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WORK RELATED TO THE CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS AND OTHER INTERNATIONAL ARRANGEMENTS AND AGREEMENTS: OTHER INTERNATIONAL, REGIONAL AND BILATERAL ARRANGEMENTS AND AGREEMENTS RELATED TO TRANSNATIONAL CORPORATIONS

Bilateral arrangements and agreements related to transnational corporations

Report of the Secretary-General

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SUMMARY

The present report examines bilateral investment protection and promotion agreements. Section I gives a brief survey of the evolution of intergovernmental agreements dealing with investment protection and focuses on recent developments in bilateral investment protection and promotion agreements. Section II provides an overview of the contents of bilateral agreements. Section III highlights the main differences in some key provisions of bilateral agreements. In section IV, the effectiveness of bilateral agreements is analysed in terms of the dual objective of protecting and promoting foreign direct investment. Finally, in a concluding section, the future of bilateral agreements is discussed within the context of the development of an international law on investment.

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* E/C.10/1986/1.

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INTRODUCTION

1. At its eleventh session, the Commission on Transnational Corporations decided to include in the provisional agenda for the twelfth session a sub-item entitled "Other international, regional and bilateral arrangements and agreements related to transnational corporations". The work of the United Nations Centre on Transnational Corporations in this area has covered several aspects, including a report to the Commission at its tenth session and two technical papers, on bilateral investment agreements and on regional and international arrangements relating to foreign investments. Both technical papers will be issued as United Nations publications. The present report was prepared in response to the Commission's request at its tenth session for a more detailed analysis of bilateral investment protection and promotion agreements.

I. ORIGIN AND TYPES OF BILATERAL INVESTMENT AGREEMENTS

2. The contemporary pattern of arrangements for the protection of foreign direct investment reflects important developments in international economic relations over the past 25 years. In particular, the rapid growth of foreign direct investment since the early 1960s took place in the absence of a multilateral framework designed to ensure an orderly and secure flow of direct investment across national boundaries. The annual flow of such investment to developing countries increased from $2.4 billion in 1971 to a peak of $14.4 billion in 1981. Thereafter, it began to fall, reaching $10 billion in 1984. 1/ Foreign direct investment flows have been channelled primarily by transnational corporations, which emerged as key actors in international economic relations, accounting for a significant share of total world production and trade.

3. The legal framework governing foreign direct investment has consisted mainly of domestic investment laws, administrative regulations and private contractual arrangements between transnational corporations and host countries. With the growth of foreign investment flows, both home and host countries of transnational corporations sought to strengthen the regulation of these flows through intergovernmental bilateral, regional and multilateral arrangements. While national regulatory activities continue to provide the main legal framework governing foreign direct investment, it is generally felt that national action needs to be supplemented by international action to deal with the international ramifications of transnational corporation activities and the possible conflicts of national jurisdictions.

4. Different types of bilateral investment agreements containing norms on investment have been developed since the Second World War. The present report is particularly concerned with the specific type of bilateral investment devoted exclusively to the promotion and protection of transnational investment, which emerged in 1959 with the conclusion of a Treaty for the Promotion and Protection of Investments between the Federal Republic of Germany and Pakistan. Indeed, while the conclusion of other types of bilateral agreements containing provisions on investment continued for a number of years, and many of them are still in force,

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specific agreements on the promotion (or encouragement) of investments now clearly dominate when it comes to the conclusion of new agreements. They are used particularly between developed and developing countries - although the same type of agreement is now also beginning to play a part in bilateral relations between developing countries.

A. Agreements on the promotion and protection of investments

5. These agreements are both specific and general in nature: specific, in that they are exclusively concerned with the promotion and protection of investments originating from one contracting party in the territory of the other contracting party; general, because they are meant to apply to all investments coming within the normally very wide definition contained in the agreement. In other words, they are not limited to particular projects or sectors of the economy (like the agreements mentioned in para. 17 below), although some agreements may expressly exclude certain types of investment.

6. To date, well over 200 bilateral investment promotion and protection agreements have been concluded, mostly between industrialized market economy countries and developing countries, but also between market-economy countries and socialist countries in Europe and Asia (Bulgaria, Romania, Yugoslavia, China); developing countries and newly industrialized countries (Singapore, Republic of Korea); developing and socialist countries; or among developing countries.

7. About 40 of the over 200 agreements have not yet entered into force. A total of about 65 developing countries are parties to one or more agreements, including 13 Asian and Pacific countries, 10 north African and Middle Eastern countries, 31 African countries south of the Sahara and 10 western hemisphere countries. There are 17 developed market economy countries (14 in Western Europe, plus Japan, New Zealand and the United States of America) which have concluded bilateral investment agreements.

8. The majority of developing countries which have signed bilateral investment agreements are to be found in Africa and South-East Asia. Except for a number of mainly small countries, 2/ Latin American countries have not concluded such agreements. It is significant that the most advanced developing countries, which also attract the largest share of foreign direct investment, seem to show no particular interest in concluding bilateral investment agreements with industrialized countries. The same is true of industrialized socialist countries.

9. To date about a dozen bilateral investment protection agreements have been concluded between developing countries. In this respect, it is worth mentioning the three model agreements prepared by the Asian-African Legal Consultative Committee in a multilateral forum composed of a large majority of developing countries. Whereas Model A is comparable to the majority of existing bilateral investment agreements, the protection standard of Model B (with alternative wordings for some articles) would be less far-reaching. Model C would correspond to Model A, the definition of investment being limited to one or more specific sectors. 3/

10. Among the socialist countries, Romania has concluded 12 agreements with developing and developed countries, all between 1976 and 1981; Yugoslavia, 4; and Bulgaria, 2. Another significant development is the conclusion by China of 14 bilateral investment agreements since 1982 with Western European countries, and with Kuwait, Romania and Thailand.

11. One of the main sources of inspiration of the first bilateral investment promotion and protection agreements was the 1967 draft multilateral convention on the protection of foreign property of the Organisation for Economic Co-operation and Development (OECD) 4/ which was meant to govern investment relations between member countries of OECD. However, no bilateral investment promotion and protection agreement has ever been concluded between two industrialized countries.

B. Other bilateral agreements containing investment provisions

12. Chronologically, the first bilateral agreements dealing with the protection of foreign investment were the Friendship, Commerce and Navigation (FCN) Treaties which were used during the post-war period and until the mid-1960s by the United States, and to a lesser extent, by Japan and a few Western European countries. Such treaties were generally wide in scope, covering most aspects of the economic relations between the contracting parties, transnational investment being one of them.

13. Whereas it is unlikely that new FCN treaties will be concluded, investment guarantee agreements, again essentially used by the United States of America and, to a more limited extent, by Canada, will no doubt continue to be negotiated with developing countries: 116 of these agreements have been concluded by the United States in the form of exchanges of letter and about 30 by Canada. The conclusion of such agreements is linked to the investment insurance schemes offered to United States and Canadian investors, by the Overseas Private Investment Corporation (OPIC) and the Canadian Export Development Corporation (EDC), respectively. They provide for subrogation of OPIC/ECD to the rights and claims of the investor, whenever the latter has been paid compensation by the former. They further stipulate that any dispute regarding the interpretation of the agreement or which, in the opinion of one of the Governments, involves a question of public international law arising out of any investment (1980 agreement between the United States and China) shall be settled by negotiation or, failing agreement, by an arbitral tribunal.

