Asia-Pacific
Economic Cooperation

APEC Investment Facilitation Initiative:
A Cooperative Effort with UNCTAD and other Multilateral Institutions
Project No.: CTI 08/2005T
Tokyo Seminar

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Summary of Discussions

Ministry of Foreign Affairs of Japan
September 2005

Session ONE: Emerging Trends and Key Issues in International Investment Agreements

Presentation 1: "Recent developments in international investment agreements: An analysis of the survey carried out by UNCTAD"

◆Joerg Weber
Programme Coordinator, International Arrangements Section, DITE, UNCTAD

(Joerg Weber, UNCTAD)

The number of bilateral investment treaties (BITs) continues to expand, albeit at a slower pace than previous years, with the momentum of international rule-making in this area shifting to more comprehensive preferential trade and investment agreements (PTIAs) and economic integration agreements (EIAs). International investment agreements (IIAs) are increasingly encompassing a broader range of issues, and their investment provisions tend to be increasingly sophisticated.

A new generation of BITs follows the trend set by some of the recent PTIAs and there are four main innovations which are discernable: (1) A comprehensive, but finite definition of 'investment', (2) Revisions to the wording of various substantive provisions, (3) A broader set of issues is addressed, including health, the environment, safety and labour rights, and (4) Innovations regarding Investor-State dispute settlement (ISDS) procedures.

Compared to BITs, PTIAs reflect far more variation in their scope, approach and content. Moreover, recent PTIAs tend to encompass a broader range of issues. Some of the more comprehensive agreements include not only investment protection, but also investment liberalization, and further address the linkage between investment and trade in services, intellectual property rights, competition policy, government procurement, temporary entry for business persons etc. On the other hand, some agreements remain rather narrow in coverage.

The proliferation of IIAs means more legal protection for the investor while this also represents an increased risk of investment disputes cases with the host country. Indeed, the past five years have seen a dramatic increase in cases. The surge in investment disputes arising from IIAs signify that governments need to be judicious in negotiating such agreements. It is also important to draw lessons from experiences in implementing treaty obligations.

There is a probability of a continued shift of emphasis regarding the type of agreements countries conclude (=from BITs to PTIAs) and their scope (=from narrow to broader coverage of investment). The large number of PTIAs currently under negotiations suggests an even more pronounced increase in the coming years. The international framework of investment rules will continue to expand independently from the fate of investment discussions in the WTO thus further contributing to the multifaceted and multilayered nature of the universe of investment agreements.

Presentation 2: "Key and emerging issues in new generation international investment agreements (BITs in the late 1990s, and economic integration agreements)"

◆Roberto Echandi
Expert for UNCTAD Secretariat

(Roberto Echandi, Expert for UNCTAD)

The presentation focused on the evolution of key issues and the identification of emerging issues in recent IIAs.

There is a gradual yet solid movement from the traditional approach focused on "investment protection" towards "liberalization of investment". There is a noteworthy trend in recent EIAs and BITs to provide guarantees in the pre-establishment phase such as the right of establishment, National Treatment and MFN, MFN only, future liberalization etc., while most BITs still condition right of establishment to laws and regulations.

There has been a greater precision in the definition of 'investment' moving away from traditional broad, open-ended definition to avoid covering elements that are not considered "investments". There are several different approaches such as to limit definition to assets used for economic purposes, to define "investment" as including those assets that have the economic characteristics of an investment, and to define "investment" in terms of a finite list of categories of assets.

Clarification of the content of certain key substantive provisions on investment protection such as "fair and equitable treatment" and expropriation has been made. Some IIAs do not have this standard, some link the standard with international law, some clarify that the standard requires no more than is required by Customary International Law, some combine the standard with MFN and National Treatment, and still others subordinate the standard to domestic laws

Promotion of transparency of regulations and rule-making is stimulated in the new IIAs. Traditionally, most BITs lack any specific provision on transparency while some IIAs include provisions mandating exchange of information between States. More recent IIAs, especially those providing for liberalization commitments, also include obligations between the host State and the investor. Obligations are no longer exclusively geared towards fostering the exchange of information, but also promoting transparency in the process of domestic rulemaking aimed at enabling interested investors to participate in that process. In some cases, obligations on transparency are not subject to ISDS.

There is a trend in IIAs to include provisions to clarify that investment protection and liberalization, while significantly important, cannot be pursued at the expense of other key public policy objectives. These need to be and can very well be balanced. Various kinds of general exceptions related to taxation, essential security, health, natural resources, cultural diversity, and prudential measures (for specific financial situations) have increased. Some IIAs contain specific provisions to reinforce the commitment of the Parties to safeguard certain objectives such as health, safety, the environment, and internationally recognized labor rights.

Innovations regarding ISDS can be seen in the new generation BITs and some investment chapters in FTAs. Firstly, there is a promotion of greater predictability and parties' control over ISDS by detailed regulation of arbitral proceedings and parties' binding interpretations for arbitral tribunals. Procedures to deal with frivolous claims, mechanisms to avoid disputes in more than one forum, and consolidation of claims have been sought out. There has been a promotion of a consistent and sound jurisprudence on international investment law by clarification of certain key investment protection provisions and appeal mechanism. Legitimacy of ISDS vis-á-vis civil society is maintained by transparency of ISDS procedures and participation through *"amicus curiae."*

From a quantitative perspective, the majority of IIAs negotiated over the last decade have not introduced significant innovations in investment regulation. However, from a qualitative point of view, during this period there has been a significant evolution in investment-rule making with new approaches and new ideas, which are often seen in the agreements entered into by some developed economies. Innovations in investment regulation will likely influence future negotiations in the field.

Presentation 3: "Interaction and coherence of international investment agreements"

◆Kenneth J. Vandevelde
Expert for UNCTAD Secretariat

The presentation focused on the issues related to how investment agreements deal with the interaction among provisions, among chapters and among different agreements.

While the number of IIA increases, there is a rising need to consider policy coherence of IIAs. There are two elements to be considered. One is that the IIA provisions should be consistent with underlying policies such as state's economic development policy, and the other is that the IIA provisions should be consistent with each other. Two impediments often mentioned in achieving consistency are (1) the difficulty to sufficiently comply with both provisions, and (2) complying with one provision effectively defeats the purpose of the other provision.

(Kenneth Vandevelde, Expert for UNCTAD)

Interaction may occur at three levels; within a state-state agreement, between different state-state agreements, and between state-state and investor-state agreements. Interaction of the IIA provisions may be divided into five categories; explication, reinforcement, amplification, cummulation, and contradiction. And there are some techniques for bringing policy coherence to inconsistent provisions using the scope (narrow the scope), definition (define the terms of the agreement), hierarchy (specify that one agreement prevails the other), election (the Party has the right to choose) and agreement (have consultation).

Explication provisions such as provisions on substantive rules, procedural rules, definitions, and scopes interact to specify content of a right or duty of the IIA, and it is critical to examine the interaction of these provisions to understand the content of a rule. Typically, this interaction occurs within the same IIA, but some exception exists.

Reinforcement refers to a situation where one provision, in effect, creates or enforces the same right or duty as another. Typically interaction occurs between different IIAs. There are five common provisions which can be considered: (1) reinforcement, which are requiring the parties to conclude another agreement, (2) reaffirming another IIA commitment, (3) requiring observance of another IIA commitment, (4) incorporating another IIA commitment, and (5) the MFN clause. Parallel dispute resolutions and the amendment of the referred IIA may be problems to be considered when including the provisions to reaffirm and require observance of another IIA commitment. The MFN clause is the most complicated of all as it incorporates the provisions of numerous other treaties including the future IIAs. As solutions to avoid inconsistencies arising from the MFN clause, one may draft narrowly, make sectional exceptions, or exclude certain IIAs. Reinforcing interaction can appear within the same agreement typically involving redundancy, and it can also appear between state-state and investor-state agreements (e.g. umbrella clause).

Cummulation refers to a situation where the provisions create different rights and duties. Typical situations of cummulation interaction within the same agreement may be separate chapters on investment and services or separated chapters on services and specific sectors such as financial services. Solutions would be to use definition of coverage, scope provisions or specify hierarchy of provisions. Cummulation interaction may be solved by specifying which treaty prevails, specify that the stronger right or duty prevails, stating that one Party may elect the prevailing provision, or stating that consultation will be held. Cummulation interaction on procedure provisions was also introduced with examples of solutions.

Amplification interaction can be seen within agreements, between different agreements and between State-State and investor-State agreements related to investment authorization.

Contradiction interaction is a situation where one provision purports to limit or extinguish some right or duty created by another provision. If it is within the same agreement, the solutions include scope, definition and hierarchy. Election and agreement is less likely to be used. If it is between different agreements, hierarchy is a more common solution. If it is within different agreements, some provisions limit, but do not distinguish others. In the case of State-to-state agreement and investor-state agreement, it is typical to limit provision of investor-State agreement or limit investor’s power to waive.

As a conclusion, "new generation" agreements provide interesting innovations that point towards how to deal more effectively with the problems and gaps (and inconsistencies) associated with the current IIA universe.

Interactive discussion between expert panel (UNCTAD resource persons and consultants) and participants on issues of key concerns by APEC members

The highly informative presentations made by the three panelists led to active discussions on key issues of recent BITs and other IIAs.

Complexities deriving from interactions and overlaps between agreements and/or articles were further discussed in depth. In this context, a panelist argued that the issue of complexity and incoherence was becoming a clear obstacle as well as a hazard-cost for businesses and governments, pointing to the urgent need to consider multilateral and harmonious approaches. Another panelist further elaborated on this issue, citing the U.S. BIT and other IIAs as examples. Some complexities were said to originate from old agreements concluded between developed countries in an era where investment disputes were not so much of a major issue (as they are now). In general, agreements designed and concluded under a different era and conditions need to be reviewed under the light of today, and be amended where necessary.

The issue of dispute settlement mechanisms also attracted high interest among participants. A panelist comprehensively explained the ongoing innovation process of ICSID. In response to this explanation, a question was raised regarding rule-settings for an appeal mechanism. According to the panelist, although including an appeal mechanism provision in IIAs may be technically difficult, this issue was certainly on the minds of all economies, and thus would probably be discussed in more detail in the international arena in the coming years. The panelist further emphasized that more attention should be paid to the innovation of ICSID, including accumulation, transparency, disclosure of arbitrations etc., and be studied more comprehensively. Another topic in this context was investor-investor dispute settlement as although BITs have state-state or state-investor provisions, they generally do not refer to investor to investor dispute settlement procedures. At most, they would stipulate that the country would make an effort to set up procedures to address the private sectors' disputes, or give national treatment regarding access to domestic courts. The consensus seemed to be that this was sufficient for the time being.

During the discussion, a new wave of BIT renegotiations was also put into the spotlight. Currently, many different types of renegotiations are seen; one is the renegotiation of treaties concluded by newly acceding members to EU (to address the pre-establishment commitments they have made in the past). Another is the renegotiation of investment treaties with China, which originally did not have investor-state dispute settlements provisions. The third is the renegotiation of old-model treaties that (because of its out-of-date contents) no longer benefit either of the party states.

As a final comment, the panelists also suggested that economies should take note that BITs and IIAs are not only a effective way to set an international legal framework to liberalize, protect, and facilitate investments, they are also an effective means to promote and fuel domestic reform. Host economies should certainly take advantage of this.

Session TWO: Presentations from Invited Speakers

Presentation 1: "How much investment do OECD agreements protect ?"

◆Marie-France Houde
Senior Economist, Head of OECD Investment Policy Review
Organisation for Economic Cooperation and Development

(Marie-France Houde, OECD)

The OECD stock taking exercise showed that OECD BITs covered a very small proportion of total inward and outward FDI while the picture with FTAs was quite different. This suggests that economies may get better value for money for their resource commitment in negotiating the latter type of agreement.

While the importance of emerging markets/economies (such as Asia and Latin America) as recipients or providers of FDI is undoubtedly increasing, OECD countries still remain the dominant force in international inward and outward investment flows. OECD governments are also, by large, the main contractors of trade agreements with investment content (TAs).

As major actors in the globalization process, OECD countries have to this day entered into 1,245 BITs or TAs with some 140 non-Member countries. They have also concluded 145 agreements between themselves. But how much investment is actually protected? The OECD estimates this coverage to be around 15 per cent. But there are important differences between countries and types of agreements. While European countries contracted the largest number of BITs, in most cases, they cover less than 10% of their outward investment. The bulk of it is protected by the EU where they invest the most. On the other hand, TAs is responsible for an increasingly larger share of investment protection in Australia (47%), Canada (44%) and the United States (20%). And more is to come. TAs in the pipeline could potentially double US treaty coverage by 50 per cent and raise the levels of protection to 30% in Korea and 28% in Japan. Similar trends can be observed for inward investment where future TAs could raise the levels of protection to 90 % in Korea and Mexico and 64 % in Canada.

The research by OECD provided useful insight from a quantity point of view. OECD advised APEC that it might be useful to conduct similar kinds of research among the APEC countries. Quality of the IIAs is not covered by this research, but currently research on quality of the IIAs is pursued by the investment committee of OECD , the result of which will be shared in the near future.

Presentation 2: "Mexico's Experience and Policy with International Investment Agreements"

◆**Alejandro Faya Rodriguez**
Directorate General for Foreign Investment, Ministry of Economy, Mexico

(Alejandro Faya Rodriguez, Mexico)

Mexico continues to strongly promote FDI through two approaches; FTAs and BITs. NAFTA, concluded in 1994, was the first FTA with an investment Chapter and triggered a new trend on investment chapters, and many treaties followed the NAFTA approach that has stronger commitments compared to the traditional BITs.

Mexico has an open-oriented policy as a result of the Mexican economy liberalization process during the 90's, and the liberalization has led Mexico to become a major exporting power as well as a major FDI recipient. IIAs have helped in creating favorable conditions for investment and resulted in attracting more FDI. In this sense, IIAs can be used as a means to diversify the types of inwards FDI.

Mexico has been involved in several investment treatment arbitration processes, 10 NAFTA cases and 2 BIT cases. There have been 24 NAFTA cases in total (including the ones involving the U.S. and Canada) and the awards seem to be conservative considering the number of the victories for States. The figures show that damages awarded tend to be less than damages claimed.

From a legal perspective, investors have claimed violations to minimum standard of treatment and expropriation in most of the cases. In few cases, the obligations alleged to have been breached were National Treatment and MFN Treatment.

There are three approaches on the minimum standard of treatment: one is the minimum standard of treatment to aliens pursuant to customary international law (CIL), second is a definition based on all sources of international law, especially conventional international law, and third is a definition based on the self-contained and autonomous concepts of fairness and equity. Some cases in which there were partial victories for investors were highlighted to learn about the interpretation made on these clauses.

Mexico's forward-looking position is to continue negotiating IIAs taking into account experience, assessing investment trends and keeping track of the global investment climate, and looking for sound and equilibrated IIAs. Issues to be considered when negotiating investment instruments are to follow a well-backed strategy, to use legal techniques that are based on clarity, consistency and certainty, and to balance investor-state dispute settlement provisions.

From Mexico's experience, advices and comments were made on particular issues. The first advice was to establish that FET and FPS are based on the CIL, noting that the protection accorded does not go beyond the minimum standard of treatment to aliens in accordance to CIL, that FET and FPS are part of such standard and are understood insofar they are recognized under the CIL and that the violation of different provisions, in and of itself, does not establish a violation of the minimum standard. Secondly, it was mentioned that expropriation does not intend to curtail the regulatory powers of the State, nor to cover investors against any kind of risks stating that expropriation provisions reflect CIL on expropriation, and Bona fide and non-discriminatory regulation should not give rise to expropriation. Thirdly, not to limit the scope of relative standards (i.e. MFN and NT) as they do not have the effect to discriminately attract other provisions. The fourth advice was to have requisite regulations in the investor-State arbitration section, in order to provide a minimum of legal certainty and limit the exposure of the State to frivolous claims**.** And finally, it was advised to avoid unnecessary language, obligations of uncertain content (e.g. transparency, promotion) and vague clauses (e.g. the umbrella clause); and put extra care in the concepts that define the scope of the instrument (e.g. investment and investor, do not include non-economic or non-asset concepts e.g. ordinary contractual breaches).

In the overall context, Mexico has gone through a positive experience with IIAs. As part of the Mexican policy, Mexico supports the negotiation of IIAs with strategic countries. However, such decision entails responsibility. More than ever, Mexico is conscious of the need to design good and balanced IIAs. As a conclusion, experience is fundamental in order to learn from it and conduct better negotiations of IIAs. Any investment treaty has to keep a right balance between a reasonable protection to investment and the legitimate needs of the host state.

Presentation 3: "Korea's experience and policy with international investment agreements (IIAs) "

◆Yeo Han-Koo
Director, Foreign Investment Policy Division,
Ministry of Commerce, Industry and Energy, Republic of Korea

(Yeo Han-Koo, Korea)

As an OECD member, Korea continues on its path to growth and development in respect with GDP, GDP growth rate, and global trade ranking. Korea has experienced a rapid development since 1962 thanks to a radical FDI regime change after the Asian financial crisis. FDI inflows increased due to this change and FDI outflows are on a steady rise. FDI-based development (Inflow as well as outflow), investment promotion and FTAs are to key factors to the opening economy with global reach.

Korea has concluded 59 investment agreements and is aiming to further develop this network , starting with the Korea-Chile FTA. The Korea-Chile FTA has been a great success, increasing the exports of automobiles, mobile phones, TV & camcorders as well as the imports of raw materials, wine, fisheries, etc. As external factors for a successful FTA, market size of the target country, industrial structure (competing or complementary), possibility of trade expansion and trade conflict, strategic value, FDI positioning (Inflow vs. outflow) and political stability, and as internal factors, level of interests in business community, industrial and corporate restructuring effect from FTAs, conflict of interests among different sectors, social consensus on redistribution of social cost, and feasibility of special legislation on redistribution of social cost stemming from FTAs should be considered.

Moving from investment protection to investment liberalization, living up to global standards following the NAFTA model as the first FTA and responding to unique circumstances such as the financial crisis are the principles underpinning the FTA investment Chapters of Korea.

FTAs that Korea has concluded so far contain elements on NT, MFN, fair and equitable treatment, performance requirements, provisions on senior management and board of directors, expropriation/compensation, and dispute settlement. These elements may be seen in the agreements involving Japan, Chile, and Singapore.

FDI is one of the main pillars advancing the Korean economy into an innovation-driven, knowledge-based economy. In the era of globalization, IIAs are a useful strategic policy tool to promote FDI, create and spread wealth on a global scale. Korea embarked on FTA negotiations with major partners in recent years, and is in the learning process of finding the right model for it. Korea will remain strongly committed to liberalization and promotion of FDI through IIAs with strategic partners.

Q&A and/or discussions on Presentation 1 ~ 3

In response to questions raised by the participants, the panelists provided in-depth explanations and advice based on their economy's experiences and practices.

Responding to the request for detailed information on the investment flow from developed to developing countries, the panelist from the OECD explained that OECD has conducted a complete inventory on all the agreements concluded by OECD and that the list of the agreements and all the statistics on the flows are to be disclosed on the website. In the context of the coverage of FDI in the IIAs, participants from UNCTAD commented on the recent phenomenon of South-South investment cooperation and the gaps between the increase of investment flow from developing countries to other developing countries and the lack of their coverage by IIAs. UNCTAD also pointed out that among developed economies (i.e. OECD economies), FDI was protected and liberalized by the OECD Code of Liberalization of Capital Movements; this should be taken into account when analysing the coverage of FDI.

As for some of the negative impacts caused by concluding FTAs (which was also asked from the floor), the Korean panelist identified the inter-industrial and intra-industrial conflict of interest under the agreement. In addition to this, the Mexican panelist affirmed that this conflict is a normal phenomenon as long as the government adopts an open-market policy seeking increased competitiveness. In conclusion, the Korean panelist stressed that it is necessary for an economic policy maker to consider the process of FTAs or BITs not only from an economic but also from a political and social perspective, and that the government should conduct, as a remedy to be taken, the restructuring process of damaged industries and the promotion of FDI from the comprehensive perspective.

The legal aspect of expropriation attracted a significant amount of participants' interest, and a participant asked whether a government could reserve the right to execute expropriation in specific designated sectors. The panelist answered they should not designate such sectors, but at the same time, many recent agreements have an exception list of areas where the host can take measures not confirming with the NT provision, such as in areas like health, security, consumer protection, competition policy etc. The host country's right to expropriate would fall under this category, so their interest under such situations would be protected.

