# Bilateral Investment Treaties

United Nations Centre on Transnational Corporations
United Nations, New York

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# PREFACE

Bilateral investment treaties (BITs), which are intended to promote and protect foreign direct investment, are a relatively new element in international economic relations - but one that has been steadily growing in importance during the past few decades. The present study is essentially devoted to a comparative analysis of the content of such treaties.

The term "treaty" is used in its general meaning, as defined in article 2 of the Vienna Convention on the Law of Treaties, 1969:

> "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."

In fact, the legal instruments considered in the present study are often called "agreements", "conventions", and sometimes, "accords" or "arrangements". The differences in terminology have no bearing on the international legal nature of the text in question.

The major capital exporting countries, which adopted a deliberate policy of concluding such bilateral treaties with developing countries to facilitate foreign direct investment flows to these countries (they play no part in investment relations among developed countries), elaborated prototype treaties as a basis for negotiations. The texts of several model agreements are annexed to the present publication.

The prototype treaty most widely used is perhaps that of the Federal Republic of Germany (annex II). Over 60 treaties have so far been concluded by that country. A comprehensive study of these treaties* shows that, with relatively few exceptions, they deviate only a little from the prototype text, although that text is being developed still further. The Netherlands model of 1979 (annex III) has been included because it is representative of the approach of one of the important smaller capital-exporting countries. That model was revised in February 1987. Although no treaty has yet been concluded following its revision, the new text has been included (annex IV) to show the evolution of that country's approach in bilateral negotiations. Only 10 treaties have so far been concluded and as of mid-1987, none of them had entered into force. It has nevertheless been considered appropriate to include the United States model treaty, revised in 1984, as it reflects the present approach of the world's largest capital-exporting country.

Whereas, until recently, bilateral investment treaties were used mainly in the relations between developed and developing countries, they are now also being concluded between a number of developing countries or, more often, newly industrialized and developing countries. Furthermore, three model investment

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* See Justus Alenfeld, Die Investitionsförderungsverträge der Bundesrepublik Deutschland (Frankfurt, Antenäum Verlag, 1970) and Heinrich Klebes, "Encouragement et protection des investissements privés dans les pays en développement - les traités bilatéraux de la République fédérale d'Allemagne dans leur contexte", thesis, Strasbourg, 1983.

agreements have been elaborated within the Asian-African Legal Consultative Committee (AALCC) (annex VI, A, B and C), one of which comes fairly close to the prototype texts of the developed market economies. There are no treaties concluded on the basis of the AALCC models, which are intended to serve as a basis for negotiations involving countries of the Asian-African region, but it seemed appropriate to include them in the present study as indicative of the approach preferred by the relevant countries.

Finally, before proceeding to the assessment of bilateral investment treaties, it should be recalled that these are only one element in a "bundle" of measures destined to encourage and protect foreign investment. Developed countries consider them part of their policy towards developing countries. The latter normally conclude them, among other reasons of a political or legal nature, because they need resources for development. These resources are largely in the hands of transnational corporations, and the developing countries seek to attract them by a variety of measures, including guarantees under bilateral treaties with the home countries of the transnational corporations concerned.

The existence of a bilateral investment treaty is often the condition for national insurance against such political investment risks as dispossession, impossibility of currency transfer and war damage. In other words, investors, in case of expropriation, need not only rely on the provisions of the treaty; they can in any case turn to their national insurance. Other measures aimed at promoting direct investment abroad, but not necessarily linked to the existence of a bilateral investment treaty, consist of tax advantages, credit facilities, advisory services etc. The host country often offers special incentives to foreign investors. Other international instruments, such as commercial agreements, economic or technical co-operation agreements, establishment conventions or double-taxation agreements, may be relevant and their effects interrelated with those of bilateral investment treaties. This should be borne in mind when assessing the content and utility of the latter.

The Centre wishes to acknowledge the important contribution of Heinrich Klebes in the preparation of the present study.

Peter HANSEN
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## INTRODUCTION

1. The legal framework governing foreign direct investment at the national level consists mostly of domestic investment laws, administrative regulations and policies and such other specific contractual arrangements as may be entered into between a particular country and a prospective investor. The promotion and regulation of foreign direct investment may also be supplemented by a variety of intergovernmental bilateral, regional and multilateral arrangements. Although by and large the developed market economy countries do not normally conclude bilateral investment treaties with the intention either of attracting foreign direct investment or of protecting foreign investors in their territories, 1/ they have perceived them as setting forth necessary guarantees of protection for the investments of their national individuals and corporations in developing countries. They consider that such guarantees in an intergovernmental agreement are greater and more reliable than those provided for under the domestic laws of the host country, which are subject to unilateral modification. 2/

2. The uncertainties about the content of customary international law on foreign investment, as well as the difficulty of concluding binding multilateral arrangements for the protection of foreign investors, have also contributed to the perception by home countries of a need for bilateral treaties. At the same time, the capital-exporting countries have felt that developing countries that wish to attract foreign direct investments could do so more easily if they offered, *inter alia*, guarantees of protection to prospective investors.

3. Given their objective, bilateral investment treaties, usually seen as providing legal stability, are now being relied upon by most developed market economy countries as part of their effort to safeguard the investments of their nationals. For their part, developing countries have negotiated bilateral investment treaties as one of the measures for attracting investment. The existence of a bilateral treaty is only one factor among many which may affect a potential investor's decision to invest in a particular developing country. Such a treaty may be redundant if the prospective investor considers the existing legal framework or the investment climate as a whole to be reasonably secure and the proposed venture profitable. Other factors taken into consideration by the prospective investors are the political stability of the host country; the economic, industrial and administrative framework; the economic profitability of an initial investment or the increase in current investments (especially in mineral sectors); the incentives package or the selection of new investment arrangements in the form of licensing agreements, management and marketing contracts, turnkey projects and equity arrangements etc. In practical terms, unless the host country can offer a secure profit-making venture to the foreign investor, the existence of a bilateral treaty will not in itself attract an investment.

4. Since 1973, the economies of oil-importing developing countries have undergone balance-of-payments deficits on current accounts due to rising import prices and a falling demand in prices for their exports. Many of these countries have come to regard liberalization of their foreign investment codes and the conclusion of bilateral investment treaties as measures to attract foreign direct investment and is a source of development finance, particularly in the natural resources sector. While seeking to attract foreign investments through such measures, it is also clear that developing countries have indicated that they do not wish the activities of foreign investors in their territories to compromise their sovereignty, and that

these activities should accord with their development goals and priorities. Hence, they have simultaneously adopted declarations reaffirming their permanent sovereignty over their natural resources and sought to promulgate standards for the activities of transnational corporations in multilateral forums. 3/ There is no necessary inconsistency between bilateral investment treaties and the adoption of global standards for transnational corporations; the two policy initiatives serve specific needs that are compatible, complementary and mutually supportive.

## Part One

## PAST AND PRESENT TRENDS

### I. BACKGROUND ON MEASURES FOR THE PROTECTION OF FOREIGN DIRECT INVESTMENT

5. Foreign direct investments increased dramatically in both developed and developing countries after the Second World War, and the upsurge continued into the 1960s. 4/ At that time, when the decolonization process accelerated, capital-exporting countries introduced measures to protect their nationals' investments in developing countries through investment insurance schemes, and provided incentives, such as fiscal and foreign exchange regulations favourable to foreign investments. Capital-importing countries passed investment laws offering incentives to foreign investors, such as exemptions from certain taxes, duties and exchange controls and guarantees against arbitrary State actions.

6. With the elimination or reduction of government barriers to capital outflows, a significant increase in the development of international direct investment occurred from the early 1960s to the mid-1970s. 5/ Foreign investors were attracted by profitable investment opportunities in developing countries arising out of rapidly growing domestic markets, resource development projects, particularly in the petroleum and mineral sectors, import substitution and export-oriented manufacturing sectors benefiting from low labour costs. Thus, the industrialized countries advocated various legislative measures and combinations of schemes to eliminate or reduce non-commercial risks and supported policies to protect private direct investment in developing countries.

#### A. Friendship, commerce and navigation treaties

7. Chronologically, the first bilateral agreements dealing with the protection of foreign investment were the friendship, commerce and navigation treaties, which were concluded during the post-war period and up to the late 1960s, by the United States of America 6/ and, to a lesser extent, Japan and a few western European countries. These treaties generally provided for the protection of natural and juridical persons, and the treatment of the property and interests of such persons. They were reciprocal and long-duration agreements designed to establish the ground rules regulating economic intercourse and setting international legal standards for the protection of nationals of the contracting parties. Although they dealt only in a limited manner with foreign direct investment, which was not as important then as it is now, some of these treaties contained significant provisions in this area.

8. Most of these treaties, concluded initially between developed countries, have a very broad scope and deal with issues such as entry and freedom of movement; protection of persons, right to counsel and prompt trial; national treatment in application of local laws; enforceability of arbitration awards; protection of acquired property; right to lease and purchase land freely; patents, trademarks; equal tax treatment; administration and exchange controls; transit of goods and persons; import and export duties and taxes; right to compete with local monopolies; consultations on restrictive business practices; freedom, commerce and navigation and freedom of transit for persons.

9. This type of treaty is no longer being negotiated, but there are friendship, commerce and navigation treaties still in effect for a number of countries. The last of these treaties were concluded by the United States with Thailand and Togo in the late 1960s. 7/

## B. Political risk insurance

10. After the Second World War, capital-exporting countries began establishing insurance schemes to insure their nationals' investments abroad against certain well-defined non-commercial risks, such as expropriation, nationalization, damage due to armed conflict, non-transferability and inconvertibility. The oldest and largest such programme is that of the United States, administered by the Overseas Private Investment Corporation (OPIC). This was introduced (through the Foreign Assistance Act, 1948) not to promote private investment in developing countries but, in the context of the European Recovery Plan (Marshal Plan), to protect United States investors against the risks of inconvertibility in Europe. The United States was followed by Japan in 1956 and by the Federal Republic of Germany in 1958. As of 1986, about 20 countries, 16 of which are members of the Organisation for Economic Co-operation and Development (OECD), offer their investors political risk insurance. As mentioned earlier, there is a link between investment insurance and bilateral investment treaties. Unless the insurer is satisfied that the legal protection of an investment is sufficiently guaranteed under the domestic law of the host State or in some other way, the existence of a treaty may be the condition sine qua non for political risk insurance. Sometimes, this may indeed be the main reason for a developing country to enter into negotiations with a developed country or to conclude a bilateral investment treaty.

11. In the longer run, this pattern might well be broadened by the existence of an effective multilateral insurance scheme. After numerous unsuccessful attempts - involving, among others, the World Bank, OECD, the Council of Europe, the Inter-American Development Bank and the European Economic Community - the World Bank Convention on the Multilateral Investment Guarantee Agency (MIGA) was opened for signature in October 1985. 8/

## C. Investment guarantee agreements

12. Investment guarantee agreements (IGAs) have been used by the United States and Canada, in connection with 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/EDC 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 which, in the opinion of one of the Governments involves a question of public international law arising out of any investment, shall be settled by negotiation or, failing agreement, by international arbitration. Investment guarantee agreements do not constitute an alternative to bilateral investment treaties in that they do not contain any provision on the treatment of investments in the host country. However, this has facilitated their acceptance by a number of developing countries which have not been prepared to conclude investment promotion and protection agreements.

13. As of 1986, the United States had concluded about 116 such agreements, mostly in the form of exchanges of letters, and Canada 36. Investment guarantee agreements will no doubt continue to be negotiated, in any case by Canada and the United States. It must be borne in mind that the United States Government has only recently embarked on a policy of seeking the conclusion of bilateral treaties concerning the reciprocal encouragement and protection of investment. Canada has concluded none. 9/

## II. THE EMERGENCE OF BILATERAL TREATIES ON THE PROMOTION AND PROTECTION OF INVESTMENTS

### A. A network of over 260 treaties

14. Bilateral investment treaties are both specific and general in nature: specific, in that they are exclusively concerned with the protection of investments originating from one contracting party in the territory of the other contracting party; general, because - subject to admission by the host country - they are meant to apply to all investments coming within the normally very wide definition contained in the treaty. In other words, they are not limited to particular projects or sectors of the economy, although some bilateral investment treaties may expressly exclude certain types of investments. It is true that another type of treaty, namely, the project or sector-specific agreement, was commended in the European Economic Community context - among others - as from 1979. 10/ However, there seems to be no practical experience so far with this type of bilateral treaty (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 taken up in 1985 by the Asian-African Legal Consultative Committee in one of the three model agreements elaborated by this body. 11/

15. By mid-1987, some 265 bilateral investment promotion and protection treaties 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, China, Hungary, Romania and Yugoslavia); developing countries and newly industrialized countries (Singapore, Republic of Korea); developing and socialist countries; or among developing countries (see annex I). At the time, about 55 of these treaties had not yet entered into force. Over 70 developing countries have signed - though not necessarily ratified - one or more treaties, including some 13 Asian and Pacific countries, about 12 North African and Middle Eastern countries, about 30 African countries south of the Sahara and some 15 western hemisphere countries; 4 Eastern European countries (Bulgaria, Hungary, Romania and Yugoslavia), as well as 18 developed market economy countries (15 in Western Europe, plus Japan, New Zealand and the United States) are parties to bilateral investment treaties.

16. The majority of developing countries which have signed bilateral investment treaties are to be found in Africa and South-East Asia. A number of Central and South American countries (including Belize, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Haiti, Honduras, Panama, Paraguay, Saint Lucia, and recently Bolivia and Uruguay), have concluded such treaties. Thus far, some of the most advanced developing countries, including the largest Latin American countries, which attract the largest share of foreign direct investment, seem to have shown no particular interest in concluding investment treaties with industrialized countries.

17. About 12 of these bilateral investment treaties have been concluded between developing countries. Mention has already been made of the three model agreements prepared by the Asian-African Legal Consultative Committee. Whereas Model A is comparable - with some reservations - to the majority of existing bilateral investment treaties, the protection standard of Model B (which is closer to the

philosophy of the Charter of Economic Rights and Duties of States) would be less far-reaching. Model C would correspond to Model A, the definition of investment being limited to one or more specific sectors (see annex VI).

18. The initiative of concluding bilateral treaties specifically devoted to the promotion and protection of investments was launched by the Federal Republic of Germany. That country concluded its first bilateral investment treaty in 1959 with Pakistan. It has been said that the Federal Republic of Germany was particularly sensitive to investment protection, its investors having lost their foreign assets twice in a great number of countries following the First and Second World Wars. With over 60 treaties in force, the Federal Republic still leads the movement among developed capital-exporting countries.

19. Switzerland concluded its first agreement on the protection and encouragement of investments with Tunisia in 1961. It now has a network of about 20 treaties of this specific type, to which might be added some 17 others (agreements on commerce, investment protection and technical co-operation etc.), which contains substantial sections on investment protection and promotion.

20. The tendency towards the conclusion of bilateral investment treaties was reinforced by the elaboration, within OECD, of a draft Convention on the Protection of Foreign Property. It is true that this was not, originally, intended to be a model for bilateral treaties but a multilateral convention aiming at setting common standards for the treatment of foreign property within OECD member countries. If the project failed, it is partly owing to the fact that the Organisation's less developed members (such as Greece, Portugal and Turkey), but also some others, were reluctant to commit themselves to some of the proposed provisions. In fact, the Draft Convention 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. The text of OECD provided important guidelines for some of the more fundamental provisions on the treatment and protection of investments included in bilateral investment treaties.

21. From the 1970s to the 1980s, the negotiation of bilateral investment treaties developed into a deliberate policy of most capital-exporting countries to protect their investment interests in the developing countries and to counteract what some capital-exporting countries considered a continuous erosion of principles of customary international law through United Nations resolutions, such as the Charter of Economic Rights and Duties of States. France signed its first bilateral convention with Tunisia in 1972 and now has over 20 conventions in force. The United Kingdom of Great Britain and Northern Ireland began in 1975 with Egypt; by mid-1987, it had signed about 28 of these treaties. Japan, now one of the most important foreign investors, joined the movement only in 1977. As for the United States, the first 10 treaties signed are awaiting approval by the United States Senate.

22. It may fairly be assumed that the network of treaties will expand further and that new treaties will be signed over the next few years - not only between developed and developing countries, but also between developing countries themselves and between socialist and other countries.

## B. Investment treaties and the international community

23. Most bilateral investment treaties tend to restate traditional principles of customary international law with respect to the treatment of foreign property abroad between the two parties. On the other hand, the developing countries have collectively, in several forums, such as the United Nations Commission on Transnational Corporations, questioned the relevance and applicability to them of such traditional standards as the duty to pay "prompt, effective and adequate" compensation in the event of nationalization/expropriation etc., on the ground that they are contrary to their national interest. The various theories and positions on this subject have been analysed with considerable detail by the United Nations Centre on Transnational Corporations (see annex VII, paras. 23-96) so they will not be elaborated here.

24. The majority of countries which question the above-mentioned principles or which reject bilateral investment treaties are not opposed to encouraging the inflow of foreign direct investments or to providing for the protection of investors. In fact they often adopt measures to these ends in the context of domestic legislation and policies. The national investment legislation and regulations enacted by many developing countries with the aim of harmonizing the activities of the transnational corporations with the development goals and objectives of the host country have a dual purpose: to regulate foreign direct investment with respect to such matters as the extent of the foreign holdings, the supply of technology and services, foreign exchange and taxation, and to attract foreign direct investment.

25. Many developing countries have also been party at one time or another to regional and subregional integration schemes. Whilst economic co-operation and collective self-reliance on the basis of regional agreements have been pursued for wider purposes, one of their underlying considerations has been that they may also serve as a means to strengthen the bargaining power of developing countries with respect to foreign investors by means of common trade programmes, co-ordinated development, and co-operation in policies regarding foreign direct investment.

26. In these circumstances, it is of interest to examine to what extent bilateral investment treaties have found acceptance in the international community and, in particular, among the developing countries. As mentioned earlier, over 70 developing countries have signed one or more treaties, that is more than half of the present strength of the countries belonging to the the Group of 77. Some of the more noteworthy exceptions are Ethiopia (which signed one treaty with the Federal Republic of Germany in 1964, but never ratified it) and Algeria in Africa; Viet Nam, Laos, Kampuchea and the Democratic People's Republic of Korea in Asia; India, whose only investment agreements with western capital exporting countries are the exchange of notes with the Federal Republic of Germany (1964) and the Investment Guarantee Agreement with the United States; and, of course, those Latin American countries which strictly adhere to the Calvo Doctrine. 12/ Many of the treaties signed with Central and South American countries are, in fact, not yet in force.

27. Also it should be noted that the policy of concluding bilateral investment treaties received formal support, through the "investment clauses" inserted in interregional agreements concluded by the European Economic Community, such as the Second Convention of Lomé (art. 64), and the Third Convention of Lomé (arts. 240-247, and the agreement with the Association of South-East Asian Nations (ASEAN) (art. 3). In this regard, the elaboration of the text of model bilateral

treaties by the Asian-African Legal Consultative Committee is recalled. The Euro-Arab Investment Convention, currently under negotiation, is also intended to support the conclusion of bilateral agreement. 13/ At the multilateral level, the Convention establishing the Multilateral Investment Guarantee Agency (MIGA) includes among the activities the Agency should undertake to encourage investment flows "the facilitating of agreements among its members on the promotion and protection of investments (art. 23)". Lastly, the draft United Nations code of conduct on transnational corporations, recognizing that intergovernmental co-operation would be essential in accomplishing the objectives of the code, provides that these objectives should be taken into consideration when negotiating bilateral agreements concerning transnational corporations.

## C. Investment treaties and the flow of direct investment

28. It is necessary, at this point, to look at the pattern of foreign direct investment in developing countries with a view to assessing to what extent bilateral investment treaties are directly or indirectly a contributory factor to the variations of investment flows.

29. A general overview of the data on foreign direct investment flows from OECD countries to developing countries in the past 10 years 14/ and of the list of countries which have concluded bilateral investment protection agreements up to mid-1987 suggests a number of considerations indicated in the following paragraphs.

30. Malta and Yugoslavia have comparatively moderate flows of foreign direct investment. Both countries have negotiated investment treaties possibly to sustain as well as encourage foreign direct investment.

31. West Asia includes both OPEC and non-OPEC countries. Most of the countries which have concluded bilateral investment treaties happen not to belong to OPEC: Israel, Jordan, Oman (although an oil-producing country), the Syrian Arab Republic and Yemen. Most of these countries do not have the resources of most OPEC countries and therefore need to attract foreign direct investment.

32. The countries of South and South-East Asia provide a different scenario. The ASEAN countries (Indonesia, Malaysia, Philippines, Singapore and Thailand) have all concluded bilateral investment treaties and have a significant amount of foreign direct investment flows. Other Asian countries which have concluded bilateral agreements are Bangladesh, Pakistan and Sri Lanka, which have relatively low annual average foreign direct investment flows from OECD countries. This shows that in Asia there are two kinds of countries which conclude bilateral investment treaties. The first group already has a large stock of foreign direct investment and concludes bilateral treaties to assure protection to existing investors or to diversify the sources of foreign direct investments. Since the major investors of Asia are Japan and the United States, the agreements may be an incentive to attract investments from the Western European countries. The second group is composed of Asian countries which have a low stock of foreign investment and seek foreign investment. A case apart is that of China, which has concluded 17 bilateral investment treaties since it began its policy of attracting foreign direct investment in the early 1980s.

33. As mentioned previously, relatively few countries in the Latin American region have concluded bilateral investment treaties. Costa Rica, El Salvador, and

Paraguay, have signed investment treaties within the last 10 years and have very low foreign direct investment flows. One exception is Panama, which signed one of the first investment treaties (not yet in force) with the United States in 1982 and has high foreign direct investment flows. The Caribbean countries (excluding tax havens such as the Bahamas and Bermuda) have low flows of foreign direct investment and, at this time, have not concluded bilateral investment treaties, with the exception of Belize, Haiti, Jamaica, Grenada, Saint Lucia and Saint Vincent and the Grenadines. 15/

34. The African region generally has a comparatively low flow of foreign direct investment. Benin, the Central African Republic, Lesotho, Mali, Mauritania, Mauritius, Senegal, Sierra Leone and the Sudan have concluded bilateral treaties, presumably in order to attract investments. Egypt, with a moderate flow of foreign direct investment, has negotiated treaties consistent with the liberalization of their policy towards foreign investment. Gabon, Kenya, Morocco and Zaire have relatively large stocks of foreign direct investment and have concluded investment treaties, presumably to protect current investment and sustain the inflow of investments.

35. It is significant to note that countries that have not concluded bilateral investment treaties have large flows of foreign direct investment. These countries include in West Asia: Saudi Arabia (which has concluded only one treaty with the Federal Republic of Germany), and the United Arab Emirates, which are oil-producing countries and have high income per capita; 16/ in Latin America: Argentina, Brazil, Chile, Colombia, Mexico and Peru; in Africa: the Libyan Arab Jamahiriya, Nigeria and Zimbabwe. These countries have significant oil or gas resources or have strategic minerals which contribute to their large stock of foreign direct investment. There are also countries with a small inflow of foreign direct investments which have not recently concluded bilateral agreements, such as Afghanistan, Burma, the Gambia and Ghana.

36. Thus, it is difficult to reach a precise conclusion as to the types of developing countries that negotiate bilateral investment treaties. Countries with large flows of foreign direct investment and countries with low stocks of foreign direct investment are parties to such treaties. On the other hand, there are countries with considerable foreign direct investment stocks that have not concluded bilateral investment treaties. Latin America as a whole has received more foreign direct investment than any other region, although few countries have concluded bilateral treaties; whereas Africa, which has signed close to half of all existing bilateral investment treaties, has received only negligible flows of foreign direct investment.

37. On the other hand, it should be noted that no such agreement has been concluded between two industrialized market economy countries, although investment flows are particularly strong between 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. Roughly, more than two thirds of developed countries' private foreign investment goes to other developed countries. 17/

38. In the table below, foreign direct investment flows from OECD countries to 33 developing countries are shown in four periods extending from 1970 to 1985, 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 recipients

of roughly the same amount of foreign direct investment as all the other 29 countries which did (50.5 per cent of the total foreign direct investment). Clearly, in these cases, investment flows have been determined by factors other than bilateral treaties. For the remaining countries, there is no apparent relationship between the number of bilateral agreements and the volume of foreign investment flows. Whereas China, Egypt, Panama and Singapore show a progressive increase in foreign investment with the increase in the number of bilateral agreements, Malaysia and the Philippines show a decline in investment despite the increase in the number of bilateral agreements. 18/ The reasons for the increase or fall in foreign direct investment can be explored in a meaningful way only if each case is examined separately, taking into account all relevant factors. The data in the table show only that there is no apparent direct relationship between the number of bilateral agreements and the volume of foreign investment flows. This impression about the inconclusiveness of quantitative results appears to be shared by OECD in a 1985 report. Nevertheless, after admitting that it is extremely difficult to assess in quantitative terms the effect of those treaties on the volume of investment in signatory countries, the report pointed out several indications of positive effects emanating from these treaties, in combination with other factors. 19/

39. It has been mentioned earlier that the existence of a bilateral investment treaty is only one of several factors that enter into the investor's decision-making process and thus affect the flow of direct investment. It is certainly not the most decisive one. Its importance varies from case to case. For some countries it is insignificant; for others it may indeed be the decisive element in attracting foreign capital to a country where it would not otherwise go. This is particularly the case when national investment guarantees require the existence of a bilateral investment treaty.

Foreign direct investment from countries of the Development Assistance Committee 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 | | 1984-1985 | | 1970-1985 | | Percentage |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | BIT | FDI | BIT | FDI | BIT | FDI | BIT | FDI | BIT | FDI | BIT | of FDI |
| Algeria | 0 | 171.0 | 0 | 104.8 | 0 | -57.0 | 0 | -114.3 | 0 | 104.5 | 0 | 2 |
| Argentina | 0 | 405.4 | 0 | 1 490.2 | 0 | 1 999.2 | 0 | 228.2 | 0 | 4 123.0 | 0 | 7.1 |
| Brazil | 0 | 4 037.2 | 0 | 7 288.6 | 0 | 4 519.2 | 0 | 1 573.7 | 0 | 17 418.7 | 0 | 29.9 |
| Cameroon | 4 | 9.6 | 0 | 12.8 | 0 | 226.2 | 1 | 6.7 | 1 | 255.3 | 6 | 0.4 |
| Chad | 3 | 0.3 | 0 | 1.8 | 0 | 0.7 | 0 | 0.2 | 0 | 3.0 | 3 | 0 |
| China | 0 | 0 | 0 | 0.1 | 0 | 88.0 | 2 | 260.6 | 8 | 348.7 | 10 | 0.6 |
| Costa Rica | 1 | 7.2 | 0 | 16.6 | 0 | 52.5 | 1 | -17.4 | 1 | 58.9 | 3 | 0.1 |
| Egypt | 0 | 3.8 | 3 | 94.5 | 7 | 843.2 | 2 | 635.9 | 0 | 1 577.4 | 12 | 2.7 |
| Gabon | 2 | 24.1 | 1 | 108.9 | 0 | 233.5 | 0 | 49.0 | 0 | 415.5 | 3 | 0.7 |
| Ghana | 1 | 31.6 | 0 | -3.8 | 0 | 29.7 | 0 | 4.5 | 0 | 62.0 | 1 | 0.1 |
| Guinea | 3 | 2.3 | 0 | -1.5 | 0 | -0.3 | 1 | 1.8 | 0 | 2.3 | 4 | 0 |
| Haiti | 0 | 0.3 | 1 | 5.6 | 0 | -0.5 | 3 | 0.8 | 0 | 6.2 | 4 | 0 |
| India | 1 | 205.9 | 0 | 166.8 | 0 | 248.8 | 0 | 33.1 | 0 | 654.6 | 1 | 1.1 |
| Indonesia | 4 | 1 461.1 | 3 | 2 007.4 | 1 | 3 723.7 | 0 | 129.1 | 0 | 7 321.3 | 8 | 12.6 |
| Iran | 3 | -786.5 | 0 | 1 812.0 | 0 | -105.5 | 0 | -17.9 | 0 | 902.1 | 3 | 1.6 |
| Ivory Coast | 6 | 1.5 | 0 | 57.7 | 0 | 163.8 | 0 | 27.9 | 0 | 250.9 | 6 | 0.4 |
| Jordan | 0 | 0.2 | 1 | 7.2 | 3 | -1.9 | 0 | 8.6 | 0 | 14.1 | 4 | 0 |
| Madagascar | 6 | 10.4 | 0 | -4.3 | 0 | 2.0 | 0 | 8.4 | 0 | 16.5 | 6 | 0 |
| Malaysia | 1 | 396.0 | 1 | 411.4 | 4 | 299.1 | 1 | 177.2 | 1 | 1 283.7 | 8 | 2.2 |
| Malta | 2 | 15.4 | 1 | 57.5 | 1 | 102.0 | 0 | -0.2 | 1 | 174.7 | 5 | 0.3 |
| Mexico | 0 | 1 255.3 | 0 | 2 117.9 | 0 | 1 879.0 | 0 | 849.1 | 0 | 6 101.3 | 0 | 10.5 |
| Morocco | 2 | -4.3 | 1 | 36.1 | 1 | 50.7 | 0 | 32.0 | 2 | 114.5 | 6 | 0.2 |
| Nigeria | 0 | 40.7 | 0 | 857.3 | 0 | 1 358.3 | 0 | -522.3 | 0 | 1 754.0 | 0 | 3.0 |
| Panama | 0 | 658.5 | 0 | 1 415.2 | 0 | 3 314.9 | 5 | 2 010.1 | 0 | 7 398.7 | 5 | 12.7 |
| Philippines | 1 | 214.7 | 0 | 857.3 | 1 | 199.6 | 1 | -152.3 | 1 | 1 119.3 | 4 | 1.9 |
| Republic of Korea | 1 | 455.0 | 3 | 347.2 | 2 | 97.9 | 0 | 414.4 | 0 | 1 314.5 | 6 | 2.3 |
| Senegal | 3 | 2.9 | 0 | 8.8 | 1 | 14.0 | 2 | -1.3 | 0 | 24.4 | 6 | 0 |
| Singapore | 0 | 280.7 | 2 | 725.0 | 4 | 2 327.7 | 0 | 957.9 | 0 | 4 291.3 | 6 | 7.4 |
| Sudan | 1 | 1.4 | 2 | 18.7 | 1 | 51.3 | 0 | 3.8 | 0 | 75.2 | 4 | 0.1 |
| Sri Lanka | 1 | 6.3 | 0 | -38.9 | 0 | 44.6 | 6 | 67.5 | 2 | 79.5 | 9 | 0.1 |
| Tunisia | 5 | 58.4 | 1 | -9.5 | 0 | 109.4 | 0 | 18.0 | 1 | 176.3 | 7 | 0.3 |
| Yugoslavia | 0 | 41.6 | 1 | 75.6 | 2 | 54.8 | 0 | 4.3 | 0 | 176.3 | 3 | 0.3 |
| Zaire | 1 | 92.3 | 2 | 507.3 | 1 | -16.0 | 0 | -17.1 | 1 | 566.5 | 5 | 1.0 |
| Total | | 9 100.3 | | 20 572.3 | | 21 852.6 | | 6 660.0 | | 58 185.2 | | 100.0 |

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

Note: BIT: Bilateral investment agreements.

FDI: Foreign direct investment.

## Part Two

## THE PROVISIONS OF BILATERAL INVESTMENT TREATIES

40. The following survey of investment treaty provisions is based on a comparison of model treaties and on a representative sample of treaties that are in force or have been signed recently.* Although the focus is on treaties dealing specifically with the promotion and protection of investments, reference will also be made, where this appears to be of significance for the point under consideration, to other types of treaties containing provisions on investment and to relevant multilateral arrangements. The chapters that follow will deal successively with the preamble; the scope of application of the treaty (delimitation of the investments to be protected, definition of nationals and companies, territorial scope of application and duration of the effects of the treaty); general treatment standards, such as fair and equitable treatment, national treatment, most-favoured-nation treatment; specific treatment standards, such as the rules on currency transfer (repatriation of capital and returns) or on compensation for damage caused by armed conflicts, revolutions or during national emergencies; and the conditions of dispossession and compensation and the settlement of disputes, including the right of subrogation.

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* Unless otherwise indicated, where the text of a model treaty has been reproduced in one of the annexes to the present publication, the references to the model treaty are to the version contained therein.

At the time the present publication was sent for printing, an additional number of bilateral investment treaties concluded in recent years became available. These will be reviewed in the relevant chapter of a forthcoming publication, <u>Transnational Corporations in World Development: Fourth Survey</u>.

## I. PREAMBLE

41. The preambles of bilateral investment treaties normally contain statements of their object and purpose. 20/ In the model treaties the draft preambles are normally short: two or three, sometimes four paragraphs. Beyond underlining the contracting States' faith in the private sector, these generally refer to the desire to intensify economic co-operation, the creation of favourable conditions for investments by nationals and companies of one State in the territory of the other and the encouragement and contractual protection of such investments. Variations to this basic approach exist but are of minor significance. For example, the United States prototype treaty (annex V) would introduce in the preamble the notion of "fair and equitable treatment" and a general treatment standard with traditional international law connotations (see chap. III below). In the AALCC models A, B and C (annex VI) there is a reference to the promotion of "wider co-operation between the countries of the Asian-African region to accelerate their economic growth and to encourage investments by developing countries in other developing countries".

42. A significantly different approach, however, may be found in the Swiss model treaty, which states:

> "Le Conseil Fédéral Suisse et le Gouvernement de ...
>
> Désireux de renforcer, entre les deux Etats, la coopération économique fondée sur le droit international et la confiance mutuelle,
>
> Reconnaissant le rôle complémentaire important des investissements de capitaux privés étrangers dans le processus du développement économique et le droit de chaque Partie Contractante de déterminer ce rôle et de définir les conditions dans lesquelles les investissements étrangers pourraient participer à ce processus,
>
> Reconnaissant que la seule manière d'établir et de maintenir un flux international de capitaux adéquat est d'entretenir mutuellement un climat d'investissement satisfaisant, et, pour ce qui est des investisseurs étrangers, de respecter la souveraineté et les lois du pays-hôte ayant juridiction sur eux et d'agir de manière compatible avec les politiques et les priorités adoptées par le pays-hôte, et de s'efforcer de contribuer de façon importante à son développement,
>
> Dans l'intention de créer des conditions favorables à l'investissement de capitaux dans les deux Etats,
>
> Désireux d'intensifier la coopération entre ressortissants et sociétés, privées ou de droit public, des deux Etats notamment dans les domaines de la technologie et de l'industrialisation,
>
> Reconnaissant la nécessité de protéger les investissements des ressortissants et sociétés des deux Etats en vue de promouvoir la prospérité économique de ces derniers."

On the one hand, it will be noted that there is at the outset a reference to "economic co-operation based on international law". On the other hand, the

proposed preamble would reaffirm the host country's right to define the conditions under which foreign investments can be received and underline the investor's duty to respect the host country's sovereignty and laws, to act in a manner compatible with its policies and priorities, and to contribute to its development. Also noteworthy is the reference to co-operation between private and public companies of the two States.

43. Similarly, in the preambles of treaties signed by some other capital-exporting countries - for example, the Belgo-Luxembourg Economic Union - specific reference is made to the desirability of promoting co-operation between private or between private and public enterprises of the two countries concerned.

44. There seems to be a tendency for the developing countries contracting parties to accept the wording proposed by the developed country contracting party. An exhaustive study of treaties concluded by the Federal Republic of Germany, for instance, has shown this to be the case for more than two thirds of the treaties.

45. Variations decided during the negotiations are relatively rare and limited. 21/ Thus in some preambles reference is made to related agreements concluded previously between the parties, 22/ to specified standards for the treatment of investments from contracting States, 23/ to the mutual desire of the contracting States to stimulate private enterprise or to promote the inflow of private capital. 24/

46. A significant variation however is where the contracting States use the preamble to define specific areas in which investments are to be protected or promoted. Thus, a reference may be made to specific economic sectors of the host State. For example, the agreement between Egypt and Greece refers to "production, industry, commerce, exploitation of natural resources, energy, tourism, transports, agriculture, science and technology". The bilateral investment treaties concluded by Switzerland with the Sudan and with Egypt stress investment promotion in the fields of "production, commerce, tourism and technology". The treaty between Switzerland and Singapore stresses co-operation in the fields of "science, technology, industry and commerce". Some other treaty provisions in the operative paragraphs may expressly exclude certain sectors of the economy from the application of the treaty (see chap. II).

## II. SCOPE OF APPLICATION OF THE TREATY

47. Bilateral investment treaties contain various provisions that deal with their scope of application, normally in the context of the definition of "investments", the definition of "nationals" and "companies" of the contracting parties, the definition of the "territory" of the contracting parties, and the duration of the treaty, including the effects it may still produce after its extinction. The provisions on these issues have far-reaching implications on the extent of the obligations undertaken by the contracting States. Furthermore, through these provisions a host Government can, to a certain extent, ensure that the treaty accords with the development goals and priorities of the country, for instance by limiting the treaty to the kinds of investments it wishes to attract and the economic sectors into which it wishes to channel them.

### A. Application ratione materiae

#### 1. The definition of investments

48. In the absence of a generally accepted definition of the term "investment", national laws and regulations have defined it variously in accordance with the purposes at hand. Not surprisingly each treaty contains its own definition of the term. Nevertheless, it can be said that the very broad formulations used in these treaties reflect, on the one hand, the preoccupation of home countries with the broadest possible coverage, and, on the other, the differences on the matter in the national legislations of host countries.

49. Some of the earlier investment treaties did not contain the very elaborate enumerative definitions now generally in use. For example, the definition in article 8 of the 1959 treaty between the Federal Republic of Germany and Pakistan provided as follows:

> "(1) (a) The term 'investment' shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term 'investment' shall also include the returns derived from and ploughed back into such 'investment'.
>
> (b) Any partnerships, companies or assets of similar kind, created by the utilisation of the above mentioned assets shall be regarded as 'investment'."

The definition in conventions concluded by France with Sri Lanka (1963), Senegal (1965) and Rwanda (1967) was still shorter, stating simply that:

> "the term 'capital investment' comprises all categories of assets, including all categories of rights and interests". (Le terme investissements de capitaux comprend toutes les catégories de biens, y inclus toutes les catégories de droits et d'intérêts.)

50. Most agreements now provide a list of the types of investment covered, normally preceded by a phrase indicating that the list is not exclusive. For example: "The term investment shall comprise every kind of asset invested ... and more particularly, though not exclusively: ...". The list typically includes

movable and immovable property, all kinds of property rights, shares, debts, 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 involving non-equity resources, sometimes referred to as "new forms of co-operation", such as management, marketing or turnkey contracts which are becoming increasingly important.

51. Portfolio investments are expressly mentioned in some treaties, such as the one concluded between France and Sri Lanka. In a few treaties it is clearly indicated that only direct investments are to be protected. An example is the treaty (not yet in force) signed in 1976 by the Federal Republic of Germany and Israel. The enumerative definition that habitually appears in the bilateral investment treaties concluded by the Federal Republic of Germany is preceded by a statement to the effect that the term "investment" means:

"(i) investment in an enterprise involving active participation therein and the acquisition of assets ancillary thereto, or

"(ii) the enterprise or assets acquired as a result of such investment".

In this way, it is made clear that all the different types of investment mentioned in the (non-exhaustive) enumeration must be linked to a direct investment.

52. The model definitions, and the majority of treaties signed during recent years include business concessions ("licence" in the AALCC models) to search for, extract and/or exploit natural resources. Two issues have often been discussed regarding concessions: the legal nature and property character of concessions, and the question of whether the protection of business concessions through investment treaties accords with the national sovereignty of a State over natural resources, wealth and economic activities within its territory. An in-depth analysis of these complex questions would exceed the ambit of the present publication.

53. In defining "investment" it is often stated explicitly that the returns of an investment falling within the scope of the treaty are also protected. Many investment treaties contain a definition of returns (see, for example, the relevant provisions in the Federal Republic of Germany and United States model treaties). The conventions concluded by France, such as the 1980 Convention with Sri Lanka, normally define "revenues" as follows:

> "les sommes produites par un investissement, notamment mais non exclusivement les bénéfices, intérêts, appréciation du capital, dividendes, redevances ou rémunérations".

54. There is no definition of returns in the AALCC model A nor in the Swiss and Dutch (1979 and 1987) model treaties, even though they contain provisions concerning the transfer of returns. The AALCC model B, on the other hand, describes returns as including profits, interest, capital gains, dividends, royalties or fees.

55. Lastly, a large number of investment treaties include in the definition of "investment" a clause stating that any alteration of the form in which assets are invested shall not affect their classification as an investment. This clause is to be found, for example, in the majority of the treaties concluded by the Federal

Republic of Germany and the United States, but also in many others. However, it does not feature in the Swiss, Dutch, United Kingdom and AALCC models.

56. The inclusion of that clause, if unqualified, risks under-cutting the requirements and conditions for admission imposed by the host country's regulations. That is why some treaties that contain the "alteration clause" stipulate that the alteration of the original asset must not be contrary to the initial approval granted to the investment by the host country. This is the case, for example, for the investment treaties concluded by France with Sri Lanka and others, and by the Federal Republic of Germany with the Côte d'Ivoire, Mali, Singapore, and the Sudan.

## 2. The admission of investments

57. If the definition of investment determines generically what transactions fall within the scope of the treaty, this does not in itself mean that any such transaction will be automatically covered by it. Apart from the United Kingdom and the United States model treaties, most model treaties and treaties concluded state that investments must be made in accordance with the rules and regulations of the host country and are subject to approval. 25/

58. The following is an example of an admission clause drawn from 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 to the conditions, if any, upon which such approval shall have been granted."

59. Some other bilateral investment treaties state that investments are only protected under the treaty as from the date of their approval (for example, the bilateral investment treaties concluded by the Federal Republic of Germany with Benin, Gabon, the Sudan and Sri Lanka). According to the treaty between the Federal Republic of Germany and Uganda, its application is restricted to "investments which have been approved under Uganda regulations for the protection of foreign investments or have received special approval for the application of this treaty".

60. Certain admission clauses make more detailed references to applicable legislation. The agreements concluded by Indonesia with Denmark, the United Kingdom and Norway will apply only to investments approved by the Indonesian Government in accordance with the foreign investment legislation currently in force (Law No. 1 of 1967). The agreements concluded by Malaysia contain the provision that an investment in a project must be classified by the appropriate Ministry in Malaysia in accordance with its legislation and administrative practice as an "approved project". This applies also to investments made prior to the entry into force of the bilateral agreement, as for example, in the investment treaties concluded by Malaysia with the United Kingdom, Belgium, the Netherlands, Sweden, the Federal Republic of Germany and France. A similar clause is to be found in the treaty between the Federal Republic of Germany and the United Republic of

Tanzania. In the convention between Switzerland and Egypt, the procedure for approval of investments under Egyptian Law No. 65/1971 (since then replaced by Law 74-43) is outlined in an exchange of letters constituting an integral part of the agreement. The treaty between the Federal Republic of Germany and Gabon refers to admission procedures under the laws and regulations related to the Gabon Investment Fund. Sometimes, the agency competent to issue admission documents is mentioned.

61. Under the agreement between Sweden and Pakistan, the host country will only give approval "in the exercise of its full discretion" to investments "in which the majority of shares are owned by nationals or companies of the other Contracting Party". The agreement between the United Kingdom and the Philippines applies only to investments "brought into, derived from or directly connected with investments brought into the territory of one contracting party by nationals or companies of the other Contracting Party which are qualified for registration and are duly registered by the appropriate government agency of the receiving Contracting Party, if so required by its laws".

62. In the model treaty of the Federal Republic of Germany (see annex 11) it is stipulated under article 2 that each contracting party shall admit investments "in accordance with its legislation", and the protocol to the treaty specifies that only "investments made in accordance with the laws and regulations" of the receiving State "shall enjoy the full protection of the present Treaty".