14. Investment guarantee agreements do not constitute an alternative to investment promotion and protection agreements, in that they do not contain any provision on the treatment of investments in the host country. For this reason they have been acceptable to a number of developing countries which, so far, have not been prepared to conclude investment promotion and protection agreements. To some extent, the purpose of bilateral investment guarantee agreements is comparable to what is to be achieved, at the multilateral level, by the 1985 World Bank Convention establishing a Multilateral Investment Guarantee Agency.

15. Economic co-operation agreements (with varying designations) which contain fairly detailed provisions on investment, can (or could) be considered an alternative to the specific type of investment agreement. Switzerland, for instance, concluded 14 treaties on commerce, investment protection and technical co-operation, mostly in the 1960s.

16. A number of recent bilateral or multilateral economic co-operation agreements, among them agreements concluded by the European Economic Community, contain general investment clauses implying different degrees of commitment by the contracting parties. 5/ For the most part, they are hardly more than declarations of intent: to promote and protect investments; to conclude specific investment promotion and protection treaties; to create favourable conditions for investment; to maintain and improve favourable investment conditions; to apply the principle of non-discrimination, and so on. Despite the very general nature of such investment clauses, it is often considered that they might constitute an "opening", leading to more specific agreements in the future.

17. Finally, another type of agreement, namely, the project or sector-specific agreement, was commended in the European Community context as from 1978. There seems to be no practical experience so far with this type of bilateral agreement (not to be confused with an investment contract between the host State and the foreign investor). It had been thought that such agreements might be useful in cases where the conclusion of a general investment agreement proved impossible or where a general agreement existed but was thought to offer inadequate protection. The idea of project or sector-specific agreements was then taken up by the Asian-African Legal Consultative Committee (Model C).

II. OVERVIEW OF THE CONTENTS OF BILATERAL INVESTMENT PROMOTION AND PROTECTION AGREEMENTS

18. Bilateral agreements on the promotion and protection of investments invariably contain several basic provisions dealing with the following matters: definitions; admission of investments/investors; basic standards of treatment (fair and equitable treatment, national treatment, most-favoured-nation treatment); nationalization and compensation; transfer of profits and repatriation of capital; settlement of disputes; and subrogation.

19. The specific guarantees provided for in these agreements vary to some extent, reflecting the various policies, approaches or negotiating power of the parties concerned. Two approaches to the negotiating process can be observed. Some agreements are negotiated on the basis of a pre-existing model agreement; this procedure is normally followed by France, the Federal Republic of Germany, the Netherlands, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland and, of late, by the United States. Other agreements are negotiated without reference to any pre-established model; in this approach, the contracting parties clearly enjoy greater flexibility of negotiation.

A. Definitions

20. Bilateral investment promotion and protection agreements normally contain several definitions, two of which deserve special attention.

1. Investment

21. The various formulations used have a common denominator, namely the attempt to give a very broad definition, in order to extend the protection of the agreement to the widest possible forms of investment. Some agreements expressly include portfolio investments. 6/

22. Most agreements provide a list of the types of investment covered under them, for illustration purposes. In other words, the definition is enumerative but not exclusive in nature, as normally stated in the covering phrase preceding the enumeration. For example: "The term 'investment' shall comprise every kind of asset invested ... and more particularly, though not exclusively: ...". The list typically includes the classical type of investment, such as movable and immovable property, all kinds of property rights, shares, debts and other interests, as well as other types of investment such as copyrights, industrial property rights, know-how, trademarks, and so on, and concessions under public law or under contract for the exploitation of natural resources. Moreover, it would appear that the definitions used are wide enough to cover other types of direct investment increasingly made use of (contractual or service arrangements or any new variation therefrom), sometimes referred as "new forms of co-operation", such as management and marketing contracts or turnkey contracts.

2. Investors

23. In most agreements, the term "investors" applies to both natural persons and companies, except in the case of agreements concluded by centrally planned economy countries where the definition of their own investors includes juridical entities only.

24. The term "company" encompasses in most cases corporations as well as firms and other business associations. Normally, the agreements do not contain an express detailed definition of the different types of entities covered under these terms. They refer instead to the relevant national laws of the contracting parties. While the definitions contained in different national legislations may vary considerably, most market economy developed or developing countries would include under these terms business organizations with limited or unlimited liability of their members, profit and non-profit organizations and private and publicly owned entities. The United States model agreement gives a definition of companies which expressly includes the assets of charitable and non-profit organizations, and enterprises with partial or total State ownership, whereas in other agreements non-profit organizations are expressly excluded.

25. The model agreements prepared by the Asian-African Legal Consultative Committee deal with state entities as a separate category of investors. The explanation given is that in the developing countries of Asia and Africa

investments, whether in the shape of capital or technology, are likely to be made at times by state entities which cannot be appropriately brought within the definition of companies. In the context of the model agreement, state entity means "a department of government, corporation, institution or undertaking wholly owned or controlled by government and engaged in activities of a commercial nature".

26. Romania defines its own investors under bilateral treaties as Romanian economic units having legal personality and which, under the law of Romania, are entitled to trade abroad and undertake international economic co-operation activities. 7/ The China/Sweden agreement defines a Chinese investor as any company, other legal person or citizen of China authorized by the Chinese Government to make an investment. In the agreements concluded between Egypt and Yugoslavia, the Yugoslav investor is defined as any basic organization or complex organization of associated labour with its seat in Yugoslavia or any legal person with a predominating Yugoslav interest, located in another country.

27. Several criteria are used in different treaties for attributing to a corporate investor the nationality of one of the parties. Most countries apply the territorial principle whereby nationality is attributed to the State in which the company is established or in which the company has its centre of operations (siège social). Among them are the Federal Republic of Germany and the United Kingdom. Other countries, such as France, Switzerland and the United States, rely on the control principle which determines the nationality of the company by reference to the nationality of the persons that directly or indirectly control the company. The important consequence of this is that companies controlled by nationals of one contracting party, but situated in a third country, are covered by the agreement. However, this would not be the case under the Netherlands model agreement which considers as Netherlands investors legal persons constituted in accordance with the law of the Netherlands, and legal persons controlled, directly or indirectly, by Netherlands nationals, but constituted in accordance with the law of the other contracting party.

B. Admission of investments

1. Admission procedures

28. Bilateral promotion and protection agreements do not normally grant the investment or the investors of one contracting party an automatic right of entry into the territory of the other contracting party. Under most agreements, the admission of investment and/or investors is subject to the laws and regulations of the host country, which often includes a specific admission procedure. Indeed, most developing countries have passed extensive legislation dealing with foreign investment or investors for reasons of public order or public policy. The restrictions that may be imposed by host countries on entry of investment include exclusion from key sectors, discretionary legislation and practice, including screening on a case-by-case basis, conditional entry requiring joint ownership, performance requirements, maximum equity participation or joint management. In some agreements an express reference is made to the requirement of previous approval by national authorities. A standard provision is contained in the agreement between Belgium and Singapore:

"This Agreement shall, to the extent that a written approval is required, only extend to investments, whether made before or after the coming into force of this Agreement, which are specifically approved in writing by the contracting party in whose territory the investments have been or will be made. An investment so approved shall be subject to the laws in force in the territory of the contracting party concerned and the conditions, if any, upon which such approval shall have been granted."