The question on an inconsistency that originates between two kinds of agreements – for example: NAFTA and the European model - and an inconsistency between recent agreements and old ones was subsequently raised. In order to cope with this inconsistency, the Mexican panelist mentioned that it is highly essential to review the agreements and re-negotiate with a partner so as to maintain a consistency and to turn a present scheme into a better one. The Korean panelist also commented on the importance of ascertaining advantages and disadvantages of domestic industries at first in order to determine a comfortable partner. This process enables making full use of FTAs.

Session THREE: Presentations from Invited Speakers (Continued)

Presentation 4: "Key Features on the 2004 U.S. Model BIT"

◆Michael K. Tracton
Investment Negotiator, Office of Investment Affairs,
U.S. Department of State, United States

Since its inception, the U.S BIT programme has maintained the same overarching objectives increasing protection of investments abroad, adoption of market-oriented investment policies (open, transparent, non-discriminatory, etc.) and international law standards consistent with these objectives. BITs are an important element for the U. S. outward investment policy. By creating conditions more favorable to U.S. private investments, these treaties assist the countries in their efforts to develop their economies, thus strengthening the development of the private sectors. The United States began negotiating BITs in the early 1980's and to date has signed 46, 39 of which are into force. U.S FTAs with

(Michael Tracton, U.S.)

investment chapters sum up to 6, 4 of which are into force.

U.S Model BIT was updated in 2004, and the new provisions include improved protections, substantive clarifications and procedural innovations in investor-State arbitration. Substantive provisions of the model BIT were introduced.

Regarding National Treatment and MFN treatment, the US model BIT provides such treatment not only limited to the post-establishment phase but also in the pre-establishment phase. Pre-establishment coverage is important because it provides an open, predictable investment environment. There have been few arbitrations on the pre-establishment issue. The U.S Model BIT uses the so-called “negative list” approach, meaning all provisions of the BIT are applied to all sectors or matters unless specifically excluded in the Annex.

The second core obligation is “minimum standard of treatment” which stipulates that a Party must accord to covered investments treatment “in accordance with customary international law, including fair and equitable treatment and full protection and security.” Additionally, it is clarified what the minimum standard treatment, fair and equitable treatment, and full protection and security refer to.

The third core obligation concerns limitation on expropriation of investments. This provision covers both direct and indirect expropriation, and compensation that is prompt, adequate and effective. This standard is intended to reflect international law on the obligations of States with respect to expropriation. The Annex to the model BIT on expropriation provides greater certainty on the boundary between non-compensable government action, and indirect expropriation.

Fourth, the model BIT limits the circumstances in which performance requirements (PRs) can be imposed upon an investment. The Model BIT list includes domestic content, domestic purchase preferences, “balancing” of imports in relation to foreign exchange earnings, and technology transfer, thus covering a broader range than the WTO TRIMs Agreement. Unlike the 1994 model, the new model disciplines PRs that are linked to the receipt of an advantage. Fifth, performance requirements to appoint senior management positions with persons of particular nationality are also covered.

Sixth, there are two articles concerning transparency. The first requires each Party to publish or otherwise make publicly available its laws, regulations, procedures, administrative rulings of general application, respecting any matter covered by the Treaty. The second requires, to the extent possible, to publish laws, regulation, procedures, administrative rulings of general application, and to provide interested persons to comment on these measures. These new obligations are not subject to ISDS. This new obligations are included in the model on account of the private sector's view that transparency is an important element of the investment environment.

Seventh, the Model BIT provides for the transferability of funds into and out of the host country without delay. Inclusion of the free transfer articles send a strong signal to the markets that BIT Parties support the free flow of capital and recognize its importance for the development of a vibrant economy.

The eighth core provision is ISDS, meaning the availability to an investor to seek compensation through binding international arbitration for an alleged breach of the specified provisions, "investment agreements" and "investment authorization" as defined in the BIT. Innovations in the model BIT's investor-State procedures include provisions on mechanism to dismiss frivolous claims, transparency concerning all related documents, public hearings and interim review of arbitral awards. Others features include limitation periods of 3 years (i.e. claim cannot be brought if more than 3 years have elapsed since the date of an alleged breach), a requirement that investors waive their rights to initiate or continue domestic proceedings when they initiate BIT arbitration, and a governing law provision.

Presentation 5: "The Performances and Tasks of Asian Pacific Community through private FDI of Japan's multinational corporations"

◆Shigeki Tejima
Dean of Faculty and Graduate School of International Politics and Economics
Nishogakusha University, Japan

(Chikara Inoue: substitute presenter for S. Tejima, Japan)

Japanese MNCs have constructed mutually beneficial relationships with East Asian host countries through international trade and FDI. Above all, they have contributed to high economic growth of host Asian countries through their FDI and their affiliates' activity, while they globally preserved their competitiveness through their FDI in East Asia and through the construction of networks in East Asia. The economic linkage in the complementary relationship between Japan and East Asia has been prominently strengthened in international trade and FDI since the 1990s, although the scale of local operation of Japanese affiliates in the USA is still larger in comparison with that in East Asia. The linkages between Japan and Central & South American countries are rather moderate in comparison with those between Japan and East Asia and between Japan and North America. In order to strengthen the former linkage, the complementary relationship of the East Asian model should be established in the Central & South American region. Success in the automobile export industry and recent high growth in the region provide many opportunities for establishing such complementary relationship.

However, Japanese MNCs are not free from difficulties in their "second stage globalization strategy." In fact, Japanese MNCs face two serious issues in their overseas operation. One is that they cannot effectuate their ownership advantage for minimizing transaction costs under the location "disadvantage" in foreign countries. Another is that Japanese MNCs' specified ownership advantage itself is threatened by the "ICT revolution" and "Modularization." Japanese MNCs have to positively respond to these issues, first, through transforming location disadvantages of host countries into location advantages and, second, through globally extending various types of international networks with their affiliates, related companies and independent partners in all operations of R&D, brand making, production, parts procurement, financial procurement and marketing. Trade and investment liberalization in the Asia and Pacific region, including East Asia, provides more opportunities for Japanese MNCs, based on the various location advantages of host countries here than compared to those on the East Asian region.

Naturally, many host countries in the Asia and Pacific region are competing as host countries. However, liberalization policy is now generally recognized among many host countries as the most effective FDI promotion policy and many countries in the region are eager to mutually conclude FTAs and/or EPAs in the 1990s and the 2000s. A critical mass will be reached in the near future for concluding a comprehensive liberalization agreement covering the Asia and Pacific region or some sub-regions (for example, East Asia) in order to save high cost of concluding many international agreements and maintaining them.

Regional financial and foreign exchange systems have to be more organized for achieving further economic development of the Asia and Pacific region. However, this is difficult given the characteristics of the two sub-regions, i.e. East Asia and Central & South America. The first is that the "export driven high growth economy" model in successful developing countries in East Asia promotes the preservation of an export competitive foreign exchange rate, whereas the Central & South American policy is based on preserving good terms of trade and the underlying purchasing power. The second is higher growth of local markets and intra-regional trade in East Asia than in Central & South America, which means that more East Asian oriented linkage may be strengthened. Another is the stronger influence of financial institutions and investment banks of the US on Central & South America as compared to East Asia. All of the three issues prevent the early formation of a regional framework of finance and foreign exchange system.

Finally, recent political instability in East Asia may put very persuadable reasoning for preferring an Asian-Pacific linkage to East-Asian linkage because of the far higher negotiating and coordinating capability of the Asian-Pacific region in international politics as compared to that of East Asia.

Q&A and/or discussions on Presentation 4 & 5

The high quality presentation on the new model of the U.S. drew the interest of many participants, and led to an active discussion over the legal aspects and implications of the new model.

During the discussion, the panelist offered informative explanations on detailed legal points and provisions in the model BIT, ranging from the governing law for investment lawsuits, the mechanism to eliminate frivolous claims, and the possibility of an appeal mechanism in the arbitration clause, relationships with WTO obligations, the flexibility of the model, and reaction and reception of new model BIT.

One of the main points was the relationship between this new model of BIT and the customary international law. During the discussion, the panelist repeated that one of objective of the model BIT is to reflect and reinforce the principles of customary international laws. In this context, one participant pointed out that defining standards of customary international law in the agreement actually leads to narrowing down the interpretation of the standards. In response to this, the panelist added that at the same time we should be careful not to constrain the evolution of customary international law in the way to preclude the important protection for investors.

Another point was the differences and inconsistencies between the new model and the previous agreements – such as the investment chapter of NAFTA. As a general background, the panelist provided detailed information on which clauses are included or excluded in each model. One of the important differences is the clause of "the arbitration of investment agreements", which is included in the new model (and not in the NAFTA model). The panelist explained that the clause was provided on the basis of demands from business community for the neutral and assured mechanism of arbitration. Another important difference, as pointed out by a participant, lies in performance requirements related to investment research and development. That is to say, the new model does not prohibit R&D requirements any longer that were prohibited in the previous US models including NAFTA. In the light of inconsistency, the panelist, referring to clauses of MFN and dispute settlement as examples, stressed that the new model ensures that these clauses are applicable only to future and not retrospective in order to address the inconsistency.

Finally, with regard to the general reaction and reception towards the new model BIT from the countries the US is negotiating with, social interest group, congress, and business community, the panelist concluded that the new model BIT has attracted great attention from these vital parties and the US government has obtained the appreciation of its BIT approach. The balance between reducing/eliminating inappropriate/frivolous claims and protecting important investments/investors must be maintained to satisfy all parties.

Session FOUR: Interactive discussions with the Japanese private sector (namely members of ABAC etc.)

An interactive dialogue was held between representatives from the Japanese private sector and APEC participants, drawing deeply from each economy's invaluable experience and knowledge.

As a threshold of this dialogue, the Japanese participant from the Tokyo Chamber of Commerce raised three impediments which Japanese companies and business organizations often face (especially in the Asian region); (1) criteria for validation and procedure concerning investment transparency, (2) export requirements of goods/services abroad, (3) local content requirements (linked to incentives).

One of the topics highlighted in the dialogue was "performance requirements

(PRs)” being applied by host economies. Australia, Malaysia, Philippines, Thailand, and Vietnam respectively commented on the current situation and position of their government on PRs. In general, while Asian countries continue to regard PRs (especially in the value-added sectors such as R&D and technology-transfer) as an important condition for increasing the impact of FDI, they say they have been loosening particular PR items such as local content and export requirements. A participant from Thailand raised that foreign investors are also able to obtain decent incentives in return of meeting PRs. Additionally, an implication was made by the Philippine participant that a more major concern of Japanese investors is the specific measures necessary to improve and enhance the business environment in the host economy, including immediate processing of tax-credits and customs. Referring to the effectiveness of PR for some host economies, the participant from UNCTAD also acknowledged the difficulty of judging whether PRs are a disincentive or a necessary requirement for development, and stressed the need to consider PRs from both aspects, that is to say, an aspect that empirical evidences shows that PRs have contributed somewhat to development, and that PRs still contain deterrent factors to foreign investments. The participant also stressed the importance of carefully considering other policy instruments in achieving development objectives.

The second topic was the “liberalization of investment”. From the viewpoint of manufacturing corporations, another Japanese participant from ABAC emphasized the importance of more comprehensive investment liberalization. Liberalization is necessary not only in regard of manufacturing industries, but also in the supporting industry/service sectors (i.e. logistics services etc.) that enable effective operations of foreign companies. This would in the long run benefit the host economies as such an environment would induce FDI to stay and expand locally. Participants from other APEC economies gave their assents to this opinion, briefing their situations in liberalization of supporting industries. In this context, the participants from Australia and UNCTAD added that liberalization of service sector is in progress also at the WTO negotiation, and it seems promising compared to other themes on Doha round. Concluding comments were made by the Japanese participant that the competitiveness of the manufacturing industry heavily depended on the liberalization of supporting/peripheral services.

The “transparency of BITs” was also discussed in this dialogue. Although many BITs/FTAs are entered based on a common understanding that they are a highly helpful tool to achieve “liberalization”, “protection”, and “facilitation” of investment, at the same time economies need to re-acknowledge the need to ensure the transparency of each agreement remains high, especially so as we face a global situation where the number of BITs/FTAs continue to sharply expand. In that sense, APEC has a transparency guideline and the vital importance of each APEC economy’s effort to comply with this standard was reemphasized.

There was a question raised by a participant from the legal sector on the degree of state enforcement on the final awards of the international arbitrations. A panelist from UNCTAD stated that there are only two cases where the arbitral awards have been non-applicant, one case was settled through political dialogue and the other award was not forced because of the financial situation of the disputing party. Another question was raised on the issue of the prior consent to go to international dispute settlement organizations stipulated under new type treaties, and Australia pointed out that the scope (especially, whether pre-establishment NT is stipulated or not) and the contents will have an impact on the decision to have the provision on dispute settlement. Some economies stated that giving prior consent is a very sensitive issue which may seen by the nationals as giving away the sovereign right to decide if the case can be brought to the international arbitration, but that effort has been made to accommodate the dispute settlement mechanism. Another expert from UNCTAD stated that not all disputes are brought under international arbitrations but are resolved through discussion between the host country and the investor. Dispute mechanism clause has the function to prevent the dispute to become more serious by setting ground rules as the norm of investment considering the fact that allege of the agreement may lead to international arbitration.

Closing Comments

◆Roy Nixon (APEC IEG Convenor)
Manager, Investment & Compliance Unit,
Foreign Investment and Trade Policy Division, The Treasury, Australia

(Roy Nixon, APEC IEG Convenor, Australia)

The UNCTAD study has highlighted some important recent developments, such as (1) a shift from BITs to investment chapters of FTAs (and this broadening in the geographic and substantive scope will likely continue, irrespective of what happens in WTO), (2) a marked shift from protection & promotion to liberalization, (3) the fact that investment agreements have become and will continue to become more complex and the risk of more investment disputes heightened, and (4) economies need to be careful in negotiating IIAs but they can learn a lot from the experience of other economies (eg the experience of Mexico and Korea).

Much was also learned from UNCTAD on how we need to deal with the existing framework and address policy coherence and implementation problems associated with it (this includes the nexus between services and investment). Perhaps, interpretative notes etc and renegotiation of treaties may be useful. And the OECD stocktaking exercise showed that OECD BITs with developing countries covered a very small proportion of total inward and outward FDI while the picture with FTAs is quite different suggesting economies may get better value for money for the resource commitment in negotiating the latter type of agreement.

Points were made from both UNCTAD and Mexico that there has been significant evolution in investment rule making. For instance, “new generation” agreements provide interesting innovations that point towards how to deal more effectively with the problems and gaps (and inconsistencies) associated with the current IIA universe. In that regard the presentation on the new US Model BIT (which also mirrors their FTA chapter) was most helpful. Also recalling the Mexican presentation on the pitfalls of investor-state dispute settlement in its FTAs, some of the participants were struck by the fact that we tend to cheer when the government wins an arbitration case and jeer when the investor wins. Why? This is definitely food for thought as the APEC IEG continues to study these issues. And of course, a strong argument was also made how surely it is better to seek greater clarity, consistency and certainty in how economies negotiate such agreements.

The issue of how complex agreements cover a wide range of economic activity was noted as well, so the comments from our Korean presenter rang very true. For instance, (1) policy makers must take all relevant factors into account be they political, social or economic in deciding on how to prioritize its negotiating objectives in relation to FTAs, (2) if your domestic policy settings are likely to conflict then you may not be ready to negotiate, (3) yet FTAs represent an important opportunity to drive and lock in domestic economic policy reform. It was also most interesting to learn that the primary aim of the US BIT (investment chapter of FTAs) policy is “to reduce policy risk”.

In summary, thoughts were given on what we can do as APEC. The first point was to listen to what our Leaders want us to do. On that point, it was re-emphasized that clear directions that sub-fora should implement the Best Practice Principles in negotiating our FTAs already exist – this is intended in a very practical sense and recent directions suggest we should look to move towards developing common elements in various areas or chapters of FTAs. Secondly, it was pointed out that we can listen more to what our business communities want (and indeed this seminar allowed to have a useful discussion on issues like performance requirements, liberalizing supplier and support industries (consulting and professional services), the need for truly “binding” dispute settlement in treaties. Thirdly, we can encourage and/or do more analysis of the type being undertaken by UNCTAD and OECD to consider innovation in investment rule making with the view to developing a list of key issues which could provide the basis for a menu or checklist approach for future agreements. We need to look to develop more joint projects with organizations such as UNCTAD and OECD and with business. This seems to be of clear mutual benefit. It was also mentioned that we needed to recognize that IEG is underrepresented in the TILF agenda as far as projects is concerned. Fourthly, we need to consider further capacity-building projects specifically directed at the developing economies in APEC – this is a critical issue in increasing their ability to negotiate investment chapters of FTAs. And lastly, we must not forget that the main priority of CTI is to support the multilateral trading system, and clearly investment (through services at least) is a central part of that.

(END)

Tokyo Seminar
APEC Investment Facilitation Initiative: A Cooperative Effort with UNCTAD and other Multilateral Institutions
（ *Project No. CTI 08/2005T* ）

Asia-Pacific
Economic Cooperation

P R O G R A M M E

1st (Thu) and 2nd (Fri) September, 2005

Venue
Toshi Center Hotel
(Conference Room 606)
Tokyo, Japan

Hosted by
The Government of Japan

Introduction

As the global economy continues to grow and evolve ever so dynamically in this “borderless” world, corporations strive to stay ahead of their peers by optimizing their business operations on a global scale, strategically utilizing both trade and foreign direct investment (FDI). This trend has naturally led to the sharp growth and increased significance of FDI worldwide, the promotion, facilitation, and liberalization of which are now found on the agenda of many economies and/or international organizations (including APEC).

However, unlike trade in goods and services, where a comprehensive/multilateral legal framework is set out by the WTO, existing multilateral rules regarding FDI are often considered to be incomprehensive or too narrow-scoped to sufficiently meet the needs and trends of the international business world of today. This is one of several reasons why bilateral or regional investment treaties/agreements have sharply emerged as an arrangement of choice for many economies to set out a framework to promote, protect, and liberalize FDI between the parties involved.

Taking the above global trends into consideration, Japan welcomes you to a two-day seminar to be held in Tokyo designed to allow policy makers of APEC economies to fulfill various objectives (referred to hereunder) in order to further promote and fuel the various efforts and priorities carried out by APEC leaders in this field.

Objective of Seminar

1) To introduce a study by UNCTAD on Bilateral Investment Treaties (BITs) and Investment Chapters of Free Trade Agreements (FTAs), analyzing trends, approaches to key and emerging issues, and interaction and coherence among international investment agreements

2) To share insights and experiences on the development of BITs or the Investment Chapters of FTAs, with a particular focus on “new generation” (or “high-level”) investment agreements

3) To actively exchange views and opinions on a wide range of issues such as “Whether the sharp rise of bilateral/regional investment treaties may eventually lead to a global momentum to start working on (or building) a multilateral framework”, “How host economies may balance high-level investment liberalization with their national policies” etc.

4) To have discussions with the Japanese private sectors on first hand experiences, requests, and proposals for improving the investment environment in host countries (and preferably establishing a network that will allow government officials to liaise with the private sector to ensure a continuing dialogue)

5) To share information and views on ongoing initiatives by UNCTAD, APEC, and other multilateral organizations in the area of investment promotion and facilitation

Background Documentation

Copies of presentation materials will be handed out at the seminar, including the penultimate draft of a study by UNCTAD in collaboration with APEC concerning BITs and economic integration agreements with investment dimensions. In addition, several relevant papers of the UNCTAD Series on “Issues in international investment agreements” will be made available.

