts. 3-4 for general standards of treatment, Art. 5 for employment of foreign personnel and Art. 9 for monetary transfers. Treaty between the US and Turkey Concerning the Reciprocal Encouragement and Protection of Investment, dated December 3, 1985, Art. II(2-3) for general standards of treatment and Art. IV for monetary transfers. See also: North American Free Trade Agreement, Arts. 1102-1105 for general standards of treatment, Art. 1107 for employment of foreign personnel and Art. 1109 for monetary transfers. Energy Charter Treaty, Art. 10 for general standards of treatment, Art. 11 for employment of foreign personnel and Art. 14 for monetary transfers.

[7]) The Netherlands suggested separation of these various topics when commenting on earlier drafts of the Guidelines. See: Comments from the Office of the Netherlands Executive Director to the May 6, 1992 draft of the Guidelines; published in Shihata, *Legal Treatment of Foreign Investment,* 423 at 424-425.

[8]) National treatment clauses require treatment *no less favourable* than the treatment granted to national investors. The concept does not mean *identical* treatment. Otherwise a host State would be prevented from treating foreign investors *better* than its national investors. Also, in cases where differentiated treatment serves a legitimate purpose *i.e.* where the different treatment is justified by the different situation of the foreign investor, the national treatment provision would not be violated if national and foreign investors are treated differently.

treaties refer to national treatment.[9] A survey done by the World Bank in 1991/92 analysing 335 BITs[10] indicated that 196 of these BITs guarantee national treatment to foreign investors. Numerous RIAs adopt this standard too.[11]

Guideline III(3)(a) grants national treatment to foreign investors in similar circumstances with respect to personal protection and security, property rights and interests, the granting of permits, import and export licenses, authorisations for hiring employees, issuance of visas for foreign personnel and other legal matters relevant to foreign investors.

A multilateral investment treaty will have to incorporate a national treatment clause. Such a provision minimises the extent to which foreign investors are put at a competitive disadvantage compared to national investors.[12] However, national treatment is not a perfect concept and has considerable limitations.

1.) It presupposes a national legal framework for investment in the host State. Many developing countries have indeed enacted national codes on foreign investment, but regulations for specific industries – particularly those involving sophisticated technology - do not always exist. Sometimes the relative standard of national treatment cannot be applied easily because it depends on the existence of a national investment regime to which comparisons can be made.[13]

2.) Even if there is a sufficiently developed national framework for investment, the domestic laws of the host State may not be adequate to protect foreign investors because they may fall short of acceptable international standards. For example, State X refuses to grant legally required business licenses to any company incorporated under its laws which has a woman as General Manager (GM). National treatment would not offer suitable protection for foreign investors because *all* companies in this country have to have a male GM. Thus, discrimination on the basis of sex, race, religion, etc., cannot effectively be prevented by national treatment.

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[9]) For a list of investment treaties not incorporating this concept, see: UNCTAD, *Series on Issues in International Investment Agreements: National Treatment* (Geneva: UN, 1999), 15, UN Doc.UNCTAD/ITE/IIT/11(Vol.IV).

[10]) This survey was one of the four background studies done in preparation of the Guidelines. See: Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties.*

[11]) See: *e.g.,* North American Free Trade Agreement, Art. 1102 and Unified Agreement for the Investment of Arab Capital in the Arab Countries, Art. 6(1).

[12]) National Treatment is rarely granted without exceptions. Treaties which guarantee national treatment to the admission stage of investments usually list exceptions in country specific negative lists in the appendices. See supra: chapter B II 2b(i). Also, numerous subject specific exceptions may be made at the post-admission stage, *e.g.,* investment incentives are often excluded (See: *e.g.,* NAFTA, Art. 1108(7)(a)) in order to allow the host State to subsidise domestic industries without having an obligation to offer foreign investors the same assistance. For more details, see: UNCTAD, *Series on Issues in International Investment Agreements: National Treatment,* 43-50.

[13]) UNCTAD, *World Investment Report: Investment, Trade and International Policy Arrangements,* 177.

3.) Domestic laws, regulations and administrative procedures of a host State may result in discriminatory treatment of investors from different States, even if investors are treated equally compared to domestic investors.[14] Such a scenario arises, for instance, if all investors (domestic and foreign) investing in a locally incorporated company are required to provide the host State with certain documents about themselves in the local language. Some countries have rather cumbersome regulations on this issue. They require investors from a country with an official language other than that of the host State, not only to furnish certified translations of the required documents but request that such translations can only be made by specifically authorised, locally registered translators. Investors from countries where the official language of the host State is spoken have a clear competitive advantage in this respect.

4.) National treatment clauses, like the one in Guideline III(3)(a), sometimes include the qualification that national treatment is granted to foreign investors "in similar circumstances". This limitation, although widely used in instruments to which the US is a party,[15] is pointless. It mistakenly assumes that a comparison of business situations between domestic and foreign investors is possible.[16] In reality, the very fact that an investor is foreign implies that his circumstances are always different from those of a national investor. For example, a company incorporated in a host State may borrow funds from its parent company to finance its initial operations. If the parent company is also incorporated in the host State, a loan agreement between the two enterprises may easily be enforced. If, on the other hand, the parent company is foreign, an identical loan agreement may be subject to extensive governmental or Central Bank approvals, and the money needs to be sent and made available in the host State. Thus, the fact that an investor is foreign has a considerable impact on the operation of his investment. In addition, the qualification "in similar circumstances" is too imprecise.[17] *What* needs to be similar? The size of the investment? The kind of investor? The sector or the location of the investment? The proposed number of employees the investors intends to hire? The environmental impact of the investment? A combination of these aspects?

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[14]) Dolzer and Stevens, *Bilateral Investment Treaties*, 64.

[15]) See: *e.g.*, North American Free Trade Agreement, Art. 1102 and Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. II(1). Instruments to which the US is not a party do not incorporate this qualification. See: *e.g.*, Energy Charter Treaty, Art. 10(3), Treaty between Papua New Guinea and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments, dated November 12, 1980, Art. 3(1) and Agreement between Japan and Hong Kong for the Promotion and Protection of Investment, dated May 15, 1997, Art. 2(2-3).

[16]) UNCTAD, *Series on Issues in International Investment Agreements: National Treatment*, 33.

[17]) So also: Dolzer and Stevens, *Bilateral Investment Treaties*, 63.

b) Most-Favoured Nation Treatment

MFN treatment is another concept widely used in BITs and RIAs.[18] It means that foreign investors shall not be granted treatment less favourable than the general treatment usually granted by the host State to investors from any third State.[19] The 1991/92 survey of BITs mentioned above revealed that 101 out of the 335 BITs analysed guarantee MFN treatment.[20] Recent treaties couple MFN treatment with national treatment specifying that investors are entitled to the more favourable of these two standards.[21]

MFN treatment is a useful supplement to national treatment because it establishes equality of competitive opportunities between foreign investors from different countries.[22] MFN treatment is sometimes – though not usually - even more favourable than national treatment. This occurs if the host State grants privileged treatment to foreign investors, but refuses to offer the same conditions to its domestic investors. MFN treatment is often subject to exceptions. Foreign investors are normally excluded from treatment guaranteed to investors from third States under a customs union or free trade area.[23]

The Guidelines do not explicitly provide for MFN treatment.[24] Guideline II(3)(b) ensures only that foreign investors shall not be discriminated against on the basis of their nationality. Shihata maintained that this Guideline automatically implies MFN treatment in practice. He

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18) For an overview of MFN provisions in regional and multilateral instruments on FDI see: Tschofen, *Multilateral Approaches to the Treatment of Foreign Investments*, 284-287.

19) Where the host State grants special privileges to an investor in an investment contract there is no obligation under the MFN clause to treat other foreign investors equally. This is because the host State cannot be obliged to enter into an individual investment contract. Thus freedom of contact prevails over MFN treatment. See: UNCTAD, *Series on Issues in International Investment Agreements: Most-Favoured-Nation Treatment*, 6-7 and Wälde, *International Investment under the 1994 Energy Charter Treaty*, 293 on the MFN clause in the Energy Charter Treaty.

20) Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 237.

21) See: *e.g.*, North American Free Trade Agreement, Art. 1104, Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. II(3), Energy Charter Treaty, Art. 10(3) and Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. II(1).

22) UNCTAD, *Series on Issues in International Investment Agreements: Most-Favoured-Nation Treatment*, 8.

23) See: *e.g.*, Guideline III(4), Agreement between Australia and China on the Reciprocal Encouragement and Protection of Investments, dated July 11, 1988, Art. III(c)(i), Treaty between the US and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, dated June 17, 1992, Art. II(9) and supra: chapter B I 1b.

24) The US criticised this fact when commenting on earlier drafts of the Guidelines. See: Memorandum Outlining the US Concerns Relating to the Legal Framework for the Treatment of Foreign Investment, dated May 28, 1992; published in Shihata, *Legal Treatment of Foreign Investment*, 413 at 415 and Memorandum Outlining the US Concerns Relating to the Legal Framework for the Treatment of Foreign Investment, dated July 22, 1992; published in *Ibid.*, 419 at 420.

justified the wording of Guideline III(3)(b) by arguing that it would be more appropriate to a multilateral instrument, while the standard MFN clause is rather typical of BITs.[25] The Energy Charter Treaty,[26] NAFTA[27] and the draft MAI,[28] however, contain common MFN clauses coupled with a provision granting foreign investors the more favourable of MFN or national treatment. In the light of these recent treaties it is difficult to equate non-discrimination on the basis of nationality with MFN treatment. Stating the former but meaning the latter would only provide the basis for subsequent misinterpretations.

The Convention should couple MFN treatment with national treatment, guaranteeing the more favourable of either standard. This would entitle foreign investors to treatment no less favourable than the treatment enjoyed by other investors, domestic or foreign.[29] However, the MFN provision needs to list exceptions.[30] As explained above,[31] the treaty must contain a so-called RIA exception. This qualification prevents non-regional investors from enjoying the treatment of RIA members through application of the MFN clause.

c) Fair and Equitable Treatment and Full Protection and Security

Fair and equitable treatment and full protection and security for aliens and their property are concepts incorporated in nearly all BITs[32] and RIAs,[33] as well as in the Guidelines.[34] They differ from national and MFN treatment in three respects:

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[25]) *Ibid.* 109.

[26]) Energy Charter Treaty, Art. 10(3).

[27]) North American Free Trade Agreement, Arts. 1103-1104.

[28]) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. III(3).

[29]) The disadvantage of such a provision is that it allows the investor the "pick-and-choose" strategy, *i.e.,* a mixture of national and MFN treatment, whichever is more favourable. One could argue that the investor has to choose whether he wants to be treated like a national or like a foreign investor, but he cannot have the better of both. However, the difficulty would remain how to assess whether national or MFN treatment is more favourable, if all investment activities need to be considered. Also, the currently more favourable treatment regime may change in the future if the local legal framework for investment changes. Is the investor then allowed to "switch" to the other regime? See: UNCTAD, *Series on Issues in International Investment Agreements: Most-Favoured-Nation Treatment,* 32.

[30]) Treaties which grant MFN treatment to the admission stage of investments usually list exceptions in country specific negative lists in the appendices. See supra: chapter B II 2b(i). For more details on exception to MFN provisions see: UNCTAD, *Series on Issues in International Investment Agreements: Most-Favoured-Nation Treatment,* 15-27.

[31]) Chapter B I 1b.

[32]) The 1991/92 survey of BITs indicated that 307 out of 335 BITs analysed refer to fair and equitable treatment. See: Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties,* 237.

1.) Both concepts lack precise definitions.[35] A reason for this is that fair and equitable treatment has been developed as an objective standard under customary international law, rather than under trade or investment treaties. Fair and equitable treatment has, however, been shaped by State practice to include at least non-discrimination and a duty of care towards foreign property by the host State.[36] It is controversial whether fair and equitable treatment is identical to the minimum international standard of treatment.[37] Some authorities argue that it is indeed tantamount to this standard.[38] Other commentators similarly maintain that fair and equitable treatment obliges host States to "implement the measures of treatment in accordance with international standards".[39] Mann, by contrast, asserts that the concept indicates a conduct which goes beyond the minimum international standard, thus affording protection to a more objective standard,[40] because the imprecise nature of the minimum international standard covers only the prohibition of arbitrary or abusive treatment. The latter standpoint is more convincing because State practice indicates that these principles are indeed different. US and Swiss BITs,[41] and the draft MAI,[42] for instance, refer to fair and equitable treatment *and* provide that foreign investors shall in no case be accorded treatment less favourable than that required by international law. In *Pope & Talbot Inc. vs. Canada* the tribunal also emphasised the difference between the minimum international standard and the fairness element included in Art. 1105 of NAFTA.[43] In contrast,

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33) For an overview of provisions on fair and equitable treatment and full protection and security in regional and multilateral instruments see: Tschofen, *Multilateral Approaches to the Treatment of Foreign Investments*, 287. Also: North American Free Trade Agreement, Art. 1105(1) and Energy Charter Treaty, Art. 10(1).

34) For fair and equitable treatment see: Guideline III(2). For the clause on full protection and security see: Guideline III(3)(a).

35) UNCTC and ICC, *Bilateral Investment Treaties 1959-1991*, 9.

36) UNCTC, *Bilateral Investment Treaties*, 42.

37) For an in-depth analysis of the controversy see: Vasciannie "The Fair and Equitable Treatment Standard in International Investment Law and Practice" (1999) 70 BYIL 99 at 139-145.

38) See: *e.g.*, Dolzer and Stevens, *Bilateral Investment Treaties*, 59 referring to a 1979 statement of the Swiss Foreign Office.

39) Mo, "Some Aspects of the Australia-China Investment Treaty" (1991) 25:3 J. World Trade 43 at 52.

40) Mann, "British Treaties for the Promotion and Protection of Investments" (1981) 52 BYIL 241 at 244; also: UNCTC, *Bilateral Investment Treaties*, 42.

41) Dolzer and Stevens, *Bilateral Investment Treaties*, 60.

42) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IV(1)(1.1).

43) *Pope & Talbot Inc. vs. Canada* (Merits, Phase 2) [2001] para. 111, 113, 115 and 117-118, published at http://www.dfait-maeci.gc.ca/tna-nac/Award-Merits-e.pdf. For more details, see infra: footnotes 54 and 55. Compare: *S.D. Myers, Inc. vs. Canada* (Partial Award) [2000] para. 263-268, published at http://www.dfait-maeci.gc.ca/tna-nac/myersvcanadapartialaward-final-13-11-00.pdf., which is less clear on this point.

there are rarely any instances, in which States have demonstrated that fair and equitable treatment and the international minimum standard are in fact identical.[44] However, there is some overlap. Arbitrary treatment and unreasonableness violate both the international minimum standard of treatment and the concept of fair and equitable treatment.[45]

The principle of full protection and security has its origin in US FCN treaties.[46] It has been interpreted by an ICSID tribunal[47] and by the ICJ in the *ELSI Case*.[48] Both decisions indicate that full or most constant protection of FDI cannot be construed as creating a "strict liability" of the host State for any damages suffered by foreign investors. It rather implies a standard of due diligence.

2.) Fair and equitable treatment and full protection and security are detached from domestic laws and other treaty commitments of the host State. Both principles represent an unconditional and more objective standard of treatment.

3.) The concepts are useful supplements to apply to individual circumstances in an investment project not foreseen by the investor and the host State, and not explicitly addressed in the Convention. They promote flexibility in the investment process without providing an *a priori* solution for each and every situation.[49]

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44) UNCTAD, *Series on Issues in International Investment Agreements: Fair and Equitable Treatment* (Geneva: UN, 1999), 40, UN Doc.UNCTAD/ ITE/IIT/11(Vol.III).

45) *Ibid.*, and Vasciannie *The Fair and Equitable Treatment Standard in International Investment Law and Practice,* 144.

46) Dolzer and Stevens, *Bilateral Investment Treaties,* 61.

47) *Asian Agricultural Products Ltd. (AAPL) vs. Sri Lanka* [1990] 6 ICSID-Rev. FILJ 526 at 546-547. In this case a Hong Kong-Sri Lankan joint venture for the cultivation and exportation of shrimps was destroyed in 1987 by military operations of the Indian government that were necessary to prevent Tamil insurgents to extent control over the northern and eastern provinces of Sri Lanka. The ICSID tribunal held that the "full protection and security" provision under the 1980 UK-India BIT obliged India to observe a level of due diligence towards foreign investors. The tribunal further found that India had violated its due diligence obligation during the hostilities of 1987. This violation resulted in the destruction of the property. Therefore compensation was due under the BIT.

48) *Case Concerning the Elettronica Sicula SpA (ELSI)* [1989] I.C.J. Rep. 15 at 52. In this case the ICJ dealt with a clause providing for "most constant protection and security" of foreign property under the 1948 US-Italy FCN treaty. ELSI, an Italian corporation, was wholly owned by two US corporations which planned its liquidation. The ELSI plant was subsequently requisitioned on the order of the Mayor of Palermo for six months. During that period of time, workers temporarily occupied the plant. The US owners liquidated ELSI four months after the requisition. The US claimed that the conduct of the Italian authorities violated *inter alia* certain provisions of the 1948 US-Italy FCN treaty, such as the article on most constant protection and security of foreign property because Italy did not prevent the occupation of the plant. The ICJ rejected in a majority decision the arguments advanced by the US and held that there was no violation of the 1948 US-Italy FCN treaty. The court emphasised that the requirement of protection does not include a guarantee that the property would not be occupied.

49) UNCTAD, *Series on Issues in International Investment Agreements: Fair and Equitable Treatment*, 11.

However, despite the flexibility they offer, both principles prompt some difficulties. The major challenge is to identify their main elements. *What* is fair and equitable?

In the area of expropriation, standards of compensation have been given a more precise definition over the time. For instance, the Hull formula,[50] stating that compensation for expropriated property needs to be "prompt", "adequate" and "effective", has been further interpreted to mean: without undue delay, in an amount representing the full value of the property taken,[51] in a form that is of real practical use to the recipient, and in a freely convertible currency.[52] If the proposed Convention could develop more "precise" definitions of "fair and equitable" treatment and "full protection and security", an adequate international standard of treatment may emerge, combining the flexibility needed with the precision of definition necessary to make these concepts valuable supplements to national and MFN treatment. In addition, a more detailed provision on fair and equitable treatment and full protection and security could assist in addressing contemporary issues foreign investors face. Factors such as access to infrastructure, absence of corruption in the host State, a workable system of justice, health, education and welfare are important concerns of investors nowadays. These aspects are often neglected in modern investment treaties that still focus primarily on traditional concepts, *e.g.* protection against expropriation.[53]

In practical terms fair and equitable treatment and full protection and security could imply *inter alia,* that: a) no excessively cumbersome administrative measures should be imposed upon investors,[54] b) in dealing with governmental authorities and officials, investors should receive

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50) Developed by former Secretary of State Cordell Hull in 1938 while dealing with the Mexican government over the compensation for expropriated US properties in Mexico since 1915. For more details, see infra: chapter B IV 3a(ii).

51) See: Comeaux and Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risks* (Dobbs Ferry, N.Y.: Oceana Publications Inc., 1997), 82.

52) *Ibid.*, See also: Peters, "Investment Risk and Trust: The Role of International Law" in De Waart, Peters and Denters (eds.), *International Law and Development* (London, Dordrecht, Boston: Martinus Nijhoff Publishers, 1988) 131 at 144.

53) Wälde, *Changing Directions for International Investment Law in the Global Economy: An Overview of Selected Issues,* 9.

54) In *Pope & Talbot Inc. vs. Canada* (Merits, Phase 2) [2001] para. 171-174, published at http://www.dfait-maeci.gc.ca/tna-nac/Award-Merits-e.pdf. the tribunal held that the conduct of Canadian authorities during a review of business documents of a US investor in Canada violated Art. 1105 of NAFTA because Canada denied fair and equitable treatment. In this case the required documents were all located in the US. The volume of the requested documents was large, a number of truckloads. Moving all these papers from the US to Canada was a substantial and disruptive burden to the US investor. The Canadian authorities refused to review the documents outside Canada although no law, regulation or written policy justified the Canadian position. The tribunal emphasised that the Canadian authorities "refused to provide any kind of legal justification" for their conduct "relying instead on naked assertions of authority". *Ibid.*, para. 174. Some BITs have a provision generally requiring host States not to impair by any arbitrary and discriminatory measures the operation, management, expansion, etc., of an investment. These BITs, however, do not list illustrative measures that would qualify under this clause. See: Treaty between the US and

decisions on required licenses, approvals, visas, and other authorisations within a reasonable period of time,[55] c) the investor should have adequate access to local courts, governmental authorities and institutions,[56] d) equal access to infrastructure and other facilities essential for doing business is crucial,[57] e) a certain degree of transparency in the regulatory environment of host States should exist,[58] and foreign investors should have access to information, laws, regulations and administrative procedures of host States,[59] and e) punitive expropriations for minor infringements of local laws should be excluded.[60]

The Convention has to guarantee fair and equitable treatment and full protection and security of FDI. It should also define - at least to some extent - by an illustrative list what these standards mean. This would give both foreign investors and host States a non-contingent

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the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, dated June 17, 1992, Art. II(2)(b), Agreement between Sweden and Yemen for the Promotion and Protection of Investments, dated October 29, 1983, Art. 2(2) and Agreement between Spain and Cuba on the Promotion and Reciprocal Protection of Investments, dated May 27, 1994, Art. III(1) See also: OECD Draft Convention on the Protection of Foreign Property, Art. 1(a).

55) In *Pope & Talbot Inc. vs. Canada* (Merits, Phase 2) [2001] para. 176, published at http://www.dfait-maeci.gc.ca/tna-nac/Award-Merits-e.pdf. (for details see supra: footnote 54), the tribunal criticised that after the Canadian authorities had completed their review of business documents of a US investor in Canada it took more than 12 weeks to inform the investor about the results of the review. See also: Guideline III(5)(a). However, a "reasonable" period of time differs in various industries. Permits, business licenses, concessions and other governmental approvals for the operation of an oil field may obviously take longer than the approval to run a factory producing furniture. Also, different countries are at different stages of development. "Reasonable" time periods need to be interpreted accordingly. What is still "reasonable" in Burkina Faso may not be reasonable at all in France. It is therefore unrealistic to impose upon host States fixed time frames within which approvals, permits, licenses, etc., need to be issued.

56) Equal access to such institutions is already guaranteed by national and MFN treatment. However, a right to "equal" access does not grant access in the first place. In some jurisdictions domestic *and* foreign investors do not have adequate access to local courts and governmental authorities.

57) Wälde, *Changing Directions for International Investment Law in the Global Economy: An Overview of Selected Issues*, 9.

58) UNCTAD argues that transparency may be implicit in the concept of fair and equitable treatment. See: UNCTAD, *Series on Issues in International Investment Agreements: Fair and Equitable Treatment*, 51. The importance of transparency has also been emphasised by the UK Department of Trade and Industry. See: DTI, *International Investment: The Next Steps*, para. 8. See also: *Metalclad vs. Mexico* [2000] ICSID Case No. ARB(AF)/97/1 (hereinafter "*Metalclad*"), para. 99-101 where the tribunal held that Mexico's conduct by *inter alia* confirming to the investor that he had obtained all necessary permits to operate a hazardous waste landfill and subsequently denying a municipal construction permit after the construction of the landfill had been completed, violated the fair and equitable treatment provision of Art. 1105(1) of NAFTA because Mexico failed to ensure a transparent and predictable framework as required by the treaty (Art. 102(1)). For an analysis of this case, see: Weiler, "*Metalclad v. Mexico*: A Play in Three Parts" (2001) 9:20 CEPMLP Internet Journal, published at http://www.dundee.ac.uk/cepmlp/journal/html/article9-20.html.

59) Some BITs establish a similar requirement. See: *e.g.*, Treaty between the US and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, dated June 17, 1992, Art. II(7) and Agreement between Australia and China on the Reciprocal Encouragement and Protection of Investments, dated July 11, 1988, Art. VI.

60) For more details on this particular issue see, infra: chapter B IV 3a(iv).

standard of treatment, detached from local laws and other treaty commitments of the host State. It would also assist in developing a standard of treatment which corresponds to the practical needs of modern foreign investors. In determining where to invest, investors consider a wide variety of aspects, such as the political and economic stability of the country, its geographical size and location, its legal framework, its markets and its infrastructure.[61] If some of these factors, such as transparency in the regulatory environment of the host State, could form part of a general standard for treatment of foreign investors, these investors might well intensify their investment activities in host States that have not yet attracted much FDI.

To summarise:

1.) The Convention should grant national treatment to foreign investors without reference to "similar circumstances" set out in Guideline III(3)(a).

2.) National treatment should be coupled with MFN treatment, providing for the more favourable standard. The treaty should clearly prescribe MFN treatment, in preference to a clause for non-discrimination on the basis of nationality.

3.) As national and MFN treatments are not detached from domestic laws and other treaty commitments of the host State, the instrument should also formulate a non-contingent international standard of treatment. The concepts of fair and equitable treatment, and full protection and security, may serve as a suitable foundation. An illustrative list of measures qualifying as fair and equitable treatment, and full protection and security, would assist in developing a clear international standard for treatment of foreign investors.

2. Monetary Transfers

A provision on monetary transfers is of the utmost importance in any investment treaty. While several other clauses, such as rules on expropriation and dispute settlement, cover exceptional situations, monetary transfers occur in the day-to-day operation of any foreign investment.[62] In fact, the ability to repatriate profits and other funds is consistently cited by

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[61]) Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme,* 671-694 and supra: chapter A I.

[62]) Maschke, *Investitionsschutzabkommen: Neue vertragliche Wege der österreichischen Wirtschaft*, 238.

foreign investors as one of their highest priorities.[63] Nearly all BITs,[64] model BITs,[65] regional[66] and multilateral[67] investment treaties and the Guidelines[68] address the repatriation of net revenues and related funds.

Monetary transfers were most controversial during the drafting of the Guidelines. Several developed countries, such as the US, Germany, the Netherlands and the UK, as well as business groups, had numerous concerns. The most frequent criticism was that the stretch-out period for the repatriation of funds from the liquidation or sale of an investment can, in the event that the host State faces foreign exchange stringencies, be as long as five years.[69] The UK was dissatisfied with Guideline III(6)(1)(a), limiting the transfer of wages and salaries of foreign personnel to a "reasonable" part,[70] and the Netherlands felt that the definition of funds covered by the Guidelines is too limited.[71]

In fact, Guideline III(6) does suffer from some inconsistencies, which will be analysed below. However, it attempts to accommodate both capital-exporting nations[72] and potential host

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63) Gray and Jarosz, "Law & Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe" (1995) 33 Col.J.Transnat'l.L. 1 at 24.

64) The 1991/92 World Bank survey on BITs indicates that all 335 BITs studied contain provisions on monetary transfers. See: Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties,* 242.

65) See: *e.g.*, German model BIT, Art. 5; US model BIT, Art. V; Austrian model BIT, 1994 (Austrian model BIT), Art. 5; Danish model BIT, 1991 (Danish model BIT), Art. 7; Dutch model BIT, 1993 (Dutch model BIT), Art. 5 and UK model BIT, Art. 6. The Austrian, Danish, and Dutch model BITs referred to are published by Dolzer and Stevens, *Bilateral Investment Treaties,* at pp. 167, 176 and 209 respectively. For publication of the other model BITs, see supra: chapter A III 1, footnote 7.

66) See: *e.g.*, Agreement for the Promotion and Protection of Investment between the ASEAN Countries, Art. VII; Unified Agreement for the Investment of Arab Capital in the Arab Countries, Art. 7 and North American Free Trade Agreement, Art. 1109.

67) See: *e.g.*, Energy Charter Treaty, Art. 14 and Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IV(4). For an overview of transfer provisions in regional and multilateral instruments see: Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment,* 286-289.

68) Guideline III(6).

69) This was criticised by Germany. See: Shihata, *Legal Treatment of Foreign Investment,* 117. The Netherlands and the US had the same concern. See: Comments from the Office of the Netherlands Executive Director on the May 6, 1992 draft of the Guidelines; published in *Ibid.*, 423 at 425 and Memorandum Outlining US Concerns Relating to the Legal Framework for the Treatment of Foreign Investment, dated May 28, 1992; published in *Ibid.*, 413 at 416 and Memorandum Outlining US Concerns Relating to the Legal Framework for the Treatment of Foreign Investment, dated July 22, 1992; published in *Ibid.*, 419 at 421. See also: Comments from the Office of the UK Executive Director; published in *Ibid.*, 427 at 428. For comments on the stretch-out provision from the German Federation of Business, see: *Ibid.*, 119.

70) Comments from the Office of the UK Executive Director; published in *Ibid.* ,427.

71) Comments from the Office of the Netherlands Executive Director; published in *Ibid.*, 423 at 425.

72) Guideline III(6) refers to the concept of free transfer of funds as advocated by most developed States.

States.[73] The Guideline may therefore well serve as a starting point for negotiations on transfer provisions in a treaty.

a) Types of Transfer

Guideline III(6)(1)(a-e) lists the forms of payment entitled to free transfer, including wages and salaries of foreign personnel,[74] net revenues,[75] payments related to contractual obligations,[76] proceeds from liquidation and sale of investments,[77] monetary compensation for expropriated assets and funds awarded to foreign investors under any dispute settlement procedure.[78] These types of payment correspond to equivalent provisions of recent BITs concluded by the US, Austria and Australia,[79] which list identical or similar items.[80] UK BITs[81] and some Swedish, Japanese as well as early German BITs,[82] by contrast, lack such an

[73]) Guideline III(6)(1)(d) allows stretch-out periods of up to five years if a given country faces foreign exchange stringencies.

[74]) Guideline III(6)(1)(a).

[75]) Guideline III(6)(1)(b).

[76]) Guideline III(6)(1)(c).

[77]) Guideline III(6)(1)(d).

[78]) Guideline III(6)(1)(e).

[79]) See: *e.g.*, Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. V(1); Abkommen zwischen der Republik Österreich und der Volksrepublik China über die Förderung und den gegenseitigen Schutz von Investitionen vom 12. September 1985, Art. 5; Agreement between Australia and Vietnam on the Reciprocal Promotion and Protection of Investments, dated March 5, 1991, Art. 9(1) and Agreement between Australia and China on the Reciprocal Encouragement and Protection of Investments, dated July 11, 1988, Art. X(1).

[80]) Specific definitions, such as what qualifies as "returns" may, however, vary. For more on this detail see: Dolzer and Stevens, *Bilateral Investment Treaties*, 91.

[81]) See: *e.g.*, Agreement for the Promotion and Protection of Investments between Singapore and the UK, dated, July 22, 1975, Art. 6 and Agreement between the UK and India of the Promotion and Protection of Investments, dated March 14, 1994, Art. 7.

[82]) See: *e.g.*, Agreement between Sweden and Yemen for the Promotion and Protection of Investments, dated October 29, 1983, Art. 6; Agreement between Japan and Hong Kong for the Promotion and Protection of Investments, dated May 15, 1997, Art. 7 and Treaty between the Federal Republic of Germany and Thailand Concerning the Promotion and Reciprocal Protection of Investments, dated December 13, 1961, Art 4.

enumeration. The same applies to older RIAs,[83] while recent ones incorporate detailed lists of payments covered.[84]

Guideline III(6)(1) refers to a wide variety of payments. The only types of funds missing are dividends and interest. The ability to repatriate dividends is crucial if an investment is made in the form of a locally incorporated company with foreign shareholders who wish to transfer dividends to their home country. Interest occurs from local savings.

There is a range of other types of payments which the investor might wish to transfer during the operation of an investment, such as management fees, royalties and technical assistance fees. Some instruments mention them explicitly.[85] All these kinds of payment seem to be covered by Guideline III(6)(1)(c) on payments related to contractual obligations. It may thus not be necessary to specify them separately.

b) Restrictions on Free Transfer

Guideline III(6)(1) and numerous other instruments on FDI guarantee free transfer of funds.[86] This means that foreign investors can repatriate their profits and related resources in a freely convertible currency without facing any cumbersome administrative measures or legal and banking restrictions, such as taxes on transfers and charges for the grant of a permission to repatriate. Limitations to this general principle are highly controversial.

There are treaties, particularly BITs concluded by the UK[87] and early German BITs,[88] which do not restrict free transfer. Thus, foreign investors may repatriate funds under any

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83) See: *e.g.*, Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, Art. 11 and OECD Draft Convention on the Protection of Foreign Property, Art. 4.

84) See: *e.g.*, Agreement for the Promotion and Protection of Investment between the ASEAN Countries, Art. VII(1) and North American Free Trade Agreement, Art. 1109(1).

85) See: *e.g.*, North American Free Trade Agreement, Art. 1109(1)(a) and Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. V(1)(c).

86) Numerous BITs state this principle see: *e.g.*, Agreement between the UK and Kenya for the Promotion and Protection of Investments, dated September 13, 1999, Art. 6; Agreement between Spain and Cuba on the Promotion and Reciprocal Protection of Investments, dated May 27, 1994, Art. VII(1) and Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. V(1). The same concept was employed by several RIAs. See: *e.g.*, North American Free Trade Agreement, Art. 1109(1); Energy Charter Treaty, Art. 14(1) and Unified Agreement for the Investment of Arab Capital in the Arab Countries, Art. 7(1).

87) Agreement between the UK and Kenya for the Promotion and Protection of Investments, dated September 13, 1999, Art. 6; Agreement between the UK and India for the Promotion and Protection of Investments, dated March 14, 1994, Art. 7, while the Agreement for the Promotion and Protection of Investments between Singapore and the UK, dated, July 22, 1975, Art. 6 seems to be an exception.

circumstances. Exceptions for situations in which host States face foreign exchange stringencies are not incorporated into these agreements. The very fact that some States may not have enough foreign exchange reserves is simply ignored. Consequently, writers have severely criticised this approach.[89]

The second option is to make monetary transfers entirely subject to national legislation and thereby undermine the concept of "free transfer". Certain Australian BITs[90] and some RIAs[91] employ this approach. Its defect is that national legislation can easily be amended to suit the host State. Also, the obligation to allow free transfer subject to domestic laws contradicts a central purpose of a treaty providing transfer guarantees independent of national legislation.[92]

A few treaties, such as the Iran-US Treaty of Amity qualify restrictions to free monetary transfers by stating that they are subject to approval by the IMF in accordance with its Articles of Agreement. Another rare qualification to free transfer includes limitations necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of the people of the host State.[93]

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88) Treaty between the Federal Republic of Germany and Thailand Concerning the Promotion and Reciprocal Protection of Investments, dated December 13, 1961, Art 4; Treaty between Papua New Guinea and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments, dated November 12, 1980, Art. 5 and Treaty between the Federal Republic of Germany and Jordan Concerning the Encouragement and Reciprocal Protection of Investments, dated July 15, 1974, Art. 4.

89) See: *e.g.*, Sornarajah, *The International Law on Foreign Investment*, 252. Alenfeld criticised German BITs: "Die juristische Betrachtungsweise...ist aber offenbar unvollkommen. Denn sie läßt den wirtschaftlichen Tatbestand... außer acht - die Tatsache nämlich, daß die Vertragspartner der Bundesrepublik notorisch zahlungsbilanzkrank sind... Dieser Umstand wird in unseren Verträgen 'hinwegverordnet'. Man kann sich des Eindrucks nicht erwehren, daß unsere Verträge in der Behandlung des Transfers die tatsächlichen Verhältnisse negieren statt sie zu ordnen." See: Alenfeld, *Die Investitionsförderungsverträge der Bundesrepublik Deutschland* (Frankfurt am Main: Athenäum Verlag, 1971), 80. For the same criticism of French BITs see: van de Voorde, *Belgian Bilateral Investment Treaties as a Means for Promoting and Protecting Foreign Investment,* 101 where he also analyses whether or not host States may invoke the concept of fundamental change in circumstances to escape a strict obligation to allow repatriation of funds in exceptional situations of foreign exchange shortfall.

90) Agreement between Australia and China on the Reciprocal Encouragement and Protection of Investments, dated July 11, 1988, Art. X(1); similar though not as narrow: Agreement between Australia and Vietnam on the Reciprocal Promotion and Protection of Investments, dated March 5, 1991, Art. 9(1). Compare: Agreement between Australia and the Philippines on the Promotion and Protection of Investments, dated January 25, 1995, Art. 9(1) allowing for free transfers.

91) Agreement for the Promotion and Protection of Investment between the ASEAN Countries, Art. VII(1).

92) Burkhardt, *Investment Protection Treaties: Recent Trends and Prospects,* 101.

93) Treaty of Amity, Economic Relations, and Consular Rights between the US and Iran, dated August 15, 1955, Art. VII(1). The Convention has to address its relation to the IMF Articles of Agreement to avoid any conflict between this instrument and its provisions on monetary transfers. For more details on conflict of two multilateral treaties, see supra: chapter B I 1b. Due to the limited scope of this study the relation of the Convention to the IMF Articles of Agreement is not addressed in detail.

The Guidelines, without making reference to national laws, allow postponing the repatriation of proceeds of liquidation and sale of an investment for up to five years if the host State faces, in exceptional circumstances, foreign exchange stringencies.[94] Any delay results in the host State being obliged to pay interest on the outstanding amount to be transferred.[95] This derogation from the rule of free transfer was incorporated because the repatriation of liquidation and sale proceeds usually involves large sums.[96]

However, it appears inconsistent to permit the stretch-out only for proceeds from liquidation and sale of an investment, while not allowing it for other transfers of large amounts, such as the repatriation of profits or the remittance of compensation for expropriated investments. This one-sided limitation of delay periods leads to illogical and impractical results. For example: Company A and B operate in State X, as locally incorporated subsidiaries of foreign enterprises. Company A is considerably smaller than company B, having only a few employees, while company B is rapidly expanding. Company A is not profitable, and thus the management of its parent company decides to liquidate it. The liquidation proceeds of USD 10m cannot be repatriated because State X faces a severe shortfall of foreign exchange. Under Guideline III(6)(1)(d), the transfer of the USD 10m may be delayed up to five years. Company B, by contrast, being successful, manages to gain USD 50m net profits within the past calendar year. The Guidelines allow company B to demand from State X permission to repatriate this sum without any stretch-out. In fact, there are instruments which, unlike the Guidelines, employ *exactly the opposite approach*. For instance, a BIT concluded by the US and Poland permits stretch-out periods for the repatriation of profits, but not for the transfer of sale and liquidation proceeds.[97] This latter approach makes more sense because normally an operating venture repatriating large amounts transfers profits, not proceeds from liquidation. The sale or liquidation of an investment is the exception rather than the rule, while the operation of a profit-making enterprise is the usual scenario of a foreign investment project.

There is no reason why delay periods for the repatriation of funds should depend on the nature of the money to be transferred. The purpose of stretch-out clauses is to allow the host

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94) Guideline III(6)(1)(d).

95) Guideline III(6)(3).

96) The World Bank Group, *Legal Framework for the Treatment of Foreign Investment, Vol.II - Guidelines, Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment* (Washington: The World Bank Group, 1993), 22.

97) Treaty between the US and Poland Concerning Business and Economic Relations, dated March 21, 1990, Protocol accompanying the treaty, Art. 4.

State to defer transfer of large sums in exceptional circumstances of foreign exchange shortfall. The Convention should permit stretch-out as set forth in Guideline III(6)(1)(d), *i.e.,* for proceeds of liquidation and sale of investments. It should equally allow delay in the repatriation of other transfers of large sums, *e.g.,* profits or compensation for expropriated investments.

The disadvantage of stretch-out provisions from an investor's perspective is, however, that they may be abused by host States. Neither the Guidelines nor most other treaties on FDI which allow stretch-out clearly define what "exceptional circumstances" or "foreign exchange stringencies" are, and in which situations stretch-out over the maximum period is appropriate, *i.e.,* five years under the Guidelines. Some BITs attempt to prevent any misuse of stretch-out provisions by permitting foreign investors to repatriate at least a minimum annual percentage of the profits or liquidation and sale proceeds.[98] This percentage usually ranges from 15-20% of the value of the delayed funds. The Convention should adopt a similar approach. A simple reference to transfers "in instalments" within a period of time "as short as possible",[99] without specific minimum annual repatriation allowances, does not reflect the high priority given by foreign investors to the concept of free transfer of funds.

Another inconsistency in Guideline III is the clause permitting transfer of only a "reasonable part" of salaries and wages of foreign personnel.[100] Most investment treaties, except for early French BITs,[101] do not include this restriction. In modern treaties salaries are transferable without any limitations.[102] Guideline III(6)(1)(a) is inconsistent with the rest of Guideline III. It should therefore not be incorporated into the Convention. The repatriation of salaries and wages of individual employees usually involves smaller sums than the transfer of profits or sales and liquidation proceeds. While the repatriation of profits is free under Guideline III(6)(1)(b), the transfer of salaries is restricted to a "reasonable part". This is illogical.

In the event of a liquidation or sale of the investment, or if an individual employment contract is terminated, foreign personnel may repatriate *all* savings from salaries at once without

98) See: *e.g.,* Treaty between the US and Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment, dated March 12, 1986, Protocol accompanying the treaty, Art. 4.

99) Guideline III(6)(1)(d).

100) Guideline III(6)(1)(a). For criticism on this clause, see: Comments from the Office of the UK Executive Director; published in Shihata, *Legal Treatment of Foreign Investment,* 427.

101) For examples of such French BITs, see: Dolzer and Stevens, *Bilateral Investment Treaties,* 93.

102) See: *e.g.,* Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. V(1)(f) and Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IV(4)(1)(g). Article 14(1)(d) and Art. 32(1) of the Energy Charter Treaty may be an exception, incorporated into this instrument to allow certain Contracting States to adapt to market economy.

delay. However, the amount of savings may well exceed the amount expatriates regularly transfer from their salaries to the home country. Thus, it is inconsistent to restrict the regular transfer of smaller sums but allow the free repatriation of possibly large amounts at once.

c) Convertibility and Exchange Rates

Guideline III(6)(2) affirms that transfer of funds shall be made in a currency brought into the host State by the investor or in any other currency designated as "freely usable" by the IMF at the applicable market rate of exchange at the time of the transfer.[103] Nearly all investment treaties incorporate similar provisions.[104] There is no reason why the proposed Convention should depart from this common practice. However, in practical terms, Guideline III(6)(2) also means that:

1.) The investor bears the risk of depreciation of the host State's currency between the date of the investment and the date of repatriation of any sale or liquidation proceeds. This seems reasonable, as a possible depreciation of local currency should be taken into account by the investor when assessing the risks of the investment.

2.) The investor also bears the risks of currency depreciation between the date on which he intended to transfer funds, but due to foreign exchange shortfalls was unable to do so, and the date of the actual repatriation. This peril may partly be set off by the payment of interest as set forth in Guideline III(6)(3). However, it may not be completely eliminated.[105] On the other hand, the investor may equally benefit from any appreciation of the local currency between the intended date of transfer and the actual transfer, although a substantial appreciation of the host State's currency immediately after circumstances, which justified a delay of transfer in the first place, seems rather unlikely.

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[103]) The freedom of a State to restrict currency exchange is limited by the Articles of Agreement of the IMF, see: Art. VIII(2) and VIII(3). However, certain exceptions may be made under Art. XIV.

[104]) See: *e.g.*, Agreement between the UK and India for the Promotion and Protection of Investments, dated March 14, 1994, Art. 7; Agreement between Spain and Cuba on the Promotion and Reciprocal Protection of Investments, dated May 27, 1994, Art. VII(3); Treaty between the US and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, dated June 17, 1992, Art. IV (2). See also: Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IV(4)(2-4) and Energy Charter Treaty, Art. 14(3).

[105]) The issue arises, for instance, if payment of compensation for expropriated investments is delayed by host States. When negotiating the MAI, certain delegations therefore proposed that in this scenario host States should not only pay interest on the amount outstanding, but should also have an obligation to compensate foreign investors for any loss due to the devaluation of the host State's currency. For more details on MAI negotiations on this issue see: Karl, "The Multilateral Agreement on Investment and Investor Protection" in OECD, *Multilateral Agreement on Investment: State of Play as of July 1996, OECD Working Paper, Vol. IV:90* (Paris: OECD, 1996) 10 at 11.

To summarise:

1.) The Convention should, in addition to the types of payments listed as freely transferable in Guideline III(6)(1)(a-e), include dividends and interest.

2.) The limitation on the repatriation of salaries and wages to "reasonable parts" in Guideline III(6)(1)(a) should not be incorporated into the treaty.

3.) Stretch-out provisions as set forth in Guideline III(6)(1)(d) should not only cover liquidation and sale proceeds but equally apply to the transfer of other large sums, such as net revenues and compensation for expropriated investments.

4.) Stretch-out clauses should include a minimum annual percentage of the delayed funds guaranteed to be repatriated regardless of balance of payment difficulties.

3. Investment Incentives

Investment incentives are host governmental measures designed to influence an investment decision by affecting the profit accruing to a potential investment or altering the risks attached to it.[106] There are three types of investment incentives:[107] 1.) Fiscal advantages, such as a reduction of the standard corporate income tax rate for foreign investors. 2.) Financial incentives, *e.g.,* governmental grants or subsidised credits, and 3.) other incentives, such as subsidised dedicated infrastructure or the right to own land where such ownership is normally not possible for foreigners.[108] Investment incentives are granted conditionally or unconditionally. Nearly every State offers them, and they can take countless forms. For instance, there were more than 117 fiscal incentives in Brazil at the beginning of the 1990s.[109] The effectiveness of investment incentives in stimulating investment flows is controversial among economists.[110]

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106) OECD, *Investment Incentives and Disincentives: Effects on International Direct Investment* (Paris: OECD, 1989), 9.

107) UNCTAD, *Incentives and Foreign Direct Investment, UNCTAD Current Studies Series A, No. 30* (New York and Geneva: UN, 1996), 4-5, UN Doc.UNCTAD/DTCI/28.

108) This particular incentive has been important in countries such as Thailand, Indonesia and Malaysia. See: OECD, *South Asia: The Role of Foreign Direct Investment in Development, OECD Working Paper, Vol. VII:28* (Paris: OECD, 1999), 17.

109) Guisinger, "Rhetoric and Reality in International Business: A Note on the Effectiveness of Incentives" (1992) 1:2 Transnational Corporations, 111.

110) Certain authorities indicate that there is no general pattern. The effectiveness of incentives differs depending on the kind of investor, type of incentive, degree of competition for investment and incentive programmes of other countries. See: Bergsman and Pirnia, "Do Incentives Work?" (1996) 1:2 FDI News 2 at 4, published at http://www.fias.net/pubs/fdinews/v1n2/index.html. Sectoral research on tax incentives revealed that the same kind of

However, recent research seems to indicate that the impact of investment incentives on investment decisions is only minor,[111] except when the investor is choosing between "competing" countries within a geographical region.[112]

Only a few treaties cover investment incentives. BITs are usually silent on this matter.[113] The same applies to major regional and multilateral instruments, such as the ASEAN Agreement and the Energy Charter Treaty. The 1976 OECD Declaration[114] deals with investment incentives only in rather vague language.[115] Finally, investment incentives are indirectly addressed in two Uruguay Round Agreements. The TRIMs Agreement prohibits WTO Members from conditioning subsidies to TRIMs.[116] For example, a State may not grant a financial incentive to any investor upon condition that he exports only a certain percentage of the products manufactured by him in

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tax incentive has different impacts on different sectors. See: *e.g.*, a World Bank Group study on tax incentives in Turkey and Pakistan by Rajagapal and Shah, *Tax Incentives, Market Power and Corporate Investment: A Rational Exceptions Model Applied to Pakistani and Turkish Industries* (Washington: The World Bank Group, 1992), 45. Empirical data from Mexico suggest that capital income tax reductions are effective in stimulating FDI flows. See: Feltenstein and Shah, *General Equilibrium Effects of Investment Incentives in Mexico* (Washington: The World Bank Group, 1992), 28. The effectiveness of investment incentives was also proved in a major study in the mid-1980s. See: Guisinger and Associates, *Investment Incentives and Performance Requirements: Patterns of International Production and Investment* (New York: Praeger Publishers, 1985), 317-318. By contrast, a survey by the OECD indicates that the impact of investment incentives is generally very low. See: OECD, *Investment Incentives and Disincentives and the International Investment Process* (Paris: OECD, 1983) 37 and 40. Finally, some studies found that incentive preferences of MNCs differ over time. See: Rolfe, Ricks, Pointer and McCarthy, "Determinants of FDI Incentive Preference of MNEs" (1993) 24 J. Int'l. Bus. Stud. 335 at 351.

111) UNCTC, *Determinants of Foreign Investment: A Survey of the Evidence* (New York: UN, 1992), 42-43, 48-50 and 60, UN Doc.ST/CTC/21 and OECD, *Investment Incentives in Transitional Economies, OECD Working Paper, Vol. V:48* (Paris: OECD, 1997), 29. Interestingly, the OECD survey revealed that factors, such as energy costs and telecommunication are more, or at least equally important to foreign investors compared to investment incentives. See: *Ibid.*, 40-41. The same study asserts that investment incentives may actually raise suspicion because foreign investors may view them as evidence that there are weaknesses or deficiencies associated with a given country or region. See: *Ibid.*, 38.

112) OECD, *Investment Incentives and Disincentives and the International Investment Process*, 37.

113) See: *e.g.*, Agreement between the UK and Kenya for the Promotion and Protection of Investments, dated September 13, 1999 and Abkommen zwischen der Republik Österreich und der Volksrepublik China über die Förderung und den gegenseitigen Schutz von Investitionen vom 12. September 1985. By contrast, the Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, indirectly refers to investment incentives in Art. VI, stating that performance requirements do not include conditions for the receipt or continued receipt of an advantage.

114) For more details on this instrument, see supra: chapter A IV 2c.

115) The Declaration states that Members shall "recognize the need to give due weight to the interest of Member countries affected by specific laws, regulations and administrative practices in this field... providing official incentives and disincentives to international direct investment..." and "...Member countries shall endeavour to make such measures as transparent as possible". The interpretation of this clause was not consistent. While the Federal Republic of Germany and France required that such measures were specifically intended to attract or discourage FDI, the US and Switzerland understood the passage to mean all measures implying incentives or disincentives to FDI. For more details on this controversy see: Schwamm, *The OECD Guidelines for Multinational Enterprises*, 348.

116) Agreement on Trade-Related Investment Measures, Art. 2 and Annex. For details on the TRIMs Agreement, see supra: chapter A IV 5b.

this country. The Agreement on Subsidies and Countervailing Measures does not permit certain kinds of investment incentives.[117] The Agreement fails to include a number of important incentives, such as measures relating to regional subsidies. Also, it only applies to incentives affecting *trade.* In fact, there is no provision, which would allow WTO Members to challenge an incentive on the basis that it affects *investment.*[118]

Guideline III(9) sets forth that fiscal incentives are not recommended, as they may create competition among host countries. The prohibition,[119] gradual removal[120] or at least the introduction of ceilings on the amount of incentives,[121] have been suggested by numerous authorities.[122] They propose several arguments to justify their position:

1.) Incentives have uncertain benefits, but clear costs. For example, fiscal incentives result in a loss of tax revenue for the host State. Their benefit on the other hand, *i.e.,* the attraction of additional investment flows is uncertain.[123] All kinds of investment incentives cause administrative costs, and many countries seeking to attract FDI do not have skilled administrators.[124]

2.) The introduction of fiscal incentives creates uncertainty, ambiguity and loopholes in a country's tax system. For instance, foreign investors may easily manipulate the "start date" of an investment in order to become eligible for a given incentive.[125]

3.) The competition among host States to attract FDI often results in "bidding". Host countries offer incentives to a point where no net benefit from FDI is left to the "successful" State.

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117) This Agreement distinguishes between subsidies which are prohibited (Art. 3), subsidies which are actionable, *e.g.,* incentives that cause injury to the domestic industry of another Member State (Art. 5(a)), and non-actionable subsidies, such as certain levels of research assistance (Art. 8(2)).

118) UNCTAD, *Incentives and Foreign Direct Investment*, 62.

119) Messing, *Towards a Multilateral Agreement on Investment*, 130.

120) Gradual removal of investment incentives similar to the liberalisation of tariff reductions under the GATT was suggested by UNCTAD, *Incentives and Foreign Direct Investment*, 82.

121) OECD, *Investment Incentives in Transitional Economies*, 24.

122) Other authorities emphasise the need to make investment incentives more transparent. See: Engering, *The Multilateral Investment Agreement,* 155.

123) Gray and Jarosz, *Law and Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 36 and Estache and Gaspar, "Why Tax Incentives do not Promote Investment in Brazil" in Shah (ed.), *Fiscal Incentives for Investment and Innovation* (New York: Oxford University Press, 1995) 309 at 332.

124) Gray and Jarosz, *Law and Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 37.

125) *Ibid.*

It is a "prisoner's dilemma". If States chose to restrict the degree of incentives, they would be better off. But if it comes to attracting a major investment project, they enter the "bidding".[126]

However, closer examination reveals that the prohibition or limitation of investment incentives is not a realistic option for the proposed Convention, for the following reasons:

1.) There is no clear definition of an investment incentive.[127] Most States argue that measures which are either harmful to the domestic industry of another country or which seriously interfere with international trade should be prohibited. This intention is reflected in the TRIMs Agreement and in the Agreement on Subsidies and Countervailing Measures. On the other hand, incentives promoting the economic development of a region or a State are considered legitimate policy tools. It is unclear where exactly the dividing line is between these two objectives. What about incentives which indirectly affect foreign industries and promote domestic economic development at the same time?

2.) Incentives are not an isolated aspect of a State's investment policy. They are often linked to performance requirements (PRs).[128] In fact, granting the former is considered an elimination of the disadvantages relating to the performance of the latter.[129] If investment incentives were prohibited or gradually phased out under the Convention, the elimination of PRs would have to be addressed as well. For the reasons outlined in the previous chapter, this approach does not seem appropriate.[130] Also, the impact of certain fiscal incentives on the overall effective tax rate of foreign investors is related to other aspects, such as the inflation rate in the host State[131] and the tax regime of the investor's home State,[132] which also determine his tax obligations.[133] An isolated prohibition or gradual elimination of fiscal incentives without considering these factors would not necessarily result in avoiding competition among host States to attract FDI.

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126) OECD, *Investment Incentives in Transitional Economies,* 24-25.

127) So also: Engering, *The Multilateral Investment Agreement,* 154 and Guisinger, *Rhetoric and Reality in International Business: A Note on the Effectiveness of Incentives,* 111.

128) OECD, *Investment Incentives and Disincentives: Effects on International Direct Investment,* 44 and Moran, *The Impact of TRIMs on Trade and Development,* 63.

129) OECD, *Investment Incentives and Disincentives and the International Investment Process,* 58.

130) See supra: chapter B II 2b(iii).

131) UNCTAD, *Incentives and Foreign Direct Investment,* 24.

132) Boadway and Shah, "Perspectives on the Role of Investment Incentives in Developing Countries" in Shah (ed.), *Fiscal Incentives for Investment and Innovation* (New York: Oxford University Press, 1995) 31 at 102.

133) The existence of a tax treaty between the home and the host State may also be a crucial aspect.

3.) Investment incentives are used by some countries to set off local disadvantages unrelated to PRs. These shortcomings may include a small domestic market size or the State's location. A government can adapt its investment policy, which is reflected *inter alia* in investment incentives it offers. However, it cannot change its population, or the size and location of the State.[134] If the proposed Convention prohibited or gradually removed investment incentives, certain countries, which are at a competitive disadvantage to attract FDI because of their size or location, would hardly manage to increase their FDI inflows. Investment incentives are a beneficial and, for some States, one of the very few tools available to attract FDI.

4.) Some investment incentives are offered to foreign investors only. For example, repatriation of profits and related funds is a matter unique to foreign investors. Only foreign investors are in a situation in which they may not able to repatriate profits. Offering certain fiscal or financial incentives to them may set off this inherent risk.

5.) The so-called "clear costs - unclear benefit" analysis of fiscal incentives by Gray and Jarosz[135] is not well founded either. A country that offers fiscal incentives may not be able to obtain FDI on less attractive terms. Thus, it is not realistic to compare the costs of fiscal incentives, *i.e.,* the loss of tax revenue, with the "unclear" benefits of the incentive.[136] Without a given fiscal incentive an investment might not have been made in the first place, and no taxes *at all* would have been paid by the investor. Also, if the fiscal incentive is effective and leads to an increase of FDI, the costs of the incentive proportionally rise. The revenue to the treasury of the host State, however, will also increase substantially by the amount of taxes paid by subsequent foreign investors.[137] Thus, fiscal incentives do not necessarily result in a loss but often in an increase of tax revenue.

6.) Investment incentives are often aimed at specific industries or regions in order to distribute investment in a way seen as appropriate by the host State.[138] The prohibition or gradual elimination of incentives would prevent States from applying this policy tool to direct investments in regions or sectors which may be most in need of FDI.

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134) Guisinger, *Rhetoric and Reality in International Business: A Note on the Effectiveness of Incentives,* 120.

135) Gray and Jarosz, *Law and Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 36.

136) Bracewell-Milnes and Huiskamp, *Investment Incentives: A Comparative Analysis of the Systems of the EEC, the USA and Sweden* (Deventer: Kluwer, 1977), 121.

137) *Ibid.*

138) OECD, *Investment Incentives and Disincentives and the International Investment Process*, 42 and 61.

7.) Finally, ceilings on the amount of incentives also do not avoid competition among host States to attract FDI for two major reasons. First, they are difficult to implement in practice.[139] Secondly, previous studies indicate that ceilings are effective only if they are coupled with the reduction of the overall amounts spent by governments on investment incentives.[140] It appears unrealistic to propose that States should agree in a multilateral investment treaty about how much money they internally spend to promote FDI.

For these reasons it does not seem useful to provide for the prohibition, gradual elimination or incorporation of ceilings on the amount of incentives in the Convention.

139) UNCTAD, *Incentives and Foreign Direct Investment,* 69.

140) *Ibid.,* 70.

IV. Expropriation – Guideline IV

Protection against expropriation in investment treaties has recently been compared to a vaccination against a disease that has disappeared.[1] In fact, spectacular expropriations, such as the nationalisation of oil companies in Libya,[2] and the unilateral termination of oil concession agreements by Kuwait[3] in the 1970s, are rare nowadays, mainly because host States eager to attract FDI cannot afford to offend foreign investors. Today an increasing number of States privatise State assets rather than taking private property. However, caution remains, because the risks of expropriation can easily re-emerge if there is a change in the political or economic policy of a host State.[4] BITs,[5] model BITs,[6] regional[7] and multilateral investment agreements[8] and the Guidelines[9] reflect the awareness of this danger by incorporating numerous articles on protection against expropriation.

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1) Karl, *The Promotion and Protection of German Foreign Investments Abroad*, 14.

2) *BP Exploration Company (Libya) Ltd. vs. Libya* [1974] 53 ILR 297 (hereinafter *"BP"*), *Texaco Overseas Petroleum Company and California Asiatic Oil Company vs. Libya* [1977] 53 ILR 389 (hereinafter *"Texaco"*) and *Libyan American Oil Company (LIAMCO) vs. Libya* [1977] 62 ILR 141 (hereinafter *"Liamco"*). For a comprehensive analysis of these cases see: Greenwood, "State Contracts and International Law – The Libyan Oil Arbitrations" (1982) 53 BYIL 27.

3) *Kuwait vs. American Independent Oil Company (Aminoil)* [1982] 66 ILR 519 (hereinafter *"Aminoil"*). The *BP, Texaco, Liamco* and *Aminoil* cases are the most well-known expropriations in recent history. For a summary of the findings of about 300 arbitral awards and judicial decisions dealing with issues of expropriation see: Westberg and Marchais, *General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists*, 377.

4) Sornarajah, *The International Law on Foreign Investment*, 281. See also: Wälde, "Investment Policies and Investment Promotion in the Minerals Industries" (1991) 6 ICSID-Rev. FILJ 94 at 96.

5) See: *e.g.*, Agreement between Spain and Cuba on the Promotion and Reciprocal Protection of Investments, dated May 27, 1994, Art. V, Agreement between Chile and Norway on the Promotion and Reciprocal Protection of Investments, dated June 1, 1993, Art. 6 and Treaty between the US and Turkey Concerning the Reciprocal Encouragement and Protection of Investments, dated December 3, 1985, Art. III. The survey of BITs prepared as one of the background studies for the Guidelines revealed that all of the 335 BITs analysed addressed the issue of expropriation. See: Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 256.

6) See: *e.g.*, Austrian model BIT, Art. 4, Danish model BIT, Art. 5 and Swiss model BIT, Art. 6.

7) See: *e.g.*, North American Free Trade Agreement, Art. 1110, Unified Agreement for the Investment of Arab Capital in the Arab Countries, Arts. 9-11.

8) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IV(2) and the Energy Charter Treaty, Art. 13. For an overview of provisions on expropriation in regional and multilateral instruments see: Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment*, 289.

9) Guideline IV.

1. Definitions

The essence of expropriation is a deprivation by State organs of a right to property.[10] Apart from this general explanation, there is no clear description of an expropriation. Confusing terminology, practical difficulties and inconclusive case law so far have prevented development of a generally recognised definition of the term.

1.) Confusing Terminology. The expressions "expropriation", "nationalisation", "confiscation", "taking", "creeping/indirect and disguised expropriation and/or nationalisation", "constructive nationalisation", "dispossession", "intervention", "regulatory taking", "compulsory acquisition", "transfer to public ownership" and "wealth deprivation" are used by different authorities and in treaties without precise descriptions or clarifications of the distinction between them.[11]

2.) Practical Difficulties. The complexities of government conduct make it impossible to define any of these terms exhaustively. Jennings and Watts listed thirteen scenarios constituting a taking, ranging from the straightforward situations of outright deprivation of property, exchange controls and currency devaluations, to the enforced but illusory "sale" of property and the acquisition of a controlling shareholding interest in a corporation.[12]

3.) Extensive but Inconclusive Case Law. Several international tribunals have been faced with the problem of deciding whether or not a given situation amounts to an expropriation. The Iran-US Claims Tribunal in particular has adjudicated cases in the grey area of expropriation, where no formal taking occurred but there was a *de facto* loss of control over the investment.[13] In

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[10]) Brownlie, *Principles of Public International Law*, 534.

[11]) Seidl-Hohenveldern, "Semantics of Wealth Deprivation and their Legal Significance" in Seidl-Hohenveldern, *Collected Essays on International Investments and International Organisations* (The Hague, London, Boston: Kluwer Law International, 1998) 249 at 250-251. Also: Weston, "'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'" (1975) 16 Virg.J.Int'l.L. 103 at 111-113 and Peters, *Investment Risk and Trust: The Role of International Law*, 142.

[12]) Jennings and Watts (eds.), *Oppenheim's International Law, Vol. I, Parts 2-4,* 916-918. A similar 10-item list has been compiled by Sornarajah. See: Sornarajah, *The International Law on Foreign Investment*, 284.

[13]) The physical seizure of tangible assets usually constitutes a taking. See: *e.g., Dames and Moore vs. Iran, the Atomic Energy Organization of Iran, the National Iranian Steel Company, the Iranian Medical Center and the National Iranian Gas Company* [1983] III, Vol. 4, Iran-US CTR 212. The tribunal in this case held that the occupation of a warehouse where office equipment, instruments and vehicles were stored, and the subsequent turning over of these items to the Iranian army amounts to a taking. The military occupation of property and premises is usually an expropriation. See: *e.g., Benvenuti Et Bonfant vs. Congo* [1980] 21 ILM 740 at 758. By contrast, the seizure of goods as a bona fide measure of enforcement of laws, such as customs legislation, is not a taking. See: *Allgemeine Gold- und Silberscheideanstalt vs. Customs and Excise Commissioners* (CA) [1980] 51 BYIL 305-306.

American Bell[14] for example, the tribunal found that it was a taking if a representative of a company was forced to transfer funds in a company's bank account to the Iranian State.

International tribunals have frequently ruled upon interference with the management of a company. No clear rule, however, emerged from their judgments. The replacement of the owner's management with representatives of the host State has usually resulted in a holding of expropriation,[15] while the unlawful arrest and subsequent forced departure of the management without a formal replacement did not qualify as a taking.[16] This distinction is questionable. The company's owner is in both cases deprived of his right of management, which is a serious interference in the control of his property amounting to a deprivation of fundamental rights of ownership.[17] The fact that in the first scenario the State itself actively assumes control over the enterprise, while in the second it does not, fails to justify the differentiation because the *effect* of the measures for the expropriated investor is very similar. He cannot manage the company anymore, no matter whether the expropriating State appoints other directors or whether it "only" forces the original managers to flee the country, leaving the enterprise without any supervision. An ICSID tribunal in *Amco II*[18] held that a military and police intervention in the operation of a hotel complex did, in fact, prevent Amco from exercising its right of management, but without depriving it of its entitlement to a share of profits.[19] In this scenario, the mere loss of control over

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14) *American Bell International Inc. vs. Iran, the Iranian Ministry of Defense, Ministry of Post, Telegraph and Telephone and the Telecommunications Company of Iran* [1986] III, Vol. 12, Iran-US CTR 170 at 214.

15) See: *e.g., Sedco Inc. vs. National Iranian Oil Company and Iran* (Interlocutory Award of October 24, 1985) [1985] 84 ILR 484 at 515 (hereinafter "*Sedco*"). In *Barcelona Traction* [1970] I.C.J. Rep. 1, Judge Fitzmaurice in *dicta* observed that the acts complained about by Belgium, which included the appointment of Spanish managers replacing foreign directors had the character of a disguised expropriation. *Ibid.*, 106.

16) In *Starrett Housing Corporation, Starrett Systems Inc. and Starrett Housing International Inc. vs. Iran, Bank Omran, Bank Mellat and Bank Markazi* (Interlocutory Award) [1983] 85 ILR 350 (hereinafter "*Starrett Housing*"), the tribunal held that only the actual appointment of a temporary manager by the government constitutes a taking, while the mere arrest of the project manager who subsequently had to leave Iran is not an expropriation.

17) So also: Concurring opinion Judge Holtzmann, *Ibid.*, 403.

18) *Amco vs. Indonesia* (Merits: Resubmission) [1990] 89 ILR 580.

19) The reason why the police intervention and thus a loss of the right of management did not result in Amco being unable to secure its share of profits was the fact that the actual profit sharing arrangement was agreed upon by the company and another local enterprise, rather than between Amco and the Indonesian government. This scenario is similar to the cases in which difficulties arise in determining as to whether a certain act of taking can actually be attributed to the host government. In *Schering Corporation vs. Iran* [1984] I, Vol. 5, Iran-US CTR 361, the tribunal held that actions of a worker's council could not be attributed to the Iranian State. The latter had no influence over the election of the members of the council. The fact that the formation of the council was initiated by the State does not imply that the council was part of the State machinery or acted on behalf of the government. *Ibid.*, 370. In *Sea-Land-Service, Inc. vs. Iran and Ports and Shipping Organization of Iran* [1984] II, Vol. 6, Iran-US CTR 149, the tribunal emphasised that a finding of expropriation would require *deliberate* governmental interference with the operations of Sea-Land resulting in a deprivation of the use and benefit of the investment. *Ibid.*, 166. Judge Holtzmann, in his dissenting and concurring opinion, argues that the critical question is the *objective* effect of the government's acts, rather than its intentions. *Ibid.*, 207. Similar scenarios arise where environmentally motivated private actions make the operation of an investment impossible or at least unattractive from an economic point of view. The host State is

the performance of the enterprise was not tantamount to a taking.[20] The ICJ in the *ELSI Case*[21] affirmed that a requisition of assets for six months in an effectively insolvent company did not deprive its owners of the right to control and manage their investment. The ICJ reached that conclusion because local insolvency laws already prevented the management from exercising effective control over the affairs of ELSI.[22]

A multilateral investment treaty cannot finally solve the problem of finding an exhaustive and clear description of "expropriation." However, it should incorporate reliable definitions of key terms, such as "creeping expropriation," as outlined in the next sections.

a) Individual Expropriations and Nationalisations

Traditionally, authors have distinguished individual measures against the property of particular persons or entities (individual expropriation) from large scale takings of numerous entities belonging to a particular sector of the economy (nationalisation). The latter usually forms part of a domestic reform programme.[23] Recent instruments, by contrast, *e.g.,* most BITs, do not define the difference, mainly because they have not been drafted with this distinction in mind.[24] BIT provisions on individual expropriations often equally apply to nationalisations.

The differentiation between these two types of takings makes sense only if it has a real practical impact. The amount of compensation payable to foreign investors may, for instance, differ depending upon the nature of the governmental measure. This point, however, is controversial and analysed in detail below.[25]

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obviously not liable for any damage caused by purely private activities that are lawful under its domestic laws. However, where the host State supports such activities or where it has a due diligence duty under international law to intervene but fails to do so, it may incur responsibility. The challenge is to draw a clear line between purely private actions and formal governmental support. See: Wälde, *Sustainable Development and the 1994 Energy Charter Treaty: Between Pseudo-Action and the Management of Environmental Investment Risk,* 257.

20) *Amco vs. Indonesia* (Merits: Resubmission) [1990] 89 ILR 580 at 597-598. However, the tribunal awarded USD 10,000 in damages to Amco for the disturbance in its rights to manage the company.

21) *Case Concerning Electtronica Sicula SpA (ELSI)* [1989] I.C.J. Rep. 15.

22) This conclusion of the ICJ, however, leaves the question whether or not this kind of "taking" would amount to an expropriation if the company was not already insolvent. The fact that the ICJ did not rule on this issue was criticised by McCorguodale, "Expropriation Rights under a Treaty – Exhausted and Naked" (1990) Camb.L.J. 197 at 198-199.

23) Kissam and Leach, "Sovereign Expropriation of Property and Abrogation of Concession Contracts" (1959) 28 Ford.L.R. 177 at 184, Brownlie, *Principles of Public International Law,* 539 and White, *Nationalisation of Foreign Property,* 41.

24) UNCTAD, *Bilateral Investment Treaties in the mid 1990s,* 65 and Gallins, "Bilateral Investment Protection Treaties" (1984) 2 Journal on Energy and Natural Resources Law 77 at 88.

25) Chapter B IV 3b.

The terms "individual expropriation" and "nationalisation" are used in this paper as outlined at the beginning of this section. By contrast, the general expressions "expropriation" and "taking" are used interchangeably, to include both.

b) Confiscation

Confiscation is a taking by a State without compensation. Penal takings may amount to confiscation.[26] Non–penal confiscations, by contrast, are rare nowadays because they are widely regarded as contrary to international law.[27] The treaty should reflect this recognised principle and prohibit non-penal confiscations by setting forth criteria for lawful takings.[28]

c) Creeping Expropriation

Creeping or "indirect" expropriation means that a State imposes upon foreign investors a series of different measures, or continuously requires certain actions by those investors where one measure, taken individually, would not amount to an expropriation, but considered together they make the effective control of an investment impossible. Creeping expropriation always occurs without a formal taking. There is no generally accepted definition of creeping expropriation in international law. Typical measures, often cited as examples, range from the compulsory sale of the investment or parts thereof,[29] the levying of unjustified taxes,[30] the impairment of the management and control over an investment,[31] to exchange and price controls,[32] the "freezing" or

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[26]) For more details, see infra: chapter B IV 3a(iv) and Wortley, *Expropriation in Public International Law*, 40-45.