2. Pre-agreement investments

29. Investments made before the agreement's entry into force (included in the provision quoted above) are normally the subject of a special "extension clause". An example is article 8 of the Federal Republic of Germany's model agreement:

"The present Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation."

30. The inclusion of investments made before the treaty is not characteristic of all bilateral agreements. Whether or not it is found acceptable depends on the host country's specific situation. Coverage may also be limited to investments made after a specific date (sometimes the date of the host country's accession to independence or the passing of a foreign investment legislation) and may be subject to a post-approval procedure.

C. Treatment of investments

1. Fair and equitable treatment

31. A provision in a bilateral agreement according fair and equitable treatment to the investments of one contracting party in the territory of the other party signifies the stipulation of a substantive legal standard of treatment which is intended to operate independently of the existing national standards. The purpose of any such clause is to protect the relevant investments against inadequate guarantees in the national regulatory régimes or arbitrariness, discrimination or lack of due process in the treatment of those investments.

32. Fair and equitable treatment clauses also provide a basis for the interpretation of specific provisions of the agreement, or of contractual terms and conditions of specific contracts concluded under the bilateral agreement. However, it would appear that in the absence of a universally accepted framework establishing the rights and obligations of transnational corporations and host countries (see sect. V below), or other internationally agreed norms, the content of any such clause is rather imprecise and open to several or even conflicting interpretations.

33. The prototype treaty adopted by the United States contains the following formulation:

> "Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments. Each party shall observe any obligation it may have entered into with regard to investments."

34. The last sentence corresponds to an "umbrella clause" that can be found in most bilateral agreements. The effect of the clause is not to transform a host State investment contract into international law, but it makes the respect of such a contract an obligation under the agreement, and this may be relevant in a dispute settlement procedure.

35. The model agreements of the Asian-African Legal Consultative Committee (art. 2.iv) contain the following clause in square brackets, indicating that there were differences of views on the need for its inclusion:

> "Each Contracting Party shall duly honour all commitments made and obligations undertaken by it with regard to investments of nationals, companies or State entities of the other Contracting Party."

2. <u>National treatment and most-favoured-nation treatment</u>

36. National treatment clauses and most-favoured-nation clauses are contained in most bilateral investment agreements (exceptions are dealt with in section III below).

37. Capital-exporting countries normally attach importance to the combination of both standards so that they can avail themselves of whichever is more favourable. The model agreement of the Federal Republic of Germany contains the following provision:

> "Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of a third State."

38. Another paragraph extends the same treatment standard to "nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory".

39. While the respective clauses normally provide for unqualified national treatment, other provisions in the main text of the agreement or in separate Protocols, explanatory notes or exchange of letters provide, expressly or by implication, for clear exceptions to that standard.

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40. The first such exception may be found in the provisions relating to the admission of investments. As indicated above, national laws may impose certain conditions and limitations on the admission of foreign investments, such as joint ownership or limited equity participation, joint management, and so on. Sometimes, the admission of foreign investments is restricted to certain sectors of the economy. In such cases, the clause on national treatment, however unqualified, would extend at most to the treatment of the investments of the contracting parties in regard to matters which were not dealt with by the initial regulation for their admission. Another limitation of national treatment may be found in provisions allowing restrictions necessary for the maintenance of public order, or for the protection of national security.

41. Some agreements also explicitly include the possibility of granting special incentives to promote domestic investments or limit national treatment to circumstances where the foreign and the domestic investor find themselves in like situations.

42. Whenever most-favoured-nation treatment is agreed, there is invariably also an "association of States" reservation stipulating that "the treatment so granted shall not apply to privileges which either Contracting Party accords to nationals or companies of a third country because of its membership in, or association with, a customs union, a common market or a free trade area".

3. Protection and security

43. The "protection and security" clause which appears in most bilateral agreements is intended to be distinct from the provisions on nationalization/expropriation. It stipulates that investments by nationals or companies of either contracting party shall enjoy "full protection and security" or "most constant protection and security" in the territory of the other contracting party. Inasmuch as it is formulated in absolute terms, this provision would he complementary to the standard of fair and equitable treatment and could be seen as one aspect thereof. It is normally assumed that under general international law a host State is expected to give reasonable protection to foreigners and their property ("due diligence" rule), but it is debatable whether host States are obliged to give special protection to foreigners and to their property if the same protection standard is to be applied to nationals and foreigners (diligencia quam in suis).

4. Transfer rules

44. Transfer clauses, from the point of view of the capital exporter, are another essential element of bilateral investment agreements. The items to be transferred are listed more exhaustively in some agreements than in others. The following clause is taken from a recent agreement concluded by the Federal Republic of Germany:

> "Each Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of payments in connection with an investment, in particular

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(a) of the capital and additional amounts to maintain or increase the investment;

(b) of the returns;

(c) in repayment of loans;

(d) of licence and other fees for the rights defined in sub-paragraph (d) of paragraph 1 of article 1;

(e) of the proceeds from the sale of the whole or any part of the investment."

45. In some agreements it is explicitly stated that the transfer will be in the currency of the investor's country or in the currency in which the original investment was made. The following are some of the provisions and formulations which operate as limitations on the freedom of transfer and which are intended to meet some of the concerns of the host country:

(a) Host country's right "to exercise equitably and in good faith" powers conferred by its laws;

(b) Host country's rights and obligations as a member of the International Monetary Fund;

(c) Host country's "special economic and financial circumstances";

(d) Where the amount of compensation payable is large, the host country may require the transfer to be effected in reasonable instalments.

46. The aforementioned agreement contains the following restrictive clause:

"In the event of exceptional balance of payments difficulties the transfer of the proceeds from liquidation may be restricted to annual installments of at least 20 per cent so that transfer will be completed within a maximum period of five years from the date of liquidation."

D. Rules concerning the dispossession of the investor

1. Nationalization/expropriation

47. Clauses on nationalization/expropriation are generally considered a *sine qua non* in investment protection agreements. Provisions may differ among different agreements, but they usually incorporate all or most of the following aspects:

(a) No measure of expropriation, direct or indirect, of the foreign investment shall be taken except for "public purposes", "public benefit", or in the "public interest". This notion is not easy to define and lends itself to wide interpretation (see sect. IV below);

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(b) The foreign investor shall be accorded a "fair and equitable" or "non-discriminatory" treatment in regard to any such measure;

(c) Legal domestic remedies must be available to the dispossessed owner;

(d) No such measure shall be taken without payment of ("just", "appropriate", "fair", "adequate") compensation. The compensation shall be "actually" or "effectively realizable" and shall be made without "undue delay"; it shall be "freely transferable", except in the limited circumstances agreed to under the provisions relating to "repatriation of capital";

(e) The legality of expropriation measures and the amount and method of compensation shall be subject to review by due process of law.

48. Although the distinctions may not be material in the ultimate analysis, the scope of "expropriation" is expressed more comprehensively in some agreements than in others (see sect. III below).

2. Compensation

49. Different wordings concerning the determination of the amount of compensation due to the dispossessed investor (market value, genuine value, equivalent of the investment expropriated etc.) will be considered further in section III.