List of Participants

◆Speakers (in the order of the presentations)

UNCTAD	Joerg Weber
	Anna Joubin-Bret
Experts (Consultants)	Roberto Echandi
	Kenneth J. Vandevelde
OECD	Marie-France Houde
Mexico*	Alejandro Faya Rodriguez
Republic of Korea*	Yeo Han-Koo
United States*	Michael K. Tracton
Nishogakusha University	Shigeki Tejima

*APEC IEG Members

◆APEC IEG Members

Australia	Roy Nixon
	Paul Kennelly
Canada	Duane Robson
People's Republic of China	Zhao Jie
Indonesia	Robin Hemdy Alwi
	Amri Zuhdi
Malaysia	Reta Siluvaimuthu
New Zealand	Kerryn Fowlie
Papua New Guinea	Michael Enga
Peru	Carlos A. Herrera
The Republic of the Philippines	Celestina B. Ilagan
The Russian Federation	Yulia Potanina
Singapore	Judy Tan
Chinese Taipei	Wen-Chang Chuang
Thailand	Vittaya Praisuwan
	Kitirat Panupong
	Bonggot Anuroj
	Patcharamon Siriwatana
Viet Nam	Nguyen Manh Hung
Japan	Satoru Satoh
	Setsuo Kosaka
	Akiko Takai
	Emi Konishi
	Kunihisa Kawasaki
	Takashi Matsumori

◆Private Sector

ABAC and others	Hiroshi Minezaki (Toshiba)
	Tsuneyuki Kobayashi (Toshiba)
	Kazuhiko Iizuka (Mitsubishi Corp.)
	Yukio Kanzaki (Support Council for ABAC Japan)
	Satoshi Sadamori (Support Council for ABAC Japan)
	Hidehiro Okayama (The Tokyo Chamber of Commerce and Industry)
	Dominic Roughton (Herbert Smith (Law Firm))

Schedule

Thursday, 1st September 2005

10:00~10:30	Opening Session Welcoming Address ◆**Satoru Satoh** (Japan Senior Official for APEC) Deputy Director-General, Economic Affairs Bureau Ministry of Foreign Affairs, Japan
10:30~12:00	**Session ONE: Emerging Trends and Key Issues in International Investment Agreements (UNCTAD)** Presentation 1: "Recent developments in international investment agreements: An analysis of the survey carried out by UNCTAD" ◆**Joerg Weber** Programme Coordinator, International Arrangements Section, DITE, UNCTAD Presentation 2: "Key and emerging issues in new generation international investment agreements (BITs in the late 1990s, and economic integration agreements)" (The presentation will focus on the evolution of key issues and the identification of emerging issues in recent international investment agreements) ◆**Roberto Echandi (Expert for UNCTAD Secretariat)** and **UNCTAD** Presentation 3: "Interaction and coherence of international investment agreements" (The presentation will focus on the issues related to how investment agreements deal with the interaction among provisions, among chapters and among different agreements) ◆**Kenneth J. Vandevelde (Expert for UNCTAD Secretariat)** and **UNCTAD**
12:00~13:00	Interactive discussion between expert panel (UNCTAD resource persons and consultants) and participants on issues of key concerns by APEC members
13:00~15:00	Lunch Break
15:00~15:30	**Session TWO: Presentations from Invited Speakers** Presentation 1: "How much investment do OECD agreements protect ?" ◆**Marie-France Houde** Senior Economist, Head of OECD Investment Policy Review Organization for Economic Cooperation and Development
15:30~16:00	Presentation 2: "Mexico's Experience and Policy with International Investment Agreements" ◆**Alejandro Faya Rodriguez** Directorate General for Foreign Investment, Ministry of Economy Mexico

16:00~16:15	Coffee Break
16:15~16:45	Presentation 3: “Korea’s Experience and Policy with International Investment Agreements” ◆**Yeo Han-Koo** Director, Foreign Investment Policy Division Ministry of Commerce, Industry and Energy Republic of Korea
16:45~17:30	Q&A and/or discussions on Presentation 1 ~ 3

Friday, 2nd September 2005

10:00~10:30	**Session THREE: Presentations from Invited Speakers (Continued)** Presentation 4: “Key Features on the 2004 U.S. Model BIT” ◆**Michael K. Tracton** Investment Negotiator, Office of Investment Affairs, U.S. Department of State United States
10:30~11:00	Presentation 5: “The Performances and Tasks of Asian Pacific Community through private FDI of Japan’s multinational corporations” ◆**Shigeki Tejima** Dean of Faculty and Graduate School of International Politics and Economics, Nishogakusha University Japan
11:00~12:00	Q&A and/or discussions on Presentation 4 & 5
12:00~14:00	Lunch Break
14:00~15:30	**Session FOUR: Interactive discussions with the Japanese private sector (namely members of ABAC etc.)**
15:30~15:45	Coffee Break
15:45~17:00	**Session FIVE: Wrap Up Interactive discussion between expert panel (UNCTAD resource persons and consultants) and participants**
17:00~17:30	1) Closing Comments from the IEG Convenor ◆**Roy Nixon** Manager, Investment and Compliance Unit, Foreign Investment and Trade Policy Division, Department of the Treasury Australia 2) Filling out of questionnaire etc.

End

For any inquires or assistance, please contact:

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1st-2nd Sep, 2005 - Tokyo Seminar
Welcoming Address
Satoru Satoh, Japan's Senior Official for APEC
DDG, Economic Affairs Bureau
Ministry of Foreign Affairs, Japan

Satoru Satoh
Senior Official for APEC
Japan

Good morning, Ladies and Gentlemen.

It is a great pleasure for me to welcome all of you to our Tokyo Seminar of "APEC Investment Facilitation Initiative: A Cooperative Effort with UNCTAD and other Multilateral Institutions".

On behalf of the Government of Japan, please let me express how delighted and honored we are to be able to welcome so many distinguished guests and participants from around the world and from the Japanese business community. Your presence and participation means a great deal to us and this seminar.

Let me begin with asking why we need to focus on investment now.
As the wave of globalization continues to evolve dynamically, investment has become a driving force of trade, national development, and the world economy as a whole. Over the past twenty years, foreign direct investment (FDI) has increased twelve times registering 610 billion dollars in 2004, while global exports expanded nearly four times to 7.5 trillion dollars.

Multinational corporations strive to stay ahead of their competitors by optimizing their business operations on a global scale, utilizing both trade and FDI. Countries are focusing on how best to capture both inward and outward FDI opportunities and maximize the benefits from FDI to accelerate their economic and social development. Thus, international legal frameworks to protect, facilitate, and liberalize investment are urgently needed from the perspective of both corporations and governments living in this changing world of globalization.

Trade and investment are undividable in today's world where one often accelerates the other, either directly or indirectly. They are, in effect, the global economy's "pair of wings". While trade has a multilateral legal framework set out by WTO, there is no equivalent comprehensive framework for investment. The existing bilateral or regional investment agreements, although their number is sharply increasing, do not necessarily satisfy the needs and trends of the business community. This is where we need to conduct further work.

Then, why is investment important for APEC?

The Asia Pacific is a unique place where we can observe an investment-led economic growth with a dynamic cycle between FDI and trade expansion. Based on the fact, as you know, in 1994 at Bogor, Indonesia, APEC leaders agreed to set a bold goal to attain "free and open trade and investment" by 2010 for developed economies and by 2020 for developing economies in the Asia Pacific region. This year we are also working on the mid-term stocktaking and a roadmap towards the Bogor Goal. Together with trade, the facilitation and liberalization of investment has become one of the main agendas of APEC.

Thanks to the work of the Investment Expert Group (IEG), APEC has made important contributions in the field of investment. APEC has produced the APEC Non-binding Investment Principles in 1994, the Menu of Options in 1998, and the Transparency Guidelines on Investment in 2002. We believe APEC can further contribute in preparing multilateral guiding principles on investment while aiming to achieve the Bogor Goal.

Now you may ask why Japan is so enthusiastic about investment and decided to host this seminar.

Japan is one of the largest investors in the world. Japanese firms have been actively investing in North America, Europe, Asia and other regions to expand their global operations. At the same time, in 2003 the Japanese government announced its Invest Japan initiative, which aims to double the inwards FDI stock within 5 years starting from 2001.

From this perspective, we have redoubled our efforts to improve our domestic legal frameworks and business environment as well as to conclude high-standard bilateral investment agreements with several countries. The Economic Partnership Agreements (EPAs), which we have signed with Singapore and Mexico and are negotiating with other Asian countries, also include a high-standard investment chapter.

Having said so, what is the objective of our seminar?

We hope this seminar will allow us to share insights and experiences of the experts and policy makers from APEC, UNCTAD and OECD, and to deepen our understanding on existing and future high-standard investment treaties as well as possible forms of comprehensive multilateral legal frameworks on investment.

The works conducted by UNCTAD and OECD will give us a good basis for our discussion, and the experiences of individual countries will also enrich our consideration. Particularly, UNCTAD has deep expertise in studying and promoting investment from the viewpoint of development, and its representatives will present us a study on international investment agreements. After reflecting your inputs made during the seminar, we hope it will be widely disseminated at various opportunities. We would also like to report the outcome of this Seminar to the IEG Meeting next week and other relevant APEC fora.

As you can see in the Seminar Programme handed out to you, we have 9 speakers with us, who will be giving us in-depth presentation followed by interactive discussions. The programme also includes discussions with the Japanese business stakeholders represented by ABAC members. We hope that after going through this comprehensive agenda, everyone will leave Tokyo with new ideas and a sense of satisfaction.

Once again, I thank you all for coming, and we hope this seminar will meet your high expectations.

Thank you.

END

INTERNATIONAL INVESTMENT AGREEMENTS: Recent Trends and Implications

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

In collaboration with

ASIA-PACIFIC ECONOMIC COOPERATION (APEC)

For the

APEC Investment Facilitation Initiative:
A Cooperative Effort with UNCTAD and other Multilateral Institutions
1-2 September 2005, Tokyo, Japan

PREFACE

The present paper has been prepared by the secretariat of the United Nations Conference on Trade and Development (UNCTAD), as part of its programme on international investment arrangements. This programme seeks to help developing countries to participate as effectively as possible in international investment rule-making. It embraces policy research and development, including the preparation of a series of issues papers; human resources capacity-building and institution-building, including national seminars, regional symposia, and training courses; and support to intergovernmental consensus-building. The programme is implemented by a team led by James Zhan. Khalil Hamdani provides overall guidance to the Programme.

The present paper was prepared by Roberto Echandi and Kenneth Vandevelde, with inputs received from Hamed El-Kady, Anna Joubin-Bret and Joerg Weber. It is based on the original UNCTAD background document for the *APEC Investment Facilitation Initiative: A Cooperative Effort with UNCTAD and other Multilateral Institutions*, held in Tokyo from 1-2 September 2005 that has been subsequently revised in light of that meeting's discussions and comments received from the participants of that meeting. These comments are gratefully acknowledged.

The contribution of the Government of Japan is gratefully acknowledged

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EXECUTIVE SUMMARY

The past few years saw a proliferation of international investment agreements (IIAs) at the bilateral, regional and inter-regional levels. Several developments are worth noting in this context. First, the universe of IIAs consisting of bilateral investment treaties (BITs) and preferential trade and investment agreements (PTIAs) continued to expand. Second, a new generation of IIAs is emerging with provisions that tend to be increasingly sophisticated and complex in content, clarifying in greater detail the meaning of certain standard clauses and covering a broader range of issues. Third, economic development policy is becoming increasingly complicated by the web of overlapping commitments arising from IIAs containing a variety of provisions applicable to the same matters. Furthermore, the increasing activity in international investment treaty making has been paralleled by a rise in investor-State disputes. As a result of these developments, countries – and firms – have to operate within an increasingly complicated framework of multi-layered and multi-faceted investment rules.

The new generation of IIAs presents new challenges for policy makers. As global economic integration becomes ever deeper, managing the impacts of integration on the domestic economy becomes more complex and the challenges involved in concluding IIAs correspondingly greater.

This paper provides an overview of this new generation of IIAs, with a special emphasis on the practice of Asian and Pacific countries. A discussion of the recent trends in the new generation of IIAs will be covered. The paper will also identify some of the key issues that have risen in the new generation of IIAs, as well as some of the issues that arise as countries seek to ensure policy coherence in the face of a complex network of overlapping IIA provisions. Finally, the paper will conclude with a consideration of some of the implications for developing countries pertaining to the new generation of IIAs.

INTRODUCTION

More than forty years ago, developed countries began to initiate programmes to conclude IIAs with developing countries for the purpose of protecting investments of developed country investors in the territory of the developing countries. During the past fifteen years, however, a new generation of IIAs has emerged. This new generation, while continuing to provide protection for international investment stocks, increasingly emphasizes liberalizing access to resources and markets.

IIAs generally fall into two groups. The first group consists of BITs, agreements negotiated between two countries to protect and promote investment of investors of one party in the territory of the other party. These treaties date back to 1959 and traditionally had a relatively uniform content that until recently had not changed markedly since their inception, apart from the introduction of provisions on investor-state dispute resolution in the 1960s (UNCTAD, 1998). Since the mid 1990s, however, the conclusion of investment protection provisions within larger trade agreements has caused some reexamination of the content of the traditional investment provisions that had appeared in BITs. In addition, the submission of a growing number of investment disputes to arbitration under the investor-state arbitration provision also has prompted some reevaluation of the content of traditional investment protection provisions. As a result, the new generation of IIAs has witnessed some innovations in BIT practice and thus there is greater variation among these agreements than in the past.

The second group of IIAs considered in this overview consists of economic integration agreements (EIAs), which are agreements intended to facilitate the cross border movement of goods, services, capital, people or information. EIAs vary enormously and range from agreements that provide only for economic cooperation to agreements that create a common market. Such agreements may be bilateral, plurilateral, regional, interregional or multilateral (UNCTAD, forthcoming 2005a). They may involve countries at the same or at different levels of economic development. Within this widely divergent group of EIAs, the primary focus in this study will be on preferential trade agreements that include investment provisions (PTIAs)[1]. During the past decade, a number of countries, particularly those on the Pacific Rim, have concluded a new generation of PTIAs comprising highly complex free trade agreements that liberalize trade in goods and services, while also containing investment protection provisions similar to those that traditionally have appeared in BITs. This new generation of PTIAs, like the new generation of BITs, has generated innovations in IIA practice.

Especially since the 1990s, there has been an explosion in the number of IIAs concluded. Such agreements have grown not only in number, but also in complexity and their normative

[1] PTIAs have a variety of names, including free trade agreement, regional trade agreement, economic partnership agreement, new-age partnership agreement, economic complementation agreement, agreement for establishing a free trade area, closer economic partnership arrangement, framework agreements. For a detailed analysis, including the definition of these agreements see UNCTAD 2005a.

content has continued to evolve. Because of the qualitative change in complexity and the evolution in content, agreements concluded particularly since the mid 1990s can justly be regarded as constituting a new generation of IIAs[2].

The Asia-Pacific Economic Cooperation (APEC) economies are among the most dynamic participants in the process of concluding IIAs. For example, APEC members had concluded a total of 687 BITs at the end of 2004, representing about 30% of all BITs. China ranks second among all countries for the number of BITs concluded.

The new generation of IIAs presents new challenges for policy makers. All IIAs, of course, limit the policy space within which countries can pursue their economic development policies. The new generation of IIAs, however, imposes a wider variety of disciplines touching more areas of host country activity and they often do so in a more complex and detailed way. Further, the interaction of agreements at different levels – including multilateral, plurilateral, regional and bilateral – creates complex interactions among agreements that exacerbate the complexities found within agreements. As global economic integration becomes ever deeper, managing the impacts of integration on the domestic economy becomes more complex and the challenges involved in concluding IIAs correspondingly greater.

This paper provides an overview of this new generation of IIAs, with a special emphasis on the practice of Asian and Pacific countries. It will begin with a discussion of recent trends in the new generation of IIAs. Next, it will identify some of the key issues that have arisen in the new generation of IIAs. Then, it will turn to an analysis of some of the challenges for policy coherence that arise from the interlocking web of BITs and PTIAs. Finally, it will conclude with a consideration of some of the implications for developing countries of the new generation of IIAs.

I. RECENT TRENDS IN NEW GENERATION IIAs[3]

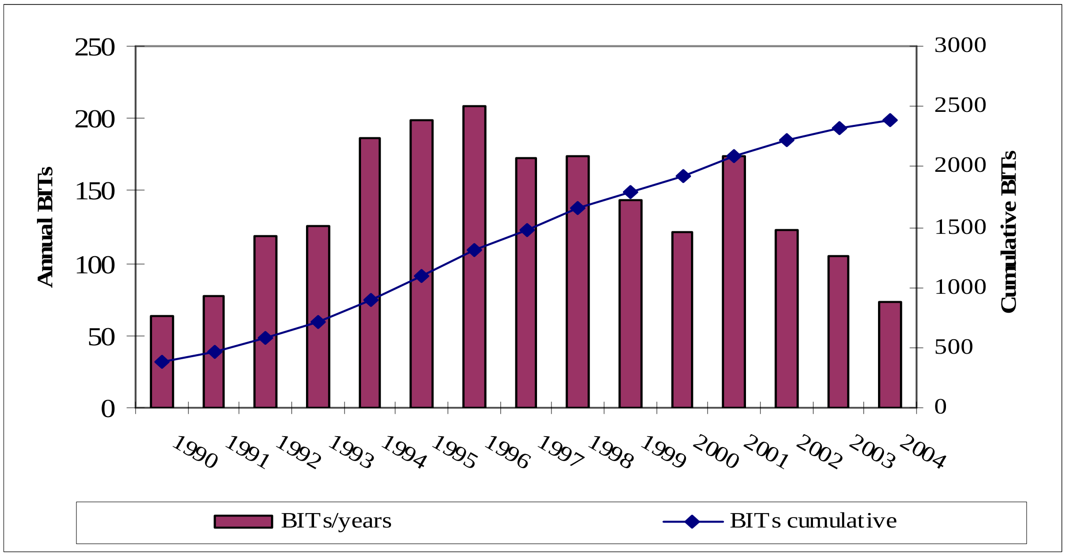
The new generation of IIAs has been shaped by a number of trends that have resulted in a growing number of agreements, as well as changes in their complexity and content. This section discusses some of the most important recent trends.

A. Growing universe of agreements

Since the 1990s, the universe of agreements has expanded dramatically, although the rate of growth is different for different types of agreements. By the end of 2004, the number of BITs had reached 2,392. Nevertheless, the rate of increase in the number of BITs concluded has been in decline since 1996, when 209 agreements were concluded in one year. By contrast, 73 BITs were concluded in 2004, the smallest number since 1990 (figure1).

[2] All instruments cited herein may be found in UNCTAD 1996, 2000a, 2001a, 2002, 2004a, 2005b and 2005c (also available on-line at www.unctad.org/iia). For the full texts of BITs, also visit www.unctad.org/iia.
[3] This section draws on UNCTAD 2005d.

Figure 1. Number of BITs concluded, cumulative and year by year, 1990 – end 2004
(Number)



Source: UNCTAD (www.unctad.org/iia).

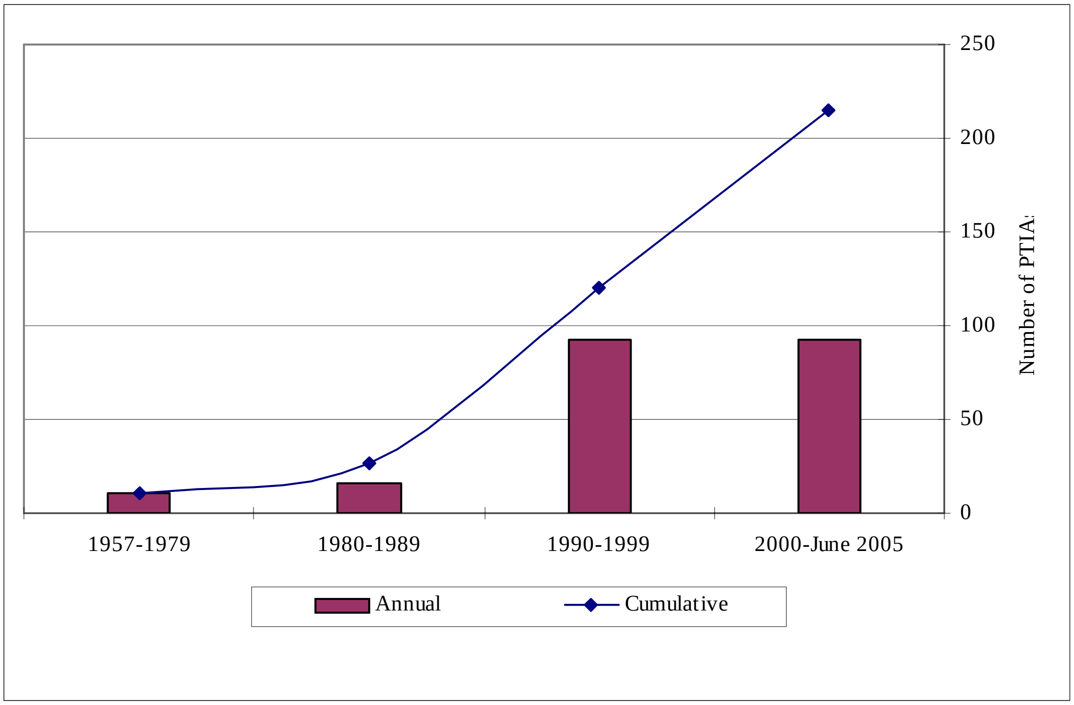
The universe of IIAs includes some renegotiated BITs. Indeed, by the end of 2004, more than 85 BITs were the product of renegotiation. The trend toward renegotiation of BITs is expected to increase further since many BITs were signed in the 1990s with an initial term ranging from 10 to 30 years.