63. A number of treaties concluded by the Federal Republic of Germany contain details on criteria and procedures for admission. Frequently, for example, clauses are included stating that the investment projects must fit into national development plans (e.g., Thailand, Rwanda, Mali). Another important aspect of some admission clauses is that through the admission procedure host States may impose special conditions or derogate from the treatment standards in the treaty. For example, the protocol to the treaty between the Federal Republic of Germany and Rwanda foresees the possibility of "special conditions" concerning the administration of the capital investment; the economic activity of the company; the reinvestment of profits; and professional training and the employment of local personnel.

64. The United States model treaty as well as the treaties concluded so far, do not preclude the host country from applying measures necessary to maintaining public order and national security, or from prescribing special formalities for the establishment of investments. But such formalities are limited only to those which do not affect the substance of the rights granted by the treaty. In this regard it should be noted that under these treaties permission of establishment is to be granted on a basis of national treatment and most-favoured-nation treatment, with the exceptions regarding sectors and matters expressly stipulated therein or in separate protocols, or those prescribed by national legislation (annex V, art. II, para. 1). The treaties concluded by the United States with Turkey and Morocco, on the other hand, provide for national treatment "within the framework of (the host country) laws and regulations" (art. II, para. 1). In addition, exceptions to that standard are described in separate protocols. The treaty with Egypt states more specifically that each party "shall, in applying its laws, regulations, administrative practices and procedures, permit investments to be established on terms and conditions that accord" national treatment (art. II, para. 1). It further provides that the parties should retain discretion to approve investments

according to national plans and priorities on a non-discriminatory basis consistent with the above provision (art. II, para. 3 (b)).

65. In sum, under most bilateral investment treaties, countries retain ample discretion to regulate the entry of investment from the other party and to stipulate terms and conditions for its establishment. Under a few treaties, this discretion is limited by the countries' duty to afford national or most-favoured-nation treatment in granting permission to the investments of the other contracting party, but, even then, the parties retain the right to prescribe exceptions to the application of these standards in specific sectors or matters.

### 3. Reserved sectors

66. In the national legislation of all countries, including developed market economy countries, foreign direct investment is prohibited in certain sectors, such as public utilities, vital or strategic industries, and medium or small-scale industries being developed by local enterprises. 26/ In addition to the admission clauses, which by referring to the national laws of the host country may indirectly limit investments to certain sectors or exclude them from reserved sectors, this desire on the part of host countries not to allow foreign investments in certain sectors is expressed in some investment agreements. This may be done by a clear indication either that foreign investments are not to be encouraged or promoted in specified sectors or that they will not be granted the treatment accorded to national investors in those sectors.

67. As already mentioned, some treaties indicate in the preamble the sectors of the economy in which investments are to be encouraged and protected and to which the treaty therefore applies. For example, the agreements concluded by Belgium with Egypt, Indonesia and the Republic of Korea state that it applies to "investments in the fields of 'agriculture, industry, mining, forestry, communications and tourism'" - to the exclusion, for example, of investments in banking and insurance. In the United States model treaty (art. II) and the treaties so far concluded, the contracting parties reserve the right of derogating from national treatment (see para. 64 above and para. 145 below) regarding both establishment and subsequent activities in specific sectors, which are mentioned in an annex. Accordingly, the treaty between the United States and Egypt (1986 consolidated text) lists the following sectors in which each party is not bound to grant national treatment:

> "The United States of America air transportation, ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programs; energy and power production; use of land and natural resources; custom house brokers; ownership of real estate; radio and television broadcasting; telephone and telegraph services; submarine cable services; satellite communications.
>
> The Arab Republic of Egypt air transportation; maritime agencies; land transportation other than that of tourism; mail, telecommunication; telegraph services and other public services which are state monopolies; banking and insurance; commercial activity such as distribution, wholesaling, retailing, import and export activities; commercial agency and broker activities; ownership of real estate; use of land; natural resources; national loans; radio, television, and the issuance of newspapers and magazines."

68. The treaty between the United States and Panama excludes from national treatment some of the above sectors and the "right to the exploitation of natural resources, including fisheries and hydroelectric power production, ownership of land located within ten kilometers of the Panamanian border".

69. The agreement concluded between Japan and Sri Lanka excludes from national treatment the conditions of registration of aircraft in the national register, matters related to the nationality of ships, activities concerning banking, and the acquisition of any interest in ships. The agreement between Japan and Egypt allows the imposition of restrictions with respect to carrying on activities concerning banking and to the acquisition of ships or of any interest in ships.

### 4. Pre-treaty investments

70. An important question in the context of bilateral treaties is whether they should cover investments made after the conclusion of the treaty or whether the standards of protection provided under it should be extended also to investments previously made. Whereas home countries naturally prefer that the treaty should cover all investments, host countries may consider that a more limited approach is preferable. From the latter's point of view it may be asked whether the extension of the treaty to investments already made is not a unilateral and unnecessary concession. At the same time it is questionable that much is to be gained by differentiating between investments solely on the basis of the time when they were made.

71. Different approaches have been adopted in the treaties studied. Most of them do, in fact, cover existing investments. The United States prototype treaty expressly includes investments made before the treaty's entry into force (annex V, art. XII, para. 1). Many treaties simply state that investments must be made "in accordance with the laws of the Contracting Party in the territory of which they are made, whether the investments have been made before or after the entry into force of the Agreement". These include treaties concluded between the United Kingdom and Jordan; Sweden and Yugoslavia; Sweden with Sri Lanka and Egypt; France with Romania, Malta, El Salvador, Paraguay and Jordan.

72. The model treaties of the Federal Republic of Germany (art. 8), Switzerland (art. 6) and the Netherlands 1979 and 1987 (art. 10) contain a special "pre-treaty investment clause", which appears in most of the treaties concluded by these countries. In the 1983 treaty between Switzerland and Egypt (art. 8), it is worded as follows:

> "The present Agreement shall also apply to investments by nationals or companies of either Contracting Party made prior to the entering into force of this Agreement and accepted in accordance with the respective prevailing legislation of either Contracting Party."

Similarly, the Netherlands 1979 and 1987 model agreements state that:

> "The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments which have been made before that date."

73. Some host countries accept the inclusion of existing investments on condition that a special request be made, and approved, in each case. Thus the treaty

between Egypt and the Federal Republic of Germany requires proprietors of "old" investments in the Federal Republic to go retroactively through the prescribed admission procedure. Other examples are the treaties concluded by the Federal Republic of Germany with Indonesia, Malaysia, Malta, Morocco and Zaire.

74. Others include investments carried out after a given date coinciding with, or close to, the date of signature, a solution not to be confused with provisional application of the treaty as from the date of signature (see paras. 99-108 below). Examples are the treaties concluded by the Federal Republic of Germany with Sri Lanka, Tunisia and Guinea, which provide for two weeks before signature.

75. The investment treaties concluded by Indonesia with the Netherlands, Switzerland and the United Kingdom apply to investments carried out after 10 January 1967, that is, the date of entry into force of the Indonesian Foreign Capital Investment Law (Law No. 1/1967). It is specified that the provisions of the treaty would not affect the rights and obligations of the parties with respect to investments made prior to that date. In the treaty between Sweden and Guinea, signed on 29 March 1982, the effective date is 1 July 1979, which is the date of entry into force of the Guinean law on joint ventures.

76. In some cases, host countries have unambiguously excluded investments made before the entry into force of the treaty. Examples are France's conventions with Morocco and the Syrian Arab Republic; and the Federal Republic of Germany's treaties with Ethiopia and Chile (both of which did not enter into force), and with Sri Lanka and the Syrian Arab Republic.

## B. Application ratione personae

77. Bilateral investment treaties protect investments by nationals and companies of one party in the territory of the other, and hence the need for each party to define its nationals and its companies. Common definitions for both parties are rare.

78. The problem of defining nationals is not as difficult with natural persons as with companies having the nationality of the contracting parties. In the former case a simple reference to the country's citizenship laws usually suffices. In the case of companies, however, more careful scrutiny is called for in order to ensure that the host State's undertakings are not unnecessarily extended to enterprises of a third country which may be doing business in one form or another in the other contracting State.

79. In the case of natural persons, the requirement of nationality is sometimes combined with another requirement. It is combined, for instance, with that of residence in the territory of the party concerned, as in the treaty between the Federal Republic of Germany and Israel: "Israeli nationals being residents of the State of Israel". The agreement between Denmark and Indonesia covers investments made by "nationals of the other Contracting Party, provided they are domiciled in the territory of their nationality".

80. Agreements concluded by Romania limit the term "investors" only to Romanian "economic units" so as not to give the impression of encouraging investments by natural persons in other countries. The following definition is from the United Kingdom agreement with Romania:

"3. 'Investors' means:

(a) in respect of the Socialist Republic of Romania: Romanian economic units having legal personality and which, under the law of Romania, are entitled to trade abroad or undertake international economic co-operation activities;

(b) in respect of the United Kingdom: corporations, firms or associations incorporated or constituted under the law in force in any part of the United Kingdom and United Kingdom nationals."

China, on the other hand, also includes "any natural person possessing the nationality of the People's Republic of China" (1985 agreement with Austria, art. 1).

81. The definition of companies is, as pointed out above, of greater practical importance for the application of the treaty, including diplomatic protection under the treaty.

82. The problem of the "nationality" of companies has been very widely discussed in legal literature, and different solutions have been adopted for different purposes in domestic legislation. Three criteria are generally applied to determine a company's "nationality":

(a) The location of the seat/registered offices (siège social) of a company;

(b) The place of incorporation or constitution under the law of the country concerned; and

(c) The control over, or "substantial interest" in, a company.

83. Each of these criteria will be found in bilateral investment treaties, alone or in combination. The model agreement of the Federal Republic of Germany defines its "companies" as "any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the German area of application of the present Treaty and lawfully existing consistent with legal provisions, irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit" (annex II, art. 1, para. 4 (a)). Since the control criterion is not applied in this definition, it would seem that companies situated in the territory of the Federal Republic of Germany in which foreigners have a "substantial interest" are covered by the treaty, whereas companies under the control of nationals of the Federal Republic of Germany situated in third countries are not.

84. The definition of Swiss companies, under article 1 of the Swiss standard draft agreement (1986 version) on the other hand, refers to legal persons or companies with or without legal personality in which Swiss nationals directly or indirectly have a substantial interest (intérêt prépondérant). As a consequence, investments by Swiss-controlled companies situated in third countries are protected under the agreement. It is one of the rare examples where the control criterion alone is applied.

85. The United States model treaty defines a "company" including "any kind of corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political sub-division thereof whether or not organized for pecuniary gain, or privately or governmentally owned" (see annex V, art. I, para. 1 (a)). This definition should be seen together with the definition of investment as "every kind of investment ... owned or controlled, directly or indirectly by nationals or companies of the other Party". Also relevant is paragraph 5 of article VI concerning investment disputes according to which "any company legally constituted under the applicable laws and regulations of either Party" which constitutes "an investment of nationals or companies of the other Party" shall be treated as a national or company of that Party. Similarly, article 3 of the Federal Republic of Germany model treaty (see annex I), concerned as it is with national and most-favoured-nation treatment refers to investments "owned or controlled by nationals or companies of the other party". It must be borne in mind in this connection that what is protected under the treaty is not the nationals or companies of a Party, but their investments; and the latter may take the form of a company established under the law of the host State.

86. Following the 1982 version of the United States prototype treaty, the treaties concluded by the United States with Bangladesh, Egypt, Haiti, Morocco, Panama, Senegal, Turkey and Zaire defined the terms "company" and "company of a party". 27/ The latter would include "a company duly incorporated, constituted or otherwise duly organized under the applicable laws and regulations of a Party or political sub-division thereof in which (i) natural persons who are nationals of such Party, or (ii) such Party or a political sub-division thereof or their agencies or instrumentalities have a substantial interest as determined by such Party" (United States/Panama, art. I). The Protocol annexed to the treaty with Egypt provides a definition of "control" as "to have a substantial share of ownership rights and the ability to exercise decisive influence. It further stipulates that in cases where there is a difference of views as to the existence of control, both parties shall resolve the dispute in accordance with the dispute settlement provisions specified in the treaty.

87. The bilateral investment treaties concluded by Switzerland with Singapore, Sri Lanka and Egypt comprise an exchange of letters clarifying the meaning of substantial interest: in order to assess what constitutes a controlling interest in a Swiss company, consideration is given to the share in the capital held by Swiss nationals and other elements which make it clear that Swiss nationals exercise a decisive influence on the company. If the host country considers that Swiss nationals do not have a controlling interest in a company, the dispute may be settled by arbitration.

88. The Netherlands model agreements (see annexes III and IV, art. 1 (iii)) cover legal persons controlled, directly or indirectly, by nationals (natural or legal persons) of one party but constituted in accordance with the law of the other party. This means that Dutch-controlled companies of the host State are protected by the agreement. It should also be noted that, unlike the Federal Republic of Germany and the United States definitions, entities without legal personality are not covered under the definition of "company". However, investments from such entities would be covered under the definition of investors if they originate from individuals who are nationals of one of the parties. This is also the case for some other treaties (e.g., France/Jordan, Belgium/Egypt).

89. The control criterion appears in recent conventions concluded by France. Thus, article 1 of the 1984 convention with Nepal stipulates the following:

> "Le terme 'société' désigne toute personne morale constituée sur le territoire de l'une des Parties contractantes conformément à la législation de celle-ci et y possédant son siège social ou controlée directement ou indirectement par des nationaux de l'une des Parties contractantes."

90. Moreover, under the treaties concluded by the United States (see annex V, art. I, para. 2) "each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations". A similar provision is included in the agreement between Switzerland and Egypt.

91. In addition, some treaties concluded by the United States provide that if a party denies the application of the agreement to a company of the other contracting party, it must consult with the other party for a resolution of the matter. Under the treaty between the Federal Republic of Germany and Malaysia, companies which are incorporated in the territory or under the law of a third party will not fall within the scope of the treaty. The United Kingdom/Philippines Agreement provides for the exclusion of a company for security reasons, namely, on the grounds of "the need to maintain public order, to protect essential security interests or to fulfil commitments relating to international peace and security", with the mutual agreement of the parties.

92. As already mentioned (see para. 80 above) bilateral investment treaties concluded by socialist countries normally define the term "investor" in a manner that reflects the special concerns of the country involved. Reference has been made to Romania and China. In the 1978 agreement between Yugoslavia and Egypt, Yugoslavia distinguishes, for its part, between "nationals" and "economic organizations", the latter meaning "organizations of organized labour".

93. The AALCC models A and B (see annex VI) offer negotiating partners a choice between a joint definition of companies (alternative A), which uses the incorporation/constitution criterion with the possible addition of the control criterion, and a separate definition left to each party (alternative B). It will also be noted that there is a separate definition for "State entities". The reason given in the explanatory report by the Committee 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'."

94. In conclusion, it will be noted that there is a wide variety of formulations to define "companies" for the purpose of a bilateral investment treaty - both as regards the type of "company" (different legal forms of organization, including or excluding those without legal personality, non-profit organizations or public enterprises) and as regards its "nationality". Concerning the latter, it would seem that there is a tendency on the part of capital-exporting countries to try to bring companies "controlled" by their nationals but constituted under the laws of the host country, or of a third country, within the scope of the treaty.

## C. Territorial application

95. The territorial scope of an investment treaty coincides normally, but not necessarily, with the delimitation of the territory of the contracting parties. A treaty may, however, contain territorial extension clauses or, possibly, territorial restriction clauses. Furthermore, whereas the territorial sea comes obviously within the definition of territory, the recent evolution of the law of the sea has led to the definition of maritime and submarine zones where the adjacent State exercises not full territorial sovereignty but certain sovereign rights relevant to the domain of transnational investment. As the matter may be considered self-evident, not all bilateral investment treaties include a definition of territory. Thus, no definition is foreseen in the Swiss and in the 1979 Dutch model agreements. The AALCC models also leave the definition to the two parties. The revised Dutch model agreement (1987), on the other hand, states that the term "territory" shall include the maritime areas adjacent to the coast of the States concerned, to the extent to which that State may exercise sovereign rights or jurisdiction in these areas according to international law (see annex IV, art. 1).

96. An interesting question in this respect relates to the treatment of maritime zones. The 1982 United Nations Convention on the Law of the Sea allows States to claim 12 miles of territorial sea and an Exclusive Economic Zone (EEZ) of 200 miles, and it defines the delimitation of the continental shelf. Economic rights are accorded to the coastal State in EEZ and on the continental shelf, although these may give rise to major foreign investments, notably for the exploration of natural resources.

97. France and Sri Lanka included in their 1980 treaty, under the definition of investments, a reference to concessions concerning natural resources situated in the maritime zones under the jurisdiction of one of the parties. Recent conventions concluded by France also contain the following definition of maritime zones:

> "L'expression 'zones maritimes' s'entend des zones marines et sous-marines sur lesquelles les Parties Contractantes exercent, en conformité avec le droit international, la souveraineté, des droits souverains ou une juridiction." 28/

98. The United States model treaty contains a definition of territory in Article II, paragraph 8, which describes national companies for the purposes of national treatment. In the protocol to the United States treaty with Egypt an explicit description of the territories of both countries to which the treaty applies is also given in defining the scope of national treatment.

## D. Application ratione temporis

99. The application of a treaty begins normally with its entry into force, but provisional application may be agreed between the parties. When its life-time ends, some of its rules may continue to be effective. The relevant provisions are customarily contained in the final clauses of the treaty.

100. According to the Vienna Convention on the Law of Treaties, a "treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree" (art. 24). Thus, whether a bilateral investment treaty requires ratification or approval depends, as with every other treaty, on

the relevant constitutional provisions of the party concerned. Non-reciprocal treaties (such as the aforementioned "first generation" conventions concluded by France, or the exchange of notes between the Federal Republic of Germany and India) normally enter into force upon signature. However, the normal practice has been that bilateral investment treaties enter into force either upon the exchange of instruments of approval or ratification, or reciprocal notification that the constitutional requirements have been fulfilled, or after a certain period, normally one month after such exchange or notification. The latter approach has been adopted, for example, in most of the treaties concluded by France, the Netherlands, the Federal Republic of Germany (the present treaty shall enter into force one month from the date of exchange of the instruments of ratification) and the United States; the former by Switzerland and the United Kingdom. Alternative formulations are offered in the AALCC models.

101. According to article 25 of the Vienna Convention a treaty may itself provide for its provisional application until its entry into force. No provisions to this effect are to be found in the various model treaties. However, provisional application by one party (the developing country) was agreed for some of the treaties concluded by the Federal Republic of Germany in an exchange of letters, in order to make it possible for the Federal Republic of Germany side to grant political risk insurance to its investments in the territory of the other party. Examples are the treaties concluded with Egypt, Mali and Israel. Since the first two treaties are now in force, only the treaty with Israel remains under provisional application status. For the Federal Republic of Germany itself, it should be noted that provisional application would be constitutionally impossible. 29/

102. As regards duration, the issue concerns the length of time for which the host country wishes to bind itself. The majority of existing bilateral investment treaties were concluded for an initial period of 10 years. A shorter period of five years is mentioned in the Swiss standard draft. An initial period of five years is also prescribed, for example, in the treaties concluded by the Federal Republic of Germany with Malta, Singapore, Sri Lanka and the Syrian Arab Republic (as well as in those, not yet in force, with Ethiopia, Kenya and the Philippines); the Netherlands with Singapore; and Egypt with Italy. One treaty, signed in 1965 by the Federal Republic of Germany and Sierra Leone, was concluded for an initial period of three years only. In contrast, some treaties provide for a period of 15 years (Sweden with China and Sri Lanka, Netherlands/Indonesia, Federal Republic of Germany/Gabon) or even 20 years (Egypt with Sweden and Romania). Bilateral investment treaties usually contain prolongation clauses. These may provide that:

(a) The treaty remains in force for an indefinite period, but can be discontinued at any time with one year's (or six months') notice. (See the United Kingdom, the Federal Republic of Germany, the United States and AALCC models); or

(b) The treaty remains in force for another fixed period, before the expiry of which it can be denounced with one year's (or six months') notice. Thus, the Switzerland "standard draft" stipulates that after the initial five-year period, if the agreement is not denounced with six months' notice, it is considered prolonged, under the same conditions, for a period of two years, and so on. In the Netherlands model agreements, the prolongation period is 10 years with six months' notice before the expiry of the current period of validity.

103. Bilateral investment treaties and model treaties also contain a continuing-effect clause with respect to investments carried out before the termination of the treaty. Thus, the Netherlands model agreements provide that:

> "In respect of investments made before the date of the termination of the present Agreement the foregoing articles thereof shall continue to be effective for a further period of fifteen years from that date."

104. Similar provisions appear in the other model treaties. The Federal Republic of Germany and the United Kingdom propose a "continuing effect" of 20 years, and the United States and Switzerland provide for 10 years additional coverage for existing investment after the treaty expires. Recent agreements concluded by France (e.g., Pakistan, Nepal, Israel) also provide for a period of 20 years, some earlier ones of 15 years (Jordan) or of 10 years (Sri Lanka). A period of 20 years is also foreseen, for example, in the agreements concluded by Egypt with Romania and Sweden; 10 years between Singapore and Sri Lanka, Belgium and Bangladesh; six years between Switzerland and Mauritania, and five years in the agreements concluded by Egypt with Italy and Switzerland. It should be noted that, sometimes, the same host countries agreed to widely diverging time-spans in their agreements with different countries.

105. In some of the treaties concluded by France with Egypt, Haiti, Indonesia, the Republic of Korea, Morocco and Yugoslavia, the continuing effect is unlimited: "En cas de dénonciation, la présente Convention restera applicable aux investissements effectués pendant la durée de sa validité.

106. Where the effect is limited, the French wording makes it plain that the continuing effect concerns only investments made during the life-time of the Convention "les investissements réalisés pendant qu'elle était en vigueur". This is specified, for example, in the agreements between Belgium and Morocco, and the United Kingdom and Thailand. The model texts of France and the United Kingdom add that the continuing effect is "without prejudice to the application thereafter of the rules of general international law". An identical provision is to be found in the agreements between Belgium and Bangladesh, and between Sweden and Sri Lanka, among others.

107. An atypical formulation is contained in the treaty concluded by Gabon with the Federal Republic of Germany, according to which the effect of the relevant provisions of the treaty

> "ne pourra pas être inférieure à quinze ans à partir de la date d'agrément de l'investissement et ne pourra se terminer avant la fin de la douzième année suivant l'expiration du traité."

The continuing effect is thus linked to the admission document established by the host country. Similarly, under the agreements concluded by Indonesia with the United Kingdom and Switzerland, the provisions of the agreement will continue to be effective for the "approved validity of the investments" admitted by the host country prior to the notification of termination. In the United Kingdom/Thailand agreement, the clause is limited to investments approved while the agreement is in force; it provides that the application of the agreement will continue for 10 years from the date of termination or for "any such longer period as may be specified at the time of the approval of the investment".

108. In other agreements, the continuing effect is to last for the period of the validity, or the fulfilment, of the contracts concluded between the host country and the investor (agreements concluded by the Netherlands with Egypt and Indonesia, and by Belgium with the Republic of Korea) or the validity of financial securities given within the framework of the agreement (Netherlands/United Republic of Tanzania). In the treaty between the Federal Republic of Germany and Cameroon signed on 29 June 1962, continuing effect is limited to investments made after 1 January 1960; the provisions of the treaty are to remain effective for these investments for 20 years from the date of termination.

## III. THE TREATMENT OF INVESTMENTS

109. This chapter concerns one of the central preoccupations of capital-exporting countries, namely, the treatment of investments during their life-time (whereas chapter IV deals with the rules governing the dispossession of the investor).

110. A number of treatment standards appear regularly in bilateral investment treaties. A distinction will be made between general treatment standards (fair and equitable treatment, national treatment, most-favoured-nation treatment etc.), relating to all aspects of the existence of a foreign investment in the host State, and specific treatment standards concerning particular issues, such as currency transfer or the compensation of losses due to armed conflict or internal disorder. 30/

111. Exceptions to these standards, whether they are expressly mentioned in the treaty (or in protocols or exchanges of letters), based on custom or simply due to political or economy circumstances, will also be examined.

### A. General treatment standards

112. This section deals with the concept of fair and equitable treatment; non-discrimination standards, such as national and most-favoured-nation treatment; and the preservation-of-rights and "umbrella" clauses found in bilateral investment treaties.

#### 1. Fair and equitable treatment

113. Fair and equitable treatment is a classical international law standard. As such, although not precisely defined, the principle has been shaped by State practice, doctrine and decisions of international tribunals. On the other hand, the content of certain standards of traditional international law and their applicability to foreign investments have been questioned by some developing countries in multilateral forums (for an in-depth analysis of the views of the developing countries on this issue, see annex VII, paras. 23-96) None the less, as will be seen, fair and equitable treatment now also appears in bilateral investment treaties concluded between developing countries.

114. It is in the nature of a very general concept like fair and equitable treatment that there can be no precise definition. What is fair and what is equitable may largely be a matter of interpretation in each individual case. The inclusion of this principle in bilateral investment treaties serves several purposes, not only as a basic standard but also as an auxiliary element for the interpretation of specific provisions of the treaty or in order to fill gaps in the treaty, as well as in relevant national legislation or State contracts (see paras. 163-170 below). Thus, the clause may constitute a point of departure in an argument on whether or not proper treatment under the treaty has been extended to the foreign investment - be it in negotiations between the parties or in judicial or arbitral proceedings.

115. Classical international law doctrine normally considers certain elements to be firm ingredients of fair and equitable treatment, including non-discrimination, the

international minimum standard and the duty of protection of foreign property by the host State. 31/

116. Non-discrimination, in its general sense, means that the host country should abstain from discriminatory action towards foreigners in general or towards the nationals of particular countries. While the principle as such is hardly contested in the international community, it should also be emphasized that a certain number of important exceptions are equally recognized by it (see below, paras. 130-163).

117. On the other hand, although the idea that States must respect certain minimum standards in the treatment they extend to foreigners (as, indeed, to their own nationals) remains valid, there are differences of opinion among the international community as to the content of some of these minimum standards. 32/ A number of developing countries, in particular, consider that this concept has often been used or, rather, misused in the past to secure privileged treatment for foreigners in economic matters, to exploit these countries natural resources, and even to justify military intervention by their home countries on their behalf.

118. Some jurists would include in the concept of fair and equitable treatment the host country's duty to protect in particular foreigners and their property whilst other jurists do not acknowledge such an obligation. Protection in this sense is now accepted as not including protection against action the State itself may decide to take in the form of expropriation or nationalization. 33/ 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 or, rather, to apply the same protection standards to nationals and foreigners.

119. Whether or not protection is to be regarded as a part of fair and equitable treatment, investment treaties normally include it in a special "protection and security clause".

120. As mentioned earlier, the concept of fair and equitable treatment has even found its place in some of the preambles, thus setting the general tone and philosophy of the treaty but providing no substantive rights which are additional to those specifically stipulated in the operative paragraphs. Mostly, however, it is inserted in one or more of the articles, alone or in combination with other treatment standards.

121. The prototype treaty adopted by the United States contains the following formulation (see annex V, art. II, para. 2):

> "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."

The formulation thus contains in its three sentences a series of treatment clauses: fair and equitable treatment, protection and security, the general requirements of international law and, in the third sentence, the so-called

"umbrella clause" (paras. 163-170) for State contracts, the host State's obligations contained in admission documents etc. Although irrelevant in practical terms, it may be asked from a jurisprudential viewpoint whether the other ingredients of the paragraph are intended to be part of the fair and equitable treatment concept or are meant as separate treatment standards.

122. Article 2 of the prototype treaty of the Federal Republic of Germany (see annex II) after stipulating that each party shall promote and admit (in accordance with its legislation) investments of the other party, provides that: "It shall in any case accord such investments fair and equitable treatment".

123. The United Kingdom model agreement includes the fair and equitable treatment clause in paragraph 2 of article II which comes very close to the formulation in the United States prototype treaty:

> "Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."

124. Article 3 of the 1979 and 1987 Dutch model agreements (see annexes III and IV), which is otherwise not very different, introduces the concepts of national and most-favoured-nation treatment in the protection clause: the host State is expected to accord to the investments of nationals of the other party the same security and protection as it accords to those of its own nationals or to those of nationals of any third State, whichever is more favourable to the investor.

125. Article 3 of the Swiss "standard draft" combines the fair and equitable treatment clause with the national treatment and most-favoured-nation clauses. Fair and equitable treatment must not be less favourable than either of the latter, whichever is more favourable.

126. A certain number of bilateral investment treaties, like most of those concluded in recent years by France with Sri Lanka, Pakistan, Nepal and Israel 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 de jure or de facto (art. 3). Agreements concluded by Belgium-Luxembourg, for example, with Malaysia also normally specify that fair and equitable treatment "may in no case be less favourable than that recognized by international law" (art. 3).

127. While the concept of "fair and equitable treatment" appears in the majority of bilateral investment treaties, including the more recent ones, there are some notable exceptions. It is generally not mentioned in agreements concluded by Romania. Some Asian and African countries (such as Rwanda, Pakistan, Saudi Arabia and Singapore) 34/ also rejected it when negotiating bilateral investment treaties. At the same time, it is interesting to note that, despite the alleged "minimum standard" connotation which does not fit well with the Calvo Doctrine, the relatively rare agreements with Central and South American States do contain a fair

and equitable treatment clause (for example, Ecuador with Switzerland and the Federal Republic of Germany, Panama with France, Costa Rica with the United Kingdom). The clause also appears in the agreements recently concluded by China (art. 3) and in those concluded by Sri Lanka with the Republic of Korea and Singapore.

128. In multilateral forums there has been a certain ambivalence towards the concept. Whereas it does not appear in the model agreements established by the Asian-African Legal Consultative Committee or in the multilateral Agreement on the Promotion, Protection and Guarantee of Investments adopted by the Third Islamic Summit Conference in 1981, it is stipulated in article 240 of the Third Lomé Convention (which came into force on 1 March 1985) between the European Economic Community and its member States on the one hand, and the 66 countries of the African, Caribbean and Pacific group of States. The principle is reflected also in the Convention establishing the Multilateral Investment Guarantee Agency (MIGA).

129. 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.

## 2. National and most-favoured-nation treatment

### National treatment

130. The principle of national treatment requires that for the purpose of the treaty foreigners should be treated in the same way as nationals. For most capital-exporting countries, national treatment is an important principle and, consequently, national treatment clauses are found in the majority of bilateral investment treaties - with some exceptions notably those concluded with socialist countries. In the context of multilateral negotiations, the developing countries might agree to its inclusion in the United Nations Code of Conduct on Transnational Corporations provided that it is properly formulated and sufficiently qualified. They have argued in that respect that granting national treatment to foreign investors would mean in practice discriminating in favour of transnational corporations, which have different capabilities and resources than domestic enterprises. In any case, it would run counter to the efforts being made by the developing countries towards strengthening their own enterprises in order to promote their autonomous and self-reliant development. Specifically, they propose the inclusion of a development clause whereby national treatment would be given to transnational corporations without prejudice to measures specified in legislation relating to declared development objectives of the developing countries (see annex VII, paras. 23-96).

131. Apart from compatibility with development policies, national laws may impose other conditions and limitations on foreign investments, such as joint ownership or limited equity participation and joint management. Sometimes, as mentioned earlier, foreign investment is restricted to certain sectors of the economy. In any case, the national treatment clause, however unqualified it may be in the treaty, would extend at most to the treatment of the investments in regard to matters not dealt with by the basic regulations on their admission, unless it is expressly stated in the treaty that the standard should apply to the treatment of admission of investment, as in the United States model (annex V, art. II, para. 1).

132. Some treaties explicitly include the possibility for the host country of granting special incentives to domestic investments or of limiting national treatment to circumstances where the foreign and the domestic investor find themselves in similar situations.

133. Another classical 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. This limitation is also reflected in the proposed clause on national treatment in the draft United nations Code of Conduct on Transnational Corporations.

134. National treatment is considered such an important matter of principle in bilateral investment treaties by some home countries like the Federal Republic of Germany, that they would insist on its inclusion and rather abandon a treaty negotiation than give up the national treatment clause. Thus, it appears in the protocol to the treaty with Romania, under article 2(a), the protocol having the same legal status as the treaty itself, and in the treaty with China under article 3, IV. To the centrally-planned-economy countries, the national treatment clause may have a different meaning because of the fundamental differences in their internal political and economic orders.

135. Other capital-exporting countries, like France, while maintaining national treatment when it is not a matter of major disagreement, do not always consider it indispensable. Nevertheless, the clause is included in most of the more recent conventions concluded by France. Still others do not include it as a matter of principle. The 1985 OECD report on intergovernmental investment agreements based on exchanges of views between government representatives, described 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 most-favoured-nation 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 most-favoured-nation 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." 35/

136. Finally, it should be noted that if two States promise each other national treatment and then agree to the most-favoured-nation treatment with a third State, the latter may legitimately claim that it is also entitled to national treatment. Otherwise, it is not treated as favourably as the "most favoured nation".

### Most-favoured-nation treatment

137. The inclusion of a most-favoured-nation clause in an international treaty means that whenever one contracting party agrees on more favourable terms with a third State, the other contracting party (to the first treaty) will benefit from the new, more favourable terms. Most bilateral investment treaties contain most-favoured-nation clauses to the effect that investments shall receive at least as favourable treatment as the host State has undertaken to provide to investments

by nationals and companies of another State. The same applies to activities in connection with the investment.

138. The few Latin American countries that have concluded investment treaties did not generally agree to a most-favoured-nation clause; foreigners must accept treatment on the same basis as nationals. There are, however, exceptions, such as the treaty concluded by the Federal Republic of Germany with Ecuador, the United Kingdom's agreements with Paraguay and Belize, and the United States agreements with Haiti and Panama. The clause may also be included in other agreements currently under negotiation by the United States with a number of Latin American countries. The treaties concluded by France with Paraguay and El Salvador, stipulate that "ce traitment sera au moins égal au traitement le plus avantageux appliqué sur le territoire national". If this does not imply that the host country extends privileged treatment to the investors of other States, there would seem to be no contradiction with the Calvo Doctrine. Treatment may indeed vary not according to the investor but according to the type or location of the investment.

139. At the same time, when most-favoured-nation treatment is accepted, the above formulation, which constitutes a most-favourable treatment clause, may well be more favourable than an ordinary most-favoured-nation clause, under which it is customarily not required to consider more favourable treatment accorded to an individual investor only and not, under a treaty, to all investors of the other party (see para. 161 below).

140. It is interesting to note that, unlike all other bilateral investment treaties concluded by the Federal Republic of Germany, there is no most-favoured-nation clause in the 1962 treaty with Madagascar. The matter is explained in an exchange of letters according to which the Federal Republic of Germany did not insist on the clause, having been informed that, as a matter of principle, Madagascar did not envisage granting privileges to foreign investors beyond the treatment applied to national investors.

National treatment and most-favoured-nation clauses

141. In bilateral investment treaties, the national treatment clause is very often combined, in one and the same paragraph, with the most-favoured-nation clause. Indeed, capital-exporting countries normally attach importance to the combination of the two standards so that investors can avail themselves of whichever is more favourable. The model agreement of the Federal Republic of Germany contains the following provision (annex II, art. 3):

> "(1) 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."

The next paragraph extends the same treatment standards to nationals or companies of the other contracting party, as regards their activity in connection with investments in its territory.

142. Paragraphs 3 and 4 of article 3 concern exceptions. The first one is the "association-of-States" clause, included in all recent investment treaties, according to which "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, an economic union, a common market or a free trade area". 36/

143. The second exception concerns privileges granted by either party to nationals or companies of a third country "by virtue of a double taxation convention or other agreements regarding matters of taxation". Again this is a fairly common reservation.

144. The Protocol to the model treaty of the Federal Republic of Germany explains what is to be understood by "activities" and "treatment less favourable" in the sense of article 3. It also contains the habitual reservation concerning measures "taken for reasons of public security and order, public health and morality". This also applies to "entry and sojourn" of persons in either Party's territory, applications being otherwise given "sympathetic consideration".

145. The United States prototype treaty deals with national treatment, together with most-favoured-nation treatment, and mentions also the rights of each party to make exceptions in certain sectors, but also subject to most-favoured-nation treatment (see annex V, art. II, para. 1).

146. The United Kingdom version in article 3 of the model agreement is very similar to the model of the Federal Republic of Germany except that the first paragraph refers to "investments or returns" and the second paragraph, instead of the general term "activities" refers to "management, use, enjoyment or disposal of investments".

147. The Netherlands model agreements (1979 and 1987 versions) provide for national and most-favoured-nation standards in connection with the protection and security afforded to investments of the other contracting party (art. 3(2) in both versions), and also with respect to fiscal matters (art. 6 of the 1979 version and art. 4 of the 1987 version), with the same reservations as in the afore-mentioned Federal Republic of Germany text, adding, however, advantages accorded "on the basis of reciprocity".

148. The Swiss "standard draft", as already mentioned, deals in article 3, paragraph 2 with fair and equitable treatment, national treatment and most-favoured-nation treatment and with the "association-of-States" reservation in the following paragraph.

149. Some treaties contain particularly large association-of-States reservations (which justifies the use of this term in place of others sometimes employed, such as customs union or common market clause). Article 2 of the 1965 commercial agreement between Denmark and Madagascar (covering investment protection) includes in the reservation:

> Co-operation between neighbouring countries to facilitate transfrontier communication (which may be considered a customary law exception);
>
> Regional and subregional arrangements to promote co-operation between developing countries; and
>
> Advantages agreed by Denmark with Finland, Iceland, Norway and Sweden.

150. The AALCC models provide for most-favoured-nation treatment in article 4, in a formulation very similar to that of the United Kingdom model. Article 5 concerns national treatment, but is in square brackets, with a footnote indicating that some countries of the region object to the national treatment clause in connection with foreign investment.

151. Recent conventions concluded by France also combine in one paragraph national treatment and most-favoured-nation treatment, both with respect to investments and activities linked to these investments; another paragraph contains the "association-of-States" reservation.

152. Other exceptions or restrictions to national treatment and most-favoured-nation treatment 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 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.

153. In some bilateral investment treaties, host countries accept national treatment but reserve the possibility of granting advantages to local industries not available to the foreign investor. For example, the Protocol to the 1980 treaty between Papua New Guinea and the Federal Republic of Germany provides that:

> "Special incentives granted by Papua New Guinea only to its own nationals in order to stimulate the creation of local industries are considered compatible with Article 3 [concerning national treatment and most-favoured-nation treatment] provided they do not substantially impair the investment and activities of nationals and companies of the Federal Republic of Germany in connection with an investment."

154. The same reservation will be found in the agreement concluded with the United Kingdom. Similarly, the Protocol to the 1970 agreement between Belgium and Indonesia provides that Indonesia "may grant facilities to Indonesian concerns which do not fully apply to Belgian concerns without prejudice to the most-favoured-nation provision". Thus, the host State may derogate from national treatment as long as there is no discrimination in comparison to other foreign investors. The same principle will be found, for example, in the United Kingdom agreements with the Republic of Korea and Singapore (art. 3), but with the reservation that this is "without prejudice to the provisions of articles (4)1 [compensation for losses] and 10 [subrogation]".

155. Protocol No. 2 to the 1974 agreement between Switzerland and Indonesia allows for derogation from national treatment of Swiss investors "in view of the present stage of development of the Indonesian national economy". The Indonesian Government may extend additional advantages to Indonesian domestic investments under its investment law. However, in pursuance of the terms of the agreement, it will grant "identical or compensating facilities to investments and nationals of the Swiss confederation in similar economic activities".

156. The treaty of the Federal Republic of Germany with Zaire, 1969, contains a third paragraph in article 3, according to which, in order to correct *de facto* inequalities between investors in the Federal Republic of Germany and in the Congo, the latter can be granted special tax advantages and credit facilities as long as these do not impair competition.

157. As mentioned already, most investment treaties concluded by Romania and China do not contain national treatment clauses, whereas the application of most-favoured-nation treatment is restricted: only States with whom Romania has concluded "similar agreements" will be considered. National treatment is nevertheless stipulated in the Protocol to Romania's treaty with the Federal Republic of Germany, according to which "mixed companies" (the only legal form in which foreign participations are possible) must not be treated less favourably than other "economic units" with legal personality.

158. Some investment treaties (for example, the Protocol to the 1977 treaty between the Federal Republic of Germany and Mali) expressly exempt public enterprises as a basis of comparison for the application of national treatment.

159. A number of treaties refer to the possibility of derogation from national treatment and most-favoured-nation treatment in connection with the admission procedure. The treaty between the Federal Republic of Germany and Uganda offers an example:

> "(d) In the interest of national economy either Contracting Party may, in approving an investment by nationals or companies of the other Contracting Party, make specific stipulations deviating from the treatment provided for in Article 2. If specific stipulations of that nature have been made, the provisions of Article 2 shall, to that extent, not be applicable. Such specific stipulations to be effective shall be made in detail in the document of approval."

160. In other cases, the host State grants national treatment and most-favoured-nation treatment to "any similar enterprise" (e.g., Norway/Indonesia) or "in the same circumstances" (United Kingdom/Belize) or "to any similar investment in its territory" (Federal Republic of Germany/Kenya, not in force), the latter being defined in the Protocol as "any investment of a like nature ... regardless of whether such investments have been made by nationals or companies of any third State or by any other individual or company".

161. As already pointed out, special conditions granted to an individual investor (for example, because of the importance of the investment for the host country's development objectives) generally are not taken into consideration for national treatment and most-favoured-nation treatment. The latter are applicable only when more favourable treatment is accorded under a treaty to all investors of another country. This is spelt out in some treaties such as the agreements concluded by Switzerland with Costa Rica (1965) and Jordan (1976) and the exchanges of letters accompanying the treaties concluded by the Federal Republic of Germany with Pakistan and Togo. The relevant provision in the Switzerland/Jordan agreement states that "provisions more favourable than those of this Agreement which have been agreed upon by either of the Contracting Parties with nationals or companies of the other Contracting Party are reserved" (art. 6). The Protocol to the treaty between the Federal Republic of Germany and Thailand contains the following paragraph:

> "Special rights and benefits granted in documents of admission shall not be deemed discriminatory treatment within the meaning of Article 2."

The 1967 OECD draft Convention (art. 1) also had attempted to codify this principle as between OECD member countries.

162. As the International Law Commission confirmed in its 1978 report, a most-favoured-nation clause entitles the beneficiary to more favourable treatment agreed with third parties before or after the entry into force of the treaty in which it is included. However, the parties may agree that the clause should apply pro futuro only. Thus, some of the treaties concluded by Sweden (with China, Malaysia, Egypt, Pakistan, Senegal, Yugoslavia) provide that the host country shall be free to grant more favourable treatment stipulated in bilateral investment treaties concluded "before the date of signature" of the agreement. The treaties concluded by the Federal Republic of Germany with Turkey and the Republic of Korea also stipulate that the most-favoured-nation clause shall not apply to rights and advantages granted before the entry into force of the treaty.

163. In relation to the effect of national treatment and most-favoured-nation clauses, questions have sometimes been expressed about the scope of either or both clauses in the investment context. 37/ There is a wide margin of interpretation of agreed exceptions. For example, the determination of what is a "similar" enterprise or activity, the meaning of the words "in the same circumstances", or the assessment of the effect of special benefits granted to local investors may well give rise to differences of opinion. To judge the relation between national treatment/most-favoured-nation clauses in bilateral investment treaties and conditions laid down in admission documents, a detailed analysis of a representative sample of the latter - not available at the moment - would be required.