50. In addition to acts of nationalization or expropriation, compensation is usually provided for loss of investment, damage, arising on account of "war, revolution, national emergency, revolt or insurrection". The usual provision is that in the matter of "restitution, indemnification, compensation or other settlement", the foreign investor will be accorded a treatment no less favourable than would be accorded in the same circumstances to domestic investors or investors of a third country.

E. Settlement of disputes

1. Disputes between contracting parties

51. All bilateral investment agreements provide for a two-stage procedure for the settlement of disputes between the contracting parties on the "interpretation or application" of the agreement.

52. In the first place, divergencies between the contracting parties are to be settled by discussion between them. If this proves impossible, either party can request that the matter be submitted to arbitration. The composition, procedure and competence of the tribunal follow classical lines. One member is to be designated by each of the parties. The third member is to be agreed between them and act as chairman. If there is no agreement on the third member of the tribunal, he/she is to be designated by a third party, such as the president of the International Court of Justice or the Secretary-General of the United Nations.

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53. The tribunal, as a rule, is competent to determine its own procedure and its decisions are binding on the parties. The agreements normally give further details on time-limits, cost-sharing, and so on.

2. Disputes between host State and investor

54. The 1967 OECD draft convention, meant to serve as a model for the negotiation of investment agreements, had foreseen (art. 7) the possibility of direct access of individuals or companies to the arbitration tribunal, subject to the consent of the home State concerned. However, this idea was not taken up in the bilateral agreements concluded by OECD countries.

55. Instead, agreements concluded after 1965 frequently contain a clause under which the host State and the investor accept the jurisdiction of the International Centre for the Settlement of Investment Disputes (ICSID) set up in accordance with the Washington Convention of 18 March 1965. For example, the agreement between France and Sri Lanka stipulates that investment disputes should be settled amicably between the parties concerned; failing agreement within a period of 12 months, they are to be submitted to ICSID at the request of either party.

56. The Asian-African Legal Consultative Committee's model agreement (A), in article 10.ii, provides for conciliation or arbitration between the host State and a national/company of the home State, under the rules of either ICSID or the United Nations Commission on International Trade Law.

3. Subrogation

57. Practically all bilateral agreements contain a subrogation clause, under which the host State accepts the principle of subrogation of the home State (or its insurance agency) to the rights and claims of an investor who has received payment under his national insurance scheme.

58. The claim of the investor thus becomes the claim of the home country. In some cases, such right is limited to the payment made to the investor by the home country under a policy of insurance covering non-commercial risks, while in others the coverage is broad enough to cover any indemnity given by the home country to its investor. Apart from the inclusion of a non-discriminatory treatment in such subrogation rights, the clause also normally provides for free transfer of such amounts from the host country (as well as for their free availability to the home country for meeting its expenditure in the host country).

F. Duration of agreement

59. According to national constitutional systems, agreements may enter into force upon signature or following ratification, the latter being more frequent. They are most often concluded for a period of 10 years. After that period, they can be denounced at any time by either contracting party giving one year's notice. However, it is normally stipulated that investments made during the lifetime of the agreement shall be covered by its provisions for another period of between 10 and 20 years ("continuing effect" clause or *clause de remanence*).

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III. DIFFERENCES IN SOME KEY PROVISIONS OF BILATERAL AGREEMENTS

60. It should be noted at the outset that there are no fundamental differences in the substantive contents of the agreements reviewed here. As has been shown, the conclusion of such agreements was started by the Federal Republic of Germany in 1959, and the practice was then gradually taken up by most other European capital-exporting countries. As they did so, they naturally looked to each other's experience with this new type of legal instrument and began to consult each other. There are now regular exchanges of views, both bilaterally and multilaterally, among EEC and OECD member countries. Thus differences that could be detected earlier in the prototype agreements of capital-exporting countries are progressively being levelled out. None the less, a certain number of differences persist, both in the prototype agreements and in agreements concluded. Furthermore, it should be remembered that the contents of apparently identical or similar provisions can be altered substantially through understandings reached in the form of protocols or exchanges of letters, which are just as binding as the main text of the agreement. 8/ In addition, unilateral declarations on interpretation are sometimes attached to the agreement by common consent. The paragraphs which follow are concerned with some of these differences.

A. Treatment standards

1. Fair and equitable treatment

61. The practical meaning of the "fair and equitable treatment" clauses is obviously debatable, as perceptions of what is equitable and fair tend to differ - particularly with the advent of a large number of new members of the international community, and different economic and social orders. Nevertheless, many capital-exporting countries continue to consider the clause an indispensable ingredient of investment agreements. One of the reasons is no doubt that, despite the uncertain substantive content of the clause, its very generality constitutes a useful point of departure in any argument on whether or not proper treatment under the agreement has been extended to the foreign investment.

62. Whereas many agreements (for example, those concluded by the Federal Republic of Germany) use the term without further qualification, others (for example, those concluded more recently by France) attempt to specify the concept of fair and equitable treatment by reference to the general principles of international law and an indication that the right thus recognized must not be impaired either de jure or de facto. 9/ In some agreements, the concept of "fair and equitable" reappears separately from the general clause in connection with specific provisions, for example, those concerning nationalization/expropriation, the amount of compensation or the application of transfer rules. In the same spirit as the aforementioned French agreements, the United Kingdom prototype treaty, in connection with the "continuing-effect" clause extending the application of treatment standards beyond the treaty's lifetime, specifies that this is without prejudice to the application thereafter of the general principles of international law.

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63. While the "fair and equitable treatment" clause appears in the vast majority of bilateral investment promotion and protection treaties, including the more recent ones, there are some notable exceptions. It is, for instance in none of the agreements concluded by Romania. Indeed, the socialist States reject certain concepts of "classical international law" developed without their participation and that of the many countries that have only recently attained national independence. 10/

64. The principle of fair and equitable treatment, in classical international law doctrine and in the judgement of international judicial and arbitral tribunals, would seem to comprise ingredients such as non-discrimination (with national and other countries) and the international minimum standard. 11/ Past uses of these concepts, and their reinterpretation in the light of present-day conditions sought by many countries, may explain part of the resistance to the clause.

65. Some Asian and African countries (such as Rwanda, Saudi Arabia and Singapore) also rejected it when negotiating bilateral investment agreements. 12/ At the same time, it is interesting to note that (despite the "minimum standard" connotation incompatible with the Calvo doctrine) the relatively rare agreements with States of the Central and South American regions do contain "fair and equitable treatment" clause. 13/ The clause also appears in the agreements recently concluded by China.

66. Fair and equitable treatment is also foreseen in the negotiations on a multilateral Euro-Arab agreement, whereas it does not appear in the model agreements established by the Asian-African Legal Consultative Committee or in the Agreement on the Promotion, Protection and Guarantee of Investments adopted by the Organization of the Islamic Conference in 1981. However, fair and equitable treatment is stipulated in article 240 of the Third Lomé Convention, which came into force on 1 March 1985, between the European Community and its member States, on the one hand, and 66 countries of the African, Caribbean and Pacific group of States, on the other.

2. National treatment and most-favoured-nation treatment

67. The majority of bilateral investment agreements, as seen previously, include both national and most-favoured-nation standards as applicable to investors and "activities in connection with the investment". Nevertheless, one can note differences among both capital-exporting countries and host countries on the expediency of including one or the other standard of treatment or the practical value of either clause (see also sect. IV below).