Often, the renegotiated BIT either supersedes or substantially amends the earlier agreement. In many cases, the renegotiation is the result of changed circumstances, especially the conclusion of other international agreements the terms of which must be harmonized with the BITs. For example, the BITs signed by ten Central European countries prior to their accession to the European Union (EU) in 2004 have been affected by these countries' membership in the EU. As a result, in late 2003 and early 2004, the United States and eight then acceding and candidate countries agreed to a package of BIT amendments and interpretations in the interest of avoiding incompatibilities between the requirements of EU membership and the United States BIT obligations. Canada is engaged in a similar exercise. In 2003 China renegotiated its 1983 BIT with Germany with improved levels of protection for the investor, including an investor-State dispute settlement provision, which was not included in the previous BIT. Negotiations are also underway with several other European countries.

In recent years, international investment rules increasingly have been adopted as part of bilateral, regional, interregional and plurilateral agreements that address, and seek to facilitate, trade and investment transactions. These agreements, in addition to containing a variable range of trade liberalization and promotion provisions, contain commitments to liberalize, protect and/or promote investment flows between the parties.

The number of such agreements has been growing steadily and, by June 2005, it exceeded 215. The large majority of these agreements, about 87 percent, were concluded since the 1990s. Indeed, at least 34 new agreements were concluded in 2004 and early 2005 alone and about 66 others were under negotiation or consultation. Thus, while the rate at which new BITs are being concluded has been slowing, the rate at which new PTIAs have been concluded has been increasing (figure2).

Figure 2. The growth of PTIAs, 1957-June 2005
(Number)



Source: UNCTAD.

Initially, most PTIAs were between countries in the same region. Since 1990s, however, countries located in different regions began to conclude PTIAs with one another, with the result that interregional PTIAs now account for 44 percent of the total 215 PTIAs.

The growth in the number of PTIAs was accompanied by two important qualitative changes. First, such agreements, previously concluded principally among countries at similar levels of economic development, were concluded with greater frequency between developed and developing countries. By June 2005, 81 such agreements had been signed, including 77 since 1990. Thirty-nine more such agreements were under negotiation. Second, PTIAs among developing countries also experienced a dramatic increase since the 1990s. By June 2005, at least

70 such agreements had been signed, including 59 since 1990. Another 24 PTIAs among developing countries were under negotiation (UNCTAD 2005e).

B. Expanded range of issues

Numerically, traditional BITs emphasizing the protection of foreign investment continue to dominate the framework of IIAs. This is particularly true in the case of South-South BITs. Nevertheless, growing numbers of BITs are including more sophisticated investment protection provisions as well as liberalization commitments.

Investment provisions are increasingly being formulated as part of agreements that encompass a broader range of issues, including notably trade in goods and services, and other factors of production). While BITs continue to be more numerous than PTIAs, the latter occupy a much more important place in the international investment regime than they did a decade ago. Some countries increasingly prefer to address traditional investment protection as well as newer investment liberalization issues in the context of these broader agreements where investment provisions are only part of a larger framework for economic integration, rather than through the conclusion of traditional BITs.

Compared to BITs, PTIAs show far more variation in their scope, approach and content. Moreover, recent PTIAs tend to encompass a broader range of issues that in the most comprehensive agreements may include not only investment protection and liberalization, but also trade in goods and services, intellectual property rights, competition policy, government procurement, temporary entry for business persons, transparency, the environment, and labor rights. Recent PTIAs concluded by countries such as Australia, Chile, Japan, Singapore, and the United States are especially comprehensive and detailed.

Not all recent IIAs have followed this pattern, however. Some recent agreements have remained rather narrow in their coverage of investment issues. These limit themselves to establishing a framework for cooperation on promotion of investments. Recent examples include the Free Trade Agreements between the EFTA countries and Romania and Croatia; bilateral Trade and Investment Cooperation Agreements between Canada and South Africa; and the ASEAN Framework Agreements with China and India (2002 and 2003, respectively), which lay down general principles with respect to committing to further investment liberalization, promotion and protection and pave the way for the future creation of a free trade and investment area. Other examples include a number of framework agreements on trade and investment relations between the United States and countries in Africa and the Middle East. The cooperation provided for is typically aimed at creating favorable conditions for encouraging trade and investment, notably through the exchange of information. It is also common for such agreements to set up consultative committees or a similar institutional arrangement between the parties to follow up on the implementation of negotiated commitments and to discuss and study possible obstacles to market access for trade and to the establishment of investment.

C. Increased sophistication and complexity

International investment rules are becoming increasingly sophisticated and complex in content. The greater level of sophistication and complexity, however, does not necessarily imply a greater degree of stringency. For example, the greater complexity at times may be the result of an effort to define an obligation with greater specificity and thereby to clarify its scope and application.

Some recent IIAs include significant revisions to the wording of various substantive treaty obligations. One major impetus for these revisions stems from the North American Free Trade Agreement (NAFTA) among Canada, Mexico and the United States. Arbitrations under the investor-state dispute resolution provision of NAFTA raised issues or resulted in awards that prompted the parties to reconsider some of the language used in their IIAs. For example, Canada and the United States subsequently modified the language of their BITs and PTIAs to clarify the meaning of "fair and equitable treatment" and the concept of indirect expropriation.

The significant revisions can affect procedural provisions as well. As discussed below, some recent IIAs have made significant innovations in the investor-state dispute resolution procedures. One purpose of these innovations is to increase transparency, by authorizing open hearings, publication of related documents, and the submission of *amicus curiae* ("friend of the court") briefs by non-disputants who have an interest in the arbitration. Another purpose of the innovations is to promote judicial economy by providing for early dismissal of frivolous claims and by attempting to prevent the presentation of the same claim in multiple fora. Other innovations, intended to foster sound and consistent results, include provisions for an appeal mechanism and for consultation with the treaty parties on certain issues.

As has been noted, PTIAs tend to address a broader range of economic transactions than BITs. The more issues that are addressed, the more complex is the agreement and the greater the likelihood of overlaps and inconsistencies. At the same time, their greater variation presents an opportunity for adopting different approaches to promote international investment flows that better reflect the special circumstances of countries at different levels of economic development and in different regions.

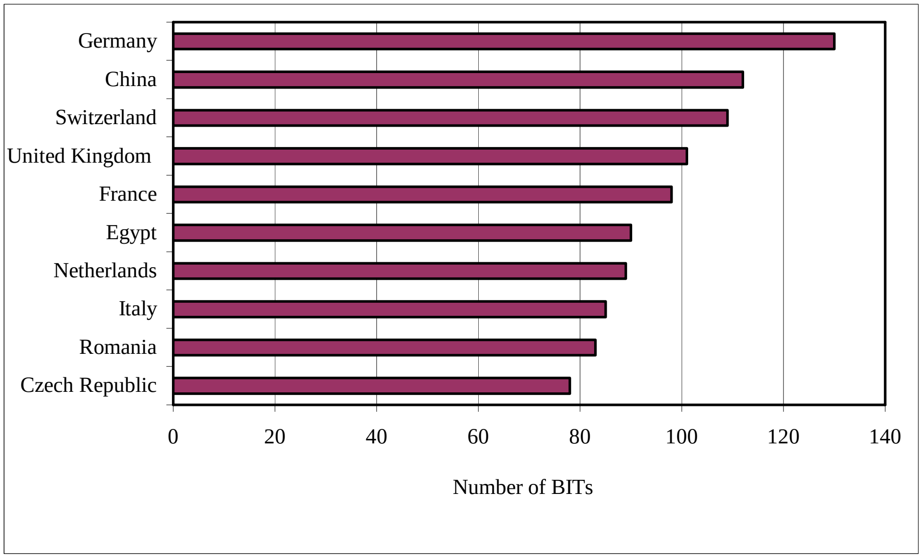
D. South-South cooperation

Developed countries seeking to protect their investment continue to be the largest concluders of IIAs. For example, seven of the ten countries that have signed the most BITs are Western European countries: Germany, Switzerland, the United Kingdom, France, the Netherlands, the Czech Republic and Italy (figure 3).

Many developing countries, however, are also extremely active participants in the process of concluding IIAs. This reflects in part their desire to attract foreign investment, but also their emerging status as sources of outward investment (UNCTAD 2005e). For example, China has concluded 112 BITs and is second only to Germany in the number of BITs concluded. Among developing countries, APEC members include many of the most active participants in

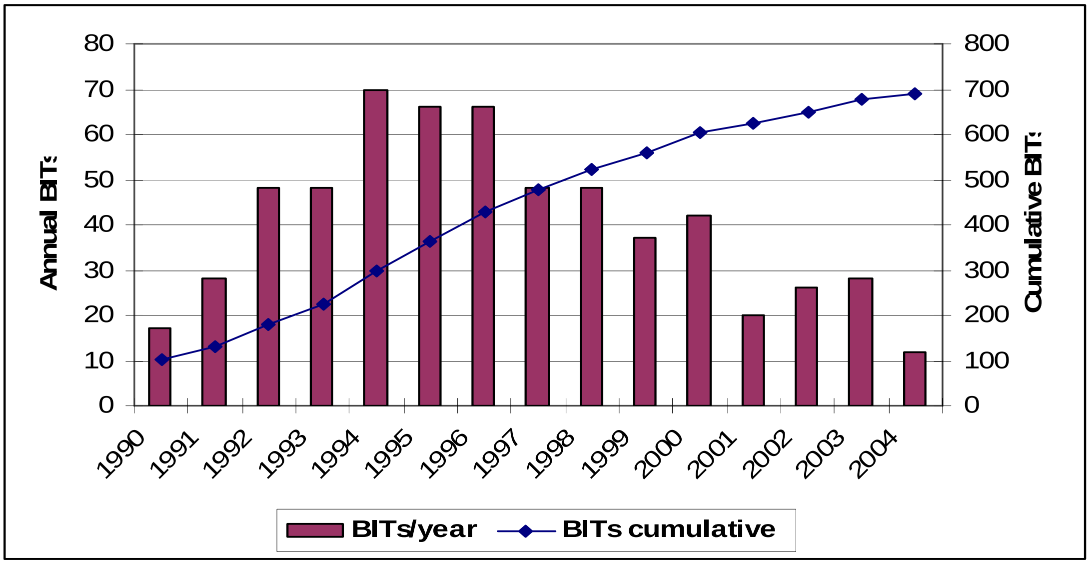
BIT negotiations. The Republic of Korea has concluded 78 BITs, Malaysia 66 and Indonesia 58. All together, APEC members had concluded a total of 687 BITs at the end of 2004, representing about 30% of all BITs (figure 4) (table 1).

Figure 3. Top ten economies signatories of BITs, end 2004
(Number)



Source: UNCTAD (www.unctad.org/iia).

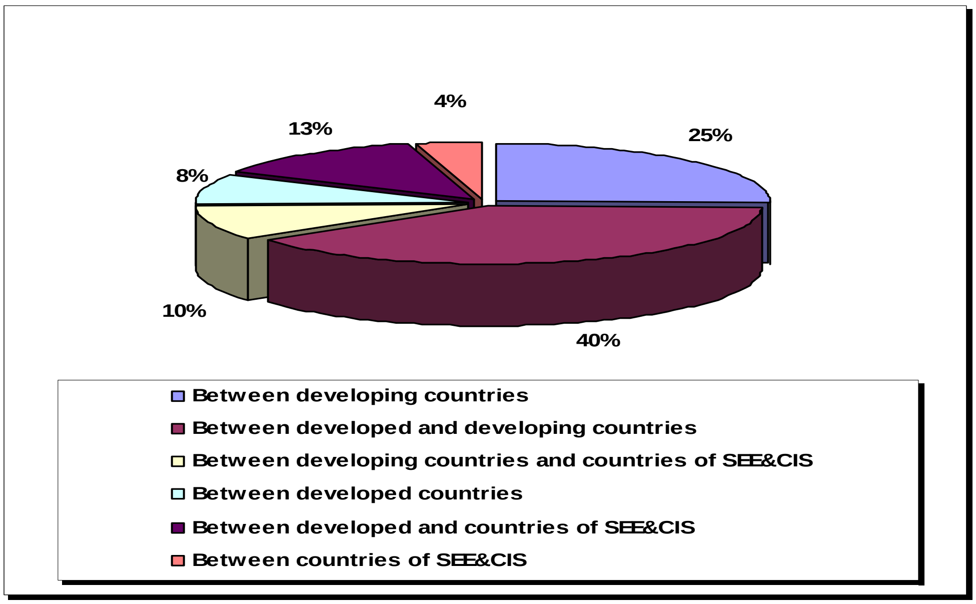
Figure 4. Number of BITs concluded by APEC economies, cumulative and year-by-year, 1990 – 2004
(Number)



Source: UNCTAD. (www.unctad.org/iia).

Indeed, developing countries are parties to the majority of BITs. As of the end of 2004, 40 percent of all BITs were between developed and developing economies, while 25 percent were between developing economies. Another 10 percent were between developing and transitional economies. Thus, developing countries were one or both parties to 75 percent of all BITs (figure 5).

Figure 5. Total BITs concluded, end 2004, by country group
(Percentage)



Source: UNCTAD (www.unctad.org/iia).

Further, a clear trend toward increased South-South cooperation is evident. For example, in 2004, the largest number of BITs signed was between developing countries. Specifically, 28 of the 73 new BITs were between developing countries. This trend reflects both a greater emphasis on South-South cooperation on investment and an increase in the quantity of outward foreign direct investment flows from developing countries.

Moreover, APEC developing members have been among the most active participants in concluding South-South BITs. For example, China, the Republic of Korea and Malaysia all have signed more than 40 BITs with other developing countries. In fact, each of these three countries has signed more agreements with other developing countries than with developed countries.

Table 1. Number of BITs concluded by APEC economies, end 2004 [a/]

Name of economy	Number of BITs	Number of BITs with other APEC members
China	112	15
Korea, Republic of	78	13
Malaysia	66	8
Indonesia	58	9
Russian Federation	52	8
Chile	51	9
United States	47	1
Viet Nam	47	12
Philippines	35	10
Thailand	35	9
Peru	29	6
Singapore	25	4
Canada	24	3
Australia	21	8
Taiwan Province of China	20	5
Mexico	17	1
Hong Kong, China	14	4
Japan	11	5
Brunei Darussalam	5	2
Papua New Guinea	5	3
New Zealand	4	3

Source: UNCTAD (www.unctad.org/iia).

a/ Excluding free trade agreements with investment chapters.

Note: Some BITs concluded with the former Czechoslovakia continue to be in effect for the two successor states, the Czech Republic and Slovakia. Hence, for purposes of the overall BITs universe they are counted as two.

The trend toward greater South-South cooperation in investment matters is also evident in the conclusion of PTIAs. As already noted, by April 2005, at least 70 PTIAs among developing countries had been signed, of which 59 had been signed since 1990, with another 24 under negotiation.

E. Increased number of investor-State disputes

The number of disputes submitted to arbitration has increased substantially in recent years. For example, while as of the end of 1994 only three investment-treaty related disputes had been submitted to the World Bank Group's International Centre for the Settlement of Investment Disputes, by the end of 2004, 106 such disputes had been submitted. Another 54 treaty-based arbitrations not involving ICSID had been instituted as of the end of 2004, compared with two as of the end of 1994. Of the 160 claims known as of the end of 2004, 92 had been filed during the prior three years. By June 2005, the number of known claims had risen to 187. These figures do not include cases where a party has issued a notice of intent to submit a claim to arbitration, but has not yet actually commenced the arbitration. If these cases are submitted to arbitration, the number of pending claims will grow still further.

The precise number of pending or decided claims is difficult to know. First, while ICSID maintains a public registry of claims, other arbitral mechanisms do not, meaning that no official records of all claims filed are available. Further, in some cases the investors or governments involved in a dispute wish to keep the dispute confidential, with the result that the disputants themselves may not reveal the existence of a claim. Even where the pendency of a claim has been made public, such as in the case of a claim listed on the ICSID registry, often information about the nature of the claim is greatly lacking. Under typical rules of arbitrations, the award issued by the tribunal is provided to the parties on a confidential basis. The details of the claim and its resolution are likely to become public only if one of the disputants discloses them.

Because of these difficulties, the actual number of claims instituted is very likely larger than what is known. In any event, it is clear that the cumulative number of treaty-based claims brought before ICSID and other arbitral tribunals has been rising dramatically over the past five years. At least 57 governments – 35 of them in the developing world, 12 in developed countries and 10 in Southeast Europe and the Commonwealth of Independent States – are involved in investment treaty arbitration. Argentina leads all countries, with 40 claims (both concluded and pending cases), 37 of which are related to that country's financial crisis. Mexico, with 15, has the second highest number of known claims, most of them arising under NAFTA and a handful arising under various BITs. The United States is a respondent in 10 claims, all arising under NAFTA.[4] Canada and Poland are respondents in 7 claims, while Egypt is a respondent in 6. Nine countries are respondents in four claims: Chile, the Democratic Republic of the Congo, the Czech Republic, Ecuador, India, Kazakhstan, the Russian Federation, Ukraine and Venezuela.

Nine APEC countries are involved in one or more arbitrations under an IIA. In addition to Mexico, the United States, Canada, and the Russian Federation, mentioned above, the other APEC economies involved in IIA arbitration and the number of claims to which they are parties are the Philippines (2), Indonesia (1), Peru (1) and Viet Nam (1).

The increase in the number of claims can be attributed to several factors. First, increases in international investment flows lead to more occasions for disputes. Second, with larger

[4] This excludes the 100+ cases brought against the United States under the UNCITRAL Arbitration Rules by several Canadian claimants alleging that the United States has violated NAFTA Chapter Eleven (Article 1102 National Treatment) by closing the border to the importation of Canadian cattle after the discovery in 2003 of a case of bovine spongiform encephalopathy (BSE or mad cow disease) in a cow in Alberta, Canada. Claimants are Canadian citizens and corporations that own and operate cattle feeding, feedlot and transportation businesses in Canada, which they allege were damaged by the border closure. See http://www.state.gov/s/l/c14683.htm.

numbers of IIAs in place, more of these disputes are likely to involve an alleged violation of a treaty provision and more of them are likely to be within the ambit of a dispute settlement provision. Further, as news of large, successful claims spreads, more investors may be encouraged to utilize the investor-State dispute resolution mechanism. Greater transparency in arbitration (e.g. NAFTA) may also be a factor.

Virtually all of these claims have been instituted by investors. Of the cases instituted to date, only one has been instituted by a government (a claim between Chile and Peru). This claim was instituted by Peru following an investor-State claim filed by a Chilean firm against Peru.

Recent cases have involved the whole range of investment activities and all kinds of investments, including privatization contracts and State concessions. Measures that have been challenged include emergency laws put in place during a financial crisis, value added taxes, rezoning of land from agricultural use to commercial use, measures on hazardous waste facilities, issues related to the intent to divest shareholdings of public enterprises to a foreign investor, and treatment at the hands of media regulators. Disputes have involved provisions such as those on fair and equitable treatment, nondiscrimination, expropriation, and the scope and definition of agreements. These disputes are yielding awards that interpret the agreements, which in turn have caused the parties to the agreements to reconsider some of the terms.

Although the financial implications of the investor-State dispute resolution process can be substantial, the information available thus far does not provide a clear picture of the full nature of those implications. Information about the quantum of damages sought by investors tends to be sporadic and unreliable, in part because many claims are still in a preliminary stage and claimants often are not required to quantify their claims until a later stage in the proceedings. Nevertheless, it is known that some claims involve large sums, in some cases in the hundreds of millions of dollars. Further, because the number of awards issued to date is relatively small, it remains unclear how frequently large claims will be successful. Nevertheless, it is known that a tribunal in 2003 awarded $270 million plus interest in a claim against the Czech Republic, while another tribunal in 2002 awarded $71 million in a claim against Ecuador. Even assuming that a claim is unsuccessful, the cost of defense can be significant (on average $1 to $2 million, including attorneys' fees and the costs of the tribunal). Claimants typically incur similar costs.

II. KEY ISSUES IN NEW GENERATION IIAs

The conclusion of an IIA raises a wide range of policy issues that must be addressed by the parties. This section discusses some of the key issues presented by the new generation of IIAs.