### 3. Preservation-of-rights and "umbrella" clauses

164. The United States prototype treaty (annex V, art. IX) contains fairly detailed provisions on preservation of rights. They have been included in all treaties signed so far. The purpose is to ensure that any more favourable treatment that might be stipulated in other international agreements or obligations binding on the parties and in national laws, regulations etc. is not superseded by the provisions of the treaty. Under subparagraph (c) of the same article reference is also made to "obligations assumed by either Party, including those contained in an investment agreement or an investment authorization." The latter are also covered by the last sentence of paragraph 2 in article II which reads as follows:

> "Each Party shall observe any obligation it may have entered into with regard to investments."

This is the "umbrella clause" for agreements between the host State and the investor. Its effect is not to transform the provisions of a State contract into international obligations as between the contracting parties - which would have absurd consequences, for example, for the application of the most-favoured-nation clause. However, it makes the respect of such contracts (or admission documents agreed between the host State and the investor) an obligation under the treaty. Thus, the breach of such a contract by the host State would engage its responsibility under the agreement and - unless direct dispute settlement procedures come into play - entitle the home State to exercise diplomatic protection of the investor.

165. In the prototype treaty of the Federal Republic of Germany (annex II, art. 8) the equivalent of the aforementioned provision is stipulated. Here there is a

clear separation between the preservation-of-rights clause and the umbrella clause. These provisions appear in all the treaties concluded by the Federal Republic of Germany.

166. The United Kingdom model agreement contains the umbrella clause in the last sentence of article 2: "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party". The same wording appears in the 1987 Dutch model agreement (annex IV, art. 3 (4)).

167. Somewhat different wordings are found in the Dutch (1979) and Swiss model agreements and in conventions recently concluded by France, to the effect that the provisions of the treaty are without prejudice to more favourable conditions accorded directly to the investor (article 12 of the Netherlands model agreement, article 7 of the Swiss "standard draft" and article 10 of the convention concluded by France with Nepal). The 1987 Dutch model expressly includes existing or future provisions of (national) law or obligations under international law containing more favourable conditions, whether general or specific, than those provided in the treaty (annex IV, art. 3 (5)).

168. Under the agreements concluded by Sweden with Pakistan, Yugoslavia and China, these will not prejudice "any rights or benefits accruing under national or international law to interests of a national or a company of one Contracting State in the territory of the other Contracting State". Indeed, China's 1985 agreement with Austria corresponds in substance to article 8 (b) of the model treaty of the Federal Republic of Germany.

169. Under article IX of the 1970 agreement between Egypt and Romania, "Each Contracting Party shall comply with any other obligations which it undertakes concerning the capital investments made on its territory by investors of the other Contracting Party". Almost the same wording will be found, for example, in Romania's agreement with Pakistan.

170. The AALCC model agreements contain an umbrella clause - comparable to the United States, United Kingdom and Federal Republic of Germany versions (see annex VI, art. 2 (IV)). However, it is placed in square brackets, as there were differences of views among member States.

### 4. Stabilization clauses

171. Under most bilateral investment treaties, investments are admitted in accordance with the host country's legislation and regulations (see paras. 57-65 above). However, such legislation can be changed. Parliament may adopt new laws less favourable to the foreign investor. For this reason, so-called stabilization clauses are sometimes introduced in State contracts and, more rarely, in bilateral investment treaties. They provide that, if the legislation is changed, the law as it stood at the time of signature of the contract or treaty should continue to apply to investments made before the change of the law. Stabilization clauses do not encroach upon the rights of the legislature provided it has been called upon to approve the agreement containing a stabilization clause. 38/ Even then, it is highly questionable whether a mere stabilization clause may suffice to impose a total fetter on the sovereign legislative powers of the host State.

172. There are no stabilization clauses in the various model texts examined. Nevertheless, stabilization clauses are to be found in some bilateral investment treaties. For example, the agreement between France and Yugoslavia (art. 4) provides that if new, less favourable legislation should be introduced, investments will continue to be governed by the law in force when they were admitted: "au cas où celle-ci [la législation] serait modifiée dans un sens moins favorable, lesdits investissements resteront régis par les dispositions en vigueur à la date où ils ont été agréés". A similar provision is in the agreement between Egypt and Greece.

173. On the other hand, as mentioned earlier, most bilateral investment treaties provide that future more-favourable legislation shall also apply to investments made earlier. Some more specific stablization clauses will be mentioned in connection with the rules on transfer of capital, profits and other payments related to the investment.

## B. Specific treatment standards

174. Specific treatment standards, for the purpose of this study, are those concerning a particular aspect of the existence of a foreign investment in the host State. In this connection, it should be borne in mind that some important matters affecting investments, such as taxation, are not normally covered by bilateral investment treaties or are even expressly excluded from the scope of the treaty.

### 1. Rules on currency transfer

175. The rules on currency transfer are among the most important ones in bilateral investment treaties. They concern an area where the interests of the host States and the foreign investor may clash most sharply.

176. Foreign investors regard the timely transfer of income from their investments and repatriation of capital in the event of disinvestment as key in their assessment of the investment climate. On the other hand, the chronic balance-of-payments difficulties of several host countries, and their requirements for essential goods and services for their population, often undercut their ability or willingness to repatriate such amounts promtly. Most developing countries have laws and policies restricting or regulating the transfer abroad of foreign currency. Their major concern is to assure that convertible currency is available in sufficient quantities for essential purposes. Controls on the transfer of currency by the host country are obviously of concern to the foreign investor, since they may operate to preclude or restrict obtaining in the host country the convertible currency necessary for the remittance of current earnings or royalties or the repatriation of capital. Foreign investors have to transfer income from their invested capital, as well as related income, to meet the obligations of their shareholders, contractors, licensors or tax obligations. This raises the question of the need to balance the interest of the host countries with the legitimate claims of the investors.

177. Bilateral investment treaties maintain in principle that investors should be able to transfer freely and without restriction all payments relating to their investments, such as income from invested capital and the proceeds from liquidation of this capital. At the same time, many bilateral investment treaties also impose

certain limitations upon the free transfer of currency, intended to accommodate the concerns of the host country.

The right of transfer

178. In general, bilateral agreements require that the transfer of currency shall be made (a) without delay, (b) in convertible currency and (c) at the official rate of exchange on the date of transfer. This right, in a few agreements, is generally unrestricted. In others, limitations are placed in cases of exceptional financial or economic circumstances. In most agreements, the host country undertakes the obligation to exercise "equitably and in good faith powers conferred by its laws" to guarantee the free transfer of currency.

179. In some treaties, the types of transfers guaranteed are not spelt out in detail. Thus, the United Kingdom model agreement simply refers to transfers "in respect of investments". Transfers are defined in detail in most of the treaties concluded by the United States. The prototype treaty of the United States provides a non-exhaustive list of the transfers which are guaranteed (annex V, art. IV, para. 1). The same method is employed in the treaties concluded by the Federal Republic of Germany (annex II, art. 5) the Netherlands (annex III, art. 4 and annex IV, art. 5) and Switzerland (art. 4) of the "standard draft". In these latter cases the list is not necessarily an exhaustive one; it usually includes:

(a) Returns, interests, dividends and other current income;

(b) Royalties and other payments deriving from licenses, franchises and other similar grants or rights;

(c) Proceeds of the total or partial liquidation of the investment, including the appreciation or increase of the invested capital;

(d) Funds in repayment of loans;

(e) Earnings of nationals of the contracting party.

The Netherlands model agreement of 1987 further includes "(b) funds necessary (i) for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or (ii) to replace capital assets, in order to safeguard the continuity of an investment; (c) aditional funds necessary for the development of an investment" (annex IV, art. 5).

180. Some agreements also stipulate the freedom of transfer of management fees, funds representing the value of the depreciation of capital assets, amounts assigned to cover expenses relating to the management or maintenance of the investment, contributions of capital necessary for the development of the investment, amortization and contractual repayments for technical, commercial or administrative assistance.

181. The right of free transfer also applies to the amount of compensation in case of expropriation, as well as the amount of compensation for losses due to armed conflict or internal disorder, although this may be stipulated in separate articles.

182. It is stated in most treaties that transfers must be allowed "without delay" or "unreasonable delay". Some of the agreements concluded by the Netherlands

stipulate that the transfer must be within "such period of time as is normally required for the completion of transfer formalities". Similarly, in the protocol of the majority of treaties concluded by the Federal Republic of Germany, a transfer is considered "made without delay if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months".

183. Under some bilateral investment treaties, most-favoured-nation treatment is to apply in matters of transfer, though subject to the eiusdem generis rule. Thus, the agreements concluded by Belgium with Malaysia and the Republic of Korea state that "the treatment referred to in paragraph (1) of this article may not be less favourable than that accorded to the nationals or legal persons of a third State who are in a similar situation". The same clause can be found in the agreements concluded by Sweden with Yugoslavia and Sri Lanka, and by France with the Republic of Korea.

184. Stabilization clauses are included in some treaties to ensure that the transfer of currency will be governed by the laws existing when the agreement entered into force (Switzerland/Zaire; and agreements concluded by the United Kingdom with Paraguay, Cameroon and Lesotho). The United Kingdom/Lesotho agreement guarantees the free transfer of capital and returns subject to the host country's powers "conferred by its laws existing when this Agreement enters into force". In the agreements concluded by Belgium with Tunisia and Morocco, the parties provided that the transfer of currency must be in conformity with the regulations promulgated in pursuance of the legislation in force at the time each investment is made. But if any "more favourable legislation" may be enacted in the future, the transfer will be governed by those rules.

Convertibility and rates of exchange

185. Most bilateral investment treaties, such as the United States prototype treaty, require that the transfer of currency must be effected in "freely convertible currency" (annex V, art. IV, para. 2). Sometimes it is stipulated that the currency should be the same as the capital originally invested or any other convertible currency agreed to by the investor and the contracting party concerned. A few agreements concluded by Sweden require the transfer in "any convertible currency".

186. The AALCC model A provides that "repatriation shall be permitted ordinarily to the country from which the investment originated and in the same currency in which the capital was originally invested or in any other currency agreed upon between the investor and the host State" (annex VI, art. 6 (iii)). The latter part of this provision corresponds to that in the United Kingdom model agreement. The B model agreement on the other hand, provides that stipulations concerning repatriation of capital and returns shall be set out in the letter of authorization and shall remain operative throughout the duration of the investment (annex VI, art. 6 (iii)).

187. With regard to the applicable rate of exchange, the model agreement of the Federal Republic of Germany and most of the treaties recently concluded by the Federal Republic of Germany stipulate that the transfer shall be made "without delay at the rate of exchange effective for the agreed currency. This rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for

conversions of the currencies concerned into Special Drawing Rights" (annex II, art. 7). The United States prototype treaty refers to "the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred" (annex V, art. IV, para. 2), and the United Kingdom model agreement to the "rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force". The latter formulation will also be found in agreements concluded by Belgium. The AALCC model A refers to the "rate of exchange applicable on the date of transfer ... unless otherwise agreed between the investor and the host State" (annex VI, art. 6 (iii)).

188. Recent French conventions mention the "taux de change normal officiellement applicable" at the date of transfer; however, other conventions refer to the "prevailing market rate" (e.g., Singapore). The matter is not further specified in the Swiss and Netherlands model agreements.

189. Some bilateral investment treaties negotiated prior to the collapse of the Bretton Woods System in 1973 refer to a rate of exchange based on the par value standard, the gold standards, or in relation to the United States dollar as formerly agreed within the articles of the International Monetary Fund. A few of these treaties included a "safety" clause which states that if, at the date of transfer, no rate of exchange exists in respect of the contracting party concerned, the market rate for a freely convertible currency shall apply, e.g., the Federal Republic of Germany/Thailand treaty (art. 6, paras. 2-3).

190. The 1979 Belgium/Malaysia agreement provides that the rates of exchange and bank charges "shall be determined by the respective banking system in the territory of each of the Contracting Parties and such rates and bank charges shall be fair and equitable" (art. 6, para. 2).

191. The 1978 Belgium/Singapore agreement states that applicable exchange rates should be governed by the most-favoured-nation standard: they should not be less favourable than those accorded to nationals of the most favoured nation, in particular "under specific undertakings laid down in agreements or arrangements concluded in the matter of protection of investments" (art. 6, para. 2).

Restrictions on free transfer

192. Most bilateral investment treaties provide that the host country may place certain restrictions upon the transfer of currency. Generally, it is added that these restrictions must be in accordance with the host country's obligations to exercise equitably and in good faith the powers conferred by its laws.

193. Several treaties underline that the transfer of currency must be in accordance with the laws and regulations of the host country. This may require authorization or licenses. The Switzerland/Indonesia agreement states that the "technical or administrative modalities" of such transfer must be subject to the "legislation or rules and regulations in the territory in which the investment has been made". Reference to licenses or authorizations to be issued in accordance with national legislation for the transfer of currency is made, inter alia, in the agreements concluded between the Netherlands and Thailand, Romania and Sri Lanka, and Belgium and the Republic of Korea. Under some of the agreements concluded by the Netherlands, any "authorization to transfer shall be issued" and "any transfer shall be carried out in conformity with the most relevant rules in force in the territory of the Contracting Party concerned".

194. The agreements concluded by the United States allow either party "to maintain laws and regulations (a) requiring reports of currency transfer and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgements in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law" (annex V, art. IV, para. 3).

195. A number of bilateral investment treaties do not allow the full transfer of the earnings or wages of nationals of the other contracting party to their home country, but only of a "moderate portion of the earnings" or an "adequate portion of the wages". They further stipulate that the repatriation of earnings may only be permitted for nationals authorized to work in the host country by permits or licenses or in relation to an agreed investment (Netherlands/Thailand; Norway/Indonesia; France agreements with Singapore, the Sudan, Jordan and Paraguay).

196. Many bilateral investment treaties now provide for the phasing out of the repatriation of capital (or compensation under the expropriation/nationalization provisions) if this is warranted by the host country's foreign exchange situation. The model treaty of the Federal Republic of Germany states that in the event of exceptional balance-of-payment difficulties repatriation may be spread out over a maximum of five years, with annual instalments of 20 per cent of the capital to be transferred (annex II, art. 5, para. 2). The same percentage is mentioned in the United Kingdom model agreement, while it is underlined that such restrictions may not apply to the transfer of returns. The AALCC model A refers to "reasonable restrictions for temporary periods" (annex VI, art. 6 (i)). No such provisions are contained in the United States, Netherlands and Swiss model texts, although this does not mean that some provision for phased repatriation of capital has not been accepted in individual cases. One proposal for combining the principle of free transfer in connection with investments with the possibility for the host State to impose restrictions when necessary, has been included in the recent Caribbean Community (CARICOM) model agreement as follows:

> "1. Each Party shall in respect of investments permit nationals or companies of the other Contracting Party the free transfer of their capital and the earnings from it, subject to the right of the [CARICOM State] to impose equitably and in good faith such measures as may be necessary to safeguard the integrity and independence of its currency, its external financial position and balance of payments, consistent with its rights and obligations as a member of the International Monetary Fund.
>
> 2. The exchange rate applicable to such transfer shall be the rate of exchange prevailing at the time of remittance.
>
> 3. In cases where large amounts of compensation have been paid ... the Contracting Party concerned may require the transfer thereof to be effected in reasonable instalments". 39/

## 2. Compensation for losses

197. Apart from compensation in the case of expropriation/nationalization (see paras. 222-226 below), most bilateral investment treaties contain provisions regarding compensation for losses due to armed conflict or internal disorder. They

do not normally establish an absolute right to compensation 40/ but, rather, promise that the foreign investor will be treated, in this respect, in the same way as the nationals of the host country. In addition, most-favoured-nation treatment may be stipulated.

198. The model treaty of the Federal Republic of Germany, like others, deals with this matter together with expropriation/nationalization and provides that investments "shall enjoy full protection as well as security in the territory of the other Contracting Party" (annex II, art. 4 (1)). As mentioned earlier (see paras. 113-125 above on fair and equitable treatment), similar protection clauses such as "full protection and security" and "most constant protection and security" are contained in many, if not most, treaties. Article 4 (3) of the same model treaty provides that investors who suffer losses "owing to war or other armed conflict, revolution, or state of national emergency, or revolt" shall be accorded national treatment with regard to compensation, the latter being freely transferable. Most-favoured-nation treatment results from article 4 (4). However, this solution has not been adopted in all treaties concluded by the Federal Republic of Germany. For example, under the treaty with Romania, the Federal Republic of Germany would grant national treatment and Romania most-favoured-nation treatment. Other agreements concluded by Romania do, in fact, establish an absolute right to compensation: that with Egypt (art. III, 2) stipulates that investors shall receive "the necessary compensation which should cover the incurred losses"; the 1977 treaty with Austria (art. 4, para. 3) foresees "adequate compensation".

199. The most-favoured-nation formula has also been adopted in the bilateral investment treaties concluded by China. National treatment and most-favoured-nation treatment are stipulated, for example, in the agreement between Japan and Egypt. The same applies to the United States revised (1984) prototype treaty with regard to any measures adopted in relation to losses (annex V, art. III, para. 3). Conventions concluded by France normally provide for most-favoured-nation treatment, it being understood that in any case investors will receive "adequate" compensation. The United Kingdom model agreement deals with this matter in article 4, separately from expropriation/nationalization, which is no doubt preferable. It provides for national treatment. However, a second paragraph concerns investors' losses resulting from

> "(a) Requisitioning of their property by its [the host country's] forces or authorities, or
>
> (b) Destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation".

In these cases, there is an absolute right to "restitution or adequate compensation" by the host country.

200. While the AALCC model A (annex VI, art. 8) contains the habitual clause "compensation for losses" in square brackets, with a choice of national treatment and/or most-favoured-nation treatment, a second paragraph follows the above wording of the United Kingdom model agreement. It emerges from the explanatory notes that the "fairly new" concept of compensation for losses was the object of reservations among the experts. The AALCC model B, on the other hand, provides for restitution or adequate compensation, without further qualifications (annex VI, art. 8).

201. Most bilateral investment treaties stipulating compensation for losses also provide that such compensation should be transferable to the investor's home country. The above-mentioned AALCC model A clause in square brackets, like a number of existing bilateral investment treaties, does not refer to transferability while the AALCC model B provides for transferability in square brackets. Indeed, for some countries this would appear logical, as compensation would normally be intended for the reconstruction of destroyed installations. This would not necessarily require foreign exchange, except to the extent that new equipment has to be imported.

### 3. Investment promotion

202. Practically all bilateral investment treaties, according to their title, concern not only the protection but also the promotion (or encouragement) of investments. Relatively few of these treaties expressly mention home country incentives as, for example, the 1980 agreement between Belgium and Cameroon, according to which Belgium will take "les mesures propres à inciter ses opérateurs économiques à participer à l'effort de développement de la République-Unie du Cameroun comformément à ses objectifs prioritaires". Similarly, the United Kingdom/Costa Rica agreement contains a clause after the standard provision on investment promotion concerning the encouragement of investments consistent with the investment objectives of the host State.

203. The AALCC model agreements, commit home States to offering appropriate incentives to investments in the territory of the other contracting party, "which may include such modalities as tax concessions and investment guarantees" (annex VI, art. 2).

### 4. Employment, right of entry and sojourn

204. Bilateral investment treaties do not normally provide for an automatic right of entry and sojourn of individuals in connection with investments. This is a matter for national legislation, although rules are sometimes agreed on in establishment conventions. Under the model treaty of the Federal Republic of Germany (annex II), the question is dealt with in the Protocol ad article 3 (b). Subject to limitations justified on grounds of public policy, contracting parties will give "sympathetic consideration" to applications for entry, sojourn and employment. Recent conventions concluded by France deal with the matter, along the same lines, in exchanges of letters. Sometimes (for example, in a number of treaties concluded by the Federal Republic of Germany with African countries) the protocol mentions the intention of the contracting parties to negotiate an establishment convention for the purpose.

205. In the United States prototype treaty entry and sojourn in connection with the investment are a right, subject to the laws of the host State. Whereas some bilateral investment treaties put an obligation on the investor to employ, as far as possible, and to train local personnel, the United States model text underlines the investing company's right "to engage top management personnel of their choice, regardless of nationality" (annex V, art. II, paras. 2-4).

## 5. Performance requirements

206. Performance requirements are sometimes included in investment contracts between a host country and the foreign investor. 41/ They may concern the starting date or quantity of production, export quotas, the purchase of local goods or services etc. Host countries may consider such requirements to be of vital importance in the context of national development plans. Thus, the Government of Algeria established the theory of "consequential damages" for the host country as a result of unsatisfactory, or late execution of contracts by the investing company. 42/ For investors, performance requirements obviously imply additional economic obligations.

207. Clauses concerning performance requirements are not a regular feature of bilateral investment treaties. The United States prototype treaty urges host countries not to impose performance requirements upon the investor (annex V, art. II, para. 5). In the treaty between the United States and Panama, for example, article II (4) reads as follows:

> "Neither Party shall impose performance requirements as a condition for the establishment of investment owned by nationals or companies of the other Party, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements."

## IV. THE DISPOSSESSION OF THE INVESTOR

208. Dispossession, or taking of property, is used as the most general term covering a wide range of specific forms of withdrawing property rights, including confiscation, normally understood as a penal measure, but sometimes also used, like spoliation, to designate the taking of property without compensation; requisition and sequester which, as a rule, are temporary measures, particularly in times of war or national emergency; and collectivization, a term habitually applied in the agricultural sector.

209. The forms of dispossession which more particularly concern investment treaties are expropriation, nationalization and the transfer of property to nationals of the host State (indigenization). The majority of bilateral investment treaties use the terms "expropriation" and "nationalization", but without distinguishing between the two terms. Where "expropriation" alone is employed, it is understood in the general sense of "taking of property", covering also nationalization and indigenization.

210. In common usage, the term "expropriation" is used both in the wide sense and, in a narrow sense, as an individual measure for a public purpose (for example, the expropriation of land for the construction of a highway), generally decided by decree on the basis of a pre-existing law. Nationalization (as, for that matter, indigenization) is a matter of public policy concerning a country's internal order. It may affect a whole branch of the economy (e.g., nationalization of the steel industry) or some of major enterprises. Developing countries, in accordance with the principle of permanent sovereignty over natural resources, will often regard nationalization as a means of playing a more active role in the exploitation of their natural resources and in implementing their social and economic policies.

211. The principle that a State may take foreign property is, as such, not contested in contemporary international law nor is that the expropriation must be for a public purpose, non-discriminatory, with compensation and be subject to due process of law. But, as seen in the negotiations on the United Nations Code of Conduct on Transnational Corporations, divergences exist regarding the conditions attached to the exercise of this right.

212. Thus, some developing countries, while acknowledging the duty to pay compensation, would seem to prefer leaving related questions as well as modalities to be settled under the law of the expropriating State. However, a number of the major capital-exporting countries maintain that a State cannot take away foreign property without abiding by certain rules of traditional customary international law such as that the compensation must be "prompt, adequate and effective" and that international dispute settlement procedures must be available. Bilateral investment treaties tend very largely to follow the latter point of view as the following general survey of provisions on expropriation/nationalization indicates.

### A. Provisions on expropriation/nationalization

213. The substantive contents of different bilateral investment treaties would not seem to differ very much in regard to expropriation/nationalization. The basic conditions which are always present are: public interest (or a similar concept), non-discrimination, compensation and due process of law.

### 1. Overview of the provisions in model treaties and representative bilateral investment treaties

214. The following provision appears in the 1977 Japanese agreement with Egypt:

> "Investments and returns of nationals and companies of either Contracting Party shall not be subjected to expropriation, nationalization, restriction or any other measure the effects of which would be tantamount to expropriation, nationalization or restriction, within the territory of the other Contracting Party, unless the following conditions are complied with: (a) the measures are taken for a public purpose and under due process of law; (b) the measures are not discriminatory; and (c) the measures are taken against prompt, adequate and effective compensation." (art. 5, para. 2).

215. The model treaty of the Federal Republic of Germany contains essentially the same elements, although in some more detail (annex II, art. 4, para. 2).

216. The Netherlands model agreement of 1979 (annex III) and most agreements concluded by it do not use the terms expropriation or nationalization. According to article 5, neither party shall take "any measures depriving directly or indirectly, nationals of the other Contracting Party of their investments" unless certain conditions are complied with. These are, in addition to public interest, due process of law and "just compensation", that the measures are not "discriminatory" and that they are not contrary to any undertaking the expropriating party may have given (for example, in an agreement with the investor). The 1987 Dutch model reproduces also this clause (annex IV, art. 6).

217. The following paragraph 2 of article 5 of the 1983 agreement with Pakistan is, with small variations, representative of recent conventions concluded by France:

> "Les Parties contractantes ne prennent pas de mesures d'expropriation ou de nationalisation ou toutes autres mesures dont l'effet est de déposséder, directement ou indirectement, les nationaux et sociétés de l'autre Partie, des investissements, leur appartenant sur son territoire et dans ses zones maritimes, si ce n'est pour cause d'utilité publique et à condition que ces mesures ne soient pas discriminatoires, ni contraires à un engagement particulier.
>
> Les mesures de dépossession qui pourraient être prises doivent donner lieu au paiement d'une indemnité prompte et adéquate dont le montant doit représenter dans tous les cas la valeur pleine et entière des investissements concernés.
>
> Cette indemnité, son montant et ses modalités de versement sont fixés au plus tard à la date de la dépossession. Cette indemnité est effectivement réalisable, versée sans retard et librement transférable. Elle produit jusqu'à la date du versement, des intérêts calculés au taux d'intérêt agréé par les Parties contractantes."

218. The United States prototype treaty (annex V) deals with the matter in article III which provides that investments "shall not be expropriated or nationalized directly or indirectly ... except ...". As in the Dutch text, non-discrimination is mentioned. It is recalled that the Federal Republic of Germany model provides for most-favoured-nation treatment. Like the United Kingdom

model agreement, the United States draft refers to "prompt, adequate and effective" compensation. A special feature of the United Kingdom text is that it requires the public purpose to be "related to the internal needs" of the expropriating party; in other words, nationalization must not be used as a tool in a State's foreign policy (see para. 232 below). A second paragraph of the same article is intended to protect the rights of shareholders:

> "Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of these shares."

219. The 1986 Swiss "standard draft" contains the following article 5 (1):

> "Aucune des Parties Contractantes ne prendra, directment ou indirectement, des mesures d'expropriation, de nationalisation ou toute autre mesure ayant le même caractère ou le même effet, à l'encontre d'investissements appartenant à des ressortissants ou à des sociétés de l'autre Partie Contractante, si ce n'est pour des raisons d'intérêt public et à condition que ces mesures ne soient pas discriminatoires, qu'elles soient conformes aux prescriptions légales et qu'elles donnent lieu au paiement d'une indemnité effective et adéquate. Le montant de l'indemnité, intérêt compris, sera réglé dans la monnaie du pays d'origine de l'investissement et sera versé sans retard à l'ayant doit, sans égard à son domicile ou à son siège."

220. Article 7 of the AALCC model A does not diverge from the others on the essential conditions for expropriation or nationalisation. It should be noted that it reflects the United States formula in paragraph 1 and also in paragraph 3 concerning (as in the United Kingdom model agreement but in more detail) the protection of shareholders' interests.

221. It should also be noted that AALCC model B, more in line with the Charter of Economic Rights and Duties of States, is different on several points and offers alternative wordings in its article 7. Alternative 1 of paragraph (i) refers to the contracting parties' "sovereign rights in the matter of nationalisation or expropriation", subject to the payment of "appropriate compensation" and the respect of any "assurances given", both as regards the principle of expropriation/nationalization and the determination of appropriate compensation and its mode of payment. Alternative 2 admits the condition of "public purpose" or "national interest" (a much wider term) and stipulates "prompt payment" of appropriate compensation. The alternative wordings in paragraph (ii) give two different definitions of appropriate compensation (referring, respectively, to "recognized principles of valuation" and to "equitable principles") which will be examined later.

## 2. Variations in concluded treaties

222. An examination of the corresponding provisions of bilateral investment treaties actually concluded by the major capital-exporting countries reveals very little variation from what is proposed in the model treaties. Some of these depend

on the time of signature and reflect earlier versions of the model drafts. Recent drafts tend, in fact, to be rather more precise in matters of expropriation, notably as regards the modalities of compensation. A number of the earlier treaties concluded by the Federal Republic of Germany (but also some more recent ones) follow the wording included in its 1959 treaty with Pakistan:

> "(2) Nationals or companies of either Party shall not be subjected to expropriation of their investments in the territory of the other Party except for public benefit against compensation, which shall represent the equivalent of the investments affected. Such compensation shall be actually realizable and freely transferable in the currency of the other Party without undue delay. Adequate provision shall be made at or prior to the time of expropriation for the determination and the grant of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process of law."

In these treaties, the first sentence of the corresponding paragraph of the protocol refers, inter alia, "to the transfer of an investment to public ownership, to the subjection of an investment to public control or to similar interventions by public authorities".

223. The treaty between the Federal Republic of Germany and Mali includes returns in the expropriation provisions ("investments ... and the profits thereof"). The agreements concluded, respectively, between Switzerland and Indonesia and the Netherlands and Kenya refer to expropriation measures taken against the "investments, goods, rights or interests" of the investor. Agreements concluded by Sweden include "current income" from an investment and, in the event of liquidation, "the proceeds from the liquidation", a matter which can normally be considered covered by the rules on transfer.

224. The expropriation provisions of the 1979 agreement between the Federal Republic of Germany and Romania (art. 3) differ in several respects from the Federal Republic of Germany model treaty. While the conditions of "public interest" and "just compensation" are maintained, it is specified that the procedure for determining the amount of compensation is governed by the law of the host State. The legality of an expropriation measure can only be challenged, as far as Romania is concerned, through judicial proceedings in the host State, if the expropriation is not decided by law or by a decree of the State Council (Government) or a presidential decree. Instead, the decision concerning the amount of compensation can be attacked in courts as well as under the International Centre for Settlement of Investment Dispute (ICSID) procedure if a divergence of views persists after exhaustion of local remedies. The treaties concluded by Romania with other western countries are closer to the standard formulations. See, for example, the corresponding provision in article 4 of the agreement with the United Kingdom:

> "The investments of capital of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except in the public interest, under due process of law and against compensation. Such compensation shall amount to the value of the capital on the date of expropriation, shall be effectively realizable, be freely transferable and

made without delay. Not later than the date of expropriation, a procedure shall be established to determine the amount and method of payment of compensation."

The following sentences, concerning the possibility of judicial review of the amount of compensation, including the ICSID clause, correspond to that in the aforementioned text.

225. The agreements concluded by China do not diverge substantially from the standard expropriation provisions. An example is article 3 of the 1982 agreement with Sweden:

"Neither Contracting State shall expropriate or nationalize, or take any other similar measure in regard to, an investment made in its territory by an investor of the other Contracting State, except in the public interest, under due process of law and against compensation, the purpose of which shall be to place the investor in the same financial position as that in which the investor would have been if the expropriation or nationalization had not taken place. The expropriation or nationalization shall not be discriminatory and the compensation shall be paid without unreasonable delay and shall be convertible and freely transferable between the territories of the Contracting States."

226. Other agreements, however, refer simply to "compensation" without a qualifying adjective or, as above, another indication as to how the amount of compensation is to be determined (for example, article 4 of that concluded with the Federal Republic of Germany (annex II), but the qualification is laid down in the Protocol to the treaty (ed. art. 4 (c)).

## B. Conditions of expropriation/nationalization

227. As already mentioned, practically all bilateral investment treaties subject expropriation measures to the four classical conditions: public interest, non-discrimination, compensation, and judicial review. As for the non-discrimination condition, most treaties either stipulate that expropriation/nationalization must not be discriminatory, or they provide for most-favoured-nation treatment (sometimes with specific reference to compensation), or both.

### 1. Public interest

228. The concept of public interest (or public purpose) is to be found in practically all bilateral investment treaties and model drafts (with the above-mentioned exception of AALCC model B), although sometimes different terminology is used, such as "public benefit", "national interest" or "social interest".

229. One may speculate about the wider or more restricted meaning of one or the other term used. When the Federal Republic of Germany concluded its treaty with Panama in 1983, it was stated in an exchange of letters that the term "social interest", the inclusion of which was desired by Panama, covered measures

considered necessary by the national authorities in the interest of the community. One would normally assume that this is covered by "public purpose".

230. There is no agreed definition of "public purpose" in international law nor is there a standard definition common to all national legal systems. For this reason, it is normally the courts, or an arbitration tribunal, which are called upon to take a decision when the "public purpose" character of an expropriation is contested. The latter, and international courts in particular, would normally grant Governments a very wide margin of appreciation of what comes within the concept, in the light of general government policy. 43/ This also implies that the contents of the concept may change with successive Governments and, *a fortiori*, that it may differ according to the internal order of the countries concerned. In any case, there is a considerable body of opinion that under international law it is a matter for the national system concerned to determine what is in the public interest.

231. On the other hand, capital-exporting countries (and not only those of the developed world) seem to attach importance to it as a matter of principle and as a possible safeguard against arbitrary measures by host Governments.

232. As can be seen from the provisions quoted earlier, an attempt has been made in the United Kingdom model agreement to delimit the range of the concept. This provision, which also appears in the investment treaties concluded by the United Kingdom, refers to a "public purpose related to the internal needs" of the expropriating country. The same wording can be found in article 7 of the 1980 Agreement between the Republic of Korea and Sri Lanka. The intention here is to exclude from the category of purposes justifying expropriation or nationalization foreign affairs considerations. 44/

233. Some bilateral investment treaties use a combination of terms. For example, the agreement between Belgium and Cameroon would only permit dispossession "*mesure privative ou restrictive de propriété*" if there are imperative reasons of public interest, security or national interest "*des impératifs d'utilité publique de sécurité ou d'intérêt national*". The treaty between the United States and Panama (like that between the Federal Republic of Germany and Panama) refers to a "public or social purpose".

234. In view of the philosophy underlying the Charter of Economic Rights and Duties of States, some countries may consider any reference to a public purpose unnecessary. AALCC model B has already been mentioned, according to which a host country would simply exercise its sovereign rights in expropriating foreign property. The agreement between Singapore and Sri Lanka (art. 4) admits expropriation or nationalization "for any purpose authorised by law" (but against "adequate, effective and prompt payment of compensation"). The reference to public interest has also been omitted in the convention between France and Malaysia (art. 3).

## 2. Compensation

### The principle of compensation

235. The question of the type of compensation is an outstanding issue in the negotiations on the United Nations Code of Conduct on Transnational

Corporations. 45/ Some developing countries have argued that questions of expropriation/nationalization are within the competence of the host State. Therefore, controversies over compensation must be settled under that State's domestic law and by its tribunals, unless other settlement procedures are freely agreed upon between the States concerned. The major capital-exporting countries have objected to this approach. They insist on the relevance of traditional rules of customary international law with respect to the taking of alien property. In their view, therefore, the violation of these rules engages the expropriating State's international responsibility and calls for international dispute settlement procedure.

236. The international standards of compensation, set by the community of States several decades ago and applied in the decisions of arbitral tribunals, were first challenged by the Soviet and Mexican revolutions. Later on, the territorial changes in the wake of the First World War, and finally the decolonization process which followed the Second World War, have led to the questioning of these standards by the new socialist and developing States as being contrary to their interests. It has been suggested that the conclusion of bilateral investment treaties was intended in large part to prevent what was considered by some western developed countries as a process of erosion of traditional rules of customary international law.

237. The classic compensation formula of "prompt, adequate and effective" has been used in the United Kingdom model agreement and in the prototype treaty of the United States (annex V, art. III, para. 1), as well as in a number of treaties 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 AALCC Model A (art. 7) and in the 1981 Agreement of the Organization of the Islamic Conference (art. 10: prompt payment of adequate and effective compensation) but combined with a reference to domestic law. On the other hand, if the term is not further specified in the treaty, there may well be different interpretations of what is "prompt" and "effective", and, above all, what is "adequate".

238. Other bilateral investment agreements have used different wordings but with similar effects (see paras. 239-256 below).

The amount of compensation

239. The United States prototype treaty explains what is to be understood by "adequate" compensation: it must be "equivalent to the fair market value of the expropriated investment immediately before the expropriating action was taken or became known" (annex V, art. III, para. 1). It shall include interest as from the date of expropriation. The United Kingdom version refers to the "market value", the rest of the definition being identical in substance.

240. Under the model treaty of the Federal Republic of Germany, "compensation shall be equivalent to the value of the investment expropriated immediately before the date the expropriation or nationalization was publicly announced" (annex II, art. 4 (2)). In the Protocol, it is specified that "value" means market value. If the latter cannot be determined, other "criteria of value" are to be applied. If the parties (that is, the host State and the investor) cannot agree within three months, the matter shall be submitted to ICSID for settlement. The latter

provision, however, appears only in the more recent treaties concluded by the Federal Republic of Germany.

241. The Swiss "standard draft" (art. 5) uses the form "indemnité effective et adéquate", not further defined, but including interest. Both the 1979 and 1987 Dutch model agreements propose "just compensation" and defines it as "the genuine value of the investments affected". It is of interest to note that "just compensation" is also the term used in article 712 of the latest restatement of the Foreign Relations Law of the United States. 46/

242. The AALCC model A stipulates that compensation is to be computed "in accordance with recognized principles of valuation such as fair market value". But where the 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 expatriated and other relevant factors" (annex VI, art. 7 (ii)). The same approach is found in the second alternative of model B (art. 7 (ii)), whereas alternative 1 refers to "recognized principles of valuation".

243. To sum up, market value (also referred to as "fair market value", "actual value", "real value" or "commercial value") is the method generally used for the valuation of expropriated assets. There are some variations. For example, the 1982 agreement between Sweden and China provides for compensation "the purpose of which shall be to place the investor in the same financial position as that in which the investor would have been if the expropriation or nationalization had not taken place". Instead, China's 1985 agreement with Austria, similar to that with the Federal Republic of Germany, refers to the value of the investment immediately before the expropriation became public knowledge.

244. As for recent conventions concluded by France, that with Pakistan (art. 5) refers to prompt and adequate compensation, representing in any case the full value of the investments concerned "une indemnité prompte et adéquate dont le montant doit représenter dans tous les cas la valeur pleine et entière des investissements concernés"; according to that with Nepal, compensation must be prompt and just, and calculated with reference to a "normal economic situation"; that with Israel adds the words "before any threat of dispossession" (antérieur à toute menace de dépossession).

245. The Belgium/Singapore agreement provides for the market value of the assets involved; however, the "party adversely affected" has the right to prove that another valuation should be used. The United Kingdom/Philippines agreement will determine the amount of compensation in accordance with the "market value" of the investments expropriated, or, in the alternative, "in the absence of a determinable market value, the actual loss sustained on or immediately before the date of expropriation".

246. The frequent reference to the value of an investment before expropriation, or before the intention to expropriate became known, is intended to protect the investor against the reduction of the market value which would normally (but not necessarily, as shown by the 1981 nationalization in France) 47/ occur in such a situation.

247. In the Netherlands/Sudan agreement, the compensation shall represent the equivalent of the "depreciated value of the investment affected". Apart from the

AALCC model agreements (see above), this is the only known agreement that recognizes depreciation as an element in the determination of the amount of compensation.

248. Sometimes there is a reference to international law. Thus, the agreement between Switzerland and the Central African Republic, 1973, (art. 6) refers to "effective and equitable compensation in conformity with international law"; the 1976 agreement with Jordan (art. 4) to "effective and adequate compensation according to international law". In the Netherlands/Kenya agreement, the payment of adequate compensation must be in accordance with "generally recognized rules of international law". The United States model (art. III, para. 1) contains a reference to international law through cross-reference to article II, paragraph 2.

249. In this connection, it should be mentioned that other standards, though not normally used in bilateral investment treaties, have been applied by Governments - such as going concern value, replacement value or book value.

250. Whereas the fair market value of a property would be the amount at which a seller willing to sell at a fair price and a buyer willing to buy at a fair price would transact, the going concern value takes into account the loss of future profits (lucrum cessans) and sometimes of intangibles (such as goodwill). The going concern value, on the other hand, is often the standard used to determine fair market value. This might be difficult to determine if the nationalized/expropriated property has not made any profit and/or if its profits have been negatively affected by government policies. Replacement value is based on the net value of the property at current prices after depreciation, but does not take into account the future profitability and intangible goods. These three methods have been favoured by capital-exporting countries.

251. Some developing countries, on the other hand, prefer the book value method. It may consist of either the net book value (depreciated asset value) or the updated book value (also called the adjusted book value, which takes into account inflation), or just the tax value reported by the enterprises. Although severely criticized by developed countries for its alleged unfairness, the net book value seems to have been used in compensation payments.

252. More recently, a few specialists have raised the possibility of resorting to the discounted cash flow method. Since nationalizations occur frequently to carry out fundamental changes in the control over strategic sectors in the economy of developing countries, the requirement to pay the "full market value" tends to impede their sovereign right to reorganize their economic system. Some developing countries feel that additional factors should be considered, such as excessive profits, amortization of the initial investment, undue enrichment as a result of historical exploitation, and unpaid taxes and labour benefits owable. 48/

253. Most bilateral investment treaties provide for the payment of interest, normally from the date of expropriation but sometimes only for unjustified delays in payment. The United States/Egypt agreement (art. 3, para. 1) requires "payments for delay as may be considered appropriate under international law". The Japan/Sri Lanka agreement refers to an "appropriate interest" rate taking into account the length of time until payment. Under article 4 of the treaty between the Federal Republic of Germany and Israel, the amount of compensation "shall carry interest in the circumstances and upon the terms applicable to the nationals of the host country".

The modalities of payment

254. The United States prototype treaty provides that the compensation must be paid without delay, fully realizable and freely transferable. These three ideas recur almost invariably in investment treaties.

255. The condition of prompt payment no doubt leaves a margin of interpretation. It does not necessarily mean that the amount due is to be paid immediately. None the less, some bilateral investment treaties (for example, those concluded by Jordan with France and the United Kingdom) fix the date of the payment of compensation no later than the day of dispossession, "unless otherwise mutually agreed between the parties concerned". Others only require that the measures to determine the value of compensation should be established at the time the expropriation occurs. The 1976 Romania/Egypt agreement (art. 3) states that "the amount and manner of payment of the compensation shall be established at the time of the expropriation at the latest". A few treaties (Federal Republic of Germany/Israel, Norway/Indonesia, France/Indonesia) provide that "provision shall be made in an appropriate manner at or prior to the time of expropriation for determination and payment of compensation".

256. The condition that the compensation must be "fully realizable" implies that payment must not be made, for example, in non-negotiable government bonds. The requirement of free transferability needs no further explanation. It is interesting to note, however, that article 3 of the 1967 OECD Draft Convention required transferability only to the extent necessary to make it effective for the expropriated investor.

### 3. Legality and judicial review

257. The model treaty of the Federal Republic of Germany provides that the "legality of any such expropriations, nationalization, or comparable measures and the amount of compensation shall be subject to review by due process of law" (annex II, art. 4 (2)). In other words, the investor is to be given the possibility of contesting both the conformity of the dispossession as such and of the amount of compensation offered with the law of the host country. This wording appears in practically all the treaties concluded by the Federal Republic of Germany.

258. The United Kingdom model agreement would entitle the investor to "prompt review, by a judicial or other independent authority ... of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph". Some of the agreements concluded by the United Kingdom contain the words "of whether the expropriation is in conformity with domestic law" instead of "of his or its case". The Netherlands model agreements (1979 and 1987) simply require that expropriatory measures are taken "under due process of law", without reference to judicial review. Neither is mentioned in the Swiss "standard draft". The same applies to the majority of conventions concluded by France.

259. AALCC model A provides that, in the absence of agreement between investor and the host State, the determination of compensation shall be referred to "an independent judicial or administrative tribunal or authority competent under the law of the expropriating State" or to arbitration under an agreement between the investor and the host State (annex VI, art. 7 (ii)).

260. The bilateral investment treaties concluded by Romania provide that, if possible, disagreement on the amount of compensation should be settled amicably. If this proves impossible, the next step is judicial review in the host country. If the disagreement persists, it can be referred to conciliation or arbitration under ICSID procedures.