68. National treatment is an important matter of principle for some investor countries which, like the Federal Republic of Germany, would normally insist on its inclusion. None the less, it appears neither in its agreement with Romania nor in that with China. Indeed, to the socialist States of Eastern Europe the national treatment clause is inapplicable because of the fundamental differences in the contracting parties' internal political and economic orders.

69. Other countries, like France, while maintaining national treatment when it is not a matter of major disagreement, do not consider it indispensable. Still others do not include it as a matter of principle. The 1985 OECD report on intergovernmental investment agreements, 5/ based on exchanges of views between government representatives, sums up the situation as follows:

> "Sweden does not include the national treatment clause in its agreements but exclusively relies on the most-favoured-nation clause. Belgium also considers the MFN principle to be more important to foreign investors than national treatment and consequently insisted on the inclusion of the latter principle in most of its agreements. The Netherlands, on the other hand, have expressed reservations as to the current use of the MFN principle in investment treaties. In their view, this principle, if not combined with substantive standards for foreign investment such as fair and equitable treatment, can still open the possibility for overall conditions detrimental to the interests of the foreign investor." (para. 39)

B. Dispossession and compensation

1. Conditions for nationalization/expropriation and equivalent measures

70. In section II above, some differences in the wording of the provisions in different agreements have already been indicated. If there is, indeed, a certain variety in terminology and language, the substantive contents of different agreements would not seem to differ very much. The basic conditions are always present: public interest (or a similar concept), compensation and due process of law. The notion of public interest is missing only in Model B of the Asian-African Legal Consultative Committee, which simply states - in accordance with the philosophy underlying the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX)) - that a "Contracting Party may exercise its sovereign rights in the matter of nationalization or expropriation in respect of any investments made in its territory by nationals, companies or State entities of the other Contracting Party ...".

71. Within the increasingly wider interpretation given by Governments to the notion of public interest (see sect. IV), it is in any case debatable whether its inclusion in investment agreements is of much practical importance. On the other hand, capital-exporting countries seem to attach importance to it as a matter of principle and as a possible safeguard against arbitrary measures by host Governments and, in any case, as an argument in a dispute between the contracting parties.

72. An increasingly difficult problem is how to define in legal terms the various forms of indirect or "creeping" expropriation, which are becoming more frequent and which, while leaving the title of the property in the hands of the owner, deprive him of any practical benefit from his investment. Negotiators and lawyers have been preoccupied during recent years with ways to refine the definition of indirect expropriation.

73. So far, the most precise definition of indirect expropriation in a bilateral agreement is in the protocol to the Federal Republic of Germany's prototype treaty. It has been retained in most of the agreements concluded by that country in recent years: "Expropriation shall mean any taking away or restricting tantamount to the taking away of any property right which in itself or in conjunction with other rights constitutes an investment". It is further specified that any government measure severely impairing the economic situation of the investment gives rise to the right of compensation. Under the treaty concluded in 1980 with Romania, "expropriation" means any "taking away or restriction of property rights or other rights constituting a capital investment or part of a capital investment, as well as other measures equivalent, in their effects on the investment, to expropriation".

74. Most other agreements use less specific wording, preferring more general definitions (which may, however, be assumed to cover the same ground), such as:

"measures tantamount to expropriation or nationalization ('creeping expropriation')" (United States prototype treaty);

"expropriation, nationalization, restriction or any other measures, the effects of which would be tantamount to expropriation, nationalization or restriction" (1977 agreement between Japan and Egypt);

"direct or indirect measures of expropriation, nationalization or dispossession" (1979 agreement between Switzerland and Mali);

"measures of expropriation or nationalization or any other measures the effect of which would be direct or indirect dispossession" (1984 agreement between France and Pakistan);

"nationalization, expropriation or other government measures which may be assimilated to nationalization or expropriation" (1978 agreement between Egypt and Yugoslavia);

"other measures having a similar effect" (1978 agreement between Egypt and the Sudan and 1979 agreement between Romania and Gabon);

"measures having effect equivalent to nationalization and expropriation" (United Kingdom prototype treaty, 1980 agreement between the Republic of Korea and Sri Lanka);

"any similar measure" (1982 agreement between Sweden and China).

75. Model A of the Asian-African Legal Consultative Committee also covers "measures having effect equivalent to nationalization or expropriation", whereas Model B offers two alternative wordings, the first limited to "nationalization or expropriation", the second corresponding to Model A.

76. However, by far the most comprehensive definition has been included in article 10 of the 1981 Organization of Islamic Conference Agreement. It refers to measures which "may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership of all or part of his basic rights or the exercise of his authority on the ownership, possession or utilization of his capital, or of his actual control over the investment, its management, making use out of it, enjoying its utilities, the realization of its benefits or guaranteeing its development and growth".

2. Modalities of compensation

77. The classic compensation formula of "prompt, adequate and effective" had been avoided for some time in investment agreements between developed and developing countries. Indeed, it seemed that this formula was objectionable to non-European countries, in the light of its historical and ideological connotations. However, it has come back recently, not only in the prototype treaty of the United States (art. IV.1), but also in a number of investment agreements between developing countries or between a developing country and a newly industrialized country (for example, in the agreements Sri Lanka has concluded with the Republic of Korea, art. 7; Singapore, art. 6; and Romania, art. 6). The formula is also found in Model A of the Asian-African Legal Consultative Committee (art. 7) and in the 1981 Agreement of the Organization of the Islamic Conference (art. 10; "prompt payment of adequate and effective compensation").

78. Where the classic formula is not used, other wording may go even further in that it specifies the meaning of the words. Thus the treaties concluded by the Federal Republic of Germany, in accordance with article 4 of its model treaty, normally require that "compensation shall be equivalent to the value of the investment expropriated immediately before the date the expropriation or nationalization was publicly announced. The compensation shall be paid without delay and shall be actually realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, or comparable measure, for the determination and payment of such compensation".

79. Less detailed, the agreement between France and Sri Lanka (art. 7), for example, stipulates that the compensation must be "just" and then goes on to define the meaning of the word: "the amount must correspond to the commercial value of the investment concerned on the day of expropriation". The amount must be fixed at the same time, at the latest, must be paid "without delay" and must be freely transferable. As the value of an investment may already have gone down by the time expropriation actually takes place, the United Kingdom model agreement (just like more recent agreements concluded by France) specifies that the compensation must correspond to the value of the investment "immediately before the expropriation or impending expropriation becomes public knowledge".

80. It is not without interest that the 1967 OECD draft convention was, in some respects, less exacting than the bilateral agreements it subsequently inspired. According to article 3, compensation is to represent the "genuine" value of the property affected and "shall be paid without undue delay, and shall be transferable to the extent necessary to make it effective for the nationals entitled thereto".

IV. EFFECTIVENESS OF BILATERAL INVESTMENT AGREEMENTS

81. With a few exceptions (for example, some of the "first generation" agreements concluded by France), all existing bilateral investment promotion and protection agreements are reciprocal in form, the same rules applying to capital flows in both directions and to the treatment of investments and investors in the territory of either contracting party. None the less, their declared purpose is (a) to increase the flow of private investment funds to the developing countries, and (b) to reinforce the legal protection of investments with regard to their general treatment in the host country and the risk of expropriation/nationalization. The question thus arises whether the agreements have proved to be an effective means towards this double end.