A. Scope of the agreement

Many different provisions affect the scope of an IIA. Within the new generation of IIAs, however, key issues have arisen particularly with regard to two types of provisions: those that define the term “investment” and “investor” and those that create exceptions to take into account governmental policies, including those of developing countries

1. Definition of “Investment” and “Investor”

BITs typically define the subject matter with which they are dealing. The typical BIT provision defines “investment” as “every kind of asset” and includes an illustrative, nonexhaustive list of assets that fall within the definition (UNCTAD 1999a). In many BITs, the list includes five categories of assets: movable and immovable property, companies and interests in companies (whether direct or portfolio investment), contract rights, intellectual property, and business concessions. This is also the most common definition found in the new generation of PTIAs.

This definition is very broad. Most BITs are based on model negotiating texts prepared by capital exporting countries, which sought to ensure that the agreements protected the widest array of their assets in the territories of their capital importing treaty partners and did not always anticipate that they would be hosts to significant amounts of investment from such partners. Nevertheless, from the perspective of a developing country, the broad definition potentially can be defended on the ground that virtually any asset can contribute to economic development, that the purpose of the treaty is to promote and protect investments that contribute to economic development, and that to exclude certain assets could risk undermining the purpose of the treaty. This definition is also open-ended to permit new economic arrangements that the home country may wish to protect or that may contribute to development to fall within the definition without having to amend the treaty (UNCTAD 2001b).

Concerns have been raised about the breadth and open-ended nature of this definition. One concern has been that certain assets in fact may not contribute to investment or constitute investment and therefore should be excluded from the definition. In fact, certain assets, such as merchandise held for trade, could fall within the broad definition even though they do not have any of the economic characteristics of investment. Another concern has been that an open-ended definition could result in coverage of assets that the negotiators of the agreement did not contemplate including. Accordingly, some recent IIAs have taken other approaches to defining “investment,” though the broad, open-ended definition remains by far the most common.

One alternative is to define “investment” as including only those assets that have the economic characteristics of an investment. Article 10.27 of the 2003 Chile-United States Free Trade Agreement, for example, defines investment as:

> “… every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”

The definition goes on to list certain forms that investment may take. Though organized differently, the scope is similar to the illustrative list that appears in the typical broad definition of investment. This definition may be viewed as excluding assets that may be held for economic purposes, but that do not contribute to the productive capacity of an economy. An earlier variation of this approach was to adopt a tautological definition of investment, under which “investment” is defined as “every kind of investment.” Although tautological definitions are subject to the criticism that they do not add sufficient meaning, the tautology was intended to emphasize that an asset must have the characteristics of an investment to be covered by the treaty.

A second alternative is to omit the broad, open-ended language and to define “investment” in terms of a finite list of categories of assets. This approach eliminates to some extent the open-ended element of the definition because it limits investment only to those assets listed, although the categories themselves could have an open-ended quality to them. The breadth of the definition depends, of course, on which assets are included, though typically the list of categories is quite extensive. For example, in the new Canada model BIT, investment is defined as an enterprise, certain equity or debt securities of an enterprise, or certain loans to an enterprise. This definition not only limits investment to those assets falling within a finite list, but it also requires that the assets be associated in some way with an enterprise. Assets associated with an enterprise are more likely to have the economic character of an investment.

Some countries have been concerned about including portfolio investment within the ambit of an investment protection agreement because they doubt that portfolio investment contributes sufficiently to economic development and believe that its potentially volatile nature can be harmful to development. Thus, some IIAs limit the definition of investment to direct investment. For example, Article 45 of the 2000 Free Trade Agreement between the EFTA countries and the United Mexican States provides that:

> “… investment made in accordance with the laws and regulations of the Parties means direct investment, which is defined as investment for the purpose of establishing lasting economic relations with an undertaking such as, in particular, investments which give the possibility of exercising an effective influence on the management thereof.”

This definition requires that the assets have not only the character of investment, but the character of direct investment.

The concern about including portfolio investment is sometimes especially present when an IIA creates a right to establish investment in the host country. For example, the 1987 ASEAN Agreement for the Promotion and Protection of Investment, which does not include a right to establish investment, utilizes the broad, asset-based definition. By contrast, the 1998 Framework Agreement on the ASEAN Investment Area, which does include a right of establishment, explicitly excludes portfolio investment from its coverage.

In some cases, the category of assets sought to be excluded from the definition is somewhat narrower. For example, some countries have sought to limit the definition of investment to assets used for economic purposes. For example, the 2000 BIT between Mexico and Greece defines "investment" as

> "…every kind of asset acquired or used for economic purposes and invested by an investor of one Contracting Party in the territory of the other Contracting Party. . ."

This definition includes the illustrative list of assets that appears in the broad definition. Essentially, it is intended to exclude assets used for non-business purposes, such as a vacation home.

IIAs also sometimes define the term "investor." Critical issues related to this term include the types of entities that can be considered investors and the tests for establishing the nationality of the investor. The latter is particularly critical because the investment generally must have the nationality of a treaty party in order to be protected.

New generation IIAs have not greatly modified the approaches taken to these issues in the past, though two minor trends are noteworthy. First, whereas traditionally corporate nationality was generally ascribed based on one of three tests – place of incorporation, principal place of business, or place of ownership – some new generation IIAs have used a commercial presence test that ascribes to an investor the nationality of the place where it has a commercial presence. Second, although the place of incorporation test has become more widely used than in the past, it is often accompanied by a clause allowing the host country to deny the benefits of the treaty to an investor who is organized under the laws of another party, but has no substantial business activities in the territory of the home country. This provision, in other words, reserves the right to the host country to limit treaty protection to corporate entities having some significant economic link with the economy of another party (UNCTAD 2001c).

2. Exceptions

The scope of an IIA is also determined by a variety of exceptions, very often included to address specific developmental concerns. These provisions are intended to preserve for host countries sufficient policy space to pursue developmental or other objectives in ways that otherwise may be difficult to reconcile with treaty obligations. The trend within new generation IIAs has been to increase the number of exceptions, again yielding treaties that are more detailed and complex than in the past.

It has been not unusual to exempt matters of taxation from some or all treaty obligations, in part because of the complexity of tax matters and in part because they are often covered by other agreements, such as agreements on double taxation. This exception continues to be found in new generation IIAs, although there is a trend toward somewhat more complex provisions, as some countries seek to apply the IIA to at least some aspects of taxation (UNCTAD 2000b).

A common exception in IIAs has been to exempt from the most-favoured nation treatment (MFN) obligation treatment guaranteed under a customs union or free trade agreement. This exception is intended to prevent non-members from free riding on special concessions made to members of a regional economic integration agreement, typically in exchange for special concessions made by those members (UNCTAD 2005f). Although there are examples of IIAs that do not include this exception, it continues to be common, and in some new generation IIAs it applies to all provisions of the treaty, not merely the MFN provision.

Other common exceptions exclude from IIA obligations measures taken to protect a country's essential security interests or to maintain public order. These also can be found in new generation IIAs.

Some exceptions have become more prevalent within new generation IIAs than in the past. Examples of these include exceptions for measures necessary to protect health, safety or the environment, to regulate financial services, or to preserve cultural patrimony, industries or diversity. The growing number of exceptions reflects the increased awareness of the complexity involved in balancing different policy objectives and the desire of IIA parties to preserve national policy space.

Some exceptions specifically address the special needs of developing countries. For example, some IIAs allow a transitional period during which a developing country or transitional economy assumes obligations gradually. For example, Article 7 (4) of the Framework Agreement on the ASEAN Investment Area, as amended in 2001, provides that:

> "… the Temporary Exclusion List for the manufacturing sector shall be progressively phased out by all Member States by 2003, except the Kingdom of Cambodia, the Lao People's Democratic Republic and the Socialist Republic of Viet Nam which shall do so not later than 2010."

A second approach is to allow existing exceptions to the principles of the IIA to remain in place. This approach is evident in the agreements, discussed elsewhere, in which the right of establishment is made subject to exceptions set forth in an annex to the treaty. The exceptions may be permitted indefinitely or they may be allowed only for a limited period of time.

A third approach is to authorize special and differential treatment for developing countries with respect to the implementation of the substantive obligations of the agreement. This approach goes beyond allowing existing exceptions and contemplates treating some parties differently than others throughout the process of implementing the agreement. For example, Article 85 (1) of the 2000 partnership agreement between the African, Caribbean and Pacific countries and the European Community provides that:

> "The least-developed ACP States shall be accorded a special treatment in order to enable them to overcome the serious economic and social difficulties hindering their development so as to step up their respective rates of development."

A fourth approach is to establish permanent exceptions that permit deviation from the principles of the treaty on a temporary basis. The most common such provision is one allowing denial of the right of free transfers in the event of balance of payments difficulties, a provision that is discussed below in the section on currency transfers.

B. Liberalization

Traditionally, the great majority of IIAs protected investment only after it was established in the territory of a party. IIAs typically did not grant to covered investors the right to establish investment in the territory of the other party. The new generation of IIAs, however, increasingly provides for liberalization of investment flows. Liberalization provisions are generally of two types. One type, which began to appear in BITs in the 1980s, requires each party to permit investors of the other party to establish investment within the territory of the first party. The other type, which traces its origin to the GATS agreement, guarantees service providers of one party access to the market of the other parties. Because services are often supplied through the establishment of a commercial presence, these provisions in effect also create a right of establishment of investment. This subsection discusses some of the issues raised by these provisions in the new generation of IIAs.

1. Admission and establishment of investment

Under customary international law, no country is required to permit the acquisition or establishment of investment by nationals or companies of another country within its territory. A limited right to establish investment, however, has been provided by a number of IIAs. A country is unlikely to permit foreign investors an unrestricted right to invest in its territory (UNCTAD 1999b). Usually a country will regard foreign investment in certain sectors of its economy as contrary to vital national interests, whether they be military, cultural or economic. Thus, when a right of establishment appears in an IIA, it generally is limited in some way. Four basic approaches are evident.

The strongest approach from the perspective of the foreign investor is to provide that covered investors have a right to establish investment in the host country, though usually subject to exceptions in an annex. For example, Article 7(1) of the 2001 Framework Agreement on the ASEAN Investment Area provides that

> "Subject to the provisions of this Article, each Member State shall: (a) open immediately all its industries for investments by ASEAN investors;"

The remainder of the article, however, provides for a list of temporary exclusions from the right of establishment, which is to be phased out gradually by 2010. The right of establishment is further qualified by an emergency safeguards provision, Article 14 (1), which provides that:

> "If, as a result of the implementation of the liberalization programme under this Agreement, a Member states suffers or is threatened with any serious injury and threat, the Member State may take emergency safeguard measures to the extent and for such period as may be necessary to prevent or remedy such injury. The measures taken shall be provisional and without discrimination."

A second approach is to guarantee to covered foreign investors national and MFN treatment with respect to the right to establish investment in the host country. These guarantees are sometimes described as "pre-establishment" guarantees of national and MFN treatment. They are to be distinguished from "post-establishment" guarantees (discussed in section II.C.2 below), which do not liberalize investment flows because they impose no obligation on the host country to permit investment, but merely provide for nondiscriminatory treatment for investment after it has been established. In some agreements, the only pre-establishment obligation is to provide MFN treatment. The pre-establishment right generally is qualified by a provision that allows the host country to specify sectors of the economy in which the right does not apply, the so-called "negative list" approach. The negative list approach has been utilized in these agreements because it tends to result in more extensive liberalization, since it creates a presumption in favor of liberalization by liberalizing all sectors not explicitly excluded, and because of its advantages for transparency, in that it puts investors on notice of all sectors in which liberalization commitments have not been made. As more agreements utilizing this approach have been concluded, the annexes have also become somewhat more complex. For example, some agreements concluded in recent years include separate annexes, one for reservations to the right of national treatment and another for reservations to the right of MFN treatment. Other agreements have an even more complex structure of annexes. For example, the 2004 United States model BIT includes one annex listing existing nonconforming measures may a party reserves the right to maintain and to modify, as long as the modification does not decrease the conformity of the measure, and a separate annex listing sectors of the economy in which a party reserves the right to impose future nonconforming measures. Still more complex is the approach, seen for example in the Japan-Republic of Korea BIT, under which one annex sets forth sectors in which a party reserves the right to maintain nonconforming measures and another annex sets forth sectors in which a party reserves the right to maintain existing nonconforming measures that may not be modified in any way that decreases their conformity and that the party shall endeavor to progressively reduce or eliminate and in which new nonconforming measures may be introduced only when exceptional financial or industrial circumstances exist.

A third approach, which remains the most common one, requires each party to admit investment "in accordance with its laws." Under this approach, the right to establish investment is limited to whatever is permitted under the laws of the host country, which the host country may change at any time. Thus, this provision protects the foreign investor against a host country's denial of the right to establish only where such denial is in violation of the host country's own laws.

A fourth approach is simply to provide for future liberalization. This approach does not result in any liberalization upon entry into force of the agreement. Its significance depends entirely upon the actions of the parties in the future. Examples of this approach include the Framework Agreements between ASEAN and China and between ASEAN and India, concluded in 2002 and 2003, respectively.

2. Market access for services

During the Uruguay Round of trade negotiations, many IIAs began to include provisions on trade in services. Because one of the modalities by which services are delivered is through a commercial presence and a commercial presence usually falls within even a narrow definition of investment, agreements regarding trade in services very often affect investments. More specifically, agreements that guarantee market access for trade in services provide what, in effect, is a right of establishment in the services sector. Four general approaches are evident with respect to providing market access for services.

The first approach is to include in the IIA a chapter on services that is structured similarly to the GATS. Several countries, including Australia, Chile, Japan, Singapore and the United States, have recently begun to conclude agreements adopting this approach. Illustrative is the 2002 Agreement between the Republic of Singapore and Japan for a New-Age Economic Partnership Agreement (EPA). Under Article 59, the parties are to inscribe in a schedule commitments to permit market access in certain service sectors with respect to certain modes of supply, the so-called “positive list” approach because it guarantees market access only to the extent set forth in the schedule. Under Article 60, the parties may make specific commitments to provide national treatment with respect to measures affecting the supply of services. Article 64 contains disciplines on domestic regulation of trade in services similar to those in the GATS. Article 65 requires the parties to ensure that monopoly suppliers of services in their territories do not act in a manner inconsistent with a party’s specific commitments, while Article 66 calls for consultations to eliminate business practices that may restrain competition and thereby restrict trade in services. Under Articles 67 and 68, restrictions on transfers for current transactions relating to specific commitments are prohibited, subject to an exception for serious balance of payments and external financial difficulties.

A second approach is to include market access commitments structured differently from those that appear in the GATS. Illustrative of this approach is the NAFTA, which guarantees national and MFN treatment with respect to the supply of services, subject to exceptions contained in an annex. It further requires the parties to set forth in an annex their commitments to liberalize quantitative restrictions, licensing requirements, performance requirements or other nondiscriminatory measures. The NAFTA approach is to create a general rule of market access in all service sectors, subject to exceptions contained in an annex, the “negative list” approach.

A third approach, which appears in the Euro-Mediterranean Agreements concluded by the European Communities,[5] is to affirm or incorporate the parties' commitments under the GATS. This third approach does not result in any liberalization, since it affirms only that liberalization that has already occurred under the GATS. This provision is not necessarily without effect, however. To the extent that it incorporates by reference the parties' commitments under the GATS, one could argue that GATS commitments become commitments under the IIA as well and that any violation of those GATS commitments also would violate the IIA and be subject to any applicable dispute resolution mechanism under the IIA as well as under the GATS.

The fourth approach is to include a general commitment to future liberalization of trade in services. For example, Article III of the 1995 ASEAN Framework Agreement on Services provides that:

> "Member States shall liberalize trade in services in a substantial number of sectors within a reasonable time-frame by:
>
> (a) eliminating substantially all existing discriminatory measures and market access limitations amongst Member States; and
>
> (b) prohibiting new or more discriminatory measures and market access limitations."

Article IV provides that the members shall enter into negotiations "directed toward achieving commitments which are beyond those inscribed in each Member State's schedule of commitments under the GATS and for which Member States shall accord preferential treatment to one another on an MFN basis." These commitments are to be set out in a schedule. Under Article X, these commitments may be modified or withdrawn after three years, provided that compensatory adjustments are made. Adoption of this fourth approach by itself also does not result in any liberalization, but does start the parties on a course toward future liberalization.

C. General standards of treatment

1. Fair and equitable treatment

The meaning of the "fair and equitable treatment" standard has become an issue in recent IIAs. More precisely, the issue is whether the fair and equitable treatment standard incorporates the international minimum standard required by customary international law or whether it imposes other, possibly more stringent, obligations on the host country (UNCTAD 1999c).

As a result of concerns about the potential breadth of the fair and equitable treatment standard, some recent IIAs have adopted language that either explicitly or implicitly indicates that the standard requires no more than is required under customary international law. An

[5] The European Community concluded Euro-Mediterranean Association Agreements with Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Liberation Organization and Tunisia. Negotiations with Syria are now formally completed.

example of the explicit language is that contained in the 2004 BIT between the United States and Uruguay (not yet in force) which provides at Article 5.1 that:

> "Each Party shall accord covered investments treatment in accordance with customary international law, including fair and equitable treatment..."

Article 5.2 goes on to state that,

> "… paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."

An example of the implicit language is that contained in the 2000 BIT between Mexico and Sweden, Article 3(2) of which provides that:

> "Investment by investors of a Contracting Party shall at all times be accorded fair and equitable treatment in accordance with the relevant international standards under International Law. Neither Contracting Party shall impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of such investments."

This seems to imply that fair and equitable treatment is a principle of customary international law, not a separate treaty-based right.

Some IIAs, however, define fair and equitable treatment in such a way as to strongly suggest that they do not equate the standard with the requirements of customary international law. For example, Article 3 of the 2002 BIT between France and Uganda characterizes as impediments to fair and equitable treatment "…any restriction to free movement, purchase and sale of goods and services, as well as any other measures that have a similar effect." This goes well beyond the requirements of customary international law. In contrast, Appendix A of the Trade and Economic Cooperation Agreement between the CARICOM countries and Cuba on the reciprocal promotion and protection of investments requires "fair and equitable treatment of Investments of Investors of the other Party under and subject to national laws and regulations," which seems to limit fair and equitable treatment to compliance with domestic law.

Another approach, used by some APEC economies in their BITs, is to combine in one single clause the fair and equitable treatment standard, which is an absolute standard of protection, with the national and MFN treatment standards, which are relative and contingent parameters of treatment. For example, Article III.1 of the 1997 BIT between Denmark and the Philippines states that:

> "Each Contracting Party shall accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable

> than that accorded to its own investors or to investors of any third state, whichever is more favourable to the investor."

Similar provisions can be found in Article 4.2 of the 1995 BIT between Thailand and Philippines, and Article IV.2 of the 1987 Agreement among the governments of Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand for the promotion and protection of investments. Providing that the fair and equitable treatment shall in no case be less favorable than national or MFN treatment suggests that the parties do not visualize the fair and equitable treatment standard as the international minimum standard according to customary international law.

None of these elaborations upon the meaning of the fair and equitable treatment clause will necessarily end the debate about its meaning. Those formulations that link it explicitly to customary international law could be characterized as making explicit what had always been intended in similar "fair and equitable treatment" clauses, while other clauses could be characterized as applying a special meaning to the clause in the context of a particular treaty.

2. Most-favoured nation (MFN) and national treatment

Although the majority of BITs long have required MFN and national treatment with respect to investment once established, in recent years a number of countries, including a number of those in APEC, have omitted the national treatment standard from at least some of their BITs. Among those countries that have omitted that standard from some BITs concluded since 1995 are Australia, Brunei Darussalam, Indonesia, Malaysia, and Singapore. A number of other BITs involving APEC economies have included the national treatment standard, but subordinated it to the domestic law of the host country. Thus, the host country need not provide national treatment except to the extent required by domestic law, which the host country is free to change at any time. The practical significance of omitting this standard or subordinating it to domestic law may be limited because often these countries have concluded at least one other IIA that includes a national treatment provision and, if so, then such a standard of treatment would be applicable to investors of any country covered by an international investment agreement with an MFN clause (UNCTAD 2000c, 1999d).

Recent IIAs also have seen some variation in the scope of the MFN and national treatment clauses. Whereas IIAs traditionally applied MFN and national treatment to covered investments or investors or both, some recent IIAs apply MFN and national treatment only to specified activities concerning the investment. For example, the 2002 BIT between the Russian Federation and Thailand guarantees MFN and national treatment to investors "as regards their management, maintenance, use, enjoyment or disposal of their investments…" language that is perhaps narrower than the usual formulation. Similar language appears in BITs concluded by a number of APEC economies, including the United States, Canada, Australia, Brunei Darussalam, and the Republic of Korea.[6]

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[6] This narrower language is of special significance in light of much discussed recent arbitral decision in *Emilio Agustin Maffezini v. Kingdom of Spain*. In that case, the claimant submitted a claim against Spain to arbitration

IIAs may also narrow the scope of the MFN clause by excluding from the standard that must be met treatment provided by specific other agreements. For example, Annex III of the Canadian model BIT provides that the MFN article "shall not apply to treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement".