## C. Indirect expropriation

261. A State may take a variety of measures which, although formally may not be expropriations or nationalizations of foreign investment, have the equivalent effect of dispossessing the investor. These measures are sometimes referred to as "indirect" or "creeping" expropriation. 49/ In the Starret case before the Iran-United States Claims Tribunal, set up under the 1979 Algiers Agreement, the Tribunal in effect described a similar type of situation as follows:

> "It is undisputed in this case that the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated. However, it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner." 50/

262. Most bilateral investment treaties refer to indirect expropriation in more or less general formulations, such as:

(a) "Measures tantamount to expropriation or nationalization (creeping expropriation)" (United States prototype treaty);

(b) "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);

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

(d) "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);

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

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

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

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

263. The AALCC model A 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.

264. A few model treaties and the treaties concluded on this basis are somewhat more explicit. The Federal Republic of Germany model treaty only refers to "any other measure the effects of which would be tantamount to expropriation or nationalization" (annex 11, art. 4 (2)); the protocol of most treaties concluded by the Federal Republic of Germany in recent years gives the following definition of "expropriation":

> "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."

265. Whereas the 1984 version of the United States prototype treaty only refers to "measures tantamount to expropriation or nationalization", some of the treaties concluded on the earlier more detailed version of the prototype treaty, such as the United States/Haiti treaty add the words "including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control or economic value".

266. The Swiss "standard draft" (art. 5(i)), only refers to "mesures d'expropriation, de nationalisation ou toute autre mesure ayant le même caractère ou le même effet". It should be noted, however, that in accordance with the treatment provisions in article 3 (i), the host State "n'entravera pas, par des mesures injustifiées ou discriminatoires, la gestion, l'entretien, l'utilisation, la jouissance, l'accroissement, la vente et, le cas échéant, la liquidation de tels investissements".

267. One of the most comprehensive definitions 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".

## V. THE SETTLEMENT OF DISPUTES

268. Many bilateral investment treaties have traditionally been concerned only with disputes between the contracting parties on the application and interpretation of the treaty. However, there seems to be a trend towards including provisions on the settlement of disputes between the investor and the host State. Since the conclusion of the 1965 Washington, D.C. Convention on the Settlement of Investment Disputes between States and Nationals of other States, so-called ICSID clauses (of varying substantive content) have been included in many bilateral treaties. Finally, subrogation clauses are a regular feature of these treaties.

### A. Disputes between the contracting parties

269. Disputes between States under a bilateral investment treaty can only concern what has been agreed in the treaty. One party may consider that the other party has not respected a provision of the treaty or that it gives an inappropriate interpretation of what is stipulated. For example, a host State might take measures that are not in conformity with the national treatment standard or, having granted preferential treatment to investments of a third State, it might neglect to draw the consequences from the most-favoured-nation clause. A host State might complain that the other party has not introduced incentive measures as agreed in some bilateral investment treaties, and so on.

270. In theory, a settlement procedure between the contracting parties could not be directly based on the breach of an investment contract. But many bilateral investment treaties contain an "umbrella clause" (see paras. 164-170 above) making respect of such a contract an obligation under the treaty. Thus, a breach of contract may in the last resort, be the subject of inter-State proceedings.

271. Two settlement procedures are foreseen in all bilateral investment treaties: settlement through negotiations (other terms used are "consultation", "exchange of views" or "diplomatic negotiations") and *ad hoc* arbitration.

#### 1. Dispute settlement by negotiation

272. The model agreement of the Federal Republic of Germany provides that disputes, "divergencies", relating to the interpretation or application of the treaty "should, as far as possible, be settled by the Governments of the two Contracting Parties" (annex II, art. 11). If this proves impossible, the matter can be submitted, at the request of either party, to an arbitration tribunal constituted *ad hoc*. Contrary to other model texts, no time-limit is set for the settlement by negotiation before recourse can be had to arbitration. The same is true for the corresponding United Kingdom, United States and AALCC texts. The Netherlands models of 1979 and 1987 refer to "a reasonable lapse of time" (annex III, art. 13), (which raises the difficult question of what is "reasonable" in this context). 51/ Conventions concluded by France normally provide for a period of six months; the Swiss "standard draft" provides for 12 months. Otherwise there are no substantial differences between existing treaties.

273. In a few cases, the settlement by negotiation has been institutionalized. Thus, under the treaties concluded respectively between the Federal Republic of Germany and Chad, and Belgium and Cameroon, the contracting parties will institute a joint governmental commission (Commission mixte gouvernementale), which will meet at the request of either party, examine questions arising from the application of the treaty and submit proposals for their settlement. If the dispute cannot be resolved through the above Commission, it will be submitted to an arbitral tribunal.

## 2. Ad hoc arbitration

274. Again, the corresponding provisions are very largely on the same lines in model agreements and concluded treaties; they are similar to what is often stipulated in bilateral agreements concerning or including ad hoc arbitration:

> "The Tribunal consists of three members. Each Contracting Party appoints one, and the two agree between them on a national or a third State as their Chairman. The appointments are to be made, respectively, within two or three months from the date proceedings have been initiated by a Contracting Party."

275. If these time-limits are not observed, each of the contracting parties may turn to an outside authority to make the necessary appointments. This is most often the President of the International Court of Justice or the Secretary-General of the United Nations. Sometimes, it is the President of the World Bank (France/Singapore), the Secretary-General of the Arab League (Egypt/Sudan; Tunisia/Kuwait) or the President of the International Chamber of Commerce (France with the Republic of Korea and the Sudan). In the agreements concluded by France with El Salvador and Singapore, the parties may agree in advance to "appoint for a period of five years, which may be renewed, a person who in case of litigation could carry out the duties of the Chairman of the tribunal".

276. The decisions of the tribunal are reached by majority votes and are binding "définitives et obligatoire" on the parties. This excludes any other remedy except as provided by the arbitral tribunal. But the res judicata character of an award would not normally exclude a request for revision or interpretation. This is not normally mentioned in bilateral investment treaties (with the exception of recent French conventions, under which a party may ask for interpretation) but it is likely to be covered in the rules of procedure.

277. Under the Convention between France and Sri Lanka the decisions of the tribunal are "définitives et exécutoires de plein droit à l'égard des deux Parties contractantes", which would exclude the argument of State immunity against execution.

278. Each party bears the cost of its "own" member and its representatives in the proceedings. The cost of the chairman and all remaining expenses are to be split between the two parties.

279. The tribunal fixes its own rules of procedure. This is obviously a significant decision, since the applicable procedural rules may affect critical questions such as the right to present witnesses, the use of direct and cross-examination, pre-hearing disclosure of relevant evidence, and the scope of expert testimony.

280. An exception to this latter point is the United States prototype treaty according to which, "in the absence of an agreement by the Parties to the contrary, the Model Rules on Arbitral Procedure adopted by the International Law Commission in 1958 (General Assembly resolution 1262 (XIII) shall govern" (annex V, art. VII). According to the same article, all hearings are to be completed within six months of the date of selection of the third arbitrator, two more months being allowed for rendering the tribunal's decision.

281. The United States prototype treaty exempts from articles VI (host State-investors disputes) and VII (inter-State disputes) matters for which other means of settlement have been agreed between the parties. This concerns, _inter alia_, the procedures laid down in investment guarantee agreements.

282. A former version of the United States text had provided that the negotiation phase, if unsuccessful, should be followed by seizure of the International Court of Justice, subject to agreement by the parties. Only in the absence of such agreement would the dispute be submitted to _ad hoc_ arbitration. This solution was adopted in the treaties concluded before 1985.

### 3. Applicable law

283. Few bilateral investment treaties contain special rules on the substantive law applicable in inter-State arbitration. It may well be considered unnecessary. In any case, it means that the matter is left to be decided by the arbitral tribunal. But there are some exceptions. Thus, the Protocol on Investment to the 1964 Economic Co-operation Agreement between Iraq and Kuwait provides in its article 7 (3) that "in its arbitration and decisions on the subject of dispute the arbitration committee shall apply the provisions and rules of international law and usage and commercial practice" (_lex mercatoria_). Under article X (3) of the Investment Agreement between Egypt and Romania "the awards of the Arbitration Court shall be based on the provisions of this Agreement and other relevant agreements between the two Parties, as well as the principles and rules of Public International Law". The same formula will be found in other treaties concluded by Romania (Denmark, United Kingdom, Sri Lanka, Sudan) and an almost identical wording is in the 1985 agreement between China and Austria. But Austria's agreement with Romania refers only to "international law"; the United States prototype treaty, to "the applicable rules of international law".

284. According to some treaties concluded by France, such as France/Malta (art. 9) and France/Malaysia (art. 8), the tribunal shall apply "les dispositions du présent Accord en conformité avec les principes du droit". One may assume that this wording which also appears, for example, in the agreement between Belgium and the Republic of Korea, is to be understood in the sense of the general principles of law, as mentioned in Article 38 of the Statute of the International Court of Justice, textually incorporated into the aforementioned 1958 Model Rules of Arbitration. Some agreements concluded between Arab countries (e.g., Tunisia/Libyan Aran Jamahiriya) refer instead to the Shari'a.

285. The treaty between the Federal Republic of Germany and Israel (art. 10 (b)) provides that the tribunal shall decide "on the basis of the treaties existing between the Contracting Parties and of general international law and taking into account the local law of the Contracting Party in which the investment is situated". This is also one of the rare treaties which refers to the exhaustion of

local remedies in connection with inter-State arbitration: "Local judicial remedies shall be exhausted before any dispute is submitted to an arbitration tribunal". The Federal Republic of Germany's treaty with Ecuador (art. XI.5) stipulates that arbitration shall not affect the jurisdiction of the courts of the home State. These clauses would, of course, only be meaningful to the extent that there is a direct link between the arbitration procedure initiated by the home State and a dispute between an investor and the host State, i.e., in the case of diplomatic protection in a matter coming within the substantive scope of the treaty.

286. A few agreements allow an option for the tribunal, at any stage of the proceedings before the final decision, to propose to the parties that the dispute should be settled amicably (agreements concluded by the Netherlands with the Sudan and Kenya; agreement concluded between Belgium and the Republic of Korea). Some of the agreements also give the parties the right, instead of choosing the applicable law, to allow the tribunal to decide the dispute ex aequo et bono, that is, on the basis of equity and justice, without being bound by strict law (the majority of the agreements concluded by the Netherlands contain this clause).

### 4. Diplomatic protection

287. Diplomatic protection in connection with investments remains a controversial issue. Many developing countries regard it as an instrument for interfering in their internal affairs and for according private interests primacy over national development goals. 52/

288. Diplomatic protection can take different forms. Article 27 of the 1965 Washington Convention distinguishes it from "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute". In reality it may be difficult to draw the line between the two. In the domain of investment protection under bilateral investment treaties, a Government might espouse the claim of its national (company), both in the negotiation phase of the settlement procedure as in arbitration.

289. The exercise of diplomatic protection under customary international law are subject to the following conditions:

(a) The protected person/company does effectively hold the nationality of the protecting State (which was the problem in the Notebohm and Barcelona Traction cases); however, in a dispute over an investment covered by a bilateral investment treaty, this question does not arise to the extent that the nationality of physical and legal persons is defined ad hoc in the treaty;

(b) The national/company has "clean hands", that is that it has not violated the law;

(c) Domestic remedies have been exhausted. 53/

290. The latter condition is rarely mentioned in bilateral investment treaties as far as inter-State settlement is concerned (on its importance in host State-investor settlement procedures, see para. 296 below). Nevertheless, some treaties (for example, those concluded by the Federal Republic of Germany with Ecuador, Egypt, Israel and the Syrian Arab Republic) do make express mention of the local remedies condition. The wording in the agreement with Israel (art. 10, 5)

provides that "local judicial remedies shall be exhausted before any dispute is submitted to an arbitral tribunal", from which one might draw the conclusion that the condition does not apply to the negotiation phase.

### 5. Subrogation

291. Strictly speaking, the right of subrogation has nothing to do with the inter-State dispute settlement procedures laid down in the treaty. It has been included in this section because it nevertheless leads to direct confrontation between the host State and the investor's home State in judicial (and, possibly, arbitral) proceedings. Subrogation clauses are to be found in practically all bilateral investment treaties, including those between developing countries (e.g., Yugoslavia/Egypt, art. 5), but with the exception of those concluded by the United States. Examples are in the Federal Republic of Germany, Dutch and AALCC models A and B (annexes II, III, IV and VI).

292. Subrogation is a well-known technique in insurance contracts. If the victim has received payment from the insurer, the latter, under the terms of an insurance contract, succeeds into the victim's rights and claims against the party which caused the damage. In the same way, subrogation clauses in bilateral investment treaties provide that if an investor has received payment from his national investment insurance against "political risks" the home State or its agency succeeds in the rights or claims of the investor against the host State. While some authors have equated subrogation with diplomatic protection, 54/ it is conceptually a different matter. The former implies a contractual relationship and is normally practised before the courts of the host State. The subrogated home State cannot assert any rights or claims beyond those of its predecessor in title. Whereas the acceptance of subrogation by the host State is provided in the treaty, acceptance by the investor is part of the insurance contract. It is also usual that investors pursue proceedings before the courts of the host State, but as representatives of their Government (or insurance agency) whose instructions they must follow. To mark the distinction between subrogation and inter-State settlement procedures under the treaty, it is also normally stipulated that the subrogation clause is without prejudice to a contracting party's right to have recourse to the latter.

293. The United States prototype treaty (like the treaties concluded by the United States) does not contain a subrogation clause because questions linked to investment insurance by the Overseas Private investment Corporation are covered by Investment guarantee agreements (see paras. 12-13 above). The latter contain a fairly elaborate subrogation clause, similar to that in the United Kingdom model investment agreement.

294. Subrogation is contrary to a strict interpretation of the Calvo Doctrine and has been expressly excluded under the Andean Foreign Investment Code (Decision 24, art. 51). Nevertheless, some members of the Andean Pact such as Bolivia, Equador and Colombia have signed investment guarantee agreements with the United States which provide for subrogation of claims. The 1971 Kuwait Convention on the Arab Investment Guarantee Corporation, instead, not only provides for subrogation but commits the host State to granting "all appropriate facilities to the Corporation to exercise the rights acquired by such subrogation" (art. 21).

295. The Romania/Pakistan agreement (art. 6) will allow subrogation only "after payment of taxes and fees and fulfilment of any duties arising from the documents of admission of the investment".

## B. Disputes between the host State and the investor

296. A number of bilateral investment treaties (for example, those concluded by the Federal Republic of Germany before 1970) do not deal with direct settlement of disputes between the home State and the foreign investor. After the conclusion of the Washington Convention in 1965, ICSID clauses began to appear in newly concluded treaties. The present tendency is to cover the question of dispute settlement between host State and investor in the treaty, whether or not there is also an ICSID clause. 55/

### 1. Overview of treaty provisions

297. The relevant provisions will be found in the model treaty between the Federal Republic of Germany and Saint Lucia (annex II, art. 10), 55/ the Dutch model agreement, 1979 and 1987 versions (annexes III and IV, art. 9); the United States prototype treaty (annex V, art. VI) and AALCC model agreements A and B (annex VI, art. 10).

298. The first-mentioned article was only very recently introduced in a bilateral investment treaty, concluded by the Federal Republic of Germany. It simply provides that if a dispute between the host country and an investor cannot be settled amicably within six months it is to be submitted to the International Centre for Settlement of Investment Disputes (ICSID) arbitration. There is no reference to the exhaustion of local remedies. This corresponds exactly to what can be found in recent conventions concluded by France.

299. The 1979 and 1987 model agreements of the Netherlands refer to conciliation and arbitration procedures only (see paras. 310-322 below). The Swiss "standard draft" (art. 9) provides in the first place for "consultation" between the parties, it being understood that this is without prejudice to the inter-State settlement procedures treated in article 10. The remainder of article 9 is devoted, in some detail, to ICSID.

300. The AALCC model agreements A and B (annex VI) are more elaborate on non-ICSID procedures. Model B provides for three stages in the resolution of disputes: negotiation, conciliation and arbitration. Under article 10 of the AALCC drafts, entitled "Settlement of Investment Disputes", each contracting party consents to the submission of such disputes to conciliation or arbitration (art. 10 (i)). Proceedings to this effect can be initiated by either party to the dispute, if it has not been solved through negotiations within a given period (left open in the draft) and unless the investor has chosen to avail himself of local remedies (art. 10 (ii)) in Model A or after the local remedies have been exhausted in Model B. Conciliation will be under the 1980 UNCITRAL Conciliation Rules, unless ICSID rules can apply (art. 10 (iii)). If conciliation fails, it is to be followed by arbitration within ICSID or under the 1976 UNCITRAL Arbitration Rules (art. 10 (iv) and (v)). Finally, diplomatic procedures between home and host State are excluded while arbitration between the parties to the dispute is proceeding and

thereafter unless the State party to the dispute fails to comply with the award rendered (art. 10 (vi)).

301. The United States prototype treaty is by far the most elaborate on host State-investor disputes. It begins by defining the term investment dispute as including disputes arising in connection with (a) host State-investor agreements, (b) investment authorizations and (c) the treaty in question. As usual, "consultation and negotiation" is to be tried first and may include "non-binding third party procedures". If this fails, the dispute shall be submitted to "previously agreed, applicable dispute settlement procedures" (annex V, art. VI, para. 2). In this connection, the treaty concluded with Panama refers to the Inter-American Commercial Arbitration Commission. No time-limit is indicated nor is there a reference to the exhaustion of local remedies.

302. Paragraph 3 of the same article is devoted to ICSID and paragraph 4 stipulates that in no dispute settlement procedure may a contracting party invoke the argument that compensation has been paid to the investor under his home State's investment insurance. Paragraph 5, in accordance with article 25 (2b) of the Washington Convention and for the purposes of dispute settlement, makes it clear that a company controlled by nationals/companies of a party shall be treated as a national/company of that party.

303. The United Kingdom model agreement does not refer to host State-investor dispute settlement with the exception of the ICSID clause. But some agreements concluded more recently by the United Kingdom also mention other procedures, such as the International Chamber of Commerce and the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL) (United Kingdom/Belize, art. 8). One agreement refers only to arbitration in accordance with UNCITRAL rules (United Kingdom/Sierra Leone, art. 8).

304. The International Chamber of Commerce is also mentioned as an alternative, if ICSID procedures are not applicable, in France's conventions with El Salvador and the Syrian Arab Republic. Otherwise, recent conventions provide only that if an amicable solution is not possible disputes are to be referred to ICSID arbitration. Similarly, the Swiss "standard draft" (art. 9) provides for "consultation" between the parties; to be followed if necessary by ICSID procedures.

## 2. Dispute settlement under ICSID

305. Following the conclusion of the ICSID Convention, under the auspices of the World Bank, establishing the International Centre for Settlement of Investment Disputes between States and Nationals of other States, an increasing number of bilateral investment treaties subsequently concluded, together with all the model agreements in their present version, include so-called ICSID clauses concerning dispute settlement in the framework of ICSID. 56/

### The Washington Convention and the International Centre

306. The Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States was submitted to Governments on 18 March 1965 and entered into force on 14 October 1966. It was intended to provide a system for the resolution of investment disputes, acceptable to both host and home States. The Convention has been remarkably successful as regards the number of countries

which have signed or ratified it. On 30 June 1982 according to the report 1981/82 of the Centre, the Convention had been signed by 88 and ratified by 81 States; 84 international treaties contained an ICSID clause and references to ICSID were to be found in the national laws of 10 countries. By 1987 the Convention had been signed by 96 States.

307. One of the merits of the Convention is that under article 27 it provides that "no Contracting State shall give diplomatic protection, or bring an international claim" unless the other State fails to comply with an award. Another advantage is that, in accordance with article 42 of the Convention, the arbitration tribunal, unless something else is agreed beween the parties "shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

308. ICSID provides sets of model clauses for State contracts (ICSID/5) and for bilateral treaties (ICSID/6). Only the latter are directly relevant to the object of the present study. ICSID offers a set of clauses to be considered for inclusion in bilateral investment treaties which, in summary, provide the following: (a) acceptance of the Centre's jurisdiction, in accordance with article 25 (I) of the Convention; (b) renunciation of diplomatic protection, in accordance with article 27 (II); (c) renunciation of other settlement procedures that may be provided in the treaty, to the extent that ICSID procedures are applicable (III); (d) renunciation of subrogated rights (IV); (e) designation of State agencies in accordance with article 25 (1) of the Convention (V and VI); (f) obligation of the investor to submit to the Centre's jurisdiction (VII); (g) limitation of the protection of the treaty to investors accepting in writing the Centre's jurisdiction (VIII); (h) renunciation of diplomatic protection for investors who refuse to accept the Centre's jurisdiction (IX); (i) commitment by the contracting parties (if they have not yet done so) to sign and ratify the Convention (X).

309. Only some of these suggestions have been taken up in bilateral treaties. There are, so far, no examples of clauses corresponding to model clauses IV to X.

### 3. ICSID clauses in bilateral investment treaties

310. AALCC model A gives preference to ICSID procedures both for conciliation and for arbitration, procedures under the respective UNCITRAL rules being second choice (annex VI, art. 10, paras. (iii)-(v)). Paragraph (vi) on diplomatic procedures corresponds to the above-mentioned ICSID model clause II.

311. The United States prototype treaty refers to ICSID in some detail in paragraph 3 of the aforementioned article VI. A "national or company ... may choose to consent" to ICSID jurisdiction, and if this consent is given, either party may institute proceedings before the Centre, unless (i) the dispute has been submitted to any other previously agreed disputes settlement procedure or (ii) the investor has chosen to seek redress under domestic law. If the parties to the dispute disagree on whether conciliation or arbitration is more appropriate, the opinion of the investor will prevail (annex V, art. VI, para. 3 (a)). Under subparagraph (b) the contracting parties, for their part, agree to ICSID jurisdiction. Paragraph 4 contains the clause already mentioned according to which a host State may not invoke payments to the other party to the dispute under an insurance contract.

312. Article 8 of the United Kingdom model agreement is exclusively devoted to dispute settlement in the framework of ICSID, reproducing to some extent the language of the Convention. Each contracting party accepts ICSID jurisdiction for "any legal dispute arising between the contracting party and a national or company of the other contracting party concerning an investment of the latter in the territory of the former". It also refers to the above-mentioned definition of nationals/companies in accordance with article 25(2b) of the Convention. If a dispute arises and cannot be settled "within three months ... through pursuit of local remedies or otherwise" it can be brought before ICSID (one may wonder if a time limit of only three months leaves the judiciary of the host State a serious chance to resolve the dispute). As in the United States model, the choice between conciliation and arbitration is the investor's. Paragraph 2 of the article confirms the renunciation of diplomatic procedures, unless the dispute is declared outside the Centre's competence or if the State party to the dispute fails to comply with the arbitration award.

313. Conventions more recently concluded by France simply state that if a dispute cannot be settled amicably within six months it is to be submitted to arbitration under ICSID procedures, at the request of either party to the dispute. Earlier conventions, like that between France and Paraguay (art. 8), stipulated acceptance by the contracting parties of ICSID jurisdiction, even in cases of subrogation:

> "... y compris dans les cas ou cette dernière [the home state of the investor] est subrogée dans les droits de l'un de ses nationaux ou sociétés."

314. The Dutch model agreements of 1979 and 1987 leave a choice between conciliation or arbitration (a) under ICSID procedures, (b) under the 1962 "Rules of arbitration and conciliation for settlement of international disputes between two parties of which only one is a State", elaborated by the Bureau of the Permanent Court of Arbitration at The Hague, or (c) through the Court of Arbitration or the Administrative Commission for Conciliation of the International Chamber of Commerce (annex IV, art. 9).

315. As already mentioned, bilateral investment treaties concluded by Romania provide for ICSID arbitration only with respect to disputes concerning the amount of compensation for expropriation.

316. The Federal Republic of Germany, although a party to the Washington Convention since 1966, included only in 1970 a "negative" ICSID clause in the provisions on inter-State settlement procedure (art. 11, para. 6). It stipulates that, in view of article 27 of the Washington Convention, inter-State arbitration will not be appealed to if ICSID settlement procedures are applicable. Only recently has the "positive" ICSID clause in article 10 of the model agreement (corresponding to that used by France) been added.

317. There is no ICSID clause in the bilateral investment treaties concluded by China with Austria, the Federal Republic of Germany and Sweden.

318. The following clause is from an agreement between Singapore and Sri Lanka (art. 10):

"(1) Any legal dispute arising directly out of an investment between either Contracting Party and a national or company of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.

(2) If any such dispute cannot be so settled within six months of it being raised by either Party to the dispute, it shall upon the request of either Party to the dispute, unless such parties have otherwise agreed, be submitted to conciliation or arbitration by the International Centre for Settlement of Investment Disputes (called "the Centre" in this Agreement) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, D.C. on 18 March 1965 (called "the Convention" in this Agreement).

(3) A Contracting Party which is a party to a dispute shall not, at any stage of conciliation or arbitration proceedings or enforcement of an award, raise an objection to the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance policy an indemnity in respect of some or all of its losses."

319. Sometimes, the contracting parties' acceptance of ICSID is expressed more forcefully, as in article 8 of the 1974 agreement between Belgium and the Republic of Korea, according to which "each Contracting Party irrevocably and anticipatorily gives its consent to submit to conciliation and arbitration" pursuant to the ICSID Convention. In contrast, under the agreement between the Netherlands and Indonesia, the investor is to comply with any request for arbitration made by the host country; and under the Netherlands agreements with Kenya and Yugoslavia recourse to ICSID is within the discretion of the State party, which will give "sympathetic consideration" to a request for ICSID arbitration.

320. As has been seen, the time-limit before recourse can be had to arbitration may include the condition of exhaustion of local remedies. Periods may vary between 3 months and 12 months. Article 7 of the agreement between Romania and Sri Lanka provides for a time-limit of 6 months. However, under the second sentence, "each Party requires the exhaustion of local administrative or judicial remedies as a condition of its consent to conciliation or arbitration" by ICSID.

321. Other agreements (e.g., Belgium's bilateral investment treaties with Bangladesh, Egypt, Indonesia and the Republic of Korea) expressly stipulate that consent to ICSID settlement "implies renunciation of the requirement that the internal administrative or judicial resorts should be exhausted".

322. Where there is no specific mention of domestic remedies or a time-limit, it must be concluded that the provisions under article 26 of the Washington Convention apply, according to which a contracting party may require the exhaustion of domestic administrative and judicial remedies.

## CONCLUSIONS

323. A study of bilateral investment treaties raises a number of questions to which it is not always easy to provide clear answers, the more so as several of these questions are interdependent.

324. First, there is the question of the practical effect of the treaties. Bilateral investment treaties are intended - at least their declared purpose is - to produce a double effect:

(a) To encourage the flow of foreign direct investment - it being understood that, despite the formal reciprocity of bilateral investment treaties, and leaving aside capital flows between developing countries of comparable economic strength, this means essentially investment by developed capital-exporting countries in developing countries;

(b) To secure the protection of investment by stipulating norms relating to the treatment of investment and investors.

325. Have bilateral investment treaties proved effective in achieving these objectives?

326. Another question concerns the mutuality of benefits which accrue to capital-exporting and capital-importing countries under such treaties. Are bilateral investment treaties one-sided, despite their formal reciprocity?

327. Finally, there is the issue of the relationship between the rules laid down in bilateral investment treaties and general international law. Are bilateral investment treaties custom-forming, as is often claimed by the developed market-economy countries? How do they relate to the work of the United Nations?

328. The following concluding observations are not intended to be definite answers on an extremely complex and controversial issue. They intend to do no more than provide a number of elements relevant to the search for answers to the questions raised.

### 1. The quantitative importance of bilateral investment treaties

329. Some indications on the growth of the network of bilateral investment treaties have been provided in part one of the present study. They have by now largely replaced earlier forms of treaties for the protection of foreign direct investment, such as friendship, commerce and navigation treaties (FCNT) and technical co-operation or commercial agreements including investment protection clauses. It is significant in this regard that the most important home countries, the United States and Japan, have recently switched from FCNT to bilateral investment treaties. It has often been stressed that the absence of a multilateral framework for investment appears to have intensified the need to rely on concluding bilateral investment treaties.

330. By mid-1987, over 260 bilateral investment treaties had been concluded, mostly between developed and developing countries, but also between developing countries and between socialist countries and developed and developing countries. The

growing number of bilateral investment treaties concluded between developing countries illustrates the trend towards South-South co-operation, but also the emergence of new capital-exporting centres outside of Western Europe, North America and Japan.

331. But it would seem that, in spite of their growing popularity, bilateral investment treaties remain a limited phenomenon in as much as only some 70 developing countries, that is about half the present membership of the Group of 77, which, now, has more than 120 members, are parties to one or more treaties. It must also be noted that a number of developing countries have not concluded any new bilateral investment treaties in over 10 years, which might suggest some disenchantment with this concept. 57/ In addition, few Latin American countries have concluded bilateral investment treaties, and most of those have not yet ratified them. A number of influential developing countries outside Latin America, such as India and Nigeria, have not concluded these treaties (although India concluded an investment agreement in the form of an exchange of notes with the Federal Republic of Germany). Furthermore, a large number of developing countries have concluded only one or two bilateral investment agreements, 58/ while 14 developing and socialist countries 59/ are parties to about half of all such agreements.

332. On the other hand, among developed countries, the situation is fairly similar since the Federal Republic of Germany alone has concluded about one fourth of all bilateral investment treaties and since two of the top capital-exporting countries (United States and Japan) are just starting to conclude this type of treaties with developing countries.

333. A quantitative assessment of bilateral investment treaties naturally invites an examination of their numerical possibilities. If all the members of the Group of 77 concluded bilateral investment treaties with all the members of OECD, one would arrive at a figure of 2,500. If each of the 66 countries of the African, Caribbean and Pacific Group, which are parties to the third Lomé Convention, concluded an investment treaty with each of the 12 members of the European Economic Community, the result would be 792 treaties. Of course, one could further restrict the number of potential contracting parties to investment treaties to include only those between whom substantial investment relations could be developed. Nevertheless, it is obvious that the present number of bilateral investment treaties remains far below the number of treaties that could be concluded by all the countries concerned with such investment relations, if they were prepared to do so; and although the number of bilateral investment treaties will no doubt continue to increase in the coming years, it is doubtful whether the gap will ever be closed. This is an important element in the discussion (see paras. 352-358 below) on whether, and to what extent, bilateral investment treaties contribute to the formation of customary international law.

334. One may also speculate whether the development of investment insurance under the World Bank's Multilateral Investment Guarantee Agency will reduce the attractiveness of bilateral investment treaties to developing countries. Indeed, it is known that some of them have only concluded such treaties because this made it possible for investments to be insured by the investor's home country (which, in turn, is an important factor in the latter's decision to invest).

## 2. The effectiveness of bilateral investment treaties

335. Bilateral investment treaties have been initiated by developed countries to provide legal protection under international law to their investments in developing countries and thus to reduce, as much as possible, the political risks involved in these countries. For developing countries, bilateral investment agreements have been entered into mostly in order to improve their "foreign investment climate" and thus to attract more foreign investment.

336. This is so despite the fact that, as has been shown in part two, some of the treatment standards agreed in bilateral treaties may be difficult to implement in reality. While the legally binding character of the various protection clauses is not in question, questions have been raised about the meaning and effect of national and most-favoured-nation treatment in the specific context of investment agreements.

337. 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 and companies) are comparatively limited in the matter. Most-favoured-nation treatment is not 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 (1967 OECD draft convention, art. 1), 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.

338. 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.

339. Absolute treatment provisions 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 out 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 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.

340. It is true that the conditions for expropriation/nationalization are practically always clearly spelt out. 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.

341. 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. The market value of an investment is not always easy to ascertain. It 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.

342. 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 procedures for the direct settlement of disputes between investor and host Government are foreseen in bilateral agreements. While safeguarding the sovereignty of host States, acceptance of ICSID settlement procedures no doubt favours an atmosphere of mutual confidence between investor and host State and thus contributes indirectly to the effectiveness of bilateral agreements. However, as is well known, the principle of international settlement procedures for investment disputes is not accepted by all members of the international community.

343. 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.

344. Of course, in order to make a fair and complete evaluation of the experience with bilateral investment treaties it would be necessary to engage in an in-depth examination of individual investment situations affected by these treaties. Such an inquiry, however, exceeds the ambit of this study. Pending that evaluation, the foregoing observations are meant to point out some of the advantages and shortcomings which appear to derive from the main clauses in this type of arrangement.

345. But despite some apparent shortcomings in the legal protection offered by bilateral investment treaties from the point of view of the investor, capital-exporting countries seem to consider the practice worthwhile. As for developing countries, it is difficult to assess to what extent the existence of a

bilateral investment treaty has channelled additional foreign direct investment. It is well known that the existence of a bilateral investment treaty or a liberal foreign investment law carries less weight for the investor than factors such as the political environment, the size of the market or its proximity to important markets. It is difficult to ascertain whether developing countries, in general, are satisfied with the results of bilateral investment agreements, but they continue to conclude them and have even started doing so between themselves.

### 3. The alleged one-sidedness of bilateral investment treaties

346. Are bilateral investment treaties mutually beneficial agreements? Commentators from developing as well as developed countries have argued that bilateral investment treaties are one-sided in favour of the capital-exporting countries, that they are "patently unbalanced" and can hardly "provide the basis for a durable regime". 60/ Three main arguments are advanced.

347. First, it is pointed out that while most bilateral investment treaties are reciprocal in form, that is that they establish identical rights and duties for both sides, capital flows in one direction only. As the treaties concentrate on the treatment to be accorded to investments, this means that the benefits will accrue exclusively to the capital-exporting countries. The counter-argument advanced by the latter states that, however this may be, there is a balance of interests: developing countries want to attract scarce foreign investment and, to this end, offer guarantees regarding treatment and protection.

348. Secondly, developing countries tend to argue that bilateral investment treaties are one-sided in that they oblige the host State to accord a certain standard of treatment to the investor, as an incentive to invest, whereas they do not normally mention any obligations of the home State to provide special incentives for investments in developing countries. As can be seen from the foregoing analysis, this is largely true. But it has also been mentioned already that capital-exporting countries do in fact provide such incentives under national laws (tax relief, credit facilities, technical assistance and, above all, political risk insurance). Still, it could be argued that, contrary to the treatment of investments in the host country, this is not made the object of international obligations.

349. Thirdly, it is said, bilateral investment treaties only provide for protection of the investor, neglecting the latter's obligations and his conduct in the host country. The argument against the inclusion of such rules is that the treaties 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, it can be pointed out, most bilateral investment treaties 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.

350. Even if one accepts this point of view, however, it can be argued that a formulation of standards of conduct would strengthen the hands of developing

countries in case of dispute (and diplomatic protection) and that, in any case, certain fundamental principles should be recognized by contracting parties to investment treaties. Indeed, a good number of such principles are no longer contested, for example, in the negotiations on the United Nations 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. 61/

351. It could be argued that, the inclusion in bilateral investment treaties of a set of principles concerning the conduct and duties of a foreign investor would strengthen the argument that a growing network of bilateral treaties contributes to the development of a body of customary international law covering all aspects of transnational investment relations.

### 4. Bilateral investment treaties and general international law

352. Advocates of bilateral investment treaties claim that the existence of a large number of such treaties containing identical or similar substantive norms is proof of the existence of customary rules of international law or contributes to the development of such rules. Is this thesis corroborated by trends in *opinio juris* and by state practice on a regional and world scale?

353. Before turning to the specific question of the custom-forming effect of bilateral investment treaties, let us briefly look at the general question: can the existence of a large number of bilateral treaties regulating the same subject-matter be considered as proof of custom, which implies that the rules laid down in such treaties would also bind States which are not contracting parties? The question has been discussed in legal doctrine 62/ and there is obviously no clear-cut answer. It depends on whether: (a) the same type of treaty has been concluded between a large majority of all those countries principally concerned with the subject-matter; (b) it can be fairly assumed that the rules contained in these treaties correspond to the contracting parties' *opinio juris*, that is to say, that they consider the rule to be generally applicable in international relations; (c) no contrary positions have been adopted in whatever form by the same or other countries concerned.

354. As for bilateral investment treaties, the custom-forming effect has been maintained by a number of authors but questioned or rejected by others. 63/ First, it has been shown above that the total number of bilateral investment treaties is at present still far below the number that could be concluded between the countries principally concerned by transnational investment. Secondly, although there is a remarkable degree of similarity, there are differences between them: for example, as regards the definition of treatment standards, the inclusion of pre-treaty investments, the requirements of admission procedures or the criteria applied to compensation. 64/ In this connection, Oscar Schachter has argued that, as a general rule, the repetition of common clauses in bilateral treaties does not create or support an inference that those clauses express customary law. He cites extradition and air transit treaties as notable examples of bilateral treaties with standard clauses that are widely used, yet it is not claimed that those provisions are either declaratory or constitutive of customary law binding on third States. 65/ Thirdly, it has been pointed out that the acceptance of certain rules in investment treaties to be considered as *lex specialis*, does not necessarily

imply that the country concerned would find these same rules acceptable as part of general international law - bearing in mind that for many developing countries, the conclusion of bilateral investment treaties is dictated by the need to attract capital for development.

355. It could even be argued that it is precisely for this reason that developing countries, which concluded bilateral investment treaties with developed countries, also voted for United Nations resolutions reflecting different positions on investment, such as the Charter of Economic Rights and Duties of States, and that their opinio juris corresponds rather to these latter texts. 66/

356. On the other hand, those who support the theory that bilateral investment treaties contribute to the formation of universally recognized rules of international law can point to the relatively recent phenomenon of bilateral investment treaties between developing countries although, on closer inspection, it appears that one of the two contracting parties in these treaties is often a capital-exporting newly industrialized country or a developing country (Romania or Yugoslavia) from Eastern Europe. Important new factors in this debate will be whether a majority of member States of the Islamic Conference ratifies the multilateral investment agreement adopted by that organization in 1981, and whether a substantial number of bilateral treaties, comparable to the ones examined in the present publication, between African and Asian States are concluded on the basis of model A agreement elaborated by the Asian-African Legal Consultative Committee. But discussions within this organization have in fact revealed substantial divergences between member States, some of which intend to remain faithful to the philosphy underlying the Charter of Economic Rights and Duties of States.

357. Thus, it would be premature to conclude that an agreement is about to emerge in the international community on a comprehensive set of rules constituting the international law of investments. No doubt, bilateral investment treaties are an important factor in the formation of custom, but the significant contrary positions and tendencies must be taken into account.

358. If the negotiations in progress within the United Nations come to a successful conclusion, the Code of Conduct on Transnational Corporations might indeed constitute a first step towards a common approach to the issues raised by transnational investment. It would have the merit of dealing with principles governing both the activities and the treatment of investors-transnational corporations in the host country.

## Notes

1/ The Euro-Arab Investment Convention, however, is designed to attract foreign investors from Arab countries to Europe.

2/ For a historical survey of the earlier attempts in this regard, see, inter alia, James Greene, The Search for a Common Ground: A Survey of Efforts to Develop Codes of Behaviour in International Investment (New York, the Conference Board, 1971).

3/ The United Nations draft code of conduct on transnational corporations, currently being negotiated in the Commission on Transnational Corporations, is one such effort. This initiative aims at establishing universal and comprehensive

standards both for the activities and the treatment of foreign direct investment and transnational corporations.

4/ See Transnational Corporations in World Development: Third Survey (United Nations publication, Sales No. E.83.II.4.14).

5/ Ibid.

6/ See, Herman Walker, Jr., "Treaties for the encouragement and protection of foreign investment: present United States practice", American Journal of Comparative Law, vol. 5 (1956), pp. 229-231; and "The Post-War Commercial Treaty Program of the United States", Political Science Quarterly, vol. 73 (1958), p. 57.

7/ For some time, certain countries (for example, Denmark and, until the 1970s, Switzerland) included provisions on investment in commercial, technical or general economic co-operation agreements.

8/ The text of the MIGA Convention is contained in International Legal Materials, vol. XXIV (November 1985), p. 1605.

9/ One of the reasons is that some of the matters normally covered by bilateral investment treaties are within the competence of the provinces.

10/ See "Joint Declaration on the Encouragement of Mining Investment", Second Lomé Convention, 1979, annex VIII.

11/ The three model agreements were adopted by AALCC at Kathmandu in February 1985 (see annex VI).

12/ The doctrine of the Argentine jurist and politician, Carlos Calvo, has indeed deeply influenced the thinking of a whole continent. It is reflected in numerous constitutions and laws. It is also the basic philosophy underlying the Andean Foreign Investment Code. Under the Calvo Doctrine, a foreign investor must accept to be treated on the same basis as a national of the host country. This precludes any form of preferential treatment of foreigners and, thus, the inclusion of most-favoured-nation or similar clauses in investment agreements or contracts. The investor is subject to national laws and to the jurisdiction of the courts of the land, excluding international dispute settlement procedures as well as diplomatic protection. As indicated in the list of treaties in annex I, some countries in the region (Belize, Ecuador, Haiti, Paraguay, Saint Lucia) are parties to bilateral investment treaties. Others (Chile, Colombia, Dominica) have signed treaties which are not yet in force. On the Calvo Doctrine, see, inter alia, D. Shea, The Calvo Clause; a Problem of Inter American Law and International Law and Diplomacy (Mineapolis, Minnesota, UP, 1955). For a more recent restatement of the Calvo principles and their application by a Latin American country see, Modesto Seara Vásquez, Politica Exterior de Mexico (Mexico, Sarla, 1984).

13/ On European Economic Community policy in the matter, see Jürgen Voss, "The protection and promotion of European private investment in developing countries: an approach towards a concept for a European policy on foreign investment", Common Market Law Review, vol. 18 (1981), p. 363. For an analysis of "investment clauses" in economic co-operation agreements concluded by the European

Notes (continued)

Economic Community see Heinrich Klebes, "Encouragement et protection des investissements privés dans les pays en développement - les traités bilatéraux de la République fédérale d'Allemagne dans leur contexte", thesis (Strasbourg, 1983), pp. 421-478; OECD, Intergovernmental Agreements Relating to Investment in Developing Countries (Paris, 1985), pp. 23-24. The system of "reference agreements" foreseen by the Second Convention of Lomé was replaced in the Third Convention of Lomé by a more detailed enumeration of measures to be taken in order to promote the flow of private investment. In Article 243 the contracting parties "affirm the importance of concluding between States, in their mutual interest, investment, promotion and protection agreements ...".

14/ From the macro database of the United Nations Centre on Transnational Corporations, based on data prepared by the OECD secretariat.

15/ The United States is currently negotiating bilateral investment treaties with Costa Rica, El Salvador, Honduras and Uruguay.

16/ As mentioned earlier, India concluded an agreement with the Federal Republic of Germany in the form of an exchange of notes in 1964. This agreement covers largely, though in less detail, the same ground as the model treaty of the Federal Republic.

17/ See the reports of the Secretary-General on recent developments related to transnational corporations and international economic relations (E/C.10/1986/3 and E/C.10/1987/2).

18/ It should be noted in this regard that some of the treaties concluded by the Philippines are not yet in force.

19/ OECD, Intergovernmental Agreements Relating to Investments in Developing Countries (Paris, 1985).

20/ Preambles are not just a solemn introduction to what has been agreed between the parties. Thus, the Vienna Convention on the Law of Treaties refers in a half-dozen articles to the object and purpose of a treaty, as defined in the preamble. Of course, not all of these rules are relevant to bilateral treaties. According to the Vienna Convention, treaty provisions must be interpreted, in case of doubt, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (art. 31, para. 1).

Article 60 (para. 3) stipulates that a

> "material breach of a treaty ... consists in ... the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

Another provision of the Vienna Convention is also relevant to bilateral investment treaties which normally require ratification and, therefore, enter into force only months, and sometimes years, after their signature. Article 18 stipulates that States "refrain from acts which would defeat the object and purpose of a treaty" before its entry into force.