A. Bilateral agreements and the promotion of investment in developing countries

82. Have investment promotion and protection agreements been successful in encouraging the flow of private capital to developing countries? There is no easy answer to this question and statistics may prove inconclusive. In accordance with the above-mentioned policy objective, this type of agreement has, until now, essentially been used in investment relations between developed and developing countries. No such agreement has been concluded between two industrialized countries, although investment flows are particularly strong between just those countries. France, the Federal Republic of Germany and the United Kingdom, for example, tend to invest heavily in the United States and vice versa. For a number of reasons, investing in developing countries is on average less attractive to the private investor than investing in developed market economies.

83. Roughly, more than two thirds of developed countries' private foreign investment goes to other developed countries. Of the remainder, some Latin American countries and newly industrialized countries of Asia receive a sizeable share, which currently leaves less than a quarter of private capital from developed market economies for investment in developing countries. The share of the latter went down both in absolute and in relative terms after the 1973 oil crisis. 14/

84. In the table, foreign direct investment flows from OECD countries to 26 developing countries are shown in three periods going from 1970 to 1983, together with the number of bilateral investment agreements signed by those countries during the same periods. The data show that the four countries which signed no agreements (Argentina, Brazil, Mexico and Nigeria) have been the recipients of more foreign direct investment than all 22 countries which did (57.3 per cent of total foreign direct investment). Clearly, in these cases, investment flows have been determined by factors other than bilateral agreements. For the remaining countries, there is no apparent relationship between the number of bilateral agreements and the volume of foreign investment flows. Whereas Egypt, Indonesia, Panama and Singapore show a progressive increase in foreign investment with the increase in the number of bilateral agreements, Jordan, Malaysia, the Republic of Korea, Sri Lanka, Tunisia and Zaire show a decline in investment despite the increase in the number of bilateral agreements. The reasons for the

Foreign direct investment from DAC countries to selected developing countries and number of bilateral investment agreements signed with OECD countries

(Millions of dollars)

Country	Up to 1969	1970-1974		1975-1979		1980-1983		1970-1983		Percentage of total FDI
	BIA	FDI	BIA	FDI	BIA	FDI	BIA	FDI	BIA	
Argentina	0	405.5	0	1 490.2	0	1 999.1	0	3 894.7	0	8.0
Brazil	0	4 037.2	0	7 288.6	0	4 390.7	0	15 716.5	0	32.3
Cameroon	3	9.6	0	12.8	1	224.8	0	247.2	4	0.5
Chad	4	.3	0	1.8	0	.7	0	2.8	4	0
China	0	.0	0	.1	0	88.0	2	88.1	2	0.2
Côte d'Ivoire	6	1.5	0	57.7	0	122.9	0	182.1	6	0.4
Egypt	0	3.8	3	94.5	7	841.4	2	939.7	12	1.9
Gabon	3	24.1	1	108.9	0	233.6	0	366.6	4	0.8
Haiti	0	.3	1	5.6	0	-.5	2	5.4	3	0
India	1	205.9	0	167.0	0	249.3	0	622.2	1	1.3
Indonesia	4	1 461.1	3	2 007.4	1	3 721.4	0	7 189.9	8	14.8
Jordan	0	.2	1	7.2	3	-1.8	0	5.6	4	0
Madagascar	6	10.4	0	-4.3	0	1.6	0	7.7	6	0
Malaysia	1	396.0	1	411.4	4	299.1	1	1 106.5	7	2.3
Malta	2	15.4	1	57.5	1	101.5	0	174.4	4	0.4
Mexico	0	1 255.3	0	2 117.9	0	1 879.5	0	5 252.7	0	10.8
Morocco	2	-4.3	2	36.1	0	42.8	0	74.6	4	0.2
Nigeria	0	40.7	0	877.3	0	1 448.8	0	2 366.8	0	4.9
Panama	0	658.5	0	1 415.2	0	3 326.2	4	5 399.9	4	11.1
Republic of Korea	1	455.0	3	347.2	3	97.9	0	900.1	7	1.8
Senegal	4	2.9	0	8.8	1	14.0	2	25.7	7	0.1
Singapore	0	280.7	2	725.0	4	2 325.9	0	3 331.6	6	6.8
Sudan	1	1.4	2	18.7	1	51.7	0	71.8	4	0.1
Sri Lanka	1	6.3	0	-38.9	0	44.6	6	12.0	7	0
Tunisia	5	58.4	1	-9.5	0	115.5	0	164.4	6	0.3
Zaire	1	92.3	2	507.3	1	-25.2	0	574.4	4	1.2
TOTAL	45	9 418.4	23	17 711.5	27	21 593.5	19	48 723.4	114	100.0

Source: Macro database of the Centre on Transnational Corporations, based on data prepared by the OECD secretariat.

BIA: bilateral investment agreements

FDI: foreign direct investment

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increase or fall of foreign direct investment can be explored in a meaningful way only if each case is examined separately. The data in the table show only that there is no apparent relationship between the number of bilateral agreements and the volume of foreign investment flows. This confirms the conclusion of the aforementioned OECD report 5/ on bilateral investment agreements, namely that "the mere existence of an investment protection treaty will not lead to increased flows of investment to developing countries unless there are other sufficiently attractive factors. Where such attractive economic perspectives exist, the absence of an investment protection treaty will not significantly affect investment activities in the host country, although it can have an inhibiting effect on investment decisions in certain cases".

85. It has been argued that, quite apart from other considerations, political risk insurance is far more important to the investor than the existence of a bilateral agreement, of which he is often not even aware or the legal significance of which he is not in a position to appreciate. However, this view tends to neglect the fact that the existence of a bilateral agreement with the respective host country is very often a pre-condition for political risk insurance by the investor's home country. Thus, there is a de facto link between investment agreements and investment insurance. 15/ The increased willingness of developing countries to conclude investment agreements would also seem to indicate that these countries do expect the agreements to have an encouraging effect on potential investors. However, the agreement is obviously only one of a number of determining factors in the investor's decision-making process. Apart from other incentives, it is in the nature of things that, from his point of view, the investment must above all make economic sense in terms of returns and security, and also from the point of view of obtaining access to new markets.

B. Effectiveness of legal protection under bilateral agreements

1. Treatment clauses

86. Part of the problem of the effectiveness of treatment clauses has already been touched upon under sections II and III above in the summary analysis of the main treatment and protection clauses and of certain differences in existing agreements.

87. While the legally binding character of the various protection clauses is not in question, some of them are difficult to implement in reality. Doubts have for example been expressed about the value of national treatment and most-favoured-nation treatment (the latter being essentially a technique used in international commercial relations) in the specific context of investment agreements. Indeed, national treatment may not be very helpful to the investor in countries where, in accordance with the internal economic order, the economic rights of the nationals (individuals or companies) are comparatively limited in the matter. Most-favoured-nation treatment would not be meaningful if there is no valid basis of comparison with a "more favoured" third State or if the advantage granted to another State is so narrowly circumscribed and adapted to its specific circumstances that it cannot easily be invoked by another. It is also understood, and expressly mentioned in some agreements (as in art. 1 of the 1967 OECD draft

convention), that special advantages granted to an individual investor cannot be invoked under most-favoured-nation treatment, unless the same advantages are also accorded to all investors from the country concerned.