[27]) See: *e.g.*, Ipsen, *Völkerrecht*, 4th ed., (München: C.H. Beck Verlag, 1999), 597 and the decision of the US Court of Appeals, Second Circuit in *Banco Nacional De Cuba vs. Sabbatino El At* [1962] 35 ILR 2 at 21 (hereinafter "*Sabbatino*").

[28]) See infra: chapter B IV 2.

[29]) See: *e.g., Fedorchak Claim* [1962] 40 ILR 96.

[30]) For more details on excessive taxation see: Wälde and Kolo, "Confiscatory Taxation under Customary International Law and Modern Investment Treaties" (1999) 4:17 CEPMLP Internet Journal 1-24, published at http://www.dundee.ac.uk/cepmlp/journal/html/article4-17.html.

[31]) See: *e.g.*, *Sedco* (Interlocutory Award of October 24, 1985) [1985] 84 ILR 484 at 515 and McKinstry Robin, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 953.

[32]) United States, *Memorandum by Robinson, Legal Adviser of the Department of State, on the Application of International Law to the Iranian Foreign Exchange Regulations*, February 15, 1984, (1984) 23 ILM 1182 at 1184, Sec. IV.

"blocking" of assets,[33] and constant administrative harassment by local authorities.[34] The economic consequences of these measures are often equivalent to those resulting from governmental conduct traditionally termed "expropriation", *i.e.* the formal taking of assets.

A special type of creeping expropriation that becomes increasingly relevant in practice is regulatory taking. A regulatory taking occurs if domestic legislation affects proprietary rights of foreign investors in a way that it is tantamount to expropriation.[35] The concept of "regulatory takings" has emerged from US law and is now gaining significance in international economic law[36] even if it has not yet been formally incorporated in international investment treaties.[37] The tribunal in *S.D. Myers Inc. vs. Canada* confirmed that even if regulatory conduct by public authorities rarely amounts to expropriation, it could not rule out that possibility[38] and in *Metalclad,* the arbitrators held that the implementation of a Mexican Ecological Decree, making the operation of an investment project impossible constituted an act tantamount to expropriation.[39] There is a wide range of domestic legislation which has an impact on the operation of an investment, ranging from local labour laws and social security regulations to restrictions on the account of public health and export bans.[40] However, changes to national tax laws and stricter environmental regulations are the major concern of foreign investors today. In the future the challenge will be to define criteria to distinguish legitimate national legislation on the one hand,

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33) See: *e.g., Tran Qui Than vs. Blumenthal* [1979] 66 ILR 350 at 358 where the District Court of the Northern District of California held in *dicta* that a definite blocking of assets if it effectively deprives an alien of substantially all the benefits of his interest in the property could amount to a taking under international law. See also: Weston, *'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation',* 154.

34) See: *e.g., Metalclad vs. Mexico* [2000], ICSID Case No. ARB(AF)/97/1, para. 104-107 and Voss, *The Protection and Promotion of Foreign Investment in Developing Countries: Interests, Interdependencies, Intricacies,* 703.

35) Wälde, "MITs (Multilateral Investment Agreements) in the Year 2000: A Contribution to Melanges Philippe Kahn" (1999) 4:15 CEPMLP Internet Journal 1-29, published at http://www.dundee.ac.uk/cepmlp/journal/html/article4-15.html.

36) Wälde, *Current Issues in Investment Disputes: Comments* (Comment), 1 at 3, published at http://www.dundee.ac.uk/cepmlp/journal/html/forum_8.html.

37) Wälde and Kolo, "Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law" (2001) 50 ICLQ 811 at 821.

38) *S.D. Myers, Inc. vs. Canada* (Partial Award) [2000], para. 281, published at http://www.dfait-maeci.gc.ca/tna-nac/myersvcanadapartialaward-final-13-11-00.pdf.

39) *Metalclad vs. Mexico* [2000], ICSID Case No. ARB(AF)/97/1, para. 109-111.

40) For export restrictions, see: *S.D. Myers, Inc. vs. Canada* (Partial Award) [2000], published at http://www.dfait-maeci.gc.ca/tna-nac/myersvcanadapartialaward-final-13-11-00.pdf.

and regulation that amounts to expropriation on the other.[41] Clearly, the dividing line can be very thin.[42]

Creeping expropriation is a "modern" form of depriving foreign investors of their property, while traditional expropriations rarely occur nowadays. It is thus crucial that the Convention addresses creeping expropriation. There are three possible approaches for defining this term:

1.) The laconic BIT approach.[43] This method incorporates creeping expropriation into the definition of expropriation. BITs often prohibit "measures having a similar character or effect as expropriation",[44] or – even more imprecisely – require that no Contracting Party shall take any measures depriving "directly or indirectly" an investor of any other Contracting Party of his investment.[45] It appears that convenience and the desire for simplicity and open-ended provisions on expropriation resulted in these widely used terms.[46] They are too vague to be helpful. What government activities have an effect *similar* to expropriation?

2.) Precise definition and other criteria. Some writers have suggested defining more precisely what creeping expropriation is. They recommend adding rather extensive protocols to the shorthand formula in many BITs.[47] The deficiency of this approach is that it appears nearly impossible to come up with an exhaustive list of interferences qualifying as creeping expropriation. Governments are creative. They can easily invent new impediments not listed in the treaty. Other authorities have proposed that aspects, such as political intent and the timing of a measure (*e.g.,* whether an interference began only after foreigners invested in a given project) should be decisive. Cases in which all these criteria are met imply that the interferences in

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[41]) Some authors have suggested a number of standards to differentiate between these two. See: *e.g.,* Wälde, *MITs (Multilateral Investment Agreements) in the Year 2000: A Contribution to Melanges Philippe Kahn*, 11-12 and *idem* and Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law,* 826-846.

[42]) McKinstry Robin, *The BIT Won't Bite: The American Bilateral Investment Treaty Program,* 953 and UNCTAD, *Series on Issues in International Investment Agreements: Taking of Property* (Geneva: UN, 2000), 6, UN Doc.UNCTAD/ITE/IIT/13.

[43]) This approach, however, is not unique to BITs. The North American Free Trade Agreement, Art. 1110, the Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IV(2) and the Energy Charter Treaty, Art. 13, employ it as well.

[44]) See: *e.g.*, Agreement between Spain and Cuba on the Promotion and Reciprocal Protection of Investments, dated May 27, 1994, Art. V(1) and Abkommen zwischen der Republik Österreich und der Volksrepublik China über die Förderung und den gegenseitigen Schutz von Investionen vom 12. September 1985, Art. 4 (1) on "Maßnahmen mit gleicher Wirkung."

[45]) See: *e.g.*, Agreement between Chile and Norway on the Promotion and Reciprocal Protection of Investments, dated June 1, 1993, Art. 6(1).

[46]) Dolzer, "Indirect Expropriation of Alien Property" (1986) 1 ICSID-Rev. FILJ 41 at 55.

[47]) *Ibid.*

question are tantamount to a creeping expropriation.[48] This method is not useful for two reasons: (1.) Some of its crucial elements, such as political intent, are hard to find out and even harder to prove. (2.) Even if certain factors can easily be proved, *e.g.,* the timing of a measure, it is quite simple for the expropriating State to find plausible explanations to justify the taking. For instance, an increase in taxes payable by an investor occurs after a foreigner has invested in a given project. In this scenario the host State could easily argue that the increase was necessary for budgetary reasons, and had nothing to do with the fact that a foreign investor was involved.

3.) Illustrative list. An adequate compromise is to list illustrative measures, such as the impairment of the management of an investment, which would clearly amount to creeping expropriation.[49] The benefits of such a non-exhaustive, illustrative list are evident:

(1.) it avoids the vagueness of the current BIT approach;

(2.) it does not depend on criteria which cannot be proved, such as political intent;

(3.) it could exclude legitimate regulations of the host State by explicitly incorporating an exception for these measures;[50]

(4.) it allows enough flexibility to include new interferences constituting a taking, which creative governments invent after the Convention comes into force; and,

(5.) it could reflect impediments which most often occur in practice, in particular constant administrative harassment by local authorities.

d) Unilateral Alteration or Termination of State Contracts

The term "State contract" describes an agreement between a government and a natural or legal person. Concession agreements, *e.g.,* contracts conferring rights on investors to exploit natural resources in the host State, are the best known examples of State contracts.[51] However,

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48) Voss, *The Protection and Promotion of Foreign Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 706.

49) See: UNCTAD, *Series on Issues in International Investment Agreements: Taking of Property,* 21 listing treaties, particularly Canadian BITs, which adopt this approach. See also: Treaty between the US and Senegal Concerning the Reciprocal Encouragement and Protection of Investment, dated December 6, 1983, Art. III(1) and Treaty between the US and Haiti Concerning the Reciprocal Encouragement and Protection of Investment, dated December 12, 1983, Art. III(1).

50) Such an exception would probably be favoured by capital-importing States, which may otherwise fear that any regulation that somehow interferes with a foreign investment may be termed "creeping expropriation" or "regulatory taking". The difficulty of defining the borderline between "legitimate regulatory measures" and "takings" would remain.

51) The term "concession agreement" often refers to an agreement to exploit natural resources, particularly oil and gas. See: *e.g.*, the *BP* [1974] 53 ILR 297, *Texaco* [1977] 53 ILR 389 and *Liamco* [1977] 62 ILR 141 cases as well as

they may also have other objectives, such as the construction and operation of transport and telecommunication systems.[52] State contracts raise two highly controversial legal issues.[53]

The first is the law applicable to such agreements in the absence of an explicit choice of law clause. Some jurists, for example arbitrator Prof. Dupuy in the *Texaco* award,[54] assert that in these cases State contracts may be "internationalised". This means that they are subject to international law either instead of or, in addition to, the law of the host State. The breach of a State contract would then *per se* constitute an international wrong, similar to the breach of a treaty. Opponents of this theory reject it because international State practice does not support it.[55] "Internationalisation" of a State contract also does not offer a clear set of rules applicable to such agreements,[56] and there is no convincing definition of the category of contracts so "internationalised"[57]. According to this alternative view, the State contract is subject to the national law of the host State, but certain aspects may be controlled by the *lex mercatoria,* or by another national law determined by applying rules of conflict of laws.[58] The breach of a State contract is not *per se* an international wrong.

The second controversy relates to the validity of stabilisation clauses. A stabilisation clause in a State contract provides that a State may not unilaterally alter or prematurely terminate the agreement. The majority of writers adopt the view that stabilisation clauses are valid under

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Sapphire International Petroleums Ltd. vs. National Iranian Oil Company [1963] 35 ILR 136 (hereinafter *"Sapphire"*), *Saudi Arabia vs. Arabian American Oil Company* [1958] 27 ILR 117 (hereinafter *"Aramco"*) and *Ruler of Qatar vs. International Marine Oil Company, Ltd.* [1953] 20 ILR 534. However, in *The Mavrommatis Jerusalem Concessions* Case [1925] P.C.I.J., Series A, No. 5, the concession covered rights for the "public distribution of electric power and for electric tramways", and rights for the "construction and exploitation of the works necessary for the supply of drinking water". See also: the decision of the Permanent Court of Arbitration in the *Lighthouses Arbitration between France and Greece* (Claim No. 27) [1956] 23 ILR 299, where the operation and administration of lighthouse services was subject to a concession agreement. For more details on contractual rights as one form of an "investment" see, supra: chapter A III 1.

52) For a more examples, see: Brownlie, *Principles of Public International Law*, 549-550.

53) For more details on State contracts see: *e.g.*, Paasivitra, "Internationalisation and Stabilisation of State Contracts versus State Sovereignty" (1989) 60 BYIL 315 and Greenwood, *State Contracts and International Law – The Libyan Oil Arbitrations*, 27.

54) [1977] 53 ILR 389 at 455 and Jennings, "State Contracts in International Law" (1961) 37 BYIL 156 at 162-163.

55) Brownlie, *Principles of Public International Law*, 552, See also: the decision of the P.C.I.J. in the *Case Concerning the Payment of Various Serbian Loans Issued in France* [1929] P.C.I.J., Series A, No. 20/21, where the court held that "any contract, which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country" *Ibid.*, 41.

56) Sornarajah, *The International Law on Foreign Investment,* 343 and Fatouros, "International Law and the Internationalized Contract" (1980) 74 AJIL 134 at 136.

57) Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach" (1988) 59 BYIL 49 at 51.

58) For more details on these other views rejecting the "internationalisation theory", see: *Ibid*, 50-53.

international law[59] as long as they do not amount to the permanent and irrevocable relinquishment of a State's sovereign powers.[60] However, it is disputed whether or not the breach of a State contract containing a stabilisation clause constitutes an internationally unlawful act.[61]

The Convention needs to avoid the uncertainties associated with these controversial questions. There are three possible approaches to deal with State contracts.

1. Explicit Provision Equating Termination or Alteration of State Contracts with Expropriation. Such a clause would specify that a unilateral alteration or termination of a State contract by the host State for non-commercial reasons may amount to a lawful expropriation if the requirements set forth in the treaty for a lawful taking are met.[62] The Guidelines contain a similar provision.[63] Such a rule clarifies that the breach of a State contract even in violation of a stabilisation clause is not *per se* unlawful under international law. It constitutes an unlawful taking only if certain pre-conditions listed in the Convention for a lawful expropriation are not satisfied. For example, the unilateral termination of a concession agreement for non-commercial reasons and without a legitimate public purpose would be illegal. The qualification that the State contract may not be unilaterally terminated or altered for non-commercial reasons is essential. It ensures that a termination or alteration by the host State for commercial reasons, and in compliance with

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59) The validity of stabilisation clauses under national law obviously depends on domestic laws and regulations. Some authors have argued that stabilisation clauses are often invalid under national law and even if they are not, their continuing effect is in the hands of the national legislature. See: Wälde and N'di, "Stabilising International Investment Commitments: International Law Versus Contract Interpretation" (1996) 1:9 CEPMLP Internet Journal 1 at 20, published at http://www.dundee.ac.uk/cepmlp/journal/html/article1-9.html. However, the validity of stabilisation clauses under domestic law only becomes an issue if the State contract in question is governed by a national law.

60) See: *e.g.*, Greenwood, *State Contracts and International Law – The Libyan Oil Arbitrations*, 61-62, Jaenicke, "Consequences of a Breach of an Investment Agreement Governed by International Law, by General Principles of Law or by Domestic Law of the Host State" in Dicke (ed.), *Foreign Investment in the Present and a New International Economic Order* (Fribourg: University Press Fribourg, 1987) 177 at 185 and the *Texaco* [1977] 53 ILR 389, *Liamco* [1977] 62 ILR 141 and *Aminoil* [1982] 66 ILR 519 awards. It is, however, unclear under which circumstances a State's sovereignty has been limited to an extent which would render a stabilisation clause invalid. In *Texaco* [1977] 53 ILR 389, a stabilisation clause in an agreement over 50 years was considered to be valid, while in *Amoco International Finance Group Corp. vs. Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company* (Partial Award) [1987] 83 ILR 501 (hereinafter *"Amoco"*), 35 years was not a "limited period of time". Detter De Lupis argues that stabilisation clauses are contrary to State sovereignty and thus invalid because a State cannot bind itself not to nationalise foreign property. See: Detter De Lupis, *Finance and Protection of Investments in Developing Countries*, 2nd ed., (Hants: Gower Publishing Company Ltd., 1987), 84-85.

61) For illegality: Judge Fitzmaurice in his separate opinion in the *Aminoil* award [1982] 66 ILR 621-627, White, *Nationalisation of Foreign Property,* 179 and arbitrator Dupuy in the *Texaco* award [1977] 53 ILR 389 at 494-495. However, the majority in the *Aminoil* case [1982] 66 ILR 519 and arbitrator Mahmassani in the *Liamco* case [1977] 62 ILR 141 at 196-197 held that the breach of a State contract containing a stabilisation clause was lawful.

62) For more details on the requirements for a lawful expropriation, see infra: chapter B IV 2.

63) Guideline IV(11).

the law of the contract, *e.g.*, upon a material breach of the contract by the investor, would not be equated with an expropriation, for which compensation would be due.[64]

2.) Obligation Clause. An obligation clause guarantees that each Contracting Party observes any obligations arising from a particular commitment it may have entered into with regard to a specific investment.[65] Some BITs contain an obligation clause, which makes the observation of the terms of a State contract a treaty obligation.[66] This feature distinguishes it from the first option outlined above. The breach of a State contract by the host State would thus automatically constitute a breach of the Convention. This technicality puts pressure upon States not to breach agreements with foreign investors. It safeguards a high degree of security and predictability. In addition to a traditional obligation clause the Convention may also specify that such a provision is without prejudice to the host States right to alter or terminate the contract for commercial reasons and in compliance with the law governing the agreement. This would reassure States otherwise reluctant to agree to an obligation clause because it ensures that unilateral alteration and termination of State contracts in these circumstances would not result in a violation of the Convention.

3.) Making the observation of a State contract a prerequisite for a lawful taking. A third option to address State contracts is explicitly to make their observation a prerequisite for a lawful taking under the Convention. The treaty would then only allow expropriation if, in addition to the other conditions for lawful takings outlined below,[67] it is not a breach of a State contract. The difference between such a provision and an obligation clause is that the latter makes the

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64) The difficulty in practice, however, is *how* to distinguish commercial from political reasons and how to deal with cases where both motivations are involved.

65) Gallins, *Bilateral Investment Protection Treaties,* 84. An obligation clause reinforces that contractual rights are "investments" under the Convention. For more details on the definition of investment, see supra: chapter A III 1.

66) Jaenicke, *Consequences of a Breach of an Investment Agreement Governed by International Law, by General Principles of Law or by Domestic Law of the Host State,* 190. A number of recent treaties, such as the Energy Charter Treaty (Art. 10(1), last sentence) and the Agreement between the UK and India for the Promotion and Protection of Investments, dated March 14, 1994, (Art. 3(3)) make the observation of *any* obligation entered into with an investor a treaty obligation. The difference between such a provision and a traditional obligation clause is that the latter is limited to "*specific* commitments" or obligations arising out of a "*specific* investment", while the former may cover all types of obligations of the host State, even commitments in general legislation on which prospective investors relied. See: Wälde, *International Investment under the 1994 Energy Charter Treaty,* 294-295. Such a broad provisions that does not clearly define *which* obligations of the host State are covered by the treaty, may not be acceptable to States in a multilateral investment convention, particularly if disputes between foreign investors and host States arising out of this provision are covered by the treaty's investor-State dispute resolution machinery. The Energy Charter Treaty - if interpreted literally - seems to provide for these very wide consequences. See: *Ibid.,* 295. The UK-India BIT, by contrast, explicitly mentions in Art. 3(3) that "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party, *provided that dispute resolution under Article 9 of this Agreement shall only be applicable to this paragraph in the absence of a normal local judicial remedy being available.*" [Emphasis added.] Article 9 of the BIT addresses disputes between an investor and a host State.

67) Chapter B IV 2.

observation of *all* articles of a State contract a treaty obligation. The former, by contrast, would only make the provision on expropriation in the State contract a treaty obligation under the Convention.

To summarise:

1.) The treaty must elaborate the concept of creeping expropriation. It should list illustrative measures, which would constitute a creeping expropriation.

2.) The instrument should include an obligation clause, making the observation of State contracts a treaty obligation. Such a provision should be without prejudice to the host State's right to alter or terminate the agreement for commercial reasons and in compliance with the law of the contract.

2. *Conditions for Lawful Expropriations*

It is generally accepted that expropriations of alien property are not *per se* contrary to international law, provided that certain conditions are met.[68] However, much disagreement exists on the exact extent of these prerequisites.

a) Public Purpose

A well-established requirement for a lawful expropriation is that the taking has to be for a "public purpose" or in the "public interest". The Guidelines[69] and countless other instruments,[70] numerous arbitral awards and judicial decisions,[71] as well as writers,[72] accept this qualification.

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[68]) Jennings and Watts (eds.), *Oppenheim's International Law, Vol. I, Parts 2-4,* 918-919 and Pellonpää and Fitzmaurice, "Taking of Property in the Practice of the Iran-United States Claims Tribunal" (1988) XIX NYIL 53 at 60. Also: GA Res. 1803(XVII) on Permanent Sovereignty over Natural Resources, dated December 14, 1962, Art. 4. Some authorities, such as Riad, regard the right of a State to expropriate alien property as a rule of *jus cogens.* See: Riad, "Host Countries Permanent Sovereignty over Natural Resources and Protection of Foreign Investors" (1983) 39 Revue Égyptienne de Droit International 35 at 74.

[69]) Guideline IV(1).

[70]) See: *e.g.*, North American Free Trade Agreement, Art. 1110(1)(a), Energy Charter Treaty, Art. 13(1)(a), Agreement between Australia and China on the Reciprocal Encouragement and Protection of Investments, dated July 11, 1988, Art. VIII(1) and Agreement between Chile and Norway on the Promotion and Reciprocal Protection of Investments, dated June 1, 1993, Art. 6(1)(a).

[71]) See: *e.g.*, *Texaco* [1977] 53 ILR 389 at 479-480, *Walter Fletcher Smith vs. The Compañia Urbanizadora Del Parque y Playa De Marianao* [1929] 24 AJIL 384 at 386 (hereinafter "*Walter Fletcher Smith*") and the decisions of the European Court of Human Rights in the *Case of James and Others* [1986] 96 Eur.Ct.H.R., Series A, No. 98, 30-32 and *Lithgow and Others* [1986] 75 ILR 439 at 485.

But there is no agreement about its content and usefulness. Tesón, for example, points to the difficulties involved in proving the absence of a public purpose in practice.[73] Other writers criticise the vagueness of the term.[74] Nawaz asserts that every State action must *per se* be deemed to have been motivated by a public purpose and that the motives of a State cannot be questioned by international law.[75] His arguments thus render the entire concept pointless.[76] Bishop[77] and Dolzer/Stevens,[78] conclude that the determination of what constitutes a public purpose in fact rests to a considerable degree with the expropriating State.

Notwithstanding these criticisms, the Convention should require the existence of a legitimate public purpose as a prerequisite for the legality of a taking. There are mainly two reasons which justify this traditional approach.

1.) In spite of its vagueness, the condition may turn out to be decisive in extreme cases. For example, in the *Walter Fletcher Smith* award,[79] the arbitrator held that a taking for purposes of amusement and private profit was unlawful. The seizure of property in the course of committing crimes against humanity or genocide would clearly be contrary to public purpose.[80] Expropriations for "extraneous political reasons" have repeatedly been held to violate international law.[81] Following the *BP* award the UK, for instance, formulated that the "public

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72) See: *e.g.*, Jennings and Watts (eds.), *Oppenheim's International Law, Vol. I, Parts 2-4,* 918-919, Domke, "Foreign Nationalizations: Some Aspects of Contemporary International Law" (1961) 55 AJIL 585 at 590 and Friedman, *Expropriations in International Law* (London: Stevens and Sons Ltd., 1953, reprint Westport, Connecticut: Greenwood Press Publishers, 1981), 140-141.

73) Tesón, "State Contracts and Oil Expropriations: The Aminoil-Kuwait Arbitration" (1984) 24 Virg.J.Int'l.L. 323 at 339.

74) Sornarajah, *The Pursuit of Nationalized Property* (Boston, Dordrecht, Lancaster: Martinus Nijhoff Publishers, 1986), 183, White, *Nationalisation of Foreign Property,* 150 and American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States*, Vol. 2, (St. Paul, Minnesota: American Law Institute Publishers, 1987), 200.

75) Nawaz seems to indicate that the presumption that any State action must be deemed to be for a public purpose is not reputable. He does not explicitly say so, but he argues that motives of States are not open to question at the international plane. See: Nawaz, "Nationalizations of Foreign Oil Companies – Libyan Decree of 1 September 1973" (1974) 14 Ind.J.Int'l.L. 70 at 75.

76) Sole arbitrator Mahmassani in *Liamco* [1977] 62 ILR 141 at 194 also held that the requirement of a public purpose is not necessarily a prerequisite for the legality of a nationalisation.

77) Bishop, *General Course of Public Law* (1965) II Recueil des Cours 151 at 404.

78) Dolzer and Stevens, *Bilateral Investment Treaties,* 104.

79) [1929] 24 AJIL 384. So also: Katzarov, "The Validity of an Act of Nationalization in International Law" (1959) 22 Mod.L.Rev. 639 at 642.

80) Muchlinski, *Multinational Enterprises and the Law* (Oxford, UK and Cambridge, US: Blackwell, 1995), 505.

81) See: *e.g.*, the *BP* award [1974] 53 ILR 297 at 329 and Pellonpää and Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal,* 63.

purpose" needs to relate to the internal needs of the expropriating State. This qualification is intended to exclude takings for "foreign policy" reasons. It is reflected in recent BITs concluded by the UK.[82] McNair[83] and Verdoss,[84] confirmed the illegality of the Indonesian nationalisations of Dutch property in 1958 because their primary purpose was to obtain sovereignty over West Irian.

2.) It is correct that, in practice, it will be the expropriating State that initially determines whether or not a given taking has been for a public purpose.[85] This fact, however, does not justify the omission of this prerequisite. The public purpose is not an entirely self-judging condition. In the event of a dispute over this issue, it will be up to an arbitral tribunal or judicial body to clarify the purpose of a given measure.[86] States expropriating foreign property may thus be more careful than without this requirement.

b) Non-Discrimination and Due Process of Law

Non-discrimination as a necessity for a lawful expropriation is widely accepted in international law,[87] and reflected in numerous BITs[88] and multilateral agreements.[89] Some authorities, *e.g.*, Detter De Lupis,[90] view this prerequisite as a mere subsidiary to the rule

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82) See: *e.g.*, Agreement between the UK and Kenya for the Promotion and Protection of Investments, dated September 13, 1999, Art. 5(1) and Agreement between the UK and Honduras for the Promotion and Protection of Investments, dated December 7, 1993, Art. 5(1).

83) McNair, "The Seizure of Property and Enterprises in Indonesia" (1959) 6 Nederlands Tijdschrift voor Internationaal Recht 218 at 246.

84) Verdoss, "Die Nationalisierung niederländischer Unternehmungen in Indonesien im Lichte des Völkerrechts" (1959) 6 Nederlands Tijdschrift voor Internationaal Recht 278 at 284.

85) Bishop, *General Course of Public Law,* 404 and Dolzer and Stevens, *Bilateral Investment Treaties,* 104.

86) Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 190. Domke, however, argues that a public purpose clause should not be included in a treaty because governments may not wish to make this issue an arbitrable one under any machinery for dispute settlement. See: Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law,* 591.

87) Foighel, *Nationalisation and Compensation,* 148, Bishop, *General Course of Public Law,* 404 and Jennings and Watts (eds.), *Oppenheim's International Law, Vol. I, Parts 2-4,* 920.

88) See: *e.g.*, Agreement between the UK and Kenya for the Promotion and Protection of Investments, dated September 13, 1999, Art. 5(1), Agreement between Australia and Vietnam on the Reciprocal Promotion and Protection of Investments, dated March 5, 1991, Art. 7(1)(b) and Treaty between the US and Turkey Concerning the Reciprocal Encouragement and Protection of Investments, dated December 3, 1985, Art. III(1).

89) See: *e.g.*, Energy Charter Treaty, Art. 13(1)(b), North American Free Trade Agreement, Art. 1110(1)(b) and Draft Multilateral Agreement on Investment (version: Feb., 14, 1998), Sec. IV(2.1.)(b). Also: Guideline IV(1).

90) Detter De Lupis, *Finance and Protection of Investments in Developing Countries,* 71.

demanding a valid public purpose for a lawful taking, while others want to limit its application to racial discrimination.[91]

In practice a violation of the rule of non-discrimination has usually been invoked if takings seemed to have been directed against aliens of a particular nationality. For example, in *Amoco*,[92] a US investor in Iran claimed – without any success - that the taking of its investment was illegal because a Japanese investor in a comparable situation had not been expropriated. In *Aminoil*[93] the company unsuccessfully argued that the rule of non-discrimination was violated because the only other oil company in Kuwait, the Arabian American Oil Company, had not been nationalised. Tribunals have generally shown a reluctance to find discrimination against aliens. Only arbitrator Lagergren in the *BP* award[94] and a US Court of Appeals in *Sabbatino*[95] explicitly held that the nationalisations involved in these cases were discriminatory and thus unlawful.

Guideline IV(1) specifies that in the event of a taking, a State may not discriminate against aliens on the basis of nationality. This rule is inconsistent with other Guidelines. The Convention should therefore omit such a provision.

As explained above the treaty should have a clause on national and MFN treatment.[96] It should also ensure fair and equitable treatment.[97] These standards guarantee sufficient protection for foreign investors against various kinds of discrimination, *e.g.*, on the basis of sex, race, nationality and religion. A clause, such as Guideline IV(1), limiting unlawful takings to

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91) Sornarajah, *The Pursuit of Nationalized Property*, 187.

92) [1987] 83 ILR 501 at 550. The tribunal argued that "it finds it difficult, in the absence of any other evidence, to draw the conclusion that the expropriation of a concern was discriminatory only from the fact that another concern in the same economic branch was not expropriated. Reasons specific to the non-expropriated enterprise, or to the expropriated one, or to both, may justify such a difference of treatment". *Ibid.*, 551. A similar argument was raised in the *Oscar Chinn* Case [1934] P.C.I.J., Series A/B, No. 63, 64 at 87, where the PCIJ held that discrimination clearly needs to be *based upon* nationality. The mere fact that one business is affected by State measures, while another one of a different nationality is not, does not suffice to establish a violation of the rule of non-discrimination.

93) [1982] 66 ILR 515 at 585. In this decision the tribunal rejected Aminoil's argument that there had been discrimination on the basis of its American nationality by emphasising that there were legitimate reasons for not nationalising the Arabian American Oil Company (AOC). AOC's concession was granted by both Saudi Arabia and Kuwait. Modifications to this concession must thus be agreed to by both countries, while Aminoil's concession was granted by Kuwait only. Termination or modification of this concession was therefore not subject to approval by another State.

94) [1974] 53 ILR 297 at 329.

95) (Court of Appeals, Second Circuit) [1962] 35 ILR 2 at 11 and 23. This decision was overruled in 1964 by the US Supreme Court on the basis of the Act of State Doctrine. *Ibid.*, 25. See also: the US District Court, Southern District, N.Y., decision in *Banco Nacional De Cuba vs. First National City Bank* [1967] 42 ILR 45. This decision was subsequently reversed by the US Court of Appeals, Second Circuit on other grounds. See: [1971] 51 ILR 11 and [1971] 66 ILR 48 and the decision of the US Supreme Court [1972] 66 ILR 102.

96) Chapter B III 1a-b.

97) Chapter B III 1c.

expropriations in cases of discrimination *on the basis of nationality only,* would cause difficulties in interpreting the Convention. One could argue that such a qualification in the article on expropriation is *lex specialis* to the general provisions on national and MFN treatment. Otherwise the section on expropriation would have been silent on the issue of discrimination, or would have referred to the general rules on treatment, emphasising that these articles equally apply to expropriations.[98] Such a "*lex specialis* interpretation" would contradict the purpose of the agreement. It does not make sense to restrict the protection available to foreign investors under national and MFN treatment to situations *other than* expropriations, particularly because many investors still fear the risk of takings. The Convention has to make clear that its general provisions on national and MFN treatment[99] apply to expropriations. Any misinterpretations between the article on takings and the general rules on treatment could thus be avoided.

The Guidelines[100] and some other agreements, such as NAFTA[101] and the Energy Charter Treaty,[102] demand that expropriations shall take place in accordance with due process of law. It is controversial whether this prerequisite constitutes an independent condition for the legality of a taking and, if so, what exactly it requires. The case law of the Iran-US Claims Tribunal, for example, does not support the existence of this restriction.[103] Some authorities are silent on this matter,[104] while others explicitly accept the condition.[105] They often equate it with the availability of judicial review,[106] a fair hearing before the expropriation takes place, decision-making by unbiased governmental officials and judges[107] and similar procedural standards.

Some of these components, such as access to domestic courts and transparency, are already addressed by the Convention in the standard of fair and equitable treatment, and full and

98) See also: Peters, *Investment Risk and Trust: The Role of International Law,* 142-143.

99) For more details, see supra: chapter B III 1a-b.

100) Guideline IV(1).

101) North American Free Trade Agreement, Art. 1110(1)(c).

102) Energy Charter Treaty, Art. 13(1)(c).

103) Pellonpää and Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal,* 65.

104) See: *e.g.*, UNCTAD, *Bilateral Investment Treaties in the mid 1990s,* 66-73.

105) See: *e.g.*, Dolzer and Stevens, *Bilateral Investment Treaties,* 106-107 and *Amco vs. Indonesia* (Merits) [1984] 89 ILR 405 where an ICSID tribunal considered the revocation of an investment license unlawful due to lack of due process.

106) Vandevelde, *The Bilateral Investment Treaty Program of the United States,* 234 and Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IV (2.6.).

107) Dolzer and Stevens, *Bilateral Investment Treaties,* 106.

constant protection and security.[108] However, it is useful to provide for due process of law as an independent criterion for the legality of an expropriation. It guarantees an additional safeguard against arbitrary and capricious actions by the host State, which may not always be clearly covered by the general rule on fair and equitable treatment, given its imprecise definition.

c) Compensation

The payment of compensation to aliens for the taking of their property is one of the most-debated issues in international law.[109] Primarily, there are two controversies: (a) whether compensation is a prerequisite for the legality of the measure? and (b) what the standard of compensation is? This section deals with the first question only.[110]

The vast majority of writers,[111] countless treaties,[112] several arbitral awards and judicial decisions[113] and other authorities[114] confirm that some sort of compensation needs to be paid to expropriated foreigners. Otherwise the taking would be illegal. This conclusion is often justified by pointing to theories, such as property rights being "acquired rights",[115] "unjust enrichment",[116] constitutional provisions or human rights.[117]

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108) For more details, see supra: chapter B III 1c.

109) Jennings and Watts (eds.), *Oppenheim's International Law, Vol. I, Parts 2-4,* 920-921.

110) The second question is addressed in chapter B IV 3.

111) See: *e.g.*, Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments,* 243, Sohn and Baxter, "Responsibility of States for the Injuries to the Economic Interests of Aliens" (1961) 55 AJIL 545 at 553, Comeaux and Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk,* 78, Friedman, *Expropriations in International Law,* 212, Muchlinski, *Multinational Enterprises and the Law,* 506 and Jennings and Watts (eds.), *Oppenheim's International Law, Vol. I, Parts 2-4,* 920 and authorities cited therein.

112) See: *e.g.*, North American Free Trade Agreement, Art. 1110(1)(d), Energy Charter Treaty, Art. 13(1)(d), Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. IV (2.1.)(d), Swiss model BIT, Art. 6(1), Danish model BIT, Art. 5, Agreement between Japan and Hong Kong for the Promotion and Protection of Investment, dated May 15, 1997, Art. 5(1), Agreement between Australia and Vietnam on the Reciprocal Promotion and Protection of Investments, dated March 5, 1991, Art. 7(1)(c). Generally on provisions on compensation, see: Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties,* 244-257 and Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment,* 289-306.

113) See: *e.g.*, *Norwegian Shipowners' Claims* [1922] 1 RIAA 307 at 338, *Liamco* [1977] 62 ILR 141 at 201. Also: the decision of the US District Court, Southern District, N.Y., in *Banco Nacional De Cuba vs. First National City Bank* [1967] 42 ILR 45. This decision was subsequently reversed by the US Court of Appeals, Second Circuit on other grounds. See: [1971] 51 ILR 11 and [1971] 66 ILR 48 and the decision of the US Supreme Court [1972] 66 ILR 102.

114) See: *e.g.*, UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 67 and the note of August 22, 1938 by US Secretary of State Cordell Hull in Hackworth (ed.), *Digest of International Law,* Vol. III, (Washington: US Government Printing Office, 1942), 658.

115) See: *e.g.*, Foighel, *Nationalisation and Compensation*, 124-128. Also: *Amco vs. Indonesia* (Merits) [1984] 89 ILR 405 at 493-498.

By contrast, Brownlie and Sornarajah maintain that the payment of compensation is at least not a prerequisite for a lawful *nationalisation,* because this requirement could render major economic and social programmes in the expropriating host State impossible.[118] A similar position was taken in the GA in its resolution which formed the Charter of Economic Rights and Duties of States.[119] It sets forth that compensation "should" not "shall" be paid.[120] The effect of this resolution was to present compensation as politically or morally desirable, rather than legally obligatory.

A treaty cannot decide this controversy as to the position in customary law. It should itself take the approach that host States may expropriate foreign investments if compensation is paid in accordance with the Convention's subsequent provisions on the standard of compensation.[121] The benefit of such a clause is that, on the one hand, it would not render takings without compensation, such as certain kinds of penal confiscations,[122] *per se* illegal. On the other hand, it would also cover most cases in which an obligation exists to compensate foreign investors for expropriated assets.

To summarise:

The treaty should precisely define that host States may expropriate foreign investments only if:

1.) The taking is for a public purpose related to the host State's internal needs.

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116) See: *e.g.*, Detter De Lupis, *Finance and Protection of Investments in Developing Countries,* 81 and the *Lena Goldfields Arbitration* [1930] 36 Cornell L.Q. 42 at 51 where, however, the Court found that the expropriation was unlawful. Also: Meessen, "Domestic Law Concepts in International Expropriation Law" in Lillich (ed.), *Valuation of Nationalized Property in International Law,* Vol. IV, (Charlottesville: University Press of Virginia, 1987) 157 at 161-165 for a critical analysis of this concept.

117) Additional Protocol to the European Convention on Human Rights, 1952, Art. 1 and American Convention on Human Rights, 1969, Art. 21(2).

118) Brownlie, *Principles of Public International Law,* 539 and Sornarajah, *The Pursuit of Nationalized Property,* 192.

119) GA Res. 3281 (XXIX), dated December 12, 1974. This resolution, however, does not reflect a consensus on customary international law because major industrialised countries voted against it or abstained. For more details see: Clagett, "Just Compensation in International Law: The Issues before the Iran-United States Claims Tribunal" in Lillich (ed.), *Valuation of Nationalized Property in International Law,* Vol. IV, (Charlottesville: University Press of Virginia, 1987) 31 at 45-48 and arbitrator Dupuy in *Texaco* [1977] 53 ILR 389 at 488-493. Also, Art. 10 of the UN Charter states that the GA can make "recommendation" only.

120) GA Res. 3281 (XXIX), dated December 12, 1974, Art. 2(2)(c).

121) Very few instruments on FDI contain such a clause. See: North American Free Trade Agreement, Art. 1110(1)(d). By contrast, many BITs and the Energy Charter Treaty (Art. 13(1)(d)) state that a lawful taking generally requires compensation, which needs to be either "just" or "appropriate" or "prompt, adequate and effective".

122) Penal confiscations are sanctions by the host State against the investor's violation of local laws, particularly in situations where the investor is engaged in illegal activities, such as drug trafficking and arms trading. For more details, see infra: chapter B IV 3a(iv).

2.) The expropriation is in accordance with due process of law and the Convention's general provisions on treatment.

3.) Compensation is paid as set forth in the subsequent provisions of the instrument.

3. Standard of Compensation

Rood wrote in 1977: "...in the confusion of today one must conclude that no settled law [on compensation] has emerged. Commentators seem to agree on this."[123] It appears that 25 years later this statement is still true. There is no agreement whether "just", "appropriate", "fair", "partial" or "prompt, adequate and effective" compensation should be paid by a State taking foreign property. Even authorities, who in principle agree upon a given standard, argue about the exceptions to their general rule. Does it make a difference whether a State expropriates an individual enterprise or an entire sector of the economy? Should the conduct of the investor matter?

a) Individual Expropriations

(i) "Fair", "Appropriate" and "Equitable" Compensation

USD 66m (as compared to USD 186m claimed) were awarded to Liamco for the premature termination of its oil concession by Libya.[124] Arbitrator Mahmassani determined this sum by relying on the formula of "equitable compensation" because it seemed reasonable and just to adopt it.[125] Mahmassani's decision is often cited as an authority for the proposition that compensation for expropriated assets should be "just" or "equitable" or "fair" or "appropriate", but in any event less than full.[126] The supporters of this theory emphasise that such a flexible

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123) Rood, "Compensation for Takeovers in Africa" (1977) 11 J.Int'l.L.&Econ. 521 at 535.

124) *Liamco* [1977] 62 ILR 141 at 218. In addition the company was awarded USD 13,882,677 for the loss of physical assets and USD 203,000 toward its arbitration costs plus 5% "compensatory indemnity" in lieu of interest on these sums.

125) *Ibid.*, 210.

126) See: *e.g.*, Asante, *International Law and Foreign Investment: A Reappraisal,* 603. The term "just" compensation is used in some domestic laws, such as in US law. In the domestic law context it usually means "full" compensation. See: Mendelson, "What Price Expropriation? Compensation for Expropriation: The Case Law" (1985) 79 AJIL 414 at 416.

approach allows an inquiry into all the relevant circumstances of a particular case,[127] *e.g.*, the risks involved in the investment and the timing of the taking.[128] Some writers maintain that the political stability of the host State and its capacity and willingness to pay should be relevant.[129] Otherwise the accepted goal of development of poor countries would be rendered pointless.[130] Finally, the conduct of foreign investors should matter. Bad business practices and "excess profits," for instance, may justify a reduction of compensation.[131] Kuwait claimed in the *Aminoil* Case[132] that the damage caused by the company's improper oil field practices should be set off from the compensation due to Aminoil.

Some GA resolutions press for "appropriate" compensation. Resolution 1803(XVII) on Permanent Sovereignty over Natural Resources is a well-known example.[133] The Charter of Economic Rights and Duties of States, by contrast, does not require any compensation.[134] Sornarajah's analysis of the former resolution reveals that "appropriate" compensation could range from full to no compensation. Partial compensation, however, is the generally accepted standard.[135]

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127) van de Voorde, *Belgian Bilateral Investment Treaties as a Means for Promoting and Protecting Foreign Investments*, 103-104.

128) Riad, *Host Countries Permanent Sovereignty over Natural Resources and Protection of Foreign Investors*, 84.

129) Kuhn, "Nationalization of Foreign-Owned Property and its Impact on International Law" (1951) 45 AJIL 709 at 710 and Dawson and Weston, "'Prompt, Adequate and Effective': A Universal Standard of Compensation?" (1962) 30 Ford.L.Rev. 727 at 754-755.

130) Sornarajah, *The Pursuit of Nationalized Property*, 191.

131) *Idem, The International Law on Foreign Investment*, 404-405 and 411 and Rood, *Compensation for Takeovers in Africa*, 531-532. Other writers achieve the same result by applying the "notion of equity", particularly in cases of nationalisations. This concept balances the claims of the dispossessed investor with the profits and advantages he enjoyed prior to the taking. See: Francioni, "Compensation of Nationalisation of Foreign Property: The Borderland between Law and Equity" (1975) 24 ICLQ 255 at 278. The issue of "excess profits" first arose in the Chilean expropriations of the Kennecott Copper Corporation and the Anaconda Company in 1971. The Chilean military government maintained that excess profits in the total amount of USD 410m for Kennecott alone was to be deducted from the compensation due to the company. In 1974 the company and the government concluded a settlement agreement indemnifying Kennecott in the total amount of USD 68m. For more details on these takings, see: Steiner and Vagts, *Transnational Legal Problems*, 3rd ed., (Mineola, N.Y.: The Foundation Press Inc., 1986), 510.

132) [1982] 66 ILR 515 at 595-599. The tribunal, however, carefully avoided a ruling on this issue by arguing that bad oil field practices had not been proven.

133) GA Res. 1803(XVII), dated December 14, 1962, Art. 4.

134) GA Res. 3281(XXIX), dated December 12, 1974, Art. 2(2)(c).

135) Sornarajah, *The International Law on Foreign Investment*, 406. He states that full compensation is only "appropriate" in cases where the foreign investor was "invited" by the host State for a project which could not have been completed without his investment, or if a small business is taken and the investor could not commence profits from his investment. *Ibid.*, 408-409.

Finally, decisions of international tribunals seem to support the concept of "appropriate", "fair" or "just" compensation. The PCIJ in its famous *obiter dictum* in the *Chorzów Factory* Case[136] confirmed that "just" compensation needs to be paid in cases of lawful expropriations.[137] "Just" compensation also was awarded in the *Norwegian Shipowners' Claims.*[138] "Appropriate" compensation was due in *Aminoil,*[139] and "equitable" compensation had to be paid in *Liamco.*[140]

(ii) The Hull Formula

A note written by US Secretary of State Cordell Hull on August 22, 1938 to the Mexican Minister of Foreign Affairs was the origin of what became subsequently known as the Hull formula. It demands "prompt, adequate and effective" compensation for expropriated foreign property.[141] Jurists interpreted this formula to mean that payment has to be made without undue delay, reflecting the real value of the expropriated investments at the time of the taking and be of practical use for the recipient, *i.e.,* freely realisable and transferable in a convertible currency.[142] Writers favouring the Hull formula argue that "flexible" compensation not based on the full value of the assets taken is inherently arbitrary and capricious.[143] It remains, for example, completely unclear how the "equitable" considerations of arbitrator Mahmassani in *Liamco*[144] resulted in the amount of USD 66m for the premature termination of the company's oil concession. Promoters of the Hull Formula further state that taking account of factors such as "excess profits" is rather unprincipled. If a foreign investor conducted a business in the host State in accordance with the domestic laws, a subsequent reduction of his compensation on the basis of "excess profits" would penalise his success.[145] Commentators preferring the outlined "flexible" standard of

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136) (Merits) [1928] P.C.I.J., Series A, No.17. This case involved an unlawful individual expropriation by Poland of German property, taken in breach of a treaty. The PCIJ held that in the event of such an unlawful expropriation restitution in kind was the proper remedy.

137) *Ibid.,* 47-48.

138) [1922] 1 RIAA 307 at 338-340.

139) [1982] 66 ILR 515 at 601-602.

140) [1977] 62 ILR 141 at 210.

141) Hackworth, *Digest of International Law,* 658.

142) Comeaux and Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk,* 82 and Peters, *Investment Risk and Trust: The Role of International Law,* 144.

143) Clagett, *Just Compensation in International Law: The Issues before the Iran-United States Claims Tribunal,* 86.

144) [1977] 62 ILR 141.

145) Clagett, *Just Compensation in International Law: The Issues before the Iran-United States Claims Tribunal,* 91.

compensation are also accused of having a stereotyped view of foreign investors. They traditionally focus on large MNCs, such as big oil companies, which have substantial market control and exploit host States for the profit of their shareholders. These authors ignore the fact that expropriations equally affect small investors.[146]

(iii) The Compromise in Guideline IV

Traditionally, the Hull formula has been supported by Western writers[147] and developed States.[148] Developing countries have favoured the flexible standard of "just", "appropriate" or "fair" compensation.[149] The Guidelines aspire to reconcile these opposing positions. They declare that compensation needs to be "appropriate",[150] *i.e.*, "prompt, adequate and effective".[151] The report accompanying the Guidelines attempts to justify this wording. It explains that the Hull formula "specifies" the general term of "appropriate" compensation, and that "normally" compensation will be deemed "appropriate" if it is "prompt, adequate and effective".[152]

However, the Guidelines and the accompanying report cause confusion by attempting to merge two different concepts. Guideline IV(1-2) is therefore not a reliable foundation for a treaty

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146) Lillich, "The Valuation of Nationalized Property in International Law: Toward a Consensus or More 'Rich Chaos'?" in Lillich (ed.), *The Valuation of Nationalized Property in International Law,* Vol. III, (Charlottesville: University Press of Virginia, 1975) 183 at 200.

147) See: *e.g.*, Robinson, *Expropriation in the Restatement (Revised)*, 176-178, Norton, "Back to the Future: Expropriation and the Energy Charter Treaty" in Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London, The Hague, Boston: Kluwer Law International, 1996) 365 at 380, *idem*, "A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation" (1991) 85 AJIL 474 at 488-492 and Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law,* 604-608.

148) The Hull formula is incorporated in many BITs concluded by developed States. See: *e.g.*, Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. III(1) and Agreement between Sweden and Yemen for the Promotion and Protection of Investments, dated October 29, 1983, Art. 5(1). More than 50% of the BITs surveyed in preparation of the Guidelines contained the Hull formula. See: Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 256. See also: American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States,* Vol. 2, 197 which does not explicitly state that compensation needs to be "prompt, adequate and effective", but describes this standard in other words. Compare: American Law Institute, *Restatement of the Law (Second): The Foreign Relations Law of the United States* (St. Paul, Minnesota: American Law Institute Publishers, 1965), 563 adopting the traditional Hull formula.

149) Asante, *International Law and Foreign Investment: A Reappraisal,* 598-602, Sornarajah, *The International Law on Foreign Investment,* 402-411 and GA Res. 3281(XXIX) on the Charter of Economic Rights and Duties of States, dated December 12, 1974 adopted by a majority of 120 States. Six major capital exporting countries (the US, the UK, Belgium, Denmark, Luxembourg and the Federal Republic of Germany) voted against it.

150) Guideline IV(1).

151) Guideline IV(2).

152) The World Bank, *Legal Framework for the Treatment of Foreign Investment, Vol. II – Guidelines, Report to the Developing Committee and Guidelines on the Treatment of Foreign Direct Investment,* 25. Western countries, however, have liked the term "specifying" in the report, as they could argue that compensation is usually only "appropriate" if it is in fact "prompt, adequate and effective".

provision. The Convention should instead secure that in cases of individual expropriations[153] foreign investors are compensated according to the Hull formula. That rule, however, is without prejudice to the instrument's general provisions on monetary transfers. Such a qualification is essential as it ensures that the host State can defer payment of compensation in cases of foreign exchange stringencies.[154] The approach of the Guidelines, by contrast, has significant deficiencies.

1.) The meaning of Guideline IV(1) and IV(2) is not clear. First, neither the Guidelines nor the accompanying report describe in which circumstances "appropriate" compensation may be less than "prompt, adequate and effective". Secondly, the standard of "appropriate" compensation is in itself indeterminate. To agree that compensation needs to be "appropriate" is to agree to nothing.[155] Even terms such as "fair" or "just" have more substance.[156]

2.) State practice does not support the concept of "appropriate" compensation without more precision. Numerous GA resolutions often cited as evidence for this standard are not conclusive. GA resolution 1803(XVII) on Permanent Sovereignty over Natural Resources was passed by a 87 votes to 2 with 12 abstentions. Many developing countries and industrialised States voted in its favour. The resolution was therefore subsequently regarded as reflecting customary international law.[157] In its Art. 4 it mentions "appropriate" compensation. However, States interpreted this term differently.[158] The US affirmed that it understood this article to mean "prompt, adequate and effective" compensation.[159] Representatives of the developing world equated it with their flexible concept of "appropriate" compensation.[160] The Charter of Economic

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[153]) For nationalisations, see infra: chapter B IV 3b.

[154]) As outlined in chapter B III 2b, the host State should have the right to defer payment of compensation for expropriated property in exceptional circumstances of foreign exchange stringencies. The Convention should make it clear in its provision on expropriation that this right takes prejudice over the rule set forth in the Hull formula requiring payment to be "prompt". The Guidelines achieve the same result by incorporating a separate provision in Guideline IV(8) stating that compensation under the Hull formula is still deemed to be "prompt" even if payment is in exceptional circumstances of foreign exchange stringencies deferred for up to five years.

[155]) Norton, *Back to the Future: Expropriation under the Energy Charter Treaty*, 380.

[156]) Peters, *Investment Risk and Trust: The Role of International Law*, 144.

[157]) See: *e.g.*, the analysis of this and other GA resolutions by arbitrator Dupuy in *Texaco* [1977] 53 ILR 389 at 486-492 and *Sedco Inc. vs. National Iranian Oil Company and Iran* (Interlocutory Award of March 27, 1986) [1986] 84 ILR 521 at 526.

[158]) Boas, "The O.E.C.D. Draft Convention on the Protection of Foreign Property" (1963-64) 1 Comm.Mkt.L.Rev. 265 at 280-281.

[159]) In fact the US proposed to include the traditional Hull formula in GA Res. 1803(XVII), but subsequently withdrew its suggested amendment. See: Schwebel, "The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources" (1963) 49 ABAJ 463 at 465-466.

[160]) See: *e.g.*, Sornarajah, *The International Law on Foreign Investment*, 405.

Rights and Duties alludes in its Art. 2(2)(c) to the term "appropriate compensation." This resolution, however, does not represent a consensus on customary international law, because major industrialised countries voted against it[161] or abstained.[162]

3.) Case law does not reinforce a "flexible" standard of compensation. The interpretation of relevant decisions has caused some disagreement amongst commentators. Sometimes writers tend to stick too much to words, rather than interpreting the *meaning* of a given award. The strongest argument in favour of a flexible standard of compensation is that none of the major cases in fact adopts the Hull formula.[163] The earlier crucial decisions, such as the *Chorzów Factory* Case[164] and the *Norwegian Shipowners' Claims*[165] were made in 1928 and 1922. The Hull formula was first introduced in 1938.[166] Clearly, cases decided ten or sixteen years prior to that do not employ the exact wording of "prompt, adequate and effective" compensation. However, these cases nevertheless support the "adequate" component of the Hull formula. Compensation is "adequate" if it amounts to the real value of the assets taken. The PCIJ in its *obiter dictum* in the *Chorzów Factory* Case explicitly confirmed that "the just price of what was expropriated" reflecting the "value of the undertaking" needs to be paid by the expropriating State.[167] In the *Norwegian Shipowners' Claims* the Permanent Court of Arbitration (PCA) emphasised that "just compensation implies a complete restitution of the *status quo ante*".[168] It is hardly convincing that these phrases in fact support a flexible standard of compensation which would amount to less than full compensation.[169] The same confusion of substance with semantics

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161) The Federal Republic of Germany, the UK, the US, Belgium, Luxembourg and Denmark voted against this resolution.

162) For a detailed analysis of this resolution, see: arbitrator Dupuy in *Texaco* [1977] 53 ILR 389 at 488-493, where he states that Art. 2 "is a political rather than legal declaration, concerned with the ideological strategy of development and, as such, supported only by the non-industrialised States". *Ibid.*, 492. Also: Clagett and Poneman, "The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law" (1988) 22 Int'l. Lawyer 35 at 37 and Robinson, *Expropriation in the Restatement (Revised)*, 176-177.

163) Schachter, *Compensation for Expropriation*, 122-123, *idem*, "Compensation Cases – Leading and Misleading" (1985) 79 AJIL 420 and Asante, *International Law and Foreign Investment: A Reappraisal*, 603.

164) (Merits) [1928] P.C.I.J., Series A, No. 17.

165) [1922] 1 RIAA 307.

166) Hackworth, *Digest of International Law*, 658.

167) (Merits) [1928] P.C.I.J., Series A, No. 17, 47.

168) [1922] 1 RIAA 307 at 338.

169) So also: Mendelson, *What Price Expropriation? Compensation for Expropriation: The Case Law*, 415-416 and *idem*, "Note to the Editor in Chief" (1985) 79 AJIL 1041-1042. See also: Gann, "Compensation Standard for Expropriation" (1985) 23 Col.J.Transnat'l.L. 615 at 651.

occurs in recent cases.[170] In *Aminoil* the tribunal awarded "appropriate" compensation, which corresponded to the depreciated replacement value of the company's tangible assets, including indemnification for the premature termination of its concession agreement. This was deemed to reflect Aminoil's "legitimate expectations" plus interest.[171] Finally, the Iran-US Claims Tribunal[172] often corroborated the standard of "prompt, adequate and effective" compensation under both the Treaty of Amity[173] and customary international law.[174]

4.) BIT practice and other regional and multilateral treaties on FDI, such as NAFTA[175] and the Energy Charter Treaty,[176] indicate that States including developing countries are willing to accept the Hull formula.[177] The 1992/93 World Bank survey of BITs revealed that more than 50% of the BITs analysed adopted the standard of "prompt, adequate and effective" compensation.[178] Whether this extensive treaty practice reflects customary international law is an ongoing controversy that has already been briefly mentioned.[179] Even if one concludes that the large number of BITs and other investment treaties requiring full compensation are not a restatement of customary international law, their significance in showing what States are willing to agree to should not be underestimated. A multilateral investment agreement that ignores this trend in modern treaty practice would hardly be acceptable to States that have incorporated the Hull formula in BITs they have concluded.

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170) The difficulty that words may sometimes jeopardise meaning is not unique to the interpretation of judicial decisions or arbitral awards. It equally occurs in interpreting treaties. For example, the North American Free Trade Agreement, Art. 1110(1) does not contain a provision that compensation needs to be "prompt, adequate and effective". It describes the Hull formula in other words. The reason for the absence of the exact wording of the Hull formula was the traditional Mexican "sensitivity" to this language. See: Levy, "NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the 'Prompt', 'Adequate' and 'Effective' Standard" (1995) 31 Stan.J.Int'l.L. 423 at 445.

171) [1982] 66 ILR 515 at 613-614.

172) For a summary of the decisions of the tribunal on compensation see: Pellonpää and Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal,* 115-175.

173) Treaty of Amity, Economic Relations and Consular Rights between Iran and the US, dated August 15, 1955, Art. IV(2). See: *e.g., Phillips Petroleum Company Iran vs. Iran and National Iranian Oil Company* [1989] I, Vol. 21, Iran-US CTR 79 at 118.

174) See: *e.g., Sedco Inc. vs. National Iranian Oil Company and Iran* (Interlocutory Award of March 27, 1986) [1986] 84 ILR 521 at 525 and *Tippetts, Abbett, McCarthy, Stratton vs. Iran, TAMS-AFFA Consulting Engineers of Iran, Civil Aviation Organization, Plan and Budget Organization, Iranian Air Force, Ministry of Defense, Bank Melli, Bank Sakhteman and Mercantile Bank of Iran and Holland* [1984] II, Vol. 6, Iran-US CTR 219 at 225.

175) North American Free Trade Agreement, Art. 1110(1) and supra: footnote 170.

176) Energy Charter Treaty, Art. 13(1)(d).

177) Muchlinski, *Multinational Enterprises and the Law,* 503.

178) Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties,* 256.

179) Chapter A IV 4.

5.) Finally, supporters of "fair", "equitable" or "appropriate" compensation argue that criteria, such as "excess profits" should be taken into consideration when determining the amount of compensation due to expropriated foreign investors. However, they fail to explain what excess profits are. Would that depend on generated income in relation to the value of the initial investment? Is the market share of the investor decisive? What if an investor faces "excess losses", *e.g.* because the investment was taken before it could generate revenue? Is this a fact relevant for the amount of compensation due? If not, why are "excess profits" taken into account while "excess losses" are ignored?

(iv) Compensation in Cases of Punitive Expropriations

Guideline IV(9) permits a reduction or even non-payment of compensation for expropriated property if the taking was a sanction by the host State against the investor's non-compliance with local laws. Capital-exporting States, particularly the Netherlands, criticised this rule because it is open to abuse.[180] Host States could conduct "punitive expropriations" for minor violations of domestic laws and refuse to pay any compensation. Advocates of developing countries favour Guideline IV(9). It gives host States an effective tool to minimise improper conduct by foreign investors.[181]

The Convention should arrive at an acceptable compromise between these two positions. It may, for instance, link the duty to pay compensation to the treaty's general provisions on treatment. The agreement may guarantee foreign investors treatment at all times in accord with the treaty's article on fair and equitable treatment. In addition, the treaty could affirm that the obligation of the host State to pay compensation for expropriated investments is without prejudice to the lawful application of its domestic laws. This technicality would balance the interests of potential host States and developing countries. Activities such as drug-trafficking, illegal arms trading and violations of domestic anti-trust laws may justify a reduction or non-payment of compensation.[182] Host States could thus put pressure upon foreign investors to comply with domestic legislation. At the same time the clause would accommodate capital-exporting countries fearing "punitive expropriations" for minor violations of domestic laws. Penal takings for minor

[180]) Shihata, *Legal Framework of Foreign Investment*, 115.

[181]) Sornarajah, *The International Law on Foreign Investment*, 221.

[182]) In cases where the investment does not comply with local laws, the investor may not claim compensation *under the Convention* anyway, as the treaty only applies to investments established and operated in accordance with domestic laws. See supra: chapter B I 3. If the investor engages in illegal activities (either in addition to operating an otherwise legal investment or by using it as a vehicle to conduct such activities), *e.g.*, drug trafficking or money laundering the outlined approach may justify the taking of the investment without compensation.

infringements of local laws would contradict the fair and equitable treatment provision of the treaty, and are therefore prohibited.[183]

b) Nationalisations

Nationalisation programmes throughout the 20th century, such as the Soviet takings after the Russian Revolution, the Mexican agrarian and oil nationalisations, and countless post-World-War-II social reform programmes in the States of the former Eastern European bloc gave rise to the question of whether in these cases the amount of compensation payable to foreign investors should be less than "prompt, adequate and effective".[184]

(i) Nationalisations and Partial Compensation

A considerable number of commentators maintain that there is no obligation of a State nationalising foreign assets to pay compensation according to the Hull formula. These authorities argue that many developing countries most likely in need of social and economic reforms may not have enough financial resources to pay all foreign investors fully upon the nationalisation of a sector of their economy.[185] Also, the financial burden is in cases of large-scale economic reforms much higher than in the event of an individual expropriation. This fact justifies the view that the capacity of a country to pay compensation should be taken into account.[186] In fact, a rule requiring full compensation would render large-scale economic reforms in some States impossible.[187]

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183) For more details on fair and equitable treatment, see supra: chapter B III 1c.

184) Other nationalisations were, *e.g.*, the takings of Dutch property by Indonesia in 1958, the Castro-seizures in Cuba and the land reforms in some successor States to Austria-Hungary. For a list of major nationalisations in the 20th century, see: Bishop, *General Course of Public Law,* 406.

185) Dolzer, "New Foundations of the Law of Expropriation of Alien Property" (1981) 75 AJIL 553 at 583 arguing that the economic situation of numerous developing countries will make full payment of compensation the exception rather than the rule.

186) Boas, *The O.E.C.D. Draft Convention on the Protection of Foreign Property,* 280.

187) Kuhn, *Nationalization of Foreign-Owned Property and its Impact on International Law*, 711 and Kronfol, *Protection of Foreign Investment: A Study in International Law,* 112. See also: Sohn and Baxter, *Responsibility of Sates for the Injuries to the Economic Interests of Aliens*, 559-560. The American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States*, Vol. 2, 199 lists narrow scenarios, such as a taking of alien property during war or similar exigency, in which the Hull formula should not be applicable. Other authorities want to allow partial compensation only if the investor has already recovered his initial investment. See: Bauman, "An International Standard of Partial Compensation Upon the Expropriation of Alien's Property" (1987) 19 Case West.Res.J.Int'l.L. 103 at 110.

Sornarajah emphasises that in cases of nationalisations it is crucial to reconcile the principle of respect for alien property with the interest of development and economic change in the host State.[188] State practice confirms this in the many lump-sum settlement agreements concluded between governments.[189] For instance, after World War II and Communist take-overs throughout Eastern Europe, the UK negotiated lump sum agreements with Argentina, Mexico, Poland and a number of other countries. Compensation provided for in these treaties amounted to approximately 30-60% of the British claims.[190] In fact, in most of the 20th century settlement agreements, payment was rarely "prompt, adequate and effective".[191]

No international tribunal has yet finally ruled on the standard of compensation payable to foreign investors in cases of large-scale economic and social reforms in host States.[192] The Iran-US Claims Tribunal has indicated in one case that under customary international law the standard of "prompt, adequate and effective" compensation may not apply to nationalisations.[193] *INA Corp vs. Iran*[194] contains *obiter dictum*[195] that: "... in the event of large-scale nationalisations of a lawful character, international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of the 'full' or 'adequate' (when used as identical to 'full') compensation standard."[196]

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188) Sornarajah, *The Pursuit of Nationalized Property,* 192.

189) Dawson and Weston, *'Prompt, Adequate and Effective': A Universal Standard of Compensation?,* 749.

190) Kronfol, *Protection of Foreign Investment: A Study in International Law,* 112. Bowett estimates that the post 1945 lump sum settlement agreements provided for compensation ranging from 10-90% of the asset value. See: Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach,* 65.

191) Garcia Amador, "A Basic Dispute: Conflicting Views on Expropriation" in Norton (ed.), *Public International Law and the Future World Order* (Littleton, Colorado: Rothman & Co., 1987) 7-1 at 7-9 particularly on the requirements of "prompt" and "effective" payment.

192) A German Court of Appeal, however, dealt with the issues in *N.V. Verenigde Deli-Maatschappijen and N.V. Senembah Maatschappij vs. Deutsch-Indonesische Tabak-Handelsgesellschaft m.b.H.* [1959] 28 ILR 16 and stated in *dicta* that in cases of large scale nationalisations and individual expropriations different standards of compensation apply. In the former category compensation only has to be paid out of the future proceeds of the enterprises nationalised. *Ibid.,* 35.

193) For an analysis of the case, see: Pellonpää and Fitzmaurice, *Taking of Property in the Practice of the Iran-United States Claims Tribunal,* 118-119, Brower, *The Iran-United States Claims Tribunal* (1990) V Recueil des Cours 133 at 342-343 and Amerasinghe "Issues of Compensation for the Taking of Alien Property in the Light of Recent Cases and Practice" (1992) 41 ICLQ 22 at 43-44.

194) [1985] 75 ILR 596.

195) *Ibid.,* 602. The tribunal held that the present case has to be decided according to the Treaty of Amity, which forms *lex specialis* to customary international law.

196) US Judge Holtzmann, however, rejected that any "reappraisal" of customary international law has led to a change in the standard of compensation. *Ibid.,* 625.

(ii) Nationalisations and the Hull Formula

The policy arguments outlined at the beginning of the previous section, pleading for less than "prompt, adequate and effective" compensation for nationalised investments, are not convincing. They can be easily refuted by other policy grounds. For instance, partial compensation for nationalised investments really means that foreign investors bear the costs of a domestic reform programme. This is particularly intolerable if the venture taken was a going concern, which is subsequently operated by the host State for its own profit.[197] Also, aliens have usually not contributed to creating the problems the nationalisation is supposed to solve. They have no influence in the decision-making process on the reform programme,[198] and they are unlikely to enjoy whatever benefits may be derived from the nationalisation.[199]

The limited financial capacity of some States is not a justification for less than full compensation because States may postpone payment in accord with the Convention's provisions on monetary transfers, *e.g.*, in cases of balance of payment problems.[200] If a State is still too poor to pay compensation as set forth by the treaty's transfer provisions, it can refrain from the measure in question.[201] Partial compensation for nationalised property would penalise foreign investors in cases where the host State wishes to carry out a reform project, for which it does not intend to pay the full price.[202] Compensation may then be considerably lower than the host

197) Clagett, *Just Compensation in International Law: The Issues before the Iran-United States Claims Tribunal,* 81 and Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law,* 607.

198) Meessen, *Domestic Law Concepts in International Expropriation Law*, 167, Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 189 and Verdoss, *Die Nationalisierung niederländischer Unternehmungen in Indonesien im Lichte des Völkerrechts,* 287. See also: the decision of the European Court of Human Rights in *Lithgow and Others* [1986] 75 ILR 439 at 484, where the court held that compensation payable in cases of large scale economic reforms may very well differ between nationals and non-nationals. The latter cannot influence the domestic legislation and it is legitimate to require nationals to bear the greater burden of such a reform. The court also held that the reference to "general principles of international law" in Art. 1(1), in the second sentence of the First Additional Protocol to the European Convention on Human Rights, is not applicable to nationals, and that governments have a "margin of appreciation" in setting the amount of compensation. *Ibid,* 483-485 and 486-487. The consequence of this ruling is that governments may in fact enjoy a wide margin of discretion to fix compensation for nationals in cases of large-scale economic reforms without fearing much interference from the European Court of Human Rights. See: Mendelson, "The United Kingdom Nationalization Cases and the European Convention on Human Rights" (1986) 57 BYIL 33 at 74.

199) Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 189.

200) Chapter B III 2.

201) See also: Clagett, *Just Compensation in International Law: The Issues before the Iran-United States Claims Tribunal,* 81 and Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts,* 189.

202) Clagett and Poneman, *The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law*, 45. It is also not reasonable, as suggested by some commentators, that the entire history of an investment project and all the relevant economic circumstances should be considered to determine the amount of compensation due. See: Penrose, Joffê and Stevens, "Nationalization of Foreign-owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation" (1992) 55 Mod.L.R. 351 at 363.

State's financial resources would allow.[203] In reality, measures called "nationalisation" or "social and economic reform" often have the real purpose of ending foreign economic domination in a given country.[204]

The point that State practice, as evidenced by numerous post World War II lump sum settlement agreements, supports a standard of compensation for nationalised assets which is less than full, is not convincing either. These agreements hardly reflect customary international law.[205] In practice, States have settled for less than they think they are entitled to because otherwise they would have ended up with nothing.[206] Recent treaties, such as most BITs,[207] NAFTA[208] and the Energy Charter Treaty[209] do not stipulate different standards of compensation for individual expropriations and nationalisations. They usually apply the Hull formula to both forms of taking. Even BITs concluded between developing countries insist upon "prompt, adequate and effective" compensation.[210]

Finally, no arbitral award or judicial decision exists confirming that an investor by accepting less than full compensation acknowledges a legal right of the nationalising State to pay only partial compensation.[211] The outlined *dictum* in *INA Corp. vs. Iran*[212] is not a definite authority for the proposition that less than full compensation should be paid by a State nationalising foreign investments. The case law of the Iran-US Claims Tribunal is inconclusive on

203) Friedman, *Expropriations in International Law,* 207.

204) Alenfeld, *Die Investitionsförderungsverträge der Bundesrepublik Deutschland,* 152. Bauman, however, argues that in cases of nationalisations aimed at ending foreign dominance, partial compensation is legitimate. See: Bauman, *An International Standard of Partial Compensation Upon the Expropriation of Alien's Property,* 110.

205) Mendelson, *The Formation of Customary International Law* (1998) 272 Recueil des Cours 155 at 301.

206) *Ibid.* and *Aminoil* [1982] 66 ILR 519 at 605-607 where the tribunal rejected the view advanced by Kuwait that transnational agreements concluded between oil companies and States in the 1970s on the compensation payable by the latter to the former for expropriated investments, settling for less than full value on the basis of the net book value, have become customary international law in the form of *lex petrolea, i.e.,* a law unique to the oil industry. The tribunal argued that reasons, such as pressure of very strong economic and political constraints caused the oil companies to agree to these deals. See also: *Amoco* [1987] 83 ILR 501 at 585.