Notes (continued)

21/ Exceptions are Egypt, Mali, Romania and Sri Lanka. In the treaties concluded by Romania with other European countries (Austria, Belgium, France, Germany, Federal Republic of, Italy and United Kingdom), the last paragraph is worded as follows:

> "Taking into consideration the Final Act of the Conference on Security and Co-operation in Europe".

This would seem to indicate a political intention by Romania to underline the importance of that Conference and to place the investment treaties in question in the framework of wider European regional co-operation in economic matters, as envisaged in "Basket 2" of the 1975 Final Act. It is indeed one of the declared objectives of the Act to increase co-operation by the conclusion of specific bilateral arrangements with a view to creating favourable conditions for the development of industrial co-operation.

22/ For instance, the treaty between the United States and Morocco recalls the Investment Guarantee Agreement concluded in 1961 by an exchange of notes.

23/ Concerning the bilateral investment treaties signed so far by the United States (but not yet in force), those negotiated more recently with Cameroon, Grenada and Turkey follow the model preamble, especially concerning the mention of "fair and equitable treatment". In others (Bangladesh, Haiti, Senegal, Zaire) there is, instead, a reference to non-discrimination on the basis of nationality:

> "Agreeing that discrimination on the basis of nationality by either Party against investment in its territory by nationals or companies of the other Party is not consistent with either a stable framework for investment or a maximum effective utilization of economic resources ..."

The fair-and-equitable-treatment standard appears on the other hand, in the preambles of some earlier bilateral investment treaties concluded by Egypt - for example, those with Sweden (1978) and Finland (1980).

24/ Treaties concluded by Japan with Sri Lanka and Egypt, for example refer to the "stimulation of the transfer of capital".

25/ The principle of host country approval was already contained in article 12 of the 1948 Havana Charter. It was confirmed by the 1974 Charter of Economic Rights and Duties of States: under article 2 (a), each State has the right "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".

26/ See National Legislation and Regulations Relating to Transnational Corporations (United Nations publication, Sales No. E.78.II.A.3), annex II, tables A6, B6, C6, D6, and annex III, table 2.

27/ The treaties concluded by the United States with Cameroon and Grenada, on the other hand, have adopted the definition contained in the revised model treaty.

Notes (continued)

28/ See France's treaties with China, Haiti and Equatorial Guinea.

29/ On the legal implications of the Berlin clause in connection with investment treaties, see Klebes, op. cit., pp. 167 and 104-113.

30/ Another current distinction is as between "absolute" (or direct) standards and "relative" (or indirect) standards, the latter (like national treatment and most-favoured-nation treatment) being determined by reference to another treatment.

31/ See the commentary on the fair and equitable treatment clause in the 1967 OECD draft convention, Acts of the Organisation, vol. 7 (1967), p. 236.

32/ See inter alia, Manuel Diez de Velasco, Instituciones de Derecho Internacional Público, vol. I., 4th ed. (Madrid, Editorial Ténicnos, 1978), pp. 327-374; Ian Brownlie, Principles of Public International Law, 3rd ed. (Oxford, England, Clarendon Press, 1979), pp. 524-528; and, in the context of investment protection, Klebes, op. cit., pp. 234-238.

33/ However, international law does require that expropriation be for a public purpose, non-discriminatory and accompanied by due process of law and payment of compensation (see chap. IV).

34/ Fair and equitable treatment does, however, appear in the Netherlands/Singapore and the draft Netherlands/Pakistan bilateral investment treaties.

35/ OECD, op. cit., para. 39.

36/ The association-of-States reservation has been an important issue in the attempts of the International Law Commission (ILC) to codify international law on the most-favoured-nation clause and in the relevant discussions in the Sixth Committee of the United Nations General Assembly. Whereas the European Economic Community countries and others claimed that such a reservation was by now part of customary international law, this was contested by the socialist countries. This is one of the reasons why the draft articles of ILC have not yet been adopted by the General Assembly.

37/ For a more detailed examination of the national treatment and most-favoured-nation clauses see, inter alia, J. P. Laviec, Protection et promotion des investissements (Paris, PUF, 1985), annex VIII, pp. 271-318. On the clause in general, see, inter alia, Richard C. Snyder, The Most-Favoured-Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs (New York, King's Crown Press, 1948); and the standard work in French by E. Sauvignon, La clause de la nation la plus favorisée (Grenoble, Presses universitaires de Grenoble, 1972).

38/ On stabilization clauses, see, inter alia, Prosper Weil, "Les clauses de stabilisation ou d'intangibilité dans les accords de développement économique", Mélanges Rousseau (Paris, Pédone, 1974), pp. 301-329. "Intangibility" means that a Government will not avail itself of the right it may have under national law to

change unilaterally, though under certain conditions, contracts it has concluded with private persons.

39/ "Draft Bilateral Investment Treaty prepared in fulfilment of the mandate of the Technical Committee on the Caribbean Basin Initiation", article 6.

40/ Such a right to compensation could not be derived from general international law either, unless the host State were held responsible for not having taken reasonable measures to protect the investment, in accordance with the diligentia quam in suis rule. See, inter alia, David John Harris, Cases and Materials on International Law (London, Sweet Maxwell, 1979) pp. 396-424. See also article 23 of the ILC draft articles on international responsibility and the deliberations of the Commission in the Yearbook of the International Law Commission, 1980.

41/ For a discussion on performance requirements see Transnational Corporations in World Development: Third Survey ... .

42/ Memorandum presented by the Government of Algeria to the Summit Meeting of OPEC countries, held at Algiers in March 1975. See Ignaz Seidl-Hohenveldern, "Propositions algériennes pour un nouveau cadre des relations contractuelles entre des entreprises des pays du tiers monde et des entreprises des pays développés", Mélanges Fernand Dehousse (Bruxelles, Labor, 1977), pp. 107-113.

43/ Apart from the "classical" cases before the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), this position has been adopted on several occasions (for example, Sporrong and Lönroth, Handyside and British nationalization cases) by the European Commission and the European Court of Human Rights who would reserve, however, their right to verify that the State concerned has acted reasonably and in good faith. See, Juchen Frowein and Wolfgang Peukert, Europäische Menschenrechtskonvention (Strasbourg, Norbert Engel Publisher Gb., 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 the Charter of Economic Rights and Duties of States (art. 2, para. 2 (c)). See also Wolfgang Peukert, "Protection of ownership under article 1 of the First Protocol to the European Convention of Human Rights", Human Rights Law Journal, vol. 2 (1981), pp. 37, 65-68. An attempt to delimit public interest was made in the explanatory report to the 1967 OECD draft convention: see Actes de l'Organisation, vol. 7 (1967), pp. 246 and 248.

44/ When the Government of Nigeria nationalized British Petroleum on 31 July 1979 (on the eve of the Commonwealth Conference at Lusaka), it issued a declaration which left no doubt that the nationalization was directed against British oil exports to South Africa. See Le Monde, 2 August 1979. In the case of Texaco/Calasiatic v. the Libyan Arab Jamahiriya it was argued that the real motive for expropriation was political, that is, to sanction the United States' Middle East policy. This reasoning was not adopted by the arbitrator according to whom it had to be accepted that the Libyan Government had acted in sovereign appreciation of the country's interest. In the ARAMCO case, the public purpose character of the expropriation was contested, as it had been designed to increase the State revenue.

Notes (continued)

45/ The different positions of principle have been described in several studies of the United Nations Centre on Transnational Corporations. See P. Robinson, The Question of a Reference to International Law in the United Nations Code of Conduct on Transnational Corporations (United Nations publication, Sales NO. E.86.II.A.5). Detlev F. Vagts, The Question of a Reference to International Obligations in the United Nations Code of Conduct on Transnational Corporations: A Different View (United Nations publication, Sales No. E.86.II.A.11) and The United Nations Code of Conduct on Transnational Corporations (United Nations publication, Sales No. E.86.II.A.15). They range from the Hull Doctrine in its classic formulation of "prompt, adequate and effective", the meaning of the words having been interpreted in doctrine as well as in judicial and arbitral decisions, to the position reflected in the Charter of Economic Rights and Duties of States. The latter admits to the principle of "appropriate compensation", but what is appropriate is to be decided under the laws and regulations of the host State, taking into account all pertinent circumstances. In the extreme, the latter may possibly lead to the conclusion (as in the Chilean copper mine expropriations) that a "negative compensation" is due, i.e., because of excess profits drawn from the investment in the past, it is the expropriated company which owes compensation to the host State. See also, "Outstanding issues in the Draft Code of Conduct on Transnational Corporations" (E/C.10/1985/S/2), reproduced in annex VII; and Alfred Dolzer, "New foundations of the Law of Expropriation of Alien Property", American Journal of International Law, 75 (1981), p. 553.

46/ See article 712 of the latest "restatement of international law" elaborated by the American Law Institute, Restatement of the Law: Foreign Relations Law of the United States, revised (St. Paul, Minnesota, American Law Institute Publishers, 1986) and, incidentally, in the Fifth Amendment (1791) of the Constitution of the United States. The 1967 OECD draft convention also used the term "just compensation", the explanatory report giving essentially the same definition as in the Dutch model agreements. For further details see OECD, Acts of the Organisation, vol. 7 (1967), pp. 250-254.

47/ See Geneviève Burdeau, "La contribution des nationalisations françaises de 1982 au droit international des nationalisations", Revue générale de droit international public, 89 (1985) L, pp. 5-28.

48/ For an analysis of the different viewpoints see D. Lapus, "Principles of compensation for nationalized property", International and Comparative Law Quarterly, 26 (1977), p. 97; and E. Aréchaga, "State responsibility for the nationalization of foreign owned property", Journal of International Law and Politics, 11 (1978), p. 197.

49/ See, inter alia, Burns H. Weston, "Constructive takings under international law: A modest foray into the problem of 'creeping expropriation'", Virginia Journal of International Law, 16 (1975), p. 103. See also Alfred Dolzer, "Indirect expropriation of alien property, ICSID Review", Foreign Investment Law Journal, vol. 1 (1986), pp. 41-65. This article provides an in-depth study of the legal aspects of indirect expropriation, taking account of recent developments, the jurisprudence of the PCIJ and ICJ as well as more recent decisions of the Court of Justice of the European Communities, the European Court of Human Rights and the Iran-United States Claims Tribunal.

Notes (continued)

50/ Case No. 24 of the Iran-United States Claims Tribunal. Quoted by Dolzer, loc. cit. (note 49 above).

51/ On the interpretation of "reasonable" in different legal contexts, see Jean J. A. Salmon, "Le concept de raisonnable en droit international public, Mélanges offerts à Paul Reuter (Paris, Pédone, 1981), pp. 447-478.

52/ As stated by the Permanent Court of International Justice in the 1924 Mavrommatis case (Greece v. United Kingdom), the right of diplomatic protection is not a right of the individual (or company) but a right of the State:

> "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law."

53/ See article 22 of the draft articles of ILC on international responsibility and the examples mentioned in the Commission's report. Yearbook of the International Law Commission, vol. II (1977), pp. 31-55.

54/ See Roy Preiswerk, New developments in Bilateral Investment Protection (Zürich, Editions polygraphiques, 1963), annex VIII.

55/ The new version of the model treaty of the Federal Republic of Germany (January 1987) covers the question of dispute settlements between host States and investors in article 11.

56/ The text of the Convention has been published by the International Centre for the Settlement of Investment Disputes as document ICSID/2. The Additional Facility approved by the Centre's Administrative Council on 27 September 1977 makes the Centre available, beyond what is foreseen in the Convention: (a) in cases where one of the parties is not a contracting State or a national/company of a contracting State; (b) for conciliation or arbitration of disputes not directly linked to an investment; and (c) for fact-finding procedures.

57/ Out of some 30 African countries south of the Sahara which have concluded at least one bilateral investment agreement (some 14 countries have not signed any), at least 15 have not done so in the last 10 years.

58/ According to the list in annex I to the present publication, some 21 developing countries have concluded only one bilateral investment treaty, about 13 of which are not in force. Some 15 developing countries have signed only two treaties.

59/ Cameroon, 7; Egypt, 15; Gabon, 4; Indonesia, 8; Kuwait, 4; Madagascar, 6; Malaysia, 9; Republic of Korea, 8; Romania, 16; Senegal, 7; Singapore, 8; Sri Lanka, 14; Sudan, 6; Tunisia, 10. All of Kuwait's agreements were concluded with capital-importing countries.

60/ Raymond Vernon, "Code on transnational corporations: ingredients for an effective international régime", Harvard Business Review, 60 (1982), p. 10.

61/ See ICC, Guide of International Investments (1972); OECD, Guidelines for Multinational Enterprise (1976); ILO, Tripartite Declaration of Principles on Multinational Enterprises and Social Policy (1977).

62/ See, inter alia, Albert Bleckmann, Grundprobleme und Methoden des Völkerrechtes (Freiburg, Alber, 1982), pp. 248 and 297.

63/ The custom-forming theory has been defended, inter alia, by F. A. Mann in "British treaties for the promotion and protection of investment", British Yearbook of International Law, 52 (1982), pp. 241-254. In the same sense, P. Juillard in "Les conventions bilatérales d'investissement conclues par la France", Journal de droit international, 2 (1979), pp. 274-325 (see bibliography). See also Charles de Visscher, Les activités du droit international public (Paris, Pédone, 1967), p. 138: "On peut penser que ces dispositions conventionnelles [included in investment treaties], en se généralisant, donneront naissance à un régime international appelé à se substituer graduellement aux garanties, malgré tout imprécises, du droit international coutumier." For a critical or contrary view see Klebes, op. cit., pp. 602-607; Davis R. Robinson, "Expropriation in the restatement" (Revised), notes and comments, American Journal of International Law, vol. 78, No. 1 (January 1984), p. 176; Oscar Schachter, "Compensation for expropriation", editorial comment, American Journal of International Law, vol. 78, No. 1 (January 1984), p. 121.

64/ This aspect has been examined in some detail by M. Sornarajah "State responsibility and bilateral investment treaties", Journal of World Trade Law (January/February 1986) pp. 79-98.

65/ See, Oscar Schachter, op. cit.

66/ The relevance of United Nations resolutions, as well as the code of conduct negotiations and various regional investment codes to the subject-matter of bilateral investment treaties have been examined by Klebes, op. cit., pp. 533-607. On the alleged "inconsistency" or "schizophrenia" of developing countries, see Jürgen Voss, "The protection and promotion of European private investment in developing countries: an approach towards a concept for a European policy on foreign investment", Common Market Law Review (1981), pp. 369-374. The author concludes as follows: "While systematically reducing investment protection under international law at multilateral level, they restore it bilaterally by means of international agreements. The explanation of this phenomenon is that each guarantee of investment protection under international law requires a developing country to weight up ideological interests related to sovereignty and the desire for economic growth, these conflicting interests carrying different weight at bilateral and multilateral levels".

Annex I

LIST OF BILATERAL INVESTMENT PROMOTION AND PROTECTION TREATIES CONCLUDED UP TO MID-1987*

| Countries | Signature | Entry into force |
| --- | --- | --- |
| Austria/ | | |
| Bulgaria | 15 May 1981 | (To be renegotiated) |
| China | 12 September 1985 | 11 October 1986 |
| Malaysia | 12 September 1985 | 1 January 1987 |
| Romania | 30 September 1976 | 8 November 1977 |
| Bangladesh/ | | |
| Belgium-Luxembourg | 22 May 1981 | - |
| Germany, Federal Republic of | 6 May 1981 | 4 September 1986 |
| United Kingdom | 19 June 1980 | 19 June 1980 |
| United States | 12 March 1986 | - |
| Belgium-Luxembourg Economic Union/ | | |
| Bangladesh | 22 May 1981 | (Provisional application) |
| Cameroon | 27 March 1980 | 1 November 1981 |
| China | 4 June 1984 | 5 October 1986 |
| Egypt | 28 February 1977 | 20 September 1978 |
| Hungary | 14 May 1986 | - |
| Indonesia | 15 January 1970 | 17 June 1972 |
| Liberia | 5 June 1985 | - |
| Malaysia | 22 November 1979 | 8 February 1982 |
| Malta | 5 March 1987 | - |
| Morocco | 28 April 1965 | 18 October 1967 |
| Republic of Korea | 20 December 1974 | 3 September 1976 |
| Romania | 8 May 1978 | 1 May 1980 |
| Rwanda | 2 November 1983 | - |
| Singapore | 17 November 1978 | 27 November 1980 |
| Sri Lanka | 5 April 1982 | 26 April 1984 |
| Thailand | 19 March 1986 | - |
| Tunisia | 15 July 1964 | 9 March 1966 |
| Turkey | 27 August 1986 | - |
| Zaire | 28 March 1976 | 1 January 1977 |
| Belize/ | | |
| United Kingdom | 30 April 1982 | 30 April 1982 |
| Benin/ | | |
| Switzerland | 20 April 1966 | 6 October 1973 |
| Germany, Federal Republic of | 29 June 1978 | 18 July 1985 |

* This list, based on information provided by the United Nations Treaty Section, Treaty Information System (SITONU) and by Member States, is not necessarily complete.

| Countries | Signature | Entry into force |
|---|---|---|
| Bolivia/ | | |
| Germany, Federal Republic of | 23 March 1987 | - |
| Bulgaria/ | | |
| Austria | 15 May 1981 | (To be renegotiated) |
| Finland | 16 February 1984 | - |
| Germany, Federal Republic of | 12 April 1986 | - |
| Burkina Faso/ | | |
| Switzerland | 6 May 1969 | 15 September 1969 |
| Burundi/ | | |
| Germany, Federal Republic of | 10 September 1984 | - |
| Cameroon/ | | |
| Belgium-Luxembourg | 27 March 1980 | 1 November 1981 |
| Germany, Federal Republic of | 29 June 1962 | 21 November 1963 |
| Netherlands | 6 July 1965 | 7 May 1966 |
| Romania | 30 August 1980 | 16 December 1981 |
| Switzerland | 28 January 1963 | 6 April 1964 |
| United Kingdom | 4 June 1982 | 7 June 1985 |
| United States | 26 February 1986 | - |
| Central African Republic/ | | |
| Germany, Federal Republic of | 23 August 1965 | 21 January 1968 |
| Switzerland | 28 February 1973 | 4 July 1973 |
| Chad/ | | |
| Germany, Federal Republic of | 11 April 1967 | 23 November 1968 |
| Italy | 11 June 1969 | - |
| Switzerland | 21 February 1967 | 31 October 1967 |
| Chile/ | | |
| Germany, Federal Republic of | 30 March 1964 | - |
| China/ | | |
| Austria | 12 September 1985 | 11 October 1986 |
| Belgium-Luxembourg | 4 June 1984 | 5 October 1986 |
| Denmark | 29 April 1985 | 29 April 1985 |
| France | 30 May 1984 | 19 March 1985 |
| Germany, Federal Republic of | 7 October 1983 | 18 March 1985 |
| Finland | 4 September 1984 | 26 January 1986 |
| Italy | 28 January 1985 | - |
| Kuwait | 23 November 1985 | 24 December 1986 |
| Netherlands | 17 June 1985 | 1 February 1987 |
| Norway | 21 November 1984 | 10 July 1985 |
| Romania | 10 February 1983 | 12 January 1984 |
| Singapore | 21 November 1985 | 7 February 1986 |
| Sri Lanka | 13 March 1986 | 25 March 1987 |
| Sweden | 29 March 1982 | 29 March 1982 |
| Switzerland | 12 November 1986 | 18 March 1987 |
| Thailand | 12 March 1985 | 13 December 1985 |
| United Kingdom | 15 May 1986 | 15 May 1986 |

| Countries | Signature | Entry into force |
|---|---|---|
| Colombia/ | | |
| Germany, Federal Republic of | 11 June 1965 | - |
| Congo/ | | |
| Germany, Federal Republic of | 13 September 1965 | 14 October 1967 |
| Switzerland | 18 October 1962 | 11 July 1964 |
| Costa Rica/ | | |
| France | 8 March 1984 | - |
| Switzerland | 1 September 1965 | 18 August 1966 |
| United Kingdom | 7 September 1982 | - |
| Denmark/ a/ | | |
| China | 29 April 1985 | 29 April 1985 |
| Indonesia | 30 January 1968 | 2 July 1968 |
| Ivory Coast | 23 November 1966 | 10 January 1968 |
| Madagascar | 10 December 1965 | 26 July 1967 |
| Malawi | 1 August 1966 | 1 August 1966 |
| Romania | 12 November 1980 | 9 April 1981 |
| Sri Lanka | 4 June 1985 | 4 June 1985 |
| Dominica/ | | |
| Germany, Federal Republic of | 1 October 1984 | 11 May 1986 |
| United Kingdom | 23 January 1987 | 23 January 1987 |
| Dominican Republic/ | | |
| Germany, Federal Republic of | 16 December 1959 | 3 June 1960 |
| Ecuador/ | | |
| Germany, Federal Republic of | 28 June 1965 | 30 November 1966 |
| Switzerland | 2 May 1968 | 11 September 1969 |
| Egypt/ | | |
| Belgium-Luxembourg | 28 February 1977 | 20 September 1978 |
| Finland | 5 May 1980 | 1 February 1982 |
| France | 22 December 1974 | 1 October 1975 |
| Germany, Federal Republic of | 5 July 1974 | 22 July 1978 |
| Greece | 1 April 1975 | 3 February 1977 |
| Italy | 29 April 1975 | 30 October 1981 |
| Japan | 28 January 1977 | 14 January 1978 |
| Netherlands | 30 October 1976 | 1 January 1978 |
| Romania | 10 May 1976 | 22 January 1977 |
| Sudan | 28 May 1977 | - |
| Sweden | 15 July 1978 | 29 January 1979 |
| Switzerland | 25 July 1973 | 4 June 1974 |
| United Kingdom | 11 June 1975 | 24 February 1976 |
| United States | 29 September 1982 | - |
| Yugoslavia | 3 June 1977 | - |

| Countries | Signature | Entry into force |
|---|---|---|
| El Salvador/ | | |
| France | 20 September 1978 | - |
| Ethiopia/ | | |
| Germany, Federal Republic of | 21 April 1964 | - |
| Finland/ | | |
| Bulgaria | 16 February 1984 | - |
| China | 4 September 1984 | 26 January 1986 |
| Egypt | 5 May 1980 | 1 February 1982 |
| France/ | | |
| Bangladesh | 10 September 1985 | - |
| China | 30 May 1984 | 19 March 1985 |
| Costa Rica | 8 May 1984 | - |
| Egypt | 22 December 1974 | 1 October 1975 |
| Equatorial Guinea | 3 March 1982 | 23 September 1983 |
| El Salvador | 20 September 1978 | - |
| Haiti | 23 May 1984 | 25 March 1985 |
| Indonesia | 14 June 1973 | 29 April 1975 |
| Israel | 9 June 1983 | 11 January 1985 |
| Jordan | 23 February 1978 | 18 October 1979 |
| Liberia | 23 March 1979 | 22 January 1982 |
| Malaysia | 24 April 1975 | 1 September 1976 |
| Malta | 11 August 1976 | 1 January 1978 |
| Mauritius | 22 March 1973 | 1 April 1974 |
| Morocco | 15 July 1975 | 13 December 1976 |
| Nepal | 2 May 1983 | 13 June 1985 |
| Pakistan | 1 June 1983 | 14 December 1984 |
| Panama | 5 November 1982 | 3 October 1985 |
| Paraguay | 30 November 1978 | 11 December 1980 |
| Philippines | 14 June 1976 | 14 July 1976 |
| Republic of Korea | 28 December 1977 | 1 February 1979 |
| Romania | 16 December 1976 | 1 August 1978 |
| Singapore | 8 September 1975 | 18 October 1976 |
| Sri Lanka | 10 April 1980 | 19 April 1982 |
| Sudan | 31 July 1978 | 5 July 1980 |
| Syrian Arab Republic | 28 November 1977 | 1 March 1980 |
| Tunisia(1) | 9 August 1963 | 1 August 1965 |
| Tunisia(2) | 30 June 1972 | 30 June 1972 |
| Yemen | 27 April 1984 | - |
| Yugoslavia | 28 March 1974 | 3 March 1975 |
| Zaire | 5 October 1972 | 1 March 1975 |
| Gabon/ | | |
| Germany, Federal Republic of | 16 May 1969 | 29 March 1971 |
| Italy | 18 November 1968 | - |
| Romania | 11 April 1979 | 5 December 1979 |
| Switzerland | 28 January 1972 | 18 October 1972 |

| Countries | Signature | Entry into force |
|---|---|---|
| Germany, Federal Republic of/ | | |
| Bangladesh | 6 May 1981 | 14 September 1986 |
| Benin | 29 June 1978 | 18 July 1985 |
| Bolivia | 23 March 1987 | - |
| Bulgaria | 12 April 1986 | - |
| Burundi | 10 September 1984 | - |
| Cameroon | 29 June 1962 | 21 November 1963 |
| Central African Republic | 23 August 1965 | 21 January 1968 |
| Chad | 11 April 1967 | 23 November 1968 |
| Chile | 30 March 1964 | - |
| China | 7 October 1983 | 18 March 1985 |
| Colombia | 11 June 1965 | - |
| Congo | 13 September 1965 | 14 October 1967 |
| Dominica | 1 October 1984 | 11 May 1986 |
| Dominican Republic | 16 December 1959 | 3 June 1960 |
| Ecuador | 28 June 1965 | 30 November 1966 |
| Egypt | 5 July 1974 | 22 July 1978 |
| Ethiopia | 21 April 1964 | - |
| Gabon | 16 May 1969 | 29 March 1971 |
| Ghana | 19 May 1967 | - |
| Greece | 27 March 1961 | 15 July 1963 |
| Guinea | 19 April 1962 | 13 March 1965 |
| Haiti | 14 August 1973 | 1 December 1975 |
| Hungary | 30 April 1986 | - |
| India | 15 October 1964 | 15 October 1964 |
| Indonesia | 8 November 1968 | 19 April 1971 |
| Iran (Islamic Republic of) | 11 November 1965 | 6 April 1968 |
| Israel | 24 June 1976 | (Provisional application) |
| Ivory Coast | 27 October 1966 | 10 June 1968 |
| Jordan | 15 July 1974 | 10 October 1977 |
| Kenya | 4 December 1964 | - |
| Lesotho | 11 November 1982 | 17 August 1985 |
| Liberia | 12 December 1961 | 22 October 1967 |
| Madagascar | 21 September 1962 | 21 March 1966 |
| Malaysia | 22 December 1960 | 6 July 1963 |
| Mali | 28 June 1977 | 16 May 1980 |
| Malta | 17 September 1974 | 14 December 1975 |
| Mauritania | 8 December 1982 | 26 April 1986 |
| Mauritius | 25 May 1971 | 27 August 1973 |
| Morocco | 31 August 1961 | 21 January 1968 |
| Nepal | 20 October 1986 | - |
| Niger | 29 October 1964 | 10 January 1966 |
| Oman | 25 June 1979 | 4 February 1986 |
| Pakistan | 25 November 1959 | 28 April 1962 |
| Panama | 2 November 1983 | - |
| Papua New Guinea | 12 November 1980 | 3 November 1983 |
| Philippines | 3 March 1964 | - |
| Portugal | 16 September 1980 | 23 April 1982 |
| Republic of Korea | 4 February 1964 | 15 January 1967 |
| Romania | 12 December 1979 | 10 January 1981 |
| Rwanda | 18 May 1967 | 28 February 1969 |

| Countries | Signature | Entry into force |
|---|---|---|
| Saint Lucia | 16 March 1985 | - |
| Saint Vincent and the Grenadines | 25 March 1986 | - |
| Saudi Arabia | 2 February 1979 | 15 March 1980 |
| Senegal | 24 January 1964 | 16 January 1966 |
| Sierra Leone | 8 April 1965 | 10 December 1966 |
| Singapore | 3 October 1973 | 1 October 1975 |
| Somalia | 27 November 1981 | 15 February 1985 |
| Sri Lanka | 8 November 1963 | 7 December 1966 |
| Sudan | 7 February 1963 | 24 November 1967 |
| Syrian Arab Republic | 2 August 1977 | 20 April 1980 |
| United Republic of Tanzania | 30 January 1965 | 12 July 1968 |
| Thailand | 13 December 1961 | 10 April 1965 |
| Togo | 16 May 1961 | 21 December 1964 |
| Tunisia | 20 December 1963 | 6 February 1966 |
| Turkey | 20 June 1962 | 16 December 1965 |
| Uganda | 29 November 1966 | 19 August 1968 |
| Uruguay | 4 May 1987 | - |
| Yemen | 21 June 1974 | 19 December 1978 |
| Zaire | 18 March 1969 | 22 July 1971 |
| Zambia | 10 December 1966 | 25 August 1972 |
| Ghana/ | | |
| Germany, Federal Republic of | 19 May 1967 | - |
| Greece/ | | |
| Egypt | 1 April 1975 | 3 February 1977 |
| Germany, Federal Republic of | 27 March 1961 | 15 July 1963 |
| Grenada/ | | |
| United States | 2 May 1986 | - |
| Guinea/ | | |
| France | 3 March 1982 | 23 September 1983 |
| Germany, Federal Republic of | 19 April 1962 | 13 March 1965 |
| Italy | - | 20 February 1964 |
| Switzerland | 26 April 1962 | 29 July 1963 |
| Haiti/ | | |
| France | 23 May 1984 | 25 March 1985 |
| Germany, Federal Republic of | 14 August 1973 | 1 December 1975 |
| United Kingdom | 18 March 1985 | - |
| United States | 13 December 1983 | - |
| Honduras/ | | |
| Switzerland | 20 July 1966 | - |
| Hungary/ | | |
| Belgium-Luxembourg | 14 May 1986 | - |
| Germany, Federal Republic of | 30 April 1986 | - |
| Sweden | 21 April 1987 | 21 April 1987 |

| Countries | Signature | Entry into force |
|---|---|---|
| India/ | | |
| Germany, Federal Republic of | 15 October 1964 | 15 October 1964 |
| Indonesia/ | | |
| Belgium-Luxembourg | 15 January 1970 | 17 June 1972 |
| Denmark | 30 January 1968 | 2 July 1968 |
| France | 14 June 1973 | 29 April 1975 |
| Germany, Federal Republic of | 8 November 1968 | 19 April 1971 |
| Netherlands | 7 July 1968 | 17 July 1971 |
| Norway | 24 November 1969 | 25 August 1970 |
| Switzerland | 6 February 1974 | 9 April 1976 |
| United Kingdom | 27 April 1976 | 24 March 1977 |
| Iran/ | | |
| Germany, Federal Republic of | 11 November 1965 | 6 April 1968 |
| Iraq/ | | |
| Kuwait | 25 October 1964 | 7 June 1966 |
| Israel/ | | |
| France | 9 June 1983 | 11 January 1985 |
| Germany, Federal Republic of | 24 June 1976 | (Provisional application) |
| Italy/ | | |
| Chad | 11 June 1969 | - |
| China | 28 January 1985 | - |
| Egypt | 29 April 1975 | 30 October 1981 |
| Gabon | 18 November 1968 | - |
| Guinea | - | 20 February 1964 |
| Ivory Coast | 23 July 1969 | - |
| Malta | 28 July 1967 | 15 October 1973 |
| Romania | 14 January 1977 | 6 March 1979 |
| Tunisia | 17 October 1985 | - |
| Ivory Coast/ | | |
| Denmark | 23 November 1966 | 10 January 1968 |
| Germany, Federal Republic of | 27 October 1966 | 10 June 1968 |
| Italy | 23 July 1969 | - |
| Netherlands | 26 April 1965 | 8 September 1966 |
| Sweden | 27 August 1965 | 3 November 1966 |
| Switzerland | 26 June 1962 | 18 December 1962 |
| Japan/ | | |
| Egypt | 28 January 1977 | 14 January 1978 |
| Sri Lanka | 1 March 1982 | 8 August 1982 |
| Jamaica/ | | |
| United Kingdom | 20 January 1987 | - |

| Countries | Signature | Entry into force |
|---|---|---|
| Jordan/ | | |
| France | 23 February 1978 | 18 October 1979 |
| Germany, Federal Republic of | 15 July 1974 | 10 October 1977 |
| Switzerland | 11 November 1976 | 2 March 1977 |
| United Kingdom | 10 October 1979 | 24 April 1980 |
| Kenya/ | | |
| Germany, Federal Republic of | 4 December 1964 | - |
| Netherlands | 11 September 1970 | 11 June 1979 |
| Kuwait/ | | |
| China | 23 November 1985 | 24 December 1986 |
| Iraq | 25 October 1964 | 7 June 1966 |
| Morocco | 3 April 1980 | - |
| Pakistan | 17 March 1983 | - |
| Tunisia | 14 September 1973 | - |
| Lesotho/ | | |
| Germany, Federal Republic of | 11 November 1982 | 17 August 1985 |
| United Kingdom | 18 February 1981 | 18 February 1981 |
| Liberia/ | | |
| Belgium/Luxembourg | 5 June 1985 | - |
| France | 23 March 1979 | 22 January 1982 |
| Germany, Federal Republic of | 12 December 1961 | 22 October 1967 |
| Switzerland | 23 July 1963 | 22 September 1964 |
| Libyan Arab Jamahiriya/ | | |
| Malta | 8 February 1973 | - |
| Madagascar/ | | |
| Denmark | 10 December 1965 | 26 July 1967 |
| Germany, Federal Republic of | 21 September 1962 | 21 March 1966 |
| New Zealand | 13 May 1966 | 28 September 1967 |
| Norway | 13 May 1966 | 28 September 1967 |
| Sweden | 2 April 1966 | 23 June 1967 |
| Switzerland | 17 March 1964 | 31 March 1966 |
| Malawi/ | | |
| Denmark | 1 August 1966 | 1 August 1966 |
| Malaysia/ | | |
| Austria | 12 April 1985 | 1 January 1987 |
| Belgium-Luxembourg | 22 November 1979 | 8 February 1982 |
| France | 24 April 1975 | 1 September 1976 |
| Germany, Federal Republic of | 22 December 1960 | 6 July 1963 |
| Netherlands | 15 June 1971 | 13 September 1972 |
| Norway | 6 November 1984 | 7 January 1986 |
| Sweden | 3 March 1979 | 6 July 1979 |
| Switzerland | 1 March 1978 | 9 June 1978 |
| United Kingdom | 21 May 1981 | - |

| Countries | Signature | Entry into force |
|---|---|---|
| Mali/ | | |
| Germany, Federal Republic of | 28 June 1977 | 16 May 1980 |
| Switzerland | 8 March 1978 | 8 December 1978 |
| Malta/ | | |
| Belgium-Luxembourg | 5 March 1987 | - |
| Germany, Federal Republic of | 17 September 1974 | 14 December 1975 |
| France | 11 August 1976 | 1 January 1978 |
| Italy | 28 July 1967 | 15 October 1973 |
| Lybian Arab Jamahiriya | 8 February 1973 | - |
| Netherlands | 10 September 1984 | 1 July 1985 |
| Switzerland | 20 January 1965 | 23 February 1965 |
| United Kingdom | 4 October 1986 | 4 October 1986 |
| Mauritania/ | | |
| Germany, Federal Republic of | 8 December 1982 | 26 April 1986 |
| Switzerland | 9 September 1976 | 30 May 1978 |
| Mauritius/ | | |
| France | 22 March 1973 | 1 April 1974 |
| Germany, Federal Republic of | 25 May 1971 | 27 August 1973 |
| United Kingdom | 20 May 1986 | 13 October 1986 |
| Morocco/ | | |
| Belgium-Luxembourg | 28 April 1965 | 18 October 1967 |
| France | 15 July 1975 | 13 December 1976 |
| Germany, Federal Republic of | 31 August 1961 | 21 January 1968 |
| Kuwait | 3 April 1980 | - |
| Netherlands | 23 December 1971 | 27 July 1978 |
| Switzerland | 17 December 1985 | - |
| United States | 22 July 1985 | - |
| Nepal/ | | |
| France | 2 May 1983 | 13 June 1985 |
| Germany, Federal Republic of | 20 October 1986 | - |
| Netherlands/ b/ | | |
| Cameroon | 6 July 1965 | 7 May 1966 |
| China | 17 June 1985 | 1 February 1987 |
| Egypt | 30 October 1976 | 1 January 1978 |
| Indonesia | 7 July 1968 | 17 July 1971 |
| Ivory Coast | 26 April 1965 | 8 September 1966 |
| Kenya | 11 September 1970 | 11 June 1979 |
| Malaysia | 15 June 1971 | 13 September 1972 |
| Malta | 10 September 1984 | 1 July 1985 |
| Morocco | 23 December 1971 | 27 July 1978 |
| Philippines | 27 February 1985 | - |
| Republic of Korea | 16 October 1974 | 1 June 1975 |
| Romania | 27 October 1983 | 1 January 1984 |

| Countries | Signature | Entry into force |
|---|---|---|
| Senegal | 3 August 1979 | 5 May 1981 |
| Singapore | 16 May 1972 | 7 September 1973 |
| Sri Lanka | 26 April 1984 | 1 May 1985 |
| Sudan | 22 August 1970 | 27 March 1972 |
| Thailand | 6 June 1972 | 3 March 1973 |
| Tunisia | 23 May 1963 | 19 December 1964 |
| Turkey | 27 March 1986 | - |
| Uganda | 24 April 1970 | - |
| United Republic of Tanzania | 14 April 1970 | 28 July 1972 |
| Yemen | 18 March 1985 | 1 September 1986 |
| Yugoslavia | 16 February 1976 | 1 April 1977 |
| New Zealand/ | | |
| Madagascar | 13 May 1966 | 28 September 1967 |
| Niger/ | | |
| Germany, Federal Republic of | 29 October 1964 | 10 January 1966 |
| Switzerland | 28 March 1962 | 17 November 1962 |
| Norway/ | | |
| China | 21 November 1984 | 10 July 1985 |
| Indonesia | 24 November 1969 | 25 August 1970 |
| Madagascar | 13 May 1966 | 28 September 1967 |
| Malaysia | 6 November 1984 | 7 January 1986 |
| Sri Lanka | 13 June 1985 | 13 June 1985 |
| Oman/ | | |
| Germany, Federal Republic of | 25 June 1979 | 4 February 1986 |
| Pakistan/ | | |
| France | 1 June 1983 | 14 December 1984 |
| Germany, Federal Republic of | 25 November 1959 | 28 April 1962 |
| Kuwait | 17 March 1983 | - |
| Romania | 21 January 1978 | 31 October 1978 |
| Sweden | 12 March 1981 | 14 June 1981 |
| Panama/ | | |
| France | 5 November 1982 | 3 October 1985 |
| Germany, Federal Republic of | 2 November 1983 | - |
| Switzerland | 19 October 1983 | 22 August 1985 |
| United Kingdom | 7 October 1983 | 7 November 1985 |
| United States | 27 October 1982 | - |
| Papua New Guinea/ | | |
| Germany, Federal Republic of | 12 November 1980 | 3 November 1983 |
| United Kingdom | 14 May 1981 | 22 December 1981 |
| Paraguay/ | | |
| France | 30 November 1978 | 11 December 1980 |
| United Kingdom | 4 June 1981 | - |

| Countries | Signature | Entry into force |
|---|---|---|
| Philippines/ | | |
| France | 14 June 1976 | 14 July 1976 |
| Germany, Federal Republic of | 3 March 1964 | - |
| Netherlands | 27 February 1985 | - |
| United Kingdom | 3 December 1980 | 2 January 1981 |
| Portugal/ | | |
| Germany, Federal Republic of | 16 September 1980 | 23 April 1982 |
| Republic of Korea/ | | |
| Belgium-Luxembourg | 20 December 1974 | 3 September 1976 |
| France | 28 December 1977 | 1 February 1979 |
| Germany, Federal Republic of | 4 February 1964 | 15 January 1967 |
| Netherlands | 16 October 1974 | 1 June 1975 |
| Sri Lanka | 28 March 1980 | 15 July 1980 |
| Switzerland | 7 April 1971 | 7 April 1971 |
| Tunisia | 23 May 1975 | - |
| United Kingdom | 4 March 1976 | 4 March 1976 |
| Romania/ | | |
| Austria | 30 September 1976 | 8 November 1977 |
| Belgium-Luxembourg | 8 May 1978 | 1 May 1980 |
| Cameroon | 30 August 1980 | 16 December 1981 |
| China | 10 February 1983 | 12 January 1984 |
| Denmark | 12 November 1980 | 9 April 1981 |
| Egypt | 10 May 1976 | 22 January 1977 |
| France | 16 December 1976 | 1 August 1978 |
| Gabon | 11 April 1979 | 5 December 1979 |
| Germany, Federal Republic of | 12 October 1979 | 10 January 1981 |
| Italy | 14 January 1977 | 6 March 1979 |
| Netherlands | 27 October 1983 | 1 January 1984 |
| Pakistan | 21 January 1978 | 31 October 1978 |
| Senegal | 19 June 1980 | 20 May 1984 |
| Sri Lanka | 9 February 1981 | 3 June 1982 |
| Sudan | 8 December 1978 | 5 December 1979 |
| United Kingdom | 19 March 1976 | 22 November 1976 |
| Rwanda/ | | |
| Belgium-Luxembourg | 2 November 1983 | - |
| Germany, Federal Republic of | 18 May 1967 | 28 February 1969 |
| Switzerland | 15 October 1963 | - |
| Saint Lucia/ | | |
| Germany, Federal Republic of | 16 March 1985 | - |
| United Kingdom | 18 January 1983 | 18 January 1983 |
| Saint Vincent and the Grenadines/ | | |
| Germany, Federal Republic of | 25 March 1986 | - |
| Saudi Arabia/ | | |
| Germany, Federal Republic of | 2 February 1979 | 15 March 1980 |

| Countries | Signature | Entry into force |
|---|---|---|
| Senegal/ | | |
| Germany, Federal Republic of | 24 January 1964 | 16 January 1966 |
| Netherlands | 3 August 1979 | 5 May 1981 |
| Romania | 19 June 1980 | 20 May 1984 |
| Sweden | 24 February 1967 | 23 February 1968 |
| Switzerland | 16 August 1962 | 13 August 1964 |
| United Kingdom | 7 May 1980 | 9 February 1984 |
| United States | 6 December 1983 | - |
| Sierra Leone/ | | |
| Germany, Federal Republic of | 8 April 1965 | 10 December 1966 |
| United Kingdom | 8 December 1981 | - |
| Singapore/ | | |
| Belgium-Luxembourg | 17 November 1978 | 27 November 1980 |
| China | 21 November 1985 | 7 February 1986 |
| France | 8 September 1975 | 18 October 1976 |
| Germany, Federal Republic of | 3 October 1973 | 1 October 1975 |
| Netherlands | 16 May 1972 | 7 September 1973 |
| Sri Lanka | 9 May 1980 | 9 May 1980 |
| Switzerland | 6 March 1973 | 3 June 1978 |
| United Kingdom | 22 July 1975 | 22 July 1975 |
| Somalia/ | | |
| Germany, Federal Republic of | 27 November 1981 | 15 February 1985 |
| Sri Lanka/ | | |
| Belgium-Luxembourg | 5 April 1982 | 26 April 1984 |
| China | 13 March 1986 | 25 March 1987 |
| France | 10 April 1980 | 19 April 1982 |
| Germany, Federal Republic of | 8 November 1963 | 7 December 1966 |
| Japan | 1 March 1982 | 8 August 1982 |
| Netherlands | 26 April 1984 | 1 May 1985 |
| Norway | 13 June 1985 | 13 June 1985 |
| Romania | 9 February 1981 | 3 June 1982 |
| Republic of Korea | 28 March 1980 | 15 July 1980 |
| Singapore | 9 May 1980 | 9 May 1980 |
| Sweden | 30 April 1982 | 30 April 1982 |
| Switzerland | 23 September 1981 | 12 February 1982 |
| Turkey | 27 March 1986 | - |
| United Kingdom | 13 February 1980 | 18 December 1980 |
| Sudan/ | | |
| Egypt | 28 May 1977 | - |
| France | 31 July 1978 | 5 July 1980 |
| Germany, Federal Republic of | 7 February 1963 | 24 November 1967 |
| Netherlands | 22 August 1970 | 27 March 1972 |
| Romania | 8 December 1978 | 5 December 1979 |
| Switzerland | 17 February 1974 | 14 December 1974 |