Some recent IIAs also permit the parties to narrow the scope of MFN or national treatment clauses by exempting certain sectors or matters from the operation of theses clauses. One approach is to include an annex to the treaty in which the parties may list sectors or matters to which the MFN or national treatment standard does not apply. The model BITs currently used by Canada and the United States categorically exclude from MFN treatment government procurement and subsidies and grants provided by a party, including government supported loans, guarantees and insurance. Another approach, typified by the 2001 BIT between China and the Netherlands, exempts from China's MFN and national treatment obligations existing nonconforming measures as well as any amendment to any nonconforming measure that does not increase the nonconformity of the measure.

Some IIAs add language that may tend to broaden the scope of the MFN or national treatment standard. For example, the 1998 BIT between Japan and Bangladesh guarantees national treatment "…in respect of investments, returns and business activities in connection with the investment." That BIT goes on to define "business activities in connection with investment" to include the maintenance of various establishments appropriate to the conduct of business activities, the management of companies, the employment of certain personnel, the making and performance of contracts, and the use, enjoyment and disposal of investments.

D. Expropriation

A major impetus for the negotiation of IIAs was to obtain protection for FDI against expropriation by the host country. It was acknowledged universally that host countries had the right under international law to expropriate foreign investment. Capital exporting countries, however, sought to ensure through IIAs that an expropriation would be lawful only if it was for a public purpose, nondiscriminatory, consistent with due process, and accompanied by compensation, generally at fair market value. The standard of compensation generally was the issue of the greatest concern in the negotiation of the expropriation provision (UNCTAD 2000d).

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under the BIT between Spain and Argentina, which required that any investment dispute be submitted to local courts before being submitted to arbitration, something that the claimant admitted he had not done. The tribunal accepted his argument that he need not submit the dispute to local courts because Spain's BIT with Chile did not require submission of a dispute to local courts and the MFN clause of the BIT between Spain and Argentina entitled him similarly to submit a claim to arbitration without invoking local remedies first. The case made clear that an MFN clause can apply to procedural as well as substantive rights, a result that some states do not favor. The language quoted above from the 2002 BIT between the Russian Federation and Thailand would seem to avoid the result in the *Maffezini* case.

Because expropriations sometimes occur through a series of actions rather than a single act, many IIAs have defined expropriation to include measures that, taken together, are equivalent to, or have the same effect as, an expropriation. Such language, however, still leaves unclear what degree of interference with the rights of ownership is required for an act or series of acts to constitute an expropriation. The classic example of an expropriation is an act that transfers ownership or possession of the investment to the state. An act that completely destroys the value of an investment is also typically regarded as an expropriation. Acts that only partially devalue an investment, however, may be viewed by the host country as merely routine regulatory acts that are not the equivalent of an expropriation. Following the conclusion of the NAFTA, a number of investment arbitrations were commenced in which claimants argued that various regulatory acts were expropriations that entitled them to compensation. Many host country feared that if arbitral tribunals required compensation for such "regulatory expropriations," the cost of regulating in sensitive areas such as health or environmental protection could become prohibitive.

Recent IIAs have begun to address this concern by attempting to clarify what is meant by the term "expropriation." For example, Annex 10-D of the 2003 Chile-United States Free Trade Agreement states that:

> "An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."

It then goes on to explain that the expropriation article "addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure." A separate paragraph attempts to define more carefully what types of actions beyond these traditional forms of expropriation might constitute an expropriation. It states that:

> " (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> > (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
> >
> > (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
> >
> > (iii) the character of the government action.

> (b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations. ”

The language in paragraph b asserts that regulatory actions do not typically constitute an expropriation, but it does not exclude that possibility entirely. This language again illustrates the trend in some new generation IIAs to clarify with greater specificity the meaning of traditional IIA provisions in response to concerns arising from claims filed through the investor-State dispute resolution process.

E. Transfers of funds

A common provision in IIAs guarantees to investors the right to transfer their investment and any returns from their investment into a freely convertible or freely usable currency (UNCTAD 2000e). Some IIAs apply not to all transfers related to an investment, but only to certain specified transfers. For example, Article 46 of the 2000 Free Trade Agreement between the EFTA States and the United Mexican States provides that:

> “The EFTA States and Mexico shall with respect to investments in their territories by investors of another Party guarantee the right of free transfer, into and out of their territories, including initial plus any additional capital, returns, payments under contract, royalties and fees, proceeds from the sale or liquidation of all or any part of an investment.”

Typically, those IIA transfer provisions that apply only to specified transfers are quite broad and include in the list most types of payments that an investor would wish to repatriate.

In some cases, the provision applies to transfers into, as well as out of, the host country. That is, it creates a right not only to repatriate capital but also to bring capital into the host country’s territory. Once an investment has been established, the investor has the right, under this language, to transfer funds relating to the investment into the territory, which could permit the investor otherwise to circumvent host country regulations on admission of investment. Such provisions reflect the fact that international production has become increasingly integrated and that permitting transfers of payments between related facilities in different countries is of growing importance to investors.

Transfers provisions in IIAs may raise serious concerns on the part of host countries. One concern is that an investor may seek to transfer a large sum at a time when foreign exchange reserves are low, thereby depleting exchange reserves needed for other purposes. Another concern is that permitting free transfers might result in massive capital flight during times of economic difficulty, thus exacerbating the host country’s problems. For these reasons, recent IIAs often limit the right of free transfers.

One approach is to implement the right of free transfers gradually. This approach, which is typical of the association agreements between the European Community and the transitional economies, provides the host country with the ability to maintain existing currency restrictions for a period of time, while also reassuring investors with the promise of the eventual elimination of those restrictions. This approach, however, does not provide any flexibility for the host country once the transitional period has ended.

A second approach is to include an exception to the transfers provision during periods of balance of payment difficulties. Such provisions typically allow a party to restrict transfers when foreign currency reserves reach low levels, provided that certain conditions are met. Examples of such conditions are that the restrictions be no greater in scope or duration than is necessary, be progressively eliminated, and be applied on a nondiscriminatory basis.

A third approach is to explicitly subordinate the right of transfer to the parties' exchange restrictions, which may change at any time. Thus, this last provision protects the investor only against restrictions on transfers that violate host country laws.

Finally, as IIAs increasingly include provisions on financial services, some recent agreements have included provisions that exempt payments by financial institutions from the transfers provision. Such provisions are intended to allow countries the freedom to regulate financial services, a sector that is usually heavily regulated. For example, Article 17.1 of the 2003 BIT between Japan and Viet Nam states:

> "Notwithstanding any other provisions of this Agreement, a Contracting Party may adopt or maintain prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise providing financial services, or to ensure the integrity and stability of its financial system."

F. Performance requirements

Host countries sometimes impose requirements on foreign investment that are intended to mandate the behavior of investments in order to shape the economic consequences of the investment. For example, to ensure that the investment contributes to employment or has a favorable impact on the balance of payments, the host country may seek to require the investment to hire local employees, purchase its inputs locally, or export at least some percentage of its product. Such requirements are often referred to as "performance requirements." In many cases, performance requirements are imposed as a condition of permitting the investment to be established or as a condition of receiving a special benefit or advantage. Such requirements may interfere with the investor's prerogative to manage its investment and may impair the value of the investment. They also may distort trade, by preventing the importation of goods or services that would otherwise occur or by requiring the exportation of goods or services that would otherwise not occur, a consequence that could be of concern in negotiating an agreement to liberalize trade (UNCTAD 2001c). Finally, they may function as a mechanism for discriminating among investments, by subjecting some investments to more burdensome requirements than others.

In general, IIAs adopt one of three models in addressing performance requirements.

The first model, which is by far the most prevalent, is to include no explicit provisions on performance requirements. The prevalence of this model reflects the strong desire of many developing countries to utilize performance requirements in at least certain cases. In this model, of course, performance requirements still would be prohibited to the extent that they violate more general IIA provisions, such the national treatment standard. In other words, this model does not usually include any special exception to general treaty obligations to allow performance requirements. To the extent that the agreement included only post-establishment national treatment obligations, however, then performance requirements imposed as a condition of establishment might very well be consistent with those obligations. Further, a host country could reserve the right to impose performance requirements that violated the national treatment standard if the agreement was one that allowed the host country to maintain exceptions to national treatment that are specified in an annex and the host country had made the necessary specifications.

The second model, which is most often found in IIAs concluded by the European Community, require one or both parties to comply with the WTO TRIMs Agreement, which prohibits certain performance requirements that are inconsistent with the provisions on national treatment and quantitative restriction in the GATT. To the extent that the parties affected are already parties to the TRIMS agreement, these provisions impose no further obligations on them. They do, however, incorporate the existing obligations into the IIA and thus may make those same obligations enforceable through any dispute resolution mechanism contained in the IIA, and not only the WTO dispute resolution procedures.

The third model, found in a number of new generation IIAs, is to include prohibitions on performance requirements beyond those addressed by the TRIMs agreement. Because the concept of a performance requirement is potentially quite broad and not well defined, the prohibition on performance requirements in these agreements usually applies only to certain specified performance requirements. The list that most commonly appears in recent IIAs, particularly those concluded by the United States, is based on Article 1106 of the NAFTA. It includes export requirements, domestic content requirements, requirements to use domestic suppliers, technology transfer requirements, or requirements that relate the volume or value of imports or the quantum of domestic sales to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment.

Recognizing, however, that performance requirements are regarded by some host countries as an important element of their economic development policy, recent IIAs that contain disciplines on performance requirements nevertheless have employed various means to leave the host country with some discretion to use them and thereby to strike a balance between the host country's economic development policy and the protection of foreign investment. One approach, for example, is to allow the parties to maintain exceptions to the prohibition on performance requirements set forth in an annex to the treaty. Another approach is to distinguish between two categories of performance requirements. The first category, which consists of those performance requirements deemed to be the most undesirable, may not be imposed on investment for any reason. The second category, which consists of those performance requirements deemed somewhat less undesirable, may be imposed on investment as a condition to the receipt of an advantage. That is, the host country may offer a special incentive to an investment in exchange for a commitment by the investment to observe certain performance requirements, if those performance requirements fall in the second category. In this approach, the prohibitions on both categories of performance requirements typically are subject to exceptions set forth in an annex.

One unusual feature that appears in some recent IIAs that follow the third model is a provision that the prohibition on performance requirements applies to all investments, not merely those of investors of the parties to the agreement. Such a provision is intended to prevent performance requirements from becoming a method of discriminating among investments of different nationalities.

G. Intellectual property rights

Provisions for the protection of intellectual property rights are one important way in which recent IIA protection provisions move beyond what appears in the typical BITs. IIAs generally have one of three types of provision on intellectual property protection. They may require adherence to international intellectual property protection agreements, require that a certain minimum standard of protection be provided, or require nondiscrimination with respect to intellectual property rights protection

The first approach is to ensure that the protection for intellectual property rights meets existing international standards. This approach typically requires the parties to adhere to certain existing multilateral conventions on intellectual property.

A second approach, often seen in IIAs negotiated by the EFTA countries with transitional economies and North African countries, include a similar provision, but also provide for national and MFN treatment, subject to exemptions in accordance with the TRIPS Agreement. Other agreements do not provide for any absolute standards of protection for intellectual property rights, but do provide for national treatment or nondiscrimination with respect to protection of intellectual property.

IIAs also may create their own substantive rules for the protection of intellectual property rights. For example, the 2004 Australia-United States Free Trade Agreement requires adherence to certain international conventions, but in a series of articles in chapter 15 sets forth detailed protections that the parties are required to provide with respect to matters such as trademarks, geographical indications, domain names on the Internet, copyright, encrypted program-carrying satellite signals, and patents. IIAs that set their own substantive standards in some cases establish standards that go beyond the requirements of the TRIPs Agreement.

Intellectual property generally falls within the definition of investment and thus is protected against many forms of host country interference by the various investment protection provisions of the IIAs. Most IIAs provide only limited protection, however, against private interference. The significance of the specific provisions on intellectual property protection is that they do protect intellectual property against private interference.

A few recent IIAs have also sought to exclude explicitly certain interferences with intellectual property rights from the definition of expropriation. For example, Article 10.13 of the 2003 Chile-Republic of Korea Free Trade Agreement provides that the expropriation article "…does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the TRIPS agreement."

Thus, even while IIAs are including increasingly elaborate provisions to protect intellectual property rights against private infringement, they are circumscribing slightly the protection against host country interference.

H. Competition

Numerous IIAs concluded by European countries include provisions that prohibit, or require the parties to prohibit, agreements or concerted practices that may affect trade between the parties and that have as their object or effect the prevention, restriction or distortion of competition (UNCTAD 2004b). In the new generation of IIAs, extensive provisions on competition policy have also begun to appear in IIAs that do not involve a European country. For example, the Australia-Thailand Free Trade Agreement contains a separate chapter on competition policy, Article 1202 of which provides that:

> "Each Party shall promote competition by addressing anti-competitive practices in its territory, and by adopting and enforcing such means or measures as it deems appropriate and effective to counter such practices."

Article 1201 defines "anti-competitive practices" to mean "business conduct or transactions that adversely affect competition" and offers as examples anti-competitive horizontal or vertical arrangements, misuse of market power, including predatory pricing, and anticompetitive mergers and acquisitions. Similarly, Article 12.2 of the competition chapter of the 2004 Australia-United States Free Trade Agreement provides that:

> "Each Party shall maintain or adopt measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto . . ."

The agreement requires each party to maintain an authority responsible for enforcing its national competition laws.

Competition provisions are unusual in certain respects. First, while most IIA provisions seek to insulate foreign investment from wrongful conduct on the part of the host country, competition provisions require the host country to impose restrictions on private parties to prevent injury to covered investment. Second, while most IIA provisions apply only to foreign investment, competition provisions by their terms apply equally to foreign and domestic investment. Where the host country fails to restrict the anticompetitive behaviour of a foreign investment, however, an injured domestic investor generally would not have any remedy under the treaty and the investment's home country is unlikely to complain. Thus, despite its even-handed language, the provision in practice may actually be principally a restriction on domestic enterprises. In the case of an IIA with more than two parties, one of the parties other than the home or host country might object if the host country fails to restrict anticompetitive behavior by a foreign investment. This is one instance in which the practical application of the agreement may be different depending upon whether or not it is bilateral.

I. Transparency

Transparency provisions in IIAs traditionally required the host country to make certain kinds of existing information available. This type of transparency provision often appears in IIAs as a form of economic cooperation. It may impose a variety of specific obligations. One is to make public or at least available a party's laws and perhaps other information concerning investment (UNCTAD 2004c). Another is to provide the information to the other parties. For example, Article 7 of the 2003 BIT between Japan and Viet Nam provides:

> "1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect investment activities.
>
> 2. Each Contracting Party shall, upon request by the other Contracting Party, promptly respond to specific questions and provide that other Contracting Party with information on matters set out in paragraph 1 above.
>
> 3. The provisions of paragraphs 1 and 2 of this Article shall not be construed so as to oblige either Contracting Party to disclose confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice privacy or legitimate commercial interests."

Such provisions have become more common than in the past.

In the new generation of IIAs, however, there also has been an important change in the nature of transparency required by the treaties. More recent IIAs have begun to impose on the parties a general obligation of transparency in all their dealings with investment. This obligation in some cases may include a requirement that the host country allow investors to participate in domestic rule making procedures that affect their investments.

In some cases, the obligation is defined in relatively general terms. For example, Article 39 of the EFTA Free Trade Agreement with Singapore states that:

> "Each Party shall, in accordance with the provisions of this Chapter, create and maintain stable, equitable, favourable and transparent conditions for investors of the other Parties to make investments in its territory."

Although this type of clause at first glance may seem weak because it imposes no very specific obligation, it is potentially the most sweeping of the transparency provisions because it could apply to a wide variety of circumstances. This type of provision thus requires not simply making existing information available, but a certain mode of behavior by the host country in dealing with covered investment. This provision, for example, might be cited by an investor as a basis for requesting an explanation of a government decision affecting its investment or a right to participate in some way in government decision-making processes.

In some cases, the obligation explicitly includes a right to participate in decision-making. For example, the 2003 Free Trade Agreement between Singapore and the United States requires each party to ensure that in its administrative proceedings:

> "(a) wherever possible, persons of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;
>
> (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and
>
> (c) its procedures are in accordance with domestic law."

The 2003 Singapore-United States Free Trade Agreement also requires each country to maintain systems that provide for appeals of administrative decisions regarding matters covered by the agreement, that the parties be given a reasonable opportunity to support their positions, and that the decision be based on the evidence and the submissions of those parties. By providing not only for notice of certain proceedings, but also an opportunity to be heard and a right to an appeal, the Singapore-United States Free Trade Agreement stretches the concept of transparency to include elements of due process.

Increasing the scope of the transparency obligations in IIAs, however, has not always been accompanied by provisions that would make those obligations enforceable through investor-State dispute resolution. For example, in the United States-Singapore FTA, some transparency obligations are set forth in a separate chapter and thus are not subject to the investor-State dispute resolution procedure, which is limited principally to disputes involving the investment chapter of the agreement.

J. Investor-State dispute settlement

Many IIAs include a provision authorizing arbitration of disputes involving the treaty between investors and host countries without the involvement of the investor's home country. Such provisions typically specify the mechanisms available to the investor for arbitrating the dispute (most often ICSID and/or UNCITRAL), describe the procedures for appointing arbitrators, and include provisions to ensure the finality of awards (UNCTAD 2003a).

Investor-State dispute settlement is one of the key areas where significant developments in treaty making have taken place over the last decade. New generation IIAs have incorporated various innovative provisions intended to achieve four general objectives, described below.

1. Promotion of greater predictability and Contracting Parties' control over arbitral procedures

First, some of the innovations in investor-State arbitration provisions in IIAs are geared toward promoting greater predictability and control by the Contracting Parties over arbitral procedures. New generation IIAs have tended to go beyond ICSID and UNCITRAL rules, addressing in advance a series of specific matters related to the arbitral proceedings that are often left for agreement between the disputing parties on a case-by-case basis.

The most elaborate provisions for investor-State arbitration may be found in the NAFTA and in recent IIAs that follow the NAFTA model. These provisions address a number of issues on which other provisions found IIAs are silent, such as the submission of the same dispute to local courts, the place of arbitration, appointment of experts, remedies available, including interim measures, and finality and enforcement of awards.

This trend continued in recent IIAs, such as 2003 Chile-United States Free Trade Agreement and the 2004 Canadian model BIT, which have included specific provisions ensuring the involvement of the Contracting Parties in arbitration proceedings addressing certain specific subject matters, such as financial services, taxation measures or the interpretation of a non-conforming measure. These IIAs contain provisions that foresee the possibility of specialized competent authorities of the Contracting Parties to make interpretations of certain matters or provisions of the agreement, which will then be binding on the arbitration tribunal. For example Article 17 of the 2004 Canadian model BIT provides that where an investor submits a claim to arbitration related to financial services, and the disputing Contracting Party invokes as a defence the general exception based on prudential reasons included in Articles 10(2) or 14(6) of the agreement, the arbitral tribunal

> "… shall, at the request of that Party, seek a report in writing from the Parties on the issue of whether and to what extent the said paragraphs are a valid defence to the claim of the investor. The tribunal may not proceed pending receipt of a report under this Article…the Parties shall proceed… to prepare a written report, either on the basis of agreement following consultations, or by means of an arbitral panel. The consultations shall be between the financial services authorities of the Parties. The report shall be transmitted to the Tribunal, and shall be binding on the Tribunal."

2. Promotion of judicial economy

Another set of innovations in investor-State arbitration provisions is geared toward promoting the principle of judicial economy in investment-related disputes.

One is a provision designed to deal with potential "frivolous claims" submitted by an investor. In this regard, Article 10.19 paragraph 4 of the 2003 Free Trade Agreement between Chile and the United States provides that an arbitral tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made. In deciding an objection under this procedure, the tribunal shall assume that the claimant's factual allegations in support of the claims are true and, if the respondent so requests, shall issue a decision or award on the objection on an expedited basis. Clearly, the objective of this expedited procedure is to avoid spending time and resources by arbitrating claims lacking a sound legal basis.