207) See: *e.g.,* Agreement between Australia and China on the Reciprocal Encouragement and Protection of Investments, dated July 11, 1988, Art. VIII(1) and Treaty between the US and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, dated June 17, 1992, Art. III(1).

208) North American Free Trade Agreement, Art. 1110.

209) Energy Charter Treaty, Art. 13.

210) See: *e.g.,* Agreement between Egypt and Turkmenistan Concerning the Promotion and Reciprocal Protection of Investments, dated May 23, 1995, Art. 5 and Agreement between the Kyrgyz Republic and Pakistan on the Reciprocal Promotion and Protection of Investments, dated August 23, 1995, Art. 4.

211) McNair, *The Seizure of Property and Enterprises in Indonesia,* 251.

212) [1985] 75 ILR 596 at 602.

this question. Other decisions, such as *American International Group Inc. and American Life Insurance Company vs. Iran and Central Insurance of Iran*[213] acknowledge that "even in a case of lawful nationalization the former owner of the nationalized property is normally entitled to compensation for the value of the property taken".

(iii) The Approach of the Guidelines

Guideline IV(10) declares that in cases of non-discriminatory nationalisations effected in the process of large scale social reforms under exceptional circumstances of revolution, war and similar exigencies, the compensation may be determined through inter-State negotiations and, failing this, through international arbitrations.[214] The Guidelines thus assume that generally compensation for individual expropriations and nationalisations should be the same. This approach is a sound basis for a treaty. The reasons advanced in the previous section explain why the Convention should guarantee the same level of compensation for individual expropriations and nationalisations.

Guideline IV(10) does not specify any rules on the standard of compensation payable for nationalised foreign property that was taken under exceptional circumstances. It only requires inter-State negotiations or, failing this, international arbitration.

In fact, inter-State negotiations seem to be the most effective method to agree upon compensation in cases of war, revolution and similar emergencies. Nationalisations of foreign property in these situations are rare occasion nowadays. They do not need to be addressed in advance in an agreement dealing with the treatment and protection of FDI during peacetime.[215] In addition, it would not make much sense to endeavour to codify the level of compensation in detail, for example, in the form of a given percentage of the value of the property taken. The exact amount and the conditions of payment will primarily depend upon the individual circumstances of a given nationalisation and the state of affairs in the country concerned following a war or a revolution. Factors, such as the size and kind of the sector of the economy nationalised and the position of a given foreign investor in the market of the host State, may be decisive, as may be the timing of the measure. Finally, inter-State negotiations on compensation for nationalised foreign property taken in times of war or revolution form the usual method for States to resolve

213) [1983] III, Vol. 4, Iran-US CTR 96 at 105.

214) For more details on inter-State dispute resolution, see infra: chapter B V 2.

215) Due to the limited scope of this study, the effect of war on the validity and applicability of the proposed Convention cannot be addressed.

mass claims.[216] Numerous lump sum settlement agreements concluded after World War II illustrate this fact.

To summarise:

Compensation for individual expropriations and nationalisations of foreign investments must be "prompt, adequate and effective". There should be two exceptions to this general rule. First, the Hull formula does not apply to penal expropriations. Second, nationalisation under exceptional circumstances of war, revolution and similar exigencies need to be treated differently. In these situations, compensation should be determined by inter-State negotiations or, failing this, by international arbitration as set forth in Guideline IV(10).

4. Valuation

Guideline IV(5-6) lists methods of valuation to be used to calculate compensation due to foreign investors upon expropriation of their property. Most BITs, by contrast, do not make detailed references to valuation techniques.[217] NAFTA only alludes to "valuation criteria such as going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value".[218] Clearly, there is no single approach to valuation applicable to all forms of assets. The Guidelines distinguish four major formulae:

1.) The discounted cash flow (DCF) method for going concerns with a proven profitability.[219] DCF means that the value of an enterprise is first assessed by reference to its expected profits over the future years for the rest of its life. This amount is then reduced by the

[216]) The World Bank, *Legal Framework for the Treatment of Foreign Investment, Vol. II – Guidelines, Report to the Developing Committee and Guidelines on the Treatment of Foreign Direct Investment,* 29.

[217]) Exceptions are the Agreement between the Czech Republic and the United Arab Emirates for the Promotion and Protection of Investments, dated November 23, 1994, Art. 6(4). It states that "Such compensation ... shall be determined in accordance with recognized principles of valuation, such as market value; where market value cannot be readily ascertained, the compensation shall be determined on equitable principles taking into account *inter alia* the capital invested, depreciation, capital already repatriated, replacement value, goodwill and other relevant factors." See also: Agreement between New Zealand and Hong Kong for the Promotion and Protection of Investments, dated July 6, 1995, Art. 6(1). This treaty provides that "... such compensation shall amount to the real value of the investment ... Where that value cannot be readily ascertained, the compensation shall be determined in accordance with generally recognized principles of valuation and equitable principles taking into account the capital invested, depreciation, capital already repatriated, replacement value, currency exchange rate movements and other relevant factors." The same language was adopted by the Agreement between Australia and Lao PDR on the Reciprocal Promotion and Protection of Investments, dated April 6, 1994, Art. 7(2).

[218]) North American Free Trade Agreement, Art. 1110(2).

[219]) Guideline IV (6)(a).

venture's expected expenditures and a discount rate reflecting the time value of money.[220] This approach is the common technique to value a company in the business world in cases unrelated to expropriations.[221] The DCF method has been applied by tribunals in both *Amco* awards[222] and in *Starrett Housing*.[223] It is generally favoured as the most appropriate way of appraising income-producing assets. The DCF formula recognises that the monetary worth of such properties is their capacity to generate revenue in the future.[224] Its critics argue that it produces speculative results.[225]

2.) The liquidation value for enterprises lacking profitability.[226] It comprises the price of the individual assets of a company sold in the process of liquidation. The enterprise's liabilities are then deducted from the income gained in the sale of the venture's goods. The tribunal in *Sedco* awarded the liquidation value of the firm taken by Iran.[227]

3.) The replacement value for tangible assets other than going concerns or companies in liquidation.[228] This equates the cash amount needed to replace an asset. It assumes that the

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220) Such a discount is needed because the value of money decreases over time due to inflation.

221) Walsh, *Key Management Ratios* (London: Pearson Education Ltd., 1996), 266 stating that "...the value of a company, which is determined by its expected future cash flows and the discount factor to be applicable to these." And Clagett and Poneman, *The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law*, 65.

222) *Amco vs. Indonesia* (Merits) [1984] 89 ILR 405 at 506-509 and *Amco vs. Indonesia* (Merits: Resubmission) [1990] 89 ILR 580 at 633-636.

223) *Starrett Housing Corporation, Starrett Systems Inc. and Starrett Housing International Inc. vs. Iran, Bank Omran, Bank Mellat and Bank Markazi* (Final Award) [1987] 85 ILR 481 at 488-492. Although the tribunal applied the DCF method, it subsequently reduced the value of the property so calculated considerably by exercising its discretion to "determine equitably" the amount of compensation due. In *Phillips Petroleum Company Iran vs. Iran and National Iranian Oil Company* [1989] I, Vol. 21, Iran-US CTR 79 at 124 and 143, the tribunal rejected the DCF calculation, and applied its own method called "underlying asset valuation", which values tangible assets at their depreciated replacement value and adds the value of intangible assets by determining their historic earnings. Both cases have been criticised. What the tribunals termed "equity" in fact amounts to a circumvention of the standard of "prompt, adequate and effective" compensation by introducing considerations of equity into the valuation of the property taken. See: Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments*, 248-250 and Lieblich, "Determinations by International Tribunals of the Economic Value of Expropriated Enterprises" (1990) 7:1 J.Int'l.Arb. 37 at 69-74.

224) Friedland and Wong, "Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies" (1991) 6 ICSID-Rev. FILJ 400 at 407. Also: Meessen, *Domestic Law Concepts in International Expropriation Law*, 164 and Clagett and Poneman, *The Treatment of Economic Injury to Aliens in the Revised Restatement of Foreign Relations Law*, 65

225) Khalilian, "The Place of the Discounted Cash Flow in International Commercial Arbitration: Awards by the Iran-United States Claims Tribunal" (1991) 8:1 J.Int'l.Arb. 31 at 45-46 and *Amoco* [1987] 83 ILR 501 at 577-578 and 581, where the tribunal rejects the DCF calculation generally as an appropriate method of valuation in cases of lawful takings.

226) Guideline IV(6)(b).

227) *Sedco Inc. vs. National Iranian Oil Company and Iran* (Interlocutory Award of March 27, 1986) [1986] 84 ILR 521 at 524.

228) Guideline IV(6)(c).

property is indeed replaceable. It therefore fails to produce reliable results in estimating the value of intangible goods, such as contractual rights.[229] The replacement value was adopted in the *Aminoil* award for the business's fixed assets.[230]

4.) The net book value for tangible assets other than going concerns or companies in liquidation.[231] This is the difference between a company's assets and liabilities as recorded on its financial statements. Representatives of the developing world regard this method to be the prevailing international standard of valuation.[232] They particularly praise its objectivity and ease of application. Most Western writers reject it as inadequate. The net book value is only an accountancy concept unrelated to the real value of an asset.[233] For example, it does not include intangible assets such as management skills or technical expertise,[234] and it fails to take inflation into consideration.

A multilateral investment treaty does not have to specify which method(s) of valuation are applicable in certain circumstances. Instead it should list the generally accepted standards of valuation outlined above, except for the net book value which is inadequate to value investments. The Convention should provide that these approaches are to be employed as the nature of the asset to be valued may require. A more detailed provision would not make much sense because valuation of expropriated investments can result in complex calculations unsuitable for a general legal document.[235]

None of the formulae available today can be mechanically used for any fixed "category" of property. For example, a profitable expropriated enterprise cannot always be valued according

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229) Lieblich, "Determining the Economic Value of Expropriated Income-Producing Property in International Arbitrations" (1991) 8:1 J.Int'l.Arb. 59 at 70.

230) [1982] 66 ILR 515 at 609-613.

231) Guideline IV(6)(c).

232) Riad, *Host Countries Permanent Sovereignty over Natural Resources and Protection of Foreign Investors,* 81 and 86.

233) Lauterpacht, *Issues of Compensation and Nationality in the Taking of Energy Investments,* 245-246.

234) Friedland and Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies,* 406.

235) In the past, most developing countries expropriating enterprises have taken over the venture's assets, which subsequently had to be valued applying one of the outlined methods. By contrast, in the few cases of nationalisations in Western Europe it has been more common to take over a company's shares. The valuation of such shares differs depending upon whether or not the companies are listed at the stock exchange. Shares in listed companies are usually valued by an average stock price during a given time frame prior to the nationalisation. Unlisted companies are valued by methods similar to the DCF calculation. For more detail on the valuation of shares in nationalised French companies (financial institutions and certain industrial concerns), see: Mendelson, "International Law and the Valuation of Nationalised Shares: Two French Decisions" (1985) 34 ICLQ 284-296.

to the DCF method. The company in question may be too young to provide reliable data for such DCF calculation. The ICSID tribunal in *SPP*[236] had to reject this method explicitly, simply because there was too little history upon which expected future revenues could have been estimated.

Valuation according to inflexible concepts applicable to pre-determined categories of assets can lead to unreasonable results in practice. Sudden economic and social changes in the host State, for instance, may have an impact on the value of the property in question. In *Sola Tiles,*[237] for example, the tribunal refused to value a formerly profitable enterprise on the basis of the DCF calculation because the Islamic revolution in Iran had caused the market for luxury tiles to disappear.

The treaty should therefore not define which formula has to be employed to value any specific property. Valuation only needs to translate the standard of compensation into actual figures.

236) *Southern Pacific Properties (Middle East) Ltd. vs. Egypt* (Award) [1992] 3 ICSID Rep. 189 at 234.

237) *Sola Tiles Inc. vs. Iran* [1987] 83 ILR 460 at 480-481.

V. Dispute Settlement – Guideline V

A treaty is only as good as its dispute settlement mechanism.[1] However, when a bilateral or multilateral agreement has been successfully negotiated, the parties sometimes fail to set out a comprehensive procedure for dispute resolution[2] mainly because their relations are still good.[3] When a conflict arises, States may regret their earlier approach.

This chapter addresses the settlement of inter-State and investor-State disputes. Conflicts at the inter-State level may arise out of the interpretation or application of the Convention or when a State espouses a claim of its national(s). Investor-State disputes are often concerned with compensation for expropriated investments. In addition, restrictions on monetary transfers or other aspects of treatment of foreign investors may give rise to controversies. The first section of this chapter explains different methods of dispute settlement. It covers both inter-State and investor-State conflicts. The second and third section then focus in detail on the resolution of inter-State and investor-State disputes respectively. The final part of this chapter outlines the difficulties arising out of the recognition and enforcement of arbitral awards.

1. Methods of Dispute Settlement

Disputes can be resolved in several different ways. First, by non-binding negotiations, conciliation or both. Secondly, inter-State conflicts could be adjudicated by the ICJ, and investor-State disputes could be submitted to the domestic courts of the host State. Thirdly, all sorts of disagreement could be settled through *ad hoc* or institutional arbitration.

Conciliation is a method of dispute resolution which is not binding upon the parties. It involves the use of a conciliator to assist negotiation of a settlement.[4] The role of the conciliator is to attempt to bring about agreement between the disputing parties and to propose a compromise

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1) Price, "Remarks to the Proceedings of the American Society of International Law" (1997) 91 ASIL Proceedings 492 at 493.

2) Certain BITs, for instance, do not deal with investor-State dispute settlement. See: *e.g.*, Abkommen zwischen der Republik Österreich und der Volsrepublik China über die Förderung und den gegenseitigen Schutz von Investitionen vom 12. September 1985 and Treaty between the Federal Republic of Germany and Jordan Concerning the Encouragement and Reciprocal Protection of Investments, dated July 15, 1974.

3) Peter, "Settlement of Investment Disputes" (1985) 5:1 J.Int'l.Arb. 67 at 81.

4) Nurick and Schnably, "The First ICSID Conciliation: *Tesoro Petroleum Corporation v. Trinidad and Tobago*" (1986) 1 ICSID-Rev. FILJ 340 at 342.

solution by recommending terms of settlement.[5] Guideline V(1) lists conciliation as one form of resolving investor-State conflict. Most arbitration institutions have adopted rules for conciliation.[6] They may serve as an initial procedure in attempting to settle a controversy in a peaceful and informal manner. Conciliation covers a variety of differences, including those which are not arbitrable.[7] If conciliation fails, parties are free to resort to other means of dispute resolution.

Conciliation proceedings are rare in practice,[8] mainly because of their non-binding character. Parties often regard such proceedings to be ineffective because they carry no guarantee of final dispute resolution.[9] Conciliation may only be a waste of time.[10]

A multilateral investment treaty should nevertheless make provision for optional conciliation.[11] It is an adequate first step to settle any argument both between States and at the investor-States level. Conciliation is particularly suitable for parties who wish to continue a long-term relationship, which might easily become sour if either party immediately turns to binding dispute resolution.[12] Also, it is the least costly, most rapid and discreet form of resolving any differences.[13]

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[5]) Shihata, *The Settlement of Disputes – General Propositions and the World Bank's Approach and Experience*, 226.

[6]) See: *e.g.*, PCA Optional Conciliation Rules 1996, ICSID Convention, Arts. 28-35 and Rules of Procedure for Conciliation Proceedings, ICC Conciliation Rules, 1988, and UNCITRAL Conciliation Rules, 1980.

[7]) A dispute may not be arbitrable under certain arbitration regimes. The conflict may, for instance, not be an "investment dispute" as required by Art. 25(1) of the ICSID Convention. In the case of *ad hoc* arbitrations, mandatory domestic laws of the State where the proceedings take place may not allow particular kinds of conflicts to be settled through arbitration.

[8]) As of November 30, 2001 ICSID had concluded 58 cases, of which three were conciliation proceedings and 55 were arbitrations. As of the same date, 37 cases were still pending before ICSID tribunals. None of these pending cases were conciliation proceedings. All 37 cases were arbitrations. See, for pending cases: http://www.worldbank.org/icsid/cases/pending.htm. For concluded cases: http://www.worldbank.org/icsid/cases/conclude.htm. So far there have been no conciliation proceedings under ICSID's Additional Facility Rules. See: Shihata and Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 794. On the rare use of conciliation in practice, see also: Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 1986), 21.

[9]) Wegen, "Dispute Settlement and Arbitration" in Rubin and Nelson (eds.), *International Investment Disputes: Avoidance and Settlement* (St. Paul, New York, Los Angeles, San Francisco: West Publishing Company, 1985) 59 at 72.

[10]) Nurick and Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, 340.

[11]) By contrast, mandatory conciliation prior to other means of dispute settlement may be counterproductive. It may only postpone the final dispute resolution and result in additional costs in cases where the conflict has already become rather hostile and one or both parties are not willing to attempt to settle it amicably. See also: Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 21.

[12]) Broches, "Settlement of Disputes Arising out of Investments in Developing Countries" (1983) 11 Int'l.Bus.Law. 206.

[13]) UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 104.

If conciliation fails, domestic litigation seems to be the most effective means to resolve conflicts at the investor-State level. Some States view recourse to arbitration as an attack on their sovereignty, and insist upon adjudication by their national courts.[14] Even States which do submit controversies with foreign investors to arbitration may find it difficult to "adjust to the rules of the game". They often expect procedural privileges not open to the investor.[15] Finally, arbitral tribunals lack essential powers usually available to domestic courts. For instance, an arbitral tribunal cannot require the attendance of witnesses under penalty of fine or imprisonment,[16] or order consolidation of actions.[17]

a) Why Arbitrate?

States and investors alike, however, rarely litigate investment disputes in courts.[18] The vast majority of BITs,[19] the Guidelines,[20] the draft MAI[21] and the Energy Charter Treaty[22] indicate that disputing parties prefer to arbitrate international investment disputes. Why?

At the inter-State level, disputing parties often consider the ICJ as an unsuitable forum. One reason for this is that, in any contested case before this court, third States may intervene on the basis of Art. 62 and Art. 63 of the ICJ Statute.[23] Arbitration proceedings, by contrast, rarely

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[14]) Lalive, "Some Threats to International Investment Arbitration" (1986) 1 ICSID-Rev. FILJ 26 at 33. For more details on Latin American States' former reluctance to submit disputes with foreigners to arbitration, see supra: chapter A IV 3a.

[15]) Lalive, *Some Threats to International Investment Arbitration,* 37.

[16]) Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* 18.

[17]) *Ibid.,* 19. Compare: North American Free Trade Agreement, Art. 1126 for the consolidation of certain investor-State arbitration proceedings under the UNCITRAL Arbitration Rules. Also: Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(D)(9).

[18]) Exceptions are the *Case Concerning Elettronica Sicula SpA* (*ELSI)* [1989] I.C.J. Rep. 15. and the *The Mavrommatis Jerusalem Concessions* Case [1925] P.C.I.J., Series A, No. 5.

[19]) See: *e.g.*, Agreement between Spain and Cuba on the Promotion and Reciprocal Protection of Investments, dated May 27, 1994, Arts. X-XI and Agreement between the UK and Honduras for the Promotion and Protection of Investments, dated October 7, 1993, Arts. 8-9. See also: UNCTAD, *Bilateral Investment Treaties in the mid 1990s,* 99.

[20]) Guideline V.

[21]) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(C)-(D).

[22]) Energy Charter Treaty, Arts. 26-27.

[23]) It is controversial whether Art. 62 and Art. 63 are mutually exclusive or whether a party to the proposed Convention could make a claim under both articles in the same proceedings. See: Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1993), 145.

allow interference from third parties.[24] Secondly, ICJ judgments are not enforceable in domestic courts. They can only be implemented through decisions of the UN Security Council.[25] However, arbitral awards, even if rendered against a State, can be put more easily into effect by the domestic courts in the jurisdiction where enforcement is sought.[26] Thirdly, arbitration gives the parties the possibility of greater control over the composition of the tribunal.[27] This feature is particularly significant in cases where arbitrators need special technical competence.[28] Fourthly, arbitration proceedings guarantee a higher degree of secrecy, because arbitral awards, unlike judgement of the ICJ, are usually only published if the parties so agree. Fifthly, inter-State arbitrations appear less politicised than ICJ proceedings. The ICJ is, after all, still a principal organ of the UN.[29] Finally, arbitration is often faster than litigation.[30]

At the investor-State level, disputing parties should generally be free to agree upon any form of dispute resolution, which they think appropriate. These mechanisms may include domestic or international arbitration and adjudication by national courts of the host State. Parties, however, sometimes fail to agree to any kind of procedure to settle their controversies. The treaty has to have a fall-back provision for these scenarios.

Arbitration is a proper method to resolve investor-State disputes in these cases. Guideline V(1) speaks of arbitration as a suitable mechanism of dispute settlement. Its major advantage is that investors do not have to rely solely on local remedies, or on their own governments to espouse their claim against the host State. This removes the argument from the intergovernmental political sphere.[31] In addition, arbitration gives the parties the chance to

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24) Gray and Kingsbury, "Inter-State Arbitration since 1945: Overview and Evaluation" in Janis (ed.), *International Courts for the Twenty First Century* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992) 55 at 63.

25) UN Charter, Art. 94(2).

26) This, however, raises the issue of State immunity from execution. For more details, see infra: chapter B V 4.

27) Gray and Kingsbury, *Inter-State Arbitration since 1945: Overview and Evaluation*, 63. Compare: Böckstiegel, "States in the International Arbitral Process" (1986) 2:1 Arb.Int. 22 at 23 arguing that States do have a certain influence on the selection of judges of the ICJ.

28) Shaw, *International Law*, 4th ed., (Cambridge: Cambridge University Press, 1997), 742. Also: Baxter, "International Business Disputes" (1990) 39 ICLQ 288 at 293 for investor-State arbitrations.

29) Wälde, "Managing the Risk of Sanctions in the Global Oil and Gas Industry: Corporate Response under Political, Legal and Commercial Pressures" (1997) 2:7 CEPMLP Internet Journal 1 at 30, published at http://www.dundee.ac.uk/cepmlp/journal/html/article2-7.html.

30) Brewer, "International Investment Dispute Settlement Proceedings: The Evolving Regime for Foreign Direct Investment" (1995) 26:3 L.&Pol.Int'l.Bus. 633 at 657 and Shaw, *International Law*, 742.

31) Broches, "Settlement of Investment Disputes" in Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private Investment Law* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1995) 161 at 163.

choose the location of the arbitration and the law governing the proceedings. It also allows parties to agree in advance on a ceiling of the amount to be paid by the losing party and how the costs of arbitration may be shared.[32]

Recourse to domestic courts of the host State is often undesirable. The legal systems of some countries are not capable of predictable and timely adjudication.[33] Domestic courts may be unaccustomed to complex investment transactions and lack experience in deciding international investment disputes.[34] Also, national courts are sometimes biased in favour of the host State as judges owe their appointments to this same State.[35] Finally, the enforcement of a judgment of a domestic court may turn out to be problematic if it is sought abroad. The recognition and implementation of international arbitral awards, by contrast, is usually easier.[36] ICSID awards, for instance, are recognised and enforced in every State party to the ICSID Convention[37] as if they were final judgments of a court in that State.[38] Non-ICSID awards may be recognised and enforced by States parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "New York Convention"), in accordance with the provisions of that treaty.[39] Finally, features of inter-State arbitrations outlined above, such as the greater control over the composition of the tribunal, speedy adjudication, and the avoidance of third party intervention make arbitration an attractive form of investor-State dispute settlement.

Smaller costs, often advanced as one of the benefits of arbitration,[40] may in practice turn out to be illusory. Fees of arbitrators, administrative costs and expenses of arbitration institutions,

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32) Shihata, *The Settlement of Disputes – General Propositions and the World Bank's Approach and Experience*, 228.

33) Gray and Jarosz, *Law and Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 31.

34) Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 20. Businessmen frequently think that courts do not understand the reality of commerce. See: Craig, Park and Paulsson, *International Commercial Arbitration: International Chamber of Commerce Arbitration*, Vol. I, (Dobbs Ferry, N.Y., London, Rome: Oceana Publications Inc., 1991), 293 and Collier and Lowe, *The Settlement of Disputes in International Law* (Oxford: Oxford University Press, 1999), 45.

35) Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 20.

36) Baxter, *International Business Disputes*, 294.

37) For a list of States parties to the ICSID Convention, see: Appendix C.

38) ICSID Convention, Art. 54(1).

39) For more details on the recognition and enforcement of international arbitral awards, see infra: chapter B V 4. For a list of States parties to the New York Convention, see: Appendix E.

40) Comeaux and Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk*, 185.

as well as payments for hiring meeting rooms, rather than using public facilities of courts cause considerable expenditure.[41] But costs differ significantly between ICC, ICSID and *ad hoc* proceedings.[42]

Diplomatic protection as a means of resolving investor-State disputes is not very effective or may even be illusory. The entire concept of diplomatic protection might be inappropriate for certain investors, such as MNCs because their interests may not be precisely identifiable with any particular State, and even if they were, investors would be required to exhaust local remedies first before their home State may exercise diplomatic protection.[43] No country is required internationally or liable under domestic law to espouse a claim of its national(s). In fact, the investor's home State may be reluctant to espouse a claim because it possibly interferes with normal diplomatic relations with the host State.[44] Even if the home State does espouse the claim, initial diplomatic negotiations can take years without any reasonable results.[45] Once the claim has been taken up by the investor's home country it becomes in fact that of the government, so that the protecting State is entitled to settle the claim on any terms it wishes even without consulting individual claimants. In theory, the government could even retain any payment made by the host State.[46] Finally, diplomatic protection may offend the host State and politicise the conflict.[47]

In the absence of any agreed mechanism of investor-State dispute settlement, diplomatic protection is unsuitable to resolve such controversies. Recourse to domestic courts of the host State is often undesirable too. However, the latter should remain an option available for parties who wish to settle their differences in domestic courts because an investment treaty which would

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41) Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 18. Inter-State arbitrations tend to be more expensive than adjudication by the ICJ because fees of arbitrators and other expenses of the tribunal need to be paid. No such payment have to be made in cases decided by the ICJ. See: Collier and Lowe, *The Settlement of Disputes in International Law,* 34. Compare: Shaw, *International Law,* 742 arguing that inter-State arbitration is usually less expensive than litigation.

42) Branson and Tupman, "Selecting an Arbitral Forum: A Guide to Cost–Effective International Arbitration" (1984) 24 Virg.J.Int'l.L. 917 at 930 comparing the expenses for each of these arbitration regimes. Also: Nurick, "Costs in International Arbitration" (1992) 7 ICSID-Rev. FILJ 57 arguing that these three arbitral regimes not only involve different amounts of costs, but also show various patterns in how such costs are allocated to the parties. For instance, under the UNCITRAL Arbitration Rules arbitration costs are usually borne by the unsuccessful party. ICSID arbitrations show no such uniform pattern. *Ibid.,* 59 and 63.

43) Muchlinski, *Multinational Enterprises and the Law,* 535-536.

44) Beveridge, *The Treatment and Taxation of Foreign Investment under International Law,* 99.

45) UNCTAD, *Bilateral Investment Treaties in the mid 1990s,* 89.

46) Kronfol, *Protection of Foreign Investment: A Study in International Law,* 127.

47) Schmidt, "Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica*" (1976) 17 Harv.Int'l.L.J. 90 at 107.

offer international arbitration as the *only* fall-back mechanism would hardly be acceptable to many developing countries. Guideline V(1) illustrates this. It lists adjudication by domestic courts as one option available to disputing parties. International arbitration offers various features advantageous to the disputants. It should therefore be incorporated into the treaty in the form of a fall-back provision too. However, which kind of arbitration is most suitable?

b) Ad hoc Arbitration

Ad hoc arbitration means that parties to a dispute settle it without the assistance of any arbitration institution with a pre-established set of procedural rules. It allows parties to shape the proceedings to meet their wishes. *Ad hoc* arbitrations at the investor-State level are an adequate alternative for parties still fearing a lack of finality in ICSID proceedings,[48] or for host States considering ICC arbitrations as a one-sided mechanism of dispute settlement, which fails to take their concerns properly into account.

Its deficiency is that disputants have to agree upon procedural rules, such as the appointment and replacement of arbitrators. This can be a time-consuming undertaking. Another drawback is the lack of expertise guaranteed by arbitration institutions,[49] and the fact that the arbitrators set their own fees.

In order to avoid lengthy negotiations on procedural rules, parties may find it convenient to conduct *ad hoc* arbitrations according to the UNCITRAL Arbitration Rules. They are widely accepted among both developed and developing countries.[50] These rules are particularly adaptable to investor-State dispute settlement.[51] They have already been successfully used by the Iran-US Claims Tribunal and other arbitration institutions, such as the Kuala Lumpur and Cairo Regional Centres for Arbitration.[52]

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48) Vandevelde, "Arbitration Provisions in the BITs and the Energy Charter Treaty" in Wälde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (London, The Hague, Boston: Kluwer Law International, 1996) 409 at 417.

49) UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 95.

50) Comeaux and Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk*, 196. Certain authorities, however, argue that arbitrations of investor-State disputes under the UNCITRAL Arbitration Rules may be biased in favour of the host State and are far too legalistic. See: Graham, "Towards an Asia-Pacific Investment Code" (1994) 3:2 Transnational Corporations 1 at 15.

51) Baxter and Davis, "Establishment of the Iran-United States Claims Tribunal" (1989) 23 Int'l. Lawyer 81 at 135.

52) Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 377.

c) Institutional Arbitration

Institutional arbitrations, *i.e.*, proceedings under the auspices of an arbitration institution, are likely to work smoothly. Their procedural rules are tested in practice and cover all major steps in the proceedings.[53]

The only institutional arbitrations available at the inter-States level are proceedings under the auspices of the Permanent Court of Arbitration (PCA), analysed below.[54] Investor-State disputes may be resolved by a variety of fora, such as the ICC, the American Arbitration Association (AAA), ICSID and ICSID's Additional Facility, the London Chamber of International Arbitration (LCIA), the Stockholm Chamber of Commerce, and the former USSR Chamber of Commerce and Industry. Only ICC and ICSID proceedings are addressed here in more detail.

ICSID[55] is the only organisation specialised in supervising arbitrations between foreign investors and host States.[56] It aims at reconciling the interests of the parties involved[57] and to de-politicise the conflict.[58] Host States particularly benefit from Art. 42(1) of the ICSID Convention. It clarifies that the law applicable in the proceedings is that of the host State and such rules of international law as may be applicable, unless the parties agree otherwise. Also, host States may require the exhaustion of local remedies as a condition of their consent to submit conflicts to ICSID.[59] ICSID proceedings are, compared to other forms of institutional arbitration, inexpensive because arbitrators' fees and administrative costs are calculated on the basis of a daily rate for work performed, rather than on an *ad valorem* basis, *i.e.,* the amount at stake in the dispute.[60]

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[53]) Peter, *Arbitration and Renegotiation of International Investment Agreements* (Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1986), 185.

[54]) Chapter B V 2.

[55]) For more details on ICSID, see supra: chapter A IV 1d.

[56]) Amerasinghe, "Dispute Settlement Machinery in Relation between States and Multilateral Enterprises – With Particular Reference to the International Centre for Settlement of Investment Disputes" (1977) 11 Int'l. Lawyer 45 at 48. The PCA adopted in 1993 Optional Arbitration Rules for Arbitrating Disputes between two Parties of which only one is a State. However, no case has yet been decided under these rules, which thus remain untested in practice.

[57]) Cahier, "The Strengths and Weaknesses of International Arbitration Involving a State as a Party" in Lew (ed.), *Contemporary Problems in International Law* (London and Reading: The Eastern Press Ltd., 1986) 241 at 245. Other writers argue that ICSID arbitrations, similar to *ad hoc* proceedings under the UNCITRAL Arbitration Rules, are excessively legalistic and biased in favour of host States. See: Graham, *Towards an Asia-Pacific Investment Code,* 15 and 18.

[58]) Shihata, *Towards Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA,* 313.

[59]) ICSID Convention, Art. 26.

[60]) Broches, "The Experience of the International Centre for Settlement of Investment Disputes" in Rubin and Nelson (eds.), *International Investment Disputes: Avoidance and Settlement* (St. Paul, New York, Los Angeles, San Francisco: West Publishing Company, 1985) 75 at 95, Shihata, "ICSID's Role in the Resolution of Investment Disputes" in Shihata, *The World Bank in a Changing World: Selected Essays and Lectures,* Vol. II, (The Hague,

The direct costs of ICSID proceedings concluded between 1985 and 2000 averaged about USD 222,000.[61]

Investors favour ICSID awards because they simplify the procedures for recognition and enforcement.[62] The implementation of non-ICSID international arbitral awards, by contrast, depends on the willingness of municipal courts to grant enforcement of such awards according to their domestic laws which may reflect certain international treaties, such as the New York Convention.[63]

A major defect of the ICSID regime is that it does not impose deadlines for the arbitration proceedings. This feature can make investors reluctant to choose this forum, because it does not guarantee speedy dispute resolution.[64] ICC proceedings, in contrast, are concluded within rather strict deadlines. For example, there are fixed time limits within which the responding party has to reply to the request for arbitration.[65] Also, ICSID has suffered a loss of credibility due to repeated annulments of its awards in the past. Finally, the ICSID regime is only available for "investment disputes".[66] Although this term is interpreted widely, controversies under some arrangements, such as supply or sales contracts, would fall outside the scope of the ICSID Convention.[67] ICSID arbitration could thus result in disputes being "split up", with the "non-investment" part being resolved by other means of dispute resolution.[68]

Arbitration under the auspices of the ICC guarantees the resolution of a wide variety of commercial conflicts in a sophisticated, but expensive manner. ICC arbitrations are primarily

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London, Boston: Martinus Nijhoff Publishers, 1995) 425 at 444-445 and Craig, Park and Paulsson, *International Commercial Arbitration: International Chamber of Commerce Arbitration,* Part I, § 1.03.

61) Shihata and Parra, *The Experience of the International Centre for Settlement of Investment Disputes,* 769.

62) ICSID Convention, Arts. 53-55. For more details on the recognition and enforcement of ICSID awards, see infra: chapter B V 4b.

63) Schmidt, *Arbitration under the Auspices of the International Centre for Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica,* 105.

64) Horlick and DeBusk, "Dispute Resolution under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID" (1993) 10:1 J.Int'l.Arb. 51 at 53 and Graham, *Towards an Asia-Pacific Investment Code*, 18.

65) ICC Arbitration Rules, 1998, Art. 5(1).

66) ICSID Convention, Art. 25(1).

67) Disputes not arising directly out of an investment can be settled through ICSID's Additional Facility provided that either the host State or the investor's home State is a Contracting Party to the ICSID Convention. See: Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, Art. 2(b). However, awards rendered under ICSID's Additional Facility are not ICSID awards and thus cannot be enforced under the ICSID Convention.

68) Delaume, "ICSID Arbitration: Practical Considerations" (1984) 1:2 J.Int'l.Arb. 101 at 123.

designed for private dispute settlement. States participate only occasionally in these proceedings.[69] The ICC does not conduct arbitrations. It rather supervises them under its rules.[70]

In practice, host States are likely to be reluctant to agree to ICC arbitrations in an investment treaty.[71] This is because the ICC is often regarded as reflecting primarily Western values, without taking concerns of the host States properly into consideration.[72] Also, time limits prescribed for ICC arbitrations often fail to take into account the amount of time a State needs to obtain approval of important decisions.[73] Finally the ICC, unlike ICSID, is not specialised in conducting proceedings where one party is a State and it has little experience in the complexities of long-term investment agreements.[74]

There is no single arbitration regime most suited to the settlement of all investment disputes. Even specialised arbitration institutions such as ICSID are not always the best or even a possible forum. Dispute resolution under ICSID, for instance, is only available for States and investors whose home States are parties to the ICSID Convention.[75]

The treaty has to ensure that investor-State disputes are resolved in the first place in accordance with the procedures agreed by the disputing parties. It should thus give parties discretion to decide a) whether to arbitrate or resort to other means of dispute resolution, and b) if they opt for arbitration, which arbitration regime is the one best suited for their particular needs. The instrument has to contain a fall-back provision for cases where parties have failed to consent to any form of dispute settlement. It should allow them to resolve their conflicts in domestic courts of the host State, or through international arbitration. The latter may include major arbitration

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69) Craig, Park and Paulsson, *International Commercial Arbitration: International Chamber of Commerce Arbitration*, Part I, §1.04 indicating that States participate in a bit less than one third of ICC arbitrations.

70) For more details on ICC arbitrations, see: Craig, Park and Paulsson, *International Commercial Arbitration: International Chamber of Commerce Arbitration*, Part I.

71) Only a few BITs provide for ICC arbitrations as a means of investor-State dispute resolution. See: *e.g.*, Agreement between Spain and Cuba on the Promotion and Reciprocal Protection of Investments, dated May 27, 1994, Art. XI(2).

72) Comeaux and Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk*, 199.

73) Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 39.

74) Muchlinski, *Multinational Enterprises and the Law*, 539.

75) Disputes where either the host State or the investor's home State is not a Contracting Party to the ICSID Convention may be settled through ICSID's Additional Facility, whose awards, however, are not ICSID awards and thus not enforceable under the ICSID Convention. See: Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, Art. 2(a).

regimes, such as ICSID and ICSID's Additional Facility proceedings and *ad hoc* arbitrations under the UNICITRAL Arbitration Rules, or such other procedural rules agreed by the parties.[76]

Different forms of inter-State arbitrations are addressed in detail in the next section.

To summarise:

1.) Before resorting to final and binding mechanisms of dispute settlement, parties should be encouraged to settle their conflicts, whether inter-State or investor-State disputes, amicably through negotiations or conciliation.

2.) Failing settlement by these means, arbitration is the most effective and suitable mechanism for binding dispute resolution at the inter-State level.

3.) Conflicts between investors and host States should be resolved as the disputing parties agree. In the absence of agreement there needs to be a fall-back provision in the Convention. Such a clause should keep different options open to disputing parties. Adjudication by domestic courts of the host State or through international arbitration are adequate methods of dispute settlement. The treaty should, finally, list major arbitration regimes such as ICSID and ICSID's Additional Facility as well as *ad hoc* arbitrations under the UNCITRAL Arbitration Rules, or such other procedural rules as the parties may agree, as possible means of investor-State dispute resolution.

2. Inter-State Disputes

The Guidelines do not explicitly address inter-State disputes. Binding investment treaties, in contrast, usually regulate such controversies. Most BITs require mandatory negotiations or consultations between Contracting Parties to attempt initially to settle any disagreement between them amicably.[77] The purpose of negotiations or consultations is to resolve inter-State differences discreetly without the assistance of third persons. This is politically more sensitive and better for the parties' long-term relationship than immediately resorting to any kind of formal dispute

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[76]) If parties have not agreed upon any means of investor-State dispute resolution, the Convention not only has to provide a fall-back provision as to the means of dispute resolution. It also has to address the case where disputing parties cannot agree upon a forum to settle the conflict, and how to proceed if parties submitted the same dispute to several fora. These issues are addressed in chapter B V 3b(ii).

[77]) See: *e.g.*, Agreement between Japan and Hong Kong for the Promotion and Protection of Investment, dated May 15, 1997, Art. 11(2), Abkommen zwischen der Republik Österreich und der Volksrepublik China über die Förderung und den gegenseitigen Schutz von Investitionen vom 12. September 1985, Art. 10(1) and Agreement between Australia and Vietnam on the Reciprocal Promotion and Protection of Investments, dated March 5, 1991, Art. 11(1). See also: Dolzer and Stevens, *Bilateral Investment Treaties*, 122-123 and UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 100.

resolution. A multilateral investment treaty should reflect this widely accepted practice. It should make negotiations and consultations between States mandatory before either party is entitled to submit the dispute to any other form of dispute settlement,[78] *i.e.* conciliation[79] or arbitration.

Failing attempts to settle amicably, Contracting Parties will have to resort to arbitration. Arbitration regimes for inter-State disputes are limited in number. In fact, States only have the option to:

1. resort to *ad hoc* arbitration under the UNCITRAL Arbitration Rules. This method of dispute settlement is rarely mentioned in BITs.[80] However, the Energy Charter Treaty (Art. 27(3)(f)) refers to it.

2. turn to *ad hoc* arbitration under some other procedural rules agreed between them.[81] Key features of such *ad hoc* arbitrations have been addressed above.[82]

3. have recourse to the PCA as the only institutional forum available.

The PCA is not a permanent court. It is an institution founded in 1899 which establishes a framework to conduct inter-State arbitrations.[83] Its tribunals are formed from a list of potential arbitrators maintained by the PCA. After handling a number of cases at the beginning of the 20th

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78) BITs differ regarding the time frame within which such negotiations or consultations shall take place. Some BITs, *e.g.*, the Agreement between Sweden and Yemen for Promotion and Protection of Investments, dated October 29, 1983 set no time limits, while others require an initial two, six or twelve month period of negotiations and consultations before the conflict may be resolved by other means of dispute resolution. For more details on time frames for negotiations and consultations, see: Dolzer and Stevens, *Bilateral Investment Treaties,* 123. Consultations are also the first step of dispute resolution of inter-State conflicts under other treaties, such as NAFTA. See: North American Free Trade Agreement, Art. 2006 and Bialos and Siegel, "Dispute Resolution under the NAFTA: The Newer and Improved Model" (1993) 27 Int'l. Lawyer 603 at 615 and Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(A)(1-2). Also: Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Agreement Establishing the WTO), Art. 4.

79) For more details on conciliation, see supra: chapter B V 1.

80) Vandevelde, *Arbitration Provisions in the BITs and the Energy Charter Treaty,* 420.

81) This approach is often adopted in non-US BITs. These treaties usually draw up very basic rules for *ad hoc* arbitrations. See: *e.g.*, Agreement for the Promotion and Protection of Investments between Singapore and the UK, dated July 22, 1975, Art. 9(3-5) and Abkommen zwischen der Republik Österreich und der Volksrepublik China über die Förderung und den gegenseitigen Schutz von Investitionen vom 12. September 1985, Art. 10(3-7). The disadvantage of this method is that it is nearly impossible to agree upon a complete set of procedural rules at a time the dispute has not yet arisen. Recent US-BITs therefore provide for the UNCITRAL Arbitration Rules to govern *ad hoc* inter-State arbitrations, unless the parties agree otherwise. See: *e.g.*, Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. X(1) and Treaty between the US and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, dated June 17, 1992, Art. VII(1). See also: Dolzer and Stevens, *Bilateral Investment Treaties,* 126 and UNCTAD, *Bilateral Investment Treaties in the mid 1990s,* 101.

82) Chapter B V 1b.

83) The PCA was established on the basis of the 1899 Hague Convention on the Pacific Settlement of International Disputes. The efforts to encourage the court's use have failed so far. See: Harris, *Cases and Materials on International Law,* 5th ed., (London: Sweet & Maxwell, 1998), 987. In 1993 the PCA also adopted optional rules for arbitrating disputes between parties of which only one is a State.

century, its work load has been very low, although there are no limitations as to the kind of conflicts it can settle.[84]

The PCA cannot be recommended as a suitable forum for disagreements arising out of a multilateral investment treaty. First of all, the arbitration rules under the 1899 and 1907 Conventions on the Pacific Settlement of International Disputes (hereinafter the "1899 and 1907 Conventions") suffer from significant procedural deficiencies. For example, they do not ensure that persons nominated as potential arbitrators are individuals of known competence in international law, or specifically international investment law. Persons selected are often chosen with a view to their function for nominating candidates for the ICJ, than to their serving as arbitrators.[85] Furthermore, the Optional Rules of Arbitrating Disputes between two States adopted in 1992 are largely untested. States can conduct proceedings under these terms regardless of whether or not they are parties to the 1899 and 1907 Conventions.[86] However, Contracting Parties are probably reluctant to agree upon these untested provisions, given the fact that other rules, such as the UNCITRAL Arbitration Rules, have already been successfully applied in practice.

A fourth technique of settling inter-State conflicts would be to adopt a model of dispute resolution similar to the mechanism set forth in the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU"). The DSU forms Annex 2 of the Agreement Establishing the WTO. The key features of this regime compared to traditional arbitration are: first, disputes are heard by panels whose members are nominated by a secretariat,[87] not as most arbitrators by the disputing parties. Secondly, panels prepare reports which the parties can comment on before the panel drafts its final report.[88] This limits the risk of panel reports which are unexpected or based on clear errors.[89] Thirdly, final panel reports are automatically adopted by the WTO Dispute Settlement Body (hereinafter "DSB"). A final panel report becomes legally binding upon the parties unless a party appeals against it or the DSB

[84]) Butler, "The Hague Permanent Court of Arbitration" in Janis (ed.), *International Courts for the Twenty First Century* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992) 43 at 46.

[85]) Working Group on Improving the Functioning of the Court, *The Permanent Court of Arbitration: New Directions* (The Hague: International Bureau of the Permanent Court of Arbitration, 1991), 11.

[86]) Optional Rules for Arbitrating Disputes between two States, 1992, Art. 1(1) and Art. 1(3) for States parties to the 1899 and/or 1907 Convention.

[87]) Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 8(6).

[88]) *Ibid.*, Art. 15.

[89]) Petersmann, *The GATT/WTO Disputes Settlement System: International Law, International Organizations and Dispute Settlement* (London, The Hague, Boston: Kluwer Law International, 1997), 185.

decides by consent, *i.e.*, unanimously, not to approve it.[90] Fourthly, there is a possibility to appeal against a final report. Appeals are heard by a seven member standing Appellate Body.[91] Fifthly, there are strict time limits for all stages of the procedure.[92]

In practice, certain aspects of an investment dispute, *e.g.*, disagreement under the TRIMs Agreement, may already be resolved through WTO dispute settlement.[93]

The draft MAI combined features of traditional *ad hoc* inter-State arbitration with the model of WTO dispute resolution. There was no appellate body because the negotiators did not expect a sufficient amount of activity to sustain such a body. A nullification procedure similar to Art. 52 of the ICSID Convention was, however, suggested.[94] Such a procedure is unknown to traditional inter-State arbitrations. The draft MAI also permitted extensive access of third Contracting Parties to documents and proceedings of pending inter-State conflicts.[95] Arbitrators, however, were to be nominated by the parties in dispute as in standard international arbitration proceedings, rather than by an institution.[96]

The WTO model, or the "combined" approach of the draft MAI, are unsuitable means for resolving investment conflicts at the inter-State level.

Institutional dispute settlement comparable to the WTO model on issues of FDI is still in its infancy. Before the complex and sophisticated WTO regime was set up, States had settled trade disputes under the pre-WTO GATT system. The latter also provided for the establishment of panels. But panel reports could only be adopted with the consent of the disputing parties.[97] It

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90) Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 16(4).

91) *Ibid.*, Art. 17. The establishment of a standing Appellate Body under the DSU is the most innovative feature in the Final Act of the Uruguay Round. See: Steger and Hainsworth, "New Directions in International Trade Law: WTO Dispute Settlement" in Cameron and Cambell (eds.), *Dispute Resolution in the WTO* (London: Cameron May Ltd., 1998) 28 at 29 and Petersmann, "How to Promote the International Rule of Law? Contributions by the WTO Appellate Review System" in *Ibid.*, 75 at 88.

92) For example, the DSB has to consider unappealed panel reports within nine months after the establishment of the panel, and Appellate Body reports within twelve month after such date. See: Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 20.

93) For more details on the TRIMs Agreement, see supra: chapter A IV 5b.

94) Small, *Remarks to the Proceedings of the American Society of International Law,* 498 and Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(C)(7).

95) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(C)(4).

96) Small, *Remarks to the Proceedings of the American Society of International Law,* 497 and Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(C)(2)(a).

97) This feature was the major weakness of the old GATT regime and is now replaced by the system of automatic adoption of panel reports by the DSB unless there is unanimous consent not to adopt the report. See: Hogg and Nawaz, "Economic Considerations and the DSU" in Cameron and Cambell (eds.), *Dispute Resolution in the WTO*

seems unlikely that States will agree upon mechanisms of dispute settlement similar to the WTO model in an area of law where no practical experience with handling such disputes by means other than traditional inter-State arbitration exists. Negotiations on the draft MAI dispute settlement regime clearly demonstrated this practical problem.[98]

A nullification procedure advanced for the draft MAI, modelled after Art. 52 of the ICSID Convention, is not desirable. It is likely to result in the same abuse as the annulment system under the ICSID Convention did in the past.[99] Such a procedure undermines both the finality of awards and the credibility of the entire dispute settlement regime.

Finally, the right of intervention by third Contracting Parties as set forth in the draft MAI[100] contradicts one feature States favour in arbitration proceedings, *i.e.*, secrecy. They are normally reluctant to allow a third Contracting Party access to documents and pleadings of a pending conflict with another Contracting Party, particularly if politically sensitive issues, *e.g.*, compensation for expropriated investments, are in dispute.[101]

The only mechanism for inter-State dispute resolution likely to be accepted by States *and* suitable for practical application is *ad hoc* arbitration. A multilateral investment treaty should encourage States to resort to the UNCITRAL Arbitration Rules, because they avoid lengthy negotiations on procedural details. However, States not wishing to use the UNCITRAL Arbitration Rules should be free to agree on their own procedural rules once a dispute has arisen. The complexity and large number of intricate regulations on procedure in a complete set of arbitration rules makes it inconvenient for Contracting Parties to agree on such special rules in the treaty. The agreement should therefore leave it to disputing parties not wishing to adopt the UNCITRAL Arbitration Rules to consent to their own procedural provisions.

(London: Cameron May Ltd., 1998), 59-60 and Horlick and DeBusk, *Dispute Resolution under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID*, 69.

98) For some controversial practical issues on setting up a dispute resolution regime under the draft MAI, see: Small, *Remarks to the Proceedings of the American Society of International Law*, 498.

99) For more details on the annulment of ICSID awards, see infra: chapter B V 3b(iv).

100) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(C)(4).

101) There is a right of States to designate certain information as "confidential", to which third parties shall not have access. See: Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(A)(2). However, it appears that a State may not designate *all* information involved in a dispute "confidential", thus preventing third parties to know that there is a conflict in the first place.

3. *Investor-State Disputes*

Investor-State disputes have considerable practical significance. Countless arbitral awards demonstrate this fact.[102] Most often investors and the host State argue about compensation for expropriated investments.[103] However, conflicts may also concern modern forms of expropriation, particularly regulatory takings,[104] and resulting disputes on whether or not the regulatory conduct of the host State amounts to a measure tantamount to expropriation in the first place.[105] Other matters unrelated to takings, such as restrictions on monetary transfers, may give rise to disputes too. The Guidelines,[106] most BITs,[107] as well as numerous other instruments on FDI[108] address investor-State disputes. If they failed to cover such conflicts, investors whose investments were injured by the host State had only two options: first, to submit the controversy to local courts, and secondly, diplomatic protection by their home State. Both options might prove inadequate.[109]

a) Exhaustion of Local Remedies

Customary international law requires foreign investors to exhaust local remedies first before an international claim – whether through diplomatic or judicial channels – may be put forward on their behalf.[110] This rule was confirmed by the PCIJ in the *Panevezys-Saldutiskis*

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102) For a summary of findings of international arbitral tribunals primarily dealing with investor-State disputes, see: Westberg and Marchais, *General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists.*

103) See: supra chapter B IV, in particular the *Texaco* [1977] 53 ILR 389, *BP* [1974] 53 ILR 297, *Liamco* [1977] 62 ILR 141 and *Aminoil* [1982] 66 ILR 519 awards.

104) For more details, see supra: chapter B IV 1c.

105) Wälde, "The Role of Arbitration in the Globalisation of Energy Markets" (2000) 6:18 CEPMLP Internet Journal 1 at 7, published at http://www.dundee.ac.uk/cepmlp/journal/html/article6-18.html.

106) Guideline V.

107) UNCTAD, *Bilateral Investment Treaties in the mid 1990s,* 90 and Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties,* 264-265.

108) See: *e.g.,* North American Free Trade Agreement, Chapter 11, Sec. B, Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(D), Energy Charter Treaty, Art. 26 and Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment,* 307-310.

109) Chapter B V 1a.

110) Jennings and Watts (eds.), *Oppenheim's International Law,* 9th ed., Part 1 and Introduction, 522-523 and Brownlie, *Principles of Public International Law,* 497. The rule is subject to certain exceptions. For instance, it does not apply if no effective remedy in domestic courts is available, or if the requirement to exhaust local remedies has been waived. For more details on the exceptions to the rule, see: Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge,

Railway Case[111] and by the ICJ in the *Interhandel Case*.[112] Its practical purpose is to enable the host State to address the issue first within its own legal framework and thus reduce the number of international claims.[113] Also, the rule reflects the respect for sovereignty and jurisdiction of the host State by requiring first resort to its legal system in search for a remedy.[114]

The Convention may deal with the rule of exhaustion of local remedies in five different ways:

1. The Early BIT Approach. Early BITs often explicitly affirm that foreign investors shall exhaust local remedies first before a given conflict can be submitted to any other means of investor-State dispute resolution.[115] The GA adopted a similar approach in its resolution on Permanent Sovereignty over Natural Resources.[116]

2. Combination of Local Remedies and Arbitration. Later BITs and some other instruments, such as the Draft Convention on the Protection of Investment between Member States of the European Communities and the members of the Arab League, required foreign investors to submit a conflict to domestic courts first. However, these treaties also allowed investors to resort to other forms of dispute resolution if the controversy was not resolved by local courts within a given time frame. The latter ranged between three months and two years.[117] These agreements thus retained the requirement of exhaustion of local remedies in a strictly controlled form.

London, New York, New Rochelle, Melbourne: Cambridge University Press, 1983), 110-133 and the *Panevezys-Saldutiskis Railway Case* [1939] P.C.I.J., Series A/B, No. 76, 18-22.

111) [1939] P.C.I.J., Series A/B, No. 76.

112) (Preliminary Objections) [1959] I.C.J. Rep. 6 at 27.

113) International Law Association, *First Report of the Committee on Diplomatic Protection of Persons and Property*, 8-9.

114) Comeaux and Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk*, 39, *Interhandel Case* (Preliminary Objections) [1959] I.C.J. Rep. 6 at 27 and separate opinion of Judge Córdova arguing that the main purpose of the exhaustion of local remedies rule lies in the necessity to harmonise the international and national jurisdictions. *Ibid.*, 41 at 45.

115) UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 93 and Shihata, *Towards Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 322-323. See also: Langer, "Das Weltbankübereinkommen zur Beilegung von Investitionsstreitigkeiten" (1972) 18 Aussenwirtschaftsdienst des Betriebs-Beraters 321 at 326 generally requiring foreign investors to exhaust local remedies first before submitting a dispute to ICSID.

116) Res. 1803(XVII), Art. 1(4) stating that local remedies shall be exhausted first, and any dispute on compensation for expropriated investments may subsequently be submitted to other forms of dispute resolution, *i.e.*, arbitration or international adjudication, if the host State agrees so. Compare: Res. 3281(XXIX) on the Charter of Economic Rights and Duties of States, Art. 2(2)(c) providing that disputes over compensation for expropriated investments shall only be settled in national courts applying the domestic law of the host State, excluding investor-State arbitration as a means of dispute resolution.

117) Vandevelde, *Arbitration Provisions in the BITs and the Energy Charter Treaty*, 415 and UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 93.

3. Mutually Exclusive Forums. Recourse to domestic courts and investor-State arbitration are sometimes mutually exclusive alternatives. Such a system is contained in recent instruments, *e.g.*, Art. 26(3)(b)(i) of the Energy Charter Treaty.[118] MAI negotiators debated this solution too.[119] Finally, Art. 26 of the ICSID Convention specifies that unless otherwise stated,[120] consent to ICSID proceedings precludes recourse to any other remedy.[121] However, States may require exhaustion of local remedies as a condition of their consent to ICSID proceedings.

4. No Provision. The treaty could be silent on the subject. Numerous BITs favoured this approach, which leaves customary international law rules in place.

5. Waiver. Finally, the agreement could explicitly[122] ensure that the exhaustion requirement is waived by virtue of the host State's consent to investor-State arbitration.[123]

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118) Art. 26(3)(b)(i) requires States to make a declaration not consenting to investor-State arbitrations as set forth in the treaty where an investor has resorted to local remedies or other previously agreed mechanisms for dispute settlement. More than 20 States have made such a declaration. See: Vandevelde, *Arbitration Provisions in the BITs and the Energy Charter Treaty,* 415. For a critical analysis of this technicality of the Energy Charter Treaty, see: Fatouros, *Towards an International Agreement on Foreign Direct Investment?,* 199.

119) Engering, *The Multilateral Agreement on Investment,* 157.

120) In *Southern Pacific Properties (Middle East) Ltd. vs. Egypt* (First Decision on Jurisdiction) [1985] 3 ICSID Rep. 112 at 122, an ICSID tribunal interpreted "unless otherwise stated" in Art. 26(1) of the ICSID Convention to mean that failure to waive other remedies (in the case at hand the enforcement of an ICC award) by one party does not impair the consent of such party to ICSID proceedings under Art. 25(1) of the instrument. Failure to waive other remedies still allows a party to consent to ICSID arbitration.

121) In *Guinea vs. Atlantic Triton Company* [1984] 82 ILR 76 the French Court of Appeal at Rennes held that the exclusion of recourse to other remedies under Art. 26 of the ICSID Convention equally applies to provisional measures, not only to the merits of the dispute. *Ibid.*, 81-82. In 1986 the Court of Cassation quashed this judgment arguing that the Court of Appeal misapplied Art. 26. Nothing in the ICSID Convention explicitly excludes the power of the national judge to order provisional measures. *Ibid.*, 84. So also: van den Berg, "Recent Enforcement Problems under the New York and ICSID Conventions" (1989) 5:1 Arb.Int. 2 at 17. A similar dispute arose in *Maritime International Nominees Establishment vs. Guinea* (hereinafter *"MINE"*), where the company applied to the US District Court, District of Columbia to obtain an order to arbitrate against Guinea. The court ordered arbitrations under the AAA on the investor's presentation that Guinea had refused to consent to ICSID arbitration. Guinea did not participate in the AAA proceedings, which were concluded with an award rendered against it. The company subsequently filed a motion in the same court to confirm the arbitration award. See: [1981] 63 ILR 535. The motion was granted, but overruled by the US Court of Appeals, District of Columbia Circuit [1982] 72 ILR 152. The company then successfully initiated attachment proceedings against Guinea on the basis of the AAA award in Belgium and Switzerland. At the same time it initiated ICSID arbitration proceedings against Guinea. The Court of First Instance at Antwerp subsequently lifted the attachment holding that the courts in Belgium have no jurisdiction over the dispute because of Art. 26 of the ICSID Convention. See: [1985] 24 ILM 1639 at 1640-1641. In Switzerland, the Geneva Surveillance Authority likewise held that the company, by resorting to ICSID arbitration, waived the ability to request provisional measures against Guinea in Switzerland. See: [1986] 26 ILM 382 at 394-395. In 1984 the Administrative Council of ICSID introduced the new Rule 39(5) of the ICSID Rules of Procedure for Arbitration Proceedings stating that nothing shall prevent parties, *provided that they have so stipulated in the agreement recording their consent,* from requesting any judicial or other authority to order provisional measures, prior to or during ICSID proceedings.

122) In the *ELSI Case* [1989] I.C.J. Rep. 15 at 42 the ICJ had to interpret a FCN treaty between the US and Italy, which did not explicitly mention the need to exhaust local remedies. The court ruled that given the importance of the principle of exhaustion of local remedies, it cannot be assumed that the application of this rule has been tacitly waived without a clear intention to do so.

123) UNCTAD, *Bilateral Investment Treaties in the mid 1990s,* 93.

The first option of forcing the foreign investor to exhaust local remedies before turning to investor-State arbitration is unhelpful. It defeats the speed and objectivity, which are the main offerings of the arbitration provision.[124] It could also lead to an unnecessary duplication of proceedings at the domestic and international level.

The "combination of local remedies and investor-State arbitration", as set forth in the Draft Convention on the Protection of Investment between the Member States of the European Communities and the members of the Arab League, is not satisfactory either. It may result in a repetition of proceedings too. This approach also appears to be ineffective as the time limits set forth for completion of domestic proceedings are not realistic.[125] It is, however, difficult to find a more suitable time frame applicable uniformly to *all* Contracting Parties, given the differences in the legal procedures of States and their speed.

An explicit waiver is also not desirable. It may subsequently be (mis)interpreted to prevent disputing parties from submitting conflicts to domestic courts where they explicitly wish to do so.[126] Finally, the *ELSI Case*[127] illustrated that no mention of the rule is no guarantee to prevent a future dispute over whether it applies.

The best approach is to clarify that, in the absence of any other agreement between the disputing parties, investor-State disputes shall be resolved a) through ICSID or ICSID's Additional Facility, or b) by means of *ad hoc* arbitration, or c) by recourse to domestic courts. Once the investor[128] has chosen a given forum to settle the dispute, his alternative right to initiate proceedings under another one should terminate.[129] This avoids duplication of proceedings. It also prevents the interference of domestic courts in international investment disputes where parties do not wish to resort to such courts. The purpose of the rule on exhaustion of local remedies, *i.e.*, to allow the host State to address the dispute within its own legal system, does not justify its incorporation as an essential preliminary to international dispute settlement under the

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124) Gudgeon, "Remarks to the Proceedings of the American Society of International Law" (1984) 78 ASIL Proceedings 46 at 48. For reasons why recourse to domestic courts may not be the most suitable mechanism to resolve investor-State disputes, see supra: chapter B V 1a.

125) Instruments adopting this approach differ considerably. The shortest period of time was as little as three months; the longest as much as two years. See: Vandevelde, *Arbitration Provisions in the BITs and the Energy Charter Treaty,* 415 and UNCTAD, *Bilateral Investment Treaties in the mid 1990s,* 93.

126) In certain cases, *e.g.*, in the event of a less important dispute involving a State with a stabile and predictable legal system, disputing parties may agree to resolve their conflict through national courts.

127) [1989] I.C.J. Rep. 15.

128) For reasons why it is in practice the investor who chooses the forum to settle investor-State disputes, see infra: chapter B V 3b(ii).

129) For more details on how to achieve this in a specific treaty provision, see: *Ibid.*

Convention because local courts are - for the reasons outlined above[130] - usually an unsuitable forum to resolve investor-State disputes.[131]

b) Arbitration Proceedings

(i) Substantive Law

The substantive law is the law applied by the arbitrators to the subject matter of the dispute. International tribunals generally give effect to agreements between the parties concerning the choice of law. The concept of freedom of the parties to choose the applicable law is reflected in some treaties, such as in Art. 42(1) of the ICSID Convention.[132] There is no reason why the Convention should depart from this generally accepted principle. It should give priority to an explicit agreement between the parties concerning the law applicable to their legal relationship.

However, matters become controversial if the parties have failed to agree to an applicable law. Some treaties deal with this scenario. Article 42(1) of the ICSID Convention, for instance, declares that in these cases the conflict shall be resolved in accordance with the domestic laws of the host State, and such rules of international law as may be applicable.[133] The Guidelines, by contrast, are silent on this issue. Article 33(1) of the UNCITRAL Arbitration Rules guides arbitrators to such conflict of law rules as they consider applicable, and the draft MAI chose an option similar to Art. 42(1) of the ICSID Convention.[134]

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130) Chapter B V 1a.

131) The inherent deficiencies in deciding conflicts in local courts, *e.g.* the lack of experience in dealing with complex investment projects and biased judges, equally arise no matter whether parties have recourse to domestic courts to *finally settle* a given controversy (*i.e.* where a conflict is adjudicated by national courts *only*) or whether parties turn to national courts *to adjudicate the conflict first, i.e.*, exhaust local remedies, and subsequently settle the conflict through international arbitration.

132) See also: UNCITRAL Arbitration Rules, Art. 33(1) and ICC Arbitration Rules, 1998, Art. 17(1) and UNCITRAL Model Law, Art. 28(1). For more details on the latter instrument see: Broches, "The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation" in Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private Investment Law* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1995), 375-432 and Herrmann, "The UNICITRAL Model Law – Its Background, Salient Features and Purposes" (1985) 1:1 Arb.Int. 6-39 and 81.

133) Some BITs have similar provisions. See: UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 96-97.

134) The draft MAI distinguishes between investor-State disputes concerning a) an alleged breach of the treaty and b) an alleged breach of any other obligation arising out of a specific investment authorisation or State contract. See: Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(D)(1)(a-b). To the former kind of disputes only international law applies (Sec. V(D)(14)(a)), while in the latter the national law of the host State, and such rules of international law as may be applicable shall govern the matter of the conflict.

The solution of the UNCITRAL Arbitration Rules appears the least attractive. Determining the applicable law by applying conflict of law rules may result in a law applied to the dispute, which has little or nothing to do with it. For instance, a dispute between State A and investor B' (from State B) is heard by an arbitrator from C. Arbitration takes place in D. The arbitrator may apply conflict of law rules of D, the place of arbitration, the conflict of law rules of C because he is familiar with these provisions, or some other conflict of law rules which he deems appropriate.[135] This practice, however, may lead to results, *e.g.*, the application of the laws of D or C or the laws of some other State, which the parties neither anticipated nor intended. Also, relying on conflict of law rules may prevent the arbitrators from determining the applicable law in some other way, better directed at the parties' legitimate expectations.[136]

Recourse to national laws of the host State is often not appropriate either. Their application by an international tribunal may, in fact, be counterproductive. It is unlikely that such a tribunal has the same expertise in the law of the host State as a national arbitral tribunal or judicial body.[137] Also, the host State can easily amend its own legislation and thereby significantly modify or even defeat the rights of the investor after the dispute arose.[138] This risk was, for instance, taken into account by the tribunal in the *Sapphire Case.*[139] It held that Iranian law, *i.e.*, the law of the host State, was not applicable.

Finally, public international law or general principles of law may be applicable to investor-State disputes.[140] This solution could perhaps ensure that the applicable law cannot be changed by unilateral action of the host State. It appears unlikely, however, that many capital-importing

135) Arbitrators have a substantial freedom to determine which set of conflict of law rules they apply. They are not, unlike national judges, bound to apply the conflict of law rules of the place of arbitration. See: Baxter, *International Business Disputes,* 297 and the *Sapphire* award [1963] 35 ILR 136 at 170. See also: European Convention on International Commercial Arbitration, 1961, Art. VII(1).

136) Cook, "Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience" (1989) 83 AJIL 278 at 285.

137) Muchlinski, "Dispute Settlement under the Washington Convention on the Settlement of Investment Disputes" in Butler (ed.), *Control over Compliance with International Law* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1991) 175 at 186.

138) Collier and Lowe, *The Settlement of Disputes in International Law,* 242. In order to minimise this risk, investors may conclude a State contract containing a stabilisation clause. For more details on such agreements, see supra: chapter B IV 1d.

139) [1963] 35 ILR 136 at 171. By contrast, the arbitrators in the *Aramco* award argued that a State is presumed to have subjected its undertakings to its own legal system. See: [1958] 27 ILR 117 at 167.

140) The tribunal in the *Sapphire Case* held that general principles of law shall be applied to the dispute at hand. See: [1963] 35 ILR 136 at 172-173. Compare: the decision of the PCIJ in the *Case Concerning the Payment of Various Serbian Loans Issued in France* [1929] P.C.I.J., Series A, No. 20/21 where the court held that "any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country". *Ibid.,* 41. This view, however, is considered to be out-dated today. See: *e.g.*, Collier and Lowe, *The Settlement of Disputes in International Law,* 242.

States would consent to this option.[141] Also, public international law and general principles of law are not sufficiently precise, specific or developed to resolve complex investment disputes.

There is no single system of law suitable to govern investor-State disputes in the absence of an explicit choice of law clause agreed upon by the parties. Some instruments therefore combine the outlined approaches. The draft MAI[142] and Art. 42(1) of the ICSID Convention require a tribunal to apply the law of the host State *and* such rules of international law as may be applicable to resolve the conflict in question. The defect of this is that it does not clarify the relationship between the law of the host State and international law. In fact, the ICSID Convention has been criticised for the vagueness of its Art. 42(1).[143] Western writers interpreted Art. 42(1) to require the tribunal to first look at the national law of the host State, and then test its application against international law. The latter prevails in cases where domestic law violates or conflicts with international law, or where domestic law has certain gaps which need to be filled.[144] ICSID tribunals tend to confirm this explanation. The *ad hoc* committee annulling the first *Amco* award spoke of the "supplementary and corrective role of international law",[145] as did the *ad hoc* committee annulling the *Klöckner* award.[146]

This interpretation, however, has been criticised. Advocates of developing countries aver that it may result in international law often prevailing over national law.[147] The so-called "gap-filling function" of international law is also rather illusory. International law often lacks clear and precise rules and is not adequately developed to settle intricate investment disputes.[148]

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141) Developing countries tend to favour the application of domestic law to investor-State disputes. This is, for instance, reflected in Art. 2(2)(c) of the Charter of Economic Rights and Duties of States. GA Res. 3281(XXIX), dated December 12, 1974.

142) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(D)(14)(b).

143) Gopal, *International Centre for Settlement of Investment Disputes,* 597, Elombi, "ICSID Awards and the Denial of Host State Laws" (1994) 11:3 J.Int'l.Arb. 61 at 67, Chukwumerije, "International Law and Article 42 of the ICSID Convention" (1997) 14:3 J.Int'l.Arb. 79 at 96 and Moti "Settling Disputes the ICSID Way" (1990) 25 Austr.L.N. 25 at 28.

144) Broches, *A Guide for Users of the ICSID Convention,* 7, Shihata, *ICSID's Role in the Resolution of Investment Disputes,* 446-447, Cherian, *Investment Contracts and Arbitration: The World Bank Convention on the Settlement of Investment Disputes,* 89, Giardina, "The International Centre for Settlement of Investment Disputes between States and Nationals of other States" in Šarčević (ed), *Essays on International Commercial Arbitration* (London, Dordrecht, Boston: Graham & Trotman and Martinus Nijhoff Publishers, 1989) 214 at 217 and Parra and Shihata, "Applicable Substantive Law in ICSID Arbitration" in Shihata, *The World Bank in a Changing World: Selected Essays and Lectures,* Vol. II, (The Hague, London, Boston: Martinus Nijhoff Publishers, 1995) 455 at 467.

145) *Amco vs. Indonesia* (Annulment) [1986] 89 ILR 514 at 521.

146) *Klöckner Industrie-Anlagen GmbH and Others vs. Cameroon* (hereinafter *"Klöckner"*) (Annulment) [1985] 2 ICSID Rep. 95 at 122.

147) Chukwumerije, *International Law and Article 42 of the ICSID Convention,* 98.

148) Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes,* 141, Sornarajah, "Power and Justice in Foreign Investment Arbitration" (1997) 14:3 J.Int'l.Arb. 103 at 113, Shihata, *The*

A multilateral investment treaty needs to find a clearer wording than the draft MAI,[149] or Art. 42(1) of the ICSID Convention.[150] It might, for example, state that in the absence of an agreement between the disputants, the controversy shall be resolved by the domestic law of the host State, *unless* it violates international law or the nature of the conflict clearly prevents its application. The latter scenario occurs, for instance, if the interpretation of the treaty is in dispute.[151] Only in these cases would international law prevail. The advantages of this solution are evident. First, it accommodates a large number of developing countries. They usually reject the primary application of public international law or general principles of law to investor-State disputes, in the absence of an agreement between the parties to the contrary. Secondly, it assures capital exporting States that in some crucial situations rules of international law prevail. This is essential in areas where industrialised States and developing countries traditionally disagree. It is equally critical where there is a high likelihood that some national laws of certain States will fall short of international standards, such as on the level of compensation for expropriated investments.[152] Thirdly, this approach reduces subsequent controversies about its interpretation. It would be clear that the tribunal has first to apply the national law of the host State. If, and only if, these laws clearly violate international law, should the tribunal turn to the latter.

(ii) State Consent to Arbitration

Consent is the cornerstone of arbitration. It is its key feature because arbitration is a voluntary mechanism of dispute resolution. Both the foreign investor and the host State must

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Settlement of Disputes under Oil and Gas Exploration and Development Agreements - The Relevance of ICSID and the World Bank Guidelines, 503-504 and Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 81.

149) Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(D)(14)(b).

150) According to Art. 41(1) of the Vienna Convention on the Law of Treaties, Contracting Parties to a multilateral treaty (*i.e.*, the proposed Convention) may *inter se* modify another treaty among themselves (*i.e.*, the ICSID Convention) if the original instrument explicitly allows it, or if such modification does not infringe the rights of other parties or contradict the purpose of the original instrument. The ICSID Convention does not address *inter se* modifications. However, it appears that a modification of Art. 42(1) of the ICSID Convention would not contradict the purpose of the ICSID Convention and would also not infringe the rights of any other party to this convention. Thus, it is possible for Contracting Parties of the treaty to alter *inter se* Art. 42(1) of the ICSID Convention.

151) In practice, however, it is rather unlikely that foreign investors and host States would argue about the interpretation of the Convention. This kind of conflict usually arises at the inter-State level.

152) For more details on this controversy, see supra: chapter B IV 3a.

agree to arbitrate.[153] Their consent is often incorporated in an arbitration clause in a State contract, or in a separate arbitration agreement.

In the absence of an explicit agreement between the disputing parties, it is the investor who decides which arbitration forum finally resolves the conflict. This is because the treaty binds only States, and thus can only guarantee advance consent of States to arbitration proceedings.[154] The investor, by contrast, agrees to arbitrate either by submitting the controversy to a certain tribunal, or by explicitly consenting to a forum chosen by the host State. This technicality, inherent in a treaty, may however, be abused by the investor. He may initiate proceedings under an *ad hoc* tribunal or a domestic court of the host State, and subsequently submit the same dispute to ICSID while the first proceedings are still pending.[155] The treaty will have to prevent such scenarios. The most effective way to achieve this is to condition the consent of States to arbitration given in the agreement to the conduct of the investor. The instrument may limit the States' consent by providing that it only applies if the investor waives his right to initiate or continue proceedings of the same conflict under any other dispute settlement procedure.[156] This technicality would – at least partly - off set the disadvantage that States often feel by agreeing to various kinds of investor-State dispute resolution, and leaving it to the investor to finally choose the forum.

Consent of States to *ad hoc* arbitrations under the UNCITRAL Arbitration Rules[157] rarely constitutes a problem. Most agreements allowing such proceedings simply confirm that the State party "consents" to such arbitrations[158] or that the disputes "shall be submitted" to a given *ad hoc*

[153]) An award rendered in the absence of an agreement to arbitrate can be challenged under Art. V(1)(d) of the New York Convention. It may also be set aside under national laws by a domestic court. For example, in *Egypt vs. Southern Pacific Properties (Middle East) Ltd. and Southern Pacific Properties Ltd.* [1984] 23 ILM 1048, the Court of Appeals of Paris set aside an ICC award because it found that Egypt had never consented to ICC arbitration.

[154]) This section does not deal with consent of host States to ICSID Conciliation. For the reasons outlined in chapter B V 1 investor-State conciliation should be voluntary. If any party does not voluntarily consent to conciliation proceedings *once a dispute has arisen,* it is highly unlikely that such proceedings will result in a settlement of the conflict, given the non-binding character of conciliation. Thus, it appears pointless to regulate the consent of States to conciliations, as such initial consent may subsequently easily be undermined by not agreeing to the outcome of the conciliation proceedings.

[155]) The opposite scenario, *i.e.,* where the investor submits the dispute to a local court or an *ad hoc* tribunal while ICSID proceedings are still pending is rather unlikely because consent to ICSID arbitration precludes recourse to any other remedy, unless the parties agree otherwise. See: ICSID Convention, Art. 26 and the Belgian and Swiss proceedings in the *MINE* case mentioned supra: chapter B V 3a, footnote 121.

[156]) See also: North American Free Trade Agreement, Art. 1121(1)(b) and Art. 1121(2)(b). For a similar, though more narrow provision, see: Energy Charter Treaty, Art. 26(3)(b)(i) and Draft Multilateral Agreement on Investment (version: February 14, 1998), Sec. V(D)(3)(b) requiring States to make an explicit declaration to this effect.

[157]) Article 1(1) of the UNCITRAL Arbitration Rules requires a written agreement of the disputing parties to conduct *ad hoc* arbitration under such rules.

[158]) See: *e.g.,* Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. IX(4) and Treaty between the US and the Russian Federation Concerning the

tribunal.[159] The Convention should declare that Contracting Parties agree to submit investor-State disputes to *ad hoc* arbitrations under the UNCITRAL Arbitration Rules.

Consent to ICSID arbitrations, by contrast, is more intricate. Article 25(1) of the ICSID Convention recognises that a State which is a party is not automatically obliged to submit any disagreement with a foreign investor to an ICSID tribunal. Before ICSID can assume jurisdiction over a given conflict, both disputing parties have to affirm in writing their consent to adjudication by an ICSID tribunal. Such acceptance once given cannot unilaterally be revoked.[160] There is no need for consent to be given in one single document.[161] ICSID tribunals and writers have repeatedly confirmed that it may be expressed in a national investment law[162] or in a treaty.[163]

A multilateral investment treaty has to guarantee that its Contracting Parties, who are also parties to the ICSID Convention consent to ICSID arbitration. Otherwise Contracting Parties would have no obligation to submit investor-State disputes to an ICSID tribunal. There are four possible ways to approach the consent requirement of Art. 25(1) of the ICSID Convention.

Encouragement and Reciprocal Protection of Investment, dated June 17, 1992, Art. VI(3)(b)(ii). See also: Art. 26(3)(a) of the Energy Charter Treaty providing for "unconditional consent" to such proceedings.

159) See: *e.g.*, Agreement between Spain and Cuba on the Promotion and Reciprocal Protection of Investments, dated May 27, 1994, Art. XI(2). Similarly, the Agreement between the UK and India for the Promotion and Protection of Investments, dated March 14, 1994, Art. 9(3)(c) states that the disputes "shall be referred to" such a tribunal.

160) ICSID Convention, Art. 25(1). The issue of unilateral withdrawal of consent to submit a given investor-State dispute to an ICSID tribunal arose in *Alcoa Minerals of Jamaica Inc. vs. Jamaica* (Jurisdiction) [1975] 4 YB Com.Arb. 206 (excerpt), where the tribunal held that Jamaica's notification under Art. 25(4) of the ICSID Convention in 1974 refusing to consent to ICSID proceedings in cases of disputes relating to minerals or other natural resources is ineffective because it would withdraw Jamaica's consent to ICSID arbitration with Alcoa which it had unconditionally given in a State contract with the company in 1968.

161) Lamm and Smutny, *The Implementation of ICSID Arbitration Agreements,* 70 and Tupman, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes,* 815.

162) *Southern Pacific Properties (Middle East) Ltd. vs. Egypt* (Second Decision on Jurisdiction) [1988] 3 ICSID Rep. 131. For an analysis of the ICSID proceedings on jurisdiction in this case see: Delaume, "The Pyramids Stand – The Pharaohs Can Rest in Peace" (1993) 8 ICSID-Rev. FILJ 231 at 237-239. It was estimated that in 2000 about 20 national investment laws provided for consent of States to ICSID arbitration. See: Shihata "ICSID and Investment Treaties" in Shihata, *The World Bank in a Changing World,* Vol. III, (The Hague, London, Boston: Martinus Nijhoff Publishers, 2000) 801 at 803. For more on consent to ICSID proceedings in national laws, see: Shihata, "Recent Developments in ICSID" (1998) 15:1 News from ICSID 4 and Collier and Lowe, *The Settlement of Disputes in International Law,* 63. See also: Muchlinski, *Dispute Settlement under the Washington Convention on the Settlement of Investment Disputes,* 180 and Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation,* 811 arguing that consent to ICSID proceedings in national laws should be treated with caution as it needs to be interpreted whether such laws constitute unconditional consent to ICSID arbitrations or regard ICSID only as an optional procedure.

163) *Asian Agricultural Products Ltd. (AAPL) vs. Sri Lanka* [1990] 6 ICSID-Rev. FILJ 526 and Parra, "ICSID and New Trends in International Dispute Settlement" (1993) 10:1 News from ICSID 7 at 8. It was estimated that in 1999 about 950 BITs provided for consent of States to ICSID arbitration. See: Parra, "The Role of ICSID in the Settlement of Investment Disputes" (1999) 16:1 News from ICSID 5 at 7.

1.) Some BITs declare that investor-State disputes should be "submitted" or "referred to" an ICSID tribunal, if both parties so agree.[164] This wording is insufficient. It neither constitutes consent to ICSID arbitration, nor does it create any legal obligation to accept ICSID's jurisdiction once a conflict has arisen.[165]

2.) A few BITs urge that States should give "sympathetic consideration" to a request of a foreign investor to submit a given conflict to ICSID.[166] Similarly, Guideline V(3) "encourages" States to resort to this forum. Both approaches equally fall short of forcing host States to agree to ICSID arbitrations. However, unlike the previous option, they at least imply that host States may not withhold consent unreasonably.[167]

3.) Some Dutch BITs adopt a third, quite unique solution. They compel host States to consent to ICSID proceedings if the investor so requests.[168] This technicality makes consent to an investor's specific request a legal obligation. Withholding such consent is a breach of the treaty. The defect of this method is that it risks transferring the initial investor-State dispute to the intergovernmental level, and thereby politicising the conflict. A major aim of ICSID proceedings, however, is to de-politicise differences.[169]

4.) Modern RIAs[170] and an increasing number of BITs,[171] particularly UK BITs,[172] clearly establish the host State's acceptance to ICSID arbitrations. They explicitly confirm that

[164]) Broches, "Bilateral Investment Protection Treaties and Arbitration of Investment Disputes" in Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private Investment Law* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1995) 447 at 449.

[165]) *Ibid.* and Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes,* 57.

[166]) Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes,* 449.

[167]) *Ibid.*

[168]) Compare: Dutch Model BIT, 1993, Art. 9 which adopts the approach outlined infra in section 4.

[169]) Shihata, *Towards Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 313.

[170]) See: *e.g.*, Energy Charter Treaty, Art. 26(3)(a).

[171]) See: *e.g.*, Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. IX(4) and Treaty between the US and Morocco Concerning the Encouragement and Reciprocal Protection of Investments, dated July 22, 1985, Art. VI(3)(b) and Dolzer and Stevens, *Bilateral Investment Treaties,* 134.

[172]) See: *e.g.*, Agreement between the UK and Peru for the Promotion and Protection of Investments, dated October 4, 1993, Art. 10(2) and Agreement between the UK and Kenya for the Promotion and Protection of Investments, dated September 13, 1999, Art. 8(1). See also: the decision of an ICSID tribunal in *Asian Agricultural Products Ltd. (AAPL) vs. Sri Lanka* [1990] 6 ICSID-Rev. FILJ 526, holding that Sri Lanka consented to investor-State dispute resolution through ICSID in the UK-Sri Lanka BIT.

Contracting Parties hereby consent to submit any dispute with investors of the other Contracting Party to an ICSID tribunal if such investors choose this forum to resolve the conflict.[173]

This is the most effective and clear-cut regulation.[174] It avoids all unnecessary deficiencies of the three previous options. Also, Contracting Parties cannot prevent the settlement of conflicts through ICSID by circumventing the consent requirement in Art. 25(1) of the ICSID Convention.

(iii) The Risk of Annulment of ICSID Awards

The object of the annulment procedure under Art. 52 of the ICSID Convention is to protect parties against procedural injustice.[175] It assures that ICSID awards rendered in violation of some fundamental procedural rules, such as in cases where arbitrators were corrupt,[176] can be set aside. An *ad hoc* committee may annul an award in whole or in part, but it cannot modify it.[177] Annulment differs from appeal. The latter reviews the legitimacy of the process of the decision *and* its substantive correctness, while the former is not directed at the substantive accuracy of an

[173]) Sornarajah argues that this wording is not sufficient to fulfil the consent requirement of Art. 25(1) of the ICSID Convention. See: Sornarajah, *Power and Justice in Foreign Investment Arbitration*, 131-132. In order to establish consent under this provision an additional agreement between the host State and the foreign investor is necessary. This, however, appears to be a minority position.

[174]) Investor-State disputes in cases where either the host State or the investor's home State is not a party to the ICSID Convention cannot be resolved through ICSID. See: ICSID Convention, Art. 25(1). In these cases disputing parties may resort to ICSID's Additional Facility. See: Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, Art. 2(a). However, awards rendered under this regime are not ICSID awards, and thus cannot be enforced under the ICSID Convention. If neither the host State nor the investor's home State is a party to the ICSID Convention, recourse to ICSID's Additional Facility is not possible. Similar to Art. 25(1) of the ICSID Convention, Art. 1 of the Arbitration (Additional Facility) Rules requires consent of disputing parties to resolve their conflict through ICSID's Additional Facility. Consequently, the Convention should equally provide that Contracting Parties not parties to the ICSID Convention at the time a given dispute needs to be resolved, hereby consent to submit investor-State disputes to ICSID's Additional Facility. Such a provision would cover both States that have never become parties to the ICSID Convention and those that have withdrawn from ICSID membership after the Convention has been concluded. It is then again up to the investor to choose whether he submits or agrees to resolve a given conflict through ICSID's Additional Facility or another forum listed in the Convention.

[175]) Broches, "On the Finality of ICSID Awards: A Reply to Michael Reisman" (1993) 8 ICSID-Rev. FILJ 92 at 96.

[176]) ICSID Convention, Art. 52(1)(c).

[177]) Caron, "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal" (1992) 7 ICSID-Rev. FILJ 21 at 23. Sornarajah, however, seems to reject the difference between an annulment procedure and an appeal. He analyses the *Klöckner* annulment and argues that "Cameroon invoked the *appeal procedure* under the Convention". He also refers to the "view taken by the *appellate* ICSID tribunal". [Emphasis added]. See: Sornarajah, *Power and Justice in Foreign Investment Arbitration*, 116. With respect, it is impossible to follow his argument, given the clear wording of Art. 52 of the ICSID Convention providing for an annulment **not** an appeal procedure.

award.[178] In practice both review procedures sometimes blur into one another. In fact, this is what happened in the annulments of the *Amco*[179] and the *Klöckner*[180] awards.

As a result there was a wave of indignation announcing the breakdown of the ICSID control mechanism[181] and a subsequent call to allow parties to opt out of the annulment procedure.[182] No doubt, repeated annulments undermine the credibility of the ICSID regime and result in a lack of finality of ICSID awards. The Convention has to avoid these difficulties. It may, for example, limit the grounds for annulment listed in Art. 52(1) of the ICSID Convention. The treaty may define more narrow cases, in which awards rendered between one Contracting Party and nationals of another Contracting Party may be annulled.[183] Finally, another option would be explicitly to oblige Contracting Parties to waive their right to request annulment of an ICSID award.[184]

In *Klöckner,*[185] the first annulment request under the ICSID regime, the *ad hoc* committee held *inter alia* that a) the tribunal had failed to apply the proper substantive law by basing its decision primarily on equitable concepts.[186] The tribunal thus manifestly exceeded its power, which constitutes a ground for annulment under Art. 52(1)(b). b) The tribunal also failed to state

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178) Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal,* 24.

179) [1986] 89 ILR 514.

180) [1985] 2 ICSID Rep. 95.

181) See: *e.g.*, Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration" (1989) Duke L.J. 739 at 785-787 and Feldman, "The Annulment Proceedings and the Finality of ICSID Awards" (1987) 2 ICSID-Rev. FILJ 85 at 94, 101 and 105.

182) Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration,* 805 and Jacob, "Reinvigorating ICSID with a New Mission and With Renewed Respect for Party Autonomy" (1992) 33 Virg.J.Int'l.L. 123 at 152-153.

183) According to Art. 41(1) of the Vienna Convention on the Law of Treaties, Contracting Parties to a multilateral treaty (*i.e.*, the proposed Convention) may *inter se* modify another treaty among themselves (*i.e.*, the ICSID Convention) if the original instrument explicitly allows it, or if such modification does not infringe the rights of other parties or contradict the purpose of the original instrument. The ICSID Convention does not address *inter se* modifications. However, it appears that a provision in the Convention limiting the grounds for annulment under Art. 52(1) of the ICSID Convention would not contradict the object of the ICSID Convention, and would also not infringe the rights of any other party to the ICSID Convention. Thus, it is possible for Contracting Parties to the treaty to modify *inter se* Art. 52(1) of the ICSID Convention.

184) It is controversial among writers whether a State can waive its right to submit an ICSID award to the annulment procedure under Art. 52 of the ICSID Convention. For more on this debate, see: Jacob, *Reinvigorating ICSID with a New Mission and With Renewed Respect for Party Autonomy,* 153. This controversy, however, shall only be addressed if the initial examination of Art. 52 reveals that the Convention should indeed provide for such a waiver.

185) After the annulment of the *Klöckner* award, the case was resubmitted to another ICSID tribunal, which rendered its award in January 1988. The parties again requested annulment of this award. In May 1990 the second *ad hoc* committee rejected the parties' application for annulment. Neither of these awards has been made publicly available and thus cannot be analysed in this paper.

186) [1985] 2 ICSID Rep. 95 at 125.

reasons on which its decision was based because it did not deal with every question submitted to it.[187] Failure to state reasons is a ground for annulment under Art. 52(1)(e). The *ad hoc* committee emphasised that the award has to "allow the reader to follow the arbitral tribunal's reasoning, on facts and on law".[188] c) If an *ad hoc* committee finds any ground(s) listed in Art. 52(1) it has to annul the award. *Ad hoc* committees have no discretion to reject annulment in such cases.[189] Consequently, the committee decided to annul totally the award.

Similarly, in the partial annulment of the *Amco* award,[190] the *ad hoc* committee, following the reasoning of the *Klöckner* case, pronounced *inter alia* that a) the tribunal's failure to apply Indonesian law in determining the amount of Amco's investment constituted a manifest excess of power;[191] and b) the tribunal failed to state reasons for its calculation of PT Amco's investment license.[192] The committee confirmed the interpretation of the *Klöckner* committee that the reasons on which the award was based needed to be sufficiently pertinent.[193]

Both annulment decisions seriously misconceived an *ad hoc* committee's role. They turned an annulment procedure into an appeal.[194] The *ad hoc* committee in *Klöckner,* for instance, interpreted the grounds for annulment in Art. 52(1) very broadly. It concluded that failure to apply the correct law implies an excess of the tribunal's power and was thus a ground for annulment under Art. 52(1)(b).[195] But detailed examination of the tribunal's reasoning on the applicable law by an *ad hoc* committee is a feature more appropriate to an appeal than to an annulment proceeding. Frequent annulments moreover invite losing parties in ICSID proceedings

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187) *Ibid.,* 150-152.

188) *Ibid.,* 138.

189) *Ibid.,* 162.

190) Like the *Klöckner* Case, the *Amco* Case was resubmitted to another ICSID tribunal, which rendered its decision in 1990. This award again was submitted to an *ad hoc* committee requesting annulment. The committee rejected the annulment of the award in 1992. The decision of this *ad hoc* committee is not publicly available and thus could not be taken into consideration in this thesis. The *Klöckner* and *Amco* annulment decisions are discussed in considerable depth by Broches, "Observations on the Finality of ICSID Awards" in Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private Investment Law* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1995), 295-355.

191) [1986] 89 ILR 514 at 543-544.

192) *Ibid.,* 544-545.

193) *Ibid.,* 527.

194) Broches, for instance, spoke of "traumatizing *Klöckner* pronouncements" See: Broches, *Observations on the Finality of ICSID Awards,* 352. See also: Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal,* 47 and Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration,* 761-765, 777 and 785-787.

195) [1985] 2 ICSID Rep. 95 at 125.

to request nullification in every case.[196] Thus, in the immediate aftermath of the *Klöckner* and *Amco* decisions, faith in the finality of ICSID awards was nearly lost.

Things, however, have changed since then.[197] Today there are no convincing reasons why States should waive the right to request annulments of ICSID awards, or why the proposed Convention should limit the grounds for annulment listed in Art. 52(1) of the ICSID Convention.

First of all, there is a necessity to have an internal control mechanism. Non-ICSID international arbitral awards are subject to review by domestic courts. However, as no national court may overrule an ICSID award,[198] the ICSID Convention itself needs to set up a control mechanism to prevent awards rendered in violation of fundamental procedural rules from becoming effective.[199]

Secondly, subsequent decisions of *ad hoc* committees considerably clarified and partly reversed the findings of the *Amco* and *Klöckner* committees. In *MINE*,[200] for instance, the *ad hoc* committee declined to annul the entire award. It departed substantially from the approach taken in *Klöckner* and *Amco.* The *MINE* committee held *inter alia* that: a) an award should not be annulled for failure to state reasons as long as "it enables one to follow how the tribunal proceeded from point A to point B and eventually to its conclusion, even if it made an error of fact or law";[201] b) a finding that a ground for annulment exists does not necessitate annulment;[202] and c) the non-application of the proper law may constitute a manifest excess of the tribunal's power, and thus a ground for annulment. The merely erroneous application of this law, however, does not justify annulment of an award.[203]

Thirdly, the *Klöckner* and *Amco* annulments are thoroughly discredited today. They interpreted the grounds listed in Art. 52(1) too broadly. Annulment was too readily available because the *ad hoc* committees assumed they had no discretion to refuse the annulment of an

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196) Feldman, *The Annulment Proceedings and the Finality of ICSID Awards,* 105.

197) Reisman, however, seems to maintain his view that the ICSID control mechanism is not working properly. See: Reisman, "Repairing the ICSID Control System: Some Comments on Aron Broches' 'Observations on the Finality of ICSID Awards'" (1992) 7 ICSID-Rev. FILJ 196 at 211.

198) ICSID Convention, Art. 53(1).

199) Paulsson, "ICSID's Achievements and Prospects" (1991) 6 ICSID-Rev. FILJ 380 at 386-387 and 391.

200) *Maritime International Nominees Establishment vs. Guinea* (Annulment) [1989] 4 ICSID Rep. 79.

201) *Ibid.,* 88.

202) *Ibid,* 86.

203) *Ibid.*, 87.

award if they established one of the grounds enumerated in Art. 52(1).[204] The ICSID control mechanism is "back on track".[205] There is thus no need to limit the grounds for annulment of ICSID awards in a future investment Convention or to allow States to opt out of the ICSID annulment procedure.

To summarise:

1.) The Convention should provide that, in the absence of an agreement between the disputing parties, the investor may choose whether a given conflict is to be resolved through a) ICSID or ICSID's Additional Facility, b) by means of *ad hoc* arbitration under the UNCITRAL Arbitration Rules, or such other procedural rules as the parties may agree, or c) by recourse to domestic courts of the host States.

2.) In the absence of agreement between the disputants on the substantive law applicable to their conflict, the arbitrators should apply the domestic laws of the host State, *unless* such laws violate international law, or the nature of the dispute matter clearly prevents the application of domestic law. In these cases international law should be applicable.

3.) The Convention should provide that Contracting Parties, which are parties to the ICSID Convention, automatically consent to submit investor-State disputes to ICSID. In addition, the treaty should declare that Contracting Parties agree to submit investor-State disputes to *ad hoc* arbitrations under the UNCITRAL Arbitration Rules. State consent to any kind of international arbitration only applies if the investor waives his right to initiate or continue proceedings of the same conflict under any other dispute settlement procedure.

4.) There is no need for States to waive any right to submit an ICSID award to the annulment procedure under Art. 52 of the ICSID Convention. Nor should the treaty in any way limit the grounds for annulment of ICSID awards listed in Art. 52(1) of the ICSID Convention.

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[204]) Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal,* 47, Broches, *Observations on the Finality of ICSID Awards,* 354 and Shihata, *ICSID's Role in the Resolution of Investment Disputes,* 448.

[205]) Broches, *Observations on the Finality of ICSID Awards,* 354, Paulsson, *ICSID's Achievements and Prospects,* 391 and Augenblick and Ridgeway, "Dispute Resolution in World Financial Institutions" (1993) 10:1 J.Int'l.Arb. 73 at 79.

4. Recognition and Enforcement of Arbitral Awards

The ultimate test for the effectiveness of arbitration as a means of dispute resolution is the recognition and enforcement of arbitral awards. Writers favouring arbitration as the most effective form of dispute settlement often point out that international arbitral awards can be more easily enforced than judgments of domestic courts.[206] This is because the network of international treaties on the recognition and enforcement of international arbitral awards is more highly developed than the corresponding provisions for the implementation of foreign judgments.[207]

Liamco's attempts to execute its award against Libya may prove such authorities wrong. The company tried to enforce the award in the US, Sweden, Switzerland and France. A US District Court rejected enforcement on the basis of the Act of State Doctrine.[208] Liamco appealed, but the appeal was dismissed due to the conclusion of a settlement agreement between the parties in the meantime. In Switzerland, a Zurich District Court issued an order for attachment applicable to financial assets of Libya in Switzerland. Libya appealed and the Swiss Federal Supreme Court annulled the order. It argued that Swiss law did not permit such proceedings against a foreign State, unless there was a close connection between the subject matter and Switzerland.[209] In France, the Tribunal de Grande Instance of Paris took the unusual step of vacating previously granted attachments of Libyan bank accounts in France *and* ordered an investigation into the exact nature of the Libyan funds in these bank accounts.[210] Liamco succeeded only in Sweden. The Svea Court of Appeals granted enforcement of the award. The court maintained that Libya was deemed to have waived its right to invoke immunity by accepting the arbitration clause in the concession agreement with Liamco.[211]

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206) Baxter, *International Business Disputes,* 294.

207) Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* 338 and Bouchez, "The Prospects of International Arbitration: Disputes between States and Private Enterprises" (1991) 8:1 J.Int'l.Arb. 81 at 107.

208) *Libyan American Oil Company vs. Libya* (District Court, District of Columbia) [1980] 62 ILR 220. The Liamco proceedings in the US resulted in the amendment of certain US laws, such as the Federal Arbitration Act. For more details, see: Kahale, "New Legislation in the United States Facilitates Enforcement of Arbitral Agreements and Awards Against Foreign States" (1989) 6:2 J.Int'l.Arb. 57-64.

209) *Libya vs. Libyan American Oil Company* [1980] 62 ILR 228 at 235. Writers interpreted the requirement of a "close connection to Switzerland" to mean that the obligation in question was contracted or was to be performed in Switzerland. The location of the arbitral tribunal in Switzerland is not sufficient to establish such a close connection. See: Hermann, "Disputes between States and Foreign Companies" in Lew (ed.), *Contemporary Problems in International Law* (London and Reading: The Eastern Press Ltd., 1986) 250 at 261.

210) *Procureur De La République and Others vs. Liamco and Others* [1979] 64 ILR 78 at 81-82.

211) *Libyan American Oil Company vs. Libya* [1980] 62 ILR 225 at 227.

The Liamco saga illustrates that the execution of an international arbitral award rendered against a State may be a complex undertaking because of a State's immunity from execution. How could a multilateral investment treaty most effectively guarantee the implementation of such awards?

This section analyses the recognition and enforcement of awards rendered in investor-State arbitrations. The execution of inter-State arbitral awards raises problems of state immunity similar to those outlined below. It is therefore not addressed in detail.

a) Non-ICSID Awards

The recognition and enforcement of international arbitral awards other than ICSID awards is governed by two sets of rules. First, by the domestic laws of the place where recognition and enforcement is sought, and secondly, by international law, particularly by certain treaty commitments. In practice, the New York Convention is the most important of these instruments.[212] It covers nearly all industrialised States and a large number of developing countries.[213]

The term "recognition" means that a court regards an award as a definite determination of the dispute between the parties. The award is *res judicata.*[214] Enforcement or execution, by contrast, implies that a court is asked to ensure that the award is carried out by using such enforcement mechanisms and such assets of the defendant as may be available within the jurisdiction.[215] The expressions "execution" and "enforcement" are used interchangeably. A court may, for instance, order a measure of execution such as seizure of the respondent party's property.[216] The recognition of an award does not guarantee its execution.

Recognition and enforcement of non-ICSID awards rendered against foreign investors are usually simple. In most cases the host State will attempt to enforce it in its own territory, in the investor's home State, where the investor probably has most of his assets, or in another country

212) There are other instruments addressing the recognition and enforcement of non-ICSID international arbitral awards, such as the 1961 European Convention of International Arbitration and the 1979 Inter-American Convention on Extra-territorial Validity of Foreign Judgments and Arbitral Awards. None of these treaties enjoys such a practical significance as the New York Convention. For a list of parties to the New York Convention, see: Appendix E.

213) Vagts, "Protecting Foreign Direct Investment: An International Law Perspective" in Wallace (ed.), *Foreign Direct Investment in the mid 1990s: A New Climate in the Third World* (London, Dordrecht, Boston: Martinus Nijhoff Publishers, 1990) 102 at 110.

214) Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* 335.

215) *Ibid.,* 336.

216) Collier and Lowe, *The Settlement of Disputes in International Law,* 265.

where the investor has substantial properties. Enforcement of such awards in the host State is subject to the host State's domestic law which may reflect international agreements to which that State is a party. It is, in practice, probably the easiest approach for the host State. If execution is sought in the investor's home State, or in a third country, the host State may request recognition and enforcement of the award in the courts of these States under the New York Convention (where it is applicable). The New York Convention allows the recognition and execution of international arbitral awards other than ICSID awards in more than 100 States.[217] Recognition and enforcement may be rejected by national courts[218] only in exceptional circumstances, exhaustively listed in the instrument.[219]

However, the New York Convention may not be applicable if the award was rendered in a country not party to this treaty.[220] It is therefore crucial that the Convention permits each party to investor-State arbitrations other than ICSID proceedings to request that the arbitration takes

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[217]) For a list of parties, see: Appendix E. A major defect of the New York Convention is that the instrument does not provide for a uniform system of international *procedural* rules of enforcement of awards. The procedure of recognition and enforcement is still governed by the domestic law of the State, where recognition and execution is sought. See: New York Convention, Art. III and Martinez, "Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The 'Refusal' Provisions" (1990) 24 Int'l. Lawyer 487 at 496.

[218]) The fact that national courts rule on the recognition and enforcement of international arbitral awards under the New York Convention, and that such courts may refuse recognition and enforcement on the basis of Art. V of this instrument, led prominent jurists to suggest the establishment of a new international court for resolving disputes on the enforceability of arbitral awards. This would ensure more uniform, just and unbiased decisions on the recognition and execution of such awards. See: Holtzmann, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards" in Hunter, Mariott and Veeder (eds.), *The Internationalization of International Arbitration* (London, Boston, Dordrecht: Graham & Trotman and Martinus Nijhoff Publishers, 1995) 109 at 110-112 and Schwebel, "The Creation and Operation of an International Court of Arbitral Awards" in *Ibid.*, 115 at 116-119.

[219]) New York Convention, Art. V. van den Berg, *The New York Arbitration Convention of 1958* (The Hague and Deventer: Asser & Kluwer, 1981), 265. The grounds for refusal of recognition and enforcement under Art. V have been subject to a controversial debate. For an in depth analysis see: *Ibid.*, 264-393. Certain authorities, such as Schmitthoff consider the grounds listed in Art. V as "antiquated". See: Schmitthoff, "Finality of Arbitral Awards and Judicial Review" in Lew (ed.), *Contemporary Problems in International Law* (London and Reading: The Eastern Press Ltd., 1986) 230 at 237. Other writers highlight the success of the New York Convention. For instance, a major study of awards enforceable under this instrument revealed that only 10% of the cases involving the New York Convention resulted in a court refusing the recognition and enforcement of awards under Art. V. See: van den Berg, "Refusal of Enforcement under the New York Convention of 1958: The Unfortunate Few" (1999) 10 ICC International Court of Arbitration Bulletin - Special Supplement 75.

[220]) New York Convention, Art. I(1) refers to awards made in *any* foreign State regardless as to whether or not such State is party to the New York Convention. However, Art. I(3) of the instrument allows Contracting Parties to make a reservation limiting their obligations to recognise and enforce foreign awards to those emanating from another Contracting Party. More than 50% of the States parties to the New York Convention have made such a reservation. See: Graving, "Status of the New York Convention: Some Gaps on Coverage but New Acceptances Confirm its Vitality" (1995) 10 ICSID-Rev. FILJ 1 at 11 and Bouchez, *The Prospects of International Arbitration: Disputes between States and Private Enterprises*, 108.

place in a State party to the New York Convention.[221] Otherwise the execution of the award in a third State may turn out to be impossible.

Of course, the host State is not deprived from seeking recognition and enforcement of the award on the basis of domestic rules of the country where execution is sought, if such provisions are more favourable than the New York Convention.[222]

Recognition and enforcement of non-ICSID awards rendered against States is more intricate. In practice, investors are often disappointed that the execution of an award against a State turns out to be impossible because of its immunity.[223]

International and domestic laws on immunity distinguish between immunity from jurisdiction and immunity from execution.[224] Today the principle of restrictive immunity as regards immunity from jurisdiction is generally accepted.[225] The concept means that a State is immune from suit in another State in respect of matters which are exercises of public authority (*acta jure imperii*). A State lacks such immunity if it is engaged in commercial transactions (*acta jure gestionis*).[226] This distinction, which appears straightforward in theory, causes considerable difficulties in practice. The key problem is *how* to distinguish between *acta jure imperii* and *acta jure gestionis*.[227]

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221) For a similar provision see: Energy Charter Treaty, Art. 26(5)(b). See also: Vandevelde, *Arbitration Provisions in the BITs and the Energy Charter Treaty,* 418. Some BITs contain such a clause. See: UNCTAD, *Bilateral Investment Treaties in the mid 1990s,* 98.

222) New York Convention, Art. VII(1) and Delaume, "Reflections on the Effectiveness of International Arbitral Awards" (1995) 12:1 J.Int'l.Arb. 5 at 13.

223) van den Berg, *Recent Enforcement Problems under the New York and ICSID Conventions,* 13.

224) Delaume, "State Immunity and Transnational Arbitration" in Lew (ed.), *Contemporary Problems in International Law* (London and Reading: The Eastern Press Ltd., 1986) 313 at 314 and 318 and Higgins, *Problems & Process: International Law and How we use it,* 85-86. Compare: Bernini and van den Berg, "The Enforcement of Arbitral Awards Against a State: The Problem of Immunity from Execution" in Lew (ed.), *Contemporary Problems in International Law* (London and Reading: The Eastern Press Ltd., 1986) 359 at 360 arguing that such a distinction is not appropriate because it is illogical that a State by agreeing to arbitration waives its immunity from jurisdiction but not its immunity from execution.

225) See: *e.g.*, Collier and Lowe, *The Settlement of Disputes in International Law,* 271, Bouchez, *The Prospects of International Arbitration: Disputes between States and Private Enterprises,* 113, Higgins, *Problems & Process: International Law and How we use it,* 82 and Vagts, *Dispute-Resolution Mechanism in International Business* (1987) III Recueil des Cours 17 at 77-78. The principle is also reflected in numerous national laws, such as Sec. 3 of the 1978 UK State Immunity Act. For an analysis of the US Foreign Sovereign Immunity Act, see: Delaume, "Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies" (1993) 8 ICSID-Rev. FILJ 29 at 41-42.

226) Singer, "Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe" (1985) 26 Harv.Int'l.L.J. 1 at 2, Chukwumerije, "ICSID Arbitration and Sovereign Immunity" (1990) 19 AALR 166 at 171 and Collier and Lowe, *The Settlement of Disputes in International Law,* 271.

227) Higgins, *Problems & Process: International Law and How we use it,* 82. Authorities attempted to distinguish *acta jure imperii* from *acta jure gestionis* by looking at the nature and/or purpose of the act or by differentiating between "private" and "public" activities of the State. For a summary of the approaches in determining whether a given act is an *actus jure imperii* or an *actus jure gestionis,* see: Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe,* 17-30.

Most commentators accept that an agreement to arbitrate automatically creates an exception to immunity from jurisdiction. It prevents a State from challenging the jurisdiction of the arbitral tribunal by invoking its immunity.[228] The European Convention on State Immunity limits in its Art. 12 a State's immunity from jurisdiction, where the State has agreed in writing to arbitrate.

Immunity from execution, by contrast, is rather controversial. Some States still adopt the view that there is absolute state immunity from execution.[229] Others apply the concept of restrictive immunity to measures of enforcement.[230] There are both economic and political considerations at stake here. Execution is generally felt to be a serious interference with the sovereign status of a State. Finally, it is unsettled whether an agreement to arbitrate implies a waiver of immunity from execution.[231]

One option to deal with this difficulty is to be silent on state immunity. Numerous BITs choose this solution.[232] Its practical effect is that the investor will go "forum shopping". He will attempt to enforce the award in a country where the host State has assets and where the domestic law limits state immunity from execution. The drawback of forum shopping is that the

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228) See: *e.g.*, Collier and Lowe, *The Settlement of Disputes in International Law,* 271, Peter, *Arbitration and Renegotiation of International Investment Agreements,* 193 and Delaume, "Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration" (1987) 2 ICSID-Rev. FILJ 403.

229) See: *e.g.*, European Convention on State Immunity, 1972, Art. 23 stating that no measure of execution against the property of a Contracting Party may be taken in the territory of any other Contacting Party, unless the party against whom the measure is sought has consented thereto in writing in any particular case. This provision, however, permits reservations, which allow States to provide for quite extensive enforcement against property in use for commercial purposes. See: *e.g.*, Sec. 13(4) of the UK State Immunity Act. Also: the decision of the Tribunal de la Grande Instance of Paris in *Procureur De La République vs. SA Ipitrade International* [1978] 65 ILR 75, where the court referred to Nigeria's absolute immunity from execution. The court nevertheless rejected to vacate previously granted attachments of various bank accounts and industrial establishments belonging to Nigeria because the parties concluded a settlement agreement after the attachment had been granted. The court emphasised that any vacation of the attachment must be refused until proof has been obtained of the renunciation of the benefits of the settlement agreement by one of the parties. *Ibid.*, 77.

230) The 1978 UK State Immunity Act, for instance, provides in Sec. 13(4) that the property of another State may only be attached if used or intended for use for commercial purposes. See also: the decision of the House of Lords in *Alcom Ltd. vs. Colombia* (HL) [1984] 2 All ER 6, where it held that bank accounts used to meet the day-to-day running costs of a diplomatic mission fall outside the scope of Sec. 13(4). For criticism, see: Fox, "Enforcement Jurisdictions, Foreign State Property and Diplomatic Immunity" (1985) 34 ICLQ 115 at 122 and 141.

231) Delaume, *Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration,* 411 and Fox, "Sovereign Immunity and Arbitration" in Lew (ed.), *Contemporary Problems in International Law* (London and Reading: The Eastern Press Ltd., 1986) 323 at 325. See also: *EURODIF Corporation Et Al vs. Iran* [1984] 23 ILM 1062 at 1068 (excerpt) where the French Court of Cassation held that a waiver of immunity from suit does not imply a waiver of immunity from execution. So also: Bouchez, *The Prospects of International Arbitration: Disputes between States and Private Enterprises,* 111 and ILC, *Report of the Commission to the General Assembly: ILC Draft Articles on Jurisdictional Immunities of States and their Property,* Art. 18(2). In the area of diplomatic law a waiver of immunity from suit also does not imply a waiver of immunity from execution. See: 1961 Vienna Convention on Diplomatic Relations, Art. 32(4).

232) See: *e.g.*, Agreement between Australia and China on the Reciprocal Encouragement and Protection of Investments, dated July, 11, 1988, Art. XII, Agreement between Australia and Vietnam on the Reciprocal Promotion and Protection of Investments, dated March 5, 1991, Art. 13 and Agreement between the UK and India for the Promotion and Protection of Investments, dated March 14, 1994, Art. 9.

investor may not be able to find such a jurisdiction. He is then left with no means of executing his award.

A second possibility would be for the Contracting Parties to the investment agreement to waive explicitly their immunity from execution.[233] Such an explicit waiver is sometimes contained in individual contracts with States, particularly in transnational loan agreements.[234] Some domestic laws, *e.g.,* Sec. 1610(1) of the 1976 US Foreign Sovereign Immunities Act provide for such advance waiver to be enforceable. Negotiators of the ICSID Convention discussed the option to include explicit advance waivers of immunity from execution.[235] From the legal perspective this is the best solution. It would reduce forum shopping by investors. It would equally avoid any subsequent controversies on state immunity from execution. But it is not realistic. Debates on the ICSID Convention clearly illustrated that this is not an acceptable solution because the vast majority of States reject it.[236]

A third option is for compliance with arbitral awards to become a treaty obligation under the investment Convention. Each Contracting Party then has to carry out without delay any award rendered against it.[237] What could be gained from such a clause? First, non-compliance with a treaty obligation can considerably damage the reputation of the host State and result for it in a reduction of FDI.[238] Such a provision might well encourage host States to comply with awards. Also, a violation of a treaty obligation may lead the investor's home State to provide diplomatic protection. It has been outlined above that diplomatic protection is not the most effective means of dispute resolution.[239] However, it is still a better alternative than being left with no means of enforcement.

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233) Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 320 and Bernini and van den Berg, *The Enforcement of Arbitral Awards Against a State: The Problem of Immunity from Execution*, 362.

234) Delaume, "Economic Development and Sovereign Immunity" (1985) 79 AJIL 319 at 344.

235) Sornarajah, *The Pursuit of Nationalized Property*, 63.

236) Broches, "Arbitration of Investment Disputes" (1984) I Malayan L.J. lxxiii at lxxvii.

237) A similar provision is incorporated in the Agreement between Spain and Cuba on the Promotion and Reciprocal Protection of Investments, dated May 27, 1994, Art. XI(4) and in the Treaty between the US and Jordan Concerning the Encouragement and Reciprocal Protection of Investment, dated July 2, 1997, Art. IX(4). See also: Energy Charter Treaty, Art. 26(8).

238) Paulsson, however, points out that "reputation" is a rather confused and fluctuating concept as even States not complying with awards rendered against them may find some reasons "justifying" their behaviour. Such reasons may have nothing to do with reality. See: Paulsson, "Third World Participation in International Investment Arbitration" (1987) 2 ICSID-Rev. FILJ 19 at 54.

239) Chapter B V 1a.

b) ICSID Awards

The recognition and enforcement of ICSID awards is regulated in Arts. 53-55 of the ICSID Convention. Articles 53(1) and 54(1) oblige each Contracting Party to abide by and comply with the terms of awards and to recognise and enforce them as if they were final judgments of its national courts. These articles attempt to make recognition and execution of ICSID awards as simple as possible.[240] Article 55, however, then specifies that execution of an ICSID award is always subject to the domestic laws on state immunity of the Contracting Party where measures of enforcement are sought, thus limiting possibilities of enforcing it.

Articles 53-55 ensure recognition and enforcement of ICSID awards rendered against foreign investors through the municipal courts of Contracting Parties in an easy and effective manner.[241]

By contrast, execution of an ICSID award rendered against a State can effectively be prevented by this State or by any other Contracting Party to the ICSID Convention in whose territory enforcement is sought, by invoking domestic rules on state immunity from execution. If a State so frustrates enforcement of an award, it violates its treaty obligation to comply with and enforce the award.[242] This may result in various sanctions.[243] However, Art. 55 may still make actual measures of execution against a State impossible.[244] The fact that this dilemma does not arise in cases where the award is self-executing, such as a decision leading to a determination of facts,[245] is of little assistance to affected investors. Self-executing awards are the exception rather than the rule.

The Matter of the Application of Liberian Eastern Timber Corporation vs. Liberia,[246] demonstrates the difficulties involved in enforcing ICSID awards rendered against a State. In this case a US District Court refused the execution of an award. It held that bank accounts of the

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240) Delaume, *State Immunity and Transnational Arbitration,* 317.

241) Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation,* 814.

242) Delaume, "State Contracts and Transnational Arbitration" (1981) 75 AJIL 784 at 818 and Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation,* 816.

243) For more details on such sanctions, see infra: chapter B V 4b.

244) For criticism, see: *e.g.*, Soley, "ICSID Implementation: An Effective Alternative to International Conflict" (1985) 19 Int'l. Lawyer 521 at 528 and 540 and van den Berg, *Recent Enforcement Problems under the New York and ICSID Conventions,* 13.

245) Sutherland, *The World Bank Convention on the Settlement of Investment Disputes,* 398.

246) [1986] 89 ILR 313.

Liberian embassy in the US are immune from execution under the 1976 US Foreign Sovereign Immunities Act and under Art. 25 of the 1961 Vienna Convention on Diplomatic Relations.[247] In practice, embassy bank accounts are usually the most significant assets a States has abroad.[248] This often leaves investors without other substantial assets of a State against which enforcement would be possible. This unsatisfactory result has led writers to conclude that such examples of abuse of immunity undermine the ICSID Convention's enforcement machinery.[249] Some commentators have therefore suggested an explicit requirement for States to waive their immunity from execution.[250] But as explained above[251] this option is not realistic. States will not agree to such an advance waiver.

The ICSID Convention contains two sanctions for failure by States to comply with an ICSID award. First, it restores the right of the investor's home State to give diplomatic protection. In addition, it allows that State to bring a claim against the defaulting State in the ICJ.[252]

Admittedly, these sanctions are less effective than automatic execution.[253] However, failure to comply with an ICSID award is unlikely to occur very often. First, ICSID awards can be executed in those jurisdictions which apply the theory of restrictive immunity from execution.[254] Secondly, non-compliance with ICSID awards would seriously damage the reputation of the

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247) (District Court, Southern District, N.Y.,) [1986] 89 ILR 355 and (District Court, District of Columbia) [1987] 89 ILR 360. Compare: *Société Quest Africaine Des Bétons Industriels (SOABI) and Others vs. Senegal* [1991] 2 ICSID Rep. 337 where the French Court of Cassation held that by submitting the conflict to the jurisdiction of an arbitral tribunal, Senegal has accepted that the award might be subject to an order of enforcement which itself does not constitute an act of execution of such a nature as to provoke Senegal's immunity from execution. *Ibid.*, 341.

248) Denza, *Diplomatic Law – A Commentary to the Vienna Convention on Diplomatic Relations*, 2nd ed., (Oxford: Clarendon Press, 1998), 132.

249) Franzoni, "International Law – Enforcement of International Centre of Investment Disputes Arbitral Awards in the United States – Signatories to the Convention on the Settlement of Investment Disputes between State and Nationals of other States are not entitled to Sovereign Immunity with Respect to Enforcement of ICSID Arbitral Awards, *Liberian Eastern Timber Corp. vs. Government of Republic of Liberia,* 650 F.Supp. 73 (S.D.N.Y., 1986)" (1988) 18 Ga.J.Int'l.&Comp.L. 101 at 116.

250) Jacob, *Reinvigorating ICSID with a New Mission and With Renewed Respect for Party Autonomy,* 134. See also: Delaume, *ICSID Arbitration and the Courts,* 800 for a waiver of immunity from execution agreed upon between the host State and the investor.

251) Chapter B V 4a.

252) ICSID Convention, Art. 27(1) and Art. 64.

253) O'Keefe, "The International Centre for Settlement of Investment Disputes" (1980) YB World Aff. 286 at 300-301.

254) Chukwumerije, *ICSID Arbitration and Sovereign Immunity,* 181 and Seidl-Hohenfeldern, "Proportionality in and under the Convention on the Settlement of Investment Disputes between States and Nationals of other States" in Seidl-Hohenveldern, *Collected Essays on International Investments and International Organisations* (The Hague, London, Boston: Kluwer Law International, 1998) 371 at 372.

defaulting State,[255] and discourage foreign investors from doing business with it.[256] Also, supporters of the current ICSID regime point out that ICSID awards were not intended to be entitled to more favourable treatment as regards execution than a final judgment of a national court.[257] Thirdly, non-compliance with ICSID awards by developing countries will rarely happen. Otherwise such a State would find it difficult and expensive to borrow from the World Bank or its affiliate institutions, because ICSID is a World Bank emanation.[258]

These reasons prove that - in spite of its shortcomings - the system of enforcing ICSID awards is more or less reliable. The only serious problem in practice, *i.e.*, state immunity from execution, cannot finally be eliminated in an investment Convention. The best guarantee to prevent a State from invoking its immunity from execution, *i.e.*, an explicit general advance waiver, is not realistic. As a safeguard, investors may therefore attempt to incorporate such waiver in individual contracts they conclude with States for specific investment projects.

To summarise:

1.) Enforcement of an arbitral award rendered against an investor is effectively regulated in both the New York Convention and the ICSID Convention. These instruments ensure enforcement of such awards through municipal courts of States parties to these treaties.

2.) Neither the New York Convention nor the ICSID Convention guarantee enforcement of awards rendered against a State due to state immunity from execution. An explicit advance waiver of such immunity would be advantageous to foreign investors. But it is not a realistic option. An investment Convention therefore only has to

(i) allow each party to non-ICSID investor-State arbitrations to demand that such proceedings take place in a country party to the New York Convention; and

(ii) make compliance with an arbitral award rendered against a State a treaty obligation.

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255) Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 543 and Chukwumerije, *ICSID Arbitration and Sovereign Immunity*, 182.

256) Generally on the impact and importance of a State's reputation, see: Wälde, *Changing Directions for International Investment Law in the Global Economy: An Overview of Selected Issues*, 19.

257) Broches, *A Guide for Users of the ICSID Convention*, 10.

258) Peter, *Arbitration and Renegotiation of International Investment Agreements*, 203 and Alenfeld, *Die Investitionsförderungsverträge der Bundesrepublik Deutschland*, 174.

Part C – Conclusions

In 1947 the international community agreed upon the General Agreement on Tariffs and Trade. Up until now it has failed to conclude a "General Agreement on Investment", despite the fact that FDI growth rates have outpaced trade growth for the past 20 years[1] and foreign investment is more crucial to the development of Third World countries, and to the advancement of the world economy as a whole, than it has ever been before.

The complexity of the subject matter, the choice of unsuitable fora, political difficulties, the unexpected strength of public opposition to such a treaty even before its conclusion and other reasons have prevented agreement among States. Yet, the international community needs a global investment treaty. Existing BITs and RIAs are a system of partly overlapping, partly contradictory instruments, with a limited scope of application, binding two States only or a few parties at the most. In practice, there are major international investments not covered by any treaty. Investment transactions worth millions of dollars are made in an international legal vacuum. Customary international law on foreign investment is unsettled and controversial, particularly on compensation for expropriated investments - an issue which is still of interest to investors.

Negotiations and failure of the MAI have illustrated that the conclusion of a multilateral treaty on FDI is an intricate undertaking. States negotiating it will have to avoid the mistakes which caused the MAI not to succeed. In future, it will be crucial to consult non-State players, such as NGOs, trade unions and the business community formally and at an early stage of the negotiations. It will be essential to address key "social issues", particularly core labour standards. It will be important to choose a forum for negotiation which is perceived as impartial as between conflicting interests and finally, it will be indispensable that the substance of the Convention balances the – often opposing – interests of host States and foreign investors, industrialised States and developing countries. This is most likely to be achieved by basing the treaty on a set of principles on FDI which is widely accepted among States. The World Bank Guidelines on the Treatment of Foreign Direct Investment, adopted by 171 States, are such a set of principles.

Change comes in small steps. An investment Convention that ignores this fact is doomed to failure. Negotiating Parties are unlikely to accept in a treaty major innovations unknown in State practice. NGOs, for instance, have sometimes proposed the establishment of an international forum where members of the local population of the host State could have the possibility of suing foreign investors for damages caused by them. However, capital-exporting countries would probably not sign or ratify a treaty which introduces such procedures. It is simply not realistic in the context of the current climate, even if it is morally desirable. An investment Convention to gain general acceptance must rather build upon existing practice. It should aim for modest changes likely to be acceptable to States. An illustrative list of what is "fair and equitable treatment", a clearer definition of "creeping expropriation", the implementation of the concept of free admission of foreign investors combined with wide discretion of host States internally to regulate investment incentives and performance requirements are important examples to which negotiators should give priority.

In theory, there might be a "perfect" treaty. It would have a simple structure, clear definitions of its terms, complete coverage of the subject matter it addresses and uncomplicated provisions. In practice, no such treaty exists. Any future multilateral investment Convention will not be an exception to this rule. It will be a compromise between States. It may have provisions with (too) many exceptions. It may incorporate vague and imprecise rules and it may contain clauses which sometimes favour the foreign investor or the host State at the expense of the other. This thesis does not claim to offer a solution to all the problems inherent in negotiating a comprehensive treaty between States. It proposes only *some* provisions for a Convention on FDI, which may minimise the difficulties and balance the interests of parties, host States, foreign investors and capital-exporting countries alike.

Core issues that the treaty must cover are *inter alia* admission and treatment of foreign investors, expropriation of investments and dispute resolution. Protection against confiscations was one of the reasons for concluding BITs in the past, as was the desire to provide for a de-politicised forum for investor-State dispute resolution. But provisions on expropriation are not anymore the most essential ones in practice. Spectacular takings, such as those resulting in the *BP*, *Texaco* or *Liamco* arbitrations in the 1970s are rare nowadays. It will be much more important in the future to focus on other matters, particularly on transfer provisions and further factors of *treatment* of foreign investors. The ability to repatriate funds is of central interest to *every* foreign investor in any host State, as is a guarantee that his investment does not face constant administrative harassment by local authorities. Expropriations, by contrast, usually affect only a few investments in a small number of host States.

It will be crucial that the Convention addresses *all* the key aspects which concern foreign investors and host States. This is one lesson negotiators should learn from the MAI. By the time it became clear that the MAI would exclude tax provisions, which were essential to foreign investors, the business community lost its interest in the treaty. That was the beginning of the end of the MAI.

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1) Jullius, *Global Companies and Public Policy: the Growing Challenge to Foreign Direct Investment,* 14.

None of the provisions outlined in this paper is an isolated rule unrelated to the rest of the treaty or other norms of international law, particularly other treaties. Negotiators of the Convention will have to draft it carefully to regulate its relation to other agreements, both existing and subsequent. They will also have to face the fact that a solution to a particular issue, most desirable from the legal point of view, cannot be implemented in practice against the opposition of States. For instance, States will not waive in a treaty their immunity from execution to simplify enforcement of arbitral awards rendered against them.

It does not seem likely that a Convention on FDI will be concluded in the immediate future. The failure of the MAI, and recent protests of an increasing number of opponents of globalisation against any kind of liberalisation of international economic relations have prevented States from seriously taking up this issue in the past three years. The EU and Canada have aspired to gain support to include talks on investment in the next round of trade negotiations in the WTO, but the US seems to reject this option. One reason for this position of the US might be the fact that its past attempts to incorporate TRIMs in the trade negotiation during the Uruguay Round resulted in a TRIMs Agreement which is rather limited in scope, falling short of the standards expected by the US. In addition, negotiations on the TRIMs Agreement turned out to be extremely slow and the US faced considerable opposition from developing countries. WTO critics also emphasise that the organisation lacks expertise and knowledge of FDI, particularly when compared to the competence of the OECD. No WTO negotiations on investment have started so far. The organisation has only established an internal working group to study the relationship between trade and investment and some other investment-related topics.

After the failure of the MAI, the OECD has not attempted again to negotiate a multilateral investment treaty. Its unsuccessful handling of the MAI affair excludes it as a suitable forum for future negotiations. Also, countries most attractive for foreign investors, such as Asian States and Latin American countries are not members of the OECD. The breakdown of negotiations on the MAI has demonstrated that any attempt to conclude a multilateral investment Convention which prevents key players, *i.e.* potential host States, from participating in the negotiation process is doomed to failure. The OECD's experience in dealing with investment matters as reflected in its Codes of Liberalisation of Current Invisible Operations and Capital Movements and its Declaration on International Investment is no sufficient justification to choose this venue for a third time (after its Draft Convention on the Protection of Foreign Property and the MAI) to negotiate a comprehensive treaty on FDI.

The UN or any of its affiliated organisations, such as UNCTAD, would hardly be an acceptable forum for most industrialised nations because of the dominant role played there by the large number of developing countries. The non-success of the UN in concluding its Code of

Conduct on Transnational Corporations and various other Codes further weakened the trust of numerous States in the UN as a possible venue for multilateral negotiations on investment. The World Bank Group, finally, has considerable knowledge in FDI through ICSID, MIGA, the IFC and its work on foreign investment as reflected *inter alia* in its Guidelines, but it lacks experience in negotiating a multilateral treaty.

The success of any future investment Convention will to a large extent depend on the sophistication and expertise of the forum negotiating the instrument. There is no international agency specialised in FDI. Institutions, such as the OECD have substantial know-how, but fall short of widespread membership. Organisations with nearly universal adherence are rejected by major capital-exporting States. These institutions are either considered biased in favour of developing countries or proved unsuccessful in handling investment issues in the past. FDI is a complicated, intricate and difficult subject matter. No single international organisation or agency today is in a position to address it comprehensively. It might therefore be advisable to establish international working groups comprising of experts of all relevant institutions, including the OECD, the WTO, the UN and UNCTAD, the World Bank Group and the IMF as well as representatives of major NGOs and other interest groups to combine efforts to establish a multilateral framework on foreign investment. Such working groups could on the one hand properly represent States *and* non-State players, particularly NGO's interested in multilateral negotiations on investment; on the other hand they could profit from expertise, knowledge and past experiences to an extent far beyond that available at any single organisation.

Realistically, it will be another 10 or 15 years before States are able to agree upon the Convention. Given the current political climate in the world, the conclusion of a multilateral investment treaty is probably not the highest priority for States, not even for the US, one of the strongest promoters of such an agreement in the past.

However, the conclusion of a Convention would not be a *guarantee* that those States that most need to attract foreign capital will, in fact, manage to increase their FDI inflows substantially. This is because other aspects, such as economic considerations and political issues, are at least as important to foreign investors as a stable legal framework. Obviously, a treaty cannot substitute for a lack of political stability in some host States. It also cannot eliminate economic and financial deficiencies or infrastructural shortcomings, which are still present in numerous regions of the world. It can only make a limited contribution to the improvement of the overall investment climate for Contracting Parties. It can probably stimulate investment flows to Contracting Parties. It can ensure legal stability and predictability in international investment transactions and it can advance the economic development of numerous countries in the Third World. And this would in itself be a significant success for the international community.

Appendix A

Guidelines on the Treatment of Foreign Direct Investment

The Development Committee

Recognizing

that a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular, in terms of improving the long term efficiency of the host country through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade;

that the promotion of private foreign investment is a common purpose of the International Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency;

that these institutions have pursued this common objective through their operations, advisory services and research;

that at the request of the Development Committee, a working group established by the President of these institutions and consisting of their respective General Counsel has, after reviewing existing legal instruments and literature, as well as best available practice identified by these institutions, prepared a set of guidelines representing a desirable overall framework which embodies essential principles meant to promote foreign direct investment in the common interest of all members;

that these guidelines, which have benefited from a process of broad consultation inside and outside these institutions, constitute a further step in the evolutionary process where several international efforts aim to establish a favorable investment environment free from non-commercial risks in all countries, and thereby foster the confidence of international investors; and

that these guidelines are not ultimate standards but an important step in the evolution of generally acceptable international standards which complement, but do not substitute for, bilateral investment treaties,

therefore *calls the attention* of member countries to the following Guidelines as useful parameters in the admission and treatment of private foreign investment in their territories, without prejudice to the binding rules of international law at this stage of its development.

I
SCOPE OF APPLICATION

1. These Guidelines may be applied by members of the World Bank Group institutions to private foreign investment in their respective territories, as a complement to applicable bilateral and multilateral treaties and other international instruments, to the extent that these Guidelines do not conflict with such treaties and binding instruments, and as a possible source on which national legislation governing the treatment of private foreign investment may draw. Reference to the "State" in these Guidelines, unless the context otherwise indicates, includes the State or any constituent subdivision, agency or instrumentality of the State and reference to "nationals" includes natural and juridical persons who enjoy the nationality of the State.

2. The application of these Guidelines extends to existing and new investments established and operating at all times as *bona fide* private foreign investments, in full conformity with the laws and regulations of the host State.

3. These Guidelines are based on the general premise that equal treatment of investors in similar circumstances and free competition among them are prerequisites of a positive investment environment. Nothing in these Guidelines therefore suggests that foreign investors should receive a privileged treatment denied to national investors in similar circumstances.

II
ADMISSION

1. Each State will encourage nationals of other States to invest capital, technology and managerial skill in its territory and, to that end, is expected to admit such investments in accordance with the following provisions.

2. In furtherance of the foregoing principle, each State will:

(a) facilitate the admission and establishment of investments by nationals of other States, and

(b) avoid making unduly cumbersome or complicated procedural regulations for, or imposing unnecessary conditions on, the admission of such investments.

3. Each State maintains the right to make regulations to govern the admission of private foreign investments. In the formulation and application of such regulations, States will note that experience suggests that certain performance requirements introduced as conditions of admission are often counterproductive and that open admission, possibly subject to a restricted list of investments (which are either prohibited or require screening and licensing), is a more effective approach. Such performance requirements often discourage foreign investors from initiating investment in the State concerned or encourage evasion and corruption. Under the restricted list approach, investments in non-listed activities, which proceed without approval, remain subject to the laws and regulations applicable to investments in the State concerned.

4. Without prejudice to the general approach of free admission recommended in Section 3 above, a State may, as an exception, refuse admission to a proposed investment:

(a) which is, in the considered opinion of the State, inconsistent with clearly defined requirements of national security; or

(b) which belongs to sectors reserved by the law of the State to its nationals on account of the State's economic development objectives or the strict exigencies of its national interest.

5. Restrictions applicable to national investment on account of public policy *(ordre pubilc)*, public health and the protection of the environment will equally apply to foreign investment.

6. Each State is encouraged to publish, in the form of a handbook or other medium easily accessible to other States and their investors adequate and regularly updated information about its legislation, regulations and procedures relevant to foreign investment and other information

relating to its investment policies including, *inter alia,* an indication of any classes of investment which it regards as falling under Sections 4 and 5 of this Guideline.

III
TREATMENT

1. For the promotion of international economic cooperation through the medium of private foreign investment, the establishment, operation, management, control, and exercise of rights in such an investment, as well as such other associated activities necessary therefor or incidental thereto, will be consistent with the following standards which are meant to apply simultaneously to all States without prejudice to the provisions of applicable international instruments, and to firmly established rules of customary international law.

2. Each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines.

3. (a) With respect to the protection and security of their person, property rights and interests, and to the granting of permits, import and export licenses and the authorization to employ, and the issuance of the necessary entry and stay visas to their foreign personnel, and other legal matters relevant to the treatment of foreign investors as described in Section I above, such treatment will, subject to the requirement of fair and equitable treatment mentioned above, be as favorable as that accorded by the State to national investors in similar circumstances. In all cases, full protection and security will be accorded to the investor's rights regarding ownership, control and substantial benefits over his property, including intellectual property.

(b) As concerns such other matters as are not relevant to national investors, treatment under the State's legislation and regulations will not discriminate among foreign investors on grounds of nationality.

4. Nothing in this Guideline will automatically entitle nationals of other States to the more favorable standards of treatment accorded to the nationals of certain States under any customs union or free trade area agreement.

5. Without restricting the generality of the foregoing, each State will:

(a) promptly issue such licenses and permits and grant such concessions as may be necessary for the uninterrupted operation of the admitted investment; and

(b) to the extent necessary for the efficient operation of the investment, authorize the employment of foreign personnel. While a State may require the foreign investor to reasonably establish his inability to recruit the required personnel locally, e.g., through local advertisement, before he resorts to the recruitment of foreign personnel, labor market flexibility in this and other areas is recognized as an important element in a positive investment environment. Of particular importance in this respect is the investor's freedom to employ top managers regardless of their nationality.

6. (1) Each State will, with respect to private investment in its territory by nationals of the other States:

(a) freely allow regular periodic transfer of a reasonable part of the salaries and wages of foreign personnel; and, on liquidation of the investment or earlier termination of the employment, allow immediate transfer of all savings from such salaries and wages;

(b) freely allow transfer of the net revenues realized from the investment;

(c) allow the transfer of such sums as may be necessary for the payment of debts contracted, or the discharge of other contractual obligations incurred in connection with the investment as they fall due;

(d) on liquidation or sale of the investment (whether covering the investment as a whole or a part thereof), allow the repatriation and transfer of the net proceeds of such liquidation or sale and all accretions thereto all at once; in the exceptional cases where the State faces foreign exchange stringencies, such transfer may as an exception be made in installments within a period which will be as short as possible and will not in any case exceed five years from the date of liquidation or sale, subject to interest as provided for in Section 6 (3) of this Guideline; and

(e) allow the transfer of any other amounts to which the investor is entitled such as those which become due under the conditions provided for in Guidelines IV and V.

(2) Such transfer as provided for in Section 6 (1) of this Guideline will be made (a) in the currency brought in by the investor where it remains convertible, in another currency designated as freely usable currency by the International Monetary Fund or in any other currency accepted by the investor, and (b) at the applicable market rate of exchange at the time of the transfer.

(3) In the case of transfers under Section 6 (1) of this Guideline, and without prejudice to Sections 7 and 8 of Guideline IV where they apply, any delay in effecting the transfers to be made through the central bank (or another authorized public authority) of the host State will be subject to interest at the normal rate applicable to the local currency involved in respect of any period intervening between the date on which such local currency has been provided to the central bank (or the other authorized public authority) for transfer and the date on which the transfer is actually effected.

(4) The provisions set forth in this Guideline with regard to the transfer of capital will also apply to the transfer of any compensation for loss due to war, armed conflict, revolution or insurrection to the extent that such compensation may be due to the investor under applicable law.

7. Each State will permit and facilitate the reinvestment in its territory of the profits realized from existing investments and the proceeds of sale or liquidation of such investments.

8. Each State will take appropriate measures for the prevention and control of corrupt business practices and the promotion of accountability and transparency in its dealings with foreign investors, and will cooperate with other States in developing international procedures and mechanisms to ensure the same.

9. Nothing in this Guideline suggests that a State should provide foreign investors with tax exemptions or other fiscal incentives. Where such incentives are deemed to be justified by the State, they may to the extent possible be automatically granted, directly linked to the type of

activity to be encouraged and equally extended to national investors in similar circumstances. Competition among States in providing such incentives, especially tax exemptions, is not recommended. Reasonable and stable tax rates are deemed to provide a better incentive than exemptions followed by uncertain or excessive rates.

10. Developed and capital surplus States will not obstruct flows of investment from their territories to developing States and are encouraged to adopt appropriate measures to facilitate such flows, including taxation agreements, investment guarantees, technical assistance and the provision of information. Fiscal incentives provided by some investors' governments for the purpose of encouraging investment in developing States are recognized in particular as a possibly effective element in promoting such investment.

IV
EXPROPRIATION AND UNILATERAL ALTERATIONS OR TERMINATION OF CONTRACTS

1. A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against the payment of appropriate compensation.

2. Compensation for a specific investment taken by the State will, according to the details provided below, be deemed "appropriate" if it is adequate, effective and prompt.

3. Compensation will be deemed "adequate" if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known.

4. Determination of the "fair market value" will be acceptable if conducted according to a method agreed by the State and the foreign investor (hereinafter referred to as the parties) or by a tribunal or another body designated by the parties.

5. In the absence of a determination agreed by, or based on the agreement of, the parties, the fair market value will be acceptable if determined by the State according to reasonable criteria related to the market value of the investment, i.e., in an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.

6. Without implying the exclusive validity of a single standard for the fairness by which compensation is to be determined and as an illustration of the reasonable determination by a State of the market value of the investment under Section 5 above, such determination will be deemed reasonable if conducted as follows:

(a) for a going concern with a proven record of profitability, on the basis of the discounted cash flow value;

(b) for an enterprise which, not being a proven going concern, demonstrates lack of profitability, on the basis of the liquidation value;

(c) for other assets, on the basis of (i) the replacement value or (ii) the book value in case such value has been recently assessed or has been determined as of the date of the taking and can therefore be deemed to represent a reasonable replacement value.

For the purpose of this provision:

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

- "*discounted cash flow value*" means the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market on alternative investments of comparable risk on the basis of their present value;

- "*liquidation value*" means the amounts at which individual asses comprising the enterprise or the entire asses of the enterprise could be sold under conditions of liquidation to a willing buyer less any liabilities which the enterprise has to meet;

- "*replacement value*" means the cash amount required to replace the individual asses of the enterprise in their actual state as of the date of the taking; and

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

7. Compensation will be deemed "effective" if it is paid in the currency brought in by the investor where it remains convertible, in another currency designated as freely usable by the International Monetary Fund or in any other currency accepted by the investor.

8. Compensation will be deemed to be "prompt" in normal circumstances if paid without delay. In cases where the State faces exceptional circumstances, as reflected in an arrangement for the use of the resources of the International Monetary Fund or under similar objective circumstances of established foreign exchange stringencies, compensation in the currency designated under Section 7 above may be paid in installments within a period which will be as short as possible and which will not in any case exceed five years from the time of the taking, provided that reasonable, market-related interest applies to the deferred payments in the same currency.

9. Compensation according to the above criteria will not be due, or will be reduced in case the investment is taken by the State as a sanction against an investor who has violated the State's law and regulations which have been in force prior to the taking, as such violation is determined by a court of law. Further disputes regarding claims for compensation in such a case will be settled in accordance with the provisions of Guideline V.

10. In case of comprehensive non-discriminatory nationalizations effected in the process of large scale social reforms under exceptional circumstances of revolution, war and similar exigencies, the compensation may be determined through negotiations between the host State and the investors' home State and falling this, through international arbitration.

11. The provisions of Section I of this Guideline will apply with respect to the conditions under which a State may unilaterally terminate, amend or otherwise disclaim liability under a contract with a foreign private investor for other than commercial reasons, i.e., where the State acts as a sovereign and not as a contracting party. Compensation due to the investor in such cases will be determined in the light of the provisions of Sections 2 to 9 of this Guideline. Liability for repudiation of contract for commercial reasons, i.e., where the State acts as a contracting party, will be determined under the applicable law of the contract.