| Countries | Signature | Entry into force |
|---|---|---|
| Sweden/ c/ | | |
| China | 29 March 1982 | 29 March 1982 |
| Egypt | 15 July 1978 | 29 January 1979 |
| Hungary | 21 April 1987 | 21 April 1987 |
| Ivory Coast | 27 August 1965 | 3 November 1966 |
| Madagascar | 2 April 1966 | 23 June 1967 |
| Malaysia | 3 March 1979 | 6 July 1979 |
| Pakistan | 12 March 1981 | 14 June 1981 |
| Senegal | 24 February 1967 | 23 February 1968 |
| Sri Lanka | 30 April 1982 | 30 April 1982 |
| Tunisia | 15 September 1984 | 13 May 1985 |
| Yemen | 29 October 1983 | 23 February 1984 |
| Yugoslavia | 10 November 1978 | 21 November 1979 |
| Switzerland/ d/ | | |
| Benin | 20 April 1966 | 6 October 1973 |
| Burkina Faso | 6 May 1969 | 15 September 1969 |
| Cameroon | 28 January 1963 | 6 April 1964 |
| Central African Republic | 28 February 1973 | 4 July 1973 |
| Chad | 21 February 1967 | 31 October 1967 |
| China | 12 November 1986 | 18 March 1987 |
| Congo | 18 October 1962 | 11 July 1964 |
| Costa Rica | 1 September 1965 | 18 August 1966 |
| Ecuador | 2 May 1968 | 11 September 1969 |
| Egypt | 25 July 1973 | 4 June 1974 |
| Gabon | 28 January 1972 | 18 October 1972 |
| Guinea | 26 April 1962 | 29 July 1963 |
| Honduras | 20 July 1966 | - |
| Indonesia | 6 February 1974 | 9 April 1976 |
| Ivory Coast | 26 June 1962 | 18 December 1962 |
| Jordan | 11 November 1976 | 2 March 1977 |
| Liberia | 23 July 1963 | 22 September 1964 |
| Madagascar | 17 March 1964 | 31 March 1966 |
| Malaysia | 1 March 1978 | 9 June 1978 |
| Mali | 8 March 1978 | 8 December 1978 |
| Malta | 20 January 1965 | 23 February 1965 |
| Mauritania | 9 September 1976 | 30 May 1978 |
| Morocco | 17 December 1985 | - |
| Niger | 28 March 1962 | 17 November 1962 |
| Panama | 19 October 1983 | 22 August 1985 |
| Republic of Korea | 7 April 1971 | 7 April 1971 |
| Rwanda | 15 October 1963 | - |
| Senegal | 16 August 1962 | 13 August 1964 |
| Singapore | 6 March 1973 | 3 June 1978 |
| Sri Lanka | 23 September 1981 | 12 February 1982 |
| Sudan | 17 February 1974 | 14 December 1974 |
| Syrian Arab Republic | 22 June 1977 | 10 August 1978 |
| Togo | 17 January 1964 | 9 August 1966 |
| Tunisia | 2 December 1961 | 19 January 1964 |

| Countries | Signature | Entry into force |
|---|---|---|
| Uganda | 23 August 1971 | 8 May 1972 |
| United Republic of Tanzania | 3 May 1965 | 16 September 1965 |
| Zaire | 10 March 1972 | 10 May 1973 |
| Syrian Arab Republic/ | | |
| France | 28 November 1977 | 1 March 1980 |
| Germany, Federal Republic of | 2 August 1977 | 20 April 1980 |
| Switzerland | 22 June 1977 | 10 August 1978 |
| Thailand/ | | |
| Belgium-Luxembourg | 19 March 1986 | - |
| China | 12 May 1985 | - |
| Germany, Federal Republic of | 13 December 1961 | 10 April 1965 |
| Netherlands | 6 June 1972 | 3 March 1973 |
| United Kingdom | 28 November 1978 | 11 August 1979 |
| Togo/ | | |
| Germany, Federal Republic of | 16 May 1961 | 21 December 1964 |
| Switzerland | 17 January 1964 | 9 August 1966 |
| Tunisia/ | | |
| Belgium-Luxembourg | 15 July 1964 | 9 March 1966 |
| Germany, Federal Republic of | 20 December 1963 | 6 February 1966 |
| France (1) | 9 August 1963 | 1 August 1965 |
| France (2) | 30 June 1972 | 30 June 1972 |
| Italy | 17 October 1985 | - |
| Kuwait | 14 September 1973 | - |
| Netherlands | 23 May 1963 | 19 December 1964 |
| Republic of Korea | 23 May 1975 | - |
| Sweden | 15 September 1984 | 13 May 1985 |
| Switzerland | 2 December 1961 | 19 January 1964 |
| Turkey/ | | |
| Belgium-Luxembourg | 27 August 1986 | - |
| Germany, Federal Republic of | 20 June 1962 | 16 December 1965 |
| Netherlands | 27 March 1986 | - |
| Sri Lanka | 27 March 1986 | - |
| United States | 3 December 1985 | - |
| Uganda/ | | |
| Germany, Federal Republic of | 29 November 1966 | 19 August 1968 |
| Netherlands | 24 April 1970 | - |
| Switzerland | 23 August 1971 | 8 May 1972 |
| United Kingdom/ | | |
| Bangladesh | 19 June 1980 | 19 June 1980 |
| Belize | 30 April 1982 | 30 April 1982 |
| Cameroon | 4 June 1982 | 7 June 1985 |
| China | 15 May 1986 | 15 May 1986 |
| Costa Rica | 7 September 1982 | - |
| Dominica | 23 January 1987 | 23 January 1987 |
| Egypt | 11 June 1975 | 24 February 1976 |

| Countries | Signature | Entry into force |
|---|---|---|
| Haiti | 18 March 1985 | - |
| Indonesia | 27 April 1976 | 24 March 1977 |
| Jamaica | 20 January 1987 | - |
| Jordan | 10 October 1979 | 24 April 1980 |
| Lesotho | 18 February 1981 | 18 February 1981 |
| Malaysia | 21 May 1981 | - |
| Malta | 4 October 1986 | 4 October 1986 |
| Mauritius | 20 May 1986 | 13 October 1986 |
| Papua New Guinea | 14 May 1981 | 22 December 1981 |
| Panama | 7 October 1983 | 7 November 1985 |
| Paraguay | 4 June 1981 | - |
| Philippines | 3 December 1980 | 2 January 1981 |
| Republic of Korea | 4 March 1976 | 4 March 1976 |
| Romania | 19 March 1976 | 22 November 1976 |
| Saint Lucia | 18 January 1983 | 18 January 1983 |
| Senegal | 7 May 1980 | 9 February 1984 |
| Sierra Leone | 8 December 1981 | - |
| Singapore | 22 July 1975 | 22 July 1975 |
| Sri Lanka | 13 February 1980 | 18 December 1980 |
| Thailand | 28 November 1978 | 11 August 1979 |
| Yemen | 25 February 1982 | |
| United Republic of Tanzania/ | | |
| Germany, Federal Republic of | 30 January 1965 | 12 July 1968 |
| Netherlands | 14 April 1970 | 28 July 1972 |
| Switzerland | 3 May 1965 | 16 September 1965 |
| United States of America/ | | |
| Bangladesh | 12 March 1986 | - |
| Cameroon | 26 February 1986 | - |
| Egypt | 29 September 1982 e/ | - |
| Grenada | 2 May 1986 | - |
| Haiti | 13 December 1983 | - |
| Morocco | 22 July 1985 | - |
| Panama | 27 October 1982 | - |
| Senegal | 6 December 1983 | - |
| Turkey | 3 December 1985 | - |
| Zaire | 3 August 1984 | - |
| Uruguay/ | | |
| Germany, Federal Republic of | 4 May 1987 | - |
| Yemen/ | | |
| France | 27 April 1984 | - |
| Germany, Federal Republic of | 21 June 1974 | 19 December 1978 |
| Netherlands | 18 March 1985 | 1 September 1986 |
| Sweden | 29 October 1983 | 23 February 1984 |
| United Kingdom | 25 February 1982 | - |

| Countries | Signature | Entry into force |
|---|---|---|
| Yugoslavia/ | | |
| Egypt | 3 June 1977 | - |
| France | 28 March 1974 | 3 March 1975 |
| Netherlands | 16 February 1976 | 1 April 1977 |
| Sweden | 10 November 1978 | 21 November 1979 |
| Zaire/ | | |
| Belgium-Luxembourg | 28 March 1976 | 1 January 1977 |
| France | 5 October 1972 | 1 March 1975 |
| Germany, Federal Republic of | 18 March 1969 | 22 July 1971 |
| Switzerland | 10 March 1972 | 10 May 1973 |
| United States | 3 August 1984 | - |
| Zambia/ | | |
| Germany, Federal Republic of | 10 December 1966 | 25 August 1972 |

Notes

a/ Including commercial agreements.

b/ Including economic co-operation agreements.

c/ Including commercial agreements.

d/ Including agreements on commerce, investment protection and technical co-operation.

e/ See the 1986 consolidated text established following the signature of the supplementary protocol (Senate Treaty, document 99-24).

## Annex II

### TREATY BETWEEN SAINT LUCIA AND THE FEDERAL REPUBLIC OF GERMANY CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS OF 16 MARCH 1985*

Saint Lucia
and
the Federal Republic of Germany,

Desiring to intensify economic co-operation between both States,

Intending to create favourable conditions for investments by nationals and companies of either State in the territory of the other State, and

Recognizing that encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations,

have agreed as follows:

### Article 1

For the purpose of the present Treaty

1. the term "investments" shall comprise every kind of asset, in particular

   (a) movable and immovable property as well as any other property rights such as mortgages, liens and pledges;

   (b) shares of companies and other kinds of interest;

   (c) claims to money which has been used to create an economic value or claims to any performance under contract having an economic value;

   (d) copyrights, industrial property rights, technical processes, trade-marks, trade-names, know-how, and goodwill;

   (e) business concessions under public law, including concessions to search for, extract and exploit natural resources;

   any alteration of the form in which assets are invested shall not affect their classification as investment;

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* This treaty corresponds, _mutatis mutandis_, to the model treaty of the Federal Republic of Germany.

2. the term "returns" shall mean the amounts yielded by an investment for a definite period as profit, dividends, interest, licence or other fees;

3. the term "nationals" shall mean

(a) in respect of the Federal Republic of Germany:

Germans within the meaning of the Basic Law for the Federal Republic of Germany;

(b) in respect of Saint Lucia:

citizens of St. Lucia under the Citizenship of St. Lucia Act 1979 (No. 7 of 1979);

4. the term "companies" shall mean

(a) in respect of the Federal Republic of Germany:

any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the German area of application of the present Treaty and lawfully existing consistent with legal provisions, irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit;

(b) in respect of St. Lucia:

corporations, firms or associations incorporated or constituted under the Commercial Code of Saint Lucia or other companies as may be agreed by exchange of letters between the Contracting Parties.

## Article 2

Each Contracting Party shall in its territory promote as far as possible the investment of capital by nationals or companies of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment.

## Article 3

(1) 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 any third State.

(2) Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.

(3) 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, an economic union, a common market or a free trade area.

(4) The treatment granted under this Article shall not refer to privileges granted by either Contracting Party to nationals or companies of third States by virtue of a double taxation convention or other agreements regarding matters of taxation.

## Article 4

(1) Investments by nationals or companies of either Contracting Party shall enjoy full protection as well as security in the territory of the other Contracting Party.

(2) Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the investment expropriated immediately before the date the expropriation or nationalization has become public knowledge. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization, or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization, or comparable measure and the amount of compensation shall be subject to review by due process of law.

(3) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other Contracting Party than that Party accords to its own nationals or companies, as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

(4) Nationals or companies of either Contracting Party shall enjoy most-favoured-national treatment in the territory of the other Contracting Party in respect of the matters provided for in the present Article.

## Article 5

(1) 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

(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 subparagraph (d) of paragraph 1 of Article 1;

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

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

## Article 6

If either Contracting Party makes payment to any of its nationals or companies under a guarantee it has assumed in respect of an investment in the territory of the other Contracting party, the latter Contracting Party shall, without prejudice to the rights of the former Contracting Party under Article 11, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim from such national or company to the former Contracting Party. The latter Contracting Party shall also recognize the subrogation of the former Contracting Party to any such right or claim (assigned claims) which that Contracting Party shall be entitled to assert to the same extent as its predecessor in title. As regards the transfer of payments to be made to the Contracting Party concerned by virtue of such assignment, paragraphs 2 and 3 of Article 4 as well as Article 5 shall apply mutatis mutandis.

## Article 7

(1) To the extent that those concerned have not made another arrangement admitted by the appropriate agencies of the Contracting Party in whose territory the investment is situated, transfers under paragraph 2 or 3 of Article 4, under Article 5 or Article 6 shall be made without delay at the rate of exchange effective for the agreed currency.

(2) This rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

## Article 8

(1) If the legislation of either Contracting Party or international obligations existing at present or established thereafter between the Contracting Parties in addition to the present Treaty contain a regulation, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by the present Treaty, such regulation shall to the extent that it is more favourable prevail over the present Treaty.

(2) Each Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by agreement with nationals or companies of the other Contracting Party.

## Article 9

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.

## Article 10

(1) Investment disputes between a Contracting Party and a national or company of the other Contracting Party shall be settled, as far as possible, amicably between the parties to the dispute.

(2) If the dispute is not settled within six months of the date of its notification by one of the parties, it shall, at the request of one of the parties, be submitted for arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.

(3) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the said Convention.

## Article 11

(1) Divergencies between the Contracting Parties concerning the interpretation or application of the present Treaty should as far as possible be settled by the Governments of the two Contracting Parties.

(2) If a divergency cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such arbitral tribunal shall be constituted ad hoc as follows: each Contracting Party shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the Governments of the two Contracting Parties. Such members shall be appointed within two months, and such chairman within three months from the date on which either Contracting Party has informed the other Contracting Party that it intends to submit the dispute to an arbitral tribunal.

(4) If the periods specified in paragraph 3 above have not been observed, either Contracting Party may, in the absence of any other relevant arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President should make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he, too, is prevented from discharging the said function, the member of the Court next in seniority who is not a national of either Contracting Party should make the necessary appointments.

(5) The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting Party shall bear the cost of its own member and of its representatives in the arbitral proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.

(6) If both Contracting Parties are members of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States the arbitral tribunal provided for above may in consideration of the provisions of paragraph 1 of Article 27 of the said Convention not be appealed to insofar as agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under Article 25 of the Convention. This shall not affect the possibility of appealing to such arbitral tribunal in the event that a decision of the Arbitral Tribunal established under the said Convention (Article 27) is not complied with or in the case of an assignment under a law or pursuant to a legal transaction as provided for in Article 6 of the present Treaty.

## Article 12

The present Treaty shall remain in force also in the event of a conflict arising between the Contracting Parties, without prejudice to the right to take such temporary measures as are permitted under the general rules of international law. Such measures shall be repealed not later than on the date of the actual termination of the conflict, irrespective of whether or not diplomatic relations exist.

## Article 13

With the exception of the provisions in paragraph 6 of the Protocol, in so far as they refer to air transport, the present Treaty shall also apply to Land Berlin, provided that the Government of the Federal Republic of Germany does not make a contrary declaration to the Government of Saint Lucia within three months of the date of entry into force of the present Treaty.

## Article 14

(1) The present Treaty shall be ratified; the instruments of ratification shall be exchanged as soon as possible in [...].

(2) The present Treaty shall enter into force one month from the date of the exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period except if denounced in writing by either Contracting Party twelve months before its expiration. After the expiry of the period of ten years the present Treaty may be denounced at any time by either Contracting Party giving one year's notice.

(3) In respect of investments made prior to the date of termination of the present Treaty, the provisions of Articles 1 to 13 shall continue to be effective for a further period of twenty years from the date of termination of the present Treaty.

Done at Bridgetown/Barbados on March 16th, 1985, in duplicate in the English and German languages, both texts being equally authentic.

For the Federal Republic of Germany,

(Signed)

For Saint Lucia,

(Signed)

PROTOCOL

On signing the Treaty concerning the Encouragement and Reciprocal Protection of Investments, concluded between Saint Lucia and the Federal Republic of Germany, the undersigned plenipotentiaries have, in addition, agreed on the following provisions which shall be regarded as an integral part of the said Treaty:

(1) Ad Article 1

(a) Returns from the investment, and, in the event of their reinvestment, the returns therefrom, shall enjoy the same protection as the investment.

(b) Without prejudice to any other method of determining nationality, in particular any person in possession of a national passport issued by the competent authorities of the Contracting Party concerned shall be deemed to be a national of that Party.

(2) Ad Article 2

Investments made, in accordance with the laws and regulations of either Contracting Party, within the said area of application of the law of that Party by nationals or companies of the other Contracting Party shall enjoy the full protection of the present Treaty.

(3) Ad Article 3

(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of paragraph 2 of Article 3: the management, maintenance, use, and enjoyment of an investment. The following shall, in particular, be deemed "treatment less favourable" within the meaning of Article 3: restricting the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.

(b) The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with the making and carrying through of an investment; the same shall apply to nationals of either Contracting Party who in connection with an investment wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Such entry shall however be subject to limitations justified on grounds of public policy, public security or public health. Applications for work permits shall also be given sympathetic consideration.

(c) It is understood that paragraphs 1 and 2 do not oblige a Contracting Party to extend to persons resident in the territory of the other Contracting Party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to nationals and companies resident in its territory.

(4) Ad Article 4

(a) The term "value" used in Article 4 paragraph 2 means market value. If a market value cannot be determined, the value has to be determined by other criteria of value. If the parties cannot agree on the amount of compensation within three months the question shall be submitted to the Centre for Settlement of Investment Disputes for final settlement pursuant to the provisions of the Convention on Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965.

(b) "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.

(c) A claim to compensation shall also exist when, as a result of State intervention in the company in which the investment is made, its economic substance is severely impaired.

(5) Ad Article 7

A transfer shall be deemed to have been made "without delay" within the meaning of paragraph 1 of Article 7 if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.

(6) Whenever goods or persons connected with the making of investments are to be transported, each Contracting Party shall neither exclude nor hinder transport enterprises of the other Contracting Party and shall issue permits as required to carry out such transport.

This shall include the transport of

(a) goods directly intended for an investment within the meaning of the present Treaty or acquired in the territory of either Contracting Party or of any third State by or on behalf of an enterprise in which assets within the meaning of the present Treaty are invested;

(b) persons travelling in connection with the making of investments.

Done at Bridgetown/Barbados in duplicate in the English and German languages, both texts being equally authentic, on March 16th, 1985.

For the Federal Republic of Germany,

(Signed)

For Saint Lucia,

(Signed)

## Annex III

## NETHERLANDS MODEL AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS

(1979 version)

### Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and ....................

The Government of the Kingdom of the Netherlands and the Government of ..........................................................................,
Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations and to encourage investments on the basis of equality and to the mutual benefit of both countries,

Have agreed as follows:

### Article 1

For the purpose of the present Agreement:

(a) the term "investments" shall comprise every kind of asset and more particularly, though not exclusively:

(i) movable and immovable property as well as any other rights *in rem*;

(ii) shares or other kinds of interests in companies;

(iii) title to money or to any performance, such as goodwill, having an economic value;

(iv) rights in the fields of the industrial property, technical processes and know-how;

(v) such business concessions under public law, including concessions regarding the prospecting for, or the extraction or the winning of natural resources, as give to their holder a legal position of some duration.

(b) the term "nationals" shall comprise with regard to either Contracting Party:

(i) natural persons having the nationality of that Contracting Party in accordance with its law;

(ii) without prejudice to the provisions of (iii) hereafter, legal persons constituted in accordance with the law of that Contracting Party;

(iii) legal persons controlled, directly or indirectly, by nationals of that Contracting Party but constituted in accordance with the law of the other Contracting Party.

## Article 2

The Contracting Parties shall, within the framework of their laws and regulations, promote economic co-operation between their nationals through the encouragement of investments by those nationals in the territory of the other Contracting Party.

## Article 3

(1) Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unjustified or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.

(2) More particularly, each Contracting Party shall accord to such investments the same security and protection as it accords either to those of its own nationals or to those of nationals of any third State, whichever is more favourable to the investor.

## Article 4

Recognizing the principle of the freedom of transfer each Contracting Party shall authorize, in conformity with its relevant most favourable rules the transfer, without undue restriction and delay, to the country of the other Contracting Party and in the currency of that country of payments resulting from investment activities and in particular of the following items:

(a) net profits, interests, dividends and other current income;

(b) funds necessary

i. for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or

ii. to replace capital assets in order to safeguard the continuity of an investment;

(c) additional funds necessary for the development of an investment;

(d) earnings of natural persons;

(e) the proceeds of liquidation of capital;

(f) funds in repayment of loans;

(g) management fees;

(h) royalties.

## Article 5

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

(a) the measures are taken in the public interest and under due process of law;

(b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;

(c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country of which those claimants are nationals and in the currency of that country.

## Article 6

Without prejudice to any special fiscal advantage accorded by the one Contracting Party by virtue of an agreement for the avoidance of double taxation, by virtue of its participation in customs unions, economic unions or similar institutions, or on the basis of reciprocity that Contracting Party shall, with respect to the levying of taxes, fees or charges and to the enjoyment of fiscal deductions and exemptions, accord to nationals of the other Contracting Party engaged in any economic activity in its territory a treatment not less favourable than that accorded to its own nationals or to those of any third country, whichever is more favourable to the national concerned.

## Article 7

Nationals of either Contracting Party shall, in the field of the protection of industrial property, enjoy in the territory of the other Contracting Party a protection not less favourable than that enjoyed by their own nationals, without prejudice to the provisions of international conventions in this field binding on the Contracting Parties.

## Article 8

If a national of the one Contracting Party has transferred any rights and securities to that Party or to another national of that Party because of that Party's or the latter national's obligation, under a legal system of guaranteeing against non-commercial risks, to reimburse the former national as to damage in respect of an investment made by the national in the territory of the other Contracting Party, the latter Contracting Party recognizes the subrogation of the grantor into the said rights and securities of the investor.

## Article 9

The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national to submit, for arbitration or conciliation, [to the Centre established by the Convention of Washington of March 1965 on the settlement of investment disputes between States and nationals of other States] [to a tribunal constituted or to a commission composed in accordance with the Rules of arbitration and conciliation for settlement of international disputes between two parties of which only one is a State, elaborated by the Bureau of the Permanent Court of Arbitration in February 1962] [to the Court of Arbitration or to the Administrative Commission for Conciliation of the International Chamber of Commerce in accordance with the Rules of conciliation and arbitration of that Chamber], any dispute that may arise in connection with the investment.

## Article 10

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments which have been made before that date.

## Article 11

Either Contracting Party may propose the other Party to consult on any matter affecting the operation of the present Agreement. The other Party shall accord sympathetic consideration to and shall afford adequate opportunity for such consultation.

## Article 12

In respect of any matter governed by the present Agreement nothing in this Agreement shall prevent a national of the one Contracting Party from benefiting from any right more favourable to him and accorded by the other Contracting Party.

## Article 13

(1) Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement which cannot be settled, within a reasonable lapse of time, be means of diplomatic negotiations, shall be submitted, at the request of any party to the dispute, to an arbitral tribunal, composed of three members. Each party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator as their chairman who is not a national of either party.

(2) If one of the parties fails to appoint its arbitrator and has not proceeded to do so within two months after an invitation from the other party to make such appointment, the latter party may invite the President of the International Court of Justice to make the necessary appointment.

(3) If the two arbitrators are unable to reach agreement, in the two months following their appointment, on the choice of the third arbitrator, either party

may invite the President of the International Court of Justice, to make the necessary appointment.

(4) If, in the cases provided for in the second and third paragraphs of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of either party, the Vice-President should make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of either party, the most senior member of the Court who is not a national of either party should make the necessary appointments.

(5) The tribunal shall decide on the basis of respect for the law. Before the tribunal decides, it may at any stage of the proceedings propose to the parties that the dispute be settled amicably. The foregoing provisions shall not prejudice the power of the tribunal to decide the dispute ex aequo et bono if the parties so agree.

(6) Unless the parties decide otherwise, the tribunal shall determine its own procedure.

(7) The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the parties to the dispute.

## Article 14

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom in Europe and to the Netherlands Antilles, unless the notification provided for in Article 15, paragraph (1) provides otherwise.

## Article 15

(1) The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have informed each other in writing that the procedures constitutionally required therefore in their respective countries have been complied with, and shall remain in force for a period of 15 years.

(2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of 10 years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.

(3) Any such termination shall have no effect on the fulfilment of contracts made under the provisions of the present Agreement.

(4) In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of 15 years from that date.

(5) Subject to the period mentioned in paragraph (2) of this Article, the Government of the Kingdom of the Netherlands shall be entitled to terminate the

application of the present Agreement separately in respect of the Netherlands Antilles.

In WITNESS WHEREOF, the undersigned representatives, duly authorized thereto, have signed the present Agreement.

DONE in duplicate at , in the English language, on day of 1979.

| For the Government of | For the Government of the Kingdom of the Netherlands |
|---|---|
| ................................... | ................................... |

## Annex IV

NETHERLANDS REVISED MODEL AGREEMENT

(February 1987)

### Agreement on Encouragement and Reciprocal Protection of Investments between

..............................................

and

the Government of the Kingdom of the Netherlands,

Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party,

Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable,

Have agreed as follows:

### Article 1

For the purposes of the present Agreement:

(a) the term "investments" shall comprise every kind of asset and more particularly, though not exclusively:

(i) movable and immovable property as well as any other rights *in rem* in respect of every kind of asset;

(ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;

(iii) title to money, goodwill and other assets and to any performance having an economic value;

(iv) rights in the field of intellectual property, technical processes and know-how;

(v) rights granted under public law, including rights to prospect, explore, extract and win natural resources.

(b) the term "nationals" shall comprise with regard to either Contracting Party:

(i) natural persons having the nationality of that Contracting Party in accordance with its law;

(ii) without prejudice to the provisions of (iii) hereafter, legal persons constituted in accordance with the law of that Contracting Party;

(iii) legal persons controlled, directly or indirectly, by nationals of that Contracting Party but constituted in accordance with the law of the other Contracting Party.

(c) the term "territory" includes the maritime areas adjacent to the coast of the State concerned, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.

## Article 2

Either Contracting Party shall, within the framework of its laws and regulations, promote economic co-operation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments.

## Article 3

(1) Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.

(2) More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the investor.

(3) If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions or similar institutions, or on the basis of interim agreements leading to such unions of institutions, that Contracting Party shall not be obliged to accord such advantages to nationals of the other Contracting Party.

(4) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.

(5) If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.

## Article 4

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to nationals of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own nationals or to those of any third State, whichever is more favourable to the nationals concerned. For this purpose, however, there shall not be taken into account any special fiscal advantages accorded by that Party under an agreement for the avoidance of double taxation, by virtue of its participation in a customs union, economic union or similar institutions, or on the basis of reciprocity with a third State.

## Article 5

The Contracting Parties shall guarantee the transfer of payments related to an investment. The transfers shall be made in a freely convertible currency, without undue restrictions and delay.

Such transfers include in particular though not exclusively:

(a) profits, interest, dividends and other current income;

(b) funds necessary

(i) for the acquisition of raw or auxiliary materials, semi-fabricated or finished products; or

(ii) to replace capital assets in order to safeguard the continuity of an investment;

(c) additional funds necessary for the development of an investment;

(d) funds in repayment of loans;

(e) royalties or fees;

(f) earnings of natural persons;

(g) the proceeds of sale or liquidation of the investment.

## Article 6

Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:

(a) the measures are taken in the public interest and under due process of law;

(b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;

(c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

## Article 7

Nationals of the one Contracting Party who suffer losses in respect of their investments in the territory of the other Contracting Party owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which that Contracting Party accords to its own nationals or to nationals of any third State, whichever is more favourable to the nationals concerned.

## Article 8

If the investments of a national of the one Contracting Party are insured against non-commercial risks under a system established by law, any subrogation of the insurer or re-insurer into the rights of the said national pursuant to the terms of such insurance shall be recognized by the other Contracting Party.

## Article 9

Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to (the International Centre for the Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965. A legal person which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.)

(a tribunal constituted or to a commission composed in accordance with the Rules of arbitration and conciliation for settlement of international disputes between two parties of which only one is a State, elaborated by the Bureau of the Permanent Court of Arbitration in February 1962.)

(the Court of Arbitration or to the Administrative Commission for Conciliation of the International Chamber of Commerce in accordance with the Rules of conciliation and arbitration of that Chamber.)

## Article 10

The provisions of this Agreement shall, from the date of entry into force thereof, also apply to investments which have been made before that date.

## Article 11

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the part of the Kingdom in Europe, the Netherlands Antilles and to Aruba, unless the notification provided for in Article 14, paragraph (1) provides otherwise.

## Article 12

Either Contracting Party may propose the other Party to consult on any matter concerning the interpretation or application of the Agreement. The other Party shall accord sympathetic consideration to and shall afford adequate opportunity for such consultation.

## Article 13

(1) Any dispute between the Contracting Parties concerning the interpretation or application of the present Agreement which cannot be settled, within a reasonable lapse of time, by means of diplomatic negotiations, shall, unless the Parties have otherwise agreed, be submitted, at the request of either Party, to an arbitral tribunal, composed of three members. Each Party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator as their chairman who is not a national of either Party.

(2) If one of the Parties fails to appoint its arbitrator and has not proceeded to do so within two months after an invitation from the other Party to make such appointment, the latter party may invite the President of the International Court of Justice to make the necessary appointment.

(3) If the two arbitrators are unable to reach agreement, in the two months following their appointment, on the choice of the third arbitrator either Party may invite the President of the International Court of Justice, to make the necessary appointment.

(4) If, in the cases provided for in the second and third paragraphs of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of either Contracting Party, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of either Party the most senior member of the Court available who is not a national of either Party shall be invited to make the necessary appointments.

(5) The tribunal shall decide on the basis of respect for the law. Before the tribunal decides, it may at any stage of the proceedings propose to the Parties that the dispute be settled amicably. The foregoing provisions shall not prejudice the power of the tribunal to decide the dispute ex aequo et bono if the Parties so agree.

(6) Unless the Parties decide otherwise, the tribunal shall determine its own procedure.

(7) The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Parties.

## Article 14

(1) The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have informed each other in writing that the procedures constitutionally required therefor in their respective countries have been complied with, and shall remain in force for a period of 15 years.

(2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of 10 years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.

(3) In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of 15 years from that date.

(4) Subject to the period mentioned in paragraph (2) of this Article, the Government of the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom.

IN WITNESS WHEREOF, the undersigned representatives, duly authorized thereto, have signed the present Agreement.

DONE in duplicate at ...................... on ............................., in the .................., Dutch and English languages, the three texts being equally authentic. In case of difference of interpretation the English text will prevail.

For the Government of

For the Government of

the Kingdom of the Netherlands:

.....................................     .....................................

## Annex V

## UNITED STATES PROTOTYPE TREATY CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS

(1984 revised text)

TREATY BETWEEN
THE UNITED STATES OF AMERICA
AND

.......................................

The United States of America

and ........................................................................

Desiring to promote greater economic co-operation between them, particularly with respect to investment by nationals and companies of one Party in the territory of the other Party; and

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties,

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and

Having resolved to conclude a treaty concerning the encouragement and reciprocal protection of investment,

Have agreed as follows:

### Article I

1. For the purposes of this Treaty,

(a) "Company of a Party" means any kind of corporation, company, association, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned;

(b) "Investment" means every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

(c) "National" of a Party means a natural person who is a national of a Party under its applicable law;

(d) "Return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;

(e) "Associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.

2. Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

## Article II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favourable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favourable, subject to the right of each party to make or maintain exceptions falling within one of the sectors or matters listed in the annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall not be less favourable than that accorded in like situations to investments

and associated activities of nationals or companies of any third country, except with respect to ownership of real property. Rights to engage in mining on the public domain shall be dependent on reciprocity.

2. 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.

3. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

4. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

5. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties.

7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

8. The treatment accorded by the United States of America to investments and associated activities under the provisions of this Article shall in any State, Territory or possession of the United States of America be the treatment accorded therein to companies legally constituted under the laws and regulations of other States, Territories or possessions of the United States of America.

## Article III

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; include interest at a commercially reasonable rate from the date of

expropriation; be paid without delay; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation and any compensation therefore, conforms to the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favourable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.

## Article IV

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Except as provided in Article III, paragraph 1, transfers shall be made in a freely convertible currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations; (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgements in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.

## Article V

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

## Article VI

1. For purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation or application of an investment agreement between a Party and a national or company of the other Party; (b) the

interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiations, which may include the use of non-binding, third-party procedures. If the disputes cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures. Any dispute-settlement procedures regarding expropriation and specified in the investment agreement shall remain binding and shall be enforceable in accordance with the terms of the investment agreement, relevant provisions of domestic laws, and applicable international agreements regarding enforcement or arbitral awards.

3. (a) The national or company concerned may choose to consent in writing to the submission of the dispute to the International Centre for the Settlement of Investment Disputes ("Centre") or under the rules of the Additional Facility of the Centre ("Additional Facility"), for settlement by conciliation or binding arbitration, at any time after six months from the date upon which the dispute arose. Once the national or company concerned has so consented, either Party to the dispute may institute proceedings before the Centre or the Additional Facility provided

(i) the dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute settlement procedures; and

(ii) the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to a dispute.

If the Parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the opinion of the national or company concerned shall prevail.

(b) Each Party hereby consents to the submission of an investment dispute to the Centre for settlement by conciliation or binding arbitration, or, in the event the Centre is not available, to the submission of the dispute to ad hoc arbitration in accordance with the rules and procedures of the Centre.

(c) Conciliation or binding arbitration of such disputes shall be done in accordance with the provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States done at Washington, 18 March 1965 ("Convention") and the Regulations and Rules of the Centre or, if the Convention should for any reason be inapplicable the Rules of the Additional Facility shall govern.

4. In any proceeding involving an investment dispute, a Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

5. For the purposes of this Article, any company legally constituted under the applicable laws and regulations or either Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall, in accordance with Article 25 (2) (b) of the Convention, be treated as a national or company of such other Party.

## Article VII

1. Any dispute between the Parties concerning the interpretation or application of this Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the Model Rules on Arbitral Procedure adopted by the United Nations International Law Commission in 1958 as referred to in the United Nations General Assembly Resolution 1262 (XIII) shall govern.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State.

3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decision within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.

4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceeding shall be paid for equally by the Parties. The Tribunal may, however, at its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

## Article VIII

The provisions of Article VI and VII shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programmes of the Export-Import Bank of the United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

## Article IX

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization, that entitle investments or associated activities to treatment more favourable than that accorded by this Treaty in like situations.

## Article X

1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.

## Article XI

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Articles VI and VII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article III;

(b) transfers, pursuant to Article IV; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1) (a) or (b), to the extent they are not subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

## Article XII

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 3 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the

provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at ...................., on the day .................... of ........................., in the English and .................. languages, both texts being equally authentic.

| FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA | FOR THE GOVERNMENT OF ......................... |
| --- | --- |

## Appendix

Consistent with Article II, paragraph 1, each Party reserves the right to maintain limited exceptions in the sectors or matters it has indicated below:

### The United States of America

Air transportation; ocean and coastal shipping; banking; insurance; government grants; government insurance and loan programmes; energy and power production; custom house brokers; ownership of real estate; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources.

## Annex VI

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE REVISED DRAFT OF MODEL AGREEMENTS FOR PROMOTION AND PROTECTION OF INVESTMENTS a/

### Model A

AGREEMENT between the Government of ....................................

and

the Government of .................................. for the Promotion, Encouragement and Reciprocal Protection of Investments.

The Government of ................................ and the Government of ..........................................................................

Recognizing in particular the need to promote wider co-operation between the countries of the Asian-African region to accelerate their economic growth and to encourage investments by developing countries in other developing countries of the region;

Also recognizing that reciprocal protection of such investments will be conducive to the attainment of desired objectives in a spirit of partnership;

Desirous to create conditions in which the investments by each other and their nationals would be facilitated and thus stimulate the flow of capital and technology within the region;

Have agreed as follows:

#### Article 1

#### Definitions

For the purpose of this Agreement

(a) 'Investment'

(Alternative A)

'Investment' means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares, stocks and debentures of companies or interests in the property of such companies;

(iii) claims to money or to any performance under contract having a financial value, and loans;

(iv) copyrights, know-how (goodwill) and industrial property rights such as patents for inventions, trade marks, industrial designs and trade names;

(v) rights conferred by law or under contract, including licence to search for, cultivate, extract or exploit natural resources.

(Alternative B)

'Investment' includes every kind of asset such as:

(i) shares and other types of holdings of companies;

(ii) claims to any performance under contract having a financial value, claims to money, and loans;

(iii) rights with respect to movable and immovable property;

(iv) rights with regard to patents, trade marks and any other industrial property; and

(v) contractual rights relating to exploration and exploitation of natural resources.

(Alternative C)

'Investment' means:

(i) in respect of investment in the territory of (First Party) ..............................................

(ii) in respect of investment in the territory of (Second Party) ..........................................

(b) 'National'

(Alternative A)

'National' in respect of each Contracting Party means a natural person who is a national or deemed to be a national of the Party under its Constitution or relevant law.

(Alternative B)

'National' in respect of (First Party) ............................ means .......................... and in respect of (Second Party) means ..........................

(c) 'Companies'

(Alternative A)

'Companies' means corporations, partnerships or associations incorporated, constituted or registered in a Contracting Party in accordance with its laws [and includes such entities in which nationals of a Contracting Party have substantial interest and majority shareholding].

(Alternative B)

'Companies' means in respect of the (First Party) ........................ and in respect of the (Second Party) ...................................

(d) '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.

(e) 'Returns' includes profits, interests, capital gains, dividends, royalties or fees.

(f) 'Host State' means the country in whose territory the investment is made.

(g) 'Territory' means:

(i) In respect of the (First Party) .............................;

(ii) In respect of the (Second Party) ...........................

Article 2

Promotion and encouragement of investments

(i) Each Contracting Party shall take steps to promote investments in the territory of the other Contracting Party and encourage its nationals, companies and State entities to make such investments through offer of appropriate incentives, wherever possible, which may include such modalities as tax concessions and investment guarantees.

(ii) Each Contracting Party shall create favourable conditions to encourage the nationals, companies or State entities of the other Contracting Party to promote investment in its territory.

(iii) The Contracting Parties shall periodically consult among themselves concerning investment opportunities within the territory of each other in various sectors such as industry, mining, communications, agriculture and forestry to determine where investments from one Contracting Party into the other may be most beneficial in the interest of both the parties.

(iv) [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]. b/

## Article 3

### Reception of investments

(i) Each Contracting Party shall determine the mode and manner in which investments are to be received in its territory.

(ii) The Contracting Parties may determine that in a specified class of investments, a national, company or State entity of a Contracting Party intending to make investment in the territory of the other Contracting Party including collaboration arrangements on specific projects, shall submit its or his proposal to a designated authority of the Party where the investment is sought to be made. Such proposals shall be processed expeditiously and soon after the proposal is approved, a letter of authorization shall be issued and the investment shall be registered, where appropriate, with the designated authority of the host State. The investment shall be received subject to the terms and conditions specified in the letter of authorization.

(iii) The host State shall facilitate the implementation and operation of the investment projects through suitable administrative measures and in particular in the matter of expeditious clearance of authorizations or permits for importation of goods, employment of consultants and technicians of foreign nationality in accordance with its laws and regulations.

## Article 4

### Most-favoured-nation treatment

(i) Each Contracting Party shall accord in its territory to the investments or returns of nationals, companies or State entities of the other Contracting Party treatment that is not less favourable than that it accords to the investments or returns of nationals, companies or State entities of any third State.

(ii) Each Contracting Party shall also ensure that the nationals, companies or State entities of the other Contracting Party are accorded treatment not less favourable than that it accords to the nationals or companies or State entities of any third State in regard to the management, use, enjoyment or disposal of their investments including management and control over business activities and other ancillary functions in respect of the investments.

## Article 5 c/

### National treatment

(i) Each Contracting Party shall accord in its territory to the investments or returns of nationals, companies or State entities of the other Contracting Party treatment that is not less favourable than that it accords to the investments or returns of its own nationals, companies or State entities.

(ii) Each of the Contracting Parties shall extend to the nationals, companies or State entities of the other Contracting Party, treatment that is not less favourable than it accords to its own nationals, companies or State entities in regard to management, control, use, enjoyment and disposal in relation to investments which have been received in its territory.

## Article 6

### Repatriation of capital and returns

(i) Each Contracting Party shall ensure that the nationals, companies or State entities of the other Contracting Party are allowed full facilities in the matter of the right to repatriation of capital and returns on his or its investments subject, however, to any condition for re-investment and subject also to the right of the host State to impose reasonable restrictions for temporary periods in accordance with its laws to meet exceptional financial and economic situations [as determined in the light of guidelines generally applied by the IMF or such other criteria as may be agreed upon by the parties]. The capital and returns allowed to be repatriated shall include emoluments and earnings accruing from or in relation to the investment as also the proceeds arising out of sale of the assets in the event of liquidation or transfer.

(ii) In the event of exceptional financial or economic situations as envisaged in paragraph (1) of this article, the host State shall exercise its powers to impose reasonable restrictions equitably and in good faith. Such restrictions shall not extend ordinarily beyond a period of ................................... As any restriction in operation thereafter shall not impede the transfer of profits, interests, dividends, royalties, fees, emoluments or earnings; as regards the capital invested or any other form of returns, transfer of a minimum of 20 per cent in each year shall be guaranteed.

(iii) Repatriation shall be permitted ordinarily to the country from which the investment originated and in the same currency in which the capital was originally invested or in any other currency agreed upon by the investor and the host State at the rate of exchange applicable on the date of transfer upon such repatriation, unless otherwise agreed by the investor and the host State.

## Article 7

### Nationalization, expropriation and payment of compensation in respect thereof

(i) Investments of nationals, companies or State entities of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except [for a public purpose] [in national interest] of that Party and against prompt, adequate and effective compensation, provided that such measures are taken on a non-discriminatory basis and in accordance with its laws.

(ii) Such compensation shall be computed on the basis of the value of the investment immediately prior to the point of time when the proposal for expropriation had become public knowledge to be determined in accordance with recognized principles of valuation such as market value. Where the 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 and other relevant factors. The compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment. The determination of the compensation, in the absence of agreement being reached between the investor and the host State, shall be referred to an independent judicial or administrative tribunal or authority competent under the laws of the expropriating State or to arbitration in accordance with the provisions of any agreement between the investor and the host State. The compensation as finally determined shall be promptly paid and allowed to be repatriated.

(iii) Where a Contracting Party nationalizes or expropriates the assets of a company which is incorporated or constituted under the laws in force in its territory and in which nationals or companies or State entities of the other Contracting Party own shares, it shall ensure that prompt, adequate and effective compensation is received and allowed to be repatriated by the owners of the shares in the other contracting Party. Such compensation shall be determined on the basis of the recognized principles of valuation such as the market value of the shares immediately prior to the point of time when the proposal for nationalization or expropriation had become public knowledge. The compensation shall include interest at a normal commercial rate from the date of nationalization or expropriation until the date of payment. If any question arises regarding the determination of the compensation or its payment, such questions shall be referred to an independent judicial or administrative tribunal or authority competent under the laws of the expropriating State or to arbitration in accordance with the provisions of any agreement between the investor and the host State.