88. Other exceptions to these relative treatment rules are often spelt out either in the agreement itself or in one of the accessory instruments, such as protocols or exchanges of letters. This well-known legal technique in modern treaty practice often results in a situation where the principle laid down in the main text of the agreement has little meaning in practice. 16/

89. Absolute treatment provisions (as distinct from relative clauses like national treatment and most-favoured-nation treatment), such as free transfer clauses, would also seem to have lost their intended purpose in a number of bilateral agreements, through understandings reached in exchanges of letters concerning, for example, the phasing of transfers, if required by the balance-of-payments situation. It is interesting, in this connection, that the article on transfers proposed in the 1967 OECD draft convention is much more flexible than the increasingly rigid rules included in most bilateral agreements. Under article 4, each party "recognizes ... the principle of the freedom of transfer of the current income from property and proceeds upon liquidation ...". It is further specified that "this Recommendation does not contain any obligation in this respect, each Party will endeavour to grant the necessary authorization for such transfers ...". In any case, this wording would seem to correspond more to what happens in reality than some of the more uncompromising provisions in bilateral agreements.

2. Rules on dispossession

90. All agreements, as indicated previously, provide for the possibility of expropriation/nationalization, and thus expressly recognize what is now a generally accepted principle of international law - except that there is also, in most agreements, the so-called umbrella clause under which the host State is to respect the contractual obligations it may have entered into directly with the investor, and that such contracts do sometimes commit the host State not to expropriate.

91. It is true that the conditions for expropriation/nationalization are practically always clearly spelt out: it must be in the public interest (or for a public purpose), based on the law of the land, and local legal remedies must be available to the owner to attack the legality of the dispossession or the amount of compensation offered. However, there is no agreed definition of public interest (public purpose) in international law. With the growing part played by Governments in economic life in most countries, the concept of public interest becomes even wider and there is a considerable body of opinion to the effect that under international law it is a matter for the Government concerned to decide what is in the public (or national) interest. 17/

92. One of the major practical problems is that of determining the amount of compensation. In the event of a dispute, the interested party could invoke, of course, what has been held to be just, equitable or adequate in certain arbitral awards or in international judiciary decisions. Sometimes the agreement specifies the meaning of the words (book value, replacement value, market value), but in such

cases the more general term would seem to become legally irrelevant. Under the prototype treaty of the Federal Republic of Germany, compensation must correspond to the value of the investment immediately before the expropriation measure was announced. The market value of the investment however can fall rapidly - not only following publication of an expropriation measure but also when the threat of such a measure is only hinted at or if the operating conditions imposed by the host State on the foreign enterprise preclude profitable economic activity.

93. The treaties provide for the availability of local remedies to the investor but from the point of view of the latter these may not constitute a sufficient guarantee. This is one of the reasons why investor/host Government contracts often provide for arbitration in different forms as a means of settling disputes. Sometimes, but rarely until now, procedures for the direct settlement of disputes between investor and host Government are foreseen in bilateral agreements. While safeguarding the sovereignty of host States, more general acceptance of ICSID settlement procedures 18/ would no doubt favour an atmosphere of mutual confidence between investor and host State and thus contribute indirectly to the effectiveness of bilateral agreements. However, as is well known, the principle of international settlement procedurea for investment disputes is not accepted by all members of the international community.

94. As seen previously all bilateral agreements provide for a two-stage inter-State settlement procedure. But although there have been a number of disputes between States parties to bilateral investment agreements, mostly concerning nationalization matters, there is no known case of an arbitration tribunal set up under the agreement and inter-State arbitration carried out in virtue of it. Normally, when a dispute arises, the Governments concerned do their best to settle the matter by negotiation (if it is not settled directly between the foreign corporation and the host State). Practice would seem to indicate that injured parties - both investors and their home State - do not necessarily insist in such cases on total compliance with the provisions of the agreement: treaty provisions would seem to lose their binding character to a certain extent and become arguments in a diplomatic debate or provide a basis from which negotiations can proceed. In most cases, Governments will find that they have a common interest, within the wider context of their political and economic relations, to see the matter settled. This is a pre-condition for concessions to be made on both sides, taking into account other relevant circumstances.

C. Bilateral investment agreements as viewed by developing countries

95. Apart from divergencies on the formulation of individual provisions, many developing countries feel that bilateral investment promotion and protection agreements are one-sided, in that they concentrate on the protection of the interests of the investor. They do not normally contain specific commitment by the capital-exporting country to provide special investment incentives (although investment insurance against political risk is envisaged in some exchanges of letters), nor do they include rules concerning the investor's obligations and conduct in the host country. The argument against the inclusion of such rules is that the agreements in question are inter-State agreements and the private investor

is not a party to them. Norms concerning the conduct and obligations of the investor are essentially a matter for national legislation in the host country. Indeed, most bilateral agreements expressly stipulate that they concern approved investments only and that investments are admitted in accordance with the laws, regulations and procedures of the host country. Thus, the home State of the investor implicitly recognizes the competence of the host State to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. 19/ It has even been argued that the admission clause in bilateral agreements constitutes a general reservation, allowing the host State to derogate from individual provisions (for example, the transfer clauses) if divergent provisions are laid down in admission certificates or investment contracts. At the same time, the host State can stipulate rules of conduct or other obligations of the investor, if these are not already covered by national legislation.

96. Even if one accepts this point of view, however, it can be argued that an enumeration of rules of conduct would strengthen the hands of developing countries in case of dispute and that, in any case, certain principles should be recognized by contracting parties to investment agreements. Indeed, a good number of such principles are no longer contested, for example, in the negotiations on a code of conduct on transnational corporations. Some of them are also included in codes of conduct, guidelines or declarations of principle adopted in other international forums where capital-exporting countries play an important part, such as OECD, the International Labour Organisation and the International Chamber of Commerce. 20/

97. The argument that bilateral investment agreements provide reciprocal rights and protection for the investors from both States parties would be valid if the flow of investments were really a two-way process. With the investments flowing almost exclusively from developed to developing countries, the rights assured to investors are virtually confined to investors from developed countries, and the concept of reciprocity therefore has little substance in practice.

V. THE FUTURE OF BILATERAL INVESTMENT AGREEMENTS

98. Are bilateral investment promotion and protection agreements characteristic of a particular period, the post-colonial era, or are they destined to become a more permanent feature of international economic relations? The main advocates of bilateral investment agreements, the major industrialized capital-exporting countries, claim that the existence of a large number of agreements - now between 200 and 300 - together with about 150 OPIC and EDC guarantee agreements (as practised by the United States and Canada), and investment provisions in other international instruments are evidence of the development of customary rules of international law in the field of international investment. On the opposite side, some representatives of developing countries consider investment agreements contrary to peremptory rules of international law (jus cogens) in that they would violate, for example, the principle of permanent sovereignty over natural resources established in numerous United Nations resolutions. 21/

99. Is the existence of a large number of bilateral agreements containing norms which are similar, if not identical, in substance evidence of international custom or, at least, of growing state practice significantly contributing to the development of international law in the field of economic co-operation? It is traditionally held that the existence of a customary rule of international law requires both constant practice by the States principally concerned by the rule in question and the conviction (opinio juris) that it should be a rule generally applicable in relations between the members of the international community (or a given part of it). Is this the case for the provisions contained in the agreements in question?