V
SETTLEMENT OF DISPUTES

1. Disputes between private foreign investors and the host State will normally be settled through negotiations between them and failing this, through national courts or through other agreed mechanisms including conciliation and binding independent arbitration.

2. Independent arbitration for the purpose of this Guideline will include any *ad hoc* or institutional arbitration agreed upon in writing by the State and the investor or between the State and the investor's home State where the majority of the arbitrators are not solely appointed by one party to the dispute.

3. In case of agreement on independent arbitration, each State is encouraged to accept the settlement of such disputes through arbitration under the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID) if it is a party to the ICSID Convention or through the "ICSID Additional Facility" if it is not a party to the ICSID Convention.

Appendix B

Membership of the IBRD and the IMF[1]

STATE	MEMBER OF THE IBRD SINCE	MEMBER OF THE IMF SINCE
Afghanistan	July 14, 1955	July 14, 1955
Albania	October 15, 1991	October 15, 1991
Algeria	September 26, 1963	September 26, 1963
Angola	September 19, 1989	September 19, 1989
Antigua and Barbuda	September 22, 1983	February 25, 1982
Argentina	September 20, 1956	September 20, 1956
Armenia	September 16, 1992	May 28, 1992
Australia	August 5, 1947	August 5, 1947
Austria	August 27, 1948	August 27, 1948
Azerbaijan	September 18, 1992	September 18, 1992
Bahamas, The	August 21, 1973	August 21, 1973
Bahrain	September 15, 1972	September 7, 1972
Bangladesh	August 17, 1972	August 17, 1972
Barbados	September 12, 1974	December 29, 1970
Belarus	July 10, 1992	July 10, 1992
Belgium	December 27, 1945	December 27, 1945
Belize	March 19, 1982	March 16, 1982
Benin	July 10, 1963	July 10, 1963
Bhutan	September 28, 1981	September 28, 1981
Bolivia	December 27, 1945	December 27, 1945
Bosnia-Herzegovina	February 25, 1993	December 14, 1992
Botswana	July 24, 1968	July 24, 1968
Brazil	January 14, 1946	January 14, 1946
Brunei Darussalam	October 10, 1995	October 10, 1995
Bulgaria	September 25, 1990	September 25, 1990
Burkina Faso	May 2, 1963	May 2, 1963
Burundi	September 28, 1963	September 28, 1963
Cambodia	July 22, 1970	December 31, 1969
Cameroon	July 10, 1963	July 10, 1963
Canada	December 27, 1945	December 27, 1945
Cape Verde	November 20, 1978	November 20, 1978
Central African Republic	July 10, 1963	July 10, 1963
Chad	July 10, 1963	July 10, 1963
Chile	December 31, 1945	December 31, 1945
China	December 27, 1945	December 27, 1945
Colombia	December 24, 1946	December 27, 1945
Comoros	October 28, 1976	September 21, 1976
Congo, Democratic Republic of	September 28, 1963	September 28, 1963
Congo, Republic of	July 10, 1963	July 10, 1963
Costa Rica	January 8, 1946	January 8, 1946
Cote d'Ivoire	March 11, 1963	March 11, 1963
Croatia	February 25, 1993	December 14, 1992
Cyprus	December 21, 1961	December 21, 1961

[1]) Membership as of November 30, 2001. Sources: http://www.imf.org/external/country/index.htm and http://www.worldbank.org/html/extdr/about/members/ibrdlist.htm.

STATE	MEMBER OF THE IBRD SINCE	MEMBER OF THE IMF SINCE
Czech Republic	January 1, 1993	January 1, 1993
Denmark	March 30, 1946	March 30, 1946
Djibouti	October 1, 1980	December 29, 1978
Dominica	September 29, 1980	December 12, 1978
Dominican Republic	December 28, 1945	December 28, 1945
Ecuador	December 28, 1945	December 28, 1945
Egypt, Arab Republic of	December 27, 1945	December 27, 1945
El Salvador	March 14, 1946	March 14, 1946
Equatorial Guinea	July 1, 1970	December 22, 1969
Eritrea	July 6, 1994	July 6, 1994
Estonia	June 23, 1992	May 26, 1992
Ethiopia	December 27, 1945	December 27, 1945
Fiji	May 28, 1971	May 28, 1971
Finland	January 14, 1948	January 14, 1948
France	December 27, 1945	December 27, 1945
Gabon	September 10, 1963	September 10, 1963
Gambia, The	October 18, 1967	September 21, 1967
Georgia	August 7, 1992	May 5, 1992
Germany	August 14, 1952	August 14, 1952
Ghana	September 20, 1957	September 20, 1957
Greece	December 27, 1945	December 27, 1945
Grenada	August 27, 1975	August 27, 1975
Guatemala	December 28, 1945	December 28, 1945
Guinea	September 28, 1963	September 28, 1963
Guinea-Bissau	March 24, 1977	March 24, 1977
Guyana	September 26, 1966	September 26, 1966
Haiti	September 8, 1953	September 8, 1953
Honduras	December 27, 1945	December 27, 1945
Hungary	July 7, 1982	May 6, 1982
Iceland	December 27, 1945	December 27, 1945
India	December 27, 1945	December 27, 1945
Indonesia	April 15, 1954	February 21, 1967
Iran, Islamic Republic of	December 29, 1945	December 29, 1945
Iraq	December 27, 1945	December 27, 1945
Ireland	August 8, 1957	August 8, 1957
Israel	July 12, 1954	July 12, 1954
Italy	March 27, 1947	March 27, 1947
Jamaica	February 21, 1963	February 21, 1963
Japan	August 13, 1952	August 13, 1952
Jordan	August 29, 1952	August 29, 1952
Kazakhstan	July 23, 1992	July 15, 1992
Kenya	February 3, 1964	February 3, 1964
Kiribati	September 29, 1986	June 3, 1986
Korea, Republic of	August 26, 1955	August 26, 1955
Kuwait	September 13, 1962	September 13, 1962
Kyrgyz Republic	September 18, 1992	May 8, 1992
Lao PDR	July 5, 1961	July 5, 1961
Latvia	August 11, 1992	May 19, 1992

STATE	MEMBER OF THE IBRD SINCE	MEMBER OF THE IMF SINCE
Lebanon	April 14, 1947	April 14, 1947
Lesotho	July 25, 1968	July 25, 1968
Liberia	March 28, 1962	March 28, 1962
Libya	September 17, 1958	September 17, 1958
Lithuania	July 6, 1992	April 29, 1992
Luxembourg	December 27, 1945	December 27, 1945
Macedonia, FYR of	February 25, 1993	December 14, 1992
Madagascar	September 25, 1963	September 25, 1963
Malawi	July 19, 1965	July 19, 1965
Malaysia	March 7, 1958	March 7, 1958
Maldives	January 13, 1978	January 13, 1978
Mali	September 27, 1963	September 27, 1963
Malta	September 26, 1983	September 11, 1968
Marshall Islands	May 21, 1992	May 21, 1992
Mauritania	September 10, 1963	September 10, 1963
Mauritius	September 23, 1968	September 23, 1968
Mexico	December 31, 1945	December 31, 1945
Micronesia, Federated States of	June 24, 1993	June 24, 1993
Moldova	August 12, 1992	August 12, 1992
Mongolia	February 14, 1991	February 14, 1991
Morocco	April 25, 1958	April 25, 1958
Mozambique	September 24, 1984	September 24, 1984
Myanmar	January 3, 1952	January 3, 1952
Namibia	September 25, 1990	September 25, 1990
Nepal	September 6, 1961	September 6, 1961
Netherlands	December 27, 1945	December 27, 1945
New Zealand	August 31, 1961	August 31, 1961
Nicaragua	March 14, 1946	March 14, 1946
Niger	April 24, 1963	April 24, 1963
Nigeria	March 30, 1961	March 30, 1961
Norway	December 27, 1945	December 27, 1945
Oman	December 23, 1971	December 23, 1971
Pakistan	July 11, 1950	July 11, 1950
Palau	December 16, 1997	December 17, 1997
Panama	March 14, 1946	March 14, 1946
Papua New Guinea	October 9, 1975	October 9, 1975
Paraguay	December 28, 1945	December 28, 1945
Peru	December 31, 1945	December 31, 1945
Philippines	December 27, 1945	December 27, 1945
Poland	January 10, 1946	June 12, 1986
Portugal	March 29, 1961	March 29, 1961
Qatar	September 25, 1972	September 8, 1972
Romania	December 15, 1972	December 15, 1972
Russian Federation	June 16, 1992	June 1, 1992
Rwanda	September 30, 1963	September 30, 1963
Samoa	June 28, 1974	December 28, 1971
San Marino	September 21, 2000	September 23, 1992
São Tomé and Principe	September 30, 1977	September 30, 1977

STATE	MEMBER OF THE IBRD SINCE	MEMBER OF THE IMF SINCE
Saudi Arabia	August 26, 1957	August 26, 1957
Senegal	August 31, 1962	August 31, 1962
Seychelles	September 29, 1980	June 30, 1977
Sierra Leone	September 10, 1962	September 10, 1962
Singapore	August 3, 1966	August 3, 1966
Slovak Republic	January 1, 1993	January 1, 1993
Slovenia	February 25, 1993	December 14, 1992
Solomon Islands	September 22, 1978	September 22, 1978
Somalia	August 31, 1962	August 31, 1962
South Africa	December 27, 1945	December 27, 1945
Spain	September 15, 1958	September 15, 1958
Sri Lanka	August 29, 1950	August 29, 1950
St. Kitts and Nevis	August 15, 1984	August 15, 1984
St. Lucia	June 27, 1980	November 15, 1979
St. Vincent and the Grenadines	August 31, 1982	December 28, 1979
Sudan	September 5, 1957	September 5, 1957
Suriname	June 27, 1978	April 27, 1978
Swaziland	September 22, 1969	September 22, 1969
Sweden	August 31, 1951	August 31, 1951
Switzerland	May 29, 1992	May 29, 1992
Syrian Arab Republic	April 10, 1947	April 10, 1947
Tajikistan	June 4, 1993	April 27, 1993
Tanzania	September 10, 1962	September 10, 1962
Thailand	May 3, 1949	May 3, 1949
Togo	August 1, 1962	August 1, 1962
Tonga	September 13, 1985	September 13, 1985
Trinidad and Tobago	September 16, 1963	September 16, 1963
Tunisia	April 14, 1958	April 14, 1958
Turkey	March 11, 1947	March 11, 1947
Turkmenistan	September 22, 1992	September 22, 1992
Uganda	September 27, 1963	September 27, 1963
Ukraine	September 3, 1992	September 3, 1992
United Arab Emirates	September 22, 1972	September 22, 1972
United Kingdom	December 27, 1945	December 27, 1945
United States	December 27, 1945	December 27, 1945
Uruguay	March 11, 1946	March 11, 1946
Uzbekistan	September 21, 1992	September 21, 1992
Vanuatu	September 28, 1981	September 28, 1981
Venezuela	December 30, 1946	December 30, 1946
Vietnam	September 21, 1956	September 21, 1956
Yemen	October 3, 1969	May 22, 1990
Yugoslavia	February 25, 1993	December 14, 1992
Zambia	September 23, 1965	September 23, 1965
Zimbabwe	September 29, 1980	September 29, 1980

Appendix C

Contracting States to the ICSID Convention[1]

STATE	SIGNATURE	DEPOSIT OF RATIFICATION	ENTRY INTO FORCE
Afghanistan	September 30, 1966	June 25, 1968	July 25, 1968
Albania	October 15, 1991	October 15, 1991	November 14, 1991
Algeria	April 17, 1995	February 21, 1996	March 22, 1996
Argentina	May 21, 1991	October 19, 1994	November 18, 1994
Armenia	September 16, 1992	September 16, 1992	October 16, 1992
Australia	March 24, 1975	May 2, 1991	June 1,1991
Austria	May 17, 1966	May 25, 1971	June 24, 1971
Azerbaijan	September 18, 1992	September 18, 1992	October 18, 1992
Bahamas	October 19, 1995	October 19, 1995	November 18, 1995
Bahrain	September 22, 1995	February 14, 1996	March 15, 1996
Bangladesh	November 20, 1979	March 27, 1980	April 26, 1980
Barbados	May 13, 1981	November 1, 1983	December 1, 1983
Belarus	July 10, 1992	July 10, 1992	August 9, 1992
Belgium	December 15, 1965	August 27, 1970	September 26, 1970
Belize	December 19, 1986		
Benin	September 10, 1965	September 6, 1966	October 14, 1966
Bolivia	May 3, 1991	June 23, 1995	July 23, 1995
Bosnia and Herzegovina	April 25, 1997	May 14, 1997	June 13, 1997
Botswana	January 15, 1970	January 15, 1970	February 14, 1970
Bulgaria	March 21, 2000		
Burkina Faso	September 16, 1965	August 29, 1966	October 14, 1966
Burundi	February 17, 1967	November 5, 1969	December 5, 1969
Cambodia	November 5, 1993		
Cameroon	September 23, 1965	January 3, 1967	February 2, 1967
Central African Republic	August 26, 1965	February 23, 1966	October 14, 1966
Chad	May 12, 1966	August 29, 1966	October 14, 1966
Chile	January 25, 1991	September 24, 1991	October 24, 1991
China	February 9, 1990	January 7, 1993	February 6, 1993
Colombia	May 18, 1993	July 15, 1997	August 14, 1997
Comoros	September 26, 1978	November 7, 1978	December 7, 1978
Congo, Demo. Rep. of	December 27, 1965	June 23, 1966	October 14, 1966
Congo, Rep. Of	October 29, 1968	April 29, 1970	May 29, 1970
Costa Rica	September 29, 1981	April 27, 1993	May 27, 1993
Côte d'Ivoire	June 30, 1965	February 16, 1966	October 14, 1966
Croatia	June 16, 1997	September 22, 1998	October 22, 1998
Cyprus	March 9, 1966	November 25, 1966	December 25, 1966
Czech Republic	March 23, 1993	March 23, 1993	April 22, 1993
Dominican Republic	March 20, 2000		
Denmark	October 11, 1965	April 24, 1968	May 24, 1968
Ecuador	January 15, 1986	January 15, 1986	February 14, 1986
Egypt, Arab Rep. of	February 11, 1972	May 3, 1972	June 2, 1972
El Salvador	June 9, 1982	March 6, 1984	April 5, 1984
Estonia	June 23, 1992	June 23, 1992	July 23, 1992

[1]) Contracting Parties as of August 7, 2001. Source: http://www.worldbank.org/icsid/constate/c-states-en.htm.

STATE	SIGNATURE	DEPOSIT OF RATIFICATION	ENTRY INTO FORCE
Ethiopia	September 21, 1965		
Fiji	July 1, 1977	August 11, 1977	September 10, 1977
Finland	July 14, 1967	January 9, 1969	February 8, 1969
France	December 22, 1965	August 21, 1967	September 20, 1967
Gabon	September 21, 1965	April 4, 1966	October 14, 1966
Gambia, The	October 1, 1974	December 27, 1974	January 26, 1975
Georgia	August 7, 1992	August 7, 1992	September 6, 1992
Germany	January 27, 1966	April 18, 1969	May 18, 1969
Ghana	November 26, 1965	July 13, 1966	October 14, 1966
Greece	March 16, 1966	April 21, 1969	May 21, 1969
Grenada	May 24, 1991	May 24, 1991	June 23, 1991
Guatemala	November 9, 1995		
Guinea	August 27,1968	November 4, 1968	December 4, 1968
Guinea-Bissau	September 4, 1991		
Guyana	July 3, 1969	July 11, 1969	August 10, 1969
Haiti	January 30, 1985		
Honduras	May 28, 1986	February 14, 1989	March 16, 1989
Hungary	October 1, 1986	February 4, 1987	March 6, 1987
Iceland	July 25, 1966	July 25, 1966	October 14, 1966
Indonesia	February 16, 1968	September 28, 1968	October 28, 1968
Ireland	August 30, 1966	April 7, 1981	May 7, 1981
Israel	June 16, 1980	June 22, 1983	July 22, 1983
Italy	November 18, 1965	March 29, 1971	April 28, 1971
Jamaica	June 23, 1965	September 9, 1966	October 14, 1966
Japan	September 23, 1965	August 17, 1967	September 16, 1967
Jordan	July 14, 1972	October 30, 1972	November 29, 1972
Kazakhstan	July 23, 1992	September 21, 2000	October 21, 2000
Kenya	May 24, 1966	January 3, 1967	February 2, 1967
Korea, Rep. of	April 18, 1966	February 21, 1967	March 23, 1967
Kuwait	February 9, 1978	February 2, 1979	March 4, 1979
Kyrgyz Republic	June 9, 1995		
Latvia	August 8, 1997	August 8, 1997	September 7, 1997
Lesotho	September 19, 1968	July 8, 1969	August 7, 1969
Liberia	September 3, 1965	June 16, 1970	July 16, 1970
Lithuania	July 6, 1992	July 6, 1992	August 5, 1992
Luxembourg	September 28, 1965	July 30, 1970	August 29, 1970
Macedonia, FYR	September 16, 1998	October 27, 1998	November 26, 1998
Madagascar	June 1, 1966	September 6, 1966	October 14, 1966
Malawi	June 9, 1966	August 23, 1966	October 14, 1966
Malaysia	October 22, 1965	August 8, 1966	October 14, 1966
Mali	April 9, 1976	January 3, 1978	February 2, 1978
Mauritania	July 30, 1965	January 11, 1966	October 14, 1966
Mauritius	June 2, 1969	June 2, 1969	July 2, 1969
Micronesia	June 24, 1993	June 24, 1993	July 24, 1993
Moldova	August 12, 1992		
Mongolia	June 14, 1991	June 14, 1991	July 14, 1991
Morocco	October 11, 1965	May 11, 1967	June 10, 1967

STATE	SIGNATURE	DEPOSIT OF RATIFICATION	ENTRY INTO FORCE
Mozambique	April 4, 1995	June 7, 1995	July 7, 1995
Namibia	October 26, 1998		
Nepal	September 28, 1965	January 7, 1969	February 6, 1969
Netherlands	May 25, 1966	September 14, 1966	October 14, 1966
New Zealand	September 2, 1970	April 2, 1980	May 2, 1980
Nicaragua	February 4, 1994	March 20, 1995	April 19, 1995
Niger	August 23, 1965	November 14, 1966	December 14, 1966
Nigeria	July 13, 1965	August 23, 1965	October 14, 1966
Norway	June 24, 1966	August 16, 1967	September 15, 1967
Oman	May 5, 1995	July 24, 1995	August 23, 1995
Pakistan	July 6, 1965	September 15, 1966	October 15, 1966
Panama	November 22, 1995	April 8, 1996	May 8, 1996
Papua New Guinea	October 20, 1978	October 20, 1978	November 19, 1978
Paraguay	July 27, 1981	January 7, 1983	February 6, 1983
Peru	September 4, 1991	August 9, 1993	September 8, 1993
Philippines	September 26, 1978	November 17, 1978	December 17, 1978
Portugal	August 4, 1983	July 2, 1984	August 1, 1984
Romania	September 6, 1974	September 12, 1975	October 12, 1975
Russian Federation	June 16, 1992		
Rwanda	April 21, 1978	October 15, 1979	November 14, 1979
Samoa	February 3, 1978	April 25, 1978	May 25, 1978
Sao Tome and Principe	October 1, 1999		
Saudi Arabia	September 28, 1979	May 8, 1980	June 7, 1980
Senegal	September 26, 1966	April 21, 1967	May 21, 1967
Seychelles	February 16, 1978	March 20, 1978	April 19, 1978
Sierra Leone	September 27, 1965	August 2, 1966	October 14, 1966
Singapore	February 2, 1968	October 14, 1968	November 13, 1968
Slovak Republic	September 27, 1993	May 27, 1994	June 26, 1994
Slovenia	March 7, 1994	March 7, 1994	April 6, 1994
Solomon Islands	November 12, 1979	September 8, 1981	October 8, 1981
Somalia	September 27, 1965	February 29, 1968	March 30, 1968
Spain	March 21, 1994	August 18, 1994	Sept. 17, 1994
Sri Lanka	August 30, 1967	October 12, 1967	November 11, 1967
St. Kitts & Nevis	October 14, 1994	August 4, 1995	September 3, 1995
St. Lucia	June 4, 1984	June 4, 1984	July 4, 1984
Saint Vincent & the Grenadines	August 7, 2001		
Sudan	March 15, 1967	April 9, 1973	May 9, 1973
Swaziland	November 3, 1970	June 14, 1971	July 14, 1971
Sweden	September 25, 1965	December 29, 1966	January 28, 1967
Switzerland	September 22, 1967	May 15, 1968	June 14, 1968
Tanzania	January 10, 1992	May 18, 1992	June 17, 1992
Thailand	December 6, 1985		
Togo	January 24, 1966	August 11, 1967	September 10, 1967
Tonga	May 1, 1989	March 21, 1990	April 20, 1990
Trinidad and Tobago	October 5, 1966	January 3, 1967	February 2, 1967
Tunisia	May 5, 1965	June 22, 1966	October 14, 1966
Turkey	June 24, 1987	March 3, 1989	April 2, 1989

STATE	SIGNATURE	DEPOSIT OF RATIFICATION	ENTRY INTO FORCE
Turkmenistan	September 26, 1992	September 26, 1992	October 26, 1992
Uganda	June 7, 1966	June 7, 1966	October 14, 1966
Ukraine	April 3, 1998	June 7, 2000	July 7, 2000
United Arab Emirates	December 23, 1981	December 23, 1981	January 22, 1982
United Kingdom	May 26, 1965	December 19, 1966	January 18, 1967
United States	August 27, 1965	June 10, 1966	October 14, 1966
Uruguay	May 28, 1992	August 9, 2000	September 8, 2000
Uzbekistan	March 17, 1994	July 26, 1995	August 25, 1995
Venezuela	August 18, 1993	May 2, 1995	June 1, 1995
Yemen	October 28, 1997		
Zambia	June 17, 1970	June 17, 1970	July 17, 1970
Zimbabwe	March 25, 1991	May 20, 1994	June 19, 1994

Appendix D

Contracting States to the WTO Agreement[1]

STATE	*DATE OF MEMBERSHIP*
Albania	September 8, 2000
Angola	November 23, 1996
Antigua and Barbuda	January 1, 1995
Argentina	January 1, 1995
Australia	January 1, 1995
Austria	January 1, 1995
Bahrain	January 1, 1995
Bangladesh	January 1, 1995
Barbados	January 1, 1995
Belgium	January 1, 1995
Belize	January 1, 1995
Benin	February 22, 1996
Bolivia	September 12, 1995
Botswana	May 31, 1995
Brazil	January 1, 1995
Brunei Darussalam	January 1, 1995
Bulgaria	December 1, 1996
Burkina Faso	June 3, 1995
Burundi	July 23, 1995
Cameroon	December 13, 1995
Canada	January 1, 1995
Central African Republic	May 31, 1995
Chad	October 19, 1996
Chile	January 1, 1995
Colombia	April 30, 1995
Congo	March 27, 1997
Costa Rica	January 1, 1995
Côte d'Ivoire	January 1, 1995
Croatia	November 30, 2000
Cuba	April 20, 1995
Cyprus	July 30, 1995
Czech Republic	January 1, 1995
Democratic Republic of the Congo	January 1, 1997
Denmark	January 1, 1995
Djibouti	May 31, 1995
Dominica	January 1, 1995
Dominican Republic	March 9, 1995
Ecuador	January 21, 1996
Egypt	June 30, 1995
El Salvador	May 7, 1995
Estonia	November 13, 1999
European Communities	January 1, 1995
Fiji	January 14, 1996
Finland	January 1, 1995

1) Contracting Parties as of November 30, 2001. Source: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

STATE	DATE OF MEMBERSHIP
France	January 1, 1995
Gabon	January 1, 1995
The Gambia	October 23, 1996
Georgia	June 14, 2000
Germany	January 1, 1995
Ghana	January 1, 1995
Greece	January 1, 1995
Grenada	February 22, 1996
Guatemala	July 21, 1995
Guinea Bissau	May 31, 1995
Guinea	October 25, 1995
Guyana	January 1, 1995
Haiti	January 30, 1996
Honduras	January 1, 1995
Hong Kong, China	January 1, 1995
Hungary	January 1, 1995
Iceland	January 1, 1995
India	January 1, 1995
Indonesia	January 1, 1995
Ireland	January 1, 1995
Israel	April 21, 1995
Italy	January 1, 1995
Jamaica	March 9, 1995
Japan	January 1, 1995
Jordan	April 11, 2000
Kenya	January 1, 1995
Korea, Republic of	January 1, 1995
Kuwait	January 1, 1995
Kyrgyz Republic	December 20, 1998
Latvia	February 10, 1999
Lesotho	May 31, 1995
Liechtenstein	September 1, 1995
Lithuania	May 31, 2001
Luxembourg	January 1, 1995
Macao, China	January 1, 1995
Madagascar	November 17, 1995
Malawi	May 31, 1995
Malaysia	January 1, 1995
Maldives	May 31, 1995
Mali	May 31, 1995
Malta	January 1, 1995
Mauritania	May 31, 1995
Mauritius	January 1, 1995
Mexico	January 1, 1995
Moldova	July 26, 2001
Mongolia	January 29, 1997
Morocco	January 1, 1995
Mozambique	August 26, 1995

STATE	***DATE OF MEMBERSHIP***
Myanmar	January 1, 1995
Namibia	January 1, 1995
Netherlands — For the Kingdom in Europe and for the Netherlands Antilles	January 1, 1995
New Zealand	January 1, 1995
Nicaragua	September 3, 1995
Niger	December 13, 1996
Nigeria	January 1, 1995
Norway	January 1, 1995
Oman	November 9, 2000
Pakistan	January 1, 1995
Panama	September 6, 1997
Papua New Guinea	June 9, 1996
Paraguay	January 1, 1995
Peru	January 1, 1995
Philippines	January 1, 1995
Poland	July 1, 1995
Portugal	January 1, 1995
Qatar	January 13, 1996
Romania	January 1, 1995
Rwanda	May 22, 1996
Saint Kitts and Nevis	February 21, 1996
Saint Lucia	January 1, 1995
Saint Vincent & the Grenadines	January 1, 1995
Senegal	January 1, 1995
Sierra Leone	July 23, 1995
Singapore	January 1, 1995
Slovak Republic	January 1, 1995
Slovenia	July 30, 1995
Solomon Islands	July 26, 1996
South Africa	January 1, 1995
Spain	January 1, 1995
Sri Lanka	January 1, 1995
Suriname	January 1, 1995
Swaziland	January 1, 1995
Sweden	January 1, 1995
Switzerland	July 1, 1995
Tanzania	January 1, 1995
Thailand	January 1, 1995
Togo	May 31, 1995
Trinidad and Tobago	March 1, 1995
Tunisia	March 29, 1995
Turkey	March 26, 1995
Uganda	January 1, 1995
United Arab Emirates	April 10, 1996
United Kingdom	January 1, 1995
United States	January 1, 1995
Uruguay	January 1, 1995

STATE	***DATE OF MEMBERSHIP***
Venezuela	January 1, 1995
Zambia	January 1, 1995
Zimbabwe	March 5, 1995

Appendix E

Contracting States to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1]

STATE	*SIGNATURE*[2]	*RATIFICATION, ACCESSION (A),*[3] *SUCCESSION (D)*	*ENTRY INTO FORCE*
Albania		June 27, 2001 (A)	September 23, 2001
Algeria		February 7, 1989 (A)	May 8, 1989
Antigua and Barbuda		February 2, 1989 (A)	May 3, 1989
Argentina	August 26, 1958	March 14, 1989	June 12, 1989
Armenia		December 29, 1997 (A)	March 29, 1998
Australia		March 26, 1975 (A)	June 24, 1975
Austria		May 2, 1961 (A)	July 31, 1961
Azerbaijan		February 29, 2000 (A)	May 29, 2000
Bahrain		April 6, 1988 (A)	July 5, 1988
Bangladesh		May 6, 1992 (A)	August 4, 1992
Barbados		March 16, 1993 (A)	June 14, 1993
Belarus	December 29, 1958	November 15, 1960	February 13, 1961
Belgium	June 10, 1958	August 18, 1975	November 16, 1975
Benin		May 16, 1974 (A)	August 14, 1974
Bolivia		April 28, 1995 (A)	July 27, 1995
Bosnia-Herzegovina		September 1, 1993 (D)	March 6, 1992
Botswana		December 20, 1971 (A)	March 19, 1972
Brunei Darussalam		July 25, 1996 (A)	October 23, 1996
Bulgaria	December 17, 1958	October 10, 1961	January 8, 1962
Burkina Faso		March 23, 1987 (A)	June 21, 1987
Cambodia		January 5, 1960 (A)	April 4, 1960
Cameroon		February 19, 1988 (A)	May 19, 1988
Canada		May 12, 1986 (A)	August 10, 1986
Central African Republic		October 15, 1962 (A)	January 13, 1963
Chile		September 4, 1975 (A)	December 3, 1975
China		January 22, 1987 (A)	April 22, 1987
Colombia		September 25, 1979 (A)	December 24, 1979
Costa Rica	June 10, 1958	October 26, 1987	January 24, 1988
Côte d'Ivoire		February 1, 1991 (A)	May 2, 1991
Croatia		July 26, 1993 (D)	October 8, 1991
Cuba		December 30, 1974 (A)	March 30, 1975
Cyprus		December 29, 1980 (A)	March 29, 1981
Czech Republic[4]		September 30, 1993 (D)	January 1, 1993

[1]) Contracting Parties as of November 30, 2001. Source: http://www.uncitral.org/english/status/status-e.htm.

[2]) The convention was open for signature only until December 31, 1958. See: New York Convention, Art. VIII(1).

[3]) The Convention is open for accession for all States which are members of the UN or any of its specialised agencies or which are party to the Statutes of the ICJ or which have been invited by the GA to accede to the treaty. See: New York Convention, Art. IX(1) and Art. VIII(1).

[4]) The Convention was signed by the former Czechoslovakia on October 3, 1958 and an instrument of ratification was deposited on July 10, 1959. On May 28, 1993, Slovakia and, on September 30, 1993, the Czech Republic deposited instruments of succession.

STATE	SIGNATURE[2]	RATIFICATION, ACCESSION (A),[3] SUCCESSION (D)	ENTRY INTO FORCE
Denmark		December 22, 1972 (A)	March 22, 1973
Djibouti		June 14, 1993 (D)	June 27,1977
Dominica		October 28, 1988 (A)	January 26, 1989
Ecuador	December 17, 1958	January 3, 1962	April 3, 1962
Egypt		March 9, 1959 (A)	June 7, 1959
El Salvador	June 10, 1958	February 26, 1998	May 27, 1998
Estonia		August 30, 1993 (A)	November 28, 1993
Finland	December 29, 1958	January 19, 1962	April 19, 1962
France	November 25, 1958	June 26, 1959	September 24, 1959
Georgia		June 2, 1994 (A)	August 31, 1994
Germany[5]	June 10, 1958	June 30, 1961	September 28, 1961
Ghana		April 9, 1968 (A)	July 8, 1968
Greece		July 16, 1962 (A)	October 14, 1962
Guatemala		March 21, 1984 (A)	June 19, 1984
Guinea		January 23, 1991 (A)	April 23, 1991
Haiti		December 5, 1983 (A)	March 4, 1984
Holy See		May 14, 1975 (A)	August 12, 1975
Honduras		October 3, 2000 (A)	January 1, 2001
Hungary		March 5, 1962 (A)	June 3, 1962
India	June 10, 1958	July 13, 1960	October 11, 1960
Indonesia		October 7, 1981 (A)	January 5, 1982
Iran		October 15, 2001 (A)	
Ireland		May 12, 1981 (A)	August 10, 1981
Israel	June 10, 1958	January 5, 1959	June 7, 1959
Italy		January 31, 1969 (A)	May 1, 1969
Japan		June 20, 1961 (A)	September 18, 1961
Jordan	June 10, 1958	November 15, 1979	February 13, 1980
Kazakhstan		November 20, 1995 (A)	February 18, 1996
Kenya		February 10, 1989 (A)	May 11, 1989
Kuwait		April 28, 1978 (A)	July 27, 1978
Kyrgyz Republic		December 18, 1996 (A)	March 18, 1997
Lao PDR		June 17, 1998 (A)	September 15, 1998
Latvia		April 14, 1992 (A)	July 13, 1992
Lebanon		August 11, 1998(A)	November 9, 1998
Lesotho		June 13, 1989 (A)	September 11, 1989
Lithuania		March 14, 1995 (A)	June 12, 1995
Luxembourg	November 11, 1958	September 9, 1983	December 8, 1983
Madagascar		July 16, 1962 (A)	October 14, 1962
Malaysia		November 5, 1985 (A)	February 3, 1986
Mali		September 8, 1994 (A)	December 7, 1994
Malta		June 22, 2000 (A)	September 20, 2000
Mauritania		January 30, 1997 (A)	April 30, 1997
Mauritius		June 19, 1996 (A)	September 17, 1996
Mexico		April 14, 1971 (A)	July 13, 1971

[5]) The Convention was acceded to by the former German Democratic Republic on 20 February 1975.

STATE	SIGNATURE[2]	RATIFICATION, ACCESSION (A),[3] SUCCESSION (D)	ENTRY INTO FORCE
Moldova		September 18, 1998 (A)	December 17, 1998
Monaco	December 31, 1958	June 2, 1982	August 31, 1982
Mongolia		October 24, 1994 (A)	January 22, 1995
Morocco		February 12, 1959 (A)	June 7, 1959
Mozambique		June 11, 1998 (A)	September 9, 1998
Nepal		March 4, 1998 (A)	June 2, 1998
Netherlands	June 10, 1958	April 24, 1964	July 23, 1964
New Zealand		January 6, 1983 (A)	April 6, 1983
Niger		October 14, 1964 (A)	January 12, 1965
Nigeria		March 17, 1970 (A)	June 15, 1970
Norway		March 14, 1961 (A)	June 12, 1961
Oman		February 25, 1999 (A)	May 26, 1999
Pakistan	December 30, 1958		
Panama		October 10, 1984 (A)	January 8, 1985
Paraguay		October 8, 1997 (A)	January 6, 1998
Peru		July 7, 1988 (A)	October 5, 1988
Philippines	June 10, 1958	July 6, 1967	October 4, 1967
Poland	June 10, 1958	October 3, 1961	January 1, 1962
Portugal		October 18, 1994 (A)	January 16, 1995
Republic of Korea		February 8, 1973 (A)	May 9, 1973
Romania		September 13, 1961 (A)	December 12, 1961
Russian Federation[6]	December 29, 1958	August 24, 1960	November 22, 1960
St. Vincent and the Grenadines		September 12, 2000 (A)	December 11, 2000
San Marino		May 17, 1979 (A)	August 15, 1979
Saudi Arabia		April 19, 1994 (A)	July 18, 1994
Senegal		October 17, 1994 (A)	January 15, 1995
Singapore		August 21, 1986 (A)	November 19, 1986
Slovakia[7]		May 28, 1993 (D)	January 1, 1993
Slovenia		July 6, 1992 (A)	June 25, 1991
South Africa		May 3, 1976 (A)	August 1, 1976
Spain		May 12, 1977 (A)	August 10, 1977
Sri Lanka	December 30, 1958	April 9, 1962	July 8, 1962
Sweden	December 23, 1958	January 28, 1972	April 27, 1972
Switzerland	December 29, 1958	June 1, 1965	August 30, 1965
Syrian Arab Republic		March 9, 1959 (A)	June 7, 1959
Thailand		December 21, 1959 (A)	March 20, 1960
Macedonia FYR		March 10, 1994 (D)	September 17, 1991
Tanzania		October 13, 1964 (A)	January 12, 1965

[6]) The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

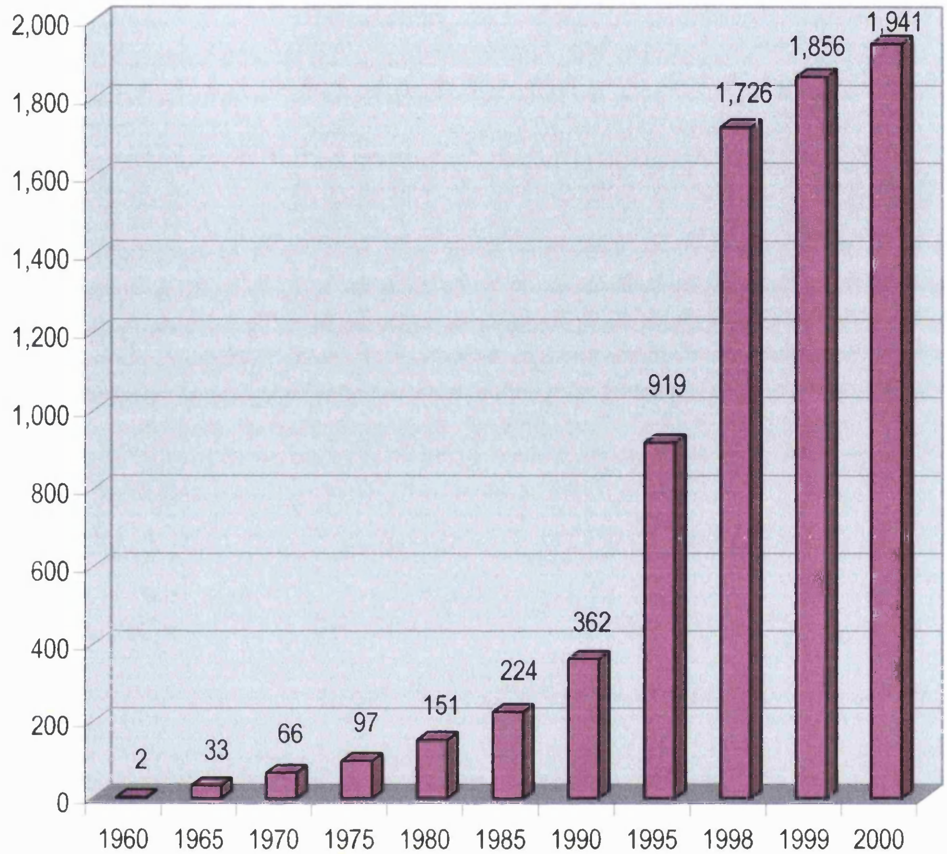
[7]) The Convention was signed by the former Czechoslovakia on October 3, 1958 and an instrument of ratification was deposited on July 10, 1959. On May 28, 1993, Slovakia and, on September 30, 1993, the Czech Republic deposited instruments of succession.

STATE	*SIGNATURE*[2]	*RATIFICATION, ACCESSION (A),*[3] *SUCCESSION (D)*	*ENTRY INTO FORCE*
Trinidad and Tobago		February 14, 1966 (A)	May 15, 1966
Tunisia		July 17, 1967 (A)	October 15, 1967
Turkey		July 2, 1992 (A)	September 30, 1992
Uganda		February 12, 1992 (A)	May 12, 1992
Ukraine	December 29, 1958	October 10, 1960	January 8, 1961
United Kingdom		September 24, 1975 (A)	December 23, 1975
United States		September 30, 1970 (A)	December 29, 1970
Uruguay		March 30, 1983 (A)	June 28 1983
Uzbekistan		February 7, 1996 (A)	May 7, 1996
Venezuela		February 8, 1995 (A)	May 9, 1995
Vietnam		September 12, 1995 (A)	December 11, 1995
Yugoslavia[8]		March 12, 2001 (D)	Effective on April 27, 1992, the date of state succession
Zimbabwe		September 29, 1994 (A)	December 28, 1994

[8]) The former Yugoslavia had acceded to the Convention on February 26, 1982. On March 21, 2001, the UN Secretary General received from the government of Yugoslavia a notification of succession.

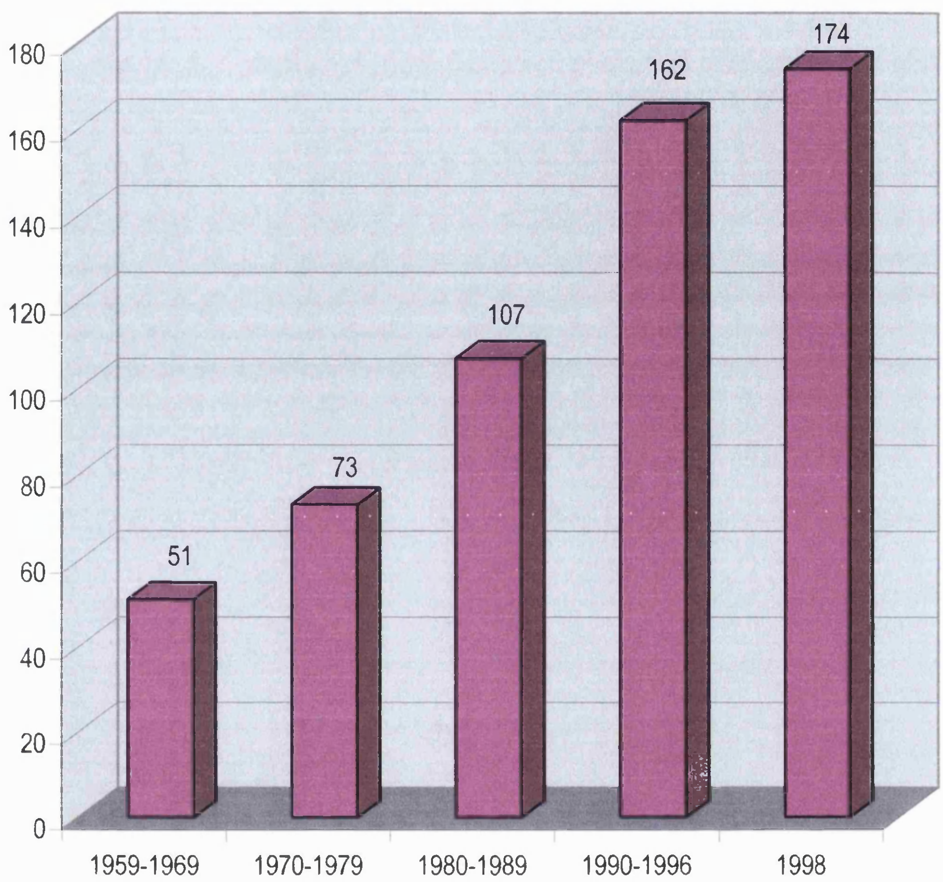
Appendix F

Total Number of Bilateral Investment Treaties Concluded between 1959-2000 [1]



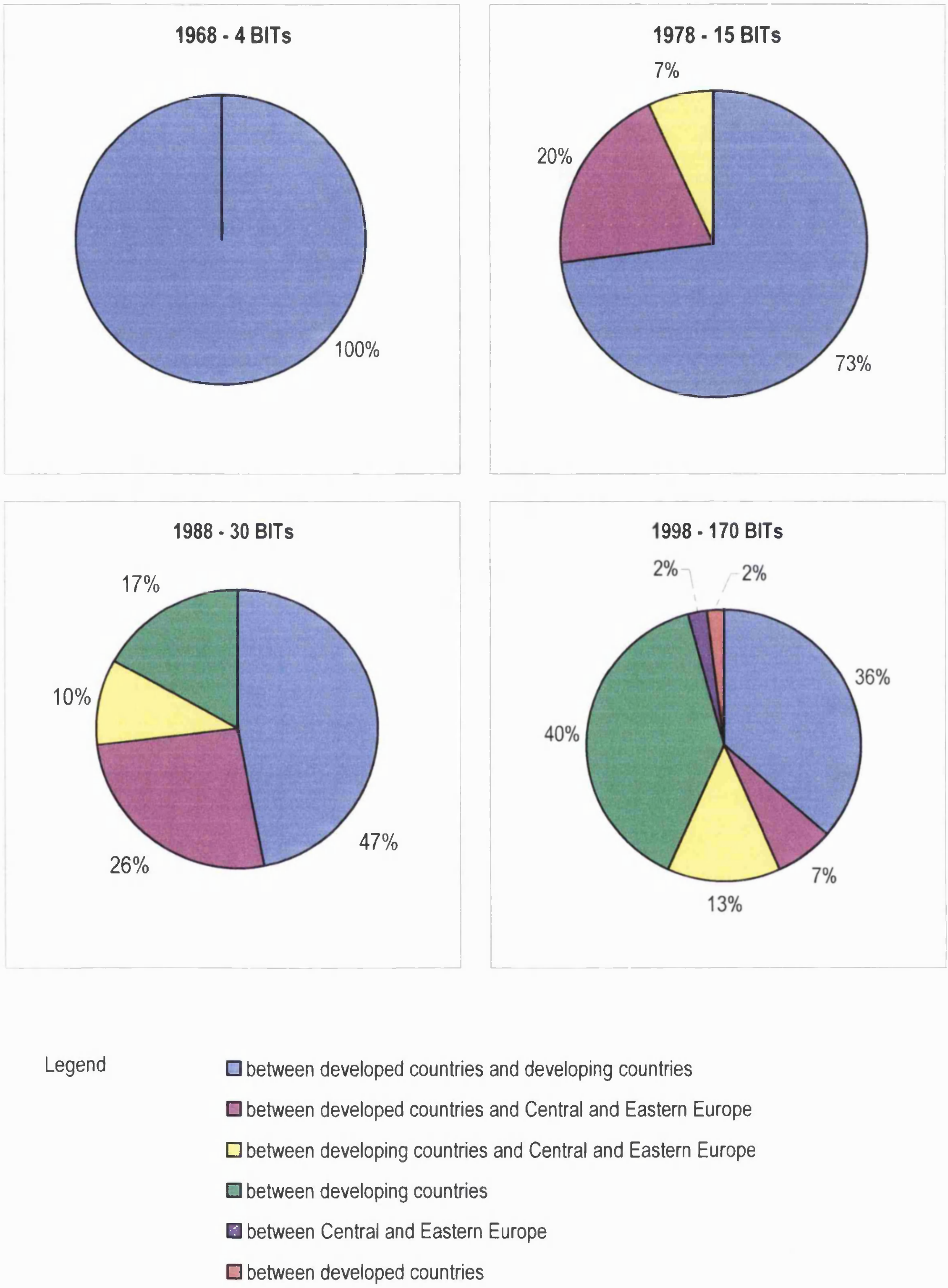
[1]) Sources: data for 1959-1995 see: http://www.worldbank.org/icsid/treaties/i-1.htm. Data for 1998 see: UNCTAD, *World Investment Report: Foreign Direct Investment and the Challenge of Development,* 117. Data for 1999 see: UNCTAD, *World Investment Report: Cross-border Mergers and Acquisitions and Development* (New York and Geneva: UN, 2000), 6, UN Doc.UNCTAD/WIR/2000. Data for 2000 see: UNCTAD, *World Investment Report: Promoting Linkages,* 6.

Total Number of Countries Participating in Bilateral Investment Treaties 1959-1998 [1]



[1]) Sources: data for 1959-1996 see: UNCTAD, *Bilateral Investment Treaties in the mid 1990s*, 10. Data for 1997-1998 see: UNCTAD, *World Investment Report: Foreign Direct Investment and the Challenge of Development*, 117. No data available for 1999 and 2000.

Types of Bilateral Investment Treaties Concluded [1]



[1]) Sources: data for 1968, 1978 and 1988 see: http://www.worldbank.org/icsid/treaties/i-1.htm. Data for 1998 see: UNCTAD, *World Investment Report: Foreign Direct Investment and the Challenge of Development,* 117. Data refer to BITs concluded between January 1 and December 31 of each year indicated.

Chronological List of Bilateral Investment Treaties 1959-1996[1]

PARTIES	SIGNATURE	ENTRY INTO FORCE
1959		
Germany/Pakistan	November 25, 1959	November 28, 1962
Dominican Republic/Germany	December 16, 1959	June 3, 1960
1960		
Germany/Malaysia	December 22, 1960	July 6, 1963
1961		
Germany/Greece	March 27, 1961	July 15, 1963
Germany/Togo	May 16, 1961	December 21, 1964
Germany/Morocco	August 31, 1961	January 21, 1968
Switzerland/Tunisia	December 2, 1961	January 19, 1964
Germany/Liberia	December 12, 1961	October 22, 1967
Germany/Thailand	December 13, 1961	April 10, 1965
1962		
Niger/Switzerland	March 28, 1962	November 17, 1962
Germany/Guinea	April 19, 1962	March 13, 1965
Guinea/Switzerland	April 26, 1962	July 29, 1963
Germany/Turkey	June 20, 1962	December 16, 1965
Côte d'Ivoire/Switzerland	June 26, 1962	November 18, 1962
Cameroon/Germany	June 29, 1962	November 21, 1963
Senegal/Switzerland	August 16, 1962	August 13, 1964
Germany/Madagascar	September 21, 1962	March 21, 1966
Congo/Switzerland	October 18, 1962	July 11, 1964
1963		
Cameroon/Switzerland	January 28, 1963	April 6, 1964
Germany/Sudan	February 7, 1963	November 24, 1967
Netherlands/Tunisia	May 23, 1963	December 19, 1964
Liberia/Switzerland	July 23, 1963	September 22, 1964
Rwanda/Switzerland	October 15, 1963	October 15, 1963
Germany/Sri Lanka	November 8, 1963	December 7, 1966
Germany/Tunisia	December 20, 1963	February 6, 1966
1964		
Switzerland/Togo	January 17, 1964	August 9, 1966
Germany/Senegal	January 24, 1964	January 16, 1966
Korea/Germany	February 4, 1964	January 15, 1967
Guinea/Italy	February 20, 1964	February 20, 1964
Madagascar/Switzerland	March 17, 1964	March 31, 1966
Belgium-Luxembourg/Tunisia	July 15, 1964	March 9, 1966
Germany/Niger	October 29, 1964	January 10, 1966
1965		
Malta/Switzerland	January 20, 1965	February 23, 1965
Germany/Tanzania	January 30, 1965	July 12, 1968
Germany/Sierra Leone	April 8, 1965	December 10, 1966

[1]) Source: http://www.worldbank.org/icsid/treaties/i-1.htm.

PARTIES	*SIGNATURE*	*ENTRY INTO FORCE*
Côte d'Ivoire/Netherlands	April 26, 1965	September 8, 1966
Belgium-Luxembourg/Morocco	April 28, 1965	October 18, 1967
Switzerland/Tanzania	May 3, 1965	September 16, 1965
Ecuador/Germany[2]	June 28, 1965	November 30, 1966
Cameroon/Netherlands	July 6, 1965	May 7, 1966
Central African Republic/Germany	August 23, 1965	January 21, 1968
Côte d'Ivoire/Sweden	August 27, 1965	November 3, 1966
Costa Rica/Switzerland	September 1, 1965	August 18, 1966
Congo/Germany	September 13, 1965	October 14, 1967
Germany/Iran	November 11, 1965	April 6, 1968
1966		
Madagascar/Sweden	April 2, 1966	June 23, 1967
Benin/Switzerland	April 20, 1966	October 6, 1973
Madagascar/Norway	May 13, 1966	September 28, 1967
Côte d'Ivoire/Germany	October 27, 1966	June 10, 1968
Germany/Uganda	November 29, 1966	August 19, 1968
Germany/Zambia	December 10, 1966	August 25, 1972
1967		
Chad/Switzerland	February 21, 1967	October 31, 1967
Senegal/Sweden	February 24, 1967	February 23, 1968
Chad/Germany	April 11, 1967	November 23, 1968
Germany/Rwanda	May 18, 1967	February 28, 1969
Italy/Malta	July 28, 1967	October 15, 1973
1968		
Denmark/Indonesia	January 30, 1968	July 2, 1968
Ecuador/Switzerland	May 2, 1968	September 11, 1969
Germany/Indonesia	November 8, 1968	April 19, 1971
Gabon/Italy	November 18, 1968	
1969		
Germany/Zaire	March 18, 1969	July 22, 1971
Burkina Faso/Switzerland	May 6, 1969	September 15, 1969
Gabon/Germany	May 16, 1969	March 29, 1971
Chad/Italy	June 11, 1969	June 11, 1969
Côte d'Ivoire/Italy	July 23, 1969	
1970		
Belgium-Luxembourg/Indonesia	January 15, 1970	June 17, 1972
Netherlands/Tanzania	April 14, 1970	July 28, 1972
Netherlands/Uganda	April 24, 1970	
Netherlands/Sudan	August 22, 1970	March 27, 1972
Kenya/Netherlands	September 11, 1970	June 11, 1979
1971		
Korea/Switzerland	April 7, 1971	April 7, 1971
Germany/Mauritius	May 25, 1971	August 27, 1973
Malaysia/Netherlands	June 15, 1971	September 13, 1972

[2]) This treaty will terminate on the entry into force of the new treaty between Ecuador and Germany, signed on March 21, 1996.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Switzerland/Uganda	August 23, 1971	May 8, 1972
Morocco/Netherlands	December 23, 1971	July 27, 1978
1972		
Gabon/Switzerland	January 28, 1972	October 18, 1972
Switzerland/Zaire	March 10, 1972	May 10, 1973
Netherlands/Singapore	May 16, 1972	September 7, 1973
Netherlands/Thailand	June 6, 1972	March 3, 1973
France/Tunisia	June 30, 1972	June 30, 1972
France/Zaire	October 5, 1972	March 1, 1975
1973		
Central African Republic/Switzerland	February 28, 1973	July 4, 1973
France/Mauritius	March 22, 1973	April 1, 1974
France/Indonesia	June 14, 1973	April 29, 1975
Egypt/Switzerland	July 25, 1973	June 4, 1974
Germany/Haiti	August 14, 1973	December 1, 1975
Germany/Singapore	October 3, 1973	October 1, 1975
1974		
Indonesia/Switzerland	February 6, 1974	April 9, 1976
Sudan/Switzerland	February 17, 1974	December 14, 1974
France/Yugoslavia	March 28, 1974	March 3, 1975
Germany/Yemen	June 21, 1974	December 19, 1978
Egypt/Germany	July 5, 1974	July 22, 1978
Germany/Jordan	July 15, 1974	October 10, 1977
Germany/Malta	September 17, 1974	December 14, 1975
Korea/Netherlands	October 16, 1974	June 1, 1975
Belgium-Luxembourg/Korea	December 20, 1974	September 3, 1976
Egypt/France	December 22, 1974	October 1, 1975
1975		
France/Malaysia	April 24, 1975	September 1, 1976
Korea/Tunisia	May 23, 1975	November 28, 1975
Egypt/United Kingdom	June 11, 1975	February 24, 1976
France/Morocco[3]	July 15, 1975	December 13, 1976
Singapore/United Kingdom	July 22, 1975	July 22, 1975
France/Singapore	September 8, 1975	October 18, 1976
1976		
Netherlands/Yugoslavia	February 16, 1976	April 1, 1977
Korea/United Kingdom	March 4, 1976	March 4, 1976
Belgium-Luxembourg/Zaire	March 28, 1976	January 1, 1977
Indonesia/United Kingdom	April 27, 1976	March 24, 1977
Egypt/Romania[4]	May 10, 1976	January 22, 1977
Egypt/Morocco	June 3, 1976	

[3]) This treaty will terminate on the entry into force of the new treaty between France and Morocco, signed on January 13, 1996.

[4]) This treaty will terminate on the entry into force of the new treaty between Egypt and Romania, signed on November 24, 1994.

PARTIES	*SIGNATURE*	*ENTRY INTO FORCE*
France/Philippines[5]	June 14, 1976	July 1, 1976
Germany/Israel	June 24, 1976	Provisionally in force
France/Malta	August 11, 1976	January 1, 1978
Mauritania/Switzerland	September 9, 1976	May 30, 1978
Austria/Romania	September 30, 1976	November 8, 1977
Egypt/Netherlands[6]	October 30, 1976	January 1, 1978
Jordan/Switzerland	November 11, 1976	March 2, 1977
France/Romania[7]	December 16, 1976	August 1, 1978
1977		
Egypt/Japan	January 28, 1977	January 14, 1978
Belgium-Luxembourg/Egypt	February 28, 1977	September 20, 1978
Egypt/Sudan	May 28, 1977	
Egypt/Yugoslavia	June 3, 1977	
Switzerland/Syria	June 22, 1977	August 10, 1978
Germany/Mali	June 28, 1977	May 16, 1980
Germany/Syria	August 2, 1977	April 20, 1980
France/Syria	November 28, 1977	March 1, 1980
France/Korea	December 28, 1977	February 1, 1979
1978		
Pakistan/Romania	January 21, 1978	October 31, 1978
France/Jordan	February 23, 1978	October 18, 1979
Malaysia/Switzerland	March 1, 1978	June 9, 1978
Singapore/Switzerland	March 6, 1978	May 3, 1978
Mali/Switzerland	March 8, 1978	December 8, 1978
Belgium-Luxembourg/Romania	May 8, 1978	May 1, 1980
Benin/Germany	June 29, 1978	July 18, 1985
Egypt/Sweden	July 15, 1978	January 29, 1979
France/Sudan	July 31, 1978	July 5, 1980
El Salvador/France	September 20, 1978	December 12, 1992
Slovenia/Sweden	November 10, 1978	November 21, 1979
Sweden/Yugoslavia	November 10, 1978	November 21, 1979
Belgium-Luxembourg/Singapore	November 17, 1978	November 27, 1980
Thailand/United Kingdom	November 28, 1978	August 11, 1979
France/Paraguay	November 30, 1978	December 11, 1980
1979		
Gabon/Morocco	January 13, 1979	
Malaysia/Sweden	March 3, 1979	July 6, 1979
France/Liberia	March 23, 1979	January 22, 1982

[5]) This treaty will terminate on the entry into force of the new treaty between France and the Philippines signed on September 13, 1994.

[6]) This treaty will terminate on the entry into force of the new treaty between Egypt and the Netherlands signed on January 17, 1996.

[7]) This treaty will terminate on the entry into force of the new treaty between France and Romania signed on March 21, 1995.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Gabon/Romania	April 11, 1979	September 18, 1982
Germany/Oman	June 25, 1979	February 4, 1986
Netherlands/Senegal	August 3, 1979	May 5, 1981
Jordan/United Kingdom	October 10, 1979	April 24, 1980
Germany/Romania[8]	October 12, 1979	January 10, 1981
Belgium-Luxembourg/Malaysia	November 22, 1979	February 8, 1982
1980		
Sri Lanka/United Kingdom	February 13, 1980	December 18, 1980
Belgium-Luxembourg/Cameroon	March 27, 1980	November 1, 1981
Korea/Sri Lanka	March 28, 1980	July 15, 1980
France/Sri Lanka	April 10, 1980	April 19, 1982
Egypt/Finland	May 5, 1980	February 1, 1982
Senegal/United Kingdom	May 7, 1980	February 9, 1984
Singapore/Sri Lanka	May 9, 1980	September 30, 1980
Bangladesh/United Kingdom	June 19, 1980	June 19, 1980
Romania/Senegal	June 19, 1980	May 20, 1984
Cameroon/Romania	August 30, 1980	December 16, 1981
Germany/Portugal	September 16, 1980	April 23, 1982
Germany/Papua New Guinea	November 12, 1980	November 3, 1983
Philippines/United Kingdom	December 3, 1980	January 2, 1981
1981		
Romania/Sri Lanka	February 9, 1981	June 3, 1982
Lesotho/United Kingdom	February 18, 1981	February 18, 1981
Pakistan/Sweden	March 12, 1981	June 14, 1981
Bangladesh/Germany	May 6, 1981	September 14, 1986
Papua New Guinea/United Kingdom	May 14, 1981	December 22, 1981
Austria/Bulgaria	May 15, 1981	
Malaysia/United Kingdom	May 21, 1981	October 21, 1988
Bangladesh/Belgium-Luxembourg	May 22, 1981	September 14, 1987
Paraguay/United Kingdom	June 4, 1981	April 23, 1992
Sri Lanka/Switzerland	September 23, 1981	February 12, 1982
Germany/Somalia	November 27, 1981	February 15, 1985
Sierra Leone/United Kingdom	December 8, 1981	
1982		
United Kingdom/Yemen	February 25, 1982	November 11, 1983
Japan/Sri Lanka	March 1, 1982	August 7, 1982
Equatorial Guinea/France	March 3, 1982	September 23, 1983
China/Sweden	March 29, 1982	March 29, 1982
Belgium-Luxembourg/Sri Lanka	April 5, 1982	April 26, 1984
Malaysia/Sri Lanka	April 16, 1982	October 31, 1985
Belize/United Kingdom	April 30, 1982	April 30, 1982
Sri Lanka/Sweden	April 30, 1982	April 30, 1982
Cameroon/United Kingdom	June 4, 1982	June 7, 1985

[8]) This treaty will terminate on the entry into force of the new treaty between Germany and Romania signed on June 25, 1996.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Costa Rica/United Kingdom	September 7, 1982	
Egypt/United States	September 29, 1982	June 27, 1992
Panama/United States	October 27, 1982	May 30, 1991
France/Panama	November 5, 1982	October 9, 1985
Germany/Lesotho	November 11, 1982	August 17, 1985
Malaysia/Romania	November 26, 1982	July 20, 1984
Germany/Mauritania	December 8, 1982	April 26, 1986
1983		
St. Lucia/United Kingdom	January 18, 1983	January 18, 1983
Kuwait/Pakistan	March 17, 1983	
France/Nepal	May 2, 1983	June 13, 1985
France/Pakistan	June 1, 1983	December 14, 1984
France/Israel	June 9, 1983	January 11, 1985
China/Germany	October 7, 1983	March 18, 1985
Panama/United Kingdom	October 7, 1983	November 7, 1983
Panama/Switzerland	October 19, 1983	August 22, 1985
Sweden/Yemen	October 29, 1983	February 23, 1984
Belgium-Luxembourg/Rwanda	November 2, 1983	August 1, 1985
Germany/Panama	November 2, 1983	March 10, 1989
Belgium-Luxembourg/Mauritania	November 23, 1983	
Senegal/United States	December 6, 1983	October 25, 1990
Haiti/United States	December 12, 1983	
1984		
Bulgaria/Finland	February 16, 1984	July 16, 1985
Costa Rica/France	March 8, 1984	
Netherlands/Sri Lanka	April 26, 1984	May 1, 1985
France/Yemen	April 27, 1984	July 19, 1991
Senegal/Tunisia	May 17, 1984	
France/Haiti	May 23, 1984	March 25, 1985
China/France	May 30, 1984	March 19, 1985
Belgium-Luxembourg/China	June 4, 1984	October 5, 1986
Bulgaria/Malta	June 12, 1984	February 7, 1985
Korea/Senegal	July 12, 1984	September 2, 1985
United States/Zaire	August 3, 1984	July 28, 1989
China/Finland	September 4, 1984	January 26, 1986
Burundi/Germany	September 10, 1984	December 9, 1987
Malta/Netherlands	September 10, 1984	July 1, 1985
Sweden/Tunisia	September 15, 1984	May 13, 1985
Dominica/Germany	October 1, 1984	May 11, 1986
Malaysia/Norway	November 6, 1984	January 7, 1986
China/Norway	November 21, 1984	July 10, 1985
1985		
China/Italy	January 28, 1985	August 28, 1987
Netherlands/Philippines	February 27, 1985	October 1, 1987
China/Thailand	March 12, 1985	December 13, 1985
Germany/St. Lucia	March 16, 1985	July 22, 1987

PARTIES	***SIGNATURE***	***ENTRY INTO FORCE***
Haiti/United Kingdom	March 18, 1985	March 27, 1995
Netherlands/Yemen	March 18, 1985	September 1, 1986
Austria/Malaysia	April 12, 1985	January 1, 1987
Finland/Malaysia	April 15, 1985	January 3, 1988
Finland/Sri Lanka	April 27, 1985	October 25, 1987
China/Denmark	April 29, 1985	April 29, 1985
Denmark/Sri Lanka	June 4, 1985	June 4, 1985
Belgium-Luxembourg/Liberia	June 5, 1985	
Norway/Sri Lanka	June 13, 1985	June 13, 1985
China/Netherlands	June 17, 1985	February 1, 1987
Morocco/United States	July 22, 1985	May 29, 1991
Bangladesh/France	September 10, 1985	October 3, 1986
Austria/China	September 12, 1985	October 11, 1986
Italy/Tunisia	October 17, 1985	June 24, 1989
China/Singapore	November 21, 1985	February 7, 1986
China/Kuwait	November 23, 1985	December 24, 1986
Turkey/United States	December 3, 1985	May 18, 1990
Morocco/Switzerland	December 17, 1985	April 12, 1991
1986		
Mali/Tunisia	February 1, 1986	
Cameroon/United States	February 26, 1986	April 6, 1989
Mauritania/Tunisia	March 1, 1986	
Bangladesh/United States	March 12, 1986	July 25, 1989
China/Sri Lanka	March 13, 1986	March 25, 1987
Belgium-Luxembourg/Thailand	March 19, 1986	
Germany/St. Vincent and Grenadines	March 25, 1986	January 8, 1989
Netherlands/Turkey	March 27, 1986	November 1, 1989
Bulgaria/Germany	April 12, 1986	March 10, 1988
Germany/Hungary	April 30, 1986	November 7, 1987
Grenada/United States	May 2, 1986	March 3, 1989
Belgium-Luxembourg/Hungary	May 14, 1986	September 23, 1988
China/United Kingdom	May 15, 1986	May 15, 1986
Mauritius/United Kingdom	May 20, 1986	October 13, 1986
Bangladesh/Korea	June 18, 1986	October 6, 1988
Belgium-Luxembourg/Turkey	August 27, 1986	May 4, 1990
Malta/United Kingdom	October 4, 1986	October 4, 1986
Germany/Nepal	October 20, 1986	July 7, 1988
France/Hungary	November 6, 1986	September 30, 1987
China/Switzerland	November 12, 1986	March 18, 1987
1987		
Jamaica/United Kingdom	January 20, 1987	May 14, 1987
Dominica/United Kingdom	January 23, 1987	January 23, 1987
Hungary/Italy	February 17, 1987	February 23, 1990
Belgium-Luxembourg/Malta	March 5, 1987	April 12, 1993
Hungary/United Kingdom	March 9, 1987	August 28, 1987
Bangladesh/Romania	March 13, 1987	October 31, 1987

PARTIES	SIGNATURE	ENTRY INTO FORCE
Bolivia/Germany	March 23, 1987	November 9, 1990
Italy/Sri Lanka	March 25, 1987	March 20, 1990
Hungary/Sweden	April 21, 1987	April 21, 1987
Germany/Uruguay	May 4, 1987	June 29, 1990
Belgium-Luxembourg/Poland	May 19, 1987	August 2, 1981
Antigua and Barbuda/United Kingdom	June 12, 1987	June 12, 1987
Hungary/Netherlands	September 2, 1987	June 1, 1988
Togo/Tunisia	September 13, 1987	
Netherlands/Oman	September 19, 1987	February 1, 1989
Romania/Tunisia	September 23, 1987	February 4, 1989
Bolivia/Switzerland	November 6, 1987	May 13, 1991
Bangladesh/Turkey	November 12, 1987	June 21, 1990
Bulgaria/Cyprus	November 12, 1987	May 22, 1988
Kuwait/Malaysia	November 21, 1987	
Benin/United Kingdom	November 27, 1987	November 27, 1987
Poland/United Kingdom	December 8, 1987	April 14, 1988
Italy/Kuwait	December 17, 1987	May 21, 1990
1988		
Italy/Malaysia	January 4, 1988	October 25, 1990
Grenada/United Kingdom	February 25, 1988	February 25, 1988
Switzerland/Turkey	March 3, 1988	February 21, 1990
Bulgaria/Netherlands	March 8, 1988	May 24, 1990
Bangladesh/Thailand	March 13, 1988	
Mauritania/Romania	March 14, 1988	December 19, 1989
Korea/Malaysia	April 11, 1988	March 31, 1989
Denmark/Hungary	May 2, 1988	October 1, 1988
Bolivia/United Kingdom	May 24, 1988	February 16, 1990
Korea/Pakistan	May 24, 1988	April 15, 1990
Austria/Hungary	May 26, 1988	September 1, 1989
Denmark/Korea	June 2, 1988	June 2, 1988
Finland/Hungary	June 6, 1988	May 12, 1989
China/Poland	June 7, 1988	January 8, 1989
Italy/Philippines	June 17, 1988	November 4, 1993
Australia/China	July 11, 1988	July 11, 1988
China/Japan	August 27, 1988	May 14, 1989
Austria/Turkey	September 16, 1988	January 1, 1992
Netherlands/Uruguay	September 22, 1988	August 1, 1991
Netherlands/Pakistan	October 4, 1988	October 1, 1989
Hungary/Switzerland	October 5, 1988	May 16, 1989
Switzerland/Uruguay	October 7, 1988	April 22, 1991
Morocco/Portugal	October 18, 1988	March 22, 1995
Belgium-Luxembourg/Bulgaria	October 25, 1988	May 29, 1991
Kuwait/Turkey	October 27, 1988	April 25, 1992
China/Malaysia	November 21, 1988	March 31, 1990
China/New Zealand	November 22, 1988	March 25, 1989
Austria/Poland	November 24, 1988	November 1, 1989

PARTIES	SIGNATURE	ENTRY INTO FORCE
Bulgaria/Italy	December 5, 1988	December 27, 1990
Hungary/Korea	December 28, 1988	January 1, 1989
1989		
Italy/Korea	January 10, 1989	June 25, 1992
Finland/Russian Federation	February 8, 1989	August 15, 1991
Belgium-Luxembourg/Russian Federation	February 9, 1989	October 13, 1991
China/Pakistan	February 12, 1989	September 30, 1990
France/Poland	February 14, 1989	February 10, 1990
Egypt/Italy	March 2, 1989	
Tunisia/United Kingdom	March 14, 1989	January 4, 1990
Ghana/United Kingdom	March 22, 1989	October 25, 1991
Korea/Thailand	March 24, 1989	September 30, 1989
Ghana/Netherlands	March 31, 1989	July 1, 1991
Bulgaria/France	April 5, 1989	May 1, 1990
Russian Federation/United Kingdom	April 6, 1989	July 3, 1991
Belgium-Luxembourg/Burundi	April 13, 1989	September 12, 1993
Belgium-Luxembourg/Czech Republic	April 24, 1989	February 13, 1992
Belgium-Luxembourg/Slovak Republic	April 24, 1989	February 13, 1992
Italy/Poland	May 10, 1989	January 10, 1993
Cyprus/Hungary	May 24, 1989	May 25, 1990
Congo/United Kingdom	May 25, 1989	November 9, 1990
Greece/Hungary	May 26, 1989	February 1, 1992
Germany/Russian Federation	June 13, 1989	August 5, 1991
Bulgaria/China	June 27, 1989	August 21, 1994
France/Russian Federation	July 4, 1989	July 18, 1991
Germany/Yugoslavia	July 10, 1989	October 25, 1990
Hungary/Uruguay	August 25, 1989	July 1, 1992
Ghana/Romania	September 14, 1989	
France/Kuwait	September 27, 1989	May 16, 1991
Morocco/Spain	September 27, 1989	January 15, 1992
Netherlands/Russian Federation	October 5, 1989	July 20, 1991
China/Ghana	October 12, 1989	
Poland/Sweden	October 13, 1989	January 4, 1990
Bulgaria/Ghana	October 20, 1989	
Austria/Yugoslavia	October 25, 1989	June 1, 1991
Bolivia/France	October 25, 1989	
Guyana/United Kingdom	October 27, 1989	April 11, 1990
Korea/Poland	November 1, 1989	February 2, 1990
Poland/Switzerland	November 8, 1989	April 17, 1990
Hungary/Kuwait	November 8, 1989	March 1, 1994
Hungary/Spain	November 9, 1989	August 1, 1992
Germany/Poland	November 10, 1989	February 24, 1991
Canada/Russian Federation	November 20, 1989	June 27, 1991
Italy/Russian Federation[9]	November 30, 1989	July 8, 1991