## Article 8

## Compensation for losses

[(i) Nationals, companies or State entities of one Contracting Party whose material assets in the investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party, shall be accorded by that Contracting Party treatment regarding restitution, indemnification, compensation or other settlement, no less favourable than that it accords to (its own nationals, companies or State entities or to) nationals, companies or State entities of any third State]. d/

(ii) Nationals, companies or State entities of one Contracting Party who suffer losses in the territory of the other contracting Party resulting from:

(a) requisitioning of their property by its forces or authorities; or

(b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation;

shall be accorded restitution or adequate compensation and the resulting payments shall be allowed to be repatriated.

## Article 9

## Access to courts and tribunals

The nationals, companies or State entities of one Contracting Party shall have the right of access to the courts, tribunals both judicial and administrative, and other authorities competent under the laws of the other Contracting Party for redress of his or its grievances in relation to any matter concerning any investment including judicial review of measures relating to expropriation or nationalization, determination of compensation in the event of expropriation or nationalization, or losses suffered and any restrictions imposed on repatriation of capital or returns.

## Article 10

## Settlement of investment disputes

(i) Each Contracting Party consents to submit any dispute or difference that may arise out of or in relation to investments made in its territory by a national, company or State entity of the other contracting Party for settlement through conciliation or arbitration in accordance with the provisions of this Article.

(ii) If any dispute or difference should arise between a Contracting Party and a national, company or State entity of the other Contracting Party, which cannot be resolved within a period of ............................ through negotiations, either party to the dispute may initiate proceedings for conciliation or

arbitration unless the investor has chosen to avail himself or itself of local remedies.

(iii) Unless the parties have reached agreement to refer the disputes to conciliation under the provisions of the International Convention for the Settlement of Investment Disputes between States and Nationals of other States 1965, conciliation shall take place under the UNCITRAL Conciliation Rules 1980 and the assistance of ...................... may be enlisted in connection with the appointment of Conciliator(s).

(iv) Where the conciliation proceedings have failed to resolve the dispute as also in the event of agreement having been reached to resort to arbitration, the dispute shall be referred to arbitration at the instance of either party to the dispute within a period of three months.

(v) Any reference to arbitration shall be initiated under the provisions of the International Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965 or "The Additional Facility Rules" of ICSID, whichever may be appropriate. In the event of neither of these procedures being applicable, the arbitration shall take place in accordance with the UNCITRAL Arbitration Rules 1976, and the appointing authority for the purposes of such rules shall be ............................

(vi) Neither Contracting Party shall pursue through diplomatic channels any matter referred to arbitration until the proceedings have terminated and a Contracting Party has failed to abide by or to comply with the award rendered by the arbitral tribunal.

## Article 11

### Settlement of disputes between Contracting Parties

(i) Disputes or differences between the Contracting Parties concerning interpretation or application of this agreement shall be settled through negotiations.

(ii) If such disputes and differences cannot thus be settled, the same shall, upon the request of either Contracting Party be submitted to an arbitral tribunal.

(iii) An arbitral tribunal shall be composed of three members. Each Contracting Party shall nominate one member on the tribunal within a period of two months of the receipt of the request for arbitration. The third member, who shall be the chairman of the tribunal, shall be appointed by agreement of the Contracting Parties. If a Contracting Party has failed to nominate its arbitrator or where agreement has not been reached in regard to appointment of the chairman of the tribunal within a period of three months, either Contracting Party may approach the President of the International Court of Justice to make the appointment. The chairman so appointed shall not be a national of either Contracting Party.

(iv) The arbitral tribunal shall reach its decision by majority of votes. Such decision shall be binding on both the Contracting Parties. The tribunal shall determine its own procedure and give directions in regard to the costs of the proceedings.

## Article 12

## Subrogation

If either Contracting Party makes payment under an indemnity it has given in respect of an investment or any part thereof in the territory of the other contracting Party, the latter Contracting Party shall recognize:

(a) The assignment of any right or claim from the party indemnified to the former Contracting Party or its designated Agency; and

(b) That the former Contracting Party or its designated Agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of such a party.

## Article 13

## Exceptions

Neither Contracting Party shall be obliged to extend to the nationals or companies or State entities of the other, the benefit of any treatment, preference or privilege which may be accorded to any other State or its nationals by virtue of the formation of a customs union, a free trade area or any other regional arrangement on economic co-operation to which such a State may be a party.

## Article 14

## Application of the Agreement

The provisions of this Agreement shall apply to investments made after the coming into force of this Agreement [and the investments previously made which are approved and registered by the host State (in accordance with its laws) within a period of .................................. from the date of entry into force of this Agreement]. e/

## Article 15

## Entry into force

[This Agreement shall enter into force on signature.]

or

[This Agreement shall enter into force as from .........................]

or

[This Agreement shall be ratified and shall enter into force on the exchange of instruments of ratification.] f/

Article 16

Duration and termination

This Agreement shall remain in force for a period of ........................ Thereafter it shall continue in force until the expiration of twelve months from any date on which either Contracting Party shall have given written notice of termination to the other. [Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ......................... years after the date of termination.] g/

In WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at ................................, this ....... day of ................... 1980. (In the ................... and .................. languages, both texts being equally authoritative.)

For the Government of ..............................

For the Government of .................................

## Addendum to Model "A"

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE (AALCC)

## Models for Bilateral Agreements on Promotion and Protection of Investments

as finally adopted at AALCC's Kathmandu session in February 1985.

### SUGGESTIONS OF THE DELEGATION OF KUWAIT

1. Article 2 (Promotion and encouragement of investments)

Paragraph (iv) should be expanded to read as follows (additions underlined):

"Each Contracting Party shall at all times ensure fair and equitable treatment to the investments of nationals, companies or State entities of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals, companies or State entities of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures.

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. Article 6 (Repatriation of capital and returns)

It is proposed that the following paragraph be added to Article 6:

"(iv) The Contracting Parties undertake to accord to transfers referred to in paragraphs (i), (ii) and (iii) of this Article a treatment as favourable as that accorded to transfers originating from investments made by nationals, companies and State entities of any third Party."

3. Article 11 (Settlement of disputes between Contracting Parties)

Paragraph (iii) of Article 11 should be expanded to read as follows:

... either Contracting Party may approach the President of the International Court of Justice to make the appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

4. Suggested additional articles

There are two additional articles that should be incorporated into the agreement. They are related to the relations between governments and to the application of other rules.

Article

Relations between Governments

"The provisions of the present Agreement shall apply irrespective of the existence of diplomatic or consular relations between the Contracting Parties."

Article

Applications of other rules

"Notwithstanding the provisions of this Agreement, the relevant international agreements which bind both contracting parties may be applied with the consent of both parties."

## Model B*

AGREEMENT between the Government of ________________________________

and

the Government of ________________________________ for Promotion, Encouragement and Reciprocal Protection of Investments.

The Government of ________________________________ and the Government of ________________________________,

Recognizing in particular the need to promote wider co-operation between the countries of the Asian-African region to accelerate their economic growth and to encourage investments by developing countries in other developing countries of the region;

Also recognizing that reciprocal protection of such investments will be conducive to the attainment of desired objectives in a spirit of partnership;

Desirous to create conditions in which investments by each other and their nationals would be facilitated and thus stimulate the flow of capital and technology within the region;

Have agreed as follows:

### Article 1

### Definitions

For the purpose of this Agreement

(a) 'Investment'

(Alternative A)

'Investment' means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares, stocks and debentures of companies or interests in the property of such companies;

---

* The model agreement is intended to provide a possible negotiating text for consideration of Governments. It is merely a model and not an adhesive text. The possibility that the text would be modified or altered in the course of bilateral negotiations to suit the needs of the parties is clearly contemplated.

(iii) claims to money or to any performance under contract having a financial value and loans;

(iv) copyrights, know-how, [goodwill] and industrial property rights such as patents for inventions, trademarks, industrial designs and trade names;

(v) rights conferred by law or under contract, including licence to search for, cultivate, extract or exploit natural resources.

(Alternative B)

'Investment' includes every kind of asset such as:

(i) shares and other types of holdings of companies;

(ii) claims to any performance under contract having a financial value, claims to money and loans;

(iii) rights with respect to movable and immovable property;

(iv) rights with regard to patents, trade marks, and any other industrial property; and

(v) contractual rights relating to exploration and exploitation of natural resources.

(Alternative C)

'Investment' means:

(i) in respect of investment in the territory of (First Party) ____________________;

(ii) in respect of investment in the territory of (Second Party) ____________________.

(b) 'National'

(Alternative A)

'National' in respect of each Contracting Party means a natural person who is national or deemed to be a national of the Party under its Constitution or relevant law.

(Alternative B)

'National' in respect of ____(First Party)____ means ____________________ and in respect of (Second Party) means ____________________.

(c) 'Companies'

(Alternative A)

'Companies' means corporations, partnerships or associations incorporated, constituted or registered in a Contracting Party in accordance with its laws [and includes such entities in which nationals of a Contracting Party have substantial interest and majority shareholding.]

(Alternative B)

'Companies' means in respect of the (First Party) ______________________ and in respect of the (Second Party) ________________________________________.

(d) '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.

(e) 'Returns' includes profits, interest, capital gains, dividends, royalties or fees.

(f) 'Host State' means the country in whose territory the investment is made.

(g) 'Territory' means:

(i) in respect of the (First Party) ______________________________;

(ii) in respect of the (Second Party) ______________________________.

Article 2

Promotion and encouragement of investments

(i) Each Contracting Party shall take steps to promote investments in the territory of the other Contracting Party and encourage its nationals, companies and State entities to make such investments, through offer of appropriate incentives, wherever possible, which may include such modalities as tax concessions and investment guarantees.

(ii) Each Contracting Party shall create favourable conditions for the nationals, companies or State entities of the other Contracting Party to promote investment in its territory.

(iii) The Contracting Parties shall periodically consult among themselves concerning investment opportunities within the territory of each other in various sectors such as industry, mining, communications, agriculture and forestry to determine where investments from one Contracting Party into the other may be most beneficial in the interest of both the parties.

(iv) *[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.]

## Article 3

### Reception of investments

(i) A national, company or State entity of a Contracting Party intending to make investment in the territory of the other Contracting Party including collaboration arrangements on specific projects, shall submit his or its proposal to a designated authority of the Party where the investment is sought to be made. Such proposals shall be examined expeditiously and so soon after the proposal is approved, a letter of authorization shall be issued and the investment shall be registered, where appropriate, with the designated authority of the host State.

(ii) The investment shall be received subject to the terms and conditions specified in the letter of authorization. Such terms and conditions may include the obligation or requirement concerning employment of local personnel and labour in the investment projects, organisation of training programmes, transfer of technology and marketing arrangements for the products.

(iii) The host State shall facilitate the performance of the contracts relatable to the investments through suitable administrative measures and in particular in the matter of expeditious clearance of authorization or permits for importation of goods, employment of consultants and technicians of foreign nationality in accordance with its laws and regulations.

(iv) The Contracting Parties shall make every endeavour through appropriate means at their disposal to ensure that their nationals, companies or State entities comply with the laws and regulations of the host State and also carry out in good faith the obligations undertaken in respect of the investments made in accordance with the terms and conditions specified by the host State.

## Article 4

### Most-favoured-nation treatment

(i) Each Contracting Party shall accord in its territory to the investments or returns of nationals, companies or State entities of the other Contracting Party treatment that is not less favourable than that it accords to the investments or returns of nationals, companies or State entities of any third State.

(ii) Each Contracting Party shall also ensure that the nationals, companies or State entities of the other Contracting Party are accorded treatment not less favourable than that it accords to the nationals or companies or State entities of

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* There were some differences of view on the needs for inclusion of this clause.

any third State in regard to the management, use, enjoyment or disposal of their investments including management and control over business activities and other ancilliary functions in respect of the investments.

## Article 5

### *National treatment

(i) Each Contracting Party shall accord in its territory to the investments or returns of nationals, companies or State entities of the other Contracting Party treatment that is not less favourable than that it accords to the investments or returns of its own nationals, companies or State entities.

(ii) Each of the Contracting Parties shall extend to the nationals, companies or State entities of the other Contracting Party, treatment that is not less favourable than that it accords to its own nationals, companies or State entities in regard to management, control, use, enjoyment and disposal in relation to investments which have been received in its territory.

## Article 6

### Repatriation of capital and returns

(i) Each Contracting Party shall ensure that the nationals, companies or State entities of the other Contracting Party are allowed facilities in the matter of repatriation of capital and returns on his or its investments in accordance with the terms and conditions stipulated by the host State at the time of the reception of the investment.

(ii) Such terms and conditions may specify:

(a) the mode and manner of repatriation of profits and returns as also the requirement, if any, concerning re-investment;

(b) the extent to which the capital invested may be allowed to be repatriated in each particular year;

(c) any requirement concerning the currency in which repatriation is to be made and the place or places of such repatriation;

(d) the nature of restrictions that may be imposed by the host State on repatriation of capital and returns in its national interest during any period of exceptional financial or economic situations.

(iii) The stipulations concerning repatriation of capital and returns shall be set out in the letter of authorization referred to in Article 3. The terms and conditions so specified shall remain operative throughout the period of the investment and shall not be altered without the agreement of the parties.

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* Some countries do not favour "national treatment" for foreign investments.

## Article 7

## Nationalization, expropriation and payment of compensation in respect thereof

(i) (Alternative 1)

A Contracting Party may exercise its sovereign rights in the matter of nationalization or expropriation in respect of investments made in its territory by nationals, companies or State entities of the other Contracting Party upon payment of appropriate compensation, subject however, to the provisions of its laws. The host State shall abide by and honour any commitments made or assurances given both in regard to nationalization or expropriation and the principles for determination of appropriate compensation including the mode and manner of payment thereof.

(Alternative 2)

Investments of nationals, companies or State entities of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except [for a public purpose] [in national interest] of that party and against prompt payment of appropriate compensation.

(ii) (Alternative 1)

*[Unless stipulations are made to the contrary at the time of the reception of the investment, the expression "appropriate compensation" shall mean compensation calculated on the basis of recognized principles of valuation.]

(Alternative 2)

Unless stipulations are made to the contrary at the time of the reception of the investment, the expression "appropriate compensation" shall mean compensation determined in accordance with equitable principles taking into account the capital invested, depreciation, capital already repatriated and other relevant factors.

## Article 8

## Compensation for losses

The nationals, companies or State entities of one Contracting Party who suffer losses in the territory of the other Contracting Party resulting from:

(a) Requisitioning of their property by its forces or authorities; or

(b) Destruction of their property by its forces or authorities which was not caused in combat actions or was not required by the necessity of the situation;

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* Some delegations had reservations on this provision.

shall be accorded restitution or adequate compensation [and the resulting payments shall be allowed to be repatriated.]

## Article 9

## Access to courts and tribunals

(Alternative 1)

The nationals, companies or State entities of one Contracting Party shall have the right of access to the courts, tribunals, both judicial and administrative, and other authorities competent under the laws of the other Contracting Party for redress of his or its grievances in relation to any matter concerning an investment including judicial review of measures relating to nationalization or expropriation, determination of compensation in the event of nationalization or expropriation or losses suffered and any restrictions imposed on repatriation of capital or returns. The local remedies shall be exhausted before any other step or proceeding is contemplated.

*[(Alternative 2)

Any difference or dispute between the investor and the host State in relation to any matter concerning an investment including those relating to nationalization or expropriation, determination of compensation in the event of nationalization or expropriation or losses suffered and any restrictions imposed on repatriation of capital and returns shall be settled through recourse to appropriate courts and tribunals, judicial or administrative and other authorities competent under the local laws of the host State. Neither Contracting Party shall pursue through diplomatic channel any such matter until the local remedies have been exhausted.]

## Article 10

## Settlement of investment disputes

(i) Each Contracting Party consents to submit any dispute or difference that may arise out of or in relation to investments made in its territory by a national, company or State entity of the other Contracting Party for settlement through conciliation or arbitration in accordance with the provisions of this Article.

(ii) If any dispute or difference should arise between a Contracting Party and a national, company or State entity of the other Contracting Party, which cannot be resolved within a period of ______________________________ through negotiations, either party to the dispute may initiate proceedings for conciliation or arbitration after the local remedies have been exhausted.

(iii) Conciliation shall take place under the UNCITRAL Conciliation Rules 1980 unless the parties have reached agreement to refer the dispute to conciliation under the provisions of the International Convention for the Settlement of Investment Disputes between States and Nationals of other States 1965.

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* Several participants considered this provision to be inappropriate.

(iv) Where the conciliation proceedings have failed to resolve the dispute, it shall be referred to arbitration at the instance of either party to the dispute within a period of three months.

(v) Any reference to arbitration shall be initiated under the provisions of the International Convention for the Settlement of Investment Disputes between States and Nationals of other States 1965 or "The Additional Facility Rules" of ICSID, whichever may be appropriate. In the event of neither of these procedures being applicable, the arbitration shall take place in accordance with the UNCITRAL Arbitration Rules of 1976, and the appointing authority for the purposes of such rules shall be ...........................

(vi) Neither Contracting Party shall pursue through diplomatic channel any matter referred to arbitration until the proceedings have terminated and a Contracting Party has failed to abide by or to comply with the award rendered by the arbitral tribunal.

## Article 11

### Settlement of disputes between Contracting Parties

(i) Disputes or differences between the Contracting Parties concerning interpretation or application of this agreement shall be settled through negotiations.

(ii) If such disputes and differences cannot thus be settled, the same shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(iii) An arbitral tribunal shall be composed of three members. Each Contracting Party shall nominate one member on the tribunal within a period of two months of the receipt of the request for arbitration. The third member, who shall be the chairman of the tribunal, shall be appointed by agreement of the Contracting Parties. If a Contracting Party has failed to nominate its arbitrator or where agreement has not been reached in regard to the appointment of the chairman of the tribunal, within a period of three months, either Contracting Party may approach the President of the International Court of Justice to make the appointment.

(iv) The arbitral tribunal shall reach its decision by majority of votes. Such decision shall be binding on both the Contracting Parties. The tribunal shall determine its own procedure and give direction in regard to the costs of the proceedings.

## Article 12

### Subrogation

If either Contracting Party makes payment under an indemnity it has given in respect of an investment or any part thereof in the territory of the other Contracting Party, the latter Contracting Party shall recognize:

(a) The assignment of any right or claim from the party indemnified to the former Contracting Party or its designated Agency; and

(b) That the former Contracting Party or its designated Agency is entitled by virtue of subrogation to exercise the rights and enforce the claims of such a party.

## Article 13

## Exceptions

Neither Contracting Party shall be obliged to extend to the nationals or companies or State entities of the other, the benefit of any treatment, preference or privilege which may be accorded to any other State or its nationals by virtue of the formation of a customs union, a free trade area or any other regional arrangement on economic co-operation to which such a State may be a party.

## Article 14

## Application of the Agreement

The provisions of this Agreement shall apply to investments made after the coming into force of this Agreement.

## Article 15

## Entry into force

*[This Agreement shall enter into force on signature.]

or

*[This Agreement shall enter into force as from ____________________.]

or

*[This Agreement shall be ratified and shall enter into force on the exchange of instruments of ratification.]

## Article 16

## Duration and termination

This agreement shall remain in force for a period of __________ years. Thereafter it shall continue in force until the expiration of twelve months from any date on which either Contracting Party shall have given written notice of

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* Alternative provisions.

termination to the other. [Provided that in respect of investments made whilst the agreement is in force, its provisions shall continue in effect with respect to such investments for a period of ________________ years after the date of termination.]

In witness whereof the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

Done in duplicate at ________________________ this ________________________ day of ________________________ 198 . [In the ________________________ and ________________ languages, both texts being equally authoritative.]

For the Government of ______________________________

For the Government of ______________________________

## Model C

Note: The provisions for incorporation in the text of this model draft would be identical with the provisions set out in Model A, with the exception of the definition of "Investment" in article 1 (a) and the text of article 14. The suggested texts for these provisions are as follows:

### Article 1

### Definitions

(a) "Investment" means:

Capital and technology employed in projects or industries in specified sectors of national importance as set out in the schedule to this Agreement and includes the following in relation thereto:

(i) shares and other types of holdings of companies;

(ii) claims to any performance under contract having a financial value, claims to money and loans;

(iii) rights with regard to patents, trademarks and any other industrial property; and

(iv) contractual rights relating to exploration and exploitation of natural resources.

### Article 14

### Application of the Agreement

The provisions of this Agreement shall apply to investments made after the coming into force of this Agreement where the investment has been made in specified sectors set out in the schedule to this Agreement.

### Explanatory notes to the provisions of the model agreement (Model C)

This Model Agreement has been prepared with a view to serve as a possible negotiating text for those States which prefer to conclude investment protection treaties relatable only to investments in specific sectors of national interest of the host State. The practice followed by these States generally reveals the position that with regard to investments covered under a treaty they would be prepared to accord full freedom in the matter of repatriation of capital and return as also market value as compensation in the event of nationalization or expropriation of the investment.

Model C accordingly contemplates that all the provisions contained in Model A should be incorporated in the text subject to only two variations, namely the definition of "investment" and the provision on application of the Agreement. These provisions are so drafted as to conform to the position that the investments covered under the treaty are those investments which are of national importance and related to those specified sectors as set out in the Schedule to the Agreement.

## Notes

a/ The model agreements are intended to provide possible negotiating texts for consideration of Governments. They are merely models and not adhesive texts. The possibility that the texts would be modified or altered in the course of bilateral negotiations to suit the needs of the parties is clearly contemplated.

The AALCC has prepared three draft models which are described as follows: Model A: Draft of a bilateral agreement basically on similar pattern as the agreements entered into between some of the countries of the region with industrialized States with certain changes and improvements particularly in the matter of promotion of investments. Model B: draft of an agreement whose provisions are somewhat more restrictive in the matter of protection of investments and contemplate a degree of flexibility in regard to reception and protection of investments. Model C: draft of an agreement on the pattern of Model A but applicable to specific classes of investments only as determined by the host State.

b/ There were some differences of views on the need for inclusion of this clause.

c/ Some countries do not favour "National Treatment" for foreign investments.

d/ Several participants had reservations on the provisions of this paragraph.

e/ There were some differences of view about the past investments being covered.

f/ Alternative provisions.

g/ There were some differences of views whether past investments should be covered.

Annex VII

# OUTSTANDING ISSUES IN THE DRAFT CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS

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## INTRODUCTION

1. At its second regular session in 1984, the Economic and Social Council considered the report of the Commission on Transnational Corporations on its reconvened special session, held from 11 to 29 June 1984. The Economic and Social Council decided to transmit the report to the General Assembly at its thirty-ninth regular session for its consideration and appropriate action.

2. At that session, the General Assembly in its decision 39/443 of 18 December 1984 considered the Commission's report. Following a general discussion and an exchange of views among delegations, it decided:

> "...
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> "(b) To request the Chairman, together with the other officers of the Commission on Transnational Corporations at its reconvened special session, and with the assistance of the United Nations Centre on Transnational Corporations, to initiate consultations aimed at overcoming the current impasse regarding the negotiations on the draft code of conduct on transnational corporations, bearing in mind, *inter alia*, the proposals of the Chairman and the Rapporteur and the progress achieved thus far during the special session;
>
> "(c) To request the United Nations Centre on Transnational Corporations to prepare a study on the outstanding issues in the draft code of conduct, including, *inter alia*, the questions of international law and international obligations *vis-à-vis* national legislation, to be circulated to Governments prior to the reconvened special session;
>
> "(d) To reconvene the special session of the Commission on Transnational Corporations for one week in June 1985 in order for the Commission to examine the study requested in paragraph (c) above and, in the light of that examination and the results of the consultations mentioned in subparagraph (b) above, to prepare a report, including suggestions regarding the most appropriate steps to be taken to complete the code of conduct, to be submitted, for consideration, to the Economic and Social Council at its second regular session of 1985 and to the General Assembly at its fortieth session."

The present study is in response to the request contained in subparagraph (b) above.

3. The study is in three chapters, in addition to the present introduction. Chapter I deals with certain basic considerations relating to the code of conduct and to the approach to the negotiations. Chapter II examines, in two sections, the major outstanding issues in the draft code: section A considers the question of international law/obligations *vis-à-vis* national legislation with regard to transnational corporations and in relation to nationalization, State contracts, non-discrimination, and fair and equitable treatment; in addition, it considers national treatment, choice of law and means of dispute settlement, and non-interference in internal affairs. Section B outlines the scope of agreement on some other major outstanding issues, namely non-collaboration by transnational corporations with the racist minority régime in southern Africa, conflict of jurisdiction, the transfer by transnational corporations of payments related to their investments, definitions and scope of application, and preamble and

objectives. The third and concluding chapter sets forth a brief summary with a view to facilitating the Commission's work of completing negotiations on the code of conduct.

## I. BASIC CONSIDERATIONS

### A. The need for the code

4. It is essential at the outset to restate basic arguments that have established the need for the code. Broadly speaking, this need rests on the evolutionary nature of international norms, the desire to minimize the negative effects of the operations of transnational corporations and the desire to maximize their positive contributions to economic growth and development in the context of an interdependent world. Together, these three considerations establish a commonality of interest among all States in adopting a code of conduct which, in a balanced manner, sets out the rights and expectations of the international community with regard to transnational corporations.

5. First, sections of the international community have traditionally held the position that there are certain standards at the international level concerning the treatment of foreign investors by which host countries must abide. The traditional concept of State responsibility in international law embodies the bulk of those standards. However, an assessment of the status of the various concepts of State responsibility and the complex interplay between State practice, official positions and political and economic developments indicates that the development of international norms is essentially an evolutionary process. International norms are not immutable or static. They are influenced and shaped by the changing needs and realities of the international community; therefore, the participation of all countries is required in the formulation of such norms. Without the code, the instability and uncertainty arising from disputes over the traditional concept of State responsibility are likely to continue and probably to worsen. A code of conduct would contribute greatly to the resolution of those disputes, not only by allowing the participation of all countries in the formulation of generally accepted norms of State responsibility, but also by reformulating traditional international law by setting out the rights and responsibilities of States as well as transnational corporations.

6. Secondly, instances of corporate misconduct during the 1970s in such areas as interference in the internal affairs of States, illicit payments, and marketing practices led to a widespread demand for some form of international regulation, or the formulation of international standards of behaviour for transnational corporations. It became clear that the national legislation of any one State was inherently incapable of coping with the international dimension of some of the issues raised by the activities of transnational corporations. This led the General Assembly, in 1974, to call for a code of conduct that would seek, inter alia, to regulate the activities of transnational corporations in host countries, to eliminate restrictive business practices and to conform the activities of transnational corporations to the national development plans and objectives of developing countries, and in this context to facilitate, as necessary, the review and revision of previously concluded arrangements (General Assembly resolution 3202 (S-VI), sect. V). The continued concern of the Assembly with possible negative effects of transnational corporations was also reflected in the International Development Strategy for the Third United Nations Development Decade (General Assembly resolution 35/56, para. 70).

7. Thirdly, the important role of transnational corporations in the global economy emphasizes the need for a stable multilateral framework that would help to promote their positive contributions to economic growth and development, as recognized by the General Assembly in adopting the International Development Strategy for the Third United Nations Development Decade. This shared desire for economic growth is not only based on the recognition that a growing world economy facilitates conscious efforts to obtain a more equitable sharing of benefits of this growth, especially between developed and developing countries. In addition, economic growth facilitates structural change in the world economy in the interest of a more efficient international division of labour and a better harnessing of the economic and human resources of all countries. As one of the leading actors in the world economy, transnational corporations can be important agents of economic growth and structural change. But, while transnational corporations influence the performance of the world economy, they are themselves influenced by the public policy framework set by Governments for their activities. As illustrated by the experience of the General Agreement on Tariffs and Trade (GATT) and the International Monetary Fund (IMF), the establishment of a multilateral policy and institutional framework provides the stability and predictability that facilitates international economic co-operation. The need for the creation of such a framework for foreign direct investment and transnational corporations is today further reinforced by the adverse economic conditions faced by most countries, particularly the developing countries, and by the acknowledged difficulties in the implementation of the International Development Strategy for the Third United Nations Development Decade.

8. Thus, a broad commonality of interests exists in establishing standards of behaviour, and in encouraging the observance of those standards, through which frictions and conflicts disruptive and costly for all parties involved can be reduced. Naturally, a framework which is based on and promotes that convergence of interests in an interdependent world cannot be established unilaterally or bilaterally. Rather, it has to be negotiated on a multilateral basis, taking into account the interests of all parties concerned. Indeed, the absence of such a multilateral framework has become increasingly felt over the past two decades, as foreign direct investment has come to rival other international economic transactions in importance.

9. The lacuna in the international institutional and policy framework established in the aftermath of the Second World War was not due to an absence of vision, for the Charter of the International Trade Organization, out of which GATT emerged, had sought to establish a comprehensive set of rules as well as an international institutional framework for the regulation of foreign direct investment. In the economic and political conditions prevailing during the immediate post-war years, however, greater need was felt for the establishment of multilateral régimes for trade, money and finance than for foreign direct investment. Nor was the priority given to trade and finance misplaced; for the multilateral framework established in those areas contributed to a large extent to the unprecedented growth in the world economy during the post-war era, most notably by providing a large measure of stability and predictability for the transactions involved.

10. With this burgeoning growth in the world economy came the rise of the transnational corporation as one of the leading actors in international economic transactions and, with that, an increased perception of the need for co-ordinated efforts among States to establish standards on the activities and operations of those corporations within an agreed-upon multilateral framework. In the absence of

such a framework, nation States have individually - and, on occasion, in concert with a number of others - resorted to a variety of measures aimed at enhancing their capacity to deal with the international issues raised by the activities of transnational corporations. Although individual national policy and regulatory régimes, both of home and host countries, remain the primary framework for the activities of transnational corporations, the formulation of a multilateral framework - for the reasons given above - has become an urgent necessity and a common endeavour of the international community.

11. Various agencies of the United Nations, regional organizations, as well as international business and labour organizations, have been engaged in the formulation of international or regional instruments containing standards and principles dealing with transnational corporations. a/ Similarly, a large number of bilateral treaties on foreign direct investment has been entered into over the past few decades. As pointed out in previous studies by the Centre, each of these endeavours is limited in scope; nor do they collectively amount to a comprehensive set of standards and principles on the activities of transnational corporations and Governments. b/ National policy and regulatory régimes are unable to deal adequately with international ramifications of the activities of transnational corporations. Bilateral treaties do not normally establish standards for the behaviour of these corporations, whilst regional instruments by definition only have a regional scope of application. At the multilateral level, the instruments already adopted are specialized in their scope and subject matter.

12. The negotiations in the Commission on Transnational Corporations on a code of conduct on transnational corporations are, to date, the only endeavour directed at the creation of a comprehensive multilateral framework for transnational corporations. The need for such a framework is reflected in a number of instruments adopted at the intergovernmental level. As already indicated, it has been recognized in the International Development Strategy for the Third United Nations Development Decade adopted by the General Assembly (resolution 35/56). In paragraph 70 of the resolution, the Assembly expressed the hope that:

> "Negotiations on a United Nations code of conduct on transnational corporations will be concluded in 1981 and the code will be adopted expeditiously by all members of the international community soon afterwards, aimed at preventing - with a view to eliminating - the negative effects of activities of transnational corporations and promoting the positive contribution of transnational corporations to the development efforts of the developing countries, consistent with the national development plans and priorities of those countries."

This text underlines the commonality of interests which is the rationale of the code of conduct.

## B. Approach to the negotiations

13. The initial conception of the code on the part of many delegations was that of an instrument governing the whole range of activities of transnational corporations. In the course of the negotiations, however, the idea of the inclusion of provisions on the treatment of transnational corporations became accepted. The agreement in this matter was reflected in Economic and Social Council resolution 1980/60, entitled "Progress made towards the establishment of

the new international economic order and obstacles that impede it: the role of transnational corporations", in which it was emphasized that the code should be effective, comprehensive, generally accepted and universally adopted. The Council furthermore provided that the code should, inter alia, associate effectively the activities of transnational corporations with the efforts to establish the new international economic order; reflect the principle of respect by transnational corporations for the national sovereignty, laws and regulations of the countries in which they operate; and encourage the contribution that transnational corporations can make towards the achievement of developmental goals and the established objectives of the countries in which they operate, particularly those of the developing countries.

14. Those guidelines shaped and gave impetus to the negotiations. By the time of the conclusion of work by the Intergovernmental Working Group on a Code of Conduct (established by the Commission to draft the code), agreement was reached on approximately two thirds of the provisions of the code. Furthermore, those guidelines provided the basis for the progress made at the special session of the Commission on Transnational Corporations in 1983.

15. With regard to the legal nature of the code, the 1980 resolution did not explicitly deal with the question of whether it should be adopted as a mandatory or as a voluntary instrument. Rather, its emphasis was on the effectiveness of the code. In this connection, it may be noted that the effectiveness of an international arrangement does not necessarily depend on its legal form - as the experience from other international instruments in this area suggests. c/ Effectiveness is essentially a function of the political commitment of the parties to an instrument and the efficacy of its implementation and follow-up procedures. The pertinent question in this connection is: Does the instrument effectively influence the decision-makers - governmental or corporate - in applying the prescribed standards? The answer to that question is not necessarily determined by the formal characterization of the code as mandatory or voluntary. This emphasis on effectiveness may thus provide a useful guidepost for concluding the negotiations on the code.

16. A number of conclusions can be drawn from this premise with practical implications for completing the code. One is that, if the issue of the legal nature of the code is not as significant as the issue of the code's effectiveness, the need for all provisions to be couched in precise legal terms would also be lessened. This would in turn make it easier to resolve the difficulties relating to some formulations, especially where those formulations are on concepts on which there is basic agreement. One example is the question of nationalization and compensation on which it is accepted that a State has the right to nationalize and the duty to pay compensation. In a document containing general standards and norms, it may not be necessary beyond the basic agreement on principle to strive for precision on elements regarding the standards for the payment of compensation. Therefore, one possibility to facilitate the conclusion of the negotiations may be that, on the assumption that the code contains standards of behaviour in a non-legally binding form, delegations may not need to insist on specific, detailed and elaborate formulations, especially on issues on which basic agreement exists on the concepts involved. In any event, to the extent that there is a need for further elaboration, the history of other instruments applicable to transnational corporations shows that there is considerable scope for evolution in the light of practical experience.

17. As noted in paragraph 13 above, the Economic and Social Council, in its resolution 1980/60 had also stated that the code should be generally accepted and universally adopted. To achieve this end, consensus has been sought in the negotiations on the language of each and every provision of the code. This approach has been fruitful to the extent that it has yielded agreement on at least two thirds of the provisions of the code. However, it has also led to an impasse on a number of provisions, and agreement has eluded the Commission, sometimes over words, even when there is no disagreement over the basic concept that is being expressed in the code. This has been the case on such issues as respect by transnational corporations for the national sovereignty of countries in which they operate; observance of their domestic laws, regulations and administrative practices; and non-interference in their internal affairs. The consensus approach has further involved obtaining the agreement of each country on each and every provision of the code, with the result that each country exercises a veto on individual provisions and consequently on the conclusion of the negotiations. The difficulties inherent in this type of approach are compounded by the further consideration that an attempt is simultaneously being made to achieve a comprehensive code, covering a broad range of issues on which elaborate provisions are formulated. If the code were to be viewed as a non-mandatory instrument, it may be easier to overcome the obstacles arising from these approaches to reaching consensus.

18. However, if, in spite of the enhanced conditions for consensus, consensus still cannot be reached, various procedural alternatives for concluding the work could be considered. It may not be necessary to resort to such established practices as explanatory statements, reservations or the possibility that some countries may join the code later. Rather, possibilities for flexibility may be found in a less ambitious approach regarding the objective of formulating a comprehensive code, that is, a code which contains detailed and final provisions on every matter that ought to be covered in an ideal code. Thus, if consensus eludes the Commission on one issue or two in the resumed negotiations, consideration could be given to the possibility that those issues could be taken up in later negotiations, either in separate negotiations or as part of the code follow-up process. This can only be done, however, if the deferment of those issues does not disturb the overall balance of the code. Furthermore, such an approach should not exclude the possibility that agreement in principle is expressed on those issues in the code itself - an agreement which would set the framework for later negotiations.

19. None of those options would be an ideal solution, and, in fact, the adoption of a comprehensive code such as has been sought and pursued since the beginning of the negotiations is still an attainable goal. However, it may be prudent to think about such options as a last recourse in order to preserve the achievements already attained by the Commission, and to permit the finalization of the negotiations. Indeed, a contemplation of the available alternatives may well lead to the conclusion that there is in fact no alternative to the speedy adoption of the code as conceived.

20. A final basic consideration that may be taken into account is that, regardless of the legal nature of the code and the precise manner of its adoption, situations are likely to arise that were not foreseen in the negotiations. The history of other public policy instruments bears this out. For example, national legislation, including national constitutions - however comprehensive in design - normally undergo a process of evolution and refinement over time. As regards instruments relating to transnational corporations, the same process can be observed. For

instance, the Declaration on International Investment and Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD) has already undergone two formal reviews since its adoption in 1976. A number of amendments have been added in the process and various provisions have been elaborated upon in a series of clarifications. Similarly, the Tripartite Declaration on Multinational Enterprises and Social Policy and the International Code of Marketing of Breast-milk Substitutes allow for periodic review in the light of the implementation experience. While those instruments have not undergone the same degree of refinement as the instruments of OECD, they still illustrate the importance of an evolutionary approach to the development of international norms pertaining to the activities of transnational corporations.

21. This suggests that, whatever the final shape of the code, its adoption is likely to be only a first - although the most significant - step towards dealing with transnational corporations and the conditions under which they operate. While the need for a multilateral framework dealing with transnational corporations has been recognized by all parties, it must also be recognized that such a framework is not static but rather is evolving and requires adaptation to new circumstances which were not foreseen at the time of its initial adoption.

22. The commonality of interest that is the underlying rationale for the code and the evolutionary character of the instrument itself may permit the flexibility that is required to bring the code negotiations to a successful conclusion. It is in this spirit - and from this perspective - that the following chapter deals with the major outstanding issues in the code negotiations. No effort has been made to review those issues in complete detail; rather, attention has been focused on some of their most important aspects as they relate to the code negotiations.

## II. MAJOR OUTSTANDING ISSUES

23. A number of major issues still require resolution before the code of conduct can be adopted. These issues are being dealt with in two parts. Section A deals with the key issue of international law/obligations and some of the principal other major issues directly related to it, namely, nationalization, State contracts, non-discrimination and fair and equitable treatment. National treatment, free choice of law and means of settlement of a dispute, and non-interference in internal affairs, on which consensus has also so far eluded the Commission, are also being considered in this section. Section B addresses non-collaboration by transnational corporations with racist minority régimes in southern Africa, conflict of jurisdiction, free and unrestricted transfer of all payments relating to investments, definitions and scope of application, and preamble and objectives.

### Section A

#### 1. International law/obligations

24. The negotiations on the code of conduct on transnational corporations have been marked by an extended discussion about the relevance of international law/obligations to the norms to be established under the code, in particular with respect to the issue of permanent sovereignty of States over their natural wealth and resources, as well as to the treatment of transnational corporations. The General Assembly itself recognized the pivotal character of that issue by singling it out among the outstanding issues that the present report should cover.

25. There are at least two different schools of thought on this matter. The first maintains that the code should allow for the applicability of customary international legal principles in relevant areas to amplify or qualify the broad standards enunciated in the code. According to this view, the applicability of international law to the relations between States and transnational corporations is not limited to international obligations expressly founded on conventions, treaties or other international agreements. In addition, customary international law is seen as prescribing principles and rules with respect to such matters as jurisdiction over transnational corporations, permanent sovereignty of States over their natural wealth and resources, renegotiation of State contracts, nationalization and compensation, non-discriminatory treatment of transnational corporations, diplomatic protection of aliens and alien property, and procedures for the settlement of disputes between Governments and transnational corporations. It follows that the provisions of the code would not derogate from the application of those customary principles of international law, subject of course to the express undertakings of the States concerned under conventions, treaties and other international agreements concluded by such States. The proponents of this view accordingly maintain that the code ought to take into account the relevance of international law by incorporating stipulations with respect to its applicability to the relations between Governments and transnational corporations.

26. The second school of thought questions the existence of universally recognized principles of customary international law governing the treatment of transnational corporations or foreign investors. Adherents to that school maintain that this area falls primarily within the purview of national law, subject to international legal norms and specific undertakings and obligations expressly stipulated in international instruments, such as codes of conduct and conventions, treaties and other international agreements, to which the States concerned have freely subscribed. A view closely associated with the foregoing position is that, if universally recognized principles of international law were to be adopted to govern the relations between States and transnational corporations, they would not necessarily be congruent with customary international law, but would take into account developments in the international community in the twentieth century, in particular the second half of the century. Among those developments are the emergence of the socialist countries of Eastern Europe, the emergence of developing countries from colonialism, and the quest for a new international economic order and its implications for a more equitable and balanced international legal order.

27. The foregoing approaches call for an analysis of the underlying theories and concepts.

(a) State responsibility for injuries to the person and property of aliens

28. The proposition that customary international law prescribes norms for the treatment of foreign companies by States derives from the legal doctrine of State responsibility for injuries to aliens and their property. According to that doctrine, which was developed during the nineteenth century, States are enjoined by international law to observe an international minimum standard in the treatment of aliens and their property. The duty to observe this standard is not necessarily discharged by according to aliens and their property the same treatment available to nationals. Where national standards fall below the international minimum standard, the latter prevails. Breach of the international minimum standard engages the responsibility of the host State, and provides a legitimate basis for the exercise of the right of diplomatic protection by the home State of the alien, a right predicated on the inherent right to protect nationals abroad.

29. Traditional international law recognizes that, in general, persons established in a foreign territory are subject to the territorial legislation of the host country for the protection of their persons and property, under the same conditions as nationals of that country. Where such persons are deprived of their rights in the host State, the home State of such persons has a right to espouse a claim on their behalf if the injury sustained constitutes a violation of international law, after the persons concerned have exhausted local remedies. Such a violation occurs where the acts or omissions of the host State fall below the international minimum standard for the treatment of the persons or property of aliens.

30. The development of the law of State responsibility was inspired by the value systems and legal traditions of the developed countries. It was elaborated particularly in the wake of the substantial expansion of transnational business operations from Western Europe and the United States into the developing countries for the purpose of protecting the persons and property rights of their nationals. In the process, the law of State responsibility, which was originally conceived for the purpose of protecting individual aliens, was extended to foreign-owned enterprises. For the purposes of the code of conduct, the relevant illustrations of the international minimum standard relate to the treatment of foreign companies and their property rights and interests.

Nationalization

31. The fundamental premise for the international minimum standard governing the treatment of foreign property is respect for acquired rights. The classical formulation of this doctrine prohibited the expropriation of foreign property, and imposed the sanction of restitution upon the expropriating State. The modern formulation of the doctrine of acquired rights concedes the sovereign right of the host State to expropriate foreign property, but requires that the expropriation must be for a public purpose, be non-discriminatory in form, be effected with due process of law and be accompanied by prompt, adequate and effective compensation. In other words, the right to nationalize is seen as being recognized and regulated by customary international law. As to compensation, the postulated standard is "full" or "adequate", which demands that the value of the nationalized property or undertaking be determined on the basis of its fair market value as a going concern, plus its future earnings prospects, the goodwill associated with it and other intangible factors. A further requirement is that the compensation be prompt and effective.

State contracts

32. Although a contract between a State and an alien would normally be governed by national law, traditional principles of State responsibility impose certain international legal obligations on the host State for the purpose of protecting the contractual or property rights of the alien. According to that argument, a State contract may be internationalized by virtue of its special features, for example, the involvement of the State (or States), or provisions for some form of legal solution outside national law. In such a case, the contract is to fall within the régime of international law and be subject to established principles regarding the extent to which agreements must be respected. Regardless of this, however, States have always afforded themselves the right to alter, under defined circumstances, domestic State contracts.