100. It would seem that, at the outset, developing countries concluded investment agreements with the specific intention of attracting foreign capital needed for their economic development. It could therefore be argued that they acted more out of need than out of conviction. The readiness of developing countries to enter into such contractual relationships with developed capital-exporting countries seems to have increased with the world economic crisis during the 1970s, continuing into the 1980s, but this does not necessarily imply that in their opinion the norms enshrined in bilateral investment agreements should permanently govern multilateral relations in the field of investments. The special circumstances that dictate the bundle of benefits and obligations in a peculiar bilateral relationship cannot be said to yield generally accepted international standards.

101. Indeed, the same countries have often taken a different stand on the issues connected with foreign investments when discussing the matter in the framework of the United Nations and other international forums. Thus practically all countries that concluded bilateral investment agreements with developed countries also voted, in 1974, for the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX)), including the much discussed paragraph 2 (c) of article 2. Furthermore, many members of the international community have so far not been prepared to conclude bilateral investment agreements. They include about one half of the members of the Group of 77 and, notably, such large countries as India and Nigeria and the majority of Latin American countries, faithful to the Calvo doctrine, with which investment agreement provisions on nationalization, jurisdiction and dispute settlement would seem difficult to reconcile. They also include, with two or three exceptions, the socialist countries of Eastern Europe. Within the Latin American region, the common investment code of the Andean countries is also considered incompatible with the conclusion of a standard investment promotion and protection agreement - although one Andean country (Ecuador) is a party to both. Thus, if the common provisions of bilateral investment agreements are regarded as a constitutive element of an emerging international customary law on investments, the latter would in any case, under present circumstances, be limited to a part of the international community.

102. On the other hand, those who defend the custom-forming thesis can point to the relatively recent phenomenon of bilateral investment agreements being concluded between two developing countries - although on closer inspection it appears that in the majority of cases one of the two parties is a newly industrialized country. They can further argue that 66 African, Caribbean and Pacific countries are morally committed to the conclusion of such agreements with EEC member countries under the

Third Lomé Convention. Important new factors in this debate will be whether a majority of the States members of the Organization of the Islamic Conference ratifies the multilateral investment agreement adopted by that organization in 1981 and whether a substantial number of bilateral agreements, comparable to those discussed here, will be concluded between African and Asian States, as a result of the work done by the Asian-African Legal Consultative Committee. But the discussions within that Committee - which, it is recalled, produced three different prototype agreements - have revealed fundamental divergencies of opinion on certain points, some member States intending to stand by the philosophy underlying the Charter of Economic Rights and Duties of States. Finally, the negotiations still under way between States members of the League of Arab States and the European Economic Community on the conclusion of a multilateral convention on the promotion and protection of investments, on terms very similar to those included in bilateral agreements, would also seem to reinforce the custom-forming theory.

103. As shown in the foregoing analysis, bilateral investment treaties by their very nature deal overwhelmingly with such issues as definitions, admission of investments/investors, basic standards of treatment (fair and equitable treatment, national treatment, most-favoured-nation treatment), nationalization and compensation, transfer of profits and repatration of capital, settlement of disputes and subrogation. In other words, as a rule, they do not include such principles as the investor's adherence to the economic goals and development objectives of the host country; respect for human rights and fundamental freedoms; non-interference in the host country's internal political affairs and in its external relations; respect for socio-cultural values; abstention from corrupt practices; consultation on balance-of-payments problems; competition and restrictive business practices; consumer and environmental protection; disclosure of information; and employment and training of local personnel. It should be noted that all these principles are covered in the draft United Nations code of conduct on transnational corporations. This makes clear that bilateral investment agreements are only one element of a comprehensive multilateral investment régime yet to be fully established. 22/

Notes

1/ See Trends and Issues in Foreign Direct Investment and Related Flows, (ST/CTC/59; United Nations publication, Sales No. E.85.II.A.15), chap. I.

2/ Including Belize, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Haiti, Honduras, Panama, Paraguay and Saint Lucia.

3/ See report to the Asian-African Legal Consultative Committee on the promotion and protection of investments (AALCC/XXIV/1, 1983).

4/ The OECD draft Convention on the Protection of Foreign Property (with Commentary), Paris 1967, was never opened for signature. Instead, the Council of OECD, by a resolution adopted on 12 October 1967, commended it to member States for the preparation of agreements on the protection of foreign property.

Notes (continued)

5/ See OECD, Intergovernmental Agreements Relating to Investment in Developing Countries (Paris 1985), pp. 23-24.

6/ The protection of portfolio investments is also foreseen in the not yet finalized draft multilateral agreement between States members of the League of Arab States and of the European Economic Community. This would seem to correspond to the specific interest of some of the major oil-producing countries.

7/ Agreements concluded by Romania with Belgium-Luxembourg, Denmark, Egypt, Pakistan, the Sudan and the United Kingdom.

8/ See the Vienna Convention on the Law of Treaties, article 1, para. 1c: "Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designations."

9/ For example, the agreement between France and Sri Lanka.

10/ See, inter alia, Grigory Tunkin, Le conflit idéologique et le droit international contemporain, in Mélanges Guggenheim, pp. 888-898.

11/ See the OECD commentary on the clause (Actes de l'Organisation, vol. 7, 1967), p. 236.

12/ See the agreements concluded by Pakistan, Rwanda, Saudi Arabia and Singapore with the Federal Republic of Germany.

13/ For example, Ecuador with Switzerland and the Federal Republic of Germany; Panama with France; Costa Rica with the United Kingdom.

14/ For details see Trends and Issues in Foreign Direct Investment ..., and the report of the Secretary-General on recent developments related to transnational corporations and international economic relations (E/C.10/1986/2).

15/ Of course, one may speculate in this connection on the effect of the Multilateral Investment Guarantee Agency, if it becomes fully operative, on the flow of private investment to developing countries.

16/ For a detailed study of the theory and reality of treatment clauses see Heinrich Klebes, Encouragement et protection des investissements privés dans les pays en développement (Ph.D. thesis, Strasbourg, 1983), pp. 286-316.

17/ This view has also been adopted by international tribunals, although they would reserve their right to verify that the State concerned has acted reasonably and in good faith. On the position taken by the European Court of Human Rights see Frowein and Peukert, Europäische Menschenrechtskonvention (Strasbourg 1985), pp. 268-274. The Court also held that the transfer of property may be justified by important social considerations constituting a public interest. See article 2, para. 2 (c) of the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX)).

Notes (continued)

18/ In fact, ICSID clauses in bilateral agreements may cover various degrees of commitment to the Centre's jurisdiction. See the model clauses proposed by ICSID for insertion in bilateral agreements.

19/ Charter of Economic Rights and Duties of States, article 2, para. 2 (a).

20/ See, for example, OECD, Guidelines for Multinational Enterprise (1976); ILO, Tripartite Declaration of Principles on Multinational Enterprises and Social Policy (1977); International Chamber of Commerce, Guidelines for International Investments (1972).

21/ The logical conclusion to be drawn from this point of view would be that investment agreements should be considered void in accordance with articles 53 or 64 of the Vienna Convention on the Law of Treaties.

22/ Article 63 of the draft United Nations code of conduct in its present form foresees that "States [agree to] [should] take into consideration the objectives of the Code as reflected in its provisions when negotiating bilateral or multilateral agreements concerning transnational corporations".