Other mechanisms fostering judicial economy that have been included in IIAs are those which prevent a particular investment dispute from being addressed in more than one forum, which would require the host country to respond to the same claims more than once and would raise the possibility of inconsistent decisions. Of special concern is the possibility that the investor may submit a dispute to the domestic courts of the host country and to international arbitration. Two approaches have been used in IIAs to deal with this issue. Some agreements force the investor to decide, *ab initio*, whether the dispute shall be resolved in domestic tribunals or through international arbitration. According to this approach, once the dispute is submitted to either forum, the election shall be definitive. An example of this technique is illustrated by Article IX.3 of the 1999 BIT between Indonesia and Chile, which provides that:

> "Once the investor has submitted the dispute to the competent tribunal of the Contracting Party in whose territory the investment was made or to international arbitration, that election shall be final."

Another approach used by some IIAs is to provide the investor with the possibility of choosing the venue to solve the quarrel at a later stage, even after the investor has submitted the dispute to the administrative or judicial tribunals of the host country. IIAs applying this technique allow the investor to opt for international arbitration even after domestic remedies have been sought, so long as such remedies are waived once arbitration is initiated. Article XIII.3 of the 1997 BIT between Canada and Thailand illustrates this approach, and provides that an investor may submit a dispute to arbitration only if:

> "… the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind."

This approach also forecloses another situation in which the same dispute could be submitted to multiple fora, specifically, the case of an investor who first submits the dispute to arbitration and, depending on the outcome, then submits it to local courts.

Another way to reduce the number of claims submitted arising out of the same dispute is to limit the parties who can file claims. For example, the 2003 Chile-Republic of Korea Free Trade Agreement provides that an investor, but not an investment, may submit a claim under the investor-State dispute resolution mechanism. This provision, however, does not entirely prevent the submission of the same dispute to multiple fora because an investment may have many investors, not all of whom have the same nationality.

Another mechanism included in some IIAs to foster judicial economy – as well as to avoid inconsistent results— is a provision that allows the consolidation of separate claims that have a question of law or fact in common and arise out of the same events or circumstances. Most of the IIAs concluded by Mexico, as well as most free trade agreements negotiated by the United States, include provisions which authorize the formation of a special tribunal to assume jurisdiction over all or part of separate claims meeting the above-mentioned criteria.

3. Promotion of a consistent and sound jurisprudence on international investment law

As the number of arbitrations under IIAs has increased, some disputes have yielded awards that are inconsistent or that adopt controversial interpretations of IIA provisions or of international law generally. Accordingly, some new generation IIAs have included provisions to foster a consistent and sound application of the substantive provisions of the IIAs.

One approach has been to include in the IIAs more detailed and clear provisions on several key substantive issues the interpretation of which in arbitral proceedings has been controversial. For example, the United States and Canada have recently modified the language of their IIAs to clarify the meaning of "fair and equitable treatment" and the concept of indirect expropriation.

Another approach has been to lay the groundwork for the creation of an appellate body or similar mechanism. For example, the 2003 Chile-United States Free Trade Agreement provides that within three years after entry into force of the agreement, the parties shall consider whether to establish a bilateral appellate body to review awards. The agreement also provides that, if the parties adhere to a multilateral agreement that establishes an appellate body to review awards by tribunals established pursuant to an international trade or investment agreement, the parties shall strive to reach an agreement that would permit that appellate body to review awards under the investor-State dispute resolution mechanism of the free trade agreement. The 2003 Free Trade Agreement concluded by the Central American States, the United States and the Dominican Republic (CAFTA) provides for establishment of a negotiating group to draft an amendment to the agreement authorizing an appellate body within one year of the formation of the group.

4. Promotion of transparency of investor-State dispute resolution

Some provisions included in new generation IIAs are geared toward promoting the transparency of investor-State arbitrations. For example, Article 10.20 of the 2003 Chile-United

States Free Trade Agreement requires the respondent to transmit to the home country and to make available to the public certain documents, including the notice of arbitration, the memorials, the transcripts of hearings, and the awards of the tribunal. That article also requires that the hearings be open to the public, though provisions are made for the protection of confidential business information. It does not require the parties to make public any settlement discussions, nor does it interfere with the confidentiality of the tribunal's deliberations. Further, it authorizes the tribunal to consider *amicus curiae* submissions from any source, not merely the parties to the dispute or the parties to the agreement.

Transparency provisions serve important goals, but may also increase the burden on the parties to the dispute and circumscribe their discretion. For example, parties may feel the need to submit additional materials responding to arguments made in the *amicus curiae* briefs. Public knowledge of the disputes may result in public pressure on the parties to settle or to refuse to settle certain disputes.

III. INTERACTIONS AND COHERENCE

Maintaining the coherence of a country's economic development policy could be complicated by the conclusion of a network of IIAs containing a variety of provisions applicable to the same matters. These provisions may be within the same IIA or in different agreements. This section surveys some of the issues that arise as countries seek to ensure policy coherence in the face of a complex network of overlapping IIA provisions.

In general, provisions of IIAs may interact in any of at least five different ways. First, they may interact in such a way as to create and define a particular right or duty, an "explication" interaction. Second, separate IIA provisions may create or enforce the same right or duty, a "reinforcement" interaction. Third, they may create different rights or duties applicable to the same subject matter, a "cumulation" interaction. Fourth, one provision may limit, diminish or extinguish the rights or duties created by another provision, a "contradiction" interaction. Finally, one provision may enlarge the impact of a right or duty created by another provision, an "amplification" interaction.

These interactions may undermine policy coherence. Policy coherence in general requires that provisions of a country's IIAs be consistent with the country's investment policy. In particular, the IIAs should not be significantly overinclusive (meaning that that they go farther than the underlying policy requires) or significantly underinclusive (meaning that they do not go as far as the underlying policy requires). Policy coherence also requires that a country's IIAs be consistent with each other. Not only should it be possible for a party to comply with all applicable IIA provisions, but compliance with one IIA provision should not impair furtherance of the policy underlying another IIA provision.

Because of the potential for IIA provisions to undermine policy coherence, IIAs have adopted a number of solutions intended to maintain policy coherence in the face of overlapping

IIA provisions. At least five different solutions can be identified in existing agreements. The "definition" solution defines the terms of a provision in such a way to eliminate any inconsistency with another provision. The "scope" solution limits the scope of a provision so as to avoid inconsistency with another provision. The "hierarchy" solution specifies which provision shall prevail, in the event of an inconsistency. The "election" solution allows a specified actor to choose which provision shall prevail, in the event of an inconsistency. Finally, the "agreement" solution specifies that any inconsistency shall be resolved by agreement of the parties.

The following discussion describes some of the most common interactions in existing IIAs, particularly those concluded by APEC economies, and identifies examples of solutions that have been employed to maintain policy coherence.

A. Interactions among provisions within IIAs

The most common interaction among provisions within an IIA is the explication interaction. In any IIA, the definitions provisions, exceptions provisions, substantive provisions, and dispute resolution provisions all interact in ways to establish the overall impact of the agreement. For example, the expropriation provision found in many IIAs requires payment of compensation for the expropriation of investment, but the nature of the assets protected by this provision typically can be identified only with reference to the definition of the term "investment." The greatest challenge to policy coherence presented by this interaction may arise from the complexity of the agreement. The larger the number of provisions involved in the interaction, the greater the likelihood that the negotiators will not be able to anticipate all the consequences of the interaction.

An increasingly common interaction in new generation IIAs, as they become more comprehensive, is the cumulation interaction. One situation where the potential for inconsistency is clear in such an interaction may be found in agreements that have a chapter on investment and a separate chapter on trade in services. As has been noted, investment chapters sometimes have provisions on establishment utilizing a negative list approach, while services chapters sometimes have provisions on market access utilizing a positive list approach. Another situation occurs in agreements that have a chapter on trade in services generally and additional chapters on trade in certain service sectors, such as financial services.

Existing agreements have addressed the potential for inconsistency in such interactions in at least three ways, all of which are exemplified by NAFTA. First, they have utilized definition solutions. For example, NAFTA article 1213 provides that the term "cross-border trade in services" does not include the provision of services by an investment. Thus, an investment of one party that provides services in the territory of another party is covered by the investment chapter, not the services chapter. Second, they have utilized scope solutions. For example, NAFTA article 1101(3) provides that "[t]his Chapter [on investment] does not apply to measure adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services)." Thus, the scope of the investment chapter was narrowed to exclude matters covered by the financial services chapter. Third, they have utilized hierarchy solutions. For example, NAFTA article 1112(1) provides that "[i]n the event of any inconsistency between this Chapter [on investment] and another Chapter, the other Chapter shall prevail to the extent of any inconsistency." Thus, the investment chapter is subordinated to another chapter if there is an inconsistency with that other chapter.

A cumulation interaction may occur not only with respect to substantive provisions in the same agreement, but with respect to dispute resolution provisions as well. For example, some IIAs include an investment chapter with an investor-State resolution mechanism that is cumulative to the more general dispute resolution mechanism in the agreement. The issue may arise as to whether disputes concerning other chapters of the agreement may be brought under the investor-State dispute resolution mechanism. Some IIAs use a scope solution to specify that the investor-State resolution mechanism applies only to disputes involving alleged breaches of specified provisions of the agreement. For example, Article 10.15.3 of the 2003 Chile-United States Free Trade Agreement states that:

> "… no claim may be submitted under this Section [relating to the Investor-State dispute resolution mechanism] that alleges a violation of any provision of this Agreement other than an obligation under Section A [of the Investment Chapter] or Annex 10-F."

Provisions of an IIA sometimes amply the impact of other provisions within the same IIA. For example, a host country that concludes an IIA with a chapter on trade in services may commit itself to granting market access to service providers in a particular sector of the economy. Once a service provider has established a commercial presence in the host country in accordance with the market access commitment, the commercial presence may also be considered an investment within the meaning of the investment chapter and, therefore, entitled to all of the protections afforded to investment generally. The solutions used to prevent undesired amplification interactions are essentially the same definition, scope and hierarchy solutions as those used to prevent inconsistency in cumulation interactions. Countries negotiating an IIA must be careful to consider the combined effect of different provisions. The effect of implementing one provision may be to trigger the application of other provisions, perhaps in other chapters of the agreement.

B. Interactions with other IIAs

1. Reinforcement interactions

Provisions of different IIAs very often have reinforcement interactions. Several different approaches may be found in existing agreements.

First, IIAs sometimes require the parties to conclude another agreement. For example, some intellectual property provisions require the parties to accede to certain multilateral intellectual property agreements. Here, the threat to policy coherence is minimal because, once the second agreement is concluded, the provision in the first agreement largely ceases to have any practical significance.

Second, IIAs sometimes include provisions in which the parties reaffirm commitments under other treaties to which they are already parties. This occurs, for example, in services-related provisions in which parties reaffirm their commitments under the GATS. Similarly, under Article 12(1) of the Framework Agreement on the ASEAN Investment Area provides that the member countries affirm their existing rights and obligations under the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol. In this type of provision, the potential threat to policy coherence depends upon the extent to which a violation of the first agreement in time is considered a violation of the agreement that reaffirmed it. If so, then the violation may give rise to multiple dispute resolution proceedings, which, as discussed below, may result in policy incoherence.

Third, IIAs sometimes require the parties to observe obligations under another agreement. Examples include various IIAs requiring the parties to abide by the TRIMs agreement. The effect of such a provision in an IIA requiring the parties to observe another agreement could well make a violation of the other agreement a violation of the IIA. This, in turn, could permit submission of a dispute involving an alleged violation of the other agreement to the dispute resolution mechanism of the IIA, again leading to the possibility of parallel dispute resolution proceedings

Fourth, IIAs may incorporate obligations under other agreements. For example, Article 35 of the EFTA Free Trade Agreement with Singapore provides that “Articles XI and XII of the GATS shall apply to payments and transfers, and to restrictions to safeguard the balance-of-payments relating to trade in services.” The incorporation may also be quite broad, going beyond a few specific provisions. The 1999 Free Trade Agreement between the Central American countries and Chile incorporated five BITs already concluded between Chile and individual Central American countries. Again, the clearest threat to policy coherence lies in the possibility of multiple dispute resolution proceedings.

One very common provision in IIAs that can serve, in effect, to incorporate the provisions of numerous other treaties is the MFN clause, requiring the host country to provide covered investment with treatment no less favorable than that provided to any other foreign investment. Depending on how the MFN clause is drafted, the host country may be obligated under the IIA to honor with respect to covered investments commitments made with respect to foreign investment in any other agreements.

In some respects, the incorporation under an MFN clause may be slightly narrower than incorporation under a more an explicit incorporation provision, such as that discussed above. First, MFN clauses often require not identical treatment, but treatment “no less favorable” than that provided to another investment, thus allowing the host country to offer different treatment as long as it is not less favorable. Second, MFN clauses often apply only to investments “in like situations,” allowing the host country to disregard the commitments made under another IIA if the covered investment is in a situation unlike that of investments covered by the other IIA.

In other respects, however, the incorporation under an MFN clause is far broader than that under any other reinforcement interaction. An MFN clause incorporates not merely the obligations under a specified other IIA, but those under every other agreement that a party has concluded. It also incorporates obligations under agreements that a party concludes in the future. Commitments made under other agreements, of course, are made as part of an overall balance of obligations assumed and concessions granted. An MFN clause, however, incorporates the party's commitments under other agreements unaccompanied by the concessions for which those commitments were exchanged. The danger is that commitments incorporated outside the context in which they were originally made may result in over-inclusiveness.

To address this problem, existing IIAs utilize a number of scope solutions to limit the reach of the MFN clause. One approach is to draft the MFN clause narrowly. For example, the 2002 BIT between the Russian Federation and Thailand guarantees MFN treatment to investors "as regards their management, maintenance, use, enjoyment or disposal of their investments." Thus, for example, dispute resolution procedures created by another IIA presumably would not be incorporated into the BIT by virtue of this MFN clause as long as they do not relate to the management, maintenance, use, enjoyment or disposal of investments. A second solution is to include an annex to the IIA in which the parties may list sectors or matters to which the MFN standard does not apply. The current model BITs used by Canada and the United States categorically exclude all government procurement and government subsidies and grants from the MFN obligation. A third solution is to exclude certain agreements from the application of the MFN provision. For example, Annex III of the current Canadian model BIT provides that the MFN standard "shall not apply to treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement."

Reinforcement interactions can exist among with respect to procedural provisions as well. Thus, IIAs sometimes rely upon institutional arrangements created by other agreements. For example, the ASEAN agreements on investment and services provide that the ASEAN dispute settlement mechanism, created under a separate agreement, shall be utilized to resolve disputes arising under those agreements.

2. Cumulation Interactions

Cumulation interactions between provisions of different IIAs are extremely common For example, most IIAs apply to investments that are means of providing cross-border services and such investments also would be governed by the GATS, to the extent that the investments could be described as constituting a commercial presence in the host country.

Again, several solutions have been employed to avoid inconsistency between cumulative provisions in different IIAs. First, some IIAs use a hierarchy solution to specify which agreement prevails. One approach is for an agreement to provide that it is subordinate to other agreements. For example, article IX(1) of the ASEAN Framework Agreement on Services provides that "[t]his Framework Agreement or any action taken under it shall not affect the rights and obligations of the Member States under any existing agreement to which they are parties." An IIA, however, also may assert that it prevails over any other agreement. For example, article 91 of the Partnership Agreement between the African, Caribbean and Pacific States and the

European Community states that "[n]o treaty, convention, agreement or arrangement of any kind between one or more Member States of the Community and one or more ACP states may impede the implementation of this Agreement." Second, some IIAs use an election solution under which the investor may choose which provision shall prevail. For example, article 2 of chapter 8 of the Singapore-Australia Free Trade Agreement provides that a natural person who is covered by another investment agreement may invoke the free trade agreement only if he or she has not invoked the protection of the other agreement. Third, some IIAs use an agreement solution, under which the parties shall resolve any inconsistency later. For example, article 5 of chapter 17 of the Singapore-Australia Free Trade Agreement provides that "[i]n the event of any inconsistencies between this Agreement and any other agreement to which both Parties are party, the Parties shall immediately consult with each other with a view to finding a mutually satisfactory solution in accordance with customary rules of public international law."

Cumulation interactions between different IIAs can also involve procedural provisions. This is particularly true where services provisions in an IIA create obligations similar to those under the GATS and that may therefore give rise to disputes that could fall within both the WTO dispute resolution mechanism and the IIA dispute resolution mechanism. Similarly, investor-to-State dispute resolution mechanisms in IIAs sometimes apply to disputes concerning an investment and could potentially be invoked to enforce provisions of other agreements, as long as those disputes relate to covered investment.

Whether they involve provisions of the same agreement or of different agreements, multiple dispute resolution proceedings can greatly threaten policy coherence. First and foremost, they can produce interpretations of the agreements that are inconsistent. Even where the results are consistent, the expenditure of resources involved in redundant resolutions of the same claim is usually inconsistent with the parties' investment policies.

Again, solutions involving hierarchy, election and agreement have been utilized to protect policy coherence. For example, article 56 of the free trade agreement between EFTA and Singapore uses an election solution that gives the complaining party the choice of forum. It provides that "[d]isputes on the same matter arising under both this Agreement and the WTO Agreement, or any agreement negotiated thereunder, to which the Parties are party, may be settled in either forum at the discretion of the complaining party. The forum selected shall be used to the exclusion of the other." A solution involving both hierarchy and agreement is that in article 17(4)(c) of the free trade agreement between the United States and Jordan, which provides that "[e]xcept as otherwise agreed by the Parties, a Party may invoke a panel under paragraph 1(c) of this Article for claims arising under Article 4 only to the extent that the claim would not be subject to resolution through the WTO understanding on Rules and Procedures Governing the Settlement of Disputes." That is, WTO procedures must be followed, unless the parties agree otherwise.

3. Contradiction interactions

Occasionally, provisions of different IIAs are in a contradiction interaction. The Vienna Convention on the Law of Treaties addresses the situation where provisions of different agreements are inconsistent. In general, that convention provides that the later agreement prevails as among the parties to both agreements. Where the two agreements are not among the same parties, the earlier agreement prevails among those who are party only to the earlier agreement. The Vienna Convention also provides that these rules may be modified by the agreement of the parties. And, as has been noted already, in some cases, IIAs do include provisions specifying which agreement shall prevail in the event of an inconsistency.

In some cases, an IIA explicitly provides for termination of a prior, potentially inconsistent agreement. For example, Article 21.4 of the 2003 Free Trade Agreement between Chile and the Republic of Korea provides that upon entry into force of the Free Trade Agreement, the BIT between the two parties shall no longer be in effect.

C. Interactions with State contracts

Interactions also occur between the provisions of an IIA and the provisions of a contract between the host country and the investor, such as an investment authorization. In some cases, the interaction is a reinforcement interaction. This occurs, for example, where the IIA has a so-called "umbrella clause," which requires the host country to observe obligations into which it has entered with respect to an investment. Under this clause, a violation of the State contract also violates the IIA. If the State contract includes a choice of forum clause specifying that disputes shall be resolved in a particular form, the investor may seek to submit the dispute both to that forum and to any forum provided by the IIA, such as an investor-State dispute resolution mechanism. Some IIAs include provisions that seek to avoid multiple dispute resolution proceedings in that situation, such as by requiring that the State contract dispute resolution mechanism be invoked first (in the hope that the dispute will be resolved in that forum) or, alternatively, by providing the investor with the choice of mechanisms, but specifying that the choice is irreversible.

Provisions of IIAs sometimes have contradiction interactions with provisions of State contracts. For example, IIA prohibitions on performance requirements may limit the host counry's ability to include certain requirements in a State contract. Similarly, IIA provisions on nondiscrimination may limit the ability of the host country to guarantee preferential treatment to a particular investor in a State contract. .

To prevent a party from claiming a contradiction where none was intended, some IIAs include non-derogation clauses, stating that the provisions of the IIA shall not derogate from State contracts providing for a higher level of protection. Such provisions add nothing to the State contract, but they make clear that the IIA takes nothing away from the State contract either.

IV. IMPLICATIONS

The number of IIAs has increased dramatically since 1990. The explosion in the number of agreements also has resulted in an increasingly complicated framework of multi-layered and multi-faceted investment rules, characterized both by overlapping obligations and by gaps in treaty coverage.

The implication is that countries might have to cope with multiple commitments in investment that overlap one another, that might be inconsistent and leave gaps, and have to translate them adequately into their national systems. At the same time, a number of agreements are not implemented, i.e. are either not ratified by national parliaments or not properly acted upon by the relevant authorities. Further, investment treaties have a limited duration and, given the evolution of international law on investment, several countries are embarking on the renegotiating of existing treaties. Finally, the current proliferation of investor claims brought forward under investor-State dispute settlement mechanisms made available by bilateral and regional investment agreements adds to complication in this regard.