Non-discrimination

33. A further illustration of the international minimum standard is the principle of non-discrimination against foreign companies and aliens. Traditional international law recognizes the sovereign right of the State to regulate and stipulate conditions for the entry of foreign companies into its territory. Beyond that, however, a State is required to accord equal treatment to aliens and nationals under its laws. Thus, a State is to refrain from discriminating unfairly between nationals and aliens, or between aliens of different nationalities, who may be parties to similar contracts with the State.

Fair and equitable treatment

34. Traditional international law also enjoins States to treat aliens in a fair and equitable manner. This standard of treatment is an aspect of the international minimum standard and hence is independent of national law. Thus, under traditional international law it is not sufficient for a State to assert compliance with its own laws and regulations in relation to an alien; rather, the critical question, which would be open for review in international arbitral or judicial procedures, is whether the treatment provided by national legislation meets the standard of fair and equitable treatment enjoined by international law.

(b) Challenges to traditional principles

35. Although the principles of State responsibility as summarized above have a long tradition and have been incorporated into numerous bilateral investment treaties, they have been challenged by a substantial body of juridical opinion.

Competing views in developed-market-economy countries

36. While the mainstream of juridical thinking in developed-market-economy countries subscribes to the principle of the international minimum standard, questions on the validity of some of the formulations of the standard, in particular with respect to nationalization and compensation, have been raised in those countries. Some maintain that the formula "prompt, adequate and effective compensation" was never a rule of traditional international law and cannot, in any case, be considered as existing international law applicable to all cases of expropriation of alien property; in fact, State practice in cases of post-war nationalizations shows that compensation fell short of the full value claimed, and that payments were deferred and often made in non-convertible currency. d/ Therefore, the formula "appropriate" or "effective" compensation more faithfully represents positive rules. e/ Still others, after reviewing State practice regarding nationalization and compensation in the period after the Second World War, conclude that there seems no clear agreement internationally today as to whether a State is, or is not, obligated by international law to pay adequate compensation to aliens whose property is taken by the State for public purposes deemed to be of importance to the national welfare, where there is no discrimination between aliens and nationals of the expropriating State. f/

37. References to the classical formulation of the international minimum standard do appear in numerous bilateral investment treaties. However, some commentators dispute any inference that, in incorporating these references within the context of special bilateral arrangements, developing countries intended to endorse all principles of customary international law. Further, there is little evidence that

in the event of nationalization, which constitutes termination of relations with a foreign company, the standards referred to in treaties designed to attract investments have actually always been adhered to in compensation settlements. g/ Accordingly, bilateral investment treaties do not necessarily represent existing customary international law.

Latin American views

38. The theoretical foundations, as well as the practical implications of the traditional law of State responsibility, have been questioned by a number of Latin American officials and jurists. Those views developed as early as the late nineteenth century in reaction to the exercise of diplomatic protection in Latin American nations. h/ The doctrine of State responsibility was challenged on procedural and substantive grounds.

39. The basis of the objection, which was elaborated by Calvo, had two main elements. First, Calvo maintained that a sovereign independent State was entitled, by reason of the principle of equality, to complete freedom from interference in any form, whether by diplomacy or by force, from other States. Second, aliens were entitled to no greater rights and privileges than those available to nationals. Accordingly, the national courts of the host State had exclusive jurisdiction over disputes involving aliens, and aliens could seek redress only in such national courts. Thus, the Latin American response to the international minimum standard was the doctrine of national treatment. According to that doctrine, customary international law merely requires a host State to accord to aliens essentially the same rights as those enjoyed by nationals.

40. Latin American States sought to reinforce this doctrine by appropriate provisions in their national constitutions and laws and by "Calvo" clauses in concessions and other State contracts which enjoined aliens to seek redress exclusively in national courts. The doctrine was further reaffirmed in a resolution adopted by the Seventh International Conference of American States, held in Montevideo in 1933, which provided as follows:

> "[The Conference] reaffirms once more, as a principle of international law, the civil equality of the foreigner with the national as the maximum limit of protection to which he may aspire in the positive legislations of the State". i/

The Conference adopted the Convention on Rights and Duties of States, article 9 of which asserted that "foreigners may not claim rights other or more extensive than those of ... nationals". Article 8 of the Convention was an emphatic restatement of the principle of non-intervention. The United States made reservations against the two provisions as inconsistent with the law of nations as generally recognized and accepted.

41. The Foreign Investment Code promulgated under the Andean Pact reaffirmed the Latin American position on the treatment of investors. Under article 50 of the Code, member States are forbidden to accord to foreign investors more favourable treatment than to national investors, while article 51 prohibits any provision for international adjudication of investment disputes in any instrument relating to investors.

42. In sum, the impact of the Calvo doctrine on the legal traditions of Latin American States is reflected in the following propositions: (a) international law requires the host State to accord national treatment to aliens; (b) national law governs the rights and privileges of aliens; (c) national courts have exclusive jurisdiction over disputes involving aliens, who may therefore not seek redress by recourse to diplomatic protection; (d) international adjudication is inadmissible for the settlement of disputes with aliens. Latin American nations have demonstrated their attachment to those principles by rejecting, with a few exceptions, the International Convention for Settlement of Investment Disputes, and by the opposition of most of them to the conclusion of bilateral investment treaties.

Views of socialist countries

43. The emergence of the socialist countries of Eastern Europe involved extensive nationalizations of private property, which challenged the philosophical assumptions underpinning the traditional doctrine of State responsibility. Although socialist countries subsequently undertook to pay compensation for nationalized foreign economic interests under lump-sum compensation settlements, they have rejected the traditional idea of an international minimum standard. Socialist countries maintain that the regulation of alien property falls exclusively within the province of national law.

44. According to Soviet jurists, "international law does not consider the nature of property rights nor does it regulate property relations within a State". j/ Accordingly, the treatment of a foreign company falls outside the purview of international law. This position is reinforced by the principle that international law is exclusively concerned with the regulation of relations between States. Such a régime does not apply to relations between a State and an entity, such as a transnational corporation, which lacks international legal personality and is not a subject of international law. Furthermore, equality of treatment between foreign and domestic enterprises is incompatible with the structure of the political and economic system of a socialist State. Socialist countries thus reject the traditional doctrine of State responsibility which, in their view, was developed to protect foreign economic interests. Such a doctrine is seen as having no validity in contemporary international law, and contravenes the basic principles of international law, namely, "principles of respect for state sovereignty, non-interference in internal affairs, equality of States ... good neighbourly fulfilment of international obligations". k/

45. The socialist countries have maintained this position in international forums. Thus, they abstained in the voting when General Assembly resolution 1803 (XVII) entitled "Permanent sovereignty over natural resources", in which the Assembly commanded the support of other regional groups, was adopted (see paras. 49-50 below).

The emergence of new States

46. The emergence of new nations from colonialism after the Second World War and their efforts to assert their economic independence and to restructure their internal economic systems has also had an impact on traditional principles of State responsibility. The new nations, especially in Africa and Asia, generally challenged the universal validity of those principles on the ground that they had been developed without their participation or consent. Furthermore, the principles

of State responsibility were assailed as unjust, inequitable and essentially colonial in character. In fact, the application of those principles to the newly independent States was seen as perpetuating an exploitative system beneficial to the developed market economies. 1/

47. This period has witnessed, therefore, a great number of nationalizations in developing countries, particularly in the natural resource sector. In taking those measures, these countries have maintained that nationalization was a legitimate exercise of national sovereignty which did not admit of qualifications or limitations, and that the sovereign right to restructure the economic order to guarantee their economic independence would be frustrated if it were encumbered by the traditional doctrine of State responsibility. In addition, they have generally departed from the traditional standards on compensation.

48. In other words, the international legal order established during the colonial era for the protection of foreign economic interests was seen to be ill-equipped to accommodate the interests and aspirations of the new members of the enlarged international community. The new nations, therefore, demanded the establishment of a more equitable international legal system to reflect the needs and realities of the new international community.

Permanent sovereignty over natural resources

49. Acts of nationalization and other forms of State intervention on the part of individual developing countries were paralleled as well as inspired by concerted action at the international level to assert the permanent sovereignty of States over their wealth and natural resources, to safeguard their economic independence and self-determination and to control foreign investment and other activities of transnational corporations. In 1952, General Assembly resolution 626 (VII) proclaimed that "the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty". The principle of permanent sovereignty over natural wealth and resources was further elaborated in General Assembly resolution 1803 (XVII), entitled "Permanent sovereignty over natural resources", of 14 December 1962. In section I thereof, the General Assembly, *inter alia*, declared:

(a) The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned;

(b) The exploration, development and disposition of such resources, as well as the import of foreign capital required for these purposes, should be in conformity with the legislation of the host State and international law;

(c) The legitimacy of nationalization and expropriation on grounds of public utility and recognized such measures as overriding purely individual or private interests;

(d) Appropriate compensation should be paid in the event of nationalization in accordance with national and international law, and, subject to the agreement of States and all parties concerned, the disputes arising from nationalization should be settled by arbitration or international adjudication, after local remedies have been exhausted;

(e) Foreign investment agreements freely entered into by or between sovereign States should be observed in good faith;

(f) States and international organizations should "strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution".

50. This resolution enjoyed a wide measure of support from both developed and developing countries as a fair representation of the international law position in the area of direct investment. For the developing countries, it represented a departure from traditional principles, most notably as regards its recognition of permanent sovereignty over natural wealth and resources, its affirmation of the sovereign right to nationalize, and its promulgation of the new compensation standard of "appropriate" instead of "prompt, adequate and effective". On the other hand, it was acceptable to the developed-market-economy countries, because it recognized that the treatment of investment is to be governed by international law as well as national law, that investment agreements are to be observed in good faith, and that disputes arising from nationalization are, subject to the agreement of the State and parties concerned, to be settled by arbitration or international adjudication. However, as stated in paragraph 45 above, the socialist countries of Eastern Europe abstained from voting on the resolution.

Establishment of a new international economic order

51. General Assembly resolution 1803 (XVII) was followed by a number of resolutions and other international declarations at the instance of the developing countries reinforcing the concept of permanent sovereignty over natural wealth and resources and asserting the economic independence of developing countries. Those endeavours culminated in the call for a restructuring of international economic relations between industrialized and developing countries and for the establishment of a new international economic order, as expressed in General Assembly resolutions 3201 (S-VI), 3202 (S-VI), 3362 (S-VII) and 3281 (XXIX). The last of those resolutions entitled "Charter of Economic Rights and Duties of States", in particular, reflects the views of a large number of countries as regards the role of international law/obligations.

52. In the light of those resolutions, developing countries have increasingly taken the following position on the question of nationalization, compensation and the treatment of foreign direct investment: (a) the right to nationalize foreign property is an inherent attribute of national sovereignty, and the assertion that it is in the national interest to nationalize cannot be challenged by another State; (b) the amount of compensation for the nationalization of a foreign undertaking should not exceed the net book value and should be consistent with the capacity of the host country to pay. Compensation should, furthermore, be effected by deferred payments; (c) the host State has full jurisdiction over a foreign company operating in its territory, and has the right to regulate the entry of the foreign investor and the conditions for its operations; (d) a host State may in the exercise of its sovereignty grant special concessions to attract foreign direct investment or impose restrictions on the operations of foreign companies in the interest of its development strategies; and (e) the Government of a host country may, by virtue of its sovereign power and in the light of changed circumstances, demand the renegotiation of a State contract or take unilateral action which may have the effect of modifying the contractual or property rights of a foreign company.

(c) Assessment

53. The traditional concept of State responsibility as a body of international standards for the protection of individual aliens was questioned when it was perceived as either inequitable or inadequate for the purposes of addressing the concerns of an enlarged international community which lacked homogeneity as to political, economic or developmental values and goals. While it cannot be asserted that a new doctrine of State responsibility prevails, it is clear that the traditional concept no longer commands universal support. This situation is the result of a number of developments, including the following:

(a) Developing countries point out that the traditional principles of State responsibility were established without their participation and consent and, for a number of them, prior to their attainment of independence. Regardless of the merits of this point of view, it needs to be taken into account because the functional efficacy of any international legal system depends on the extent to which it enjoys wide international support. For this reason, it is important that the negotiations on the code of conduct provide all countries with an opportunity to participate in the formulation of international standards;

(b) It is likely that traditional concepts of State responsibility will continue to be seen as inequitable as long as they deal primarily with the protection of foreign direct investment and, therefore, it is equally likely that controversies will continue to arise in such areas as nationalization and compensation, regulation of transnational corporations and permanent sovereignty over natural resources. An international legal system which addresses the concerns of one party to an investment relationship only cannot inspire confidence as a fair, international régime. Such a system should also protect the interests of host countries by imposing appropriate restraints and obligations upon transnational corporations;

(c) The law of State responsibility is sometimes conceived of as emanating from international concern for the protection of aliens. However, it may be considered that the protection of corporations which may have substantial impact on host countries may call for different standards than the protection of individuals against arbitrary violations and deprivations by Governments. The importance of the operations of transnational corporations in the world economy in general, and in many host countries in particular, requires the establishment of viable international standards that make transnational corporations responsive to the public interest of States as well as the international community in general;

(d) A process has, in fact, already begun with the formulation of various codes of conduct to rectify this situation. They establish, in a manner that balances the rights and obligations of all parties involved, an international public policy framework in such areas as restrictive business practices and labour and employment practices. Whether these frameworks are legally non-binding or mandatory, they are all part of a process of evolution resulting in the elaboration of international standards - standards which are formulated with the participation of the entire international community;

(e) The demonstrated willingness of States from all regions to participate in this process of creating new norms suggests that there are no doctrinal impediments to the elaboration of international standards as such. What is contested is not so much the idea of international standards as the content of the prescribed norms.

54. The process of establishing international standards relating to the operations of transnational corporations can perhaps be helped if the terms "international law" and "international obligation" are not seen as mutually exclusive, particularly in view of the evolutionary character of international norms. In the particular area of the international responsibilities of States with respect to the treatment of aliens and foreign companies, the term "international obligations" according to the traditional conception of international law subsumes international obligations founded not only on treaties, conventions and other international agreements, but also on the customary law of State responsibility. Similarly, for the supporters of the restricted view of State responsibility, international law subsumes international obligations prescribed by international law, including treaties, conventions, agreements and other international arrangements based on the express consent of the States concerned. Thus, the terms "international law" and "international obligations" are interchangeable from the technical point of view, even though the sources of the norms involved may not be entirely the same. In any event, broad agreement exists that international standards relating to transnational corporations are required, and the negotiations on the code of conduct provide the opportunity for all Governments to participate in the formulation of a universally accepted framework for the evolution of norms relating to transnational corporations and their treatment.

## 2. National treatment

55. In a number of multilateral instruments it has been accepted that developing countries, by virtue of their weaker economic position and development needs, should receive preferential treatment. Most importantly, this has found its expression in the generalized system of preferences accorded to developing countries in international trade and established under the General Agreement on Tariffs and Trade in 1971. Another example of preferential treatment for the developing countries signatories to the Lomé Convention is embodied in the provision regulating non-reciprocal trade preferences granted by the European Community:

> "In view of their present development needs, the ACP States shall not be required, for the duration of this Convention, to assume, in respect of imports of products originating in the Community, obligations corresponding to the commitments entered into by the Community in respect of imports of the products originating in the ACP States, under this Chapter." m/

56. While the principle of preferential treatment was formulated in the context of inter-State trade relations, its application has been extended to domestic industries of developing countries. For example, in the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, one of the principles governing the application of the set is "preferential or differential treatment for developing countries". A specific subsection on the set of principles devoted to this principle states:

> "In order to ensure the equitable application of the Set of Principles and Rules, States, particularly developed countries, should take into account in their control of restrictive business practices the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

"(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy, and

"(b) Encouraging their economic development through regional or global arrangements among developing countries." n/

57. It appears, therefore, that the principle of preferential treatment for developing countries has been accepted as applicable to various aspects of international economic relations. o/ It would not seem to be inconsistent, therefore, if the code were to contain a provision promoting the establishment or development of domestic enterprises in developing countries. In fact, some developing countries proposed at the beginning of the negotiations that States should have the right to grant incentives and concessions exclusively to domestic enterprises. However, in the course of negotiations, it became accepted as a compromise that the code should contain a provision on national treatment, provided it was appropriately qualified.

58. There is, however, no universally accepted principle of national treatment in international law. In documents such as the OECD Declaration on International Investment and Multinational Enterprises, which deal with the subject, one or several of four approaches have been used in formulating a principle acceptable and applicable to nations with different policies. First, national treatment has been stated as a goal, rather than an absolute obligation, by the use of phrases such as "States should endeavour". Second, specific exceptions to national treatment have been mentioned, such as national security. Third, States have agreed to make transparent specific exceptions to national treatment affecting the interests of other States, to notify and to consult about them. Fourth, States have recognized that exceptions to national treatment do not justify treatment of alien enterprises so unfair or inequitable as to amount to a denial of justice.

59. In the negotiations on the code, the principal outstanding issue regarding national treatment relates to the recognition of exceptions justified by development policies (development clause). One compromise formulation provides that, subject to certain specified exceptions, entities of transnational corporations should be given the treatment accorded to domestic enterprises when the circumstances under which they operate are similar. Exceptions to the principle would be made in respect of (a) national requirements for maintaining public order and protecting national security and other vital interests; (b) consistency with socio-economic systems as reflected in national constitutions and other laws; (c) measures specified in legislation and policies relating to declared development objectives of the developing countries. It has, however, been maintained that those qualifications are unduly broad and ambiguous. In particular, the terms "and other vital interests" and "and other laws" are seen to introduce exceptions so comprehensive as to prejudice the basic principle of national treatment. With regard to the development clause, it is felt that the reference to "legislation and policies relating to declared development objectives" should be limited to legislation and policies existing at the time when the investment is made. Furthermore, the expression "when the circumstances under which they operate are similar" could be seen as negating the application of the principle of national treatment, since it could be argued that the circumstances can hardly ever be similar.

60. In addition, the issue has been raised as to whether the code should not expressly provide that host countries should be free to grant preferential treatment for transnational corporations. Another view on this is that this possibility follows inexorably from a formulation which incorporates a "no-less-favourable" standard.

61. It should be noted that a relationship exists between the principle of national treatment and that of fair and equitable treatment. Since the latter defines a minimum standard of treatment, acceptance of a clear statement of the fair-and-equitable-treatment principle may alleviate concern about exceptions to the national-treatment principle.

### 3. Free choice of law and means of dispute settlement

62. Transnational corporations frequently enter into a variety of contracts in their dealings with host-country entities. Such contracts may be with the Government of the host country or its agencies, domestic enterprises, labour unions or even other transnational corporations. Various views have been advanced on the law governing such kinds of contracts.

63. On the one hand, it has been argued with regard to contracts with the Government of a host country or its agencies that these contracts are subject to the law of the country concerned by virtue either of their governmental character or of the fact that they relate to economic activities within that country. For the latter reason, contracts with other (private) parties are said to be subject to the law of the country concerned. On the other hand, another school of thought distinguishes between contracts with Governments or governmental agencies and contracts with private parties. The former are said to have a quasi-international legal character and their violation by the Government therefore engages the international legal responsibility of the State. With respect to the latter, according to that school of thought, it is not automatic that the law of the host country applies, since the parties may choose the law that is to govern their contract and, in the event of disputes, the forum for the settlement of such disputes.

64. The subject of choice of law and forum of dispute settlement raises questions relating to the proper law of the contract - questions that call for a systematic judicial inquiry in order to determine which State has the most significant contact with the substance of a contract. It is a complex area in which there is already a substantial body of law in all jurisdictions; but, overall, the principle of free choice of law is governed by a range of exceptions, including exceptions pertaining to the public policy of the State concerned.

65. One proposal in the negotiations on the code is to include a formulation that would stipulate that:

> "In contracts in which at least one party is an entity of a transnational corporation the parties should be free to choose the applicable law and the form for settlement of disputes, including arbitration, it being understood that such a choice may be limited in its effects by the law of the countries concerned." p/

66. Another proposal is not to include this concept in the code. Apart from the intricacies which are inherent in the concept, it is felt that, within the context of the code of conduct a provision on it would (a) undermine the right of a country to regulate and monitor the activities of entities of transnational corporations operating within its territory; (b) oust the jurisdiction of its courts in a number of instances. Moreover, the reference to free choice of means of dispute settlement, including arbitration, would - in contracts with Governments or governmental agencies - endorse a viewpoint that is not generally accepted.

### 4. Non-interference in internal affairs

67. The principle that States should not interfere in the internal affairs of other States is well established under international law. This principle is an aspect of the sovereign equality of States, as well as of the principles of respect for the national sovereignty and territorial integrity of other States. The principle of non-intervention has been applied by extension to other actors in the international system, notably international organizations.

68. Some countries consider that the principle applies *a fortiori* to the activities of other actors, such as transnational corporations. They consider that such corporations, by virtue of their size, resource and economic power, can pose a threat to Governments in the political sphere, as well as undermine the ability of Governments to determine economic policies within their countries. They hold, therefore, that one fundamental purpose of the code should be to strengthen Governments in their dealings with transnational corporations in general, and to prohibit interference by transnational corporations in their internal decision-making processes in particular.

69. In the context of the activities of transnational corporations, the concept of non-interference poses difficulties arising from differences in national legal practices. In the first place, some countries have specific laws and regulations concerning the range of activities in which transnational corporations may or may not engage, while other countries do not. With respect to the former category of countries, the question then becomes one of formulating an appropriate reference in the code to the existing national legislation. It is for countries that do not have such legislation - where the absence of legislation is not an implicit acceptance of any interfering activity on the part of a transnational corporation - that the role of the code as a supplement to national measures arises. It follows that for these countries a provision on non-interference would be devoid of substance if formulated by reference to national legislation.

70. In spite of different national approaches, a common element in all complaints about interference relates to surreptitious activities. In other words, many of the most controversial instances of interference have involved activities which were objectionable as much because of their disguised nature as because of what was done. This raises the issue of whether reference to avoidance of surreptitious or illegal involvement by transnational corporations could not help to advance the discussion of the issue. The negotiations could consider, on the one hand, that national legislation may provide for the definition of the concept of surreptitious or, on the other hand, that it may be more appropriate not to leave the definition of this concept to any particular national legislation.

71. Although there is a convergence of views on the inclusion of the concept of non-interference in the code, the outstanding difficulty relates to the precise scope of the concept. Many delegations feel that there should be an unqualified prohibition of interference by transnational corporations in the internal affairs of the countries in which they operate and of any activities that undermine the political and social systems of those countries. Some delegations consider that the phrase "internal affairs" is too general and that the paragraph should refer to internal political affairs. They also feel that the provisions should explain the notion of interference by referring to illegal interference and illicit activities. Furthermore, they feel that the concept of non-interference would be more clearly understood if it were explicitly linked to the idea that the activities in question tend to undermine the political and social systems or are of a subversive nature in the countries concerned. Many delegations, however, feel that such qualifications are uncalled for. In their view, subversive and other illicit activities that undermine political and social systems constitute a category in themselves and should be specifically prohibited; they consider that the concept of non-interference is much broader than that of subversive and other illicit activities.

72. The proposals put forward at the special session reflect the two basic positions that divide delegations on this subject. One proposal would have the paragraph state the following:

> "Transnational corporations should/shall not interfere in the internal affairs of the countries in which they operate. They should refrain from any subversive and other activities undermining the political and social systems in these countries" (E/C.10/1984/S/5, para. 56).

Another proposal would have the paragraph read:

> "Transnational corporations should not intervene illegally in the internal affairs of the countries in which they operate, nor should they interfere through subversive or other activities aimed at undermining the political and social systems of these countries." (E/C.10/1984/S/5, para. 57).

These two basic proposals and variants of them were discussed, but neither appproach commanded the support of all delegations.

73. In the search for a compromise solution, a working group at the special session proposed the following text:

> "Transnational corporations should not interfere in the internal affairs of the countries in which they operate and, to achieve this end, should not engage in activities prohibited by the laws, established policies and administrative practices of the countries in which they operate and should refrain from activities undermining the political and social systems in these countries." (E/C.10/1984/S/5, para. 58).

No consensus, however, emerged from the discussion on this text.

## Section B

### 1. Non-collaboration by transnational corporations with racist minority régimes in southern Africa

74. From the beginning of the negotiations on the code, many delegations have advocated that the code should contain provisions relating to the activities of transnational corporations in southern Africa and their collaboration with the racist minority régimes in that area. Some other delegations, while expressing condemnation of the system of *apartheid*, had raised questions about the propriety of dealing with this matter in the code.

75. At its sixth session, held at Mexico in 1980, the Commission unanimously recommended to the Economic and Social Council for adoption a resolution which gave certain guidelines designed to facilitate the negotiations in the Intergovernmental Working Group on a Code of Conduct. One of these, relating to the issue of southern Africa, was to the effect that the code should:

> "Deal in the most effective and appropriate manner with the issue of the activities of transnational corporations in South Africa and Namibia, recognizing that concern was widely expressed in the Commission on Transnational Corporations, in the context of the struggle against *apartheid*, at the collaboration of transnational corporations with the racist minority régime."

The Economic and Social Council unanimously adopted that resolution (1980/60).

76. In addition, since its third session, the Commission has adopted at each of its annual sessions a resolution on the issue of southern Africa. Those resolutions have consistently attracted negative votes or abstentions from some of the major industrialized countries.

77. In addition to the proposed text to be included in the section of the code relating to the activities of transnational corporations, some delegations felt that the issue should be reflected in the preamble-and-objectives section of the code, as follows:

(a) In the preamble:

> "*Recalling also* that the Economic and Social Council, in resolution 1980/60, affirmed that the code of conduct should, *inter alia*, deal in the most effective and appropriate manner with the issue of the activities of transnational corporations in South Africa and Namibia, recognizing that concern was widely expressed in the Commission on Transnational Corporations, in the context of the struggle against *apartheid* at the collaboration of transnational corporations with the racist minority régime." *q/*

(b) In the section on objectives:

> "To prevent the collaboration of transnational corporations with the illegal racist minority régime of *apartheid* in South Africa and its continued illegal occupation of the Territory of Namibia". *r/*

78. At the 1983 special session, a Working Group that dealt with this issue agreed upon a text ad referendum. However, differences of view remained as to the heading of the paragraph. During a meeting of the Commission, many delegations stated that their acceptance of that text was based on the understanding that the heading "Non-collaboration by transnational corporations with racist minority régimes in southern Africa" formed an integral part of the text and that, together with the substance of the paragraph, represented a balance. Other delegations stated that it was their understanding that in elaborating the text of the paragraph in the Working Group, no linkage was made between the text and an eventual heading.

79. In order to safeguard their concern that the provisions of the code on this matter embody the concept of non-collaboration, some delegations proposed that the second paragraph in the text agreed ad referendum should be replaced by the following:

> "Transnational corporations shall refrain from collaborating directly or indirectly with that régime especially with regard to its racist practices in South Africa and its illegal occupation of Namibia, to ensure the successful implementation of United Nations resolutions in relation to these two countries, and shall/should engage in appropriate activities within their competence with a view to eliminating racial discrimination and all other aspects of the system of apartheid." (E/C.10/1985/5, sect. IV).

80. It appears that the root of the difficulty lies in the interpretation of the term "collaboration". That term does not have a specific technical meaning, but is generally used to describe co-operation by one person with another in a common endeavour; as such, it is not necessarily pejorative, unless the co-operation refers to a questionable activity. In the context of the code, the term would therefore derive its specific content from the substance of the provisions agreed ad referendum, namely, (a) operations and activities supporting and sustaining the racist minority régime of South Africa in maintaining the system of apartheid and the illegal occupation of Namibia; (b) non-engagement by transnational corporations in appropriate activities with in their competence with a view to eliminating racial discrimination and all other aspects of the system of apartheid; and (c) non-compliance with obligations resulting from Security Council decisions and non-respect for those resulting from all relevant United Nations resolutions. In other words, the term non-collaboration as used in the code would comprise and be defined by the matters dealt with in the substantive provisions of the code. This is not to say that the term would not continue to be used outside the context of the code with a variety of other connotations, but such connotations would obviously be of no relevance with regard to the standards of behaviour expected of transnational corporations in the code.

### 2. Conflict of jurisdiction

81. The annotated outline of the draft code adopted by the Intergovernmental Working Group had included jurisdiction as a specific subsection in the part of the code relating to the treatment of transnational corporations. This subsection sought in four paragraphs to deal with: (a) the issue of an entity of a transnational corporation being subject to the jurisdiction of a country in which it operates (para. 55); (b) the issue of the settlement of disputes between a State and an entity of a transnational corporation (para. 56); (c) the issue of the free choice of applicable law and forum for dispute settlement in contracts (para. 57); (d) the issue of conflict of jurisdiction (para. 58).

82. During the 1983 special session of the Commission, the chairperson, in a set of compromise proposals, put forward an approach whereby the entire section on jurisdiction would be eliminated completely. Under that approach, the key issues under paragraphs 55 and 56 would still be dealt with in substance, but under other sections of the code. There would, however, be a specific section relating to conflict of jurisdiction. The paragraph proposed by the chairperson under the new heading, entitled "Conflict of jurisdiction", would proceed from the premise that the exercise of jurisdiction over transnational corporations and their entities by more than one State may lead to conflicts of jurisdiction. In this situation, the code would call upon the States concerned to endeavour to adopt mutually acceptable principles and procedures, bilaterally and multilaterally, for the settlement of such conflicts on the basis of respect for their mutual interests.

83. At the 1984 reconvened special session of the Commission, then, agreement was reached on a provision on this subject in a text that would read as follows:

> "Where the exercise of jurisdiction over transnational corporations and their entities by more than one State may lead to conflicts of jurisdiction, States concerned should endeavour to avoid such conflicts, in particular by seeking to avoid the exercise of jurisdiction by one State where jurisdiction more properly appertains to another State, and should endeavour to adopt mutually acceptable principles and procedures, bilaterally and multilaterally, for the settlement of such conflicts on the basis of respect for the principle of sovereign equality and for their mutual interests." (E/C.10/1985/5, sect. XII).

### 3. Free and unrestricted transfer of all payments relating to investments

84. Some delegations consider that the code should include a paragraph stating that transnational corporations should be permitted to transfer freely and without restriction all payments relating to their investments, such as income from invested capital and the repatriation of such capital when the investment is terminated, as well as licensing and technical assistance fees and other royalties, without prejudice to the relevant provisions of the section of the code on balance of payments and financing, in particular, paragraph 29 of the draft code.

85. Many delegations object to the inclusion of such a paragraph in the code. However, if the provision on the subject is to be included, they consider that it should explicitly recognize the fact that the transfer of payments is to be governed by foreign exchange laws and regulations. In their view, the proposal to state that such transfers should be carried out "without restriction" would be unduly broad. It has, therefore, been suggested that the provision should contain a reference to "the foreign exchange laws of host countries" and that the term "without restriction" should be deleted.

### 4. Definitions and scope of application

86. Since work began on the subject of transnational corporations in various international forums, the question of the definition and scope of the term "transnational corporation" has posed difficulties.

87. In the United Nations, the Group of Eminent Persons defined transnational corporations as:

"Enterprises which own or control production or service facilities outside the country in which they are based. Such enterprises are not always incorporated or private; they can also be co-operatives or state-owned entities." s/

88. The Guidelines for Multinational Enterprises of the OECD used the following approach on the issue of a definition:

"A precise legal definition of multinational enterprises is not required for the purposes of the guidelines. These usually comprise companies or other entities whose ownership is private, state or mixed, established in different countries and so linked that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge and resources with the others. The degree of autonomy of each entity in relation to the others varies widely from one multinational enterprise to another, depending on the nature of the links between such entities and the fields of activity concerned. For these reasons, the guidelines are addressed to the various entities within the multinational enterprise (parent companies and/or local entities) according to the actual distribution of responsibilities among them on the understanding that they will co-operate and provide assistance to one another as necessary to facilitate observance of the guidelines. The word 'enterprise' as used in these guidelines refers to these various entities in accordance with their responsibilities." t/

89. The International Labour Organisation, which adopted in 1977 the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, used a somewhat similar approach:

"To serve its purpose this Declaration does not require a precise legal definition of multinational enterprises; this paragraph is designed to facilitate the understanding of the Declaration and not to provide such a definition. Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their field of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned. Unless otherwise specified, the term 'multinational enterprise' is used in this Declaration to designate the various entities ... according to the distribution of responsibilities among them, in the expectation that they will co-operate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration." u/

90. The Commission on Transnational Corporations, which has had an item relating to the definition of transnational corporations on its agenda since its inception, decided to deal with the matter in the context of the code of conduct. In that regard, the Intergovernmental Working Group on a Code of Conduct reached agreement on the main characteristics of a transnational corporation (contained in the text

cited in para. 91 below), thereby identifying the enterprises to which the code would be applicable. Differences remained, however, as regards the nature of the ownership of the enterprises involved. The fundamental issue was whether the code was applicable to State-owned or public enterprises, as well as enterprises of private or mixed ownership.

91. At the 1983 special session of the Commission on Transnational Corporations, the rapporteur of the special session presented a set of proposals on definitions and scope of application in which the question of ownership was dealt with not in the paragraph on the definition of the term "transnational corporation", but in the paragraph on the scope of application of the code. The paragraph on definitions would set out the essential characteristics of a transnational corporation, while that on scope of application would provide that the code applies to all enterprises having those characteristics "regardless of their ownership". In addition, another paragraph on scope of application would stipulate that the code is universally applicable in and open for adoption by all countries. The texts of the proposals were as follows:

> "1. (a) The term 'transnational corporation' as used in this code means an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others.
>
> "2. This code applies to all enterprises having those characteristics mentioned in paragraph 1 (a) above, regardless of their ownership.
>
> "3. The code is universally applicable in and open for adoption by all States, regardless of their political and economic systems and their level of development." v/

Most delegations expressed the view that those proposals dealt adequately with the matter. Some delegations, however, felt that it should be expressly stipulated that the code would apply to all enterprises irrespective of their country of origin or the nature of their ownership.

92. The reconvened special session, held in January 1984 did not examine specific proposals or formulations on any of the outstanding issues as its objective was to assess the work on the code of conduct. On the question of definitions and scope of application, however, the chairperson of the special session mentioned a number of possible solutions, including the introduction of a footnote to clarify the matter. Among the formulations put forward by delegations for a footnote were the following (E/C.10/1984/S/5, para. 14):

> "In one proposal the footnote would state that:
>
> > 'The provisions of the code on definitions and scope of application apply to all enterprises and entities irrespective of the "country of origin".'
>
> "In another, it would state that:

'The provisions above apply to enterprises or entities of all countries, irrespective of the origin and type of ownership of the transnational corporation.'

"A third proposal would have the text of the footnote read as follows:

'The provisions above apply to enterprises and entities of all countries, whether of public, private or mixed ownership, and irrespective of the level of development and political and economic systems of these countries.'"

While expressing their readiness to consider solutions, delegations that felt that the proposals did not adequately meet their concerns stated that, for them, the crucial point was that the code should be universally applied and that the precise manner of doing so was immaterial as long as universal coverage was ensured. Some other delegations declared their political will to consider solutions to the so-called problem of the ambiguity of the formulation regarding the scope of application of the code, provided there was a satisfactory resolution of all other issues of the compromise text and the balance of the whole package was maintained.

93. At its reconvened special session, held in June 1984, the Commission examined a variety of texts put forward by delegations on the question of definitions and scope of application. By the end of that session, a proposal had been put forward that drew upon several of the elements reflected in the texts considered, as well as upon the views expressed at the session. In that proposal, the approach would be to focus on the scope of application of the code in such a manner as would make it explicit that the code would be universally applicable to all enterprises, irrespective of their country of origin and their ownership, including private, public or mixed. The text of that proposal was as follows:

"1. (a) This code is universally applicable to enterprises, irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others. Such enterprises are referred to in this code as transnational corporations."

For paragraphs 1 (b)-(e), use the agreed text set out in annex II of the report of the Commission on Transnational Corporations on the special session. w/

"2. For the application of this code, it is irrelevant whether or not enterprises as described in paragraph 1 (a) above are referred to in any country as transnational corporations.

"3. The code is universally applicable in all States, regardless of their political and economic systems or their level of development." (E/C.10/1984/5/CRP.3).

The Commission, however, reached no agreement on any of the main outstanding issues that it considered, including this outstanding issue.

94. Thus, it would seem that the three possibilities on which the discussion has converged in the search for agreement on this issue are: (a) the introduction of a footnote in connection with the scope of application of the code; (b) a statement by the chairperson of the Commission on Transnational Corporations, to be reflected in the report of the session, to the effect that all groups confirmed that there are enterprises as described in paragraph 1 of the code which originate in their countries and that the code is therefore applicable to those enterprises as well as to other such enterprises which operate in their countries; and that it was also agreed by all countries that all such enterprises would be covered in subsequent work on review and implementation of the code by the Commission and the Centre; and (c) an explicit statement in the provision on the scope of application of the code to the effect that the code applies to all enterprises whether private, public or mixed and whether or not they are called transnational corporations in any country. A solution of the matter would be facilitated in the context of a solution of the other major outstanding issues.

### 5. Preamble and objectives

95. With regard to the preamble, there are two basic options. One possibility is that the preamble should be short and formal. A preamble along those lines could recall the legislative history of the code and make reference to the relevant work of other bodies of the United Nations system. The second possibility is that the preamble should itself be substantive. Such a substantive preamble could additionally contain elements reflecting the substantive provisions of the code. Those elements could reflect, in a balanced manner, both the positive and negative effects of the activities of transnational corporations.

96. With respect to the objectives of the code, a similar approach could be chosen. One possibility would be that the broad objective of the code as specified in the International Development Strategy is stated. Such a statement would reflect, in a balanced manner, the position of all delegations on that matter. This could be followed by formal statements reflecting (a) the desire of Governments to establish a mechanism for facilitating co-operation among States on issues relating to transnational corporations and to alleviate difficulties stemming from the transnational character of those corporations and the diversity of national laws and policies to which they are subject; (b) the desire of Governments to establish a focal point for international standards and arrangements relating to transnational corporations in close co-operation with other bodies within the United Nations system. Another possibility is to set out, in addition to the foregoing, a detailed set of objectives abstracted from various documents that addressed themselves to the code. Particularly relevant in this context, would be the Declaration and Programme of Action on a New International Economic Order, the statement on the objectives of the programme of work adopted by the Commission, Economic and Social Council resolution 1980/60 and so on.

## III. TOWARDS COMPLETING THE NEGOTIATIONS

97. Agreement has been reached on a substantial portion of the code. A number of major issues, however, are still to be resolved. Since all Governments are in agreement that the code should be completed, it should be possible to resolve those issues as well. To facilitate agreement, and recognizing the broad commonality of interests which is the rationale for the code, it may be advisable to re-examine the approach to the negotiations. Provided that the balance of the code as a whole is maintained, it may not be necessary to insist on precise and elaborate formulations for each provision. In this regard, recognition of the possibility of the evolutionary nature of the code could be particularly helpful for areas in which it is not possible at this stage to cover the entire range of issues. What is important is that a multilateral framework is established which is capable of responding to the concerns of all parties involved in the course of time.

98. The above examination of the major outstanding issues shows that there are, indeed, possibilities to reach agreement. In particular, a solution of the question of international law/obligations, which should be possible on the basis of some of the proposals before the Commission, would simultaneously enable agreement on the question of permanent sovereignty, renegotiation of contracts, nationalization and compensation, fair and equitable treatment, and settlement of disputes. The Commission could usefully adopt the approach, which commands substantial support, that the most realistic objective with respect to the international law/obligation issue is to agree on a formulation which, while meaningful as a compromise, is still flexible enough to permit interpretations which are broadly consistent with the respective positions taken in the negotiations. Furthermore, the mere circumstance that in the course of the negotiations certain delegations may have interpreted a given formula in a particular way should not necessarily exclude the possibility that the formula has ultimately been accepted as a genuine compromise.

99. On the other major issues reviewed above on national treatment, choice of law and means of dispute settlement, non-interference in internal affairs (chap. II, paras. 55-73) there are proposals before the Commission on which delegations are not far apart. Given the political will, it should, therefore, be possible to arrive at satisfactory compromise solutions.

100. Finally, as regards the outstanding issues reviewed above on non-collaboration by transnational corporations with the racist minority régime in southern Africa, conflict of jurisdiction, transfer of payments relating to investments, definitions and scope of application, preamble and objectives (chap. II, sect. B) texts exist on which there is sufficient agreement or agreement ad referendum, on the basis of which further action by delegations is possible in the context of an overall solution of the major outstanding issues. With regard to the preamble and objectives, the valuable work done so far provides the basis for a concluding text which need not be overly ambitious, but rather could reflect careful selectivity. The International Development Strategy itself has shown that it is possible to state the basic objective of the code in a balanced manner and without unnecessary elaboration.

101. In sum, it seems possible to identify for each of the outstanding issues one or two texts that could provide the best hope for finding an appropriate solution.

## Notes

a/ See "Developments under other international arrangements and agreements on matters related to transnational corporations" (E/C.10/1985/6).

b/ See "Bilateral, regional and international arrangements on matters relating to transnational corporations" (E/C.10/1984/8).

c/ See E/C.10/1985/6.

d/ See, for example, Oscar Schachter, "Compensation for expropriation", American Journal of International Law, vol. 78 (January 1984), pp. 121-130.

e/ See Ove E. Bring "The impact of developing States on international customary law concerning protection of foreign property", Scandinavian Studies in Law 1980 (Stockholm, Almquist and Wiksell, 1980), pp. 99-132. Bring states, for example, that the classical formulation of prompt, adequate and effective compensation is obsolete; the only element of that formula supported by State practice is effective compensation, that is, the obligation to pay in convertible currency or in some other effectively realizable form.

f/ See William W. Bishop, Jr., International Law: Cases and Materials (Boston, Little Brown and Company, 1971), p. 866.

g/ See notes d and e above.

h/ E. Vattel, Law of Nations, book II, chap. 6.

i/ Seventh International Conference of American States, Final Act, p. 30 International Conferences of American States, First Supplement, 1933-40, Washington, D.C., resolution LXXIV, pp. 91 ff.

j/ See Vitkov "Nationalization and international law", Soviet Yearbook of International Law, 1960, p. 78 (English summary).

k/ Grigorii Ivanovich Tunkin, Theory of International Law (Cambridge, Massachusetts, Harvard University Press, (1974), p. 86.

l/ For a review, see S. K. B. Asante, "Restructuring transnational mineral agreements", American Journal of International Law, vol. 73 (1979), pp. 335-371. See also, G. M. Abi-Saab, "The newly independent States and the rules of international law: an outline", Howard Law Journal, vol. 8 (1962), p. 95; R. P. Anand, "Attitude of the Asian-African States toward certain problems of international law", The International and Comparative Law Quarterly, vol. 15 (1966), p. 55.

m/ ACP (African, Caribbean and Pacific Group)-EEC Convention of Lomé, 28 February 1975 (A/AC.176/7), annex, art. 7. The provision was retained in subsequent renewals of the Convention.

n/ The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (United Nations publication, Sales No. E.81.II.D.5), sect. C.7.

Notes (continued)

o/ See also articles 18 and 19 of the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974).

p/ Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev.1), annex II, para. 57.

q/ Ibid., annex V, fifth paragraph of the preamble.

r/ Ibid., para. (g).

s/ The Impact of Multinational Corporations on Development and on International Relations (United Nations publication, Sales No. E.74.II.A.5), p. 25.

t/ OECD, Guidelines for Multinational Enterprises, (Paris, 1986), para. 8.

u/ International Labour Organisation, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1982), para. 6.

v/ Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev.1), annex IV.

w/ Ibid., annex II, para. 1.

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