[9]) This treaty will terminate on the entry into force of the new treaty between Italy and the Russian Federation signed on April 9, 1996.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Germany/Guyana	December 6, 1989	March 8, 1994
France/Lao PDR	December 12, 1989	March 8, 1991
1990		
Cape Verde/Germany	January 18, 1990	December 15, 1993
Denmark/Turkey	February 7, 1990	August 1, 1992
Congo/United States	February 12, 1990	August 13, 1994
Italy/Uruguay	February 21, 1990	
France/Nigeria	February 27, 1990	August 19, 1991
Kuwait/Poland	March 5, 1990	December 18, 1993
Bangladesh/Italy	March 20, 1990	September 20, 1994
Poland/United States	March 21, 1990	August 6, 1994
Germany/Swaziland	April 5, 1990	August 7, 1995
Finland/Poland	April 5, 1990	March 29, 1991
Canada/Poland	April 6, 1990	November 22, 1990
Bolivia/Spain	April 24, 1990	May 12, 1992
Belgium-Luxembourg/Bolivia	April 25, 1990	
Bolivia/Italy	April 30, 1990	February 22, 1992
Denmark/Poland	May 1, 1990	October 30, 1990
Tunisia/United States	May 15, 1990	February 7, 1993
Italy/Vietnam	May 18, 1990	May 6, 1994
Argentina/Italy	May 22, 1990	October 14, 1993
Italy/Venezuela	June 5, 1990	
Norway/Poland	June 5, 1990	October 24, 1990
Argentina/Belgium-Luxembourg	June 28, 1990	August 26, 1992
Czech Republic/United Kingdom	July 10, 1990	October 26, 1992
Slovak Republic/United Kingdom	July 10, 1990	October 26, 1992
Italy/Morocco	July 18, 1990	
Korea/Zaire	July 19, 1990	
China/Russian Federation	July 21, 1990	
Korea/Romania	August 7, 1990	
Lao PDR/Thailand	August 22, 1990	
Indonesia/Singapore	August 28, 1990	August 28, 1990
Australia/Papua New Guinea	September 3, 1990	October 20, 1991
Burundi/United Kingdom	September 13, 1990	September 13, 1990
France/Czech Republic	September 13, 1990	September 27, 1991
France/Slovak Republic	September 13, 1990	September 27, 1991
Bolivia/Sweden	September 20, 1990	July 3, 1992
Morocco/Sweden	September 26, 1990	Provisionally in force
Czech Republic/Germany	October 2, 1990	August 2, 1992
Germany/Slovak Republic	October 2, 1990	August 2, 1992
Czech Republic/Switzerland	October 5, 1990	August 7, 1991
Slovak Republic/Switzerland	October 5, 1990	August 7, 1991
Austria/Czech Republic	October 15, 1990	October 1, 1991
Austria/Slovak Republic	October 15, 1990	October 1, 1991
Cape Verde/Portugal	October 26, 1990	October 4, 1991

PARTIES	SIGNATURE	ENTRY INTO FORCE
Spain/Russian Federation	October 26, 1990	November 28, 1991
Morocco/United Kingdom	October 30, 1990	Provisionally in force
Czech Republic/Finland	November 6, 1990	October 23, 1991
Finland/Slovak Republic	November 6, 1990	October 23, 1991
Czech Republic/Sweden	November 13, 1990	September 23, 1991
Slovak Republic/Sweden	November 13, 1990	September 23, 1991
China/Turkey	November 13, 1990	August 19, 1994
Canada/Czech Republic	November 15, 1990	March 9, 1992
Canada/Slovak Republic	November 15, 1990	March 9, 1992
Romania/Uruguay	November 23, 1990	August 29, 1993
Guinea/Tunisia	November 28, 1990	
Russian Federation/Switzerland	December 1, 1990	August 26, 1991
Italy/Romania	December 6, 1990	March 14, 1995
Egypt/Tunisia	December 8, 1990	
Argentina/United Kingdom	December 11, 1990	February 19, 1993
Jamaica/Switzerland	December 11, 1990	November 21, 1991
Nigeria/United Kingdom	December 11, 1990	December 11, 1990
Czech Republic/Spain	December 12, 1990	November 28, 1991
Slovak Republic/Spain	December 12, 1990	November 28, 1991
Korea/Russian Federation	December 14, 1990	July 10, 1991
Russian Federation/Turkey	December 14, 1990	
1991		
Belgium-Luxembourg/Vietnam	January 24, 1991	
Romania/Turkey	January 24, 1991	
Indonesia/Korea	February 16, 1991	March 10, 1994
Belgium-Luxembourg/Cyprus	February 26, 1991	
Australia/Vietnam	March 5, 1991	September 11, 1991
Czech Republic/Denmark	March 6, 1991	September 19, 1992
Denmark/Slovak Republic	March 6, 1991	September 19, 1992
Austria/Korea	March 14, 1991	November 1, 1991
Turkey/United Kingdom	March 15, 1991	
Korea/Mongolia	March 28, 1991	April 30, 1991
Hungary/Norway	April 8, 1991	December 4, 1992
Argentina/Germany	April 9, 1991	November 8, 1993
Argentina/Switzerland	April 12, 1991	November 6, 1992
China/Papua New Guinea	April 12, 1991	February 12, 1993
Jamaica/Netherlands	April 18, 1991	August 1, 1992
Algeria/Belgium-Luxembourg	April 24, 1991	
Indonesia/Italy	April 25, 1991	June 24, 1995
Greece/Zaire	April 26, 1991	
Czech Republic/Netherlands	April 29, 1991	October 1, 1992
Netherlands/Slovak Republic	April 29, 1991	October 1, 1992
Australia/Poland	May 7, 1991	March 27, 1992
Hungary/Israel	May 14, 1991	September 14, 1992
Korea/Turkey	May 14, 1991	June 4, 1994
Canada/Uruguay	May 16, 1991	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Algeria/Italy	May 18, 1991	November 26, 1993
Czech Republic/Norway	May 21, 1991	August 6, 1992
Kuwait/Romania	May 21, 1991	July 26, 1992
Norway/Slovak Republic	May 21, 1991	August 6, 1992
Israel/Poland	May 22, 1991	May 6, 1992
Spain/Tunisia	May 28, 1991	June 20, 1994
China/Hungary	May 29, 1991	April 1, 1993
Tunisia/Turkey	May 29, 1991	February 7, 1993
Czech Republic/Greece	June 3, 1991	December 31, 1992
Norway/Romania	June 11, 1991	March 23, 1992
Guinea-Bissau/Portugal	June 24, 1991	
Germany/Mongolia	June 26, 1991	June 23, 1996
Argentina/France	July 3, 1991	March 3, 1993
Cyprus/Romania	July 26, 1991	July 25, 1993
Argentina/Poland	July 31, 1991	September 1, 1992
Albania/Greece	August 1, 1991	July 4, 1995
Argentina/Chile	August 2, 1991	January 1, 1995
Poland/Uruguay	August 2, 1991	October 21, 1994
Australia/Hungary	August 15, 1991	May 10, 1992
Poland/Turkey	August 21, 1991	August 19, 1994
China/Mongolia	August 26, 1991	November 1, 1993
Israel/Romania	September 2, 1991	August 26, 1992
Austria/Cape Verde	September 3, 1991	April 1, 1993
France/United Arab Emirates	September 9, 1991	
Albania/Italy	September 12, 1991	
Greece/Romania	September 16, 1991	October 21, 1992
Sri Lanka/United States	September 20, 1991	May 1, 1993
Chile/Spain	October 2, 1991	March 29, 1994
Argentina/Spain	October 3, 1991	September 28, 1992
Canada/Hungary	October 3, 1991	November 21, 1993
Mongolia/United Kingdom	October 4, 1991	October 4, 1991
Ghana/Switzerland	October 8, 1991	June 16, 1993
Malaysia/United Arab Emirates	October 11, 1991	
Hungary/Thailand	October 18, 1991	October 18, 1991
Oman/Tunisia	October 19, 1991	
Chile/Germany	October 21, 1991	
United Kingdom/Uruguay	October 21, 1991	
Czech Republic/United States	October 22, 1991	December 19, 1992
Netherlands/Venezuela	October 22, 1991	November 1, 1993
Slovak Republic/United States	October 22, 1991	December 19, 1992
Indonesia/Vietnam	October 25, 1991	
Bulgaria/Switzerland	October 28, 1991	October 26, 1993
Cape Verde/Switzerland	October 28, 1991	May 6, 1992
Bahrain/United Kingdom	October 30, 1991	October 30, 1991
Thailand/Vietnam	October 30, 1991	
Albania/Germany	October 31, 1991	August 18, 1995

PARTIES	*SIGNATURE*	*ENTRY INTO FORCE*
Belgium-Luxembourg/Uruguay	November 4, 1991	
Argentina/Canada	November 5, 1991	April 29, 1993
Denmark/Estonia	November 6, 1991	February 24, 1993
France/Mongolia	November 8, 1991	December 22, 1993
Cape Verde/Netherlands	November 11, 1991	November 25, 1992
Chile/Switzerland	November 11, 1991	
Argentina/United States	November 14, 1991	October 20, 1994
Peru/Thailand	November 15, 1991	November 15, 1991
Argentina/Sweden	November 22, 1991	September 28, 1992
Peru/Switzerland	November 22, 1991	November 23, 1993
Indonesia/Norway	November 26, 1991	October 1, 1994
China/Czech Republic	December 4, 1991	December 1, 1992
China/Slovak Republic	December 4, 1991	December 1, 1992
Hungary/Morocco	December 12, 1991	
1992		
Denmark/Malaysia	January 6, 1992	September 18, 1992
Denmark/Ghana	January 13, 1992	January 6, 1995
Hungary/Turkey	January 14, 1992	November 1, 1994
Malaysia/Vietnam	January 21, 1992	
Paraguay/Switzerland	January 31, 1992	September 28, 1992
China/Portugal	February 3, 1992	
China/Spain	February 6, 1992	May 1, 1993
Japan/Turkey	February 12, 1992	March 12, 1993
Estonia/Finland	February 13, 1992	December 3, 1992
Philippines/Vietnam	February 27, 1992	
Germany/Lithuania	February 28, 1992	Provisionally in force
Hungary/Portugal	February 28, 1992	
Belgium-Luxembourg/Mongolia	March 3, 1992	
Finland/Latvia	March 5, 1992	December 7, 1992
Bolivia/Netherlands	March 10, 1992	November 1, 1994
Latvia/Sweden	March 10, 1992	November 6, 1992
China/Uzbekistan	March 13, 1992	April 14, 1994
Lithuania/Sweden	March 17, 1992	September 1, 1992
Finland/Romania	March 26, 1992	January 6, 1993
Cyprus/Greece	March 30, 1992	February 26, 1993
Denmark/Latvia	March 30, 1992	November 18, 1994
Denmark/Lithuania	March 30, 1992	January 8, 1993
Estonia/Sweden	March 31, 1992	May 20, 1992
Spain/Uruguay	April 7, 1992	May 6, 1994
France/Lithuania	April 23, 1992	January 11, 1995
Belarus/Poland	April 24, 1992	January 18, 1993
Czech Republic/Korea	April 27, 1992	March 16, 1995
Kyrgyz Republic/Turkey	April 28, 1992	September 28, 1995
Turkey/Uzbekistan	April 28, 1992	May 18, 1995
Czech Republic/Turkey	April 30, 1992	
Turkey/Turkey	May 1, 1992	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Turkey/Turkmenistan	May 2, 1992	
Argentina/Turkey	May 8, 1992	May 1, 1995
Bolivia/China	May 8, 1992	
Argentina/Egypt	May 11, 1992	December 3, 1993
Portugal/Tunisia	May 11, 1992	December 6, 1994
Indonesia/Tunisia	May 13, 1992	
China/Kyrgyz Republic	May 14, 1992	
Estonia/France	May 14, 1992	September 23, 1995
Finland/Ukraine	May 14, 1992	January 30, 1994
France/Latvia	May 15, 1992	October 1, 1994
United/United States	May 19, 1992	January 12, 1994
Hungary/Indonesia	May 20, 1992	February 13, 1996
France/Vietnam	May 26, 1992	
Romania/United States	May 28, 1992	January 15, 1994
Albania/Turkey	June 1, 1992	
Cyprus/Poland	June 4, 1992	July 6, 1993
Niger/Tunisia	June 5, 1992	
Finland/Lithuania	June 12, 1992	January 8, 1993
Estonia/Norway	June 15, 1992	June 15, 1992
Korea/Uzbekistan	June 16, 1992	November 20, 1992
Latvia/Norway	June 16, 1992	December 1, 1992
Lithuania/Norway	June 16, 1992	December 19, 1992
Argentina/Tunisia	June 17, 1992	January 23, 1995
Russian Federation/United States	June 17, 1992	
China/Greece	June 25, 1992	December 21, 1993
Jordan/Romania	July 2, 1992	
Switzerland/Vietnam	July 3, 1992	December 3, 1992
Armenia/China	July 4, 1992	
Belarus/Vietnam	July 8, 1992	
Chile/France	July 14, 1992	
Belgium-Luxembourg/Chile	July 15, 1992	
China/Philippines	July 20, 1992	
Poland/Spain	July 30, 1992	May 1, 1993
Georgia/Turkey	July 31, 1992	June 6, 1995
Argentina/Austria	August 7, 1992	January 1, 1995
China/Kazakhstan	August 10, 1992	August 13, 1994
Moldova/Romania	August 14, 1992	
Netherlands/Poland	September 7, 1992	February 1, 1994
Indonesia/Sweden	September 17, 1992	February 18, 1993
Albania/Switzerland	September 22, 1992	April 30, 1993
Germany/Kazakhstan	September 22, 1992	May 10, 1995
Armenia/United States	September 23, 1992	
Bulgaria/United States	September 23, 1992	June 2, 1994
Hungary/Poland	September 23, 1992	June 16, 1995
Germany/Jamaica	September 24, 1992	May 29, 1996
Lithuania/Poland	September 28, 1992	August 6, 1993

PARTIES	SIGNATURE	ENTRY INTO FORCE
Finland/Kazakhstan	September 29, 1992	
China/Korea	September 30, 1992	December 4, 1992
Finland/Uzbekistan	October 1, 1992	October 22, 1993
Poland/Russian Federation	October 2, 1992	
Belgium-Luxembourg/Paraguay	October 6, 1992	
Indonesia/Poland	October 6, 1992	July 1, 1993
Greece/Poland	October 14, 1992	February 20, 1995
Argentina/Netherlands	October 20, 1992	October 1, 1994
Denmark/Ukraine	October 23, 1992	April 29, 1994
Estonia/Netherlands	October 27, 1992	September 1, 1993
Malaysia/Papua New Guinea	October 27, 1992	
Belarus/Finland	October 28, 1992	December 11, 1994
Netherlands/Paraguay	October 29, 1992	August 1, 1994
Singapore/Vietnam	October 29, 1992	
China/Ukraine	October 31, 1992	May 29, 1993
Greece/Tunisia	October 31, 1992	April 21, 1995
Austria/Morocco	November 2, 1992	July 1, 1995
Netherlands/Nigeria	November 2, 1992	February 1, 1994
Egypt/Spain	November 3, 1992	April 26, 1994
Argentina/China	November 5, 1992	June 17, 1994
Argentina/Denmark	November 6, 1992	January 2, 1995
China/Moldova	November 7, 1992	March 1, 1995
Chile/Malaysia	November 11, 1992	
Estonia/Germany	November 12, 1992	Provisionally in force
Australia/Indonesia	November 17, 1992	July 29, 1993
Hong Kong/Netherlands	November 19, 1992	September 1, 1993
China/Turkmenistan	November 21, 1992	June 6, 1995
Czech Republic/Slovak Republic	November 23, 1992	January 1, 1993
China/Vietnam	December 2, 1992	September 1, 1993
Lao PDR/Malaysia	December 8, 1992	
United Arab Emirates/United Kingdom	December 8, 1992	December 13, 1993
Egypt/Uzbekistan	December 16, 1992	
Poland/Thailand	December 18, 1992	August 10, 1993
Estonia/Switzerland	December 21, 1992	August 18, 1993
Egypt/Ukraine	December 22, 1992	
Korea/Paraguay	December 22, 1992	August 6, 1993
Latvia/Switzerland	December 22, 1992	April 16, 1993
Lithuania/Switzerland	December 23, 1992	May 13, 1993
1993		
Belarus/China	January 11, 1993	January 14, 1995
Poland/Ukraine	January 12, 1993	September 14, 1993
Czech Republic/Hungary	January 14, 1993	May 25, 1995
Hungary/Slovak Republic	January 15, 1993	
Italy/Mongolia	January 15, 1993	September 1, 1995
France/Jamaica	January 19, 1993	September 16, 1994
Kyrgyz Republic/United States	January 19, 1993	January 12, 1994

PARTIES	SIGNATURE	ENTRY INTO FORCE
China/Lao PDR	January 31, 1993	June 1, 1993
Poland/United Arab Emirates	January 31, 1993	April 9, 1994
Kuwait/Moldova	February 4, 1993	
Ukraine/United Kingdom	February 10, 1993	February 10, 1993
Albania/China	February 13, 1993	
Egypt/Kazakhstan	February 14, 1993	
Germany/Ukraine	February 15, 1993	June 29, 1996
Hungary/Malaysia	February 19, 1993	July 8, 1995
Kyrgyz Republic/Ukraine	February 23, 1993	
Armenia/Vietnam	February __, 1993[10]	
Nepal/United Kingdom	March 2, 1993	March 2, 1993
Albania/Croatia	March 5, 1993	
Argentina/Hungary	March 5, 1993	June 2, 1994
Albania/Poland	March 7, 1993	August 9, 1993
Chile/Italy	March 8, 1993	February 8, 1995
China/Tajikistan	March 9, 1993	January 20, 1994
Poland/Portugal	March 11, 1993	August 3, 1994
Bulgaria/Greece	March 12, 1993	April 29, 1995
Albania/Austria	March 18, 1993	August 1, 1995
Poland/Tunisia	March 29, 1993	September 22, 1993
Belarus/Germany	April 2, 1993	September 23, 1996
Chile/Venezuela	April 2, 1993	May 25, 1995
Germany/Vietnam	April 3, 1993	Provisionally in force
Argentina/Senegal	April 6, 1993	
Barbados/United Kingdom	April 7, 1993	April 7, 1993
Bulgaria/Denmark	April 14, 1993	May 20, 1995
Argentina/Armenia	April 16, 1993	December 20, 1994
Switzerland/Uzbekistan	April 16, 1993	November 5, 1993
Germany/Latvia	April 20, 1993	June 9, 1996
Malaysia/Poland	April 21, 1993	March 23, 1994
Moldova/United States	April 21, 1993	November 25, 1994
Latvia/Poland	April 26, 1993	July 19, 1993
Germany/Uzbekistan	April 28, 1993	Provisionally in force
Romania/Thailand	April 30, 1993	August 20, 1994
Czech Republic/Slovenia	May 4, 1993	May 21, 1994
Estonia/Poland	May 6, 1993	August 6, 1993
Cuba/Italy	May 7, 1993	August 23, 1995
Finland/Turkey	May 13, 1993	April 23, 1995
Korea/Vietnam	May 13, 1993	September 4, 1993
Lithuania/United Kingdom	May 17, 1993	September 21, 1993
Albania/Egypt	May 22, 1993	
Chile/Sweden	May 24, 1993	December 30, 1995
Armenia/Greece	May 25, 1993	April 28, 1995
Armenia/United Kingdom	May 27, 1993	July 11, 1996
Bulgaria/Portugal	May 27, 1993	

[10]) Signature date unavailable.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Chile/Finland	May 27, 1993	
Belarus/Switzerland	May 28, 1993	July 13, 1994
Chile/Denmark	May 28, 1993	November 3, 1995
Czech Republic/Egypt	May 29, 1993	January 4, 1994
Chile/Norway	June 1, 1993	September 8, 1994
China/Georgia	June 3, 1993	March 1, 1995
Korea/Peru	June 3, 1993	April 20, 1994
Poland/Singapore	June 3, 1993	December 29, 1993
China/Croatia	June 7, 1993	July 1, 1994
Bulgaria/Russian Federation	June 8, 1993	
Australia/Romania	June 21, 1993	April 22, 1994
Belgium-Luxembourg/Georgia	June 23, 1993	
Italy/Oman	June 23, 1993	
Georgia/Germany	June 25, 1993	Provisionally in force
Greece/Russian Federation	June 30, 1993	
China/United Arab Emirates	July 1, 1993	September 28, 1994
Finland/United Arab Emirates	July 1, 1993	
Cuba/Russian Federation	July 7, 1993	
Czech Republic/Poland	July 16, 1993	June 29, 1994
Egypt/Greece	July 16, 1993	April 6, 1994
Trinidad and Tobago/United Kingdom	July 23, 1993	October 8, 1993
Slovak Republic/Slovenia	July 28, 1993	March 28, 1996
Argentina/Romania	July 29, 1993	May 1, 1995
Bolivia/Peru	July 30, 1993	February 19, 1995
Jordan/Turkey	August 2, 1993	
Germany/Paraguay	August 11, 1993	
Hungary/Paraguay	August 11, 1993	April 1, 1995
Austria/Paraguay	August 13, 1993	
Denmark/Vietnam	August 25, 1993	August 7, 1994
Ecuador/United States	August 27, 1993	
China/Estonia	September 2, 1993	June 1, 1994
Sweden/Vietnam	September 8, 1993	August 2, 1994
China/Slovenia	September 13, 1993	January 1, 1995
Finland/Vietnam	September 13, 1993	
Australia/Hong Kong	September 15, 1993	October 15, 1993
Hungary/Romania	September 16, 1993	
Argentina/Bulgaria	September 21, 1993	
Korea/Lithuania	September 24, 1993	November 9, 1993
Italy/Jamaica	September 29, 1993	November 9, 1995
Romania/Russian Federation	September 29, 1993	
Australia/Czech Republic	September 30, 1993	June 29, 1994
Peru/United Kingdom	October 4, 1993	April 21, 1994
France/Peru	October 6, 1993	
Paraguay/Spain	October 11, 1993	
France/Uruguay	October 14, 1993	
Honduras/Switzerland	October 14, 1993	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Philippines/Spain	October 19, 1993	September 21, 1994
Finland/Korea	October 21, 1993	May 11, 1996
Romania/Switzerland	October 25, 1993	July 30, 1994
Chile/Ecuador	October 27, 1993	January 2, 1996
France/Uzbekistan	October 27, 1993	
Belarus/France	October 28, 1993	
France/Trinidad and Tobago	October 28, 1993	
Germany/Slovenia	October 28, 1993	
Denmark/Russian Federation	November 4, 1993	
Argentina/Finland	November 5, 1993	
China/Lithuania	November 8, 1993	June 1, 1994
Czech Republic/Romania	November 8, 1993	July 28, 1994
Czech Republic/Portugal	November 12, 1993	August 3, 1994
Argentina/Venezuela	November 16, 1993	July 1, 1993
Portugal/Romania	November 17, 1993	November 17, 1994
Ecuador/Venezuela	November 18, 1993	February 1, 1995
Switzerland/Venezuela	November 18, 1993	November 30, 1994
Gambia/Switzerland	November 22, 1993	
United Kingdom/Uzbekistan	November 24, 1993	November 24, 1993
Russian Federation/Slovenia	November 30, 1993	
China/Uruguay	December 2, 1993	
Bulgaria/Israel	December 6, 1993	
Honduras/United Kingdom	December 7, 1993	March 8, 1995
1994		
Tanzania/United Kingdom	January 7, 1994	
Belarus/United States	January 15, 1994	
Korea/Spain	January 17, 1994	July 19, 1994
Egypt/Indonesia	January 19, 1994	
Germany/Namibia	January 21, 1994	Provisionally in force
Indonesia/Malaysia	January 22, 1994	
Albania/Malaysia	January 24, 1994	
Latvia/United Kingdom	January 24, 1994	February 15, 1995
Lithuania/Netherlands	January 26, 1994	April 1, 1995
Ecuador/Paraguay	January 28, 1994	September 18, 1995
Morocco/Romania	January 28, 1994	August 1, 1994
Paraguay/Peru	January 31, 1994	December 18, 1994
Argentina/Jamaica	February 2, 1994	
Denmark/Hong Kong	February 2, 1994	March 4, 1994
Jamaica/United States	February 4, 1994	
Lithuania/Ukraine	February 8, 1994	March 6, 1995
Azerbaijan/Turkey	February 9, 1994	
Brazil/Portugal	February 9, 1994	
Czech Republic/Tajikistan	February 11, 1994	
Czech Republic/Thailand	February 12, 1994	May 4, 1995
Moldova/Turkey	February 14, 1994	
Slovak Republic/Tajikistan	February 14, 1994	March 12, 1996

PARTIES	***SIGNATURE***	***ENTRY INTO FORCE***
Greece/Morocco	February 16, 1994	
Argentina/Ecuador	February 20, 1994	December 1, 1995
Israel/Latvia	February 27, 1994	May 9, 1995
Germany/Moldova	February 28, 1994	
Belarus/United Kingdom	March 1, 1994	December 28, 1994
Lao PDR/Mongolia	March 3, 1994	
Romania/Slovak Republic	March 3, 1994	March 7, 1996
Ukraine/United States	March 4, 1994	
Georgia/United States	March 7, 1994	
Azerbaijan/China	March 8, 1994	April 1, 1995
Lithuania/Romania	March 8, 1994	December 15, 1994
Colombia/United Kingdom	March 9, 1994	
Netherlands/Vietnam	March 10, 1994	February 1, 1995
Estonia/Israel	March 14, 1994	
India/United Kingdom	March 14, 1994	January 6, 1995
Latvia/Netherlands	March 14, 1994	April 1, 1995
Czech Republic/Peru	March 16, 1994	March 6, 1995
Nicaragua/Spain	March 16, 1994	March 28, 1995
Argentina/Bolivia	March 17, 1994	May 1, 1995
Congo/Italy	March 17, 1994	
Czech Republic/Ukraine	March 17, 1994	
Finland/Thailand	March 18, 1994	
Honduras/Spain	March 18, 1994	May 23, 1996
China/Ecuador	March 21, 1994	
Brazil/Chile	March 22, 1994	
Chile/China	March 23, 1994	
Spain/Spain	March 23, 1994	June 22, 1995
Albania/United Kingdom	March 30, 1994	August 30, 1995
Germany/Kuwait	March 30, 1994	
China/Iceland	March 31, 1994	
Czech Republic/Russian Federation	April 5, 1994	
Australia/Lao PDR	April 6, 1994	April 8, 1995
Indonesia/Netherlands	April 6, 1994	July 1, 1995
Korea/Philippines	April 7, 1994	
Bulgaria/Poland	April 11, 1994	March 9, 1995
Albania/Netherlands	April 15, 1994	September 1, 1995
Bulgaria/Sweden	April 19, 1994	April 1, 1995
Estonia/United States	April 19, 1994	
Netherlands/Romania	April 19, 1994	February 1, 1995
China/Egypt	April 21, 1994	
Colombia/Peru	April 26, 1994	
Hungary/Vietnam	April 26, 1994	June 16, 1995
Albania/Bulgaria	April 27, 1994	January 28, 1996
France/Turkmenistan	April 28, 1994	
Malaysia/Zimbabwe	April 28, 1994	
France/Ukraine	May 3, 1994	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Peru/Sweden	May 3, 1994	August 1, 1994
Italy/Peru	May 5, 1994	October 18, 1995
Ecuador/United Kingdom	May 10, 1994	August 24, 1995
Albania/Romania	May 11, 1994	September 2, 1995
Estonia/United Kingdom	May 12, 1994	December 16, 1994
Kazakhstan/Switzerland	May 12, 1994	
Austria/Estonia	May 16, 1994	October 1, 1995
Ecuador/El Salvador	May 16, 1994	January 14, 1996
Peru/Romania	May 16, 1994	January 1, 1995
Argentina/Korea	May 17, 1994	
Paraguay/Romania	May 21, 1994	April 12, 1995
Cuba/Spain	May 27, 1994	June 9, 1995
Hong Kong/Sweden	May 27, 1994	June 26, 1994
Malaysia/Turkmenistan	May 30, 1994	
Bulgaria/Romania	June 1, 1994	May 23, 1995
France/Kyrgyz Republic	June 2, 1994	
Bulgaria/Hungary	June 8, 1994	September 7, 1995
Croatia/Romania	June 8, 1994	September 9, 1995
China/Peru	June 9, 1994	February 1, 1995
Denmark/Romania	June 14, 1994	August 24, 1995
Russian Federation/Vietnam	June 16, 1994	
Portugal/Venezuela	June 17, 1994	May 11, 1995
Slovak Republic/Ukraine	June 22, 1994	April 3, 1996
Poland/Romania	June 23, 1994	December 30, 1994
Albania/Czech Republic	June 27, 1994	July 7, 1995
Algeria/Romania	June 28, 1994	December 30, 1995
Armenia/Kyrgyz Republic	July 4, 1994	
Bulgaria/Turkey	July 6, 1994	
Lithuania/Spain	July 6, 1994	December 22, 1995
Lithuania/Turkey	July 11, 1994	
China/Romania	July 12, 1994	September 1, 1995
Indonesia/Slovak Republic	July 12, 1994	March 1, 1995
Netherlands/Ukraine	July 14, 1994	
Barbados/Venezuela	July 15, 1994	
Brazil/United Kingdom	July 19, 1994	
Bulgaria/Slovak Republic	July 21, 1994	March 9, 1995
Portugal/Russian Federation	July 22, 1994	
Namibia/Switzerland	August 1, 1994	
Switzerland/Zambia	August 3, 1994	March 7, 1995
Malaysia/Namibia	August 12, 1994	
Cambodia/Malaysia	August 17, 1994	
Poland/Slovak Republic	August 18, 1994	March 14, 1996
Poland/Vietnam	August 31, 1994	November 24, 1994
Greece/Ukraine	September 1, 1994	
Romania/Vietnam	September 1, 1994	August 15, 1995
Argentina/Malaysia	September 6, 1994	

PARTIES	***SIGNATURE***	***ENTRY INTO FORCE***
Ecuador/France	September 7, 1994	June 10, 1996
Costa Rica/Germany	September 13, 1994	
Hungary/Mongolia	September 13, 1994	
France/Philippines	September 13, 1994	
Lithuania/Lithuania	September 15, 1994	
Pakistan/Spain	September 15, 1994	April 26, 1996
Ukraine/Ukraine	September 17, 1994	
Armenia/Romania	September 20, 1994	December 24, 1995
South Africa/United Kingdom	September 20, 1994	
Poland/Poland	September 21, 1994	May 25, 1995
Bolivia/Chile	September 22, 1994	
Hong Kong/Switzerland	September 22, 1994	October 22, 1994
Italy/Kazakhstan	September 22, 1994	
Trinidad and Tobago/United States	September 26, 1994	
Israel/Lithuania	October 2, 1994	
Jordan/Malaysia	October 2, 1994	
Argentina/Portugal	October 6, 1994	
Mongolia/United States	October 6, 1994	
Argentina/Peru	October 10, 1994	
Hungary/Ukraine	October 11, 1994	
Bangladesh/Malaysia	October 12, 1994	
France/Oman	October 17, 1994	
Indonesia/Lao PDR	October 18, 1994	
Canada/Ukraine	October 24, 1994	June 24, 1995
Czech Republic/Estonia	October 24, 1994	July 18, 1995
Morocco/Poland	October 24, 1994	May 29, 1995
Czech Republic/Latvia	October 25, 1994	August 1, 1995
China/Jamaica	October 26, 1994	
Czech Republic/Lithuania	October 27, 1994	July 12, 1995
Bangladesh/Netherlands	November 1, 1994	
Georgia/Greece	November 9, 1994	
Brazil/Switzerland	November 11, 1994	
Moldova/Poland	November 16, 1994	July 27, 1995
Austria/Latvia	November 17, 1994	
Peru/Spain	November 17, 1994	February 16, 1996
China/Indonesia	November 18, 1994	April 1, 1995
Kuwait/Russian Federation	November 21, 1994	
Peru/Portugal	November 22, 1994	October 2, 1995
Czech Republic/United Arab Emirates	November 23, 1994	
Denmark/Peru	November 23, 1994	February 17, 1995
Egypt/Romania	November 24, 1994	
Chile/Croatia	November 28, 1994	
Denmark/Venezuela	November 28, 1994	
Pakistan/United Kingdom	November 30, 1994	November 30, 1994
Italy/Lithuania	December 1, 1994	
Argentina/Croatia	December 2, 1994	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Barbados/Germany	December 2, 1994	
Mongolia/Mongolia	December 2, 1994	May 13, 1995
Hungary/Kazakhstan	December 7, 1994	March 3, 1996
Bulgaria/Ukraine	December 8, 1994	December 10, 1995
El Salvador/Switzerland	December 8, 1994	
Kyrgyz Republic/United Kingdom	December 8, 1994	
Bosnia and Herzegovina/Malaysia	December 16, 1994	
Croatia/Malaysia	December 16, 1994	
United States/Uzbekistan	December 16, 1994	
Belarus/Sweden	December 20, 1994	
Ethiopia/Italy	December 23, 1994	
Algeria/Spain	December 23, 1994	January 17, 1996
India/Russian Federation	December 23, 1994	
Netherlands/Peru	December 27, 1994	February 1, 1996
1995		
Albania/United States	January 10, 1995	
Poland/Uzbekistan	January 11, 1995	April 29, 1995
Latvia/United States	January 13, 1995	
Armenia/Cyprus	January 18, 1995	
Bulgaria/Georgia	January 19, 1995	
Italy/United Arab Emirates	January 22, 1995	
Australia/Philippines	January 25, 1995	December 8, 1995
Greece/Korea	January 25, 1995	November 4, 1995
Romania/Spain	January 25, 1995	December 7, 1995
Cuba/United Kingdom	January 30, 1995	May 11, 1995
Germany/Peru	January 30, 1995	
Turkmenistan/United Kingdom	February 9, 1995	February 9, 1995
El Salvador/Spain	February 14, 1995	February 20, 1996
Estonia/Ukraine	February 15, 1995	July 5, 1995
Georgia/United Kingdom	February 15, 1995	February 15, 1995
Spain/Turkey	February 15, 1995	
Croatia/Poland	February 21, 1995	October 4, 1995
Germany/Ghana	February 24, 1995	
United Kingdom/Zimbabwe	March 1, 1995	
Gabon/Spain	March 2, 1995	
Hungary/Russian Federation	March 8, 1995	
Mongolia/Netherlands	March 9, 1995	June 1, 1996
Norway/Peru	March 10, 1995	May 9, 1995
Bolivia/Denmark	March 12, 1995	
Denmark/Nicaragua	March 12, 1995	January 26, 1996
Denmark/Mongolia	March 13, 1995	
United Kingdom/Venezuela	March 15, 1995	August 1, 1996
Dominican Republic/Spain	March 16, 1995	October 7, 1996
Pakistan/Turkey	March 16, 1995	
China/Oman	March 18, 1995	
Brazil/France	March 21, 1995	

PARTIES	SIGNATURE	ENTRY INTO FORCE
France/Romania	March 21, 1995	
Germany/Honduras	March 21, 1995	
Austria/Vietnam	March 27, 1995	
China/Morocco	March 27, 1995	
Brazil/Finland	March 28, 1995	
Italy/Turkey	March 28, 1995	
Barbados/Switzerland	March 29, 1995	December 22, 1995
Cambodia/Thailand	March 29, 1995	
Albania/Sweden	March 31, 1995	April 1, 1996
Brazil/Italy	April 3, 1995	
Malaysia/Spain	April 4, 1995	February 16, 1996
Czech Republic/Philippines	April 5, 1995	
Czech Republic/Singapore	April 8, 1995	
Armenia/Bulgaria	April 10, 1995	
China/Israel	April 10, 1995	
Albania/Russian Federation	April 11, 1995	
Belarus/Netherlands	April 11, 1995	August 1, 1996
Kuwait/Tajikistan	April 18, 1995	
Hungary/Moldova	April 19, 1995	
Kuwait/Malta	April 19, 1995	
Russian Federation/Sweden	April 19, 1995	
Switzerland/Ukraine	April 20, 1995	
Chile/Czech Republic	April 24, 1995	
China/Cuba	April 24, 1995	
Lithuania/Venezuela	April 24, 1995	
Canada/Latvia	April 26, 1995	July 27, 1995
Czech Republic/Venezuela	April 27, 1995	
Chile/Portugal	April 28, 1995	
Finland/Peru	May 2, 1995	
Italy/Ukraine	May 2, 1995	
Korea/Portugal	May 3, 1995	
Brazil/Denmark	May 4, 1995	
Swaziland/United Kingdom	May 5, 1995	May 5, 1995
Bolivia/Cuba	May 6, 1995	
Croatia/Portugal	May 9, 1995	
Netherlands/South Africa	May 9, 1995	
Egypt/Hungary	May 23, 1995	
Egypt/Turkmenistan	May 23, 1995	
Bolivia/Ecuador	May 25, 1995	
Belarus/Romania	May 27, 1995	
Indonesia/Spain	May 30, 1995	
Austria/Tunisia	June 1, 1995	
Lao PDR/United Kingdom	June 1, 1995	June 1, 1995
Côte d'Ivoire/United Kingdom	June 8, 1995	
Colombia/Spain	June 9, 1995	
Albania/France	June 13, 1995	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Mexico/Spain	June 22, 1995	
Argentina/Israel	June 23, 1995	
South Africa/Switzerland	June 27, 1995	
Egypt/Poland	July 1, 1995	
Honduras/United States	July 1, 1995	
Nicaragua/United States	July 1, 1995	
Chile/Romania	July 4, 1995	
Chile/Poland	July 5, 1995	
Hong Kong/New Zealand	July 6, 1995	August 5, 1995
Korea/South Africa	July 7, 1995	
Malaysia/Pakistan	July 7, 1995	
Germany/India	July 10, 1995	
Mexico/Switzerland	July 10, 1995	
Pakistan/Switzerland	July 11, 1995	
Oman/Sweden	July 13, 1995	June 8, 1996
Romania/United Kingdom	July 13, 1995	January 10, 1996
Belarus/Iran	July 14, 1995	
Korea/Tajikistan	July 14, 1995	August 13, 1995
Indonesia/Kyrgyz Republic	July 18, 1995	
Kyrgyz Republic/Malaysia	July 20, 1995	
Mongolia/Singapore	July 24, 1995	January 14, 1996
Belarus/Italy	July 25, 1995	
Malaysia/Mongolia	July 27, 1995	January 14, 1996
Greece/Latvia	July 29, 1995	
India/Malaysia	August 3, 1995	
Chile/Paraguay	August 7, 1995	
Belarus/Turkey	August 8, 1995	
Argentina/Ukraine	August 9, 1995	
Malaysia/Uruguay	August 9, 1995	
Argentina/Australia	August 23, 1995	
Kyrgyz Republic/Pakistan	August 23, 1995	
Finland/Moldova	August 25, 1995	
Moldova/Ukraine	August 29, 1995	
Korea/Sweden	August 30, 1995	
Brazil/Korea	September 1, 1995	
Bulgaria/Spain	September 4, 1995	
Albania/Denmark	September 5, 1995	
Denmark/India	September 6, 1995	
Estonia/Lithuania	September 7, 1995	
Canada/Trinidad and Tobago	September 11, 1995	July 8, 1996
Germany/South Africa	September 11, 1995	
Brazil/Germany	September 21, 1995	
Moldova/Netherlands	September 26, 1995	
Latvia/Portugal	September 27, 1995	
Lithuania/Vietnam	September 27, 1995	
Germany/Zimbabwe	September 29, 1995	

PARTIES	*SIGNATURE*	*ENTRY INTO FORCE*
Philippines/Thailand	September 30, 1995	
India/Turkmenistan	September __, 1995[11]	
Norway/Russian Federation	October 4, 1995	
Bolivia/Romania	October 9, 1995	
France/South Africa	October 11, 1995	
Barbados/Italy	October 25, 1995	
Chile/Uruguay	October 26, 1995	
Chile/Ukraine	October 30, 1995	
Spain/Venezuela	November 2, 1995	
Armenia/France	November 4, 1995	
Egypt/Uganda	November 4, 1995	
India/Netherlands	November 6, 1995	December 1, 1996
Mongolia/Romania	November 6, 1995	
Mongolia/Poland	November 8, 1995	March 21, 1996
Canada/Philippines	November 9, 1995	
Slovenia/Switzerland	November 9, 1995	
Chile/Philippines	November 20, 1995	
Moldova/Uzbekistan	November 21, 1995	
India/Italy	November 23, 1995	
United/United Kingdom	November 23, 1995	November 23, 1995
Oman/United Kingdom	November 25, 1995	
Canada/South Africa	November 27, 1995	
Hong Kong/Italy	November 28, 1995	
France/Hong Kong	November 30, 1995	
Moldova/Switzerland	November 30, 1995	
Mongolia/Russian Federation	November 30, 1995	
Cuba/South Africa	December 8, 1995	
Bulgaria/United Kingdom	December 11, 1995	
Malaysia/Peru	December 13, 1995	
Belarus/Ukraine	December 14, 1995	Provisionally in force
China/Yugoslavia	December 18, 1995	
Armenia/Germany	December 21, 1995	
Azerbaijan/Germany	December 22, 1995	Provisionally in force
Israel/Kazakhstan	December 27, 1995	
India/Tajikistan	December __, 1995[12]	
1996		
Chile/United Kingdom	January 8, 1996	
Czech Republic/Kuwait	January 8, 1996	
Chile/Cuba	January 10, 1996	
France/Morocco	January 13, 1996	
Iran/Kazakhstan	January 16, 1996	
Egypt/Netherlands	January 17, 1996	

[11]) *Ibid.*

[12]) *Ibid.*

PARTIES	*SIGNATURE*	*ENTRY INTO FORCE*
Czech Republic/Italy	January 22, 1996	
Albania/Hungary	January 24, 1996	
Romania/Slovenia	January 24, 1996	
Germany/Hong Kong	January 31, 1996	
India/Israel	January __, 1996[13]	
Eritrea/Italy	February 6, 1996	
Croatia/Slovak Republic	February 12, 1996	
Croatia/Turkey	February 12, 1996	
Belarus/Bulgaria	February 21, 1996	
Denmark/South Africa	February 22, 1996	
Lebanon/Spain	February 22, 1996	
Bosnia and Herzegovina/Croatia	February 26, 1996	
India/Korea	February 26, 1996	May 7, 1996
Croatia/Czech Republic	March 5, 1996	
Algeria/Germany	March 11, 1996	
Egypt/Sri Lanka	March 11, 1996	
Netherlands/Uzbekistan	March 14, 1996	
Egypt/Korea	March 18, 1996	
Moldova/United Kingdom	March 19, 1996	
Korea/Korea	March 20, 1996	
Ecuador/Germany	March 21, 1996	
Bolivia/Korea	April 1, 1996	
Italy/Russian Federation	April 9, 1996	
Bulgaria/Moldova	April 17, 1996	
Canada/Romania	April 17, 1996	
Romania/Romania	April 25, 1996	
Canada/Ecuador	April 29, 1996	
Cuba/Germany	April 30, 1996	
Germany/Kenya	May 3, 1996	
Germany/Nicaragua	May 6, 1996	
Argentina/El Salvador	May 9, 1996	
Germany/Venezuela	May 14, 1996	
Croatia/Hungary	May 15, 1996	
Korea/Lao PDR	May 15, 1996	
Croatia/Russian Federation	May 20, 1996	
Belgium-Luxembourg/Moldova	May 21, 1996	
Bulgaria/Morocco	May 22, 1996	
Barbados/Canada	May 29, 1996	
Croatia/France	June 3, 1996	
Macedonia, FYR of/Slovenia	June 5, 1996	
El Salvador/Peru	June 13, 1996	
Germany/Qatar	June 14, 1996	
Germany/Romania	June 25, 1996	
Ecuador/Spain	June 26, 1996	
Canada/Venezuela	July 1, 1996	

[13]) *Ibid.*

PARTIES	SIGNATURE	ENTRY INTO FORCE
Germany/Lao PDR	August 9, 1996	
Germany/Macedonia, FYR of	September 10, 1996	
Canada/Panama	September 12, 1996	
Netherlands/Slovenia	September 24, 1996	
Belgium-Luxembourg/Hong Kong	October 7, 1996	
Austria/Hong Kong	October 11, 1996	
Germany/Burkina Faso	October 22, 1996	
Germany/Saudi Arabia	October 29, 1996	
Croatia/Netherlands	October 31, 1996	
Chile/Guatemala	November 8, 1996	

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PARTIES	*SIGNATURE*	*ENTRY INTO FORCE*
Albania/Austria	March 18, 1993	August 1, 1995
Albania/Bulgaria	April 27, 1994	January 28, 1996
Albania/China	February 13, 1993	
Albania/Croatia	March 5, 1993	
Albania/Czech Republic	June 27, 1994	July 7, 1995
Albania/Denmark	September 5, 1995	
Albania/Egypt	May 22, 1993	
Albania/France	June 13, 1995	
Albania/Germany	October 31, 1991	August 18, 1995
Albania/Greece	August 1, 1991	July 4, 1995
Albania/Hungary	January 24, 1996	
Albania/Italy	September 12, 1991	
Albania/Malaysia	January 24, 1994	
Albania/Netherlands	April 15, 1994	September 1, 1995
Albania/Poland	March 7, 1993	August 9, 1993
Albania/Romania	May 11, 1994	September 2, 1995
Albania/Russian Federation	April 11, 1995	
Albania/Sweden	March 31, 1995	April 1, 1996
Albania/Switzerland	September 22, 1992	April 30, 1993
Albania/Turkey	June 1, 1992	
Albania/United Kingdom	March 30, 1994	August 30, 1995
Albania/United States	January 10, 1995	
Algeria/Belgium-Luxembourg	April 24, 1991	
Algeria/Germany	March 11, 1996	
Algeria/Italy	May 18, 1991	November 26, 1993
Algeria/Romania	June 28, 1994	December 30, 1995
Algeria/Spain	December 23, 1994	January 17, 1996
Antigua and Barbuda/United Kingdom	June 12, 1987	June 12, 1987
Argentina/Armenia	April 16, 1993	December 20, 1994
Argentina/Australia	August 23, 1995	
Argentina/Austria	August 7, 1992	January 1, 1995
Argentina/Belgium-Luxembourg	June 28, 1990	August 26, 1992
Argentina/Bolivia	March 17, 1994	May 1, 1995
Argentina/Bulgaria	September 21, 1993	
Argentina/Canada	November 5, 1991	April 29, 1993
Argentina/Chile	August 2, 1991	January 1, 1995
Argentina/China	November 5, 1992	June 17, 1994
Argentina/Croatia	December 2, 1994	
Argentina/Denmark	November 6, 1992	January 2, 1995
Argentina/Ecuador	February 20, 1994	December 1, 1995
Argentina/Egypt	May 11, 1992	December 3, 1993
Argentina/El Salvador	May 9, 1996	
Argentina/Finland	November 5, 1993	

PARTIES	*SIGNATURE*	*ENTRY INTO FORCE*
Argentina/France	July 3, 1991	March 3, 1993
Argentina/Germany	April 9, 1991	November 8, 1993
Argentina/Hungary	March 5, 1993	June 2, 1994
Argentina/Israel	June 23, 1995	
Argentina/Italy	May 22, 1990	October 14, 1993
Argentina/Jamaica	February 2, 1994	
Argentina/Korea	May 17, 1994	
Argentina/Malaysia	September 6, 1994	
Argentina/Netherlands	October 20, 1992	October 1, 1994
Argentina/Peru	October 10, 1994	
Argentina/Poland	July 31, 1991	September 1, 1992
Argentina/Portugal	October 6, 1994	
Argentina/Romania	July 29, 1993	May 1, 1995
Argentina/Senegal	April 6, 1993	
Argentina/Spain	October 3, 1991	September 28, 1992
Argentina/Sweden	November 22, 1991	September 28, 1992
Argentina/Switzerland	April 12, 1991	November 6, 1992
Argentina/Tunisia	June 17, 1992	January 23, 1995
Argentina/Turkey	May 8, 1992	May 1, 1995
Argentina/Ukraine	August 9, 1995	
Argentina/United Kingdom	December 11, 1990	February 19, 1993
Argentina/United States	November 14, 1991	October 20, 1994
Argentina/Venezuela	November 16, 1993	July 1, 1993
Armenia/Argentina	April 16, 1993	December 20, 1994
Armenia/Bulgaria	April 10, 1995	
Armenia/China	July 4, 1992	
Armenia/Cyprus	January 18, 1995	
Armenia/France	November 4, 1995	
Armenia/Germany	December 21, 1995	
Armenia/Greece	May 25, 1993	April 28, 1995
Armenia/Kyrgyz Republic	July 4, 1994	
Armenia/Romania	September 20, 1994	December 24, 1995
Armenia/United Kingdom	May 27, 1993	July 11, 1996
Armenia/United States	September 23, 1992	
Armenia/Vietnam	February __, 1993[14]	
Australia/Argentina	August 23, 1995	
Australia/China	July 11, 1988	July 11, 1988
Australia/Czech Republic	September 30, 1993	June 29, 1994
Australia/Hong Kong	September 15, 1993	October 15, 1993
Australia/Hungary	August 15, 1991	May 10, 1992
Australia/Indonesia	November 17, 1992	July 29, 1993
Australia/Lao PDR	April 6, 1994	April 8, 1995
Australia/Papua New Guinea	September 3, 1990	October 20, 1991
Australia/Philippines	January 25, 1995	December 8, 1995
Australia/Poland	May 7, 1991	March 27, 1992

[14]) *Ibid.*

PARTIES	SIGNATURE	ENTRY INTO FORCE
Australia/Romania	June 21, 1993	April 22, 1994
Australia/Vietnam	March 5, 1991	September 11, 1991
Austria/Albania	March 18, 1993	August 1, 1995
Austria/Argentina	August 7, 1992	January 1, 1995
Austria/Bulgaria	May 15, 1981	
Austria/Cape Verde	September 3, 1991	April 1, 1993
Austria/China	September 12, 1985	October 11, 1986
Austria/Czech Republic	October 15, 1990	October 1, 1991
Austria/Estonia	May 16, 1994	October 1, 1995
Austria/Hong Kong	October 11, 1996	
Austria/Hungary	May 26, 1988	September 1, 1989
Austria/Korea	March 14, 1991	November 1, 1991
Austria/Latvia	November 17, 1994	
Austria/Malaysia	April 12, 1985	January 1, 1987
Austria/Morocco	November 2, 1992	July 1, 1995
Austria/Paraguay	August 13, 1993	
Austria/Poland	November 24, 1988	November 1, 1989
Austria/Romania	September 30, 1976	November 8, 1977
Austria/Slovak Republic	October 15, 1990	October 1, 1991
Austria/Tunisia	June 1, 1995	
Austria/Turkey	September 16, 1988	January 1, 1992
Austria/Vietnam	March 27, 1995	
Austria/Yugoslavia	October 25, 1989	June 1, 1991
Azerbaijan/China	March 8, 1994	April 1, 1995
Azerbaijan/Germany	December 22, 1995	Provisionally in force
Azerbaijan/Turkey	February 9, 1994	
Bahrain/United Kingdom	October 30, 1991	October 30, 1991
Bangladesh/Belgium-Luxembourg	May 22, 1981	September 14, 1987
Bangladesh/France	September 10, 1985	October 3, 1986
Bangladesh/Germany	May 6, 1981	September 14, 1986
Bangladesh/Italy	March 20, 1990	September 20, 1994
Bangladesh/Korea	June 18, 1986	October 6, 1988
Bangladesh/Malaysia	October 12, 1994	
Bangladesh/Netherlands	November 1, 1994	
Bangladesh/Romania	March 13, 1987	October 31, 1987
Bangladesh/Thailand	March 13, 1988	
Bangladesh/Turkey	November 12, 1987	June 21, 1990
Bangladesh/United Kingdom	June 19, 1980	June 19, 1980
Bangladesh/United States	March 12, 1986	July 25, 1989
Barbados/Canada	May 29, 1996	
Barbados/Germany	December 2, 1994	
Barbados/Italy	October 25, 1995	
Barbados/Switzerland	March 29, 1995	December 22, 1995

PARTIES	SIGNATURE	ENTRY INTO FORCE
Barbados/United Kingdom	April 7, 1993	April 7, 1993
Barbados/Venezuela	July 15, 1994	
Belarus/Bulgaria	February 21, 1996	
Belarus/China	January 11, 1993	January 14, 1995
Belarus/Finland	October 28, 1992	December 11, 1994
Belarus/France	October 28, 1993	
Belarus/Germany	April 2, 1993	September 23, 1996
Belarus/Iran	July 14, 1995	
Belarus/Italy	July 25, 1995	
Belarus/Netherlands	April 11, 1995	August 1, 1996
Belarus/Poland	April 24, 1992	January 18, 1993
Belarus/Romania	May 27, 1995	
Belarus/Sweden	December 20, 1994	
Belarus/Switzerland	May 28, 1993	July 13, 1994
Belarus/Turkey	August 8, 1995	
Belarus/Ukraine	December 14, 1995	Provisionally in force
Belarus/United Kingdom	March 1, 1994	December 28, 1994
Belarus/United States	January 15, 1994	
Belarus/Vietnam	July 8, 1992	
Belgium-Luxembourg/Algeria	April 24, 1991	
Belgium-Luxembourg/Argentina	June 28, 1990	August 26, 1992
Belgium-Luxembourg/Bangladesh	May 22, 1981	September 14, 1987
Belgium-Luxembourg/Bolivia	April 25, 1990	
Belgium-Luxembourg/Bulgaria	October 25, 1988	May 29, 1991
Belgium-Luxembourg/Burundi	April 13, 1989	September 12, 1993
Belgium-Luxembourg/Cameroon	March 27, 1980	November 1, 1981
Belgium-Luxembourg/Chile	July 15, 1992	
Belgium-Luxembourg/China	June 4, 1984	October 5, 1986
Belgium-Luxembourg/Cyprus	February 26, 1991	
Belgium-Luxembourg/Czech Republic	April 24, 1989	February 13, 1992
Belgium-Luxembourg/Egypt	February 28, 1977	September 20, 1978
Belgium-Luxembourg/Georgia	June 23, 1993	
Belgium-Luxembourg/Hong Kong	October 7, 1996	
Belgium-Luxembourg/Hungary	May 14, 1986	September 23, 1988
Belgium-Luxembourg/Indonesia	January 15, 1970	June 17, 1972
Belgium-Luxembourg/Korea	December 20, 1974	September 3, 1976
Belgium-Luxembourg/Liberia	June 5, 1985	
Belgium-Luxembourg/Malaysia	November 22, 1979	February 8, 1982
Belgium-Luxembourg/Malta	March 5, 1987	April 12, 1993
Belgium-Luxembourg/Mauritania	November 23, 1983	
Belgium-Luxembourg/Moldova	May 21, 1996	
Belgium-Luxembourg/Mongolia	March 3, 1992	
Belgium-Luxembourg/Morocco	April 28, 1965	October 18, 1967
Belgium-Luxembourg/Paraguay	October 6, 1992	
Belgium-Luxembourg/Poland	May 19, 1987	August 2, 1981
Belgium-Luxembourg/Romania	May 8, 1978	May 1, 1980

PARTIES	SIGNATURE	ENTRY INTO FORCE
Belgium-Luxembourg/Russian Federation	February 9, 1989	October 13, 1991
Belgium-Luxembourg/Rwanda	November 2, 1983	August 1, 1985
Belgium-Luxembourg/Singapore	November 17, 1978	November 27, 1980
Belgium-Luxembourg/Slovak Republic	April 24, 1989	February 13, 1992
Belgium-Luxembourg/Sri Lanka	April 5, 1982	April 26, 1984
Belgium-Luxembourg/Thailand	March 19, 1986	
Belgium-Luxembourg/Tunisia	July 15, 1964	March 9, 1966
Belgium-Luxembourg/Turkey	August 27, 1986	May 4, 1990
Belgium-Luxembourg/Uruguay	November 4, 1991	
Belgium-Luxembourg/Vietnam	January 24, 1991	
Belgium-Luxembourg/Zaire	March 28, 1976	January 1, 1977
Belize/United Kingdom	April 30, 1982	April 30, 1982
Benin/Germany	June 29, 1978	July 18, 1985
Benin/Switzerland	April 20, 1966	October 6, 1973
Benin/United Kingdom	November 27, 1987	November 27, 1987
Bolivia/Argentina	March 17, 1994	May 1, 1995
Bolivia/Belgium-Luxembourg	April 25, 1990	
Bolivia/Chile	September 22, 1994	
Bolivia/China	May 8, 1992	
Bolivia/Cuba	May 6, 1995	
Bolivia/Denmark	March 12, 1995	
Bolivia/Ecuador	May 25, 1995	
Bolivia/France	October 25, 1989	
Bolivia/Germany	March 23, 1987	November 9, 1990
Bolivia/Italy	April 30, 1990	February 22, 1992
Bolivia/Korea	April 1, 1996	
Bolivia/Netherlands	March 10, 1992	November 1, 1994
Bolivia/Peru	July 30, 1993	February 19, 1995
Bolivia/Romania	October 9, 1995	
Bolivia/Spain	April 24, 1990	May 12, 1992
Bolivia/Sweden	September 20, 1990	July 3, 1992
Bolivia/Switzerland	November 6, 1987	May 13, 1991
Bolivia/United Kingdom	May 24, 1988	February 16, 1990
Bosnia and Herzegovina/Croatia	February 26, 1996	
Bosnia and Herzegovina/Malaysia	December 16, 1994	
Brazil/Chile	March 22, 1994	
Brazil/Denmark	May 4, 1995	
Brazil/Finland	March 28, 1995	
Brazil/France	March 21, 1995	
Brazil/Germany	September 21, 1995	
Brazil/Italy	April 3, 1995	
Brazil/Korea	September 1, 1995	
Brazil/Portugal	February 9, 1994	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Brazil/Switzerland	November 11, 1994	
Brazil/United Kingdom	July 19, 1994	
Bulgaria/Albania	April 27, 1994	January 28, 1996
Bulgaria/Argentina	September 21, 1993	
Bulgaria/Armenia	April 10, 1995	
Bulgaria/Austria	May 15, 1981	
Bulgaria/Belarus	February 21, 1996	
Bulgaria/Belgium-Luxembourg	October 25, 1988	May 29, 1991
Bulgaria/China	June 27, 1989	August 21, 1994
Bulgaria/Cyprus	November 12, 1987	May 22, 1988
Bulgaria/Denmark	April 14, 1993	May 20, 1995
Bulgaria/Finland	February 16, 1984	July 16, 1985
Bulgaria/France	April 5, 1989	May 1, 1990
Bulgaria/Georgia	January 19, 1995	
Bulgaria/Germany	April 12, 1986	March 10, 1988
Bulgaria/Ghana	October 20, 1989	
Bulgaria/Greece	March 12, 1993	April 29, 1995
Bulgaria/Hungary	June 8, 1994	September 7, 1995
Bulgaria/Israel	December 6, 1993	
Bulgaria/Italy	December 5, 1988	December 27, 1990
Bulgaria/Malta	June 12, 1984	February 7, 1985
Bulgaria/Moldova	April 17, 1996	
Bulgaria/Morocco	May 22, 1996	
Bulgaria/Netherlands	March 8, 1988	May 24, 1990
Bulgaria/Poland	April 11, 1994	March 9, 1995
Bulgaria/Portugal	May 27, 1993	
Bulgaria/Romania	June 1, 1994	May 23, 1995
Bulgaria/Russian Federation	June 8, 1993	
Bulgaria/Slovak Republic	July 21, 1994	March 9, 1995
Bulgaria/Spain	September 4, 1995	
Bulgaria/Sweden	April 19, 1994	April 1, 1995
Bulgaria/Switzerland	October 28, 1991	October 26, 1993
Bulgaria/Turkey	July 6, 1994	
Bulgaria/Ukraine	December 8, 1994	December 10, 1995
Bulgaria/United Kingdom	December 11, 1995	
Bulgaria/United States	September 23, 1992	June 2, 1994
Burkina Faso/Germany	October 22, 1996	
Burkina Faso/Switzerland	May 6, 1969	September 15, 1969
Burundi/Belgium-Luxembourg	April 13, 1989	September 12, 1993
Burundi/Germany	September 10, 1984	December 9, 1987
Burundi/United Kingdom	September 13, 1990	September 13, 1990
Cambodia/Malaysia	August 17, 1994	
Cambodia/Thailand	March 29, 1995	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Cameroon/Belgium-Luxembourg	March 27, 1980	November 1, 1981
Cameroon/Germany	June 29, 1962	November 21, 1963
Cameroon/Netherlands	July 6, 1965	May 7, 1966
Cameroon/Romania	August 30, 1980	December 16, 1981
Cameroon/Switzerland	January 28, 1963	April 6, 1964
Cameroon/United Kingdom	June 4, 1982	June 7, 1985
Cameroon/United States	February 26, 1986	April 6, 1989
Canada/Argentina	November 5, 1991	April 29, 1993
Canada/Barbados	May 29, 1996	
Canada/Czech Republic	November 15, 1990	March 9, 1992
Canada/Ecuador	April 29, 1996	
Canada/Hungary	October 3, 1991	November 21, 1993
Canada/Latvia	April 26, 1995	July 27, 1995
Canada/Panama	September 12, 1996	
Canada/Philippines	November 9, 1995	
Canada/Poland	April 6, 1990	November 22, 1990
Canada/Romania	April 17, 1996	
Canada/Russian Federation	November 20, 1989	June 27, 1991
Canada/Slovak Republic	November 15, 1990	March 9, 1992
Canada/South Africa	November 27, 1995	
Canada/Trinidad and Tobago	September 11, 1995	July 8, 1996
Canada/Ukraine	October 24, 1994	June 24, 1995
Canada/Uruguay	May 16, 1991	
Canada/Venezuela	July 1, 1996	
Cape Verde/Austria	September 3, 1991	April 1, 1993
Cape Verde/Germany	January 18, 1990	December 15, 1993
Cape Verde/Netherlands	November 11, 1991	November 25, 1992
Cape Verde/Portugal	October 26, 1990	October 4, 1991
Cape Verde/Switzerland	October 28, 1991	May 6, 1992
Central African Republic/Germany	August 23, 1965	January 21, 1968
Central African Republic/Switzerland	February 28, 1973	July 4, 1973
Chad/Germany	April 11, 1967	November 23, 1968
Chad/Italy	June 11, 1969	June 11, 1969
Chad/Switzerland	February 21, 1967	October 31, 1967
Chile/Argentina	August 2, 1991	January 1, 1995
Chile/Belgium-Luxembourg	July 15, 1992	
Chile/Bolivia	September 22, 1994	
Chile/Brazil	March 22, 1994	
Chile/China	March 23, 1994	
Chile/Croatia	November 28, 1994	
Chile/Cuba	January 10, 1996	
Chile/Czech Republic	April 24, 1995	
Chile/Denmark	May 28, 1993	November 3, 1995

PARTIES	SIGNATURE	ENTRY INTO FORCE
Chile/Ecuador	October 27, 1993	January 2, 1996
Chile/Finland	May 27, 1993	
Chile/France	July 14, 1992	
Chile/Germany	October 21, 1991	
Chile/Guatemala	November 8, 1996	
Chile/Italy	March 8, 1993	February 8, 1995
Chile/Malaysia	November 11, 1992	
Chile/Norway	June 1, 1993	September 8, 1994
Chile/Paraguay	August 7, 1995	
Chile/Philippines	November 20, 1995	
Chile/Poland	July 5, 1995	
Chile/Portugal	April 28, 1995	
Chile/Romania	July 4, 1995	
Chile/Spain	October 2, 1991	March 29, 1994
Chile/Sweden	May 24, 1993	December 30, 1995
Chile/Switzerland	November 11, 1991	
Chile/Ukraine	October 30, 1995	
Chile/United Kingdom	January 8, 1996	
Chile/Uruguay	October 26, 1995	
Chile/Venezuela	April 2, 1993	May 25, 1995
China/Albania	February 13, 1993	
China/Argentina	November 5, 1992	June 17, 1994
China/Armenia	July 4, 1992	
China/Australia	July 11, 1988	July 11, 1988
China/Austria	September 12, 1985	October 11, 1986
China/Azerbaijan	March 8, 1994	April 1, 1995
China/Belarus	January 11, 1993	January 14, 1995
China/Belgium-Luxembourg	June 4, 1984	October 5, 1986
China/Bolivia	May 8, 1992	
China/Bulgaria	June 27, 1989	August 21, 1994
China/Chile	March 23, 1994	
China/Croatia	June 7, 1993	July 1, 1994
China/Cuba	April 24, 1995	
China/Czech Republic	December 4, 1991	December 1, 1992
China/Denmark	April 29, 1985	April 29, 1985
China/Ecuador	March 21, 1994	
China/Egypt	April 21, 1994	
China/Estonia	September 2, 1993	June 1, 1994
China/Finland	September 4, 1984	January 26, 1986
China/France	May 30, 1984	March 19, 1985
China/Georgia	June 3, 1993	March 1, 1995
China/Germany	October 7, 1983	March 18, 1985
China/Ghana	October 12, 1989	
China/Greece	June 25, 1992	December 21, 1993
China/Hungary	May 29, 1991	April 1, 1993
China/Iceland	March 31, 1994	
China/Indonesia	November 18, 1994	April 1, 1995

PARTIES	SIGNATURE	ENTRY INTO FORCE
China/Israel	April 10, 1995	
China/Italy	January 28, 1985	August 28, 1987
China/Jamaica	October 26, 1994	
China/Japan	August 27, 1988	May 14, 1989
China/Kazakhstan	August 10, 1992	August 13, 1994
China/Korea	September 30, 1992	December 4, 1992
China/Kuwait	November 23, 1985	December 24, 1986
China/Kyrgyz Republic	May 14, 1992	
China/Lao PDR	January 31, 1993	June 1, 1993
China/Lithuania	November 8, 1993	June 1, 1994
China/Malaysia	November 21, 1988	March 31, 1990
China/Moldova	November 7, 1992	March 1, 1995
China/Mongolia	August 26, 1991	November 1, 1993
China/Morocco	March 27, 1995	
China/Netherlands	June 17, 1985	February 1, 1987
China/New Zealand	November 22, 1988	March 25, 1989
China/Norway	November 21, 1984	July 10, 1985
China/Oman	March 18, 1995	
China/Pakistan	February 12, 1989	September 30, 1990
China/Papua New Guinea	April 12, 1991	February 12, 1993
China/Peru	June 9, 1994	February 1, 1995
China/Philippines	July 20, 1992	
China/Poland	June 7, 1988	January 8, 1989
China/Portugal	February 3, 1992	
China/Romania	July 12, 1994	September 1, 1995
China/Russian Federation	July 21, 1990	
China/Singapore	November 21, 1985	February 7, 1986
China/Slovak Republic	December 4, 1991	December 1, 1992
China/Slovenia	September 13, 1993	January 1, 1995
China/Spain	February 6, 1992	May 1, 1993
China/Sri Lanka	March 13, 1986	March 25, 1987
China/Sweden	March 29, 1982	March 29, 1982
China/Switzerland	November 12, 1986	March 18, 1987
China/Tajikistan	March 9, 1993	January 20, 1994
China/Thailand	March 12, 1985	December 13, 1985
China/Turkey	November 13, 1990	August 19, 1994
China/Turkmenistan	November 21, 1992	June 6, 1995
China/Ukraine	October 31, 1992	May 5, 1993
China/United Arab Emirates	July 1, 1993	September 28, 1994
China/United Kingdom	May 15, 1986	May 15, 1986
China/Uruguay	December 2, 1993	
China/Uzbekistan	March 13, 1992	April 14, 1994
China/Vietnam	December 2, 1992	September 1, 1993
China/Yugoslavia	December 18, 1995	
Colombia/Peru	April 26, 1994	
Colombia/Spain	June 9, 1995	
Colombia/United Kingdom	March 9, 1994	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Congo/Germany	September 13, 1965	October 14, 1967
Congo/Italy	March 17, 1994	
Congo/Switzerland	October 18, 1962	July 11, 1964
Congo/United Kingdom	May 25, 1989	November 9, 1990
Congo/United States	February 12, 1990	August 13, 1994
Costa Rica/France	March 8, 1984	
Costa Rica/Germany	September 13, 1994	
Costa Rica/Switzerland	September 1, 1965	August 18, 1966
Costa Rica/United Kingdom	September 7, 1982	
Côte d'Ivoire/Germany	October 27, 1966	June 10, 1968
Côte d'Ivoire/Italy	July 23, 1969	
Côte d'Ivoire/Netherlands	April 26, 1965	September 8, 1966
Côte d'Ivoire/Sweden	August 27, 1965	November 3, 1966
Côte d'Ivoire/Switzerland	June 26, 1962	November 18, 1962
Côte d'Ivoire/United Kingdom	June 8, 1995	
Croatia/Albania	March 5, 1993	
Croatia/Argentina	December 2, 1994	
Croatia/Bosnia and Herzegovina	February 26, 1996	
Croatia/Chile	November 28, 1994	
Croatia/China	June 7, 1993	July 1, 1994
Croatia/Czech Republic	March 5, 1996	
Croatia/France	June 3, 1996	
Croatia/Hungary	May 15, 1996	
Croatia/Malaysia	December 16, 1994	
Croatia/Netherlands	October 31, 1996	
Croatia/Poland	February 21, 1995	October 4, 1995
Croatia/Portugal	May 9, 1995	
Croatia/Romania	June 8, 1994	September 9, 1995
Croatia/Russian Federation	May 20, 1996	
Croatia/Slovak Republic	February 12, 1996	
Croatia/Turkey	February 12, 1996	
Cuba/Bolivia	May 6, 1995	
Cuba/Chile	January 10, 1996	
Cuba/China	April 24, 1995	
Cuba/Germany	April 30, 1996	
Cuba/Italy	May 7, 1993	August 23, 1995
Cuba/Russian Federation	July 7, 1993	
Cuba/South Africa	December 8, 1995	
Cuba/Spain	May 27, 1994	June 9, 1995
Cuba/United Kingdom	January 30, 1995	May 11, 1995
Cyprus/Armenia	January 18, 1995	
Cyprus/Belgium-Luxembourg	February 26, 1991	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Cyprus/Bulgaria	November 12, 1987	May 22, 1988
Cyprus/Greece	March 30, 1992	February 26, 1993
Cyprus/Hungary	May 24, 1989	May 25, 1990
Cyprus/Poland	June 4, 1992	July 6, 1993
Cyprus/Romania	July 26, 1991	July 25, 1993
Czech Republic/Albania	June 27, 1994	July 7, 1995
Czech Republic/Australia	September 30, 1993	June 29, 1994
Czech Republic/Austria	October 15, 1990	October 1, 1991
Czech Republic/Belgium-Luxembourg	April 24, 1989	February 13, 1992
Czech Republic/Canada	November 15, 1990	March 9, 1992
Czech Republic/Chile	April 24, 1995	
Czech Republic/China	December 4, 1991	December 1, 1992
Czech Republic/Croatia	March 5, 1996	
Czech Republic/Denmark	March 6, 1991	September 19, 1992
Czech Republic/Egypt	May 29, 1993	January 4, 1994
Czech Republic/Estonia	October 24, 1994	July 18, 1995
Czech Republic/Finland	November 6, 1990	October 23, 1991
Czech Republic/France	September 13, 1990	September 27, 1991
Czech Republic/Germany	October 2, 1990	August 2, 1992
Czech Republic/Greece	June 3, 1991	December 31, 1992
Czech Republic/Hungary	January 14, 1993	May 25, 1995
Czech Republic/Italy	January 22, 1996	
Czech Republic/Korea	April 27, 1992	March 16, 1995
Czech Republic/Kuwait	January 8, 1996	
Czech Republic/Latvia	October 25, 1994	August 1, 1995
Czech Republic/Lithuania	October 27, 1994	July 12, 1995
Czech Republic/Netherlands	April 29, 1991	October 1, 1992
Czech Republic/Norway	May 21, 1991	August 6, 1992
Czech Republic/Peru	March 16, 1994	March 6, 1995
Czech Republic/Philippines	April 5, 1995	
Czech Republic/Poland	July 16, 1993	June 29, 1994
Czech Republic/Portugal	November 12, 1993	August 3, 1994
Czech Republic/Romania	November 8, 1993	July 28, 1994
Czech Republic/Russian Federation	April 5, 1994	
Czech Republic/Singapore	April 8, 1995	
Czech Republic/Slovak Republic	November 23, 1992	January 1, 1993
Czech Republic/Slovenia	May 4, 1993	May 21, 1994
Czech Republic/Spain	December 12, 1990	November 28, 1991
Czech Republic/Sweden	November 13, 1990	September 23, 1991
Czech Republic/Switzerland	October 5, 1990	August 7, 1991
Czech Republic/Tajikistan	February 11, 1994	
Czech Republic/Thailand	February 12, 1994	May 4, 1995
Czech Republic/Turkey	April 30, 1992	
Czech Republic/Ukraine	March 17, 1994	
Czech Republic/United Arab Emirates	November 23, 1994	
Czech Republic/United Kingdom	July 10, 1990	October 26, 1992
Czech Republic/United States	October 22, 1991	December 19, 1992

PARTIES	SIGNATURE	ENTRY INTO FORCE
Czech Republic/Venezuela	April 27, 1995	
Denmark/Albania	September 5, 1995	
Denmark/Argentina	November 6, 1992	January 2, 1995
Denmark/Bolivia	March 12, 1995	
Denmark/Brazil	May 4, 1995	
Denmark/Bulgaria	April 14, 1993	May 20, 1995
Denmark/Chile	May 28, 1993	November 3, 1995
Denmark/China	April 29, 1985	April 29, 1985
Denmark/Czech Republic	March 6, 1991	September 19, 1992
Denmark/Estonia	November 6, 1991	February 24, 1993
Denmark/Ghana	January 13, 1992	January 6, 1995
Denmark/Hong Kong	February 2, 1994	March 4, 1994
Denmark/Hungary	May 2, 1988	October 1, 1988
Denmark/India	September 6, 1995	
Denmark/Indonesia	January 30, 1968	July 2, 1968
Denmark/Korea	June 2, 1988	June 2, 1988
Denmark/Latvia	March 30, 1992	November 18, 1994
Denmark/Lithuania	March 30, 1992	January 8, 1993
Denmark/Malaysia	January 6, 1992	September 18, 1992
Denmark/Mongolia	March 13, 1995	
Denmark/Nicaragua	March 12, 1995	January 26, 1996
Denmark/Peru	November 23, 1994	February 17, 1995
Denmark/Poland	May 1, 1990	October 30, 1990
Denmark/Romania	June 14, 1994	August 24, 1995
Denmark/Russian Federation	November 4, 1993	
Denmark/Slovak Republic	March 6, 1991	September 19, 1992
Denmark/South Africa	February 22, 1996	
Denmark/Sri Lanka	June 4, 1985	June 4, 1985
Denmark/Turkey	February 7, 1990	August 1, 1992
Denmark/Ukraine	October 23, 1992	April 29, 1994
Denmark/Venezuela	November 28, 1994	
Denmark/Vietnam	August 25, 1993	August 7, 1994
Dominica/Germany	October 1, 1984	May 11, 1986
Dominica/United Kingdom	January 23, 1987	January 23, 1987
Dominican Republic/Germany	December 16, 1959	June 3, 1960
Dominican Republic/Spain	March 16, 1995	October 7, 1996
Ecuador/Argentina	February 20, 1994	December 1, 1995
Ecuador/Bolivia	May 25, 1995	
Ecuador/Canada	April 29, 1996	
Ecuador/Chile	October 27, 1993	January 2, 1996
Ecuador/China	March 21, 1994	
Ecuador/El Salvador	May 16, 1994	January 14, 1996
Ecuador/France	September 7, 1994	June 10, 1996
Ecuador/Germany	March 21, 1996	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Ecuador/Germany[15]	June 28, 1965	November 30, 1966
Ecuador/Paraguay	January 28, 1994	September 18, 1995
Ecuador/Spain	June 26, 1996	
Ecuador/Switzerland	May 2, 1968	September 11, 1969
Ecuador/United Kingdom	May 10, 1994	August 24, 1995
Ecuador/United States	August 27, 1993	
Ecuador/Venezuela	November 18, 1993	February 1, 1995
Egypt/Albania	May 22, 1993	
Egypt/Argentina	May 11, 1992	December 3, 1993
Egypt/Belgium-Luxembourg	February 28, 1977	September 20, 1978
Egypt/China	April 21, 1994	
Egypt/Czech Republic	May 29, 1993	January 4, 1994
Egypt/Finland	May 5, 1980	February 1, 1982
Egypt/France	December 22, 1974	October 1, 1975
Egypt/Germany	July 5, 1974	July 22, 1978
Egypt/Greece	July 16, 1993	April 6, 1994
Egypt/Hungary	May 23, 1995	
Egypt/Indonesia	January 19, 1994	
Egypt/Italy	March 2, 1989	
Egypt/Japan	January 28, 1977	January 14, 1978
Egypt/Kazakhstan	February 14, 1993	
Egypt/Korea	March 18, 1996	
Egypt/Morocco	June 3, 1976	
Egypt/Netherlands	January 17, 1996	
Egypt/Netherlands[16]	October 30, 1976	January 1, 1978
Egypt/Poland	July 1, 1995	
Egypt/Romania	November 24, 1994	
Egypt/Romania[17]	May 10, 1976	January 22, 1977
Egypt/Spain	November 3, 1992	April 26, 1994
Egypt/Sri Lanka	March 11, 1996	
Egypt/Sudan	May 28, 1977	
Egypt/Sweden	July 15, 1978	January 29, 1979
Egypt/Switzerland	July 25, 1973	June 4, 1974
Egypt/Tunisia	December 8, 1990	
Egypt/Turkmenistan	May 23, 1995	
Egypt/Uganda	November 4, 1995	
Egypt/Ukraine	December 22, 1992	
Egypt/United Kingdom	June 11, 1975	February 24, 1976
Egypt/United States	September 29, 1982	June 27, 1992
Egypt/Uzbekistan	December 16, 1992	

[15]) This treaty will terminate on the entry into force of the new treaty between Ecuador and Germany, signed on March 21, 1996.