Taken together, these issues increase the complexity of the international investment rule system and, in the final analysis, might threaten to render it a destabilizing rather than a stabilizing factor in international investment relations. This raises a number of systemic implications.

First, the complexity of negotiations increases as more and more countries, and more and more issues, are involved. The more countries are involved, the more it may be advisable to take a modest and incremental approach. This raises questions of how broad the agenda of any particular set of negotiations should be, and how ambitious parties want to be concerning the nature of commitments. Too ambitious investment negotiating agendas at the international level may have a lesser likelihood of success than more modest and incremental propositions. In any event, the success of negotiations also depends upon the clarity with which each participant perceives the aims and objectives of the negotiations as a whole, as well as the forum in which negotiations take place.

Second, the negotiation of IIAs includes interrelated, difficult policy issues that at least in principle touch upon a whole range of domestic concerns, including, increasingly, social and environmental matters. Indeed, such agreements reflect increasingly the growing internationalization of the domestic policy agenda. Failure to take related issues of national policy properly into consideration and to reflect a certain balance between rights and responsibilities – either by including them within the same instrument or by establishing bridges with other binding and non-binding international instruments – might affect the overall acceptability of a particular investment agreement.

Third, while IIAs by definition contain obligations that, by their very nature, limit to some extent the autonomy of participating parties, the need for a certain degree of flexibility to allow countries to pursue their development objectives in light of their specific needs and circumstances must be addressed. The more investment agreements go beyond promotion and protection issues and in particular attempt to include commitments to liberalize, the more complicated their negotiation becomes. Where liberalization is sought, progressive liberalization of investment regulations (going beyond "standstill") may be more acceptable than up-front and all-embracing commitments to liberalize.

Fourth, transparency in the conduct of investment negotiations plays a key role in securing the necessary support and legitimacy for international investment agreements. The awareness, understanding and input of civil society from both developed and developing countries are important. The involvement of all interested parties from the initial stages of discussions or negotiations, through appropriate mechanisms, may prove crucial for the success of negotiations.

While the above issues are important to all countries at whatever level of development, developed, developing and transitional alike, they are more pertinent for developing countries that have less capacity to deal with them. In particular, developing countries are faced with four challenges in this regard.

First, developing countries need to ascertain how best to integrate these agreements into their economic development policy. IIAs are intended to promote economic development by providing a stable, transparent environment for foreign investment. Yet, all international agreements circumscribe the discretion of the parties. Developing countries must retain sufficient policy space to promote economic development, without undermining the effectiveness of the IIA (UNCTAD 2000f, 2003b). The quantum of policy space surrendered by conclusion of an IIA is established by the overall relationship of the definitions provisions, the exceptions, the substantive provisions and the dispute resolution provisions.

Second, developing countries should also try to establish and maintain policy coherence in the face of a large number of interacting IIAs. As an initial matter, this entails creating a coherent national development policy, which may require extensive discussions among the governmental agencies with responsibility for matters related to international investment policies at both the national and the sub-national levels. These discussions also may involve consultations with the private economic sector and with representatives of civil society. As new IIAs are negotiated, each should be reviewed carefully to ensure that it is consistent with and, in fact, promotes the country's economic development policy.

Establishing and maintaining policy coherence has become more challenging for developing countries in recent years because of at least two factors. One factor is that many developing countries are now both capital importing and capital exporting economies. Thus, an IIA may have implications for a developing country as both host and home country. The other factor is the sheer number and complexity of the agreements. The complexity arises out of interactions of provisions within IIAs and interactions between a particular IIA and other agreements.

Third, developing countries need to ensure that they have sufficient capacity to analyze the scope of obligations into which they are entering when they conclude an IIA. One way to accomplish this goal is to minimize the capacity necessary to conclude and implement an IIA. For example, countries with less developed capacities may elect to conclude IIAs with a narrower scope, or seek to improve their capacities to understand the scope of the obligations they are considering to undertake.

Fourth, developing countries should implement the treaty commitments they have assumed. Implementation entails completing the ratification process, bringing national laws and practices into conformity with treaty commitments, managing the disputes that arise under IIAs, and reevaluating national investment policies in light of past experience.

International organizations can have a role to play in addressing these challenges. They can provide training and technical assistance to countries seeking to create an economic development policy or to conclude IIAs that are consistent with, and will promote, that policy. They also can organize negotiating rounds among a large number of countries seeking to conclude agreements, thereby permitting the most efficient use of resources. In addition, international organizations can provide fora in which developing countries can consult with each other, share experiences and expertise, and seek common approaches where their interests are similar. As this suggests, the work of international organizations may serve to build capacity, to assist in consensus building and to promote policy coherence among developing countries.

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ANNEX

Annex Table 1. Bilateral PTIAs concluded by APEC member countries

Agreement	Year of conclusion
Trade and Cooperation Agreement between The European Community and Its Member States and China	1985
Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America	1985
Free trade agreement between Canada and the United States of America	1988
Agreement on Trade and Commercial Relations between the Government of Australia and the Government of Papua New Guinea	1991
Free trade agreement between the Republic of Chile and the Republic of Venezuela	1993
Economic Complementation Agreement N.22 between the Government of the Republic of Bolivia and the Government of the Republic of Chile	1993
Free trade agreement between the Republic of Costa Rica and the United Mexican States	1994
Free trade agreement between the Republic of Colombia, the Republic of Venezuela and the United Mexican States	1994
Free trade agreement between the Republic of Chile and the Republic of Ecuador	1994
Free trade agreement between the Republic of Bolivia and the United Mexican States	1994
Economic Complementation Agreement N.24 between the Republic of Chile and the Republic of Colombia	1994
Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of One Part, and the Russian Federation, of the Other Part	1994
Agreement between Canada and Ukraine on Economic Cooperation	1994
Trade and Economic Cooperation Arrangement between the Government of Canada and the Government of Australia	1995
Cooperation Agreement between the European Community and Viet Nam	1995
Free trade agreement between Canada and the Republic of Chile	1996
Framework Agreement for Trade and Cooperation between the European Community and Its Member States, on the One Hand, and the Republic of Korea, on the Other Hand	1996
Free trade agreement between the United Mexican States and the Republic of Nicaragua	1997
Arrangement on Trade and Economic Cooperation between the Government of Canada and the Government of the Kingdom of Norway	1997
Memorandum of Understanding on Trade and Investment between the Government of Canada and the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua	1998
Free trade agreement between the Republic of Chile and the United Mexican States	1998
Economic Complementation Agreement N.38 between the Republic of Chile and the Republic of Peru for the Establishment of a Free Trade Area	1998
Free trade agreement between the Governments of the Central American States and the Government of the Republic of Chile	1999
Agreement between the Government of the Republic of Turkey and the Government of the United States of America Concerning the Development of Trade and Investment Relations	1999
Agreement between the Government of the Republic of Ghana and the United States of America Government of the Concerning the Development of Trade and Investment Relations	1999
Agreement between the Government of the Arab Republic of Egypt and the United States of America Concerning the Development of Trade and Investment Relations	1999
Agreement between Australia and Fiji on Trade and Economic Cooperation	1999

Free trade agreement between the United Mexican States and the Republics of El Salvador, Guatemala and Honduras	2000
Agreement between the United States of America and the Socialist Republic of Viet Nam on Trade and Investment Relations	2000
Agreement between New Zealand and Singapore on Closer Economic Partnership	2000
Partnership, Political Coordination and Cooperation Economic Agreement between the European Community and Its Member States, of the One Part, and the United Mexican States, of the Other Part; Decision N.2/2001 Implementing the Agreement	2001
Free trade agreement between the EFTA States and the United Mexican States	2001
Free trade agreement between the EFTA States and Singapore	2002
Framework Agreement between ASEAN and China	2002
Economic Complementation Agreement N.54 and N.55 between MERCOSUR and the United Mexican States	2002
Agreement Establishing an Association between the European Community and the Republic of Chile	2002
Agreement between Japan and the Republic of Singapore for a New-Age Economic Partnership	2002
Trade and Investment Framework Agreement between the Government of the United States of America and the Government of Brunei Darussalam	2002
Trade and Economic Framework Agreement between Australia and Japan	2003
Trade and Economic Framework Agreement between Australia and China	2003
Political Dialogue and Co-operation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its Member States, Bolivia, Colombia, Ecuador, Peru and Venezuela, of the Other Part	2003
Free trade agreement between the Republic of Korea and the Republic of Chile	2003
Free trade agreement Between the Government of Chile and the Government of the United States of America	2003
Free trade agreement between the EFTA States and the Republic of Chile	2003
Free trade agreement between Singapore and the United States of America	2003
Free trade agreement between Panama and Taiwan, Province of China	2003
Free trade agreement between Australia and Singapore	2003
Framework Agreement for Establishing a Free Trade Area between the Republic of India and the Republic of Thailand	2003
Framework Agreement for Comprehensive Economic Partnership between Japan and ASEAN	2003
Economic Complementation Agreement N. 58 between MERCOSUR and the Republic of Peru	2003
Agreement on Closer Economic Partnership Arrangement between Mainland China and Macao	2003
Agreement on Closer Economic Partnership Arrangement between Mainland China and Hong Kong	2003
Agreement Between the Government of the Government of the United States of America and the Government of the Kingdom of Saudi Arabia Concerning the Development of Trade and Investment Relations	2003
Free trade agreement between the Kingdom of Bahrain and the United States of America	2004
Free trade agreement between the Hashemite Kingdom Jordan and the Republic of Singapore	2004
Free trade agreement between the Government of the United Mexican States and the Republic of Uruguay	2004
Free trade agreement between Central America, the Dominican Republic and the United States of America (CAFTA)	2004
Free trade agreement between Australia and the United States of America	2004
Free trade agreement between Australia and Thailand	2004

Framework Agreement Between the Government of the United States of America, the Government of the Republic of Kazakhstan, The Government of the Kyrgyz Republic, the Government of the Republic of Tajikistan, the Government of Turkmenistan, and the Government of the Republic of Uzbekistan Concerning the Development of Trade and Investment Relations	2004
Economic Complementation General Agreement on Integration, Economic and Social Cooperation for the Establishment of a Common Market between the Republic of Bolivia and the Republic of Peru	2004
Agreement Concerning the Development of Trade and Investment Relations between the Government of the United States of America and the Government of the United Arab Emirates	2004
Agreement Concerning the Development of Trade and Investment Relations between the Government of the United States of America and the Government of the State of Qatar	2004
Agreement Concerning the Development of Trade and Investment Relations between Malaysia and the United States of America	2004
Agreement Concerning the Development of Trade and Investment Relations between Malaysia and the United States of America	2004
Trade and Investment Framework Agreement between Afghanistan and the United States	2004
Agreement between Japan and the United Mexican States for the Strengthening of Economic Partnership	2004
Comprehensive Economic Cooperation Agreement between India and Singapore	2005
Agreement on Closer Economic Partnership between New Zealand and Thailand	2005
Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Chile	2005
Free trade agreement between the Republic of Korea and the Republic of Singapore	2005

APEC Investment Facilitation Initiative

Closing Comments by IEG Convenor,

Roy Nixon

Key findings

- The UNCTAD study has highlighted some important recent developments:
  - There has been a shift from BITs to investment chapters of FTAs and this broadening in the geographic and substantive scope will likely continue, irrespective of what happens in WTO;
  - A marked shift from protection and promotion to liberalisation;
  - Investment agreements have become and will continue to become more complex and the risk of more investment disputes heightened;
  - Economies need to be careful in negotiating IIAs but they can learn a lot from the experience of other economies (eg the experience of Mexico and Korea).

Key findings

- We further learned from UNCTAD that we need to deal with the existing framework and address policy coherence and implementation problems associated with it (this includes the nexus between services and investment)
  - Interpretative notes etc and renegotiation of treaties may be useful.
- The OECD stocktake exercise showed that OECD BITs with developing countries covered a very small proportion of total inward and outward FDI while the picture with FTAs is quite different suggesting economies may get better value for money for the resource commitment in negotiating the latter type of agreement.

Innovation in IIAs

- We heard from both UNCTAD and Mexico that there has been significant evolution in investment rule making:
  - “new generation” agreements provide interesting innovations that point towards how to deal more effectively with the problems and gaps (and inconsistencies) associated with the current IIA universe
    - In that regard the presentation on the new US Model BIT (which mirrors their FTA chapter) was most helpful;
  - Recalling the Mexican presentation on the pitfalls of investor-state dispute settlement in its FTAs, I was struck by the fact that we tend to cheer when the government wins an arbitration case and jeer when the investor wins. Why?
  - Surely it is better to seek greater clarity, consistency and certainty in how we negotiate such agreements.

FTAs are more than trade agreements…

- They are complex agreements covering a wide range of economic activity so the comments from our Korean presenter rang very true:
  - Policy makers must take all relevant factors into account be they political, social or economic in deciding on how to prioritise its negotiating objectives in relation to FTAs.
  - And if your domestic policy settings are likely to conflict then you may not be ready to negotiate.
  - Yet FTAs represent an important opportunity to drive and lock in domestic economic policy reform.
  - And a primary aim of the US BIT (investment chapter of FTAs) policy is “to reduce policy risk”.

What can APEC do to move forward?

- We can listen to what our Leaders want us to do:
  - Clear directions that sub-fora should implement the Best Practice Principles in negotiating our FTAs – this is intended in a very practical sense and recent directions suggest we should look to move towards developing common elements in various areas or chapters of FTAs.
- We can listen more to what our business communities want (and we have had a useful discussion here on issues like performance requirements, liberalising supplier and support industries (consulting and professional services), the need for truly “binding” dispute settlement in treaties.

What can APEC do to move forward?

- We can encourage and/or do more analysis of the type being undertaken by UNCTAD and OECD to consider innovation in investment rule making with the view to developing a list of key issues which could provide the basis for a menu or checklist approach for future agreements.
- Look to develop more joint projects with organisations such as UNCTAD and OECD and with business;
  - That are of clear mutual benefit
  - IEG is underrepresented in the TILF agenda as far as projects is concerned.

What can APEC do to move forward?

- We also need to consider further capacity-building projects specifically directed at the developing economies in APEC – this is a critical issue in increasing their ability to negotiate investment chapters of FTAs.
- We must not forget that the main priority of CTI is to support the multilateral trading system and clearly investment (through services at least) is a central part of that.

APEC Investment Facilitation Initiative: A Cooperative Effort with UNCTAD and other Multilateral Institutions

TOKYO SEMINAR held on 1st and 2nd September 2005
Venue: Toshi Center Hotel, Tokyo, Japan

	Participation status	Economy	Name	M/F	Title	Oraganization
1	Speaker	Switzerland	Joerg Weber	M	Economic Affairs Officer, Policies and Capacity-building Branch, Division on Investment, Technology and Enterprise Development	UNCTAD
2	Speaker	Switzerland	Anna Joubin-Bret	F	Training and Technical Assistance Coordinator, International Arrangements Section, Division on Investment, Technology & Enterprise Development	UNCTAD
3	Speaker	Costa Rica	Roberto Echandi Gurdian	M	Professor, Diplomatic Institute	Ministry of Foreign Affairs
4	Speaker	U.S.A.	Kenneth J. Vandevelde	M	former Dean	Thomas Jefferson School of Law
5	Speaker	France	Marie France Houde	F	Manager, OECD Foreign Investment Policy Reviews	OECD
6	Speaker/APEC member	Mexico	Alejandro Faya Rodriguez	M	Deputy Director-General for International Affairs, Directorate General for Foreing Investment	Ministry of Economy
7	Speaker/APEC member	Republic of Korea	Yeo Han-Koo	M	Director, Foreign Investment Policy Division	Ministry of Commerce, Industry and Energy
8	Speaker/APEC member	U.S.A.	Michael Tracton	M	Investment Negotiator, Office of Investment Affairs (EB/IFD/OIA)	U.S. Department of State
9	Speaker	Japan	Shigeki Tejima	M	Dean of Faculty and Graduate School of International Politics and Economics	Nishogakusya University
10	APEC member	Australia	Roy Nixon	M	(APEC IEG Convenor) Manager, Investment and Compliance Unit, Foreign Investment and Trade Policy Division,	Treasury Department
11	APEC member	Australia	Paul Kennelly	M	International Economy Division, Macroeconomic Group	Treasury Department
12	APEC member	Canada	Duane Robson	M	Second Secretary (Investment)	Canadian Embassy in Tokyo
13	APEC member	People's Republic of China	Zhao Jie	F	Official, Department of International Trade and Economic Affairs	Ministry of Commerce
14	APEC member	Indonesia	Robin Hemdy Alwi	M	Deputy Director, Directorate of Regional Cooperation	BKPM (The Investment Coordinating Board)
15	APEC member	Indonesia	Amri Zuhdi	M	Head, UN Section and non-UN Cooperations	BKPM (The Investment Coordinating Board)
16	APEC member	Malaysia	Reta Siluvaimuthu	F	Assistant Director, Strategic Planning and International Cooperation Division	Malaysian Industrial Development Authority
17	APEC member	New Zealand	Kerryn Fowlie	F	Senior Analyst, International and Defence Section, Regulatory and Tax Policy Branch	Treasury Department
18	APEC member	Papua New Guinea	Michael W. Enga	M	Special Project Officer - International Affairs	Investment Promotion Authority
19	APEC member	Peru	Carlos A. Herrera	M	Chief, Investor Servicing	Investment Promotion Agency
20	APEC member	The Republic of the Philippines	Celestina B. Ilagan	F	Executive Director, Investment Promotions Group	Philippine Board of Investments
21	APEC member	The Russian Federation	Yulia Potanina	F	Senior Expert, Dept of Investment Policy	Ministry of Economic Development and Trade(MEDT) of the Russian Federation
22	APEC member	Singapore	Judy Tan	F	Senior Officer, International Agreement International Policies	Economic Development Board
23	APEC member	Chinese Taipei	Wen-Chang Chuang	F	Technical Specialist	Industrial Development & Investment Center,Ministry of Economic Affairs
24	APEC member	Thailand	Vittaya Praisuwan	M	Director, International Affairs Division	Office of the Board of Investment
25	APEC member	Thailand	Kitirat Panupong	M	Second Secretary, Department of International Economic Affairs	Ministry of Foreign Affairs
26	APEC member	Thailand	Bonggot Anuroj	F	Senior Investment Promotion Officer, International Affairs Division	Office of the Board of Investment
27	APEC member	Thailand	Patcharamon Siriwatana	F	Investment Promotiopn Officer	Office of the Board of Investment
28	APEC member	Viet Nam	Nguyen Manh Hung	M	Senior Expert, Foreign Investment Agency	Ministry of Planning and Investment (MPI)
29	APEC member	Japan	Satoru Satoh	M	Japan's Senior Official for APEC Deputy Director-General, Latin America & Caribbean Affairs Bureau/Economic Affairs Bureau	Ministry of Foreign Affairs
30	APEC member	Japan	Setuso Kosaka	M	Senior Coordinator, Economic Affairs Bureau	Ministry of Foreign Affairs
31	APEC member	Japan	Akiko Takai	F	Researcher, Economic Affairs Bureau	Ministry of Foreign Affairs
32	APEC member	Japan	Emi Konishi	F	Officer, Economic Affairs Bureau	Ministry of Foreign Affairs
33	APEC member	Japan	Kunihisa Kawasaki	M	Researcher, Economic Affairs Bureau	Ministry of Foreign Affairs
34	APEC member	Japan	Takashi Matsumori	M	Officer, International Policy Planning Unit, Policy Bureau	Ministry of Land, Infrastructure and Transport
35	Business community	Japan	Hiroshi Minezaki	M	Chief Specialist, Administration, Overseas Business Promotion Div., TOSHIBA	
36	Business community	Japan	Tsuneyuki Kobayashi	M	Senior Manager, Support Development Group, External Relations Div., TOSHIBA	
37	Business community	Japan	Kazuhiko Iizuka	M	Manager-External Relations, Corporate Strategy & Research Dept., MITSUBISHI CORP	
38	Business community	Japan	Yukio Kanzaki	M	Executive Director, Support Council for ABAC Japan	
39	Business community	Japan	Satoshi Sadamori	M	Deputy Executive Director, Support Council for ABAC Japan	
40	Business community	Japan	Hidehiro Okayama	M	Manager in Chief, Economic Affairs, Int'l Div., The Tokyo Chamber of Commerce	
41	Business community	Japan	Dominic Roughton	M	Partner, HERBERT SMITH	