[16]) This treaty will terminate on the entry into force of the new treaty between Egypt and the Netherlands signed on January 17, 1996.

[17]) This treaty will terminate on the entry into force of the new treaty between Egypt and Romania, signed on November 24, 1994.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Egypt/Yugoslavia	June 3, 1977	
El Salvador/Argentina	May 9, 1996	
El Salvador/Ecuador	May 16, 1994	January 14, 1996
El Salvador/France	September 20, 1978	December 12, 1992
El Salvador/Peru	June 13, 1996	
El Salvador/Spain	February 14, 1995	February 20, 1996
El Salvador/Switzerland	December 8, 1994	
Equatorial Guinea/France	March 3, 1982	September 23, 1983
Eritrea/Italy	February 6, 1996	
Estonia/Austria	May 16, 1994	October 1, 1995
Estonia/China	September 2, 1993	June 1, 1994
Estonia/Czech Republic	October 24, 1994	July 18, 1995
Estonia/Denmark	November 6, 1991	February 24, 1993
Estonia/Finland	February 13, 1992	December 3, 1992
Estonia/France	May 14, 1992	September 23, 1995
Estonia/Germany	November 12, 1992	Provisionally in force
Estonia/Israel	March 14, 1994	
Estonia/Lithuania	September 7, 1995	
Estonia/Netherlands	October 27, 1992	September 1, 1993
Estonia/Norway	June 15, 1992	June 15, 1992
Estonia/Poland	May 6, 1993	August 6, 1993
Estonia/Sweden	March 31, 1992	May 20, 1992
Estonia/Switzerland	December 21, 1992	August 18, 1993
Estonia/Ukraine	February 15, 1995	July 5, 1995
Estonia/United Kingdom	May 12, 1994	December 16, 1994
Estonia/United States	April 19, 1994	
Ethiopia/Italy	December 23, 1994	
Finland/Argentina	November 5, 1993	
Finland/Belarus	October 28, 1992	December 11, 1994
Finland/Brazil	March 28, 1995	
Finland/Bulgaria	February 16, 1984	July 16, 1985
Finland/Chile	May 27, 1993	
Finland/China	September 4, 1984	January 26, 1986
Finland/Czech Republic	November 6, 1990	October 23, 1991
Finland/Egypt	May 5, 1980	February 1, 1982
Finland/Estonia	February 13, 1992	December 3, 1992
Finland/Hungary	June 6, 1988	May 12, 1989
Finland/Kazakhstan	September 29, 1992	
Finland/Korea	October 21, 1993	May 11, 1996
Finland/Latvia	March 5, 1992	December 7, 1992
Finland/Lithuania	June 12, 1992	January 8, 1993
Finland/Malaysia	April 15, 1985	January 3, 1988

PARTIES	SIGNATURE	ENTRY INTO FORCE
Finland/Moldova	August 25, 1995	
Finland/Peru	May 2, 1995	
Finland/Poland	April 5, 1990	March 29, 1991
Finland/Romania	March 26, 1992	January 6, 1993
Finland/Russian Federation	February 8, 1989	August 15, 1991
Finland/Slovak Republic	November 6, 1990	October 23, 1991
Finland/Sri Lanka	April 27, 1985	October 25, 1987
Finland/Thailand	March 18, 1994	
Finland/Turkey	May 13, 1993	April 23, 1995
Finland/Ukraine	May 14, 1992	January 30, 1994
Finland/United Arab Emirates	July 1, 1993	
Finland/Uzbekistan	October 1, 1992	October 22, 1993
Finland/Vietnam	September 13, 1993	
France/Albania	June 13, 1995	
France/Argentina	July 3, 1991	March 3, 1993
France/Armenia	November 4, 1995	
France/Bangladesh	September 10, 1985	October 3, 1986
France/Belarus	October 28, 1993	
France/Bolivia	October 25, 1989	
France/Brazil	March 21, 1995	
France/Bulgaria	April 5, 1989	May 1, 1990
France/Chile	July 14, 1992	
France/China	May 30, 1984	March 19, 1985
France/Costa Rica	March 8, 1984	
France/Croatia	June 3, 1996	
France/Czech Republic	September 13, 1990	September 27, 1991
France/Ecuador	September 7, 1994	June 10, 1996
France/Egypt	December 22, 1974	October 1, 1975
France/El Salvador	September 20, 1978	December 12, 1992
France/Equatorial Guinea	March 3, 1982	September 23, 1983
France/Estonia	May 14, 1992	September 23, 1995
France/Haiti	May 23, 1984	March 25, 1985
France/Hong Kong	November 30, 1995	
France/Hungary	November 6, 1986	September 30, 1987
France/Indonesia	June 14, 1973	April 29, 1975
France/Israel	June 9, 1983	January 11, 1985
France/Jamaica	January 19, 1993	September 16, 1994
France/Jordan	February 23, 1978	October 18, 1979
France/Korea	December 28, 1977	February 1, 1979
France/Kuwait	September 27, 1989	May 16, 1991
France/Kyrgyz Republic	June 2, 1994	
France/Lao PDR	December 12, 1989	March 8, 1991
France/Latvia	May 15, 1992	October 1, 1994
France/Liberia	March 23, 1979	January 22, 1982
France/Lithuania	April 23, 1992	January 11, 1995
France/Malaysia	April 24, 1975	September 1, 1976
France/Malta	August 11, 1976	January 1, 1978

PARTIES	SIGNATURE	ENTRY INTO FORCE
France/Mauritius	March 22, 1973	April 1, 1974
France/Mongolia	November 8, 1991	December 22, 1993
France/Morocco	January 13, 1996	
France/Morocco[18]	July 15, 1975	December 13, 1976
France/Nepal	May 2, 1983	June 13, 1985
France/Nigeria	February 27, 1990	August 19, 1991
France/Oman	October 17, 1994	
France/Pakistan	June 1, 1983	December 14, 1984
France/Panama	November 5, 1982	October 9, 1985
France/Paraguay	November 30, 1978	December 11, 1980
France/Peru	October 6, 1993	
France/Philippines	September 13, 1994	
France/Philippines[19]	June 14, 1976	July 1, 1976
France/Poland	February 14, 1989	February 10, 1990
France/Romania	March 21, 1995	
France/Romania[20]	December 16, 1976	August 1, 1978
France/Russian Federation	July 4, 1989	July 18, 1991
France/Singapore	September 8, 1975	October 18, 1976
France/Slovak Republic	September 13, 1990	September 27, 1991
France/South Africa	October 11, 1995	
France/Sri Lanka	April 10, 1980	April 19, 1982
France/Sudan	July 31, 1978	July 5, 1980
France/Syria	November 28, 1977	March 1, 1980
France/Trinidad and Tobago	October 28, 1993	
France/Tunisia	June 30, 1972	June 30, 1972
France/Turkmenistan	April 28, 1994	
France/Ukraine	May 3, 1994	
France/United Arab Emirates	September 9, 1991	
France/Uruguay	October 14, 1993	
France/Uzbekistan	October 27, 1993	
France/Vietnam	May 26, 1992	
France/Yemen	April 27, 1984	July 19, 1991
France/Yugoslavia	March 28, 1974	March 3, 1975
France/Zaire	October 5, 1972	March 1, 1975
Gabon/Germany	May 16, 1969	March 29, 1971
Gabon/Italy	November 18, 1968	
Gabon/Morocco	January 13, 1979	
Gabon/Romania	April 11, 1979	September 18, 1982
Gabon/Spain	March 2, 1995	
Gabon/Switzerland	January 28, 1972	October 18, 1972

[18]) This treaty will terminate on the entry into force of the new treaty between France and Morocco, signed on January 13, 1996.

[19]) This treaty will terminate on the entry into force of the new treaty between France and the Philippines signed on September 13, 1994.

[20]) This treaty will terminate on the entry into force of the new treaty between France and Romania signed on March 21, 1995.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Gambia/Switzerland	November 22, 1993	
Georgia/Belgium-Luxembourg	June 23, 1993	
Georgia/Bulgaria	January 19, 1995	
Georgia/China	June 3, 1993	March 1, 1995
Georgia/Germany	June 25, 1993	Provisionally in force
Georgia/Greece	November 9, 1994	
Georgia/Turkey	July 31, 1992	June 6, 1995
Georgia/United Kingdom	February 15, 1995	February 15, 1995
Georgia/United States	March 7, 1994	
Germany/Albania	October 31, 1991	August 18, 1995
Germany/Algeria	March 11, 1996	
Germany/Argentina	April 9, 1991	November 8, 1993
Germany/Armenia	December 21, 1995	
Germany/Azerbaijan	December 22, 1995	Provisionally in force
Germany/Bangladesh	May 6, 1981	September 14, 1986
Germany/Barbados	December 2, 1994	
Germany/Belarus	April 2, 1993	September 23, 1996
Germany/Benin	June 29, 1978	July 18, 1985
Germany/Bolivia	March 23, 1987	November 9, 1990
Germany/Brazil	September 21, 1995	
Germany/Bulgaria	April 12, 1986	March 10, 1988
Germany/Burkina Faso	October 22, 1996	
Germany/Burundi	September 10, 1984	December 9, 1987
Germany/Cameroon	June 29, 1962	November 21, 1963
Germany/Cape Verde	January 18, 1990	December 15, 1993
Germany/Central African Republic	August 23, 1965	January 21, 1968
Germany/Chad	April 11, 1967	November 23, 1968
Germany/Chile	October 21, 1991	
Germany/China	October 7, 1983	March 18, 1985
Germany/Congo	September 13, 1965	October 14, 1967
Germany/Costa Rica	September 13, 1994	
Germany/Côte d'Ivoire	October 27, 1966	June 10, 1968
Germany/Cuba	April 30, 1996	
Germany/Czech Republic	October 2, 1990	August 2, 1992
Germany/Dominica	October 1, 1984	May 11, 1986
Germany/Dominican Republic	December 16, 1959	June 3, 1960
Germany/Ecuador	March 21, 1996	
Germany/Ecuador[21]	June 28, 1965	November 30, 1966
Germany/Egypt	July 5, 1974	July 22, 1978
Germany/Estonia	November 12, 1992	Provisionally in force
Germany/Gabon	May 16, 1969	March 29, 1971
Germany/Georgia	June 25, 1993	Provisionally in force
Germany/Ghana	February 24, 1995	

[21]) This treaty will terminate on the entry into force of the new treaty between Ecuador and Germany, signed on March 21, 1996.

PARTIES	***SIGNATURE***	***ENTRY INTO FORCE***
Germany/Greece	March 27, 1961	July 15, 1963
Germany/Guinea	April 19, 1962	March 13, 1965
Germany/Guyana	December 6, 1989	March 8, 1994
Germany/Haiti	August 14, 1973	December 1, 1975
Germany/Honduras	March 21, 1995	
Germany/Hong Kong	January 31, 1996	
Germany/Hungary	April 30, 1986	November 7, 1987
Germany/India	July 10, 1995	
Germany/Indonesia	November 8, 1968	April 19, 1971
Germany/Iran	November 11, 1965	April 6, 1968
Germany/Israel	June 24, 1976	Provisionally in force
Germany/Jamaica	September 24, 1992	May 29, 1996
Germany/Jordan	July 15, 1974	October 10, 1977
Germany/Kazakhstan	September 22, 1992	May 10, 1995
Germany/Kenya	May 3, 1996	
Germany/Korea	February 4, 1964	January 15, 1967
Germany/Kuwait	March 30, 1994	
Germany/Lao PDR	August 9, 1996	
Germany/Latvia	April 20, 1993	June 9, 1996
Germany/Lesotho	November 11, 1982	August 17, 1985
Germany/Liberia	December 12, 1961	October 22, 1967
Germany/Lithuania	February 28, 1992	Provisionally in force
Germany/Macedonia, FYR of	September 10, 1996	
Germany/Madagascar	September 21, 1962	March 21, 1966
Germany/Malaysia	December 22, 1960	July 6, 1963
Germany/Mali	June 28, 1977	May 16, 1980
Germany/Malta	September 17, 1974	December 14, 1975
Germany/Mauritania	December 8, 1982	April 26, 1986
Germany/Mauritius	May 25, 1971	August 27, 1973
Germany/Moldova	February 28, 1994	
Germany/Mongolia	June 26, 1991	June 23, 1996
Germany/Morocco	August 31, 1961	January 21, 1968
Germany/Namibia	January 21, 1994	Provisionally in force
Germany/Nepal	October 20, 1986	July 7, 1988
Germany/Nicaragua	May 6, 1996	
Germany/Niger	October 29, 1964	January 10, 1966
Germany/Oman	June 25, 1979	February 4, 1986
Germany/Pakistan	November 25, 1959	November 28, 1962
Germany/Panama	November 2, 1983	March 10, 1989
Germany/Papua New Guinea	November 12, 1980	November 3, 1983
Germany/Paraguay	August 11, 1993	
Germany/Peru	January 30, 1995	
Germany/Poland	November 10, 1989	February 24, 1991
Germany/Portugal	September 16, 1980	April 23, 1982
Germany/Qatar	June 14, 1996	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Germany/Romania	June 25, 1996	
Germany/Romania[22]	October 12, 1979	January 10, 1981
Germany/Russian Federation	June 13, 1989	August 5, 1991
Germany/Rwanda	May 18, 1967	February 28, 1969
Germany/Saudi Arabia	October 29, 1996	
Germany/Senegal	January 24, 1964	January 16, 1966
Germany/Sierra Leone	April 8, 1965	December 10, 1966
Germany/Singapore	October 3, 1973	October 1, 1975
Germany/Slovak Republic	October 2, 1990	August 2, 1992
Germany/Slovenia	October 28, 1993	
Germany/Somalia	November 27, 1981	February 15, 1985
Germany/South Africa	September 11, 1995	
Germany/Sri Lanka	November 8, 1963	December 7, 1966
Germany/St. Lucia	March 16, 1985	July 22, 1987
Germany/St. Vincent and Grenadines	March 25, 1986	January 8, 1989
Germany/Sudan	February 7, 1963	November 24, 1967
Germany/Swaziland	April 5, 1990	August 7, 1995
Germany/Syria	August 2, 1977	April 20, 1980
Germany/Tanzania	January 30, 1965	July 12, 1968
Germany/Thailand	December 13, 1961	April 10, 1965
Germany/Togo	May 16, 1961	December 21, 1964
Germany/Tunisia	December 20, 1963	February 6, 1966
Germany/Turkey	June 20, 1962	December 16, 1965
Germany/Uganda	November 29, 1966	August 19, 1968
Germany/Ukraine	February 15, 1993	June 29, 1996
Germany/Uruguay	May 4, 1987	June 29, 1990
Germany/Uzbekistan	April 28, 1993	Provisionally in force
Germany/Venezuela	May 14, 1996	
Germany/Vietnam	April 3, 1993	Provisionally in force
Germany/Yemen	June 21, 1974	December 19, 1978
Germany/Yugoslavia	July 10, 1989	October 25, 1990
Germany/Zaire	March 18, 1969	July 22, 1971
Germany/Zambia	December 10, 1966	August 25, 1972
Germany/Zimbabwe	September 29, 1995	
Ghana/Bulgaria	October 20, 1989	
Ghana/China	October 12, 1989	
Ghana/Denmark	January 13, 1992	January 6, 1995
Ghana/Germany	February 24, 1995	
Ghana/Netherlands	March 31, 1989	July 1, 1991
Ghana/Romania	September 14, 1989	
Ghana/Switzerland	October 8, 1991	June 16, 1993
Ghana/United Kingdom	March 22, 1989	October 25, 1991
Greece/Albania	August 1, 1991	July 4, 1995
Greece/Armenia	May 25, 1993	April 28, 1995

[22]) This treaty will terminate on the entry into force of the new treaty between Germany and Romania signed on June 25, 1996.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Greece/Bulgaria	March 12, 1993	April 29, 1995
Greece/China	June 25, 1992	December 21, 1993
Greece/Cyprus	March 30, 1992	February 26, 1993
Greece/Czech Republic	June 3, 1991	December 31, 1992
Greece/Egypt	July 16, 1993	April 6, 1994
Greece/Georgia	November 9, 1994	
Greece/Germany	March 27, 1961	July 15, 1963
Greece/Hungary	May 26, 1989	February 1, 1992
Greece/Korea	January 25, 1995	November 4, 1995
Greece/Latvia	July 29, 1995	
Greece/Morocco	February 16, 1994	
Greece/Poland	October 14, 1992	February 20, 1995
Greece/Romania	September 16, 1991	October 21, 1992
Greece/Russian Federation	June 30, 1993	
Greece/Tunisia	October 31, 1992	April 21, 1995
Greece/Ukraine	September 1, 1994	
Greece/Zaire	April 26, 1991	
Grenada/United Kingdom	February 25, 1988	February 25, 1988
Grenada/United States	May 2, 1986	March 3, 1989
Guatemala/Chile	November 8, 1996	
Guinea/Germany	April 19, 1962	March 13, 1965
Guinea/Italy	February 20, 1964	February 20, 1964
Guinea/Switzerland	April 26, 1962	July 29, 1963
Guinea/Tunisia	November 28, 1990	
Guinea-Bissau/Portugal	June 24, 1991	
Guyana/Germany	December 6, 1989	March 8, 1994
Guyana/United Kingdom	October 27, 1989	April 11, 1990
Haiti/France	May 23, 1984	March 25, 1985
Haiti/Germany	August 14, 1973	December 1, 1975
Haiti/United Kingdom	March 18, 1985	March 27, 1995
Haiti/United States	December 12, 1983	
Honduras/Germany	March 21, 1995	
Honduras/Spain	March 18, 1994	May 23, 1996
Honduras/Switzerland	October 14, 1993	
Honduras/United Kingdom	December 7, 1993	March 8, 1995
Honduras/United States	July 1, 1995	
Hong Kong/Australia	September 15, 1993	October 15, 1993
Hong Kong/Austria	October 11, 1996	
Hong Kong/Belgium-Luxembourg	October 7, 1996	
Hong Kong/Denmark	February 2, 1994	March 4, 1994

PARTIES	SIGNATURE	ENTRY INTO FORCE
Hong Kong/France	November 30, 1995	
Hong Kong/Germany	January 31, 1996	
Hong Kong/Italy	November 28, 1995	
Hong Kong/Netherlands	November 19, 1992	September 1, 1993
Hong Kong/New Zealand	July 6, 1995	August 5, 1995
Hong Kong/Sweden	May 27, 1994	June 26, 1994
Hong Kong/Switzerland	September 22, 1994	October 22, 1994
Hungary/Albania	January 24, 1996	
Hungary/Argentina	March 5, 1993	June 2, 1994
Hungary/Australia	August 15, 1991	May 10, 1992
Hungary/Austria	May 26, 1988	September 1, 1989
Hungary/Belgium-Luxembourg	May 14, 1986	September 23, 1988
Hungary/Bulgaria	June 8, 1994	September 7, 1995
Hungary/Canada	October 3, 1991	November 21, 1993
Hungary/China	May 29, 1991	April 1, 1993
Hungary/Croatia	May 15, 1996	
Hungary/Cyprus	May 24, 1989	May 25, 1990
Hungary/Czech Republic	January 14, 1993	May 25, 1995
Hungary/Denmark	May 2, 1988	October 1, 1988
Hungary/Egypt	May 23, 1995	
Hungary/Finland	June 6, 1988	May 12, 1989
Hungary/France	November 6, 1986	September 30, 1987
Hungary/Germany	April 30, 1986	November 7, 1987
Hungary/Greece	May 26, 1989	February 1, 1992
Hungary/Indonesia	May 20, 1992	February 13, 1996
Hungary/Israel	May 14, 1991	September 14, 1992
Hungary/Italy	February 17, 1987	February 23, 1990
Hungary/Kazakhstan	December 7, 1994	March 3, 1996
Hungary/Korea	December 28, 1988	January 1, 1989
Hungary/Kuwait	November 8, 1989	March 1, 1994
Hungary/Malaysia	February 19, 1993	July 8, 1995
Hungary/Moldova	April 19, 1995	
Hungary/Mongolia	September 13, 1994	
Hungary/Morocco	December 12, 1991	
Hungary/Netherlands	September 2, 1987	June 1, 1988
Hungary/Norway	April 8, 1991	December 4, 1992
Hungary/Paraguay	August 11, 1993	April 1, 1995
Hungary/Poland	September 23, 1992	June 16, 1995
Hungary/Portugal	February 28, 1992	
Hungary/Romania	September 16, 1993	
Hungary/Russian Federation	March 8, 1995	
Hungary/Slovak Republic	January 15, 1993	
Hungary/Spain	November 9, 1989	August 1, 1992
Hungary/Sweden	April 21, 1987	April 21, 1987
Hungary/Switzerland	October 5, 1988	May 16, 1989
Hungary/Thailand	October 18, 1991	October 18, 1991
Hungary/Turkey	January 14, 1992	November 1, 1994

PARTIES	SIGNATURE	ENTRY INTO FORCE
Hungary/Ukraine	October 11, 1994	
Hungary/United Kingdom	March 9, 1987	August 28, 1987
Hungary/Uruguay	August 25, 1989	July 1, 1992
Hungary/Vietnam	April 26, 1994	June 16, 1995
Iceland/China	March 31, 1994	
India/Denmark	September 6, 1995	
India/Germany	July 10, 1995	
India/Israel	January__, 1996[23]	
India/Italy	November 23, 1995	
India/Korea	February 26, 1996	May 7, 1996
India/Malaysia	August 3, 1995	
India/Netherlands	November 6, 1995	December 1, 1996
India/Russian Federation	December 23, 1994	
India/Tajikistan	December __, 1995[24]	
India/Turkmenistan	September __, 1995[25]	
India/United Kingdom	March 14, 1994	January 6, 1995
Indonesia/Australia	November 17, 1992	July 29, 1993
Indonesia/Belgium-Luxembourg	January 15, 1970	June 17, 1972
Indonesia/China	November 18, 1994	April 1, 1995
Indonesia/Denmark	January 30, 1968	July 2, 1968
Indonesia/Egypt	January 19, 1994	
Indonesia/France	June 14, 1973	April 29, 1975
Indonesia/Germany	November 8, 1968	April 19, 1971
Indonesia/Hungary	May 20, 1992	February 13, 1996
Indonesia/Italy	April 25, 1991	June 24, 1995
Indonesia/Korea	February 16, 1991	March 10, 1994
Indonesia/Kyrgyz Republic	July 18, 1995	
Indonesia/Lao PDR	October 18, 1994	
Indonesia/Malaysia	January 22, 1994	
Indonesia/Netherlands	April 6, 1994	July 1, 1995
Indonesia/Norway	November 26, 1991	October 1, 1994
Indonesia/Poland	October 6, 1992	July 1, 1993
Indonesia/Singapore	August 28, 1990	August 28, 1990
Indonesia/Slovak Republic	July 12, 1994	March 1, 1995
Indonesia/Spain	May 30, 1995	
Indonesia/Sweden	September 17, 1992	February 18, 1993
Indonesia/Switzerland	February 6, 1974	April 9, 1976
Indonesia/Tunisia	May 13, 1992	
Indonesia/United Kingdom	April 27, 1976	March 24, 1977
Indonesia/Vietnam	October 25, 1991	

[23]) Signature date unavailable.

[24]) *Ibid.*

[25]) *Ibid.*

PARTIES	SIGNATURE	ENTRY INTO FORCE
Iran/Belarus	July 14, 1995	
Iran/Germany	November 11, 1965	April 6, 1968
Iran/Kazakhstan	January 16, 1996	
Israel/India	January __, 1996[26]	
Israel/Argentina	June 23, 1995	
Israel/Bulgaria	December 6, 1993	
Israel/China	April 10, 1995	
Israel/Estonia	March 14, 1994	
Israel/France	June 9, 1983	January 11, 1985
Israel/Germany	June 24, 1976	Provisionally in force
Israel/Hungary	May 14, 1991	September 14, 1992
Israel/Kazakhstan	December 27, 1995	
Israel/Latvia	February 27, 1994	May 9, 1995
Israel/Lithuania	October 2, 1994	
Israel/Poland	May 22, 1991	May 6, 1992
Israel/Romania	September 2, 1991	August 26, 1992
Italy/Albania	September 12, 1991	
Italy/Algeria	May 18, 1991	November 26, 1993
Italy/Argentina	May 22, 1990	October 14, 1993
Italy/Bangladesh	March 20, 1990	September 20, 1994
Italy/Barbados	October 25, 1995	
Italy/Belarus	July 25, 1995	
Italy/Bolivia	April 30, 1990	February 22, 1992
Italy/Brazil	April 3, 1995	
Italy/Bulgaria	December 5, 1988	December 27, 1990
Italy/Chad	June 11, 1969	June 11, 1969
Italy/Chile	March 8, 1993	February 8, 1995
Italy/China	January 28, 1985	August 28, 1987
Italy/Congo	March 17, 1994	
Italy/Côte d'Ivoire	July 23, 1969	
Italy/Cuba	May 7, 1993	August 23, 1995
Italy/Czech Republic	January 22, 1996	
Italy/Egypt	March 2, 1989	
Italy/Eritrea	February 6, 1996	
Italy/Ethiopia	December 23, 1994	
Italy/Gabon	November 18, 1968	
Italy/Guinea	February 20, 1964	February 20, 1964
Italy/Hong Kong	November 28, 1995	
Italy/Hungary	February 17, 1987	February 23, 1990
Italy/India	November 23, 1995	
Italy/Indonesia	April 25, 1991	June 24, 1995
Italy/Jamaica	September 29, 1993	November 9, 1995
Italy/Kazakhstan	September 22, 1994	
Italy/Korea	January 10, 1989	June 25, 1992

[26]) *Ibid.*

PARTIES	SIGNATURE	ENTRY INTO FORCE
Italy/Kuwait	December 17, 1987	May 21, 1990
Italy/Lithuania	December 1, 1994	
Italy/Malaysia	January 4, 1988	October 25, 1990
Italy/Malta	July 28, 1967	October 15, 1973
Italy/Mongolia	January 15, 1993	September 1, 1995
Italy/Morocco	July 18, 1990	
Italy/Oman	June 23, 1993	
Italy/Peru	May 5, 1994	October 18, 1995
Italy/Philippines	June 17, 1988	November 4, 1993
Italy/Poland	May 10, 1989	January 10, 1993
Italy/Romania	December 6, 1990	March 14, 1995
Italy/Russian Federation	April 9, 1996	
Italy/Russian Federation[27]	November 30, 1989	July 8, 1991
Italy/Sri Lanka	March 25, 1987	March 20, 1990
Italy/Tunisia	October 17, 1985	June 24, 1989
Italy/Turkey	March 28, 1995	
Italy/Ukraine	May 2, 1995	
Italy/United Arab Emirates	January 22, 1995	
Italy/Uruguay	February 21, 1990	
Italy/Venezuela	June 5, 1990	
Italy/Vietnam	May 18, 1990	May 6, 1994
Jamaica/Argentina	February 2, 1994	
Jamaica/China	October 26, 1994	
Jamaica/France	January 19, 1993	September 16, 1994
Jamaica/Germany	September 24, 1992	May 29, 1996
Jamaica/Italy	September 29, 1993	November 9, 1995
Jamaica/Netherlands	April 18, 1991	August 1, 1992
Jamaica/Switzerland	December 11, 1990	November 21, 1991
Jamaica/United Kingdom	January 20, 1987	May 14, 1987
Jamaica/United States	February 4, 1994	
Japan/China	August 27, 1988	May 14, 1989
Japan/Egypt	January 28, 1977	January 14, 1978
Japan/Sri Lanka	March 1, 1982	August 7, 1982
Japan/Turkey	February 12, 1992	March 12, 1993
Jordan/France	February 23, 1978	October 18, 1979
Jordan/Germany	July 15, 1974	October 10, 1977
Jordan/Malaysia	October 2, 1994	
Jordan/Romania	July 2, 1992	
Jordan/Switzerland	November 11, 1976	March 2, 1977
Jordan/Turkey	August 2, 1993	
Jordan/United Kingdom	October 10, 1979	April 24, 1980

[27]) This treaty will terminate on the entry into force of the new treaty between Italy and the Russian Federation signed on April 9, 1996.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Kazakhstan/China	August 10, 1992	August 13, 1994
Kazakhstan/Egypt	February 14, 1993	
Kazakhstan/Finland	September 29, 1992	
Kazakhstan/Germany	September 22, 1992	May 10, 1995
Kazakhstan/Hungary	December 7, 1994	March 3, 1996
Kazakhstan/Iran	January 16, 1996	
Kazakhstan/Israel	December 27, 1995	
Kazakhstan/Italy	September 22, 1994	
Kazakhstan/Korea	March 20, 1996	
Kazakhstan/Lithuania	September 15, 1994	
Kazakhstan/Mongolia	December 2, 1994	May 13, 1995
Kazakhstan/Poland	September 21, 1994	May 25, 1995
Kazakhstan/Romania	April 25, 1996	
Kazakhstan/Spain	March 23, 1994	June 22, 1995
Kazakhstan/Switzerland	May 12, 1994	
Kazakhstan/Turkey	May 1, 1992	
Kazakhstan/Ukraine	September 17, 1994	
Kazakhstan/United Kingdom	November 23, 1995	November 23, 1995
Kazakhstan/United States	May 19, 1992	January 12, 1994
Kenya/Germany	May 3, 1996	
Kenya/Netherlands	September 11, 1970	June 11, 1979
Korea/Argentina	May 17, 1994	
Korea/Austria	March 14, 1991	November 1, 1991
Korea/Bangladesh	June 18, 1986	October 6, 1988
Korea/Belgium-Luxembourg	December 20, 1974	September 3, 1976
Korea/Bolivia	April 1, 1996	
Korea/Brazil	September 1, 1995	
Korea/China	September 30, 1992	December 4, 1992
Korea/Czech Republic	April 27, 1992	March 16, 1995
Korea/Denmark	June 2, 1988	June 2, 1988
Korea/Egypt	March 18, 1996	
Korea/Finland	October 21, 1993	May 11, 1996
Korea/France	December 28, 1977	February 1, 1979
Korea/Germany	February 4, 1964	January 15, 1967
Korea/Greece	January 25, 1995	November 4, 1995
Korea/Hungary	December 28, 1988	January 1, 1989
Korea/India	February 26, 1996	May 7, 1996
Korea/Indonesia	February 16, 1991	March 10, 1994
Korea/Italy	January 10, 1989	June 25, 1992
Korea/Kazakhstan	March 20, 1996	
Korea/Lao PDR	May 15, 1996	
Korea/Lithuania	September 24, 1993	November 9, 1993
Korea/Malaysia	April 11, 1988	March 31, 1989
Korea/Mongolia	March 28, 1991	April 30, 1991
Korea/Netherlands	October 16, 1974	June 1, 1975
Korea/Pakistan	May 24, 1988	April 15, 1990

PARTIES	SIGNATURE	ENTRY INTO FORCE
Korea/Paraguay	December 22, 1992	August 6, 1993
Korea/Peru	June 3, 1993	April 20, 1994
Korea/Philippines	April 7, 1994	
Korea/Poland	November 1, 1989	February 2, 1990
Korea/Portugal	May 3, 1995	
Korea/Romania	August 7, 1990	
Korea/Russian Federation	December 14, 1990	July 10, 1991
Korea/Senegal	July 12, 1984	September 2, 1985
Korea/South Africa	July 7, 1995	
Korea/Spain	January 17, 1994	July 19, 1994
Korea/Sri Lanka	March 28, 1980	July 15, 1980
Korea/Sweden	August 30, 1995	
Korea/Switzerland	April 7, 1971	April 7, 1971
Korea/Tajikistan	July 14, 1995	August 13, 1995
Korea/Thailand	March 24, 1989	September 30, 1989
Korea/Tunisia	May 23, 1975	November 28, 1975
Korea/Turkey	May 14, 1991	June 4, 1994
Korea/United Kingdom	March 4, 1976	March 4, 1976
Korea/Uzbekistan	June 16, 1992	November 20, 1992
Korea/Vietnam	May 13, 1993	September 4, 1993
Korea/Zaire	July 19, 1990	
Kuwait/China	November 23, 1985	December 24, 1986
Kuwait/Czech Republic	January 8, 1996	
Kuwait/France	September 27, 1989	May 16, 1991
Kuwait/Germany	March 30, 1994	
Kuwait/Hungary	November 8, 1989	March 1, 1994
Kuwait/Italy	December 17, 1987	May 21, 1990
Kuwait/Malaysia	November 21, 1987	
Kuwait/Malta	April 19, 1995	
Kuwait/Moldova	February 4, 1993	
Kuwait/Pakistan	March 17, 1983	
Kuwait/Poland	March 5, 1990	December 18, 1993
Kuwait/Romania	May 21, 1991	July 26, 1992
Kuwait/Russian Federation	November 21, 1994	
Kuwait/Tajikistan	April 18, 1995	
Kuwait/Turkey	October 27, 1988	April 25, 1992
Kyrgyz Republic/Armenia	July 4, 1994	
Kyrgyz Republic/China	May 14, 1992	
Kyrgyz Republic/France	June 2, 1994	
Kyrgyz Republic/Indonesia	July 18, 1995	
Kyrgyz Republic/Malaysia	July 20, 1995	
Kyrgyz Republic/Pakistan	August 23, 1995	
Kyrgyz Republic/Turkey	April 28, 1992	September 28, 1995
Kyrgyz Republic/Ukraine	February 23, 1993	
Kyrgyz Republic/United Kingdom	December 8, 1994	
Kyrgyz Republic/United States	January 19, 1993	January 12, 1994

PARTIES	SIGNATURE	ENTRY INTO FORCE
Lao PDR/Australia	April 6, 1994	April 8, 1995
Lao PDR/China	January 31, 1993	June 1, 1993
Lao PDR/France	December 12, 1989	March 8, 1991
Lao PDR/Germany	August 9, 1996	
Lao PDR/Indonesia	October 18, 1994	
Lao PDR/Korea	May 15, 1996	
Lao PDR/Malaysia	December 8, 1992	
Lao PDR/Mongolia	March 3, 1994	
Lao PDR/Thailand	August 22, 1990	
Lao PDR/United Kingdom	June 1, 1995	June 1, 1995
Latvia/Austria	November 17, 1994	
Latvia/Canada	April 26, 1995	July 27, 1995
Latvia/Czech Republic	October 25, 1994	August 1, 1995
Latvia/Denmark	March 30, 1992	November 18, 1994
Latvia/Finland	March 5, 1992	December 7, 1992
Latvia/France	May 15, 1992	October 1, 1994
Latvia/Germany	April 20, 1993	June 9, 1996
Latvia/Greece	July 29, 1995	
Latvia/Israel	February 27, 1994	May 9, 1995
Latvia/Netherlands	March 14, 1994	April 1, 1995
Latvia/Norway	June 16, 1992	December 1, 1992
Latvia/Poland	April 26, 1993	July 19, 1993
Latvia/Portugal	September 27, 1995	
Latvia/Sweden	March 10, 1992	November 6, 1992
Latvia/Switzerland	December 22, 1992	April 16, 1993
Latvia/United Kingdom	January 24, 1994	February 15, 1995
Latvia/United States	January 13, 1995	
Lebanon/Spain	February 22, 1996	
Lesotho/Germany	November 11, 1982	August 17, 1985
Lesotho/United Kingdom	February 18, 1981	February 18, 1981
Liberia/Belgium-Luxembourg	June 5, 1985	
Liberia/France	March 23, 1979	January 22, 1982
Liberia/Germany	December 12, 1961	October 22, 1967
Liberia/Switzerland	July 23, 1963	September 22, 1964
Lithuania/China	November 8, 1993	June 1, 1994
Lithuania/Czech Republic	October 27, 1994	July 12, 1995
Lithuania/Denmark	March 30, 1992	January 8, 1993
Lithuania/Estonia	September 7, 1995	
Lithuania/Finland	June 12, 1992	January 8, 1993
Lithuania/France	April 23, 1992	January 11, 1995
Lithuania/Germany	February 28, 1992	Provisionally in force
Lithuania/Israel	October 2, 1994	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Lithuania/Italy	December 1, 1994	
Lithuania/Kazakhstan	September 15, 1994	
Lithuania/Korea	September 24, 1993	November 9, 1993
Lithuania/Netherlands	January 26, 1994	April 1, 1995
Lithuania/Norway	June 16, 1992	December 19, 1992
Lithuania/Poland	September 28, 1992	August 6, 1993
Lithuania/Romania	March 8, 1994	December 15, 1994
Lithuania/Spain	July 6, 1994	December 22, 1995
Lithuania/Sweden	March 17, 1992	September 1, 1992
Lithuania/Switzerland	December 23, 1992	May 13, 1993
Lithuania/Turkey	July 11, 1994	
Lithuania/Ukraine	February 8, 1994	March 6, 1995
Lithuania/United Kingdom	May 17, 1993	September 21, 1993
Lithuania/Venezuela	April 24, 1995	
Lithuania/Vietnam	September 27, 1995	
Macedonia, FYR of/Germany	September 10, 1996	
Macedonia, FYR of/Slovenia	June 5, 1996	
Madagascar/Germany	September 21, 1962	March 21, 1966
Madagascar/Norway	May 13, 1966	September 28, 1967
Madagascar/Sweden	April 2, 1966	June 23, 1967
Madagascar/Switzerland	March 17, 1964	March 31, 1966
Malaysia/Albania	January 24, 1994	
Malaysia/Argentina	September 6, 1994	
Malaysia/Austria	April 12, 1985	January 1, 1987
Malaysia/Bangladesh	October 12, 1994	
Malaysia/Belgium-Luxembourg	November 22, 1979	February 8, 1982
Malaysia/Bosnia and Herzegovina	December 16, 1994	
Malaysia/Cambodia	August 17, 1994	
Malaysia/Chile	November 11, 1992	
Malaysia/China	November 21, 1988	March 31, 1990
Malaysia/Croatia	December 16, 1994	
Malaysia/Denmark	January 6, 1992	September 18, 1992
Malaysia/Finland	April 15, 1985	January 3, 1988
Malaysia/France	April 24, 1975	September 1, 1976
Malaysia/Germany	December 22, 1960	July 6, 1963
Malaysia/Hungary	February 19, 1993	July 8, 1995
Malaysia/India	August 3, 1995	
Malaysia/Indonesia	January 22, 1994	
Malaysia/Italy	January 4, 1988	October 25, 1990
Malaysia/Jordan	October 2, 1994	
Malaysia/Korea	April 11, 1988	March 31, 1989
Malaysia/Kuwait	November 21, 1987	
Malaysia/Kyrgyz Republic	July 20, 1995	
Malaysia/Lao PDR	December 8, 1992	
Malaysia/Mongolia	July 27, 1995	January 14, 1996

PARTIES	SIGNATURE	ENTRY INTO FORCE
Malaysia/Namibia	August 12, 1994	
Malaysia/Netherlands	June 15, 1971	September 13, 1972
Malaysia/Norway	November 6, 1984	January 7, 1986
Malaysia/Pakistan	July 7, 1995	
Malaysia/Papua New Guinea	October 27, 1992	
Malaysia/Peru	December 13, 1995	
Malaysia/Poland	April 21, 1993	March 23, 1994
Malaysia/Romania	November 26, 1982	July 20, 1984
Malaysia/Spain	April 4, 1995	February 16, 1996
Malaysia/Sri Lanka	April 16, 1982	October 31, 1985
Malaysia/Sweden	March 3, 1979	July 6, 1979
Malaysia/Switzerland	March 1, 1978	June 9, 1978
Malaysia/Turkmenistan	May 30, 1994	
Malaysia/United Arab Emirates	October 11, 1991	
Malaysia/United Kingdom	May 21, 1981	October 21, 1988
Malaysia/Uruguay	August 9, 1995	
Malaysia/Vietnam	January 21, 1992	
Malaysia/Zimbabwe	April 28, 1994	
Mali/Germany	June 28, 1977	May 16, 1980
Mali/Switzerland	March 8, 1978	December 8, 1978
Mali/Tunisia	February 1, 1986	
Malta/Belgium-Luxembourg	March 5, 1987	April 12, 1993
Malta/Bulgaria	June 12, 1984	February 7, 1985
Malta/France	August 11, 1976	January 1, 1978
Malta/Germany	September 17, 1974	December 14, 1975
Malta/Italy	July 28, 1967	October 15, 1973
Malta/Kuwait	April 19, 1995	
Malta/Netherlands	September 10, 1984	July 1, 1985
Malta/Switzerland	January 20, 1965	February 23, 1965
Malta/United Kingdom	October 4, 1986	October 4, 1986
Mauritania/Belgium-Luxembourg	November 23, 1983	
Mauritania/Germany	December 8, 1982	April 26, 1986
Mauritania/Romania	March 14, 1988	December 19, 1989
Mauritania/Switzerland	September 9, 1976	May 30, 1978
Mauritania/Tunisia	March 1, 1986	
Mauritius/France	March 22, 1973	April 1, 1974
Mauritius/Germany	May 25, 1971	August 27, 1973
Mauritius/United Kingdom	May 20, 1986	October 13, 1986
Mexico/Spain	June 22, 1995	
Mexico/Switzerland	July 10, 1995	
Moldova/Belgium-Luxembourg	May 21, 1996	
Moldova/Bulgaria	April 17, 1996	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Moldova/China	November 7, 1992	March 1, 1995
Moldova/Finland	August 25, 1995	
Moldova/Germany	February 28, 1994	
Moldova/Hungary	April 19, 1995	
Moldova/Kuwait	February 4, 1993	
Moldova/Netherlands	September 26, 1995	
Moldova/Poland	November 16, 1994	July 27, 1995
Moldova/Romania	August 14, 1992	
Moldova/Switzerland	November 30, 1995	
Moldova/Turkey	February 14, 1994	
Moldova/Ukraine	August 29, 1995	
Moldova/United Kingdom	March 19, 1996	
Moldova/United States	April 21, 1993	November 25, 1994
Moldova/Uzbekistan	November 21, 1995	
Mongolia/Belgium-Luxembourg	March 3, 1992	
Mongolia/China	August 26, 1991	November 1, 1993
Mongolia/Denmark	March 13, 1995	
Mongolia/France	November 8, 1991	December 22, 1993
Mongolia/Germany	June 26, 1991	June 23, 1996
Mongolia/Hungary	September 13, 1994	
Mongolia/Italy	January 15, 1993	September 1, 1995
Mongolia/Kazakhstan	December 2, 1994	May 13, 1995
Mongolia/Korea	March 28, 1991	April 30, 1991
Mongolia/Lao PDR	March 3, 1994	
Mongolia/Malaysia	July 27, 1995	January 14, 1996
Mongolia/Netherlands	March 9, 1995	June 1, 1996
Mongolia/Poland	November 8, 1995	March 21, 1996
Mongolia/Romania	November 6, 1995	
Mongolia/Russian Federation	November 30, 1995	
Mongolia/Singapore	July 24, 1995	January 14, 1996
Mongolia/United Kingdom	October 4, 1991	October 4, 1991
Mongolia/United States	October 6, 1994	
Morocco/Austria	November 2, 1992	July 1, 1995
Morocco/Belgium-Luxembourg	April 28, 1965	October 18, 1967
Morocco/Bulgaria	May 22, 1996	
Morocco/China	March 27, 1995	
Morocco/Egypt	June 3, 1976	
Morocco/France	January 13, 1996	
Morocco/France[28]	July 15, 1975	December 13, 1976
Morocco/Gabon	January 13, 1979	
Morocco/Germany	August 31, 1961	January 21, 1968
Morocco/Greece	February 16, 1994	
Morocco/Hungary	December 12, 1991	

[28]) This treaty will terminate on the entry into force of the new treaty between France and Morocco, signed on January 13, 1996.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Morocco/Italy	July 18, 1990	
Morocco/Netherlands	December 23, 1971	July 27, 1978
Morocco/Poland	October 24, 1994	May 29, 1995
Morocco/Portugal	October 18, 1988	March 22, 1995
Morocco/Romania	January 28, 1994	August 1, 1994
Morocco/Spain	September 27, 1989	January 15, 1992
Morocco/Sweden	September 26, 1990	Provisionally in force
Morocco/Switzerland	December 17, 1985	April 12, 1991
Morocco/United Kingdom	October 30, 1990	Provisionally in force
Morocco/United States	July 22, 1985	May 29, 1991
Namibia/Germany	January 21, 1994	Provisionally in force
Namibia/Malaysia	August 12, 1994	
Namibia/Switzerland	August 1, 1994	
Nepal/France	May 2, 1983	June 13, 1985
Nepal/Germany	October 20, 1986	July 7, 1988
Nepal/United Kingdom	March 2, 1993	March 2, 1993
Netherlands/Albania	April 15, 1994	September 1, 1995
Netherlands/Argentina	October 20, 1992	October 1, 1994
Netherlands/Bangladesh	November 1, 1994	
Netherlands/Belarus	April 11, 1995	August 1, 1996
Netherlands/Bolivia	March 10, 1992	November 1, 1994
Netherlands/Bulgaria	March 8, 1988	May 24, 1990
Netherlands/Cameroon	July 6, 1965	May 7, 1966
Netherlands/Cape Verde	November 11, 1991	November 25, 1992
Netherlands/China	June 17, 1985	February 1, 1987
Netherlands/Côte d'Ivoire	April 26, 1965	September 8, 1966
Netherlands/Croatia	October 31, 1996	
Netherlands/Czech Republic	April 29, 1991	October 1, 1992
Netherlands/Egypt	January 17, 1996	
Netherlands/Egypt[29]	October 30, 1976	January 1, 1978
Netherlands/Estonia	October 27, 1992	September 1, 1993
Netherlands/Ghana	March 31, 1989	July 1, 1991
Netherlands/Hong Kong	November 19, 1992	September 1, 1993
Netherlands/Hungary	September 2, 1987	June 1, 1988
Netherlands/India	November 6, 1995	December 1, 1996
Netherlands/Indonesia	April 6, 1994	July 1, 1995
Netherlands/Jamaica	April 18, 1991	August 1, 1992
Netherlands/Kenya	September 11, 1970	June 11, 1979
Netherlands/Korea	October 16, 1974	June 1, 1975
Netherlands/Latvia	March 14, 1994	April 1, 1995
Netherlands/Lithuania	January 26, 1994	April 1, 1995
Netherlands/Malaysia	June 15, 1971	September 13, 1972
Netherlands/Malta	September 10, 1984	July 1, 1985

[29]) This treaty will terminate on the entry into force of the new treaty between Egypt and the Netherlands signed on January 17, 1996.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Netherlands/Moldova	September 26, 1995	
Netherlands/Mongolia	March 9, 1995	June 1, 1996
Netherlands/Morocco	December 23, 1971	July 27, 1978
Netherlands/Nigeria	November 2, 1992	February 1, 1994
Netherlands/Oman	September 19, 1987	February 1, 1989
Netherlands/Pakistan	October 4, 1988	October 1, 1989
Netherlands/Paraguay	October 29, 1992	August 1, 1994
Netherlands/Peru	December 27, 1994	February 1, 1996
Netherlands/Philippines	February 27, 1985	October 1, 1987
Netherlands/Poland	September 7, 1992	February 1, 1994
Netherlands/Romania	April 19, 1994	February 1, 1995
Netherlands/Russian Federation	October 5, 1989	July 20, 1991
Netherlands/Senegal	August 3, 1979	May 5, 1981
Netherlands/Singapore	May 16, 1972	September 7, 1973
Netherlands/Slovak Republic	April 29, 1991	October 1, 1992
Netherlands/Slovenia	September 24, 1996	
Netherlands/South Africa	May 9, 1995	
Netherlands/Sri Lanka	April 26, 1984	May 1, 1985
Netherlands/Sudan	August 22, 1970	March 27, 1972
Netherlands/Tanzania	April 14, 1970	July 28, 1972
Netherlands/Thailand	June 6, 1972	March 3, 1973
Netherlands/Tunisia	May 23, 1963	December 19, 1964
Netherlands/Turkey	March 27, 1986	November 1, 1989
Netherlands/Uganda	April 24, 1970	
Netherlands/Ukraine	July 14, 1994	
Netherlands/Uruguay	September 22, 1988	August 1, 1991
Netherlands/Uzbekistan	March 14, 1996	
Netherlands/Venezuela	October 22, 1991	November 1, 1993
Netherlands/Vietnam	March 10, 1994	February 1, 1995
Netherlands/Yemen	March 18, 1985	September 1, 1986
Netherlands/Yugoslavia	February 16, 1976	April 1, 1977
New Zealand/China	November 22, 1988	March 25, 1989
New Zealand/Hong Kong	July 6, 1995	August 5, 1995
Nicaragua/Denmark	March 12, 1995	January 26, 1996
Nicaragua/Germany	May 6, 1996	
Nicaragua/Spain	March 16, 1994	March 28, 1995
Nicaragua/United States	July 1, 1995	
Niger/Germany	October 29, 1964	January 10, 1966
Niger/Switzerland	March 28, 1962	November 17, 1962
Niger/Tunisia	June 5, 1992	
Nigeria/France	February 27, 1990	August 19, 1991
Nigeria/Netherlands	November 2, 1992	February 1, 1994
Nigeria/United Kingdom	December 11, 1990	December 11, 1990

PARTIES	SIGNATURE	ENTRY INTO FORCE
Norway/Chile	June 1, 1993	September 8, 1994
Norway/China	November 21, 1984	July 10, 1985
Norway/Czech Republic	May 21, 1991	August 6, 1992
Norway/Estonia	June 15, 1992	June 15, 1992
Norway/Hungary	April 8, 1991	December 4, 1992
Norway/Indonesia	November 26, 1991	October 1, 1994
Norway/Latvia	June 16, 1992	December 1, 1992
Norway/Lithuania	June 16, 1992	December 19, 1992
Norway/Madagascar	May 13, 1966	September 28, 1967
Norway/Malaysia	November 6, 1984	January 7, 1986
Norway/Peru	March 10, 1995	May 9, 1995
Norway/Poland	June 5, 1990	October 24, 1990
Norway/Romania	June 11, 1991	March 23, 1992
Norway/Russian Federation	October 4, 1995	
Norway/Slovak Republic	May 21, 1991	August 6, 1992
Norway/Sri Lanka	June 13, 1985	June 13, 1985
Oman/China	March 18, 1995	
Oman/France	October 17, 1994	
Oman/Germany	June 25, 1979	February 4, 1986
Oman/Italy	June 23, 1993	
Oman/Netherlands	September 19, 1987	February 1, 1989
Oman/Sweden	July 13, 1995	June 8, 1996
Oman/Tunisia	October 19, 1991	
Oman/United Kingdom	November 25, 1995	
Pakistan/China	February 12, 1989	September 30, 1990
Pakistan/France	June 1, 1983	December 14, 1984
Pakistan/Germany	November 25, 1959	November 28, 1962
Pakistan/Korea	May 24, 1988	April 15, 1990
Pakistan/Kuwait	March 17, 1983	
Pakistan/Kyrgyz Republic	August 23, 1995	
Pakistan/Malaysia	July 7, 1995	
Pakistan/Netherlands	October 4, 1988	October 1, 1989
Pakistan/Romania	January 21, 1978	October 31, 1978
Pakistan/Spain	September 15, 1994	April 26, 1996
Pakistan/Sweden	March 12, 1981	June 14, 1981
Pakistan/Switzerland	July 11, 1995	
Pakistan/Turkey	March 16, 1995	
Pakistan/United Kingdom	November 30, 1994	November 30, 1994
Panama/Canada	September 12, 1996	
Panama/France	November 5, 1982	October 9, 1985
Panama/Germany	November 2, 1983	March 10, 1989
Panama/Switzerland	October 19, 1983	August 22, 1985
Panama/United Kingdom	October 7, 1983	November 7, 1983
Panama/United States	October 27, 1982	May 30, 1991

PARTIES	SIGNATURE	ENTRY INTO FORCE
Papua New Guinea/Australia	September 3, 1990	October 20, 1991
Papua New Guinea/China	April 12, 1991	February 12, 1993
Papua New Guinea/Germany	November 12, 1980	November 3, 1983
Papua New Guinea/Malaysia	October 27, 1992	
Papua New Guinea/United Kingdom	May 14, 1981	December 22, 1981
Paraguay/Austria	August 13, 1993	
Paraguay/Belgium-Luxembourg	October 6, 1992	
Paraguay/Chile	August 7, 1995	
Paraguay/Ecuador	January 28, 1994	September 18, 1995
Paraguay/France	November 30, 1978	December 11, 1980
Paraguay/Germany	August 11, 1993	
Paraguay/Hungary	August 11, 1993	April 1, 1995
Paraguay/Korea	December 22, 1992	August 6, 1993
Paraguay/Netherlands	October 29, 1992	August 1, 1994
Paraguay/Peru	January 31, 1994	December 18, 1994
Paraguay/Romania	May 21, 1994	April 12, 1995
Paraguay/Spain	October 11, 1993	
Paraguay/Switzerland	January 31, 1992	September 28, 1992
Paraguay/United Kingdom	June 4, 1981	April 23, 1992
Peru/Argentina	October 10, 1994	
Peru/Bolivia	July 30, 1993	February 19, 1995
Peru/China	June 9, 1994	February 1, 1995
Peru/Colombia	April 26, 1994	
Peru/Czech Republic	March 16, 1994	March 6, 1995
Peru/Denmark	November 23, 1994	February 17, 1995
Peru/El Salvador	June 13, 1996	
Peru/Finland	May 2, 1995	
Peru/France	October 6, 1993	
Peru/Germany	January 30, 1995	
Peru/Italy	May 5, 1994	October 18, 1995
Peru/Korea	June 3, 1993	April 20, 1994
Peru/Malaysia	December 13, 1995	
Peru/Netherlands	December 27, 1994	February 1, 1996
Peru/Norway	March 10, 1995	May 9, 1995
Peru/Paraguay	January 31, 1994	December 18, 1994
Peru/Portugal	November 22, 1994	October 2, 1995
Peru/Romania	May 16, 1994	January 1, 1995
Peru/Spain	November 17, 1994	February 16, 1996
Peru/Sweden	May 3, 1994	August 1, 1994
Peru/Switzerland	November 22, 1991	November 23, 1993
Peru/Thailand	November 15, 1991	November 15, 1991
Peru/United Kingdom	October 4, 1993	April 21, 1994
Philippines/Australia	January 25, 1995	December 8, 1995
Philippines/Canada	November 9, 1995	
Philippines/Chile	November 20, 1995	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Philippines/China	July 20, 1992	
Philippines/Czech Republic	April 5, 1995	
Philippines/France	September 13, 1994	
Philippines/France[30]	June 14, 1976	July 1, 1976
Philippines/Italy	June 17, 1988	November 4, 1993
Philippines/Korea	April 7, 1994	
Philippines/Netherlands	February 27, 1985	October 1, 1987
Philippines/Spain	October 19, 1993	September 21, 1994
Philippines/Thailand	September 30, 1995	
Philippines/United Kingdom	December 3, 1980	January 2, 1981
Philippines/Vietnam	February 27, 1992	
Poland/Albania	March 7, 1993	August 9, 1993
Poland/Argentina	July 31, 1991	September 1, 1992
Poland/Australia	May 7, 1991	March 27, 1992
Poland/Austria	November 24, 1988	November 1, 1989
Poland/Belarus	April 24, 1992	January 18, 1993
Poland/Belgium-Luxembourg	May 19, 1987	August 2, 1981
Poland/Bulgaria	April 11, 1994	March 9, 1995
Poland/Canada	April 6, 1990	November 22, 1990
Poland/Chile	July 5, 1995	
Poland/China	June 7, 1988	January 8, 1989
Poland/Croatia	February 21, 1995	October 4, 1995
Poland/Cyprus	June 4, 1992	July 6, 1993
Poland/Czech Republic	July 16, 1993	June 29, 1994
Poland/Denmark	May 1, 1990	October 30, 1990
Poland/Egypt	July 1, 1995	
Poland/Estonia	May 6, 1993	August 6, 1993
Poland/Finland	April 5, 1990	March 29, 1991
Poland/France	February 14, 1989	February 10, 1990
Poland/Germany	November 10, 1989	February 24, 1991
Poland/Greece	October 14, 1992	February 20, 1995
Poland/Hungary	September 23, 1992	June 16, 1995
Poland/Indonesia	October 6, 1992	July 1, 1993
Poland/Israel	May 22, 1991	May 6, 1992
Poland/Italy	May 10, 1989	January 10, 1993
Poland/Kazakhstan	September 21, 1994	May 25, 1995
Poland/Korea	November 1, 1989	February 2, 1990
Poland/Kuwait	March 5, 1990	December 18, 1993
Poland/Latvia	April 26, 1993	July 19, 1993
Poland/Lithuania	September 28, 1992	August 6, 1993
Poland/Malaysia	April 21, 1993	March 23, 1994
Poland/Moldova	November 16, 1994	July 27, 1995
Poland/Mongolia	November 8, 1995	March 21, 1996
Poland/Morocco	October 24, 1994	May 29, 1995

[30]) This treaty will terminate on the entry into force of the new treaty between France and the Philippines signed on September 13, 1994.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Poland/Netherlands	September 7, 1992	February 1, 1994
Poland/Norway	June 5, 1990	October 24, 1990
Poland/Portugal	March 11, 1993	August 3, 1994
Poland/Romania	June 23, 1994	December 30, 1994
Poland/Russian Federation	October 2, 1992	
Poland/Singapore	June 3, 1993	December 29, 1993
Poland/Slovak Republic	August 18, 1994	March 14, 1996
Poland/Spain	July 30, 1992	May 1, 1993
Poland/Sweden	October 13, 1989	January 4, 1990
Poland/Switzerland	November 8, 1989	April 17, 1990
Poland/Thailand	December 18, 1992	August 10, 1993
Poland/Tunisia	March 29, 1993	September 22, 1993
Poland/Turkey	August 21, 1991	August 19, 1994
Poland/Ukraine	January 12, 1993	September 14, 1993
Poland/United Arab Emirates	January 31, 1993	April 9, 1994
Poland/United Kingdom	December 8, 1987	April 14, 1988
Poland/United States	March 21, 1990	August 6, 1994
Poland/Uruguay	August 2, 1991	October 21, 1994
Poland/Uzbekistan	January 11, 1995	April 29, 1995
Poland/Vietnam	August 31, 1994	November 24, 1994
Portugal/Argentina	October 6, 1994	
Portugal/Brazil	February 9, 1994	
Portugal/Bulgaria	May 27, 1993	
Portugal/Cape Verde	October 26, 1990	October 4, 1991
Portugal/Chile	April 28, 1995	
Portugal/China	February 3, 1992	
Portugal/Croatia	May 9, 1995	
Portugal/Czech Republic	November 12, 1993	August 3, 1994
Portugal/Germany	September 16, 1980	April 23, 1982
Portugal/Guinea-Bissau	June 24, 1991	
Portugal/Hungary	February 28, 1992	
Portugal/Korea	May 3, 1995	
Portugal/Latvia	September 27, 1995	
Portugal/Morocco	October 18, 1988	March 22, 1995
Portugal/Peru	November 22, 1994	October 2, 1995
Portugal/Poland	March 11, 1993	August 3, 1994
Portugal/Romania	November 17, 1993	November 17, 1994
Portugal/Russian Federation	July 22, 1994	
Portugal/Tunisia	May 11, 1992	December 6, 1994
Portugal/Venezuela	June 17, 1994	May 11, 1995
Qatar/Germany	June 14, 1996	
Romania/Albania	May 11, 1994	September 2, 1995
Romania/Algeria	June 28, 1994	December 30, 1995
Romania/Argentina	July 29, 1993	May 1, 1995
Romania/Armenia	September 20, 1994	December 24, 1995

PARTIES	SIGNATURE	ENTRY INTO FORCE
Romania/Australia	June 21, 1993	April 22, 1994
Romania/Austria	September 30, 1976	November 8, 1977
Romania/Bangladesh	March 13, 1987	October 31, 1987
Romania/Belarus	May 27, 1995	
Romania/Belgium-Luxembourg	May 8, 1978	May 1, 1980
Romania/Bolivia	October 9, 1995	
Romania/Bulgaria	June 1, 1994	May 23, 1995
Romania/Cameroon	August 30, 1980	December 16, 1981
Romania/Canada	April 17, 1996	
Romania/Chile	July 4, 1995	
Romania/China	July 12, 1994	September 1, 1995
Romania/Croatia	June 8, 1994	September 9, 1995
Romania/Cyprus	July 26, 1991	July 25, 1993
Romania/Czech Republic	November 8, 1993	July 28, 1994
Romania/Denmark	June 14, 1994	August 24, 1995
Romania/Egypt	November 24, 1994	
Romania/Egypt[31]	May 10, 1976	January 22, 1977
Romania/Finland	March 26, 1992	January 6, 1993
Romania/France	March 21, 1995	
Romania/France[32]	December 16, 1976	August 1, 1978
Romania/Gabon	April 11, 1979	September 18, 1982
Romania/Germany	June 25, 1996	
Romania/Germany[33]	October 12, 1979	January 10, 1981
Romania/Ghana	September 14, 1989	
Romania/Greece	September 16, 1991	October 21, 1992
Romania/Hungary	September 16, 1993	
Romania/Israel	September 2, 1991	August 26, 1992
Romania/Italy	December 6, 1990	March 14, 1995
Romania/Jordan	July 2, 1992	
Romania/Kazakhstan	April 25, 1996	
Romania/Korea	August 7, 1990	
Romania/Kuwait	May 21, 1991	July 26, 1992
Romania/Lithuania	March 8, 1994	December 15, 1994
Romania/Malaysia	November 26, 1982	July 20, 1984
Romania/Mauritania	March 14, 1988	December 19, 1989
Romania/Moldova	August 14, 1992	
Romania/Mongolia	November 6, 1995	
Romania/Morocco	January 28, 1994	August 1, 1994
Romania/Netherlands	April 19, 1994	February 1, 1995
Romania/Norway	June 11, 1991	March 23, 1992
Romania/Pakistan	January 21, 1978	October 31, 1978

[31]) This treaty will terminate on the entry into force of the new treaty between Egypt and Romania, signed on November 24, 1994.

[32]) This treaty will terminate on the entry into force of the new treaty between France and Romania signed on March 21, 1995.

[33]) This treaty will terminate on the entry into force of the new treaty between Germany and Romania signed on June 25, 1996.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Romania/Paraguay	May 21, 1994	April 12, 1995
Romania/Peru	May 16, 1994	January 1, 1995
Romania/Poland	June 23, 1994	December 30, 1994
Romania/Portugal	November 17, 1993	November 17, 1994
Romania/Russian Federation	September 29, 1993	
Romania/Senegal	June 19, 1980	May 20, 1984
Romania/Slovak Republic	March 3, 1994	March 7, 1996
Romania/Slovenia	January 24, 1996	
Romania/Spain	January 25, 1995	December 7, 1995
Romania/Sri Lanka	February 9, 1981	June 3, 1982
Romania/Switzerland	October 25, 1993	July 30, 1994
Romania/Thailand	April 30, 1993	August 20, 1994
Romania/Tunisia	September 23, 1987	February 4, 1989
Romania/Turkey	January 24, 1991	
Romania/United Kingdom	July 13, 1995	January 10, 1996
Romania/United States	May 28, 1992	January 15, 1994
Romania/Uruguay	November 23, 1990	August 29, 1993
Romania/Vietnam	September 1, 1994	August 15, 1995
Russian Federation/Albania	April 11, 1995	
Russian Federation/Belgium-Luxembourg	February 9, 1989	October 13, 1991
Russian Federation/Bulgaria	June 8, 1993	
Russian Federation/Canada	November 20, 1989	June 27, 1991
Russian Federation/China	July 21, 1990	
Russian Federation/Croatia	May 20, 1996	
Russian Federation/Cuba	July 7, 1993	
Russian Federation/Czech Republic	April 5, 1994	
Russian Federation/Denmark	November 4, 1993	
Russian Federation/Finland	February 8, 1989	August 15, 1991
Russian Federation/France	July 4, 1989	July 18, 1991
Russian Federation/Germany	June 13, 1989	August 5, 1991
Russian Federation/Greece	June 30, 1993	
Russian Federation/Hungary	March 8, 1995	
Russian Federation/India	December 23, 1994	
Russian Federation/Italy	April 9, 1996	
Russian Federation/Italy[34]	November 30, 1989	July 8, 1991
Russian Federation/Korea	December 14, 1990	July 10, 1991
Russian Federation/Kuwait	November 21, 1994	
Russian Federation/Mongolia	November 30, 1995	
Russian Federation/Netherlands	October 5, 1989	July 20, 1991
Russian Federation/Norway	October 4, 1995	
Russian Federation/Poland	October 2, 1992	
Russian Federation/Portugal	July 22, 1994	
Russian Federation/Romania	September 29, 1993	
Russian Federation/Slovenia	November 30, 1993	

[34]) This treaty will terminate on the entry into force of the new treaty between Italy and the Russian Federation signed on April 9, 1996.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Russian Federation/Spain	October 26, 1990	November 28, 1991
Russian Federation/Sweden	April 19, 1995	
Russian Federation/Switzerland	December 1, 1990	August 26, 1991
Russian Federation/Turkey	December 14, 1990	
Russian Federation/United Kingdom	April 6, 1989	July 3, 1991
Russian Federation/United States	June 17, 1992	
Russian Federation/Vietnam	June 16, 1994	
Rwanda/Belgium-Luxembourg	November 2, 1983	August 1, 1985
Rwanda/Germany	May 18, 1967	February 28, 1969
Rwanda/Switzerland	October 15, 1963	October 15, 1963
Saudi Arabia/Germany	October 29, 1996	
Senegal/Argentina	April 6, 1993	
Senegal/Germany	January 24, 1964	January 16, 1966
Senegal/Korea	July 12, 1984	September 2, 1985
Senegal/Netherlands	August 3, 1979	May 5, 1981
Senegal/Romania	June 19, 1980	May 20, 1984
Senegal/Sweden	February 24, 1967	February 23, 1968
Senegal/Switzerland	August 16, 1962	August 13, 1964
Senegal/Tunisia	May 17, 1984	
Senegal/United Kingdom	May 7, 1980	February 9, 1984
Senegal/United States	December 6, 1983	October 25, 1990
Sierra Leone/Germany	April 8, 1965	December 10, 1966
Sierra Leone/United Kingdom	December 8, 1981	
Singapore/Belgium-Luxembourg	November 17, 1978	November 27, 1980
Singapore/China	November 21, 1985	February 7, 1986
Singapore/Czech Republic	April 8, 1995	
Singapore/France	September 8, 1975	October 18, 1976
Singapore/Germany	October 3, 1973	October 1, 1975
Singapore/Indonesia	August 28, 1990	August 28, 1990
Singapore/Mongolia	July 24, 1995	January 14, 1996
Singapore/Netherlands	May 16, 1972	September 7, 1973
Singapore/Poland	June 3, 1993	December 29, 1993
Singapore/Sri Lanka	May 9, 1980	September 30, 1980
Singapore/Switzerland	March 6, 1978	May 3, 1978
Singapore/United Kingdom	July 22, 1975	July 22, 1975
Singapore/Vietnam	October 29, 1992	
Slovak Republic/Austria	October 15, 1990	October 1, 1991
Slovak Republic/Belgium-Luxembourg	April 24, 1989	February 13, 1992
Slovak Republic/Bulgaria	July 21, 1994	March 9, 1995
Slovak Republic/Canada	November 15, 1990	March 9, 1992
Slovak Republic/China	December 4, 1991	December 1, 1992
Slovak Republic/Croatia	February 12, 1996	

PARTIES	SIGNATURE	ENTRY INTO FORCE
Slovak Republic/Czech Republic	November 23, 1992	January 1, 1993
Slovak Republic/Denmark	March 6, 1991	September 19, 1992
Slovak Republic/Finland	November 6, 1990	October 23, 1991
Slovak Republic/France	September 13, 1990	September 27, 1991
Slovak Republic/Germany	October 2, 1990	August 2, 1992
Slovak Republic/Hungary	January 15, 1993	
Slovak Republic/Indonesia	July 12, 1994	March 1, 1995
Slovak Republic/Netherlands	April 29, 1991	October 1, 1992
Slovak Republic/Norway	May 21, 1991	August 6, 1992
Slovak Republic/Poland	August 18, 1994	March 14, 1996
Slovak Republic/Romania	March 3, 1994	March 7, 1996
Slovak Republic/Slovenia	July 28, 1993	March 28, 1996
Slovak Republic/Spain	December 12, 1990	November 28, 1991
Slovak Republic/Sweden	November 13, 1990	September 23, 1991
Slovak Republic/Switzerland	October 5, 1990	August 7, 1991
Slovak Republic/Tajikistan	February 14, 1994	March 12, 1996
Slovak Republic/Ukraine	June 22, 1994	April 3, 1996
Slovak Republic/United Kingdom	July 10, 1990	October 26, 1992
Slovak Republic/United States	October 22, 1991	December 19, 1992
Slovenia/China	September 13, 1993	January 1, 1995
Slovenia/Czech Republic	May 4, 1993	May 21, 1994
Slovenia/Germany	October 28, 1993	
Slovenia/Macedonia, FYR of	June 5, 1996	
Slovenia/Netherlands	September 24, 1996	
Slovenia/Romania	January 24, 1996	
Slovenia/Russian Federation	November 30, 1993	
Slovenia/Slovak Republic	July 28, 1993	March 28, 1996
Slovenia/Sweden	November 10, 1978	November 21, 1979
Slovenia/Switzerland	November 9, 1995	
Somalia/Germany	November 27, 1981	February 15, 1985
South Africa/Canada	November 27, 1995	
South Africa/Cuba	December 8, 1995	
South Africa/Denmark	February 22, 1996	
South Africa/France	October 11, 1995	
South Africa/Germany	September 11, 1995	
South Africa/Korea	July 7, 1995	
South Africa/Netherlands	May 9, 1995	
South Africa/Switzerland	June 27, 1995	
South Africa/United Kingdom	September 20, 1994	
Spain/Algeria	December 23, 1994	January 17, 1996
Spain/Argentina	October 3, 1991	September 28, 1992
Spain/Bolivia	April 24, 1990	May 12, 1992
Spain/Bulgaria	September 4, 1995	
Spain/Chile	October 2, 1991	March 29, 1994

PARTIES	SIGNATURE	ENTRY INTO FORCE
Spain/China	February 6, 1992	May 1, 1993
Spain/Colombia	June 9, 1995	
Spain/Cuba	May 27, 1994	June 9, 1995
Spain/Czech Republic	December 12, 1990	November 28, 1991
Spain/Dominican Republic	March 16, 1995	October 7, 1996
Spain/Ecuador	June 26, 1996	
Spain/Egypt	November 3, 1992	April 26, 1994
Spain/El Salvador	February 14, 1995	February 20, 1996
Spain/Gabon	March 2, 1995	
Spain/Honduras	March 18, 1994	May 23, 1996
Spain/Hungary	November 9, 1989	August 1, 1992
Spain/Indonesia	May 30, 1995	
Spain/Kazakhstan	March 23, 1994	June 22, 1995
Spain/Korea	January 17, 1994	July 19, 1994
Spain/Lebanon	February 22, 1996	
Spain/Lithuania	July 6, 1994	December 22, 1995
Spain/Malaysia	April 4, 1995	February 16, 1996
Spain/Mexico	June 22, 1995	
Spain/Morocco	September 27, 1989	January 15, 1992
Spain/Nicaragua	March 16, 1994	March 28, 1995
Spain/Pakistan	September 15, 1994	April 26, 1996
Spain/Paraguay	October 11, 1993	
Spain/Peru	November 17, 1994	February 16, 1996
Spain/Philippines	October 19, 1993	September 21, 1994
Spain/Poland	July 30, 1992	May 1, 1993
Spain/Romania	January 25, 1995	December 7, 1995
Spain/Russian Federation	October 26, 1990	November 28, 1991
Spain/Slovak Republic	December 12, 1990	November 28, 1991
Spain/Tunisia	May 28, 1991	June 20, 1994
Spain/Turkey	February 15, 1995	
Spain/Uruguay	April 7, 1992	May 6, 1994
Spain/Venezuela	November 2, 1995	
Sri Lanka/Belgium-Luxembourg	April 5, 1982	April 26, 1984
Sri Lanka/China	March 13, 1986	March 25, 1987
Sri Lanka/Denmark	June 4, 1985	June 4, 1985
Sri Lanka/Egypt	March 11, 1996	
Sri Lanka/Finland	April 27, 1985	October 25, 1987
Sri Lanka/France	April 10, 1980	April 19, 1982
Sri Lanka/Germany	November 8, 1963	December 7, 1966
Sri Lanka/Italy	March 25, 1987	March 20, 1990
Sri Lanka/Japan	March 1, 1982	August 7, 1982
Sri Lanka/Korea	March 28, 1980	July 15, 1980
Sri Lanka/Malaysia	April 16, 1982	October 31, 1985
Sri Lanka/Netherlands	April 26, 1984	May 1, 1985
Sri Lanka/Norway	June 13, 1985	June 13, 1985
Sri Lanka/Romania	February 9, 1981	June 3, 1982
Sri Lanka/Singapore	May 9, 1980	September 30, 1980

PARTIES	SIGNATURE	ENTRY INTO FORCE
Sri Lanka/Sweden	April 30, 1982	April 30, 1982
Sri Lanka/Switzerland	September 23, 1981	February 12, 1982
Sri Lanka/United Kingdom	February 13, 1980	December 18, 1980
Sri Lanka/United States	September 20, 1991	May 1, 1993
St. Lucia/Germany	March 16, 1985	July 22, 1987
St. Lucia/United Kingdom	January 18, 1983	January 18, 1983
St. Vincent and Grenadines/Germany	March 25, 1986	January 8, 1989
Sudan/Egypt	May 28, 1977	
Sudan/France	July 31, 1978	July 5, 1980
Sudan/Germany	February 7, 1963	November 24, 1967
Sudan/Netherlands	August 22, 1970	March 27, 1972
Sudan/Switzerland	February 17, 1974	December 14, 1974
Swaziland/Germany	April 5, 1990	August 7, 1995
Swaziland/United Kingdom	May 5, 1995	May 5, 1995
Sweden/Albania	March 31, 1995	April 1, 1996
Sweden/Argentina	November 22, 1991	September 28, 1992
Sweden/Belarus	December 20, 1994	
Sweden/Bolivia	September 20, 1990	July 3, 1992
Sweden/Bulgaria	April 19, 1994	April 1, 1995
Sweden/Chile	May 24, 1993	December 30, 1995
Sweden/China	March 29, 1982	March 29, 1982
Sweden/Côte d'Ivoire	August 27, 1965	November 3, 1966
Sweden/Czech Republic	November 13, 1990	September 23, 1991
Sweden/Egypt	July 15, 1978	January 29, 1979
Sweden/Estonia	March 31, 1992	May 20, 1992
Sweden/Hong Kong	May 27, 1994	June 26, 1994
Sweden/Hungary	April 21, 1987	April 21, 1987
Sweden/Indonesia	September 17, 1992	February 18, 1993
Sweden/Korea	August 30, 1995	
Sweden/Latvia	March 10, 1992	November 6, 1992
Sweden/Lithuania	March 17, 1992	September 1, 1992
Sweden/Madagascar	April 2, 1966	June 23, 1967
Sweden/Malaysia	March 3, 1979	July 6, 1979
Sweden/Morocco	September 26, 1990	Provisionally in force
Sweden/Oman	July 13, 1995	June 8, 1996
Sweden/Pakistan	March 12, 1981	June 14, 1981
Sweden/Peru	May 3, 1994	August 1, 1994
Sweden/Poland	October 13, 1989	January 4, 1990
Sweden/Russian Federation	April 19, 1995	
Sweden/Senegal	February 24, 1967	February 23, 1968
Sweden/Slovak Republic	November 13, 1990	September 23, 1991
Sweden/Slovenia	November 10, 1978	November 21, 1979
Sweden/Sri Lanka	April 30, 1982	April 30, 1982

PARTIES	***SIGNATURE***	***ENTRY INTO FORCE***
Sweden/Tunisia	September 15, 1984	May 13, 1985
Sweden/Vietnam	September 8, 1993	August 2, 1994
Sweden/Yemen	October 29, 1983	February 23, 1984
Sweden/Yugoslavia	November 10, 1978	November 21, 1979
Switzerland/Albania	September 22, 1992	April 30, 1993
Switzerland/Argentina	April 12, 1991	November 6, 1992
Switzerland/Barbados	March 29, 1995	December 22, 1995
Switzerland/Belarus	May 28, 1993	July 13, 1994
Switzerland/Benin	April 20, 1966	October 6, 1973
Switzerland/Bolivia	November 6, 1987	May 13, 1991
Switzerland/Brazil	November 11, 1994	
Switzerland/Bulgaria	October 28, 1991	October 26, 1993
Switzerland/Burkina Faso	May 6, 1969	September 15, 1969
Switzerland/Cameroon	January 28, 1963	April 6, 1964
Switzerland/Cape Verde	October 28, 1991	May 6, 1992
Switzerland/Central African Republic	February 28, 1973	July 4, 1973
Switzerland/Chad	February 21, 1967	October 31, 1967
Switzerland/Chile	November 11, 1991	
Switzerland/China	November 12, 1986	March 18, 1987
Switzerland/Congo	October 18, 1962	July 11, 1964
Switzerland/Costa Rica	September 1, 1965	August 18, 1966
Switzerland/Côte d'Ivoire	June 26, 1962	November 18, 1962
Switzerland/Czech Republic	October 5, 1990	August 7, 1991
Switzerland/Ecuador	May 2, 1968	September 11, 1969
Switzerland/Egypt	July 25, 1973	June 4, 1974
Switzerland/El Salvador	December 8, 1994	
Switzerland/Estonia	December 21, 1992	August 18, 1993
Switzerland/Gabon	January 28, 1972	October 18, 1972
Switzerland/Gambia	November 22, 1993	
Switzerland/Ghana	October 8, 1991	June 16, 1993
Switzerland/Guinea	April 26, 1962	July 29, 1963
Switzerland/Honduras	October 14, 1993	
Switzerland/Hong Kong	September 22, 1994	October 22, 1994
Switzerland/Hungary	October 5, 1988	May 16, 1989
Switzerland/Indonesia	February 6, 1974	April 9, 1976
Switzerland/Jamaica	December 11, 1990	November 21, 1991
Switzerland/Jordan	November 11, 1976	March 2, 1977
Switzerland/Kazakhstan	May 12, 1994	
Switzerland/Korea	April 7, 1971	April 7, 1971
Switzerland/Latvia	December 22, 1992	April 16, 1993
Switzerland/Liberia	July 23, 1963	September 22, 1964
Switzerland/Lithuania	December 23, 1992	May 13, 1993
Switzerland/Madagascar	March 17, 1964	March 31, 1966
Switzerland/Malaysia	March 1, 1978	June 9, 1978
Switzerland/Mali	March 8, 1978	December 8, 1978
Switzerland/Malta	January 20, 1965	February 23, 1965
Switzerland/Mauritania	September 9, 1976	May 30, 1978

PARTIES	SIGNATURE	ENTRY INTO FORCE
Switzerland/Mexico	July 10, 1995	
Switzerland/Moldova	November 30, 1995	
Switzerland/Morocco	December 17, 1985	April 12, 1991
Switzerland/Namibia	August 1, 1994	
Switzerland/Niger	March 28, 1962	November 17, 1962
Switzerland/Pakistan	July 11, 1995	
Switzerland/Panama	October 19, 1983	August 22, 1985
Switzerland/Paraguay	January 31, 1992	September 28, 1992
Switzerland/Peru	November 22, 1991	November 23, 1993
Switzerland/Poland	November 8, 1989	April 17, 1990
Switzerland/Romania	October 25, 1993	July 30, 1994
Switzerland/Russian Federation	December 1, 1990	August 26, 1991
Switzerland/Rwanda	October 15, 1963	October 15, 1963
Switzerland/Senegal	August 16, 1962	August 13, 1964
Switzerland/Singapore	March 6, 1978	May 3, 1978
Switzerland/Slovak Republic	October 5, 1990	August 7, 1991
Switzerland/Slovenia	November 9, 1995	
Switzerland/South Africa	June 27, 1995	
Switzerland/Sri Lanka	September 23, 1981	February 12, 1982
Switzerland/Sudan	February 17, 1974	December 14, 1974
Switzerland/Syria	June 22, 1977	August 10, 1978
Switzerland/Tanzania	May 3, 1965	September 16, 1965
Switzerland/Togo	January 17, 1964	August 9, 1966
Switzerland/Tunisia	December 2, 1961	January 19, 1964
Switzerland/Turkey	March 3, 1988	February 21, 1990
Switzerland/Uganda	August 23, 1971	May 8, 1972
Switzerland/Ukraine	April 20, 1995	
Switzerland/Uruguay	October 7, 1988	April 22, 1991
Switzerland/Uzbekistan	April 16, 1993	November 5, 1993
Switzerland/Venezuela	November 18, 1993	November 30, 1994
Switzerland/Vietnam	July 3, 1992	December 3, 1992
Switzerland/Zaire	March 10, 1972	May 10, 1973
Switzerland/Zambia	August 3, 1994	March 7, 1995
Syria/France	November 28, 1977	March 1, 1980
Syria/Germany	August 2, 1977	April 20, 1980
Syria/Switzerland	June 22, 1977	August 10, 1978
Tajikistan/China	March 9, 1993	January 20, 1994
Tajikistan/Czech Republic	February 11, 1994	
Tajikistan/India	December __, 1995[35]	
Tajikistan/Korea	July 14, 1995	August 13, 1995
Tajikistan/Kuwait	April 18, 1995	
Tajikistan/Slovak Republic	February 14, 1994	March 12, 1996
Tanzania/Germany	January 30, 1965	July 12, 1968

[35]) Signature date unavailable.

PARTIES	SIGNATURE	ENTRY INTO FORCE
Tanzania/Netherlands	April 14, 1970	July 28, 1972
Tanzania/Switzerland	May 3, 1965	September 16, 1965
Tanzania/United Kingdom	January 7, 1994	
Thailand/Bangladesh	March 13, 1988	
Thailand/Belgium-Luxembourg	March 19, 1986	
Thailand/Cambodia	March 29, 1995	
Thailand/China	March 12, 1985	December 13, 1985
Thailand/Czech Republic	February 12, 1994	May 4, 1995
Thailand/Finland	March 18, 1994	
Thailand/Germany	December 13, 1961	April 10, 1965
Thailand/Hungary	October 18, 1991	October 18, 1991
Thailand/Korea	March 24, 1989	September 30, 1989
Thailand/Lao PDR	August 22, 1990	
Thailand/Netherlands	June 6, 1972	March 3, 1973
Thailand/Peru	November 15, 1991	November 15, 1991
Thailand/Philippines	September 30, 1995	
Thailand/Poland	December 18, 1992	August 10, 1993
Thailand/Romania	April 30, 1993	August 20, 1994
Thailand/United Kingdom	November 28, 1978	August 11, 1979
Thailand/Vietnam	October 30, 1991	
Togo/Germany	May 16, 1961	December 21, 1964
Togo/Switzerland	January 17, 1964	August 9, 1966
Togo/Tunisia	September 13, 1987	
Trinidad and Tobago/Canada	September 11, 1995	July 8, 1996
Trinidad and Tobago/France	October 28, 1993	
Trinidad and Tobago/United Kingdom	July 23, 1993	October 8, 1993
Trinidad and Tobago/United States	September 26, 1994	
Tunisia/Argentina	June 17, 1992	January 23, 1995
Tunisia/Austria	June 1, 1995	
Tunisia/Belgium-Luxembourg	July 15, 1964	March 9, 1966
Tunisia/Egypt	December 8, 1990	
Tunisia/France	June 30, 1972	June 30, 1972
Tunisia/Germany	December 20, 1963	February 6, 1966
Tunisia/Greece	October 31, 1992	April 21, 1995
Tunisia/Guinea	November 28, 1990	
Tunisia/Indonesia	May 13, 1992	
Tunisia/Italy	October 17, 1985	June 24, 1989
Tunisia/Korea	May 23, 1975	November 28, 1975
Tunisia/Mali	February 1, 1986	
Tunisia/Mauritania	March 1, 1986	
Tunisia/Netherlands	May 23, 1963	December 19, 1964
Tunisia/Niger	June 5, 1992	
Tunisia/Oman	October 19, 1991	
Tunisia/Poland	March 29, 1993	September 22, 1993

PARTIES	SIGNATURE	ENTRY INTO FORCE
Tunisia/Portugal	May 11, 1992	December 6, 1994
Tunisia/Romania	September 23, 1987	February 4, 1989
Tunisia/Senegal	May 17, 1984	
Tunisia/Spain	May 28, 1991	June 20, 1994
Tunisia/Sweden	September 15, 1984	May 13, 1985
Tunisia/Switzerland	December 2, 1961	January 19, 1964
Tunisia/Togo	September 13, 1987	
Tunisia/Turkey	May 29, 1991	February 7, 1993
Tunisia/United Kingdom	March 14, 1989	January 4, 1990
Tunisia/United States	May 15, 1990	February 7, 1993
Turkey/Albania	June 1, 1992	
Turkey/Argentina	May 8, 1992	May 1, 1995
Turkey/Austria	September 16, 1988	January 1, 1992
Turkey/Azerbaijan	February 9, 1994	
Turkey/Bangladesh	November 12, 1987	June 21, 1990
Turkey/Belarus	August 8, 1995	
Turkey/Belgium-Luxembourg	August 27, 1986	May 4, 1990
Turkey/Bulgaria	July 6, 1994	
Turkey/China	November 13, 1990	August 19, 1994
Turkey/Croatia	February 12, 1996	
Turkey/Czech Republic	April 30, 1992	
Turkey/Denmark	February 7, 1990	August 1, 1992
Turkey/Finland	May 13, 1993	April 23, 1995
Turkey/Georgia	July 31, 1992	June 6, 1995
Turkey/Germany	June 20, 1962	December 16, 1965
Turkey/Hungary	January 14, 1992	November 1, 1994
Turkey/Italy	March 28, 1995	
Turkey/Japan	February 12, 1992	March 12, 1993
Turkey/Jordan	August 2, 1993	
Turkey/Kazakhstan	May 1, 1992	
Turkey/Korea	May 14, 1991	June 4, 1994
Turkey/Kuwait	October 27, 1988	April 25, 1992
Turkey/Kyrgyz Republic	April 28, 1992	September 28, 1995
Turkey/Lithuania	July 11, 1994	
Turkey/Moldova	February 14, 1994	
Turkey/Netherlands	March 27, 1986	November 1, 1989
Turkey/Pakistan	March 16, 1995	
Turkey/Poland	August 21, 1991	August 19, 1994
Turkey/Romania	January 24, 1991	
Turkey/Russian Federation	December 14, 1990	
Turkey/Spain	February 15, 1995	
Turkey/Switzerland	March 3, 1988	February 21, 1990
Turkey/Tunisia	May 29, 1991	February 7, 1993
Turkey/Turkmenistan	May 2, 1992	
Turkey/United Kingdom	March 15, 1991	
Turkey/United States	December 3, 1985	May 18, 1990
Turkey/Uzbekistan	April 28, 1992	May 18, 1995

PARTIES	SIGNATURE	ENTRY INTO FORCE
Turkmenistan/China	November 21, 1992	June 6, 1995
Turkmenistan/Egypt	May 23, 1995	
Turkmenistan/France	April 28, 1994	
Turkmenistan/India	September __, 1995[36]	
Turkmenistan/Malaysia	May 30, 1994	
Turkmenistan/Turkey	May 2, 1992	
Turkmenistan/United Kingdom	February 9, 1995	February 9, 1995
Uganda/Egypt	November 4, 1995	
Uganda/Germany	November 29, 1966	August 19, 1968
Uganda/Netherlands	April 24, 1970	
Uganda/Switzerland	August 23, 1971	May 8, 1972
Ukraine/Argentina	August 9, 1995	
Ukraine/Belarus	December 14, 1995	Provisionally in force
Ukraine/Bulgaria	December 8, 1994	December 10, 1995
Ukraine/Canada	October 24, 1994	June 24, 1995
Ukraine/Chile	October 30, 1995	
Ukraine/China	October 31, 1992	May 5, 1993
Ukraine/Czech Republic	March 17, 1994	
Ukraine/Denmark	October 23, 1992	April 29, 1994
Ukraine/Egypt	December 22, 1992	
Ukraine/Estonia	February 15, 1995	July 5, 1995
Ukraine/Finland	May 14, 1992	January 30, 1994
Ukraine/France	May 3, 1994	
Ukraine/Germany	February 15, 1993	June 29, 1996
Ukraine/Greece	September 1, 1994	
Ukraine/Hungary	October 11, 1994	
Ukraine/Italy	May 2, 1995	
Ukraine/Kazakhstan	September 17, 1994	
Ukraine/Kyrgyz Republic	February 23, 1993	
Ukraine/Lithuania	February 8, 1994	March 6, 1995
Ukraine/Moldova	August 29, 1995	
Ukraine/Netherlands	July 14, 1994	
Ukraine/Poland	January 12, 1993	September 14, 1993
Ukraine/Slovak Republic	June 22, 1994	April 3, 1996
Ukraine/Switzerland	April 20, 1995	
Ukraine/United Kingdom	February 10, 1993	February 10, 1993
Ukraine/United States	March 4, 1994	
United Arab Emirates/China	July 1, 1993	September 28, 1994
United Arab Emirates/Czech Republic	November 23, 1994	
United Arab Emirates/Finland	July 1, 1993	
United Arab Emirates/France	September 9, 1991	
United Arab Emirates/Italy	January 22, 1995	
United Arab Emirates/Malaysia	October 11, 1991	

[36]) *Ibid.*

PARTIES	SIGNATURE	ENTRY INTO FORCE
United Arab Emirates/Poland	January 31, 1993	April 9, 1994
United Arab Emirates/United Kingdom	December 8, 1992	December 13, 1993
United Kingdom/Albania	March 30, 1994	August 30, 1995
United Kingdom/Antigua and Barbuda	June 12, 1987	June 12, 1987
United Kingdom/Argentina	December 11, 1990	February 19, 1993
United Kingdom/Armenia	May 27, 1993	July 11, 1996
United Kingdom/Bahrain	October 30, 1991	October 30, 1991
United Kingdom/Bangladesh	June 19, 1980	June 19, 1980
United Kingdom/Barbados	April 7, 1993	April 7, 1993
United Kingdom/Belarus	March 1, 1994	December 28, 1994
United Kingdom/Belize	April 30, 1982	April 30, 1982
United Kingdom/Benin	November 27, 1987	November 27, 1987
United Kingdom/Bolivia	May 24, 1988	February 16, 1990
United Kingdom/Brazil	July 19, 1994	
United Kingdom/Bulgaria	December 11, 1995	
United Kingdom/Burundi	September 13, 1990	September 13, 1990
United Kingdom/Cameroon	June 4, 1982	June 7, 1985
United Kingdom/Chile	January 8, 1996	
United Kingdom/China	May 15, 1986	May 15, 1986
United Kingdom/Colombia	March 9, 1994	
United Kingdom/Congo	May 25, 1989	November 9, 1990
United Kingdom/Costa Rica	September 7, 1982	
United Kingdom/Côte d'Ivoire	June 8, 1995	
United Kingdom/Cuba	January 30, 1995	May 11, 1995
United Kingdom/Czech Republic	July 10, 1990	October 26, 1992
United Kingdom/Dominica	January 23, 1987	January 23, 1987
United Kingdom/Ecuador	May 10, 1994	August 24, 1995
United Kingdom/Egypt	June 11, 1975	February 24, 1976
United Kingdom/Estonia	May 12, 1994	December 16, 1994
United Kingdom/Georgia	February 15, 1995	February 15, 1995
United Kingdom/Ghana	March 22, 1989	October 25, 1991
United Kingdom/Grenada	February 25, 1988	February 25, 1988
United Kingdom/Guyana	October 27, 1989	April 11, 1990
United Kingdom/Haiti	March 18, 1985	March 27, 1995
United Kingdom/Honduras	December 7, 1993	March 8, 1995
United Kingdom/Hungary	March 9, 1987	August 28, 1987
United Kingdom/India	March 14, 1994	January 6, 1995
United Kingdom/Indonesia	April 27, 1976	March 24, 1977
United Kingdom/Jamaica	January 20, 1987	May 14, 1987
United Kingdom/Jordan	October 10, 1979	April 24, 1980
United Kingdom/Kazakhstan	November 23, 1995	November 23, 1995
United Kingdom/Korea	March 4, 1976	March 4, 1976
United Kingdom/Kyrgyz Republic	December 8, 1994	
United Kingdom/Lao PDR	June 1, 1995	June 1, 1995
United Kingdom/Latvia	January 24, 1994	February 15, 1995
United Kingdom/Lesotho	February 18, 1981	February 18, 1981
United Kingdom/Lithuania	May 17, 1993	September 21, 1993

PARTIES	SIGNATURE	ENTRY INTO FORCE
United Kingdom/Malaysia	May 21, 1981	October 21, 1988
United Kingdom/Malta	October 4, 1986	October 4, 1986
United Kingdom/Mauritius	May 20, 1986	October 13, 1986
United Kingdom/Moldova	March 19, 1996	
United Kingdom/Mongolia	October 4, 1991	October 4, 1991
United Kingdom/Morocco	October 30, 1990	Provisionally in force
United Kingdom/Nepal	March 2, 1993	March 2, 1993
United Kingdom/Nigeria	December 11, 1990	December 11, 1990
United Kingdom/Oman	November 25, 1995	
United Kingdom/Pakistan	November 30, 1994	November 30, 1994
United Kingdom/Panama	October 7, 1983	November 7, 1983
United Kingdom/Papua New Guinea	May 14, 1981	December 22, 1981
United Kingdom/Paraguay	June 4, 1981	April 23, 1992
United Kingdom/Peru	October 4, 1993	April 21, 1994
United Kingdom/Philippines	December 3, 1980	January 2, 1981
United Kingdom/Poland	December 8, 1987	April 14, 1988
United Kingdom/Romania	July 13, 1995	January 10, 1996
United Kingdom/Russian Federation	April 6, 1989	July 3, 1991
United Kingdom/Senegal	May 7, 1980	February 9, 1984
United Kingdom/Sierra Leone	December 8, 1981	
United Kingdom/Singapore	July 22, 1975	July 22, 1975
United Kingdom/Slovak Republic	July 10, 1990	October 26, 1992
United Kingdom/South Africa	September 20, 1994	
United Kingdom/Sri Lanka	February 13, 1980	December 18, 1980
United Kingdom/St. Lucia	January 18, 1983	January 18, 1983
United Kingdom/Swaziland	May 5, 1995	May 5, 1995
United Kingdom/Tanzania	January 7, 1994	
United Kingdom/Thailand	November 28, 1978	August 11, 1979
United Kingdom/Trinidad and Tobago	July 23, 1993	October 8, 1993
United Kingdom/Tunisia	March 14, 1989	January 4, 1990
United Kingdom/Turkey	March 15, 1991	
United Kingdom/Turkmenistan	February 9, 1995	February 9, 1995
United Kingdom/Ukraine	February 10, 1993	February 10, 1993
United Kingdom/United Arab Emirates	December 8, 1992	December 13, 1993
United Kingdom/Uruguay	October 21, 1991	
United Kingdom/Uzbekistan	November 24, 1993	November 24, 1993
United Kingdom/Venezuela	March 15, 1995	August 1, 1996
United Kingdom/Yemen	February 25, 1982	November 11, 1983
United Kingdom/Zimbabwe	March 1, 1995	
United States/Albania	January 10, 1995	
United States/Argentina	November 14, 1991	October 20, 1994
United States/Armenia	September 23, 1992	
United States/Bangladesh	March 12, 1986	July 25, 1989
United States/Belarus	January 15, 1994	
United States/Bulgaria	September 23, 1992	June 2, 1994
United States/Cameroon	February 26, 1986	April 6, 1989
United States/Congo	February 12, 1990	August 13, 1994

PARTIES	SIGNATURE	ENTRY INTO FORCE
United States/Czech Republic	October 22, 1991	December 19, 1992
United States/Ecuador	August 27, 1993	
United States/Egypt	September 29, 1982	June 27, 1992
United States/Estonia	April 19, 1994	
United States/Georgia	March 7, 1994	
United States/Grenada	May 2, 1986	March 3, 1989
United States/Haiti	December 12, 1983	
United States/Honduras	July 1, 1995	
United States/Jamaica	February 4, 1994	
United States/Kazakhstan	May 19, 1992	January 12, 1994
United States/Kyrgyz Republic	January 19, 1993	January 12, 1994
United States/Latvia	January 13, 1995	
United States/Moldova	April 21, 1993	November 25, 1994
United States/Mongolia	October 6, 1994	
United States/Morocco	July 22, 1985	May 29, 1991
United States/Nicaragua	July 1, 1995	
United States/Panama	October 27, 1982	May 30, 1991
United States/Poland	March 21, 1990	August 6, 1994
United States/Romania	May 28, 1992	January 15, 1994
United States/Russian Federation	June 17, 1992	
United States/Senegal	December 6, 1983	October 25, 1990
United States/Slovak Republic	October 22, 1991	December 19, 1992
United States/Sri Lanka	September 20, 1991	May 1, 1993
United States/Trinidad and Tobago	September 26, 1994	
United States/Tunisia	May 15, 1990	February 7, 1993
United States/Turkey	December 3, 1985	May 18, 1990
United States/Ukraine	March 4, 1994	
United States/Uzbekistan	December 16, 1994	
United States/Zaire	August 3, 1984	July 28, 1989
Uruguay/Belgium-Luxembourg	November 4, 1991	
Uruguay/Canada	May 16, 1991	
Uruguay/Chile	October 26, 1995	
Uruguay/China	December 2, 1993	
Uruguay/France	October 14, 1993	
Uruguay/Germany	May 4, 1987	June 29, 1990
Uruguay/Hungary	August 25, 1989	July 1, 1992
Uruguay/Italy	February 21, 1990	
Uruguay/Malaysia	August 9, 1995	
Uruguay/Netherlands	September 22, 1988	August 1, 1991
Uruguay/Poland	August 2, 1991	October 21, 1994
Uruguay/Romania	November 23, 1990	August 29, 1993
Uruguay/Spain	April 7, 1992	May 6, 1994
Uruguay/Switzerland	October 7, 1988	April 22, 1991
Uruguay/United Kingdom	October 21, 1991	
Uzbekistan/China	March 13, 1992	April 14, 1994
Uzbekistan/Egypt	December 16, 1992	

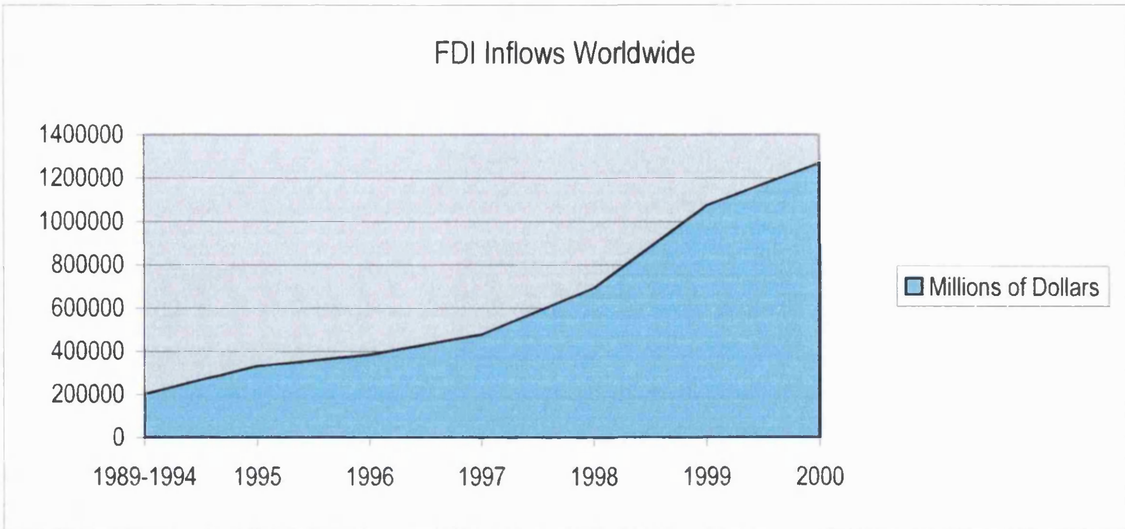
PARTIES	SIGNATURE	ENTRY INTO FORCE
Uzbekistan/Finland	October 1, 1992	October 22, 1993
Uzbekistan/France	October 27, 1993	
Uzbekistan/Germany	April 28, 1993	Provisionally in force
Uzbekistan/Korea	June 16, 1992	November 20, 1992
Uzbekistan/Moldova	November 21, 1995	
Uzbekistan/Netherlands	March 14, 1996	
Uzbekistan/Poland	January 11, 1995	April 29, 1995
Uzbekistan/Switzerland	April 16, 1993	November 5, 1993
Uzbekistan/Turkey	April 28, 1992	May 18, 1995
Uzbekistan/United Kingdom	November 24, 1993	November 24, 1993
Uzbekistan/United States	December 16, 1994	
Venezuela/Argentina	November 16, 1993	July 1, 1993
Venezuela/Barbados	July 15, 1994	
Venezuela/Canada	July 1, 1996	
Venezuela/Chile	April 2, 1993	May 25, 1995
Venezuela/Czech Republic	April 27, 1995	
Venezuela/Denmark	November 28, 1994	
Venezuela/Ecuador	November 18, 1993	February 1, 1995
Venezuela/Germany	May 14, 1996	
Venezuela/Italy	June 5, 1990	
Venezuela/Lithuania	April 24, 1995	
Venezuela/Netherlands	October 22, 1991	November 1, 1993
Venezuela/Portugal	June 17, 1994	May 11, 1995
Venezuela/Spain	November 2, 1995	
Venezuela/Switzerland	November 18, 1993	November 30, 1994
Venezuela/United Kingdom	March 15, 1995	August 1, 1996
Vietnam/Armenia	February __, 1993[37]	
Vietnam/Australia	March 5, 1991	September 11, 1991
Vietnam/Austria	March 27, 1995	
Vietnam/Belarus	July 8, 1992	
Vietnam/Belgium-Luxembourg	January 24, 1991	
Vietnam/China	December 2, 1992	September 1, 1993
Vietnam/Denmark	August 25, 1993	August 7, 1994
Vietnam/Finland	September 13, 1993	
Vietnam/France	May 26, 1992	
Vietnam/Germany	April 3, 1993	Provisionally in force
Vietnam/Hungary	April 26, 1994	June 16, 1995
Vietnam/Indonesia	October 25, 1991	
Vietnam/Italy	May 18, 1990	May 6, 1994
Vietnam/Korea	May 13, 1993	September 4, 1993
Vietnam/Lithuania	September 27, 1995	
Vietnam/Malaysia	January 21, 1992	
Vietnam/Netherlands	March 10, 1994	February 1, 1995
Vietnam/Philippines	February 27, 1992	
Vietnam/Poland	August 31, 1994	November 24, 1994

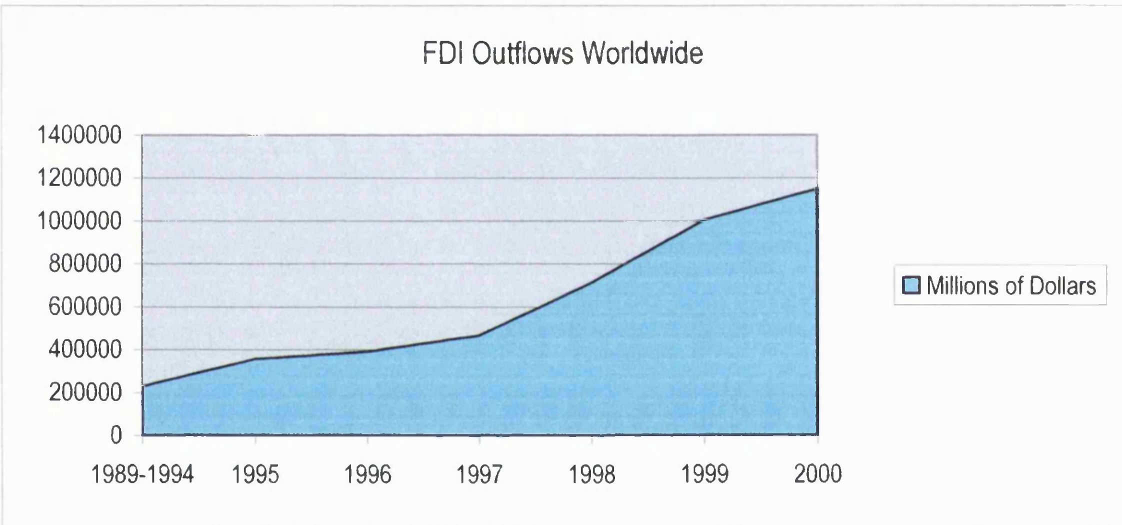
[37]) *Ibid.*

PARTIES	SIGNATURE	ENTRY INTO FORCE
Vietnam/Romania	September 1, 1994	August 15, 1995
Vietnam/Russian Federation	June 16, 1994	
Vietnam/Singapore	October 29, 1992	
Vietnam/Sweden	September 8, 1993	August 2, 1994
Vietnam/Switzerland	July 3, 1992	December 3, 1992
Vietnam/Thailand	October 30, 1991	
Yemen/France	April 27, 1984	July 19, 1991
Yemen/Germany	June 21, 1974	December 19, 1978
Yemen/Netherlands	March 18, 1985	September 1, 1986
Yemen/Sweden	October 29, 1983	February 23, 1984
Yemen/United Kingdom	February 25, 1982	November 11, 1983
Yugoslavia/Austria	October 25, 1989	June 1, 1991
Yugoslavia/China	December 18, 1995	
Yugoslavia/Egypt	June 3, 1977	
Yugoslavia/France	March 28, 1974	March 3, 1975
Yugoslavia/Germany	July 10, 1989	October 25, 1990
Yugoslavia/Netherlands	February 16, 1976	April 1, 1977
Yugoslavia/Sweden	November 10, 1978	November 21, 1979
Zaire/Belgium-Luxembourg	March 28, 1976	January 1, 1977
Zaire/France	October 5, 1972	March 1, 1975
Zaire/Germany	March 18, 1969	July 22, 1971
Zaire/Greece	April 26, 1991	
Zaire/Korea	July 19, 1990	
Zaire/Switzerland	March 10, 1972	May 10, 1973
Zaire/United States	August 3, 1984	July 28, 1989
Zambia/Germany	December 10, 1966	August 25, 1972
Zambia/Switzerland	August 3, 1994	March 7, 1995
Zimbabwe/Germany	September 29, 1995	
Zimbabwe/Malaysia	April 28, 1994	
Zimbabwe/United Kingdom	March 1, 1995	

Appendix G

FDI Flows - Worldwide[1]



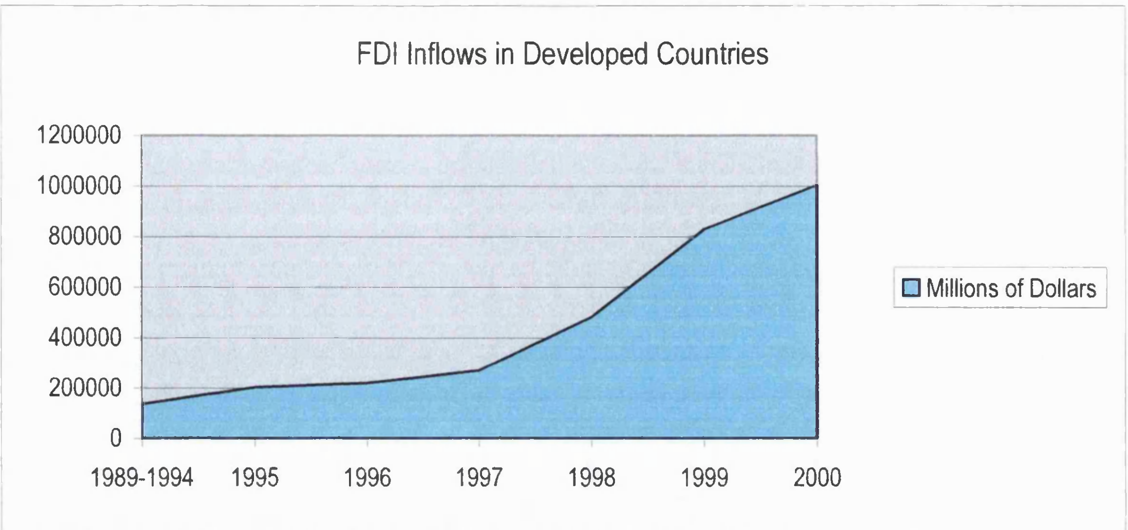


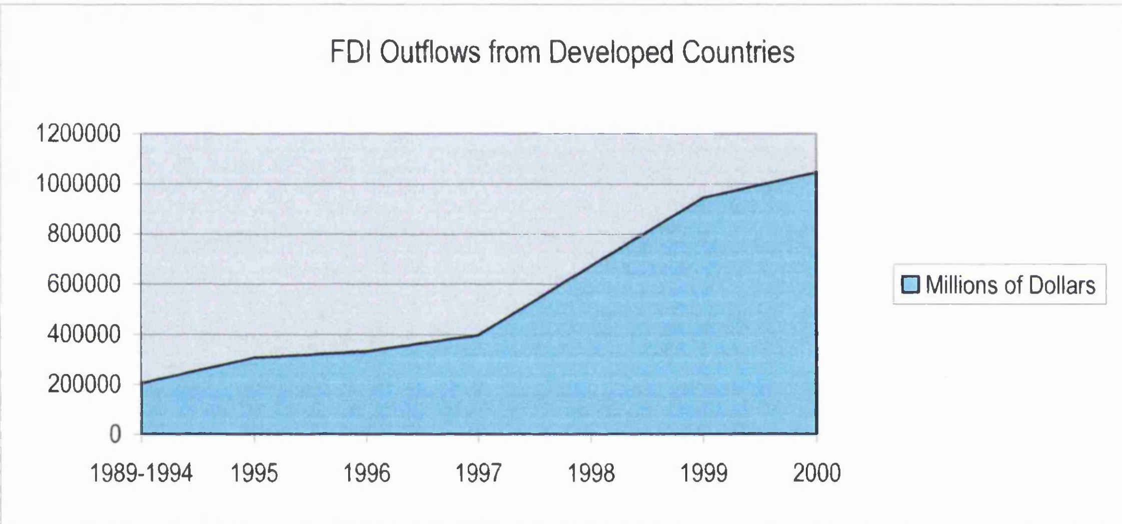
Year	FDI Inflows	FDI Outflows
1989-1994[2]	200,145	228,281
1995	331,068	355,284
1996	384,910	391,554
1997	477,918	466,030
1998	692,544	711,914
1999	1,075,049	1,005,782
2000	1,270,764	1,149,903

[1]) Source: UNCTAD, *World Investment Report: Promoting Linkages,* 291 and 296.

[2]) Annual average between 1989 and 1994.

FDI Flows - Developed Countries[1]



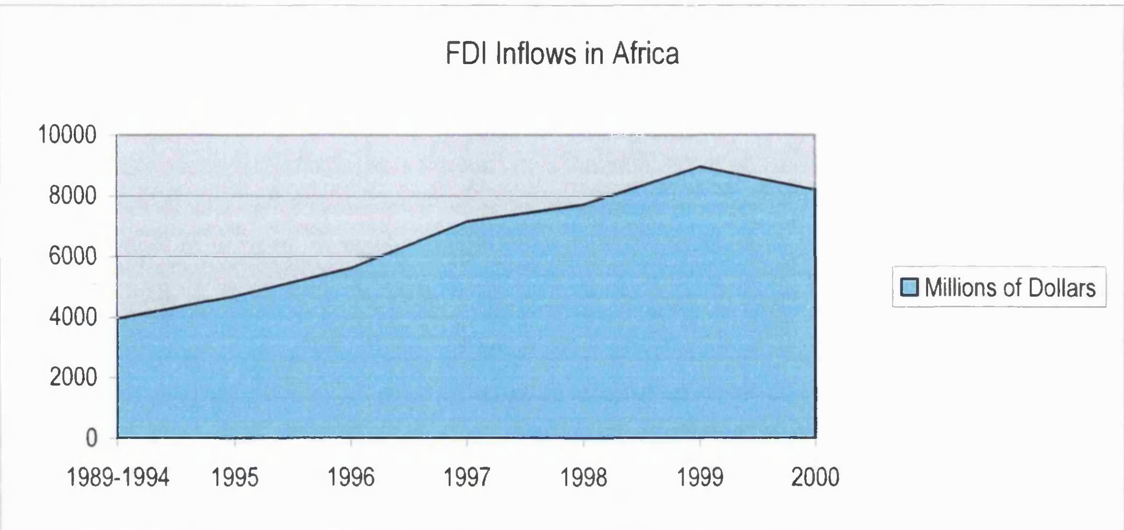


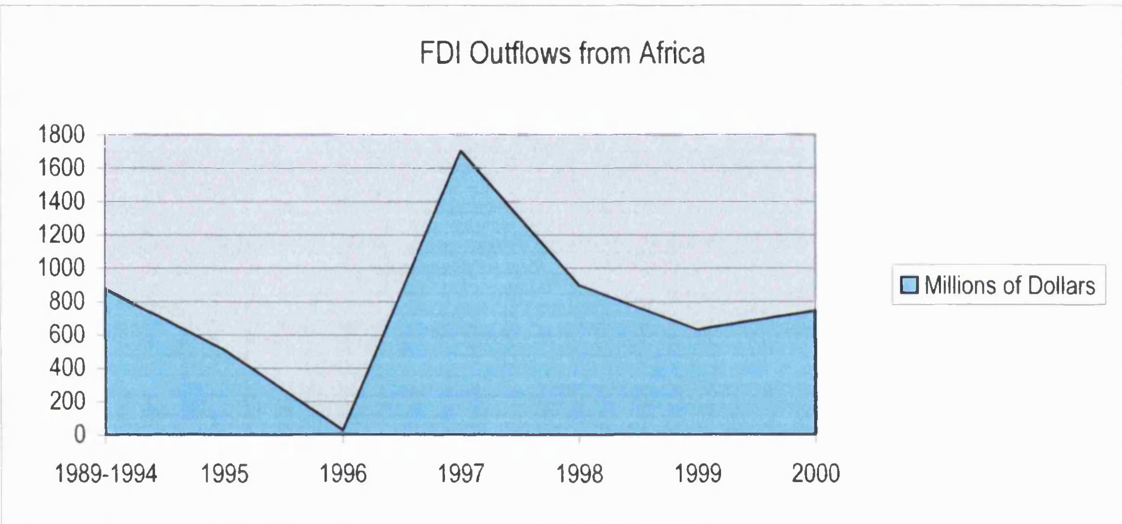
Year	FDI Inflows	FDI Outflows
1989-1994[2]	137,124	203,231
1995	203,462	305,847
1996	219,688	332,921
1997	271,378	396,868
1998	483,165	672,027
1999	829,818	945,687
2000	1,005,178	1,046,335

[1]) Source: UNCTAD, *World Investment Report: Promoting Linkages*, 291 and 296. States covered: Australia, Austria, Belgium-Luxembourg, Canada, Denmark, Finland, France, Germany, Gibraltar, Greece, Iceland, Ireland, Isreal, Italy, Japan, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, UK, US.

[2]) Annual average between 1989 and 1994.

FDI Flows - Africa[1]



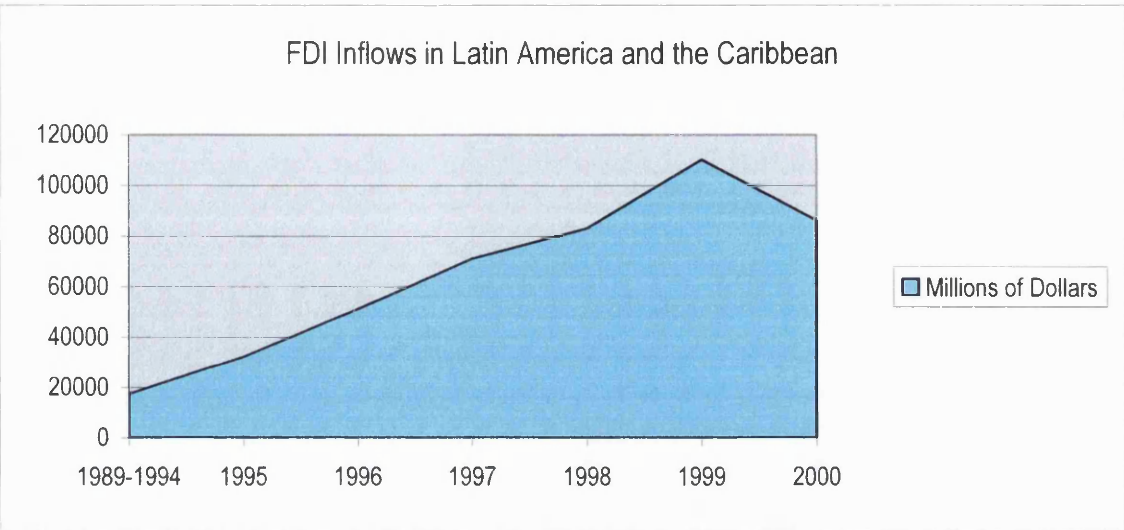


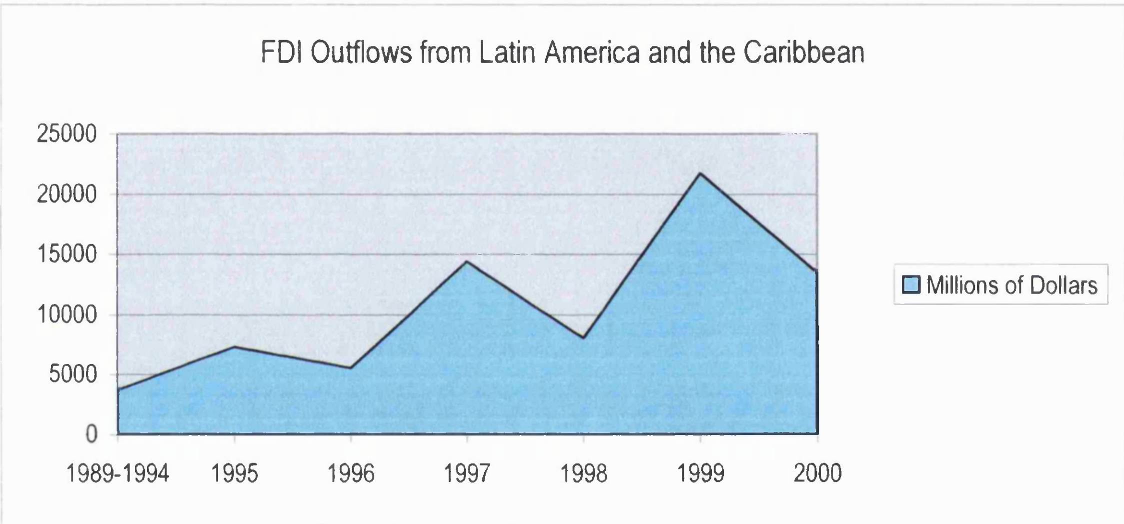
Year	FDI Inflows	FDI Outflows
1989-1994[2]	3,952	876
1995	4,694	509
1996	5,622	28
1997	7,153	1,704
1998	7,713	897
1999	8,971	632
2000	8,198	744

[1]) Source: UNCTAD, *World Investment Report: Promoting Linkages,* 291 and 296. States covered: Algeria, Angola, Benin, Botswana, Bukina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Congo Demo. Rep. of, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia, Zimbabwe.

[2]) Annual average between 1989 and 1994.

FDI Flows - Latin America and the Caribbean[1]



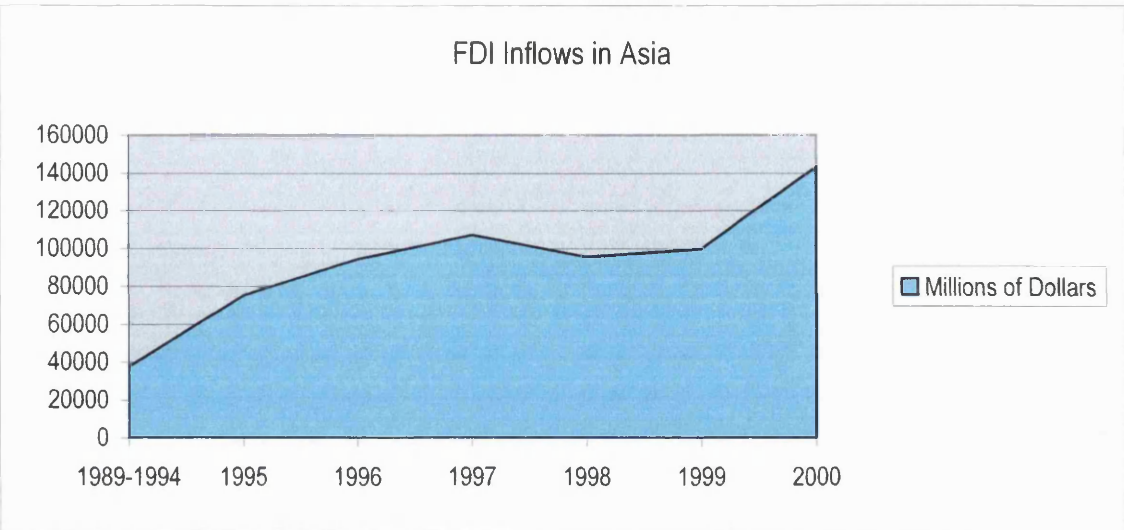


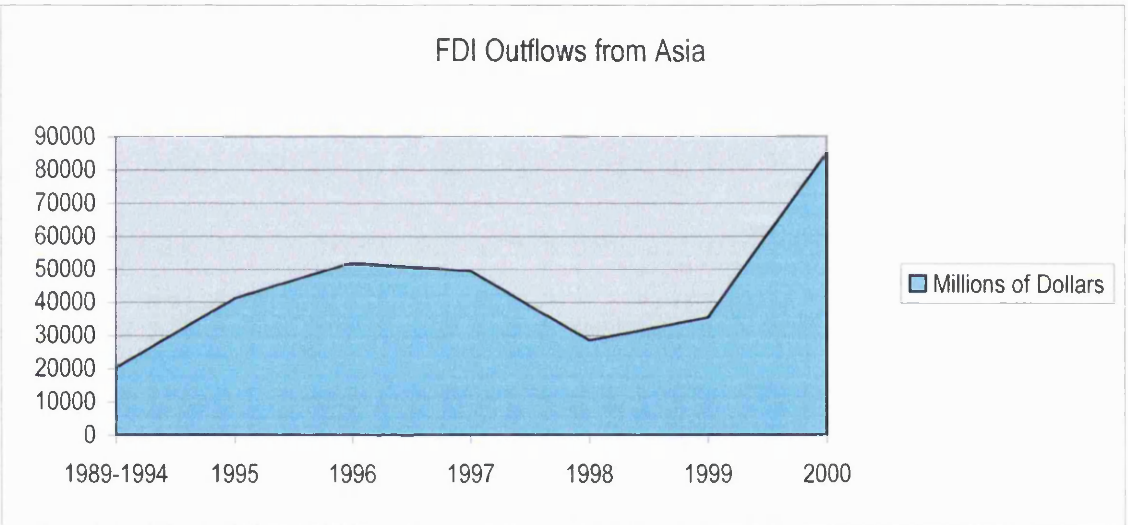
Year	FDI Inflows	FDI Outflows
1989-1994[2]	17,506	3,698
1995	32,311	7,306
1996	51,279	5,549
1997	71,152	14,391
1998	83,200	8,048
1999	110,285	21,753
2000	86,172	13,442

[1]) Source: UNCTAD, *World Investment Report: Promoting Linkages*, 292 and 297. States covered: Anguilla, Antigua and Barbuda, Argentina, Aruba, Bahamas, Barbados, Belize, Bermuda, Bolivia, Brazil, Cayman Islands, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Montserrat, Netherlands Antilles, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, Venezuela, Virgin Islands.

[2]) Annual average between 1989 and 1994.

FDI Flows - Asia[1]



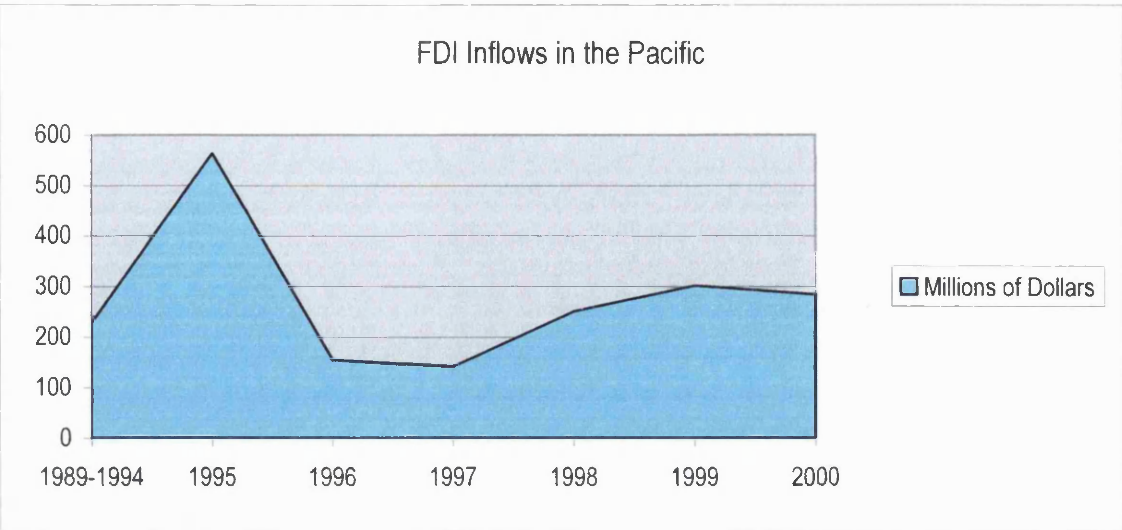


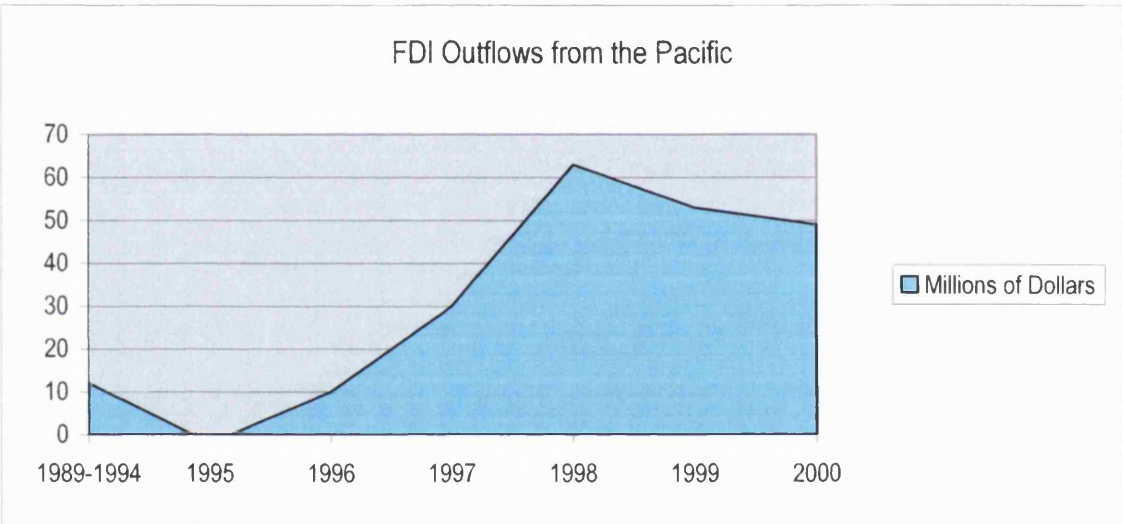
Year	FDI Inflows	FDI Outflows
1989-1994[2]	37,659	20,335
1995	75,293	41,149
1996	94,351	51,924
1997	107,205	49,393
1998	95,599	28,617
1999	99,728	35,421
2000	143,479	85,204

[1]) Source: UNCTAD, *World Investment Report: Promoting Linkages,* 293 and 298. States covered: Afghanistan, Armenia, Azerbaijan, Bahrain, Bangladesh, Bhutan, Brunei Darussalam, Cambodia, China, Cyprus, Georgia, Hong Kong (China), India, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Korea Democratic People's Republic, Korea Republic of, Kuwait, Kyrgyztan, Lao PDR, Lebanon, Macau, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Occupied Palestinian Territory, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Taiwan (Province of China), Tajikistan, Thailand, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, Viet Nam, Yemen.

[2]) Annual average between 1989 and 1994.

FDI Flows - The Pacific[1]



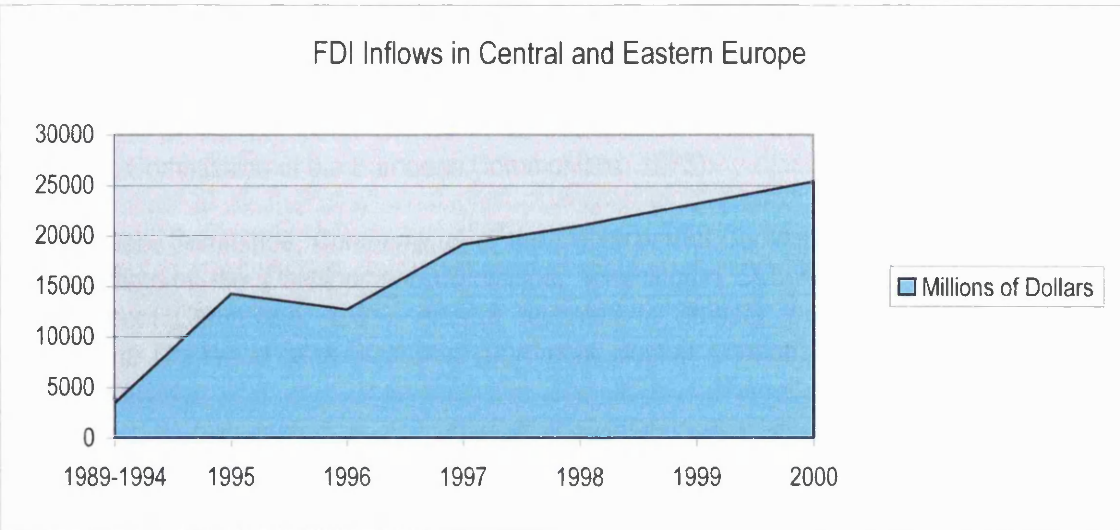


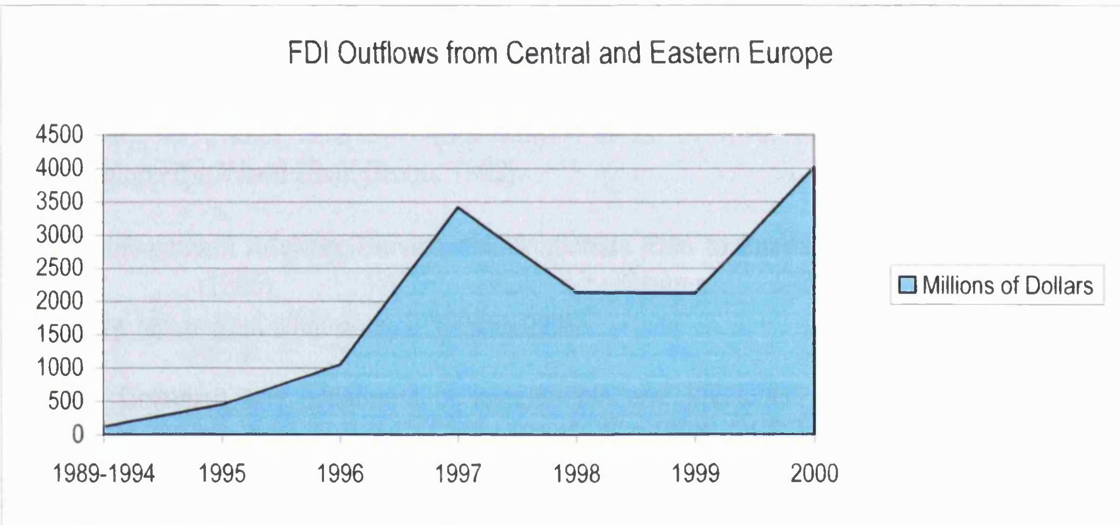
Year	FDI Inflows	FDI Outflows
1989-1994[2]	229	12
1995	564	-2
1996	155	10
1997	142	30
1998	251	63
1999	302	53
2000	284	49

[1]) Source: UNCTAD, *World Investment Report: Promoting Linkages,* 294 and 299. States covered: Fiji, Kiribati, New Caledonia, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

[2]) Annual average between 1989 and 1994.

FDI Flows - Central and Eastern Europe[1]





Year	FDI Inflows	FDI Outflows
1989-1994[2]	3,444	125
1995	14,268	450
1996	12,730	1,049
1997	19,188	3,417
1998	21,008	2,137
1999	23,222	2,118
2000	25,419	4,022

[1]) Source: UNCTAD, *World Investment Report: Promoting Linkages,* 294 and 299. States covered: Albania, Belarus, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania, Russian Federation, Slovakia, Ukraine.

[2]) Annual average between 1989 and 1994.

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